IN THE SUPREME COURT OF FLORIDA

APPEAL NO.: 92,987

JASON DEMETRIUS STEPHENS,

Appellant,

v.

STATE OF FLORIDA

Appellee.

REPLY BRIEF

Appeal from the Circuit Court
Duval County, Florida

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ARGUMENT

I. **THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL REGARDING THE MURDER CHARGE**

The defendant recognizes that his counsel's abbreviated motion for judgment of acquittal may not have properly preserved this issue for review.[1] [V13, R1486]. See, Showers v. State, 570 So.2d 377, 378 (Fla. 1st DCA 1990)(holding issue not preserved for review where motion for judgement of acquittal "failed to set out any grounds whatsoever or to make any supporting argument."). Nonetheless, this Court has long recognized, "An error is fundamental when it goes to the foundation of the case or the merits of the cause of action and is equivalent to a denial of due process." J.B. v. State, 705 So.2d 1376, 1377 (Fla. 1998), quoting, State v. Johnson, 616 So.2d 1, 3 (Fla. 1993).

In Troedel v. State, 462 So.2d 392 (Fla. 1984), this Court on its own initiative addressed the issue of whether it was error to convict the defendant for two burglaries when the evidence only supported one conviction. Id. at 399. This Court held, "[W]e reach the issue anyway because we believe that a conviction imposed upon a crime totally unsupported by evidence constitutes fundamental error." Id. See also, Harris v. State, 647 So.2d 206, 208 (Fla. 1st DCA 1994)(finding fundamental error mandated reversal where State

[1]Unfortunately, this is not the first case this Court has seen in which defendant's trial counsel, Richard Nichols, Esquire, has made such abbreviated arguments.

did not prove element of crime of resisting arrest); K.A.N. v. State, 582 So.2d 57, 60 (Fla. 1st DCA 1991)(vacating escape conviction where State failed to prove essential element of crime); Griffin v. State, 705 So.2d 572, 574 (Fla. 4th DCA 1998)(holding, "A conviction is fundamentally erroneous when the facts affirmatively proven by the State simply do not constitute the charged offense as a matter of law.). As in Troedel, this Court should also find the State did not prove an essential element in this case as to the charge of premeditated murder. The trial court erred in denying defendant's motion for judgment of acquittal for that same reason.

Significantly, in a case in which the record facts are of central importance, the State has chosen not to set forth a statement of facts specifically disputing any of defendant's factual allegations. Thus, the defendant asks this Court to find that defendant's Statement of Facts is undisputed. The majority of factual allegations made by the State in its Answer Brief are couched in inflammatory and non-objective terms which could not be included in a proper statement of the facts, e.g, "lethal act," "entombed in the car," "lethally left," "like an oven," and "cook to death." [Answer, 5, 20, 28].

The State also mis-characterizes record testimony by suggesting in its factual recitation that Robert Sparrow, Jr., complained of being choked by the defendant. Furthermore, the State

erroneously suggests that Robert Sparrow, Jr., asked Jason Stephens if he was going to kill him. [Answer, 14, 16]. In fact, the record shows that Sparrow, Jr. was directing both of those comments to Horace Cummings or an unidentified defendant in a room separate from the living room in which Stephens was detaining the robbery victims. [V11, R1038-39, 1103-04].

The burglary and robbery lasted a total of from five to twenty minutes. [V11, R1063, 1067, 1142]. The kidnaping transpired over less than one mile in a car. [V13, 1522-25, 1529] The defendant reached a place of safety within five minutes of the time he left Robert Sparrow, III, in a parked car. [V3, R1527, 1549]. Thus, all of the predicate crimes together took place in less than one half hour.

In this case, a child of three years and four months of age was found dead in a car in which he had been left. The medical experts differed on their opinions of what caused death. Dr. Floro opined that the death was caused by strangulation. [V12, R1375]. Floro's opinion in part rested on his belief that the child - who he was told could open car doors and windows- would have exited the car if he had been alive when it got hot. [V13, R1425]. Dr. Dunton opined that the death was caused by hyperthermia. [V14, R1627-28]. Neither doctor could be specific as to the time of death. Floro with a margin of error of several hours placed the death closer to 3:00 p.m. than 9:00 p.m. [V12, R1381]. Dr. Dunton opined with the

caveat that it was somewhat of a guess that the child's death took from 30 minutes to several hours. [V14, R1651].

The State speciously argues that defendant's conditional threats that he would harm the child if followed are proof of premeditation. [Answer, 29]. Amazingly, the State then asserts, "Appellant sealed the victim's fate and his own when he left the windows closed and closed the car doors, intending the victim's death just as if had [sic] sealed the victim inside a kitchen oven." [Answer, 29](emphasis added). Common sense dictates that leaving a three year and four month old child in a car parked in plain view in a residential neighborhood is not a means by which anyone has ever attempted to kill anyone.

Simply stated, the State did not prove the element of premeditation in this case. See, Norton v. State, 709 So.2d 87, 92-93 (Fla. 1998)(holding evidence did not support a finding of premeditation and adjudging the defendant guilty of manslaughter); Hoefert v. State, 617 So.2d 1046, 1049-50(Fla. 1993)(holding evidence was insufficient to prove premeditation, vacating first degree murder conviction and finding defendant guilty of second degree murder). Accordingly, it was reversible error for the trial court to have denied Stephen's motion for judgment of acquittal. Defendant recognizes as the State argues that this Court has found in other cases that such error can be harmless error when there is sufficient evidence to convict of murder under a felony murder

theory. See e.g., Mungin v. State, 689 So.2d 1026, 1029-30 (Fla. 1995)(finding error in giving premeditation instruction was harmless). However, the error in this case was not harmless because it skewed the entire guilt and penalty phases. The trial court's error was further compounded by its error in denying defendant his requested theory of defense instructions which squarely addressed whether a felony murder actually occurred in this case. Thus, this Court can not find that there is no reasonable possibility that the trial court's wrongful denial of a judgment of acquittal did not contribute to Stephens' conviction.

Furthermore, the court also erred in denying the motion as to the murder charge under a felony murder theory. First, defendant again reiterates that no felony murder occurred under the appropriate definition of causation set forth in his theory of defense instructions. The State asserts that the felony murder charge was justified because, "As long as Little Robert remained in the car, where Appellant had encased him, Little Robert's confinement continued." [Answer, 20].

The State did not establish that Robert Sparrow, Jr., died as a consequence of and while the defendant was engaged in the commission of a kidnapping, or a robbery, or a burglary. The State also did not establish that the death occurred as a consequence of and while the defendant was escaping from the immediate scene of a kidnapping, or a robbery, or a burglary. As set forth above, the

actual time of Robert Sparrow, Jr.'s death was not proven at trial. Jason Stephens' testimony that he reached a place of safety within five minutes of his departing from the car in which he left Robert Sparrow, Jr. stands unrebutted. [V13, R1527, 1549].

Defendant agrees with the State that this Court in Berry v. State, 668 So.2d 97 (Fla. 1996), did establish that leaving victims tied at the scene of a robbery may under certain circumstances constitute elements of the crime of kidnapping. [Answer, 21]. However, the defendant strongly disagrees with the fallacious leap the State makes from that point. Contrary to the State's assertion, any confinement of Robert Sparrow, Jr., ended the moment Jason Stephens departed the scene. The State speculates that Robert Sparrow, Jr., remained in the car because he did not feel free to leave in light of what he had witnessed.

Fortunately, such speculation is not the stuff on which convictions are allowed in this country. A more plausible reason the child may have remained in the car was because his uncle had physically disciplined him the prior day for opening the same car's door and putting the window up and down. [V12, R1307]. Regardless of why the child remained in the car, the record shows that Jason Stephens did not restrain or confine the child when he left him in the parked car. The State simply failed to prove the death was caused by or during any underlying felony.

In Allen v. State, 690 So.2d 1332 (Fla. 2nd DCA 1997), the

court affirmed the defendant's convictions for grand theft and driving without a valid license. Id. at 1333. The court also overturned the defendant's third degree felony murder conviction. In Allen, the State established that the defendant was involved in a fatal accident while driving a stolen vehicle. Yet, the court found:

> The fact that an incidental death occurs in conjunction with a felony does not in itself make the perpetrator of the felony guilty of felony murder. In any felony murder conviction the element of causation, i.e., that the homicide was committed in the perpetration of the felony must be established.

Id. at 1334 (emphasis added). Applying the holding of Parker v. State, 570 So.2d 1048 (Fla. 1st DCA 1990), the court concluded:

> [A]fter considering the relationship between the grand theft and the accident, we conclude that there was a break in the chain of circumstances, and the appellant was, therefore, not engaged in the commission of the grand theft at the time of the accident.

Id. The court further found that the defendant's testimony established that he had completed his flight from the scene of the grand theft at the time of the accident. Id. at 1335. Accordingly, the court vacated the felony murder conviction. See also, Gomez v. State, 496 So.2d 982, 983 (Fla. 3rd DCA 1986)(vacating conviction where, "At best, the state merely showed that the robbery and the homicide occurred at the same time; there is no direct or circumstantial evidence showing that the homicide was causally related to the robbery.").

The State's boilerplate recitations of cases involving delayed deaths, and the State's inept analogies to fires and cliffs, simply do not control the outcome of this case. Stephens' act of leaving Robert Sparrow, Jr., in a car unharmed was not the equivalent of shooting the child or pushing him off of a cliff. Jason Stephens had seen the three year and four month old Robert Sparrow, Jr., function as a normal child during the robbery and kidnapping. Stephens had no reason to think that the child would not leave the car, seek help and be promptly discovered when he left the car parked in front of a home. Accordingly, this Court should hold the trial court erred in denying Stephens motions for judgment of acquittal because the State did not prove that Stephens caused the child's death during the commission of a predicate felony.

II THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR NEW TRIAL REGARDING THE MURDER CHARGE

As with the majority of its one-hundred page brief, the State's boilerplate recitations of law do little to help this Court resolve the issues before it. The State once again bases its argument on its misguided notion that Stephens confined Robert Sparrow, Jr., in the car when he departed. The record shows that is not the case. The officer who found the child testified that the car was unlocked. [V12, R1353-54].

The verdict of first degree murder in this case was clearly

contrary to the weight of the evidence. The case of Fisher v. State, 715 So.2d 950 (Fla. 1998), is directly on point with the facts of this case. [Initial Brief, 40-41]. The State seems to believe that if it asserts the defendant "lethally acted" enough times that the murder conviction will somehow be justified. The State's unsound argument notwithstanding, the record in this case simply does not support defendant's first degree murder conviction.

The record is bereft of any evidence establishing that Stephens intended to kill the child. Likewise, the record does not establish that the death occurred as a consequence of a predicate felony. Thus, the verdict of first degree murder was contrary to the weight of the evidence and the trial court erred in not setting aside that conviction. Accordingly, this Court should vacate that conviction.

III THE TRIAL COURT ERRED IN REFUSING TO SET ASIDE DEFENDANT'S PLEA CONCERNING ROBBERY OF DERRICK DIXON, AND ERRED IN NOT GRANTING DEFENDANT A JUDGEMENT OF ACQUITTAL AS TO THAT CHARGE

The State asserts the defendant should not have been allowed to withdraw his plea because "he had already reaped the tactical benefit of his plea." [Answer, 41]. Defendant is left wondering what "tactical benefit" the defendant allegedly reaped from his

pleas.[2] Aside from that shallow argument, the State wholly fails to grasp that it is fundamental that one should not be convicted of a crime which did not occur. Apparently the State would argue this Court should uphold a conviction of one who pleads guilty to a murder even after the alleged decedent shows up living at a later date.

The State apparently wishes to believe the defendant in this instance when the defendant testified - after having moved to withdraw his plea to the robbery of Derrick Dixon - that he had taken monies from Mr. Dixon. [Answer, 43-45]. However, the question is whether the trial court abused its discretion in denying defendant's prior motion to withdraw his plea to that robbery count. [V13, R1493].

Contrary to the State's assertion, Andres v. State, 683 So.2d 604 (Fla. 4th DCA 1996), is directly on point with the facts of this case. Accordingly, this Court should hold the trial court erred in not granting the defendant's motion and allowing him to plead to an attempted robbery charge.

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[2]It is likely that defendant's trial counsel's tactic of having had his client plead to predicate felonies will embroil the courts at all levels in this State in post-conviction litigation for years to come. Similarly, defense counsel's "tactic" of not cross-examining State's witnesses Consuelo Brown, Robert Sparrow, Derrick Dixon, Roderic Gardner, Tammy Cobb, David Cobb and Officer Chase will also likely be fertile grounds for litigation in coming years. [V11, R1092, 1094, 1192, 1213-14; V12, R1267, 1272, 1290, 1318, 1345].

IV THE TRIAL COURT ERRED IN DENYING DEFENDANT'S THEORY OF DEFENSE INSTRUCTIONS

The State's argument boils down to its assertion that defendant's instructions were covered by the standard jury instructions. [Answer, 50-51]. However, the State overlooks that this case involved a factually unique series of events. The question of causation placed at issue by the murder charge - given the evidence introduced at trial - presented the fact finder with an unprecedented decision.

The State remained silent below when asked if the State wished to be heard on the issue of defendant's requested theory of defense instructions. [V14, R1746]. Accordingly, the State's belated attempt to create objections to the form of defendant's requested instructions should not be countenanced.

In Parker v. State, 641 So.2d 369 (Fla. 1994), this Court approved and relied upon the analysis of causation contained in Parker v. State,570 So.2d 1048 (Fla. 1st DCA 1990), in assessing whether a killing fell within the definition of felony murder. Id. at 376. Defendant's requested instructions tracked the causation analysis set forth in Parker v. State, 570 So.2d 1048 (Fla. 1st DCA 1990).

Defendant's Requested Instruction Number One asked the jury to determine whether there had been "some definitive break in the chain of circumstances" between the predicate crimes and Robert

Sparrow, Jr.'s death. [V2, R245]. Contrary to the State's assertion, there is nothing confusing about that instruction. The requested instruction addresses the question of causation in a manner not addressed in the "as a consequence of" and "while engaged" language contained in the standard instruction. [V2, R255]. A death may occur as a "consequence of" an act, however, it is a separate question as to whether an intervening act or occurrence was the actual legal cause of the death. The defendant was entitled to have the jury decide that factual issue. Defendant was especially entitled to have the jury decide that issue in light of the State repeatedly arguing that it did not matter whether the child died from suffocation or hyperthermia. [Initial Brief, 48-49].

Likewise, defendant's Requested Instruction Number Two asked the jury to determine whether "because of the passage of time and/or the separation in space from the felonies of kidnaping, robbery and /or burglary that those felonies had been completed prior to the death of Robert Sparrow, III." [V2, R246]. Once again, the standard jury instruction did not address the question of whether space or time separated the predicate felonies from the child's death such that a finding of felony murder was not lawful. It bears noting that the trial court found the predicate robberies and burglary had ended prior to the child's death. [V15, R390].

This Court should reject the State's argument that a true

causation analysis is a matter for an appellate court and not for a trier of fact. [Answer, 53-54]. Under the facts of this case, with the central issue raised by defendant's theory of defense having been whether the child's death was caused by and during a predicate felony, the defendant was entitled to have the jury decide that issue. The trial court erred in not allowing the jury to decide that question.

The defendant's Requested Instruction Number Three asked the jury to determine if the child's death was a "predictable result of the felonious acts" of the defendant. [V2, R247]. The "as a consequence of" language contained in the standard jury instruction simply does not address the question of foreseeability raised by defendant's defense. In a typical felony murder case, it is pretty cut and dry as to whether a death is a foreseeable result of a felonious act, e.g., it is reasonably foreseeable that someone may get shot during an armed bank robbery. However, this case presented the specific question of whether it was reasonably foreseeable that a child who had been kidnaped would die from hyperthermia when that child was left in a parked car in a residential neighborhood at a time at which people were usually walking up and down the street. [V13, R1525, 1529; V15, R386].

The defendant's Requested Instruction Number Three correctly asked the jury to determine the factual question of foreseeability. It again bears noting that the time of the child's death was not

established with any degree of certainty at trial. The defendant was entitled to have the trier of fact decide that question. Accordingly, this Court should hold the trial court reversibly erred by denying defendant's request.

Finally, the State's assertion that any error in denying defendant's requested instructions was harmless because the State also proved a premeditated murder is groundless. [Answer, 55-56]. As previously addressed, the State clearly did not prove that a premeditated murder occurred in this case.

V THE TRIAL COURT ERRED BY DENYING DEFENDANT'S MOTION FOR CHANGE OF VENUE

The State waived the objections it now attempts to raise concerning the technical form of defendant's motion by not raising those objections before the trial court. [Answer, 56-57]. Likewise, the State's argument that the trial court did not rule on defendant's adopted motion is absurd. Indeed, the majority of the trial court's ruling expressly focused on the Motion for Change of Venue as it applied to Jason Stephens. [V10, R. 967-69]. Accordingly, defendant reasserts and stands on his argument set forth in his Initial Brief. [Initial Brief, 52-54].

VI **THE TRIAL COURT ERRED BY NOT CONDUCTING A NELSON INQUIRY**

The defendant strongly disagrees with the State's characterization of his request to discharge his appointed counsel. The State overlooks that the request was made just two months before the case was set to proceed to trial. The defendant through his motion and his oral statements clearly challenged the competency of his counsel. Accordingly, the defendant stands or his prior argument that the trial court erred by not conducting a full fledged Nelson inquiry.

VII **THE TRIAL COURT ERRED BY ALLOWING THE STATE TO QUERY ABOUT A STATEMENT THE DEFENDANT HAD MADE TO AUTHORITIES CONCERNING THE ELECTRIC CHAIR**

The State attempts to grossly distort the factual record concerning this issue. For obvious reasons, the State omits and does not address the proffer which took place after defendant's counsel objected to the State's inquiry regarding whether the defendant had asked arresting officers for their help. [Answer, 73]. As set forth in Stephens' Initial Brief, Stephens made clear during proffer that he asked officers to help him obtain the electric chair in the context of discussing all crimes he had committed in his life. [Initial Brief, 56-57].

The proffer in full occurred as follows:

> Q I think I have already shown you what is marked as State's Exhibit JJ for identification, haven't I?

A Yes.

Q And is that your signature on that?

A Yes.

Q Okay. And are you familiar with this document?

A Yes.

Q What did you ask the FBI and GBI to do to help you?

A I told them about all the crimes in all my life that I have done, could they assist me in getting the electric chair.

Q An why – let me ask you this about this particular trial. You do know that you – the Judge told you when you entered your pleas of guilty to what you have admitted that the maximum punishment was I think some number of years or life imprisonment; is that correct?

A Yes.

Q And that only if you murdered Little Rob Sparrow, could you get the death penalty, is that true, is that you're your [sic] understanding?

A No, he never told me that.

Q No, I'm asking you, is that your understanding?

A Yes.

Q Well, if you didn't murder Little Rob, why are you asking them to help you get the death penalty since you couldn't get the death penalty if you didn't murder him?

A I'm talking about all the crimes in my life, with all those combined, I was

hoping that I could get the electric chair. See, I knew Little Rob wasn't murdered, so in order for me to get the electric chair, I was talking everything else I had done.

C * *

Q When you were arrested in Georgia, when these people came to you to question you, they knew that you were the Jason Stephens wanted in the Logan Street robbery and the death of Little Rob; is that true?

A Yes.

[V13, R1564-66]. Thus, Stephens' testimony that he requested assistance in getting the electric chair in the context of discussing all crimes he had committed in his life stood unrebutted when the court ruled the statement was admissible.

The State is wrong in contending that the statement was admissible as evidence of Stephens' consciousness of guilt for the murder of Robert Sparrow, III. The State is also wrong in contending that the trial court did not err in holding, "He can ask him questions that go to his state of mind <u>when he turned himself in</u> regarding his guilt, and I think in light of his testimony he can lead him." (emphasis added)[Answer, 74, n 10; V13, R1568]. The trial court was patently wrong in finding the statement bore upon defendant's state of mind "when he turned himself in" because the defendant did not turn himself in to authorities. It bears noting that the statement was made on an unspecified date over one year after the death of Robert Sparrow, Jr., following Stephens' arrest

in Georgia. [V13, R1528, 1542-43].

The State's attempt to downplay this blatant error in a footnote should not be taken lightly by this Court. Indeed, the State even suggests to this Court through quotations that defendant's statement was expressly made in relation to "this Sparrow murder case." [Answer, 75]. The State even asserts "Here, the officers were extremely specific, as they were asking Appellant about 'this Sparrow murder case.'" [Answer, 77]. The State provides no record cites for those assertions because no such record evidence exists. This Court should not countenance the State's blatant misrepresentation of the record. The State's assertion that the statement was admissible as evidence of "consciousness of guilt" of the charged murder rests wholly on the State's misrepresentation.

Likewise, the State's alternative argument that the statement was admissible as a legitimate grounds of cross-examination to fill in gaps again rests on the State's distortion of the record. Once again the State's assertion that Stephens statement was an admission to the Sparrow murder is bereft of any record support. [Answer, 79]. Thus, this Court should reject the State's arguments and hold the trial court reversibly erred in admitting the statement.

Lastly, the State asserts the admission of the statement was harmless error given the evidence presented and defendant's pleas.

[Answer, 79-80]. That argument is specious. What could be more prejudicial to a defendant in both the guilt phase and the penalty phase than introduction of testimony that the defendant had expressed a desire to be electrocuted? The State does not even attempt to address a Rule 403 analysis for the obvious reason that admission of the statement was overwhelmingly prejudicial. The erroneous admission of Stephens' death wish statement necessitates that this Court order a new trial.

VIII **THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO DEATH THE SENTENCE IS NOT IN ACCORD WITH THE HOLDING OF TISON V. ARIZONA, 481 U.S. 137 (1987)**

The defendant considers this issue to be one of central importance to his appeal. However, only a brief reply is necessitated because the State has completely failed to overcome defendant's showing in his Initial Brief that he is entitled to relief under this issue.

The State errs in contending that Tison v. Arizona, 481 U.S. 137 (1987), and Enmund v. Florida, 481 U.S. 137 (1982), do not control whether the death penalty is constitutionally permissible in this case. [Answer, 80-83]. Those cases clearly control whether a sentence of death is permissible under the facts of this case. Both Enmund and Tison mandate that a death sentence is not permissible under the facts of this case.

In the alternative the State contends that Jason Stephens acted with a recklessness which merits a sentence of death under Tison and Enmund. As grounds for that argument the State relies upon its baseless assertion that Stephens must have known Robert Sparrow, Jr., was likely to die from hyperthermia when he left the child in the car. [Answer, 84-85]. The State's argument defies commonsense and is not grounds on which to uphold a sentence of death.

The State fails to grasp this Court's holding in Jackson v. State, 575 So.2d 181 (Fla. 1991), that the death penalty is only appropriate in a narrow range of felony murder cases. Id. at 193. Significantly, the State completely fails to address defendant's showing that the death penalty has not been imposed in other circumstantial evidence cases in Florida in which children have died from neglect. [Initial Brief, 66-68].

This Court has only upheld the death penalty for reckless acts leading to a child's death when the reckless conduct was egregious conduct which occurred over a prolonged period of time. In Cardona v. State, 641 So.2d 361 (Fla. 1994), the defendant was convicted of aggravated child abuse and first degree murder after her three year old son died. Id. at 361-62. This Court found:

> During an eighteen-month period that began after the children were returned to her, Cardona beat, choked, starved, confined, emotionally abused and systematically tortured Lazaro [the decedent]. The child spent much of the time tied to a bed, left in a bathtub with

> the hot or cold water running, or locked in a close. To avoid changing Lazaro's diaper for as long as possible, Cardona would wrap duct tape around the child's diaper to hold in the excrement. Cardona blamed Lazaro for her descent 'from riches to rags,' and referred to him as 'bad birth.'

Id. at 362. The child died from blows to the head with a baseball bat after having been locked in a closet from a beating the prior day which had resulted in the child's head being split open. Id.

> According to the medical examiner, Lazaro did not die from one particular injury; rather, he died from months of child abuse and neglect. When three-year-old Lazaro was found, he was emaciated, weighing only eighteen pounds. His diaper, which was heavily soiled, had been wrapped repeated with the duct tape. The child had numerous and extensive physical injuries, some of which were up to a year old. It was impossible to date many of the injuries because of their composite nature, i.e., injury upon injury. Most of the injuries would have caused excruciating pain.

Id. at 362. This Court's opinion further details the child's tragic condition including meningitis, deep bruises, burns and lacerations and fatal blows. Id. at 362-63.

In Cardona, this Court addressed the defendant's proportionality challenge to the sentence of death:

> This review leads us to agree with the trial court that, in light of the extended period of time little Lazaro was subjected to the torturous abuse leading to his death, the ultimate sentence is warranted in this case. Dobbert v. State, 328 So.2d 433 (Fla. 1976)(death warranted where defendant murdered his nine-year-old daughter by continuous beatings, kicking, hitting, choking and other torture and depriving her of medical care),

affirmed, 432 U.S. 282 (1977).

Id. at 365-66. (emphasis added). Unlike Cardonna, there was no prolonged period of reckless conduct which caused Robert Sparrow, Jr.'s death. Rather, in this case the child died from hyperthermia after being left in a car in a residential neighborhood.

As unfortunate and tragic as Robert Sparrow, Jr.'s death was, there was not a prolonged period of reckless conduct and abuse which justifies imposition of the death penalty. The evidence of record does not support the trial court's finding that Stephens acted with a level of reckless indifference to human life such that the death penalty is warranted in Stephens' case. Accordingly, this Court must vacate the sentence of death imposed in this case.

IX THE TRIAL COURT ERRED IN ITS ASSESSMENT AND APPLICATION OF AGGRAVATING AND MITIGATING FACTORS

This Court has long recognized the death penalty is reserved for "only the most indefensible of crimes." Almeida v. State, 24 F.L.W. S336, S339 (Fla. July 8, 1999). Furthermore, "Our law reserves the death penalty for only the most aggravated and least mitigated murders." Almeida v. State, 24 F.L.W. S336 (Fla. July 8, 1999), quoting, Kramer v. State, 619 So.2d 274, 278 (Fla. 1993). The record of this case shows that it is not "the most indefensible of crimes."

This is certainly a tragic case. All deaths of young children are by definition tragic. However, as the trial court found in its Sentencing Order, the State did not prove that the defendant intended to kill Robert Sparrow, Jr. Thus, the trial court gave that mitigating factor significant weight. [V15, R395]. In light of that finding, and in light of the record evidence which indicates the death was an accident, the death penalty is not warranted in this case. The trial court erred in finding that the 3 aggravating factors which it found and gave great weight, justified imposition of death over the 9 mitigating factors which it found and gave some weight and the one mitigating factor if found and gave significant weight.

The State in its analysis also errs by again failing to understand the element of causation. [Answer, 89]. As set forth in prior sections of this Brief, the State did not prove that Robert Sparrow, Jr.'s death occurred while the defendant was fleeing from predicate felonies. The trial court was simply wrong on that point and erred in giving that factor great weight.

The State - as did the trial court - confuses Stephens' unwillingness to name other persons involved with his personal acceptance of responsibility. [Answer, 89-90]. Entering pleas of guilty to once count of armed kidnapping, three counts of armed robbery, two counts of attempted armed robbery, one count of armed burglary and one count of aggravated battery is clearly a major

acceptance of responsibility.

Regardless of whether defendant entered those pleas when he did because his counsel advised him there was a tactical advantage to doing such, the defendant did accept responsibility when he entered those pleas. In doing such, Stephens knew he was going to prison for the rest of his natural life for those pleas. The trial court erred in not giving that mitigating factor great weight.

The most significant error the State makes in regards to the weighing of aggravating and mitigating factors is the State's contention that the trial court did not err in giving codefendant Cummings life sentence entered pursuant to a plea bargain little weight. [Answer, 91]. While Stephens admitted that the robbery was instigated and lead by him, the fact remains that Cummings drove Jason Stephens from the site of the parked car in which Robert Sparrow, Jr. died. [V13, 1522-26]. Given the trial court's finding that the State did not prove the death occurred from suffocation and that the child may have died from hyperthermia, there were no direct participants in the child's death as that term is commonly used.

In Fernandez v. State, 24 F.L.W. S102 (Fla. February 25, 1999), this Court recognized that the sentences which codefendants receive are a significant factor when assessing whether a sentence of death is proportional. In Fernandez, this Court applied the proportionality test set forth in Enmund and Tison. The defendant

in Fernandez was inside the getaway car during a robbery-murder at a bank. Id. at S104. This Court held, "We find that a death sentence for appellant, who did not directly participate in the actual killing would be disproportionate relative to the life sentences of [two codefendants] who also did not directly participate in the killing." Id. As in Fernandez, it would be disproportionate to sentence Stephens to death in light of Cummings' negotiated life sentence. Accordingly, this Court should vacate the death sentence imposed by the trial court.

X THE COURT ERRED IN DENYING DEFENDANT'S REQUEST TO DECLARE §922.10 UNCONSTITUTIONAL

The defendant reasserts and relies upon the arguments set forth in his Initial Brief.

XI THE COURT ERRED IN DENYING DEFENDANT'S REQUEST TO DECLARE §921.141, FLA. STAT. (1997), UNCONSTITUTIONAL

The defendant reasserts and relies upon the arguments set forth in his Initial Brief.

CONCLUSION

The defendant has shown in his Initial Brief and herein that his conviction for first degree murder is in error. The trial court reversibly erred in denying defendant's theory of defense

instructions. The court also reversibly erred in allowing the State to introduce an overwhelmingly prejudicial statement to the effect that the defendant desired the electric chair. Lastly, defendant has shown that the sentence of death imposed in this case is wholly unwarranted. Accordingly, this Court should vacate Jason Stephens' conviction and death sentence for first degree murder.

Respectfully submitted,

_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to **Stephen R. White, Esquire, Assistant Attorney General**, Counsel for the State, Office of the Attorney General, The Capital, Tallahassee, Florida 32399, by Express Mail, this _____ day of September, 1999.

_____
ATTORNEY