IN THE SUPREME COURT OF FLORIDA

LORENZO M. JENKINS, :

Appellant, :

vs. : Case No. 83,727

STATE OF FLORIDA, :

Appellee. :

_____:

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PINELLAS COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On June 23, 1993, an indictment was filed in Pinellas County, Florida, charging the Appellant, LORENZO JENKINS, with the first-degree murder of Jeffrey Tackett, a police officer, in violation of §782.04(1)(a), Fla. Stat. (1991). The death occurred on June 13, 1993 (R4,5). Mr. Jenkins had a jury trial from February 28 through March 3, 1994, and was found guilty as charged. The Honorable W. Douglas Baird, Circuit Judge, presided (T1-1032;R1351). On March 4, 1994, the penalty phase was conducted; and the jury recommended life (T1033-1138; R1360). After hearing further arguments as to the penalty to be imposed on March 25, 1994 (SR817-853), the trial court overrode the jury's life recommendation and imposed a sentence of death on April 11, 1994 (R1433-1452, 1612-1658). Mr. Jenkins timely filed his notice of appeal on May 5, 1994 (R1466).

STATEMENT OF THE FACTS

A. Trial Testimony

On the evening of June 13, 1993, 19-year-old Amy Walker was home alone at 672 Poinsettia Condominium, Unit #10, in Pinellas County watching television upstairs when she heard clicking or tapping noises coming from downstairs (T349,350,352,354). She described the layout of her condo as follows: the second floor had three bedrooms and two baths; the first floor had a foyer, bathroom, living room, dining room, kitchen, and backdoor -- which was seldom used but intact on the day in question -- leading to the garden; the backyard/garden had trees, bushes, flowers, patio, lights that are on at night, and a 6 or 7 foot high privacy fence (T350-352,361,362). The Pinellas Trail runs behind their condo on the other side of the fence (T351). She muted the sound on the television and could still hear the noises (T353). Ms. Walker called a friend about the noise and then called 911. She spoke with part-time dispatcher Michelle Stamm (T354,368,371). Ms. Walker said she was hearing noises from downstairs, but she also informed the dispatcher that the noises could be caused by an animal. An animal had gotten into the walls of Ms. Walker's condo before and made clicking and pounding noises (T354, 355).

The dispatcher for the Belleair Police Department dispatched the only Belleair police officer on duty that night -- Officer Jeffrey Tackett -- at 11:15 p.m. on what the dispatcher termed "an animal complaint" (T371). The dispatcher noted that Officer Tackett had come to work at 8:00 p.m. and had had only one other

call prior to the animal complaint call -- a traffic stop (T370). The dispatcher also admitted that there was no tape of the calls between the communications center and office that night. The system had run out of tape, and she was not authorized to change the tape nor was she obligated to call the matter to anyone's attention (T369,370).

When Officer Tackett arrived at Ms. Walker's condo a few minutes later, Ms. Walker spoke to the officer from a window on the second floor facing the parking lot (T372). He asked if he could get to the back from there, and Ms. Walker said "yes" (T356). The officer went around to the back, and Ms. Walker stayed on the phone with the dispatcher (T356). Via Officer Tackett's radio, both Ms. Walker (over the phone) and the dispatcher could hear Officer Tackett say he had someone, a black male suspect at gunpoint, and he needed backup right away (T356,373). At that point the dispatcher went on the radio trying to get an officer from the next local town -- Belleair Bluffs -- to respond, but there was no response (T373, 374). The dispatcher stopped transmitting except for emergency air traffic and dialed the phone to call the Belleair Bluffs police station. When the officer at the Belleair Bluffs Police Station answered, the dispatcher informed the officer that Officer Tackett had a suspect at gunpoint and needed backup. That Belleair Bluffs officer answered the call and asked for directions over the radio, and the dispatcher passed on directions she was getting from Ms. Walker (T374,375,441,442). The Belleair Bluffs officer then notified the Sheriff's Department dispatcher that he

was on the way to backup a Belleair officer who had a man at gunpoint behind one of the buildings (T443). The Belleair Bluffs officer then switched back to the Belleair channel, and it is at this point that the Belleair Bluffs officer and the Belleair dispatcher heard Officer Tackett say his suspect was resisting and ask for his backup (T375,443). The Belleair Bluffs officer also heard Officer Tackett say his gun was being taken, whereupon the Belleair Bluffs officer switched to the Sheriff's Department channel to advise then the officer was having his gun taken away and they needed more help right away (T443).

The next thing the Belleair dispatcher heard from Officer Tackett was: "I'm shot. It's bad. He's got my gun and he shot me." The dispatcher acknowledged his transmission and called for medical attention (T375). Ms. Walker could hear the shot through the condo -- which she believed was about four minutes from when she first saw the officer, and then she got disconnected from the dispatcher (T356,357,364). The dispatcher said it was about one minute from when Officer Tackett says he had a suspect at gunpoint until he said he is shot (T385). The dispatcher starts making other calls for assistance -- a helicopter, a K-9 unit, and additional units; plus, the dispatcher's phone starts ringing. When the dispatcher has to put Ms. Walker on hold, the dispatcher disconnects Ms. Walker due to a problem with the phone system (T376, 377).[1] Christina Pack, who lived on the other side of the

[1] Another dispatcher showed up for work at this point, but lost control and started crying when she found out what was happening (T378).

Pinellas Trail and behind the condominiums in question, was taking out her garbage at about 11:20 - 11:30 p.m. when she heard a male caucasian voice say, "put it down, put it down now, put it down." About three seconds later she heard a gunshot (T393-396). Ms. Pack believed the voice was about 150 to 200 feet away (T396). Another person -- a neighbor of Ms. Walker's in unit #8 -- also heard a shot. When she stuck her head out the back door, she could hear a man screaming and crying (T429-431). Both ladies called 911 (T397, 431).

The Belleair Bluffs officer took a wrong turn and was delayed in getting to 672 Poinsettia (T444). The Belleair Bluffs officer arrived at the scene at the same time as the Belleair Beach officer arrived. They asked Ms. Walker, who was still at the second-story window at the front of the condo, where the Belleair officer was; and she pointed to the rear of the building (R444). The two officer ran to the back of the building with their weapons drawn and found Officer Tackett's lit flashlight on the ground. A neighbor came out and said he had heard a shot to the north, so the officers ran about three buildings to the north.[2] Hearing and seeing nothing, they went back to Ms. Walker's unit where they met with a sergeant from the Largo Police Department. The Largo officer informed them that a K-9 officer and dog was on the way to help locate the missing officer (T445,458,463). When the K-9 officer

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[2] The neighbor at unit #8, immediately next door to #10 to the south, also stated she told the officers not to go any further south because the shot had come from the north. She noted that she did not realized that what had occurred was right next door (T434).

and dog arrived from the Largo Police Department and was told to locate the missing officer, the K-9 officer went behind Ms. Walker's condo with the intent of going north based on what people were telling him. The dog, however, alerted to the south and immediately located Officer Tackett (T474-476).

The lighting conditions behind unit #10 were described differently by various officers: The Belleair Bluffs officer described it as being very dark in the back with one very dim street light; he never saw Officer Tackett on the ground or the damage to the rear French doors (T446). The K-9 officer said there were areas of light and darkness behind the condo -- "It's very dark. There are trees overhanging it. There's fences, there's plants there. At the same time, there are also landscaping lights and things like that which give you kind of a blinding effect so that it is difficult to see back there. If you look here, it's very lit and over here, very dark and your vision, it's hard to adjust back there." (T476). Another Largo Police officer described the lighting as very poor with a lot of vegetation (T479). It is to be noted that Officer Tackett was dressed in a dark uniform (T467).

Once the K-9 officer located Officer Tackett, he informed the other officers at the scene; but he also advised them to take cover and be careful. The information the officers had been receiving was sketchy and erroneous; they had been lead to believe this situation involved domestic violence. The K-9 officer saw the damage to the French doors at the rear of the condo not far from where Officer Tackett was and showed the damage to the Largo sergeant.

Both officers believed the hole in the French door was caused by a bullet and Officer Tackett had been shot by someone inside the condo (T467,477,478).

Two of the first officers to see Officer Tackett immediately believed Officer Tackett to be dead (T467,480). Officer Tackett was described as being slightly keeled over to his right side, his left arm was draped up over his chest, his left leg was bent at the knee, his right leg was straight, and his right arm was out with the palm up (T480). The expert in blood stain pattern analysis and reconstruction gave her opinion that Officer Tackett was lying down when shot. This conclusion was based on the fact that the bloodshed would be instantaneous and there was no downward blood flow at all on the pants or on the leg (T845,865,866). The expert also believed Officer Tackett had to be on his right side immediately upon being wounded -- there had to be some constriction of the blood flow from the femoral artery because there was no projection of blood, no spurting of blood, and no downward flow of blood. Immediately after impact, Officer Tackett had to be on his right side or the expert would have found gushing (R866). In her opinion, Officer Tackett did not move while he was bleeding (T867). The expert also noted that the blood staining on the left hand and the radio is consistent with Officer Tackett holding the radio in his left hand (T863).

The paramedic was the first person to touch Officer Tackett's body (T490). The paramedic noticed the large pool of blood and the radio in Officer Tackett's left hand. The paramedic rolled Officer

Tackett over so that he would be flat on his back, and the paramedic's partner ripped the officer's shirt open. In the paramedic's opinion Officer Tackett was dead, but they used EKG paddles on the chest without success. After verifying that Officer Tackett was dead, the paramedics left the scene (T489). The paramedic stated he had just rolled the body over; he did not drag it around or interrupt the blood. He also noted that he did not return the body to its original position when he left it at the scene, and one of the officers stated the picture of the body were taken after the body had been moved (T486,491).

The medical examiner who performed the autopsy on Officer Tackett found the cause of death to be a gunshot wound to the thigh which severed the femoral artery and resulted in acute blood loss. The femoral artery is the main vessel supplying blood to the leg (T820). The time of death would have been about four to seven minutes from the time of being shot (T821). Irreversible shock -- the point where a person is still alive but there is nothing that can be done to save that person -- would have occurred in two to four minutes with the shorter period of time being the most likely due to stress causing the heart to beat faster and the blood to pump out faster (R821,822). The bullet had entered on the side of the right thigh towards the back, exited on the inside of the right thigh slightly higher and more to the front, and entered in the right side of the scrotal sack where the bullet was located (T809, 812). Thus, the bullet path was from back to front, slightly upward, and from right to left (T825). Officer Tackett would have

had to receive immediate attention (within a minute to one and a half minutes) from someone who knew what they were doing to be of any assistance; however, that is not to say Officer Tackett would have survived even with this assistance (T823,826). The medical examiner noted the femoral artery is on the inside of the leg, so the bullet from the outside of the leg had to travel through 90% of the leg before reaching the femoral artery (T830). He also noted there was "extensive bright red blood present on the right pants leg" and a lot of blood under the right leg at the scene (T807,833, 834). The medical examiner did not see any smoke or powder by the entrance wound of the pants (T808), but he did see some other recent injuries -- scrape on left elbow, scrapings on right chin, cut on finger, and bruise on shoulder (T835).

Officer Tackett's handcuffs were missing from the scene, and Officer Tackett's gun was found on the other side of the privacy fence between the fence and the Pinellas Trail in a ditch (T565, 591,613,792,793). The gun was fully loaded with a round in the chamber (T565). The gun could hold up to nine bullets -- eight in the magazine and one in the chamber. Only one bullet had been fired, and 8 live bullets were still in the gun (T739). A butcher knife was also found at the scene in some mulch (T605). That knife was consistent with the type of tool used to pry wood off from the French doors at the point of attempted entry (T612,616-619,728-730), and the knife had some paint on it consistent with the paint of the door (R719-722).

Approximately four miles away and about eleven minutes away by bicycle, Lorenzo Jenkins rode up to his wife's home at 402 Marshall Street at about 11:30 p.m. on June 13, 1993 (T508,509,522,523,640, 641). The two had been separated for a couple of months (T508). Mr. Jenkins found his wife across the street visiting with some neighbors (T510,511,522,524). Mr. Jenkins' step-son and a couple of neighbors noted that Mr. Jenkins was not wearing his short and had something wrapped around his right wrist (T511,512,524,534, 547). One neighbor who had been talking with Kathy Jenkins (Mr. Jenkins' wife) heard the conversation Mr. Jenkins had with his wife: Mr. Jenkins told his wife he was in trouble. He needed some money because he had lost his job. He shot a police officer. He was breaking into a house that night. He needed his wife's help. When his wife asked what was under the shirt that was around his right hand, Mr. Jenkins threw the shirt at Mrs. Jenkins; and the neighbor could see a handcuff attached to the right hand and dangling from the right hand (T524-526).

Mr. and Mrs. Jenkins and a friend wound up in the neighbor's apartment in order to clean up Mr. Jenkins (T528,536). They were taking a long time in her apartment, so the neighbor sent her boyfriend, Sean Davis, into the apartment to find out what was going on (T529,536). Mr. Davis, when he went into the apartment, could see that they had been trying to get the handcuffs off Mr. Jenkins' wrist. Mrs. Jenkins knew Mr. Davis was a welder, and she asked if he would help. Mr. Davis said that before he would do anything he wanted to know where Mr. Jenkins had shot someone --

was it close? Mr. Jenkins said, "yes" (T537,538). Mr. Davis didn't ask any more questions and helped take the locked handcuffs off. Mr. Davis noticed Mr. Jenkins' wrist was slightly bruised (T538). Once the handcuffs were off, Mr. Jenkins gathered up his stuff and they all left (T538,539). Mr. Jenkins went down an alley, and Mrs. Jenkins became very upset. Mrs. Jenkins decided to call the police (T539, 540).

After that, there was a lot of police activity in the area (T516,540-542). At about 2:00 a.m. Mr. Jenkins returned to the area where Mrs. Jenkins lived and tried to get someone to hide him in one of the apartments until the police left (T516,542). Mr. Jenkins was wearing different clothes (T518,542). At that point, the police arrested Mr. Jenkins; Mr. Jenkins did not resist (T518, 530,543,552,553). After being given his Miranda warnings and signing a waiver, Mr. Jenkins was questioned at the station (T795-798). The investigating officer noted the deep marks on Mr. Jenkins' right wrist that appeared to be the width of a handcuff. Mr. Jenkins claimed the arresting officer had put the cuffs on too tight (T798). Mr. Jenkins denied being involved with the death of Officer Tackett and denied being involved in an attempted burglary at the Pelican Place Condominiums (T802). When Mrs. Jenkins was brought into the room to confront Mr. Jenkins with their prior conversation, Mr. Jenkins denied having said these things to his wife (T803). Mr. Jenkins admitted having just been fired from his job that day, having only $18 in a savings account somewhere, and needing $75 for his rent that would be due the next day (T800).

Two people who had worked with Mr. Jenkins during the day of June 13, 1993, also testified that Mr. Jenkins had told them he needed money real bad to pay his rent the next day[3] (T670-673,675-677). They all spent the day doing yard work, and it was noted Mr. Jenkins used white cotton work gloves with a blue band on the wrist while he worked. They also noted Mr. Jenkins was fired that day (T670-677).

Several experts testified as to various aspects of physical evidence: The gunshot reside analyst found no residue on Mr. Jenkins' hands. There could be several reasons for this: (1) The better the gun, the less likely residue will be present; and this gun was a well-made gun. (2) Wearing gloves will keep off residue. (3) Residue will come off with wiping or washing (T627-634). The hair and fiber analyst examined fabric impressions left on the knife found at the scene and found them to be consistent with having been made by a light-duty work glove that is white with a blue rim at the wrist. An examination of hairs and fibers taken from Mr. Jenkins' clothing worn at the time of his arrest and the clothes he was wearing when he had the handcuffs removed revealed nothing that compared to Officer Tackett and no caucasian hairs. An examination of fibers and hairs removed from Officer Tackett also revealed nothing that compared to Mr. Jenkins and no negroid hairs. The expert talked about a theory of transfer that states the longer two people are in close personal contact with each other the more likely there will be a transfer of hair and fibers. In a

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[3] These witnesses both said he needed $700 (T673,677).

struggle there should be a transfer, but here there was none. The expert did admit there would be a good likelihood of transfer if a person who is standing close enough to handcuff a person is subsequently overpowered by that person (T678-694). The blood analyst did not find any blood on Mr. Jenkins' clothes (T695-701). The glass analyst found glass on Mr. Jenkins' clothes with the same refractive index as the glass in the broken door where the attempted point of entry was located. The expert admitted that the refractive index only tells that the glass could have come from a known sample -- it's not a definite comparison. The expert also admitted that someone doing yard work could very well pick up pieces of broken glass in the dirt. The expert did find dissimilar glass on Mr. Jenkins' clothes (T702-717).

The firearms and toolmarks analyst rendered his opinion that the bullet found in Officer Tackett had come from the officer's gun (T733,734). In describing the officer's gun, he noted it was a single action/double action pistol (T742). Typically this gun is carried in the holster with the hammer forward so the first shot is a double-action shot with subsequent shots being single action. It takes more pressure to pull the trigger in a double-action mode (12 1/2 pounds in this gun) than in a single-action mode (7 1/2 pounds in this gun) (T742-744). This gun was capable of firing nine bullets without reloading -- one in the chamber and eight in the magazine. In this case he had received only one fired bullet, one fired case, and eight live cartridges (T739). This gun had three safeties that would prevent it from going off in a cocked position

if dropped, and these safeties were working (T744-747). He had examined Officer Tackett's clothes, but found no gunshot residue (T750-751). Typically, one would find particles embedded in the target material within one to two feet from the muzzle to the target; but he found no embedded materials in the officer's pants (T752). The expert said there are four factors that might impact on whether or not there would be any residue: (1) shots fired a distance greater than the maximum distance at which residues would be deposited (in this case, test firing of the gun revealed particles still hit the target at three feet, a few particles hit the target at 4 1/2 feet, and no particles hit the target at five feet); (2) there's an intervening object (like shooting through a shirt); (3) the residue could have been there but fell off in the handling by medical personnel, evidence technicians, etc.; and/or (4) the residue may have been deposited but could have been washed away by heavy bleeding (T753-761). Because he did not find any gunshot powder residue or vaporized lead on the officer's pants, he could not make any determination as to muzzle-to-garment distance. The expert refused to conclude that there was no residue because the distance was over 4 1/2 feet; he simply could not determine muzzle-to-garment distance and pointed to his four reasons (T772-780).

The parties stipulated that the person shot and killed on this particular night was Jeffrey Tackett, and Tackett was at all times material to this case a law enforcement officer in the execution of his duties (T556,557). After the State rested, the defense rested

without putting on any evidence (T872,877). It is to be noted that in opening statement and closing argument, defense counsel admitted that Mr. Jenkins was trying to break into Ms. Walker's condo and had shot the officer during a struggle (T343-347,912,930,937,968, 976). Thus, identity was not an issue in this case.

B. Penalty Phase Testimony

In addition to the evidence presented at trial, the State only presented one additional witness at the penalty phase. Sergeant Mark Teunis testified as to his investigation of Mr. Jenkins having fired a gun into a building occupied by Kathy Carey (who eventually became Kathy Jenkins, Mr. Jenkins' wife) and her three children. The incident occurred on March 3, 1988. Ms. Carey, who was near the front door when three shots were fired -- one at the door and two at the front window, said she had broken up with Mr. Jenkins in December of 1987. Mr. Jenkins was cooperative and polite and calm when he was arrested, and he denied doing the shooting. However, Mr. Jenkins did plead guilty to the offense of shooting into an occupied building on November 30, 1988 (T1057-1067).

The defense presented Mrs. Jenkins' testimony as to both the 1988 shooting and the 1993 shooting of Officer Tackett. Mrs. Jenkins knew it was Mr. Jenkins who had fired the shots in March 1988; they were fired because of a jealous feud. After that, they got back together, were married, and worked together as managers of an apartment building. Mr. Jenkins helped support her family. She did not believe her husband wanted to kill her in 1988; she would

never have married him if she thought that. Although they were still married at the time of the trial, they had separated in the summer of 1993. However, when her husband came to her on that night with a handcuff on his wrist, she helped him. She also called the police because she knew an officer was down somewhere. She was also afraid the police would end up killing her husband. Mrs. Jenkins testified that she knew her husband did not kill the officer on purpose -- "he was freaked out when he came to me, really freaked out" (T1071-1078).

The defense also presented testimony of Mr. Jenkins' sisters, brother, and mother: Carrie Jenkins, Mr. Jenkins' younger sister, grew up with her brother in Jacksonville. He came back to Jacksonville in November 1992 for their sister's funeral, and he stayed with her for a while working daily jobs and trying to get a permanent job. She had corresponded and spoken with her brother a lot since the shooting (T1079,1080). Benetha Jenkins, another of Mr. Jenkins' sisters, also grew up with her brother in Jacksonville. He was like an older brother; he kept everyone in line while their mother was at work (T1081,1082). James Jenkins, Mr. Jenkins's older brother, said they were close when they grew up. James Jenkins noted he had been shot and ended up in a wheelchair 5 1/2 years ago while resisting a robbery. When their sister died, Lorenzo came home to be with the family. Lorenzo brightened everyone up a little bit. Lorenzo helped him (James) out a lot and did things to make his (James') life easier (T1084,1085). Dorothy Jenkins, Mr. Jenkins' mother, testified that her son was very sweet

and loving growing up; he was close to his brothers and sisters. She gave Lorenzo authority over the other children when she was gone. Lorenzo is a good son. She still communicates with Lorenzo, even in prison (T1086,1087).

SUMMARY OF THE ARGUMENT

The trial court erred in failing to grant Mr. Jenkins' motion for judgment of acquittal as to the premeditated theory of first-degree murder inasmuch as the circumstantial evidence in this case failed to establish premeditation. The facts that Mr. Jenkins had sole possession of a fully-loaded gun after the first shot was fired, the shot was fired into the officer's leg (an area that would normally be considered non-life threatening), and the officer was clearly still alive after the shot (neighbors heard screaming and crying and officer continued to speak to dispatch) clearly demonstrate a complete lack of premeditation on Mr. Jenkins' part in this shooting. The circumstantial evidence in this case (the lack of gunshot residue on the officer's pants, the blood flow, the hearing of a male Caucasian voice saying "put it down" three times and a shot heard about three seconds later, the lighting behind the condo, and the absence of an exchange of fibers) is not inconsistent with Mr. Jenkins' theory of events. The evidence in this case was clearly consistent with Mr. Jenkins' reasonable hypothesis of innocence that the two struggled over the gun and the gun accidentally went off. The circumstantial evidence does not refute, and the facts clearly demonstrate, a complete lack of premeditation on Mr. Jenkins' part. The trial court erred in not granting the motion for judgment of acquittal as to premeditated first-degree murder, in allowing the State to argue under alternative theories of first-degree murder, and in allowing the jury to convict Mr. Jenkins under either theory.

Although there may have been ample evidence of felony first-degree murder in this case, the trial court's error in allowing the State to argue both theories of premeditation and felony murder cannot be considered harmless in this case. Since the evidence was insufficient to support the premeditated murder theory by which the jury might have convicted Mr. Jenkins of first-degree murder, that theory was unconstitutional; because allowing the jury to convict on insufficient evidence violated due process. Thus, allowing the jury to convict on alternative theories in this case is per se reversible error. The error in this case is also not harmless, if the harmless error standard is appropriate; because the jury clearly had a problem with felony murder as a theory. The jury could have convicted Mr. Jenkins of third-degree felony murder based on resisting with violence if faced with only the one theory of felony first-degree murder. A new trial on felony first-degree murder is necessary.

If, however, this Court finds there was sufficient evidence of premeditation to go to the jury, then the standard jury instruction in this case was erroneous and misleading in that it allows for a lesser standard needed to find premeditation than is required by law. Since the State was allowed to argue this lesser standard to the jury and the trial court's giving of the standard instruction validated the State's argument on a critical and disputed element of premeditated murder (how long it takes to form premeditation), Mr. Jenkins' theory of defense (no time to form intent to kill) was

undermined by the instructions given to the jury. A new trial is required.

The trial court also erred in not having Mr. Jenkins present at the site where peremptory challenges to the prospective jurors were being exercised. This Court has recently ruled in Coney v. State, 653 So. 2d 1009 (Fla. 1995), that defendants are entitled to be present at the site where peremptory challenges are being exercised; and unless a waiver is explicit in the record by the appellant, a new trial is required. The question here is whether this Court's 1995 Conev decision -- which is prospective only -- applies to pipeline cases on appeal. Mr. Jenkins argues that the Coney decision should apply to his case (his trial took place in 1994) and notes that the First District has certified this issue.

Most importantly, the trial court erred in overriding the jury's recommendation of life and imposing the death penalty. The trial court's imposition of death was erroneous in two aspects: (1) The trial court improperly doubled two aggravating factors -- capital felony at issue was committed to avoid lawful arrest and/or escape and the victim of the capital felony at issue was a law enforcement officer -- and improperly applied the aggravator of committing capital felony while engaging in another felony to a felony-murder situation. (2) The trial court improperly overrode the jury's life recommendation; because under the totality of the circumstances, a life recommendation was reasonable. The circumstantial evidence in this case clearly supports Mr. Jenkins's contention that the shooting occurred accidentally during the

struggle. The jury reasonably could have found that Mr. Jenkins' life should be spared due to these circumstances; and the trial court's rejection of what a reasonable juror could have concluded was not a death penalty case is a violation of Tedder v. State, 322 So. 2d 908 (Fla. 1975). The jury could also have reasonably based its life recommendation on other nonstatutory mitigating circumstances: Mr. Jenkins' emotional stress on the day of the shooting and Mr. Jenkins' good character traits. The jury also had before it the factor that the alternative sentence was life in prison without possibility of parole.

ARGUMENT

ISSUE I

DID THE TRIAL COURT ERR IN FAILING TO GRANT APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO FIRST-DEGREE PREMEDITATED MURDER?

The State prosecuted this case on alternative theories by arguing both premeditated and felony murder (T341-343,954-957,961). Defense counsel argued that the State would not be able to and then had clearly failed to prove premeditation in this case, but defense counsel's objections to the prosecutor's opening[4] and closing argument, defense counsel's motion for judgment of acquittal as to premeditated murder, and defense counsel's objection to premeditated murder juryinstructionsweredenied (T315-319,341-343,873-877,888, 891,896,954-957,979,980). It is Mr. Jenkins' contention that the circumstantial evidence in this case fails to establish first-degree premeditated murder.

When the State relies entirely upon circumstantial evidence to convict an accused, this Court "[has] always required that such evidence must not only be consistent with the defendant's guilt but it must also be inconsistent with any reasonable hypothesis of innocence." Cox v. State, 555 So. 2d 352 (Fla. 1989); Jaramillo v. State, 417 So. 2d 257 (Fla. 1982); McArthur v. State, 351 So. 2d 972 (Fla. 1977). In McArthur, this Court reversed a conviction of

[4] Because this case was almost completely tried about a month before and had resulted in a mistrial, defense counsel could anticipate the prosecutor's opening statement and the lack of evidence to support that argument.

first-degree premeditated murder for insufficiency of the circumstantial evidence to prove the charged offense, stating:

> Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. *Davis* v. *State,* 90 So. 2d 629 (Fla. 1956); *Mayo* v. State, 71 So. 2d 899 (Fla. 1954); *Head v. State, 62 So.* 2d 41 (Fla. 1952). (The meaning of "not inconsistent" may be sufficiently different from "consistent" as to prevent a substitution of terms.) In applying the standard, the version of events related by the defense must be believed if the circumstances do not show that version to be false. Mayo v. State, above; *Holton* v. *State, 87* Fla. *65, 99 So. 244* (1924).

McArthur, 351 So. 2d at 976 ftnt. 12. More recently in Golden v. State, 629 So. 2d 109 at 111 (Fla. 1993), this Court reiterated:

> Moreover, when circumstantial evidence is used to prove the corpus delicti, "it must be established by the most convincing, satisfactory and unequivocal proof compatible with the nature of the case, excluding all uncertainty or doubt." *Lee [v. State],* 96 Fla. at 65, 117 so. at 702; *Davis v. State, 90 So.* 2d 629 (Fla. 1956); *Dieterle v. State,* 101 Fla. 79, 134 So. 42 (1931). By its very nature, circumstantial evidence is subject to varying interpretations. It must, therefore, be sufficient to negate all reasonable defense hypotheses as to cause of death and show beyond a reasonable doubt that the death was caused by the criminal agency of another person. *See State v. Law, 559 So.* 2d 187 (Fla. 1989), *McArthur v. State,* 351 So. 2d 972 (Fla. 1977).

In State v. Law, 559 So. 2d 187 (Fla. 1989), this Court described the respective roles of the judge and jury in circumstantial evidence cases when the trial court is presented with a motion for judgment of acquittal:

Upon careful consideration, we find that the view expressed in *Lynch [v. State, 293 So.* 2d 44 (Fla. 1974)) and that expressed by the district court below in the instant case and in *Fowler [v. State,* 492 So. 2d 1344 (Fla. 1st DCA 1986), rev. *denied, 503 So.* 2d 328 (Fla. 1987)] are harmonious. A motion for judgment of acquittal should be granted in a circumstantial evidence case if the state fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilty. *See Wilson v. State, 493 So.* 2d 1019, 1022 (Fla. 1986). Consistent with the standard set forth in *Lynch,* if the state does not offer evidence which is inconsistent with the defendant's hypothesis, "the evidence [would be] such that no view which the jury may lawfully take of it favorable to the [state] can be sustained under the law." 293 So. 2d at 45. The state's evidence would be as a matter of law "insufficient to warrant conviction." Fla. R. Crim P. 3.380.

It is the trial judge's proper task to *review* the evidence to determine the presence or absence of competent evidence from which the jury could infer guilt to the exclusion of all other inferences. That view of the evidence must be taken in the light most favorable to the state. *Spinkellink v. State, 313 So.* 2d 666, 670 (Fla. 1975), *cert. denied, 428 U.S.* 911, 96 S. Ct. 3227, 49 L. Ed. 2d 1221 (1976). The state is not required to "rebut conclusively every possible variation" *[State v. Allen,* 335 So. 2d 823, 826 (Fla. 1976)] of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events. See *Toole v.* State, 472 So. 2d 1174, 1176 (Fla. 1985). Once that threshold burden is met, it becomes the jury's duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt.

If the rule were not applied in this manner , a trial judge would be required to send a case to the jury even where no evidence contradicting the defendant's theory of innocence was present, only for a verdict of guilty to be reversed on direct appeal. We agree with the *Fowler* court that

> it is for the court to determine, as a threshold matter, whether the state has

> been able to produce competent, substantial evidence to contradict the defendant's story. If the state fails in this initial burden, then it is the court's duty to grant a judgment of acquittal to the defendant as to the charged offense, as well as any lesser-included offenses not supported by the evidence . . . . Otherwise, there would be no function or role for the courts in in reviewing circumstantial evidence, as was stated *so* well in *Davis v. State,* 436 So. 2d [196 (Fla. 4th DCA 1983)], *200:* "If we were to follow the state's logic, a trial judge could never. . . grant a motion for judgment of acquittal pursuant to Florida Rule of Criminal Procedure 3.380 when the evidence [is] circumstantial. Instead, every case would have to go to the jury."
> Fowler, 492 So. 2d at 1347.

Law, 559 So. 2d at 188-89 (footnote omitted).

Thus, the State had the burden of producing competent, substantial evidence which is clearly inconsistent with the defendant's hypothesis of innocence; where the state fails to meet this burden, the trial court must grant a judgment of acquittal. Fowler v. State, 492 So. 2d 1344, 1347 (Fla. 1st DCA 1986), rev.denied, 503 So. 2d 328 (Fla. 1987), approved in State v. Law, 559 So. 2d 187, 188-89 (Fla. 1989). In applying this standard, the version of the events related by the defendant must be believed if the circumstances do not show that version to be false. McArthur, 351 So. 2d at 976; Fowler, 492 So. 2d at 1347; Rager v. State, 587 So. 2d 1366, 1369 (Fla. 2d DCA 1991). As stated in Fowler:

> . . . [W]e must consider whether, in order to be legally sufficient, the circumstantial evidence relied on by the state must lead only to an inference or conclusion that contradicts defendant's hypothesis of innocence, or whether it may be susceptible of two or more infer-

> ences, one being consistent with defendant's story and others being inconsistent with such story. We conclude that a circumstantial evidence case should not be submitted to the jury unless the record contains competent, substantial evidence which is susceptible of only one inference and this inference is clearly inconsistent with the defendant's hypothesis of innocence. Evidence that leaves room for two or more inferences of fact, at least one of which is consistent with defendant's hypothesis of innocence, is not legally sufficient to make a case for the jury.

Fowler, 492 So. 2d at 1347, 1348 (emphasis in opinion, footnote committed).

Finally, "[c]ircumstantial evidence is not sufficient when it requires such pyramiding of inferences in order to arrive at a conclusion of guilt. Chaudoin v. State, 362 So. 2d 398 at 402 (Fla. 2d DCA 1978); Gustine v. State, 86 Fla. 24, 97 So. 207 (1923)." Weeks v. State, 492 So. 2d 719 at 722 (Fla. 1st DCA 1986), rev. dismissed, 503 So. 2d 328 (Fla. 1987).

In the case sub iudice, the State took the position that Mr. Jenkins wrestled the gun away from the officer, the officer was on the ground in some sort of curled-up position, and then Mr. Jenkins took aim and intentionally shot the officer with the intent to kill. Even though Mr. Jenkins had only seconds to form this premeditated intent, the State argued the law that says this type of intent can be formed in only a few moments (T955, 956).[5] On the other hand, Mr. Jenkins' position is that he and the officer struggled, the gun went off during the struggle, and the officer was accidentally shot. The circumstantial evidence in this case -- the

[5] See McCutchen v. State, 96 So. 2d 152 at 153 (Fla. 1957).

circumstantial evidence that the State relies on -- does not contradict Mr. Jenkins' hypothesis of innocence.

The circumstantial evidence showed the following:

(A) There was no gunshot residue found on the officer's pants. There were four possible reasons for this -- (1) the shot was fired a distance greater than the maximum distance at which residues would be deposited (in this case, a distance in excess of 4 1/2 feet); (2) there is an intervening object; (3) the residue fell off when handled by medical personnel, evidence technicians, etc.; and (4) the residue was washed away by heavy bleeding. The expert refused to speculate which of these four possibilities was the more likely to be present in this case; in fact, the expert refused to comment on the distance between the gun and the officer. Without any residue on the pants, the expert could not make any determination as to muzzle-to-garment distance. The expert specifically refused to conclude that possibility #1 -- distance being over 4 1/2 feet -- was the reason for the lack of residue and referred back to all four possibilities (T753-761,772-780). Thus, the State's theory that Mr. Jenkins was at least 3 feet away when he shot the officer (T956) was not inconsistent with Mr. Jenkins' reasonable hypothesis that they were struggling and closer than 3 feet when the gun went off. The lack of residue could just as easily be due to the handling of the clothes, or the very heavy bleeding in this case, or even a combination of two or more possibilities. Neither the evidence nor the State's expert refuted Mr. Jenkins' reasonable hypothesis.

(B) The blood splatter expert positioned the officer lying down on the ground when shot[6] and immediately on his right side without movement after the shooting.[7] In addition, the medical examiner testified that the bullet path was from back to front, slightly upward, and from right to left in the right thigh (T820, 825). The only facts this physical evidence proves are: (1) the officer was lying down when shot, and (2) the officer was not shot in what is customarily thought of as the more lethal areas -- the heart or head. These are the only facts that are conclusively established; anything else is pure speculation and conjecture. The State argued the officer was on the ground trying to curl up to make himself a smaller target when Mr. Jenkins premeditatedly pulled the trigger (T957), but the circumstantial evidence does not dictate Mr. Jenkins' position nor the officer's position on the ground. Mr. Jenkins' counsel argued Mr. Jenkins also fell to the ground during the struggle when the gun went off. Considering the bullet's path through the officer's leg, Mr. Jenkins' reasonable hypothesis is even more likely than the State's theory: the bullet entered from the back, was angled slightly upward, and went from right to left. It is far more plausible to envision that both men

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[6] This conclusion was based on the facts that bloodshed would be instantaneous in this case and there was no downward blood flow (T845,865,866).

[7] This conclusion was based on the facts that there had to be some constriction of blood flow from the femoral artery because there was projection of blood, no spurting of blood, and no downward flow of blood. The officer had to be immediately on his right side or the expert would have found evidence of gushing (T866).

were on the ground with Mr. Jenkins to the right side of the officer when the gun went off to justify the bullet's path. If, according to the State's viewpoint, Mr. Jenkins was standing, then the officer would not only have had to assume some unusual, curled-up defensive position;[8] but the officer would have had to also be totally on his left side -- a position excluded by the blood splatter expert who testified that the officer had to immediately be on his right side after the shooting or there would have been some evidence of gushing. The bottom line, however, is that the actual position of both the officer and Mr. Jenkins is open to several possibilities. The State's version is not inconsistent with Mr. Jenkins' version.

(C) Christina Pack,[9] who lived behind the condo in question on the other side of the Pinellas Trail, heard a male Caucasian voice say, "put it down, put it down now, put it down." About three seconds later she heard a shot (T393-396). Although she said the voice was some distance away (her estimate was 150 to 200 feet away) and there was a fence between them, she described the male voice as being authoritative with underlying tones of pleading (T396). Although the State's position is that Mr. Jenkins' had total control over the gun for a few seconds, formed his intent, and then pulled the trigger (T944,956), there is the equally

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[8] No officer testified during the trial that curling up was standard procedure in such a circumstance.

[9] It is to be noted that Ms. Pack had known the victim in this case for about 20 years and was a friend. She spoke at sentencing, presumably to ask that death be imposed (R1615-1616).

plausible defense position that the two were still struggling for control over the gun when the officer spoke those words. Mr. Jenkins had obviously grabbed the gun and had his hand on it. It would be quite natural for the officer to say "put it down" while attempting to regain control over the gun. The fact is that Ms. Pack could not see what was happening 200 feet away on the other side of the 7-foot privacy fence, and the State's version is neither inconsistent with Mr. Jenkins' reasonable hypothesis nor is more plausible than Mr. Jenkins' reasonable hypothesis.

(D) There is the lighting aspect of the scene where the shooting took place. The descriptions of the lighting varied: One of the first officers on the scene who was running back and forth behind several condos (with the help of misdirection by well-intentioned neighbors) unsuccessfully trying to find the missing officer, described the area behind #10 as being very dark with only a dim street light. That officer did not discuss the landscape lights that were present, and he did not notice either the downed officer nor the damage to the rear French doors (T446). The officer who found Officer Tackett did notice the damage immediately to the rear French doors. That officer described the lighting as difficult because there were patches of darkness and patches of light from the landscape lights that had a blinding effect (T476). There was also Officer Tackett's lit flashlight (T445). Thus, it was established that there was some lighting in the back of #10. It was also established the Mr. Jenkins was behind #10 working on the rear French doors for quite awhile -- long enough for Ms.

Walker to place a call to a friend before calling the police, to then call the police, and to have Officer Tackett leave the Belleair Police Station and go to Ms. Walker's residence." Since there were some lights present in the back, since Mr. Jenkins had plenty of time to adjust his eyesight to the lighting conditions, and since Mr. Jenkins was obviously working away at the French doors in the back, it is more reasonable to believe that Mr. Jenkins could see behind #10.

The trial court made it clear in its sentencing order that it believed the poor lighting conditions made it impossible for Mr. Jenkins to see what he was aiming at, thus is could not be presumed that Mr. Jenkins was not trying to shoot the officer in a more vital spot. In light of the conflicting testimony about the lighting conditions and in light of the fact that Mr. Jenkins had been working back there for several minutes, the trial court's conclusion in this matter is not reasonable. The lighting conditions are consistent with Mr. Jenkins' reasonable hypothesis that the two struggled over the gun, and Mr. Jenkins accidentally shot the officer. In further support of this conclusion are the facts that the gun was fully loaded with eight more bullets, the gun would definitely have been a lot more easier to shoot the

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[10] This fact was not lost on at least one juror who wrote to the trial court before sentencing, stating that she believed Mr. Jenkins' eyes had adjustedtothe lighting conditions (R1455-1457).

second time[11] (only 7 1/2 pounds of pressure needed to pull the trigger versus 12 1/2 pounds if the gun had initially been in a double-action mode), only one bullet was shot, and the officer was alive and screaming when Mr. Jenkins left (T375,429-431,739,742-744). If Mr. Jenkins truly intended to kill the officer, he could have easily finished the task. Instead, Mr. Jenkins fled the scene while the officer was very much alive without firing a second shot and abandoned the gun on the other side of the privacy fence at the scene.

(E) Finally, the State argued that the absence of fibers having been transferred from the officer to Mr. Jenkins or from Mr. Jenkins to the officer was evidence of not much of a struggle (T956). Although the State's expert in fiber analysis testified about a theory of transfer that states the longer two people are in close personal contact with each other the more likely there will be a transfer of hair and fibers, the State expert also had to admit he would have expected such a transfer to take place between a person who is standing close enough to handcuff another person and the person being handcuffed overpowers the person doing the handcuffing. Thus, the State's expert believed that a transfer of fibers should have taken place under facts known to exist in this case; yet no fiber transfer had been found. The fiber expert had

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[11] This particular gun could have been in either a double-action mode, uncocked position requiring 12 1/2 pounds of pressure to pull the trigger; or it could have been in a single-action mode, cocked position requiring 7 1/2 pounds of pressure when Mr. Jenkins grabbed the gun from the officer. There is no way of knowing in which mode the officer had the gun before Mr. Jenkins grabbed it.

no explanation for this (T678-694). The lack of fiber transfer, therefore, is not inconsistent with Mr. Jenkins' reasonable hypothesis of a struggle and an accidental shooting. One might even assume that the struggle did not last long; however, that assumption is not inconsistent with Mr. Jenkins' theory of events.

The State had the burden of introducing competent evidence which is inconsistent with Mr. Jenkins' theory of events. It is not enough that the State's version be equally plausible. Again, as noted in Fowler, 492 So. 2d at 1348, "[e]vidence that leaves room for two or more inferences of fact, at least one of which is consistent with defendant's hypothesis of innocence, is not legally sufficient to make a case for the jury." The evidence in this case was clearly consistent with Mr. Jenkins' reasonable hypothesis of innocence that the two struggled over the gun and the gun accidentally went off. Although this Court noted in McArthur, 351 So. 2d at 976, that "review of prior decisions of this Court in similar cases is not helpful to the analysis required here, since the nature and quantity of circumstantial evidence in each case is unique," there are a few prior decisions of this Court that should be examined. These opinions demonstrate situations in which this Court has found no evidence of a premeditated murder theory.[12] Those situations are clearly similar to the case sub iudice and have precedential value,

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[12] After much thought, undersigned counsel has decided not to argue insufficient evidence under the felony murder rule. The evidence in this case clearly established that the shooting occurred during the flight from attempted burglary and/or a robbery and/or escape while under arrest.

In the case of Terry v. State, 21 Fla. Law Weekly S9 (Fla. Jan. 4, 1996), the defendant shot the woman operating a convenience store at a Mobile gas station during a robbery. No one witnessed the actual shooting -- the co-defendant and the victim's husband were in the garage portion of the station at the time. In finding the facts only supported a felony murder theory, and not a premeditated murder theory, this Court stated:

> While there is an abundance of evidence to support the conclusion that Terry shot and killed the victim during the commission of a robbery, there is simply an absence of evidence of premeditation. In fact, there is an absence of how the shooting occurred.

The facts this Court then set forth for this conclusion demonstrated that the defendant was the shooter, that the defendant and co-defendant had been riding around looking for a place to rob, and that the station was missing money.

In the case of Rogers v. State, 660 So. 2d 237 (Fla. 1995), this Court reversed a first-degree murder conviction because there was insufficient evidence of premeditation and an underlying felony. As to the lack of premeditation, this Court held:

> In addition, the State did not present sufficient evidence to support premeditated murder. We have defined premeditation as more than a mere intent to kill; it is a fully formed conscious purpose to kill. This purpose to kill may be formed a moment before the act but must exist for a sufficient length of time to permit reflection as to the nature of the act to be committed and the probable result of that act.
> *Wilson v. State, 493 So.* 2d 1019, 1021 (Fla. 1986). Although the evidence shows that Rogers took his gun from the car when he asked Daniel and Hastings for a ride, the circum-

> stances of Hastings' fatal shooting do not support premeditation. The testimony reflected that Hastings grabbed Rogers' gun, the two men struggled over the gun, and the gun fired. This is not sufficient to prove that Rogers had, upon reflection and deliberation, formed a conscious purpose to kill Hastings. Without sufficient evidence to support premeditated murder or felony murder, we must reverse Rogers' conviction of first-degree murder.

Rogers, 660 So. 2d at 241.

These two cases illustrate two different points, both of which are applicable to Mr. Jenkins's situation: (1) a shooting which occurs during a robbery with no other facts to establish how the shooting occurred may establish the commission of a felony murder, but it does not establish premeditated murder; and (2) a shooting that occurs during a struggle over a gun is not sufficient to prove premeditation -- i.e., a formed conscious purpose to kill upon reflection and deliberation. In Mr. Jenkins' case, the shooting occurred during the commission of a felony or attempted felony or in fleeing from the commission of a felony and it occurred during a struggle. There are no facts in this case establishing premeditation. The circumstantial evidence in this case clearly supported Mr. Jenkins' reasonable hypothesis of innocence as to premeditated murder; but, more importantly, the State failed to produce competent, substantial evidence which is clearly inconsistent with Mr. Jenkins' hypothesis of innocence. In fact, the evidence in this case clearly establishes a total lack of intent to kill in that Mr. Jenkins had full possession of a loaded gun after the first shot was fired, the shot was fired into the officer's leg (an area that would normally be considered nonvital), and the officer was clearly

still alive because a neighbor heard screaming and crying (T429-431) and the dispatcher heard the officer say over his radio that he had been shot (T375); and yet Mr. Jenkins did not fire a second shot in order to silence the officer. These three facts clearly demonstrate a complete lack of premeditation on Mr. Jenkins' part in this shooting. The trial court erred in allowing the State to argue under alternative theories of first-degree felony murder and in allowing the jury to convict Mr. Jenkins under either theory. The trial court should have granted Mr. Jenkins' motion for judgment of acquittal on first-degree premeditated murder.

The next question is what the remedy should be in such a case where the prosecutor argues alternative theories of both premeditated and felony murder to the jury (T954-957,961), the trial court instructs on both theories (T979,980), and the jury is given a general first-degree murder form that does not distinguish between the two theories (T961,R1351).[13]

Based on the judge's instructions, the prosecutor's arguments, and the general verdict, some or all of the jurors could have rejected the felony murder theory; or, alternatively, some or all of the jurors might have reached only the premeditated murder charge and never considered felony murder. It cannot be said with certainty that any juror -- much less a majority or all of them -- considered the felony murder theory and found Mr. Jenkins guilty of it.

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[13] As noted on the first page of this issue, defense counsel clearly objected at every step to the State pursuing this case under the theory of premeditated first-degree murder.

Mr. Jenkins does not dispute the propriety of general verdicts for first-degree murder. Felony and premeditated murder are not different crimes but rather are different means of proving a sufficiently egregious mental state for the same crime. Florida is like Arizona in that "neither premeditation nor the commission of a felony is formally an independent element of first-degree murder; they are treated as mere means of satisfying a mens rea element of high culpability." Schad v. Arizona, 115 L. Ed. 2d 555, 580 (1991). Florida equates "the mental states of premeditated murder and felony murder as species of the blameworthy state of mind required to prove a single offense of first-degree murder." Id. at 571. Mr. Jenkins' case, however, is not like Schad because, although the jurors in each case unanimously agreed that the defendant had a sufficiently blameworthy state of mine, the jurors in this case, unlike Schad, may have based their decision at least in part on a mental state for which the evidence was insufficient. In Schad, no error occurred. In this case, by contrast, an error occurred which could have affected the jury's decision to convict. In particular, if the circumstantial evidence does not establish premeditated murder -- which it clearly does not in this case -- then (1) the trial court should have granted the motion for judgment of acquittal for premeditated murder, (2) instructing the jury on premeditated murder was error, and (3) the court should not have allowed the jury to base its verdict wholly or partly on this erroneous instruction.

Because the evidence was insufficient to prove premeditated murder and because some or all of the jurors may have rejected or not reached felony murder, this Court cannot now say beyond a reasonable doubt that Mr. Jenkins received a trial by jury on felony murder, the sole remaining legitimate theory of guilt. He had a right under the Sixth and Fourteenth Amendments to a verdict agreed to by at least six jurors, Balley v. Georqia, 435 U.S. 223 (1978); by a substantial majority of the jurors on the panel, Johnson v. Louisiana, 406 U.S. 356 (1972); and, arguably, in a capital case, by a unanimous jury, Andres v. United States, 333 U.S. 740 (1948). In this case, no juror may have decided to convict on a valid theory of guilty. This violation of the right to trial by jury was per se reversible error.

Federal constitutional law is clear that, if a jury reached a general verdict without specifying which of two or more alternative theories of guilt it accepted, the invalidity of any of the theories requires per se reversal, particularly in capital cases.

> with respect to findings of guilt on criminal charges, the Court has consistently followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court was uncertain which of the two grounds was relied upon in reaching the verdict. In reviewing death sentences, the Court has demanded ever greater certainty that the jury's decisions rested on proper grounds. See, *e.g., Andres v. United States, 333 U.S. 740, 752* (1948) ("That reasonable men might derive a meaning from the instructions given other than the proper meaning of §567 is probable. In death cases doubts such as those presented here should be resolved in favor of the accused'*). Unless we can rule out the substantial possibility that the jury may have

> rested its verdict on the "improper" ground, we must remand for resentencing.

Mills v. Marvland, 486 U.S. 367, 377 (1988) (most citations omitted).

Similarly, Justice Rehnquist said in Boyd v. California, 108 L. Ed. 2d 315, 328-29 (1990) (citations omitted), that:

> we have held that "when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside." In those cases a jury is clearly instructed by the court that it may convict a defendant on an impermissible legal theory, as well as on a proper theory or theories. Although it is possible that the guilty verdict may have had a proper basis, "it is equally likely that the verdict . . . rested on an unconstitutional ground," and we have declined to choose between two such likely possibilities.

The Court has applied this rule to several situations. In the leading case, Stromberg v. California, 283 U.S. 359, 368 (1931), the Court reversed a conviction because one of the three possible theories of guilt violated the First Amendment.

> As there were three purposes set forth in the statute, and the jury were instructed that their verdict might be given with respect to any one of them, independently considered, it is impossible to say under which clause of the statute the conviction was obtained. If any one of these clauses . . was invalid, it cannot be determined upon this record that the appellant was not convicted under that clause . . . . [T]he necessary conclusion from the manner in which the case was sent to the jury is that, if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld.

In Leary v. United States, 395 U.S. 6 (1968), under one of two theories of guilt, the trial court instructed the jury that it

could infer that a possessor of marijuana knew it was imported. This instruction violated due process because the facts proved and presumed had no rational connection. Even thought the evidence was sufficient (as in the present case) to convict under the second theory of guilt, the Court nevertheless reversed because "[f]or all we know, the conviction did rest on [the first] ground. It has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside." Id. at 31-32.

Similarly, in Yates v. United States, 354 U.S. 298 (1957), the Court reversed when the trial court misinterpreted a conspiracy statute and instructed the jury incorrectly. "[A] verdict [must] be set aside in cases where the verdict is supportable on one ground but not on another, and it is impossible to tell which ground the jury selected." Id. at 312.

Finally, in a case especially similar to the present case, the trial court instructed the jury to consider all means charged in a single count of conspiracy and to find a general verdict of guilt if any charged was proved. Nash v. United States, 229 U.S. 373 (1913). Some charges had been abandoned, however, and another showed only cheating and did not warrant a conspiracy conviction. Although the evidence was sufficient for the remaining charges, the Court automatically reversed; because the evidence was insufficient for some of the charges and it could not say the conviction was not based solely on the abandoned or insufficient charges.

Although this Court has rejected the application of Stromberg to this type of situation in Parker v. Dugger, 660 so. 2d 1386 (Fla. 1995); and 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), and found the erroneous giving of both premeditated and felony murder theories to be harmless error as long as sufficient evidence as to one of the theories exists, it uses as support for this conclusion the case of Griffin v. United States, 502 U.S. 46 at 53, 112 S.Ct. 466 at 471, 116 L.Ed. 2d 371 (1991). Reliance on Griffin, however, is misplaced because Griffin did not involve a death penalty case and did not discuss the Sixth Amendment's requirement of a unanimous verdict. Griffin held the due process clause of the Fifth Amendment does not require that in federal prosecutions a general guilty verdict in a multiple-object conspiracy be set aside if evidence is inadequate to support the conviction as to one object. Griffin dealt with multiple-object conspiracies and specifically examined the law in that area when coming to the conclusion that a conspiracy conviction would be upheld even if the evidence was insufficient as to one of the alleged objects of the conspiracy. See Griffin, 502 U.S. at 473. The Court concluded by saying:

> Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law -- whether, for example, the action in question is protected by the Constitution, is time barred, or fails to come within the statutory definition of the crime. When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and

> expertise will save them from that error. Quite the opposite is true, however, when they have been left the option of relying upon a factually inadequate theory, since jurors are well equipped to analyze the evidence, see *Duncan v. Louisiana,* 391 U.S. 145, 157, 88 S. Ct. 1444, 1451, 20 L.Ed.2d 491 (1968). As the Seventh Circuit has put it:
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> > "It is one thing to negate a verdict that, while supported by evidence, may have been based on an erroneous view of the law; it is another to do so merely on the chance -- remote, it seems to us -- that the jury convicted on a ground that was not supported by adequate evidence when there existed alternative grounds for which the evidence was sufficient."
>
> *United States v. Townsend, 924* F. 2d 1385, 1414 (1991).

Griffin, *502* U.S. at 59, 60. However, it is to be noted that in setting forth examples, Griffin indirectly referred to Anderson v. United States, 170 U.S. 481, 18 S. Ct. 689, 42 L. Ed. 1116 (1898), in which it had sustained a murder conviction based on indictment which was duplicitous in charging that death had occurred through both shooting and drowning. This Court held that the means of death was immaterial in Anderson. If this is, indeed, the type of factual scenario Griffin is referring to -- duplicitous charges -- then Griffin is, in reality, carving an exception for surplusage.

Another example, also referred to in Griffin, would be the various ways to prosecute a drug trafficker. For example, a trial court might instruct the jury that drug trafficking occurs when a defendant knowingly sells cocaine or brings it into Florida. If no evidence even remotely showed that the defendant brought cocaine into Florida and if the prosecutor did not attempt to argue this theory of guilty, then the reference to importing cocaine was mere

surplusage because no jury could reasonably convict him on this theory. A reviewing court could say that the error was harmless because the jurors in fact must unanimously have convicted him or the other theory. This Court seems to have adopted this harmless error theory for surplusage in Morris v. State, 557 So. 2d 17 (Fla. 1990).

If, however, some or all of the jurors might have chosen an invalid theory of guilt, then, as previously argued, the error can never be harmless, regardless of the evidence in support of other theories. A reviewing court in such cases cannot say that the defendant in fact received a trial by jury on a valid theory of guilt. Some jurors may never have considered the valid theory or may have rejected it.

In any event, the error in this case was not harmless. Defense counsel argued to the jury that Mr. Jenkins did not intentionally shoot to kill the officer. Defense counsel also argued that felony murder was not established because the attempted burglary was over when the officer arrested Mr. Jenkins (T922-924), the robbery was never established because Mr. Jenkins did not permanently deprive the officer of his gun[14] since it was left at the scene and because he did not use force to take handcuffs so that he could walk around with a handcuff on his right hand (T924), and there was no escape because Mr. Jenkins was not completely under arrest when the shooting occurred (T925). This last aspect

[14] The jury was only instructed on permanent deprivation -- not temporary (T984-985).

of the State's alternatives under the felony murder rule is what seemed to worry the jury the most, for defense counsel argued that Mr. Jenkins was only guilty of third-degree felony murder for resisting arrest with violence -- not escape (T925-930,937,966,972-976). The problem with these two felonies is that this Court's definitions have effectively blurred the two so that the same facts constitute violations of both statues. It is presumably up to the jury -- and the power of the jury's pardon[15] -- that decides whether, in this case, Mr. Jenkins is convicted of first-degree felony murder based on escape or third-degree felony murder based on resisting arrest with violence. See State v. Ramsey, 475 So. 2d 671 (Fla. 1985), wherein this Court specifically quoted from Judge Orfinger in a special concurrence in State v. Iafornaro, 447 So. 2d 961 (Fla. 1984), that pointed out this problem:

> Even though not yet physically restrained, one who has been placed under arrest has had his liberty restrained in that he is not free to leave. His confinement has thus begun and if he escapes from lawful custody, the fact that he may be properly charged with resisting arrest does not affect the result, because oftentimes a single act violates two or more criminal statutes.

Ramsey, 475 So. 2d at 672. The jury was obviously troubled with its choice between first-degree felony murder and third-degree felony murder as reflected by the subsequent questions submitted by the jury: (1) the request for clarification on escape as to what

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[15] Juries are allowed to convict on lesser offenses despite overwhelming evidence of the charged offense under this Court's recognition of the jury's right to exercise its "pardon power." Amado v. State, 585 So. 2d 282 at 283 (Fla. 1991); Douqan v. State, 595 So. 2d 1 at 4 (Fla. 1992).

constitutes being transported, and (2) a request for a clearer definition of intention to avoid lawful confinement (T999-1027). Obviously, the jury was having a problem with the felony-murder theory of the State's case and had an option of arriving at a verdict other than first-degree murder.

The problem with Griffin and Parker is the assumption that the jury would obviously have convicted the defendant of first-degree felony murder since the evidence was insufficient to support the State's alternative premeditated theory. Yet, how can this assumption be made when it is apparent to the jury that the trial judge and prosecutor both believe sufficient evidence of premeditation exists. If two trained and educated attorneys -- one who is now a learned judge -- do not believe the evidence of premeditation was insufficient, why should it be so readily assumed that all 12 jurors soundly rejected the theory. The prosecutor argued for it and the trial court gave the instruction. What if some jurors did not reject this theory? What if those who did reject premeditation had problems with the lack of distinction between escape and resisting arrest with violence, i.e., the first-degree versus third-degree felony murder theories? The jury in this case had five avenues open to it -- first-degree premeditated murder, first-degree felony murder under three separate felony theories (attempted burglary, robbery and escape) and third-degree felony murder (resisting with violence). Just because the case law (of which the jurors would have no knowledge) establishes that the evidence was sufficient for a first-degree felony murder conviction

under one of the three possible felonies, does not mean error in instructing on premedicated murder had no effect on the jury's verdict and is therefore harmless error.

Supposing that the erroneous instruction on premeditated murder was harmless would mean that the judge could just as well have taken this case from the jury's consideration and convicted the defendant on the theory that no reasonable jury could have found a lack of first-degree felony murder. To the contrary, the killing could have been a resisting arrest with violence that got out of hand without any actual intent to kill. The case law has effectively blurred the distinction between escape and resisting with violence; therefore, leaving the decision up to which it will convict on up to the jury and its jury pardoning powers. A reasonable juror could have agreed with the resisting with violence argument. This, if this Court uses a harmless error standard, the error was not harmless.

For obvious reasons, the State had strenuously argued in other cases that specific verdicts are not required to show whether the jury found premeditated murder, felony murder, or both. The State likes general verdicts because they allow conviction without requiring unanimous juror agreement on any one theory of guilt. The State's arguments were successful. Brown v. State, 473 So. 2d 1260 (Fla. 1985). Having made its bed, however, now the State must lie in it. With one possible exception, Stromberg requires per se

reversal if the evidence is insufficient for one of the alternate methods of proof that support a general verdict.[16]

In this case, the evidence was insufficient to support the premeditated murder theory by which the jury might have convicted Mr. Jenkins of first-degree murder. Accordingly, this theory was unconstitutional because allowing the jury to convict on insufficient evidence violated due process. In re Winship, 397 U.S. 358 (1970)" Although the felony murder theory was constitutional and had sufficient supporting evidence, because the general verdict did not specify whether the jury adopted the constitutional felony murder theory or the unconstitutional premeditated murder theory, the per se reversal rule of Stromberg and its progeny applied. The error was not only harmful but per se reversible error. Remand is therefore necessary for a new trial on first-degree murder without consideration of premeditated murder.

ISSUE II

WAS THE TRIAL COURT INSTRUCTION ON PREMEDITATED FELONYMURDERERRONEOUS AND REVERSIBLE ERROR IN THIS CASE?

Should this Court disagree with Issue I and find that there was sufficient evidence of premeditation to go to the jury, then the jury should have received a complete instruction on premedita-

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[16] See thorough and well-reasoned dissent by Chief Justice Urbigkit in Bouwkamp v. State, 833 P. 2d 486 at 516-540 (Wyo. 1992), arguing for the need for specific separate verdicts for jurors determining guilt in a first-degree murder charge when faced with alternative theories of guilt -- premeditated or felony murder.

tion as needed under the facts of this case. The jury did not receive such an instruction. As has already been noted, Mr. Jenkins' argument against the premeditation theory of felony murder was the lack of intent to kill -- there was a struggle and the gun went off. The State, on the other hand, argued the intent to kill and pointed to the lack of gunshot residue on the officer's pants as evidence of more than 3 1/2 feet from the gun to the officer, the lack of fiber transfer as evidence of not much of a struggle, an Ms. Pack's hearing of "put the gun down" and the shot about three seconds later (T955,956). In order to make this argument, the State had to argue that premeditation can be formed quickly: "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" (T955). The State argued that the mere conscious decision to take a life is enough time to form premeditation.

During the jury instruction conference Mr. Jenkins submitted his own instruction on premeditation, the majority of which was a direct quote from this Court's case of McCutchen v. State, 96 So. 2d 152 at 153 (Fla. 1957) (R1266;T896). Mr. Jenkins argued that the standard jury instruction on premeditation was wrong in that it relieved the State of the burden of proof as to the requirement that the premeditated design be fullv formed before the killing, not just formed as set forth in the standard instruction. Mr. Jenkins went on to argue that the definition set forth in McCutchen is far more thorough and sets forth a higher standard than the

standard jury instruction's definition of premeditation (T896-898). The trial court refused to deviate from the standard instruction and denied Mr. Jenkins' requested instruction (R1266;T898,979,980).

The differences between the standard jury instruction and the definition set forth in McCutchen are major, and a comparison of the two clearly reveals that McCutchen's definition of premeditation is much higher than the definition set forth in the standard jury instruction:

> A premeditated design to effect the death of a human being is a fully formed and conscious purpose to take human life, formed upon reflection and deliberation, entertained in the mind before and at the time of the homicide. The law does not prescribe the precise period of time which must elapse between the formation of and the execution of the intent to take human life in order to render the design a premeditated one; it may exist only a few moments and yet be premeditated. If the design to take human life was formed a sufficient length of time before its execution to admit of some reflection and deliberation on the part of the party entertaining it, and the party at the time of the execution of the intent was fully conscious of a settled and fixed purpose to take the life of a human being, and of the consequence of carrying such purpose into execution, the intent or design would be premeditated within the meaning of the law although the execution followed closely upon formation of the intent.

McCutchen, 96 So. 2d at 153.

> Killing with premeditation is killing after consciously deciding to do so. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formulation of premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant.

> The premeditated intent to kill must be formed before the killing. The question of premeditation is a question of fact to be determined by you from the evidence. It will be sufficient proof of premeditation if the circumstances of the killing and the conduct of the accused convince you beyond a reasonable doubt of the existence of premeditation at the time of the killing.

Florida Standard Jury Instructions in Criminal Cases. Inasmuch as the issue of time needed to form intent to kill was the major point of contention as to the issue of premeditation in this case, the more thorough and higher standard of premeditation as set defined in McCutchen was vital. The standard instruction was not complete and mislead the jury as to what is actually required to find premeditation.

In Campbell v. State, 577 So. 2d 932 (Fla. 1991), the defendant had requested a special instruction concerning temporary possession for purposes of testing quality while in the owner's presence not being legal possession. This Court held that inasmuch as legal possession was the issue and this issue is generally for the jury, the jury should have been instructed as per the defendant's request. This Court reiterated that "'a defendant is entitled to have the jury instructed on the rules of law applicable to his theory of defense if there is any evidence to support such instruction.' Smith v. State, 414 So. 2d 726, 732 (Fla. 1982) . . . ." Campbell, 577 So. 2d at 935. Because there was evidence to show the defendant's dominion and control as well as evidence to show only temporary possession for the sole purpose of testing,

this Court reversed for a new trial based on the trial court's failure to give the defendant's requested instruction.

In Mr. Jenkins's case, the theory of defense was that there was no time to form the intent to kill, and the circumstantial evidence clearly supported this argument (see Issue I). Mr. Jenkins was entitled to have his theory of defense -- i.e., premeditation -- clearly and thoroughly presented to the jury as set forth in McCutchen.

The mere fact that the instruction given was in the standards (as argued by the State, T898) does not make the instruction correct or correct for every situation. The Standard Jury Instructions are not perfect and are often undergoing scrutiny and revision by this Court. See State v. Smith, 573 So. 2d 306 (Fla. 1990). In this case the standard jury instructions were misleading because they played down the formulation of intent to kill, whereas the law as set forth in McCutchen clearly requires "a fully formed and conscious purpose to take human life, formed upon reflection and deliberation." There is no mention of "fully" formed or "deliberation" in the standard instruction. The standard instruction, therefore, did not place an adequate burden of proof on the State. Thus, the jury was mislead on a critical and disrupted issue. As stated in Croft v. State, 117 Fla. 832, 158 So. 454 at 455 (Fla. 1935):

> Where the trial court attempts to define the offense, for the commission of which an accused is being tried, it is the duty of the count to instruct the jury as to each and every essential element of the offense charged, and a charge attempting to define the

> offense which does not cover material elements of the offense is necessarily misleading and prejudicial to the accused. It is the equivalent to directing the jury that it is not necessary for the state to prove any elements of the offense except those included in the definition given by the court.

See also Motley v. State, 155 Fla. 545, 20 So. 2d 798 (1945). In Diez v. State, 359 So. 2d 55 at 56 (Fla. 3d DCA 1978), the court stated:

> A challenged jury instruction or portion of the instruction must be considered with the whole instruction or other instructions bearing on the same subject in determining whether the law was fairly presented or whether the instruction might have misled the jury. *Waters c. State,* 298 So.2d 208 (Fla. 2d DCA 1974).

Diez went on to state that one must look at the instruction as a whole to see if it was improper.

In Mr. Jenkins' case the State was allowed to erroneously argue in closing argument a lesser standard needed to find premeditation (T955,956). The State's erroneous argument was then bolstered with the trial court's erroneous and misleading statement of law as to the definition of premeditation in the jury instructions -- a definition that held the State to a much lesser standard of proof of premeditation.[17] By not giving the definition of premeditation as set forth in McCutchen, the jury was misled on a critical

[17] In Lowe v. State, 650 So. 2d 969 at 975 (Fla. 1994), this Court held that the prosecutor's misstatement of the law in closing arguments was cured by the jury instructions given immediately after. In this case, the prosecutor's misstatement of the law was bolstered by the erroneous jury instructions.

and disputed element of premeditated murder. Mr. Jenkins is entitled to a new trial.

ISSUE III

DID THE TRIAL COURT ERR IN NOT INSURING APPELLANT'S CONSTITUTIONAL AND RULE RIGHTS TO BE PRESENT AT THE SITE WHERE PEREMPTORY CHALLENGES TO PROSPECTIVE JURORS WERE EXERCISED?

After counsel for the parties inquired of prospective jurors, the trial judge called the lawyers to the bench where challenges to the jurors were made (T194-211). Both cause challenges and peremptory challenges were made at the bench (T194-211). The prosecutor and defense counsel then asked some questions of additional prospective jurors. The process of questioning prospective jurors and then making challenges at the bench happened several times. Each time the lawyers would return to the bench to exercise cause and peremptory challenges. (T194-211,226-228,235,240-242,263,264, 303-311). Mr. Jenkins was present in the courtroom during this process, but he was not at the bench conferences where challenges were made (T194,226,235,240,303-311). The record is silent as to whether Mr. Jenkins was advised of his right to be present at the site where challenges were exercised; as to whether he waived that right; as to whether counsel conferred with him regarding challenges; and as to any ratification of defense counsel's actions in making peremptory challenges. (Tl-311).

Mr. Jenkins had the right under the United States and Florida Constitutions and Florida Rule of Criminal Procedure 3.180 to be

physically present at the immediate site where peremptory challenges are exercised. Art. I, §§ 9, 16, Fla. Const.; Amend. V, VI, XIV, U. S. Const.; Francis v. State, 413 So. 2d 1175, 1177 (Fla. 1982); Snyder v. Massachusetts, 291 U.S. 97, 54 S. Ct. 330, 78 L. Ed. 674 (1934). Florida Rule of Criminal Procedure 3.180(a)(4) specifically provides:

> (a) Presence of Defendant. In all prosecutians for crime the defendant shall be present.
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> * * *
>
> (4) At the beginning of the trial during the examination, challenging, impanelling, and swearing of the jury; . . . .

In Turner v. State, 530 So. 2d 45 at 47-49 (Fla. 1987), this Court further stated:

> We recognized in *Francis v. State,* 413 So. 2d 1175, 1177 (Fla. 1982), that the defendant has the constitutional right to be present at the stages of his trial where fundamental fairness might be thwarted by his absence. *Snyder v. Massachusetts,* 291 U.S. 97, 54 S. Ct. 330, 78 L. Ed. 674 (1934). See *also, Faretta v. California,* 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).
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> Florida Rule of Criminal Procedure 3.180(a)(4) recognizes the challenging of jurors as one of the essential stages of a criminal trial where a defendant's presence is mandated.
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> * * *
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> A defendant's waiver of the right to be present at essential stages of trial must be knowing, intelligent and voluntary. *Amazon v. State, 487 So.* 2d *9* (Fla.), *cert. denied, 479* U.S. 914, 107 S. Ct. 314, 93 L. Ed. 2d 288 (1986); *Peede v. State, 474 So.* 2d 808 (Fla. 1985), *cert. denied, 477* U.S. 909, 106 S. Ct. 3286, 91 L. Ed. 2d 575 (1986).

Recently, this Court revisited this issue in Coney v. State, 653 So. 2d 1009 (Fla. 1995).[18] After referencing Francis and Florida Rule of Criminal Procedure 3.180(a)(4), this Court wrote:

> We conclude that the rule means just what it says: The defendant has a right to by [sic] physically present at the immediate site where pretrial juror challenges are exercised. See *Francis.* Where this is impractical, such as where a bench conference is required, the defendant can waive this right and exercise constructive presence through counsel. In such a case, the court must certify through proper inquiry that the waiver is knowing, intelligent, and voluntary. Alternatively, the defendant can ratify strikes made outside his presence by acquiescing in the strikes after they are made. *See State v. Melendez,* 244 So. 2d 137 (Fla. 1971). Again, the court must certify the defendant's approval of the strikes through proper inquiry. Obviously, no contemporaneous objection by the defendant is required to preserve this issue for review, since the defendant cannot be imputed with a lawyer's knowledge of the rules of criminal procedure. Our ruling today clarifying this issue is prospective only.
>
> Juror challenges in the present case were exercised on two occasions: first, during a brief bench conference after prospective jurors had been polled concerning their willingness to impose death, and second, during a lengthy proceeding at the conclusion of voir dire. Coney was not present at the sidebar where the initial challenges were made, and the record fails to show that he waived his presence or ratified the strikes.

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[18] The instant case is a pipeline case on appeal, and the announced rule in Coney that the trial court must certify the defendant's approval of the strikes through proper inquiry or must certify the accused's waiver of his right to be present during the challenging of the jury must be applied in this case. It is to be noted that the First District has certified the question of Coney's application to pipeline cases in Lett v. State, 21 Fla. Law Weekly D580 (Fla. 1st DCA March 1996).

Coney, 653 So. 2d at 1013.[19]

Here, Mr. Jenkins was not "physically present at the immediate site where pretrial juror challenges [were] made." Coney, 653 So. 2d at 1013. This was error. Coney; Francis; see also, Waters v. State, 486 So. 2d 614 (Fla. 5th DCA 1986) (the term "presence" as used within Rule 3.180(a) means that a defendant must be allowed to view and not merely hear the evidence against him). The record is silent on the questions of whether Mr. Jenkins waived his right to be present or ratified the actions of his attorney in his absence. A defendant may waive his presence, or adopt his attorney's actions during his absence, provided the waiver or acquiescence is knowingly, intelligently, and voluntarily made. Turner, 530 So. 2d at 49. However, silence is insufficient to demonstrate a waiver of the right to be present. Id. An involuntary absence from the site where challenges are exercised, without waiver or subsequent ratification, is reversible error. See Francis, 413 So. 2d at 1179.

This violation of Mr. Jenkins' right to be physically present at the bench during this critical stage is not harmless. In Garcia v. State, 492 So. 2d 360 (Fla.),. cert. denied, 479 U.S. 1022, 107 S. Ct. 680, 93 L. Ed. 2d 730 (1986), this Court noted:

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[19] The prospective new rule is that the trial court must certify the defendant's acquiescence of the strikes and the voluntariness of the waiver. State v. Melendez, 244 So. 2d 137 (Fla. 1971), had previously held that a defendant may ratify the action of counsel and proceedings occurring in his absence, while silence will not constitute a ratification. The holding in Coney also otherwise reaffirms the legal principles of Turner and Francis.

> . . . while Rule 3.180(a) determines that the involuntary absence of the defendant is error in certain enumerated circumstances, it is the constitutional question of whether fundamental fairness has been thwarted which determines whether the error is reversible. In other words, when the defendant is involuntarily absent during a crucial stage of adversary proceedings contrary to Rule 3.180(a), the burden is on the state to show beyond a reasonable doubt that the error (absence) was not prejudicial.

Id. at 364, citing Delaware v. Van Arsdall, 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986).

Addressing whether the defendant's absence from the site where peremptory challenges were exercised was harmless, this Court, in Francis, said:

> The exercise of peremptory challenges has been held to be essential to the fairness of a trial by jury and has been described as one of the most important rights secured to a defendant. *Pointer v. United States,* 151 U.S. 396, 14 S. Ct. 410, 38 L. Ed. 208 (1894); *Lewis v. United States,* 146 U.S. 370, 13 S. Ct. 136, 36 L. Ed. 1011 (1892). It is an arbitrary and capricious right which must be exercised freely to accomplish its purpose. It permits rejection for real or imagine partiality and is often exercised on the basis of sudden impressions and unaccountable prejudices based only on the bare looks and gestures of another or upon a juror's habits and associations. It is sometimes exercised on grounds normally thought irrelevant to legal proceedings or official action . . . .

Francis, 413 So. 2d at 1178-1179.

The defendant in Francis was not physically present where his attorney exercised his peremptory challenges, and the defendant could not actively participate. This Court was "unable to assess the extent of prejudice, if any, Francis sustained by not being

present to consult with his counsel during the time his peremptory challenges were exercised.'* Id. at 1179. Accordingly, this Court concluded that Francis' "involuntary absence without waiver by consent of subsequent ratification was reversible error and that Francis is entitled to a new trial." Id.; cf. Coney (supreme court finds violation of right to be present harmless where only causal challenges, not peremptory challenges, were exercised outside the defendant's immediate physical presence).

The same result should be reached here. Mr. Jenkins was not physically present at the immediate site where his lawyer exercised his peremptory challenges, but rather was seated at counsel table where he could not actively participate in the "arbitrary and capricious" selection process himself. This was error. Francis, Coney. Further, the record is silent on whether Mr. Jenkins waived his right to be physically present or ratified the actions of his attorney in his absence. This Court should reverse Mr. Jenkins' conviction and remand his case for a new trial.

ISSUE IV

DID THE TRIAL COURT ERR IN OVERRIDING THE JURY'S RECOMMENDATION OF LIFE IN IMPOSING THE DEATH PENALTY?

The jury recommended that Mr. Jenkins be given a life sentence without the possibility of parole[20] (T1131-1134;R1360). The trial

[20] Section 775.0823(1), Florida Statutes (1991), provides that if a defendant kills a police officer while the officer is performing his duty and the death penalty is found to be inappropriate, then the defendant shall not be eligible for release.

court, however, overrode the jury's life recommendation and imposed death (R1433-1452,1625-1659). The trial court erred in imposing death because it improperly doubled aggravating factors, and the record contains more than ample evidence to support the jury's life recommendation. Each of these errors will be discussed below.

A. The Trial Court **Improperly** Doubled **Aggravating** Factors.

The trial court found four aggravating factors: (1) Mr. Jenkins was previously convicted of a violent felony; (2) the capital felony at issue was committed while Mr. Jenkins was engaged in the commission, in an attempt to commit, or in the flight after committing or attempting to commit a felony to wit attempted burglary; (3) the capital felony at issue was committed for the purpose of avoiding a lawful arrest or effecting an escape from custody; and (4) the victim of the capital felony at issue was a law enforcement officer engaged in the performance of his official duties (R1436-1439). The trial improperly doubled aggravators #3 and #4 and improperly applied aggravator #2 in a felony-murder situation.

As to the improper doubling of aggravators #3 and #4, this Court has now clearly stated "that the aggravating circumstances of 'committed for the purpose of avoiding arrest' and 'murder of a law enforcement officer engaged in the performance of official duties' are duplicative because they are based on the same aspect of the crime; that is, that the law enforcement officer was killed to avoid arrest." Armstrong v. State, 642 So. 2d 730 at 738 (Fla.

1994). In Armstrong, the only evidence supporting the "committed to avoid arrest" aggravator was the fact that the victim was a law enforcement officer;[21] thus, this Court found the aggravating factors of "committed to avoid arrest" and "victim was a law enforcement officer" to be duplicative since both factors are based on a single aspect of the offense. Id. This holding has been most recently reiterated by this Court in Kearse v. State, 662 So. 2d 677 at 685, 686 (Fla. 1995) (another case in which an officer was trying to arrest the defendant and the defendant shot the officer in order to escape).

In Mr. Jenkins' case, the killing of the officer occurred while Mr. Jenkins was trying to escape. Clearly, as per Armstrong, aggravators #3 (committed to avoid arrest) and #4 (victim was a law enforcement officer) are duplicative. The trial court erred in considering these as separate aggravators.

The trial court also erred in applying aggravator #2 (committed while engaged in the commission, in the attempt to commit, or in the flight after committing or attempting to commit a felony) in a murder case that is solely based on a felony-murder theory (see Issue I). The felony-murder aggravating circumstance (as set forth in §921.141(5)(d), Fla. Stat. (1991), violates both the Florida and United States Constitutions. The use of this aggravator renders Mr. Jenkins' death sentence unconstitutional pursuant to Article I, Sections 2, 9, 16, and 17 of the Florida Constitution and the

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[21] In Armstrong, the defendant shot the officer while the officer was arresting the defendant for robbery.

Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.**

Aggravating circumstance (5)(d) states:

> The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

All of the felonies listed as aggravators are also felonies which constitute felony murder in the first-degree murder statute. §784.04(1)(a)2, Fla. Stat. (1991).

This aggravating circumstance violates both the United States and Florida Constitutions. The decisions of the United States Supreme Court have made clear that under the Eighth and Fourteenth Amendments, an aggravating circumstance must comply with two requirements before it is constitutional. (1) It "must genuinely narrow the class of persons eligible for the death penalty." Zant v. Stephens, 456 U.S. 410, 102 S. Ct. 1856, 72 L. Ed. 2d 222 (1983). (2) It "must reasonably justify the imposition of a more severe sentence compared to others found guilty of murder." Zant.

It is clear that the felony-murder aggravator fulfills neither of these functions. It performs no narrowing function whatsoever. Every person convicted on a felony-murder theory qualifies for this aggravator. It also provides no reasonable method to justify the death penalty in comparison to other persons convicted of first-

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[22] Mr. Jenkins objected to the use of this aggravator (R1577-1590)

degree murder. All persons convicted on a felony-murder theory start off with this aggravator, even if they were not the actual killer or if there was no intent to kill. However, persons convicted of premedicated murder are not automatically subject to the death penalty unless they act with "heightened premeditation." See §921.141(5)(i), Fla. Stat. (1991). Rogers v. State, 511 So. 2d 526 (Fla. 1987). It is completely irrational to make a person who does not kill and/or intend to kill automatically eligible for the death penalty whereas a person who kills someone with a premeditated design is not automatically eligible for the death penalty. This aggravating circumstance violates the Eight and Fourteenth Amendments pursuant to Zant. This aggravating circumstance also violates Article I, Sections 2, 9, 16, and 17 of the Florida Constitution.

Three different state supreme courts have held this aggravator to be improper under state law, their state constitution, and/or federal constitutional grounds. State v. Cherry, 298 N.C. 86, 257 S. E. 2d 551 (1979); Engberg v. Meyer, 820 P. 2d 70, 87-92 (Wyo. 1991); State v. Middlebrooks, 840 S. W. 2d 317, 341-347 (Tenn. 1992). Undersigned counsel recognizes this Court's recent decisions that have specifically rejected this issue. Johnson v. State, 660 So. 2d 636 at 647 (Fla. 1995); and Wuornos v. State, 20 Fla. Law Weekly S481 (Fla. Sept. 21, 1995). Mr. Jenkins asks this Court to reconsider those decisions.

B. The Trial Court Improperly Overrode the Jury's Recommendation of Life Because the Record Contains More than Ample Evidence to Support the Jurv's Recommendation.

In a capital case, the jury's recommendation reflects the conscience of the community and is entitled to great weight. See e.g., McCampbell v. State, 421 So. 2d 1072, 1075 (Fla. 1982); Richardson v. State, 437 So. 2d 1091, 1095 (Fla. 1983); Holsworth v. State, 522 So. 2d 348, 354 (Fla. 1988). A trial judge may not override a jury's recommendation of life imprisonment unless the facts suggesting a sentence of death are "so clear and convincing that virtually no reasonable person could differ." See, e.g., Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975); Cannadv v. State, 427 So. 2d 723, 732 (Fla. 1983); Huddleston v. State, 475 So. 2d 204, 206 (Fla. 1985); Amazon v. State, 487 So. 2d 8, 12 (Fla. 1986); Fead v. State, 512 So. 2d 176, 178-179 (Fla. 1987); Holsworth v. State, 522 So. 2d 348 at 354 (Fla. 1988). In other words, in reviewing a jury override this Court "must decide, after considering the totality of the circumstances, if the life recommendation is reasonable." Cooper v. State, 581 So. 2d 49 at 51 (Fla. 1991). If "there is any reasonable explanation for the jury's life recommendation," then the death sentence should be vacated. Hallman v. State, 560 So. 2d 223 at 226 (Fla. 1990); Cooper, 581 So. 2d at 51.

Only when there is no reasonable basis in the record for a jury's life recommendation -- i.e., "cases when the jury can be said to have acted unreasonably" [Brown v. State, 526 So. 2d 903, 907 (Fla. 1988)] -- can this Court uphold a death sentence imposed

by means of override. Where, on the other hand, the record contains any significant mitigating evidence -- whether statutory or nonstatutory -- to support the jury's life recommendation, then the trial judge is not free to override it. See e.g., Weltv v. State, 402 So. 2d 1159, 1164 (Fla. 1981); Gilvin v. State, 418 So. 2d 996, 999 (Fla. 1982); McCampbell, 421 So. 2d at 1075; Cannadv, 427 So. 2d at 731; Herzog v. State, 439 So. 2d 1372, 1380-1381 (Fla. 1983); Holsworth, 522 So. 2d at 353-354; Perry v. State, 522 So. 2d 817, 821 (Fla. 1988). As this Court made clear in Ferry v. State, 507 So. 2d 1373, 1376-1377 (Fla. 1987), review of a "life override" focuses on whether there was mitigating evidence to establish a reasonable basis for the jury's recommendation; not on the four corners of the trial judge's sentencing order:

> The state . . . suggests that the override was proper here because the trial court judge is the ultimate sentencer and his sentencing order represents a reasonable weighing of the relevant aggravating and mitigating circumstances. According to the state's theory, this Court should view a trial court's sentencing order with a presumption of correctness and, when the order is reasonable, this Court should uphold the trial court's sentence of death. We reject the state's suggestion. Under the state's theory there would be little or no need for a jury's advisory recommendation since this Court would need to focus only on whether the sentence imposed by the trial court was reasonable. This is not the law. Sub judice, the jury's recommendation of life was reasonably based on valid mitigating factors. The fact that reasonable people could differ on what penalty should be imposed in this case renders the override improper.

Accordingly, where the trial judge, in overriding a life recommendation, "merely substituted his view of the evidence and

the weight to be given it for that of the jury," the override is improper.[23] Holsworth, 522 So. 2d at 353; see also, Gilvin, 418 So. 2d at 999; Rivers v. State, 458 So. 2d 762, 765 (Fla. 1984); Burch v. State, 522 So. 2d 810, 813 (Fla. 1988). Similarly, even in cases where the trial judge found no mitigating circumstances, overrides have been held improper where the jury reasonably could have found mitigating factors. See Welty, 402 So. 2d at 1164 ("[u]nder the circumstances of this case, we believe that reasonable persons could differ. Although the trial court found no mitigating factors, there was evidence introduced by Welty relative to nonstatutory mitigating factors which would have influenced the jury to return a life recommendation."). See also, Gilvin, 418 So. 2d at 999; Amazon, 487 So. 2d at 13,

As this Court recognized in the "life override" case of Holsworth, 522 So. 2d at 354-55, "[t]he death penalty, unique in its finality and total rejection of the possibility of rehabilitation, was intended by the legislature to be applied 'to only the most aggravated and unmitigated of most serious crimes.' State v.

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[23] In the instant case, the trial judge evidently found only some of the nonstatutory mitigating factors proffered by appellant (see 1439-1447), but concluded in his view of the evidence that "the aggravating factors substantially outweigh the non-statutory mitigating factor" (R1447). It should be noted that the trial judge rejected two nonstatutory mitigating factors that it should not have rejected (see Issue I and this issue). It should also be noted that the trial judge's weighing process was tainted by his consideration of one invalid aggravating circumstance [see Issue IV A]. See e.g., Cannady, 427 So. 2d at 732; Richardson, 437 So. 2d at 1094 (trial judge erroneously relied on improper aggravating factor or factors in overriding jury life recommendation).

Dixon, 283 So. 2d 1, 7 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S. Ct. 1950, 40 L. Ed. 2d 295 (1974)."

In the instant case, the trial judge articulated no compelling reason for his overriding the jury's life recommendation [see Thompson v. State, 328 So. 2d 1, 5 (Fla. 1976)]; rather, it appears that he merely disagreed with the jury's view of the evidence and their weighing of the aggravating and mitigating factors. See Cooper, Holsworth, Gilvin, Rivers, Burch. As previously discussed [Issue IV A.], the trial judge also improperly doubled two aggravating factors -- capital felony committed to prevent a lawful arrest and the victim was a law enforcement officer engaged in the performance of his duties. Clearly, the circumstances of the killing in this case were not of such a nature that reasonable people could not disagree as to the appropriate penalty.

Foremost in his decision to override the jury's life recommendation was the trial court's complete rejection of a lack of intent on Mr. Jenkins' part to cause the death of Officer Tackett. This rejection, however, was in reality, a substitution of the trial court's judgment for that of the jury. As was established in Issue I, premeditation was clearly not proven in this case: The lack of gun residue was a circumstance that could be explained by one or more of four possibilities -- distance over 4 1/2 feet between gun and target, intervening object, handling of the clothes, heavy bleeding. The State's expert could not say which of these four was the cause for the lack of residue and refused to give an opinion of distance between gun and target. The jury was given this informa-

tion for consideration as part of a circumstantial evidence case. The jury could reasonable have concluded that the gun could have gone off as the two fell to the ground -- the distance may have been less that 3 to 4 1/2 feet and the residue (which lessens with each inch) could have fallen off due to the heavy bleeding and/or subsequent handling of the clothes. By rejecting this possibility (R1444), the trial court substituted its judgment for that of the jury. Similarly, the lack of fiber transference could not be explained by the State's expert; because obviously a struggle with contact had occurred in this case. The trial court's conclusion that this meant the struggle had to have been very slight was, again, a substitution of a factual determination that was for the jury to decide. Most notably, the trial court does not discuss the path of the bullet (except to note the officer could not have pulled the trigger which was not questioned) or the blood splatter expert's testimony; yet, these physical pieces of this circumstantial puzzle are very important. The bullet's path from back to front, slightly upward, and from right to left with the officer having to be on the ground and almost immediately on his right side (due to a lack of blood gushing and flowing downward) more plausibly suggests both men had fallen to the ground when the shot was fired. Although a neighbor heard a white male voice saying "put it down" and then heard a shot about three seconds later, since the neighbor saw nothing her testimony is not inconsistent with a struggle and the men having fallen to the ground. The jury could have reasonably found this struggle to be the cause of the shoot-

ing. By rejecting this version and picturing a far different scenario, the trial court substituted its fact finding for that of the jury. Since the circumstantial evidence in this case is not clear on how the shooting occurred, the trial court could not substitute its judgment for that of the jury. See Cooper, 581 So. 2d at 51, ftnt.; Rivers, 458 So. 2d at 765.

In regards to the argument that Mr. Jenkins did not intend to kill the officer as evidenced by the sole shot to the leg -- an area normally not considered to be a vital area such as the chest or head -- and the gun which still had 8 out of 9 bullets in it,[24] the trial court also rejected these facts as having no significance on the issue of intent. Again, the trial court erroneously substitutes its judgment for that of the jury. According to the trial court's finding, "virtually every witness who viewed the scene of the shooting that night confirmed how dark it was . . . . The location . . . was so dark that two backup officers going to Officer Tackett's aid twice passed within a few feet of the body without seeing him." (R1444). The trial court concluded that Mr. Jenkins could not have had the ability to deliberately shoot in a non-vital spot. This summation of the facts was based on facts that the trial court chose to believe -- while rejecting other

[24] The trial court erroneously states the weapon could hold up to 10 rounds -- 9 in the magazine and 1 in the chamber and then stated that the recovered weapon still had 8 rounds in the magazine and 1 in the chamber (R1443). In fact, the trial court was counting one bullet too many -- the magazine carried 8 and the chamber 1 with 8 bullets still in the gun (T739). This error is of no real importance, however, since there is no question that only 1 bullet was fired from the fully loaded gun.

facts and the conclusion was the result of this factual determination.

As to the lighting conditions, the evidence was conflicting. One of the officers who first arrived on the scene and ran around in the back of several of the condos without seeing the downed officer or the damage to the French doors, testified it was very dark. There are two possible interpretations for this testimony: (a) because it was very dark, or (b) because the officer bungled his job and failed to see what was clearly there and had to come up with an excuse for his lack of observation. If this officer's testimony was the only testimony as to the lighting conditions where the shooting occurred, then (a) would be the only reasonable conclusion (which is what the trial court chose). However, the testimony about the lighting conditions is not limited to the one officer. The occupant of the condo -- Amy Walker -- said there were lights on in the back at night; and the K-9 officer, who found Officer Tackett quickly and also saw the damage to the French door immediately, testified that there were landscape lights that would light up certain areas of the back. Plus, Officer Tackett's lit flashlight was found at the scene. Thus, it was not pitch black where the shooting occurred. In addition, Mr. Jenkins had been in the back working away at the French doors for a very long time -- certainly long enough for his eyes to have adjusted to the lighting conditions (a fact not lost on one juror -- see Issue I). Under all of the testimony concerning the lighting conditions, it was erroneous for the trial court to select which officer to believe on

the subject and then substitute its factual finding for that of the jury.

As to the fact that only one shot was fired, the trial court rejected this as being evidence of a lack of intent to kill: "the defendant . . . 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." (R1445). The trial court's conclusion on this aspect ignores the evidence under the totality of the circumstances and substitutes its judgment for that of the jury. The fact that Mr. Jenkins had a fully loaded gun (that would have been definitely easier to have pulled the trigger a second time due to less weight being required on the second firing) and a live victim after one shot to the leg does have a great deal of significance under the totality of the circumstances. There is no way anyone other than Mr. Jenkins can know with any degree of certainty what was going on in Mr. Jenkins' mind when the gun was fired, but from all of the circumstances we do know that the officer was still alive and Mr. Jenkins had sole possession of a gun with 8 more bullets. If Mr. Jenkins' intent

was to kill, why didn't he finish the job?[25] An intent to maim -- i.e., shoot the officer in the leg so that an escape can be made -- is not the same as an intent to kill. The first shot did stop the officer, and Mr. Jenkins did not go any farther. Speculating on what might have happened if the officer had continued to go after Mr. Jenkins is just speculation.

In Hallman, the defendant was fired at by the victim -- a security guard -- during the defendant's attempt to get away from a bank robbery. The defendant fired back twice, with one shot mortally wounding the victim. The defendant observed the victim on the ground and then started to leave; the victim fired his remaining shots at the defendant, striking the defendant with one of the shots. The defendant did not fire back even though he had three more shots remaining. In that case this Court reversed the trial court's imposition of a death sentence which had overridden the jury's life recommendation and reduced the sentence to life under Tedder. In finding that the trial court had not given the jury's recommendation the great weight that Tedder requires, this Court found several reasons to support the jury's recommendation, but "[m]ost significantly, the jury reasonably could have found that Hallman should be spared because of the circumstance of the

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[25] See Rembert v. State, 445 So. 2d 337 at 340 (Fla. 1984), wherein the victim was alive when the defendant left the premises and could conceivably have survived to accuse his attacker. In rejecting the aggravator of avoiding arrest by eliminating the witness, this Court noted that if the defendant was really concerned about the possibility of being identified later, "his more reasonable course of action would have been to make sure that the victim was dead before fleeing." Id.

shooting: Hallman fired in reaction to Hunick's shots, and after he saw Hunick was disabled did not fire again, even after he had been shot." Hallman, 560 So. 2d at 226, 227.

Mr. Jenkins' situation is very similar to that in Hallman: Mr. Jenkins shot the officer in the leg, disabled the officer, but did not execute the officer even though Mr. Jenkins could have easily done so. The jury could have also reasonably found the shooting occurred accidentally during the struggle. The jury reasonably could have found that Mr. Jenkins' life should be spared due to these circumstances. The trial court's rejection of what a reasonable juror could have concluded was not a death penalty case was a violation of Tedder.

There was, of course, one other circumstance that the jury could have relied on in reaching its decision as to lack of intent -- Mrs. Jenkins' testimony as to Mr. Jenkins' emotional behavior almost immediately after the shooting. Mrs. Jenkins testified at the penalty phase that she knew her husband did not kill the officer on purpose because "he was freaked out when he came to me, really freaked out" (T1074). In weighing Mrs. Jenkins' testimony and credibility, the jury had several factors to consider: Mrs. Jenkins was married to Mr. Jenkins, Mrs. Jenkins was separated from Mr. Jenkins at the time of the shooting, Mrs. Jenkins had tried to help Mr. Jenkins by getting the handcuffs off his wrist, and Mrs. Jenkins had called the police to report Mr. Jenkins' involvement in the shooting. Thus, Mrs. Jenkins' knowledge of Mr. Jenkins combined with her sense of doing what was right may have given her

testimony a great deal of credibility in the eyes of the jury -- Mrs. Jenkins was not so involved with Mr. Jenkins so as to be blind to what he had done. Yet, in Mrs. Jenkins' opinion, Mr. Jenkins' state of mind almost immediately after the shooting demonstrated a clear lack of intent on Mr. Jenkins' part. Mrs. Jenkins' credible testimony was an additional factor that supported the jury's finding of a lack of intent which, in turn, helped to support the jury's recommendation of life.

Finally, the jury could reasonably have based its life recommendation on the established evidence of other nonstatutory mitigating circumstances introduced in the penalty phase. Weltv, Gilvin, McCampbell, Herzog, Holsworth, Perry. Taking these factors as a whole, the jury could reasonably have found the following as significant mitigating factors: Mr. Jenkins' emotional stress on the day of the shooting and Mr. Jenkins' good character traits.

On the day of the shooting, Mr. Jenkins was fired from his job and needed money badly for his rent; because he was going to be kicked out of his apartment the next day. His desperate need for money resulted in his attempting to burglarize the condo when he encountered Officer Tackett. Mr. Jenkins had also recently separated from his wife. Psychological stress caused by financial and family problems has been recognized by this Court as a valid nonstatutory mitigator partially justifying a jury's recommendation of life imprisonment. See Perry, 522 So. 2d at 821 (defendant unemployed, wife pregnant, and couple trying to find a place to live); Huddleston, 475 So. 2d at 206 (defendant had just lost his

job and his pregnant girlfriend wanted to put their baby up for adoption against his wishes); Hallman, 560 So. 2d at 226 (defendant was under stress due to several factors: he had recently lost his job, his wife had recently filed for divorce, and he had to move out of their home).

The jury was also very much aware that Mr. Jenkins had good character traits in that he was a good husband, son, and brother. When Mr. Jenkins was with Mr. Jenkins, they worked together as managers of an apartment building. Mrs. Jenkins also testified that Mr. Jenkins helped support her family. Mr. Jenkins' siblings testified that Mr. Jenkins was a good brother who had watched over them while their mother was at work when they were growing up. Mr. Jenkins's disabled brother testified how Lorenzo had helped him (James) out a lot. Mrs. Jenkins' mother also testified that she gave him authority over the other children when she was gone when the children were young, and Mr. Jenkins was still close to his siblings. Mr. Jenkins had returned for the funeral of one of his sisters and had helped the family out at that time. Being good and kind to one's family, being helpful around the home, and financially supporting one's wife and her children from another relationship are factors showing positive character traits that have been recognized by this Court as a valid nonstatutory mitigator helping to justify a jury's recommendation of life imprisonment. See Perry, 522 So. 2d at 821 (defendant was good to his family and helpful around the home); Holsworth, 522 So. 2d at 354 (jury could have considered in mitigation the defendant's employment history

and positive character traits as showing potential for rehabilitation and productivity within the prison system); Fead, 512 So. 2d at 179 ("we have found that the defendant's qualities as a good father, husband and provider constitute valid mitigating factors that could form the basis of a jury recommendation of life. Thompson v. State, 456 So. 2d 444, 448 (Fla. 1984)"); Washington v. State, *432 So.* 2d 44 at 48 (Fla. 1983) (defendant's father and grandmother testified that defendant was a good person who had helped support his disabled parents established a nonstatutory mitigating factor of the defendant's character); Cooper, 581 So. 2d at 51 (maintenance of close family ties a nonstatutory mitigator).

The jury had one other aspect of this case to consider when deciding whether or not the ultimate penalty was appropriate in this case -- the fact that Mr. Jenkins would spend the rest of his life in prison as a result of killing a police officer pursuant to section 775.0823(1), Florida Statutes (1991), if life was imposed. The trial court erroneously rejected this valid aspect (T1445-1447). In Jones v. State, 569 So. 2d 1234 at 1239, 1240 (Fla. 1990), this Court found that the defendant had been improperly prevented from arguing that he could be sentenced to two consecutive minimum-mandatory twenty-five-year prison terms on two murder charges should the jury recommend life:

> The standard for admitting evidence of mitigation was announced in *Lockett v. Ohio, 438* U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). The sentencer may not be precluded from considering as a mitigating factor, "any aspect of a defendant's character or record

> and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* at 604, 98 S. Ct. at 2965. Indeed, the Court has recognized that the state may not narrow a sentencer's discretion to consider relevant evidence "that might cause it to *decline to* impose the death sentence." *McClesky* v. Kemp, 481 U.S. 279, 304, 107 S.Ct. 1756, 1773, 95 L.Ed.2d 262 (1987) (emphasis in original; footnote omitted). Counsel was entitled to argue to the jury that Jones may be removed from society for at least fifty years should he receive life sentences on each of the two murders. The potential sentence is a relevant consideration of "the circumstances of the offense" which the jury may not be prevented from considering.

(Emphasis added.) More recently in Turner v. State, 645 So. 2d 444 at 448 (Fla. 1994), this Court found the trial court's override of the jury's life recommendation improper. Finding and listing the ample mitigation to have supported the jury's life recommendation, this Court included the fact that the alternative to the death penalty was two life sentences which the jury knew would have required the defendant to serve a minimum of fifty years in prison before he could be considered for parole.

The trial court rejected the application of Jones in the case of the death of a police officer because it believed this would provide an automatic nonstatutory mitigator in every murder involving the death of a police officer, thereby making police officers second-class citizens resulting in less protection instead of more -- not the intended result of the statute. This reasoning is wrong. The statute provides for automatic aggravation when a police officer is killed. The statute providing for life imprisonment without possibility of parole if death is not imposed is an

aspect of the case for the jury to weigh and consider along with all of the other aspects of the case. The jury is free to give it each factor whatever weight it wishes to place on their balancing sale. This is not a situation where one merely counts up the number of aggravators versus the number of mitigators. How much consideration is given to each aspect -- whether it be in the plus or minus column -- is up for the jury to consider.[26]

In Simmons v. South Carolina, 512 U.S. ___, 114 S. Ct. 2187, 129 L. Ed. 2d 133 at 142, 143 (1994), the United States Supreme Court examined this issue and found the actual duration of the defendant's sentence to be indisputably relevant in the sentencing phase:

> [W]here the jury has sentencing responsibilities in a capital trial, many issues that are irrelevant to the guilt-innocence determination step into the foreground and require consideration at the sentencing phase. The defendant's character, prior criminal history, mental capacity, background, and age are just a few of the many factors, in addition to future dangerousness, that a jury may consider in fixing appropriate punishment. *See Lockett v. Ohio, 438* US 586, 57 L Ed 2d 973, 98 S Ct *2954* (1978); *Eddings v. Oklahoma, 455* US 104, 110, 71 L Ed 2d 1, 102 S Ct 869 (1982); *Barclay v. Florida,* 463 US, at 948-951, 77 L Ed 2d 1134, 103 S Ct 3418.
>
> In assessing future dangerousness, the actual duration of the defendant's prison

[26] The trial court's logic is wrong for another reason. If killing a police officer and the possibility of getting life without parole is an automatic mitigator that must be rejected, then, by analogy, killing more people would also result in an automatic mitigator that must be rejected. Yet, in Jones and Turner where two people were killed allowing for the option of a total of 50 years minimum mandatory in prison, this Court still found this factor to be valid for the jury's life recommendation.

> sentence is indisputably relevant. Holding all other factors constant, it is entirely reasonable for a sentencing jury to view a defendant who is eligible for parole as a greater threat to society than a defendant who is not. Indeed, there may be no great assurance of a defendant's future nondangerousness to the public than the fact that he never will be released on parole. The trial court's refusal to apprise the jury of information so crucial to its sentencing determination, particularly when the prosecution alluded to the defendant's future dangerousness in its argument to the jury, cannot be reconciled without well-established precedents interpreting the Due Process Clause.

The prosecutor in Mr. Jenkins' case argued on behalf of the State of Florida for the ultimate penalty. In doing so, he argued Mr. Jenkins' past violence (having shot into the home of his future wife), the dangerousness of the situation at issue (Mr. Jenkins' attempt to break into the home of a girl who was alone), and the force used to kill the officer (T1056,1098-1111). As pointed out by this Court in Holsworth, 522 So. 2d at 354, 355: "The death penalty, unique in its finality and total rejection of the possibility of rehabilitation, was intended by the legislature to be applied 'to only the most aggravated and unmitigated of most serious crimes.' State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973), cert. denied, 415 U.S. 943, 94 S. Ct. 1950, 40 L. Ed. 2d 295 (1974)." By arguing for the death penalty in this case, the prosecutor declared Mr. Jenkins to be beyond rehabilitation; i.e., he would remain a danger to society. However, the jury had the right to consider and weigh the aspect that Mr. Jenkins would spend

the rest of his life in prison without eligibility for parole.[27] The jury's recommendation of life without possibility of parole, therefore, is reasonable based on the aspect that Mr. Jenkins will never be released from prison. The trial court erred in totally rejecting this aspect as a reasonable basis for the jury's life recommendation.

If there is conflicting evidence as to Mr. Jenkins' intent or lack of intent (which Mr. Jenkins does not concede -- see Issue I), then the jury might well have believed Mr. Jenkins' version and decided he did not intend to kill the officer. Considering this, the nonstatutory mitigating evidence, and the alternative sentence of life in prison without possibility of parole, it cannot be said that the jury's recommendation is not reasonable.[28] The trial court's override cannot be sustained.

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[27] Defense counsel argued this during the penalty phase (T1116, 1117, 1118).

[28] In addition to the mitigating evidence the jury heard, the trial court heard an additional piece of mitigating evidence that was not presented to the jury. Mr. Jenkins had tried to assist a neighbor who was being beaten by his mother's boyfriend. The perpetrator was temporarily calmed down by Mr. Jenkins and another person, but then continued his attacks by using a knife and threatening his girlfriend, her son (Mr. Jenkins' neighbors) and the police. Mr. Jenkins also cooperated with the police as a witness in this case (R1384-1409). Although the trial court gave this evidence very little weight (R1442), this type of evidence is valid nonstatutory mitigating evidence. In Penny v. State, 522 So. 2d 817 at 821 (Fla. 1988), the testimony that the defendant had fully cooperated with authorities in another criminal case in which he was a witness was part of the substantial nonstatutory mitigating evidence that supported the jury's reasonable basis for recommending life imprisonment. The trial court's override was reversed for the imposition of life imprisonment.

The final reason the trial court gave for rejecting the jury's life recommendation was based on a portion of defense counsel's argument to the jury during the penalty phase. The trial court believed that defense counsel's argument regarding the issue of intent "may have unintentionally mislead the jury" (R1448). The objectionable argument as set out in the trial court's order follows:

> And, ladies and gentlemen, the fact is quite simple, that based on the law and the evidence, Jeffery Tackett died as a result of an accidental discharge of his weapon during the course of this struggle. The death penalty is reserved for those intentional actions, when somebody intends to take the life of another human being.

(R1448 of the trial court's order; T1115 of the penalty phase argument.) The trial court's order, however, does not include the last sentence of that paragraph: "That's what the death penalty is for, the most serious first degree murders." (T1115). The trial court then goes on to quote another portion of defense counsel's argument it considered to be objectionable, but it again leaves out a very important sentence in that paragraph: "You have to examine the aggravating circumstances and weight them against the mitigating circumstances." (T1117). The trial court set forth the following:

> And the two mitigating circumstances that far outweigh anything else that the State of Florida has proven, first, that Officer Tackett died as a result of a discharge of a weapon during the course of a struggle. There was no intention whatsoever. They have not proven it. They couldn't prove it during the course of the guilt phase and they certainly haven't proven it during the course of the

> penalty phase. An accidental discharge cost Officer Tackett his life. It's not an intentional action, and it demands that your recommendation be life. And that's exactly what your recommendation is.

(R1449 of the trial court's order; T1117, 1118 of the penalty phase argument.) The trial court objected to these portions for two reasons: (1) defense counsel erroneously argued that the death penalty cannot be imposed unless there is a specific intention to take a life, and (2) defense counsel erroneously implied that it was the State's burden to prove the intent to kill before the death penalty could be recommended (R1449).

The second part of the trial court's reasoning has been fully addressed earlier in this issue and in Issue I. Since the prosecutor was arguing this case in the alternative of premeditation and felony murder, it was the State's obligation to prove intent to kill if premeditation was the theory chosen. The jury's decision on which theory was chosen was not revealed because the verdict did not require an election of theories. Some of the jurors could have rejected premeditation, thereby rejecting an intent to kill. By repeatedly finding an intent to kill in this case -- as evidenced throughout the trial court's order imposing death -- the trial court was, in reality, substituting its judgement for that of the jury. The issue of intent -- and the lack thereof -- was a reasonable basis for the jury's recommendation of life.

The trial court's other reason for rejecting the jury's life recommendation because defense counsel misled the jury by stating

only intentional killings require the death penalty is also erroneous. First of all, the overall argument of defense counsel is not really misleading. Although defense counsel does say the death penalty is reserved for those who intend to kill, defense counsel also states -- repeatedly -- that the jury must weigh the aggravators and the mitigators. Taking these two statements together, as they were said, the most that can be said is that the two statements might be inconsistent; it cannot be said that the statement concerning intent completely overpowered defense counsel's statements about weighing the aggravators and mitigators. Taken in context, it is clear that defense counsel was really trying to point out that the death penalty is reserved for the most aggravated and unmitigated of most serious crimes. State v. Dixon, 283 So. 2d 1 at 7 (Fla. 1973). Inasmuch as neither the prosecutor nor the trial court objected to defense counsel's argument at the time it was made, it is not unreasonable to believe that this is how it was interpreted when it was said.

Even if the statement was erroneous, it is doubtful that the jury was misled. At the beginning of the penalty phase arguments, the jury was told that they were about to hear the final arguments regarding the penalty of the case (T1098); and at the end of the arguments but immediately before the jury instructions, the trial court informed the jury that it was their duty "to follow the law that will now be given" to them by the Court (T1120). The day before the penalty phase, the jury had heard the guilt phase arguments; and immediately before those arguments the jury was told by

the Court that the attorneys' final arguments were not evidence. They were also told that if the evidence as argued by the attorneys was not as the jurors recalled it, they must follow their own recollection. The arguments were intended only as an aid (T909, 910). They were also told to base their decision only on the evidence and the instructions in the guilt phase (T994,995), and they were told to base their decision on the evidence in the penalty phase (T1121). With this understanding of the role of the attorneys' arguments followed immediately by the jury instructions, any misstatement by the attorneys would have been corrected. In Lowe v. State, 650 So. 2d 969 at 975 (Fla. 1994), this Court held in a death conviction case that the prosecutor's misstatement of the law in closing argument was not reversible error. This Court noted "that the misstatement involved a minor issue and that the jury instructions given almost immediately after the closing argument corrected the misstatement." Id.

In this case the jury was clearly informed by everyone -- including defense counsel -- that the jury had to weigh the aggravators and the mitigators. Defense counsel argued that the mitigating circumstances in this case outweighed the aggravators. This was a proper argument to make to the jury. It is doubtful that the statement that death is only for intentional killing was taken out of context so literally; and if the jury was confused by any conflicting statements (death for intentional killing only versus weighing mitigators and aggravators to determine whether

death is appropriate), then any such confusion would have been cleared up by the trial court's instructions.

Pursuant to Tedder, the jury's recommendation must be given great weight by the trial court. Because the trial court believed the jury's verdict was based on a misapplication of the law, it totally rejected the jury's recommendation. The trial court erred in giving no weight to the jury's life recommendation. The jury's recommendation cannot be cast so easily aside.

In Cochran v. State, 547 So. 2d 928 (Fla. 1989), this Court addressed the situation wherein a trial court overrode a jury's life recommendation because the trial court knew about the defendant's prior murder conviction but the jury did not know about this prior conviction when it recommended life. Although it was proper for the trial court to consider this prior conviction, it was not proper for the trial court to find the jury's life recommendation unreasonable under the additional facts. This additional circumstance did "not alter this Court's responsibility to review the sentence under the Tedder standard. When the sentencing judge is presented with evidence not considered by the jury, the jury's recommendation still retains great weight." Id. at 931. This Court found the facts in Cochran to be "not so clear and convincing that no reasonable person could differ that death is the appropriate penalty." Id. at 932. Because the jury might have given the mitigating evidence great weight and the mitigating evidence was sufficient to support a life sentence, this Court vacated the death sentence with directions that the defendant be sentenced to life.

The question, therefore, in the case sub iudice is not whether the jury might have been mislead (which Mr. Jenkins does not concede), but whether the mitigating evidence in this case was sufficient to support a life sentence. The circumstantial evidence surrounding the shooting was not so clear and convincing that no reasonable person could differ that death is the appropriate penalty. In addition, the jury could have given very little weight to the aggravating evidence of the prior violent felony conviction, because the prior act was committed against Mr. Jenkins' wife before they were married. Mrs. Jenkins testified that the charge was due to a jealous feud, and she would never have married him after that episode if she had thought he had really wanted to kill her. Instead, she did not consider the shooting serious; and she married him and worked with him as managers of an apartment building after the incident. Mrs. Jenkins then proceeded to give positive testimony about Mr. Jenkins. The jury could have easily given little weight to the prior violent conviction based on Mrs. Jenkins' testimony. The jury could have also balanced the aggravator of the death being of a police officer with the circumstance that the alternative sentence would be life without possibility of parole. The jury's consideration of the weight to be given to the aggravators and the nonstatutory mitigators along with the circumstances of this case are sufficient to support a life sentence. As this Court stated in Cochran, 547 So. 2d at 933:

> Clearly, since 1985 the Court has determined that *Tedder* means precisely what it says, that the judge must concur with the jury's life recommendation unless "the facts suggesting a

> sentence of death [are] so clear and convincing that virtually no reasonable person could differ." *Tedder,* 322 So.2d at 910.

Once it has been determined that the jury's life recommendation was reasonable, the constitutional protection of double jeopardy applies to that life recommendation. Wrisht v. State, 586 So. 2d 1024 at 1032 (Fla. 1991):

> Under well-settled Florida law, we have held that life imprisonment is the only proper and lawful sentence in a death case when the jury reasonably chooses not to recommend a death sentence. *Tedder v. State,* 322 So.2d 908 (Fla.1975). Thus, when it is determined on appeal that the trial court should have accepted a jury's recommendation of life imprisonment pursuant to *Tedder,* the defendant must be deemed acquitted of the death penalty for double jeopardy purposes. Art. I, §9, Fla. Const.

Because there was a reasonable basis for the jury to recommend life, the trial court's concern over the possibility of a misapplication is inappropriate. The trial court can neither substitute its opinion of the evidence and its weight of the aggravators and mitigators for that of the jury nor can it set aside the jury's acquittal of Mr. Jenkins of the death sentence. The Tedder standard controls here, and the jury's life recommendation must be given great weight. Under the totality of the circumstances, the life recommendation was reasonable in this case.

There have been other situations similar to Mr. Jenkins' case wherein the jury's life recommendation was found reasonable and the trial court's override rejected by this Court. In Cooper v. State, 581 So. 2d 49 (Fla. 1991), Cooper and Ellis committed an armed robbery and fled in a car. One of them shot and killed a deputy

who stopped them. Ellis was subsequently killed by another officer. Cooper was captured and convicted of murder. During a resentencing trial, the jury recommended life by an evenly divided six to six vote. The trial court imposed a death sentence upon finding four aggravating factors -- under sentence of imprisonment (parole), prior convictions for armed robberies, offense committed while in flight from an armed robbery, and offense committed to avoid arrest. Although Cooper's case was much more aggravated than Mr. Jenkins's case, this Court vacated the death sentence because the jury's life recommendation was reasonably supported by mitigating circumstances -- conflicting evidence as to who shot the deputy, history of alcohol abuse, drinking on the day of the offense, suffering from emphysema, no future danger to the community, not eligible for parole until age 62, good prison behavior, close family ties, financial support of family, and remorse. Four of these mitigating factors (in addition to other mitigating factors) also apply to Mr. Jenkins, who will never be eligible for parole; plus the circumstances surrounding the shooting -- the issue of whether it was accidental -- is similar to Copper's mitigating factor as to who shot the deputy.

The situation in Hallman, wherein the defendant shot the guard after the guard shot at the defendant but the defendant did not fire again at the guard -- who was still alive at the time of the shooting -- even though the defendant had more bullets, is also very similar to Mr. Jenkins' situation. It has been thoroughly discussed earlier in this issue, but it is to be noted that the

circumstances of the shooting as well as some of the nonstatutory mitigators (defendant under a great deal of stress, played minor role in prior violent felony conviction) are very similar to Mr. Jenkins' situation. The circumstances surrounding the shooting in the case sub iudice demonstrate that Mr. Jenkins could have shot the officer several more times after the first shot, but did not do so; and when Mr. Jenkins left the scene, the officer was still alive. In addition, Mr. Jenkins' nonstatutory mitigating factor of being under stress and having a prior violent felony conviction, whose weight could have been substantially reduced by the testimony of Mrs. Jenkins, parallels Mr. Hallman's situation. This Court reversed the trial court's override of the jury's life recommendation in Hallman and imposed a life sentence. Mr. Jenkins is entitled to a similar result.

In Brown v. State, 526 So. 2d 903 (Fla. 1988), Brown and his companion committed a robbery, then Brown shot and killed an officer who stopped them by shooting the officer twice in the head. Despite the jury's life recommendation, the court sentenced Brown to death upon finding four aggravating factors -- prior conviction for a violent felony, committed during flight from a robbery, committed to avoid arrest and hinder law enforcement, and HAC. This court struck the unproven HAC factor and vacated the death sentence because the life recommendation was supported by mitigating factors -- age 18, immature for his age, mentally and emotionally handicapped, borderline intelligence, impoverished background, abusive parents, lack of education, and potential for rehabilitation.

Again, Brown's case was much more aggravated than Mr. Jenkins', who shot the officer only once in the leg.

In Washinston v. State, 432 So. 2d 44 (Fla. 1983), Washington; his brother, Hunter; and another man went to a tire store to sell stolen guns. Hunter went inside but was unsuccessful in finding a buyer. A deputy followed Hunter to the car to investigate. Washington premeditatedly shot the deputy four times and killed him. Despite the jury's life recommendation, the Court imposed a death sentence upon finding the murder was committed to avoid arrest and disrupt a government function and was cold, calculated, and premeditated (CCP). This Court struck the CCP factor because it was not supported by the evidence. This Court vacated the death sentence because the life recommendation was reasonably supported by mitigating factors. Washington, his father, and his grandmother testified that Washington was a good person who helped support his disabled parents and had never before committed a crime of violence. Washington was 19 and had no significant record of prior criminal activity. Washington involved a more egregious aggravating circumstance on how the deputy was shot and similar mitigating factors as this case. Mr. Jenkins is no more deserving of death than Washington.

In Walsh v. State, 418 So. 2d 1000 (Fla. 1982), the defendant was trespassing on private property to hunt wild boars. Walsh shot and killed one of two deputies investigating a complaint about gun shots. Although the jury recommended life, the court imposed death upon finding three aggravating factors -- prior convictions for

violent felonies, avoid arrest, and CCP. This Court vacated the death sentence because the life recommendation was supported by mitigating factors -- no significant prior criminal activity and testimony of Walsh's good character. Thus, Walsh's crime was similarly aggravated but less mitigated than Mr. Jenkins' case.

Cooper, Hallman, Brown, Washington, and Walsh plainly demonstrate that the jury's decision to recommend life in a circumstance when an officer has been killed, there are other aggravators, but there are also several nonstatutory mitigating factors and circumstances must be given great weight and followed. In all of these cases the trial court's override was found to be a violation of Tedder. In Mr. Jenkins' case the jury had several nonstatutory mitigating factors and circumstances to consider when it recommended life: the circumstances surrounding the shooting were not clearly established and the jury could have reasonably found the shooting to be accidental and not premeditated; the officer was shot in the leg and not in the head or chest; the officer was shot only once even though Mr. Jenkins possessed a fully loaded gun and the officer was still alive when Mr. Jenkins left the scene; Mrs. Jenkins' testimony that Mr. Jenkins was "freaked out" after the shooting and her belief the shooting was not intentional; Mr. Jenkins' emotional stress of having recently been separated from his wife, needing money badly for his rent the next day, and having been fired that day; Mr. Jenkins' good character traits in that Mr. Jenkins was close to his family, gave them support, and had financially supported his wife and her

children; and the fact that the alternative sentence is life in prison without the possibility of parole. These mitigating factors and circumstances more than give the jury's recommendation a reasonable basis when weighed against the three aggravators.[29] The prior violent felony conviction might have been given very little weight in light of Mrs. Jenkins' testimony of the situation being a matter of jealously with no real intent to harm. The second aggravator of the capital felony being committed during a felony or the attempt to commit a felony or in the flight after the felony could have been given less weight due to the fact that the burglary was never completed and the shooting of the officer could have been unintentional. The last aggravator -- the killing of a police officer engaged in his duties -- could have been balanced against the idea that Mr. Jenkins' alternative sentence to death was life in prison without possibility of parole.

The jury's life recommendation was patently reasonable. The trial court's override was, under the law and under the facts, plainly improper. The trial court expressed no compelling reason for overriding the jury's recommendation, and it is evident from his sentencing order that he merely disagreed with factual determinations and the weight which the jury gave to the evidence in aggravation and mitigation.

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[29] It should be again noted that the trial court erroneously considered four aggravators instead of just three. The trial court's considering of capital felony committed to avoid arrest and victim of capital felony was an officer constituted an improper doubling of aggravators.

CONCLUSION

Based on the foregoing arguments, reasoning, and citation of authorities, undersigned counsel respectfully requests this Court to reverse and remand for a life sentence and grant Appellant a new trial.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 4th day of June, 1996.

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