IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

DERRICK CUMMINGS,)
Appellant,)
vs.)
STATE OF FLORIDA,)
Appellee.)

CASE NO.: 86,413
LOWER CASE NO.: 94-2237-CF

On appeal from the Circuit Court of the Fourth Judicial Circuit, in and for Duval County, Florida

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant, DERRICK CUMMINGS was the defendant in the Circuit Court Criminal Division, Duval County, Florida. Appellee, the State of Florida, prosecuted him. The Appellant will be referred to as **"Appellant"** or **"Defendant".** Appellee will be referred to as **"Appellee"** or **"State".** References to the record on appeal, which contains the pleadings and other documents filed in the case will be **"R"** followed by the appropriate page numbers as assigned by the clerk. References to the transcripts of motions, trial, penalty phase and sentencing will be **"T"** followed by the appropriate page numbers as assigned by the court reporter.

STATEMENT OF THE CASE

Appellant, Derrick Levon Cummings, was charged by information filed on March 8, 1994, with second-degree murder, shooting or throwing deadly missiles, escape and possession of a firearm by a convicted felon. **(R-10).** Appellant **was** charged as was Andre Leartis Fisher, 'Marion L. King and Kevin Lamar Dixon. Appellant was indicted for first-degree murder, shooting or throwing deadly missiles, escape and possession of a firearm by a convicted felon by a Duval County Grand Jury on April 27, 1994. (R-70). The indictment alleged that Appellant committed first-degree murder of Shelton Lucas, Jr., with premeditated design to effect the death of Shelton Lucas, Jr. or another person. The three co-defendants, Cummings, King and Dixon, were alleged to have had a firearm in their possession during the commission of the first degree murder. In Count II, he and the other two co-defendants were charged with shooting a firearm or throwing a deadly missile into a building. Defendant was also indicted for escape, and possession of a firearm by a convicted felon with the prior felony being the sale and delivery of cocaine. (R-70).

Detective Gilbreath testified before the grand jury as the sole witness. He testified that, prior to appearing before the grand jury, he would have reviewed the homicide supplement report. (R-476). He did not take any exhibits into the room other than photographs. (R-476). He did not present any depositions, sworn statements, or written reports such as the homicide supplement

report to the Grand Jury. (R-476). Prior to testifying, it was his understanding that the statements given by defendant Fisher and defendant, claimed that Kevin Dixon had done all the shooting. (R-478). He did not, however, present any statements of Andre Fisher or Defendant. (R-483).

He advised the grand jury that he had the cooperation of King. (R-493). He testified that King indicated that Cummings, Dixon and Fisher had gotten out at the house. They knew there were three firearms involved in the ballistics. (R-494). He advised the jury that Andre Fisher had a dispute with Pap. Dap stayed at the residence that was shot, according to King, and that prior to the shots being fired, the father of the child had been on the car-port for the purpose of smoking a cigarette. (R-495). He told the grand jury that he had talked with the father of the deceased child. The father said that he had been out there and "that King told O'Steen that as they rounded the corner, one of the participants in the car said, 'there he is', and pointed to a figure in the car port." (R-495). This is testimony that is solely derived from Marion King. (R-495, 496). He further advised the Grand Jury that King had been there and had given them that story. (R-496).

Subsequent to the grand jury testimony, Marion King was discredited and, in fact, a gun belonging to him had been at the scene of the shooting. The prosecutor indicated in open court that their key witness, co-defendant Marion King, was a "liar" who had perjured himself on material facts in this case and that they could not rely on him. They therefore dropped the case against the co-

defendant Kevin Dixon on January 27, 1995. (T-233). They indicated that he would not be used at trial because he was not believable (T-237), and cannot represent that he would tell the truth. (T-259). In the case, Mr. King's testimony provided material evidence for premeditation in that he is the only one who testified that the participants in the car said "there he is". Further, he was the only one who said that there were four (4) people in the car and that the three (3) shooters got out of the car. An indictment on premeditation would be based on that statement and that statement alone. Therefore, King's testimony was material.

The state revealed that King was not trustworthy to the Court and to the defendant. However, the state never revealed to the Grand Jury that testimony relying on King was perjured and unreliable.

Counsel for Appellant filed the following motions as to the death penalty:

(1) Motion to preclude death qualifications of jurors in the innocence or guilt phase of the trial and to utilize the bifurcated jury, if a penalty phase is necessary. (R-268).

(2) Motion for evidentiary hearing and for payment of fees and costs of expert witnesses on the constitutionality of death qualifications. (R-290).

(3) Motion to prohibit instruction on the aggravating factors 5(h) and 5(i).

(4) Motion to declare Section 921.141(i) Florida Statutes unconstitutional.

(5) Motion to declare Section 921.141(5)(h) Florida Statutes unconstitutional. (R-298).

(6) Motion to declare Section 921.141(5)(i) Florida Statutes unconstitutional. (R-314).

(7) Motion to prohibit misleading references to the advisory role of the jury at sentencing. (R-345).

(8) Motion to adopt all constitutional and other motions filed by the Office of the Public Defender. (R-351). These included:

a. Motion to dismiss and declare Sections 782.04 and 921.141 Florida Statutes Unconstitutional for a variety of reasons;

b. Motion to Prohibit Argument and/or Instructions Concerning First Degree Felony Murder;

c. Motion for Statement of Aggravating Circumstances:

d. Motion to Declare Sections 921.141 and 922.10, Florida Statutes, Unconstitutional Because Electrocution is Cruel and Unusual Punishment;

e. Motion to Declare Section 921.141, Florida Statutes, Unconstitutional As Applied Because of Arbitrariness in Jury Overrides and Sentencing;

f. Motion for Evidentiary Hearing;

g. Motion to Preclude Death Qualification of Jurors in the Innocence or Guilt Phase of the Trial and to Utilize a Bifurcated Jury, if a Penalty Phase is Necessary:

h. Motion for Additional Peremptory Challenges;

i. Motion for Evidentiary Hearing, and for Payment of Fees and Costs of Expert and Lay Witnesses, on the Constitutionality of Death by Electrocution;

j. Motion to Declare Sections 782.04 and 921.141, Florida Statutes, Unconstitutional Because of Treatment of Mitigating Circumstances;

h. Motion Requesting Proffer of "Victim Impact Evidence";

i. Motion to Exclude Evidence or Argument Designed to Create Sympathy for the Deceased;

j. Demand for Disclosure to Exculpatory Evidence;

1. Motion to Dismiss Indictment:

m. Amended Motion to Dismiss Indictment: and

Trial counsel, in addition, filed a motion to Dismiss Indictment Due to Perjured Testimony Given to Grand Jury. (R-361). The motion to dismiss the Indictment was denied by the Court. (T-208). The court authorized the deposition of Detective Gilbreath and O'Steen to divulge the Grand Jury Testimony. (T-208).

Defendant's motion for continuance was denied. (T-221). The Co-Defendants, Kevin Dixon, case was nol prossed by the State Attorney's office. (T-233). The Public Defender invoked Co-Defendant's Fifth Amendment privilege not to testify. (T-240). Jury selection was held on January 30, 1995.

During voir dire, the Appellant exhausted his peremptory challenges. The Court denied the request for additional challenges. (T-537). As a result, Mr. Bold, who had been

unsuccessfully challenged for cause, was left on the jury and served as the foreman. (R-402)

The Court denied the Defendant's motion to dismiss the indictment, (T-613), because there was no showing that the indictment was the result of perjured testimony and because even if the court did dismiss the indictment, it would accomplish nothing except a delay because the State would re-indict based on other evidence. (T-614).

The Court also held argument on a motion to preclude the state from arguing felony murder. (T-614). The State was precluded from arguing felony murder based on burglary in their opening statement, (T-626) but they were allowed to argue felony murder. The motion for judgment of acquittal at the end of the evidence was denied. (T-1074).

Closing arguments were held and the prosecutor argued that several times, the Defendant stated take me to get my "shit". (T-1171, 1173). Additionally, the prosecutor argued "Does he say I'm sorry?" (T-1186). "Only for shooting at the car". The prosecutor continued in that vein to argue that upon hearing that the child was shot, the Defendant said, "so fuck it". (T-1187). He didn't claim that it was an accident or say I didn't mean to kill the baby. He made threats instead. (T-1188, 1190). During closing, defense objected to the state attorney arguing "the first words. Does he say I'm sorry? Does he say I was only shooting at the car?" (T-1186). The Defendant's attorney objected within the rules and the state continued to argue "Did he ask 'Oh my God I was just

shooting at the car?' Did he say 'I didn't mean that to happen?'" Looking to the jury, the prosecutor said, "I apologize, but I'm using the killers words, his first words after hearing this baby boy had been shot, 'So fuck it. So fuck it.' his first words . . ." (T-1187-1188).

In the jury charge conference, the Court found that there was no felony murder apparent in this case and did not instruct on it. (T-1084). The Court found that as a matter of law, felony murder did not apply. (T-1085).

The Appellant was convicted of first degree murder. (R-402). On March 8, 1995, when the State filed its Notice of Filing Victim Impact Statement (R-411) the defense objected to the Victim Impact argument stating it would simply create sympathy for the deceased (T-1378) as well as be used as a non-statutory aggravating circumstance. The Defense also filed a Request to Instruct on Victim Impact Evidence which was denied. (R-421).

Defense counsel filed requests for penalty phase jury instructions. (R-425). At the penalty phase hearing, over Defendant's objections, the Court instructed on the following aggravating circumstances:

1. Defendant, in committing the crime for which he is to be sentenced, knowingly created a great risk of death to many persons: (T-1396).

2. The crime for which Defendant is to be sentenced was committed while he was engaged in the commission or flight after

the commission or attempt to commit the crime of burglary; (T-1400, T-1401).

3. The crime was cold, calculated, and premeditated. (T-1411). Over objection the Court modified the cold, calculated and premeditated instruction to state "heightened premeditation necessary for the circumstances do not have to be directed toward a specific person." (T-1414). Defendant requested a limiting instruction regarding Victim Impact Statements, (R-421), which was denied.

A majority of the jury, by a vote of 10 to 2, recommended the imposition of the death penalty. (R-429). A Motion for New Trial was filed on March 30, 1995, (R-431) and was denied. (R-432).

On July 28, 1995, Appellant was sentenced to die for. the charge of first degree murder. (R-440). The Court issued a sentencing order and found as an aggravating circumstance that the Defendant knowingly created a great risk of death to many persons and weighed this factor only slightly. (R-451). Additionally, the Court found that the capital felony was committed while the defendant was engaged or was an accomplice in the commission of or in an attempt to commit or flight after committing or attempting to commit a burglary. The Court gave "some, but not great weight", (R-452), to this factor. The Court found as a third aggravating circumstance that the capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of law and legal justification. The Court indicated that the statement by the Defendant after being told a child had been

shot, "So fuck it", showed a "prior and on-going mind set". Great weight was given to this factor. (R-453). The Court found no mitigating circumstances. (R-454). Finally, the Court found that there was no issue of proportionality for the third co-defendant, King, who only drove the car. Additionally, the Court did not mention the fourth co-defendant, Dixon. (R-457). The Court found Defendant to be a major participant in the homicide who contemplated lethal force and exhibited a reckless disregard of human life. (R-458). Appellant timely filed a Notice of Appeal. (R-468).

STATEMENT OF THE FACTS

On February 15, 1994, Shelton Lucas, Sr., spent the day at 5206 Washington Estates Drive with his wife and children. (T-678-679). His brother-in-law, Carlon Johnson, also known as "Dap", visited the home on that day. He formerly lived there. (T-679, 680). Dap's car was parked under the carport and had been parked there for about a month. (T-680). Dap was wearing blue jeans and a tee-shirt on that evening. Shelton Lucas, Sr., was dressed in the same manner. (T-680). Shelton Lucas is 6'1" and weighs 210-220 lbs. Dap is 6'2" and weighs 210-220 lbs. (T-681).

Mr. Lucas ate dinner with his family and watched t.v. after dinner. At approximately 9:00 p.m., he went outside on the carport to have a cigarette. (T-681, 682). As he finished, he turned and went back inside; he noticed a car coming down the street, although he did not pay much attention to it. He walked across the room and heard a popping sound. (T-682). His wife woke up and yelled "He's hit". (T-682). Their son, Shelton Lucas, Jr., had been hit in the head. (T-682). He turned to look and saw his son kicking and gasping for air. (T-682).

The carport faced Dostie and Washington Estates Drive. It was open on both sides and from the kitchen door you could see through the carport to Washington Estates Drive. (T-693). The car that approached the carport was coming from Dostie. (T-693). There was no overhead light on in the carport (T-694), but there were lights on in the rest of the house. (T-694). The lights were also on in the living room where the television was and where his wife and son

were was asleep. (T-696). There were no bullet holes in the home prior to the shooting. (T-697). When Mr. Lucas, Sr. was standing on the carport steps, in relation to the kitchen door, smoking a cigarette, he testified he would have been visible from the side. (T-698-699).

Shelton Lucas, Jr. died on February 16th at University Hospital. (T-700).

On cross-examination, Mr. Lucas indicated that he was outside smoking a cigarette for a couple of minutes and only saw a car when he was getting ready to go back in the house. (T-701). He walked into his house while the car was by his neighbors'. (T-701). He walked through the kitchen and into the living room, put his cigarettes up, and closed the door behind him.' (T-702). Before he heard any noises, he was in the second room. (T-702).

Charlsie Lewis testified that she lives at 5206 Washington Estates Drive with her two children, Saneka and Jarrell Lucas. (T-721). She has lived there all of her life, 30 years. (T-721). She has a brother named Carlon Johnson who goes by the nickname of "Dap". (T-721).

Around 9:00 p.m. on February 15, 1994, she was asleep on the sofa in her home. (T-721). Her son was in her arms asleep on the couch with her. (T-722, 723). She was awakened by the sound and vibrations of what sounded like firecrackers being thrown in the home. (T-723). She got up, looked around and shots started entering the home. Something went past her face and she could feel the heat from it. She grabbed her child, pulled him up and yelled,

"He's been hit". (T-723, 724). She put her child down and ran out of the house.

Her son was hit in the head. He was taken to the hospital by rescue. He died on February 16, 1994. He was five (5) years old. (T-724).

Pearl Jordan lives at 7155 Dostie Drive, E., and has lived there for 30 years. (T-726). She lives across the street from the Lucas family. At approximately 9:00 p.m. on February 15, 1994, she was in her bedroom talking on the telephone when she heard a noise for about 5 minutes. (T-726). She heard a car speeding away. (T-727). She dialed 911 and then went to see Charles C. Lucas because she had heard Charlsie in the yard screaming "Someone killed my baby." (T-727). She identified the photograph of Shelton Lucas, Jr. (T-728).

Dr. Floro was qualified as an expert forensic pathologist. (T-730). He performed the autopsy on Shelton Lucas, Jr. (T-731). He died as a result of a gunshot wound to the head, with perforations of the skull and brain and the manner of the death was homicide. (T-733). The child was five (5) years old when he died. (T-734). He was shot only one time. (T-734). The bullet was a fully jacketed and consistent with a nine millimeter bullet. The child's gun shot wound was unusual in that it appeared elongated or oval, which suggested that the bullet was "tumbling" at the time it hit the head, which indicates that it was usually a "secondary target". The bullet had probably passed through something and then tumbled

and hit the head of the child. (T-743). The bullet was introduced into evidence (T-744).

Carlon Johnson testified that he was 26 years old and went by the name Dap. (T-751). On February 15, 1994, he was at his sister's, Charlsie Lucas', home. In the late afternoon he left her home to buy some beer. After he bought the beer, he returned and never left the house again. (T-752). About 7:00 to 8:00, he left to get more beer at the corner store. (T-753). While crossing the street from the store to get some Popeyes' fried chicken, a speeding car with no headlights drove by. It was dark and the male driver should have had the headlights on, so Dap yelled at him to turn on the lights. (T-753). The driver of the car "slammed into the second driveway, jumped out of the car, said what's up, what's up here?" The man had his hand behind his back so Dap looked to see if he had a weapon. The two exchanged words and the man swung at Dap. Dap then hit him behind the ear with a quart beer bottle. (T-754). Dap's friend, Jason, broke up the fight. The driver got in his car and sped off. Dap went back to his sister's home. Dap then rode off to Southside with a friend to stay calm.

Justin Robinson is 18 years old and lives at 6815 Rhode Island Drive E. (T-764). On the night of Tuesday, February 15, 1994, he was standing at the corner of Washington Estates and Soutel. (T-765). Around 7:30, he went to get some food at Popeye's on the corner of Soutel and Kings Road. (T-765). He saw Dap and two other people cross the street to Popeye's. On their way there, someone drove down the street quickly with their lights off and Dap asked

them to turn on their lights and slow down. (~-766). He saw Dap and the man standing in front of each other arguing at Popeye's, looking as though they were "fixing to fight". (T-766). Mr. Robinson went to Popeye's, grabbed the driver and pushed him away. The driver, was Andre Fisher, the co-defendant. (T-767). Andre Fisher then left in the car. (T-768). Robinson told Dap and the others to go home. (T-768). Robinson, however, stayed on the corner on his bicycle. (T-768).

While Robinson was waiting on the corner, a burgundy and gray Chevrolet came up. Defendant, Derrick Cummings, who Robinson identified in the courtroom, was in the car with someone named Levy. (T-770). Mr. Cummings asked the witness if he knew who was in the fight and where everybody would be at that time of night. Robinson told him that he did not know what happened and that no one was around. (T-771). When he was talking to Defendant, Robinson saw a Uzi type gun on Defendant's lap. (T-772). The car left going back on Soutel towards Sherwood. Robinson left to use the bathroom at Popeye's. About 15 to 30 minutes later, Robinson saw a white Honda Accord with dark tint on the windows, driving from Sherwood onto Washington Estates off Soutel. (T-773). He recognized the driver as Marion King. (T-774). Robinson attempted to slow the car down but was unsuccessful. He also saw another person in the front passenger seat, Andre Fisher, who ducked his head underneath the tinted window. (T-774). He thought there were four (4) people in the car (T-775), but did not recognize anyone else. The car proceeded down Washington Estates

towards Dostie Drive, (T-775). The car drove down Dostie Drive to the stop sign, was about to make a left, but instead, made a wide right. The witness didn't see the car after that. (T-777). Dap Johnson and his family live on the corner of Dostie and Washington Estates Drive. (T-777, 778). After the car made a right, he heard "a bunch of gunshots." That was about a minute to two minutes after he last saw the car. (T-778). He then rode on his bicycle to the Johnson residence where he heard Dap's sister screaming, "he shot my baby." (T-779).

On cross-examination, the witness, Mr. Robinson, indicated he never heard Fisher threaten Dap at Popeyes. He merely heard him say, "why'd you do it". (T-788). The witness didn't think Fisher tried to hit Dap before Dap hit him with the bottle. Andre Fisher had gotten hit in the back of the head with the bottle by Dap. (T-788). Fisher did not even have a chance to swing any punches. (T-788).

Michael Gardner testified that he is 22 and lives in the Sherwood area and knows Derrick Cummings and Andre Fisher. (T-816). He had known Defendant Cummings since he was a child. They grew up together. (T-817). On February 15, 1994, he saw Defendant around 5:00 in the Sherwood area. After they played basketball, they went to Defendant's apartment for about 30 minutes. They were driving a gray Chevrolet. They next went to Richard Mote's house, where the Defendant received a page on his pager. (T-820). The Defendant called the number and said "what happened, what happened?" (T-821). After he finished his conversation, he told

Gardner that Dap had "jumped on" Andre Fisher. The Defendant was upset. (T-822). He asked Gardner to get "my shit", which means to get my gun. They went to the Defendant's Baymeadows apartment and stayed there about 5 minutes. Next they proceeded down U.S. 1, and saw two men standing on the street. They pulled over and had a conversation with those two men. Then they went to the Defendant's grandmother's house, where Mr. Gardner dropped off Defendant. (T-823).

Later, Gardner went to Jenkins Bar-B-Que with his cousin, Motes, While they were in line to get bar-b-que, they heard the rescue and police. Jenkins bar-b-que is about 5 minutes from the corner of Soutel and Washington. They followed the rescue to Dap's house and saw a lady running hysterically screaming "her baby, her baby". (T-825).

Robinson saw Defendant pulled over at Skinner's Dairy on Sibbald off Soutel. (T-827) Robinson asked Defendant, "What happened?" Defendant said, "He didn't know". Robinson the told him that a baby got shot and the Defendant replied "So fuck it". On proffer, the defense objected to this testimony as irrelevant and more prejudicial than probative. (T-184). The Court held it was relevant to show knowledge on Robinson's behalf that Defendant knew about the incident and why he was requesting Robinson to make a false exculpatory statement. (T-815). Defendant was in Kevin Dixon's car. (T-828).

The next day, Robinson saw Defendant at Richard Mote's house. The Defendant said that some detectives had been to his

grandmother's house. Defendant told Robinson that he was going to see the detectives, but told Robinson that if they asked him, to say that they were together with his cousin at Donnie's house. (T-830) Robinson subsequently talked to the police and told them that they were together playing cards. (T-830).

On cross examination, Robinson indicated that Defendant Cummings did not have an uzi. (T-831). In fact, he did not see him with a gun at all that night. (T-831).

Officer Tarkington was an evidence technician called to the scene on February 15, 1994. In the carport there was a door that led into the utility room on the west wall as well as the door that led into the kitchen on the north wall. (T-842, 843) Officer Tarkington observed marks in the door frame, freeze-board and the brick, which appeared to be where bullets had struck the wall of the carport. (T-843). A concrete driveway leads from the street to the carport. (T-846). He recovered a bullet fragment from the driveway. On cross examination, the officer indicated that the car was parked by the west wall (T-851). From the carport to the kitchen door was 3 steps. (T-855). The front of the car, facing toward the street, was about two-thirds of the way up the door.

Officer Michael J. Sams collected bullet projectile shell casings from the Lucas' residence on January 12, 1996. (T-867). There were 35 shell casings. (T-876). One projectile was recovered from the house (T-879). In addition, a piece of a bullet fragment was found in the street. (T-876).

Officer Mark A. McClain collected 21 cartridge casings (T-874). The Casings were from the road outside the driveway. (T-875). There was a hole in the kitchen window screen. (T-877). The car was hit 5 or 6 times, but no bullets hit the car windows. (T-881). Projectiles were recovered from the rear door, carport walls (2), and the outside door frame. (T-884). The officer admitted that no shell casings were found on the property of the residence. (T-885). Twelve bullet fragments were found on or around the vehicle. (T-890). The north brick wall was 65' to the street and the door was in the brick wall. (T-891). It was a standard door, 36" across. (T-892). The north wall was 27' 10" in width. (T-892). There were three more holes in this wall. (T-891). The west wall is 19' in width. (T-894). There were 11 projectile markings in the brick wall. (T-894). Two projectiles were in the top of the plank board which trimmed the top of the brick wall and 5 bullet strikes were in the wood. (T-895). There were 15 projectiles around the vehicle. The door was hit 4 times. (T-896). Thirty-five shell casings were collected. (T-897). All shots were into the carport. (T-903). They recovered one projectile from the dining room and another from the utility room. (T-903). It was 70' from the driveway to the corner approximately. (T-905).

Richard Motes testified that he is related to Michael Gardner. He knows the Defendant. On the day of the shooting, he saw Defendant between 6:00 and 7:30, with Michael Gardner. He was present when the Defendant got a page and saw him make a phone call. (T-915). After he competed the call, he stated that

Defendant said that Fisher got "jumped on" by Dap. Defendant was angry. (T-917). The following day, Defendant called him and told him to say that he was at his house the night before, watching videos. (T-917). He said he was going to turn himself into the police. (T-917).

On proffer during cross-examination, the defense tried to elicit testimony that a witness had told Appellant that "he'd better be careful because Dap is known to carry, . . . a gun". (T-919). The proffer into evidence was not allowed (T-922) in this trial. A mistrial was denied. (T-924).

Margie Manley testified that she lived at 8335 Freedom Crossing Trail, Apt. 3707. In February of 1994, she lived there with the Defendant. (T-934). Defendant was her boyfriend. (T-935). On the night of February 15, 1994, she saw the Defendant and Andre Fisher at approximately 10:00, before the 11:00 news. (T-935). She noticed that Andre Fisher was injured in the head area. Fisher told her that he had a fight with his brother. He also indicated that he was in a fight at the Mirage. (T-936). Ms. Manley and Defendant slept in the same room. Fisher slept in the living room that evening. (T-941). Subsequently, a gun was found by Detective Gilbreath in Ms. Manley's apartment when she allowed it to be searched. (T-942). She had not noticed the gun that night when she went to bed. (T-943).

Detective Gilbreath testified that he had been a homicide detective for 19 years and participated in the investigation of this shooting. (T-968). On February 16, 1994, he met with the

witness, Ms. Manley. He searched her apartment and found a gun. (T-970). He placed the gun in a bag to be super fumed. (T-971). He also found a handwritten note that had been written on a paper towel and then torn up. (T-973). When he found the weapon, it was not loaded. (T-975). Ms. Manley said she had never seen the gun before. (T-976).

Officer Bryant testified the he had been in the Sheriff's Office for two years and he super fumed the Glock 9 millimeter pistol found in Ms. Manley's apartment for fingerprints. (T-979).

Charlotte Allen is an expert latent fingerprinting examiner for the FDLE. (T-983, 984, 987). She examined the 9 millimeter Glock pistol. She found two fingerprints of the Defendant on the pistol on the right of the gun at the front of the slide mechanism. (T-992, 995). It was the right ring finger and the right middle finger. She could not state when the print was put on the gun.

David Warniment testified as an expert firearm's examiner for the FDLE. (T-1025, 1026). Mr. Warniment testified that some of the bullet fragments were typical of Glock semi-automatic firearms. (T-1033). Other fragments were from a Uzi pistol or carbine type firearm. (T-1033). There was also a third type of gun that left cartridges. (T-1033). In his opinion, the cartridge cases found were from three (3) different firearms. The cartridges recovered from the side of the house were consistent with the Uzi. (T-1047). All thirty-five cartridge cases were 9 millimeter, luger caliber. (T-1049). Nine cartridge cases were fired from the Glock semi-automatic. (T-1046). The bullet that was recovered bears typical

Glock style rifling. (T-1048). The witness indicated that, based on his examination, he could not identify nor eliminate the bullet, State's Exhibit 12, from having been fired from the Glock pistol. (T-1053). All parties rested.

PENALTY PHASE

At penalty phase, the state relied on the evidence presented at trial to establish three of the aggravating factors. (T-1435, 1436). The state called Virginia Johnson, who was Shelton Lucas, Jr.'s grandmother. (T-1437). She indicated that she had information relating to Shelton's uniqueness as a human being, the loss to the community's members by his death and proceeded to read a written statement over the defenses' objections. (T-1437). The victim's statement was read by Ms. Johnson. (T-1437). This included Shelton being very excited and showing his grandmother the big birdcage that his grandfather had give him for a favorite pet. He would always ask his grandmother for chewing gum or another treat in the purse and give his grandmother a hug. He always shared with his brother's and sisters. Ms. Johnson shared that "Shelton was precious and very special to me. It was a joy to me to see his face sparkle." (T-1438). She continued to read that Shelton was active, loved nature and would pick flowers, bringing them to her. He would tease her with lizards and have a big grin on his face. She indicated that Shelton, Jr., loved his mother and was very devoted and attached to her and was like a shadow for her. He looked forward to playing little league baseball and starting school.

The state called Charlsie Lucas, mother of Shelton Lucas. (T-1441). She indicated that the past year has been a "living nightmare" for her, causing her headaches, nausea, stomach spasms and other physical problems. (T-1442). She read that Shelton's classmates keep asking for Shelton. The other brother cries out for him, his grades have dropped and he refuses to sleep in the room he shared with his brother. His sister, who was nine, was an honor student but her grades have dropped. She wrote a poem that she misses him a lot, she also suffers headaches and nosebleeds. The mother also testified that her son was a special and precious son who loved his family. She talked about his pets and riding a two wheeled bike. (T-1443). She further indicated that sleep does not come easily for her, even though she takes sleeping pills. She testified that her son loved to color and was excited about shopping at the Dollar Store, collected cards and was a member of Fox Thirty. His favorite movies were Batman and Jurassic Park. She couldn't describe that vacant emptiness she lives with every day. Her life was unbearable. (T-1444).

The defense called Willeta Cummings, who is the grandmother and foster mother of Derrick Cummings. (T-1446). She testified that she had seven children, eight including Derrick. During the Defendant's life, he lived with his grandmother, as well as his mother, who was in and out with her drug problems. (T-1446, 1447). His mother would leave him dirty and hungry. Twice he was burned with cigarettes when he was with his mother. Once he came home with a broken arm and the mother did not know how it happened. (T-

1447). The grandmother took Defendant at age 2, but his mother was still in and out. She had no permanent place to stay. His mother did not become "clean" until about 5 years ago.

The grandmother worked two jobs, a day time and a night time job, but would leave the defendant with her other children. When the defendant was a teenager, he had a motorcycle accident: broke his leg, arm, ribs and had a hole knocked in his head. The doctors asked that she have a psychiatrist see him, but she never did. He was in the hospital for three (3) months, and in and out after that. He missed a lot of school. The defendant did not go any further in school than about 6th or 7th grade, After the accident, they told her that he wouldn't walk again, but he did walk. (T-1449, 1450).

As a teenager, he would cut tree limbs for the neighbors and help them keep their cars running. He helped everyone. When he had his first job, he brought the money home to his grandmother.

His father was not ever there for him, although he was in and out. He had a step-father who also was not there very long. His mother would come in and out and be abusive to him. (T-1451). She would hit him with a shoe, a bottle, anything. (T-1452).

Defendant grew up in the church. He has a close relationship with all of his family. He always tells the children to read their Bible, say their prayers and do what their mother says. (T-1452).

The grandmother is also the mother of Andre Fisher, the co-defendant. (T-1454). The defendant worked at Popeyes and then did yard work. (T-1456). He also had a construction job. (T-1456).

He moved out from home a year prior to his arrest (T-1456); even though he was 19 when he was arrested. (T-1457).

The next witness called by the defense was Ms. Starling, who knew Derrick Cummings, but is not related to him. He was a friend of her children; he lived in the same neighborhood that she did. (T-1464). He has helped her with chores around her house. He has helped her take in groceries. (T-1464).

Ruth Taylor testified for the defense that she has lived as a neighbor of Derrick Cummings for 23 years. She is not related to him, but she knows him from raising children together in the neighborhood. (T-1467). As a boy, he was always helpful at bringing in groceries, cutting wood, or whatever chores were to be done. He would help her cut wood for her wood stove. (T-1468).

Jeanetta Lynn Thorpe testified that she was the defendant's aunt. She worked with the Jails and Prisons Divisions of the Duval Detention Center. She is the mother of a 15 year old son and a 9 year old daughter. (T-1470). She visits with the defendant frequently. He is very close with her children. He constantly talks to them; telling them to stay in school, do their work, mind her and study their Bibles. She was around him when he had the motorcycle accident. He was badly hurt. He was crushed inside. (T-1471). He missed a lot of school that year and it caused him to drop out. (T-1472). The defendant helped other people in the neighborhood, mainly older people, with their chores and their yards. He would wash their cars. He would always do his grandmother's yard. (T-1472).

On cross-examination, she testified that she thought Dap was more responsible for Shelton's death than Derrick Cummings. The jury was not allowed to hear why she felt that way, although she would have testified that Dap has a reputation as a bully, who robs, aggravates, assaults and does not really care about anyone but himself. She thinks that is what caused the friction with his family, and because of the neighborhoods and the reputation that Dap has, that he is more responsible. (T-1477).

Charlie McCormick testified that he was a self-employed carpet installer and knew the defendant, but is not related to him. (T-1485). He knows of him to have done helpful things for people in the neighborhood. He mostly helps older people when their cars will not start, or works in their yards. When the witness was out of town, the defendant helped his wife. He would not accept payment, he would just do it. McCormick knows Defendant to give advice to children in the community (T-1486) to stay in school and try to stay off the streets. Defendant helped the witness' step-son in that manner. (T-1487).

Ella Green testified that she was on disability. she is not related to Derrick Cummings, but she has known him since 1978. He has helped her with her personal needs for her yard, house and car. She bought her own home and it was in terrible condition. She is a single person. He helped her buy the right things for her home, cut down the trees, clean it up and get the house into good condition; all without pay. (T-1489, 1490)

Mary Cummings testified that she was a receptionist at the Speech and Hearing Center. She is the defendant's great-grandmother. The defendant helped her around the house after her husband died. He would mow the yard. (T-1494). He would help on the roof. (T-1495). She is an active member of the Shiloh Metropolitan Baptist Church and took her great-grandson to church with her. (T-1495, 1496). He helped the children around the neighborhood. He was never too old or too large to help them stay out of trouble. (T-1496). They have a close, loving Christian family. (T-1497).

In closing, the state, over objections, was allowed to argue that it is not necessary for the defendant to know exactly how many persons he is putting at harm on one aggravating factor: (T-1510) and also to argue that the victim was a human, a unique individual. (T-1532).

SUMMARY OF ARGUMENT

The indictment in this case rested on the hearsay testimony of Detective Dale Gilbreath. Detective Eilbreath relied on Marion King for his testimony in all material respects before the grand jury. Later, it was discovered that Marion King was unreliable and the state could not vouch for his truthfulness. The state so advised the court and the defense but failed to advise the grand jury that the testimony they had relied upon was from a witness who was not telling the truth.

The foreman of the jury was challenged for cause because he could not put aside, in the sentencing phase, that victim was .a child. He felt this would influence his decision and should have been excused.

The profane language was allowed as evidence, over defense objection, and was used so effectively to portray the Defendant as uncaring, when the language was not probative in any way and was, in fact, extremely prejudicial. The defendant's use of profanity should not have been introduced as evidence.

The fact that Dap was known to carry a gun was not allowed into evidence. This defense argument was necessary to show why Defendant felt he should arm-himself and should have been allowed.

There was not a great risk of death to many persons. The defendant fired his weapon from the street towards the carport, where no one was present. There were only three persons who were in the possible line of fire and that is not enough to justify high probability of death to a great many people.

The Defendant, upon learning that his uncle had been attacked by Dap, immediately, in anger, left to find Dap. There was no time to plan or prearrange a murder. There is no evidence that the defendant planned to kill or knew that his actions would lead to the murder of an individual.

Defendant was a useful member of his community, helping the elderly and children. His life has been full of hardships which he has overcome. The death penalty is inappropriate and should be struck by this court.

The victim impact statement in this case went way beyond what was contemplated by Florida Statutes. It was prejudicial and used only as a plea for sympathy to the jury.

The Defendant was raised with several mitigating factors which should have been given credence as a mitigating factor. There was no evidence presented to rebut any of defendant's disadvantages which would weigh as mitigating factors: therefore these factors should have been given credibility.

There was no attempt at burglary in this case. The Defendant made no attempt to enter the premises, the property or the curtilage at any time, nor did any of the co-defendants. The finding in sentencing that a capital felony was committed while engaged in burglary should be reversed.

For premeditation, the accused must be conscious of the deed he is about to commit and the probable result of flow from it insofar as the life of the victim is concerned. In the instant case, there was no one in view at the time of the shooting.

ARGUMENT

ISSUE I

THE COURT ERRED IN NOT DISMISSING THE INDICTMENT DUE TO PERJURED TESTIMONY GIVEN TO THE GRAND JURY.

In this cause, defendant was originally charged with second degree murder. After a co-defendant, Marion King, decided to testify against the defendant, the case was presented to the Grand Jury. The Grand Jury returned an indictment of murder in the first degree. The sole witness for the indictment was Detective Dale Gilbreath. (R-473).

Detective Gilbreath testified that, prior to appearing before the grand jury, he would have reviewed the homicide supplement report. (R-476). He did not take any exhibits into the room other than photographs. (R-476). He did not present any depositions, sworn statements, or written reports such as the homicide supplement report to the Grand Jury. (R-476). Prior to testifying, it was his understanding that the statements given by defendant Fisher and defendant, claimed that Kevin Dixon had done all the shooting. (R-478). He did not, however, present any statements of Andre Fisher or Defendant. (R-483).

He advised the jury that he had the cooperation of King. (R-493). He testified that King indicated that Cummings, Dixon and Fisher had gotten out at the house. They knew there were three firearms involved in the ballistics. (R-494). He advised the jury that Andre Fisher had a dispute with Dap. Dap stayed at the

residence that was shot, according to King, and that prior to the shots being fired, the father of the child had been on the car-port for the purpose of smoking a cigarette. (R-495). He told the grand jury that he had talked with the father of the deceased child. The father said that he had been out there and "that King told O'Steen that as they rounded the corner, one of the participants in the car said, 'there he is', and pointed to a figure in the car port." (R-495). This is solely that is derived from Marion King. (R-495, 496). He further advised the Grand Jury that King had been there and had given them that story. (R-496).

Subsequent to the grand jury testimony, Marion King was discredited and, in fact, a gun belonging to him had been at the scene of the shooting. The prosecutor indicated in open court that their key witness, co-defendant Marion King, was a "liar" who had perjured himself on material facts in this case and that they could not rely on him. They therefore dropped the case against the co-defendant Kevin Dixon on January 27, 1995. (T-233).

They indicated that he would not be used at trial because he was not believable (T-237) and they could not represent that he would tell the truth. (T-259). In the case, Mr. King's testimony provided material evidence for premeditation in that he is the only one who testified that the participants in the car said "there he is". Further, he was the only one who said that there were four (4) people in the car and that the three (3) shooters got out of the' car. An indictment on premeditation would be based on that

statement and that statement alone. Therefore, King's testimony was material.

The state revealed that King was not trustworthy to the Court and to the defendant. However, the state never revealed to the Grand Jury that testimony relying on King was perjured and unreliable. Under the seminal case, case of Anderson v. State, 574 So.2d 87 (Fla. 1991), the Florida Supreme Court addresses this exact issue. In Anderson, the witness was the defendant's girlfriend. Her testimony at trial was different from her grand jury testimony. The Court did not find it to be material because her testimony at trial was more damaging than her testimony in front of the grand jury, and the grand jury testimony was not materially false in any respect that would have affected the indictment. Id. at 92. The Court said that they were not faced with any "deliberate subornation" of perjury. The state did not knowingly present false testimony to the grand jury. Id.

In the instant case, however, the other principals that were elucidated in Anderson would apply because the testimony was material. While the state did not suborn perjury nor did they fail to reveal it to the Court of the defendant, they did not ever reveal it to the Grand Jury. In Anderson, the Court relies on United States v. Basurto, 497 F.2d 781 (9th Cir. 1974) where the Ninth Circuit Court of Appeals held that

> the Due Process Clause of the Fifth Amendment is violated when a defendant has to stand trial on an indictment which the government knows is based partially on perjured testimony, when the perjured testimony is material, and when jeopardy has not attached.

> Whenever the prosecutor learns of any perjury committed before the grand jury, he is under a duty to immediately inform the court an opposing counsel--and, if the perjury may be material, also the grand jury--in order that appropriate action may be taken. Id. at 785-86. Anderson at 91.

They also cite to the Florida Rule regulating Florida Bar 4-3.3(a), which holds that it is a duty of a lawyer to take reasonable remedial measures if he has produced material evidence which he later comes to know is false. The court also cites to a New York case, People v. Pelchat, 62 N.Y.2d 97, 464 N.E.2d 447, 476 N.Y.S.2d 79 (1984), where the New York Court of Appeals indicated that when the prosecutor knew of false grand jury testimony, the prosecutor was "duty bound to disclose the admission to the court and seek its permission to reindict the defendant." Id. Similarly, in Escobar v. Superior Court, 155 Ariz. 298, 301, 746 P.2d 39, 42, (App.1987), the prosecutor in a child abuse case was aware of materially false testimony and he should have informed the court and the grand jury. Anderson at 91.

The Florida Supreme Court held 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. This policy is predicated on the belief that deliberate deception of the court and the jury by presentation of evidence known by the prosecutor to be false 'involve[s] a corruption of the truth-seeking function of the trial process', United States v. Agurs, 427 U.S. 97, 104, 96 S.Ct. 2392, 2398, 49 L.Ed.2d 342 (1976) and is incompatible with 'rudimentary demands of justice.'" Giglio v. United States, 405 U.S. 150, 153, 92 S.Ct., 763, 765, 31 L.Ed.2d 104 (1972) (citation

> omitted). Deliberate deception is also inconsistent with any principal of "ordered liberty" and with the "ethical obligation of the prosecutor to respect the independent status of the grand jury." (citations omitted). Id. at 91.

Our Florida Constitution, Article I, Section 9, indicates that "no person shall be deprived of life liberty or property without due process of law." When a person has to stand trial and defend against charges based on perjured material testimony, the defendant's due process rights demand that the criminal charges be dismissed.

Clearly, in the instant case, the evidence of Marion King was material to obtaining an indictment. The appropriate procedure for the prosecutor would have been to seek a new indictment and to have apprised the grand jury immediately upon learning that the material testimony of Marion King could not be relied upon and was perjured. The instant case should be reversed and remanded with the prosecutor being allowed to seek a new indictment, deleting any perjured material testimony.

ISSUE II

THE COURT ERRED IN REFUSING TO EXCUSE THE FOREMAN FROM THE JURY FOR CAUSE

The defense tried to strike juror Mr. Bold for cause, stating that he had four (4) children at home and this would weigh on his decision and he could not put that out of his head. The court, in denying the challenge, said that even though he had four (4) children at home and it would be in his mind, he could put it out of his head and disallowed the challenge for cause over the defense factual objection that he said he could not put the victim's age out of his mind. (T-S). The record reflects that Mr. Bold, the prospective juror raised his hand and stated:

> "I have four kids under thirteen and I think that would probably weigh in the sentencing--
>
> Mr. Fallis--okay. Mr. Bold.
>
> Prospective juror: for me too.
>
> Mr. Fallis--okay, when you say "weigh", you mean even if you were told that was something you shouldn't consider you think it would outweigh
>
> Prospective juror: it would be in my head.
>
> Mr. Fallis--thank you sir.

There was no rehabilitation by the state after this colloquy. Earlier, the lead in question by the defense attorney, Mr. Fallis, had been

> Let me ask the second row, how about the second row? 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 older? (R-469).

After that, persons began raising their hands. Again, the question from Mr. Fallis was,

> "it's really important for both the state and defense to know this right now, up front, than to harbor these things and, in effect, if they do affect you and you can't sit as a fair juror, then it is important for us to know that.
>
> How about on the second row? Anybody else in the second row feel that the fact in itself would weigh and perhaps skew your feelings as to whether or not you could follow the law or not, if the law didn't discern the age of the victim? (T-470).

There was no response, then Mr. Fallis repeated the question:

> How about over here. Anybody over here feel the fact that if you were to learn that the victim in this case happened to be a child, would it affect your feelings about the case or perhaps about the people or persons accused in this case? (R-470).

Persons at that time began responding that it would affect them as to the sentencing phase. (R-471).

In the instant case, Mr. Bold was challenged for cause (T-510), but was ultimately seated on the jury. The defense had exhausted all of its peremptories and moved for an additional peremptory, which was denied. (T-537). Prejudice has been suffered by the defendant because Mr. Bold could not put "aside any bias or prejudice and 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.), cert. denied, 469 U.S. 873, 105 S.Ct. 229, 83 Led2d 158 (1984). If there is a reasonable doubt that exists on whether the juror possesses the requisite state of

mind "to render an impartial recommendation as to punishment, the juror must be excused for cause.11 Hill v. State, 477 So.2d 553, 556 (Fla. 1985).

For the case to be reversible, the court must "force the party to use peremptory challenges on persons who should have been excused for cause, provided the parties subsequently exhaust all peremptory challenges and an additional challenge is sought and denied." Hill, 477 So.2d at 556. (emphasis added): accord Trotter v. State, 576 So.2d 691, 69.3, (Fla. 1990).

In Bryant v. State, 656 So.2d 426 (Fla. 1995), it was not reversible because, even though Bryant had used the peremptory challenge to excuse a juror who should have been excused for cause, he was granted one additional peremptory challenge. In the instant case, despite the defendant's request, he was not granted an additional peremptory challenge after he had exhausted all of his peremptories. The juror did sit on the case even though there was reasonable doubt as to whether or not he could be fair in the sentencing portion of the case because he indicated that he could not put aside the age of the victim. The age of the victim was not a statutory aggravating factor. If the record, as it does in this case, establishes "preliminarily" that a juror's views could prevent or substantially impair his or her duties, it is for the prosecutor or the judge to rehabilitate the juror. Bryant v. State, 601 So.2d 529 (Fla. 1992). If the rehabilitation does not occur, as it did not in this case, and there was a basis for a

reasonable doubt as to the juror's present state of mind, the case should be reversed. Id.

ISSUE III

THE COURT ERRED IN ALLOWING INTRODUCTION OF PROFANITY BY THE DEFENDANT IN RESPONSE TO BEING ADVISED THAT A BABY WAS KILLED IN THE SHOOTING.

In the instant case, a person sees the Defendant and asks the Defendant what happened. The Defendant indicates he does not know. The witness then advises the Defendant that a baby was killed and he responds, **"so fuck it".** The language is objected to as irrelevant and more prejudicial than probative, but it was admitted into evidence by the court under the theory that it showed that the Defendant knew that a crime had been committed and was relevant to his asking the witness then to tell the police that he was with the witness. (T-448).

The prejudicial value of this language far outweighed any probative value. Even under the court's ruling, it was not probative of any issue because the false exculpatory issue would be there whether or not that language was admitted. Further, the sole purpose of the language **was** to show that the Defendant was callous. It was thus argued by the State Attorney that way in closing argument. In closing, the argument was **"Does** he say I'm **sorry?"** (T-1186). He did not claim that it was an accident or say I did not mean to kill the baby. He made threats instead and what were his first words, does he say I'm sorry, does he say I was only shooting at the car, did he say **"Oh** my **God",** I **was** shooting at the car, did he say I did not mean that to happen? I apologize, but

I'm using the killer's words, his first words after hearing this baby boy had been shot--"so fuck it, so fuck it". (T-1186). The argument for that was not relevant to anything except to be argued as callous by the prosecutor. On the other hand, the words could have easily meant "that's too bad." The words were ambiguous but they were taken and argued over objection in a way to harm and to be prejudicial to the defendant. They did not show premeditation. They were uttered at a time after the killing had occurred, and further, they had no probative value whatsoever because the words can be interpreted in two different ways.

The court's reasoning for a logical sequence of events as the basis for the admission of the statement does not comport with the law. In the case of Conelv v. State, 627 So.2d 180 (Fla. 1993), the Florida Supreme Court held that dispatch statements which were inherently accusatory could not be admitted merely under the theory that it would explain the sequence of events. Conlev further excluded statements because the contents of the statement were not relevant to establish a logical sequence of events. Id. at 183. The court used the basic weighing factor of the "inherently prejudicial fact versus any probative value", which is the standard which should be used in the instant case.

Similarly, in the case of Singer v. State, 647 So.2d 1021, Defendant was arrested for resisting a law enforcement officer without violence and obstructing an officer with violence. The case was reversed because the prejudicial effect outweighed any limited relevance. In the Sinser case, the officer repeated the

appellant's words "when I get out, f. . , the judge, f. . . the jury, I'll just blow your head off." It was held not to be held relevant and was prejudicial. The court held that even if it was "marginally relevant", the prejudicial impact far outweighed any probative value. Id. at 1021. The case was reversed for a new trial,

In the instant case, this should be reversed for a new trial because the language was used so effectively to portray the Defendant as uncaring, when in fact the language is ambiguous, not probative and extremely prejudicial. This case should be remanded for a new trial.

ISSUE IV

THE COURT ERRED IN NOT ALLOWING TESTIMONY THAT THE DEFENDANT WAS ADVISED THAT DAP CARRIED A GUN AND WAS KNOWN TO DO SO

Michael Gardner testified that he was a friend of the Defendant and that the Defendant told him, "take me to get my shit" - meaning gun. On the testimony of Mr. Levy, the defense proffered that Levy had warned Defendant that Dap was known to carry a gun, and that Dap had, in fact, pulled a gun on Mr. Levy (T-919). The state objected as irrelevant because the character of Dap was not at issue. (T-920).

The defense argued that it was reasonable and a theory of the defense to introduce why Defendant armed himself. His state of mind when he left was angry, but he was told to be careful by a witness because Dap had been known to pull a gun. This makes defendant's actions much more reasonable and less premeditated if this theory of defense had been introduced into evidence. The court had denied the evidence saying there was not a right to be a vigilante (T-922).

In essence, the Court denied the defense proof of its claim of lack of premeditation to kill. The testimony was relevant, probative and by denying it, the court created reversible error. It is well established that a theory of defense should be allowed to be presented to the jury. This case should be remanded for a new trial.

ISSUE V

THE COURT ERRED IN FINDING AS AN AGGRAVATING FACTOR THAT THE DEFENDANT KNOWINGLY CREATED **A GREAT RISK OF DEATH TO MANY PERSONS BY THE SHOOTING.**

The Florida Supreme Court has defined great risk of death to many persons a5 "not a mere possibility, but a likelihood or high probability". Coney v. State, 653 So.2d 1009, 1015 (Fla. 1995). In the Coney case, the defendant sat his jailhouse lover on fire. They were incarcerated in the Dade Correctional Institution when the two became disenchanted. The defendant went into his former **lover's cell,** doused him with a flammable liquid and set him afire. The court held this was not a great risk to many people because the fire was "relatively **small, was** in a single cell, was in an area of constant surveillance, and was easily extinguished with several puffs of a fire extinguisher." Id. In that case, the error was harmless, because four strong aggravating factors remained.

In the case of Jackson v. State, 599 So.2d 103, 108 (Fla. 1992), the aggravating factor of creating a great risk to many was rejected. In that instance, the defendant had set an automobile aflame. The trial court felt that there was a great risk because the defendant had no way of knowing or caring how many police officers, medical personnel or fireman would respond to the scene. Further, an explosion could have happened. The Florida Supreme Court held that this did not qualify as a likelihood of a high probability of death to many people. "[T]he fact that fire might

have caused an explosion which might have killed those responding to the fire is insufficient to support this aggravating factor." Id.

In the case of Williams v. State, 574 So.2d 136 (Fla. 1991), the Defendant robbed a Tampa bank, killing the bank guard. The court held that it was error to find a great risk to many persons, even though several other people were present in the bank at the time of the robbery. The court stated that "[t]his factor is probably found only when, beyond any reasonable doubt, the actions of defendant created immediate and present risk of death for many persons." Id. at 138. In the Williams case, the defendant's actions created risk but not "immediate and present risk" to the others in the bank. Id. Since there was indiscriminate shooting in the direction of bank customers but only the intent to kill the bank guard, it did not qualify.

In Harmon v. State, 562 So.2d 223 (Fla. 1990), the Florida Supreme Court again rejected the aggravating factor of knowingly creating a great risk to many persons. The trial court found that there were ten persons in the area of the shoot out. Any of the persons could have been struck. Additionally, the shoot out occurred near a busy thoroughfare. The defendant and another person fired at each other, apparently from close range, and did not aim in the direction of a large number of people. Defendant maintained there was "only the chance that a bystander would be struck by a stray shot, and that such a danger is insufficient to support the aggravating circumstance." The Florida Supreme Court

held that the factor should have been rejected. While the trial judge had found that there were numerous people in the bank and five bystanders outside the bank and passerbys on the highway, the evidence only showed that the seven persons in the bank were behind partitions and not in the line of fire. The witnesses outside the bank either saw or heard the shooting, and only one of them was in the line of fire. As to the highway, only one of eight shots was towards the highway, although two others could have been. The mere possibility of those three gunshots toward the busy highway was not considered proof that Defendant knowingly created a great risk of death to many persons. Id.

In sum, it would appear that in the instant case, factually it would not qualify as great risk of death to many persons. Inside the home in the possible line of fire ricochet were only three persons, the victim and the victim's parents. (Three persons are not enough to qualify as great risk for this factor. Bello v. State, 547 So.2d 914 (Fla. 1989).) The other two persons in the home, the brother and sister, were clearly in bedrooms, not anywhere near the line of fire and would not qualify. As there is not a great risk, that is a likelihood or high probability of death to more than three person, this factor should have been rejected entirely.

ISSUE VI

THE COURT ERRED IN FINDING THE AGGRAVATING FACTOR AND IMPOSING THE DEATH PENALTY FOR COLD, CALCULATING, AND PREMEDITATED.

In the case of Gambel v. State, 659 So.2d 242 (Fla. 1995), the Florida Supreme Court set forth the criteria for finding the aggravating factor for cold, calculated and premeditated. It is correct to find it when:

> [t]he killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold), and that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated), and that the Defendant exhibited heightened premeditation (premeditated) and that the defendant had no pretense of moral or legal justification. Jackson v. State, 648 So.2d 85, 89 (Fla. 1994) (citations omitted).

In the Gambel case, it was correctly applied in that the Defendant had instructed his girlfriend six (6) days prior to the murder that he was going to kill the victim. The day before the murder, he had her pack their belongings to leave town. He also practiced the crime with her by choking her. The day of the murder, he picked up his final paycheck and got money to use as a ruse to pay the rent. They approached the victim and asked for a rent receipt. When the victim went to get the receipt in his apartment, the co-defendant searched the garage for a weapon and found a claw hammer. When the victim returned, the defendant struck him in the head and the victim fell to the floor. The co-defendant then struck the victim in the head repeatedly with the claw hammer. Whereupon, the co-defendant wrapped a cord around his neck and choked him. They

wrapped the hammer and cord in newspaper and left them lying on the floor. They cleaned up, stole the victims car, got their girlfriends, cashed a check on the victim's account and left town. These are the kinds of fact which "completely support" a finding of cold, calculated and premeditated. Id. at 245.

Similarly, in Jackson v. State, 648 So.2d 85, 88 (Fla. 1994), the Florida Supreme court set forth the guidelines for cold, calculated and premeditated. It applies to "'murders more cold-blooded, more ruthless and more plotting than the ordinary reprehensible crime of premeditated first degree murder."' The killing involves "calm and cool reflection" Richardson v. State, 604 So.2d 1107, 1109 (Fla. 1992). Id. at 88. The Florida Supreme Court continues to state that there is a heightened premeditation which is required over and above the ordinary premeditation element of first degree murder. To be calculating, there must be a 'Careful plan or a prearranged design." (cite omitted) Id. at 89. Further, there must be no pretense of moral or legal justification. Id. at 89.

In the case of Costra v. State, 644 So.2d, the court rejected cold, calculated and premeditated without any pretense of moral or legal justification. The court found that the record reflected that the defendant planned to rob the victim, but it did not show a careful design and heightened premeditated intent. In Costra, the Defendant drove to Ocala, drank heavily for several days, planned to leave town but needed to steal a car in order to leave. The Defendant grabbed his victim by the throat and squeezed so hard

that blood came out of his mouth. The defendant stabbed the victim between 5 and 15 times. The defendant then left in the victim's car and drove to Lake city. When he was arrested in Lake City, his speech was slurred **and his eyes were bloodshot and he was arrested** for disorderly intoxication. Even though defendant had planned this over a day and had convinced the victim not to leave several times, and had gone to a neighboring apartment to get a gun, it did not reach the level of cold, calculated and premeditated.

In Wyatt v. State, 641 So.2d 1336, 1341 (Fla. 1994), the Florida Supreme Court again rejected a finding of cold, calculated and premeditated. In the Wvatt case, the defendant and a friend escaped from a prison work crew in North Carolina to come to Florida. In Jacksonville, they stole a Cadillac and drove to Vero Beach. They entered a Domino's Pizza Restaurant armed with guns. The defendant took money and raped one of the female employees. He then shot all three employees to death. Although there were other aggravating factors, "cold, calculated and premeditated" was not found in this case.

In the case of Sweet v. State, 624 So.2d 1138, 1142 (Fla. 1993), the Florida Supreme Court sustained a finding of cold, calculated and premeditated. In Sweet, there was a prearranged plan to kill a victim. Most importantly, the motive was to eliminate a potential witness. The defendant went to the victim's door, pounded on the door, and attempted to break in. After the door was opened, he pushed his way in and immediately began

shooting. This was found to be consistent with a plan to kill and not to merely scare or harass.

In the instant case, there is not the heightened premeditation necessary for cold, calculated and premeditated. It is particularly important in this case because it was given great weight by the trial court. (R-453).

In the instant case, the parties did not know where Dap was, but instead drove around trying to find him. There was evidence that was proffered at the trial that the reason that the defendant was armed was because Dap had a reputation for violence and carried a gun. There was some justification for being armed. Further, there is no evidence whatsoever, that the defendant knew that he was going to kill someone or that his actions would kill someone. No parties knocked on the door and asked for someone in particular. There was no face to face confrontation or close range shooting. There was not any kind of plan. It was not a cold murder, but in fact was something done in the heat of the rage of finding out that his uncle, with whom he was very close, had been severely injured by Dap. It certainly was not carefully prearranged or thought out.

Additionally, the jury was misled on premeditation in that over objection of counsel, the court instructed that "heightened premeditation necessary for this circumstance does not have to be directed toward the specific person killed". (R-425) This denigrates the role of heightened premeditation by stating that it doesn't need to be a plan to kill anyone in particular. This could be construed to take away the meaning of heightened premeditation.

The language is confusing and would tend to lead one to believe that if someone merely wanted to kill anyone, that would qualify as sufficient premeditation.

In sum, the court should reject the finding of cold, calculated and premeditated and reverse for new sentencing.

ISSUE VII

THE IMPOSITION OF THE DEATH PENALTY IS NOT PROPORTIONATE IN THIS CAUSE WITH THE IMPOSITION OF THE DEATH PENALTY IN OTHER CASES

The death penalty is an inappropriate sentence in this case because it would not be proportionate with other death penalty cases. Proportionality review serves the function of insuring uniformity of death-penalty law and is a unique and important function of this court. Sinclair v. State, 657 So.2d 1138, 1142 (Fla. 1995). Proportional reviews are mandated by Article I, Section 17, Florida Constitution, (Id.) and also on the fact that death is a unique irreversible sentence. Article I, Section 9, Florida Constitution. Id.

In Sinclair, there was a valid aggravator in that the murder was committed in the course of the robbery. The mitigators were that the Defendant cooperated with the police, his lower intelligence and he was raised without a father. The court found that death was a disproportionate sentence in that case.

In Thompson v. State, 647 So.2d 844 (Fla. 1994), the court struck three (3) aggravating circumstances leaving a fourth aggravating circumstance that the murder was committed in the course of a robbery. The death penalty was struck as a sentence as there was significant mitigation. Id. at 827.

In the instant case, death is not a proportionate sentence. The mitigation includes the fact that the defendant was capable of forming close relationships with his family, helped neighbors, especially the elderly and children in his neighborhood, and had

led a life which included overcoming a serious accident. The defendant further had a deprived childhood, was abused by his mother for the first two (2) years of his life and neglected. Later, while he was raised by his grandmother, she worked two jobs and could not provide the supervision that would be needed. He was left with other children. The aggravating factors, except for cold, calculated and premeditated, were only given slight weight and should be struck by this court.

In addition, of the original the co-defendants in this case, one was sentenced to a term of years, another had his case dropped and the other two persons received the death penalty. This court should carefully review and remand this cause with instructions to vacate and set aside the death penalty and impose a life sentence.

ISSUE VIII

THE COURT ERRED IN ADMITTING "VICTIM IMPACT" EVIDENCE AT THE PENALTY PHASE TRIAL WITHOUT LIMITING IT AND GIVING AN INSTRUCTION THAT IT IS NOT TO BE CONSIDERED AS AN AGGRAVATING CIRCUMSTANCE.

Over the objection of the trial counsel, the mother and grandmother of the victim read prepared statements to the jury in the sentencing phase. (T-1437 and T-1442). Portions of the statements were excised and then remaining comments were read to the jury.

In Windom v. State, 656 So.2d 432 (Fla. 1995), victim impact evidence was allowed at the penalty phase hearing under the guidance of Payne v. Tennessee, 501 U.S. 808, 111, Supreme Ct. 2597, 115 L.Ed 2d 720 (1991). Windom further stated that any testimony should be limited to the victim's uniqueness and the loss to the community created by the victim's death. Id. at 438. In Windom, the testimony was erroneously admitted, but the error was not preserved for appellate review. That testimony concerned the effect on children in the community other than the victim's sons. The court, in Windom, indicates that Florida Statute Section 921.141(7) "indicates clearly that victim impact evidence is admitted only after there is present in the record of evidence one or more aggravating circumstances." Id. at 438. It continues to state that the evidence is not an aggravator and cannot be admitted unless there is an aggravator. If it is an aggravator, then it would violate the statutory weighing of aggravators and mitigators approved in State v. Dixon, 283 So.2d 1, (Fla. 1973), cert denied,

416 U.S. 943, 94, Supreme Ct. 1950, 40 L.Ed 2d 295 (1974). However, the Windom court clearly holds that it does not interfere with the schedule set forth in State v. Dixon. Id.

In the instant case, however, the evidence was objected to, (T-1375), because there was no aggravating circumstance and because the testimony went beyond the impact on the family, uniqueness of the individual and the loss of the community. (T-1376). Particularly what Shelton, the victim, was eagerly looking forward to would not be a victim impact statement. (T-1376). It is particularly prejudicial to hear testimony that Shelton was a "precious son" as all children at age five (5) are precious children. That is not unique but is merely a plea designed to create sympathy in the jurors in a case which is already replete with sympathy as evidenced by the voir dire. Further, it is speculative in that he was looking forward to playing little league but have never played. This was objected to. (T-1393).

Interestingly enough, in the case which allows the testimony of victim impact, Payne v. Tennessee, 501 U.S. 115 L.Ed 2d 720, 111 Supreme Ct. 2597, 2609, the entire victim impact was the mother of the deceased--in response to a single question--stating that the child misses his mother and baby sister, both of whom were murdered. The statements in the instant case go well beyond this and by not giving an instruction to the jury on how to consider this testimony, the likelihood for its misuse and plea for sympathy is aggravated so that it would be used as an improper aggravating factor.

The prosecutor argued in closing that you heard what Shelton like to eat, about his pet bird, that he loved his family and was loved by his mother and father and grandfather; that watching television will never be the same for this family and sitting down to dinner, and while the prosecutor argued these statements cannot be used as aggravation, they were offered to give a sense of balance. (T-1522). Over objection, the prosecutor then was allowed to argue that the defendant knew that his victim was not a human island, but a unique individual. (T-1523). The prosecutor then argued that murder takes away a little boy's hopes and dreams and transforms that person into a corpse. (T-1523). Again, the little boy's hopes and dreams should not have been introduced as victim impact evidence since it was prejudicial used as a plea, for sympathy to this jury and was well beyond anything contemplated by Payne v. Tennessee or by the Florida Statutes. This case should be reversed for a new trial on the sentencing phase.

ISSUE IX

THE TRIAL COURT ABUSED ITS DISCRETION IN GIVING NO CREDIBILITY TO THE NON-STATUTORY MITIGATING FACTORS WHICH WERE APPROVED BY APPELLANT

There must be competent, substantial evidence to reject mitigators, even non-statutory. See Johnson v. State, 608 So.2d 4 (Fla. 1992). In the instant case, Defendant proved the existence of non-statutory mitigating factors including the following:

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.

There was no evidence to rebut or impeach any of these mitigators and the court could not just merely reject them out of hand. It was reversible error not to consider these and this cause should be remanded and reversed with instructions for the imposition of a life sentence.

ISSUE X

THE COURT ERRED IN FINDING IN SENTENCING 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.

In the instant case the facts show that thirty five shots were fired at two different walls in a carport. The facts showed that while five shots hit the kitchen door: most of the shots fell around the car or hit a brick wall. The evidence was also uncontroverted that there was no one in the carport at the time that the shots were fired and that the blinds were drawn on the kitchen window leaving only an inch or a half an inch at the bottom that was not completely covered. The evidence was also uncontroverted that all of the casings were found in the street and that the defendants never were physically on the property belonging to the Lucas'.

The proposition that these facts constitute a burglary seems to expand Florida cases regarding burglary.

The Second District Court of Appeal certified the following questions: does Florida's burglary statute require that the "curtilage be closed, and if so, to what extent?" The court analyzed and answered the question as to what is the appropriate definition. In Hamilton v. State, 660 So.2d 1038 (Fla. 1995), the Defendant was charged with burglarizing the dwelling of another and with felony murder. The defendant entered the yard of Jenk's home with the intent to steal boat motors attached to a boat located in a yard next to the home. The theory on the second degree murder

charge was that by perpetrating the burglary, the homeowner shot and killed one of the perpetrators and the other perpetrator was then, therefore, guilty of felony murder. The back yard where the boat was, was not enclosed by fencing or shrubs or in any other manner. The defendant requested that curtilage be defined as it is in the Florida Standard Jury Instructions in criminal cases wherein "structure means any building of any kind, either temporary or permanent, that has a roof over it, and the enclosed space of srounds and out-buildinss immediatelv surroundins the structure." The trial court did not give that requirement that the yard be enclosed. The defendant was found guilty of grand theft, burglary and second degree felony murder. The Florida Supreme Court reversed.

The Court adopted the reasoning of the Fourth District Court of Appeal in Hamilton, that the curtilage would be the enclosed space of ground and out-buildings immediately surrounding the structure. Id. 1040. The Court defined curtilage strictly as based on Florida Statutes and the case law. Criminal statutes are to be construed strictly in favor of the person against whom the penalty is to be imposed. Cowan v. State, 515 So.2d 161, 166 (Fla. 1987), Florida Statute §775.021(1), Florida Statutes. Id. at 1044. In Hamilton, because there was no enclosure or any fence, the case was reversed.

In the instant case, there is no question but that the Defendants did not come on the property or the curtilage. The issue is therefor, whether or not the firing of a gun at a home

where one of the bullets penetrates the home is burglary. There has to be an intent to commit a crime within the home. The State has argued that the intent was to kill. However, there was no proof at trial that the Defendants saw anyone after the door was shut in the home. So, therefore, the question is whether or not there was an intent to kill, and even if there was an intent, does it qualify as burglary?

In the case of Baker v. State, 636 So.2d 1342 (Fla. 1994), the Florida Supreme Court found that Baker had been correctly convicted when he was on the curtilage next to the home, broke a window with a board and then fled when the burglar alarm went off. The key in that case is that he was, himself, on the curtilage when he broke the window with the board. Id.

The Court defines our present day burglary statute as requiring entry by either entering or remaining on the property without invitation or license. If the property was a conveyance, the burglar did not have to enter if he takes part in dismantling a portion of conveyance. Id. at 1344.

However, it still seems to stretch the burglary statute and to extend it to hold that a person can stand outside the curtilage, outside the dwelling and have no entry, but can merely effect an entry by shooting a gun; The Court in Baker said that "the burglary statute is clear and unambiguous, and this Court 'may not modify it or shade it out of any consideration of policy or regard for untoward consequences.' McDonald v. Roland, 65 So.2d 12, 14 (Fla. 1953)." Id. If the burglary statute is to be read by its

plain meaning, then certainly entering would not be accomplished under these facts where the instrument was not under Defendant's control once it had left his weapon. Additionally, the Defendant was not holding the part of the instrument that effected entry when it entered. Thus it was inappropriate to instruct on burglary. This should be remanded and reversed for a new sentencing phase hearing.

ISSUE XI

THE COURT ERRED IN NOT GRANTING A JUDGMENT OF ACQUITTAL

In this case, the facts do not show that there was a premeditated design to kill. There were never any threats to anyone. The shots that were fired were fired into a carport where no one was. The majority of the shots hit a brick wall and the floor of the carport. The assailants did not get out of the car and go up to the door or make any effort to wait for the person to come out or to leave the home. The prosecutor argued in closing that the persons had driven up, taken the time to get out of their car, at which time there would have been no one in the kitchen or near a window. The car-port was dark and there was only a 1" light at the bottom of the kitchen window. There was nothing to indicate the shooting was anything other than an intent to send a warning to stay away.

Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed and the nature and manner of the wounds inflicted. At no time before the homicide is well enable to allow the accused to be conscious of the deed he is about to commit and the probable result of flow from it insofar as the life of the victim is concerned. Larry v. State, 104 So.2d 352 (Fla. 1958). Premeditation has been shown where as particularly lethal gun was used with bullets of a high penetrating ability and no sudden provocation and shots were fired at the

victim at close range. Griffin v. State, 474 So.2d 777, 780 (Fla. 1985). For premeditation, the accused must be conscious of the deed he is about to commit and the probable result of flow from it insofar as the life of the victim is concerned.

In the instant case, there was no one in view at the time of the shooting. The person who was shot, was only shot by a "tumbling" bullet according to Dr. Floro, which means that he was a secondary target. None of the shots appeared to be aimed at anyone. There was no waiting for someone to come out the door, there was no stalking, the manner of death was accidental. There was no evidence whatsoever to show that the Defendant anticipated a killing. Nor was there was a showing that it would have been a reasonable expectation from their actions in that even Shelton Lucas, Sr. said that he had been gone into another room when he heard the shots. The kitchen door was in a brick wall. The shots were not centered at the door. There is no showing of premeditation and the judgment of acquittal should have been granted.

CONCLUSION

The trial court erred in not allowing the defendant to present evidence to refute premeditation and by allowing the state to introduce evidence slurring the defendant's character. The case should be reversed. In addition, the indictment should have been dismissed.

Further, the sentencing should be reversed as Mr. Bold could not be fair and should have been excused for cause. The sentencing hearing was extremely unfair because of the victim impact being introduced with no limiting instructions by the court. Also, the aggravating factors found by the court were predicated on insufficient evidence. Finally, the imposition of the death penalty is not proportional in this case and the case should be remanded for the imposition of a life sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Robert A. Butterworth, Attorney General, the Capitol, Tallahassee, Florida 32301, by regular United States Mail this 18th day of November, 1996.

Jeanine B. Sasser
Attorney for Appellant