IN THE SUPREME COURT OF FLORIDA

DERRICK MCLEAN,)
)
Appellant,)
)
vs.) CASE NO. SC007-2297
)
STATE OF FLORIDA,)
)
Appellee.)
_____________________)

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

INITIAL 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

	PAGE NO.
TABLE OF CONTENTS	i
TABLE OF CITATIONS	iii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	7
SUMMARY OF THE ARGUMENTS	18
ARGUMENTS	
POINT I: 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.	20
POINT II: APPELLANT'S DEATH SENTENCE IS DISPROPORTIONATE, EXCESSIVE, AND INAPPROPRIATE, AND IS CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF ARTICLE 1, SECTION 17 OF THE FLORIDA CONSTITUTION, AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.	29
POINT III: THE TRIAL COURT ERRED IN CONDUCTING A PRETRIAL HEARINGS WHERE THE APPELLANT	50

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.

POINT IV: 50
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.

POINT V: 53
FLORIDA'S DEATH SENTENCING SCHEME IS UNCONSTITUTIONAL UNDER THE SIXTH AMENDMENT PURSUANT TO ***RING V. ARIZONA***.

CONCLUSION 56

CERTIFICATE OF SERVICE 57

CERTIFICATE OF FONT 57

TABLE OF CITATIONS

CASES CITED:	PAGE NO.
Accord Hudson v. State 538 So.2d 829 (Fla.1989)	29
Bottoson v. Moore 833 So. 2d 693 (Fla. 2002), ***cert. denied*** 537 U.S. 1070 (2002)	53, 54
Bozeman v. State 714 So.2d 570 (Fla. 1998)	52
Caldwell v. Mississippi 472 U.S. 320 (1985)	54
Coney v. State 653 So.2d 1009 (Fla. 1995)	47, 48
Diaz v. State 860 So.2d 960 (Fla. 2003)	51
Francis v. State 413 So.2d 1175 (Fla. 1982)	47, 49
Garcia v. State 492 So.2d 360 (Fla. 1986)	47
Gilbert v. California 388 U.S. 263, 87 S.Ct. 1951, 18 L. Ed. 2d 1178 (1967)	26
Hess v. State 794 So.2d 1249 (Fla. 2001)	38, 40
Hubbard v. State 751 So.2d 771 (Fla. 5th DCA 2000)	52
Hunter v. State	

660 So.2d 244 (Fla. 1995) 51

Johnson v. State
720 So.2d 232 (Fla. 1998) 35, 36

Jones v. State
963 So.2d 180 (Fla. 2007) 36, 38

King v. Moore
831 So.2d 143 (Fla. 2002) ***cert. denied***
537 U.S. 1069 (2002) 53, 54

Kirby v. Illinois
406 U.S. 682, 92 S.Ct. 1877, 32 L. Ed. 2d 411 (1972) 26, 27

Mansfield v. State
758 So.2d 636 (Fla. 2000) 28

Menendez v. State
419 So.2d 312 (Fla.1982) 29

Nelson v. State
850 So.2d 514 (Fla.2003)
(quoting ***Connor v. State***, 803 So.2d 598, 608 (Fla.2001) 20

Porter v. State
564 So.2d 1060 (Fla.1990)
cert. denied 498 U.S. 1110, 111 S.Ct. 1024, 112 L.Ed.2d 1106 (1991) 29, 30

Ring v. Arizona
536 U.S. 584 (2002) 53, 54

Sinclair v. State
657 So.2d 1138 (Fla. 1995) 37, 41, 43

Sobczak v. State
462 So. 2d 1172 (Fla. 4th DCA 1984) 27

State v. Burns
661 So.2d 842 (Fla. 5th DCA 1995) 27

State v. Dixon
283 So.2d 1 (Fla.1973) 46

State v. Jones
849 So.2d 438 (3d DCA 2003)
rev. den. Jones v. State, 889 So.2d 806 (Fla. 2004) 25

State v. Smith
547 So.2d 131 (Fla. 1989) 27

State v. Steele
921 So.2d 538 (Fla. 2005) 54

State v. Williams
742 So.2d 509 (Fla. 1st DCA 1999) 52

Terry v. State
668 So.2d 954 (Fla.1996) 29, 33, 35, 37

Thompson v. State
647 So.2d 824 (Fla.1994) 37, 42

Tillman v. State
591 So.2d 167 (Fla.1991) 30

Traylor v. State
596 So.2d 957 (Fla. 1992) 25, 27

United States v. Ash
413 US 300 (1973) 25

Woods v. State
733 So.2d 980 (Fla. 1999) 40, 41

OTHER AUTHORITIES CITED:

Amendment VI, United States Constitution 53, 54
Amendment VIII, United States Constitution 29, 54
Amendment XIV, United States Constitution 29, 54
Article I, Section 16, Florida Constitution 55
Article I, Section 17, Florida Constitution 55
Article I, Section 17, The Florida Constitution 29, 30
Article I, Section 9, Florida Constitution 30, 55
Article V, Section 3(b)(1), Florida Constitution 30

Section 921.141, Florida Statutes 53

Rule 3.180, Florida Rule of Criminal Procedure 47
Rule 7.11, Florida Standard Jury Instruction Criminal 51

IN THE SUPREME COURT OF FLORIDA

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

PRELIMINARY STATEMENT

The original record on appeal comprises twenty-eight consecutively numbered volumes. The pages of the first thirteen volumes are numbered consecutively from one to 2,059. Volume fourteen begins renumbering the pages sequentially from page one through 1994 which concludes volume twenty-six. Volume twenty-seven begins renumbering the pages sequentially from page one through 276 which concludes volume twenty-eight. Counsel will refer to the record on appeal using the appropriate Roman numeral to designate the volume number followed the appropriate Arabic number referring to the appropriate pages.

STATEMENT OF THE CASE

Derrick McLean, hereinafter referred to as appellant, was indicted by Grand Jury with Murder in the First Degree; Attempted Home Invasion Robbery with Firearm; Attempted First Degree Murder; Kidnapping with Intent to Commit a Felony with a Firearm; and Attempted Robbery with Firearm. (V 536) The state filed a Notice of Intent to Seek the Penalty of Death. (V 583) The appellant filed eighteen pretrial motions challenging the constitutionality of the Florida death penalty scheme.[1] The trial court denied these Motions.[2] The state filed a Notice to Rely on Aggravators.[3] (VII 953) The state amended the Notice to Rely on Aggravators to include the avoid arrest aggravating factor. (XXIV 1632) The appellant filed a Motion to Declare the avoid arrest aggravator unconstitutional.

---

[1] Presumption of Death VI 776; Standard of Proof Mitigation VI 779; Inadequate Appellate Review VI 784; Lack of Unanimous Death Verdict VI 806; No Jury Finding of Aggravating Circumstances VI 810; Aggravating Factors not Charged in Indictment VI 814; CCP Aggravating Factor Improper VII 956; Improper Jury Instruction VII 976; Violates ***Ring v. Arizona*** VII 995; Limited Peremptory Challenges VII 1024; Use of Hearsay Evidence at Penalty Phase VII 1034; Pecuniary Gain Aggravator Improper VII 1038; Prior Violent Felony Aggravator Improper VII 1043; Felony Murder Aggravator Improper VII 1048; Bare Majority of Jurors Required for Death Sentence VII 1060; Inadequate Guidance to Jury VII 1062; Violation of Free Speech VII 1071; Under Sentence of Imprisonment Aggravator Improper. VII 1078

[2] VII 942-947; VIII 1131; VIII 1176; VIII 1197; VIII 1203; VIII 1209; VIII 1215; VIII 1226; VIII 1240; VIII 1250; VIII 1253; VIII 1276; VIII 1284; VIII 1289

[3] Under Sentence of Imprisonment; Prior Violent Felony; Felony Murder

(XXIV 1645)

The appellant wrote a letter to the trial court requesting that he be assigned new counsel. (IX 1309) The trial court held a ***Nelson*** Hearing and the appellant claimed that his counsel was pushing him to take a plea; not investigating his claim of alibi; and taking too long to develop mitigation evidence and depose the co-defendants. (III 263-64) The counsel for appellant requested an ***in camera*** hearing to respond to the alibi issue. (III 265) Counsel approached the bench without the appellant and state and detailed their efforts to investigate the appellant's alibi claim. (III 266) The trial court found that appellant's counsel was providing effective assistance of counsel, and would not discharge counsel. (III 273) The trial court advised the appellant that he could keep current counsel, hire new counsel or represent himself. (III 274)

The appellant filed three Motions to Suppress Evidence related to the photographic and live lineup of the appellant. (IX 1321-1340) The appellant argued that the photographic and live lineups were overly suggestive and should be suppressed. (IX 1334) The appellant also argued that he was entitled to have legal counsel present when the photographic lineup was shown to Mr. Lewis and when the live lineup was conducted at the Orange County Jail. (IX 1321) Finally, the

---

(Robbery); Pecuniary Gain; CCP.

appellant argued that the photographic and live lineup should be suppressed based upon a violation of due process rights. (IX 1328) After hearing, the trial court denied the appellant's motion to suppress. (X 1502)

The case proceeded to trial. After the jury was sworn, the appellant rejected the state's plea offer for life imprisonment. (XIX 743) The appellant objected to the physical live lineup and inquiry identification as violating the issues raised in the Motion to Suppress. (XIX 820) The appellant requested the ability to cross-examine eyewitness Lewis on his description that he gave of the shooter the day after the shooting. (XIX 834) During Mr. Lewis' deposition he stated that the shooter was five foot nine inches tall where in his direct testimony he stated that the shooter was five foot ten inches tall. (XIX 834) The trial court denied the appellant the ability to cross-examine Lewis on his physical description. (XIX 835) The appellant renewed his objections involving the admissibility of the lineup. (XX 948)

The state rests. (XXIII 1455) The appellant made a Motion for Judgment of Acquittal as to all counts. (XXIII 1456-1471) The trial court denied the Motion for Judgment of Acquittal as to Count I, II, III, and V and took the Motion for Judgment of Acquittal on Count IV under advisement. (XXIII 1470, 1472) The appellant rests. (XXIII 1479) The jury returned a verdict of guilty as charged to all

charges. (XXIV 1628)

PENALTY PHASE

The state announced that it would not proceed with the CCP aggravating factor. (XXIV 1652) The appellant stipulated to the aggravating factor that the appellant was on felony probation at the time of the offense. (XXIV 1653) The appellant objected to the jury being instructed on the avoid arrest aggravating factor. (XXIV 1663) The appellant's objection to the avoid arrest aggravating factor was overruled. (XXIV 1672)

The appellant rests. (XXV 1874) Appellant requested a special jury instruction that the jury must unanimously find aggravating circumstance before it is established. (XXV 1919) The trial court denied the appellant's special jury instruction. (XXV 1919) The jury recommended that Derrick McLean be sentenced to death by a vote of nine (9) to three (3). (XXV 1983)

The trial court found that the state proved three statutory aggravating factors.[4] (XI 1768) The trial court found that the state failed to prove the avoid arrest aggravating factor beyond a reasonable doubt. (XI 1772) The trial court found that the statutory mitigating factors extreme mental or emotional disturbance and the capacity to conform his conduct to the requirements of law was

---

[4] Under Sentence of Imprisonment (Moderate Weight); Prior Violent Felony

substantially impaired was reasonably established but gave them little weight. (XI 1775) The trial court found non-statutory mitigation but gave it little weight. (XI 1776-1779) The trial court sentenced the appellant to death on Count I, twenty-five year minimum mandatory as to Count II and V; and life imprisonment on Count III and IV. (XI 1780) The sentences imposed on counts III, IV and V are concurrent with each other and consecutive to the sentences imposed in Count I and II. (XI 1780)

(Great Weight); Felony Murder/Pecuniary Gain (Great Weight).

STATEMENT OF THE FACTS

Theothlus Lewis and his wife Shirley Lewis were next door neighbors to Jahvon Thompson in the Silver Pine Apartments. (XIX 792) Lewis was watching television when he heard two booms and thought it was loud music next door. (XIX 795) Lewis went next door to stop the noise. (XIX 796) The appellant opened the door and had a gun and motioned Lewis to come into the apartment. (XIX 796) The appellant asked Lewis "where was the money at." (XIX 799) Lewis put his hands in his pockets and pulled the inside pockets out and said he did not have any money. (XIX 799) Lewis then observed a masked man with Jahvon coming from the hallway area. (XIX 799) Lewis was then seated on a couch in the apartment and Jahvon was told to sit next to him. (XIX 802) The appellant then kept searching through the apartment while the mask person stood there with the gun. (XIX 802)

After concluding the search, the appellant told the guy with the mask to go outside and if he sees the girl next door to shoot her. (XIX 805) The appellant stood by the door with the gun and sensing something was wrong Lewis dove to the floor and crawled towards the back room. (XIX 808) As soon as Lewis turned back around he felt a bullet go across his ear. (XIX 808) Lewis then realized he was shot in the back. (XIX 808) Several other shots were fired. (XIX 808) After a

few moments Lewis got up and started walking towards the door. (XIX 809) Lewis observed Jahvon in the apartment and had multiple gunshots in his chest. (XIX 809) Lewis went to his apartment door and his wife let him in. (XIX 810)

Lewis gave a description of the appellant to the police. (XIX 811) Lewis worked with a police sketch artist to develop a composite sketch of the appellant. (XIX 811) Lewis also was provided a photo lineup by the police and picked photo number five as being the appellant. (XIX 819) Lewis made a in court identification of the appellant as being the shooter. (XIX 821)

Captain Ellis of the Orlando Police Department was driving in an unmarked car in the vicinity of the Skyline apartments at the time of the shooting. (XX 874) Captain Ellis was advised that there was a shooting at the apartments. (XX 874) Captain Ellis observed a brown vehicle exiting the apartment complex on to Pine Hills Road. (XX 875) Captain Ellis activated his lights, and the brown vehicle attempted to elude Captain Ellis going 60 to 70 miles per hour northbound on Pine Hills Road. (XX 875) Captain Ellis lost sight of the vehicle, then came upon the brown vehicle after it hit the back of a unmarked sheriff's department vehicle. (XX 876) Captain Ellis observed a black male running from the driver's side of the vehicle. (XX 876) Ellis described the person as a black male, close cropped hair, blue shirt and dungarees or blue pants. (XX 878) Captain Ellis chased the suspect

into the woods and lost sight of him. (XX 879) Soon thereafter a canine officer had located a person that met Captain Ellis' description. (XX 880) During the chase of the suspect, Captain Ellis heard a shot fired at him. (XX 885)

Deputy Steven Harrielson was an Orange County Sheriff on a perimeter for a residential burglary at the intersection of Pine Hills Road and Clarion Road. (XX 888) Deputy Harrielson heard of squealing of tires from behind him and looked back and saw a older model Buick coming directly at him. (XX 889) Deputy Harrielson started running from the doorway of his vehicle trying to get out of the way and the vehicle struck the passenger rear tail of his patrol car. (XX 889) The force of the crash pushed the deputy's patrol car and the deputy was struck in the right hip and thrown into the grassy median. (XX 890) Deputy Harrielson got up and observed a black male wearing a dark shirt and baggy blue jeans running straight at him. (XX 890) The suspect began running west up Clarion Road towards Pine Hills Road. (XX 890) Deputy Harrielson observed another black male in the front passenger seat and with a large Afro and very thin. (XX 891) The suspect in the car was taken into custody. (XX 892)

A canine officer was dispatched to track the person that fled the vehicle. (XX 904) The canine officer was told that someone had seen the person that exited the vehicle discard a blue type shirt in the area of Fred's Crane Service. (XX 904)

The canine officer started tracking from that shirt. (XX 904) The dog tracked to codefendant Maurice Lewin. (XX 907)

An additional canine officer also came to the scene to do tracking. (XX 923) The canine officer had information of an individual running south and another individual running north from the crash scene. (XX 924) The canine officer then proceeded into the nearby woods. (XX 923) Approximately thirty yards into the wood line the canine came across some items that looked like they were freshly placed there. (XX 925) The canine officer saw black and white gloves, a baseball hat and a shirt. (XX 925)

Theo Lewis was shown three different photo lineups created by the Orlando Police Department. (XX 941) One of the photo lineups included co-defendant Maurice Lewin. (XX 941) Lewis could not identify anyone out of the three different lineups. (XX 944) On December 1st Orlando Police Department was given information on a third person involved named "Derrick." (XX 944) This suspect Derrick was thought to be the cousin of Maurice Lewin. (XX 944) The Orlando Police obtained this information from the father of co-defendant James Jaggon. (XX 944) Orlando Police also obtained information from a crime line tip. (XX 945) The crime line tip stated that a person named Derrick who lived in the Rosemont area was involved in the homicide. (XX 946) The Orlando Police then

created a photo lineup including a picture of the appellant. (XX 947)

On December 9th the photo lineup including appellant was presented to Lewis. (XX 949) Lewis was asked if he could identify or recognize anyone in the photo lineup. (XX 951) Lewis identified the appellant as the shooter. (XX 951) Lewis said he was 90% sure that the appellant was the shooter. (XX 951) Lewis also identified the appellant in a live lineup. (XX 957)

Dr. Jan Garavaglia was the medical examiner that performed the autopsy on the victim Jahvon Thompson. (XX 974) The victim had three gunshot wounds. (XX 976) The shooter was on the left side of the victim and more than two feet away at the time the shots were fired. (XX 982) Each gunshot wound could have caused death. (XX 983)

James Jaggon is serving a prison sentence of twenty three years as part of an agreement to testify in this case. (XX 1024) Jaggon and Maurice Lewin decided to go to Jahvon Thompson's apartment to rob the marijuana that was there. (XX 1028) The appellant also came along for the planned robbery. (XX 1029) The three headed to Thompson's apartment in Maurice Lewin's champagne colored Buick. (XX 1029) The appellant was armed with a .380 caliber handgun. (XX 1030) Jaggon was also armed with a .45 caliber handgun that he had gotten from Maurice Lewin. (XX 1033)

Lewin came to Thompson's apartment complex and backed into a parking space. (XX 1032) It was agreed among the parties that Jaggon and the appellant would go in the apartment and there was no talk of shooting anyone. (XX 1035) Jaggon wore a ski mask and the appellant wore a black ball cap. (XX 1037) Jaggon knocked on the door and Jahvon answered and the appellant and Jaggon rushed in the apartment. (XXI 1046) Jaggon stood in the living room while the appellant searched the apartment. (XXI 1046) A few minutes later someone knocked on the door. (XXI 1047) The appellant answered the door and pointed his gun at the person. (XXI 1048) The appellant asked the visitor if he had anything on him and he searched him. (XXI 1048) The appellant told Jaggon then to leave the apartment and to shoot the lady that was outside the apartment. (XXI 1049) Jaggon did not shoot the lady because he did not feel there was a need to. (XXI 1049) While Jaggon was returning back to the car he heard gunshots from the apartment. (XXI 1050) Maurice Lewin and Jaggon drove to the nearby Pizza Hut to meet the appellant. (XXI 1051) The appellant arrived with a blue bag. (XXI 1053)

After Jaggon's arrest, he told police that he was "chilling with Jahvon" and somebody came and robbed him and they put him in the car and they crashed. (XXI 1057) The appellant told Maurice Lewin that he wanted to see what it felt

like to shoot and kill someone. (XXI 1107) “I mean, he never really told me exactly why he shot it, he said he wanted to feel like what it feels like to shoot and kill somebody.” (XXI 1107)

Law enforcement recovered gloves and a shirt in the woods adjacent to the car crash. DNA recovered from the gloves and the shirt matched the appellant’s DNA. (XXII 1285, 1286) The appellant’s DNA was also detected on the pillow sham that was recovered from the victim’s apartment. (XXII 1292)

PENALTY PHASE

Under Sentence of Imprisonment

The appellant was placed on probation February 3, 2003, for a period of five years for attempted armed robbery. (XXIV 1686)

Prior Violent Felony

On February 25, 2002 Carolla Montouth was employed at the Fast Check of Florida. (XXIV 1687) Montouth arrived at work at 10:00 in the morning, and after she entered the business she heard a beep from someone else entering. (XXIV 1688) Montouth turned around and there was a gentleman with a gun pointed at her telling her to “shut up and don’t say anything.” (XXIV 1688) The appellant forced Montouth to the second floor where the safe was located. (XXIV 1688) The appellant pushed the gun towards her head told her to shut up and open the safe.

(XXIV 1688) Montouth entered the wrong code to the safe so that it would send an alarm to the security company and the safe would not open. (XXIV 1689) When the safe was not opening, the appellant turned to Montouth and said "today is your lucky day bitch, today is your lucky day" and he put her in the bathroom and closed the door. (XXIV 1689) The appellant then fled the scene. (XXIV 1689)

Mitigation Evidence

Doctor Hymen Eisenstein is a clinical psychologist with a sub-speciality in neuropsychology. (XXIV 1709) Dr. Eisenstein first met the appellant in November of 2005 and started a neuropsychological examination by administering several tests to access his cognitive and brain behavior functioning. (XXIV 1717) Dr. Eisenstein administered the Wechsler Adult Intelligence Scale Third Edition. (XXIV 1718) Appellant had a verbal IQ score of 99, performance IQ score of 105 which yielded a false scale IQ score of 102.(XXIV 1720) The appellant had a standard score of 80 in testing. (XXIV 1732) A score of 80 equals falls within the 9th percentile, which is on the low end. (XXIV 1732) The appellant obtained a score of 118 in the visual testing which put him at the higher end of testing. (XXIV 1732) The clinical significance of the difference in these scores is that the appellant's brain does not process with the amount of consistency that one

normally expects between the operation of the two sides of the brain. (XXIV 1733) The appellant was administered the MMPI test and there was nothing that was strikingly abnormal. (XXIV 1741) The appellant did approach the abnormal range in the anxiety scale, and schizophrenia scale. (XXIV 1742)

Dr. Reed diagnosed the appellant with organic brain impairment and a borderline personality disorder. (XXIV 1754) The appellant suffers from cognitive brain dysfunction where there is a discrepancy in the consistency of the overall functioning of the appellant's brain. (XXIV 1754) The borderline personality disorder manifests in poor impulse control, explosiveness, depression, anger and volatility of mood. (XXIV 1754) The disorder does not rise to the level of a psychotic process, however, it is a serious mental disorder. (XXIV 1754) The appellant suffers from an emotional disturbance. (XXIV 1755)

The appellant's brother Lloyd Lewin described the childhood of the appellant. (XXV 1798) The appellant spent his early years in the Bronx, New York with extended family members. (XXV 1798) The appellant lived in a house that was shared among twenty-one other relatives. (XXV 1799) When the appellant was thirteen years old they moved to a predominately white neighborhood in Baltimore, Maryland. (XXV 1799) The neighborhood in Baltimore had racial tensions and had gangs of skin heads and Nazis that would attack blacks. (XXV

1800) While walking home from school one day the appellant was struck in the head with a baseball bat by these gang members. (XXV 1800) The appellant's parents would fight, and they would be physical. (XXV 1801) In some of the fights family members would use knives, throw glass and break objects in the house. (XXV 1802) After the appellant's mother lost her job at a local bank she would complain that people were talking about her or following her and she started to change. (XXV 1804) The appellant's mother seemed to be overly paranoid. (XXV 1804)

Dr. Jethro Toomer is a clinical and forensic psychologist who did testing of the appellant. (XXV 1823) Dr. Toomer also reviewed witness statements, records from the Orange County police department and also interviewed the appellant's father. (XXV 1821) The appellant performed the Bender Gestalt Designs Test and the results revealed there were soft signs of underlying organic impairment. (XXV 1825) The appellant also took the Kauffman Brief Intelligence Test and scored a 100 which was in the average range. (XXV 1827)

The appellant had a history of substance abuse involving marijuana alcohol and ecstasy. (XXV 1827) Based upon other testing, there was nothing to suggest that appellant suffered from an axis one psychiatric disorder such as schizophrenia. (XXV 1829) The testing did indicate that the appellant is suffering from a major

personality disorder. (XXV 1829) The testing showed that the appellant has a borderline personality disorder which is basically a personality disorder that is characterized by instability. (XXV 1831) The appellant's mother was out of touch with reality for an extended period of time. (XXV 1843) Dr. Toomer further diagnosed certain personality traits to go along with the borderline personality disorder. (XXV 1844) The appellant also has schizoid personality traits, that basically means that you have an individual who tends to manifest the pattern of detachment with respect to how he or she deals with others. (XXV 1844) The appellant also had another personality trait called schizo-typical where the prominent factors are deficits in terms of cognitive and/or perceptual distortion. (XXV 1845) Due to this impairment, an individual is not able to weigh alternatives and project consequences, with the result that the individual distorts what is going on around him. (XXV 1845)

SUMMARY OF ARGUMENT

Law enforcement sought a warrant to have Derrick McLean stand in a live lineup. A warrant was signed by a Judge that stated: "Mr. McLean would say, where is the money," as part of the physical lineup and will be given reasonable notice of time, date and place of lineup and shall be instructed of his refusal to appear and said lineup may be used against him in any further court proceedings. Law Enforcement took the warrant and visited McLean and asked him "if he would mind standing in the lineup," and McLean agreed to do it. McLean was not informed of, or shown the Judge's warrant to do the lineup. Mclean was not provided his ***Miranda*** rights prior to his participation in the lineup, nor was he advised that he could have an attorney present before he participated in the lineup.

Appellant proved a substantial amount of mitigating evidence. The three aggravating factors found by the trial court were not so substantial that they outweighed the substantial mitigation. Based upon the totality of the circumstances, the death sentence in this case is disproportionate to other similar cases that have been before this Court.

The counsel for appellant requested an ***in camera*** hearing to respond to the complaints made by appellant at a ***Nelson*** Hearing. Counsel approached the bench without the appellant and state and detailed their efforts to investigate the

appellant's alibi claim. The trial court found that appellant's counsel was providing effective assistance of counsel, and would not discharge counsel. The trial court advised the appellant that he could keep current counsel, hire new counsel or represent himself. Appellant submits that reversible error occurred when the trial court continued holding a portion of the ***Nelson*** hearing without the required presence of the appellant.

The trial court also erroneously instructed the jury on the "witness elimination" aggravating circumstance. Defense counsel objected and argued that the evidence did not support the circumstance. In fact, the trial court rejected the application of the factor in the written findings of fact in support of the death penalty. Since the jury was instructed on an inapplicable factor, a new penalty phase is required.

Appellant challenges the constitutionality of Florida's death sentencing scheme. The procedure violates the Sixth Amendment right to a jury trial. Additionally, the instructions improperly denigrate the role of the jury in deciding appellant's fate.

POINT I

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.

A. Standard of Review

This Court recently explained the standard of review for orders on motions to suppress:

> [A]ppellate courts should continue to accord a presumption of correctness to the trial court's rulings on motions to suppress with regard to the trial court's determination of historical facts, but appellate courts must independently review mixed questions of law and fact that ultimately determine constitutional issues arising in the context of the Fourth and Fifth Amendment and, by extension, article I, section 9 of the Florida Constitution.

Nelson v. State, 850 So.2d 514, 521 (Fla.2003) (quoting ***Connor v. State***, 803 So.2d 598, 608 (Fla.2001).

B. Pertinent Facts[5]

The appellant filed three Motions to Suppress Evidence related to the

---

[5] These facts are culled from the trial court's order denying Appellant's

photographic and live lineup of the appellant. (IX 1321-1340) On November 24, 2004, Detective Wright responded to the scene of a murder/home invasion robbery in the Pine Hills section of Orlando. (III 291) Jahvon Thompson was shot and killed during this incident. Theothlus Lewis survived the gunshot wounds he received. After speaking with the officers at the scene, Detective Wright learned that Maurice Lewin and James Jaggon, two suspects, had been apprehended at their location. (III 292) Both Mr. Lewis and Mr. Jaggon were interviewed and gave different stories as to what transpired at the scene. (III 293)

Detective Wright interviewed Mr. Lewis the following day at a local hospital. (III 296) Mr. Lewis described the shooter as five foot nine, two hundred to two hundred and twenty pounds and light brown complexion wearing a black shirt with blue jeans. (III 296) Detective Wright showed Mr. Lewis a lineup containing a picture of Maurice Lewin. (III 297) Mr. Lewis indicated that the shooter was not included in any of the photographs. (III 297) Days later, Lewis was shown another photographic lineup containing the photographs of individuals who may have been involved. (III 298) Again, Mr. Lewis indicated that the shooter was not included in the group of photographs. (III 298)

The next week, Detective Wright spoke to Mr. Jaggon's father. (III 299)

---

motion to suppress as well as the hearing held on the motion.

During this conversation, Detective Wright learned that a person named "Derrick", Maurice Lewin's cousin, may have been involved in the shooting. (III 299) On December 6, 2004 an anonymous call to crime line indicated that a person named "Derrick" was the shooter. (III 300) Through further investigation, Detective Wright learned that Derrick McLean used to live with Maurice Lewin. (III 301)

On December 9, 2004 Mr. Lewis and Shirley Smith attended a bond hearing for Maurice Lewin. (III 310) Although neither testified at that hearing, they had the opportunity to observe the inmates seated in the courtroom that day, including Mr. Lewin. (III 310) After leaving the courtroom, Ms. Smith remarked to Mr. Lewis that one inmate seen in the jury box may have been the shooter. (III 311) Mr. Lewis agreed with Ms. Smith that Mr. Lewin looked like the shooter. (III 344) Detective Campbell, who assisted Detective Wright in the investigation, told Ms. Smith not to speak to Mr. Lewis about the case because he did not want her to taint Mr. Lewis' testimony or ability to identify the third suspect. (III 344) Detective Campbell also told them that there are people that may look like people, but that doesn't necessary mean that's them. (III 345) He also informed them that they would later be show lineups to identify potential suspects. (III 345)

Later that same day, Detective Wright presented Mr. Lewis with a photographic lineup for his review. (III 308) Mr. Lewis pointed to the third

photograph and said that he was 90% sure that he knew this individual was the shooter. (III 312) He advised Detective Wright that he could be certain of his identification if he saw the suspect in person again. (III 313) Although Mr. McLean was pictured in that photograph, Detective Wright gave no indication to Mr. Lewis that his selection was correct or not. (III 312)

Through his investigation, Detective Wright learned that McLean was on probation. (III 315) He also learned that Mr. McLean had a pending domestic violence charge and upcoming trial date at which he was expected to enter a plea. (III 315) Although there was a pending criminal charge against Mr. McLean, his probation officer had not yet sought the issuance of a violation of probation warrant. (III 315) On December 13, 2007, Mr. McLean did enter a plea to the domestic violence charge. (III 316) Detective Wright thereafter had the violation of probation warrant served on Mr. McLean. (III 316) After his arrest, Mr. McLean was taken to Orlando Police Department headquarters and interviewed about his alleged involvement of the murder/home invasion robbery. (III 318) He was then taken to the Orange County Jail to be held on a violation of probation warrant. (III 318)

Detective Wright sought a warrant to have Mr. McLean stand in a live lineup. (III 320) A warrant was signed by a Judge that stated: "Mr. McLean would

say, where is the money," as part of the physical lineup and will be given reasonable notice of time, date and place of lineup and shall be instructed of his refusal to appear and said lineup may be used against him in any further court proceedings. (III 320) Detective Wright took the warrant with him and visited Mr. McLean and asked him "if he would mind standing in the lineup," and McLean agreed to do it. (III 321) McLean was not informed of, or shown the Judge's warrant to do the lineup. (III 321) Mclean was not provided his ***Miranda*** rights prior to his participation in the lineup, nor was he advised that he could have an attorney present before he participated in the lineup. (III 321)

On December 17, 2004, Detective Wright requested the corrections officers at the Orange County Jail assemble a group of similar looking men for the purposes of a live lineup. (III 322) Mr. McLean and five other men were ultimately placed in a small room. (III 323) Because of the small size of the room, not all six men could fit on the podium or be viewed at the same time. (III 330) Detective Wright initially asked two men to step forward, then the next four. (III 330) Mr. McLean was in the group of four men. (III 330) Mr. Lewis was able to positively identify him as the shooter after observing him for ten to fifteen seconds. (III 332) Mr. McLean was subsequently charged by indictment with first degree felony murder, attempted home invasion robbery with a firearm, attempted first

degree murder, kidnaping, and attempted robbery with a firearm. He filed instant motions seeking the suppression of the photographic and live lineups.

The appellant argued that the photographic and live lineups were overly suggestive and should be suppressed. (IX 1334) The appellant also argued that he was entitled to have legal counsel present when the photographic lineup was shown to Mr. Lewis and when the live lineup was conducted at the Orange County Jail. (IX 1321) Finally, the appellant argued that the photographic and live lineup should be suppressed based upon a violation of due process rights. (IX 1328) After hearing, the trial court denied the appellant's motion to suppress. (X 1502)

C. Argument

The Defendant should have been assisted by counsel during the photo lineup . Cf. ***State v. Jones,*** 849 So.2d 438 (3d DCA 2003) ***rev. den. Jones v. State,*** 889 So.2d 806 (Fla. 2004). This is because the presumptions and reasoning relied on by the Court in ***Jones*** is based on a flawed interpretation of ***United States v. Ash***, 413 US 300 (1973).

In ***Traylor v. State***, 596 So.2d 957 (Fla. 1992), where the question was whether the defendant's confession had been obtained in violation of his right to counsel under the Florida Constitution, the Court concluded that once the right to counsel attaches, the defendant must be advised of the right at the commencement

of each crucial stage of the prosecution. For the purpose of this advisement, the Court defined crucial stage as "any stage that may significantly affect the outcome of the proceedings." ***Id.*** at 968. As the preceding arguments have demonstrated, the pre-trial identification of the defendant by an eyewitness, whether from a live lineup or a recorded image, is-under current police practices and the current state of due process law - a crucial stage of the prosecution at which only the presence of counsel can protect the defendant's right to confront the witnesses and evidence against him in a meaningful way, and to be tried fairly.

In the Defendant's case, the presence of counsel was denied. The consequence was the application of ever increasingly suggestive procedures on a witness. The goal was to provide an identification of Mr. Mclean as the shooter in this case. The presence of counsel would have prevented the overly suggestive lineups and actually preserved the State's case. Instead law enforcement made the effort to procure the desired answer.

Right to counsel in a pre-trial "live" lineup

In the Federal courts a defendant has a right to counsel when identification is to be made through the use of a pretrial line-up. ***See Gilbert v. California***, 388 U.S. 263, 87 S.Ct. 1951, 18 L. Ed. 2d 1178 (1967). **Identifications obtained in violation of the right to counsel are per se inadmissible,** [emphasis added]

Gilbert. This right was limited by the court in ***Kirby v. Illinois***, 406 U.S. 682, 92 S.Ct. 1877, 32 L. Ed. 2d 411 (1972), to times subsequent to the initiation of adversarial judicial proceedings. The initiation of judicial criminal proceedings is when a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. ***Kirby v. Illinois,*** 406 U.S. 682, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972). Clearly the Federal Sixth Amendment right to counsel applies to the defendant's case.

In Florida, a defendant is entitled to counsel **as soon as feasible after custodial restraint.** ***Traylor,*** 596 So.2d at 970 [emphasis added] The right begins at the earliest "crucial stage"; a crucial stage is defined as a stage in the proceedings that may affect the outcome of the proceedings. ***See, Traylor, supra; State v. Burns***, 661 So.2d 842 (Fla. 5th DCA 1995). This has been applied to cases where the powers of the court have been applied to compel the accursed. ***See State v. Smith***, 547 So.2d 131 (Fla. 1989) (An ex parte procedure employed by State in order to obtain order compelling defendant who was already in custody to submit to lineup violated defendant's due process rights.) ***Sobczak v. State***, 462 So. 2d 1172 (Fla. 4th DCA 1984) (The execution of an order by a judge ordering the defendants to participate in a lineup must surely be viewed as an adversary judicial proceeding for purposes of sixth and fourteenth amendment rights.)

It might be argued that the Defendant was not in custody for the purposes of the Sixth Amendment and Article I section 16 right to counsel. This is simply not true. Custody is where a reasonable person would consider himself after considering: the manner in which he was summoned by law enforcement, why he was being detained, if he was confronted with evidence of his guilt, and whether the accused was informed of his right to leave questioning. ***Mansfield v. State***, 758 So.2d 636 (Fla. 2000). How could the defendant not think that he was in custody for the purpose of a murder prosecution?

Once arrested on the violation of probation warrant, the Defendant was questioned about the murder and confronted with accusations about his participation. In this case it is clear. The Defendant was in custody for the purpose of a murder investigation. The defendant should have been provided with the opportunity of the assistance of counsel at the photographic and the live lineups.

POINT II

APPELLANT'S DEATH SENTENCE IS DISPROPORTIONATE, EXCESSIVE, AND INAPPROPRIATE, AND IS CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF ARTICLE 1, SECTION 17 OF THE FLORIDA CONSTITUTION, AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This Court has described the "proportionality review" performed in every capital death case as follows: Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances. ***Porter v. State***, 564 So.2d 1060, 1064 (Fla.1990), cert. denied, 498 U.S. 1110, 111 S.Ct. 1024, 112 L.Ed.2d 1106 (1991). ***Accord Hudson v. State***, 538 So.2d 829 at 831 (Fla.1989); ***Menendez v. State***, 419 So.2d 312, 315 (Fla.1982). Proportionality review "requires a discrete analysis of the facts," ***Terry v. State,*** 668 So.2d 954, 965 (Fla.1996), entailing a ***qualitative*** review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis.

The requirement that death be administered proportionately has a variety of sources in Florida law, including the Florida Constitution's express prohibition against unusual punishments. Art. I, Sec. 17, Fla. Const. It clearly is "unusual" to impose death based on facts similar to those in cases in which death previously was deemed improper. ***Tillman v. State***, 591 So.2d 167 (Fla.1991). Moreover, proportionality review in death cases rests at least in part on the recognition that death is a uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny or process than would lesser penalties. Art. I, Sec. 9, Fla. Const.; ***Porter***.

Proportionality review also arises in part by necessary implication from the mandatory, exclusive jurisdiction this Court has over death appeals. Art. V, Sec. 3(b)(1), Fla. Const. The obvious purpose of this special grant of jurisdiction is to ensure the uniformity of death-penalty law. Thus, proportionality review is a unique and highly serious function of this Court, the purpose of which is to foster uniformity in death penalty law. ***See Tillman*** at 169.

In sentencing McLean to death on the single-count of first degree felony-murder, Judge O'Kane found that the State had proved three aggravating circumstances: That appellant was previously convicted of a felony and on probation (moderate weight); that appellant had previously been convicted of another felony involving the use or threat of violence to a person (great weight);

and felony-murder/pecuniary gain (great weight). The trial court properly rejected the state's argument that the murder was committed to eliminate a witness or avoid arrest. The trial court found that the evidence supported and accepted two separate statutory mitigating factors:

> (1) That McLean was under the influence of extreme mental or emotional disturbance (little weight);
>
> (2) McLean's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired (little weight).

In dealing with the evidence of nonstatutory mitigation circumstances, the trial court found the following:

> (1) Substance abuse (little weight);
>
> (2) History of mental illness in the family: mother heard voices and sister suffered from same ailments as mother (little weight);
>
> (3) Fracture of the family with move of grandparents and fighting among family members (little weight);
>
> (4) McLean was not prejudiced by racial problems in Baltimore with Skinheads and Nazis (little weight);
>
> (5) Emotional deprivation from the lack of support from parents (little weight);
>
> (6) Overcrowded living conditions as a child living with 17 relatives in a house in the Bronx, New York (little weight);
>
> (7) Unstable residential history (little weight);

(8) Repeated bloody domestic violence between parents, and unstable marriage (little weight);

(9) Repeated bloody domestic violence between mother and sister (little weight);

(10) No parental supervision at an early age (little weight);

(11) Dysfunctional family after death of grandmother (little weight);

(12) Organic brain injury from being struck with a baseball bat (little weight);

(13) Emotional age of a young teen (little weight);

(14) No positive role models during his formative years (little weight).

In spite of weighty mitigation, including both mental statutory mitigating factors, the trial court inappropriately weighed the evidence and concluded that death was the appropriate penalty for felony-murder.

The aggravation in this case was not overwhelming. Two of the aggravating factors were "status-type" circumstances, i.e. the prior violent felony and under sentence of imprisonment for that prior violent felony conviction. The only aggravating factor that should be given weight is the felony-murder aggravating factor. The weighty aggravating factors heinous, atrocious and cruel and cold, calculated and premeditated are absent in this case.

CASES WHERE DEATH SENTENCE WAS DISPROPORTIONATE

On many occasions, this Court has held a death sentence disproportionate. The cases discussed below where this Court reversed the death sentences are comparable to this case. Derrick McLean death sentence must also be reversed as disproportionate.

1. ***Terry v. State***, 668 So.2d 954 (Fla. 1996). Mr. & Mrs. Franco worked together in a gas station and convenience store. Mr. Franco was in the garage when he heard a voice say, “Don't move or I shoot.” A man in a red mask was pointing a small silver gun at him. Mr. Franco heard a scream and thirty seconds later a shot. A second man, who was not wearing a mask, emerged from the office. Mrs. Franco was murdered.

Co-defendant Floyd confessed to his involvement in the murder. He told the police that he and appellant Terry were riding around looking for places to rob and that appellant had the guns and masks in the green and white “Foot Action” bag. Floyd wore the red mask and had the inoperable .25 caliber gun, and Terry wore the white “O.P.P.” mask and used the .38 caliber gun. Floyd held Mr. Franco in the garage while Terry went to rob Mrs. Franco.

Appellant was charged with first-degree murder, armed robbery, and principal to aggravated assault. He was convicted of all the charges. During the

penalty phase, the state relied on the evidence previously presented and called no witnesses. Terry, on the other hand, called two witnesses, an aunt and his girlfriend, Valerie Floyd. Terry claimed four nonstatutory mitigating circumstances: (1) emotional and developmental deprivation in adolescence; (2) poverty; (3) good family man; and (4) circumstances of the crimes do not set this murder apart from the norm of other murders.

After the penalty phase, the jury recommended the death sentence by a vote of eight to four. The trial judge found no mitigators and two aggravators: prior violent felony and the merged aggravators of capital felony committed while defendant was engaged in the commission of a robbery and pecuniary gain.

In finding that Terry's death sentence was disproportionate this Court held:

> When we compare this case to other capital cases, we find it most similar to robbery-murder cases like ***Sinclair v. State,*** 657 So.2d 1138 (Fla.1995), and ***Thompson v. State,*** 647 So.2d 824 (Fla.1994). In ***Sinclair,*** which is factually very similar to the case ***sub judice,*** the appellant robbed and fatally shot a cab driver twice in the head. Considering these circumstances and finding there was only one valid aggravator, no statutory mitigators, and minimal nonstatutory mitigation, we vacated the death sentence. In ***Thompson,*** the appellant walked into a sandwich shop, conversed with the attendant, fatally shot the attendant through the head, and robbed the establishment. On appeal, we vacated the death sentence, finding there was only one valid aggravator (the murder was committed in the course of a robbery) and some

> "significant," nonstatutory mitigation. ***Id***. at 827. As in ***Sinclair*** and ***Thompson***, we find the circumstances here insufficient to support the imposition of the death penalty. We conclude that the circumstances here do not meet the test we laid down in ***State v. Dixon***, 283 So.2d 1, 8 (Fla.1973), "to extract the penalty of death for only the most aggravated, the most indefensible of crimes.

Terry at 965.

2. ***Johnson v. State***, 720 So.2d 232 (Fla. 1998) "Big" Gaines and his father, Willie, were repairing his car. The car was parked in front of the Gaineses' residence. Co-defendant Anthony appeared next to Big Gaines with a gun and asked, "Where the money at, where the dope at?" Big Gaines gave Anthony approximately $1,400 and his cellular phone. Johnson escorted Willie Gaines into the Gaineses' house. Soon thereafter there were two or three shots fired in the house. Johnson lead Willie Gaines by the arm out of the house and onto the front porch. Johnson stood over Willie Gaines for five or six seconds, then shot him in the jaw after Anthony yelled, "Let's go." Willie Gaines died from his wounds. In finding that Johnson's death sentence was disproportionate this Court held that:

> The circumstances of this case support vacating the death sentence. The prior violent felony aggravating circumstance, although properly found to be present, is not strong when the facts are considered. The aggravator is based in part on an aggravated assault committed by Calvin upon his brother, Anthony. Anthony testified in the present case that he was not injured in the confrontation with his brother and that the entire incident occurred because of a misunderstanding. The

> aggravator is also based in part on Calvin's two contemporaneous convictions as principal to crimes against Big Gaines simultaneously committed by co-defendant Anthony. This prior violent felony aggravator and the burglary/pecuniary gain aggravator are balanced against the following statutory and nonstatutory mitigation: (1) Calvin was twenty-two at the time of the crime; (2) Calvin voluntarily surrendered to the police; (3) Calvin had a troubled childhood; (4) Calvin was previously employed; (5) Calvin was respectful to his parents and neighbors; (6) Calvin has a young daughter; and (7) Calvin earned a GED and participated in high school athletics. The trial judge accorded substantial weight to the final mitigating circumstance. In addition to the totality of the circumstances supporting the vacation of the death sentence, we find that this case is similar to other capital cases in which we have vacated imposed death sentences.

Johnson at 238.

3. ***Jones v. State***, 963 So.2d 180 (Fla. 2007). Ambria Edmonds, (Jones' girlfriend) and Jones drove from West Palm Beach to Okeechobee to visit Jones' father. Upon reaching Okeechobee, Jones drove around while waiting for his father to return home. While driving around, Paul Rosier, Jones's cousin, stopped Jones and asked for a ride to the "camp." Rosier informed Jones and Edmonds that he had met a woman who knew someone who had money. The three then drove to a park where they met the woman, Ellen Cuc. Cuc described to the group a "Mexican" who sold beer and cigarettes out of his home. The person she described was Hilario Dominguez. Edmonds explained that based on the

conversation in the car, she knew Dominguez was "gonna get robbed of his money." Jones said, "I hope the man got money because I hope we're not going on a blank trip." Cuc then directed the group to the home of the "Mexican."

Upon arrival, Edmonds testified that Rosier instructed Cuc to go in and purchase something so as to determine whether there were other people there. After Cuc returned to the car, Rosier, Jones, and Edmonds approached the house pretending to want to purchase beer. Edmonds watched Rosier and Jones go up the stairs, approach the front door, and give Dominguez some money. Shortly thereafter, Dominguez opened the door to hand Rosier and Jones the beer. Jones then stuck his foot in the door, pushed it open, and struck Dominguez with a handgun. Dominguez fought with Jones but eventually fell down on his knees. All three entered the house while Jones demanded that Dominguez tell where his money was and Rosier took Dominguez's wallet from his pants pocket. Rosier went outside to see if any lights came on after the shot was fired. Rosier then returned and said, "Let's go." " Jones shot Dominguez dead.

In finding that Jones' death sentence was disproportionate this Court held that:

> In the present case, as in ***Terry***, ***Thompson*** and ***Sinclair***, there is little or no evidence of what happened immediately before the victim was shot. Further, as with many cases of murders during a robbery there is no evidence of premeditation. ***See***, e.g., ***Rembert v. State***, 445 So.2d 337, 340 (Fla.1984) ("This is a classic example of a felony

> murder, [where] very little, if any, evidence of premeditation exists.") As in these similar cases, we conclude the single aggravator is insufficient to justify a sentence of death. Further, even with the instructions on multiple aggravators, the jury only recommended death by a vote of seven to five, one vote away from a life recommendation. We do not diminish the tragic and inexcusable loss of life of the victim, but we must reserve the death penalty for the most egregious of murders. Accordingly, we find that the death sentence is disproportionate in this case and remand for implementation of a life sentence without possibility of parole.

Jones at 188.

4. ***Hess v. State***, 794 So.2d 1249 (Fla. 2001) Hess picked Mrs. Hess up at work and the two went to dinner at a Denny's restaurant. Afterwards, they drove to Lake Fairways because Hess wanted to talk to the security guard there about changing jobs. When the guard called him an idiot an altercation ensued between the two. Hess shot the security guard dead. Hess then went through the guard's pocket and found a wallet. Hess ran back to his car, where he told Ms. Hess what happened and gave her the wallet. They stopped at a bridge and threw the gun into the river, and continued traveling south on Highway 41 to a Shell service station where Ms. Hess worked. After that, they drove south on Highway 41 to Everglades City, where they rented a motel room using the victim's credit card. Ms. Hess signed the register in the victim's name.

At trial, there were two aggravating factors: Felony-Murder and Prior Violent Felony (sexual battery of Hess' nieces). In mitigation there was evidence

that appellant has a history of learning disabilities, was considered ten years behind his chronological age, was considered borderline retarded during his school years and was placed in special education classes as a result of his mental or emotional infirmities. The record also reflects that appellant was diagnosed in 1991 as being chronically depressed and suffering from substantial mood swings, for which he was placed on prescription medication. As of the time of the penalty phase proceeding, appellant was still taking medication for depression and had been receiving counseling in jail.

In finding that Hess' death sentence was disproportionate this Court held that:

> Like the factual circumstances in ***Terry***, the exact circumstances surrounding the robbery-murder in the instant case are unclear. Appellant provided several different recitations to the police as to how the murder occurred. The only other person allegedly present at the time of the crime was appellant's wife who did not actually witness the murder. And, as noted above, while the evidence supports a finding of two aggravating factors, those factors are not as compelling as we have found in other cases, especially in light of the totality of the aggravating and mitigating circumstances in this case. Finally, we note that the mitigating evidence presented herein and found by the trial court is far more substantial than that presented in both ***Terry*** and ***Johnson***. Indeed, based on the evidence presented, this clearly is not a case involving minimal or insignificant mitigation. Thus, we conclude that we are unable to say that this case stands out and qualifies as one of the most aggravated, least mitigated crimes for which the ultimate sanction of death is reserved.

Hess at 1268-69.

5. ***Woods v. State***, 733 So.2d 980 (Fla. 1999). Woods had a dispute over a car with Clarence Langford. Woods called the police on a couple of occasions between May and June of 1996. On one of the occasions, he told an officer that he was paying for a car and wanted permission to drive it although he did not own the title and registration for the car. Another time, Woods called the police demanding that they order the Langfords to release the car.

Woods called the Langfords and unsuccessfully asked them to meet him that night to finalize the sale. On the following day, Woods again called requesting that the Langfords meet him since he had the money and wanted them to sign a bill of sale for the car and have it notarized. Accordingly, at 9 p.m. that night, the Langfords met Woods at the community library. Woods got in the back seat of the Langfords' car and directed Mr. Langford to a dirt road where his girlfriend lived; he wanted to include his girlfriend as a witness to the transaction. When Mr. Langford stopped the car because there were too many potholes in the road, Woods said he would go on foot to get his girlfriend and come right back. Thereafter, Mrs. Langford heard an explosion "inside her head" and saw Woods running away from the car. Both victims had been shot multiple times with a small-caliber firearm. Mrs. Langford survived but Mr. Langford died.

In finding that Wood’s death sentence was disproportionate, this Court held that:

> When the CCP aggravator is removed from the sentencing equation, we are left with a single aggravator and substantial mitigation. We have rarely approved a death sentence with a single aggravator involving a contemporaneous felony and substantial mitigation, and we cannot do so under the circumstances of this case. ***See Songer v. State***, 544 So.2d 1010 (Fla.1989). In light of Woods' borderline intelligence, his lack of violent criminal activity prior to the present crime, and the other substantial evidence offered in mitigation, we conclude that this case does not constitute one of the most aggravated and least mitigated of first-degree murders.

Woods at 990.

6. ***Sinclair v. State***, 657 So.2d 1138 (Fla. 1995). Sinclair summoned a cab to take him to his mother's home. He further testified that he never intended to pay the cab fare and was going to run from the cab. Sinclair admitted that he carried a loaded .22 caliber handgun in his pocket as he entered the cab. Sinclair pulled the gun out of his pocket to scare the victim as Sinclair left the cab. The gun was discharged in the cab and that the cab driver was shot in the head. Sinclair claimed that the gun fired only one time, but the medical examiner testified that there were two separate and distinct gunshot wounds to the right side of the victim's head. Sinclair denied taking any money from the cabdriver. The victim collected $61 plus tips that day. A thorough search of the victim's person, the scene, and the cab was conducted, but the money was never found.

Prior to the date of the murder, Sinclair and his friends devised a scheme to defraud Sinclair's mother out of her money. Sinclair forged the signature of his mother on numerous bank withdrawal request forms and removed $4,000 from her bank account. On the day of the murder, Sinclair and his mother were scheduled to appear at the bank to discuss the unauthorized withdrawals of money.

On the eve of the murder, Sinclair openly discussed his plans to commit robberies in order to gain money. In particular, he told one friend that he planned to rob a cabdriver.

In finding that Sinclair's death sentence was disproportionate, this Court held that:

> In ***Thompson v. State***, 647 So.2d 824 (Fla.1994), as in the instant case, we reviewed a case in which the only valid aggravator was that the murder was committed in the course of a robbery. Though here the mitigators are not as significant as those found in ***Thompson,*** there are mitigators which were found to have some weight by the trial court. These were: (1) Sinclair cooperated with police; (2) Sinclair has a dull normal intelligence; and (3) Sinclair was raised without a father or father figure or any positive male role model. We further find evidence in the record that the low intelligence level of and the emotional disturbances inflicting this defendant were mitigators which had substantial weight.
>
> In ***Thompson*** we remanded for the imposition of a life sentence. In light of ***Thompson*** and our consideration of ***Clark v. State,*** 609 So.2d 513 (Fla.1992), ***McKinney v. State,*** 579 So.2d 80 (Fla.1991), ***Lloyd v. State,*** 524 So.2d 396 (Fla.1988), ***Proffitt v. State,*** 510 So.2d 896 (Fla.1987), ***Caruthers v. State,*** 465 So.2d 496 (Fla.1985), and ***Rembert***

> ***v. State,*** 445 So.2d 337 (Fla.1984), we agree with Sinclair that death is a disproportionate sentence.

Sinclair at 1142.

Derrick McLean's death sentence is disproportionate. McLean was twenty-seven at the time of the murders. Despite his chronological age, McLean emotionally functioned at the level of someone in their early teenage years and was impulsive and unable to consider consequences before making decision, which the trial court accepted as mitigating. All of the mental health experts agreed, and the trial court found, that Derrick McLean was operating under the influence of an extreme mental or emotional disturbance (organic brain impairment, borderline personality disorder with schizoid personality traits, and substance abuse) at the time of the murders. McLean's personality disorder impacted his ability to appreciate the criminality of his conduct. The trial court inappropriately gave little weight to this extraordinarily important statutory mitigator. The trial court did so based on appellant's "intentional and deliberate" actions on the time of the murders. Based on similar reasoning (appellant's "actions were rational"), the trial court also gave little weight to the valid mitigating factor that McLean's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. The trial court's conclusion flies in the face of her acceptance that the unrefuted evidence established this mitigating

circumstance. In another words, the trial court's written conclusions about the weight to be given to the factor (McLean's actions were rational that night) inherently contradict her finding of this factor.

The trial court similarly and inexplicably gave mere lip service to the extensive nonstatutory mitigation proven up by appellant. Although the trial court found that the evidence supported that McLean abused alcohol and drugs, the court gave little weight to this factor.   In spite of the testimony that clearly established the enormous impact of McLean's dysfunctional family life and family history of mental illness, the trial court gave this mitigation only little weight.

This is not one of the more aggravating murders that has come before this Court. Two of the three aggravating circumstances found by the trial court were the product of a prior felony conviction for attempted armed robbery and the associated probation sentence for that prior crime. The other aggravating factor is felony-murder which is not one of the weighty aggravating factors (ie; HAC, CCP) that this Court relies upon when it finds that a death sentence is proportionate. Finally, although not legally controlling, the state made a plea offer to the appellant of a life sentence prior to trial and even after the jury was selected for this case. This indicates that the state also believed that this was not one of the more aggravating murders to come to their office.

CONCLUSION

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. The jury vote was by a bare majority vote of nine (9) to three (3). Three jurors, even though being improperly influenced by the witness elimination aggravating circumstance instruction, believed that the circumstances here were insufficient to support the imposition of the death penalty. This Court should find that the circumstances here do not meet the test that this Court laid down in ***State v. Dixon***, 283 So.2d 1, 8 (Fla.1973), "to extract the penalty of death for only the most aggravated, the most indefensible of crimes."

POINT III

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.

Florida Rule of Criminal Procedure 3.180 states that "the defendant shall be present...at any pretrial conference, unless waived by the defendant in writing." A defendant's absence with no express waiver is error. ***See Garcia v. State***, 492 So.2d 360 (Fla. 1986). This Court has held that a defendant's involuntary absence may be harmless error where his presence would not have assisted the defense in any way. Id.

> [The defendant] has the constitutional right to be present at the stages of his trial where fundamental fairness might be thwarted by his absence.

Francis v. State, 413 So.2d 1175, 1177 (Fla. 1982) (citations omitted). In ***Coney v. State***, 653 So.2d 1009 (Fla. 1995), this Court extended ***Francis*** and held that a defendant has a right to be physically present at the immediate site (in that case, at sidebar) where pretrial juror challenges are exercised. The appellant wrote a letter to the trial court requesting that he be assigned new counsel. (IX 1309) The trial

court held a ***Nelson*** Hearing and the appellant claimed that his counsel was pushing him to take a plea; not investigating his claim of alibi; and taking too long to develop mitigation evidence and depose the co-defendants. (III 263-64) The counsel for appellant requested an ***in camera*** hearing to respond to the alibi issue. (III 265) Counsel approached the bench without the appellant and state and detailed their efforts to investigate the appellant's alibi claim. (III 266) The trial court found that appellant's counsel was providing effective assistance of counsel, and would not discharge counsel. (III 273) The trial court advised the appellant that he could keep current counsel, hire new counsel or represent himself. (III 274)

Appellant submits that reversible error occurred when the trial court continued holding a portion of the ***Nelson*** hearing without the required presence of the defendant. The trial court heard the Appellant's complaints in writing and open court.

This was not a hearing involving strictly legal matters. Derrick McLean had specific complaints about his trial counsel. Complaints about one's trial attorney are as important as a defendant's input into jury selection. ***Coney v. State***, 653 So.2d 1009 (Fla. 1995). No one ever told McLean exactly what was discussed during the ***in camera*** hearing held outside his presence.

McLean's involuntary absence from the ***in camera*** portion of the ***Nelson*** hearing violated the Florida Rules of Criminal Procedure as well as his

constitutional right to be present at all stages of his trial where fundamental fairness **might** be thwarted by his absence. ***Francis v. State***, 413 So.2d 1175 (Fla. 1982). The exclusion of Derrick McLean from a critical portion of the proceedings resulted in a deprivation of his constitutional rights under both the federal and state constitutions.

POINT IV

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.

At the charge conference, defense counsel objected to any jury instruction on the aggravating circumstance that the murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape cold, calculated, and premeditated manner without any pretense of moral or legal justification. Defense counsel vociferously objected and provided authority from this Court that where the victim is not a law enforcement officer, the state must demonstrate beyond a reasonable doubt that the sole or dominant motive for the murder was the elimination of the witness. The trial court overruled the objections and allowed the state to argue the presence of this aggravating circumstance and instructed the jury as well.

In her findings of fact in supporting the death penalty, the trial court rejected the applicability of this aggravating factor as to the felony- murder. The court wrote:

> Evidence of a desire to eliminate a witness as the sole or dominate motive for the murder is not present in this case. The defendant did not know Jahvon and had

> never been to his apartment before the day of the murder. In planning to commit the robbery, the defendant made no statement to James or Maurice that he intended to kill the occupants of the apartment. While it is true that the defendant did not have to murder Jahvon to accomplish the home invasion robbery, this alone does not make the defendant's dominant motive the desire to avoid arrest. The only statement attributed to defendant after the murder was that he shot Jahvon and Mr. Lewis because he wanted to see what it felt like to shoot and kill another person. While this statement suggests that the defendant might be a cold and heartless human being, it does not establish the witness elimination aggravator.

(IV 1771, 72)

A trial court may give a requested jury instruction on a aggravating circumstance if the evidence adduced at trial is legally sufficient to support a finding of that circumstance. ***Diaz v. State***, 860 So.2d 960 (Fla. 2003). Aggravating circumstances must be proven beyond a reasonable doubt. ***Fla. Std. Jury Instr. Crim.*** 7.11. Although aggravating circumstances can be proven by circumstantial evidence, the evidence must be competent and substantial. ***Hunter v. State***, 660 So.2d 244 (Fla. 1995).

A trial court's ruling on whether an aggravating circumstance has been proven is a mixed question of law and fact. The trial court's finding of an aggravating circumstance will not be disturbed on appeal as long as the correct law was applied by the trial court, and the record contains competent, substantial evidence to support the aggravating circumstance. McLean's trial judge rejected

this particular aggravating circumstance, she had instructed the jury and allowed the state to argue the applicability. In general, a trial court's ruling on jury instructions is reviewed under an abuse of discretion standard. ***See, e.g., Bozeman v. State***, 714 So.2d 570 (Fla. 1998). Appellant submits, since an aggravating factor must be proven beyond a reasonable doubt, the trial court's ruling on this issue below should be reviewed like a denial of a judgment of acquittal. As such, the standard of review would be ***de novo***. ***See, e.g., State v. Williams***, 742 So.2d 509 (Fla. 1st DCA 1999). Additionally, incomplete and misleading jury instruction on elements of the crime, similar to the aggravating factors in a capital case, is reviewed as fundamental error. ***See, e.g., Hubbard v. State***, 751 So.2d 771 (Fla. 5th DCA 2000). McLean's death sentence, based in part on erroneous jury instructions is unconstitutional.

POINT V

FLORIDA'S DEATH SENTENCING SCHEME IS UNCONSTITUTIONAL UNDER THE SIXTH AMENDMENT PURSUANT TO ***RING V. ARIZONA***.

During the course of the proceedings, trial counsel repeatedly challenged the constitutionality of Florida's Capital Sentencing Scheme. None of the challenges were successful and Derrick McLean was ultimately sentenced to death. Some challenges were based on a denial of McLean's Sixth Amendment rights as interpreted by ***Ring v. Arizona***, 536 U.S. 584 (2002). The jury was repeatedly instructed that the ultimate decision on the appropriate sentence was the **sole** responsibility of the trial judge.

Appellant also acknowledges that this Court has adhered to the position that it is without authority to declare Section 921.141, Florida Statutes unconstitutional under the Sixth Amendment even though ***Ring*** presents some constitutional questions about the statute's continued validity, because the United States Supreme Court previously upheld Florida's statute on a Sixth Amendment challenge. ***See, e.g. Bottoson v. Moore***, 833 So. 2d 693 (Fla. 2002), ***cert. denied,*** 537 U.S. 1070 (2002) and ***King v. Moore***, 831 So.2d 143 (Fla. 2002) ***cert. denied***, 537 U.S. 1069 (2002). Additionally, appellant is aware that this Court has held that it is without authority to correct constitutional flaws in the statute via judicial interpretation and

that legislative action is required. ***See, e.g., State v. Steele***, 921 So.2d 538 (Fla. 2005).

The jury recommendations for his death sentence was a bare majority of nine (9) to three (3). Moreover, the trial court repeatedly instructed and the state persistently pointed out that the ultimate decision on sentence was the sole responsibility of the judge. If ***Ring v. Arizona*** is the law of the land, and it clearly is, the jury's Sixth Amendment role was repeatedly diminished by the argument and instructions in contravention of ***Caldwell v. Mississippi***, 472 U.S. 320 (1985).

Since the jury did not make specific findings as to aggravating and mitigating factors, we cannot determine at this point whether the jury was unanimous in their decisions on the applicability of appropriate circumstances. Additionally, we cannot know whether or not the jury unanimously determined that there were "sufficient" aggravating factors before addressing the issue of whether they were outweighed by the mitigating circumstances.

At this time, appellant asks this Court to reconsider its position in ***Bottosom*** and ***King*** because ***Ring*** represents a major change in constitutional jurisprudence which would allow this Court to rule on the unconstitutionality of Florida's statute. This Court should vacate appellant's death sentences and remand for imposition of

life imprisonment without the possibility of parole. ***Amends. VI, VIII, and XIV, U.S. Const.; Art. I, §§ 9, 16, and 17.***

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; order a new penalty phase trial as to Count IV; and reverse the judgement and sentence of death and remand to the trial court with directions to sentence appellant to life imprisonment as to Point II and V.

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 32118
(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 Bill McCollum, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to Mr. Derrick McLean, DC#218693, Florida State Prison, 7819 N.W. 228th St., Raiford, FL 32026, this 7th day of November , 2008.

____
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