IN THE SUPREME COURT OF FLORIDA

CASE NO. 87,505

DARRYL THOMPSON,

Petitioner,

-vs.-

STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, THIRD DISTRICT OF FLORIDA

PETITIONER'S INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND OF THE FACTS

This is a proceeding for discretionary review of a decision of the Third DCA reversing in part and affirming in part the conviction of the Defendant/Petitioner, Darryl Thompson. See Thompson v. State, 667 So. 2d 470 (Fla. 3d DCA 1996). The case arose from a "reverse sting" operation by undercover police and their informants, which is "where the police attempt to take drug money off the street by having the people with the money that are looking to purchase narcotics, purchasing narcotics from the police rather than purchase it from illegitimate sources." Tr-324.

The operation went awry and the police and Defendants drew weapons and started shooting. E.g., Tr-363, 655. Many shots were fired by the police (Tr-768), and from one to three shots were fired by Mr. Thompson (compare Tr-789 with Tr-1188), but no one was injured in the fray. Mr. Thompson was charged with five counts of attempted first degree murder of a law enforcement officer with a firearm, one count of possession of cocaine, one count of armed robbery, and one count for conspiracy to traffic in cocaine. R-264.

Although hotly disputed, there was ample evidence from which the jury could find that Mr. Thompson did not attempt to murder any law enforcement officer, and that the Defendants were armed only for self-defense out of fear of the narcotics suppliers they believed would be present. E.g., Tr-1129[1]. There was evidence

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[1] Although there is no issue as to the sufficiency of the evidence to support the convictions, the existence of evidence to support the Appellant's theory of the case is relevant to demonstrate the harm in the errors committed at trial. Therefore, the Court has a "need to know" at least some of the

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that supported Mr. Thompson's position that he fired a single shot without intending to kill, only as a desperate reaction to being surrounded by unknown persons in unmarked cars, who exited their vehicles with shotguns and machine guns blazing. Tr-1188. There was evidence that Mr. Thompson was so intoxicated on cocaine that he was incapable of formulating specific intent. Tr-1104-1110.

There was evidence on both sides of the question whether Mr. Thompson knew that the alleged victims were law enforcement officers. Compare Tr-945 with Ts-1185. The police were not in regular uniforms and were driving unmarked vehicles. Tr-777. However, their clothes bore indicia of their status as officers (Tr-358) and they claim to have shouted "Police" when the shooting started. Tr-910. Mr. Thompson said after his arrest "that he did not know it was the police he was shooting at." Tr-1254.

Detective Marshall Lee testified that he participated in the investigation involving Mr. Thompson and his co-Defendants. Tr-325. Detective Lee did not have any direct contact with any of the suspects prior to their arrests. Tr-325.

Miguel Torres, a confidential informant ("CI") working for the North Miami Police Department, met with Detective Lee and other officers to begin the investigation. Tr-560. Mr. Torres and another CI named Luis Camacho planned with the police to try to sell a kilogram of cocaine to the Defendant. Tr-561.

Darryl Thompson testified that he was a drug addict with a serious addiction. Tr-1079. During 1991, Mr. Thompson shared a

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facts adduced at trial.

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cell in the Dade County Jail with CI Luis Camacho. Ts-1080. Mr. Thompson and Camacho spent a lot of time together while in jail, and the Defendant told Camacho that he "was waiting to go in the drug program." Tr-1081.

About two weeks after Mr. Thompson had completed the drug program following his release from the County Jail, he received a number of telephone calls from Mr. Camacho at his home. Tr-1083, 1090. The other CI, Mr. Torres, also made telephone contact with Mr. Thompson, who was known as "Slim." Tr-563.

During calls between Mr. Thompson and the CIs, they agreed to meet to discuss a transaction. Tr-1090. Mr. Torres told Slim "how to get to the meeting place to discuss the amount of cocaine that is to be purchased, the type of cocaine, [and] how the transaction would take place." Tr-563. The first meeting was arranged for July 6, 1992 at the parking lot behind the Red Lobster Restaurant at Kendall Drive and 127th Avenue in Dade County. Tr-329.

At that first meeting, Detective Lee, who remained out of sight in an unmarked car, saw the Defendant Thompson "walk over and get into the informants' vehicle, which [was] parked in the rear of the Red Lobster." Tr-329. Detective Lee had nstructed the informants to tell the Defendant that the deal could not be consummated that day, and that it would have to be put off for a day or two. Tr-329.

Mr. Torres and the other confidential informant met with Mr. Thompson in their vehicle, talked about the quality of the cocaine and the amount of cocaine needed, and provided a free gram of

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cocaine to Mr. Thompson to take as a sample. Tr-565, 1092. The transaction for the kilogram was set up for the next day, but was rescheduled for the second day after that initial meeting, or until July 8, 1992. Tr-567. The second meeting was scheduled for the Shooters parking lot at N.E. 35th Avenue in Sunny Isles Boulevard, at a large shopping center near the Intracoastal Waterway. Tr-337.

After that first meeting, Mr. Thompson went around his neighborhood trying to raise $10,000 to buy the cocaine from Mr. Camacho, but could not raise the money. Tr-1099. Thereupon, others suggested to Mr. Thompson that they could take some money "and fix it up and make it look like there's $10,000 and pass it to Camacho," to obtain the cocaine. Tr-1099. Mr. Thompson testified as to what he meant by "fix up" the money to make it look like $10,000: "We took a whole lot of one dollars bills and put twenties and fifties on the top and put rubber bands around it, make it look like we had a lot of money." Tr-1101.

Mr. Thompson testified that as he and the other Defendants proceeded to the mall in North Miami Beach where the transaction was to occur, he still had most of the gram of cocaine that he had been given by the CIs and he was "sniffing on that as [they] arrived." Tr-1104. He "snorted it all." Tr-1105. When asked what effect the snorting of the cocaine had on Mr. Thompson, he testified: "It make you real hyper, you perspire a lot, sweat a lot, hyper. And you also tend to be nervous and shaky." Tr-1105.

Mr. Thompson was not thinking clearly after snorting the rest of the gram of cocaine, "was speeding a little bit," and "wasn't

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really in the right state of mind." Tr-1106. It took him a while to find the transaction location, because the cocaine had an effect on his ability to remember the directions he was given over the telephone and effected his ability to find the place. Tr-1108.

The informants were in a van in the parking lot. Tr-343. Detective Lee saw the Defendants' vehicle stop near the informants' van, while the unmarked vehicle in which Detective Lee and other police officers were riding "kind of zig-zagged through the lot" toward the Defendants. Tr-351. The informant was unsuccessful in his effort to have the Defendants stop before reaching the CIs' van, and the Defendants drove past him and parked. Tr-352.

The Defendant and Mr. Torres spoke in the parking lot, and the Defendant's nervousness caused him to start backing up and requesting reassurance from Mr. Torres, who told him that everything was alright. Tr-1109. Mr. Torres and Mr. Thompson walked over to the informants' van. Tr-353. The other CI, Camacho, who was inside the van, showed the Defendant the kilo of cocaine, indicating that everything was okay, so Mr. Thompson "rushed around to the passenger's side, got inside the van with him." Tr-1109.

Mr. Thompson testified: "Mr. Camacho cut the kilo of cocaine open, dug down inside of it, and said, 'Hit this.' So I hit it." Tr-1109-10. Mr. Thompson snorted three hits of the cocaine, then put a "big rock" of cocaine Camacho gave him in his mouth. Tr-1110.

The Co-Defendant, Mr. Miller, at first stayed in Defendants' vehicle. Tr-353. Detective Lee testified: "After Thompson gat in our van and sat in the front seat and inspected the cocaine, he

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motioned to Mr. Miller. Mr. Miller got out of their vehicle, walked around and met Thompson at the back corner of our van." Tr-354. As Mr. Miller exited his vehicle, Detective Lee "saw him drop a gun pouch" which was tan in color and in the triangular shape "that's commonly used for carrying and storing firearms." Tr-355. Mr. Miller "then picked it up and threw it on the driver's seat of their vehicle." Tr-355.

After Mr. Miller put the gun pouch back in his car, Detective Lee saw him walk around to the back of the vehicle, carrying a plastic bag, where he met Mr. Thompson at the rear of that vehicle. Tr-359. Detective Lee testified that Mr. Miller met Mr. Thompson at the right rear corner of the vehicle, the two Defendants "had a brief discussion, and Mr. Thompson produced a gun and walked up to the front door of [the informants'] vehicle." Ts-360.

When Mr. Thompson came back to the van and passed the money to Camacho, Camacho did not pass him the cocaine, and looked as if he was going to count the money. Tr-1110. Mr. Thompson pulled out his pistol and Mr. Camacho threw the cocaine toward him. The cocaine hit the ground, and when Mr. Thompson bent over to pick it up he heard something, looked to see a car coming in his direction, and felt that he was in danger of being robbed. Tr-1111.

Detective Lee already had advised the informants and other police officers that he had seen the gun pouch dropped by Mr. Miller and suggested that there was a possibility of a "ripoff." Tr-361. Detective Lee advised his colleagues over the radio that they should be alert and be careful, not knowing that one of the

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confidential informants "was giving a take-down signal." Tr-361.

At the time of the take-down signal, Detective Lee's vehicle was being maneuvered toward the Defendants' vehicle in an effort to block its path. **Tr-363.** However, the undercover officers did not reach that location and had to change plans quickly, "[b]ecause gunfire erupted, and Thompson and Miller started running." **Tr-363.**

Mr. Thompson testified that he felt that Mr. Camacho had "some people to back him up" so he fired a shot in that direction, then "took off running in the opposite direction," dropping the gun and the kilo of cocaine as he ran. Tr-1111. Shortly thereafter, he was arrested and handcuffed. Tr-1111. The Defendant testified that he could not remember all of the details of the transaction at the van and the car corning toward him, because he was "intoxicated . . . on cocaine at the time." Tr-1112.

Mr. Torres testified that he saw "Slim run and his associate run and the police chasing." Tr-589. When asked what he saw Slim doing as he ran, Mr. Torres testified: "I saw him turn once and fire his gun, and then I saw him drop whatever he had in his hand, which was a kilo of cocaine and the money." Tr-589.

Detective Lee said he saw gunfire coming from Mr. Thompson's gun as he "was pointing back" while running away. Tr-364. Detective Lee instructed Officer Borrell not to block the front of the Defendants' vehicle, but to stop the car, whereupon Detective Lee "got out and fired two rounds at Mr. Thompson." Tr-365. As he exited his vehicle after the Defendant already had fired his weapon, Detective Lee said he yelled "police." **Tr-365.**

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The police had their weapons on fully automatic on the date in question, resulting in a lot of rounds of ammunition being shot by the police that day. Tr-768. "[F]ully automatic" meant that the shots were coming from police weapons "like machine gun" fire. Tr-769. Mr. Torres testified that--after the first shot was fired by the Defendant--"all hell broke loose" and Mr. Thompson and Mr. Miller started running away. Tr-655-56. As Mr. Thompson ran, Torres said that he extended his arm behind him toward the right, and fired another shot as he ran quickly, while the police were firing at him. Tr-656.

The evidence from which it could be found that the Defendant did not know that Detective Lee and the other undercover officers were police officers included Detective Lee's testimony that he was not readily identified as a police officer by other non-police officers and people who did not know him. Tr-388-89.

Detective Lee and his partners were in an undercover Nissan Maxima, four-door automobile which was not marked as a police vehicle. Tr-357-58. Detective Lee was not wearing a typical police uniform. Tr-358. Mr. Thompson testified that he never heard anyone say "Police" on July 8, 1992. Tr-1185. Another one of the police officers on the scene testified that he would not have been identified by a passerby as a police officer as he drove around in his unmarked Buick. Tr-766-67.

Detective David Lanier and Detective Alexander were in a car that was supposed to block the Defendants' car in place after the narcotics transaction. Tr-776. Their car was an undercover blue

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Camaro, which had no police markings on it at all. Tr-777.

On the other hand, there was evidence from which the jury could find that Mr. Thompson knew that Detective Lee was a police officer when the shots were exchanged. The Detective testified that he "was wearing jeans and a police t-shirt and . . . also wearing a bullet-proof vest that has large white letters 'POLICE' across it with a large badge in the center." Tr-358. The letters and the badge were approximately three inches in height. Tr-358. The other three police officers in the car with Detective Lee "were all members of the SWAT Team . . . wearing black SWAT uniforms with "POLICE" written . . . on [them]." Tr-358.

Detective Lanier was wearing a black ball cap with "Police" in silver letters across it, he had on a black tee shirt with "Police" in silver letters across the back and front, and was wearing a bullet-proof vest with "Police" across that. He was also wearing his badge. Tr-777.

Evidence from which the jury could find that the Defendant did not attempt to murder anyone included Mr. Thompson's testimony that he took the cocaine and the money and started running away from the undercover van, but he did not fire a shot until after he saw "a car approaching fast . . . [with a gun] pointed out the window." Tr-1184. Mr. Thompson said he only fired one shot to try to scare the unidentified oncomers, and said he did not pull the trigger again as he ran away. Tr-1188. As he ran, he first realized that police were surrounding him when he saw a blue light on a dashboard of a vehicle corning towards him, whereupon he dropped the gun, the

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cocaine, and the money, and hit the ground. Tr-1188.

Other evidence that supported the defense theory that Mr. Thompson fired a shot only to scare the others coming after him included questioning of Mr. Torres on the circumstances of Mr. Thompson shooting back in his direction as Mr. Thompson ran away from the scene. Tr-653. Mr. Torres agreed that it was reasonable that, if Mr. Thompson wanted to kill Mr. Camacho, he could have done that as he stood approximately two and one-half feet from Mr. Camacho prior to starting to run away and firing the shot. Tr-654. Mr. Thompson's direct testimony closed with his testimony that he had fired only one shot and did not intend to kill any law enforcement officers at the time, but intended only to scare away whoever was corning towards him at the time. Tr-1129.

Evidence that Mr. Thompson had not premeditated any attempt to kill included the prosecution's expert testimony that his Taurus pistol was inoperable when received for testing "because of dry lubricants" in the mechanism of the weapon. Tr-848. The State's expert, Mr. Hart, testified that--assuming a round had been chambered in the Taurus--the hammer could have fallen with sufficient force to discharge that first shot, but its greasy and dirty condition was reasonably likely to have prevented the slide from moving with sufficient force to cleanly eject the spent cartridge from that first round, jamming the empty cartridge in the weapon and preventing a second shot from being fired. Tr-878.

There was other evidence from which the jury could have found that the Defendant attempted to commit murder. Detective

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Lanier testified that he made eye contact with the Defendant Thompson, who looked at the Detective, "brought the gun up and fired it." Tr-787. The detective said he saw Mr. Thompson firing his weapon two more times at someone he could not specifically identify. Tr-789.

Detective Lanier testified that immediately after those two shots were fired, "three members of the North Miami Beach special response team came running up from the direction that the round came from." Tr-789. Detective Lanier testified that the bullet that was fired at him by the Defendant hit a red Nissan automobile which was parked about three feet to his right. Tr-790.

The State called as a witness Steven Diaz, a police officer for the City of North Miami Beach. Tr-971. Sergeant Diaz, who had the primary responsibility to arrest the Defendants, was carrying a .45 caliber sidearm and a MP5 machine gun. Tr-974. Sergeant Diaz testified that he saw the Defendant Thompson opening the door to the confidential informants' van, displaying a firearm and pointing it at the informant sitting inside the van. Tr-977. Sergeant Diaz exited his van, yelled "Police," and saw the Defendant Thompson turn clockwise and fire a shot at a car approaching him. Tr-978.

Sergeant Diaz testified that the next thing he saw was the Defendant Thompson running away, shooting back at him. Tr-978. The sergeant fired shots at the Defendant and began to chase him. Tr-980. Sergeant Diaz fired approximately twenty-one rounds from his machine gun at the Defendant. Tr-1016.

In beginning to argue the jury instructions at the close of

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the State's case, counsel for the State argued that it was not an element of the attempted murder offense for the State to prove that the victims were, in fact, law enforcement officers, nor that the Defendant had knowledge of the officers' status as police. Tr-1061-62. The Judge held that he would address the issue later. Tr-1070.

In arguing the jury instructions, the defense requested an instruction which would require the jury to find that the alleged victims of the shooting were, in fact, police officers as charged in the information. **Tr-1270-76.** Additionally, the defense argued that **there** was a knowledge element to the charge on which the jury should be instructed. **Tr-1278.** The instructions given did not contain an element that the State had to **prove** the Defendant's knowledge that the victims were police. **R-232-37;** Tr-1374-76.

Mr. Thompson was convicted on one of the counts for attempted first degree murder of a law enforcement officer with a firearm, on Count VI for possession of cocaine, Count VII for armed robbery, and Count VIII for conspiracy to traffic in cocaine. **R-264.** He was acquitted on four of the attempted murder counts. Id.

SUMMARY OF THE ARGUMENT

The Third District erroneously affirmed the trial court's denial of Defendant's requested jury instruction concerning knowledge of the alleged victims' status as law enforcement officers. Section 784.07(3), Fla. Stat. creates the substantive offense of attempted murder of a law enforcement officer which includes as an element the Defendant's knowledge of the status of

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the victim as an officer of the law. The existence of the Defendant's knowledge as an element of the crime has been expressed by the Legislature in the inclusion of the attempted murder law in the same section of Florida statutes as appear the crimes of assault and battery upon law enforcement officers, which expressly include the mens rea element of the Defendant's knowledge.

The inclusion of the mens rea element by the Legislature also is apparent from the Legislature's inclusion of knowledge as an element of the crime of attempted murder of a law enforcement officer who is off-duty. There is no rational reason why the legislature would intend that knowledge be an element of a crime against an off-duty officer, but not against one who is engaged in the scope of his or her duties at the time of the crime.

Finally, the requirement of a Defendant's knowledge is expressed in the Legislature's description of the crime as an "attempt" crime. Especially after the abolition of the attempted felony murder doctrine, the crime of attempt requires the intent to commit the underlying crime. Therefore, because the underlying crime would require knowledge of the victim's status, the attempt likewise includes that necessary element.

Even if the Legislature had purported to omit the mens rea requirement as an element of this crime, that mental state element is implied by law because of the nature of the offense as a serious crime which is primarily mala in se. While the Legislature has the power to define crimes involving threats to the public welfare, or mala prohibita offenses which do not possess any mens rea

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requirement, that legislative power is limited by the historical requirement that crimes at the common law, as well as crimes which involve serious penalties such as long terms of imprisonment, must be defined to include a mental state element.

Finally on this issue, even if the Legislature has the power to enact a crime such attempted murder of a law enforcement officer which omits the mental state element of knowledge of the victim's status, that legislative power is limited by the bounds of due process and equal protection. Those constitutional bounds are exceeded where, as here, the requisite mental state is purportedly eliminated in only a limited class of cases which bears no rational relationship to any legitimate governmental objective.

The statute in question plainly includes a knowledge requirement where the victim is not engaged in the lawful performance of his or her duties. Only where an on-duty officer is involved does the purported elimination of a mens rea requirement exist.

Even if the Legislature possessed the good-faith belief that on-duty officers are deserving of greater protection than those off-duty (an assumption which is invalid, in light of the more precarious position of off-duty officers, being farther away from their partners, equipment, and otherwise being more on their own), that objective cannot be met by abolition of the mental state requirement. A Defendant who is unaware of the status of his victim as a law enforcement officer is not going to be deterred by that status. Therefore, officers engaged in the lawful performance

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of their duties are equally at risk whether there is a mens rea requirement or not, and the purported elimination of the requirement from the statute defies constitutional limitations.

The Third District erroneously affirmed the trial court's denial of Defendant's requested jury instruction on the voluntary intoxication defense. There was evidence that the Defendant snorted more than one-half gram of cocaine during the time that he and his co-defendant were driving to the place where the narcotics transaction was to occur, and he consumed much more cocaine while in the confidential informant's van at the scene. The evidence was unrefuted that Mr. Thompson was impaired by ingestion of the cocaine, testifying that his thinking and memory were inpaired, and that he "wasn't really in the right state of mind." Voluntary intoxication is a valid defense to specific intent crimes, including the crime of attempted murder of a law enforcement officer. Therefore, Defendant was entitled to the requested jury instruction and the decision below should be quashed and the judgment of conviction be vacated.

Judge Rosinek erroneously sustained the State's objections on hearsay grounds to statements made by the confidential informant, Mr. Camacho. To begin with, those statements were admissible as non-hearsay, because they were relevant as circumstantial evidence of the state of mind of the hearer, Mr. Thompson. Mr. Camacho's statement's were admissible under the hearsay exception of admissions of a party opponent, the State of Florida.

Judge Rosinek fundamentally erred by advising the jury that

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its desire to hear the Defendant's version of events was "the American way." By using such language, His Honor erroneously advised the jury that **any** failure on the jury's part to demand an explanation from the Defendant was un-American. By branding the jurors as un-patriotic if they did not seek testimony from the Defendant, Judge Rosinek impermissibly commented an the Defendant's right to remain silent and the affirmance of the error should be quashed by this Court.

Finally, the trial court erroneously denied Defendant's Motion for Mistrial following Detective Lanier's irrelevant and prejudicial testimony that he **was** afraid at the time of the encounter between undercover **police** and the Defendants in the parking lot. That testimony was irrelevant and prejudicial to the Defendant, *so* the mistrial should have been granted. The Third District's affirmance of the judgment **was** erroneous, and should be quashed with instructions to vacate the judgment of conviction.

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ARGUMENT[2]

I.

THE TRIAL COURT ERRONEOUSLY DENIED DEFENDANT'S REQUESTED INSTRUCTION CONCERNING KNOWLEDGE OF THE ALLEGED VICTIMS' STATUS AS POLICE OFFICERS, BECAUSE KNOWLEDGE OF THE VICTIM'S STATUS IS *AN* ELEMENT OF THE OFFENSE OF ATTEMPTED MURDER OF A LAW ENFORCEMENT OFFICER UNDER § 784.07, FLA. STAT.

Introduction:

The issue upon which this Court's conflict jurisdiction is based[3] is whether--in a prosecution for attempted murder of a law enforcement officer engaged in the lawful performance of his or her duties under Florida Statutes section 784.07--the Defendant's knowledge of the alleged victim's status as a law enforcement officer is an element of the crime which must be alleged and proved by the State. There are three overlapping analyses under which such knowledge can be shown to be an element of the crime of attempted murder of a law enforcement officer.

First, the legislative intent to include as an element such knowledge of the victim's status is demonstrated by other portions of the statute, which expressly include knowledge as an element to convict for assaults and batteries upon law enforcement officers,

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[2]All arguments are based upon the Third District's erroneous affirmance of the judgment of conviction, notwithstanding Mr. Thompson's demonstration on appeal of those errors made at the trial level. To save space, the errors are all presented as those made by the trial court, rather than "The Third District erred in . . . ."

[3]Petitioner presents this argument first because it pertains to the issue which gave rise to this Court's jurisdiction, not because it is any stronger than the other arguments made herein.

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and which require such knowledge to convict for attempted **murder** of an officer not engaged in the performance of his or her duties.

Second, assuming that the Legislature did not express its intent to include knowledge as an element of the crime, knowledge must be deemed to be an implied element anyway, because the nature of the crime is a serious crime involving a long sentence, and is more like a crime which is mala **in** se instead of mala prohibita. while the Legislature can enact statutory crimes regulating actions of a less serious nature which were not crimes at common law, and can in defining such crimes dispense with the mens rea requirement of specific intent, that power is limited. Where the conduct proscribed is of an infamous nature **and** the crime existed at common law, the better-reasoned authorities require that knowledge of the facts giving rise to a violation must be pleaded and proven even though omitted from the statutory description of the crime.

The third analysis assumes, arguendo, that the crime of attempted murder of a law enforcement officer can be divided into two components: 1) the attempt to kill, **and** 2) the identity of the victim, the first of which is **mala** in se and the second is **mala** prohibitum. Under such an analysis, although the Legislature has the power to criminalize **mala** prohibita conduct (and assumedly to create more serious levels of crimes otherwise cognizable at the common law which include additional factors associated with promoting the public welfare, without requiring any new mental state component to accompany that public welfare factor), that power is limited by the constitutional constraints of due process

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and equal protection. Petitioner submits that it violates due process and equal protection to read § 784.07(3) to permit a conviction for attempted murder of a law enforcement officer performing his duties--without any need to prove the Defendant's knowledge of the status of the victim as an officer of the law--while requiring such knowledge where the officer is off-duty at the time.

It was the Defendant's position throughout trial that he lacked knowledge that the undercover officers with whom he exchanged shots were police. He thought that the people coming at him with guns blazing after the deal soured were vicious drug dealers who were trying to steal the money they thought he had brought to the scene. That testimony was bolstered by the fact that the police were in unmarked cars and they did not wear typical police uniforms.

In a similar case which also involved an undercover drug investigation gone awry at the shopping center parking lot meeting between police and the target of their investigation, the Defendant argued on appeal, and the Fifth District "agree[d], that before he can be convicted of attempting to murder a police officer in the lawful performance of his duty, the State must allege and prove that he knew his victim was a police officer." Grinage v. State, 641 So. 2d 1362, 1364 (Fla. 5th DCA 1994). This Court in State v. Grinage, 656 So. 2d 457 (Fla. 1995) approved another aspect of the

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Fifth District's decision in that case[4], but did not reach the question whether the Defendant's knowledge of the victim's status is an element of the crime of attempted murder of a law enforcement officer.

The Third District below disagreed with the Fifth District in Grinage and "agree[d] with the First District in Carpentier v. State, 587 So. 2d 1355 (Fla. 1st DCA 1991) . . . and the cases that follow . . . , that the 'statute simply does not require that the offender have knowledge that the victim was a law enforcement officer.'" The Second and Fourth Districts do not appear to have addressed this question yet.

A. **The Legislatura Intended Knowledua to be an Element:**

The statute which gives rise to this conflict between the districts sets forth two sets of circumstances in which a Defendant "shall be guilty of a life felony." Subsection (3) of section 784.07 first states that it applies to "any person who is convicted of attempted murder of a law enforcement officer engaged in the lawful performance of his duty." That subsection then goes on to state that it applies as well to the second circumstance of someone "who is convicted of attempted murder of a law enforcement officer when the motivation for such attempt was related, all or in part, to the lawful duties of the officer."

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[4]The issue reached by this Court in Grinacre was the inapplicability of the attempted felony murder doctrine in cases involving the attempted murder of law enforcement officers following the decision in State v. Gray, 654 So. 2d 457 (Fla. 1995).

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The second circumstance under which the statute applies does not require that the law enforcement officer to have been engaged in the performance of his or her duties at the time of the crime. However, the second circumstance seems surely to require knowledge on the part of the Defendant that the victim was a police officer. If the victim was not known to be such an officer, then there could be no "motivation for such attempt . . . related . . . to the lawful duties of the officer." See § 784.07(3), Fla. Stat.

The First District in Carpentier explained one way in which the second circumstance could apply: "One scenario would be where the offender attempts to murder an officer, who was not then engaged in the performance of his duties, in order to 'get even' with the officer for the latter's earlier enforcement of the law against the offender." 587 So. 2d at 1357. Acknowledging the need for a nexus to be shown between the police officer's duties and the motivation of the Defendant under the second circumstance, the First District allowed as how "it may well be that this method of violation necessarily requires knowledge that the victim is a law enforcement officer." Id.

Under the first portion of the statute, however, there is no language so clearly supporting the argument that an element of the crime is the Defendant's knowledge of the victim's status as an officer. That part of the statute applies to "any person who is convicted of attempted murder of a law enforcement officer engaged in the lawful performance of his duty." The issue then boils down

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to the question whether the omission of any clearly-expressed[5] reference to the Defendant's awareness of the alleged victim's status reflects a legislative intent to permit a conviction under this statute where the Defendant assumedly is unaware that the target of his attempt is a police officer.

As a practical matter, this issue would seem to be limited to the circumstances where an undercover operation is involved and the target of the attempt is in plain clothes. The times when a uniformed officer is engaged in the lawful performance of his or her duty--but a Defendant who attempts the officer's murder is unaware of the officer's status--would seem to be few and far between.

Petitioner submits that the Legislature demonstrated in three ways its intent to include the Defendant's knowledge of the officer's status as an element of the crime where the officer is engaged in the lawful performance of his duties. First is the placement of the statute in the same section as that which pertains to assaults and batteries on law enforcement officers.

Section **784.07,** Fla. Stat., entitled "Assault or battery of law enforcement officers, firefighters, intake officers, or other specified officers; reclassification of offenses," provides for criminal penalties for "knowingly committing an assault or battery upon a law enforcement officer." Id. §(2). That subsection of the

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[5]As will be shown, Petitioner agrees with the Fifth District in Grinage, supra, "that section 784.07(3) is not silent as to the requirement of pens rea," even where the case involves an officer engaged in the lawful performance of his duties under the first portion of that statute.

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statute has been uniformly held to require specific intent; that is, the State must allege and prove that the Defendant knew that the victim of an assault or battery was a law enforcement officer. See Mordica v. State, 618 So. 2d 301, 305 (Fla. 1st DCA 1993); Kee v. State, 580 So. 2d 796 (Fla. 3d DCA), rev. denied, 591 So. 2d 184 (Fla. 1991); Evans v. State, 452 So. 2d 1093 (Fla. 2d DCA 1984).

An attempted murder is a level of assault. Had the Florida Legislature intended to omit the knowledge element from the crime of attempted murder of a law enforcement officer, it would not have simply added the next subsection (3) to the statute without stating that the mental state requirement of subsection (2) does not apply where the assault takes on the character of an attempted murder. Thus, by including the attempted murder crime in the statute which criminalizes the knowing assault or battery of a law enforcement officer, the Legislature demonstrated its intent to include the requirement of knowledge of the victim's status as an element of the attempted murder crime.

The second way in which the Legislature expressed its intent that knowledge be an element of the attempt to kill an officer in the line of duty is by expressly making knowledge an element of the crime of attempting to kill an off-duty officer. As noted by the First District in Carpentier, supra: "One scenario would be where the offender attempts to murder an officer, who was not then engaged in the performance of his duties, in order to 'get even' with the officer for the latter's earlier enforcement of the law against the offender.!! 587 So. 2d at 1357.

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Another possible scenario where the attempt to kill an off-duty officer is a crime under § 784.07(3) is where someone tries to kill an off-duty officer to prevent the officer from continuing with (or commencing) an investigation which the perpetrator fears. In such a case, it again would be necessary for the prosecution to prove knowledge of the officer's status by the Defendant, or there would be no "motivation for such attempt . . . related . . . to the lawful duties of the officer" within the meaning of the statute. See § 784.07(3), Fla. Stat.(emphasis added). The First District has conceded that where an off-duty officer is the target, "it may well be that this method of violation necessarily requires knowledge that the victim is a law enforcement officer." 587 So. 2d at 1357.

It would make no sense to hold that a Defendant's knowledge must be proven to support the conviction for the attempted murder of an off-duty officer, but that an attempt to kill an undercover officer whose status was not known to the Defendant is within the statute. If the mere status of the victim as a law enforcement officer were enough to trigger the statute (without regard for the Defendant's knowledge), then why would that status be insufficient and knowledge be required where the officer was off-duty when the attempt occurred? If the Legislature aimed to heighten the level of criminality of all attempts against the lives of police without regard to the mental state of the Defendant, then it would have refrained from adding the motivation element when the attempt is against an off-duty officer.

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At first one possible answer may seem to be that the Legislature perceived a need for greater protection against attempts on the lives of on-duty officers, such as the undercover officers involved in the present case. A proponent of the State's position might argue that elimination of the knowledge element gives protection to those whose status as police might not be so readily known to the Defendant.

But a law which punishes more severely the attempted killing of a victim whose status is utterly unknown to the Defendant will not provide any more protection to the police than before, because the Defendant who is ignorant of the status of his or her victim will not be dissuaded from acting by virtue of that status. Thus, the absence of the knowledge element cannot be inferred from a perceived desire to give more protection to the police.

If giving added protection to the police were considered to be so important a goal that the Defendant's knowledge of the victim's status was not to be an element of the crime, then such knowledge would likewise not be an element of the crime of attempting to murder an off-duty officer. Off-duty officers are as deserving of protection as those on duty at the time of an attempt, and arguably are in need of more protection from the law than on duty officers.

Officers who are on duty when an attempt is made on their lives are more likely to be within the protection of back-up forces, probably have quicker access to radio communications, and often are better armed for self-defense than are off-duty officers. Thus, if either category of potential victims is in need of greater

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protection than the other, the off-duty officer (whose partner is at home, whose radio and shotgun are in the cruiser, and whose shift commander and dispatcher are not expecting to hear from him in the next few moments or hours) needs the greater threat of a long sentence against one who would try to take his life. By adding the element of knowledge of the victim's status to an attempt against a more vulnerable off-duty target, the Legislature expressed its will that the mens rea requirement exist in all cases under the statute.

The third way in which the Legislature demonstrated the need to prove a Defendant's knowledge of the alleged victim's status was by use of the word "attempted" in the statute. The Fifth District so held in the Grinage case, supra:

> While the "knowingly committed" language [of subsection (2) of § 784.07 pertaining to assault and battery upon a law enforcement officer] is not repeated in subsection (3), it is replaced by the legally equivalent word "attempted." As Justice Overton observed in his dissenting opinion in Amlotte v. State, 456 So. 2d 448, 450 (Fla. 1984), "A conviction for the offense of attempt has always required proof of the intent to commit the underlying crime." . . . How could Grinage have intended to murder . . . a "law enforcement officer . . . engaged in the lawful performance of his duty," if he did not know that Boaz was, in fact, a police officer?

641 So. 2d at 1362 (emphasis in original).

Petitioner urges this Court to adopt the position of the Fifth District in Grinage, supra, "that section 784.07(3) is not silent as to the requirement of mens rea." See 641 So. 2d at 1365. Under that analysis the Third District erroneously affirmed the trial court's denial of Defendant's requested jury instruction on the

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element of knowledge of the victim's status, so the decision under review should be quashed and the judgment of conviction be vacated.

B. Knowledae is a Necessarily-Implied Element of the Crime Because it is a Serious Crime Primarily Mala In Se

Even if the Legislature had intended to enact this criminal statute and thereby to create a different crime of attempted murder which did not include a mens rea requirement of knowledge by the Defendant of the facts constituting the crime, such a legislative intent to omit the mental state would be ineffective because the crime is a serious one involving a long prison sentence upon conviction, and the overall nature of the crime is that of mala in se rather than mala grohibita. Even though a legislative body may criminalize certain conduct without regard to the Defendant's mental state, a mens rea element must be recognized as an implied element of the crime except where the crime is one involving only the regulation of the public welfare, or is otherwise an act more akin to mala prohibitum than that involved in the present case.

Although there is the authority of legislative bodies to enact laws which criminalize conduct which was not criminal at common Law, and to define those crimes as not involving the mens rea element of criminal intent, that class of crimes is limited. One such common class of crimes for which no mens rea element will be implied is that of "public welfare offenses," which criminalize offenses against the public health, safety, or welfare, and which often arise from negligence of failure to act rather than by the positive act of a Defendant. See aenerally Morisette v. United

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States, 342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 288 (1952).

The better-reasoned authorities recognize only the limited right of the Legislature to enact statutory crimes which do not include implied mens rea requirements. "[T]he existence of mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." State v. Smith, 151 So. 2d 889, 890 (Fla. 1st DCA), cert. denied, 157 So. 2d 818 (Fla. 1963). Accord., e.g., Liparota v. United States, 471 U.S. 419, 105 S. Ct. 1793, 85 L. Ed. 2d 434 (1985). But see State v. Gray, 435 So. 2d 816, 820 (Fla. 1983)(authorities which indicate that "common law crimes may not be defined in such a way to dispense with the element of specific intent . . . are suspect"); State v. Medlin, 273 So. 2d 394 (Fla. 1973)(indicating legislative silence on mental state element permits conviction without showing of criminal intent).

One of many cases discussing the historical limitations on the Legislature's creation of crimes which omit express references to the Defendant's state of mind is State v. Gruen, 586 So. 2d 1280 (Fla. 3d DCA 1991), rev. denied, 593 So. 2d 1951 (Fla. 1991). In Gruen, the court noted:

> The legislature's power is first limited by the nature of the proscribed conduct. In State v. Oxx, 417 So. 2d 287, 289 (Fla. 5th DCA 1982), the court explained the distinction between statutes codifying crimes recognized at common law and statutes that proscribe conduct not prohibited at common law. In the common law crimes[,] or crimes "mala in se", the intent for the offense is deemed inherent in the offense, even if the statute fails to specify intent as an element. . . . But crimes proscribing conduct not prohibited at common law[,] or crimes "mala prohibita", which usually result

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from neglect, do not require any criminal intent.

586 So. 2d at 1281.

Petitioner anticipates the argument (or concern by the Court) that the status of the victim as a law enforcement officer is not the issue which renders the attempted murder a common law crime, so the Legislature should be permitted to promote the public safety by increasing the severity of the crime of attempted murder where an officer is the victim without including knowledge as an element. In other words, the crime of attempted murder of a law enforcement officer arguably can be broken into two components: the attempt to kill and the status of the victim. It is not contested that intent to kill is an essential element of the first component. See State v. Gray, 655 So. 2d 552 (Fla. 1995). That component is doubtless of the mala in se character, rather than mala prohibitum.

On the other hand, the State may argue that the status of the victim did not matter at the common law, and there is no need to impose a separate mens rea requirement over an isolated element of the statutory crime which is more akin to mala prohibitum than the attempt to kill component. Should that argument be raised or should this Court have that question, Petitioner has two responses.

First, Petitioner submits that the statute should not be broken down into its components and a mental state element be imposed for some but not all the components. The overall nature of the statute is more akin to mala in se than to a public health law criminalized as mala prohibita. The State should have to establish the requisite mental state as to each of the aspects of a violation

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of the statute to obtain a conviction, not just to part of them.

Second, Petitioner submits that the mala in se-vs.-mala grohibita distinction is only a part of the analysis into what laws can dispense with the mental state requirement for conviction of crimes. Another very significant factor is the penalty imposed upon a violation of the statute.

In Staples v. United States, 511 U.S. _____, 128 L. Ed. 2d 608, 114 s. ct. 1793 (1994), the United States Supreme Court held that a conviction under the statute forbidding possession of an illegal firearm required knowledge by the Defendant of the characteristics of the firearm which made it illegal. Among the grounds for the holding, the Court noted the "potentially harsh penalty attached . . .--up to 10 years' imprisonment," and held as follows:

> Historically, the penalty imposed under a statute has been a significant consideration in determining whether the statute should be construed as dispensing with mens rea. Certainly the cases that first defined the concept of the public welfare offense almost uniformly involved statutes that provided for only light penalties such as fines or short jail sentences, not imprisonment in the state penitentiary.

128 L. Ed. 2d at 623.

In the present case, the minimum sentence upon conviction of attempted murder of a law enforcement officer is life without parole for twenty-five years. See § 775.0825, Fla. Stat. That penalty is so harsh that even a determination that the status of the victim was not part of the common law crime should not be determinative on the question whether a conviction can stand absent

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a finding of specific intent. The stakes are too large to uphold a law which dispenses with that basic mental state requirement on an essential aspect of the case. If Mr. Thompson is retried, he should be entitled to an instruction that his knowledge of the status of the alleged victim as a law enforcement officer is an element of the crime.

C. **Creation** of the Crime **Without Intent** as an Element **Would Violate** Due **Process** and **Equal** Protection:

It would be an irrational exercise of legislative power to create crimes with enhanced penalties for assault or battery under subsection (2) of § 784.07--which require knowledge of the victim's status as a law enforcement officer--and to create a third enhanced penalty offense for attempted murder under subsection (3), which inconsistently has no such mental state requirement.

On the other hand, it would be rational to legislatively create a crime with more serious punishment where the Defendant subjectively knows that his or her intended victim is an officer of the law. That rational relationship has been recognized by the courts in upholding enhancement of sentences departing from the guidelines' based on the Defendants' knowledge of the status of their victims.

In Viera v. State, 532 So. 2d 743 (Fla. 3d DCA 1988) rev. denied, 542 So. 2d 991 (Fla. 1988), the court held that the trial court correctly departed upward from a guidelines sentence because the Defendant knew that his victim was a police officer:

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> We reject Viera's argument that because he did not know at the outset that his intended victim was a police officer, his departure sentence cannot stand. Viera knew before the shooting and struggle that the victim was a police officer. Under these circumstances, the fact that the victim was a police officer was a valid reason for departure. . . . Bair v. State, 466 So. 2d 1144 (Fla. 3d DCA 1985), aff'd, 483 So. 2d 423 (Fla. 1986) . . . established that a defendant "who chooses to make a police officer acting the line of duty the victim of his crime is to be treated differently than a defendant who commits the same crime upon an ordinary citizen.

523 So. 2d at 745 (emphasis added). Ipso facto, where knowledge of the alleged victim's status is absent, it is not fair to impose a harsher penalty upon a Defendant than where the victim is an ordinary citizen.

It likewise would be inconsistent with due process and equal protection to treat attempted murders of officers engaged in the performance of their duties differently from attempts to kill off-duty officers. As noted in section A., above, if giving added protection to the police were considered to be so important a goal that the Defendant's knowledge of the victim's status was not to be an element of the crime, then such knowledge would likewise not be an element of the crime of attempting to murder an off-duty -officer. Off-duty officers are as deserving of protection as those on duty at the time of an attempt, and arguably are in need of more protection from the law than on-duty officers, due to their distance from backup personnel and their equipment and weapons, and absence from the watchful eyes of those to whom they report.

Thus, there would be no legitimate governmental objective in treating the two classes of cases differently and constitutional

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limitations upon the Legislature's power preclude enforcement of a law which purports to selectively omit the important mental state requirement. The trial court erred in refusing to instruct the jury on the element of knowledge, the Third District erroneously affirmed same, so the decision below should be quashed and the judgment of conviction be vacated.

II.

THE TRIAL COURT ERRONEOUSLY DENIED DEFENDANT'S REQUESTED INSTRUCTION ON THE VOLUNTARY INTOXICATION DEFENSE

There was ample evidence from which the jury could have found that the Defendant Darryl Thompson was intoxicated on cocaine prior to arriving at the scene of the reverse sting transaction, and further evidence from which it could be found that he became more intoxicated while there before the trouble started. He testified that he had snorted more than one-half gram of cocaine during the time that he and his co-defendant were driving to the mall parking lot where the transaction was to occur. The Defendant further testified at to the adverse effects which ingesting that cocaine had upon him. Those effects included effects upon his thinking process.

Mr. Thompson testified that the cocaine made him "real hyper, nervous and shaky." Tr-1105. He testified that he was not thinking real clearly due to snorting the cocaine he brought to the scene, "was speeding a little bit," and "wasn't really in the right state of mind." Tr-1106. Further evidencing the intoxicating effect that

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the drug had on him, it took Mr. Thompson a long time to find the transaction location, because the cocaine impaired his ability to remember the directions he was given over the telephone and affected his ability to find the place. Tr-1108.

The State argued below (and no doubt will argue again here) that the free gram of cocaine given to Mr. Thompson by the CIs two days earlier must have been exhausted before the subject encounter in the Shooters parking lot. However, at best for the State, the evidence of the use of the remainder of that gram of cocaine was in conflict and the jury should have been permitted to decide the issue. Even if the jury was for some reason not entitled weigh the evidence, however, such impeachment should not be held to eliminate entitlement to a voluntary intoxication instruction because of other proof in the record.

In addition to his testimony that he was high on the cocaine the informants gave him before arriving upon the scene of the reverse sting operation, the Defendant testified that he snorted three more "hits" of cocaine from the kilo which was being offered to him there, and he orally consumed a large rock of cocaine from that kilogram after his arrival at the transaction location. Therefore, even if the jury was not entitled to believe the Defendant's testimony that he was high on cocaine when he arrived (by reason of the State's attempted impeachment of the Defendant concerning the likelihood that the cocaine was exhausted well prior to his arrival upon the scene), the jury could well have found that **the Defendant became sufficiently intoxicated while sitting in the**

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informants' van to negate the specific intent and premeditation elements of the crimes with which he was charged.

Voluntary intoxication is a defense to the premeditation element which is present in attempted first degree murder, and is a defense to the specific intent element of crimes such as robbery, with which the Defendant was charged. See Gardner v. State of Florida, 480 So. 2d 91 (Fla. 1985). See also generally, e.g., Evans v. State, 452 So. 2d 1093, 1094 (Fla. 2d DCA 1984)(intoxication is defense to specific intent element of battery on a law enforcement officer). Upon a showing of facts from which the jury could find that the Defendant was intoxicated at the time of the requisite mental state, that Defendant is entitled to a jury instruction on the voluntary intoxication defense. Id.

Counsel for the Defendant Thompson asked for a jury instruction on the defense of voluntary intoxication on the issue of forming specific intent. Tr-1245. Judge Rosinek denied the requested instruction on the ground that the evidence did not support same. Tr-1249. Additionally, His Honor stated that he found that the defense was untimely, having been made after the defense rested. Tr-1250. The trial court erred in those rulings, the Third District erroneously affirmed same, so the decision below should be quashed and the judgment of conviction be vacated.

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111.

THE TRIAL COURT ERRONEOUSLY PRECLUDED THE DEFENDANT FROM TESTIFYING ABOUT STATEMENTS MADE TO HIM BY THE CONFIDENTIAL INFORMANT

The trial court erroneously sustained the State's objections to statements made to the Defendant by the confidential informant, Camacho. Those objections were made only upon grounds of hearsay. The statements made by CI Camacho were admissible as nonhearsay, were also admissible under at least one exceptions to the hearsay rule, and for the third reason that the hearsay objection was waived.

The State objected to Mr. Thompson testifying as to statements made by Mr. Camacho during that telephone conversation on the ground that it was hearsay. Tr-1084. The prosecutor argued that Mr. Camacho's extra-judicial statements were inadmissible because he was not a co-conspirator with Mr. Thompson, but was "an agent of the police department." Tr-1085. The State's objection was sustained; the trial court ruling that Mr. Camacho's out-of-court statements were hearsay which fell within no recognized exception. Tr-1087-88. The trial court continued to sustain the State's objections to the statements made by Mr. Camacho. Tr-1090.

First, the statements of Camacho were admissible as nonhearsay evidence, offered--not to prove the truth of the matter asserted--but as circumstantial evidence of the Defendant's state of mind. Anything and everything that Camacho said to the Defendant during the negotiations which led up to the reverse sting operation were calculated to have an effect upon the Defendant's state of mind and

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to induce him to act upon those statements. The Defendant's mental state and intent was, of course, highly relevant to the issues of premeditation and specific intent to commit robbery. Therefore, the things that Camacho said to Mr. Thompson could have and should have been introduced to show the effect that the statements had upon the Defendant when he heard them.

For example, had Camacho told the Defendant that the fictional drug suppliers were likely to be armed, the Defendant's hearing of that statement would very possibly result in a mental state which lead to the Defendant arming himself without premeditating murder of anyone, merely as a matter of self-defense. other things which the CI may have said to the Defendant concerning the fronting of the cocaine by the suppliers would have negated the specific intent element of the robbery count.

An exception to the hearsay rule under which the statements of Camacho to the Defendant should have been rendered admissible, is that those statements were admissions of a party opponent, the State. In the usual case in which statements made by a confidential informant are held to be inadmissible hearsay, they are being offered by the prosecution through the testimony of police officers concerning the informant told the police. However, in the present case, the statements of the informant was being offered--not by the party employing the informant--but by the adverse party, the Defendant.

The State in this case already had characterized the confidential informants as its agents. When the State objected to

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Mr. Thompson testifying as to statements made by Mr. Camacho during that telephone conversation on the ground that it was hearsay, the prosecutor argued that Mr. Camacho's extra-judicial statements were inadmissible because he was not a co-conspirator with Mr. Thompson, but was "an agent of the police department." Tr-1085. If the CI was the agent of the police, then what he said to the Defendant out of court was admissible as **an admission under** § 90.803(18)(d), Fla. Evid. Code.

Finally, the hearsay objection was waived by the State's failure to object to other questions which elicited testimony from the Defendant as to what Mr. Camacho had told him about the drug deal in question. For example, in response to questions to which the State posed no objection, Mr. Thompson testified that Mr. Camacho proposed that the Defendant be given one-half kilogram of cocaine on consignment to sell and support his habit, and another half kilo to sell for Mr. Camacho. Tr-1092. Thus, the hearsay objection could not thereafter have been asserted.

Therefore, there are at least three reasons why the things that Camacho said during the negotiations which lead up to the arrest of the Defendants were admissible, so the decision of the Third District affirming the judgment on that ground should be quashed and the judgment based on the erroneous exclusion of that testimony should be vacated.

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IV.

THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR BY ADVISING THE JURY THAT A DESIRE TO HEAR TESTIMONY FROM THE DEFENDANT WAS "THE AMERICAN WAY," THEREBY INDICATING A LACK OF PATRIOTISM IF THE JURY DID NOT EXPECT THE THE DEFEND&NT TO TESTIFY ON HIS OWN BEHALF

During voir dire, Judge Rosinek tried to explain the Defendant's right to refrain from taking the witness stand, and to condition the jurors that their desire to hear from the defense should not work to the prejudice of a silent defendant. However, this well-intentioned explanation prejudiced the Defendant, by effectively characterizing jurors as unpatriotic if they did not subconsciously demand an explanation from the Defendant.

Using the example of a parent who wants to hear from each of his two children when one of them breaks a vase and one points the finger at the other, Judge Rosinek prejudicially characterized the desire to hear both sides of an issue as "the American way." He did it in the following manner:

> The vase is broken. You want to know who did it, right? How many of you [jury panel members] would want to know what happened? How many would want to know what happened?
>
> Okay. So what you want to do is you want to hear both sides, both of the kids, or you ask just one?
>
> UNIDENTIFIED JUROR: Both.
>
> THE COURT: You want to hear both sides. Isn't that the American way, to hear both sides? I want to hear both sides of the question, right.
>
> Well, let's go back to what I said before [about the Defendant's lack of a burden of proof] . . . .

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Tr-48. (emphasis added).

His Honor then went on to explain that this natural expectation on the part of the jury would not necessarily be fulfilled during the course of a criminal trial. Tr-48-50. While His Honor explained the Defendant's lack of any burden of proof and to instruct the jury that no adverse inference could be drawn from a Defendant's failure to take the stand, the venire must have been left with the understanding that they were un-American if they did not continue to want to hear from the defense, and that there was something un-American about the process which would allow the Defendants to remain silent.

Judge Rosinek erroneously confused the jury by expressing that there was something un-patriotic about the Defendant's right to remain silent and to refrain from testifying. That is as prejudicial as any remark could be. Therefore, the remark from the bench constituted prejudicial error of a fundamental nature, and it deprived the Defendant of his right to a fair trial, so his convictions and sentence should be reversed.

V.

THE TRIAL COURT ERRONEOUSLY DENIED DEFENDANT'S MOTION FOR MISTRIAL FOLLOWING DETECTIVE LANIER'S IRRELEVANT AND PREJUDICIAL TESTIMONY THAT HE WAS AFRAID

The trial court erroneously denied Defendant's motion for mistrial made during the testimony of Detective Zanier. R-827-30. That motion was based upon the detective's irrelevant and highly

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prejudicial testimony that he was put in fear for his life by the Defendant's actions. The alleged fear of the witness was not relevant to any material issue because both Defendants waived their request for an instruction on the lesser included offense of aggravated assault as to each of the alleged victims.

During the testimony of Detective Lanier, Judge Rosinek sustained an objection to one question from the State regarding the detective's feelings when he saw the Defendant with a weapon; after further argument from the State that the witnesses' feelings were relevant to the lesser included offense of aggravated assault, Judge Rosinek indicated that he would permit questioning concerning the alleged victim's feelings of fear. Tr-808. Thereupon, both Defendants' attorneys waived their request for an instruction on the lesser included defense of aggravated assault as to each of the alleged victims, and the Judge reinstated his ruling that the detective's feelings of fear were not admissible. Tr-809-10.

Upon cross examination, Detective Lanier admitted that he initially had denied having firing his shotgun at the scene of the subject transaction, and had been administratively disciplined for his actions on the scene. Tr-814-15. upon redirect by the State, Detective Lanier was asked to explain why he initially denied discharging his firearm. Tr-826. Over the Defendant's objections that the question called for a narrative response, the witness testified: "I didn't expect when somebody looked me in the eye and pulled a trigger that I would duck and look for cover ~~and be~~ afraid. Tr-827(emphasis added).

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At that point, counsel for Mr. Thompson moved for a mistrial based upon the court's prior ruling that the detective's feelings of fear were irrelevant and inadmissible. Tr-827-28. Judge Rosinek denied the Motion for Mistrial, holding is essence that the defense had opened the door to the officer's fear by questioning him on cross examination concerning his lying to his superiors about discharging his shotgun. Tr-830.. Tr-830.

Judge Rosinek ruled that the detective's fear was admissible as an explanation for why he had denied firing his weapon, and the witness provided the following in completion to the answer he gave to that question:

> I didn't want to have to admit to another investigator that I was so scared that I cowered behind a car and accidentally fired my weapon up into the air where it did no good. So, initially, I told him I didn't shoot because the round didn't go anywhere but up in the air, and it had no effect on the case anyway. But in retrospect, afterwards, when they came and asked me again, I had to admit that I fired the weapon.

Tr-833(emphasis added).

Detective Zanier's testimony that he was in fear for himself was especially prejudicial, in that he characterized himself (and was perceived by the jury) as a big, brave officer, thereby greatly magnifying the level of fear which the detective suggested should have been engendered in the average citizen from the Defendant's actions, which was wholly irrelevant to the charge of attempted murder. The error was compounded by the testimony from the officer after the ruling: "I was so scared that I cowered behind a car and

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accidentally fired my weapon up into the air where it did no good." The trial court should have granted a mistrial based upon the prejudice which resulted from that testimony, and its failure to do so constitutes reversible error.

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CONCLUSION

WHEREFORE, the trial court having erred in failing to instruct the jury as to the knowledge element of the attempted murder of law enforcement officer charge, having erroneously failed to instruct the jury on the voluntary intoxication defense, having erroneously precluded Defendant from testifying as to matters he was told by CI Camacho, having fundamentally erred by mischaracterizing a desire to hear testimony from the Defendant as "the American way," and having erroneously denied Defendant's motion for mistrial; and the Third District having erroneously affirmed on all those grounds, the decision under review should be quashed and the judgment of conviction should be vacated.

Respectfully submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof was served by mail, upon Consuelo Maingot, Esq., Assistant Attorney General, Office of the Attorney General, Department of Legal Affairs, P.O. Box 013241, Miami, FL 33101, on this, the 24th day of June, 1996.

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