IN THE SUPREME COURT OF FLORIDA

ANDRE FISHER,

Appellant,

V.

CASE NO. 86,665

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS[1]

A. Pretrial Proceedings

On the evening of February 15, 1994, unknown persons fired gunshots into the carport area of 5206 Washington Estates Drive in Jacksonville, Florida. Several bullets penetrated a door leading into the kitchen. One of these bullets traveled through the kitchen and into the living room, striking five-year-old Shelton Lucas as he lay sleeping on a couch. Shelton Lucas died the next day.

By February 18, 1994, police had arrested four suspects: Andre Fisher, Derrick Cummings, Marion Lorenzo King, and Kevin Dixon. On March 7, 1994, all four suspects were charged with second-degree murder and shooting or throwing deadly missiles. R 8-10. On April 7, 1994, Marion King gave a sworn statement as part of a negotiated plea to second-degree murder. In his statement, King said he drove Cummings, Fisher, and Dixon to the

[1] References to Volumes I-II of the record on appeal, containing pleadings and court documents, are designated by "R" and the page number. References to Volumes III-XIV, containing the transcript of trial and sentencing proceedings, are designated by "T" and the page number. References to Volumes I-II of the Supplemental Record are designated by "SR" and the page number. All proceedings were before Circuit Judge Alban E. Brooke.

scene but did not carry his own gun or participate in the shooting. R 153-167. On April 27, 1994, the Duval County grand jury indicted Cummings, Fisher, and Dixon for premeditated first-degree murder. R 24-26.

On January 25, 1995, five days before trial, the Public Defender, representing Dixon, informed the court that ballistics tests had established three shell casings from the crime scene were fired from Marion King's gun, proving King had lied about his gun not being used in the shooting.[2] T 165-167. Dixon immediately moved to dismiss the indictment on the ground it had been obtained as a result of King's perjured testimony. SR 245-252, T 165. The trial court denied Dixon's motion. Later that same day, Dixon, joined by the state, moved for a continuance, which the trial court denied. SR 242-244, T 193-213.

Two days later, on January 27, 1995, the state announced it was dropping the charges against Dixon because King was a proven liar and King's testimony was the only admissible evidence placing Dixon at the crime scene.[3] T 216-220. Dixon

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[2] In addition to his April 7, 1994, sworn statement that his gun was not used in the shooting, R 159-160, King stated in a January 11, 1995, deposition his gun had been stolen several days before the shooting while he was visiting relatives in Vero Beach. T 169, 172. Although the gun was never recovered, the Public Defender was able to trace it to a previous owner, who supplied the spent shell casings for comparison with the shell casings found at the crime scene. T 217-218.

[3] The prosecutor informed the court: "[W]e, quite frankly, cannot put Mr. King on the stand because we can't believe and we can't represent to the court that he would tell the truth as to the issue as to whether Mr. Dixon was there or not." T 220. Continuing, the prosecutor noted, "[B]ased on the evidence that we have now we cannot prosecute Dixon. . . Dixon may have been there, I just can't prove he was there." T 222.

simultaneously executed a waiver of speedy trial[4] and filed notice he was invoking his fifth amendment right not to testify. T 222. The trial court subsequently denied the state's motion to set aside King's guilty plea.

Just prior to trial, Fisher and Cummings moved to dismiss the indictment on the ground it was based on perjured testimony, which the trial court denied. SR 253-256, T 554, 562-563. The trial judge granted the defense motion to preclude the state from arguing felony murder with burglary as the underlying felony. Fisher and Cummings, whose cases had been severed, T 159, were tried before separate juries on January 30-February 3, 1995.

B. Guilt Phase Proceedings

The victim's father, Shelton Lucas, Sr., testified that on the night of the shooting, Shelton, Jr., was living at 5206 Washington Estates Drive with his mother, Charlsie Lucas, and his brother and sister. Mr. Lucas was separated from his wife but was visiting that day. Charlsie Lucas's brother, Karlon Johnson, nicknamed "Dap," also was visiting that day. Dap had previously lived there, and his car was still parked in the carport. Mr. Lucas last saw "Dap" at the house around 7 p.m. He was wearing a white t-shirt and blue jeans, the same as Mr. Lucas. Both men were about 6'1" and 210-220 pounds. T 637-639.

Around 9 p.m., Mr. Lucas went out into the carport to smoke a cigarette. He smoked his cigarette just outside the door leading from the kitchen to the carport, while standing on the top of three stairs that led down into the carport. The carport

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[4]The nolle pros was conditioned on Dixon's waiver of speedy trial. T 221-222.

was open on two sides, the sides facing Washington Estates and Dostie.[5] Dap's car was parked in the carport in front of the door leading into the kitchen and facing the road. Mr. Lucas testified his body was visible above the roof of Dap's car from his thighs up. T 657. An investigator testified the roof of the car came two-thirds of the way up the door. T 793. Mr. Lucas said the kitchen and living room lights were on, but the carport light was off. The carport was much darker than it appeared in State's Exhibit 1. T 663. As Mr. Lucas turned to go back inside, he saw a car coming down Dostie Drive, to which he paid little attention. T 639-640. There were bushes on that side of the carport, but he could see through the bushes. T 661. He did not know if he would have been visible from the street at night with the carport light off. T 662. He went inside, closed the door, and walked through the living room, about ten steps. He was halfway across the living room when he heard what sounded like firecrackers. His wife, who was sleeping on the couch with Shelton, Jr., woke up and said their son had been hit. T 640, 656, 665.

The medical examiner testified Shelton, Jr., died from a single gunshot wound to the top of his head. T 691. The wound was oval, meaning the bullet passed through a secondary target and tumbled before hitting Shelton. T 701.

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[5]The Lucas residence was on the corner of Washington Estates and Dostie. The house faced Washington Estates, the carport faced Dostie. See State's Exhibit 13. A facsimile of State's Exhibit 13, as well as a drawing of the house derived from State's Exhibits 1-8, is attached hereto as Appendix A.

Dap testified he was at his sister's house three to five times a week, T 718. His car, which was "pretty distinguishable," had been parked in her carport since January. T 719. On February 15, 1994, he left his sister's house at 4 p.m. to get beer at the corner store. T 710. He and three friends went to get more beer between 7 and 8. They ran into another friend, Jason Robinson, at the corner. AS they crossed the street to Popeye's, a car drove by with its lights off. Dap yelled at the driver, Andre Fisher, to turn on the lights. The car turned into Popeye's, and Andre jumped out, and said, 'What's up, what's up here." They started talking, and Andre swung at Dap, missing. Dap then hit Andre in the head with a quart bottle. T 711-712. Four other guys were with Dap when this occurred. T 721. Dap denied telling the others to "smoke" Andre. T 720. Jason broke up the fight, and Andre got in his car and left. Dap walked back to his sister's house, then rode down to the southside with a friend to calm down. T 713. Before this incident, Dap had never seen Andre Fisher before in his life. He had met Derrick Cummings before this, though. T 719.

Jason Robinson, age 18, testified he was friends with Dap and hung out daily in Dap's sister's yard. T 722, 745. Jason ran into Dap and his friends on the corner of Soutel and Washington Estates around 7:30 p.m. the night of the shooting. T 723. As they crossed the street to Popeye's, Andre Fisher drove by with his lights off. Dap asked Andre to turn on his lights and slow down. Jason saw Dap and Andre arguing face-to-face, like they were fixing to fight. T 724. Jason could not see

whether Andre swung at Dap before Dap hit him. It did not look like he did, though, because Andre got hit in the back and he did not have a chance to swing any punches. T 746. Andre never threatened Dap afterwards, he just kept saying, "Dap, why did you do it?" T 745-746. Jason grabbed Andre and tried to get him in his car. Andre resisted but Jason got him to leave. The others left, too. T 725-726.

After the confrontation at Popeye's, Jason rode his bicycle around, then returned to the corner of Soutel and Washington Estates. T 726-727. As he was talking to a man named "Cat-Eye," Derrick Cummings and Michael Levy drove up in a burgundy and gray Chevy, asking where was the guy who was in the fight. T 727-729. Derrick had a Uzi-type gun in his lap. Jason told them no one was around, and they headed down Soutel towards Sherwood. T 730. About 15 to 30 minutes later, a white Honda Accord with darkly tinted windows came down Soutel from Sherwood and turned onto Washington Estates. Jason recognized the car as the one Marion King drove. Jason put up his hands, but the car headed on down Washington Estates. There were four people in the car. Jason recognized Andre Fisher as the front seat passenger. T 731-733. The car went down to the stop sign at Dostie and looked like it was going left when it made a wide right instead. T 735. A minute or two later, Jason heard shots. He rode down the street and heard Dap's sister screaming. T 736, 751.

Michael Levy Gardner, age 22, testified he was with Derrick Cummings at Derrick's grandmother's house in Sherwood around 5 p.m. the day of the shooting. T 765, 767. They played

basketball, then Michael drove Derrick in his mother's burgundy gray Chevrolet to Derrick's apartment in Baymeadows, where they stayed thirty minutes. T 768. They picked up Michael's little sister, then went to see his cousin, Richard Mote. At Richard's house, Derrick got paged. T 769. When he called the number back, he learned Dap had 'jumped on Andre." This was around 8 p.m. T 770. Derrick was upset and asked Michael to "take me to get my shit," meaning his gun. Michael drove Derrick to Derrick's apartment, where they stayed five minutes. T 771. As they drove down U.S. 1, Derrick told Michael to pull over, and he had a short conversation with two guys on the street. Michael dropped Derrick off at his grandmother's, where Fisher also lived.[6] T 772.

Later, Michael and his cousin Donnie Bell were at Jennings Barbecue, about five minutes from Washington Estates and Soutel, when they heard police sirens. They followed the rescue vehicle to Dap's house, where they saw a lady running around, saying, "Oh my God, my baby. Oh, my baby." T 773-776. They went back to Jennings, then headed home down Soutel. At Sibbald and Soutel, they ran into Derrick. Derrick jumped out of Kevin Dixon's Jeep, and Michael asked him what happened. Derrick said he did not know. When Michael told him, "A baby got shot," Derrick said, 'So fuck it." T 777. Michael never saw Derrick with a weapon that night. T 781. The next day, Derrick asked Michael to tell

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[6]Though only two years younger, Derrick Cummings is Andre Fisher's nephew. Derrick's grandmother is Fisher's mother, Fisher was twenty-one and Derrick was nineteen when the crime was committed.

the police he, Michael, and Richard were all playing cards at Donnie's house when the shooting occurred. T 779.

Richard Mote testified Derrick and Michael were at his apartment between 6 and 7:30 p.m. the night of the shooting. T 870-871. Derrick got paged. When he returned the call, he learned Dap had jumped on Andre. Richard did not know who Derrick called. Derrick was angry. He and Michael left. T 872.

Margie Manley testified Derrick Cummings was her boyfriend and living with her in Baymeadows at the time of the shooting. T 907-908. Andre and Derrick came over that night around 10:00 p.m. Andre had a big knot on his head, which was oozing blood. He told her he was in a fight with his brother, then later said he was in a fight with some guys at a club. T 909-910. Andre asked Margie what time the news came on, and they watched the 11:00 news together in the living room. Derrick was in the bedroom, which also had a T.V. When Andre heard a child had been shot, he seemed "stunned." T 910-911. Derrick and Andre both stayed the night. Derrick and Margie slept in the bedroom, Andre slept in the living room. Derrick and Andre were still there when Margie left the next morning. T 912. That evening, Margie received a message from Andre that there would be a note for her at home. T 913. The note said to tell the detectives she was his girlfriend and was with him when the shooting took place. T 914.

That evening the police recovered a 9 millimeter unloaded Glock pistol from Margie's apartment. T 925, 927, 931, 936. Two fingerprints from the Glock were identified as belonging to

Derrick Cummings. T 953-954. Police also retrieved the note Margie had found, which a handwriting expert identified as having been written by Andre Fisher.. T 971.

Thirty-five shell casings were found on Dostie Drive East, all of them in the road. R 84-85, T 820, T 831, T 841. The shell casings came from three different firearms, all 9 millimeter caliber. T 989, 1000. Nine of the shell casings were typical of Glocks, twenty-three were consistent with Uzi pistols, and the remaining three were probably fired from a Tech 9. T 1000,.

Thirty-five bullet fragments were recovered. Of the thirty-one fragments found in the carport, fifteen were found on or near Dap's car. T 846. The car itself was hit five or six times, though no windows were damaged. T 837, 794. Sixteen bullets went into or around the brick north wall, which was about sixty-five feet from the road. T 851, 860. Four bullets went through the door in the north wall that led to the kitchen. T 852-853. During the initial investigation, two bullet fragments were recovered from inside the house, one from the dining room area, one from the utility room. T 859. A year later, police recovered another bullet fragment, which Lucas family members found inside the house. T 822-824. Investigators were puzzled as to how the bullet got to the sofa area. T 855.

The bullet fragments fell into two groups, those characteristic of Clock firearms and those characteristic of Uzis. T 994. The bullet fragment recovered from inside the house by the victim's family was consistent with having been

fired from an Uzi. T 996. The bullet that struck the child was consistent with having been fired from a Glock pistol, T 997, though the expert could not say it was fired from the Glock found in Margie Manley's apartment. T 1008.

At the close of the state's case-in-chief, Fisher moved for judgment of acquittal, which was denied. T 1029-1034. Fisher presented no evidence. The trial judge denied the state's request to charge the jury on felony murder, with burglary as the felony, and the case went to the jury solely on a theory of premeditated murder. T 1040. During deliberations, the jury passed out the following question: "Does the concept of transfered intent apply to the subparagraphs of the verdict?" T 1273. After determining that by subparagraphs, the jurors meant the unnumbered paragraphs having to do with carrying a firearm, T 1275, the trial judge responded to their question by stating, 'The concept of transferred intent applies only to 1st degree murder." T 1277-1278. The jury found Fisher guilty of premeditated murder while carrying a firearm. R 256, T 1291.

C. **Penalty Phase Proceedings**

Fisher's penalty phase was held March 10, 1995. Detective Goff testified Fisher had been convicted of an armed robbery that occurred September 12, 1990. Fisher pulled a pistol on two people at a car wash, then took their money and car. Fisher confessed and was sentenced to six years. He was released to Leon County under the Supervised Release Program on October 1, 1993, and was discharged from Supervised Release on December 1, 1993. T 1519-1522.

Two members of the victim's family read victim impact statements to the jury. Virginia Johnson, the victim's grandmother, and Charlsie Lucas, the victim's mother, described Shelton, Jr., and the pain and suffering they and the rest of his family had experienced since his death. T 1523-1529.

Four members of Andre Fisher's family testified on his behalf. Wiletta Cummings, Andre's mother, said she raised seven children of her own, along with three others, including Derrick Cummings, her grandson. T 1531, 1535. Andre finished high school, then went to the Marine Academy School. He worked in a seafood restaurant in Tallahassee. He was quiet, stayed to himself a lot, read a lot. He took care of the younger children, often taking them to football and basketball games. Mrs. Cummings knew about Andre's 1991 conviction. She believed he got involved in crime by 'running with the wrong crowd." After he did his time, he was afraid to leave the house. He was looking for a job and had filled out some applications. He never had a problem with alcohol or drugs. T 1531-1533.

Mary Cummings, Andre's grandmother, said Andre was a quiet child who never got into trouble growing up and was never violent. T 1536, 1539. Her understanding of the robbery was that it was a school prank that began when the robbery victim took Andre's money. T 1537. When questioned by the prosecutor about the robbery involving the stolen jewelry and car, Mrs. Cummings said she did not know anything about that. T 1541.

Ella Green, a family friend, said she worked with Andre's grandmother at the hospital and met Andre and his family in 1978.

She was in the house two or three times a week and every other weekend. It was hard for her to believe Andre was on trial for murder. She had never known Andre to be disrespectful. She had never known him to be violent or to get in fights. T 1546-1548.

Jenetta Lynette Thorpe, Andre's older sister, said Andre was the youngest of the seven children. He was very quiet, both at home and at school. Her mother worked two jobs, so Jenetta helped raise Andre. Andre loved kids and was always watching out for them. He loved to read and be read to. When he was young, they used to tease him and called him ‘Red Fox" because he had red hair and red skin. He was not violent, did not even fight back. He shied away from conflict because he was a "scary frail little boy." T 1550-1552.

The jury recommended the death sentence by a vote of 8 to 4. T 1614.

At sentencing on March 30, 1995, Fisher made a brief statement, apologizing to the court and the victim's family. T 1623. The victim's father asked the judge to impose the death penalty. T 1624.

On July 28, 1995, the trial court imposed the death sentence, finding four aggravating circumstances (prior violent felony conviction, great risk of death to many persons, committed during a burglary, and cold, calculated and premeditated) and no mitigating circumstances. The sentencing order is attached herein as Appendix B. R 284-304.

Notice of belated appeal was granted October 10, 1995. R 317.

SUMMARY OF ARGUMENT

Point 1. This was not a first-degree murder. A car carrying four people, including Fisher, fired thirty-five shots from three guns into the Lucas carport. Four shots went through the kitchen door, one of which entered the living room, where it struck and killed a sleeping child. The child's father was in the living room when the shots were fired but had been standing in the carport moments earlier. The state's theory was that Fisher saw Mr. Lucas in the carport, mistook him for Dap, and shot to kill because Dap had hit him in the head with a beer bottle earlier that evening. Though the evidence is consistent with the state's theory, it is equally consistent with Fisher's innocence. First, the evidence does not establish intent to kill by anyone, much less premeditated murder. Second, since there were only three shooters, the evidence does not even establish Fisher's participation. The evidence is entirely consistent with a spur-of-the-moment shooting in the nature of a warning, which Fisher neither intended nor participated in. Fisher's first-degree murder conviction must be reversed.

Point 2. The evidence does not support the cold, calculated, and premeditated aggravating factor because, as explained above, there was no evidence of simple premeditation, much less heightened premeditation or a prearranged plan to kill before the crime began. The evidence does not support the great risk of harm to many persons aggravator because the shooting placed only three persons at risk. The evidence does not support the felony murder/burglary aggravator because no Florida

authority has ever held shooting into a dwelling from the street is a burglary; the common law authorities are scant and ambiguous; and to hold the entrance of a bullet is a burglary would violate due process and lead to absurd results.

Point 3. Death is a disproportionate penalty in this case because there is no evidence Fisher took life, attempted to take life, or intended to take life; death is inappropriate where, as here, there exists mitigating evidence and only one relatively weak aggravator; and imposition of the death penalty would result in unequal justice because an equally culpable codefendant received a lesser sentence.

Point 4. The victim impact evidence denied Fisher due process and a fair sentencing proceeding. The testimony of the child-victim's mother and grandmother describing the family's pain and suffering was gutwrenching. This testimony plainly was designed to arouse sympathy for the family and hatred towards Fisher. To suggest it did not have such an effect on the jury is ludicrous. This type of emotion-laden appeal has no place in a death penalty proceeding and deprived Fisher of a fair sentencing.

ARGUMENT

Point I

THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUPPORT FISHER'S CONVICTION FOR PREMEDITATED MURDER.

The state indicted and prosecuted Andre Fisher on a theory of first-degree premeditated[7] murder. The evidence before the jury failed to prove, however, that Fisher was one of the shooters or that he aided and abetted the others in the shooting. Even assuming Fisher participated in the shooting, the evidence was grossly insufficient to prove he intended to kill anyone, much less that he killed according to a preconceived design. Fisher's first-degree murder conviction must be reversed and his death sentence vacated.

The evidence of Fisher's participation in this crime was entirely circumstantial. In reviewing the sufficiency of circumstantial evidence, the test to be applied is whether the evidence is not only consistent with guilt but also inconsistent with any reasonable hypothesis of innocence. State v. Law, 559 So. 2d 187, 188 (Fla. 1989); Davis v. State, 90 So. 2d 629 (Fla. 1956) ; Mayo v. State, 71 So. 2d 899 (Fla. 1954); Head v. State, 62 So. 2d 41 (Fla. 1952). This Court explained this special standard of review in Davis:

> Evidence which furnishes nothing stronger than a suspicion, even though it would tend to justify the suspicion that the defendant committed the crime, is not sufficient to sustain conviction. It is the actual exclusion of the hypothesis of innocence

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[7] As noted previously, the trial judge refused the state's request to instruct the jury on felony murder, with burglary as the underlying felony. T 1040.

> which clothes circumstantial evidence with the force of proof sufficient to convict. Circumstantial evidence which leaves uncertain several hypotheses, any one of which may be sound and some of which may be entirely consistent with innocence, is not adequate to sustain a verdict of guilt. Even though the circumstantial evidence is sufficient to suggest a probability of guilt, it is not thereby adequate to support a conviction if it is likewise consistent with a reasonable hypothesis of innocence.

90 So.2d at 631. The same strict standard applies in reviewing the sufficiency of circumstantial evidence of premeditation. See, e.g., Crump v. State, 622 So. 2d 963 (Fla. 1993) (state must exclude every other reasonable inference that may be drawn from circumstantial evidence to show existence of premeditation through circumstantial evidence); Cochrane v. State, 547 So.2d 928, 930 (Fla. 1989) (circumstantial evidence must not only be consistent with premeditation, it also must be inconsistent with every other reasonable inference).

At trial, the state's theory of prosecution was that Andre Fisher and his friends got their guns and set out on a mission to destroy Karlon "Dap" Johnson because Dap had hit Fisher in the head with a beer bottle.[8] Seeing someone they believed was Dap go inside the Lucas house, they tried to kill him by shooting at the door he had just gone through. According to the state's theory, even if Fisher did not actually fire a gun, he

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[8] He "gather[ed] his buddies, his force, his pack, to eliminate the prey, because that's what 'Dap' was, he was the prey, and they were going hunting that night, and they had those weapons of mass destruction to make sure they got him, they got their prey, and that's what we have here, just as if they had gone hunting because that's what they were doing, they went hunting for 'Dap." T 1211.

masterminded the murder and was guilty as a principal. T 1209-1210.

The evidence is consistent with this theory. The evidence is equally consistent, however, with other reasonable scenarios that exclude Andre Fisher's guilt.

A. The Evidence is Consistent With the Reasonable Hypothesis that Fisher Was Neither a Shooter Nor a Principal to the Shooting But Was Merely Present at the Scene.

Although there were four people in Marion King's car, only three weapons were used in the shooting. The evidence was consistent, then, with only three shooters. There was no evidence linking Andre Fisher to a gun before, during, or after the crime. Two of the guns used in the shooting were linked to Derrick Cummings, the Uzi seen on his lap shortly before the shooting and the Glock with his fingerprints found at his apartment the next day. The third gun, the Tech **9,** was linked to no one.[9] No one witnessed the shooting. The evidence is entirely consistent, then, with the reasonable possibility that Fisher was not one of the shooters. The state conceded as much in closing argument. T 1209-1210.

If Fisher was not one of the shooters, he could only be convicted if there were sufficient evidence to establish he aided and abetted the persons who actually did the shooting." To be convicted as a principal for a crime physically committed by

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'Ballistics tests had proved the Tech 9 used in the shooting belonged to Marion King, but this evidence was not presented at trial.

[10]Both the actor and the one who aids and abets him are principals in the first degree and may be charged and convicted of the crime. Both are equally guilty. s. 777.011, Fla. Stat. (1977); Chaudoin v. State, 362 So. 2d 398,401 (Fla. 2d DCA 1978).

another, 'one must intend that the crime be committed and do some act to assist the other person in actually committing the crime." Staten v. State, 519 So. 2d 622, 624 **(Fla. 1988).** Intent may be proved either by showing the aider and abetter had the requisite intent himself, or by showing he knew the principal had that intent. Stark **v. State,** 316 So. 2d 586, 587 **(Fla.** 4th **DCA** 1975), cert. denied, 328 So. 2d 845 **(Fla.** 1976), cited with approval in, Staten, 316 So. 2d at 624.

Consistent with these principles, this Court upheld Staten's conviction as a principal to robbery and second-degree murder where there was evidence Staten was present on numerous occasions when the robbery was planned, subsequently participated in group discussions on the way to the scene, waited in the car across the street from the robbery and murder, and drove the getaway car. Staten, 519 So.2d at 624.

Here, in contrast, there was no direct evidence of any planning by anyone, and the only evidence of Fisher's participation was his presence at the scene. Mere presence at the scene of a crime, without more, is not sufficient to establish either an intent to participate or an act of participation. Ryals v. State, 112 Fla. 4, 150 So. 132 (1933); Chaudoin v. State 362 So. 2d 398 (Fla. 2d DCA 1978); Hedgeman v. State, 661 So. 2d 87 (Fla. 2d DCA 1995); see also Staten, 519 So.2d at 624 **(mere** knowledge the offense is being committed nor mere presence at the scene nor a display of questionable behavior afterwards is equivalent to participation with criminal intent) .

In Van Poyck v. State, 564 So. 2d 1066, 1069 (Fla. 1990), cert. denied, 499 U.S. 932, 111 S.Ct. 1339, 113 L.Ed.2d 270 (1991), for example, this Court held the evidence insufficient to establish premeditated murder where the evidence did not show which of two defendants was the triggerman during an escape attempt. The court reached the same result in Jackson v. State, 575 So. 2d 181, 186 (Fla. 1991), where either of two robbers could have fired the gun that killed the robbery victim.

The Second District's decisions in Chaudoin and Hedgeman also are instructive. In Chaudoin, the defendant was convicted of second-degree murder as a principal to a shooting actually committed by his brother, James. The brothers were ejected from a bar after picking a fight with the victim, apparently to settle an old grudge. A few minutes later, two shots were fired through the open doorway of the bar, followed by eight more shots through the closed wooden door, killing one man and wounding another. An unidentified man was seen running behind a building as James was firing at the front door. James ran off, then came back ten minutes later, saying he was shot, got in his truck and drove away. Another witness saw one man running empty-handed from the bar and another man standing by a telephone with something in his hand. The man by the phone got into a truck and picked up the other man. Two rifles were recovered by the brothers' trailer. Shell casings from the crime scene matched one of the rifles, which was traced to James.

The state hypothesized the defendant acted in concert with his brother in fighting the victim, then continued to act in

concert with him by helping him procure the rifle and otherwise assisting in the shooting. The Second District disagreed:

> To find appellant guilty, an impermissible succession of inferences would be necessary. First, it would **have to be** inferred that appellant remained in the vicinity outside the **bar** after the fight. Second, that inference would **have to be used** to support the further inference that appellant's purpose in remaining was to participate in the shooting and that he acted in furtherance of that purpose by some word or deed. Circumstantial evidence is not sufficient when it requires the pyramiding of assumption upon assumption in order to arrive at the conclusion necessary for a conviction. Gustine v. State, 86 Fla. 24, 97 So. 207 (1923).
>
> The evidence in this **case** just **as** reasonably supports the inference that, although appellant may have remained in the vicinity, he did so with no intention whatsoever of participating in a shooting. Even if appellant was the running person seen by the witnesses, he could have been fleeing the scene to avoid any participation in the shooting. A willingness, indeed an eagerness, to fight does not necessarily equal a willingness to kill. Hard feelings against a person shared by two brothers may incite one to shoot but not necessarily incite the other to help him. Concerted action in a fist fight does not necessarily produce concerted action to kill. Conclusions of guilt from these circumstances are reasonable, but certainly do not exclude reasonable hypotheses of innocence.

362 So. 2d at 402.

Similarly, the defendant in Hedgeman was convicted of second-degree murder, as a lesser included offense of premeditated murder, for a crime actually committed by Daniel White. The evidence showed the victim owed Hedgeman $10, and that Hedgeman and White had been in two prior altercations with the victim over the debt, during one of which Hedgeman said he

was going to get the victim. The night of the murder, White, Hedgeman, and two others went to the apartment the victim was visiting. White entered and shot the victim three times. Hedgeman was either behind White when White fired the shots or entered the apartment immediately after the shooting. As the victim lay wounded on the floor, Hedgeman kicked him. Later that day, Hedgeman said, 'We killed that f---- n----." The Second District reversed the murder conviction, reasoning:

> Absent any testimony to establish that White planned to kill the victim that night and that Hedgeman knew of his plans, there is no evidence Hedgeman intended that the crime be committed. Further, although there was conflicting testimony regarding whether Hedgeman was in the room when White fired the shots, there was no evidence that Hedgeman took any action prior to or during the shooting to aid, encourage, or participate in White's act of shooting the victim.

661 so. 2d at 88.

Here, too, assuming Fisher was not one of the shooters, there was no evidence Fisher intended to kill Dap that night and no evidence he knew the others intended to kill Dap. Nor is there any evidence Fisher took any action, before or during the shooting, to aid, encourage, or assist the others in the shooting.

As in Chaudoin, to find Fisher guilty requires an impermissible pyramiding of inferences. First, it would have to be inferred that Fisher spearheaded the mission because he was the one that got hit in the head. It cannot be assumed, however, that Fisher is the one who told Cummings about the fight at Popeye's. The evidence is equally consistent with someone else

having told Cummings about the fight, such as one of the other participants in the shooting. Nor can it be assumed that Fisher had the "most motive" to get back at Dap. See Prosecutor's closing argument, T 1226. Fisher had never met Dap before in his life. Cummings, on the other hand, knew Dap from before; Cummings was visibly angry when he heard about the incident; and Cummings got a gun and went out looking for Dap before he even met up with Fisher.

Most importantly, it cannot be assumed Fisher, or anyone else in the car, intended to retaliate by killing Dap. This case is striking in its lack of evidence. The simple fact is the record in this case does not tell us what anyone in the group, separately or collectively, planned to do as they drove around looking for Dap. Carrying guns does not necessarily mean they planned to kill. See Van Poyck; Mungin v. State, 20 Fla. L. Weekly S459 (Fla. Sept. 7, 1995), rehearing pending. As there was no evidence of a plan to shoot or kill Dap, there is no evidence Fisher intended that the crime be committed. Furthermore, absent evidence of a plan, the evidence is consistent with a spur-of-the-moment shooting, which Andre neither intended nor participated in.

In sum, there is no proof Fisher carried or possessed a firearm, and there is no proof he actually participated in the crime, or that he intended it be committed. Fisher's conviction and sentence must be reversed, with directions he be discharged.

B. Assuming Fisher was a Principal to the Crime, the Evidence is Consistent with the Reasonable Hypothesis that Fisher Neither Killed Nor Intended to Kill Anyone.

Assuming arguendo that Fisher participated in the crime, either as a shooter or an aider and abetter, the evidence fell far short of establishing premeditated murder. The evidence showed, at most, the state of mind required for second-degree murder.

Premeditation requires "more than a mere intent to kill; it is a fully formed conscious purpose to kill." Roberts v. State, 510 so. 2d 885, 888 (Fla. 1987), cert. denied, 485 U.S. 943, 108 S.Ct. 1123, 99 L.Ed.2d 284 (1988). Second-degree murder, on the other hand, requires no specific intent to kill. Second-degree murder is committed when an unintended death results from an act "imminently dangerous to another and evincing a depraved mind regardless of human life." s. 782.04(2), Fla. Stat. (1993); Marasa v. State, 394 So. 2d 544, 545 (Fla. 5th DCA), review denied, 402 So.2d 613 (Fla. 1981).[11]

This Court has recognized several types of evidence from which the presence or absence of premeditation may be inferred: 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, the nature of the wounds, and the manner in which the wounds were inflicted. Sireci v. State, 399 So. 2d 964, 967 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982); Hill v. State, 133 so. 2d at 68, 72 (Fla. 1961).

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[11] An act is imminently dangerous to another and evincing a depraved mind if it is an act (1) a person of ordinary judgment would know is reasonably certain to kill or do serious bodily injury to another, (2) is done from ill will, hatred spite, or an evil intent, and (3) is of such a nature that the act itself indicates an indifference to human life. Marasa, 394 So. 2d at 545.

Other courts and commentators have grouped the types of evidence from which premeditation may be inferred into three categories: (1) facts showing planning activity directed toward a killing purpose; (2) facts from which a motive to kill could be inferred; and (3) facts about the nature of the killing from which it may be inferred "the manner of killing was so particular and exacting the defendant must have killed according to a preconceived design." See W. R. LaFave & A. W. Scott, 2 Substantive Criminal Law, s. 7.7, at 238 (1986) [hereinafter LaFave & Scott].

> Illustrative of the first category are such acts by the defendant as prior possession of the murder weapon, surreptitious approach of the victim, or taking the prospective victim to a place where others are unlikely to intrude. In the second category are prior threats by the defendant to do violence to the victim, plans or desires of the defendant which would be facilitated by the death of the victim, and prior conduct of the victim known to have angered the defendant. As to the third category, the manner of killing, what is required is evidence (usually based upon examination of the victim's body) showing the wounds were deliberately placed at vital areas of the body.

Id. at **239-40** (citations omitted).

The present **case** lacks evidence in any of these categories. As for preplanning, the state argued in closing that the defendants had plenty of time to plan the murder.[12] Obviously, "[i]t is not enough that the defendant is shown to have had time to premeditate and deliberate. One must actually premeditate and

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[12] ""Premeditation in this case is overwhelming. You know why? Because you've got an hour and a half worth of premeditation because, as you recall, the incident at Popeye's happened about 7:30 and this murder occurred at 9:00 o'clock. That's an hour and a half getting angry, rounding up your buddies and going out in a pack to try to get your prey." T 1197-1198.

deliberate, as well as actually intend to kill, to be guilty of this sort of first-degree murder." LaFave & Scott, supra, at 238. And, although the group was looking for Dap, the record is silent as to what they intended to do if they found him. There plainly was no evidence of planning necessarily directed toward a killing purpose. Cf. Peterka v. State, 640 So. 2d 59 (Fla. 1994)(evidence of preplanning included driver's license with victim's name but defendant's picture, other identification belonging to victim, and ads for jobs in Alaska), cert. denied, 115 S.Ct. 940, 130 L.Ed.2d 884 (1995). As explained above, the fact the group had guns is ambiguous and does not necessarily establish an intent to kill. They may have carried guns for protection,[13] and they certainly made no effort to hide that they were looking for Dap and made no effort to prevent their identification.

Nor is there any evidence from which a motive to kill can be inferred. Although the evidence reasonably supports the inference the group intended to respond to Dap's assault on Fisher, there is no evidence they intended to respond by killing him. Getting hit in the head with a beer bottle hardly establishes a motive for murder. Cf. Clark v. State, 609 So.2d 513 (Fla. 1993) (defendant killed victim to get his job); People v. Cole, Cal.2d 99, 301 P.2d 854 (1956) (evidence showed defendant killed victim to remove her as an obstacle to his marital plans).

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[13]The trial court refused to allow Richard Mote to testify he told Derrick before he left that Dap had pulled a gun on him before and was known to carry a gun. T 875-884.

The last category of evidence, the manner of killing, is weakest of all. What is required is evidence the wounds were deliberately placed at vital areas of the body. See Caraker v. State, 84 So. 2d 50, 51 (Fla. 1956); LaFave & Scott, supra, at 240.

In cases involving shooting deaths, this Court has sustained convictions for premeditated murder only where the weapon was fired at close range to some vital part of the body. E.g., Pietri v. State, 644 So. 2d 1347 (Fla. 1994) (defendant, stopped for speeding, removed gun from holster and shot officer in heart at close range with weapon that required use of both hands), cert. denied, 115 S.Ct. 2588, 132 L.Ed.2d 836 (1995); Peterka (victim shot from behind in head at close range while in reclining position, and gun could not have fired accidentally); Asay v. State, 580 So. 2d 610, 612-613 (Fla.) (unarmed and retreating victim shot once in abdomen at close range), cert. denied, 502 U.S. 895, 112 S.Ct. 265, 116 L.Ed.2d 218 (1991); Young v. State, 579 So. 2d 721 (Fla. 1991)(defendant said he would shoot back if anyone shot at him, victim **died** of two separate wounds to chest and lower abdomen, and weapon had to be manually unloaded and reloaded after each shot), cert. denied, 502 U.S. 1105, 112 S.Ct. 1198, 117 L.Ed.2d 438 (1992); Bello v. State, 547 So. 2d 914 (Fla. 1989)(as officers entered room during drug bust, defendant, who knew officers were attempting to enter, fired numerous shots through partially closed door 'at angle that would most likely hit, and probably kill, anyone attempting to open door"); Griffin v. State, 474 So. 2d 777, 780 (Fla.

1985) (defendant fired two shots at close range using particularly lethal gun with special bullets with high penetrating ability, and there was no sudden provocation by victim), cert. denied, 474 U.S. 1094, 106 S.Ct. 869, 88 L.Ed.2d 908 (1986).

Even when the victim was shot at close range in a vital spot of the body, premeditated murder cannot be sustained if the evidence is consistent with a spur-of-the-moment shooting. See Mungin (evidence of premeditation insufficient where robbery victim shot once in head at close range with weapon procured in advance, which had six-pound trigger pull, but where there were no eye witnesses to shooting); Jackson (evidence of premeditation insufficient where victim shot at distance of three feet and evidence consistent with spontaneous, reflexive shooting) .

Here, in sharp contrast, the bullets were not fired at close range to a vital spot of the body, and the evidence was entirely consistent with a spur-of-the-moment shooting. The bullets were not even directed at a person at all, but were directed into an empty carport. Yes, there was a door leading into the house, but there was no evidence the bullets were directed at the door. The shots certainly were not carefully placed. The manner in which Shelton Lucas was killed was neither particular nor exacting. It was freakish. Even the police investigators were baffled as to how a bullet could have gotten to the sofa area of the living room. T 855. The shooting in this case has the earmarks of a hasty, impetuous, indiscriminate attack, not a calculated plan to take life.

Furthermore, to conclude from the manner of killing the shots were fired with intent to kill requires an impermissible succession of inferences. It would have to be inferred someone in the car saw Mr. Lucas in the carport and mistook him for Dap. That inference would have to be used to support the further inference that the group fired at the door through which Mr. Lucas entered the house in an effort to kill him. However, the evidence just as reasonably supports the inference that no one saw Mr. Lucas and the shooters simply decided to shoot Dap's car.[14] Even if the shooters saw Mr. Lucas, they could have fired into the carport not to kill him but merely to intimidate, harass, threaten, or warn him to leave them alone.

Shooting at an obviously occupied house is a stupid, dangerous, reckless act, which, in this case, resulted in a senseless, tragic death. It is not premeditated murder, however. Indeed, a death resulting from shooting into an occupied structure is classic second-degree murder. See Keltner v. State, 650 So. 2d 1066 (Fla. 1995)(pointing loaded firearm in someone's direction, then firing it); Knowles v. State, 632 So. 2d 62 (Fla. 1993)(same); Vause v. State, 424 So. 2d 52 (Fla. 1st DCA 1983)(firing loaded rifle into departing vehicle occupied by two persons), quashed in part on other grounds, 476 So.2d 141 (Fla. 1985) ; Pressley v. State, 395 So. 2d 1175 (Fla. 3d DCA) (firing gun into crowd of people), review denied, 407 So.2d 1105 (Fla. 1981); Presley v. State, 499 So. 2d 64 (Fla. 1st DCA

[14]During closing argument, the state conceded this possibility: "The defense may get up and say they were shooting at the car, they realized that car was "Dap's" car and they just wanted to get even so they figured they'd shoot up the car, Yeah, I guess anything is possible." T 1219.

1986) (discharging gun into window of automobile occupied by six persons); see also LaFave & Scott, supra, at 202 (listing as examples of second-degree murder firing bullet into room defendant know is occupied by several people; starting fire at door of occupied dwelling; shooting into caboose of passing -train or moving automobile, necessarily occupied by human beings; shooting at point near, but not aiming directly at, another person).

Evidence of premeditated design must be supported by more than guesswork and suspicion. See Jenkins v. State, 120 Fla. 26, 161 So. 2d 840 (1935). In the present case, the state's case for premeditated murder consisted of surmise, conjecture, and speculation, not proof. Fisher's first-degree murder conviction must be reversed.

Point 2

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON AND FINDING AS AGGRAVATING CIRCUMSTANCES (A) THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER; (B) FISHER KNOWINGLY CREATED A GREAT RISK OF HARM TO MANY PERSONS; AND (C) THE HOMICIDE WAS COMMITTED DURING A BURGLARY.[15]

At the March 8 charge conference, codefendant Cummings objected to instructing the jury on the cold, calculated, and premeditated aggravating factor, T 1363-1367; the great risk of harm aggravating factor, T 1348-1352; and the felony murder aggravating factor. T 1352-1361. Fisher adopted all motions filed by Cummings, thereby preserving his objection to these jury instructions. R 220A. Fisher also expressly renewed these objections prior to the jury charge. T 1559-1561.

A. The Evidence Was Insufficient to Establish the Homicide was Cold, Calculated, and Premeditated.

In finding this aggravator, the trial judge stated:

> The sole reason for this crime was the intended execution of a man with whom this defendant had a fight. The entire operation was a search and destroy operation. It was not done in the heat of passion and was certainly well planned and thought out from the first reaction of calling his nephew to plan the retaliation, to the cruising of the streets of Jacksonville looking for "Dap." On at least one occasion the defendant was urged to go home and abandon the effort. The premeditation was focused and the manner of execution by firing nearly three dozen shots was cold and certainly calculated to kill. To reiterate that there was no pretense of moral or legal justification is to belabor

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[15] These arguments are based on Fisher's rights to due process and a fair and reliable sentencing guaranteed by Article I, sections 9 and 17, of the Florida Constitution, and the Eighth and Fourteenth Amendments of the United States Constitution.

> the obvious. This defendant set out to kill, searched for his target and when he thought he had found him he attempted to carry out the retaliatory deed.
> This aggravating factor has been proved beyond any doubt and the court gives great weight to it.

R 292-293.

Each element of an aggravating circumstance must be proved beyond a reasonable doubt. Banda v. State, 536 So. 2d 221, 224 (Fla. 1988), cert. denied, 489 U.S. 1087, 109 S.Ct. 1548, 103 L.Ed.2d 852 (1989); State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). Moreover, such proof cannot be supplied by inference from the circumstances unless the evidence is inconsistent with any reasonable hypothesis other than the existence of the aggravating circumstance. Geralds v. State, 601 So. 2d 1157, 1163-64 (Fla. 1982); Simmons v. State, 419 So. 2d 316, 318 (Fla. 1982).

Three of the four elements the state must prove to establish the cold, calculated, and premeditated (CCP) aggravator are (1) "heightened premeditation," (2) the defendant had **a** 'prearranged design to kill before the crime began," and (3) the homicide was the product of "cool and calm reflection."[16] Jackson v. State, 599 So. 2d 103 (Fla. 1992). The state failed to prove any of these elements.

As explained in Point 1, supra, the evidence before the jury failed to establish even simple premeditation. There **was** a complete absence of evidence as to what anyone in the group

[16]The fourth element is no pretense of legal or moral justification. Jackson, 648 So. 2d at 89.

intended, and intent to kill cannot be presumed from the act of shooting from a distance of sixty-five feet into the carport or brick wall of a residence. Accordingly, the state failed to establish beyond a reasonable doubt the elements of "heightened premeditation" and "prearranged design to kill."[17]

The "cold" element also was not established as the shooting clearly was the product of emotion due to Dap's attack on Andre Fisher earlier that evening, See Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993) (CCP inapplicable because although killing **was** calculated, it was result of emotion and not calm and cool reflection); accord Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992). Two witnesses testified Derrick Cummings got mad when he learned Dap had jumped on Andre. Since no one witnessed the shooting itself, there is no evidence of the shooters' states of mind at the time. The manner of killing--driving around in a car, then shooting wildly into a carport--does not evidence cool and calm reflection. This element was not proved beyond a reasonable doubt.

It was error for the trial judge to instruct the jury on this aggravator. It also was error for the trial judge to consider this aggravator as a reason for imposing the death sentence. Because the trial judge gave the invalid aggravator 'great weight," his consideration of this aggravator cannot be deemed harmless. In light of the 8 to 4 advisory verdict, nor can the jury's consideration of this invalid aggravator be deemed

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[17]This Court has defined heightened premeditation as "a cold-blooded intent to kill that is more contemplative, more methodical, more controlled than that necessary to sustain a conviction for first-degree murder." Nibert v. State, 508 So.2d 1, 4 (Fla. 1987).

harmless. These errors require reversal for a new penalty phase proceeding.

B. The Evidence Was Insufficient to Establish Fisher Knowingly Created a Great Risk of Harm to Many Persons.

In finding this aggravating circumstance, the trial judge stated:

> The state proved that the Lucas' home was well lit and that there were two cars parked outside in or near the carport. The house was located in a residential neighborhood. The defendant and others attacked at 9:00 p.m. on a Tuesday night; a time referred to many as the television primetime family viewing period. The state has further shown that there were at least four persons present at the time exclusive of the deceased child. 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 tends to show this aggravating circumstance but because of current caselaw (ie Parker v. State, 641 So. 2d 369, Fla. 1993) the Court gives it only slight weight.

R 290-291.

This aggravator requires more than "some degree of risk of bodily harm to a few persons." Bello v. State, 547 So. 2d 914, 917 (Fla. 1989). The state must prove the defendant knowingly created a "likelihood or high probability of death" to at least four persons, besides the victim. Id. In cases involving shootings, this Court consistently has held the degree of risk to persons out of the line of fire, or separated from direct gunfire by walls, is insufficient to support this aggravator. See id., (other people considered by trial court to have been put at risk were too far away, separated by several walls, or out of the line

of fire so there was only a possibility of their being killed by Bello's actions); Hallman v. State, 560 So. 2d 223, 225-26 (Fla. 1990)(persons in bank not placed at risk by shoot-out outside bank as they were behind partitions and away from doors or windows and not in the line of fire); Alvin v. State, 548 So. 2d 1112, 1115 (Fla. 1989)(evidence insufficient to support great risk aggravator where two of four persons in area of shooting were not in line of fire).

In the present case, the trial judge erred in concluding the shooting placed four persons besides the victim at great risk of death. The court presumably was referring to the victim's parents and two siblings. No evidence was presented, however, regarding the whereabouts of the siblings during the shooting." The only evidence regarding the victim's siblings was that they lived with their mother. Because the state did not prove four persons besides the victim were in the line of direct gunfire, the great risk aggravator does not apply in this case.

Furthermore, the trial judge erred in concluding the shooters would or should have known many people were at risk because it was "prime-time" for television, this was a residential neighborhood, and the lights were on. It is absurd to assume every residential household contains five or more people sitting around watching television at night. Furthermore, in this case, the shots were fired not into the residence but at

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[18]In his opening statement, the prosecutor said the other two children were in a separate bedroom. T 616. This is not evidence, of course, and cannot be used as a basis for finding the aggravator, Even if this were evidence, it does not establish the children were in the line of direct fire.

an impenetrable brick wall. Only a very small area of that wall, the top third of the door leading into the kitchen, was vulnerable to the gunfire.

The evidence was wholly insufficient to support the great risk aggravator. It was error for the trial judge to instruct the jury on this aggravator. It also was error for the judge to consider this aggravator as a reason for imposing the death sentence. These errors require reversal for a new penalty phase proceeding.

C. The Evidence Was Insufficient to Establish the Homicide Was Committed During a Burglary.

During the guilt phase of the trial, the state requested an instruction on felony murder, with burglary[19] as the underlying felony. The state's theory was that the defendants "entered" a structure within the meaning of the burglary statute by shooting into the Lucas residence with the intent to kill Dap. T 563-575. The trial judge refused to instruct the jury on felony murder, ruling the entry of the bullets was not a burglary under Florida law. T 1037-1040.

During the penalty phase, the trial judge revisited the burglary issue. The state argued that because the question of intent had been settled by the jury's guilty verdict, it was appropriate to instruct the jury on burglary as an aggravating circumstance. The trial judge reversed his earlier ruling with 'reservations" and charged the jury on burglary as an aggravating

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[19]The state also argued the underlying felony could be the unlawful throwing, discharging, or placing a destructive device. T 576. The court rejected this argument because the statute requires a half-inch bore and the weapons in this case were ,355 inches. T 1040.

circumstance. T 1352-1361, 1561-1563. The judge gave a modified instruction on burglary, which stated the "entry need not be the whole body of the defendant. It is sufficient if the defendant extends any part of the body or an instrument far enough into the structure to commit the offense."[20] T 1607.

In finding burglary as an aggravating circumstance, the trial judge stated:

> The state proved at trial that the defendant and the codefendant fired some thirty-five shots into the area of the door through which the supposed victim had just gone. Under JES v. State, 453 So.2d 168 (1DCA 1984) and Baker v. State, 622 So.2d 1333 (1DCA 1993) affirmed 636 So.2d 1342 (1994); State v. Williams, 873 P2d 471 (Or App 1994), People v. Tragni, 449 N.Y.S.2d (1982) as well as Wharton's Criminal Law, section 333, the entrance of the bullet into the home constitutes a burglary. While this factor was not presented for the jury's consideration during the guilt phase it is properly considered as an aggravating factor.
>
> This aggravating factor has been established and the court does give it some, but not great, weight.

R 292.

The trial court erred in instructing the jury on and finding burglary as an aggravating circumstance. First, as explained in Point 1, supra, the state failed to prove the bullets were fired with the intent to kill anyone. The intent element of burglary thus was not established. Second, the cases and authorities relied on by the trial judge do not support his ruling. No

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[20]The standard jury instruction states the "entry necessary need not be the whole body of the defendant. It is sufficient if the defendant extends any part of the body far enough into the [structure][conveyance] to commit (crime ***alleged).*** Fla.Std. Jury Instr. (Crim.) 135. Florida's standard jury instruction was one basis for the trial judge's initial ruling that shooting into a building is not a burglary in Florida.

Florida authority has ever held shooting into a building is a burglary. There is scant authority on the issue anywhere, and the authority that exists is, at best, ambiguous. Under the rule of lenity, this Court must construe the statute narrowly in favor of the accused. To hold otherwise would violate due process and lead to absurd results.

Burglary is defined in Florida as "entering or remaining in a structure or conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain." s. 810.02(1), Fla. Stat. (1993). The current statute does not define the element of "entry," see s. 810.011, Fla. Stat. (1993), nor did any of its predecessors.[21] Because the legislature used the term "enter" without defining it, it must be assumed the term was intended in its common law sense. See State v. Hamilton, 660 So. 2d 1038 (Fla. 1995); Purvis v. State, 377 So. 2d 674 (Fla. 1979); Simpson v. State, 347 So. 2d 414 (Fla.), appeal dismissed, 434 U.S. 961, 98 S.Ct. 498, 54 L.Ed.2d 447 (1977); Ellis v. Brown, 77 So. 2d 845 (Fla. 1955); Smith v. State, 80 Fla. 315 (1920); Deehl v. Knox, 414 So. 2d 1089 (Fla. 3d DCA 1982).

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[21] Florida's first burglary statute, enacted in 1895, was very similar to the common law version of burglary. See Ch. 4405, Laws of Fla. (1895)(later codified at section 810.01, Fla. Stat. (1941)); State v. Hamilton, 660 So. 2d 1038, 1040 (Fla. 1995). At common law, burglary was defined as the breaking and entering of the dwelling house of another in the nighttime with the intent to commit a felony. State v. Hicks, 421 So. 2d 510, 511 (Fla. 1982). The burglary statute has since been extensively modified: The "breaking" and "nighttime" elements have been eliminated; remaining on the property without license or invitation has been added to the "entering" element; the "dwelling" element has been expanded to include any building, and the grounds around it, as well as any conveyance; the "intent" element has been expanded to encompass the intent to commit any offense. Baker v. State, 636 So. 2d 1342, 1344 (Fla. 1994).

The common law refers not only to the common law as declared by England, but also as declared by courts of the American states. DeGeorge v. State, 358 So. 2d 217 (Fla. 4th DCA 1978); State v. Egan, 287 So. 2d 1 (Fla. 1973); Coleman v. Davis, 120 so. 2d 56 (Fla. 1st DCA 1960). In Florida, decisional law long has recognized that "entry may be made by an instrument instead of the body, but in such case, to be an entry, the instrument must be inserted not merely for the purpose of breaking but for the purpose of committing the contemplated felony."[22] Foster v. State, 220 So. 2d 406, 407 (Fla. 3d DCA), cert. denied, 225 So.2d 913 (Fla. 1969); Stanley v. State, 626 So. 2d 1004 (Fla. 2d DCA 1993), review denied, 634 So.2d 627 (Fla. 1994); Spearman v. State, 366 So. 2d 775, 776 (Fla. 2d DCA 1979).

No Florida authority has ever considered, however, whether shooting into a dwelling with the intent to kill satisfies the common law "entry" element. The Florida cases cited by the trial judge below involve curtilage, not entry, issues. See Baker v, State, 622 So.2d 1333 (Fla. 1st DCA 1993) (holding entry onto fenced yard was entry into dwelling for purposes of burglary statute), approved, 636 So.2d 1342 (Fla. 1994); J.E.S. v. State, 453 So.2d 168 (Fla. 1st DCA 1984) (holding driveway of victim's home was in curtilage).

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[22]In limiting entry by instrument to situations where the instrument is intended to be used in the commission of a crime, Florida is in accord with the majority of jurisdictions, See State v. Ison, 744 P.2d 416,419 (Alaska App. 1987), and cases cited therein, A minority of jurisdictions hold there is an entry even where the instrument is used only for the purpose of breaking, See People v. Oseaueda, 163 Cal.App.3d Supp. 25,210 Cal.Rptr. 182 (1984); State v. Tixier, 89 N.M. 297,551 P.2d 987 (App. 1976).

There is a similar paucity of authority in foreign jurisdictions. In some states, entry is statutorily defined. A number of statutes restrict entry by instrument to instruments held in the hand or connected to the body. See Code of Ala. 13A-8-11(b) (any physical object connected with the body); Tex. Penal Code Ann. s. 30.02(b) (Vernon 1983) (any physical object connected with the body); Rev. Code of Wash. Ann. s. 9A.52.010(2) (any instrument or weapon held in the hand and used or intended to be used to threaten or intimidate a person or to detach or remove property). Others do not. Ariz. Rev. Stat. Ann. s. 13-1501(2) (intrusion of any part of any instrument inside the external boundaries of a structure or unit of real property"); Del. Code Ann. 11 s. 829(e)(introduction of any part of any instrument, by whatever means, into or upon the premises).

In only one state, Texas, is there a specific statutory provision extending entry to include 'the discharge of firearms or other deadly missile into the house, with intent to injure any person therein." Tex. Penal Code Ann. s. 30.02; Nalls v. State, 87 Tex.Crim. 83, 219 S.W. 473 (1920) (statute declaring entry may be by discharge of weapons does not create new offense but simply extends enumeration of manner of "entry"); Garner v. State, 31 Tex.Crim. 22, 19 S.W. 333 (1892); accord Williams v. State, 505 S.W.2d 838 (Crim. App. 1974).

The only American case that directly addresses whether shooting into a building is an entry under the common law is Williams v. State, 127 Or. App. 574, 873 P.2d 471, review denied,

319 Or. 274, 877 P.2d 1203 (1994).[23] In Williams, the defendant, while standing in an alley, fired two bullets into a window of the home of a woman who was planning to testify against him in his upcoming criminal trial. The bullets killed a child who was sleeping on the sofa, and the defendant was convicted of felony murder under the theory he "entered" the house with the intent to tamper with a witness when he fired the shots. No other state has applied the common law definition of entry in this manner.

The Oregon court relied on 3 Wharton's Criminal Law, s. 333 (14th ed. 1980 & Supp. 1993)[hereinafter Wharton's], which states there is an entry "when the defendant, while standing outside, fires a bullet which pierces a window and lands inside, the gun having been discharged for the purpose of killing the occupant." Wharton's relies on the Texas case of Holland v. State, 55 Tex.App. 27, 115 S.W. 48 (1908). In Texas, however, as noted above, shooting into a house is a burglary by virtue of an express statutory provision. Neither Williams nor Wharton's, then, is very good authority for determining whether shooting into a building was a common law burglary.

Furthermore, there is no consensus of opinion among writers and commentators in the field as to whether shooting into a building was a burglary under the common law.

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[23] Williams is one of the two out-of-state cases relied on by the trial court below. The other case, People v. Tragni, 113 Misc.2d 852,449 N.Y.S.2d 923 (1982), did not involve shooting into a building but, rather, drilling a hole through an outside wall of a building. In dicta, and without citing any authority, the court in Tragni listed as an example of using an instrument to accomplish a crime in a building "the splintering a door with a bullet intended to kill or to injure someone inside".

Some writers restrict entry by instrument to instruments held in the hand. See A. Clements, Comments, Cases, and Text on Criminal Law & Procedure 508 (1952); Hochmeimer on Crimes & Criminal Procedure, s. 277, at 311 (2d ed. 1904); Hughes on Criminal Law & Procedure, s. 698, at 194 (1901); Harris's Principles of the Criminal Law 250 (8th ed. 1899); Blackstone's Commentaries 328 (1891).

A respected encyclopedia notes that "discharge of firearms into a dwelling may be a sufficient entry to constitute burglary under statutes defining 'entry' as including such act." 12A C.J.S. Burglary, s. 19, citing cases from Texas.

Some commentators state shooting from the outside into a house, without putting the gun into the house, is not a burglary, e.g. Clark & Marshall, A Treatise on the Law of Crimes, s. 1304, at 1003 n.75 (7th ed. 1967); 1 Hale, Pleas of the Crown 555 (1st Amer. ed. 1847), while others state the opposite. See Miller on Criminal Law at 334 n. 88 (1934); 1 Hawkins, Pleas of the Crown 132 (8th ed. 1824).

In sum, as several commentators acknowledge, the authorities are uncertain. See 2 Russell on Crimes & Misdemeanors 1072-73 (7th ed. 1910)(hereinafter Russell); East, Pleas of the Crown 490. Given the scant caselaw on this issue--i.e., only one case has ever addressed the question--and the lack of unanimity among secondary authorities, it is impossible to determine whether the Florida legislature intended to include within the definition of entry the act of shooting into a building.

When a criminal statute is ambiguous, it must be strictly construed in favor of the accused. s. 775.021(1), Fla. Stat. (1993); Hamilton; State v. Camp, 596 So. 2d 1055 (Fla. 1992); Perkins v. State, 576 So. 2d 1310 (Fla. 1991). Any doubt as to its meaning must be resolved in favor of strict construction so that those covered by the statute have clear notice of what conduct the statute proscribes. City of Miami Beach v. Galbut, 626 So. 2d 192 (Fla. 1993).

In the present case, there is so little authority on the issue, and so much uncertainty among the authorities that exist, a person of ordinary intelligence could not be expected to know what conduct is proscribed. The Court, therefore, must apply the narrowest construction, i.e., that entry may be accomplished by an instrument only if the instrument is held in the hand or connected to the body. Under this definition, shooting into a dwelling from the roadway is not a burglary.

To hold otherwise would violate the constitutional bar against vagueness and uncertainty. See Hamilton, 660 So.2d at 1038. To hold otherwise also would violate the rule of statutory construction that requires courts to interpret statutes so as to avoid unreasonable, harsh, or absurd results. See id. If shooting a bullet into a structure were a burglary, then throwing an egg at someone standing in his yard behind a picket fence would be a burglary with assault, a first-degree felony punishable by a term of years not exceeding life. This is absurd.

It was error for the trial judge to instruct the jury on the felony murder aggravating factor and error to consider this aggravator in imposing the death sentence. These errors require reversal for a new penalty phase proceeding.

Point 3

THE DEATH PENALTY IS NOT WARRANTED IN THIS CASE WHERE THERE EXISTS A SINGLE VALID AGGRAVATOR; THE EVIDENCE WAS INSUFFICIENT TO SHOW FISHER KILLED, ATTEMPTED TO KILL, OR INTENDED TO KILL; AND AN EQUALLY CULPABLE CODEFENDANT DID NOT RECEIVE THE DEATH PENALTY.

Because death as a punishment is unique in its finality and its total rejection of the possibility of rehabilitation, it has been reserved for the worst of first-degree murders. State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).

As explained in Point 1, supra, this homicide is not even a first-degree murder. Assuming this homicide qualifies as a first-degree murder, it is not one of the worst. First, even it this was a premeditated killing, the death penalty is not proportionally warranted when compared to other cases involving a single aggravator. Second, assuming in the alternative this was felony murder, the death penalty is a disproportionate penalty under Enmund v. Florida, 458 U.S. 782, 801, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), because the evidence was insufficient to show appellant "took life, attempted to take life, or intended to take life." Third, the death penalty is disproportionate and disparate because an equally culpable codefendant received a lesser sentence.

As explained in Point 2, supra, the CCP, great risk, and felony murder aggravators were improperly found. This leaves one valid aggravator, Fisher's prior violent felony conviction. This Court has affirmed the death penalty despite mitigation in one-

aggravator cases only "where the lone aggravator is especially weighty." Ferrell v. State, 680 So. 2d 390, 391 (Fla. 1996). Where the lone aggravator is a prior violent felony, as here, "especially weighty" means a prior murder or similar prior violent assault. See Ferrell (prior second-degree murder); Lindsey v. State, 636 So. 2d 1327 (Fla.) (prior second-degree murder), cert. denied, 115 S.Ct. 444, 130 L.Ed.2d 354 (1994); Duncan v. State, 619 So. 2d 279 (Fla.), cert. denied, 510 U.S. 969, 114 S.Ct. 453, 126 L.Ed.2d 385 (1993)(prior second-degree murder); King v. State, 436 So. 2d 50 (Fla. 1983), cert. denied, 466 U.S. 909, 104 S.Ct. 1690, 80 L.Ed.2d 163 (1984)(prior axe slaying of common-law wife); Lemon v. State, 456 So. 2d 885 (Fla. 1984), cert. denied, 469 U.S. 1230, 105 S.Ct. 1233, 84 L.Ed.2d 370 (1985) (prior conviction for assault with intent to commit first-degree murder for stabbing); Harvard v. State, 414 So. 2d 1032 (Fla. 1982), cert. denied, 459 U.S. 1128, 103 S.Ct. 764, 74 L.Ed.2d 979 (1983)(death sentence affirmed for shooting second ex-wife where prior conviction was for aggravated assault arising from shooting attack on first ex-wife and her sister).

The prior violent felony in the present case, though serious, is a breed apart from those the Court has found sufficiently weighty to support the death penalty. Fisher pulled a gun on two persons at a carwash and took their car and jewelry. He was 18 years old. No shots were fired. No one was injured.

Although the trial judge found no mitigating circumstances,[24] there was evidence Fisher was a good son, grandson, and brother, which this Court has recognized as mitigating. Perry v. State, 522 So. 2d 817, 821 (Fla. 1988) (that defendant was "kind" and 'good to his family" was mitigating); Rogers v. State, 511 So.2d 526, 535 (Fla. 1987) (contributions to family are evidence of positive character traits to be weighed in mitigation), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). Given the mitigating evidence presented, and the single relatively weak aggravator, the death penalty is not warranted.

The death penalty as applied to Fisher also violates the requirement of individualized punishment set forth in Enmund. In Enmund, the defendant drove the getaway car and his two colleagues killed the intended robbery victims. The Supreme Court held death is a disproportionate penalty "for one who neither took life, attempted to take life, nor intended to take life." 458 U.S. at 801. In finding the death penalty disproportionate as applied to Enmund, the Court focused on Enmund's personal culpability and concluded the Eighth Amendment prohibited the state from treating Enmund the same as the robbers who killed. Subsequently, in Tison v. Arizona, 481 U.S. 137, 158, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987), the Court held "major participation in the felony committed, combined with reckless

[24]Trial counsel did not specifically propose any nonstatutory mitigating factors. Nor did counsel argue any mitigating factors to the jury. In fact, defense counsel's closing argument, consisting of three-and-a-half pages of transcript, addressed neither the mitigating evidence nor the four aggravating factors proposed and argued by the state. T 1600-1604.

indifference to human life, is sufficient to satisfy the Enmund culpability requirement."

The Enmund requirement has not been satisfied here. As argued in Point 1, supra, there is no evidence Fisher's participation went beyond his presence in the car when the shooting occurred. There is no evidence Fisher possessed or fired a weapon. There is no evidence Fisher intended to shoot or kill Dap or knew the others intended to shoot or kill Dap. There is no evidence the guns were carried for anything other than protection. There is no evidence the shooting was anything other than a spontaneous act to warn Dap to leave them alone. Under such circumstances, the death penalty is unwarranted. See Jackson v. State, 575 So. 2d 181 (Fla. 1991)(Enmund not satisfied in robbery/murder involving two defendants where triggerman not identified and single gunshot may have been reflexive action to victim's resistance); White v. State, 532 So. 2d 1207, 1221-22 (Miss. 1988) (Enmund not satisfied in murder case involving multiple defendants where there were no eyewitnesses and actual killer not identified).

Finally, the death penalty is not warranted for Andre Fisher because an equally culpable codefendant received a lesser sentence. Proportionality review includes analysis of the culpability of codefendants to eliminate the disparity of imposing the death sentence when an equally culpable codefendant has received a lesser sentence. Slater v. State, 316 So. 2d 539 (Fla. 1975); Scott v. Dugger, 604 So. 2d 465 (Fla. 1992). As explained in Slater:

> We pride ourselves in a system of justice that requires equality before the law. Defendants should not be treated differently upon the same or similar facts. When the facts are the same, the law should be the same. The imposition of the death sentence in this case is clearly not equal justice under the law.

316 So. 2d at 542.

In addressing this aspect of the crime, the trial court stated:

> One of the questions that this court has considered at great length is the issue of proportionality. This is necessary since the third defendant, who entered a plea, was sentenced to a term of years. This does not make this defendant's sentence disproportionate since the defendant who was sentenced to a term of years was never charged by the state attorney with the capital crime and all agreed that his involvement consisted only of driving the car. The evidence clearly showed that this defendant and his nephew were active participants in the actual shooting.

R 297.

The trial court's finding is wholly unsupported by the record. Although the trial court stated, 'all agreed that [King's] involvement consisted only of driving the car," there was not a whit of testimony, or any other kind of evidence, establishing who did the actual shooting in this case. As explained in Point 1, supra, the evidence leaves open the reasonable possibility that Marion King was a shooter while Fisher was not. The evidence does not show when or where the four persons got together. The evidence does not show who choreographed the shooting or who actually did the shooting. Four people, three shooters--that is the extent of what the state

proved. No evidence was presented showing Fisher's moral culpability was greater than Marion King's.[25]

Imposition of the death penalty on Fisher is not "equality before the law." See Slater; Scott; Curtis v. State, 21 Fla. Law Weekly S442 (Fla. Oct. 10, 1996). Fisher's death sentence is disparate and must be reversed. Any other result would violate due process and subject Fisher to cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments of the United States Constitution and Article 1, sections 9 and 17, of the Florida Constitution.

[25] Interestingly, prior to the nolle pros in Dixon's case, the state's theory apparently was that Dixon fired the Glock, which fired the bullet that killed Shelton Lucas. T 238.

Point 4

THE TRIAL COURT VIOLATED FISHER'S RIGHT TO DUE PROCESS OF LAW BY ADMITTING IRRELEVANT, HIGHLY INFLAMMATORY VICTIM IMPACT EVIDENCE.

Over defense counsel's objection,[26] the trial court admitted testimony by Shelton Lucas's mother and grandmother concerning his hopes and plans for the future, his value to their family, and their loss following his death. T 1523-1529. The admission of this irrelevant and emotionally inflammatory evidence violated Fisher's right to a fair penalty proceeding under the due process clauses of the state and federal constitutions. Appellant acknowledges this Court's decision in Windom v. State, 656 So. 2d 432 (Fla. 1995), "reject[ing] the argument which classifies victim impact evidence as a nonstatutory aggravator," but asks the Court to reconsider its ruling based upon the following argument. Appellant further submits that even if victim impact evidence is admissible in some cases, it was error to admit the victim impact evidence in this case.

In Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720, 736 (1991), the Court reversed its decision in Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), and held the Eighth Amendment erects no per se bar to admission of victim impact evidence. The Eighth Amendment thus leaves Florida free to determine whether victim impact evidence is relevant and admissible in a capital sentencing proceeding. See

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[26]Prior to the penalty phase, defense counsel objected to the victim impact statements in general, as well as to specific portions of the statements. T 1330-1347. Although the trial judge excised portions of the statement, ostensibly "to strike the language that is emotional rather than factual," T 1346, the excisions failed to accomplish that purpose.

Payne, 115 L.Ed.2d at 735. Florida's latitude in permitting victim impact evidence is not without constitutional limits, however, as the "[d]ue Process clause provides a mechanism for relief" in the event "evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair." Id.

The Florida Legislature responded to Payne by enacting section 921.141(7), Florida Statutes (1993), which allows the prosecution to introduce victim impact evidence "designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death." Notably absent from section 921.141(7) is any provision for the proper consideration by the jury or sentencing judge of the victim's uniqueness as a human being or the loss to members of the community. The statute plainly does not establish a new statutory aggravating circumstance. See Windom. Since section 921.141(5) limits the aggravating circumstances to the eleven factors listed in that section, none of which directly involves the victim's uniqueness as a person or the loss to community members, what legitimate purpose is served by the victim impact evidence allowed by section 921.141(7)?

The most fundamental principle of Florida evidentiary law is that evidence must tend to prove or disprove a material fact in issue to be relevant and admissible. See, e.g., Czubak v. State, 570 so. 2d 925, 928 (Fla. 1990); Williams v. State, 110 So. 2d 654 (Fla.), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959); ss. 90.402, ,403, **Fla.** Stat. (1991). In fact, this Court ruled that victim impact evidence was not relevant and not

admissible in murder trials long before Booth and Payne were decided. Melbourne v. State, 51 Fla. 69, 40 So. 189 (1906); Rowe v. State, 120 Fla. 649, 163 So. 23 (1935). And after Booth, but before Payne, this Court treated victim impact evidence as an impermissible nonstatutory aggravating factor. See Patterson v. State, 513 So. 2d 1257, 1263 (Fla. 1987); Grossman v. State, 525 so. 2d 833, 842 (Fla. 1988), cert. denied, 489 U.S. 1071, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989).

Even after Payne, this Court's decisions in cases tried before the effective date of section 921.141(7) indicated that relevance to a material fact in issue was the test for determining the admissibility of victim impact evidence. See Hodges v. State, 595 So. 2d 929, 934 (Fla.), vacated on other grounds, 113 S.Ct. 33, 121 L.Ed.2d 6 (1992), affirmed on remand, 619 So. 2d 272 (Fla. 1993) (evidence of victim's desire to prosecute Hodges for indecent exposure was relevant to statutory aggravating circumstances of crime committed to disrupt lawful exercise of government functions and cold, calculated, and premeditated); Burns v. State, 609 So. 2d 600, 605-06 (Fla. 1992) (evidence of victim's background, training, character, and conduct as a law enforcement officer improperly admitted because not relevant to any material fact in issue).

The enactment of section 921.141(7) cannot constitutionally dispense with the requirement that victim impact evidence must be relevant to a material fact in issue to be admissible. Furthermore, article I, section 16(b), of the Florida Constitu-

tion, expressly requires victim impact evidence to be relevant to be admissible.[27]

The existence of statutory aggravating circumstances and mitigating circumstances are the material facts in issue during the penalty phase of a capital trial in Florida. See ss. 921.141(1), (2), (3), (5), Fla. Stat. (1993). Thus, victim impact evidence is relevant to a material fact in issue and admissible only when it tends to prove or disprove an aggravating or mitigating circumstance. See Hodges, 595 So. 2d at 933-34. When victim impact evidence is not probative of the aggravating or mitigating circumstances, it is not relevant and should not be admitted. See Burns, 609 So. 2d at 605-07.

Even relevant victim impact evidence must be excluded to the extent that it interferes with the constitutional rights of the accused. Art. I, s. 16(b), Fla. Const. The most fundamental and significant constitutional right of the accused is the right to a fair trial under the due process clauses of the state and federal constitutions. Accordingly, the Florida Evidence Code provides that "relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice." s. 90.403, Fla. Stat. (1993). Thus, to preserve the constitutional right to a fair trial, relevant victim impact evidence must be

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[27] Article I, section 16, provides:

> Victims of crime or their lawful representatives, including the next of kin of homicide victims, are entitled to the right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused. (Emphasis added).

excluded when its probative value is outweighed by its prejudicial effects, and the admission of unduly prejudicial victim impact evidence violates the right to due process of law, See Payne, 115 L.Ed.2d at 735.

In the present case, the victim impact evidence consisted of testimony by Shelton Lucas's mother and grandmother describing Shelton, their relationship with him, and the pain they and the rest of the family had suffered as a result of his death.

Virginia Johnson, Shelton's grandmother, told the jury Shelton's favorite pet was a bird he called "Birdie." She described how he 'would pick flowers and bring them to me smiling, waiting anxiously for me to put them in a vase," and how, "[w]ith a big grin he would mischievously pull a lizard out his pocket and attempt to give it to me." She told the jury how devoted Shelton was to his mother, how he was looking forward to playing little league baseball and football, and that he loved school and was smart. T 1523-1525.

Charlsie Lucas told the jury the "past year has been a living nightmare for me and my family. At times tears are changed into excruciating headaches, nausea, stomach spasms and other physical related problems." T 1527. She explained how Shelton's six-year-old brother had "cried out one day, 'He's not coming back, is he, mama?"' She told the jury "Little Shelton loved to color," climb trees, show off on his two-wheeled bike, and dress like his brother. Concluding, she said, "I can't describe the ache and emptiness that I live with everyday. The

pain is deep and the sorrow is real. Often life seems unbearable." T 1529.

This evidence clearly was not relevant to any of the proposed aggravating factors, nor to the mitigating circumstances. Since the victim impact evidence was not probative of the aggravating and mitigating circumstances, it was not relevant to any material fact in issue and should not have been admitted.

Furthermore, the testimony given here is not even encompassed within the terms of section 921.141(7), which restricts victim impact testimony to evidence designed to show the victim's uniqueness and the community's loss. The testimony is this case went way beyond the terms of the statute by placing before the jury in graphic and heartrending detail the pain and suffering experienced by each family member. No one with a heart could listen to this testimony and not be moved. This testimony plainly was designed to arouse the jurors' sympathy for Shelton Lucas and his family and inflame their emotions against Fisher. It cannot seriously be argued that it did not have precisely this effect.

This Court has recognized the purpose of the death penalty statute is to "insulate its application from emotionalism and caprice." Bush v. State, 461 So.2d 936, 942 (Fla. 1984) (Ehrlich, J., specially concurring), cert. denied, 475 U.S. 1031, 106 S.Ct. 1237, 89 L.Ed.2d 345 (1986). The court has not hesitated to reverse death sentences where a prosecutor in closing argument injects "elements of emotion and fear into the jury's deliberations." See Garron v. State, 528 So.2d 353, 359

(Fla. 1988). How, then, can testimony designed to elicit an emotional response be permitted?

The admission of the irrelevant and highly prejudicial victim impact evidence in this case violated the due process clauses of the state and federal constitutions, U.S. Const. amend. XIV; Art. I, s. 9, Fla. Const., as well as the victim impact provision of the Florida Constitution. Art. I, s. 16(b), Fla. Const. Fisher's death sentence must be vacated and the case remanded for a new penalty phase trial with a newly empaneled jury.

CONCLUSION

Appellant respectfully requests this Honorable Court to reverse and remand for the following relief: Point 1, reverse appellant's conviction, with directions he be discharged, or, in the alternative, with directions the conviction be reduced to second-degree murder; Points 2 and 4, reverse for a new penalty phase proceeding; Point 3, vacate the death sentence and remand for imposition of a life sentence.

Respectfully submitted,

NANCY DANIELS
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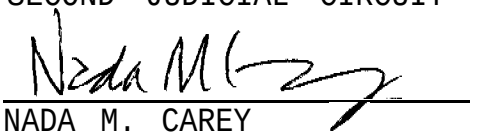

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy of the foregoing has been furnished to Richard B. Martell, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to appellant, ANDRE FISHER, #121959, Union Correctional Institution, Post Office Box 221, Raiford, Florida 32083, on this ~~14th~~ 15th NMC day of February, 1997.

Nada M. Carey

IN THE SUPREME COURT OF FLORIDA

ANDRE FISHER, :

Appellant, :

v. : CASE NO. 86,665

STATE OF FLORIDA, :

Appellee. :

_____/

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

APPENDIX TO INITIAL BRIEF OF APPELLANT

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