IN THE SUPREME COURT OF FLORIDA

OMAR SHAREEF JONES,

Appellant,

v. CASE NO. 84,840

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM SENTENCE OF DEATH
FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant was the defendant below, and will be referred to as either the appellant or the defendant in this brief.

The record of pleadings is referred to by the symbol "R" followed by the appropriate page number, while the transcript will be referred to by the symbol "TR" followed by the appropriate page number.

STATEMENT OF THE CASE

Omar Shareef Jones was arrested on November 5, 1993 (R-l). On November 6, 1993, he was indicted for first degree murder, attempted robbery with a firearm, and possession of a firearm by a convicted felon (R-6-7). He was charged in the first two counts along with co-defendants Marlon Rondino Hawkins, Edward Jerome Goodman and Ellis Curry. The Public Defender's office was

appointed to represent Mr. Jones (R-4) while the other defendants received independent counsel. Motions for severance of co-defendants and Count III of the indictment were granted (R-34,38). Numerous pretrial motions were filed by the defense which were denied by the Court (R-22,39-63,66-75,84-87,138-166,196,198-201,205-208,216-221).

Just before trial, Mr. Jones filed a motion for continuance, due to his counsel's inability to subpoena an essential witness for trial, which was denied (R-245-250; TR-391,979). Jury selection was conducted on October 17-19, 1994 (TR-396-979). After less than three days of trial the jury convicted Mr. Jones as charged after 45 minutes of deliberation (TR-1481-1482).

Counsel for Mr. Jones filed numerous pre-penalty phase motions and requests for jury instructions (R-251-294,303-330,336-349,352-360). A motion for new trial was filed and denied (R-295-302,350). The penalty phase was conducted before the jury on November 10, 1994. The State presented only four witnesses all of whom testified as to victim impact evidence over the repeated objection of defense counsel (TR-1593-1621). Defense counsel presented 13 character witnesses and a mental health expert (TR- 1622-1762). After deliberating for one hour and 14 minutes, the jury recommended death by a vote of 7-5 (TR-1796).

On November 21, 1994, the Court conducted a sentencing

hearing at which the State presented three victim impact witnesses, again over the objection of defense counsel, and the defense presented one character witness (TR-1593-1762). On November 23, 1994 the Court sentenced Mr. Jones to death for premeditated murder and to 30 years to run consecutively for attempted armed robbery with a minimum mandatory sentence of three (R-385-403). Notice of appeal was filed December 6, 1994; and statement of judicial acts to be reviewed, designation to court reporter and directions to clerk were filed December 7, 1994 (R-470-474). An amended notice of appeal and amended directions to clerk were filed December 7, 1994 (R-476-77).

STATEMENT OF FACTS

On November 4, 1993, Omar Shareef Jones spent the day around his mother's house with his friend Ellis Curry watching TV (TR-1083). Omar was 19 years old but he had a mental age of a 13 or 14 year-old and could only read on a second grade level (TR-1734,1757). Due to his inability to progress, he had given up on school, and due to his inability to read and write, he had been unable to obtain work (TR-1636-37). At the time of the offense, he had applied for the Job Corps and was waiting to be admitted (TR-1651). Generally, Omar was not a heavy drinker or drug user (TR-1036). However, the State presented Omar's friend and co-defendant Ellis Curry who testified that on this day, from an hour before dark until 30 minutes before the offense, Omar was

drinking. First he drank a quart of malt liquor; then he shared two bottles of wine among three people (TR-1084,1119). Omar drank more than Ellis and Ellis quit because he had had too much (TR-1123). At the time immediately before the offense, Omar was talking and laughing loudly, when he was normally a soft spoken person, and appeared to be intoxicated (TR-1121,1124,1308-09). In addition to being drunk, he shared a marijuana "cigar" with two other people although the witness had not seen him use marijuana before (TR-1309-10). These large amounts of alcohol and marijuana were unusual for Omar and were consumed in a two-hour period just before the offense (TR-1310).

In the early evening, Jerome Goodman called Marilyn Wilcox, a friend of Marlon Hawkins, to come pick him up (TR-1032). Marilyn picked up Jerome and Marlon (TR-1033). As they were driving around, Jerome got a call on his beeper (TR-1058). When they saw Omar and Ellis Curry leaving Cumberland Apartments, Jerome and Marlon talked to Omar. Omar then told Ellis that a guy owed Jerome money and "we got to do something" (TR-1090). They all got into Marilyn's car together and drove to the nearby school (TR-1035). The State witnesses testified that there was no prior plan for a robbery: Marilyn said from what she overheard them say, she thought they were going to the school so that Jerome could buy drugs, and Ellis said they went to get some money owed to Jerome (TR-1078,1125,1128). Both agreed that there

was no plan to kill or rob anyone or to split any money (TR-1128). Jerome's friend had a gun and there was a discussion in the car about who would carry it. Finally, Omar stated, "Give me the gun before one of us might do something crazy" (TR-1092, 1130).

Jerome Goodman was the leader: Omar had no prior plan to go to the school before Jerome and Marlon came (TR-1130); both Omar and Ellis were in special education classes (TR-1113); Jerome was not a follower type of person (TR-1077); Jerome usually carried a marijuana cigar (TR-1122); Jerome got a beeper call and then decided to go to the school before he saw or spoke to Omar (TR-1125); when they got to the school, Jerome told Marilyn where to park; Marilyn was clear that at no time did Omar tell anybody what to do (TR-1075); Jerome's friend Marlon Hawkins was carrying the gun (TR-1128); and Jerome wanted to carry it (TR-1077,1092,1128,1130). Omar ended up taking the gun because he was generally a cooler head and didn't want anyone to do something crazy (TR-1092-93). After the offense, Ellis had to figure out what to do and tell Marilyn to drive away (TR-1076). Omar then sought advice from a friend as to what to do with the gun.

As they entered the school grounds around 10:00 pm, they encountered two boys waiting to be picked up after a school event : the victim Richard Jeff Mitchell and his friend Bill

Fagan. At the trial Bill described what happened:

> A He was sitting and I was standing right next to him, and three men came from around the corner, and they saw us, and the fourth man came down from the hall, and they surrounded us. That was it. And one of the three asked if he had any money.
>
> Q If who had any money?
>
> A If Jeff had any money. And he just said, 'no'. And then he went in his pocket and pulled out the gun and he said, "This is a gun," and then he shot him in the side, he shot Jeff in the side, and he just leaned over, and when he leaned over he shot him in the head and took off (TR-1014).

Bill also testified that all four boys had their faces covered (TR-1021).

The defense argued that the gun went off accidentally and pointed to a wealth of evidence most of which was presented by the State's own witness. Omar had never fired the gun before. Unknown to him, the gun had been modified to have a very sensitive hair trigger. Ellis testified that he had fired the gun only days before the shooting. Ellis repeatedly stated the gun fired very easily whether or not it was cocked (TR-1127-28). In fact, there was very little difference in how much pressure was required to fire the gun when it was cocked and it only took a slight touch for the gun to fire (TR-1132). Earlier in the car, when Jerome gave the gun to Omar, no one said the gun was loaded or checked to see if it was loaded (TR-129).

The medical examiner testified that the wounds were

consistent with the gun going off and the first bullet entering the leg, the boy's head then dropping down over his leg, and the gun going off again striking him in the back of the head (TR-1251-52). The lack of powder residue indicated that the gun was more than two feet away when it was fired (TR-1255). The medical examiner's findings were not inconsistent with the two shots being very close together (TR- 1256). The witnesses varied on their estimate of the time between the two shots. Ellis testified that the two shots were so close together that he thought there was only one shot (TR- 1095); Marilyn said the shots were no more than a second apart (TR-1075); Ms. Fralee, a teacher, said the shots were very close together, maybe one or two seconds apart (TR-1010); and other witnesses thought it may have been two to three seconds.

All of the four co-defendants ran. A teacher testified that as the taller man (Omar) ran past her, he pulled off his mask and asked, "What happened?" (TR-1001,1008). Omar and Ellis went back to the car.

Both Marilyn and Ellis described Omar as distraught and hysterical; he was yelling that everyone should lay down. Ellis was the one who remained calm and told Marilyn to just drive away (TR-1046,1076). Ellis said that Omar was very upset and kept saying that he didn't mean to do it and apologizing to him for what had happened (TR-1130).

While Marilyn, Omar and Ellis left in the car, Jerome and Marlon ran down the street and were apprehended a short distance away (TR-1170-71). After Marilyn dropped them off at their apartments, Omar and Ellis went to see a man known as Dwight. While they were riding with Dwight, Omar told Ellis that Omar had given the gun to someone. Later, Omar sent Ellis in the house and left with Dwight (TR-1105-07. Omar told the police that Dwight took him to the river to throw away the gun (TR-1217). A friend who lived next door said that later that night, after the television news was over, she saw Omar standing in the hallway crying. This was so unusual that she told her sister (TR-1311-12).

Omar was arrested at his home at 5:30 a.m. the same night (TR-1181). He was very quiet and made no response when his rights were read to him (TR-1173,1178). Later at the police station, when Omar was told the boy had died he started crying and when he was told he was only 14 years old, he continued crying saying, "I killed a baby." (TR-1211,1217). He told the officers that the gun went off accidentally and he did not intend to kill the boy (TR-1219).

The State presented a ballistics expert who testified that in general, more effort is required to fire a gun that is not cocked than one which is (TR-1272). Since he did not have the actual murder weapon, he was unable to testify as to how much

pressure it would have required to fire the gun either cocked or uncocked (TR-1280). He did not comment on what the difference would be if a gun had a hair trigger. He did state that guns can very easily be altered with common tools to have a hair trigger (TR-1282,1285). He testified that a gun cannot go off accidentally (i.e. without touching the trigger) but a gun can go off unintentionally (TR-1284).

The defense presented a witness who testified that she had observed Omar smoking a marijuana "cigar" and drinking immediately before the offense. This was unusual for him. Further, she was familiar with his normal behavior and it was her opinion that he was intoxicated (TR-1307-10).

In closing argument, the Defense argued that Omar was not guilty due to his intoxication, and in the alternative, that he was only guilty of second degree murder because there was insufficient evidence to support premeditated intent to kill or rob (TR-1408-38).

The prosecutors[1] argued that even if the first shot could have been accidental, the second shot was a case of "target practice". The Defense objected and moved for a mistrial on the grounds that the Court had already upheld an earlier Defense objection to the same characterization and had instructed the jury to disregard the term (TR-1398-1400). The objection was

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'Both Mr. Kowalski and Mr. Shorstein addressed the jury.

denied. The State also urged the jury to disregard the intoxication defense because alcohol doesn't "excuse" a crime and the Defense had only one "weak" witness (TR-1403,1447).[2] The prosecutor swayed the jury with misrepresentations of facts, denigration of defense counsel, and appeals to passions of the jury. He concluded with an emotional plea to the jury to "do justice" and convict of first degree murder for the "execution of a child" (TR-1453).[3]

In the penalty phase of the trial, the State presented only four witnesses all of whom testified to victim impact evidence: the victim's best friend, two of the victim's teachers, and the victim's father (TR-1593-1621). The defense objected repeatedly to the inappropriate use of only victim impact witnesses which resulted in victim impact evidence becoming the main feature of the State's case (TR-1523-1548,1562-1588,1621).

Omar was only 19 years old at the time of this offense. He was born prematurely, suffered an enlarged heart, and was diagnosed with brain damage by an abnormal EEG when he was only

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[2]Ironically, the State objected to a continuance of the trial which would have made it possible to obtain the attendance of an additional intoxication witness who saw Omar immediately after the offense and would have been a powerful defense witness regarding intoxication (TR-378-91).

[3]The record suggests that the jury yielded to this impassioned plea; forty five minutes of deliberation is hardly sufficient to elect a foreperson, much less conduct a thorough analysis of all the evidence.

two months old (TR-1738-39). He had good behavior and made a strong effort to achieve in his special education classes (TR-1691-94). He won an important art award which was given to him by the mayor and the superintendent of schools (TR-1718-28). He was known to his family, friends and neighbors as someone who was generous and caring. He was respectful of adults and very good with children. He mopped floors, cooked, babysat, ran errands, and willingly did anything else he was asked to do (TR-1638-53). He suffered a series of devastating losses: his stepfather died after a long illness; his beloved grandmother died when he was 15; three months after his grandmother died his father died of AIDS; and after Omar had cared for him for two months, a cousin who was like a brother died of AIDS just a month before this offense (TR-1631-34, 1665). School records reveal that he reads on the level of a child who is halfway through second grade (TR-1734-37). Expert testing revealed that his IQ is 76 and that he is particularly weak in the area of judgment (TR-1734,1741). It is unrebutted that he only functions at the mental level of a child between the age of 13 and 14 years old (TR-1734). The mental health expert found that given his already low level of judgment, this amount of alcohol would have significantly impaired his judgment (TR-1743).

SUMMARY OF THE ARGUMENT

ISSUE I. **Insufficient evidence.** There is insufficient evidence to establish beyond reasonable doubt that either the shooting or the attempted robbery were intentional or premeditated. Omar was intoxicated when he was approached with a plan for four black teenagers to go to a school to collect money owed to one of the four. Omar Jones took possession of a gun from a codefendant so no one would do something "crazy". Immediately upon entering the school yard, by chance they encountered the victim and a friend. Omar asked for money and the victim, who was sitting in a chair, said no. As Omar pulled the gun from his pocket saying, "this is a gun" the friend thought it was a joke. However, unknown to Omar the gun had a very sensitive hair trigger and as the gun came out of his pocket it went off twice, first wounding the victim in the leg and then, as his head dropped down over his leg, in the head. Omar immediately ran, pulling off his mask and saying, "What happened?" When he got to the car, he was hysterical and kept repeating that he didn't mean to do it.

ISSUE II. **Motion for continuance.** Omar Jones relied on the defense of intoxication. Just before the trial, he became aware that a witness being sought for ballistics testimony also had evidence of intoxication. The witness voluntarily came to the Public Defender's office and gave a statement that immediately after the offense, Omar Jones was extremely intoxicated. Defense counsel satisfied all the requirements for requesting a continuance. The witness was critical as evidenced by the prosecutor's argument at both phases of the trial that the Defense only had "one weak witness" as to intoxication.

ISSUE III. **Prosecutorial overreaching.** The prosecutor used improper tactics to inflame the passions of the jury. Although the State conceded to the court that the facts did not prove that the shooting was heinous atrocious or cruel, the prosecutor asked the jury for conviction and a death sentence because the murder was an "execution", "target practice" and a "horrible, senseless, aggravated murder". He also misrepresented that Omar used words such as "gat" and " jack" to inflame racial passions. He denigrated the defense by referring to the intoxication defense as a "contrived excuse" and to Omar as "a wonderful, loving, caring murderer". The prosecutorial tactics violated due process and fundamental fairness.

ISSUE IV. **Venue.** The Omar Jones case was used to fuel a media blitz against black youthful defendants. City officials rode the wave of what was reported as a "crime-fighting frenzy". The State Attorney pledged to personally prosecute to the fullest extent, the Mayor called a statewide crime fighting conference, and the Sheriff said "we are close to losing control". Due to this public "frenzy", the Omar Jones case was referred to repeatedly long after the case itself was no longer news. Members of the jury panel recalled the media hype on racial fears and characterization of the shooting as "senseless" and "target practice". The court erred by refusing to grant dismissal of a venirewoman who believed that Omar Jones was guilty because of the publicity. The publicity and racial emphasis were so massive that it was simply not possible to assure a fair and impartial jury.

ISSUE V. **Statement involuntary.** The detectives made no special inquiry regarding the waiver of rights because they were unaware that

Omar Jones was retarded with a mental age between 13 and 14, and a reading level of a second grade child. There is no recorded or written evidence of a waiver. The detectives representations as to the rights waiver and the content of the statement are unreliable as illustrated by discrepancies in their testimony.

ISSUE VI. **Jury selection.** The jury selection was unfair and contrary to due process when the State was allowed to excuse a potential juror because of race, the defense voir dire regarding intoxication was restricted, and the court denied Defense challenges for cause of biased jurors.

ISSUE VII. **Death sentence contrary to law.** The compelling mitigation evidence far outweighs the single aggravating factor of pecuniary gain during an attempted robbery. At worst, the evidence proves a "robbery gone bad".

ISSUE VIII. **Victim impact evidence.** The only penalty phase evidence presented by the State were the victim's father, best friend and two teachers. The State perverted the sentencing scheme of weighing aggravating and mitigating factors by featuring the victim evidence to overwhelm the jury's passions in favor of death.

ISSUE IX. **Jury instructions.** The court erred in failing to properly instruct the jury.

ISSUE X. **Pretrial motions.** The court erred in failing to grant pretrial motions raising constitutional issues and to grant motions to curb the prosecution.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED BY NOT GRANTING A JUDGMENT OF ACQUITTAL AS TO PREMEDITATED MURDER AND ATTEMPTED ROBBERY BECAUSE THE STATE FAILED TO EXCLUDE THE REASONABLE HYPOTHESIS ESTABLISHED BY ITS OWN EVIDENCE OF AN ACCIDENTAL, UNPREMEDITATED SHOOTING; AND THE COURT COMPOUNDED THE ERROR BY NOT INVALIDATING THE MURDER VERDICT AND INSTRUCTING THE JURY TO CONSIDER PREMEDITATION.

The State charged Omar Jones with first-degree murder as premeditated and/or felony murder (R-6-8). At the close of the State's case, the Defense moved for a judgment of acquittal on the ground that premeditation to kill had not been proved. The motion was denied (TR-1293). The Defense moved for a jury verdict form that distinguishes premeditated murder from felony murder, but the court denied the motion (TR-1364). The jury was then instructed as to premeditation, and returned a general verdict finding premeditated and/or felony first-degree murder (R-228-29). The Defense moved for a new trial on the ground that the verdict was contrary to law and the weight of the evidence, and that the court erred by not granting a directed verdict of acquittal (R-295-302). That motion was denied (R-350). The court's decisions with respect to premeditated murder and attempted robbery, and instructing the jury as to premeditation, were erroneous and violated Omar Jones' federal and state constitutional rights to a fair trial, equal protection, due

process, and against cruel and/or unusual punishment. U.S. Const. Amends VI, VIII, XIV; Art. I, §§ 9, 16, 17, Fla. Const.

Premeditation to kill was an essential element of the first-degree murder charge. The State has the burden to prove premeditation beyond a reasonable doubt by direct evidence, circumstantial evidence, or both. When the State relies on circumstantial evidence, the evidence must be inconsistent with every other reasonable hypothesis. Mungin v. State, 21 Fla. L. Weekly S459 (Fla. Sept. 7, 1995) (on rehearing denied Feb. 8, 1996) ; Hoefert v. State, 617 So. 2d 1046, 1048 (Fla. 1993); Cochran v. State, 547 So. 2d 928, 930 (Fla. 1989). Thus, the only direct evidence[4] heard by the jury proved the gun went off accidentally. The circumstantial evidence also is fully consistent with an accidental shooting.

The State's only attempt to dispute the reasonable inference of an accidental shooting came from its firearms expert, whose evidence fell way short of the mark. The expert said a standard .38-caliber Smith & Wesson revolver never goes off accidentally if the gun was in good working order and if the gun had not been cocked (TR-1273). But (1) this gun had a very sensitive hair trigger and fired very easily whether or not it was cocked; (2) the gun was not recovered and the expert did not examine it, so

[4] A confession is direct evidence in Florida. E.g. Walls v. State, 641 So. 2d 381 (Fla. 1994), cert. denied, 115 S. Ct. 943, 130 L. Ed. 2d 887 (1995).

there was no evidence that the gun had in fact been in good working order on the day of the killing; (3) the expert could not testify as to whether or not Omar Jones had an intent to make the gun go off (TR-1284); and (4) if a person is trying not to fire by easing the trigger forward, it can still slip and go off (TR-1288).

This case is unusual in that there is actual, uncontroverted evidence that the gun was fired accidentally both times. The first shot went into the victim's leg which does not indicate an intent to kill. The second shot went into the boy's head when it dropped down over his leg. The gun fired very easily whether or not it was cocked (TR-1127) . But the most conclusive evidence was the comment by Omar overheard by a teacher as he pulled his mask off saying "What happened?" (TR-1008). Immediately thereafter he was described by two state witnesses as hysterical and repeating over and over that he didn't mean to do it (TR-1046,1130). Later, when he was told that the victim died and was 14 years old, he began crying and saying, "I killed a baby." (TR-1211).

Another indication that the shooting was accidental was that there was no prior plan to rob or kill. They went to collect money owed to a co-defendant but they encountered the victim by chance. The four boys' attitudes were not threatening and the eyewitness testified that he thought they were joking about

wanting money (TR-1027).

This Court many times has reversed premeditation rulings in similar cases for lack of sufficient evidence. In Terry v. State, 21 Fla. L. Weekly S9 (Fla. Jan. 4, 1996), two men robbed a gas station using Terry's guns, and Terry shot the attendant to death; but because nobody saw the shooting, the facts presented insufficient evidence of premeditation. In Mungin, a store clerk was shot once in the head at close range in an armed robbery with a gun that required 6 pounds of pressure to fire; and the same gunman had committed two other armed robberies and shot the clerks each time. But this Court said the State did not prove premeditation because it could have happened at the spur of the moment; no statements showed Mungin had formed the intent to kill before the shot was fired; no witnesses saw the murder; and there was only a single shot as opposed to multiple shots or a continuing attack. In Jackson v. State, 575 So. 2d 181 (Fla. 1991), a store owner was shot to death with a single shot in an armed robbery where the defendant had been in the same store the day before, leaving open the likelihood that they would be identified by the owner if left alive. Premeditation was not proved because there had been only one shot from an unknown weapon; there was no evidence of particularly deadly special bullets; the defendant made a statement indicating his intent was to rob the store but the clerk "bucked the jack"; there was no

evidence of a fully formed conscious purpose to kill; and the evidence was not inconsistent with defense's theory that the shot was fired reflexively. There was no premeditation in Van Poyck v. State, 564 So. 2d 1066 (Fla. 1990), cert. denied, 499 U.S. 932, 111 S. Ct. 1339, 113 L. Ed. 2d 270 (1991), where two men hijacked a prison van to free an inmate, one of the men shot and killed an officer with three shots from a 9-mm pistol; any of the shots would have been fatal; one shot was a contact wound where the barrel had been placed against the officer's head; the other two shots were to the chest; the defendant then aimed a gun at a second officer and pulled the trigger but it failed to fire; and the defendant kicked one of the guards before the murder.

In Hall v. State, 403 So. 2d 1319 (Fla. 1981), an armed deputy was shot while on duty by one of two defendants who had just emerged from a store where they had been reported as suspicious. The deputy was shot from 2-5 feet away while wearing a bullet-proof vest; his revolver was stolen; the murder occurred right after the defendant apparently had just committed an abduction, rape and shooting of another victim; and the defendants fled from the deputy's murder in a stolen vehicle only to be captured in a police shootout. This Court found insufficient evidence of premeditation, noting that no witness saw the shooting and the evidence was equally consistent with a shooting during a struggle as it was with a premeditated murder.

In McArthur v. State, 351 So. 2d 972 (Fla. 1977), the Court struck down premeditation and murder where a wife fired a single fatal shot into her husband from only 7 inches away as he lay on his bed, the Court finding the facts consistent with an accidental shooting. See also Taylor v. State, 156 Fla. 122, 22 so. 2d 639 (1945) (defendant struggled with victim, stabbed him in the face and armed, then took victim's gun and shot him twice, once fatally); Snipes v. State, 154 Fla, 262, 17 So. 2d 93 (1944) (defendant shot sheriff during struggle with a deputy where officers were searching defendant's home for contraband); Douglas v. State, 152 Fla. 63, 10 So. 2d 731 (1942) (defendant struck woman with pipe, argued with fellow worker, retrieved a shotgun, cocked one trigger, returned to area, and when intercepted by posse he killed victim with one shot at close range; but he had no animus toward victim, no premeditated design to eradicate the posse, and he would have exhausted ammunition to shoot at posse if he had premeditated to kill); Forehand v. State, 126 Fla. 464, 171 so. 241 (1936) (defendant killed deputy and brother by shooting at them 4-5 times as the victims struggled on floor with each other); Smithie v. State, 84 Fla. 498, 94 So. 156 (1922) (proof that defendant fired fatal shot insufficient to prove premeditation); Richardson v. State, 80 Fla. 634, 86 So. 619 (1920) (train conductor believing defendant to be dangerous drew gun and shot, defendant responded by shooting victim in face or

shoulder and fired a second shot in victim's buttocks after victim fell); cf. Hoefert (no premeditation where defendant had strangled several women (not to death) during sexual. assaults, but his latest victim died by asphyxiation after which he dug a hole to bury the body and then fled to Texas; Driggers v. State, 164 So. 2d 200 (Fla. 1964) (proof of premeditated murder of defendant's wife by throwing her off railroad trestle was not inconsistent with defendant's claim of accidental death).

This Court has also found that the fact that a gun has a hair trigger infers that a gun could have fired accidentally:

> The evidence of this factor is that appellant's gun (assuming that it was the murder weapon) must be cocked before firing. The trial court thus inferred that appellant would have had to go through two distinct motions to shoot Cilla Taylor. However, the record also demonstrates that appellant's pistol (Again, assuming it was the murder weapon), was, due to a dangerously light trigger pull, vulnerable to accidental firing. This infers the possibility that the gun could have fired accidentally, without appellant taking the second action of pulling the trigger. Thus, the record is inconclusive as to whether the murder was cold, calculated, and premeditated. State v. Stokes, 548 So. 2d 188, 197 (Fla. 1989).

A State witness said that the gun fired very easily, that if it was cocked you could barely touch it and that it was only a little bit harder if it was not cocked (TR-1128,1132). Furthermore, it is very significant that Omar had never fired the

gun before and was unaware that it had a hair trigger.

Because the State failed to prove premeditation or intent to rob beyond a reasonable doubt, the judge should have granted a judgment of acquittal as to premeditated murder and attempted robbery. That error was compounded when the judge erroneously instructed the jury as to premeditated murder because it is error to instruct on a theory of prosecution for which a judgment of acquittal should have been issued. Mungin; McKennon v. State, 403 so. 2d 389 (Fla. 1981). These errors necessarily tainted the first-degree murder verdict. This Court should reverse and remand for a new trial.

ISSUE II

THE TRIAL COURT VIOLATED OMAR JONES' RIGHT TO PRESENT A CRITICAL DEFENSE WITNESS WHO WOULD HAVE TESTIFIED THAT OMAR JONES WAS INTOXICATED AT THE TIME OF THE OFFENSE.

On October 12, 1994, five days before the trial was scheduled to begin, the Defense filed a five page motion for continuance (R-245-50). In this motion a continuance was requested to obtain the attendance in court of a critical defense witness named Dwight Jones. This witness was first located on September 28 and gave a statement to the Public Defender's Office. He was the key witness for the Defense. He stated that he saw Omar Jones at the time of the offense and that Omar was very drunk, that he had never seen Omar act violently before this

incident, and that the owner of the murder weapon had told him it had a hair trigger.

At the time he appeared in the Public Defender's office on September 28, Dwight Jones indicated he would be willing to testify at trial (TR-380). On September 29, a subpoena was issued and the Public Defender's regular process server started trying to serve the subpoena. When this was unsuccessful, the investigator assigned to the case took over on Thursday, October 12, 1995. Defense counsel filed and argued a motion for continuance to the court on Thursday which was denied without prejudice. On Friday, counsel informed the court that the witness was not cooperating and he did not think they would be able to serve him. The court responded, "You will get him." (TR-371-72).

The Defense presented testimony to the court on October 17 by the defense investigators Andrew Ewing and Kevin Wiggins, about their extensive attempts to locate the witness[5]. Defense

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[5] On Thursday October 12, the witness called defense counsel and told him where he could be served. Mr. Ewing went to the location where the witness had arranged a meeting but he didn't appear. That evening Mr. Ewing attempted to speak to the girlfriend who had arranged the initial contact but her mother adamantly refused any further involvement by her daughter for fear of her daughter's safety, On Friday October 13, Mr. Ewing spoke to another contact who **was** able to set up another meeting with the witness. Again the witness did not show up. Mr. Ewing ran a car license check and went to that address and left a card. He obtained a photograph and description of the witness's car and showed it at various locations. Friday evening he handed over all of the materials to the weekend process server, Kevin Wiggins

counsel presented evidence of due diligence. Counsel explained to the court that when the State recently provided notice that they were calling a firearms expert to testify regarding the pressure needed to fire a gun, it became critical to locate a defense witness to testify that the gun had a hair trigger. The subsequent investigation led to Dwight Jones.[6] When Dwight Jones was interviewed regarding the ballistic's issue, the Defense discovered that he had critical testimony regarding intoxication previously unknown to the Defense.

After proving due diligence, the Defense presented evidence that if a continuance were granted, the witness' attendance at trial could be achieved. Mr. Jones was a long-term resident of Jacksonville, his family was there, and his girlfriend and baby were there, Counsel was sure that he could be served within 30 to 60 days (TR-389-91). The court denied the motion without comment and issued a writ of attachment (TR-391). Before the

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(TR. 380-86). Mr. Wiggins testified that he went to two different known addresses Friday night, showing the picture and doing a neighborhood canvass. On Saturday morning from 5:45 to 6:25 a.m. he drove through the area looking for the witness's vehicle. At 11:30 a.m. to 1:30 p.m. he went to another neighborhood and obtained another address. He waited at that address from 5:30 to 7:30 p.m. and did a neighborhood canvass. On Sunday morning from 5:45 to 6:30 a.m. he drove through the neighborhoods looking for the witness's car. From 1:00 to 2:30 p.m. he went to the neighborhood of some relatives and did a neighborhood canvass. From 7:00 to 8:00 p.m. he again drove around looking for the car (TR. 386-88).

[6]The ballistics evidence was examined on October 3, 1994 and a deposition could not be conducted until October 6.

jury was sworn on October 19, the Defense renewed the motion for continuance (TR-967,979). After the State rested and prior to the Defense case, the motion for continuance was again renewed and denied (TR-1301).

The prejudice to Omar Jones at both phases of the trial was manifest. At trial Omar Jones relied on the intoxication defense and the lack of a premeditated intent to commit first degree murder or attempted robbery (TR-1408-38). The prosecutor argued that the only witness presented by the Defense in support of his intoxication at the time of the offense was a "weak" witness (TR-1403,1447). At the penalty phase, the effects of the alcohol and marijuana consumed by Omar were a major issue in mitigation of the death penalty. Although the court found that these drugs were consumed, he did not consider the evidence because there was insufficient lay witness testimony to establish his state of intoxication. Obviously Dwight Jones was a critical witness at both phases of the trial.

Omar Jones satisfied all the requirements to prevail on his motion for continuance Geraldo v. State, 21 Fla. L. Weekly S85,86 (Fla. 1995), made a powerful showing of due diligence, the witness' future availability, that substantially favorable testimony would have been forthcoming, and that the denial of the continuance caused material prejudice. At no time did the court make a finding that defense counsel did not exercise due

diligence or that the witness would not be available. In fact, the record demonstrates the Defense made an almost superhuman effort to serve the witness. The witness would have changed the verdict and sentence.

The court's failure to grant the motion for continuance was erroneous and violated federal and state constitutional rights to a fair trial, equal protection, due process, and against cruel and/or unusual punishment, U.S. Const. Amends. VI, VIII, XIV; Art. I, Sections 9, 16, 17, Fla. Const.

ISSUE III

OMAR JONES DID NOT RECEIVE THE BENEFIT OF HIS RIGHT TO DUE PROCESS DUE TO THE PROSECUTOR'S OVERREACHING TACTICS IN AN ATTEMPT TO OBTAIN A DEATH SENTENCE IN THIS WEAK CASE, AND THE COURT ERRED IN FAILING TO CURB THE PROSECUTOR'S TACTICS.

The State Attorney faced a difficult situation in the prosecution of Omar Jones. As the facts developed in preparation for trial, it became obvious that the case was not a death penalty case under the laws of Florida. The facts of the shooting did not correlate with the usual aggravated murders which result in a death sentence. In fact, the State's own witnesses established that the original intent of the four boys had been to collect money that was owed to one of them, that Omar took the gun to keep something crazy or stupid from happening, that unknown to Omar the gun had a hair trigger and fired very easily, that after the boy was shot Omar asked "What happened",

and then Omar became hysterical saying he didn't mean to do it. The second problem in obtaining a death sentence was that there was only one aggravating circumstance which was not one of the more serious aggravating factors. Finally, Omar Jones was 19 years old, had the mind of a child between 13 and 14 years old and had an impressive amount of good character evidence.

Generally, such a case would be easy instead of difficult. The Defense was willing to enter a plea to a life sentence with no parole for 25 years and such a plea seemed obvious. However, the reason that the Jones case caused problems for the State was that Harry Shorstein had ridden a wave of frenzy generated by the press and wanted to obtain a death sentence for Omar Jones (R-150-61). Although, by the time the case came to trial it became known that the rates of school violence were down, the State was already publicly committed (TR-664). The State was only able to obtain a verdict for first degree murder and a death sentence by overweening and fundamentally unfair trial tactics.

From the beginning of the trial, the State's strategy was to distract attention from the facts and the law by appealing to the jury's sympathy and passion. The media had already set up the racial conflict in their coverage of the case. The State made repeated veiled references to race. This case received massive publicity. (See Issue IV). The media had developed the racial theme as reported by some members of the jury panel. One

venireman said there was "a lot of racial talk." The race issue "was my recollection of the media." (TR-531-33). In voir dire, the State improperly excused black jurors (See Issue VI). Throughout the trial, the prosecutor used the euphemism of honor students to highlight the racial difference. He invented street words that were never used by Omar Jones such as "jack" and "gat" to emphasize the racial difference (TR-1445). He told the jury to negate the mitigation presented by the Defense because "When you get the type of criminal like Omar Jones...they know what they are doing and deserve to be punished for it" (TR-1774)(emphasis added). The only possible interpretation of this statement is as a racial slur.

In opening argument, State Attorney Shorstein started his argument by improperly telling the jury that the State personally stood behind the evidence. He assured them that despite possible disagreements and minor discrepancies in the State's case, "We believe, though, the evidence presented will be relevant, material and consistent.. ..We will never try to mislead you, and for that matter I'm sure that that's true with Mr. Higbee and Ms. Finnell." (TR-984-85).

The prosecutor then pursued an "us against them" theme by characterizing State witness Richard Fraley as a "young Terry Parker honor student". The defense attempted to restrain these tactics, but the objection to the prejudicial comment was

overruled (TR-985-86). The prosecutor contrasted race and class by referring to the black defendant as "this man, the murderer" and the white victim as "a young boy" or "this great child" (TR-987,991,1778).

The prosecutor's opening statement was extremely argumentative and misleading. It was not factually correct. He stated that Omar said "let's jack someone" when in fact the evidence showed that Omar said he was going to the school to get some money or marijuana owed to a co-defendant and that no force would be used if the money was paid (TR-1078,1090-91).[7] The State also argued that Omar was the leader but cited no evidence which would be presented except that he said "give me the gun". This representation was completely misleading. The State's own witnesses testified that Omar was trying to prevent his co-defendants from doing something stupid or crazy and his actual statement was, "Give me the gun before one of us might do something crazy" (TR-1092) (emphasis added). The prosecutor then argued that because Omar "couldn't find a suitable target", he found a young boy. The actual evidence presented by the State was that the four boys accidentally encountered the victim

[7] When the prosecutor explicitly tried to elicit evidence of a reference to "jacking" through leading questions, the witness responded that Omar's statement was that they were going to the school because a guy owed Jerome some money and his exact words were, "If the dude don't pay him his money, he was going to have to suffer the consequences." (TR. 1091) (emphasis added.)

immediately when they entered the school ground (TR-1094). Again the defense attempted to restrain the prosecutor's outrageous tactics. The court made no effort to curb the prosecutor and overruled the objection (TR-991). To conclude his opening "statement", the prosecutor argued that there would be two versions of the facts but that "this man pointed the gun at Jeff Mitchell's head and executed him". This time when the Defense again objected, the court finally granted the objection (TR-994). However, it was far too late -- the damage had been done. The prosecutor had achieved his purpose to inflame and mislead the jury by blatantly violating the purpose of opening statement with an impassioned argument based on misrepresentations of the evidence.

During the trial the Defense made objections to improper evidence which were overruled (TR-1108-10,1145-48). Again, during the State's closing argument, the Defense again made a vain attempt to restrict the State's inflammatory and improper argument. The State argued numerous "facts" for which no evidence had been presented. The medical examiner and a State's eyewitness testified that Omar had remained at some distance away; that after the first shot went off hitting the victim in the leg, that the victim's head had then dropped down over his leg and was struck when the gun then went off again. Based on this evidence, the prosecutor argued that the defendant

"...leaned forward and fired a shot into the back of Jeff's head" (TR-1387).

The prosecutor was not content to misrepresent the facts in the State's favor. He then denigrated the Defense by telling the jury, "Now the defendant wants you to speculate, he wants you to imagine, he wants you to fabricate on what could have been wrong --" (TR-1392). A Defense objection was sustained but a motion for mistrial was denied but the prosecutor was not deterred. He continued to denigrate the Defense theory and even commented on the defendant's right to remain silent:

> Do not let yourself speculate on this gun. There is only one person in this courtroom who knows exactly how that gun operates, and he saw fit to deny you the opportunity --" (TR-1394)(emphasis added).

The Defense objected that the prosecutor's statement could be understood by the jury as a comment on the defendant's right to remain silent and moved for a mistrial. When the court asked the Defense for a curative instruction, defense counsel said there was no instruction which could cure the error. The court found that the prosecutor's statement was fair comment and denied the motion (TR-1396).

The prosecutor falsely alleged that the defendant "leaned forward" when there was no evidence to that and "took aim" although there was no evidence, and then characterized the shooting as "target practice" (TR-1398). The Defense objected

and pointed out that the court had already sustained an objection to the term target practice and had instructed the jury to disregard it. Defense counsel noted that after the State used the term during the trial, it had then appeared in a sensationalist article on the front page of the newspaper the next morning. The court denied the objection and motion for mistrial although he advised the State that "I would prefer that you use a different choice of words...." (TR-1399-1400).

More than once, the prosecutor urged the jury to disregard the defense of intoxication because all the Defense had presented was "one weak witness" (TR-1403). This argument evidences the extreme prejudice to the Defense when the court denied the motion to continue in order to obtain a critical witness who would have testified to Omar's severe intoxication immediately after the offense. (See Issue II) The prosecutor closed his argument by urging the jury "...you should do justice in this case and find him guilty" (TR-1406) (emphasis added). When the Defense objected and asked to approach the bench, the judge denied the request to approach the bench.[8] Counsel was forced to inform the court in the presence of the jury that it is improper argument for the prosecutor to tell the jury to "do justice." (TR-1065). The court joined in the denigration of the Defense when he denied

[8]The Defense counsel had already objected to this practice and pointed out the prejudice to the court (TR-1065).

the objection and permitted the prosecutor to close his argument by repeating the statement:

> We ask you to do justice in this case, and find the defendant guilty as charged (TR-1407) . (Emphasis added).

The error of the improper statement was compounded by first, forcing the Defense to argue the objection in front of the jury and secondly, by permitting the prosecutor to repeat the statement verbatim.

In the State's final argument, the prosecutor immediately resorted to denigrating the Defense by describing the intoxication defense as a "contrived excuse":

> Does the defense's theory that somehow this intoxication or accident suggestion mitigate the murder? If you recall, during the jury selection, obviously we couldn't go into the facts of the case to the extent that you **heard now, or to the** law that you still haven't heard, the alleged **intoxication and accident in this** case mitigates nothing. Quite the contrary, those suggestion, the accident, which is outrageous, totally untrue, the other, the intoxication to the extent it occurred, these contrived excuses for the murder -- (TR-1441) (emphasis added).

The Defense objection was sustained but the prosecutor only repeated his denigration:

> The evidence in this case suggests nothing but a contrived excuse and does not mitigate and, in fact, in every way aggravates this vicious murder (TR-1442)(emphasis added.)

The prosecutor again proceeded to argue things that were not

supported by the evidence. He reminded the jury of the defendant's statement where a detective had cleverly phrased the facts of going to help a co-defendant collect a debt as going "to rob" although the State witnesses testified that was not an accurate representation of the facts (See Issue V.) He said it couldn't have been an accident because "one wound was in the front and one in the back" when the medical examiner testified that the evidence was not inconsistent with the second shot occurring as the victim's head dropped down over the first wound (TR-1251-52,1256,1442). The prosecutor quoted Ellis Curry as saying that Omar said he went to "jack somebody" when in fact Ellis testified that Omar went at the request of Jerome Goodman to collect money owed to Jerome (TR-1090-91). The prosecutor advised the jury to disregard the intoxication defense because "you can be kneewalking drunk and still guilty" under the law of intoxication (TR-1447). While urging the jury to disregard the evidence of intoxication and the Defense argument that the shooting was accidental, the State argued that any lack of motive only "grossly aggravated" the crime (TR-1449-50). Then the prosecutor tried to create evidence from his imagination: "Some people say he was mad before he went to the robbery/murder" (TR-1450). This is simply untrue. No one ever testified that Omar Jones was mad. In fact, the State witnesses describe just the opposite (TR-1092).

Repeatedly, the prosecutor inflamed the jury by referring to the shooting as an "execution" (TR-1450). The prosecutor asked the eyewitness if the shooting was like "target practice" and the witness responded "no". The Defense objection was sustained (TR-1023). However, in argument the prosecutor repeatedly used the term target practice to inflame the jury,

The effectiveness of the prosecutorial tactics was obvious. The State's evidence of deliberate premeditation was extremely weak. At best it was a borderline case. The State's own witnesses established that there was no prior intent to rob or kill; that Omar's motivation for carrying the gun was to reduce the chance of violence; that Omar did not know the gun had a hair trigger; that the physical evidence was consistent with an accidental shooting; and that immediately after the shooting, Omar said "what happened?" and became hysterical saying he didn't mean to do it.

A careful analysis of all the evidence is time consuming. However, the jury was only out 45 minutes -- hardly long enough to use the bathroom, fix a cup of coffee and choose a foreperson -- before they came back with a verdict of guilty as charged (TR-1481-82). The State's improper tactics, which went far beyond the limits of fundamental fairness and due process, paid off.

The same steamroller tactics were just as effective in the sentencing phase. The prosecutor repeatedly denigrated the

mitigating evidence. In regard to the evidence of retardation and brain damage since birth, the prosecutor dismissed it by saying, "Ladies and gentlemen, these offenses aren't generally committed by rocket scientists." (TR-1765). He sarcastically referred to Omar Jones as a "wonderful, loving, and caring murderer" (TR-1777). Although the Defense presented an overwhelming case for a life sentence with fifteen witnesses including neighbors, teachers and a mental health expert, the State **was** able to obtain their much sought after death sentence by arguing that mitigation was actually aggravation; by characterizing the facts as an aggravated murder; and by featuring the victim impact evidence of the victim's father, best friend and two teachers. (See Issue VIII) The court's decisions with respect to the prosecutor's overreaching tactics were erroneous and violated federal and state constitutional rights to a fair trial, equal protection, right to counsel, due process, and against cruel and/or unusual punishment. U.S. Const. Amends. VI, VIII, XIV; Art. I, Sections 9, 16, 17, Fla. Const.

ISSUE IV

THE TRIAL COURT ERRED IN REFUSING TO GRANT A CHANGE OF VENUE WHEN THE CHARGES AGAINST OMAR JONES WERE SENSATIONALIZED IN THE PRESS FOR A YEAR AND A HALF INCLUDING SEVERAL WEEKS AFTER THE OFFENSE, IMMEDIATELY BEFORE THE TRIAL, THROUGHOUT THE TRIAL, AND BETWEEN THE TRIAL AND PENALTY PHASE.

On September 29, 1994, 17 days before the trial began, the

Defense filed a motion for change of venue on behalf of Omar Jones (R-139-61). The motion was supported by the sworn affidavits of three prominent Jacksonville attorneys who stated that they did not believe that Omar Jones could receive a fair trial in Jacksonville, Florida. William Sheppard, Robert Willis, and Stephen Weinbaum all cited the intense publicity through newspapers, radio and television broadcasts much of which would not be admissible at a trial or penalty phase in this case. They were also concerned about the great deal of public interest and sentiment generated by the publicity and referred to the detailed accounts of the shooting as reported by the media (R-141-49). The court reserved ruling commenting that:

> THE COURT: That raises the issue and preserves the point, but I still think you go through the exercise of trying. Mr. Kowalski?
>
> MR. KOWALSKI: That's the State's position, that you would have to inquire (TR-225).

Apparently neither the court nor the prosecutor questioned the need for concern due to the extensive and hostile publicity.

The media did not provide unbiased or accurate reporting. Only the prosecution's version of the facts was reported. The case was sensationalized in every way conceivable to fuel fear and hostility. The shooting was "senseless"; not, the shooting "may have been accidental". "It was a very brazen act"; not "intoxication was involved" (R-150-51). As time went on, the authorities also rode the wave for their own reasons increasing

the hysteria. Sheriff McMillan said "I think we're getting close to losing control" (R-151); not, this shooting appears to have been out of character. The media continued to sensationalize the shooting exploiting the grief of the teachers, classmates and family of the victim (R-152). The extent of the media's success in stirring up a public frenzy of fear and hate is indicated by the attendance of 750 people at the funeral which was covered with a prominent news article and two large pictures (R-153-54). The State Attorney's office staged several teen indictments at the same time which generated additional publicity and further statements by other city officials (R-157).

The publicity was not only designed to fuel general hostility and fear, it featured racial divisiveness. Race was indicated by small snapshots of either Omar Jones or Jeff Mitchell. Members of the jury panel commented on the racial nature of the media coverage (TR-531-33, 826,831). Youth was also targeted.

Teen defendants were characterized only as dangerous criminals who can't be stopped; the only solutions suggested were more severe penalties. There was no reporting of whether any of the defendants suffered from mental disability or intoxication. The message from the media and government officials gathered momentum. Mayor Austin called a statewide summit of prosecutors and legislators to attack crime (R-157). As time went on, the

incident continued to make news. When a gun buyback program was conducted in Jacksonville, it was titled "Gun buyback pleases slain teen's dad" (R-155-56). Another article cited this case as a reason that police may patrol every high school (R-158). When a shot was fired at the Terry Parker High School, another article mentioned this case (R- 160).

The media characterized the public reaction as a crime-fighting frenzy:

> It wasn't the number of homicides in Jacksonville in 1993 that drove people into a crime-fighting frenzy, spurring measures from gun buybacks to a package of initiatives from the mayor....There were 132 homicides reported in Jacksonville in 1993, compared with 146 in 1992. But the 1993 killings included the deaths of 17 teens and resulted in charges against 34 teens (R-159) (emphasis added).

The Mitchell case was cited in the above article as a prime example of an offense used to fuel the frenzy.

As the time approached for trial, the publicity continued. Co-defendant Ellis Curry's guilty plea was reported noting that the plea was justified by his agreement to testify against Omar Jones (R-161). During the trial, the media featured a front page article that the prosecutor had characterized the shooting as "target practice" (TR-1399-1400). Members of the jury panel reported seeing media coverage of the case at various times, including the day before jury selection began and during jury selection (TR-637).

Given the admitted climate of local frenzy surrounding this case, the motion for change of venue should have been granted. The **court** erred in believing that questioning of the jurors would be a sufficient safeguard in this case. Not only is it human nature for potential jurors to downplay their bias due to publicity, but in this case the media's message was clear: all good citizens should take action against Omar Jones and other teenaged defendants.

When the jury panel **was** asked if they had heard of the case, 24 out of 51 potential jurors raised their hand (TR-459). Several more remembered the case after they heard more about it (TR-557). Some had seen State Attorney Shorstein on T.V. (TR-664). The precise issues that the media had exploited were parroted by the panel: so many young people and no remorse (TR-465); guilty from what they heard in the media (TR-477); saw the victim's father and some of the things he said and that's what biased me (TR-625); victim was an honor student which made a big impression (TR-481,484); triggerman from New York and parents brought him here to give him a better life (TR-482); there was a lot of racial talk (TR-531-33); the police talked to other co-defendants and they said the defendant is guilty (TR-492); the crime was premeditated - he knew he was going to do **a** robbery (TR-503); can't be fair because the shooting was "senseless" (TR-507); many people were talking about it (TR-507); he did it for a

few dollars (TR-515); the victim was shot because he had no money (TR-520); I'm glad they were apprehended and the defendant was there or he wouldn't have been arrested (TR-522); I **was** particularly disturbed with that case. I found it totally evil.. ..whoever did such a crime I have no consideration for (TR-580-81); I **was** shocked and recognized the name Omar Shareef (TR-584); I remember the victim's picture (TR-596); and I discussed it with co-workers (TR-585). These themes were repeated through the voir dire. The publicity was extensive and hostile to Omar Jones.

The court recessed overnight after admonishing the panel not to read, see or hear any media accounts. Despite the admonishment, eight people raised their hands the next morning when half of the panel was asked if they were aware that the case had been reported in the media. One of them observed that it was on the radio and the first thing on T.V., "I couldn't escape it." (TR-640). The other half of the venire was not asked if they were aware of the media coverage but only if all they heard was that a jury being selected (TR-642) . This was improper in that two jurors had already said that the media reports had gone into facts and procedure relative to the trial (TR-641,642).

The Sixth Amendment to the United States Constitution guarantees every person charged with a crime **a** fair trial, free of prejudice. Estelle v. Williams, 425 U.S. 501, 505 (1976).

Florida **law** requires that in ruling on a motion to change venue, a trial court should determine:

> whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely on the evidence presented in the courtroom.

McCaskill v. State, 344 So. 2d 1276, 1278 (Fla. 1977); Pietri v. State, 644 So. 2d 1347, 1352 (Fla. 1994); Manning v. State, 378 So. 2d 274 (Fla. 1979).

Omar Jones has established both actual and presumptive prejudice: the general atmosphere of the community was deeply hostile to him which is demonstrated both by the hostile publicity and the great difficulty in selecting a jury." Copeland v. State, 457 So. 2d 1012, 1017 (Fla. 1984). This Court has said:

> We take care to make clear, however, that every trial court in considering a motion for change of venue must liberally resolve in favor of the defendant any doubts to the ability of the State to furnish a defendant a trial by fair and impartial jury. Every reasonable precaution should be taken to preserve to a defendant trial by such a jury and to this end if there is a reasonable basis shown for a change of venue a motion therefor properly made should be granted.
>
> A change of venue may sometimes inconvenience the State, yet we can see no

> way in which it can cause any real damage to it. On the other hand, granting a change of venue in a questionable case is certain to eliminate a possible error and eliminate a costly retrial if it be determined that venue should have been changed. More important is the fact that real impairment of the right of a Defendant to trial by a fair and impartial jury can result from the failure to grant a change of venue. Singer v. State, 109 so. 2d 7, 14 (Fla. 1959).

In short, "Where the evidence presented reflects prejudice, bias, and preconceived opinions, the trial court is bound to grant the motion to change venue." Manning, 378 So. 2d at 276.

The prosecutor's arguments played directly to the media themes when he said that the intoxication defense was just an "excuse" that "grossly aggravates" the murder. He urged the jury to disregard the mitigation because "this type of criminal" did not deserve a life sentence. He closed his argument by asking the jury to "do justice" (TR-1407). The prosecutor's argument made it clear that by asking the jury to do "justice" he was not asking for a dispassionate and balanced evaluation of all of the evidence before them.

Voir dire of the jurors was simply not sufficient to protect Omar Jones from the racial prejudice and "crime-fighting frenzy" spawned by the media's sensationalization and distortion of the facts of this case.

ISSUE V

BECAUSE OMAR JONES WAS UNABLE TO READ OR UNDERSTAND THE WAIVER OF HIS RIGHT TO REMAIN SILENT AND TO HAVE THE ASSISTANCE OF AN ATTORNEY, HIS STATEMENT WAS NOT MADE KNOWINGLY AND VOLUNTARILY AND THE COURT ERRED IN FAILING TO GRANT THE MOTION TO SUPPRESS.

The police arrested Omar at 5:30 a.m. the same night as the murder (TR-124). Detective Bolena stated that he verbally recited the Miranda warnings to Omar Jones from memory but could not testify that he was sure that Omar heard him:

> **Q** Now, during this process that you say that you read him -- I'm sorry, that you verbally **gave** him his rights, isn't it a fact that Omar Jones said absolutely nothing?
>
> A That's a fact.
>
> **Q** In fact, he did not even acknowledge hearing you; correct?
>
> A That's true (TR-125).

Unknown to the officers, Omar had a mental age between 13 and 14 years old and was only capable of reading on a level of halfway through second grade. Because they were unaware of his mental disability, the officers testified that they followed their usual procedure which was to ask him to read a sentence, to then read the rest of his rights to him, and to ask him to sign a form (TR-131). Although officers testified that Omar signed a form, they were unable to produce any documentary evidence of such a form (TR-123). No audio tape was made of the statement (TR-1204). The

only record of what was said by Omar, or the officers, was a handwritten statement made by an officer and signed by Omar (TR-141). This was a deliberate strategy to deprive Omar Jones, his counsel and the courts of an accurate and reliable record of what actually occurred. It is without question that the Jacksonville Police Department has access to tapes and tape recorders when interviewing a first degree murder suspect. In this case, they chose not to for obvious reasons. The officers were able to selectively choose what facts to write down and what facts to omit. Given their knowledge of the law, they were able to rephrase statements. Comments made by Omar Jones during the interrogation were conveniently forgotten. There is no record of whether there were threats or promises. The lack of such a record is particularly problematic when a co-defendant stated under oath that one of the officers doing the interviews threatened to "kick his butt".

Intoxication was a major issue. When asked if he was under the influence of alcohol, Omar said that he had been drinking beer at his apartment complex several hours earlier (TR-134). At the motion to suppress hearing, Detective Hickson indicated that they did not find out how much he had been drinking:

> Q Now, you said that Omar Jones didn't tell you he was intoxicated at the time of the crime. He didn't tell you he was sober, did he?
>
> A No sir, he didn't.

> Q In fact, you-all didn't push the issue of how much he had to drink, did you?
>
> A No, sir, we didn't (TR-1201).

However, at the trial Detective Hickson suddenly remembered that he did find out how much he had been drinking:

> Q What if anything did Omar Jones tell you about any alcohol consumption the night of the murder or the day of the murder?
>
> A His statement was that he had been drinking a beer or two at the apartment complex with some friends earlier that night (TR-1199).

The lack of a recorded statement created a situation where the detectives had the opportunity to remember evidence helpful to the prosecution.

The detective acknowledged that he had no prior knowledge that Omar was in special education classes (TR-1203), yet he was unable to remember how Omar responded when he was asked about his educational background:

> Q Do you recall the defendant's responses when you asked him about his educational background?
>
> A No, sir, I don't (TR-133).

This lack of memory was very convenient for the State.

The record reflects in at least three different instances that Omar stated that he didn't mean to do it. He first made the statement to Ellis Curry immediately after the shooting (TR-1130). In the detective's handwritten statement, he recorded that Omar stated that "I did not mean to hurt the boy but the gun

went off (R-44). While awaiting trial, he told a friend that he didn't mean to do it. In the suppression hearing, the detective testified that:

> ...Mr. Jones broke down and he cried, said something to the effect that he had killed the baby, he didn't -- he had killed the baby... (TR-139)(emphasis added).

There is a logical conclusion that the complete statement made by Omar was that he had killed the baby, he didn't mean to do it. The detective simply omitted the rest of the statement and almost let it slip out. This would have been a powerful weapon for the Defense which may have been "lost". This Court is unable to determine what in fact was said because the officer's chose not to record the interrogation. When defense counsel asked to review the detective's notes, the request was denied.

There is also evidence that the detective rephrased Omar's words to fit a legal conclusion. At trial, two state witnesses testified that they went to the school to collect money owed to co-defendant Jerome Goodman. No one testified that the four boys went to the school to rob someone. It is reasonable to assume that Omar told the officers the same set of facts. However, in the handwritten statement made by the detective, it is phrased as follows:

> He agreed to go there because Edward Goodman said that there was some money. We were only going there to rob and not hurt anyone (R-43).

There is no way that the mentally retarded Omar Jones, who could

only read on a second grade level, would understand the fine distinction of going to collect money from someone (in which case no force may be needed) and going to rob someone. Yet the officers now had a signed statement which was not only a perversion of what he had actually said but was in fact untrue as proven by the State's own witnesses at the time of trial.

Omar Jones had a right to knowingly and voluntarily understand that he had a right to have a free lawyer and that he did not have to make a statement. Once he understood his rights, he then had to be capable of a knowing and voluntary waiver. There is evidence that not only did Omar not have the ability to read the documents he was asked to sign, he did not even understand all of the words that were read to him. Since the officers were unaware that they were dealing with a retarded boy, they did not take any special precautions to see if he understood his rights. It is common knowledge that retarded persons routinely try to appear that they are not disabled.[9] Without special questioning, Omar was unable to understand his rights or voluntarily waive them.

Defense counsel established that given his language level as proven by standardized school testing, Omar did not understand the language used in the rights form. Dr. Burling was a school

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[9]Dr. Krop testified that Omar Jones was able to pass as a person of regular intelligence.

psychologist for the Duval County School Board for over 20 years and was qualified by the court as an expert for purposes of giving an opinion of Omar's language level (TR-155,169). He testified that he had tested Omar Jones on behalf of the Duval County school system when Omar was one month short of age 18. He had a specific recollection of the testing and said Omar was cooperative and put forth his best effort (TR-158). The testing showed that verbal skills were substantially below motor skills.[10] Two of his verbal scores fell into the mentally handicapped range. His verbal age equivalence is seven years 11 months of age (TR-167). The doctor testified that specifically someone on Omar's language level would not have understood a word such as "afford" (TR-171) as it appears in the phrase "if you cannot afford an attorney." Furthermore that it would be highly unlikely that Omar's language level would have substantially changed since the time of the testing:

> Q Would these learning difficulties that he has be something that would be easily rectifiable?
>
> A Based on the fact that he was a senior in high school and had very weak reading and writing skills, it would appear that his learning problems were not very correctable (TR-170).

The Defense established that Omar Jones is far below the level of

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[10]The school would classify him as a slow learner (TR-162). Of 100 people taking the test, 92 would have gotten a higher score.

a normal person with some verbal scores in the mentally retarded range and the reading ability of a seven year old child. Dr. Krop's similar results after the offense, establishes that no miracle improvement occurred between Dr. Burling's testing and the time of the interrogation.

In considering the voluntariness of a confession, a court must take into account a defendant's mental limitations to determine whether the confession was a product of his free will. Thompson v. State, 548 So. 2d 198, 204 (Fla. 1989) citing Jurek v. Estelle, 623 F. 2d 929, 937 (5th Cir. 1980). Florida law holds that the court should consider the mental weakness of the accused and also should consider

> comprehension of the rights described to him, . . . a full awareness of the nature of the rights being abandoned and the consequences of the abandonment. State v. Kight, 512 So. 2d 922,926 (Fla. 1987).

To this end, the burden is on the State to show by a preponderance of the evidence that the confession was freely and voluntarily given and that the rights of the accused were knowingly and intelligently waived. Thompson, supra. The court's decisions with respect to admission of the statement were erroneous and violated federal and state constitutional rights to a fair trial, the right to remain silent, equal protection, due process, and against cruel and/or unusual punishment. U.S. Const. Amends. V, VI, VIII, XIV; Art. I, Sections 9, 16, 17, Fla. Const.

The State chose to eliminate a record which could have been used to carry their burden of proof. There is no written record that Omar Jones ever signed a waiver of his rights. His statement should have been suppressed.

ISSUE VI

OMAR JONES WAS DENIED A FAIR TRIAL WHEN THE COURT MADE IT IMPOSSIBLE FOR DEFENSE COUNSEL TO SELECT A FAIR AND IMPARTIAL JURY.

When the Defense asked for a change of venue, due to the massive prejudicial and misleading publicity in this case, neither the court nor the State contested the allegation that the publicity had been prejudicial. Due to the publicity, the court agreed to withheld ruling until the Defense had the opportunity to attempt to select a fair and impartial jury (See Issue IV). However, when it came time to select the jury, Defense requests for procedures necessary to assure a fair and impartial jury were denied. The Defense was improperly denied challenges for cause. The Defense **was** required to accept jurors it believed to be biased in favor of the State when the court denied a request for additional peremptory challenges. The Defense **was** restricted in its questioning the jurors regarding their bias against intoxication. The State, on the other hand, was permitted to improperly excuse jurors based on their race.

The media's racial theme in regard to this murder of a white boy by a black boy at a predominantly white school was carried

into the trial by the State prosecutors. The first two peremptory strikes by the State were against black veniremen. when the State attempted to strike venireman Gilmore, the Defense challenged the strike on the basis of race. The only reasons the prosecutor could come up with was that he was young and wore a lot of gold jewelry (TR-946). The strike was denied. The State's attempt to strike venireman McKissick was challenged by the Defense on the basis of race. The State's only excuse was that Mr. McKissick had worked with the court system, both prosecution and defense, eight years previously. The court improperly granted the strike although there was no testimony whatsoever that Mr. McKissick would be impartial (TR-47).

The Defense made a timely and procedurally correct objection to the strike of the black juror. The reason given by the State was insufficient. In order to assure "equality of treatment and evenhanded justice", Florida law prohibits any discrimination in a court proceeding including the dismissal of a juror because of his race. State v. Slappy, 522 So.2d 18,20 (Fla. 1988); State v. Neil, 457 So.2d 481 (Fla. 1984). Broad leeway must be given to the objecting party and any doubts as to the existence of a "likelihood" of impermissible bias must be resolved in the objecting party's favor. Slappy, supra.

The burden is on the State to prove that their proffered reason is neutral, reasonable and not a pretext. The reason that

a potential juror worked with the court system eight years earlier, standing by itself, is simply not reasonable. There is no showing of any reason to believe that the juror would be prejudiced other than the fact he was of the same race as the defendant. The court had already ruled that the State had excused one juror because of race. The court was therefore on notice that the State was willing to excuse jurors on the basis of race. Later the court denied the State's attempt to strike another venireman because the reason given that he was unemployed was insufficient (TR-55-57).

In regard to a Neil inquiry, the issue is "whether any juror has been so excused, independent of any other." Slappy, 522 So.2d at 22 (emphasis in original). The appellant has repeatedly described the racial tactics by the media in reporting this case, the racial tension in the community and among the veniremen concerning this case, and other tactics by the prosecutor to exploit the race issue in the State's favor in the trial. Absolutely no prejudice had been indicated by Mr. McKissick against either party. It would be disingenuous to suggest that the State did not excuse this juror because of his race. The Defense preserved the Neil challenge by renewing the motion to strike the panel at the close of the jury selection (TR-966-67).

The court erred in dismissing ten jurors solely on the basis that they were opposed to the death penalty. The jury was

improperly biased by seating only jurors who believe in the death penalty contrary to the law as stated in the pretrial motions (TR-926) filed by the Defense. The Defense also objected to the dismissal of potential jurors who stated they could set aside their beliefs, follow the law, and weigh the evidence in both phases of the trial (TR-928-29). Venireman Schotter stated that he could consider life versus death after hearing about mitigating and aggravating circumstances but he was still excused for cause because he initially said he didn't believe in the death penalty (TR- 921-22,926). This is clearly contrary to State and federal constitutional requirements.

While the court only denied one of the State challenges for cause, six of the Defense challenges for cause were denied (TR 933,936,939,940,942). The court denied a strike for cause of venirewoman Rogers-Cooper although she said that the publicity had already convinced her that Omar Jones was guilty and she knew that the case was in the media again even after the court had admonished her not to watch, read or hear about the case (TR-475,936) . The court denied dismissal for cause of venirewoman Moore although she had followed the case on TV and in the papers and thought that Omar Jones committed the crime for a few dollars (TR-515,936). The court refused to dismiss Mr. Gavin for cause even though he said that racial talk "was my recollection of the media" and that there had been a lot of racial talk about the

case (TR-530-31). When the prosecutor argued against the dismissal for cause, defense counsel commented, "He's making us do that to burn a strike" (TR-940). The court could have mitigated the error of denying proper challenges for cause by granting the Defense request for additional peremptory challenges, but the request was denied (TR-962).

Omar Jones did not have a fair and impartial jury. The denial of his motion for change of venue was not cured by the voir dire of the jury panel. Because the court refused to grant valid dismissals for cause, the Defense was required to use peremptory strikes on those jurors. When the court denied additional peremptory strikes, the Defense had to accept biased jurors.

ISSUE VII

THE SENTENCE **OF DEATH AS APPLIED TO** OMAR JONES IS DISPARATE CONTRARY TO FLORIDA LAW AND THE SIXTH, **EIGHTH AND FOURTEENTH** AMENDMENTS OF THE UNITED STATES CONSTITUTION.

The fundamental fairness of Florida's death penalty law rests on this Court's success in reviewing each death sentence to assure evenhanded application of this most extreme punishment. State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973). It is a daunting task to balance different results due to regional variations, judicial temperament, prosecutorial tactics, attorney skills, and jury passions, any of which can create different results based on the same facts.

When this case is compared to other capital cases with similar facts, the disparity is clear. There is only one aggravating factor which is the lesser factor of a capital felony committed during the course of an attempted armed robbery/pecuniary gain. The mitigation is extensive and includes mental age between 13 and 14 years of age, which combined with the effects of alcohol and marijuana, resulted in significantly impaired judgment. Finally, the facts of the shooting establish spur of the moment action with substantial evidence that the shooting was accidental.

This Court recently reviewed a similar case where there were two aggravating circumstances and "not a great deal of mitigation," but the facts indicated a "robbery gone bad" State v. Terry, 21 Fla. L. Weekly S9, 13 (Jan. 4, 1996). In this case there is one aggravator, substantial mitigation and the facts indicate that at most the offense was a spur of the moment act which resulted in an unplanned death.

The aggravating evidence was weak.

Omar Jones was sentenced to death with only one aggravating factor - the intent to achieve pecuniary gain during an attempted robbery. Neither heinousness, cold and calculated intent, or a severe prior violent felony, which have been defined by this Court as more serious aggravating factors, were found. Not only was there but one aggravating factor, which was a lesser

aggravator, the mitigating evidence was very powerful.

The mitigating evidence was strong.

The Defense presented a compelling case of mitigation. Omar's mother testified that Omar was born prematurely with a congenital heart defect which kept him in the hospital for 50 days after he was born. On two or more occasions, he stopped breathing. Once when he turned blue and had to be rushed back to the hospital, he was kept in the hospital for another two and a half months (TR-1623). Omar was mentally slow and was late to walk and potty train. When he started school he couldn't learn the alphabet (TR-1623-27). He was put in special education in the second grade. As a child Omar was quiet and withdrawn but he was always respectful and never made any trouble for her (TR-1628). He only had to be asked once to do things, and got along well with the other children (TR-1634). He was good at sports such as swimming and basketball which did not require reading. He was active in the church choir and youth groups but was very low in self esteem due to his disability (TR-1636-37). Omar never knew his father as a child. His mother did not marry Omar's father because he was a heavy drug user; and she never received any financial help from him (1629-30). Omar missed his natural father and also suffered a series of other painful losses. His mother married another man who died of heart failure when Omar was 13. His mother said that Omar worked very hard to

care for his stepfather, and she could not have done it without his help (TR-1631). When he was in his midteens, Omar's real father moved nearby, and Omar had hopes of having a father. However, his father was still a drug user who was unable to show concern or guidance for Omar. He died of AIDS in December 1989 when Omar was 16 years old (TR-1632-33). In the same year, Omar suffered another devastating loss when his beloved grandmother died. She was like a mother to him and he did everything for her such as errands, household chores and massaging her feet and wrists (TR-1633-34). Finally, in October of 1993, Omar's cousin, who grew up with him and was like a brother (TR-1665), also died of AIDS after Omar nursed him through a painful illness. Omar had no natural brothers and after his cousin's death, he became very despondent and withdrawn. This happened only a month before this offense (TR-1635).

Omar's brother-in-law, who works for St. Vincent's Medical Center, described Omar as responsible, generous and thoughtful. He was respectful to his mother. He loved children and often took care of Mr. Williams' kids (TR-1638-40).

Omar's aunt described him as very respectful and loving "with no talking back". He was mentally slow but when he was 15 or 16, he cared for her children while she was in the hospital. Her children loved him. He helped keep her older son out of trouble and told him to stay in school (TR-1655-59).

Omar's first cousin took leave from the Air Force to come testify. He stated that Omar and he were like brothers in New Jersey and described several typical incidents which established Omar's good character. When Omar heard some other guys making rude comments to women, he told his cousin he didn't want to be like that. Omar told his cousin that he wanted to finish his education and make something of himself. His cousin remembered, in regard to Omar's mental disability, that at age 12 or 13, Omar was still writing his threes backwards. He said Omar was very generous and would give you the shirt off his back or his last $5.00. He got along well with his cousins and did whatever was needed around the house (TR-1661-64).

A cousin who was a frame stylist for Lens Crafter, said Omar encouraged her to go back to school after her baby was born and babysat for her so she could go to school. One time when Omar was babysitting, her daughter became upset because she accidentally messed her pants; so Omar bathed her, fed her and rocked her to sleep. Around the house he mopped floors, cooked dinner, washed dishes and treated his mother with respect. He was very generous and would give his cousin a dollar or two if he had it (TR-1668-73). Another cousin testified that Omar was like a brother and was very generous, and good with kids, and was trying to get into the Job Corps at the time of the offense (TR-1675-77). Another cousin said that Omar had helped her with her

baby and had even spoken to the father of the baby about his responsibility to help the mother with the child. Omar told her to stay in school and now she is studying to be a nurse. Omar was good around the neighborhood; he would get kids out of the street and tell others to watch their language around the children (TR-1679-83).

A close friend of the family said that Omar was respectful to adults. He warned her if her kids were going with the wrong group. When her son went to the service, Omar tried to be a man around the house when she needed him. She said he was a slow learner. When asked if he used good judgment, she would only say he was "quiet". When asked if he knew right from wrong, she said,

> "I seen him on occasion where he couldn't determine what to do at all, he would go to his mother. I could see when he would get confused about a matter he wasn't completely sure, he would go to his mother" (TR-1685-90).

A woman friend who was 19 years old and a full time student at FCCJ, testified that Omar would often give free haircuts. He tried to keep her out of trouble. He encouraged her and others to stay in school when they wanted to quit. He **was** respectful to adults and would tell other young people to keep the noise down at night. After the shooting, Omar told her that he was sorry that the boy had been killed. He told her that the shooting was an accident and he was sorry he had killed a baby (TR-1641-45).

Another woman friend who was 19, said that Omar treated her like a little sister. He would tell her to stay in school and try to counsel her (TR-1646-47).

Omar's girlfriend stated that she had two small children by other men and that Omar was very good with them. They loved him and called him daddy. He even helped her through her pregnancy by another man. Omar told her that he could not stay in special education because he was older than the other kids and didn't fit in. He was very hurt by his cousin's death but was happy about getting into the Job Corps (TR-1649-53).

Omar's sister said that he was sick all the time as a baby and he drank baby formula until he was four years old. The other kids picked on him and called him retarded. She also teased him about his retardation because she was very smart. Omar very much wanted to be close to his father. Their father would promise to come pick them up but only actually did it one time. When their stepfather got sick, their mother had to quit her job. They went through very hard times when there was not even enough food. He was his grandmother's favorite and was very close to her. When she died in September 1989, he was hurt very, very bad and became very withdrawn. Only three months later his father died of AIDS (TR-1696-1716).

Omar lived in New Jersey before his family moved to Jacksonville. A teacher of the handicapped from New Jersey said

that Omar was very slow mentally and was dyslexic. He and another child were the most disabled students in her special education class. Because of his disability he was very quiet and withdrawn. He was very motivated to learn and would ask her for special help, but he was unable to read (TR-1691-94).

Omar's art teacher from New Jersey also testified that he taught Omar in a special education class. Omar was a very cooperative student and would help when there were disturbances among the other children. He said that Omar was a fine artist and sculptor. Although Omar was in a special education class in a very rough intercity school, he won the city art award beating out even the students from the special art schools. There was a special ceremony to give him the award where he met the mayor and the superintendent of schools. Omar was very shy and bewildered, as if this special attention was a trick life was playing on him. Because Omar had such a special talent, the teacher started giving him art supplies and took him to a professional art show. Omar's art was displayed in the Prudential Building and the Federal Courthouse (TR-1718-28).

Omar finally gave up his schooling at age 18 because he was older than the other kids and didn't fit in. Omar tried to get jobs but could not fill out the applications (TR-1636-37). At the time of the offense, he was happy about waiting to be admitted to the Job Corp. (TR-1650-510).

The final mitigation witness was Dr. Harry Krop. He testified that Omar's IQ tested at 76 and that he had a mental age between 13 and 14 years old. Omar put in such an optimal effort to do well in his interview that originally the doctor was led to believe that he was more intelligent than he is. However, testing and records revealed his disability. In 1991, Duval County school records indicated that his reading level was 1.5 which is the equivalent of halfway through second grade (TR-1734-37,1756-57). Dr. Krop said that his brain problem occurred at a very early time and that premature babies are often retarded. Omar also had respiratory illness which made him blue from lack of oxygen, and he had a heart murmur and enlarged heart which can also cause lack of oxygen to the brain. Whatever the cause, he was diagnosed with brain damage at the age of two months with an abnormal EEG (TR-1738-39). In regard to Omar's judgment at the time of the offense, Dr. Krop said that his testing showed that although he was low in all areas, judgment was Omar's lowest area of functioning. Whereas alcohol affects even the average person's judgment, it had a much greater effect on Omar due to his disability which had greatly reduced his ability to make judgments. If Omar drank a significant amount of alcohol such as a quart of beer and a bottle of wine, his judgment would be "significantly impaired" and his impulse control would be greatly reduced. His ability to conform his conduct to the requirements

of law was impaired (TR- 1741-43). Omar acknowledged his responsibility and cried when he told the doctor that the victim was just a child. Dr. Krop interviewed Omar three different times and Omar always said that the shooting was accidental. Omar was very remorseful; and if the shooting was not accidental, it was the doctor's opinion that Omar might be trying to cope with a terrible event inconsistent with his normal belief system (TR-1744-46,1752).

Not only is there one lesser aggravating factor while the mitigating factors are very strong, the facts of the case also require a life sentence.

At worst the facts support a [illegible] gone bad".

In closing argument, the prosecutor argued that Omar's judgment is OK and he knows the difference between right and wrong. He dismissed the mitigating evidence by telling the jury that the fact Omar was loved by his family and had artistic merit doesn't mitigate murder. He argued that Omar lied about the shooting being an accident. He said Omar showed good judgment by destroying evidence, lying, protecting a friend's identity, and running. He **gave** his personal opinion that "when you get a type of criminal like Omar Jones...they know what they are doing and deserve to be punished for it" (TR-1765-74). Although the prosecutor told the jury that there were two aggravating circumstances which merge, he went on to say " . . .but both have

been proven beyond a reasonable doubt. There is no doubt these aggravating circumstances exist from which your death penalty should come" (TR-1775) (emphasis added).

The prosecutor urged the jury to disregard any feelings of sadness or sympathy they might have for Omar or his family, but "An understanding of the loss is another matter" (TR- 1777). The prosecutor was able to sway the jury with an impassioned plea for the death sentence based on the victim impact evidence presented by the State. He said defense counsel wants you to think about the people who testified for the defendant and what they told you but remember the testimony from the State about "...what this senseless murder has done to a wonderful family" (TR-1778). Although the prosecutor knew that the jury would be instructed not to consider victim impact evidence as aggravation, clearly he argued that the jury should balance the mitigation, not against the aggravating circumstances, but against the State's victim impact witnesses.

Defense counsel tried to rebut the State's argument by saying that the fact that there has been a murder does not in itself justify a death sentence and that they should weigh the character of the defendant, not the victim. She argued that Omar did not have good judgment, that there was no prior plan to hurt someone, that he took the gun so something bad would not happen, that he was hysterical in the car and that he showed remorse.

She then listed the instances of good character and asked for a life sentence (TR-1780-88). The jury voted 7-5 to recommend death after deliberating for 90 minutes.

The following facts are unrebutted. A co-defendant originated the idea of going to the school where the victim was killed. Another co-defendant brought a gun. Omar ended up carrying the gun because he was afraid one of the others "might do something crazy". The State presented evidence that the plan was to go to the school to get money from someone who owed money to Jerome Goodman. At the school, the four co-defendants happened to come upon two boys waiting for a ride. Omar asked one of the boys for money. He did not make any prior threats, but pulled a gun from his pocket while saying, "let me show you a gun." Unknown to Omar, the gun had a hair trigger which went off very easily whether or not it was cocked. As he held the gun it went off two times. The first shot hit the boy in the leg and after his head dropped down in front of his leg, the gun went off again entering the back of his head and killing him instantaneously.

Immediately after the shots were fired, a teacher overheard Omar say, "What happened?" He and another co-defendant ran back to the car where Omar was described as distraught and hysterical. The co-defendant had to tell the driver to drive away. Omar kept saying it was an accident and apologizing for what had happened.

He asked a friend for help with the gun and was later observed crying in the hallway of his mother's apartment. The next day when the officers told him that the boy had died he started crying again and when told the boy was only **14,** he continued to cry saying, "I killed a baby." He then explained to the officers that the gun had gone off accidentally. While awaiting trial, he told others, including a friend and the mental health expert, how sorry he was and he repeatedly insisted to the mental health expert that the gun went off by accident. None of the above facts were rebutted by the State other than to say that they did not believe that Omar was being truthful.

The State inflamed the jury.

Given the weak aggravation, the strong mitigation and strong evidence that the shooting was accidental, it is hard to believe that the jury recommended a death sentence by a 7-5 vote. The explanation lies with the prosecutor's improper argument and use of evidence to inflame the jury.

At the penalty phase, the prosecutor used improper argument and victim impact evidence to distract the jury from the lack of aggravating circumstances (see Issues III,VIII). He told the jury that when they thought about the mitigating evidence

> ...you also have to remember the testimony you heard from the State today, what this senseless murder has done to a wonderful family. (TR- 1778).

The prosecutor closed his argument to the jury by saying:

> You have a horrible, senseless, aggravated murder. Weigh the evidence presented during both phases of this trial, the murder of this great child during an attempt to get a little money, against the mitigating evidence you have heard, and then the State must urge you to return the only appropriate recommendation, death. (TR-1778).

Because the prosecutor was unable to argue that the aggravating factors outweighed the mitigating factors, he very cleverly avoided this problem by working on the jury's emotions. First the prosecutor inflamed the jury about the murder.[11] Then he urged them to focus on the victim impact evidence, instead of the balancing process of aggravating factors versus mitigating factors. The jury only deliberated for 45 minutes. Apparently neither defense counsel's argument or the judge's instructions to the jury were sufficient to get the jury back on the right track of weighing aggravation versus mitigation. The jury vote for death was seven to five. If only one juror had changed their mind, the recommendation would have been for a life sentence.

The trial court did not properly consider the evidence.

The judge was not inclined to correct the jury's sentencing recommendation. The sentencing order is fraught with error.

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[11]Earlier in the trial the prosecutor characterized the shooting as "target practice". The defendant's objection was sustained and the jury was instructed to disregard the comment. Despite the fact the court had sustained the objection, the prosecutor repeated his comment about "target practice" in his closing argument and the defense objection was overruled (TR-1398-1400).

In the order, although the judge acknowledged that the two aggravating factors, pecuniary gain and in the course of an attempted robbery, should merge into one factor, in the very next sentence the order refers to more than one aggravating factor: "The aggravating factors should be and will be given great weight by this court..." (R-394)(emphasis added). Although the court recognized that the two factors should merge, in fact they were considered as two factors.

In weighing the mitigating factors, the trial court erred in giving no weight to most of the substantial mitigation presented for Omar Jones. Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990). Although the court accepted that Omar was 19 at the time of the offense and that he had a mental age between 13 and 14 years, the court found that:

> While this arguably mitigating circumstance does exist, it is entitled to no weight. The defendant's chronological age of nineteen is not in and of itself mitigation: The age of the defendant must be linked with some other characteristic in order for age to be accorded any significance by the court. The defendant's extensive criminal history and his obvious maturity at the time he committed this crime yield the conclusion that this circumstance should be accorded no weight by the court (R-395)(emphasis added).

The State presented no evidence of maturity. On the other hand, the Defense established through hospital records, school records, teachers, family members, psychological testing, and an expert opinion that Omar had been mentally disabled by brain damage and

retardation since birth and had very impaired judgment. The court erred in according no weight to the evidence of young age. Christmas v. State, 632 So. 2d 1368 (Fla. 1994).

The judge acknowledged that a mental health expert testified that Omar's judgment was impaired by his retardation, coupled with his use of alcohol and marijuana at the time of the offense, but he dismissed consideration of this mitigation because "...the defense witness did not testify that the defendant's judgment was substantially impaired." (R-395) (emphasis in original). The trial court wrongly disregarded this weighty statutory and nonstatutory mitigating evidence of impaired judgment due to retardation, brain damage and intoxication on the technicality that the expert referred to Omar's impairments as "significant" instead of "substantial" (TR-1743). The expert's testimony supported a finding of the statutory mitigating factor. However, even if it did not, the evidence established nonstatutory mitigation. The court erred in refusing to give any weight to the evidence of impaired judgment. State v. Crump, 654 so. 2d 545 (Fla. 1995).

The trial court acknowledged that there was evidence that the defendant consumed alcohol and marijuana prior to the attempted robbery and murder. Dr. Krop testified that the amount of beer and wine consumed by Omar over a two and a half hour time period immediately before the offense would have impaired an

average person's judgment and had a much greater effect on Omar's judgment. The court refused to give the evidence any weight because he found that the facts demonstrated that the defendant was in control of his faculties (R-396). The court recognized the intake of alcohol and marijuana but again gave no weight to the evidence. Knowles v. State, 632 So. 2d 62, 67 (Fla. 1994); Stevens v. State, 613 So. 2d 402 (Fla. 1992).

Although Dr. Krop testified that he had reviewed hospital records which showed an independent diagnosis of brain damage based on an abnormal EEG at the age of two months, the court found that "The suggestion that the defendant suffers from organic brain damage is just that, a suggestion without any competent proof." (R-396). It is hard to imagine more competent proof than actual records of an independent diagnosis of brain damage based on an abnormal EEG. Knowles, supra.

The court then found, "It is true that the defendant has a low IQ but this standing alone is not meaningful." (R-396) (emphasis added). The court disregarded retardation because the "...Defendant at all pertinent times knew right from wrong, was able to make judgments based on morality and **was** not suffering from any mental illness or emotional disturbance." (R-396). This Court has found in previous cases that the inability to know right from wrong does not negate the statutory factor of substantially impaired judgment. Nor is a showing of a

particular mental illness required when a person is retarded or brain damaged. State v. Morgan, 639 So. 2d **6** (Fla. 1994); State **v**. Bryant, 601 So. 2d 529 (Fla. 1992). The court goes on to delineate two prior arrests which he characterizes as an "extensive criminal history" which "demonstrates that Defendant **was** not impaired in his ability to conform his conduct to the requirements of law" (R-397). Common sense would conclude that prior arrests are evidence of a person's inability to conform to the requirements of law. While prior contact with the judicial system can be used to establish familiarity with procedures and yield particular facts which might demonstrate maturity, counsel is unaware of any precedent that two prior arrests standing alone can establish that a person has the ability to conform their conduct to law. This is particularly true in light of the unrebutted expert opinion that Omar's judgment was significantly impaired by his brain disfunction and alcohol intake. Knowles, supra; Kearse v. State, 20 Fla. L. Weekly 300 (Fla. 1995).

The court acknowledged that Omar **had** proven great artistic merit but gave it no weight. The court actually used Omar's artistic merit as aggravation because he had not 'taken advantage" of his opportunity. In regard to the winning of the art award, the court stated, "This certainly is noteworthy but is of no significance as a mitigating factor." (R-397).

The court also disregarded the evidence of poverty which sometimes resulted in the family going without food and which obstructed Omar's ability to obtain art supplies, "The purported disadvantaged childhood of the defendant is a mere excuse and subterfuge. This factor is given no weight by the court." (R-398).

The court gave no weight to evidence of good character:

> The defendant says he has demonstrated a caring and helpful disposition toward others in that he babysat for young children of relatives and friends, he cut hair at no charge for those who wanted a haircut, he helped neighbors with heavy lifting and massaged his grandmother's arthritic feet. In addition he assisted his arthritic grandmother with ambulation and took care of his dying stepfather by bathing and changing his clothes. This conduct is not extraordinary nor is it even remarkable. It is something one would expect of a family member who cares about other family members and humanity in general. Certainly this does not rise to the level of significant mitigation and is accorded no weight by this court.
>
> Witnesses testified that the defendant counseled with them and other young people to stay in school and complete their education. In addition he encouraged another youth to support a child that the youth had fathered out of wedlock. He counseled young children to be respectful to adults. The defendant urges this as a contribution to the lives of others. This was not established as a significant mitigating circumstance and is given no weight by the court. (R-398-99)(emphasis added).

Other defendants are routinely given weight in the scales of mitigation versus aggravation for the same or similar acts of

kindness- State v. Allen, 636 So. 2d 494 (Fla. 1994); State v. Pangburn, 20 Fla. L. Weekly 5323 (Fla. 1995); State v. Jackson, 599 so. 2d 103 (Fla. 1992).

Because Omar told the officers that the shooting was an accident, the court found that he did not fully confess to the crime and found that the mitigating factor had not been established. In regard to remorse, evidence was presented that immediately after the offense Omar was hysterical and kept apologizing for what had happened, that he was seen crying by himself later that evening, and that he burst into tears when told the victim had died. The court erred in giving this evidence no weight: "The court finds that the defendant's purported remorse was not genuine." (R-399) Stevens v. State, 613 so. 2d 402 (Fla. 1992). The court disregarded Omar's offer to plead guilty: "This mitigating factor was established and is recognized as a non-statutory mitigating circumstance entitled to no weight in view of the overwhelming evidence against the defendant who very pragmatically offered to plead guilty in order to escape the ultimate sanction for his conduct." (R-400). State v. Koenig, 597 So. 2d 256 (Fla. 1992).

When evidence is presented by a defendant, which this Court has recognized to be mitigating of a death sentence, a trial court is not permitted to simply accord no weight whatsoever to such evidence. Nibert v. State, 574 So. 2d 1059, 1062 (Fla.

1990). In this case the trial court acknowledged proof of many mitigating factors such as retardation, good character, artistic merit, receipt of major art award, poverty, caring and helpful disposition, contributions to the lives of others, significantly impaired judgment, and offer to plead guilty but accorded them no weight whatsoever (R-395-400).

There were numerous other nonstatutory mitigating factors supported by the evidence but not found by the court. Omar proved a capacity to form loving relationships. State v. Scott, 603 So. 2d 1275 (Fla. 1992). Omar was very hurt because he could not bond with his natural father. State v. Backman, 20 Fla. L. Weekly S323 (Fla. 1995). He was helpful to people in the community. State v. Pangburn. He had a prior history of non-violence. State v. Thompson, 647 So. 2d 824 (Fla. 1994). He was good to his siblings and had difficulty in school. State v. Allen, 636 So. 2d 484 (Fla. 1994).

Not only is it clear that the trial court erred in failing to properly balance mitigation, it is clear that if the trial court had properly balanced the mitigation that a life sentence mandated by the prior rulings of this Court.

Counsel has cited only a few of the many cases which establish that this Court recognizes the weight of mitigating evidence presented at the penalty phase in regard to Omar Jones. In considering the proportionality of this death sentence, Mr.

Jones asks this Court to conclude that like Terry, supra although the homicide is deplorable, it is not in "the category of the most aggravated and least mitigated for which the death penalty is appropriate." 21 Fla. L. Weekly S12 (Fla. 1996). Further, even if the Court finds proof of an intent to rob, this case falls into the category of a "robbery gone bad" similar to other robbery-murder cases where this Court has reduced a death sentence to life. Terry, supra; Sinclair v. State, 657 So. 2d 1138 (Fla. 1995); and Thompson v. State, 647 So. 2d 824 (Fla. 1994). Finally, the aggravating factor in this case is a lesser aggravator compared to other cases where the death sentence was upheld based on one aggravating circumstance. Ferrell v. State, No. 81,668 (Fla. April 11, 1996). This death sentence violates federal and state constitutional rights to a fair trial, equal protection, due process, and against cruel and/or unusual punishment. U.S. Const. Amends. VI, VIII, XIV; Art. I, Sections 9,16,17, Fla.Const.

ISSUE VIII

THE STATE'S PRESENTATION OF VICTIM IMPACT EVIDENCE IN THE PENALTY PHASE VIOLATED OMAR JONES' RIGHT TO A FAIR PROCEEDING CONTRARY TO FLORIDA LAW AND THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

At the penalty phase, the prosecutor used victim impact evidence to inflame the jury. The only witnesses presented during the penalty phase were the victim's friend, two teachers

and the victim's father. Defense counsel objected frequently and at length against the improper use of the victim impact evidence to distract the jury from the required balancing of aggravating and mitigating circumstances.

The prosecutor was in a difficult situation. He was unable to argue that the aggravation outweighed the mitigation because there was only one aggravating circumstance and many mitigating circumstances. In a weighing contest he would clearly lose. His solution was to avoid the weighing process by going far outside the limited scope of victim impact evidence. In addition to denigrating the mitigation,[12] he inflamed the jury about the murder.[13] But the main theme of the State's penalty phase argument was the victim impact evidence:

> I'm not making light of the impact that this case in your ultimate decision may have on this defendant's family. You have Omar Jones' family album, and the witness told you about where these things took place, the fun the family was having, you know what favorable impact Omar Jones had on his family and friends. But the Mitchell family from their testimony didn't present a family album, because it has a big empty hole in it, it stops with Jeff at age 14.

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[12]The prosecutor repeatedly denigrated the mitigating evidence. In regard to the evidence of retardation and brain damage since birth, the prosecutor dismissed it by saying, 'Ladies and gentlemen, these offenses aren't generally committed by rocket scientists." (TR-1765). He sarcastically referred to Omar Jones as a "wonderful, loving, caring murderer" (TR-1777).

[13]The prosecutor characterized the shooting as "target practice" and an "execution" (TR-1398,1450,1769).

> MS. FINNELL: Excuse me, Your Honor, I'm going to renew my pretrial motion at this time.
>
> THE COURT: Very well. Overruled.
>
> MR. SHORSTEIN: Let me show you the pictures that you saw at trial of their family album. (TR-1768).

The prosecutor then presumably showed the jury the autopsy photographs. Although the prosecutor denigrated the mitigation, misrepresented the facts[14], and referred to the shooting as "execution murder of a child on a school ground" (TR-1769), his coup de grace was to improperly feature and exploit the victim impact evidence and to link it to a racial theme. He emphasized to the jury that while sympathy for the defendant or his family was improper, victim impact evidence is "another matter":

> Sympathy for the defendant, or the defendant's family and friends and teachers should not be a factor in your decision. An understanding of the loss is another matter. The testimony we presented to you today, the purpose of that testimony from friends, teachers and father of Jeff Mitchell should help the jury assess the harm caused by this defendant, help determine the loss (TR-1777)(emphasis added).

The message is clear - don't be influenced by sympathy for Omar Jones but feeling sympathy for the victim and his family is appropriate. The prosecutor then focused completely on victim impact evidence for the last page and a half of his argument. Again the message is clear, the sympathy which it is appropriate

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[14]The numerous misrepresentations of the evidence are described in Issue III.

to have for the victim and his family is much more important to the jury's decision than the balancing process of aggravating versus mitigating factors.

He told the jury that when they thought about the mitigating evidence:

> ...you also have to remember the testimony you heard from the State today, what this senseless murder has done to a wonderful family." (TR-1778).

The prosecutor closed his argument to the jury by saying:

> You have a horrible, senseless, aggravated murder. Weigh the evidence presented during both phases of this trial, the murder of this great child during an attempt to get a little money, against the mitigating evidence you have heard, and then the State must urge you to return the only appropriate recommendation, death (TR-1778)(emphasis added) .

Apparently neither defense counsel's argument or the judge's instructions to the jury were sufficient to counteract the victim impact evidence and argument and get the jury back on the right track of weighing aggravation versus mitigation.

Florida law has consistently recognized the potential for prejudice of such evidence in the guilt-innocence phase of any trial (capital or otherwise). Jones v. State, 569 So. 2d 1234 (Fla. 1990). This type of evidence is not relevant to any issue in the guilt-innocence phase and is highly inflammatory and prejudicial. Even if such evidence were relevant, its prejudice outweighs any possible probative value. Fla.Stat. 90.403. The

admission of such evidence at the penalty phase violated Mr. Jones' fundamental rights to have a fair sentencing process pursuant to Article I, Sections 2, 9, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Florida law emphasizes the importance of weighing aggravating evidence versus mitigating evidence at the penalty phase or before the judge. Fla.Stat. 921.141. When the State uses victim impact evidence to negate the weighing process as in this case, due process and fundamental fairness are denied. Victim impact evidence is inadmissible, when it's use violates fundamental due process contrary to state and federal constitutional rights. U.S. Const., Amends. VI, VIII, XIV; Art. I, Sections 9, 16, 17, Florida Constitution.

Payne v. Tennessee, 111 S.Ct. 2597 (1991), found that the Eighth Amendment does not bar victim impact evidence during the penalty phase of a capital trial. However, Payne warns that in some circumstances the evidence can be "so unduly prejudicial" that its introduction at the penalty phase violates the Due Process Clause of the Fourteenth Amendment. 111 S.Ct. at 2608. For example, Payne specifically prohibits 'the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence." Id. at 2611 n.2.

Although victim impact evidence is admissible, due process considerations do not permit such evidence to be exploited to negate, distort, and completely undermine the sentencing process as in this case. The Due Process Clause of Article I, Section 9 of the Florida Constitution places limits on the use of this type of evidence.

The State's use of the victim impact evidence in this case violated Article I, Sections 9 and 17. First, the State used the evidence to introduce into the penalty decision considerations that have no rational bearing on any legitimate aim of capital sentencing. Second, the State exploited highly emotional and inflammatory testimony to subvert the reasoned and objective inquiry which the courts have required to guide and regularize the choice between death and lesser punishments. Third, the State used the evidence to persuade the jury to impose the death sentence on the basis of race, class and other clearly impermissible grounds.

The purpose of the admission of victim impact evidence is to balance sympathy to the defendant and his family - not to distort the entire sentencing process. The unintended physical, emotional and psychological after-effects on relatives should not be used to argue the moral blameworthiness of Omar Jones beyond the onus he already bears for committing the murder. Allowing the State to use victim impact to negate the weighing process

makes the entire system freakish and arbitrary and violates Article I, Sections 9 and 17.

The State used the admission of the victim evidence to highlight the race and class status of the victim. Thus, the State violated Article I, Sections 9 and 17. The State's use of victim evidence was also unconstitutional under the Eighth and Fourteenth Amendments to the U.S. Constitution. In Payne v. Tennessee, 111 S. Ct. 2597 (1991) the Court **stated** that this evidence may be so "unduly prejudicial" that it violates the Due Process Clause of the Fourteenth Amendment. Id. at 2608.[15]

The admission of this evidence is unconstitutional pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The failure to sufficiently guide discretion or to limit the subversion of the weighing process, resulted in an arbitrary and discriminatory sentence contrary to Furman v. Georgia, 92 S.Ct. 2726 (1972). The guiding of the judge and jury's discretion was a critical factor to both the Florida Supreme Court and the United States Supreme Court in upholding the facial constitutionality of the Florida statute. Proffitt v. Florida, 96 S.Ct. 2960, 2969 (1976).

In this case, the prejudice outweighed its probative value,

[15]There is nothing in Payne that permits evidence concerning such unlimited and undefined evidence as that designed to show "uniqueness as a human being" and "loss to the community". This goes way beyond the scope of Payne and violates the Eighth and Fourteenth Amendments.

thus violating Florida Statutes, Section 90.403. The victim evidence was used to shift the judge's and jury's attention away from a reasoned weighing of aggravating and mitigating factors to a naked cry for vengeance.

The defendant Omar Jones is black and the deceased is white. Both the United States Supreme Court and the Florida Supreme Court have recognized the special danger of racial prejudice infecting a capital sentencing decision in a case involving a black defendant and a white deceased. Turner v. Murray, 106 S.Ct. 1683 (1986); Robinson v. State, 520 So. 2d 1 (Fla. 1988). In Turner, supra, the Court held that the Sixth and Fourteenth Amendments to the United States Constitution mandate that a black capital defendant accused of killing a white person has a right to voir dire on racial prejudice. The Court stated:

> Because of the range of discretion entrusted to the jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected... The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence. 106 S.Ct. at 1687-1688.

The Florida Supreme Court recognized the special danger of racial prejudice influencing a capital sentencing proceeding in Robinson. The Court noted the long history of racial prejudice in our society and the need for the "unceasing attention" of the courts to eradicate it.

The Court went on to state:

> The situation presented here, involving a black man who is charged with kidnapping, raping, and murdering a white woman, is fertile soil for the seeds of racial prejudice. Id. at 7.

By placing its primary emphasis on the testimony of family and friends of the deceased, the State improperly highlighted the fact that the deceased was white, whereas Omar Jones is black. Thus, as in Robinson and Turner it created an unacceptable risk that racial prejudice infected the proceedings pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16, and 22 of the Florida Constitution. This is especially true, in light of the prosecutor's characterization of Omar Jones as "this type of criminal" and his impassioned plea for death based on the victim impact evidence.

The court's decisions with respect to the victim impact evidence were erroneous and violated federal and state constitutional rights to a fair trial, equal protection, due process, and against cruel and/or unusual punishment. U.S. Const. Amends VI, VIII, XIV; Art. I, Sections 9,16,17, Fla. Const.

If the jury had properly weighed the aggravating factors against the mitigating factors, a life sentence would have been the outcome. However, the court failed to restrain the distorted use of sympathy for the victim and his family. The prejudice is

evident; the jury vote for death was only seven to five. One changed vote would have resulted in a life sentence.

ISSUE IX

THE COURT ERRED IN DENYING THE JURY INSTRUCTIONS REQUESTED BY DEFENSE COUNSEL AND IN GRANTING THE STATE'S REQUESTED INSTRUCTION.

The Defense made numerous requests for special jury instructions. Virtually all of the requests were denied. Before the guilt phase, the Defense requested that the jury be instructed that their vote must be unanimous as to whether Omar Jones was guilty of premeditated or felony murder and the penalties for the offense (R-294-95). The court denied the requested instructions (TR-1363-64). The court also erred in denying the Defense objection to the specific intent instruction and the accomplice instruction requested by the State (TR-1351-53,1356-57).

In regard to the penalty phase, the Defense requested numerous jury instructions which would inform the jury of the law in regard to sentencing considerations (R-308-30,352-60). It was a violation of state and federal constitutional rights not to give these requested instructions. Some of the instructions which the court refused to give the jury are listed below:

a. In order for one aggravating circumstance to support a recommendation of death by electrocution, there must exist only very little or no mitigation (R-308).

b. . . . the law requires me to give great weight to your recommendation. I may reject your recommendation only if the facts are so clear and convincing that virtually no reasonable person could differ (R-311).

c. The aggravating circumstances I have just listed are the only ones you may consider. You are not allowed to take into account any other facts or circumstances as a basis for recommending a sentence of death (R-312) .

d. The jury must unanimously find an aggravating circumstance before it is established. You should presume the defendant innocent of each aggravating circumstance until and unless the presumption is overcome by proof beyond a reasonable doubt. The reasonable doubt standard is also applied to the aggravating circumstances as a whole. Unless you find that the State has shown beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors in this case, you cannot recommend a sentence of death (R-313).

e. You do not have to be unanimous in your decisions about mitigating circumstances. Each of you should make up your own minds about mitigation (R-314).

f. Mere sympathy which is purely an emotional response to what you have heard should not influence you decision in any way. However, if sympathy arises as part of a reasoned moral response to mitigation placed before you, you may consider that in your decision about the appropriate penalty (R-315) .

g. In determining the appropriate sentence, you may consider, as a mitigating factor, the treatment of other participants in this incident (R-319).

h. If you are reasonably convinced that the defendant did not intend to kill the victim, you may consider that fact as a mitigating circumstance (R-320).

i. You may consider as a mitigating circumstance

> the defendant's deprived background and early life (R-321).
>
> j. If factors you heard in evidence in this trial cause you to believe a life sentence is appropriate, you recommendation should be for a life sentence, regardless whether those factors are included in the list of statutory aggravating circumstances (R-322).

The court improperly denied each of these requests which error was aggravated by the facts of the case and the State's overreaching prosecutorial tactics (TR-1503-65).

The court also denied the defense request to instruct the jury as follows:

> You must not consider as a reason to recommend a sentence of death any feelings of anger toward the defendant, feelings of sympathy for the victims or their survivors, the relative expense of imprisonment, or the deterrence of other persons (R-324).

The standard instructions make one reference that the aggravating circumstances are limited to those listed by the Court. However, the standard instructions never expressly prohibit the jury from considering other matters as reasons to the jury to disregard particular matters that history has shown that jurors often consider. Public opinion polls and voir dire examinations regularly show that jurors consider anger toward the defendant, sympathy for the victims, the relative expense of imprisonment, and the deterrence of other persons in weighing their sentencing recommendation. If jurors are not told specifically to disregard those matters, the sentence recommendation will violate the

Eighth Amendment to the United constitution and Article I, Section 17 of the Florida Constitution.

The Defense argued passionately for a limiting instruction as to the victim impact evidence which became the main feature of the penalty phase. (See Issue VIII) Specifically, the defendant argued that there are no guidelines as to what the jury should do with victim impact evidence (TR-1534). The court was troubled by the lack of guidance for the jury and said that the trial court's decisions "may be a fatal fault" (TR-1535). The court erred in refusing a proper jury instruction regarding the State's victim impact evidence (TR-1542,1593).

The Defense renewed their objections to the jury instructions at the close of the reading of the instructions to the jury (TR-1481,1796). In denying the requested jury instructions, the court violated state and federal constitutional rights to a fair trial, a unanimous jury verdict, proof beyond a reasonable doubt, equal protection, right to counsel, due process, and against cruel and/or unusual punishment. U.S. Const. Amends. V, VIII, XIV; Art. I, Sections 9, 16, 17, Fla. Const.

ISSUE X

DUE PROCESS WAS DENIED WHEN THE COURT REFUSED TO GRANT PRETRIAL MOTIONS MADE BY COUNSEL ON BEHALF OF OMAR JONES.

Defense counsel filed numerous pretrial motions in an

attempt to achieve an even footing with the State at the trial.

The court erred in denying the following pretrial motions:

a. Motion to Require the State to Elect, or, in the Alternative, for More Definite Statement of Particulars.

b. Defendant's Motion for Special Verdict.

c. Motion for Production of Favorable Evidence.

d. Motion for Statement of Aggravating Circumstances.

e. Motion to Dismiss and to Declare Sections 782.04 and 921.141, Florida Statutes, Unconstitutional for a Variety of Reasons.

f. Motion to Declare Sections 782.04 and 921.141, Florida Statutes, Unconstitutional Because of Treatment of Mitigating Circumstances.

g. Motion to Declare Sections 921.141 and 922.10, Florida Statutes, Unconstitutional Because Electrocution is Cruel and Unusual Punishment.

h. Motion for Evidentiary Hearing, and for payment of Fees and Costs of Expert and Lay Witnesses, on the Constitutionality of Death by Electrocution.

I. Motion to Declare Section 921.141, Florida Statutes, Unconstitutional as Applied Because of Arbitrariness in Jury Overrides and Sentencing.

j. Motion for Evidentiary Hearing, for Payment of Fees and Expenses of Expert Witnesses, Concerning Arbitrary Application of the Death Penalty.

k. Motion to Declare Section 921.141(5)(h), Florida Statutes, unconstitutional.

l. Motion to Declare Section 921.141(5)(I), Florida Statutes, Unconstitutional.

m. Motion to Declare Section 921.141(5)(d),

Florida Statutes, Unconstitutional.

n. Motion to Preclude Death Qualifications of Jurors in the Innocence or Guilt Phase of the Trial and to Utilize a Bifurcated Jury, if a Penalty Phase is Necessary.

o. Supplemental Motion for Individual and Sequestered Voir Dire, for Evidentiary Hearing and to tax Costs.

p. Motion for Additional Peremptory Challenges.

q. Motion to Prohibit use of Jurors Criminal Records by the State and Alternative Motion for Disclosure of Criminal Records of Prospective Jurors.

r. Motion to Prohibit Impeachment of Defendant by Prior Criminal Convictions, or, in the Alternative, to Impanel a new Penalty Phase Jury.

s. Motion in Limine Concerning Other Crimes Evidence.

t. Notice of Waiver of Mitigating Circumstances 921.141(6) (a) and Motion in Limine.

The motions cited above were presented to the court, argued, denied and raised in the motion for new trial.[16] (TR-250-365) . However, appellant's counsel is unable to fully brief these issues because the motions were omitted from the record on appeal.

The Defense also challenged the constitutionality of Florida's death sentencing law as applied to a defendant whose mental age is below 16. The evidence was uncontroverted that Omar Jones had a mental age between 13 and 14 years of age. Defense counsel relied on both state and federal law in challenging the constitutionality of the application of the death sentence to Omar Jones because his

[16]Counsel has filed a motion to the Court to supplement the initial brief within 10 days of receipt of the supplement to the record and not to exceed the total number of pages allowed for an initial brief.

mental age was below 16. Allen v. State, 636 So.2d 494 (Fla. 1994); Thompson v. Oklahoma, 487 U.S. 815 (1988) (R-66-75).

The court erred in failing to grant the defense motion to dismiss Count II of the indictment charging attempted robbery as contrary to both state and federal constitutional requirements for due process (R-84-87). The grounds for the motion to dismiss are based on the fact that the crime of attempted robbery contains no elements which are not required to be proved under a prosecution for first degree felony murder robbery pursuant to Section 782.04(2)(d), Florida Statutes. U.S. v. Dixon, 113 S.Ct. 2849,2857 (1993). This Court's rational for the contrary finding in State v. Enmund, 476 So.2d 165 (Fla. 1985) is no longer viable because the Florida Legislature has since amended Section 775.021 to specifically exempt from cumulative punishment (1) offenses which require identical elements of proof, (2) offenses which are degrees of the same offense as provided by statute, and (3) offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense. See Chapter 88-131, Laws of Florida. Clearly, in light of the Florida Legislature's subsequent exemption, the rationale expressed in Enmund has been superseded.

The Defense also made a pretrial objection to improper argument by the State at the penalty phase using nonstatutory aggravation and referring to statutory aggravation which is inapplicable to Omar Jones (R-303-304). The court erred in denying this request.

The evidence that Omar Jones premeditated the death of the victim was very weak: the gun had a hair trigger, the encounter

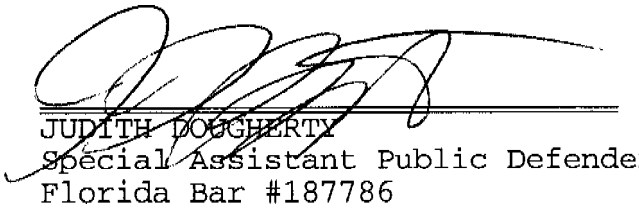
with the victim was by chance, when the shots were fired Omar said "what happened?", and immediately thereafter he began to cry and tell his codefendant he didn't mean to do it. Further, it was uncontroverted that there was only one aggravating factor and Omar Jones was age 19 with a mental age between 13 and 14 years of age. In light of these uncontroverted facts, the Defense argued that the State knew that a death sentence could not survive appellate scrutiny as to proportionality and was using the death penalty as a pretext to obtain a biased jury (R-198-200). Again the court failed to exert any control over the State's conduct of their trial strategy and erred in denying the motion.

As to each of these issues, Omar Jones urges the Court to find that the trial court's rulings were contrary to law. The court's tactics were erroneous and violated federal and state constitutional rights to a fair trial, equal protection, right to counsel, due process, and against cruel and/or unusual punishment. U.S. Const. Amends. VI, VIII, XIV; Art. I, Sections 9, 16, 17, Fla. Const.

CONCLUSION

Omar Jones has established that he did not receive a fair trial or fundamental due process when he was tried by a biased jury and the State used improper tactics to transform an accidental shooting into a conviction of premeditated murder with a sentence of death which are not supported by the evidence. The appellant requests that this court reverse the trial court's judgment and sentence and remand for a new trial, or impose a sentence of life.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Robert A. Butterworth, Attorney General, by delivery to The Capitol, Criminal Appeals Division, Plaza Level, Tallahassee, Florida, and to appellant, this 17th day of April, 1996.

JUDITH DOUGHERTY