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IN THE SUPREME COURT OF FLORIDA

RASHEEM DUBOSE

Appellant,

v. CASE NO. SC10-2363

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF THE APPELLEE

PAMELA JO BONDI
ATTORNEY GENERAL

MEREDITH CHARBULA
Assistant Attorney General
Florida Bar No. 0708399

DEPARTMENT OF LEGAL AFFAIRS
PL-01, THE CAPITOL
Tallahassee, Florida 32399-1050
(850) 414-3300, Ext. 3583
(850) 487-0997 (Fax)

COUNSEL FOR APPELLEE

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PRELIMINARY STATEMENT

References to the appellant will be to "Dubose" or "Appellant." References to the appellee will be to the "State" or "Appellee." References to the forty-one (41) volume direct appeal record will be to "TR" followed by the appropriate volume and page number. The three volume supplemental record will be referred to as "STR" followed by the appropriate volume and page number. References to Dubose's initial brief will be to "IB" followed by the appropriate page number.[1]

This case was tried twice. The trial judge declared a mistrial, in Dubose's first capital trial, when the jury was not able to return a verdict in the guilt phase. Volumes 18-28 of the record on appeal contain the transcript of the case that was mistried. Except for those portions in those volumes, if any, that are directly relevant to the issues on appeal in his brief, the State will cite solely to the case that was tried to verdict through both the guilt and penalty phases.

[1] Going through the voluminous record in this case is made more difficult by the fact that the many hearings held in this case are not placed in chronological order throughout the record on appeal. For example, in Volume XVII, the first hearing in this volume is from November 22, 2010. The second is from September 2008, the third from October 3, 2007, and the final one from December 9, 2010. The Spencer hearing is in Volumes XII and XVII, rather than in the same volume. The same scattered placement of hearing transcripts can be found in other volumes. It would be helpful for both the attorneys and likely this Court if hearings appear in every capital record on appeal in chronological order.

CASE SNAPSHOT

In this case, the defendant, Rasheem Dubose, and his two brothers, TaJuan (sometimes TaJuane) and Terrell Dubose, murdered eight year old Dreshawna Monique Washington-Davis. Dreshawna died because the Dubose brothers entered the victim's yard and sprayed her house with bullets fired from three separate handguns. Twenty-nine shell casings were found at the scene. Of those 29 shots, Dubose fired 23 of them. Dubose also fired the bullet that actually killed Dreshawna.

Dreshawna was not the target of the shooting. Instead, her uncle, Willie "Psycho" Davis, was the target. The brothers targeted Mr. Davis because, earlier in the day, Davis had attempted to rob and publicly humiliate Rasheem.

At the time the shooting started, Davis was sitting on a couch in front of a window. Dubose fired through the window and into the house where Davis was sitting. Rather than hitting Davis, one of the bullets traveled through an interior wall and struck Dreshawna in the left side of her chest. At the time Dubose's bullet struck her, Dreshawna was kneeling on the floor shielding two younger cousins from the hail of bullets raining into her home.

All three brothers were convicted of first degree murder. TaJuan and Terrell Dubose were sentenced to life. Rasheem

Dubose was sentenced to death after a jury recommendation of 8-4.

Before this Court, Rasheem Dubose raises nine claims including: an allegation of juror misconduct, an attack on the sufficiency of his conviction for first degree murder, a challenge to the denial of a motion for change of venue, a relative culpability claim, a challenge to the judge's rulings denying a motion for continuance and finally a claim challenging the rejection, as mitigation evidence, of Dubose's alleged "attempt" to plead guilty as part of a plea agreement.

STATEMENT OF THE CASE

On July 26, 2006, twenty-two year old Rasheem Dubose, murdered eight year old Dreshawna Monique Washington-Davis. Dubose was arrested on unrelated burglary charges some four days later. (TR Vol. I 2). Dubose was arrested on December 8, 2006 for the murder and for shooting missiles into an occupied dwelling. (TR Vol. I 1).

The charges stemmed from an incident in which Dubose and his two brothers approached the victim's house, went over a fenced enclosure and into the victim's yard, and fired some 29 bullets into the home occupied by the victim and six others. Dubose fired 23 of the bullets. (TR Vol. XI 1876). Dreshawna was not the target of the shooting. Instead, the intended target was Willie Davis, Dreshawna's uncle. (TR Vol. I 1-2). Dubose

and his brothers wished to exact revenge on Mr. Davis for humiliating Rasheem Dubose earlier in the day during an attempted robbery. (TR Vol. I 2).

When the shooting started, Dreshawna used her body to shield two younger children from the rain of bullets coming into her home. Those two children were unhurt. Dreshawna was, however, mortally wounded. She died of a single gunshot wound to the left side of her chest. (TR Vol. XXXV 1247).

On January 3, 2007, a Duval Grand Jury indicted Dubose on one count of first degree murder and one count of wantonly and maliciously shooting a firearm within or into a building. (TR Vol. I 13). On February 17, 2007, a Duval Grand Jury handed down a superseding indictment charging Dubose with one count of first degree murder, one count of wantonly and maliciously shooting a firearm into a building, and one count of possession of a firearm by a convicted felon. (TR Vol. I 37-38).

Dubose first went to trial on January 11, 2010. On January 23, 2010, the trial judge declared a mistrial after jurors were unable to reach a verdict. (TR Vol. XXVIII 2101).[2]

On February 8, 2010, Dubose's second trial began. Dubose only went to trial on two of the three counts of the indictment;

[2] Dubose's two brothers were tried along with him, albeit it with a separate jury. The brothers' jury was able to reach a verdict against both brothers. The trial judge sealed the verdicts until after Dubose's second trial.

first degree murder (count 1) and wantonly and maliciously shooting into a building.[3] The state called some twenty-seven witnesses and then rested its case. At the close of the State's case, Dubose moved for a judgment of acquittal (JOA). Dubose averred there was insufficient evidence to go to the jury on the charge of first degree murder. Dubose asked the trial court to JOA the charge to second degree murder. (TR Vol. XXXVII 1672). The trial judge denied the motion. (TR Vol. XXXVII 1672).

Dubose called three witnesses. He did not testify on his own behalf.

On February 18, 2010, contrary to his pleas of not guilty, Dubose was convicted as charged. By way of a special verdict, the jury found Dubose guilty of both premeditated murder and felony murder. (TR Vol. VIII 1263-1267). The jury also made a special finding that Dubose discharged a firearm resulting in serious bodily injury or death. (TR Vol. VIII 1263). The trial court polled each juror by name whether the guilty verdicts were "your individual verdict." All answered in the affirmative. (TR Vol. XXVIII 1979-1982).

[3] As is customary, the possession of a firearm by a convicted felony charge was severed from the remaining charges to assure the defendant was not prejudiced by juror knowledge that Dubose was a convicted felon.

After the verdict was entered, Dubose renewed his motion for a judgment of acquittal without any further argument. The trial judge denied the motion. (TR Vol. XXXVIII 1990-1991).

On March 5, 2010, Dubose filed a motion for a new trial. (STR Vol. II 125-127). The trial judge denied the motion. (STR Vol. II 124).

On March 9, 2010, three weeks after the guilt phase, the penalty phase commenced. The State called four victim impact witnesses who read prepared statements. (TR Vol. XXXIX 52- 90) The State also called Officer Scott Medlock, who testified about the facts surrounding Dubose's prior violent felony conviction; resisting an officer with violence. (TR Vol. XXXIX 90-103). Dubose called eleven witnesses, including two mental health experts. (TR Vol. XXXIX 107-200; TR Vol. XL 205-400; TR Vol. XLI 404-439).

On March 11, 2010, the jury recommended Dubose be sentenced to death by a vote of 8-4. (TR Vol. XLI 557). The jurors were polled. Each affirmed that the 8-4 recommendation for death correctly reflected the jury's verdict. (TR Vol. XLI 560).

On April 23, 2010, Dubose filed a motion for a mistrial on the basis of juror misconduct. (STR II 101-106). Attached to the motion was an affidavit and signed by a juror (hereinafter Juror #14). (STR Vol. II 119-123).

On the same day as the motion was filed, the trial judge held a hearing. The trial court struck the motion for mistrial after finding the defense had interviewed the juror in violation of the rules governing juror interviews. (TR Vol. XVI 2721). The court instructed counsel that he could file a proper motion to interview the jurors. (TR Vol. XVI 2721-2722).

On June 24, 2010, Dubose filed a motion to interview jurors. (STR Vol. III 135-1423). The State filed a response. (STR Vol. III 143-146)). Dubose filed a reply. (STR Vol. III 147-148). On August 13, 2010, the trial court conducted a juror interview of Juror #14. (STR Vol. I 2-53).

On September 13, 2010, the trial judge denied the defendant's motion for mistrial in a written order. (STR Vol. III 165-169). In the order, the trial judge made specific findings as to the credibility of Juror #14. (STR Vol. III 165-169).

On November 10 and on November 22, 2010, the trial court held a Spencer hearing. (TR Vol. XII 1896-2040; TR Vol. XVII 2811-2930). Dubose presented several witnesses at the Spencer hearing; four lay witnesses and two mental health experts, Dr. Alan Waldman and Dr. Hyman Eisenstein. (TR Vol. XII 1902-2038; TR Vol. XVII 2814-2924). Both sides submitted sentencing memoranda to the trial court. (TR Vol. XI 1799-1814; TR Vol. XI 1819-1859).

On December 9, 2010, the trial judge followed the jury's recommendation and sentenced Dubose to death. (TR Vol. XI 1875-1892). The trial court found the state had proven four aggravators beyond a reasonable doubt: (1) Dubose had previously been convicted of a violent felony (great weight); (2) the defendant knowingly created a great risk of death to many persons (great weight); (3) Dubose committed the murder in the course of a burglary (great weight); and (4) the victim was a child under the age of 12 (great weight). (TR Vol. XI 1877-1880).

The trial court considered and weighed two statutory mitigators: (1) Dubose's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired (slight weight); and (2) age (little to no weight). The trial court also found and weighed several non-statutory mitigators: (1) Dubose saved the life of a drowning child (slight weight); (2) Dubose was good to his grandmother and helped her maintain her home (very slight weight); (3) Dubose was a loving and caring father (slight weight); (4) Dubose was a good brother and tried to provide for and protect his family (very slight weight); (5) Dubose shares the love and support of his family (slight weight); (6) Dubose exhibited good courtroom behavior (very slight weight); (7) Dubose maintained gainful employment (very slight weight); (8)

Dubose grew up without any significant role models in his life (very slight weight), and (9) Dubose suffers depression from abandonment issues relating to his mother (minimal weight). (TR Vol. XI 1881-1888).

The trial judge rejected several other proposed mitigators: (1) Dubose has a long and well-documented history of abuse and neglect in his family (not established); (2) Dubose was under an extreme emotional or mental disturbance at the time of the murder (not established); (3) Dubose suffered from a lack of parental affection and stability, and was separated from his parents (not established); (4) Dubose has attempted to have a positive influence on family members despite his incarceration (not established); (5) the victim's father does not want Dubose executed (not considered); (6) Dubose is remorseful (not established); (7) Dubose is amenable to rehabilitation and a productive life in prison (not established); (8) disparity with the uncharged co-conspirator, Maxie Wilson (not established); (9) Dubose attempted to enter into a plea agreement with the State prior to trial (not considered), and (10) the life sentences of his two brothers (relative culpability). (TR Vol. XI 1880-1891).

As to the relative culpability of Dubose and his two brothers, the trial court noted that Dubose's jury was informed that Dubose's two brothers' jury recommended life for both

Terrell and Tajuan Dubose. The Court found, however, that it was "abundantly clear" that Dubose was the leader among his siblings. (TR Vol. XI 1890). The court also noted that "it appears Dubose was the most culpable of the three co-defendants." (TR Vol. XI 1890). The trial court found, as well, that Dubose was the only shooter who shot through the window into the living room of the home where the victim was and who fired 23 of the 29 shots fired that night. (TR Vol. XI 1891). The Court found that "nothing in this record mandates that the defendant receive the same sentence as his brothers." (TR Vol. XI 1891).

On December 10, 2010, Dubose filed a notice of appeal. (TR Vol. XI 1895). On October 1, 2012, Dubose filed his initial brief. This is the State's answer brief.[4]

[4] Briefing in this case was delayed somewhat by the need to supplement the record with the order denying Dubose's motion for mistrial as well as with other pleadings relevant to Dubose's first claim on appeal. At the time Dubose filed his initial brief, the order was not in the record on appeal.

THE PRINCIPAL PLAYERS[5]

Dreshawna Monique Washington-Davis - The murder victim. She was 8 years old at the time of her death. At the time of her death, Dreshawna lived with her grandmother and grandfather, David and Vonnie Frazier.

Rasheem Dubose – The defendant and the person who fired the gun that actually killed Dreshawna Monique Washington-Davis. He is also the oldest of the three Dubose brothers. At the time of the murder, Dubose was 22 years and 4 months old.

TaJuan Dubose - Rasheem's youngest brother. His street name is "Hammer." TaJuan Dubose was one of the three brothers who fired into the victim's house. Contrary to his pleas, TaJuan was convicted of first degree murder and shooting a missile into a building. TaJuan Dubose was sentenced to life for the murder after his jury recommended a life sentence. At the time of the murder, TaJuan was 18 years and 2 months old.

Terrell Dubose – Terrell is the middle Dubose brother. His street name is "P.J." Terrell Dubose was one of the three brothers who fired into the victim's house. Contrary to his pleas, Terrell was convicted of first degree murder and shooting a missile into a building. Terrell Dubose was sentenced to life

[5] At times, the State may refer to the Dubose brothers by their first names. Although the undersigned counsel does not commonly refer to people by their first names in appellate briefs, in this case, it may be necessary, at times, to distinguish between the three Dubose brothers.

after his jury recommended a life sentence. At the time of the murder, Terrell was 20 years and 4 months old.

Willie Davis - Davis' street name is "Psycho." He is the victim's uncle. On the afternoon of the murder, Davis had a confrontation with TaJuan Dubose because TaJuan was apparently standing in the middle of the street. Although witnesses differed on whether Davis swerved to hit TaJuan or swerved to miss him, Davis and TaJuan had words after Davis told TaJuan to get out of the street (expletives deleted). Rasheem Dubose, who witnessed the confrontation between TaJuan and Davis, also had words with Davis. It was this initial encounter between Davis and two of three Dubose brothers that began the string of events that led to Dreshawna Washington-Davis's murder. Contrary to his pleas, Davis would later be convicted of attempted armed robbery and sentenced to 30 years in prison in connection with a second encounter with Rasheem Dubose that occurred shortly after the incident with TaJuan but before the shooting. On the day before the murder of his niece, Willie Davis turned 22 years old.

Maxie Wilson - The Dubose brothers' cousin. He supplied two of the three guns used to shoot up the house in which the victim was killed. He also drove the Dubose brothers to the murder scene and acted as the getaway driver. After the murder, Wilson would also assist in getting rid of the guns used in the murder

as well as the clothes the Dubose brothers were wearing at the time of the shootings. He would also arrange accommodation so the brothers could hide out from the law.

Cinee Tinsley - Willie Davis' girlfriend at the time of the murder. Ms. Tinsley was also the mother of Davis' child. She witnessed the initial confrontation between Davis and TaJuan Dubose, the second incident between Davis and Rasheem Dubose, and was in the house when the Dubose brothers fired a hail of bullets into the victim's home.

Alicia Tinsley - Cinee Tinsely's mother and the grandmother of Willie Davis' child. She witnessed the second encounter between Willie Davis and Rasheem Dubose and intervened to end the situation.

STATEMENT OF THE FACTS

The eight year old Dreshawna Monique Washington-Davis died, because Rasheem Dubose and his brothers wished to exact revenge on Willie Davis, a man who had disrespected Rasheem Dubose earlier in the day. The victim, however, was not the person who had wounded Dubose's pride. Instead, the victim was an innocent who got caught in the hail of bullets that Dubose and his brothers fired into a house where the victim lived. When the shooting started, Dreshawna shielded her two younger cousins from the barrage. They lived. Indeed, they were not physically hurt at all. Dreshawna, their protector, died.

The medical examiner testified that Dreshawna died from a single gunshot wound. Dr. Scheuermann testified that the bullet entered Dreshawna's chest on the left side. The bullet passed through Dreshawna's 8th rib, the left lung, the aorta, the diaphragm, and the liver. The bullet came to rest just under the skin on the right side of Dreshawna's body. (TR Vol. XXXV 1247-1248). Dr. Scheuermann told the jury that the bullet that struck Dreshawna passed through something else before penetrating her body. Dr. Scheurmann agreed that a wall could the object through which the bullet that Killed Drewshana had passed. (TR Vol. XXXV 1250).

The chain of events leading up to the murder of Dreshawna Washington-Davis began about 4:00 in the afternoon of the murder. On July 26, 2006, Willie Davis and Cinee Tinsley's were driving back to Ms. Tinsley's house to drop Ms. Tinsley off at home. Davis and Tinsley had spent the previous night together at Davis' father's home. (TR Vol. XXXIV 1150). As Davis was nearing Ms. Tinsley's home, Davis saw TaJuan ("Hammer") Dubose standing in the middle of the street. Davis swerved but did not hit TaJuan Dubose. Cinee Tinsley testified that Davis swerved to hit Hammer. (TR Vol. XXXIII 861). Davis claimed he swerved to miss him. (TR Vol. XXXIV 1167).

Whatever his intent, Davis did not hit TaJuan with his car. Nonetheless, the two exchanged angry words. As a result of the

exchange, Davis felt "disrespected." (TR Vol. XXXIV 1152). Rasheem Dubose witnessed this incident between TaJuan and Willie Davis. Rasheem told Davis not to talk to his brother that way. (TR Vol. XXXVII 1624).

When Davis pulled into Ms. Tinsley's yard, Rasheem Dubose approached Davis and the two got involved in a verbal altercation. (TR Vol. XXXIV 1152-1153). Davis felt Rasheem Dubose was "disrespecting" him. (TR Vol. XXXIV 1153).

Instead of dropping Ms. Tinsley off at home after his confrontation with TaJuan and Rasheem Dubose as planned, Davis drove off and over to his father's house. Once there, Davis retrieved a .40 caliber handgun from the backyard and drove back to Ms. Tinsley's house. (TR Vol. XXXIV 1154). Davis told Ms. Tinsley he was going to make Rasheem get naked in the street. Davis intended to humiliate Rasheem Dubose. (TR Vol. XXXIV 1154).

When Davis returned to Ms. Tinsley's home, he saw Rasheem standing in the front yard along with Ms. Tinsley's brother, Adrian. (TR Vol. XXXIV 1155). Davis got out of the car and put the .40 caliber handgun to Rasheem Dubose's head. (TR Vol. XXXIII 866; TR Vol. XXXIV 1155). Davis demanded that Rasheem empty his pockets. When Rasheem turned out his pockets, Rasheem had nothing of value for Davis to take. When Davis saw that Rasheem had nothing to take, Davis demanded that Rasheem take

down his pants. At trial, Davis unabashedly admitted that he wished to humiliate Dubose. (TR Vol. XXXIV 1157).

Fortunately for Rasheem Dubose, Ms. Alicia Tinsley, Cinee Tinsley's mother, intervened and convinced Davis to leave Dubose alone. Davis testified that, as he was leaving and heading toward his car, he heard something that made him turn back. Dubose pointed his finger at Davis and told him "I am going to get you for this. I am going to get you for this." (TR Vol. XXXIV 1158). In response to Dubose's threat, Davis started back toward Dubose to re-engage. Once again, Alicia Tinsley intervened and pulled Dubose into the house. Ms. Tinsley's actions ended the confrontation between Davis and Rasheem Dubose, at least for that moment. (TR Vol. XXXIV 1158-1159). Both Davis and Cinee Tinsley drove away and stopped at Davis' mother's house. (TR Vol. XXXIII 869; TR Vol. XXXIV 1159-1161).

In the meantime, the Dubose brothers were angry and excited. Le'Sean Jackson saw Rasheem shortly after Rasheem's "robbery" encounter with Willie Davis. Jackson was at the Dubose home where he had been hanging out with P.J. and Hammer. Rasheem came jogging up to the house. Before he went in, Jackson heard Rasheem say "N…r just tried to rob me." (TR Vol. XXXIII 904). Jackson also saw Rasheem talking on Terrell's phone. When Rasheem hung up, Rasheem said, to no one in particular, that "I'm going to kill that n…r." (TR Vol. XXXIII

905). Rasheem also threw the phone to the ground, shattering it. (TR Vol. XXXIII 905).

TaJuan was also in a state of high emotion. TaJuan's cousin, Maxie Wilson, described him as "panicky and rowdy." (Tr Vol. XXXIV 1034-1035). TaJuan placed several calls to his cousin, Maxie Wilson. TaJuan wanted Wilson to come to the home where the Dubose brothers lived. Although TaJuan called Wilson numerous times, it was only when TaJuan told Wilson that Willie Davis had put a gun to Rasheem's head that Wilson agreed to drive over to the Dubose home. (TR Vol. XXXIV 1034-1035).

Wilson was not alone, however. Earlier in the day, Wilson met Sherman Eley at the Whispering Oaks Apartment. He and Eley rode around in Wilson's car smoking marijuana. (TR Vol. XXXIV 1032-1033). Wilson was driving a four-door, white Chevy Impala. (TR Vol. XXXII 956; TR Vol. XXXIV 1031).

It was Wilson and Eley who would drive the Dubose brothers to the scene of the murder. Wilson also supplied two of three firearms which the brothers used to spray the victim's home with gunfire. Wilson's identification of the firearms each brother used during the shooting, along with the firearms examiner's testimony, proved that it was Rasheem Dubose who not only fired the vast majority of the bullets (23/29) into the victim's home but was also the man who actually killed Dreshawna.

Wilson told the jury that when he arrived at the Dubose home, both TaJuan and Terrell jumped into his car and into the backseat. TaJuan had a gun. The gun was a 9mm. Both brothers directed Wilson to drive around the corner to pick up Rasheem. Rasheem was standing on someone's porch drinking a beer. TaJuan told Rasheem to get in. Rasheem got in to Wilson's car. (TR Vol. XXXIV 1039). Like his brothers, Rasheem sat in the backseat.

Rasheem told Wilson that "a n…r had pulled a gun to his head." Both Rasheem and TaJuan wanted to "get this n…r." (TR Vol. XXXIV 1040).

Rasheem told Wilson to drive by Davis' house. As they drove by, Rasheem told Wilson that the car parked right in front of the house was "Psycho's car." (TR Vol. XXXIV 1041). One of the brothers rolled down the window and looked like he wanted to shoot from the backseat. Eley told him not to do that. (TR Vol. XXXIII 965, TR Vol. XXXIV 1042).

Wilson drove around the corner from the house and parked in the parking lot of the Crystal Springs Water Company. (TR Vol. XXXII 735). The water company is located behind and to the side of the victim's residence and is separated by fencing. (State's Exhibit 38).

The victim's yard is entirely enclosed by a chain link fence. The only opening in the fence is the driveway where cars can enter and exit the property. (TR XXXII 731-733).

Once parked, Wilson gave the brothers two more guns. TaJuan gave Terrell the 9mm. Wilson gave Rasheem a Glock with an extended magazine. (TR Vol. XXXIV 1044). Wilson gave TaJuan a .45. (TR Vol. XXXIV 1044).

According to Sherman Eley, Maxie Wilson asked the brothers "Ya'll sure you sure you want to do this?" (TR Vol. XXXIII 969). The brothers said they did. (TR Vol. XXXIII 969). Mr. Eley told the jury that all three brothers got out of the car, ran, and jumped the fence. The next thing he heard was a whole lot of gunshots. (TR Vol. XXXIII 971). There were too many to count. Mr. Eley testified that the whole thing lasted about three minutes. (TR Vol. XXXIII 971).

After Eley heard the gunshots, the brothers came back to the car "fast." A woman, waiting for her husband to get off work at the Springs Water Company, heard the gunshots. She told the jury that after hearing the gunshots, she saw three or four black males running to a white car. The men were shooting back towards the direction from which they were running. (TR Vol. XXXII 739).

Rasheem was the last of the three brothers to return to the white Impala. All three had the same guns they left the car

with. Rasheem still had the gun with the extended clip. (TR Vol. XXX 973). Eley heard gunshots as they got back into the car and drove off fast. (TR Vol. XXIII 972).

Inside the house, now riddled with bullets, Dreshawna lay dead on her bedroom floor from a single gunshot wound. When Vonnie Frazier, Dreshawna's grandmother, went to check on the children once the shooting stopped, she found Dreshawna on the floor of her bedroom, in a kneeling position. Dreshawna's arms were wrapped around her two younger cousins, Janae and Jasmine. Both were unhurt. (TR Vol. XXXII 729-730).

After the murder, the Dubose brothers did not return home. Instead, all three went into hiding with the help of Maxie Wilson. Wilson originally intended to stash the brothers in a Jacksonville hotel room. They ended up not going to the hotel because it was too "hot." (TR Vol. XXXIV 1056-1063). Four days later, on July 30, 2006, all three Dubose brothers were discovered in a little house in the woods in the Southside of Jacksonville. (TR Vol. 1, TR Vol. XXXIII 974).

Information about the type and caliber of guns used by the brothers during the murder, along with forensic evidence at the scene, allowed law enforcement officials to determine where each of the three Dubose brothers were standing at the time they fired twenty-nine rounds into the victim's home. Additionally, law enforcement investigators, including a forensic firearm

examiner, were able to determine who was responsible for each shot fired and which of the three shooters fired the bullet that killed Dreshawna Davis-Washington. (TR Vol. XXXIII 839-840; State's Exhibit 209 (diagram); State's Exhibit 144 (photo): TR Vol. XXXVII 1653-1655); TR Vol. XXXV 1248-1250); State's Exhibit 226, 227, 259).[6]

SUMMARY OF THE ARGUMENT

ISSUE I: Dubose failed to prove juror misconduct so as to warrant a new trial. The trial judge, after conducting a limited interview with a juror who came forward after trial to report alleged juror misconduct, found the juror not credible.

In order to obtain a new trial due to juror misconduct, the defendant must first prove actual juror misconduct. If he does, the burden shifts to the state to show no reasonable possibility such misconduct affected the verdict. In this case, the trial judge's determination the complaining juror was not credible means Dubose has failed to show juror misconduct. Accordingly, the trial court properly denied the claim.

ISSUE II: There is sufficient evidence to sustain Dubose's conviction for first degree premeditated murder under the doctrine of transferred intent. The evidence introduced at trial

[6] This evidence is discussed in detail in the State's response to Dubose's challenge to his conviction for premeditated murder. For brevity's sake (to the extent it is possible in a 96 page brief), the State will not repeat it here.

demonstrated that Dubose stated his intent to kill Davis and then a short time later, Dubose fired 23 shots into the house where Davis was. Dubose's stated intent to kill Davis coupled with his actions shortly thereafter is evidence sufficient to sustain his conviction for premeditated murder.

ISSUE III: There is sufficient evidence to sustain Dubose's conviction for first degree felony murder with burglary as the underlying felony. A person is guilty of burglary if he enters a structure or dwelling, along with its curtilage with the intent to commit a felony therein. Dubose and his three brothers entered the curtilage of the victim's home with the intent to commit a felony. Dubose does not dispute, at least for the purpose of this issue, that he entered the victim's yard. Dubose also does not dispute the victim's home was surrounded by a fence. Dubose claims, instead, that an opening in the fence to allow for ingress and egress by way of a driveway means the victim's yard is not part of the home's curtilage. As such, he cannot be guilty of burglary. The State disagrees. Nearly two decades ago in State v. Hamilton, 660 So.2d 1038 (Fla. 1995), this Court found that a yard is part of the home's curtilage if surrounded by some form of enclosure. The victim's fence broken only to allow ingress and egress is some form of enclosure sufficient to make the victim's yard part of the home's curtilage. Accordingly, there was more than

sufficient evidence to support Dubose's conviction for felony murder.

ISSUE IV: In this claim, Dubose avers the trial judge erred in failing to grant Dubose's motion for change of venue. There was no error because there was no difficulty picking a fair and impartial jury. The record conclusively shows that the minds of the inhabitants of the community from which Dubose's jury was drawn were not so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely upon the evidence presented in the courtroom. Accordingly, the trial judge was under no obligation to change venue.

ISSUE V: In this issue, Dubose raises a claim that his sentence to death violates the dictates of Ring v. Arizona, 536 U.S. 584 (2002). Ring is satisfied because Dubose was previously convicted of a violent felony. This Court has consistently rejected Ring claims when the defendant has previously been convicted of a violent felony.

ISSUE VI: In this claim, Dubose raises a proportionality claim. Dubose's argument rests on the notion that equally culpable defendants were treated differently (relative culpability claim). Dubose points, first, to Maxie Wilson, a person who was not charged at all in connection with the murder of Dreshawna

Washington-Davis. Well-established precedent establishes that a relative culpability analysis is not appropriate when the comparators are not convicted of the same degree of murder. Because Wilson was not charged at all, a relative culpability analysis is not appropriate.

As to his two brothers, a relative culpability is appropriate because both were convicted of first degree murder and both were sentenced to life. However, the evidence showed, and the trial judge found, that Rasheem Dubose was the more culpable of the three brothers. He was the oldest, he fired the most bullets into the victim's home, and he was the one who fired the bullet that killed the victim. The trial judge found that Rasheem Dubose was the leader of his family. When the defendant is more culpable, disparate treatment is permissible. Because the record shows that Rasheem was more culpable than his two younger brothers, Rasheem's sentence to death is proportionate. Likewise, applying a typical proportionality analysis, Rasheem's sentence to death is proportionate.

ISSUE VII: The trial judge properly rejected Dubose's suggested mitigator of his attempt to enter into a plea agreement in his sentencing order. This is true for two reasons. Dubose offered no evidence of any attempt to plead guilty. Although the burden to offer mitigation is light, there is still a burden. Dubose offered no evidence at all. Second, evidence of an attempt to

plead guilty is not admissible. It is not error to refuse to consider inadmissible evidence. Even if the Court erred, however, any error is harmless.

ISSUE VIII: In this claim Dubose avers the trial court abused its discretion in denying the defendant's motion to continue the penalty phase to obtain the results of a PET scan. The trial judge committed no error. Although the defendant filed a motion for a continuance of the penalty phase, the defendant made no claim a continuance was necessary to obtain a PET scan. Indeed, the record shows that the PET scan was not even requested until weeks after the penalty phase had concluded. It is axiomatic that a trial judge cannot err in failing to grant a continuance to obtain the results of a test that has not been conducted or even requested.

ISSUE IX: In this claim, Dubose raises a claim of cumulative error. Where there is no error, there is no cumulative error. Dubose can make no showing that error, let alone cumulative error, deprived him of a fair trial.

ARGUMENT

ISSUE I

WHETHER TRIAL COUNSEL ABUSED ITS DISCRETION IN DENYING THE DEFENDANT'S MOTION FOR MISTRIAL BECAUSE OF ALLEGED JUROR MISCONDUCT

In this claim, Dubose avers the trial judge erred in failing to grant Dubose's motion for mistrial due to alleged

juror misconduct. Contrary to Dubose's argument, the trial judge committed no error. After a juror interview, the trial judge found the complaining juror incredible and as such, found there was no basis to overturn the verdict.

A. What Happened

On February 17, 2010, after closing arguments at the guilt phase of Dubose's capital trial, the trial judge released the jury to go home for the evening. The Court instructed jurors to return the next day for instructions. The Court also told the jury that it would start deliberations as well. The Court told jurors to leave any cell phones or communication devices at home. (TR Vol. XXVIII 1907).

The next morning, the jury returned and was given its final instructions. (TR Vol. XXVIII 1918-1960). On February 18, 2010, contrary to his pleas of not guilty, Dubose was convicted as charged. The trial court polled each juror by name whether the guilty verdicts were "your individual verdict." Each individual juror said it was. (TR Vol. XXVIII 1979-1982).

On March 9, 2010, the penalty phase commenced. Testimony lasted two days.

On the afternoon of March 10, 2010, the judge instructed the jury that, the next day, it would hear closing arguments and instruction and then begin deliberations. The trial judge told jurors to pack an overnight bag because they might be

sequestered and required to stay overnight in a hotel. The trial judge told jurors to bring a book because all TV's and radios would be turned off. The judge also told jurors they would not be allowed to have cell phones. (TR Vol. LXI 444).

Sequestration was not necessary, however. On March 11, 2010, the jury recommended Dubose be sentenced to death by a vote of 8-4. (TR Vol. XLI 557). Once again, the jurors were polled. Each affirmed that the 8-4 recommendation for death correctly reflected the jury's verdict. (TR Vol. XLI 560).

On April 23, 2010, Dubose filed a motion for a mistrial on the basis of juror misconduct. (STR II 101-106). Attached to the motion was an affidavit signed by Juror #14. (STR Vol. II 119-123).

Prior to submitting the motion, drafting the affidavit, or meeting with the juror to obtain her signature on the affidavit, neither counsel for Mr. Dubose, nor anyone else working on the juror issue, filed a proper motion to interview juror(s) accord with Rule 3.575, Florida Rules of Criminal Procedure. Accordingly, the State had no notice of, nor any opportunity to respond to, the defense's interview of Juror #14.

On April 23, 2010, the same day the motion was filed, the trial judge held a hearing in chambers on the motion. (TR Vol. XVI 2719-2733). The trial judge admonished counsel that he had violated both the rules regulating the Florida Bar (Rule

Regulating The Florida Bar 4-3.5(d)(4)) and the rules of criminal procedure (Rule 3.575) in interviewing Juror #14 without permission of the court. (TR Vol. XVI 2719). Counsel's response was "prosecutors, lawyers do it all the time." (TR Vol. XVI 2720). Counsel told the court that he looked at the rule and did not believe he had done anything inappropriate. (TR Vol. XVI 2720).

The Court disagreed and dismissed Dubose's motion for mistrial. The court found the motion was improperly filed because it was the product of misconduct. (TR Vol. XVI 2721). The trial judge advised counsel he could, however, file a proper motion to interview the juror. (TR Vol. XVI 2721). The trial judge told counsel for Mr. Dubose that "[t]his is so far away from the proper way to do it, I'm just speechless." (TR Vol. XVI 2722).

On June 24, 2010, Dubose, through counsel, filed a motion to interview Juror #14. (STR Vol. III 135-142). As is the case in his brief before the Court, Dubose made many allegations of juror misconduct. On July 8, 2010, the State filed a response. (STR Vol. III 143-146). Each side also proposed questions to pose to the juror. (STR Vol. III 149-154).

On August 13, 2010, the trial judge held a hearing on the motion. (STR Vol. I 2-53). The trial judge inquired what motions were before the court. Apparently, the trial judge did

not recall that he has stricken the defendant's motion for mistrial. When the trial judge asked defense counsel what motions were before the court, defense counsel advised that he had filed a motion for new trial and a motion for mistrial. However, the motion for new trial had nothing to do with alleged juror misconduct. (STR Vol. II 125-128).

When the court asked whether counsel had withdrawn the motion for mistrial, counsel advised he had not. Apparently the trial judge did not recall that he has earlier dismissed the motion for mistrial due to counsel's failure to comply with Rule 3.575, Florida Rules of Criminal Procedure. As such, everyone - the defense, the state, and the trial court - simply acted as if the defendant's motion to interview the jurors effectively revived Dubose's motion for mistrial. In any event, Juror #14 testified at the hearing. (STR Vol. I 11-51). She testified that her affidavit was true. (STR Vol. I 15).

The trial judge then asked Juror #14 specific things about the allegations set forth in her affidavit. First, the trial judge inquired into cell phone use during deliberations.

The trial judge questioned Juror #14 about whether she saw anyone using their cell phones during deliberations. Juror #14 told the judge that she did not see anyone using their cell phones during deliberations during the guilt phase deliberations. (STR Vol. I 16). Juror #14 told the court that

she did see two jurors using their cell phones during penalty phase deliberations. One of the jurors was Mr. Phillips, the jury foreman. The other man she described but could not identify by name. When asked whether she saw what Mr. Phillips was doing on his cell phone, Juror #14 said "no." (STR Vol. I 18). She heard him talking on it once. (STR Vol. I 19). She did not hear the conversation. (STR Vol. I 19). When asked whether she remembered being told the jurors could not have cell phones, Juror #14 said she did not recall that. Juror #14 assumed they could not have them, however, because from the "previous phase" they could not have them so she left hers in the car. (STR Vol. I 20). Juror #14 did recall that during the first phase, the trial judge told them to leave their cell phones in the car and come with a packed bag so "that is what we did." (STR Vol. I 21).

When asked about the second man she saw using his cell phone during deliberations, Juror #14 told the court she saw him using the phone. Like was the case for Mr. Phillips, she did not see what he was doing on the phone. (STR Vol. I 21). Jurors tended to play games on the phones. Juror #14 told the court she played games on her I-Pod Touch during breaks as internet was "hit or miss." (STR Vol. I 23). When asked whether it appeared jurors were doing any kind of research during deliberations, Juror #14 said "not during deliberations,

no." (STR Vol. I 23). No one changed their vote because of something that came from a cell phone or IPod. She did not think anything about the use of the cell phones had an effect on deliberations or the verdict. (STR Vol. I 23).

When asked about the teardrop tattoo, Juror #14 explained that someone mentioned seeing the tattoo. (STR Vol. I 24). She explained that, during the first phase, Dubose had dreads and then in the penalty phase they were cut. (STR Vol. I 24). They did not discuss the tattoo during deliberations but during breaks. (SGTR Vol. I 25).

Juror #14 refused to answer a question about being polled during the guilt phase. (STR Vol. I 26). She did not think it was right to poll the jury in front of all those people and media. Juror #14 said that they never should have been polled like that. She was concerned for her three kids because "they're gang members and I can't do that to my kids." (STR Vol. I 28).

Juror #14 told the trial judge she tried to communicate with him. She emailed, twice. She did not use her name or mention anything about Dubose or even mention that she was a juror. (STR Vol. I 30). Juror #14 told the court that, "the two emails I send you did not have anything stated in there that this was the Dubose case." (STR Vol. I 30). Juror #14 told the court that when they were in the courtroom, she also tried to

see the trial judge. "They" told her to come into the courtroom and at the door "they" said she could not speak with the judge and would have to make an appointment. (STR Vol. I 29). When asked whether she ever told the judge the verdict was not hers, Juror #14 said she did not. (STR Vol. I 30).

When the Court inquired as to how she came to sign the affidavit, Juror #14 told the court that she emailed an assistant public defender. When she spoke with him, she told him that she was a friend of a juror that has a problem with the verdict. She also told Mitch Stone, a friend's friend. She then contacted trial counsel, Richard Kuritz. (STR Vol. I 32). Mr. Stone helped her with the affidavit. The affidavit was created after she had lunch with Mr. Kurtiz and Ms. Shelley (Eckels). Mr. Kuritz suggested lunch to discuss her concerns. (STR Vol. I 34). Juror #14 had her own notes which she gave to Mr. Stone. The affidavit was prepared and Mr. Kuritz had her sign it to submit to the court. (STR Vol. I 34). She did not type the affidavit herself. She guesses that Mr. Stone or someone in his office typed it because it got emailed to her. (STR Vol. I 35). Mr. Kurtiz printed out and they met at Starbucks to sign it "just kind of quick and go." (STR Vol. I 36).

The trial judge asked Juror #14 once again about the polling of the jury in the guilt phase. She did not want to

answer. When asked about the polling after the penalty phase, Juror #14 told the trial judge that "that was our verdict." (STR Vol. I 51).

On September 7, 2010, the State served a pleading opposing Dubose's motion for new trial/penalty phase based on juror misconduct. (STR Vol. III 155-159). On September 8, 2010, Dubose served his arguments in support of a new trial. (STR Vol. III 160-164).

On September 13, 2010, the trial court entered a written order denying the defendant's motion for new trial/mistrial. In the order, the trial judge made specific findings of credibility. (STR Vol. III 165-169). In particular, the trial judge found Juror #14 not credible. In pertinent part, the trial court concluded:

> …This cause came on to be heard on three motions filed by the defendant, filed under seal by prior order of this Court. The first motion sought permission to allow a juror interview. This motion was granted. At the request of the defendant in his motion, Juror No. 14 was subpoenaed to appear in camera to be interviewed regarding her allegations about juror misconduct during deliberations. Juror No. 14 appeared pursuant to this subpoena and was interviewed in camera in the presence of the undersigned, counsel for the State, and counsel for the defendant. The defendant's appearance was waived by his counsel. Both the State and the defendant were allowed to submit written questions in writing to the Court prior to the hearing. The Court declined to ask any questions regarding ordinary contact during deliberations. A verdict cannot be subsequently impeached by conduct which inheres in the verdict and relates to the jury's deliberations. Mitchell v. State, 527 So.2d 179, 181

(Fla. 1988), citing Russ v. State, 95 So.2d 594 (Fla. 1057). Matters that essentially inhere in a verdict include jurors' mental thoughts and beliefs which relate to what occurred in the jury room during the jury's deliberation. Devoney v. State, 717 So.2d 501, 502, 504 (Fla. 1988).

The manner in which jury pollings are conducted during deliberations is also a matter that inheres in a jury's verdict. Johnson v. State, 593 So.2d 206 (Fla. 1992). *See also*, Baptist Hospital of Miami, Inc. v. Maler, 579 So.2d 97 at 99 (Fla. 1991), holding that jurors cannot be asked about their "emotions, mental processes, or mistaken beliefs"; Jones v. State, 928 So.2d 1178 (Fla. 2006); Cooper Tire and Rubber Co. v. Pierre, 18 So.3d 700 (Fla. 4DCA 2009); and Smith v. Florida Healthy Kids Corporation, 27 So.2d 692 (Fla. 4DCA 2010).

Juror No. 14 during the interview testified under oath that she did not see any jurors using cell phones during deliberations in the guilt phase of the trial. (Transcript of Juror Interview 8/13/10, pgs. 15-17.) When asked if she saw any of the jurors using a cell phone during the deliberations in the penalty phase, Juror No. 14 responded "yes". However, Juror No. 14 testified that she had no knowledge whatsoever of what this juror did with their cell phone, whether they were playing a game, obtaining stock market quotes, reading the news, or making a phone call. (Transcript of Juror Interview 8/13/10, pgs. 17-18.) She further testified that she saw a second juror with a cell phone, but that the second juror did not use the cell phone as a talking or communication device. She further commented that she thought he might have been playing a game on his cell phone. (Transcript of Juror Interview 8/13/10, pgs. 21-22.)

Juror No. 14 also testified that no one told her or the jury that phones could not be used during deliberations in the penalty phase of the trial. (Transcript of Juror Interview 8/13/10, pg. 19.) However, the record is clear and uncontroverted that the Court instructed the jury both in the guilt phase and in the penalty phase that they would be sequestered and would not be allowed to have any outside influences during deliberations. (See,

excerpts of Trial Transcript, pgs. 33-35.) The undersigned instructed Lt. Steve Weintraub, Jacksonville Sheriff's Office, supervisor of courthouse security, that no cell phones were to be taken into the deliberations room. Lt. Weintraub personally oversaw the jury at all times they were sequestered.

Juror No. 14 testified that she never saw any of the other jurors conducting research on their cell phones during deliberations. (Transcript of Juror Interview 8/13/10, pg. 22.)

Juror No. 14 also testified that cell phone use never had any effect on the deliberations or the verdict, and that no one changed their vote based upon any use of cell phones. {Transcript of Juror Interview, pg. 22.)

In the motion, the defendant alleges that Juror No. 14 stated that jurors used their cell phones to research a tear drop tattoo seen on the defendant's face, and that the meaning of the tattoo was that gang members got them after they killed someone. Juror No. 14's testimony during the interview completely contradicted this contention. She testified that the discussion regarding the tattoo was an innocent comment made after the defendant drastically changed his appearance between the guilt phase and the penalty phase by cutting off his very long and thick dredlocks. She testified that one of the jurors noticed the tattoo after he cut his dredlocks off, and that the discussion of the tattoo never took place during deliberations, but only discussed during breaks. (Transcript of Juror Interview 8/13/10, pgs. 23-24.)

Juror No. 14 admittedly contacted only defense attorneys about her complaints. She made no attempt to contact the State, and made no meaningful attempt to contact the Court. She admitted to talking to several different defense counsel about this issue, having lunch with defense counsel, and testified that she had no idea how the affidavit previously filed in this case was created. (Transcript of Juror Interview 8/13/10, pgs. 32-36.)

> Juror No. 14 appears to be biased towards the defense in this case. Her demeanor when testifying was extremely emotional, bordering on hysterical. Her allegations are internally inconsistent and exhibit bias and partiality toward the defendant. The jury was polled after the guilty verdict and the penalty phase verdict, and in both instances Juror No. 14 told the Court that that was in fact her individual verdict. At no time during polling did she make any effort to advise the Court that she had any misgivings about the verdict. Her after the fact testimony and allegations are unreliable.
>
> There is no indication from any part of the record herein that any juror misconduct actually occurred, nor that any alleged misconduct had any influence upon the final result of this trial. Nothing in the record would support a finding that the defendant was deprived of a fair trial because of the conduct of any juror. See, State v. Rodgers, 347 So.2d 610 (Fla. 1977).
>
> Wherefore, it is, upon consideration, hereby ORDERED AND ADJUDGED that the defendant's Motion for New Trial should be and the same is hereby denied. Likewise, the defendant's Motion for Mistrial to be Declared should be and the same is hereby denied.

(STR Vol. III 165-169).

B. The standard of review

The standard of review is an abuse of discretion. Devoney v. State, 717 So.2d 501, 504 (Fla. 1998); State v. Hamilton, 574 So.2d 124, 126 (Fla. 1991). "[D]iscretion is abused only where no reasonable man would take the view adopted by the trial court." Huff v. State, 569 So.2d 1247, 1249 (Fla. 1990). *See also* Patrick v. State, 104 So.3d 1046, 1065 (Fla. 2012).

C. The law on juror misconduct

Normally, the first inquiry into an allegation of juror misconduct is whether there are sufficient allegations of prejudicial outside influences to warrant a jury interview. However, in this case, without objection from the State, the court conducted a limited juror interview of the complaining juror, Juror #14. On appeal, Dubose makes no claim the trial court erred in failing to grant any additional juror interviews. Indeed, Dubose's motion to interview juror only included a request to interview Juror #14. (STR Vol. III 135-142). Instead, the issue now before this Court is whether the trial judge abused his discretion in denying Dubose's motion for mistrial.

The most pertinent case to guide this Court seems to be its own decision in State v. Hamilton, 574 So.2d 124, 126 (Fla. 1991). While Hamilton itself dealt with extraneous material in the jury room, it appears that the test applied in Hamilton is the appropriate standard to apply to the allegation made by Dubose here.

In Hamilton, the court explained the two step analysis that a trial court should apply in deciding whether to grant a new trial on the basis of juror misconduct. In order to be entitled to a new trial, the defendant must first show there was actual juror misconduct. If the defendant establishes actual juror

misconduct, the defendant is entitled to a new trial, unless the State shows there is no reasonable probability the misconduct affected the verdict. Hamilton v. State, 574 So.2d at 129. *See also* Williams v. State, 933 So.2d 671 (Fla. 1st DCA 2006)(applying the Hamilton test to analyze a claim of juror misconduct).

Overlaying the Hamilton test is that allegations of juror misconduct can be divided into two categories. These are matters that inhere in the verdict and matters that don't.

A juror is not competent to testify as to any matter that inheres in the verdict. Jurors' mental thoughts and beliefs which relate to what occurred in the jury room during the jury's deliberation inhere in the verdict. Devoney v. State, 717 So.2d 501, 502, 504 (Fla. 1998).

Matters that inhere in the verdict may not be used to overturn the verdict. Powell v. Allstate Ins. Co., 652 So.2d 354 (Fla. 1995). Matters that have been determined to inhere in the verdict include: (1) a juror did not assent in the verdict, (2) the manner in which votes were taken during deliberations, (3) considerations of the defendant's failure to testify, (4) allegations that jurors discussed matters not introduced into evidence, (5) allegations that a juror was unduly influenced by the statements or otherwise of his fellow jurors, (6) allegations the jury misunderstood the instructions of the

court, (7) allegations the verdict was prompted by sympathy for the victim, and (8) allegations that a juror drank alcohol during the trial. Devoney v. State, 717 So.2d 501, 502,504 (Fla. 1998); Powell v. Allstate Ins. Co., 652 So.2d 354, 356 n.3 (Fla. 1995).

On the other hand, matters that do not inhere in the verdict but instead involve influence on the jury from outside sources are matters that may, if prejudicial, be used to impeach the verdict. This Court has explained that such matters include racial remarks, statements, or jokes that appeal to the open bias of others, an agreement between two or more jurors to disregard their oaths and to ignore the law, a juror was improperly approached by a party, his agent, or attorney; witnesses or others conversed as to the facts or merits of the cause, out of court and in the presence of jurors; and that the verdict was determined by aggregation and average or by lot, or game of chance or other artifice or improper manner. Tai A. Pham v. State, 70 So.3d 485, 492-494 (Fla. 2011); Reaves v. State, 826 So.2d 932, 943-944 (Fla. 2002); Devoney v. State, 717 So.2d 501, 502,504 (Fla. 1998).

D. This Case

First of all, the remedy that Dubose asks for is not the right remedy. Remand for additional interview(s) or questions is the appropriate remedy, in any event, not a new trial or new

penalty phase. In this case, however, neither a remand nor a new trial/penalty phase is warranted because Dubose did not prove actual juror misconduct.

Before this Court, Dubose's primary complaints, which he alleges are sufficient to warrant a new trial, are:

(1) The jury made fun of Dubose because he is a black male, made a racial reference to being a black male, and stated that the police interview needed subtitles because the jury could not understand Dubose because he was a black male.

(2) Juror Number # 14 did not want to vote guilty but the "angry mob" that the jury had turned into pressured her into it and other jurors verbally abused Juror #14.

(3) Jurors learned that the home of the grandmother had burned down after the verdict and the jury discussed whether the verdict and fire were related.

(4) The jury was doing their own internet research of tear drop tattoos under the mistaken belief the defendant had a tear drop tattoo and as such infected the jury with information regarding gangs and gang killing ritual. Jurors also conducted their own research as to the location of the homes and apartments involved in the case.

(5) A victim advocate asked the jury if they were the Dubose jury then sat next to the grandmother during trial.

(6) The jury made up their mind prematurely and most jurors never considered or discussed the evidence or arguments.

(7) The jury foreman marked guilty in ink immediately after retiring to the jury room and acted surprised that anyone wanted to actually deliberate.

(8) The jury foreman drank wine at lunch and bought other jurors lunch before he was elected foreman.

(9) The jury had been told to pack an overnight bag and some of the jurors failed to do so and instead of deliberating joked they had a 5:00 p.m. dinner date. (IB 17-20).

In working through each allegation, it seems clear that some of the allegations are clearly matters that inhere in the verdict and may not be used to impeach the verdict. For instance, allegations that Juror #14 felt pressured by other jurors is a matter that inheres in the verdict. Likewise, allegations that the foreman marked guilty in ink and acted surprised when jurors wanted to deliberate, that jurors made up their minds prematurely, discussed the victim's house burning down and allegedly joked about a 5:00 dinner date at the penalty phase are matters that inhere in the verdict as they are undisputedly part of the deliberative process.

Insofar as the allegation about the victim advocate and his claim the jury foreman drank wine during lunch, Dubose can show no prejudice. Juror #14 made no allegation in her affidavit

that the foreman was ever drunk or that the jury was concerned about, or even discussed, the victim advocate's presence in the courtroom. Nor did Juror #14 allege the victim's advocate spoke to them about any substantive matter at all.

At the bottom line, the two allegations that, on the surface, merit any scrutiny are the allegations of juror research into the tattoo and racial remarks. Neither of these allegations warrant a new trial or even further inquiry. This is so for two reasons. First, the trial court found Juror #14 not to be credible. Second, neither the juror's affidavit nor testimony at the juror interview hearing demonstrated there were prejudicial outside influences at work on Dubose's jury. For instance, Juror #14's only "racial" allegation is that the jury laughed and made fun of the defendant's police interview, made unspecified racial references and stated the video needed subtitles so they could understand his English. (STR Vol. I). Her allegation does not support Dubose's claim on appeal that the jury made fun of Dubose because he was a black male. Indeed, Juror #14 did not explain at all what she believed to be racial references. Moreover, Juror #14 made no allegation that any jurors appealed to the racial bias of other jurors or exhorted other jurors to decide the case upon racial bias. Indeed, Juror #14 did not even allege when this occurred or that it had any influence whatsoever on the jury's verdict or

recommendation. (STR Vol. I 121). Tai A. Pham v. State, 70 So.2d 485, 493-494 (Fla. 2011)(although jurors made comments about Pham's ethnicity, the comments did not warrant a new trial because they did not rise to the level of open appeals to bias in others).

As to the alleged research about the tattoo, Juror #14's testimony at the hearing refuted the allegations put into her affidavit. For instance, in her affidavit, she claimed that jurors were using their cell phones during deliberations to do internet research. She described this research as research into places involved in the crime and a tear drop tattoo. (STR Vol. I 121). During her interview, however, Juror #14 told the judge she did not see or know what the two jurors she saw with phones during the penalty phase were doing and that nothing jurors did with their phones affected the verdict. (STR Vol. 1 16-23).

When asked specifically about the teardrop tattoo, Juror #14 explained that someone mentioned seeing the tattoo. (STR Vol. I 24). She explained that during the first phase, Dubose had dreads and then in the penalty phase they were cut. (STR Vol. I 24). She told the judge that "they said that had just noticed it, I think." (STR Vol. I 24). Juror #14 told the court that jurors did not discuss the tattoo during deliberations. (STR Vol. I 25).

There is competent substantial evidence to support the trial judge's conclusion that Juror #14 was not a credible witness. Accordingly, Dubose failed to bear his burden to show actual juror misconduct. Even if that were not the case, given Juror #14's affidavit and testimony at the juror interview, Dubose has not borne his burden to show juror misconduct. Moreover, given there is no reasonable possibility the alleged misconduct affected the deliberations in any way, the trial court did not abuse his discretion in denying Dubose's motion for mistrial.

ISSUE II

WHETHER THE TRIAL JUDGE ERRED IN DENYING APPELLANT'S MOTION FOR A JUDGMENT OF ACQUITTAL FOR PREMEDITATED MURDER

In this claim, Dubose avers the trial judge erred in denying the defendant's motion for a judgment of acquittal for premeditated murder. The standard of review is *de novo*. Delgado v. State, 71 So.3d 54, 65 (Fla. 2011).

An appellate court's determination on the sufficiency of evidence to prove premeditation is guided by the five principles. First, premeditation is a factual issue for the jury. Second, if the evidence of premeditation is direct, whether in whole or in part, a jury's finding of premeditation will be sustained if, when viewing the evidence in the light most favorable to the State, the finding is supported by

competent, substantial evidence in the record. Third, where the evidence of premeditation is wholly circumstantial, the evidence must be both sufficient to support the finding of premeditation and, when viewed in the light most favorable to the State, must also be inconsistent with any reasonable hypothesis of innocence. Heyne v. State, 88 So.3d 113 (Fla. 2012). Fourth, in a circumstantial evidence case, once the State presents evidence that is inconsistent with the defendant's hypothesis of innocence, it is up to the jury to resolve the inconsistencies. The jury is not required to believe the defendant's version of the facts when the State has produced evidence inconsistent with the defendant's reasonable hypothesis of innocence. Perry v. State, 801 So.2d 78, 84 (Fla. 2001). As long as the jury's resolution of the inconsistency in favor of the State is supported by competent, substantial evidence, this Court will affirm. Twilegar v. State, 42 So.3d 177 (Fla. 2010). Finally, premeditation is more than a mere intent to kill; it is a fully formed conscious purpose to kill. Premeditation may be formed in the moment before the act. All that is required is that there is a sufficient length of time to permit reflection as to the nature of the act to be committed and the probable result of that act. Buckner v. State, 714 So.2d 384, 387 (Fla. 1998). Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or

absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted. Twilegar v. State, 42 So.3d 177, 190 (Fla. 2010). Logically, also relevant is evidence that the defendant stated, prior to the murder, that he was going to kill the victim.

In his initial brief, Dubose claims there was insufficient evidence that Dubose had a premeditated design to kill anyone. Dubose claims that, similar to a random drive-by shooting, the murder of Dreshawna was the result of a shooting that was "random in nature [with] no specific target in sight." (IB 37). Dubose also avers that the problem for the state is that there is "no evidence whatsoever of a conscious purpose to kill." (IB 44). Finally, Dubose claims that this is a circumstantial evidence case. Dubose is mistaken on all three counts.

First, this is not a circumstantial evidence case. This is so for several reasons. First, there was evidence that shortly before the murder and shortly after Dubose's "robbery" encounter with Davis, Dubose said, referring to Davis that "I'm going kill that n….r". (TR Vol. XXXIII 903-905). Willie Davis testified that as he was disengaging from Dubose after attempting to rob him, Dubose told him twice, "I am going to get you for this." I am going to get you for this. I am going to get you for this." (TR Vol. XXXIV 1158). Maxie Wilson testified that on the way

over to the victim's house, both TaJuan and Rasheem "wanted to get this n….r." (TR Vol. XXXIV 1040). Statements of intent to "get" or "kill" Davis is direct evidence of Dubose's premeditated intent to kill. Kocaker v. State, --- So.3d ----, 2013 WL 28243 (Fla. 2013).

Additionally, contrary to Dubose's assertions that the shooting was random with no specific target in sight, Dubose knew that Davis was in the house. Maxie Wilson testified that when they stopped in front of the victim's house, there was a car parked in the driveway. One of the brothers in Wilson's car identified the car as "Psycho's car." (TR Vol. XXXIV 1041). The State also presented evidence that Dubose fired into the house at the exact spot where Davis was sitting on the couch in front of a window.

Ms. Vonnie Frazier testified that Davis was sitting on the couch near the window. At the time of the shooting, it was broad daylight. Ms. Frazier testified that you could see clearly in and out of the window. (TR Vol. XXXII 725).

The shot that killed Dreshawna went first through the window in front of the couch where Davis was sitting and then through the interior wall(s) separating the living room and the victim's bedroom. (TR Vol. XXXIII 839-840); State's Exhibit 209 (diagram); State's Exhibit 144 (photo).

Mr. Peter Larizabal testified that there were 29 shell casings found at the murder scene. Twenty-three of the shell casings were fired by a single firearm, a 9 mm consistent with a Glock. (TR Vol. XXXVII 1651). Two were fired from a .45 caliber handgun and four were fired from a gun consistent with a Hi-Point. (TR Vol. XXXVII 1651-1653). The fatal bullet (State's Exhibit 231) was a 9mm projectile fired by a Glock. (TR Vol. XXXVII 1653-1655); (TR Vol. XXXV 1248-1250); State's Exhibit 227).[7]

The evidence at trial proved that it was Dubose who carried and fired the 9mm Glock. Maxie Wilson testified that he gave Dubose a Glock with an extended magazine. (TR Vol. XXXIV 1044). Such a magazine will hold 33 rounds. (TR Vol. XXXVII 1660-1661). TaJuan had the .45 and P.J. got the 9mm Hi point. (TR Vol. 1043-1044). After the shooting, Sherman Eley saw that Dubose was still armed with the same gun with the extended clip. (TR Vol. XXXIII 973).[8]

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[7] State's Exhibit 226 shows all of the shell casings and the trajectories of all the bullets. Only the colored circles (29 in all) are shell casings. The white circles are not shell casings.

[8] Dubose asserts that the initial plan was to shoot up Psycho's ca but a passenger told them not to do that. Dubose implies that if only the passenger would have not stopped them from shooting Davis' car, that is all they would have done. The record does not support such an assertion. First, neither Dubose nor his brothers testified that the initial plan was to shoot up Davis' car. Sherman Eley testified that when they rolled by the victim's house, the young one (Hammer) rolled down

Evidence that Dubose: (1) stated an intent to "get" and "kill" Davis; (2) knew Davis was in the house; (3) could see Davis sitting on the couch through the window in broad daylight; (4) fired directly at the same window in front of where Davis was sitting; and (5) fired 23 rounds into the house is competent substantial evidence that Dubose premeditated the murder. Even if this Court were to apply a circumstantial evidence standard to the premeditation element of first degree murder, which it shouldn't, the State introduced evidence inconsistent with Dubose's hypothesis that he fired into the house to "scare" Davis with "no specific target in sight." (IB 37). Given the jury's resolution in favor of the State is supported by competent, substantial evidence, this Court should affirm. Twilegar v. State, 42 So.3d 177 (Fla. 2010). *See also* Lynch v. State, 2 So.3d 47 (Fla. 2008) (discussing transferred intent when one premeditates to kill one person and unintentionally

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the window "like he wanted to shoot or something." Eley told him not to do that when he was in the car. (TR Vol. XXXIII 965-966). Maxie Wilson testified that someone tried to shoot out of the backseat. Wilson testified that Sherman said "Man don't do that." (TR Vol. XXXIV 1042). Although Wilson denied knowing who was going to shoot out the window, the testimony of both Eley and Wilson demonstrate that at this particular point in time only Hammer was armed. Wilson and Eley's testimony do not support Dubose's assertion that the "initial plan" was to shoot up Davis' car. Indeed, although Davis' car was parked in front of his mother's house and all three brothers entered the yard with guns, none of the brothers fired a single shot into the car. Additionally, Wilson's testimony that he thought the brothers only intended to scare Davis is not actual evidence of Dubose's intent. (TR Vol. XXXIV 1070).

kills another; Howell v. State, 707 So.2d 674 (Fla. 1998) (conviction first degree premeditated murder legally sufficient when Howell intended to kill one person with a homemade bomb hidden in a microwave oven and killed a highway patrol trooper instead).

In support of his argument there was no premeditated design to kill, Dubose points to two companion decisions from this Court, Cummings v. State, 715 So.2d 944 (Fla. 1998) and Fisher v. State, 715 So.2d 950 (Fla. 1998). Fisher and Cummings were co-defendants who were tried together before separate juries. In both cases this Court set aside the defendants' convictions for pre-meditated murder. Neither case supports the notion there is insufficient evidence of premeditation in Dubose's case.

In Cummings and Fisher, the defendants were charged with first-degree murder for the shooting death of Shelton Lucas, Jr. In both cases, the Court set forth the same evidence that was introduced at trial:

> On the evening of February 15, 1994, Karlon "Dap" Johnson yelled at Andre Fisher to turn on the lights of his car and slow down as he drove down a street in Jacksonville. Fisher got out of his car and a fight ensued between Johnson and Fisher. Johnson hit Fisher in the head with a beer bottle. Justin Robinson interceded to break up the dispute and convinced Fisher to leave. Robinson testified that Fisher resisted leaving the scene.
>
> After the fight, someone contacted Fisher's nephew Derrick Cummings by phone and told him about the fight between Fisher and Johnson. Michael Gardner, Cummings'

companion at the time he received the call and learned about the fight, testified that Cummings was upset by this information and asked Gardner to drive him to get his gun. Gardner also testified that he dropped Cummings off at the house where Fisher lived. Sometime after the fight, Robinson saw Cummings in a burgundy car with an "Uzi-type gun" on his lap. Cummings asked about the fight and inquired as to Johnson's whereabouts.

Later that evening, a white Honda Accord drove by the house where Johnson's sister Charlsie Lucas and her children lived. Johnson stayed at his sister's house several nights each week; Johnson's car, which apparently was quite distinctive, was also parked in the carport of his sister's house. Shelton Lucas, Sr., Johnson's brother-in-law, was smoking a cigarette in the carport when he noticed the car driving down the street. Lucas Sr. is the same height and weight as Johnson and was wearing clothes similar to those worn by Johnson earlier that evening. After Lucas Sr. reentered the house from the carport through the kitchen door, he heard what sounded like firecrackers. The passengers in the car fired at least thirty-five shots at the house from three different nine millimeter guns, a Glock, a Luger, and an Uzi. Several bullets penetrated the kitchen door. One of the bullets traveled through the kitchen into the living room and struck five-year-old Shelton Lucas, Jr., who was sleeping on a couch with his mother. The next day the child died from this wound.

Robinson testified that the white Honda Accord passed him shortly before the shooting. There were four people in the car, and he recognized Fisher in the front passenger seat. He watched the car go along the street and turn right at the house where Johnson's sister lived. Shortly thereafter Robinson heard shots being fired. Robinson further testified that the car in question was Marion King's car. The following day Cummings told Robinson that, if the police asked him, he should say that they were together the previous evening at his cousin's house.

Cummings v. State, 715 So.2d 944 (Fla. 1998); Fisher v. State,75 So.2d 950 (Fla. 1998).

Applying the circumstantial evidence standard of review, this Court found the evidence insufficient to support Cummings' and Fisher's convictions for premeditated murder. This Court concluded that it could not say the State was able to exclude every reasonable hypothesis that the homicide occurred other than by premeditate design. This Court noted that while Cummings and Fisher clearly had a motive to retaliate against Johnson, the State presented no evidence that either Fisher or Cummings actually saw Lucas (who the State contended the defendants mistook for Johnson) standing in the carport as it was dark. Additionally, this Court pointed to the fact that Lucas was well into the house (10 steps) before the shooting started. This was important because this meant the State offered no evidence that Fisher or Cummings could see where Lucas was in the house when they started shooting. Accordingly, this Court found that the State had not excluded the reasonable hypothesis that Fisher and Cummings only intend to scare Johnson or damage his car which was struck by several of the bullets. Cummings v. State, 715 So.2d at 949-950; Fisher v. State, 715 So.2d at 952.

Both cases are distinguishable from the case at bar. First, in this case, unlike in Cummings and Fisher, the State introduced evidence that shortly before the murder, Dubose, at least twice, said he would "get" or "kill" Davis. Additionally,

Davis was sitting on a couch in front of a window in broad daylight, a place in the house visible from the outside and visible from where Dubose was standing at the time he fired into the house. (State's Exhibit 209)(diagram). Moreover, the State introduced evidence that Dubose fired directly at the window immediately in front of the couch where Davis was seated. While Davis' car was parked right by the house, none of the brothers fired a single round into Davis' car. All 29 rounds were fired into the house, with Dubose firing 23 of them.

Unlike the case in Cummings and Fisher, and even assuming this is a circumstantial evidence case, the State introduced evidence inconsistent with Dubose's theory that he only intended to scare Willie Davis. As such, it was up to the jury to resolve the conflict, which it did in the State's favor. As there is competent, substantial evidence to support the verdict, this Court should affirm. Twilegar v. State, 42 So.3d 177 (Fla. 2010).[9]

[9] Any insufficiency is harmless because the evidence supports Dubose's guilt for first degree felony murder, which the jury found on a special verdict form. *See generally* Hess v. State, 794 So.2d 1249, 1261 (Fla. 2001); Steverson v. State, 787 So.2d 165, 168 (Fla. 2d DCA 2001).

ISSUE III

WHETHER THE EVIDENCE IS SUFFICIENT TO SUPPORT THE DEFENDANT'S CONVICTION FOR FIRST DEGREE FELONY MURDER

Although Dubose couches this in terms of jury instructions, this is really a claim that there is insufficient evidence to support Dubose's conviction for first degree felony murder with burglary as the underlying felony.[10] For burglary to occur, the defendant must, among other things, have entered or remained in a dwelling, structure, or conveyance. For burglary purposes, "a dwelling is a building or conveyance of any kind … [that is] designed to be occupied by people lodging therein at night, ***together with the curtilage thereof***." *Section 810.011(2), Florida Statutes (2006).*

Dubose does not dispute, at least for the purposes of this issue, Dubose and his brothers entered the victim's yard with the intent to commit an offense therein. Dubose also does not

[10] Such a claim would ordinarily be couched in terms of the alleged wrongful denial of a motion to dismiss prior to trial or a claim that the trial judge erred in failing to grant a motion for a judgment of acquittal (JOA). However, Dubose never filed a motion to dismiss on the felony murder charge on the grounds that the yard was not a part of the curtilage. Nor did he premise his motion for a judgment of acquittal on the argument he presents here to this Court. Instead, Dubose only asked for a JOA on the State's premeditated murder theory. (TR Vol. XXXVII 1672). Accordingly, a JOA issue is not preserved. Prior to his re-trial, after mistrial, Dubose advised the Court that he wished to renew his previously filed motion to exclude from the jury an instruction on felony murder with burglary as an underlying felony. The trial court denied the motion. (TR Vol. XIX 26).

dispute that the victim's yard was surrounded by a chain link fence.[11] Instead, Dubose argument rests on the notion the victim's yard was not part of the curtilage of her home because the fence surrounding it had an opening in front for the driveway. In Dubose's view, total enclosure is required. Dubose claims the opening in the victim's fence precludes a conviction for burglary. [12] The State disagrees.

In support of this claim, Dubose relies on this Court's decision in State v. Hamilton, 660 So.2d 1038 (Fla. 1995). In Hamilton, the defendant, along with another man, entered Mr. Jenks' yard with the intent to steal some boat motors from a boat parked in the yard. Mr. Jenks' yard was not fenced. There were also no shrubs around the yard that might be considered as some sort of natural fence. The only thing enclosing the yard

[11] Shell casings and bullet strikes found after the murder proved that Dubose and his brothers fired into the victim's house from both the side and the back of the house. State's Exhibits 21-23 (photos) show that the fence surrounding the victim's home has a break for the driveway that extends from the street to what appears to be an attached garage. Additionally, the brother's parked behind the victim's home near the water plant and jumped the victim's fence to gain access to the yard. (TR Vol. XXXIII 969-971). Accordingly, the record refutes any notion the brothers accessed the home by walking through the opening in the fence.

[12] Dubose claims the yard was "open to the public." (IB 53). To avoid being fanciful or frivolous, Dubose must mean that the opening in the victim's fence allows people like the mailman and visitors to lawfully access the property to deliver mail or to knock on the front door.

was "several unevenly spaced trees." State v. Hamilton, 660 So. 2d at 1046.

The issue on appeal was whether Hamilton's entry into Mr. Jenks' unfenced yard to steal the motors was sufficient to sustain his burglary conviction. This Court's decision turned on whether the yard was part of the dwelling's "curtilage."

This Court found that in order for an area surrounding a residence to be considered part of the curtilage, "some form of an enclosure" is required. State v. Hamilton, 660 So.2d 1038, 1044-45 (Fla. 1995). Because Mr. Jenks' yard was completely unfenced save for a few unevenly spaced trees, this Court found Mr. Jenks' yard was not part of the curtilage of his home. As such, Hamilton's conviction for burglary could not be sustained. Id.

Contrary to Dubose's suggestion, this Court's decision in Hamilton does not require total enclosure, only "some form of enclosure." The victim's home in Hamilton was not surrounded by any form of enclosure. The victim's home in this case was. Indeed, the home was completely surrounded by a fence save for an opening to allow ingress and egress by way of the driveway. Accordingly, the fence around the victim's home constituted "some sort of enclosure" as this Court described in Hamilton.[13]

[13] Dubose claims that a few courts in this State have "attempted to recede" from this Court's opinion in Hamilton. (IB 52)

Apart from Hamilton, which does not require total enclosure, the First District Court of Appeal has concluded, in Dubose v. State, 75 So.3d 383 (Fla. 1st DCA 2011), that the enclosure surrounding the victim's yard was sufficient to establish the yard as part of the curtilage of the victim's home. On appeal from his conviction and life sentence, Terrell Dubose challenged his conviction for felony murder with burglary as the underlying felony. Dubose claimed he was entitled to judgment of acquittal on felony murder because he could not have committed burglary where the yard of the dwelling at issue was not fully enclosed.

The First District Court disagreed. Relying on this Court's decision in Hamilton, the First District found that a fence need not be continuous to constitute "some form of enclosure." The Court concluded that an ungated opening for ingress and egress does not preclude a determination that the yard is included in the curtilage of the house. Accordingly, the First District found the fencing around the victim's home

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Dubose points to the 4th DCA's opinion in Chambers v. State, 700 So.2d 441 (Fla. 4th DCA 1997) and the 1st DCA's decisions in, Jacobs v. State, 41 So.3d 1004 (Fla. 1st DCA 2010) and Terrell Dubose v. State, 75 So.3d 383 (Fla. 1st DCA 2011). Dubose is mistaken when he says the First and the Fourth District Courts of Appeal have "attempted to recede" from Hamilton. Indeed both Courts relied on Hamilton to find that total enclosure is not required. Even if this was not the case, district courts of appeal may not recede or even attempt to recede from decisions of this Court. Distinguish yes, recede no.

satisfies the enclosure requirement in Hamilton. Id. *See also* Jacobs v. State, 41 So.2d 1004 (Fla. 1st DCA 2010).

The Fourth DCA reached a similar conclusion in Chambers v. State, 700 So.2d 441 (Fla. 4th DCA 1997). In Chambers, the defendant was convicted of burglary of a dwelling as a result of taking a bicycle from behind the victim's house. The victim's yard was enclosed partially by a wooden fence and a chain link fence; however, there was a space of between ten and fifteen feet in order to accommodate the victim's boat and trailer. In response to a question from the jury, the court instructed the jury that the structure did not have to be totally enclosed. Chambers claimed this instruction was error.

The Fourth District disagreed. Citing to this Court's decision in Hamilton, the Court concluded that the fencing, along with the ten to fifteen foot gap, conformed to the "some form of enclosure" requirement of Hamilton. The Court noted that it "cannot imagine that there should be any distinction between crimes committed by those who illegally enter such yards, depending on whether there is a closed gate, an open gate, or no gate." The Court went on to observe that Hamilton does not require total enclosure but only some form of enclosure. Accordingly, the Fourth District concluded that the trial court properly responded to the jury's question. Chambers v. State, 700 So.2d at 442.

Dubose acknowledges that the First and the Fourth District Courts of Appeal have rejected the notion that a yard must be totally enclosed by a fence to be considered the curtilage for the purposes of Florida's burglary statute. Dubose points, however, to two cases decided by the Fifth District Court of Appeal. (IB 51). In neither case, however, did the Fifth District Court of Appeal rule that a yard must be totally enclosed by a fence to constitute the curtilage. Neither did the Fifth District rule that a break in a fence for ingress and egress means a yard cannot be part of the curtilage of a home.

In J.L. v. State, 57 So.3d 924 (Fla. 5th DCA 2011), the defendant stole a go-cart, a four-wheeler, and a skateboard from the victim's yard. The items were leaning against the side of the victim's residence. At trial, the State apparently failed to introduce any photographs of the fence surrounding the victim's yard. Instead, the sole evidence about any enclosure was the victim's mother's testimony that there was a fence "in the back" and a fence "between ... my house and my neighbor's house." The State offered no testimony as to the distance of these fences from the house, whether the two fences connected to each other or whether there was a fence on the side of the house from which the victim's personal property was taken. J.L. v. State, 57 So.3d. at 925. Relying on its earlier decision in Martinez, the Fifth District Court of Appeal found the State had

failed to prove the defendant entered the curtilage of the victim's home with the intent to commit a theft.

In Martinez v. State, 700 So.2d 142 (Fla. 5th DCA 1997), the defendant stole a sander from an unattached and doorless garage. The victim testified at trial that a driveway ran from the street to his two-car garage and a walkway ran between the garage and his house. A fence which was otherwise not described traced the north and east borders of the property. The garage, however, was located at the south end of the property. The victim testified that his property, including the garage, was not enclosed and that only land separated the garage from the nearest home to the south.

The Fifth District Court of Appeal concluded that the victim's unattached garage was not part of the curtilage of his home. The Court observed that "merely identifying the boundaries of a property, as opposed to erecting a barrier to entry to the extended residence of the curtilage, falls short of bringing unattached structures within the curtilage of the home." Martinez v. State, 700 So.2d at 143-144. The Court also agreed with Martinez's suggestion that "enclosed" means to surround on all sides. As was the case in J.L., however, the Fifth District did not opine that a yard surrounded by a fence on all sides save for an opening for ingress and egress could not be considered the curtilage of the home.

Even assuming the Fifth District's decisions in J.L. and Martinez were correctly decided, the facts of these two cases are distinguishable from the facts of this case. Unlike the case in J.L. and Martinez, in this case there was a fence surrounding Ms. Davis' yard on all sides. Moreover, adopting Dubose's view that an opening in the fence means the yard is not part of the home's curtilage would lead to an absurd result. Common sense dictates that it would be rare for a fence surrounding a home not to have some sort of break in it to allow for ingress and egress. Chambers v. State, 700 So.2d 441 (Fla. 4th DCA 1997). As the Fourth District implicitly recognized in Chambers, even requiring a permanent gate would raise the possibility of absurd results. Would the homeowner always have to keep the gate closed to protect the sanctity of the back and side yards? Could the question of whether a homeowner's yard constitutes the curtilage change from day to day depending on whether the gate is open or closed? What would be the result if homeowner opened the gate to go to work but returned to the house for three minutes to retrieve a forgotten item? Would the yard not be the curtilage for those three minutes but would be cartilage for the remainder of the day?

This Court in Hamilton ruled that some sort of enclosure is required. A fence surrounding the house, save for a break for

ingress and egress is "some sort of enclosure." This Court should reject Dubose's third claim on appeal.[14]

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A CHANGE OF VENUE

In this claim, Dubose avers the trial judge erred in denying the defendant's motion for change of venue. Dubose premises his claim on extensive pre-trial publicity, which he claims was highly inflammatory.

A. The Facts

On January 11, 2010, Dubose filed a motion for a change of venue. (TR Vol. VII 1001-1132). Prior to the first trial, the trial court denied the motion subject to the defendant re-raising the motion "after we've tried to select a jury." (TR Vol. XVIII 19). A jury was selected but ultimately a mistrial was declared after the jury was unable to reach a verdict. (TR Vol. XXVIII 2101).

After Dubose's first trial was mistried, the defendant renewed his motion for a change of venue.[15] (TR Vol. XIX 16).

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[14] Any insufficiency is harmless because the evidence supports Dubose's guilt for first degree premeditated murder which the jury found on a special verdict form. *See generally* Hess v. State, 794 So.2d 1249, 1261 (Fla. 2001); Steverson v. State, 787 So.2d 165, 168 (Fla. 2d DCA 2001).

[15] Dubose provides no record citations for the renewal of his motion for a change of venue, the trial court's ruling, or any part of *voir dire* that supposedly supports his claim. Instead,

The court reserved ruling until the parties attempted to seat a jury. (TR Vol. XIX 26).

Just after the some 69 member venire entered the courtroom and was given some preliminary instructions, the trial judge asked each member of the venire whether they had heard any kind of media coverage of this case, eithernewspaper, radio, television, TV, internet, blogs or anything of that nature. The judge went through each member of the venire, one by one. Of the 69 members of the venire, 53 said they had heard something about the case, 15 said they had not heard anything, and 1 said "maybe." (TR Vol. XXIX 39-51).[16] Any member of the venire that stated they had heard anything about the case was individually questioned. (TR Vol. XXIX 51).

During the individual questioning, each juror was asked what they had heard. The trial judge also asked each juror whether they had formed any opinion about the guilt or innocence of the defendant and/or whether they could set aside anything they heard outside the courtroom and decide the case based on what they have seen and heard in the courtroom. (TR Vol. XIX 51-200; TR Vol. XXX 201-262). The trial judge granted ten

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he leaves it to the Appellee and this Court to comb through the record to find the pertinent portions of the record.

[16] Initially, two members of the venire said "maybe." One reconsidered and thought he had heard something. Accordingly, he was questioned individually as well.

challenges for cause against jurors who said they had already formed an opinion as to the guilt of the accused or who had doubts whether they could set aside what they had read or heard about the case and decide the case solely on the evidence. (TR Vol. XIX 130-133; TR Vol. XXX 251, 258).[17]

However, there was no difficulty picking a jury. Indeed, a jury was selected from the initial venire with some to spare. The jurors were: Larosa Taylor-Johnson, Robert Loria, Ali Hightower, Tomi Chavez, Mitchell Warren Currie, Phillip Phillips (foreman), Raymond Woconish, William Hazelhurst, Scott Smith, Christopher Dupries, Anthony Gambitta, and John Feeney. Deborah Poulin and Gerald Walker were alternates.

Of the jurors that were ultimately selected, six of the jurors had not heard of the case at all before the trial. (TR Vol. XIX 40-44, 49).[18] The remaining six had heard something about the case but unequivocally stated they could set aside anything they had heard before and decide the case solely on the

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[17] Two others were excused apart from pre-trial publicity, one who was elderly and could not read. Another was excused because he was a listed witness in the case.

The judge denied several challenges for cause made solely because members of the venire had heard or read there was a previous mistrial. The trial judge granted Dubose an additional three peremptory challenges to "replace" three denied challenges. (TR Vol. XXXI 595-614). Dubose never made any attempt to exercise a challenge for cause against any of the 12 potential jurors that ultimately sat on his jury.

[18] These six were Ms. Hightower, Mr. Woconish, Mr. Smith, Mr. Feeny, Ms. Chavez and Mr. Phillips (the foreman).

evidence presented at trial. (TR Vol. XIX 53-54, 57-58, 89, 98, 119, 165). Additionally, of those jurors that had been exposed to some pre-trial publicity, most knew very little. Ms. Taylor-Johnson had seen commercials (apparently about the memorial service for Dreshawna) but it "really did not stay in my head long." (TR Vol. XIX 53-54). Another, Mr. Loria, saw a news commercial/blog for the memorial service and knew only that a child was shot. He did not go to the memorial service. (TR Vol. XIX 57-58). Mr. Currie, whose initial response during *voir dire* that he had "maybe" heard something told the court that back in 2006 he had likely read something in the Florida Times Union. He remembered reading that a young bright child was shot in her bedroom while she was doing her homework or "something of that nature." (TR Vol. XIX 89). Mr. Hazelhurst heard it was a drive-by shooting and an 8 year old girl got killed. The only other thing he knew that it has been quite a while since it happened. (TR Vol. XIX 98). Mr. Gambitta "vaguely" remembered that it was a drive-by shooting, someone wanted to settle a score and a child got in the way. He lived in Miami at the time of the shooting. (TR Vol. XIX 164-165). Mr. Dupries heard it involved three brothers, a drive-by shooting and a little girl who was killed. He had formed no opinion and could set anything he heard aside and decide the case solely on the evidence. (TR Vol. XIX 118-119).

B. The Standard of Review

The standard of review is an abuse of discretion. Serrano v. State, 64 So.3d 93 (Fla. 2011). If an appellate court determines that reasonable persons could differ as to the propriety of the action taken by the trial court, there can be no finding of an abuse of discretion. Brown v. Estate of Stuckey, 749 So.2d 490 (Fla. 1999)

C. Law Governing Motions for Change of Venue

A trial judge is not required to grant a motion for a change of venue simply because there is extensive pre-trial publicity. Instead, the test for determining a change of venue is whether the general state of the minds of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely upon the evidence presented in the courtroom. Serrano v. State, 64 So.3d at 112. The defendant bears the burden to show this is the case. Id. While a trial judge may grant a motion for change of venue prior to trial, the need to change venue ordinarily should not be determined until an attempt is made to select a jury. Serrano v. State, 64 So.3d at 112.

In ruling on a motion for a change of venue, the trial court should consider the following: (1) the extent and nature

of any pretrial publicity; and (2) the difficulty encountered in actually selecting a jury. Rolling v. State, 695 So.2d 278, 285 (Fla. 1997). The ability to seat an impartial jury in a high-profile case may be demonstrated by either a lack of extrinsic knowledge among members of the venire or, assuming such knowledge, a lack of partiality. If prospective jurors can assure the court during *voir dire* that they are impartial, despite their extrinsic knowledge, they are qualified to serve on the jury and a change of venue is not necessary. Serrano v. State, 64 So.3d 93, 112 (Fla. 2011).

D. This Case

In his initial brief, Dubose focuses solely on the first prong of Rolling; the extent and nature of pre-trial publicity and simply ignores the fact that there was no difficulty seating a jury. Indeed, as noted above, six of the jurors had no exposure to pre-trial publicity and the other six knew very little. Not a single member of the venire told the court that they had heard the media, or anyone else for that matter, describe the brothers as "horrific, cowardly, thugs or miscreants." (IB 55). Not one member of the venire told the court that they had read or heard any opinion that the brothers were guilty, went into hiding after the murder, or had made any inculpatory statements. Additionally, all six who had some exposure to pre-trial publicity assured the court during

individual *voir dire* that they could set aside anything they did hear and decide the case solely on the evidence and the instructions of the court. Dubose did not even challenge their veracity or credibility as to those assurances. Because there was no difficulty in selecting the jury and because the six jurors who had been exposed to some publicity assured the court of their impartiality, the trial judge did not abuse his discretion in denying the defendant's motion for change of venue. Serrano v. State, 64 So.3d 93, 112 (Fla. 2011).

ISSUE V

WHETHER DUBOSE'S SENTENCE TO DEATH IS UNCONSTITUTIONAL PURSUANT TO RING v. ARIZONA

In this claim, Dubose avers his death sentence is unconstitutional pursuant to Ring v. Arizona, 536 U.S. 584 (2002). Dubose acknowledges this Court has rejected the same claim he raises here but invites this Court to reconsider. This Court should decline the invitation for two reasons.

First, Dubose relies on a decision of a single federal district court in Florida, in Evans v. McNeil, (S.D. Fla. Case No. 08-14402-civ, 2011). After Dubose, filed his initial brief, the Eleventh Circuit Court of Appeals overturned the district court's ruling granting Evans' petition for a writ of habeas corpus. The Court rejected Evans' claim that Florida's capital sentencing statute was unconstitutional pursuant to Ring. Evans

v. Secretary, Florida Dept. of Corrections, - F.3d -, 2012 WL 5200326 (11th Cir. 2012).

Second, Dubose was previously convicted of a prior violent felony. Although Dubose contends that his prior violent felony was not "violent," Dubose did not raise a separate challenge to this aggravator on appeal. Dubose also committed the murder in the course of an underlying felony.

This Court has repeatedly held that Ring will not act to disturb a sentence to death when the defendant was previously convicted of a violent felony. Heyne v. State, 88 So.3d 113 (Fla. 2012); Hodges v. State, 55 So.3d 515, 540 (Fla. 2010). This Court has also rejected Ring claims when the defendant committed the murder in the course of an enumerated felony. Baker v. State, 71 So.3d 802 (Fla. 2011) (explaining that Ring is not implicated when the trial court has found as an aggravating circumstance that the crime was committed in the course of a felony). Based on now well-established precedent, this Court should reject Dubose's Ring claim.

ISSUE VI

WHETHER DUBOSE'S SENTENCE TO DEATH IS DISPROPORTIONATE

This Court considers the proportionality of the death sentence in every capital case. Barnhill v. State, 834 So.2d 836, 854 (Fla. 2002). In deciding whether death is a proportionate penalty, this Court considers the totality of the

circumstances of the case and compares the case with other capital cases in Florida. Douglas v. State, 878 So.2d 1246, 1262 (Fla. 2004).

A. Relative Culpability

Dubose's argument on this claim rests, primarily, on his allegation that equally culpable co-defendants, specifically his two brothers and Maxie Wilson, were treated differently. Dubose points to the fact that Maxie Wilson was never charged at all and both of his younger brothers were sentenced to life in prison. (IB 72).

Where more than one defendant is involved in the commission of a crime, this Court performs an analysis of relative culpability to ensure that equally culpable co-defendants were treated alike in capital sentencing and received equal punishment. Shere v. Moore, 830 So.2d 56, 60 (Fla. 2002). When a co-perpetrator is equally culpable or more culpable than the defendant, disparate treatment of the co-perpetrator may render the defendant's punishment disproportionate. Farina v. State, 801 So.2d 44 (Fla. 2001). When co-perpetrators are not equally culpable, however, the death sentence of the more culpable defendant is not disproportionate when the others receive a life sentence. *See* Jennings v. State, 718 So.2d 144, 153 (Fla. 1998). *See also* Larzelere v. State, 676 So.2d 394 (Fla. 1996) (disparate treatment of defendants is not impermissible in

situations where a particular defendant is more culpable); Cardona v. State, 641 So.2d 361 (Fla. 1994); Hoffman v. State, 474 So.2d 1178 (Fla. 1985).

Wilson's situation is the easiest. This is so for two reasons. Wilson was not convicted of first degree murder. Indeed, Wilson was not charged and convicted at all in connection with Dreshawna's murder. A relative culpability analysis is not appropriate when the comparator defendant is not convicted of first degree murder. Shere v. Moore, 830 So.2d 56 (Fla. 2002) (noting that a relative culpability analysis comes into play only when the co-defendant has been found guilty of the same degree of murder).

Second, a relative culpability analysis is not appropriate when a co-defendant's lesser sentence, or in this case no charges or sentence at all, was the result of a plea agreement or prosecutorial discretion. Melendez v. State, 612 So.2d 1366, 1368-69 (Fla. 1992) ("Arguments relating to proportionality and disparate treatment are not appropriate where the prosecutor has not charged the accomplice with a capital offense."). In accord with well-established case law, the fact that the State decided not to prosecute Maxie Wilson does not render Rasheem Dubose's sentence to death disproportionate. Krawczuk v. State, 92 So.3d 195, 207 (Fla. 2012); Wade v. State, 41 So.3d 857, 868 (Fla. 2010).

On the other hand, TaJuan and Terrell were both convicted of first degree murder. Likewise, neither received their life sentence as a result of prosecutorial discretion. Accordingly, a relative culpability analysis is appropriate. However, TaJuan and Terrell's life sentences do not render Rasheem's sentence to death disproportionate in this case.

The trial judge made several relevant findings, all of which are supported by competent substantial evidence. First, the trial court found that "it is abundantly clear that Rasheem Dubose is the leader among the Dubose siblings." (TR Vol. XI 1890). Second, the trial judge found that Rasheem Dubose fired the most rounds into the victim's home and fired the bullet that actually killed Dreshawna. The court found that of the 29 shots fired into the victim's home, Dubose fired 23 of them (≈80%). (TR Vol. XI 1876). The trial court also found that "as the leader and 'father figure' of this group, it appears that he [Rasheem] as the most culpable of the three co-defendants." (TR Vol. XI 1890).

This Court has consistently affirmed death sentences for the more culpable defendant where the evidence establishes he was the dominant force in the killing. Kormondy v. State, 845 So.2d 41 (Fla. 2003).[19] This is true even when the defendant's

[19] In Kormondy, for example, this Court rejected any notion that Kormondy's co-defendant's life sentences rendered Kormondy's

co-perpetrators actively participate in inflicting injuries, albeit non-fatal ones, to the victim prior to his or her death.

While neither TaJuan nor Terrell actually inflicted any injuries to the victim or any other person in the victim's home, for that matter, both brothers unquestionably fired into the victim's home. As such, cases where the co-perpetrators also wielded a knife or actively participated to some degree in the actual assault on the victim are analogous cases to which this Court may look, and apply to the facts, in this case.

In Brown v. State, 721 So.2d 274 (Fla. 1998), the defendant asked this Court to consider his co-defendant's lesser sentence.[20] Although Brown had initially confessed to stabbing the victim multiple times in the chest and in the back, Brown claimed that McGuire slit the victim's throat. This Court, apparently assuming for the purposes of its relative culpability

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death sentence disproportionate. Kormondy was the actual shooter. Yet, both of Kormondy's co-defendant's were heavily involved in the commission of the crime, including raping C.M. and invading the victim's home while armed. One of the two fired a gun in the same bedroom where C.M. lay after being raped by all three perpetrators at gunpoint. Kormondy is a good comparator case. Kormondy v. State, 845 So.2d 41 (Fla. 2003).

[20] It does not appear from this Court's opinion in Brown that the defendant was asking this Court to consider McGuire's disparate treatment as part of its proportionality review. Nonetheless, when considering the issue that Brown did raise, this Court cited to several cases in which this Court analyzed the relative culpability of the co-defendants in its proportionality review. Brown v. State, 721 So.2d 274, 282 (Fla. 1998).

analysis that McGuire did inflict the neck wounds to the victim, found no grounds to vacate Brown's sentence to death.[21] This Court noted that evidence that McGuire slit the victim's throat did not exonerate Brown as the more culpable co-defendant because the medical examiner testified that the neck wounds were nonfatal injuries, despite the substantial blood loss. The wounds to the chest and lower back, however, were fatal. Given that McGuire inflicted non-fatal wounds, while Brown inflicted the fatal ones, this Court rejected Brown's disparate treatment claim. Brown v. State, 721 So.2d at 282.

Brown is a good comparator case. In Brown, both defendants participated in the stabbing. Brown, however, was the only one who inflicted the fatal wounds. In the case at bar, all three brothers fired at the victim's home. Rasheem, however, fired 80% of the rounds. Rashemm also fired the fatal shot. Looking to this Court's decision in Brown, this Court should reject any notion that TaJuan and Terrell's life sentences render Rasheem's sentence to death disproportionate.

Another comparator case is Hernandez v. State, 4 So.3d 642 (Fla. 2009). In Hernandez, two men invaded the home of the

[21] McGuire denied participating in the stabbing at all. Brown said he did. When this Court did the relative culpability analysis, it appears the court gave Brown the benefit of the doubt. This Court still found Brown more culpable because even under Brown's version of events, McGuire inflicted non-fatal wounds while Brown inflicted the fatal ones. Brown v. State, 721 So.2d 274, 282 (Fla. 1998).

female victim. The victim was suffocated, stabbed, and her neck was broken. Hernandez got death while his co-defendant, Christopher Shawn Arnold, was sentenced to life in prison without the possibility of parole after pleading *nolo contendere* to felony murder with a deadly weapon. Hernandez claimed that his death sentence was disproportionate because Arnold was equally culpable. This Court rejected his claim.

This Court observed that while Arnold was a participant in the crimes and inflicted non-fatal injuries by smothering the victim with a pillow, it was Hernandez, and not Arnold who inflicted the fatal injuries by breaking the victim's neck and slashing her throat.[22] Even though Arnold had actually inflicted injuries to the victim, this Court found Hernandez' death sentence proportionate because Hernandez actually inflicted the fatal injuries. Hernandez v. State, 4 So.3d at 671-672. *See also* White v. State, 817 So.2d 799, 801-02, 809-11 (Fla. 2002) (finding the defendant's death sentence proportionate where the defendant delivered the fatal stab wounds to the victim after his codefendant suggested they teach the victim a lesson and they beat her, drove her to the end of a deserted road, and pulled her out of the car and passed her over a barbed wire fence before killing her); Brooks v. State, 918 So.2d 181, 186-

[22] This Court also noted that the record "suggests" that Arnold expressed reluctance to finish off the victim even helping her breathe.

87, 208-10 (Fla. 2005) (holding that the defendant's death sentence was proportionate where the defendant was the "knifeman" in the planned attack on the codefendant's paramour and her infant daughter); Hannon v. State, 638 So.2d 39, 41, 44 (Fla. 1994) (concluding that the defendant was more culpable and his death sentence was justified where he delivered the fatal blow to one of the victims, after his codefendant had stopped stabbing the victim, and where he shot the other victim); Colina v. State, 634 So.2d 1077, 1078, 1082 (Fla. 1994) (agreeing with the trial court that the codefendant's participation was lesser where the codefendant hit one of the victims only once and the defendant was responsible for the lethal blows that killed both victims).

Similar to the case in Hernandez, both TaJuan and Terrell actively participated in firing bullets into the victim's home. Even together, however, they were responsible for only 6 of the 29 shots fired into the home. Moreover, it was Rasheem and not TaJuan or Terrell who fired the bullet that killed Dreshawna. Relying on Hernandez and Brown, this Court should reject any notion that TaJuan and Terrell's life sentences render Rasheem's disproportionate.

B. Proportionality

Apart from a relative culpability analysis, Rasheem's sentence to death is proportionate when compared to other cases in Florida. In sentencing Dubose to death, the trial judge found the state had proven four aggravators beyond a reasonable doubt: (1) Dubose had previously been convicted of a violent felony (great weight); (2) the defendant knowingly created a great risk of death to many persons (great weight); (3) Dubose committed the murder in the course of a burglary (great weight), and (4) the victim was a child under the age of 12 (great weight). (TR Vol. XI 1877-1880).

The trial court considered and weighed two statutory mitigators: (1) Dubose's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired (Slight weight); and (2) age (little to no weight). The trial court also found and weighed several non-statutory mitigators: (1) Dubose saved the life of a drowning child (slight weight); (2) Dubose was good to his grandmother and helped her maintain her home (very slight weight); (3) Dubose was a loving and caring father (slight weight); (4) Dubose was a good brother and tried to provide for and protect his family (very slight weight); (5) Dubose shares the love and support of his family (slight weight); (6) Dubose exhibited good courtroom behavior (very slight weight); (7)

Dubose maintained gainful employment (very slight weight); (8) Dubose grew up without any significant role models in his life (very slight weight), and (9) Dubose suffers depression from abandonment issues relating to his mother (minimal weight). (TR Vol. XI 1881-1888).

Dubose does not cite to a single case to which this Court can look to find Dubose's sentence to death disproportionate. However, there are cases to which this Court may look to find Dubose's sentence to death proportionate. For instance, in Heath v. State, 648 So.2d 660 (Fla. 1994), the defendant, along with his brother, killed Michael Sheridan in the course of a robbery. The trial court found two aggravators, prior violent felony and murder committed in the course of a felony. The trial court found three mitigating circumstances: that Heath was under the influence of extreme mental or emotional disturbance, based upon his consumption of alcohol and marijuana; that Heath demonstrated good character in prison; and that codefendant Kenneth Heath, Heath's younger brother, received a life sentence. The court found that the aggravating circumstances outweighed the mitigating factors and sentenced Heath to death for the first-degree murder conviction. This Court found Heath's sentence to death proportionate. Although not on all fours from the case at bar, this Court may look to Heath to find Dubose's sentence proportionate. Heath got death while his

younger brother got life. Heath, like Dubose, was the oldest of the murderous brothers. While Heath's prior conviction was more serious than Dubose's, the trial court in Dubose found two additional aggravators to exist, including that the victim was under the age of 12. Moreover, the trial court in Heath found that Heath had been drinking and taking drugs prior to murdering Mr. Sheridan, the trial judge in this case made no finding that Dubose was under the influence of drugs or alcohol at the time he murdered Dreshawna Washington-Davis. Heath is a case to which this Court may look to find Dubose's sentence to death proportionate.

Another case to which this Court may look to find Dubose's sentence to death proportionate is McMillan v. State, 94 So.3d 572 (Fla. 2012). McMillan shot his estranged girlfriend to death. A couple of days after the murder, McMillan also shot at a police officer when the officer tried to apprehend him. McMillian was convicted of one count of premeditated murder and one count of attempted second degree murder. The jury recommended that McMillan be sentenced to death by a vote of 10-2.

In aggravation, the trial court found: (1) prior violent felony based on McMillian's conviction for attempted second-degree murder for shooting at a police officer (great weight), and (2) felony probation stemming from McMillian's felony

fleeing and eluding offense in Georgia (great weight). The trial court found one statutory mitigator; no significant criminal history (little weight) and several non-statutory mitigators: (1) McMillian was raised in the church (very slight weight); (2) McMillian loves and is loved by his family and friends (little weight); (3) McMillian has a consistent history of employment (little weight); (4) McMillian's biological mother was not an active participant in his upbringing (slight weight); (5) McMillian has an IQ of 76 (little weight); (6) McMillian behaved appropriately during trial (slight weight); (7) McMillian suffered from some mental or emotional distress at the time of the murder (some weight).

This Court found McMillan's sentence to death proportionate. McMillan is a good comparator case. Both crimes were committed because of a perceived wrong. The aggravators are similar as are the non-statutory mitigators.

Both were previously convicted of violent felonies. However, in contrast to Dubose, McMillan's criminal conviction stemmed from conduct after the murder. Dubose, however, murdered Dreshawna less than a year after he attempted to take a police officer's gun when the officer detained Dubose in connection with a report of a suspicious person. (TR Vol. XI 1878; TR Vol. XXXIX 90-102). Likewise, Dubose committed the murder in the course of an enumerated felony and killed an 8

year old child. While both have lower range IQs, McMillan's IQ was 76 while Dubose's IQ is 82, a score that is considered low average. This Court should look to McMillan to find Dubose's sentence to death proportionate. *See also* Bailey v. State, 998 So.2d 545 (Fla. 2008) (affirming death sentence as applied to a defendant who fatally shot a police officer during a traffic stop based on trial court's determination that two weighty aggravators (avoid arrest and felony probation) outweighed the statutory age mitigator (very little weight) and eight nonstatutory mitigators including low IQ, history of mental illness, intoxication, and coming from a broken home (little weight as to each); Shellito v. State, 701 So.2d 837 (Fla. 1997) (death sentence proportionate for 18 year old defendant who killed another 18 year old, apparently because Shellito was miffed when the intended robbery victim had no money, two aggravators were found [not HAC or CCP], and in mitigation the trial court found the age mitigator and the catch all); Pope v. State, 679 So.2d 710 (Fla. 1996) (affirming death penalty as to defendant who fatally beat and stabbed his girlfriend, based on the trial court's determination that the prior violent felony and pecuniary gain aggravators outweighed both statutory mental health mitigators and several nonstatutory mitigators, including intoxication at the time of the murder and fighting with the victim girlfriend just before the murder).

ISSUE VII

WHETHER THE TRIAL JUDGE ERRED IN REFUSING TO CONSIDER AS A MITIGATOR DUBOSE'S ALLEGED ATTEMPT TO ENTER INTO A PLEA AGREEMENT WITH THE STATE

In this claim, Dubose avers that the trial judge erred in refusing to consider, in mitigation, Dubose's attempt to enter into a plea agreement with the State. This claim does not appear to be a claim the trial judge erred in refusing to allow Dubose to present such evidence to the jury. Instead, this claim appears to be solely aimed at the trial judge's refusal to consider Dubose's "attempt" to enter into a plea agreement as a mitigator in his sentencing order.

Dubose cites to no case law to support his claim. Indeed, Dubose does not seem to dispute that as a general rule, evidence of any "attempt" to plead guilty is inadmissible. *See* Donaldson v. State, 722 So.2d 177 (Fla. 1998). Dubose's theory of admissibility, however, is that the State opened the door to its admissibility, during the guilt phase, when it played portions of Dubose's interview with the police in which Dubose stated that if the State offered him a plea deal, he was willing to take it. (IB 80). Dubose claims the refusal of the trial judge to consider Dubose's "attempt" to plead guilty is reversible error. (IB 80). This claim should be denied for three reasons.[23]

[23] Although Dubose does not mention it, this claim was preserved for appeal because Dubose did argue, at a March 2010 hearing,

First, before this Court, Dubose fails to point to any record evidence to support his claim that, prior to trial, he "attempted" to plead guilty. Nor does Dubose point to any record evidence of the circumstances surrounding his attempt.

In his statement of the facts supporting this particular argument, Dubose cites only to Volume X, pages 1593-1607. (IB 79). However, this citation is not to record evidence.

Instead, the citation is to a pleading filed by defense counsel, on March 1, 2010, in support of a motion to strike the state's notice of its intent to seek the death penalty. (TR Vol. X pages 1593-1607). Such a pleading is not substantive evidence supporting a mitigator. While the burden on the defendant to present evidence in mitigation is light, there is still some burden. That is, the defendant must present evidence to "reasonably establish" any mitigator he wishes the court to consider. *See generally* Knowles v. State, 632 So.2d 62 (Fla. 1993).

At a hearing held on March 1, 2010, the State specifically contested the "facts" set forth in the motion concerning any plea negotiations in Dubose's case. (TR Vol. XV 2503). Still Dubose offered no evidence to support his alleged "attempt" to plead guilty. Failure to offer any actual evidence to the trial

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that Dubose's offer to plead guilty was admissible because the state opened the door to such evidence. (TR Vol. X 2505-2506)

court that Dubose attempted to plead guilty means the trial judge's refusal to consider it cannot be error.

Second, this Court should reject this claim on appeal because evidence of a defendant's offer to plead guilty is not admissible. Section 90.401, Florida Statutes, provides that evidence of an offer to plead guilty is inadmissible in any criminal proceeding. The same rule is true even if the state "opens the door." Reese v. State, 694 So.2d 678 (Fla. 1997).[24]

In Reese, the defendant claimed it was error for the trial court to refuse to allow him to tell the jury that he offered to plead guilty when the state asked him, during cross-examination, whether he was doing his best to get out of the death penalty. This Court found no error. Id. at 684. See also Donaldson v. State, 722 So.2d 177, 188 (Fla. 1998); Bottoson v. State, 443 So.2d 962, 965 (Fla. 1983). It is axiomatic that a trial court does not err in refusing to consider evidence in mitigation that is inadmissible.

Finally, this Court may deny the claim because any error is harmless in light of the aggravating circumstances.[25] The trial

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[24] The State is not conceding it opened to the door to such evidence. The State's argument presumes it only for the sake of argument.

[25] In any event, Dubose asks for the wrong remedy. Because this is a sentencing order claim, any remand would only require the trial judge to consider Dubose's attempt to plead guilty and then reweigh it along with all the other mitigation against the proven aggravators.

court found four aggravators had been proven beyond a reasonable doubt, giving them all great weight. The trial court also found that each of the four aggravating factors standing alone would outweigh all of the mitigators. (TR Vol. XI 1891). There is simply no reasonable probability the trial judge's failure to consider Dubose's attempt to plead guilty to save his own life affected the judge's sentence to death. Ault v. State, 53 So.3d 175, 195-196 (Fla. 2010) (when there is no likelihood that consideration of the excluded mitigating could have resulted in a lesser sentence, any error is harmless).[26]

ISSUE VIII

WHETHER THE TRIAL JUDGE ERRED IN DENYING DUBOSE'S MOTION TO CONTINUE THE PENALTY PHASE OF HIS CAPITAL TRIAL

In this claim, Dubose alleges the trial judge erred in denying Dubose's motion(s) to continue the penalty phase of his capital trial. Dubose avers a continuance was required because results of a PET scan, performed by a Dr. Gur, were not available at the time of the penalty phase.[27] Dubose argues that

[26] To the extent that Dubose's claim touches on any alleged error in refusing to allow him to present evidence of remorse, the record refutes any such notion. The trial court did not refuse to consider Dubose's claim that he was remorseful. Although rejecting the mitigator as not proven, the Court put up no barrier to Dubose's argument that the trial court should consider the "remorse" mitigator. (TR Vol. XI 1868).

[27] Dubose does not provide a single record citation in support of this claim leaving Appellee and this Court to search the voluminous record for the relevant procedural history. While Dubose cites to the Spencer hearing where Dubose discussed the

if the jury would have heard evidence revealed by the PET scan, two jurors would have "clearly" been swayed to a life recommendation. (IB 83).

This claim may be denied for three reasons. First, Dubose never asked for a continuance of the penalty phase so that he could obtain the results of the PET scan. Failure to do so means that Dubose did not preserve this issue for appeal. Second, a PET scan was not actually requested until weeks after the penalty phase. The trial judge does not err in failing to grant a motion for a continuance to await the results of testing that has not yet been requested or conducted. Third, any error is harmless in light of Dr. Eisenstein's testimony during the penalty phase of Dubose's capital trial.

A. The Facts

The record shows that in this case, trial counsel started preparing for the mitigation case very early on in the proceedings. On February 26, 2007, over three years before the penalty phase was conducted in this case, trial counsel filed a motion to incur costs of an expert psychologist. (TR Vol. I 39). The motion was granted the same day. (TR Vol. I 41).

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delay in getting the PET scan results, Dubose does not raise a claim that the trial judge erred in failing to continue the Spencer hearing. It is likely that Dubose does not raise such a claim because Dubose concedes that the trial judge allowed Dubose to submit the PET scan results prior to sentencing. Indeed, the trial court's sentencing order reflects consideration of the PET scan results. (TR Vol. XI 1883).

Dr. Krop evaluated the defendant on at least three occasions prior to March 30, 2009, and recommended a "comprehensive" neuropsychological exam. (TR Vol. I 59). As a result, on March 30, 2009, nearly a full year before the penalty phase, trial counsel requested authority to incur costs, and to have the defendant transported, for a "comprehensive" neuropsychological exam. Both motions were granted on April 8, 2009. (TR Vol. I 60-62).

On February 12, 2010, while Dubose's second trial was still on-going, the parties met to discuss possible dates for the penalty phase. Counsel for Mr. Dubose agreed to March 9, 2010. (TR Vol. XXXIV 1191). On February 18, 2010, the jury found Dubose guilty as charged. (TR Vol. VIII 1263)

On March 1, 2010, however, counsel for Mr. Dubose filed a motion to continue the penalty phase. For the most part, the motion was boilerplate, setting forth the responsibilities of penalty phase counsel.[28] (TR Vol. IX 1580-1588).

While at the tail end of the motion, counsel explained that some things still needed to be done, counsel offered no reason why these tasks were not, and could not have been, accomplished in the three years since Mr. Kuritz had been appointed as trial

[28] Indications that the motion was little more than boilerplate is evident by the fact that second chair counsel is referred to as "he" while Dubose's second chair counsel is a "she." (TR Vol. IX 1586, 1588).

counsel or in the seven months since penalty phase counsel, Ms. Eckels, had been appointed. (TR Vol. I 20, 69). Importantly, nowhere in the motion did Dubose claim he needed a continuance because he wished to conduct a PET scan or was awaiting the results of a PET scan. (TR Vol. IX 1580-1588).

On the same day as the motion was filed, a hearing was held. Trial counsel asked for a three week continuance. Counsel for Dubose made no mention of a PET scan. Nor did she request time to conduct a PET scan. (TR Vol. XV 2513-2536). The trial judge denied the motion to continue the penalty phase. (TR Vol. IX 1579).

On March 5, 2010, four days before the penalty phase was due to commence, counsel for Mr. Dubose filed a motion to appoint Dr. Hyman Eisenstein, a neuropsychologist, to assist the defense in the preparation and presentation of its mitigation case. The court granted the motion the same day. (TR Vol. X 1631-1633).[29]

In addition to filing a motion to appoint Dr. Eisenstein, counsel for Mr. Dubose filed a renewed motion to continue the penalty phase. Dubose asserted two bases for his request. First, that Dr. Miller, a psychiatrist, had died during the guilt phase of Dubose's initial trial. (TR Vol. X 1636).

[29] Dr. Eisenstein testified at the penalty phase which was held on March 10-11, 2010.

Dubose offered no explanation, in his motion, how Dr. Miller's death necessitated the need for a continuance.

Second, Dubose averred that Dr. Krop had yet to complete his evaluation, including a comprehensive neuropsychological exam. Trial counsel alleged that she had just received school records on March 1, 2010, and that Dr. Krop needed additional time (2-3 weeks) to conduct interviews and to investigate matters such as Dubose's early development history, early physical history, and Dubose's history and extent of any mental or physical abuse. (TR Vol. X 1637-1639).

Dubose offered no explanation why the records had not been sought earlier or why Dr. Krop had not completed his evaluation. Such an explanation was certainly warranted given the fact that, a year before, the trial court had authorized costs, and ordered the defendant transported, for the express purpose of a "comprehensive" neuropsychological exam. (TR Vol. I 60-62). Like in the original motion for a continuance, Dubose made no claim that a continuance was necessary because he wished to conduct a PET scan or was awaiting the results of a PET scan. (TR Vol. X 1636-1640).

The court held a hearing on the motion. Dubose made no claim that a continuance was necessary to conduct a PET scan or to get results. (TR Vol. XVI 2630-2643).

On March 9, 2010, the penalty phase began. Prior to the start of the penalty phase, trial counsel did not renew her motion for continuance. Nor did she assert that any such continuance was necessary because the defense wished to conduct a PET scan or that the defense was waiting the results of a PET scan. (TR Vol. XXXIX 5-32).

The first mention of a PET scan came during Dr. Eisenstein's testimony. Dr. Eisenstein suggested that a PET scan might be indicated. (TR Vol. XXXIX 184-185). Trial counsel also mentioned in front of the jury that no PET scan had been done and as such, no results were available. (TR Vol. XXXIX 189). However, neither before nor after Dr. Eisenstein's testimony did Dubose request a continuance in order to conduct a PET scan. (TR Vol. XXXIX 151: TR Vol. XL 205-218).

The first mention of an actual intent to request a PET scan that counsel for the Appellee can find in this record is on April 29, 2010, some six weeks after the penalty phase had been completed. Counsel for Mr. Dubose filed a pleading (Motion to Extend Time to File Additional Motions) in which counsel mentioned that he was attempting to "obtain costs information relating to the Defendant having a PET scan completed" so that he could file a motion to incur costs of the scan. (TR Vol. X 1706). Counsel advised the court that in accordance with the procedures of the Justice Administration Commission (JAC), he

was required to seek authorization of the JAC before filing a formal motion in the trial court. (TR Vol. X 1705-1706).

On September 1, 2010, counsel for Mr. Dubose filed a motion to incur costs of a PET scan specialist, Dr. Reuben Gur. (TR Vol. X 1750-1751). The Court granted the motion on October 6, 2010, more than a month before the Spencer hearing. (TR Vol. X 1760-1761). On October 28, 2010, the PET scan was conducted. (TR Vol. XVII 3088).

B. The Standard of Review

The standard of review is an abuse of discretion. If an appellate court determines that reasonable persons could differ as to the propriety of the action taken by the trial court, there can be no finding of an abuse of discretion. Brown v. Estate of Stuckey, 749 So.2d 490 (Fla. 1999). This Court has noted that it will review with caution the exercise of experienced discretion by a trial judge in ruling on a motion for continuance. Doorbal v. State, 983 So.2d 464, 486 (Fla. 2008).

C. The Law and this Case

This claim should be denied for two reasons. First, it is not preserved for appeal. While counsel for Mr. Dubose did file a motion to continue the penalty phase on March 1, 2010, along with a renewed motion five days later, Dubose never alleged a

continuance was needed to await results of a PET scan. (TR Vol. IX 1580-1588, TR Vol. X 1636-1640).

In order to preserve an error for appeal, the defendant must make the same arguments below as he does on appeal. Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982) ("[I]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below."). Because Dubose made no claim below that a continuance of the penalty phase was necessary because the defense was waiting for PET scan results, this claim is not preserved for appeal.

This claim may also be denied because it is without merit. Dubose's claim is that the trial court erred in denying the motion to continue the penalty phase because results of a PET scan, performed by a Dr. Gur, were not available at the time of the penalty phase. However, the record in this case demonstrates that a PET scan was not even requested, let alone conducted, until weeks after the penalty phase had concluded. A trial court does not err in failing to continue a penalty phase to await the results of tests that have not been requested or conducted.

Finally, any error is harmless. The essential findings of the PET scan, as summarized by trial counsel, was that Dubose had reduced metabolism in some areas of his brain and increased

metabolism in another. Dr. Gur noted that the regions of the brain that were affected involved, threat detection, impulse control, memory and ability to regulate behavior. The scan also noted that Fetal Alcohol Syndrome "may" be indicated. (TR Vol. XI 1794).

Before the jury, however, Dr. Eisenstein testified about brain damage, impulse control, evidence of fetal alcohol influence, and Dubose's ability to regulate his behavior. Dr. Eisenstein's penalty phase testimony may be found at TR Vol. XXXIX 151-200 and TR Vol. XL 205-218).

Dr. Eisenstein testified that it wasn't Dubose's choice or decision to commit the crime. Dr. Eisenstein explained that a person (like Dubose) who has executive functioning impairment acts in a reactive manner rather than a proactive manner. (TR Vol. XXXIX 200).

Dr. Eisenstein also testified that Dubose has an 82 IQ, in the low average range. (TR Vol. XXXIX 179). Testing showed mild to moderate impairment in executive functioning. (TR Vol. XXXIX 183). According to Dr. Eisenstein, Dubose has problems with judgment, reasoning, and decision making skills. (TR Vol. XXXIX 183). Testing indicates frontal lobe involvement.

Dr. Eisenstein explained that the frontal lobe affects the ability to stop oneself from doing something wrong. (TR Vol. XXXIX 184). Dr. Eisenstein explained why Dubose's brain is

abnormal. (TR Vol. XXXIX 191). Dr. Eisenstein told the jury that there was some indication of drug and alcohol usage neonatally. (TR Vol. XXXIX 190). Dr. Eisenstein also explained that Dubose's own drug and alcohol use can cause brain damage.

Dr. Eisenstein also told the jury that, in his opinion, Dubose did not have the ability to walk away from the situation, after Davis had humiliated him. According to Dr. Eisenstein, Dubose did not have the judgment and thinking processes to walk away. Once "that" took over Dubose's thinking, everything he did was "automatic." (TR Vol. XXXIX 195). Dr. Eisenstein told the jury that if Dubose could have been proactive, this "tragedy" would not have occurred. (TR Vol. XXXIX 195).

During cross-examination, Dr. Eisenstein's reiterated that in his opinion, Dubose has brain damage. When the state questioned Dr. Eisenstein about the fact there was no PET scan, Dr. Eisenstein testified that, while a PET scan would "further" corroborate an organic basis for Dubose's brain damage, the scientific data from his neuropsychological evidence was substantial and significant. (TR Vol. XL 206).

Dr. Eisenstein's testimony rendered any error in failing to grant a continuance for PET scan results harmless. Dr. Eisenstein testimony allowed the defense to argue that Dubose deserved a life sentence because, through no fault of his own, he was a brain damaged man who had poor impulse control and no

ability to control his reaction to his humiliation on the day of the murder. Given that Dr. Eisenstein's testimony touched on the critical areas revealed by the PET scan, any error in failing to grant a continuance was harmless.

ISSUE IX

WHETHER CUMULATIVE ERROR DENIED DUBOSE A FAIR TRIAL

In his final claim, Dubose argues that he was denied a fair trial based upon cumulative errors committed by the trial court. However, where individual claims of error alleged are without merit, the claim of cumulative error must fail. See Downs v. State, 740 So.2d at 509 n. 5. In this case, the trial court committed no error. Because the alleged individual errors are without merit, the contention of cumulative error is similarly without merit and Dubose is not entitled to relief. Griffin v. State, 866 So.2d 1, 22 (Fla. 2003).

CONCLUSION

Based upon the foregoing, the State requests respectfully that this Court affirm the Dubose's convictions and sentence to death.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

/s/ Meredith Charbula
_____
MEREDITH CHARBULA
Assistant Attorney General
Florida Bar No. 0708399
Department of Legal Affairs
PL—01, The Capitol
Tallahassee, Florida 32399-1050
(850) 414-3583 Phone
(850) 487-0997 Fax
Attorney for the Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by email to the following email address: jaxlaw1999@aol.com, this 17th day of April 2013.

/s/ Meredith Charbula

_____
MEREDITH CHARBULA
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

/s/ Meredith Charbula

_____
MEREDITH CHARBULA
Assistant Attorney General