IN THE SUPREME COURT OF FLORIDA

CASE NO. **77,736**

DOUGLAS 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.

Douglas Escobar has adopted many of the arguments set forth in Dennis Escobar's brief in Case No. 77,735. As to those arguments, the State relies on its Brief in Dennis Escobar's appeal, and would note that the arguments contained therein, on the points which Douglas has adopted, contain discussions of any unique or different ramifications as to Douglas. The symbol "2R.___" refers to the two volume record on appeal in Dennis Escobar's case.

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, Douglas Escobar filed a Motion to Suppress Confessions, Admissions and Statements. **R.**31-2. After a pretrial evidentiary hearing, the motion was denied. **R.** 1227-9. 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**.4822. 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 Douglas 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**.231, 246-48. The court also found that three other factors had been established as to Douglas, 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; b) that the crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; and c) that the murder was cold, calculated and premeditated. **R**.246-48. The only mitigating factor found by the court was the nonstatutory factor that the defendant came from a "broken home." **R**.248. The court found that the remaining evidence adduced as mitigating evidence did not rise to the level of a mitigating factor. **R**.248.

SUMMARY OF THE ARGUMENT

I. Douglas Escobar's motion to suppress statements was properly denied, as there was no coercion on the part of the police and there was substantial testimony from which the court could conclude that he was not under the influence of drugs.

II. Escobar was not denied effective assistance of counsel in an interlocutory appeal, as no conflict of interest was established.

III, IV, and **V.** Evidence of collateral offenses was properly admitted where it was relevant to explain the motive for this murder, and it did not become the feature of this trial. Several of these claims are not preserved for appellate review.

VIand **XIII.** Claims regarding ex parte communications are without merit, as the hearing before a Special Master supports the conclusion that there were no ex parte communications.

VII. Consolidation of the two defendants trials was proper, as there was no Bruton problem, since each defendant's statement was sufficiently interlocking to establish its reliability for purposes of the Sixth Amendment.

VIII. There was no improper limit on cross-examination during the competency hearing, as that rested within the court's discretion. Furthermore, the claim is not properly preserved for review.

IXand **X.** The Neil claim is not properly preserved for review, and is refuted by the record. The claim regarding a change in jury selection proceedings during voir dire is similarly not preserved for review and is also without merit.

XI. Evidence of premeditation is overly abundant, in view of the defendant's prior threats to kill an officer and his directive to his brother to shoot the officer.

XII. There is no reason to treat the claim of cumulative errors any different than the individual claims.

XIV. The lack of a limiting instruction regarding doubling of aggravators is harmless, in view of the judge's proper reliance on just one such factor, and the de minimis nature of the mitigating evidence.

XV. During sentencing, there was no discovery violation as to Douglas, and therefore no basis for a Richardson inquiry. Furthermore, there was no request for any such hearing, and the claim is unpreserved, and the record reflects, in any event, that an adequate inquiry was conducted.

XVI. As detailed in prior issues, collateral offense evidence was highly relevant and admissible. Evidence properly admitted at the guilt phase cannot have an impermissible effect on sentencing phase proceedings. Furthermore, evidence of the collateral offenses was also relevant to the aggravating factor of a prior conviction for a violent felony.

XVII. The sentence imposed herein was proportionate to that imposed in other death sentence cases. The principal mitigating factor asserted on appeal, the influence of alcohol, was not asserted below, and was not supported by the evidence.

ARGUMENT

I. THE LOWER COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS STATEMENTS, CONFESSIONS AND ADMISSIONS.

Prior to trial, the defendant filed a Motion to Suppress Defendant's Confessions, Admissions, and Statements. R.31. This motion was based on the assertion that, as a result of the defendant's medical condition at the time of the statements, he was unable to give a free and voluntary statement and to knowingly and intelligently waive his rights. The trial court heard extensive evidence on this motion and subsequently denied it.

Douglas Escobar gave a series of statements. The first statement was obtained by Detectives Morin and Roberson, on April 30, 1988, between 12:00 noon and 1:00 p.m., at the Twin Cities Hospital, where Douglas Escobar was recovering from wounds and surgery which resulted from the California shoot-out. **R**.920-22,994-98. According to Detective Morin, at this initial meeting with Escobar, the defendant was in bed, with his eyes open; he was awake; and there were no complaints about pain or discomfort. **R**. 922-3. Roberson similarly testified that the defendant had no apparent discomfort or pain; did not appear to be under the influence of medication; was alert; was not sleepy; and did not have any slurred speech. **R**.998-1000.

The detectives told the defendant that they wanted to talk to him about the murder of Officer Estefan. **R**.926,998. They gave him his full Miranda warnings, and Douglas did not have any problems responding or understanding; he waived his rights. **R**.923-5, 1000. They told him that they had evidence linking him to the murder, including a truthful statement from Dennis and a fingerprint on the car. **R**.926. The detectives acknowledged that they did not have such information at the time. **R**.927. Escobar initially stated that he was not a killer; only a car thief. **R**.927-8. Subsequently, he gave further details, regarding the fact that they left the car in an apartment complex parking lot and washed the car to erase any prints. **R**.929-30. He then spoke about his problems in the United States, including a speeding ticket, an arrest warrant, immigration problems, and a life of crime to support his family. **R**.931-2. He stated that he did not want to go back to prison. **R**. 932. Subsequently, he gave details regarding the theft of the car from the Mazda dealer and the murder of Officer Estefan. **R**.932-6. Those details are the same as what is included in the testimony from Detective Morin, at trial, regarding Escobar's confession, and are detailed in the Statement of Case and Facts herein, pp. 5-7, supra.

At the conclusion of this confession, the defendant indicated that he was tired, although he did not sleep. **R**.937-8. Escobar and the officers agreed that the officers would return around 6:00 p.m., with a tape recorder, to obtain a recorded statement. **R**.937-9,1002. The officers did return at that time, and started recording and giving Escobar his Miranda warnings, but Escobar waved for them to stop. **R**.939-41, 944, 1006-7. Upon telling the officers to stop, Escobar stated that it was hard to tell on yourself; the tape recording was stopped. **R**.944, 1007. According to Detective Roberson, after the recording was stopped, the defendant inquired about the reward for information regarding Officer Estefan's murder. **R**.1007. According to Morin, after the tape was turned off, Escobar again agreed to talk and stated that it was hard to tell on himself and inquired about the reward. **R**.941-4. The officers advised him that it would not be possible for him to receive any reward. **R**.944-5,1008-09. According to Roberson, Escobar inquired about where he would serve his California and Florida sentences. Roberson responded that if he was found guilty in California and then in Florida, "he would be brought back to Florida and it was my understanding he would serve the remaining time in Florida." **R**.1008. Escobar wanted that to occur. **R**.1008. As the interview was ending, Morin inquired whether Escobar really thought that he was going to get away with the murder, and Escobar responded affirmatively. **R**.946. He added that he made two mistakes: telling Gilberto and leaving the fingerprints. Id.

With respect to the 6:00 p.m. interview, both officers stated that there were no threats or promises; the defendant did not appear to be under the influence of medication; there was no

apparent pain or discomfort; there were no requests for doctors or nurses. **R.**945-8,1010.[1] This interview lasted between 35 and 40 minutes. **R.**1011.

After Morin and Roberson left, the California officers spoke to Escobar for about an hour and then Morin returned to ask a few brief questions. **R.**949. Morin inquired where the Escobars had been coming from prior to the murder, and Douglas responded that they had been at a coffee shop. **R.**950. Escobar also added, after questioning, that he was wearing dark clothing on the night of the murder and did not recall what his brother was wearing. Id. As previously detailed in the Statement of Facts, Douglas' admissions at both the noon and 6:00 p.m. interviews on April 30, 1988, were introduced into evidence at trial.

Morin returned to speak to Douglas once again, on May 3, 1988. **R.**951. Escobar was lucid and alert, although in somewhat worse medical condition. **R.**951-2. He was Mirandized and questioned about the disposal of the gun, and he acknowledged that it was disposed of by an Indian reservation at a canal. **R.**953. That was the full extent of the interview and this May 3rd statement was not introduced into evidence at trial.

Morin again saw Douglas in a California prison, on July 12, 1989. **R.**954-65. The prosecution agreed that the statement obtained at this time was obtained improperly and that it was not going to be used at trial. **R.**1197. The statement was not used at trial.

At the suppression hearing, the defense produced Dr. Elizabeth Weatherford, a psychiatrist from California. She had never treated Escobar, and was testifying solely on the basis of a review

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[1] Nurse Sherry Lemon, who was on shift before and after the 6:00 p.m. interview, testified at trial, but not at the suppression hearing, and offered similar testimony. She had administered morphine at 4:50 p.m., stating that it relieves pain and does not affect the patient's mental state. She had no concerns about the officers speaking to Escobar. Shortly prior to that interview, Escobar was lucid and clear-headed. R.5416.

of hospital records and notes. **R.**1063-77, 1101-2, 1105-6. The essence of her testimony was that Escobar had been receiving steady doses of morphine, from April 27, 1992 until May 2, 1992. The dosages increased, initially starting at 2 milligrams and increasing up to 8 milligrams. **R.**1070-82. Dr. Henry, the treating physician, also indicated that the dosages increased gradually, both in dosage and frequency. **R.** 1125. According to Weatherford, based on these dosages, although possible, she does not think that Escobar was thinking clearly at the time of his April 30th statements to the detectives. **R.**1085-7, 1093-4. Her review of the records indicated that on May 1st, the day after the statements, Escobar showed signs of hallucinations. **R.**1089, 1166-7. The prosecution elicited that Weatherford did not have any real expertise in the effects of morphine. **R.**1098-1100. She never observed Escobar and was relying solely on medical notes. **R.**1101-2, 1105-6. She acknowledged that it is difficult to understand what is going on in the hospital room just by looking at records. **R.**1107-8. Her evaluation did not consider what the defendant told the detectives, even though she acknowledged that it might be relevant to know if the defendant spoke rationally and coherently. **R.**1108-9.

Dr. Henry indicated that on April 30th, Escobar's general medical condition was poor and he did not think the defendant could understand Miranda warnings. **R.**1127-8. He acknowledged that the effect of morphine on a person's understanding depends upon the person. **R.**1129. He also acknowledged that nurses and police would have a good idea of whether a person is under the influence of drugs, on the basis of their daily experiences. **R.**1137-8; 1139-40. The heavier doses of morphine reflect the defendant's ability to tolerate the drug. **R.**1140-1. On April 30th, the records indicated that Escobar's vital signs were stable, he was alert and he was active. **R.**1133-4, 1136-7. That would have pertained to his visit to Escobar between 7:00 and 9:00 a.m. on the 30th. Id. Dr. Henry also acknowledged that if the defendant had been asked questions, was not drowsy, was

responsive and articulate, and did not have slurred speech, it is possible that his answers could be valid. **R.**1139-40. Upon further questioning by the court, the doctor stated he had not noticed Escobar having delirium and agreed that if Escobar had been irrational or irresponsive during the doctor's visits, the doctor would have noted that on the records. **R.** 1142-3.

The prosecution called Diana Dyer as a rebuttal witness at the suppression hearing. She was a nurse at the Twin Cities Hospital and was present for the 3:00 p.m. to 11:00 p.m. shift on April 30, 1988. **R.**1150. Prior to the 6:00 p.m. interview conducted by the detectives, the officers had obtained staff permission for such an interview. **R.**1154. She had spoken to Escobar prior to the interview, and he was awake, alert, oriented and knew where he was, who he was and why he was there. Id. She also noted that Escobar had a very high tolerance for morphine. **R.**1155.

With respect to the statements obtained by California deputy sheriff Gimple on May 28, 1988, **R.**878-87, those statements were not introduced into evidence at trial and are thus completely irrelevant. As those statements were obtained several weeks after the April 30th statements,[2] there is no possibility that the May 28th statement could in any way have affected the earlier statements. Thus, the details regarding Gimple's interview are not being set forth herein.

At the conclusion of the evidentiary presentation, the judge noted that Dr. Weatherford had never observed the defendant, and that Dr. Henry had not made any notes about the defendant being irrational, prior to May 1st, even though he would have made such notations had he made such observations. **R.**1227-8. The judge also credited nurse Dyer's testimony that Escobar was coherent on April 30th. **R.**1228. Thus, the statements made on April 30th were deemed voluntary, as were the subsequent statements of May 3rd and May 28th. **R.**1228-29.

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[2] The Appellant has erroneously stated that the statement was obtained on April 27, 1988. The record is, however, clear that the Gimple statement occurred a month later, on May 28, 1988. **R.** 878.

The Appellant's primary argument is that his state of mind, as a result of his medical condition, precluded him from making a knowing and intelligent waiver of his rights, and precluded his statement from being voluntary. The Appellant's contention has been repudiated by the United States Supreme Court in Colorado v. Connelly, 479 U.S. 157, 102 S.Ct. 515, 93 L.Ed.2d 473 (1986). The Supreme Court held that a defendant's mental condition, "by itself and apart from its relation to official coercion," does not render a statement involuntary. 479 U.S. at 164. "Absent police conduct causally related to the confession, there is simply no basis for concluding that any state action has deprived a criminal defendant of due process of law." Id. Thus, a finding of involuntariness must be predicated on coercive conduct by the police. The Supreme Court embellished upon its earlier decisions, in which defendants' states of mind had been relevant, by showing that in those cases, the police exploited the defendants' conditions, fully aware of those conditions. For example, in Blackburn v. Alabama, 361 U.S. 199, 80 S.Ct. 274, 4 L.Ed.2d 242 (1960), the police, aware of the defendant's history of mental problems, exploited those problems through an 8-9 hour sustained interrogation in a claustrophobic room filled with officers. In Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), the police administered a truth serum to the defendant, aware that he had previously been given drugs and was addicted.

This Court has acknowledged the same principles. In Brown v. State, 565 So. 2d 304, 306 (Fla. 1990), a defendant's claim, that a statement was involuntary due to lack of sleep and exhaustion, was rejected "in the absence of any coercion." In Richardson v. State, 604 So. 2d 1107 (Fla. 1992), this Court rejected a claim that a defendant's retardedness, in and of itself, rendered a confession involuntary. In Copeland v. Wainwright, 505 So. 2d 425, 429 (Fla. 1987), the Court stated that the defendant's defective mental condition did not, by itself, render his statements involuntary. See also, Thompson v. State, 548 So. 2d 198, 201-202 (Fla. 1989).

In the instant case, there was no coercive police conduct. The interviews on April 30th were both relatively brief, no more than an hour each. When the defendant asked to terminate the interviews, the officers did. The defendant was alert, awake, rational and coherent, with the officers. In their opinion, and based on their experiences, the defendant was not under the influence of medication at the time. Sgt. Finale, a California officer who saw the defendant that same afternoon, concurred in that judgment. **R**.1040-2,1047-9. Hospital personnel and nurses had approved of police contact with Escobar on both occasions on the 30th. Although Dr. Weatherford did not believe Escobar could understand and waive his rights, she never saw him that day and had no knowledge of how he behaved and responded when interviewed. Dr. Henry's opinions were qualified, as he acknowledged that the records indicated that the defendant was alert; there were no notations of the defendant being irrational or delirious prior to the interviews on the 30th; and he accepted that officers and nurses have the skills to determine whether a person is under the influence at the time of the statement.

Under such circumstances, the lower court properly determined that the statements on April 30th were voluntary and that the waiver of rights was knowing, intelligent and voluntary. See, e.g., Thompson, supra, 548 So. 2d at 203-204 (claim of involuntariness due to mental subnormality rejected in light of conflicting evidence, ability of defendant to speak to officers for over two hours without difficulty in understanding questions). All of the subsequent statements, from May 1988 and July, 1989, are irrelevant, as they were not used during trial and could not affect any prior statements.

The defendant also claims that his confession was involuntary because the police deluded him when Roberson indicated that his time would be served in Florida if the Florida conviction followed the California conviction. The Appellant argues that the lack of any reference to the

possible death penalty constitutes a delusion of the defendant. See, Brief of Appellant, pp. 19-20. There are several problems with this argument. First, it was never raised, in either the motion to suppress or in arguments at the suppression hearing. As such, it cannot be raised for the first time on appeal. Tillman v. State, 471 So. 2d 32, 34-35 (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."). Moreover, this statement by Roberson came after the full-blown confession obtained on the 30th between noon and 1:00 p.m. Roberson's statement, whatever significance it may have, came during the 6:00 p.m. interview on the 30th. Thus, it could not affect the prior confession and the subsequent statements by Escobar were minimal. Thus, even if there were an error as to admitting what Escobar said after Roberson's statement, such error would have to be deemed harmless, since a full-blown confession preceded it and was admissible.

Furthermore, Roberson's statement did not constitute an improper promise or delusion of the defendant. It was not an inducement to obtain a statement. The defendant wanted to know where he would serve time, and was told that, assuming he was found guilty in California, then tried in Florida and found guilty, he would serve time in Florida. **R**.1008. As to the lack of reference to a possible death sentence, the officer never told Escobar what sentence he would or could get, one way or the other. Even if this were somehow treated as false information, that could not render the confession involuntary. See, e.g., Burch v. State, 343 So. 2d 831 (Fla. 1977) (confession voluntary where defendant incorrectly informed he failed polygraph); Frazier v. Cupp, 394 U.S. 731, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969) (confession voluntary even though defendant falsely told partner confessed); Paramore v. State, 229 So. 2d 855 (Fla. 1969); Holland v. McGinnis, 963 F.2d 1044, 1050-52 (7th Cir. 1992).

II. THE TRIAL COURT DID NOT DENY THE DEFENDANT HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY APPOINTING AS COUNSEL FOR AN INTERLOCUTORY APPEAL THE SAME ATTORNEY WHO HAD PREVIOUSLY BEEN APPOINTED TO REPRESENT THE CODEFENDANT.

Prior to trial, the State filed a notice of intent to offer evidence of other crimes, wrongs or acts. The State sought to introduce the following: 1) Evidence of two prior California warrants outstanding against Douglas Escobar at the time of the Estefan shooting for robbery and for unlawful flight to avoid prosecution; 2) a statement made by Douglas Escobar to his neighbor Angel Bonilla in 1988 prior to the Estefan shooting, in which Douglas said that he "carried a gun, and if the police stopped him he was going to shoot it out with him because there was no way he was going to go back to jail and rot there"; and 3) evidence that the Escobars fled from and engaged in a shoot-out with California Highway Patrol officers one month after the Estefan shooting.

The trial court conducted a hearing on these matters, and after legal arguments, **R.** 707-28, the court reserved ruling. **R.** 728. The court then proceeded with an evidentiary hearing on the defendants' motions to suppress confessions, and then announced its ruling regarding the Williams Rule motion. The trial court ruled that none of the above evidence was admissible. R. 99-100, 1229-32.

The State commenced pretrial appellate proceedings, in Third District Court of Appeal case nos. 90-1303 and 90-1378, to seek review of these rulings. Those proceedings included a petition for writ of certiorari, regarding the exclusion of the outstanding warrants for Douglas Escobar and the Escobars' attempted first degree murder of the California officers (Appellant's Appendix 1-11), and a separate appeal regarding the statement which Douglas Escobar made to his brother. (Appellee's Appendix 3-14).

On May 22, 1990, pursuant to the request of attorney Carter, on behalf of Dennis Escobar, the trial court appointed John Lipinski as additional counsel to represent Dennis Escobar. R. 876. On May 24, 1990, Mr. Galanter, counsel for Douglas Escobar, requested that appellate counsel be appointed for Douglas Escobar in the appellate proceedings, which had not yet been commenced. **R.** 1267-8. The State advised the court that Mr. Lipinski had already been appointed to represent Dennis Escobar, and suggested that he could handle the appeal for both defendants. **R.** 1269. The judge initially indicated that the "issues are the same. I don't have a problem. . . . Same issue would be placed as to both defendants. It's not a different matter that remains to either one. The legal issues are the same." Id. Douglas Escobar's attorney, Mr. Galanter, responded: "If there is no conflict and the Court has absolutely no conflict, I reflect I have no problem." **R.** 1269-70. Shortly afterwards, Mr. Galanter suggested a possible conflict:

> **MR. GALANTER:** Judge, and I'll, I think there is a conflict because well, one of the things that they are appealing is your specific ruling as to the statement that Douglas made about that he would kill a cop.
>
> **THE COURT:** How is there a conflict in that just allowing that statement as it relates to Dennis the legal issue as to whether it's admissible.
>
> **MR. GALANTER:** Because Dennis' argument is going to be completely different. Dennis' argument is going to be that the entire arrest and shooting incidents that took place in California is not admissible which is also the argument that Douglas has with the addition of the statement.
>
> **THE COURT:** I understand that. I don't see how there is a conflict in that. The one argument is identical to both. It just so happens that Douglas has a second argument. It's not adverse to Dennis. It's just an additional argument. That's the way I analyze it.
>
> **MR. GALANTER:** I have no problem with it.
>
> **THE COURT:** Here's what I would like to do.
>
> **MR. GALANTER:** I am concerned. I know the time is of the essence.

THE COURT: Let Mr. Lipinski start on it. If he sees when he looks at the issues that have been raised that there is a problem, come in immediately and then if we have to we will appoint somebody else. It's as simple as that. But I don't see it as a conflict situation but I see it as an additional situation.

R.1270-1. Mr. Galanter subsequently suggested that the right of the defendant to cross appeal, with respect to separate issues on the denial of the defendant's motion to suppress, could cause a problem. **R.**1273-4. The trial court promptly advised Mr. Galanter that the defendant was not going to have any right to cross-appeal suppression motion issues in the State's Williams rule appeal. **R.**1274. Mr. Galanter responded, "I am sure the Court is correct." Id. Mr. Galanter did not engage in any further efforts to point out any conflict which would preclude the appointment of one appellate attorney for both defendants. Nor did Mr. Galanter come back to the court, at any time, after having consulted with Mr. Lipinski, to again assert that a conflict had been discovered.

Douglas Escobar now argues that it was error to appoint Mr. Lipinski as counsel to represent both defendants in the interlocutory appeal and certiorari proceedings. This claim fails for several reasons. First, Douglas' trial counsel did not establish the existence of any actual conflict of interest which would preclude the appointment of one attorney to represent both defendants in the pretrial appellate proceedings. Second, Douglas' counsel clearly acquiesced in the trial court's decision to appoint Mr. Lipinski and then reconsider the question of conflict if Mr. Lipinski or Mr. Galanter raised it after having consulted with Mr. Lipinski.

Most case law regarding conflicts of interest and representation of multiple parties deals with trial counsel. See generally, Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978); Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980); Foster v. State, 387 So. 2d 344 (Fla. 1980). Different standards are involved, depending upon whether counsel calls a potential conflict to the attention of the trial court. When counsel does not properly object in a

timely manner, relief can subsequently be granted solely upon a showing of "an actual conflict which adversely affected the lawyer's performance." Cuyler, supra, 446 U.S. at 348; Oliver v. Wainwright, 782 F.2d 1521, 1524 (11th Cir. 1986); Barclay v. Wainwright, 444 So. 2d 956, 958 (Fla. 1984). Although Douglas Escobar's trial counsel initially attempted to assert a conflict of interest, it is hereby submitted that the Cuyler standard is the applicable one, since counsel promptly agreed with the trial court judge that a conflict did not appear to exist, and that presumption was to remain in effect unless trial counsel raised the issue again, after having consulted with the appointed appellate attorney. Thus, Douglas Escobar is entitled to some form of relief only upon a showing of an actual conflict of interest which adversely affected the performance of counsel.

As noted above, no such conflict was demonstrated at the trial court level. Appellant currently attempts to demonstrate such a conflict by arguing that Dennis Escobar's trial counsel, at trial, focused on Douglas' collateral crimes in order to prove that Douglas was responsible for the offenses charged. See Brief of Appellant, p. 22 at n. 3. Such argument is without merit, as trial strategies utilized months after the Third District Court of Appeal ruled that the collateral crimes evidence was admissible do not demonstrate that prior appellate counsel had a conflict of interest which prejudiced the defendant.[3] Indeed, at the hearing on the Williams rule motion, Mr. Carter, counsel for Dennis Escobar, vehemently argued that all of the evidence the State was seeking to use, including that related to Douglas, should be excluded. **R.**719-24. Thus, with respect to the statement in which Douglas stated that he would kill a cop if the situation arose, Dennis' counsel argued that

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[3] Indeed, at the time of the State's appellate proceedings related to those issues, the trials of the two codefendants had previously been severed, and they had not yet been reconsolidated for joint trial. The cases were originally severed on May 24, 1990. **R.**1253-4. The State's Third District appeal was filed on May 29, 1990, after the cases had been severed, and the Third District certiorari petition was filed on June 15, 1990. State's App. 15, 16. Thus, at that time, there was no possibility that Dennis' trial counsel would be contemplating a joint trial strategy of pointing the finger at Douglas and emphasizing Douglas' prior collateral offenses or prior incriminating statements.

the admission of such a statement "would be prejudicial in a case against Dennis to allow that to come in at that point." **R**.721. Mr. Carter had similarly argued that the evidence of the other offenses should likewise be excluded **R**. 722-24, and had previously filed a motion in limine to that effect. **2R**.44-45. Thus, at the time that the State's interlocutory appellate proceedings were pursued, Dennis Escobar's counsel clearly had no predesigned intent or strategy to utilize Douglas' prior violent acts and statements in support of Dennis' defense. At that point in time, both defendants' interests on these issues were mutual, as both believed they would be prejudiced by the evidence which the State was seeking to use. Not only did both seek to exclude the evidence, but there was nothing inherent in any of the legal arguments on behalf of the defendants which would inure to the benefit of one, but not the other. See argument on Williams rule evidence, infra, at point III herein.

"A conflict occurs 'whenever one defendant stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to the cause of a codefendant whom counsel is also representing.'" Barclay v. Wainwright, 444 So. 2d 956, 958 (Fla. 1984), quoting Foxworth v. Wainwright, 516 F.2d 1072, 1076 (5th Cir. 1975). As demonstrated above, at the time of the Third District Court of Appeal's pretrial appellate proceedings, no conflict existed, as both parties were arguing to exclude the evidence, the trials had been severed and not reconsolidated as of that time, and Dennis' counsel would not have had any reason at that time to even contemplate a strategy of using this evidence, at Douglas's trial, for the purpose of shifting the blame towards Douglas.

Nevertheless, even if it is found that Douglas' trial counsel adequately preserved the conflict of interest issue, or even if there was an actual conflict of interest which adversely affected prior appellate counsel's performance, such a conflict has no bearing on the trial court proceedings. When a conflict of interest is found to have rendered appellate counsel ineffective, the remedy is a new

appeal, in which all pertinent claims can be reargued. Barclay, supra. This case presents the somewhat anomalous situation of a pre-capital trial evidentiary issue being adjudicated by the District Court of Appeal. While an issue previously adjudicated by an appellate court is generally deemed to constitute the law of the case, for the purpose of precluding the appellate court from subsequently relitigating the same issue, Preston v. State, 444 So. 2d 939 (Fla. 1984), such a principle can not apply in the context of a pretrial ruling by a District Court of Appeal, in a case which ultimately turns out to be a capital case, fully reviewable on direct appeal by this Court. As the judgment of conviction is reviewable by this Court, it would appear to be axiomatic that this Court has the power, to review issues regarding evidentiary matters, even if those issues had been litigated in the District Court of Appeal prior to the trial. Thus, Douglas Escobar is free to raise, and has in fact raised, the very same Williams rule issues, in point III of this appeal, as had been litigated in the prior Third District Court of Appeal proceedings. Douglas Escobar is therefore getting what, at most, he would be entitled to, if his conflict claim were correct - the opportunity to relitigate the claim and present any and all arguments, through his current independent counsel, which arguments were allegedly neglected by prior counsel due to the alleged conflict. Accordingly, this claim of a conflict of interest has no independent significance; this Court can simply review the Williams rule claim, determine if the evidence was properly admitted at trial, and, if there was any error, assess it in terms of harmless error analysis. See, Argument III, infra.

III. THE TRIAL COURT DID NOT ERR IN ADMITTING EVIDENCE OF COLLATERAL OFFENSES AND A STATEMENT IN WHICH DOUGLAS ESCOBAR INDICATED HIS INTENT TO KILL A POLICE OFFICER IF ANY OFFICER STOPPED HIM.

As previously noted, in point II, the State, prior to trial, filed a notice of intent to offer evidence of other crimes. The State sought to introduce: 1) evidence of outstanding arrest warrants;

2) Douglas' statement to a neighbor; and 3) evidence of the California shoot-out. After a hearing on the State's motion, the court ruled that the evidence was inadmissible. The State commenced pretrial appellate proceedings in the Third District Court of Appeal, with respect to the exclusion of this evidence. The Third District ruled in favor of the State as to all of the evidence at issue. State v. Escobar, 570 So. 2d 1343 (Fla. 3d DCA 1990). Subsequently, at trial, this evidence was used, over the objection of the defendant. The Appellant argues herein that the Third District Court of Appeal erred in ruling that the evidence was admissible.

Douglas Escobar's statements to Bonilla, one month prior to the murder of Officer Estefan, establish his motive for murdering Officer Estefan. These statements indicate that Douglas knew that law enforcement authorities were looking for him and that if a police officer tried to stop him he would shoot it out with the officer because he was not going back to jail. One month after the statements, when Officer Estefan attempted to stop Douglas for a traffic violation, he was shot and murdered, as Douglas had stated.

The instant case is extremely analogous to that of 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.

Douglas's own prior statements are also directly admissible against him under Section 90.803(18), Florida Statutes, as a statement of a party opponent. One recent example of this, in a similar context, is found in Pace v. State, 596 So. 2d 1034, 1035 (Fla. 1992). In a murder prosecution, evidence was admitted of the defendant's statements to his cousin, in which he "expressed despair at being broke and said that he was going to remedy the condition 'tomorrow' by doing something 'he hated to do.'" Id. These statements were deemed admissible, as this Court relied upon Swafford v. State, 533 So. 2d 270 (Fla. 1988), cert. denied, 489 U.S. 1100, 109 S.Ct. 1578, 103 L.Ed.2d 944 (1989), in which this Court found other statements admissible as statements of a party opponent, under Section 90.803(18), Florida Statutes.

Several other cases support the admissibility of Douglas's statements. In Jackson v. State, 498 So. 2d 406 (Fla. 1987), the defendant, after murdering a police officer, told a friend that she had shot a cop because she "wasn't going back to jail." This Court held that the evidence was properly admitted because it was relevant to prove the defendant's motive for killing the police officer. See also Mackiewicz v. State, 114 So. 2d 684 (Fla. 1959) (appellant told cell-mate that he had struggled with and shot a police officer because he felt that the police were on to him for a robbery he had committed; evidence deemed admissible to show motive and intent in shooting officer); Craig v. State, 510 So. 2d 857, 863 (Fla. 1987). ("While evidence of motive is not necessary to a conviction, when it is available and would help the jury to understand the other evidence presented, it should not be kept from them merely because it reveals the commission of crimes not charged. The test for admissibility is not the necessity of evidence, but rather is relevancy.")

The Appellant argues that the statement in the instant case is more analogous to that in Jackson v. State, 451 So. 2d 458 (Fla. 1984), in which the defendant, at some unspecified point in time, had boasted to the state's witness about being a "thoroughbred killer" from Detroit. However, in that case, the fact that the defendant had stated that he had committed prior murders did not furnish the motive for the killings for which he was now being tried. The statement at issue did not reflect any future intent to commit a particular type of crime if the situation arose. There was no indication that the defendant in Jackson was wanted for those prior murders, or that there were warrants out for his arrest, or that he was committing the new murders to avoid arrest and imprisonment for those prior killings. Arsis v. State, 581 So. 2d 935 (Fla. 3d DCA 1991), on which the Appellant also relies, suffers from the same defect, as it does not relate to the motive for the new offense. It simply involved a statement that the defendant had robbed taxis for a living.

The Appellant also objects to the Third District's alternative holding which suggests that Douglas's statement was also admissible under Section 90.803(18)(e), as a co-conspirator's statement, in furtherance of the conspiracy. That portion of the Third District's holding is inconsequential as to Douglas. The State, in the instant case, never sought to admit the statement under the co-conspirator exception. Furthermore, as detailed above, the statement was independently admissible under Section 90.803(18)(a), as a simple statement of a party opponent, or under Section 90.803(3).

The evidence regarding the outstanding warrants for Douglas Escobar was also properly admitted. **R**.4273-9. The warrant was issued prior to the murder of Officer Estefan, and was relevant to show the motive and intent for that murder. The warrant is interwoven with Douglas's statements to his neighbor, Jose Angel Bonilla. It is due to the outstanding warrant, which Douglas is aware of, that he fears going back to prison, and formulates the intent to murder any officers during a

confrontation, to avoid a return to prison for the pending charges. The cases cited above, clearly support the relevancy of the warrant, with respect to the issue of motive.

In Grossman v. State, 525 So. 2d 833, 837 (Fla. 1988), cert. denied, 489 U.S. 1071, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989), this Court held that evidence that at the time of the murder of a police officer, the defendant was on probation and had stolen a gun which violated his probation, was admissible and relevant to his motive for killing the officer. McVeigh v. State, 73 So. 2d 694 (Fla.), app. dismissed, 348 U.S. 885, 75 S.Ct. 210, 99 L.Ed. 696 (1954), also presents remarkably similar facts. The defendant was charged with the murder of a police officer, who had custody of him after a traffic violation. Evidence was introduced that at the time of the murder, the defendant was a probation violator from California and that 23 days prior to the murder, a California court had revoked his probation and issued a bench warrant for his arrest. In upholding the admissibility of this evidence, this Court stated:

> Under this state of facts it was perfectly apparent why defendant did not want to go to the police station where he would be confronted with his criminal history. Even though such evidence proved the commission of another and different crime, it was admissible to show motive.

73 So. 2d at 696. See also, Johnson v. State, 130 So. 2d 599, 600 (Fla. 1961).

Evidence of the California shoot-out, which occurred one month after the murder of Officer Estefan, was also admitted, after the Third District Court of Appeal ruled that it was admissible. This incident was properly admitted as evidence of flight from a threatened prosecution and as evidence of consciousness of guilt. The pertinent principles are set forth in this Court's decision 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:

> . . . 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 1336, 1339 (Fla. 1994).

The essence of the Appellant's contention is that Douglas Escobar may have been fleeing from the California warrants, as opposed to the Miami murder, and that Douglas was unaware of the fact that he was wanted for the Florida murder. These contentions are without merit. First, it is painfully clear that the Escobars were fleeing from the Florida murder. Immediately after the shooting, they thoroughly washed their vehicle, to remove prints, and abandoned it. They then proceeded to change their appearances. Before going to the airport and going 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.

Moreover, in Bundy v. State, 471 So. 2d 9, 20-21 (Fla. 1985), this Court rejected the same type of arguments that Douglas Escobar is currently making. Bundy had argued that an instruction on flight was unwarranted unless 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." 471 So. 2d at 20. Bundy further argued that the state should not be allowed to introduce evidence of flight "unless the state can show that Bundy had no other reason to flee." Id. In Bundy, the defendant fled from an officer who had stopped him,

six days after the disappearance of one of the murder victims, about 200 miles away. As the disappearance of the girl had attracted much publicity, this Court felt "it is a reasonable inference to make that Bundy fled from the officer as a result of consciousness of guilt on his part for the Leach crime." 471 So. 2d at 21. The second flight occurred two days later, when another officer spotted a license tag on Bundy's car floorboard. This Court concluded that the evidence of flight was properly admitted as to both instances, notwithstanding the number of days which had elapsed, and notwithstanding an apparent lack of knowledge on the part of Bundy that he was being sought for those offenses.

This Court has similarly rejected the contention that flight must be shown to be from one particular offense, as opposed to another. Freeman v. State, 547 So. 2d 125 (Fla. 1989). Thus, even if Douglas Escobar's flight was attributable to both the Florida murder and the California warrants, the flight evidence is still admissible. Indeed, it would be reasonable for a jury to infer that the flight was motivated more by the Florida murder than the California warrant. First, the defendant had fled from Florida to California. Second, he would presumably have been aware that the consequences of a conviction for a murder are considerably greater than the consequences for lesser offenses in California. See also, Harvey v. State, 529 So. 2d 1083 (Fla. 1988); Mackiewicz, supra.

In addition to showing the consciousness of guilt for the murder of Officer Estefan, the flight from and shoot-out with the California officers supports the State's theory that the defendants were sufficiently motivated by their desire to prevent the arrest of Douglas Escobar on outstanding warrants that they murdered Officer Estefan. Their willingness to engage in a shoot-out with the California officers lends credibility to the expected testimony of witnesses that Douglas Escobar said he would engage police officers in a shoot-out if they tried to stop him, and that both defendants confessed that their motive for murdering Officer Estefan was to prevent Douglas' recapture.

The California incident is also relevent as it rebuts Douglas's attempts to minimize his own role and point his finger at his brother, the triggerman in the Officer Estefan killing. In Remeta v. State, 522 So. 2d 825 (Fla. 1988), the defendant was charged with the murder and robbery of a convenience store clerk. In his statements, the defendant claimed that his companion was the primary perpetrator and triggerman in the killing. The State introduced evidence from the survivor of a subsequent attempted murder and robbery, who testified that the defendant, and not his companion, had a gun and fired it. This Court held that evidence of this subsequent crime was properly admitted to counteract the defendant's statements blaming the charged crimes on his companion. See also, Wuornos v. State, 644 So. 2d 1000, 1006 (Fla. 1994); Baker v. State, 241 So. 2d 683 (Fla. 1970) (defense counsel, through cross-examination of State witnesses, attempted to elicit defense that defendant did not intend to participate in a felony robbery with his companion, and evidence that defendant, a few hours later, committed a robbery was therefore relevant to rebut the defense that defendant had only intended to commit a minor larceny).

The Appellant next asserts, in reliance on Heuring v. State, 513 So. 2d 122 (Fla. 1987), and Edmond v. State, 521 So. 2d 269 (Fla. 2d DCA 1988), that the other crimes evidence was not properly admitted in the instant case because it was not shown to have striking similarities to the offenses charged herein. That argument has been addressed and explicitly repudiated by this Court, in Williams v. State, 621 So. 2d 413 (Fla. 1993). Not all evidence of "other crimes" is admitted because of its similarity to the charged offense. Some such evidence is admitted because it is probative of material facts at issue, even if the other crimes are not similar. Thus, the requirement that other offenses be shown to be strikingly similar, is limited to situations in which the evidence is admitted to prove identity or a common plan; the requirement of striking similarity is inapplicable

when the evidence comes in for other relevant purposes, such as motive, intent, consciousness of guilt, etc.:

> This case presents a textbook example of the interplay of Florida's rules of evidence concerning the admissibility of evidence of other crimes, wrongs, or acts. As a general rule, such evidence is admissible if it casts light on a material fact in issue other than the defendant's bad character or propensity. . . . Evidence of other crimes or acts may be admissible if, because of its similarity to the charged crime, it is relevant to prove a material fact in issue. But it may also be admissible, even if not similar, if it is probative of a material fact in issue. Although similarity is not a requirement for admission of other crime evidence, when the fact to be proven is, for example, identity or common plan or scheme it is generally the similarity between the charged offense and the other crime or act that gives the evidence probative value. Thus, evidence of other crimes, whether factually similar or dissimilar to the charged crime, is admissible if the evidence is relevant to prove a matter of consequence other than bad character or propensity.

621 So. 2d at 414. The same principles apply in the instant case, as the other crimes evidence was admitted not to prove identity or common plan or scheme, but to prove other material facts, such as motive, intent, and consciousness of guilt.

The Appellant next argues that the evidence of the California shoot-out was improperly admitted because it became the feature of the prosecution. See Brief of Appellant, pp. 34-37. This Court has often observed that even when collateral-offense evidence is admissible, it cannot become the feature of the trial. Williams v. State, 117 So. 2d 473 (Fla. 1960); Stano v. State, 473 So. 2d 1282, 1289 (Fla. 1985); Ashley v. State, 265 So. 2d 685, 693 (Fla. 1972).

The claim that the collateral offenses became a feature of the trial is not preserved for appellate review. During the pretrial arguments, and prior to the appellate proceedings on the collateral offense evidence, Appellant, inter alia, argued that if the California case is going to become the "highlight" of this case, the prejudicial effect would outweigh the probation value. **R**.718. As noted by the State at the time, such an argument was "premature" and the proper time to object on this basis was prior to the evidence being introduced. **R**.726-7. Subsequently, prior to opening

arguments, counsel for Dennis noted that the Third District Court's opinion had deemed that the collateral crimes evidence was relevent, but that the trial judge still had to determine the balance between prejudice and probative value. **R**.4193-4. The trial court determined that, "[w]hen the material is offered, you can make your same objection as you certainly made previously, certainly." **R**.4194. Thereafter, there were no objections or arguments that the testimony or evidence being presented was becoming a feature, focus, or highlight of the case. Indeed, at the conclusion of Trooper Kell's testimony, the judge stated, "[m]y feeling with regard to the Williams rule material is such that that should not be the focus of this case." **R**.4983. The judge also indicated that he would permit Trooper Koenig to testify. **R**.4986. Notwithstanding the judge's comments, neither Douglas nor Dennis's counsel objected that the evidence was becoming a "feature." The Brief of Appellant alludes to two other comments by the judge; neither refers to the evidence as a feature, and neither includes any such objection by defense counsel. The instant claim is thus not preserved due to the lack of any timely objection based on the "feature" theory. 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."). Dennis Escobar has adopted Douglas' argument as to this issue and it should therefore be noted that the claim is also unpreserved as to Dennis.[4]

Even if the claim regarding collateral offenses is reached, it must be concluded that they did not become a feature. The principal witness to testify about the California shoot-out was Trooper

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[4] Furthermore, claims regarding collateral offense testimony have routinely been held not to constitute fundamental error. See, e.g., Harmon v. State, 527 So. 2d 182 (Fla. 1988); Correll v. State, 523 So. 2d 562 (Fla. 562); Phillips v. State, 476 So. 2d 197 (Fla. 1985).

Kell, whose direct examination testimony consisted of 62 pages. Officer Koenig's testimony for the State, regarding the shoot-out was much more abbreviated, and related solely to Dennis Escobar's role in the incident. Lt. Amoroso did not discuss the shoot-out. She simply testified that Douglas Escobar had outstanding arrest warrants from 1987. Douglas Saballos did not testify about the California shoot-out. His testimony pertained to prior statements which Douglas Escobar had made and which explained the motive for killing Officer Estefan - i.e. the wish to avoid going back to jail. Jose Bonilla did not testify about the California shoot-out. He, too, testified about prior statements which explained the motive for killing Officer Estefan. During the course of that testimony, there was a brief reference to Douglas Escobar acknowledging that he had robbed a bank in California, and thus was not going to be captured by the police. **R**.5003-5. Sgt. Finale, of the California Highway Patrol, did not testify about the California shoot-out. His brief testimony for the State, **R**.5505-20, simply elicited the Escobars' mental states when he interviewed them, after their capture in California, and upon questioning by Detectives Barraza and Morin, from Miami. He did not give any details about the California shoot-out. Sgt. Bohan did not testify about the shoot-out. He simply stated that after he became aware of it, he was assigned to look for the Mazda. **R**.4590-98. Detective Morin went to California after the Escobars were captured, to get statements from them. He did not discuss what happened in the shoot-out.[5]

In the context of a prosecution presenting over 40 witnesses, with close to 1,700 pages of evidentiary presentations, the California shoot-out did not become a feature of the trial. See, e.g., Wilson v. State, 330 So. 2d 457 (Fla. 1976) (extremely extensive similar fact evidence that spanned

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[5] It should be noted that cautionary instructions regarding Williams rule testimony were repeatedly given. **R**.4271-2, 4890, 5567, 4997. In Oats, supra, the Court observed that the use of proper limiting instructions for Williams rule testimony is a proper corrective to protect against misuse of the evidence.

over 600 pages approached but did not reach over boundary where prejudice begins to outweigh probative value); Dean v. State, 277 So. 2d 13 (Fla. 1973) (no error where four other victims used to prove one rape charge); Stano v. State, 473 So. 2d 1282 (Fla. 1987) (evidence of eight prior murders used to prove aggravating factor in sentencing phase proceedings); Rogers v. State, 511 So. 2d 526 (Fla. 1987) (detailed evidence of two other robberies did not become feature of case); Burr v. State, 466 So. 2d 1051 (Fla. 1985)(evidence of three other incidents); Talley v. State, 160 Fla. 593, 36 So. 2d 201 (1948) (eight other victims used to prove one rape); Headrick v. State, 240 So. 2d 203 (Fla. 2d DCA 1970) (nine witnesses called to establish six collateral burglaries); Johnson v. State, 432 S. 2d 583 (Fla. 4th DCA 1983)(no feature merely from volume of testimony); Espey v. State, 407 So. 2d 300 (Fla. 4th DCA 1981)(score of sexual batteries committed on five other victims to prove one charged crime); Snowden v. State, 537 So. 2d 1383 (Fla. 3d DCA 1989) (detailed evidence of two prior sexual batteries used to prove charged offense); Oats v. State, 446 So. 2d 90, 94 (Fla. 1984) (evidence of a prior robbery/shooting not a feature, where evidence of prior incident elicited through five witnesses); Wuornos, 644 So. 2d at 1006.

Finally, the Appellant argues that the probative value of the collateral offense evidence was outweighed by its prejudice. As detailed above, the collateral offense evidence was highly relevant in this case. On the record detailed herein, it cannot be said that the prejudice outweighed the probative value. The evidence adduced was not repetitive or cumulative, the issues did not become confused, the jury was not misled, and the cautionary instructions limited the use of the evidence for its proper purpose.

IV. THE LOWER COURT DID NOT ERR IN ADMITTING PHOTOGRAPHS AND SKETCHES REGARDING THE DEFENDANT'S COLLATERAL CRIMES.

Trooper Kell's testimony regarding the California shoot-out is detailed at pp. 12-13, herein, and is addressed in the preceding issue herein. In a related argument, the Appellant claims that it was reversible error to admit six exhibits, consisting of five photographs, and one sketch, during Kell's testimony. In large part, this is another effort to argue that the California offense became the feature of the instant trial. The State relies on its argument on point III, supra, with respect to that aspect of the argument.

Two of the photographs, Exhibits 55 and 56, merely showing the vehicles and casings at the scene, were admitted without any objection, and counsel specifically stated that there was no objection. **R**.4900-1; 4901-2. Similarly, Exhibit 57, a sketch of the scene, specifically came in without objection. **R**.4916-17. All of these items were used to assist the witness' explanation of what transpired and were clearly relevant. Exhibits 58 and 59, both photographs of the weapon Douglas used, were objected to and admitted over objections. **R**.4947-50. One of those photos identified the weapon and the other focused on the area where the weapon had jammed, and served to explain why Douglas had not actually managed to shoot the officers. Exhibit 60 was a photograph of Trooper Koenig's injuries. Initially the judge had sustained an objection to this photograph, **R**.4938-9, but he permitted the State to introduce it, on redirect examination, after Dennis' counsel had suggested on cross-examination of Kell, that Dennis did not really do anything during this incident.

As to exhibits for which there were no objection, this issue is not preserved for appeal. Tillman, supra. Moreover, 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). There was nothing excessively gruesome about any of these photographs. Indeed, five of the six

exhibits were of purely physical surroundings or inanimate objects. As the evidence of the shoot-out was relevant to questions of flight and consciousness of guilt, the State had the right to reasonably present this incident and to foreclose efforts by the defense to minimize the participation of the defendants or to explain the incident away. All of the exhibits served that purpose.[6]

Dennis Escobar has adopted Douglas' claim on this issue. As to Dennis, not only should it be noted that the failure to object applies to Dennis, as well, but, as to the photo of Koenig's injuries, its use was necessitated by Dennis' efforts to imply that Dennis was not a participant in the California incident.

V. THE TRIAL COURT DID NOT ERR IN ADMITTING EVIDENCE THAT THE DEFENDANT WAS THE "BANDIT OF CAMINO REAL."

The principal thrust of Douglas Saballos' testimony was that Douglas Escobar, during a conversation, had indicated that he had done certain things in California, that he was not going to

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[6] The principal case relied upon by the Appellant is clearly distinguishable. In Bryan v. State, 533 So. 2d 744 (Fla.) 1988, evidence of a prior bank robbery was relevant as to the issue of ownership and possession of a murder weapon by the defendant, as to a murder committed three months later. The photo of the sawed off shot gun, used in the bank robbery, and being held by the defendant, was deemed excessive and prejudicial, since the defendant's ownership of the murder weapon was established in several different manners. By contrast, in the instant case, the photographs of the weapon did not place it in the defendant's hands; the defendant is not even in those photographs. Moreover, as the defendant's failure to shoot anyone was of relevance to the question of consciousness of guilt and flight, the photos of the weapon served to demonstrate the manner in which the weapon was jammed, thereby preventing the defendant from shooting, and providing visual corroboration of the Trooper's testimony that Douglas had continually attempted to shoot the weapon and to try to get it to work. In Elledge v. State, 613 So. 2d 434 (Fla. 1993), contrary to the Appellant's argument, this Court did not reverse a conviction. This Court simply reversed a death sentence, from a resentencing proceeding, because several gruesome photographs of the victim's corpse were introduced into evidence, at the sentencing phase proceedings, even though the photographs were not relevant to any aggravating factors which the State was attempting to prove at the sentencing proceeding.

be stopped by the police, and that he was not going to go to jail. The "certain things" that Douglas told Saballos about were described as follows:

> **Q.** You said he was wanted for some things. What things did he actually say?
>
> **A.** A chain of holdups. At that time he sort of bragged that he was known as the bandit of El Camino Real, and that was a scary thing, you know.

R.4820. This testimony came in without objection. Id. The Appellant claims that defense counsel, immediately prior to Saballos' testimony, preserved this claim, in the following colloquy:

> **MR. GALANTER:** Judge, Mr. Band [prosecutor] wouldn't intentionally bring this out in his direct examination I would hope. During Mr. Saballos' deposition, he constantly made reference to the fact that my client was a bad guy and a violent guy and made characterization type statements, and since my client's character is not in issue in this trial, I am moving at this time in limine to specifically exclude any reference of that nature through this witness.
>
> **MR. BAND:** So you know, I cautioned this witness previous to this, and I have gone over his testimony before. The only area where he will comment is on a comment Douglas Escobar made to him that he was wanted in California for robberies, but other than that - -
>
> **THE COURT:** I don't think that was what Mr. Galanter was alluding to.
>
> **MR. BAND:** I understand that. Other than that, we are staying away from the character.

R.4809 (emphasis added). This colloquy, to which Appellant is referring, is most emphatically not an objection to references to the California robberies. Defense counsel was referring to general character evidence that his client was a bad or violent person. When the testimony about the California robberies then came in, defense counsel did not object, or protest that his earlier objection had been misconstrued. This issue is therefore not preserved for appellate review. Correll v. State, 523 So. 2d 562 (Fla. 1988); Phillips v. State, 476 So. 2d 194 (Fla. 1985); Tillman, supra. As Dennis has adopted Douglas' argument on this point, it should be noted that the claim is likewise unpreserved as to Dennis.

Furthermore, as detailed in point III herein, this evidence was clearly admissible, as it demonstrated the motive for killing Officer Estefan - the desire to avoid going to jail for offenses for which the defendant was, or believed he was, wanted for in California. See, Jones, Pace, Jackson, Mackiewicz, Johnson, Craig, supra.

Ramon Arguello, a witness for the prosecution, was living with Douglas Escobar at the time of the murder of Officer Estefan. He testified that at about 11:00 p.m. that night, both Escobars came into the apartment: Douglas had a gun; Dennis had a head injury; and Douglas explained that Dennis was injured in a fight at a neighborhood restaurant. **R**. 5105-9. On cross-examination, attorney Carter, on behalf of Dennis Escobar, asked whether Douglas used to date a woman who worked at that restaurant. **R**.5121. Arguello said that he did, and Carter then asked whether someone brought the woman to Arguello's studio one night. Id. After an objection was sustained, Carter asked, apparently referring to that same instance, "Did Douglas Escobar ever put a pistol in your chest and threaten to kill you?" **R**.5122. An objection, which did not articulate any grounds, was overruled, and Arguello responded affirmatively. Id. At the conclusion of Arguello's testimony, Douglas' counsel objected to the answer elicited by Carter in reference to the gun, and moved for a mistrial, simply stating that "[i]t was totally improper, totally irrelevant to this case." **R**.5126. As counsel never articulated any objection based on the Williams rule, and in no way referred to evidence of collateral offenses, the objection and motion for mistrial were insufficient to preserve this claim for appellate review. See, Tillman, supra, 471 So. 2d at 35 "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.").

Alternatively, any error regarding attorney Carter's questioning of Arguello must be deemed harmless. The jury was fully and properly aware of other violent incidents in which Douglas had been included, including the California shoot-out. Limiting Williams rule instructions were repeatedly given to the jury. The brief allusion to this additional instance, in light of the evidence regarding the California shoot-out, and the ample evidence of guilt as to the murder herein, is therefore harmless.

VI. THE TRIAL COURT DID NOT ENGAGE IN ANY IMPROPER EX PARTE COMMUNICATIONS.

The Appellant claims that a portion of the transcript of a pretrial status conference, conducted on September 19, 1990, reflects the existence of a prior ex parte communication between the trial judge and prosecution. This Court, in an order dated January 11, 1993, appointed Circuit Judge Jeffrey E. Streitfeld as a master, to conduct a hearing regarding alleged "off-the-record or ex-parte communications surrounding the reversal of the trial judge's order of severance and granting of the State's Motion to Consolidate trials."

Prior to September, 1990, the trials of the two defendant's had been severed. At the status conference on September, 19, 1990, the following colloquy transpires:

> **THE COURT:**. . .You still haven't got me what I asked you to get me last week.
>
> **MR. MENDELSON [Assistant State Attorney]:** Judge, I'll have that to you today. I have prepared a motion for rejoinder or consolidation with defendant with a cover letter explaining as you indicated and I think Mr. Cohn and Mr. Carter are aware of that. We just need a hearing date on that motion.

R.1353. The Appellant asserts that the court's reference to "what I asked you to get me last week" implies the existence of a prior ex parte communication between the judge and prosecutor.

At the conclusion of the evidentiary hearing before the specially appointed master, the master entered an order finding that there were no ex parte communications:

2. No witnesses testified that there was any recollection of any form of communication concerning the alleged ex parte discussions.

3. No other evidence was presented to support the claim that such improper communication took place concerning the Motion for Rejoinder of the Defendants.

WHEREFORE, this Court does specifically find that there is no relevant evidence or factual basis to support the claim by the defense that there was any form of ex parte communication which preceded the transcript of September 19, 1990 or the rulings of September 27, 1990.

App. 83. The Master reiterated this in a subsequent order. App. 85-86.

On September 19, 1990, the State did file a Motion for Rejoinder or Consolidation of Defendants. R. 124-130. The request to re-consolidate the two defendants' trials was based on a change in the evidence code regarding declarations against interest and codefendants statements. Id.

The Master's findings are also supported by the evidence taken at the hearing regarding alleged ex parte communications. HT. 1-190. Assistant State Attorney Michael Band was unaware of any ex parte communications. HT. 39, 28-29. He speculated that at the conclusion of an in-court hearing, all of the attorneys may have accompanied the judge into chambers, without a court reporter, to discuss scheduling matters, and that, during the course of such an informal proceeding, the prosecution may have mentioned its intention to file a motion to re-consolidate the cases. HT. 28-29, 41-42. Assistant State Attorney Paul Mendelson similarly had no recollection of any ex parte communication. HT. 52-54. With respect to the trial judge's question on September 19th, Mr. Mendelson could not recall what the judge was asking him for. HT. 53, 73. A third prosecutor, Abe Laeser, affirmatively stated that he had no ex parte communications with the judge. HT. 81-82.

Judge Shapiro, when asked about his inquiry of September 19th, had no direct recollection, but then recalled that there had been prior situations where all of the attorneys would join him in

chambers, after conclusion of an in-court hearing, to discuss scheduling problems, attorneys' travel plans, etc. HT. 89-90. He believed that on one of those occasions, with all counsel present, one of the prosecutors made a reference to rejoinder, and the judge told him to "get me a copy of that." HT. 90. Judge Shapiro denied engaging in any ex parte communications. HT. 90-99.

Defense counsel Carter did not know what Judge Shapiro was referring to at the September 19th hearing. HT. 103-4. He did not recall the informal meetings that Judge Shapiro referred to, but did not deny their existence. HT. 107-8. Defense counsel Cohn similarly did not know what Judge Shapiro was referring to on September 19th. HT. 113. He did, however, recall scheduling discussions in chambers, "after court," in which the judge "generally" brought a court reporter in. HT. 120-21. Defense counsel Galanter also denied knowing what Judge Shapiro was referring to on September 19th. HT. 125. Mr. Galanter did, however, recall previous conversations with prosecutors regarding the rejoinder issue. HT. 126. He did not recall if these discussions were in the presence of the judge, prior to September 19th. HT. 129. He also acknowledged that there were some impromptu proceedings regarding travel and expenses, at which a reporter might not always have been present. HT. 134.

At the conclusion of the hearing, the Master set forth verbal findings:

> I am persuaded by the greater weight of evidence that there was a pattern of conduct that was not inappropriate; that was appropriate because it was not ex parte where counsel for both sides would, on a regular basis, meet briefly with the Court to determine if there was any change in the status of the case with regard to whether or not the Third District had ruled with regard to the admissibility of similar facts, the evidence commonly called the Williams' Rule evidence, actually, similar fact evidence, and that defense counsel generally was aware of the fact, through conversation with the prosecutor, that the state was going to be seeking a re-visitation by the trial court on the issue of joinder.
>
> As a result of change in the Florida Statute 90.804, I am persuaded by the greater weight of evidence that more likely than not that's what was referred to by the Judge in his comment by the Judge in that hearing, and that the comment did not refer to

an improper ex parte communication between the State Attorney's Office on one hand and the trial judge on the other hand.

HT. 139-40.

The evidence and record clearly support the conclusion that there was no ex parte communication. The Appellant argues that the Master's findings are improper because no one had independent recollection. This argument is clearly meritless, as the judge and prosecutors emphatically denied the existence of any ex parte communication. Thus, the concerns implicated in Rose v. State, 601 So. 2d 1181 (Fla. 1992), are not at issue herein, as there were no ex parte communications. As further corroboration for this point, it is highly significant that all defense attorneys, who were present at the September 19th hearing, did not so much as inquire into what Judge Shapiro was referring to at that time. Had there been any belief that the comment referred to an ex parte communication, trial counsel would reasonably have been expected to say something about it at that time.

The Appellant argues, in the alternative, that if there was no ex parte communication, something transpired for which no transcript exists, and the absence of a transcript denies him effective assistance of counsel, and results in a violation of due process of law. Contrary to Appellant's argument, neither due process of law, nor effective assistance of appellate counsel require a transcript of every portion of the trial court proceedings. In Bransford v. Brown, 806 F. 2d 83 (6th Cir. 1986), transcripts of jury instructions had been unavailable for a state court direct appeal. In federal habeas corpus proceedings, the federal appellate court rejected arguments that effective assistance of appellate counsel and due process had been denied. The federal court found that lower federal courts, interpreting pertinent Supreme Court cases, "have held that the Fourteenth Amendment does not require a word-by-word transcript where the production of such is impossible

and the failure to produce the transcript is not insidiously motivated." 806 F.2d at 83. The Court emphasized that trial and appellate counsel were able to communicate, and with the absence of a partial transcript, the defendant "must show prejudice resulting from the missing transcripts." 806 F.2d at 84. Such prejudice must be based on "something more than gross speculation." Id. See also, Mitchell v. Wyrick, 698 F.2d 940, 941 (8th Cir. 1983) ("Mere absence of a perfect transcript does not necessarily deny one due process of law"); United States ex rel. Cadogan v. LaValee, 428 F.2d 165 (2d Cir. 1970); Ortiz-Salas v. I.N.S., 992 F.2d 105, 108 (7th Cir. 1993). This Court has reached the same conclusion in Ferguson v. Singletary, 632 So. 2d 58 (Fla. 1994).

In the instant case, the only thing that might be missing is a reference, after a casual discussion, in chambers, about scheduling and transportation, to an intent to file an impending motion to re-consolidate. At any such proceeding, the record supports the conclusion that all attorneys would have been present. No attorney has been able to point to any prejudicial occurrence. Accordingly, the absence of any such transcript cannot constitute a denial of due process or ineffective assistance of counsel. This is all the more true since the issue of consolidation was fully and fairly litigated at a subsequent proceeding. **R.** 1359-71

VII. THE LOWER COURT DID NOT ERR IN GRANTING THE STATE'S MOTION FOR REJOINDER.

The Appellant argues that it was improper to consolidate the trials of the two codefendants because of ensuing problems emanating from Bruton v. United States, 391 U.S. 124, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). As there were no Bruton problems, there are no severance problems.

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.**124-30. A hearing on this motion was held on September 27, 1990. **R.**1359-71

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. 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).When the reliability of the evidence hinges on particularized guarantees of trustworthiness, rather than a firmly rooted hearsay exception, the evidence "must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." Wright, 497 U.S. at 822. 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),..." 481 U.S. 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 '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 recognized 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. In rejecting 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 as evidence against appellant.

525 So. 2d at 838. 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.

The Appellant's Brief misconstrues Grossman. The Appellant refers to Grossman as a harmless error case. Brief of Appellant, pp. 54, 56. In Grossman, the trial court did not permit the codefendants' statements to be used against one another. Rather, the trial court permitted the introduction of Taylor's statement against Taylor, with the use of a limiting jury instruction that the statement not be construed against the appellant Grossman. It was the use of the instruction which was deemed to be an error, albeit a harmless error. The substantive use of Taylor's statement against Grossman was not an error, since the trial court had precluded that. Nevertheless, as noted above, this Court concluded that Taylor's statement was sufficiently reliable, and therefore should have been substantively admitted against Grossman without any limiting instruction. 525 So. 2d at 828. Likewise, 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. Douglas was driving, when they noticed that a police car was following them. Douglas made a series of turns, in an effort to lose the police, before stopping the car. When the police appeared again, Douglas told Dennis to shoot the officer if he got out. Dennis exited the car and fired three or four shots at Officer Estefan. Subsequently, they disposed of the weapon in a body of water. Douglas was not familiar with the precise location, but Dennis was able to identify it. The car was subsequently abandoned in an apartment building parking lot. Both brothers stated that the motive was to avoid going back to prison.

The Appellant does not point to any significant discrepancies which would undermine the indicia of reliability. The Appellant refers to a portion of Douglas' statement, adduced at the pretrial suppression hearing, but not at trial, in which Douglas stated, that "he was not a cop killer." 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. The Appellant also argues that Detective Morin gives inconsistent statements regarding when Douglas told Dennis to shoot. At the pretrial suppression hearing, Morin attributes this statement to Douglas after the officer exited the car. **R**.934. At trial, Morin says that Douglas claimed to have told Dennis to shoot the officer if he gets out. **R**.5210. Dennis also told Morin that Douglas told him 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 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 Dennis was properly admitted for substantive use against Douglas.

Not only is there no violation of the Sixth Amendment confrontation clause, but Dennis' confession was properly admitted as a statement against interest, under Section 90.804(2)(c), Florida Statutes 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, Dennis' statement was properly admissible, as a statement against interest, against Douglas. 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.[7] Finally, the State submits that even if there was any error, same was harmless beyond a reasonable doubt, in light of (a) Douglas' own confession to the police; (b) his prior statements to two of his own friends (one of which was made in the presence of Dennis) that he was wanted in California and would shoot if stopped by the police; (c) the brothers' joint admission to Saballos that they had committed the instant murder; (d) Douglas's subsequent conduct in the California shoot-out which demonstrated his consciousness of guilt and major participation; and, (e) Douglas' fingerprints in the gray Mazda, which was described by the victim, and was recovered and shown, through testimony of other witnesses, to have been stolen by both brothers; said vehicle also exhibiting physicial damage from colliding with the victim's car, in accordance with the victim's description of the crime.

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[7] It should be noted that Dennis has adopted Douglas' argument on this point, even though it has no applicability as to Dennis.

VIII. THE LOWER COURT DID NOT COMMIT REVERSIBLE ERROR BY LIMITING CROSS-EXAMINATION OF AN EXPERT DURING A COMPETENCY HEARING.

During the pretrial competency hearing, two experts testified that the defendant was competent and two reached a contrary conclusion. **R**.544,578,603,636. On cross-examination of Dr. Miller, who found the defendant competent, defense counsel asked, "When is the last time you ever found anyone incompetent in a court of law?" **R**. 592. An objection to the question was sustained. **R**.592. Defense counsel did not proffer what the anticipated response would be. Nor did counsel ask for permission to make a proffer.

Insofar as defense counsel never proffered the anticipated response or sought permission for a proffer, this issue is not preserved for appellate review. See, e.g., Sims v. State, 444 So. 2d 922, 924 (Fla. 1983) (limitation on cross-examination not reversible where defense did not make proffer or ask for opportunity to make proffer to show relevance); Silveira-Hernandez v. State, 495 So. 2d 914 (Fla. 3d DCA 1986)(same); Strapp v. State, 588 So. 2d 27 (Fla. 3d DCA 1991) same. In the absence of a proffer, there is no basis for knowing whether any matter of potential relevance would be elicited. As the witness had been appointed as a disinterested expert about five months prior to the hearing, SR. 13, defense counsel certainly had ample opportunity to obtain information about the doctor's background and present it to the court in the form of a proffer.

Moreover, the limitation of cross-examination does not constitute reversible error. First, the witness was appointed as a disinterested expert. As such, he represented no particular party. Furthermore, defense counsel had the opportunity for extensive cross-examination regarding Dr. Miller's conclusions. **R**.579-92. Indeed, defense counsel had previously stipulated to the witness' qualifications and did not seek to engage in preliminary voir dire. **R**.567. Additionally, questions about competency determinations of other defendants, in other cases, are of dubious relevancy, as

the facts and circumstances of each particular defendant are unique. There is no reason to turn a competency proceeding into a trial of other competency cases.

Limitations on cross-examination rest within the trial court's discretion. Pandula v. Fonseca, 145 Fla. 395, 199 So. 358 (1941). In the foregoing circumstances, with a disinterested, court-appointed expert, who is not being paid by either litigant, the limitation herein was not an abuse of discretion, especially given the full opportunity to cross-examine in reference to the doctor's conclusions in this evaluation. See also, Lipsius v. Bristol-Myers Co., 265 So. 2d 396 (Fla. 1st DCA 1972) (no error in limiting cross-examination as to expert witness' fees); H. I. Holding Co. v. Dade County, 129 So. 2d 693 (Fla. 3d DCA 1961) (amount of cross-examination of witness to show bias rests in court's discretion); Alvarez v. Mauney, 175 So. 2d 57 (Fla. 2d DCA 1965) (no abuse of discretion in limiting cross-examination of plaintiff's chief medical witness as to his financial and professional association with plaintiffs' attorneys in past and present cases).

Lastly, any error must be deemed harmless. Not only was extensive cross-examination permitted, but two witnesses deemed the defendant competent and a third witness, Dr. Marina, significantly qualified her opinion of incompetency, stating that the defendant did recognize and appreciate the charges against him, and finding that he was able to stand the stress of being in the courtroom. **R.**616, 617, 621.

IX. THE TRIAL COURT DID NOT ERR IN REFUSING TO CONDUCT A NEIL INQUIRY.

The Appellant, Douglas Escobar, contends that the trial court erred in not conducting a Neil inquiry. This issue is not preserved, as counsel for Douglas Escobar did not, at any time, request any Neil inquiry. Counsel for Douglas did not otherwise complain of any of the State's exercises of peremptories, raised herein, either.

Initially, the Appellant has stated that he requested to join in all objections and motions by the codefendant's counsel. The Appellant has added that he also assisted in making arguments for the codefendant during jury selection. The record, however, reflects that although during voir dire, prior to any challenges, requests for inquiry, etc., Appellant requested that the codefendant's objections and motions be deemed adopted by him, the trial court denied this request. **R**.2186-7. The court explicitly required that Appellant specifically join any objections or motions he wished to adopt:

> **THE COURT:** . . . If you have an objection, after Mr. Carter makes an objection . . . , if I sustain it, and you want, or if I overrule the objection and you want to join in that, just stand up and say Your Honor, I join in the objection. Then that is sufficient. Okay, so we don't have to go through a whole thing. If you have to add a new ground to it that is fine. But let's just try to keep it on the legal basis for the argument. I think for appellate purposes you are better off if you do say it.

Id. Counsel for Appellant expressed his understanding of the Court's requirement for a specific objection, separately made by each party, by then immediately specifically joining on certain prior motions and objections made by the codefendant's counsel. **R**.2187-88. Thereafter, again during voir dire and immediately prior to the exercise of challenges and request for a Neil inquiry by the codefendant, this Appellant asked and was told by the court that he needed to specifically join in the codefendant's challenges in order to adopt same. **R**.3681. The record then reflects that Appellant did not join in the requests for a Neil inquiry by the codefendant. **R**.3950, 4124-5, 4135-6, 4144, 4150, 4153-4. The record also reflects that Appellant, contrary to the representations herein, did not assist in any Neil inquiry arguments made by the codefendant; instead, Appellant only assisted codefendant in giving race neutral explanations for the codefendant's own peremptories, pursuant to a Neil inquiry initiated by the State! **R**.4030-1, 4040-1, 4049-50. Indeed, the record reflects that

Appellant joined the State and attempted to challenge for cause two of the very jurors complained of herein, Messrs. Westmore and Bacon. **R.**3789-90, 3926-7; See Brief of Appellant, p. 60.

Far from requesting or assisting in any Neil inquiry of the State, the record reflects that Appellant affirmatively requested that no Neil inquiry be made of the State until after the completion of jury selection. **R.**4017. Appellant explained that what was actually transpiring in the courtroom, before, during and after the Neil inquiry requests by the codefendant, was that the State was not making racially motivated challenges, but rather attempting to seat jurors who were likely to impose a death sentence:

> **MR. GALANTER:** This is a classic example of a cold hard record . . . not recognizing what is really transpiring in the court room . . . I want to make a statement about that. . .
>
> • • •
>
> We have all, the judges, the clerks, Mr. Laeser, Mr. Band, Mr. Mendelson [prosecutors], . . . trying cases for years. I don't think anybody who knows Mr. Laeser, Mr. Band, Mr. Mendelson, any member of the prosecutors, who has ever tried a case with them could point a finger at any of these prosecutors, they systematically exclude because of race. Just not those type of people. . . .
>
> The issue that is transpiring, that table [prosecution] is trying to get members of this community who are likely to impose a death sentence. That's what is transpiring, that's what they want. . .
>
> . . . I would suggest that you not make the decision on systematic exclusion by any of the sides or any of the lawyers until after you have witnessed the entire process.

R.4014-17.

Finally, when the panel of the 12 jurors was tendered and sworn, Appellant again did not make any request for an inquiry, nor did he object to the peremptories exercised by the State. **R.**4138-40. The State would note that six of twelve jurors in this panel, 50%, who actually served as jurors, were black. **R.**4156. The trial judge had previously noted that the jury pool which had undergone the extensive three week voir dire herein, had consisted of 99 people: 42 Caucasians, 30

Latins, 26 Blacks and one Oriental. **R.** 3955-6. Dade County, at the time, was "roughly 17% black." Id. Likewise, when the three alternate jurors none of whom ultimately served on the jury, and one of whom was black, **R.**4156, were tendered and sworn, again Appellant did not request any inquiry, nor did he object to any peremptories exercised by the State. **R.**4141-56. In sum, the Appellant in no way objected to the tendered jurors, prior to them being sworn in, or prior to the release of the remainder of the pool. The State thus respectfully submits that the Appellant has waived any argument with respect to the conduct of any Neil inquiry and as to the propriety of the State's peremptory challenges. See, Joiner v. State, 618 So.2d 174, 176 (Fla. 1993), wherein this Court held that Neil issues are waived when a party does not renew or reserve earlier objections immediately prior to the jurors being sworn:

> We do not agree with Joiner, however, that he preserved the Neil issue for review. He affirmatively accepted the jury immediately prior to its being sworn without reservation of his earlier-made objection. We agree with the district court that counsel's action in accepting the jury led to a reasonable assumption that he had abandoned, for whatever reason, his earlier objection. It is reasonable to conclude that events occurring subsequent to his objection caused him to be satisfied with the jury about to be sworn. We therefore approve the district court to the extent that the court held that Joiner waived his Neil objection when he accepted the jury. Had Joiner renewed his objection or accepted the jury subject to his earlier Neil objection, we would rule otherwise. Such action would have apprised the trial judge that Joiner still believed reversible error had occurred. At that point the trial judge could have exercised discretion to either recall the challenged juror for service on the panel, strike the entire panel and begin anew, or stand by the earlier ruling.

In the instant case, Appellant never questioned the propriety of the State's challenges and never requested a Neil inquiry, let alone renew any objections immediately prior to the jurors being sworn, as required in Joiner, supra. The Neil issue has thus not been preserved.

The State would note that codefendant, Dennis Escobar, has adopted this issue on appeal. The State again submits that the codefendant has also waived this Neil issue, pursuant to Joiner,

supra. Dennis Escobar, like the Appellant herein, did not renew his prior Neil objections immediately prior to the jurors being sworn.[8]

In any event, the State would note that the trial court properly denied Dennis' requests for a Neil inquiry, as the latter did not establish any "strong likelihood" of racial discrimination during jury selection. The instant trial was conducted prior to State v. Johans, 613 So.2d 1319 (Fla. 1993). Thus, Johans is inapplicable and, "[A]t the time of this trial [subsequent to 1991, but prior to 1993], Florida law required the party objecting to a peremptory challenge to make a prima facie showing of a 'strong likelihood' of racial discrimination before there was a necessity of inquiring into the challenging party's motivation." Taylor v. State, 638 So. 2d 30, 32-3 (Fla. 1994).

In the instant case, the trial judge unequivocally stated that the state's peremptory challenges were not racially motivated: "the inquiry [Neil inquiry request] made by Mr. Carter with regard to the challenges exercised by the State doesn't sway me. I don't think for a moment that the challenges that were exercised by Mr. Laeser [prosecutor] were racially oriented for a moment." **R**.3998. The trial court's assessment, shared, as noted above, by even Douglas' counsel, **R**.4014-17, is well supported by the record.

The record herein reflects an extensive voir dire of 99 jurors, which commenced on November 28, 1990 and was completed on December 20, 1990. **R**.1373-4163. The prospective jurors, in two groups, were first individually voir dired, by both the court and all counsel, on pretrial publicity, sequestration, death penalty issues, involvement of a police officer victim, language difficulties, etc. **R**.1376-7, 2188, 2995. The jurors were then questioned, again in two groups, first

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[8] The only objection renewed by Dennis Escobar immediately prior to the jury being sworn was that his own racially motivated peremptory challenges had not been allowed. **R**.4138-9. The issue of Dennis' racially motivated challenges has been separately raised in the latter's own brief, and addressed in the State's brief in response thereto.

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. The trial judge herein, at the time of the exercise of the peremptories had taken extensive notes as to each venireman, "50 or 60 pages of notes," pursuant to said extensive inquiries. **R.**4021. The details of jurors' demeanor and even manner of answering questions, were noted by the trial judge, who rejected the State's request for a Neil inquiry, based upon the challenged jurors' demeanor towards defense counsel. **R.**3945-6. As noted previously, the collective panels consisted of 42 Caucasians, 30 Latins, 26 Blacks, and one Oriental. Although the population of Dade County at the time was 17% black, 50% of the jurors sworn (6 out of 12) were black. At the time that this main panel of 12 jurors was finally sworn, the State had exercised only 10 of its 20 total peremptory challenges. **R.**4135-39.

In view of the above circumstances, the State would first note that three of the black jurors,[9] whom the Appellant contends were challenged due to racial reasons, were alternate prospective jurors who were challenged by the State after the main panel, consisting of six black jurors, had been sworn. **R.**4140, 4144, 4150, 4153. The alternates did not participate and were excused prior to the deliberations herein. **R.**6033-5, 6055, 6421.The State initially submits that since these three challenged jurors were alternates who would not have served in any event, the State's use of peremptories with respect to these alternates would not encroach on appellant's constitutional guarantees. See, Rector v. State, 605 So.2d 559 (Fla. 4th DCA 1992):

> Appellant raises a Neil/Slappy issue as to the peremptory challenge of one African American juror. . . . The full panel of twelve jurors was selected and sworn by the trial judge. The [African American] juror challenged by the state was being questioned as a prospective alternate juror. Two alternates were sworn in, but both were excused prior to the jury deliberations.

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[9] Jurors Rogers, Scott, and Campus.

> We think that under these circumstances no error is demonstrated affecting appellant's right to a fair trial before an impartial jury. Article I, Section 16, Florida Constitution. As the challenged juror would not have served in any event, the state's use of the peremptory challenge did not encroach on appellant's constitutional guarantee.

See also, Roberts v. Singletary, 794 F. Supp. 1106 (S.D. Fla. 1992).

Moreover, in light of a) the trial judge's above noted prior finding that the state's exercise of peremptory challenges during the selection of the main panel had not been racially motivated; b) the fact that six of the previously sworn jurors were black; c) that, at said time, the state still had 10 peremptory challenges remaining, which it had declined to exercise; and d) the defense merely stated that said alternates were black and requested an inquiry with no further elaboration, the Appellee respectfully submits that the trial judge did not abuse his discretion in refusing to find a substantial likelihood that said alternates were challenged because of their race, and declining to conduct a Neil inquiry. See, 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. Given the circumstances that both the defendant and the victim were white and that two black jurors were already seated, we cannot say that the trial judge abused his discretion in concluding that the defense had failed to make a prima facie showing that there was a strong likelihood that the jurors were challenged because of their race."); Taylor v. State, 583 So.2d 323, 327 (Fla. 1991) ("the mere fact that the state challenged one of four black venire members does not show a substantial likelihood that the state was exercising peremptory challenges discriminatorily, particularly since the effect of the challenge was to place another black on the jury. See Woods v. State, 490 So.2d 24, 26 (Fla. 1986) (three peremptories exercised by state against blacks did not rise to level needed to require

trial court to inquire into state's witness for challenges), cert. denied, 479 U.S. 954, 107 S.Ct. 446, 93 L.Ed.2d 394 (1986)."); United States v. Allison, 908 F. 2d 1532, 1537 (11th Cir.), cert. denied, 114 L.Ed.2d 77 (1991) (unchallenged presence of African Americans on jury undercuts inference of impermissible discrimination that might arise solely from striking of other black prospective jurors); United States v. Dennis , 804 F.2d 1208, 1210-11 (11th Cir. 1986) (defendant was not entitled to any inquiry into prosecutor's reasons for exercising peremptory challenges, where the government used three of four peremptory challenges to strike blacks, but eventually accepted two black jurors, with three peremptory challenges left, which were never exercised. The court noted, "It is thus obvious" that the prosecutor was not racially motivated.)

Likewise, no abuse of discretion, as to the trial judge's failure to find a strong likelihood of racially motivated challenges during the selection of the main panel, has been demonstrated either. As noted by the Appellant, the State exercised its first peremptory against a white juror, whom it had previously challenged for cause. **R**.3921. The second peremptory by the state was against Mr. Bacon, a black juror complained of herein. The record reflects that the state first renewed its previous challenge for cause against this juror, based upon the latter's ability to "comprehend, follow the testimony, to interact with his fellow jurors." **R**.3926. The state's reasons were abundantly substantiated by the record **R**.3758-62, and were not questioned by counsel for Dennis. **R**.3927, 3761. Indeed, counsel for Douglas had joined in this cause challenge! **R**.3927. After the court's denial of the challenge for cause, the state excused Bacon peremptorily. Id. The state's third challenge was to another black juror complained of herein, Mr. Westmore. **R**.3931-4. Again, the record reflects that the state first renewed a previous challenge for cause, **R**. 3789-91, as to this juror, on the basis of the latter's statements that he was "bitter" about police officers and had "direct animosity toward law enforcement," both as a result of his own dealing with the police and

observation of police conduct towards third parties. **R.** 3931-4. These reasons were amply supported by the record. **R.**2413-6. Again, counsel for Dennis did not question the State's reasons, **R.**3935, and indeed, counsel for Douglas had previously joined the State's challenge for cause. **R.**3789-91. Upon denial of the challenge for cause by the court, the state then exercised a peremptory challenge to Mr. Westmore. **R.**3935. The state exercised its fourth peremptory challenge against a white juror, Ms. Karch, again after its renewed challenge for cause had been denied by the court. **R.** 3935-38. The state's fifth peremptory was exercised against Ms. Fitzpatrick, another black juror complained of herein.[10] **R.**3950.

At this juncture counsel for Dennis stated that the prosecutor had exercised three out of five of its challenges against blacks and that he was thus, "looking for race neutral explanation for the excusal of the three who I have named, Bacon, Westmore and now Fitzpatrick." Id. Counsel added that in his opinion the State had spent more time with these jurors in order to find "some reason to excuse them." **R.**3951. The prosecutor commented that the record did not support defense counsel's accusation that he had spent more time with said jurors. Id. Defense counsel did not elaborate on his accusation, either in the court below or herein. Id. The record also reflects that at this point, five black jurors had been accepted by the state. **R.**3951-2. The state's challenge of Ms. Fitzpatrick also brought Mr. Davis, yet another black juror onto the panel. Id. The trial court rejected Dennis' request for a Neil inquiry, on the ground that the state's challenges were not racially motivated:

> I was observing what was going on and I did not perceive anyone making an undue inquiry to anyone for any other reasons than were obvious, that is answers to questions given.

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[10] The record reflects that another juror, during individual voir dire, had described Firzpatrick as someone who had mentioned a newspaper article on the trial, to other jurors despite the court's earliler admonishment not to read articles, after she had already denied reading said article. **R.**3795-6,3768-9.

. . .

> At this point I do not perceive that the state's challenges are other than oriented towards people that they feel are improper jurors and they have no relationship to race. I am going to deny Mr. Carter's request with due respect to go and make an inquiry and I don't feel that these are race directed or minority directed challenges.

R.3952.

In spite of the above, counsel for Dennis then immediately announced that he would continue to make Neil objections, "regardless" of what the prosecutor would do. **R**. 3952-3. Counsel for Dennis also announced that only the black jurors who were seated were satisfactory to him. **R**.3987. Perhaps in light of said comments, the trial court, as previously noted herein, again subsequently reiterated its belief that the state's challenges were not racially motivated, and that Dennis' arguments to the contrary did not "sway" the court. **R**.3998.

Thereafter, the State peremptorily challenged two white jurors, **R**.4119-20,4133, and accepted two additional black jurors, Paul and Berry, **R**.4100,4118-19,4063, prior to challenging the remaining two black jurors complained of herein, Roberson, **R**.4123, and Ms. Jeanty. **R**.4135. True to his prior word, counsel for Dennis, without any elaboration, and based solely on the number of blacks excused by the state, asked for "explanation" from the State. **R**.4123,4135. The record, after the State's last challenge, of Jeanty, reflected that six black jurors remained on the 12-member panel, at the time, and that said jurors were sworn in. **R**.4140,4156. As to Mr. Roberson, the trial court thus found that no explanation from the State was required. **R**.4123. With respect to Ms. Jeanty, the court stated that it perceived no racially discriminatory pattern, and "will refuse to make an inquiry at this time." **R**.4135.

As seen above, with respect to Dennis Escobar's challenge of the State's peremptories of black jurors, in the main panel, the record reflects that the trial judge expressly declined to find the

state's challenges to be racially motivated, because: 1) the State gave race neutral reasons, in the course of challenging the first two jurors for cause, which reasons were never questioned by the defense; 2) that Appellant then requested an inquiry of the first three jurors, based upon a reason which the court explicitly found was not supported by the record; 3) that Appellant then expressed his bad faith by stating that he would continue to make Neil objections, "regardless" of what the prosecutor would do; 4) at all times when this Appellant requested an "inquiry," at least 4 to 6 black jurors had been accepted by the State and were in fact seated at said times, 5) and neither the defendants nor the victim herein were black. The trial judge thus did not abuse his discretion in declining to find a "strong likelihood" of racial motivation by the State and refusing to conduct a Neil inquiry. Taylor v. State, 638 So. 2d at 32-3 (no abuse of discretion in failing to conduct a Neil inquiry where three black jurors had been selected, race neutral reason was already on the record and the Court had found "defense's representation that the prosecution was excluding blacks to be unconvincing."); Reed, supra, at 206 ("Given the circumstances that both the defendant and the victim were white and that two black jurors were already seated, we cannot say that the trial judge abused his discretion in concluding that the defendant had failed to make a prima facie showing that there was a strong likelihood that the jurors were challenged because of their race"); Woods, supra, at 26 (three peremptories exercised by state against blacks did not rise to level needed to require trial court to inquire into state's witnesses for challenges); see also, United States v. Allison, supra, at 1537 and United states v. Dennis, supra, at 1210-11 (unchallenged presence of blacks on jury undercuts inference of discrimination which might arise solely from striking of other black prospective jurors).

Finally, the Appellant has also adopted this issue with respect to Oriental juror, Yamamoto. Upon the State's exercise of a peremptory on the latter, counsel for Dennis merely stated he wanted

a race neutral reason. **R.**4124. The Court did not require one, finding no prima facie showing had been made by the defense. **R.**4125. The trial court was correct as the defense made no attempt to demonstrate that this group was "large enough that the general community recognizes it as an identifiable group in the community". State v. Alen, 616 So. 2d 452, 454 (Fla. 1993). Moreover, the state would again note that this juror, too, had been previously challenged for cause by the state, based upon her views on the death penalty. **R.**2106-7. This juror had stated that she did not believe in the death penalty, and that even if she did not have a "reasonable doubt" of guilt, "any doubt" would prevent her from voting for the death penalty. **R.**2096-2100. The defense attempts at rehabilitating this juror had also failed. **R.**2102. As the race neutral reason for excusal was already on the record, the trial court did not err in declining to conduct a Neil inquiry. Taylor, supra. In sum, the instant claims are unpreserved and without merit.

X. THE DEFENDANT'S USE OF CHALLENGES WAS NOT RESTRICTED.

The Appellant contends that his use of peremptory challenges was unduly restricted when the court, without notice, altered the jury selection method, and forced him to accept a juror, Ms. Berry, whom he had previously excused. The record reflects that on December 10, 1990, after all parties tendered a panel of 12 jurors, the trial court, instead of swearing said jurors, informed the parties that they would continue to select six alternate jurors. **R.**4056-8. The court allowed one peremptory challenge, per alternate juror, to each of the defendants. **R.**4059. The parties then began challenging alternates, beginning with Ms. Berry, who was challenged by Appellant. **R.**4063. The next day, individual voir dire of one of the jurors on the main panel, Ms. Holley, established that the latter had misrepresented her involvement in a notorious police shooting case involving the instant prosecutor and some of the witnesses herein. **R.**4079-95. Holley was thus excused for cause. **R.**4096. The trial judge then announced that it would proceed as if the selection of alternates on the

preceding day had not taken place, and that the parties would again have to first select a 12th juror for the panel. **R**.4097-4100. All of the potential veniremen available as alternates on the preceding day, including Ms. Berry, were reinstated. Id. The one peremptory, per alternate juror, for each defendant was also restored. Id.

Initially, the state would note that neither of the defendants ever objected to the above procedure. This claim has thus not been preserved. More importantly, the Appellant has neglected to mention that he in fact did subsequently exercise a peremptory on the juror complained of herein, Ms. Berry, and she did not serve on the jury! **R**.4117. In addition, when the main panel herein was sworn, Appellant still had one peremptory challenge left, which was never exercised. **R**.4137-9. In effect, the Appellant's complaint is that instead of excusing Ms. Berry on December 10, 1990, the latter was excused less than 24 hours later. Appellant has thus failed to establish any claim of restriction of peremptory challenges. Trotter v. State, 576 So. 2d 691, 693 (Fla. 1990) ("under Florida law, '[t]o show reversible error, a defendant must show that all peremptories had been exhausted and that an objectionable juror had to be accepted.'").

Appellant's reliance upon United States v. Turner, 558 F.2d 538 (9th Cir. 1977), United States v. Sams, 470 F.2d 751 (5th Cir. 1972) and United States v. Ricks, 776 F.2d 461 (4th Cir. 1985) is unwarranted as these cases all involved preventing the defendant from exercising peremptories, through either prohibiting backstrikes or otherwise holding that peremptories had been waived. Moreover, the per se reversible rule announced in said federal cases is contrary to the later decision of the United States Supreme Court in Ross v. Oklahoma, 487 U.S. 81 (1988).

XI. THERE WAS SUFFICIENT EVIDENCE OF PREMEDITATION

The evidence in this case reflects that three shots were fired at Officer Estefan, resulting in multiple wounds. Douglas Escobar had stated, 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 he committed in California. The evidence also reflected that immediately prior to being stopped by the victim, Douglas Escobar told his brother to shoot Estefan. Dennis, in his confession, admitted that he was aware that Douglas was wanted in California, and that that was a motive for the shooting. 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.

Having told Dennis to shoot Officer Estefan, for the purpose of avoiding prosecution and prison for other offenses, Douglas is clearly a principal in the crime and is responsible for that which his brother did, in shooting the officer. Jacobs v. State, 396 So. 2d 713 (Fla. 1981).

The prior threat to kill an officer is indicative of the intent to kill and premeditation. See. e.g., Jones v. State, 440 So. 2d 570, 577 (Fla. 1987); Prince v. State, 277 So. 2d 648 (Fla. 1st DCA 1974). See also, Jackson v. State, 498 So. 2d 406, 410 (Fla. 1987) (evidence of premeditation sufficient where defendant shot officer six times and admitted that she shot an officer because she was not going back to jail); Fitzpatrick v. State, 437 So. 2d 1072 (Fla. 1983) (defendant's threat to kill hostages sufficient to establish premeditation); Provenzano v. State, 497 So. 2d 1177 (Fla. 1986) (threat to kill plus fatal shot established premeditation).

As noted above, as a co-principal, Douglas is fully responsible for all of Dennis' acts as well. Thus, the intentional firing of multiple shots, and the infliction of multiple wounds, although done by Dennis, are equally attributable to Douglas, and further establish premeditation. See, Sireci v. State, 399 So. 2d 964, 967 (Fla. 1981) (premeditation may be inferred from nature of weapon, manner in which homicide committed, nature and manner of wounds inflicted); Grossman v. State, 525 So. 2d 833 (Fla. 1988) (officer shot in back of head, during struggle in which defendant sought to avoid prison for probation violation); 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 seeks to minimize his direction to his brother to shoot Estefan, by referring to a discrepancy between the trial and suppression hearing testimony of Detective Morin, regarding the precise moment when Douglas gave the directive. First, as the suppression hearing testimony was not adduced at trial, as to this alleged conflict, it has no bearing on the question of the sufficiency of evidence at trial. Second, even if it is considered, Douglas' liability and premeditation remain the same, whether he told Dennis to shoot if the officer gets out, or whether he told Dennis to shoot after Estefan had exited the police vehicle. Moreover, as previously noted, Dennis was present, weeks before, when Douglas told Saballos that he intended to kill any officers who stopped him, and Dennis admitted that this was the motive for the crime.

The Appellant also asserts that there is a reasonable hypothesis of innocence regarding premeditation - i.e., a spontaneous killing theory. Several problems exist with that theory, however. First, the reasonable hypothesis of innocence standard applies only in the context of circumstantial evidence. Although premeditation, as a state of mind, is typically established through circumstantial evidence, in the instant case, there was direct evidence of Douglas' state of mind: his admission that he told his brother to shoot Estefan to avoid going back to jail. Second, even if this is treated as a circumstantial evidence issue, the "spontaneous killing" theory is repudiated by Douglas' prior threats, the motive admitted in his confession, the number of shots fired, and the absence of any provocation. Contrary to the Appellant's argument, there is no evidence of any struggle between Dennis and Estefan. The sole witness to refer to a "scuffle," Gary Keller, did not see anything; he only heard people hitting the ground and moving; he expressly stated that he did not know what he was referring to by a "scuffle." **R**.4634,4644.Furthermore, any such struggle, even if it existed,

would be irrelevant, as Douglas' directive to his brother, while they were both still in their car, to shoot Estefan, precedes any speculative struggle, and was developed weeks before the murder, and establishes premeditation from the outset. Even more significantly, no such hypothesis of innocence was ever proffered in the trial court and cannot be submitted for the first time, on appeal. State v. Law, 559 So. 2d 187, 189 (Fla. 1989) ("The state is not required to 'rebut conclusively every possible variation' of events which should be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events.").

The sole theory adduced at trial by Douglas was that Dennis did everything by himself. **R**.5767-96. Far from arguing that Dennis was struggling with Estefan, Douglas's counsel argued that the "scuffling . . . was Douglas trying to stop his brother from doing anything... " **R**.5787. Thus, he reiterates the claim that the two brothers were arguing. **R**.5796. As such, there was certainly no duty on the state to rebut an unasserted hypothesis that Dennis and Estefan were struggling and that the killing occurred spontaneously during that struggle.

As seen above, there was ample evidence of premeditation. The Appellant's arguments on appeal with respect to this issue are unpreserved as they were never raised in the court below, and are also without merit.

XII. CUMULATIVE ERRORS DO NOT REQUIRE THE REVERSAL OF THE CONVICTION HEREIN.

With respect to the claim that cumulative errors require the a reversal of the conviction, the State relies on the arguments set forth in points I-XI above.

XIII. THERE WERE NO IMPROPER EX PARTE COMMUNICATIONS REGARDING THE SENTENCING ORDER.

One issue regarding alleged ex parte communications has previously been addressed in Issue VI, supra. This Court authorized the Special Master to inquire into a second alleged ex parte

communication, regarding the preparation of the sentencing order. This matter was inquired into at two hearings conducted by the Master. As noted by the Appellant, the evidence presented at said hearings was undisputed, and the Master made the following findings of fact:

> 1) the trial judge, on the day prior to announcement and entry of the sentence in open court, attempted to notify all counsel of the availability of the sentencing order at the office of the trial judge; 2) Prosecutor Paul Mendelson went to Judge Shapiro's office and was directed by the trial judge into the Judge's office area; Judge Shapiro, while alone in the office with Mr. Mendelson, presented Mr. Mendelson a copy of the proposed sentencing order; Mr. Mendelson read the entire sentencing order alone in the presence of the trial judge and did not recommend any changes or modifications; Mr. Mendelson left his copy in the Judge's chambers; no words were exchanged, but Mendelson said "looks good to me"; 3) no other counsel viewed the sentencing order prior to its entry; Mendelson did not inform either prosecutors Band or Laeser, or any defense counsel, that he had reviewed the order; and 4) defense attorney Cohn recalled that Judge Shapiro had notified his office of the existence and availability of the sentencing order on the day prior to the imposition of sentence but that Cohn had decided against traveling to the Judge's chambers to obtain a copy.

Brief of Appellant at p. 79.

In light of the undisputed evidence and the above findings, the Master concluded that there was no ex parte communication, as there had been no dialogue between the prosecutor and judge, and no revisions to the order. HT. 176. The Master stated:

> I am persuaded by the greater weight of the evidence that there was no ex parte communication in the sense that exists in our current jurisprudence. In saying that, to me a communication with regard to an order is one where there is an exchange of ideas, opinions, a dialogue that affects the entry of the order such that the person whose interest is being affected is not present and has been prevented from having an opportunity to participate in that exchange of ideas and that dialogue.

HT. 183. The Master's final order thus provided that "[t]here was no communication between the trial judge and prosecutor Mendelson; i.e., no dialogue or interaction which would constitute a violation of Judicial Canon 3A(4)." Appellant's App. 87. Furthermore, "[t]here was no possible prejudice to any party . . . since there was no substantive communication, alteration or modification of the sentencing order." Id.

The Appellant has not disputed the Master's findings of fact. Rather, the Appellant, has argued that there was reversible "appearance of impropriety," because there was "an opportunity" for substantive communication in the instant case. Brief of Appellant at p. 82. There is no legal support for such an argument.

Appellant's reliance upon Ijn re Dekle, 308 So. 2d 5 (Fla. 1975) is unwarranted, as that case involved a situation where the judge had accepted an ex-parte memorandum of law from one of the parties, and actually utilized the memorandum in drafting his opinion. Dekle, 308 So. 2d at 9. ("It is true Justice Dekle received the ex parte memorandum from Mason and used it."). This Court, having noted that, "objective and not merely subjective misconduct warrants judicial discipline", found that a public reprimand, as opposed to removal from the bench, was appropriate, in light of the lack of any "willful and deliberate corrupt misconduct." 300 So. 2d at 9-12. In the instant case there was no misconduct, as the trial judge did not receive nor utilize any legal or factual input, in writing or otherwise, from any party.

The instant case is also considerably different from the situation presented in Rose v. State, 601 So. 2d 1181 (Fla. 1983). In Rose, the State had responded to a rule 3.850 motion and additionally sent a copy of a proposed order, denying the motion without a hearing, to the judge, without furnishing a copy to defense counsel. This Court assumed that the trial court had requested the State to prepare the order. The danger inherent in such a situation, as pointed out by this Court in Rose, was that "a judge is placed in the position of possibly receiving inaccurate information or being unduly swayed by unrebutted remarks about the other side's case. The other party should not have to bear the risk of factual oversights or inadvertent negative impressions that might easily be corrected by the chance to present counter arguments." 601 So.2d at 1183. Such a situation does not transpire when a judge is merely making copies of an order available, and is not soliciting any

comments, and is not entertaining any argument. Thus, in Rose, this Court stated that "a judge should not engage in any conversation about a pending case with only one of the parties participating in that conversation. Obviously, we understand that this would not include strictly administrative matters not dealing in any way with the merits of the case." Id. What transpired in the instant case can not be deemed a "conversation" in the sense prohibited by Rose.

Appellant's reliance upon Spencer v. State, 615 So. 2d 688 (Fla. 1993) is also unwarranted. In Spencer, immediately prior to the hearing at which the judge was to impose sentence, the defense attorney entered the judge's chambers and observed the prosecutors and judge proofreading the sentencing order. Id. at 689. When court convened shortly thereafter, the judge explained that "he had been having a conversation with the prosecutor concerning this Court's decision in Grossman . . . ." The sentencing order had also been prepared before defense counsel had had the opportunity to address the court, as opposed to the penalty phase jury, regarding the proper sentence to impose. Id. at 689-90. The problem in Spencer was thus not the mere communication with the prosecutor, but the formulation of the ultimate sentencing decision before the required input from the defense. Furthermore, in Spencer, the judge and prosecutor had admittedly been involved in a substantive discussion about sentencing procedures, and the prosecutor was actively assisting the judge in the preparation of the order. By contrast, in the instant case, defense counsel and the prosecution had long since presented all of their arguments to the judge, after the jury had recommended death, and after the parties had had the opportunity to present any additional witnesses to the court. Moreover, there is no suggestion that the prosecution has in any way assisted in the preparation of the sentencing order.

Accordingly, Dekle, Rose and Spencer, supra, do not require reversal in the instant case, where the judge simply made the order available to all parties in advance, and engaged in no substantive discussions with the prosecution.

XIV. THE LOWER COURT DID NOT COMMIT REVERSIBLE ERROR IN FAILING TO GIVE A LIMITING INSTRUCTION REGARDING THE DOUBLING OF AGGRAVATING FACTORS.

The lower court instructed the jury on three similar aggravating circumstances: a) that the crime was committed for the purpose of avoiding or preventing a lawful arrest; b) that the crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; and c) that the victim was a law enforcement officer engaged in the performance of the officer's official duties. Defense counsel had previously objected to the "doubling" of these factors, and had also requested two similar limiting instructions, which would have advised the jury to consider a single aspect of the offense in support of just one aggravating circumstance. **R**.202, 205. The lower court denied the request for a limiting instruction.

In Castro v. State, 597 So. 2d 259, 261 (Fla. 1992), this Court held that such limiting instructions are proper. This holding is, however, "prospective" only. Wuornos, 644 So. 2d at 1066. The instant trial, however, occurred prior to this Court's holding in Castro. The failure to give the requested limiting instruction was thus not reversible error, because, "at the time of the trial in this case, this issue was governed by Suarez v. State, 481 So. 2d 1201 (Fla. 1985), cert denied, 476 U.S. 1178, 106 S.Ct. 2908, 90 L.Ed.2d 984 (1986), in which we determined that the failure to instruct a jury on duplicative aggravating factors is not reversible error when the trial court does not give the factors double weight in its sentencing order." Armstrong v. State, 642 So. 2d 730, 734, (Fla. 1994); See also Jackson v. State, 648 So. 2d 85, 91-2 (Fla. 1994) (failure to give a merger jury instruction, with respect to the three aggravators of disrupting governmental function, avoid arrest and victim

was a law enforcement officer, was not reversible error, where the trial judge either merges the factors into one or finds only one of the factors to apply); Wuornos, supra.

The failure to give the requested limiting instruction in the instant case, in accordance with Suarez, thus does not constitute error. Moreover, any error must be deemed harmless. First, the trial court, in imposing the death sentence, relied only on one of the three related factors, and specifically stated that the other two were not considered in support of the court's decision. R. 247-48. The only one on which the court relied was the factor that the victim was an officer engaged in the lawful performance of his legal duties. Second, this was a case of two strong aggravating factors and minimal mitigation. The court also found that the defendant had previously been convicted of a violent felony - the two attempted murders in California. Mitigating evidence was virtually nonexistent. The defendant's young son said that the defendant was a good father. The defendant's attorney in California said that he was a gentleman. The lower court did not feel that any of this evidence rose to the level of a mitigating factor. See, Sochor v. State, 619 So. 2d 285, 292-93 (Fla. 1993). The only evidence treated as a nonstatutory mitigating factor was the testimony that the father was an alcoholic who abandoned the family when Douglas was 4 or 5 years old. Douglas was not the victim of any abuse, and there was no connection, direct or indirect, between the abandonment and the murder. Indeed, Douglas' subsequent childhood was sufficiently stable to enable him to complete high school and commence university studies at an architectural college in Mexico.[11] In view of the minimal mitigation, substantial aggravating factors, and proper treatment of "doubling" factors in the sentencing order, any error must be deemed harmless. Armstrong, Jackson, Wuornos, supra.

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[11] As to Dennis, who has adopted Douglas' brief on this issue, the mitigating evidence was similarly minimal.

XV. THE LOWER COURT DID NOT ERR IN EXCLUDING WITNESSES FROM THE SENTENCING PHASE PROCEEDINGS.

Appellant contends that the trial judge erred in failing to conduct a Richardson inquiry. The instant claim is without merit. The record reflects that the jury returned its guilt-phase verdicts on Wednesday, January 16, 1991. **R**.6054-5. At that time, attorney Carter, on behalf of Dennis Escobar, indicated that he had witnesses coming in from California and Nicaragua for the sentencing-phase proceedings. **R**.6058-9. As a result, the trial judge delayed commencement of the penalty-phase proceedings until Friday, January 25, 1991. **R**.6060. At that time, the judge directed the parties to have their sentencing phase witnesses available for deposition by Wednesday, January 23rd. **R**.6059-60. Counsel for Douglas Escobar did not offer any comments at that time.

On Thursday, January 24, 1991, the day before the sentencing proceedings were to commence, attorney Carter on behalf of Dennis Escobar, again sought a continuance, because of visa and financial problems regarding witnesses being brought in for the proceedings. **R**.6084-86. The judge expressed concern regarding the effect of an extensive delay on the jury's ability to recall the guilt-phase evidence, and their prior commitments. **R**.6086. Nevertheless, the trial judge postponed the sentencing proceedings an additional week, until Thursday, January 31, 1991. **R**.6095-7. The prosecution at this juncture noted that counsel for Dennis had not provided a witness list for the penalty phase, and that, "the only [witnesses] who have been made available in any way, shape or form, are going to be the people that Mr. Galanter and Mr. Cohn [counsel for Douglas Escobar] are flying in from California." **R**.6091. The prosecutor stated that, he wanted to avoid a situation where defense counsel "shows up" with witnesses at the "last minute," and, that he wanted an opportunity to examine the witness and verify any proffered information. **R**. 6092. The trial court agreed that

the prosecution would have "the same opportunity that you [the defense] yell for and that you are entitled to insofar as discovery is concerned." **R**.6101.

During the above proceedings, attorney Galanter, on behalf of Douglas Escobar, stated that, "We plan on calling much fewer witnesses and are not going to go into any issues Carter is going to go into." **R**.6062. Indeed, Galanter even indicated that he did not want the jury on Douglas' case, to hear the family members whom Carter was going to present and whom Galanter had "chosen" not to call. **R**.6070.

At a hearing commencing at 4:00 p.m. on Wednesday, January 30, 1991, **R**.6109, the day before the rescheduled sentencing phase proceedings were to commence, the prosecution advised the court that attorney Carter had suggested that additional witnesses would first be arriving at 10:30 that night. **R**.6110. The prosecutor stated that he wanted "to make certain that we resolve that matter and that all the witnesses who might testify are here and available for being deposed this afternoon." Id. After discussing other matters, the prosecutor stated that he and counsel for Dennis Escobar had agreed that the latter, "would produce everybody who was not yet deposed at one o'clock for a deposition." **R**.6123. The prosecution indicated that the two prosecutors had each been deposing some 18 witnesses during the day, in separate places but at the same time, in an effort to expedite the process. **R**.6121. The prosecutor added that shortly after the commencement of the 4:00 p.m. hearing, counsel for Dennis had delivered a witness list, reflecting that most of the already deposed witnesses were not going to testify, and which list indicated additional witnesses that, not only had not been produced for deposition, but that defense counsel was indicating would not even be available until late that night if at all. **R**.6120-23.

The prosecution noted, "that no matter what type of Richardson inquiry we have at this point, the state is forced upon the proverbial guitar." **R**.6121. In light of the lack of an opportunity to

depose Dennis Escobar's witnesses, the prosecutor stated that there was a "severe" and "intentional" discovery violation, and requested the court to conduct an "inquiry as to the status of each and every one of these witnesses, their availability and why they have not been available and made physically present at a previous time." **R.** 6122. In response, counsel for Dennis announced the names of six witnesses who were either present at the hearing or would be made available that afternoon. **R.**6123-24. With respect to two of the now complained of witnesses, counsel for Dennis stated that the prosecution could talk with them, "as soon as Berrios [another witness] arrives." **R.**6124. The prosecutor objected and stated that he would not have the opportunity to impeach the witnesses if they were not made available at a reasonable time. **R.**6124-25. Counsel for Dennis merely responded, "I don't know if these persons are going to get here." **R.**6125.

The trial judge ruled that the prosecution should continue to depose whatever witnesses were available that afternoon. The Court, however, added that it would abide by the previous ruling that the prosecution was entitled to timely discovery, in the event that the defense sought to present additional and previously unavailable witnesses, at the sentencing:

> **THE COURT:** Very simply, what I am going to do, whoever is here, whoever you people can depose this afternoon, you make your efforts and you depose them. Tomorrow morning, if we come to the situation when I call the defense and ask who you're going to put on and if they call somebody who you had not had the opportunity to speak with, then I'll make the necessary ruling at that time whether or not I am going to allow that person to testify.
>
> I made a ruling last week as to when people were supposed to be furnished and I am going to stand by it. . . .

R.6125.

The next day, immediately prior to the sentencing hearing, counsel for Dennis sought to present late arriving witnesses. **R.**6195. The trial judge excluded said witnesses. Id. The trial judge stated:

> You had all this time, continued the matter, witnesses coming in 10:30, well beyond what I could require the State to do with regard to prepare insofar as those witnesses are concerned. If you wish to proffer, you may proffer. They will not be permitted to testify.
>
> . . .
>
> I continued this case at your request because you wanted to bring people in. I felt that was absolutely reasonable request on your part. I said list the witnesses. Yesterday, you give them a list at four o'clock in the afternoon. Witnesses coming in at 10:30 last night. They are not going to testify, simple as that.

Id. Counsel for Dennis then proffered the testimony as to the four (4) excluded witnesses. **R.**6197-6199. All four witnesses had known Dennis Escobar when he was a child and would provide deprived background information as to Dennis. Id. Two of the witnesses would also provide information that Dennis served in the Sandinistas during Somoza's regime. Id.

At the conclusion of the proffer, counsel for Douglas Escobar, who had been silent throughout, requested an opportunity to speak to the four individuals whom Carter had proffered:

> Even though the time is as late as it is, I didn't know these people existed and in light of the fact that they know my client's brother and his childhood and they are so close together, it would seem incumbent upon us to have an opportunity to speak to them to see whether or not they know anything about my client's background, his childhood or any other event or story or anything that may come up. I did not know they existed, I would like an opportunity to speak to them.

R.6200. The judge denied the request. Id.

The penalty-phase proceedings then commenced. After the prosecution presented one witness, Douglas Escobar presented three witnesses - his father, his son and an attorney from California. **R.**6211-51. The defense then rested on behalf of Douglas Escobar. The court queried Douglas regarding the decision not to testify and, upon asking if the defendant wanted any other witnesses, Douglas referred to the four who had been excluded. **R.**6253-4. Douglas' attorney reiterated that he had not interviewed the four yet, although Douglas had asked him to do so when

Douglas saw them. **R**.6255. Douglas' counsel acknowledged that his client had not previously referred to the four, asserting that his client is apparently less articulate than Dennis. Id.

Attorney Carter then presented Dennis' sentencing-phase case. **R**.6256-6313. He presented five family members as to his background, plus a psychiatrist. After the rendition of the jury's verdicts, the judge announced that the parties, on the following morning, could present any further witnesses they desired, to the judge. **R**.6425. The next morning, counsel for Douglas presented brief testimony from four family members, **R**. 6430-40, and Carter presented three family members and one family friend. **R**.6440-46. Neither counsel for Douglas nor Dennis even attempted to present the four previously excluded witnesses, even though there was no limitation imposed by the court, and even though counsel for Douglas had the previous afternoon and evening in which to speak to those four.

The Appellant's argument, that the lower court erred in excluding the witnesses without a Richardson inquiry, fails for several reasons. First, the only thing that Douglas' counsel ever sought was approval to speak to these individuals.[12] He did not seek to present these witnesses. This Court has previously held that there is no need for a Richardson inquiry under such circumstances. Brazell v. State, 570 So. 2d 919 (Fla. 1990). In Brazell, this Court held that the principles regarding Richardson are equally applicable to the exclusion of defense witnesses. However, there was no need for a Richardson inquiry where the defense could not even state that it was calling the prospective witness as a witness. Although "the rule places the burden upon the trial judge rather

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[12] In effect, this was a request for a continuance. This request did not in any way implicate either a discovery violation or a Richardson inquiry. To the extent that counsel was seeking a continuance, such matters rest within the discretion of the trial court. Gore v. State, 599 So.2d 978 (Fla. 1992). Insofar as the court had already provided over two weeks of time subsequent to the guilt-phase verdicts, and insofar as the defendant had two attorneys, one of whom could have spoken to these individuals while the other was in court, there was no abuse of discretion in denying a continuance to permit counsel to speak to those witnesses.

than the parties to initiate the Richardson hearing, the judge must be alerted to the necessity of doing so. In other words, before it can be said that reversible error has automatically occurred because no inquiries were made, there must be a clear showing of the need for a Richardson hearing." 570 So. 2d at 921 (emphasis added). This Court, in Brazell, continued:

> it appears that Brazell had just informed his attorney about Taylor. There was no suggestion that Brazell's attorney would call Taylor as a witness or that Taylor's presence at the trial could ever be obtained. Therefore, at this juncture it would have been difficult, if not impossible, to hold a meaningful Richardson inquiry. Until such time as the defense indicated that it wished to call Taylor as a witness, it could not be said that a discovery violation had occurred. Therefore, any Richardson inquiries were essentially irrelevant....

Id. For the same reasons, as counsel for Douglas expressed no desire to call these individuals as witnesses, and had previously stated that they did not intend to call the family members Carter was calling for Dennis, there was no reason, as to Douglas, for the court to conduct any inquiry.

Second, Douglas Escobar has not preserved this issue for appellate review, as he never requested any Richardson inquiry. Prior to the sentencing phase proceedings, counsel for Douglas had expressly professed that there was no intent to present testimony from the family members whom Carter intended to call for Dennis. The only thing counsel for Douglas ever sought was an opportunity to speak to the four individuals. He did not even know whether they had anything useful to say for Douglas. He certainly could not, and did not, say that he wanted to present them as witnesses. Under such circumstances, this issue is not preserved for appellate review. In Dailey v. State, 594 So. 2d 254 (Fla. 1992), this Court found a Richardson claim unpreserved. Defense counsel objected to the use of a photograph which had not been furnished during discovery. Defense counsel declined the court's offer of special voir dire of the witness and "failed to request any alternative inquiry..." 594 So. 2d at 257. Under such circumstances, the trial court was deemed to have properly overruled the defense's objection. Similarly, in the instant case, defense counsel did

not request any inquiry, but remained mute. See also, Lucas v. State, 376 So. 2d 1149, 1152 (Fla. 1979) (where prosecution failed to list rebuttal witnesses and defense counsel acquiesced in court's ruling that rebuttal witnesses need not be furnished in advance, this Court found the issue unpreserved, emphasizing that it "will not indulge in the presumption that the trial judge would have made an erroneous ruling had an objection been made and authorities cited contrary to his understanding of the law. Under the circumstances, the trial judge was not required to make further inquiry."). Matheson v. State, 500 So. 2d 1341 (Fla. 1987); Andrew v. State, 621 So. 2d 568 (Fla. 4th DCA 1993); Taylor v. State, 589 So. 2d 918 (Fla. 4th DCA 1991).

For similar reasons, Dennis Escobar, who has adopted Douglas' argument on this issue, did not preserve the issue for appellate review, as he did not seek a Richardson inquiry when the court actually excluded the late arrivals, and allowed an opportunity for any proffers. Alternatively, it is submitted that the record reflects that the judge did conduct an adequate inquiry. The judge was obviously aware that he had given the parties over two weeks, after the guilt phase, in which to get their sentencing-phase witnesses. The court had previously heard attorney Carter's explanations regarding visa and financial problems, one week prior to the exclusion, and the late arrival of the witnesses. The court also heard Carter's proffer as to the testimony of those individuals. Counsel for Douglas had nothing to add to that, and was clearly not prohibited from adding anything. Counsel for Douglas simply asked for an opportunity - which implied a continuance or adjournment - to talk to those individuals. Under such circumstances, it should be concluded that the court had acquired the pertinent information regarding the reason for the dilatory listing and production of these witnesses and the nature of their anticipated testimony. Therefore, it should be concluded that an adequate Richardson inquiry was conducted, even if the parties did not explicitly refer to it as such. As to the issue of whether any violation was willful or inadvertent, the court was made aware

that Douglas' counsel did not previously know of the witnesses, even though counsel clearly had access to a wide variety of other family members, including Douglas' wife, father, and mother. The court had also heard Carter's lack of explanation for his late listing of witness proffer regarding the testimony, and, how long counsel had to prepare both for trial and sentencing. The court was thus fully apprised of what it needed to know to determine whether any violation was trivial or substantial. Lastly, on the issue of prejudice, which refers to the defendant's ability to prepare for trial,[13] nothing was done by the State or court which could impair the defendant's ability to prepare for sentencing. Any such impairment derived from either the defendant's or defense counsel's own actions. The judge also knew that the State had been precluded from deposing these witnesses or conducting any investigation regarding them. Thus, the on-record inquiries should be deemed sufficient. See e.g., Wilder v. State, 587 So. 2d 543 (Fla. 1st DCA 1991) (court ascertained that witness not located until previous day, nature of testimony); Wilkerson v. State, 461 So. 2d 1376 (Fla. 1st DCA 1985) (court conducted adequate inquiry and failure to call it a Richardson hearing or make formal findings did not constitute reversible error).

Lastly, and alternatively, the State submits that any error herein was harmless beyond a reasonable doubt. See State v. Schopp, supra. The principal inquiry under Richardson is the question of prejudice, which refers to the prejudice of the defendant's ability to prepare for trial. State v. Schopp, Smith, supra, 500 So. 2d at 126; Richardson v. State, 246 So. 2d 771, 775 (Fla. 1971). In the context of a violation by the defense, this concept of prejudice to the defendant's ability to prepare for trial is not applicable, as no one has impaired the defendant's ability to prepare for trial. The only prejudice which remains to be assessed with respect to defense violations, is any

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[13] See Smith v. State, 500 So. 2d 125 (Fla. 1987); See also State v. Schopp, 653 So. 2d 1016 (Fla. 1995).

substantive harm from the exclusion of a witness' testimony. This is a matter which is routinely the subject of harmless error analysis, as proffers of testimony, by defense counsel, are weighed against the remainder of the trial court proceedings. See, e.g., Gurganus v. State, 451 So. 2d 817 (Fla. 1984); Colin v. State, 570 So. 2d 929 (Fla. 1990); Hall v. State, 508 So. 2d 882 (Fla. 1990); Zerquera v. State, 549 So. 2d 189 (Fla. 1989). As to this type of substantive prejudice, as long as the defense adequately proffers the evidence, harmless error analysis can be conducted. If no proffer is made, the claimed error would not be preserved for review. See, e.g., Lucas v. State, 568 So. 2d 18 (Fla. 1990).

When such substantive harmless error analysis is conducted, it must be concluded that any error, as to either defendant herein, is harmless beyond a reasonable doubt. Two of the excluded witnesses would have presented general family background evidence, and two would have presented that type of testimony plus references to Dennis' involvement with the Sandinistas. With respect to Douglas, he had presented testimony from his father and son. His mother and sister, who testified for Dennis, were also available and could have been called regarding general family background, but Douglas chose not to call the two individuals most intimately familiar with general family background matters. It is disingenuous to suggest that more distant relatives or acquaintances would provide any greater details than the uncalled mother and sister could have. One witness, Carlos Cruz, would allegedly have said something about "mental abuse" by the stepfather as to Dennis. When the mother testified, all she could say was that the stepfather was not physically abusive towards the boys and did not communicate well. **R**.6283,6278-9. The sister stated that the stepfather did not abuse the children or mother. **R**.6291. When the mother testified about these matters, Douglas did not seek to adopt her testimony as part of his case.

As to references to the Sandinistas, no one has ever claimed that Douglas had any involvement or that any such testimony would have been pertinent to him. Moreover, with the mother and sister present, and testifying for Dennis, Douglas could have elicited such information from them, but chose not to.

Not only did Douglas not seek to elicit any of the foregoing information from the mother and sister, whom he could have called, but, when the court permitted the parties to present any further information about abuse by the stepfather, or service with the Sandinistas, from any witnesses, either for Douglas or Dennis, neither party produced any such evidence. It is also significant to note that when one of the witnesses adduced by Dennis, Rodolpho Berrios, testified about Dennis' involvement with the Sandinistas, **R.** 6443-4, Douglas did not seek to incorporate his testimony as to Douglas or to further question Berrios on behalf of Douglas. The court clearly would have granted any such request, as it previously permitted Dennis' counsel to adopt testimony from Douglas' witnesses. **R.** 6432,6440.

In view of the foregoing, it would have to be concluded that Douglas was not prejudiced by the exclusion of the four witnesses, and that any error was harmless.

As to Dennis, who has adopted this argument, any error would similarly be harmless. Dennis, too, had the opportunity to present these witnesses to the judge the day after the jury's advisory sentence, but failed to do so. As to general family background, Dennis presented several witnesses, including better ones, more intimately familiar with his life - i.e., the mother, sister, and his wife who knew him since he was a teenager. Moreover, during the penalty-phase proceedings before the jury, Dr. Rose made reference to Dennis' service with the Sandinistas, but Dennis did not claim this as a mitigating factor. During the proceedings before the judge, the next day, Dennis presented witness Berrios, who discussed Dennis' service with the Sandinistas. Not only did Dennis

never claim that any of the excluded witnesses could have added anything to what Berrios said, but even when Berrios so testified, Dennis never sought to claim service with the Sandinistas as a mitigating factor. See generally, Lucas v. State, 568 So.2d 18 (Fla. 1990) (defendant cannot assert mitigating factor which was not identified by trial counsel as alleged mitigating factor).

Lastly, references to Sandinista military service would not establish a mitigating factor. There is nothing inherently mitigating about service with the Sandinistas. News coverage during the Sandinista revolution routinely portrayed the Sandinistas as a gang of terrorists who committed countless atrocities on the civilian population. Service in such an "army" would have no greater inherent mitigating value than allegations of service in Mao's Red Guards or the Peruvian Shining Path. A mitigating factor exists if it is a matter which "in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed." Rogers v. State, 511 So.2d 526, 534 (Fla. 1987). A mere claim of service in the Sandinistas does not suffice.

In view of the foregoing, it is submitted that: 1) there was no discovery violation as to Douglas; 2) in the absence of any discovery violation as to Douglas, there is no Richardson issue; 3) the Richardson claim is not preserved by either defendant; 4) even if the claim is deemed preserved, the inquiries conducted by the court were adequate under Richardson; and 5) any error was harmless beyond a reasonable doubt in light of the lack of any procedural or substantive prejudice.

XVI. COLLATERAL OFFENSE EVIDENCE DID NOT HAVE AN IMPROPER EFFECT ON SENTENCING PROCEEDINGS.

The State relies on its prior arguments in sections III, IV and V, for the position that all of the collateral offense evidence was properly admitted. Where the evidence is properly admitted, it

cannot have an impermissible effect on the sentencing proceedings. The case on which the Appellant relies, Lawrence v. State, 614 So.2d 1092 (Fla. 1993), entailed a situation in which several items of collateral offense evidence were deemed to have been improperly admitted during the guilt phase. While the effect on the guilt phase was deemed harmless, that was not the case as to the penalty phase. Lawrence has no applicability in the context of evidence which has properly been admitted. Thus, this Court emphasized that "we held that, in those instances that had been preserved for appeal, any error regarding the introduction of that evidence was harmless as to Lawrence's conviction. We are not convinced, however, that any error would be equally harmless in regards to his death sentence." 614 So.2d at 1096. Thus, the Court was only talking about evidence for which there was an objection, and evidence which was improperly presented in the guilt phase. Finally, evidence of the California shoot-out was relevant in the penalty phase, as one of the aggravators was the prior convictions for violent felonies, and the penalty phase jury therefore had the right to know the details of the prior offenses, in order to determine what weight to assess as to that factor. See Lockhart v. State, 655 So. 2d 69, 72 (Fla. 1995).

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

The imposition of the death sentence herein was based on two aggravating factors: 1) Douglas 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**.246-48. The court had also found that three other aggravating factors - a) murder was committed for the purpose of avoiding or preventing a lawful arrest; b) the crime was committed to disrupt or hinder the lawful exercise of any governmental

function or the enforcement of laws; and c) the murder was cold, calculated and premeditated - had been established, but they were not being considered by the court in its decision. **R**.247-48.

Mitigating evidence was virtually nonexistent. The defendant's young son said that the defendant was a good father. The defendant's attorney in California said that he was a gentleman. The lower court did not feel that any of this evidence rose to the level of a mitigating factor. **R**.248. See, Sochor v. State, 619 So. 2d 285, 292-93 (Fla. 1993). The only evidence treated as a nonstatutory mitigating factor was the testimony that the father was an alcoholic who abandoned the family when Douglas was 4 or 5. **R**.248,6239. Douglas was not the victim of any abuse, and there was no connection, direct or indirect, between the abandonment and the murder. Indeed, Douglas' subsequent childhood was sufficiently stable to enable him to complete high school and commence university studies at an architectural college in Mexico. **R**.6243.

The principal mitigating factor which the Appellant appears to be relying on in his proportionality argument, is the claim that Douglas was an alcoholic who was drunk when he committed the murder. See, Brief of Appellant, p. 96. Defense counsel did not present any evidence or assert any such mitigating factor in the closing argument before the jury. **R**.6390-6408.[14] The day after the jury returned its recommendation of the death sentence, the trial judge permitted the defendants to present, to the judge, any further mitigating evidence they desired. Counsel for Douglas presented three family members who said nothing about any alcohol or substance abuse problems of Douglas, either in general or on the day of the murder. **R**.6430-39. When counsel for

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[14] The evidence at the guilt phase reflects that during the month preceding the murder, Douglas had told a friend that he no longer drank. **R**.5005. Another friend who had gone out to bars with Douglas in the months preceding the murders, also testified that he had never seen the latter intoxicated. **R**.4817.

Douglas was permitted the opportunity to present further argument to the judge, again, not a word was said about alcohol use constituting a mitigating factor. **R**.6456-62.

The Appellant cannot, in effect, rely on an alleged mitigating factor which was never argued in the lower court. This Court has clearly required defense attorneys to reasonably identify all mitigating factors on which they are relying in the trial court:

> As the state points out, Lucas did not point out to the trial court all of the nonstatutory mitigating circumstances he now faults the court for not considering. Because nonstatutory mitigating evidence is so individualized, the defense must share the burden and identify for the court the specific nonstatutory mitigating circumstances it is attempting to establish. This is not too much to ask if the court is to perform the meaningful analysis required in considering all the applicable aggravating and mitigating circumstances.

Lucas v. State, 568 So.2d 18, 23-24 (Fla. 1990); See also Jones v. State, 652 So. 2d 346 (Fla. 1995).

In view of the foregoing, it must be concluded that the imposition of the death sentence in the instant case is proportionate to sentences imposed and affirmed 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. In the context of the two substantial aggravating factors actually considered, the CCP factor which was found to have been established yet not even considered, and minimal nonstatutory mitigation, the imposition of the death sentence is proportionate to sentences reviewed and upheld by this Court. In Griffin v. State 639 So. 2d 966, 972 (Fla. 1994), the defendant, who had previously announced he was not going back to jail, was being followed by the police after having completed a burglary. When the codefendant tried to stop the vehicle, Griffin began shooting at the police and killed an officer. The trial court had found three

of the aggravators in the instant case, i.e. - prior conviction of a violent felony,[15] avoid arrest, and cold, calculated and premeditated - in addition to finding that the murder had been committed during the course of a felony. The mitigation in Griffin was more substantial but also similar to that found herein: Griffin had a traumatic childhood, had been twenty years old at the time of the crime, had shown remorse, and had a learning disability. The sentence of death was deemed proportionate to other death sentences approved by this Court. See also, Street v. State, 636 So. 2d 1297 (Fla. 1994) (sentence upheld with three aggravating factors of prior violent felony convictions, murder committed to avoid arrest/involved law enforcement officer victim, and committed during the course of a felony, outweighing mitigation that defendant was under the influence of mental or emotional disturbance).

The Appellant seeks to analogize this killing to heat of passion killings in which this Court has been inclined to find the death sentence disproportionate. The Court's reasoning, in such cases, 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). The instant case, most clearly, is not a heated domestic confrontation. This murder emanated from a previously expressed desire to avoid capture, prosecution and imprisonment for prior offenses. The Appellant's analogy is misguided.

Likewise, the fact that Douglas did not pull the trigger is not dispositive. The death sentence has been upheld in non-triggerman situations. See, State v. White, 470 So. 2d 1377 (Fla. 1985). Indeed, the evidence here reflects that this murder was perpetrated pursuant to Douglas's instructions to Dennis, and is therefore analogous to contract killing situations.

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[15] The prior violent felony factor in Griffin was also attempted murder of a law enforcement officer, although it occurred during the same episode as the capital crime. The factor in the instant case involves attempted murders of two law enforcement officers and arose from a separate episode.

The Appellant's reliance on Rembert v. State, 445 So. 2d 337 (Fla. 1984), is similarly misplaced, as that was simply a typical murder during a robbery, with no distinguishing factors, and just the one aggravator. 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). Lloyd v. State, 524 So. 2d 396 (Fla. 1988), on which the Appellant also relies, found the death sentence inappropriate where there was just one aggravator - during the course of an attempted robbery - weighed against a statutory mitigating factor - the absence of a significant prior criminal history.

Lastly, the Appellant suggests that this murder occurred during the course of a struggle between Dennis and the officer. Once again, this is an apparent attempt to rely on alleged mitigating factors which were not asserted in the lower court. See, Lucas, Jones, supra. Moreover, contrary to the current assertion of a struggle between Dennis and Officer Estefan, counsel for Douglas argued in the trial court that the "scuffling . . . was Douglas trying to stop his brother from doing anything." Having failed to convince the jury of such a proposition, the Appellant now, without any further evidentiary support, expects this Court to abide by a completely different conjecture as to "scuffling" that was heard, but not seen, by an individual in the vicinity.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Corrected **ANSWER BRIEF OF APPELLEE** was furnished by mail to **RONALD S. LOWY, ESQUIRE,** 420 Lincoln Road, PH/7th Floor, Miami Beach, Florida 33139; and **JOHN LIPINSKI, ESQUIRE,** 1455 Northwest 14th Street, Miami, Florida 33125, on this 5 day of April, 1996.

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/blm