IN THE SUPREME COURT OF FLORIDA

JERMAINE LEBRON,

Appellant,

vs. APPEAL NO. SC02-1956

CR96-2147

STATE OF FLORIDA,

Appellee.

_____/

APPEAL FROM THE CIRCUIT COURT
IN AND FOR OSCEOLA COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This cause comes before this Curt as a result of the Appellant Jermaine Lebron, being resentenced to death following resentencing proceedings conducted pursuant to this Court's opinion in Lebron v. State, 799 So. 2d 1997 (Fla. 2001). The record on appeal consists of a total of seventeen (17) volumes, including two (2) supplemental volumes. The volume number on appeal will be referenced using Roman numerals. The trial clerk failed to put any page numbers on the materials contained in the supplemental volumes.

STATEMENT OF THE CASE

Jermaine Lebron, the Appellant in this case, was charged by Indictment with First Degree Murder and Robbery with a Firearm of Larry Oliver, in the Ninth Judicial Circuit, Osceola County, Florida on October 28, 1996. (I,R107) Mr. Lebron was

convicted of First Degree Murder and Robbery with a Firearm and was sentenced to death for the First Degree Murder and life imprisonment for the Robbery with a Firearm. He subsequently appealed those convictions and sentences to this Court.

On August 30, 2001, this Court issued an opinion that appeal. The convictions for First Degree Murder and Robbery with a Firearm were affirmed, but the sentence of death was reversed and a new penalty phase was ordered. (I,R3-55) The mandate was issued on

December 3, 2001. (I,R1)

On May 13, 2002, a new jury for the penalty phase was impaneled and the penalty phase proceedings were conducted with Belvin Perry, circuit judge presiding. (I,R72-75)

Prior to the closing argument Mr. Lebron requested that trial counsel be discharged, and that he be allowed to represent himself. (I,R73;XV,R979-1003) Mr. Lebron sought the discharge of his trial counsel because he did not wish trial counsel to give a closing argument. (XV,R979-990) The trial court allowed Mr. Lebron to discharge his trial counsel, and then ordered trial counsel to act as stand-by counsel.(XV,R1011-1012) Although the State gave a closing argument, the defense did not make a closing argument based on Mr. Lebron's decision to waive closing argument.

The jury returned an advisory recommendation that the death penalty be imposed by a vote of 7 to 5. (I,R75,88;XV,R1040)

Following the penalty phase proceeding before the jury, trial counsel was reappointed to represent Mr. Lebron at his request and the court then set a Spencer hearing for June 19, 2002. (I,R89;V,R195-215) At the Spencer hearing, defense counsel requested that the court review the written sentencing memorandum submitted by defense counsel during the prior proceedings. (V,R196) Defense counsel also requested that the court review the four exhibits previously entered into evidence, which included the deposition of Jocelyn Ortiz, Jermaine's school records, and two

sets of Jermaine's institutional records from the Pleasantville Cottage School. (I,R199) Defense counsel argued that these records corroborated the testimony of Dr. McClane presented during the penalty phase proceedings before the jury. (V,R199) Counsel also requested that the trial court consider the circumstances surrounding the convictions relating the Nasser incident in that were committed in response to Nasser's attempted rape of Jermaine's friend. (V,R200)

Defense counsel noted that the jury's vote of 7 to 5 in the instant case occurred in a penalty phase proceeding in which the State gave a closing argument, and there was no closing argument

by the defense. (V,R201-202)

Defense counsel reminded the trial court that one aggravating factor found in the trial court's first sentencing order had been stricken by this Court. (V,R202) In addition, the prior felonies relating to Nasser that were relied on in the first proceeding had been reversed for a new trial, and Mr. Lebron had been convicted of significantly lesser offenses at a new trial.(V,R202)

Mrs. Oliver, the mother of Larry Oliver, addressed the trial court. (V,R206) The State also requested that their prior written sentencing memorandum be used. (V,R196) The State asserted that Dr. McClane's testimony lessened the weight of the mitigation in the instant proceeding, as opposed to the mitigation in the first penalty phase. (V,R207-208)

On August 6, 2002, Mr. Lebron filed a motion in which he sought to bar the imposition of the death penalty pursuant to Ring v. Arizona, 122 s. cT. 2428 (2002). (I,R93-105) The trial court denied the motion. (I,R106)

Mr. Lebron appeared for sentencing on August 15, 2002. (VI,R217-262) The trial court imposed a sentence of death for the First Degree Murder and a sentence of life imprisonment for the Robbery with a Firearm. (I,R134-136) The sentencing order was read in open court. (VI,R217-262)

The trial court's sentencing order was also filed on August 15, 2002. (I,R107-132) In the sentencing order the trial court found two aggravating factors:

> (1) The defendant was previously convicted of a felony involving the use or threat of violence to a person.
>
> (2) The capital felony was committed while the defendant was engaged in or was an accomplice in the commission of the crime of robbery.

The trial court found the following mitigating factors and assigned the following weight:

> (1) Prenatal problems - Drug addicted mother - Very little weight.
>
> (2) School Performance - Some weight.
>
> (3) Interpersonal - Good with children-Very little weight.
>
> (4) Parent Profile-Very little weight.
>
> (5) Neglect-Some weight.
>
> (6) Incarceration-no escapes; maintaining family contact - Very little weight.

> (7) Psychological-Very little weight due to lack of link between emotional problems, mental health problems, and mother's deficiencies and the murder.

The trial court rejected the following mitigating factors which were requested by trial counsel:

> <u>Statutory</u>
>
> (1) The Defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor. The court acknowledged that the

verdict had determined that the victim was killed by someone other than Jermaine and that Jermaine had a firearm during the robbery.

Non-Statutory

(1) Disparate treatment of Co-Defendants.

(2) Domestic Violence.

(3) Race.

(4) Urban Resident.

(5) Institutionalization.

(6) Childhood Accidents.

The trial court then conducted an Enmund-Tyson Analysis to determine the relative culpability of the co-defendants. (I,R129) The court found that Mr. Lebron was a major participant in the felony and was recklessly indifferent to human life. (I,R131)

The trial court found that the aggravating factors outweighed the mitigating factors. (I,R131)

A timely Notice of Appeal was filed on August 21, 2002. (I,R145)

STATEMENT OF THE FACTS

The following summarizes the evidence and testimony presented

during the penalty phase proceedings before the jury:

STATE PRESENTATION

Rebecca Oliver testified that she is the mother of the victim, Larry Oliver. (XII,R566) She described the victim as energetic, very funny, a happy-go-lucky person. (XII,R567) The victim was an avid soccer player and his mother went to most of his games. (XII,R568)

The victim worked two jobs- one at the Marriott World Center as a server, and the second at Umbro, a retail store. (XII,R569) The victim had a truck that was very special to him. (XII,R570)

Mrs. Oliver was then permitted to read a prepared statement. (IXII,R572) The trial court did require that references in the statement addressed to the victim be deleted. (XII,R573) Mrs. Oliver prefaced her reading the prepared statement with the comment that she had written this as a eulogy at his funeral. (XII,R573)

Larry Oliver, Sr., is Mr. Oliver's father. (XII,R575) He testified that Mr. Oliver was a great kid, very nice, and very kind to people. (XII,R576) Mr. Oliver recounted some memories of the victim as a child. (XII,R578) He stated that the victim did not have a definite career path, but that he wanted to help people.

(XII,R578) The victim's death affected him deeply. (XII,R579) He repaired the victim's truck and drives it daily. (XII,R579)

Charissa Wilburn testified that she met Mr. Lebron in 1995 through her boyfriend, Mark Tocci and his twin brother, Joe. (XII,R582) Jermaine went by the nickname "Bugsy". (XII,R583) During this period, Wilburn and the Tocci twins were part of a group of kids which included Duane Sapp, Mary Lineberger, Vern Williams, and Danny Summers. (XII,R584) The Toccis, Sapp, and Williams all had matching tattoos that said "Foreplay". (XII,R623) Those four had known each other for years and were like brothers. (XII,R624) Mr. Lebron joined this existing group when he began to hang out with Joe Tocci. (XII,R584)

The Toccis, Williams, and Sapp all lived together in a house on Gardenia. (XII,R584) At some point in time, Mr. Lebron moved into the house. (XII,R585)

On the night of the murder, Mark Tocci and Wilburn left her parents home to meet the others at Kinko's. (XII,R586) Mr. Lebron needed to "fake" some school papers in order to get money from his mother. (XII,R587) They had a problem at Kinko's, so Danny Summers, Mr. Lebron, Wilburn, and Mark Tocci then went to Mary Lineberger's parent's home. (XII,R588) They messed around on the computer, watched some TV, and then decided to leave. (XII,R588)

While they were driving, a red pickup truck pulled up beside them at a traffic light. (XII,R589) Summers said he knew the

driver, Larry Oliver. (XII,R589) Summers and Mr. Oliver had worked together at Marriott. (XII,R590) Mr. Lebron told Summers to get Mr. Oliver to pull over, and Mr. Oliver did. (XII,R590)

Mr. Oliver started talking about parts he wanted for his truck. (XII,R590) Mr. Lebron told Summers to tell Mr. Oliver that he had the parts for his truck. (XII,R590) Mr. Lebron told Summers to tell Mr. Oliver to come back to the house on gardenia to look at them. (XII,R591)

Mr. Lebron had a gun in the truck with him. (XII,R591) It was a shotgun that Mr. Lebron called "Betsy". (XII,R591) Wilburn claimed that she could not remember anyone else in the group with this gun, although she admitted that she remembered seeing a picture of Joe Tocci with the gun. (XII,R616) On cross-examination, Wilburn acknowledged that during her previous testimony she had admitted to seeing Mark Tocci with the gun. (XII,R636-637) Wilburn then stated she did remember Mark Tocci with the gun. (XII,R637) Wilburn then agreed with her prior testimony that most of the guys (Summers, Sapp, and Williams) had handled the gun. (XII,R638) Wilburn testified that the gun was kept in a closet and that all of them had access to it. (XII,R638)

As they were driving back to the house on Gardenia, Wilburn testified that Mr. Lebron was very excited and was saying things like "I'm going to jack him"; "Watch what I can do"; "I'm going

to show you how it's done". (XII,R631)

Wilburn also testified that she heard Mr. Lebron say "I'm going to kill him". (XII,R592;609) On cross-examination she admitted that she had never claimed to hear this before and that she did not remember him saying this exactly. (XII,R631) Previously, she did not remember Mr. Lebron saying that he was going to kill Mr. Oliver, only that he would "jack" or rob him. (XII,R631) After her prior testimony was read back to her, Wilburn stated that Mr. Lebron did not say that he was going to kill Mr. Oliver. (XII,R633)

Wilburn did not know what to make of what Mr. Lebron was saying, so she asked Mark Tocci what he meant. (XII,R592) Tocci just shrugged. (XII,R592) Wilburn did not think Mr. Lebron was capable of doing something like that. (XII,R610)

When they arrived at the house on Gardenia, Mr. Oliver pulled in behind them. (XII,R593) Mr. Lebron tossed the gun into Wilburn's lap. (XII,R593) The gun was wrapped up. (XII,R610) He told her to take it into the house. (XII,R593) Wilburn took the gun into the house and put it on Joe Tocci's bed. (XII,R594) She then went across the hall into Mark Tocci's bedroom. (XII,R594)

Wilburn did not know what was going to happen. (XII,R595) She thought there might be some violence, but she made no

attempt to warn Mr. Oliver. (XII,R595)

Later, Mark Tocci came into the room and sat next to Wilburn. (XII,R596) Mark said that nothing was going on. (XII,R596) Mr.

Lebron then came into the room and asked Mark to come out of the bedroom. Mark left. (XII,R596)

Wilburn then heard the stereo turned up and Mr. Lebron screaming at someone to get down. (XII,R596) She next heard a gunshot. (XII,R597) Mr. Lebron then came into the room and told Wilburn that she could get up, and that it was done. (XII,R597) Mark came in and got her and Mark and Wilburn went outside and left. (XII,R598) Wilburn admitted that Mr. Lebron did not threaten her or try to stop her from leaving. (XII,R641) Wilburn could not give a reason why she did not go to the police at that point.(XII,R641)

At the time the shots were fired, Wilburn thought that Mark, Mr. Lebron, Summers and herself were the only people in the house. (XII,R599) Wilburn did not know who killed Mr. Oliver. (XII,R610) She loved her boyfriend and did not want to see him, his brother, or Summers get into trouble. (XII,R611)

Mark and Wilburn returned to the house. (XII,R599) Mr. Lebron was sitting on the couch looking through Mr. Oliver's wallet. (XII,R599) Joe Tocci, Summers, Lineberger and Sapp were

at the house. (XII,R599) Wilburn saw Williams and Sapp pulling the body out of the house. (XII,R600;644)

Wilburn then stated did not call the police because she was afraid of Mr. Lebron. (XII,R600) She also admitted that she did not call the police because she knew her boyfriend and other

friends were involved and did not want to see them in trouble. (XII,R611;622-623)

The next day Wilburn, both Toccis, Mr. Lebron, Summers, and Sapp went to the Hooter's restaurant in downtown Orlando. (XII,R601) Mr. Oliver's credit card was used to pay for the meal. (XII,R620)

At some point in time, Wilburn learned that Sapp's truck had been on the news because it had been photographed at a bank where Sapp was cashing a check belonging to Mr. Oliver. (XII,R602) At that point, they discussed going to the police. (XII,R614) Wilburn thought if she kept saying things happened because she was afraid of Mr. Lebron, she would not be charged with anything. (XII,R617)

A week later, she went to the house on Gardenia and discovered that the police were there. (XII,R602) Wilburn agreed to talk to them. She was ultimately charged with Accessory After the Fact. (XII,R603) She pled to the charge, and served two years in prison and two years on probation.

(XII,R603) Wilburn served only seven months in prison before being placed on work release. (XII,R648)

Sergeant Andrew Lang was a detective who investigated the death of Mr. Oliver. (XII,R676) He was at the sheriff's office when Mark Tocci, Joe Tocci, and Duane Sapp came in to report that Joe Tocci's vehicle had been stolen and was possibly en route to New York. (XII,R676)

After further talking with these individuals, Duane Sapp took

the law enforcement officers to Mr. Oliver's body. (XII,R677) The body was recovered from an orange grove. (XII,R678) An attempt had been made to conceal the body. (XII,R678) An autopsy determined that the cause of death was a gunshot wound to the back of the head. (XII,R680)

Lang went to the house on Gardenia. (XII,R681) There was a strong odor present in the house. (XII,R681) There was a large area of blood found when the bedroom door to Joe Tocci's room was opened. (XII,R681) A towel, sponges, and kitty litter were found near the blood. This showed an attempt to clean up the blood. (XII,R684)

Williams and Sapp turned themselves in to the Connecticut State Police. (XII,R685) Lineberger and Wilburn showed up at the house on Gardenia while investigators were there and they

were arrested at this scene. (XII,R685)

Mr. Lebron was arrested in New York City. (XII,R686) Stacy Kirk and Howard Kendall were with Mr. Lebron. (XII,R686) They had Joe Tocci's truck. (XII,R686) A day planner and an insurance card belonging to Mr. Oliver were found in the truck. (XII,R687) A Winchester 4 shotgun shell was also found in the truck. (XII,R692)

Lang learned the following information regarding this case, which he was allowed to testify to over the objection of defense counsel (XII,R687-690;695-696):

Danita Sullivan was Mr. Lebron's girlfriend. (XII,R692)

Sullivan claimed that Mr. Lebron told her that he shot Mr. Oliver after having him get on his knees and putting his hands behind his head. (XII,R692)

Christine Charbonnier, another girlfriend of Mr. Lebron's, stated that Mr. Lebron told her he was looking for an alibi for the night of the murder. (XII,R698) Mr. Lebron told Charbonnier how the murder happened, and that he put Mr. Olvier on the floor and shot him. (XII,R699)

Charbonnier was interviewed two years after Mr. Lebron's arrest. (XII,R719) She came forward after getting letters from Mr. Lebron asking her to provide an alibi. (XIII,R739)

Jesenia Ortiz was the sister of a person who was in jail

with Mr. Lebron. (XII,R701) Mr. Lebron offered her $20,000 if she would provide him with an alibi for the night of the murder. (XII,R701) She said that he told her he committed the murder. (XII,R701) After an objection by defense counsel, Lang clarified his testimony and said that Ortiz said that Mr. Lebron never said he was the shooter, but with hand gestures he indicated that he was. (XII,R703)

Stacy Kirk was arrested with Mr. Lebron. (XII,R704) She provided information about how the murder allegedly occurred based on information that Mr. Lebron told her. (XII,R704) Kirk told law enforcement officers that Mr. Lebron screamed at Mr. Oliver, then put his foot on Mr. Oliver's head and shot him. (XII,R705) Kirk

and Lineberger were roommates. (XII,R705) Shotgun shells were also found in Kirk's purse at the time of her arrest. (XIII,R726)

Lang acknowledged that during an investigation some people tell the truth and others do not. (XIII,R724)

Lang stated that in his investigation there was no individual who stated they saw Mark Tocci shoot Mr. Oliver. (XII,R705)

Defense counsel moved for a mistrial with respect to this testimony, arguing that testimony that Mr. Lebron was the

shooter was in contravention to the opinion of this Court and inadmissible based on the prior jury's finding of fact in their verdict that MR. Lebron was not the shooter. (XII,R707-711) The motion was denied.

Lang knew that Danny Summers was the person who got Mr. Oliver to stop. (XIII,R724) Summers had fled thejurisdiction and did not turn himself in until December. (XIII,R725) Vern Williams fled with Summers. (XIII,R725-26)

Lang's investigation confirmed that Sapp, Williams, Linegerger, and Wilburn attempted to clean up the house on Gardenia. (XIII,R726)

Lang's investigation developed that Sapp and Howard Kendall got rid of Mr. Oliver's truck and tried to burn it. (XIII,R727) Lang's investigation also developed that Sapp and Williams dumped the body. (XIII,R727)

Property belonging to Mr. Oliver was found in the house on Gardenia. (XIII,R727) A CD binder with over one hundred CDs was

found. (XIII,R727) Various pieces of Mr. Oliver's jewelry were found throughout the house. (XIII,R727) Mr. Oliver's rings were found in Vern William's bedroom. (XIII,R729)Mr. Oliver's jewelry was also found on the mantel and in a dish in the kitchen. (XIII,R729) Different items from Mr. Oliver's truck were found in the garage. (XIII,R727)

Sapp and Joe Tocci pawned various items taken off of Mr. Oliver's truck. (XIII,R728) Mr. Lebron was present at the pawn shop according to Joe Tocci and Sapp. (XIII,R733) An employee of the pawn shop was shown Mr. Lebron's photo and could not identify him. (XIII,R743)

When Mr. Oliver's credit card was used at Hooters the day after the murder, Sapp signed the credit card payment slip. (XIII,R728) Mr. Lebron was also at Hooters. He left his telephone number with a waitress. (XIII,R743)

Sapp and Mark Tocci cashed a check belonging to Mr. Oliver. (XIII,R728) They claimed that Mr. Lebron was with them, but security photographs taken that day showed only two people in the car. (XIII,R733-734)

None of Mr. Oliver's possessions were found on Mr. Lebron's person. (XIII,R729) Mr. Lebron's handwriting was found in Mr. Oliver's day planner. (XIII,R734)

Detective Mark Thompson also worked on this case. (XIII,R745) He interviewed Wilburn and prepared a written report of that

interview. (XIII,R746) According to his report, Wilburn told Thompson that Mr. Lebron said he wanted to jack someone that evening and kill someone, though not Mr. Oliver specifically. (XIII,R749)

The State then requested that a certified copy of the New York conviction for a prior violent felony be moved into evidence.

Defense counsel objected to the introduction of this prior conviction of Mr. Lebron from New York on the grounds that the New York disposition was as a Youthful Offender. (XIII,R752) The conviction document reflected a section called "mitigating circumstances", which under New York law that this was not a conviction. (XIII,R752) The alleged conviction was not for a ""D" felony". (XIII,R754) Defense counsel further objected that the proffered document was not a conviction and did not state it was a conviction. (XIII,R755)

The State then requested that the Information in the Nasser case be moved into evidence. An objection was made by defense counsel to the jury being informed in the Nasser case that the original charge was attempted first degree murder. Defense counsel also objected to the jury being informed that Mr. Lebron was convicted of a misdemeanor on that charge. (XIII,R764-766)

Officer Ron Schroeder testified that he investigated an aggravated assault that Mr. Lebron had been convicted of involving Brandy Gribben. (XIII,R767) Gribben maintained that she had been

threatened with a shotgun by Mr. Lebron (XIII,R768) Over

objection, documents relating to that conviction were published to the jury. (XIII,R769-770)

Schroeder testified that Mr. Lebron was charged with Aggravated Assault with a Firearm and that the offense occurred in November. (XIII,R771) Schroeder admitted that when making the complaint, Gribbens failed to mention that she had pulled a knife on Mr. Lebron, threatened him with it, had to be disarmed, and had taken a baseball bat to the walls of the apartment. (XIII,R772)

Schroeder also investigated a case involving a Mr. Nasser. (XIII,R777) This crime occurred on December 1. (XIII,R777) Over objection, Schroeder stated that Nasser claimed that while he was with Stacy Kirk, a white man with a stun gun and a black man with a shotgun blindfolded him and took him away in a car. (XIII,R779) Mr. Lebron was identified as the black man, and Howard Kendall was identified as the white man. Nasser was driven to an orange grove and made to get out of the car. (XIII,R780) Nasser was forced to get on his knees. (XIII,R78) Someone said "Tell the Lord Bugsy says hi" and the trigger was pulled, but the gun jammed. (XIII,R781) While the black man went back to the car, Nasser ran away. (XIII,R782)

Nasser was never deposed and did not testify at trial because he had disappeared. (XIII,R778;785)

Defense counsel objected to evidence being presented to the

jury that Mr. Lebron had used a firearm in the Nasser case, when the verdicts in that case were for simple assault, kidnapping without a weapon, and robbery without a weapon. (XIII,R794) A motion for mistrial was made by defense counsel and denied. (XIII,R795-798)

Defense Presentation

Jocelyn Ortiz is the mother of Mr. Lebron. (XIV,R802) She lives in New York City, but was born in the Dominican Republic. (XIV,R802) Ms. Ortiz came to New York at the age of 11 or 12 with her mother and brother. (XIV,R803) By age 16, she was living on her own. (XIV,R803) She lived on the streets. (XIV,R804)

Shortly after leaving home, she became pregnant with Mr. Lebron. (XIV,R804) She was 17 when Mr. Lebron was born. (XIV,R805) The father had been her boyfriend for a couple of months. He was a few years older than her, and also lived on the streets. (XIV,R805) He was a drug user. (XIV,R807) He made an attempt to parent Mr. Lebron at one point when he was released from a prison sentence, but left after a few months. (XIV,R805-806) Ms. Ortiz did not blame him for this because who would want to take care of a baby? (XIV,R806) Mr. Lebron had no contact with the father after he was three months old. (XIV,R807)

Ms. Ortiz got pregnant because it was the thing to do in the '70's. (XIV,R805) She lived on the streets, but if she had a kid she could get public assistance, an apartment, and other stuff.

(XIV,R805) Having a child was a way to support herself. (XIV,R805)

Ms. Ortiz felt frustrated with having a child. (XIV,R811) Ms. Ortiz referred throughout her testimony to her son as "it". (XIV,R811) She testified that she "didn't want it, actually. I didn't want to be mother. You know, I did it because it was the thing to do. And when I had it and when I saw what a hassle it was, I didn't want it. I resented it." (XIV,R811)

Ms. Ortiz resented Mr. Lebron because he kept her from being with her friends. (XIV,R811) Ms. Ortiz was very much into her body and having a child changed her body. (XIV,R811) She couldn't go dancing. (XIV,R811) She couldn't imagine anyone wanting a child. (XIV,R811)

When Mr. Lebron was about three months old, Ms. Ortiz entered a residential drug treatment program called Day Top. (XIV,R807) The program was for drug addicts. (XIV,R807) Ms. Ortiz first began in the day program, but she continued using drugs.(XIV,R808) She was then told that if she did not enter the residential program, she would be reported to social

services and her child taken. (XIV,R808) She felt that in the residential program she could get some schooling, and a place to live. (XIV,R829) She wanted to better herself and not be on drugs, so she entered the program. (XIV,R829) She remained in the drug program for 27 or 28 months. (XIV,R809)

Ms. Ortiz began using drugs for the first time when she ran

away from home at age 14. (XIV,R807) She used heroin, cocaine, pills, amphetamines, downer, uppers, LSD- whatever was around at the time and "hip". (XIV,R807) She used various drugs while pregnant with Mr. Lebron, including downers, uppers, and marijuana. (XIV,R808) Despite these admissions, Ms. Ortiz called herself a drug user, not an addict. (XIV,R828)

Mr. Lebron was placed in foster care while Ms. Ortiz completed the drug program. (XIV,R809) For the first year and a half of the program she did not see him at all. (XIV,R810) For the remaining time she would see him once every couple of months. (XIV,R810) He did not return to her until she had finished the program and participated in aftercare. (XIV,R809) Mr. Lebron came back to her at age four or five. (XIV,R810)

Ms. Ortiz had mixed feelings on having Mr. Lebron back. (XIV,R812) Part of her wanted him so she would not feel guilty, but she really did not want him back. (XIV,R812)

Ms. Ortiz met Joesph Oritz in drug treatment. (XIV,R812)

Their marriage lasted less than a year. (XIV,R812) Their marriage failed because they had no money, and Ms. Ortiz had to try to be a parent when she did not want to be a parent. (XIV,R813)

Ms. Oritz worked as a drug counselor for awhile after the marriage ended. (XIV,R814) She still had Mr. Lebron, but found raising him frustrating. (XIV,R814) She did not like having to teach him things like how to tie his shoes. (XIV,R814) She had

subsidized childcare for Mr. Lebron and spent as little time as possible with him. (XIV,R814) Her memories of Mr. Lebron at this age were "frustrated and hard". (XIV,R815)

When Mr. Lebron entered school he had problems. He was also hyperactive. (XIV,R815) Ms. Ortiz refused to give Mr. Lebron medicine to control his hyperactivity. (XIV,R815) While she did not believe that Mr. Lebron was a "retard", she felt he suffered from what she herself had attention deficient disorder. (XIV,R815)

Ms. Oritz left counseling to become a bikini dancer, which soon evolved into her becoming a go-go dancer and then stripper. (XIV,R826) Ms. Ortiz remained a stripper for over ten years. (XIV,R816) She worked all hours and in many places all over the country. (XIV,R816-817) She spent little time with Mr. Lebron, and instead leaving him with sitters. (XIV,R817) Ms. Ortiz was

too tired, physically and emotionally, to care for Mr. Lebron, so she tried to make a lot of money to provide things for him to make up for it. (XIV,R817)

Ms. Ortiz saved her money and she also met a boyfriend through dancing who loaned her the money to open up her own strip club. (XIV,R818) She opened the club when Mr. Lebron was a teenager. (XIV,R818) Mr. Lebron was having so many problems in school that a therapist suggested that he be placed in a school for kids with emotional disabilities. (XIV,R818) Ms. Ortiz put Mr. Lebron into Pleasantville Cottage School when he was twelve. (XIV,R818)

Mr. Lebron remained at Pleasantville for many years. (XIV,R823) Ms. Ortiz would see him once a month or so. (XIV,R823) When he came to visit she could not work, so she would just leave him with a sitter. (XIV,R823)

Ms. Ortiz was so frustrated by Mr. Lebron,that she would hit him. (XIV,R824) She hit him because he would not listen to her or because he would be afraid to do something. (XIV,R824) She did not beat him badly enough to require hospitalization, but she hit him. (XIV,R824) She also recalled punching him in the face one time. (XIV,R824) Ms. Ortiz thought that if she had a mother who didn't beat her, perhaps she wouldn't have beat Mr. Lebron. (XIV)

She would also say mean things to him. (XIV) She could not remember ever saying anything nice to him because she was not brought up that way. (XIV) She never told him that she loved him. (XIV)

Ms. Ortiz stated she was dancing and did not have time to control Mr. Lebron, especially with his emotional problems. (XIV) There is a family history of mental health problems. (XIV,R820) Ms.Ortiz' mother had mental problems, including hearing voices. (IXV,R820) Her twin brother is schizophrenic, for which he is institutionalized. (XIV,R820) Ms. Aortas is depressed and takes Prozac. (XIV,R820)

Ms. Oritz had no contact with her mother since before Mr. Lebron was born. (XIV,R821) She did not know if her mother was

alive or dead. (XIV,R821) She has no contact with her brother, because he embarrasses her. (XIV,R821)

Ms. Ortiz thought that Mr. Lebron wanted love and a mother, but she is incapable of being a mother. (XIV,R816) She never wanted to be a mother and still doesn't. (XIV)

Ms. Ortiz believes that Mr. Lebron wants to please people and to be accepted. (XIV,R822) As a child he would give away expensive toys and clothing to ghetto kids in order to be liked. (XIV,R822-823) She did not think he was a leader. (XIV,R823) She believes that her son was a coward. (XIV,R831)

Ms. Oritz could not name a single long term stable influence in Mr. Lebron's life. (XIV,R823)

Ms. Ortiz has supported Mr. Lebron since the murder because he is her son. (XIV) She may have treated him like a dog because she did not know any better, but out of guilt she has provided money. (XIV,R827) Ms. Ortiz would have liked to have walked away and said to hell with Mr. Lebron, but she did not because of guilt. (XIV,R827) She would not be able to live with herself if she walked away, so it was to deal with her guilt that she came to court and paid his legal bills. (XIV,R827) There are moments when she hates and despises her son, and some moments that she loves him. (XIV,R830)

Dr. Thomas McClane is a psychiatrist. (XIV,R834-835) He specializes in forensic psychiatry, (XIV,R836) He frequently is

asked to evaluate parenting skills and render opinions on fitness of individuals to parent. (XIV,R836)

In this case Dr. McClane reviewed numerous documents relating to Mr. Lebron and a deposition of Ms. Aortas. (XIV,R840) He also was present in the courtroom for the testimony of Ms. Aortas. (XIV,R840)

Dr. McClane testified that people who do not have the experience of a loving mother are often warped and limited in their own ability to show appropriate affection and nurturing to

their own children. (XIV,R841) Ms. Aortas had poor patenting, which combined with other improperly learned behaviors in an atmosphere clouded by drugs, rendered her an unfit parent. (XIV,R842-843)

Separation from the mother for a young child often causes the child to be warped as the child does not have appropriate warmth and security. (XIV,R844) Separation is highly traumatic for the child. (XIV,R846) In this situation, with the genetics and family history of mental illness, it would be even stronger. (XIV,R846)

The separation experienced by Mr. Lebron when his mother entered drug treatment would increase the likelihood that the child would view the world as rejecting, and not nurturing. (XIV,R847) Children subjected to this type of seperation form barriers against intimacy and have difficulty forming relationships, showing love, and having respect for people, values, and society. (XIV,R847)

The return to his mother with a stepfather would likely have

had a negative effect. (XIV,R847) When his stepfather left, this experience would reinforce loss. (XIV,R847)

In Dr. McClane's opinion, Ms. Aortas was torn between a feeling of duty and her lack of loving feelings toward Mr. Lebron. (XIV,R848) She did not want the child, felt guilty for

feeling that way, and then overcompensated with money to make up for physical and geographical absence and lack of nurturing behaviors. (XIV,R848)

Hyperactivity disorder causes people to act on impulse without thinking out their actions. (XIV,R849) They have difficulty concentrating, staying on task, or waiting for anything. (XIV,R849) Attention deficit hyperactivity disorder is often complicated by other emotional and learning disabilities. (XIV,R849)

In Mr. Lebron's situation, the presence of ADHD combined with the home situation would contribute to failure in school. (XIV,R851)

Dr. McClane believed that Mr. Lebron had an exaggerated need for approval based upon his background. (XIV,R851) He would have shallow emotional attachments. (XIV,R852) Ms. Ortiz' physical treatment of Mr. Lebron in terms of her hitting him would be significant in development. (XIV,R853)

Dr. McClane testified that Mr. Lebron's childhood was fraught with difficulties from pregnancy on. (XVI,R854) It was a situation in which where there was very little of what would be called a

normal childhood. (XIV,R854)

Dr. McClane opinions were rendered in generalities because

he had not interviewed Mr. Lebron, but instead relied on decumentary materials and the information continued in Ms. Ortiz' testimony. (XIV,R855)

Over objection, Dr. McClane testified that he would usually interview the defendant and perhaps do some testing. (XIV,R858-860) He would also review records, which was done in this case. He would associate a neuropsychologist, if necessary. (XIV,R859)

In this case Dr. McClane reviewed Mr. Lebron's school records, legal papers, and Ms. Aortas's deposition. (XIV,R861) He did not perform a mental health evaluation of Mr. Lebron. (XIV,R862) However, Dr. McClane felt he could reach a reliable, probable conclusion about Mr. Lebron based upon what he reviewed. (XIV,R862)

On cross, Dr. McClane stated he was aware of a diagnosis referred to as conduct disorder. (XIV,R863) While there were some suggestions of conduct disorder in the documents that Dr. McClane reviewed, he did not make a finding of conduct disorder.

Dr. McClane found school records which indicated that Mr. Lebron had difficulty in school, suffered low self-esteem, was hyperactive, manipulative, unprepared, and distractible. (XIV,R867) He was suspended, and eventually expelled from school. (XIV,R867) These behaviors would not be used by most mental health professionals to diagnose conduct disorder. (XIV,R868) Dr. McClane

briefly defined antisocial personality disorder. (XVI,R871) Although he could not state for certain that this diagnosis would not apply to Mr. Lebron, without more information he would still find the ADHD diagnosis instead of antisocial. (XIV,R872) A strikingly large number of people who manifest ADHD as children will carry those same behaviors into adulthood. (XIV,R878)

Dr. McClane found no evidence of psychosis or schizophrenia in Mr. Lebron's records. (XIV,R874) He did find evidence of learning disabilities. (XIV,R874) Mr. Lebron's IQ was in the normal range. (XIV,R874)

Defense exhibits of prior testimony were admitted into evidence as follows:

Defense counsel published to the jury excerpts from the trial involving Brandi Gribben. (XV,R945) Joe Tocci testified that he was yelling at Brandi at the apartment, and telling her to pack her things and leave. (XV,R946) Brandi got crazy and mad, and began throwing things. (XV,R946) She started swinging a bat and throwing mugs at Mr. Lebron. (XV,R946) She then smacked Mr. Lebron. (XV,R946) Gribben made holes in the apartment wall. (XV,R946) Gribben then went into the kitchen and grabbed a knife. (XV,R946) She looked like she wanted to slice someone. (XV,R946) Tocci grabbed the knife from her. She

seemed to be directing her anger at Mr. Lebron. (XV,R947)

Tocci and Mr. Lebron, along with several others left.

(XV,R947) They all went back to the house on Gardenia and go the gun. (XV,R947) They returned to the apartment. (XV,R948) Mr. Lebron walked up to Gribbens, held up the gun,and told her to leave. (XV,R948)

SUMMARY OF THE ARGUMENT

The trial court erred in permitting the state to exercise a peremptory strike against an African-American juror without providing a race-neutral reason that was supported by the record.

Reversible error occurred when the State repeatedly violated the prior opinion of this court by presenting evidence and argument to the jury that Mr. Lebron was the shooter in this case.

The trial court erred in permitting the jury to consider an inadmissible misdemeanor conviction and an inadmissible crime from New York,and then relying upon those convictions in imposing a death sentence. The trial court further erred in permitting prejudicial and inflammatory testimony regarding the misdemeanor conviction for simple assault.

The death sentence is unconstitutional under Ring v.

Arizona, 122 S. Ct. 2428 (2002).

The trial court committed reversible error in failing to find mitigating factors that were established by the greater weight of the evidence and uncontroverted. The trial court also committed reversible error by abusing its discretion in assigning weight to

mitigating factors.

The sentence of death in this case is not proportional when compared to the sentences of the co-defendants and other death penalty cases.

ARGUMENT

ISSUE I

REVERSIBLE ERROR OCCURRED WHEN THE STATE IMPERMISSIBLE EXERCISED A PEREMPTORY CHALLENGE TO EXCUSE AN AFRICAN-AMERICAN JUROR WITHOUT PROVIDING A RACE-NEUTRAL REASON FOR THE EXCLUSION

During jury selection the State, struck Juror 108, Mrs. Nelson-Brown, utilizing a peremptory challenge. (X,R465-466) Noting that juror 108 was an African-American, defense counsel requested a race-neutral reason for the strike. (X,R465) The State's response was as follows:

> She 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.

(X,R465).

Defense counsel challenged this explanation, pointing out that other potential jurors had expressed that they did not strongly favor the death penalty but could be fair, and those jurors had not

been stricken. (X,R466) Defense counsel specifically referenced Juror Bastian and Juror Daniels. (X,R466) The trial court permitted the strike. (X,R466)

Defense counsel timely raised a *Neil/Slappy* issue regarding Mrs. Nelson-Brown. Defense counsel timely objected on racial grounds, established that Nelson-Brown is a member of a distinct racial group, and requested a reason for the use the challenge. Rodriguez v. State, 753 So. 2d 29 (Fla. 2000), rehearing denied, cert. denied, 121 S.Ct. 145 (2000).

The issue is preserved for appeal because defense counsel disagreed with the state's explanation regarding the use of the peremptory challenge and contested the explanation. Defense counsel pointed out that other jurors were permitted to remain on the panel by the State even though they expressed the same

opinions as Nelson-Brown. Floyd v. State, 569 So. 2d 1225 (Fla. 1990). Defense counsel also objected at the time the panel was seated. (X,R470) Melbourne v. State, 661 So. 2d 932 (Fla. 1996). The standard of review on this issue is whether or not the trial court abused its discretion. Files v. State, 613 So. 2d 1301 (Fla. 1992).

When the State is challenged to support the use of a peremptory challenge based on a race-neutral reason, the burden shifts to the State to come forward with a race-neutral explanation. If, based on all the circumstances, the trial court

believes that the explanation is not a pretext, the peremptory challenge is allowed. Rodriguez, supra; Overstreet v. State, 712 So. 2d 1174 (Fla. 3rd DCA 1998).

The court in Overstreet listed five factors to be considered when evaluating whether or not a challenge is race-neutral. The court found that if one of the five factors is present, the explanation for the peremptory challenge will tend to be an impermissible pretext. The five factors delineated in Overstreet are:

(1) Alleged group bias not shown to be shared by juror in question.
(2) Failure to examine juror or perfunctory examination.

(3) Singling out juror for special questioning designed to evoke certain response.
(4) Prosecutor's reason is unrelated to facts.
(5) Challenge is based on reasons equally applicable to jurors who were not challenged.

The questioning of Nelson-Brown, Juror 108, revealed that while she did not agree with the death penalty, she could lay aside that opinion and consider it as a punishment. (VIII,R129) If, under the law, a death sentence was warranted, she could vote to impose it. (VIII,R129) She could also vote for a life sentence. (VIII,R129)

Several other jurors gave the same responses as Nelson-Brown.

For example, Juror 207 (a seated juror) believed the death penalty was warranted in some cases and not in others. (VIII,R121) She would "do her best" to follow the law. (VIII,R122) Her response that she would "do her best" was a weaker response that Nelson-Brown's affirmation that she could follow the law.

Juror 187 was in favor of the death penalty depending on the circumstances. (VIII,R163) She could lay aside her preconceived notions regarding the circumstances in which she felt the death penalty was appropriate, and follow the law. (VIII,R164) Like Nelson-Brown, Juror 187 was not necessarily in favor the death

penalty.

Juror 115 felt that the death penalty might be warranted in some circumstances. (VIII,R131) She thought she could set aside her personal beliefs and follow the law. (VIII,R132) The answers Juror 115 on her ability to follow the law were somewhat equivocal and less certain than Nelson-Brown's responses.

Although Nelson-Brown stated she was not always in favor of the death penalty, the jurors discussed above were also not always in favor of the death penalty and had reservations about its application. These jurors were less sure of their ability to set aside their reservations then Nelson-Brown, who answered that she could follow the law without hesitation. The "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.

The trial judge abused its discretion by allowing the State to use a peremptory strike against Nelson-Brown over defense objection. A new penalty phase proceeding before a new jury is required.

ISSUE II

THE TRIAL COURT COMMITTED REV-
ERSIBLE ERROR BY ALLOWING THE
STATE TO PRESENT TESTIMONY THAT
MR. LEBRON WAS THE SHOOTER IN

CONTRAVENTION TO THE PRIOR JURY VERDICT AND IN VIOLATION OF THIS COURT'S PRIOR OPINION IN THIS CASE AND BY ALLOWING THE STATE TO PRESENT OPINION TESTI-MONY THAT THE EVIDENCE POINTED ONLY TO MR. LEBRON AS THE SHOOTER.

In reversing the sentence of death against Mr. Lebron, this Court in Lebron v. State, 799 So. 2d 1997 (Fla. 2001), held that during the new penally phase proceedings, the trial court could "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."

Throughout the proceedings Mr. Lebron, through defense

counsel, attempted to enforce the prior ruling of this Court by prohibiting the State from prejudicing the jury with argument and evidence that Mr. Lebron was the shooter. Defense counsel maderepeated objections that were overruled by the trial judge. Objections were made by defense counsel during opening statement when the State told the jury that the only person with Mr. Oliver at the time of the shooting was Mr. Lebron, and that they

would hear no evidence other than that Mr. Lebron was the shooter. (XI,R502-515;524-525) Defense counsel objected to the State asking witness Wilburn if she had any opinion who might have been the shooter other than Mr. Lebron. (XII,R653-654) During the testimony of Detective Lang, defense counsel again objected to hearsay testimony that named Mr. Lebron as the shooter. (XII,R695-697) Defense counsel objected to the State being permitted to ask Detective Lang, if in his opinion, there was any evidence that someone other than Mr. Lebron was the shooter. Lang stated there was not.(XII,R705-706)

The trial court also denied defense counsel's request for a limiting instruction to the jury explaining the ruling of this Court as to Mr. Lebron's role in the crime. (XII,R697-698) Defense counsel renewed this request a second time before the trial court finally fashioned a limiting instruction. (XII,R699-700)

Defense counsel moved for a mistrial, arguing that the trial court, through the overruling of the defense objections, had

allowed the State to violate the prior ruling of this Court and allowing the State to persuad this jury that the prior jury had erroneously concluded that Mr. Lebron was not the shooter. (XII,R708-713) The trial court denied the motion for mistrial, telling counsel that he wanted no more argument on the matter.

(XII,R712) Counsel advised the court he disagreed, but would abide by the trial court's ruling. (XII,R713)

The issue was property preserved for review. San Martin v.State, 717 So. 2d 462 (Fla. 1998)

The State's repeated presentation of evidence to this jury that Mr. Lebron was the shooter, coupled with the testimony of Wilburn and Detective Lang that in their opinion no one other than Mr. Lebron was the shooter violated this Court's holding that the sentence of death could not be premised on a finding that Mr. Lebron was the shooter. The admission of this evidence essentially told this sentencing jury that the prior jury's determination was incorrect, with the clear implication that they could choose to ignore it. There is simply no was to ensure that the recommendation of death in this case was not premised on this jury concluding that Mr. Lebron was the shooter and that the other jury was mistaken given the evidence presented to them.

Equally alarming and prejudicial was the improper use of opinion testimony from Wilburn and Detective Lang about whether or not Mr. Lebron was the shooter.

Section 90.701.1, Florida Statutes, (1999), prohibits the lay witness from offering an opinion, except under limited circumstances. Neither of these circumstances are applicable in

the instant case.

In Martinez v. State, 761 So. 2d 1074 (Fla. 2000), this Court found that it was error to permit a police officer to testify that as a result of the investigation there was no question in his mind that the defendant had murdered the victim. A witnesses opinion as to the guilt or innocence of the accused is not admissible. Further, there is an increased danger of prejudice to the jury when a police officer testify as to his opinion regarding guilt. See also, Glendening v. State, 536 So. 2d 212 (Fla. 1988), cert. denied, 492 U.S. 907 (1989). More importantly, in the instant case is the fact that the issue of who was the shooter was not even before this jury, since this had been resolved in Mr. Lebron's favor during the previous trial.

The error in this case was not harmless. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). The State, as the beneficiary of the error in this case, must be able to establish that the error did not contribute to the result- the death recommendation. That burden cannot be met because it is impossible to determine if this jury improperly considered that Mr. Lebron was the shooter as suggested by the testimony, in making a death recommendation.

Reversible error occurred because it cannot be said that the

improper opinion testimony from Lang and Wilburn influence the sentence recommendation in this 7-5 death recommendation. 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.

ISSUE II

THE TRIAL COURT ERRED IN PERMITTING THE JURY TO CONSIDER TWO INADMISSABLE CONVICTIONS IN AGGRAVATION AND IN ALLOWING THE JURY TO HEAR INFLAMMATORY AND PREJUDICIAL TESTIMONY ABOUT ONE OF THOSE CONVICTIONS

The state, over DEFENSE COUNSEL'S objection, successfully presented to the improper evidence in aggravation that consisted documentation and testimony relating to two INADMISSABLE convictions. The first improper conviction arose from a New York conviction following a plea, and the second from a Florida jury verdict of simple assault.

Mr. Slovis, one of Mr. Lebron's defense counsel, objected to the use of the New York conviction because under New York law, the trial court has the power in certain lesser offenses where there has been no violence or weapons and the person is between the ages

of 16 and 19, the trial court can grant youthful offender

treatment. (XIII,R752) Attorney Slovis informed the trial court

that the way this is done is to cite to "mitigating circumstances" on the sentencing document. Attorney Slovis pointed out to the trial court that the New York documents do not state a conviction occurred. The New York documents also reflected a Class D felony, which is a lesser of Robbery in the second degree. The New York documents indicated a youthful offender treatment rather than a conviction. (XIII,R752-753) Attorney Slovis acknowledged that he missed this in the first trial because he did not read the New York documents. (XIII,R754)

The State countered that the documents reflected a conviction, and that he did not understand Attorney Slovis' argument. (XIII,R756) Attorney Slovis again explained that Florida law might be different, but under New York law, the submitted documents reflected youthful offender treatment and no conviction in New York.(XIII,R756)

The trial court overruled the objections and allowed the admission of the documents relating to the New York documents. (XIII,R760)

Under Florida law when an out-of-state conviction is being used to enhance or aggravate a sentence the label given the out-of-state conviction is not the determining factor to be

considered. O'Neill v. State, 684 So. 2d 720 (Fla. 1996), rehearing denied, cert. denied, 117 S. Ct. 1562 (1997). Misdemeanor convictions do not constitute a "felony" in Florida for the purposes of

establishing a prior violent felony aggravating circumstance. Carpenter v. State, 785 So. 2d 1182, rehearing denied, (Fla. 2001). Juvenile adjudications may not be used for the purpose of establishing the prior violent felony aggravating factor. Issues about whether or not a prior conviction qualifies to be used as a prior violent felony under Section 921.141(5)(b) require strict construction of the statute in favor of the accused under Carpenter.

The issue is appropriately preserved for review.

The appropriate standard of review for this issue is that of *de novo* review. The decision as to whether or not the New York documents were a conviction, as opposed to a discretionary youthful offender disposition is purely a question of law-either there was a conviction that could be used for aggravation or there was not. Alston v. State, 667 So. 2d 1000 (Fla. 3rd DCA 1996). As required under the *de novo* standard of review, this Court can evaluate the documentary evidence supplied in the record. Under this standard, the appellate court is free to decide the legal issue differently without paying deference to

the trial court's conclusions. Blanco v. State, 706 So. 2d 7 (Fla. 1997). In reviewing the trial court's order, the trial court must determine whether or not the state has proven each aggravating circumstance and this Court must review the record to determine whether or not the trial court applied the correct rule of law for each aggravating factor, and whether

competent substantial evidence supports it. Philmore v. State 820 So. 2d 919 (Fla. 2002).

The determination by the trial court that evidence of a New York conviction was admissible evidence was error. Tt is not supported by competent, substantial evidence. Attorney Slovis, a licensed New York attorney, has been found in the previous opinion of this Court in the instant case to be "well qualified", as "having tried over seventy murder cases", and as being an "expert in such proceedings". (I,R43-44) Attorney Slovis, based upon his qualifications, advised the trial court and State that in the jurisdiction in which he was an expert that the New York documents did not establish a conviction, but rather demonstrated that Mr. Lebron had received youthful offender treatment for the New York offense and was not convicted in such a fashion as to qualify this offense for aggravation as a prior violent felony. The State offered nothing to counter this objection other than to argu that the

documents were a conviction and that he did not understand Mr. Slovis' argument. Thus, absent additional evidence from the State to rebut Attorney Slovis' well-taken objection to the presentation of the New York documents to the jury, the State did not provide competent, substantial evidence that this particular offense qualified as an aggravating prior felony for purposes of aggravation. Thus, the presentation to the jury of the New York documents and the subsequent reliance on these documents by the

trial court in finding as aggravating factor was error.

The second error relating to the prior violent felony aggravator, involving the State's presentation of evidence from a case involving Mr. Nasser as the victim. In that case, Mr. Lebron was originally charged with Attempted First Degree Murder. At the time of the new penalty phase trial in the instant case Mr. Lebron had only been convicted of Simple Assault, a first-degree misdemeanor, as a lesser included offense of the original charge of Attempted First Degree Murder. As stated previously in this issue, misdemeanors do not qualify as prior violent felonies for purposes of aggravation. Section 921.141(5)(b), Florida Statutes, (1997); Carpenter, supra. Even though it is abundantly clear that the conviction for simple Assault was inadmissible, the State was also permitted to

present significant amounts of prejudicial and inflammatory testimony and documents regarding this conviction.

The State on numerous occasions was permitted over the objection of defense counsel to present testimony to the jury from the Nasser case that was inconsistent with the jury's verdict of simple Assault. (XII,R696;XII,R763-766;769-770;777-778;780-781;794-796) The trial court overruled these objections, stating that "The facts of a case are the facts. A jury only hears what a witness testifies to at trial... He has been convicted of Robbery. the assault comes into play because of all the facts surrounding the Robbery. All of these things were part and parcel of the robbery

conviction." (XIII,R796-797)

The State presented the testimony of Officer Ron Schroeder that on December 1, 1995, Mr. Lebron, Stacie Kirk and Howard Kendall kidnapped Mr. Nasser at gunpoint and took him to an orange grove. While in the grove, Mr. Lebron, who had a shotgun, ordered Mr. Nasser to his knees and held the shotgun to Mr. Nasser's head. (XIII,R776-781) Mr. Lebron, according to Shroeder, then told Mr. Nasser to tell "The Lord that Bugsy said Hi" and pulled the trigger. (XIII,R781) The gun misfired and Mr. Nasser escaped. (XIII,R781-782)

In addition to the testimony from Officer Schroeder, the

State also introduced three volumes worth of documents related to the Nasser matter at the Spencer hearing, including a transcript of the sentencing hearing, where the trial court departed from the sentencing guidelines and listed aggravation in support of the departure. (VII,R726) The State argued in that transcript that departure was appropriate due to the striking similarity between the Nasser crime and the Oliver murder. (VII,R726) (Volumes II,VII, and an unnumbered Volume containing pages 1-100) Also contained in the documents the trial court allowed into evidence at the Spencer hearing were the verdicts in the first trial involving Mr. Nasser, where Mr. Lebron was convicted as charged. (Unnumbered volume,R80-81) These convictions were later reversed on appeal and Mr. Lebron was convicted of lesser offenses at the retrial.

Mr. Nasser did not testify at the trial and was unable to be deposed by defense counsel because he had disappeared. Defense counsel argued that the Schroeder's testimony about what Mr. Nasser said to them was unrebuttable hearsay. (XIII,R777-778;784-785;794-796)

Although the State may present evidence, even in some instances hearsay evidence, relating to the facts surrounding a prior conviction, that evidence is subject to rebuttal and the prejudicial impact must not outweigh the probative value of that

evidence. In allowing the State to present the testimony and documentary evidence relating to the Nasser convictions, the trial court permitted error to occur 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.

Although Florida law permits the introduction of hearsay concerning prior violent felonies through a law enforcement

officer, a defendant's Sixth Amendment rights may not be abrogated. Rodriguez v. State, 753 So. 2d 29, 44-45 (Fla. 2000); Rhodes v. State, 547 So. 2d 1201 (Fla. 1989); Tompkins v. State, 502 So. 2d 415 (Fla. 1986). Section 921.141(1), Florida Statutes, (1997) authorizes the use of hearsay testimony providing the defendant has been afforded a fair opportunity to rebut the hearsay statements.

In Rodriguez, this Court reasoned that hearsay testimony

from a police officer regarding the facts of the prior violent felonies may be preferable to a victim testifying. The reason this procedure is preferable, the Rodriguez opinion states, because the Sixth Amendment confrontation right is protected because the victim was subject to cross-exam during the original trial, through depositions, and these transcripts would be available for impeachment. In the instant case the protection of the Sixth Amendment were not afforded to Mr. Lebron. In the instant case, the trial court erred in permitting hearsay concerning Nasser's statements to law enforcement officers where Mr. Lebron had never had an opportunity to confront Nasser in any adversarial setting and to utilize the results of this confrontation as a tool of cross-examination.

The testimony from Schroeder relating to facts supporting an Attempted First Degree Murder charge and the testimony from Schroeder that Nasser claimed that Mr. Lebron had a firearm was not relevant under Section 90.403, Florida Statutes (1997) and the

prejudicial impact far outweighed the probative value. In Duncan v. State, 619 So. 2d 279 (Fla. 1993), this Court noted that evidence of the surrounding circumstances of prior violent felonies is admissible, but that a "line must be drawn when evidence is not relevant, gives rise to a violation of the

defendant's confrontation rights, or the prejudicial impact outweighs the probative value." In Duncan it was determined that a gruesome photograph of another victim was inadmissible where certified convictions for that offense were entered into evidence, and a police officer gave a brief factual scenario to the second-degree murder. See also, Rhodes v. State 547 So. 2d 1201 (Fla. 1989).

In the instant case, the evidence testified to by Schroeder about Mr. Lebron kidnapping Mr. Nasser at gun point and placing a gun to Mr. Nasser's head and firing the weapon was not only not relevant, but it was inconsistent with the verdict reached by the jury in the Nasser trial.

The testimony was also highly prejudicial and inflammatory in that it made it appear that Mr. Lebron would have committed another homicide of striking similarity to the homicide involving Mr. Oliver, but for the gun not firing. Under the facts of the instant case, the evidence which was contrary to the jury verdict should not have been admitted. The error created by the admission of this evidence was not harmless. A new penalty phase preceeding with a jury is required, in which this inadmissible evidence is not

presented.

ISSUE IV

THE SENTENCE OF DEATH IS UN-CONSTITUTIONAL

The capital sentencing scheme is unconstitutional in that it impermissible 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.

Although recognizing that this Court has held that the decision of Ring does not impact on the Florid death sentencing scheme (Bottoson v. Moore, 833 So. 2d 693 (Fla.) cert. denied, 123 S.Ct. 662 (2002)) Mr. Lebron asserts that this conclusion is error and that the defecienies in the Arizona capital sentencing structure are present as well in Florida.

The United States Supreme Court has rejected arguments that the Florida and Arizona sentencing structures differ. Walton v. Arizona, 497 U.S. 639, 648 (1990). Under Florida law, a defendant cannot be sentenced to death unless the judge- not the jury- makes specific findings of fact. I particular, before a sentence of death may be imposed under Fla. Stat. 921.141(3), the court "shall set forth in writing its findings upon which the sentence of death is based as to the facts... [t]hat sufficient aggravating circumstances exist...and...[t]hat there are insufficient

mitigating circumstances to outweigh the aggravating circumstances." Thus, Section 921.141 explicitly requires two separate findings of fact by the trial judge before a death sentence can be imposed: the judge must find as a fact that (1) sufficient aggravating circumstances exist and (2) there are insufficient mitigating circumstances to outweigh the aggravating circumstances. A defendant thus may be sentenced to death only if the sentencing proceeding "results in finding by the court that such person shall be punished by death." Fla. Stat. 775.082(1).

Because Florida law requires fact findings by the trial judge before a death sentence may be imposed, it is thus unconstitutional under the holding and rationale of Ring. Just as with the Arizona statute, the Florida statute is directly contrary to the rule of law enunciated in Ring and Apprendi that "if a state makes an increase in a defendant' authorized punishment contingent on the finding of fact, that fact...must be found by a jury beyond a reasonable doubt." Ring. Just as with the Arizona statute, the Florida statute is explicit that a defendant "cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and no the death penalty."Id. Because the trial judge-and not

the jury- must make specific findings of fact before a death sentence can be imposed under Florida law, Ring holds

squarely that the statute is unconstitutional under the Sixth and Fourteenth Amendments.

Admittedly the Florida statute provides for a jury advisory verdict. But that has no bearing on the analysis set out above. the trial judge is directed by Section 921.141(3) to make the fact findings necessary to support a death sentence "notwithstanding the recommendation of a majority of the jury." And unless the court makes the findings requiring the death sentence, the defendant must be sentence to life. The jury's role thus does not alter the essential point- the controlling point under Ring- that the Florida statute is unconstitutional because a death sentence cannot be imposed without fact findings by the trial judge.

Ring further clarified that "aggravating factors operate as "the functional equivalent of an element of a greater offense" that is, of capital versus non-capitol murder." Ring, see also, State v. Dixon, 283 So. 2d 1,9 (Fla. 1973). Thus, to be charged with capitol murder, the state must allege in the indictment the aggravating circumstances on which it intends to rely in seeking the death penalty. Because the state failed to do this, imposition of the death penalty is impermissible.

Under Furman v. Georgia, 408 U.S. 238 (1972), as interpreted by this Court in Donaldson v. State, 265 So. 2d 499 (Fla. 1972), when the provisions of a death sentence have been rendered unconstitutional, a life sentence is the appropriate remaining

punishment. Since findings required by Section 921.141 cannot be made consistent with the requirements of the Sixth and Fourteenth Amendment as established in Ring, the appropriate outcome is a life sentence.

The lack of a unanimous recommendation of death by this jury also renders the imposition of a death sentence unconstitutional. A mere numerical majority- which is all that is required under Section 921.141(3) for the jury's advisory sentence-does not satisfy constitutional considerations. See, Apidaca v. Oregon, 406 U.S. 404 (1972). See, Hertz v. State, 803 So. 2d 629 (Fla. 2001), cert. denied, 536 U.S. 963 (2002).

ISSUE V

THE SENTENCE OF DEATH IS DISPROPORTIONATE IN THIS CASE WHERE THE FACTS DO NOT SUPPORT A FINDING THAT THIS CASE IS ONE OF THE MOST AGGRAVATED AND LEAST MITIGATED OF CAPITAL CASES

In Urbin v. State, 714 So. 2d 411 (Fla. 1998), this court affirmed that the reviewing court must never lose sight of the fact that the death penalty is reserved for only the most

aggravated and least mitigated of first-degree murders. This court continues to adhere to this most basic principle of death penalty jurisprudence. Away v. More, 828 So. 2d 985 (Fla. 2002); White v. State, 817 So. 2d 799 (Fla. 2002). Proportionality review is necessary in order to ensure procedural and substantive fairness and uniformity in

death penally law. Ocha v. State, 826 So. 2d 956 (Fla. 2002); Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988). Proportionality review is not simply a matter of counting the number of aggravating factors versus the number of mitigating factors. Because death is different, it is necessary in each case to conduct proportionality review based on the total circumstances in a case as compared to other capital cases. Only then can a just and fair determination be made that a death sentence is appropriate or inappropriate in a particular case. Rimmer v. State, 825 So. 2d 304 (Fla. 2002), rehearing denied, cert. denied, 123 S.Ct. 567 (2002).

When conducting proportionality review, all doubts are to be resolved in favor of the defendant. Ocha, supra.

A. This is not among the least mitigated of first-degree murders

Initially, Mr. Lebron contends that the trial court improperly rejected or improperly assigned little weight to

several mitigating factors. Assuming for the purposes of this Issue that all the mitigating factors were properly found and considered and adding those to the mitigating factors that the court found, this case is certainly not one of the least mitigated first degree murders.

The testimony and records reflect that Mr. Lebron was born to a sixteen year old drug addicted mother. Mrs. Ortiz did not want a child, but had him to get welfare money. Her child, still

referred to in her testimony some 25 years later as "it", first landed into foster care as an infant while his mother spent the next 27 months in residential drug treatment. She was a user of numerous drugs, including LSD, heroin, speed, mescaline, amphetamines, and methamphetamine. Mr. Lebron's father was not in the picture.

Upon release from drug treatment, Mrs. Oritz regained custody of her son. During this period Mr. Lebron suffered abuse at the hands of his oft absent mother. A marriage to a fellow addict from the treatment center soon ended in divorce.

During this period Mrs. Ortiz admitted she did not want Mr. Lebron and would have given him away but for guilt. She tried to provide materially possessions in order to overcome this guilt, resulting in her becoming an adult entertainer.

Mrs. Ortiz described her young son during this period as suffering from ADHD and hyperactivity. He would set fires and break things. Mrs. Ortiz routinely smacked and physically abused Mr. Lebron out of frustration and anger. She recalled hitting him at least once with a fist, leaving a permanent mark on him. Mrs. Oritz found nothing positive in being a mother, she didn't want "it", for he had ruined her life and her body.

Upon returning to the adult entertainment industry in New York City, Mrs. Ortiz left Mr. Lebron with a series of babysitters. Mr. Lebron was exposed to his mother having sex with a variety of men

and viewed her in a pornographic video. He, according to psychological records, believed her to be a prostitute.

Mr. Lebron performed abysmally in school. After testing determined that he was hyperactive and emotionally disturbed, he was placed briefly in a special school. Due to lack of parental involvement and poor behavior, Mr. Lebron was expelled from the public elementary school.

As a middleschooler Mr. Lebron was placed in institutional care at the Pleasantville Cottage School. After additional failures at Pleasantville, Mr. Lebron was sent to Glenn Mills School for Boys in Pennsylvania. Mrs. Oritz continued her pattern of abandonment, seldom visiting her son. He stayed there

a year, was sent home for a visit and never returned.

From this point on Mr. Lebron bounced from foster home to half-way houses because Mrs. Ortiz did not want him around. He often lived with people she didn't know. Eventually Mr. Lebron fell into a bad crowd in New York and was arrested. Shortly after this, he left with a stripper that worked at his mother's club and went to Florida.

When Mr. Lebron returned from Florida after Thanksgiving 1995, Mrs. Ortiz noticed that Mr. Lebron was so thin and looked so terrible that he must be using drugs.

Although of low average intelligence, school records indicate that Mr. Lebron was often five years delayed in language ability. 52
His IQ was at times established as 80, or borderline. Mr. Lebron struggled with impulsivity and anger.

Records from the Mount Pleasant Cottage School reflect that at age 14 Mr. Lebron was functioning 3.1 years below his biological age. He also failed hearing tests and spoke with a lisp. Mr. Lebron tested at a second to fourth grade school level at a time he would have been in ninth grade.

At Glenn Mills his test scores were far below normal. He showed little improvement in speech and language. Home visits were not productive. Mr. Lebron was described as depressed, with low self-esteem and high anxiety. Mrs. Ortiz was described

as "quite deficient" in her parenting capacity. She could not nurture and could only give material things.

Other assessments note that Mr. Lebron was described as willing to do anything for peer approval. It was noted that he associated with problematic youngsters. Compulsive public masturbation was a serious problem. He had serious emotional problems and his behavior was described as out-of-control.

A 1989 pssychological report found that Mr. Lebron was at the age of 14.5 and functioned in the low average to borderline intelligence range. He was described as passive-aggressive with a poor self-concept and lack of confidence. Home life was described as "barren and empty". He suffered from intense anxiety and had ineffectual coping skills. Emotional problems prevented him from

reaching his full potential. He was diagnosed with Dystemic Disorder and Early Personality Disorder with Passive-Aggressive features. Mr. Lebron exhibited indications that he was physically abused. Mrs. Ortiz admitted to both physical and verbal abuse.

A psychiatric evaluation in 1990 showed a drop in Mr. Lebron's IQ from 97 to 87. Mr. Lebron had poor judgment, was impulsive, had little superego restraint, and had a need for instant gratification. He was viewed as emotionally fragile

with poor insight and judgment. He was tolerated, but not liked by peers. He was described as passive.

Mr. Lebron, after his arrest in New York, was not allowed home by his mother. He was sent to Covenant House, then referred to Emergency Children Services and placed in a shelter. He was again found to be emotionally disturbed.

An evaluation at age 16 stated that he had many problems stemming from his relationship with his mother. He had problems with peers and did not know how to make friends, although he very much wanted to. Mr. Lebron was still developmentally behind his biological age and was functioning at about age 12.

During the spring of 1992 Mr. Lebron at age 17 was not accepted for placement due to the severity of his behavior problems He was arrested and his mother failed to appear at his court dates. In April 1993, agency records reflect that Mrs. Ortiz would no longer work with JCCA. She requested that she not be called

anymore. Mr. Lebron was about to turn 19, so he was discharged from JCCA and their programs.

According to Dr. McClane, children raised in such an environment often experience deep trauma. Such children cannot form meaningful relationships. (XIV,R844) They become warped and lack the mature, moral and ethical standards necessary for

treating others. (XIV,R844;847)

The hyperactive disorder that Mr. Lebron was diagnosed with leads to acting on impulse without thinking, difficulty concentrating and staying on task. (XIV,R849) In adults such as Mr. Lebron, it often is seen as bipolar disorder and often with substance abuse. (XIV,R849)

The combination of factors documented in Mr. Lebron's records and the testimony of his mother would make it unlikely that a child in that environment would be able to rise above it. (XIV,R851) A child raised in that environment would have an exaggerated need for approval. (XIV,R851)

In numerous decisions by this court, childhood abuse has been recognized as a significant mitigating factor. It is especially compelling when coupled with other factors such as youth, immaturity, or substance abuse. See, e.g., Livingston v. State, 565 So. 2d 1288, 1292 (Fla. 1998); Nibert v. State 574 So. 2d 1059, 1061-3 (Fla. 1990); Clark v. State, 609 So. 2d 513, 515 (Fla. 1992); Elledge v. State, 613 So. 2d 434,436 (Fla. 1993); Walker v.

State, 707 So. 2d 300,318 (Fla. 1997); Mahn v. State, 714 So. 2d 391,400 (Fla. 1998); Urbin v. State, 714 So. 2d 411, 417 (Fla. 1998).

Mr. Lebron was also diagnosed with a personality disorder.

A personality disorder is a very serious diagnosis. "In any scheme that tries to classify persons in terms of relative mental healthy, those with personality disorder would fall near the bottom." Comprehensive Text of Psychiatry (4th Ed. 1985), p.958. The fact that the defendant suffers from a personality disorder is a significant nonstatutory mitigating factor. Eddings v. Oklahoma, 455 U.S. 104 (1982); Heiney v. State, 629 So. 2d 171,173 (Fla. 1993).

Mr. Lebron is a person whose childhood was spent in a tumult of rejection and violence. His entire adolescence was spent in institutionalized care. Shortly after his leaving foster care and half-way house treatment, the instant offense occurred. Long-standing, diagnosed mental health issues cannot be shunted aside.

B. This is not the most aggravated of first-degree murders

The trial court found two aggravators in this case : felony was committed in the commission of a robbery and prior violent felony. Notably lacking are the most serious aggravators such as HAC and CCP. See, Ocha v. State, 826 So. 2d 956 (Fla. 2002); Morrison v. State, 818 So. 2d 432 (Fla. 2002), cert. denied, 123 S.Ct. 406 (2002).

Often this court has determined that prior violent felonies are entitled to lesser weight based upon the facts surrounding

those prior convictions. See, Chaky v. State, 651 So. 2d 1169 (Fla. 1983) (defendant's prior conviction for attempted murder given little weight in proportionality review), Johnson v. State, 714 So. 2d 423 (Fla. 1998)(defendant's prior conviction for second-degree murder given less weight were it had occurred in defense of the defendant's sister); Kramer v. State, 619 So. 2d 274 (Fla. 1993)(defendant had previously beaten another man to death and was convicted of beating the instant victim to death); White v. State, 616 So. 2d 21 (Fla. 1993)(defendant had previous convictions for burglary and aggravated battery against the victim, who was his girlfriend). The facts surrounding the Nasser incident and the Gibbons incident support a decrease in weight given to the prior convictions.

In comparison, these prior convictions do not rise to the level of aggravation found in other cases. See, Mungin v. State, 698 So. 2d 1026, 1031-1032 (Fla. 1995); Williamson v. State, 681 So. 2d 688, 690 (Fla. 1996), and Melton v. State, 638 So. 2d 927 (Fla. 1994).

The prior violent felony convictions arise from Mr. Lebron's convictions of lesser included offenses in Florida, wherein he was not the only aggressor and was found to have been unarmed, several improperly considered misdemeanors, and an inapplicable New York

offense. These offenses are distinguishable from the type of prior felonies that this court has previously upheld. For example, in Ferrell v. State, 680 So. 2d 390 (Fla. 1996), the prior felony aggravator was a conviction for second-degree murder.

The aggravating factor of relating to the commission of the robbery should be afforded little weight. It is impossible to commit felony murder during a robbery and not have this aggravator present. The jury in this case acquitted Mr. Lebron of being the shooter and being in possession of the firearm.

This case is certainly not the most aggravated of cases. Compare, Darling v. State, 808 So. 2d 145, rehearing denied, cert. denied, 123 S.Ct. 190 (2002)(two aggravators but little mitigation); White, supra, (four aggravators and little mitigation); Vining v. State, 827 So. 2d 201 (Fla. 2002) (three aggravators with only mitigator being good military history). A death sentence predicated on the aggravation in this case is inappropriate.

C. Disparate treatment of co-defendants under Enmund-Tyson

Equally culpable co-defendants should be treated equally-thus when an equally culpable co-defendant receives a life sentence in a capital case, a sentence of death should not be imposed on the other. Hunter v. State, 817 So. 2d 786 (Fla. 2002). Disparate treatment may be appropriate where one

defendant is more culpable. In this present case, the facts do not support the trial court's

determination that death is the appropriate sentence for Mr. Lebron while no other co-defendant received other than a minimal prison sentence.

The uncontroverted fact in this case is that the jury conclusively determined that someone else that night killed Larry Neal Oliver. Mr. Lebron was not the shooter. Thus, according to the impaneled jury, the shooter received a marginal prison sentence or none at all. Thus, as compared to his co-defendants, Mr. Lebron's participation is at most equal, if not less culpable. Disparate treatment is only permitted where the defendant is shown to be more culpable. For example, in Evans v. State, 808 So. 2d 92 (Fla. 2001), rehearing denied, cert. denied, 123 S.Ct. 416 (2002), this court found the defendant's death sentence was proportional even though the co-defendant received a life sentence where the defendant was the mastermind and the trigger man in the murder-for-hire scheme. In White v. State, 817 So. 2d 799 (Fla. 2002), a death sentence was found to be proportional for the defendant as compared to a fifteen year sentence for the co-defendant when it was established that the defendant inflicted the fatal stab wounds on the victim.

In this case the facts do not support that Mr. Lebron was

the mastermind- it does not appear that the murder was planned out, but rather happened on the spur of the moment. Clearly the jury chose not to believe the self-serving testimony at trial of the members

of "Foreplay" and their girlfriends that the murder happened at Mr. Lebron's urging alone. The circumstances surrounding the murder indicate that the other co-defendants in this case acted independently from Mr. Lebron, including the person who was the actual killer. Testimony established that all the men handled the gun, shotgun shells and the personal effects of the victim were found in the bedroom of a co-defendant, and all co-defendants shared in the financial benefits from the killing. Evidence also established that others, not Mr. Lebron, disposed of the body and the personal effects of the victim. This was not a murder-for-hire, nor a pre-planned killing. Griffin v. State, 820 So. 2d 906 (Fla. 2002).

The evidence simply fails to establish that Mr. Lebron was the "mastermind" of this tragic occurrence. The lack of evidence combined with the finding that Mr. Lebron was not in possession of the firearm at the time of the killing and was not the shooter render a death sentence disproportionate when compared to the sentences received by the co-defendants.

D. Comparison with Other Proportionality Decisions

While no single case is precisely identical to this one, undersigned counsel submits that the following decisions are the closest, and collectively demonstrate that the death penalty is not the appropriate sentence. Urbin v. State, 714 So. 2d 411 (Fla. 1998); Armstrong v. State, 642 So. 2d 730 (Fla. 1988); Livingston

v. State, 565 So. 2d 1288 (Fla. 1988); Jackson v. State, 502 So. 2d 409 (Fla. 1986). Although not decided on proportionality grounds, the case of Mahn v. State 714 So. 2d 391, 400-402 (Fla. 1998), is also relevant to the proportionality review in this case.

CONCLUSION

Based upon the facts, law, and argument recited herein, Appellant respectfully requests that this Honorable Court reverse the sentence of death and remand for a new penalty phase proceeding, or in the alternative, a life sentence.

CERTIFICATE OF FONT SIZE

I hereby certify that the type font used is 12 point Courier New.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the

foregoing has been sent via U.S. Mail to the Office of the Attorney General, 444 Seabreeze Blvd., Suite 500, Daytona Beach, Florida 32118, this ____ day of July, 2003

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