

IN THE SUPREME COURT OF FLORIDA

JERMAINE LEBRON, )  
 )  
 Appellant, )  
 )  
 vs. )  
 )  
 STATE OF FLORIDA, )  
 )  
 Appellee. )  
 \_\_\_\_\_ )

CASE NO: 93,955

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

REPLY BRIEF OF APPELLANT

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STATEMENT OF TYPE USED

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PRELIMINARY STATEMENT

Petitioner will be responding to each Issue set forth in the Initial Brief and Answer Brief.

ARGUMENT

ISSUE I

APPELLANT'S CONVICTION VIOLATES BOTH THE DUE PROCESS AND DOUBLE JEOPARDY CLAUSES OF THE UNITED STATES CONSTITUTION AND FLORIDA CONSTITUTION BASED ON THE JUDGE'S IMPROPER EX PARTE COMMUNICATION WITH A JUROR AND THE IMPROPER DECLARATION OF A MISTRIAL.

The State hinges its response to Appellant's claim of double jeopardy on the premise that Appellant is procedurally barred from raising this issue on direct appeal because it was either not raised in the trial court (Answer Brief pages 47-49) or that it was not raised at the right time (Answer Brief pages 49-50) This argument by the State is without merit for two reasons. First, this court has specifically ruled against the position taken by the State and held that a claim of double jeopardy is considered fundamental error and may be raised for the first time on direct appeal even absent objection below. Secondly, the record reflects that the issue was objected to below.

The right not to be placed twice in jeopardy is a

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"fundamental" right. Dixon v. State, 584 So. 2d 195 (Fla. 5th DCA 1995) A violation of double jeopardy is fundamental error

which can be considered by the appellate court even if the defendant fails to object in the trial court. State v. Johnson, 483 So. 2d 420 (Fla. 1986); Laboo v. State, 23 FLW D1784 (Fla. 1st DCA 1998); Henry v. State, 707 So. 2d 370 (Fla. 1st DCA 1998); Singleton v. State, 561 So. 2d 1296 (Fla. 2d DCA 1990). The State's Answer Brief fails to apprise this Court of the correct standard of review and affirmatively advances an incorrect statement of the law.

The failure to timely raise a claim of double jeopardy does not in and of itself constitute a waiver of that claim. In Wilson v. State, 693 So.2d 616,618 (Fla. 2nd DCA 1997) the court stated "A defendant's silence or his failure to object or protest against an illegal discharge of the jury before a verdict does not constitute consent and is not a waiver of the constitutional prohibition against a subsequent trial for the same offense if the jury was improperly discharged. C.A.K. vs. State, 661 So. 2d 365, 367 (Fla. 2nd DCA 1995)". In Wilson the trial court declared a mistrial *sua sponte* after the prosecutor alluded in his closing argument to evidence that had been suppressed. The Second District was reviewing the case after the denial of a motion for post-conviction relief.

There is absolutely nothing in this record which indicates a waiver of the claim of double jeopardy. The record completely

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refutes the position advanced in the Answer Brief. Defense counsel objected to a mistrial. Appellant specifically raised the issue of double jeopardy with a written motion and argued the motion to the trial court. No waiver occurred.

The recitation of facts regarding the events surrounding the granting of the mistrial listed in the State's Answer Brief is inaccurate. Prior to the jury's note regarding deadlock, the *ex parte* communications with the juror and the judge occurred. After this improper conduct, which the State failed to include in their recitation of the facts, the juror returned to deliberations with the rest of the jury panel. After an unspecified time, the jury then returned with the note regarding their difficulty in reaching a verdict. There is no information about what was said in the jury room after the juror returned from his conference with the judge.

The State's interpretation of the facts regarding the objections to the trial court's declaration of a mistrial is

incorrect. The trial court proposed the first solution, which was to declare a mistrial and discharge the jury. After consultation, defense counsel asked for an Allen charge. Obviously, this is an objection to the judge's proposal to discharge the jury since it is a request to take an opposite course than that proposed by the judge. The judge then informed counsel that he would not automatically give the Allen charge as they requested, but stated he would question the jury first regarding whether or not they

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thought further deliberations would do any good, and then decide whether to give it. The judge further stated that if the jury said no, he would declare a mistrial. It is further noteworthy that the State Attorney did not wish a mistrial either and proposed an alternative solution of seating an alternate(Vol.17,T1531), a fact which was omitted from the Answer Brief.

The key to whether or not an issue is preserved for appeal is whether or not the objection is sufficiently specific so as to apprise the trial judge and to preserve the record for intelligent appellate review. Bohannon v. State, 546 So. 2d

1081, rev. denied, 557 So. 2d 35 (1990). Even if the double jeopardy claim was not subject to a fundamental error analysis, the record reflects that both criteria necessary to preserve an issue for appeal are met in this case.

The State's complaint that the issue of double jeopardy is barred by procedural default due to the timing of the hearing on the motion is equally without merit. (State's Answer Brief at 49-50) Again, the fundamental error doctrine is applied to the review of this issue. The record reflects that counsel had been informed by the trial court that motions would be heard the Friday before the scheduled trial date. The trial court instead chose to leave town without hearing motions and without offering an alternative time for their resolution until the morning of trial.

This whole scenario is not, as the State suggests, a failure

to object, but rather an objection to the granting of a mistrial

that the court then overruled, thus giving rise to the

application of the doctrine of manifest necessity. The State's claim of procedural bar is wholly without merit and should be disregarded.

The State next claims that double jeopardy cannot be claimed because the jury was hung, thus necessitating a mistrial. The State then advances the rather ludicrous position that the only reason that defense counsel objected to the mistrial being ordered was because if he did not do so, the issue would not be preserved for appeal.(Answer Brief at page 52). The whole purpose for the lodging of an objection is to preserve the record for appeal. Exactly why the Attorney General finds fault with the proper use of an objection is not clear.

The State asserts that Appellant's claim is meritless because there was "manifest necessity" for the mistrial. The State's response appears to be that Judge Perry had no other alternative but to declare the mistrial and reject the solution offered by the State of substituting an alternate and also reject the defense solution of the giving of the Allen charge and permitting continued deliberation.

The Attorney General cites Fuente v. State, 549 So. 2d 652

(Fla. 1989) in support of this position. In Fuente the defense attorney requested a mistrial after an improper comment by the prosecutor. According to the opinion, which does not contain the

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comment, trial counsel took the position that the comment was "grossly negligent" and that it had not been "deliberately asked for that purpose" (to obtain a mistrial). On appeal, a claim of double jeopardy was raised and it was asserted that the prosecutor's comment was intended to provoke a mistrial. In rejecting this argument, this Court affirmed the general principle that when a defendant requests a mistrial, double jeopardy will only act as a bar in a very narrow exception-where it can be shown that the prosecutor's conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial. This Court rejected Fuente's claim due to trial counsel's statements that took the opposite position. There was also no finding or request for a finding of prosecutorial intent.

In this case, there was no defense request for a mistrial. There was an objection to the mistrial. Also there was not a

waiver of the doctrine of manifest necessity. Fuente is inapplicable to this case.

With respect to the issue of manifest necessity the State apparently misunderstands the burden in these situations. On page 52 of the Answer Brief the assertion is made that Appellant has failed to carry his burden of showing a lack of manifest necessity. There are no cases which have placed this burden on the defendant. In fact, the case law is clear that the burden is on the State to

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establish manifest necessity. Both this Court in Thomason v. State, 620 So. 2d 1234,1237 (Fla. 1993) and the Second District Court of Appeal in C.A.K v. State, 661 So. 2d 365,367(Fla. 2d DCA 1995), have characterized the State's burden as " a heavy burden" to show that the mistrial was justified by manifest necessity.

The Appellant did not concede, as the State asserts, that the standard of review is one of an abuse of discretion. (Answer Brief page 52) Apparently, the State hinges this assertion on the quoted passage taken from Thomason that had quoted United States v. Perez, 6 L. Ed. 165 (1824). Appellant

did not suggest, nor does Thomason hold that the appropriate standard of review is one of judicial discretion. The quoted portion refers to the requirement that judge's must exercise "sound discretion" in deciding to declare a mistrial. It does not set forth a standard of review.

There is no support for the Attorney General's assertion that "...the State's right to a full and fair opportunity to have its case against Lebron decided was thwarted by the jury foreman's bias against law enforcement and-or by the reporting juror's belief that the foreman was so biased and had lied to the Court regarding the same." (Answer Brief at 53-54) The trial judge specifically ruled that he did not believe that the jury foreman had lied or misled anyone on voir dire or on the jury questionnaire because he had not been asked the question. The State Attorney posed no objection to this conclusion regarding the jury foreman made by the court and

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did not seek a mistrial from the trial court. In fact, as previously stated, the State had offered an alternative to the declaration of a mistrial, to-wit: substituting an alternate.

In Johnson v. State, 685 So. 2d 1369,1370 (Fla. 2d DCA

1996), the defendant took the stand and testified in a way that the State claimed violated a pre-trial motion in limine. The State moved for a mistrial. Defense counsel suggested that the testimony be stricken and a curative instruction be given. The court granted a mistrial, finding that the State's case was materially prejudiced. Johnson was retried and appealed, arguing the retrial violated double jeopardy grounds. The Second District, in citing to both Thomason and United States v. Perez noted that a mistrial may be predicated upon either (1) Some misfortune, which although the fault of neither party, renders continuation of the trial impossible or unreasonably prejudicial to the substantial interest of either the judicial process itself, the defendant, the state, or both, or (2) Some unfair or wrongful tactic, action or conduct on the part of the defendant, by which a substantial interest in the state is unfairly frustrated or embarrassed.

Neither of these situations is applicable to this case. The record is devoid of any action by defense counsel which thwarted the State. The State Attorney in the lower court never requested a mistrial or argued that the State's right to a fair trial had been thwarted by the alleged bias of the jury

foreman.

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The law is clear that in order to declare a mistrial over the objection of the defense the court must consider all alternatives. This requires, according to the Second District in Rodriguez v. State, 719 So. 2d 1215,1216 (Fla. 2d DCA 1998), "...an investigation into the viability of the alternatives". In Rodriguez the State announced after the jury was selected and sworn that a codefendant had pled and would testify at the trial. Defense counsel objected, stating he would need a month to reformulate his defense. The prosecutor agreed a continuance was necessary and asked if the defense was requesting a mistrial. Defense counsel responded that he liked the jury. The trial court would not postpone the trial for a month because of the inconvenience to the jurors and declared a mistrial *sua sponte*. The trial court did not ask the jurors if they would mind. The district court ruled that any inconvenience to the jurors would not outweigh the defendant's right to be tried by a particular jury.

Certainly, in this case, any inconvenience to the jury by

reading them the Allen charge and asking them to continue to deliberate would have been far less inconvenience than what was proposed in Rodriguez. Further, one third of the jurors indicated it might help. The Allen charge contains helpful suggestions for breaking a potential deadlock that the jurors in this case were never told, and never given the chance to utilize. Under those circumstances, the State cannot meet its heavy burden to prove that

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a mistrial was warranted as a manifest necessity.

The State next asserts that nothing in Judge Perry's conduct with the juror is any consequence to this appeal. The first basis for this is the continued erroneous assertion of procedural bar. As demonstrated earlier, this argument is not a correct statement of the law and that double jeopardy violations are fundamental error, subject to review for the first time on direct appeal even absent objection or assertion below.

The State then simply states that the claim is without merit. The Answer Brief wholly fails to discuss, distinguish, or otherwise address the applicable law related to this Issue

that was presented in the Initial Brief, including that promulgated by the United States Supreme Court. It further fails refute the arguments set forth in the Initial Brief.

The State simply reiterates that the mistrial was necessary because the jurors minds had not changed in eight hours. There is no record support for this statement. Although the initial note from the jury did not indicate what the vote was, it did indicate that the jury was considering an acquittal. The second note, after the improper contact occurred, indicated the jury was divided, but this does not mean that after a proper instruction (the Allen charge) the jury could not reach a verdict. This note also does not tell us what Juror Forner may have told the jury after his conference with the Judge.

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The bottom line is judges simply are not allowed to interfere in a situation like this. While the State argues that Judge Perry did not do this to thwart an acquittal, they offer no alternative reason, reasonable or otherwise, as to why the judge would engage in such conduct. The facts support the

defense contention that the judge's conduct falls within the law as announced by the United States Supreme Court in United States v. Tateo, 377 U.S. 463 (1964), Oregon v. Kennedy, 72 L.Ed. 2d 416 (1982), and United States v. Jorn, 400 U.S. 470 (1971), and that his double jeopardy rights were violated by the retrial following the inexcusable conduct of the trial judge.

## ISSUE II

THE TRIAL COURT ERRED IN DENYING THE MOTION FOR CONTINUANCE DUE TO COUNSEL'S UNAVAILABILITY AT THE TIME OF TRIAL.

The record supports the designation of Mr. Norgard as lead counsel in this case. Undersigned counsel was appointed to represent Jermaine on December 19, 1994. (V1,R11) He had the primary responsibility to represent Mr. Lebron for a substantial period of time until Mr. Slovis' appearance at the trial in which he was permitted to appear pro hoc vice by the trial court in 1997. (Vol.IV,R203-206). Judge Perry's statement that Mr. Slovis did the "lion's share of the work"(Answer Brief at 56) is unsupported and

completely refuted by the record. The record establishes that all pre-trial motions were prepared, signed and filed by, Mr. Norgard with the exception of the Mr. Slovis's affidavits in the change of venue motion. Mr. Slovis did none of the discovery depositions in Florida and was present for only two of the out of state witnesses' depositions, the New York police officers who arrested Jermaine. Mr. Slovis was not present at any of the pretrial hearings, even those which occurred after he was permitted to appear as co-counsel. Mr. Slovis and Mr. Norgard both cross-examined witnesses in the guilt phase. Mr. Norgard did the Motion for Judgment of Acquittal and Charge Conference. Mr. Norgard handled most of the matters raised at bench conferences. Mr. Norgard gave the initial Closing Argument, and Mr. Slovis did the Rebuttal Closing Argument. Mr. Slovis did not prepare or file the sentencing memorandum. Mr. Slovis did not appear at the Spencer hearing. Mr. Slovis did not appear at the sentencing hearing. The judge calling Mr. Slovis lead counsel after he had denied the motion for continuance, thus forcing Mr. Lebron to go to trial without Mr. Norgard, does not change the fact that undersigned counsel was

lead counsel and an integral part of the guilt phase of the trial.

The record establishes that good cause had been established for the granting of a continuance after the trial date had been set. The Polk county trial had been set for early January, a fact which Mr. Norgard informed the court of at the pre-trial

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conference. The death of counsel's mother occurred after the date

of the pre-trial conference in this case and caused a delay in the commencement of the Polk county trial. Difficulties in the Polk trial caused further delay. Thus, the requirements of Fla. R. Crim. P. 3.190(g)(3) have been met- the cause for the continuance arose after the trial date had been set and good cause was established for continuing the trial.

The State's assertion that counsel failed to provide record support for his arguments is false. Counsel provided record citation for Mr. Slovis' feelings that he was not qualified to proceed without Mr. Norgard on page 53 of the Initial Brief, and it is located at Vol.Supp.,R148;157-158

Slovis' statement regarding his inability to proceed without Mr. Norgard is also contained in the State's Brief on page 56 in the last sentence of the first paragraph, where it is assigned a citation of "Id. at 10" and again on page 59 of the Answer Brief where it is cited as "2R 15". Since the State also cites to the record for the same proposition, it is clear that the statement that Slovis did not feel qualified to proceed without Mr. Norgard is supported by the record. However, to lay any doubt to rest on this point, the following are instances in which Mr. Slovis made statements to the Court regarding his inability to proceed with Mr. Norgard:

At the February 9 telephone conference, when a continuance was being discussed, Mr. Slovis made the following comments:

"I would

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have to now whip it around and find somebody who knows something about the death penalty to voir dire the jury properly. You know how this case went down judge, I didn't do anything with the death penalty I just did the trial stage..." (V.Supp.T148) "I understand your position, I just don't think as far as the defendant is concerned that I can actually do it

myself." (V.Supp.R148) Later, during the same conference, Mr. Slovis stated "...I do believe judge, if you remember saying judge, that it was best for two people to try the case. It's not like a robbery case, it got voluminous witnesses. I'm certainly not one to shy away from a trial, I just think it is not in the best interest of the defendant, and I'd be putting myself in the position of not being fully knowledgeable about certain things I would have to be knowledgeable about, if I had Norgard. ...This is a death penalty case. This is something I'm not familiar with and I need Mr. Norgard." (V.Supp.T157-158)

Just prior to the commencement of the trial during the hearing on the continuance on February 16, Slovis referred to Mr. Norgard as the death penalty expert(V.18,T7) Even though Mr. Slovis stated he had done 70 murder cases, he qualified this by telling the court that in this case Mr. Norgard had done six witnesses, the closing, and "most importantly he did 80% of the jury selection, which I really took no part of."(V18,R10) Mr. Slovis stated "But I feel that I am incompetent to pick a jury in a death penalty case and I

think the stacks(sic) are so high that it would be improper, irregardless of the other motions Mr. Norgard made, for us to try this case at this moment.... I do not know any of the questions to ask. I have no practice in it. As you know, New York has just adopted death penalty but we don't execute anyone and I'm not on any panel in New York to do it "(V18,T10-11)

"If I had an idea that this would happen, I can tell you I could have gone to seminars on the death penalty, I could have learned all about the death penalty and jury selection...".(V18,T12)

With regard to the prior trial responsibilities, Mr. Slovis took issue with the judge's assertion that he had done 99%, and noted that each time this was discussed the judge increased the percentage. Slovis stated he did not do the female witnesses (of which Charissa Wilburn was a key witness), closing argument, or jury selection.

The State claims on page 60 of the Answer Brief that a record citation to support a statement made by Judge Perry regarding his vacation plans was absent. Contrary to the State's claim that no record citation was provided to support Mr. Lebron's argument that the trial judge denied the

continuance improperly, the reference to the record appears on page 53 of the Initial Brief where Judge Perry was quoted directly.

The State has apparently misunderstood Mr. Lebron's argument regarding the prejudice he suffered as a result of the denial of

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his motion. Mr. Lebron is not raising a claim of ineffective assistance of counsel against Mr. Slovis in this proceeding. Neither, however, is he waiving his right to do so at a future time if necessary. In Smith v. State, 37 So. 2d 573 (Fla. 1905), a decision cited by Appellant, this Court ruled that judicial discretion was not abused because there had been no showing that the attorney who was present was not as well-qualified as absent counsel. The Initial Brief clearly points this out on page 55. The Initial Brief then showed numerous instances where the record clearly established that Mr. Slovis, who was not licensed in Florida, was unfamiliar with the Florida Rules of Criminal Procedure, was unfamiliar with Florida law relating to felony murder, and was unfamiliar with capital jury selection, thus establishing that Mr. Slovis was

not as well-qualified as absent counsel to try a capital case in Florida. Therefore, under Smith, there was an abuse of discretion in denying the motion for continuance because of this disparity in qualifications.

In Issue III the State cites Scott v. State, 717 So. 2d 908 (Fla. 1998), with a comment that the opinion also held that there was no abuse of discretion in the denying of the motion for continuance. In Scott the trial court had begun an evidentiary hearing on January 23, and then needed to continue it. When the court wanted to set it on the following day, defense counsel objected because he would not be present because he was going on

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vacation. A later hearing date of February 14-15 was also objected to by defense counsel because he would be in an unrelated hearing in Maryland on February 16. Scott was represented by co-counsel when the hearing reconvened on February 14. This Court found no abuse of discretion in this rescheduling by the court where the reason for the rescheduling was because defense counsel was going on vacation. A far different reason was

present in this case- counsel was in the middle of another capital trial. This reason would clearly satisfy the reasonable person standard of Scott.

The record supports Mr. Lebron's position that it was error to deny his motion for continuance and that the error resulted in the deprivation of his right to effective assistance of counsel.

### ISSUE III

THE TRIAL COURT ERRED IN DENYING THE  
MOTION TO RECUSE WHERE THE IMPARTIALITY  
OF THE TRIAL COURT WAS COMPROMISED BY  
*EX PARTE* COMMUNICATIONS

Appellant will primarily rely upon the argument set forth in the Initial Brief except as follows: Scott v. State, 717 So. 2d 908 (Fla. 1998), which is cited in the Answer Brief, is factually distinguishable from this case. In Scott the *ex parte* communication occurred when the judicial assistant called the State to confirm that the judge would continue the hearing until the next available day. This was the same statement that had been made in

open court to defense counsel. In this case where the communication came directly from the judge and dealt with a matter that was not previously discussed with defense counsel.

#### ISSUE IV

THE TRIAL JUDGE COMMITTED REVERSIBLE ERROR IN IGNORING THE SPECIAL VERDICT FORMS RETURNED BY THE JURY WHICH FOUND APPELLANT NOT GUILTY OF PREMEDITATED MURDER AND THAT THE DECEDENT WAS KILLED BY SOMEONE ELSE, AND THAT APPELLANT DID NOT POSSESS A FIREARM DURING THE MURDER AND SENTENCING APPELLANT TO DEATH

The Answer Brief fails to address the State's ability to contest this issue in light of their failure to object to the special findings of the jury. This Court should consider this point (Point B and Point D in the Initial Brief) waived by the State. There is no legal basis by which the trial judge could disregard the jury's findings of fact and substitute his own. When a jury acquits, there is no exception to the prohibition against trying the same person for the same offense, no matter how erroneous the acquittal may have been. Hudson v. State, 711 So. 2d 244 (Fla. 1st DCA 1998). There is no doubt that the

jury's findings were an acquittal of premeditated murder and of Jermaine being the shooter. Barrett v. State, 649 So. 2d 219 (Fla. 1994)

The State's position that Jermaine is eligible for the death penalty under *Enmund-Tison* is error. The cases cited in support of

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this position actually support Appellant's position.

In Benedith v. State, 717 So. 2d 472 (Fla. 1998), this Court relied on the holding in Jackson v. State, 575 So. 2d 181 (Fla. 1991), that the defendant must be the actual shooter or that the defendant's state of mind was sufficiently culpable to rise to the level of reckless indifference to human life. In Benedith there was no evidence that the defendant was the shooter. The defendant did ask a friend to paint the car stolen from the decedent after the murder and said that he was going to go to New York. The defendant's fingerprints were found on the co-defendant's car that had been abandoned near the murder scene and he was found in possession of the murder weapon. The defendant had also been seen standing by the

victim's car within five minutes of the firing of the shots that killed the victim. The fourteen-year-old co-defendant was seen in the passenger seat of the victim's car as it left the murder scene. This Court found that the record lacked competent, substantial evidence to support the *Tison* culpable state of mind requirement.

In Jackson this Court found that the evidence established that the defendant was a major participant in the crime, but that it did not show beyond every reasonable doubt that Jackson's state of mind was any more culpable than any other armed robber whose murder conviction rests solely on the theory of felony murder. Jackson had previously indicated his intent to rob the hardware store, he was

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in the vicinity of the store shortly before and after the crime, he had been with his brother whose fingerprints were on the cash register of the store, and Jackson made a statement after the homicide that the murder had to be committed because "he bucked the jack". Jackson also asked his mother to get rid of the gun and to say he had not been around the hardware store. There was no evidence that Jackson took a gun into the

store, that he intended to harm anyone, or that he expected the robbery to erupt into violence. There was no ability for Jackson to stop the crime.

Likewise, in this case the most that is established, based upon the findings of the jury and the evidence, was that Jermaine may have made a statement about "jacking" Mr. Oliver, that he handed a weapon to another person before going into the house, that he went into the house, and that he was possibly present when Mr. Oliver was killed. Like Jackson, he did not carry a weapon into the location of the homicide, he made no mention of any intent to kill, and he had no opportunity to prevent what happened. In both Benedith and Jackson it was not specifically determined whether or not they or the co-defendant were the trigger man. In the case at bar the jury found that Jermaine was not the trigger man.

The purported "findings" listed by the State on pages 73 and 74 are incorrect and misleading. They are clarified as follows:

1. There is no evidence to support that Jermaine chose the victim.

2. There was no evidence that only Jermaine liked the truck.

It appears from the record that everyone in that car were impressed with the truck.(V22,963)

3. Danny Summers was the driver and stopped the car to talk to someone he knew. There is no evidence that he was "ordered" to do this by Jermaine.(V21,T654;V22,T853,963)

5. Whether or not Jermaine made a statement about "jacking" the victim was contradicted by the testimony of the people in the car. Danny Summers did not hear this statement. Mark Tocci said he heard the statement, but he did not take it seriously and thought Jermaine might be singing to the words to the song that was playing.(V21,T656-7,7823;V23.T1008,1076)

6. The Tocci's and others also kept the gun and fired it. Shells for the gun were found in Joe Tocci's room. (V22,T852;V23,T1161,1186)

10. In opposition to the verdict rendered by the jury.

11. In opposition to the verdict rendered by the jury.

12. In opposition to the verdict rendered by the jury.

13. Not indicative of guilt.

The remaining points are also contradicted by the verdict

of the jury and were merely the State's theory of the case. These facts were not proved, however.

The evidence in this case does not show beyond a reasonable doubt that Jermaine displayed the requisite state of mind or

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possessed the requisite intent to warrant the application of the

death penalty in light of the participation of the co-defendants. The sentence of death cannot stand.

#### ISSUE V

THE APPLICATION OF THE AGGRAVATING  
FACTOR OF FELONY PROBATION  
VIOLATES CONSTITUTIONAL *EX POST*  
*FACTO* LAWS.

This Court has ruled in favor of the Appellant on this issue after the filing of the Initial Brief. In Zack v. State, 25 Fl. L. Weekly S19 (Fla. January 6, 2000), this Court specifically held that the application of the felony probation aggravator to cases arising before the effective date of the amendment violates the *ex post facto* provisions of the Florida

Constitution. The amendment to the statute went into effect in October 1996 and Zack's offenses had occurred in June 1996. This Court held that the aggravator could not be applied to Zack.

The offenses in this case occurred in 1995, well before the effective date of the amendment, thus the aggravator is inapplicable.

It should be noted that the Zack decision was rendered in January, 2000, two and one half months before the filing of the Answer Brief in this case. The Answer Brief fails to cite Zack, even as contrary authority. In fact, the argument presented in the

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Answer Brief is the exact argument rejected by this Court in Zack.

The State's claim of procedural bar due to lack of objection has no merit. Counsel not only objected to the evidence of this aggravator being submitted to the jury and to its application in this case, he also specifically referenced its *ex post facto* application. In Trotter v.State, 576 So. 2d 691 (Fla. 1990), often referred to as Trotter I, and cited by

the State in the Answer Brief, the issue of *ex post facto* was raised for the first time on direct appeal, with no objection below, and was still heard by this Court.

The cases cited by the State do not support their position. In Bell v. State, 699 So. 2d 674 (Fla. 1997), the question concerned a challenge to the wording of a CCP instruction- not to the applicability of the aggravating circumstance of CCP. Defense counsel had affirmatively stipulated to the wording of the instruction. Not only is the entire basis for the challenge different, there is absolutely no evidence of an affirmative stipulation. Likewise, in Wournos v. State, 676 So. 2d 972 (Fla. 1996), the challenge was to the wording of the instruction, not to the applicability of the aggravator. In this case the objection was correctly directed to the use of the aggravating circumstance.

This aggravating circumstance was incorrectly applied in this case. It must be stricken and the case reversed for a new penalty phase proceeding.

ISSUE VI

THE TRIAL COURT ERRED IN THE REJECTION  
OF SEVERAL MITIGATING FACTORS.

Each argument of the Attorney General will be addressed in the same form as presented in the Initial Brief.

**B. Age as a Statutory Mitigating Factor**

As stated in the Initial Brief, the trial court's reason for rejecting this mitigating factor due to an absence of evidence regarding mental and emotional immaturity was error. The Initial Brief pointed out that Defendant's Exhibits B,C, and D presented ample evidence of immaturity, both mental and emotional. The Attorney General makes no effort to contest this evidence, but instead relies on the trial court's erroneous finding.

In Sims v. State, 681 So. 2d 1112 (Fla. 1996), this mitigator was found to be properly rejected due to the lack of evidence to establish that his mental, emotional, or intellectual age was lower than his chronological age of 24. Appellant submitted the exact evidence that was lacking in Sims. Thus, under Sims, it was an abuse of discretion for the trial court to not find this aggravator.

**C. Abusive childhood or #7 of the sentencing order**

The trial court's findings with regards to the treatment

of Jermaine by his mother are completely refuted by her deposition. It is not simply a matter of a "disagreement" between Jermaine and

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his mother. Neither can the court disregard the opinions of experts where there is no evidence presented to controvert those opinions. Judge Perry's limited observations of Mr. Lebron's court room behavior cannot supplant the years of evaluation that was uncontroverted by any evidence presented by the State regarding Jermaine's childhood and its effects on him.

**Other non-statutory mitigation**

It has been long-recognized that any factor in a defendant's background may be considered as mitigation and should be considered if proven. Based on that premise, it was error for the court to exclude Jermaine's race and the fact that he was raised in the inner city.

The State's assertion that Jermaine lived in a "foster home" is incorrect. Jermaine was placed in Pleasantville Cottage School, a group residential facility. He was then placed in the Glenn Mills Boy's School until he went AWOL on

a home visit pass. He was later unsuccessfully placed in group homes as well. Once again, the evidence contained in Exhibits A,B,C,and D were not refuted by any evidence presented by the State and should have been considered mitigating by the trial court and assigned weight.

In reviewing the psychological mitigation the trial court erroneously stated that there was no testimony or evidence to show the nature and degree of Jermaine's problems. Because of this, little weight was given. The Defendant's Exhibits A,B,C and D,

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which include school and psychological records, show the nature and degree of Jermaine's psychological problems. Thus, this mitigating factor must be reweighed by the trial court. The reweighing must include a proper evaluation of Defendant's Exhibits A,B,C and D.

#### ISSUE VII

THE SENTENCE OF DEATH IS DISPROPORTIONATE  
IN THIS CASE WHERE THE FACTS DO NOT SUPPORT  
A FINDING THAT THIS CASE IS ONE OF THE MOST  
AGGRAVATED AND LEAST MITIGATED OF CAPITAL  
CASES

The State argues that the Initial Brief fails to provide page citations in referring to the Defendant's Exhibits. No page citations were given because the Clerk of the trial court was told not to do this by this Court's order. Undersigned counsel requested that these Exhibits be copied and numbered in order to provide uniform page numbering for all parties. This request was denied. Undersigned counsel did not assign random page numbers to the Exhibits because there was no way of knowing whether or not those page numbers would reflect the order in which this Court received those documents from the Clerk. Instead, the Initial Brief was prepared by referencing only the Exhibit letter of A,B,C,or D.

The State attempts to refute Appellant's assertion that Jocelyn Ortiz was addicted to drugs at the time of Appellant's

birth and during his early childhood based upon her denial of addiction. Ms. Ortiz may have denied addiction, but the facts speak otherwise. Ms. Ortiz admitted to using enough amphetamines, LSD, methamphetamine, speed, mescaline, and heroin to land her in a residential drug treatment facility for 27 months after Jermaine's birth. Clearly Jermaine's mother

was a drug addict.

The State's summary of Jermaine's childhood on page 92 of the Initial Brief is grossly inaccurate. It ignores much of Ms. Ortiz's statements about her true feelings and treatment of Jermaine. It ignores the unrefuted evidence contained in the records from the institutions in which Jermaine was placed. It ignores the findings of the numerous psychological evaluations of Jermaine that were prepared by the Pleasantville Cottage School in support of his continued placement there by the State of New York. It ignores the findings by those treating Jermaine that determined Jocelyn to be extremely deficient in her ability to parent and nurture.

The entire response by the State to this portion of the Issue is contradictory. For example, on page 84 the Attorney General claims that the record does not contain evidence of childhood abuse, yet on page 89 she cites to the record that Ms. Ortiz admitted to hitting Jermaine on the head and in the face.

The State asserts that Ms. Ortiz sent Jermaine to private schools. Perhaps this is true if one considers a state placement

in a residential home for children to be a private school. Ms. Ortiz did send Jermaine to parochial school for a brief time in kindergarten, but that was the only private school Jermaine ever attended.

The State cannot rewrite the facts contained in Exhibits nor can they be ignored by the court, especially when they were uncontroverted by any contrary evidence submitted by the State.

### **Aggravators**

Despite the Attorney General's failure to recognize the ruling of this Court regarding the aggravating factor of felony probation, that aggravator must now be stricken. That leaves the remaining aggravating factors of prior violent felony and that the murder was committed during the course of a felony-robbery.

The State relies upon the case of Shellito v. State, 701 So. 2d 837 (Fla. 1997) to support their position that a death sentence is warranted in this case with the two aggravating circumstances present in this case. Shellito, however, had far less mitigation than is present in this case. Shellito grew up with his family in a middle-class neighborhood. Evidence

concerning his emotional and mental health problems was contradictory and inconclusive. Shellito's only mitigating factors were age, background, and character. All of these mitigators were given slight weight due to contradictory evidence as to the existence of the last two. The extensive mitigation in this case compels a different result than

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that reached in Shellito.

The case of Ferrell v. State, 680 So. 2d 390 (Fla. 1996) is likewise distinguishable. Ferrell had a single aggravating circumstance, a prior felony conviction. He had little mitigation, all of which was assigned little weight. In affirming the death sentence, this Court considered the facts behind that single aggravator. This Court concluded that the aggravator was entitled to great weight because it was a prior conviction for second-degree murder and the facts of that prior murder closely mimicked the current murder.

None of Mr. Lebron's prior convictions rise to the level of that in Ferrell despite the State's attempt to argue otherwise. It is entirely appropriate for this Court to consider the facts behind each of those cases, as was done in

Ferrell.

For example, in the New York convictions there were no injuries to anyone. Appellant will rely upon the facts of each of the other instances set forth in the Initial Brief, which conclusively refutes any claim by the State that they rise to the level of severity found in Ferrell.

The State also cites Hunter v. State, 660 So. 2d 244(Fla. 1995) in support of their argument that death is proportionate. In Hunter the defendant was charged with first-degree murder, three counts of attempted first-degree murder, three counts of armed robbery, and one count of attempted armed robbery. Hunter robbed

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one man at gunpoint. He then traveled to a sandwich shop, confronted four men outside of the shop, robbed them at gunpoint, then shot each of the four men as they lay on the sidewalk. Hunter had four prior violent felony convictions, for a total of twelve prior violent felony convictions. The trial court found 12 non-statutory mitigating factors. In looking at the factors surrounding this murder and three attempted murders, this Court found death proportional and not in

conflict with a life sentence in the case of Livingston v. State, 565 So. 2d 1288 (Fla. 1988). The case at bar is far more similar to Livingston than to Hunter. Like in Livingston there was only one victim, the mitigation is far more compelling, and the facts behind the prior violent felonies are more similar.

This is not one of the most aggravated and least mitigated of first degree murders. As such, a sentence of death is disproportionate.

**C. Comparison of Appellant's sentence with those of the co-defendants**

The jury's findings regarding the culpability of the co-defendants in this case may not be disregarded by the trial court, the Attorney General, or this Court. The jury conclusively determined that someone other than Jermaine shot and killed Neal Oliver and that Jermaine was not even in possession of a gun at the time of the murder. The jury's acquittal on these elements of the

murder in and of themselves render Jermaine's participation as minor in this incident as compared to that of the co-

defendants.

The facts apparently relied upon by the State contained in the footnote on page 100 of the Answer Brief do not compel a different result. At the time that Mr. Oliver was seen driving, Jermaine was not driving the car, he did not know Mr. Oliver, he did nothing to force Danny Summers to pull over and to speak with Mr. Oliver. Jermaine did not carry the gun into the house, and the jury determined that he was not in possession of the gun at the time of the homicide. Jermaine may have given Charissa Wilburn the gun to take in the house. The testimony from Charissa at trial was that she took it to Joe Tocci's bedroom.

Jermaine requesting that the music be turned up in the house is certainly not a factor that would warrant the imposition of the death penalty against him, when the actual killer received at most four years in prison and possibly probation. The record reflects that Jermaine did not dispose of the body or the truck. He did not cash the decedent's checks. He did not use the decedent's credit card. The facts in this case simply do not warrant the imposition of a death sentence.

The State quotes extensively from this Court's opinion in Larzelere v. State, 676 So. 2d 394 (Fla. 1996), cert. denied, 117 S.Ct. 615 (1996). While the law regarding disparate sentencing of co-defendants is correct, when applied to this case it will not

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support a death sentence. The defendant in Larzelere was the decedent's wife. For a six year period of time before the murder she obtained insurance policies on her husband totalling 3 million dollars. Within six months of the murder she had doubled the value on the life insurance policies. The defendant then tried to get two of her lovers to kill her husband, but they declined. The defendant then convinced her son to commit the murder. The defendant planned the murder and was present when it occurred. She directed others in disposing of the murder weapon. She reenacted the murder to friends in the days following the incident. The defendant was the instigator and mastermind, the dominant force behind the planning and execution of the crime. The motive, financial gain, was fully in her control.

The facts establishing that the defendant in Larzelere was

the dominant force are absent in this case. That Jermaine was dominant force was rejected by the jury's verdict. Jermaine obtained no financial benefit from the murder, nor was it within his control. There is no basis upon which to support the imposition of a death sentence. The death penalty is not proportionate in this case.

#### CONCLUSION

Based upon the facts, law and argument recited herein and in the Initial Brief, Appellant respectfully requests this Honorable Court grant the relief requested in the Conclusion of Appellant's Initial Brief.

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#### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent via U.S. Mail to the Office of the Attorney General, 444 Seabreeze Blvd., Suite 500, Daytona Beach, Florida 32118, this \_\_\_\_ day of May, 2000.

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