THE SUPREME COURT OF FLORIDA

CASE NO. **77,735**

DENNIS ESCOBAR,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

CORRECTED BRIEF OF APPELLEE

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INTRODUCTION

Pursuant to this Court's previous order, this is the Appellee's corrected brief, utilizing the pagination in the revised 31 volumes of transcripts of proceedings. The symbol "R.___" will be used to designate said volumes, as well as the original two volumes of record on appeal which have not been revised. The symbol "JSR.___" refers to the revised Joint Supplemental Record on Appeal. The symbol "HT.___" refers to the transcripts of the 1993 proceedings before the Special Master, pursuant to this Court's orders. Said transcripts have not been included in the revised records on appeal; they are contained in the Appellant's Appendix.

Dennis Escobar has adopted many of the arguments set forth in Douglas Escobar's brief in Case No. 77,736. As to those arguments, the State relies on its Brief in Douglas Escobar's appeal, and would note that the arguments contained therein, on the points on which Dennis has adopted, contain discussions of any unique or different ramifications as to Dennis.

STATEMENT OF THE CASE AND FACTS

Douglas Escobar and Dennis Escobar were charged with the first degree murder of Officer Victor Estefan, grand theft of a Mazda automobile, and possession of a firearm during the commission of a felony. (R.1). Dennis Escobar was also charged with possession of a firearm by a convicted felon. (R.1). The two defendants' trials, which had originally been severed, (R.1253-4), were subsequently reconsolidated for a joint trial. (R.1359-71). Additional details regarding severance motions and arguments of both parties will be set forth in greater detail in the ensuing argument section of this Brief which deals with severance related issues.

Prior to trial, Dennis Escobar filed a Motion to Suppress Confessions, Admissions and Statements. (R.56-7). After a pretrial evidentiary hearing, the motion was denied. (R. 737-865). The evidence from the suppression hearing will be summarized in the ensuing argument portion of this brief which deals with the suppression issue.

Prior to trial, the State filed a notice of intent to offer evidence of other crimes. (JSR.345-6). This included evidence of two prior California warrants outstanding against Douglas Escobar at the time of the Estefan shooting; evidence that the Escobars fled from and engaged in a shoot-out with California Highway Patrol officers one month after the Estefan shooting; and a statement made by Douglas Escobar to a neighbor, prior to the Estefan shooting, in which Douglas said that he was going to shoot the police if he stopped them because he was not going to go back to jail. Id. The trial court initially excluded this evidence from use at

trial. (R.1230; JSR.340-1). The State filed a petition for writ of certiorari, and an interlocutory appeal, in the Third District Court of Appeal, and that Court, prior to trial, concluded that the evidence was admissible. State v. Escobar, 570 So. 2d 1343 (Fla. 3d DCA 1990). Additional details regarding this matter will be set forth in the summary of the evidence adduced at trial, and in the argument section of this brief dealing with the Williams rule issue raised by the Appellant.

A. Evidence Adduced At Trial

Victor Estefan, a City of Miami police officer, was shot at approximately 9:30 p.m., on March 30, 1988. (R.4439-40; 4471). Several officers and civilian witnesses had seen or heard Officer Estefan shortly before and shortly after the shooting.

Jimmy Morejon, who operated a tow truck, had been assisting Officer Estefan with a traffic problem which required a tow truck, at about 9:00 p.m. on March 30, 1988. (R.4429-34). While he and Estefan were attending to that matter, about 20 minutes later, a gray car, without headlights, was driving in the vicinity. As that car drove by, Estefan got into his patrol car and hastily followed it. (R.4433-36).

Antonio Miyar was on his way home around 9:00 p.m. that night, when he observed Estefan's car, with the motor running, in the middle of the street where Miyar lives. Estefan was lying on the ground and had been shot. (R.4384-8). Miyar called for help on the officer's radio and moments later a motorcycle officer arrived. (R.4393-4).

Officer Inastralia, the motorcycle officer, had been in the vicinity and had heard Estefan's first radio transmission, ordering a wrecker. (R.4439-40). About an hour later, he heard a second transmission from Estefan, and it sounded as though something was wrong. (R.4441-2). He proceeded to look for Estefan in the area and came across Estefan's vehicle, when Miyar waved him down. (R.4444-46).

Officer Raul Cairo had also been in the same vicinity and heard Estefan's second radio transmission, asking for assistance. (R. 4467-8). Shortly after that transmission, Cairo heard three rapid gun shots, at approximately 9:27 or 9:28 p.m. (R.4469-71). He proceeded to the area where Estefan had been shot and found the motorcycle officer already there with Estefan. Id. Cairo was able to speak to Estefan, who related that a short Latin male had shot him. (R.4475).

Detective Robert Beaty also responded to the scene and was told by Estefan that a passenger in a small gray car had shot him. (R.4547). He described the passenger as a short Latin with bushy hair, wearing a guayabara shirt. (R.4548). Miami City Commissioner Joseph Plummer, who heard the call on a police radio and was in the vicinity, also responded to the scene. He was a friend of Estefan's and accompanied Estefan in the rescue vehicle which transported him to the hospital. At that time, Estefan again indicated that it was the passenger of the vehicle who shot him, and he reiterated the description of the passenger. (R.4575). He added that the car which had been involved was a small gray car, and that he believed there was damage to the car's right rear as a result of a collision with his police car. (R.4576). Estefan told Plummer that there had been three shots. (R.4578).

Jael and Jose Hernando reside on the block where the shooting occurred. They each believed they heard five shots at about 9:30 p.m. (R.4490-1, 4498). Jose, after hearing the shots, heard a car door slam in front of his house and then heard a car zoom off. (R.4499-500). Gary Keller, another resident of the same block, heard car doors opening and slamming, in addition to voices. (R.4627-33). He had previously heard the sounds of cars stopping. Id. Keller heard, but did not see, what he referred to as a "scuffle." (R. 4634). He indicated that he did not really know what the "scuffling" that he heard was. (R.4644). He believed that he heard four gun shots. (R.4634-35).

The pertinent radio transmissions were admitted into evidence, both in tape recorded version and through transcripts. (R.4412-27). The initial call from Estefan was at 8:48 p.m. and was a routine traffic request for a wrecker. (R.4421-25). At 9:24 p.m., the victim transmitted that, "they're going to run from me, east on 9 Terrace from 36 Court." (R. 4424). Thirty-five seconds after that, another officer calls the dispatcher to report that shots had been heard in that vicinity (R.4425-7), and yet another call then reports an officer down. *Id.*

Detective George Morin, with the City of Miami Police Department, obtained statements from both Douglas and Dennis Escobar. Morin had proceeded to California, after receiving information from California law enforcement officers regarding the Escobars, in late April, 1988. (R.5160-64). The Escobars, at that time, had been arrested after a confrontation and shoot-out with two California Highway Patrol troopers. (R.4889-4943). Dennis Escobar, at that time, was in the California Men's Colony medical wing, a prison facility where he was being treated

for his injuries from the shoot-out. (R.5168-9). Douglas Escobar was at the Twin Cities Hospital, where he was being treated for his wounds from the shoot-out. (R.5182).

Detective Morin initially attempted to speak to Dennis Escobar on April 29, 1988. (R.5169). Dennis had one leg wound and one hand wound. (R.5169). Dennis did not have any problems conversing and did not have any apparent mental difficulties. (R.5170). Dennis was advised of his rights and agreed to speak to the officers without counsel, but he indicated that he did not want to talk about the Miami case at that time, as he wanted to speak with the California authorities about their case. (R.5179). Morin and Dennis agreed that Morin would return on May 2, 1988. (R.5180-1). Sgt. Roman Finale, a California officer, was present at this time, and similarly indicated that Dennis agreed that he would talk to Morin a few days later. (R.5412-15).

On April 30, 1988, Morin went to speak to Douglas Escobar. (R.5181-2). Douglas was in an emergency ward and it was necessary to get clearance from hospital personnel in order to speak to Douglas. (R.5182). Morin obtained the approval of the hospital personnel for the interview of Douglas. (R.5183). According to Morin, Douglas did not have any difficulty in talking or in understanding anything. (R.5183-87, 5283-4).

The officers provided Douglas with information suggesting that they basically knew how the murder occurred, including information that Dennis had confessed to being the shooter, even though he had not. (R.5187-91). Douglas initially told the officers that he was not a murderer. (R.5198). Douglas proceeded to blame his

problems on the American justice system, elaborating about asylum and residency problems; traffic tickets and an arrest order. (R.5202-3). He then started to provide details about the offense.

Douglas stated that he and Dennis had stolen a gray Mazda 626 from a dealership in southern Dade County and that they were driving the car on the night of the shooting of Estefan. (R.5205-7). There was a gun in the vehicle, which Douglas had purchased, but which he believed had been stolen. (R.5207-8). On March 30, the night of the shooting, he knew that he was wanted by California authorities and did not want to go back to prison. (R.5208). He stated that while driving the Mazda, he passed Officer Estefan's car, which made a U-turn and pursued him. (R.5209). Douglas sped up, trying to lose the police car through a series of turns. (R.5210). Thinking that he had lost the officer, he pulled onto a residential yard. Id. When the officer's vehicle showed up again, Douglas told Dennis that if the officer gets out, Dennis should shoot him. Id. As Estefan exited the police vehicle, with a weapon in hand and aimed towards Dennis, Dennis proceeded to get out of the Mazda and fired at Estefan. (R.5211). Douglas indicated that Dennis exited through the passenger door and shot three or four times. (R.5211-12). Dennis then got back in the car. As Douglas was attempting to back out the Mazda, he collided with the victim's police car. (R.5212)

With respect to the gun, Douglas indicated that he and Dennis threw it away somewhere, but he did not know the exact location, since he was not familiar with the Miami area. (R.5213). He did say that it was at a location far from Dennis' residence and that the gun was thrown into a canal. Id. As to the Mazda, he stated

that it had been left in an apartment building parking lot which was close to Dennis' residence. (R.5200). Before abandoning the car, the two brothers had taken it to a car wash and attempted to remove all prints. Id.

The above interview lasted about 40-45 minutes. (R.5214). The officers wanted to obtain a recorded statement, but Douglas indicated that he was tired and wanted to rest. Id. It was agreed that the officers would return at 6:00 p.m. that day for a recorded statement. (R.5215). As the officers were leaving, Douglas inquired as to what Dennis had told them. (R.5212). Morin told him that Dennis had given a confession consistent with what Douglas had said and Douglas then added, "I'm glad my brother decided to tell you the truth." (R.5217-19).

When the officers returned to Douglas at 6:00 p.m. with the recording equipment, Douglas decided not to give a recorded statement, since it was "hard to tell on yourself and he could not do it." (R.5225-6). Douglas then reiterated that he was in his difficulties because of the American justice system. (R.5228). When Morin inquired whether Douglas thought that they would get away with the murder, Douglas replied that telling an acquaintance about the murder and leaving a fingerprint had been a mistake. Id. This latter interview lasted about 30 minutes and the California authorities then entered. (R.5229). Detective Morin and his associates returned about one hour later, to resolve a few questions. (R.5231). At this time, Douglas stated that immediately prior to the shooting, the Escobars had been coming from a Nicaraguan coffee shop in the vicinity. (R.5233). Douglas recalled that he was wearing dark clothing, but could not recall what Dennis was wearing. Id.

Nurse Sherry Lemon who had been Douglas' attending nurse for three days, had administered morphine to Douglas over an hour before the 6:00 p.m. interview. (R.5410). She stated that morphine does not affect a patient's mental state; it only relieves pain. (R.5411-12). On that day, Douglas was alert and oriented. (R.5412-13). She did not have any concerns about Douglas speaking to the officers and had given permission. (R.5414). After the officers left, Douglas told her that they had been "real nice," adding that "I confessed, I am going to die anyway." (R.5415). Douglas had been lucid and clear headed. (R. 5416).

On May 2nd, Detective Morin returned to Dennis Escobar. (R.5234-6). Dennis was given his Miranda warnings and agreed to speak to the police. (R.5236-7). The officers advised Dennis that they had obtained a full statement from Douglas, and that Dennis' wife, Fatima, had been cooperating with the police. (R.5237-8). Dennis indicated that if he gave a statement regarding his involvement, he would be putting himself in the electric chair. (R.5238-9). He then indicated that he could not speak to the officers. (R.5239). As the officers were leaving, a guard at the gate had received a call, indicating that Dennis asked for them to return. (R.5239-40).

When the officers returned to Dennis, it was about 10:45 a.m. (R.5240). Dennis wanted to know what was going on with his wife in Miami and he wanted to know what Douglas said. Id. Morin advised him that Douglas said that he told Dennis to shoot. (R. 5241). Dennis agreed to state what happened, and initially told Morin that he Dennis, and his wife had been at home when Douglas came to their house saying that he had just shot an officer. Id. Morin told Dennis that he was

lying and the officers again started to leave. (R.5242-4). Dennis again called to get the officers to return. (R.5244). The officers did return, and Dennis again expressed concern about his wife, whom Morin indicated was cooperating with investigators in Miami. (R.5244-5). Dennis stated that if they left her alone, he would tell the police everything that they wanted to know. (R.5245). Morin responded that he could not give any guarantees, as Dennis' wife would have to deal with any involvement on her part. Id

Dennis then said that he knew that he was killing himself, but he would tell exactly what happened. (R.5247). He stated that he and Douglas had been drinking most of the day, having visited several bars in Miami. (R.5260-1). Several days prior to the killing, he, Douglas and Fatima Dennis' wife, went to the dealership where he had stolen a new, gray Mazda 626, with a sunroof. (R.5261-2). He obtained a license tag for the car after the theft, by stealing a tag and registration from a mailbox. (R.5262).

With respect to the killing of Officer Estefan, Dennis indicated that he was the passenger in the Mazda, which was driven by Douglas, when Douglas made him aware that there was a police car pursuing them. (R.5263-4). Dennis told Douglas to try to lose the police car and Douglas sped up, making a series of turns. (R.5264). The gun, which had been under the passenger seat, was retrieved by Dennis. Id. Douglas believed he had lost the officer, and pulled the car over, but, when the officer emerged again, Douglas told Dennis that if the officer gets out of the car, Dennis should shoot him. (R.5265-6). The officer exited the vehicle, with a gun drawn, pointed in Dennis' direction. (R.5266). The officer yelled at the

Escobars to get out of their car. Id. While the officer was standing in between the two cars, Dennis proceeded to get out of the Mazda, and as he was doing so, opened fire on the officer, firing three or four times. (R.5266-7). Dennis then got back into the Mazda and Douglas sped off, having collided with either a tree or the police car. (R.5267).

With respect to the motive for the crime, Dennis stated that he was aware that Douglas was wanted in California, and he further knew that the gun was probably stolen, and that the car was stolen. (R.5263). As to the gun, Dennis stated that they had disposed of it by a hotel near the airport. (R.5270). As this was not far from Dennis' residence, Morin was skeptical, based on information he had received from Douglas. Dennis also said that the day after the shooting, he and Douglas took the car to a car wash and had it washed several times, in an effort to remove any fingerprints. (R.5271). They abandoned the car in an apartment building parking lot on 7th Street, near his residence. (R.5272).

The officers returned the next day to ask Dennis to clarify some matters. They had received some information from his wife, Fatima, regarding the weapon, and wanted to ask Dennis about this again. (R.5275-6). Dennis, on this occasion, indicated that he had mentioned the airport hotel in an effort to keep his wife out of this. (R.5276). This time, he said that he, Douglas and Fatima drove to a distant Indian reservation, and Dennis and Douglas exited the car and threw the gun into a canal. (R.5277). Dennis had wrapped the gun in a plastic bag and placed that inside a paper bag; he, himself, actually threw the gun into the canal. (R.5278).

Wayne Parker, the sales manager from the Mazda dealership, discovered the 1988 Mazda 626 LX stolen in mid-April, 1988, when he went to look for it for a deal with another dealership. (R.4668-73). He reported it stolen at that time. (R.4668). The vehicle was ultimately located and retrieved. (R.4508-16, 4593-99, 4799-4801, 5050-3). Dennis' wife, Fatima, corroborated that the two brothers stole the car from the dealership, late at night, when the dealership was closed, about two weeks prior to the shooting, while she was in the car that they drove to get to the dealership. (R.5028-33). A friend of the Escobars, Mr. Saballos had also seen them driving a gray Mazda at approximately the same time period. (R.4825-6). An accident reconstruction expert, William Fogerty, examined the Mazda and Officer Estefan's vehicle, and concluded that the two vehicles had collided together, based on an inspection and measurements of the two bumpers of the respective cars. (R.5493). Based on the patterns he observed, it was more likely that the damage to the two vehicles occurred while the Mazda was moving backwards, catching the bumper of the stopped police vehicle. (R.5498). Two of Douglas' fingerprints were found on the interior part of the car's sunroof. (R.5635-7).

The police also attempted to find the murder weapon, taking Fatima Escobar to the vicinity where she stated that it had been disposed of. However, a search of the canal did not locate the weapon. (R.5053-6, 5084-5).

As noted above, both Escobars acknowledged that the motive for the murder was the effort to preclude Douglas' return to California for prosecution on offenses for which he was wanted. Lt. Amoroso, from the San Jose police department,

established that there was an outstanding arrest warrant, for Douglas Escobar, since October 22, 1987. (R. 4275-6). The motive for the murder was also established through several statements that Douglas had made to acquaintances. Douglas Saballos was a friend of Douglas and Dennis Escobar. On one occasion, in early March, 1988, the three men had been out drinking, when Douglas stated that he was wanted for certain things in California, "and that he wasn't going to be taken back, that he was, you know, willing to get to break anybody that would try to stop him." (R.4819-22, 4843). According to Saballos, when this was related, Dennis is present, thus further corroborating Dennis' own statement, in which he admitted knowing that Douglas was wanted in California. (R.4819-22, 4853-4). Similarly, in February, 1988, Douglas Escobar had told another acquaintance, Jose Bonilla, that he had robbed a bank in California, that he was worried about being stopped by the police, and that he was going to shoot whoever stopped him. (R.5003-5).

Several witnesses, including Douglas Saballos (R.4822-31, 4832, 4845), Fatima Escobar (R.5033), Ramon Arguello (R.5111-13), with whom Douglas was residing in March, 1988, and Yadira Mendoza, (R.5453-56), all established that both Escobars changed their appearances after the killing of Officer Estefan, by changing their hair lengths, beards, and other similar things.

On the night of the shooting, Fatima Escobar stated that her husband came home at approximately 9:00 p.m., asking for the keys to her red Chevette. (R.5026-28). She did not see Douglas at that time. (R.5026). Dennis left hastily and appeared very nervous. (R. 5027). Ramon Arguello, with whom Douglas was

residing at the time, stated that Douglas and Dennis arrived at his home around 11:00 p.m. that night. (R.5103-5). The brothers were pretty nervous and there were drops of blood on Dennis' pants. (R.5106). Douglas had a revolver and was driving the Chevette which belonged to Fatima Escobar. (R.5106-7). With respect to a small cut which Dennis had on the back of his head, Douglas stated that Dennis had gotten into an argument at a restaurant. (R.5108-9). Douglas stayed in Arguello's apartment that night and left one or two days later, saying that he was going to Texas, with Dennis, to work with his father. (R.5109-10).

About one week after the shooting, the Escobars visited Douglas Saballos, their former friend and drinking companion. (R.48220. The Escobars asked Saballos for the address and phone number of his brother, Gilberto, in California. (R.4823). Based on, (a) Escobars' changed appearances, (b) the fact that the murder had occurred in close proximity to a bar frequented by the brothers, (c) media reports of the car and the assailant, as described by the victim, having matched the car being driven by the brothers and the physical description of one of the brothers, and, (d) Douglas Escobar's previous statements in which he threatened to kill police officers who stopped him, Saballos was suspicious about the Escobars' involvement in the shooting of Officer Estefan. (R.4824). Saballos called his brother in California, to express those concerns, and to advise his brother to stay away from the Escobars. Id. On April 26, 1988, Saballos got a call from his brother, stating that the Escobars had beaten him up and told him about the murder in Miami, stating that they did it. (R.4826). Douglas And Dennis Escobar then got on

the phone, at Gilberto's residence, and told Saballos that they had not beaten Gilberto and that nothing was going to happen to Gilberto. (R.4827).

California Highway Patrol Trooper Grant Kell explained what happened in the shoot-out with the Escobars. He and his partner, Officer Koenig, observed a suspicious Lincoln Continental, around 2:20 a.m., on April 27, 1988. They thought that the driver was either sleepy or intoxicated. (R.4895-6). They pursued the vehicle and pulled it over. (R.4897-4900). Dennis Escobar had been driving and, upon his exiting of the vehicle, Koenig started approaching him. (R.4903-5). Douglas Escobar, the passenger, exited, crouched and moved away from the car, when Kell observed Douglas pointing a gun at Koenig. (R.4906-7). Douglas kept trying, unsuccessfully, to get the weapon to fire, and Kell fired a single round, hitting Douglas in the chest. (R.4911-13). Douglas managed to hide, temporarily, and, when seen again, was still trying to fire his weapon. (R.4914-16, 4920-1). Eventually, Kell observed Dennis Escobar attacking Trooper Koenig and fired a shot towards Dennis. (R.4931, 4937). Additional shots were fired by Kell, and backup assistance eventually arrived, resulting in the capture of the two Escobars. (R.4943).

After Dennis' counsel cross-examined Kell and appeared to minimize or question Dennis' role in the shoot-out, the prosecution decided to call Trooper Koenig, whom the state had not otherwise intended to call as a witness. (R.4959-70, 4980, 4982-6). The judge agreed to allow Koenig to testify as to his injuries, but did not want a complete repetition of the incident. (R.4986). Trooper Koenig proceeded to relate how he approached Dennis, asking Dennis to step to the rear

of the car, while pointing a weapon at Dennis. (R.5577-8). Koenig saw someone else running towards Kell's position and heard a shot. Id. Dennis grabbed Koenig's gun and a struggle ensued. (R.5578-80). During the course of the struggle, Dennis tried kicking Koenig in the groin, bit Koenig's left hand, and grabbed Koenig's baton, striking him with it. (R.5582, 5585-6). Koenig eventually emptied all six rounds out of his weapon and could not recall much else, as he was dazed at the time; he later received 14 stitches in the eye brow area and a "bone chip" in his nose. (R.5586, 5589).

Additional testimony, from the medical examiner, Dr. Mittleman, established that the cause of death of Officer Estefan was multiple gunshot wounds. (R.4367). One of the wounds, to Estefan's left arm, was inflicted from close proximity, as evidenced by the presence of stippling. (R.4305, 4309-10). The remaining wounds to the stomach and left wrist, did not show any signs of stippling. (R.4328-9, 4345-6). A careful reading of Dr. Mittleman's testimony regarding the location of the wounds and stippling, indicates that the only reasonable sequence was that: a) the first shot fired from a distance, entered the stomach; b) the second shot, fired from within three feet, strikes the left arm, which is in a downward position, covering a huge stomach wound, while the officer is doubled over, as the bullet exits on the interior of the arm and enters the torso; and c) the final shot, fired while the shooter is backing away, strikes the officer's left wrist, which at the time is down against the officer's left thigh, as metal scraps from the watchband were embedded in the left thigh. (R.4305-6, 4310-15, 4324, 4328-9, 4334-35, 4338-39, 4346-56, 4364-67).

A firearms examiner, Robert Hart, was able to state that two of the bullets retrieved during the autopsy were definitely fired from the same gun. (R.5558-60). A third projectile was consistent with having been fired from the same gun, but there were too few similarities present to say that it was conclusively from the same gun. (R.5560).

Additional testimony was also adduced from several crime scene technicians who gathered the physical evidence. (R.4679-99, 4869-78, 5067-85). There was no evidence that Officer Estefan's weapon was ever fired. His gun was found, lying on the ground, near his hand, while he was on the ground and injured, awaiting assistance. (R.4741, 4521).

Neither defendant presented any witnesses at the guilt phase proceedings. The jury found each defendant guilty of first degree murder, grand theft of a motor vehicle, and possession of a firearm in the commission of a felony. (R.181-183; 2R. 234-37).

B. Penalty Phase

After the jury rendered its verdicts in the guilt phase, the judge initially set the commencement of the penalty phase proceedings for January 25th, 1991, nine days later. (R.6061). On January 24, 1991, the court postponed the penalty phase proceedings for an additional week, due to problems of Dennis Escobar's counsel in obtaining witnesses from California and Central America. (R.6084-88, 6097). On January 30, 1991, the day before the commencement of the sentencing proceedings, the court heard arguments regarding last minute witnesses being produced by attorney Carter, who had not yet been made available for deposition,

and who would not be arriving until late that night. (R.6110-11, 6120-25). The next morning, prior to the commencement of the evidentiary presentation, the court ruled that the last-minute witnesses would not be permitted to testify for Dennis Escobar. (R.6195).

The State presented one witness in its case-in-chief, Chris Rogers, an investigator with the district attorney's office in California. Rogers had investigated the California shoot-out and simply testified that both Douglas and Dennis Escobar were charged with two counts of attempted first degree murder for that incident, and that both were found guilty on both counts. (R.6201-06).

Douglas Escobar then presented three witnesses. Richard Pointer, an attorney who represented Douglas in a DUI case in California, stated that after a plea agreement had been worked out on that case, Douglas failed to show for a sentencing hearing, and an outstanding bench warrant was issued. (R.6212-15). With respect to the "El Camino bank robberies," Pointer had represented two other individuals who had been charged with those robberies, and he stated that an indictment was never filed for Douglas on those robberies. (R.6219-20). He added that Douglas had always been a "gentleman" in his presence. (R.6221).

Douglas Escobar's son stated that his father was a good father and that he missed his father. (R.6232-5). Douglas's father, Dennis Raul Escobar, also testified, stating that he last saw Douglas in 1980. (R.6236). The father was an accountant, who drank excessively, and left the family when Douglas was about 4 or 5. (R.6239-43). He related an incident in which he hit his wife, which Douglas might have seen; on that same occasion, he fired a gun at his wife. (R.6242). As a result

of that, he left the household and had little subsequent contact with the family. Id. Years later, he sent Douglas to Mexico to study architecture at a university, but stopped sending money in the midst of Douglas' studies. (R.6243-3). He was aware that after he left home, all of the children, Douglas, Dennis and a sister, completed school. (R.6249). After the presentation of these witnesses, Douglas Escobar rested. (R.6251).

Dennis Escobar then presented five witnesses. Michael Rose, a psychiatrist who spent less than two hours with Dennis, described Dennis as a perfectionist, who tried hard to do a complete job. (R.6259-60, 6267). Dennis was not an impulsive person; he was not spontaneous. (R.6260). Rather, Dennis was a structured individual who tends to act within a larger organization, rather than acting on his own. (R.6266). Rose associated criminal personalities with impulsive and aggressive individuals. Id. Rose was impressed by Dennis Escobar's enthusiasm in describing his revolutionary activities in the overthrow of the Somoza government. (R.6258, 6269). When the prosecution asked Dr. Rose to assume an incident in which Dennis attempted to disarm a bailiff in a courtroom, to effectuate an escape, Rose would not say that Dennis could not do that, but Rose maintained that Dennis' personality was not of that type. (R.6273-4). The prosecution also elicited that Rose did not speak to any family members or police officers and did not review an reports of this case. (R.6267-8). Rose's primary conclusion was that Dennis was not likely to act alone or be aggressive in the future. (R.6274-5).

Angel Blanco, the mother of the two defendants, related that there were problems when the father was drinking, but she did not recall the father ever hitting

the children. (R.6276-7). After the father left, she raised the children, selling clothes, and operating a restaurant. (R.6277). She married again, this time to her first husband's brother, but that marriage did not work out well as the second husband was not communicative. (R. 6277-79). She eventually separated from him and raised the children by herself. (R.6279). Neither the first nor the second husband had been physically abusive towards the children. (R. 6283). In raising the children, she sent them to school and church; they were obedient and good children. (R.6284). Dennis eventually went so far as to start law school for one year, and Douglas attended architectural school. (R.6285).

Dennis' sister, Bertha Escobar, described Dennis as a good person, who helped people and loved his children. (R.6287-8). Dennis' wife, Fatima Escobar, whom he had married in 1980 and known for several years prior to that, described Dennis as an excellent father who was concerned with his children's school problems. (R.6292). However, Dennis stopped seeing his young son in 1987, when the child was seven months old. (R.6297-9). Dennis' father was then recalled for brief testimony, reiterating what he had said on behalf of Douglas. (R.6301-04). Dennis's 10 year old daughter, Denise, also described her father as a nice person, whom she missed. (R.6306-12). Douglas did not seek to adopt or use any of the testimony from Dennis' witnesses.

After Dennis Escobar rested, the State produced one rebuttal witness, Robin Wakerly, who served as a municipal court bailiff, in August, 1988, when Dennis, in the courtroom, tried to remove her gun from her holster and got involved in an ensuing struggle. (R.6352-59).

On January 31, 1991, the jury returned its advisory verdict, recommending the imposition of the death penalty for both Douglas Escobar and Dennis Escobar, with votes of 11-1 as to each defendant. (R.6422-3). Immediately after the rendition of those verdicts, the judge advised the parties that the defendants could present any additional witnesses and argument which they desired to produce on the following morning. (R.6425).

The next morning, Douglas presented four witnesses, his wife, Evelyn Escobar, his mother, Angela Blanco, his sister, Bertha, and his father, Dennis Escobar, Sr. (R.6430-39). Each essentially asked for the mercy of the court. They emphasized his love for his children and other family members. Counsel for Dennis adopted what these witnesses said as to Dennis, (R.6435, 6437, 6440), and then produced four more witnesses. Dennis' wife, Fatima Escobar, talked about the effect on their children and asked for clemency from the court. (R.6441). Rodolpho Berrios, a family friend, stated that Dennis went underground with the Sandinistas after finishing school. (R.6442-3). According to Berrios, all of the youth of that age grabbed weapons to fight for what they believed was just. After the Sandinistas obtained power, the youth became fed up with the war and looked for new horizons. (R.6443-4). Maria Rojas, the aunt of Fatima Escobar, simply asked for clemency for Dennis and for the children. (R.6444-5). Douglas did not seek to adopt any of their testimony. Dennis Escobar then gave a brief statement on his own behalf. (R. 6445-6).

The court imposed the sentence of death for first degree murder, for both Douglas and Dennis Escobar, on February 22, 1991. (R.6466-74). As to Dennis

Escobar, the court relied upon two aggravating factors: a) that the victim of the crime was a law enforcement officer engaged in the performance of his official duties; and b) that the defendant was previously convicted of a violent felony - the attempted murders of the California Highway Patrol troopers. (R.255, 271-73). The court also found that two other factors had been established as to Dennis, but specifically stated that the court was not relying on those factors. Those factors were: a) that the crime was committed for the purpose of avoiding or preventing a lawful arrest; and, b) that the crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws. (R. 271-73). The only mitigating factor found by the court was the nonstatutory factor that the defendant came from a "broken home." (R.273). The court found that the remaining evidence adduced as mitigating evidence did not rise to the level of a mitigating factor. (R.273).

SUMMARY OF THE ARGUMENT

I. Severance was not required where: (a) the codefendants' statements were interlocking and trustworthy for Sixth Amendment purposes and admissible against one another; (b) there is no record of Douglas's courtroom behavior adversely affecting Dennis; (c) the defenses were not sufficiently antagonistic to require separate trials; and (d) evidence of collateral offenses was admissible against each defendant, to establish motive and consciousness of guilt.

II. The Appellant has not demonstrated any error or prejudice in the exercise of his peremptory challenges.

III. A juror, whose views on the death penalty precluded her from following the court's instructions, was properly stricken for cause.

IV. Photographs of the victim's wounds were relevant to several issues, including premeditation and the identity of the party who shot the victim. Each wound was depicted by a single photograph and there was nothing excessive about the photos used.

V. An insurance report regarding the theft of the Mazda was not sufficiently objected to at trial to preserve the claim for appeal. Moreover, due to the abundance of other testimony about the theft, any error must be deemed harmless.

VI. Claims regarding evidence of the victim's good character were not preserved for appellate review.

VII. A claim regarding opinion testimony from Detective Morin was not preserved for appeal, as counsel did not state any grounds for the objection.

VIII. Virtually all of the prosecutorial comments during closing arguments, about which the Appellant complains, were not objected to and the claims are not preserved for appeal. Most, if not all, of the comments are proper, and no possible error is sufficiently egregious to warrant reversal.

IX. The prohibition on the use of jury instructions on flight does not apply retroactively to trials, such as the instant one, which preceded this Court's decision in Fenelon.

X. There was no error in failing to instruct on third-degree murder, since the alleged felony, the theft of the Mazda, was one which had been fully completed several weeks prior to the murder of Officer Estefan, and the murder was not during the course of that theft.

XI. Evidence of premeditation was more than sufficient, in view of Douglas' prior threats to kill any officers, Dennis' prior awareness of those threats, Douglas' direction to Dennis to shoot, and Dennis' firing of three shots, all striking the officer.

XII. The motion to suppress statements was properly denied, as there was no evidence of coercion by the police, and the defendant's medical condition did not preclude a voluntary waiver of rights and statement.

XIII. The death sentence was proportionate as to Dennis, in view of two strong aggravating factors and minimal mitigating evidence.

XIV. The Appellant's attacks on the constitutionality of Florida's death penalty statute have repeatedly been denied by both this Court and the Supreme Court of the United States.

ARGUMENT

I.

THE LOWER COURT DID NOT ERR IN DENYING DEFENDANT'S MOTIONS TO SEVER.

A. Bruton Issue

The Appellant argues that it was improper to sever the trials of the two codefendants because of the ensuing problems emanating from Bruton v. United States, 391 U.S. 124, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1988). This argument fails because there is no problem under Bruton and its progeny.

In May, 1990, the trials of the two codefendants had been severed, with the concurrence of the prosecution. (R. 1253-4). Effective October 1, 1990, the legislature amended Section 90.804(2)(c), Florida Statutes, regarding the declaration against hearsay exception to the hearsay rule. As a result of this amendment, the prosecution believed that there would no longer be any evidentiary problem regarding the use of each codefendant's statement against the other codefendant. Thus, as a result of the change in the evidence code, the State, on September 19, 1990, filed a Motion for Rejoinder or Consolidation of Defendants. (R. 124-130).

A hearing on this motion was held on September 27, 1990. (R. 1357-71). Counsel for Dennis Escobar argued that the application of the change in the evidence code would constitute an ex post facto violation. (R. 1360-62). He further argued that the use of the codefendants' statements against one another would constitute a Bruton violation. (R. 1362-64, 1366-68). The use of a codefendant's statement as evidence against another defendant must satisfy both the confrontation clause of the

Sixth Amendment of the United States Constitution and any requirements of the state evidence code. That was accomplished in the instant case.

The confrontation clause of the Sixth Amendment simply requires that statements of nontestifying declarants have "indicia of reliability." See generally, Idaho v. Wright, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990). The "indicia of reliability" requirement can be satisfied "where the hearsay statement 'falls within a firmly rooted hearsay exception,' or where it is supported by 'a showing of particularized guarantees of trustworthiness.'" Id. 497 U.S. at 816 (quoting Ohio v. Roberts, 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980)).

These principles have been applied in the context of the admissibility of one non-testifying codefendant's out-of-court statement against another defendant. In Lee v. Illinois, 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986), the prosecution argued that sufficient indicia of reliability existed because the confessions of the defendant and non-testifying codefendant overlapped to a great extent. The Supreme Court, in rejecting this contention, found that the discrepancies between the two confessions were neither irrelevant nor trivial. As such, there did not exist sufficient "indicia of reliability." 476 U.S. at 546. Nevertheless, the Court implied that sufficiently interlocking confessions, without significant discrepancies, could demonstrate sufficient indicia of reliability.

The Supreme Court continued the evolution of this theme in Cruz v. New York, 481 U.S. 186, 107 S.Ct. 1714, 95 L.Ed.2d 162 (1987). There, the Court emphasized that "what the interlocking nature of the codefendant's confession pertains to is not its harmfulness but rather its reliability. . . . " 481 U.S. at 192. Moreover, the

reliability of the codefendant's out-of-court statement "may be relevant to whether the confession should (despite the lack of opportunity for cross-examination) be admitted as evidence against the defendant, see Lee v. Illinois, 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986), . . ." Id. at 192-93. The Court reiterated this proposition:

> Of course, the defendant's confession may be considered at trial in assessing whether his codefendant's statements are supported by sufficient 0'indicia of reliability' to be directly admissible against him . . . despite the lack of opportunity for cross-examination.

481 U.S. at 193-94. Thus, the sole question presented by the confrontation clause is whether the codefendant's out-of-court statement bears sufficient indicia of reliability. If the indicia of reliability exist, the statement is fully admissible against the defendant, without any violation of the Sixth Amendment. Those indicia of reliability are established in the instant case by the thoroughly interlocking nature of the codefendant's and defendant's statements. There are no significant discrepancies.

This Court has clearly recognized and applied the same principles. In Grossman v. State, 525 So. 2d 833 (Fla. 1988), this Court held that separate confessions can be so interlocking that they establish the reliability of each other. In Grossman, the appellant confessed to three friends while his codefendant, Taylor, confessed to a police officer. At their joint trial, all four confessions were introduced into evidence. The trial court had utilized a cautionary instruction, advising the jury to consider each defendant's statement only as to the defendant making the statement. In rejecting the appellant's argument that the introduction into evidence of Taylor's confession to the police officer violated his rights under the confrontation clause, this Court stated:

> Taylor's statement interlocks with and is fully consistent in all significant aspects with all three statements that appellant made to Hancock, Allan,

> and Brewer and which were directly admissible against appellant. The indicia of reliability are sufficient to have permitted introduction of Taylor's statement against appellant.

525 So.2d at 838.[1] Similarly, in Glock v. Dugger, 537 So. 2d 99 (Fla. 1989), this Court made it clear that a denial of a motion for severance was justified because the interlocking nature of a joint confession clearly indicated its reliability. Roundtree v. State, 546 So.2d 1042, 1045-46 (Fla. 1989), adheres to the foregoing principles by finding that a codefendant's statement was not admissible against the defendant insofar as there were significant discrepancies and the statements could not be deemed interlocking.

The statements in the instant case were interlocking, and lacked any significant discrepancies. Both Dennis and Douglas confessed to the following significant events leading up to and culminating in the death of Officer Estefan. On the day of the murder, they were in possession of a stolen gun and were in a Mazda 626, which they had stolen. (R. 5205, 5207-08, 5261-5263). Douglas was driving, when they noticed that a police car was following them. (R. 5209, 5263-4). Douglas made a series of turns, in an effort to lose the police, before stopping the car. (R. 5210, 5263-65). When the police appeared again, Douglas told Dennis to shoot the officer if he got out. (R. 5210, 5265-6). Dennis exited the car and fired three or four shots at Officer Estefan. (R. 5211, 5266-7). Subsequently, they disposed of the weapon

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[1] It was an error in Grossman to utilize the limiting instruction, since Cruz, supra, holds that when a statement lacks the requisite indicia of reliability to permit its substantive use against the defendant, it is improper to permit its use solely as to the codefendant, with a limiting instruction. Thus, the use of the limiting instruction can never be proper. In the instant case, no such instruction was used, and the statements were fully admissible against each codefendant, substantively.

in a body of water. Douglas was not familiar with the precise location, but Dennis was able to identify it. (R. 5213, 5270, 5277). The car was subsequently washed and abandoned in an apartment building parking lot. (R. 5199-5200, 5271-2). Both brothers stated that the motive was to avoid going back to prison. (R. 5263, 5208).

The Brief of Appellant does not refer to any discrepancies in the statements. Douglas Escobar's brief in the related appeal does allege the existence of discrepancies, and those will be noted here. In a portion of Douglas' statement, adduced at the pretrial suppression hearing, but not at trial, Douglas stated that "he was not a cop killer." (R. 931). This was not a significant discrepancy. This was consistent with Douglas' confession that Dennis pulled the trigger, and Douglas apparently believed, because of that, that he was not a cop killer as long as he did not pull the trigger. This was also before Douglas decided to give a full confession. Next, Detective Morin, in the pretrial suppression hearing, stated that Douglas told Dennis to shoot after Estefan exited the car (R. 934), but at trial, Morin, says that Douglas claimed to have told Dennis to shoot the officer if he gets out. (R. 5210). Dennis told Morin that Douglas told him (Dennis) to shoot if the officer gets out. (R. 5266). Any inconsistency regarding when Douglas told Dennis to shoot is not significant, since both Douglas and Dennis concurred that Dennis shot and Douglas told him to shoot; they both wanted to avoid going back to prison.

As the confessions were thoroughly interlocking without any significant discrepancies, the motion to re-consolidate the trials was properly granted, and the confession of Douglas was properly admitted for substantive use against Douglas. Bryant v. State, 565 So.2d 1298 (Fla. 1990), relied upon by the Appellant herein,

without any explanation or analysis, does not compel any contrary conclusion. In Bryant, this Court concluded, in the context of Bruton and severance arguments, that the trials of four codefendants should have been severed, because the use of redacted statements of the codefendants, which effectively inculpated other defendants, had the potential to confuse the jurors. The redacted statements had replaced the parties' names with nondescript pronouns, which rendered it difficult to determine who was talking about whom. This Court, in Bryant, distinguished that case from situations in which the evidence is not so complex that the jury would be confused and would be incapable of applying the evidence to the conduct of each individual defendant. The instant case is an example of the straightforward, non-confusing case, in which the various statements are not inherently confusing, and the totality of the evidence is such that the jurors can be expected to assess it in the context of each individual defendant's conduct.

Not only is there no violation of the Sixth Amendment confrontation clause, but Douglas' confession was properly admitted as a statement against interest, under Section 90.804(2)(c), Florida Statues (1990). Prior to October 1, 1990, Section 90.804(2)(c) did not include, as a statement against interest, "[a] statement or confession which is afforded against the accused in a criminal action, and which is made by a codefendant or other person implicating both himself and the accused. . . ." Since that proviso was deleted from the statute, effective October 1, 1990, Douglas' statement was properly admissible, as a statement against interest, against Dennis. This evidence therefore satisfied the requirements of both the confrontation clause and the evidence code. The sole requirement of a statement against interest

is that its trustworthiness be established. As the interlocking nature of the statements demonstrated reliability for Sixth Amendment purposes, it did the same for purposes of the state evidence code. Accordingly, severance was not required due to any Bruton problems. Glock, supra; Grossman, supra. Finally, the State submits that even if there was any error, same was harmless beyond a reasonable doubt, in light of (a) Dennis' own confession to the police, (b) both brothers' joint admission to Saballos that they had committed the instant murder, (c) Dennis' subsequent conduct in the California shoot-out which demonstrated his consciousness of guilt and major participation; (d) Dennis' presence when Douglas, days prior to the instant murder, stated that he would shoot if stopped by the police, because he was wanted in California; and (e) testimony of other witnesses establishing that the brothers had stolen the gray Mazda, which was described by the victim, and was recovered and shown to exhibit physical damage from colliding with the victim's car, in accordance with the victim's description of the crime.

B. Courtroom Behavior of Douglas Escobar

Dennis Escobar argues that he should have been granted a severance as a result of inappropriate courtroom behavior of Douglas Escobar. On once occasion, counsel for Dennis Escobar sought a severance, during voir dire, on the grounds that Douglas "has on at least two occasions given him [a prospective juror] the bam, bam (indicating)." (R. 2623). Neither the judge, nor anyone else confirmed that Douglas engaged in any form of improper conduct, let alone conduct which would in any way prejudiced Dennis Escobar. The Appellant also alludes to an occasion, shortly prior to closing arguments in the guilt phase, when Douglas' counsel questioned Douglas'

competency. (R. 5691-92). Dennis' counsel did not state that anything transpired in open court, at that time, which could have any effect on Dennis. Likewise, minutes earlier, the prosecutor sought to have a colloquy on the record, as to Douglas, for the purpose of ascertaining whether Douglas was waiving his right to testify. (R. 5689). The judge alluded to medication that Douglas has been taking and indicated that they should wait until the next day. Once again, there was no motion from Dennis' counsel at that time, and no claim that Douglas had done anything in open court which would in any way prejudiced Dennis. Indeed, the record affirmatively reflects that both the prosecutor and the court, without contradiction from the defense, noted that according to their observations there had been no episodes of any difficulty with Douglas Escobar. (R. 5690, 5691-3).

In view of the foregoing, there is absolutely nothing in the record to reflect the existence of any inappropriate conduct on the part of Douglas, let alone any conduct which would either be prejudicial to Dennis or require a severance.

C. Antagonistic Defenses

The Appellant next argues that severance should have been granted because the codefendants' defenses were so antagonistic that they precluded a fair trial. The pertinent principles have been frequently reiterated by this Court, and derive from McCray v. State, 416 So. 2d 804, 806 (Fla. 1982):

> . . . the question of whether severance should be granted must necessarily be answered on a case by case basis. Some general rules have, however, been established. Specifically, the fact that the defendant might have a better chance of acquittal or a strategic advantage if tried separately does not establish the right to a severance. . . . Nor is hostility among defendants, or an attempt by one defendant to escape punishment by throwing the blame on a codefendant, a

> sufficient reason, by itself, to require severance. . . . If the defendants engage in a swearing match as to who did what, the jury should resolve the conflicts and determine the truth of the matter. As in this case, the defendants are confronting each other and are subject to cross-examination upon testifying, thus affording the jury access to all relevant facts.

Douglas Escobar's attorney, in opening argument, had asserted that the evidence would show that Douglas was trying to prevent a tragedy from occurring. (R. 4235). He further argued that Douglas was not responsible for his brother's actions. (R. 4238-39). He reiterated this theme in closing argument. (R. 5768, 5783). Dennis' attorney, in closing argument, attempted to argue that the evidence was consistent with Douglas having shot Officer Estefan. (R. 5827-29).

This Court, in circumstances comparable to those of this case, has found that severance was not required. In O'Callaghan v. State, 429 So. 2d 691 (Fla. 1983), the two codefendants, O'Callaghan and Tucker, each accused the other of shooting the victim. This Court, after relying on the principles enunciated in McCray, simply found that severance was not required, as the defendant had the opportunity to confront and cross-examine all witnesses who testified, and there was no confusing or improper evidence submitted to the jury in the joint trial. 429 So. 2d at 695. Similarly, in McCray, severance was not required where the appellant presented an alibi defense and the codefendants testified that the appellant shot the victim. 416 So. 2d at 807. In Espinosa v. State, 589 So. 2d 887 (Fla. 1991), a severance argument was rejected notwithstanding Espinosa's effort to blame his codefendant for the murder and other offenses. See also, Dean v. State, 478 So. 2d 38 (Fla. 1985).

The principal case from this Court, on which the Appellant relies, Crum v. State, 398 So. 2d 810 (Fla. 1981), was carefully analyzed in McCray, supra, in which this Court stated:

> The problem in Crum was not simply that the codefendants had antagonistic defenses. The problem was that one codefendant induced the other to believe that their defenses would be completely consistent and then, after jeopardy attached, decided to change his story, thereby prejudicing the proper preparation of the case for trial. The circumstances would have been different had there been no prior statement or had there been sufficient notice before trial of the change in Marvin's position.

416 So. 2d at 807. In the instant case, Douglas never changed his pretrial version of events after the trial began. Douglas did not testify and did not give any further statements. The only thing that transpired at trial was that Douglas' attorney attempted to put the best interpretation on Douglas' pretrial statements. Thus, Dennis was never induced into believing that the parties' defenses would be consistent. Douglas' pretrial statements indicated that Dennis was the shooter, and that was the same position that Douglas' counsel asserted at trial. Thus, severance was not required due to any antagonistic defenses.

D. California Evidence

The Appellant also argues that he was entitled to a severance because of the collateral offense evidence, which he asserts should have been admissible against Douglas, but not Dennis. The Appellant refers, in general, to the California shoot-out evidence, and to witness Bonilla's statement that Douglas told him that he had robbed a bank in California, and that he would shoot any police who stopped him, because he would not go to jail.

Contrary to the Appellant's arguments, the evidence of the California shoot-out and Douglas' statements to Bonilla was fully admissible against both defendants. With respect to the statements of Douglas to Bonilla, they were admissible, against Dennis, under Section 90.803(3), Florida Statues, the hearsay exception regarding a declarant's state of mind. In Jones v. State, 440 So. 2d 570, 577 (Fla. 1983), seven days before the murder of a police officer, the defendant had been arrested for a traffic infraction and had violently resisted that arrest. The arresting officer from the traffic infraction was permitted by this Court to testify that the defendant had told him that "'he was tired of the police hassling him, he had guns, too and intended to kill a pig.'" 440 So.2d at 577. This evidence was deemed admissible under Section 90.803(3), Florida Statutes, regarding a statement of the declarant's existing state of mind, when the evidence is offered to "[p]rove or explain acts of subsequent conduct of the declarant." Thus, the prior statement explained the subsequent acts of the declarant, and explained the motive for the killing of the officer. Such statements are admissible unless they are made under circumstances that indicate [a] lack of trustworthiness." Section 90.803(3)(b)(2), Florida Statutes. There are no circumstances, in the instant case, to indicate a lack of trustworthiness. The statement was fully consistent with all of Douglas' actions, both in Florida and California. Douglas had indicated that he had robbed a bank in California, and the professed desire to avoid capture and jail was thus indicative of the trustworthiness of the statement. Furthermore, Douglas' statement to Bonilla is effectively corroborated, and rendered trustworthy, by Dennis' own statement to the police, in which Dennis acknowledges that the motive for the killing of Officer Estefan was to

avoid going to prison, as well as Dennis' acknowledgment that he knew Douglas was wanted in California. (R. 5263).

Under Section 90.803(3), as long as the declarant's state of mind is at issue, the evidence is admissible, even if the declarant is someone other than the defendant. See, e.g., Peede v. State, 474 So. 2d 808, 816 (Fla. 1985) (statements of victim, that she was scared of meeting defendant and might be in danger, were admissible, as victim's state of mind was at issue in case); Nelson v. Seaboard Coast Line R. Co., 398 So. 2d 980, 982 (Fla. 1st DCA 1981), rev. denied, 411 So. 2d 383 (Fla. 1982) (contents of suicide note admissible where decedent's state of mind was at issue).

Even though the statement to Bonilla reflected Douglas' motive to kill any officer, it is similarly relevant to Dennis' motive to kill the officer when told to do so by Douglas. Not only were the two close brothers, but there was ample evidence that Dennis was aware of Douglas' criminal problems in California, and Dennis admitted this in his own confession. (R. 5263). Thus, when Douglas told Dennis to shoot, Dennis knew why he was shooting.

Douglas' statement to Bonilla would also be admissible as a declaration against interest, under Section 90.804(2)(c), Florida Statutes, as it tended to subject Douglas to criminal liability, by virtue of the acknowledgment of flight from pursuit of California authorities for California offenses. As previously detailed, in conjunction with the Bruton/severance issue, see pp. 26-32, supra, a declaration against interest is admissible against codefendants, as long as it has sufficient indicia of trustworthiness

for Sixth Amendment purposes. And, as noted above, the requisite indicia of trustworthiness are present.[2]

As the Third District Court of Appeal found, when it determined this issue prior to trial, in State v. Escobar, 570 So. 2d 1343, 1345 (Fla. 3d DCA 1990), the statement is also admissible against Dennis because the parties were charged as joint actors and principals, with a common plan or scheme. See also, Section 90.803(18)(a), Florida Statutes; State v. Brea, 530 So. 2d 924, 925 (Fla. 1988) ("Admission" under Section 90.803(18) "encompasses statements made by someone acting in concert with the defendant. . . .").

Likewise, evidence of the California shoot-out, which occurred one month after the murder of Officer Estefan, was also admitted, and was admissible and relevant as to both Dennis and Douglas, as evidence of flight from a threatened prosecution and as evidence of consciousness of guilt. The pertinent principles are set forth in Straight v. State, 397 So.2d 903 (Fla. 1981), in which the defendant and a co-perpetrator murdered a civilian in Florida and then fled to California. In California, the defendant fled as police officers approached him and the defendant attempted to avoid arrest by firing at the officers. This Court stated the general principle that a suspected person's attempt to escape or evade a threatened prosecution by, inter alia, resistance to lawful arrest, is admissible because it is relevant to the consciousness of guilt which may be inferred from such circumstances:

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[2] For further arguments regarding the admissibility of this evidence, see pp. 33-44, in the Brief of Appellee, filed in the case of Douglas Escobar v. State, Case No. 77,736.

> . . . the evidence of appellant's flight from police and use of his gun was relevant to the issue of his guilty knowledge and thereby to the issue of guilt. Appellant was willing to use at least the threat of deadly force to avoid arrest. This is probative of his mental state at the time.

397 So. 2d at 908; see also, Wyatt v. State, 641 So. 2d 355 (Fla. 1994) (defendant's statement, upon arrest, that he was glad he did not have a gun when he was stopped, as he would have shot officer, was admissible as evidence of flight).

Both defendants, shortly after the killing of Officer Estefan, had changed their appearances, washed their vehicle, to remove prints, and abandoned it. Before going to the airport and to California, they visited an acquaintance, Douglas Saballos, and asked for the address of Saballos's brother in California. Thus, the entire flight to California was an effort to avoid prosecution for the Florida murders.

This Court, in Bundy v. State, 471 So. 2d 9, 20-21 (Fla. 1985), rejected an argument that flight indicated consciousness of guilt only if the State could prove that the flight was due to the guilty knowledge of the defendant for the crime for which he is on trial beyond a reasonable doubt "and to the exclusion of any other explanation for the flight." The State was not required to prove that the defendant had no other reason to flee. Id.

Dennis fled from Florida to California, with his brother, and the shoot-out was a continuation of the flight and further evidence of consciousness of guilt. Furthermore, Dennis participated in the shoot-out, as he physically attacked one of the two officers, and attempted to get that officer's weapon. Thus, Dennis was not just a passive observer of Douglas' activities.

Moreover, any possible error with respect to the admission of Bonilla's testimony about Douglas' statements must be deemed harmless as to Dennis. Counsel for Dennis, Mr. Carter, seized every opportunity he could to emphasize Douglas' violent conduct. For example, on cross-examination of Ramon Arguello, attorney Carter elicited references to an incident in which Douglas pulled a gun on Arguello, even though this matter had not been elicited during prior direct examination. (R. 5122). Similarly, on cross-examination of Bonilla, Carter chose to highlight and emphasize the reference to Douglas' threat to kill an officer. (R. 5016). This was fully consistent with Carter's apparent strategy of trying to show that the evidence was consistent with Douglas having killed Estefan. (R. 5827-29). Furthermore, other evidence was properly admitted, without objection, in which Douglas Saballos related how, shortly before the Estefan murder, both Escobars visited Saballos, while en route to California, and Douglas told him, while in the presence of Dennis, that Douglas "wasn't going to be stopped by anything, that he didn't want to go back to California. He didn't want to go to jail." (R. 4822, 4853-4).

II.

THE LOWER COURT DID NOT ERR IN NOT ALLOWING THE DEFENDANT TO EXERCISE CERTAIN PEREMPTORY CHALLENGES.

The Appellant contends that the trial judge had no authority to infringe upon his exercise of peremptory challenges. However, a criminal defendant does not have any right to the discriminatory use of peremptory challenges. If the defense's use of peremptories is based upon a substantial likelihood of racial bias, the State may object, and the trial judge, upon a finding of such bias, pursuant to a Neil inquiry, has

the discretion to fashion an appropriate remedy, including the denial of the improper challenge and the seating of the improperly challenged juror. State v. Alderet, 606 So. 2d 1156 (Fla. 1992); see also, Jefferson v. State, 595 So.2d 38 (Fla. 1992); Perez v. State, 584 So.2d 213 (Fla. 3d DCA 1991). Moreover, the prohibition against racial bias, and the requirement of a Neil inquiry, also apply to peremptory challenges of white prospective jurors. Elliot v. State, 591 So.2d 981 (Fla. 1st DCA 1991); McClain v. State, 596 So.2d 800 (Fla. 1st DCA 1992), rev. dismissed, State v. McClain, 614 So.2d 498 (Fla. 1993); see also, Roman v. Abrams, 822 F. 2d 214, 228 (2d Cir. 1987) ("Though wholesale exclusion is more often practiced against minorities or traditionally disadvantaged members of society, the exclusion of groups normally in the majority is no less objectionable for it arbitrarily deprives that group of a share of the responsibility for the administration of justice, deprives the defendant of the possibility that his petit jury will reflect a fair cross-section of the community, and gives every appearance of unfairness."). In the instant case, the trial court found the Appellant's use of some of his peremptory challenges to be racially biased and thus did not allow him to exercise said challenges. The trial court's findings were abundantly supported by the record and Appellant has thus not demonstrated any error, nor has he shown any prejudice.

The record in the instant case reflects an intensive voir dire of 99 prospective jurors, which commenced on November 28, 1990 and was completed on December 20, 1990. (R. 1385, 4163). The prospective jurors were first individually voir dired, by both the court and all counsel, on pretrial publicity, sequestration, death penalty issues, etc. (R. 1375-8, 2188, 2995). The jurors were then questioned, in groups,

first by the trial judge and then by each of the parties' counsels. Problematic prospective jurors were then again individually questioned. The exercise of peremptory challenges took place at the completion of this process (R. 3924-4156), with the exception of Appellant's peremptory challenge against prospective juror Smiley, which took place in the midst of voir dire, pursuant to Appellant's request. The trial judge herein, at the time of the exercise of the peremptories had taken extensive notes, "50 or 60 pages of notes," as to each venireman, pursuant to the aforesaid extensive inquiries. (R. 4021). Even the details of the prospective jurors' demeanor and manner of answering questions had been noted by the trial judge. (R. 3945-6). The collective panel consisted of 42 Caucasians, 30 Latins, 26 Blacks, and one Oriental. (R. 3955-6). The population of Dade County at the time, was "roughly 17% black." Id. The defendants and the victim were Latin, and defense counsel for this Appellant was Black. (R. 3978-9).

Defense counsel for Appellant exercised his first three peremptory challenges against Caucasian prospective jurors, Smiley, Morris and Jorgenson. (R. 3944-46). The State requested a Neil inquiry when Appellant struck the third prospective juror, Jorgenson, based upon a pattern of excusing Caucasians and the fact that there were no race neutral reasons for excusing the third prospective juror. Id. The trial judge denied this request. Id. Without any explanation from the defense, the court stated that, with respect to the first juror, Smiley, it could understand the reason for the challenge due to "the manner in which he [Smiley] responded to defense counsel. Id. As to the second challenge, the court noted that it could understand why both sides would wish to excuse the juror, due to her inconsistent belief in the death penalty. Id.

The court noted that it could not see a reason why juror Jorgenson had been challenged, but that it was nevertheless denying the State's request for an inquiry, as no pattern of discrimination had been demonstrated. Id.

Defense counsel then requested a Neil inquiry of the State, based upon its exercise of challenges on Black prospective jurors, which was denied by the trial court, upon a finding that the State's challenges had not been racially motivated. (R. 3950-52). All parties then tendered the panel, which at this time consisted of six Black jurors. (R. 3952). Appellant then announced that he would continue making Neil objections to the State's exercise of challenges, until such time as the jury was sworn, "regardless" of what the prosecution would do. (R. 3952-53).

At this juncture, Appellant, without even first naming a juror, also announced, "I will strike a white female." (R. 3953). Upon the State's objection that instead of a name, the defense was announcing a strike by race, Appellant stated that it wished to exercise a peremptory on, "A white female by the name of Noreen Virgin." Id. Appellant stated that he had previously challenged this juror for cause. Id. However, the court noted that there had been no prior challenge for cause as to this juror by the Appellant. (R. 3954). Appellant responded that he did not recall the reason for the alleged cause challenge. Id. The State then requested a Neil inquiry, stating that there was no "race neutral basis to excuse Ms. Virgin and frankly there are certain notes that I have concerning her feelings about the death penalty that sort of made me believe that she was going to be a defense juror." (R. 3954-5). The court, at this time, agreed that a Neil inquiry was necessary and required Appellant to state "race neutral" reasons for his peremptory strikes. (R. 3955-57).

Appellant then stated that as to prospective juror Jorgenson, his notes reflected her to be, "A.L.S.," which meant "Abe Laeser [prosecutor] smilers." (R. 3957). The trial judge rejected this reason and found that it was not race neutral. (R. 3963). With respect to prior jurors, Appellant "refused" to give race neutral reasons. (R. 3958). Appellant stated that the State had not demonstrated a prima facie case of racial discrimination pursuant to Neil and Slappy. (R. 3960). The court responded that it had found such a "prima facie" case, and again asked Appellant to state race neutral reasons for his challenges. Id. Defense counsel then stated that, after conferring with his client, the latter did not like and did not want prospective jurors Smiley, Morris, Jorgenson and Virgin on this jury. (R. 3960-62). The court rejected this reason as well, finding that it was not race neutral, and stating, "I don't believe that the cases would allow the tail to wag the dog, and the client can not do what a lawyer cannot do in so far as violat[ing] the case law as it exists in the State of Florida, specifically those cases beginning with the Neil decisions." (R. 3962-63).

The trial court thus ruled that it was not allowing the three[3] improper challenges and said jurors would remain. (R. 3963-4). Appellant's peremptories expended on those jurors were restored. Id. The Appellant then sought to remove all other Caucasian jurors: Santin, Carpenter, Diaz. (R. 3964, 3981-2, 3985), and expressly stated that he was satisfied only with the black prospective jurors. (R. 3987-8). The State again requested a Neil inquiry which was granted by the Court. (R. 3965-7, 3981-4, 3985-6). The reasons given for wishing to challenge said Caucasian jurors

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[3] Virgin, Jorgenson and Morris.

were that the defendant did not "like" Santin and the latter "giggles too much with the state attorney"; Carpenter was "a little racist," and Mr. Diaz could have "bias" against the Appellant. Id. The court rejected these reasons as not being supported and race neutral, and again allowed said prospective jurors to remain on the panel. (R. 3963, 3967, 3984, 3986-7).

The next day, the Court expressed its reservation about placing "the rights of the community and the rights of potential jurors to sit on a jury above the rights of a defendant to participate in selection of a jury." (R. 4003). Defense counsel then stated that he had an "AC system," where he took into account "at least 75 factors," based upon "nothing scientific - psychological," such as jurors dressing up, having or not having pets, belonging to organizations, race, sex, etc. (R. 4006-07). The court then gave Appellant another opportunity to state specific race neutral reasons supported by the record, as to the improperly challenged jurors. (R. 4025-26).

Appellant then stated that prospective juror Morris had "waver[ed] back and forth" in her responses. (R. 4026-27). The court accepted this reason and this juror was excused. (R. 4028). Appellant then stated that he had attempted to excuse juror Carpenter because his notes reflected that she was, "Redneck." (R. 4033). The court overruled the State's objection that this was a racial reason, and stated that he "perceived" Appellant's terminology to refer to "people who live down in the Redland area and the Homestead area who are agricultural type people. (R. 4033-4). The state pointed out that the juror was from West Dade, not, "Redland or Homestead or anywhere near that." (R. 4036). Nonetheless, the court allowed the juror to be excused, based upon a subsequent reason, given after consultation and assistance

from the codefendant's counsel, that said juror had been a plaintiff in a law suit (R. 4036-38, 4040-1); this, despite the fact that two of the seated black jurors on the panel were also plaintiffs in lawsuits. (R. 4041-2). As to previously challenged juror Santin, the court allowed Appellant to excuse this juror because she had a close friend who had been the victim of a violent crime. (R. 4053-4). Again, this was done despite the fact that another black seated juror had himself been a victim of a violent crime. (R. 4054). No additional reasons were given as to the remainder of the Caucasian jurors whom the Appellant wished to excuse the previous day. (R. 4058, 4115). The next and final day of jury selection, again the record reflects that Appellant continued to challenge the Caucasian jurors. When the Appellant chose to give any reason with a semblance of validity, the trial court allowed said jurors to be excused. (R. 4126-28; 4128-30; 4148-9). Finally, the State would note that the jurors previously challenged by the Appellant, Jorgenson, Virgin and Diaz, were then all excused by the codefendant. (R. 4122, 4124, 4137).

In sum, the State respectfully submits that as seen above, the Appellant clearly expressed his intent to accept only black prospective jurors and to challenge all of the Caucasian veniremen. The trial court thus correctly found that a strong likelihood of racially motivated peremptory strikes had been established and required the Appellant to state race-neutral reasons for his challenges. Reed v. State, 560 So.2d 203, 206 (Fla. 1990) ("Within the limitations imposed by State v. Neil, the trial judge necessarily is vested with broad discretion in determining whether peremptory challenges are racially intended. State v. Slappy. Only one who is present at the trial can discern the nuances of the spoken word and the demeanor of those involved.").

The record also reflects that in the instances where the Appellant gave any facially race-neutral reasons, the challenged juror was excused. The record reflects that the trial judge only rejected speculative and pretextual reasons such as "A.L.S." or the defendant not "liking" a juror or thinking that a juror could be "biased" against him. See, Wright v. State, 586 So.2d 1024, 1025-29 (Fla. 1991) (when a party meets its initial burden of persuasion, Neil imposes upon the other party an obligation to rebut the racial discrimination inference by a "clear and reasonably specific" racially neutral explanation. "Peremptory challenges based on bare looks and gestures are not acceptable reasons unless observed by the trial judge and confirmed by the judge or the record."). The Appellant has thus not demonstrated any error. State v. Alderet, supra; Jefferson v. State, supra; Elliot v. State, supra; Reed, supra; Wright, supra. Moreover, as seen in the Appellant's brief on this issue, all of the complained of prospective jurors specified therein were in fact excused by other parties and did not serve on the sworn jury. See Brief of Appellant at pp. 55-56. The Appellant has thus not demonstrated any prejudice either. Not only is prejudice not demonstrated for the foregoing reasons, but, even if it were concluded that any peremptory challenge was erroneously interfered with, the State submits that this Court should adopt the harmless error analysis which has been set forth in the three-judge panel's opinion in United States v. Annigoni, 68 F. 3d 279 (9th Cir. 1995) (rehearing en banc granted January 10, 1996 and currently pending). That panel's opinion held that an erroneous denial of a peremptory challenge, after an inquiry regarding the alleged discriminatory use of peremptory challenges, should not constitute reversible error absent a demonstration that any of the jurors who were ultimately seated were biased.

III.

THE TRIAL COURT DID NOT ERR IN EXCLUDING A PROSPECTIVE JUROR WHOSE VIEWS ON THE DEATH PENALTY WOULD PREVENT OR SUBSTANTIALLY IMPAIR THE PERFORMANCE OF HER DUTIES AS A JUROR IN ACCORDANCE WITH THE COURT'S INSTRUCTIONS.

Juror Rogers repeatedly indicated that her views on the death penalty would interfere with the court's instructions regarding the jury's duty in recommending a sentence. Under such circumstances, the lower court did not abuse its discretion in excusing Juror Rogers for cause.

The standard for determining when a prospective juror may be excluded for cause because of views on capital punishment "is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), quoting Adams v. Texas, 448 U.S. 38, 45, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980). See also, Gray v. Mississippi, 481 U.S. 648, 658, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987). The standard "does not require that a juror's bias be proved with 'unmistakable clarity.'" Witt, 469 U.S. at 424. A trial court's determination on this issue is one which rests within that court's discretion and must be upheld in the absence of an abuse of discretion. See e.g., Johnson v. State, 608 So. 2d 4, 8 (Fla. 1992); Mitchell v. State, 527 So. 2d 179, 180 (Fla. 1988). The reasons for the trial court's discretion and the lack of a requirement of proof of bias by unmistakable clarity, are set forth in Witt:

> . . . determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. For reasons that will be developed more fully, infra, this is why deference must be paid to the trial judge who sees and hears the juror.

469 U.S. at 424-26.

Juror Rogers expressed, not only her lack of belief in the death penalty, but the strong possibility that she would not be able to follow the court's instructions. Initially, she affirmatively stated that her view would substantially interfere with her ability to carry out her instructions and duties. (R. 1698). Subsequently, she "guessed" that she could follow the court's instructions, but would "have a really hard time" and would "like to go the other way." (R. 1698). When asked if there were "any circumstances" under which she thought she could recommend imposition of the death penalty, at first she thought it was "possible," but immediately after reconsidered and retracted, stating "I don't know." (R. 1699). On further questioning, she "guessed" or "supposed" that under some circumstances, she could recommend the death penalty. (R. 1700).

On questioning by the prosecutor, the juror indicated that a recommendation of death would have to be in a case "unbelievably worthy" of it, and she would have a "very hard time". (R. 1703). She adhered to this view even when confronted with

the situation in which the judge instructed that a recommendation of death would be appropriate under a lesser standard:

> **MR. LAESER:** Let's assume that the standard of law is something less than unbelievably worthy of it. We're dealing with questions of, are there more reasons to impose it than reasons to less impose it? That's ultimately the type of question that jurors deal with.
>
> . . . would it be fair to say that if it was a regular case, not something unusual or bizarre that in your mind you would not recommend the death penalty?
>
> **JUROR ROGERS:** Probably not.

(R. 1703-4). In response to further questioning, she thought that she would require the prosecution "to present evidence that is so strong, so overwhelming in order to convince [her] to even consider" recommending the death penalty. (R. 1704). She "definitely" viewed herself as "partial towards the idea of recommending life." (R. 1705). She did not know if her partiality was so strong that it would be very difficult for the prosecutor to convince her to recommend death. Id. Counsel for the codefendant posed one question, presupposing that the prosecution met its burden of proof, and asking if Rogers would have problems following her duties as a juror. (R. 1706-7). Rogers responded, "No, I don't." (R. 1707).

In view of the foregoing, Ms. Rogers repeatedly professed difficulties in following the court's instructions. At times, she was unable to even consider the death penalty. At other times, she would hold the State to a burden higher than that which the law imposes on it. At still other times, she simply did not know whether she would ultimately be able to follow the law.

The instant case is similar to that of Randolph v. State, 562 So. 2d 331 (Fla. 1990). There, juror Hampton was equivocal regarding the ability to recommend death. At first, Hampton indicated that she could consider the death penalty and could render a verdict calling for the death penalty, consistent with the court's instructions, in an appropriate case. 562 So. 2d at 335. Subsequently, Hampton indicated an inability to ever vote for the death penalty. Id. Upon further consideration, Hampton "guessed" that she could vote for the death sentence in extreme circumstances. Id. at 336. Based on such equivocation, this Court found that the decision to excuse Hampton for cause rested within the trial court's discretion, as this Court could not "say that the record evinces juror Hampton's clear ability to set aside her own beliefs 'in deference to the rule of law.'" Id. at 337. See also, Robinson v. State, 487 So. 2d 1040 (Fla. 1986) (jurors put themselves "in the end zone 'with the death penalty opponents'" and equivocated about effect of possible death sentence on their performance as jurors, and trial court's excusal of jurors was upheld by this Court).

In Trotter v. State, 576 So. 2d 691, 694 (Fla. 1990), juror Burse "answered, 'I don't know' or otherwise equivocated ten times in response to questions concerning his views of the case and the death penalty." A challenge for cause was deemed proper, notwithstanding an affirmative response "to a question regarding his ability to follow the law as instructed...." Id. It was still necessary to consider the entire record. Id. As noted therein, "[o]n appeal the question is not whether a reviewing court might disagree with the trial court's findings, but whether those findings are fairly supported by the record." Id. See also Valle v. State, 474 So. 2d 796, 801-04 (Fla. 1985) (on at least six separate occasions, juror indicated her feelings on capital

punishment would impair her ability to follow law as instructed; trial court's findings as to whether her view would substantially impair her ability to act as impartial juror were entitled to great deference, as judge was in position to observe her demeanor and credibility).

IV.

THE LOWER COURT DID NOT ERR IN ADMITTING ALLEGEDLY GRUESOME PHOTOGRAPHS.

Eight photographs of the victim's body were introduced into evidence, (Exhibits 2, 4, 5, 6, 9, 10, 11, and 12; R. 4306, 4312-14, 4315-16, 4328-32, 4347-48, 4350, 4352-53, 4354). Five of those, exhibits 2, 4, 5, 11 and 12, came in without objection. Exhibits 2, 4, and 5 depict different bullet exit and entrance wounds. Exhibit 11 does not show a bullet wound; it shows abrasions at the back of the victim's leg. Exhibit 12 also shows abrasions to a different area of the leg. As to those photographs to which neither Dennis nor Douglas' counsel objected, this claim is not preserved. Tillman v. State, 471 So. 2d 32, 34-35 (Fla. 1985).

With respect to Exhibit 6 which shows a different bullet wound to the stomach area (R. 4328-32), after defense counsel objected to the proffered photo (R. 4329), the prosecutor used a less gruesome photo (R. 4329-30), which defense counsel, Mr. Carter, specifically said was "less objectionable than the other." (R. 4330). Douglas Escobar's counsel concurred in that. Id. Exhibits 9 and 10 depicted different wounds, those on the area of the victim's hand. (R. 4347-50). Defense counsel had objected to these. (R. 4344-45). Exhibit 13, to which the Appellant refers, does not reflect

any wounds; it is a photo of a T-shirt which the medical examiner had examined. (R. 4357).

All of the photographs came in through the medical examiner, depicted different injuries and were used to explain his examination and the cause of death. As such, they were relevant and properly admitted. In addition to showing the cause of death, by corroborating the number of distinct bullet wounds, and thus bearing on the number of distinct shots fired, they are relevent to the question of premeditation - an issue which the Appellant, in the current appeal, is still contesting. See, e.g., Christian v. State, 550 So. 2d 450 (Fla. 1989) (number of stab wounds relevant to premeditation); Jackson v. State, 530 So. 2d 269 (Fla. 1988) (same). Additionally, defense counsel for Dennis Escobar made the photographs of even more significance, in opening argument, when he raised questions about who shot at the victim, by virtue of the location and angle of the wounds. (R. 4256-58).

This Court has stated that premeditation can be established by "the manner in which the homicide was committed and the nature and manner of the wounds inflicted." Sireci v. State, 399 So. 2d 964, 967 (Fla. 1981). Photographs "are admissible if they are relevant and not so shocking in nature as to defeat the value of their relevance." Czubak v. State, 570 So. 2d 925, 929 (Fla. 1990). This Court has "consistently upheld the admission of allegedly gruesome photographs where they were independently relevant or corroborative of other evidence." Id. See also, Jackson v. State, 545 So. 2d 260 (Fla. 1989) (photographs relevant to identity and circumstances of murder, and to corroborate medical examiner's testimony); Bush v. State, 461 So. 2d 936 (Fla. 1984) (photographic blowup of gunshot wound to face

relevant to assist medical examiner's testimony); Straight v. State, 397 So. 2d 903 (Fla. 1981) (photographs show how death was inflicted); Wilson v. State, 436 So. 2d 908 (Fla. 1983) (identity, nature of injuries, cause of death, premeditation); Foster v. State, 369 So. 2d 928 (Fla. 1979) (cause of death).

This is not a case where multiple photos were used for each wound. Each wound was shown in a single photograph. Nor was the total number of photographs excessive. Nor were any of the photos sufficiently gruesome to outweigh their probative value.

V.

THE TRIAL COURT DID NOT ERR IN ADMITTING AN INSURANCE REPORT INTO EVIDENCE.

Wayne Parker, the new car sales manager for Pioneer Mazda, testified that when he discovered that the 1988 Mazda 626 LX was missing, on April 13, 1988, he reported its theft to the police. (R. 4666, 4668-73). Additionally, he stated that he made an insurance claim for the vehicle. (R. 4673). Over defense counsel's hearsay objection, the insurance report was admitted into evidence as Exhibit 26. (R. 4673-75). Parker indicated that he prepared and filed the report and retained a copy for his business files. (R. 4672-73).

The Appellant contends that the introduction of this document does not satisfy the requirements of the business records exception to the hearsay rule. Those requirements - introduction through a records custodian; regular course of business; etc. - were designed to avoid having to call as witnesses all of the parties included in the preparation of the record. Holley v. State, 328 So. 2d 224, 225-26 (Fla. 2d DCA

1976); McEachern v. State, 388 So. 2d 244, 246 (Fla. 5th DCA 1980). As such, the requirements would not seem to have applicability where the individual who prepared and submitted the report, and retained a copy for his business files, is the one who testifies about it.

Furthermore, although the testimony was not extensive, it satisfied the requirements of Section 90.803(6), Florida Statutes. A sales manager is certainly a party who would satisfy the records custodian requirement. A qualifying witness is one who "is well enough acquainted with the activity to give the testimony." Alexander v. Allstate Insurance Company, 388 So. 2d 592, 593 (Fla. 5th DCA 1980); Specialty Linings, Inc. v. B.F. Goodrich Co., 532 So. 2d 1121 (Fla. 2d DCA 1988). Since Parker filed the report, he certainly had the requisite degree of acquaintance with it. Moreover, Section 90.803(6) refers not only to records custodians, but, alternatively, to any "other qualified witness." As to the requirement that the record be kept in the course of a regularly conducted business activity and that it be the regular practice to make such reports, that is inherent from the nature of the document. Since insurance policies require the reporting of claims, the claims report obviously must be prepared and submitted. Claimants are obviously going to retain copies for their own records. This is purely a matter of common sense.

Alternatively, any error in the admission of the exhibit was harmless beyond a reasonable doubt. Separate and apart from the insurance report, Parker has already testified as to the dealership's ownership of the car, the discovery of the theft, and the reporting of the theft to the police and insurer. The report does not add anything to that prior testimony. There is no dispute as to ownership. Nor is there any claim that

the vehicle was not stolen. Both defendants admitted that they stole the car and Dennis' wife, Fatima, convirmed this. Appellant's Brief (p. 71) even acknowledges the "minimal probative value" of the document. Since the document merely corroborated independent evidence that the vehicle was stolen, and since it did not link the defendants to the theft, any error cannot possibly be prejudicial.

VI.

THE LOWER COURT DID NOT ERR IN ADMITTING EVIDENCE OF THE VICTIM'S GOOD CHARACTER.

The Appellant's claims regarding evidence of the victim's good character are all unpreserved for appellate review. Jimmy Morejon, a tow-truck driver who identified a photograph of the victim, referred to Officer Estefan as a "one-of-a-kind of an officer, very sweet, very understanding with everybody." (R. 4430). There was no objection to this testimony. Officer Martinez was on patrol and responded to the call that an officer had been shot. He was surprised upon learning that the officer was Estefan, because Estefan was always laughing and was not aggressive. (R. 4520). Defense counsel objected to this (R. 4520), but, when asked by the court to state the legal basis for the objection, counsel said, "withdraw it." (R. 4521). At the conclusion of Martinez's testimony, the judge admonished the prosecution not to elicit testimony that the victim was "a nice police officer" as the officer's character was not an issue. (R. 4536). Defense counsel started to explain that he did not want to object in front of the jury, and the judge told him to simply object on grounds of irrelevancy, adding that the judge "would sustain the objection." (R. 4537). Thus, these two instances are clearly not objected to.

On another occasion, Lt. Bonewitz indicates that "[i]f anybody was injured, he [Estefan] was concerned about them, he'd call for rescue." (R. 4613). Once again, there is no objection.

Finally, the prosecution asked Officer Smigelski how Estefan took care of his car, and Smigelski responded that Estefan was a perfectionist, who never let anyone else drive it. (R. 4881). There was no objection to this. When the state asked further questions about how Estefan cared for his car, defense counsel objected. (R. 4882-83). The prosecution explained that there was an issue regarding damage to the car and when it occurred. (R. 4882-83). The court disagreed and sustained the objection. (R. 4883-84). Defense counsel did not ask for a curative instruction and did not seek to have the initial question and answer, for which there was no objection, stricken. Thus, this matter is likewise unpreserved. Ferguson v. State, 417 So. 2d 639, 641 (Fla. 1982).

Douglas Escobar, who likewise did not object to any of the foregoing matters, and who has adopted Dennis' argument on this point, has similarly failed to preserve the issue for appellate review.

The Appellant's assertion that the foregoing matters amount to fundamental error is clearly incorrect. See. e.g., Capehart v. State, 583 So. 2d 1009 (Fla. 1991) (defendant failed to preserve for appellate review issue that trial court erred in admitting testimony concerning personal characteristics of victim where defendant failed to object to admission of the evidence).

Alternatively, any error in any of the foregoing testimony must be deemed harmless. The defendant's confessions and corroborative physical evidence, clearly

establish their guilt for the charged offenses, and there was no plausible support for any of the defenses asserted.

VII.

THE LOWER COURT DID NOT ERR IN ADMITTING DETECTIVE MORIN'S OPINION THAT DENNIS ESCOBAR SHOT OFFICER ESTEFAN.

Detective Morin testified as to the separate confessions by each of the defendants, wherein both had admitted that Dennis Escobar was the shooter herein. On cross-examination of this detective, counsel for Dennis attempted to baselessly insinuate that Douglas had lied and failed to tell the detective that he himself had been the shooter. (R. 5371-74). Subsequently, on cross-examination of this detective, counsel for Douglas then questioned the detective as follows:

> **Q. [Attorney Galanter]:** Today, is there any doubt in your mind as to who the individual person was that shot with a firearm Victor Estefan?
>
> **A.** No.
>
> **Q.** Is that person Dennis Escobar?
>
> **Mr. CARTER:** Objection.
>
> **THE COURT:** Overruled.
>
> **THE WITNESS:** Absolutely.

(R. 5401). Although Dennis' attorney objected, no grounds for the objection were ever given. Under such circumstances, this claim is not preserved for appellate review. See, Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985) ("In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part

of that presentation if it is to be considered preserved."). See also, Glendening v. State, 536 So. 2d 212, 221 (Fla. 1988) (no error in admitting expert's opinion that child's father committed sexual offense in absence of objection); Johnston v. State, 497 So. 2d 863, 868-69 (Fla. 1986) ("general objection and motion for mistrial were not made with the required specificity to apprise the trial court of error or preserve the objection for appellate review."); Ferguson v. State, 417 So. 2d 639, 641 (Fla. 1982) (general objection not sufficient to preserve issue for appellate review). Moreover, as noted above, counsel for Dennis clearly opened the door for such questioning. See generally, Pope v. State, 441 So. 2d 1073, 1076 (Fla. 1983).

VIII.

PROSECUTORIAL COMMENTS DURING CLOSING ARGUMENTS DID NOT DENY THE DEFENDANT A FAIR TRIAL.

The Appellant asserts that approximately a half-dozen prosecutorial comments during closing argument in the guilt phase were improper and denied him a fair trial. Not a single one of the comments referred to (Brief of Appellant, pp. 76-81), was objected to, either at the time of the comment, during breaks in the course of closing argument, or at the conclusion of the argument. Indeed, throughout the course of the prosecutor's closing argument, which entails 130 pages of transcripts (R. 5837-5966), only one objection was ever made (R. 5895), and that pertains to a matter which is unrelated to any issue raised on appeal. Due to the absence of any proper or timely objections, and the absence of fundamental error, these claims are not preserved for appellate review. See, e.g., Parker v. State, 456 So. 2d 436 (Fla. 1984); Groover v. State, 489 So. 2d 15 (Fla. 1986); Marshall v. State, 604 So. 2d 799 (Fla. 1992).

Furthermore, a review of the comments in question reflects that either the comments were proper, or that any improprieties were minimal and of a non-fundamental nature. Appellant initially complains about comments in which the prosecutor refers to the defense attorney's tactics of pointing fingers at the other defendant. First, as noted above, there was never any objection about this. Second, this was an accurate statement, since that is precisely what each defense attorney did. (R. 5768, 5792, 5827-29). Third, even if the defendants had not been tried jointly, the evidence against Dennis Escobar would still have remained the same, and there is

no reason to believe that his attorney's argument, in asserting that the evidence was consistent with Douglas' guilt and Dennis' innocence would have been different. The prosecutor was simply focusing on, and responding to, the arguments of both defense attorneys; there is nothing improper in this. See, e.g., Ferguson v. State, 417 So. 2d 639, 561-42 (Fla. 1982) (No impropriety in comment that defense counsel was asking jurors to find a scapegoat, by blaming another defendant and co-perpetrator who had previously been found guilty). Moreover, these comments came amidst, and in the context of, a lengthy recitation of the evidence establishing each defendant's guilt. The Appellant relies exclusively on lower appellate court decisions in which the prosecution asserted that defense counsel resorted to improper, disingenuous, sleazy or unethical tactics. Nothing of the sort occurred herein, where the prosecution simply set forth the essence of the finger-pointing defense and responded to it. See also, Carter v. State, 560 So. 2d 1166 (Fla. 1990) (claim unpreserved for appellate review where defense counsel failed to object to prosecutorial comment impugning defense counsel).

Appellant next complains about the comment that "it is clearly not our job to put somebody on the witness stand who is a known liar or a known felon..." (R. 5882). Asserting that you do not put known liars on the stand is not the same as vouching for a witness' credibility by asserting that the witness is being truthful. The prosecutor obviously leaves open the possibility, for the jury's determination, that the witness is lying without prior knowledge on the part of the prosecution. Thus, this is not an exercise in impermissible vouching for a witness. Also, as noted above, in the absence of any objection, this issue is not preserved for appellate review. Carter,

supra, 560 So. 2d at 1168 (claim unpreserved where defense counsel failed to object to comment of prosecutor vouching for truthfulness of State's chief witness); Marshall v. State, 604 So. 2d 799 (Fla. 1992) (same).

The Appellant's next assertion is that the prosecutor improperly commented on conversations between the two Escobar brothers, as those conversations were not the subject of any testimony. (R. 5883). To put this in context, it must be noted that the prosecutor starts out by discussing evidence relating that Douglas Escobar bragged to others that he was wanted by the FBI. Id. The prosecutor argued that Escobar's knowledge that he was wanted also controlled Dennis Escobar's actions, suggesting that just as Douglas bragged about this to others, it was reasonable to infer that Dennis, with whom he was very close, was made aware of this:

> You know, there is no deep separation between these brothers. They are brothers that are together on a regular basis. They ride together, they do things together, sometimes interesting things like steal cars, but still they are together. They have conversations and Douglas Escobar and Dennis Escobar have these conversations just as obviously as Douglas Escobar has had them with these other witnesses who testified on the witness stand about the fact that he knows he's wanted in California, and that is an important motivating factor for why people took the actions that they did.

Id. Thus, the prosecutor was simply asserting a common sense inference from the evidence: if Douglas told others, he must have told Dennis, a brother with whom he was close. There is nothing improper about this, as it is permissible to comment on inferences which may reasonably be drawn from the evidence.[4] Bertolotti v. State,

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[4] Indeed, Dennis, in his confession, admitted that he knew that Douglas was wanted in California, and admitted that that was the motive for the crime. (R. 5263). Furthermore, there was evidence that Dennis was present with Douglas and Saballos when Douglas Escobar made similar statements to Saballos. (R. 4819-22, 4853-4).

476 So. 2d 130 (Fla. 1985); Mann v. State, 603 So. 2d 1141 (Fla. 1992); Breedlove v. State, 413 So. 2d 1 (Fla. 1982). Alternatively, and as noted above, any error is not preserved due to the absence of any objection. Pope v. Wainwright, 496 So. 2d 798 (Fla. 1986) (prosecutorial comment on matter not in evidence - i.e., the defendant grinning during trial - not preserved for review); State v. Cumbie, 380 So. 2d 1031 (Fla. 1980) (claim based on comment that police would have cleared defendant if he were innocent, thereby referring to nonexistence of any other evidence and non-record matters, was not preserved for appellate review).

The Appellant next claims that it was improper for counsel to comment on the California incident involving Officer Koenig, by implying that the defendant would have killed the officer if he had been able to. (R. 5955). The prosecutor was properly commenting on matters in evidence. As it was established that Escobar attempted to kill Koenig, it was no more than a reasonable inference to raise the question of what Escobar might have done had he succeeded in his course of action. See, Breedlove, supra; Mann, supra; Bertolotti, supra. As with the other claims, this is likewise unpreserved, due to the absence of any objection. As to the contention that this made the California offense the focus of the trial, that is hardly the case, as the prosecutor spent no more than 3-4% of his argument (R. 5953-56), addressing that matter.

Lastly, the Appellant complains that the prosecutor asked the jurors not to cooperate with or perpetrate "evil" (R. 5965), and, to "go back there and vote your conscience about what you know happened that night." (R. 5966). Again, there were no objections to said comments. Moreover, the first comment was both preceded by

and followed with the prosecutor's statements that the jury should consider the factual evidence and instructions of law by the trial judge:

> You took an oath to God that says you're going to make your decision in this case based upon the law and the evidence that you heard from the witness stand and what the judge instructs you. That is the basis for your decision. All I'm asking you to do is be true to that oath when you go back and deliberate.

(T. 5964); and that: "if you're true to the facts in this case, I think that your verdict is one that will battle against evil." (T. 5965). Likewise, the prosecutor gave an accurate summary of the facts of the instant case immediately prior to the second comment. (T. 5965-66). As to the second comment, since the jurors' consciences can dictate widely different results, asking jurors to abide by their consciences, in light of the factual evidence, is hardly improper. A juror's conscience will presumably preclude a conviction in the absence of sufficient evidence and will convict only with adequate proof. As to the first comment, a "dissertation" on evil, during the penalty phase, admonishing the jury that they would be cooperating with evil and would themselves be involved in evil "just like [the defendant] if they recommended life imprisonment," is reversible. King v. State, 623 So. 2d 486, 488 (Fla. 1993). The instant comment, however, was neither objected to nor made during the penalty phase. Moreover, it did not constitute a "dissertation on evil," especially in light of the prosecutor's statements immediately before and after it, that the jury was to base its verdicts upon the evidence presented and the instructions provided by the trial court. With respect to comments during closing arguments at the guilt stage, "prosecutorial error alone does not warrant automatic reversal of a conviction unless the errors

involved are so basic to a fair trial that they can never be treated as harmless. The correct standard of appellate review is whether 'the error committed was so prejudicial as to vitiate the trial.'" [citation omitted]." State v. Murray, 443 So. 2d 955, 956 (Fla. 1984). "Reversal of the conviction is a separate matter; it is the duty of appellate courts to consider the record as a whole and to ignore harmless error, including most constitutional violations." Id. Such a harmless error analysis must be "focused" not only on the prosecutor's conduct, but also the "factual evidence" presented, and a "conclusion as to whether this evidence was or was not dispositive." Id. In the instant case, as seen above, all of the other instances of alleged prosecutorial misconduct are without merit, as they constituted fair comments on the evidence and arguments presented. The instant comment was also immediately accompanied by the proper admonishment that the jurors should return their verdict in accordance with the factual evidence and instructions of law by the court. Moreover, the evidence against the defendants herein was overwhelming, in light of the confessions to the police, the joint admission of guilt to friend Saballos, participation in the California shoot-out which demonstrated consciousness of guilt, and, the testimony and physical evidence placing the defendants at the scene of the crime, in accordance with the victim's description of the crime. Any error as to the isolated comment herein, in light of the remainder of the State's closing argument which was entirely proper, in view of the overwhelming evidence of guilt, and given the fact that it was not objected to, is thus unpreserved and harmless beyond a reasonable doubt. State v. Murray, supra. See also, Jackson v. State, 522 So. 2d 802, 809 (Fla. 1988) (claim based on comment asking jury to show that community cares not preserved); Jones v. State, 411 So. 2d

165, 168 (Fla. 1980) (claim based on comment that murder one of most serious ever committed in county not preserved).

The Appellant also refers to several penalty phase comments. For several of these, there were no objections or requests for curative instructions, and they are therefore unpreserved for appellate review. The remainder are either not improper, or, if improper are not sufficiently egregious to constitute reversible error.

The Appellant initially refers to comments the prosecutor made regarding the aggravating factor based on prior violent offenses. The prosecutor pointed out that the defendants already got life sentences for those California offenses and then queried whether they would "get in effect a free crime if they receive no more punishment." (R. 6373). This is a legitimate comment on the prior violent felonies, a proper aggravating factor, and it puts the factor into a legitimate context for the jurors to determine what weight to give to this factor. Moreover, in the absence of any objection, this claim is not preserved for appellate review. Jackson v. State, 522 So. 2d 802, 809 (Fla. 1988).

After discussing mitigating factors, the prosecutor stated, "[t]he death penalty is a message sent to certain members of our society . . . who choose not to follow." (R. 6383). An objection was sustained, and defense counsel "moved" to strike the entire thing," without indicating whether he was referring to a single sentence, paragraph or entire argument. Id. The request was denied. While this Court has disapproved "message to the community" comments, Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985), this was not such a comment. The prosecutor was simply stating that the death penalty is a message to murderers - i.e., those who choose not

to follow the law. Such a comment not only states the obvious, but it does not pressure the jurors to send a message to the community. Moreover, the objection was sustained. The defendant's burden to seek an appropriate curative instruction. See Ferguson v. State, 417 S. 2d 639, 641 (Fla. 1982), was not satisfied by an overly broad, unlimited request to "strike the entire thing."

Several other comments were not objected to, including comments that: the jurors represented a fair cross-section of the community (R. 6388), and "the defendants knew what the proper recommendation for this crime was," (R. 6388).[5] In the absence of objection, these claims are not preserved. Jackson, supra, 522 So. 2d at 809.

Another comment, referring to the jury as the conscience of the community was objected to, and the objection was overruled. (R. 6387). Finally, an objection was overruled as to a comment that the community "cannot condone nor permit this type of behavior." (R. 6384). The latter comment, stating the obvious, that a convicted murderer must be punished, does not appear objectionable. As to the "conscience of the community" comment, once again, since "conscience" implies a just result, that comment does no more than ask the jurors to do what they believe is right. The conscience of the jurors and community would only recommend the death penalty in an appropriate case, in accordance with the law. The comment is not improper. See, Grossman v. State, 525 So. 2d 833, 846 (Fla. 1988) (jury's recommendation reflects

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[5] This was a reference to Dennis' statement to Detective Morin, that if he related what happened, he would subject himself to the electric chair.

"the conscience of the community."). Any error, moreover, is not sufficiently egregious to warrant reversal. In Bertolotti, this Court pointed out that in sentencing proceedings, the misconduct must be egregious before reversal is warranted. Several improper comments, in the aggregate, were not deemed reversible in Bertolotti. By contrast, in Garron v. State, 528 So. 2d 353, 358-60 (Fla. 1988), numerous comments, all the subject of objections, were egregious and resulted in reversal. Significantly, the prosecutor in Garron repeatedly asked the jurors to place themselves in the position of the victim and to feel her pain.

The Appellant has also relied on Taylor v. State, 583 So.2d 323, 329-30 (Fla. 1991), but such reliance is misplaced, for several reasons. First, that case involved numerous comments about the victim not having any choice between life and prison. Second, and equally significant, the remand for resentencing in Taylor is also based, in part, on the prosecutor's disingenuous arguments, leading the trial judge to believe that certain comments were proper when this Court had disapproved of them and the prosecutor was aware of that disapproval.

Douglas Escobar has adopted Dennis' argument on this issue. All of the foregoing arguments and procedural bars, due to a lack of objection, are equally applicable to Douglas.

IX.

THE LOWER COURT DID NOT ERR IN INSTRUCTING THE JURY ON FLIGHT.

The Appellant argues, in reliance on Keys v. State, 606 So. 2d 669 (Fla. 1st DCA 1992), which in turn relies on Fenelon v. State, 594 So. 2d 292 (Fla. 1992), that it was error to instruct the jury on flight. In Fenelon, this Court held that the holding, disapproving of the use of the flight instruction, was to apply prospectively only, to trials conducted subsequent to the Fenelon decision. This Court recently reiterated that Fenelon applied only to future trials. Taylor v. State, 630 So. 2d 1038, 1041-42 (Fla. 1993). Fenelon was held not to apply in Taylor, a capital case in which the trial preceded the decision in Fenelon. The same principle applies in the instant case, as the trial occurred two years prior to the Fenelon decision. See also, Lovette v. State, 19 Fla. L. Weekly S164 (Fla. Mar. 31, 1994).

The Appellant's argument herein is predicated solely on Fenelon. The Appellant, in his Brief of Appellant, does not argue that the flight instruction was improper under pre-Fenelon standards, or that there was insufficient evidence of flight to warrant a flight instruction.

X.

THE TRIAL COURT DID NOT ERR IN DENYING A DEFENSE-REQUESTED INSTRUCTION ON THIRD-DEGREE MURDER.

Defense counsel requested a jury instruction on third-degree murder as a lesser included offense. Third-degree murder, under Section 782.04(4), Florida Statutes, is felony murder for any felonies other than the specifically enumerated felonies.

Defense counsel asserted that grand theft of the motor vehicle was the qualifying underlying felony.

The Appellant's argument fails because the theft of the vehicle occurred several weeks prior to the murder, and the murder, accordingly, was not perpetrated during the course of the felony/theft. Under Section 782.04(4), the felony-murder doctrine applies when the killing is committed "by a person engaged in the perpetration of, or in the attempt to perpetrate" the qualifying underlying felony. The fact that the Appellant was in the stolen car, several weeks after the completed theft, does not make the murder one committed during the perpetration of the theft.

Several cases have addressed the issue of when an underlying felony terminates for purposes of the felony-murder rule. In Horabeck v. State, 77 So. 2d 876 (Fla. 1955), this Court, in applying the felony murder rule to an escape from a robbery, approvingly quoted from People v. Boss, 210 Cal. 245, 290 P. 881, 883 (Cal. 1930), which emphasized that the offense had not terminated insofar as the perpetrators had "'not seen their way even momentarily to a place of temporary safety. . .'" 77 So. 2d 873, 877-78 (Fla. 1969) (same).

The First District Court of Appeal, also in the context of an escape from an underlying felony, has spoken more generally about the termination of the underlying felony:

> Factors to be considered in determining whether there has been a break in the chain of circumstance include the relationship between the underlying felony and the homicide in point of time, place and causal relationship.

Parker v. State, 570 So. 2d 1048, 1051 (Fla. 1st DCA 1990). Similarly, Mills v. State, 407 So. 2d 218, 221 (Fla. 3d DCA 1981), looks for the existence "of some definitive break in the chain of circumstances beginning with the felony and ending with the killing. . . ." Johnson v. State, 486 So. 2d 657, 658-59 (Fla. 4th DCA 1986), once again in the context of flight, refers to "the entire criminal episode." McFarlane v. State, 593 So. 2d 305, 306 (Fla. 3d DCA 1992), speaks in terms of a "break in the chain of events sufficient to relieve the appellant of criminal responsibility" for the murder.

An intervening period of several weeks, and a distinctly different geographic location, are certainly factors which terminated the original theft and broke any chain between it and the murder, for purposes of the felony murder rule. Cases from other jurisdictions have emphasized time and distance as factors separating the murder from an earlier felony. For example, the felony murder rule was deemed inapplicable in People v. Ford, 416 P.2d 132, (Cal. 1966), cert. denied, 385 U.S. 1018 (1966), overruled on other grounds, 489 P. 2d 1361 (Cal. 1970), where many hours had elapsed after a robbery and prior to the shooting of an officer, and there was no evidence that the defendant was attempting to escape from the robbery when he shot the officer. The officer was not pursuing the defendant in relation to the earlier robbery, and the police were unaware of the robbery until after the defendant's apprehension. The continued possession of stolen property is a salient factor only so long as the perpetrators are attempting to complete their escape and dominion over the property. State v. Adams, 98 S.W.2d 632 (Mo. 1936).

There are no apparent cases in which the felony murder rule has been applied to a felony separated from the murder by several weeks, with the murder having been committed at a different location as well. Thus, there was no evidentiary support for the requested instruction and there was no error in declining to give it. See, Rule 3.3510(b), Florida Rules of Criminal Procedure ("The judge shall not instruct on any lesser included offense as to which there is no evidence."); Amado v. State, 585 So. 2d 282 (Fla. 1991) (instruction on permissive lesser included offense should be precluded where there is a total lack of evidence on lesser offense); Higgins v. State, 565 So. 2d 698 (Fla. 1990) (second degree arson was not necessarily lesser included offense of first degree arson and, if evidence did not support second-degree arson, defendant was not entitled to instruction on it).

Alternatively, if any error exists in failing to instruct on third-degree murder, such error must be deemed harmless under State v. Abreau, 363 So. 2d 1063 (Fla. 1978), insofar as the jury was instructed on second-degree murder, as a lesser included offense (R. 6007-8), and the jury nevertheless rejected second-degree murder and returned the verdict for first-degree murder.

XI.

THE EVIDENCE WAS SUFFICIENT TO PROVE PREMEDITATION FOR FIRST-DEGREE MURDER.

The evidence in this case reflects that either three or four shots were fired at Officer Estefan, resulting in multiple wounds. Additionally, Douglas Escobar had repeatedly indicated, prior to the murder, that he intended to kill any officer who confronted him, as he had no intention of going back to jail for offenses committed in California. The evidence also reflects that immediately prior to being stsopped by the victim, Douglas told his brother to shoot Estefan. Dennis Escobar was fully aware of Douglas' motive, as of the time that Douglas told Dennis to shoot; Dennis, in his own confession, acknowledges that this was the motive for the murder. (R. 5263). Furthermore, Dennis had been present, several weeks before the murder, when Douglas told their mutual acquaintance, Saballos, that he intended to kill any officer who confronted him. (R. 4819-22; 4853-54).

Multiple, intentional gunshot wounds, coupled with a previously formulated intent or motive to kill when confronted by an officer, are sufficient to establish premeditation. Premeditation may be inferred from "such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed and the nature and manner of the wounds inflicted." Sireci v. State, 399 So. 2d 964, 967 (Fla. 1981). The instant case is highly similar to Jacobs v. State, 396 So. 2d 713 (Fla. 1981), in which this Court found sufficient evidence of premeditation. Evidence that Jacobs fired shots at two officers, while her companion was struggling to escape from

the police, was deemed sufficient evidence for a first-degree murder conviction. See also, Grossman v. State, 525 So. 2d 833 (Fla. 1988) (sufficient evidence for first-degree murder conviction based on firing of weapon into back of officer's head, during struggle in which defendant sought to avoid going back to prison for probation violation); Asay v. State, 580 So. 2d 610, 612-13 (Fla. 1990) (premeditation established where "there was sufficient evidence from which the jury could have concluded that, prior to discharging the fatal shot, Asay was conscious of the fact that he was going to shoot Booker and that Booker would likely die as a result of being shot). Additionally, evidence of multiple wounds is indicative of premeditation. See, e.g., Jackson v. State, 530 So. 2d 269 (Fla. 1988); Christian v. State, 550 So. 2d 450 (Fla. 1989); Nibert v. State, 508 So. 2d 1 (Fla. 1987) (premeditation established by number of stab wounds); Preston v. State, 444 So. 2d 939 (Fla. 1984) (same); Knowles v. State, 632 So. 2d 62 (Fla. 1994) (sufficient evidence as to first-degree murder where defendant shot his father, twice in the head, after exchanging words with father).

The Appellant's effort to portray this as a mere spontaneous killing is misguided. "Premeditation is a fully formed conscious purpose to kill that may be formed in a moment and need only exist for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of that act." Asay, supra, 580 So. 2d at 612. Furthermore, the "spontaneous" killing theory is repudiated by evidence that Douglas intended to kill any officer who confronted him, and Dennis had prior awareness of Douglas' motive, even acknowledging that motive as the reason for the killing in his [Dennis'] own confession. Douglas' prior threats,

of which Dennis was aware, add to the element of premeditation and detract from the claim of spontaneity. See, e.g., Jones v. State, 440 So.2d 570, 577 (Fla. 1987); Prince v. State, 277 So.2d 648 (Fla. 1st DCA 1974).[6]

XII.

THE LOWER COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS.

Prior to the trial, the defendant filed a motion to suppress confessions, admissions and statements, summarily alleging that the various statements were involuntary. (R. 56). A hearing was held on this motion on May 21, 1990. (R. 737-865). At the conclusion of the hearing, the judge ruled that the statements were voluntary and freely given, that the defendant had received his Miranda warnings, and that there was no coercion on the part of the police. (R. 864-65).

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[6] The evidence does not support the claim made by Douglas, in the related appeal, that the shooting occurred spontaneously, during a scuffle between Dennis and Estefan. The sole witness to use the word "scuffle" admitted he did not see anything and did not know what he heard, except for voices, people moving and people hitting the ground. (R. 4634, 4644-45). Furthermore, this theory is inconsistent with the testimony of the medical examiner, who found that the shooting was consistent with the first shot being the stomach wound (without stippling, and from a greater distance), with the shooter then stepping forward, before shooting the victim in the arm, at a closer distance, and leaving signs of stippling. (R. 4366-67). A careful reading of Dr. Mittleman's testimony regarding the location of the wounds and stippling, indicates that the only reasonable sequence was that: (a) the first shot, fired from a distance, entered the stomach; (b) the second shot, fired from within three feet, strikes the left arm, which is in a downward position, covering a large stomach wound, while the officer is doubled over, as the bullet exits on the interior of that arm and enters the torso adjacent to the interior of the arm; and (c) the final shot, fired while the shooter is backing away, strikes the officer's left wrist, which at the time is down against the officer's rear left thigh, as metal scraps from the watchband were embedded in the left thigh. (R. 4305-6, 4310-15, 4324, 4328-29, 4334-35, 4338-39, 4345-56, 4364-67).

Detective Morin first saw the defendant at a prison medical ward in California, on April 29, 1988, shortly after Dennis Escobar had been involved in the California shoot-out. (R. 739). The defendant had a gunshot wound to his lower extremities, and another wound to the hand, which had resulted in the loss of parts of some fingers. (R. 741, 746). Morin told the defendant that he wanted to speak about the Miami offense. (R. 741-42). The defendant did not appear to have any problems understanding, and Morin had no difficulties understanding the defendant. (R. 743). Morin read the defendant his Miranda warnings from a waiver form, which the defendant initialled, to indicate that he understood. (R. 744-46). The defendant appeared alert and lucid, did not complain about any pain, and did not appear to be in discomfort. (R. 746-7). He did not appear to be under the influence of medication. (R. 751). Morin advised him that he had spoken to Douglas and Dennis' wife, Fatima, and knew about his involvement. (R. 748). The defendant stated that if he spoke, he would just be putting himself in the electric chair, and indicated that he did not want to speak any more that evening. (R. 748). Morin asked if they could speak at another time, and Escobar suggested the following Monday. (R. 749). Morin waited for an hour, while California officers spoke to Escobar about the California incident, and at the conclusion of their interview, one California officer told Morin that Escobar stated that he would speak to Morin on the following Monday. (R. 750).

Sgt. Finale, a California officer, was there on April 29th as well. At that time, the defendant had an IV in his left arm. (R. 801). Finale witnessed the administration of the Miranda warnings, and observed that the defendant understood and initialed the waiver form. (R. 804-5). When the defendant told Morin that he did not want to talk

at that time, Morin terminated the interview. (R. 807). Finale confirmed that Escobar agreed to talk again in a few days. (R. 807). Morin was present when the California officers then spoke to Escobar, and at the conclusion of that session, Escobar indicated that he would speak to Morin on the following Monday. (R. 807). Throughout that day, the defendant was not sleepy; he was coherent and responsive. (R. 809). No threats were made to the defendant. (R. 809).

Morin returned on Monday, May 2, 1988. (R. 750). At that time, once again, the defendant did not display any discomfort, there were no indications of pain, and there were no indications that the defendant was under the influence of medication. (R. 751). On May 2nd, according to two other witnesses, Officer Palma, a California officer at the facility, and Detective Roberson, who accompanied Morin, Escobar no longer had an IV. (R. 827, 830, 839-40). Morin again gave Escobar his Miranda warnings, and the defendant indicated that he understood. (R. 754-55). Escobar asked to see Roberson's tape recorder, to ensure that it was not being used. (R. 755-56). Morin told Escobar that his brother had given a full statement and that Escobar's wife had spoken about the stolen car. (R. 756). The defendant indicated that he could not talk, as it would put him in the electric chair, and Morin proceeded to leave. (R. 757). While Morin was leaving, a guard approached him to indicate that Escobar had asked that he return. (R. 757-58). Officer Palma confirmed that Escobar had asked Palma to get Morin to return. (R. 823). Morin did return, and Escobar started giving a statement in which he attributed the shooting solely to Douglas. (R. 759). Morin told him he was not being truthful and proceeded to leave again. (R.

759-60). Once again, as corroborated by Officer Palma, Escobar asked the guards to get Morin to return. (R. 760, 824).

When Morin returned, Escobar wanted to know about his wife. (R. 760). When he asked if he would get the electric chair, Morin responded that that was not up to him. (R. 761). Escobar indicated that he knew that he was killing himself, but that he would tell exactly what happened. (R. 761). He then proceeded to give details about the theft of the Mazda, Estefan's pursuit of them, the shooting of Estefan, the disposition of the gun, and the washing and abandonment of the vehicle. (R. 761-66). These details are discussed in conjunction with Morin's trial testimony about Dennis' statements, and are detailed in the Statement of Facts, at pp. 5-11, supra. See also, R. 5234-78, for Morin's trial testimony.

Towards the conclusion of this interview, Escobar asked if he could call his wife, and Morin responded that Escobar was in the custody of the California authorities and that it was up to them. (R. 767). Morin emphasized that no threats were made and that he did not give Escobar any inducements to make the statements. (R. 767). Morin had also indicated that Escobar was not in any discomfort or pain, and showed no signs of being under the influence of medication. (R. 751). Officer Palma indicated that Dennis was doing well on this day. He was coherent, talking, asking for things from nurses and did not appear to be under the influence of medication. (R. 822). Dennis was able to walk around and did so. (R. 822). He was not using an IV on this day. (R. 827).

Morin returned again on May 3, 1988, for some further questions about the weapon. (R. 767-68). Escobar had previously stated that he disposed of it near a

hotel by the airport. Having received contradictory information, Morin wanted to question Escobar about that again, and Escobar then indicated that he disposed of it in a canal, out near an Indian reservation. (R. 768-69). He had previously been trying to keep his wife out of this matter. Id. Once again, Escobar was Mirandized and there were no threats or inducements.

Morin saw Escobar one more time, on July 14, 1989, in a California prison. (R. 770). Once again, Escobar was given his Miranda warnings. (R. 771). Escobar did not want to talk about the Miami offense, but indicated that he wanted to speak about other things, such as California prison privileges. (R. 771). He subsequently made some statements regarding his family. (R. 772).

Escobar testified on his own behalf, denying that he signed the waiver form on April 29th, and claiming that he was coerced into confessing on May 2nd, by threats that he could not call his wife until he confessed. (R. 845, 847-48). He denied ever mentioning the electric chair. (R. 855).

Based on the foregoing, the trial court properly concluded that the statements were voluntarily obtained, pursuant to properly administered Miranda warnings. See generally, Thompson v. State, 548 So. 2d 198, 201-201 (Fla. 1989). The Appellant briefly argues that he was under the influence of medication, referring to "R. 979." That record citation has no support for that contention, and that portion of the record comes well after the court denied Dennis' motion to suppress. (R. 865). Furthermore, defense counsel's argument on behalf of Dennis never asserted that he was under the influence of medication. (R. 858-62). His sole argument was predicated on threats and psychological coercion. Id. As there was no argument based on the effect of

medication during the trial court proceedings, such a claim cannot be raised for the first time on appeal. Tillman v. State, 471 So. 2d 32, 34-35 (Fla. 1985). Furthermore, a defendant's state of mind, in and of itself, absent coercion on the part of the police, does not render a statement involuntary. See, e.g., Colorado v. Connelly, 479 U.S. 157, 102 S.Ct. 515, 93 L.Ed.2d 473 (1986); Copeland v. Wainwright, 505 So. 2d 425 (Fla. 1989).

As to the alleged threats, this was simply a matter of credibility of competing witnesses, for the trial court to decide. Thompson, supra. Accordingly, viewing the evidence in the light most favorable to the State, as the prevailing party below, the lower court properly concluded that the statements were voluntary.

XIII.

THE LOWER COURT DID NOT ERR IN IMPOSING THE DEATH PENALTY AS TO DENNIS ESCOBAR.

The imposition of the death sentence herein was based on two aggravating factors: (1) Dennis Escobar's previous conviction for the attempted first degree murders of the two California Highway Patrol troopers; and (2) the victim, Officer Estefan, was a law enforcement officer engaged in the lawful performance of his official duties. (R. 272-73, 6467-68). The court had also found that two other aggravating factors - (a) the murder was committed for the purpose of avoiding or preventing a lawful arrest; and (b) the crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws - had been established, but these were not considered by the court in its decision. (R. 272; 6467-68).

With respect to mitigating evidence, the court found that Dr. Rose's testimony, that Dennis Escobar was not likely to be aggressive in the future, was "wishy-washy," was given "little credence," and was not deemed to constitute a mitigating factor. (R. 272, 6469). The only mitigating factor which the lower court found to be established was that the defendant came from a broken home. Id. As to this, it should be noted that the defendant's father, who had an alcohol problem, left home when the defendant was an infant. The defendant was never subjected to any violence from the father. The defendant resided with his mother, who provided shelter, and saw to it that the defendant finished high school and started studying at a law school. For portions of that time, there was also a stepfather, the mother's second husband, residing with the family. Thus, the defendant, by all accounts, had a relatively stable and comfortable childhood, attaining a fairly high level of education. The departure of the father therefore was not shown to have any effect, direct or indirect, on the commission of the murder herein.

In view of the foregoing, it must be concluded that the imposition of the death sentence in the instant case is proportionate to death sentences imposed in other cases. Proportionality review requires a consideration of the totality of the circumstances when comparing the case to other capital cases. Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990).

This is a case with two significant aggravating factors. The prior violent felonies are not run-of-the mill offenses; they were attempted murders of law enforcement officers. The Appellant seeks to eliminate this factor, on the ground that these other attempted murders did not precede the killing of Officer Estefan. This

Court, on many occasions, has rejected that position, finding that the prior convictions establish this factor if they are in existence at the time of sentencing. King v. State, 390 So. 2d 315, 320-21 (Fla. 1980); Correll v. State, 523 So. 2d 562 (Fla. 1988); Craig v. State, 510 So. 2d 857 (Fla. 1987).

In the context of two substantial aggravating factors and minimal nonstatutory mitigating factors, the imposition of the death sentence is proportionate to sentences reviewed and upheld by this Court. See, e.g., Duncan v. State, 619 So. 2d 279 (Fla. 1993) (sole aggravating factor was that the defendant had previously been convicted of two violent felonies, including a murder; numerous non-statutory mitigating factors found, such as bad childhood, good employee, good friend, and mitigators, which trial court found, regarding influence of alcohol and extreme mental or emotional disturbance stricken on appeal); Clark v. State, 613 So. 2d 412 (Fla. 1992) (death sentence not disproportionate in view of two aggravating factors - pecuniary gain and prior violent felony - and no mitigating evidence); Lemon v. State, 456 So. 2d 885 (Fla. 1984) (death sentence not disproportionate, based on aggravating factor of prior violent felony, and mitigating factor of emotional disturbance); Williams v. State, 437 So. 2d 133 (Fla. 1983) (death sentence not disproportionate, based on two aggravating factors - defendant under sentence of imprisonment and prior violent felony - and minimal nonstatutory mitigation); Cook v. State, 581 So. 2d 141 (Fla. 1991) (previous conviction for capital felony; murder during robbery and pecuniary gain merged into single factor; statutory mitigation of no significant history of prior criminal activity); Freeman v. State, 563 So. 2d 73 (Fla. 1990) (two aggravating factors - prior murder conviction; murder during court of burglary/pecuniary gain - and nonstatutory

mitigation of low intelligence, abuse by stepfather, inter alia); Lucas v. State, 613 So. 2d 408 (Fla. 1992) (two aggravators, HAC and prior conviction for violent felony, and several mitigating factors); Mordenti v. State, 19 Fla. L. Weekly S61 (Fla. Jan. 27, 1994) (two aggravators - CCP and pecuniary gain - and several statutory and nonstatutory mitigators); Lindsey v. State, 19 Fla. L. Weekly S241 (Fla. April 28, 1994) (prior murder conviction in aggravation; minimal nonstatutory mitigation); Melton v. State, 19 Fla. L. Weekly S262 (prior murder conviction; murder committed for pecuniary gain; minimal nonstatutory mitigation).

The Appellant's proportionality argument rests, primarily, on Kramer v. State, 619 So. 2d 274 (Fla. 1993). Kramer presented a situation with extreme mitigating evidence, including alcoholism, severe loss of emotional control, mental stress, and other factors. Furthermore, this Court characterized Kramer as a run-of-the-mill homicide: "The evidence in its worst light suggests nothing more than a spontaneous fight, occurring for no discernible reason, between a disturbed alcoholic and a man who was legally drunk". 619 So. 2d 15 278.

In conjunction with Kramer, the Appellant argues herein that he was alcoholic, see Brief of Appellant, p. 88, and that this was a spontaneous homicide. See Brief, p. 89. As to the claim of alcohol use, the defendant never argued this as a mitigating factor in the trial court and cannot do so now. Lucas v. State, 568 So. 2d 18, 23-24 (Fla. 1990). Furthermore, the only remote evidence dealing with alcohol use, was testimony from Dennis' wife, stating that he had been drinking, when he came home on the evening of March 30, 1988. (R. 5027). She did not know when or how much. She did not state what his condition was. Similarly, Dennis' confession simply asserts

that he and Douglas had been drinking earlier in the day without saying when they stopped, how much they had, etc. See also, Sochor v. State, 619 So. 2d 285, 292-93 (Fla. 1993) (evidence of "alcohol problems" insufficient to compel trial court to find existence of a mitigating circumstance).

Other cases on which the Appellant relies are likewise inapplicable. In Rembert v. State, 445 So. 2d 337 (Fla. 1984), there was just one aggravator, murder during the course of a robbery, and "a considerable amount of nonstatutory mitigating evidence," which the trial court had rejected. Rembert was a typical murder during a robbery, with no distinguishing factors. As this Court has noted, affirmances of death penalties predicated on single aggravating factors are rare. McKinney v. State, 579 So. 2d 80 (Fla. 1991). In Lloyd v. State, 524 So. 2d 396 (Fla. 1988), the death sentence was deemed inappropriate where there was but one aggravator - during the course of an attempted robbery - weighed against a statutory mitigating factor - the absence of a significant prior criminal history. Wilson v. State, 493 So. 2d 1019 (Fla. 1986), entailed a spontaneous killing during a domestic confrontation. That is a far cry from a murder whose commission had previously been contemplated, with both participants being fully aware of the motive well before the confrontation. In "heat of passion" killings, this Court's reasoning has related solely to the fact that the cases involved "heated domestic confrontations," in the absence of similar prior incidents. See, Blakely v. State, 561 So.2d 560 (Fla. 1990). Murders of police officers, for the purpose of avoiding arrest, are clearly within a category of cases for which the death sentence is proper. See, e.g., Valle v. State, 581 So. 2d 40 (Fla. 1991).

XIV.

THE LOWER COURT DID NOT ERR IN DENYING VARIOUS MOTIONS ATTACKING THE CONSTITUTIONALITY OF SECTION 921.141, FLORIDA STATUTES.

Counsel for Douglas Escobar filed several motions attacking the constitutionality of Florida's death penalty statute. (2R. 40-56). Counsel for Dennis Escobar adopted these motions (R. 681), and at a hearing on May 21, 1990, the motions were summarily denied, with neither counsel adding any further argument. (R. 681-85).

The appellant initially argues that Florida's death penalty statute is facially unconstitutional, as it violates the cruel and unusual punishment clause of the Eighth Amendment, and because it permits disproportionate penalties. These claims have repeatedly been rejected by this Court and the Supreme Court of the United States. See, e.g., Thompson v. State, 619 So. 2d 261, 287 (Fla. 1993); Lightbourne v. State, 438 So. 2d 380 (Fla. 1983), cert. denied, 465 U.S. 1051, 104 S.Ct. 1330, 79 L.Ed.2d 725 (1984); Raulerson v. State, 358 So. 2d 826 (Fla. 1978), cert. denied, 439 U.S. 959, 99 S.Ct. 364, 58 L.Ed.2d 352 (1978); Proffit v. Florida, 428 U.S. 242, 98 S.Ct. 2980, 49 L.Ed.2d 913 (1976).

The Appellant next claims that the aggravating factors in Section 921.141(5)(b) and (j) are vague and overly broad because they do not consider the circumstances of the prior conviction or the interference with the law enforcement officer's official duties. The State would first note that the argument with respect to aggravating factor 921.141(5)(j) was not raised below. (2R. 45-51). Moreover, defense counsel never attacked the language in the jury instructions regarding either of these factors and never sought a limiting instruction regarding same. (R. 6421; 2R. 197-218).

Accordingly, these claims are not preserved. See, e.g., Sochor v. State, 619 So. 2d 285 (Fla. 1993). Such claims have also previously been rejected. Lightbourne, supra; Songer v. Wainwright, 571 F.Supp. 1384 (M.D. Fla. 1983), aff'd., 733 F.2d 788 (11th Cir. 1983); Shere v. State, 579 So. 2d 86 (Fla. 1991) (statute not unconstitutional on ground that aggravating and mitigating factors, as applied, do not adequately limit class of persons eligible for death penalty); Peavy v. State, 442 So. 2d 200, 202 at n.* (Fla. 1983). As to the related claim that the statute violates Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), that was rejected in Peavy. Florida's statute has consistently been held to permit the introduction of any mitigating evidence, and the consideration of any mitigating factors, whether listed or not. Songer v. State, 365 So. 2d 696, 700 (Fla. 1978); Downs v. State, 572 So. 2d 895, 899 (Fla. 1990).[7]

The Appellant next asserts that Florida's statute minimizes the role of the jury and that each party to the sentencing process is improperly relieved of its responsibility in imposing sentence. Numerous cases, subsequent to Caldwell v. Mississippi, 472 U.S. 320 (1985), make it clear that there is nothing inherent in Florida's statute which mandates a limitation on the jury's role; problems arise only in the context of improper

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[7] In a related argument, the Appellant asserts that the court failed to consider mitigating factors argued by the defendant. Brief of Appellant, p. 95. The court's order reflects that evidence from relatives, that the defendant was a nice person, was considered and rejected as not constituting a mitigating factor. (R. 272-73). The same applies to Dr. Rose's testimony. (R. 272). This is fully consistent with Sochor v. State, 619 So. 2d 285, 293 (Fla. 1993), in which this Court found no abuse of discretion on the part of the trial court in finding that the evidence of family history matters, adduced by the defendant, did not rise to the level of a mitigating circumstance, due to its minimal nature. See also, King v. Dugger, 555 So. 2d 355 (Fla. 1990); Scull v. State, 533 So. 2d 1137 (Fla. 1988).

instructions or comments minimizing the jury's role. The judge retains full responsibility for the ultimate imposition of the sentence. See, e.g., Ford v. State, 522 So.2d 345 (Fla. 1988).

Lastly, the Appellant claims that the statute is unconstitutional, insofar as it does not require advance notice of aggravating factors that the state intends to rely on. This claim was rejected in Gore v. State, 475 So. 2d 1205, 1210 (Fla. 1985).

In a related argument, the defendant asserts that the statute does not require an instruction that the jury be convinced beyond every reasonable doubt that the aggravating factors outweigh the mitigating factors. While each aggravating factor must be established beyond a reasonable doubt, Scott v. State, 603 So. 2d 1275 (Fla. 1992), and this jury was so instructed pursuant to standard instructions (R. 6416-21), and the sentencing order so found (R. 272), there is no constitutional requirement that the aggravating factors outweigh the mitigating factors "beyond a reasonable doubt." This Court, in Tafero v. State, 403 So. 2d 355 (Fla. 1981), cert. denied, 455 U.S. 983, 102 S.Ct. 1492, 71 L.Ed.2d 694 (1982), held that the statute provides adequate standards for weighing the aggravating and mitigating factors. See also, Proffitt, supra; Boyde v. California, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990) (Upholding jury instruction stating that "[i]f you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death.").

Arguments based on the jury's role in rendering an advisory opinion have been rejected in Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984); Proffitt, supra (upholding weighing scheme); Patten v. State, 598 So. 2d 60

(Fla. 1993) (rejecting claim of unconstitutionality of a statute due to lack of requirement of specific written findings from jury as to aggravating and mitigating factors); Hildwin v. Florida, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989) (Sixth Amendment does not require that specific findings authorizing death sentence by made by jury). Finally, the claim that jury overrides create double jeopardy problems is academic in a non-override case, and, in any event, has been rejected. Spaziano, supra; Cannady v. State, 427 So. 2d 723 (Fla. 1983).

CONCLUSION

Based on the foregoing the convictions and sentence should be affirmed.

Respectfully submitted,

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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 **JOHN LIPINSKI,** Esq., 1455 N.W. 14th Street, Miami, Florida 33125; and **RONALD S. LOWY,** Esq., 420 Lincoln Road, PH/7th Floor, Miami, Beach, Floirda 33139 on this 18 day of June, 1996.

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