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IN THE SUPREME COURT OF FLORIDA

LORENZO JENKINS, :

Appellant, :

vs. : Case No. 83,727

STATE OF FLORIDA, :

Appellee. :

______________________________:

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

REPLY BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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TOPICAL INDEX TO BRIEF

PAGE NO.

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 2

SUMMARY OF THE ARGUMENT 4

ARGUMENT 5

ISSUE I

DID THE TRIAL COURT ERR IN FAILING TO GRANT APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO FIRST-DEGREE PREMEDITATED MURDER? 5

ISSUE II

WAS THE TRIAL COURT INSTRUCTION ON PREMEDITATED FELONY MURDER ERRONEOUS AND REVERSIBLE ERROR IN THIS CASE? 15

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? 16

ISSUE IV

DID THE TRIAL COURT ERR IN OVERRIDING THE JURY'S RECOMMENDATION OF LIFE IN IMPOSING THE DEATH PENALTY? 21

CERTIFICATE OF SERVICE 30

TABLE OF CITATIONS

CASES	PAGE NO.
Armstrong v. State, 642 So. 2d 730 (Fla. 1994)	21
Assay v. State, 580 So. 2d 610 (Fla. 1991)	10
Bedford v. State, 589 So. 2d 245 (Fla. 1991)	5
Bello v. State, 547 So. 2d 914 (Fla. 1989)	11
Buenoano v. State, 478 So. 2d 387 (Fla. 1st DCA 1985)	6
Coney v. State, 653 So. 2d 1009 (Fla. 1995)	16, 18
Coney v. State, 20 Fla. L. Weekly S16 (Fla. Jan. 5, 1995)	16-18
Dupree v. State, 615 So. 2d 713 (Fla. 1st DCA 1993)	6
Engle v. State, 510 So. 2d 881 (Fla. 1987)	26
Fowler v. State, 492 So. 2d 1344 (Fla. 1st DCA 1986)	6, 9
Francis v. State, 413 So. 2d 1175 (Fla. 1982)	17
Gibson v. State, 661 So. 2d 288 (Fla. 1995)	17
Hallman v. State, 560 So. 2d 223 (Fla. 1990)	24-27
Holton v. State, 573 So. 2d 284 (Fla. 1990)	5
Jackson v. State, 98 So. 2d 407 (Fla. 1986)	14
Jones v. State, 569 So. 2d 1234 (Fla. 1990)	28

TABLE OF CITATIONS (continued)

Kearse v. State,
662 So. 2d 677 (Fla. 1995) 21

Lett v. State,
Case No. 87,541 16, 19

Lett v. State,
668 So. 2d 1094 (Fla. 1st DCA 1996) 16

Lewis v. United States,
146 U.S. 370, 13 S. Ct. 136, 36 L. Ed. 1011 (1982) 17

McKennon v. State,
403 So. 2d 389 (Fla. 1981) 14

Mejia v. State,
675 So. 2d 996 (Fla. 1st DCA 1996) 17, 18

Mills v. State,
476 So. 2d 172 (Fla. 1985) 26, 27

Mungin v. State,
667 So. 2d 751 (Fla. 1995) 14

Norris v. State,
420 So. 2d 688 (Fla. 1983) 25-27

Pointer v. United States,
151 U.S. 396, 14 S. Ct. 410, 38 L. Ed. 208 (1984) 17

Reilly v. State,
601 So. 2d 222 (Fla. 1992) 25-27

Salcedo v. State,
497 So. 2d 1294 (Fla. 1st DCA 1986) 18

Sireci v. State,
399 So. 2d 964 (Fla. 1981) 11

Sochor v. Florida,
504 U.S. 527, 112 S. Ct. 2114, 119 L. Ed. 2d 526 (1992) 12, 13

State v. Clark,
614 So. 2d 453 (Fla. 1992) 18

State v. DiGuilio,
491 So. 2d 1129 (Fla. 1986) 18

TABLE OF CITATIONS (continued)

State v. Johnson,
616 So. 2d 1 (Fla. 1993) 18

State v. Law,
559 So. 2d 187 (Fla. 1989) 12

Stone v. State,
564 So. 2d 225 (Fla. 4th DCA 1990) 6

Tedder v. State,
322 So. 2d 908 (Fla. 1975) 24

Thomas v. State,
456 So. 2d 454 (Fla. 1984) 10

Torres-Arboledo v. State,
524 So. 2d 403 (Fla. 1988) 26

Turner v. State,
645 So. 2d 444 (Fla. 1994) 28

STATEMENT OF THE CASE

Mr. Jenkins relies on the Statement of the Case contained in his initial brief.

STATEMENT OF THE FACTS

In response to supplemental/clarification facts set forth by the State, Mr. Jenkins notes the following:

The State points out that Amy Walker's neighbor, Jean Nash, stated it was nearly pitch dark behind Ms. Walker's condo and she (Nash) couldn't see Officer Tackett because it was too dark and overgrown (Appellee's brief at pg. 1; T432,433). It should also be noted that Ms. Nash lived in condo #8, while Ms. Walker lived in condo #10 (T429,349). The condo units in this complex consisted of two units to a building. One neighbor testified that 10 & 12 were together in one building (T635).[1] Thus, Ms. Nash did not share the same backyard with Ms. Walker.

The State also states that Crum concluded "that some residue would have been discernible if Tackett had been shot from less than five feet away (T762)." (Appellee's brief, pg. 2) In actuality, Mr. Crum said he would expect residue to be deposited within approximately 5 ft. if there's no intervening object (T762). However, when asked to clarify this on cross examination, Mr. Crum refused to say his ultimate opinion for lack of residue was that the distance between gun and victim was over 5 ft.:

> Q. And, of course, your determination then is that has to be the fourth one, that being that it has to be outside of 5 feet; that is, in fact, your ultimate opinion in this case, correct, that there is no gunshot residue

[1] This neighbor was in unit #16, and his purpose in testifying was that he had stolen from his unit lawnchair cushions that were found on Ms. Walker's porch (T606,636-638).

> because of the fact that it had to be fired outside of 4-and-a-half feet, true?
>
> A. No, sir. As I stated in my report, I cannot determine muzzle-to-garment distance. I gave an answer to a question in my direct testimony what four factors could come into play and explain the absence of residue and there are those four factors I talked about.

(T771,772). Mr. Crum later repeated that he could not determine muzzle-to-garment distance and pointed again to the four reasons (shots fired at a distance greater than the maximum distance at which residue would be deposited, and/or an intervening object, and/or residue fell off during handling, and/or residue washed away by heavy bleeding) (T753-761,780).

Lastly, the State asserts defense counsel only asserted that Officer Tackett had accidentally shot himself during the struggle with Mr. Jenkins (Appellee's brief, pg. 2; T927-930). In reality, defense counsel argued both possibilities -- the gun accidentally shot by Mr. Jenkins or by Officer Tackett during the struggle -- by merely arguing that the gun went off accidentally during the struggle[2] (T344,345,873). Undersigned counsel, however, did not include this in the Statement of Facts as a fact as to how the killing actually took place. Defense counsel's argument was only included to note that identity was not an issue in this case (Appellant's brief, pg. 15).

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[2] In opening statements and at the motion for judgment of acquittal, defense counsel did not specifically argue who shot the gun. Defense counsel simply argued that there was a struggle and the gun discharged -- the shooting was accidental (T344,345,873).

SUMMARY OF THE ARGUMENT

Mr. Jenkins relies on the Summary of the Argument contained in his initial brief.

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?

In response to Mr. Jenkins' argument that his version of events must be believed unless circumstances show that version to be false, the State contends that Mr. Jenkins's initial denial at the time of his arrest is, in and of itself, an inconsistency with the hypothesis of innocence he presented at trial which would, alone, allow the issue of premeditation to go to the jury. The cases the State cites for this proposition, however, do not support such a conclusion. In the cases cited by the State, there were many other pieces of circumstantial evidence that were inconsistent with a reasonable hypothesis of innocence as to a lack of premeditation. Bedford v. State, 589 So. 2d 245 at 250, 251 (Fla. 1991), cert. denied, 503 U.S. 1009 (1992) (victim's mouth tightly taped inconsistent with defendant's story he had untapped it and victim asked defendant to squeeze her neck, victim's multiple contusions to her head while alive inconsistent with defendant's claim injuries occurred after death, medical examiner's testimony inconsistent with defendant's version); Holton v. State, 573 So. 2d 284 at 289 (Fla. 1990), cert. denied, 500 U.S. 960 (1991) (victim found with ligature secured tightly around her neck, victim had long fingernails and defendant had fresh scratches on chest, and defendant's setting house on fire all inconsistent with defendant's claims of

accidental death); Dupree v. State, 615 So. 2d 713 at 718 (Fla. 1st DCA), rev. denied, 623 So. 2d 495 (Fla. 1993) (victim beaten before her death, strangulation took several minutes to accomplish, victim taken to a secluded area at night); Stone v. State, 564 So. 2d 225 (Fla. 4th DCA 1990), rev. denied, 576 So. 2d 292 (Fla. 1991) (two shots fired 5 to 9 seconds apart, and gun had a heavy-trigger pull); Fowler v. State, 492 So. 2d 1344 (Fla. 1st DCA 1986), rev. denied, 503 So. 2d 328 (Fla. 1987) (this case does not support the State's position at all in as much as the jury acquitted the defendant of premeditated murder and the court found the trial court should have granted the motion for judgment of acquittal as to felony murder due to insufficient evidence -- any statement as to what was not present in this case (like conflicting statements by defendant) is only dicta); Buenoano v. State, 478 So. 2d 387 (Fla. 1st DCA 1985), rev. dismissed, 504 So. 2d 762 (Fla. 1987) (in addition to conflicting statements made by defendant, there were contradictions between the physical evidence (victim's body located a substantial distance from the defendant and overturned canoe) and defendant's statements as to how and where the canoe capsized, and the defendant had a motive (life insurance proceeds) in committing the killing).

Although these cases also involved the defendant's giving inconsistent or exculpatory statements, there were many other facts present that were inconsistent with the hypothesis of innocence. These cases do not hold that a defendant's initial exculpatory statement is enough, by itself, to be inconsistent with a reason-

able hypothesis of innocence to send the issue of sufficiency of the evidence of premeditation to the jury. It is Mr. Jenkins' contention that more is required; more has always been required. In this case Mr. Jenkins' initial exculpatory statements of denial upon arrest hardly show an inconsistency with the reasonable hypothesis of innocence that the shooting occurred accidentally as a result of a struggle over the officer's gun. The fact that a black man accused of killing a white cop would deny any involvement with the shooting upon his arrest should be considered a normal reaction.

The real issue is whether the State presented competent, substantial evidence which is clearly inconsistent with Mr. Jenkins' hypothesis of innocence during its case in chief. The State did not present this evidence to overcome Mr. Jenkins' hypothesis of an accidental shooting, as was clearly set forth in pages 27-33 of Appellant's initial brief; and Mr. Jenkins relies on that argument.

In attacking Mr. Jenkins' position that all of the circumstantial evidence is consistent with Mr. Jenkins' reasonable hypothesis of innocence, the State's arguments fail to make a convincing showing of any contradictions. The State claims that 7 1/2 pounds is too much of a pull of the trigger to support the shooting as accidental. However, the State conveniently forgets Mr. Jenkins' claim that the shooting occurred during a struggle for control over the gun. During such a struggle, the amount of pressure needed to pull

the trigger would mean nothing; and it would definitely not refute the accidental shooting theory.

In regards to the State's claims that the gun was shot from "at least several feet away" (Appellee's brief, p. 10), that conclusion is one the State very much wanted to make but could not get support for from its own firearms expert. The State's own expert refused to conclude that there was no residue present because the distance was over 4 1/2 feet from gun to victim. When asked to make such a conclusion as to why there was no residue present on the officer, the expert pointed to four possible reasons (shots fired at a distance greater than the maximum distance at which residue would be deposited, and/or an intervening object, and/or residue fell off during handling, and/or residue washed away with heavy bleeding) (T753-761,772-780). If the State's expert could not discount any of the above reasons for the lack of residue, then the State has no real support for concluding only distance would account for the lack of residue. The State may have a different version of that night's events; but it failed to present competent, substantial evidence that contradicted Mr. Jenkins' version.

In regards to the position of the two men when the gun went off, the State persists in trying to position Mr. Jenkins standing over the officer; yet, the circumstantial evidence cannot establish the position of Mr. Jenkins. It is to be noted that the bullet's path through the officer's right thigh was back to front, slightly upward, and from right to left (T825). The State conveniently fails to mention the "back to front" aspect of the path, making the

State's version of Mr. Jenkins standing to the right of the officer with the officer on his back an unlikely conclusion. Again, the bottom line is that the actual position of both Mr. Jenkins and the officer is open to several possibilities; and the State's version is not inconsistent with Mr. Jenkins' version.

As to what was happening when Ms. Pack, someone who lived behind the condo and across the Pinellas Trail, heard a male caucasian voice say, "put it down, put it down now, put it down," the State concedes the point by stating "this is one of those areas where there is room for differences to be drawn." The State's problem is that it believes it should get the opportunity to take such a difference to the jury; however, the law dictates otherwise. As noted in Fowler v. State, 492 So. 2d 1344 at 1348 (Fla. 1st DCA 1986), rev. denied, 503 So. 2d 328 (Fla. 1989), "[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 State's failure to contradict Mr. Jenkins' version means it cannot take its version to the jury for determination.

The State also attacks Mr. Jenkins' claim of lack of premeditation being shown by the fact that Mr. Jenkins left the scene while the officer was alive. The State relies on caselaw for the proposition that leaving the scene with the victim still alive does not preclude a finding of premeditation; but the facts contained within the cases cited by the State clearly show why, under the circumstances, premeditation can be shown even if the victim is

alive when the defendant leaves the scene. In Thomas v. State, 456 So. 2d 454 at 457 (Fla. 1984), the victim was so severely beaten about the head that the skull was fractured in many places. The victim was rendered unconscious and never regained consciousness. In Assay v. State, 580 So. 2d 610 (Fla.), cert. denied, 502 U.S. 895 (1991), the victim was shot in the abdomen; and witnesses to the shooting described the defendant as the aggressor who started an argument and then pulled his gun out to shoot at the victim. The fact that the victim ran away before dying or that the defendant said he had not killed the man, just scared him, did not preclude a finding of premeditation in Assay. The fact that the defendant consciously shot the victim in the abdomen -- as testified to by witnesses -- was essential to the court's ruling.

These factual scenarios are a far cry from Mr. Jenkins' situation. Mr. Jenkins was in sole possession of a fully loaded gun, and the officer was still alive with one gunshot wound to his leg. If the bullet had not severed the officer's major artery to his leg, the officer probably would not have died; and Mr. Jenkins had no way of knowing the single shot to the officer's leg would result in such major trauma. A shot to the leg would not lead one to conclude lethal force was used, unlike a shot or severe blows to the head or a shot to the chest. Compared to the cases cited by the State, Mr. Jenkins' factual situation clearly refutes premeditation.

In addition, due to the location of the one shot and the fact that the officer was obviously still alive, the State's claim that

Mr. Jenkins premeditatedly shot the officer to kill because he didn't need to shoot in order to escape continues to ignore Mr. Jenkins' contention that the shooting occurred accidentally during the struggle over control for the gun. If Mr. Jenkins wanted to shoot to kill the officer in order to avoid going back to prison, then why did he shoot the officer once in the leg and leave the officer alive despite having a fully loaded gun? Mr. Jenkins could not have reasonably known that a single shot to the leg would probably kill the officer, unlike the situation referred to by the State in Bello v. State, 547 So. 2d 914 at 916 (Fla. 1989), wherein the defendant shot at an angle that would probably kill anyone attempting to open the door.

The State sets forth the definition of premeditation in its brief (Appellee's brief, pg. 16); however, Mr. Jenkins' case does not fit within the definition. The accused must be conscious of the nature of the act he is about to commit and the probable result to flow from that act. Sireci v. State, 399 So. 2d 964 at 967 (Fla. 1981), cert. denied, 456 U.S. 984 (1982). It cannot be said that shooting someone in the leg and leaving them alive is to commit an act that will probably result in death.

Finally, the absence of fibers being transferred between Mr. Jenkins and the officer is of no help to the State. Under the facts of this case -- the officer handcuffed Mr. Jenkins, there was a struggle, and Mr. Jenkins took the officer's gun -- the State's own expert believed a transfer should have taken place but yet found no fibers. The State's fiber expert had no explanation for

this, and the State's version of events is not inconsistent with Mr. Jenkins' version.

Notably, the State claims that defense counsel's version to the jury in closing argument -- one possible scenario -- is somehow important to this issue (Appellee's brief, pg. 8). The State goes so far as to state that the defense counsel's scenario in closing is the <u>only</u> hypothesis of innocence that the State was required to refute at trial. This is, of course, erroneous. The real issue is in examining the circumstantial evidence the State presented in its case and in viewing that evidence in the light most favorable to the state, did the State present competent, substantial evidence which is clearly inconsistent with the defendant's hypothesis of innocence. If the State fails to meet that burden, the trial court must grant a judgment of acquittal and the issue never goes to the jury. <u>See</u> <u>State v. Law</u>, 559 So. 2d 187 (Fla. 1989). Defense counsels' closing arguments play no part in this issue, and the jury is always instructed that counsels' closings are not evidence. Thus, the State's references to defense counsel's closing argument are irrelevant in this issue. In this case the State failed to meet its burden in establishing premeditated murder, and the trial court erred in not granting Mr. Jenkins' motion for judgment of acquittal.

As for the next question as to what remedy is required in this case, Mr. Jenkins relies on his initial brief for this argument. It is to be noted, however, that the State's reliance on <u>Sochor v. Florida</u>, 504 U.S. 527, 112 S. Ct. 2114, 119 L. Ed. 2d 526 (1992),

is misplaced. Sochor dealt with an aggravating factor presented to the jury in the penalty phase for which there was insufficient evidence. The jury recommended death, but the United States Supreme Court refused to assume the jury had considered a factor for which there was insufficient evidence -- the jury does not list what aggravating factors it did or did not consider. However, the trial court then weighs the aggravating and mitigating factors and does list what it has considered. Because the trial court did consider an aggravator for which there was insufficient evidence was verified by its order, the United States Supreme Court reversed and remanded for resentencing.

The penalty phase in Florida consists of a two-step process in which the jury's recommendation is not the final word. The trial court considers the jury's recommendation but makes it own weighing process. This process is memorialized in an order and reviewed by the Florida Supreme Court. Errors in the penalty process, like the one in Sochor, can be found and corrected. The guilt phase, on the other hand, is an entirely different matter. If the jury, in part or as a whole, relies on an invalid theory of guilt which has not been established by evidence and convicts, under present case law in Florida that error will never be corrected or reviewed. Sochor's problem in the penalty phase is hardly analogous to a problem in the guilt phase. If Sochor has any relevance to this case, it is to enhance the point that possible erroneous reliance on an aggravator by the jury in penalty phase can be eventually cured. However, under present Florida law, the jury's possible

erroneous reliance on a theory of guilt not supported by sufficient evidence will never be cured.

Mr. Jenkins has established that the error in his case was both harmful and per se reversible error. The State's arguments fail to refute either.[3] Mr. Jenkins is entitled to relief in this issue.

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[3] The State cited the following cases as to the harmlessness of this error, but these cases are not analogous. In Jackson v. State, 98 So. 2d 407 (Fla. 1986), this Court found the evidence sufficient to support both premeditated and felony murder theories. In McKennon v. State, 403 So. 2d 389 (Fla. 1981), the evidence of premeditation was overwhelming and the prosecutor did not argue felony murder to the jury. In Mr. Jenkins' case the prosecutor not only argued both theories, but the jury was faced with a difficult decision between two different degrees of felony murder -- first and third. Finally, the State erroneously cites Mungin v. State, 667 So. 2d 751 (Fla. 1995), because that published opinion has been withdrawn due to a pending motion for rehearing. The correct cite is Mungin v. State, 20 Fla. L. Weekly S459 (Fla. Sept. 7, 1995). However, Mungin is not applicable because this Court specifically found that the overwhelming evidence of felony murder made the error in instructing on premeditated murder clearly harmless. It was apparent that the erroneous instruction did not contribute to the defendant's conviction. The same cannot be said in Mr. Jenkins' case due to the issue of what degree of felony murder was applicable.

ISSUE II

WAS THE TRIAL COURT INSTRUCTION ON PREMEDITATED FELONY MURDER ERRONEOUS AND REVERSIBLE ERROR IN THIS CASE?

Mr. Jenkins relies on the argument contained in his initial brief on this issue.

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?

The State responds to Mr. Jenkins' argument in three different ways: (1) the Coney[4] issue does not apply to pipeline cases, (2) the issue has not been preserved, and (3) the error was harmless. Each of these arguments will be briefly addressed.

Whether or not Coney is applicable to cases tried before the opinion was released but pending in the "pipeline" is a hotly contested issue that is already pending before this Court in several cases. One example is the case of Lett v. State, Case No. 87,541.[5] In addition to the arguments Mr. Jenkins made in his brief, he also adopts all of appellant's arguments in the Lett case.

As to the issue of preservation, the State claims that the deletion of certain language from the Coney decision on rehearing -- "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."[6] -- now means that an objection is necessary in

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[4] Coney v. State, 653 So. 2d 1009 (Fla. 1995).

[5] The certified question in Lett regarding the application of Coney to pipeline cases arose from Lett v. State, 668 So. 2d 1094 (Fla. 1st DCA 1996).

[6] Coney v. State, 20 Fla. L. Weekly S16 at 17 (Fla. Jan. 5, 1995).

order to preserve this issue. The deletion of that language, however, does not mean that an objection is required to preserve the issue. That point has been recently addressed in Mejia v. State, 675 So. 2d 996 (Fla. 1st DCA 1996):

> Regarding the state's preservation argument, we note that the initial version of the Coney opinion includes the following sentence, which was deleted, without explanation, after both sides filed motions for rehearing: "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." Coney v. State, 20 Fla. L. Weekly S16, 17 (Fla. Jan. 5, 1995). The state argues that this deletion "indicates that appellant must preserve the issue." We are unwilling to read so much into such a revision. No objection need be made to preserve this issue. No objection was made in Coney, and despite the removal of language specifically addressing same, it must be noted that the Supreme Court did not find lack of objection to bar review of the issue. But see Gibson v. State, 661 So. 2d 288, 291 (Fla. 1995) (denying claim that defendant's right to be present at bench conferences at which challenges for cause were made by his counsel had been violated and noting, in apparent dicta, that "no objection to the court's procedure was ever made").
>
> According to the supreme court, "[t]he 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." Francis v. State, 413 So. 2d 1175, 1178-79 (Fla. 1982) (citing Pointer v. United States, 151 U.S. 396, 14 S. Ct. 410, 38 L. Ed. 208 (1984), and Lewis v. United States, 146 U.S. 370, 13 S. Ct. 136, 36 L. Ed. 1011 (1982)). Clearly it is because this is considered such a critical stage of the proceedings that the court has undertaken to ensure that a defendant's right to meaningful participation in the decision of how peremptory challenges are used is assiduously protected.

> If a contemporaneous objection were required to preserve for appeal the issue of deprivation of that right, it seems to us that, as a practical matter, the right would be rendered meaningless. Accordingly, to ensure the viability of the rule laid down (or "clarified") by the supreme court in Coney, we conclude that a violation of that rule constitutes fundamental error, which may be raised for the first time on appeal, notwithstanding the lack of a contemporaneous objection. See State v. Johnson, 616 So. 2d 1, 3 (Fla. 1993) ("for an error to be so fundamental that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a denial of due process"); Salcedo v. State, 497 So. 2d 1294, 1295 (Fla. 1st DCA 1986) (allegation that defendant was absent from courtoom during exercise of peremptory challenges "alleged reasonable possibility that the error contributed to the conviction." State v. DiGuilio, 491 So. 2d 1129, 1138 (Fla. 1986). The fact that an error may be classified as fundamental, so that it may be raised for the first time on appeal, does not necessarily preclude application of a harmless error analysis. State v. Clark, 614 So. 2d 453 (Fla. 1992). In fact the supreme court expressly applied a harmless error analysis in Coney. 653 So. 2d at 1013.

While Mr. Jenkins does not agree with the final result in Mejia (court found defendant was not prejudiced), Mr. Jenkins does adopt Mejia's arguments against the necessity of raising an objection for preservation of this issue.

Finally, there is the issue of whether or not the error can be harmless. The State points to the fact that Mr. Jenkins had the opportunity to consult with his attorney before the attorney approached the bench alone to select the jury as if this opportunity to discuss would cure all the constitutional defects. This argument presumes the fact that defense trial counsel did, indeed,

discuss the prospective jurors and the concept of peremptory challenges with Mr. Jenkins; but inasmuch as the attorney/client privilege prohibits an inquiry into this matter and, of course, no inquiry was made into the nature of the discussions between attorney and client, the State presumes too much.

This argument also assumes that the matter of exercising peremptory challenges is a matter of form similar to exercising challenges for cause; i.e., the defendant will know who he doesn't like and can tell his attorney ahead of time. Nothing could be further from the truth. Selecting a jury is a complicated process and it is not done in a vacuum. The State gets to exercise peremptory challenges as well; and defense strategies can change in an instant depending on the prosecutor's actions. Also, the fact that peremptory challenges can be denied if based solely on an apparent attempt to eliminate a certain group from the jury (e.g., blacks, hispanics, men, etc.) can change the jury selection process in seconds. A brief consultation with the defendant prior to going to the bench where only the attorneys and trial court are privy to what is happening hardly constitutes a meaningful participation in an essential part of the trial. The fundamental error of Mr. Jenkins' absence from the bench during the selection of the jury without a willing, voluntary, and knowing waiver must, therefore, be considered harmful per se error. Mr. Jenkins relies on his brief and the arguments made by appellant in Lett for any other arguments on this aspect of this issue.

Because Mr. Jenkins was not physically present at the immediate site where his lawyer exercised his peremptory challenges and because Mr. Jenkins could not actively participate in the arbitrary and capricious selection process himself, per se reversible error was committed; and Mr. Jenkins is entitled to a new trial.

ISSUE IV

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

A. The Trial Court Improperly Doubled Aggravating Factors

This Court has ruled that "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; i.e., a law enforcement officer was killed to avoid arrest. Armstrong v. State, 642 So. 2d 730 at 738 (Fla. 1994); Kearse v. State, 662 So. 2d 677 (Fla. 1995). The State's arguments asking for reconsideration of this issue are not compelling. Factually, the proof is the same for both aggravators. The officer in this case was killed while performing his official duty in that the officer was in the process of arresting Mr. Jenkins. The State's claim that these two aggravators are legally distinct is also without merit. To claim that the "avoid arrest factor" could apply to a citizen's arrest is to stretch the possibility of a distinction between the two factors too far. Although 'it could happen,' the fact is that the State cites no example of a citizen getting killed while making an citizen's arrest. In reality, it doesn't happen. Therefore, the State's attempt to legally distinguish these two aggravators is without merit.

As to Mr. Jenkins' argument that the aggravator of the murder committed during the course of a felony in a murder case solely

based on a felony-murder theory is unconstitutional, Mr. Jenkins relies on the argument contained in his initial brief.

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

A large portion of the State's argument on this issue is quoting page after page of the trial court's order. Inasmuch as Mr. Jenkins addressed the trial court's order point-by-point, he will rely on the argument contained in his initial brief for the majority of arguments presented in this issue. There are a few points that the State makes in its brief, however, that require response.

In attempting to bolster the trial court's finding that Mr. Jenkins intended to kill the officer, the State focuses on the lighting condition at the scene (Appellee's brief, pp. 43,44). The State requests record references for Amy Walker's testimony as to lights being in the backyard. The record cite for this is at page 2 of Appellant's brief in the Statement of the Facts. For the benefit of the State, however, it will be reiterated here that Ms. Walker testified they did have lights in the back of the condo at night (T352). The State added the fact that Ms. Walker could not remember if the lights were on that night or not as if that point has some factual significance. Inasmuch as the K-9 officer testified that the landscaping lights were, in fact, on (T476; Appellant's brief p. 6), the State's emphasis on Ms. Walker's faulty memory has no significance. Equally without significance is the

State's attempt to rely on the neighbor's testimony as to the lighting conditions behind Ms. Walker's condo. Ms. Nash, although a neighbor, was in a different building from Ms. Walker. Ms. Nash lived in condo #8 while Ms. Walker lived in condo #10 (T429,349). The testimony established that the condo units in the complex consisted of two units to a building with units #10 and #12 together in one building (T635). Thus, Ms. Nash looking out her back door into her backyard would have no relevance -- she did not share a backyard with Ms. Walker. To further demonstrate Ms. Nash's lack of relevance in testifying as to the lighting conditions behind the Walker condo, Ms. Nash testified she did not see any lights at all behind the Walker condo (T432). Clearly, the K-9 officer's testimony as to the existence of landscape lights behind the Walker condo puts the issue of the presence of lights to rest. Ms. Nash's comments on the subject, however, are not relevant since her view from her back door had no bearing on what the lighting condition behind #10 was like.

In addition to all of the testimony as to the lighting conditions behind #10, there was the additional fact -- ignored in the State's brief -- that Mr. Jenkins had spent considerable time working on the french doors while kneeling on cushions he had taken from #16. It cannot be said that Mr. Jenkins was completely blind the whole time he was behind #10 because the lighting was poor. Such a conclusion makes no sense under the totality of the circumstances.

In arguing that the "adverse" lighting conditions supports the trial court's finding Mr. Jenkins did not deliberately shoot the officer in the leg and showed an intent to kill, the State has made two errors: (1) Mr. Jenkins never claimed he deliberately shot the officer in the leg. To the contrary, Mr. Jenkins has always maintained the shooting was accidental. In order to bolster that argument, the fact that the shot was to the leg instead of the head OK chest supports the lack of intent to kill because the shot was to a non-vital area. If Mr. Jenkins had accidentally shot the officer in the head or chest, his burden of claiming the shooting to be accidental would have been much more difficult. (2) The State completely ignores Mr. Jenkins' sole possession of a fully-loaded gun -- that would have been easier to shoot the second time -- when the officer was still alive after being shot in the leg. Not finishing the job by shooting the officer again clearly demonstrates a lack of intent; yet, the State simply ignores this fact.

Such a fact, however, was not ignored by this Court in Hallman v. State, 560 So. 2d 223 (Fla. 1990). In that case this Court reversed the trial court's death sentence which had overridden a jury's life recommendation and reduced the sentence to life. In so doing, this Court found the trial court had not given the jury's recommendation the great weight that Tedder[7] requires and found several reasons to support the jury's life recommendation. However, "[m]ost sisnificantlv, the jury reasonably could have found that Hallman should be spared because of the circumstance of the

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[7] Tedder v. State, 322 So. 2d 908 (Fla. 1975).

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 (emphasis added). Hallman had three more shots remaining. The fact that Hallman could have finished the job right then and there but did not do so -- even though the victim eventually died of his wounds -- was important enough of a fact to support the jury's life recommendation. Thus, the State's argument that a lack of intent to kill has no significance in the jury's weighing process is clearly erroneous in light of Hallman. Having the means (a loaded gun) and the motive (eliminate an eyewitness) and not killing the officer resulted in a life sentence for Mr. Hallman. Mr. Jenkins is entitled to the same result.

The State's argument that a lack of intent is not important when the case involves felony murder and the mens rea of the felony substitutes for premeditation is contradicted by the cases it sets forth in its brief at p. 48. Both Reilly v. State, 601 So. 2d 222 (Fla. 1992), and Norris v. State, 420 So. 2d 688 (Fla. 1983), dealt with felony murder situations; but this Court held that the jury's finding of no premeditation in Reilly and no intent to kill in Norris presented a factor which caused this Court to reverse a jury override. The fact that the two defendant's in these cases had mental problems was an additional factor. The mental state of these defendants was not the sole reason for reversing the jury override; but just as these defendants had other mitigating factors in addition to the lack of intent, so had Mr. Jenkins. (Mr.

Jenkins' emotional stress of having recently been separated from his wife; needing money badly for his rent; having been fired that day; Mr. Jenkins' good character traits in that Mr. Jenkins was close to his family, gave them support, and financially supported his wife and her children; and the alternative sentence of life without parole). The totality of evidence presented at trial provided a reasonable basis for the jury's life recommendation in Mr. Jenkins' case, and the record fails to disclose a justification for the trial court's decision to override that recommendation.

The State cites to cases wherein this Court has upheld a judicial override in felony-murder situations to support its argument that lack of premeditation is not a reasonable basis for a jury's life recommendation. Those cases are factually distinguishable, and it is the nature of those facts that clearly sets these cases apart from Hallman, Norris, Reillv, and Mr. Jenkins. In Torres-Arboledo v. State, 524 So. 2d 403 (Fla.), cert.denied, 488 U.S. 901 (1988), the victim was shot twice (arm and chest) in an attempted robbery. The opinion does not state if the State proceeded under alternative theories; the State could have argued premeditation as well as felony murder. The defendant also went on to kill someone else immediately after. In Engle v. State, 510 So. 2d 881 (Fla. 1987), cert.denied, 485 U.S. 924 (1988), there was a "brutal slaying" of a clerk taken from a Majik Market who was raped (fist up the vagina) and strangled and stabbed. The opinion also does not say if the State pursued just one theory of felony murder or alternative theories of premeditated or felony murder. In Mills

v. State, 476 So. 2d 172 (Fla. 1985), cert.denied, 475 U.S. 1031 (1986), the defendant brought a shotgun to the scene and broke into the victim's home and shot the victim before fleeing. Although this is the only case the State cites which is clearly a felony murder case, there were no mitigating factors in the case and three valid aggravators. The first two cases the State cites do not fit a felony-murder only situation because the opinions are not so narrow in describing the murders and because the facts (especially in the Engle case) do not rule out premeditation. In addition, all three cases show an intent to kill.-- two shots, one to the arm and one to the chest; brutal raping and strangling and stabbing; and used a shotgun he brought to kill victim. These three cases hardly fall into the same category as Hallman, Norris, Reilly, and Mr. Jenkins wherein the lack of intent to kill was clear.

Turning to the mitigation Mr. Jenkins has set forth, the State contends there is significance in the fact that defense trial counsel did not discuss Mr. Jenkins' positive character traits or the stress he was under in penalty-phase arguments to the jury. (State's Appellee's brief, p.50,51) Simply because defense trial counsel did not argue these factors to the jury, this does not mean defense trial counsel did not believe in them or that they do not exist. After all, defense counsel put on witnesses to set forth these facts; and the jury had this evidence before it to consider. Whether or not these facts were argued to the jury is of no significance. They were introduced as evidence and the jury recommended life.

The State's argument on the factor of the alternative sentence being life without parole defies logic. According to the State, it is permissible for the Appellant to argue alternative sentences to the jury; but the trial court has every right to reject such a factor. This reasoning is contrary to caselaw and makes no sense. Jones v. State, 569 So. 2d 1234 at 1239, 1240 (Fla. 1990), specifically states that the potential sentence should death not be imposed is a relevant consideration for the jury to consider as a circumstance of the offense; and Turner v. State, 645 So. 2d 444 at 448 (Fla. 1994), held that the fact that the alternative to death was two life sentences with a minimum mandatory of 50 years in prison was a factor which supported the jury's recommendation of life. This does not in any way diminish the officer's status as victim in this case. The jury had before it the automatic aggravating factor of the victim being a law enforcement officer and could weigh that aggravator along with the alternative sentence of life without parole.

At the end of each argument, the State concludes by saying that if there was error, the error was harmless. With all of the error that has occurred in this case -- improper doubling of aggravators, trial court substituting his view of the evidence and the weight to be given it for that of the jury, improper rejection of the factor of the alternative sentence to death being life without parole, the trial court's rejection of the jury's life recommendation because of defense trial counsel's closing arguments -- it cannot be said the error had no affect on the outcome in this case.

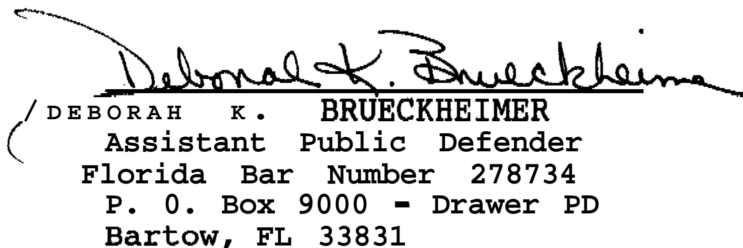
The bottom line is that there is a reasonable basis in the record for the jury's life recommendation; and the trial court's override was, under the law and under the' facts, plainly improper. Mr. Jenkins' sentence must be reduced to a life sentence without possibility of parole.

Mr. Jenkins relies on his initial brief for any other arguments on Issue IV B.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Carol Dittmar, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this 13th day of November, 1996.

Respectfully submitted,



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