IN THE SUPREME COURT OF FLORIDA

DERRICK MCLEAN,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. SC07-2297
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0786438
444 Seabreeze Blvd, Suite 210
Daytona Beach, Florida 32118
(386) 252-3367

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

DERRICK MCLEAN,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. SC07-2297
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

POINT I

IN REPLY AND IN SUPPORT THAT THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS THE LIVE LINEUP IDENTIFICATION WHERE LAW ENFORCEMENT DID NOT OFFER OR PROVIDE ASSISTANCE OF COUNSEL.

The appellant relies upon the initial brief in reply to the appellee.

POINT II

IN REPLY AND IN SUPPORT THAT APPELLANT'S DEATH SENTENCE IS DISPROPORTIONATE.

The state argues that there is sufficient aggravating factors and no compelling mitigation to support the death penalty. The state argues that the following cases ***Shellito v. State***, 701 So.2d 837 (Fla. 1997); ***Melton v. State***, 638

So.2d 927 (Fla. 1994); and ***Sliney v. State***, 699 So.2d 662 (Fla. 1997) are comparable to the instant case, and this Court affirmed the death penalty after proportionality review. The appellant argues that these cases can be distinguished from the instant case.

In finding that the death penalty was proportionate in ***Shellito*** this Court held that:

> The facts of this case reflect that Shellito previously had been sentenced as an adult for a violent felony conviction and was on probation at the time he committed the murder, and that he committed three robberies and an aggravated assault on a police officer within days of the murder. Further, Shellito was not a minor; the evidence regarding his intellectual functioning indicated he was in the low average range of intelligence; and the evidence regarding his mental status was not supported by expert testimony and was conflicting. Under the circumstances of this case, we do not find the sentence to be disproportionate.

Shellito is distinguishable from the instant case. The trial court found that Mclean suffered two statutory mental mitigating factors at the time of the offence, and substantially more non-statutory mitigating evidence.

In finding that the death penalty was proportionate in ***Melton*** this Court held that:

> As in the instant case, the trial court found two statutory aggravating factors: (1) the murder was committed for pecuniary gain and (2) the defendant had been convicted of a prior murder. *Id.* at 77. There were no statutory mitigating

> factors and the nonstatutory mitigators were not compelling. *Id.* In finding that the death sentence was not disproportionate, the Court noted that the trial judge had weighed the aggravating and mitigating factors and "[i]t is not this Court's function to reweigh these circumstances." *Id.* The record is clear in the instant case that the trial judge weighed the aggravating and mitigating factors in this case, and we will not reweigh these circumstances. Melton's death sentence is not disproportionate to other cases.

Melton is distinguishable from the instant case. The trial court found that Mclean suffered two statutory mental mitigating factors at the time of the offense, and there was also compelling non-statutory mitigating evidence including:

(1) Substance abuse;

(2) History of mental illness in the family: mother heard voices and sister suffered from same ailments as mother;

(3) Emotional deprivation from the lack of support from parents;

(4) Organic brain injury from being struck with a baseball bat;

(5) Emotional age of a young teen;

(6) No positive role models during his formative years.

In finding that the death penalty was proportionate in ***Sliney*** this Court held that:

> In reviewing the proportionality of a death sentence, we must consider the totality of the circumstances in a case and compare it with other capital cases. ***Terry v. State***, 668 So.2d 954, 965 (Fla.1996). Although the trial court did not

> find the aggravating circumstance that the murder was especially heinous, atrocious, or cruel, this was a particularly brutal murder. The victim was beaten with a hammer to the face and was found with a pair of scissors stuck in his neck, with fractured ribs, and with a fractured backbone. The trial court did find two aggravating circumstances. Moreover, the trial court did not find any statutory mental mitigation. Comparing this to other cases in which the death penalty was imposed, we do not find that the mitigating circumstances which were found to exist in this case make the death sentence disproportionate. ***See Smith v. State***, 641 So.2d 1319 (Fla.1994); ***see generally Geralds v. State***, 674 So.2d 96 (Fla.), *cert. denied*, 519 U.S. 891, 117 S.Ct. 230, 136 L.Ed.2d 161 (1996); ***Finney v. State***, 660 So.2d 674 (Fla.1995), *cert. denied*, 516 U.S. 1096, 116 S.Ct. 823, 133 L.Ed.2d 766 (1996). Furthermore, we agree with the trial court that the codefendant's life sentence does not require a different result because Sliney was more culpable than his codefendant. ***See Heath v. State***, 648 So.2d 660 (Fla.), *cert. denied*, 515 U.S. 1162, 115 S.Ct. 2618, 132 L.Ed.2d 860 (1995).

Sliney is distinguishable from the instant case. The trial court found that Mclean suffered two statutory mental mitigating factors at the time of the offense, and substantially more non-statutory mitigating evidence. Also, this Court observed that the ***Sliney*** murder was particularly brutal. Moreover, the decision by this Court that the death sentence was proportional in ***Sliney*** was a 4-3 decision.

A comparison of this case to those in which the death penalty has been affirmed leads to no other conclusion but that the death sentence must be reversed and the matter remanded for imposition of a life sentence.

POINT III

IN REPLY AND IN SUPPORT THAT THE TRIAL COURT ERRED IN CONDUCTING A PRETRIAL HEARINGS WHERE THE APPELLANT WAS INVOLUNTARILY EXCLUDED THUS DENYING MCLEAN'S RIGHT TO DUE PROCESS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE FLORIDA CONSTITUTION.

The appellant relies upon the initial brief in reply to the appellee.

POINT IV

IN REPLY AND IN SUPPORT THAT THE TRIAL COURT ERRED IN INSTRUCTING THE JURY, OVER TIMELY AND SPECIFIC OBJECTION, ON THE HEIGHTENED PREMEDITATION AGGRAVATING CIRCUMSTANCE WHERE IT WAS NOT SUPPORTED BY ANY QUANTUM OF EVIDENCE AND WAS ULTIMATELY REJECTED BY THE TRIAL COURT.

The appellant relies upon the initial brief in reply to the appellee.

POINT V

IN REPLY AND IN SUPPORT THAT FLORIDA'S DEATH SENTENCING SCHEME IS UNCONSTITUTIONAL UNDER THE SIXTH AMENDMENT PURSUANT TO ***RING V. ARIZONA***.

The appellant relies upon the initial brief in reply to the appellee.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, as well as those cited in the Initial Brief, Appellant respectfully requests this Honorable

Court to order a new trial as to Point I and III; remand the case to the trial court with directions that the appellant is sentenced to life imprisonment as to Point II and Point V; and remand the case to the trial court with directions to conduct a new penalty phase trial as to Point IV.

Respectfully submitted,

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

_____
GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0786438
444 Seabreeze Blvd., Suite 210
Daytona Beach, FL 32114
(386) 252-3367

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand- delivered to the Honorable Charles Crist, Attorney General, 444 Sea breeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to Mr. Derrick McLean, DC#996584, Florida State Prison, P.O. Box 747, Starke, FL. 32091, this 15th day of May, 2009.

_____
GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

_____
GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER