IN THE SUPREME COURT OF FLORIDA

ZACHARY TAYLOR WOOD,

Appellant,

v.

CASE NO. SC15-954
L.T. CASE NO. 14-CF-137

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTEENTH JUDICIAL CIRCUIT,
IN AND FOR WASHINGTON COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE[1]

On June 16, 2014, the Washington County Grand Jury indicted Zachary Taylor Wood and Dillon Scott Rafsky, for the first-degree murder of James Shores, burglary of a structure with a firearm, and robbery with a firearm. R1:16-17.

Zachary Wood was tried by jury on February 23-26, 2015.[2] At the close of the state's case, Wood's motions for judgment of acquittal on all three counts were denied. R17:405-13. The jury found Wood guilty as charged. R1:78-80; R19:697-98.

The penalty phase was held the following day, February 27.

[1] References to the twenty-two-volume record on appeal are designated "R," followed by the volume number and page number. References to the first Supplemental Record (Defendant's Exhibits 1 and 2), are designated "SR1." References to the Second Supplemental Record (Defense Exhibit 3), are designated "SR2." All proceedings were before Washington County Circuit Judge Christopher Patterson.

[2] Dillon Rafsky has yet to be tried.

Six lay witnesses testified for the defense. The jury unanimously recommended death. R1:83, R20:798.

A Spencer hearing was held April 17. Wood testified. R12:635-52. Captain Brock, a jail administrator, testified. R12:655-56. The defense submitted an x-ray and radiology report of Wood's thigh. R12:653-54. The parties submitted sentencing memoranda. R1:167-180.

On May 12, the trial court sentenced Wood to death, finding three aggravating circumstances: cold, calculated, and premeditated; felony murder; and avoid arrest. In mitigation, the court found (1) capable of employment and contribution to work force; (2) disruptive and abusive childhood; (3) good jail conduct; (4) education; (5) support from siblings and friends. R2:203-18. The judge imposed 100 years in prison, concurrent, on the burglary and robbery convictions. R2:203-16, Appendix A.

Notice of appeal was timely filed May 19, 2015. R2:242.

STATEMENT OF FACTS

Guilt Phase

State's Case-in-Chief

Around 5:30 p.m., on April 19, 2014, Trooper Phillips was involved in a high-speed chase and shoot-out with two men in a white Camry just south of Enterprise, Geneva County, Alabama. Zachary Wood, the passenger, was taken into custody at the scene and transported to Southeast Medical. Dillon Rafsky, the driver, was captured a mile or two away and taken to Flowers hospital. Agent Rogers found James Shores' wallet and passport inside the Camry, which was registered to Shores, and requested a welfare check on Shores. R15: 119-23, 136-37, 145-46.

Washington County Deputy Marshall was dispatched at 1:37 a.m. to Shores' residence, where he met Shores' older brother, Joe Boy. En route to his brother's trailer, Joe Boy saw a Jeep bogged down in the front yard of the old family farmhouse on Johnson Road, which had been unoccupied for years. Seeing no signs of activity around the Jeep, Joe Boy drove around the farmhouse and through the woods to his brother's trailer, which was 300 yards behind the farmhouse. When no one answered, the two men walked back to the farmhouse, where they found Shores' body by the back door, face-down, feet bound by cloth, hands chained behind his back, and with massive trauma to his head. R15:161-79.

The scene, a secluded farmhouse on a hill overgrown with vegetation, was processed the next morning. The Jeep, about 75 feet from the road, was bogged down to the axles in mud. Jacks and tree limbs were around the car and behind the tires. Nearby was a shovel. On the front porch was a piece of chain similar to a swing set chain. The front door was open and bore a muddy footprint. Inside, drawers and cabinets were open. A Marlboro cigarette butt was in the fireplace, another in the toilet, along with toilet paper smeared with fecal matter. A discharged fire extinguisher sat on the kitchen counter. R15:181-92, 203, 225.

The Jeep's gas tank was open, with a stain beneath, and the cap was on the roof. A watch hung from the antenna. The Jeep's license plate was missing, the screws were on the bumper. A paper checkbook was on the Jeep's dash. In the cargo area were totes, tools, paperwork, and a wallet containing a Wells Fargo debit card with Rafsky's name and an Alabama driver's license with Wood's name. R15:192-95, 202, 206.

Shores's body was 72 feet from the Jeep. Nearby were his shoes and a plastic hanger. The chain binding his hands was like swing-set chain on the front porch. His clothing was stained with some kind of liquid. Five matches were on the ground nearby. Also nearby were pieces of fiberglass that matched a fiberglass handle and hoe head found 110 feet away. Barefoot and tennis shoe prints were overlaid on the back porch, two barefoot

prints stepping into the back yard. R15:185-87, 198-205.

At 11:36 a.m., Wood was questioned at the Geneva County jail by Captain Collins and Lieutenant Brock from Washington County and Alabama Special Agent Rogers.[3] R16:273-74.

Asked if he knew why Florida police were there, Wood said, yes, Rafsky had pulled over Kelly's Jeep, gotten stuck, they were trying to get it out, and a man came up and said they needed to get off his property, and Rasky and the man started fighting, and Dillon used a hoe and bashed his head in. Asked to start from the beginning, Wood said Kelly Eggleston lived in Autumn Ridge Apartments, in Enterprise. Wood was there when Rafsky got the Jeep, Wood thought Kelly was letting him borrow it. They went to Wood's room at Enterprise Inn and Suites for a little while, then went dirt road riding. They got stuck and spent the night on a dirt road. The next day, a guy who lived down the road pulled them out. They did more dirt road riding, then went to Rafsky's parents' house. From there, they headed to Florida. They did more riding and stopped at a couple of stores on the way to Florida, a food mart, a Dollar General, a Chevron. Rafksy's friend, Heather, lived on a dirt road near Bonifay, past Fred's. They stopped at Fred's, where Wood took some pants, a shirt, and two Gatorades. A half hour to 45 minutes later, they turned onto a dirt road and got stuck in the yard of an abandoned house.

[3]The interview was recorded. See State's Exhibit 14A.

Before they got stuck, they had passed a mail lady, who gave them each a cigarette. When they got to the old house, Rafsky said they were supposed to be there. He had been driving crazy all day. He reversed in, and the ground turned to mush. They tried to dig the Jeep out, shoveled dirt under the tires, tried plywood and tree limbs, tried to jack it up, nothing worked. Wood wasn't wearing a watch but Rafksy was. The man came up about an hour and a half after they got stuck. He had gray hair, was nice but firm. He told them they needed to get off and said he'd call the sheriff to pull them out. Wood told him that would be nice. Rafksy didn't want the sheriff called. Wood told the man when they got unstuck, they'd fill in the holes and put grass over them. The man said, all right, that works for me, but I'll get your tag number just in case. He drove around the car, got the tag number, and drove to the back of the house. Rafksy followed him and beat him. He told Wood he used a hoe. He came back, got one of the guns out of the man's car, and went back there. A shot was fired, but Wood didn't know if he shot the guy. He used the two-barrel shotgun. Wood wasn't familiar with guns. Asked about the man's hands and feet, Wood said the man was tied up. Rafsky asked for a chain, and it wasn't enough, and he had Wood run to the very back of the house, and Wood grabbed a shirt and helped tie him up. Asked if he helped with the chain and the shirt, Wood said, just the shirt. The man was alive at that

time. He did not see Rafsky shoot the fellow, he was over by the Jeep. Asked what part he played, if he struck the man, and how many times, Wood said he did not strike him, he helped tie up the feet. Asked if he punched him, Wood said, if he did, it would have been only one time to show Rafsky that he wasn't gonna run and tell. Rafsky told him to take the tag off, so he took it off and put it in the car. The man had a larger shotgun and a smaller shotgun. After the shot was fired, Wood did not go back over there. The things in the Jeep were Kelly's or came from the abandoned house. Asked what else he could tell the police about the scene, Wood said the front door was open and Rafsky had used the bathroom and sprayed the fire extinguisher around the house. Wood was in the house when the dust was sprayed. Rafsky also took some paperwork. He thinks it's easy to get rich off someone else's information. Also, the mailbox was twisted around. The box was on the right as you leave the driveway. They left in the man's vehicle. They stopped at a few stores, went to Hartford, Enterprise, Daleville, back to Hartford, Enterprise. R16:282-305.

They picked up the Jeep on Thursday morning. Rafsky went in and talked to Kelly. Wood was there but didn't talk to Kelly. They were stealing stuff at the stores, cold drinks mostly. At the abandoned house, when Rafsky said they were meant to be there, Wood didn't know what he meant. After Rafsky followed the

man to the back, Wood heard bumping. Wood started to run back there but didn't have shoes on. By the time he got there, the man was on the ground and his hands were being tied up. Rafsky said the man tried to hit him, but Wood didn't believe him. They had been using the hoe to get dirt out from under the tires. Wood didn't know if Rafsky took it with him when he went back there. That's around the time Wood was messing with the mailbox. He turned around out of frustration, and the box may have fallen later. He was frustrated because Rafsky gets so angry. The man was still breathing when he tied his feet. He may have punched him to prove to Rafsky that he wouldn't snitch on him. Asked about the matches on the ground, Wood said Rafsky wanted him to catch the man on fire. Asked what was poured on him, Wood said he thought it was STP that Rafsky poured. Wood struck each match and threw it, as if it wouldn't light. He didn't want the man to catch on fire because he was still alive. The STP came from the Jeep. The medium shotgun was used, not the smallest one and not the big one. They went inside the house before they tried to get the Jeep out. Wood threw the gym shorts he was wearing out on the side of the road about 30 minutes after they left because they were ripped and old. Rafsky changed after it happened and put the clothes he was wearing in the Camry. Rafsky had a little blood on him and some blood on his hand. R16:306-21, 325.

Asked if they had any guns before they got to Florida, Wood

said, no, the guns came from the Camry. Wood didn't know if Rafsky ever pulled out the double barrel. Wood moved the guns from the trunk to the back seat and put the tag in the trunk. Rafsky took the gun with the barrels on top of each other to the back of the house. R16:324-27.

Agent Rogers, noting he had talked to Wood the previous night at the hospital, asked Wood to clarify what Rafsky told him to do after the blue lights came on. Wood said Rafsky told him to hand him the camouflaged gun. Rafsky rolled down the window and shot through the trooper's passenger window. Rafsky asked Wood to shoot as they were going down the road, but Wood wouldn't do it. Rafsky then slid the gun across his lap and shot out the window. Asked if he assisted Rafsky, Wood said, no, all he did was move the gun from the back to the front. When the car hit the tree, Wood threw his hands up to show he didn't have anything. That's when he got shot. Rafsky got away across the field. The trooper finally stopped shooting, and Wood got out of the car. R16:328-31.

Captain Collins testified that Wood was "very, very wounded" when he gave his statement. R16:274. He provided police with a wealth of information, most of it accurate. He told them about the mailbox, which they would not have known about; told them Rafsky was wearing a silver watch, which they found on the Jeep's antenna; told them about staying at Enterprise Inn & Suites,

which they verified; told them about Kelly Eggleston; told them about the mail carrier, which led them to her, and the Marlboro cigarettes, which were consistent with the butts in the house; and told them he wasn't wearing shoes, consistent with the barefoot footprints. Asked what was going on when Wood seemed to be crying during the interview, Collins said he didn't remember any crying. R16:335-37.

Collins also talked to Rafsky that day at the jail. Rafsky denied everything. R16:337-38.

Agent Rogers was present when they gave Wood morphine at the hospital. During the jail interview, Wood was in distress from his wounds and on medication. He was very cooperative and answered all their questions. Rogers did not see Rafsky at the hospital but talked to him at the jail. Rafsky was uncooperative, kept saying he was a good guy, a good person, that he didn't know anything about what had happened. R15:157-59.

Trooper Phillips testified the Camry was going 94 m.p.h. when he turned on his lights and sirens and got up to 130 m.p.h. during the pursuit. Rafsky kept hitting the brakes, and at one point, Phillips was forced to pull alongside the Camry. Phillips saw a gun barrel in front of Rafsky's chest, heard a loud explosion, and closed his eyes. When he opened his eyes, his car was in a ditch. He got out and returned fire at the Camry. Wood's hands came up from the passenger side, but Phillips kept

firing because he didn't know if he was coming up with something. While firing at the Camry, Rafsky, who had already jumped out of the car, came out from behind a tree and ran into the woods. Phillips fired 50-60 shots from his pistol and assault rifle. While reloading his rifle, he heard Woods yell, don't shoot, and he stopped firing, which is when he realized he had been shot. He ordered Wood onto the ground, Wood obeyed, and back-up arrived in a minute or two.[4] R15:119-34.

Four .20 gauge shotgun casings were found behind the Camry, another on the driver's floorboard. Rafsky's hat and flip-flops were just outside the driver's door, as if he had jumped out of his shoes when he fled the vehicle. A Charles Daley .20 gauge shotgun was found 140 feet from the Camry, all five rounds had been fired. The Charles Daley has a trigger pull of 4-3/4 pounds. It takes 5 pounds opens a coke. The Camry's side mirror was found inside the patrol vehicle. Five shots struck the patrol vehicle, with shots exiting the driver's window. R15:138-43, 156, 207, R16:257-61.

Blood in the passenger area of the Camry was consistent with the wounds Wood suffered. A Cricket .22 rifle, made for kids, was lying on the front console. On the back floorboard was a Crossman air rifle. Under the air rifle was a Stevens .12 gauge double barrel shotgun. There was no indication any of the

[4] State's Exhibit 35 is a video of the chase.

firearms in the car had been fired. All the rounds fired came from either the Charles Daley .20 gauge shotgun or Trooper Phillips' sidearm or AR-15. R15:143, 151-57. All the firearms appeared to be in good working order. R16:375.

Inside the wallet found on the floor of the Camry were credit cards and a Coinstar receipt, dated 3:15 p.m., April 19. R15:145, 148. On the front passenger floorboard was a Wal-Mart receipt with Shores' credit card number, dated 3:33 p.m, April 19, and new not-yet-activated cell phones. In the console were boxes of ammo and a Doc's Market receipt dated April 19, 12:52 p.m., with the numbers 19AH632 written on the back. A black Sharpie on the driver's side floorboard was consistent with the writing on the Doc's receipt. In the trunk was an STP Octane Booster bottle and cap; clothes from Wal-Mart and Fred's, with tags still on them; groceries that matched the items purchased at Doc's that day; two license plates, one from Florida, one from Alabama; a matchbox. R16:207, 210-22.

Jenna Holloman testified she was delivering mail on Johnson Road around noon when she saw two men in a muddy Jeep playing on the roads, spinning their tires, going through puddles. When they splashed her a little, they stopped, and the passenger apologized, got out, and asked if she had any cigarettes. She gave them each a Marlboro. R14:54-60.

Misty Voeller saw a Jeep stuck at the Shores' old farmhouse

when she drove by at 2 p.m. and again at 2:45 p.m. R14:63-64.

Elizabeth Richey works in the firearms section of the Florida Department of Law Enforcement. Richey testified the seven-and-a-half bird shot found in Shores' body was similar to a wad fired from the Charles Daley shotgun and to the shell found under the passenger seat of the Camry. Richey also examined the jacket fragments in State's Exhibit 38A and B, which police had retrieved from inside the Camry two weeks before the trial, after being asked to look for anything consistent with a firearm going off in the car. Fragment 38A, from the rear passenger door, was consistent with having been fired from a 223 rifle or an AR-15. Fragment 38B, from the front passenger door, was consisent with a 40-caliber pistol. R16:257-61, 373-74.

Jennifer Kay, crime lab analyst, testified to the DNA results. Wood was excluded from DNA found on the Jeep's steering wheel, Rafsky could not be included or excluded. Rafsky was the major contributor to DNA on the interior driver door and gear shift (Wood could not be excluded or included). R16:253-54. The major DNA profile on the Jeep's glove box matched Wood, the minor profile matched Shores. Either Shores came in contact with the glove box or there was a secondary transfer from the major donor, for example, if Wood shook Shores' hand and then touched the glove box. Not much DNA is required, a hair is enough. R16:242-45, 251-52. Wood's DNA was on the cigarette butt in the

fireplace. R16:241. Rafsky's DNA was on the cigarette butt and feces in the toilet. R16:242. Rafsky's DNA was on the chain binding Shores' hands. R16:245. Blood on the action bar of the Charles Daley shotgun matched Rafsky's DNA profile. R16:246. Other areas of the gun were swabbed, none matched Wood. R16:250. Wood was excluded from DNA on the STP bottle cap, Rafsky could not be excluded. R16:246-47. Shores' DNA was on the hoe head and handle. R16:240-41.

Carl Chasteen, Fire Marshall Chief, testified the liquid on Shores' shirt was a heavy petroleum distillate, not gasoline. The distillate could be diesel, kerosine, or lamp oil. It did not come from the empty STP bottle, which had contained a medium aromatic product. R16:262-68.

Shores' daughter-in-law testified he left her house that day at 12:15 to go grocery shopping. A video showed Shores purchasing groceries at Doc's Market at 12:53. R14:66-70.

Video clips from the Fenway Express in Daleville showed the Camry entering the parking lot at 2:58 p.m.; Wood and Rafsky entering the store and asking for a pizza; Rafsky getting his drink and leaving; Wood swiping a card and leaving. Video clips from Wal-Mart showed Wood and Rafsky entering the store; in front of the Coinstar machine; Wood purchasing cell phones; Wood and Rafsky at a self-checkout register, with a buggy of items. The clip of Wood purchasing the phones shows Wood speaking to a

customer and laughing. A clip of the check-out counter shows Wood scanning and placing items into bags, Rafsky walking up while Wood is scanning, and Wood swiping a card six times[5] and leaving. Another clip shows Rafsky leaving with the buggy of bags at 3:42, while Wood is still at the counter, and Wood turning, talking to an associate, and leaving. R:14:74-89, State's Exhibits 4A-N.

The distance from Doc's Market to the old farmhouse is 9.7 miles; from the farmhouse to Fenway Express is 40 miles; from Fenway to the Enterprise Wal-Mart is 9.3 miles. R15:110-11.

Dr. Hunter, the medical examiner, testified the cause of death was an immediately lethal gunshot wound to the head. The gunshot wound was relatively close, 4-6 feet. Shores was probably in the position in which he was found when he was shot. He had other head injuries consistent with the edge of a garden hoe, which caused abrasions but not deep laceration or tearing of the skin. He also had injuries to the shoulders and upper back. Dr. Hunter could not say whether Shores was rendered unconscious by the blows. It is unlikely he would have died from the impact injuries. Some of the injuries around the eye and nose could have been caused by a fist. There were no defensive-type injuries. Shores could have been unconscious when he hit the ground. Dr. Hunter could not rule out that a punch or two to the

[5]The receipt police obtained showed that the transaction was denied at 4:03 p.m. The total was $257.47. R15:113.

face knocked him out on his feet, giving the attacker the opportunity to grab the hoe and start hitting him. R16:340-63.

Wood's May 1 booking photo, a head shot, showed no injuries. R16:369-79, R17:388. Shores was 5'8", 170 pounds. Rafsky was 5'8", 150. Wood was 5'10", 140. R17:389.

Defense Case

Jana Enfinger, 30, has known Wood since he was hired at Sonic when he was 16. They worked there for two years and then off and on for another six years. Wood was still working there when Jana left in October 2013. They were good friends, had friends in common, and Jana was familiar with Wood's reputation in the community. He was a humble soul, never violent, was known as a nice guy, always with a kind word, humble, peaceful, an all-around good person. Jana was aware, as were most people in Enterprise, that Zack was bisexual. He had a meth problem, as had Jana, who was now clean after completing a year-long in-patient program. Meth was very prevalent in Enterprise. Zack's's behavior didn't change when he used meth. He occasionally used other drugs, possibly prescription pills. Jana stayed with him for a while in January 2014. Everyone who knew Zack would vouch that he's a peaceful person. Jana did not know Dillon Rafsky. R17:391-401.

Kelly Eggleston lived in the Autumn Ridge Apartments in April 2014. Zack lived in an apartment upstairs and was a

friend. Dillon lived with Zack and with Kelly during that time period, and Kelly and Dillon had been involved romantically. Kelly had heard Zack was gay. On Tuesday, April 14, Dillon came downstairs and asked to borrow her Jeep. She told him, no, but a friend who was helping her pack that day gave him the keys. On Wednesday or Thursday, she reported the car stolen. On Saturday, April 19, around 5 or 6 p.m., Dillon appeared at the back door, and Kelly's friend confronted him about not returning the Jeep. Dillon picked up a shotgun, then took off. R18:461-68.

Robbie Walker, Zack's father, lives in Glenwood, 40 miles from Enterprise. Walker met Dillon once, in January or February of 2014, when Zack brought him to the house. Walker thought they were friends. Walker didn't approve the relationship because he didn't like or trust Rafsky. In March, Zack and Heather Williamson borrowed Walker's van to go to Heather's house in Esto. The van was totaled, and Walker was told that Dillon was driving it. Walker told his son he didn't want Rafsky around any more. Around that time, Zack came over beaten up. He wouldn't say who did it, but Walker knew Dillon had done it. R18:469-73.

Zack, 24, testified on his own behalf. He and his older sister moved to Geneva County when he was 12, and he had lived in Enterprise off and on since age 18. He lived for six months at Autumn Ridge Apartments, where Kelly Eggleston was his neighbor. He graduated high school with a 3.8 GPA and attended some

college, but dropped out because of drugs. He worked at Sonic in Enterprise and worked at Sears in Montgomery. He and Jana hit it off right away, and they had been friends and coworkers over the years. He had used prescription pain pills throughout his life. He started using meth two years ago, which makes you feel the best in the world and gives you energy, no pain. At the end of 2013, he was still working at Sonic. R18:475-76, 481-82.

Zack met Dillon in November 2013 through his a roommate who wanted him to try Dillon's dope. A month or so later, Zack, who is bisexual, began a sexual relationship with Dillon, and in mid-January 2014, Dillon forced Zack's roommate out and moved in. After that, Zack learned Dillon was "completely shady." The drugs he dealt weren't his and came from big dealers in Mexico, and he often owed people money. Bad people were always coming and going, so Zack moved out. R18:482-85.

In March, Zack and Heather were at Zack's father's house when Dillon called them to come get him in Pensacola. Zack borrowed his father's van, saying they were going to Heather's. They stopped by Heather's in Esto, then went to Pensacola, where Dillon had gotten into some bad stuff and had burglarized his grandmother's home. While driving back, Dillon took some meth and crashed the van. They had gone to Pensacola the first time so Dillon could clear up some warrants, but Zack didn't know if he had. Dillon seemed to be on the run after that. R18:486-87.

In mid-April, Zack stayed with Shannon Auty at her parents' house for a while, then got a room at Enterprise Inn and Suites. When he ran out of money, he called Kelly to come get him. Dillon showed up, high, which is how he was pretty much always. Dillon was driving aimlessly, and they slept in the truck on a dirt road Friday night. One minute Dillon was fine, one minute sad, and the next minute he was the person with the hugest heart, but for only five minutes. After they got unstuck, Dillon kept getting crazier, and Zack asked him to drop him off somewhere in town. Zack was standing by the Jeep on a dirt road when Dillon shot him in the left thigh with a handgun. The next thing he remembered was being in the car and Dillon saying, we're going to Pensacola. He went to a doctor two weeks ago and the projectile was still in his thigh. After he was shot, he was terrified of Dillon. R18:487-91. In the police car on the way to arraignment, he got up the courage to ask Dillon why he shot him, and Dillon just called him a name. R18:492.

The statement Zack gave police about what happened was accurate, though he left out things. He had been in the hospital for five hours, hadn't slept, and had morphine and Dilaudid in his system. He had been shot 8 or 9 times by the trooper, mostly in the hands but also in the left shoulder. He was down on the floorboard with his hands up. He thought Dillon fired at him, too. After firing at the trooper multiple times, Dillon pointed

the gun at Zack, it clicked, and he pulled the trigger. Dillon then ran. Zack was not familiar with guns. R18:492-94.

When they headed to Pensacola, Zack thought they were going to Heather's. They ran into a mail lady while mud-riding and got stuck at Shores' place 5 minutes. They passed a house that looked abandoned, Dillon reversed, bottomed out, then said, "It's okay because we're supposed to be here." Zack didn't know what Dillon meant by that, he never knew what was going on in Dillon's mind. They were both high. The plan was to get the Jeep out, but they first went in the house. Dillon kicked in the door, Zack had no shoes on. Dillon used the toilet and went through papers. He was always looking for easy ways to make money. They were in the house about 10 minutes, then went outside to work on the Jeep, using a shovel and hoe they found outside. R18:495-98.

About an hour later, Mr. Shores drove up. He was nice but firm and let them know he wanted the Jeep off the property. Zack promised him when they got it unstuck, he wouldn't be able to tell they were there. Shores initially had said he should call the Sheriff to get it unstuck, but when Zack said that would be wonderful, Shores seemed to take that as an indication that they'd really get the Jeep off the property. Zack was happy when Shores showed up and would have been glad for the help. Shores drove behind the Jeep to get the tag number, Zack dusted it off and read it to him. Shores then drove around behind the house.

Dillon said he was going to ask to borrow Shores' phone. Zack tore the mailbox when Dillon went behind the house, frustrated from trying to get the Jeep out with no help from Dillon. Zack heard bumping noises, walked to the back, and was stunned to find Dillon tying Shores' hands with a chain. Dillon told Zack to get a cloth for the feet, and Zack got a shirt from the screened porch. Shores was breathing but not saying anything. Dillon gave Zack matches and said to light him on fire. Zack struck the matches so they wouldn't light. He didn't know what Dillon squirted on Shores, something from the Jeep. R18:498-504.

Dillon acted crazy the whole time they were there. He would laugh and then he would yell, laugh and then yell. R18:504.

Dillon then told him to take the tag off the Jeep and get in car, they were leaving. Zack removed the tag and put his wallet in the back of the Jeep to tell someone what happened because he thought he was going to die. Dillon put the car in drive, drove a few feet, stopped, put the car in park, popped the trunk, got out, and walked back to Shores. Zack heard the shot but didn't see it. Dillon got back in the car and they left. R18:504-06.

Defense Exhibit 1 was admitted into evidence, showing what Zack looked like after Dillon beat him up. R18:506-07.

The recording made in the police car when they were taken to arraignment was played (Defense Exhibit 2). In the recording, Dillon was laughing and said, "I'll whip your ass. Why we got to

be here?" Zack said, "I want to know . . .," intending to ask why he had to shoot Mr. Shores and shoot at him. Dillon yelled to shut up talking about it and said, "You want to know crazy. You get the Bible and read it over and over again, you bitch." Zack told Dillon the bullet went through his hand and was telling him many times the trooper shot him when Dillon said, "I seen you need to get to my level." Zack did not know what he meant by this. Dillon was worse that day. One minute he'd refer to himself as Jesus, the next minute as the devil. He said he knew everything and could find out everything and was everywhere at one time. Zack believed Dillon could harm not only him but others. Dillon mentioned Shannon a few times, a girl Zack was hanging out with, which Dillon was mad about. Zack was afraid for his family too. R18:508, 512-14, 519-22.

Zack had worked with credit cards since he was 16 and knew they would be found through using Shores' credit card. He knew a card might not be authorized if used too many times at one place or if the use wasn't normal for the carrier, and he knew the location, date, and time went to the bank. It was the only thing he could think to do to stay alive. If he told someone, Dillon would notice. Dillon told him to buy the cell phones at Wal-Mart and was watching him buy them. Dillon told him to buy the items he had at the checkout counter. He swiped the card six times, knowing it wouldn't go through. He kept hoping someone would

come and make him explain what was going on, but no one came, even when Dillon rolled the cart out of the store. R18:476-81.

On cross-examination, Zack said he had a smile on his face when he was buying the phones because Dillon told him if he acted scared, he would know. He walked out after Dillon, like he was told. He talked to someone on the way out but knew Dillon was waiting, and it was embedded in his mind that if he said anything, Dillon would find out and kill him. If he didn't leave with Dillon, Dillon would have gone to someone else he cared about. He ran when he got outside because Dillon had said he better be right behind him. R18:532-37.

He told everything he could remember when he gave his statement. He was on opiates. Nothing was inaccurate but there were things it didn't enter his mind to say. He didn't tell them Dillon had shot him because what seemed important was telling them what happened to Mr. Shores. R18:543-45. Asked why he didn't talk about Dillon starting to drive away before he got the gun and shot him, he said he thought he said that later in his statement. R18:551. He did say he was close to the Jeep when the shot was fired but he was in the Camry. R18:556-57. He was answering the questions and telling what happened the best he could. R18:560. When they got stuck, Dillon was angry one minute, not angry the next. R18:564. His dad didn't want him hanging around Dillon, no one did. R18:567. When Dillon was

beating on Shores, Zack was trying to get the Jeep unstuck. He twisted the mailbox because he was frustrated. R18:569. He didn't see Dillon pour anything on Shores. He thought it was STP but apparently it wasn't. R18:571. They were low on fuel when they got there, and Dillon looked for gas before Mr. Shores showed up but didn't find any that Zack was aware of. R18:571-72. He told police they didn't have any guns when they got to Florida because they didn't have any when they got to Shores' property. Dillon had stopped and sold the gun he shot Zack with. R18:575-76. Dillon had beaten Zack up about a month before. R18:577. Zack was still shocked and terrified when the police were questioning him. R18:580. During the chase, the gun was in the back seat when Dillon said to slide it to him. Zack slid it to him but didn't feel he had a choice. He didn't think Dillon would fire it because they were driving. R18:580-83. He made sure the matches went out. He would rather his life end than kill someone. R18:585. He left a phone by Shores before he was shot. When Dillon got back in the car after shooting him, he had the phone, and Zack thought Dillon knew what he had tried to do. R18:586. The checkbook, which Dillon found in the house before everything happened, had stubs in it, not checks. R18:592. The police did not ask why he was afraid Dillon would think he'd snitch. He asked to talk to Captain Collins after he recovered from his wounds, but Collins did not respond. R18:594-95.

The defense introduced into evidence a bench warrant for the arrest of Dillon Scott Rafsky on April 1, 2014, signed by Judge Powell in Bonifay, Florida. The court aslo took judicial notice of the evidence. R18:448-49, 604, Defense Exhibit 3.

Penalty Phase

Heather Griffin, Zack's sister, read a statement. Heather was 15 when Zack was born. Their mother died a horrific death from colon cancer, but Heather raised Zack since he was born and had always felt he was her child. Their mother worked nights and their father "had issues that are too hard to explain." She took Zack to his first day of kindergarten, every school function, bought his clothes, provided for him as best she could. She did her best, but he had a difficult life. In her heart, she feels responsible. Zachary was an intelligent child and always worked hard. Heather worked in the District Attorney's Office as a Pretrial Diversion Coordinator for 12 years. During that time, she divorced an abusive husband who was addicted to drugs. Zack witnessed her ex-husband's abuse and destructive drug use. Heather finally got them out of that environment. Some of her closest friends are in law enforcement, including Trooper Phillips, and the people who arrested Zack had watched him grow up. Most of the people they knew could be character witnesses but can't because they are in law enforcement. R20:722-24.

Heather helped others free themselves from drugs but did not

realize how bad her own child's use was until it was too late. Drug use is bad in her area, many young adults ruin their lives, and people do things on meth they would not normally do. It is an epidemic. Telling Zack he couldn't be a part of her, her daughter's, and her new husband's life until he got his life straight was a tragic mistake. She feels she failed him and is sorry for not doing something that could have prevented this. Zack is not a violent person, has never been violent, has a huge heart, has always just wanted to be loved. R20:724-25.

His relationship with Dillon should not be held against him. It was difficult to be different. He tried to hide it, especially with her. He did not want any of this to happen. He wanted to get away from the drugs, the abuse, the craziness. He would never intentionally hurt another person. He let drugs and an extremely abusive relationship ruin his future. He was in fear of Dillon and had expressed deep concern for Heather and her daughter's safety. Dillon had him terrified. Zack was guilty of drug use, burglary, and not running away from Dillon. It's unfair to Mr. Shores and his family, but please let his life be spared. R20:722-25.

Matthew Walker, 32, is Zack's brother. Matthew and Zack grew up seeing their mother physically and mentally abused by their father, Robbie Walker. Zack was 8 years old when their mother died and stayed mostly with their sister after that

because she didn't want him growing up in an abusive home. When Zack was 6, 7 years old, he got in trouble for the smallest things. Walker suspected that Zack was not his biological child and told Zack this. Around the time of the crime, Zack had been living with their father again because he had nowhere else to go. He has been visiting and supporting Zack throughout the trial. Drugs were a factor in their family, and Zack grew up in an abusive home, but he's a good kid. Matthew never knew Zack to get into fights or even fight back. Zack was very afraid of Dillon. R20:726-31.

Jeffrey Wood, Zack's maternal uncle, lives in Montgomery, Alabama. Zachary's mother died 16 years ago after a long illness. Zack is very sensitive, and his mother's death "messed him up a little." Zack's mother divorced Robbie Walker, who was not Zack's biological father, right before she died. No one was comfortable with Walker raising Zack, and Heather was in her 20's when their mother died. Robbie Walker's name was like a bad word at the Wood house. Zack often visited in the summers and on holidays. Two of Jeffrey's sisters had died, so there were six kids at the house. Zachary was often the favorite. He was very smart, did well in school, and they had high expectations of him. Zack came to live with his uncle right after high school, before starting at Auburn in Montgomery. Jeffrey thought Zack dropped out because of alcohol and drugs but never witnessed it. One

weekend when Jeffrey was away, Zack had a friend over, and Jeffrey learned they had been drinking, fought, and both had called the police to the house. Jeffrey made his home unwelcoming after that. Jeffrey thought Robbie Walker was an alcoholic, but his sister (Zack's mother) never talked about the abuse. They found out from the kids after she died. Zack is very loved and was a loving child. That he was involved in a violent crime came as a great shock. Jeffrey last saw Zack on Christmas or Thanksgiving of 2012. R20:734-39.

Pat Lindsey is a retired Judicial Assistant. Heather Griffin is her best friend. Zack came to live with Heather when he was in 7th grade and often came to the courthouse with her. Zack helped Pat work, putting traffic tickets in order, and so on. Since Zack finished high school, Pat has seen him at Sonic. Zack was always a very respectable, nice young man, "Yes, ma'am. No, ma'am." She never had any concerns about him. R20:740-43.

Laura Kinman has known Zack since her daughter, Kacia, became friends with him in the seventh grade. Zack lived with the Kinmans for four months from the end of 2012 into 2013. He was the manager at Sonic at the time but was struggling and had nowhere to live. He showed initiative, cooked supper when not at work, offered money for room and board, bought groceries. Ms. Kinman came home one day, and Zack had redone her flower garden without being asked. She never had any concerns about him. He

told her before he moved in that he had a drug problem and was quitting, and he did. His goal was to be self-supporting, and when he got on his feet, he moved out. Since then, Ms. Kinman has eaten with him, helped him move, and had contact with him through Kacia. He has a good heart, is very intelligent, and has a special place in her heart because of the way he treated their family. The true Zack is a compassionate, good boy. She last saw him in the fall of 2013. He was moving a bed from north Alabama, and she helped him fix a flat. R20:745-49.

Kacia Kinman last saw Zack a month or two before his arrest. At that time, he was "getting straight," had his own apartment, had a job, and things were going great. He wasn't hanging with the friends he had been hanging with and had been to a rehab program. Before that, she hadn't seen him for a few years, but they had stayed in touch through social media. Kacia was away at college when Zack lived with her parents. Kacia knew Zack as a kind-hearted gentleman. They thought he would be a lawyer, he was so smart. He didn't have to work for his grades and was an all-around great student. She was shocked to hear of his arrest in a homicide. Anybody that knew him would be shocked. Growing up, he protected her. If he knew something was bad, he would make sure she wasn't around it. She had never heard of Dillon Rafsky before the trial. R20:750-56.

Spencer Hearing

Zack testified the checkbook found in the Jeep's glove box came from the house. It was old, had been used up for some time, and was in the Jeep when Mr. Shores drove up. While Zack was talking with Mr. Shores, Dillon was just standing back. At that time, Zack knew Dillon had some problems in Pensacola but didn't know he had a warrant for his arrest in Holmes County. Zack thought his conversation with Shores ended well because Shores said everything was fine. After Zack read the tag number out to him, he said he needed to check on something and drove to the back. Zack first learned something had happened when he heard commotion, went to the back, and saw Shores being tied. Having been shot by Dillon the previous day, Zack was terrified of him. When Dillon told him to do something, he felt he had no choice. He was worried about his life, but Dillon had also made threats toward his family, and he believed him. He got the shirt and tied it around Shores' ankles. He couldn't remember how the liquid got on him. He thought the STP was used but heard the expert say whatever was on his shirt was not that. He didn't know where the matches came from, Dillon handed them to him. He had no intention of trying to ignite a fire and made sure the matches didn't light. He would do the match, act like it was wet or something, and throw it down. He had put Shores' cell phone beside him because he had heard that people can hear while

they're unconscious and he was trying to talk to him, and he told him who they were and what had happened and told him where his cell phone was and that as soon as they were gone, to call 911. After that, Dillon came around, he had the shotgun, and he told Zack to get in the car. Dillon got in the car, too, and put it in drive, but he stopped, put it in park, and got out. He got the shotgun, went back to where Shores was, and Zack heard the shot. Dillon may have said he killed him, and "maybe a part of me believed him, but then again part of me didn't want to believe it." The only thing Zack took from the house was a pair of socks. The credit cards they used afterward were in the Camry, in a wallet in the center cup holder. R12:635-46.

On cross-examination, Wood said he had four counts of forgery in Coffee County. Asked about a teardrop tattoo under his eye, Wood said he got it a week ago, that it means you've lost a loved one while incarcerated. After he got it, he learned that, in Florida, it can mean you killed someone. He never struck Mr. Shores while he was on the ground, but he wrapped the shirt around his feet, poured liquid on him. He took the tag off the Jeep sometime after Dillon struck Mr. Shores, close to the end. Asked if he understood at that time that Dillon was going to kill Mr. Shores, he said he was in shock. He was scared at the stores afterward, but is able to put on a front and not let people see his emotions. Shores posed no threat to them, there

was no reason to kill him, no reason to strike him. Asked if he wanted the death penalty, Wood said, to be honest, yes. R12:646-52.

Regarding the checkbook with carbon copies of checks from a Belle Glade bank (State's Exhibit 14), which indicated the checkbook was old and came from the house, the judge took judicial notice that Belle Glade is near Lake Okeechobee, where Shores had once lived. R12:652.

The x-ray taken at Southeast Alabama hospital and radiology report describing bullet fragments in Wood's left thigh were admitted into evidence. Defense counsel reported that the surgeon the judge had ordered to evaluate Wood had concluded that removal of the fragments required hospital surgery and would cause more harm than leaving them in. R12:653-54.

Captain Carla Brock, the jail administrator, testified they had no problems from Wood, other than the tattoo. R12:655.

Heather Griffin, Wood's sister, submitted a letter to the judge saying she was unable to include everything in her previous statement to the jurors. Heather's father, Robbie Walker, is not Zack's real father and was so angry when Zack was born that he said their mother could not bring him home and he was giving him up for adoption. Heather told her father she would take care of Zack and he was not giving him away. This took courage, as her father was very abusive. He abused Heather, their mother, and

Zack. He allowed their mother to bring Zack home but continued to beat her daily and continue to beat Heather until she moved out at age 18. They were very poor, went without electricity, and Heather sometimes had to beg for food for the family. When Zack turned about 3, Robbie started abusing him. By this time, Heather had moved in with her ex-husband, trading one world of abuse for another. But, in her mind, it was better because she did not have to go hungry and could take care of Zack. During this time, their mother worked multiple low-level jobs. She was told she needed a colonoscopy, but Robbie wouldn't let her have one. Six months before their mother died, she left Robbie, leaving Zack with Heather. In addition to abusing her, Heather's ex-husband became addicted to cocaine and prescription pills. Zack witnessed all of this. When she left her ex-husband, she left Zack with Robbie for several weeks. He has never told her everything, but she knows terrible atrocities were committed against Zack because they were done to her. The next few years were happy for both of them. Zack did well in school and had lots of friends. He loved Heather's little girl. Things changed when Zack turned 16. Heather was unaware of the drinking and drugs and didn't know how bad things were until later. When Zack left her home, he went back around Robbie Walker. He would do anything for Robbie to accept him. Robbie had received a huge sum of money from a lawsuit and tried to buy Zack's forgiveness

with cars and money for drugs. Zack has always migrated towards abusive relationships. Before he met Dillon, he was in an abusive relationship with another boy. Zack was truly afraid of Dillon. His sexuality should not be held against him. Victims of domestic violence are victims, whether male or female. Zack did not hurt Mr. Shores. He was there but was under threat of violence to himself. Zack was terrified of Dillon. The photos at Walmart look bad, but Zack has always smiled. She thinks it's a defense mechanism, if he smiles, no one will be mad at him and hurt him, such as Robbie, her ex-husband, or Dillon. R1:151-54.

Sentencing

Wood read a statement. He said he expected to get the death penalty and then addressed the Shores family as follows:

> I'm sorry, but there is no possible way for me to know how you feel, but if someone hurt a member of my family, I'd want them dead, too, whether it was the one who actually did the killing or not, just for being involved. I'd want revenge also.
>
> I firmly stand by what I said. I promise you I never knew Dillon was going to kill Mr. Shores. I am now convicted of something I had no part in planning, of something I did not see, of something I wish I could have prevented. I am sorry, I didn't know what to do at the time, nor can I say I'd know what to do now. I was just too shocked. None of it seemed real, and it doesn't seem real now.
>
> I don't know why, but Dillon was enraged. I still don't know why or even how anyone could do something like that. It is beyond me. I'm sure by now you have heard Dillon is claiming to be mentally unstable. He is one cruel person, and I was scared of him. Anyone would be and should be afraid of him in that state. I still wake up with nightmares.
>
> If I could change things from that day, I would. Not because I got locked up, but for Mr. Shores. My heart breaks every time I think of him. I can't imagine what it's like for you. Killing me isn't going to change what happened that day or take away the grief you have endured since, but it if relieves you of any pain at all, or boosts up Judge Patterson's career, then at least something positive came from the conviction. I can only hope this takes away a fraction of your pain.
>
> I wish I could do more. If only I could go back and prevent that terrible incident, though I'm still unsure of what I could have done to stop Dillon. Maybe if I knew then what I know now, things would be different, but who is to say. If I can testify against Dillon to help you convict him, I will do it for the Shores family.

> I pray one day Jesus will place back together your shattered hearts, and I'm sorry that even then a piece will still be missing. I truly pray someday you will forgive me for being too scared to act. I am very sorry. Zachary Wood.

R13:669-71.

SUMMARY OF ARGUMENT

Issue I. The evidence is legally insufficient to establish premeditated murder. Because the evidence points to Rafsky as the person who actually shot Shores, the state sought Wood's conviction of premeditated murder on a principal theory. To be convicted as a principal for a crime physically committed by another, one must intend that the crime be committed and do some act to assist the other person in actually committing the crime. In his statement and testimony, Wood said after Shores took down their tag number and drove to the back of the house, Rafsky followed him. Hearing noise, Wood went to the back and saw Shores on the ground and Rafsky tying his hands behind his back. At Rafsky's direction, Wood tied a shirt around Shores' ankles, but when Rafsky told him to light Shores on fire, Wood tossed the matches aside as if they wouldn't light. As they were leaving in Shores' car, Rafsky stopped the car, took one of Shores' rifles, walked back to where Shores was, and shot him. Wood's statement/testimony is consistent with the other evidence. The evidence thus does not establish that Wood intended Shores' death or that he assisted Rafsky in the shooting. Wood's conviction of premeditated murder cannot be sustained.

Issue II. Wood's death sentence is disproportionate under the Enmund/Tison[6] standard, which precludes a death sentence

[6] Enmund v. Florida, 458 U.S. 782 (1982); Tison v. Arizona, 481 U.S. 137 (1987)

absent proof beyond a reasonable doubt that Wood was a major participant in the burglary/robbery and that during the course of those crimes, he demonstrated a reckless indifference to human life. The term "reckless indifference" means "knowingly engaging in criminal activities known to carry a grave risk of death" and "subjectively appreciating that one's acts were likely to result in the taking of innocent life." Tison v. Arizona, 481 U.S. 137, 152, 157 (1987). Here, neither Wood nor Rafsky had weapons when they randomly drove onto Shores property and the Jeep they were driving got stuck in the mud. Wood had no reason to anticipate violence would erupt when Mr. Shores showed up. Wood was not present when Rafsky attacked Shores behind the house and after Shores was incapacitated, he foiled Rafsky's attempt to burn him by tossing the matches aside as if they would not light. As they were leaving in Shores' car, Rafsky retrieved a rifle from the car, walked back to where Shores was, and shot him. Wood did not see the actual shooting. No action by Wood that day either further harmed Shores or worsened his predicament. Wood also took actions to prevent further harm to Shores, in refusing to burn him and placing a phone nearby so that he could call for help after they left. Nowhere during the unfolding events is there evidence that Wood himself engaged in actions "known to carry a grave risk of death," nor is there evidence that Wood "subjectively appreciate[d] that [his] acts were likely to result

in the taking of innocent life." One need not believe all or any of Wood's testimony, but, without it, there is little to establish his involvement in Shores' death. Reckless indifference must be established beyond a reasonable doubt. Here, the evidence falls short of satisfying that standard.

Death is also disproportionate under this Court's proportionality analysis, where Wood did not kill, intend to kill, or assist in the killing, and the sole aggravating factor applicable to Wood is felony murder.

Issue III. The trial court erred in applying the cold, calculated, and premeditated (CCP) and avoid arrest aggravating circumstances vicariously to Wood. The CCP aggravator cannot apply to Wood for the same reason premeditated murder cannot be sustained: the record is lacking in competent, substantial evidence that Wood either intended Shores' death or assisted Rafsky in killing him. The same logic applies to the avoid arrest aggravating factor. Assuming arguendo that Rafsky's motive for killing Shores was to eliminate a witness, that motive cannot be applied vicariously to Wood, who did not intend or assist in the shooting.

Issue IV. The trial judge rejected Wood's drug abuse history as mitigating because no evidence was presented linking his use to the offense. This was error because there is no requirement that mitigation have a nexus to the offense. The

trial court rejected Wood's remorse as mitigating because Wood got a teardrop tattoo, which to some inmates, but not to Wood, is gang-related and means someone has been killed. This was error. Wood expressed genuine remorse for his role in the crime to the Shores' family at sentencing and in a letter to the judge. Wood's remorse was established by the greater weight of the evidence, and the judge cited no competent, substantial evidence to reject it.

Issue V. Wood's death sentence is unconstitutional under Hurst v. Florida, 136 S. Ct. 616 (2016). Because no jury found all the facts necessary to impose a death sentence under Florida law, Wood's death sentence was imposed in violation of his Sixth Amendment right to trial by jury. This defect is structural and not amenable to harmless error analysis. Under section 775.082(2), Wood's death sentence must be vacated and remanded for imposition of a life sentence.

ARGUMENT

ISSUE I
THE EVIDENCE IS INSUFFICIENT TO SUPPORT WOOD'S CONVICTION AS A PRINCIPAL TO PREMEDITATED MURDER WHERE THERE IS NO EVIDENCE WOOD INTENDED SHORES' DEATH OR ASSISTED RAFSKY IN SHOOTING HIM.

The state prosecuted Wood on theories of both felony murder and as a principal to premeditated murder, and the jury, by special verdict, found him guilty of both. As to premeditation, the prosecutor acknowledged that, "We don't know who actually pulled the trigger," R19:616, but argued that Wood was guilty as a principal if he "had a conscious intent that the act be done" and "did some act or said some word which was intended to and which did ... assist the other person...to actually commit the crime." R19:627. The evidence, however, failed to establish beyond a reasonable doubt that Wood intended that Shores be killed or aided Rafsky in the shooting. Wood's conviction of premeditated murder cannot be sustained.[7]

This issue was preserved by appellant's motions for judgment of acquittal at the close of the state's case, R17:405-13, and at the close of all the evidence. R19:694.

The standard of review is de novo. See, e.g., Fisher v. State, 715 So. 2d 950 (Fla. 1998).

To be convicted as a principal for a crime physically committed by another, "one must intend that the crime be

[7]While the resolution of this issue does not affect Wood's guilt of first-degree murder, it is relevant to his sentence.

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). Mere presence at the scene 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 (neither knowledge that the offense is being committed, nor presence at the scene, nor a display of questionable behavior afterwards is equivalent to participation with criminal intent).

Also, a defendant may not be convicted of premeditated murder where it cannot be established whether he or his accomplice actually performed the killing. See Van Poyck v. State, 564 So. 2d 1066, 1069 (Fla. 1990)(evidence insufficient to establish premeditated murder where evidence did not show which of two defendants was triggerman during escape attempt), cert. denied, 499 U.S. 932 (1991); Jackson v. State, 575 So. 2d 181, 186 (Fla. 1991)(evidence insufficient to establish premeditated murder where evidence did not show which of two robbers fired gun that killed robbery victim).

Here, both the prosecutor and the trial judge recognized that, leaving aside Wood's statement, we cannot know who pulled the trigger. The trial judge further recognized that "the facts suggest Rafksy may have been the one who fired the shotgun into

the head of the victim."[8] R2:203. Thus, apart from Wood's statement and testimony, premeditation cannot be sustained under Van Poyck and Jackson. The question then becomes, did Wood's statement and testimony prove beyond a reasonable doubt that he both intended and aided in the shooting? The answer is no.

According to Wood's statement and testimony, Wood was not present when Rafsky beat Shores with the hoe. And, according to Dr. Hunter, Shores could have been knocked unconscious or lost consciousness when on the ground after the assault. A punch to Shores, tying a shirt around Shores' feet, retrieving the license plate from their immobile car, and stealing Shores' car to escape, are all actions consistent with robbery and do not imply intent to kill. A single punch to someone already incapacitated, bound, possibly unconscious, does no additional harm and does not show intent to kill. Binding the feet of an already helpless person makes no sense if you intend to kill him. Up to that point, there is nothing to indicate Wood suspected Rafsky had murder in mind, let alone that Wood did himself.

Further, when handed matches and told to light Shores on fire, Wood said he made sure the matches did not light and tossed them aside. Whether one believes Wood or not, there is no evidence contradicting his statement/testimony that he chose not

[8]Some of those facts are that only one shot was fired, Rafsky's DNA was on the action bar of the shotgun, and Rafsky fired five times at Trooper Phillips in Alabama.

to burn Shores. The judge's assertion that Wood tried to light the matches but couldn't because they were wet is not supported by any evidence. The limited circumstantial evidence about the matches does not contradict Wood: he said he deliberately failed to light the matches and tossed them aside, and five matches were found near Shores' body. The evidence also shows that Rafsky and Wood were given Marlboro cigarettes by the mail lady shortly before getting stuck, and police found in the house discarded cigarette butts consistent with the brand given by the mail carrier. They lit those cigarettes with something, possibly the same matches Wood says he later pretended didn't work. The point is not that every detail uttered by Wood must be believed, but that there is no other evidence that contradicts his version of events, and other than what he described, there is nothing to establish his involvement in the murder of Shores.

Further, Rafsky had a motive for assaulting Shores above and beyond breaking and entering an abandoned house: to prevent Shores from calling the sheriff to help extricate the Jeep because the sheriff might discover that Rafsky had outstanding warrants. So Rafsky had a serious motive to assault Shores, while Wood had no such motive. At some point after the assault occurred, Rafsky probably realized that if he left the scene without killing Shores, he left behind a potential witness to his assault. In contrast, Wood had not committed any assault and

thus had no motive for killing Shores.

The incident with the matches and Wood's other brief interactions with Shores had nothing to do with the actual cause of death. The cause of death was the gunshot wound, and there is no evidence in the record even suggesting that Wood aided or encouraged Rafsky to fatally shoot Shores. According to Wood's statement and testimony, Rafsky removed a gun from Shores' car and walked back to where Shores was on the ground. In fact, according to Wood's testimony, both men were in the car and starting to leave when Rafsky, the driver, stopped the car, grabbed a gun, and returned to shoot Shores. It thus appears that Rafsky himself did not decide to shoot Shores until just moments before he pulled the trigger. Again, whether Wood's testimony is accepted or not, without it, there is no other evidence of what he may have seen, known, or done.

The judge described that morning's events as "unfolding," and it appears to have been just that: a joy ride, by chance getting stuck in deep mud in front of an abandoned house, Shores' chance arrival with a possible call to the sheriff, Rafsky's reactive assault to thwart his arrest on outstanding warrants, then stealing his car to get away, and then, just before leaving in the stolen car, going back to kill Shores, the entire thing unfolding from moment to moment without any order or planning.

The state presented no evidence establishing that Wood had

anything to do with Shores' killing, apart from being nearby, possibly closer to the front of the house, near the stuck Jeep, depending on how far the Camry moved.

The prosecutor argued that Wood's presence at the scene and his demeanor afterwards, including failing to report the crime, meant "they were working together" to commit "all of these crimes." R19:632. But, neither mere presence at the scene, nor questionable behavior afterwards is equivalent to participation with criminal intent. Staten; Van Poyck; Jackson.

Accordingly, the state did not prove beyond a reasonable doubt Wood was a principal to premeditated murder.

ISSUE II

THE DEATH PENALTY IS DISPROPORTIONATE BECAUSE (A) THE EVIDENCE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT WOOD'S MENTAL STATE AMOUNTED TO RECKLESS INDIFFERENCE, AND (B) MORE CULPABLE DEFENDANTS HAVE RECEIVED LIFE SENTENCES.

A. Enmund/Tison proportionality

In his sentencing order, the trial judge stated:

> Given that the Defendant and Co-Defendant Dillon Rafsky were both present at the scene of the murder, and the facts suggest Rafsky may have fired the shotgun into the head of the victim, James William Shores, an issue of culpability arises under an [sic] Enmund/Tison. This Court is guided by Perez v. State, 919 So. 2d 347 (Fla. 2005). The Defendant admits to being present at the crime scene through his post-arrest statement and trial testimony. The Defendant further admits to being inside the old farm house, and physical evidence such as his foot print found and a cigarette butt from inside the house with his matching DNA further support his admission. The Defendant admits to ingesting methamphetamine which made him do thngs he would not normally do. Defendant admits to "plundering" inside the farm house. The Defendant further admits to using the garden hoe to assist with unsuccessful attempts to dig out the stuck Jeep Cherokee. The Jeep, upon which [sic] both Wood and Rafsky arrived, was adjacent to the front porch of the house. The victim, who was driving his Toyota Camry, arrived at the scene a short time thereafter and encountered both Wood and Rafsky. Defendant Wood knew that the victim had written down the license tag number of the Jeep and placed it on his person. Subsequently a struggle ensued. The Defendant in his post-arrest statement admits that he may have punched the victim in a show of solidarity to Rafsky. Additional evidence found inside the Jeep Cherokee glove box indicates the presence of DNA from both Defendant and the victim. A piece of chain link length similar to the type that was used to bind the victim's hands was found on the front porch of the farm house with matching DNA to Defendant Wood. Defendant admits that Rafsky sent him looking for additional items with which to bind the victim. The Defendant admits to securing the victim's feet with a shirt he obtained from the farm house back porch.

> The Defendant admits the victim was bound behind the back porch of the farm house, where the garden hoe was later found. The Defendant admits that a potentially flammable liquid was poured on the victim while he was still alive and to striking matches over the victim's body. Physical evidence establishes that [sic] victim was brutally attacked, receiving in excess of fifteen strikes of a linear and repeated nature consistent with the garden hoe found at the scene. No defensive wounds were found on the victim's body. The victim did not die from the blunt force trauma. The victim suffered immediate death from a shotgun wound to the top of his head. The location of the victim's body and shotgun wound is consistent with being shot while lying face down. Upon fleeing the scene in the victim's car, Defendant admits to throwing out alongside the roadway the clothes he was wearing during the murder. Thereafter, Defendant controlled the money and valuables. Defendant admits to using the victim's money and credit cards at several locations after the murder.
>
> There is substantial and competent evidence in the record to support the jury's determination that Wood was a major participant in the premeditated murder of James William Shores. Likewise, there is competent evidence that Wood participated in the felony murder of the victim by burglary of his farmhouse and/or vehicle and robbery of his valuables and motor vehicle all while a firearm was employed. Given the jury's verdict, the jury determined that Wood was a major participant in each of the crimes for which he is convicted and that these crimes were not independent acts of one another. This Court is satisfied that Defendant Zachary Taylor Wood acted with reckless disregard for human life during the murder of James William Shores, that the Enmund/Tison standard is satisfied. The Defendant is death eligible.

R2:204.

Contrary to the trial court's conclusion, neither its own description of the facts, nor any other evidence, establishes beyond a reasonable doubt that Wood either intended or attempted to kill Shores or that he acted with reckless indifference to Shores' life.

This Court explained the Enmund/Tison[9] culpable state of mind requirement in Jackson v. State, 575 So. 2d 181, 190-91 (Fla. 1991):

> In Enmund and Tison, the Court said that the death penalty is disproportional punishment for the crime of felony murder where the defendant was merely a minor participant in the crime and the state's evidence of mental state did not prove beyond a reasonable doubt that the defendant actually killed, intended to kill, or attempted to kill. Mere participation in a robbery that resulted in murder is not enough culpability to warrant the death penalty, even if the defendant anticipated that lethal force might be used, because "the possibility of bloodshed is inherent in the commission of any violent felony and this possibility is generally foreseeable and foreseen." Tison, 481 U.S. at 151 []. However, the death penalty may be proportional punishment if the evidence shows both that the defendant was a major participant in the crime, and that the defendant's state of mind amounted to reckless indifference to human life. As the Court said, "we simply hold that major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the Enmund culpability requirement." Tison, 481 U.S. at 158 []. Courts may consider a defendant's "major participation" in a crime as a factor in determining whether the culpable state of mind existed. However, such participation alone may not be enough to establish the requisite culpable state of mind. Id. at 158 n.12 [].

The decision in Tison, and decisions from this Court illustrate how the culpable state of mind requirement has been applied. In Tison, the defendants were Ricky and Raymond Tison, sons of Gary Tison, a convicted killer serving life for killing a prison guard during an escape attempt. Ricky and Raymond armed their father and his cellmate and helped them escape from prison.

[9] Enmund v. Florida, 458 U.S. 782, 797 (1982); Tison v. Arizona, 481 U.S. 137, 158 (1987).

When their car broke down, they flagged down a passing car occupied by a couple and two children. With Ricky and Raymond present, Gary and his cellmate killed all four captives.

In determining the sons' culpability, the Court focused on the following facts:

> Raymond Tison brought an arsenal of lethal weapons into the Arizona State Prison which he then handed over to two convicted murderers, one of whom he knew had killed a prison guard in the course of a previous escape attempt. By his own admission he was prepared to kill in furtherance of the prison break. He performed the crucial role of flagging down a passing car occupied by an innocent family whose fate was then entrusted to the known killers he had previously armed. He robbed these people at their direction and then guarded the victims at gunpoint while they considered what next to do. He stood by and watched the killing, making no effort to assist the victims before, during, or after the shooting. Instead, he chose to assist the killers in their continuing criminal endeavors, ending in a gun battle with the police in the final showdown.
>
> Ricky Tison's behavior differs in slight details only. Like Raymond, he intentionally brought the guns into the prison to arm the murderers. He could have foreseen that lethal force might be used, particularly since he knew that his father's previous escape attempt had resulted in murder. He, too, participated fully in the kidnapping and robbery and watched the killing after which he chose to aid those whom he had placed in the position to kill rather than their victims.

481 U.S. at 151-52. On these facts, the Court held both brothers "subjectively appreciated that their acts were likely to result in the taking of innocent life" and that their respective states of mind amounted to "reckless indifference to the value of human life." Id. at 152.

In Diaz v. State, 513 So. 2d 1045 (1987), cert. denied, 484

U.S. 1079 (1988), this Court held the Enmund/Tison culpability standard was satisfied where the defendant was one of three men convicted of murdering a bar manager during a robbery. Diaz was identified by a witness as the triggerman; Diaz and his fellow robbers each discharged a gun; Diaz's gun had a silencer; and eight to twelve persons were in the bar at the time. The Court concluded this evidence proved beyond a reasonable doubt that "Diaz was a major participant in the felonies and at the very least was recklessly indifferent to human life." Id. at 1048.

This Court also found the Enmund/Tison standard met in DuBoise v. State, 520 So. 2d 260 (1988), reasoning:

> Duboise and his two companions decided to grab a woman's purse in order to get some money. As they passed the victim on the street, DuBoise left their car and attempted to snatch her purse. When she resisted, the other men came to assist DuBoise. The victim recognized one of DuBoise's companions, and the three men put the victim in the car and drove to another area of town. There, while DuBoise raped her, the man whom the victim had recognized struck her with a piece of lumber. DuBoise's companions then raped the woman and both struck her with pieces of lumber. DuBoise was a major participant in the robbery and sexual battery. He made no effort to interfere with his companions' killing the victim. By his conduct during the entire episode, we find that he exhibited the reckless indifference to human life required by Tison.

Id. at 266; see also Van Poyck v. State, 564 So. 2d 1066 (Fla. 1990)(Enmund/Tison standard met where although evidence either of two codefendants may have shot corrections officer, evidence showed defendant was instigator and primary participant in escape attempt, recruited co-defendant, and obtained the three guns used

in the crime); Perez v. State, 919 So. 2d 347 (2005)(Enmund/Tison satisfied where Perez's wife's aunt was stabbed 94 times in her home; Perez's statement placed him at the scene; a bloody shoeprint next to the body matched the shoes Perez was wearing at the time, which Perez admitted disposing of because they had blood on them; there was sufficient planning to cut phone lines and disable a security light; there was evidence Perez was armed with a knife; Perez knew the victim was awake watching television and would recognize him).

This Court overturned death sentences in Jackson and Benedith v. State, 717 So. 2d 472 (Fla. 1998) on the other hand, finding the evidence insufficient to satisfy the strict requirements of Tison.

In Jackson, the owner of a hardware store was fatally shot in the chest during a robbery perpetrated by two brothers. In analyzing Jackson's culpability, the Court observed that in Tison, Diaz, and Duboise, there was compelling evidence that each defendant actively participated in their respective crimes and had a highly culpable state of mind:

> In Tison, the defendants armed known killers, one of whom had killed before in the same situation; during a prolonged affair, they watched four murders, some of which they may have been able to stop; and one brother admitted he was prepared to kill to get his father out of prison. Diaz possessed a gun equipped with a silencer, and not only did he discharge the weapon with twelve innocent people in a bar, a witness testified he was the actual killer. DuBoise kidnapped and raped the woman while he watched his companions beat her to

> death; it was a long, drawn-out episode during which DuBoise had the opportunity to stop his companions from committing murder but chose not to do so.

Jackson, 575 So. 2d at 192.

The evidence against Jackson, however, did not show beyond a reasonable doubt "that his state of mind was any more culpable than any other armed robber whose murder conviction rests solely upon the theory of felony murder." Noting that either of the two brothers could have fired the gun, the Court explained:

> There was no evidence presented in this trial to show that Jackson personally possessed or fired a weapon during the robbery, or that he harmed Phillibert. There was no evidence that Jackson carried a weapon or intended to harm anybody when he walked into the store, or that he expected violence to erupt during the robbery. There was no real opportunity for Jackson to prevent the murder since the crime took only seconds to occur, and the sudden, single gunshot was a reflexive reaction to the victim's resistance. No other innocent lives were jeopardized.

Id. at 192-93. The evidence thus was insufficient to establish Jackson's state of mind amounted to reckless indifference to human life such as to warrant the death penalty. Id. at 193.

The Court reached the same conclusion in Benedith, where the evidence linked Benedith to a plan to rob the victim of his car:

> Appellant contacted Loblack, the auto mechanic, on the day of the murder about painting a car he wanted to dive to New York. On the night of the murder, appellant was identified as having the victim's car. Appellant's fingerprints were on the car. Appellant was identified as being with the victim beside the victim's car within five minutes of the firing of the shots that killed the victim. The victim's car was seen leaving the parking lot where the victim's body was left after the murder. Within a month of the

> murder, the murder weapon was in appellant's possession in New York when appellant attempted a robbery to which appellant pled guilty. The other participant in this crime was fourteen years old at the time of the crime and was seen in the front passenger seat of the victim's car as the car was driven away just after the murder. Although appellant was not seen in the car as it was being driven away, appellant was no longer seen in the motel parking lot after the car was driven away.

717 So. 2d at 475-76. On these facts, the Court found the record lacking in competent, substantial evidence to establish the Tison culpability requirement:

> The evidence does not prove that appellant was the actual shooter, that he procured the firearm for use in the robbery, that he possessed the firearm before or during the robbery, that he or Taylor had ever used a firearm previously in a robbery, or that he could have prevented the use of the firearm while the robbery was being committed. Based upon the evidence, a reasonable inference could be drawn that either appellant or Taylor did the actual shooting. Thus, the death sentence must be vacated.

Benedith, 717 So. 2d at 477.

Major participation and reckless indifference thus are more likely to be found where the defendant possessed a weapon during the felony or supplied the arms used; beat or raped the victim before the homicide; expected violence to erupt; or could have prevented the killing. If, on the other hand, the facts do not establish that the defendant personally possessed or used a weapon during the felony, supplied weapons to a co-felon, personally harmed the victim, or expected violence to erupt during the felony, proof beyond a reasonable doubt that the defendant demonstrated reckless indifference is unlikely.

None of the factors that might establish reckless indifference exist here. Unlike Tison, DuBoise, Diaz, and Perez, neither felony was planned. Wood followed Rafsky into what appeared to be an abandoned farmhouse, after Rafsky kicked in the door.[10] Neither Wood nor Rafsky was armed when they arrived, and there was no evidence that Wood possessed or used a weapon during the crime. There was no evidence Wood anticipated that Rafsky would attack Shores, the record does not even show what precipitated the attack. While Wood tied the already helpless man's ankles, he testified that he did so under duress and out of fear of Rafsky.[11] Further, according to his statement and testimony, Wood refused to light Shores on fire when Rafsky told him to do so and left a phone nearby so that Shores could call for help when he came to. Finally, Wood had no opportunity to prevent the shooting itself, as it happened quickly.

This case is similar to State v. Lacy, 187 Ariz. 340, 929 P.2d 1288 (1996).[12] In Lacy, the defendant went to the victims'

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[10] The evidence showed a shoeprint on the door, whereas Wood told police after his arrest that he was barefoot when he entered the farmhouse after Rasky.

[11] This fear is not unreasonable, given that Rafsky had beat up Wood a few weeks earlier and had just beat Shores unconscious, and given that they were stranded in an isolated area.

[12] The trial court's reliance on Perez v. State, 919 So. 2d 347 (Fla. 2005), is misplaced. In Perez, Perez and Calvin Green cut the phone lines and disabled a security light before entering the home of Perez's wife's aunt, Susan Martin, removed a screen in the garage, entered, and ransacked the house. Martin, who was found just inside the front door, had been stabbed 94 times. Perez, who had been implicated in a previous jewelry theft from Martin's home, was carrying a knife and knew Martin was awake

apartment with his co-defendant to get chemicals to make drugs. While there, his co-defendant argued with the victims and shot one. The defendant claimed that he ran out, taking a microwave with him. When he re-entered the apartment, his co-defendant had tied up the other victim and was shooting her in the head. The defendant stated that he ran away again, and his co-defendant later picked him up and drove him home. The Arizona Supreme Court reversed the death sentence, finding insufficient evidence that the defendant acted with reckless indifference to human life. The only evidence of what occurred inside the apartment was the defendant's statement. According to the court:

> Here, other than what the defendant described, there is little to establish his involvement in the deaths of these young women. We know that, at a minimum, he stole a microwave after one of the murders and did nothing to prevent either victim's death. While this may demonstrate callousness and a shocking lack of moral fiber, it does not alone rise to the level of reckless indifference.

929 P.2d at 1300. The court continued: "We do not suggest that defendant's tale must be accepted a face value. Without his statement, however, we are left with an almost complete void as to what occurred that night." Id. (noting it was unclear whether defendant knew his co-defendant had a gun or should have

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watching television when he entered the house. While Perez denied killing Martin himself, his story changed 6-7 times over the course of three interviews with police. Here, in contrast, there was no planning at all, the farmhouse where the Jeep got stuck was unoccupied and appeared abandoned, neither Wood nor Rasksy was armed, and the shooting itself happened quickly, with no opportunity to stop it.

anticipated violence).

As in Lacy, there is no evidence here as to what occurred on the Shores' property other than Wood's statement and testimony. According to Wood's statement/testimony, Rafsky had assaulted and was already binding Shores' hands when Wood arrived at the back of the house. While Wood did place a shirt around Shores' ankles when Rafsky told him to do so (and possibly punched him), Shores was already incapacitated, probably unconscious, and Wood's actions neither further harmed Shores nor worsened his predicament. Wood also took actions to prevent further harm to Shores, in refusing to burn him and placing a phone nearby so that he could call for help after they left. As in Lacy, one need not believe all or any of Wood's testimony, but, without it, there is little to establish his involvement in Shores' murder. Although he was present and tied Shores' feet--at which time, Wood had no reason to anticipate or expect further violence, as neither he nor Rafsky had any firearms--that conduct alone does not establish reckless indifference.

Wood did not plan the felonies; did not procure the weapon or carry a weapon himself for use in a felony; did not beat, rape, or otherwise incapacitate the victim; had no reason to expect either Rafsky's violent assault or shooting of Shores; and had no time to stop either event, since both happened quickly and without warning.

The term "reckless indifference to human life" means "knowingly engaging in criminal activities known to carry a grave risk of death," Tison, 481 U.S. at 157, and "subjectively appreciating that one's acts were likely to result in the taking of innocent life." Id. at 152. As the judge noted, and as discussed in Issue I, supra, the events that day unfolded from chance event to chance event, moment to moment. They chanced on an abandoned house on an unpaved country road while out four-wheeling; they got stuck in a mud hole in front of the house; Shores by chance drove up; Rafsky, concerned perhaps that Shores would call the sheriff and his outstanding arrests warrants would be discovered, assaulted Shores; Shores' by chance kept guns in his car, providing Rafsky with a murder weapon. But nowhere during the unfolding events is there evidence that Wood himself engaged in actions "known to carry a grave risk of death," Tison, 481 U.S. at 157, nor is there evidence that Wood "subjectively appreciate[d] that [his] acts were likely to result in the taking of innocent life." Id. at 152 (emphasis added). While a highly inculpatory version of the events that day can be imagined, "a mere possibility, or even the likelihood, that [Wood] exhibited reckless indifference is insufficient." See Lacy, 929 P.2d at 1301 (emphasis in original). Reckless indifference must be established beyond a reasonable doubt. Here, the evidence falls short of satisfying that standard. Wood's death sentence cannot

be upheld under Tison.

B. Dixon Proportionality.

As explained in Issue III, infra, the CCP and avoid arrest aggravating circumstances were improperly applied to Wood.

This leaves one valid aggravating circumstance, the felony murder aggravator, the weakest of the aggravating factors. See Rembert v. State, 445 So. 2d 337 (Fla. 1984); Proffit v. State, 510 So. 2d 896 (1987). The felony murder aggravating factor is especially weak in this case, where the burglary involved two young men using the toilet and rifling through an old abandoned house, and the robbery of the car (and its contents) was not planned but was a means of fleeing, given that the defendants' Jeep was stuck in mud. Although Wood participated in the felonies, he was not the instigator or leader. Moreover, Wood's testimony that he felt he had no choice but to do what Rafsky told him is reasonable. Family members and friends testified that Rafsky was abusive and had beaten Wood up recently, a beating corroborated by a photograph. See Defense Exhibit 1. Given Wood's abusive relationship with Rafsky, and the abuse Wood suffered and witnessed as a child, it is reasonable that Wood, a nonviolent, passive-type individual, coming upon Rafsky after he clubbed Shores--a stranger who had done nothing to harm them--while in the middle of nowhere with no place to run or hide, would be afraid for his own safety and life.

The purpose of this Court's proportionality review "is to foster uniformity in death penalty law" and to prevent the imposition of "unusual" punishments. "It clearly is 'unusual' to impose death based on facts similar to those in cases in which the death penalty previously was deemed improper." Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991). Proportionality review thus requires the Court to compare the case with other capital cases. Williams v. State, 437 So. 2d 133 (Fla. 1983). Also, the death penalty is reserved only for cases with the most aggravating and least mitigating circumstances. State v. Dixon, 283 So. 2d 1 (Fla. 1973, cert. denied, 416 U.S. 943 (1974).

This Court has vacated the death sentence in numerous cases where the sole aggravating circumstance was that the murder was committed during a robbery or burglary. See Williams v. State, 707 So. 2d 683 (Fla. 1998)(shooting death of man outside his home); Sinclair v. State, 657 So. 2d 1138 (Fla. 1995)(shooting of taxi driver); Thompson v. State, 647 So. 2d 824 (Fla. 1994) (shooting of subway shop clerk); McKinney v. State, 579 So. 2d 80 (Fla. 1991)(shooting of businessman); Lloyd v. State, 524 So. 2d 396 (Fla. 1988)(shooting in home robbery); Proffit (victim stabbed once during home burglary); Caruthers v. State, 465 So. 2d 496 (Fla. 1985)(shooting of convenience store clerk); Rembert (clubbing during nightclub robbery); Menendez v. State, 419 So. 2d 312 (Fla. 1982)(shooting of jewelry store clerk).

In each of the above-cited cases, the defendant personally killed the victim. Here, in contrast, the evidence points to Rafsky as the person who both beat and killed Mr. Shores. The present case thus is not the most aggravated, and, when compared to the preceding cases, it is clear that more culpable defendants have received sentences of life imprisonment.

Although proportionality review is not a trial court function, the trial judge concluded Wood's sentence is not disproportionate because "[t]he most logical interpretation" is that Wood and Rafsky together, with calculated plan and heightened premeditation, beat Shores, then shot and killed him. R2:217. For the reasons discussed in Issues 1 and 2(A), supra, the trial court's "interpretation" is not the most logical but the most inculpatory of many possible scenarios. However, a mere possibility, even a probability, of guilt (of the offense or of an aggravating factor) is insufficient. Davis v. State, 90 So. 2d 629 (Fla. 1956); Geralds v. State, 601 So. 2d 1157 (Fla. 1982). Proof must be beyond a reasonable doubt.

This case is neither the most aggravated, nor the least mitigated. Accordingly, this Court should reverse Wood's death sentence and remand for imposition of a sentence of life with no possibility of parole.

ISSUE III
THE TRIAL COURT ERRED IN APPLYING (A) THE COLD, CALCULATED, AND PREMEDITATED AND (B) AVOID ARREST AGGRAVATING CIRCUMSTANCES VICARIOUSLY TO WOOD WHERE THE RECORD IS LACKING IN EVIDENCE THAT WOOD EITHER INTENDED SHORES' DEATH OR ASSISTED RAFSKY IN THE SHOOTING.

A trial court's ruling on an aggravating circumstance will be upheld if the court applied the correct rule of law and its ruling is supported by competent, substantial evidence. Williams v. State, 37 So. 3d 187, 962 (Fla. 2010).

A. Cold, Calculated, and Premeditated (CCP)

In order to establish the CCP aggravator, the evidence must show: (1) "the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold);" (2) "the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated);" (3) "the defendant exhibited heightened premeditation (premeditation);" (4) "the defendant had no pretense of moral or legal justification." Franklin v. State, 965 So. 2d 79, 98 (Fla. 2007). "CCP involves a much higher degree of premeditation than is required to prove first-degree murder." Deparvine v. State, 995 So. 2d 351, 381-82 (Fla. 2008)(internal quotation and citation omitted). "Premeditation can be established by examining the circumstances of the killing and the conduct of the accused." Franklin, 965 So. 2d at 98. Further, "the evidence must prove beyond a reasonable doubt that the defendant planned and prearranged to commit murder before the

crime began." Thompson v. State, 565 So. 2d 1311 (Fla. 1990).

Each element must be proved beyond a reasonable doubt. Banda v. State, 536 So. 2d 221, 224 (Fla. 1988), cert. denied, 489 U.S. 1087 (1989). 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 (Fla. 1992); see also Harris v. State, 843 So. 2d 856, 866 (Fla. 2003).

In finding this aggravating factor had been proved beyond a reasonable doubt, the trial court stated, in pertinent part:

> It is undisputed that James William Shores was shot in the head while lying face down with his hands and legs bound. The Victim encountered both Defendant and Rafsky on his property, and while they were in the course of partying and "plundering" his farm house. The defendant was the first to be aware James Shores recorded the immobilized Jeep license tag and was going to call law enforcement. According to the Defendant's version of events, Rafsky and the victim engaged in a struggle, after which the victim lay motionless on the ground after a beating with a garden hoe.
>
> This Court finds Defendant's version of events minimizes his involvement, given that Wood readily admits he may have punched James Shores. The Defendant's claims that the struggle took place while he was elsewhere are not credible, given his differing versions of being near the Jeep or at the mailbox in front of the house.
>
> Defendant asserts the victim was alive while he was lying face down in the backyard. This is corroborated by the opinion of the Medical Examiner. Dr. Michael Hunter observed multiple linear and repeated lacerations on the head and upper torso of the victim consistent with a garden hoe. The garden hoe

was located at the scene with Shores' DNA on the metal end. However, Dr. Hunter opined the garden hoe injuries were not associated with the skull fractures he observed. While Dr. Hunter acknowledged that the attack was prolonged, it was unlikely the victim died from the blunt trauma. No defensive wounds were observed by Dr. Hunter on the victim's body, and he concedes that the victim could have been unconscious after such an attack. The Defendant and Rafsky could have abandoned their purpose at this point and left the scene with the victim still alive. They did not.

Instead, Rafsky and Defendant proceeded to gather chain with which to bind James Shores' hands behind his back. Defendant Wood's DNA is found on the chain found at the scene similar to the chain used to bind Shores' hands behind his back. Defendant secured a shirt from the back porch of the house to bind the victim's legs. According to the Defendant, James Shores was alive and breathing at this point. With the victim incapacitated and unable to free himself, the Defendants could have abandoned their purpose and left the scene with the victim alive. They did not.

According to the Defendant's post-arrest statement, he poured some sort of liquid no the victim, possibly STP gas treatment. Wood stood over the victim's body striking matches in an attempt to light the victim on fire. The matches were too wet and would not light. Mr. Carl Chasteen, Forensic Lab Chief for the Florida Fire Marshal, opined that while STP gas treatment may not be ignitable, there was another ignitable substance found on Shores' clothing. The Court also notes State Exhibit 9-L, depicting the Jeep driven by Defendants with its gas cap open and some sort of residue apparently spilled from the gas tank. The Defendant continued to insist he acted only upon orders an direction of Dillon Rafsky . . . . This Court does not find the Defendant's continued obedience to Rafksy's demands as believable....

Defendant returned to the immovable Jeep and removed the Alabama license tag, while Rafsky retrieved a shotgun from the victim's car and shot him in the upper back and left side of Shores' head. According to Dr. Hunter, the wound and associated material in the victim's skull is consistent with an execution style murder, with the victim lying face down at the time of

the lethal gunshot. The defendant placed the Alabama tag in the trunk of the victim's car and the two left the premises in order to return to Alabama.

This Court finds the cold killing of James Shores was done in an execution-style, after cool reflection . . . Additionally, after the victim was bound and incapacitated, the Defendant Wood armed himself with what he believed to be an ignitable liquid and struck matches in an attempt to burn James Williams Shores.

The second prong of CCP, namely "calculated," is satisfied ... by the subsequent efforts to burn Shores, and the unimpeded actions of Rafsky and the lethal gun shot blast to James Shores' skull. In both instances the Defendant Wood and Rafsky utilized items found on the property to accomplish their developing plans. after a series of events extended over an ample period of time, they bound the victim's hands and feet, attempted to burn him to death, and ultimately took his life with a single shotgun blast to Shores' head.

The record also supports a finding of "heightened premeditation" ... After the brutal beating, the Defendant bound the victim to ensure Shores would not escape. After the hoe attack, and with full knowledge that the Defendants had been seen by Shores, Wood did nothing to implore Rafsky to stop, nor did he impede Rafsky in any manner. Instead, Wood continued his participation in the ultimate killing of Shores. During this period Wood had the presence of mind to remove the license tag and place it in the trunk of the victim's car. . . in the period before the final gunshot, Wood had ample time to reach into the Jeep glove box, leaving inside traces of Shores' DNA along with his. It is a reasonable inference Wood was looking to remove other identifying evidence or things of value from the glove box. It is equally reasonable to conclude that as Wood was wearing gym shorts, his wallet may have been placed in the Jeep at the time of these events.

. . . .

At trial the Defendant argued he acted out of duress for fear of what Rafsky might do to him or to his family. Wood claimed his fear was real given he had been beaten by Rafksy earlier in the month and that he had been shot in the leg by Rafksy the day before.

The facts adduced at trial do not support such a claim. The Defendant is of similar age and size with Dillon Rafsky. The fear of being shot again (if that in fact did happen) is unreasonable given that the gun alleged to have been used by Rafsky was sold prior to arriving at the Shores' property. Additionally video of Defendant immediately after the Shores' murder does not indicate any limp or difficulty walking. The evidence gives rise to a reasonable inference that any gunshot wound suffered by Wood was as a result of the subsequent gunfight between defendant and Alabama State Trooper Marcel Phillips. The bullet fragments remain in Defendant's leg and have not been removed due to medical necessity. The Court determines that any perceived threat by Wood was not real, imminent or impending at the time of Shores death.

The Court pauses to address the Defendant's ever-evolving statements as to what he claims transpired at the scene. Forensic evidence as presented before the jury indicates neither Defendant nor Rafsky's DNA was found on the splintered handle of the garden hoe, yet the Defendant admits to using the hoe to at one point attempt to dig out the Jeep from the mud. The STP gas treatment bottle cap found does not indicate the presence of Defendant's DNA, yet by Wood's admission he poured something on the victim's body. . . . the Court notes while DNA belonging to Rafsky was found on the shotgun, it is likely that there may have been other DNA otherwise not recoverable.... Not only does the Court reject Defendant's self-serving statements minimizing his involvement and placing blame against Rafsky, the Court also rejects Defendant's claim that he had no knowledge Rafsky was going to shoot Shores, or if Rafsky even did so.... The overwhelming evidence does not support the Defendant's version of critical facts.

The circumstances surrounding the continuing series of events leads this Court to apply this aggravator vicariously to both Defendant Wood and Rafsky, as both were engaged in the attempted burning of the live victim and his subsequent death by gunshot. Howell v. State, 707 So. 2d 674 (Fla. 1998).

The record clearly demonstrates the defendant acted without provocation. At no time did the defendant abandon the plan. The Court determines the

> four part test has been demonstrated by the totality of the circumstances, and proven beyond every reasonable doubt. The aggravating circumstance of CCP is established by competent and substantial evidence.

R2:205-08.

As discussed in Issue I, supra, the evidence failed to establish simple premeditation, as intent to kill cannot be inferred from any of Wood's conduct, including the possible punch after Rafsky alone beat Shores unconscious, tying the already-helpless man's ankles, and refusing to set Shores on fire. For the same reason, the evidence failed to establish CCP.

Furthermore, the trial court's findings are based not on competent evidence but on a misapprehension of the facts, rank speculation, and inferences not supported by any evidence.

First, no evidence was presented that Wood's DNA was on any chain found at the scene. Second, the trial court's finding that Wood "likely" reached into the glovebox to remove identifying information or items of value is pure speculation, as no evidence was presented to explain Wood's and Shores' DNA on the glovebox. There are many possible explanations for both mens' DNA on the glovebox, including that the transfer occurred when Wood looked in the glovebox for a screwdriver to remove the screws from the license plate, which were sitting on the bumper.

Next, the trial court's conclusion that the element of "calculation" is satisfied by "Wood's efforts to burn Shores" must be rejected because there is no competent, substantial

evidence that Wood tried to burn Shores. The trial court's finding that Wood failed to light Shores on fire because the matches were too wet is pure speculation. In his statement and testimony, Wood said he made certain the matches would not light. The state presented no evidence that contradicts Wood's statement, and, while the trial judge is not required to believe Wood's statement, without it, there is no evidence to establish his connection to the matches or anything else that occurred.

The trial court's conclusion that the "cold" element is satisfied because the shooting was done "execution-style," and the elements of "calculation" and "heightened premeditation" are satisfied because Wood "did nothing to implore Rafsky to stop, nor did he impede Rafsky in any manner" also must be rejected. The elements of CCP require an examination of the "conduct of the accused," not a co-perpetrator. See Franklin, 965 So. 2d at 98. The elements of CCP may properly be applied to Wood, then, only if the evidence shows Wood committed the crime after calm reflection, Wood had a careful plan to commit murder before the crime began, and Wood exhibited heightened premeditation. See Franklin, 965 So. 2d at 98. Here, while these elements may exist as to Rafsky, Rafsky's state of mind cannot be attributed to Wood merely because Wood was present and failed to stop him from committing the crime. Failure to stop Rafsky from committing the crime does not itself constitute criminal behavior, much less

establish CCP as applied to Wood.

This Court has held the especially heinous, atrocious, or cruel aggravating factor cannot be applied vicariously to a principal if there is a possibility the defendant did not directly cause or have knowledge or control over the manner of death. See Perez v. State, 919 So. 2d 347, 380 (Fla. 2005); Archer v. State, 613 So. 2d 446 (Fla. 1993); Omelus v. State, 584 So. 2d 563 (Fla. 1991). Here, as noted above and argued in Issue I, supra, the evidence suggests that Rafsky was in all probability the actual shooter, and there is no competent, substantial evidence establishing that Wood was either the shooter or a principal to the shooting. For the same reason Wood's conviction of premeditated murder cannot be sustained, the CCP aggravator cannot be sustained. No facts establish that Wood intended Shores' death, much less that he had "a cold-blooded intent" that was contemplative, methodical, or controlled.

Finally, the trial court's conclusion that any perceived threat by Rafsky was "not real or imminent" ignores undisputed evidence and is based on speculation and personal opinion. That Wood and Rafsky were of similar age and size does not prove Wood had no reason to fear Rafsky. Violent bullies come in all sizes, as do submissive, peaceful individuals. Rafsky had beaten Wood the previous month. Wood's family members and friends testified that the relationship was abusive and that he feared Rafsky.

Furthermore, that Wood was unable to prove the bullet in his thigh did not come from Trooper Phillips' gun is irrelevant. A failure to prove that Fact A exists does not prove that Fact A does not exist.

The CCP aggravating circumstance cannot be applied vicariously to Wood, and the trial court erred in instructing the jury on the CCP aggravating circumstance.

B. Avoid Arrest

In finding this aggravator, the trial judge stated, in pertinent part:

> This Court is mindful that where the victim is not a law enforcement officer, the evidence must be "very strong" to prove that the dominant motive for the killing was to eliminate a witness. Mere speculation cannot support this aggravator. Looney v. State, 803 So. 656 (Fla. 2001).
>
> The circumstantial evidence in this case demonstrates neither Defendant Wood nor Rafsky wore masks or gloves. Wood punched the victim. Shores was brutally attacked by a garden hoe and was bound by Defendant Wood and Rafsky using a chain and a shirt. Defendants were not prevented from leaving the property, as Shores was subdued. Once in a position to offer no resistance or threat, an ignitable liquid was poured on Shores with Wood standing over his body striking matches to set him on fire. As the attempt to burn Shores failed, Defendants used the victim's shotgun to inflict a lethal gunshot to his skull.
>
> Defendant Wood admits to removing the license tag from the Jeep and placing it into the trunk of victim's car. Defendant went into the glove compartment after physically touching Shores, probably looking for Wood's misplaced wallet so as to avoid leaving his personal identification. Defendant's wallet was later found by law enforcement in the luggage area after the Jeep was towed to the Washington County Sheriff's Office. Wood

> later removed the gym shorts he wore at the scene and tossed them out on the highway. Wood's clothing was never recovered.
>
> The Court relies upon the similar facts in Willacy v. State, 696 So. 2d 693 (Fla. 1997), as it finds the existence of this aggravator. As such, this Court finds the circumstantial evidence of defendants' actions leads to an inference that the primary purpose of the killing of James William Shores was to avoid detection and arrest. The Court finds beyond all reasonable doubt that the supporting evidence establishes this aggravating circumstance and gives it great weight.

R2:211.

As the trial court recognized, for this aggravator to be sustained, proof of the perpetrator's intent to avoid arrest must be very strong; mere speculation cannot support the avoid arrest aggravator. See Williams v. State, 37 So. 3d 187 (Fla. 2010).

Here, as argued in Issues 1, 2, and 3(A), supra, the record is devoid of competent, substantial evidence establishing that Wood intended Shores' death or assisted Rafsky in the fatal shooting. Because there was a warrant for Rafsky's arrest in Holmes County, and Shores had mentioned calling the sheriff to help get the Jeep unstuck, one could surmise that Rafsky's motive in attacking Shores was to avoid arrest. One could also surmise that after Rafksy knocked Shores' unconscious with the hoe, his motive for shooting him in the head was to eliminate him as a witness to the beating. Given the dearth of evidence that Wood was involved in either the beating or the shooting, Rafsky's motives cannot logically or legally be attributed to Wood.

The avoid arrest aggravating factor cannot be applied vicariously to Wood, and the trial court erred in instructing the jury on avoid arrest.

ISSUE IV
THE TRIAL COURT ERRED IN REJECTING AS MITIGATING WOOD'S (A) DRUG ABUSE HISTORY AND (B) REMORSE.

The trial judge erred in failing to find Wood's drug/alcohol history and remorse as mitigating, despite ample evidence to support each of them. The trial judge's evaluation of these mitigating circumstances was legally or factually erroneous and deprived Wood of a fair sentencing hearing.

A mitigator is supported by the evidence "if it is mitigating in nature and reasonably established by the greater weight of the evidence." Ferrell v. State, 653 So. 2d 367 (Fla. 1995). The trial court must find a mitigating circumstance has been proven if it is supported by a reasonable quantum of competent, uncontroverted evidence. Nibert v. State, 574 So. 2d 1059 (Fla. 1990). The trial court may reject a mitigating circumstance only if the record contains competent, substantial evidence to support that rejection. Mansfield v. State, 758 So. 2d 636 (Fla. 2000).

The applicable standards of review are as follows:

> 1) Whether a particular circumstance is truly mitigating in nature is a question of law and subject to de novo review by this Court; 2) whether a mitigating circumstance has been established by the evidence in a given case is a question of fact and subject to the competent substantial evidence standard . . . .

Blanco v. State, 706 So. 2d 7, 10 (Fla. 1997).

A. Wood's Substance Abuse History

In rejecting Wood's drug and alcohol abuse as mitigating, the trial court wrote:

> Family, friends, and [] Wood's admission all demonstrate defendant's extensive drug use. According to defendant, methamphetamine and pain pills were his drug of choice. He reported that methamphetamine made him feel significant energy and no pain. Defendant also abused alcohol and other prescription drugs. Wood testified that using "meth" would make feel like he could do things he normally would not do. However, according to one of defendant's friends, Wood appeared to be the same person sober as when he was high.
>
> Defendant's brother, Matthew Walker, testified drug abuse had always been a factor in their family. Defendant's sister, Heather Griffin, admitted to not realizing just how badly Defendant was abusing drugs. Relative Jeffrey Wood testified that he and his family welcomed defendant into their home to assist with his college participation. Their expectations were very high for Defendant. Defendant later left their residence after dropping out of college. [Kacia] Kinman, a friend of defendant since middle school, testified that she saw Wood about a "month or two" before his arrest. According to Kinman, defendant told her he was trying to get clean.
>
> Notwithstanding, defendant's drug abuse was evident on the date of Shores' murder. Both he and Rafsky were eating methamphetamine just before they were discovered by James Shores. There is no evidence to suggest Wood's continued drug abuse lessens his moral culpability. On the contrary it appears to have emboldened him. Defendant does not claim his drug use made him participate in the murder. Likewise, there is no evidence defendant's past drug and alcohol abuse caused any mental deficiencies tending to mitigate his role in the murder. This mitigating factor has not been proven, and the Court assigns no weight thereto.

R2:215.

The trial judge concluded Wood's drug abuse history, though

established,[13] was not mitigating because there was no evidence his drug abuse lessened his culpability. This was error.

The definition of mitigating is extremely broad. A mitigating circumstance is anything "that, in fairness or in the totality of the defendant's life or character, extenuates or reduces the degree of moral culpability for the crime committed or that reasonably serves as a basis for imposing a sentence less than death." Crook v. State, 813 So. 2d 68, 74 (Fla. 2002)(emphasis added); see also Jones v. State, 652 So. 2d 346, 351 (Fla. 1995). There is no requirement that mitigation have a nexus to the offense. Cox v. State, 819 So. 2d 795 (Fla. 2002); see also Smith v. Texas, 543 U.S. 37, 44-45 (2004)(rejecting "nexus" requirement and reiterating that only relevant question is whether proposed mitigation would give jury "a reason to impose a sentence more lenient than death"). There is no requirement that mitigation relate specifically to the defendant's culpability. See, e.g., Skipper v. South Carolina, 476 U.S. 1 (1986)(defendant's good behavior in jail while awaiting trial is mitigating, for while any favorable inferences jurors might draw from such evidence would not relate

[13] The PSI further notes that Wood was prescribed medication for depression and anxiety at age 22, including Lithium, Remeron, Respiradol, and Trazadone; that Crenshaw Community Hospital records confirm prescriptions and substance abuse at his admission in 2012; and that Wood overdosed on Percoset and Xanax while traveling by plane, and the pilot had to make an emergency stop in Charlotte, NC, so he could be hospitalized. R1:181-88.

specifically to the defendant's culpability for the crime committed, such inferences would be "mitigating" in that they might serve as bases for a sentence less than death). Finally, this Court has long held that a history of drug and alcohol abuse is mitigating in nature. E.g., Mahn v. State, 714 So. 2d 391 (Fla. 1998); Clark v. State, 609 So. 2d 513 (Fla. 1992); Ross v. State, 474 So. 2d 1170 (Fla. 1985).

The trial court erred in failing to give Wood's history of substance abuse appropriate weight as a mitigating circumstance.

B. Wood's Remorse

In rejecting Wood's remorse as a mitigating factor, the trial court stated:

> Defendant testified at the Spencer hearing that "there was no reason to kill Shores." However, the Court noted at the same hearing that Defendant presented himself with a new tattoo of a teardrop beneath his left eye. When questioned whether he knew that such a tattoo is gang related with a meaning someone had been killed, he responded that he did not know that. Wood claims that the tattoo was in memory of a family member. The Court also considers the previously ordered Pre-Sentence Investigation wherein Defendant attached a 4-page handwritten letter to the Court. Wood expresses that "April 19 2014 was the worst thing I have ever experienced." While the letter continues to justify Wood's defense at trial, he goes on to state, "yet again I feel as if it was my fault," and that he is "sorry for what happened." Defendant has testified that he "wants the death penalty," but that statement is more to do with what he perceives may happen in prison rather than true remorse for his actions. This mitigating circumstance has not been established.

R2:216.

Remorse is a mitigating factor. See, e.g., Ault v. State, 53 So. 3d 175, 193 (Fla. 2010). The only question, then, is whether the evidence established Wood's remorse by the greater weight of the evidence. Wood told the Shores' family at sentencing that he was sorry, that if he could change things from that day, he would, and that his heart breaks every time he thinks of Mr. Shores. He made similar statements in his letter to the court, including that he felt it was his fault. R1:189-92. Despite these heartfelt statements, the judge rejected remorse as a mitigating circumstance because Wood got a teardrop tattoo. Wood testified that his tattoo meant he had lost someone he loved while incarcerated, and that he learned after he got the tattoo that, in Florida, a teardrop tattoo can mean that you killed someone.[14] No other evidence was presented regarding the tattoo. Accordingly, the trial judge's rejection of remorse as a mitigating circumstance is not supported by competent, substantial evidence. That Wood continues to assert that he did not intend or cause harm to Mr. Shores, yet still feels responsible, also is not a valid basis for rejecting his remorse as a mitigating circumstance. People often feel responsible when they fail to prevent a tragedy. Heather Griffin, Wood's sister,

[14] Wikipedia confirms that the "teardrop tattoo" can have various meanings: "It can signify that the wearer has killed someone or has spent time in prison; that the wearer was raped while incarcerated, or it can acknowledge the loss of a family or fellow gang member. Sometimes, only the wearer will know the exact meaning of the tattoo."

feels responsible for Wood's criminal conduct and drug problem because she raised him. Family and loved ones of suicide victims often feel responsible, believing they could have done something to prevent the suicide. People look back at the chain of events leading to a tragedy and wonder if they could have said or done something that would have altered the outcome. Here, that Wood feels responsible for setting Rafsky off by telling Shores that calling the sheriff was a good idea, and for not knowing how to stop Rafsky, is reasonable. The record shows that Wood felt genuine remorse for his role in the crime. This mitigating circumstance was proved by the greater weight of the evidence, and the trial court did not cite competent, substantial evidence to support its rejection. The trial court erred in not giving Wood's remorse mitigating weight.

ISSUE V
WOOD'S DEATH SENTENCE MUST BE VACATED UNDER HURST V. FLORIDA, 136 S. Ct. 616 (2016).[15]

Because no jury found all the facts necessary to impose a death sentence under Florida law, Wood's death sentence was imposed in violation of his Sixth Amendment right to trial by jury. This defect is structural and not amenable to harmless error analysis. Wood's death sentence must be vacated and remanded for imposition of a life sentence.

Hurst v. Florida

In Hurst, the United States Supreme Court held Florida's capital sentencing scheme unconstitutional because the "Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." 136 S. Ct. at 619. As the Court explained, this holding followed from its decisions in Apprendi v. New Jersey, 530 U.S. 466, 494 (2000), and Ring v. Arizona, 536 U.S. 584 (2002). In Apprendi, the Court held that any fact that "expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict" is an "element" that must be submitted to a jury. In Ring, the Court held that Arizona's capital sentencing statute violated the Apprendi rule because it "allowed a judge to find the facts necessary to sentence a defendant to death." Hurst, 136 S. Ct. at 621. Under Arizona's law, a defendant convicted of first-

[15]This issue was preserved. R1:53-55.

degree murder could not be sentenced to death unless further findings were made by a judge, specifically, at least one aggravating circumstance. Because the finding of an aggravating circumstance exposed Ring to a greater punishment than that authorized by the jury's guilty verdict, Ring's death sentence violated "his right to have a jury find the facts behind his punishment." Id.

The Court had little difficulty concluding that Hurst's death sentence also violated the Sixth Amendment. The Court noted that under Florida's scheme, a person convicted of a capital felony shall be punished by death only if an additional sentencing proceeding "results in findings by the court that such person shall be punished by death." s. 775.082(1), Fla. Stat. (2010). Otherwise, such person shall be punished by life without parole. Although the jury renders an advisory recommendation--without specifying the factual basis for its recommendation--the court, after weighing aggravating and mitigating circumstances, imposes sentence, and if the court imposes death, it must "set forth in writing its findings upon which the sentence of death is based." s. 921.141(3). Id. at 620. Thus, Florida, like Arizona, "does not require the jury to make the critical findings necessary to impose the death penalty." Id. at 622.

Florida's sentencing statute requires more than the finding of a single aggravating factor to impose death, however:

> [T]he Florida sentencing statute does not make a defendant eligible for death until "findings *by the court* that such person shall be punished by death." Fla. Stat. s. 775.082(1)(emphasis added). The trial court *alone* must find "the facts ...[t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." s. 921.141(3).

136 S. Ct. at 622. The "critical findings necessary to impose the death penalty" in Florida, then--which must be found by jury--are whether "sufficient aggravating circumstances exist" and whether "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Id.

Wood's Case

The trial judge sentenced Wood to death for first-degree murder, finding three aggravating factors: (1) the capital felony was committed in a cold, calculated, and premeditated manner; (2) the capital felony was committed during the commission of a burglary or robbery; (3) the capital felony was committed for the purpose of avoiding arrest. The judge described the particular facts he believed established each of the aggravating factors. The judge further found that the aggravating circumstances outweighed the mitigating circumstances. The jury, after being instructed as to its advisory role, returned an advisory recommendation of death by a 12-0 vote. As with Hurst, a trial judge increased Wood's authorized punishment based on his own factfinding. Wood's death sentence was thus imposed in violation of the Sixth Amendment.

The Constitutional Defect Identified in Hurst is Structural and Not Amenable to Harmless Error Analysis.

As discussed above, the constitutional defect in Wood's death sentence is that the judge, rather than a unanimous jury, determined "the facts necessary for imposition of death," that is, "that sufficient aggravating circumstances exist" and "that there are insufficient mitigating circumstances to outweigh the aggravating circumstances."

This defect is structural and not subject to harmless error review because the absence of a jury determination of elements of an offense is a "defect affecting the framework within which the trial proceeds," see Arizona v. Fulminante, 499 U.S. 279, 310 (1986), rather than an error that occurs "during the presentation of the case to the jury, and which may therefore be quantitatively assessed." See id. at 307-08. The Hurst defect is structural because it deprives defendants of a "basic protectio[n] without which a [capital] trial cannot reliably serve its function." Sullivan v. Louisiana, 508 U.S. 275, 281 (1993). The structural nature of a Hurst defect is further underscored by what Justice Scalia called the "illogic of harmless-error review." See Sullivan 508 U.S. at 280. Because Florida's statute is defective in that it does not allow for a jury verdict on the necessary elements for a death sentence to be imposed, "the entire premise of [harmless error] review is simply absent." See id. Harmless error analysis requires the reviewing

court to determine "not whether, in a trial that occurred without the error, a [jury fact-finding of sufficient aggravating circumstances] would have been rendered, but whether the [death sentence] actually rendered in trial was surely unattributable to the error." Id. Because there are no jury findings on the requisite aggravating circumstances, it is not possible to review whether such findings would have occurred absent the Hurst error. In such cases:

> There is no object, so to speak, upon which harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury *would surely have found* petitioner guilty [of the aggravating circumstances] beyond a reasonable doubt–not that the jury's actual finding of guilty [of the aggravators] beyond a reasonable doubt *would surely not have been different* absent the constitutional error. This is not enough. The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal. It requires an actual jury finding of guilty [of the aggravators].

Sullivan, 508 U.S. at 280. For this Court "to hypothesize a [jury's finding of aggravating circumstances] that was never rendered--no matter how inescapable the findings to support the verdict might be–would violate the jury-trial guarantee." See id. at 279.

Justice Anstead summed up the harmless-error barrier best in his concurrence in Bottoson v. Moore, 833 So. 2d 693, 708 (Fla. 2002)(Anstead, J., concurring), abrogated by Hurst:

> [C]ompared to our ability to review the actual findings of fact made by the trial judge, there could hardly be

> any meaningful appellate review of a Florida jury's advisory recommendation to a trial judge since that review would rest on sheer speculation as to the basis of the recommendation, whether considering the jury collectively or the jurors individually. In other words, from a jury's bare advisory recommendation, it would be impossible to tell which, if any, aggravating circumstances a jury or any individual juror may have determined existed. And, of course, a "recommendation" is hardly a finding at all.

See also Combs v. State, 525 So. 2d 853, 859 (Fla. 1988)(Shaw, J., specially concurring)("the sentencing judge can only speculate as to what factors the jury found in making its recommendation"); Johnson v. State, 53 So. 3d 1003, 1007-08 (Fla. 2010)(dispensing with harmless error analysis based on "sheer speculation"), as revised on denial of rehearing (Fla. 2011).

Hurst error simply cannot be quantified or assessed because the record is silent as to what any particular juror, much less a unanimous jury, actually found.

In the present case, for example, the jury was instructed on three aggravating circumstances. While the Court could conclude that the jury unanimously found the felony-murder aggravator based on its verdicts of guilt of the underlying felonies, it is impossible to tell whether any particular juror, much less a unanimous jury, found the CCP aggravator or the avoid arrest aggravator or both of them. Likewise, while the 12-0 advisory recommendation indicates all the jurors found the mitigation did not outweigh the aggravation, there is no way of knowing which combination of aggravating factors any particular juror found

sufficient to impose death, much less whether a unanimous jury found the same combination of aggravating factors sufficient to impose death. For example, it is possible that four jurors did not find avoid arrest but determined that CCP and felony-murder were sufficient to impose death; four other jurors did not find CCP but found avoid arrest and felony-murder were sufficient to impose death; and the remaining four jurors found neither CCP nor avoid arrest but determined that felony-murder alone was sufficient to impose death. This scenario, as well as many other possible scenarios, would not satisfy the Sixth Amendment, which as Hurst has now made clear, requires a unanimous jury to find beyond a reasonable doubt "each fact necessary to impose the sentence of death."

Because the determination of what constitutes "sufficient" aggravating circumstances" to impose a sentence of death is highly subjective, vastly different from the objective, discrete elements at issue in Ring, and because the jury renders only a general advisory verdict, it is impossible to deduce what the advisory jury might have found. As Judge O.H. Eaton elaborated:

> The role of the jury during the penalty phase under the Florida penalty scheme has always been confusing. The jury makes no findings of fact as to the existence of aggravating or mitigating circumstances, nor what weight should be given to them, when making its sentencing recommendation. The jury is not required to unanimously find a particular aggravating circumstance exists beyond a reasonable doubt. It makes the recommendation by majority vote, and it is possible that none of the jurors agreed that a particular

> aggravating circumstance submitted to them was proven beyond a reasonable doubt. The jury recommendation does not contain any interrogatories setting forth which aggravating factors were found, and by what vote; how the jury weighed the various aggravating and mitigating circumstances; and, of course, no one will even know if one, more than one, any, or all the jurors agreed on any of the aggravating and mitigating circumstances.

Aguirre-Jarquin v. State, 9 So. 3d 593, 611 (Fla. 2009)(Pariente, J., specially concurring)(quoting Judge Eaton's sentencing order).

According, because the jury's advisory verdict is devoid of evidence of the jury's factfinding, the constitutional error identified in Hurst is structural, precluding harmless-error review and requiring that Wood's death sentence be vacated.

The Caldwell v. Mississippi Problem

Even if harmless-error analysis could be applied to a Hurst defect,[16] the Court can place little or no weight on the jury's advisory recommendation, given that Wood's jury was instructed dozens of times that its recommendation was advisory only, thus diminishing its responsibility in violation of Caldwell v.

[16] If there were no Caldwell problem, harmless error analysis could be applied to a Hurst defect in only one situation, where the jury was instructed on only one aggravating circumstance, either the felony-murder aggravator in which the jury found the underlying felony or felonies by its verdict, or the prior violent felony aggravator, where a different jury found the prior felony by its verdict, and the jury unanimously recommended death. In that situation, a reviewing court could conclude that a unanimous jury found the single aggravator, determined that it was sufficient for death, and that the aggravator was not outweighed by the mitigating circumstances. Of course, death sentences in single-aggravator cases are rarely, if ever, upheld under this Court's proportionality review.

Mississippi, 472 U.S. 320 (1985). In Caldwell, where the prosecutor told the jury that its sentencing decision was automatically reviewed by the state supreme court, the United States Supreme Court vacated Caldwell's sentence, holding that "it is constitutionally impermissible [under the Eighth Amendment] to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U.S. at 328-29. That a jury's role has been diminished by the judge, rather then counsel, weighs even more heavily in favor of reversal. See Boyde v. California, 494 U.S. 370, 384 (1990)(argument of counsel is "likely viewed as the statements of advocates," as distinct from jury instructions, which are "viewed as definitive and binding statements of law"); Bollenbach v. United States, 326 U.S. 607, 612 (1946)("The influence of the trial judge on the jury is necessarily and properly of great weight...Particularly in a criminal trial, the judge's last word is apt to be the decisive word").

Indeed, following Ring, members of this Court observed that Florida's instructions minimizing the advisory role of the jury might be unconstitutional. In Combs, 525 So. 2d at 856-57, this Court rejected a Caldwell claim because, unlike the prosecutor's misleading argument in Caldwell, the challenged Florida jury instruction accurately reflected the jury's advisory role. But

in so doing, the Court acknowledged that if the jury's verdict were not merely advisory, the Court "would necessarily have to find that [Florida's] standard jury instructions, as they have existed since 1976, violate the dictates of Caldwell," thereby requiring "resentencing proceedings for virtually every individual sentenced to death in this state since 1976." Id. at 858 (internal quotations omitted).

In the present case, the jurors were told again and again, by both the judge and the prosecutor, that their role was only advisory--a recommendation. The effect of this instruction, though it accurately identified the role of the jury under Florida law, was to undermine the reliability of the jury's deliberative process, thereby presenting an additional barrier to reading anything into the jury's recommendation. The reasoning in Caldwell is straightforward and applies with equal force to the defect identified in Hurst. As the Court observed, it "has taken as a given that capital sentencers would view their task as the serious one of determining whether a specific human being should die at the hands of the State." Caldwell, 472 U.S. at 329. Where the jury is improperly told that it may shift responsibility to another entity--here, the trial judge[17]--there are "specific reasons to fear substantial unreliability as well

[17] See Fla. Std. Jury Inst. 7.11(2)("As you have been told, the final decision as to which punishment shall be imposed is the responsibility of the trial judge...as the trial judge, that responsibility will fall on me.")

as bias in favor of death sentences." Id. at 330. Several of those reasons are relevant here. First, jurors instructed that their role is only advisory might choose to "send a message" of disapproval by recommending a death sentence, even when they have not made the requisite findings of fact to expose the defendant to such a sentence, id. at 331, their consciences relieved by the assurances made by the court and the prosecutor that the judge is the ultimate sentencer. Second, informing jurors that responsibility for fact finding will lie with the trial judge "presents an intolerable danger that the jury will in fact choose to minimize the importance of its role. Indeed, one can easily imagine that in a case in which the jury is divided on the proper sentence, the presence of [judicial] review could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in." Id. at 333 (because jurors in capital cases find themselves swimming in very uncomfortable waters and are given substantial discretion to determine whether another should die, a minimizing role is "highly attractive").

In short, denigrating the role of the jury is likely to have an adverse consequence on the reliability of the jury's deliberative process and, thus, its recommendation. A reviewing court therefore cannot assume that the recommendation actually reflects factual findings of any one juror, let alone all of them

collectively. Accordingly, this Court cannot give any weight to the jury's unanimous recommendation, which in addition to violating the Sixth Amendment, carries with it none of the hallmarks of reliability required under the Eighth Amendment.

Remand for a Life Sentence is Required Under section 775.082(2), Florida Statutes.

Section 775.082(2), Florida Statues, provides:

> In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1).

After the United States Supreme Court ruled that Florida's capital sentencing scheme was unconstitutional in Furman v. Georgia, 408 U.S. 308 (1972), but while a petition for rehearing was pending, this Court addressed the provision now identified as section 775.082(2) and said:

> We have given general consideration to any effect upon the current legislative enactment to commute present death sentences to become effective October 1, 1972. The statute was conditioned upon the very holding which has now come to pass by the U.S. Supreme Court in invalidating the death penalty as now legislated. It is worded to apply to those persons already convicted without recommendation of mercy and under sentence of death.

Donaldson v. Sack, 265 So. 2d 499, 505 (Fla. 1972).

Subsequently, after the petition for rehearing in Furman was denied, this Court, citing Donaldson, determined that it should

impose life sentences in all the cases in which death sentences had been imposed under the capital sentencing scheme held unconstitutional in Furman. Anderson v. State, 267 So. 2d 8, 9-10 (Fla. 1972); see also Walker v. State, 296 So. 2d 27, 30 (Fla. 1974)(legislature intended in section 775.082(2) to require life imprisonment in the event Florida's death penalty was declared unconstitutional).

In Furman, the narrowest of the majority's opinions were authored by Justices Stewart and White. 408 U.S. at 375 (Burger, C.J., dissenting). "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." Ventura v. State, 2 So. 3d 194, 206 (Fla. 2009), citing Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976). Justices Stewart and White joined the majority in Furman based on their belief that the death penalty was enforced "wantonly" and "freakishly" against "a capriciously selected random handful," 408 U.S. at 309-10 (Stewart, J., concurring), on each occasion by a jury acting "in its discretion...no matter what the circumstances." 408 U.S. at 314 (White, J., concurring). The gravamen of Furman was that unguided decision-making in capital sentencing violated the Eighth Amendment.

In Hurst, the Court held that Florida's capital sentencing

scheme violates the Sixth Amendment guarantee of trial by jury, in that the jury's discretion, though guided by post-Furman statutes setting out permissible aggravating factors, is usurped by judges having the final say in finding the facts underlying a death sentence. As in Furman, the Court in Hurst struck down a capital sentencing scheme because of a serious defect in the process by which those who will suffer the death penalty are selected. In both situations, the existing death penalty was held unconstitutional. In Anderson, this Court held the law now codified as section 775.082(2) dictated how to deal with death sentences imposed under the pre-Furman scheme, since the Legislature made it clear what its preference would be in the event the scheme was ruled unconstitutional as currently legislated. This Court should follow the precedent set in Anderson.

Accordingly, this Court should vacate Mr. Wood's sentence and remand his case for the imposition of a life sentence.

CONCLUSION

Appellant respectfully asks this Honorable Court to reverse and remand this case for the following relief: Issues 2 and 5, vacate the death sentence and remand for imposition of a life sentence; Issues 3 & 4, vacate the death sentence and remand for resentencing.

CERTIFICATE OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by electronic mail to Berdene Beckles, Assistant Attorney General, Appeals Division, The Capitol, PL-01, Tallahassee, FL, 32399-1050, at Capapptlh@myfloridalegal.com as agreed by the parties, and by U.S. mail to appellant, Zachary Wood, #Q30086, F.S.P., 7819 N.W. 229th St., raiford, FL 32026, on this 15th day of February, 2016.

I hereby certify that this brief has been prepared using Courier New 12 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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