IN THE SUPREME COURT OF FLORIDA

DERRICK CUMMINGS,

Appellant,

v. CASE NO. 86,413

STATE OF FLORIDA,

Appellee.

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

ANSWER BRIEF OF APPELLEE.

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STATEMENT OF THE CASE

On February 17, 1994, Derrick Cummings was arrested for the February 15, 1994, murder of five-year-old Shelton Dale Lucas, Jr. (R1). Formal charges were filed within the 30-day period required by Florida rules, by way of an information dated March 7, 1994 (R 10). Charged with involvement in the murder with Cummings were Marion King, Kevin Dixon and Andre Fisher (R 10). King entered a plea of guilty to second degree murder (R 47). On April 27, 1994, a Duval County grand jury indicted Cummings, Fisher and Dixon on charges of premeditated murder and shooting a firearm into a building. In addition, Cummings was charged with escape or attempted escape and with possession of a firearm by a convicted felon (R 69-71).

Trial counsel Thomas Fallis entered his notice of appearance on behalf of Cummings on March 22, 1994 (R 18). His motion for appointment of co-counsel (R 241 et seq) was granted by order of the trial court dated January 6, 1995, appointing Jeanine Sasser co-counsel for Derrick Cummings (R 251).

During the course of the pre-trial proceedings, the trial court granted several defense motions for continuance (TR 33-34--continuance granted; TR 37-48--continuance granted; TR 54-99--continuance granted).

On January 25, 1995, a hearing was conducted on co-defendant Dixon's motion to dismiss the indictment (TR 184-208). Only a portion of Dixon's' motion was applicable to Cummings (TR 201). However, counsel for Fisher and Cummings announced that they would file their own motions after deposing Detective Gilbreath, who apparently was the only witness to testify before the Grand Jury (TR 201-02). The trial court denied Dixon's motion to dismiss, but ordered that Detective Gilbreath be deposed with respect to his grand jury testimony and to divulge that testimony to defense counsel (TR 207).

Detective Gilbreath was deposed on January 25, 1995 (R 471 et seq). On January 27, 1995, the State announced that it would file a nolle prosequi dismissing the charges against Kevin Dixon for two reasons: Marion King was the only available witness who could place Dixon at the scene of the murder and the State had decided that King would not be a credible witness; in addition, Dixon had an alibi supported by three witnesses (TR 233-37).

On February 1, 1995, Cummings' trial counsel filed a Motion to Dismiss Indictment Due to Perjured Testimony Given to Grand Jury (R 361-64). The motion was heard the same day (TR 596-614). Defense counsel argued that the State had acknowledged that King could not be believed and that without King's information there was no

probable cause to indict Cummings (TR 610). The State responded that even without King's statements, probable cause existed to indict Cummings; further, those portions of King's statements which identified Cummings and Fisher as participants in the murder were not false (TR 611-12). The trial court agreed, finding that, as to Cummings and Fisher, there was 'no showing that the indictment was the result of perjured testimony (TR 613). The court pointed out, in addition, that even if it did dismiss the indictment, "it would accomplish nothing except a delay because there's no statute of limitations on first degree murder, [and] the State could go back and re-indict him" based on other information available to the State (TR 614).

Following the presentation of the State's case at trial, the trial court denied Cummings' motion for judgment of acquittal (TR 1074). However, the trial court declined to instruct the jury as to felony murder (TR 1084-85). Contrary to the indication in Cummings' brief (Initial Brief of Appellant at 6), the State did not argue felony murder to the jury at the guilt phase of the trial (TR 1165-95). Cummings was convicted of premeditated murder (TR 1335).

At the penalty phase, the trial court instructed the jury as to three aggravating factors, including the contemporaneous-felony

aggravator, the felony being burglary. Although initially skeptical, the Court ultimately accepted the State's **reasoning** that Cummings' conviction of premeditated murder established his intent to kill, and that the shooting into a house with intent to kill would support a finding of burglary by instrument (TR 1400-09).

Following a penalty hearing, the jury recommended death by a 10-2 vote (TR 1665-66). The trial judge followed that recommendation, finding three aggravating circumstances (Cummings knowingly created a great risk of death to many persons; the murder was cold, calculated and premeditated, **and** the murder was committed during the commission of a burglary) and no mitigating circumstances (R 440-461).[1]

STATEMENT OF THE FACTS

GUILT PHASE: The State generally accepts Cummings' statement of the facts as to the guilt phase. The State will provide any necessary amplification and clarification in its discussion of the issues.

PENALTY PHASE: The State generally accepts Cummings' penalty-phase statement of the facts, subject to the following amplification and clarification.

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[1]Andre Fisher also was convicted of murder and sentenced to death. His appeal is pending in this Court, Case No. 86,655.

Until the age of two, Cummings alternated between living with his mother and grandmother (TR 1453). After age two, he lived with his grandmother. She provided a "loving and nurturing home," and "tried to teach him rules, right and wrong" (TR 1453). She did not abuse her grandson, but occasionally spanked him (TR 1453-54). When Cummings dropped out of school following a motorcycle accident, his grandmother 'carried him back." For a while, he was enrolled in a "DTC" program to learn a skill, but he dropped out (TR 1455). Cummings had been on his own, sharing an apartment with his girlfriend, for at least a year before his arrest for murder, and maybe longer (TR 1456-57). His grandmother did not think he was working (TR 1456). Although she had brought him up in the church, he had not attended regularly for three or four years prior to his arrest (TR 1457-58). Cummings' grandmother testified that she was opposed to the death penalty under any circumstances (TR 1458). Furthermore, she felt like the murder of Shelton Lucas, Jr., was the victim's uncle's fault; she thought that Dap (the victim's uncle and the intended target of the 35 shots fired into the house) was more to blame for his nephew's death than was Cummings (TR 1458-59).

Elvie Starling, who testified that Cummings had helped her take in groceries (TR 1464), acknowledged on cross-examination that

Cummings had moved out of the area and had not been around for the 'last year or so" (TR 1465). She has had no contact with Cummings since he left, and did not know what Cummings was doing at nighttime or during the times when she was not in contact with him (TR 1465-66). Likewise, Ruth Taylor has had minimal contact with Cummings since he moved out of his grandmother's house (TR 1468-69) .

Cummings' aunt, Jeanetta Lynn Thorpe, acknowledged on cross-examination that, following his motorcycle accident, Cummings was given chances to go back to school and did not go (TR 1473). She, like Cummings' grandmother, thought Dap was more to blame for the victim's death than was Cummings (TR 1474).

Charlie McCormick acknowledged on cross-examination that while Cummings was advising children to stay in school, Cummings himself was not staying in school (TR 1487). He did not know what Cummings was doing at night when McCormick was not around (TR 1487).

Cummings does not mention the testimony of Lewis Tut, a minister (TR 1670). Tut did not testify before the jury, but did testify at the penalty hearing before the judge. He testified that as a result of his contact with Cummings in prison, where Cummings was "witnessing to others," Cummings deserved a second chance (TR 1672). On cross-examination Tut acknowledged that he did not know

Cummings before his arrest for murder, and was not aware that Cummings had been arrested both as a juvenile and as an'adult prior to being arrested for this murder (TR 1673). The prosecutor asked Tut how many chances he though Cummings deserved (TR 1674). Tut answered that he thought that Cummings would "be an asset in the community" once he got out of prison; Tut believed Cummings would go into the ministry (TR 1674). Tut thought Cummings had repented to the point that 'he will be able to tell someone that this is wrong. This young man here is needed out there to say, look, I was there, I know what happened" (TR 1678).

SUMMARY OF ARGUMENT

There are eleven issues on appeal: (1) The trial court did not err in denying Cummings' motion to dismiss the indictment. The State did not knowingly present any false testimony to the grand jury, and even if the State later had doubts about the truthfulness of some of the statements made by Cummings' codefendant Marion King, no untruthful statements about Cummings' involvement were presented to the grand jury. Furthermore, even without King's statements, the grand jury heard evidence from independent sources sufficient to establish probable cause to indict Cummings. (2) Because trial counsel did not identify Randall Bold as a juror whom defense counsel would have struck if granted additional peremptory challenges, Cummings has not preserved any issue of the trial court's refusal to excuse Bold for cause. Furthermore, the age of the victim was admitted in evidence without objection, and Bold was not disqualified to serve just because the age of the victim would be in his "head" at the penalty phase. (3) Cummings' statements about the crime were properly admitted in evidence to demonstrate consciousness of guilt, and the state' was not obliged to sanitize the language Cummings himself used to feign innocence of any knowledge of the murder. (4) Absent any suggestion, much less evidence, that Cummings acted in self-defense, testimony that Dap

was known to carry a gun was properly excluded. (5) The trial court was authorized to find that Cummings knowingly created a great risk of death to many persons when he and two others fired 35 nine-millimeter rounds into a dwelling occupied by five persons, located in a residential area. Any error, however, is harmless because the trial court gave this aggravator only "slight" weight. (6) The evidence supports the trial court's CCP finding. After learning of a confrontation between Dap and Cummings' uncle, Cummings armed himself and went looking for Dap. He then enlisted the assistance of armed accomplices. They went on a "search and destroy" mission to Dap's home, where they spotted someone who looked like Dap sitting in the carport. They stopped the car, exited the vehicle, and fired 35 rounds at a doorway which Dap's brother-in-law had just entered. Cummings had over an hour to reflect on his actions, and to consider the consequences. Although he shot the wrong person, this was a cold, calculated and premeditated killing. (7) Cummings' death sentence is not disproportionate. There are three aggravating factors and nothing in mitigation. (8) There was no improper victim impact evidence. (9) Cummings' trial counsel did not identify specific nonstatutory mitigating factors to the trial court, and therefore may not complain that the trial court failed individually to address

specific nonstatutory mitigating factors. Furthermore, the record supports the trial court's rejection of nonstatutory mitigation. Finally, even if the trial court erred, any mitigation was, at best, minimal, and any error is harmless. (10) Because entry by instrument is sufficient to establish the element of entry where the instrument is actually used to commit the contemplated crime, the trial court properly found that the murder was committed during the commission of a burglary. Although there seems to be no Florida precedent addressing specifically an entry by bullets, there is Florida precedent for finding entry by instrument, and the treatises indicate that a bullet can be such an instrument. (11) The evidence sufficiently demonstrates Cummings' intent to kill, and the trial court did not err in denying Cummings' motion for judgment of acquittal.

ARGUMENT

ISSUE I

THE TRIAL COURT DID NOT ERR BY REFUSING TO DISMISS THE INDICTMENT

Cummings argues here that the trial court erred when it denied his motion to dismiss the indictment. The procedural history relevant to this issue is contained in Appellee's Statement of the Case and will not be repeated here except to note that the motion to dismiss was premised on an allegation that the indictment was based upon information provided by co-defendant Marion King, whom the State later acknowledged had lied about whether a gun belonging to him was involved in the crime and, perhaps as well, about Dixon's involvement. Cummings relies upon Anderson v. State, 574 So.2d 87 (Fla. 1991), in which this Court stated that "due process is violated if a prosecutor permits a defendant to be tried upon an indictment which he or she knows is based on perjured, material testimony without informing the court, opposing counsel, and the grand jury." Id. at 91.

The State would note that in the strictest sense, at least, it is clear that no perjured testimony was presented to the grand jury; King did not personally testify before the grand jury, and

Detective Gilbreath testified in his deposition that he presented no sworn statements from King or anyone else to the grand jury (R 476). But assuming that Anderson applies to a case in which a State's witness testifies to the grand jury about information provided by a third party which the State knows to be false, dismissal of the indictment was not required in this case, for several reasons.

First of all, this quite clearly 'is not a case where the state knowingly presented false testimony to the grand jury." Id. at 92. Any doubts the State had about Marion King's truthfulness arose after Cummings was indicted, as Cummings acknowledges. Initial Brief of Appellant at 31. Furthermore, as the trial court noted, just because the state acknowledged that Marion King is a liar does not necessarily mean that "anything that he said should be excluded from the grand jury. . . . Just as a witness' testimony may be fact but not relevant, so a liar may give testimony that is fair" (TR 612). It is the State's contention that (1) no demonstrably untruthful statements by Marion King concerning Cummings' involvement in the crime were presented to the grand jury and (2) evidence from independent sources, presented to the grand jury, established probable cause to indict Cummings.

King admitted to the police that he was present at the scene of the murder, but he claimed that he had no gun and did not fire any shots. King identified the three shooters as Cummings, Fisher and Dixon (R 50-51, 53-54; TR 248-49). However, the State learned that a gun previously owned by King (which he claimed he no longer possessed because it had been stolen) had been identified as one of the three guns that had ejected shells at the murder scene (TR 234-35).[2] The State then administered a polygraph examination to King, which King failed 'on at least two questions, one, who was present during the commission of this crime and, two, whose weapons were used and by whom" (TR 247-48). The State thereafter dismissed the charges against Kevin Dixon because Dixon had an alibi, and King's testimony would have been the only evidence the state could have presented at trial to place Dixon with Cummings and Fisher at the scene of the murder.[3] Even without King's testimony, however, the State contended that it had ample evidence to prosecute Cummings,

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[2]The same pawn shop records establishing that King had owned the gun also identified the previous owner. Investigators went to the previous owner and obtained shell casings which had been fired from the gun. Ballistics examination identified them as having been fired from the same gun as some of the shell casings recovered from the murder scene (TR 234-35).

[3]Fisher and Cummings had also placed Dixon at the scene of the murder, but they, of course, were unavailable as witnesses to the State in any prosecution of Dixon.

including Cummings' fingerprint on the gun identified as the **murder weapon** (TR 253).

A review of King's sworn statement (R 46-59) shows that, aside from King's attempt to minimize his own involvement in the shooting and his identification of Dixon as one of the three shooters, the facts sworn to by King in his statement are consistent with the evidence the State presented at trial. For example, King admitted being the driver, admitted that he drove the others to the murder scene in his white Honda automobile, and placed Fisher in the front passenger seat (R 53) . This statement is entirely consistent with trial testimony by Justin Robinson, who saw a white Honda being driven by King, with Fisher in the front passenger seat, proceeding toward the victim's house just before the shooting (TR 773-778). King's sworn statement about the argument between Fisher and Dap in which Dap had hit Fisher on the head (R 50) is corroborated by Dap's trial testimony that he and Fisher had gotten into an argument about the way Fisher had been driving, and that Dap had hit Fisher in the head with a beer bottle (TR 751-54). King's sworn statement about Cummings having a Uzi when he first entered King's car (R 51) is consistent with trial testimony that Cummings ♦♋♦ seen carrying an Uzi shortly before the murder (TR 772). King's sworn statement that as they drove by Dap's house Cummings

said, "hold up, it looks like somebody's sitting on the porch lighting a cigarette or something" (R 9-10), is consistent with the testimony of Shelton Lucas, Sr., that he was sitting outside smoking a cigarette just before the shooting (TR 700-02). Finally, even if King lied about not being one of the shooters himself, his sworn statement that the shooters exited the car before they shot is consistent with the location of the shell casings recovered at the scene (TR 864, 1057, 1178-79).

Detective Gilbreath testified at his deposition that he presented to the grand jury information King had provided, along with other information that Gilbreath knew about the crime (R 476, 482). He told the grand jury that Dixon was identified by King as being in the car with Cummings, Fisher and King, and that according to King, who was "the driver of the vehicle," , . . 'he drove to the house where Dap stayed, and the other three participants got out of the vehicle and fired at the house" (TR 477). In addition, Gilbreath told the grand jury about Cummings' escape attempt (TR 479), and reported to the grand jury that, although Cummings and Fisher had given statements to police identifying Dixon as the sole shooter, forensic work indicated that at least three guns had been fired at the scene (TR 478-79). Gilbreath told the grand jury that Dixon had been seen by another witness (not King) after the

shooting in the company of Fisher and Cummings (TR 485). Gilbreath told the grand jury that King was cooperating with the police (TR 493). Gilbreath told the grand jury that "Andre Fisher had a dispute with Dap who had hit him in the--Dap hit Andre in the head with a beer bottle that evening, earlier. That Dap stayed at that residence, according to King and also according to what [officer] O'Steen told me that happened from his interviews of the people in the house, just prior to the shots being fired that, I believe, the father of the child that was killed who was, I believe, a brother, uncle, something, of Dap, had been on the carport for the purpose of smoking a cigarette and had just gone back inside" (TR 494-95). In addition, Gilbreath told the grand jury that King had stated that as his group "rounded the corner, one of the participants in the car said, 'There he is,' and pointed to a figure in the carport" (TR 495). Gilbreath reported that O'Steen had interviewed King's mother and she had stated to him that her son had admitted being involved (TR 498). Gilbreath did not tell the grand jury which defendant was holding which weapon at the time of the shooting (TR 502). However, Gilbreath reported that he had interviewed someone other than King who had placed an Uzi in Cummings' hands shortly prior to the murder (TR 503).

From the foregoing, it is clear that the following testimony presented to the grand jury was supported by information from sources other than King: (1) there was an altercation between Dap and Andre Fisher in which Dap hit Fisher in the head with a beer bottle; (2) Dap's brother was smoking a cigarette in the carport just before the shooting; (3) Cummings admitted being present but accused Dixon of being the sole shooter; (4) forensic evidence indicated that at least three guns had been fired at the scene; (5) Cummings was in possession of an Uzi shortly before the murder; and, (6) Cummings tried to escape from jail. Even without any information from King, probable cause to indict Cummings was established.

Furthermore, the State does not agree that the following testimony, presented to the grand jury based on information from King, was false: (1) Cummings was in the car being driven by King; (2) King drove the group to the house where Dap stayed; (3) as they rounded a corner, one of the group said, 'There he is," and pointed to a figure in the carport; (4) King stopped the car and three people got out and fired at the house. As noted above, all of this testimony was at least consistent with, if not fully corroborated by, testimony presented by other witnesses at trial. The mere fact that the State had doubts about the self-serving portions of King's

statement, or even his identification of Dixon, does not mean that the State had doubts about the remainder of his statement, or that any other part of his statement is demonstrably false.[4] Cf. Bank of Nova Scotia v. U.S., 487 U.S. 250, 261, 108 S.Ct. 2369, 101 L.Ed.2d 228 (1988) ("Although the Government may have had doubts about the accuracy of certain aspects of the summaries, this is quite different from having knowledge of falsity.")

Here, as in Anderson v. State, "we are not faced with subsequent testimony that can be said to remove the underpinnings of the indictment." 574 So.2d at 92. Although King's role arguably was changed by the subsequently-discovered evidence that his gun had been fired at the scene, Cummings' role was not. King's attempt to minimize his own conduct and to identify Dixon as one of those present had "no factual bearing on the grand jury's decision to indict [Cummings] for the murder." Ibid.

The State would note that Cummings and Fisher have now been found guilty of first-degree murder beyond a reasonable doubt. The

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[4]Cummings' trial counsel argued that the State's decision not to use King **as** a witness demonstrated that the State did not think anything King said was true, otherwise why would the State not use King to testify about those statements that "might be true." The trial court answered: 'They're pragmatic lawyers and they understand if they use him you and [counsel for Fisher] would crucify him on the other issue" (TR 613).

trial jury's "subsequent guilty verdict means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt." United States v. Mechanik, 475 U.S. 66, 70, 106 S.Ct. 938, 89 L.Ed.2d 50 (1986). The trial jury's "verdict of guilty beyond a reasonable doubt demonstrates a fortiori that there was probable cause to charge the defendants with the offenses for which they were convicted." Id. at 67. Nothing that happened in the grand jury proceedings deprived Cummings of a fair determination of his guilt or innocence, and this issue provides no basis for a reversal of his conviction.

ISSUE II

CUMMINGS HAS FAILED TO PRESERVE FOR APPEAL ANY ISSUE OF THE COURT'S REFUSAL TO EXCUSE JUROR BOLD FOR CAUSE; BUT EVEN IF THIS ISSUE IS PRESERVED, THERE WAS NO REVERSIBLE ERROR

Randall Bold stated on voir dire examination that he was married, had four children at home, and had never before served on a jury (TR 274). Bold was "undecided" about the death penalty, in contrast to the many jurors who stated that they were "for it" (TR 364). Later, however, he did state that he could impose a death sentence (TR 391-92), explaining: 'Personally I'm undecided, but if

the death penalty is part of the law, then I would follow the law, if it's -- it was part of the sentencing" (TR 430).

Defense counsel subsequently asked prospective jurors, "Does anybody here feel that the fact that the victim in this case is a child it would make you more prone to convict or convict at a higher degree as opposed to whether or not the victim were somebody that were [sic] older?" (TR 469). Some of the jurors answered that while it would not make a difference as to guilt, it might be a factor as to sentence (TR 471-73). Randall Bold responded: "I have four kids under 13 and I think that would probably weigh in the sentencing . . . for me, too" (TR 473). Defense counsel followed up this answer by asking Bold, 'When you say weigh, you mean even if you were told that's something you shouldn't consider, you think it would outweigh--" Bold interrupted to say: 'It would be in my head" (TR 474).

Counsel asked Bold no further questions on this subject. However, defense counsel later asked if anyone with young children might be "distracted" or "worried" about them if asked to serve as jurors (TR 482). Bold responded that if he could make arrangements for his parents to take care of them, it "wouldn't be on my mind;" if he could not make arrangements, he did not "know the answer" (TR 483).

Following the conclusion of the voir dire examination, the court took up challenges for cause (TR 506 et seq). One of defense counsel's challenges was to Randall Bold (TR 510) :

> MR. FALLIS: Your Honor, I believe Mr. Bold for cause, and not because he's got to worry about baby-sitting. He said he had four children at home and he thinks it would weigh on his decision, okay, and he couldn't put that out of his head. As the Court is aware, you know, as of now the age of the victim is not an aggravating factor.
>
> THE COURT: I understand that, but, Mr. Fallis, what he actually said was he had four children at home and it would be in his mind, but he could put it out of his head. He was very clear about that. . . . I'll disallow that as a cause challenge.

The court did, however, excuse prospective jurors who had stated that "age would weigh heavily in the guilt phase" (TR 513); that age "would affect his thinking" (TR 513); and that "age would make a difference" (TR 516). The court did not excuse a prospective juror who expressed "difficulty but not an inability" as to the age of the victim (TR 515).

After the defense exhausted its peremptories, defense counsel asked for more peremptories. The court asked defense counsel to identify any of the twelve jurors he would challenge if granted extra peremptories (TR 536). Defense counsel identified only Harriet Safer (TR 537). After some discussion about what Safer's

voir dire answers had been, the trial court asked, "And that was the one that you would ask for an additional challenge for?" Defense counsel answered, "Yes, Your Honor." After thus making sure which juror defense counsel would challenge if granted an additional peremptory, the trial court denied "the defense's motion for an additional challenge" (TR 537).

The law in this State is that in order to preserve any issue about the denial of a challenge for cause, a defendant must first exhaust all of his peremptory challenges and seek an additional challenge which is denied. Kearse v. State, 662 So.2d 677, 683 (Fla. 1995). Cummings' trial counsel clearly satisfied this initial requirement. However, in addition, the defendant must at the same time "identify a specific juror whom he otherwise would have struck peremptorily" and this juror must have "actually sat on the jury." Ibid. Although trial counsel did identify a specific juror, he did not identify Randall Bold as a juror whom defense counsel would have struck peremptorily if an additional challenge had been granted. In effect, Cummings is complaining about the denial of an additional peremptory on a ground not raised at trial. 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."). Following the exhaustion of the defendant's peremptory challenges, Cummings' trial counsel did not renew his challenge for cause to Bold, or attempt to challenge Bold peremptorily, or otherwise object to Bold's service on the jury. Trotter v. State, 576 So.2d 691, 693 (Fla. 1990). The only juror he complained about following the exhaustion of his peremptory challenges was Harriet Safer, It is now too late for Cummings to argue that he should have been granted an additional peremptory to use against Randall Bold. Pietri v. State, 644 So.2d 1347, 1353 (Fla. 1994) (issue not preserved when counsel failed to identify juror whom he would have struck peremptorily when he sought additional peremptories) .

Even if preserved, however, there was no reversible error. Although the trial court may not have remembered Bold's voir dire answer correctly (it does not appear that Bold said he could put the age of the victim out of his head), nevertheless, a "conclusion or decision of a trial court will generally be affirmed, even when based on erroneous reasoning, if the evidence or an alternative theory supports it." Caso v. State, 524 So.2d 422, 424 (Fla. 1988). (This rule of appellate review may be referred to euphemistically as the "right-for-any-reason* rule.) Bold did not say (as did one juror who was disqualified) that the age of the

victim would "weigh heavily" on the issue of guilt. Bold did not even say that it would weigh "heavily" on the issue of sentence. In fact, he ultimately did not even **say** for sure that he would "weigh" the age of the victim at all; only that it "would be in my head." Cummings does not explain why such answer should have disqualified Bold. The age of the victim, after all, was introduced in evidence without objection (TR 724), and the State does not understand the law to be that a juror should be required to put properly admitted evidence out of his head. Moreover, although the State acknowledges that the age of the victim was not a statutory aggravator at the time of the trial,[5] the State does not agree that the age of the victim was irrelevant to the issue of sentence. This Court has held that the weight properly accorded to an aggravator will depend upon a consideration of the "totality of the circumstances in a case," Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990), and, more specifically, that the age of a victim is a circumstance which may properly be considered. Slawson v. State, 619 So.2d 255, 259-60 (Fla. 1993) (age of victim of prior

[5]The State would note that under present law, enacted since Cummings' trial, the fact that the murder victim was a person under the age of 12 is a statutory aggravator. § 921.141 (5)(l), Fla. Stat. 1996. If Cummings were to be resentenced, this statutory aggravator presumably would apply.

felony properly considered in determining weight to given the prior-violent-felony aggravating factor). Juror Bold was not disqualified to serve as a juror simply because the age of the victim would be "in his head." Cummings has failed to demonstrate that Bold was biased or prejudiced or that he could not 'render a verdict solely upon the evidence presented and the instructions of the law given by the court." Lusk v. State, 446 So.2d 1038, 1041 (Fla. 1984).

ISSUE III

TESTIMONY THAT CUMMINGS RESPONDED TO NEWS OF A CHILD'S DEATH WITH PROFANITY WAS PROPERLY INTRODUCED IN EVIDENCE; EVEN IF NOT, ANY ERROR WAS HARMLESS

Michael Gardner testified that he was with Cummings the day of the murder when Cummings received a page on his beeper (TR 820). After returning the call, Cummings told Gardner that Dap had 'jumped on" Andre Fisher. Cummings stated that he needed to go to his apartment "to get his shit" (TR 821-22). Gardner drove him there and then to Fisher's house, where he dropped Cummings off and left (TR 823-24). Later that evening, after Gardner had learned about the murder of Dap's nephew, Gardner saw Cummings in the company of Kevin Dixon. Gardner asked Cummings what had happened. Cummings answered that he did not know. Gardner told him, 'A baby

got shot." Cummings response was: "So fuck it" (TR 828). The next day, however, Cummings sought out Gardner to ask him to corroborate a false alibi that he planned to give to the police (TR 829-30).

Cummings' trial counsel objected on grounds of relevance and prejudice to that portion of Gardner's testimony in which Gardner described Cummings' profane response to the statement that a baby had been shot (TR 796-97, 813-14). The State argued that the response showed 'consciousness of guilt" (TR 797). After listening to a proffer outside the presence of the jury, the trial court overruled the objection. In the court's view, the fact that Cummings had attempted to establish a false alibi with the same witness to whom he initially had pretended ignorance of the facts 'makes [his response to the news of the child's death1 relevant" (TR 815).

On appeal, Cummings argues that his profane response was irrelevant or, at least, that any probative value was outweighed by prejudice. The State does not agree.

Cummings cites two cases. In Conlev v. State, 620 So.2d 180 (Fla. 1993), this Court dealt with a dispatch report in which an unidentified person made a statement that a man carrying a gun was chasing a woman. This Court held that while the fact of a statement may be offered to explain a police officer's subsequent

conduct, the content of such statement ordinarily should not be admitted. Conley obviously is inapposite. Not only was the statement at issue in this case made by the defendant himself (and not some unidentified third party), the statement in this case was not offered to explain the subsequent conduct of the person who heard the statement--it was offered to explain Cummings' own consciousness of guilt.

At issue in Sinser v. Stats, 647 So.2d 1021 (Fla. 4th DCA 1994), was the admissibility of actual threats made by the defendant to the arresting officer, the judge and the jury. The threats, particularly to the judge and the jury, were minimally relevant and highly prejudicial. No such threats were introduced in this case, and Singer, too, is inapposite.

In this case, Cummings' own statements about the crime were introduced to show consciousness of guilt of premeditated murder. When the consequence of the shooting was called to Cummings' attention, he did not claim that he was only shooting at the car or the house, or that he meant only to scare, not to murder, Instead, he effectively denied any part in the killing by professing ignorance about the murder and treating it as a matter of no consequence to him. Subsequently, however, he elicited Gardner's assistance in concocting an alibi. The fact that Cummings made

inconsistent statements about his participation in or knowledge of a crime was relevant to show that he attempted to avoid detection by lying and properly was offered affirmatively to show consciousness of guilt and unlawful intent. Smith v. State, 424 So.2d 726, 730 (Fla. 1983) (inconsistencies in various statements were "relevant to show that appellant had attempted to avoid detection by lying to the police"); Blair v. State, 406 So.2d 1103, 1106-07 (Fla. 1981) (defendant's statements were admissions or declarations which sought to provide an explanation of innocence; fact that they were inconsistent "shows not only guilty knowledge but also the very real intent to cover up the fact that [the victim's] death was the result of his criminal agency"); State v. Frazier, 407 So.2d 1087 (Fla. 3d DCA 1982).

Cummings' initial responses to Gardner's inquiry about the murder, coupled with his subsequent attempt to concoct an alibi for that murder, were highly relevant to show consciousness of guilt, and the State was not obligated to sanitize the language Cummings used to distance himself from the murder. The trial court did not err in admitting these statements into evidence.

Even if the trial court erred for any reason, however, in admitting the profane portion of Cummings' statements, such error was harmless. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). It

essentially is unrefuted that Cummings responded to the news that Dap had got into an altercation with Cummings' uncle Andre Fisher by grabbing an Uzi and rushing to Dap's house, where he and his codefendants fired 35 ***rounds*** at the doorway which Dap's brother-in-law (who closely resembled Dap in height and build) had just entered. These facts compellingly demonstrate Cummings' guilt of the offense of first degree murder. The fact that Cummings said "So fuck it" instead of "So what" in response to the news of the child's death was inconsequential to the jury's verdict.

ISSUE IV

ABSENT EVEN A SUGGESTION THAT CUMMINGS ACTED IN SELF-DEFENSE, TESTIMONY THAT CUMMINGS WAS WARNED THAT DAP CARRIED A GUN WAS IRRELEVANT AND PROPERLY EXCLUDED

Cummings attempted to offer the testimony of a witness describing a conversation with Cummings in which the witness had warned Cummings that he had "better be careful" because Dap was known to carry a gun and, in fact, had pulled a gun on the witness (TR 919). The State objected that, absent some claim of self defense, such testimony was irrelevant (TR 920). Defense counsel responded: "If [Cummings] was going out to settle the score with someone who he thought was known to be armed, was told was armed, and whether he carried a gun would be very relevant, Judge, and I

believe that's what we're arguing." The court disagreed, stating: "If he had the right to be a vigilante, it might be. He did not and I will not allow the proffer." (TR 922).

Citing no authority whatever, Cummings argues on appeal that the court's ruling was error. He contends that it makes his actions "less premeditated" if he was warned that Dap carried a gun. Initial Brief of Appellant at p. 41. But Cummings does not contend that he acted in self-defense, or that he armed himself in case Dap sought him out. On the contrary, Cummings went looking for Dap, and even his trial counsel acknowledged that Cummings went to Dap's residence to "settle the score." Moreover, there is not even a suggestion that the person they saw in the carport was armed, or fired first, or acted in any way threatening or otherwise was an aggressor. It is well-settled that the character of the intended victim is irrelevant in these circumstances. Dupree v. State, 615 So.2d 713, 721 (Fla. 1st DCA 1993); Pino v. Kowlber, 389 So.2d 1191, 1194 (Fla. 2d DCA 1980). The trial judge did not err in excluding testimony that Dap was known to carry a gun.

ISSUE V

THE TRIAL COURT WAS AUTHORIZED TO FIND THAT CUMMINGS KNOWINGLY CREATED A GREAT RISK OF DEATH TO MANY PERSONS WHEN HE AND OTHERS FIRED 35 ROUNDS INTO AN OCCUPIED DWELLING; ALTERNATIVELY, BECAUSE THE TRIAL COURT ONLY GAVE THIS AGGRAVATOR "SLIGHT WEIGHT" ANY ERROR IN FINDING IT WAS HARMLESS

Cummings and at least two others fired 35 times into the kitchen-door area of a well-lit, occupied dwelling in a residential neighborhood, at 9 p.m. on Tuesday night--a time when (as the trial court noted in its sentencing order) families typically are at home watching television. There were five persons in the house. The trial court found that the "time, location, neighborhood and the outward appearance of the home coupled with the firing of at least 35 shots from at least three semi-automatic weapons directly toward and into the home which was in a residential subdivision" was sufficient to demonstrate that Cummings knowingly had created a great risk of death to many persons (R 451).

This case is more like Welty v. State, 402 So.2d 1159 (Fla. 1981), Fitzpatrick v. State, 437 So.2d 1072 (Fla. 1983), and Suarez v. State, 481 So.2d 1201 (Fla. 1985), than it is to the cases cited by Cummings. In Welty, this Court held that "six" people "can be classified as many persons." Id. at 1164. In Fitzpatrick, this Court upheld the great risk aggravator where the

defendant got into a gun battle with two police officers in the presence of three hostages. In Suarez, the great risk aggravator was upheld where the defendant fired at three officers in the presence of three accomplices in the driveway of a migrant labor camp.

By contrast, the defendant in Conev v. State, 653 So.2d 1009, 1015 (Fla. 1995), created a great risk to no one other than the person he set on fire. In Jackson v. State, 599 So.2d 103, 108-09, the trial court had found the great-risk-to-many-persons aggravator based on speculation that the fire the defendant had set to a car might have caused an explosion which might have killed those responding to the fire. In Williams v. State, 574 So.2d 136, 138 (Fla. 1991), this Court found no "immediate and present risk" to many others where there was no evidence of indiscriminate shooting in the direction of bank customers.

Finally, Cummings relies on Bello v. State, 547 So.2d 914, 917 (Fla. 1989), which holds that "three people simply do not constitute 'many persons'" within the meaning of the great-risk-to-many-persons aggravator. In Bello, however, the defendant had been inside the house, in a bedroom, and had shot a mere five shots at drug officers attempting to enter that bedroom. In this case, by contrast, Cummings and his codefendants were not in a house, and

they did not shoot only five times; they stood in the street ip a residential area and fired thirty-five rounds from the street into a dwelling. Furthermore, there were five persons in the house, none of whom were Cummings' intended victim, and, even if two of them were in a bedroom, all of them were at great risk of being fatally injured by one or more of the 35 nine-millimeter rounds fired into the house. Cummings' actions created an 'immediate and present risk" to many persons. Although Dap was the intended target, Cummings and his accomplices fired indiscriminately from the street towards a doorway of an occupied dwelling in a suburban residential area. The trial court was authorized to find that Cummings' actions presented a great risk of death not just to their intended target, but to many persons, including the innocent victim who was killed in the hail of gunfire.

Should this Court disagree, however, any error was harmless because the trial court only gave this aggravator "slight weight" (R 451), and because striking this aggravator would leave two aggravators and nothing in mitigation. Geralds v. State, 674 So.2d 96, 104-05 (Fla. 1996) (no reasonable likelihood of different sentence where striking an aggravator left two aggravators to be weighed against one statutory mitigator and three nonstatutory mitigators); Pietri v. State, 644 So.2d 1347, 1354 (Fla. 1994)

(Striking CCP left three aggravators and, even if trial court had found mitigation, there was no reasonable likelihood of a different sentence).

ISSUE VI.

THE TRIAL COURT DID NOT ERR BY FINDING THIS MURDER TO HAVE BEEN COLD, CALCULATED AND PREMEDITATED

Between 7:30 and 8 p.m. the evening of the murder, Andre Fisher started a fight with Karlon Johnson, otherwise known as Dap (TR 751, 765, 766-67). During the fight, Fisher was struck in the head with a beer bottle (TR 754). Jason Robinson broke up the fight and, with difficulty, persuaded Fisher to leave (TR 768). At 8 p.m., Fisher called his nephew, Derrick Cummings, to tell him what had happened (TR 821). Cummings' first reaction was to get his gun and go looking for Dap (TR 822, 916). Michael Gardner drove Cummings to his apartment to get the gun, and then to the area of the confrontation, where Cummings asked Jason Robinson where Dap was (TR 771, 822-23). Cummings had an Uzi in his lap (TR 772). Gardner drove Cummings to his grandmother's house, where Gardner left him (TR 823). At nine p.m. (at least an hour after Cummings first learned of the confrontation), Cummings and Fisher were in a Honda driven by Marion King, proceeding towards the residence Dap shared with his sister and her family (TR 726, 773-

74, 777-78). Jason Robinson tried unsuccessfully to divert them from their mission (TR 774). Unknown to Cummings, Dap had already left (TR 755). His car, however, was in the carport (TR 680). Dap's brother-in-law, Shelton Lucas, Sr., was sitting in the carport smoking a cigarette when Cummings and the others drove by (TR 682). Shelton Lucas, Sr., is approximately the same height and weight as Dap, and was wearing a white T-shirt and blue jeans, just like Dap had been wearing earlier that evening (TR 680-81). Cummings and the others stopped the car, got out, and fired 35 nine-millimeter rounds at the doorway which Shelton Lucas, Sr., had just entered (TR 872 et seq).

Cummings argues that this murder was not cold, calculated and premeditated. The State disagrees. The trial court accurately described this crime as a 'search and destroy operation" (R 453). Cummings had over an hour to reflect on his actions and their attendant consequences. He had time to look for Dap, to learn where he lived, to procure a weapon himself, to associate his allies and to make sure they, too, were well armed, and to drive to Dap's residence to kill him. Cummings did not act out of emotional frenzy, panic, or a fit of rage. There was no evidence of any loss of emotional control; Cummings simply made the cold-blooded decision to murder the person who had the temerity to mess with his

uncle. Walls v. State, 641 So.2d 381 (Fla. 1994). The murder clearly was planned sufficiently in advance to afford Cummings "ample time . . . to reflect on his actions and their attendant consequences." Jackson v. State, 522 So.2d 802, 810 (Fla. 1988); Foster v. State, 654 So.2d 112, 115 (Fla. 1995). The evidence presents a compelling case of cold, calculated premeditation. The fact that Cummings and his accomplices fired at least 35 shots at the doorway Lucas had just entered is consistent with an intent to kill, and inconsistent with an intent merely to scare or harass. As the trial court stated, "The premeditation was focused and the manner of execution by the firing of nearly three dozen shots cold and certainly calculated to kill" (R 453).[6]

The fact that the Shelton Lucas, Jr., was not the actual subject of the planning "does not preclude a finding of cold, calculated premeditation." Sweet v. State, 624 So.2d 1138, 1142 (Fla. 1993). The heightened premeditation necessary for this circumstance does not have to be directed toward the specific victim. "It is the manner of the killing, not the target, which is

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[6]The State would suggest that Cummings' response to the news that a child had been killed ('So fuck it"), corroborates the trial court's assessment of Cummings' state of mind at the time of the murder.

the focus of this aggravator." Ibid. (citing Provenzano v. State, 497 So.2d 1177, 1183 (Fla. 1986)).

As for the factor of any pretense of moral or legal justification, there is no evidence that Dap planned to retaliate even against Fisher, much less Cummings. Even assuming, arguendo, that Cummings had some pretense of justification for arming himself, he had no pretense of justification for planning an armed raid of Dap's home or for firing 35 shots into that home at someone who offered no resistance whatever. Ferrell v. State, 21 Fla. L. Weekly S 388 (Fla. September 19, 1996) (CCP aggravator upheld where evidence indicated defendant murdered victim to prevent the him from retaliating for a previous robbery committed against him by defendant).

The trial court properly found that this murder was cold, calculated and premeditated.

ISSUE VII

CUMMINGS' DEATH SENTENCE IS NEITHER EXCESSIVE NOR DISPROPORTIONATE TO PENALTIES IMPOSED IN SIMILAR CASES, CONSIDERING BOTH THE CRIME AND THE DEFENDANT

Citing two single-aggravator, felony-murder cases--Sinclair v. State, 657 So.2d 1138 (Fla. 1995) and Thompson v. State, 647 So.2d 824 (Fla. 1994) --Cummings argues that his death sentence is

disproportionate. These cases are not similar to Cummings' **case,** in which multiple aggravators were found, the strongest of which--according to the weight assigned by the trial court--was the CCP aggravator. Not only is this case more aggravated than those he cites, but it is less mitigated. Even Cummings does not contend that any statutory mitigators should have been found by the trial court, and the trial court found no nonstatutory mitigation. Cummings does complain about this latter finding, but it is clear that even if the proffered mitigation evidence is reviewed in the light most generous to the defendant, any nonstatutory mitigation was no more than minimal--according to his own witnesses, Cummings is not mentally retarded, he has no mental disorders, and he was raised by his grandmother in a "loving an nurturing home" in which he was taught rules and **was** given the benefit of religious instruction.

This Court's proportionality review entails consideration not merely of the statutory aggravators and of any mitigators, but includes consideration of the "totality of circumstances in a case." Sinclair v. State, supra at 1142 (emphasis in original) (quoting Tillman v. State, 591 So.2d 167 (Fla. 1991). One of the undisputed circumstances of this case is that the victim was only five years old. Although the age of the victim was not a statutory

aggravating circumstance at the time of the trial--and was not presented as such by the State or considered as such by the sentencer--nevertheless, under present law it is an aggravating circumstance that the murder victim was under the age of 12, as noted previously (footnote 4). The State would contend that this Court properly may consider the age of the victim as a valid aggravating factor in its proportionality review of this case, in accordance with its "responsibility to review the entire record in death penalty cases and the well-established appellate rule that all evidence and matters appearing in the record should be considered which support the trial court's decision." Echols v. State, 484 So.2d 568, 576-77 (Fla. 1985). Even if this Court is reluctant to consider the age of the victim independently, however, the State would contend that, at the very least, this Court may consider the age of the victim as a matter going to the weight properly to be assigned to the aggravators found by the trial court. Slawson v. State, 619 So.2d 255, 260 (Fla. 1993) (age of victim relevant to weight assigned to prior-violent-felony aggravator); Terry v. State, 668 So.2d 954 (Fla. 1996) (in conducting proportionality review, circumstances of aggravator relevant to weight; Florida's sentencing scheme not founded on

"mere tabulation" of aggravating and mitigating factors, but relies on "weight of underlying facts").

The death penalty was imposed properly for the cold, calculated and premeditated drive-by shooting of a five-year old child lying asleep on the couch in his own home. Geralds v. State, 674 So.2d 96 (Fla. 1996) (death sentence proportionate when two aggravators weighed against one statutory and three nonstatutory mitigators); Finney v. State, 660 So.2d 674 (Fla. 1995) (death sentence proportionate where there were three aggravators and five nonstatutory mitigators); Gamble v. State, 659 So.2d 242 (Fla. 1995) (death sentence proportionate where there were two aggravators, one statutory mitigator, and several nonstatutory mitigators); Bogle v. State, 655 So.2d 1103 (Fla. 1995) (death sentence proportionate where there were four aggravators, one statutory mitigator and several nonstatutory mitigators); Fennie v. State, 648 So.2d 95 (Fla. 1994) (death sentence proportionate where there were three valid aggravators and both statutory and nonstatutory mitigators); Bruno v. State, 574 So.2d 76 (Fla. 1991) (death sentence proportionate with three aggravators and no statutory mitigators).

ISSUE VIII

VICTIM IMPACT EVIDENCE WAS ADMITTED PROPERLY AT THE PENALTY PHASE

At the penalty phase, the State introduced victim impact evidence consisting of the victim's mother and grandmother reading from prepared statements which were reviewed in advance by the trial court. These statements described the personal characteristics of the victim and the impact that his death had on his family (TR 1437-39, 1442-44). This is precisely the kind of evidence contemplated by § 921.141 (7) Fla. Stat. 1993. Bonifay v. State, 680 So.2d 413, 419-20 (Fla. 1996) (impact to family members relevant under victim-impact statute). Cummings' complaints about the constitutionality of the admission of victim-impact evidence have been answered contrary to his contentions in Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). See also Archer v. State, 673 So.2d 17, 21 (Fla. 1996) (rejecting contention that victim impact is impermissible nonstatutory aggravator) .

The trial court properly overruled Cummings' objection to the prosecutor's argument that the victim was a unique individual (TR 1523). Argument on victim impact evidence is authorized specifically by § 921.141 (7): "the prosecution may introduce, and

subsequently argue, victim impact evidence." Shelton Lucas, Jr., was a unique individual and was morally entitled to be considered as such, not as a "faceless stranger." Payne v. Tennessee, supra, 115 L.Ed.2d at 735.

Even if some portion of the evidence or argument was allowed improperly, any error was harmless in light of the strong aggravation and minimal mitigation presented in this case.

ISSUE IX

BECAUSE CUMMINGS FAILED TO IDENTIFY SPECIFIC NONSTATUTORY MITIGATING CIRCUMSTANCES FOR THE TRIAL COURT, HE MAY NOT CONTEND NOW THAT THE TRIAL COURT ERRED IN NOT EXPRESSLY CONSIDERING OR FINDING NONSTATUTORY MITIGATION; FURTHER, THE RECORD SUPPORTS THE TRIAL COURT'S REJECTION OF NONSTATUTORY MITIGATION

Here Cummings contends the trial court erred in rejecting seven alleged nonstatutory mitigating circumstances: (a) no father figure; (b) a deprived childhood economically; (c) disadvantaged school career; (d) a severe motorcycle accident which was to have left Defendant permanently unable to walk; (e) a helpful disposition to neighbors, including elderly people and children; (f) a close family relationship, and (g) a disadvantaged situation with a mother who abused him for the first two critical years of his life and a grandmother who was busy working two jobs and could

not spend the proper time to raise him. Initial Brief of Appellant at 55.

It has been noted that nonstatutory mitigation includes "factors too intangible to write into a statute." Gregg v. Georsia, 428 U.S. 153, 222, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (cited in Lockett v. Ohio, 438 U.S. 586, 606, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (fn. 14)). This very intangibility allows a broad range of inferences from the evidence and allows the same evidence to be described in innumerable ways. Consalvo v. State, 21 Fla. L. Weekly S423, S427 (Fla. Oct. 3, 1996) ("Unlike statutory mitigation that has been clearly defined by the legislature, nonstatutory mitigation may consist of any factor that could reasonably bear on the sentence. The parameters of nonstatutory mitigation are largely undefined."). For this reason, it is incumbent on the defense to identify for the trial court specific nonstatutory mitigating circumstances it is trying to establish. Hodges v. State, 595 So.2d 929, 934-35 (Fla. 1992). If trial counsel fails to do so, this Court "will not fault the trial court for not guessing which mitigators" the defendant will 'argue on appeal." Id. at 935.

In this case, trial counsel did discuss the defense mitigation testimony in closing argument to the jury (TR 1531-37). And the

State does not contend that there is no logical connection between the specific nonstatutory mitigators listed in Cummings' brief and the discussion of the testimony in his closing argument to the jury. The State would insist, however, that trial counsel did not identify the *specific* nonstatutory mitigating circumstances he now alleges, and would contend that Cummings' trial counsel (one of whom is now appellate counsel) failed to assume their burden to *identify for the court the specific nonstatutory mitigating circumstances [they were] attempting to establish." Lucas v. State, 568 So.2d 18, 24 (Fla. 1990). Therefore the trial court did not err 'in not expressly considering or finding these as nonstatutory mitigators." Consalvo v. State, supra at S427.

However, to the extent that any issue is preserved here, the State would contend that the trial judge did not err, or at most erred harmlessly, in its consideration and rejection of nonstatutory mitigation.[7]

There are "no hard and fast rules about what must be found in mitigation in any particular case . . . . Because each case is unique, determining what evidence might mitigate each individual

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[7]The trial judge individually addressed and rejected all of the statutory mitigators. Cummings does not complain about this portion of the trial court's sentencing order.

defendant's sentence must remain with the trial court's discretion." Lucas v. State, 568 So.2d 18 (Fla. 1990). Accord, Atkins v. Singletary, 965 F.2d 952, 962 (11th Cir. 1992) ('Acceptance of nonstatutory mitigating factors is not constitutionally required; the Constitution only requires that the sentencer consider the factors."); Kight v. Singletary, 50 F.3d 1539, 1548 (11th Cir. 1995) (sentencer must consider mitigating factors, but need not accept them).[8] So long as the trial court considers the evidence presented in mitigation--and there is no indication in this case that the trial judge did not--the decision as to whether a mitigating circumstance has been established, and the weight to be given to it if it is established, are matters

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[8]See also, Burger v. Kemp, 483 U.S. 776, 794, 107 S.Ct.3114, 97 L.Ed.2d 638 (1987) (quoting with approval 11th Circuit's observation that "mitigation may by in the eye of the beholder"); Tuilaepa v. California, ___ U.S. ___, ___ S.Ct. , 129 L.Ed.2d 750, 767 (Souter, J., concurring) ("refusing to characterize ambiguous evidence as mitigating or aggravating is . . . constitutionally permissible"). The State would note that in jury-sentencing states, there typically are no mitigation findings to review on appeal, because requiring such findings in the form of a verdict agreed to by the jury as a whole would run afoul of the requirement that each juror must be allowed to decide for himself or herself what is and what is not mitigating, and the weight to be given to any mitigation. McKoy v. North Carolina., 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990); Mills v Maryland, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988).

within the trial court's discretion. Bonifay v. State, supra, 680 So.2d at 416.

Cummings was raised by his grandmother and his uncles and aunts. Although his grandmother testified that she worked two jobs to support the family, there is no evidence that Cummings ever lacked food, clothing or any other necessities of life, or that his childhood--although obviously not wealthy--was economically deprived. Moreover, although his mother did not provide parental care for him, she left him in the company of relatives who could, and it is not disputed that Cummings was provided a "loving and nurturing home" by persons who attempted to provide moral guidance. His family background properly was rejected as mitigating. Jones v. State, 652 So.2d 346, 351 (Fla. 1995) (where defendant's mother was unable to care for him but left him in the care of relatives who could, "court did not abuse its discretion by refusing to find in mitigation that [defendant] was abandoned by an alcoholic mother"); Sochor v. State, 619 So.2d 285, 293 (Fla. 1993) ("Deciding whether such family history establishes mitigating circumstances is within the trial court's discretion."); Valle v. State, 581 So.2d 40, 48-49 (Fla. 1991) (trial court properly rejected evidence of dysfunctional family and abusive childhood as mitigating factors) .

The only evidence of a 'disadvantaged school career" is that after a motorcycle accident, Cummings quit school and refused to return, despite having opportunities to do so. The trial court committed no error in rejecting the purported disadvantaged school career in mitigation. That Cummings may occasionally have been helpful to his neighbors before he left home to live in an apartment with his girlfriend over a year before the murder (without any obvious legal means of support) is neither extraordinary nor remarkable, but only what might reasonably be expected of any neighbor. Zeigler v. State, 580 So.2d 127, 130 (Fla. 1991) (not error to conclude that defendant's character was "no more good or compassionate than society expects of the average individual"). Moreover, Cummings indicated to the presentence investigator that, instead of working, he had been supporting himself (in fine style) by selling drugs. That, coupled with his criminal record--which according to the presentence report includes a 1992 conviction for sale and delivery of cocaine and numerous charges of driving without a license and resisting arrest--belies his claim of good character.

Substantial, competent evidence supports the trial court's rejection of nonstatutory mitigation. Should this Court find any error, however, the State would contend that it was harmless. Even

if all the nonstatutory mitigation Cummings now proposes were considered as valid nonstatutory mitigation, it would be minimal considered against the aggravating circumstances. There is no mental mitigation and Cummings was raised in a good home in which his emotional, physical and moral needs were met. He rejected his upbringing, left home, supported himself by illegal means, and, ultimately, murdered a five-year-old child. Cummings' death sentence should be affirmed. Wickham v. State, 593 So.2d 191 (Fla. 1991); Cook v. State, 581 So.2d 141 (Fla. 1991); Zeigler v. State, supra, 580 So.2d at 130-31; Rogers v. State, 511 So.2d 526 (Fla. 1987).

ISSUE X

THE TRIAL COURT PROPERLY FOUND AS A STATUTORY AGGRAVATING CIRCUMSTANCE THAT THE MURDER OF SHELTON LUCAS, JR., WAS COMMITTED WHILE THE DEFENDANT WAS ENGAGED IN THE COMMISSION OF A BURGLARY; BY ITS VERDICT OF GUILTY OF PREMEDITATED MURDER, THE JURY FOUND THAT CUMMINGS INTENDED TO KILL, AND ENTRY BY INSTRUMENT IS SUFFICIENT TO ESTABLISH THE ELEMENT OF ENTRY WHERE THE INSTRUMENT IS ACTUALLY USED TO COMMIT THE CONTEMPLATED CRIME

The Lucas house is located at 5206 Washington Estates Drive, on the corner of Washington Estates Drive and Dostie Drive (TR 692). The carport faces south to Dostie Drive. The west wall of the carport has a door to a utility room; the north wall is brick

and has a door to the kitchen; the east side apparently has a low wall but is open. The kitchen door faces toward Dostie, but from inside the kitchen one can look through the screened window of the kitchen door out the east side of the carport to see Washington Estates Drive (TR 693, 842-43, 876-77).

The evidence indicates that Cummings and his accomplices approached the Lucas residence from Washington Estates Drive and made a wide right turn onto Dostie. Shelton Lucas, Sr., was in the back of the carport, next to the kitchen door, just finishing a cigarette when he saw the headlights of a car on Dostie (TR 681-82, 693). He entered the house. The lights were on in the kitchen and in the living room (TR 696-97). From the kitchen door to the living room was "about four" steps (TR 707). As he walked into the living room, he heard a 'popping sound" (TR 682, 702). He thought it was 'firecrackers," but as the popping sounds continued, his wife woke up and yelled, 'He's hit" (TR 682).

Charlsie Lucas, the victim's mother (and Dap's sister) testified that she was asleep on the couch with the victim in her arms (TR 722-23). She was awakened by the sound of "firecrackers being thrown into the house." As she got up, "shots started entering the home" (TR 723). A bullet passed by her face so closely that she could "feel the heat from it" (TR 723-24).

Immediately afterwards, she realized that her son had been hit (TR 724).

A neighbor across the street testified that the shooting seemed to last 'five minutes," and then she heard a car speed away (TR 726).

Investigators found marks from eleven bullets in the brick wall around the kitchen door (TR 894). They found five bullet strikes in the wood flashing at the top of the brick wall, plus another five or six that hit the door frame or went through the door (TR 895-96). The car sitting in the carport had been hit five to six times (TR 881). There were only three holes in the wooden utility-room wall on the west side of the carport, and no hits to the east wall or to the ceiling (TR 891, 903, 908). There were 35 spent shell casings in the street in front of the carport, fired from at least three different nine millimeter guns (TR 876, 885, 1043-45, 1049). The bullet that struck Shelton Lucas, Jr., in the head is consistent with having been fired from the Glock pistol found under Cummings' pillow with his fingerprint on it, and is inconsistent with having been fired from either of the other two guns known to have been fired at the house (TR 941-42, 969-70, 989-91, 1047-48).

The State agrees that all of the shell casings were found in the street and that most probably none of the shooters were ever physically on Lucas property. The State does not agree that the shooters were firing at "two different walls." Initial Brief at 56. Although three bullets did strike the utility-room wall, most of the bullets hit the kitchen door or the area around that door. The shooters clearly were firing at the door which Shelton Lucas, Sr., had just entered. Moreover, it is indisputable that one bullet not only entered that door, but struck Shelton Lucas, Jr., in'the head, killing him,

The trial court found as an aggravating circumstance that "The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit a burglary" (R 451-52). Cummings contends this finding is not supported by evidence because the only "entry" was by bullets. The State agrees that, since there is no evidence that any of the shooters actually entered the Lucas home or even entered the curtilage of that home, the issue here is "whether or not the firing of a gun at a home where one of the bullets penetrates the home is burglary." Initial Brief of Appellant at 57-58. The State contends that where the

defendant fires a gun into a home, intending to kill, he has committed the offense of burglary. § 810.02 Fla. Stat. (1989).

Although the definition of the crime of burglary has been refined and expanded by statute in recent years, see Baker v. State, 636 So.2d 1342 (Fla. 1994), the 'entry" element of burglary has been neither qualified nor specially limited by statute. § 810.11 Fla. Stat. (1989). It has long been held in Florida that entry may be accomplished by "an instrument instead of the body," so long as the entry by instrument is not merely for the purpose of gaining entry but actually to commit the contemplated offense inside the structure. Foster v. State, 220 So.2d 406, 407 (Fla. 3d DCA 1969) (quoting ***Miller on Criminal Law). Accord, State*** Spearman, 366 So.2d 775, 776 (Fla. 2d DCA 1979) ("It is well established that the unqualified use of the word 'enter' in a burglary statute does not confine its applicability to intrusion of the whole body but includes insertion of any part of the body or of an instrument designed to effect the contemplated crime."); Baker v. State, 622 So.2d 1333, 1335 (Fla. 1st DCA 1993) (entry by instrument sufficient where the instrument is "actually used to commit the contemplated crime") (affirmed as to definition of curtilage in 636 So.2d 1342, supra).

The State contends that a burglary was committed when Cummings fired into the Lucas dwelling intending to kill the person he thought had just entered the home; the entry by instrument (here a bullet) was actually used to commit the contemplated crime (here, a murder). Cummings has two bases for disagreeing. First, he contends that the State failed to prove his intent to kill. If this contention is correct, then the burglary aggravator does not matter; Cummings' premeditated murder conviction cannot **stand.** Because the State has addressed the sufficiency of the evidence to support a finding of premeditation in its argument at to Issues VI and XI, the State will not further address this question here except to say that Cummings' intent to kill was established beyond a reasonable doubt. Cummings' second basis for disagreeing that a burglary by instrument was committed is his contention that a bullet fired from a gun does not qualify as an instrument of entry. There apparently is no Florida case directly on point. However, the question of whether 'the crime of burglary encompasses those situations in which a person, without making any physical intrusion, causes a bullet or other tangible object to intrude into another's structure with the intent that the object accomplish a criminal purpose," was addressed in the Oregon case of State v. Williams, 873 P.2d 471, 473 (Or. App. 1994) (review denied 877 P.2d

1203). The Oregon Court of Appeals answered this issue 'of first impression" in the affirmative:

> At common law, the term "enter," when used in reference to the crime of burglary, had an established meaning. Under the common law definition of burglary, no "entry" occurs when an instrument is used solely to facilitate a subsequent entry and not to achieve a criminal purpose inside the structure. 2 East, *Pleas of the* **Crown** *484,* 490 (1803); *3 Wharton's Criminal Law* § *333* (14th Edition 1980 and Supp 1993); 2 LaFave and Scott, *Substantive Criminal Law* § a.13 (1986 and Supp 1994). Thus,
>
> "there is no entry when a stick, being used by the defendant merely to break a window, happens to pass through the opening; when, after breaking the glass of a door or window, he pokes a stick inside for the purpose of unlatching the door; when the defendant throws a boulder at a window, and it smashes the window and lands on the inside, it having been thrown merely for the purpose of making an opening; or when the defendant, while standing outside, fires a bullet which smashes the lock of a door and lands inside, the gun having been discharged merely for the purpose of breaking the lock." *3 Wharton's Criminal Law, supra,* § *333.*
>
> However, an "entry does occur when an instrument intrudes into the structure for the purpose of consummating a criminal intent. See 2 East, *Pleas of the Crown, supra,* § *333;* 2 LaFave *&* Scott, *supra, Substantive Criminal Law* § 8.13. Thus,
>
> "there is an entry when the defendant, after breaking a window, pokes a stick inside for the purpose of impaling and stealing a fur

> coat; when, after breaking a window, the defendant pushes the barrel of a gun through the opening for the purpose of shooting and killing the occupant; or ***when the defendant, while standing outside, fires a bullet which pierces a window*** and ***lands inside, the gun having been discharged for*** the ***puxpose of killing the occupant." 3 Wharton's Criminal Law, supra, § 333.*** (Emphasis supplied.)
>
> Defendant has not cited, and we have been unable to locate, any source that remotely suggests a legislative intent to deviate from the common law meaning of the term "entry." We conclude that the term "entry," as used in the burglary statutes, is utilized in its common law sense. . . .
>
> . . . Because defendant fired bullets into Hall's house for the immediate purpose of committing the offense of tampering with a witness, he thereby made an 'entry" into the house under [Oregon law.]

The State would contend that the reasoning of the Oregon Court of Appeals is sound and should be adopted by this Court. See also People v. Traani, Sup., 449 N.Y.S.2d 923 (1982) (by providing no definition of "entry," drafters of burglary statute are presumed to have adopted common-law and common sense definitions of instrumental entry; example of entry by instrument would include "the splintering of a door with a bullet intended to kill or to injure someone inside"); People v. Osegueda, 163 Cal.App.3d Supp. 25, 210 Cal.Rptr. 182 (Cal.Super. 1984) (buglary by instrument

occurs even where instrument only accomplishes entry and not the ultimate criminal purpose).

In this case, the trial court did not instruct the jury on felony murder at the guilt phase of the trial. Only after the jury, by finding Cummings guilty of premeditated murder, determined beyond a reasonable doubt that Cummings had shot into the Lucas home with the intent to kill, was the burglary issue presented to the jury at the penalty phase.

Shelton Lucas, Jr., was asleep on the couch in the living room of his own home when a bullet entered his home and struck him in the head. This event was just as great an intrusion into the sanctity of the home as if Cummings had first smashed the door open and then fired. The circumstances of this case amply justify the finding of the burglary aggravator.

ISSUE XI

THE TRIAL COURT PROPERLY DENIED THE MOTION FOR JUDGMENT OF ACQUITTAL

The facts pertinent to this issue have been addressed in the State's argument as to Issue VI (murder was CCP), and will not be repeated here. There is no merit to Cummings' contention that the trial court erred in denying Cummings' motion for judgment of acquittal.

When reviewing a motion for judgment of acquittal:

> It is the trial judge's proper task to review the evidence to determine the presence or absence of competent evidence from which the jury could infer guilt to the exclusion of all other inferences. That view of the evidence must be taken in the light most favorable to the state. [Cit.] The state is not required to "rebut conclusively every possible variation" of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events. [Cit.] Once that threshold is met, it becomes the jury's duty to exclude every reasonable hypothesis of innocence beyond a reasonable doubt.

State v. Law, 559 So.2d 187, 189 (Fla. 1989). Furthermore:

> If there is room for a difference of opinion between reasonable people as to the proof or facts from which an ultimate fact is to be established, or where there is room for such differences on the inferences to be drawn from conceded facts, the court should submit the case to the jury.

Taylor v. State, 583 So.2d 323, 328 (Fla. 1991).

After arming himself in advance, enlisting reinforcements, and spending over an hour looking for Dap, Cummings went to Dap's home and, with his accomplices, fired thirty-five rounds at a doorway which Dap's brother-in-law (who closely resembled Dap) had just entered. A rational trier of fact readily could find from the evidence that Cummings intended to kill, not merely to "send a

warning" as Cummings argues in his brief. Initial Brief of Appellant at 60.

The Constitutional test for sufficiency of the evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, *443 U.S. 307,* 318-19, 99 S.Ct. 2781, 61 L.Ed.2d *560* (1979). This test "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to *draw reasonable inferences from basic facts to ultimate facts."* Ibid. (Emphasis supplied.)

On appeal, only the legal sufficiency, not the weight, of the evidence is in issue. Tibbs v. State, 397 So.2d 1120, 1123 (Fla. 1981), aff'd, 457 U.S. 31, 102 S.Ct. 221, 72 L.Ed.2d 652 (1982). This Court has held that a judgement of conviction comes to this Court with a presumption of correctness, and a defendant's claim of insufficiency will not prevail where there is substantial, competent evidence to support the verdict and judgment. Spinkellink v. State, 313 So.2d 666, 671 (Fla. 1975). Moreover, this Court has specifically applied the Jackson v. Virginia standard in Melendez v. State, 498 So.2d 1258 (Fla. 1986). So have

the District Courts of Appeal. Kaufman v. State, 429 So.2d 841 (Fla. 3d DCA 1983); D.M. v. State, 394 So.2d 520 (Fla. 3d DCA 1981). As in these cases, Cummings' jury weighed the evidence, resolved any conflicts in the testimony, and drew reasonable inferences from the basic facts to the ultimate facts.

The trial court did not err by denying Cummings' motion for judgment of acquittal.

CONCLUSION

WHEREFORE, for all the foregoing reasons, the State respectfully asks this Court to affirm the judgment below in all respects.

Respectfully submitted,

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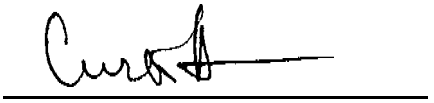
ATTORNEY GENERAL



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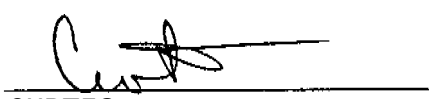
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Jeanine B. Sasser, Attorney at Law, 1717 Blanding Blvd., Suite 102, Jacksonville, Florida 32210, this 21st day of February, 1997.



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