IN THE SUPREME COURT OF FLORIDA

OMAR SHAREEF JONES,

Appellant,

v.

CASE NO. 84,840

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

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ARGUMENT

ISSUE I

THE TRIAL COURT ERRED BY NOT GRANTING A JUDGMENT OF ACQUITTAL AS TO PREMEDITATED MURDER AND ATTEMPTED ROBBERY.

The appellee objects to some of the facts cited by the appellant. Most notable is their objection that "there is no support in the record for the appellant's assertion (IBA at 9) that the firearms examiner testified that a gun can go off unintentionally" (AB-7).[1]

At trial, the state obtained a conviction and death sentence by arguing that the shooting was "intentional" because the state's ballistics expert testified that the gun could not have

[1]In this brief "IB" will be used to refer to appellant's initial brief while "AB" will be used to designate the appellee's answer brief.

been fired "accidentally". The appellee concedes that the expert agreed that the first shot could have been "accidental" (RB-17). However, the appellee argues strenuously that this was premeditated, intentional murder because the firearms expert testified that 'the murder weapon could not have been fired twice by accident" (RB-18).

Whether the appellee's play on words is intentional or accidental, it is very misleading. The appellee is correct that the expert testified on direct examination that the second shot could not have been accidental if the gun's cocking mechanism had been functional(RB-17). However, on cross-examination the expert testified that the term "accidental" did not mean the same thing as 'unintentional":

Q But you do not use the word accidentally to be synonymous with nonintentionally, do you?

A Or unintentionally.

Q Or unintentionally?

A That's correct.

Q Those are different words to you?

A To me they are.

Q Accidental has more of a technical meaning to correct?

A That's correct.

Q And unintentional has more to do with the state of mind; correct?

A Yes, sir.

(TR-1283-84). It was not the expert's testimony that the gun could not have gone off unintentionally as argued by the prosecutor at trial and the appellee to this Court.

Furthermore, the expert testified on cross examination that it was possible for the second shot to have been accidental, as well as unintentional, if the cocking mechanism of the gun had been disabled in the process of converting the gun to a hair trigger mechanism. The expert testified that when a novice alters a gun to create a hair trigger effect, the cocking mechanism can easily be disabled as well. When this occurs, the gun 'fires like a revolver in the double action mode" (TR-1281-86). In other words, both shots work off the same spring and therefore fire with the same amount of pressure. This is precisely the characteristic of this gun as described by state witness Ellis Curry, when he testified that the gun went off very easily whether or not it was cocked (TR-1127-28,1132).

Finally, the expert stated on cross examination that even if the cocking mechanism was functional, the gun could have gone off accidentally if a person was trying not to fire by easing the trigger forward, because it could still slip and go off accidentally (TR-1288).

The appellee has not addressed these facts in his brief. Instead, he has encouraged this Court to believe that the state

introduced competent, substantial evidence inconsistent with the defendant's theory of an unintentional shooting because the second shot could not have been "accidental". This is **contrary** to the record in which the expert describes three ways the second shot could have been unintentional: (1) even if a gun has a normal mechanism which requires normal finger pressure, testimony that the firing cannot be "accidental" does not imply that it could not be "unintentional" (TR-1283-84)[2]; (2) the second shot could occur unintentionally if after the gun is cocked, a person is trying not to fire by easing the trigger forward and it slips (TR-1288); and (3) alteration of a gun to create a hair trigger can also disable the cocking mechanism causing the gun to fire with the same pressure for both shots "like a double action revolver" (TR-2181-86).

The appellee's only other basis for a finding of an intentional shooting is the opinion testimony of Bill Fagen, a young and impressionable friend of the victim. Bill Fagen and Ellis Curry were the only two eyewitnesses who testified at the trial. Bill stated that when the boys surrounded them and asked for money he thought they were joking (TR-1027).

At trial Bill Fagen initially stated only that the shooter went in his pocket and pulled out the gun and said "this is a

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[2]The logical conclusion of the appellee's argument is that there could never be an unintentional firing of a gun unless it was the first shot of a gun with a hair trigger mechanism.

gun" and then shot Jeff in the side and when Jeff leaned over he shot him in the head and took off (TR-1014). It was only in response to leading questions by the prosecutor that opinion testimony was elicited as to whether the shooter "paused", "aimed" and "showed no surprise" (TR-1023-25).[3] The second eyewitness, Ellis Curry, agreed with the facts stated by Bill Fagen but disagreed with the opinion testimony. Ellis Curry said the shots were so close together that he only heard one shot,[4] and that, far from acting like a cold blooded killer immediately afterward, Jones became hysterical, repeatedly apologizing to Ellis and Marilyn saying that he was sorry and it was an accident (TR-1095,1130). Finally, another student at the scene, testified that immediately after the shots went off, the taller guy (Omar Jones) ran by pulling off his mask saying "What happened?" (TR-1008).

The appellee asserts that the opinion evidence supports a finding of premeditated murder. However, the opinion evidence does not constitute proof beyond reasonable doubt when compared to the evidence to the contrary. The appellee does not contest the following facts: (1) the State could not identify any motive

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[3]The Court sustained a defense objection to the witness's reference to "target practice" as unresponsive to the question (TR-1024).

[4]State witness Marilyn Wilcox said the shots were one second apart and a teacher and another student said one to two seconds (TR-1075,1010).

for an intentional killing; (2) no reason was offered as to why Omar Jones **would** suddenly become a cold blooded killer when he never previously exhibited any violent tendencies; (3) Omar said he wanted the gun "so no one would do something crazy"; **(4)** the first shot struck the victim in the leg; **(5)** the second shot was in the same line of fire; (6) immediately after the gun went off, Omar said ‘what happened?"; (7) he got hysterical; **(8)** he apologized over and over to his co-defendants saying he didn't mean to do it; (8) later he was standing in the hallway by himself crying and (9) he broke into tears when officers told him the victim had died. All of this evidence contradicts the opinion evidence that the shooting was intentional. The eyewitness and the medical examiner both confirm that the gun was pointed toward the leg area and the victim's head dropped down into the line of fire. It is only the witness's opinion the gun was ‘aimed" and that Omar Jones did not feel shock or surprise after the first shot.

Appellee's suggestion that the verdict may be sustainable on **a** felony murder theory is incorrect **because** the evidence of an intention to rob is insufficient. According to the state witnesses there was no prior intent to rob anyone; they went to the school to collect money from someone who owed money to Jerome

Goodman.[5] It is unclear whether the request for money was serious or just joking. Eyewitness Billy Fagen thought Omar was joking when he asked his friend if he had any money (TR-1027). It is not reasonable that four robbers would seriously choose a 14 year old boy to rob. If this Court were to find that the evidence supports a verdict of felony murder then the appellant requests that the Court set aside the consecutive sentence of 30 years for armed robbery.

Finally, the appellee cites several cases in which the evidence established an "execution style" killing as authority to support the finding of premeditation against Omar Jones (RB-22). This case is not the execution style killing for which these cases can be cited as appropriate authority.

(1988). This Court has always held that

> "A plan to kill cannot be inferred solely from a plan to commit or the commission of another felony." Geralds v. State., 601 So.2d 1157, 1163 (Fla.1992): see also Sochor v. State,'619 So.2d 285, 292 (Fla.), cert. denied, --- U.S. ----, 114 S.Ct. 638 (1993); Power v. State, 605 So.2d 856, 864 (Fla.1992), cert. denied, --- U.S. ____, 113 S.Ct. 1863 (1993); Hardwick v. State, 461 So.2d 79, 81 (Fla. 1984), cert. denied, 471 U.S. 1120 (1985).

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[5]The appellee relies on the statement alleged to have been given by Omar Jones to establish an intent to rob (RB-22). However, appellant has argued that it is obvious that the statement **was** contrived by the police since the other witnesses make it clear this was not the intent for going to the school (TR-1078,1125,1128).

Barwick v. State, 660 So. 2d 685,696 (Fla. 1995). 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 v. State, 21 Fla.L.Weekly 459 (Fla. Sept. 7, 1995); 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.

Although the appellee lists the four issues which the trial court should have considered (RB-30-31), the trial court never ruled on any of these issues. On Thursday, October 13, the Court denied the motion without prejudice to renew it. On October 14, when the motion was renewed, the Court's only comment was, "You will get him" (TR-371-72). On October 17, after lengthy sworn testimony about numerous, almost desperate, attempts to serve the witness over the weekend, the Court denied the motion without comment but issued a writ of attachment. At no time did the Court rule that the witness was not substantial and there was no

material prejudice, at no time did the court find a failure of due diligence, and at no time did the Court find that the witness would not be available in the near future or unwilling to testify. To the contrary, the Court indicated a belief that the witness was available ("You will find him"); and that the witness was very important to the defense (the Court sua sponte issued a writ of attachment in an attempt to obtain the witness on the first day of trial.)

The appellee now alleges that defense counsel did not show due diligence in their attempts to find the witness and argues that defense counsel had actual notice since April (RB-25). This is not correct. In April, defense counsel found out there was a witness named Dwight Jones who had been with the defendant soon after the shooting. However, simply having a name means nothing. Defense counsel did not have reason to seek Dwight Jones as an important defense witness until three weeks before trial when the defense was first told that a ballistics expert would testify that the second shot could not have been accidental. There was no explanation by the prosecutor as to why, although a year had gone by, a firearms expert could not be produced until three weeks before the trial making it necessary for the defense to scramble for witnesses in the last moments before trial. At that time counsel sought out the witness in regard to the gun. One week later (two weeks before trial), the witness voluntarily

appeared at the Public Defender's Office, gave a statement, and said that he was willing to testify at the trial. Not only could he state that he had previously fired the gun and that it had a hair trigger but also that Omar Jones was very intoxicated immediately after the shooting.

The defense obtained a subpoena on September 29, the next day after the witness was interviewed, and attempted to obtain the witness's appearance for a deposition scheduled on October 10. On October 13, when the ordinary methods of serving process were of no avail, the defense put special investigators to work looking for the witness and notified the Court that the defense had been unable to serve the witness.

The appellee concedes that the witness was in Jacksonville.[6] The appellee does not contest that the witness could have given testimony regarding Omar Jones state of intoxication at the time of the shooting but only states that it would have been "cumulative" to Aaron Zachary. This argument is not credible in light of the appellee's repeated references to the inadequacy of the defense evidence of intoxication (e.g. RB-3,4,80). It is

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[6]The appellee argues that law officers had been unable to locate the witness for a year. If the witness had been an important witness for the state instead of the defense, the search would have undoubtedly been more vigorous and effective. It is unbelievable that with due diligence, over a year's time, that an effective professional law enforcement agency such as the Jacksonville Police Department could not locate a local resident in the City of Jacksonville.

hard to overestimate how important it would have been to the defense to have been able to establish a strong intoxication defense through the witness. He was the most important defense witness available since he saw Omar Jones immediately after the shooting.

There are no rulings by the trial court on which this Court can evaluate the trial court findings. Rules of law are meaningless if the trial court makes no findings. This Court has no way to evaluate whether the Court considered the necessary factual issues or was even aware of what those issues were. As a result, this Court can only guess at the possible bases for the trial court's findings. The case should be reversed for a new trial.

ISSUE III

OMAR JONES DID NOT RECEIVE THE BENEFIT OF HIS RIGHT TO DUE PROCESS DUE TO THE PROSECUTOR'S OVERREACHING TACTICS.

The appellee concedes that "portions of the opening statement might have been objectionable" and that the word "fabricate" in the closing argument was improper (RB-44-45). However, he overlooks the fact that when the defense objected and moved for mistrial, the prosecutor repeated the improper argument.

The prosecutors' "facts" were misleading and incorrect. The prosecutor argued in opening argument that Omar said "let's jack

someone", No such evidence was presented and in fact the evidence was to the contrary (TR-1078,1090-91).[7] 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). In closing argument, the prosecutor repeated the misrepresentation that Omar Jones had used the words "gat" and "jack" (TR-1024).

The prosecutor said that Omar said "give me the gun" when his actual statement was, "Give me the gun before one of us might do something crazy" (TR-1092)(emphasis added). The prosecutor said that because Omar "couldn't find a suitable target", he found a young boy (TR-991). To the contrary the four boys encountered the victim immediately when they entered the school ground (TR-1094). The prosecutor even deliberately tried to create a motive: "Some people say he was mad before he went to the

[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 only if the dude don't pay him his money, he was going to have to suffer some unspecified consequences (TR-1091).

robbery/murder" (TR-1450). This is simply untrue. It is reversible error for a prosecutor to argue facts not in evidence. Huff v. State, 437 So. 2d 1087 (Fla. 1983).

The prosecutor told 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). To conclude his opening "statement", the pr osecutor said that, although there would be two versions of the facts, "this man pointed the gun at Jeff Mitchell's head and executed him". The court granted the defense objection (TR-994). The prosecutor told the jury that the defenses of accident and intoxication were "outrageous, totally untrue" (TR-1441). It is reversible error for the prosecutor to give his personal opinion about a verdict or sentence. Brooks v. Kemp, 762 F.2d 1383, 1408 (11th Cir. 1985).

The prosecutor denigrated Omar Jones, and his counsel, and the defense. The prosecutor told 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). The defense objected and moved for mistrial. The appellee concedes that the word fabricate was "a poor choice of words" but "it was

just one word" (RB-45). The prosecutor argued that any lack of motive only "grossly aggravated" the crime (TR-1449-50). He told the jury that merely by exercising his right to raise the defense that the shooting was unintentional and that he was intoxicated was a contrived excuse that only "aggravates" this "vicious" murder (TR-1044). It is reversible error to denigrate the defendant, and the exercise of his constitutional right to present a defense. Johnson v. State, 351 So. 2d 10 (Fla. 1977).

At the sentencing phase the prosecutor repeatedly disparaged legally recognized mental health mitigating factors. In reference to the testimony of the mental health expert that Omar Jones had reduced intelligence and brain damage since birth, he said, '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). He told the jury to disregard the evidence 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), It is reversible error to disparage legally recognized mental health factors and to urge the jury not to consider them. Cheshire v. State, 568 So. 2d 908 (Fla. 1990); Rosso v. State, 505 So. 2d 611 (Fla. 3d DCA 1987); Messer v. Florida, 834 F.2d 890 (11th Cir. 1987).

The prosecutor deliberately used inflammatory rhetoric designed to evoke a wholly emotional response from the jury and divert them from their groper role. When the prosecutor asked the eyewitness if the shooting **was** like target practice, the witness responded "no" (TR-1023). The defense objection was sustained (TR-1023) and the trial court admonished the prosecutor stating, 'I would prefer that you use a different choice of words...." (TR-1399-1400). However, the prosecutor continued to characterize the shooting as target practice. Repeatedly, the prosecutor also inflamed the jury by referring to the shooting as an "execution" (TR-1450).

It is disingenuous for the appellee to suggest that race was not an issue in this case or that the prosecutor used no racial innuendo.[1] The prosecutor juxtaposed the term honor students with street words such as "jack" and "gat" which he wrongfully attributed to Omar Jones (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). It is reversible error to inflame the jury with inflammatory rhetoric and racial innuendo.

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[1] Four black teenagers shot **a** white teenager. One venireman stated that there **was** "a lot of rachial talk" and the race issue 'was my recollection of the media." (TR-531-33) and another venireman expressed fears of serving on the jury because he worked in a black neighborhood.

It is improper for the prosecutor to suggest to the jury that they should consider factors outside the trial. The prosecutor closed his argument by urging the jury "...you should do justice in this case and find him guilty" (TR-1406) (emphasis added). Defense counsel was required to object in the presence of the jury, the court denied the objection, and the prosecutor closed his argument by repeating the statement. It is reversible error for a prosecutor to urge the jury to base their findings on any interest outside the confines of the trial. Exhorting the jury to "do justice" is an improper reference to opinions of others outside the courtroom in the same vein as asking the jury to 'send a message." Brooks v. Kemp, 762 F. 2d 1383, 1412 (11th Cir. 1985).

The prosecutor deliberately violated the court's direction to restrain his argument. The most egregious comment to the jury was the repeated allegation that the defense theory that the shooting was unintentional was a "totally untrue" contrived excuse" that "aggravates" this "vicious" murder:

> ...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).

When the trial court sustained the defense objection to denigration of the defense, the prosecutor deliberately repeated

the statement:

> 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.)

In this single statement, the prosecutor deliberately, contrary to the court's instruction, (1) misrepresented the facts by stating that there was no evidence to support an unintentional killing; (2) denigrated the defense for even suggesting such a "contrived excuse"; (3) expressed his personal opinion that the defense theory that the shooting was unintentional **was** "totally outrageous, untrue"; (4) disparaged the appellant's exercise of his constitutional rights by arguing that even the suggestion of the defense of intoxication and unintentional shooting 'in every way aggravates this vicious murder"; and (5) used inflammatory rhetoric to divert the jury's attention from its proper role.

The overzealous prosecution in this case is so inflammatory and pervasive that it distorts the result of the trial and rises to the level of fundamental error which does not require a contemporaneous objection to each and every instance of impropriety. Knight v. State, 672 So. 2d 590 (Fla. 4th DCA 1996).

ISSUE IV

THE TRIAL COURT ERRED IN REFUSING TO GRANT A CHANGE OF VENUE.

Appellee relies on a comment made by defense counsel

regarding the publicity. However, he disregards the sworn affidavits of three highly respected defense attorneys to the contrary.

Defense counsel filed a motion for change of venue on behalf of Omar Jones 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 media characterized public reaction as a "crime-fighting frenzy" of which Omar Jones was a featured highlight (R-159).

The inescapable effect of all of the extremely prejudicial and biased publicity simply cannot be dismissed because defense counsel stated he had seen worse (RB-52).

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

THE COURT ERRED IN FAILING TO GRANT THE MOTION TO SUPPRESS.

Appellant argued to this Court in his initial brief that due to the numerous discrepancies and contradictions regarding the alleged statement of Omar Jones, the police officers' oral testimony is unreliable. Furthermore, there is no evidence that Omar Jones waived his right to counsel other than the officer's oral representation. Given the demonstrated unreliability of the oral testimony, this Court has insufficient evidence to either determine what in fact was said or whether Omar Jones waived his right to counsel. The officers made a deliberate decision to deprive the Court of a record of their interrogation. When defense counsel asked to review the detective's notes, the request was denied.

Omar Jones did not write the statement and he couldn't read. There is a reasonable basis to believe that the detective rephrased Omar's words from collect money to ‘to rob" (R-43). A boy who could only read on a second grade level, would not be able to understand the fine distinction of going to collect money from someone (in which case no force may be needed) and going to rob someone. The officers produced a signed statement which appears to be a perversion of what he had actually said and was in fact untrue as proven by the state's own witnesses at the time of trial.

The appellee conveniently avoided these issues by simply not addressing them in their brief.

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.

During jury selection defense requests for procedures necessary to assure a fair and impartial jury were denied. The defense 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). The trial court did not apply the proper standards in excusing members of the panel who initially stated they didn't believe in the death penalty, but after further questioning said they could consider life versus death after learning about mitigating and aggravating circumstances (TR-921-22,926). Contrary to the appellee's general assertion, the trial court did not apply the proper Witherspoon standard in dismissing jurors for cause.

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 appellee does not address any of the appellant's arguments that the trial court applied improper standards in considering whether a death sentence is appropriate in this

case. The trial court found young age as a statutory mitigating circumstance but accorded it 'no weight". The trial court committed error in finding that "the biological age of nineteen is not in and of itself mitigation" and "must be linked with some other characteristic in order for age to be accorded any significance by the court." (R-395)[9]. The court had a misunderstanding of what is necessary to establish the age mitigator. A defendant is not required to link this mitigator with some other characteristic before a trial court must give it some weight.

Even if there were such a requirement, the defense established through hospital records, school records, teachers, family members, psychological testing, and an expert opinion that Omar had been mentally disabled since birth, had very impaired judgment, and a mental age of 13 to 14 years[10]. The trial court erred in according no weight to the evidence of

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'Although this Court has held that proof of unusual maturity can lessen the weight to be accorded to this mitigating factor, in this case the appellant was shown to have reduced mental ability and judgment and the only evidence presented by the State was two prior offenses which were presented to the judge and not the jury.

[10]The appellee attempts to contest the evidence of mental disability by relying on such facts as winning an art contest in seventh grade and testimony of an expert that with a maximum amount of effort, a person with Omar Jones' mental ability could "possibly" achieve fifth or sixth grade reading level (AB-10-11,59). Appellee also relies on an incorrect statement that Omar lived on his own (AB-80) when in fact he lived with his mother all his life.

young age. Christmas v. State, 632 So. 2d 1368 (Fla. 1994).

In regard to the mitigating factor of substantially impaired judgment, the appellee argues that it was proper for the trial court to totally disregard the mental health expert's opinion that Omar's judgment was "significantly impaired" because the evidence did not establish that he was legally intoxicated, and on cross examination the prosecutor was able to lead some of the family witnesses to say that Omar knew right from wrong (RB-80). Again the trial court applied an improper standard of proof. Either as a statutory or nonstatutory mitigating factor, the expert's opinion must be considered and weighed. State v. Crump, 654 So. 2d 545 (Fla. 1995) [11].

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 immediately before the offense would have impaired an average person's judgment and would have a much greater effect a person with Omar's mental disability. The court applied an improper standard of proof in refusing to consider the effect of the intoxicants on the appellant's

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[11]Although the trial court acknowledged in the sentencing order that the appellant had consumed alcohol and marijuana that evening, the appellee argues that he was not substantially impaired because he was not intoxicated (RB-80). The expert did not base his opinion on intoxication but on the fact that a small amount of intoxicants reduces the judgment of a person with appellant's brain injury much more than the average person.

judgment, Knowles v. State, 632 So. 2d 62, 67 (Fla. 1994); Stevens v. State, 613 So. 2d 402 (Fla. 1992).

The trial court applied an improper standard in finding that a low IQ standing alone is not meaningful because the appellant knew right from wrong (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 has a low IQ or is brain damaged. State v. Morgan, 639 So. 2d 6 (Fla. 1994); State v. Bryant, 601 So. 2d 529 (Fla. 1992).

The trial court applied an improper standard in finding that two prior arrests is sufficient evidence to totally disregard statutory or nonstatutory mental mitigation to conform his conduct to the requirements of law (R-397). 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 erred in applying a standard that required that artistic merit be "taken advantage of" before it can have any weight as a mitigating factor. The court applied an improper standard in finding that evidence of poverty which sometimes required that the family go without food "is a mere excuse and subterfuge" (R-398). The trial court erred in giving no weight

to good character mitigation (R-398-99) when other defendants are routinely given consideration for the same or similar acts of kindness[12]. State v. Allen, 636 So. 2d 494 (Fla. 1994); State v. Pangburn, 20 Fla. L. Weekly S323 (Fla. 1995); State v. Jackson, 599 So. 2d 103 (Fla. 1992). The trial court erred in not giving any weight to the six[13] witnesses who testified to the evidence of remorse contrary to the consideration that is routinely given to other defendants. Stevens v. State, 613 So. 2d 402 (Fla. 1992).

The trial court erred in not giving any weight to the factor of troubled family simply because they were loving (RB-82). Omar's mother never married his father because he was a serious drug addict. She had to work two jobs, was **away** from home much of the time requiring Omar to do the cleaning and cooking, and the family lived in great poverty[14]. When Omar was 13 years old, he had to work very hard to care for a stepfather who died of heart failure (TR-1631). Omar's real father never parented him and died of AIDS when Omar was 16

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[12]Appellee incorrectly states that the evidence of good character was from his childhood but the evidence showed that just before the offense he had just nursed his cousin while he did of AIDS and regularly counseled his peers to stay out of trouble and go to school (IB-10-11,57-62).

[13]Police officer, two friends, two eyewitnesses, and Dr. Krop.

[14]The appellee is wrong in claiming that Omar had art supplies but instead chose a life of crime. The record reflects that the only time he had art supplies was when his teacher in New Jersey gave him supplies (TR-1723).

years old (TR-1632-33).

The trial court also erred in not considering that Omar was under severe stress at the time of the offense due to the death of a cousin who died from AIDS less than a month before the shooting after Omar nursed him through a lengthy illness (TR-1665). He had already endured the lingering deaths of his stepfather, grandmother and father; and after his cousin's death, he became very despondent and withdrawn (TR-1635).[15]

There is only one aggravating factor, intent to achieve pecuniary gain during the course of an attempted armed robbery. Balanced against this one aggravator, the trial court found the statutory mitigating factor of young age. Due to the application of improper standards, the trial court erred in failing to find statutory mental mitigating factors or to give any weight to numerous nonstatutory mitigators such as good character, remorse, intoxication, reduced mental capacity, low IQ, stress at the time of the offense, attempts to find employment, artistic talent and abnormal EEG (IB 9-11).

In considering the proportionality of this death sentence, Omar Jones asks this Court to conclude that although the homicide is deplorable, it is not in 'the category of the most aggravated and least mitigated for which the death penalty is

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[15]The appellant's initial brief lists numerous other nonstatutory mitigating factors which have been found by this Court to be mitigating but were not considered by the trial court (IB-75).

appropriate":

> 'When we compare this case to other capital cases, we find it most similar to robbery-murder cases like Sinclair v. State, 657 So.2d 1138 (Fla. 1995), and Thompson v. State, 647 So.2d 824 (Fla. 1994). In Sinclair, which is factually very similar to the case sub judice, the appellant robbed and fatally shot a cab driver twice in the head, Considering these circumstances and finding there was only one valid aggravator, (FN13) no statutory mitigators, and minimal nonstatutory mitigation, we vacated the death sentence. In Thompson, the appellant walked into a sandwich shop, conversed with the attendant, fatally shot the attendant through the head, and robbed the establishment. On appeal, we vacated the death sentence, finding there was only one valid aggravator (the murder was committed in the course of a robbery) and some "significant," nonstatutory mitigation. (FN14) Id. at 827. As in Sinclair and Thompson, we find the circumstances here insufficient to support the imposition of the death penalty. We conclude that the circumstances here do not meet the test we laid down in State v. Dixon, 283 So.2d 1, 8 (Fla. 1973), "to extract the penalty of death for only the most aggravated, the most indefensible of crimes."

Terry v. State, 668 So.2d 954,966 (Fla. 1996)[16].

ISSUE VIII

THE STATE'S PRESENTATION OF VICTIM IMPACT EVIDENCE WAS IMPROPER.

In his initial brief, appellant argued that simply because victim impact evidence is authorized in a death sentence proceeding does not mean that it can be misused by the prosecution. Victim impact evidence was misused in this case in violation of the eighth amendment and rendered the sentence capricious and arbitrary. Justice Kogan observed that:

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[16]The appellee devotes four and one half pages of their reply brief to an argument that this Court is wrong in finding that an unexpected killing during a robbery gone bad does not deserve the death penalty (RB-72-77).

> I write separately because the use of victim-impact evidence can pose a constitutional problem if misused. While I agree with Justice Anstead that any error was slight and harmless here, I do not believe the courts can or should encourage the use of victim-impact evidence when it in effect may invite jurors to gauge the relative worth of particular victims' lives.

Windom v. State, 656 So. 2d 432 (Fla. 1995).

The prosecutor's only evidence at the sentencing phase was four victim impact witnesses. During his argument he relied heavily on victim impact issues and repeatedly urged the jurors to vote for death because of the exceptional worth of the victim. The prosecutor focused completely on victim impact evidence for the last page and a half of his argument.

Not only did the prosecutor feature the victim impact evidence in his plea for the death sentence, but he enhanced the passions of the jury further by emphasizing 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 was clear - don't be influenced by sympathy for

Omar Jones but feel sympathy for the victim and his family. Finally, he went even further by telling the jury that sympathy 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 that they:

> ...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(emphasis added).

(TR-1778). The appellant is a black teenager and the deceased was a young white boy. In this case, racial inuendo and slurs such as "gat' and "jack" were also used to sow "the fertile soil" with the seeds of racial prejudice. Robinson v. State, 520 So. 2d 1,7 (Fla. 1988).

In Payne v. Tennessee, 111 S.Ct. 2597, 2608 (1991), the Court found that the Eighth Amendment does not bar victim impact evidence during the penalty phase of a capital trial unless the circumstances are such that the evidence is "so unduly prejudicial" that its introduction at the penalty phase violates the Due Process Clause of the Fourteenth Amendment.

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. **In** this case, the victim evidence was **unduly** prejudicial because it was used to shift the jury's attention from a reasoned weighing of aggravating and mitigating factors to an emotional cry for vengeance.

CONCLUSION

The appellant relies on the arguments in his initial brief in regard to any issues not addressed in the reply brief. Due process and fairness require that the case be remanded for a new trial or that this Court impose a life sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Curtis French, Assistant Attorney General, by delivery to The Capitol, Criminal Appeals Division, Plaza Level, Tallahassee, Florida, and to appellant, this 26 day of November, 1996.

JUDITH DOUGHERTY