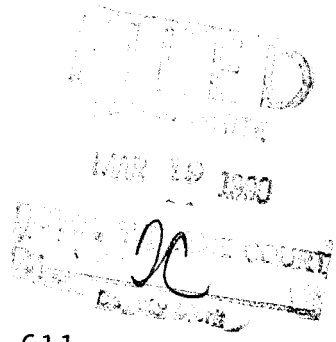
IN THE SUPREME COURT OF FLORIDA



VERNON RAY COOPER,

Appellant,

v. CASE NO. 74,611

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR ESCAMBIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Vernon Ray Cooper was convicted of first degree murder and robbery on June 21, 1974. Following the jury's recommendation that the death penalty be imposed, the trial court sentenced Appellant to death. The Florida Supreme Court affirmed the convictions and sentence of death in **Cooper v. State**, 336 So.2d 1133 (Fla. 1976), **cert. denied**, 431 U.S. 925 (1977). At 336 So.2d 1136, the court detailed the facts presented at trial upon which the jury returned its verdict. Cooper sought post-conviction relief in the trial court which was denied and said denial was affirmed in **Cooper v. State**, 437 So.2d 1070 (Fla. 1983), **cert. denied**, 464 U.S. 1073 (1984). In **Cooper v. Dugger**, 526 So.2d 900 (Fla. 1988), this Court, in reviewing Cooper's "**Hitchcock**" claim, held that the State had not demonstrated that the error in this case was harmless beyond a reasonable doubt and therefore vacated the death sentence and remanded the cause for a new sentencing proceeding before a jury. **Cooper v. Dugger**, 526 So.2d at 903. On February 27, 1989, to March 3, 1989, a new sentencing proceeding was held before the Honorable Nicholas P. Geeker, in the Circuit Court in and for Escambia County, Florida. Following extensive testimony from witnesses for the State and the defense, the jury returned a 6-6 vote, thus resulting in a life recommendation. (TR 1080). The trial court, on July 28, 1989, overrode the jury's recommendation of life and found that:

> In this case the sentence of death is so clear and convincing that virtually no reasonable person could differ, and a jury override in light of the standard pronounced in **Tedder v. State**, 322 So.2d 908 (Fla.

> 1975), would be warranted. **White v. State**, 403 So.2d 331, 340 (Fla. 1981).

(TR 1148).

The trial court found four statutory aggravating factors proven beyond a reasonable doubt. Specifically:

> (1) The crime, for which the defendant is to be sentenced was committed while defendant was under a sentence of imprisonment, viz., on parole from the state of Alabama for two 1966 armed robbery convictions and on parole from the United States of America for one 1966 Dyer Act conviction.
>
> (2) The defendant has been previously convicted of a felony involving the use or threat of violence of some person, viz., the two robbery convictions to which reference is made in paragraph (1) above.
>
> (3) The crime for which the defendant is to be sentenced was committed while he was engaged in or accomplice in flight after committing the offense of robbery.
>
> (4) The crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(TR 1144).

The court then specifically rejected the existence of statutory mitigating factors (TR 1145-1146), but found two non-statutory mitigating factors, "that defendant had a significant history of alcohol abuse which eroded his family unit and contributed in a small way to his criminal conduct"; and that the defendant "maintained close family ties throughout his adult life and attempted to keep those ties in tact even through periods of incarceration." (TR 1146). The court then noted:

> Other than these two non-statutory mitigating factors, the court finds the evidence insufficient to establish the existence of

> any other non-statutory mitigating factors and rejects those refuted by other evidence. **See generally, Lamb v. State**, 532 So.2d 1051, 1054 (Fla. 1988). Two of these circumstances tendered which have been rejected bear special comment: Even though defendant had no history of having physically harmed anyone before this offense, it can hardly be concluded that he was not a violent person; secondly, this court observed defendant while testifying and finds that defendant is not contrite or remorseful but rather calloused and indifferent in his comportment and demeanor.

(TR 1146-1147).

In determining that death is the appropriate sentence **sub judice**, the court held:

> The court thereby finds that the aggravating circumstances far outweigh the mitigating circumstances and that the death penalty is the appropriate sentence in this case. The jury's recommendation of a life sentence could have been reasonably based only on minor, non-statutory mitigating circumstances or sympathy. 'It would not be reasonable for a jury to recommend a sentence of life based only upon the evidence presented regarding these non-statutory mitigating factors standing alone.' **Harmon v. State**, 527 So.2d 102, 189 (Fla. 1988). The argument that one statutory mitigating circumstance was presented, i.e., defendant was not the triggerman **and that his participation in the capital felony was relatively minor,** has been thoroughly analyzed by this court and rejected because no reasonable person could differ on this interpretation of the facts. It should be added that even if the factfinder were to accept defendant's version that he was not the triggerman, he sat idly by in the car and did nothing to prevent the shooting when his accomplice went to the deputy's car and shot him; and he did not stay at the scene after the shooting to lend aid to the victim but instead assisted in wiping the murder weapon clean and disposing of it. Thus, it is inconceivable that any reasonable person would accept defendant's participation in the capital felony was 'relatively minor' especially since the

> argument is based solely on defendant's self-serving version of these events. It has not gone unnoticed that the only other first-hand witnesses to these events are both dead and that Ellis' death was precipitated by the inexplicable discharge of the shotgun by defendant in the Camaro. Were these events on I-10 as unintentional as defendant attempts to claim and were they the result of some more devious design to eliminate Ellis' testimony? Certainly, Ellis' approach to Bates and his later attempt to shot him were not executed with the same swiftness and cold efficiency used to kill Deputy Wilkerson, a fact which further dissuades this court that Ellis killed Wilkerson.
>
> In this case the sentence of death is so clear and convincing that virtually no reasonable person could differ, and a jury override in light of the standard pronounced in **Tedder v. State**, 322 So.2d 908 (Fla. 1975), would be warranted. **White v. State**, 403 So.2d 331, 340 (Fla. 1981).

(TR 1147-1148).

Appellee accepts the statement of the facts presented at the resentencing proceeding, however, Appellee also commends to the Court the findings of facts made by the trial court in his sentencing order found at (TR 1141-1145).

Of significance in the trial court's findings are the following facts which support the trial court's conclusion of the aggravating factors **sub judice**. The court noted:

> Prior to the robbery on the evening of January 19, 1974, defendant and Ellis had committed three other armed robberies about the same time in the Pensacola area. Earlier on the day of January 19, 1974, defendant and Ellis traveled from Mobile, Alabama, to Pensacola, Florida, in a black Camaro, registered to defendant's sister but purchased by defendant for her. Along the way they test fired a shotgun later used by defendant in the confrontation with law enforcement officers on I-10. This shotgun belonged to Ellis and was a gift to him from defendant and his girlfriend, Ellen Sager.

During the course of the robbery, witnesses described defendant as the person 'in charge' who gave instructions to those persons at the robbery scene as well as the warning it would be 'unhealthy' if they came outside the store and pursuit of defendant and Ellis. A nickel or chrome plated .38 Smith/Wesson revolver described by witnesses as used by Ellis in the robbery was obtained by defendant from his sister, Lilly Bassett. This weapon was in Ellis' possession at the time he was slain on I-10 by Deputy Bates. A blue steel revolver the robbery witnesses saw in defendant's possession was never recovered. Ballistics expert Don Champagne of the FDLE testified the nickel or chrome plated .38 Smith/Wesson that was recovered from the person of Ellis was **not** the pistol that fired the bullet which was recovered from the head of the victim, Charles Wilkerson. The second bullet recovered from the victim's head was so badly damaged it was not identifiable but was believed to be of the same caliber as the other bullet. The defendant testified that there was a third blue steel pistol that he carried, inferring that Ellis had two pistols, the chrome-plated .38 Smith/Wesson and another blue steel pistol that was the murder weapon. The defendant testified he left his blue steel pistol in the black Camaro after the shoot-out when he fled into the wooded area. Sheriff's deputy's maintained constant custody of the black Camaro and no blue steel pistol was ever found during the subsequent search and inventory of it by crime scene officers. It can be reasonably concluded that the blue steel pistol the defendant possessed during the robbery was the murder weapon he used and later threw out of the car.

The evidence is inescapable that defendant was driving the black Camaro when it was stopped south of I-10 on Pine Forest Road by Deputy Wilkerson and that defendant was the person who slew him. This conclusion is buttressed by defendant's own testimony. Defendant explained that after the vehicle was stopped with Ellis as the driver, the deputy walked around in front of the car to the passenger's door where defendant was located and asked him to wait. Defendant also explained that the sawed-off shotgun

that he later used in the shoot-out in I-10 belonged to Ellis and was located between the console in the passenger's seat when he retrieved it and fired it a Deputy Bates. These are inplausible explanations and belied by all notions, common sense and unreasonableness. Deputy Wilkerson would not have given instructions to wait to defendant had he not been the person in control of the car, viz., the driver. Furthermore, since Ellis owned the shotgun, it would be expected to be within his reach, that is on the side of the car where he was seated. Had Ellis been the driver all along, the shotgun would have been kept on the driver's side and not the passenger's side.

Testimony of a passerby witness, William Waters, disclosed that he passed the scene and saw the front door of the cruiser car open and a pair of legs protruding from it. He also saw a man leaving the cruiser car and get in to the passenger's side of a dark car. Another witness further away, Lewis Bolling, saw intermittent portions of the same event but only saw a slim person head to the driver's side of the black car without knowing which side of the car he ever entered. This side of the car would have been the only side exposed to Bolling's view. These observations are not irreconcilable. First, it is noteworthy that the description of a person scene by Bolling generally fit that of defendant and not Ellis. What the court finds under this reconstruction of the evidence is that defendant walked towards the driver's side of the vehicle, instructed Ellis to slide over the console and assume the role of driver and then walked around the vehicle and entered on the passenger's side.

The reason for this scenario is borne out by subsequent facts. Defendant, not Ellis, was a three time loser and by his own testimony had been done in by 'fluke' happenings that he didn't want repeated. Defendant, as a prior convicted felon, knew his fingerprints were on record. Ellis had no prior record and it would not be expected that he would have a fingerprint record. Therefore, to protect himself from detection and to insure that the murder weapon was properly wiped clean and disposed of, defendant left nothing to chance. He entered the passenger's side

> of the vehicle and wiped his fingerprints from the gun and bullets while Ellis drove. He then hurled the sanitized gun and cartridges from the speeding car along the roadway himself content this time no 'fluke' happening would do him in. Unexpectedly, however, Deputies Bates and Joye caught up to defendant and Ellis. While Ellis talked to Bates, it was defendant who initiated the shoot-out by firing the shotgun at or towards Bates. This aggressive behavior, coupled with the foregoing reasons and the identification of defendant's fingerprints on the gearshift lever of the Camaro, convicted this court beyond a reasonable doubt that the defendant was the driver of the black Camaro when it was stopped by Deputy Wilkerson, that defendant was the person who killed him and that defendant left the murder scene occupying the passenger's seat of the black Camaro.

(TR 1142-1145).

SUMMARY OF ARGUMENT

I.

The trial court did not err in overriding the jury's recommendation of life. Evidence with regard to non-statutory mitigating evidence was **de minimus** and as such, did not violate **Tedder v. State**, 322 So.2d 908 (Fla. 1975).

II.

The exclusion of the results of Cooper's 1977 polygraph examination was not error in that the trial court was correct in ascertaining that polygraph evidence suffers from an indicia of unreliability. Moreover, any error was harmless beyond a reasonable doubt in that the jury's recommendation, based on a 6-6 tie, resulted in a life recommendation.

III.

The trial court did not abuse its discretion in the admission of the photograph of the victim, thus allowing the jury to consider probative evidence in determining what the appropriate sentence should be.

IV.

The trial court did not err in rejecting Cooper's tendered instructions with regard to specific mitigating factors.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN OVERRIDING THE JURY'S RECOMMENDATION OF LIFE

While not unmindful that a jury override must meet the stringent standards in **Tedder v. State**, 322 So.2d 908 (Fla. 1975), the trial court, in his sentencing order, found that the override was mandated because the evidence was so clear and convincing that virtually no reasonable person could differ. In applying this standard as noted by this Court in **Cochran v. State**, 547 So.2d 928 (Fla. 1989), this Court has admonished trial judge's that great care must be given the jury's recommendation. As such, Appellee would further observe that case comparisons with regard to the appropriateness of one jury override versus another jury override should not be the basis for review. Rather, a case by case analysis of individual cases must take place.

Given this premise, the facts regarding how the murder took place and "whether Vernon Ray Cooper was the triggerman" is not the issue in determining whether the override was appropriate. Certainly, Vernon Ray Cooper was not a minor participant in this crime or series of crimes. In fact, he was a full participant and acknowledges same, with the exception that Cooper maintains that he never killed Deputy Wilkerson. This is not a case where the jury may consider the "disparate treatment" between co-defendants in attempting to assess who the triggerman may have been. In this instance, the record shows that Ellis died that same day in Cooper's and Ellis' continuing attempt to allude

detection of the Winn-Dixie robbery and the murder of Deputy Wilkerson.

This is also not a case where Cooper's guilt is at issue. Cooper's trial was held in 1974 and at that time he was convicted of murder and robbery. The sentencing jury hearing that case recommended a death recommendation. At resentencing, the State was not obligated to prove beyond a reasonable doubt that Cooper was guilty of this crime or that he was in fact the triggerman. Rather, the State's obligation was to prove beyond a reasonable doubt that Cooper was not a minor participant in this crime and that based on the facts and circumstances presented at resentencing, aggravating factors were present and they were proven beyond a reasonable doubt. In that vein, the instant case is very similar to that of **White v. State**, 403 So.2d 331 (Fla. 1981), wherein the court held:

> . . . In this case the trial court properly found five aggravating and no mitigating circumstances under the death statute. The only colorable mitigating circumstance was the non-statutory consideration that the defendant was not the triggerman. We do not believe, however, that this factor alone outweighs the enormity of the aggravating facts, especially in light of the defendant's full cooperation in the robberies and the complete acquiescance in the cold-blooded systematic murder or attempted of eight individuals. We hold, therefore, that the trial judge imposed the death sentence consistent with **Tedder**. . .

403 So.2d at 340.

The trial judge **sub judice**, in his sentencing order, detailed why no reasonable person would (a) have determined that Cooper was not the triggerman, and (b) that based on this crime

spree of robbery and murder and attempted murder, Cooper's participation warranted the death penalty.

In **Cochran v. State**, 547 So.2d 928, 933 (Fla. 1989), this Court crystalized those occasions when a jury override would be sustained. This Court opined that since 1985, the Court has stated that **Tedder** means precisely what it says that the judge must concur with the jury's recommendation unless the facts suggesting death are so clear and convincing that virtually no reasonable person could differ. That is the standard and that is the conclusion reached by the trial judge.

Unlike **Fuente v. State**, 547 So.2d 652, 658-659 (Fla. 1988), or **Brookings v. State**, 495 So.2d 135 (Fla. 1986), or **Pentecost v. State**, 545 So.2d 861 (Fla. 1989), Cooper cannot point to disparate treatment in the imposition of sentences between co-defendants. If anything, even assuming Ellis had not been killed during the course of his escape from the murder and robbery, he did not sit in the same position as Cooper with regard to his past criminal conduct (Cooper had five previous robbery convictions vs. Ellis had no criminal background); Ellis was nine or ten years younger than the thirty-eight year old Cooper when the crime was committed; and Cooper was on parole at the time of the murder -- Ellis had never been incarcerated.

Cooper's case is unlike **Cochran v. State, supra**, in that Cooper was not youthful nor did he suffer extensive psychiatric deficiencies nor did he have a low IQ or suffer such emotional disturbance that under stress he became substantially impaired in his ability to conform his conduct to the requirements of the law.

Nor is Cooper's case like **Brown v. State**, 526 So.2d 903 (Fla. 1988), wherein Brown, an eighteen year old, and his co-defendant Cotton, robbed a convenience store and then, in their attempt to escape, was intercepted by Officer Bevis. Based on testimony from co-defendant Cotton, Officer Bevis made both Brown and Cotton exit their vehicle and while Officer Bevis attempted to handcuff Cotton, Brown secured a weapon and shot Officer Bevis twice. In that case, this Court, in reversing the judge's override of the jury's recommendation of life, found that Brown's age, eighteen years old, the invalidation of the aggravating factor of heinous, atrocious and cruel and the mitigation presented, that Brown suffered from severe mental and emotional handicaps, that he came from a very impoverished background, that he had a low IQ, that he could not appreciate the wrongness of his conduct, that he could be rehabilitated and that he was not a vicious person, were all grounds upon which the jury could have found a life recommendation appropriate. That is not the facts nor the circumstances of the case herein.

In **Cooper v. Dugger**, 526 So.2d 900 (Fla. 1988), wherein this Court vacated the death sentence based on **Hitchcock**, and remanded for a new sentencing proceeding, the Court recounted the evidence presented at the original sentencing proceeding. Specifically, this Court noted:

> During petitioner's sentencing proceeding, held on June 24, 1974, he sought to introduce, among other things, the testimony of family and friends regarding his employment history and his attempts to rehabilitate himself since his release from a prior incarceration; the testimony of his girlfriend regarding their relationship and

> the defendant's character; and the testimony of several witnesses concerning his relationship with his accomplice in crime, Stephen Ellis. The trial judge repeatedly sustained the prosecutor's objections to this evidence as irrelevant to the statutory mitigating factors. . .

526 So.2d 901.

As evidenced by footnote 3, at 526 So.2d 901, Cooper was permitted to introduce to the jury evidence of his general reputation in the community for being a peaceful, law abiding citizen.

At resentencing, Cooper called a number of witnesses in his behalf. Much of the testimony presented was either the same or very similar to that presented in 1974. For example, Renee Waites, Cooper's niece, testified that Cooper was very close to her mother, Lilly Bassett. (TR 651). She testified that Appellant would provide financial support when he could and on one occasion Cooper came to her mother's rescue when her ex-husband threatened her. (TR 652). Ms. Waites testified that in 1960, when Cooper got into trouble, she would go visit him in prison. At that time, she was fourteen or fifteen years old. (TR 652). She further testified that she knew Cooper to visit his brother when he was in a nursing home and take his brother for rides and visits to their home. (TR 654-655). Cooper took care of his father, who he lived with (TR 655), and although she saw evidence that Cooper drank, she never saw any evidence that Cooper was violent. She testified that her mother had a nickname for Cooper that he was 'The Walking Glass'. (TR 656). Ms. Waites testified that other members of her mother's family had

drinking problems and that her mother, although she never drank, had been, at one point, addicted to Valium. (TR 657). Ms. Waites also knew Steve Ellis, Cooper's co-defendant. She testified that her mother worked for him or with him at the South Dauphin Apartments. She indicated that her mother cleaned apartments and that Mr. Ellis managed them. (TR 658). Ms. Waites remembered that Ellis was a very flirtatious person but that she ignored him. (TR 658). Ms. Waites testified that she never met Cooper's daughter nor did she know Cooper's first wife, Sylvia. She did know, however, that Cooper's daughter, Susan, had died from a heart attack when she was eighteen. (TR 659). Ms. Waites testified that she corresponded with Cooper and that she has visited him three or four times in the last fifteen years. (TR 660). On cross-examination, Ms. Waites admitted that she saw Cooper both sober and drunk. (TR 662). She testified that he was a loving person and that he worked at a number of jobs. She testified that their family was a close-knitted family however she knew nothing about Cooper's daughter nor did her grandfather nor Cooper ever talk about Cooper's daughter. (TR 663-664). Although she admitted she didn't like Ellis, Ms. Waites testified that he never acted mean to her. (TR 665). She observed that Cooper and Ellis were pals and that she had no real knowledge of the crimes of which Cooper was convicted. (TR 666-667).

Lewis Bolling was also called by the defense to recollect the events of January 19, 1974, the murder of Officer Wilkerson. That day, he was working at the Gulf Station pumping gas. (TR

695). He heard shots and turned and told Mr. Cary, also working at the gas station, that a deputy down the road had just shot somebody. He testified that he saw someone leave the cruiser towards the driver's side of a black Camaro. (TR 696-697). He described the individual he saw as 5'10", weighing approximately 165-170 pounds, with stringy hair. He saw the car drive off in a northward direction on Pine Forest Road. He testified that he tried to get a description of the car and a tag number but all he could determine was that the Camaro was a dark color car having an Alabama license tag. (TR 698). Mr. Bolling testified that Mr. Cary got into the truck and went to the cruiser to see what happened. He observed that Deputy Wilkerson was on his back on the front seat behind the steering wheel with his feet sticking out of the car, hanging on the ground. The radio mike was in his lap. Mr. Cary apparently had checked for a pulse and found none. Efforts were made to contact police on the police radio. (TR 699).

On cross-examination, Mr. Bolling testified that the service station was approximately 480 feet from the shooting. He testified that he heard two or three shots and the reason that he was not sure of the number was based on the possible echo from the marsh in that area. (TR 703-704). He testified that he saw the officer stop the Camaro (TR 707), and when the Camaro drove by, he was able to identify it as a Camaro and at that point he tried to get the license tag number. (TR 711). He testified that he did not know how many people were in the car but he though he saw a slim, longish haired man move from the cruiser to

the Camaro. (TR 714). Mr. Bolling, on cross-examination, testified that he felt that the person who shot the officer moved from the driver's side of the cruiser to the passenger's side of the Camaro. He reasoned this because he never saw a break in the headlight beams which were facing towards him. (TR 718). Moreover, he could not testify positively whether Cooper was or was not the man running from the trooper car that day. (TR 719).

Defense also called Marilyn Smith, Cooper's niece. (TR 734). She testified that she was raised in the same household as her uncle and that Cooper was eleven years older than her. (TR 736). She testified that Cooper always had a drink in his hand, Jim Beam, and that Cooper had told her that Jim Beam was his best friend. (TR 737). Ms. Smith also testified, however, that although Cooper always had a drink in his hand, he never acted like he was drunk. (TR 738). She testified that after Cooper got out of jail and got a job, he helped her financially when she was expecting her last child. She testified that he helped his parents and that Cooper would buy baby clothing and stuff. She testified that he was working at either the glass company or the TB hospital. (TR 739). Cooper even helped her husband get a job at the South Dauphin Apartments at the time he was working there. She testified she knew Stephen Ellis, Cooper's boss, and that Stephen was younger than Cooper. She also mentioned that other members of her family had drinking problems and that Cooper was always helpful in helping his paralyzed brother. Cooper would visit him on Sunday's and take him for home visits. (TR 741-742). Cooper also cared for his father when he had heart trouble

and helped to pay bills. Ms. Smith did not like Ellis although she observed that Cooper and Ellis got along very well and that her mother liked Ellis. (TR 743). On cross-examination, Ms. Smith testified that Cooper drank in front of the children and that although she knew Cooper's first wife and she knew Cooper's daughter, she only saw them on a couple of occasions. (TR 745-748).

A number of witnesses' testimony was read to the jury based on their previous testimony. One of those was Watson Cooper, Cooper's father. Mr. Cooper testified that Vernon helped him financially and that he had met Ellis and thought him a friendly person. Ellis and Cooper helped build a porch for him although Mr. Cooper testified he didn't know Mr. Ellis very well. (TR 753-755).

Ms. Eva Jackson's testimony was also read to the jury. She testified that she was a friend of Cooper's for twenty-three years and that they would talk and watch television when he came to visit. She never saw Cooper threaten anyone nor did she ever see him with a gun. (TR 757). All she knew about Cooper's criminal endeavors was what Cooper's mother told her. (TR 758).

Virginia Schroeder's testimony was also read to the jury. She testified she was the same age as Cooper and had known him all of her life. She testified that he was good with the children, a kind person and she had never seen him to be violent. (TR 761). She testified that she could not believe that Cooper could ever kill anyone and that she recalled how he had helped his father. She said she still loved him no matter what he did.

(TR 762-763). Stephen Curtis Smith's testimony was also read to the jury. Mr. Smith met Cooper in the county jail following Cooper's arrest for the murder and robbery. He observed that when Cooper arrived his right jaw was swollen, he had scratches on his chest and bruises on his body. (TR 766).

William Gates' testimony was also read to the jury and he accounted that he was incarcerated at the same time as Cooper. When Cooper arrived he was limping and his face was bruised. (TR 771). Edward Bausley's testimony was read to the jury and he also stated that, while incarcerated, he saw bruises and scratches on Cooper's body. (TR 775).

Lilly Mae Bassett was next called to the stand and testified that she was Cooper's sister. (TR 781). She indicated that Cooper was the baby in the family and that he was born in 1936 when their mother was about forty years old. She testified that her brother, J.C., had been on drugs and had been in an accident and paralyzed. She also indicated that she had had problems with drugs in 1982 or 1984. (TR 782). She recounted that a number of members of the family had drinking problems including her father and grandfather and that Cooper constantly drank every day and night. (TR 784). She recalled that in 1972 and 1973, Cooper worked at the Dauphin Street Apartments where he did maintenance work. Cooper would drink on the job and as a result, she named him the Walking Glass. (TR 784). In describing how and where they grew up in Copeland, Alabama, Ms. Bassett said that conditions were not too good in the country, "lots of people didn't have much." When Cooper was six years old, the family

moved to Mobile because that is where his father found work at a packing company. (TR 786-787). She testified that she had good parents, they were hard workers but they could not provide alot for the family. She testified that Cooper and her father was strict and that Cooper got whippings when he disobeyed his father's orders. She left home at eighteen and a half when she got married. (TR 787). She stayed in touch with the family and she was able to recall that Cooper went to school until he was in the tenth grade. (TR 788). She recalled that Cooper, after quitting school, worked in the drugstores and delivered prescriptions. However, at age seventeen, he was convicted of stealing a car and sent to federal prison for a year in "Oklahoma." (TR 789). When he returned from his sentence, he got a job driving a cab (TR 788), and then he became a bookkeeper at the Association for the Blind. (TR 789). She remembered that Cooper had to get married to his first wife, Sylvia, because Sylvia was pregnant. She said that they stayed together only a few days. (TR 790). Cooper maintained contact with his family while he was in prison and when he was out and working, he would provide money and stuff for her family and others. (TR 791, 793). Cooper eventually remarried, however, that marriage to Rose Stagner, ended in divorce when he returned to prison. (TR 794). Ms. Bassett testified that she met, and Cooper met, Ellis at the apartments where they worked. Ellis was younger than Cooper and she didn't know whether Ellis had ever been in trouble. (TR 795). Ellis and Cooper were close drinking buddies and she remembered a time when Ellis gave Cooper a antique silver flask inscribed Jim Beam Special. (TR 797-798).

Ms. Bassett said that Cooper would help his family financially and in return for helping her specifically, she gave him a little .38 caliber gun. She remembered a time when Cooper came to Mississippi to help her when she was having trouble with her ex-husband. At that time, Cooper was on parole and he took a risk of violating parole to help. Although there was no altercation, Cooper had access to a weapon. (TR 803). Ms. Bassett testified that on the day of the murder of Officer Wilkerson, Cooper was attempting to avoid Ellis. She recalled that he was drinking that day as usual and that he had went over to Ellen Sager's house to hide from Ellis. (TR 804-805). She said that she saw Cooper a couple of days after his arrest and observed that he had a hard time to walk. He had bruises and scratches on his body when she saw him in the Pensacola jail. (TR 806). They have kept in touch over the years and Cooper writes her every week or so. Ms. Bassett says she visits Cooper twice a year. Although she testified that Cooper had coped well, he has suffered from many heartaches while incarcerated. Specifically, the lost of his daughter, Susan, to a heart attack, the death of his brother, and the death of Cooper's father. (TR 808). Ms. Bassett testified that she knows her brother could not have killed anyone. (TR 809).

On cross-examination of Ms. Bassett, she testified that Cooper first went to prison at age seventeen and really after that she had no real knowledge of what was occurring since she had moved away. (TR 810-811). She didn't see Cooper's daughter very often and she was never with Cooper when he visited her

daughter. (TR 812). Ms. Bassett said that Cooper, while working at a gas station, would help her by giving her some money for the family. However, she did observe that, during the same period of time, Cooper was able to take trips to New Orleans and other places with his girlfriend and she had no idea how he got the extra money. (TR 815). She again stated that Cooper would not shoot anyone nor had she seen her brother rob anyone so she didn't know whether Cooper ever carried a gun during the robberies. Although she knew of Cooper's prior convictions for robberies, she didn't think that he would hurt a fly. (TR 817).

Ellen Sager also was called in behalf of the defense and testified that she first met Cooper in the second grade when they were in school together. Over the years they were on and off acquaintancess until the mid '60's. (TR 822). She didn't like Ellis, thinking him to pushy and always wanting to be right. She didn't know that Cooper and Ellis drank together but did observe that Cooper had tried to avoid Ellis on a number of occasions. (TR 823-824). She admitted taking trips with Cooper to New Orleans and Tennessee and other places but did not know how much money Cooper made nor where he got the extra money. (TR 825). Just prior to the murder, she testified that Cooper avoided Ellis more frequently. (TR 825). When she finally saw Cooper in Pensacola at the jail, she observed that he was walking rather slowly and that he looked like he was in pain. (TR 826). She maintains correspondence with him, however, the last time that she visited him was approximately ten years ago. (TR 827).

James Treheren also testified in Cooper's behalf. Mr. Treheren was in the Pensacola jail when Cooper was arrested for murder. They were cellmates for approximately two months. (TR 831). During that period of time, Mr. Treheren observed that Cooper would help others while he was in jail and he recalled a couple of instances where Cooper would assist younger inmates in incidences. (TR 834-835). Mr. Treheren's opinion of Cooper was high, thinking Cooper an intelligent man and a man of integrity. He stated that he wrote letters and visited Cooper once a year. He observed that Cooper now has respiratory problems but does not know whether Cooper has ever suffered any disciplinary problems. (TR 838). On cross-examination, Mr. Treheren did not know that Cooper had been convicted of six previous robberies however, he indicated that that would not change his opinion. (TR 839-840). Mr. Treheren believed Cooper to be a non-violent person, almost a consciencious objector type. (TR 841).

Terminally, Mr. Cooper took the stand on his own behalf and gave an accounting of his life. He observed that he was born October 10, 1936, in Copeland, Alabama, to Watson Cooper and Mattie Mae Cooper. (TR 844-845). He had two older brothers and an older sister. When he was six he moved from Copeland, Alabama, to Mobile so his father could get work. He did fairly well in elementary school and spent one year in high school before he quit. In high school he liked to play hookey and therefore he didn't do very well. (TR 846-847). His family did not get along consequently everybody went their own way. His father worked swingshifts to support the family and his older

brother went to prison when Cooper was ten years old. (TR 847). His middle brother, J.C., went into the Army when Cooper was eleven and his sister, Lille Mae, got married around that same time. Cooper could not remember much about his childhood, but remembered that he went to prison when he was seventeen because he stole a car. (TR 848). He was convicted of Interstate Transportation of a Stolen Vehicle and was given three years and sent to Colorado. He spent a year in prison and returned to Mobile, Alabama, at which time he returned to school and studied bookkeeping. (TR 849). He testified to holding a number of jobs and acquiring his GED while living at home at age twenty-two in 1958. Although he was unemployed for long periods of time, he on and off attempted to work. (TR 851). He attempted to join the Army but was classified 4-F because of his felony conviction. He was reclassified 1-A but still could not get a waiver to join the military. (TR 852).

Cooper never got along well with his father until later years and observed that his father drank. (TR 852). His relationship with his father improved after he returned from prison in 1966. At that time, his father became a more caring person and apparently his father stopped drinking. (TR 854). Cooper got a job at a glass company and worked alongside his father for awhile. He testified that he has been married twice, his first wife being Sylvia McBride, who he married because she was pregnant. They had a daughter named Susan, however he and his wife never really lived together and were soon divorced. (TR 855). He testified that he did not have much of a relationship

with his daughter Susan because she lived with his ex-wife. He also testified that in the early years, he had been arrested a couple of times for non-payment of child support. He claims that because of his record, it was difficult to get a job and therefore it was difficult to make child support payments. (TR 857). After he got out of jail and started working with the glass company, he got layed off and continued to live with his father. His mother died in 1971. (TR 857-858).

Cooper admitted that he started drinking when he was fourteen when he bought moonshine and started drinking regularly in the late '60's. He drank beer because he didn't have much money and everybody started calling him Walking Glass when he started drinking Jim Beam all the time. (TR 860). He admitted to drinking at that point, a pint to a fifth a day, but also admitted to feeling good at that time in 1973, when he first met Ellis. (TR 861). He recalled trying to give money to his family but admitted that it wasn't very much. (TR 862). He and Ellis were good friends that got along well although Ellis was ten years younger and that they would get together and listen to music and talk and drink beer. Cooper testified that he loved Ellis like a brother. (TR 863). Cooper did not know whether Ellis had ever been arrested and at the time of the robbery, Ellis was a fireman. When Ellis found out that Cooper had been to prison and had committed robberies, he became interested in Cooper and wanted to talk about it. (TR 865). Cooper observed that Ellis developed a fascination with Cooper's record and talked with Cooper about the logistics of committing robberies

because Ellis was in debt. (TR 866). He and Ellis started committing robberies although Cooper testified that he never hurt anyone. Just prior to the Winn-Dixie robbery, Cooper testified that he had gotten off his night shift and that he and Ellis drove towards Pensacola that day. (TR 867-869). Although they planned to rob the Winn-Dixie, Cooper testified that he never planned to hurt anyone.

At the time of the murder, Cooper testified that Ellis got out of the car (Cooper's Camaro), and went up to the deputy who stopped them. Cooper heard shots and at that point Ellis returned to the car and said, "I'm sorry, I had to do it." (TR 874). Cooper testified that, if caught, he had planned to give himself up although they were heavily armed. The agreement between Cooper and Ellis was that they were not going to hurt anyone and that they just brought the shotgun along. (TR 875). Cooper testified that Ellis was driving the car because he did not have a driver's license and that after the shooting, Ellis handed him the gun and told him to get rid of it. (TR 876-877). As they drove along the Interstate, Cooper took the bullet out, wiped the gun clean and threw them out the window. (TR 877). Cooper again stated that he did not know Ellis was going to kill the cop. (TR 877). When asked about the later altercation with Officer Bates, Cooper recalled that he thought the officers were shooting at him after Ellis got out of the car. He didn't know what happened and didn't know that Ellis had gotten shot. He testified that the shotgun went off in the car, blowing a hole in the floorboard and at that time, gunfire was exchanged. He

admitted shooting a second round towards the police cruisers, however, he didn't think about killing anyone. (TR 879-881, 882). He then attempted to move the car by working the accelerator with his hand and steering the car a few hundred feet down the road from the gunfight. At that point he fell out of the car from the passenger's side and left the .38 Smith and Wesson in the car. (TR 883). He managed to get out of the car and started running up the hill, he stumbled into a briar patch and was eventually found in a ditch. The shotgun was found underneath him. Upon arrest, he asked the officiers not to shoot him. (TR 886). He testified that he got scratched and bruised as he was being walked back to the police cruiser after having to traverse a fence with his hands handcuffed. He also testified that he got bumped around in jail. (TR 887-888). He waived extradition and returned to Florida on January 20, 1974. (TR 889).

Mr. Cooper testified that he has been on death row for over fifteen years in a little cell with a commode and a sink and a bunk and a locker. He testified that he stays in the cell except for two days a week when he gets to go outside for two hours. He used to talk to friends on death row, however, his best friend has been executed. There is no air conditioning in the building and he gets to take a shower every other day. (TR 890-892). He has received one disciplinary report several years ago for a minor infraction. (TR 893). He also recalled an incident when a guard was killed on death row and although he heard all the commotion, there was nothing he could do about it. He has been

in good health, however, he has developed emphysema and chronic obstruction pulmonary disorder.

He also testified that he has two detainers lodged against him, one from Alabama and one from the federal government. (TR 899). Mr. Cooper testified that he does not want to die in the electric chair, that he is fifty-two years old and the earliest possible consideration for release in 1999. (TR 900).

On cross-examination, Cooper admitted that Ellis was involved in robberies with him. (TR 902). He tesified that they agreed nobody would be hurt during the robberies although, prior to the murder that day, they test fired the gun. (TR 905). Although the gun was test fired and fully loaded, Cooper testified he never intended to use it. (TR 906). When asked about the presence of the gun, he testified that he was only going to use it to threaten people by showing them the gun, he was never going to shoot anyone. (TR 908). When Officer Wilkerson approached Cooper and Ellis, the officer was very polite, did not have his pistol drawn and asked if they would wait a minute. (TR 911). Wilkerson walked back to his cruiser and at that point, Ellis (based on Cooper's rendition) got out and went back there. (TR 912). Cooper testified that he knew Ellis had a gun. (TR 916). In recalling the incident with Officer Bates, Cooper testified that he accidentally shot the floorboard of the Camaro and after the incident, he fell out of the passenger's side of the car, not the driver's side of the car. (TR 917).

On re-direct, Cooper testified that he drank about a fifth of Jim Beam a day and that his memory was hazy the early part of the day and didn't remember the specifics about getting to the Winn-Dixie parking lot. He recalled that it could have been asleep. (TR 922). Cooper said that although they did not plan to do any robberies that day, they were fully armed to do them. (TR 923).

The best Cooper can gleam from the following summaries of the testimony presented, was that he had normal family problems and, at some points in his life, he drank daily. The trial court found these two non-statutory mitigating factors to be present but concluded that neither of them were strong nor were either a basis upon which reasonable jurors would conclude that life was an appropriate sentence versus death. The trial court found four statutory aggravating factors, no statutory mitigating factors and the two aforenoted non-statutory mitigating factors applicable in this case. Cooper has emphasized the fact that the jury could have rationally determined that he was not the triggerman and as such, the trial court should have followed the jury's recommendation. Just as this Court observed in **Cochran v. State, supra**, that one particular aggravating factor "does not and cannot automatically nullify a jury's life recommendation," it is also true that a defendant's age or, the fact that he may not be the triggerman, is not an **overriding factor** in reviewing whether the trial court was correct that no reasonable person could conclude that life was an appropriate sentence. In **Thompson v. State**, 553 So.2d 153 (Fla. 1989), this Court observed:

> We now turn to the trial court's override of the jury's recommendation of life imprisonment. An override may be sustained only when there is no reasonable basis upon which the jury could have based its recommendation. **Tedder v. State**, 322 So.2d 908 (Fla. 1975). Thompson argues that the evidence demonstrated that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. In addressing this statutory mitigating circumstance in the sentencing order the trial court stated . . .

553 So.2d 156.

At this point, the court, in detail, discussed the opinion of Dr. Arthur Stillman as to whether Thompson could conform his conduct to the requirements of law. This Court found that the evidence supported the trial court's reasoning that the statutory mitigating factor did not exist. A similar analysis should be made **sub judice**. **See Craig v. State**, 510 So.2d 857 (Fla. 1987). Here, the trial court carefully detailed why no rational juror would have found that Cooper was not the triggerman. The court also opined, however, even if Cooper was not the triggerman, his culpability in this crime in the planning and execution of it did not diminish his role nor his eligibility for the death penalty.

In **Thompson**, the court also observed:

> Thompson also argues that the jury may have recommended life imprisonment because the others involved received lesser sentences or were granted immunity in exchange for their testimony. Jury recommendations against the death penalty which may have been based on a desire to provide equality in sentencing were considered in **Eutzy v. State**, (cite omitted) . . .
>
> As in **Eutzy**, the evidence in this case provides no basis upon which the jury could have recommended life in prisonment in order

> to prevent disparity in sentencing. The record reflects that Thompson was in charge and his accomplices were subordinates. Thompson ordered that Savoy be apprehended, and it was Thompson, rather than his accomplices, who inflicted the fatal shot.
>
> The remaining evidence submitted in mitigation did not provide a reasoned basis for a jury recommendation of life imprisonment. In the final analysis, this was a contract killing conducted in a professional manner by an underworld crime boss. With five valid aggravating circumstances, no statutory mitigating circumstances and very little non-statutory mitigating evidence, the trial judge's override was legally sound.

553 So.2d at 158.

Similarly, in the case at bar, there is nothing in this record that would support the jury's recommendation of life. **See Torres-Arboledo v. State**, 524 So.2d 403, 413 (Fla. 1988), wherein this Court found that although there was evidence with regard to rehabilitation:

> It is apparent from the record that Torres-Arboledo's intelligence and potential for rehabilitation were the sole factors upon which the jury could have relied in making its recommendation. We do not believe that these factors, for which the sole support was testimony of an expert witness, are of such weight that reasonable people could conclude that they outweigh the aggravating factors proven. This is particularly so in light of the previous conviction for the California homicide which was committed subsequent to the commission of the offense at hand. Since reasonable people could not differ as to whether death was appropriate in this case, the trial judge was not bound to follow the jury's recommendation of life. We therefore find the override proper in this case.

Interestingly enough, in Torres-Arboledo's case, one fact at issue was **whether** Torres-Arboledo was the triggerman. (See

recital of the facts, 524 So.2d at 407). In **Echols v. State**, 484 So.2d 568 (Fla. 1985), the court therein found that the defendant's age of fifty-eight was not a mitigating factor. **Sub judice**, Cooper makes much of the fact that he has long suffered on death row and that he will not get out until 1999, at which time he will be approximately sixty-three years old. The court, in **Echols**, observed:

> We have previously addressed this question of whether age, without more, is to be considered a mitigating factor in **Agan** and **Peek v. State**, (cite omitted), but the question continues to be raised. It should be recognized that age is simply a fact, every murderer has one, and it can be considered under the general instruction that the jury may consider any aspect of the defendant's character or the statutory mitigating factors, §921.141(6)(g), Fla.Stat. (1981). However, if it is to be accorded any significant weight, it must be linked with some other characteristic of the defendant or the crimes such as immaturity or senility. This case, for example, we see nothing in the record that would warrant finding any truly mitigating significance in the Appellant's age. On the contrary, Appellant's age, along with the other evidence, suggested Appellant is a mature, experienced person of fifty-eight years, of sound mind and body who knew very well what he was undertaking and, equally, that the undertaking was without any pretense of moral or legal justification.

484 So.2d at 575.

Terminally, with regard to Cooper's non-violent nature, the record is clear, that throughout his life, Cooper had a penchant for committing robberies. Although no one ever got hurt during the course of the robberies, Cooper was armed and used weapons, especially in the Winn-Dixie robbery, in a threatening manner. But for good fortune, Mr. Cooper is never tested as to whether he

would have used his weapons! Moreover, his family ties at best were minimal and what, one would normally expect. Evidence with regard to his incarceration conditions had nothing to do with his rehabilitation but rather, demonstrated he was an unremarkable prisoner on death row for the last fifteen years. Certainly, nothing in **Skipper v. South Carolina**, 476 U.S. 1 (1986), mandates further consideration of this "fact".

It is submitted that based on the foregoing, that the trial court's override was supported by competent evidence and that his analysis that no reasonable person would find mitigation to support such a life sentence must be affirmed.

POINT II

WHETHER THE TRIAL COURT'S EXCLUSION OF THE RESULTS OF THE POLYGRAPH EXAMINATION VIOLATED FLORIDA STATUTES, §921.141(1), THE EIGHTH AMENDMENT AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION

Cooper next argues that at resentencing the trial court erred in disallowing his motion to permit the introduction of the results of his polygraph examination. The examination occurred in 1977 and was done by a Mr. Holmes, a polygraph examiner. At resentencing, the defense proffered Warren Holmes' testimony. He observed that on November 17, 1977, he gave a polygraph examination to Cooper in order to ascertain whether Cooper shot Officer Wilkerson. (TR 681). Mr. Holmes, after securing background information, asked eight questions of Cooper germane to the instant inquiry. Seven of which Mr. Holmes stated Cooper answered truthfully. The last, an eighth question, Mr. Holmes

testified that Cooper answered untruthfully. Those questions are set out at (TR 684-685). Specifically, Mr. Holmes, in his proffer, said that Cooper answered truthfully that he did discuss murdering the officer; that Cooper did not get out of the car when the officer was shot; that Ellis did get out of the car when the officer was shot; that he did not shoot the police officer; that Ellis told him to throw the gun away; that he threw the gun out the window; that he left a .38 caliber weapon in the car at the time he fled. (TR 687). Apparently Cooper was not truthful with regard to his answer that he did not intend to shoot at Officer Bates when he fired the shotgun. The trial court ruled that polygraph evidence does not suffer the indicia of reliability and as such, since the State was not willing to concur, said evidence was to be excluded.

Cooper argues that said evidence was admissible pursuant to §921.141(1), Florida Statutes and that the trial court abused its discretion in rejecting same. Citing to **Green v. Georgia**, 442 U.S. 95 (1979), Cooper argues that the due process clause bars rigid application of evidentiary rules to exclude testimony that is highly relevant to a critical issue in a case. Appellee has a difficult time finding merit to Cooper's arguments since the jury's recommendation, albeit 6-6, resulted in a life recommendation. Moreover, **Lockett v. Ohio**, 438 U.S. 586 (1978), speaks in terms of the admission of **relevant** mitigating evidence. In contemplation of determining what is relevant, the United States Supreme Court fully contemplated that evidentiary rules would be utilized in discerning what was relevant and not

relevant with regard to mitigation. Certainly, **Green v. Georgia**, is not to the contrary.

Moreover, any error that this Court should find is harmless beyond a reasonable doubt in that both at trial in 1974 and at resentencing in 1989, Vernon Ray Cooper continually maintained to both the jury and the trial judge that he did not kill Officer Wilkerson. Based on the foregoing, this error, if any, is harmless beyond a reasonable doubt.

POINT III

WHETHER THE TRIAL COURT ERRED AND VIOLATED APPELLANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS IN ADMITTING A GRUESOME AND INFLAMMATORY PHOTOGRAPH OF THE DECEASED

Cooper next argues the trial court erred in the admission of a "gruesome photograph" at the resentencing proceeding. He argues that there was no relevance shown to said admission and as such his rights were violated. Appellee would note again that a life recommendation was rendered by the resentencing jury. However, their role **was to determine** the appropriateness of the sentence to be imposed. As observed in **Teffeteller v. State**, 495 So.2d 744 (1986), it is within the trial court's discretion to allow the admission of photographs of the victim during the course of a proceeding. There, as here, the trial court had the discretion to decide whether the jury would hear and see probative evidence in order that the jury might reach an appropriate advisory sentence. Having shown no abuse **sub judice**, this claim is groundless.

POINT IV

WHETHER THE TRIAL COURT ERRED AND VIOLATED APPELLANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BY REFUSING TO INSTRUCT THE JURY ON THE PARTICULAR NON-STATUTORY MITIGATING CIRCUMSTANCES PRESENTED BY THE EVIDENCE

Cooper next asserts that the trial court erred in failing to instruct the jury on particular non-statutory mitigating circumstances. Citing the pendency of **Boyde v. California**, 46 Cr.L. 2172, **cert. granted**, 109 S.Ct. 2447 (1989), he contends that this is a federal constitutional error that will be resolved by said decision. Indeed, on March 5, 1990, the United States Supreme Court decided **Boyde v. California**, 46 Cr.L. 2172 (1990), adversely to Cooper. Citing to **Blystone v. Pennsylvania**, 494 U.S. ____ (1990), the court stated that a general instruction to consider all relevant mitigating evidence was sufficient and all that was necessary in instructing the jury with regard to what mitigation they may consider.

Based on the foregoing, no relief should be forthcoming on this issue.

CONCLUSION

Based on the foregoing, Appellant is entitled to no relief and his instant convictions and sentence of death should be affirmed in all respects.

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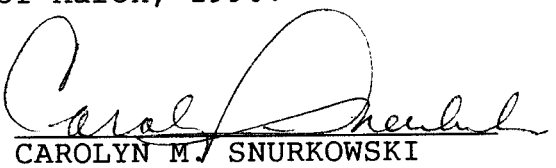
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. Randy Hertz, Esq., New York University School of Law, 249 Sullivan Street, New York, New York 10012, this 19th day of March, 1990.



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