ORIGINAL

IN THE SUPREME COURT OF FLORIDA

VERNON RAY COOPER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

CASE NO. 74,611

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

INITIAL BRIEF OF APPELLANT

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I. PRELIMINARY STATEMENT

This is an appeal of a sentence of death imposed by the trial court, overriding the jury's recommendation of life imprisonment. The record on appeal consists of seven volumes. References to the record will be designated by the letter "R".

II. STATEMENT OF THE CASE

The proceedings below consisted solely of a capital sentencing hearing. Appellant had been convicted of first-degree murder and robbery on June 24, 1974, and sentenced to death on July 1, 1974. In Cooper v. Dugger, 526 So.2d 900 (Fla. 1988), this Court vacated appellant's death sentence and remanded the case for a new sentencing hearing before a jury.

The resentencing hearing was held on February 27, 1989 to March 3, 1989, in the Circuit Court in and for Escambia County, Division B, the Honorable Nickolas P. Geeker presiding. At the conclusion of the hearing, the jury recommended, by a vote of six to six, that the court impose a sentence of life imprisonment without the possibility of parole for 25 years. R. 1080. On July 28, 1989, the trial court imposed a sentence of death, overriding the jury's recommendation and declaring that the override was consistent with the doctrine of Tedder v. State, 322 So.2d 908 (Fla. 1975). See R. 1141-48 (Order Stating Reasons for Imposition of Death Sentence).

III. STATEMENT OF FACTS

A. The Convictions on Which Appellant Was Sentenced

On June 21, 1974, appellant was convicted after trial of first-degree murder and robbery. R. 298-99. The evidence presented at trial is summarized in this Court's decision in Cooper v. State, 336 So.2d 1133, 1136 (Fla. 1976), cert. denied, 431 U.S. 925, 97 S. Ct. 2200, 53 L. Ed.2d 239 (1977).

B. The Prosecution's Evidence at the Resentencing Hearing

(1) Testimony concerning the robbery and the circumstances leading up to the killing of Deputy Wilkerson

John Glover, who was the assistant manager of a Winn-Dixie Food Store in Escambia County in 1974 (R. 303), testified that appellant and Stephen Ellis robbed the store on January 19, 1974, at approximately 7:00 p.m. Glover stated that appellant came up to him, said that the store was being robbed, and then pulled back his coat, exposing a weapon which was tucked into the waistband of his pants. R. 304. The weapon was a blue steel pistol with a brown handle. R. 308. Glover stated that appellant and Ellis took the money from the safe and cash registers and then, as they exited the store, appellant said "it would be unhealthy if any of [you] . . . c[o]me outside." R. 305-6, 307. Throughout the robbery, appellant never pulled the gun out of the waistband of his pants and never pointed it at Glover or anyone else in the store. R. 314.

Clyde Ward, who was a customer in the Winn-Dixie store at the time of the robbery (R. 318-19), testified that Ellis announced that the store was being robbed (R. 319), pulled a gun out of his pocket (R. 322-23), pointed it at a cashier, and robbed her at gunpoint (R. 323-24). The gun was a chrome-plated pistol, which appeared to be a .22 or .32 caliber pistol (R. 321-22).

Several witnesses who were Escambia County Deputy Sheriffs at the time testified that a report of the robbery was broadcast over the police radio. R. 329 (Donald Douglas Parker); R. 337 (Dale W. Krause); R. 346 (Ed Bates); R.

394-95 (Charles Joye). Parker testified that Deputy Wilkerson thereafter came on the radio and informed his supervisor, Bill Lynch, that he was going to Pine Forest Road to watch for individuals acting suspiciously. R. 328-29.

(2) Testimony concerning the shooting of Deputy Wilkerson

(a) Testimony of William Waters

William Waters, who was driving his pickup truck on Pine Forest Road at approximately 8 p.m. that night (R. 414-15, 424), saw a police car with its blue lights flashing and a black car in front of it, stopped approximately 70 or 100 feet south of the Gulf station on Pine Forest Road (R. 415, 426-27). Waters was driving south (R. 415, 424) and the cars were on the opposite side of the road from him (R. 419). The police car was parked on the north side of a highway sign. R. 423, 427-28, 429. Both cars had their headlights on (R. 415). As Waters drove past, he glanced out his window (R. 419) and observed a man go from the driver's side of the police car to the passenger side of the black car which was parked in front of the police car. R. 415-16, 422. The door of the police car was partially open, and Waters could see the foot or leg of the car's occupant protruding below the door. R. 416. Waters then observed the black car drive away. R. 416, 420-21.

These events happened very quickly (R. 419). Waters stated that he would not have seen anything if he had been there "ten seconds later . . . or ten seconds earlier" (ibid.). When asked about the man who went from one car to the other, Waters was unable to describe his race, height, or weight. R. 419-20. Waters did not see a flash of gunfire or hear any gunfire as he drove past the cars. R. 420. At the time, he did not think that he had seen anything suspicious. R. 416 ("did not think anything of it").

(b) Testimony of police officers regarding the discovery of Deputy Wilkerson's body

Former deputy sheriffs Donald Douglas Parker and Dale W. Krause recalled

receiving a radio transmission stating that gunshots had been reported in the vicinity of Pine Forest Road near the interstate. R. 328 (Parker); R. 337-38 (Krause). Parker and Krause each went to that location to investigate. R. 328, 337.

Krause was the first officer to arrive on the scene. R. 338. When he got there, he found Wilkerson's body lying in a patrol car, shot in the head and apparently dead. R. 337-38. Krause described the body as lying in a frontal position with the feet protruding through the open car door. R. 338. One of the civilians who was on the scene when Krause arrived, a man named Bolling, told Krause that he had observed a black Camaro leave the scene at a high rate of speed, traveling north on Pine Forest Road. R. 338-39. Krause broadcast information regarding the shooting (R. 338) and the description of the car (R. 339).

When Parker arrived on the scene, Krause and several other officers were already there. R. 330. Parker described Wilkerson's body as positioned on the front seat of the car, leaning against the passenger door and facing the driver's door. R. 330. He had been shot twice in the head and was apparently dead. R. 330-31.

Then-Investigator Charles Joye heard a dispatch stating that an officer may have been shot on Pine Forest Road (R. 395). Joye went there and observed that Wilkerson had been shot (R. 395-96).

(c) The testimony of the pathologist who performed the autopsy

Pathologist Thomas Rogers Birdwell testified by videotape (R. 604) about the autopsy he performed on Charles Wilkerson (R. 606-7). He described three wounds to the forehead, two of which were bullet entrance wounds, and one of which was caused by a fragment from the second bullet. R. 608. He stated that the nature of the wounds suggested that the shots were fired at close range. R. 615-16. He identified a photograph depicting the wounds. R. 608-9.

(3) Testimony regarding the attempted apprehension of the suspects and the shootout that ensued

(a) Testimony of Deputy Sheriff Ed Bates

After receiving a radio dispatch reporting that an officer had been shot and a subsequent report that the officer had been shot in the head (R. 346-48), Deputy Sheriff Ed Bates received a radio broadcast stating that a description had been given for a black vehicle going north on Pine Forest Road (R. 348). Bates began searching the Interstate, heading west toward Mobile, Alabama (R. 350). He received a radio report from Investigator Joye, who said that he was following a black car containing two white males fitting the description. R. 350.

Bates found the black car, drove alongside it and looked in the window, and then dropped behind it. R. 351. Appellant was in the passenger seat of the black car and Ellis was in the driver's seat. R. 361. Bates put on his patrol car's blue light (R. 351), the car stopped, and Bates pulled his patrol car in behind it (R. 352). At that moment, Ellis exited quickly from the driver's side of the black car, coming at Bates before he could leave the police car. R. 352, 370. In Bates' words, "Ellis . . . jumped out of the car, and he started back . . . [and] he was right on top of me." R. 352. Bates immediately aimed his shotgun in Ellis' face and ordered Ellis to stand with his hands on the hood of the police car. R. 352, 370. As Joye guarded the other suspect, who was still in the black car (R. 352, 376), Bates began patting down Ellis (R. 353). While still engaged in the frisk, Bates heard a shotgun go off. R. 353, 376-77. Thinking Joye had been shot, Bates stepped back and turned to look in Joye's direction. R. 354, 377. When Bates turned back to Ellis, he discovered that Ellis was no longer facing the police car. Ellis had turned so that he was facing Bates, had pulled out a gun, and was pointing it at Bates. R. 354, 378. Ellis said "you're next or something to

that effect" (R. 354, 379), clearly meaning to kill Bates (R. 379). Bates fired his shotgun at Ellis, killing him. R. 354-55, 380-81. Ellis' gun fell on top of the patrol car. R. 355.

Then Bates heard another gun fire and the windows of his car shattered. R. 355. Bates responded by firing repeatedly at the black car, in which appellant was still seated. R. 355, 378. At that point, the car moved away, slowly. R. 356-57. Appellant, who was seated in the passenger side of the car (R. 361), had leaned over and pushed the accelerator (R. 357). After the car had gone a short distance, it stopped, and appellant jumped out of the car and ran away. R. 357. Bates learned later that the first shotgun blast, which had caused him to look in Joye's direction, had been caused by appellant's accidentally setting off a shotgun and firing a shot through the floorboard of the black Camaro. R. 387.

(b) Testimony of Investigator Charles Joye

After going to Pine Forest Road and observing Wilkerson's body (R. 395-96), Joye drove west on the Interstate toward Mobile, looking for the perpetrators (R. 396-97). He received a radio report that "a dark-colored car, possibly a Camaro" may have been involved in the robbery and the shooting. R. 397. Joye thereafter observed a dark-colored Camaro and radioed for assistance in stopping the car (R. 397-98).

Officer Bates arrived on the scene and stopped the car (R. 398). Appellant was seated on the passenger side of the car and Ellis in the driver's seat. R. 403. Ellis "immediately got out of the car and came back to where Bates was standing by his car." R. 399. Joye observed that appellant was still in the Camaro. R. 400. A gunshot seemed to come from the Camaro. Ibid. Joye glanced in Bates' direction and saw that Ellis had pulled out a blue-chrome pistol. R. 400, 404. Bates shot Ellis with his shotgun, and Ellis fell to the ground. R. 400. A shot then came from the Camaro (R. 400-1), and Joye

began shooting at the car (R. 401). The car moved away, with the occupant, who was still in the passenger's seat, apparently leaning over to push the accelerator. R. 401. Joye followed the car for a short distance and then the occupant ran away. R. 401-2.

In response to cross-examination, Joye testified that at one point appellant had the opportunity to shoot him but did not make any attempt to do so. R. 406-7. After the Camaro had been stopped and Ellis had left the car, Joye walked to the driver's side of the car, looked into the car through the open door, and observed appellant sitting in the passenger seat. R. 399, 406. Appellant had ample opportunity to shoot Joye as he was standing and looking into the car through the open door. R. 406. But appellant did not fire a gun at him. R. 406. Indeed, as Joye looked at appellant, Joye observed no motion whatsoever. R. 400.

(4) Testimony concerning the arrest of appellant, a statement he made to the police, and the police seizure of two firearms

Don Powell, who was a deputy sheriff at the time, arrived at the scene of the shootout after Ellis had been shot by Bates. R. 432. Powell participated in a search for the suspect which was conducted by several hundred police officers from Florida and Alabama. R. 433-35. Shortly before 2 a.m., Powell found appellant lying in a viaduct drainage ditch. R. 438, 442. Powell recounted that when he ordered appellant to show his hands and stand up, appellant said "Mister, don't shoot, don't shoot me, I did not kill the deputy, the other guy did." R. 438, 443. Appellant did not offer any resistance. R. 442. When appellant was handcuffed, the police found a sawed-off, double-barrel Stevens shotgun, which Powell identified as State's Exhibit No. 1, lying underneath appellant's body, strapped around his right shoulder. R. 438-39. Two spent shells were found in the gun. R. 439.

Walter Crook, who was a deputy sheriff with the Sheriff's Department of

Baldwin County, Alabama (R. 495-96), testified that he assisted in the arrest of appellant (R. 496). Crook described the discovery of appellant lying in the ditch and the shotgun lying underneath his body. Crook identified State's Exhibit No. 1 as that shotgun (R. 496-97) and identified State's Exhibit No. 2 as a firearm he retrieved from the hood of a police car. R. 497-98, 511.

(5) Ballistics evidence

Donald Champagne, firearms examiner for the Florida Department of Law Enforcement crime laboratory, testified as a ballistics expert. R. 467. He stated that in his opinion, one of the two bullets removed from the body of Deputy Wilkerson could not have been fired from State's Exhibit No. 2, a chrome-plated Smith and Wesson revolver (R. 472-75). The other bullet was so damaged that the caliber could not be determined. R. 471, 474.

(6) Testimony relating to the processing of the crime scene, the recovery of physical evidence, and the taking of photographs

Henry Edward Wolff and Preston J. McGlothern, who were crime scene investigators with the identification division of the Escambia County Sheriff's Department (R. 447, 464), testified regarding their collection of evidence from, and taking of photographs of, the crime scene.

McGlothern described his inventory of the Camaro (R. 520-28) and stated that he found, among other things, two bags with money (R. 521), a bottle of Jim Beam (R. 522), and a transfer of the title of the Camaro from appellant to Vivian J. Cooper (R. 525); he did not find a blue steel pistol in the car (R. 527). McGlothern stated that the passenger side of the floorboard displayed "an apparent shotgun blast." R. 526. In response to defense counsel's questioning, he said that the region in which the events took place had "a number of . . . water crossings, and . . . swampland." R. 546. McGlothern also testified that an examination of Ellis' body showed that he was five feet, eleven inches tall and weighed 180 pounds. R. 559.

Daniel Lodge, who was then a deputy with the crime scene unit (R. 627), testified that he attended the autopsy of Deputy Wilkerson (R. 628) and obtained the bullets which were removed from his body (R. 628), as well as the autopsy photograph previously identified by Dr. Birdwell (R. 629-30). The prosecution moved to introduce the photograph. Defense counsel objected on the ground that the depiction of the wounds on the deceased's face was more prejudicial than probative. R. 629. The court overruled the objection and the photograph was received in evidence. R. 630.

Lodge also testified regarding a diagram of the scene which showed distances between relevant locations. R. 631-32. He stated that the distance between the Gulf station and Deputy Wilkerson's patrol car was 480 feet. R. 632. The car was approximately 50 feet behind a road sign. R. 631.

(7) Testimony regarding the convictions on which appellant was being sentenced

Audrey Dean, the deputy clerk of the Criminal Division of the Circuit Court, testified that the clerk's file shows that appellant was found guilty of first-degree murder and robbery on June 21, 1974. R. 298-99.

(8) Testimony concerning appellant's prior record

Chuck Williams, who was the chief assistant State's Attorney for the First Judicial Circuit in 1974 (R. 487), testified that the official records of the clerk's office show that appellant was convicted of robbery in three cases in 1974. R. 488. On cross-examination, defense counsel elicited that appellant entered a plea of guilty in those cases and received a life sentence in each case to run concurrently with his death sentence (R. 489-90). Williams stated that he does not "have a specific recollection" whether any victims were physically harmed in any of these robberies, but that he does not "recall that anyone was injured." R. 490.

Linda Bibby, a deputy clerk and records custodian for the Circuit Criminal

Department, testified that the official records reflect the convictions and sentences described by Chuck Williams. R. 494-95.

Andrew G. Hildreth, who was a police officer in Pritchard, Alabama in 1966 (R. 569), testified that on January 4, 1966, appellant was convicted of a robbery that took place in the City of Mobile, as well as a robbery that took place in the City of Pritchard (R. 570). Hildreth stated that a .45-caliber revolver was used in these robberies (R. 573). Appellant received a 12-year sentence in each case, the two sentences to run concurrently. On cross-examination, the witness acknowledged that no one was physically harmed in either of the two cases (R. 572), and that the convictions were on a plea of guilty. R. 571-72.

William H. Cobb, a probation and parole officer in Mobile, Alabama (R. 573), was appellant's parole officer from 1970 to 1974 (R. 575). He testified that appellant received two concurrent sentences of 12 years in 1966. R. 574. Appellant was paroled on March 16, 1970 (R. 575) and was still on parole on January 19, 1974 (R. 575).

During the years that appellant was on parole, appellant was always very respectful of and courteous to the parole officer in a way that Cobb has never seen in other parolees. R. 583. Appellant worked at a glass company in Mobile, Alabama. R. 576. He "provided some care to his father." R. 577. During these years, appellant suffered from a drinking problem. R. 582. He was very close friends with Stephen Ellis, who was appellant's supervisor on a job at an apartment complex for a period of time. R. 584-85.

Cobb testified that he filed two parole violations against appellant during the period from March 16, 1970 to January 28, 1974 (R. 577-78), but that appellant did not have his parole revoked (R. 578), in part because Cobb recommended against revocation (R. 579). One of the violations was based on an assault charge that was dismissed (ibid.); the other was a charge of possession

of a carbine rifle at a period of time when it was not against the law in Alabama for a convicted felon to possess a firearm (R. 579, 582).

In response to defense counsel's questions, Cobb testified that the State of Alabama has lodged a detainer against appellant. He explained the concepts of detainers and parole revocation, and the strong possibility of appellant's being sentenced to serve the remaining portion of his sentence in Alabama in the event of revocation. R. 580-81.[1]

C. The Defense Evidence at the Resentencing Hearing

(1) Pre-Hearing Motion to Admit Polygraph Results

Prior to the resentencing hearing, appellant filed a "Motion to Permit Introduction of Results of Polygraph Examination." R. 1065-66. The motion sought leave to introduce into evidence the results of a polygraph examination of appellant which showed that there was "no deception on his part in stating that he did not fire the shots which killed Mr. Wilkerson." Id. at 1065. Appellant's counsel explained that "there's been a dispute between the State and the defense all these years as to whether or not Mr. Cooper was the trigger person or Mr. Ellis" (R. 17).

In support of the motion, appellant cited § 921.141(1), Fla. Stat., which authorizes introduction at a sentencing hearing of "'evidence which the court deems to have probative value . . ., regardless of its admissibility under the exclusionary rules of evidence.'" R. 1065-66. Appellant's counsel informed the court that appellant was willing to submit to an independent polygraph examination arranged by the prosecution and to consent to the introduction of the results of such an examination (R. 18, 690), or, if the prosecution preferred, an examination under the effects of sodium pentothal (R. 690).

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[1]/ In addition to the criminal convictions described in the text of this subsection, appellant himself testified that he was convicted of a federal Dyer Act offense, interstate transportation of a stolen vehicle, at the age of 17. See p. 21 infra.

The prosecutor rejected these proposals (see R. 17-18, 19-21, 1065) and objected to the introduction of the polygraph examination results. R. 19-21. The trial judge denied appellant's motion and precluded the polygraph evidence on the ground that "polygraph examinations . . . don't have that indicia of trustworthiness to have real probative value." R. 21. The judge allowed defense counsel to present the polygraph examiner on a proffer for the record. Ibid.

At the sentencing hearing, polygraph examiner Warren D. Holmes testified on proffer, outside the presence of the jury. R. 669-91. The judge ruled that the witness "possesses [the] requisite qualifications" to present expert testimony. R. 680. Holmes testified that he conducted a polygraph examination of appellant on November 17, 1977, at the request of appellant's counsel. R. 681. Holmes recounted that he asked appellant the following questions regarding the shooting of Deputy Wilkerson, and that appellant's answers to the questions were as follows:

> One, before Deputy Wilkerson was shot, was there any discussion between you and Ellis about shooting him? He answered no to that. Two, did you get out of the car at any time after you and Ellis were stopped by Deputy Wilkerson, and he answered no. Three, did you actually see Ellis get out of the car just before Deputy Wilkerson was shot. He answered yes. Four, did you shoot Deputy Wilkerson? He answered no.

R. 684-85. On the basis of the polygraph results, Holmes concluded that all of appellant's answers to these questions were truthful. R. 687.

The polygraph examination also included a series of questions relating to the events which took place after the shooting of Deputy Wilkerson. The appellant was asked the following questions, and gave the following answers:

> "Five, did Ellis actually ask you to throw away a gun? He answered yes. And, six, did you actually throw a gun out the window of your car shortly after Deputy Wilkerson was shot? He answered yes. And, seven, did you actually leave the .38 special in your car after you fled from him? He answered yes.

R. 685. Once again, the polygraph showed that appellant answered truthfully

(R. 687-88).[2]

At the conclusion of the proffer, the judge reaffirmed his earlier ruling that the polygraph examination results would be excluded on the ground that polygraph examinations are "inherent[ly] unreliable." R. 689-90.

(2) Defense evidence concerning the circumstances of the offense

(a) The testimony of Louis David Bolling

Louis Bolling testified that on January 19, 1974, he was working at the Gulf station on Pine Forest Road, where he had a part-time job pumping gas and doing other service-station work. R. 695. He noticed a deputy sheriff, in a police car with blue lights flashing, stop a car in the southbound lane, talk briefly with the occupant (who was a person with whom Bolling was acquainted), and then let him go. R. 702, 705. Then the deputy crossed the median and, again with blue lights flashing, stopped another car. R. 705-7. The deputy stopped the car approximately 480 feet south of the Gulf station (R. 695, 702), just south of a traffic sign (R. 696, 707).

The deputy stopped his car approximately three or four feet behind the other car. R. 707. Bolling was at this point "standing out on the front sidewalk in front of the Gulf station." R. 696, 711. His attention was then drawn to the patrol car by the sound of gunshots. R. 696. Bolling stated that it sounded like three shots, but that there may have been an echo from the swamp. R. 703-4. Bolling turned to his co-worker, David S. Cary, and said

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[2]/ There was a final question, on which the polygraph examination showed appellant's answer to be untruthful. This was: "And, eight, did you deliberately fire the gun at Deputy Bates? And he answered no." R. 685. This question concerned the shot fired by appellant after Ellis' death. The polygraph showed that appellant's answer was not truthful (R. 686) and appellant subsequently admitted this to the polygraph examiner (ibid.). The polygraph examiner explained that appellant's "pronounced physiological reaction to that question as compared to the other questions" (ibid.) both exposed his untruthful response to this particular question and served as a "control question" (ibid.) confirming the truthfulness of his responses to the other questions.

"the deputy . . . shot somebody." R. 697. Bolling then saw someone leave the cruiser car and go to the driver's side of the other car. R. 697, 713, 730. The figure was silhouetted in the headlight of the patrol car. R. 710. Bolling was not able to see the person actually enter the car (R. 713) but could "see him go towards the driver's side." Ibid. Bolling only saw the man for a split second because the man was rushing. R. 713.

The person appeared to be "five, ten, five, eleven, 165, 170 pounds, somewhere in that area," with "bushy, stringy hair" (R. 697), possibly "165 to 175 pounds" (R. 726). When asked by the prosecutor whether he would describe this person as "slim," Bolling stated "Yes, sir, to me he was slim." R. 714. Bolling elaborated on this comment on redirect, stating that he himself was "[p]robably 225 pounds" (R. 726, 733) at the time, and so he would have viewed someone who weighed "165, 75 pounds" (R. 727) as "slim" "in relation to [Bolling's own] . . . size." R. 727, 733.

After the person ran from the deputy's car to the other car, the private car drove off, going north on Pine Forest Road. R. 698, 711. At that point, Bolling and Cary "realized that evidently instead of the deputy shooting somebody that it might have been the other way around." R. 698. Bolling "tried the best [he] . . . could to get a description of the car and get the tag number." R. 698. He ran to get a better view (R. 711; see R. 698), and "got almost completely into the intersection of Pine Forest and Detroit when the car passed by." R. 698. Bolling observed "[a] dark-colored Camaro, and it appeared . . . it was Alabama or the color tags of an Alabama tag[,] [but he] could not get a tag number." R. 698. Cary and Bolling found Wilkerson's body, and Bolling was unable to feel a pulse. R. 699. Bolling used the police radio in Wilkerson's car to summon help from the Sheriff's Department. R. 699-700. The police arrived and Wilkerson was taken away in an ambulance. R. 700.

(b) The testimony of Michael F. Colter

Michael Colter was a police reporter for the Pensacola News Journal. R. 646. On the night of January 19, 1974, Colter received a telephone call telling him about the killing of Deputy Wilkerson. R. 647. Colter went to the scene of the crime and arrived shortly after Deputy Bates' shooting of Stephen Ellis. Ibid. Colter interviewed Bates at the scene to get information for a newspaper story. R. 648. Bates told Colter "that Ellis had turned to him and said you're next." R. 648.

(c) Appellant's testimony regarding the circumstances of the crime

Appellant testified that Ellis drove the Camaro at all relevant times. R. 875, 876, 879. Although the car belonged to appellant (R. 869), Ellis drove it because Ellis had a driver's license (R. 876), and appellant's license had been suspended as a result of a conviction for Driving While Intoxicated (R. 870). The two did not want to risk the investigation that could ensue if the car were stopped for a traffic offense and the police discovered that the driver lacked a valid license. See R. 876.

When the car was stopped by Deputy Wilkerson, Ellis got out; appellant stayed in the car. R. 874, 876-77. Appellant heard the sound of gunshots and then Ellis got back in the car, saying "something like I'm sorry, I had no choice or I'm sorry, I had to do it." R. 874. Ellis handed appellant a gun and told him to get rid of it. Appellant broke it down, wiped the gun and bullets of all fingerprints, and then threw the gun and bullets out the window. R. 877-78. The gun was a .38 special made of a lightweight metal alloy. R. 878.

When the car was stopped for a second time, an officer looked into the Camaro at appellant. Appellant did not try to shoot him (R. 880); appellant explained that he "didn't want to shoot anybody." Ibid.

While appellant was seated in the car, he accidentally set off the

shotgun, shooting a hole through the floor of the Camaro. R. 879-80. The police started firing into the car (R. 882), and appellant threw himself to the floor of the Camaro. R. 882. While still on the floor, he fired the shotgun without "shooting at anyone in particular." R. 882-83. He then drove the car away by leaning over to the driver's floorboard and working the accelerator with one hand while steering with the other. After a few hundred feet, he fell out of the passenger side of the car and ran away. He took a shotgun out of the car, but not the .38 special Smith & Wesson. R. 883, 885. See also R. 910.

When asked whether he had any inkling that Wilkerson would get shot by Ellis, appellant said "[n]one whatsoever." R. 877. Appellant and Ellis had made "an agreement that . . . we wouldn't hurt anybody." R. 875.

(3) Defense evidence of mitigating circumstances relating to appellant's character and record

Roger Voelker, a physician (R. 591), testified that he treated appellant at University Hospital from August 29, 1988 to September 6, 1988 (R. 598) for respiratory problems (R. 593-94). Appellant was sent there by a doctor at the jail infirmary who felt that appellant required more sophisticated treatment than was possible in the infirmary. R. 593. Dr. Voelker testified that appellant suffers from emphysema (R. 594-95) and has roughly half the lung tissue of a healthy person (R. 597). Although there is no way of knowing for sure how the illness will progress (R. 600-1), such lung conditions generally do not improve (R. 601), and can become a debilitating or even fatal disease. R. 602.

Renee Waites, a niece of appellant's (R. 651), is a teacher of twelfth-grade English in the Raleigh school system (R. 650). She testified that when she was young, appellant provided her mother (appellant's sister, Lillie Bassett) with financial support to help the family through hard times. R.

651-52. When Ms. Waites' father threatened to kill her mother, appellant intervened and protected her. R. 653. Appellant regularly visited his brother, who was paralyzed, in a nursing home, and brought him home on weekends. R. 654-55. In the years prior to his arrest in the present case, appellant lived with his father for the purpose of taking care of him. R. 655. Since the time appellant has been in prison, Ms. Waites has corresponded with him, and she and her husband have visited him in prison. R. 660.

Ms. Waites stated that appellant always had a glass of alcohol with him, from the time he woke up in the morning. R. 656-57. Ms. Waites' mother and an uncle referred to appellant as the "walking glass." R. 656. Ms. Waites stated that her family has a history of substance abuse problems. R. 657. Her grandfather and another uncle both had drinking problems, and her mother was addicted to valium at one point. R. 657-58.

Marilyn Smith, a niece of appellant's who is a manager of a store (R. 735), testified that when appellant was released from Alabama state prison, he promptly looked for a job. R. 739. Once he had a job, he used his salary to provide financial assistance to his parents and to Ms. Smith when she was pregnant. R. 739. Appellant also helped Ms. Smith's husband find a job. R. 740. Before his paralyzed brother was placed in the nursing home, appellant helped take care of him; after he was in the nursing home, appellant went to visit him every Sunday and brought him home to visit with the rest of the family. R. 742. When appellant's father was hospitalized for two heart attacks, appellant visited him daily and helped to pay the medical bills. R. 743.

Ms. Smith stated that appellant "drank all day," from the time he woke up in the morning until the time he went to bed at night. R. 738. He always had a glass of alcohol in his hand (R. 738) and he also carried around a flask (R. 737). She said that two of her other uncles also had drinking problems. R.

741.

Lillie Mae Bassett, appellant's sister (R. 781), testified that she and her brother have always been very close (R. 783) and have stayed in touch even after his incarceration (R. 807). They write to each other every week. Ibid. When she had financial difficulties at one point in her life, appellant helped make the payments on her house, bought groceries for her, and tires for her car. R. 799. When her husband threatened to kill her, appellant came to her home in Mississippi and protected her, even though he was risking revocation of his parole by leaving the State of Alabama. R. 802-3.

Ms. Bassett testified that when appellant was a child, his father frequently whipped him with a switch or a belt. R. 787. Appellant dropped out of school after the tenth grade, and promptly obtained employment in a drug store. R. 788. He was incarcerated for a year when he was 17. R. 788-89. He thereafter worked as a secretary/bookkeeper for the Association for the Blind and drove a cab. R. 789. He was still working for the cab company when he was sentenced to prison in Alabama. R. 790-91. After his release, he worked for the Southern Glass Company (R. 792). He lost this job because he took too much time off from work to visit his father, who had been hospitalized for a stroke. R. 792-93. Appellant then did maintenance work at Mobile General Hospital (R. 793) and at the South of Dauphin Apartments. R. 784.

Appellant married his girlfriend because she became pregnant. R. 790. After their divorce, he provided child support (R. 791) and visited his daughter (R. 791-92). She died as a result of a heart attack on her eighteenth birthday, while he was incarcerated. R. 808.

Ms. Bassett testified that her father and grandfather both had drinking problems (R. 783), that her brother developed a drug problem after he was paralyzed in an accident (R. 782), and that she herself had a drug problem for two years (R. 782-83). As for appellant, she related that in the years

immediately preceding his arrest in this case, he "drank constantly," "every day and every night." R. 784. He would typically have a glass of "Jim Beam" with him at all times. R. 804. When he went off to work in the morning, he would take a glass of Jim Beam with him. R. 805. On the day of the killing, at shortly before one o'clock in the afternoon, Ms. Bassett observed appellant at home, drinking. R. 804.

Ms. Bassett recounted that Stephen Ellis, who was approximately eight or nine years younger than appellant (R. 795), was appellant's supervisor at the South of Dauphin Apartments until Ellis was fired (ibid). Ellis and appellant became friends and would drink together. R. 796. On the day of the killing, however, appellant was trying to avoid Ellis. R. 804. In an attempt to "hide from" Ellis, he went with Ms. Bassett to the home of Ellen Sager. R. 805. But Ellis "came over there and found him." Ibid.

Ellen Sager testified that she has known appellant since the second grade (R. 821). She recounted that appellant and Ellis worked together and then became friends. Ms. Sager described Ellis as a "pushy" person, who had to have "[e]verything . . . his way." R. 823. Approximately a year before the killing, appellant began to make efforts to avoid Ellis. R. 824. Appellant would go with Ms. Sager to various places, sometimes on trips to other States, so that he would not be home when Ellis called. R. 824. Shortly before the killing, appellant's efforts to avoid Ellis became increasingly desperate, and "he didn't stay home very much." R. 825.

James Trehern testified that he came to know appellant in the Pensacola jail in mid-March 1974, when Mr. Trehern was detained on a charge of murder. R. 831. Mr. Trehern stated that appellant tried to protect younger jail inmates from the "older, more hardened career people." R. 834. Mr. Trehern related two specific incidents in which appellant intervened on behalf of a younger inmate and prevented the inmate from being injured. R. 834-35. Mr.

Trehern explained that appellant also tried to encourage younger inmates to rehabilitate themselves and turn away from crime and drugs. R. 834, 836.

The jury was read the testimony of six witnesses who testified at the first sentencing hearing but now were deceased or otherwise unavailable. Appellant's father testified at that hearing that appellant lived with him and financially supported him. R. 753-54. Eva Jackson, a neighbor of appellant's for 23 years (R. 756-57), testified that she never saw him act violently or possess a weapon. R. 756-61. Virginia Schroeder, a life-long friend (R. 761), testified to appellant's non-violent character (ibid.) and stated that appellant has consistently taken care of his father. R. 762. Curtis Smith, William Gates, and Edward L. Bosley, who were prisoners in the Escambia County Jail when appellant was brought there after his arrest in this case, testified that appellant had severe bruises and scratches and was having difficulty walking. R. 765-67 (Smith); R. 771-72 (Gates); R. 775-77 (Bosley).

In addition to testifying about the circumstances of the offense (as described above), appellant testified about his background and record. He left school after a year of high school. R. 846-47. At the age of 17, while he was working at a grocery store (R. 848), he attempted to join the Army, but was unable to do so because his parents would not sign the forms necessary for a minor to enlist. R. 853. That same year, he was convicted of interstate transportation of a stolen vehicle and was incarcerated for a year in Colorado. R. 849. Upon his release, he studied bookkeeping. R. 849. At the age of 20 or 21, he again attempted to enlist in the Army but was rejected because of his criminal record. At 22, he returned to school and obtained a General Education Degree (G.E.D.). R. 849-50. His criminal record interfered with his ability to gain employment. R. 857. For almost two years, he was unemployed, notwithstanding his use of employment agencies to look for work. R. 857.

Appellant worked for the Crane Company for two years (R. 849). He then

worked for a furniture company as a shipping clerk (ibid.), and then for a taxicab company, driving a taxicab on the night shift for two and a half years (R. 860). Following his incarceration in an Alabama prison from 1966-70, he obtained employment at a glass company, cutting glass and doing bookkeeping. R. 854, 857. He worked there for a year and a half and was then laid off (although hired back two years later). R. 858. After being laid off from his job at the glass company, he worked as a maintenance worker at the South of Dauphin Apartments. R. 861-62. He was re-hired by the glass company in 1973 (R. 858) but was fired because he spent too much time away from work, visiting his father who had been hospitalized for a stroke. R. 868. Appellant thereafter obtained a job at a hospital for tuberculosis patients (R. 861, 867), where he worked a swing shift which included the midnight shift. R. 867-68. He was still working at this job when he was arrested on the charges in the present case. R. 867-68.

Appellant testified that he began drinking alcohol at the age of 14, "buying moonshine by the gallon." R. 859. He started drinking regularly during the two years that he was unemployed. R. 860. After his return home from prison in 1970, his use of alcohol increased, and he would drink a pint to a fifth of alcohol a day. R. 860-61. He also drank on the job. R. 863. On the day of the killing, he drank roughly a fifth of "Jim Beam" (R. 921); he had drinks at home, then at Ellen Sager's house, again at Steve Ellis' house, and then in the car (R. 921-22). He has no recollection of when he stopped drinking and has no memory of some of the events that followed his drinking (ibid.).

Appellant became acquainted with Steve Ellis in 1971. R. 861. At that time, Ellis was appellant's supervisor at the South of Dauphin Apartments. R. 862. Ellis was 9 or 10 years younger than appellant. Ibid. They became friends and drank together. R. 863. Ellis, who kept alcohol in his apartment,

provided appellant with the key to the apartment; appellant would go to Ellis' apartment and drink during breaks from work. R. 863-64.

Ellis, who had no prior record (R. 864, 902), discovered that appellant did, when appellant's parole officer came to their workplace (R. 864-65). Ellis "develop[ed] a fascination" (R. 866) with the idea of committing a robbery to pay off his debts (R. 866-67), and spoke of it constantly (R. 866-67). Appellant tried talking Ellis out of it (R. 866), but Ellis was "obsessed" (R. 867). Eventually, appellant committed some robberies with Ellis (R. 867, 902), including the three of which he was convicted in 1974 (R. 902).

Appellant stated that no one was ever physically harmed in these robberies. R. 867. He testified that he has never physically harmed anyone. R. 867-68.

Appellant stated that when he went to his sister's aid in Mississippi, he knew that there was a risk that this could result in revocation of both his parole for the federal conviction and for the Alabama conviction. R. 872-73. He telephoned both of his parole officers before leaving but was unable to reach them (R. 873); he called them upon his return to inform them of his actions (ibid.). When asked why he went to Mississippi notwithstanding the risk of consequences for himself, appellant stated: "My sister needed me[,] . . . needed my help, and I went." R. 873.

Appellant testified that since his arrest in this case, he has been in prison for 15 years. R. 893. He has committed only one disciplinary violation -- failing to stand up for a count of prisoners on one occasion. R. 893-94. In response to defense counsel's questions, appellant described the stressful nature of living on death row (R. 890-92, 894-95), awaiting execution (R. 896, 900). He stated that he is now 52, and will not be eligible for parole on his Florida prison sentence until 1999. R. 900. Both the State of Alabama and the United States have lodged detainers against him. R. 899.

IV. SUMMARY OF ARGUMENT

The trial court's override of the jury's life recommendation violated the standard established by this Court in Tedder v. State, 322 So.2d 908 (Fla. 1975). Instead of giving "great weight" to the jury recommendation, as Tedder requires (id. at 910), the judge "merely substituted his view of the evidence and the weight to be given it for that of the jury." Holsworth v. State, 522 So.2d 348, 353 (Fla. 1988).

There was substantial evidence that it was Stephen Ellis, not appellant, who committed the killing of Deputy Sheriff Charles L. Wilkerson. In overriding the jury's life recommendation, the trial judge stressed his view that appellant was the triggerman. But a review of the record reveals that the trial court erroneously rejected or wholly ignored several grounds on which the jury could reasonably have concluded that Ellis was the triggerman and that appellant therefore should not be sentenced to death.

The trial court also erroneously rejected several mitigating circumstances that the jury could reasonably have viewed as justifying a life recommendation. The evidence in mitigation showed that appellant has a history of alcohol abuse and was intoxicated at the time of the killing; that he poses no threat to society in the future, since he is presently 52 years old, would not be parole-eligible in Florida until he is 62 (and would then be subject to additional incarceration because of detainers from Alabama and the federal government), and has a record of good conduct in prison; that he has a good employment history; that he constantly aided family members and provided them with financial assistance in times of need, and that he has remained in close contact with his family while he has been incarcerated; that, at the time of the crime, he was dominated by Stephen Ellis; and that appellant feels remorse for the death of Deputy Wilkerson.

In addition to this violation of the Tedder rule, the trial court erred in

excluding the results of a polygraph examination which showed that appellant was truthful in stating he did not kill Deputy Wilkerson or collude in Ellis' killing of Deputy Wilkerson. The exclusion of such evidence at a capital sentencing hearing violates Fla. Stat. § 921.141(1), the Eighth Amendment, and the Due Process Clause of the Fourteenth Amendment.

Finally, the trial court erred in admitting an autopsy photograph of the deceased, depicting the fatal gunshot wounds. The photograph was wholly irrelevant to any issue in dispute at the sentencing hearing. Introduction of so inflammatory a photograph subjected appellant to a capital sentencing proceeding tainted by passion and emotion, in violation of state law, the Eighth Amendment, and the Due Process Clause of the Fourteenth Amendment.[3]

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[3] For the purpose of preserving a contention foreclosed by a prior decision of this Court without trespassing on the Court's time, appellant summarily submits as an additional ground for reversal that the trial court's refusal to instruct the jury on the particular non-statutory mitigating factors presented by the evidence violated the Eighth and Fourteenth Amendments. See pp. 52-53 infra.

V. ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN OVERRIDING THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT

The jury in this case recommended that the court sentence appellant to life imprisonment without the possibility of parole for twenty-five years. R. 1080.[4] The trial judge overrode this recommendation and instead imposed a sentence of death. R. 1148.

In Tedder v. State, 322 So.2d 908 (Fla. 1975), this Court held that:

> A jury recommendation under our trifurcated death penalty statute should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.

Id. at 910. The Tedder rule "has been consistently interpreted by this Court to mean that when there is a reasonable basis in the record to support a jury's recommendation of life, an override is improper." Harmon v. State, 527 So.2d 182, 189 (Fla. 1988).[5]

In this case, much of the evidence presented at the sentencing hearing, and the bulk of the trial judge's analysis in his "Order Stating Reasons for Imposition of Death Sentence", related to the issue of whether the triggerman

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[4]/ The vote of the jury was six to six. R. 1080. As this Court stated in Craig v. State, 510 So.2d 857, 867 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S. Ct. 732, 98 L. Ed.2d 680 (1988), "the margin by which a jury recommends life imprisonment has no relevance to the question of whether such recommendation should be followed," and a close jury vote cannot be "consider[ed] as an aggravating circumstance." Thus, for example, in Hawkins v. State, 436 So.2d 44 (Fla. 1983), a case in which the life recommendation was based upon a jury vote of six to six (see id. at 46), this Court applied the Tedder rule in precisely the same way it would be applied in a case with a greater number of votes for life imprisonment.

[5]/ The inquiry under Tedder is whether "there are valid mitigating factors discernible from the record upon which the jury could have based its recommendation." Ferry v. State, 507 So.2d 1373, 1376 (Fla. 1987). See also Cochran v. State, 547 So.2d 928, 933 (Fla. 1989) (the post-1985 caselaw stringently enforcing the Tedder rule "'is a strong indicator to judges that they should place less reliance on their independent weighing of aggravation and mitigation'").

in the killing of Deputy Wilkerson was appellant or Stephen Ellis. The defense presented evidence and argued to the jury that it was Ellis, not appellant, who shot Deputy Wilkerson. The crux of the trial court's reasoning rejecting the life recommendation was the judge's conclusion that "no reasonable person could differ on the interpretation of the facts" showing that appellant was the triggerman. R. 1147. It was this factual conclusion that caused the judge to believe that "[t]he jury's recommendation of a life sentence could have been reasonably based only on minor, non-statutory mitigating circumstances or sympathy." Ibid.

However, as the following discussion shows, the record contains more than ample evidence from which the jury very reasonably could have concluded that it was Ellis, rather than appellant, who killed Deputy Wilkerson. And when a record reveals evidence adequate to support a finding that the defendant was not the triggerman, this Court's precedents applying Tedder do not permit the trial judge to disregard a jury recommendation that may be based in substantial part on such a finding. See, e.g., Stevens v. State, 14 F.L.W. 513, 515 (Fla. Oct. 13, 1989); Pentecost v. State, 545 So.2d 861, 863 (Fla. 1989); Harmon v. State, supra, 527 So.2d at 189; Malloy v. State, 382 So.2d 1190, 1193 (Fla. 1979); Hawkins v. State, supra, 436 So.2d at 47.

Other than the testimony of appellant himself, the evidence most directly bearing on the issue of the triggerman's identity was the testimony of prosecution witness William Waters and defense witness Louis Bolling. The prosecution argued that the jury should credit Waters' testimony that he observed a person run from the patrol car to the passenger side of a black car and then enter the car (R. 979-80, 989-90); the defense argued that the jury should credit Bolling's testimony that the man went to the driver's side of the Camaro (R. 1013-15). It would have been entirely reasonable for the jury to credit Bolling rather than Waters. Bolling stood and watched the man (R. 696-97); he

had reason to look carefully because he had just heard gunshots come from the area of the cars (R. 696-97); and he had cause to remember these events carefully because he suspected that he had witnessed the shooting of a deputy (R. 698), and he then went to Wilkerson's assistance and radioed for help (R. 699-700). In contrast, Waters merely glanced out of his window as he drove by[6] on the opposite side of the road (R. 419); his observations lasted for no more than ten seconds (ibid.); and he had no reason to look carefully or remember the events he saw, since he did not hear gunshots or observe anything suspicious (R. 416, 420).

Moreover, as defense counsel argued to the jury (R. 1011-12), the jurors could reasonably have found that what Waters saw was Deputy Wilkerson's (or another patrol officer's) stop of a different car on Pine Forest Road somewhat prior to the killing. The jury knew that appellant's car was not the first vehicle Deputy Wilkerson stopped that evening.[7] All that Waters could say

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[6]/ Although the record is not fully developed on the subject of the speed at which Waters was traveling, it would appear that he was probably driving between 30 and 60 miles an hour. Waters testified that after observing the events, he continued on to Ard's Grocery Store, which was four or five miles away, and arrived there within five or six minutes or possibly eight minutes. See R. 421.

[7]/ Other evidence in the case suggests that Deputy Wilkerson was engaged in stopping cars on Pine Forest Road prior to the stop of the Camaro. Former Deputy Donald Douglas Parker testified that after the report of the robbery of the Winn-Dixie store, Deputy Wilkerson stated on the police radio that:

> he was going to set up on Pine Forest Road. And when we use the term set up in a law enforcement context, he wasn't blocking the road, but he was parked by the side of the road observing any traffic, looking for anybody that might be acting in a manner that could be considered suspicious.

R. 328-29. Louis Bolling testified that he observed Deputy Wilkerson stop a car in the southbound lane prior to crossing the median and stopping the Camaro in the northbound lane. R. 705-6. Thus, the jury could reasonably have concluded that Deputy Wilkerson had already once before crossed the median to stop a car that looked suspicious in the northbound lane. Deputy Wilkerson was obviously watching for suspects going in either direction since he stopped at least one car going northbound and one going southbound.

about the patrol car and the other car he observed were that they were a "county cop car [and] . . . a black or dark car that was in front of him." R. 415. The two cars he observed were roughly "70 foot, not over 100 foot" from the Gulf gas station (R. 427), but the crime scene investigators' diagram definitively showed that Deputy Wilkerson's patrol car and the black Camaro were positioned 480 feet from the gas station at the time of the killing (R. 632; see also R. 696); and Waters' testimony placed the police car he observed in front of a road sign (R. 423, 427-30), while the police diagram placed Deputy Wilkerson's car fifty feet behind a road sign (R. 632).

If the jury had credited Bolling's testimony, as they reasonably could have, then the logical conclusion would have been that Ellis committed the killing. Both Deputy Bates and Investigator Joye testified that when they stopped the Camaro, Ellis was driving, while appellant was in the passenger's seat. R. 361 (Bates); R. 403 (Joye).[8]

The trial court cited the evidence of "defendant's fingerprint on the gear shift lever of the Camaro" as helping to prove "beyond a reasonable doubt that defendant was the driver of the black Camaro when it was stopped by Deputy Wilkerson." R. 1145. But the record indisputably establishes an explanation for the fingerprint on the gear shift other than appellant's having driven the car: in the aftermath of Bates' shooting of Ellis, appellant, who was in the passenger's seat of the Camaro, moved the car by leaning over to the driver's side, "pull[ing] . . . it in gear and . . . push[ing] . . . the accelerator."

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[8]/ In addition, appellant's explanation of why Ellis drove the car that day has the unmistakable ring of truth. Appellant testified that he had had his driver's license suspended for Driving While Intoxicated (R. 870), and that Ellis had a valid driver's license (R. 876). Thus, if appellant was driving the car when it was stopped by the police for a traffic infraction, there was a much higher risk of prolonged detention. Appellant stated: "[Ellis] had a driver's license. So it made more sense for him to drive than me. What if we had been just stopped for a speeding ticket or crossing lanes improperly or anything you might get stopped for and I didn't have any driver's license?" R. 876.

R. 357 (testimony of Deputy Bates); see also R. 401, 883.

The proposition that a jury could reasonably have credited Bolling's testimony is proven by the fact that the judge himself credited Bolling's testimony that the individual ran to the driver's side of the black car. See R. 1144. The sole reason why this failed to persuade the judge that Ellis was the triggerman is that the judge harmonized the accounts of Bolling and Waters by constructing a scenario in which appellant "walked toward 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." R. 1144. Regardless of whether this explanation is reasonable or not (and appellant would submit that it is not[9]), it can hardly be said under Tedder that it would have been unreasonable for the jury to find the trial court's scenario improbable. Indeed, the scenario is so improbable that the prosecutor never argued it to the jury.

Like the judge, the jurors obviously credited Bolling's testimony that the killer ran to the driver's side of the car. But, unlike the judge, the jurors recommending life imprisonment drew the obvious (and certainly reasonable) conclusion from this fact: that the killer was the same person who was observed in the driver's seat of the car at all other times -- Stephen Ellis.

While this alone should have been enough to persuade the judge of the inappropriateness of a Tedder override, there were additional grounds on which the jury reasonably could have concluded that the triggerman was Ellis and not

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[9]/ If, as the judge believed, appellant was the original driver and the shooter and then returned to the car to take the passenger's seat, common sense dictates that he would not have first walked to the driver's side of the car and told Ellis -- who, in the judge's scenario, would have been on the passenger side of the car -- to "slide over the console and assume the role of driver" (R. 1144). Rather, he would have walked directly to the passenger's side of the car, told Ellis to "slide over", and gotten into the passenger's seat as Ellis vacated it. The complicated, time-consuming sequence envisioned by the judge is particularly unlikely, because the killer would have been in a rush to get away at that point.

appellant. As defense counsel argued to the jury, Ellis' conduct after the Camaro was stopped by Deputy Sheriff Ed Bates tends to show that it was Ellis, rather than appellant, who was the killer. R. 1015-16. When Bates stopped the car, Ellis rushed to Bates' car, in a manner mirroring that of Wilkerson's killer. Although Bates was able to prevent Ellis from doing anything at that point by pointing a shotgun at him, Ellis seized the next possible opportunity to pull a gun and try to kill Bates. And, as he started to shoot Bates, Ellis said "you're next." Given the entirely circumstantial nature of the prosecution's case, the jury reasonably could have viewed Ellis' actions as fully supportive of appellant's testimony that Ellis was the triggerman.

The judge rejected this possibility, stating that "Ellis' approach to Bates and his later attempt to shoot 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." R. 1148. But the testimony on this point by both of the police officers present -- Deputy Bates and Investigator Joye -- proves that Ellis did in fact approach Bates swiftly and efficiently. Deputy Bates testified that as soon as he stopped the Camaro, "Ellis . . . jumped out of the car, and he started back . . . [and] he was right on top of me." R. 352. Bates recounted that Ellis surprised him by coming at him so quickly, and that Ellis was halfway to Bates' car by the time Bates could even open his car door. R. 370. Investigator Joye similarly testified that as soon as the Camaro was stopped, Ellis "immediately got out of the car and came back to where Bates was standing by his car." R. 399. What rendered these acts less effectual than the earlier killing of Wilkerson was that Deputy Bates had prepared his shotgun for quick use even before stopping

the Camaro (R. 369-70)[10] and was thus able to fend off Ellis by quickly pointing his shotgun at Ellis' face (R. 352).[11] But the reason Bates prepared in this way for the encounter with Ellis was his knowledge that one police officer had already been shot; Wilkerson, lacking such foreknowledge of the risks, easily fell prey when the killer approached him in precisely the same manner as Ellis approached Bates.

Ellis again acted swiftly and efficiently when he pulled out his gun and aimed it at Deputy Bates. During the few seconds that Bates glanced away in response to the gunshot from the Camaro, Ellis had turned around to face Bates, pulled out the gun, and pointed it at Bates. R. 354, 378.[12] Bates recalled that Ellis "cussed . . . and said you're next or something to that effect." R. 379. Although Bates could not remember the words precisely, he recalled clearly that "[i]t meant my life." R. 379. Michael Colter, the former police reporter for the Pensacola News Journal, confirmed this, testifying that Deputy Bates stated on the night of the incident that "Ellis had turned to him and said you're next and used the expletives thereafter." R. 648.[13]

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[10]/ Bates testified as follows: "[B]efore I stopped the car, I put my knee up against the wheel of the car to drive it. I was still behind the vehicle, never had put the blue light on. I reached over in the car. The shotgun was laying there. I pulled it up. I jacked one in the thing and put my hand up on the wheel and laid it down." R. 369-70.

[11]/ Bates stated that when Ellis "jumped out of the car . . . and was right on top of me[,] . . . I pushed the door open with my foot, and I throwed the gun up in his face. I said don't move, I'll blow your brains out. I said put your hands up on the car and do what I tell you. So he started back and put his hands on top of the hood." R. 352.

[12]/ Bates recounted: "When I turned back around, just a few seconds when I turned back around, he had pulled a gun out like this, and he had turned around." R. 354. "I could see the thing like that he was sitting beside me, pointed it to me, and the gun already straight out." R. 378.

[13]/ The trial court wholly failed to mention Ellis' cold-blooded statement "you're next" in its review of the evidence. Since the court obviously took great pains to identify every single fact in support of its conclusion that appellant was the triggerman (see R. 1142-45, 1147-48) and to distinguish facts pointing to the contrary conclusion (see R. 1144), the probability is

In arguing to the jury that appellant was not the triggerman, defense counsel contrasted the conduct of Ellis with that of appellant following the stop of the Camaro by Bates and Joye. R. 1016. Counsel pointed out that "there was testimony from Charles Joye that Vernon had a chance to shoot him when Charles Joye went up beside the car. He walked up the side and looked in the driver[']s side, and Vernon had a chance to shoot him, and he didn't." R. 1016 (closing argument of defense counsel). See R. 406-7 (testimony of Investigator Joye). The jury reasonably could have viewed this as yet further proof that Ellis was the triggerman in the killing of Deputy Wilkerson. While Ellis rushed to Bates' car and then tried to kill him, appellant remained in the car and did not shoot the deputy closest to him, even though he had ample opportunity to do so.

Rather than treating appellant's conduct as bearing on the reasonableness of the jury's life recommendation, the trial court's Order omits any mention of these facts. Instead, the Order focuses on a different aspect of appellant's conduct after the stop, stating that the evidence showed that "it was defendant who initiated the shoot-out by firing the shotgun at or towards Bates." R. 1145 (emphasis in original). But there was absolutely no evidence to support a finding that appellant fired "at or towards Bates" when he discharged the shotgun. To the contrary, the prosecution's own witness, Deputy Bates, testified that the shot which initiated the shoot-out was fired "[a]ccidentally" when "the shotgun went off accidentally in the car" and put a shot through the floorboard of the car. R. 387. See also R. 526 (testimony of the crime

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that the judge overlooked or failed to perceive the significance of Ellis' statement. But the statement is highly significant. Ellis took pains to boast to Bates of the killing of his fellow officer before killing Bates next. This type of twisted pride in the killing of Deputy Wilkerson strongly suggests that it was indeed Ellis who committed the killing. At the very least, it provided added support for a reasonable jury finding that Ellis was the killer.

scene investigator that the passenger side of the floorboard displayed an apparent shotgun blast).

The trial court's Order diverges even further from the evidence when it suggests that appellant set off this shot for the purpose of engineering Ellis' death. The Order states:

> 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 Camero. Were these events on I-10 as unintentional as defendant attempts to claim or were they the result of some more devious design to eliminate Ellis' testimony?

R. 1148. Although the judge couched this part of the Order as an insinuation rather than a finding of fact, it is apparent that the judge seriously entertained this interpretation of the evidence. But, here again, the judge's theory is so far-fetched that it was never argued to the jury by the prosecutor.[14]

There are other disputed facts which the trial court's Order treats as self-evidently supporting the thesis that appellant was the triggerman even though a jury reasonably could have viewed them otherwise. This is true of the judge's analysis of the circumstances of the robbery[15] and appellant's tes-

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[14]/ Even assuming for the sake of argument that appellant's discharge of the shotgun had been intentional (and all the evidence is otherwise), this cannot reasonably be viewed as an attempt to engineer Ellis' death. The probable consequences of firing a gun under these circumstances would be to cause the police to shoot into the Camaro, at the person who set off the gun, not at Ellis. And in fact it was not appellant's inadvertent gunshot that brought about Ellis' death. As Deputy Bates stated unequivocally, the event that resulted in Ellis' death was Ellis' drawing a gun and trying to shoot Bates. In Bates' words, when Ellis "pulled a gun out . . . and said something about you're next" (R. 354), "[i]t meant my life" (R. 379), and "all I could think about was getting one shot off and getting him or either he was going to shoot me, one or the two" (ibid.). Thus, what caused Ellis' death was that he had no compunction about killing police officers; it is precisely this fact that the jury reasonably could have viewed as proving that it was Ellis who killed Deputy Wilkerson.

[15]/ The judge states in the Order that "[d]uring the course of the robbery, witnesses described defendant as the person "'in charge'". R. 1142. In fact, neither of the two witnesses who testified about the robbery — John

timony concerning the circumstances of Deputy Wilkerson's stop of the Camaro.[16] Thus, at essentially every critical juncture of his analysis of the facts, the judge failed to do what Tedder requires: to "give[] great weight . . . [to the]

Glover and Clyde Ward -- ever used the ostensibly quoted words "'in charge'" or an equivalent term in their testimony. See R. 303-17 (testimony of John Glover); 317-25, 462-63 (testimony of Clyde Ward). Nor does the testimony compel a finding that appellant was in charge during the robbery. Indeed, Ellis took the lead role in robbing the cashiers and taking the money from the cash registers (see R. 315, 323-24). Significantly, although the judge treats the circumstances of the robbery as shedding light on the issue of the trigger-man's identity, the Order wholly omits an aspect of the robbery which demonstrates that Ellis was far more willing to draw and use his gun than was appellant: throughout the robbery, appellant never once took his gun out of his waistband (R. 314, 323), while Ellis took out his gun and at least once robbed a cashier while pointing the gun directly at her (R. 322, 324).

[16]/ There are two aspects of appellant's testimony on this subject that the trial court rejected as "implausible . . . and belied by all notions of common sense and reasonableness." R. 1143. First, the Order states: "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 them to wait." On this point, the trial court states that "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." R. 1143. But appellant did not testify that Deputy Wilkerson gave instructions only to him; rather, appellant testified that Deputy Wilkerson "said will you all mind waiting a minute, please?" R. 912. Moreover, appellant did not testify that the deputy walked around in front of the car to the passenger's door. Appellant testified that the deputy walked over to appellant's side of the car. R. 911-12. The prosecutor subsequently asked the question "Q. And then he -- after you stopped or Ellis stopped, Officer Wilkerson, walked in front of his headlights around to your side of the car, had a conversation with you, is that correct?" Appellant answered "A. Yes, he made a statement." R. 919. Thus, appellant never described the sequence of events in the manner attributed to him by the judge's Order. The second aspect of appellant's account that the judge found "implausible . . . and belied by all notions of common sense and reasonableness" (R. 1143) was appellant's statement "that the sawed-off shotgun that he later used in the shoot-out on I-10 belonged to Ellis and was located between the console and the passenger seat when he retrieved it and fired it at Deputy Bates." R. 1143. The judge concluded that: "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." R. 1143-44. The judge's analysis overlooks the fact that if the shotgun had been placed on the driver's side of the console, it easily could have interfered with the operation of the foot pedals of the car. But, here again, whether the judge's analysis is more reasonable than the account given by appellant is not the issue under Tedder. The appellant's testimony was manifestly not so implausible that no reasonable juror could possibly believe it.

jury recommendation of life," Tedder, supra, 322 So.2d at 910, by respecting any "reasonable basis in the record to support [the] . . . jury's recommendation," Harmon v. State, supra, 527 So.2d at 189. The trial court's Order sets forth -- and speculatively stretches -- every conceivable fact that can be made to advance the thesis that appellant was the triggerman; it omits crucial facts supporting the contrary conclusion; disputed facts are consistently construed in such a way as to bend them to the judge's thesis, with no attempt to examine whether the jury could equally reasonably have construed these facts in support of the life recommendation.

As this discussion has shown, there were numerous "reasonable bas[e]s" for the jury to find that appellant was not the triggerman. Bolling's testimony showed that the killer of Deputy Wilkerson went to the driver's side of the Camaro; Bates' and Joye's testimony placed Ellis in the driver's seat when the car was thereafter stopped. Ellis then behaved exactly like Deputy Wilkerson's killer in rushing to Bates' patrol car; appellant remained seated in the Camaro. Nothing in the prosecution's entirely circumstantial evidence regarding the identity of the triggerman contradicts the striking fact that, in this entire record, the only direct evidence of anyone threatening a police officer or trying to shoot a police officer at point-blank range points exclusively to Ellis. It was Ellis who explicitly threatened Deputy Bates, taunting him that he would be Ellis' "next" victim; and it was Ellis who seized every possible opportunity to shoot Deputy Bates at point-blank range, while appellant did not make any attempt at all to shoot Investigator Joye even though he had ample opportunity to do so. Accordingly, the judge erred in overriding the jury's recommendation on the ground that "no reasonable person could differ . . . [with an] interpretation of the facts" as showing that appellant was the triggerman in the killing of Deputy Wilkerson. R. 1147.

The trial court's opinion goes on to say:

> It should be added that even if the fact-finder 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.

R. 1147. It is not clear whether this is meant to be an alternative ruling that even if appellant was not the triggerman, a jury override would still be appropriate under Tedder. If so, its legal premise is necessarily that "no reasonable person could differ" (Tedder, supra, 322 So.2d at 910) with the proposition that a non-triggerman deserves the death penalty solely because he does "nothing to prevent" his accomplice from committing the killing and does not "stay at the scene . . . to lend aid to the victim" (R. 1147). But this Court's cases applying Tedder lend no support to that premise. E.g., Hawkins v. State, supra (evidence reasonably supporting a conclusion that Hawkins was not the triggerman provided a ground for upholding the jury's life recommendation (see 436 So.2d at 47), notwithstanding that Hawkins did nothing to attempt to prevent the two murders (see id. at 46), left the scene of the killing with his accomplice (see id. at 45), and not merely failed to inform the police of the still-living victim's need for medical attention but affirmatively attempted to delude the police into believing that no one was inside the victims' home (see id. at 45)). See also Pentecost v. State, supra, 545 So.2d at 862-63; Malloy v. State, supra, 382 So.2d at 1193; cf. Cochran v. State, supra, 547 So.2d at 931.

In its review of the mitigating circumstances presented by appellant, the trial court's Order once again fails to employ the proper Tedder analysis of asking whether the jury reasonably could have viewed the evidence as warranting a life recommendation. For there was substantial mitigating evidence which a reasonable juror could have viewed as calling for life imprisonment, especially when combined with a finding that appellant was not the triggerman.

As the trial court itself found, "the evidence establishes that defendant had a significant history of alcohol abuse." R. 1146. This Court has recognized that a history of alcohol abuse is a mitigating factor supporting a jury's life recommendation. See Stevens v. State, supra, 14 F.L.W. at 514; Pentecost v. State, supra, 545 So.2d at 863; see also Amazon v. State, 487 So.2d 8, 13 (Fla. 1986), cert. denied, 479 U.S. 914, 107 S. Ct. 314, 93 L. Ed.2d 288 (1986) (history of drug abuse); Norris v. State, 429 So.2d 688, 690 (Fla. 1983) (same).

There was also evidence that appellant was intoxicated at the time of the crime. Appellant testified to having drunk roughly a fifth of "Jim Beam" during the course of the day, and this was corroborated by his sister's account of seeing him drinking in the early afternoon and the crime scene investigators' discovery of the bottle of "Jim Beam" in the Camaro. The effects of this alcohol ingestion are indicated by appellant's lapses of memory of some of the events that followed his drinking. Intoxication at the time of the crime is a factor which calls for deference to a jury's life recommendation. Holsworth v. State, 522 So.2d 348, 354 (Fla. 1988); Fead v. State, 512 So.2d 176, 178-79 (Fla. 1987), modified on other grounds in Pentecost v. State, supra, 545 So.2d at 863 n.3; Buckrem v. State, 355 So.2d 111, 113 (Fla. 1978). Moreover, even in cases where the evidence of intoxication at the time of the crime was inconclusive, this Court has held that the combination of some evidence of this factor, together with evidence of a history of substance abuse, provided a ground for upholding a jury's life recommendation under Tedder. Amazon v. State, supra, 487 So.2d at 13 ("some inconclusive evidence that Amazon had taken drugs the nights of the murders, [and] stronger evidence that Amazon had a history of drug abuse"); Norris v. State, supra, 429 So.2d at 690 ("Norris . . . suffered from a drug abuse problem, and claimed to have been intoxicated at the time of the crime").

The trial court in the present case viewed the evidence of appellant's "significant history of alcohol abuse" as "contribut[ing] . . . in a small way to his criminal conduct." R. 1146. But, as this Court concluded in Burch v. State, 522 So.2d 810, 813-14 (Fla. 1988), it would not have been unreasonable for the jury to have viewed the evidence of appellant's substance abuse as possessing greater mitigating weight than the judge chose to give it in his "'independent weighing of aggravation and mitigation,'" Cochran v. State, supra, 547 So.2d at 933.

There was also evidence that appellant would not "in the future pose a danger to the community if he were not executed." Skipper v. South Carolina, 476 U.S. 1, 5, 106 S. Ct. 1669, 1671, 90 L. Ed.2d 1, 7 (1986). It was shown that he will not be eligible for parole in Florida until he is 62 years of age and will then be subject to further incarceration because of detainers from Alabama and the federal government. Although this Court in Eutzy v. State, 458 So.2d 755, 759 (Fla. 1984), cert. denied, 471 U.S. 1045, 105 S. Ct. 2062, 85 L. Ed.2d 336 (1985), questioned whether advanced age "alone" is sufficient to show that a capital defendant is no longer dangerous to society, there is more in this case. Appellant's good prison record shows that he "would not pose a danger if spared (but incarcerated)." Skipper v. South Carolina, supra, 476 U.S. at 5, 106 S. Ct. at 1671, 90 L. Ed.2d at 7. During the fifteen years he has spent in prison, he has had only one minor disciplinary infraction (which was for failing to stand up during a count of prisoners). While incarcerated, he has acted to protect weaker inmates from more experienced prisoners, and has encouraged younger inmates to rehabilitate themselves and give up drugs. As this Court has recognized, a record of good conduct in prison should be viewed as supporting a jury's life recommendation under Tedder. See, e.g., Fead v. State, supra, 512 So.2d at 179; McCampbell v. State, 421 So.2d 1072, 1075 (Fla. 1982).

Evidence of a good record of employment is an additional mitigating factor which supports a jury's life recommendation under Tedder. See, e.g., Stevens v. State, supra, 14 F.L.W. at 514-15; Holsworth v. State, supra, 522 So.2d at 353-54; Wasko v. State, 505 So.2d 1314, 1318 (Fla. 1987); Fead v. State, supra, 512 So.2d at 179; McCampbell v. State, supra, 421 So.2d at 1075; Buckrem v. State, supra, 355 So.2d at 113. In the present case, appellant consistently sought out and maintained employment, starting at an early age. This is not altered by the fact that he "held a number of jobs" (Holsworth v. State, supra, 522 So.2d at 353) and was fired from one job because he took off too much time from work in order to "stay with . . . [his hospitalized father] every day." R. 793 (testimony of Lillie Bassett). What is significant is that appellant has a strong work ethic and has demonstrated an appreciation of the importance of employment. Upon his release from prison in 1970, he immediately pursued employment. During the brief early period in his life when he was unable to find employment, he enlisted the aid of employment agencies.

This Court also has recognized that evidence of "positive character traits" supports a jury's life recommendation. Stevens v. State, supra, 14 F.L.W. at 514, 516 n.10. See also, e.g., Fead v. State, supra, 512 So.2d at 179; McCampbell v. State, supra, 421 So.2d at 1075. The trial court correctly found that appellant "maintained close family ties throughout his adult life and attempted to keep those ties intact even through periods of incarceration." R. 1146. But there was far more significant evidence of good character. The evidence showed that: appellant cared for his paralyzed brother and his elderly and infirm father; he provided financial assistance to his parents, his sister and her family when they fell on hard times, and his niece when she became pregnant; he helped pay his father's medical bills; he helped his niece's husband find a job; when his sister was in need of protection from her husband, he rushed to her side, even though it meant risking parole revocation. In

short, there was evidence that appellant was "kind and generous to those who knew him" (Stevens v. State, supra, 14 F.L.W. at 514) and provided financial support to "the members of his family" (Fead, supra at 179; accord, Stevens, supra, 14 F.L.W. at 516 n.10; Thompson v. State, 456 So.2d 444, 448 (Fla. 1984)).

Moreover, the jury could have reasonably viewed the evidence as showing that appellant acted under the influence of Stephen Ellis. Prior to his association with Ellis, appellant was gainfully employed and had stayed away from criminal activity for seven years. It was Ellis who influenced appellant to return to a life of crime. Appellant made efforts to avoid Ellis, such as staying away from home and leaving town on occasion, but to no avail.

The trial court apparently concluded that appellant was not under the domination of Stephen Ellis because Ellis was "8 or 9 years his junior . . . [and] had never before been exposed to the criminal justice system." R. 1146. But this emphasis on the age differential overlooks a crucial fact: appellant and Ellis first became acquainted at work, where Ellis was appellant's supervisor; and the working relationship that formed, with appellant in the subordinate role, was replicated in their personal relationship. Moreover, an age differential of 8 or 9 years has little impact when the actors are, respectively, in their late twenties and mid-thirties. As for Ellis' lack of exposure to the criminal justice system, it was precisely this fact that produced Ellis' bizarre fascination with the thought of committing robberies and led to his attempts to enlist appellant's aid after he discovered that appellant had a criminal record.

In argument to the jury and again in a sentencing memorandum to the court, defense counsel emphasized that appellant never physically harmed anyone in his prior crimes. R. 1005-6, 1121. In summarily rejecting this argument, the trial court stated: "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." R. 1147.[17] But the lack of any victim injury in appellant's prior crimes cannot be simply brushed aside in this manner. The proper question is whether it was "a mitigating . . . aspect[] of the defendant's . . . record," Lockett v. Ohio, 438 U.S. 586, 605, 98 S. Ct. 2954, 2965, 57 L. Ed.2d 973, 990 (1978), that the jury could reasonably consider.

The answer to this question is evident in the sentencing criteria adopted by the Legislature. In creating the Sentencing Commission and establishing general principles for sentencing, the Legislature provided that "victim injury" is a basis for departing from sentencing guidelines and imposing a more severe sentence. Section 921.001(7), Fla. Stat. (Supp. 1988). If the infliction of injury upon a victim can render a crime more heinous and the perpetrator more culpable, it stands to reason that the lack of infliction of injury renders the perpetrator less culpable. Thus, contrary to the conclusion of the trial court, the lack of victim injury in appellant's prior crimes was a factor which the jury could reasonably have viewed as supporting a life recommendation.

In testifying, appellant expressed remorse for the death of Deputy Wilkerson. When asked how he felt when he learned that Ellis had just killed a police officer, appellant said "I couldn't even begin to tell you how bad I felt. It's like the world had come to an end. . . . [It] was terrible." R.

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[17]/ It is not clear to what extent the judge's analysis of this issue was affected by his view that appellant was the triggerman. The judge's statement that "it can hardly be concluded that [appellant] . . . was not a violent person" may have meant either that appellant's violent nature is shown by: his commission of the killing and nothing more; his commission of the killing plus his prior record; or his prior record alone. If it was the first or second of these, then the judge's erroneous dismissal of the possibility of Ellis' having been the triggerman also taints the trial court's analysis of this point. The text above shows that even if the judge was looking solely to the prior record, he erred in failing to recognize the mitigating significance of the fact that appellant had never physically injured anyone.

877. Defense counsel argued to the jury and judge that appellant's remorse constitutes a mitigating circumstance in this case. R. 1009, 1120). See, e.g., Pope v. State, 441 So.2d 1073, 1078 (Fla. 1983) (recognizing remorse to be a proper mitigating circumstance). The trial court rejected this mitigating circumstance, stating that it "observed defendant while testifying and finds that defendant is not contrite or remorseful but rather is calloused and indifferent in his comportment and demeanor." R. 1147. Significantly, the trial court did not base its finding of "lack of remorse" on any explicit statements by appellant. Rather, in rejecting the sincerity of appellant's explicit expression of remorse, the trial court relied solely upon its view that appellant's "comportment and demeanor" were "indifferent" and apparently "calloused." R. 1147. But "'lack of emotion'" is not necessarily "synonym-[ous]" with "`lack of remorse.'" Hill v. State, 549 So.2d 179, 184 (Fla. 1989). As this Court indicated in Herzog v. State, 439 So.2d 1372 (Fla. 1983), a finding of "lack of remorse" is appropriate primarily when there is an "affirmative statement by the defendant indicating his lack of remorse." Id. at 1379 (explaining Sireci v. State, 399 So.2d 964 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S. Ct. 2257, 72 L. Ed.2d 862 (1982); see also Pope v. State, supra, 441 So.2d at 1073, 1077-78. Compare Echols v. State, 484 So.2d 568 (Fla. 1985), cert. denied, 479 U.S. 871, 107 S. Ct. 241, 93 L. Ed.2d 166 (1986) (approving the use of evidence of "lack of remorse" to "negate mitigation" (id. at 575) where the "lack of remorse" was explicitly shown by tape-recorded statements of the defendant "boastfully recount[ing] . . . details of the crimes" (id. at 571)); Agan v. State, 445 So.2d 326, 328 (Fla. 1983), cert. denied, 469 U.S. 873, 105 S. Ct. 225, 83 L. Ed.2d 154 (1984) (approving the use of evidence of "lack of remorse" to negate mitigation where the defendant stated that "he hoped to get a life sentence so that he could return to prison and kill again" (id. at 327)).

Given the stringent restrictions which this Court has placed upon the use of "lack of remorse" as a basis for a death sentence (see, e.g., Cochran v. State, supra, 547 So.2d at 931; Robinson v. State, 520 So.2d 1, 6 (Fla. 1988); Patterson v. State, 513 So.2d 1257, 1263 (Fla. 1987); Pope, supra, 441 So.2d at 1077-78; McCampbell v. State, supra, 421 So.2d at 1075), and given the particular need for reliability in capital sentencing (Lockett v.Ohio, supra, 438 U.S. at 604, 98 S. Ct. at 2964, 57 L. Ed.2d at 989; Zant v. Stephens, 462 U.S. 862, 888, 103 S. Ct. 2733, 2748, 77 L. Ed.2d 235, 256-57 (1983)), an assessment of a defendant's demeanor at trial is too insubstantial a basis for rejecting the proffered mitigating circumstance of remorse. But even if this Court were to conclude that findings of "lack of remorse" can be based solely upon an assessment of demeanor, the trial court erred in applying its view of appellant's demeanor to support its Tedder analysis. The proper question under Tedder is whether a jury could reasonably have credited appellant's expression of remorse. Even assuming the jury shared the judge's impression of appellant's trial demeanor as "indifferent" and apparently "calloused," it could reasonably have attributed such demeanor to the passage of fifteen years since the events took place, and to the fact that appellant spent those fifteen years under the stress of awaiting execution (R. 896, 900) and the harsh conditions of life on death row. R. 890-97.

In its analysis of mitigating circumstances, as in its analysis of the identity of the triggerman, the trial judge "merely substituted his view of the evidence and the weight to be given it for that of the jury." Holsworth v. State, supra, 522 So.2d at 353. He chose to "giv[e] . . . little weight to the testimony . . . concerning appellant's . . . alcohol problem . . . [and] found no mitigating value in the evidence offered concerning appellant's . . . employment history, . . . potential for rehabilitation and productivity within the prison system," id. at 354, as well as the mitigating evidence of Ellis'

domination, appellant's positive character traits, the lack of victim injury in appellant's prior crimes, and appellant's expressions of remorse. "Although a trial judge may not believe the evidence presented in mitigation or find it persuasive, others may. . . . It takes more than a difference of opinion for a trial judge to overrule a jury's life recommendation." Stevens v. State, supra, 14 F.L.W. at 515; accord, Holsworth v. State, supra, 522 So.2d at 353-54.

The evidence supporting a finding that Ellis was the triggerman and the substantial quantity and quality of mitigating evidence all show that there is "a reasonable basis in the record to support a jury's recommendation of life." Harmon v. State, supra, 527 So.2d at 189. Accordingly, the trial judge's override was in violation of the Tedder standard, and this case should be remanded for imposition of a life sentence. See, e.g., Hawkins v. State, supra, 436 So.2d at 47.

ISSUE II

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

In ruling on appellant's Motion to Permit Introduction of Results of Polygraph Examination, the trial court applied the general rule of this State -- that polygraph evidence is inadmissible at a judicial proceeding, except upon stipulation by the parties. See, e.g., Davis v. State, 520 So.2d 572, 573-74 (Fla. 1988); Delap v. State, 440 So.2d 1242, 1247 (Fla. 1983), cert. denied, 467 U.S. 1264, 104 S. Ct. 3559, 82 L. Ed.2d 860 (1984). However, there are both constitutional and statutory grounds for modifying this evidentiary rule when the proceeding is a capital sentencing hearing.

The command of the Eighth Amendment that a capital sentencer must receive

and consider mitigating evidence (e.g., Lockett v. Ohio, supra) does not depend upon the technical admissibility of the evidence under state law. Skipper v. South Carolina, supra. And in Green v. Georgia, 442 U.S. 95, 99 S. Ct. 2150, 60 L. Ed.2d 738 (1979), the United States Supreme Court held that the Due Process Clause bars rigid application of evidentiary rules to "exclude[] testimony [that is] . . . highly relevant to a critical issue in the punishment phase of . . . [a capital] trial." Id. at 97, 99 S. Ct. at 2151, 60 L. Ed.2d at 741 (citing Lockett). The trial court in Green had applied the hearsay rule to exclude evidence that the defendant did not participate in his accomplice's shooting of the victim. Id. at 96, 99 S. Ct. at 2151, 60 L. Ed.2d at 740. The Court vacated the defendant's sentence, holding that the "mechanistic" application of Georgia's hearsay rule in Green's capital sentencing hearing served to "'defeat the ends of justice'" and therefore violated due process. Id. at 97, 99 S. Ct. at 2151-52, 60 L. Ed.2d at 741.

In Florida, the constitutional rule prohibiting "mechanistic" application of evidentiary rules at a capital sentencing hearing is incorporated in § 921.141(1), Fla. Stat. (Supp. 1988). The statute provides, in relevant part:

> In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements.

(Emphasis added.) This Court has not as yet had occasion to rule on whether the statute permits a capital defendant to introduce polygraph evidence at his or her sentencing hearing, but the ordinary rule that statutes are to be construed so as to avoid raising unnecessary questions concerning their

constitutionality[18] strongly militates in favor of interpreting § 921.141(1) in a manner that will not bring it into tension with Green and Lockett. Notably, the Washington Supreme Court has concluded that its state statute (which is essentially identical to the Florida statute)[19] must be construed as permitting admission of polygraph evidence at a capital sentencing hearing, subject to the opposing party's right to cross-examine on the examiner's qualifications and other factors bearing on the reliability of the examination. State v. Bartholomew, 101 Wash.2d 631, 644-47, 683 P.2d 1079, 1088-89 (1984).[20] The court in Bartholomew viewed this construction as necessary to satisfy the Lockett requirement that a capital defendant be allowed to submit any mitigating evidence of his character, record, or the circumstances of the offense. Id. at 646-47, 683 P.2d at 1089.

In the proceedings below, appellant based his Motion to Permit Introduction of Results of Polygraph Examination on § 921.141(1), Fla. Stat., as well as on the Eighth and Fourteenth Amendments. R. 1065-66. The polygraph examiner, Warren D. Holmes, was obviously a qualified and objective expert. He testified that he has been a polygrapher since 1955, the first eight years as a detective sergeant in charge of the Miami Police Department's lie detection

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[18]/ See, e.g., Sandlin v. Criminal Justice Standards & Training Comm'n, 531 So.2d 1344, 1346 (Fla. 1988); Falco v. State, 407 So.2d 203, 206 (Fla. 1981); Schultz v. State, 361 So.2d 416, 418 (Fla. 1978); Corn v. State, 332 So.2d 4, 8 (Fla. 1976).

[19]/ The Washington statute provides for a trial court's admission, at a capital sentencing hearing, of "any relevant evidence which it deems to have probative value regardless of its admissibility under the rules of evidence." Wash. Rev. Code § 10.95.060(3).

[20]/ The court listed the following factors as encompassed in the roster of subjects upon which the opposing party is entitled to cross-examine: "(a) . . . [the examiner's] qualifications and training; (b) the conditions under which the test was administered; (c) the limitations of and possibilities for error in the technique of polygraph interrogation; and (d) at the discretion of the trial judge, any other matter deemed pertinent to the inquiry." 101 Wash.2d at 646, 683 P.2d at 1089.

bureau (R. 670-71); that he lectures and writes on the subject (R. 672-73); and that he has testified for the prosecution in court hundreds of times in Dade County (R. 678-79). The trial judge ruled that the witness "possesses [the] requisite qualifications" to present expert testimony. R. 680.

The judge nevertheless excluded the polygraph evidence, holding that polygraph examinations are "inherent[ly] unreliable." R. 689-90. This categorical ruling violated Green v. Georgia, Lockett v. Ohio, and Fla. Stat. § 921.141(1). Rigid exclusionary rules based upon the supposed generic unreliability of whole categories of evidence are too undiscriminating to pass constitutional muster when they are applied to deny a defendant the opportunity to present a crucial aspect of his or her defense. Rock v. Arkansas, 483 U.S. 44, 107 S. Ct. 2704, 97 L. Ed.2d 37 (1987).[21] Like the defendant in Green, petitioner sought to use the proffered evidence to show that he was not the triggerman. And this was a case in which the factfinder's assessment of appellant's credibility on that central issue was critical.

The evidence presented by both prosecution and defense on the issue of the triggerman's identity was entirely circumstantial, with one obvious exception: the testimony of appellant himself. Since the circumstantial evidence was conflicting and often equivocal, the resolution of the issue largely turned upon the factfinder's view of whether appellant was or was not telling the truth. The polygraph results showed that he was. They supported not only the veracity of appellant's denial that he shot Deputy Wilkerson but also the veracity of appellant's statements that he threw the murder weapon out the window of the car at Ellis' directive and that he left his own pistol in the car after the shoot-out.

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[21]/ The trial court's sweeping generalization condemning all polygraph evidence as unreliable is grossly overblown. See, e.g., Bennett v. City of Grand Prairie, 883 F.2d 400, 405 (5th Cir. 1989) ("Polygraph exams, by most accounts, correctly detect truth or deception 80 to 90 percent of the time.").

In Hawkins v. State, 436 So.2d 44 (Fla. 1983), this Court treated polygraph examination results as shedding light on the issue of the identity of the triggerman. Id. at 47. Concededly, Hawkins did not decide any question of admissibility because the prosecution there did not object to the admission of the polygraph evidence. But the Court would scarcely have viewed the polygraph evidence in Hawkins as it did if -- as the trial judge below asserted -- all such evidence is inherently unreliable. And in the present case, appellant not only offered Warren Holmes' polygraph testimony subject to adversarial probing on cross-examination but also offered to submit to a polygraph examination arranged by the prosecution or, at the prosecution's option, a sodium pentothal examination.

Under these circumstances, the polygraph evidence proffered by appellant could not properly be deemed by the trial judge to be so lacking in "probative value" (§ 921.141(1)) as to be excludable. The judge's exclusion of it from both his and the jurors' consideration of sentence[22] was statutory and constitutional error.

ISSUE III

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

The trial court permitted the prosecution to put into evidence an autopsy photograph of the deceased, depicting the fatal wounds to his face. The prosecutor drew the jury's attention to the photograph in closing argument, saying:

> Dr. Birdwell [testified to] . . . close wounds to the head. There's

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[22]/ Although the judge did of course hear the evidence in the proffer, his ruling that the testimony would be excluded as a matter of law (R. 690) must be viewed as signifying that he put it out of his mind in considering sentence. See, e.g., Eddings v. Oklahoma, 455 U.S. 104, 112-13, 102 S. Ct. 869, 876, 71 L. Ed.2d 1, 9-10 (1982).

> photographs over there for you to look at if you want to. Two wounds to the head. One had powder burns. [T]hat would indicate feet rather than yards, I think he testified.

R. 984.

As this Court has held, a central issue in judging the propriety of admission of a gruesome photograph is whether it truly is relevant. See, e.g., Grossman v. State, 525 So.2d 833, 837 (Fla. 1988), cert. denied, __ U.S. __, 109 S. Ct. 1354, 103 L. Ed.2d 822 (1989). When, as in the present case, the photograph was "made after the bod[y] . . . [had] been removed to a morgue many miles from the scene of the homicide[], . . . [it] should not be admitted . . . unless . . . [it has] some particular relevance." Reddish v. State, 167 So.2d 858, 863 (Fla. 1964).

In the present case, the inflammatory photograph was not relevant to any issue that was in dispute. Although the prosecutor referred to it as demonstrating the number of wounds and the close range at which the shots were fired, it is readily apparent that this was nothing more than a pretext for calling the jury's attention to the photograph. There has never been any dispute in this case about the number of wounds or the manner of their infliction. As this Court stated in describing the facts on direct appeal of the trial and original sentencing,

> After being stopped, either Cooper or Ellis walked to Deputy Wilkerson's patrol car and fired two shots into his head. He was killed instantly.

Cooper v. State, supra, 336 So.2d at 1136. Nor was there any debate about the fact that these shots were fired at close range. This was a central feature of the defense theory of the case, consistent with the prosecution's. Every witness who testified to the circumstances of the killing -- prosecution witness William Waters, defense witness Louis Bolling, and appellant himself -- all placed the killer in close proximity to the deceased at the time of the killing.

The photograph was not relevant to any of the aggravating or mitigating circumstances. The one aggravating circumstance to which the nature of the fatal wound is ordinarily pertinent -- the classification of a killing as "especially heinous, atrocious, or cruel" (§ 921.141(5)(h), Fla. Stat. (Supp. 1988)) -- was previously found by this Court to be inapplicable to the present case. Cooper v. State, supra, 336 So.2d at 1140-41.

Even assuming for the sake of argument that there had been a dispute about the distance from which the shots were fired, the photograph nonetheless was not relevant since it did not elucidate this issue. A layperson cannot glean anything about the proximity of the shooter from a photograph of a gunshot wound. Indeed, in referring to the photograph in closing argument, the prosecutor did not even attempt to say that the wounds show a particular distance; he rather relied on an imprecise reference to the testimony of the pathologist.

Moreover, if the distance had been in dispute and if the photograph had somehow shed light on that issue, it would still have been more prejudicial than probative. Dr. Birdwell testified to the number of shots and to the distance from which they were fired (to the extent that distance could be gauged without a ballistics test). The photograph was, at best, cumulative of this testimony and only vaguely supportive of it.

It is apparent, therefore, that the sole benefit of the photograph to the prosecution was the very one that is prohibited: the inducement of sympathy for the victim and antipathy for the apparent perpetrator. As this Court has stated, admission of gruesome photographs "primarily to inflame the jury" is reversible error. Jackson v. State, 359 So.2d 1190, 1192-93 (Fla. 1978), cert. denied, 439 U.S. 1102, 99 S. Ct. 881, 59 L. Ed.2d 63 (1979). In a case such as this one, where the prosecution's evidence on the central issue of the perpetrator's identity is entirely circumstantial, an inflammatory photograph has

the particularly prejudicial effect of riveting attention to the horrifying physical details of the crime and undermining the dispassion necessary for a careful sifting of the evidence bearing on the particular defendant's individual involvement and personal culpability.

Both the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment require that the decision to impose a sentence of death be a reasoned determination and not the product of irrational passion. "It is of vital importance to the defendant and the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358, 97 S. Ct. 1197, 1204, 51 L. Ed.2d 393, 402 (1977). "[T]he sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime rather than mere sympathy or emotion." California v. Brown, 479 U.S. 538, 545, 107 S. Ct. 837, 841, 93 L. Ed.2d 934, 942 (1987) (O'Connor, concurring). The "'qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.'" Zant v. Stephens, supra, 462 U.S. at 888, 103 S. Ct. at 2748, 77 L. Ed.2d at 256-57, quoting Lockett v. Ohio, supra, 438 U.S. at 604, 98 S. Ct. at 2964, 57 L. Ed.2d at 989. The gratuitous admission of the inflammatory photograph in this case unacceptably undermined the reliability of the sentencing proceeding.

ISSUE IV

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

The trial court refused appellant's proposed jury instruction identifying the particular non-statutory mitigating circumstances which could be found by the jury. See R. 937-39, 1079. Appellant believes that this was federal constitutional error. In light of Jackson v. State, 530 So.2d 269, 273 (Fla.

1988), cert. denied, __ U.S. __, 109 S. Ct. 882, 102 L. Ed.2d 1005 (1989), it would be inappropriate to occupy this Court's time by arguing the issue, but appellant raises it (and will brief it further if the Court wishes) in order to preserve it for subsequent review if necessary. Cf. Boyde v. California, No. 88-6613, cert. granted, __ U.S. __, 109 S. Ct. 2447, 104 L. Ed.2d 1002 (1989).

VI. CONCLUSION

Appellant Vernon Ray Cooper respectfully asks this Court to reverse the trial court's sentence of death and remand with instructions to sentence appellant to life in prison without the possibility of parole for twenty-five years. In the alternative, the Court should reverse the trial court's sentence of death and remand for a new sentencing hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been served by mail on Carolyn Snurkowski, Esq., Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302; and a copy has been mailed to appellant, Vernon Ray Cooper, # 042748, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, on this 22nd day of January, 1990.

RANDY HERTZ