

IN THE SUPREME COURT OF FLORIDA

JERMAINE LEBRON,

Appellant,

vs.

APPEAL NO. SC06-138

STATE OF FLORIDA,

Lower Ct. No. CR96-2147

Appellee.

_____ /

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

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

	<u>PAGE NO.</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	iii
ISSUE I	
THE TRIAL COURT ERRED IN REJECTING MITIGATING CIRCUMSTANCES WHICH WERE REASONABLY ESTABLISHED BY THE GREATER WEIGHT OF THE EVIDENCE AND FURTHER ERRED IN THE WEIGHT WHICH WAS ASSIGNED TO OTHER MITIGATION.	1
ISSUE II	
THE TRIAL COURT ERRED IN THE FINDING REGARDING MITIGATION BY RELYING UPON FACTS WHICH ARE NOT CONTAINED IN THIS RECORD.	11
ISSUE III	
THE SENTENCE OF DEATH IS NOT PROPORTIONATE.	20
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.	32
CONCLUSION	35
CERTIFICATE OF SERVICE	35

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE NO.</u>
<u>American National Bank of Jacksonville v. Marks Lumber and Hardware Co., 45 So. 2d 336 (Fla. 1950)</u>	33
<u>Baldwin v. State, 700 So. 2d 95 (Fla. 2nd DCA 1997)</u>	12
<u>Blanco v. State, 706 So. 2d 7 (Fla. 1997)</u>	25, 26, 28
<u>Coday v. State, 31 Fla. L. Weekly S714 (Fla. 2006)</u>	1
<u>Combs v. State, 436 So. 2d 93 (Fla. 1983)</u>	33
<u>Consalvo v. State, 697 So. 2d 805 (Fla. 1996)</u>	24, 26, 28
<u>Crook v. State, 813 So. 2d 68 (Fla. 2002) <u>sentence reduced to life,</u> 908 So.2d 350 (Fla. 2005)</u>	20
<u>Ferrell v. State, 680 So. 2d 490 (Fla. 1996)</u>	22, 26, 29, 30
<u>Galindez v. State, 32 Fla. L. Weekly S89 (Fla. February 15, 2007)</u>	11, 12
<u>Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977)</u>	14
<u>Heath v. State, 648 So. 2d 660 (Fla. 1994)</u>	23, 26, 29, 30, 31
<u>Huggins v. State, 889 So. 2d 743 (Fla. 2004)</u>	32, 33
<u>Johnson v. State, 660 So. 2d 637 (Fla. 1995)</u>	23, 25, 26, 28

<u>Johnson v. State,</u> 660 So.2d 648 (Fla. 1995)	23
<u>Lucas v. State,</u> 841 So.2d 380 (Fla. 2003)	11
<u>Mann v. State,</u> 453 So.2d 784 (Fla. 1984)	12
<u>Matthews v. Metropolitan Life Insurance Co.,</u> 89 So.2d 641 (Fla. 1956)	34
<u>Melton v. State,</u> 638 So.2d 927 (Fla. 1994)	22,26,27,28
<u>Miller v. State,</u> 770 So.2d 1144 (Fla. 2000)	22,24,26,28
<u>Pope v. State,</u> 679 So.2d 710 (Fla. 1996)	20,25,26,28
<u>Porter v. State,</u> 400 So.2d 5 (Fla. 1998)	14,15
<u>Preston v. State,</u> 607 So.2d 404 (Fla. 1992)	11
<u>Shellito v. State,</u> 701 So.2d (Fla. 1997)	23,26,28
<u>Sliney v. State,</u> 699 So.2d 662 (Fla. 1997)	25,26,28
<u>State v. Steele,</u> 921 So.2d 538 (Fla. 2006)	32,33,34
<u>Teffeteller v. State,</u> 495 So.2d 744 (Fla. 1986)	12
<u>Walker v. State,</u> 707 So.2d 300 (Fla. 1997)	20
<u>Way v. State,</u> 760 So.2d 903 (Fla. 2000)	15

ISSUE I

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

The appropriate framework by which a trial court is required to evaluate evidence of mitigation and the standards of review under which the appellate courts evaluate the actions of the trial court were correctly set forth in the Initial Brief and not disputed by the State in the Answer Brief. Suffice it to say, a 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, 31 Fla. L. Weekly S714 (Fla. 2006). Under this standard, it is clear that Mr. Lebron's position is correct- the trial court erred in rejecting the mitigating circumstances of age, drug addiction of his mother, interpersonal, domestic abuse(both physical and emotional), and institutionalization.

ERRONEOUS REJECTION OF MITIGATION

1. Age

Mr. Lebron contends that the trial court erred in rejecting

his age of 21 as mitigating. The State does not dispute that age is a mitigating factor, but argues that it does not apply in this case. To support this argument, the State makes what it claims to be factual assertions that are nothing more than false conjecture. The State's argument is that at the time of the murder Mr. Lebron was "surviving successfully on thievery, could live away from any residence, and would go AWOL from all residences, was living on his own in Florida, and was able to obtain a rifle." All but one of these assertions is false and the remaining assertion does not establish that Mr. Lebron's age should not have been found to be a mitigating factor.

The State's claim that Mr. Lebron was surviving successfully on thievery is false. There was no evidence presented that Mr. Lebron was engaged in thievery. Evidence was presented that Mr. Lebron and the members of Four Play and their girlfriends attempted to forge a transcript to send to Mr. Lebron's mother so she would send him money to be used by the group, but the evidence was clear that this attempt was unsuccessful and no transcript was made, let alone sent. There is absolutely no evidence that Mr. Lebron was stealing anything from anyone.

Likewise, the State's claim that the age mitigator

should not apply because Mr. Lebron could live away from any residence and go AWOL is also incorrect. Evidence at the hearing established that the only time Mr. Lebron was AWOL was when he left Glenn Mills School to stay with his mother at age 17.(V,ER281;296) Mr. Lebron was not considered AWOL after his 18th birthday-he was discharged from services because he was no longer eligible after reaching the age of majority in the New York juvenile system.(V,ER327-328;399) Likewise, the evidence did not establish that Mr. Lebron was choosing to live away from any residence. To the contrary, the evidence established that Mr. Lebron wanted to live with his mother, but that she kicked him out repeatedly. She would not permit him to live with her.(V,ER315;323;344)

The testimony did not establish that Mr. Lebron was living independently in Florida. The testimony established that Mr. Lebron was allowed to sleep temporarily on a couch at the residence that was rented by the Tocci twins and their cohorts, but only as long as Mr. Lebron could get money for them. The evidence established through the testimony of Ms. Ortiz was that she continued to support Mr. Lebron because she felt guilty about her lack of love or affection for him. The evidence did not establish that

Mr. Lebron had attained societal benchmarks of adulthood associated with persons of his biological age, such as the ability to be self-supporting or to hold employment.

The evidence established that Mr. Lebron's documented immaturity throughout his entire adolescence had not abated at the time of the offense. The evidence established that Mr. Lebron was still functioning as he had his entire life-making the same errors of judgment he made while he was under supervision and subject to documentation. Mr. Lebron chose to associate with undesirable or negative acting out persons (V,ER457) (the members of Four Play, their friends, and girlfriends all were underage, abused drugs and alcohol, engaged in criminal activity, and engaged in gang behavior); he engaged in actions detrimental to himself in an effort to be accepted and please others (V,ER457), he could not perform successfully in school (III,ER162;IV,ER174,192,193,196,238;V,ER431,445,457)(as evidenced by the need to falsify a transcript to reflect passing grades), used poor judgment (V,ER431-432), and had poor temper control(V,ER431-432).

The record in this case contains uncontroverted evidence that Mr. Lebron was not mentally and emotionally mature. His life pattern had not altered. The trial court

failed to link the longstanding, unbiased, and documented evidence of Mr. Lebron's immaturity to his age. In failing to do so the trial court erred under Coday by rejecting uncontroverted evidence of this mitigator.

2. Drug Addiction of Mother

The State responds to the trial court's failure to consider the uncontroverted evidence of maternal drug addiction and the effect that addiction had on the life of Mr. Lebron by simply reproducing a portion of the trial court's sentencing order coupled with the a statement that the court also looked at the 2005 proceedings argues that the court's finding of drug use is sufficient. The trial court's current order wholly fails to recite or otherwise address Ms. Ortiz's testimony about the extent of her drug addiction, the longevity of her drug addiction, the effects her drug addiction on the early life of Mr. Lebron which resulted in foster care placement for the first five years of his life, the effects her drug addiction had on her unwillingness to parent her child so she could party, and the effects her drug addiction had on her determination to place her son in residential care so she would be free of any responsibility for him.

3. Interpersonal

The trial court rejected any mitigation under this heading, save for a finding that Mr. Lebron was somewhat good with children. In doing to the trial court's findings were absolutely contrary to the evidence contained in the exhibits. The psychological and other treatment records of Mr. Lebron, the testimony of Ms. Ortiz, and the evidence from the trial do not support the trial court's findings or the State's attempt to portray Mr. Lebron as a self-confident, friendly, outgoing, well-adjusted individual. The State and trial court ignore the obvious- if Mr. Lebron was all those things, he would not have been determined to be an emotionally disturbed child in need of residential treatment for most of his life. Mr. Lebron's likeable qualities as a young child only serve to highlight the tragedy that resulted from years of emotional neglect and abuse from his mother. Mr. Lebron's ability to form positive relationships, to develop appropriate self-esteem instead of seeking negative attention as an alternative to abandonment, and his ultimate inability to form meaningful emotional attachments because none were formed with him by his caregiver establish the existence of this mitigating circumstance.

4. Domestic violence

a. Physical abuse

The State seeks to discredit this claim by relying upon the clearly erroneous sentencing order of the trial court. Contrary to the trial court's conclusory statement, Ms. Ortiz did not testify in these proceedings that she struck Mr. Lebron on only one occasion. Physical abuse is a separate and distinct mitigating circumstance entitled to independent consideration. The trial court failed to correctly evaluate the evidence in this proceeding.

Ms. Ortiz testified that her method of discipline for Mr. Lebron from the time he was returned to her at age five until he left her care at age 12 was to hit him, smack him, and yell at him. Ms. Ortiz confessed her physical abuse of Mr. Lebron to his counselors during therapy sessions. The physical discipline that Ms. Ortiz admitted to in therapy was deemed "physical abuse" by the therapist. This evidence was uncontroverted. The trial court cannot ignore or diminish the nature of the physical abuse where competent evidence supports the type and duration of the abuse and then reject it as mitigating. The trial court's decision to reject physical abuse as mitigating cannot be relied upon when the trial court fails to accurately recite the facts upon which the mitigation rests.

b. Emotional/Psychological Abuse

The trial court did not address the issue of emotional psychological abuse under "parent profile" as the State suggests. The trial court's sentencing order is clear- the trial court rejected this mitigating circumstance because he erroneously determined "Neither the record nor the testimony of the defendant's mother supports the allegation that he was physically and/or psychologically abused." While Mr. Lebron would agree that his mother neglected him, as noted by the trial court under parent profile, there was undisputed testimony and documentary evidence that Ms. Ortiz also emotionally/psychologically abused her child.

Neglect is defined by Black's Law Dictionary as "to omit, fail, or forbear to do a thing that can be done, or that is required to be done, but it may also import an absence of care or attention. And it may mean a designed refusal or unwillingness to perform one's duty." Clearly, Ms. Ortiz neglected Mr. Lebron when he was a small child- she failed to provide adequate shelter, food, or care because of her drug addiction. Neglect is the failure to provide adequately for physical needs.

Conversely, emotional abuse arises from the failure to provide for the emotional and mental needs. Emotion is

defined by Black's Law Dictionary as "a strong feeling of hate, love, sorrow, and the like arising within a person...". Emotional abuse is distinct from neglect- a person can love their child and demonstrate that emotional commitment but be unable to provide for the physical needs of their child, resulting in neglect.

Tragically, Ms. Ortiz failed in both. She was physically neglectful of Mr. Lebron when he was a child and she was emotionally abusive to him throughout his entire life. Emotional abuse derived from her complete disattachment from him, her failure to love him, her anger and hatred at him for fact of his birth, and her lack of desire and inability to provide to him the love, security, and stability necessary for healthy emotional development. Ms. Ortiz exposed her child to inappropriate sexual activity, which included viewing her in pornographic movies and observing her in sexual acts with superfluous partners.

The evidence in this record is crystal clear- Ms. Ortiz did not love her child, she formed no emotional attachment to him, and as a result, her child was subject to severe psychological trauma. The trial court's finding that there was no evidence of emotional/psychological abuse is not supported by competent, substantial evidence. The

trial court clearly erred.

5. Institutionalization

Mr. Lebron argued that despite the trial court's self-serving statement that this mitigating circumstance was specifically addressed under the category "Parent Profile", no mention of institutionalization appears under that category. The State makes no argument to the contrary, and only reproduces the trial court's "Parent Profile" findings.

The Initial Brief detailed the fallacy of the trial court's "factual" recitation. Because the trial court's factual conclusions are wholly inaccurate and are not a credible reflection of the evidence, the trial court's determination cannot be deemed reliable. There is no competent evidence to support the trial court's rejection of this mitigating circumstance and the sentencing order offers no credible basis for doing so.

ERRONEOUS ASSIGNMENT OF WEIGHT TO MITIGATING CIRCUMSTANCES

Mr. Lebron argued in his Initial Brief that the trial court not only erred in refusing to address the existence of mitigating circumstances, but that the trial court also erred in the assignment of weight to compelling mitigation.

The trial court erred in minimizing the mitigation it lumped into the Parent Profile and Psychological categories when it assigned this mitigation very little weight.

ISSUE II

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

In the Initial Brief Mr. Lebron argued that the trial court impermissibly relied upon information that was contained in the prior proceedings because in doing so the trial court did not adhere to the requirement that resentencing proceedings are to be *de novo*. The State's response to this argument is to assert that no error occurred because the trial court also considered some evidence from the current proceeding, and even if the trial court used evidence from the prior proceedings, any error was harmless. Neither argument is well taken.

This Court has repeatedly adhered to the requirement that subsequent proceedings conducted after a remand for new sentencing proceedings are to be a "clean slate". See, Galindez v. State, 32 Fla. L. Weekly S89 (Fla. February 15, 2007), concurring opinion, J., Cantero; Lucas v. State, 841 So.2d 380 (Fla. 2003); Preston v. State, 607 So.2d 404,

408 (Fla. 1992); Teffeteller v. State, 495 So.2d 744 (Fla. 1986). A hallmark of this principle is that both sides are permitted to introduce additional evidence. Mann v. State, 453 So.2d 784, 786 (Fla. 1984). And as Justice Cantero noted in Galindez, the State is required to produce evidence on sentencing issues even if the State had established the fact at the original sentencing regardless of whether the fact had been disputed by the defendant at either proceeding. Likewise, the defendant is entitled to challenge sentencing factors that were not previously challenged and to seek additional grounds for sentence mitigation that were not previously presented. See, Baldwin v. State, 700 So.2d 95, 96 (Fla. 2nd DCA 1997).

Under the "clean slate" rule the trial court is not permitted to rely upon testimony from a prior proceeding that was not made a part of the current record as a basis for rejecting mitigation when that mitigation bears upon the determination of sentence in the new proceeding. This bar is even more significant, when as in this instance, the evidence at the new proceeding may differ from that presented at the prior proceeding.

In this case the trial court rejected three mitigating circumstances- drug addiction of the mother, interpersonal,

and physical abuse by relying upon testimony from the prior proceeding and ignoring additional testimony presented as to each of these factors at the current resentencing. The State argues that the trial court's reliance on the prior testimony, even where it is contradicted or expanded upon in the current proceedings in harmless error. This is incorrect.

First, this argument that the error is harmless ignores the fact that the trial court went outside the record. Trial judges and juries are not allowed to base their determinations on factors outside the record. The State in this case did not ask the trial court to take judicial notice of the prior penalty phase testimony- the prior testimony is not a part of this record and was not appropriately before the trial court for his consideration.

Neither did the State cross-examine or impeach Ms. Ortiz with her former testimony and afford her an opportunity to explain any inconsistencies. While the State cross-examined Ms. Ortiz, it did not refer to her former testimony in any fashion. The State cannot now claim that the 2002 testimony should be relied upon by the trial court and the current proceeding testimony discarded or ignored when the State failed to take the appropriate actions to

have place the prior testimony before the trial court.

The trial court's use of evidence from a prior proceeding which has been nullified in this case deprived the defense of their fundamental right to due process- from notice that that as to what evidence would be relied upon at sentencing and from having an opportunity to rebut or explain any inconsistencies between the two. This Court has held that the trial court's reliance on evidence not presented in open court and contrary to evidence presented or not proved at trial violates due process. Porter v. State, 400 So.2d 5 (Fla. 1998); Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977).

In Porter the trial court relied upon evidence that was not presented in open court as a basis for the imposition of a death sentence. The witness had testified in a deposition and at trial. The witness's trial testimony differed from that contained in the deposition. The trial court relied upon the deposition testimony of the witness for critical findings relating to the death sentence. This Court reversed, finding that due process was violated where the defense had no notice that the trial court intended to rely upon facts outside this record as a basis for its sentencing determination. The trial judge did not provide

prior notice to the parties that it intended to rely upon the prior testimony. Porter is indistinguishable from this case. Ms. Ortiz testified in this proceeding differently from her prior testimony. The trial court relied upon the prior testimony in lieu of the open court testimony to reject critical mitigation. The trial court did not provide any notice prior to issuing the sentencing order that it intended to look outside the record for factors critical to the imposition of the death sentence. Under Porter, the trial court violated Mr. Lebron's due process rights and committed reversible error.

In the new proceeding a defendant must have the opportunity to decide whether or not to follow the same course as previously followed, to adopt a new strategy, or to ensure that prior deficiencies, such as a perceived lack of evidence, are corrected. See, Way v. State, 760 So.2d 903 (Fla. 2000). If the trial court is permitted to disregard the current proceedings in favor of a prior proceeding, the defendant is deprived of his right to have the State meet their burden of proof and is denied an opportunity to present his defense to a neutral judge. A practice such as used by the trial judge here carried to its logical conclusion would permit a judge to enter a

conviction against a defendant absent sufficient evidence solely by relying upon testimony from a prior proceeding that was reversed. If the trial court is permitted to utilize testimony from the prior nullified proceedings and ignore the testimony properly before it, common sense dictates that there is no meaningful reason for a remand granting a new penalty phase proceeding. The error is only compounded when, as here, the trial court failed to provide any notice or opportunity to be heard by the defendant as to the prior evidence and simply reissued portions of the prior nullified sentencing order which have no evidentiary support in the present proceeding.

The State contends that any error is harmless because the testimony from 2002 and 2005 is the same. This is not true. The testimony was not the same on three disputed areas. For example, in 2002 Ms. Ortiz did not describe her drug usage and its effect on Mr. Lebron with the detail that she provided in the current proceeding as is able to be adduced from the trial court's reference to the prior proceeding in this sentencing order. In 2002, as is only able to be deduced from the trial court's sentencing order of 2002 as used in this sentencing order, Ms. Ortiz denied being an addict. In the 2005 proceeding evidence was

presented to establish that the trial court's prior finding in 2002 (and 2005) was incorrect. Ms. Ortiz did not deny being a drug addict in this proceeding. Ms. Ortiz candidly told the State that part of the reason she could not remember details about Mr. Lebron's upbringing and placement was because of her drug usage- drug usage during a period of time that occurred both prior to her entry in residential treatment and for many years following her discharge from treatment.(VIII,T403) It defies logic to presume that an individual who spends four years in a combination of residential and after care drug treatment, who returns to drug abuse a year later, and continues to use drugs for the next ten years, who admits to enjoying the use of drugs and "partying" and cannot recall significant events in her life because of her drug use is not an addict. The trial court's finding to the contrary, albeit based upon a 2002 record not before this Court, is wrong and completely contradicted by the evidence in this proceeding.

In rejecting the mitigating circumstance of physical abuse, the trial court relied upon the earlier 2002 sentencing order for the statement that Ms. Ortiz had admitted to striking Mr. Lebron with a closed fist only

once throughout his entire childhood. No where in this record is there testimony that Mr. Lebron was struck only once with a closed fist. That incorrect factual assertion is simply not part of the evidence in this proceeding. The evidence in this proceeding is that Ms. Ortiz disciplined Mr. Lebron during the time he was in her care by smacking him, hitting him, and yelling at him.(VIII,T392-393;407;409;V,ER451) Ms. Ortiz admitted in therapeutic sessions that she was physically abusive to her son.(V,ER451) This evidence is a far cry from the factual finding made by the trial court of a single isolated incident.

In the category INTERPERSONAL the trial court trial court found that Mr. Lebron was "good with children", a fact not specifically presented in this proceeding, but then failed to address any other evidence which supported Mr. Lebron's claim that the lack of family support, the lack of emotional support, and stunted emotional growth led to significant difficulties in Mr. Lebron's ability to form and maintain appropriate peer and adult relationships.

The State's argument that any error is harmless because the evidence presented in all the proceedings has been the same is without merit and without record support.

The State claims that there is no record support for contention made in the Initial Brief (p. 65-66) that Ms. Ortiz used drugs within a year of leaving Daytop. (State's Brief at p. 44) This is incorrect. In 2005 Ms. Ortiz testified that she entered drug treatment when Mr. Lebron was 3 months old and stayed for 28 months in a residential drug treatment center. Ms. Ortiz testified that she did not regain custody of Mr. Lebron until he was four years old, after she completed the residential and aftercare programs- Ms. Ortiz was without her son from age three months to four or five years old. (VII,T368) Upon her release from Daytop, Ms. Ortiz married Tony Ortiz and they remained together for one year while they both worked as drug counselors. (VII,T374) After her divorce from Mr. Ortiz after one year of marriage and hence, one year after leaving Daytop, Ms. Ortiz quit her job at Daytop and returned to work as a dancer/stripper, work she then did for the next 10 years. (VII,T379) Ms. Ortiz testified that while she worked as a dancer/stripper she got a lot of drugs and a lot of money. (VIII,T403) She traveled and partied while a dancer/stripper. (VIII,T382) During the ten years that Ms. Ortiz worked as a dancer/stripper and used drugs, Mr. Lebron grew from a four year old to a fourteen

year old. Thus, the Initial Brief is correct- Ms. Ortiz returned to a life of drug abuse within a year after leaving treatment.

The trial court's reliance and citation to evidence from prior proceedings where that evidence was not admitted in the lower court is error. Both state and federal constitutional due process guarantees are violated by the practice and it violates the federal and state guarantees that a new proceeding is just that- a clean slate.

ISSUE III

THE SENTENCE OF DEATH IS NOT PROPORTIONATE.

In order to appropriately conduct proportionality, a thorough, well-reasoned, and factually accurate sentencing order is of paramount importance. The sentencing order in this case does not meet these requirements, as evidenced the arguments set forth in Issues I and II of the Initial Brief. The deficiencies of the sentencing order preclude meaningful appellate review. See, Walker v. State, 707 So.2d 300, 319 (Fla. 1997). Without conceding these deficiencies, it is Mr. Lebron's position that a sentence of death is not proportional.

Proportionality review requires this Court to evaluate

and compare the instant case before it to other capital cases in order to ensure that a sentence of death is imposed on only the most aggravated and least mitigated of cases. Both factors must be considered and the underlying facts of both the instant case and other cases must be compared in proportionality review. Crook v. State, 813 So.2d 68 (Fla. 2002), sentence reduced to life on proportionality grounds, 908 So.2d 350 (Fla. 2005).

In arguing that a death sentence is proportional, the State provides a list of cites to ten cases. (State's Brief p. 67-69)(the three pages actually contain cites to 11 cases, however Pope v. State, 679 So.2d 710 (Fla. 1996) is cited to twice, on pages 68 and 69). However, no analysis is provided to assist this Court in determining whether or not these cases demonstrate that Mr. Lebron's case is among the most aggravated or the least mitigated when compared to these ten cases. Mr. Lebron's case is distinguishable from each of the ten cases- in each instance the case the State has relied upon is either more aggravated, less mitigated or both.

A. Analysis of Aggravation

While most of the cases cited by the State contain the same named aggravators, an examination of the facts in

those cases which supported those aggravators show that the aggravation was far more severe in those cases than is present in this case.

Each of the ten cited cases contain the prior violent felony aggravator, as does this case. However, it is also critical in proportionality analysis to consider what the prior violent crimes were and how many prior felonies existed. Mr. Lebron had a single prior juvenile conviction for second-degree attempted robbery, wherein a co-defendant was the actual perpetrator. Mr. Lebron had Florida convictions for aggravated assault, admitted as State Exhibit 1. Mr. Lebron also had a robbery and a kidnapping conviction stemming from an incident that occurred one week after this offense, in which a jury specifically found that Mr. Lebron did not use any firearm during that incident.

The prior violent felonies committed by the defendants in the ten cases cited by the State are far more severe or far more extensive in number than those of Mr. Lebron and do not support a finding that death is a proportionate penalty in this case. In the cases of Miller v. State, 770 So.2d 1144 (Fla. 2000)(hereinafter, Miller), Ferrell v. State, 680 So.2d 490 (Fla. 1996)(hereinafter, Ferrell), Melton v. State, 638 So.2d 927 (Fla. 1994)(hereinafter,

Melton), and Heath v. State, 648 So.2d 660 (Fla. 1994)(hereinafter, Heath), each of the defendants had committed a prior first- or second-degree murder. In Ferrell, for example, this Court upheld the death sentence as proportionate in large part due to the striking similarity between the facts of the current murder of the defendant's girlfriend with the prior murder of another girlfriend. In another case, Johnson v. State, 660 So.2d 637 (Fla. 1995)(hereinafter, Johnson), the defendant had committed and was convicted of a second first-degree murder close in time to the murder. See, Johnson v. State, 660 So.2d 648 (Fla. 1995)(affirming the defendant's conviction for first-degree murder and upholding death sentence based upon aggravators of HAC, prior violent felony, and pecuniary gain). Clearly, the fact that the defendant has previously murdered is a more severe aggravating factor weighted in favor a death sentence than other types of prior felonies and does not support a death sentence for Mr. Lebron.

Neither is Mr. Lebron's prior record as extensive as other death sentenced defendants among the ten cases cited by the State. The defendant in Shellito v. State, 701 So.2d 837 (Fla. 1997)(hereinafter, Shellito), although almost the

same age as Mr. Lebron, had amassed an extensive criminal record. The 19 year old Shellito was first arrested at age fourteen. By the time of his conviction for murder five years later, he had been arrested 22 times, charged with 30 different crimes, waived to adult court at age 16, convicted of 4 adult felonies as a juvenile and had an additional 8 convictions for felonies committed while he was an adult. Shellito was also on probation at the time he committed the murder. Mr. Lebron's prior history does not compare to that of Shellito.

In determining whether or not this case is among the most aggravated, this Court must also consider the facts of this offense against the facts of other cases. In this case the victim died from a single gunshot wound to the head and death was instantaneous. The facts of the murders in the ten cases cited by the Stated establish that the brutal and violent nature of those murders distinguish them from this case. The facts in those cases demonstrate that this is not among the most aggravated of first-degree murders.

In Miller, the defendant beat the victim to death with a metal pipe and severely injured a second victim. The victim in Consalvo v. State, 697 So.2d 805 (Fla. 1996)(hereinafter, Conslavo), was stabbed to death.

The victim in Heath was first shot by Heath's brother at Heath's direction. Then Heath stabbed the victim in the neck and was unsuccessful in slitting his throat because the knife was too dull. Heath resorted to "sawing" at the victim's throat. Still unable to kill the victim, Heath then ordered his brother to shoot the victim the again.

The victim in Blanco v. State, 706 So.2d 7 (Fla. 1997)(hereinafter, Blanco), was shot once by the defendant, ran from the defendant to a child's room and fell on top of a child lying on the bed, and was then shot an additional six times by the defendant. In Pope v. State, 679 So.2d 710 (Fla. 1996)(hereinafter, Pope), the victim was beaten and stabbed, then left for dead by the defendant. She managed to crawl to a house and died eight days later from her wounds.

In two of the cases cited by the State, the murder was sufficiently gruesome to support the HAC aggravating circumstance. The victim in Johnson, at 660 So.2d 637, was an elderly woman who was stabbed 24 times and had defensive wounds. This Court upheld the HAC aggravator, in addition to prior violent felony and pecuniary gain. This Court affirmed a death sentence in Sliney v. State, 699 So.2d 662 (Fla. 1997), based upon the brutal nature of the murder.

This Court noted that even though HAC was not found by the trial court, the victim had been beaten on the face and body, suffered broken ribs and a broken tailbone, was hit on the head three times with a hammer, and was stabbed in the neck and back with a pair of scissors, and the scissors were found protruding from the victim's back. These two cases, rather than supporting a death sentence based upon proportionality grounds in this case, demonstrate that this was clearly not among the most aggravated of first-degree murders.

This Court must also consider the findings of the jury that Mr. Lebron was not the actual killer when determining whether or not this is among the most aggravated of cases and compare that finding to the roles of the defendants in the ten cases cited by the State.

The fact that the jury determined that Mr. Lebron was not the actual killer distinguishes this case from those cases in which the defendant acted alone and was the actual killer. In Miller, Consalvo, Ferrell, Pope, Johnson, Blanco, and Shellito the defendants were solely responsible for the murder.

In Sliney, Melton, and Heath the defendants did not act alone in the commission of the murders. However, in

each of those cases the defendant was the actual killer. Melton fired the fatal shot in the robbery of a pawnshop, Sliney fired the fatal shot that resulted in the death of the gas station owner, and the victim in Heath would have died from the wounds inflicted by the defendant.

The ten cases relied upon by the State are more aggravated than this case. They collectively do not support the imposition of a death sentence in this case.

B. Analysis of Mitigation

To uphold a sentence of death this Court must not only determine that the case represents the most aggravated of first-degree murders, this Court must also determine that the case is among the least mitigated. The cases cited by the State do not have as much mitigation as present in this case or contain insufficient facts about the mitigation to permit a meaningful comparison.

Because proportionality review requires a comparison between cases, a logical prerequisite to a valid comparison is sufficient factual information upon which a comparison can be made. A valid comparison of the mitigating circumstance of abusive childhood between two cases cannot be made unless the facts upon which the abuse was based are contained in the opinion. Several cases among the ten

relied upon by the State contain no factual information whatsoever about the mitigating circumstances the trial court considered, rejected, or assigned minimal weight to. For example, the opinion in Consalvo notes that the trial court gave very little weight to the mitigating factor of abusive childhood, but contains no information about what was abusive to the defendant. The opinion in Melton contains no facts about the defendant's mitigation of a difficult family background. Likewise, Pope contains no background information or facts about what formed the basis for the mitigation. These cases cannot be relied upon for proportionality analysis because the lack of factual data preclude a meaningful comparison with this case.

The mitigation that is recited in most of the cases cited by the State differs significantly from the mitigation presented in this case. The mitigation regarding the childhood, family background, and parental relationships presented in most of the ten cases was exactly the opposite of what was presented in this case. In Miller, Johnson, Blanco, Shellito, and Sliney the defendants presented as mitigation their positive and loving relationships with mothers, fathers, siblings, and children, loving family backgrounds, excellent

interpersonal relationships with employers and friends, and positive parental support. While these factors are mitigating, it is not appropriate to compare positive family background mitigation with the type of mitigation presented in this case. It is indisputable that Mr. Lebron did not have a positive, loving family, a loving family background, excellent interpersonal relationships with friends and employers, or positive parental support. Comparison between positive backgrounds with a traumatic, dysfunctional background is to compare apples to oranges.

The two remaining cases, Ferrell and Heath, that either contains some facts which would permit comparison or where the mitigation is more similar are distinguishable from this case. The mitigation presented in this case is far more compelling than the mitigation in either Ferrell or Heath.

In Ferrell the defendant killed his girlfriend in a manner that this Court found to be strikingly similar to the defendant's previous murder of another girlfriend. The trial court found Ferrell to be impaired, disturbed, a good worker, to have a good prison record, remorseful, and to have an alcohol problem. No mitigation is referenced in the opinion as to the defendant's childhood, family

background, or any other information which would have explained his later impairments. This Court did not focus on the mitigation in Ferrell, but rather found the sentence of death to be proportionate based upon the aggravating factor of the prior murder, and in particular, the uncanny resemblance between the two murders. Obviously the fact that Ferrell had killed before significantly undercut the mitigating nature of any mental health issues, remorse, or his good record in prison.

In contrast, the mitigation presented in this case demonstrates that this is not among the least mitigated of cases. The evidence in this case is comparable to those cases cited in the Initial Brief in which other young defendants from severely dysfunctional backgrounds who commit an offense shortly after adolescence and where immaturity and impulsivity are the hallmarks dominant features of the crime.

The trial court in Heath found three mitigating circumstances: the statutory mitigating circumstance of emotional disturbance due to drug and alcohol use at the time of the murder and two non-statutory mitigating circumstances of good character in prison and the life sentence received by the co-defendant. The co-defendant was

the brother of the defendant. The evidence had established that Heath and his brother had convinced the victim to leave a bar with them. In their attempt to rob the victim, Heath had ordered his brother to shoot the victim once. After the brother fired one shot, Heath tried to slit the throat of the conscious victim. The dullness of the knife resulted in Heath "sawing" the victim's neck. When the victim failed to die, Heath ordered his brother to shoot the victim again, which was done. Death would have occurred from either the gunshot wounds or the neck injuries. The mitigation presented in Heath pales in comparison to the mitigation present in this case. Heath was an equally active participant in the actual killing of the victim, he was undoubtedly the dominant participant due to his ability to exert considerable influence over his younger brother, and his drug/alcohol intoxication was a voluntary act. There is no information in the Heath opinion about the background of the defendant, his childhood, and relationships with his family, or any other information similar to the mitigation presented in this case. The mitigation evidence present in this case, which was extensively outlined in the Initial Brief, is of a far more mitigating nature than that in Heath.

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.

In this Issue, this Court must determine whether a practice that this Court has determined to be an essential departure from the requirements of the law requires this case to be reversed. Mr. Lebron argued in the Initial Brief that the trial court's use of specialized verdict forms which required the jury to record their numerical findings as to each aggravating factor and mitigating circumstance required the reversal of his case under this Court's decision in State v. Steele, 921 So.2d 538 (Fla. 2006). The State does not dispute that trial court insisted on giving a verdict form over the objections of both the State and defense counsel. Neither can the State dispute that the trial court made the decision to have the jury record their findings because he wanted to know what they actually found and further made the statement that he wanted to know the jury count because he "didn't like fishing in the dark." (VIII,T489)

The State argues that the case of Huggins v. State, 889 So.2d 743 (Fla. 2004) is applicable to this case, thus

any error is harmless. Mr. Lebron submits that error which is deemed to be a departure from the essential requirements of the law cannot be harmless and even if it were to be harmless, this record supports a finding that the error was harmful.

In Steele this Court clearly overruled Huggins. In Huggins this Court specifically declined to address whether or not the use of the special verdict forms constituted error. This question was conclusively answered in Steele—not only is the use of specialized verdict forms error, that error is a departure from the essential requirements of the law. A departure from the essential requirements of the law amounts to a violation of due process. See, Combs v. State, 436 So.2d 93 (Fla. 1983). Errors which are an essential departure from the requirements of the law have been termed as errors which result in the illegality of the procedure. See, American National Bank of Jacksonville v. Marks Lumber and Hardware Co., 45 So.2d 336 (Fla. 1950). Errors which are an essential departure from the requirements of the law have also been defined as errors where a “fundamental and essential element of the judicial process that a litigant cannot be said to have had, the “remedy by due course of law as guaranteed by Section 4 of

the Declaration of Rights of our Constitution"" . Matthews v. Metropolitan Life Insurance Co., 89 So.2d 641, 642 (Fla. 1956). Mr. Lebron submits that a due process error which this Court has termed to be a substantial departure from the essential requirements of the law requires reversal irrespective of whether or not harm has occurred. This Court, in deciding Steele did not state that a defendant would have to prove harm if such forms were given. In Steele this Court held that the use of the forms, in and of itself, would not only require the use of new jury instructions, but would call into question the constitutionality of the entire death penalty scheme.

Even if this Court were to determine that a litigant must establish harm in order to prevail when a trial court departs from the essential requirements of the law, this record supports a finding that Mr. Lebron was harmed. The trial court specifically stated that he wished to utilize the special verdict forms so that he was not "fishing in the dark". The use of the numerical vote tally by the trial court was clearly an impermissible use contemplated by Steele. Thus, under Steele, Mr. Lebron has demonstrated harm.

CONCLUSION

Based upon the forgoing arguments and citations of law, and that contained in the Initial Brief, Mr. Lebron requests that this Court reverse the judgment and sentence and remand for a new penalty phase proceeding, or in the alternative, remand for the imposition of a life sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the Office of the Attorney General, Barbara Davis, 444 Seabreeze Blvd., 5th FL, Daytona Beach, FL 32188 this ___ day of March, 2007.

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CERTIFICATE OF FONT COMPLIANCE

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

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