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IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,116

LEONARDO FRANQUI,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

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# BRIEF OF APPELLEE

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## STATEMENT OF THE CASE AND FACTS

### Introduction

Defendant was charged, along with codefendants Pablo San Martin and Pablo Abreu, in an indictment filed on February 18, 1992, in the Eleventh Judicial Circuit in and for Dade County, Florida, with: (1) the premeditated or felony murder of Raul Lopez; (2) the attempted premeditated or felony murder with a firearm of Danilo Cabanas, Sr.; (3) the attempted premeditated or felony murder with a firearm of Danilo Cabanas, Jr.; (4) the attempted robbery with a firearm of Lopez and the Cabanases; all of which occurred during an ambush-style robbery attempt an December 6, 1991; (5) the grand theft of a motor vehicle belonging to Young Kon Huh; (6) the grand theft of a motar vehicle belonging to Anthony Docal; and (7) the use of a firearm during the commission of the murder, attempted murders, and/or the attempted robbery. (R. 1-5). Before trial, the defendants moved to suppress the portions of their statements referring to the robbery due to an alleged lack of corpus delicti. (T. 38-43). The motions were denied. (T. 43). Defendant also moved to sever his trial from that of his codefendants based upon their allegedly inconsistent statements given to the police. (T. 457-472). The court denied the motion, finding:

> The confessions of the defendants, as redacted by the State, are indistinquishible. The differences that do exist concern unimportant factors and are such as one would find in the testimony of disinterested eyewitnesses. As concerns the planning of the crime, the stealing of the vehicles to be used in the commission of the crimes, the

> description of the guns, the description of the crime itself, the escape to San Martin's house and the disposal of the firearms used the confessions are for purposes of this analysis, identical.
>
> The sole issue which the defense argued was significantly different is that each defendant denies having fired the fatal bullet, the resulting inference being that it must have been the other defendants who did. This conclusion is strained. The defendants did not specifically deny firing the fatal bullet they simply related what they did during the commission of the crime. At no point did any defendant specifically state or suggest that another defendant fired the fatal bullet.
>
> Regardless of this the issue of who fired the fatal bullet is not significant to the guilt phase of this trial since the state has charged the defendants with first degree murder under the felony murder doctrine.
>
> Considering the similarities in the confessions, in conjunction with the fact that they were taken individually, i.e. no defendant was present when his codefendants confessed, the confessions interlock in every significant and material way and they contain the independent indicia of reliability required by the United States Supreme Court, the Supreme Court of Florida, and other Florida precedents.

(R. 213-14).

A. Guilt Phase

Codefendant Abreu pled out and the trial of Defendant and San Martin commenced an September 21, 1993. (T. 1716). Those portions of the voir dire relevant to the issues herein will be discussed in the body of the argument.

Danilo Cabanas, Jr. ("Junior") testified that he was disabled with heart problems, but occasionally assisted his father, Danilo Cabanas, Sr. ("Senior") with his check-cashing business in Medley, Florida. (T. 1717). On Fridays Junior usually accompanied his father to the bank. Prior to August of 1991, Senior usually went to the bank alone. (T. 1718). In August, 1991, Senior was robbed while at the bank. (T. 1719). Thereafter they would go to the bank together, accompanied by a friend, Raul Lopez, who also kept his funds at the Republic National Bank. They followed the same routine every Friday. Raul would drive his brawn Ford pickup truck ("the Pickup") and meet them at the bank. (T. 1720). The Cabanases drove their red and white Blazer ("the Blazer"). All three carried guns for protection. The Cabanases had two 9mm pistols. (T. 1753).

On Friday, December 6, 1991, they followed the usual procedure. Junior picked up his dad and they proceeded to the bank in the Blazer. (T. 1721). When they arrived at the bank, he stopped the Blazer right outside they door, and Senior went in to get the money. Raul was already there, in the Pickup. Junior and Raul waited outside to keep watch. They waited for about half an hour. (T. 1721). Senior returned with about $25,000. (T. 1723).

They then exited the bank with Raul following, and proceeded along 44th Place in Hialeah toward the Palmetto Expressway. They made a left turn onto 20th Avenue, a two-lane road which runs alongside the expressway. (T. 1724). As they

approached 41st Street, Junior noticed a truck hesitating in front of them. As he went to pass the truck, another truck came up very fast from behind in the left lane, so he stopped. The truck in front stopped and the second truck stopped alongside the Blazer, blocking the way. Then the doors opened on the truck in front and two masked men got out and started shooting at the Cabanases. (T. 1725). Senior pushed Junior aside and returned their fire. Junior did not know where Raul was at that time. (T. 1727). Eventually the two from the front truck got into their vehicle and left. After the shooting stopped, the Cabanases reloaded the guns in case the robbers returned. (T. 1728). Senior went to check on Raul. Raul was lying in the street behind the Pickup. They flagged down a police car. Raul was in pain and short of breath. Junior turned Raul on his side so he could breathe better and held him until the rescue people arrived and took him away. (T. 1729). Raul's gun was laying in the street. Senior picked it up and put it in the Blazer for safekeeping. When the police arrived, Junior gave all three guns to the officers. (T. 1730).

After the incident Junior noted that the driver-side window of the Pickup was up. (T. 1730). The door was closed. The Pickup's front bumper was touching the Blazer's rear, but there had not been any collision. There was no blood in the Pickup, and no trail of blood from the door to Lopez's body. (T. 1731). While they were still at the scene, the police asked Junior to identify the two Suburbans which were found parked in the emergency lane on the Palmetto Expressway. (T. 1735).

Danilo Cabanas, Sr. related the same account of his business practices, the visit to the bank and the ambush, as his son. (T. 1995-1998). The men started shooting almost immediately after they got out of the front Suburban. They shot through the windshield. One of the bullets went through the headrest and out the back window. If Senior had not ducked, it would have hit his head. He picked up his gun and started shooting back at them. (T. 1999). The shooting lasted for about 20-25 seconds. (T. 2000).

After the assailants left, Senior checked on Raul and found him at the back of the Pickup. He was laying in the road with his head toward the Pickup. Raul's gun was about two feet in, under the back of the Pickup. (T. 2005). The passenger door was open. (T. 2006).

Mark Tansley was a traffic homicide investigator with the Hialeah Police Department. (T. 1981). On the date of the shooting he was on routine patrol when he was flagged down by the Cabanases at the scene of what appeared to be a minor accident. When he arrived he saw the Cabanases and then he saw Raul Lopez. (T. 1982). Lopez was lying in the road behind the Pickup. He was conscious at the time. (T. 1983). Tansley could not understand what Raul was saying because he was in a great deal of pain. He had a bullet entrance wound under his right arm in the lung area. He was unable to find an exit wound. Senior had minor facial wounds. (T. 1984).

The conditian of the vehicles caused Tansley to conclude that the impact when the Pickup hit the Blazer was very minor because there was no damage. (T. 1988). The situation of the vehicles was consistent with the Pickup having been left in drive and it moving forward of its own volition. (T. 1990).

Dr. Michael Hellinger was a general surgeon. (T. 2159). He was a surgical resident at Jackson Memorial at the time of the incident. He treated Raul Lopez when he was brought to Jackson. (T. 2161). On arrival Lopez had a large entrance wound in his chest. There were no other wounds. He placed three tubes in his chest to drain the blood. Prior to making the incisions for the tubes, there were no wounds on the left side of Lopez's body. (T. 2162). They x-rayed him and determined that there was a bullet on the left side just below the diaphragm. Dr. Hellinger determined that the bullet had come through Lopez's right chest and the diaphragm from the back of the liver up the front. (T. 2163). The bullet then went through the stomach and lodged in the area of the left diaphragm in the abdomen. They recovered the bullet from Lopez. (T. 2164). Dr. Hellinger was unable to save Lopez's life, as he bled to death. (T. 2167).

Dr. Valerie Rao, associate medical examiner with Dade County, testified that the cause of death was from a gunshot wound to the chest and abdomen, especially from loss of blood through the liver. (T. 2061-62).

When Mr. Yung K. Huh returned to his home at 8261 NW 8th Street on around 10 p.m. on a Wednesday in December, 1991, he

noticed that his blue and white 1979 Chevy Suburban ("the Blue and White") was missing. (T. 1770-1772). Huh identified the Blue and White as his. when he received it from the police it had thirteen bullet holes, and the steering column and vent window were broken. (T. 1773). There was also a stocking in the truck that was not there before it was stolen. Huh did not recognize the Defendants and had not given them permission to take his truck. (T. 1774).

In December, 1991, Anthony Docal owned a gray 1987 Chevy Suburban with a Georgia tag ("the Gray"). At that time ha was working at an office near Le Jeune Road and SW 8th Street. Docal identified the Gray as his vehicle. (T. 1883). On December 5, 1991, when he went out to drive to lunch the Gray was gone. (T. 1884). There were no bullet holes in it before it was stolen. He did not give Defendants permission to use the vehicle. (T. 1885).

Albert Nabut was a Homicide Investigator with the Hialeah Police Department. (T. 1911). On January 18, 1992, Nabut and his partner Nazario met with Defendant at the Metro-Dade Police Headquarters. (T. 1914). Defendant initially denied knowledge of Lopez's murder. Nabut then showed Defendant a photo of the Republic Bank and the Suburbans. Defendant then admitted that he knew about the incident and agreed to talk to Nabut. (T. 1916).

Defendant stated that he learned through Fernando Fernandez that the Cabanases had a check-cashing business located in Medley, and that their usual routine was to go to the bank on

Friday mornings to get a lot of cash and drive back to the business. (T. 1916). The discussion with Fernandez occurred three to five months before the shooting took place. Defendant then observed the Cabanases' routine along with his codefendants prior to the day of the shooting. They had originally planned on carrying out the robbery shortly after the initial conversation with Fernandez. (T. 1917). Then Fernandez told Defendant that they could not rob them right away because Cabanas had just been robbed and would be more careful. (T. 1918).

Defendant stated that they had used two stolen Chevy Suburbans. (T. 1918). On the morning of the crime, Defendant and the codefendants drove the Suburbans to the area of the bank. They left a getaway vehicle, Abreu's van, on the Palmetto with the flashers on as if it was broken down. Then they went back to the bank with the Suburbans and watched the bank. (T. 1919). Once they verified that the victims had arrived at the bank, they proceeded to a four way stop at W 44th Street and 18th Avenue to wait for the victims to drive by. Defendant said that he had a big ,357 or .38 revolver. San Martin had a 9mm semiautomatic, which at times jammed, and Abreu had a Tech-9 9mm semiautomatic, which resembles a small machine gun. (T. 1920).

At the four way stop, Defendant waited until they saw the Cabanases. The plan was for San Martin and Abreu to drive in front of them, and then for Defendant to follow. (T. 1920). Then San Martin and Abreu were to stop in front of the victims. They followed the plan. When the victims stopped, Defendant

pulled alongside them so they could not get away. When Defendant arrived Abreu and San Martin exited and almost immediately, there was a gun battle between the Defendants in the Blue and White and the two victims behind them. At that point Defendant stated that the Pickup rammed the Cabanases and Lopez opened fire. Defendant claimed to duck and fire in the direction of the Pickup. (T. 1921). Defendant said he was in the Gray. Abreu and San Martin were in the Blue and White. (T. 1922). Abreu was driving and San Martin was in the right front passenger seat. They wore stockings as masks. Defendant could not say how many shots he fired. (T. 1923). The formal stenographically recorded statement of Defendant, which was consistent with the oral statements, was read to the jury. (T. 1930-63, R. 372-405).

Michael Santos was a homicide detective with Metro-Dade Police Department. (T. 2077). Santos interviewed Defendant San Martin. (T. 2080). San Martin said that he, Defendant, and Fernando Fernandez had a meeting three or four months before the incident. Fernandez told them about a man with a check-cashing business. Fernandez had planned the robbery but told the others to execute it. (T. 2096). A few days before the actual robbery, they planned to steal a couple of trucks to use in the robbery. (T. 2097). San Martin, Defendant, and Pablo Abreu took one truck from the Flagler Street/Palmetto Expressway area, and one from near SW 8th Street and Le Jeune Road, in Miami. They left the trucks in Hialeah. (T. 2099). On the day of the incident, they picked up the trucks and drove to the Republic Bank. Defendant

waited a block away in one truck and San Martin and Abreu waited near the bank for the man from the check-cashing business. The Blazer eventually showed up. After they transacted their business, the victims left the bank in the Blazer. San Martin and Abreu put on stocking masks. (T. 2100). They had surveilled the victims and knew they always followed the same route, so San Martin and Abreu left the bank before the Blazer did. Defendant followed the Blazer in the second Suburban. The plan was to box them in and rob them. They stopped their vehicle in the area of W 20th Avenue and 41st Street. (T. 2101). San Martin exited through the passenger side of the Suburban, and Abreu got out the driver's side. San Martin had a 9mm pistol and Abreu had a "small machine gun." San Martin did not know exactly where Defendant was at that time because the vehicle obstructed the view. After he got out San Martin told the driver of the Blazer not to move, in Spanish. The Blazer's passenger raised his hands in the air. (T. 2102). The driver then pulled out a gun and opened fire. Abreu and San Martin then returned fire. San Martin said that he fired his gun twice. Abreu filed several shots. He did not know if Defendant fired because his view was obstructed. San Martin fired his shots at the Blazer, not at the Pickup. Then they got back into the Suburbans and fled. (T. 2103). They abandoned the Suburbans beside the Palmetto where they had left the getaway vehicle and went to San Martin's house. Defendant and Abreu left from there. (T. 2104).

San Martin said that they later threw the guns from a bridge in Miami Beach, but he did not recall exactly where. (T. 2104). San Martin declined to give a formal statement. (T. 2106). On January 21, 1992, Detective Nabut spoke with San Martin. (T. 2116). San Martin told him that they had not thrown the guns in the water on the Beach, but in the river near his home. (T. 2118). He had thrown a .357 or .38 and the 9mm in the river. San Martin then drew a map indicating the location of the guns. (T. 2119). San Martin told Nabut that the guns were in the river under the Dolphin Expressway bridge near the end of 19th Court. (T. 2122). The weapons were found at that location by a police diver at that location the next day. (T. 2123).

Oscar Roque was a police diver with Metro-Dade Police Department. (T. 2125-26). He located two weapons in plastic bags in the river at the Expressway and 18th Avenue. (T. 2129-30). He recovered an automatic and a revolver. (T. 2131).

James Olsen was a crime scene technician with the Hialeah Police Department for 15 years. (T. 1754). On December 6, 1991, he responded to the Palmetto Expressway at about NW 71st Street where the Gray and the Blue and White were located in the side lane. (T. 1758).

The driver's vent window and steering column were broken on the Blue and White. (T. 1761). With the exception of the rear window, which had bullet holes, all other windows were intact. (T. 1763). Olsen recovered three spent casings outside the passenger door of the Blue and White on the ground where it was

parked on the Palmetto. (T. 1765). The casings came from a 9mm automatic. (T. 1788). There was also a casing on the passenger floorboard of the Blue and White. (T. 1789). That casing was also a 9mm. (T. 1790). Olsen also recovered a lady's stocking from the transmission hump in the Blue and White. (T. 1791).

There were three holes in the Blue and White's rear window. (T. 1789). There was a bullet strike mark on the inside of the tailgate. (T. 1792, R. 312-313). Olsen found a spent projectile in the rear floor area right below the ricochet mark on the tailgate. (T. 1796). He also recovered a spent projectile between the right rear door and the frame in the Blue and White. (T. 1798).

On the Gray, the driver's window was up; the left rear door window and the left rearmost window were up and had no holes in them. There were no holes in the tailgate window. (T. 1804). On the right side the rearmost window and the rear door window each had a bullet hole in them. The passenger door window was broken out. (T. 1805). The hole in the rearmost right window had some tinting film sticking out of it. (T. 1807).

There were no projectile holes or spent projectiles, except for a small copper fragment found in the rear cargo area of the Gray. (T. 1808). The fragment was below the hole with the tinting sticking out of it. Olsen recovered a projectile in the passenger door mirror. (T. 1810). There was a bullet hole through the passenger door. (T. 1811). The trajectory of the hole lined up with the projectile found in the mirror. (T.

1812). There were no spent projectiles found opposite the holes in the windows inside the Gray. The passenger window was rolled down broken inside the door. (T. 1820).

Terry Andrews was a Crime Lab Technician with the Hialeah Police Department for twenty-one years. (T. 1822). On December 6, 1991, he was dispatched to the shooting scene. (T. 1823). The scene was 7/10 mile from the Republic Bank. (T. 1825). He found a red and white Blazer at the scene, facing southbound in the traffic lane. To the left and rear of the Blazer was a brown Pickup, with its right front light touching the Blazer's bumper. The Pickup was over the centerline of the road. (T. 1828).

There were no marks or projectiles on the left side of the Pickup. There were two holes in the windshield. (T. 1834). One was an entry hole, the other was a ricochet. (T. 1837). There was also a bullet hole in the passenger door of the Pickup. (T. 1881). There was one hole in the rear window of the Pickup. (T. 1835). The was one hole in the tonneau cover of the Pickup bed. (T. 1837). A dowel showed the trajectory of a bullet going through the windshield, out the back window, and into the tonneau on the Pickup bed. (T. 1839, 1841). The projectile lodged in the bed of the Pickup, where Andrews recovered it. The trajectory went right over the steering wheel, where the driver would have been sitting. (T. 1841). There were no casings or blood found within the Pickup. (T. 1845).

There were ten bullet holes and one ricochet on the windshield of the Blazer. (T. 1.846). Andrews recovered several

small pieces of lead from the floor of the Blazer. (T. 1849). He also recovered a spent projectile from the hood of the Blazer. (T. 1853). Andrews recovered three weapons from inside the Blazer. There was a .32 semiautomatic pistol in the rear floorboard. (T. 1854). Andrews also impounded a 9mm Star semiautomatic with one spent casing in the chamber. (T. 1857). The third gun was a Browning 9mm semiautomatic which was found in the console of the Blazer. It had twelve live rounds in the clip. (T. 1859). Through the use of dowels, Andrews determined that one of the bullets which came in through the windshield exited through the tailgate window of the Blazer. (T. 1860). The trajectory began at a strike mark on the hood, went through the windshield, through the passenger-seat headrest then out through the rear window. (T. 1862). The Blazer also had two bullet holes in the driver's window, The door windows were both up and intact except for the bullet holes. (T. 1863). Nine spent casings were retrieved from the street. (T. 1873). None of them were .32's. They did not recover any .32 caliber casings from the vehicles either. (T. 1880).

Robert Kennington worked for the Metro-Dade Crime Laboratory Firearms Identification Unit for 20 years. (T. 2169). Kennington received casings, fired projectiles, live rounds and projectile and jacket fragments. He received two 9mm pistols and a .32 pistol which belonged to the victims. He also received two weapons which were found in a canal, a .357 revolver and a semiautomatic pistol. (T. 2179). The .357 was rusty and the

serial number had been intentionally removed. (T. 2180). Kennington also received a bullet from Jackson Memorial. (T. 2182).

The .357 revolver found in the canal was capable of firing .38 projectiles. (T. 2191). The semiautomatic was less damaged than the revolver. (T. 2193). When Kennington fired it, it was subject to jamming. When unjamming an automatic, the jammed cartridge will be ejected much like a spent casing, and will be left at the scene unless the shooter picks it up. (T. 2194).

The .32 semiautomatic from the victim was fully loaded. (T. 2196-97). There was lint inside the barrel, indicating that it had not been recently fired. (T. 2197). None of the physical evidence gathered had come from a .32. In Kennington's opinion, the gun, which was Lopez's, had not been fired. (T. 2198).

The bullet from the hospital was a Remington-Peters .38 special. It was a semijacketed hollow point, which is designed to expand when it enters the body,, in order to cause more tissue damage. (T. 2199). This bullet was inconsistent with the victims' guns. Nor could it have been fired from the 9mm found in the water, or from a Tech-g. (T. 2200). A Tech-9 is a large 9mm semiautomatic which resembles a machine gun. The bullet could only have been fired from a revolver. The bullet was consistent with having been fired from the .357 found in the water. (T. 2203). The rust prevented Kennington from ruling out that it may have been fired from another .357 of the same model. (T. 2204). There were, however no inconsistencies between the bullet and the recovered .357. (T. 2206).

Kennington examined the projectile recovered from the right-side mirror on the Gray vehicle occupied by Defendant. (T. 2206). It was also a Remmington-Peters .38 special copper-jacketed hollow point. The tool marks were the same as those on the bullet taken from Raul Lopez. (T. 2207). Kennington was able to say to a certainty that the murder bullet was fired by the same gun as the one found in the mirror. (T. 2208).

Kennington examined the copper fragment found in the rear storage area of the Gray. It was a fragment of the copper jacket of a .38 special copper-jacketed hollow point bullet. (T. 2209). It was manufactured by Remmington-Peters, as were the bullets from the hospital and the mirror. It was not, however, from either of those bullets; the jacket portion of those bullets was intact. (T. 2210). It could not have been fired by the victims' guns or the 9mm from the canal or by a Tech-g. (T. 2211).

The bullet recovered from the front hood of the Blazer was also a .38 special. It was consistent with the .357 revolver. Kennington was able to say to a certainty that it was fired from the same gun as the bullets from the hospital and the mirror. (T. 2212).

Kennington testified that the hole in the rear passenger window of the Gray was made by a bullet passing from the inside to the outside. Likewise, the hole in the third right side window of the Gray with the film sticking out of it was caused by a bullet exiting the vehicle. (T. 2214). Both were entirely inconsistent with bullets being fired into the vehicle.

(T. 2215). The two 9mm casings and an unfired cartridge found at the scene was being fired by a Tech-9. (T. 2224-27). Kennington was able to conclusively identify six casings and two live rounds found at the scene or in the Blue & White as having been fired by the 9mm from the water. Therefore, the weapon was fired at least six times, in addition to at least two unsuccessful firing attempts. (T. 2233).

The State rested. (T. 2265). The defense presented no evidence. (T. 2266). After considering the evidence, the jury found both defendants guilty as charged on all counts. (T. 2464)

B. Penalty Phase

During the penalty phase proceedings, the State's case-in-chief consisted of witnesses as to Franqui's prior violent felonies and the cold, calculated and premeditated nature of the murder herein.

Through Craig Van Nest and Detective Boris Mantecon, it was established that Franqui had proposed and participated in an unrelated armed robbery in which Van Nest, who was driving an auto parts van, was pursued and confronted by Franqui, San Martin, and a third individual. (T. 2535-45, 2558). Franqui had proposed "to take over a van," and he and his companions expected Van Nest's van to be carrying a lot of money. (T. 2558-59). Van Nest eluded the perpetrators after they first tried to get Van Nest to pull over, by flashing a police badge. (T. 2536-37). When Van Nest proceeded to his destination and left his van

to make a delivery, he returned to find Franqui and the other men searching through his van and removing items. (T. 2540-41). Vasquez hit Van Nest on the head, one of the perpetrators stole the van, and, during the ensuing flight, the gun, which Vasquez had given to Franqui, went off, in the perpetrators' vehicle, which was occupied by San Martin and Franqui. (T. 2562-65, 2560-61). The prosecution introduced into evidence certified copies of Franqui's convictions for armed kidnapping and armed robbery, with respect to the Van Nest Case. (T. 2579).

Pedro Santos and Detective Nazario provided testimony as to another unrelated attempted robbery and aggravated assault which Franqui had participated in and had previously been convicted for. Franqui, San Martin, and a third companion had been at a restaurant, when they observed a security guard carrying a cash bag near the Republic National Bank, and they decided to rob the guard. (T. 2595-96, 2605-08). First, the three men had to steal a car. (T. 2609, 2596-99). After doing that, two of the men returned to the bank and waited for the guard to make his appearance, while Franqui remained nearby in a separate getaway vehicle. (T. 2598-2600, 2609-10). According to the guard, after the cash bag was demanded, he was threatened and shots were fired. (T. 2586). The guard, Santos, was not hit, and held onto the bag. (T. 2587). He reached for his own gun, and several more shots were fired at him, when the offenders fled. (T. 2588-89). The stolen car was abandoned, and the three perpetrators proceeded to get away in Franqui's vehicle. (T. 2613). Copies

of the judgments of conviction for aggravated assault and attempted robbery with a firearm were introduced into evidence. (T. 2617-21).

The next witness, Pablo Abreu, had participated in the instant offenses with Franqui and San Martin. He had previously pled guilty to first degree murder, two counts of attempted first degree murder and attempted robbery, far which he received a life sentence, with a twenty-five year minimum mandatory provision. (T. 2715-17). He testified at the penalty phase proceedings regarding the manner in which the offenses were pre-planned. According to Abreu, Franqui had planned to steal two cars for use in the planned robbery, and the plan included the use of guns. (T. 2695-96). At a meeting attended by Franqui, San Martin and Abreu, it was made known that the subjects of the planned robbery were going to be getting money out of a bank, and that they would be accompanied by an escort/bodyguard. (T. 2696). At that meeting, there were explicit discussions regarding Franqui's pre-planned intention to shoot and kill the bodyguard:

> **A.** He [Franqui] said not to worry about it, that the only one that could shoot there was the bodyguard, not the others.
>
> **Q.** And what did Franqui tell you or Pablo they were going to do to the bodyguard, if anything?
>
> **A.** That it would be better for him to be dead first than Franqui.
>
> **Q.** What did Franqui tell you that they were going to do with the bodyguard during the crime?

A. First he was going to crash against him and throw him down the curbside, and then he would shoot at him, but he didn't do it that way.

(T. 2696-97). Abreu's role was to stop the stolen vehicle which he was driving in front of the vehicle driven by the cash owners, while Franqui and San Martin stopped the escort vehicle in back of the victims. (T. 2698). Before proceeding to the scene of the crime, the three men had met at San Martin's house and Abreu was given one of Franqui's weapons. (T. 2700). All three perpetrators were armed. (T. 2706). At the scene of the crime, after the victims were blocked by the perpetrators, Franqui "was pointing, shooting at the bodyguard with his window down." (T. 2708). Franqui told Abreu that he ran out of bullets, and the three perpetrators then left, while the deceased victim was on the ground. (T. 2709). During the ensuing flight, Franqui told Abreu that he had shot at the guard. (T. 2712).

The defense then presented several witnesses at the penalty phase, introducing family background evidence and psychological evidence. Albert Gonzalez, Franqui's father-in-law, described Franqui as "a respectful guy," who was never seen drunk and who did not smoke. (T. 2777-78). Franqui had two young children, and was a dedicated father, who gave the children food, changed diapers and cleaned the house. (T. 2779). Franqui had also worked with Gonzalez, and was described as an excellent worker, who could be immature at times. (T. 2781). At times, Franqui simultaneously held three different jobs. (T. 2784). Franqui had no problems communicating with Gonzalez, and Franqui was

described as having "a mind of his own." (T. 2783). Franqui never spoke to Gonzalez about having been abused or mistreated by anyone in Franqui's family. (T. 2785-86).

Mario Franqui Suarez was Franqui's uncle, and he related Franqui's family history. Franqui's mother, while living in Cuba, had been kicked out of her family's home when she was pregnant with Franqui. (T. 2857). Soon thereafter, and prior to Franqui's birth, the mother met, and started living with, Fernando Franqui, Mario Franqui Suarez's brother. Fernando was not the biological father of the defendant, but raised the defendant in a parental capacity, and was viewed by all as the defendant's father.

The defendant's mother moved into the Franqui household, which apparently had several generations of relatives living together. (2860-61). Mario Franqui Suarez described the mother as "not normal," someone who laughed at anything and tripped on things; she was "unstable," although she was a "very good worker." (T. 2860). While the mother was living in the Franqui household, she was very attentive to the defendant, as was Mario's brother, Fernando. (T. 2861). However, when the defendant was about two years old, the mother left the Franqui household, taking the defendant's younger brother, Fernando, Jr., and leaving the defendant behind, with Fernando Franqui and the Franqui relatives. (T. 2861-62). About one year later, the mother returned Fernando, Jr., to the Franqui household. (T. 2863). During the mother's absence from the Franqui household, she periodically visited. (T. 2862).

While in Cuba until 1980, the defendant remained in the Franqui household, being brought up by close relatives, including his father, his aunts and his grandmother. (T. 2861, 2876-78). Within one year after the family came to the United States, the defendant's younger brother died after surgery. (T. 2865). The defendant's father then started taking drugs and used alcohol excessively. (T. 2866-67). At various times, throughout the defendant's youth and teenage years in the United States, he lived with an aunt, Mario's sister, or his grandmother, or Mario. (T. 2869-71). At age 15, the defendant started living with Mario, but subsequently moved in with Mario's children. (T. 2871). The defendant started working with Mario, in a family refrigerator/auto tire business. (T. 2871).

Mario described the defendant as "a very good boy," a loving person, who was pleasant, respectful of the elderly, and who did favors for anybody. (T. 2872). The defendant **was** crazy about Mario's two children, the defendant's cousins. (T. 2873). He was also described as being "very slow." (T. 2864). The defendant, however, was a "good worker," and he was never beaten or mistreated by anyone in the family. (T. 2881-82). The defendant got along with others, never appeared to be overly depressed, never hallucinated, and never acted in a bizarre manner. (T. 2885, 2888).

Dr. Jethro Toomer, a forensic psychologist, testified on behalf of the defense. Dr. Toomer saw the defendant on three occasions, spoke to family members and reviewed school records.

(T. 3209-11). With respect to the instant offenses, the only information which Toomer reviewed was one of the defendant's statements to the police; he did not review police reports or other witness statements, and had no contact with either police or prosecutors. (T. 3158). The essence of Toomer's testimony was that a series of childhood abandonments - the mother leaving the family; the death of the younger brother; and the father resorting to drugs and alcohol - resulted in a "lack of ongoing nurturing," and this in turn short-circuited the development of the defendant's mental processes, caused him to be malaclapted, and resulted in a number of deficits that impaired overall judgment and functioning. (T. 3128-31, 3140, 3144, 3113).

Toomer related difficulties in the communicative process with the defendant, who was slow in responding. (T. 3115). Toomer found that the defendant's insight and judgment were impaired, based on tests administered and in terms of the defendant's ability to describe or articulate reasons and rationales for his actions. (T. 3116). In addition to the family abandonments, Toomer emphasized "school problems" (T. 3120-22), and an accident in which the defendant, when 16, was struck by a car while he was riding a bicycle. (T. 3125). With respect to the bicycle/car accident, the State elicited from Toomer that Toomer accepted the defendant's representation regarding a loss of consciousness, even though there was no mention of any such loss of consciousness in the hospital records. (T. 3173-74).

Toomer explained the tests which he administered and which formed a basis for his conclusions. First, there was the "revised" Beta examination, an IQ test which measures performance, nonverbal intelligence. (T. 3133). This was a "timed" test. (T. 3133). On this test, the defendant scored under 60, which reflected, to Toomer, cognitive and intellectual functioning in the retarded range. (T. 3134-35). Toomer also administered the Wechsler Adult Intelligence Scale (IQ) test. (T. 3137). Although he asserted that all tests were consistent with his opinions, cross-examination clearly reflected that that was not so. The Wechsler test showed a full scale IQ of 83, which reflected low/average intelligence. (T. 3198). The Wechsler test included a High Performance Test for nonverbal behavior, which, like the Beta test, is fully timed. (T. 3199). On this portion of the Wechsler test, the defendant scored 92, which was in the average range. (T. 3199).

Although Toomer did not refer to any organic brain damage during direct examination by defense counsel, on cross-examination, for the first time, he asserted that the 10 point differential between the verbal and performance scales on the Wechsler test was indicative of organic impairment, which would recommend a neuropsychological evaluation. (T. 3211-12). Notwithstanding this conclusion, Toomer, inexplicably, did not administer any neuropsychological tests. (T. 3213).

Toomer also administered the Bender Gestalt test, which he described as a screening instrument relating to visual motor

perception and overall personality functions. (T. 3136). Toomer also administered the Carlson Psychological Survey, a personality inventory which is normed against other persons who are charged with or convicted of the commission of crimes. (T. 3136). This was established to be a self-reporting test, where the tested person controls the answers which are given. (T. 3181). Thus, truthfulness is important in this test. (T. 3181). Notwithstanding the importance of truthfulness, the defendant apparently gave false answers to several questions, including his use of weapons. (T. 3181-82).

Toomer also administered the Minnesota Multiphasic Personality Inventory (MMPI), which was a profile of overall personality functioning in terms of adjustment and interaction with others. (T. 3137). During this test, the defendant claimed the existence of hallucinations, but had previously denied them during his psychosocial history. (T. 3191-92). The "F-scale," for faking, was extremely elevated on this test, just below the 80th percentile, and the 80th percentile would have rendered the test result completely invalid. (T. 3193-94). Although the MMPI profile predicted addictive behavior, there were no family references to any drug or alcohol use on the part of the defendant, and, indeed, all of the family testimony was to the contrary. (T. 3197).

Based upon the tests and the various interviews, Toomer concluded that the defendant was suffering from an extreme mental or emotional disturbance at the time of the crime. (T. 3138).

He also concluded that the defendant's emotional age was lower than his chronological age of 21, at the time of the crimes. (T. 3138-39). Toomer also referred to a "borderline personality disorder," which was not a major mental disorder. (T. 3209).

On cross-examination, the State elicited Toomer's underlying premises: anyone who commits premeditated murder is sick, and "any condition affecting the person's decision making process is extreme." (T. 3150-52, 3154). Toomer also admitted that he did not perceive the defendant's chronological age as a factor, and he further admitted that, in a prior deposition, when he referred to age as not being a factor, he did not distinguish between chronological and emotional age. (T. 3155-56). He also acknowledged that his conclusions regarding the instant offenses were made in a vacuum of ignorance, as he was unaware of anything other than one of the defendant's statements. (T. 3158, 3162). This was quite significant, as Toomer acknowledged that a lack of truthfulness on the part of the defendant could affect his opinions. (T. 3163).[1] Toomer also acknowledged that he never even asked the defendant why he committed the crimes. (T. 3162).

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[1] Such a lack of truthfulness on the part of the defendant appears repeatedly. The defendant denied involvement in the crimes to his uncle. (R. 3189). He falsely answered questions on the Carlson test regarding the number of times he used weapons. (R. 3182). He denied knowing his mother in Cuba, while there was testimony that she continued to visit the family even after moving out of the Franqui household. (R. 3164). The defendant, although questioned about it by Toomer, refused to admit that he had a close relationship with the Franqui family members with whom he lived. (R. 3165-66).

Toomer was equally ignorant of the other offenses which the defendant committed. (T. 3182).

The prosecution's cross-examination of Toomer further demanstrated inconsistencies in Toomer's reliance on school records. The records demonstrated that even during the time period when the defendant's brother died, and his father resorted to drugs and alcohol, the defendant continued to receive good grades in nonverbal subjects, such as mechanical shop and art. (T. 3220).

Toomer also acknowledged that even though all of the family "abandonments," which were instrumental to his conclusions, had occurred by 1982, the defendant never claimed to have committed any crimes between 1982 and 1991, and the criminal conduct only commenced some nine years after the last of these "abandonments." (T. 3205). Toomer also admitted that while he concluded that the abandonments caused maladaptive behavior, the defendant's work habits, marriage, parental responsibilities and nonuse of drugs or alcohol were not indicative of any maladaptive behavior. (T. 3205-06). Moreover, notwithstanding the so-called "abandonments," the defendant was always cared for by close family members and had a roof, shelter and food. (T. 3200). Toomer did not think that it was sufficiently important to speak to the defendant's employers when coming to his conclusions about the long-term effects of the "abandonments." (T. 3207).

Toomer's conclusions were further explicitly rejected and repudiated by Charles Mutter, a psychiatrist, who testified as a

rebuttal witness for the State. Mutter examined police reports, depositions and other documents regarding the instant offenses, and also conducted a mental status exam of the defendant, reviewing Toomer's test results in the process. (T. 3224, 3234-35, 3240). During Mutter's interview of the defendant, the defendant was "precisely oriented" as to time and place. (T. 3235-36). Franqui's memory was "clear and crisp," he was able to do abstract problems, and he was concrete in thought. (T. 3236). There were no problems in communicating. (T. 3236).

When Franqui was asked why he committed the crimes, he provided a rational, articulate explanation, asserting that he made a "bad decision," as he was out of work, had a wife and child, and had financial problems. (T. 3237). He did not blame the crimes on abandonment by the mother or the death of his brother. (T. 3237). Mutter emphasized that the defendant, throughout his life, had demonstrated an ability to deal with stressful situations, acting in an appropriate manner. Thus, when he left school, because he did not like school, he got a job, working for his uncle and then working other jobs as well. (T. 3238-39). Although he had lost a job with the City of Miami for not complying with rules regarding signing out, that had occurred under duress, as he had just learned that his child had been accidentally locked in a car. Mutter found that Franqui acted appropriately under the circumstances.

Most significantly, there was no evidence of any mental retardation in either the clinical interview or in Toomer's test

results. (T. 3240). Mutter found the Beta test result questionable since, if properly administered, a result similar to the Wechsler test would be expected. (T. 3240-41). The Beta score was also questionable in light of the mental status exam which Mutter had conducted, as the clear, crisp answers, good recent memory and precise orientation, were all inconsistent with the Beta score. (T. 3298-99). The Beta score would have been consistent with "tremendous memory defects" which did not exist with Franqui. (T. 3299).

Mutter also concluded that there was no evidence of organic brain damage. (T. 3242-43, 3245, 3247-48, 3252). With respect to the lo-point differential in the Wechsler performance and verbal test results, Mutter concluded that this was easily explained by Franqui's lack of interest in things dealing with language skills, as opposed to his greater interest in mechanical things. (T. 3242). The discrepancy was not consistent with organic brain damage. (T. 3242). There were no indications of organic impairment in the psychosocial history. (T. 32242-43). Franqui denied having hallucinations, and both his recent and remote memory were very good. (T. 3243). With organic impairment, the first thing a person loses is recent memory. (T. 3243). Likewise, Franqui's hospitalization for the automobile accident was not consistent with organic damage, as there was no indication of a loss of consciousness on the hospital charts. (T. 3243-44).

Mutter also reviewed Toomer's Bender-Gestalt test and again found no indication of organic brain damage. (T. 3246). He also found no evidence of any borderline personality disorder. (T. 3246). Nor was there any evidence of extreme mental or emotional disturbance at the time of the crime. (T. 3246). While neurological testing is resorted to if there is any indication of organic damage, nothing in the clinical examination of Franqui indicated a need for such testing. (T. 3247-48).

With respect to Toomer's theory of maladaptive behavior through abandonment, Mutter concluded: "In the medical context, it doesn't make sense." (T. 3249). Mutter repudiated the notion inherent in Toomer's theory, that "anyone who is abandoned by parents is prone to be a criminal no matter what." (T. 3249). While it is traumatic to be abandoned, people can grow out of it and be "normal functional human beings." (T. 3249). Toomer's conclusions, if carried to their logical extension, would find justification for the criminal actions of any person who had a parent die while the person was a child. (T. 3249).

Mutter found no evidence that the defendant's actions were attributable to anything other than free choice. (T. 3249-50). Franqui did not blame drugs, alcohol, abandonment, the death of his brother or the departure of his mother. (T. 3251). Franqui simply said that he made a "bad choice," indicating that he was responsible, that he was not out of his mind, and that he was not organically impaired. (T. 3252). Mutter acknowledged that Franqui had "some impairment" of the intelligence function, as

the test results indicated dull normal intelligence. (T. 3286, 3291). Impaired judgment is not a mental defect; it is merely bad judgment. (T. 3296). While Mutter acknowledged, on cross-examination, that Franqui "might" have mild brain damage, as previously indicated, Mutter found no basis for concluding that organic damage existed. (T. 3295).

The State's final rebuttal witness was Robert Barrechio, the greenskeeper for the City of Miami Golf Course and Franqui's employment supervisor from June-October, 1991. (T. 3349). Franqui was responsible for daily maintenance, including the mowing of the greens, cutting, changing holes, and the use of the rotary push mower and weed eater. (T. 3349). The job changed daily, depending on what Barrechio assigned to Franqui. (T. 3349-50). Franqui was very personable, a good employee, who was able to make his own decisions, showing initiative when Barrechio was busy. (T. 3350). Franqui followed instructions and completed his jobs on time. (T. 3350). Franqui was mentally stable and sharp; he did not show any signs of mental retardation or mental deficiency. (T. 3351). Indeed, he was such a good employee that Barrechio offered to rehire him in November, 1991. (T. 3352).

The jury recommended a sentence of death by a vote of nine to three. (T. 3501). The trial court imposed the death sentence for the offense of first degree murder. (R. 1183, et seq.). The court found that four aggravating factors existed: (1) that the defendant was previously convicted of other felonies involving

violence (R. 1184)[2]; (2) that the murder was committed during the course of an attempted robbery (R. 1184); (3) that the murder was committed for pecuniary gain (R. 1185); and (4) that the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. (R. 1185). The second and third factors were merged and treated as one aggravating factor. (R. 1185).

The trial court found that no statutory mitigating circumstances existed, finding that the defense proffered only one statutory mitigating circumstance, that the defendant was under the influence of extreme mental or emotional disturbance. (R. 1188-94). As to that factor, the trial court explicitly rejected Dr. Toomer's testimony and concluded that Dr. Mutter's opinion was well-reasoned. (R. 1190).

The trial court's order also extensively reviewed the nonstatutory mitigating circumstances asserted by the defense. The court accepted, as nonstatutory mitigation, that the defendant suffered hardships during his youth, including the abandonment by the mother, the death of the brother, and the father's resort to drugs and alcohol. (R. 1198-99). The court also accepted that the defendant was a caring husband, father,

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[2] The trial court considered the aggravated assault and attempted armed robbery in the Republic Bank case, the armed kidnapping and armed robbery in the Van Nest case, and the two counts of attempted first degree murders herein, all as prior violent felonies. (R. 1184).

brother and provider, although noting that there was "very little objective proof of this assertion." (R. 1200).

All other alleged nonstatutory mitigation was found not to exist. The order extensively details the reasons for rejecting the claim of mental retardation (R. 1195-96), the claim of a borderline personality disorder (R. 1196), the claim of organic brain damage (R. 1197), the claim of mental or emotional problems which do not reach the level of statutory mitigation (R. 1200-1201), as well as several other alleged categories of nonstatutory mitigation.

The sentencing judge then concluded: "that the aggravating circumstances in this case far outweigh the mitigating circumstances. The aggravating circumstances in this case are appalling, the defendant's previous convictions for violent crimes, the fact that the murder herein was committed during the commission of an attempted robbery and for pecuniary gain and the cold, calculated and premeditated manner in which the murder was committed, greatly outweigh the relatively insignificant non-statutory circumstances established by this record. Even in the absence of the cold, calculated and premeditated aggravator the court would still feel that the remaining two aggravators seriously outweighed the existing mitigators." (R. 1202-1203).

## SUMMARY OF THE ARGUMENT

I. Defendant's contention that the trial court erred in admitting the confession of his non-testifying codefendant, and/or refusing to sever their trials, is without merit. The record shows that the statements were identical in every material aspect. As such there were sufficient indicia of reliability to admit the codefendant's statement, and no error occurred. Further, in light of the corroborating testimony of the experts and eyewitnesses, any error would be harmless.

II. The defendant's statement was properly admitted, where (1) there **was** sufficient proof of the corpus delicti of attempted armed robbery, apart from the statement, and (2) the statement was independently admissible as evidence as to the murder, for which there was adequate proof of the corpus delicti.

III. Defendant's contentions regarding improprieties during voir dire are also without merit, and, in part, not properly preserved. Defendant has failed to show any abuse of discretion or prejudice as a result of the trial court's refusal to conduct individual sequestered voir dire. Likewise, Defendant's claim that the trial court unduly limited his inquiry of the venire regarding the mitigating factors is without record support. Finally, Defendant has failed to demonstrate prejudice when he was not provided with a clerk's jury questionnaire, as he was nevertheless provided with the information contained therein.

IV. A. The CCP aggravator was amply supported by the evidence. Franqui planned the ambush far in advance and specifically told his accomplice that he intended to shoot the escort/bodyguard. The evidence corroborated this, as Franqui commenced shooting immediately. The victim never fired any shots and Franqui's shooting preceded any shots by the other victims of the attempted robbery.

IV. B. While the Appellant objected to the standard CCP instructions, he did not object to the longer version which the trial court actually gave, and this issue has not been preserved. Furthermore, the instruction which was given is correct and virtually identical to the one approved by this Court in Jackson, infra.

IV. c. The trial court did not abuse his discretion and properly rejected the proffered mitigation which was inconsistent and contradicted by the State's evidence.

IV. D. The sentence of death herein is proportionate to that approved in numerous capital cases, many of which involve comparable attempted robbery settings, with comparable (or less) aggravating factors and comparable mitigation.

IV. E. There was no error in precluding speculative argument or instruction regarding non capital sentences.

IV. F. The attacks on the constitutionality of the death sentence are unpreserved and have been repeatedly rejected.

## ARGUMENT

I.

**THE STATEMENT OF CO-DEFENDANT PABLO SAN MARTIN WAS INDEPENDENTLY RELIABLE, AND AS SUCH, THE TRIAL COURT PROPERLY ALLOWED THE STATEMENT TO BE ADMITTED AGAINST DEFENDANT AND PROPERLY REFUSED TO SEVER THE TRIALS OF SAN MARTIN AND DEFENDANT.**

Defendant contends the trial court erred in failing to sever his trial from that of non-testifying co-defendant Pablo San Martin. He asserts that San Martin's statement should not have been admitted against him because it did not sufficiently "interlock" with his. However, a review of the two statements, as well as the other evidence presented shows that San Martin's statement was independently reliable and thus admissible against Defendant. Under such circumstances, severance was not mandated. Further, any alleged error would be harmless beyond a reasonable doubt.

In Cruz v. State, 481 U.S. 186, 107 S. Ct. 1714, 95 L. Ed. 2d 162 (1987), the Supreme Court held that a nontestifying codefendant's incriminating statement should not be admitted at a joint trial, unless the statement would be directly admissible against the defendant under Lee v. Illinois, 476 U.S. 530, 106 S. Ct. 2056, 90 L. Ed. 2d 514 (1986). Here, San Martin's statement would have been admissible against Defendant under Lee, and as such, the denial of severance was proper.

Lee holds that a non-testifying codefendant's statement is generally considered hearsay and may not be admitted with violation of the Sixth Amendment unless it is supported by a

showing of a particularized guarantee of trustworthiness. Where the codefendants' statements are "thoroughly substantiated by the defendant's own confession," i.e., where the discrepancies between the statements are not significant, the codefendant's confession may be admitted. Id., 476 U.S., at 546. Because the statements in Lee differed in material aspects, e.g., the roles of the defendants in the crime, and the issue of premeditation, and because the surrounding circumstances did not provide any indicia of reliability, the Court found that the statement should not have come in. See Grossman v. State, 525 So. 2d 833, 383 (Fla. 1988).

Contrary to Defendant's assertions, and unlike the statements in Lee, the statements in question here did not differ in any material respect. Defendant stated that he got involved in the robbery through his friend Fernando Fernandez. Fernandez told him that the victims had a check cashing business and carried money. (R. 373). Fernandez showed Defendant and San Martin where the business was and the car the victims drove. (R. 374). This occurred five OK six months prior to the shooting. (R. 377). Fernando told them to postpone the robbery after the victims were robbed by someone else. Fernando planned the robbery but was not going to participate in it. (R. 378). He thought they would get $25,000. (R. 379).

San Martin stated that he and Defendant met with Fernandez three or four months before the shooting. Fernandez told them that the victim had a check-cashing business. Fernandez had

planned the robbery but told the others to execute it. He thought they would get $75,000. (T. 2096).

Defendant stated that before December 6, they took two trucks. One was white and blue and the other was gray and blue. (R. 379). They took the blue and white one from near Malibu Castle Park behind Mall of the Americas, around 8-9 p.m. (R. 380). He and San Martin took the second truck from a parking lot near SW 8th Street and Le Jeune Road. (R. 383). After they stole the trucks they parked them behind a building near Palm Avenue in Hialeah. (R. 382, 384).

San Martin stated that they stole one truck from near Castle Park and the Mall of the Americas, around Flagler and the Palmetto Expressway. The other was taken from near S.W. 8th Street and Le Jeune Road. They then parked the trucks at an apartment building in Hialeah. (T. 2098).

According to Defendant, on the day of the crime, Defendant, San Martin and Pablo Abreu met at San Martin's house. They drove Abreu's van and recovered the trucks. Defendant got into the gray and blue truck and the other two got into the blue and white. They drove to the bank. They parked one truck close to the bank. (R. 386). Then they left Abreu's van at the expressway. (R. 387). They returned to the bank and San Martin and Abreu got into the blue and white, and Defendant remained in the gray Suburban. (R. 389). He waited a block away until the victims came out of the bank. (R. 391). Defendant stated he was armed with a .357. Abreu had a 9mm Tech-g. (R. 389). San Martin had a 9mm pistol.

According to San Martin, Defendant waited a block from the bank in one truck and he and Abreu waited at the bank in the other. (T. 2100). San Martin had a 9mm pistol and Abreu had "a small machine gun."[3] San Martin did not indicate in the first statement what type of gun Defendant had. (T. 2102). In his second statement he referred to disposing of a 9mm pistol and a .357. (T. 2119).

According to Defendant, after the victims left the bank in the red Blazer, Abreu got in front of them and Defendant followed. (R. 391). The Pablos were both wearing nylon stockings as face masks. (R. 399). The other Suburban stopped in front of the Blazer. Defendant drove his vehicle alongside the Blazer to the left, so that they could block them in and take the money from them. (R. 393). San Martin was just supposed to get out and demand the money; they did not plan on the shooting. Then the pickup came up from behind and the man got out with a gun. (R. 394). Defendant then, ducked down because the two Pablos were shooting and bullets were everywhere. Defendant fired a shot through the window, toward the brown truck, toward its windshield. (R. 396). Then he drove away, and the Pablos and the victims were still shooting. Abreu had gotten out one side and San Martin had gotten out the other, and they were shooting to the rear. Abreu was the driver. (R. 396). They stayed on their respective sides while shooting. The victims

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[3] A Tech-9 resembles a machine gun. (T. 2203).

were shooting back. Defendant left and then the Pablos left also. (R. 397).

According to Pablo San Martin, he and Abreu left the bank ahead of the Blazer. They were wearing stocking masks. Defendant followed in the second Suburban. The plan was to box them in and rob them. He saw the pickup come up behind the Blazer. (T. 2100-01). San Martin got out the right side of the Suburban and Abreu got out the left. San Martin did not know where Defendant was at that time because his view was blocked by the vehicle. San Martin instructed the victims not to move, but they started shooting at him. (T. 2102-03). Abreu and San Martin returned fire. San Martin could not say if Defendant fired because his view was still blocked. San Martin fired his shots at the Blazer, not the pickup.[4] Then all three got into the vehicles and fled. (T. 2103).

After they fled, Defendant stated that they abandoned the Suburbans on the expressway. (R, 399). They left in Abreu's vehicle and went to San Martin's house. Then Defendant left in his car. He left the guns at San Martin's house. (R. 400). The Pablos later told him that they had disposed of the guns. (R. 401). Defendant further noted that the 9mm frequently jammed. (R. 402).

San Martin stated that after they fled, they abandoned the Suburbans beside the expressway and left in Abreu's van. They went to San Martin's house, and Defendant and Abreu left from

[4] The pickup was, however, directly behind the Blazer.

there. (T. 2104). San Martin said that later the guns were thrown off a bridge in Miami Beach, but he was unsure where. (T. 2104).

In his second statement, San Martin indicated that he had thrown the 9mm and the .357 in the river near his house. (T. 2119).

Defendant contends that these statements "were different in significant respects which belied the reliability of San Martin's statement." (B. 21) The "significant" differences which Defendant avers are: (a) San Martin claimed 3-4 months of planning while Defendant claimed six, (B. 21); (b) San Martin thought they would get $75,000, while Defendant only thought they would take $25,000, (B. 21); (c) Each purportedly "placed the blame for the fatal shot on the other." This is based upon San Martin's denial that he shot at the pickup versus Defendant's alleged statement that the Pablos shot at all three victims, (B. 22); and (d) Defendant's confession allegedly "contained no statements relating to the discarding or hiding of the weapons at all." (B. 22). These alleged discrepancies (to the extent they are even accurate) are not, however, of the magnitude condemned in Lee or its progeny. On the contrary, a comparison of these statements, each taken by a different detective a month and a half after the shooting, shows that they are to a remarkable degree identical.

The state would submit that the first two alleged discrepancies, as to the amount of the take, and the time of the

planning are not significant. What both statements make abundantly clear is that the Defendant, San Martin and Abreu were advised of this "opportunity" to obtain a large sum of money by Fernando Fernandez several months before the incident took place. Both statements also show that two Suburbans were taken from two specific locations and lodged in Hialeah; that the participants then took these trucks on the appointed day and proceeded to the bank; that Abreu and San Martin were in one truck and Defendant waited a block away in the other; that the two Pablos proceeded first when the victims left the bank and Defendant followed; that the Pablos' vehicle stopped in front and Defendant pulled alongside; and that the murder victim pulled up behind in a pickup; that the Pablos got out of their truck wearing stockings on their heads; that a firefight ensued; and that they fled.

Defendant's third "discrepancy" is simply not accurate. In fact neither defendant pointed the finger at the other. San Martin denied any knowledge as to whether or where Defendant shot. Defendant admitted to shooting at both the Blazer and the Pickup. San Martin claimed he only shot at the Blazer. However, this is consistent with Defendant's statement that San Martin shot "to the rear."

Furthermore, both statements are consistent,[5] with the physical evidence. The forensic evidence unequivocally showed

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[5] To the extent the confessions are inconsistent with the physical evidence, the physical evidence shows a greater degree of culpability than either statement. For example, the statements claim that Lopez shot first, whereas the forensic evidence showed beyond any doubt that Lopez's gun was never

that the .38 bullet which killed Lopez could only have been fired from the gun which both Defendant and San Martin said was carried by Defendant, the .357 revolver. Likewise the .38 bullet which lodged in the mirror of the Gray Suburban could only have been fired from within that vehicle. Defendant and San Martin both said Defendant was the sole occupant of that vehicle. That bullet was, to a certainty, fired from the same gun as the murder bullet, as was a third .38 slug which was recovered from the hood of the Blazer.

Defendant finally asserts that Defendant's statement contained no reference to the disposal of the weapons. This is not true. On the contrary Defendant stated that they had been disposed of:

> **Q.** You mentioned earlier you felt that the guns had been thrown out by San Martin and Abreu?
>
> A. Yeah.
>
> **Q.** Why did you say that?
>
> **A.** Because that's what they told me.
>
> * * *
>
> **Q.** Did they tell you where they threw them out?
>
> **A.** No.

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fired. Likewise, although Dafendant claimed to fire only once, the physical evidence showed that at least three .38 bullets were fired from within the Gray Suburban which it was uncontested that he alone occupied.

(R. 401-02). This is entirely consistent with San Martin's statement that the .357 and the 9mm pistol had been thrown in the canal. The reliability of that statement is of course fully corroborated by the fact that the guns were found where San Martin said they would be. The connection to this case is further bolstered by the fact that the guns are the same type which Defendant said were used by him and San Martin. Further, several of the 9mm projectiles, casings, and unfired cartridges[6] were conclusively tied to the 9mm pistol found in the canal. The murder bullet as well as two other projectiles fired from within the Gray Suburban occupied by Defendant, could have been fired from the .357 found in the river. Defendant stated he used a .357, and stated that San Martin had said he threw the guns away. San Martin's statement regarding the disposal of the guns is unquestionably reliable.

Finally, Defendant's contention that San Martin had a motive to distort the facts to Defendant's detriment, (B. 23), is of no consequence. Regardless of whether such a motive did or did not exist, the fact remains that San Martin did not attempt to lay the blame on Defendant. Indeed he repeatedly stated that during the shootout he was unable to see what Defendant was doing from his vantage point. San Martin's statement that he fired at the Blazer cannot be considered exculpatory, where the murder victim was directly to the rear of the Blazer, unless one

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[6] The unfired cartridges show that San Martin's 9mm jammed, a fact alluded to by Defendant and confirmed by the firearms technician.

suspends the laws of physics and logical trajectories of bullets. Thus this claim must be rejected for the chimera which it is.

In sum, the statements of Defendant and San Martin, were fully consistent in every material aspect. As such San Martin's confession was properly admitted. Lee; Cruz, 95 L. Ed. 2d, at 172. It follows that the motion to sever was properly denied.

Finally, assuming arguendo, that the statement was not sufficiently reliable to be admitted substantively against Defendant, rendering the failure to sever a Bruton[7] violation, any error is subject to harmless error analysis. See Cruz, 95 L. Ed. 2d, at 172; Harrington v. California, 395 U.S. 250, 89 S. Ct. 1726, 23 L. Ed. 2d 284 (1969); Grossman v. State, 525 So. 2d 833 (Fla. 1988). As discussed, ante, Defendant's confession corroborated San Martin's in virtually every aspect. Furthermore, the testimony of the eyewitnesses and the physical evidence was overwhelming and also corroborated San Martin's testimony.[8] Thus, the admission of San Martin's testimony could not have had any probable impact an the jury. Harrington. Defendant's convictions should be affirmed.

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[7] Bruton v. U.S., 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968).

[8] See n. 5, above.

11.

**THE CORPUS DELICTI FOR ATTEMPTED ROBBERY WITH A FIREARM WAS AMPLY ESTABLISHED APART FROM THE DEFENDANTS' CONFESSIONS WHERE THE INDEPENDENT EVIDENCE SHOWED THAT THE VICTIMS DEPARTED A BANK WITH $25,000 IN THEIR POSSESSION AND WITHIN 7/10 OF A MILE FROM THE BANK WERE "BOXED IN" BY TWO LARGE VEHICLES FROM WHICH MASKED GUNMEN EMERGED, GUNS BLAZING, AND THE CONFESSIONS WERE THUS PROPERLY ADMITTED.**

Defendant's second contention is that the State failed to independently prove the corpus delicti of attempted robbery with a firearm,[9] and that therefore the trial court erred in admitting the portions of the defendant's confessions dealing with the attempted robbery. As the independent evidence was sufficient to establish all elements of attempted robbery save the identity of the assailants, the corpus delicti was amply proved. Further, the robbery plot proved an element of the crime of first degree felony-murder, with which Defendant was charged, and was thus admissible for that purpose.

To satisfy the corpus delicti requirement, the State has the burden of proving by substantial evidence that a crime was committed, which it may prove by circumstantial evidence. Burks v. State, 613 So. 2d 441 (Fla. 1993). The proof need not be uncontradicted or overwhelming, but it must at least show the existence of each element of the crime. Id. The identity of the defendant as the guilty party is not part of the corpus delicti.

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9 Defendant clouds the issue by repeatedly referring to the crime of "robbery" in his brief, which Defendant was neither charged with nor convicted of. (B. 27, 30-31).

Id. This standard was met with regard to the attempted robbery charge.

An attempted robbery is committed if the defendant intends to commit the crime of robbery and does some physical act in furtherance of that intent. Intent may be proved by considering the accused's conduct before, during, and after the alleged attempt along with any other relevant circumstances. Cooper v. Wainwright, 308 So. 2d 182, 185 (Fla. 4th DCA 1975).

Here, both Cabanases testified that they exited the bank, as they did every Friday, with a large sum of money, $25,000 in cash. Less than a mile from the bank a large Chevrolet Suburban stopped in front of them. A second Suburban pulled alongside them at a high rate of speed and also stopped, foreclosing any escape. Two masked men emerged from the front Suburban and immediately opened fire at the Cabanases. The victims returned fire, and the attackers fled. The two Suburbans, subsequently determined to be stolen, were found nearby, abandoned beside an expressway, suggesting a prearranged getaway plan. The State would submit that there is no reasonable way to interpret the foregoing as evidence of anything but a preplanned robbery, aborted only by the Cabanases self-defense.

In Cooper, similar facts were held to support a conviction for attempted armed robbery. There, the defendant negotiated a large marijuana transaction with undercover officers. On arrival at the sale location, one of the officers proceeded to open the rear door of a van to inspect the merchandise. The officer then

saw two men in the back with shotguns. The defendant then jumped out of his car and yelled "freeze!" The officers fired their guns and ultimately managed to subdue the defendant and his accomplices, without injury. Upon a conviction for attempted robbery with a firearm, the defendant claimed that the evidence was insufficient to prove his intent to commit a robbery. The court rejected that claim, finding that the circumstances surrounding the incident were sufficient to prove the crime.

There is no distinction between the facts in Cooper and those proven independent of the confessions below.[10] Thus, as the nonconfession evidence was sufficient to show both intent and an overt act, the State amply proved the corpus delicti of attempted robbery with a firearm. The confessions were therefore properly admitted. Id.

Furthermore, Defendant was also charged with both premeditated and felony first-degree murder. The confessions were therefore admissible to prove either intent or the underlying felony as an element of murder, assuming the State proved the corpus delicti of murder. Jefferson v. State, 128 So. 2d 132 (Fla. 1961). To meet that burden the State need only show the death, the identity of the victim, and the criminal agency of another. Golden v. State, 629 So. 2d 109 (Fla. 1993). This

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[10] Defendant seems to rely heavily upon the fact that he and his cohorts had no verbal communication with the victims. The State would submit, however, that Cooper's statement, "Freeze!" is no more a demand for money than that in this case, other than that here the Cabanases, and especially Raul Lopez, were not given the opportunity to "freeze" and presumably exchange their lives for the money.

burden was satisfied by proof that Raul Lopez was killed by a bullet to the chest fired by one of the assailants during the ambush. There is no requirement that the degree of the homicide be shown, only that it was unlawful. Jefferson at 136. Thus assuming, arguendo, that the corpus delicti was insufficient to allow a conviction for attempted robbery, Defendant's contention that that alleged infirmity also goes to Defendant's felony-murder conviction, (B. 30-31), is without merit. Jefferson; Atkins v. Dugger, 541 So. 2d 1165, 1167-68 (Fla. 1989)(Grimes, J., specially concurring)(Even where corpus delicti insufficient to allow sexual battery convictions, jury properly instructed that sexual battery could be underlying felony to murder and confessions to sexual battery properly admissible as explaining circumstances of murder). Defendant's convictions should be affirmed.

**III.**

**THE TRIAL COURT PROPERLY DECLINED ALLOW INDIVIDUAL SEQUESTERED VOIR DIRE OF THE VENIRE, PROPERLY LIMITED DEFENDANT'S VOIR DIRE TO QUESTIONS CONCERNING THE JURY'S ABILITY TO FOLLOW THE LAW, AND DID NOT REVERSIBLY ERR IN DECLINING TO OBTAIN FOR DEFENDANT, MINUTES BEFORE TRIAL BEGAN, PURPORTED COPIES OF THE CLERK'S JURY QUESTIONNAIRES.**

In his third argument, Defendant raises several contentions with regard to the jury selection process: that the trial court improperly denied his request for individual sequestered voir dire; that the trial court improper limited his voir dire

examination of the potential jurors, egarding the factors in mitigation; and that the court improperly refused his request for the jury questionnaires returned by the jurors. The first and third claims are not preserved for review, and, in any event, none of the claims warrant reversal.

Defendant's first contention, that he was improperly denied individual sequestered voir dire of the potential jurors, (B. 35), has not been preserved for review. Even if it were preserved, the claim is without merit.

Voir dire originally commenced on July, 7, 1993. (T. 549). At that time the defendants joined in a motion for individual sequestered voir dire, which was denied. (T. 563-565). The next day, codefendant San Martin's attorney was called away on a family emergency, (T. 886), and the trial was continued and the venire discharged. (T. 902). The trial was again commenced on September 20, 1993, at which time no mention was made of individual sequestered voir dire. The State would submit that the failure to again raise the issue when an entirely new venire was presented two and a half months later prevents review of the question on appeal.

Assuming, arguendo, that the issue is properly before the Court, it lacks merit. The granting of individual and sequestered voir dire is within the trial court's sound discretion. Randolph v. State, 562 So. 2d 331, 337 (Fla. 1990); Davis v. State, 461 So. 2d 67, 69 (Fla. 1984); Stone v. State, 378 So. 2d 765, 768 (Fla. 1980).

In Randolph, there was no factual basis demonstrating that the jurors might have been tainted by pretrial publicity at the time the motion was made. The trial court stated it would reconsider the motion if the need to do so arose during voir dire. The motion was not thereafter renewed and under the circumstances the Court found no abuse of discretion in declining to individually examine the venire members.

Here, the trial court indicated that if publicity became an issue during the voir dire, it would deal with the jurors individually. As discussed above, the motion was never renewed. As such, under Randolph there clearly was no abuse of discretion. Further, Defendant has made no showing that there was any adverse pretrial publicity, nor made any showing that he was in any way prejudiced. As such his claim must fail. See, Davis, at 70 ("Davis has demonstrated neither the partiality of his jury nor an abuse of discretion by the trial court, and we find no merit to this claim."); Mu'Min v. Virginia, 500 U.S. 415, 425-426, 11 S. Ct. 1899, 114 L. Ed. 2d 493 (1991)("it is not enough that such questions might be helpful. Rather, the trial court's failure to ask these questions must render the defendant's trial fundamentally unfair."); Pietri v. State, 19 Fla. L. Weekly S486, S487 (Fla. Sept. 29, 1994)(same).

Counsel below further argued that the focus of the motion was not so much pretrial publicity, but to prevent the "tainting of the jury on death qualification issues," (T. 564), Defendant presents no authority for the conducting of individual

sequestered voir dire for reasons other than pretrial publicity. The State has located no such authority. It would further submit that the reasons for conducting such interviews do not present themselves in the context of so-called "death qualification issues."

The rationale for individual interrogation of venire members in the pretrial publicity context is to prevent a juror with knowledge of the case from revealing the substance of that knowledge to the other jurors, and thereby "tainting" the impartiality of the others, On the other hand questions regarding "death qualification" do not seek to elicit facts, but opinions based upon the prospective juror's individual conscience. As the trial judge noted in denying the motion, such opinions are much less likely to be "polluted" by the responses of other jurors:

> I'm denying it on the basis of my experience that I have rarely had jurors shy away from expressing either their great preference to [sic] the death penalty or their great aversion to the death penalty.

(T. 565). Nevertheless, accepting arquendo that such sequestered voir dire may be undertaken, Defendant has failed to make any showing that the trial court abused its discretion or that he was prejudiced by having a partial jury seated; indeed substantial questioning on the subject of the death penalty was undertaken during the multi-day voir dire conducted below. As such the claim must fail. Randolph; Davis; Mu'Min; Pietri.

Defendants next contention is that the trial court "consistently prohibited defense counsel from exploring the jurors' feelings and preconceptions relative to mitigating circumstances." (B. 35). The court did no such thing. During voir dire, defense counsel asked:

> Do you feel that the defendant's young age would be a factor you would take into effect, take into your mind in deciding whether or not to impose the death penalty7

(T. 1270). The State properly objected. See, Lavado v. State, 469 So. 2d 917, 920, n. 3 (Fla. 3d DCA 1985)(Pearson, J., dissenting), dissent adopted, 492 So. 2d 1322 (Fla. 1986)(improper to question jury on final application of facts as opposed to application of law). The trial court concurred, and instructed counsel to ask his questions "generically". (T. 1270).

The court explained that it meant that the defense was welcome to inquire regarding the process so long as the questions were put in the context of the jurors' ability to follow the law, rather than eliciting a promise that the juror would factor in a specific mitigating circumstance:

> I think you can ask them hypotheticals. If the court were to say to you that the fact that the Defendant never had a traffic infraction, is a mitigating circumstance, do you follow an instruction even if you did not feel that it was a mitigating circumstance or any subject like that? That is what I mean by generic. Not specifically addressing any particular mitigating circumstance.

(T. 1273). Counsel thus was not prohibited from inquiring whether a mitigator could be considered if the judge so instructed them.[11]

Furthermore, the scope of voir dire questioning rests in the sound discretion of the trial court, and will not be interfered with unless that discretion is clearly abused. Vining v. State, 637 So. 2d 921 (Fla. 1994). In Vining, the trial court similarly refused to allow the defense to question jurors about their personal views of what constitutes a mitigating circumstance. The Court held that that was not an abuse of discretion where counsel was permitted to explore the potential jurors' understanding of the two-part procedure involved and their ability to follow the law as instructed in the penalty phase. Id., at 927. The Court further noted that the examination was sufficient to allow defense counsel to strike several jurors for cause. Id. The same leeway was accorded defense counsel below, and indeed the defense struck at least five jurors for cause based upon death penalty questions.[12] The judge plainly did not abuse his discretion.

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[11] Despite his contention that the State was permitted to ask purportedly improper hypotheticals, and his contention that the defense was not permitted to ask similar questions, (B. 35), in his brief Defendant curiously makes no cite to the record where such a "similar" question was refused. The State would submit that its hypotheticals were proper under Lavado.

[12] The jurors were Paula Lightbourne, (T. 1365), Robert Ortega, (T. 1378), Brunilda Lopez, (T. 1676), Vance Larkins, (T. 1677), Leonard Walinsky (T. 1682). Several other jurors were stricken by the defense for cause without opposition or explanation of the cause.

Defendant's final contention is that the trial court erred in refusing his alleged request to be furnished with any questionnaires returned by the prospective jurors. This question has not been properly preserved for appellate review, and even if it were, would not warrant reversal.

The record is devoid of any indication that Defendant ever requested the questionnaires from the clerk's office or that the clerk's office was actually unwilling or unable to provide Defendant with the questionnaires.[13] Nor does the record disclose whether such questionnaires ever in fact existed. Such a record does not provide a sound basis for review.

Assuming, arguendo, that the issue is properly before the court, it is without merit. As Defendant points out in his brief, there is no Florida case law concerning the effect of alleged noncompliance with R. 3.281, Fla. R. Crim. P. There has, however, been judicial suggestion that there is no legal authorization for the gathering of such questionnaires in criminal cases. In State v. Thayer, 528 So. 2d 67, 69 (Fla. 4th DCA 1988)(Glickstein, J., specially concurring), it was suggested that the only questionnaire which should be sent to the venire was that permitted by R. 1.431, Fla. R. Civ. P. The majority opinion in Thayer quashed a trial court order granting a

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[13] Rule 3.821 provides:

> Upon request, any party shall be furnished by *the clerk of the court* with a list containing names and addresses of prospective jurors summoned to try the case together with copies of all jury questionnaires returned by the prospective jurors.

Defendant's motion to submit a questionnaire to the jury pursuant to R. 3.281. It based its conclusion on this court's opinion in Smith v. Portante, 212 So. 2d 298 (Fla. 1968). Thayer, at 68. Smith held that § 40.101, Fla. Stat.,[14] was invalid as an unconstitutional delegation of authority by the legislature.[15] The delegation was improper because there were no guidelines in the statute which limited the scope of the questionnaires, creating the possibility of an unwarranted intrusion into the privacy of the prospective jurors. The State would submit that if the questionnaires could not be lawfully gathered, there was certainly no error in the trial court's refusal to supply them.

Finally, even if there were in fact proper questionnaires completed by the jurors, the State would submit that the trial court's failure to produce them is not reversible error. In U.S. v. Crowell, 442 F.2d 346 (5th Cir. 1971), relied upon by Defendant, the court held, that if the defendant had not been provided with a copy of the jury list, it would be reversible error. Crowell was predicated upon a federal statute requiring the service of the indictment, witness list and venire list three days before trial in capital cases. The statute had previously been held to be mandatory and failure to comply with it

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[14] Defendant cites to the "repealed" § 40.101 in his brief. (B. 38).

[15] Curiously, R. 3.281, enacted in 1971, refers to questionnaires produced pursuant to the then already invalid § 40.101. The statute was ultimately repealed by the legislature in 1979. Ch. 79-235, § 21, Laws of Fla.

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reversible. See, Logan v. U.S., 144 U.S. 263, 12 S. Ct. 617, 36 L. Ed. 429 (1888).[16]

There is no such precedent associated with R. 3.821; indeed its validity, at least as to the questionnaires at issue here, has been questioned. Thayer. Nor is there justification for the per se rule of reversal advocated by Defendant. The purpose of the rule is to expedite the jury selection process. See, Committee Notes, R. 3.281 ("The furnishing of such a list should result in considerable time being saved at voir dire."). The commentary to ABA Standards for Criminal Justice, Trial by Jury, 2.2, upon which the rule is based, also indicates such a purpose. Nothing in that purpose, absent a showing of prejudice, warrants automatic reversal for noncompliance.

The federal approach in non-capital cases is instructive. For example in U.S. v. Clarke, 468 F.2d 890 (5th Cir. 1972), the court found no error in failing to provide advance knowledge of the jury list, because ample questioning of the venire was permitted. By way of contrast, in Bailey v. U.S., 53 F.2d 982 (5th Cir. 1931), cited by Defendant, the conviction was reversed not solely because, as Defendant seems to suggest, the defendant was not provided with the jury list. Rather, that default, when combined with the trial judge's refusal to allow more than three

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[16] The State would note that unlike R. 3.300, Fla. R. Crim. P which grants parties the right to examine the venire, the federal rules provide that voir dire examination by the attorneys is a matter of discretion. R. 24. Fed. R. Crim. P.

questions to the venire deprived the defendant of a meaningful basis upon which to exercise his challenges.

Here, the questionnaires asked only the nature of the juror's employment, whether the juror was a student, unemployed or retired. (R. 707). These very questions, along with several others, were asked by the trial court of every prospective juror at the commencement of voir dire. Defendant thus cannot possibly demonstrate any prejudice in not receiving questionnaires which he requested minutes before these very questions were asked by the judge. This claim, along with Defendant's other contentions regarding voir dire, should be rejected.

**IV.**

**THE LOWER COURT DID NOT ERR IN IMPOSING THE SENTENCE OF DEATH.**

**A. THE TRIAL COURT DID NOT ERR IN FINDING THAT THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.**

The lower court's finding, that the homicide was committed in a cold, calculated and premeditated manner, is in accordance with the legal principles defining that factor, and is supported by the record herein. The lower court's written order includes detailed findings, relating that not only the robbery, but the homicide as well, were carefully planned in advance:

> The evidence established that the defendant was aware of the method in which the Cabanas went to the bank to make their cash withdrawals. The defendant Franqui himself, in his confession, explained that he was aware of the Cabanas' schedule up to five to six months before the attempted robbery,

> murder and attempted murder in this case occurred. The co-defendant Abreu testified that the robbery was carefully planned but that the issue of how to handle the "bodyguard" the Cabanas had hired was also discussed. The defendant and his co-defendants decided that in order to successfully execute the robbery of the Cabanas the "bodyguard" would have to be murdered. At some point in time the defendants decided that the defendant Franqui would be the one to distract and assassinate the "bodyguard". It was planned that Franqui would drive his car in such a way as to force the bodyguard's" car off the road and then he would kill him.

(R. 1185-86). The foregoing description of the planned murder is fully consistent with the testimony of Pablo Abreu:

> **A.** He [Franqui] said not to worry about it, that the only one that could shoot there was the bodyguard, not the others.
>
> **Q.** And what did Franqui tell you or Pablo they were going to do to the bodyguard, if anything?
>
> A. That it would be better for him to be dead first than Franqui.
>
> **Q.** What did Franqui tell you that they were going to do with the bodyguard during the crime?
>
> A. First he was going to crash against him and throw him down the curbside, and then he would shoot at him, but he didn't do it that way.

(T. 2696-97). Franqui also told Abreu that he, Franqui, would "take care of the escort." (T. 2703).

The court's order then details how the crime proceeded, and concludes that that evidence was corroborative of the prior plan to kill Raul Lopez:

> The defendant Franqui's passenger window was open and the evidence shows that immediately upon stopping his vehicle Franqui opened fire on Raul Lopez. Consistent with their intentions Franqui killed Raul Lopez before the latter could in any way help his friends.

(R. 1186-87). This, too, is fully supported by the evidence. According to Danilo Cabanas, Sr., the shooting started immediately after the defendants blocked the victims' vehicles. (T. 1999). The shooting commenced before the Cabanas' ever fired any shots. (T. 1999, 1727). Furthermore, the deceased's weapon was found to have been fully loaded and not fired. (T. 2198). Thus, the defendant could not have been returning fire after having been fired upon. Franqui's explanation, given to the police, that he fired in the direction of Lopez's vehicle after Lopez opened fire is therefore clearly repudiated. (T. 1921).

As seen above and contrary to the Appellant's argument, the factor was not applied solely on the basis of Abreu's testimony. Rather, the factor was found to exist based upon (a) Abreu's testimony; (b) extensive eyewitness and physical evidence corroborating Abreu's testimony, based on the manner in which the shooting occurred; and (c) a clear negation of the defendant's claim as to how the shooting occurred.

The requirements of the CCP factor are delineated in Jackson v. State, 19 Fla. L. Weekly S215, 217 (Fla. April 21, 1994):

> . . . in order to find the CCP aggravating factor under our case law, the jury must determine that the killing was the product of cool and calm reflection and not an act

> prompted by emotional frenzy, panic, or a fit of rage (cold), . . .; and that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated) . .. and that the defendant exhibited heightened premeditation (premeditated), . . .' and that the defendant had no pretense of moral or legal justification.

Those factors are satisfied in the instant case. This killing did not reflect an emotional frenzy. Not only was it part of a well-developed prior plan, but the evidence supports the conclusion that the firing began immediately, prior to any shooting by the Cabanas, and in the absence of any shooting by the deceased victim. Second, the existence of the careful plan or prearranged design is established through Abreu's testimony and corroborated by the manner in which the shooting occurred. The heightened premeditation is discerned from the immediacy of the shooting, reflecting an individual who was intent upon carrying out the prior plan, regardless of whether any resistance was displayed by the victim. The absence of any "pretense of moral OK legal justification" is demonstrated by the absence of "any colorable claim based at least partly on uncontroverted and believable factual evidence or testimony that, but for its incompleteness, would constitute any excuse, justification, or defense as to the homicide." Walls v. State, 19 Fla. L. Weekly s377, 379 (Fla. July 7, 1994). Not only is there no pretense of any such justification in the instant case, but the defendant's own claim, in the police statement, that he returned the victim's fire, is explicitly repudiated by the testimony of the two

surviving victims, as well as the forensic testimony, establishing that the deceased never fired any weapon.

The foregoing conclusions are supported by many other cases. Most significantly, in the recent case of Griffin v. State, 639 So. 2d 966 (Fla. 1994), this factor was upheld, on the basis of the defendant's statements to his codefendants, that if they were pulled over by the police, he would get out and shoot, because he was not going back to jail. The evidence corroborated that the defendant subsequently shot an officer, immediately upon having his vehicle pulled over by the police. See, also, Rutherford v. State, 545 So. 2d 853, 856 (Fla. 1989) (aggravator valid when the defendant followed a prior plan to kill. "[T]he finding of cold, calculated and premeditated is not limited to execution-style murders. It is appropriate, as we indicated in Rogers, when there is evidence of calculation, which we defined as consisting of a 'careful plan or prearranged design.'"); Johnson v. State, 438 So. 2d 777, 779 (Fla. 1984) (murder of a deputy within a half hour of a robbery properly found to constitute CCP, where the defendant had previously announced that he "would not mind shooting people" and the deputy was shot three times); Brown v. State, 565 So. 2d 304, 308 (Fla. 1990) (prior statement of intent to shoot is evidence of pre-planning for the purpose of this aggravator); Harvey v. State, 529 So. 2d 1083, 1087 (Fla. 1988) (prior discussion of whether to kill victims is sufficient evidence of the reflection and calculation contemplated by this aggravating factor); Remeta v. State, 522

So. 2d 825, 829 (Fla. 1988) (aggravator supported due to planning a robbery in advance with intent to leave no witnesses); Cruse v. State, 588 So. 2d 983, 992 (Fla. 1991) (advance procurement of a weapon, expression of intent, lack of provocation and the appearance of a killing carried out as a matter of course, are all indications of the existence of this aggravating factor).

Finally, assuming, arguendo, that the finding of this factor is deemed erroneous, any such error must be deemed harmless beyond a reasonable doubt. The lower court specifically stated that the death sentence herein was warranted even in the absence of this factor. (R. 1202-3). There was no reasonable likelihood of a life sentence, in light of the remaining aggravators herein which are of substantial weight, and "seriously outweighed the existing mitigators" (R. 1203), which, as seen in the statement of case and facts pp. 17-33 and argument IV. C., infra, were of a de minimis nature. Street v. State, 636 so. 2d 1297, 1304 (Fla. 1994)(error in finding CCP and HAC aggravators was harmless, where the sentencing order reflected that death was warranted even absent said factors).

### B. THE CCP INSTRUCTION GIVEN TO THE JURY WAS NOT UNCONSTITUTIONALLY VAGUE, AND ANY CLAIM REGARDING THIS ISSUE IS PROCEDURALLY BARRED.

The Appellant also claims that the jury instruction on the CCP aggravator was unconstitutionally vague. While the instruction given in this case is virtually identical to the one approved for use in Jackson v. State, 19 Fla. L. Weekly S215,

S218 at n. 8 (Fla. April 21, 1994), it must first be noted that this claim has not been preserved for appellate review.

In Jackson, this Court observed that claims regarding the vagueness of the CCP instruction "are procedurally barred unless a specific objection is made at trial and pursued on appeal." Id. at S217. This Court stated, "Jackson objected to the form of the instruction at trial, asked for an expanded instruction which essentially mirrored this Court's case law explanation of the terms, and raised the constitutionality of the instruction in this appeal as well." Id. See also, James v. State, 615 So. 2d 668, 669 (Fla. 1993)("James, however, objected to the then standard instruction at trial, asked for an expanded instruction and argued on appeal against the constitutionality of the instruction his jury received."); Wuornos v. State, 19 Fla. L. Weekly S503, S506-507 (Fla. Oct. 6, 1994); Street, supra, at 1303.

In the instant case, while defense counsel objected to the abbreviated instruction which was disapproved in Jackson, defense counsel's objections were directed solely towards that abbreviated instruction and not to the more detailed instruction which was subsequently given in this case. Indeed, defense counsel explicitly led the trial judge to believe that the proffered objection did not extend to the detailed instruction which was ultimately utilized. Moreover, there was no request for an expanded instruction beyond that given herein, nor was any of the reasoning argued on appeal mentioned in the court below.

During the initial charge conference, defense counsel argued that the facts did not warrant any instruction on CCP. (T. 2645-47), thus objecting to the applicability of the factor. The court then inquired whether a CCP instruction would be the standard abbreviated one, which was subsequently disapproved in Jackson, or a more detailed one:

> **PROSECUTOR:** Which instruction is the Court going to give? Is there going to be a discussion as to what, assuming that you give it?
>
> **COURT:** This is the standard.
>
> **PROSECUTOR:** And then there is one which is an option that has been given to us. We'll withdraw the lengthy instruction.
>
> **DEFENSE COUNSEL:** I think we object to it being given. And if it's given, I think I objected to the grounds that the instruction as given is vague and ambiguous.
>
> **THE COURT:** The standard?
>
> **DEFENSE COUNSEL:** Yes.
>
> **THE COURT:** That's the only objection that you're voicing on this?
>
> **DEFENSE COUNSEL:** We object to it not fitting the facts of this case, and also that it's vague and ambiguous.
>
> **THE COURT:** But as to the other one you're not taking a position?
>
> **DEFENSE COUNSEL:** Which is the other one?
>
> **THE COURT:** The longer version.
>
> . . .
>
> **PROSECUTOR:** Let's put it this way. If they want it [the longer version] we have no objection.

**THE COURT:** That's what I'm asking you. They say they don't want it. I'm asking you your position.

**DEFENSE COUNSEL:** Which is the one that they want to submit7

**THE COURT:** The little one, the standard.

**DEFENSE COUNSEL:** This standard one we do object to.

**THE COURT:** You object to the standard?

**DEFENSE COUNSEL:** **Yes.**

**THE COURT:** What about the next one, the longer one that defines cold, premeditated?

**DEFENSE COUNSEL:** Judge, I think the longer one is certainly better than the shorter one.

**THE COURT:** I agree.

(T. 2650-52). The only objection made thereafter, related to the doubling of CCP with the premeditation element of first degree murder. (T. 2652). Defense counsel never claimed that the long version of the CCP instruction, which was given, was in any way vague. Defense counsel never pointed to any phrases in the long version which counsel claimed were vague, or needed to be altered.

At a subsequent charge conference, after San Martin's attorney again asserted that the evidence did not warrant the giving of the CCP instruction, Franqui's attorney stated:

> Judge, if I could add to that, I restate all my general objections. I believe it is vague and ambiguous.

(T. 3330). At the conclusion of the argument regarding whether the evidence warranted a CCP instruction, defense counsel simply stated, "Restate the standard objection.' (T. 3333). The Appellant appears to be asserting that the above reference to "vague and ambiguous," (T. 3330), refers to the long version of the CCP instruction. That position is not tenable. First, defense counsel was restating his prior objections. His prior objections were limited to the standard CCP instruction, not the long version. Second, defense counsel never pointed to any particular phrase in the long version which was deemed vague. Even if the reference is deemed to refer to the long version, it would still be insufficiently preserved since defense counsel failed to focus on any particular part of the long version, or suggest any changes. Third, after defense counsel explicitly advised the court that the long version "is certainly better than the shorter one," (T. 2652), it would be disingenuous for the defense to suggest that the final reference to "vague and ambiguous," without anything more, would be construed by the trial judge as a reference to the long version. Accordingly, the objection must be read to apply only to the standard instruction, not to the one which was given. Therefore, this issue should be deemed unpreserved. Jackson, supra; James, supra; Street, supra; Wuornos, supra; Tillman v. State, 471 So. 2d 32, 34-35 (Fla. 1985). When the specific nature of the current argument of the Appellant is observed, the need for requiring preservation will be all the more apparent.

In Jackson, this Court approved the following instruction for use, until such time as a new standard instruction is adopted:

> The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. In order for you to consider this aggravating factor, you must find the murder was cold, and calculated, and premeditated, and that there was no pretense of moral or legal justification. "Cold" means the murder was the product of calm and cool reflection. "Calculated" means the defendant had a careful plan or prearranged design to commit the murder. "Premeditated" means the defendant exhibited a higher degree of premeditation than that which is normally required in a premeditated murder. A "pretense of moral or legal justification" is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide.

19 Fla. L. Weekly at S218, n. 8.

The instruction given in the instant case reads as follows:

> The crime for which LEONARDO FRANQUI and/or PABLO SAN MARTIN are to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.
>
> "Cold" means calm and cool reflection, not prompted by wild emotion.
>
> "Calculated" means a careful plan or prearranged design.
>
> "Premeditated" means that the killing was committed after consciously deciding to do so. The decision must be present in the mind at the time of the killing. The premeditated intent to kill must be formed before the killing. The period of time must be long enough to allow reflection by the defendant.

> Although the law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing, this aggravating factor requires that the premeditation be of a heightened degree, more than what is necessary to prove first degree premeditated murder.
>
> "Pretense of moral or legal justification" means any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide.

(R. 1143).

The Appellant complains that the definition of "cold" is vague. The instruction, as given, is the same as that approved in Jackson, except for the addition of the language "not prompted by wild emotion." The specific nature of this attack presents an argument, all the more compelling, as to why the objection in the lower court should not be deemed to preserve the issue for appellate review, as the trial court would have needed a crystal ball to surmise that the defendantwould be complaining about the reference to "not prompted by wild emotion." In any event, said phrase does not result in any significant difference from the instruction approved in Jackson and does not render the instruction vague. Indeed, the language is fully consistent with language used in the text of the Jackson opinion, defining the CCP factor as requiring a determination "that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage. . . ." 19 Fla. L. Weekly at 5217 (emphasis added). The instruction as given

conveys the exact same principle, and contrary to the Appellant's argument, does not lessen the State's burden.

While the Appellant also complains about the lower court's definition of "calculated," that is identical to the definition approved of that term in Jackson. Both the lower court, and Jackson, refer to "a careful plan or prearranged design."

The Appellant also complains that the trial court, in its CCP instruction, incorporated the standard first degree murder premeditation instruction, before advising the jury that CCP "requires that the premeditation be of a heightened degree, more than what is necessary to prove first degree premeditated murder." Once again, as there is nothing remotely alerting the trial court to the nature of this argument, it should be deemed unpreserved. Had the argument been made; the lower court would have had the opportunity to delete the references to the standard, first-degree murder definition of premeditation. In any event, incorporating that definition into the CCP instruction can hardly constitute confusion. The standard first degree murder premeditation instruction is obviously, in and of itself, not vague or misleading. The jury had previously been advised of the definition of premeditation during the guilt phase jury instructions. (R. 635). Hence, the jury was simply given a reiteration of the prior guilt phase premeditation instruction, coupled with the additional instruction that the CCP factor "requires that the premeditation be of a heightened degree, more than what is necessary to prove first degree premeditated

murder." As the jury obviously has to be aware of the difference between premeditation, as an element of murder, and heightened premeditation, as part of the CCP factor, there cannot be anything confusing or misleading.

Thus, the trial court did precisely what was required by Jackson. Far from chastising the judge for minor and insignificant discrepancies from what was ultimately approved in Jackson, the sentencing judge should be commended for the foresight in dealing with this issue and in a virtually identical manner to that which this Court has subsequently approved.

### C. THE LOWER COURT DID NOT ERR IN FAILING TO FIND THE EXISTENCE OF ALLEGED MITIGATING CIRCUMSTANCES.

#### 1. Nonstatutory Mitigating Factors

The Appellant argues that the trial court improperly failed to find the existence of several alleged nonstatutory mitigating factors, including the defendant's retarded state, his impaired judgment, impaired intelligence and organic brain damage. A review of the record reflects that the lower court carefully considered all of these alleged factors and properly concluded that they were not established by the evidence.

A trial court is obligated to find, as a mitigating circumstance, only those proposed factors which are mitigating in nature and have been reasonably established by the greater weight of the evidence. Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990). Furthermore:

> . . . when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved. A trial court may reject a defendant's claim that a mitigating circumstance has been proved, however, provided that the record contains "competent substantial evidence to support the trial court's rejection of these mitigating circumstances."

Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1992). Opinion testimony of experts comes with a further caveat, as it is not necessarily binding even if uncontroverted. Walls v. State, 641 so. 2d 381, 390-91 (Fla. 1994) ("Certain kinds of opinion testimony . , . are not necessarily binding even if uncontroverted. Opinion testimony gains its greatest force to the degree it is supported by the facts at hand, and its weight diminishes to the degree such support is lacking. A debatable link between fact and opinion relevant to a mitigating factor usually means, at most, that a question exists for judge and jury to resolve.").

In the instant case, defense counsel submitted a written memorandum regarding sentencing, in which 17 nonstatutory circumstances were designated. (R. 1163, 1174-76). The lower court, finding that the list was repetitive, analyzed them under 11 separate categories. (R. 1194, et seq.). The court's sentencing order addresses, at great length, all of the alleged factors relating to the defendant's state of mind: alleged mental retardation (R. 1195-96); alleged borderline personality disorder (R. 1196); organic brain damage (R. 1197); alleged mental problems and emotional disturbance not reaching level of

statutory mitigating factors (R. 1200-1201). After giving each such factor extensive analysis, the court concluded that each one was not established by the evidence. Of direct significance to the instant argument, the lower court addressed the contentions regarding mental retardation and low IQ, as follows:

> The court has considered the results of Dr. Toomer's test as concerns the defendant's IQ. Since it is impossible for the court to verify the accuracy or validity of such a test, the court must consider it in the light of the facts known to the court. In making this analysis the court is conscious of the fact that although an individual's performance on such a test may be unable to exceed his true abilities it may easily reflect less than his best efforts.
>
> The defense suggests that this court should accept, as a non-statutory mitigating factor the fact that, according to Dr. Toomer, Mr. Franqui is mentally retarded. Every piece of evidence presented in this trial, penalty phase and sentencing hearings, with the exception of Dr. Toomer's testimony, definitively establishes that Mr. Franqui is not mentally retarded. The crimes he has committed, as described above, reflect an unshakable pattern of premeditation, calculation and shrewd planning that are totally inconsistent with mental retardation. Mr. Franqui's "good employment background" (one of the asserted non-statutory mitigating circumstances) as established by witness Michael Barecchio shows that he was not only a good employee but that on many occasions he displayed initiative and a capacity to finish his assigned tasks and move on to others without direction or supervision. His ability to establish a meaningful relationship with a woman, to have and raise children with her and to support a family further suggest that he is not mentally retarded.
>
> In order to find that this defendant is mentally retarded the court would have to accept Dr. Toomer's test result and ignore

> the clear and irrefutable logic of the facts in this case. , . .

(R. 1195-95). Furthermore, as detailed in the Statement of the Case and Facts, supra, Dr. Mutter explicitly rejected Dr. Toomer's conclusions, and found that Franqui was not retarded (T. 3240) and that Toomer's reliance on the Beta IQ test result was highly questionable, since it was inconsistent with both the Wechsler test result and with the mental status exam which Mutter conducted. (T. 3240-41, 3298-99). The trial judge herein thus acted within his discretion in rejecting Dr. Toomer's conclusion and relying on those of Dr. Mutter. Walls, supra; Nibert, supra.

The Appellant tries to circumvent the foregoing by referring to Mutter's acknowledgment of "impaired intelligence function." Brief of Appellant, pp. 46-47. Mutter, however, carefully explained that "some impairment" had no significance, as it was not a mental defect; it was merely bad judgment, in the sense of making a bad decision. (T. 3286, 3291, 3296).

Similarly, the Appellant refers to the uncle's testimony that Franqui was "slow." That was inconsistent with the testimony of Franqui's employment supervisor, Robert Barrechio (T. 3350-51), and with all of Dr. Mutter's findings at the clinical interview, as Franqui gave clear, crisp answers and reflected good recent memory and precise orientation. (T. 3298-99). Franqui had no difficulty communicating. (T. 3236).

With respect to the Appellant's references to organic brain damage, the lower court concluded that notwithstanding Dr. Toomer's testimony that factors indicated the existence of

organicity, "there is no direct proof of this and the court is not reasonably convinced of the existence of this mitigator." (R. 1197). Dr. Mutter explicitly repudiated Toomer's suggestion of organic brain damage. (T. 3242-43, 3245, 3247-48, 3252, 3246). Indeed, Toomer, himself was rather contradictory on this. He did not think that organicity was important enough to mention in a lengthy direct examination, and, when questioned on cross-examination, after referring to indicia of organic impairment, he noted that such indicia would recommend a neurophsychological evaluation, yet he admitted that he did not administer any such neuropsychological tests. (T. 3211-13). Toomer, himself, did not affirmatively state that there was any organicity, Mutter explicitly repudiated it, no other expert gave any opinion to support it, and no facts exist to support it. Toomer's suggestion that the Wechsler test indicated organic impairment was based on the 10 point discrepancy between the verbal and performance scales. Mutter, however, rejected any such interpretation of the lo-point discrepancy. (T. 3242). Finally, while Mutter, at one point, acknowledged that Franqui "might" have mild brain damage, he clearly concluded that there was no basis, from the facts or testing, to conclude that Franqui "did" have any organic damage. (T. 3295).

Accordingly, it must be concluded that the lower court's decision regarding the alleged nonstatutory mitigating factors was supported by the evidence, as the facts of the offense, the defendant's lifestyle and the results of his psychological

examinations, were inconsistent with the alleged mitigators, and Dr. Mutter explicitly rejected all of the claims now being made. See also, Cook v. State, 581 So. 2d 141, 143-44 (Fla. 1991) (proper rejection of mental mitigating circumstances in light of conflicting and contradictory evidence).

2. Statutory Mitigators

The Appellant also argues that the trial court should have found that the defendant failed to appreciate the criminality of his conduct and that his capacity to conform his conduct to the requirements of the law was substantially impaired. The lower court stated:

> The court recalls no expert testimony establishing the existence of this mitigating factor nor does the court feel that any evidence presented on the defendant's behalf establishes it. Accordingly the court rejects the existence of this statutory mitigating circumstance.

(R. 1193). The trial court's conclusion is correct, No witness testified that this mitigating factor existed. Dr. Toomer never even referred to it. Defense counsel, during closing argument, referred to several statutory and nonstatutory mitigating factors, but never referred to this one. (T. 3436-43). The first time defense counsel referred to it was in the presentencing memorandum, subsequent to the jury's recommendation. (R. 1174). At that time, defense counsel merely listed it as a factor for the court to consider, without referring to any evidence in support of the factor. (R. 1174). Indeed, in the sentencing order, the judge notes surprise that

the defense alluded to this factor in the sentencing memorandum since it was never referred to during the sentencing proceedings conducted before the jury. (R. 1188).

At this late date, the Appellant still does not cite any evidence which was offered in support of this factor. The Appellant seems to be arguing that this factor could be found on the basis of the evidence of retardation and low IQ. As previously indicated, the lower court properly rejected those factors, and they therefore could not mandate a finding of a more remote statutory mitigator which does not necessarily follow from the fact of low intelligence, even if that fact had been established.

Furthermore, the judge, in the sentencing order, presents detailed reasons for rejecting the factor of extreme mental or emotional disturbance, (R. 1188-93). The reasoning contained therein would be equally applicable to the factor regarding the ability to conform conduct to the requirements of the law. The judge, in that discussion, notes the reasons for rejecting Toomer's conclusions and accepting Mutter's. The judge also emphasizes that Franqui's conduct was inconsistent with the statutory mental mitigating factor, as his domestic and work lives reflected a high level of maturity, and his role in the instant offenses reflected a high degree of careful planning. All of those factors similarly repudiate the notion that the defendant could not conform his conduct to the law. The same conclusion is implied by Dr. Mutter's testimony, when he

emphasizes that Franqui made a bad, but rational decision, based upon his perceived needs for supporting his family. Mutter also noted that Franqui had repeatedly demonstrated an ability to act in an appropriate manner when dealing with stressful situations. (T. 3238-39). Accordingly, the lower court properly rejected this factor.

Lastly, the Appellant asserts that the trial court erred in rejecting his age, 21, as a mitigating factor. This factor was explicitly rejected in the sentencing order. (R. 1193). That conclusion is consistent with this Court's decisions. The finding of age as a mitigating factor is a decision which rests within the discretion of the trial court, and numerous decisions have upheld the refusal to treat ages of 20 or more as mitigating. See, e.g., Cooper v. State, 492 So. 2d 1059, 1063 (Fla. 1986) (trial judge acted within discretion in rejecting age of 18 as mitigating factor); Kokal v. State, 492 So. 2d 1317, 1319 (Fla. 1986) (no abuse of discretion in not finding age of 20 as mitigating); Garcia v. State, 492 So. 2d 360 (Fla. 1986) ("The fact that a murderer is twenty years of age, without more, is not significant, and the trial court did not err in not finding it as mitigating."); Scull v. State, 533 So. 2d 1137, 1143 (Fla. 1988) ("This Court has frequently held that a sentencing court may decline to find age as a mitigating factor in cases in which the defendants were twenty to twenty-five years old at the time their offenses were committed."); Mills v. State, 476 So. 2d 172, 179 (Fla. 1985)(defendant 22 at time of offense).

As previously detailed herein, the lower court rejected evidence of mental retardation and low intelligence. The court, based upon evidence of Franqui's responsible handling of jobs, marriage and parenthood, as well as evidence of the high level of planning which he contributed to the instant offenses, could further conclude that age was not a mitigating factor. Furthermore, the defense witness, Dr. Toomer, expressly found that the defendant's age was not a factor. (T. 3155-56).

With respect to the failure to give a jury instruction regarding age as a statutory mitigating factor, it should first be noted again that Dr. Toomer himself had rejected age as a factor. (T. 3155-56). Furthermore, even though the court did not instruct on age as a factor, the court did instruct that the jury could consider "any other aspects of Leonardo Franqui's . . . character or record . . . and any other circumstance of the offense." (T. 3479). Thus, defense counsel was able to argue age as a mitigating factor under, that instruction and defense counsel did, in fact, argue age as mitigation:

> . . . And I submit to you that the mitigating factors which come under that were first of all, be the youth of Leonardo Franqui, something very important for you consider. A twenty one year old kid at the time of this offense with a much lower IQ and a much lower emotional age. Much lower according to the testimony.

(T. 3437). Insofar as age was in fact argued as mitigation to the jury, under an instruction which would have enabled them to consider it if they chose to do so, and insofar as the age is clearly of de minimis significance at best, given the propriety

of the court's rejection of this factor, it must further be concluded that there was no error in failing to give an express instruction on age. Assuming, arguendo, that there was error, same is harmless beyond a reasonable doubt in light of (a) arguments of counsel; (b) the catchall instruction permitting the jury to consider the factor; (c) additional instructions to the jury that, "[m]itigating 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. 1133), and that they could give all mitigation whatever weight they chose to (R. 1139); (d) the strength of the aggravators herein; and (e) the de minimis evidence of mitigation in this case, as set forth herein.

**D. THE SENTENCE OF DEATH IS NOT DISPROPORTIONATE IN THE INSTANT CASE.**

"Proportionality review compares the sentence of death with other cases in which a sentence of death was approved or disapproved." Palmes v. Wainwright, 460 So. 2d 362, 362 (Fla. 1984). The Court must "consider the totality of circumstances in a case, and compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances." Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990), cert. denied, ___ U.S. ___, 111 S.Ct. 1024, 112 L.Ed. 2d 1106 (1991). "Absent demonstrable legal error, this Court accepts those aggravating factors and mitigating circumstances found by the trial court as the basis for proportionality review." State v. Henry, 456 So. 2d 466, 469 (Fla. 1984).

The applicable aggravating factors herein are: (1) prior convictions for felonies involving violence; (2) murder committed during the course of an attempted robbery; (3) murder committed for pecuniary gain (merged with prior aggravator); and (4) murder committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification. There are no statutory mitigating circumstances, and there is minimal nonstatutory mitigation: hardships during the defendant's youth, including abandonment by the mother, the death of a younger brother, and the father's drug and alcohol abuse after the brother's death; and the fact that the defendant was a caring husband, father, brother and provider.

The Appellant's principal contention is that the sentence of death is generally inappropriate for murders committed during armed robberies. The Appellant's principal support for this proposition derives from a series of jury override cases, in which this Court found that the trial court improperly rejected the juries' life recommendations. See, e.g., Cannady v. State, 427 So. 2d 723 (Fla. 1983); McCaskill v. State, 344 So. 2d 1276 (Fla. 1977); Williams v. State, 344 So. 2d 1276 (Fla. 1977). Jury override cases, however, are irrelevant in the proportionality review herein. See, Hudson v. State, 538 So. 2d 829, 831-32 (Fla. 1989); Lemon v. State, 456 So. 2d 885, 888 (Fla. 1984).

Numeraus cases have affirmed death sentences while the murder was committed during the course of a robbery. See, e.g.,

Smith v. State, 641 So. 2d 1319 (Fla. 1994); Heath v. State, 19 Fla. L. Weekly S540 (Fla. Oct. 20, 1994); Carter v. State, 576 so. 2d 1291 (Fla. 1989); Cook v. State, 581 So. 2d 141 (Fla. 1991); Lowe v. State, 19 Fla. L. Weekly S621 (Fla. Nov. 23, 1994); Freeman v. State, 563 So. 2d 73 (Fla. 1990) (murder during course of burglary/for pecuniary gain); Wickham v. State, 593 So. 2d 191 (Fla. 1992) (murder committed during an armed robbery/ambush of a vehicle alongside a road). Thus, far from constituting an inappropriate circumstance for the imposition of a death sentence, the fact that a murder was committed during the course of a robbery has indeed been a common situation in which the sentence of death has been upheld by this Court.

Many of the foregoing cases also present a combination of aggravating and mitigating circumstances which is very comparable to the instant case. In Smith, supra, 641 So. 2d at 1319, the defendant received the death sentence for the killing of a cab driver. The trial court found the existence of two aggravating circumstances: (1) the murder was committed during an attempted robbery; and (2) the defendant had a previous conviction for a violent felony. If anything, the aggravation in Smith is less than that in the instant case, as this case presents a further aggravating factor, CCP, in addition to two otherwise identical aggravators. In Smith, the court also found one statutory mitigating circumstance - no significant history of criminal activity - and several nonstatutory mitigating circumstances relating to Smith's background, character and record. This Court

rejected Smith's claim of disproportionality. The instant case, with considerably more aggravation, less mitigation - as there were no statutory factors found - and a basically similar situation of a murder during armed robbery, presents a more compelling case for the imposition of the death sentence.

In Heath v. State, 19 Fla. L. Weekly S540 (Fla. Oct. 20, 1994), the two aggravating circumstances were the commission of the murder during the course of an armed robbery, and the existence of a prior conviction for second-degree murder. As in Smith, the murder was not accompanied by the additional CCP factor. The court found substantial mitigating factors, including the influence of extreme mental or emotional disturbance, based upon consumption of alcohol and marijuana, as well as minimal nonstatutory mitigation. Once again, the death sentence was found to be appropriate by this Court.

Lowe v. State, 19 Fla. L. weekly S621 (Fla. Nov. 23, 1994), related to the murder of a convenience store clerk during the course of an attempted armed robbery. Two aggravating factors existed: (1) prior conviction of a violent felony; and (2) murder committed during the attempted robbery. Once again, a virtually identical case to the instant one, minus the additional CCP factor. The trial judge's sentencing order was somewhat ambiguous as to whether it was rejecting all of the mitigation or whether it was treating it as established but outweighed by the aggravation. This Court, on appeal, assumed that the various mitigating factors were established (defendant 20 years old at

time of crime; defendant functions well in controlled environment; defendant a responsible employee; family background; participation in Bible studies) and still proceeded to find that the death sentence was warranted.

Other cases similarly support the conclusion that the death sentence was proper in the instant case. Watts v. State, 593 So. 2d 198 (Fla. 1992) (Aggravators: prior violent felonies; murder during course of sexual battery; murder committed for pecuniary gain. Mitigation: low IQ reduced judgmental abilities; defendant 22 at time of offense); Freeman v. State, 563 So. 2d 73 (Fla. 1990) (Aggravators: prior violent felony; murder during course of burglary; murder committed for pecuniary gain [merged with prior factor]. Mitigation: low intelligence; abuse by stepfather; artistic ability; enjoyed playing with children); Mordenti v. State, 630 So. 2d 1080 (Fla. 1994) (Aggravators: murder committed for pecuniary gain; CCP. Mitigation: defendant 50 at time of crime; no significant history of prior criminal activity; defendant's father died when he was young; defendant abandoned by mother; defendant a good stepson to stepparents; defendant supported woman he lived with and her children; other nonstatutory mitigation as well); Cook, supra, 581 So. 2d at 141 (Aggravators: murder during course of robbery; prior violent felony. Mitigation: no significant history of criminal activity and minor nonstatutory mitigation).

In view of the foregoing, the imposition of the death sentence is clearly proportionate with death sentences approved

in other cases. As previously noted, several of the cases relied upon by the Appellant are jury override cases and, as such, are irrelevant to proportionality review. The few remaining cases upon which the Appellant relies are equally inapplicable. While Carruthers v. State, 465 So. 2d 496 (Fla. 1985), involved a murder committed during an armed robbery, after this Court found two other aggravators improper, just one aggravating circumstance remained, as opposed to one substantial statutory mitigating factor (no significant history of prior criminal activity) and several nonstatutory mitigating factors. With considerably less aggravating factors, both in terms of substance and number, and a greater level of mitigation, with one very substantial statutory factor, Carruthers offers no basis of comparison with the instant case.

The Appellant also compares his case to Livingston v. State, 565 So. 2d 1288 (Fla. 1990), where the aggravation consisted of two factors: murder during an armed robbery; prior violent felony. Mitigation included the defendant's age (17), and his unfortunate home life and rearing. This Court, in Smith, supra, distinguished Livingston, pointing out the severe beatings and neglect Livingston had been subjected to, as well as the marginal nature of Livingston's intellectual functioning. 641 So. 2d at 1322. Furthermore, the instant case involves more extensive aggravating circumstances, as it adds CCP to the otherwise same factors found in Livingston.

Smalley v. State, 546 So. 2d 720 (Fla. 1989), also relied upon by the Appellant herein, is clearly insignificant, as it was a case of a single aggravating factor (HAC), which was found to be offset by four statutory mitigating circumstances: lack of prior criminal history; extreme mental and emotional disturbance; extreme duress or domination by another; impairment of ability to appreciate criminality of conduct. Several nonstatutory mitigating circumstances existed as well.

Lastly, Rembert v. State, 445 so. 2d 337 (Fla. 1984), involved just a single aggravating factor (murder during the course of a felony), as three other factors were stricken. The aggravating factors are thus in no way comparable to what existed in the instant case.

With respect to the Appellant's reliance on alleged mitigating factors which the lower court concluded were not established, as noted in the prior argument, the lower court's conclusions were proper. Such alleged factors - mental retardation, organic brain damage, mental handicaps, etc. - therefore have no function in this proportionality review. It is therefore readily apparent that the sentence of death imposed herein is proportionate to that approved in other cases. See, Smith, supxa; Lowe, supra; Cook, supxa.

E. THE LOWER COURT DID NOT ERR IN PROHIBITING ARGUMENTS OR INSTRUCTIONS TO THE JURY REGARDING THE POTENTIAL IMPOSITION OF CONSECUTIVE SENTENCES.

Defense counsel, prior to the commencement of the sentencing hearing, argued that he should be able to argue that

any prison sentence for the first-degree murder could be run consecutively with any sentences for the noncapital offenses. (T. 2509-12). The trial court ruled that such arguments would be improper. (T. 2512-13). Similarly, when the jury, during deliberations, questioned whether the sentences run consecutively or concurrently (T. 3493), the court responded that the jury should not concern itself with the possible sentences on the noncapital counts. (T. 3500).

This Court, in Marquard v. State, 641 So. 2d 54 (Fla. 1994), rejected a virtually identical claim. Defense counsel, during closing argument, sought to present argument about the sentence that the defendant could receive for the noncapital armed robbery. The prosecution objected, and the judge precluded further argument. This Court stated that "[s]entencing on this charge [the armed robbery] was not before the jury-the sole issue before them was the proper sentence on the murder charge." 641 So. 2d at 58. The Court relied upon its prior decision in Nixon v. State, 572 So. 2d 1336, 1345 (Fla. 1990), cert. denied, ___ U.S. , 112 S.Ct. 164, 116 L.Ed. 2d 128 (1991), in which this Court stated: "As to offenses in which the jury plays no role in sentencing, the jury will not be advised of the possible penalties."

The recent decision of the United States Supreme Court in Simmons v. South Carolina, 512 U.S. , 114 S.Ct. , 129 L.Ed. 2d 133 (1994), does not compel any contrary conclusion. Therein, a majority of the United States Supreme Court agreed that in the

penalty phase of a state capital trial, due process requires that a defendant be allowed to inform the capital sentencing jury, through either argument or instructions, of his ineligibility for parole, under state law, where future dangerousness is at issue. The Court noted that the due process clause does not permit the execution of a person on the basis of information which he had no opportunity to deny or explain. Simmons had established that the jury in his case may have reasonably believed that he could be released on parole if he were not executed. The prosecution encouraged this misperception by urging a verdict of death as Simmons posed a "threat" to society if he were not executed. Yet, Simmons was prohibited from any mention of the true meaning of the noncapital sentencing alternative, life imprisonment without parole, under state law, and the judge did not provide the jury with accurate information regarding Simmons' parole ineligibility.

The instant case, however, does not involve any effort to impose the death penalty on the basis of future dangerousness, nor is ineligibility for parole at issue. While the South Carolina scheme involved a matter which could be asserted with certainty - i.e., the alternative life sentence was a true life sentence without parole - the matter which defense counsel herein sought to discuss involved pure speculation. If a life sentence for the murder were imposed, the trial court would have complete discretion as to whether to run it consecutively or concurrently with any noncapital or prior offenses. See, §921.16(1), Florida

Statutes. Thus, any argument or instruction to the jury on this question would simply leave the jury where it already was - without any knowledge or any way of knowing what the sentencing judge would ultimately do. Such speculation is clearly not required by Simmons. Indeed, the Court therein expressly stated:

> It is true that Ramos stands for the broad proposition that we generally will defer to a state's determination as to what a jury should and should not be told about sentencing. In a state in which parole is available, how the jury's knowledge of parole availability will affect the decision whether or not to impose the death penalty is speculative, and we shall not lightly second-guess a decision whether or not to inform a jury of information regarding parole.

129 L.Ed. 2d at 145. (emphasis added).

The only relevant, nonspeculative and accurate information which the jury should have been given in the instant case was that in the event of imposition of a life sentence, the defendant would serve at least 25 years before becoming eligible for parole.[17] The trial court in the instant case provided this information to the jurors. The jury was instructed:

> The punishment for this crime is either death or life imprisonment without the possibility of parole for 25 years.

(T. 2532).

In addition to the above accurate information under Florida law, which was provided to the jury by the trial court, the defense counsel herein also argued:

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[17] Current Florida law, enacted after the commission of the crimes, convictions and sentences herein, provides for parole ineligibility. Fla. Stat. 775.082 (1994).

> Defense Counsel: The prosecutor told you that Mr. Abreu the co-defendant who testified over here is going to serve the rest of his life in prison.
>
> The life sentence in this case will apply equally to Mr. Franqui, who would serve the rest of his life in prison. The punishment, the punishment is there.
>
> . . .
>
> Judge Sorondo gave you instructions back during the voir dire period in which he told you this is a true mandatory minimum, you can remember back to that instruction that he gave you. The punishment is there. Society will be protected.

(T. 3428-29). Accordingly, Simmons has no bearing on the instant case, and the principles of Nixon and Marquard are controlling.

F. THE DEATH PENALTY IS NOT UNCONSTITUTIONAL.

The Appellant argues that Florida's death penalty is arbitrarily and discriminatorily applied on the basis of the race, sex and economic status o,f the victim as well as the offender. This claim has never been presented in the trial court; no facts, figures or studies were ever adduced, and none are offered now. As such, this claim is unpreserved fox appellate review. See, e.g., Taylor v. State, 601 So. 2d 540 (Fla. 1992) (sentencing errors requiring resolution of factual matters not contained in record cannot generally be raised fox first time on appeal). The application of that principle in the instant context is implicit in Foster v. State, 614 So. 2d 455, 463-65 (Fla. 1992), as this Court held that the trial court

properly refused to conduct an evidentiary hearing on a similar claim, where the defendant had presented studies and figures which this Court concluded did not make out a prima facie case. Furthermore, similar claims have routinely been denied an the merits. See, McClesky v. Kemp, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed. 2d 262 (1987); Roberts v. State, 510 So. 2d 885, 895 (Fla. 1987); King v. State, 514 So. 2d 354, 359 (Fla. 1987); Cochran v. State, 547 So. 2d 928, 930 (Fla. 1989).

The Appellant also generally argues that the death penalty constitutes cruel and unusual punishment under any circumstances. This issue is also barred, as it was not raised below. Furthermore, it has routinely been rejected. See, e.g., Thompson v. State, 619 So. 2d 261, 267 (Fla. 1993); Lightbourne v. State, 438 So. 2d 380 (Fla. 1983); Raulerson v. State, 358 So. 2d 826 (Fla. 1978); Proffit v. Florida, 428 U.S. 242, 98 S.Ct. 2980, 49 L.Ed. 2d 913 (1976). The same cases, and numerous others, obviously refute the proposition that the death penalty is morally wrong.

Lastly, the Appellant asserts that the death penalty's application is particularly offensive here, as it is applied to the mentally retarded. As repeatedly noted herein, the evidence of mental retardation was explicitly refuted in the record and expressly rejected by the trial court.

## CONCLUSION

Based on the foregoing, the convictions and sentence of death should be affirmed,

Respectfully submitted,

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## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by **mail** to **GEOFFREY C. FLECK**, 5115 Northwest 53rd Street, Gainesville, Florida **32653,** on this 4 day of January, 1995.

**FARIBAN. KOMEILY**
Assistant Attorney General

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