IN THE SUPREME COURT OF FLORIDA

SUPREME COURT CASE NO: 71,026
CIRCUIT COURT CASE NO: 86-33032-A

SAMUEL RIVERA,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

****

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICAL CIRCUIT OF FLORIDA IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

****

BRIEF OF APPELLEE

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INTRODUCTION

The Appellee, **State of Florida**, was the prosecution below and the Appellant, **Samuel Rivera**, was the defendant in the trial court. In this brief, the parties will be referred to as they appeared before the lower court. The record on appeal is designated as "R___". All emphasis is supplied unless otherwise indicated.

TABLE OF CITATIONS

TABLE OF CITATIONS CONT'D

TABLE OF CITATIONS CONT'D

TABLE OF CONTENTS

STATEMENT OF THE CASE AND FACTS

Appellee accepts the Appellant's Statement of the Case as a substantially accurate account of the proceedings below. Appellee rejects the Appellant's Statement of the Facts as incomplete and submits the following:

I. GUILT PHASE

A. The Burglary

At approximately 5 - 5:30 on the afternoon of November 6, 1986, the Defendant and his brother entered the Dollar General Store, adjacent to the Palm Spring Mall in Hialeah, Florida. (R. 1036-1037, 1120). The Defendant's brother was carrying a KG-99 sub machine gun inside a blue duffle bag. (R.1667-1668; 1670, 1124; 1571). This gun had been purchased earlier in the day, in the Defendant's presence. Id. The Defendant walked to the rear of the store, through a set of doors, and into the store's stock room, which was clearly marked "Employees Only". (R. 1121, 1671). The Defendant's brother watched the Store's employees. (R. 1122, 1155). The employees became suspicious and asked a customer to contact police. (R. 1122-1124). The Defendant then exited the stock room, went to his brother and spoke for several minutes. (R. 1145, 1672). The two then left, having spent a total of 5 to 15 minutes inside the store. (R. 1149, 1701).

The store employees also contacted the store manager. (R. 1146-1147). One of the employees stood by the store room until the manager arrived. (Id.). The manager had left the store at approximately 5:00 to 5:15 p.m. after securing the stockroom which also served as her office. (R. 1158, 1139). She arrived back at the store at approximately 5:30 - 6:00 p.m. (R. 1159). The manager had the customers leave and checked the stockroom. (R. 1160). She discovered that an unused cash register on her desk had been pried open. (R. 1161-1163). The back loading door which she had secured with a metal bar was unlocked with scraping marks on it. (R. 1164-1166). Another manager also had a separate, locked office in the area. (R. 1166). This door, too, had pry marks on it; upon entry the manager saw that this room had been ransacked with drawers open and checkbooks all over the floor. (R. 1167-1168). A previously locked door separating the storage rooms was also found unlocked; a box from one of these rooms had been moved out to the hallway. (1169-1171).

B. The Investigation

In the meantime, a store customer, alerted a motorcycle police unit, Officer Quintelo, who was regulating traffic outside of Palm Springs Mall. (R. 1202-1206). Quintelo radioed the police dispatcher that he was going to Dollar General Store for investigation and requested that his partner, Officer George Miyares, join him at the store. (R.

1207). Quintelo then went to Dollar General and spoke to the store's employees. (R. 1208). Officer Miyares arrived as the employees were giving descriptions and indicating the direction in which the Defendant and his brother had headed. (R. 1209). Quintelo and Miyares then separated; Miyares headed east towards the front of the Palms Spring Mall and Quintelo headed west to the back of the mall. (R. 1211). Both Officers were wearing blue police uniforms. (R. 1222).

Quintelo located the Defendant and his brother, who matched the store employees' descriptions, walking outside of the mall, at the rear of Builder's Square Store. (R. 1211-1212). At this point Quintelo radioed Miyares and advised the latter of their location. (R. 1214). Quintelo then stopped the Defendant and his brother and asked them for identification in English. (R. 1214-1215, 1236). The Defendant stated that they did not have any identification. (R. 1215, 1236). Quintelo asked them what they were doing in the area. (R. 1215). The Defendant, in a combination of English and Spanish, responded that his sister had dropped them off and they were looking for her car. (R. 1215, 1217). Officer Miyares had joined the parties at this time. (R. 1215).

Quintelo then asked what was in the blue duffle bag. (R. 1217). The Defendant responded that there was nothing in the bag. (R. 1218). Upon request by Quintelo to look inside

the bag, the Defendant grabbed the blue bag and started running. (Id.). Officer Miyares, who was still on his motorcycle, told Quintelo that he was going after the Defendant and that Quintelo should go after the Defendant's brother; the latter had started to run in the opposite direction. (R. 1219-1221).

C. The Shooting of Officer Miyares

At this point, the State relied upon the testimony of four civilian eyewitnesses both inside and outside of the Palm Springs mall. By way of background information, Palm Springs mall is a big shopping center covering approximately 4 blocks on West 49th Street in Hialeah. (R. 1036-1037, 1202). The mall itself is a two story building with open areas around the escalators and stairwells which enable one to look down from the second floor on to the first floor. (R. 1042, 1242). Retail stores are on the first floor. (R. 1037). The second floor is an extension of St. Thomas University where classes are held. (R. 1038-1039, 1055, 1241). The mall is adjacent to a Builder's Square Store through which one can enter the mall. (R. 1023, 1039).

Barbara Escalante, a secretary at St. Thomas University School of Law, observed a motorcycle officer outside the mall going towards the back of the Builder's Square Store. (R. 1298-1295). She then entered the mall and saw the

Defendant come out of the Builder's Square Store into the mall, with the officer behind him. (R. 1295). She heard the officer asking the Defendant to stop. (R. 1296). The Defendant did not stop; he picked up pace instead. (Id.). The Defendant then headed towards a set of glass doors when the officer caught him in a "bear hug" from behind. (R. 1297). The blue duffle bag carried by the Defendant was thrown on the floor when the struggle began. (R. 1306).

During the struggle, the Defendant didn't say anything. (R. 1307). The officer, however, was telling him to "slow down and relax". (R.1299). The struggle lasted approximately five minutes. (R.1297). Neither before, nor during the struggle, did the officer ever have a gun in his hands. (R.1298). This witness also stated that, from the beginning of the incident to the end, the officer never struck the Defendant, either with his hands, gun, police radio, or anything else. (R. 1298). Far from being violent, the officer was "very polite, actually nice". (R.1299). Although the officer was bigger and taller than the Defendant so as to overpower the latter, he did not; the Defendant had the "upperhand." (R. 1299, 1313-1314). The Defendant started "to become really very violent." (R. 1298). Finally, the Defendant stood up with the officer's gun in his hands. (R. 1300).

The officer was "down", not completely kneeling, but, "he was sort of scrunched over", "hands up,"...palms up. ... Bent at the elbows, palms outstretched." (R. 1300, 1313). This witness then heard four shots, saw the Defendant hesitate for a second and then run to the exit with the gun still in his hand. (R. 1302). The Defendant did not appear to be injured in any way and there were no signs of blood on him. (Id.) This witness then ran to the officer to help. (Id).

Witness Carlos Martinez was going to his class on the second floor of the mall when he saw the Defendant running by with the officer behind him. (R. 1241-1242). The officer's gun was not drawn. (R. 1242). Martinez went up the escalator to the second floor and then looked down on to the first floor. (Id). He saw that the officer had grabbed the Defendant with his hands around the latter. (R. 1243). Martinez then saw the ensuing struggle which he characterized as "not actually a punching match, but it's a wrestling match more or less." (R. 1245). The Defendant pushed the officer such that the officer fell back and lost his helmet. (Id.). Martinez, who was able to see the officer's hands at all times during the struggle, testified that the officer never drew his gun. (R. 1249, 1267-1268). The officer did not hit the Defendant at anytime, with his hands, radio, gun or anything else, either. (R. 1245-1246 1252).

Finally, Martinez saw the Defendant break loose from the officer and stand up with a gun in his hand. (R.1250). The Defendant's knees were bent and he pointed the gun down towards the officer. Id. The officer still had one knee on the ground, one leg up and hands raised. (R. 1250-1251). The Defendant then shot the officer, three times. (R. 1252). The Defendant, with gun pointing up, then ran through the mall. (R. 1254-1255). At this point the witness focused on the Defendant because he felt his "life was at stake." (R. 1265). The Defendant faced him, right side of the face, but Martinez saw no blood or any sign of injury on the Defendant as the latter ran out of the mall. (R. 1256, 1265-1266).

Witness William Alheim, Jr. is the owner of a snack bar in the Palm Springs Mall. (R. 1270). He saw two people struggling and ran towards the location. (R. 1271-1272). He observed the Defendant and the officer struggling on the ground, "wrestling sort of. . . . it wasn't a punching type of thing, it was more of a grabbing and wrestling. . ." (R. 1273). There were "a lot of people in the mall" and Alheim moved to go around one of the people when he heard a shot. (Id.). Alheim saw the Defendant standing up with a gun. (Id). He then focused "complete one hundred percent concentration" on the Defendant and saw the latter with knees slightly bent, both hands together, at about a 45 degree angle to the ground. (R. 1274-1275). Alheim then saw the

Defendant cock the hammer of the gun. (R. 1275). He explained:

> Q: And then what did he [Defendant] do?
>
> A: He [Defendant] again took plenty of time, looked at him [officer] and aimed, cocked the handle, aimed, and pulled it back, and thought about it, and fired.
>
> Q: And then what did he do?
>
> A: The exact same thing. He took his time and he aimed, cocked the hammer, thought about it, and fired.
>
> Q: So you saw him fire three times?
>
> A: Yes. (Id).

Alheim did not see the officer strike the Defendant or draw a gun at anytime. (R. 1276). The Defendant then ran "almost directly at" Alheim and headed north in the mall, still holding the gun with "his finger on the hammer". (Id.) Alheim followed the Defendant to outside the mall. He did not see any blood or other appearance of injury on the Defendant. (R. 1277).

Officer Miyares sustained three gunshot wounds. (R. 1255). He remained alive, conscious, and tried to talk until fire rescue arrived. (R. 1031, 1302, 1985). He asked one of the officers at the scene "to get me a chaplain" (1985). His last message to the police dispatch prior to the shooting was to yell "315". (R. 1374, 1397). 315 is the most important

call in police work. (R. 1398). It is not used frequently; most officers are hesitant to use the signal because it means that the officer has lost control of the situation and needs emergency backup. (Id.).

D. The Chase to Catch the Defendant

Due to the 315 call for help, numerous police officers arrived at Palm Springs Mall. Witness Alheim, who was following the Defendant, saw the latter exit the mall and go into the parking lot. (R. 1278). The Defendant went to an automobile parked against the sidewalk; the driver's side was open and a lady was getting out. (Id.).

The lady in question, Aurora Macias, testified that she had turned off her car and opened her door when the Defendant dragged her out by her hair. (R. 1366). The Defendant asked for her car keys while holding a revolver to her head. (R. 1367). Ms. Macias surrendered her keys and asked the Defendant to "please let me get my mother and my son out." (R. 1367-1368). Ms. Macias then reached into the car and pulled her 5 year old son out of the back seat. (R. 1368-1369). After some difficulty, the mother was also able to exit. (Id.).

Officer Rudy Toth observed the Defendant get into the vehicle. (R. 1375). The Defendant started to exit the

parking lot when Officer Toth made eye contact with him. (R. 1378). Officer Toth had a side view of the Defendant's face and his upper torso, but did not see any sign of injury or blood on the Defendant. (R. 1388). The officer pulled his vehicle behind that of the Defendant and followed. (Id.).

Upon exit, the Defendant ran a red light on West 49th Street which is a major, congested intersection in Hialeah. (R. 1379, 1381). At this time, approximately 5:40-6:00 p.m., traffic was backed up. (R. 1380-1381). The Defendant therefore proceeded to drive up on the side walk for approximately a block and a half, running over a bus bench. (R. 1381).

The Defendant then got back on the road and drove through a residential area for approximately six blocks, running 6 stop signs. (R. 1382-1383). He was weaving in and out of traffic, travelling between fifty and fifty-five miles an hour. (R. 1383). After approximately 1 1/2-2 miles, the Defendant crashed into a parked car. (R. 1384-1385).

Other police officers, including motorcycle units, were following Officer Toth because he could not keep up with the Defendant and had radioed for help. (R. 1383-1384). Officer DeJesus saw the Defendant crash into the parked vehicle. (R. 1438). He jumped out of his vehicle and ran towards the Defendant. (Id.) The Defendant ran out of his vehicle with a

revolver, as this officer cried "police; stop, police." (R. 1438-1439). The Defendant did not appear injured and there were no signs of blood on him. (R. 1439). In fact, the Defendant jumped over two fences with no difficulty and climbed over a third one, which was 6-7 feet high, with Officer DeJesus chasing him. (R. 1440-1442).

The Defendant was then observed going towards a house. (R. 1442). The officers set up a perimeter around the house and requested K-9 units' assistance. (R. 1442-1443). Officers Garcia and Torres finally located the Defendant hiding under a table, on the patio, in the backyard of the house. (R. 1464, 1756-1760).

The K-9 dog was sent to pull the Defendant out from underneath the table. (R. 1464-1465). Both Officers Torres and Garcia testified that at this point the Defendant did not appear to be injured and had no signs of blood on his all-white clothing. (R. 1464-1465, 1761). In fact Officer Garcia testified: "that man didn't have a scratch on his head, or any deep cuts anywhere on his body, until my dog got to him". (R. 1778).

The K-9 dog tried to pull the Defendant out but the latter started kicking at the dog, flailing at his legs, trying to reach for his gun. (R. 1466-1467). The dog attacked and bit the Defendant. (R. 1467). In the process

of struggling, the Defendant fell back and hit some flood lights on a stake in the patio. (R. 1761-1763, 1471). At this point the Defendant started to bleed heavily. (R. 1763, 1469). He was put under arrest and was taken to the hospital.

E. Physical Evidence

Officer Miyares died of a tremendous amount of bleeding within the body in the chest cavity. (R. 1326). Of the three bullets recovered from his body, one bullet entered the right side of his chest and went through the heart. (R. 1322). This shot was fatal. (R. 1326). Another bullet entered the left side of the chest and exited from the abdomen area. (R. 1326). The third bullet "entered on the inner aspect" of the officer's right arm and exited in the back of the arm. (R. 1327).

The arm wound was consistent with being a defensive one - i.e., the wound was sustained while trying to avoid getting shot. (R. 1345-1346). The two wounds to the chest were consistent with a person standing in a relatively erect position and firing the gun downward; the victim was in a crouched position, leaning foreward in the case of the shot to the left side of the chest, and leaning backwards in the case of the shot to the right side. (R. 1344).

Expert medical testimony, based upon "stippling" on the arm wound, indicated that the muzzle of the gun was approximately 18 inches away from the arm. (R. 1341). Expert testimony, based upon examination of singed fibers, gunpowder and burns on both the Defendant's and the officer's clothing, established that the gunshot wound to the left side of the chest was fired from a distance of 4-5 feet away. (R. 1522-1547). The shot to the right side of chest was fired from 6-12 inches away. (R. 1548-1549).

The three bullets recovered from Officer Miyare's body were consistent with having been fired from his own gun, which was recovered from the Defendant. (R.1565). The Defendant's fingerprints were found on this gun. (R. 1520). The gun had been fired five times and had one bullet left. (R. 1483-1484).

Apart from the three bullets in the officer's body, one bullet had gone through the glass doors of a store next to the scene of the shooting; it was recovered from a light fixture inside the store. (R. 1040-1041, 1045). Another bullet was lodged in the floor of the aluminum frame of this store's window. (R. 1045, 1060-1061).

Gunpowder smoke, soot, was discovered on Officer Miyares' left hand. (R. 1354). This soot was consistent with the officer having grabbed and pulled the end of the

gun as it was being discharged while the officer and the Defendant were struggling on the ground. (R. 1357, 1535-1539). Because of the position of the two, the sounds of these shots could have been muffled. (R. 1536).

Expert testimony also established that, consistent with Alheim's eyewitness testimony, Officer Miyares' gun could have been fired after being cocked. (R. 1569-1570). The officer's gun is a double-action revolver. (R. 1570). It can be fired single-action: "That is first pulling back, cocking the hammer and then firing the trigger, pulling the trigger to discharge the weapon. . . ." (Id.). This method is considered to be more accurate, although slower than the double-action method. (Id.). The latter method involves simply using the trigger and discharging the weapon. (Id.). The vehicle driven by the Defendant was also examined and photographed. (R. 1448, 1475). There were no signs of blood in the white interior. (R. 1448, 1475-1476).

F. THE DEFENDANT'S CASE

The Defendant testified that on November 6, 1986, at about 2:00 p.m., he took approximately $200, which he had brought over from Puerto Rico, in order to go Christmas shopping for a pair of inexpensive pants and shoes for himself. (R. 1663, 1697-1698). The Defendant and his brother travelled from Miami Beach to Hialeah, taking two buses. (R. 1664). At the

first bus stop, the Defendant's brother purchased two or three marijuana cigarettes and a firearm contained in a blue bag. (R. 1664-1665, 1666-1667). The Defendant did not, however, take any drugs or alcohol that day. (R. 1665).

After taking a second bus, the Defendant and his brother arrived at their destination store. (R. 1669-1670). The Defendant was afraid that his brother might get arrested because of the weapon and advised the latter not to enter the store. (R. 1669-1671). Nevertheless, the two entered the store. (R. 1671). The Defendant, after going to the clothing section, saw an open door which he went through. (Id.). He testified that he came out when he did not see any articles for sale, without having touched or broken into anything. (R. 1671-1672). The Defendant then told his brother that it was getting late and the two left after another five minutes in the store, without buying anything. (R. 1672, 1703).

The Defendant and his brother then walked through the parking area, when the latter was stopped by a police officer. R. 1673). The Defendant testified that he pulled the bag away from his brother and started to run, in order to get rid of the bag so that his brother would not go to jail. (R. 1674). The Defendant then ran into the mall through a store and towards a hallway with doors. (R. 1675-1676). He tried to open the door but could not. (R. 1676). The Defendant then stated that because he could not exit, he threw the bag on the floor and told the officer "if this is what you want,

here, you can have it." (Id.). The Defendant further testified that he turned around and "felt something strong in my back." (R. 1677). He again turned around and saw the officer, who was allegedly angry and upset, with a weapon in his hand. (R. 1677, 1678). The Defendant then stated: "He [the officer] was so strong I thought that he was going to kill me so I went with my hand and I jumped towards his hand." According to the Defendant, he and the officer then fell to the ground, both grabbing for the gun and turning about, when all the shots were fired. (R. 1679-1681).

The Defendant then exited the mall, with the officer's gun, and stole a car because he "needed to disappear." (R. 1682-1683). He sped away, running a red light while being chased by the police. (R. 1683-1684). Because of "an awful lot of traffic, many cars. . .," he looked for a sidewalk and eventually crashed into a car. (Id.). The Defendant then stated that he ran between some houses, jumped over two fences, and hid in a patio behind a house. (R. 1684-1685). After approximately a half hour, a German Sheperd located and tried to pull him out, but he "began to scream and tried to get away. . . ." (R. 1686-1687). Eventually, he was arrested and taken to the hospital. (R. 1689). The Defendant testified that he did not fall and hit his head during the dog attack or the chase. (R. 1690, 1684).

The Defendant, on cross-examination, stated that he had

lived in New York in 1983 and 1984. (R. 1695). He had previously been convicted of nine felonies. (R. 1696). In response to whether he intentionally pulled the trigger to defend himself, the Defendant stated: "I defended myself." The Defendant also admitted:

> Q. So you were stealing the car in order to get away from the shooting and where you had defended yourself in front of a crowd of people?
>
> A. Yes, I wanted to leave that place.
>
> Q. No matter what you had to do?
>
> A. It was important.
>
> Q. It was important to you?
>
> A. Yes.
>
> Q. No matter what happened to anybody else?
>
> A. For sure, I am sorry.
>
> Q. Well, were you worried about the people when you were driving on the sidewalk?
>
> A. Yes.
>
> Q. But you still drove on the sidewalk?
>
> A. I had to.
>
> Q. And that's because you were being chased by the police?
>
> A. Yes.
>
> Q. And this is for defending yourself?
>
> A. Yes.
>
> Q. An then you drove the vehicle and you finally crashed the car, is that correct?
>
> A. Yes.
>
> (R. 1719-1720).

Librado Torres, a student, testified that while waiting for classes she saw the Defendant come out of the Builder's Square store and walk fast to the back door of the mall. (R. 1644-1645). He tried to open the door, but it was locked and the officer was behind him. (R. 1646-1647). The Defendant then tried to go back to the middle of the mall, but the officer was too close. (R. 1647). The Defendant and the officer then stopped, facing each other, and the Defendant said, "Is this what you want? Here." (R. 1647-1648). The Defendant threw the bag to the floor and tried to get away while the officer was saying, "Hold it, hold it and stop." (R. 1648). The Defendant did not say anything; he just tried to get away. (R. 1648). The police officer then went to hold the Defendant, saying, "Calm down, calm down; I just want to talk to you." (R. 1649, 1654). The Defendant did not want to be held and a struggle ensued. (R. 1649). This witness stated that she heard four shots while the officer and the Defendant were on the ground. (R. 1651).

On cross-examination, Torres stated that she saw the officer being thrown against a glass window such that his helmet came off. (R. 1655-1656). She therefore ran to the middle of the mall to call for help because it seemed that the officer could not hold the Defendant down. (R. 1656). The witness further stated that she "saw" one shot but "heard" four. (R. 1657).

Torres also testified that the officer did not, at any

time, hit the Defendant with either his fist, gun or anything else. (R. 1657). She never saw a gun in the police officer's hands; she saw a gun only in the Defendant's hand. (Id.). In response to whether the officer had been "physical and violent, or was he being nice," this witness stated that the officer was "too nice to this man." (Id.). Torres also saw the Defendant walk away with the gun, with no signs of blood or any indication of injury. (R. 1659).

Dr. Robert Quencer, a radiologist who viewed the Defendant's CAT scans, testified that the Defendant had sustained a skull injury on the right side of his head. (R. 1617, 1619-1620). In response to whether the Defendant's injury could have been caused by falling and hitting his head, the Doctor stated: "Well, depending on what you hit when you hit the ground." (R. 1622). The Doctor stated that the Defendant's injury "would be possible" if he was hit with the tip of a pistol. (R. 1624).

On cross-examination, the Doctor stated that he could not tell what, if any, instrument caused the Defendant's injury; just that ". . . either the head was struck by something or that the head struck something. . . ." (R. 1630-1631). The Doctor further testified that the Defendant's injury could have resulted from falling and hitting the edge of a patio or a light fixture. (Id.).

The Doctor also stated that the scalp area is very vascular and tends to bleed more than other parts of the body. (R. 1631-1632). Based upon the laceration over the skull injury, indicated in the Defendant's medical reports, the Doctor testified that he would "expect that there would be blood, yes, a fair amount. . . ." (R. 1633-1634). On redirect examination, the Doctor added: "Let's put it this way: If I had to guess, if somebody said: was there a lot of bleeding? I would say that I would bet there was a lot of bleeding." (R. 1636).

II SENTENCING PHASE

The advisory portion of the sentencing phase began on July 9, 1987. The State first presented evidence that the Defendant had been previously convicted of aggravated assault upon a police officer in 1984. (R. 1981-1982). The State then presented evidence that Officer Miyares was alive after the shooting and while Fire Rescue put an IV in and started CPR. (R. 1985-1986). He was conscious and asked, "Get me a Chaplain." (R. 1985, 1987). The State then rested. (R. 1988).

The defense presented the Defendant's testimony. (R. 1989). He testified as to the circumstances of his 1984 conviction. (R. 1989-1992). He stated that he had not assaulted an officer, but had pled guilty upon the advice of his attorney. (R. 1994). After cross-examination of the Defendant, the defense rested.

Counsel for the State and the Defendant then presented closing arguments. (R. 2002-2036). The Court instructed the jury in accordance with the current Florida Standard Jury Instructions. (R. 2036-2043). However, in accordance with a previous defense request, the jury was instructed that the two aggravating factors of whether the capital felony was committed for the purpose of avoiding lawful arrest or effecting an escape from custody, and, whether the capital felony was committed to disrupt enforcement of laws, should be considered individually, but, if both were found applicable, then only one of these factors should be considered as an aggravating circumstance. (R. 1945-1954, 2038-2039). The jury returned a verdict of 7-5, recommending the death penalty. (R. 2051-2053). The case was continued until July 14, 1987, for the court to impose sentence. (R. 2058).

On July 14, 1987, counsel for the State and the Defendant presented argument to the Court. (R. 2063-2075). The Defendant also made a statement to the Court, stating that he was sorry but that "I do not see myself as a criminal." (R. 2075).

The Court made findings of fact as to the aggravating and mitigating circumstances. (R. 2076-2089). The Court, having found sufficient aggravating circumstances for the imposition of the sentence of death and insufficient mitigating circumstances to outweigh the aggravating circumstances, orally announced the imposition of the death penalty upon the Defendant. (R. 2089-2090). The written order was entered on July

21, 1987. (R. 322-330). The Court found six aggravating factors:

1. The Defendant was previously convicted of another capital felony involving the use or threat of violence to the person (aggravated assault against police officer in 1984). (R. 323).

2. The Defendant knowingly created a great risk of death to many persons because the shooting incident took place in a heavily populated shopping mall and the Defendant fired two shots which missed the victim; one bullet went through the window of an occupied store and one lodged in the flooring of the shopping center. Additionally, the Defendant ran through the mall with the weapon raised, ready for use, with still another cartridge in the weapon. The Defendant then stole a vehicle with three occupants who managed to get out of the car. He then fled, driving the vehicle onto sidewalks. After the vehicle was smashed, the Defendant alighted and fled into a residential neighborhood, causing the police to pursue him and fire their weapons. (R. 323-324).

3. The Defendant committed the capital felony while he was engaged in the flight after the commission of an attempted robbery and a burglary. (R. 324).

4. The Defendant commited the capital felony for the purpose of avoiding a lawful arrest or effecting an escape from custody because he shot the officer after the latter attempted to physically restrain the Defendant from fleeing. (R. 324-325).

5. The murder was especially heinous, atrocious and cruel because the Defendant fired three shots into the body of the victim. Any one of the shots could have immobilized the victim and the Defendant could have escaped from custody. The victim was fully cognizant of his impending death upon the first and second shots being fired. (R. 325-326).

6. The murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. (R. 326).

The Court, aware of the prohibition against doubling §§921.141(5)(d) and (f), treated the two as a single aggravating circumstance and did not consider pecuniary gain. (R. 2081-2082, 325). The Court also found evidence of §921.141(5)(g), but did not consider this as an aggravating circumstance in light of its consideration of §921.141(5)(e). (R. 2082-2083, 325).

The Court found no statutory mitigating circumstances. (R. 326-328, 2085-2088). The Court then addressed non-statutory mitigating factors under a separated heading:

> Non-statutory Mitigating Factors-There was no non-statutory mitigating evidence regarding the defendant's behavior while incarcerated and the Court having heard no testimony, does not consider this as a mitigating factor. No other non-statutory mitigating circumstance has been offered by the defendant and this Court finds that none exist.
>
> The only facts that this Court has considered in determining the sentence to be imposed are those facts presented as evidence during the course of the trial and the penalty phase thereof, ... (emphasis added).
>
> (R. 328).

The Court then declared its awareness that the imposition of sentence was not "an arithmetic process," but, ". . . actually a reasoned judgment as to what the factual situation was of this trial. . . .", and found:

> Based on the foregoing findings, the Court concurs, but independent of, the jury's recommendation that the death penalty be imposed on the defendant, and further holds that the sufficient aggravating circumstances exist for

> the imposition of the sentence of death, and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances. The Court further finds that each of the aggravating circumstances under subsections (b) through (i) standing alone outweigh any and all possible mitigating circumstances in this case.
>
> (R. 328-329).

Additional relevant facts will be set forth in the argument portion of this brief.

POINTS ON APPEAL

I.

WHETHER THE TRIAL COURT ERRED IN LIMITING THE CONSIDERATION OF MITIGATING CIRCUMSTANCES TO FACTORS ENUMERATED UNDER SECTION 921.141 SOLELY AND NOT ADVISING THE JURY THAT IT COULD CONSIDER NON-STATUTORY MITIGATING CIRCUMSTANCES IN FAVOR OF THE SENTENCE OF LIFE IMPRISONMENT AS OPPOSED TO DEATH.

II.

WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE MURDER OF WHICH THE DEFENDANT HAS BEEN CONVICTED WAS ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL.

III.

WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE KILLING WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED FASHION.

IV.

WHETHER COUNSEL FOR DEFENDANT WAS DEFICIENT AT SENTENCING BY FAILING TO INTRODUCE EVIDENCE OUTSIDE SECTION 921.141 THEREBY PREJUDICING THE OUTCOME OF THE HEARING.

V.

WHETHER THE TRIAL COURT ERRED IN NOT GRANTING A MISTRIAL BASED ON THE PROSECUTION'S REPEATED IMPROPER ARGUMENTS, WHICH SINGULARLY, AND IN THE CUMULATIVE WERE IMPROPER AND PREJUDICED THE DEFENDANT.

VI.

WHETHER THE TRIAL COURT ERRED IN FAILING TO ADVISE THE JURY, DURING THE PENALTY DELIBERATIONS, ONCE ASED BY THE JURY, THE PRISON TIME CALLED FOR BY THE CHARGES OF WHICH THEY HAD CONVICTED THE DEFENDANT.

SUMMARY OF ARGUMENT

1. The trial judge and the prosecutor instructed the jury that it could consider any aspect of the Defendant's character or record, and any circumstances of the offense in mitigation. Consideration of non-statutory mitigating factors was thus not limited.

2. The murder was heinous, atrocious and cruel because the Defendant continued to shoot the victim after the latter was rendered defenseless and was on his knees with hands raised. The victim also had knowledge of his impending death.

3. The calculated and deliberate actions of the Defendant, as recounted by eyewitnesses to the crime, support the finding that this murder was committed in a cold, calculated and premeditated fashion.

4. Ineffective assistance of counsel is not a direct appeal issue and Appellant has not requested relinquishment of jurisdiction in order to file for post-conviction relief.

5. The prosecutor's allegedly improper comments were relevant to the issues, based upon evidence in the record and were not egregious so as to support a new sentencing hearing.

6. The trial judge correctly instructed the jury to concern their deliberations with the advisory opinion of whether the Court should impose the death penalty or a life sentence, in accordance with the previously given standard jury instructions. The instruction was not objected to and was given at defense counsel's request.

ARGUMENT

I.

THE TRIAL COURT DID NOT LIMIT THE CONSIDERATION OF MITIGATING CIRCUMSTANCES TO FACTORS ENUMERATED UNDER SECTION 921.141 AND ADVISED THE JURY THAT IT COULD CONSIDER NON-STATUTORY MITIGATING CIRCUMSTANCES IN FAVOR OF THE SENTENCE OF LIFE IMPRISONMENT AS OPPOSED TO DEATH.

The State concurs with the Appellant's statement of the applicable law on this issue that non-statutory mitigating evidence must be considered. The State, however, submits that the facts in the instant case reflect no limitation of consideration of non-statutory mitigating circumstances. The defense was not precluded from presenting any evidence. The jury herein was instructed in accordance with the current Florida Standard Jury Instructions. The prosecutor, defense counsel and trial judge all advised the jury that it could consider any aspect of the Defendant's character or record and any circumstances of the offense. The trial judge specifically addressed non-statutory mitigating circumstances and found that non existed. A finding of insufficient mitigating circumstances to outweigh six aggravating factors does not mean that consideration of non-statutory mitigating circumstances was limited. Appellant's argument on this point is thus without merit as shown below.

The trial of this cause was conducted in June and July, 1987, subsequent to the decision rendered in Hitchcock v. Dugger, 481 U.S. ___, 107 S.Ct. ___, 95 L.Ed.2d 347 (1987). The prosecutor first told the jury that they had to weigh aggravating and mitigating circumstances: "it is not so many against so many." (R. 2004). The prosecutor then went through the statutory aggravating factors and argued that seven were established through the evidence. (R. 2004-2010). After this argument, the prosecutor stated that the jury now had to "decide, does he have enough in his favor to weigh for life imprisonment." (R. 2010). He then went through the statutory mitigating factors and argued that none of these were applicable or supported by the evidence. (R. 2010-2013). At this point, the prosecutor added:

> Then, finally, there is one last mitigating instruction: Any other aspect of the defendant's character or record, and any other circumstance of the offense.
>
> I mean, in order to be fair, the defense is allowed to put on anything that they feel will weigh in his behalf.
>
> You sat through three weeks of this trial. Did you hear of one single solitary word that weighed in favor of this person?

(R. 2013).

It is in this context of having argued that no mitigating circumstance of any sort existed that the prosecutor later made the complained of statement that "it is seven to nothing." See Appellant's brief, p. 15.

Likewise, the defense counsel advised the jury:

> As he [the prosecutor] told you, and as His Honor will tell you, one mitigating can outweigh all aggravating, whatever number they are. It depends on the weight that you assign to it.
>
> It is not just the aggravating and mitigating circumstances that have been set out for you that you have to decide upon, because you also decide about the other evidence that you heard in the first trial in this case as well.
>
> . . . .
>
> -- we have a street kid. I am not saying what he did was right. We have a street kid -- no education -- from Puerto Rico.
>
> He comes from a poor family and he was 22 years old at the time this happened.
>
> I am not trying to excuse what he did because he was 22 years old, but with a better education, with a hopefully more affluent family, with the better breaks in life, that we have had, perhaps he wouldn't have ended up like this.
>
> With the wisdom of age perhaps he wouldn't have would up like this.
>
> (R. 2026-2027).

Finally, the trial judge, in accordance with the current Florida jury instructions, instructed the jury, in part, as follows:

> . . . .
>
> Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.

> Among the mitigating circumstances you may consider, if established by the evidence are:
>
> . . . .
>
> Any other aspect of the defendant's character or record, and any other circumstances of the offense.

(R. 2039-2041).

As this Court reiterated in Riley v. Wainwright, 517 So.2d 656, 658 (Fla. 1987):

> Under our capital sentencing statute, a defendant has the right to an advisory opinion from a jury. . . . In determining an advisory sentence, the jury must consider and weigh all aggravating and mitigating circumstances. . . . The jury must be instructed either by the applicable standard jury instructions or by specially formulated instructions, that their role is to make a recommendation based on the circumstances of the offense and the character and background of the defendant. [Citation omitted].

The standard jury instruction on mitigating circumstances which includes an instruction to the jury that it could consider any other aspect of the defendant's character or record, or any other circumstances of the offense, "complies with the constitutional principles set forth in Lockett v. Ohio, 438 U.S. 586 (1978)." Jackson v. State, 13 FLW 305, 307 (Fla. May 13, 1988).

As seen above, the jury in the instant case was instructed that it could consider any other aspect of the defendant's character or record, or any other circumstances of the offense.

Thus, the Appellant's contention that the jury in the instant case was limited in its consideration of non-statutory mitigating circumstances is without merit. Jackson, supra.

The Appellant has also argued that the trial judge did not consider two non-statutory mitigating factors and improperly limited his consideration of mitigating factors to those enumerated in Fla. Stat. 921.141(6). See Appellant's Brief, pp. 16-17. The Appellant admits that the only testimony adduced was in rebuttal to enumerated aggravating factors and that the only non-statutory mitigating "evidence" was that defense counsel "mentioned in argument that the Defendant was a 'street kid' from 'a poor family'." See Appellant's Brief, p. 17. (emphasis added).

It is well established that argument of counsel is not evidence. Florida Standard Jury Instructions in Criminal Cases, charge 1.02 (1981). Defense counsel made mention of the Defendant being a "street kid" from a "poor family" during argument to the jury. (R. 2027). During separate argument before the trial judge, prior to imposition of sentence, there was no mention of the Defendant's background. (R. 2062-2071). There was no testimony or other evidence during either the guilt phase or the penalty phase as to the Defendant being a street kid from a poor family.

This Court has noted that there appears to be some confusion over the concept of mitigation as set forth in our death penalty statute. Rogers v. State, 511 So.2d 526, 534 (Fla. 1987). This Court explained that: "a 'finding' that no mitigating factors exist has been construed in several different ways: (1) that the evidence urged in mitigation was not factually supported by the record; (2) that the facts even if established by the record, had no mitigating value; or (3) that the facts, although supported by the record and also having mitigating value, were deemed insufficient to outweigh the aggravating factors involved." Id.

This Court then relied upon Eddings v. Oklahoma, 455 U.S. 104, 114-15, 102 S.Ct. 869, 876-877, 71 L.Ed.2d 1 (1982) and Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), for the proposition that the sentencer may not refuse to consider "any relevant mitigating evidence" and held:

> Mindful of these admonitions, we find that the trial court's first task in reaching its conclusions is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding has been made, the court then must determine whether the established facts are of a kind capable of mitigating the defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed. If such factors exist in the record at the time of sentencing, the sentencer must determine whether they are of sufficient weight to counterbalance the aggravating factors.

Rogers, supra, at 534 (elmphasis added). This Court then addressed Rogers' argument that the trial court had failed to consider mitigating evidence of childhood trauma. The court noted that no testimony had been presented on this issue and that the only evidence of such trauma was in a notation in the presentence investigation. This Court thus concluded that the "record factually does not support a conclusion that Rogers' childhood traumas produced any effect upon him relevant to his character, record or the circumstances of the offense so as to afford some basis for reducing a sentence of death." Rogers, supra, at 535.

In the instant case there was no testimony or evidence as to the Defendant being a street kid from a poor family; defense counsel merely mentioned this to the jury without any factual support. The trial judge, in accordance with Rogers, first, under separate heading, considered whether there were facts supported by evidence in mitigation and stated:

> Non-statutory Mitigating Factors. There was no non-statutory mitigating evidence regarding the defendant's behavior while incarcerated and the court having heard no testimony, does not consider this as a mitigating factor. No other non-statutory mitigating circumstance has been offered by the defendant and this Court finds that none exist.
>
> The only facts that this Court has considered in determining the sentence to be imposed are those facts presented as evidence during the course of the trial and the penalty phase thereof. . . .

(R. 328).

The trial Court, after the above conclusion and having previously found six aggravating factors and no statutory mitigating circumstances, then stated that it was not conducting "a mere arithmetic process." (R. 328). The Court emphasized that it was rendering "a reasoned judgment as to what the factual situation was of this trial." (R. 328). (emphasis added).

The Appellant's argument that the trial judge improperly failed to consider non-statutory mitigating factors is therefore without merit. Rogers, supra. It should also be noted that, even if evidence of nonstatutory mitigating factors had been presented, there is no requirement that specific reference to said factors be made, when the judge has instructed the jury to consider any aspect of the defendant's record, background, and circumstances of the offense. There is a presumption that the judge followed his own instructions to the jury on the consideration of non-statutory mitigating evidence. Johnson v. Dugger, 520 So.2d 565 (Fla. 1988).

Assuming, arguendo, that non-statutory mitigating factors were properly presented, there is still no error in the sentence imposed. "Reversal of a sentence is permitted only if this Court can say that the errors in weighing aggravating and mitigating factors, if corrected, reasonably could have resulted in a lesser sentence. If there is no likelihood of of a different sentence, the error must be deemed harmless."

Rogers, supra, at 535. See also, Delap v. Dugger, 513 So.2d 659 (Fla. 1987). In Rogers, this Court overturned three out of five aggravating factors and additionally stated that the trial judge could have found that the Defendant was a good provider. Nevertheless, this Court held: "we cannot say that there is any reasonable likelihood the trial court would have concluded that the aggravating circumstances were outweighed by the single mitigating factor." Rogers, supra, at 535. See also, Hardwick v. State, 13 FLW 83, 85 (Fla. Feb. 12, 1988)(weak evidence of drug dependency held to be mitigating but no reversal of sentence in light of three valid aggravating factors). In the instant case, the trial judge found six aggravating factors and stated: "The Court finds that the proof of aggravating circumstances outweighs any and all possible mitigating factors beyond and to the exclusion of any reasonable doubt." (R. 328). There is, therefore, no reasonable likelihood that the Defendant would have received a lesser sentence.

II

THE TRIAL COURT DID NOT ERR IN FINDING THAT THE MURDER OF WHICH THE DEFENDANT HAS BEEN CONVICTED WAS ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL.

The trial court found that the capital felony was especially heinous, atrocious, or cruel because the Defendant

fired three shots into the body of the victim. (R. 325). The Court found:

> . . . . Any one of the original shots would have immobilized the victim, but did not render him unconscious and the defendant could have escaped from custody. This defendant knowingly, willfully, in the most vicious, atrocious, cruel, heinous and predatory manner, killed this police officer. When he fired the third shot into the victim's chest, this defendant knew what he was doing, and exercised this action well understanding the result of what he was doing. At the same time, the victim was fully cognizant of his impending death upon the first and second shots being fired.

(R. 325-326).

In determining whether this aggravating factor applies, this Court has focused on the infliction of physical pain or mental anguish of the victim. Vaught v. State, 410 So.2d 147, 151 (Fla. 1982). Thus, numerous cases have noted and relied upon the victim's knowledge, anticipation of and fear of impending death. Roberts v. State, 510 So.2d 885, 894 (Fla. 1987)(defensive wounds to hands supported foreknowledge of impending killing, thus finding heinous, atrocious and cruel); Tompkins v. State, 502 So.2d 415 (Fla. 1987); Philips v. State, 476 So.2d 194, 196-197 (Fla. 1985); Mills v. State, 462 So.2d 1075, 1080-81 (Fla. 1985); Stano v. State, 460 So.2d 890, 893 (Fla. 1985); Doyle v. State, 460 So.2d 353 (Fla. 1984); Francois v. State, 407 So.2d 885 (Fla. 1982). These cases have also noted that the existence of instantaneous death and the absence of prolonged torture do not negate this factor. Vaught, supra; Mills, supra.

An execution style killing will also satisfy the requirements of this factor. Hargrave v. State, 366 So.2d 1, 5 (Fla. 1979); Smith v. State, 424 So.2d 726, 733 (Fla. 1982); Knight v. State, 338 So.2d 201, 202 (Fla. 1976); Grossman v. State, 13 FLW 127 (Fla. February 28, 1988).

The relevant facts in the instant case as to Officer Miyares' knowledge of impending death, and the execution style of killing, include the following: All four eyewitnesses to the shooting testified that Officer Miyares never hit the Defendant with anything nor even drew his gun; he was trying to calm the Defendant and was actually being too nice. (R. 1298-1299; 1249, 1245-1246; 1276; 1654-1655; 1657). The officer's last call to the police dispatch was "315" which meant he had lost control of the situation and needed emergency help. (R. 1374, 1397). The soot on the officer's hand was consistent with the officer having pulled the end of the gun as it was discharged during a struggle on the ground. (R. 1354, 1357, 1535-1539). This was corroborated by witness Torres' testimony that she "saw" one shot while the officer and Defendant were on the ground (witness had "heard" four shots); the gun was only seen in the Defendant's hands. (R. 1654-1657). Thereafter, three eyewitnesses saw the Defendant stand over the victim, pointing the gun down towards the victim. (R. 1273-1275, 1250, 1300). Two eyewitnesses saw the victim down on one knee with his hands raised, palms outstretched.(R. 1300, 1313, 1250-1251). The Defendant had the officer's gun. (R. 1565, 1520).

Medical testimony and expert testimony based upon gun powder burns on the officer's and Defendant's clothing corroborated the above eyewitness account of the Defendant's and victim's relative positions at the time of the shooting. (R. 1344, 1527, 1533). Another eyewitness then saw the Defendant cock the hammer of the gun and described the shooting as:

> A. He [the Defendant] again took plenty of time looked at him [the officer] and aimed, cocked the handle, aimed, and pulled it back, and thought about it, and fired.
>
> Q. And then what did he do?
>
> A. The exact same thing. He took his time and he aimed, cocked the hammer, thought about it and fired.
>
> Q. So you saw him fire three times?
>
> A. Yes.
>
> (R. 1275).

Expert testimony established that the above method of firing is slower and therefore more accurate than the alternative method of just pulling the trigger. (R. 1569-1570). It should be noted that the victim was a police officer for 3[illegible] years (R. 1787) and presumably familiar with his own gun. Further evidence that he knew he was going to die is established by the officer asking for a "chaplain." (R. 1985, 1987). As to the Defendant, he testified that he was afraid of being with his brother because he might get arrested. (R. 1670-1671). The Defendant further admitted that it was "important" to get away, no matter what the cost was. (R. 1719-1720).

Thus, the record establishes the execution style of this

murder and Officer Miyares' anguish and knowledge of impending death. He had struggled for his own gun; he had sent an emergency signal for help; he saw his assailant stand over him and slowly choose the most accurate method of shooting in the chest area over his heart. There was a defensive gunshot wound to the officer's raised arm; he was trying to avoid being shot. (R. 1345-1346). The officer asked for a chaplain. The Defendant, on the other hand, already possessed the officer's gun and therefore knew that Miyares was defenseless. There were no other officers in the area when he deliberately and slowly aimed and shot Miyares three times while the latter was on his knees with hands raised. It was "important" to the Defendant to get away without being arrested at any and all costs to other people. In Hargrave, supra, at 5, this Court upheld the heinous, atrocious and cruel factor where "Appellant in a calculated fashion 'executed' the victim" in order to avoid getting caught. The trial court in Hargrave had made this finding predicated upon the defendant's act of deliberately shooting the victim in the h d after he had already rendered him helpless by shooting him twice in the chest. In Philips, supra, at 197, this Court upheld this aggravating circumstance, stating: "the trial court correctly surmised that between the two vollies of gunfire the victim [a parole officer] must have agonized over his ultimate fate and properly considered this circumstance in the sentencing process." See also, Roberts, Grossman, supra.

The Appellant has mischaracterized the trial court's finding of this aggravating circumstance as being based solely upon the

victim's status as a law enforcement officer. (See Appellant's Brief, p. 25). The Appellant has quoted statements from the trial judge to the Defendant after the pronouncement of sentence and with no mention that these were the reason for finding the heinous, atrocious and cruel factor. (Appellant's Brief, pp. 21-22). There is no indication that the victim's status as a police officer was the sole reason for finding this factor in either the oral pronouncement or written reasons for the sentence. (R. 325-326, 2083-2084). From this erroneous premise, the Appellant has cited cases where there was no evidence as to what the victim felt or suffered or whether the victim had foreknowledge of impending death.

For example, in Fleming v. State, 374 So.2d 959 (Fla. 1979), cited by the Appellant, this Court rejected the heinous, atrocious and cruel factor where a police officer, rushing in the midst of a struggle between the defendant and a hostage, was mortally wounded when the hostage grabbed the gun and it was discharged. In Teffeteller v. State, 439 So.2d 840, 846 (Fla. 1983), this aggravating circumstance was rejected when the victim was stopped in traffic and shot "with a single sudden shot" when he produced no money. There was no evidence that the victim knew in advance that he was going to be mortally wounded. See also, Wilson v. State, 436 So.2d 908 (Fla. 1983)(single stab wound to the chest during a family struggle); Cooper v. State, 336 So.2d 1133, 1140-1141 (Fla. 1976) (police officer was shot twice in the head upon stopping the Defendant's car; the officer died instantly. This Court found an execution style of killing but no evidence of knowledge of impending death or mental anguish of the victim); Brown v. State, 13 FLW

317, 319 at n. 11 (Fla. May 13, 1988)(mere fact that victim was a police officer was insufficient to sustain heinous, atrocious and cruel finding. There had been a struggle for the gun; a witness testified having heard "please don't shoot" and two subsequent shots. The trial judge, however, speculated as to the method of killing and emphasized that the victim, because of his training as a police officer, must have tried to protect himself. The trial judge further speculated as to the "indignity" of a police officer being "shot down by a two-time loser.").

In the instant case, as seen previously, there was eyewitness and expert testimony that the victim was on his knees, with hands raised, and already helpless in the absence of his gun. The Defendant, according to eyewitness testimony, deliberately and slowly, choosing the most accurate method of firing, shot the officer three times. The officer remained conscious and asked for a chaplain. There was both foreknowledge of impending death, suffering of the victim, and a deliberate, calculated, unnecessary execution by the Defendant. The heinous, atrocious and cruel aggravating circumstance was properly imposed. Hargrave, Philips, Grossman, supra.

Finally, assuming, arguendo, that this factor is found invalid by this Court, the sentence of death is still appropriate since there are five remaining aggravating factors and no mitigating circumstances. Jackson v. State, supra, at 307; Rogers, supra, at 535.

III

THE TRIAL COURT DID NOT ERR IN FINDING THAT THE KILLING WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED FASHION.

The trial judge found:

> The evidence establishes without any equivocation that this homicide was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. The victim was on one knee with his hands upraised when the defendant fired the three shots that went into the body of the victim. This was no more or less than a deliberate, methodical execution and showed an amoral and conscienceless killing of this police officer by this defendant.
>
> (R. 326).

The Appellant has stated that the trial judge, in finding the above aggravating circumstance, chose to give greater weight to forensic evidence as opposed to the testimony by eyewitnesses, the Defendant and his medical expert, Dr. Quencer; that, in fact, the Defendant "presented evidence which, at a minimum,'establish[ed] that appellant (Mr. Rivera) had at least a pretense of a moral or legal justification' for the actions he took. Mr. Rivera believed he was protecting his own life." (Appellant's Brief, pp. 29-30).

The testimony of the four eyewitnesses to the shooting, as to the actions of Officer Miyares and the deliberate actions of the Defendant, have already been detailed in the Statement of Facts and Point II on appeal, herein. Appellant's reliance on defense witness Torres' testimony, that all four shots were fired

while the Defendant and the victim were on the ground, is unjustified. (See Appellant's Brief, p. 29). Torres admitted that she started running for help after the first shot; she "saw" only one shot but "heard" four. (R. 1656-1657). The shot on the floor seen by Torres is consistent with a shot having been fired during the struggle, with the bullet having lodged in the floor of the shopping center; expert examination of soot on the officer's left hand evidenced that he was grabbing the end of the gun during the struggle when the gun was fired. (R. 1045, 1357, 1535-1539). However, thereafter, the Defendant stood up and deliberately, slowly, aimed at and shot the officer three times while the latter was kneeling, without a gun and with hands raised. (R. 1273-1275, 1250-1251, 1300, 1313). In addition to this eyewitness testimony, the medical examiner corroborated the three state witnesses' testimony as to the positions of the victim and the Defendant at the time of the shooting. (R. 1344-1346).

As to the Appellant's argument that the Defendant's head wound substantiated self-defense, we should note the testimony of his own medical expert, Dr. Quencer. This Doctor testified that due to the location of the injury: "Let's put it this way: If I had to guess, if somebody said: was there a lot of bleeding? I would say that I would bet there was a lot of bleeding." (R. 1636, 1633-1634). However, the four eyewitnesses to the shooting did not see any blood or sign of injury on the Defendant as he fled from the shooting. (R. 1302; 1256, 1265-1266; 1277; 1659). The officer who followed the Defendant in the ensuing high speed chase and the officer who chased the Defendant after he crashed the car, did not

see any blood or other signes of injury, either. (R. 1388, 1439). An examination of the white interior of the Defendant's vehicle during his escape did not reveal any signs of blood. (R. 1448, 1475-1476). The K-9 unit officers who subsequently captured the Defendant did not see any injury either, until the Defendant, in the process of attacking the K-9 dog, fell and hit his head on some floodlights on a stake in the patio where he was hiding. (R. 1464-1465, 1471, 1761-1763, 1778). Dr. Quencer testified that the Defendant's injury was consistent with falling and hitting the edge of a patio or a light fixture. (R. 1630-1631).

There is thus no merit in the contention that the Defendant's actions were a result of self-defense, with moral or legal justification. The Defendant himself admitted that it was improtant to him to get away, regardless of cost to other people. (R. 1719-1720, 1670-1671). The cases cited by the Appellant are therefore inapplicable. The calculated, deliberate nature of the Defendant's actions supports the finding of this aggravating circumstance by the trial court. Philips, supra. See also, Garron v. State, 13 FLW 325, 328 (Fla. May 27, 1988).

Assuming arguendo, that this factor is found invalid by this Court, the sentence of death is still appropriate because there are five remaining aggravating factors and no mitigating circumstances. Jackson v. State, supra, at 307; Rogers, supra, at 535.

IV

THE APPELLANT HAS IMPROPERLY RAISED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL ON DIRECT APPEAL

Ineffective assistance of counsel cannot be raised on direct appeal. State v. Barber, 301 So.2d 7 (Fla. 1974). However, Appellant has requested a remand to the trial court "for the purposes of a full sentencing hearing," in reliance upon Combs v. State, 403 So.2d 418 (Fla. 1981). See Appellant's Brief, pp. 31, 35. This Court, in Combs, supra, at 422, observed:

> If appellate counsel in a criminal proceeding honestly believes there is an issue of reasonably effective assistance of counsel. . . that issue should be immediately presented to the appellate court that has jurisdiction of the proceeding so that it may be resolved in an expeditious manner by remand to the trial court. . . .(emphasis added).

There is no mention in Combs that upon a mere conclusory statement of ineffective assistance of counsel, unaccompanied by any proffer of supporting evidence, a defendant would be entitled to a new and full sentencing hearing. Instead, this Court noted that in Francis v. State, it had relinquished jurisdiction to permit Appellant to file a Rule 3.850 motion, raising a claim of ineffective assistance of counsel in the trial court. Combs, supra, at 422 at n. 1.

In the instant case, Appellant has not filed a motion

to relinquish jurisdiction to the trial court for a hearing upon ineffective assistance of counsel. Instead, the Appellant has requested a remand for a new and full sentencing hearing.

Appellant has merely alleged that trial counsel did not introduce evidence as to rehabilitation, drug dependency, employment, emotional disturbances, etc. (See, Appellant's Brief, p. 32). There is no allegation that trial counsel did not investigate these factors. Furthermore, although appellate counsel has stated that she "honestly believes" non-statutory mitigating evidence was available, she admits that she has not even questioned the Defendant, his family or friends, experts, etc. (See, Appellant's Brief, pp. 33, 35, at notes 6 and 9).

The State respectfully submits that the above allegations and admissions do not constitute an honest belief of an "issue" as to effectiveness of counsel under Combs, supra. Even if a bona fide issue of ineffective assistance of counsel is presented, the proper procedure is to relinquish jurisdiction for the filing of a motion for post-conviction relief. Combs, supra; Francis, supra. Consideration of such a motion would then be governed by the standards set forth in Strickland v. Washington, 466 U.S. 688, 104 S.,Ct. 2052, 80 L.Ed.2d 674 (1984) - i.e., did counsel in fact render a deficient performance? and, if so, was this prejudicial to the defense so as to have altered the result of the proceedings. See also, Elledge v. Dugger, 823 F.2d 1439, 1445-1448 (11th Cir. 1987).

V.

TRIAL COURT DID NOT ERR IN REFUSING TO GRANT A MISTRIAL BASED UPON THE PROSECUTOR'S REMARKS.

Prosecutorial error alone does not warrant automatic reversal; in the penalty phase of a murder trial, resulting in a recommendation which is advisory, prosecutorial misconduct must be egregious to warrant resentencing. Bertolotti v. State, 476 So.2d 130, 138 (Fla. 1985); Also see Garron v. State, 13 F.L.W. 325, 327 (May 27, 1988). A prosecutor's statements, at penalty phase, if relevant to the aggravating or mitigating circumstances argued, are proper. Kennedy v. State, 455 So.2d 351, 354 (Fla. 1984).

The Appellant has requested a resentencing due to penalty phase misconduct; yet, the first error alleged is a comment during guilt phase. (See Appellant's brief, p.36, R.1873). With respect to such an alleged error, each case must be considered upon its own merits and within the circumstances pertaining when the questionable statements are made, and, if there is ample basis in the record to support the remarks a conviction will be affirmed." Darden v. State, 329 So.2d 287, 291 (Fla. 1976). In the instant case, throughout the trial, the defense attorney kept referring to the Defendant as a "boy" (R.1646-1652). In closing argument, defense attorney noted that the State had taken issue with his references to the boy, and stated: "I am sorry to say - I

am 48 years old and this kid could be my son. So he is a boy to me. When this happened he was 22, and a couple years before that he was a teenager". (R.1848). The State in its closing directly addressed the latter part of the defense counsel's argument and responded: "What does that mean? Emilio Miyares was 27. He will always be 27 because of the actions of this man". (R.1873). The evidence had established that Miyares was in fact 27 years old. (R. 1786). The Defendant himself testified that he killed Miyares. The prosecutor's comment was therefore in response to defense counsel's argument and had ample basis in the record. The prosecutor's remark thus did not deprive Appellant of a fair trial, especially when the totality of the evidence is considered. Darden, supra.

The State concedes that the comment "we would have a lot of dead police officers in this community." (R.2010) may be improper. Defense counsel objected and moved for a mistrial on the ground that the comment was "improper" (Id). The grounds specified by the Appellant herein were not raised before the trial judge. Nevertheless, the trial court, immediately gave a curative instruction, advising the jury to disregard the comment. In this posture, said remark, when considered within the totality and strength of evidence and in view of the remainder of the prosecutor's comments complained of herein, was not so "egregious" so as to justify a new penalty phase. Garron, supra; Craig v. State, 510 So.2d 857, 864 (Fla. 1987).

As to the next two complained of remarks, it should be noted that the prosecutor had been addressing the "mitigating instruction: Any other aspect of the defendant's character or record, and any other circumstance of the offense". (R.2013, 2017). The prosecutor was arguing that no mitigating circumstances were present in this case. He referred to the defendant's testimony during sentencing, and in this context, stated: "does he say he is sorry" (R.2017). Defense counsel objected but did not state a specific ground. Nevertheless, the trial court instructed the jury to disregard the comment. Remorse may be a mitigating circumstance. Pope v. State, 441 So.2d 1073 (Fla. 1983). The comment was thus relevant and not improper. Murehleman v. State, 503 So.2d 310, 317 (Fla. 1987).

Likewise, in arguing that defendant's character was not a mitigating circumstance, the prosecutor stated: "did you hear any defense witness come up here and say anything nice about him?" (R.2018). Defense counsel objected that the remark was improper because defendant was not required to present witnesses. However, he did not request a mistrial as to this remark. The Court noted that the defendant had testified during the penalty phase and overruled the objection. Thus, the comment was relevant as to mitigating circumstances and was not properly preserved below. Craig, supra, at 864, Murehleman, supra.

The next comment complained of is: "it is extra, extra terrible when a police officer dies, and that is why we have --" (R.2020). Defense counsel objected and requested for mistrial. The prosecutor's emphasis on police officers herein was relevant to his argument on the aggravating circumstance that the murder was committed to avoid arrest and hinder law enforcement. (R.2020-2021). There was clear evidence of this factor throughout this case. Thus, the remark was proper. Kennedy, supra at 354. Nevertheless, the trial court instructed the jury to disregard the remark and not consider it in their deliberations (R.2020). It should also be noted that defense counsel, in his closing to the jury, was allowed to emphasize: "it is worse when a police officer is killed. However, as part of the aggravating circumstances, you are not to consider that. It does not say, If a police officer is killed that makes it more aggravating". (R.2024). In addition, the jury was instructed, under the Standard Jury Instructions, to only consider the statutorily enumerated aggravating circumstances. In this posture, too, the remark was therefore not prejudicial.

Finally, the Appellant, has complained of the prosecutor's remark that "you can just imagine this gun is pointing down to him while he is on his knees with hands up in the air and sees this man fire the gun. . ." (R.2014-2015). This remark was not objected to and thus not preserved for review. Craig, supra, at 864; White v. State, 446

So.2d 1031, 1035 (Fla. 1984), Brown v. State, 473 So.2d 1260 (Fla. 1985). In addition, the prosecutor was explaining and arguing the aggravating circumstance of heinous, atrocious, and cruel (R.2014). Advance knowledge of being shot, execution style, is necessary for establishing this factor as argued in point II herein. The remark was thus highly relevant to this factor. There was eyewitness testimony as to the position of the victim as described by the prosecutor. The remark was thus not improper, See Muehleman, supra, at 317 (reference to a "feeble sickly, 97 year old man" relevant to establish heinous, atrocious and cruel nature of the crime). This remark is different than the one made in Taffeteller v. State, 439 So.2d 840, 845 (Fla. 1983) cited by the Appellant. In Taffeteller, the prosecutor repeatedly urged the jury to recommend the death penalty, otherwise, the defendant would be paroled and would kill the witnesses. It should be noted, however, that this Court in Bertolotti and Garron, supra, held Golden Rule arguments, asking the jury to imagine pain and suffering of the victim, to be improper. However, in both Garron supra at 307 and Bertolotti supra at 133 the prosecutors had made repeated references to "pain" , "anguish" and victim's "screams . . . for punishment." In the instant case, the prosecutor described the eyewitness testimony with no reference to "pain" or "anguish".

In conclusion, considering the totality of the prosecutor's remarks, strong evidence of guilt and

overwhelming aggravating circumstances, the prosecutor's comments were not so "egregious" so as to justify a new sentencing hearing. Bertolotti, supra, Garron, supra; Craig, supra.

VI.

THE TRIAL COURT WAS CORRECT IN NOT ADVISING THE JURY, DURING PENALTY PHASE, OF THE MINIMUM OF TIME TO BE SERVED ON OTHER NON-CAPITAL CHARGES.

During the penalty phase, the jury asked: "Is there a minimum of time to be served on the other charges?" (R. 2045). The trial judge, over the State's objection and at defense counsel's request (R. 2045-2047), responded:

> You are to concern your deliberations solely on the advisory opinion whether or not the Court should impose the death penalty or life with 25 year minimum as set forth in my instructions.
>
> (R. 2049).

Generally, feasibility and scope of reinstruction of the jury reside within the discretion of the trial judge. Garcia v. State, 492 So.2d 360, 366 (Fla. 1986). In Garcia, supra, during the penalty phase for two counts of first-degree murder, the jury asked if life sentences were imposed concurrently or consecutively. "[T]he judge responded that such decision was reserved to him and referred the jury to the jury instructions", over objection by the defendant. Id. This Court held that the

trial judge had answered the question with a correct and complete statement of the law. Id. Similarly, the trial judge's response in the instant case was correct. Furthermore, questions of maximum and minimum instructions, even during guilt phase, require specific objection and statement of grounds therefor, in order to be preserved for review. Craig, supra, at 865.

Rule 3.390(a), Florida Rules of Criminal Procedure, provides that, "Except in capital cases, the judge shall not struct the jury on the sentence which may be imposed for the offense for which the accused is on trial." (emphasis added). The rule clearly reflects the intent that penalty instructions shall be given only as to capital charges, not to other incidental charges for non-capital offenses. Indeed, during the sentencing phase, when the jury made its request, the defendant was no longer "on trial" for the burglary and robbery. He had been found guilty of those charges and the jury had no further responsibility - advisory or otherwise - as to those charges. Since he was no longer on trial for those charges, the jury was not entitled to any information regarding the penalty for them. Thus, the Standard Jury Instructions for the penalty phase make no reference to, and do not even contemplate, penalty instructions for any of the non-capital charges for which the defendant had just been found guilty.

Therefore, Appellant's proposition, without any citation of authority, that the Court "should have informed the jury that while if they recommended life, and the Defendant was in fact

sentenced to life that this Court could have then sentenced him to additional time for his additional convictions" is without merit. See Appellant's Brief, p. 42. Likewise, the Appellant's subsequent argument that the court's response herein was fundamental error, because the jury could have split 6-6 and then "perhaps the trial court would not have sentenced the Defendant to die", is without any basis. The trial judge in his sentencing order specifically stated:

> Based on the foregoing findings, the Court concurs, but independent of, the jury's recommendation that the death penalty be imposed on the defendant. . . .
>
> (R. 328).

There was thus no error in the Court's response to the jury's question. Garcia, supra. Assuming, arguendo, that the response was erroneous, this issue has not been preserved for review and had no effect upon the sentence imposed. Craig, supra.

CONCLUSION

Based upon the foregoing, the judgment and sentences should be affirmed.

Respectfully submitted,

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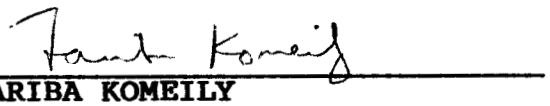

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by mail to **MILY RODRIGUEZ**, FERREL, WILLIAMS, Professional Association, 100 Chopin Plaza, Suite 1920, Miami, Florida 33131 on this 20th day of June, 1988.

FARIBA KOMEILY
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