8-12

IN THE SUPREME COURT OF FLORIDA

CASE NO. 87,505

DARRYL THOMPSON,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

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

BRIEF OF RESPONDENT ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

CONSUELO MAINGOT
Assistant Attorney General
Florida Bar No, 0897612
Office of the Attorney General
Department of Legal Affairs
The 110 Tower SE 6th Street
Ft. Lauderdale, Florida 33301
(954) 712-4600 Fax: 712-4706

TABLE OF CONTENTS

Pages

TABLE OF CITATIONS ii

INTRODUCTION 1

STATEMENT OF THE CASE AND FACTS 1

QUESTION PRESENTED 15

SUMMARY OF ARGUMENT 16

ARGUMENT 17

WHETHER, IN A PROSECUTION FOR ATTEMPTED MURDER OF A LAW ENFORCEMENT OFFICER ENGAGED IN THE LAWFUL PERFORMANCE OF HIS/HER DUTIES UNDER F.S. 784.07(3) (1993), THE DEFENDANT'S KNOWLEDGE OF THE VICTIM'S STATUS AS A LAW ENFORCEMENT OFFICER IS *AN* ELEMENT OF THE CRIME WHICH MUST BE ALLEGED AND PROVED BY THE STATE?

CONCLUSION 38

CERTIFICATE OF SERVICE 38

TABLE OF CITATIONS

CASES **PAGES**

Alfonso v. State,
661 *So.* 2d 308 (Fla. **3d** DCA 1995) 14

Ansin v. Thurston,
101 So. 2d 808 (Fla. 1958) 19

Be13 v. State,
394 So. **2d** 979 (Fla. 1981) 28

Bryant v. State,
412 So. 2d 347 (Fla. **1982)** **28**

Camentier v. State,
587 So. 2d 1355 (Fla. **1st** DCA 1991) 22, 24, 27

Duest v. **State,**
462 So. 2d 446 (Fla. **1985)** **36, 37**

Evans v. State,
625 *So.* 2d 915 (Fla. 1st DCA 1993) 27

Fuller v. State,
637 ***So.*** **2d 911** (Fla. **1994)** **18**

Grinage v. State,
641 So. 2d 1362 (Fla. 5th DCA 1994) 18, 25, *26*

Hester v. State,
503 So. **2d** 1342 (Fla. 1st DCA 1987) 29, 31

Isaac v. State,
626 So. **2d** 1082 (Fla. 1st **DCA** 1993),
review *denied,* 634 So. **2d** 624 (Fla. 1994) *27*

Jacobs v. State,
396 So. **2d** 1113 (Fla. 1981),
cert. denied, 454 U.S. ,933,
102 S. Ct. 430, 70 L. **Ed. 2d** 239 (1981) 28, **31**

TABLE OF CITATIONS, continued

Lee v. State,
664 So. 2d 330 (Fla. 3d DCA 1995) 14

Love v. State,
583 So. 2d 371 (Fla. 3d DCA 1991) 34

Richards v. State,
643 So. 2d 89 (Fla. 3d DCA 1994) 22

Salvatore v. State
366 So. 2d 745 (Fla. 1978),
cert. denied, 444 U.S. 885,
100 S. Ct. 177, 62 L. Ed. 2d 115 (1979) 36, 37

Solomon v. State,
596 So. 2d 789 (Fla. 3d DCA 1992) 36, 37

, a e v . iGuilio,
491 So. 2d 1129 (Fla. 1986) 33, 37

State v. Gray,
654 So. 2d 552 (Fla. 1995) 19

State v. Grinage,
656 So. 2d 457 (Fla. 1995) 26

State v. Grissom,
492 So. 2d 1324 (Fla. 1986) 34, 35

State v. Hayes,
333 So. 2d 51 (Fla. 4th DCA 1976) 19

State v. Iacovone,
660 So. 2d 1371 (Fla. 1995) 27

State v. Kearse,
491 So. 2d 1141 (Fla. 1986) 33

State v. Wilson,
No. 86,680 (Fla. July 3, 1996) 21

TABLE OF CITATIONS, continued

Thompson v. State,
667 So. 2d 470 (Fla. 3d **DCA 1996)** 13, 14, 18

Wilson **v. State,**
660 So. 2d 1067 (Fla. 3d DCA 1995) 14, 20

OTHER AUTHORITIES

Fla. Std. Jury Instr. 3.04(g) (Crim.) 28
Fla. Std. Jury Instr. (Crim.) 937 23
Rule 3.390(1), Fla.R.Crim.P. (1992) 21
Sec. ***90.802***, Fla. Stat. 32
Sec. 90.803(18)(e), Fla. Stat. 32
Sec. 775.0825, Fla. Stat. 24, 25
Sec. 777.04, Fla. Stat. 11, 24
Sec. 782.04(1) **(a)**, Fla. Stat. 11, 22, ***23***, 24
Sec. 784.07(2), Fla. Stat. (1993) 26
Sec. 784.07(3), **Fla. Stat.** (1993) . 15, 16, 17, **21,** *23*, 24, *26*

XNTRODUCTION

Respondent, THE STATE OF FLORIDA, was the prosecution in the trial court and Appellee in the District Court of Appeal of Florida, Third District. Petitioner, **DARRYL** THOMPSON, was the Defendant in the trial court and the Appellant in the District Court **of** Appeal. The parties shall be referred to as they stand before this Court. The **symbol** "R." designates the original record on appeal, and the symbol "T." designates the transcript of the trial court proceedings.

STATEMENT OF THE CASE AND FACTS

On July 29, 1992, the Petitioner along with his three codefendants Miller, Roux and White, **was** charged by Information with five counts of attempted first degree murder of law enforcement officers Lanier, Alexander, Gomer, Diaz, and Asada respectively. (R. 1-5). The Petitioner and codefendants were also charged with seven additional counts of armed trafficking in cocaine, armed robbery, conspiracy to traffic in cocaine, conspiracy to commit a first degree felony, and unlawful possession

of a firearm by a convicted felon. (R. 6-9, 11). Codefendants Roux and White were removed from the Information as having pled to the charges and the unlawful possession counts against the Petitioner and Miller were severed. (T. 8-9). These charges arose out of a "reverse sting" operation involving undercover police, confidential informants and the defendants in a transaction in which the Petitioner was to purchase a kilogram of cocaine from the undercover officers on July 8, 1992, but which erupted instead into a shoot-out resulting in the arrests.

The case was tried to a jury before the Honorable Jeffrey Rosinek from February 14 to 22, 1994. (T. 1-1448). During the preliminary charge at voir *dire* the trial court explained the Petitioner's right not to testify, stressing that a defendant in our judicial system is not required to prove anything. (T. 46-47). The trial court went on to explain that the presumption of innocence attaches to the defendant and it is the State's obligation to prove beyond a reasonable doubt that he is guilty. (T. 46). The trial court explained the difference between the fairness and impartiality of a criminal trial and a parent's exercise of fairness between children whom the parents are disciplining for the destruction of a valuable vase:

THE COURT: Let me give you an example. . .

****

The vase is broken. You want to know who **did** it, right? **How** many of you would want to know who did it? How many would want to know what happened?

Okay. Now, 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 just said before. Didn't **I** just say, Do you understand that the defendant **in** a criminal case is required to prove nothing. He **does** not have to prove his innocence. He doesn't have to furnish any evidence whatsoever, He doesn't have to say hello. He does not have to take the witness stand.

And, what's more, if you were selected and **you** go in the jury room, if he didn't say anything or either of them didn't say anything, you can never use it against them because the constitution of Florida and the United States say they don't have **to.**

Do you understand that?

****

THE COURT: Now we're **talking** about **a** concept of law, justice. **Here** in the United States, they don't have to say anything.

Do you understand?

You may want to hear it, I may want to hear it. But do you have a right to hear it?

PROSPECTIVE JURY PANEL: No.

(T. 46, 48-49), Defense counsel failed to object either contemporaneously or prior to accepting the jury panel. (T. 48, 261-262). Defense counsel did ask the jurors on *voir dire* whether they understood that an impartial trial by an unbiased jury was a constitutional guarantee, and whether they could reach a verdict based solely upon the evidence introduced at trial, and was answered in the affirmative. (T. 195-196). Defense counsel continued probing on the issue of fairness in judging a defendant accused of drug dealing and as to the presumption of innocence. (T. 207-208, 214-215).

During opening statements the Petitioner did argue as a theory of defense that the evidence would show that none of the parties in the transaction were identifiable as police officers. The Petitioner made no assertion that voluntary cocaine intoxication prevented him from having the requisite state of mind to commit the crimes charged against him. (T. 315-321, 318).

At trial, Detective Lanier testified that he was the passenger in a blue Camaro undercover police surveillance vehicle which was located outside the perimeter of the drug transaction. Their task was to block the escape of the subjects after the sting operation was concluded. (T. 776-7771, He was wearing a black ball cap with POLICE written in silver letters across it and wore a black tee shirt with POLICE in silver letters on the back and front under a black bulletproof vest with POLICE written in fluorescent gold letters five inches high. He wore his badge on the front of his vest. (T. 777). As his vehicle closed in towards the informant's van, Detective Lanier saw the Petitioner bring a gun up towards the van's open passenger door. (T. 782). Lanier's vehicle pulled up close to a red Nissan and he exited the vehicle from the passenger side, closest to the van about fifteen (15) yards from the Petitioner's position. (T.783-784). As he turned, the Petitioner followed with his gun the direction taken by the informant who was running away from him. (T. 785). Detective Lanier had cleared the door of his vehicle and took two steps towards the Petitioner yelling "Police, freeze." (T. 786). He could not recall whether any other law enforcement officers were identifying themselves (T. 786-787). At that point the Petitioner continued turning until he was in line with Detective Lanier, and Lanier described what

happened next:

> Q. (State Attorney) What did you *see* him **do?**
>
> A. **I** made eye contact with him. He looked at me. He brought the gun up and fired it.
>
> Q. How did you feel at that point?
>
> **A.** Scared the hell out of me
>
> MR. LOHLEIN: (Defense Counsel) Objection, your Honor.
>
> THE COURT: Do you have a legal ground? State your legal reason.
>
> MR. LOHLEIN: Your Honor, it's not an element of any of the crimes charged here, his feelings.
>
> THE COURT: I will sustain it.

(T. 787-788). The Petitioner did not move for a mistrial at that time. (T. 788, 810). At sidebar the State argued that both defendants had asked for instruction on the lesser included offense **of** aggravated assault on a law enforcement officer (LEO), and that the State should be permitted to inquire as to how the officer felt since ***it*** was a element of that offense. (T. 798-799). The Petitioner offered to withdraw that instruction, but the

codefendant would not, so the trial court ruled that as long as the instruction on the **lesser** included offense of aggravated assault on a LEO was to be included as to one defendant, the State would be permitted its inquiry. (T.800-808). Following a discussion, both defendants waived the lesser included instruction for aggravated assault and the trial court ruled that the State could not inquire as to Lanier's state of mind. (T.809-810).

On cross examination of Detective Lanier, Defense Counsel attacked the witness' credibility **by** inquiring into Departmental disciplinary procedures against him for initially denying that he had discharged his weapon at the **scene** and later admitting to having fired the weapon, **(T.** 813-816, 821-822). On redirect examination, the State asked Detective Lanier:

> BY MS. GLICKMAN (State Attorney):
>
> ***Q.*** Would you please explain to the members of **the** jury why you initially denied discharging your firearm.
>
> **A.** Yes. As a police officer, and especially one who's been in law enforcement for a few years, we all have images of ourselves as being protectors of the innocent.
>
> MR. LOHLEIN: Objection, your Honor. The question calls for a narrative response.

THE COURT: I'll allow him to answer it. Get to the point, please,

THE WITNESS: **Anyway,** we think we're being brave **cops** --

MR. LOHLEIN: **Objection** to what we think.

THE WITNESS: **I** think and have thought that I was a big, brave officer who, when it came down to going toe to toe with a bad guy --

MR. LOHLEIN: Objection, your Honor. If we could relate it to this case and not have a narrative response.

THE COURT: **Be** a bit more specific as to this case. Thank you.

THE WITNESS: **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.**

MR, LOHLEIN: Objection, your Honor. Move to strike. Move for a mistrial on the previous ruling, your Honor.

(T. 826-827). At sidebar the trial court denied Petitioner's motion for mistrial on grounds that the defense had opened the door on the issue **of** why Lanier lied about discharging his weapon and the witness was permitted to explain. (T. 830). The witness was then permitted to finish his explanation. (T. 833). The Petitioner did not request a curative instruction. (T. 833).

The Petitioner testified that he was in Dade County Jail during 1991 and that the confidential informant (CI) in this case, Luis Camacho, was his cell mate for a month during that time. (T. 1080). During direct examination, defense counsel attempted on numerous occasions to have the Petitioner testify as to what Luis Camacho said to him. On each of those occasions the State objected and the trial court sustained the objections on the basis of inadmissible hearsay, (T. 1082, 1082, 1082, 1083, 1084, 1090, 1090, 1091, 1101, 1102, 1107, 1108). The Petitioner was permitted to testify to what he did, not to what someone else (Luis Carnacho) said to him. He successfully told his version of the events to the jury indicating that he was snorting cocaine during the entire transaction (to support his theory of involuntary intoxication), that he was acting upon the instigation of the confidential informant (entrapment), and that he did not know that he was shooting at police officers. (T. 1080-1115).

After the Petitioner rested, at the jury charge conference defense counsel requested an entrapment instruction. (T. 1228). Discussion followed and the trial court would not permit defense counsel to withdraw the entrapment defense until he heard argument on the issue even though the court was of the impression that based

on the case law and evidence presented, the Petitioner was not entitled to an entrapment defense. (T. 1230). The State was permitted to bring rebuttal witnesses to counter the Petitioner's testimony in support of his entrapment defense -- that he had an uncontrollable addiction and was primarily a user rather than a seller. (T. 1211-1214). The trial court then asked:

> THE COURT: Your theory of the defense, I'm not too sure what you're doing with that.
>
> MR. LOHLETN: It will **probably** go along with the other requested instruction, which I think you've allotted.
>
> THE COURT: The other one -- I know what you're talking about. I'm not quite sure I understand. It may **be** the lateness of the hour for me, **but I don't know what theory of defense that you're going to ask** for, **a general** theory **of defense.**

(T. 1232). The court recessed for the weekend at that point. When the trial resumed, defense counsel requested a jury instruction as to **a** voluntary intoxication defense. (T. 1244). The trial court heard argument from defense counsel stating facts supporting the instruction and denied the requested jury instruction stating:

> THE COURT: No problem, Got it. Got your record. Thank you.
>
> I'm finding as a defense it's untimely. This is after you have rested. The State had rested initially, and now it's before rebuttal. And at best, I find it's improper, unreliable defense at this point in time.

(T. 1244-1250). A discussion of the jury instructions for attempted murder of a law enforcement officer followed. (T. 1268-1280). The parties agreed that jury instructions on attempted first, degree murder of a law enforcement officer under Florida Statute 782.04(1)(a) and 777.04 would be given. (T. 1285, 1410). Defense counsels both declined instructions on the lesser included offenses of aggravated battery on a LEO which includes the element that a Petitioner must know that the victims are LEOs. (T. 809-810, 1278).

Following closing arguments the trial court read jury instructions on attempted murder first degree of a LEO. (R. 236; T. 1374). The trial court also instructed the jury on the lesser included offenses of attempted murder first degree, those being attempted murder second degree and attempted manslaughter on a law enforcement officer. (R. 247-249; T. 1387-1389).

The jury returned a verdict of guilty on Count 1 of the Information -- attempted first degree murder of Detective Lanier with a firearm, not guilty as to Counts 2, 3, 4 and 5, guilty as to the lesser included offense of armed trafficking in cocaine Count 6 possession of cocaine, guilty as to Count 7 armed robbery with a firearm, guilty as to Count 8 conspiracy to traffic in cocaine, and not guilty of Count 9 of the Information. (R, 222-230; T. 1439-1441). Judgment of guilt was entered on Counts 1, 6, 7, 8 of the Information. (R. 264-265; T. 1443-1444). The Petitioner scored a recommended sentence of 22 to 27 years and a permitted sentence of 17 to 40 on his Category 1 sentencing guidelines. (R. 289; T. 1451). On March 17, 1994, the trial court sentenced the Petitioner on Count 1 to forty (40) years with a twenty-five (25) year minimum mandatory term, on Count 7 to thirty (30) years with a three (3) year minimum mandatory term consecutive to Count 1, on Count 6 to five (5) years, on Count 8 to fifteen (15) years with a minimum mandatory term of fifteen (15) years concurrent to Counts 1 and 7, and on severed Count 11 to which he pled guilty he was sentenced to thirteen (13) years incarceration, all concurrent to each other except as indicated in the consecutive minimum mandatory sentences. (R. 283-288; T. 1489-1491).

The Petitioner appealed his conviction, alleging as error in

his initial brief and supplemental brief the following:

> The trial court erroneously denied Petitioner's requested instruction on the voluntary intoxication defense.
>
> The trial court erroneously denied Petitioner's requested instruction concerning knowledge of the alleged victims' status as **police** officers on the attempted murder of law enforcement officers counts.
>
> The trial court erroneously precluded Petitioner from testifying about statements made to him by the confidential informant Camacho.
>
> The trial court committed fundamental error by advising the jury that a desire to hear testimony from the Petitioner was "The American Way."
>
> The trial court erroneously denied Petitioner's motion for mistrial following Detective Lanier's irrelevant and prejudicial testimony that he was afraid.
>
> The trial court erroneously instructed the jury on the crime of attempted felony murder.
>
> The trial court erroneously sentenced Defendant to consecutive minimum mandatory terms on two counts arising from the same criminal episode.

In its opinion of January 31, 1996, the Third District Court of Appeal dealt with the ramifications flowing from judicial decisions that various criminal convictions were for nonexistent offenses. Thompson v. State, 667 So. 2d 470 (Fla. 3d DCA 1996)

The Third District found that upon reversal of the attempted first-degree murder conviction on grounds that one of the crimes that went to the jury, attempted felony murder, did not exist, there was no impediment to a new trial on the charge of attempted premeditated murder where the facts could support a guilty verdict on that charge. The district court specifically noted that the opinion in Thompson differed from its opinions in Lee v. State, 664 *So.* 2d 330 (Fla. 3d **DCA 1995)** *question* ***certified,*** Alfonso v. State, 661 ***So.*** 2d 308 (Fla. 3d DCA 1995) *question certified,* and Wilson v. State, 660 ***So,*** 2d 1067 (Fla. 3d DCA 1995) *question certified.* In those cases the court refused to reduce the convictions for attempted felony murder to a lesser included offense **or** remand for a new trial on a lesser included offense because it found that there **could** be no lesser included offense to the now non-existent crime of attempted felony murder. Thompson v. State, 667 So. 2d at **471.** Furthermore, the Third District rejected the Petitioner's contention that the trial court erroneously denied his requested jury instruction that it is an element of the crime of attempted murder of a law enforcement officer that the Petitioner know that the victim is a police officer, **and** found the other grounds urged for reversal to be without merit. This petition for discretionary review followed.

QUESTION PRESENTED

WHETHER, IN A PROSECUTION FOR ATTEMPTED MURDER OF A LAW ENFORCEMENT OFFICER ENGAGED IN THE LAWFUL PERFORMANCE OF HIS/HER DUTIES UNDER F.S. 784.07(3) (1993), THE DEFENDANT'S KNOWLEDGE OF THE VICTIM'S STATUS AS A LAW ENFORCEMENT OFFICER IS *AN* ELEMENT OF THE CRIME WHICH MUST BE ALLEGED AND PROVED BY THE STATE?

SUMMARY OF THE ARGUMENT

Section 784.07(3), Fla. Stat. pertains to attempted murder of a law enforcement officer engaged in the lawful performance of his duty and does not require that the offense be committed "knowingly", rather it serves as an enhancement of the conviction for attempted murder if the victim happens to be a law enforcement officer engaged in the lawful performance of his duties or if the motivation for the attempt was related to the lawful duties of the officer,

ARGUMENT I

WHETHER, IN A PROSECUTION FOR ATTEMPTED MURDER OF A LAW ENFORCEMENT OFFICER ENGAGED IN THE LAWFUL PERFORMANCE OF HIS/HER DUTIES UNDER F.S. 784.07(3) (1993), THE DEFENDANT'S KNOWLEDGE OF THE VICTIM'S STATUS AS A LAW ENFORCEMENT OFFICER IS *AN* ELEMENT OF THE CRIME WHICH MUST BE ALLEGED AND PROVED BY THE STATE?

This case is before the Court for review of alleged conflict between the district courts and this Court on the issue of whether it **is** an element of the crime of attempted murder of a law enforcement officer that the defendant know that the victim is a **police officer.** The **State** submits **Section** 784.07(3) **deals** with enhancement of the offense against a **law** enforcement officer for attempted first degree murder and does not require that the defendant know the victim's status to be subject to the enhanced penalty.

The Petitioner has further asserted that this Court should exercise **its** discretionary jurisdiction to review the trial court's rulings and the Third District's decision affirming the denial of **a** jury instruction on voluntary intoxication, affirming the preclusion of Petitioner's testimony about statements made to him **by** the confidential informant, finding no merit in the argument

that the trial court's description of a desire to hear both sides of a story was "the American Way", and affirming the denial of Petitioner's motion for mistrial following Detective Lanier's testimony that he was afraid. (Petitioner's Brief pp. 33, 36, 39, 40).

The State would initially note that the instant case is here pursuant to the limited certification of conflict between the lower court's ruling denying a defense requested jury instruction that on a charge of attempted first degree murder of a law enforcement officer engaged in the lawful performance of his duty the defendant must know that the victim is a police officer, and the contrary decisions of the First and Third District Courts of Appeal on that issue. Grinage v. State, 641 So. 2d 1362 (Fla. 5th DCA 1994), Thompson v. State, 667 So. 2d 470 (Fla. 3d DCA 1996). Although this Court does have the inherent power to exercise its discretion to consider issues beyond the scope of certified questions, see, Fuller v. State, 637 So. 2d 911, 914 (Fla. 1994), there is no reason for this Court to entertain questions regarding the lower court's actions on factually based issues which do not invoke conflict or review on legal grounds.

The tactic of appending to certified questions the multitude of extraneous, non-certified issues which have been briefed in District Courts of Appeal, is a tactic which the Respondent has observed occurring with ever-increasing regularity. It is an effort to turn the proceedings in this Court into a full, second plenary appeal, even though District Courts of Appeal are viewed as courts of final appellate jurisdiction subject to the limited classes of cases permitted further review in this Court. *See,* State v. Hayes, 333 So. 2d 51 (Fla. 4th DCA 1976); Ansin v. Thurston, 101 So. 2d 808 (Fla. 1958).

Before addressing the question presented herein, Respondent would note that the decision of the Third District to remand for a new trial on the charge of attempted premeditated murder was correct and is not contested here. While this Court, in State v. Gray, 654 So. 2d 552 (Fla. 1995), held that attempted felony murder is no longer an offense in Florida, that decision did not address the propriety of either remanding such cases to the trial court for retrial on lesser included offenses of the original charge of attempted first degree murder, or for reducing the conviction for attempted third degree felony murder to a potential lesser included offense. Insofar as this Court did not address either of those

possibilities in its opinion in Gray, the Third District Court of **Appeal's** construction of Gray, in the instant case, as mandating reversal and remand for a new trial on the charge of attempted premeditated murder, is correct in light of this Court's subsequent answer to the question certified in Wilson v. State, 660 So. 2d **1067, 1069** (Fla. 3d **DCA** 1995).

On July 3, **1996,** this Court answered the certified question posed by this Court in *Wilson,* stating in relevant part that:

> We hold that the proper remedy is remand to the trial court for retrial on any of the other offenses instructed on at trial.
>
> **We** have previously considered nonexistent offenses in slightly different circumstances. . . . .
>
> Wilson is correct in his assertion that those cases involved nonexistent offenses which were lesser **included** offenses of the principal charge in the charging document, as opposed to the instant case, where the principal charge was **a** nonexistent offense. However, **we** do not agree that this mandates dismissal of the charges in the instant case. In the earlier cases, "nonexistent" had a slightly different connotation. There, the offenses in question were never valid statutory offenses in Florida; they were simply the product of erroneous instruction. Here, attempted felony murder was a statutorily defined offense, with enumerated

> elements and identifiable lesser offenses, for approximately eleven years. It only became "nonexistent" when we decided Grav. Because it was a valid offense before Gray, and because it had ascertainable lesser offenses, retrial on any lesser offense which was instructed on at trial is appropriate,

State v. Wilson, No. 86,680 (Fla. July 3, 1996).

Thus, there being no acquittal -- explicit or implicit -- for either the attempted felony murder charge or the attempted first degree murder of a law enforcement officer, -- there is no constitutional bar to retrial on the attempted first degree murder charge where the jury was instructed in the alternative and the facts of the case could support a guilty verdict on that charge. State v. Wilson, No, 86,680 (Fla. July 3, 1996).

With respect to the question presented here, it is axiomatic that a trial court must instruct the jury on the law of the case and that it is within the sound discretion of the court to determine what law applies. Rule 3.390(1), Fla.R.Crim.P. (1992). Section 784.07(3), Florida Statutes, does not require that a defendant have knowledge that the victim was a law enforcement officer when the defendant is charged with attempted murder of a

law enforcement officer engaged in the lawful performance of his duty. Carpentier v, State, 587 So. 2d 1355, 1357 (Fla. 1st DCA 1991), rev. *denied, 599 So.* 2d 654 (Fla. 1992). A Petitioner is not entitled to a jury instruction on an issue which is not an essential element of the crime charged. Richards v. State, 643 So. 2d 89, 90-91 (Fla. 3d DCA 1994).

In the instant case, the Petitioner was charged with attempted murder of a law enforcement officer by premeditated design (first degree). Section 782.04(1)(a), Fla. Stat. (1992). The Florida Standard Jury Instruction for first degree murder, combined with the modifying instruction on attempted crimes, enumerates the elements of the crimes charged which the State is obligated to prove beyond a reasonable doubt before a defendant can be convicted:

> There are two ways in which a person may be convicted of first degree murder. One is known as premeditated murder and the other is known as felony murder.
>
> Before you can find the Petitioner guilty of First Degree Premeditated Murder, the State must prove the following three elements beyond a reasonable doubt:
>
> 1. Victim is dead

2. The death was caused by the criminal act or agency of the Petitioner.

3. There was a premeditated killing of the victim.

Fla. Std. Jury Instr. (Crim.) 937; Section 782.04(1)(a), Fla. Stat. (R. 236).

In order to convict the Petitioner of attempted first degree murder of Detective Zanier the jury had only to determine that the Petitioner committed a criminal act directed at the person of the victim, Lanier, and that he did so as a result of a premeditated design, Knowing the status of your victim is not an element of the crime of attempted first degree murder, and consequently a jury instruction to that effect is not required.

It appears evident that the Legislature intended to provide additional protection for law enforcement officers engaged in the lawful performance of their duties by the enactment of Section 784.07(3), Fla. Stat., which provides:

> Notwithstanding the provision of any other section, any person who is convicted of attempted murder of a law enforcement officer engaged in the

> lawful performance of his duty or 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, shall be guilty of a life felony, punishable as provided in s. 775.0825.

Section 784.07(3), Fla. Stat. (1992). This subsection provides an enhanced penalty applicable to a charge on the substantive offense consisting of the elements of murder (in any degree) , which are found by reference to section 782.04; plus the elements of a criminal attempt, which are found by reference to section 777.04(1), when the victim is a "law enforcement officer engaged in the lawful performance of his duty." The wording is clear. The intended victim must be determined to have been a law enforcement officer engaged in the lawful performance of his duties. It does not require that the Petitioner must know the victim is one of the protected class of persons, only that the victim be a member of the protected class. Carpentier v. State, 587 So. 2d 1357. The clear intent behind Section 784.07(3) is that a person who attempts to murder "a law enforcement officer engaged in the lawful performance of his duty," or "a law enforcement officer when the motivation for such attempt was related, all or in part, to the lawful duties of the officer," is guilty of a life felony and subject to the

additional 25 year minimum mandatory penalty set out in Section 775.0825. The subsection protects those off-duty police officers not engaged in the performance of their duties, but where the motivation for the attempt relates to their police duties or their status as police officers. Contrary to Petitioner's assertion, the statute is clear that the person of a law enforcement officer is subject to enhanced protection on or off duty so long as the offense relates to the officer's status.

The sequence is clear. In the instant case, first the jury had to determine that the Petitioner was the person who tried to kill the victim. Then the jury had to decide that the victim was a police officer engaged in the lawful performance of his duties. Finally, the jury had to determine whether the attempted crime was premeditated. Having made those determinations, the jury found the Petitioner guilty of attempted first degree premeditated murder of Detective Zanier. Having determined that the victim was indeed a law enforcement officer, the Petitioner was subject to the penalties set out in Sections 784.07(3) and 775.0825.

The Petitioner relies upon Grinage v. State, 641 So. 2d 1362, for the proposition that the State must allege and prove that the

he knew that his victim was a police officer for a conviction under sec. 784.07(3). Although there is language to that effect, the questions certified to this Court in that case involved the offense of attempted felony murder. In that case, this Court held that the crime of attempted felony murder no longer exists, but did not reach the issue of whether or not knowledge of the victim's status as a law enforcement officer is a necessary element of the offence of attempted murder when the conviction is enhanced under sec. 784.07(3). State v. Grinase, 656 So. 2d 457 (Fla. 1995). This is not a **case** where presumption **was** stacked upon presumption as in Grinage v. State, in which the Petitioner could not be charged with attempted murder of **a law** enforcement officer engaged in the lawful performance of his duty for cutting an undercover officer during the course of an attempted robbery where the knife thrust that resulted in **a** cut **was** the only alleged act of force, violence or assault, and as an essential element of the underlying qualifying offense of attempted robbery, the knife thrust could not also constitute the overt act required to prove attempted murder. Grinase v. State, 641 So. 2d 1362.

The Third District Court opined that section 784.07, subsection (2) specifies that the assault or battery upon a law

enforcement officer must be committed "knowingly." However, subsection (3) does not contain the same requirement for the separate and distinct offense of attempted murder of a law enforcement officer engaged in the lawful performance of his duty. Carpentier v. State, 587 So. 2d at 1357; Isaac v. State, 626 So. 2d 1082 (Fla. 1st DCA 1993), review denied 634 So. 2d 624 (Fla. 1994); Evans v. State, 625 So. 2d 915 (Fla. 1st DCA 1993). Subsection (3) provides an enhanced penalty on a conviction for attempted murder if the victim happens to be a law enforcement officer in the lawful performance of his duty or if the motivation for the attempts was related to the lawful duties of the officer. State v. Iacovone, 660 so. 2d 1371, 1373-1374 (Fla. 1995). Therefore, the trial court properly instructed the jury as to the law and cannot be held to have abused its discretion for declining to give a jury instruction on scienter which is not required to convict on the crime charged. Accordingly, the district court correctly affirmed the lower court, and its decision does not conflict with any decision of this Court or other district courts.

Briefly, on the remaining assertions of error Petitioner has raised, Respondent submits that this Court need not review the decision of the district court, and responds as follows:

Taken in the order presented herein, the Petitioner claims that the trial court erroneously denied his requested instruction on the voluntary intoxication defense. It is well settled that voluntary intoxication is a defense to the specific intent crimes of first degree murder and robbery. Fla. Std. Jury Instr. 3.04(g) (Crim.) 931. Bell v. State, 394 so. 2d 979 (Fla. 1981). A defendant has the right to a jury instruction on the law applicable to his theory of defense where any trial evidence supports that theory, Bryant v. State, 412 So. 2d 347 (Fla. 1982). However, jury instructions regarding intoxication need not be given in every case in which evidence has been adduced at trial that the defendant had consumed alcoholic beverages prior to the commission of the offense and it is not error to refuse such an instruction when there is no evidence of the amount of alcohol consumed during the hours preceding the crime and no evidence that the defendant was intoxicated. Jacobs v. State, 396 So. 2d 1113 (Fla. 1981), cert. ***denied,*** 454 U.S. 933, 102 s. ct. 430, 70 L.Ed.2d 239 (1981). Additionally, where the collective testimony of victims that the defendant had red eyes, looked sick and tired, and made some -- but not a lot -- of noises that they could not understand, combined with the testimony of the arresting officer that the defendant appeared **as** if he might possibly have been drinking or using drugs,

the evidence was sufficient to suggest that the defendant may have resembled a person who might have had a few drinks, but was insufficient to establish that the defendant was intoxicated or even that he had actually consumed alcoholic beverages or drugs, to support a jury instruction on the defense of voluntary intoxication. Hester v. State, 503 so. 2d 1342, 1344 (Fla. 1st DCA 1987).

Here, the only evidence adduced at trial as to his level of intoxication and his "uncontrollable drug addiction" was the Petitioner's self serving testimony that he had consumed cocaine in indeterminate amounts at indeterminate periods starting two days prior to the drug transaction and up to and including the time of the transaction, (T. 1075-1079). However, evidence to the contrary indicating that the Petitioner was in control of the whole operation was elicited throughout the trial, During that two days the Petitioner admitted to having organized the drug transaction, masterminded the rip-off when he could not raise the purchase price, assisted in putting together the flash role to be used in the rip-off, and to having acquired the firearms necessary for their protection, (T. 1162-1164). Moreover, the Petitioner testified that after he sampled the cocaine, he assessed it to be

good and signaled his codefendant to continue with the exchange of the money in the flash role for the kilo the CI was holding, ordering the CI to get out of the van. (T. 1177-1179)

By his own admission, Petitioner said that he had been given one gram of cocaine by the confidential informant (CI) Luis Camacho, and over a period of two days he had over half of it left while on his way to the drug transaction, and had snorted all of it by the time he arrived to conclude the drug exchange. (T. 1104-1105, 1151-1152). The Petitioner answered on direct examination that he took the cocaine to relax him and clear his mind, but after further prodding on the part of defense counsel he testified that he **was** "speeding and sweating." (T. 1104-1108). The **State** suggests that this nervousness was the result of the danger of executing a drug rip-off rather than a drug induced excitation, and failure to follow directions is not necessarily symptomatic of an altered state of mind. (T. 1105-1108). Once he made contact with the CI he sampled the cocaine he was purchasing **by** ingesting three "hits" and a rock of cocaine. (T. 1110, 1175-1176). Thus, the only evidence was the Petitioner's uncorroborated statement that he was too intoxicated to form the requisite intent, yet he was able to orchestrate and execute the

rip-off, as well as forcefully attempt to elude authority when the whole thing went awry.

Furthermore, no questions were asked of any witnesses regarding the Petitioner's demeanor during the drug rip-off. Added to the fact that at no time, until the eleventh hour at the close of all the evidence and just before the State was to put on its rebuttal of his entrapment defense, did Petitioner announce the involuntary intoxication defense, the Petitioner did not elicit testimony from any of the State's witnesses regarding whether or not he had exhibited any signs of intoxication either during the transaction or at arrest. While Petitioner's testimony alone could have been taken as evidence that he had ingested the intoxicant prior to and during the drug rip-off, there was no evidence at all that he was intoxicated and no corroborative evidence that he had actually consumed the cocaine as he said he did. Therefore, the trial court correctly denied and the Third District properly affirmed the denial of the instruction on the defense of involuntary intoxication as an unreliable, untimely defense. Hester v. State, 503 so. 2d 1344; Jacobs v. State, 396 So. 2d 1113.

Secondly, out of court statements offered for the truth of the matter asserted are inadmissible in evidence as hearsay. Section 90.802, Fla. Stat. (1992). In the instant case on twelve occasions during his testimony, Petitioner attempted to relay to the jury the substance of a statement made to him by the CI while he and the CI shared a cell at Dade County Jail several months prior to the events which were the subject of the trial. The State objected and the trial court properly sustained the objections as to what the CI told the Petitioner. Petitioner was permitted to relate to the jury any action and any statements he made as a result of the conversations with the CI. He was not permitted to relate specifically what the CI said to him. Those statements do not fall within any recognized exception to the hearsay rule.

The statements were not admissible under the exception to the hearsay rule allowing statements made by a coconspirator where there was no charge of conspiracy in this case, nor were they statements made by an agent of the Petitioner since the CI was an undercover officer. Section 90.803(18)(e), Fla. Stat. (1992). The statements were classical inadmissible hearsay and the fact that the Petitioner was able to relate actions taken by the CI and his own actions taken as a result of the CI's statements does not

constitute a State waiver of the hearsay rule. Moreover, the assertion that the CI's statements to Petitioner were admissible as "state of mind" evidence is obviated by Petitioner's testimony. What could more clearly express Petitioner's "state of mind" than his own account of the CI's actions and his own actions taken as a result of the negotiations? It is disingenuous to suppose that the Petitioner or any other person who embarks on a drug transaction fully armed, as here, would be doing so in self defense rather than from a preconceived premeditated notion that the other contractual party would also be fully armed.

In his next assertion of error Petitioner claims that the trial court "confused" the jury by expressing that there was something un-patriotic about the Petitioner's right to remain silent and to refrain from testifying, Only those comments which are "fairly susceptible" of being interpreted as a comment on the defendant's right to silence will be treated as such. State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986). Where a review of the record indicates that one could reasonably conclude that the witness' comment implicated the defendant's right to remain silent, such comment should be evaluated under the harmless error doctrine. State v. Kearse, 491 So. 2d 1141, 1142 (Fla. 1986). Where the

trial court's statement to the venire effectively informed the jury that the defendant would not offer an explanation of his actions highlighting the fact that the defendant was not testifying at trial, reversal was required. Love v. State, 583 So. 2d 371, 372 (Fla. 3d DCA 1991). Where the trial court's explanation to the jury that it is proper for witnesses including the defendant to confer with their attorney's as to any testimony they may give, was not fairly susceptible of being interpreted by the jury as referring to the defendant's exercise of his right to silence and reversal was not required. State v. Grissom, 492 So. 2d 1324 (Fla. 1986).

In the instant case the jury heard both sides because the Petitioner testified. By testifying he effectively waived his objection to the purportedly erroneous statement. Nevertheless, on its face the statement is not fairly susceptible of being interpreted by the trier of fact as a comment on the Petitioner's silence nor can it be said to have confused the jury. An analysis of the context of the statement unequivocally establishes that the trial court was in praise of the fairness and openness of a system of justice that permits and encourages both sides of the issues in dispute. The trial court went on to explain that a court of law

has different rules to follow, and that predominant in import is the rule that the defendant is protected by the mantle of the presumption of innocence from the highest authority, the United States Constitution and the Constitution of the State of Florida. The trial court carefully juxtaposed the sense of fairness inherent in the American Way to the presumption of innocence and burden of proof beyond a reasonable doubt carried by the State, instructing the jury that the latter was paramount. (T. 46, 48-49). State v. Grissom, 492 so. 2d at 1324. It is a stretch of the imagination to say that the jury would feel unpatriotic if they didn't want to hear the Petitioner, and illogical in the extreme to suppose that the trial court was commenting on the Petitioner's exercise of his right to silence when he was explaining to the jury the source and power of that venerable right.

In Petitioner's final assertion of error, he claims that the trial court improperly allowed Detective Lanier to testify that he was "afraid" when he saw the Petitioner aiming a gun at him, and that the statement was so irrelevant and prejudicial that it warranted a mistrial. (Petitioner's Brief p. 40). A motion for mistrial should be granted only in circumstances where the error committed was so prejudicial as to vitiate the entire trial.

Solomon v. State, 596 So. 2d 789, 790 (Fla. 3d DCA 1992); Duest v. State, 462 So. 2d 446 (Fla. 1985). A motion for mistrial is addressed to the sound discretion of the trial judge and should only be granted in the case of absolute necessity. Salvatore v. State, 366 So. 2d 745 (Fla. 1978), cert. denied, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979).

In the instant case, Petitioner sought to show that he was a liar by asking Detective Lanier about the discrepancy in his first account of the reverse sting operation to his supervisors in which he said that he had not discharged his weapon, and his subsequent admission that he had fired the shotgun in the air, which resulted in a departmental reprimand. The witness Lanier was allowed to explain his actions on redirect, and testified that he had been afraid when confronted by the Petitioner who pointed his weapon directly at him, that he had retreated, and that he had fired his weapon in the air.

Where the Petitioner opened the door to the inquiry surrounding Lanier's actions and his reprimand, it is proper to permit the witness explain his answers. Upon a request for mistrial for a perceived prejudicial response from the witness,

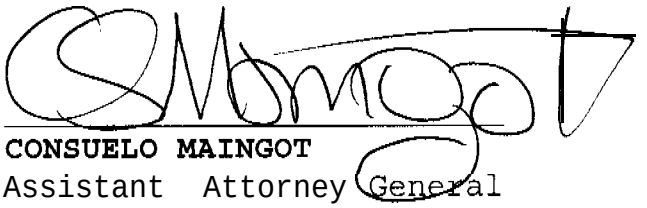
without a curative instruction being called for, the error, if any, is harmless beyond a reasonable doubt, there being no reasonable possibility that the statement contributed to the conviction. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). It is particularly true in this case since the law enforcement officer's fear of assault or threat of harm were not elements of any of the offenses charged. Moreover, the jury was exposed to three or four eyewitness accounts identifying the Petitioner as the shooter, the jury, therefore, had sufficient facts upon which to convict. Where there is substantial evidence in the record to support the conviction, the statement was not so prejudicial as to vitiate the entire trial. There being no absolute necessity warranting mistrial, the sound discretion of the trial court should not be disturbed on appeal, and the decision of the Third District Court so finding was correct. Solomon v. State, 596 So. 2d 790; Duest v. State, 462 So. 2d 446; Salvatore v. State, 366 So. 2d 745.

CONCLUSION

WHEREFORE, based upon the foregoing, the decision of the District Court of Appeal should be affirmed.

Respectfully submitted,

ROBERT A BUTTERWORTH
Attorney General
Tallahassee, Florida



CONSUELO MAINGOT
Assistant Attorney General
Florida Bar No. 0897612
Office of the Attorney General
Department of Legal Affairs
The 110 Tower SE 6th Street
Ft. Lauderdale, Florida 33301
(954) 712-4600 Fax: 712-4706

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF** OF **PETITIONER ON THE MERITS** was furnished by mail to **ROY D. WASSON, Esq.,** Special Assistant Public Defender, Suite 402 Courthouse Tower, 44 West Flagler Street, Miami, Florida 33130 on this 18 day of July 1996.

CONSUELO MAINGOT
Assistant Attorney General