IN THE SUPREME COURT OF FLORIDA

LORENZO M. JENKINS,

Appellant,

v. Case No. 83,727

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The following is offered to supplement and/or clarify the statement of the case and facts recited by the appellant:

The appellant's brief describes the lighting conditions behind Amy Walker's condominium as testified to by the officers present. In addition, Amy Walker stated that you couldn't really see anything out back at night, and she could not recall whether the lights were at the time of the offense (T. 352). Walker's neighbor, Jean Ann Nash, stated that it was nearly pitch dark behind her condo, and that she couldn't see Officer Tackett because it was too dark and too overgrown (T. 432-433).

The appellant's brief also mentions that the appellant had been fired on the day of the murder. It is noteworthy as well that the appellant had just been hired the day before (T. 674, 677).

In discussing the expert testimony as to the glass found on the appellant's clothes, the appellant neglects to mention that, although the refractive index is not a definite comparison, the expert stated that glass is optically different nine out of ten times (T. 716). And although the expert admitted that someone doing yard work could pick up glass in the dirt, he also noted that no soil was found on the clothes (T. 715).

The appellant's description of Richard Crum's testimony about attempting to determine a muzzle-to-garment distance left out several critical points. According to Crum, two of the factors identified as potentially contributing to a lack of residue, the possible loss of particles through necessary handling or from excessive bleeding, only related to residue that had been loosely adhered to the victim and would not explain the lack of embedded residue (T. 754, 774, 779, 782). Crum test fired the gun in this case, using similar ammunition and material similar to the cloth of the victim's pants, from about fifteen different distances (T. 757-762). He observed embedded residue when the cloth was shot from as far as eighteen inches away (T. 760). Crum concluded, based on his knowledge of the case, and his examination of Officer Tackett's pants, that some residue would have been discernible if Tackett had been shot from less than five feet away (T. 762).

Finally, the appellant's brief notes that defense counsel admitted that the appellant was trying to break into the condo and shot the officer during a struggle (Appellant's Initial Brief, p. 15). Actually, defense counsel asserted that Officer Tackett had accidentally shot himself when he fell during a struggle with the appellant (T. 927-930).

SUMMARY OF THE ARGUMENT

I. There was substantial, competent evidence presented below to support a verdict of first degree premeditated murder in this case. Officer Tackett was shot with his own gun after telling the appellant repeatedly to put the gun down. The appellant had grabbed the gun while Tackett was attempting to arrest him for burglary, and was standing several feet away at the time of the shot. Tackett's wound caused immediate and extreme blood loss, and he died in four to seven minutes. Furthermore, any possible deficiency in the evidence of premeditation would not affect the outcome in this case, since the appellant concedes that sufficient evidence of first degree felony murder was offered to sustain the jury's verdict of guilt.

II. The giving of the standard jury instruction on the definition of premeditation does not compel the granting of a new trial for the appellant. This Court has repeatedly upheld the standard instruction on premeditation as accurate and complete.

III. The appellant's argument as to his alleged absence from the bench conferences held during voir dire where peremptory challenges were exercised has not been preserved for appellate review, since there was never any objection on this basis directed to the trial court. Even if this argument is considered, the

appellant's reliance on Coney v. State, 653 So. 2d 1009 (Fla. 1995), is misplaced since the holding in that case is prospective only. There is no error presented under the line of cases prior to Coney, since the appellant was provided the opportunity to consult with his attorneys before the conferences, and thereafter acquiesced in his attorneys' peremptory challenges.

IV. The trial court did not err in overriding the jury recommendation of life and imposing a sentence of death. There was no reasonable basis for the jury recommendation, and the facts compelling a death sentence were so clear and convincing that no reasonable persons could differ as to the appropriate sentence.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO FIRST-DEGREE PREMEDITATED MURDER.

The appellant initially challenges the trial court's denial of his motion for judgment of acquittal, alleging that the evidence was insufficient to establish the element of premeditation. Of course, a court should not grant a motion for judgment of acquittal unless there is no view of the evidence which the jury might take favorable to the opposite party that can be sustained under the law. DeAngelo v. State, 616 So. 2d 440, 441-442 (Fla. 1993); Taylor v. State, 583 So. 2d 323, 328 (Fla. 1991), cert. denied, ___ U.S. ___, 115 S. Ct. 518, 130 L. Ed. 2d 424 (1994); Lynch v. State, 293 So. 2d 44, 45 (Fla. 1974). In moving for judgment of acquittal, a defendant admits the facts in evidence as well as every conclusion favorable to the state that the jury might fairly and reasonably infer from the evidence. If there is room for a difference of opinion between reasonable people as to the proof or facts from which an ultimate fact is to be established, or where there is room for such differences on the inferences to be drawn

from conceded facts, the court should submit the case to the jury. Lynch, Taylor.

The appellant's argument repeatedly asserts that the evidence in this case was not inconsistent with his theory that Officer Tackett was shot accidentally during a struggle. While this Court has recognized that circumstantial evidence may be deemed insufficient where it is not inconsistent with a reasonable theory of defense, this Court has also recognized repeatedly that the question of whether any such inconsistency exists is for the jury, and this Court will not disturb a verdict which is supported by substantial, competent evidence. Spencer v. State, 645 So. 2d 377, 380-381 (Fla. 1994); Cochran v. State, 547 So. 2d 928, 930 (Fla. 1989); Heiney v. State, 447 So. 2d 210, 212 (Fla.), cert. denied, 469 U.S. 920 (1984); Williams v. State, 437 So. 2d 133, 134 (Fla. 1983), cert. denied, 466 U.S. 909 (1984); Rose v. State, 425 So. 2d 521 (Fla. 1982), cert. denied, 461 U.S. 909 (1983). It is not this Court's function to retry a case or reweigh conflicting evidence; the concern on appeal is limited to whether the jury verdict is supported by substantial, competent evidence. Tibbs v. State, 397 So. 2d 1120 (Fla. 1981), aff'd., 457 U.S. 31, 102 S. Ct. 2211, 72 L. Ed. 2d 652 (1982). As will be seen, the state clearly presented substantial, competent evidence of premeditation in this

case, and therefore the appellant is not entitled to any relief on this issue.

The appellant's brief notes that "the version of the events related by the defendant must be believed" unless the circumstances show that version to be false. The first problem with the appellant's argument is that his "version of events" was itself inconsistent with the hypothesis of innocence he presented to the jury during the trial. The appellant's version of events, according to the testimony of Detective Kanoski, was that he had nothing to do with Tackett's murder, the attempted burglary of Amy Walker's condominium, or anything that happened in Largo on the night of June 13, 1993 (T. 799, 802-803). By the time of trial, of course, he had adopted a theory that Tackett's death resulted from an accidental shooting during their struggle. Because these two versions are inconsistent, the jury was entitled to reject either one. When a defendant has made pretrial statements that contradict his story at trial, the evidence is sufficient to create a jury issue. Bedford v. State, 589 So. 2d 245, 250-251 (Fla. 1991), cert. denied, 503 U.S. 1009 (1992); Holton v. State, 573 So. 2d 284, 290 (Fla. 1990), cert. denied, 500 U.S. 960 (1991); Dupree v. State, 615 So. 2d 713, 718 (Fla. 1st DCA) rev. denied, 623 So. 2d 495 (Fla. 1993); Stone v. State, 564 So. 2d 225 (Fla. 4th DCA

1990), rev. denied, 576 So. 2d 292 (Fla. 1991); Fowler v. State, 492 So. 2d 1344 (Fla. 1st DCA 1986), rev. denied, 503 So. 2d 328 (Fla. 1987); Buenoano v. State, 478 So. 2d 387 (Fla. 1st DCA 1985), rev. dismissed, 504 So. 2d 762 (Fla. 1987).

Defense counsel below offered only one scenario during his closing argument: Officer Tackett discovered the appellant attempting to break into Amy Walker's condominium, and started to place him under arrest. He mistakenly double locked the handcuff he placed on the appellant's right wrist, however, causing the appellant pain when Tackett reached up to cuff the left hand. The appellant tried to turn around to relieve the pressure on his wrist, and saw Tackett reaching for his gun. Wanting to make sure he didn't get shot just for complaining about his pain, the appellant grabbed Tackett's hand and the two of them fell to the ground. As they hit the ground, Tackett had his finger on the trigger, causing the gun to discharge (T. 927-930). According to defense counsel, Tackett's gun was eighteen inches away from his leg at the time of the shot (T. 936).

It is this hypothesis of innocence which the state was required to refute at trial. State v. Law, 559 So. 2d 187, 188 (Fla. 1989). Although the appellant's brief continues to assert that Tackett was shot accidentally during a struggle, appellate

counsel has distanced herself from much of the scenario offered to the jury. She no longer suggests the gun was eighteen inches away, but offers other explanations for the lack of gunshot residue on the victim's pants. She has also apparently abandoned trial counsel's suggestion that Christina Pack heard Tackett say "put it down" when Tackett discovered the appellant attempting to break in and was telling him to put down his knife (T. 921). She does not contend that Tackett was actually the one holding the gun, but notes elsewhere in her brief that the fact that appellant pulled the trigger was "not questioned" (see, Appellant's Initial Brief, p. 67).

The facts presented at trial clearly refuted trial counsel's version of an accidental shooting. The firearms expert testified that the gun had three safety mechanisms, which were working, and would have taken either seven and a half or twelve and a half pounds of pressure, depending on whether it was in single action or double action mode. Even seven and a half pounds is a significant pull and, coupled with the testimony about the safety mechanisms, refuted any theory that this shot was an "accident." Compare, Peterka v. State, 640 So. 2d 59, 67-68 (Fla. 1994) (firearms expert testified that the gun only could be fired by applying between two and a half to nine pounds of pressure on the trigger; together with

the safety mechanisms of the gun, that would have prevented an accidental firing), cert. denied, ___ U.S. ___, 115 S. Ct. 940, 130 L. Ed. 2d 884 (1995).

The appellant specifically reviews some of the evidence presented below -- the lack of gunshot residue on Tackett's pants; the conclusion that Tackett was lying on the ground at the time of the shot; the witness testimony of hearing a male Caucasian voice say "put it down" three times a few seconds before the shot; the lighting conditions at the scene; and the absence of transferred hair or fibers between Tackett and the appellant -- and attempts to explain why the testimony was not inconsistent with the theory of an accidental shooting. These explanations do not stand up under careful scrutiny.

For example, the appellant casually dismisses the testimony by Agent Crum about the lack of gunshot residue on the victim's pants, concluding that this testimony was meaningless since Crum had refused to provide a specific muzzle-to-garment distance and had discussed several possibilities for the lack of residues. When Crum's testimony is examined in light of the other evidence, however, the only reasonable conclusion to be drawn is that Tackett was shot from at least several feet away. Agent Crum had concluded, based on his knowledge of the case, that he would have

expected to have found some residue if the weapon had been closer than five feet, absent some intervening object (T. 762). The appellant has never suggested that there was an intervening object present between the gun and the victim, and certainly there are no mysterious bullet holes in any of the evidence which would support that possible explanation for the lack of residue.

The other two possibilities, that any residue was lost due to necessary handling of the pants or washed away in excessive bleeding, would only affect residue particles which were loosely adhered to Tackett's pants, and would not explain the absence of any particles actually embedded in the pants themselves (T. 754, 774, 779, 782). According to Crum's test firings, embedded residue particles were visible from the other side of the fabric when his sample cloth was shot from eighteen inches away (T. 760). This is probably why defense counsel below told the jury during closing argument that Tackett's gun was about 18 inches away when Tackett fell to the ground during the struggle and accidentally shot himself (T. 936).

In addition, the testimony indicated that extreme care had been taken to preserve any possible residue while removing and packing the pants, as well as during the testing at the FBI (T. 566-568, 681-683, 775-776). The associate medical examiner had

also inspected the pants for residue, detecting none, and Agent Crum stated that although the pants were bloody, the blood did not inhibit his examination (T. 769-770, 808).

The position of Tackett's body and the path of the bullet are also consistent with premeditation and inconsistent with the defense theory of an accidental shooting. Although Tackett could certainly have been lying down if shot during a struggle, the bullet wound proves that the gun was not pointed down at the time of the shot, as it naturally would have been if the two men were roughly parallel in a struggle. Since the bullet traveled upward through the leg, the shooter had to have been at the side and deliberately pointing the gun toward Tackett.

The appellant discounts the state's theory that he was standing at the time, with Tackett on the ground, drawing his legs up defensively, because no one testified at the trial that this was the standard procedure when you are lying on the ground and an escapee is standing over you with your gun.[1] However, jurors are permitted to use their common sense, and it is reasonable to assume

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[1]The prosecutor admitted that there was no way to ascertain Tackett's exact position, but offered as a plausible scenario that Tackett was on the ground, with the appellant standing near his feet, and Tackett had pulled his leg up into a fetal position as a reflex to protect his vital organs at the time the shot was fired (T. 952, 956-957).

that an officer in such a situation may instinctively pull his legs up in a defensive posture. It is not true, as the appellant asserts, that this theory would mean Tackett must have been "totally on his left side," (Appellant's Initial Brief, p. 29), since Tackett could have easily, and most likely, been lying on his back, with the appellant standing off to his right.

Officer Tackett's repeated command for the appellant to put the gun down is also inconsistent with a shot fired during a struggle. The state disagrees with the suggestion that it would be "natural" for a person attempting to regain control of a weapon during an scuffle to tell the other person to "put it down." Pleading with someone that has taken your gun is a last resort, a concession that your mercy is completely in their hands, and this would not be a natural remark in the heat of a struggle. This is clearly one of those areas "where there is room for such differences on the inferences to be drawn" that it should be left to the jury. Taylor, 583 So. 2d at 328.

The appellant also asserts that the facts of this case affirmatively demonstrate a lack of premeditation. Consideration of these facts, however, does not refute a finding that the appellant intended to kill Officer Tackett. Even if the appellant left the scene believing that Tackett was alive, this does not

establish a lack of premeditation. See, Asay v. State, 580 So. 2d 610, 613 (Fla.) (fact that after victim ran from the scene Asay told friend that he did not think he had killed victim but merely had scared him does not preclude a finding of premeditation), cert. denied, 502 U.S. 895 (1991); Thomas v. State, 456 So. 2d 454, 457-458 (Fla. 1984) (contention that Thomas could not be found guilty of premeditated murder since victim was still alive when appellant left him in the alley after beating him without merit). The appellant's contention that the location of the injury indicates that the appellant did not intend to kill is inconsistent with the hypothesis offered below of an accidental shooting. Defense counsel never suggested to the jury during the guilt phase that the appellant had intentionally fired a non-fatal shot, and there is no view of the evidence which reasonably supports this theory.

There was no evidence presented below which supports the appellant's suggestion that Tackett's fatal wound resulted from an accidental shot during a struggle. Compare, Williams v. State, 437 So. 2d at 135 (noting lack of evidence of any struggle where victim was crouching on the corner of the bed and the gunshot wound was not suffered at close range; Court notes the fact that the victim was only shot once is not dispositive of lack of premeditation since the wound immediately caused massive and

visible loss of spurting blood). The lack of any transferred hairs or fibers between the appellant and Officer Tackett clearly indicates that any struggle was short in duration and did not involve much physical contact, since the longer and closer the contact was, the more likely trace evidence would have been transferred (T. 689). The lack of blood on either the appellant or the gun, despite Tackett's heavy and immediate bleeding, similarly supports the conclusion that the parties were not close at the time of the shot.

It is clear from the record in this case that the appellant fired Tackett's gun intending to kill the officer. The appellant did not need to shoot Tackett in order to avoid being arrested; he had Tackett at gunpoint, lying on the ground, and could have simply run away after Tackett advised him to put the gun down. The fact that he chose not to do so, but instead shot and killed the officer, is clear evidence of premeditation. See, Grossman v. State, 525 So. 2d 833, 837 (Fla. 1988) (rejecting contention defendant did not intend to kill, but merely panicked and shot officer out of fear; noting his fear of going back to prison would not have been satisfied by beating the officer into submission and taking back his handgun and driver's license), cert. denied, 489 U.S. 1071 (1989); Bello v. State, 547 So. 2d 914, 916 (Fla. 1989)

(finding sufficient evidence from which the jury could have inferred premeditation to the exclusion of all other possible inferences, based on Bello's shooting at police officers through door: "It is clear from the record that Bello knew that police officers were attempting to enter the room, and he fired at an angle that would most likely hit, and probably kill, anyone attempting to open the door.")

Of course, premeditation may be formed in a moment and need only exist for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of that act. Spencer, 645 So. 2d at 380-381; Asav, 580 So. 2d at 612; Wilson v. State, 493 So. 2d 1019, 1021 (Fla. 1986); Preston v. State, 444 So. 2d 939, 944 (Fla. 1984), cert. denied, U.S. ___, 113 S. Ct. 1619, 123 L. Ed. 2d 178 (1993). There is no prescribed length of time which must elapse between the formation of the purpose to kill and the execution of the intent; it may occur a moment before the act. Provenzano v. State, 497 So. 2d 1177, 1181 (Fla. 1986), cert. denied, 481 U.S. 1024 (1987); Sireci v. State, 399 So. 2d 964, 967 (Fla. 1981), cert. denied, 456 U.S. 984 (1982); McCutchen v. State, 96 So. 2d 152 (Fla. 1957). This Court has characterized the duration of the premeditation as "immaterial so long as the murder results from a premeditated

design existing at a definite time to murder a human being." Songer v. State, 322 So. 2d 481, 483 (Fla. 1975), vacated on other grounds, 430 U.S. 952, 97 s. ct. 1594, 51 L. Ed. 2d 801 (1977).

Whether or not the evidence shows a premeditated design to commit a murder is a question of fact for the jury which may be established by circumstantial evidence. Penn v. State, 574 So. 2d 1079, 1081-1082 (Fla. 1991); Asay, 580 So. 2d at 612; Cochran, 547 So. 2d at 930; Wilson, 493 So. 2d at 1021; Preston, 444 So. 2d at 944; Spinkellink v. Stat-e, 313 So. 2d 666 (Fla. 1975), cert. denied, 428 U.S. 911 (1976). Weighing the evidence in light of these standards it is clear that the appellant's premeditation was proven beyond a reasonable doubt.

Furthermore, it is obvious that any possible deficiency in the evidence of premeditation must be considered harmless beyond any reasonable doubt. The appellant concedes that there was sufficient evidence of felony murder, based on three possible felonies, to support a jury verdict for first degree felony murder (Appellant's Initial Brief, p. 33). Where such evidence exists, any error in denying a motion for judgment of acquittal and instructing the jury on the alternative of premeditated murder is harmless. Mungin v. State, 667 So. 2d 751, 754 (Fla. 1995); McKennon v. State, 403 So. 2d 389, 390-391 (Fla. 1981); see also, Jackson v. State, 498 So.

2d 406, 410 (Fla. 1986) (even without the evidence of premeditation, the jury could have found felony murder based on the commission of the crime of escape), cert. denied, 483 U.S. 1010 (1987).

The appellant disputes the harmlessness of any error in this case, claiming it cannot be said that any juror, let alone all of the jurors, based the conviction solely on a felony murder theory, so there is the possibility of an invalid basis for the conviction. Relying on a line of United States Supreme Court cases following Stromberg v. California, 283 U.S. 359, 51 S. Ct. 532, 75 I,. Ed. 1117 (1931), the appellant claims any invalidity in the theory of premeditation requires per se reversal.

The appellant has failed to demonstrate any justification for reconsideration of this argument, which has previously been rejected by this Court. Parker v. Dugger, 660 So. 2d 1386 (Fla. 1995) ; Atwater v. State, 626 So. 2d 1325, 1327-28, n. 1 (Fla. 1993), cert. denied, ___ U.S. ___, 114 S. Ct. 1578, 128 L. Ed. 2d 221 (1994). Parker succinctly explains the rationale for not applying Stromberg in the situation at bar:

> *Stromberg* involved a conviction under a California statute that prohibited the flying of red flags on three alternative grounds, one of which violated rights guaranteed by the First Amendment. The United States Supreme

> Court reversed the general verdict against Stromberg as it was impossible to tell if her conviction rested on the unconstitutional ground. *283* U.S. at 370, 51 S.Ct. at 536. As the United States Supreme Court recently explained, *Stromberg* does "not necessarily stand for anything more than the principle that, where a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground." *Griffin v. United States, 502* U.S. *46, 53, 112* S.Ct. 466, 471, 116 L.Ed.2d 371 (1991). Neither felony murder nor premeditated murder is an unconstitutional ground on which to base a conviction. Thus, *Stromberg* is inapposite to the instant case.

660 so. 2d at 1390.

The appellant criticizes this Court's reliance on Griffin United States, *502* U.S. 46, 112 S. Ct. 466, 116 L. Ed. 2d 371 (1991), noting Griffin is not a case involving the death penalty and does not discuss the right to unanimous verdict. The appellant also claims that the reasoning of Griffin is flawed, in that a jury cannot be assumed to reject a theory which is unsupported by the evidence since they would believe that the prosecutor and judge believed the evidence to be sufficient. In addition, the appellant distinguishes Schad v. Arizona, 501 U.S. 624, 111 s. ct. 2491, 115 L. Ed. 2d 555 (1991) since Schad did not involve a legal theory supported by insufficient evidence. Finally, relying on the fact that his jury asked questions relating to the felony of escape, the

appellant speculates that the jury may have returned a third degree felony murder conviction if they had not been given the alternative premeditated theory.

None of these concerns warrant the reversal of this Court's holding in Parker, or the granting of a new trial in this case. The fact that Griffin did not involve the death penalty is immaterial, since the issue presented does not relate to sentencing. ' fin soundly rejects the claim that a general verdict must be set aside where one possible basis is not supported by sufficient evidence. 112 S. Ct. at 474. Additionally, the United States Supreme Court has applied this reasoning in the death penalty context. See, Sochor v. Florida, 504 U.S. 527, 538, 112 S. Ct. 2114, 119 L. Ed. 2d 526 (1992) (refusing to presume juror error of finding aggravating circumstance that was not supported by sufficient evidence).

The suggestion that the jury would have found premeditation even if the evidence was lacking simply because the prosecutor argued it and the judge instructed them on it is unconvincing, Jurors are presumed to follow the law, and there is no reason to believe the jury in this case would ignore the law and simply do what the prosecutor told them for the fun of it. The court below

obviously gave many instructions, not just first degree murder, but that was the only verdict returned,

Also, speculation about what the jury may have done based on the questions presented during the deliberations is hardly a basis for a new trial. Certainly, the distinction between felony murder based on escape and felony murder based on resisting arrest with violence is a difficult concept. The jury questions, if anything, merely reflect that the jury gave careful consideration to its verdict, supporting the presumption in Griffin that the jury below fulfilled its obligation to follow the law.

In conclusion, there was substantial, competent evidence of premeditation presented below to support a first degree murder conviction in this case. Any possible concern with the sufficiency of this evidence, however, would not affect the validity of the verdict in this cause, since there is obviously sufficient evidence to support a first degree felony murder conviction. Therefore, the appellant is not entitled to relief in this issue.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN GIVING THE STANDARD JURY INSTRUCTION ON PREMEDITATION.

The appellant next contends that the trial court should have granted his request to have the jury instructed on the definition of premeditation in accordance with McCutchen, 96 So. 2d at 153, rather than the standard jury instruction. This Court has expressly upheld the standard jury instruction, finding that it "addresses all of the points discussed in McCutchen, and thus properly instructs the jury about the element of premeditated design." Spencer, 645 So. 2d at 382.

Although the appellant characterizes the differences between the definition of premeditation set forth in McCutcheon and that in the standard instruction as "major," he has only specifically discussed the facts that the instruction does not explicitly state that the intent must be "fully" formed before the killing and requires "reflection" but does not mention "deliberation." These differences, however, do not affect the substance of the instruction and certainly do not mislead the jury on the definition or render the instruction erroneous.

It is well settled that the correctness of a jury charge should be determined by the consideration of the whole charge. Barkley v. State, 152 Fla. 147, 10 So. 2d 922 (Fla. 1942); Anderson v. State, 133 Fla. 63, 182 So. 643 (Fla. 1938). The denial of a requested jury instruction cannot be deemed error where the substance of the charge was adequately covered by the instructions as a whole, and the charges as given are clear, comprehensive, and correct. Bolin v. State, 297 So. 2d 317, 319 (Fla. 3d DCA), cert. denied, 304 so. 2d 452 (1974); Roker v. State, 284 So. 2d 454, 455 (Fla. 3d DCA 1973). In this case, the jury was completely and thoroughly instructed on the definition of premeditation (T. 979-980). Therefore, there was no abuse of discretion committed when the trial court refused to give the special instruction on premeditation requested in this case.

The appellant also claims that the definition from McCutcheon was required because it is more thorough and sets forth a higher standard for premeditation than the standard instruction. This claim was rejected in Spencer. In addition, this is not a relevant consideration in reviewing the denial of a requested instruction. Every instruction could be expounded upon, but the focus must be on whether the instruction, as given, was sufficient to advise the jury of the law. Case decisions may offer additional definitions

or explanations of the law, but a trial judge is not required to embody such decisions into his charge to the jury. This Court has recognized that not every judicial construction must be incorporated into a jury instruction. Jackson v. State, 648 So. 2d 85, 90 (Fla. 1994). "Passages from appellate opinions, taken out of context, do not always make for good jury instructions." Sarduy v. State, 540 So. 2d 203, 205 (Fla. 3d DCA 1989).

The appellant attacks the state's closing argument that "The time period involved must have been sufficient to allow reflection on his part and that the premeditated intent to kill existed before and at the time of the killing" (T. 955; Appellant's Initial Brief, p. 48).[2] Yet that is the law on premeditation in this state. As previously noted, premeditation may be formed in a moment and there is no prescribed length of time which must elapse between the formation of the purpose to kill and the execution of the intent; it may occur a moment before the act. Spencer, 645 So. 2d at 380-381; Asay, 580 So. 2d at 612; Provenzano, 497 So. 2d at 1181; Sireci, 399 So. 2d at 967. There is absolutely no error shown in the state's closing remarks about premeditation.

'Naturally, there was no objection to these comments.

In addition, the trial court could have properly refused the instruction requested by the defense because it is not an accurate statement of the law. Although much of the requested instruction was taken from McCutcheon, it also informed the jury that

> Deliberation is the element which distinguishes first and second degree murder. It is defined as a prolonged premeditation and so is even stronger than premeditation.

(R. 1266). No legal authority has been offered, at trial or on appeal, to support the statement that premeditated murder requires something "stronger than premeditation." There was no reason to so instruct the jury.

The giving of a requested instruction is within the trial court's discretion. Kramer v. State, 619 So. 2d 274, 277 (Fla. 1993). The appellant has failed to establish any abuse of discretion in this case, and is not entitled to a new trial on this issue.

ISSUE III

WHETHER THE TRIAL COURT VIOLATED THE APPELLANT'S RIGHT TO BE PRESENT AT THE EXERCISE OF PEREMPTORY CHALLENGES.

The appellant's next issue has not been preserved for appellate review. The appellant complains that he was not present at bench conferences during jury selection, where potential jurors were discussed and jury challenges were exercised. However, the appellant never requested the opportunity to attend these conferences with his attorney, and never objected to the procedure used by the court to select the jury. The lack of a contemporaneous objection precludes this Court's review of this issue. Gibson v. State, 661 so. 2d 288, 290 (Fla. 1995); Shriner v. State, 452 So. 2d 929, 930 (Fla. 1984). Although this Court's original opinion in Conev v. State, 653 So. 2d 1009 (Fla. 1995), stated that no objection was necessary to preserve this issue for appeal, that statement was omitted from the revised opinion issued on April 27, 1995;[3] therefore, this issue is clearly barred. Compare, Conev v. State, 20 Fla. Law Weekly S16, S17 (Fla. January 5, 1995) and 653 So. 2d at 1013.

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[3]The appellant's initial brief quotes from the original opinion in Conev, including this statement.

Even if the issue is considered, however, the appellant has not demonstrated that he is entitled to a new trial. His reliance on Coney is misplaced since his trial occurred in 1994 and the rule in Coney is, by its own terms, to be applied prospectively only. 653 So. 2d at 1013; Lett v. State, 668 So. 2d 1094, 1095 (Fla. 1st DCA 1996) (certifying question); Quince v. State, 660 So. 2d 370, 371 (Fla. 4th DCA 1995); Ogden v. State, 658 So. 2d 621, 622 (Fla. 3d DCA 1995); see generally, Wuornos v. State, 644 So. 2d 1000, 1007-1008, n. 4 (Fla. 1994), cert. denied, U.S. , 115 s. ct. 1705, 131 L. Ed. 2d 566 (1995). Therefore, Coney does not apply to the instant case.

Clearly, no new trial is warranted under the case law relating to this issue prior to Coney. A review of the record indicates that jury selection was conducted by the court asking preliminary questions of the prospective panel; followed by individual voir dire as to any exposure to pretrial publicity; followed by general questions to the entire prospective panel from the state and the defense (T. 1-311). Several jurors were excused for cause during the individual voir dire, both at bench conferences (T. 226-228, 235-236, 240-242) and in open court (T. 245, 263-264). The appellant's brief refers to five bench conferences where the record does not affirmatively indicate whether he was present or absent,

citing to T. 194, 226, 235, 240, and 303 (Appellant's Initial Brief, p. 53). The record reflects, however, that at three of these conferences, only causal challenges based on the individual questioning were exercised (T. 226, 235, 240). Even applying Coney to these instances, no reversible error has been demonstrated. 653 so. 2d at 1013 (error harmless where only causal challenges were exercised). As to the two bench conferences where peremptory challenges were made, the record clearly reflects that the defense attorneys were advised to consult with the appellant prior to approaching the bench (T. 194, 303). Thus, as in Gibson, "there is no indication in this record that [the appellant] was prevented or limited in any way from consulting with his counsel concerning the exercise of juror challenges," and, in fact, the record affirmatively indicates otherwise.

The law prior to Coney provided that no reversible error **was** shown where the defendant was present in court but not at the bench when the actual selections were made, as long as there were no limitations on his ability to consult with counsel before any decisions or challenges were made. Jones v. State, 569 So. 2d 1234, 1237 (Fla. 1990) (no error shown, despite defendant's absence from side-bar, where court gave defense counsel the opportunity to consult with client prior to bench conference), cert. denied, ___

U.S. ___, 114 S. Ct. 112, 126 L. Ed. 2d 78 (1993); Turner v. State, 530 So. 2d 45, 49-50 (Fla. 1987) (error harmless where Turner had the opportunity to participate in choosing which jurors would be stricken from the panel, since he could have offered no further assistance during counsel's actual exercise of the peremptories), cert. denied, 489 U.S. 1040 (1989); Quince, 660 So. 2d at 371-372; Ogden, 658 So. 2d at 622; Lewis v. State, 566 So. 2d 270 (Fla. 2d DCA 1990); Smith v. State, 476 So. 2d 748 (Fla. 3d DCA 1985), aff'd., 500 So. 2d 125 (Fla. 1986). Since the appellant was provided the opportunity to consult with his attorneys prior to their appearance at the bench conferences, no reversible error has been presented in this case.

On these facts, no new trial is mandated by the appellant's alleged absence from the bench conferences held during jury selection.

ISSUE IV

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

The appellant's final issue challenges the propriety of his sentence. He contends that the trial court's imposition of a death sentence was improper in light of the jury recommendation for life imprisonment. However, the appellant has failed to demonstrate any reasonable basis for the jury's recommendation, and therefore he is not entitled to relief on this issue.

In his argument on this issue, the appellant initially criticizes the trial court's consideration of the aggravating factors, alleging that two of the factors -- avoid arrest and murder of a law enforcement officer -- were improperly doubled, and that a third, murder committed during the course of a felony, could not be considered since the appellant could only have been convicted of felony murder. Taking the last argument first, the state reiterates that the evidence discussed in Issue I clearly demonstrates that the appellant could properly have been convicted of first degree premeditated murder as well. Even any deficiency in this regard, however, is inconsequential since this Court has repeatedly rejected the suggestion that this factor may not be applied when the murder conviction rests on a felony murder theory.

See, Wuornos v. State, 20 Fla. L. Weekly S481 (Fla. Sept. 21, 1995); Johnson v. State, 660 So. 2d 637, 647 (Fla. 1995). Those decisions are based on well-established law. See, Lowenfield v. Phelphs, 484 U.S. 231, 108 S. Ct. 546, 98 L. Ed. 2d 568 (1988); Squires v. State, 450 So. 2d 208, 212 (Fla.), cert. denied, 469 U.S. 892 (1984); Waterhouse v. State, 429 So. 2d 301 (Fla.), cert. denied, 464 U.S. 977 (1983), 488 U.S. 846, 869 (1988); Menendez v. State, 419 So. 2d 312 (Fla. 1982); White v. State, 403 So. 2d 331, 335-336 (Fla. 1981), cert. denied, 463 U.S. 1229 (1983). The arguments advanced for reconsideration of this issue are not compelling.

In addition, the appellant's claim that the court improperly doubled two of the aggravating factors does not establish that his death sentence was unwarranted. The state recognizes that this Court has previously held that the factors of avoid arrest and murder of a law enforcement officer are duplicative and should only be considered as one factor. Kearse v. State, 662 So. 2d 677, 685-686 (Fla. 1995); Armstrong v. State, 642 So. 2d 730, 738 (Fla. 1994), cert. denied U.S. , 115 S. ct. 1799, 131 L. Ed. 2d 726 (1995). Respectfully, the state submits that this holding misconstrues the nature of these circumstances and the relevant case law on this issue.

In Kearse, this Court held that these factors were improperly doubled because each was based on the same aspect of the crime, that the victim was a law enforcement officer killed to avoid arrest. However, these are actually separate aspects, since avoid arrest refers to the motivation for the murder, and murder of a law enforcement officer refers to the status of the victim. Compare, Stano v. State, 460 So. 2d 890, 893 (Fla. 1984) (HAC and CCP not improperly doubled, since CCP refers to state of mind and HAC refers to the nature of the killing), cert. denied, 471 U.S. 1111 (1985). The defendant's state of mind is clearly a different aspect than the victim's occupation. In rejecting the defense claim of improperly doubling of these factors, the court below noted that avoid arrest related to the crime, while murder of a law enforcement officer related to the victim (T. 1043). Thus, the court concluded it could properly consider both factors.

Cases discussing whether aggravating factors have been improperly doubled often address whether the factors are supported by distinct proof. Where separate evidence and distinct facts are offered to establish the different factors, consideration of both factors is deemed proper. Mills v. State, 462 So. 2d 1075, 1081 (Fla.), cert. denied, 473 U.S. 911 (1985); Waterhouse, 429 So. 2d at 307; Bill v. State, 422 So. 2d 816, 818-819 (Fla. 1982), cert.

denied, 460 U.S. 1017 (1983). In the instant case, proof of the appellant's motive to avoid arrest is found in the fact that he was committing a burglary when discovered by the victim; and that he was partially handcuffed when he fled after the murder. Proof that the victim was a law enforcement officer engaged in the performance of his duties came in the form of a stipulation by the parties (T. 557). Thus distinct, independent proof was offered to support each of these factors, and the trial court properly found both factors to exist.

Even if the same proof is offered as to both aggravating circumstances, an improper doubling does not occur where the factors themselves are distinct. In Echols v. State, 484 So. 2d 568 (Fla. 1985), cert. denied, 479 U.S. 871 (1986), this Court rejected such a challenge where the trial court had given separate weight to pecuniary gain and to cold, calculated and premeditated.

> There is no reason why the facts in a given case may not support multiple aggravating factors provided the factors are themselves separate and distinct and not merely restatements of each other as in a murder committed during a robbery and murder for pecuniary gain, or murder committed to eliminate a witness and murder committed to hinder law enforcement.

484 So. 2d at 574-575. The avoid arrest and murder of law enforcement officer factors in this case are not mere restatements

of each other. The avoid arrest factor would have applied even if the appellant had been apprehended by a private citizen. The fact that a law enforcement officer was killed is a distinct fact giving rise to a distinct aggravating factor, and the court below did not err in refusing to merge that factor with the avoid arrest circumstance.

In Toole v. State, 479 So. 2d 731, 733 (Fla. 1985), this Court rejected a claim of improper doubling of the factors of murder during the commission of an arson and great risk of death to many persons. Noting that arson could, as in that case, involve great risk of death to many people, this Court stated "this aggravating factor is dependent upon proof at trial and is not necessarily encompassed by the felony of arson. By contrast, every robbery necessarily involves pecuniary gain, so that when these two factors are both found there is an improper doubling." Since neither avoid arrest nor murder of a law enforcement officer are necessarily encompassed by the other, the reasoning of Toole supports the trial court's actions in finding both of these factors below. Furthermore, as noted in Justice McDonald's dissent in Kearse, the fact that the legislature added the aggravating factor of murder of a law enforcement officer evidences legislative intent to treat this circumstance as additional to the avoid arrest factor. Either

of these factors could be committed independently; the fact that both apply on the facts of this case makes this offense more egregious, and the trial court did not err in treating it as such.

Clearly, any possible error in the failure to combine the avoid arrest and murder of a law enforcement officer factors in this case was harmless. It is not the number of aggravating factors that matters; it is the combined weight of the factors when balanced against the relevant mitigation. Even if these factors had been merged, there would exist three strong aggravators. The trial court found only negligible nonstatutory mitigation and clearly would have imposed the same sentence. Armstrong, 642 So. 2d at 739 (improper doubling harmless due to three strong aggravating factors); Peterka, 640 So. 2d at 71; Sims v. State, 444 so. 2d 922 (Fla. 1983), cert. denied, 467 U.S. 1246 (1984) (two instances of improper doubling both harmless); Straight v. State, 397 So. 2d 903 (Fla.), cert. denied, 454 U.S. 1022 (1981).

The appellant also contends that the jury override was improper because the judge did not sufficiently consider the proposed evidence in mitigation. Specifically, the appellant claims that the court should have found and weighed his purported lack of intent to kill, as well as his lack of eligibility for parole. He speculates that the judge 'merely disagreed with the

jury's view of the evidence" and improperly substituted his judgment for that of the jurors, particularly on the issue of the appellant's intent, asking this Court in turn to substitute its judgment for that of the trial judge. He concludes that "Because the trial court believed the jury's verdict was based on a misapplication of the law, it totally rejected the jury's recommendation," giving it "no weight." (Appellant's Initial Brief, p. 84). This conclusion is clearly refuted by the thorough and well-reasoned sentencing order entered below.

In rejecting the jury's recommendation the trial judge, in the instant case, expressly recognized the Tedder standard and concluded that no reasonable interpretation of the facts and evidence would support the jury recommendation for life (R. 1447). The court further noted that the jury may have been unintentionally misled by defense counsel's closing argument into believing that the death penalty could not be imposed unless the appellant entertained an intent to kill, not simply that the lack of such an intent was something that may be weighed in mitigation (R. 1447-1451). This was not a total rejection of the jury recommendation, but merely an attempt to explain why the jury would have returned an unreasonable recommendation.

The sentencing judge thoroughly analyzed the appellant's suggestion that he did not intend to kill Officer Tackett and found that the facts refuted this suggestion.

> At trial defense counsel proposed to the jury two separate interpretations of the evidence as support for the contention that the defendant had no intent to kill Officer Tackett. The first suggested that the shooting was accidental and occurred during a struggle. The second conceded that the defendant intentionally deprived the officer of his weapon and deliberately shot the officer, but that based on the location of the wound, the defendant did not intend for the shot to be fatal. With the foregoing in mind, the actual evidence introduced at trial must be examined to determine if either interpretation is factually supported.
>
> Let's first examine the suggestion that the shooting was accidental: The testimony of Richard Crum, the FBI firearms expert, established that the murder weapon was Officer Tackett's own .45 Cal. Smith & Wesson Semi-Automatic. This gun has three safety devices that prevent it from accidentally discharging. Agent Crum's testimony, which was uncontroverted, was that the only way that the fatal shot could possibly have been fired was by someone pulling the trigger. The weapon can hold a total of ten rounds, nine in the magazine and one in the firing chamber. When the weapon was recovered it contained eight live rounds in the magazine and one live round in the firing chamber. The shell casing for the one expended round was found in the general area where the shooting occurred. This is significant because it proves that at the time the confrontation occurred Officer Tackett's gun had a live round in the firing

chamber and a full magazine. Tests conducted with the weapon revealed that it would take approximately twelve pounds of pressure to pull the trigger in its double action mode. Once the first round is fired any remaining rounds may be fired in the single action mode which would require seven pounds of pressure on the trigger. This weapon did not have a hair trigger by any standard. Normally, the first round to be fired from a full semi-automatic is double action. The trigger is pulled, the firing hammer goes back and then falls forward striking the firing pin and discharging the chambered round. The weapon then automatically ejects the spent cartridge case and by the same action cocks the firing hammer so that the weapon is then in a single action mode. The only way that this fully loaded weapon could be fired in the single action mode would be if the shooter manually cocked the firing hammer before pulling the trigger, under the circumstances in this case, a highly unlikely possibility. It was established that the weapon could only be discharged by someone's finger pulling the trigger, most probably by exerting twelve pounds of pressure. The next question that must be addressed is whose finger caused that trigger to be pulled. To assist in that determination an examination of the trajectory of the bullet is instructive. The bullet entered the side of Officer Tackett's right thigh from slightly behind and traveled at a slightly upward angle. It severed the femoral artery and exited the inside of the thigh, eventually lodging in Officer Tackett's scrotum. Given the physical characteristics of the human wrist, the length of the arm and the angle at which the gun would have had to have been held to cause the bullet to have such a trajectory, it would have been virtually impossible for the finger that pulled the trigger of the weapon to have been

Officer Tackett's. In addition, the muzzle-to-cloth firing tests that were conducted by the FBI would completely rule out such a possibility. The only conceivable person who could have fired the weapon under these circumstances was the Defendant. The fact that he did so was never seriously questioned. The Defendant himself admitted to his wife, in the presence of Dorothy Grey, that he had "shot a cop." After he went up to Dorothy Grey's apartment to have the handcuffs removed he admitted the shooting to Shawn Davis. In neither incident did the Defendant suggest that the shooting was accidental.

Other evidence sheds light on the question of how the shooting occurred. There was testimony from Judy Bunker, the blood spatter expert, that Officer Tackett was lying on the ground at the time the shot was fired. A neighbor across the Pinellas Trail from the complex where the shooting occurred, Christina Pack, heard a male Caucasian voice that could only have been Officer Tackett. The voice shouted, 'Put it down! Put it down now! Put it down!" followed three seconds later by the fatal shot. Agent Crum, who conducted extensive firing tests with the murder weapon testified that the muzzle of the gun had to be at least four and one half feet away from the point of entry before the shot would leave no evidence of gunpowder residue on test cloth, which was similar to Officer Tackett's uniform pants. Officer Tackett's uniform was carefully preserved and sent to the FBI laboratory for analysis. Upon being examined no evidence of gunpowder residue could be detected. In light of all this evidence, it must be assumed that at some point during their confrontation, the Defendant physically deprived Officer Tackett of his weapon. Was there a struggle, as the Defendant has suggested? FBI Agent Mike Malone, an

acknowledged hair and fiber expert, testified that it is normal, during a struggle between two individuals, for there to be hair or fiber transfer between them. A careful scraping of the clothing of both Officer Tackett and the Defendant revealed that there had been no such transfer. The Defendant's clothing contained no evidence of blood. The only physical evidence of injury on either Tackett or the Defendant was a minor scrape on the back of the officer's left elbow and a quarter inch abrasion on the front upper portion of one leg, Any "struggle" based on this evidence could not have been too serious or extensive. When viewed in its totality, the evidence, all of which is of necessity circumstantial, fails to support the conclusion that the shooting was accidental during the course of a struggle.

Let's now examine Defendant's second theory; that he deliberately shot Officer Tackett in a non-vital area in order to escape: The testimony from virtually every witness who viewed the scene of the shooting that night confirmed how dark it **was.** Officer Tackett's uniform pants were black and his shirt was a dark olive drab color. The location where this shooting took place on the night in question was so dark that two backup officers going to Officer Tackett's aid twice passed within a few feet of his body without seeing him. For any person to believe under those conditions that the Defendant could have the ability, after depriving a police officer of his gun, to deliberately place a shot in a non-vital part of the victim's body is just not reasonable.

Consider the situation from the standpoint of the Defendant on the night in question: He is about to be evicted for nonpayment of rent. He told two people that

day that he needed several hundred dollars. That same day he is fired from his job, further adding to his financial problems. So that night he rides his bike down the Pinellas Trail, looking for someplace to burglarize. He stops at the Pelican Place condominium complex, gets two lawn chair cushions from Scott Daniels' patio at Unit #16 and takes them down to Amy Walker's Unit #10. He places the cushions at the base of the rear glass door of the unit and begins to methodically chip away with a kitchen knife at the glass next to the frame where the lock is located. This was the "tapping" or "clicking" sound which Miss Walker heard that caused her to first call a friend and then 911. The Defendant slowly chips away at the glass until he finally breaks through and creates a small hole near the edge. At that point he discovers that the door has not one but two layers of glass to be penetrated. Before he can begin to chip through the second pane, he is surprised by Officer Tackett. Caught redhanded, the Defendant knew he was going to jail, and probably prison. Under these circumstances, given a day filled with frustration, the defense attorney suggested that the Defendant developed a non-lethal escape plan. The plan was to take Officer Tackett's weapon away from him and to shoot the officer in some non-vital area in order to avoid going to jail. Such a suggestion, when viewed in light of the evidence is ridiculous. What evidence does the Defendant suggest as support for his interpretation? First, that the bullet struck Tackett in an area that would not normally be considered vital. It is not reasonable to believe, and there is no evidence to support, that under those conditions and circumstances the Defendant had either the ability or the desire to obtain such a result. Secondly, the Defendant, in final argument to the jury and in the

> memorandum submitted to the Court, suggested as additional proof of this claimed lack of intent to kill, the fact that only one shot was fired. The implication being that since Tackett was still alive after the first shot, failure to continue firing evidences a lack of intent to kill. The issue is not what the Defendant's intent was after the first shot, but what it was at the time it was fired. Based on the evidence, there can be no doubt that if the first shot had not stopped Officer Tackett, subsequent shots surely would have. The only reasonable interpretation that can be gleaned from the available evidence is that the Defendant forcibly took Officer Tackett's weapon from him while being handcuffed and deliberately shot the officer as he lay on the ground, three seconds after the officer told him to 'Put it down!"
>
> In the final analysis there is no evidence to support the existence of the mitigating factor of lack of intent to kill. The Defendant's claim that the shooting was an accident that occurred during a struggle was unsupported by any facts. The suggestion that the Defendant deliberately shot Officer Tackett in a non-vital area is absurd. The totality of the evidence in this case does not reasonably convince the Court that this mitigating circumstance exists. It has not been established by the greater weight of the evidence. The Court does not find this non-statutory mitigating circumstance to exist.

(R. 1443-1445). It is within the trial court's discretion to determine whether the facts alleged in mitigation are supported by the record. Barker v. State, 641 So. 2d 369 (Fla. 1994), cert. denied, ___ U.S. ___, 115 s. ct. 944, 130 L. Ed. 2d 888 (1995);

Hall v. State, 614 So. 2d 473 (Fla.), cert. denied, ___ U.S. ___, 114 S. Ct. 109, 126 L. Ed. 2d 74 (1993). A trial court's rejection of a mitigating factor cannot be disturbed where the court's reasons are supported by the record. Valdes v. State, 626 So. 2d 1316 (Fla. 1993), cert. denied, ___ U.S. , 114 S. Ct. 2725, 129 L. Ed. 2d 849 (1994). Even in an override, a judge is entitled to reject mitigation that does not comport with his view of the evidence. See, Thompson v. State, 553 So. 2d 153 (Fla. 1989), cert. denied, 495 U.S. 940 (1990). The court below provided an extensive, thoughtful and well-reasoned explanation for the rejection of this factor which is supported by the record, and the conclusion that the appellant shot Officer Tackett with the intent to kill should not be disturbed on appeal.

The appellant counters this rejection by engaging in a detailed analysis of the facts and attempting to have this Court make its own factual conclusions. However, the offered analysis has as many faults as the appellant attributes to the trial court. For example, the appellant's discussion of the lighting conditions characterizes the evidence as conflicting, concluding that the court erroneously chose to believe one officer in substituting his judgment for the jury. The appellant's brief notes, without record cites, that Amy Walker testified that there were lights on

in back, failing to mention that at T. 352 she stated that you could not really see anything in back at night and that she could not remember if any back lights were on that night. The brief also comments that the K-9 officer was able to find the victim quickly, as if the searching canine actually used sight rather than smell to locate Officer Tackett. The brief fails to discuss the testimony of the neighbor, Jean Ann Nash, who went out to look for the victim after hearing the shot, and stated **that it was 'just about** pitch dark" outside her condominium and that she couldn't see the victim because it **was** too dark and too overgrown (T. 432-433).

Clearly, the testimony relied upon by the trial court in concluding that the lighting conditions were poor did not just come from one officer that "bungled his job and . . . had to come up with an excuse for his lack of observation," as asserted by the appellant (Appellant's Initial Brief, p. 69). The court correctly noted that "virtually every witness who viewed the scene of the shooting that night confirmed how dark it was," see, T. 352 (Amy Walker); T. 432-433 (Jean Ann Nash); T. 446 (Bellair Bluffs Police Officer John Stevenson); T. 476-477 (Largo K-9 Officer Randall Chaney, stating it was 'very dark" and that he had difficulty seeing Officer Tackett even after the dog had located him); T. 479 (Largo Police Officer Richard Dunleavy); T. 495 (PCSO Sgt. Michael

Coachman), The fact that there were landscape lights which, according to Officer Chaney, made it more difficult to see (T. 476) and that Tackett's flashlight was found somewhere (not particularly disclosed) in the vicinity do not establish that the trial court was wrong in finding the lighting conditions to have been adverse to the suggestion that the appellant deliberately shot Officer Tackett in the leg. Given the record support for the trial court's conclusions regarding the appellant's intent to kill Tackett, this Court should not consider an alleged lack of intent to kill to have been proven in considering the propriety of the override imposed in this case.

Even if a purported lack of intent to kill were discernible on these facts, it need not be considered mitigating or weighed against the aggravating circumstances in this case. Given the conviction for felony murder (as the appellant contends this would have to have been with no intent to kill), any lack of intent to kill is simply a fact of the crime, and does not thereby ameliorate the appellant's guilt or otherwise reduce his culpability for this offense. In a strictly premeditated murder case, the fact that no felony is committed is not mitigating. In DeAngelo v. State, 616 So. 2d 440, 443 (Fla. 1993), this Court offered the following remarks about the purported mitigation:

> Some of the evidence DeAngelo points to as mitigating was not mitigating at all. For example, he established, and the trial court found, that his victim was not a stranger or a child, that the killing **was** not for financial gain, that it did not create a great risk to many persons, and that it did not occur during the commission of another crime. Yet, neither evidence of who the victim "was not" nor the fact that the crime was not more aggravated reduces the moral culpability of the defendant or the seriousness of the crime which was committed. The same is true of the finding that DeAngelo was "not a drifter." While this fact was established, we do not believe that it was mitigating in any meaningful sense. We reject DeAngelo's claim that the trial court failed to give these mitigators adequate weight.

616 So. 2d at 443. Any alleged lack of intent to kill must be considered in the same vein as the proposed mitigation in DeAngelo: it simply shows the crime could have been more aggravated, but was not. This does not constitute reasonable mitigation. Therefore, the lack of the element of premeditation should not be deemed mitigating of a conviction for first degree felony murder.

A review of the historical justification for felony murder supports this conclusion. A person convicted of felony murder is not culpable due to his intent to kill the victim; culpability flows from the recklessness involved during the commission of a violent felony. The mens rea of felony murder, under Florida law, is just as egregious as the mens rea for premeditated murder. This

is consistent with the norm of American jurisprudence, as noted in Schad v. Arizona, 111 S. Ct. at 2502. In Schad, the United States Supreme Court recognized "sufficiently widespread acceptance" that the two mental states required for premeditated and felony murder were alternative means to satisfy "the mens rea element of the single crime of first-degree murder." 111 s. ct. at 2502. Therefore, the Court concluded, both mental states "reasonably reflect notions of equivalent blameworthiness or culpability." 111 S. Ct. at 2503. Since there is no "moral disparity" between the mental state involved in felony murder and that involved in premeditation, the fact that the appellant in this case may have entertained one but not the other cannot be considered to be mitigating.

Evidence which extenuates or reduces the degree of a defendant's moral culpability is clearly mitigating. Wickam v. State, 593 So. 2d 191 (Fla. 1991), cert. denied, 505 U.S. 1209 (1992). However, where the appellant's culpability does not rest on any intent to kill (assuming agreement with the defense that there was none), the lack of any such intent does not reduce his moral culpability, and therefore is not mitigating. Any jury recommendation based on an alleged lack of intent to kill on the part of a shooter in a felony murder situation is inconsistent with

Florida law's assignment of high culpability for the utter indifference exhibited in shooting someone during the course of a violent felony, and such recommendation is accordingly unreasonable.

The sentencing judge's order suggests that the lack of intent to kill may be mitigating when proven, citing Norris v. State, 429 So. 2d 688 (Fla. 1983). A review of Norris and similar cases refutes the suggestion that any lack of intent to kill in this case could be mitigating. Norris committed a murder during the course of a burglary, and in reversing the sentence of death imposed over a jury recommendation of life, this Court noted that the state had not produced any evidence of his intent to kill. This Court also noted that Norris was 19 years old, suffered from a drug abuse problem, and claimed to have been intoxicated at the time of the crime. Certainly Norris' mental state was a relevant consideration in determining the propriety of the jury override. Similarly, in Reilly v. State, 601 So. 2d 222 (Fla. 1992), this Court reversed a jury override, noting that the jury had found that the murder was not premeditated, as Reilly had been acquitted in a special verdict of premeditated murder. However, Reilly also suffered from long term, chronic mental impairments. Thus, both Norris and Reilly involved mitigating mental factors that directly affected the

defendants/ ability to form an intent to kill, and presumably affected the defendants' abilities to intend the underlying felonies as well. In the instant case, conversely, there was absolutely no direct evidence of the appellant's mental state admitted during either the guilt or penalty phase of the trial, and the appellant concedes that the premeditation for the underlying felony was well established. There was never any suggestion of mitigation based on drug or alcohol use or any mental deficiency. On these facts, even accepting the defense theory that the appellant did not intend to kill, the lack of any such intent is not mitigating in and of itself.

Even if the lack of intent to kill may be considered mitigating in some situations, the ultimate question in this case -- whether the appellant's purported lack of intent to kill could provide a reasonable basis for the jury recommendation -- must be answered in the negative. If the lack of premeditation in a felony murder prosecution could establish a reasonable basis for a life recommendation, there could never be a judicial override affirmed on appeal in a strict felony murder case. However, this Court has approved such overrides in the past. Torres-Arboledo v. State, 524 so. 2d 403 (Fla.), cert. denied, 488 U.S. 901 (1988); Engle v. State, 510 So. 2d 881 (Fla. 1987), cert. denied, 485 U.S. 924

(1988); Mills v. State, 476 So. 2d 172 (Fla. 1985), cert. denied, 475 U.S. 1031 (1986). As a matter of law, the death penalty is not excessive punishment for the triggerman committing a felony murder. Enmund v. Florida, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982). If that was the basis of the jury recommendation herein, the recommendation was unreasonable and properly overridden. This Court has recognized that, when a death sentence is otherwise proper, a jury recommendation of life based on some matter not reasonably related to a valid ground of mitigation is properly overridden. Francis v. State, 473 So. 2d 672, 676-677 (Fla. 1985), cert. denied, 474 U.S. 1094 (1986); Thomas, 456 So. 2d at 460.

The appellant also claims that other nonstatutory mitigation, such as his stress on the day of the crime and his positive character traits, may provide a reasonable basis for the jury recommendation. Even though such evidence was admitted, an override 'is not improper simply because a defendant can point to some evidence established in mitigation." Zeigler v. State, 580 so. 2d 127, 131 (Fla.), cert. denied, 502 U.S. 946 (1991). See, Burch v. State, 522 So. 2d 810, 813 (Fla. 1988) (rejecting proposition that presence of any mitigating factor bars override of jury recommendation). It is significant that defense counsel did not once mention the appellant's purported positive character

traits or his having been under stress in arguing to the jury that a life recommendation was appropriate (T. **1067-1071, 1112-1118).** This Court has certainly approved jury overrides offering greater mitigation than the slim evidence presented in this case that the appellant was a good son and brother with financial difficulties. See, Washinaton v. State, 653 So. 2d 362 (Fla. 1994) ("inconsequential" mitigation included testimony of mother and clinical psychologist of potential for rehabilitation); Robinson v. State, 610 So. 2d 1288 (Fla. 1992) (close family ties, supportive of mother), cert. denied, ___ U.S. , 114 S. Ct. 1205, 127 L. Ed. 2d 553 (1994); Coleman v. State, 610 So. 2d 1283 (Fla. 1992) (close family ties, supported his mother, athletic potential), cert denied, ___ U.S. ___, **114 S. Ct. 321, 126** L. Ed. 2d 267 (1993); Marshall v. State, 604 So. 2d 799 (Fla. 1992) (did well in school until older brother negatively influenced him, father loved him, mother had failed to discipline him, entered prison at young age, good behavior at trial), cert. denied, 508 U.S. 915 (1993) ; Zeigler, 580 So. 2d at 130-131 (no significant criminal history, good prison record, good character, community/church involvement); Torres-Arboledo, 524 so. 2d at 413 (intelligence, potential for rehabilitation). The nonstatutory mitigation offered in this case

does not provide a reasonable basis for the life recommendation in light of the aggravated nature of this murder.

The appellant also argues that the trial court's rejection of his alternative sentence of life without eligibility for release as mitigation was error. In consideration of this fact as nonstatutory mitigation, the trial court stated:

> As authority for his position that this statute may be argued to the jury as a non-statutory mitigating circumstance, the Defendant cites Jones v. *State, 569* So.2d 1234 (Fla. 1990). In *Jones,* the defendant was convicted of murdering two victims. During the penalty phase of the trial, the defendant requested permission to argue to the jury the possibility that the sentencing judge could sentence the defendant to two consecutive life sentences if the jury recommended life and that he would not be eligible for release for at least fifty years. The trial court refused the request as too speculative. Upon appeal, the Florida Supreme Court reversed the trial court and suggested that such an argument could properly be made. In the instant case, unlike Jones, the potential alternative sentence is not part of the 'circumstances of the offense" as those circumstances were contemplated by *Jones, supra* or *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). The statute, which this defendant now claims as additional protection against the imposition of the death penalty for the murder of Officer Tackett, was enacted to "...provide for an increase and certainty of penalty..." for those who would commit such acts and were not otherwise subject to the death penalty. Fla. Stat. 8775.0823. It was obviously not enacted to provide those who

murder police officers with a legislatively guaranteed non-statutory mitigating circumstance that may be relied upon to avoid the ultimate penalty that is provided in an appropriate case for every other murderer. Indeed, the Legislature in 1987 amended the Florida capital sentencing statute and provided for an additional Aggravating Circumstance when the victim is a law enforcement officer. §921.141(5)(j). Both statutes discourage violence against law enforcement officers, who by the nature of their occupation are regularly required to confront situations similar to the one facing Officer Tackett on the evening of June 13th, 1993. Given the frequency and necessity of instances during which law enforcement officers are required to risk their lives in the performance of their duties, these statutes serve as a deterrent to those who may consider the use of deadly force against those officers. By the adoption of §921.141(5)(j) the Florida Legislature has said, in effect, that the murder of a law enforcement officer in the performance of his duty is an aggravating circumstance so offensive to community standards that the mere fact of an officer as the victim alone is enough to justify the imposition of the death penalty absent sufficient mitigation. Likewise, by the adoption of Fla. Stat. §775.0823 the Legislature has said that the murder of a law enforcement officer during the performance of his duty is so serious that even when death is not appropriate, the defendant shall not be eligible for release in the same manner as other murderers. Neither statute should be interpreted or applied in a manner that would frustrate the very purpose for which each was adopted.

This Court is unaware of any other factual circumstance under the Florida death

> penalty sentencing scheme whereby such a result would obtain. Every other non-statutory mitigating circumstance is a matter of factual proof and therefore unique to the particular case or individual. Here, by analogy, the defendant would suggest that solely because his victim is a law enforcement officer, the mitigating circumstance is established by operation of law. In other words, the defendant suggests that the statute which was adopted to increase the punishment for the murderer of a law enforcement officer in those instances where the death penalty is not appropriate, should be interpreted to create a mitigating circumstance through which the death penalty could be avoided when it would otherwise be justified. Such an interpretation would have the effect of encouraging the murder of law enforcement officers as opposed to any other victim in a given situation, since murder of a Law enforcement officer would guarantee the existence of at least one non-statutory mitigating circumstance for the jury and the court to consider. This Court finds that such an interpretation is not required by ***Jones v. State, supra,*** and is not otherwise appropriate. Absent specific precedent to the contrary, this Court will not interpret ***Jones, supra*** to **cause** law enforcement officers to become second-class victims in murder cases, whose killers enjoy an exclusive advantage in avoiding the death penalty over those who kill ordinary citizens. The Court finds that this factor does not constitute a non-statutory mitigating circumstance and should be given no weight in determining the sentence to be imposed.

(R. 1446-1447).

Under Jones, 569 So. 2d at 1239-1240, the length of an alternative sentence is an appropriate consideration in the determination of mitigating evidence. However, this Court has never held that a defendant's potential length of sentence, ***standing alone,*** provides a reasonable basis for a jury to recommend life. Compare, Turner v. State, 645 So. 2d 444 (Fla. 1994) (alternative sentence one of many factors noted in mitigation to reverse jury override). To the contrary, in Garcia v. State, 644 so. 2d 59, 63-64 (Fla. 1994), cert. denied, ___ U.S. ___, 115 s. ct. 1799, 131 L. Ed. 2d 726 (1995), this Court upheld the jury override, despite the fact that Garcia would not be eligible for parole for 50 years.

To follow the appellant's argument to its logical conclusion, a jury recommendation of life in any case where the victim was a law enforcement officer, or where more than one homicide was committed, would be more reasonable than a recommendation of life for a single murder where the defendant would have been eligible for parole in only 25 years. It defies logic that the larger the number of victims, or the more protections granted legislatively due to a victim's status as a law enforcement officer, the more reasonable a jury's recommendation of life.

This is not a case where the judge disallowed the presentation of evidence or argument as to the appellant's alternative sentence. A review of the record shows that defense counsel argued the appellant's ineligibility for release to the jury (T. 1116-1117). Thus, Simmons v. South Carolina, 512 U.S. , 114 s. ct. 2187, 129 L. Ed. 2d 133 (1994), holding that due process requires a defendant be afforded the right to have his jury consider an alternative life-without-parole sentence when the state seeks the death penalty by relying on a defendant's future dangerousness, is not relevant to this case.[4] The judge below merely found that, on the facts of this case, the appellant was not entitled to a windfall mitigating factor due to the legislature's provision of a more severe sentence for murder when the victim was a law enforcement officer.

A defendant's statutorily mandated sentence without eligibility for release does not reduce his moral culpability or otherwise excuse his criminal behavior. A defendant's potential alternative sentence is not mitigating simply because it has been

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[4]It is worth noting that there is no reading of the record which supports the appellant's assertion that the prosecutor in this case "declared" the appellant to be beyond rehabilitation and a remaining danger to society (Appellant's Initial Brief, p. 78). There are no record cites offered to support this assertion, and the prosecutor's arguing the facts of this offense along with those of the appellant's prior violent felony does not amount to such a declaration.

deemed a relevant consideration by the sentencer. Furthermore, even if a life sentence without parole is regarded as mitigating in some sense of the word, this does not equate to a reasonable basis for a jury recommendation of life in this case. Thus, even if the judge should have given the parole ineligibility some weight, his failure to do so is harmless. Armstrong, 642 So. 2d at 739 (any error in failing to give weight to nonstatutory mitigation harmless in light of three strong aggravating factors and negligible mitigation).

The cases cited by the appellant as comparable do not compel this Court's reversal of his death sentence. In Hallman v. State, 560 So. 2d 223 (Fla. 1990), the defendant was characterized as having many good qualities but being subject to poor judgment when under stress. The appellant cites Hallman because the defendant shot the victim after the victim first shot at Hallman, and Hallman did not continue shooting after disabling the victim, even though the victim continued to shoot. In the instant case, to the extent that the appellant claims this was an instinctive rather than a planned killing, it was allegedly a reaction to getting arrested, not to being shot at. Although the appellant left the scene, he did not do so under fire, but after he had taken the victim's gun and used it to mortally wound Officer Tackett. Mitigating evidence

introduced in Hallman included considerable family background testimony, including severe abuse by his father; an exemplary work record; a good disciplinary record in prison; his record on parole; his good character; and the pressures affecting him at the time of the killing. Compare, Johnson v. State, 393 So. 2d 1069 (Fla. 1980) (no reasonable basis for life recommendation, despite facts of offense showing that Johnson had completed the robbery and started to leave without incident, until the victim emptied his gun at Johnson, then Johnson went back and shot victim), cert. denied, 454 U.S. 882 (1981).

In Cooper v. State, 581 So. 2d 49 (Fla. 1991), there was conflicting evidence as to whether Cooper or his codefendant shot the victim, in addition to "considerable" family testimony of nonstatutory mitigation, evidence of chronic alcohol abuse and intoxication at the time of the crime, remorse, and poor health. In Brown v. State, 526 So. 2d 903 (Fla.), cert. denied, 488 U.S. 944 (1988), the murder was committed by an 18-year-old defendant from an impoverished background with the emotional maturity of a preschool child. In Washington v. State, 432 So. 2d 44 (Fla. 1983), a 19-year-old defendant with no significant criminal history was described as a good person that helped his parents. The valid aggravating circumstances were avoid arrest and disrupting law

enforcement. In Walsh v. State, 418 So. 2d 1000 (Fla. 1982), testimony about the defendant's good character combined with his lack of a criminal record to provide a reasonable basis for the jury recommendation of life after Walsh shot a plainclothes officer while hunting wild boar with his younger brother's friends. None of these cases are truly comparable to the one at bar with regard to the mitigation present. The only thing the cases have in common is this Court's rejection of a jury override in a situation where a law enforcement officer was killed. Since the facts cited above were noted in finding reasonable bases for the jury recommendations involved in those cases, and those factors are not present in the instant case, the cases are easily distinguished factually and do not compel the reduction of the sentence in this case to life.

The instant case presents a highly aggravated murder, where the defendant took an officer's gun and shot the officer in order to avoid getting arrested for burglary. The defendant had a prior conviction due to his reckless use of a firearm in another instance. Given the egregious nature of the crime, the presence of three strong aggravating factors (granting the merger on avoid arrest/murder of a law enforcement officer), and the absence of any compelling mitigation, the jury recommendation for life has no

reasonable basis. Therefore, the trial court did not err in overriding that recommendation and imposing a sentence of death.

CONCLUSION

Based on the foregoing arguments and citations of authority, the appellee respectfully requests that this Honorable Court affirm the judgment and sentence of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Deborah K. Brueckheimer, Assistant Public Defender, Polk County Courthouse, P. 0. Box 9000--Drawer PD, Bartow, Florida, 33830, this 13th day of September, 1996.

C Dittmar

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