IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,482

VICTOR TONY JONES,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

****

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCIUIT IN AND FOR DADE COUNTY, FLORIDA

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BRIEF OF APPELLEE

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INTRODUCTION

The Appellee, State of Florida, was the prosecution below. Appellant, Victor Tony Jones, was the defendant. All parties will be referred to as they stood below. The symbols "R.", "T.", and "B." will be used to refer to the record on appeal, transcript of proceedings, and Defendant's initial brief, respectively.

Although the State filed a notice of appeal, it has elected at this time not to pursue a cross-appeal.

STATEMENT OF THE CASE AND FACTS

On January 11, 1991, an indictment was filed charging Defendant with: (1) the first degree murder by premeditation or during a robbery of Matilda Nestor; (2) the first degree murder by premeditation or during a robbery of Jacob Nestor; (3) the armed robbery of Matilda Nestor; (4) the armed robbery of Jacob Nestor; and (5) the unlawful possession of a firearm by a convicted felon. (R. 13-16). Defendant's motion to sever count 5 was granted on November 25, 1992. (R. 217).

A. THE GUILT PHASE

The trial began before Judge Rodolfo Sorondo on January 26, 1993. (T. 932).

Irene Fisher, who resided in Baldwin, New York, was the daughter of Jacob Nestor, 67, who was known as "Jack", and Matilda Nestor, 66, who went by the name "Dolly". (T. 1588).

Fisher spoke to her parents the morning of December 19, 1990, as she did every day. (T. 1593-1594). They discussed a trip Fisher would be taking. There did not appear to be anything amiss. They sounded "wonderful". After they hung up, her mother called back almost immediately, to talk "girl-talk" briefly, and then hung up. There did not appear to be anything amiss at that time either. Fisher also testified that her father did business

with a tooling company in Kansas City by the name of Padgett Industries. (T. 1595).

The records custodian for Southern Bell testified that two phone calls were made from the Nestors' number to Irene Fisher's number in Baldwin, New York on December 19, 1990 at 10:09 a.m. and at 10:17 a.m. (T. 1461-1462). The last phone call made that day was to Padgett's number in Kansas City, Missouri, at 11:21 a.m. (T. 1463).

Oscar Izquierdo, a UPS driver, made daily deliveries to the business of Jack and Dolly Nestor at 148 Northeast 28th Street in Miami. Izquierdo arrived at the Nestor's business around noon on December 19, 1990. (T. 1629-1631). The door was locked, so he rang the doorbell. No one responded. (T. 1632). In the past when the door had been locked, he would knock and Dolly would open the door with a buzzer that was located in the shop. On that day she did not buzz him in.

When he got no answer, Izquierdo knocked on the door and yelled "UPS, I have a delivery for you." Then he noticed that both cars were in the parking lot. Usually when both cars were there the Nestors were both there, so he looked through the mail slot. (T. 1633).

The office was always very neat and very organized. However, when Izquierdo looked through the slot on December 19, it looked like a hurricane had gone through. He began to realize that something was very wrong. He went downstairs to the neighbor, Sorondo, who was always outside working. (T. 1634-1635).

Ernesto Sorondo[1] operated an auto repair business, and resided, directly next door to Nestor Engineering on Northeast 28th Street. (T. 1312). From his business Sorondo could see anyone leaving or entering the Nestor establishment. (T. 1319). On the day before the murders, Sorondo had seen the Nestors' new employee for the first time. (T. 1320). The new employee had come in an orange Toyota and spoken to Mr. Nestor. Afterward, around 9:30 a.m., Sorondo saw the new employee cleaning the cars. He washed the cars for several hours and left around 4:30. (T. 1321). Sorondo later saw the Nestors leave.

On the day of the murders, Sorondo got up around 8:10. Mrs. Nestor's Volvo and the employee's Toyota were already there at that time. (T. 1322). After Mr. Nestor showed up, Mrs. Nestor left alone in the Volvo around 9:30 a.m. She came back, alone, around 10:00 a.m. (T. 1323). Carlos Torres, a former neighbor,

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[1] Although Judge Sorondo did not know this witness, upon inquiry it was determined that the witness' father's brother was the judge's father's second cousin. Both defense counsel and Defendant stated that they had no concern with regard to this relationship. (T. 1309)

saw Dolly Nestor leaving a local hardware store around 10:00 a.m. (T. 1558). Sorondo did not see the driver of the Toyota at any point that morning. Other than Mrs. Nestor, he did not see anyone come or go until the UPS truck showed up around noon. (T. 1324).

Sorondo testified that the UPS worker came down and asked Sorondo if anyone was there. They went upstairs together and Sorondo looked through the mail slot. He saw a lot of blood on the floor, on the desk, and on the phone. He ran downstairs and called the police. (T. 1325-1326).

City of Miami Police Officer David Magnusson was dispatched to the scene. (T. 1280). The business had a heavy door which was locked when he arrived. The windows had bars on them. (T. 1281). A second door was also locked. He looked through the mail slot in the door and saw a large amount of blood on the floor and what appeared to be the foot or shoe of a person. (T. 1282). There was no blood anywhere on the outside of the building. (T. 1284). Magnusson radioed his supervisor and the homicide unit, and awaited their arrival. Eventually the door was broken down by the fire department.

After the door was broken down, paramedic Alfredo Rodriguez went in first and observed two bodies. (T. 1530). He checked the bodies for vital signs. There was a male and a female.

Neither had a pulse. (T. 1530). Rodriguez then retreated because there was someone alive inside. Magnusson and Officer Mervolian went in. They saw the deceased man on the floor with a lot of blood around him. (T. 1285).

Defendant was slumped back on the couch with a jacket covering part of his body. Magnusson saw the butt of a gun protruding from under Defendant's left arm. (T. 1286, 1290). They trained their weapons on him and told him not to move. He did not move; Mervolian retrieved the weapon and gave it to Magnusson, who placed it on a chair behind him. (T. 1288).

There was a great deal of blood in the office area where Defendant and the body were. Magnusson had to move with care so as not to disturb it. Defendant had blood on his sneakers and on his pants. (T. 1291).

Officer J. L. Garcia was also present when the door was broken down, and entered the building with Magnusson and Mervolian. (T. 1708-1712). There was a lot of blood on the floor. There appeared to have been a fight. The furniture was all over the place.

Defendant was laying on the couch. Defendant was wearing only pants and white tennis shoes. The shoes had a lot of blood on them. A leather coat partially covered his chest. (T. 1713).

Defendant had a firearm under his left arm. After he saw the gun, Garcia immediately ordered him to put his hands up. All three officers had their guns trained on the man. (T. 1714). Defendant hesitated for a few seconds and then obeyed. They recovered the pistol.

Defendant was then handcuffed and escorted from the scene. (T. 1715). Defendant had no difficulty walking down the stairs. Defendant had no complaints, except that the handcuffs were too tight. (T. 1716). As Garcia was escorting Defendant to the car, Officer John Vance noticed a bulge in his front pocket. Garcia had not noticed it before. (T. 1717). Vance checked the pocket. (T. 1491). He found a large set of keys, money, cigarette lighters and a small change purse. He kept the items until he gave them to the crime scene technician. (T. 1492).

Garcia then placed Defendant in the back of the car, where Defendant complained that he had a headache. (T. 1717). Garcia observed a small amount of blood on Defendant's forehead, and asked him what happened. Defendant said, "the old man shot me." Defendant appeared to understand the questions Garcia asked and had no difficulty responding. After Defendant said he had been shot, Garcia called rescue to attend to Defendant. (T. 1718).

Sorondo was still there when the police brought Defendant out of the office. Defendant was the new employee that he had

seen the day before. That was the first time Sorondo had seen him on the day of the crime. (T. 1328-1329).

Steven Evans, an identification technician for the City of Miami Police Department, responded to the crime scene. Before Evans entered the premises, Vance gave him some keys, two cigarette lighters, a key fob, a small leather change purse and $238.67 in U.S. currency. (T. 1357). Irene Fisher testified that the purse belonged to her mother. (T. 1591).

After impounding the items from Vance, Evans proceeded to examine the crime scene. The building was a two story concrete block structure surrounded by a six to eight foot-high chain link fence. (T. 1359). The entrance to the upstairs was from two outside exterior stairs that went up to steel doors. Both doors had been locked. (T. 1360).

The main office was "a very large mess" when Evans entered. It was very difficult for him to move around without getting blood on him. (T. 1361). The body of the male victim was on the floor in this room. The body had been moved after the victim died. The blood pattern on the shirt matched the blood pattern on the floor. The body had originally been on its back, and someone rolled it over more onto its side. (T. 1399, 1817). Neither the police nor fire rescue had moved the body; that is how the body was found. (T. 1300, 1399). The male victim had a

stab wound to the upper chest. There was also a large gash above the eye. He had no identification or money on him. (T. 1400). He had an empty holster on his waistband. The gun taken from Defendant would have fit the holster. (T. 1383-1384).

Medical examiner Dr. Joseph Davis testified that the autopsy of Jack Nestor showed that he appeared to be in his sixties, was 5'9", and weighed 219 pounds. There were some minor injuries to his legs and face. He had a stab wound on the front of his chest, three inches above the nipple. (T. 1806). The wound was 3/4" wide. The internal examination indicated that the wound was approximately seven inches deep, ending in the heart. (T. 1808). The seven inch deep wound was consistent with a stabbing with a 5 7/8 inch knife because the muscle and fat of the chest wall can be compressed. (T. 1814). A forceful blow could have penetrated to that extent.

The cause of death of Jack Nestor was a stab wound to the chest involving the heart, with bleeding. (T. 1817).

Dolly Nestor's body was found in the back corner bathroom. (T. 1365). There was no trail of blood between the bathroom and the pool of blood in the main office. There was blood smeared on the bathroom wall, but none in between the two spots. There were no bloody footprints between the two locations. (T. 1366). There was a towel rack in the bathroom which had been broken off

and was on the floor. (T. 1410). The towel rack was behind the victim's body. The only blood in the bathroom was on the victim's body and in a smear on the wall. (T. 1411). She was stabbed in the center of her back. (T. 1412). She also had an injury above her right eye. When the female victim was searched, no property, money or valuables were found on her. (T. 1479).

The autopsy of Mrs. Nestor revealed that she was a white female who appeared to be in her sixties, 5'3", 135 pounds. She had a stab wound high in the back at the base of the neck. There was an abrasion to the upper right of the left eye, and an abrasion to the lip. (T. 1790). The major wound appeared to be the result of a downward stabbing angle and was about an inch long. (T. 1739).

The internal examination confirmed that it was a downward stab wound, which was about four inches deep. The path of the wound went downward along the vertebral column and ended in the aorta, the main artery which carries blood from the heart to the rest of the body. (T. 1794).

Dolly's injuries were consistent with her being stabbed in the back and falling forward and striking her head against some ceramic object in the bathroom. (T. 1796). Her stab wound was consistent with a knife that was 5 7/8" long and 3/4" wide. (T. 1801).

Dr. Davis testified that Mrs. Nestor died due to a lack of blood and oxygen to the brain. (T. 1803).

Evans recovered the firearm from a chair in the office where Magnusson had left it. It was in cocked position, ready to fire. There was one live round in the chamber. The clip was empty. (T. 1372). He impounded the live projectile. (T. 1373). He also recovered and impounded several spent projectiles from the scene. (T. 1375).

James Carr, a firearms examiner employed by the Metro-Dade crime lab, examined the firearm, the fired bullets, including the one removed from Defendant's head, the shell casings, and the live cartridge. (T. 1610). The gun was a .22 short automatic pistol. (T. 1611). The trigger required 3½ pounds of pressure to fire. It would not likely go off by accident.

Carr was only able to positively say that one of the bullets was fired from the gun. The others all could have been fired from the same gun. (T. 1623). All five casings had been fired from the gun. (T. 1624).

Evans found a bloody knife on the floor of the office, just below the desk, which he impounded. (T. 1388-1390). Tool mark expert Carr examined the knife and three body parts he had been

given. One of the parts was a portion of Mrs. Nestor's spine. The other two were rib parts which belonged to Mr. Nestor. (T. 1624). The knife was a professional fish filleting knife approximately eleven inches long. The stainless steel blade was 5 7/8" long and 3/4" wide at the widest point. (T. 1626).

There were small cuts on the rib sections from Jack Nestor, but they were in soft material which was not conducive to picking up identifiable marks from the knife. The piece from Dolly had a portion which went right through certain areas. The cut was 3/4" wide, which was consistent with the knife. (T. 1628).

The blood swabbings from the knife matched Jack Nestor's DNA profile. There was also an indication that Dolly's blood was present, but not clear enough to say with certainty. (T. 1689). The blood scrapings from the knife blade also matched Jack Nestor. (T. 1691). The finding that the knife samples matched Jack Nestor did not preclude the possibility that the same blade was also used to stab Dolly. (T. 1692). Dr. Davis also testified that the wounds of the Nestors were consistent with them having been both stabbed with the same knife. (T. 1814).

Evans also found a brown lady's jacket and a lady's purse on the couch in the office. (T. 1392). There was no money, property, or valuables located in the woman's purse. (T. 1479). Irene Fisher testified that these items belonged to her parents. (T. 1592).

The blood on a T-shirt found in the office matched Defendant's DNA sample. (T. 1684). Blood samples taken from the telephone at the scene matched Jack Nestor's DNA profile. They did not match Defendant's or Dolly's. (T. 1481, 1685).

Guillermo Martin, supervisor of the Latent Fingerprint Comparison Detail of the Miami Police Department, testified that a latent taken from the bathroom at the crime scene was a positive match with Defendant's prints. (T. 1069). The print was located on the wall such that Defendant was probably leaning with his left hand against the wall over Mrs. Nestor's body at the time it was made. (T. 1769-1771).

The medical examiner, Dr. Davis, testified that the evidence was consistent with an assailant approaching Dolly from behind, surprising her with a knife and stabbing her with such force that it would cause her to fall violently forward, strike her head against the toilet, and go into shock and die, possibly ripping the towel rack from the wall as she fell. (T. 1804-1805).

Dr. Davis further testified that the evidence was consistent with Mr. Nestor responding after hearing his wife's collapse, being surprised by an assailant who was facing him, being stabbed forcefully in the chest, which would have caused the bleeding to have begun outside of his office, retreating from the

door of the office, knocking over the furniture, bleeding profusely, stumbling backwards, pulling the knife out of his own chest, dropping it, reaching for the phone, stumbling, drawing his gun and firing five shots at his assailant, collapsing on the table, getting up and then collapsing again. It was also consistent with the assailant then rolling his body and removing his personal property from his pockets after his final collapse. (T. 1818).

At Jackson Memorial Hospital, Evans impounded the pants and sneakers Defendant had been wearing. In the pants, he found some keys, and a wallet in each back pocket. (T. 1342-1343). The blood stains on Defendant's sneakers only matched the DNA profile of Jack. They did not match the samples of either Defendant or Dolly. (T. 1661-1673). The first stain from the pants matched both Jack Nestor and Defendant, indicating that their blood had mixed together. (T. 1677). The second through fourth samples from the pants gave the same result. (T. 1679). The remaining three stains from the pants all matched only Jack Nestor's blood. (T. 1680).

A man's wallet was in the right rear pocket of the pants and a woman's wallet was in the left rear. (T. 1349). Irene Fisher identified the wallets and their contents as her parents'. (T. 1590-1591).

Edwina Crum, associate head nurse on the evening shift in the neurological intensive care unit at Jackson Memorial, testified that during the second night of his stay, Defendant indicated that he wanted to leave. She explained that he was in the hospital and he could not leave. Defendant insisted that he had to go. She asked him why and Defendant told her that he had killed those people and he had to leave. She asked him why and Defendant said that they owed him money and he had to kill them. (T. 1821, 1832).[2]

The defense called Ramona Bouzy and Betsy Augustine, both nurses working under Nurse Crum. They both testified that they were not present when Defendant confessed to Crum. (T. 1934-1954).

The jury retired at 3:13 p.m. (T. 2166). At 4:55 p.m., it returned with a verdict. (T. 2169). It found Defendant guilty of Counts 1-4, as charged. (R. 319-322, T. 2170-2171). Defendant was accordingly adjudicated guilty of two counts of first degree murder (counts 1 & 2), and of two counts of armed robbery (counts 3 & 4). (R. 323, T. 2184).

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[2] Defendant also told Detective John Buhrmaster, "the mother fucker owed me $2,300 and would not pay me. So I took a knife and took my money. No one's keeping anything from me." (T. 211). This confession was the subject of a motion to suppress. (R. 213) Although the motion to suppress was denied (T. 416), the State did not call Buhrmaster.

B. PENALTY PHASE PROCEEDINGS BEFORE THE JURY

A competency hearing was held on February 11, 1993. The court found Defendant competent to proceed. (T. 2436). The defense proposed more than 31 special penalty phase jury instructions, none of which related to specific aggravating or mitigating circumstances, except for the request that the word "extreme" be deleted from the standard instruction on the statutory mitigating circumstance of extreme mental or emotional disturbance. (R. 379, 396-403).

At the penalty phase trial, the State called Barbara Lewis, Nannette Martin, and Doug Tyrell, who testified to the facts surrounding an armed robbery which occurred on December 12, 1989. Lewis and Martin were employed by the Debbie School, which was located on the campus of Jackson Memorial Hospital, and catered to hearing impaired pupils. Defendant, dressed as a security guard, entered the school and forcibly took the purse of school secretary Janet Herron. Lewis and Martin came to her rescue and were able to wrest away from Defendant the gym bag into which he had placed Herron's purse. Defendant had a large knife in the gym bag. Defendant then went into another room and made off with the purse of a visiting teacher. Defendant then fled the premises with the women chasing and screaming. (T. 2514-2549).

Tyrell, an unarmed security guard encountered Defendant running across the campus. After Defendant punched Tyrell in the jaw, Tyrell was able to subdue him. (T. 2550-2551).

In case number 89-47989, Defendant was charged with and convicted of robbery and burglary with an assault in connection with the Debbie School incident. Defendant was sentenced to four years imprisonment. (T. 2564-2566). Defendant was conditionally released from imprisonment on the Debbie School charges on November 27, 1990. (T. 2576). He was released into the community on November 30, 1990. (T. 2580).

The State rested after presenting the foregoing evidence. (T. 2584).

Dr. Jethro Toomer, PhD, a psychologist, evaluated Defendant and testified on his behalf. (T. 2596). Dr. Toomer testified that Defendant was born in 1961. Before Defendant was five years old, his mother went to New York, and he was left in the care of his mother's sister, Laura Long, who lived in Miami. (T. 2600). Defendant was raised by the Longs, in a home, by individuals who cared for him, who required a high standard of behavior, and who were demanding in terms of the type of behavior which was required. (T. 2606). His aunt and uncle tried to teach him right from wrong. They had a middle class household and took him to church when he was young. (T. 2615). Defendant was provided with clothing, food, and shelter. His teacher indicated that he was appropriately dressed and had the proper school supplies when he came to class. (T. 2607).

Around the age of twelve, Defendant began to skip school and got involved in the use of marijuana and was involved in some burglaries. He ran away several times. (T. 2611). At 14 he went to New York and saw his mother. (T. 1612).

On cross-examination, Dr. Toomer testified that Defendant's aunt was married to a minister. (T. 2663). Defendant was raised with his two cousins. Dr. Toomer did not interview the cousins. (T. 2664). Mrs. Long indicated that her husband loved Defendant like his sons. (T. 2665). Dr. Toomer also testified that Defendant stayed with his mother for approximately two years after 1973. He was registered in school in New York. Then he left her. (T. 2649). He went to Texas and supported himself by working. Then he went to California where he worked from 1976 until 1981. He was not stealing or committing crimes during that time. (T. 2650). In 1981, at the age of 20, Defendant moved to Atlanta. In Atlanta Defendant stopped working and was supported by a common-law wife, who eventually threw him out. (T. 2652). After working out west, Defendant returned to Miami and lived with his grandmother from 1980 until the present, except when he was in Atlanta or in prison. (T. 2667). Dr. Toomer did not interview the grandmother. (T. 2668). Dr. Toomer also noted that Defendant had had a number of disciplinary problems while he was in state prison and in the Dade County jail. (T. 2627). He concluded that Defendant was of average intelligence. (T. 2639).

Dr. Toomer also acknowledged on cross-examination that he has only testified in capital cases on behalf of defendants. (T. 2631, 2634). He did not review Defendant's police reports, hospital records, correspondence, prison "jacket", or any witness testimony or statements. (T. 2637). Nor did Dr. Toomer ask Defendant what he did during the three weeks between the time he was released from prison and the time he killed the Nestors. (T. 2647). Dr. Toomer never asked Defendant why he killed the Nestors. (T. 2672). Defendant had never in his life been treated for any mental disease or defect. He had never had any psychological counselling. There was no evidence of him ever engaging in bizarre behavior. In January 1988, his prison evaluation reflected that Defendant did not have any psychotic symptoms. (T. 2673).

Dr. Toomer opined that Defendant suffered from borderline personality disorder. (T. 2621). Dr. Toomer felt that Defendant was the victim of abandonment and that his family was dysfunctional. As a result he engaged in maladaptive behavior.

Despite his good home environment, Dr. Toomer asserted that Defendant's emotional needs were not met. (T. 2608). Dr. Toomer conceded that emotional deprivation does not necessarily lead to trouble with the law. In the cases where that did not occur it can usually be seen that there was some person who took the person "under his or her wing". (T. 2609).

Dr. Toomer testified that he felt the statutory mitigating circumstance of under the influence of extreme mental or emotional disturbance applied, although he conceded that he did not discuss with Defendant what had happened at the time of the murders. Nor was Dr. Toomer aware of the facts of the crime from any other source when he reached the conclusion that Defendant was under the influence of extreme emotional disturbance when he killed the Nestors. (T. 2642). He did not believe the particular facts mattered. In his opinion, Defendant has always been suffering from an extreme mental or emotional disturbance. Dr. Toomer was also unaware of any of the facts of the Debbie School incident. (T. 2643). He was nevertheless of the opinion that Defendant was suffering from extreme emotional disturbance when he committed that crime also. (T. 2644). Dr. Toomer, conceded, however that Defendant did not suffer from any major mental disorder or psychosis. (T. 2648). He also conceded that without counseling, and a desire to seek counseling on the part of Defendant, the probability of Defendant turning his behavior around was "practically nil". (T. 2628).

Dr. Toomer conceded that a large part of his opinion was dependant on the truthfulness of Defendant's assertions to him. (T. 2639). He acknowledged that Defendant told him that he did not commit any crimes while in Atlanta, when in fact he had. (T. 2651). Defendant also told Dr. Toomer that he had never

participated in drug treatment when in fact, he was referred to drug treatment programs in connection with his criminal charges in both Atlanta and South Florida. In South Florida he was sent to at least four different treatment programs. (T. 2653). Defendant refused to accept the treatment, (T. 2654), and also declined drug treatment programs while in state prison. (T. 2655).

Despite the fact that Defendant told Dr. Toomer that he was either not sorry for, or never thought about, the illegal things he had done, and despite the fact that according to Dr. Toomer's testing, Defendant scored in the 90th percentile of the prison population on the antisocial tendencies scale, Dr. Toomer was not of the opinion that Defendant suffered from antisocial personality disorder. (T. 2661-2662).

Dr. Charles Mutter, MD, a forensic psychiatrist, was called by the State in rebuttal. Dr. Mutter, who had testified on behalf of both the State and the defense in the past, and had on occasion testified as to mitigating circumstances which he felt existed, also examined Defendant. (T. 2682-2683). He had no difficulty understanding Defendant. Defendant did not appear to have any difficulty understanding him and was of at least average intelligence.

Dr. Mutter also reviewed the Jackson Memorial Hospital records relating to Defendant's gunshot wound, Dr. Toomer's notes and depositions, the police reports, the MMPI report done while Defendant was incarcerated on July 24, 1992, Defendant's arrest records from 1987 to 1990, the DOC records from February 1987 through July 1990, including the records of his disciplinary problems and medical status, and his current Dade County jail records. (T. 2687).

Dr. Mutter concluded that the statutory mitigating circumstance of extreme mental or emotional disturbance was not applicable to this case. (T. 2688). He found no evidence in the record that Defendant had ever been psychotic, that he was under the influence of acute drug intoxication, that he had been out of touch with reality, or that he had flashed back to some traumatic experience. (T. 2689).

The Longs had taught Defendant right from wrong and how to live as an adult. Defendant knew right from wrong. Dr. Mutter's examination of Defendant and of his records indicated that without question. Defendant made a choice. (T. 2690). Dr. Mutter was of the opinion that Defendant's history of trouble with the law from age twenty on was to get money for drugs. He did not believe that was an extreme mental or emotional disturbance; it was a choice. (T. 2691). Dr. Mutter rejected the excuse that Defendant used drugs because he was emotionally

abandoned as a child. There was also no evidence that Defendant was under the influence of alcohol or drugs when he murdered the Nestors. Defendant himself denied that he was. (T. 2692).

Dr. Mutter concluded that Defendant had an antisocial personality, which is not considered a major mental disorder. In Dr. Mutter's opinion, it did not rise to the level of a mitigating circumstance in this case. Defendant knew what he was supposed to do, but did not care. (T. 2698). Defendant knew what the rules were but made different choices. (T. 2699).

Dr. Mutter based his diagnosis on the prevalence of Defendant's symptoms. He had a behavior pattern of being in conflict with society and the law; he could be impulsive; he showed little remorse; he had very little loyalty; and he had very minimal conscience. (T. 2697). Defendant did display some symptoms of borderline personality disorder. However, he did not believe Defendant suffered from that disorder. Borderline types usually keep within the boundaries of the law. The disorder affects their moods and interpersonal relationships, not their ability to conform to the law.

Defendant began to be antisocial when he was around twelve. That that was a choice was demonstrated by Defendant's earlier record which showed he did fairly well in school. Defendant thereafter made the same errors over and over again because he

was more concerned with what he thought was good for himself than in learning from his mistakes. (T. 2702). Usually people behave this way because they think they can get away with it; they think they can beat the system.

Dr. Mutter further testified that any early influences in Defendant's life did not rise to a circumstance in mitigation of what he did when he was 29 years old. (T. 2708). Dr. Mutter did not see any evidence that Defendant had ever changed his behavior since the crime.

At a second jury instruction conference, the defense raised its objection to the wording of the instruction on the statutory mitigating circumstance of extreme mental or emotional disturbance, specifically to the inclusion of the term "extreme". (T. 2712).

The aggravating instructions were then discussed. The court indicated that it would give the instructions for the aggravating factors of under sentence of imprisonment; previous conviction of another felony involving the use of violence; felony murder; and pecuniary gain. The defense objected to the giving of any of those factors because they had not been established by the evidence. The defense also objected that the use of the aggravators either individually or collectively[3] "would violate

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[3] The term appears as "correctively" in the transcript.

rights guaranteed to the Defendant under the 5th, 6th, 8th and 14th amendments to the United States Constitution and article 1 sections 2, 9, 16 and 17 of the Florida Constitution." (T. 2719). It further argued that the wording of the instructions was so vague and confusing as to not give the jury or the court sufficient guidance. (T. 2720). The defense raised no other objection to the instructions on the aggravating factors. Nor did it proffer any alternative instruction.

The defense made no mention of fetal alcohol syndrome in its argument to the jury. (T. 2755-2765). The defense did not specifically present argument about any factor in mitigation or aggravation except that Defendant suffered from borderline personality disorder, and that Dr. Toomer had testified that Defendant had been unable to overcome the deprivation of his early life. (T. 2760, 2764).

After deliberation, the jury recommended by a 10-2 vote that Defendant receive the death penalty for the murder of Matilda Nestor. (R. 353, T. 2774). The jury unanimously recommended a sentence of death for the murder of Jacob Nestor. (R. 354, T. 2774).

C. PENALTY PHASE PROCEEDINGS BEFORE THE COURT

A sentencing hearing before the court was held on February 22, 1993, for the purpose of presenting further mitigating evidence to the court and to allow the defense to present further evidence regarding Defendant's competency. (T. 2782).

Dr. Hyman Eisenstein, PhD, a neuropsychologist, was called by the defense and testified primarily on the issue of Defendant's competency. (T. 2793-2815). He had no opinion as to the existence of any mitigating circumstances, and was unable to say whether any of the neurological deficits he diagnosed predated the gunshot wound which Defendant received during the commission of the murders. (T. 2820).

The defense also called Laura Long, Defendant's aunt, who testified that she raised Defendant after he came to live with her when he was two years old. He lived with her until he was fourteen or fifteen. (T. 2835). As a baby, Defendant was very nice. He did very well in school. Long was a teacher and was able to help him and the other children with their lessons. Defendant did not have any problems with his lessons or behavior in elementary school. (T. 2836). The teacher said Defendant behaved very well; he was an ideal student. She took Defendant to church when he was young. He liked to go with the kids and they liked him. (T. 2837).

Defendant was between twelve and fourteen when he ran away. Before that, Defendant and his best friend began to get into trouble. Defendant told her his friend got him into trouble. She did not know why. (T. 2839). After Defendant went to New York around the age of fifteen, Defendant never lived with Long again, although she asked him to come back. (T. 2840). She loved him very much. The first time Defendant came home on drugs, she was very upset. (T. 2842). She asked him why he was doing drugs, and he told her that most of the kids were doing it. He did it because of peer pressure from his friends. (T. 2842).

The State did not call any witnesses, and no argument of counsel was presented to the court. On February 25, 1993, the State filed a sentencing memorandum, urging the court to impose the death sentence for each murder. (R. 456-465). The State also filed a supplementary sentencing memorandum and motion to depart from the sentencing guidelines on the armed robbery convictions, based upon the two unscorable capital convictions. (R. 454-455). No memoranda were filed by the defense.

Defendant was sentenced at a hearing on March 1, 1993. (T. 2848). The court again ruled that Defendant was competent. (T. 2850). The court then sentenced Defendant to death on each murder count and to life imprisonment for each robbery count, all sentences to run consecutive. (R. 325-327, T. 2859-2871).

The court found three aggravating circumstances were established with regard to each murder: that Defendant was under a sentence of imprisonment at the time of the murders; that Defendant was convicted of a prior violent felony; and that the murders were committed for pecuniary gain, which the court considered as a single factor merged with the commission of the murders during the course of a robbery. The court found no mitigating circumstances. In the sentencing order, the court specifically rejected the only statutory mitigating circumstance argued by the defense, that Defendant was under extreme mental or emotional disturbance at the time he killed the Nestors:

> The State rebutted the testimony of Dr. Toomer with the testimony of Dr. Charles Mutter. Although Dr. Mutter did not discard the possibility that the defendant may suffer from a borderline personality disorder he opined that this had nothing to do with the crimes the defendant has committed. Dr. Mutter disagrees with the conclusion that the defendant was under the influence of extreme mental or emotional disturbance at the time he committed these offenses. He persuasively argues that, like other people, the defendant was fully capable of making choices in his life and his criminal record speaks clearly to the choices that he has made.
>
> Dr. Eisenstein has no opinion as to the defendant's state of mind on the day of the offense.
>
> Although the defendant does not have to prove the existence of mitigating circumstances beyond a reasonable doubt this court cannot accept the suggestion of Dr. Toomer that the defendant was under the influence of extreme mental or emotional disturbance at the time of the offense. This court is persuaded by the well reasoned opinions of Dr. Mutter in this regard. Thus the court does not find that this "statutory" mitigating circumstance exists.

(R. 471-473). The court also found that the defense had failed to establish any lesser degree of emotional disturbance as a nonstatutory mitigating circumstance:

> The court further analyzed the testimony of Drs. Toomer and Eisenstein in determining whether some lesser level of mental or emotional disturbance had been established. The court however does not feel that the defendant's psychological testimony rises even to the level of a non-statutory mitigator. Accordingly this entire mitigating circumstance is rejected.

(R. 473). The court also rejected two other nonstatutory mitigators presented by the defense:

> The defense also presented, as a non-statutory mitigating circumstance, the fact that the defendant was an abandoned child who was raised by relatives. The court rejects this argument. The evidence is clear that the defendant's mother abandoned the defendant in large part due to her own problems with narcotics. She delivered him into the infinitely superior environment of the Long household. Mr. Long was a minister and the defendant was raised in a decent, law abiding and God fearing home. The Long's [sic] took him in and cared for him as if he was one of their own. During his childhood Mrs. Long testified, the defendant did well in school and was a good child. This childhood scenario can hardly be considered a mitigating circumstance.
>
> The defense suggests that the defendant's drug use during his teen years should serve to mitigate his sentence in this case. The court rejects this argument as well. The defendant's drug use is, at best, vague. There is no evidence other than Mrs. Long's rendition of a police officer's opinion on a given day in the defendant's life that the defendant ever ingested drugs at all. There

> is absolutely no evidence that the defendant was under the influence of drugs or alcohol on the date that these crimes were committed. The court therefor [sic] does not accept this as a statutory or a non-statutory mitigating circumstance.

(R. 473). Although not raised by the defense, the court also considered and rejected the remaining statutory mitigators. (R. 474-475).

This appeal followed.

POINTS ON APPEAL

(GUILT PHASE)

WHETHER THE MOTION FOR JUDGMENT OF ACQUITTAL AS TO THE TWO COUNTS OF ARMED ROBBERY WAS PROPERLY DENIED WHERE THE EVIDENCE CLEARLY DEMONSTRATED THAT DEFENDANT TOOK THE PROPERTY OF MR. AND MRS. NESTOR BY THE USE OF FORCE OR VIOLENCE? (RESTATED)

(PENALTY PHASE)

I.

WHETHER THE TRIAL COURT DID NOT ERR IN NOT INSTRUCTING THE JURY TO MERGE THE PECUNIARY GAIN AND ROBBERY AGGRAVATING FACTORS WHERE NO SUCH INSTRUCTION WAS PROFFERED BY THE DEFENSE AND WHERE THE TRIAL COURT SPECIFICALLY CONSIDERED ROBBERY AND PECUNIARY GAIN AS ONE FACTOR IN AGGRAVATION? (RESTATED)

II.

WHETHER THE TRIAL COURT PROPERLY DENIED DEFENDANT'S REQUEST TO DELETE THE TERM "EXTREME" FROM ITS INSTRUCTION ON THE STATUTORY MITIGATING CIRCUMSTANCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE? (RESTATED)

III.

WHETHER THE COURT DID NOT ERR IN FAILING TO CONSIDER FETAL ALCOHOL SYNDROME AS A MITIGATING CIRCUMSTANCE WHERE THERE WAS NO EVIDENCE PRESENTED, NOR ARGUMENT MADE, THAT DEFENDANT SUFFERED FROM THE SYNDROME; NOR DID THE TRIAL COURT ERR IN REJECTING THE "ABANDONMENT" OF DEFENDANT BY HIS MOTHER WHERE THERE WAS SUBSTANTIAL COMPETENT EVIDENCE THAT NEITHER DEFENDANT'S PRIOR HISTORY OF CRIME NOR THE MURDERS OF THE NESTORS WERE THE PRODUCT OF THAT ABANDONMENT? (RESTATED)

IV.

WHETHER THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION FOR MISTRIAL BASED UPON THE STATE'S ALLEGEDLY IMPROPER COMMENTS DURING THE PENALTY-PHASE CLOSING ARGUMENT? (RESTATED)

SUMMARY OF ARGUMENT

(Guilt Phase)

Defendant argues that his convictions for robbery of the Nestors must be reduced to theft because there was no evidence that the Nestors were put in fear. However, robbery may be proved by showing violence in the taking or by putting in fear. Here, where Jack and Dolly Nestor were killed in the course of the taking, violence was abundantly proved. Likewise, Defendant's contention that the alleged infirmity of the of the robbery convictions requires a new sentencing hearing because the court found, as an aggravating factor, that the murders were committed in the course of a robbery, is also without merit. Defendant concedes that he was guilty of at least theft, which supports the pecuniary gain aggravator. The trial court merged the pecuniary gain and robbery aggravators, and considered them as one circumstance. Thus even assuming arguendo that the robbery convictions should be reduced to theft, the aggravating factor remains. Defendant is not entitled to either lesser convictions or to a new sentencing proceeding.

(Penalty Phase)

1. Defendant contends that his sentence of death must be overturned because the jury was not given a merger instruction regarding the "pecuniary gain" and "in the course of a robbery" aggravating circumstances. However, where, as here, the defense did not specifically request a merger instruction and where the trial court merged the factors at sentencing, no reversible error exists. This contention is procedurally barred and without merit.

2. Defendant next contends that the trial court erred in refusing to delete the term "extreme" from the standard jury instruction on the statutory mitigating factor of extreme mental or emotional disturbance. The trial court gave the standard instruction on nonstatutory mitigation and additionally gave an instruction requested by the defense which further defined mitigating circumstances. Under this precise scenario, both this court and the U.S. Supreme Court have rejected Defendant's contentions. They are without merit.

3. Defendant's third contention is that the trial court erred in not considering fetal alcohol syndrome as a mitigating circumstance. However this contention is entirely without merit as the syndrome was never mentioned at all below. Further, the court properly found no mitigation where the evidence proffered

by the defense in mitigation was thoroughly rebutted by the State.

4. Defendant's final contention is that the trial court erred in failing to grant a mistrial based upon allegedly improper comments made by the prosecutor during the penalty phase closing argument. However, Defendant has not shown that the court abused its discretion, and his contentions should be rejected. The State would submit that contrary to Defendant's contentions, none of the cited comments were improper, but rather were fair comment on the evidence. The State would further note that three of the comments were not preserved for appellate review, and finally, that any purported impropriety was harmless beyond a reasonable doubt in view of the evidence presented.

Defendant's convictions and sentences should be affirmed.

ARGUMENT
(GUILT PHASE)

THE MOTION FOR JUDGMENT OF ACQUITTAL AS TO THE TWO COUNTS OF ARMED ROBBERY WAS PROPERLY DENIED WHERE THE EVIDENCE CLEARLY DEMONSTRATED THAT DEFENDANT TOOK THE PROPERTY OF MR. AND MRS. NESTOR BY THE USE OF FORCE OR VIOLENCE. (RESTATED)

Defendant contends that his motion for judgment of acquittal as to the robberies of Jack and Dolly Nestor should have been granted. He argues that his taking of their property was a mere "posthumous theft". (B. 29). Defendant bases this contention on the assertion that the victim's perception is one of the elements of robbery. However, in the context of a robbery by force or violence, as opposed to a robbery by assault or putting in fear, this contention is without legal support. Equally without merit is Defendant's contention that the alleged infirmity of his robbery convictions entitles him to a new capital penalty phase proceeding.

Robbery is distinguished from theft by the additional elements of force, violence, assault, or putting in fear. These elements are in the disjunctive, and the presence of any one of them, when coupled with the taking, will constitute a robbery. McCloud v. State, 335 So. 2d 257 (Fla. 1976); § 812.13(1), Fla. Stat. (1989).

Defendant first argues that because he stabbed Dolly in the back, the alleged "victim awareness" element of robbery was not proved, entitling him to a conviction for petit theft. He cites a number of cases he contends support that position.[1] An examination of the cases he cites reveals that they are inapplicable to the facts presented here.

In S.W., as Defendant notes, the issue was whether the gentle unclasping of a bracelet from a child during a game of patty-cake was sufficient to constitute robbery where the child was not put in fear. The court held it was not. It further held that the slight force necessary to physically remove the property, without more, did not satisfy the element of "force" as contemplated in the robbery statute:

> The child was never hit, pushed or physically harmed during this encounter.

Id., at 1090. Because the state had not proved either "force" or "putting in fear", S.W.'s conviction was reduced to theft.[2]

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1 R.P. v. State, 478 So. 2d 1106 (Fla. 3d DCA 1985); S.W. v. State, 513 So. 2d 1088 (Fla. 3d DCA 1987); Walker v. State, 546 So. 2d 1165 (Fla. 3d DCA 1989); Harris v. State, 589 So. 2d 1006 (Fla. 4th DCA 1991).

2 R.P. similarly held that where there was no force beyond that necessary to remove the item, and no putting in fear, no robbery occurred.

However, S.W. can not seriously be read to suggest that Defendant was entitled to a judgment of acquittal in the case at bar. The Nestors were clearly "physically harmed". Defendant entered the offices of Nestor Engineering as an employee. Once there, he sank a knife four inches into Dolly's back, and stabbed Jack through the heart. He then rolled Jack's dead body over to take his wallet and ransacked Dolly's purse and took her wallet as well. Surely Defendant does not suggest that the force used here was no more than was necessary to "physically remove the property". Id., at 1090, 1091 (where some additional force is used, the "force or violence" aspect of robbery is satisfied).

Defendant also asserts that there could be no robbery because the victim must be aware that the theft is taking place, and must offer some resistance to the taking.[3] Again, this contention ignores the fact that this is a "violence" or "force" case, not a "putting in fear" case. See, Harris (force used in committing sexual battery unrelated to subsequent taking; where victim not aware of taking there could not have been taking by putting in fear); and Walker (neither force comparable to that in S.W., nor fear arising from "bad neighborhood", as opposed to Walker's actions, supported robbery conviction). These cases simply hold that the victim must be aware of the threat to

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[3] He cites S.W., Walker, and Harris for this contention.

satisfy the "putting in fear" element. They cannot be read to impute such a requirement to the "force" element.

Defendant further contends that although there are many cases involving a robbery and a murder together, such "cases are factually very different" from this case. (B. 31). By way of example, he cites only Taylor v. State, 557 So. 2d 138 (Fla. 1st DCA 1990), for the proposition that the victim must have actively opposed the taking before he or she was killed in order for the crime to constitute a robbery. (B. 31) Such is not the holding of Taylor, wherein the only issue with regard to the defendant's robbery conviction was whether the victim or Taylor was the owner of the money which Taylor took.

On the contrary, the proposition which Defendant argues directly conflicts with the plain language of the statute, which provides:

> (1) "Robbery" means the taking of money or other property . . . when in the course of the taking there is the use of force [or] violence . . .
>
> * * *
>
> (3)
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> * * *
>
> (b) An act shall be deemed "in the course of taking" if it occurs either prior to, contemporaneous with, or subsequent to the taking of the property and if it and the act of taking constitute a contemporaneous series of acts or events.

Section 812.13, Fla. Stat. (1989)(emphasis supplied). Thus, so long as the violence or force is part of the same transaction as the taking, a robbery has occurred. Nothing in the statute requires that the victim be aware of the reason for an actual act of violence which precedes a taking. As the court in S.W. noted, the essence of robbery is a taking combined with a crime of violence against a person. Thus, victim awareness is only a factor in the case of potential violence -- assault or putting in fear -- for the simple reason that the victim cannot said to have suffered an assault or been put into fear unless he or she was aware of the threat. As the dead body of Dolly Nestor eloquently testifies, however, the suffering of actual violence requires no advance warning. Walker.

This court upheld a robbery conviction under circumstances quite similar to those presented here in Bruno v. State[4]. In that case Bruno was at the victim's house, drinking beer. Bruno got up and went to the bathroom. On return he proceeded to bludgeon the victim with a crowbar and then placed a pillow over his head and shot him twice. He left the apartment, subsequently returned, and "posthumously" took the victim's stereo and VCR. Bruno had indicated to witnesses that he killed the victim to get the stereo, but there was no indication that the victim was aware he was being beaten and shot because Bruno coveted his electronic

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[4] 574 So. 2d 76 (Fla. 1991).

equipment. See also, Perri v. State, 441 So. 2d 606 (Fla. 1983)(murder and robbery convictions upheld where defendant and accomplice beat and killed elderly victim while he was asleep in bed); Mitchell v. State, 407 So. 2d 343 (Fla. 4th DCA 1981)(attempted murder and robbery convictions upheld where defendant struck victim from behind, rendering him unconscious, and victim was never aware of defendant's presence).

Likewise, here, whether or not Jack and Dolly were aware of why their employee was stabbing them is simply irrelevant. The "act" here, i.e., the stabbing of Dolly and Jack, took place prior to the taking. Further, the murders and the taking were part of the same series of acts or events. The Nestors were killed sometime between 11:21 a.m., when the call was placed to Padgett Industries and around noon when Izquierdo and Sorondo called the police. At no point during that 40 minute period did Defendant leave the premises. Finally, he himself stated to Nurse Crum that he killed them to obtain the money. There is absolutely no evidence in the record that the Nestors were killed for any reason other than so Defendant could take their money. As such he is guilty of robbery.

Defendant also briefly suggests, without any authority, that Dolly was not robbed because the property Defendant took from her was "not taken from her person or from her immediate custody or control." (B. 31, n. 2) The statutory language does not contemplate actual physical possession:

> If it [the property] is away from the owner, yet under his control, for instance in another room of the house, or in another building on his property, it is nevertheless in his personal possession; and if he is deprived thereof, it may well be said it is taken from his person.

Wood v. State, 98 Fla. 703, 124 So. 44, 46 (1929). Under § 812.13, Fla. Stat., property which is the subject of a robbery need not be in "immediate custody or control;" it need only be property which may be the subject of larceny from the person or custody of another. Defendant was apprehended lying on the couch in the very room where Dolly worked on a daily basis, inside the Nestor's locked building. He had her wallet in his back pocket and her ransacked purse was on the couch next to him. She did not surrender her possession or custody of these items by going to the rear of the same building to use the restroom. The evidence thus supports the finding that Defendant took the property from her person or custody. Defendant's robbery convictions should be affirmed.

Finally, Defendant's contention that he is entitled to a new sentencing proceeding due to the alleged infirmity of his robbery convictions is also without merit. As discussed below, with regard to the penalty phase issues, the trial court properly found the existence of three aggravating and no mitigating circumstances. The robbery factor was merged by the trial court with the pecuniary gain factor.

Defendant does not dispute that the murders were committed for pecuniary gain or that he was at the very least guilty of the theft of the wallets, money and other possessions of Dolly and Jack Nestor. Thus the pecuniary gain factor would remain even if his robbery convictions were reduced to theft. Therefore, even if Defendant were entitled to have his robbery convictions reduced to theft, his sentences of death for the murders of Jack and Dolly Nestor should be affirmed.

ARGUMENT
(PENALTY PHASE)

I.

THE TRIAL COURT DID NOT ERR IN NOT INSTRUCTING THE JURY TO MERGE THE PECUNIARY GAIN AND ROBBERY AGGRAVATING FACTORS WHERE NO SUCH INSTRUCTION WAS PROFFERED BY THE DEFENSE AND WHERE THE TRIAL COURT SPECIFICALLY CONSIDERED ROBBERY AND PECUNIARY GAIN AS ONE FACTOR IN AGGRAVATION. (RESTATED)

Defendant's first contention is that the trial court erred in failing to instruct the jury that it could not consider the fact that the murders were committed in the course of a robbery and the fact that they were committed for pecuniary gain as separate aggravating factors. This argument is without merit.

Contrary to Defendant's contention, the instruction of the jury on both factors was not improper.[5] The jury is free to consider either factor. Castro v. State, 597 So. 2d 259, 261 (Fla. 1992)("When applicable, the jury may be instructed on 'doubled' aggravating circumstances since it may find one but not the other to exist"). However, Defendant was entitled to a "merger" instruction only if he requested one. Id.

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[5] The court considered these as a single factor:

> The court recognizes however that [the pecuniary gain] aggravator merges with the [robbery] aggravator listed in number three above and consequently these two aggravators are considered as one for purposes of the weighing process required by F.S. 921.141.

(R. 469, 470).

The State would note that Defendant made no such request and has thus waived the issue. At the charge conference, Defendant submitted more than 31 proposed penalty phase instructions. Not one of them dealt with the merger of the robbery and pecuniary gain factors. Nor did he raise any objection when the jury was charged. Both steps were necessary to preserve the issue:

> [T]he settled rule in Florida procedure is that, in order to preserve an objection to a jury instruction, a party must object after the trial judge has instructed the jury. While the rule is subject to a limited exception for an advance request for a specific jury instruction that is explicitly denied, Sochor gets no benefit from this exception, because he never asked for a specific instruction.

Sochor v. Florida, 504 U.S. ___, 112 S. Ct. ___, 119 L. Ed. 2d 326, 338, n. * (1992)(citations omitted); see also, Castro, at 261 (defendant must request limiting instruction to preserve doubling issue). Defendant has thus not preserved the issue for review.

Furthermore, Defendant's unexplained suggestion that the decision in Espinosa v. Florida[6] somehow alters these principles is without merit. Espinosa does not obviate the necessity of contemporaneous objection to preserve jury instruction issues,

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[6] ___ U.S. ___, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992).

even if they are of constitutional magnitude. See, Turner v. Dugger,[7] where this court held:

> Finally we note that although the jury was given an instruction on the aggravating factor of heinous, atrocious, or cruel similar to that which was recently ruled unconstitutionally vague by the United States Supreme Court in *Espinosa v. Florida,* 112 S. Ct. 2926 (1992), Turner *failed to object on constitutional or vagueness grounds and thus deprived the trial court of an opportunity to rule on the issue. Turner thus waived the claim.*

Id., at 1081 (emphasis supplied). See also, Espinosa v. State, 18 Fla. L. Weekly S470 (Sept. 2, 1993)(seeking through motion in limine to prevent jury from considering HAC factor did not preserve Espinosa's claim, where he never attacked the instruction itself by submitting a limiting instruction or objecting to the instruction as worded); Sochor (claim as to constitutionality of jury instruction waived under Florida law where no contemporaneous objection interposed).

Thus Defendant has clearly waived any claim as to the lack of a merger instruction under both Castro and Espinosa. His first contention must be rejected.

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[7] 614 So. 2d 1075 (Fla. 1992).

II.

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S REQUEST TO DELETE THE TERM "EXTREME" FROM ITS INSTRUCTION ON THE STATUTORY MITIGATING CIRCUMSTANCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE. (RESTATED)

As his second penalty-phase claim, Defendant argues that the trial court erred in refusing to delete the word "extreme" from the standard jury instruction on the statutory mitigating circumstance of extreme mental or emotional disturbance. This contention has been specifically rejected by this court, and is without merit.

The State would note that in addition to the standard instruction on nonstatutory mitigation,[8] the court also gave Defendant's requested "Rogers" instruction.[9] In Stewart v. State,[10] this court held that the defendant's request to omit the word "extreme" from the standard instruction was properly denied by the trial court. Id., at 420. Likewise in Jones v. State,[11] this court held that where the evidence was insufficient to support a charge on the statutory mitigator of extreme mental or

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8 "Any other aspect of Defendant's character or record, and any other circumstance of the offense." (R. 447, T. 2768).

9 See, Rogers v. State, 511 So. 2d 526, 534 (Fla. 1987). The instruction read: "Mitigating circumstances are factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed." (R. 445, T. 2768).

10 558 So. 2d 416 (Fla. 1989).

11 612 So. 2d 1370 (Fla. 1992).

emotional disturbance, the standard general jury instruction on nonstatutory mitigation was sufficient. Id., at 1375.

Defendant's contention is based upon the assertion that the standard instruction "deprived the jury of the Cheshire analysis," and held him to a higher standard of proof.[12] (B. 36-37). The contention that so-called catch-all instructions such as those given here are insufficient because they do not apprise the sentencing jury that it may consider non-enumerated mitigating circumstances was specifically rejected by the U.S. Supreme Court in Boyde v. California, 494 U.S. 370, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990). The contention has been likewise rejected by this court:

> The instruction is not ambiguous, and we find no reasonable likelihood that the jurors understood the instruction to prevent them from considering and weighing any "constitutionally relevant evidence."

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[12] Cheshire v. State, 568 So. 2d 908 (Fla. 1990), held that the trial court's refusal to consider less-than-extreme mental or emotion disturbance as a possible non-statutory mitigating circumstance was error. The trial court here explicitly considered Defendant's arguments in this regard, but found the evidence insufficient to support the mitigating circumstance. (R. 471-473).

While Defendant's brief argues that the jury instruction erroneously included the word extreme, (B. 36-37), Defendant's heading to this argument asserts that the court erroneously rejected Defendant's mental or emotional disturbance as a mitigating factor. The lower court's reasons for rejecting this as a nonstatutory mitigating factor were clearly sufficient. See, Brief of Appellee, pp. 49-58, infra.

Robinson v. State, 547 So. 2d 108, 111 (Fla. 1991)(quoting Boyde, 110 S. Ct., at 1198). Defendant's contention is without merit and must be rejected.

III.

THE COURT DID NOT ERR IN FAILING TO CONSIDER FETAL ALCOHOL SYNDROME AS A MITIGATING CIRCUMSTANCE WHERE THERE WAS NO EVIDENCE PRESENTED, NOR ARGUMENT MADE, THAT DEFENDANT SUFFERED FROM THE SYNDROME; NOR DID THE TRIAL COURT ERR IN REJECTING THE "ABANDONMENT" OF DEFENDANT BY HIS MOTHER WHERE THERE WAS SUBSTANTIAL COMPETENT EVIDENCE THAT NEITHER DEFENDANT'S PRIOR HISTORY OF CRIME NOR THE MURDERS OF THE NESTORS WERE THE PRODUCT OF THAT ABANDONMENT. (RESTATED)

Defendant argues that since no one -- neither his counsel nor the experts -- brought fetal alcohol syndrome to the court's attention, he should receive a new sentencing hearing. As this claim has never been presented to the lower court it can not be presented for the first time on appeal. White v. State, 446 So. 2d 1031 (Fla. 1984); Williams v. State, 414 So. 2d 509 (Fla. 1982).

Defendant's current appellate counsel has not furnished this court with any affidavits from any experts who will say that this defendant suffered from the syndrome or what the effect of the sydrome was on this defendant. The only thing presented by current appellate counsel is an attorney's interpretation of medical treatises. Whatever alcohol problems Defendant's mother may have had, the record does not reflect that they existed

during pregnancy or birth. Under such circumstances there was no basis for the lower court to even consider such testimony.[13]

Yet, Defendant contends that the trial court erred in failing to consider Fetal Alcohol Syndrome or Fetal Alcohol Effect (FAS/FAE) as a mitigating circumstance. In view of the fact that there was no testimony that Defendant suffered from FAS/FAE, and that there was no argument regarding FAS/FAE to the trial court, this contention is without merit. Defendant further contends that the trial court erroneously "refused" to consider abandonment by his mother as a mitigating circumstance. This contention is also without merit.

With regard to the FAS/FAE argument, as noted above, this alleged mitigating circumstance makes its first appearance in Defendant's brief. At trial there was absolutely no testimony by expert opinion, or otherwise, that Defendant suffered from FAS or FAE. Nor was there any argument by counsel on the subject. The trial court did not err in failing to find a mitigating circumstance which was not proffered to it, as this court held in Hodges v. State:[14]

> [D]efendants share the burden of identifying nonstatutory mitigators, and we will not

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[13] This is embellished upon in the ensuing discussion.

[14] 595 So. 2d 929 (Fla. 1992).

fault the trial court for not guessing which mitigators Hodges would argue on appeal.

Id., at 935.[15] See, also, Muhammad v. State, 494 So. 2d 969, 976 (Fla.), cert. denied, 479 U.S. 1101, 107 S. Ct. 1332, 94 L. Ed. 2d 183 (1986)("trial court is not obliged to infer a mitigating circumstance" where the defendant did not argue its existence and presented no evidence in support of its existence).

The State would note that much of the "evidence" which is cited in support of the contention that Defendant suffered from FAS/FAE is not of record. Contrary to Defendant's contentions, there were not "repeated references" to Defendant's mother's alcoholism. The primary evidence of drug or alcohol problems cited by Defendant was related, third hand, by Dr. Toomer, who referred only to her "difficulty with alcohol and drugs." (T. 2600). There was no evidence regarding the cause of her death, which according to Defendant's appendix, occurred when Defendant was well into his twenties. There was no evidence as to whether her alleged substance abuse problems commenced before, during, or after her pregnancy with Defendant. Most critically, there was absolutely no expert opinion on, or even mention of, the subject of FAS/FAE by any witness at trial. Without conceding the accuracy or relevance of the treatise on FAS/FAE presented in

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[15] Note that the trial court considered, and rejected as unsupported by the evidence, the statutory mitigators which Defendant did not assert.

Defendant's brief, the State would submit that Defendant's argument is simply without evidentiary support.

Defendant goes on to argue that the evidence supported not only the conclusion that Defendant exhibited many of the FAS/FAE factors, but also the statutory mitigating factor of extreme mental or emotional distress. (B. 45). However, "deciding whether such family history establishes mitigating circumstances is within the trial court's discretion." Sochor v. State, 619 So. 2d 285, 293 (Fla. 1993).

Here the trial court had ample basis, not only from the rebuttal testimony of Dr. Mutter, but from the testimony of Dr. Toomer as well, to conclude that Defendant was not under the influence of extreme mental or emotional distress at the time he murdered Jack and Dollie Nestor.[16]

Defense expert Dr. Toomer opined that as a result of Defendant's "abandonment" by his mother, Defendant suffered from borderline personality disorder, and accordingly was foredoomed to a life of crime over which he had no control. Yet Dr. Toomer himself qualified this opinion, stating that the effects of early abandonment can be overcome where someone, such as a relative,

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[16] Note that while Dr. Toomer testifed that he has never testified against a Defendant in a capital penalty-phase proceeding, Dr. Mutter had in the past testified on behalf of capital defendants in favor of finding circumstances in mitigation. (T. 2631, 2634, 2682-2683).

takes the child "under his or her wing." (T. 2609). Both Dr. Toomer and Mrs. Long, Defendant's aunt, testified that while a pre-schooler, Defendant was delivered into the care of the Longs, where he was brought up in a loving, middle class environment. Mrs. Long testified that until he reached his early teen years, Defendant was model student and a good child, and she loved him very much. At that point she testified that he succumbed to peer pressure and began to use drugs and get into trouble. Thereafter, however, the evidence showed that from the time he was fifteen until he was twenty, he was able to work for a living and did not engage in criminal acts.

Thus despite Dr. Toomer's dire prognostications, Defendant's history showed that both during his early life, and during his late adolescence, Defendant was able to conform his conduct to the law. The court further had the benefit of the unequivocal opinions of Dr. Mutter. Dr. Mutter, who, unlike Dr. Toomer, had examined the facts of this case and the facts surrounding Defendant's earlier criminal episodes, concluded that Defendant was simply antisocial. Dr. Mutter noted that Defendant did not fit the profile of the borderline personality type. Such persons usually have trouble in interpersonal relationships, but do not as a rule have difficulty conforming to the requirements of the law.

Although Dr. Toomer opined that Defendant did not have antisocial personality disorder, his own testing belied his opinion. In tests administered by Dr. Toomer, Defendant scored in the 90th percentile of the prison population for antisocial tendencies. Defendant had further indicated to Dr. Toomer that he was not troubled by his past criminal acts or did not think of them at all.

Dr. Mutter testified that his opinion that Defendant was antisocial was supported, in addition to Dr. Toomer's test results, by Defendant's behavior pattern of being in conflict with society and the law, by the fact that he showed very little remorse, by the fact that he had little loyalty and by the fact that he had very little conscience.

Finally, since he was unfamiliar both with the circumstances of the crime itself, and with Defendant's actions from the time of his conditional release on November 30, 1990 until he murdered the Nestors on December 19, 1990, Dr. Toomer's opinion that Defendant was under the influence of extreme mental or emotional disturbance was based upon his conclusion that Defendant had been so disturbed his entire life. There was, however, an absence of evidence that Defendant actually was disturbed at the time he committed the crimes. To the contrary, by all accounts, Defendant was extremely calm when he was arrested at the scene. He himself stated that he was not under

the influence of alcohol or drugs at the time. Dr. Mutter thus rejected Dr. Toomer's hypothesis, concluding that none of the circumstances of Defendant's early life had any bearing on murders committed when Defendant was 29 years old.[17]

The court carefully weighed the evidence presented to it, and found Dr. Mutter more persuasive than Dr. Toomer:

> Dr. Mutter disagrees with the conclusion that the defendant was under the influence of extreme mental or emotional disturbance at the time he committed these offenses. He persuasively argues that, like other people, the defendant was fully capable of making choices in his life and his criminal record speaks clearly to the choices that he has made.
>
> * * *
>
> Although the defendant does not have to prove the existence of mitigating circumstances beyond a reasonable doubt this court cannot accept the suggestion of Dr. Toomer that the defendant was under the influence of extreme mental or emotional disturbance at the time of the offense. This court is persuaded by the well reasoned opinions of Dr. Mutter in this regard. Thus the court does not find that this "statutory" mitigating circumstance exists.

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[17] Defendant refers in his brief to support for his position from the testimony of the doctors (Dr. Toomer and Dr. Eisenstein) at the competency hearing. (B. 45). Dr. Toomer is addressed herein. Dr. Eisenstein testified that he had no opinion as to any mitigating factor, and that he was unable to comment on Defendant's condition or actions prior to receiving the gunshot wound. (T. 2819-2820). That wound was of course inflicted by Jack Nestor in self-defense during the course of the murders.

> The court further analyzed the testimony of Drs. Toomer and Eisenstein in determining whether some lesser level of mental or emotional disturbance had been established. The court however does not feel that the defendant's psychological testimony rises even to the level of a non-statutory mitigator. Accordingly this entire mitigating circumstance is rejected.
>
> The defense also presented, as a non-statutory mitigating circumstance, the fact that the defendant was an abandoned child who was raised by relatives. The court rejects this argument. The evidence is clear that the defendant's mother abandoned the defendant in large part due to her own problems with narcotics. She delivered him into the infinitely superior environment of the Long household. Mr. Long was a minister and the defendant was raised in a decent, law abiding and God fearing home. The Long's [sic] took him in and cared for him as if he was one of their own. During his childhood Mrs. Long testified, the defendant did well in school and was a good child. This childhood scenario can hardly be considered a mitigating circumstance.

(R. 471-473)

Under the circumstances, the trial court properly found no mitigation. Patten v. State, 598 So. 2d 60, 63 (Fla. 1992)("rejection [of mitigation] is supported by the evidence, including . . . testimony that the defendant is simply antisocial"); Pettit v. State, 591 So. 2d 618, 620 (Fla. 1992)(defendant contended "that the trial judge failed to consider nonstatutory mitigation. The sentencing order itself [did] not mention the word "nonstatutory". We conclude, however, that by his treatment of Pettit's physical condition and by allowing the testimony of the grandfather, the judge fully

understood the requirement of considering, and did consider nonstatutory mitigating evidence"); Valle v. State, 581 So. 2d 40, 48-49 (Fla. 1991)(trial court properly weighed and rejected evidence of dysfunctional family and abusive childhood as statutory and nonstatutory mitigating factors). Cf., Elledge v. State, 613 So. 2d 434 (1991)(error to reject mitigation evidence were it was uncontradicted). The trial court had ample evidence which contradicted his proffered mitigation evidence. Defendant's contentions must be rejected.

IV.

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION FOR MISTRIAL BASED UPON THE STATE'S ALLEGEDLY IMPROPER COMMENTS DURING THE PENALTY-PHASE CLOSING ARGUMENT. (RESTATED)

Defendant's final contention regarding the penalty phase proceeding is that the trial court should have granted a mistrial based upon the prosecutor's closing argument. He cites five specific comments, and further alleges that the cumulative effect of the comments required a mistrial even if none standing alone were sufficient to warrant a new sentencing proceeding.

A motion for mistrial is addressed to the sound discretion of the trial judge and the power to declare a mistrial and discharge the jury should be exercised with great care and should be done only in cases of absolute necessity. Ferguson v. State, 417 So. 2d 639, 641 (Fla. 1986) Defendant has not shown that the court abused its discretion, and his contentions should be rejected. The State would submit that contrary to Defendant's contentions, none of the cited comments were improper, but rather were fair comment on the evidence. The State would further note that three of the comments were not preserved for appellate review, and finally, that any purported impropriety was harmless beyond a reasonable doubt in view of the evidence presented.

Defendant first attacks the prosecutor's use of the word "assassination" to describe the murder of Dolly Nestor, contending that the use of the term "amounted to instructing the jury" on the cold, calculated, premeditated aggravator. (B. 52).

This contention has been waived by Defendant's failure to specify the grounds now argued as the basis for the objection below. A general objection is insufficent to apprise the trial court of any potential error or provide for meaningful appellate review. Ferguson, at 641; Castor v. State, 365 So. 2d 701 (Fla. 1978).

Furthermore, even had the issue been properly preserved, when the comment is taken in context, however, Defendant's contention is untenable. At the time the reference was made, the prosecutor was clearly discussing the mitigating circumstances:

> What can justify? What can explain what is in mitigation of an assassination of Dollie Nestor?

(T. 2741). The court properly overruled the objection, finding that "assassination" was a reasonable characterization of first degree murder.[18] (T. 2752). The court further found that the in any event the comment did not rise to any level of prejudice.

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[18] See, Webster's Third New International Dictionary, Unabridged 130 (1986): "Assassinate: . . . 1: to murder (a usu. prominent person) violently."

(T. 2752). The court did not err; this was an entirely proper and accurate comment on the evidence before the court, and in any event, the comment was not so inflammatory as to warrant a mistrial. Muehleman v. State, 503 So. 2d 310 (Fla.), cert. denied, 484 U.S. 882, 108 S. Ct. 39, 98 L. Ed. 2d 170 (1987)(reference to "feeble, sickly, 97-year-old man" not improper despite tendency to excite passion of jury, where it was an accurate statement of the facts); Burr v. State, 466 So. 2d 1051, 1054 (Fla.), cert. denied, 474 U.S. 879, 106 S. Ct. 201, 88 L. Ed. 2d (1985)(argument that defendant "executes" people, and that people are afraid properly ruled fair comment by trial court; statements in any event not so unduly inflammatory or prejudicial as to warrant mistrial).

Defendant next contends that the comment with reference to Gerald Ford and Clarence Thomas "departed wildly" from the evidence. (B. 53). Defendant has again taken the comment entirely out of context.

It must be recalled that Dr. Toomer, without any knowledge of the facts of this crime or Defendant's previous crimes, flatly opined that because Defendant was raised in a foster home, he was under extreme mental or emotional distress at the time of both the murders of the Nestors and the Debbie School incident. The prosecutor was merely pointing out the absurdity of Dr. Toomer's opinion, and urging the jurors to use their common sense, by

pointing to examples of people who were not raised by their birth parents who made the right choices,[19] and went on to live productive lives:

> Yet Dr. Toomer would have you believe that because he was raised by a minister that he is going to turn into a sociopathic killer and that's destiny. That that's going to happen.
>
> I mean, Let's use our common sense and decide and think about other people. Clarence Thomas, Supreme Court Justice, a black man raised in a foster home. Think about it. He made choices in his life. He made a choice to pursue an education. He made the choice to achieve and look what became of him.
>
> Gerald Ford, president of the United States, adopted, not raised by his natural parents, adopted. He made choices in his life. You folks can think yourselves of examples of people who have achieved in those situations.
>
> They made choices. He made different choices. He made choices of essentially to follow a life of crime, to hurt other people, ultimately to kill people. Those are not mitigating circumstances. [There was no objection to this portion of the argument.]
>
> * * *
>
> Is everybody raised in a foster home destined to be a killer? That is riduclous [sic].
>
> Use your common sense. We have talked about people, this doesn't make any, Gerald Ford, Clarence Thomas. It is an insult to those kinds of people who -- [A defense objection was sustained]

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[19] Dr. Mutter specifically testified that Defendant was not the victim of his childhood, but rather freely chose to follow the course in life which he had.

> To believe that that mitigating circumstance applies in this case flies in the face of the concepts of responsibility and choice, two words that I want you to always remember when you think about this case.

(T. 2734-2735, 2742-2743). Although the court sustained the objection, the State would submit that this argument, when taken in context was nothing more than an appeal to common sense in the face of the (explicitly rebutted) expert opinion of a defense witness which defied common sense. See, Mann v. State, 603 So. 2d 1141, 1143 (Fla. 1992)(this court rejected similar contentions: "It is clear from the record that the prosecutor made these statements to negate the psychologist's conclusion that the statutory mental mitigators applied to Mann. Merely arguing a conclusion that can be drawn from the evidence is permissible fair comment."); Lucas v. State, 568 So. 2d 18, 21 (Fla. 1990)(comments regarding defendant's awareness of what he was doing at the time of the crime was proper comment on the evidence); also, Valle v. State, 581 so. 2d 40 (Fla.), cert. denied, ___ U.S. ___, 112 S. Ct. 597, 116 L. Ed. 2d 621 (1991)(state may properly argue that defendant has failed to establish a mitigating factor).

Furthermore, although the court characterized the "insult" portion of the argument as "unfortunate", the court recognized the "analogy" the State was attempting to make, and did not feel

that the comment rose to the level of prejudice. (T. 2752). Burr. Finally, Defendant declined the court's offer to give a curative instruction to the jury and as such has waived the issue. Irizarry v. State, 469 So. 2d 822 (Fla. 1986); Duest v. State, 462 So. 2d 446 (Fla. 1985); Ferguson.

Defendant next objects to the alleged references to "community spirit". (B. 53). Although this was the basis for the objection below, that characterization of the comment in question simply is not supported by the record, as the trial judge correctly recognized:

> I don't remember the exact verbiage used by [the prosecutor], however, had the mention of community spirit or anything having to do with community spirit been mentioned, *that would have been all over*. I know I remember.
>
> * * *
>
> However, I don't, it did not jump out at me that way and that is one of the things that I listen for very carefully, along with Golden Rule arguments. I am going to overrule the objection as I did before and deny the motion for mistrial.

(T. 2751). A review of the actual comment makes it clear that the court did not err:

> Your legal duty is to assess the aggravating and mitigating circumstances. I am sure if you were asked none of you would wish to be here at this moment. None of you volunteered for this, you have performed the highest duty

> other than serving in the armed forces of this country by responding to your subpoena and coming here and deliberating on the most, one of the most important things to a jury in your lifetime, you did not put yourself here, you did not ask to deliberate this case. This person by his actions caused us all to be here.

(T. 2723). This comment merely served to remind the jury of the solemnity of its duty and as such was not improper.

Likewise, Defendant's next contention is also without merit. He contends that the reference to the newspaper was also a community spirit argument. When viewed in context, however, it is plain that the comment was nothing of the kind:

> Perhaps the defense will argue to you that the injuries that the Defendant sustained which are obvious, he got shot in the head should be considered in mitigation, when you think, if that argument is made to you that you should consider the fact that he was injured and how he was injured, I want you to think about one thing, how did he get the injuries, was he injured at the time of the murders? No. He wasn't injured at all. He got these injuries that he has as a result of the death of Jack Nestor, in his dying gasping breaths he was able to shoot five times so that certainly isn't mitigating.
>
> It is like it would be synonymous with a situation of a Defendant [sic] claiming to consider himself an orphan as a mitigator in when [sic] the trial he has killed both his parents, it is just ridiculous. It's totally ridiculous. It is not mitigating.

> I realize that we are a court of law and the rules that the court gives you are that you are going to apply to this case will be followed and you are going to make a reasoned judgment. If you read about this kind of factual scenario in the newspaper, at home. Drinking a cup of coffee and you read about a man who had just been out of --

(T. 2744-2745). Rather, it was again a plea to the jury not to leave its common sense at the door. The court properly overruled the defense objection. See, Bertolotti v. State, 565 So. 2d 1343 (Fla. 1990)(appeals to common sense and for justice not improper).

Defendant's final specific contention is that the reference to the threat against the security guard, Tyrell, during the Debbie School incident was improper because it had nothing to do with a statutory aggravating factor. The comment, however, was not addressing any aggravating factor, and when viewed in context, was clearly proper.

The comment was made during a discussion of Dr. Toomer's testimony that Defendant was under extreme mental or emotional disturbance during both the murders and the Debbie School incident.[20] The prosecutor was pointing out that Dr. Toomer's opinion was inconsistent with the facts of the cases:

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[20] As noted above, Dr. Toomer did not ascertain any of the facts of either the Nestor murders or the Debbie School incident.

> To believe that that mitigating circumstance applies in this case flies in the face of the concepts of responsibility and choice, two words that I want you to remember in this case.
>
> What was his demeanor when he discussed the murders that he committed with Edwina (phonetic), when he told her I killed those people because they owed me money. She told you he was cold, he was factual. Just an ice cold demeanor. As factual as I need to go to the store for a gallon of milk.
>
> What was he to Barbara Lewis? He is laughing. He knew he would get out of prison and he was out in eleven months. What did he tell Douglas Tyrell? [Objection overruled.]
>
> What did he tell Douglas Tyrell? I will get you. [Objection sustained.]
>
> The extreme mitigator does not apply in this case. It is not meant for this type situation. This man does not have mental disturbances and these crimes were committed because of choice and because of responsibility.

(T. 2742-2744). The court noted that when it sustained the objection, the prosecutor moved on, and ruled that there was no prejudice warranting a mistrial.

Despite the fact that the court sustained the objection, the State would again submit that the comment was entirely proper in that the prosecutor was merely pointing to facts in the record

which refuted Dr. Toomer's contentions. The comment can in no way be construed as an appeal to find a nonstatutory aggravating factor. See, Freeman v. State, 563 So. 2d 73 (Fla.), cert. denied, ___ U.S. ___, 111 S. Ct. 2910, 115 L. Ed. 2d 1073 (1990)(comparison of facts of murder with those of previous case proper comment on evidence); Mann; Lucas; Valle.

Furthermore, this contention is waived because the defense did not request a curative instruction after the court sustained the objection.

Defendant concludes his argument with the contention that the tenor of prosecutor's entire argument which purportedly was "permitted to roll on uncontrollably," requires a new sentencing proceeding. (B. 54). This claim is not supported by the record. It must be pointed out that contrary to this assertion, the prosecutor did in fact move on when the objections were sustained. As the court, in denying the "cumulative comment" motion for mistrial, pointed out, some of the objected-to comments were entirely proper, and the remaining ones simply "did not rise to the level of prejudice in light of the evidence that ha[d] been presented." (T. 2753-2754) This ruling was proper. A review of the entire argument shows that the prosecutor overwhelmingly limited himself to the facts in evidence and their

application to the aggravating and mitigating factors on which the jury was instructed. That those facts were unsupportive of Defendant's position, and did not cast him in the most flattering light, did not entitle Defendant to a mistrial. Muehleman, at 317 ("We cannot, however, rewrite on behalf of the defense the horrible facts of what occurred or make the slaying appear to be less reprehensible that it actually was"). Further, Defendant again did not request a curative instruction, and as such the issue is waived.

Finally, to the extent that any of the State's comments were improper, any error was harmless beyond a reasonable doubt. The three statutory aggravating factors which were argued by the State, under sentence of conviction, prior violent felony, and committed during a robbery/for pecuniary gain, were unquestionably established by the evidence that Defendant was conditionally released 19 days before he murdered the Nestors, by the robbery conviction stemming from the Debbie School incident, and by the robbery convictions at the guilt phase, respectively. On the other hand, the testimony offered by Defendant regarding the mitigation was, as previously discussed, internally inconsistent, and thoroughly rebutted by the State. The objected-to comments were brief passages in an argument which was overwhelmingly confined to a discussion of the evidence as it pertained to the aggravating and mitigating factors Under these

circumstances, it cannot be said that any of the comments, alone or collectively, were so egregious as to fundamentally undermine the reliability of the jury's recommendation. Davis v. State, 604 So. 2d 794 (Fla. 1992); Bertolotti. Defendant's sentence should be affirmed.

CONCLUSION

For the foregoing reasons, the judgments and sentences of the the trial court should be affirmed.

Respectfully submitted,

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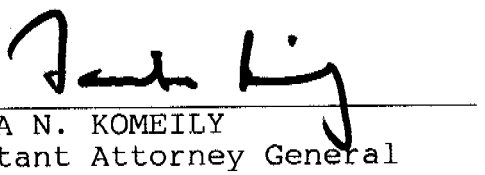
CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing BRIEF OF APPELLEE was served by mail on Nancy C. Wear, 18305 Biscayne Boulevard, Suite 400, North Miami Beach, Florida 33160, this 1st day of April, 1994.



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