IN THE SUPREME COURT OF FORIDA

JERMAINE LEBRON,

Appellant,

vs.

CASE NO. SC06-138
Lower Ct. No. CR96-2147

STATE OF FLORIDA,

Appellee.
_____/

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

INITIAL BRIEF OF APPELLANT

ROBERT A. NORGARD
ATTORNEY AT LAW
FLORIDA BAR NO. 322059
P.O. BOX 811
BARTOW, FL 33830
863)533-8556

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

PRELIMINARY STATEMENT

The instant appeal arises over the imposition of a sentence of death in the Ninth Judicial Circuit after remand by this Court for a new penalty phase. The Appellant, Jermaine Lebron, will be referred to by his proper name. The Appellee, the State of Florida, will be referred to as the State. The appellate record consists of thirteen volumes: Volumes I-V contain the penalty phase proceedings and transcripts. These portions of the record will be referred to in the Initial Brief with the Volume number and the designation "R". Volumes VI-VIII contain the penalty phase testimony. This portion of the record will be referred to with the Volume number and the designation "T". The penalty phase exhibits are contained in the remaining five volumes and will be referred to in the Initial Brief with the Volume number and the designation "ER".

This Court has previously reviewed Mr. Lebron's conviction and sentence in Lebron v. State, 799 So.2d 997 (Fla. 2001)(affirming conviction, remanding for new penalty phase) and Lebron v. State, 894 So.2d 849 (Fla. 2005)(remand for new penalty phase).

STATEMENT OF THE CASE

On October 28, 1996, the Appellant, Jermaine Lebron, was Indicted by the Grand Jury of the Ninth Judicial Circuit, in and for Osceola County, for the First-Degree Murder of Larry Neal Oliver between November 24 and December 2, 1995, contrary to §782.04, Fla. Stat.(1995) and one count of Armed Robbery, contrary to §812.13, Fla. Stat. (1995).(I,R1-2) Mr. Lebron was convicted after a jury trial, in which the jury made the specific factual finding pursuant to a special verdict form that Mr. Oliver was killed by a person other than Mr. Lebron and that Mr. Lebron did not have a firearm in his personal possession at the time the murder occurred.(I,R9), See, Lebron v. State, 799 So.2d 997, 1020,n.19 (Fla. 2001). This Court affirmed the convictions, but remanded for a new penalty phase. Ibid.

A new penalty phase was conducted and Mr. Lebron was again sentenced to death. This Court reversed the death sentence and remanded for a new penalty phase in Lebron v. State, 894 So.2d 849 (Fla. 2005).

The instant appeal arises from the new penalty phase proceedings commenced in 2005:

The parties convened on August 15, 2005, after a

previous mistrial and penalty phase was held from August 15, 2005 through August 18, 2005.(II,R206) Prior to proceeding the defense renewed all previously filed defense motions attacking the Florida's capital sentencing scheme which had earlier been denied. (IV,T7)

The jury returned a vote carrying a recommendation for a sentence of death by a margin of 7/5 on August 18, 2005. (II,R219;224)

The special verdict form prepared by the trial court and given over the objection of both the defense and the State was completed by the jury. The jury made the following findings as to the aggravating circumstances in Attachment "A":

12/0 that the defendant had been previously convicted of a prior violent felony;

12/0 that the crime was committed while the defendant was engaged in the commission of a robbery;

9/3 that the crime was committed for financial/pecuniary gain.

The jury had been advised by a notation on the bottom of the verdict form that the course of a robbery and financial gain aggravators would be merged. (II,R220-221)

The verdict form Attachment "B" reflects the following

findings of the jury as to mitigation:

0/12 members of the jury do not find that the defendant was an accomplice in the offense for which his is to be sentenced but the offense was committed by another person and the defendant's participation was minor;

0/12 members of the jury do not find the age of the defendant to be a mitigating factor;

3/9 members find that some aspect of the defendant's character is mitigating and nine do not,

0/12 members of the jury do not find that some other circumstance of the offense is a mitigating factor. (II,R222-223)

A Spencer hearing pursuant to Spencer v. State, 615 So.2d 688 (Fla. 1993) was conducted by the court on October 20, 2005. (IV,R370-388) The defense entered into evidence prior Exhibits B, C, and D, all of which were records pertaining to Mr. Lebron. (IV,R370) In this proceeding they were admitted as Exhibits 1, 2, and 3. (IV,R370) Exhibit 1 contained Mr. Lebron's early school records and other documents related to those school records. Exhibit 2 contained Mr. Lebron's educational/treatment records from the Mount Pleasant Cottage School. Exhibit 3 contained the records from the Jewish Child Care Association in New York,

including records from Pleasantville Cottage School. (IV,R371)

The defense asked the court to take judicial notice of the fact that in the case involving Mr. Nasser, the jury made the specific finding that Mr. Lebron did not possess a firearm during the incident. (IV,R372) Defense counsel also asked the court to take judicial notice of the testimony from the Nasser case from Mr. Howard Kendall that the motivation behind the crime was due to Nasser's attempted rape and kidnapping of Stacy Kirk, a friend of both Kendall and Mr. Lebron. (IV,R372) The trial court ruled that he would take judicial notice of all of Mr. Kendall's prior trial testimony. (IV,R374)

Mr. Lebron appeared for sentencing on December 27, 2005.(V,R391-402) The trial court re-imposed a sentence of death. (II,R249-253) A written sentencing order was filed by the trial court. (II,R255-278) The trial court made the following findings as to aggravation and mitigation:

A. AGGRAVATING CIRCUMSTANCES:

1. Prior violent felony conviction- The trial court found that Mr. Lebron had prior violent felony convictions for attempted robbery (1993 in New York) and robbery, kidnapping, and aggravated assault (1999 conviction in

Osceola County which occurred in the same time period as the instant offense).

2. The Offense was Committed in the Commission of a Robbery: The trial court, referencing trial testimony of several witnesses, found this factor was established.

B. MITIGATING CIRCUMSTANCES

A. The trial court found no statutory mitigating circumstances. The trial court rejected two statutory mitigating circumstances that the defense argued had been established: Mr. Lebron's age of 21 at the time of the offense and that he was an accomplice in the offense and his participation was relatively minor.

B. Non-statutory mitigating factors:

1. Disparate treatment of co-defendants: The trial Court rejected this as a mitigating circumstance, finding that none of the group other than Mr. Lebron lied to the victim, lured the victim to the residence, or intended to rob the victim. The trial court found that although the others were involved in the cover-up of the murder, "they were not major players in the robbery or murder of the victim."

2. Prenatal Problems-Drug Addicted Mother: The trial court acknowledged that the defendant's mother, Mrs. Ortiz

admitted to taking many drugs during pregnancy and admitting herself to drug treatment so she would not lose her son, but stated that Mrs. Ortiz denied addiction. The trial court rejected a drug abuse mitigating circumstance, but found the evidence of drug usage was a mitigating circumstance and afforded it “very little weight. (II,R271)

3. School Performance: The trial court concluded Mr. Lebron performed poorly in school, had difficult social behaviors, and was of low intelligence, but was not brain damaged. The court agreed that it was established that Mr. Lebron was a failure in school, attended special education classes, and eventually dropped out. This mitigating circumstance was given “some weight”. (II,R272)

4. Interpersonal: The trial court rejected proposed mitigating circumstances that Mr. Lebron was easily led by others, had an exaggerated need for approval, and shallow emotional attachments, but did not find this to be mitigating. The trial court found that some evidence was presented at the prior proceeding that Mr. Lebron was “good with children” and assigned this “very little weight”.

5. Parent Profile: The trial court found that Mr. Lebron parent’s were never married, that his mother was a drug user and his father had a criminal history, that his

father abandoned his mother while she was pregnant, that Mr. Lebron lived in foster homes and was sometimes cared for by extended family, that his mother did not care for him while growing up, that she traveled, and that his mother worked as a “go-go” dancer and was an adult club owner. The trial court concluded that it was not proven that these circumstances affected Mr. Lebron, but found them to be mitigating and assigned them “very little weight”. (II,R272)

6. Neglect: The trial court found that it was proven that Mr. Lebron was rejected by his mother and that she had negative feelings for him. This factor was given “some weight”.

7. Domestic Violence: The court stated that Mrs. Ortiz admitted to striking Mr. Lebron with a closed fist. The trial court concluded there was no physical or psychological abuse of Mr. Lebron by his mother and rejected any mitigating circumstance based upon physical or mental abuse.

8. Institutionalization: The court noted that his mitigating circumstance was considered under “Parent Profile.

9. Incarceration: The trial court found Mr. Lebron displayed appropriate courtroom behavior and gave this circumstance very little weight.

10. Psychological(numbered as "12" in the sentencing order): The trial court found that Mr. Lebron suffered from emotional and mental health problems his whole life and "did not have the world's best mother", but that he had a mother and she sought institutional and social services for him. The trial court assigned little weight to this circumstance because the trial court did not believe there was a link between Mr. Lebron's mental and emotional problems and the facts of the murder.

C. Enmund-Tison Analysis

The court determined that Mr. Lebron was a major participant in the crime committed and was, at least, recklessly indifferent to human life.

A Notice of Appeal was filed on January 23, 2006. (II,R280)

STATEMENT OF THE FACTS

A. PENALTY PHASE

Penalty phase was conducted in this case on August 15, 2005, before Circuit Court Judge Belvin Perry.(IV-V) The proceedings are summarized as follows:

Defense counsel was granted a continuing objection to the hearsay testimony of Detective Lang. (VII,T205)

Deputy Andrew Lang testified that he was lead investigator in this case.(VII,T250) Mr. Oliver was reported missing on November 25, about a week before his body was found. (VII,T250)

On December 1, Duane Sapp, Mark Tocci, and Joe Tocci came to the police station with information about Mr. Oliver.(VII,T254) On that day Duane Sapp's picture had appeared on television as part of an attempt to gain information about Mr. Oliver.(VII,T337) Sapp was captured on a video trying to cash a check belonging to Mr. Oliver at a bank and that video was aired.(VII,T338)

Mark and Joe Tocci are identical twins.(VII,T293) The Tocci twins, along with Vern Williams and Danny Summers worked at Disney together. They were extremely close. (VII,T293) They called themselves "Four Play" and had gotten matching tattoos on their backs.(VII,T294) The tattoo was of a rabbit smoking a marijuana cigarette and their initials. (VII,T294-296)

Danny Summers admitted to being a daily marijuana user during this time period.(VII,T306) The court excluded testimony from the jury of the drug usage of Mark Tocci,

but accepted a proffer of the testimony that Mark Tocci was a heavy user of cocaine and marijuana during this time period.(VII,T315)

Summers would refer to the Tocci twins as his cousins. (VII,T296) Mark Tocci referred to Summers and Williams as “his brothers”.(VII,T296) Williams, Duane Sapp, and the Tocci twins lived together at the home where Mr. Oliver was killed.(VII,T296)

Mary Lineberger was living in an apartment leased by Joe Tocci for her.(VII,T303) Lineberger was 17- too young to rent the apartment by herself.(VII,T303) Lineberger had a roommate named Brandi Gribben.(VII,T304) Lineberger and Gribben were working together at a strip club in Orlando. (VII,T303-304) Gribben had met Mr. Lebron, had a brief relationship with him, and introduced him to Lineberger. (VII,T304) Lineberger then introduced Mr. Lebron to the Tocci twins, Williams, Summers, Sapp, and Charissa Wilburn. (VII,T304) All of those persons agreed that Mr. Lebron was just an acquaintance- no one from their very tight group was particularly close to Mr. Lebron.(VII,T305)

Information provided by Sapp after his interview with police led to the discovery of Mr. Oliver’s body in an area behind Disney World on the evening of December 1.

(VII,T255) Mr. Oliver was found wrapped in a blanket and brush had been piled on top.(VII,T256-258) Mr. Oliver had been shot in the head.(VII,T258) There were no signs of defensive wounds on Mr. Oliver and no signs of a struggle. (VII,T292) The gunshot wound would have resulted in instantaneous death.(VII,T292)

Mary Linegerger, Charissa Wilburn, and Danny Summers also provided information.(VII,T254) Danny Summers told the police that he knew Mr. Oliver.(VII,T259) The Tocci twins, Lineberger, Wilburn, Sapp, and Mr. Lebron had all been together on the night Mr. Oliver was killed.(VII,T259) Wilburn was the girlfriend of Mark Tocci and Lineberger was the girlfriend of Joe Tocci.(VII,T260) The group was at the home of Lineberger's parents using their computer to create a transcript that Mr. Lebron could send to his mother. (VII,T26-262) Mr. Lebron needed to send his mother a transcript so she would continue to send him money for college.(VII,T260) Mr. Lebron was carrying a gun with him that night that he called "Betsy".(VII,T262,265)

Deputy Lang learned during his investigation that others besides Mr. Lebron handled the shotgun.(VII,T309) Police found a picture of Mark Tocci with the gun. (VII,T342)

According to Danny Summers, the group all left the Lineberger residence and headed toward home in Kissimmee. (VII,T262) Summers, Wilburn, Mark Tocci, and Mr. Lebron rode in one vehicle.(VII,T265) Mr. Lebron got his gun from Joe Tocci's car and put it in Mark Tocci's car.(VII,T265)

When the group reached the Sand Lake area, a red pick-up truck drove up next to them.(VII,T266) Mr. Oliver was the owner of the truck.(VII,T266) After Mr. Lebron commented on how nice the truck was, Summers mentioned that he used to work with Mr. Oliver.(VII,T266) Summers rolled down his window and flagged Mr. Oliver down.(VII,T266)

Mr. Oliver pulled off the road and Summers asked him if he had any marijuana.(VII,T267) Mr. Oliver had none. (VII,T267) Mr. Lebron then started to talk with Mr. Oliver about some "spinners" and offered to sell him some. (VII,T267) There were no spinners.(VII,T267) Mr. Oliver was told to follow Tocci back to the house so he could look at the non-existent spinners, which he did.(VII,T267)

According to Deputy Lang, Summers said that on the way back to the house Mr. Lebron was talking and loading the gun.(VII,T268) Mr. Lebron said he couldn't believe the guy was so stupid and that he wanted to "jack" him.(VII,T268) According to Lang, Summers said that "jack" means to rob.

(VII,T268) Lang testified that Summers described Mr. Lebron as being excited.(VII,T269)

According to Lang, when the group got to the house, Wilburn said that Mr. Lebron wrapped the gun in a sweater and gave it to her.(VII,T269) According to Lang, Summers said that Mr. Lebron told Wilburn to bring the gun in the house.(VII,T269) Summers told Lang that Wilburn took the gun in the house, followed by Mark Tocci, himself, Mr. Lebron, and Mr. Oliver.(VII,T270) Wilburn gave Deputy Lang a sworn statement admitting to taking the gun in the house and placing it in Joe Tocci's bedroom.(VII,T275)

According to Lang, Summers claimed that he and Mr. Oliver sat in the living room and began to listen to music. (VII,T270) Mr. Lebron went down a hallway toward the bedroom where Mark Tocci had gone.(VII,T270) According to Wilburn, Mark Tocci came into a bedroom with her, then left.(VII,T276) Summers and Oliver got up and walked down the hallway when Mr. Lebron called to them.(VII,T271)

Deputy Lang testified that Summers claimed that Mr. Lebron appeared out of Joe Tocci's bedroom on the right side of the hall way with a shotgun in his hand.(VII,T274) According to Summers, Mr. Lebron yelled at Mr. Oliver to "get the fuck on the floor" several times.(VII,T274) Mr.

Oliver put up a struggle, but then lay down according to Danny Summers.(VII,T274) Mr. Oliver was shot once.

After Mr. Oliver was shot, Summers and Mark Tocci smoked marijuana in the living room together.(VII,T329)

Duane Sapp, according to Deputy Lang, arrived at the house with Mary Lineberger after the others and after Mr. Oliver was shot.(VII,T277) When Sapp got there, Mr. Lebron told him to look in the garage.(VII,T277) Sapp saw a red truck in the garage.(VII,T278)

When Sapp went inside he saw the body of a young man lying in the hallway.(VII,T278) The body was half in Joe Tocci's room.(VII,T278) According to Deputy Lang, Mr. Lebron instructed the others to clean up.(VII,T278) Sapp and Vern Williams carried the body out. Sapp and Williams put the body in Mark Tocci's car because it was the biggest.(VII,T329) Sapp and Williams drove to an area behind Disney World and dumped the body.(VII,T278;329) Sapp covered the body with brush.(VII,T330) On the way back to the house, Sapp and Williams stopped and bought cleaning supplies.(VII,T330)

Wilburn, Lineberger, and the Tocci twins tried to clean up the blood in the house.(VII,T279) Lineberger suggested they use peroxide.(VII,T331) Wilburn and

Lineberger tried to burn some of Mr. Oliver's identification cards in the sink.(VII,T331)

Sapp and Mark Tocci stripped Mr. Oliver's truck down, removing the stereo system, amps, and speakers.(VII,T280) Sapp and the Tocci twins later pawned these items. (VII,T280) According to Deputy Lang, Sapp claimed that Mr. Lebron was present when this was done, although Sapp's print was on the pawn ticket and Sapp used some of Mr. Oliver's identification.(VII,T280;332) Mark Tocci also pawned some of Mr. Oliver's possessions at a second pawn shop using Joe Tocci's ID.(VII,T332-333)

Deputy Lang testified that Sapp, Summers, and Howard Kendall then took Mr. Oliver's truck to a wooded area and tried to burn it.(VII,T335)

Deputy Lang testified that Sapp claimed that Mr. Oliver's credit cards were used at Hooter's restaurant when the group went for a meal.(VII,T280) Sapp said that when the bill came, Mr. Lebron gave Mr. Oliver's credit card to him and told him to use it.(VII,T281) Wilburn described the meal as fine, with no hostility between Mr. Lebron and the others.(VII,T334) Mr. Lebron flirted with the waitress and gave her his phone number.(VII,T335) A waitress from Hooters gave a sworn statement that Sapp used the credit

card.(VII,T281)

Deputy Lang testified that Sapp also tried to cash a check belonging to Mr. Oliver a few days after he was murdered.(VII,T281) According to Sapp, Mr. Lebron was present when this was attempted. Mr. Lebron was just not picked up by the security camera that captured Sapp and Mark Tocci on film.(VII,T282;333) Sapp tried to cash a second check belonging to Mr. Oliver at a different bank as well.(VII,T333)

Deputy Lang testified that Charissa Wilburn admitted to seeing Mr. Oliver's parents on television, but did not go to the police.(VII,T323) Wilburn didn't call the police because she loved Mark Tocci and was protecting him. (VII,T335)

Mr. Lebron was arrested in New York.(VII,T343) Howard Kendall and Stacy Kirk were with him.(VII,T345) They were in Joe Tocci's vehicle.(VII,T343) A shotgun shell was found in the car.(VII,T343) Mr. Oliver's day planner was found in the car.(VII,T343) Mr. Lebron had begun to write in the planner.(VII,T343)

Hearsay testimony from Deputy Lang was also admitted about the Nasser case, CR95-2368.(VII,T282) Mr. Lebron was convicted in that case of robbery and kidnapping with

intent to commit a felony.(VII,T283) This incident occurred about a week after Mr. Oliver was killed.(VII,T283) Howard Kendall was a co-defendant. (VII,T343)

Deputy Lang also testified that Mr. Lebron was convicted of aggravated assault in another case involving the shotgun “Betsy”.(VII,T284)

According to Deputy Lang, other people outside the group were interviewed and gave sworn statements.(VII,T285) Five or six other people had conversations with Mr. Lebron about this offense and his involvement.(VII,T285) Over objection, Deputy Lang testified that Mr. Lebron did not claim that anyone else killed Mr. Oliver.(VII,T286)

Over objection Deputy Lang testified that there was no evidence discovered in the course of the investigation that Danny Summers, Mark Tocci, Charissa Wilburn, Duane Sapp, Vern Williams, Joe Tocci, or Mary Lineberger killed Mr. Oliver.(VII,T289)

Rebecca Oliver testified that she is Mr. Oliver’s mother.(VII,T346) At the time of his death, Mr. Oliver lived with his parents.(VII,T349) Mr. Oliver had been working and going to community college.(VII,T349) Mr. Oliver loved soccer and loved his truck. (VII,T349) Mr. Oliver had owned his truck for about six months.(VII,T350)

He spent a lot of money fixing it up.(VII,T350) Mr. Oliver belonged to a truck club that raised money for charity and provided social opportunities.(VII,T350)

Mrs. Oliver showed the jury a picture of Mr. Oliver. (VII,T351) Mrs. Oliver read a prepared statement to the jury that detailed her loss over Mr. Oliver's death. (VII,T352) She described the pain and loss as intolerable. (VII,T352) Mrs. Oliver still drives the truck.(VII,T353) A truck show is held in Orlando each year in Mr. Oliver's memory.(VII,T353)

The defense presented the following testimony:

Jocelyn Ortiz testified that she is Mr. Lebron's mother.(VII,T355) Ms. Ortiz lives in New York City. (VII,T354) Ms. Ortiz was born in Puerto Rico and raised in the Dominican Republic.(VII,T355) She came to the United States at age 12 with her mother and twin brother. (VII,T356-7) Because her mother was abusive and would beat her and her brother, Ms. Ortiz left home at age 16. (VII,T358) Ms. Ortiz and her brother lived on the streets, staying where ever they could.(VII,T359) Ms. Ortiz's brother was eventually committed to a mental institution because he was schizophrenic.(VII,T359)

Ms. Ortiz became pregnant shortly after leaving her

mother's house.(VII,T359) She gave birth to Mr. Lebron at age 17. (VII,T359) Ms. Ortiz didn't want a child, but got pregnant in order to get public assistance so she could get off the street.(VII,T360) Mr. Lebron's father was older than she.(VII,T361) He sold drugs, was in and out of jail, and lived on the street as well.(VII,T361) Mr. Lebron's father was around for only the first few months of his life, he then took off.(VII,T361-2)

Ms. Ortiz found that having a child was not what she expected.(VII,T370) She couldn't party and resented her son very much.(VII,T370) She couldn't go out to discotheques with her friends.(VII,T370) Ms. Ortiz resented her child because her pregnancy messed up her body.(VII,T370)

Ms. Ortiz began using drugs when she was fifteen or sixteen.(VII,T363) She used whatever she could get or what someone would give her- marijuana, amphetamines, cocaine, heroin, LSD, Quaaludes, speed or "Black Beauties", and other pills.(VII,T364-64) Ms. Ortiz used drugs while she was pregnant with Mr. Lebron.(VII,T364)

Shortly after Mr. Lebron was born, Ms. Ortiz entered into a residential drug treatment program called Daytop Village.(VII,T362) Ms. Ortiz began the program as an outpatient, but then entered the residential program

because she could not stop partying, getting high, doing drugs and drinking.(VII,T365) Ms. Ortiz would leave Mr. Lebron with whatever friend was available so she could party.(VII,T366) She and the baby had no stable residence. (VII,T366) Ms. Ortiz could not recall anything about Mr. Lebron at this stage of his life. (VII,T375) She could not recall ever holding him or doing anything with him. (VII,T375) Her only memory of being with him was when she was high and trying to feed him, but messing it up. (VII,T375) Ms. Ortiz was told if she didn't enter the residential drug treatment program, her son would be taken away and put in a group home.(VII,T366) Ms. Ortiz entered the program in Peeksville, New York and remained there for 28 months.(VII,T366) Mr. Lebron was placed in foster care while she was in drug treatment.(VII,T367)

Ms. Ortiz had no contact with Mr. Lebron for the first year of treatment and did not see him until he was around fifteen months old.(VII,T367) During the second year of her drug treatment, Ms. Ortiz would see Mr. Lebron once a month or once every other month at the foster home where he lived in Queens.(VII,T368) Ms. Ortiz kept this monthly visitation schedule until she finished the aftercare program at Daytop and was able to get an apartment.(VII,T368) Ms. Ortiz did

not get Mr. Lebron back until he was four or five years old.(VII,T368) During this time period Mr. Lebron lived in several foster homes, but Ms. Ortiz did not know how many. (VII,T369)

While in the drug treatment program, Ms. Ortiz met and married Tony Ortiz.(VII,T371) Both worked at Daytop when they married.(VII,T372) Mr. Lebron came to live with them. (VII,T374) Mr. Lebron loved Mr. Ortiz very much because Tony would play with him and talk to him.(VII,T375) Mr. Lebron believed Tony was his father.(VII,T374)

The marriage between her and Tony Ortiz lasted only a year.(VII,T373) Mr. Lebron was very angry and upset when Mr. Ortiz left.(VII,T374) Mr. Lebron blamed his mother for the absence of Mr. Ortiz.(VII,T374)

Ms. Ortiz admitted that she didn’t like kids and still doesn’t like kids.(VII,T375) According to her, she doesn’t have “the mother thing that people supposed to have. I don’t. I don’t.”(VII,T375)

According to his mother, Mr. Lebron did very poorly when he entered school.(VII,T376) He was hyperactive and not well behaved.(VII,T376) A school counselor suggested that Mr. Lebron be put on Ritalin, but Ms. Ortiz did not do this because she did not want him to be “labeled”.

(VII,T377) She didn't want Mr. Lebron to be a "zombie". (VII,T377)

Mr. Lebron was in a Catholic school that required the parents to attend meetings.(VII,T376) Ms. Ortiz didn't do anything she was supposed to do, so the school called and said that Mr. Lebron would not be able to go to school there because she did not participate.(VII,T376) Ms. Ortiz admitted she never met with Mr. Lebron's teachers or tried to find out how he was doing.(VII,T376) She did not participate in any functions related to the school at all. (VII,R376) She did not help Mr. Lebron with homework because she also had her own problems.(VII,T378) Ms. Ortiz noted that she "was not all that into" helping Mr. Lebron. (VII,T378) Mr. Lebron then entered public school.

While in public school Mr. Lebron was diagnosed with dyslexia.(VII,T377) He had concentration problems. (VII,T377)

When Ms. Ortiz quit working at Daytop after she and Tony Ortiz parted. She became a "go-go" dancer.(VII,T379) She danced for about ten years.(VII,T379) Ms. Ortiz testified that she first started dancing while wearing a bikini, then worked as a topless dancer, then as a stripper.(VII,T379) While working as a stripper she would

travel to different cities and different places. She would travel out of the country for weeks at a time. (VII,T380;383) Ms. Ortiz made a lot of money as a dancer-from $800 per day to $3,000 per week.(VII,T383) Ms. Ortiz got a lot of drugs and a lot of money while she was a dancer and enjoyed it.(VIII,T403) She continued to use drugs in her later life.(VII,T404) Mr. Lebron was left with many different baby-sitters while she worked, partied, and traveled.(VII,T382)

During the time period that Ms. Ortiz worked as an adult entertainer, she did nothing with Mr. Lebron other than send him to school if she was home.(VII,T380) Ms. Ortiz testified that she didn't have the patience and kids are very demanding.(VII,T380) Ms. Ortiz said that she "didn't do anything with him" because she couldn't do it.(VII,T381)

Ms. Ortiz was raised as a Catholic and attended church in the Dominican Republic and in the U.S. as a child. (VII,T381) She never took Mr. Lebron to church.(VII,T381)

In the summer Ms. Ortiz would send Mr. Lebron to camp because she wanted him gone.(VII,T382) She wanted to be by herself.(VII,T382) When Mr. Lebron was at home Ms. Ortiz disciplined him by yelling at him and hitting him "because

all mothers hit their kids".(VII,T407)

After ten years as a dancer, Ms. Ortiz, with the help of a boyfriend, opened a topless club of her own. (VII,T384) She still owns an adult club in New York. (VII,T384)

At some point in her life, Ms. Ortiz entered therapy. At her therapist's suggestion, Ms. Ortiz took Mr. Lebron to see a psychiatrist, Dr. Luis Shankman.(VIII,T406) Mr. Lebron went to therapy for about five months, but his problems still persisted.(VIII,T406)

When Mr. Lebron was a teenager, Ms. Ortiz placed him a residential program at the suggestion of her therapist. (VII,T385) In July 1988, Mr. Lebron entered Pleasantville Cottage School, a program for kids that have emotional and behavior problems.(VII,T385) Ms. Ortiz recalled taking Mr. Lebron to the institution, but nothing else-she noted "I was a drug user, I don't know..".(VIII,T403) Ms. Ortiz put Mr. Lebron in Pleasantville because he had emotional problems, couldn't study, had very poor grades, had disciplinary problems at home and at school, and stole from her.(VIII,T405-6)

Ms. Ortiz was not sure about what treatment Mr. Lebron got in Pleasantville.(VII,T412) She didn't know of any

medication and thought he was going to school.(VII,T412) She could not recall Mr. Lebron seeing a psychiatrist or counselor while there.(VIII,T413)

Mr. Lebron remained at Pleasantville until he left in 1990.(VIII,T413) After Pleasantville, he went to a program in Pennsylvania for a short period.(VII,T386) This was a military-type school called Glenn Mills.(VIII,T415) When Mr. Lebron left Glenn Mills, Ms. Ortiz gave up on Mr. Lebron.(VII,T417) She was sick of him and kicked him out of her house. (VII,T417)

While in New York, after he left treatment at Glenn Mills, Mr. Lebron was charged with robbery.(VII,T387) Mr. Lebron pled as an accessory and received probation. (VII,T387) Ms. Ortiz was not involved with any of this. (VII,T387)

When asked, Ms. Ortiz could not name a single person that Mr. Lebron had a stable, emotionally supportive relationship with while he was growing up.(VII,T392) Ms. Ortiz never wanted to be a mother.(VII,T392)

When she was married, Mr. Lebron “was just there”. (VII,T392) As Mr. Lebron got older and would cry or cling when she left, she would smack him.(VII,T393) She would say mean things to him.(VII,T393) She would yell at him and hit

him.(VII,T409) Ms. Ortiz has very few memories of Mr. Lebron and his growing up years because she has tried to black it out.(VII,T410)

Ms. Ortiz has never told Mr. Lebron that she loved him.(VII,T393) She resented the fact that she had a child and didn't like the responsibility that came with it. (VII,T393) Ms. Ortiz had given Mr. Lebron material things, but she has never given him anything on an emotional, supportive, or parental level.(VII,T393-394;VIII,T417-18) She doesn't know how to show any feeling toward him. (VII,T394)

The defense admitted the following exhibits into the record: Defense Exhibit 1- the charging document, trial verdict, and judgment and sentence of Vern Williams relative to this offense reflecting a sentence of 48 months as an accessory after the fact(II,E40); Defense Exhibit 2- charging document, plea form, and sentencing documents of Mary Lineberger relative to this offense reflecting a sentence of 2 years community control and eight years probation in exchange for truthful testimony against Mr. Lebron (II,ER51); Defense Exhibit 3- the charging document and nolle prosequi of Danny Summers relative to this offense(II,ER54-55); Defense Exhibit 4- the charging

document, plea form, and judgment and sentence documents of Mark Tocci relative to this offense reflecting a sentence of 36 months as a Youthful Offender with the rights to seek post-sentence relief (II,ER57-64); Defense Exhibit 5- the charging document, plea form, and judgment and sentence documents of Joe Tocci, Jr., relative to this offense reflecting a sentence of 2 years community control and 8 years probation conditioned on truthful testimony against Mr. Lebron (II,ER65-71); Defense Exhibit 6- the charging document, plea form, and judgment and sentence documents of Charissa Wilburn relative to this offense reflecting a 24 month Youthful Offender sentence, 2 years community control conditioned upon truthful testimony with sentence to be determined based on cooperation level (II,ER72-78); and Defense Exhibit 8- the charging documents, trial verdict, and judgment and sentence documents for Duane Sapp relative to this offense reflecting a sentence of 48 months prison. (VIII,T357-58;511;II,ER101-115)

Defense Exhibit 7, a composite of the police reports and documents related to Mr. Lebron's New York conviction for attempted robbery were admitted into evidence. (VIII,T459;II,ER23-34;80-99)

Defense counsel then read into evidence a portion of

the trial testimony of Joe Tocci in Case No. CR95-2553, which involved victim Brandi Gribben. (VIII,T460) Joe Tocci testified that when he arrived at the apartment shared by Mary Lineberger and Brandi Gribben there was a fight. Joe Tocci told Brandi Gribben that if she wasn't going to pay her rent, she needed to get her stuff and go- he didn't want to deal with her.(VIII,T461) According to Joe Tocci, Gribben got upset, and was acting crazy and mad.(VIII,T461) Gribben threw things and swung a baseball bat, putting holes in the wall. Gribben threw mugs at Mr. Lebron.(VIII,T461) According to Joe Tocci, Gribben smacked Mr. Lebron because he was standing in front of her. (VIII,T461) Mr. Lebron started to hit her back, but the others stopped him.(VIII,T462) Gribben then went into the kitchen and grabbed a knife.(VIII,T462) The knife was taken from her by Joe Tocci "because it looked like she wanted to slice someone."(VIII,T462) Joe Tocci testified that Gribben directed her anger at Mr. Lebron.(VIII,T462) Mark Tocci and Duane Sapp stayed at the apartment while Mr. Lebron, Joe Tocci, and a Spanish guy went back to their house.(VIII,T463) Joe Tocci and Mr. Lebron got a gun from their house and returned to the apartment.(VIII,T463) Joe Tocci and Mr. Lebron entered the apartment.(VIII,T464)

Gribben was sitting in a rocking chair- Mark Tocci, Mary Lineberger, Duane Sapp, and three other Spanish guys were in the apartment.(VIII,T464) Mr. Lebron pointed the gun at Gribben's head and told her to leave.(VIII,T464) Gribben left. (VIII,T464)

Defense counsel also read into evidence a portion of the prior testimony of Danny Summers in this case: Mr. Summers testified that on the evening the Mr. Oliver was killed, he was in the Joe Tocci's car with Mr. Lebron.(VIII,T465) Mr. Summers testified that the music was on very loud in the car.(VIII,T465) Mr. Summers was sitting next to Mr. Lebron in the back seat. Mark Tocci and Charissa Wilburn were in the front seat.(VIII,T466) Mr. Summers did not hear Mr. Lebron say anything on the ride back to their house.(VIII,T466) Summers did not hear Mr. Lebron say anything about doing something bad to Mr. Oliver and did not hear him say he was going to "jack" Mr. Oliver. (VIII,T467) Mr. Lebron was singing with the music and sang along to the words "gonna get paid".(VIII,T468)

B. SUMMARY OF EXHIBITS

STATE EXHIBITS

State Exhibit 1: The Information in CR95-2553 charged Mr. Lebron with Aggravated Assault with a Firearm against

Brandi Gribben. (I,E2) Mr. Lebron was convicted of that offense and sentenced to 45.75 months DOC.(I,E2-3)

State Exhibit 1(Vol.II): The verdict form from trial in this case rendered on February 25, 1998, wherein Mr. Lebron was found guilty of First-Degree Felony Murder as charged in the Indictment and Robbery with a Firearm.(II,E7) The jury also found as follows: Larry Neal Oliver, Jr., was killed by a person other than Jermaine Lebron. (II,E8)

State Exhibit I(Vol.IV): A summary compiled by the State of selected records contained the school, medical, and treatment records of Mr. Lebron. (IV,ER120-122) The State Exhibits are duplicates of those submitted by the defense.(IV,ER122-157)

DEFENSE EXHIBITS

A. Elementary School Records (Vol.IV,ER158-182)

Mr. Lebron entered elementary school in September, 1980.(IV,ER159) His attendance was spotty- missing from 17 days per year to 51 days per year.(III,ER159) Mr. Lebron, from an early age, demonstrated an exaggerated need for attention, difficulty relating to peers, and difficulty in obeying school rules.(III,ER160) It was noted that Mr. Lebron, at this early age, was seldom prepared for school

and had never completed homework.(III,ER160) Mr. Lebron consistently received failing or unsatisfactory evaluations in social behavior and work/study habits in elementary school.(III,ER162) Mr. Lebron was referred for special education in second grade.(IV,ER178)

In middle school, Mr. Lebron entered special education for middle school students in sixth grade and received speech therapy as well.(IV,ER169) An evaluation in 1986 described Mr. Lebron as compliant, but unable to relax, fidgety, and sleepless.(IV,ER172) Mr. Lebron had a five year delay in receptive language and communicated poorly and improperly.(IV,ER172) Mr. Lebron was deemed below average in all academic areas and failed all his 7th grade classes. (IV,ER174)

In 1986, an evaluation noted Mr. Lebron had an IQ of 80, low average.(IV,ER176) He had deficits in auditory and language processing.(IV,ER176) It was noted that Ms. Ortiz needed much guidance in parenting.(IV,ER176)

A psychological report from April 1986, stated that Ms. Ortiz “works long hours in a restaurant” and her use of a live-in housekeeper was not enough.(IV,ER178) It was noted that Mr. Lebron’s behavior improves when his mother spends time with him.(IV,ER178) The report stated that Ms.

Ortiz, however, cannot give him the necessary attention and loses her temper with him too frequently.(IV,ER178) Her ability to control Mr. Lebron had reached its limits. (IV,ER178)

B. Pleasantville Cottage School Records(IV,ER184-275)

Mr. Lebron was admitted to Pleasantville Cottage School in July 1988.(IV,ER184) During his last year at home (8th Grade),he received home tutoring.(IV,ER192) He tested at a 4th grade reading level, 3rd grade spelling level, 4.8th grade in math level, and had very poor handwriting skills when he entered Pleasantville.(IV,ER192-193;196) He performed poorly on all but one measure of appropriate peer/social interaction.(IV,ER195) Mr. Lebron was placed in special classes at Pleasantville.(IV,ER234)

In grades 9 and 10 at Pleasantville Mr. Lebron's academic performance was lacking- he received below average grades in all but music and PE.(IV,ER238) He failed the New York State Regency Competency Tests.(IV,ER239-240)

In September 1988 Mr. Lebron was given speech/hearing tests.(IV,ER184-85) His failures on those tests led to speech therapy.(IV,ER186;254) Mr. Lebron was discharged from these therapies in January 1990 due to his disinterest and lack of progress.(IV,ER252)

A summary of Barbara Novic's report was included in the file.(IV,ER190; also State Exhibits) The summary noted that Mr. Lebron was found to be a guarded and controlled child with low self-esteem. He had distant relationships with adults, which was of concern to him.(IV,ER190) Although ADD was ruled out, it was noted that he had difficulties in visual sequential memory.(IV,ER190)

C. Jewish Child Care Association Records (Vol.V-VIII)

JCCA documents contain several psychiatric evaluations performed on Mr. Lebron.(V,ER431) In addition periodic assessments were made regarding Mr. Lebron's treatment and progress at Pleasantville which contained data about Mr. Lebron's psychological and emotional status.

A UCR Reassessment and Service Plan Review dated October 12, 1988, which was shortly after Mr. Lebron entered Pleasantville, found that Mr. Lebron had behavior and management problems early on at Pleasantville.(V,ER457) Mr. Lebron had very poor peer relations, provoked anger in his peers, and used poor judgment.(V,ER457) It was noted that he would do anything for peer approval and associated with the "more acting-out negative youngsters."(V,ER457) Compulsive public masturbation was a problem and he had made some inappropriate sexual gestures toward younger

children.(V,ER457;461) He had explosive outbursts with staff.(V,ER457)

Records demonstrate that Mr. Lebron suffered academically in all areas.(V,ER457) He was approximately five grades behind at his admission to Pleasantville.(V,ER457)

Mr. Lebron was described by staff as depressed, with low self-esteem and high anxiety, impulsive, and fearful of losing his mother.(V,ER457) Ms. Ortiz, it was noted, was outwardly concerned about Mr. Lebron, but never felt she could relate to him.(V,ER457) Her parenting skills were described as “quite deficient”. Ms. Ortiz knew only how to give in terms of material things and tended to overindulge Mr. Lebron materially, but offered little warmth and nurturance.(V,ER457) It was noted that Mr. Lebron’s problems appeared to be emotional in origin.(V,ER457) Ms. Ortiz appeared to be more concerned with her own needs that those of Mr. Lebron.(V,ER458)

A psychiatric report dated March 3, 1989 found that at age 14 and 4 months Mr. Lebron had an IQ of 87, in the low average.(V,ER445) He had poor planning in organizational skills and rotational difficulties.(V,ER444) Despite being in high school his academic mastery was at the elementary

school level.(V,ER445) Testing showed a learning disability in spelling and indications of mild organic impairment.(V,ER445) Mr. Lebron was described as a passive-aggressive individual with perfectionist strivings. He had poor self-concept and a lack of confidence in his abilities.(V,ER445) Mr. Lebron was often frustrated, angry and depressed.(V,ER446)

The 1989 evaluation described Mr. Lebron's home life as "barren and empty with a deep-rooted sense of isolation and with intense anger and anxiety surrounding this." (V,ER446) Mr. Lebron viewed maternal figures as aggressive, punitive, and hurtful.(V,ER446) His environment failed to provide him with the emotional support that he was striving for, causing him to view himself as helpless, vulnerable, and defensive.(V,ER446) When his defense mechanisms unravel, Mr. Lebron experienced intense anxiety and fearfulness.(V,ER446) Residential treatment was recommended.(V,ER446)

A Psychiatric Re-Evaluation was performed on April 5, 1989, when Mr. Lebron was 14 1/2. At the time of his voluntary admission by Ms. Ortiz he had been truant, stealing from her, and running away for as much as five days at a time.(V,ER447)

Mr. Lebron admitted to stealing from his mother to get attention as early as age 7.(V,ER447) He stole only from her, more when she gave him less attention.(V,ER447;449) He did not believe his mother loved him.(V,ER447)

The report noted that Mr. Lebron had been seeing a therapist, Dr. Feinberg in March 1988.(V,ER447) Mr. Lebron was diagnosed with Axis I Dysthymic Disorder and Conduct Disorder, Socialized, Nonaggressive and Axis II Early Personality Disorder with Passive-Aggressive Features and Mixed Specific Developmental Disorder.(V,ER448) Residential treatment was recommended.(V,ER448) Additional therapy was done with Louis Shenkman from February 1988 through July 1988.(V,ER448)

A maternal psychiatric history was reported.(V,ER448) Ms. Ortiz believed that her mother was psychotic.(V,ER448) An older brother, then deceased, had been a paranoid schizophrenic.(V,ER448) Ms. Ortiz's twin brother was diagnosed as schizophrenic.(V,ER448)

Mr. Lebron had a great deal of difficulty getting adjusted to Pleasantville Cottage School.(V,ER450) He spent most of the first months on restriction.(V,ER450) He was disliked by peers due to his being perceived as a snitch, braggart, and exhibition of provocative behavior including

inappropriate sexual behavior and masturbation.(V,ER450)

Mr. Lebron's relationship with his mother was described as "conflictual".(V,ER450) Mr. Lebron described his mother as a "whore".(V,ER450) Ms. Ortiz admitted that her son had walked on her having sex with someone who was not her boyfriend during a home visit.(V,ER450)

It was noted that Ms. Ortiz complained of the sacrifices that she made to visit Mr. Lebron.(V,ER450) However, she had visited only one time since his admission. (V,ER450) Ms. Ortiz complained that visiting Mr. Lebron was "too boring".(V,ER451) She often failed to come.(V,ER451)

Ms. Ortiz was described as "overtly devaluing" Mr. Lebron.(V,ER450) She complained that he was like her- "undisciplined".(V,ER450) Indications in Mr. Lebron's history indicated physical abuse, which Ms. Ortiz admitted to.(V,ER451) Although no longer physically abusive, Ms. Ortiz remained verbally abusive to Mr. Lebron.(V,ER453)

The report noted that Mr. Lebron had seen pornographic videos of his mother that she had made.(V,ER451) He believed her to be a prostitute, which she denied. (V,ER451) Mr. Lebron was unable to express his feelings, anger, and difficulties to his mother personally and requested staff to do so.(V,ER451) When Mr. Lebron tried to

express his feelings about her activities at a conference session, Ms. Ortiz angrily told him he would have to accept what she does or go to foster care.(V,ER452) She defended her profession as a stripper as “art” and was angry at Mr. Lebron for “talking about her behind her back.”(V,ER452)

Mr. Lebron had chosen not to go on home visits due to his feelings regarding his mother.(V,ER451) His behavior in the cottage and classroom improved when he declined to visit.(V,ER451) The report further noted that Mr. Lebron was afraid his mother would not want him to ever return. (V,ER452) It was noted that the goal of “permanency” might need to change depending on whether adequate progress could be made in resolving the conflicts between Ms. Ortiz and her son.(V,ER453)

A Psychiatric report dated April 25, 1990, noted that Mr. Lebron had inconsistent and poor academic functioning.(V,ER431) His IQ had decreased from a 1987 Full Scale IQ of 97 to a Full Scale IQ of 86.(V,ER431) He had developmental disabilities in reading, math, and articulation.(V,ER431)

Mr. Lebron was described as having poor judgment, poor insight, as impulsive with little superego restraint, and would lie, cheat, and steal upon impulse.(V,ER431;432) His

relationship with his mother was described as “remains troubled and conflicted with marked mutual dependency and ambivalence.”(V,ER431)His peer relationships were superficial.(V,ER431) He was prescribed medication for a “provisional Mild Attention Deficit Disorder with Hyperactivity”, but medication was discontinued due to noncompliance by Mr. Lebron.(V,ER431) It was felt that Mr. Lebron has a long-standing underlying depressive trend probably reactive to nurturational deprivation and long-standing conflict and ambivalence with his mother. (V,ER432)

Mr. Lebron was transferred to Glen Mills School in Pennsylvania in June 1990 because his level of acting out at Pleasantville had reached the point where he could not remain at Pleasantville.(V,ER281;366) Mr. Lebron went AWOL from Glen Mills in April 1991 and returned to live with Ms. Ortiz, although he was mostly on the loose.(V,ER281;296) Ms. Ortiz did not want him living with her.(V,ER361) She failed to return forms that would permit JCCA to seek placement alternatives.(V,ER365;416-419;424) It was felt that Mr. Lebron was an emotionally disturbed child and was still in need of placement in a residential treatment center. (V,ER281-82)

In October 1991, Mr. Lebron had been scheduled for an interview with Lutheran Community Services and was admitted to their group home in Brooklyn.(V,ER296) Within a week Mr. Lebron snatched a purse from a woman in that community and was discharge from the Lutheran program.(V,ER296) Neither Mr. Lebron nor Ms. Ortiz could be reached.(V,ER296)

A later report, dated January 9, 1992, noted that Mr. Lebron had gone to Florida and been arrested.(V,ER304) According to this report Mr. Lebron was returned to Ms. Ortiz in November 1991, but she would not allow him to remain with her.(V,ER304) Mr. Lebron was then placed at Covenant House, but did not follow the rules, so he was sent to Emergency Children Services, a shelter.(V,ER304) Mr. Lebron had not benefited from any services rendered to him. (V,ER304) It was further noted that Mr. Lebron needed to address his problem of stealing from his mother and Ms. Ortiz needed to learn to express affection towards him without approving of his delinquent behavior.(V,ER308-9)

The January 1992 report noted that Ms. Ortiz had failed to attend the a placement conference for Mr. Lebron in November 1991, but gave a message as to her position.(V,ER312;352) She did not want Mr. Lebron with her.

A letter dated December 2, 1991, from JCCA noted that Mr. Lebron had low self-esteem and is anxious, but had never been aggressive or violent.(V,ER438) Mr. Lebron tries to make friends, but doesn't know how to go about it. (V,ER438)

A report dated March 18, 1992, indicated that Ms. Ortiz "again did not show" and neither did Mr. Lebron for a court hearing on behalf of Mr. Lebron.(V,ER371) Mr. Lebron's attorney also failed to appear.(V,ER371)

A six month review report dated April 12, 1992 indicated that Mr. Lebron had left the Emergency Children's Shelter prior to placement.(V,ER344) Despite placement efforts, all agencies had rejected him.(V,ER344) The rejections were due to the severity of his behavior and age.(V,ER402-404;414;428) One rejection noted "Jermaine is a very conduct disordered adolescent." (V,ER402)

The April 1992 report noted that Mr. Lebron had become involved in an armed robbery and spent several days at Riker's.(V,ER344) Mr. Lebron was released to live with his mother, but she wanted him placed.(V,ER344) Ms. Ortiz was now living with a boyfriend.(V,ER344) The report noted that Ms. Ortiz did not appear for a court hearing on February 4, causing the judge to issue a "Diligent Search"

for her.(V,ER344) It was further stated that Mr. Lebron was an emotionally disturbed child in need of residential treatment.(V,ER347)

Neither Ms. Ortiz nor Mr. Lebron attended a planning/placement meeting held on August 27, 1992. (V,ER335)

A report dated October 12, 1992 stated that Ms. Ortiz did not show any interest in continuing to work with JCCA and did not respond to numerous contacts from the agency. (V,ER327) Ms. Ortiz reported attending one court date for Mr. Lebron, but did not attend any after that.(V,ER327) The report noted that Mr. Lebron had turned 18, hence there was little the agency could do to assist him since a judge had ordered that there be no more court hearings after his 18th birthday. (V,ER327-28)

A planning conference was held on February 17, 1993. Ms. Ortiz was unwilling to cooperate with the agency and refused to attend the meeting. Mr. Lebron could not be located.(V,ER323)

On April 12, 1993, Ms. Ortiz indicated again to JCCA that she was no longer interested in working with the agency.(V,ER315) Ms. Ortiz had not responded to numerous prior calls and letters and had not cooperated with the

agency since 1992.(V,ER315) Ms. Ortiz indicated that Mr. Lebron had left her home in March 1992 and she did not know his whereabouts.(V,ER315) Ms. Ortiz requested no further contact from the agency.(V,ER315)

Mr. Lebron was discharged from JCCA on July 21, 1993. (V,ER399)

SUMMARY OF THE ARGUMENT

ISSUE I: The trial court erred in rejecting the mitigating circumstances of age, maternal drug addiction, interpersonal relationships, domestic violence/emotional abuse, and institutionalization where uncontroverted evidence was presented establishing each of those mitigating circumstances. The trial court also erred in the assignment of weight to the mitigating circumstances of Maternal Drug Use, Parent Profile, and Psychological where these same factors have been accorded significantly more weight in other capital cases with similar facts. This error requires reversal for a reconsideration of sentence.

ISSUE II: The trial court erred in relying upon testimony from prior proceedings in this case that was never admitted into evidence in this case. The trial court impermissibly chose to ignore to the actual evidence presented in these proceedings in his analysis of the

mitigating circumstances of Prenatal Problems-Drug Addicted Mother and Interpersonal. This error requires reversal for a reconsideration of sentence.

ISSUE III: The sentence of death is disproportionate in this case. This case is not the most aggravated of first degree murders and more significantly, it is not among the least mitigated. Remand for the imposition of a life sentence is required.

ISSUE IV: The trial court impermissibly required the jury to record a numerical vote for each mitigating and aggravating circumstance on special forms labeled Attachment A and Attachment B over the objections of both the State and defense. The trial court's action in requiring the jury to record their numerical vote was an essential departure from the requirements of the law which requires reversal for a new penalty phase.

ISSUE V: Florida's capital sentencing process is unconstitutional because a judge rather than jury determines sentence. The Florida capital sentencing process is further constitutionally flawed because the jury is not required to return a unanimous sentencing recommendation in order for a sentence of death to be imposed.

ISSUE VI: The existence of the prior violent felony aggravator does not circumvent the necessity of a jury finding as to each aggravating factor in capital proceedings in order to satisfy constitutional requirements under Ring v. Arizona, 536 U.S. 584 (2002).

ISSUE VII: The standard penalty phase jury instructions are unconstitutional because they fail to give appropriate guidance to the jury's determination regarding mitigation and impermissibly shift the burden of proving that a life sentence should be imposed to the defendant. The standard penalty phase jury instructions require the defendant to prove that the mitigation outweighs the aggravation.

ISSUE VIII: The standard jury instructions impermissibly denigrate the role of the jury in the capital sentencing proceedings and are unconstitutional.

ISSUE IX: Execution by lethal injection constitutes cruel and unusual punishment under the Eighth Amendment to the United States Constitution under the current protocols established by the State of Florida and through the use of the three chemical sequence utilized by the State.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN REJECTING MITIGATING CIRCUMSTANCES WHICH WERE REASONABLY ESTABLISHED BY THE GREATER WEIGHT OF EVIDENCE AND FURTHER ERRED IN THE WEIGHT WHICH WAS ASSIGNED TO OTHER MITIGATION

In sentencing Mr. Lebron to death, the trial court considered and rejected several mitigating circumstances that were presented by the defense. The trial court specifically rejected Mr. Lebron's age of 21 as mitigating (II,R269), that Mr. Lebron's mother, Ms. Ortiz, was addicted to drugs at the time of Mr. Lebron's birth and early childhood and continued to abuse drugs while he was in her care(II,R270-271), Mr. Lebron's difficulties in forming relationships(II,R272), childhood abuse/domestic violence suffered by Mr. Lebron at the hands of Ms. Ortiz (II,R273), and the institutionalization of Mr. Lebron (II,R272-273). In each instance the trail court rejected the mitigation circumstance due to a lack of evidence or failure of proof. The trial court's rejection of each of these mitigating circumstances was error because the record conclusively established the existence of each mitigating circumstance with unrebutted testimony.

This Court has repeatedly stated what the trial

court's obligation is in considering mitigating circumstances. This Court has defined a mitigating circumstance as being any aspect of a defendant's character that reasonably may serve as a basis for imposing a sentence less than death. Campbell v. State, 571 So.2d 415, n.4 (Fla. 1990), quoting, Lockett v. Ohio, 438 U.S. 536, 604(U.S. 1978), receded from in part, Trease v. State, 768 So.2d 1050 (Fla. 2000). Uncontroverted evidence of a mitigating circumstance must be accepted by the trial court as proven. Miller v. State, 770 So.2d 1144 (Fla. 2000) A mitigating circumstance is proven if there is a reasonable quantum of competent evidence to support it. All believable and uncontroverted mitigation must be considered and weighed by the trial court. Crook v. State, 813 So.2d 68 (Fla. 2002), sentence reduced to life on proportionality grounds, 908 So.2d 350 (Fla. 2005). The trial court may only reject a mitigating circumstance as unproven if competent, substantial evidence supports the rejection or if the proffered mitigation does not square with other evidence. Coday v. State, ___ So. 2d ___ 2006 WL 3028248 (Fla. 2006). A trial court's rejection of mitigation evidence is subject to a harmless error analysis. Miller v. State, supra.

After making the appropriate determination as to what mitigation has been established, it is then the duty of the trial court to assign weight to each mitigating circumstance. Generally, it is within the discretion of the trial court to determine what weight will be assigned and appellate review of the trial court's decision is done under the abuse of discretion standard. Coday v. State, supra.

ERRONEOUS REJECTION OF MITIGATION

The trial court's rejection of the following mitigation was error:

1. Age

The age of a defendant is properly considered as a mitigating circumstance when the age is linked to another characteristic of the defendant, such as immaturity, or the crime. Mahn v. State, 714 So.2d 391 (Fla. 1998). The defendant Mahn was 19 at the time he committed a double murder. Other evidence established that Mahn had a drug/alcohol problem, a documented history of mental/emotional instability, and had been passive in the face of physical and mental abuse from his mother. Evidence had established that Mahn was a far cry from a normal 19 year old, thus it was error for the trial court

to reject age as a mitigating circumstance. This Court held that, given the other evidence of Mahn's upbringing, the trial court should have linked those factors with Mahn's age. The trial court in this case committed the same error as the trial court in Mahn by failing to consider the extensive evidence of Mr. Lebron's extreme immaturity and his background which made him a far cry from a normal 21 year old.

Trial testimony established that at the time of this murder Mr. Lebron was 21 years old. Mr. Lebron's documented social/psychological history from elementary school through age 18 conclusively established that at no time was Mr. Lebron ever functioning at a level commiserate with his chronological age.

Mr. Lebron entered school and within a year was placed into special education classes. He continued in special education classes until he left Pleasantville at age 17. In 1989, Mr. Lebron had an IQ of 87 and evidence of a mild organic impairment.(V,ER445) The last IQ test performed on Mr. Lebron showed an IQ of 86, low average.(V,ER431) Each evaluation of Mr. Lebron from elementary on indicated a child who was at least five grades behind in academic performance and lagging behind in social/behavioral

development. Mr. Lebron also struggled with speech impediments. Throughout his teen age years Mr. Lebron was found to have poor judgment skills, poor insight, and little self-restraint. (V,ER431-2) At age sixteen Mr. Lebron was viewed as having the developmental functioning of a twelve year old. At ages 17-18, Mr. Lebron was characterized as being emotionally disturbed and in need of residential treatment, immature, and with delayed social development.(V,ER347) There is no evidence in this record which rebuts the uncontroverted evidence that throughout his entire adolescence, Mr. Lebron lagged in development and was far less mature than his chronological age. There is no evidence to even suggest that Mr. Lebron, from his last evaluations as an eighteen year old suddenly reversed a life time of delayed development and matured into a twenty-one year old with adult insight, adult capabilities, and adult judgment.

The trial court's conclusion that there was no evidence that Mr. Lebron was "not mentally and emotionally mature" overlooks every psychiatric evaluation done of Mr. Lebron throughout his life. The trial court's rejection of this mitigating circumstance was error.

2. Drug Addiction of Mother

The trial court's sentencing order does not refer to the testimony of Ms. Ortiz in the hearing in 2005, but instead references the earlier 2002 proceedings. The error of the trial court's reliance on the earlier proceedings will be addressed in Issue II. However, the testimony that the trial court was required to consider was Ms. Ortiz's testimony in August 2005. Her testimony establishes that she was addicted to drugs at the time of Mr. Lebron's birth, that her addiction led her to neglect and abandon her child, that her addiction led her to treatment that caused her to lose custody of Mr. Lebron until he was age four or five, that her subsequent return to drugs a year or so after leaving treatment led her to further resent and neglect Mr. Lebron, and ultimately led to his placement in institutional care.

Ms. Ortiz testified in these proceedings that prior to and during her pregnancy with Mr. Lebron she used every drug she could get her hands on.(VII,T363,370) Her drug usage was so severe that she had no recollection of the first three months of Mr. Lebron's life other than a vague memory of trying to feed him when she was so high that she wasn't able to give him food.(VII,T375) Ms. Ortiz would leave Mr. Lebron with anyone in order to satisfy her need

to “party”.(VII,T366) Ms. Ortiz’s drug addiction led her to outpatient treatment, then inpatient treatment. Ms. Ortiz was in residential treatment for drug addiction for 28 months while Mr. Lebron stayed in numerous foster homes. Ms. Ortiz testified that she did not get Mr. Lebron back from the state of New York until she completed after-care, which was not until Mr. Lebron was four or five years old.

Within a year of discharge from treatment, Ms. Ortiz began working as a stripper/dancer. With this employment came much travel and partying.(VII,T403) Ms. Ortiz testified that she again began to use drugs, which she very much enjoyed. Her drug usage was such that she could not recall past events, including the interview when Mr. Lebron entered Pleasantville.(VII,T403-404)

Independent records from the public school system and JCCA corroborate Ms. Ortiz’s neglect of Mr. Lebron throughout these years. She was deemed a poor parent, self-absorbed, and more concerned about her own needs- all characterizations with which Ms. Ortiz agreed.

Psychological evaluations of Mr. Lebron clearly link Ms. Ortiz’s neglect and disinterest in her child with the development of psychological and emotional problems in Mr. Lebron.

Contrary to the trial court's assertion, at no time in this proceeding did Ms. Ortiz deny that she was addicted to drugs or that she had ceased to use drugs. The trial court's determination that Ms. Ortiz was not a drug addict was error.

The trial court's further conclusion that Ms. Ortiz's drug usage which affected Mr. Lebron from his time *in utero* and throughout the entire time he lived in her household was entitled to only "very little weight" is also error. (II,R271) The trial court abused his discretion in the assignment of weight to this significant mitigation. In other cases similar to this case, trial judges have assigned significantly more weight to this mitigating circumstance. For example, maternal drug use coupled with neglect and emotional abuse was assigned "great weight" by the trial court in the case of Morris v. State, 811 So.2d 661 (Fla. 2002). The impact of Ms. Ortiz's drug usage was entitled to greater weight by the trial court and to assign is very little weight was an abuse of discretion under the facts of this case.

3. Interpersonal

The trial court found that Mr. Lebron did not have difficulties with interpersonal relationships, but found

that the evidence established only that Mr. Lebron had an exaggerated need for approval, was easily led, and had shallow attachments and rejected any mitigating circumstance based upon those issues. While the evidence did establish that Mr. Lebron had an exaggerated need for approval, was easily led, and had shallow attachments, it established far more and was entitled to be found and weighed.

Under this heading the trial court again erroneously relied on prior proceedings and found that some evidence had been presented in a prior proceeding that Mr. Lebron was “good with children”. The trial court found that this “good with children” was a somewhat mitigating fact and was entitled to little weight.

The record established in this case from psychological assessments of Mr. Lebron that Mr. Lebron had significant deficits in forming relationships. From a very young age Mr. Lebron could not form relationships, most likely due to “nurturational” deprivation from his mother. As a young child it was noted that Mr. Lebron’s relationships with adults were “distant”. (V,ER190)(State Exhibit: Report of Barbara Novic). It was also noted that this distance was of great concern and a source of fear for Mr. Lebron as a

young child. As Mr. Lebron grew, his ability to forge relationships did not improve. In 1988 it was noted that he had "poor peer relationships and that he provoked anger in peers". (V,ER457) In 1990 it was noted that he was disliked by his peers. Mr. Lebron was described as having superficial peer relationships and a troubled and conflicted relationship with his mother.(V,ER431) In 1991 Mr. Lebron was reported to be an individual with low self-esteem who can't make friends. (V,ER438)

The testimony presented in this case showed that Mr. Lebron was not considered to be a friend by the members of "Four Play" and their girlfriends, Wilburn and Lineberger. Mr. Lebron was an outsider who was tolerated for the money he brought to the table.

The trial court erred in rejecting this mitigating circumstance as unproven.

4. Domestic Violence

In rejecting this mitigating circumstance, the trial court found that the defense contended there "was some physical violence had been directed toward the defendant and that there was some psychological abuse of the defendant. The testimony of the defendant's mother established that she hit him once with a closed fist.

Neither the record nor the testimony of the defendant's mother supports the allegations that he was physically or emotionally abused." (II,R273) The trial court's findings are wholly without record support and again rely on prior testimony. The record contains ample and uncontroverted evidence that Ms. Ortiz physically and psychologically abused her child:

a. Physical Abuse

Ms. Ortiz testified that when Mr. Lebron returned to her care at age four or five she would discipline him by yelling at him and hitting him "because all mothers hit their children". (VII,T407) If Mr. Lebron cried or tried to cling to her, she would "smack him". (VII,T393) As Mr. Lebron grew, Ms. Ortiz continued to discipline him by yelling and hitting him. (VII,T409)

Independent verification of Ms. Ortiz's physical abuse of Mr. Lebron is found in elementary school records and those from JCCA. Elementary reports noted that Ms. Ortiz needed much guidance in parenting and that she lost her temper too frequently. (IV,ER178) When Mr. Lebron entered Pleasantville, her parenting skills were found to be "quite deficient". (V,ER457) A later psychological report noted that Ms. Ortiz had admitted to physically abusing Mr.

Lebron during therapy sessions. (V,ER451) Although the physical abuse stopped when Mr. Lebron was outside the home, the same report noted that Ms. Ortiz continued to be emotionally and verbally abusive to her son. (V,ER453)

b. Emotional/Psychological Abuse

Ms. Ortiz testified that she never loved her child. Ms. Ortiz testified that she had never told Mr. Lebron that she loved him, she had never done anything on an emotional, supportive, or parental level for him. (VII,T393-4;VIII417-18) Ms. Ortiz could not identify any stable or emotionally supportive relationship in the life of her son. (VII,T392) Ms. Ortiz admitted that she often said “mean things” to Mr. Lebron. (VII,T393). Ms. Ortiz further acknowledged that she had exposed her son to her sexual behaviors by his viewing her having sex with a man who was not her boyfriend and by his viewing her in a pornographic video. (V,ER450-451)

Independent evidence corroborated Ms. Ortiz’s psychological and emotional abuse of Mr. Lebron and the devastating impact it had on him. Even after years of therapy/counseling, Ms. Ortiz was observed to be “overtly devaluing” in her comments and communications with Mr. Lebron in the presence of a counselor. (V,ER450)

Psychological assessments of Mr. Lebron found that there was no warmth or nurturance in his home or from his mother. (V,ER457) His home life was described as "barren and empty which led to a deep rooted sense of isolation, intense anger, and anxiety" by Mr. Lebron as an early adolescent. (V,ER446) Ms. Ortiz was described by therapists as remaining "emotionally and verbally abusive" to Mr. Lebron while he was at Pleasantville. (V,ER453) Psychological reports noted that Mr. Lebron viewed mothers as "aggressive, punitive, and hurtful." (V,ER446) As a young child at age seven, Mr. Lebron was so desperate for his mother's attention that he began to steal from her and only her. (V,ER447) A constant theme in the psychological reviews of Mr. Lebron was that his mother's neglect and emotional abuse was the source of his emotional and psychological problems, leaving an individual with deep rooted psychological conflicts who was still in need of residential treatment at the time of this eighteenth birthday.

The unrebutted and uncontroverted evidence established that Ms. Ortiz was physically and emotionally abusive to her son. This testimony is not in conflict with any other evidence in the record. The trial court's rejection of

this mitigating circumstance is clearly error.

5. Institutionalization

The trial court did not independently discuss this mitigating circumstance in the sentencing order, but noted that it had been addressed under "Parent Profile". Under Parent Profile, the trial court at no point even refers to Mr. Lebron's placement in institutionalized care for his entire adolescence in Pleasantville Cottage School or Glenn Mills. The only reference to care outside the home is the comment from the trial court "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".(II,R272) Not only did the trial court fail to address institutionalization as a mitigating circumstance, but the trial court also erred in the factual findings made under Parent Profile.

There was absolutely no testimony to support the trial court's statement that Mr. Lebron was ever cared for by extended family members. Ms. Ortiz testified that she was born in Puerto Rico and raised in the Dominican Republic. Her father died when she was a child. Ms. Ortiz described her mother as abusive and she believed her mother had been psychotic. (VII,358; V,ER448) Ms. Ortiz left home at age

sixteen, after coming to the United States, because her mother beat her. (VII,T356-7)

Ms. Ortiz had two brothers: an older brother, who was deceased and who had been diagnosed as paranoid schizophrenic. Ms. Ortiz also had a twin brother, who was committed to a mental hospital when Mr. Lebron was young for schizophrenia. (VII,T359; V,ER448). Ms. Ortiz did not testify about any other family members. Ms. Ortiz denied contact with her mother or brother. Her testimony was that prior to drug treatment she left Mr. Lebron with anyone who would take him. After she began working as a stripper, she left Mr. Lebron with a series of "housekeepers", non of which were family.

Neither did Ms. Ortiz testify that she "traveled somewhat" as characterized by the trial court. Ms. Ortiz testified that after she began working as a stripper she traveled frequently, even leaving the country for weeks at a time. Mr. Lebron was left with a series of housekeepers while Ms. Ortiz traveled and partied. Elementary school records noted that the care arrangements provided by these housekeepers was inadequate and insufficient. The trial court's findings of the facts under this heading are not supported by competent substantial evidence and should be

disregarded.

The trial court wholly failed to address and consider as mitigating the fact that Mr. Lebron entered institutional care as an 8th grader and remained "in need of residential treatment services" up until he turned eighteen and was discharged from services by the court because he was ineligible due to having reached the age of majority.

ERRONEOUS ASSIGNMENT OF WEIGHT TO MITIGATING CIRCUMSTANCES

In addition to the mitigation the trial court failed to find, the trial court also erred in weight assigned to several mitigating factors found to have been established. Again, the appellate standard of review is whether or not the trial court's assignment of weight was an abuse of discretion. In each of the following instances, the trial court abused his discretion in assigning the weight to be given to the mitigation.

In evaluating the upbringing of Mr. Lebron under Parent Profile and Psychological categories, the trial court overlooked significant and undisputed facts, which led to an incorrect assignment of weight. The trial court's characterization of Ms. Ortiz as not being "the world's best mother" or not a "world class mother" ignores

the unrebutted evidence that Ms. Ortiz's neglect and abuse of her child from birth on was responsible for the significant emotional and mental problems Mr. Lebron suffered from. Each evaluator of Mr. Lebron found that the foundation for the emotional and personality disorders that Mr. Lebron suffered from was caused by his mother's failure to provide any maternal nurturing. By her own admission, Ms. Ortiz did nothing out of a desire to help her son- she neglected him and put him in an institution so she would not have to be responsible for him. This pattern was established at birth and continued his entire life. Similar patterns of neglect, emotional abuse, and parental history have been found to merit significantly more weight by other trial judges. See, Morris v. State, 811 So.2d at 661(teenage, unmarried mother, maternal drug and alcohol abuse, neglect and deprivation, and physical and emotional abuse by mother entitled to great weight); Crook v. State, 813 So. 2d at 68 (each of the following mitigating circumstances entitled to moderate weight- terrible and unstable home life, parents who were abysmal failures, absence of a role model, and that the defendant as a child suffered emotional trauma from being habitually left while mother prostituted herself.) The trial court's assignment

of very little weight to the mitigation based upon Mr. Lebron's upbringing and emotional/mental health issues is not commiserate with the weight assigned to virtually identical factors by other courts, thus undermining any assurance that there is uniformity in the capital sentencing process.

This Court should reverse the sentence and remand this cause to the lower court with specific instructions that the court find as established each of the mitigating circumstances outlined above and reconsider the weight assigned to the mitigation.

ISSUE II

THE TRIAL COURT ERRED IN THE FINDINGS REGARDING MITIGATION BY RELYING UPON FACTS WHICH ARE NOT CONTAINED IN THIS RECORD.

When a case is remanded by this Court after the vacation of a death sentence for a new penalty phase proceeding before a new jury, the resentencing should proceed *de novo* on all issues bearing on the proper sentence. The prior proceeding is a nullity. Morton v. State, 789 So.2d 324 (Fla. 2001) A trial judge cannot consider evidence from a separate proceeding that was not introduced in the instant proceeding for issues relating to

guilt and sentence. Dailey v. State, 594 So.2d 254 (Fla. 1991) and Engle v. State, 438 So.2d 803 (Fla. 1983).

In this case the trial court impermissibly relied upon testimony from prior proceedings in the analysis of the mitigating circumstances. The trial court's improper use of evidence not admitted in this penalty phase is reversible error.

In addressing the mitigating circumstance of Prenatal Problems-Drug Addicted Mother, the trial court reproduced in the current Sentencing Order an excerpt from the testimony of Ms. Ortiz during the May 2002 penalty phase proceedings and relied upon that testimony as a basis for the rejection of the mitigating circumstance. The May 2002 proceedings were never admitted into evidence in the current proceeding and not properly before the trial court for consideration. Not only did the trial court utilize a document and testimony not in evidence, the trial court wholly failed to consider the testimony that was given by the same witness, Ms. Ortiz in this proceeding.

The testimony of Ms. Ortiz in this case differed from her testimony in May 2002 in two respects material to the consideration of this mitigating circumstance. First, Ms. Ortiz did not try to deny she was an addict in 2005.

Secondly, Ms. Ortiz admitted that she returned to using drugs within a year or so after she was discharged from drug treatment and that she continued to use drugs while Mr. Lebron was in her care until she put him in Pleasantville.

Ms. Ortiz gave more details about how her drug usage affected Mr. Lebron in 2005. She admitted to neglecting and abandoning him from birth to three months to do drugs. She admitted to choosing to party over being a parent. Ms. Ortiz admitted that she could recall little about Mr. Lebron, including her interviews with Pleasantville because of drugs.

The trial court also ignored the evidence presented in 2005 in favor of that presented in 2002 when evaluating the mitigating circumstance titled INTERPERSONAL. In this instance, the trial court failed to reference any of the evidence regarding Mr. Lebron's stunted emotional growth and the lack of supportive individuals in his life. Instead, the trial judge only considered what he termed "some evidence that he was good with children" that was presented "at the previous proceeding". Since this case has had two prior penalty phases, it is impossible to determine which prior proceeding the trial court was even

referring to.

The trial court cannot use information that is not evidence as a basis for sentencing the defendant to death. Because the trial court did just this, the sentence must be reversed with this case remanded to the judge for reconsideration.

ISSUE III

THE SENTENCE OF DEATH IS NOT PROPORTIONATE.

This Court has consistently held that due to the uniqueness and finality of death, the propriety of all death sentences must be addressed through proportionality review by this Court. In conducting this review this Court considers the totality of the circumstances in the case before it as compared to other cases in which the death penalty has been imposed in order to insure uniformity in the application of the death penalty. Urbin v. State, 714 So.2d 411, 416-17 (Fla. 1998).

In performing this proportionality analysis, this Court has declined to engage in a reweighing of the mitigating circumstances against the aggravating factors, instead delegating this responsibility to the trial court.

Bates v. State, 750 So.2d 6, 14-15 (Fla. 1999). Still, this Court has continued to determine that the death penalty is reserved for only the most aggravated and least mitigated of first-degree murders. Crook v. State, 813 So.2d 68 (Fla. 2002) sentence reduced to life on proportionality grounds, 908 So.2d 350 (Fla. 2005). This case is not the most aggravated and it is certainly not the least mitigated of first-degree murders which requires that the sentence of death be reversed.

In addressing the first requirement it must first be remembered that a numerical count of the aggravators is not sufficient. It is important to examine the facts behind the aggravators and to consider what aggravation was not found. The trial court found two aggravators to be present: (1) that Mr. Lebron had previously been convicted of a violent felony and (2) that the murder was committed for pecuniary gain.

It is undisputed that Mr. Lebron had been previously convicted of prior violent felonies. However, in each instance the facts establish that these prior offenses were not worthy of a death sentence. Mr. Lebron's New York conviction occurred when he was a juvenile in the company of another boy who actually committed the robbery. Mr.

Lebron received probation and essentially juvenile sanctions.

Mr. Lebron's most serious prior felony convictions, those which arose from the incident involving Ms. Gribben, were clearly errors of judgment. The testimony from the trial in that case which was made a part of this record was that Ms. Gribbens was asked to vacate an apartment and became furious. She swung a bat at the head of Mr. Lebron, punched holes in the wall, smacked him, and at one point pulled a knife on him. According to the testimony introduced in this proceeding, Mr. Lebron left with two others and returned with a gun. He held the gun on Ms. Gribben and told her to leave the apartment. The facts established that although Mr. Lebron bears responsibility for his actions, this was not an unprovoked assault.

It should be noted that although this case is aggravated, it does not contain the most serious aggravators of HAC or CCP. See, Larkins v. State, 539 So.2d 90, 95 (Fla. 1999). It is also distinguishable from the cases in which three or more aggravators are present, especially those cases which contain multiple victims or where the manner of death was particularly tortuous or brutal.

The second step in proportionality analysis requires an examination of the mitigation. Due to the deficiencies with the trial court's order as outlined in Issues I and II, the sentencing order provides an inadequate basis for this Court to rely upon. This Court should exercise it's prerogative to independently review the evidence.

The combined records from Mr. Lebron's youth coupled with the testimony of his mother, Ms. Ortiz, conclusively show that this is not the least mitigated of cases. The mitigation evidence has been detailed in the Statement of the Facts and Issues I and II, so will be summarized for this Issue.

Mr. Lebron was born to a teenage, drug addicted mother who did not want her child. Ms. Ortiz resented his birth and continued her life of self-absorbed "partying" after his birth. Mr. Lebron was left with anyone Ms. Ortiz could find. Ms. Ortiz could recall only one vague memory in the first three months of Mr. Lebron's life- that she couldn't feed him because she was too high.

Ms. Ortiz entered drug treatment and surrendered Mr. Lebron to the state when he was three months old. She did not see him for over a year. During this time period Mr. Lebron remained in foster care. When visitation between

Mr. Lebron and his mother began, it was sporadic at best.

Mr. Lebron continued to live in numerous foster homes. After four years of treatment, Ms. Ortiz completed aftercare and Mr. Lebron was returned to her at age four or five.

For a brief period of time Ms. Ortiz was married to Tony Ortiz. Tony Ortiz provided the only bright spot in the emotionally barren existence of Mr. Lebron. During this time period Ms. Ortiz acknowledged she had nothing to do with her son. The relationship between Ms. Ortiz and Tony Ortiz ended within a year, a loss that was devastating to the five year old child.

Ms. Ortiz embarked on her career as an adult entertainer at the expense of her child. While she traveled and partied, Mr. Lebron was left with a series of caretakers. Mr. Lebron, as early as kindergarden, was identified as an emotionally disturbed child in need of special education classes, and the product of a deprived and barren home. Ms. Ortiz testified that she would hit and yell at her son when she was home. When he would cling to her she would smack him. In a desperate bid for any attention from his mother, at age 7 Mr. Lebron began to steal from her.

As Mr. Lebron grew, Ms. Ortiz's patience and desire to continue to raise him declined. She described herself as unsupportive and unloving- observations shared by the counselors and school professionals that evaluated Mr. Lebron. By the time Mr. Lebron was of middle school age, Ms. Ortiz made the decision to be rid of him and placed him in the Pleasantville Cottage School, an institution for children with severe emotional disabilities.

From the time that Mr. Lebron entered Pleasantville until this offense occurred, his tortured relationship with his mother dominated his life. He observed her having sex with men and viewed her in a pornographic video, he was noted to engage in chronic public masturbation and other inappropriate sexual conduct. Mr. Lebron was terrified at the thought that she would never retrieve him- observations were made by staff that it might be in his best interest if the goal of "permanency" with his mother was reevaluated due to his mother's lack of progress in therapy. Mr. Lebron made no academic progress, made little progress with speech therapy, and continued to regress emotionally. Until he reached the age of 18 and was discharged from juvenile services, Mr. Lebron was deemed an emotionally disturbed child in need of residential treatment. Ms.

Ortiz was described as a person unable to parent, self-absorbed, emotionally abusive to her son, with no apparent progress or desire to change. Ms. Ortiz only effort toward Mr. Lebron was to buy him things out of guilt.

By the time Mr. Lebron reached the age of 17, Ms. Ortiz was finished with him. She failed to appear for any court appearances and kicked him out of her home. Any further support was done to assuage her guilt.

The mitigation outlined by the defense at trial and as contained in the defense exhibits demonstrates that this is not the least mitigated of cases.

The third step in proportionality analysis in the comparison of this case to other capital cases. While this Court has upheld sentence of death with the two aggravators present in this case, that result was largely due to little mitigation or mitigation that was not compelling. See, for example, Melton v. State, 638 So.2d 927, 930 (Fla. 1994).

When considering both the aggravation and the mitigation present in this case, it is suggested that this case is similar to Robertson v. State, 699 So.2d 1343 (Fla. 1997), Livingston v. State, 565 So.2d 1288 (Fla. 1988), and Urbin v. State, Id., 714 So. 2d 411.

In Robertson v. State, 699 So.2d 1343 (Fla. 1997), the defendant brutally killed a woman. Two aggravators were established: HAC and murder committed in the course of a burglary. The following mitigation was present: Robertson was 19 at the time of the murder, his capacity to appreciate the criminality of his conduct was impaired, he had a deprived and abusive childhood, he had a history of mental problems, and he was of low intelligence. Despite the seriousness of the HAC aggravator, this Court vacated the sentence of death, finding that it was not among the least mitigated.

In this case Mr. Lebron's age of 21 should be considered as mitigating, he was the product of an abusive childhood, he suffered sever emotional deprivation and abandonment by his mother, he had a history of mental health problems, and he is of low intelligence. A life sentence, in accord with Robertson is appropriate in this case.

In Livingston v. State, 565 So.2d 1288 (Fla. 1988), the defendant was convicted of killing a convenience store clerk and shooting at another patron in the store. Livingston was also convicted of armed robbery, displaying a weapon during the robbery, burglary, and grand theft. On

the morning of the murder, Livingston had burglarized a home and stolen the murder weapon. Livingston went to the store twice in the evening before entering and firing twice at the clerk and once at a customer in the store. The trial court found three aggravators: prior violent felony conviction, murder committed during an armed robbery, and murder committed to avoid arrest. In mitigation the trial court found age (Livingston was 17), and catch-all non-statutory mitigation of an unfortunate home life and upbringing. Evidence indicated that Livingston was neglected by his mother, beaten by her boyfriend, and that he used cocaine and marijuana. This Court struck the avoid arrest aggravator and remanded for the imposition of a life sentence.

The aggravation in this case is nearly identical to that in Livingston, except that Livingston shot a second person, whom evidence indicated he intended to kill. The mitigation in this case is equally similar to that in Livingston, if not more compelling. In both cases, the mother was neglectful and largely absent. In both cases age should be an appropriate mitigator. This case contains additional evidence of mitigation- Mr. Lebron's emotional and mental health problems, institutionalization, and

learning disabilities that was not referenced in Livingston. Thus, the imposition of a life sentence in Livingston supports the imposition of a life sentence in this case.

In Urbin v. State, 714 So.2d 411 (Fla. 1998), at the age of 17 the defendant and two co-defendants planned to commit a robbery that resulted in the death of a patron from a pool hall. Evidence established that after two failed attempts, Urbin entered the building, came out and got a gun, then followed the victim and shot him as he resisted. Several weeks later Urbin committed additional violent crimes, including armed robbery with a firearm, burglary with an assault, and armed kidnapping. The trial court found three aggravating factors- prior violent felony, robbery/pecuniary gain, and that the murder was committed to avoid arrest. In mitigation the trial court considered Urbin's age, his ability to appreciate the criminality of his conduct was impaired, along with evidence of parental neglect and the absence of parental influence in his early adolescence. After striking the avoid arrest aggravator, this court reduced the death sentence premised upon an 11-1 jury recommendation to a life sentence on proportionality grounds.

In this case the aggravation is virtually identical. The mitigation in this case is equally similar to that in Urbin. The death recommendation of 7-5 in this case was substantially less than the 11-1 recommendation in Urbin.

Mr. Lebron has demonstrated that a sentence of death in this case is disproportionate when compared with sentences in other capital cases with similar aggravation and mitigation. This case is not among the most aggravated and least mitigated, for which a death sentence is reserved. It is appropriate for this Court to reduce the sentence to life in prison.

ISSUE IV

THE TRIAL COURT ERRED IN REQUIRING THE JURY TO RECORD THEIR NUMERICAL VOTE AS TO THEIR FINDINGS REGARDING EACH AGGRAVATING FACTOR AND EACH MITIGATING CIRCUMSTANCE.

Prior to trial in this case, defense counsel filed a standard motion requesting special verdict forms. (I,R98-101) During the charge conference the trial court provided a copy of the jury instructions and verdict form to each attorney and informed them that it was his intent to require the jury to record their numerical vote because he liked to “ask the interrogatories on what they actually

find as far as mitigation and aggravation and the number that they vote by. So take your time, peruse over them, and then we'll go through it." (VIII,T471) The state objected to the trial court giving the interrogatory verdict form. (VIII,T488) Defense counsel joined with the State and objected as well. (VIII,T489) The trial court then announced that he was going to give the interrogatories because "I don't like fishing in the dark". (VIII,T489) The trial court ultimately instructed the jury that they were to record their numerical vote as to aggravating factors on Attachment A and they were to record their numerical vote as to mitigating circumstances on Attachment B. (VIII,T550-555) After the jury instructions were read, both defense counsel and the state renewed their objections to the giving of Attachment A and portions of B and to requiring the jury to render a numerical vote. (VIII,T556-557)

In State v. Steele, 921 So.2d 538 (Fla. 2006), this Court held that a trial judge departs from the essential requirements of the law if he permits a special verdict form to be used which requires the jury to record its vote on each aggravating factor. According to the majority in Steele, the use of such a verdict form could unduly

influence the determination of the trial court of how to sentence the defendant and impermissibly affect the independent judgment of the trial court with regards to sentence. Special numerical verdict forms would require clear directions about the effect of such findings on a trial judge and create the potential of inconsistency of a constitutional magnitude in capital sentencing proceedings. Special numerical verdict forms, this Court found, could result in a determination that the State is administering §921.41 (Fla. Stat) arbitrarily and contrary to the Eighth Amendment's ban on cruel and unusual punishment and would require clear instructions on how a special verdict form would affect the jury's role in rendering its advisory sentence and the trial court's role in determining whether to impose a sentence of death.

The trial court in this case utilized a special verdict form which runs afoul of Steele. The use of this specialized verdict form constitutes an essential departure from the requirements of the law and requires reversal where the use of the form was objected to by both the defense and the State.

It does not appear that this Court has yet addressed the appropriated remedy for a situation such as this. Two

other cases, Floyd v. State, 913 So.2d 546 (Fla. 2005)(decided prior to Steele) and Simmons v. State, 934 So.2d 1100 (Fla. 2006)(decided after Steele) both contained specialized verdict forms. The use of these forms was not raised as an appellate issue and was not addressed by this Court in either case. It is submitted by the Appellant, that under Steele, an error which constitutes an essential departure from the requirements of the law requires reversal of the case. Thus, the jury's recommendation was derived from an act which departed from the essential requirements of the law and must be set aside.

None of the precautionary measures this Court identified as necessary in Steele if special numerical verdict forms were utilized by the trial court in this case. No special instructions were crafted for the jury and no additional guidance was given to the trial court.

It appears from this record that the trial court sought the special verdict forms for an improper purpose identified in Steele. The trial court made statements that can be reasonably construed as evidence that he wished to have the findings of the jury for his own benefit to assist in sentencing- hence the comment that he didn't like "fishing in the dark". How these findings contained on

Attachment A and Attachment B impacted the trial court's sentencing decisions is impossible to determine, but the appearance from the court that the findings would guide his sentencing determination is sufficient to require reversal. Under Steele, reversal is required for a new penalty phase.

ISSUE V

FLORIDA'S CAPTIAL SENTENCEING PROCESS IS UNCONSTITUTIONAL BECAUSE A JUDGE RATHER THAN JURY DETERMINES SENTENCE AND THE JURY RECOMMENDATION NEED NOT BE UNAMINOUS IN ORDER TO IMPOSE A DEATH SENTENCE

During the course of the lower court proceedings defense counsel attacked the constitutionality of Florida's capital sentencing statutes under the holding of the United States Supreme Court in Ring v. Arizona, 536 U.S. 584 (2002).(I,R65-88;89-97) Defense counsel further requested that special jury instructions be given consistent with the arguments presented in the pretrial motions and in light of the trial court's denial of those motions.

The United State's Supreme Court in Ring struck the death penalty statute in Arizona because it permitted a death sentence to be imposed by a judge who made the factual determination that an aggravating factor existed, overruling its prior decision in Walton v. Arizona, 497

U.S. 639 (1990). The Court held that Arizona's enumerated aggravating factors operated as the "functional equivalent of an element of a greater offense" under Apprendi v. New Jersey, 530 U.S. 466 (2000). Absent the presence of aggravating factors, a defendant in Arizona would not be exposed to the death penalty. Subsequent noncapital cases have adhered to the principle that sentencing aggravators require a specific jury determination as opposed to one performed solely by the court. Blakely v. Washington, 124 S.Ct. 2531 (2004).

Similar to Arizona, under the law in Florida, a "hybrid state", the aggravating circumstances are matters of substantive law which actually "define those capital felonies which the legislature finds deserving of the death penalty." Vaught v. State, 410 So.2d 146, 149 (Fla. 1982). See also, State v. Dixon, 283 So.2d 1,9 (Fla. 1973). Under Florida's statute, the jury submits a penalty recommendation, but is not required to make specific findings as to aggravating or mitigating factors. Nor is jury unanimity required as to the specific findings of aggravators or mitigators. Unanimity of the jury is not required in order for a death sentence to be imposed.

Ultimately, in Florida, it is the judge who makes the

findings of the statutory aggravators and mitigators. It is the judge who is required to independently weigh the aggravating factors he has found against the mitigating factors which he has found, and thereupon determine whether to sentence the defendant to death or life imprisonment. See, King v. State, 623 So.2d 486, 489 (Fla. 1993). While the jury recommendation is to be given great weight, this Court has said "We are not persuaded that the weight given the jury's advisory recommendation is so heavy as to make it the de facto sentence… Not withstanding the jury recommendation, whether it be for life imprisonment or death, the judge is required to make an independent determination, based on the aggravating and mitigating factors." Grossman v. State, 525 So.2d 833, 840 (Fla. 1988)(emphasis added).

Since, just as in Arizona, it is the Florida trial judge who makes the crucial findings of fact necessary to impose a death sentence, it logically follows that Ring applies to the State of Florida. Mr. Lebron recognizes that this position has not been ruled upon favorably by a plurality of this Court in Bottson v. Moore, 833 So.2d 693 (Fla.)cert. denied, 123 S.Ct. (2002), and subsequent cases, but this Court has yet to garner a majority vote as

to the applicability of Ring. See, Windom v. State, 886 So.2d 915 (Fla. 2004)(Cantero, J., concurring opinion) and Johnson v. State, 904 So.2d 400 (Fla. 2005). However, Mr. Lebron respectfully asserts that the plurality rejection of Ring is erroneous and that the Florida capital sentencing statute does not meet constitutional requirements. The fundamental defect under Ring still exists in this case- the ultimate determination in this case of what sentence was to be imposed was determined by the trial court without a unanimous jury recommendation.

While the jury in this case did make some inadequate findings regarding aggravation and inadequate findings as to mitigation and returned a jury recommendation of 7-5, this attempt is insufficient to cure the constitutional quagmire the Florida capital scheme has become. This Court has, as noted in Issue IV, struck the requirement for any specialized verdict form. Even if this Court were to conclude that Ring was satisfied in this case because of the invalid verdict attachment forms, the failure of the jury to reach a unanimous vote remains. The lack of unanimity from the jury vitiates the reliability of the death sentence, especially when the judge is the ultimate sentencer. The lack of unanimity in the jury recommendation

was specifically objected to. (I,R114-115;140-152)

As this Court recognized in State v. Steele, 921 So.2d 538 (Fla. 2005), Florida is now the only state in the country to permit a death sentence to be imposed where a jury may determine by a mere majority vote whether or not to recommend the death penalty. Despite urgings from this Court, the Florida legislature has failed to address the infirmity of the Florida statute. Both Justice Pariente and Justice Anstead recognized in the dissenting opinion in Butler v. State, 842 So.2d 817 (2003), that a unanimous recommendation of death by the jury is necessary to meet the constitutional safeguards expressed in Ring. The reasoning of the dissent is that "the right to a jury trial in Florida would be senselessly diminished if the jury is required to return a unanimous verdict of every fact necessary to render a defendant eligible for the death penalty with the exception of the final and irrevocable sanction of death". Butler, at 824.

This Court has little choice but to ensure that constitutional rights are protected and to hold that Ring applies to Florida. The failure of the Florida capital sentencing scheme to require a unanimous recommendation of death violates constitutional guarantees of due process

under the Fourteenth Amendment to the United States Constitution and corresponding provisions of the Florida Constitution and the Sixth Amendment right to jury trial under the United States Constitution and corresponding provisions of the Florida Constitution.

ISSUE VI

THE EXISTENCE OF THE PRIOR VIOLENT FELONY AGGRAVATOR SHOULD NOT BAR APPLICATION OF THE RING TO DEATH SENTENCES.

This Court has frequently used as an alternative basis for rejecting Ring challenges in numerous cases the fact that one of the aggravating factors was the defendant's prior violent felony conviction. This Court has concluded in majority opinions since 2003 that the constitutional requirements of both Ring v. Arizona, 536 U.S. 584 (2002) and Apprendi v. New Jersey, 530 U.S. 466 (2000) are satisfied when one of the aggravating circumstances is a prior conviction of one or more violent felonies (with no distinction being made as to whether the crimes were committed previously, contemporaneously, or subsequent to the charged offense. See, Floyd v. State, 913 So.2d 564 (Fla. 2005); Marshall v. Crosby, 911 So.2d 1129 (Fla. 2005). In this case Mr. Lebron also had prior convictions and objected to the automatic application of

the prior violent felony aggravator. (I,R116-124)

The concept that recidivism findings might be exempt from otherwise applicable constitutional principles regarding the right to a trial by jury or the standard of proof required for conviction "represents at best an exceptional departure from historic practice." Apprendi v. New Jersey, supra., 530 U.S. at 487. The recidivism exception was recognized in the context of non-capital sentencing by a 5-4 vote of the United States Supreme Court in Alamendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed 2d 350 (1988). In his dissenting opinion, Justice Scalia, joined by Justices Stevens, Souter, and Ginsburg asserted "there is no rational basis for making recidivism an exception." 523 U.S. at 258 (emphasis in opinion). In Apprendi, the majority consisted of the four dissenting Justices from Alamendarez-Torres, with the addition of Justice Thomas (who had been in the Alamendarez-Torres majority). The opinion of the Court in Apprendi states:

> Even though it is arguable that Alamendarez-Torres was incorrectly decided, [footnote omitted], and that a logical application of our reasoning today should apply if the recidivist issue were contested, Apprendi does not contest the decision's validity and we need not revisit

it for purposes of our decision today.

530 U.S. at 489-90.

The Apprendi Court further remarked that "given its unique fact, [Alamendarez-Torres] surely does not warrant rejection of the otherwise uniform course of decision during the entire history of our jurisprudence." 530 U.S. at 490. In his concurring opinion in Apprendi, Justice Scalia wrote

> This authority establishes that a "crime" includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment). Thus, if the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some sort of aggravating fact--- of whatever sort, including the fact of a prior conviction- the core crime and the aggravating factors together constitute the aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime. Similarly, if the legislature has provided for setting the punishment of a crime based on some fact-such as a fine that is proportional to the value of the stolen goods- that fact is also an element. No multifactor parsing of statutes, of the sort we have attempted since McMillan, is necessary. One need only look to the kind, degree, or range of punishment to which the prosecution is by law entitled for a given set of facts. Each fact necessary for that entitlement is an element.

530 U.S. at 501[emphasis supplied].

In addition, it is noteworthy that the majority in Alamendarez-Torres adopted the recidivism exception at least partially based on its assumption that a contrary ruling would be difficult to overrule with the now-overruled precedent of Walton v. Arizona, 497 U.S. 639 (1990) and the implicitly overruled Hildwin v. Florida, 490 U.S. 638 (1989). See, 523 U.S. at 247. It appears highly doubtful whether the Alamendarez-Torres, exception for "the fact of a prior conviction" is still good law.

Even if this exception still survives in noncapital contexts, it plainly, by its own rationale, cannot apply to capital sentencing and it especially cannot apply to Florida's "prior violent felony" aggravator which involves much more- and puts more facts before the jury- than the simple "fact of the conviction".

As previously mentioned, the Apprendi Court took note of the "unique facts" of Alamendarez- Torres. Because Alamendarez-Torres had admitted his three earlier convictions for aggravated felonies, all of which had been entered pursuant to proceedings with their own substantial procedural safeguards, "no question concerning the right to a jury trial or the standard of proof that would apply to a

contested issue of fact was before the Court". Apprendi, 530 U.S. at 488[emphasis supplied].

Unlike the noncapital sentencing enhancement provision of Alamendarez-Torres, which authorized a longer sentence for a deported alien who returns to the United States without permission when the original deportation "was subsequent to a conviction for the commission of an aggravated felony", Florida's prior violent felony aggravator focuses at least as much, if not more, upon the nature and details of the prior, contemporaneous, or subsequent criminal episode as it does on the mere fact of conviction. Even more importantly, one of the main reasons given for Justice Breyer's majority opinion in Alamendarez-Torres for allowing a recidivism exception in noncapital sentencing was the importance of keeping the fact of the prior conviction and the details of the prior conviction from prejudicing the jury.

In this case, and in Florida death penalty proceedings, both the fact of the prior convictions and the details of the prior crimes are routinely introduced to the jury through documentary evidence, including testimony from victims, law enforcement, or other parties. Even if the defense offers to stipulate to the existence of the prior

conviction, the state "is entitled to decline the offer and present evidence concerning the prior felonies." Cox v. State, 819 So.2d 705, 715 (Fla. 2002).

When Cox argued before this Court that the presentation of this evidence was unduly prejudicial contrary to the holding of Old Chief v. United States, 519 U.S. 172 (1997), this Court rejected that assertion. This Court determined that such evidence would aid the jury in evaluating the character of the accused and the circumstances of the crime so that the jury could make an informed recommendation as to the appropriate sentence. This Court rejected the holding of Old Chief in the capital sentencing proceeding where "the 'point at issue' is much more than just the defendant's 'legal status'". Cox, 819 So. 2d at 716.

In this case law enforcement was permitted to give a summary of the facts surrounding the conviction arising from the Brandi Gribbens incident, including possession of the shotgun by Mr. Lebron and the placing of the shotgun at her head. The jury knew far more than just the "fact of the conviction".

For the same reason that Old Chief is not analogous to Florida's capital sentencing procedure, neither is the

Alamedarez-Torres exception. The issue in a capital sentencing proceeding is much more than the defendant's legal status or the bare fact that he has a prior record. If the jury is allowed to hear the details of the defendant's prior conviction, there is no rationale for carving out an exception to Ring's holding that the findings of the aggravating factors necessary for the imposition of the death penalty be made by a jury. Thus, the existence of a prior violent felony conviction does not relieve the need for a jury finding under Ring as to each aggravating factor in order to meet constitutional safeguards and ensure due process is afforded.

ISSUE VII

THE PENALTY PHASE JURY INSTRUCTIONS UNCONSITUTIONALLY SHIFT THE BURDEN OF PROOF TO THE DEFENDANT TO ESTABLISH MITIGATING FACTORS AND TO SHOW THAT THE MITIGATING FACTORS OUTWEIGH THE AGGRAVATING CIRCUMSTANCES.

The Florida Death Penalty sentencing scheme is constitutionally infirm because it permits a sentence of death to be predicated upon unconstitutional jury instructions which shift the burden of proof to the defendant to establish mitigating factors and to then establish that those mitigating factors outweigh the

aggravating factors. Defense counsel objected to the use of these standard jury instructions.(I,R133-139) During penalty phase the prosecutor argued to the jury that "the real issue in this case is has the defendant proven mitigating circumstances sufficient to outweigh the aggravators that are clearly proven. So really it's the defendant's show. It's Mr. Norgard's show. So the real issue here is has the defendant carried his burden of proof." (VIII,T500)

Under Florida law a capital sentencing jury must be told that:

> "… the State must establish the existence of one or more aggravating circumstances before the death penalty could be imposed… [S]uch a sentence could be given if the State showed the aggravating circumstances outweighed the mitigating circumstances."

State v. Dixon, 283 So.2d 1 (Fla. 1973; Mullaney v. Wilbur, 421 U.S. 684 (1975). This straight forward standard was never applied to the sentencing phase of Mr. Lebron's trial over the objections of defense counsel. The standard jury instructions given in this case were inaccurate and provided misleading information as to whether a death recommendation or life sentence recommendation should be returned.

The jury instructions as given shifted to Mr. Lebron the burden of proving whether he should live or die by directing the jury that is was their duty to render an opinion on life or death by deciding "whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist." In Hamblen v. Dugger, 546 So.2d 1039 (Fla. 1989), a capital post-conviction case, this Court addressed the question of whether the standard jury instructions shifted the burden to the defendant as to the question of whether he should live or die. The Hamblen opinion reflects that this issue should be addressed on a case by case basis.

The jury instructions in this case required that the jury impose death unless Mr. Lebron could produce mitigation and proved that the mitigation outweighed and overcame the aggravation. The trial court then employed the same standard in sentencing Mr. Lebron to death. This standard obviously shifted the burden to Mr. Lebron to establish that life was the appropriate sentence. The standard jury instructions further limited consideration of the mitigating evidence to only those factors which Mr. Lebron proved were sufficient to outweigh aggravation. Because the standard jury instructions conflict with the

straight forward standard established in Dixon and Mullaney, they violate Florida law.

This jury was precluded from "fully considering" and "giving full effect to" mitigating evidence. Penty v. Lynaugh, 109 S.Ct. 2934, 2952 (1989). This burden shifting resulted in an unconstitutional restriction upon the jury's consideration of any relevant circumstance that could be used to decline the imposition of the death penalty. McCoy v. North Carolina, 110 S.Ct. 1227, 1239 (1990)[Kennedy, J. concurring]. The effect of these jury instructions is that the jury can conclude that they need not consider mitigating factors unless they are sufficient to outweigh the aggravating factors and from evaluating the totality of the circumstances as required under Dixon. Mr. Lebron was forced to prove to the jury that he should live. This violated the Eighth Amendment under Mullaney.

The standard jury instructions are further flawed because the jury is instructed that mitigating evidence can be found only if the juror is "reasonably convinced" that the mitigating factor has been established. The "reasonably convinced" standard is contrary to the constitutional requirement that all mitigating evidence must be considered.

Continued use of the standard jury instruction runs afoul of the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16, and 17 of the Florida Constitution.

ISSUE VIII

THE PENALTY PHASE JURY INSTRUCTION IMPROPERLY MINIMIZE AND DENIGRATE THE ROLE OF THE JURY IN CAPITAL SENTENCING IN VIOLATION OF CALDWELL V. MISSISSIPPI.

Defense counsel objected to the use of the standard jury instructions as being in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985) and submitted alternative instructions. Caldwell prohibits the giving of any jury instruction which denigrates the role of the jury in the sentencing process in violation of the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. The penalty phase instructions in Florida violate not only Caldwell, but also violate Article I, Sections 6, 16, and 17 of the Florida Constitution.

By repeatedly advising the jury that their verdict is merely advisory and a recommendation and being told that the decision rests solely with the court as to sentence, the jury is not adequately and correctly informed as to

their role in the Florida sentencing process. These instructions minimize the jury's sense of responsibility for determining the appropriateness of a death sentence.

Mr. Lebron acknowledges that this Court has ruled against this position previously. See, for example, Thomas v. State, 838 So.2d 535 (Fla. 2003).

ISSUE IX

DEATH BY LETHAL INJECTION CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT

Florida uses a system of lethal injection, whose protocols have been presented to this Court by the State as attachment to the pleadings most recently in Rutherford v. Crist, 31 Fla. Law Weekly S669 (Fla. October 17, 2006) and have been previously published by this Court in Sims v. State, 754 So.2d 657 (Fla. 2000). The combination of chemical agents as reported by these sources which are utilized in the lethal injection process by the State of Florida cause undue pain and suffering in violation of the Eighth and Fourteenth Amendments to the United States Constitution. The defendant is subjected to needless and excruciating pain before death.

The Eighth Amendment prohibits the "unnecessary and wanton infliction of pain." Gregg v. Georgia, 428 U.S.

153, 173 (1976), (citing Furman v. Georgia, 408 U.S. 238, 392 1972)). The United States Supreme Court has long held that the protections of the Eighth Amendment protect prisoners from "the gratuitous infliction of suffering". Gregg, 428 U.S. at 183 [citing Wilkerson v. Utah, 99 U.S. 130, 135-36(1878) and In Re: Kemmler, 136 U.S. 436, 437 (1890)]. In the capital punishment context, when the suffering inflicted in executing a condemned prisoner is caused by procedures involving "something more than the mere extinguishment of life", the Eighth Amendment's prohibition against cruel and unusual punishment is implicated. See, Furman v. Georgia, 408 U.S. 238, 265 (1972)[quoting Kemmler, 136 U.S. at 447].

The method of execution by lethal injection as set forth by the filings of the Attorney General and as set forth in Sims v. State, 754 So.2d 657 (Fla. 2000) and in the operating and procedures manuals of the Florida Department of Corrections violates these constitutional principals. Florida's method of execution by lethal injection as described in Sims is similar to procedures that two district courts have recently found to raise serious questions based on the Eighth Amendment. See, Morales v. Hickman ___ F.Supp. 2d ___. 2006 WL 335427(N.D.

Cal. Feb. 14, 2006) aff'd __ F.3d. __ (2006)(finding that the three chemical substance sequence raises "substantial questions" that the condemned would be subjected to an " an undue risk of extreme pain".) and Anderson v. Evans, No.Civ. -05-8-0825-F, 2006 WL 38903, (W.D. Okla. Jan. 11, 2006)(accepting in its entirety a Magistrate Judge's report holding that death-sentenced inmates state a valid claim that Oklahoma's administration of the same three chemical sequence for lethal injection "creates an excessive risk of substantial injury and pain" under the Eighth Amendment).

Mr. Lebron recognizes that this Court recently rejected this argument in Rutherford v. Crist, supra., however he respectfully submits this rejection was erroneous.

CONCLUSION

Based upon the foregoing arguments, citations of law, and other authorities, the Appellant, Jermaine Lebron, respectfully requests that this Court reverse this case for a new penalty phase proceeding, or alternatively, reduce the sentence to life in prison.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Initial Brief has been furnished by U.S. Mail to the Office of the Attorney General, Assistant Attorney General Barbara Davis, Esq., 444 Seabreeze Blvd. Ste. 500, Daytona Beach, FL 32118, this ___ day of November, 2006.

ANDREA M. NORGARD
P.O. Box 811
Bartow, FL 33831
(863)533-8556
Fla. Bar No. 0661066

ROBERT A. NORGARD
P.O. Box 811
Bartow, FL 33831
(863)533-8556
Fla. Bar No. 322059

Counsel for Appellant

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Initial Brief was prepared in Courier New, 12 point font, in compliance with and pursuant to Fla. R. App. P. 9.210.

ANDREA M. NORGARD
Attorney at Law

ROBERT A. NORGARD
Attorney at Law