IN THE SUPREME COURT OF FLORIDA

JERMAINE LEBRON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. SC02-1956

APPELLEE'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Appellee, the State of Florida, the prosecuting authority in the trial court, will be referenced in this brief as Appellee, the prosecution, or the State. Appellant, Jermaine Lebron, the defendant in the trial court, will be referenced in this brief as Appellant or by his proper name.

The record on appeal consists of 15 consecutively paginated volumes, which will be referenced by the letter “R,” followed by any appropriate page number. The supplemental record consists of two non-paginated volumes, which will be referenced by the letters “SR,” followed by any appropriate designation from the Clerk’s index. "IB" will designate Appellant's Initial Brief, followed by any appropriate page number.

All bold-type emphasis is supplied, and all other emphasis is contained within original quotations unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

This Court set out the facts of the instant case as follows:

> Appellant, Jermaine Lebron (“Lebron”) was arrested in New York City for the murder of Larry Neal Oliver. During the first trial concerning the charge, Lebron was represented by Mr. Slovis (a New York attorney, appearing pro hac vice on Lebron’s behalf) and Mr. Norgard (a Florida lawyer, also representing Lebron on appeal). n1 This first trial resulted in a mistrial, based upon the trial court's finding of a jury

deadlock.

n1 Although Slovis conducted the majority of the venire questioning in the first trial, and was present during voir dire inquiry regarding the death penalty, Norgard assumed the lead with regard to interrogating prospective jurors concerning death penalty issues.

At the beginning of Lebron’s retrial, Norgard was involved in another capital case, and, therefore, the pretrial and guilt phase proceedings were conducted with only Slovis appearing on Lebron’s behalf. During this second trial, it was established that Lebron was a major participant in the robbery and murder of the victim (who worked with one of Lebron’s acquaintances, Danny Summers). Indeed, all of the eyewitnesses testified that it was Lebron (nicknamed “Bugsy”) who had directed the events both before and after the victim's death, and who, using a sawed-off shotgun (which he called “Betsy”), had fatally shot the victim.

According to eyewitnesses, the victim had been lured to a house in Osceola County (the “Gardenia house”) where Lebron and several others were staying after Lebron offered to sell the victim some “spinners” for his truck. Shortly after the victim arrived at the home, Lebron called to him to come toward the back bedrooms. As the victim entered the hallway leading to the bedrooms, he was forced to lie face down, and was shot at short range in the back of the head. Eyewitnesses testified that, after the victim was shot, Lebron was smiling and laughing, yelling, “I did it. I did it,” and describing how it felt to kill the victim, and what it looked like. Money, checks, and a credit card were taken from the victim, and stereo equipment was stripped from his truck. Lebron directed others present at the time to burn the victim’s identification papers, to dispose of the victim’s body, and to clean up the area where the victim had been shot.

Over the next several days, Lebron and some of the others used the victim's credit card, pawned his stereo equipment, and cashed his checks. An attempt was also made to burn the victim’s truck. During this

time, Lebron admitted to his former girlfriend, Danita Sullivan, that he had shot a man, that “he had killed someone.” He also told his current girlfriend, Christina Charbonier, that he had killed a man for his truck. Shortly thereafter, Lebron left for New York City, the place where “Legz Diamond,” a topless juice bar owned by his mother, was located.

The victim’s body was later discovered in a rural area near the Walt Disney World property. Although the body was covered with a blanket and some shrubs, it was still visible from the road.

The medical examiner, Dr. Julia Martin, performed the autopsy on Oliver’s body after it was discovered. She testified that the head was badly decomposed, and that the trauma to the head, which incorporated the left portion of the lip, was consistent with a gunshot wound or other type of trauma, with no evidence of any abrasion around it. The entrance of the gunshot wound was to the right back of the head, slightly to the right of the midline and low in the back of the head. X-ray films showed the shot pellets traveling in a slightly upward fashion, right to left. There was a laceration of the scalp consistent with a shot at close or contact range. There were some bones missing from the back of the head. There were no bruises to the hands consistent with defensive wounds. The cause of death, which was instantaneous, was from a shotgun wound to the head.

After Lebron left for New York, the others having knowledge of the event reported the murder to law enforcement officers. All of the witnesses claimed that they had followed Lebron’s directions throughout the unfolding events because Lebron had threatened them, and they were afraid that he might do to one of them what he had done to Oliver. Initially, two of these individuals, Joe and Mark Tocci, did not tell the complete truth concerning the extent to which members of the group had been involved in the murder. During the course of the interview, however, the witnesses, who were questioned by the officers separately, eventually recounted the events of the murder and its aftermath consistently with their testimony at trial. All of the witnesses other than

the Tocci brothers gave statements which were consistent throughout, and also consistent with what the police were able to verify with evidence and other statements (such as where the body was hidden; where the truck was burned; how the checks were cashed; and where Oliver's property was pawned).

At about the same time, a crime-scene investigation was being conducted by the Osceola County Sheriff’s Department. Investigators observed several drops of what appeared to be dried blood in a big area at the southeast bedroom door of the home where the event allegedly occurred. They also discovered what appeared to be blood that had some foreign substance on it. The area was at least twelve to fourteen inches in diameter. A very strong stench of dried blood was detected immediately upon entering the residence.

Plastic balls were found inside the southeast bedroom, along with sponges and pellets. A spent Winchester twelve-gauge pheasant shotgun shell was found in a drawer in another bedroom. In a third bedroom, the police found four shotgun shells and the decedent’s ring in a pair of sneakers.

Shortly after these eyewitness reports were made to law enforcement, Lebron, accompanied at the time by Stacie Kirk and Howard Kendall (who was involved in burning Oliver's truck), was apprehended in a car parked on the street outside of Legz Diamond, and arrested. Incident to the arrest, a search of the vehicle was conducted, and a day planner was recovered from the center console underneath the dashboard between the passenger seat and the driver’s seat. Upon opening the planner, an identifying card with the name “Larry N. Oliver” was found. Detective Rodriguez retrieved the planner and secured it for safekeeping. He also found four shotgun shells in the center console.

After searching the vehicle, Detective Rodriguez returned to the precinct offices where Lebron was being held, and was present while Detective Thompson interrogated Lebron. Prior to speaking with Lebron, Thompson read him the standard Miranda rights from two forms. Lebron was also allowed to read the forms, and

he signed or initialed the forms, indicating that he understood their content.

Rodriguez and Detective Delroco from the Manhattan precinct were also present. They began questioning Lebron at approximately 3:15 in the morning. Thompson obtained Lebron's statement, and it was recorded on a microcassette. This was received into evidence, and played for the jury. In his recorded statement, Lebron told the officer that he had stayed at the Gardenia house, sleeping on the couch, or in one of the rooms. He denied being at the house on the night of the murder, claiming to have gone to his former girlfriend's house that night. He repeatedly said he did not know Oliver, although, at the end of the statement, he said "it could have happened" that he met Oliver that night, but simply did not remember the meeting. He recalled that one of the others had pawned a stereo in Orlando, and admitted having gone to Kinko's with the others (where they had initially gathered on the night of the murder). He acknowledged having seen information about the missing red truck in a flyer, and having heard Oliver's parents make an appeal on the news. When questioned about whether he had noticed any blood spot at the house, or smelled any strange odors there, he said: "It always smelled like that. We always--everybody said it was Mary. That's what everybody always said, it was Mary."

After he was arrested, Lebron was charged with first-degree murder and armed robbery. While in jail, Lebron wrote letters to Christina, who did not respond to them. In the letters, which were written in his own hand, Lebron stated that he loved Christina, called her his fiancee, and referred to her testifying as an alibi witness for him. About a week before trial, however, Christina went to the Osceola County Sheriff's office with the information to which she testified (as a State's witness) at trial. She stated that Lebron threatened her at that time, so she had sought advice about what she should do. She decided to testify, because she "started thinking about if anything happened to, if anything happened to my daughter I would want somebody to come forward."

Use of Special Verdict Forms at Trial

When it came time for the jury's deliberation, special verdict forms were presented to the jurors. Pursuant to these forms, the jury was to determine whether Lebron was or was not guilty of premeditated murder or felony murder, first degree (Count I). If the jury found Lebron guilty of felony murder, it was to indicate whether Lebron had a firearm in his possession at the time the offense was committed. The jury was also to determine whether Lebron was or was not guilty of robbery (Count II). If the jury found Lebron guilty of robbery, it was to indicate whether Lebron had a firearm in his possession at the time the robbery was committed. Lastly, the jury was provided with a special verdict form which applied only if the jury found Lebron guilty of the felony murder charge, and which contained the following options: "We, the jury, having found the defendant guilty of felony first degree murder, find as follows: [Option 1] Jermaine Lebron is the person who killed Larry Neal Oliver, Jr. [Option 2] Larry Neal Oliver, Jr. was killed by a person other than Jermaine Lebron."

The jury expressed some confusion in attempting to use these forms. The jurors sent the judge the following note: "Does option # 2 mean the same as the "or" in (3) under Felony Murder - First Degree. Is this a standard document can an option be added." After consulting with counsel, the judge clarified with the jury foreman (in counsels' presence) what this question meant --i.e., was the second option on the special verdict form ("Larry Neal Oliver, Jr. was killed by a person other than Jermaine Lebron") the same as the (3) "or" option in the Felony Murder-First Degree instruction ("Larry Neal Oliver, Jr. was killed by a person other than Jermaine Lebron but both Jermaine Lebron and the other person who killed Larry Neal Oliver, Jr. were principals in the commission of robbery"). The jury was then advised that "the following part of the felony murder first degree instruction, '(3) Larry Neal Oliver was killed by a person other than Jermaine Lebron but both Jermaine Lebron and the person who killed Larry Neal Oliver were principals in the commission of robbery,' is reflected by special finding as to felony murder option number 2, which reads 'Larry Neal Oliver, Jr.

> was killed by a person other than Jermaine Lebron.'" The jury was also asked, "What other options are you referring to?" However, the jury did not, thereafter, send the judge any further notes.
>
> Upon full deliberation, the jury returned the verdict forms and found, as to Count I, that Lebron was guilty of felony murder first degree. It found that Oliver was killed by a person other than Lebron, and that Lebron did not have a firearm in his possession during the commission of the offense charged in Count I. As to Count II, the jury found Lebron guilty of robbery with a firearm. It found that Lebron did have a firearm in his possession during the commission of Count II. Based upon the jury's findings, Lebron was convicted of first-degree murder and armed robbery.

Lebron v. State, 799 So.2d 997, 1001-04 (Fla. 2001).

This Court affirmed Lebron's convictions, but remanded the case to the trial court "for a new penalty phase proceeding before a jury and resentencing, consistent with this opinion." Id. at 1022.

The State accepts Lebron's statement of the facts as being generally supported by the record, and provides the following testimony relied upon by the trial court in its sentencing order.

> Witness Charissa Wilburn testified that when they were leaving the home of Mary Lineberger's father to return to Kissimmee, she saw the defendant get his shotgun from Dwayne Sapp's truck and place it in Mark Tocci's vehicle. Charissa Wilburn testified:
>
> Q As you were driving down Orange Avenue towards Kissimmee, did - - Was there any

conversation about another car or another vehicle on the road?

A Yes, there was.

Q What was that conversation?

A Jermaine turned around and spotted a pickup truck and commented on how nice it was.

Q After Jermaine had drawn your attention to this pickup truck did anyone else in the car say anything about the truck or its rider?

A Yes, Danny Summers commented on the fact it looked like someone he had known.

Q After Danny said that, did Jermaine say anything to Danny?

A Yes, he told him when we stop at the traffic light to turn around and say hi to him or ask him what was up.

Q And did Danny do that?

A Yes, he did.

Q Was there conversation between the driver of the red pickup truck and the people in the car?

A Between Danny and the driver.

Q After that conversation did you pull off the road?

A Yes, we did.

Q Was there more conversation?

A Yes.

Q What do you remember being said by anyone in your car to the driver of the red pickup truck?

A I remember Danny Summers asking the driver how he was, what he was doing, was he still working?

Q Do you remember the driver being asked if he had any weed?

A Yes, I did.

Q And did the driver respond that he didn't have any?

A Yes, he did.

Q Was anything said about a car parked (sic) [part]?

A Yes, the driver had asked Jermaine if he knew of anyone who had some spinners for his car.

Q Jermaine was in the passenger side rear seat of the car you were in?

A Yes.

Q And what conversation did you hear about the spinners?

A Jermaine told the driver, yes, he did have some, they were back at his house and the driver asked Jermaine did he have a whole set, Jermaine said, yes, the driver asked 'Jermaine how much did he want for them, Jermaine said whatever you want to pay, since you're Danny's friend, I'll trust you and told the driver he could follow us back to the house.

Q After this conversation did Mark start driving again?

A Yes.

Q The pickup truck started following?

A Yes.

Q After you started driving away did Jermaine say anything?

A Yes. He said that he was going to jack this guy, that he was going to do it for all the guys to see.

Q Now, at this point, at that time, were you familiar with the term jack?

A Not really.

Q At that time what did you think that meant?

A That he was going to rob him.

Q After saying that he was going to jack this guy and do it for all the guys to see, did Jermaine say anything else about the person in the pickup truck?

A Yes, he commented he couldn't believe how stupid the driver was to follow us back to the house.

Q On the way back to the house in Kissimmee while you were on the way back, did you see the shotgun?

A Not immediately.

Q At some point did Jermaine have the shotgun in his hand?

A Yes.

Q Was he doing anything with it?

A He began loading it, cocking it.

Q Playing with it?

A Yes.

Q Was he continuing to talk about what he was going to do?

A Yes. He just kept repeating the same thing over.

Q At this point what did you do?

A I sat there and looked over at Mark and I asked him what was going on and he said he didn't know.

Charissa Wilburn testified to the following concerning what occurred when they arrived back at the house:

Q When you got back to the house did you see the shotgun again?

A Yes, I did.

Q Where did you see it at this time?

A Jermaine had wrapped it in a sweatshirt, threw it in my lap. and told me to take it in the house.

Q At that point what did you do?

A I picked it up and ran into the house and put it in Mark's room on - in Joe's room on the bed.

Q Now, you had heard Jermaine talking about what you said he was talking about on the way down. Did you know what Jermaine was going to do?

A I thought maybe he was going to rob him.

Q Did you know Jermaine to be a big talker?

A Yes, I did.

Q Did you have any certainty what was going to happen when you got back to the house?

A No, I wasn't sure.

Q Based on what he had been saying you thought he was going to rob this person?

A Yes.

Q When you got back to the house you put the gun in Joe's room?

A Yes.

Q And you went in Mark's room?

A Yes.

Q Why did you go to Mark's room?

A I'm not sure. I went in there and sat down.

Q While you were sitting there on the bed, did you hear any conversation outside the bedroom in the hallway?

A Yeah, shortly after Mark left I heard Jermaine screaming at someone to get down, don't look at me, I'm gonna blast you.

Q As best you recall, you're using the same words when you recall what he said?

A Yes.

Q That is what he was saying?

A He said get down on the floor or I'll blast you, don't look at me.

Q Do you remember any cuss words being used?

A Yes.

Q What was that?

A He said get down motherfucker or I'll blast you right here.

Q After he said those words at some point did you hear something else?

A Yes.

Q What did you do (sic)?

A A shotgun.

Charissa Wilburn testified further that after hearing the shotgun blast, the defendant came into the room and told her it was over and that "he's dead, you can get up now." Charissa Wilburn later observed the defendant going through the victim's personal property and saw the defendant take the victim's money, checks and credit cards.

Witness Danny Summers testified similarly as the other witnesses about going to Kinko's and Mary Lineberger's father's house. He testified that he, Jermaine Lebron, Mark Tocci, and Charissa Wilburn left to return to the house in Kissimmee. On the way to the house, they came into contact with the victim, Larry Neal Oliver, Jr., a young man that Summers knew from work. After some brief conversation, the victim followed them to the house. Summers additionally testified that the defendant asked Charissa Wilburn to bring the shotgun into the house. Once at the house, Danny Summers showed the victim around parts of the house and then took him into the living room. They remained in the living room until the defendant called them into the back part of the house.

Danny Summers testified concerning what occurred once they got to the back of the house:

Q As you're walking down the hall do you see someone come out of one of the rooms?

A Yeah, Jermaine.

Q Did he have anything in his hand?

A He had Betsy.

Q Betsy, is that the shotgun you've been referring to in your testimony?

A Yes. Yep.

Q So he has the gun. Tell the jury what happens?

A He stuck it in Larry's face and tells him to get down on the fucking floor.

Q So he points the gun at Larry, tells him to get on the fucking floor, does Larry do anything?

A Larry went to make a move like he was going to get the gun from him, but Jermaine just wasn't hearing that.

Q And then Jermaine, what happened?

A Told him again, I ain't playing, get down on the fucking floor, loud.

Q What did Larry do?

A He got on the floor.

Q Tell us what happened next?

A He ended up, Larry was lying down backwards and Jermaine had the gun, to the back of his head and he shot him.

Q What do you remember seeing happen to the victim's head when the shot was fired?

A It was disintegrated, his head.

Witness Dwayne Sapp testified that he was with the defendant and the others at Kinko's and at the home of Mary Lineberger's father. He later went to

the house in Kissimmee with Mary Lineberger and Joe Tocci. When he went inside, he saw the defendant with a shotgun in his hand.

Dwayne Sapp testified as follows concerning what happened after he saw the defendant with the shotgun:

Q Tell us what happened next?

A He came up to me, handed me a pager and then he said go check out my new ride in the garage, so I went to the garage, looked inside, there was a red pickup truck and I asked him where he got it and he said go look inside. I walked back inside, looked down the hallway and saw a body lying on the floor.

The defendant instructed Dwayne Sapp and Vern Williams to get rid of the body.

Witness Joe Tocci testified to the following concerning what happened when he arrived at the house:

A When we got home, all the lights were on in the house, and that never happens, so I walked in the door, I don't remember what order, I think I was after Dwayne, and I walked in and Jermaine came around the comer with the shotgun on his shoulder and he was all excited and told Mary to sit down. And my room was to the right, and she wanted to go to bed, and he said sit your girl down, she needs to sit down. I got Mary to sit down - - He opened the garage and I saw the truck and said, where did you get that, and he said, turn around, and I saw the body laying in the hallway.

Q What was your action when Jermaine showed you this truck and then you saw a body?

A The first thing I asked was, was he dead, and he was like, what do you think, and it was the first time I had ever seen a dead body and I kind of freaked, but I wasn't going to say anything with Jermaine all hyper like that, so I went with the flow like it was.

Q While you all were there, did Jermaine tell anybody to do anything?

A Yes.

Q What do you recall?

A He told everybody else basically since he did it everybody else has to clean up-after him.

(R, 111-18).

Dr. McClane testified that preparation in this case consisted of listening to the live testimony and reviewing the deposition of the defendant's mother, Jocelyn Ortiz, and the defendant's school records. Dr. McClane further testified that:

1. Jocelyn Ortiz did not "have a nurturing loving mother experience with [her] own mother," thus people like that "are somewhat warped in the way and limited in their own ability to show appropriate affection and nurturing to their own child."

2. Jocelyn Ortiz, due to her drug use, was forced to be separated from the defendant for a few years.

3. "A baby who doesn't have warmth and security and hasn't been shown appropriate love will often be warped, in a sense, and find it difficult to form meaningful relationships in society and to

have a mature moral and ethical standards and other standards for treating other people."

4. "It appears that she [Jocelyn Ortiz] was torn within herself between her feeling of duty toward the child and her apparent, from what she said, rather consistently during her testimony, absence of real loving feelings. She didn't want the child, didn't want the child back. She has never wanted the child. But she felt guilty about that. And it appears compensated for that by overindulging at time with money to try to compensate for her physical and geographical absence, at times, and for her lack of warm, loving, nurturing behaviors."

5. The defendant had symptoms consistent with someone with Attention Deficit Disorder.

6. The defendant had an exaggerated need for approval and likely had shallow emotional attachments.

7. The defendant had a "childhood that's fraught with difficulties from pregnancy through the first few months, through the first few years of separation from mom, through the double-whammy of mama not being able to show love and yet overindulging in material things and otherwise. It seems like a situation where there was little of what we would normally call normal mothering."

The cross-examination of Dr. McClane by the State of Florida revealed the following:

Q You repeatedly in your testimony referred to what impact something could have had, what it can have, what it may have?

A Yes.

Q You don't know in this situation in point of fact what, if any, affect any of those things had on this defendant who sits in this courtroom today; Isn't that right?

A That's correct. To the extent - I was merely talking about statistical probabilities.

Q And generalities?

A Certainly not certainties.

Q Okay. Now, that's because you have not done a complete workup (sic) on this defendant; Is that correct?

A That is correct. I have never met him before today.

Dr. McClane testified that in performing a thorough mental health evaluation of someone for a death penalty case he would normally interview the defendant for an hour and a half to two hours. The doctor would also give some psychological testing to assess a defendant's psychological status concerning organic matters, learning problems, personality problems, or intelligence problems.

Here, Dr. McClane did not interview the defendant nor did he do any psychological testing on him. Dr. McClane was not given any information about the defendant's foster parents or any other persons who might have known the defendant.

Dr. McClane testified as follows:

Q All right. Now, you were not asked to do that complete kind of mental health evaluation in this case; Is that correct.

A That's correct.

Q All you were asked to do is read the deposition and look at the records and come to conclusions based on those?

A Conclusions regarding him.

Q Let me rephrase that. To render some opinions based on those sources?

A That's correct.

Q Now, would you not agree that it is - That that information is not sufficient to come to any reliable conclusions or final conclusions about the defendant?

A Perhaps not final conclusions. Reliability is a different word. If I assume that the records are accurate and that the deposition and court testimony-is accurate, I can come to some probable conclusions, yes.

Q Let me put it to you this way: As a doctor, you would not start on a course of treatment of an individual based on that minimum amount of information, would you?

A No.

On the issue of whether the defendant suffered from Attention Deficit Disorder or conduct disorder, Dr. McClane testified:

Q So based upon the records you reviewed, we don't know whether we have a sufferer from A.D.H.D. or conduct disorder or elements of both?

A That's right. I would favor the latter, but don't know for sure. There is not enough information.

(R, 125-28).

SUMMARY OF ARGUMENT

1. This Court has repeatedly held that a prospective juror's view against the death penalty is a legitimate, race neutral reason for a peremptory challenge. Here, Mrs. Nelson-Brown, unlike the jurors identified by Lebron, specifically stated

that she was against the death penalty. On this record, that reason was sufficient to provide a race neutral reason for the peremptory challenge.

2. Lebron cannot show reversible error on this claim because the State presented the facts as they existed, the trial Court twice specifically instructed the jury that it could not base its recommendation on a finding that Lebron was the shooter, and Lebron has not come forward with any vestige of proof that the jury violated those instructions.

3. Below, Lebron claimed that the New York documents showed youthful offender treatment; however, he provided the trial court with no authority to support his claim. Further, the certificate of disposition signed by the New York clerk of court certifies a “crime convicted of.” Moreover, Lebron conceded that he was given “five years probation, the same as a felony.” As to Lebron’s Florida felonies, the relevant facts from those convictions were the facts detailing the use or threat of violence during the commission of those felonies; and, Lebron cites to no authority for those facts to have been changed to conform to the verdicts rendered on the other charges from the same episode.

4. Ring has no application to the facts of this case. Lebron’s death sentence was based in part on his previous

convictions for felonies involving the use or threat of violence. (R, 107-32). See Jones v. State, Nos. SC01-734 & SC02-605 (Fla. May 8, 2003)(citing Bottoson v. Moore, 833 So.2d 693, 723 (Fla. 2002)(Pariente, J., concurring in result only) (explaining that "in extending Apprendi to capital sentencing, the Court in Ring did not eliminate the 'prior conviction' exception")).

5. Although the trial court gave little weight to the existence of Lebron's emotional and mental health problems because of the absence of any evidence that it caused Lebron's actions on the night of the murder, the sentencing order clearly reflects that the trial court considered the evidence and weighed it accordingly. "The fact that [Lebron] disagrees with the trial court's conclusion does not warrant reversal."

ARGUMENT

Jurisdiction

This Court has jurisdiction pursuant to Article V, section 3(b)(1) of the Florida Constitution.

ISSUE I

WHETHER THE STATE IMPERMISSIBLY EXERCISED A PEREMPTORY CHALLENGE TO EXCUSE AN AFRICAN-AMERICAN JUROR WITHOUT PROVIDING A RACE NEUTRAL REASON FOR THE EXCLUSION?

Statement of the Issue

Appellee restates the issue because Appellant's formulation is not posed in the form of a neutral question which frames the issue to be decided by this Court.

Standard of Review

The standard of review applied by an appellate court when addressing a trial court's decision concerning peremptory challenges is the abuse of discretion standard established in Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980). Files v. State, 613 So.2d 1301 (Fla. 1992).

Argument

Lebron argues that "[t]he 'race-neutral' explanation given by the State for the striking of Nelson-Brown, a black juror, would have applied no less to the white jurors. Thus, it cannot be viewed as race neutral." (IB, 32-33). However, this argument is not supported by the record.

Prospective juror number 207 stated "[i]n some cases it's warranted," when asked "[h]ow do you feel about the death penalty?" (R, 121). Prospective juror number 115 stated "I think in some cases it's warranted" when asked "[h]ow do you feel about the death penalty?" (R, 131). Prospective juror 187 stated "I am in favor of it, depending on the circumstances" when asked "[d]o you have any opinions about the death penalty?" (R, 163). The prospective juror at issue, number 108

- Mrs. Nelson-Brown, stated "I don't agree with it" when asked "[d]o you have any opinions concerning the death penalty?" (R, 128).

When asked for a racially neutral reason for striking Mrs. Nelson-Brown, the State responded that "[s]he indicated that she did not agree with the death penalty, though she eventually did say she could consider it. The fact that she does not agree with it is my racially neutral reason for striking her." (R, 465). In response to Lebron's argument that the State's reason applied equally well to Mrs. Bastian and Mrs. Daniels, the State pointed out that:

> Ms. Bastion said sometimes the death penalty is necessary. That is a far cry from I don't agree with the death penalty. Mrs. Daniels, I don't have an exact quote, but I basically have a note: Neutral go either way. And, my recollection is she never indicated an opposition to the death penalty, while she may not have been a strong proponent. That's far different than --

(R, 466).

This Court has repeatedly held that a prospective juror's view against the death penalty is a legitimate, race neutral reason for a peremptory challenge. Hartley v. State, 686 So.2d 1316 (Fla. 1996)(citing Walls v. State, 641 So.2d 381 (Fla. 1994) cert. denied, 513 U.S. 1130 (1995); Atwater v. State, 626 So.2d 1325 (Fla. 1993), cert. denied, 511 U.S. 1046 (1994)). Here, Mrs. Nelson-Brown, unlike the jurors identified

by Lebron, specifically stated that she was against the death penalty. On this record, "[t]hat reason was sufficient to provide a race neutral reason for the **peremptory**[1] challenge." Id. at 1322.

ISSUE II

WHETHER THE TRIAL COURT WAS REQUIRED TO RESTRICT THE TESTIMONY ALLOWED BEFORE THIS JURY TO CONFORM TO THE SPECIAL VERDICT RENDERED BY THE PREVIOUS JURY EVEN THOUGH THE PREVIOUS JURY HAD HEARD ESSENTIALLY THE SAME EVIDENCE?

Statement of the Issue

Appellee restates the issue because Appellant's formulation is not posed in the form of a neutral question which frames the issue to be decided by this Court.

Standard of Review

"A trial court has wide discretion in areas concerning the admission of evidence, and, unless an abuse of discretion can be shown, its rulings will not be disturbed." San Martin v. State, 717 So.2d 462, 470-71 (Fla. 1998)(citing Welty v. State, 402 So.2d 1159, 1162-63 (Fla. 1981)).

Argument

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[1]As this was not a challenge for cause, whether or not Mrs. Nelson-Brown "could lay aside that opinion and consider it as a punishment" (IB, 31), is not relevant. See Barnhill v. State, 834 So.2d 836, 843-46 (Fla. 2002), cert. denied, 123 S.Ct. 2281 (2003).

Lebron argues that "[a] new penalty phase is required in which the State is specifically forbidden to present evidence and to argue or imply to the new jury that Mr. Lebron was the shooter and that the prior jury finding could be ignored." (IB, 37). The State respectfully disagrees.

Here, as in San Martin, there was no abuse of discretion in the admission of the evidence at issue as Lebron's involvement in the robbery and murder was pertinent both to the penalty that could be imposed[2] and, ultimately, to the applicability of the "committed during the commission of the crime of robbery" aggravator[3]. Id.

This Court ordered a new penalty phase because, although the trial court "correctly analyzed Lebron's relative culpability, as compared to the other known participants, based upon its finding - which is supported by the evidence adduced at trial - that the record was 'totally devoid of any evidence of anyone else being responsible for the murder of

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[2]Tison v. Arizona, 481 U.S. 137, 157-58 (1987); Enmund v. Florida, 458 U.S. 782, 801 (1982)(holding an individual cannot be sentenced to death for felony murder by an accomplice unless the jury finds the defendant killed the victim, intended that the victim be killed, intended that lethal force be used, or acted with reckless indifference to human life).

[3]Section 921.141(5)(d), Florida Statutes (1994), provides that it is an aggravating circumstance if the capital felony was committed while the defendant was engaged, or an accomplice, in the commission of the crime of robbery.

the victim," it was error for the trial court to conclude that "'the evidence established beyond a reasonable doubt that the defendant murdered Larry Neal Oliver, Jr.'" as that conclusion was contrary to the jury's special verdict. Lebron, 799 So.2d at 1020-21. This ruling highlights the problem created by the jury's special verdict. If Lebron is more culpable than any of the known participants, but he is at the same time not the shooter, then there must be an unknown participant - the "shooter." However, there is no evidence to support the existence of another participant/shooter.

Legal fiction is defined[4] as an assumption of fact made by a court as a basis for deciding a legal question. As there is no evidence in this case of an unknown participant, this Court's implicit reference to an unknown participant can only be an assumption of fact based on the jury's special verdict. Notwithstanding the legal fiction that may[5] accompany the jury's special verdict in this case, the desire for a factually supported verdict does not authorize the creation of evidence. Below, the State was bound by the evidence as it

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[4]BLACK'S LAW DICTIONARY 894 (6th ed. 1990).

[5]It cannot be established that the jury's special verdict was anything more than a jury pardon.

existed, and could not create, or change, any evidence to comply with this Court's assumption of an unknown participant.

During the State's opening argument, Lebron objected to the State's presentation of circumstantial evidence that "put everybody in a position where they couldn't kill Mr. Oliver except for Jermaine Lebron," and argued that putting this evidence before the jury violated this Court's ruling that Lebron's sentence "must be based on the evidence that he was not the shooter." (R, 502). The trial court, translating this Court's opinion, ruled that:

> (1) this jury, nor can this court, predicate any sentence based upon the fact that Mr. Lebron himself was the shooter. But this court, nor did the Supreme Court, indicate that we were to manufacture evidence or change the testimony of any witness or change the testimony of any facts.
>
> It simply translates to me that in order to assess the defendant's culpability in the light of the facts established by the record, that the testimony is the
>
> testimony. That was what the testimony was. Now, why that jury found that, I don't know. They found it and we're stuck with it. But the Supreme Court, in none of these instructions, say to come in here and change the facts of the testimony. They didn't say, come in here and pull the wool over anybody's eyes about the testimony.

> At the appropriate time in my instructions, I will include a special instruction to them that they cannot predicate any of these aggravating factors on the fact that he was the shooter, but they can assess his relative participation. And the only way to determine his relative participation is to present the unadulterated facts based upon testimony.
>
> If I'm wrong, the Florida Supreme Court will tell me. And that's what that particular paragraph means to me. It doesn't mean to come in here and create new facts. Those are the facts. We're stuck with it just like we're stuck with the fact that the jury found that he was not the shooter.
>
> With that said, your objection is noted and it will be overruled.

(R, 505-07).

Before this Court, Lebron specifically identifies the testimony of witnesses Lang and Wilburn as inadmissible opinion testimony that "no one other than Mr. Lebron was the shooter." (IB, 34-35). However, when the State asked witness Wilburn whether she knew any information that would indicate that Mark Tocci killed Larry Oliver, Lebron objected to the question because it called for an opinion; and, the trial court sustained the objection. (R, 653-54). When the State asked Wilburn whether she had seen Mark shoot Oliver, heard Mark say he shot Oliver, heard Lebron say Mark shot Oliver, or heard anyone say Mark shot Oliver, Lebron raised no

objections. (R, 654). Similarly, when the State asked witness Lang whether, from his investigation, there was any evidence implicating Mark Tocci as the person who shot Larry Oliver, Lebron objected to the question because it called for an opinion; and, the trial court sustained the objection. (R, 705). When the State asked Lang whether any individual had indicated they saw Mark Tocci shoot Oliver, heard from Mark Tocci that he killed Oliver, or heard from anybody that Mark Tocci killed Oliver, Lebron raised no objections. (R, 706). As the trial court sustained Lebron's objections and prohibited the alleged opinion testimony, Lebron cannot show that the jury was prejudiced by opinions it never heard.

At the close of Lang's direct testimony, Lebron moved for either a mistrial or a curative instruction based on the admission of the statements by Lebron that he had killed Larry Neal Oliver. (R, 707-08). However, the trial court had already given the following limited admissibility instruction at the request of the defense:

> Ladies and gentlemen of the jury, the evidence that you are hearing now has to do with assessing the defendant's relative culpability in light of the facts established by the record; that is, what his degree of participation in his defense (sic) is.

It is also admissible for the fact of showing that no other known participant was proven to be the shooter.

As I have indicated to you earlier is that a special finding by the jury found that the defendant, Jermaine Lebron, did not actually pull the trigger or kill Mr. Oliver. The jury found that Larry Neal Oliver was killed by a person other than Jermaine Lebron.
Your finding, and whatever those findings may be in this particular case, cannot be predicated upon a finding that he was, quote, the shooter, unquote, but must be whatever you find predicated on his degree of
participation in this event of murder in the first degree.

So this evidence is limited to that particular function. His degree of participation and whether or not any other known participant was proved to be the shooter. Again, I instruct you that whatever evaluation you make in deciding these aggravating factors or mitigating factors cannot be premised upon the finding that Mr. Lebron was himself the shooter. It must be premised upon his level of participation in the offense.

(R, 699-700).

The trial court, therefore, denied Lebron's motion stating:

I have given a limited instruction and in fashioning that limited instruction, I have quoted liberally from the opinion of the Florida Supreme Court in this particular matter.

The Florida Supreme Court did not give any direction whatsoever when it talked about evidence of this defendant's participation in the homicide of Larry Neal Oliver.

The Florida Supreme Court did not go back and ask me to go in and restructure the testimony of

> witnesses who raised their hands, under oath, and testified. Their testimony is their testimony. I can't change it; you can't change it; and the Florida Supreme Court should not change it. But they, as you say, are the Supreme Court and they can do whatever they want to do. And we have to respect that since they are the Supreme Court. But the facts are the facts. The Supreme Court indicated that any sentence in this particular case cannot be predicated on the fact that he was the shooter. Just like we assume that the jury in the last trial understood all of the instructions, understood all of the evidence, and we're giving that verdict great deference as to the special finding that Larry Neal Oliver was killed by a person other than Jermaine Lebron.
>
> I would hope and trust that these twelve individuals here will take their oath just as serious as that last jury that took their oath. I have instructed them and will instruct them that any decision that they reach, whatever that is, in determining the absence or presence of aggravating or mitigating factors cannot be predicated on the fact that he was the shooter. But that evidence is relevant and material in determining and assessing (1) his participation; and (2) that no other known participant was a shooter.
>
> Now, I'm not good at smoking mirrors and I have ruled. If I am wrong, then I am quite sure that the men and women of the Florida Supreme Court, at some point in time, will tell me that. But I have ruled for better or worse. You have perfected your record. I will give you, if you would like, Mr. Slovis and Mr. Norgard, a standing objection.

(R, 710-11). (See also the trial court’s final instructions to the jury during which the jury was twice told that it could not recommend a sentence premised upon a finding that Lebron was the shooter in the death of Larry Neal Oliver, Jr.) (R, 1016-17).

Consequently, the issue before this Court is whether Lebron can show reversible error when the State presented the facts as they existed, when the Court twice specifically instructed the jury that it could not base its recommendation on a finding that Lebron was the shooter, and when Lebron has not come forward with any vestige of proof that the jury violated those instructions.

Lebron argues that the jury was tainted by evidence that implicated Lebron as the shooter; however, this jury heard no more evidence that Lebron was the shooter than did the jury that specifically found that he was not the shooter and yet also recommended his death. Thus, it is not clear, based on the juries identical recommendations, what prejudice Lebron claims resulted. Given the complete absence of any indication that this jury violated the trial court's instructions not to base their recommendation on Lebron having been the shooter, and the presumption that the jury followed the trial judge's instructions[6], the instant record only supports a finding that both juries simply found the aggravating circumstances outweighed the mitigating circumstances.

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[6]See e.g. Carter v. Brown & Williamson Tobacco Corp., 778 So.2d 932, 942 (Fla. 2000)(citing Sutton v. State, 718 So.2d 215, 216 (Fla. 1st DCA 1998)).

This Court has explained "that inconsistent verdicts are allowed because jury verdicts can be the result of lenity, and, therefore, verdicts do not always speak to the guilt or innocence of a defendant." State v. Connelly, 748 So.2d 248, 252 (Fla. 1999)(citing Fayson v. State, 698 So.2d 825, 826-27 (Fla. 1997)). Lebron's desire for a sentence "based on the evidence that he was not the shooter" does not authorize the creation of that evidence. Below, the State was bound by the evidence as it existed, and could not create, or change, any evidence to comply with this Court's assumption, based on the jury's special verdict, of an unknown participant. As the trial court so eloquently put it:

> I would hope and trust that these twelve individuals here will take their oath just as serious as that last jury that took their oath. I have instructed them and will instruct them that any decision that they reach, whatever that is, in determining the absence or presence of aggravating or mitigating factors cannot be predicated on the fact that he was the shooter. But that evidence is relevant and material in determining and assessing (1) his participation; and (2) that no other known participant was a shooter.
>
> Now, I'm not good at smoking mirrors and I have ruled. If I am wrong, then I am quite sure that the men and women of the Florida Supreme Court, at some point in time, will tell me that.

(R, 710-11).

ISSUE III

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE LEBRON'S PRIOR CONVICTION FOR ATTEMPTED ARMED ROBBERY AND WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE EVIDENCE NECESSARY TO DESCRIBE LEBRON'S CONVICTIONS FOR ROBBERY AND KIDNAPPING?

Statement of the Issue

Appellee restates the issue because Appellant's formulation is not posed in the form of a neutral question which frames the issue to be decided by this Court.

Standard of Review

"If the ruling consists of a pure question of law, the ruling is subject to de novo review. See, e.g., Philip J. Padovano, Florida Appellate Practice § 9.4 (2nd ed. 1997)." State v. Glatzmayer, 789 So.2d 297, 301 n.7 (Fla. 2001). If the ruling consists of a mixed question of law and fact addressing other issues, the ruling must be sustained if the trial court applied the right rule of law and its ruling is supported by competent substantial evidence. Id. Finally, regarding the testimony admitted, "[a] trial court has wide discretion in areas concerning the admission of evidence, and, unless an abuse of discretion can be shown, its rulings will not be disturbed." San Martin v. State, 717 So.2d 462, 470-71 (Fla. 1998)(citing Welty v. State, 402 So.2d 1159, 1162-63 (Fla. 1981)).

Argument

Lebron's first claim raised in this issue is that "[t]he determination by the trial court that evidence of a New York conviction was admissible evidence was error." (IB, 40). The State respectfully disagrees.

Lebron argues that the trial court's determination that Lebron's New York conviction was admissible is unsupported by competent substantial evidence. To support this statement, Lebron refers to the absence of additional evidence from the State to rebut Attorney Slovis's assertion that the New York documents actually reflected youthful offender treatment; however, Lebron cites to no authority for the trial court to defer to an unsupported argument by an advocate. Although Slovis claimed that the documents showed youthful offender treatment, he provided the trial court with no authority either from the New York documents, New York caselaw, New York statutes, or New York court rules, to support his claim. Further, the certificate of disposition signed by the New York clerk of court certifies a "crime convicted of."(SR, State's Exhibit 3). Moreover, Slovis conceded that Lebron was given "five years probation, the same as a felony." (R, 753). Thus, it would appear that it was Lebron's argument that was not supported by competent substantial evidence.

Nevertheless, the record reflects without dispute the presence of felony convictions of Lebron for robbery, kidnapping, and aggravated assault with a firearm to support the prior violent felony aggravator for his death sentence. Accordingly, any error in the admission of Lebron's New York attempted robbery conviction was harmless. See Henyard v. State, 689 So.2d 239, 252 (Fla. 1996)(finding improper admission of juvenile adjudication for robbery with a weapon harmless given presence of six other felony convictions to support the prior violent felony aggravator).

Lebron's other claim in this issue is that the trial court erred in allowing the admission of testimony describing the factual circumstances of his convictions for robbery and kidnapping that were inconsistent with his conviction for simple assault. (IB, 41). More specifically, Lebron argues that the trial court erred in "three ways: (1) by allowing hearsay that was unrebuttable to be admitted through Officer Schroeder; (2) by allowing the State to present evidence which indicated that Mr. Lebron was guilty of the attempted first-degree murder by permitting testimony through Officer Schroeder that Nasser told law enforcement officers that Mr. Lebron pointed a gun at his head and fired it when this testimony was contrary to the verdict for simple assault and

(3) by allowing Officer Schroeder to testify that the black man used a gun contrary to the jury's finding that Mr. Lebron did not use a firearm during the Nasser incident." (IB, 43).

Regarding Lebron's claim of unrebuttable hearsay, although the victim was unavailable, as Lebron was given the opportunity to cross-examine Officer Schroeder, there was no error in the admission of the officer's testimony. See Damren v. State, 696 So.2d 709, 713 (Fla. 1997)(finding no error where defendant afforded opportunity to cross-examine hearsay witnesses); Spencer v. State, 645 So.2d 377 (Fla. 1994)(finding no error because Spencer was given an opportunity to cross-exaimine the officer); Waterhouse v. State, 596 So.2d 1008 (Fla. 1992)(finding hearsay testimony about defendant's prior first-degree murder conviction admissible where defendant afforded opportunity to rebut, even though he did not or could not rebut the testimony).

Lebron's second part of this sub-issue has two apparent components. First that the testimony about Lebron trying to kill Nasser was inconsistent with the latter jury's verdict[7], and, second, that this testimony was highly prejudicial and inflammatory. Lebron's desire for testimony supporting simple

[7]The first jury did convict Lebron of attempted murder. Lebron v. State, 724 So.2d 1208 (Fla. 5th DCA 1999).

assault[8] does not authorize the creation of that evidence. Further, Lebron does not challenge, or even address, the testimony's relevance to his convictions for kidnapping and robbery, the actual aggravating factors. The relevance to the kidnapping and robbery convictions is obvious, as it was the use of the gun, whether by Lebron or at his direction, that facilitated the kidnapping and robbery and it was the gun jamming that allowed the victim to escape. Therefore, the testimony was admissible because the facts of the kidnapping and robbery were relevant and inseparable from the facts supporting the simple assault conviction. See Lamarca v. State, 785 So.2d 1209, 1212 (Fla. 2001)(finding inseparable crime evidence admissible under section 90.402 because it is relevant); Coolen v. State, 696 So.2d 738, 742-43 (Fla. 1997)(finding evidence of uncharged crimes admissible as necessary to "'describe the deed'"). See also Morgan v. State, 415 So.2d 6, 12 (Fla. 1982) (not limiting evidence to conviction by finding admission of evidence of accusation of first-degree murder that led to conviction for second-degree

[8]Again, regarding the consistency of the testimony with the verdicts, because jury verdicts can be the result of lenity, they do not always speak to the guilt or innocence of a defendant. State v. Connelly, 748 So.2d 248, 252 (Fla. 1999)(citing Fayson v. State, 698 So.2d 825, 826-27 (Fla. 1997)).

murder relevant to apprise jury of background of prior conviction).

As to the prejudicial and inflammatory nature of the evidence, it was the details of the use or threat of violence that was relevant from his prior felony convictions. Only prior felonies involving the use or threat of violence are admissible under section 921.141(5)(b), Florida Statutes, not all prior felony convictions. Accordingly, the relevant facts from Lebron's prior felony convictions were the facts detailing the use or threat of violence during the commission of those felonies; and, Lebron cites to no authority for those facts to have been changed to conform to the verdicts rendered on the other charges from the same episode. Here, as Lebron points out, there was no victim testimony, just a law enforcement officer relating the details of Lebron's prior violent felonies. Thus, Lebron has failed to demonstrate that the probative value of this evidence was outweighed by the alleged inflammatory or overly prejudicial nature of the evidence. See e.g. Jones v. State, 748 So.2d 1012, 1026 (Fla. 1999)(finding details of prior victims death, including photographs and coroner's report, relevant and admissible to assist the jury in evaluating the character of the defendant and the circumstances of the crime).

Finally, regarding the evidence that the black man used the gun, the defense could easily have rebutted this testimony with the "jury's finding that Mr. Lebron did not use a firearm during the Nasser incident." (IB, 43).

ISSUE IV

WHETHER FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL UNDER APPRENDI/RING?

Statement of the Issue

Appellee restates the issue because Appellant's formulation is not posed in the form of a neutral question which frames the issue to be decided by this Court.

Standard of Review

"If the ruling consists of a pure question of law, the ruling is subject to de novo review. See, e.g., Philip J. Padovano, Florida Appellate Practice § 9.4 (2nd ed. 1997)." State v. Glatzmayer, 789 So.2d 297, 301 n.7 (Fla. 2001).

Argument

Lebron argues that Florida's "capital sentencing scheme is unconstitutional in that it impermissibly allows a judge rather than a jury to find the aggravating factors necessary to impose a death sentence and in that a sentence of death may be imposed absent a unanimous recommendation from the jury." (IB, 46). The State respectfully disagrees.

Initially, the State points out that Ring, an extension of the Supreme Court's holding in Apprendi v. New Jersey, 530 U.S. 466 (1999), to death penalty cases, is not implicated in Florida, because the maximum penalty for a capital felony in Florida is death. See e.g., Porter v. Crosby, 840 So.2d 981 (Fla. 2003) (noting that this Court has repeatedly held that the maximum penalty under the statute is death), reh'g denied, (Mar. 13, 2003).

More specifically, in Mills v. Moore, 786 So.2d 532 (Fla.), cert denied, 523 U.S. 1015 (2001), this Court announced that Apprendi was inapplicable to Florida's capital sentencing law because:

> The plain language of section 775.082(1) is clear that the maximum penalty available for a person convicted of a capital felony is death. When section 775.082(1) is read in pari materia with section 921.141, Florida Statutes, there can be no doubt that a person convicted of a capital felony faces a maximum possible penalty of death.

Mills, 786 So. 2d at 538 (Fla. 2001). See also Shere v. Moore, 830 So. 2d 56 (Fla. 2002) (stating that a Florida defendant is eligible for a sentence of death if convicted of a capital felony).

As noted in Mills and Shere, death is an available punishment for a defendant convicted of a capital felony. Florida's District Courts of Appeal, the courts of appeal for

non-death penalty capital convictions, have had cause to explain the distinction between "capital" offenses where death as a punishment was unavailable at the time the defendant was charged as opposed to cases in which the death penalty could have been imposed but was not. See e.g. Ferguson v. State, 692 So.2d 930, 931 (Fla. 5th DCA 1997). The "further proceedings to determine sentence" mandated by section 921.141 of the Florida Statutes, is not provided for capital offenses, such as capital sexual battery, where death as a punishment is unavailable. Id. Obviously, if death were not a penalty available for his convictions, the unique further proceedings twice provided Lebron pursuant to section 921.141 of the Florida Statutes would not have been required.

Florida's sentencing process is a way to satisfy the Eighth Amendment and protect against capricious and arbitrary sentences, and does not translate into a constitutional analysis for Sixth Amendment purposes. The "two separate findings of fact by the trial judge" identified by Lebron narrows the class of defendants already subject to the death penalty by virtue of their conviction. See e.g., Porter v. Crosby, 840 So.2d 981 (Fla. 2003) (noting that this Court has repeatedly held that the maximum penalty under the statute is death), reh'g denied, (Mar. 13, 2003). It does not increase

the punishment, it merely limits the selection of a death sentence to a portion of those who have already been found eligible to receive that sentence. As such, Apprendi is inapplicable to sentences at the statutory maximum in capital cases for the same reason Apprendi is inapplicable to sentences at the statutory maximum in noncapital cases. Whether punished under section 921.0022-24 (the Criminal Punishment Code) or under section 921.141, of the Florida Statutes, if the sentence imposed does not exceed the statutory maximum, there was, of course, no violation of the right to a jury determination of any fact that increases the penalty for a crime beyond the prescribed statutory maximum. Cf. Hall v. State, 823 So.2d 757, 764 (Fla. 2002)(finding Apprendi inapplicable because the sentence for each of Hall's offenses did not exceed the statutory maximum).

Nonetheless, Ring has no application to the facts of this case. Lebron's death sentence was based in part on his previous convictions for felonies involving the use or threat of violence. (R, 107-32). See Jones v. State, Nos. SC01-734 & SC02-605 (Fla. May 8, 2003)(citing Bottoson v. Moore, 833 So.2d 693, 723 (Fla. 2002)(Pariente, J., concurring in result only) (explaining that "in extending Apprendi to capital

sentencing, the Court in Ring did not eliminate the 'prior conviction' exception")).

ISSUE V

WHETHER LEBRON'S SENTENCE OF DEATH IS PROPORTIONAL?

Statement of the Issue

Appellee restates the issue because Appellant's formulation is not posed in the form of a neutral question which frames the issue to be decided by this Court.

Standard of Review

"In reviewing the proportionality of death sentences, this Court does not simply compare the number of aggravators to the number of mitigators. Instead, [this Court] ensure[s] uniformity in the death penalty by reviewing all the circumstances in the present case relative to other capital cases." Evans v. State, 838 So.2d 1090, 1097-98 (Fla. 2002)(citations omitted).

Argument

Initially, Lebron argues that the trial court improperly rejected or improperly assigned little weight to several mitigating factors. (IB, 50). The State respectfully disagrees.

Lebron claims that his childhood abuse should have been recognized as a significant mitigating factor by the trial

court because it was coupled with other factors such as youth, immaturity, and substance abuse. (IB, 55). Lebron supports this claim with the testimony of his mother, his school records, and Dr. McClane's evaluation of that evidence. (IB, 50-56).

As to Lebron's age, the trial court found:

> The defendant was 21 years of age at the time of the commission of this crime. Age is only a mitigating circumstance when it is relevant to the defendant's mental and emotional maturity and his ability to take responsibility for his own acts and to appreciate the consequences resulting from them. There is no evidence that the defendant was not mentally and emotionally mature.

(R, 121).

Lebron's arguments regarding his emotional or mental age are insufficient to show error in this determination. In his initial brief, Lebron claims that "[r]ecords from the Mount Pleasant Cottage School reflect that at age 14 Mr. Lebron was functioning 3.1 years below his biological age; however, on the same page Lebron notes that "[a] 1989 pssychological (sic) report found that Mr. Lebron was **at** the age of 14.5 and functioned in the low average to borderline intelligence range. (IB, 53). As Lebron was born on July 16, 1974, he was only 14.5 years old by 1989. Even if this report was generated as late as December of 1989, it could only mean that Lebron

had substantially improved in a short period and was **at** an age that was within a year or less of his biological age.

Many of Lebron’s other claims, without record references, are apparently references to school reports of educational, as opposed to mental or emotional, deficits. Regarding Lebron’s school performance, the trial court found:

> The defendant's school records reflected that he performed poorly academically and exhibited difficult social behaviors. The records also showed that he had been observed to express age appropriate interests.
>
> The records reflect that the defendant was a child of low average or average intelligence, with no indication of organic damage. Dr. Thomas McClane, who was called by the defense, testified on cross-examination by the State that the records he reviewed reflected that the defendant's level of intelligence was about average for the population. Dr. McClane testified that the defendant's IQ range was around a hundred, which by definition is the population average.
>
> The records also indicated that the defendant, up to age eighteen, was delayed in language and math skills, and had engaged in an escalating pattern of antisocial or delinquent behavior. The records do not show, however, that the defendant was acting at a level inconsistent with his chronological age at the time the murder was committed, or that his emotional or mental age is inconsistent with his chronological age.
>
> It is quite evident from the records that the defendant was a failure in school, attended some special education classes and eventually dropped out of school.
>
> The Court finds that this is a mitigating circumstance and gives it some weight.

(R, 123).

Regarding Lebron’s interpersonal skills, the trial court found:

> There was no evidence presented that supports the notion that the defendant had an exaggerated need for approval, was easily led by others, or that he had shallow emotional attachments. There was evidence that he was good with some children.
>
> The Courts finds that being good with children is somewhat of a mitigating factor but gives it very little weight.

(R, 123).

Regarding Lebron’s parents, the trial court found:

> The evidence established that the defendant's mother and father were never married; that his mother was once a drug user and not an addict as alleged by the defense; that his father had a criminal history; that his father abandoned his mother while she was pregnant; that the defendant was in foster homes; that the defendant was cared for by extended family at times; that the defendant did not have total care by his mother while growing up; that his mother was a "go-go" dancer/adult club owner; and that his mother traveled somewhat.
>
> While the Court finds the things mentioned above were proved, there was no evidence presented on what effect, if any, these circumstances had on the defendant.
>
> The Court finds this to be a mitigating factor but gives it very little weight.

(R, 124).

Regarding whether Lebron was neglected, the trial court found:

> The defense contends that the defendant was rejected by his mother and she had negative feelings about him. While the Court finds that this was proven, there was no evidence presented on what effect, if any, this had on the defendant in relationship to the commission of the crimes he was convicted of in this case.
>
> The Court finds that this factor is present and gives it some weight.

(R, 124).

Regarding whether Lebron had psychological problems, the trial court found:

> The defense contended that the defendant has emotional problems, mental health problems, substance abuse problems, is hyperactive and suffers from a speech impairment. The evidence presented to establish these problems were the deposition and live testimony of Jocelyn Ortiz, the defendant's mother, treatment notes/records, the defendant's school records, and the testimony of Dr. Thomas McClane, a forensic psychiatrist.
>
> Dr. McClane's Testimony
>
> Dr. McClane testified that preparation in this case consisted of listening to the live testimony and reviewing the deposition of the defendant's mother, Jocelyn Ortiz, and the defendant's school records. Dr. McClane further testified that:
>
> 1. Jocelyn Ortiz did not "have a nurturing loving mother experience with [her] own mother," thus people like that "are somewhat warped in the way and limited in their own ability to show appropriate affection and nurturing to their own child."
>
> 2. Jocelyn Ortiz, due to her drug use, was forced to be separated from the defendant for a few years.

3. "A baby who doesn't have warmth and security and hasn't been shown appropriate love will often be warped, in a sense, and find it difficult to form meaningful relationships in society and to have a mature moral and ethical standards and other standards for treating other people."

4. "It appears that she [Jocelyn Ortiz] was torn within herself between her feeling of duty toward the child and her apparent, from what she said, rather consistently during her testimony, absence of real loving feelings. She didn't want the child, didn't want the child back. She has never wanted the child. But she felt guilty about that. And it appears compensated for that by overindulging at time with money to try to compensate for her physical and geographical absence, at times, and for her lack of warm, loving, nurturing behaviors."

5. The defendant had symptoms consistent with someone with Attention Deficit Disorder.

6. The defendant had an exaggerated need for approval and likely had shallow emotional attachments.

7. The defendant had a "childhood that's fraught with difficulties from pregnancy through the first few months, thorough the first few years of separation from mom, through the double-whammy of mama not being able to show love and yet overindulging in material things and otherwise. It seems like a situation where there was little of what we would normally call normal mothering."

The cross-examination of Dr. McClane by the State of Florida revealed the following:

Q You repeatedly in your testimony referred to what impact something could have had, what it can have, what it may have?

A Yes.

Q You don't know in this situation in point of fact what, if any, affect any of those things had on this defendant who sits in this courtroom today; Isn't that right?

A That's correct. To the extent - I was merely talking about statistical probabilities.

Q And generalities?

A Certainly not certainties.

Q Okay. Now, that's because you have not done a complete workup (sic) on this defendant; Is that correct?

A That is correct. I have never met him before today.

Dr. McClane testified that in performing a thorough mental health evaluation of someone for a death penalty case he would normally interview the defendant for an hour and a half to two hours. The doctor would also give some psychological testing to assess a defendant's psychological status concerning organic matters, learning problems, personality problems, or intelligence problems.

Here, Dr. McClane did not interview the defendant nor did he do any psychological testing on him. Dr. McClane was not given any information about the defendant's foster parents or any other persons who might have known the defendant.

Dr. McClane testified as follows:

Q All right. Now, you were not asked to do that complete kind of mental health evaluation in this case; Is that correct.

A That's correct.

Q All you were asked to do is read the deposition and look at the records and come to conclusions based on those?

A Conclusions regarding him.

Q Let me rephrase that. To render some opinions based on those sources?

A That's correct.

Q Now, would you not agree that it is - That that information is not sufficient to come to any reliable conclusions or final conclusions about the defendant?

A Perhaps not final conclusions. Reliability is a different word. If I assume that the records are accurate and that the deposition and court testimony-is accurate, I can come to some probable conclusions, yes.

Q Let me put it to you this way: As a doctor, you would not start on a course of treatment of an individual based on that minimum amount of information, would you?

A No.

On the issue of whether the defendant suffered from Attention Deficit Disorder or conduct disorder, Dr. McClane testified:

Q So based upon the records you reviewed, we don't know whether we have a sufferer from A.D.H.D. or conduct disorder or elements of both?

A That's right. I would favor the latter, but don't know for sure. There is not enough information.

(R, 125-28).

Based on the evidence presented, the trial court concluded:

> It is quite evident that the defendant has suffered from emotional and mental health problems throughout his life. It is also quite evident that the defendant did not have the world's best mother, but he did have a mother who attempted to provide him with everything he needed and wanted. But most important of all, she used the system to provide him with social services through various agencies and schools.
>
> Dr. McClane's testimony was limited by the assignment and materials that were presented to him. As he stated in his testimony, he could not base a course of treatment on the limited information he received concerning the defendant. Not much weight can be placed on his testimony about a defendant he had never interviewed nor seen before first seeing him in court during his testimony. In essence, the doctor did not tell much about the defendant that was not already revealed by his school records.
>
> While the Court finds these factors would be mitigating, it must give these factors little weight because no evidence was presented which demonstrated a link between the defendant's emotional problems, mental health problems and lack of a world class mother and the facts surrounding the murder. There is no evidence to show any relationship between these factors and the murder of Larry Neal Oliver, Jr.

(R, 128).

Lebron is before this Court with the burden of showing error by the trial court; however, he does not address the trial court's inability to assign more than little weight to Lebron's psychological problems due to the absence of any evidence relating those problems to the facts surrounding the murder. Instead, Lebron takes issue with the assignment of

little weight by the trial court (IB, 50), without addressing why little weight was assigned.

"Deciding the weight to be given a mitigating circumstance is within the trial court's discretion, and a trial court's decision is subject to the abuse-of-discretion standard." Cole v. State, 701 So.2d 845, 852 (Fla. 1997)(citing Blanco v. State, 702 So.2d 1250 (Fla. 1997)(holding that in reviewing a trial court's application of the law to a rule 3.850 motion following an evidentiary hearing, this Court applies the following standard of review: "As long as the trial court's findings are supported by competent substantial evidence, 'this Court will not 'substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.'")).

In the instant case, when asked "You don't know in this situation in point of fact what, if any, affect any of those things had on this defendant who sits in this courtroom today; Isn't that right?," Dr. McClune responded "That's correct. To the extent - I was merely talking about statistical probabilities." (R, 126). Thus, here, as in Robinson v. State, 761 So.2d 269, 276 (Fla. 1999), Lebron's emotional and mental

health problems were "given little weight as there [was] insufficient evidence that it caused the Defendant's conduct." Although the trial court gave little weight to the existence of Lebron's emotional and mental health problems because of the absence of any evidence that it caused Lebron's actions on the night of the murder, the sentencing order clearly reflects that the trial court considered the evidence and weighed it accordingly. "The fact that [Lebron] disagrees with the trial court's conclusion does not warrant reversal." Id. at 277 (citing James v. State, 695 So.2d 1229, 1237 (Fla.)(noting that "[r]eversal is not warranted simply because an appellant draws a different conclusion"), cert. denied, 522 U.S. 1000(1997)).

Two of Lebron's other sub-issues are whether "[t]his is not the most aggravated of first-degree murders" and whether there was "[d]isparate treatment of co-defendant's under Enmund-Tyson." (IB, 56-60). However, as they are inextricably intertwined, they will be addressed together.

This Court's opinion from Lebron's first direct appeal specifically found that "one of Lebron's two remaining aggravators was grave (involving his two prior violent felony convictions), and the death penalty has been upheld in cases

similar to this one (FN18)[9] where there was no serious issue of the relative culpability of co-defendants ....” Lebron, 799 So.2d at 1020.

In Lebron’s last direct appeal, this Court found:

> The trial court, cognizant of the jury's special verdicts, [FN19][10] undertook a thorough analysis pursuant to *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), and *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987), to determine whether--assuming that Lebron was not the actual shooter--the defendant was eligible for the death penalty because of the degree of his participation in the charged felonies. Consistent with the record evidence, the trial court determined that Lebron, who orchestrated the events leading to Oliver's death, was qualified pursuant to

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[9] FN18. See *Sliney v. State*, 699 So.2d 662, 672 (Fla.1997) (finding the death penalty proportional with the existence of two aggravators (commission during a robbery and avoid arrest), two statutory mitigators (age and lack of criminal history), and a number of nonstatutory mitigators); *Pope v. State*, 679 So.2d 710, 712 n. 1, 716 (Fla.1996) (finding the death sentence to be proportionate where aggravators were a previous violent felony and that the murder was committed for pecuniary gain; where the statutory mitigators were extreme mental or emotional disturbance and impaired capacity to appreciate the criminality of his conduct; and where nonstatutory mitigation included intoxication at the time of the offense, the violence occurred subsequent to a boyfriend/girlfriend dispute, and the defendant was under the influence of a mental or emotional disturbance).

[10] FN19. In a "special finding" as to the felony murder, the jury found that Oliver "was killed by a person other than Jermaine Lebron," and that Lebron "did not have in his personal possession a firearm" when the murder occurred. The jury also found Lebron guilty of "robbery with a firearm," and made a "special finding" that, during the commission of the robbery, he "did have in his personal possession a firearm."

> the *Enmund- Tison* culpability requirement for imposition of the death penalty, because, as the trial court found, he "was a major participant in the felony committed in this case and at the very least was recklessly indifferent to human life." *Cf. DuBoise v. State*, 520 So.2d 260, 265-66 (Fla.1988) (finding that a nontrigger person who is a major participant in a felony murder and whose conduct demonstrates reckless indifference to human life is death qualified); see generally *Diaz v. State*, 513 So.2d 1045 (Fla.1987) (establishing the mandate that trial courts shall include in their sentencing orders findings supporting the *Enmund/Tison* culpability requirement). The trial court also correctly analyzed Lebron's relative culpability, as compared to the other known participants, based upon its finding--which is supported by the evidence adduced at trial--that the record was "totally devoid of any evidence of anyone else being responsible for the murder of the victim."

Id.

This Court then directed:

> Upon remand, the trial court, in any resentencing of Lebron, may assess the defendant's relative culpability in light of the facts, established by the record, that Lebron was an orchestrator of and major participant in the felonies charged, and that no other known participant was proven to be the shooter. However, the sentence imposed cannot be premised upon a finding that Lebron was himself the shooter, since this would be contrary to the jury's special verdicts.

Id. at 1021.

Lebron alleges no presentation of new evidence that one of the known participants shot the victim, only that the special verdict proves that the shooter received disparate treatment. However, the special verdict was the same during

this Court's review of Lebron's first death sentence. Absent new or additional evidence, Lebron's argument has already been rejected and that rejection approved by this Court. Further, the trial court, in assessing Lebron's relative culpability, was following the directions of this Court when it considered, in light of the facts established by the record, "that Lebron was an orchestrator of and major participant in the felonies charged, and that no other known participant was proven to be the shooter". Therefore, given the competent substantial evidence supporting the trial court's culpability determination (R, 129-31), Lebron cannot show reversible error in the Enmund/Tison analysis conducted by the trial court.

As for whether "[t]his is not the most aggravated of first-degree murders," one of Lebron's two aggravators is grave (involving his four prior violent felony convictions), and the death penalty has been upheld in cases similar to this one where there was no serious issue of the relative culpability of co-defendants. Lebron, 799 So.2d at 1020 n.18[11].

[11]*Sliney v. State*, 699 So.2d 662, 672 (Fla.1997) (finding the death penalty proportional with the existence of two aggravators (commission during a robbery and avoid arrest), two statutory mitigators (age and lack of criminal history), and a number of nonstatutory mitigators); *Pope v. State*, 679 So.2d 710, 712 n. 1, 716 (Fla.1996) (finding the death sentence to be proportionate where aggravators were a previous

See also Blanco v. State, 706 So.2d 7, 11 (Fla. 1997)(affirming death penalty where the trial court found two aggravators, prior violent felony and pecuniary gain - commission during a burglary, one statutory mitigator, impaired capacity, and 11 nonstatutory mitigators); Shellito v. State, 701 So.2d 837, 845 (Fla. 1997)(affirming the death penalty of a twenty-year-old defendant where the trial court found two aggravators, prior violent felony and pecuniary gain - committed during a robbery, and various nonstatutory mitigation consisting of alcohol abuse, a mildly abusive childhood, difficulty reading, and a learning disability); Heath v. State, 648 So.2d 660, 666 (Fla. 1994)(affirming defendant's death sentence based on the presence of two aggravators - prior violent felony and murder committed during the course of a robbery - despite the existence of the statutory mitigator, extreme mental or emotional disturbance); Melton v. State, 638 So.2d 927, 930 (Fla. 1994)(holding death penalty proportional where two aggravated factors of murder

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violent felony and that the murder was committed for pecuniary gain; where the statutory mitigators were extreme mental or emotional disturbance and impaired capacity to appreciate the criminality of his conduct; and where nonstatutory mitigation included intoxication at the time of the offense, the violence occurred subsequent to a boyfriend/girlfriend dispute, and the defendant was under the influence of a mental or emotional disturbance).

committed for pecuniary gain and prior violent felony outweighed some nonstatutory mitigation).

CONCLUSION

Based on the foregoing, all relief should be denied.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to: **Robert Norgard**, Esquire, P.O. Box 811, Bartow, Florida 33831, by MAIL on September ____, 2003.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

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