IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,611

PABLO SAN MARTIN,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Introduction

Defendant was charged, along with codefendants Leonardo Franqui' and Pablo Abreu, in an indictment filed on February 18, 1992, in the Eleventh Judicial Circuit in and for Dade County, Florida, Case No. 92-6089-C, 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 on December 6, 1991; (5) the grand theft of a motor vehicle belonging to Young Kon Huh; (6) the grand theft of a motor 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. 3843). 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. 457-72). The court denied the motion, finding:

> The confessions of the defendants, as redacted by the State, are indistinguishable. 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.

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[1] See Franaui v. State, Florida Supreme Court case no. 83,116 (opinion pending).

> 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 Franqui commenced on 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 brown 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 the 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. 1995-98). 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 condition 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 dram 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 he 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 codefendant Franqui at the Metro-Dade Police Headquarters. (T. 1914). Franqui initially denied knowledge of Lopez's murder. Nabut then showed Franqui a photo of the Republic Bank and the Suburbans. Franqui then admitted that he knew about the incident and agreed to talk to Nabut. (T. 1916).

Franqui stated that he learned through Fernando Femandez that the Cabanases had a checkcashing 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. Franqui 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 Franqui that they could not rob them right away because Cabanas had just been robbed and would be more careful. (T. 1918).

Franqui stated that they had used two stolen Chevy Suburbans. (T. 1918). On the morning of the crime, Franqui and the codefendants drove the Suburbans to the area of the bank. They left a getaway vehicle, Abreu's van, on the Palmetto Expressway 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. Franqui said that he had a big ,357 or .38 revolver. Defendant 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, Franqui waited until they saw the Cabanases. The plan was for Defendant and Abreu to drive in front of them, and then for Franqui to follow. (T. 1920). Then Defendant and Abreu were to stop in front of the victims. They followed the plan. When the victims stopped, Franqui pulled alongside them so they could not get away. When Franqui arrived Abreu and Defendant 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 Franqui stated that the Pickup rammed the Cabanases and Lopez opened fire. Franqui claimed to duck and fire in the direction of the Pickup, (T. 1921). Franqui said he was in the Gray. Abreu and Defendant were in the Blue and White. (T. 1922). Abreu was driving and Defendant was in the right front passenger seat. They wore stockings as masks. Franqui could not say how many shots he fired. (T. 1923). The formal stenographically recorded statement of Franqui, which was consistent with the oral statements, was read to the jury. (T. 1930-63, R. 372405).

Michael Santos was a homicide detective with Metro-Dade Police Department. (T. 2077). Santos interviewed Defendant. (T. 2080). Defendant said that he, Franqui, 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). Defendant, Franqui, 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. Franqui waited a block away in one truck and Defendant 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. Defendant and Abreu put on stocking masks. (T. 2100). They had surveilled the victims and knew they always followed the same route, so Defendant and Abreu left the bank before the Blazer did. Franqui 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). Defendant exited through the passenger side of the Suburban, and Abreu got out the driver's side. Defendant had a 9mm pistol and Abreu had a "small machine gun." Defendant did not know exactly where Franqui was at that time because the vehicle obstructed the view. After he got out Defendant 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 Defendant then returned fire. Defendant said that he fired his gun twice. Abreu filed several shots. He did not know if Franqui fired because his view was obstructed. Defendant 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 Defendant's house. Franqui and Abreu left from there. (T. 2104).

Defendant said that they later threw the guns from a bridge in Miami Beach, but he did not recall exactly where. (T. 2104). Defendant declined to give a formal statement. (T. 2 106). On January 21, 1992, Detective Nabut spoke with Defendant. (T. 2116). Defendant 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, Defendant then drew a map indicating the location of the guns. (T. 2119). Defendant 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 rear-most 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. 1846). 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. 219697). 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 semi-jacketed 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-9. (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 Franqui. (T. 2206). It was also a Remington-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 Remington-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-9. (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 Defendant's prior violent felonies and the cold, calculated and premeditated nature of the murder. Through Craig Van Nest and Detective Boris Mantecon, it was established that Franqui had proposed and participated in an unrelated armed robbery and kidnapping in which Van Nest, who was driving an auto parts van in the City of Miami, was pursued and confronted by Franqui, Defendant, and a third individual, Vasquez. (T. 2554-65, 2572). One of them 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. 2579-80). Van Nest eluded the perpetrators after they first tried to get Van Nest to pull over, by flashing a police badge. (T. 2556). When Van Nest proceeded to his destination and left his van to make a delivery, he returned to find the men searching through his van and removing items. (T. 2557-58). Vasquez hit Van Nest on the head with a pistol, and pushed him into the group's van with San Martin driving. Vasquez stole Van Nest's van. The gun, which Vasquez had given to Franqui, went off. (T. 2559, 2562-64, 2580-81). 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. 2599).

Pedro Santos and Detective Ralph Nazario provided testimony as to another unrelated

attempted robbery and aggravated assault which Defendant and Franqui had participated in and had previously been convicted for. Franqui, Defendant, and Ricardo Gonzalez were at a restaurant when they observed a security guard carrying a cash bag near the Republic National Bank on Bird Road at SW 87th Avenue in Dade County, and they decided to rob the guard. (T. 2600-05, 2619). First, the three decided to steal to steal a car as the heist vehicle. Defendant with the help of his third accomplice broke into and stole a Camaro 2-28 from a car dealership. (T. 2620-21). Defendant and Gonzalez returned to the bank in the Camaro and waited for the guard to make his appearance, while Franqui remained nearby in a separate getaway vehicle. (T. 2621-22). Defendant jumped out of the car and demanded the cash bag. (T. 2622). According to the guard, after the cash bag was demanded, Defendant threatened and fired upon him. (T. 2609). Defendant's gun was the same one he used in the Hialeah holdup. (T. 2623). The guard reached for his own gun, and several more shots were fired at him, when the offenders fled in a white Camaro. (T. 2611-12). The stolen car was abandoned, and the three got away in Franqui's vehicle. (T. 2624). Copies of the judgments of conviction for aggravated assault and attempted robbery with a firearm were introduced into evidence. (T. 2637-40).

The next witness, Pablo Abreu, Defendant's cousin, participated in the attack on the Cabanases and Lopez with Franqui and Defendant. He had pled guilty to first degree murder, two counts of attempted first degree murder and attempted robbery, for which he received a life sentence, with a twenty-five year minimum mandatory provision. (T. 2735, 2737). 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. 2715-16). At a meeting attended by Franqui, Defendant 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. 2717). 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. 2717-18). 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 Defendant stopped the escort vehicle in back of the victims. (T. 2718). Before proceeding to the scene of the crime, the three men had met at Defendant's house and Abreu was given one of Franqui's weapons. (T. 2720). All three perpetrators were armed, (T. 2721). At the scene of the crime, after the victims were blocked, Abreu and Defendant got out of their vehicle with gloves and stocking masks on, shooting. (T. 2726-27). Franqui "was pointing, shooting at the bodyguard with his window down." (T. 2728). The three perpetrators then left, while the deceased victim was on the ground. (T. 2729).

Abreu did not participate in the Bird Road or Van Nest robberies. (T. 2715, 2731).

Defendant then called Abreu as his first witness. (T. 2764, 2771). Abreu testified regarding Defendant's family. (T. 276568). Defendant also called Domingo Maldonado, a deacon and minister at the Dade County Jail. (T. 2777). Maldonado testified that Defendant had accepted God and changed his way of thinking. (T. 2780). Defendant had never said he was specifically sorry for his actions in this case. (T. 2784). Defendant also called Julio Calveiro, a member of Maldonado's church who participated in the jail ministry, who testified that Defendant had repented. (T. 2789-90).

Defendant then called his brothers Juan San Martin (T. 2825-43), Javier San Martin (T. 2844-49), and his sister, Daisy San Martin (T. 2850-60), his grandmother, Paulina Martinez, (T. 2861- 63), and his mother Francisca San Martin, (T. 2865-73), all of whom testified regarding their home life and Defendant's childhood.

Defendant called Dr. Dorita Marina, a clinical psychologist, next. (T. 2914). She examined Defendant in January and October of 1993. (T. 2920). Dr. Marina deliberately avoids learning anything about the patient before examining him. (T. 2922). Defendant denied drug use to her and denied ever having had hallucinations. (T. 2928). Defendant "went lightly over the facts" of this case with her. (T. 2936).

Dr. Marina testified that Defendant had an IQ of 76, which put him in the borderline

range of intellectual functioning. (T. 2945). She further testified that his scoring showed he had poor planning and judgment and impulsivity. (T. 2946). Dr. Marina found no evidence of organic impairment. (T. 2947). She concluded that Defendant suffered from extreme mental disturbance. She based this on her conclusions of narcissistic personality disorder, the eye trauma at a young age. (T. 2959-61).

On cross-examination Dr. Marina stated that she had testified around 15 times in penalty-phase proceedings, all for the defense. (T. 2969). Dr. Marina did not ask Defendant many detailed questions regarding the crime. She did not consider it relevant. (T. 2976). She did not know that all Defendant's family members denied Defendant's report to her of childhood abuse. (T. 2983). Defendant's "fake scale" on the MMPI was elevated, to the point of being unusable. (T. 2984). Dr. Marina concluded that Defendant is not retarded. (T. 2993). In the "trail making" test he tested normal. And she found no evidence of organicity . (T. 2993). Dr. Marina also found that Defendant suffered from cyclothymia or mild mood swings. (T. 2996).

Defendant called Jorge Herrera, a neuropsychologist, next. He examined Defendant in August, 1993. (T. 3041). Defendant discussed the crime and his history. He denied any history of hyperactivity. (T. 3044). He noted that Defendant had held a job at a factory for over three years. (T. 3047). Based on his testing Defendant had a borderline IQ of 75. (T. 3050). Dr. Herrera's initial impression was that Defendant suffered from some sort of brain injury. He commissioned an BEG which was performed by a Dr. Lorenco. (T. 3064-3065). Afterwards Dr. Herrera concluded that Defendant had some sort of frontal lobe lesion. (T. 3068). Herrera

opined that Defendant was unable to appreciate the consequences of his actions (a mitigating circumstance rejected by Dr. Marina). (T. 3070). On cross-examination, Dr. Herrera rejected Dr. Marina's finding of extreme mental or emotional disturbance, because there was not any sign of psychopathology or mental disorder. (T. 3081-82).

In rebuttal, the State called Dr. Mutter, who was accepted by both Defendants as an expert in the field of forensic psychiatry. (T. 3239-40). Dr. Mutter has testified on behalf of both the State and defendants in capital penalty phase trials in the past. (T. 3242). Dr. Mutter examined Defendant and reviewed numerous documents, police reports, depositions, reports, and raw data regarding Defendant and this case, including statements of Defendant's doctors and family members and Abreu. (T. 3244).

At the examination, Dr. Mutter conducted a mental status exam. Defense counsel and an official interpreter were present. (T. 3245). He asked Defendant what his role in the case was, and Defendant claimed that he had fired in self-defense He said he did not plan to kill anyone, he just wanted to rob and get money. Defendant waffled when asked by Dr. Mutter whether he knew what he did was wrong and that robbing people could get him sent to jail. (T. 3246). However, Dr. Mutter concluded, based on his claims of having found the Lord, and his participation, that there was "no doubt" that Defendant understood what he was doing, he understood that there was a plan, he knew that he was collaborating with other people. (T. 3247).

Defendant did not exhibit any mood swings during the interview. Dr. Mutter testified that Dr. Lorenco's report of mild dysfunction of the left temporal region based upon an EEG taken in October of 1993 was not necessarily correct. He found that all that was indicated was a slowing of a brain wave, of unclear clinical significance. It was not in and of itself diagnostic of an organic lesion. (T. 3247). In Dr. Mutter's opinion the effect of the mildly abnormal EEG on Defendant's behavior in this case was "none whatsoever." Dr. Mutter further testified that in his opinion, Defendant "definitely" knew the difference between right and wrong -- Defendant himself told him. (T. 3248). Defendant was also well aware of the consequences of his acts. Dr. Mutter further testified that Defendant appreciated the criminality of his conduct; there was no clinical evidence of any kind of mental disturbance, either psychological or organic, which impaired him such that he did not know what he was doing. (T. 3249).

Dr. Mutter saw no evidence of the cyclothymia or mood swings that Dr. Marina diagnosed. (T. 3249). Indeed, cyclothymia and organic dysfunction are considered to be incompatible. Dr. Mutter concluded that there was no clinical or historical evidence to substantiate Dr. Marina's conclusions. Cyclothymia would involve a two year period of manic hypomania. (T. 3250). Rorschach tests are not designed to measure how long a person was suffering from mental illness. They test only the underlying personality structure and have nothing to do with criminality or when behavior began or ended. (T. 3251).

Based on the documentation, the family members, the doctors, the police reports, Defendant's actions at the scene, and his confession, Dr. Mutter concluded that "there is no

evidence" that Defendant was suffering from extreme mental or emotional distress at the time of the crime. Dr. Mutter explained he realized that the ultimate decision on the question was the judge and jury's, and that he viewed his role as examining Defendant and see if there was any physical disorder which really impaired him. Taking into account Defendant's history and circumstances, he concluded that Defendant did not fit the profile. (T. 3252). As for mental disorders, Dr. Mutter looked for evidence that Defendant was unable to appreciate what he was doing. The was no pattern in the records to indicate that such was the case. On the contrary, the record showed that Defendant went along with the plan that was planned out over several months, which showed organized thinking, goaldirected behavior. He did various things to set up the robberies, and there is no evidence of alcohol or drug impairment. (T. 3253).

There were separate tests conducted to determine whether Defendant was mentally retarded. There was some indication of ability in "the borderline ranges." This would not impair him from knowing the consequences of his acts or equate with an extreme mental or emotional disturbance. There was absolutely no indication in the record of function at a level which would indicate moderate or severe mental retardation. (T. 3254).

On cross-examination, Dr. Mutter explained the symptoms that indicate organic brain damage. The first is recent memory disturbance: Defendant recognized he was in jail; he recalled toward the end of the session that Mutter was a doctor; he knew Clinton was president; he knew the date; he knew he was in Miami, Florida, in the Dade County Jail. If Defendant had an organic defect, he would have missed three or four of the foregoing questions.

Defendant, however, knew where he was, who his lawyer was, why he was in jail, that he was charged with a crime. Under the circumstances, it would not matter what the person's IQ was, if he were truly defective, he could not process information and could not answer the questions. (T. 3283-84). Dr. Mutter also explained that he never stated that Defendant was mentally retarded. Rather he stated that the testing conducted by others indicated borderline intellect. (T. 3284). Dr. Mutter also testified that Defendant's borderline intelligence was not in his opinion a nonstatutory mitigating circumstance because it did not rise to the level where it would affect whether Defendant knew what he was doing. (T. 3288). Dr. Mutter explained that he was not saying the circumstance could never be mitigating, just that it was not here:

> If a person has borderline intellect, he is very limited. He grows up. He's never been taught the difference between right and wrong. Then this could be in my opinion an influence on why he would do something because he didn't know better.
>
> It is not just the numbers of a person's intellectual capacity. It is also what he was taught, what he learned, what he knows about right/wrong issues and just a number for a person's IQ has no bearing whatsoever. It's got to fit other facts of the case. It's got to make sense.

(T. 3289-90). Dr. Mutter felt that Defendant's judgment was impaired at the time of the offense. (T. 3293). However, Dr. Mutter did not believe that bad judgment was a mental defect -- it was just bad judgment. (T. 3317). Dr. Mutter was unable to predict whether or not Defendant would adjust well to prison life. (T. 3294). A limited intellectual capacity could make one suggestible; or it could make one intransigent, depending on the individual's background. (T. 3295).

Dr. Mutter considered the opinions of Drs. Herrera and Lorenco. (T. 3295). Dr.

Lorenco's finding of asymmetry for the temporal regions with marked decreased power on the left side could be due to the eye injury, or some other kind of lesion. (T. 3297-98). However, accepting the findings as true, and Dr. Mutter had not seen the actual test tracings, only the report, it would not alter his opinion that it was unrelated to Defendant's behavior in regard to the crime. (T. 3299). Dr. Mutter rejected any notion that Defendant was subject to impulsiveness also. Tmpulsivity is usually associated with the frontal lobe, not the temporal. The exception would be temporal lobe epilepsy, but there was no evidence at all of that in Defendant's history. (T. 3300). The doctor also noted that 15% of all EEG's show abnormality when there is no abnormal brain function -- it is probably the most primitive test available. (T. 3301).

On November 4, 1993, after the State, (T. 3379-3429), and Defendant, (T. 3464-93), presented closing argument, the jury was instructed, and retired to deliberate. (T. 3494-3505). The jury recommended that Defendant be sentenced to death by a 9-3 vote. (T. 3521).

On November 16, 1993, the sentencing hearing was held before the court. (T. 3526). The State and defendants presented sentencing memoranda to the court. (T. 3528). Defendant's attorney, Fernando de Aguero testified regarding plea negotiations he conducted with the State on Defendant's behalf. (T. 3551-54). After the presentation of argument by the State and defense, the court retired to consider the sentence. (T. 3574). On November 23, 1993, the sentence was pronounced. (T. 3576-3638). The court found the existence of three factors in aggravation: (1) prior violent felony conviction, (2) pecuniary gain merged with commission

during the course of a felony, (3) that the murder was cold, calculated and premeditated. (R. 1096-99). The court considered, and rejected as not established by the evidence, the mitigating circumstances enumerated in the statute. (R. 1099-1108). The court rejected the following proffered nonstatutory mitigating circumstances: (1) Defendant's alleged borderline intelligence, (2) his alleged organic brain damage, (3) Abreu's life sentence, (4) that Defendant did not actually shoot Lopez, (5) Defendant's confession, (6) Defendant's alleged remorse, (7) mental problems not rising to the level of a statutory mitigator, and (8) mercy. (R. 1109-15). The court did find the existence of one mitigating circumstance, that his family loved him. (R. 1113). The court concluded that the "appalling" aggravating factors outweighed the one "relatively insignificant" mitigating circumstance, and sentenced Defendant to death for the murder of Raul Lopez, noting that even in the absence of the CCP factor, it would have reached the same conclusion. (R. 1115-16) The court also sentenced Defendant to two life sentences with three year minimum mandatories for the attempted murders of the Cabanases, fifteen years with a three year minimum mandatory for the attempted robbery, and two terms of five years for the grand thefts of the Suburbans, and fifteen years for possession of a firearm during the commission of a felony, all to run consecutively. (T. 3631-32).

This appeal followed.

SUMMARY OF THE ARGUMENT

1. Defendant's claims regarding the State's use of peremptory challenges were not preserved for review. In any event, Defendant has not shown that the State exercised its peremptory challenges in an impermissible manner. Likewise, Defendant's argument that he was entitled to individual sequestered voir dire of the jurors, absent a showing of adverse pretrial publicity, is also not preserved for review, and in any event Defendant was not entitled to such where there was no showing of excessive publicity before trial.

2. Defendant claims that the trial court erred in failing to grant his motion for severance based upon the fact that his nontestifying codefendant's statement was introduced at trial. However, the statments were virstually identical in all material aspects and the surrounding circumstances were such that it was proper to admit the statements at the joint trial, Even if they shopuld not have been admitted the error would be hgarmless beyond a reasonable doubt were all the forensic and eyewitness evidence fully corroborated the statements.

3. Defendant claims that his confession and that of his codefendant should have been suppressed. The claim regarding his intelligence level and the fact that he declined to give a recorded statement were not raised below and should be rejected. As to the preserved claims, the trial court, in an extensive written order found Defendant's factual claims to be unworthy of belief and his confession voluntary. That determination is supported by the evidence and shou;ld not be disturbed. Finally, Defendant is without standing to assert Franqui's Miranda rights.

4/5. In his fourth and fifth claims, Defendant asserts that there was insufficient evidence to instruct the jury on, and to convict him of, premeditated first degree murder, respectively. Both claims are wholly without merit. Firstly, the evidence was more than sufficient to support felony murder charges. The jury does not have to, and did not, specify which it found Defendant guilty of. The evidence bespeaks of a clear intent to kill where the attackers exit their vehicle with their guns blazing, as was done here. Furthermore, as a principle, Defendant was as guilty as his codefendant Franqui, who shot, "in self defense" a man whose gun still had lint in it after he died.

6. Defendant's claim that evidence of his refusal to give a recorded statement after giving a full oral confession violated his right to silence is without merit. Such evidence is not a comment on silence.

7. As is well-settled, Defendant was not entitled to a special verdict form indicating whether the jury found him guilty of premeditated or felony murder.

8. Defendant was not entitled to a jury-selection expert as such assistance is not a fundamental necessity for a fair trial. Further, Defendant's claims regarding his need to travel to Denmark to depose the former medical examiner are not preserved, without merit, where his testimony would not affect any of the main issues of the trial, and in any event, harmless.

9. Defendant may not claim error in Dr. Mutter offering his opinion as to whether a particular mitigating circumstance existed where Defendant specifically evoked the opinion over State objection. Furthermore, the trial court properly rejected Defendant's proffered mental health mitigation where it was internally inconsistent and bore no relation to the objective facts.

10. The evidence amply supported the instruction to the jury and the finding by the court of the CCP aggravating factor. The evidence showed that Franqui, with the knowledge and acquiescence of his codefendants, planned to kill Raul Lopez, whom they believed was the only armed victim. This fact was fully supported by the eyewitness testimony of the victims and the forensics, which showed that the defendants descended upon the victims like stormtroopers in a hail of bullets. finally, any error was harmless where the court stated it would find for death even without the CCP factor.

11. The trial court properly denied defense requests to argue in mitigation that the defendants could get consecutive life sentences on the noncapital counts. Such argument would be wholly speculative and therefore not a relevant consideration for the jury.

12. Neither Defendant's right to cross-examine the State's witnesses nor his right to present argument on the evidence was impaired during the penalty phase.

13. As has been well-established, the jury was sufficently apprised of nonstatutory mitigation when given the standard instruction.

14. Defendant's challenge to the weighing provisions of the death penalty statute are not preserved; his challenge to the instruction is without merit, as has been repeatedly held.

15. Florida's death penalty is constitutional, and Defendant's sentence is proportional.

16. Defendant's claims of prosecutorial conduct are not preserved, constitute fair comment on the evidence, and even if error, were harmless beyond a reasonable doubt.

ARGUMENT

I.
DEFENDANT'S JURY WAS NOT IMPROPERLY "DEATH-QUALIFIED;" NOR WAS HE ENTITLED TO INDIVIDUAL SEQUESTERED VOIR DIRE.

Defendant's first contention is that he was denied due process because of the State's alleged use of peremptory challenges to exclude venire members who were opposed the death penalty. He further objects to the trial court's refusal to conduct individually sequestered voir dire. These contentions are both procedurally barred and substantively without merit.

To preserve an issue regarding the use of a peremptory challenge for appellate review, the party seeking review must make an explicit objection on the record at the time of the strike. Windom v. State, 20 Fla. L. Weekly S200, S201 (April 27, 1995); Thomas v. Wainwright, 486 So. 2d 574 (Fla. 1986)(objection to peremptory strike of death-scrupled juror not preserved where no objection at trial); Bundy v. State, 471 So. 2d 9, 19 (Fla. 1985)(Witherspoon issue barred where not raised at trial). See also, Ross v. Oklahoma, 487 U.S. 81, 108 S. Ct. 2273, 101 L. Ed. 2d (1988)(noting that peremptory challenges are a matter of state law, and that procedural bar relating thereto was constitutionally permissible). Here, the State was permitted to exercise eight peremptory strikes.[2] None of these strikes was challenged on the grounds here argued.[3] As such this claim has not been preserved for review. Windom; Thomas; Bundy.

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[2] Strachan, (T. 1391); Fox, (1409); Thomas, (T. 1413); Rodriguez, (T. 1420); Brewer, (T. 1440); Fritz, (T. 1696); Asmundsson (T. 1706); Dunt (T. 1706); and Sacher, (T. 1707).

[3] Four of the strikes were challenged under State v. Neil, 457 So. 2d 481 (Fla. 1984): Fox, Strachan, Rodriguez, and Thomas, but only on the grounds of race. The State provided

Furthermore the contention is substantively without merit. Indeed, it is factually unsound. Thirteen of the seventy-four jurors summoned expressed reservations of some kind regarding the death penalty.[4] Of those thirteen, one juror served.[5] One was stricken peremptorily by Defendant.[6] One was challenged for cause by codefendant Franqui.[7] Four were stricken for cause, either on joint motion or without defense objection.[8] Four were stricken for cause over defense objection.[9] The remaining two jurors where stricken peremptorily by the State. Thus of thirteen jurors, one served and six were stricken at the behest or acquiescence of the defense. Such does clearly not reflect the conspiracy which Defendant posits in his brief."[10]

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race-neutral reasons for the strikes which the trial court accepted. (T. 1391, 1409, 1413, & 1420). Two other Neil challenges to State strikes were granted: Gonzalez, (T. 1701), and Garcia, (T. 1703). These two jurors were seated.

[4] Fox, (T. 967), Granat, (T. 978), Mantel, (T. 988), Garrote, (T. 990), Garrido, (T. 994), Orlin, (T. 997), Wong, (T. 998), Strachan, (T. 1000), Arnoldo, (T. 1010), Ceballo-Hernandez, (T. 1026), Garcia, (T. 1036), Stewart, (T. 1058), and Sanchez, (T. 1060).

[5] Garcia, (T. 1713).

[6] Garrido, (T. 1386).

[7] Arnoldo, (T. 1392).

[8] Mantel, Garotte, (T. 1386), Stewart, (T. 1417), and Sanchez, (T. 1418).

[9] Granat, (T. 1380), Orlin, (T. 1388), Wong, (T. 1389), and Ceballo-Hemandez, (T. 1403).

[10] It should also be noted that ten jurors were stricken for cause because of their views in favor of the death penalty, either without State objection: Lepper, (T. 1377), Lightboume, (T. 1383), Rudisell, (T. 1392), Hemandez, (T. 1393), Smith, (T. 1396), Coulter, (T. 1410), Lopez, (T. 1694), and Larkins, (T. 1465); or in spite of it: Ortega, (T. 1397), and Wilensky. (T. 1700).

In any event, even were this claim factually supported, Defendant offers no legal support for his position that the facts which he alleges form a basis for relief. Defendant does not now challenge the propriety of the granting of the four challenges for cause which were objected to below. Nor does he contest the resolution of the Neil challenges to the exercise of the two peremptories. Rather, he vaguely asserts that due process somehow entitles him to a jury which includes persons who state they can follow the law, yet who nevertheless have serious questions about the propriety of the very law they must follow. The State is aware of no principles which require such a conclusion. Defendant provides none; on the contrary he recognizes the decision in Lockhart v. McCree, 476 U.S. 162, 174-177, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986), in which it was held that there is no right to have persons opposed to the death penalty, "or for that matter any other group defined solely by shared attitudes" serve on petit juries. Likewise, Florida law is clear that the use of peremptories by any party is limited only by the rule that they may not be used to exclude members of a "distinctive group." Neil (race); State v. Alen, 616 So. 2d 452 (Fla. 1993)(hispanic ethnicity) Abshire v. State, 642 So. 2d 542 (Fla. 1994)(gender). All of these classes are based upon discrete groups which are defined by immutable characteristics, and/or which are constitutionally protected based upon such status. Lockhart makes it quite clear that personal opinions do not form the basis of such a protected class. Id., 476 U.S. at 177. Indeed, opinions are precisely the sort of factor upon which peremptories are properly based. See Holland v. Illinois, 493 U.S. 474,480, 110 S. Ct. 803, 107 L. Ed. 2d 905 (1990)(state has right to exclude on peremptory challenge "persons thought to be inclined against their interests"). See also Purkett v. Elem, ___ U.S. ___, ___ s. ct. ___, ___ L. Ed. 2d ___, 9 Fla. L. Weekly 524, S25 (May 15, 1995)(striking of persons with facial hair or long unkempt

hair proper under Batson) claim must be rejected.

Defendant's alternate argument, (B. at 58), that he was entitled to individual sequestered voir dire of the potential jurors, has not been preserved for review. Even if it were preserved, this claim is also 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. 564-566). The next day, Defendant's attorney was called away on a family emergency, (T. 903), and the trial was continued and the venire discharged. (T. 920). 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. 565). 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. 566). Nevertheless, accepting arguendo 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.

II.
CO-DEFENDANT FRANQUI'S CONFESSION WAS PROPERLY ADMITTED AGAINST DEFENDANT AT THEIR JOINT TRIAL.

Defendant contends the trial court erred in failing to sever his trial from that of non-testifying codefendant Franqui where Franqui's confession was admitted into evidence without a limiting instruction. However, a review of the two statements and the circumstances surrounding their taking, shows that Franqui'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. New York, 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, Franqui'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 without 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). Further, the courts will look to the circumstances surrounding the making of the out of court statement in determining its reliability. Lee, 476 U.S., at Idaho v. Wright, U.S. , S. Ct. , 111 L. Ed. 2d (19).

Contrary to Defendant's assertions, and unlike the statements in Lee, the statements in question here did not differ in any material respect. Further, the circumstances surrounding the giving of the statements do not suggest that they are unreliable. 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.

Franqui 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 Franqui and Defendant where the business was and the car the victims drove. (R. 374). This occurred five or six months prior to the shooting. (R. 377). Femandez told them to postpone the robbery after the victims were robbed by someone else. Fernandez planned the robbery but was not going to participate in it. (R. 378). He thought they would get $25,000. (R. 379).

Defendant stated that he and Franqui 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).

Franqui 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 Defendant 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).

Defendant 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 Franqui, on the day of the crime, Franqui, Defendant and Pablo Abreu met at Defendant's house. They drove Abreu's van and recovered the trucks. Franqui 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 Defendant and Abreu got into the blue

and white, and Franqui remained in the gray Suburban. (R. 389). He waited a block away until the victims came out of the bank. (R. 391). Franqui stated he was armed with a .357. Abreu had a 9mm Tech-9. (R. 389). Defendant had a 9mm pistol.

According to Defendant, Franqui waited a block from the bank in one truck and he and Abreu waited at the bank in the other. (T. 2100). Defendant had a 9mm pistol and Abreu had "a small machine gun.[11]" Defendant did not indicate in the first statement what type of gun Franqui had. (T. 2102). In his second statement he referred to disposing of a 9mm pistol and a .357. (T. 2119).

According to Franqui, after the victims left the bank in the red Blazer, Abreu got in front of them and Franqui followed, (R. 391). Defendant and Abreu were both wearing nylon stockings as face masks. (R. 399). The other Suburban stopped in front of the Blazer. Franqui drove his vehicle alongside the Blazer to the left, so that they could block them in and take the money from them. (R. 393). Defendant 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). Franqui then ducked down because Abreu and Defendant were shooting and bullets were everywhere. Franqui fired a shot through the window, toward the brown truck, toward its windshield. (R. 396). Then he drove away, and Defendant and Abreu and the victims were still shooting. Abreu had gotten out one side and Defendant had gotten out the other, and they were shooting to the rear. Abreu was the driver. (R. 396). They stayed on their respective

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

sides while shooting. The victims were shooting back. Franqui left and then Defendant and Abreu left also. (R. 397).

According to Defendant, he and Abreu left the bank ahead of the Blazer. They were wearing stocking masks. Franqui 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). Defendant got out the right side of the Suburban and Abreu got out the left, Defendant did not know where Franqui was at that time because his view was blocked by the vehicle. Defendant instructed the victims not to move, but they started shooting at him. (T. 2102-03). Abreu and Defendant returned fire. Defendant could not say if Franqui fired because his view was still blocked. Defendant fired his shots at the Blazer, not the pickup.[12] Then all three got into the vehicles and fled. (T. 2103).

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

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

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

there. (T. 2104).

Defendant said that later the guns were thrown off a bridge in Miami Beach, but he was unsure where. (T. 2104). In his second statement, Defendant indicated that he had thrown the 9mm and the .357 in the river near his house. (T. 2119). Franqui said that Defendant told him that he had disposed of the guns, but Franqui did not know where. (R. 401-02).

In addition to their interlocking nature, the trial court observed that none of the codefendants were present when the other confessed, and further neither attempted to inculpate the other in the actual shooting. (R. 192-93). Additionally, the court had previously found that Franqui's confession was freely and voluntarily given. (R. 133).

In sum, the statements of Franqui and Defendant were fully consistent in every material aspect. Both statements make it abundantly clear is that Franqui, Defendant and Abreu were advised of an "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 Defendant were in one truck and Franqui waited a block away in the other; that Defendant and Abreu proceeded first when the victims left the bank and Franqui followed; that the vehicle containing Defendant and Abreu stopped in front and Franqui pulled alongside; and that the murder victim pulled up behind in a pickup; that Abreu and Defendant got out of their truck wearing stockings on their heads; that

a firelight ensued; and that they fled. Further, nothing in the circumstances surrounding the taking of the confessions, such as occurred in Lee, casts doubt upon their reliability. As such Franqui's confession was properly admitted against Defendant. Lee; Cruz, 95 L. Ed. 2d, at 172. It follows that the motion to sever was properly denied.[13]

Further, assuming arguendo, that the statement was not sufficiently reliable to be admitted substantively against Defendant, rendering the failure to sever a Bruton[14] 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, Franqui's confession corroborated Defendant's in virtually every aspect. Furthermore, the testimony of the eyewitnesses and the physical evidence was overwhelming and also corroborated Franqui's (and Defendant's) statement.[15] The forensic evidence unequivocally showed that the .38 bullet which killed Lopez could only have been fired from the gun which both Franqui and Defendant said was carried by Franqui, the ,357 revolver. Likewise the .38 bullet which lodged in the mirror of the Gray Suburban could only have been

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[13] Contrary to Defendant's apparent argument, either Franqui's confession (which referred to Defendant) was properly admitted against him, or it was not. Under no circumstances would it have been proper to admit the unredacted confession at the trial and instruct the jury not to consider it against Defendant him. Richardson v. Marsh, 481 U.S. 200, S. Ct. , L. Ed. 2d (1987).

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

[15] 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 fired. Likewise, although Franqui 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.

fired from within that vehicle. Franqui and Defendant both said Franqui 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. Likewise, the statement regarding the guns is fully corroborated by the fact that the guns were found where Defendant said they would be. The connection to this case is further bolstered by the fact that the guns are the same type which Franqui said were used by him and Defendant. Further, several of the 9mm projectiles, casings, and unfired cartridges[16] 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 Franqui, could have been fired from the .357 found in the river. Franqui stated he used a .357, and stated that Defendant had said he threw the guns away. Defendant's statement regarding the disposal of the guns is unquestionably reliable. Thus, the admission of the codefendant's statements could not have had any probable impact on the jury. Harrington.

Finally, Defendant complains that the statements were improperly redacted and/or that supposedly exculpatory statements were suppressed. Defendant does not indicate the content of the allegedly excluded statements, how their exclusion actually prejudiced him, or even offer a record cite showing where these contentions were raised or the allegedly exculpatory statements were proffered below. As such this claim does not present any basis for appellate review, and should be rejected. Defendant's convictions should be affirmed.

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

III.
THE TRIAL COURT PROPERLY REFUSED TO SUPPRESS DEFENDANT'S CONFESSION.

As his third issue Defendant raises multiple claims regarding the failure to suppress the confessions given by him and his codefendant Leonardo Franqui, including the contentions that they were not voluntary because Defendant had "borderline" intelligence and Franqui was a "moron," (B. 65), because Defendant's confession was the product of delay, (B. 67), because of the defendants' alleged prior invocation of counsel, (B. 68), and because the police did not record San Martin's statement. (B. 70). The claims regarding Defendant's intelligence level and the fact that Defendant declined to give a formal statement were not raised below as grounds for suppression and may not now be considered. The remaining claims are factually unsupported and legally without merit. Finally, to the extent Defendant is challenging the failure to suppress Franqui's statement, (B. 69), he is without standing to do so.

At no point below did Defendant raise the claims regarding his intelligence level or in any way suggest that his statement was inadmissible because he declined to give it formally. As such these claims may not now be raised on appeal, and must be rejected. Robinson v. State, 487 So. 2d 1040, 1041 (Fla. 1986)(claims regarding the admission of confession will not be considered on appeal where they differed from grounds raised below); Henry v. State, 586 So. 2d 1033, 1035, n. 3 (Fla. 1991)(same).

With regard to the remaining two claims, a lengthy evidentiary hearing was held below with regard to the defendants' motions to suppress. (T. 54420). The trial court thereafter

issued an extensive written order denying the defendants' motions to suppress. (R. 124-42). Where the trial court has explicitly found that a defendant's statement was voluntary and should not be suppressed, that finding should not be disturbed on appeal unless the defendant demonstrates that the finding was clearly erroneous. Jones v. State, 440 So. 2d 574 (Fla. 1983), cert. den., 449 U.S. 986, 101 S.Ct. 407, 66 L.Ed.2d 250 (1980). The ruling of the trial court comes to this court with the same presumption of correctness that attaches to jury verdicts and final judgments. Stone v. State, 378 So. 2d 765 (Fla. 1979), cert. den., 449 U.S. 986, 101 S.Ct. 407, 66 L.Ed.2d 250 (1978).

In its order, the trial court summarized the evidence presented as follows:

> On January 18, 1992, Detective Mike Santos of the Metro Dade Police Department and Special Agent Dorothy Ingrahm [sic] of the Florida Department of Law Enforcement, went to the ICDC Annex of the Dade County Jail and contacted Pablo San Martin. The defendant agreed to accompany the officers to the Metro-Dade Police Department. San Martin was picked up at ICDC at approximately 11:30 am and transported to the police station. At approximately 12:00 p.m. the defendant was placed in an interview room and his handcuffs were removed. Because the defendant has difficulty speaking English, Detective Santos read him his Miranda rights in Spanish. San Martin listened to his rights and acknowledged that he understood them. He indicated that he did not want a lawyer present and agreed to speak to the detective. The defendant was thereafter questioned by Detective Santos reference the North Miami murder. During the interview, detective Santos took breaks and provided the defendant with food and drink.
>
> At some point in time, Detective Santos was approached by Detectives Nabut and Nazario of the Hialeah Police Department and was advised that San Martin had been implicated in the Hialeah murder. Santos advised Nabut and Nazario that the defendant had already been advised of his rights and had freely and voluntarily

waived them and agreed to speak to police without a lawyer present. Nabut and Nazario spoke to the defendant and he confessed to his involvement in the Hialeah murder case.

On January 21, 1992, Nabut visited the defendant at the ICDC Annex and conducted another interview. Before speaking to the defendant, Nabut again read him his constitutional rights off the Miranda card. Although the defendant waived his rights verbally, he refused to execute a written waiver. At no time during the interview did the defendant indicate any reluctance to speak to the detective nor did he request the assistance of counsel.

The defendant testified that he was picked up by Detective Santos at the ICDC Annex and taken to the police station. He stated that although he was advised of his constitutional rights he did not understand them. He therefore asked the detectives to read them to him again. When Santos got to the right to counsel the second time, the defendant says he told Santos that he did want a lawyer.

According to the defendant, the questioning continued and he became increasingly intimidated because he suffers from bad nerves and he could "feel" that the others were being beaten in the adjoining rooms. He said that he signed the rights waiver form because he was afraid.

On January 21, 1992, the defendant testified he was once again approached by Nabut at the jail. Nabut advised him of his rights and once again the defendant says he asked for a lawyer. Nabut ignored his request and proceeded with the interview. The defendant testified that although Nabut never threatened him, he was afraid he would be beaten if he did not answer the detective's questions.

(R. 135-137)

Based upon the evidence presented the trial court rejected the "delay" claim as without factual support:

> The defendant's motion to suppress argues, in very general terms, that his confession was not freely and voluntarily made. In support of this general allegation, the motion refers to the amount of time the defendant was at the police station and equates that time with the time the defendant was actually being interrogated. This suggestion ignores the very persuasive testimony of the detectives herein who specifically stated that during substantial periods of time on January 18, 1992, the defendant was not being questioned. At times the questioning of San Martin ceased while detectives stepped outside the interview room to share their information with their supervisors and other detectives who were interviewing other defendants. Other times the questioning stopped so the defendant could eat or drink. Consequently, this court finds that to equate the amount of time the defendant spent at the police station and the amount of time the defendant was interrogated is grossly misleading. This Court is persuaded by the highly credible testimony of the detectives herein who testified that the defendant freely and voluntarily waived his rights; that he agreed to speak to the police without a lawyer and that he fully cooperated with the interview process.

(R. 137-138).

In U. S. v. Stage, 464 F.2d 1057 (9th Cir. 1972), upon which Defendant relies, the court held that keeping a defendant incommunicado for five days rendered his confession involuntary as a matter of law. Such is plainly not the case here. Although Defendant was in the police station for most of the day in question, the time spent with regard to this case and the confession in question was only a few hours. It must be recalled that the reason Defendant spent as much time as he did at the station is because he was involved in three robberies and/or murders which he had committed in three separate jurisdictions within Dade County. It must also be recalled that Defendant was at the time he gave the confession in question already in custody on other charges. As such, this is not a situation where the defendant confessed simply so he could go

home. As the trial court properly concluded, all the evidence (except Defendant's own self-serving statements which were contradicted by the other witnesses) shows that Defendant's confession was freely and voluntarily given. Thus Defendant's vague claim of "delay," must be rejected.

The trial court also rejected any claim that Defendant was denied his Sixth Amendment right to counsel:

> San Martin further alleges in his motion that the "police officers questioning the defendant ignored the fact that the defendant was in custody in a separate matter and was already represented by counsel. The interviews conducted by those officers were conducted without prior notification of counsel and in the absence of counsel." San Martin's argument, although similar to Franqui's, is not the same since San Martin never clearly invoked his right to counsel in the robbery case. Regardless of that difference, however, the court's ruling is the same on this issue and consequently, for the reasons stated above in the analysis of Franqui's claim, this argument is rejected.

(T. 138).

As indicated in the above passage, the trial court had previously explained, correctly, that Franqui's denial of counsel claim was also without merit:

> First, he claims that his invocation of his right to counsel, formally executed . . . should invalidate any subsequent statement taken from him by police agents. The defendant stands upon his rights as guaranteed by the Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States.
>
> In McNeil v. Wisconsin, [___ U.S. ,] 111 s. ct. 2204 [, 115 L. Ed. 2d 158] (1991) the Supreme Court of the United States addressed the issues herein and decided them against the

defendant. In McNeil the Court of Appeals in the State of Wisconsin, noting that the issue had never been addressed by the Supreme Court of Wisconsin certified the following question:

> Does an accused's request for counsel at an initial appearance on a charged offense constitute an invocation of his Fifth Amendment right to counsel that precludes police interrogation on unrelated, uncharged offenses?

In addressing the defendant's Sixth Amendment right the Supreme Court stated:

> The Sixth Amendment right . . . is offense-specific. It cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced, that is, "at or after the initiation of adversary judicial criminal proceedings -- whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."[2]

Clearly under the Sixth Amendment Franqui's claim fails since the invocation of right to counsel at issue here was executed in the armed robbery case and not in the present case.[3]

The next issue for consideration is precisely the same issue certified by the Court of Appeals of Wisconsin to its Supreme Court, i.e., does the Fifth Amendment extend to the defendant the protection he seeks? In Edwards v. Arizona, [451 U.S. 477,] 101 S. Ct. 1880 [, 68 L. Ed. 2d 378] (1981) the Supreme Court "established a second layer of prophylaxis for the Miranda right to counsel: by holding that once a defendant asserts the right not only must all questioning stop but he may not be approached for additional interrogations "until counsel has been made available". [U.S. at ,] 101 S. Ct. at 1884-1885. The Court has subsequently held that counsel must actually be present subsequent to the initial invocation.[4] Additionally, the Edwards rule is not offense-specific, "once a suspect invokes the Miranda right to counsel for interrogation regarding one offense, he may not be reapproached regarding any offense unless counsel is present." McNeil, [U.S. ,] 111 S. Ct. at 2208.[5]

In McNeil, as in the present case, the defendant waived his Miranda right to counsel on every occasion he was interrogated.

His legal contention on appeal was that his waivers were not valid because his prior invocation of the offense-specific Sixth Amendment right in the armed robbery case for which he had been arrested was also an invocation of his non-offense-specific Miranda-Edwards right. The Supreme Court rejected this argument by distinguishing the purpose of each right. The Court explained that the purpose of the Sixth Amendment right is "to protect the unaided layman at critical confrontations: with his "expert adversary," the government, after "the adverse positions of government and defendant have solidified" with respect to a particular alleged crime. Gouveia, [U.S. at ,] 104 S. Ct. at 2298. The purpose of the Miranda-Edwards guarantee is to protect the suspect's "desire to deal with the police only through counsel." Edwards, [U.S. at ,] 101 S.Ct. at 1884. The Court went on to say in footnote 3:

> We have in fact never held that a person can invoke his Miranda rights anticipatorily, in a context other than "custodial interrogation". . .Most rights must be asserted when the government seeks to take the action they protect against. The fact that we have allowed the Miranda right to counsel, once asserted, to be effective with respect to future custodial interrogation does not necessarily mean that we will allow it to be asserted initially outside the context of custodial interrogation, with similar future effect.

Based on this reasoning, the court rejected the defendant's claim in McNeil.

As indicated above the defendant Franqui's situation in the present case is identical to that of the defendant in McNeil. Franqui's invocation of his right to counsel in his robbery case, like in Mr. McNeil's case, protected him only as to further police interrogation in the robbery case.

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[2] Citing United States v. Gouveia, [467 U.S. 180,] 104 S. Ct. 2292 [, 81 L. Ed. 2d 146] (1984); Kirby v. Illinois, [406 U. S. 682,] 92 S. Ct. 1877 [, 32 L. Ed. 2d 411] (1972).

[3] See also Trody v. State, 559 So. 2d 641 (Fla. 3d DCA 1990), vacated, Florida v. Trody, [U.S. ,] 111 S. Ct. 2845 [, 115 L. Ed. 2d 1013] (1991), on remand, Trody v. State, 586 So. 2d 440 (Fla.

3d DCA 1991).

[4] See Minnickv.Mississippi, [498 U.S. 146,] 111 S. Ct. 486 [, 112 L. Ed. 2d 489] (1990).

[5] See also Arizona v. Roberson, [483 U.S. 423,] 108 S. Ct. 2093 [, 75 L. Ed. 2d 1154] (1988).

(T. 130-133)(footnotes in original), See also Travlor v. State, 596 So. 2d 957, 972-73 (Fla. 1992)(prior invocation of counsel in unrelated case not relevant to determination of voluntariness of confession). It should be noted that Defendant's contention, (B. 69), that it is probable that Defendant executed a written notice of invocation of counsel because although the record does not contain one, there is in the record "a similar notice pertaining to another person who has absolutely nothing to do with this case" is specious.[17] Both the prosecutor and defense counsel specifically noted that Defendant, unlike codefendant Franqui, had not executed any written invocation of counsel. (T. 410). Thus, to the extent the current denial of counsel claim is based upon any purported written invocation, it was affirmatively waived below. Plainly there was no cognizable case-specific invocation of counsel with regard to the Hialeah murder.

Thus the only effective invocation of counsel which could have been relevant to this case would have been one made during the subject interrogation. However, the court rejected, as without factual support, the Fifth Amendment-based denial of counsel claim:

The Court rejects as not credible, the defendant's testimony that he

[17] The notice to which he refers, (R. 123), is an exhibit to the State's memorandum in opposition to Franqui's motion to suppress. The State relied on Florida v. Trodv in support of its contention that Franqui's invocation was not valid as to the confession in this case. The exhibit was attached to show that the invocation executed by Trody, and found wanting under the same circumstances, was identical to that executed by Franqui. (See R. 121).

invoked his right to counsel . . .

(R. 138).

Here Defendant has not shown that the court's findings were clearly erroneous. On the contrary, the trial court's findings are legally correct and amply supported by the record and should be affirmed. Jones; Stone; Henry.

Finally, as to Franqui's confession, Defendant is without standing to contest the voluntariness of Franqui's confession. McKenney v. State, 388 So. 2d 1232, 1234 (Fla. 1980)(defendant may not raise alleged violation of another's Miranda rights).'" In view of the foregoing the trial court properly refused to suppress Defendant's confession. Defendant's third claim must be rejected.

[18] The State would submit that even if Defendant had standing, there was no error in refusing to suppress Franqui's statement, which is borne out by the fact that Franqui himself did not even raise the issue of the voluntariness of his confession in his own direct appeal. See Brief of Appellant, Franqui v. State, Florida Supreme Court case no. 83,116 (opinion pending).

IV./V.
THE STATE PRESENTED EVIDENCE SUFFICIENT TO SUPPORT DEFENDANT'S CONVICTION OF FIRST DEGREE MURDER.

Defendant's fourth contention is that the evidence of premeditated firstdegree murder was insufficient to submit the issue to the jury. His fifth claim is that the evidence was insufficient to sustain a conviction of first degree premeditated murder. Although there may be some fine shade of distinction between these issues, the simple fact is that the evidence presented to the jury was more than sufficient to sustain a first-degree murder conviction under either a theory of premeditation or felony-murder.

As discussed in Point VII, infra, there is no requirement that the jury specify whether its verdict finding Defendant guilty of firstdegree murder was based upon a premeditation or felony-murder theory. Notwithstanding that fact, the evidence presented here was more than sufficient to support a conviction under either theory. There is no doubt that the murder occurred during the course of an attempted robbery. There is further no doubt that Defendant intended that lethal force be used during that attempted robbery. As such Defendant was properly convicted of first-degree felony murder, a fact which he does not appear to contest.

The evidence also supports a conviction based upon a premeditation theory. Defendant's assertion, (B. 72, 75), that there was no evidence of a plan to kill is simply ludicrous. While no one testified during the guilt phase that the defendants overtly planned to kill their victims, their actions speak thunderously. Defendant, along with codefendant Abreu, dismounted his

vehicle, guns blazing in the direction of all three victims, without so much as a "stick 'em up!" The forensic evidence showed that in addition to the numerous shots fired by his accomplices, at least eight casings were ejected from the gun which was undisputedly fired by Defendant himself. This evidence provided a compelling basis for the jury to have found that Defendant and his codefendants had a premeditated intent to cause the death of Raul Lopez.[19]

The level of premeditation necessary to sustain a conviction for first-degree murder may be formed in a moment. Spencer v. State, 645 So. 2d 377, 381 (Fla. 1994). It "need only exist for such time as will allow the accused to be conscious of the nature of the act about to be committed and the probable result of the act." Spencer, at 381; Sochor v. State, 619 So. 2d 285, 288-89 (Fla. 1993)(same). Premeditation may be established by circumstantial evidence, including the nature of the weapon used, the presence or absence of provocation, and the manner in which the homicide was committed. Spencer, at 381; Esty v. State, 642 So. 2d 1074, 1078 (Fla. 1994)(same); Crump v. State, 622 So. 2d 963, 971 (Fla. 1993)(same); Holton v. State, 573 So. 2d 284, 289 (Fla. 1990)(same); Provenzano v. State, 497 So. 2d 1177, 1181 (Fla. 1986)(same). Whether the premeditated design to kill was formed prior to the killing is a question of fact for the jury, Spencer, at 381, determination as to whether the evidence of premeditation is inconsistent with any reasonable hypothesis of innocence. Crump, at 971. Where there is competent substantial evidence of premeditation, the jury's verdict will not be reversed on appeal. Crump, at 971.

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[19] The intent necessary for the attempted murders of the Cabanases is likewise supported by this evidence. Notably Defendant does not challenge those convictions.

Here the evidence was more than sufficient to prove that Defendant had formed the premeditated design to kill not only Lopez, but both Cabanases, as well. Young v. State, 579 So. 2d 721,723 (Fla. 1991)(evidence of premeditation sufficient where defendant armed himself, expressed a willingness to use his gun and fired first); Bello v. State, 547 So. 2d 914, 916 (Fla. 1989)(evidence of premeditation sufficient where defendant knew victim was attempting to enter room and defendant fired at an angle that would most likely hit and probably kill anyone attempting to open the door); Sochor, at 288-89 (sufficient time to form premeditated intent where defendant's brother interrupted assault on victim, defendant yelled at brother and returned to attack); Provenzano, at 1181 (defendant removed loaded gun from jacket and commenced to fire on victim); see also Murray v. State, 491 So. 2d 1120, 1123 (Fla. 1986)("Frankly we find Murray's purported lack of intent to shoot the victim inconsistent with his admitted intent to kidnap, rob and sexually batter her").

Finally, Defendant's rumination, (B. 72), about transferred intent must be rejected as the red herring which it is. Even assuming arguendo that Defendant did not personally have the intent to kill Lopez, he was a full and complete participant in the attempted robbery. The forensic evidence conclusively showed that Franqui shot and killed Lopez in the furtherance of that robbery. The evidence further showed that no shots were fired into Franqui's vehicle. Cabanas, Sr. testified that he returned fire, but only toward Abreu and Defendant. Lopez's gun was never fired. These factors clearly support a finding of premeditation on Franqui's part. Spencer; Crump; Young; Bello; Sochor; Provenzano. As such Defendant is guilty of premeditated firstdegree murder; not because of "transferred intent," but because

as a fully involved principle he is liable for the acts of his codefendant. Foxworth v. State, 267 So. 2d 647, 650 (Fla. 1972)(conviction of premeditated murder upheld where evidence showed that either defendant or codefendant actually killed victim); Hall v. State, 403 So. 2d 1319, 1320 (Fla. 1981)(same); Hall v. State, 403 So. 2d 1321, 1323 (Fla. 1981)(same); James v. State, 453 So. 2d 786, 792 (Fla. 1984), sentence rev. on other grounds, 615 So. 2d 668 (Fla. 1993)(where defendant was present and actively participated in events each defendant responsible for the acts of the other). For the foregoing reasons, Defendant's convictions of first-degree murder should be affirmed.

VI.
TESTIMONY THAT DEFENDANT DECLINED TO GIVE A FORMAL RECORDED STATEMENT AFTER GIVING A FULL AND COMPLETE ORAL CONFESSION WAS NOT AN IMPROPER COMMENT ON DEFENDANT'S RIGHT TO SILENCE.

Defendant's sixth claim is that Detective Michael Santos's testimony that after orally confessing, Defendant declined to give a formal statement was an improper comment on his right to silence. This claim is without merit.

Under Florida law, the rule for determining whether a statement constitutes a comment on silence is whether it is "fairly susceptible" of being interpreted as such. Jackson v. State, 522 So. 2d 802, 807 (Fla. 1988); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); State v. Kinchen, 490 So. 2d 21 (Fla. 1985).

Having just recounted Defendant's complete confession describing the planning and carrying out of the crimes in question, the comment that Defendant refused to then give a recorded statement which would have been identical to the oral one, cannot be seen as fairly susceptible of being a comment on a right which Defendant plainly had not invoked. The two district courts of appeal which have considered the issue have so held. Love v. State 438 So. 2d 142, 144 (Fla. 3d DCA 1983)("the privilege against self-incrimination is waived after a full confession whether it is oral or written"); Walker v. State, 484 So. 2d 1322, 1323 (Fla. 3d DCA 1986)(police detective's testimony that after confession defendant declined to have statement stenographically recorded not comment on right to silence). The court's observations in McCoy

v. State, 429 So. 2d 1256, 1256 (Fla. 1st DCA 1983), are particularly germain here:

> The accuracy and integrity of oral incriminating statements are frequent targets of defense counsel who often suggest the unfairness of the use of oral statements of an accused who has not been afforded the opportunity to put his statement into writing. It is only reasonable that the State be permitted to elicit the fact that the accused was given that opportunity and declined.
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> * * *
>
> To suggest that Detective Pruett's testimony in the case sub judice offends the Fifth Amendment is to suggest an expansion of the construction of the Fifth Amendment to an illogical and unreasonable extent. We decline to do so.

McCoy, at 1257-58. Here, the State's interest in showing that Defendant was given the opportunity to give a recorded statement was all the more compelling in view of the fact that Franqui did give a stenographically recorded confession.[20]

Defendant suggests that Peterson v. State, 405 So. 2d 997 (Fla. 3d DCA 1981), supports his position. Peterson, however was factually quite different. There, the defendant declined to undergo further questioning, effectively invoking his right to silence., as in Hoven v. Walker, and McCoy, Defendant did not refuse further questioning. s e d , start to finish. He merely declined to have that statement taken down formally. Indeed it should be noted that far from refusing to answer any more questions, Defendant gave further statements to the police on subsequent dates. Clearly where no right to silence has been invoked, there can

[20] Indeed, Defendant has suggested in his brief that the fact that he only gave an oral statement calls into question its voluntary nature. (B. 70).

not have been a comment on it.

Finally even assuming arguendo that the comment could be interpreted as Defendant posits, any error is subject to harmless error analysis. Jackson; DiGuilio. As Defendant gave a full confession as to his role in these crimes, it is hard to imagine how this isolated comment could have in any way affected the verdict. Walker. This claim must be rejected.

VII.
DEFENDANT WAS NOT ENTITLED TO A VERDICT FORM WHICH SPECIFIED WHETHER HE WAS GUILTY OF FELONY OR PREMEDITATED MURDER.

Defendant's seventh claim is that he was denied all manner of due process because the verdict did not specify whether he was guilty of felony or premeditated murder. As Defendant notes in his brief, (B. 76), this contention has been repeatedly rejected. Sochor v. State, 619 So. 2d 285, 288, n. 3 (Fla. 1993); Turner v. Dugger, 614 So. 2d 1075 (Fla. 1992); Patten v. State, 598 So. 2d 60 (Fla. 1992); Young v. State, 579 So. 2d 721 (Fla. 1991); Haliburton v. State, 561 So. 2d 248 (Fla. 1990); Buford v. State, 492 So. 2d 355 (Fla. 1986); Brown v. State, 473 So. 2d 1260 (Fla. 1985). Furthermore, even assuming arguendo that Defendant's contentions had any merit, any putative error would have been harmless, in that the evidence amply supports Defendant's conviction under either theory. See Point IV & V, supra. Defendant's seventh claim must be denied.

VIII.
DEFENDANT WAS NOT IMPROPERLY DENIED THE USE OF EXPERTS IN HIS TRIAL.

Defendant's eighth claim is two-fold: that he was denied the services of a jury selection expert, and that he was denied the funds for counsel to travel to Denmark to take the deposition of Dr. Hougen, the visiting medical examiner who performed the autopsy of Raul Lopez. The former claim is partially, and the latter, wholly, procedurally barred. Defendant fails, however, to explain the basis for the entitlement he claims, nor how the denial thereof harmed his case, both of which are prerequisites to the relief he seeks.

As for the jury selection expert, the State would note first note, without in any way conceding the validity of the argument, that his claim, (B. at 79), that denial of a jury selection expert where those defendants represented by the Public Defender's Office allegedly have access to such experts, constitutes a denial of equal protection, was never raised at trial. As such, the claim was not preserved for review and may not now be raised.

As for the general claim that he was entitled to a jury selection expert, Defendant cites no authority for the proposition that he is entitled to have such an expert at public expense. The State has unearthed no precedent directly addressing this point. However, the law regarding the appointment of experts for indigent defendants is quite clear.

This court applies an abuse of discretion standard when reviewing the trial courts refusal to provide funds for the appointment of experts for indigent defendants. Martin v. State, 455 So.

2d 370, 372 (Fla. 1984); Quince v. State, 477 So. 2d 535, 537, (Fla. 1985), cert. denied, 475 U.S. 1132, 106 S. CT. 1662, 90 L. Ed. 2d 204 (1986). The courts which have considered the question generally apply a two part test in determining whether a defendant was improperly deprived of the assistance of expert assistance: (1) whether the defendant made a particularized showing of need, and (2) that denial of such assistance would result in a fundamentally unfair trial. See Moore v. Kemp, 809 F. 2d 702, 710-712 (11th Cir.), cert. denied, 481 U.S. 1054, 107 S. Ct. 2192, 95 L. Ed. 2d 847 (1987); Dinnle v. State, 654 So. 2d 164, 166 (Fla. 3d DCA 1995); Cade v. State, 20 Fla. L. Weekly D1335, D1335-36 (Fla. 5th DCA June 2, 1995)(on rehearing).

Before applying that test to Defendant's claims, however, it should be noted that to the extent he is asserting a federal claim under Ake v. Oklahoma, 470 U.S. 74, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985), (B. at 81), this claim of entitlement to nonpsychiatric expert assistance is of questionable merit. See Moore, at 711:

> The Supreme Court's statement in *Caldwell* implies that the government's refusal to provide nonpsychiatric assistance could, in a given case, deny a defendant a fair trial. The implication is questionable, however, in light of the Court's subsequent statement that it had "no need to determine as a matter of federal constitutional law what ***if*** any showing would have entitled a defendant to assistance of the type [Caldwell] sought." ***Id.***

Citing to Caldwell v. Mississippi, 472 U.S. 320, 324, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985)(emphasis the 11 th Circuit's).

Defendant's claim regarding the appointment of jury experts clearly fails the need test.

Selection of a jury is a uniquely legal function which should be well within the competence any licensed attorney. There has been no suggestion that counsel was not fully competent to perform this basic trial function without the assistance of "expert" help. Plainly defense attorneys and prosecutors alike have conducted criminal trials without the benefit of such experts for centuries. Defendant has offered no basis for the conclusion that such experts are of any benefit in the undeniably subjective art of jury selection, much less that such an expert would have been of assistance in his case. See Moore, at 712 (Ake and Caldwell hold that defendant must show more than a mere possibility of benefit from a requested expert); Caldwell, 472 U.S. at 323 n. 1 ("Given that petitioner offered little more than undeveloped assertions that the requested assistance would be beneficial, we find no deprivation of due process in the trial judge's decision"); McKinley v. Smith, 838 F.2d 1524, 1530 (11th Cir. 1988)(request for pathologist properly denied where defendant averred little moire than that such expert would be beneficial); Baxter v. Thomas, 45 F. 3d 1501, 15 11 (11 th Cir. 1995)(no error where defendant did not show "substantial basis" for appointment of expert); cf. Dingle, at 166 (showing of need sufficient where "defendant eloquently argued" that the State's evidence the expert would have attacked "was pivotal to a determination of guilt").

Likewise, Defendant has failed to show that denial of funds for a jury selection expert rendered the trial fundamentally unfair. It is well-established that in questions of jury selection, a trial will be rendered fundamentally unfair only if the defendant shows that his jury was not impartial. Ross v. Oklahoma, 487 U.S. 81, 88, 108 S. Ct. 2273, 101 L. Ed. 2d 80 (1988). Defendant has not alleged, much less proven as much. As such he has not shown that the judge

abused his discretion.

Defendant's claim that the trial court erred in refusing to allow him to travel to Denmark to depose the medical examiner who conducted the autopsy, Dr. Hougen, has not been preserved for review. When the issue first arose, counsel for the defendants agreed to depose Dr. Hougen telephonically, with leave to pursue additional measures if that proved unsatisfactory. (T. 456). Dr. Hougen was apparently deposed. (T. 505). However, none of the Defendants thereafter asserted that they needed to travel to Denmark. As such the claim may not now be considered.

Assuming arguendo that the travel claim were preserved for review, it would be without merit. The evidence was unequivocal that victim had not shot his weapon and that the fatal shot was fired from the gun used by codefendant Franqui. Defendant in no way explains how opening the evidence to the possibility that there may have been another shot could have in any way helped his case.[21] Defendant himself notes, (B. at 80), that it was undisputed that the visiting medical examiner erred in that As such Defendant has failed to show need, the first prong of the test enunciated in Moore, Dingle, and Cade; see also Caldwell. Defendant fails to explain how he was prejudiced. As noted above, there is no way that travelling to Denmark to interview Dr. Hougen could have produced any evidence which would have been beneficial

[21] This of course assumes that there is any possibility that such evidence could have been developed, a proposition itself highly doubtful. Dr. Hellinger, who operated on Lopez in the emergency room prior to his death, was unequivocal that there was only one bullet entrance wound and that there were no exit wounds when Lopez was brought to the hospital. (T. 2161-67).

to Defendant's case. As such it cannot be said that Defendant's trial was fundamentally unfair. Moore, 1227. The trial court did not abuse its discretion.

Finally in view of the points articulated above, any error which may have occurred was harmless beyond a reasonable doubt. See Morgan v. State, 639 So. 2d 6, 12 (Fla. 1994)(error in denial of appointment of expert harmless where it would not have affected the outcome of the proceedings). Defendant's Claim VIII must be rejected.

Ix.

DEFENDANT'S MAY NOT CLAIM ERROR IN DR. MUTTER GIVING HIS OPINION REGARDING THE EXISTENCE OF MITIGATION WHERE DEFENDANT ASKED FOR THE OPINION; THE TRIAL COURT PROPERLY REJECTED DEFENDANT'S PROFFERED MENTAL HEALTH MITIGATION.

Defendant's ninth claim is that State rebuttal witness Dr. Mutter's inaccurate opinion regarding the law of mitigation led the trial court to improperly reject Defendant's proffered mitigation. The error, if any, in Dr. Mutter's opinion was wholly elicited by Defendant and may not now be raised. In any event, the trial court properly rejected the mitigation proffered by the defense as unsupported by the evidence.

Defendant claims he was harmed when Dr. Mutter purportedly opined that Defendant's alleged borderline intelligence was not a mitigating circumstance. This claim is in a unique procedural posture, in that the now-objected to opinion was in response to a direct question by defense counsel, to which the State objected:

> Q. [by Defendant's counsel, Mr. Vasquez] Do you agree that he has borderline intelligence or not?
>
> A. Sure.
>
> Q. Would that be a mitigating circumstance --
>
> MR. KASTRENAKIS [the prosecutor]: Objection.
>
> Q. (By Mr. Vasquez) -- in your opinion?
>
> THE COURT: Grounds?
>
> THE WITNESS: No.
>
> MR. KASTRENAKIS: It is a nonstatutory mitigator

which this doctor as well as any doctor is -- does not have expertise to opine about. He can report a fact that exists. It is up to the jury to determine whether those are mitigators. T mean --

MR. VASQUEZ: He said look for mitigators besides statutory mitigators. I am asking him it he decides --

THE COURT: I will allow the doctor to answer.

(T. 328748). Defendant thus specifically elicited, over State objection, the response of which he now complains. As such the claim is waived. Furthermore, the subsequent comment regarding the "law" by Dr. Mutter was brief. Defense counsel thereupon sought to further explore Dr. Mutter's views on the law:

Q. (By Mr. Vasquez) Is the purpose of the law --

(T. 3288). Upon co-counsel's objection, the court then instructed the jury that it was the sole source of the law. (T. 3288-89). Defense counsel thereafter continued on the subject, with Dr. Mutter deferring to the court:

Q. (By Mr. Vasquez) Now, doctor, besides the two statutory mitigators that you talk about all the time . . . are there other mitigating circumstances, the last one, number eight is any other aspects of the Defendant's character or record and any other circumstances of the offense. That is the law. Would you agree with that?

A. I am not a lawyer. If that is what you are saying the Judge says, that's fine.

Q. You are not a lawyer.
Now don't you think that being of borderline intelligence is mitigating?

A. Not in and of itself.

Q. Not in and of itself that you want to take it right as to the next impairment, judgment impairment or mental or emotional distress; right?

> A. No your question is misleading. I need to explain my answer. If a person has borderline intellect, he is very limited. He grows up. He's never been taught the difference between right and wrong. Then this could be in my opinion an influence on why he would do something because he didn't know better.
>
> It is not just the numbers of a person's intellectual capacity. It is also what he was taught, what he learned, what he knows about right/wrong issues and just a number for a person's IQ has no bearing whatsoever. It's got to fit other facts of the case. It's got to make sense.

(T. 3289-90). Having deliberately asked the doctor's opinion on the matter, Defendant cannot, assign the same as error now. Ferguson v. State, 417 So. 2d 639 (Fla. 1982); Dufour v. State, 495 So. 2d 154 (Fla. 1986); Darden v. Wainwriaht, 477 U.S. 168, 106 S. Ct. 2464, 91 L Ed. 2d 144 (1986). Any error assigned to Dr. Mutter's testimony must be rejected.

Furthermore, the trial court's rejection of Defendant's mental health mitigation was proper. 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). In addition:

> [W]hen 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").

The trial court carefully considered, and rejected as not established, the mental health mitigation proffered by Defendant. This conclusion was not airily based upon one statement by Dr. Mutter, as suggested in the brief. (B. **83).** Rather the totality of the circumstances showed that Defendant was simply not mentally impaired in any way which affected his decision to commit this crime:

SENTENCING ORDER

* * *

STATUTORY MITIGATING **CIRCUMSTANCES**

In his sentencing memorandum, the defendant San Martin argues that the evidence has established the existence of two statutory mitigating circumstances. The court will consider all of the statutory mitigating circumstances set forth in F.S. 921.141 in the light of this record.

The crime for which Pablo San Martin is to be sentenced was committed while he was under the influence of the extreme mental or emotional disturbance.

The defendant San Martin offered the testimony of Dr. Dorita Marina to establish the existence of the statutory mitigating circumstance. Dr. Marina testified that her evaluation of Mr. San Martin revealed that the defendant was socially, economically and educationally deprived. She testified that the defendant suffered mistreatment at the hands of his alcoholic father and that his IQ is in the borderline range, meaning that it is slightly above mentally retarded and just below "low normal". Dr. Marina added that the

defendant also suffered from immaturity and coping deficits. Based upon these findings she concludes that on December 6, 1991 the defendant was under the influence of extreme menta or emotional disturbance. The court has great difficulty accepting the conclusions of Dr. Marina.

It is interesting to note before beginning an analysis of Dr. Marina's diagnosis and conclusions that the defendant's second expert, Dr. Jorge Herrera, concludes that the defendant does not suffer from extreme mental or emotional disturbance.

Dr. Marina diagnosed the defendant as suffering from cyclothemia [sic]. The evidence presented during the penalty phase established that cyclothemia is defined as mild mood swings. It was additionally established that this diagnosis is inconsistent with the findings of the other defense experts that the defendant suffers from mild organicity. Regardless of this contradiction among the defendant's own experts, it takes a quantum leap to find the statutory mitigator here in question from a diagnosis of mild mood swings.

As this court remembers the testimony brought out during the penalty phase of this case, Mr. San Martin came from a close and loving family. All of his brothers and sisters have grown to be hard working, law abbiding [sic] and respectable young men and women. There was testimony from the defendant's family that he was a good and conscientious son and brother who always cared for his family. There was evidence that he was able to hold down a good job for several years. Finally, the suggestion by the defendant to Dr. Marina that he was mistreated by his alcoholic father was resoundingly refuted by every member of the defendant's family who testified. Although all acknowledged that the defendant's father drinks too much, they all further acknowledged that he had never been abusive to ny of the children and that he has always been a good provider. The defense's suggestion that the entire family is in denial about their father's alcoholism is unsubstantiated by the evidence and is unacceptable to this court.

The shortcomings of Dr. Marina's conclusions are very similar to those of Dr. Jethro Toomer's conclusions on behalf of codefendant Franqui. As in the case of Mr. Franqui the court is persuaded by Dr. Charles Mutter's well reasoned opinion that the defendant simply made choices which were oriented to improve the

defendant's financial situation and that the defendant was not acting under the influence of any extreme mental or emotional disturbance. The facts support Dr. Mutter's conclusions.

The single most significant aspect of this case and of the defendant's other violent crimes is planning. Although this defendant cannot be characterized as the most successful armed robber in the history of Dade County, it was not for lack of planning.

In the November 29, 1991 attempted robbery and attempted murder of Pedro Santos the evidence established that the defendant and his codefendants met at the Dennys [sic] restaurant which adjoins the Republic National Bank in question From there they observed the bank security guard carry a bag from the bank to the drive-in teller. Believing that the guard was carrying money the defendant and his friends planned and engineered theft of cars to facilitate the robbery.

Having planned the robbery for the following day, they were frustrated by the Thanksgiving holiday and had to postpone their plans for the next day. On Friday after Thanksgiving they executed their plans and attempted the robbery. Every action of the defendant was meaningful and goal oriented. The object of his efforts was money and as future events would show, never on a small scale.

On January 14, 1992 the unfortunate object of the defendant's attention was Craig Van Nest. Once again the defendant acted in an organized and goal oriented manner. The record is unclear as to why Mr. Van Nest was targeted however it is consistent with this defendant's other crimes that Mr. Van Nest deals in very expensive merchandise. The defendant and his co-defendants approached Van Nest while the latter was driving his car. They tried to pull him over by identifying themselves as police officers, yet another example of planning that went into the commission of these crimes. When Van Nest refused to stop his vehicle he was followed to his destination where he was pistol whipped by one of Mr. San Martin's codefendants and then kidnapped by San Martin and Franqui.

This defendant's premeditating and calculating nature was most clearly set out in the present case. This was the most thoroughly planned of defendant's crimes. The victims were stalked. Their

> routines were studied, Their relative functions were analyzed. Trucks were stolen so they could be used in the robbery the next day. A get-away vehicle was placed at a pre-arranged location so that the stolen trucks could be abandoned and escape could be more discreetly achieved. Masks were used to make identification impossible. Gloves were used so no identifying fingerprints would be left behind. The ambush was arranged to occur in a somewhat isolated location. The victims' cars were efficiently blocked to prevent escape. Raul Lopez was assassinated to prevent resistance. Finally, it is obvious, whether pre-planned or not, that the defendant and his accomplices never intended to "ask" for the money in question. They all exited their vehicles firing their weapons at Raul Lopez and the Cabanas [sic]. The defendants San Martin and Abreu showered the windshield of the Cabanas car with gunfire before any request for money was made. Thus the violence was not something reserved for the uncooperative victim but an integral part of the plan.
>
> The facts of all these cases belie Dr. Marina's suggestion that the defendant acted while under extreme mental or emotional disturbance on December 6, 1991. Dr. Mutter's suggestion that the defendant simply chose to commit these crimes is bourne [sic] out by the testimony which established that the defendant was at one time in his life fully capable of holding a job and helping provide for his family. Life is made up of a long series of choices all of us must make. People are ultimately judged by the choices they make. The defendant San Martin is no exception.
>
> For the reasons stated above the court rejects the existence of this statutory mitigating circumstance.

(R. 1095-1105). From the foregoing it is plain to see that the court's decision was not as cavalier as Defendant would suggest.

The Court rejected the remaining statutory mitigators, with similar thoroughness. (R. 1105-08). The other statutory mitigating factor urged by the defense, that Defendant's impaired capacity to appreciate the criminality of his conduct or conform it to the requirements of the law was rejected for reasons similar to those cited above. Dr. Herrera testified that the factor applied

while Drs. Marina and Mutter testified that it did not. (R. 1106). The court accepted the findings of Dr. Lorenco, that Defendant had a minor lesion on his brain. (Id.) The court rejected the notion, however, that the Defendant's "mild organicity" impaired his ability to appreciate the criminality of his conduct, finding that such a conclusion was a "quantum leap . . . which seeks to hurdle the ever present obstacle of logic." (Id.) The court found that the same evidence which ruled out emotional disturbance also ruled out this factor. (Id.)

The court similarly analyzed Defendant's proffered nonstatutory mitigation. (R. 1109-1115). The court first rejected Defendant's IQ of 77 as mitigating. It noted the organized, preplanned and goal-oriented nature of Defendant's crimes, and concluded that the mitigating nature of Defendant's alleged intelligence was not proven:

> Every piece of evidence presented in this trial, penalty phase and sentencing hearings, with the exception of Dr. Marina's testimony, definitively establishes that Mr. San Martin is capable of goal oriented and sophisticated conduct. The crimes he has committed, as described above reflect a pattern of premeditation, calculation and shrewd planning that are not consistent with someone in a low range of intelligence.

(R. 1109). The court also noted his ability to hold a job, and provide for his family. Additionally he was the one sought out by his siblings for advice. (R. 1109-10). As to the alleged organic brain damage, the court noted that the pm-ported lesion had not affected Defendant's behavior in the eight years after the injury which allegedly caused it until his current crime spree began. Nor could it have caused his violent behavior before the injury. (T. 1110). The foregoing is all amply supported by the record; Defendant's claims should be rejected. Walls; Nibert; see also Cook v. State, 581 So. 2d 141, 143-44 (F'la. 1991) (proper rejection of mental mitigating circumstances in light of conflicting and contradictory evidence).

X.

THE EVIDENCE WAS MORE THAN ADEQUATE TO SUPPORT BOTH THE INSTRUCTION OF THE JURY ON, AND FINDING BY THE TRIAL COURT OF, THE COLD CALCULATED AND PREMEDITATED AGGRAVATING FACTOR.

Defendant's tenth claim is that the trial court erred in instructing the jury on the cold calculated and premeditated (CCP) aggravating factor because the evidence was insufficient to support it. For the same reason, he avers, the trial court erred in finding the factor to exist. Both these contentions are wholly without merit.

The trial court entered a detailed written order explaining its findings. The court concluded that both the robbery and the murder, 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 codefendant 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 codefendants 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. 1097-98). 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. 2717-18). Abreu also testified that Franqui said he would "take care of the escort." (T. 2723).

The court's order further 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.
>
> This court is satisfied beyond and to the exclusion of every reasonable doubt that Raul Lopez was marked for death long before December 6th; that the defendant San Martin and his codefendants in a cold, calculated and premeditated manner planned his murder for no other reason than to facilitate the robbery of the thousands of dollars the Cabanas were carrying on the day in question; that the premeditation in this case is far greater than necessary for a conviction for the crime of first degree murder and is of the heightened nature required for the establishment of this aggravator.

(R. 1098-99). This conclusion is also fully supported by the evidence. According to Danilo Cabanas, Sr., the shooting started immediately after the defendants blocked the victims' vehicles.

(T. 2022). The shooting commenced before the Cabanases ever fired any shots. (T. 2022, 1744-45). Furthermore, the Lopez's weapon was found to have been fully loaded and not fired. (T. 2218). Thus, the Franqui 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.

Thus, the factor was not applied solely on the basis of Abreu's testimony. Rather, the circumstance is supported by (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 Franqui'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, S217 (Fla. April 21, 1994):

> [I]n 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.

These factors are satisfied here. This killing did not reflect an emotional frenzy. Not only was it part of a welldeveloped previously devised plan, the evidence shows that the firing began immediately, prior to any defensive shooting by the Cabanases, and in the absence of any shooting at all by Lopez. Further, the existence of the careful plan or prearranged design was established through Abreu's testimony and was corroborated by the manner in which this

Storm-trooper style attack and 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 or not.

Defendant's apparent suggestion, (B. at 86), that there was some pretense of justification here borders on the facetious. The absence of any "pretense of moral or 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 here, but Franqui'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, which established that Lopez never fired any weapon.

The foregoing is amply supported in the case law. In Griffin v. State, 639 So. 2d 966 (Fla. 1994), a finding of CCP was recently 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 where the defendant followed a prior plan to kill: "the 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).

As the evidence clearly supported the finding of the factor, it follows that there was no error in giving the CCP instruction to the jury. Defendant's reliance in this regard, (B. 86), on Espinosa v. Florida, 505 U.S. ___, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992), is entirely misplaced. Contrary to his assertions, the issue in that case was not the sufficiency of the evidence to support an instruction on the HAC aggravator, or even the constitutionality of the aggravating factor itself. Rather the question was whether the instruction was sufficiently clear to properly channel the jury's decision-making process. Here, that is not a issue as the CCP instruction given was virtually identical to that recently promulgated by this court in Jackson v. State, 19 Fla. L. Weekly S215, S218 at n. 8 (Fla. April 21, 1994). Thus, even if Defendant's

untenable proposition that the evidence did not support the giving of the CCP instruction were accepted, the Espinosa claim would fail. As explained in Sochor v. Florida, 504 U.S. ___, 112 S. Ct. 2114, 119 L. Ed, 2d 326 (1992), the fact that a jury is instructed on an aggravating factor which lacks evidentiary support does not result in Eighth Amendment error:

> Because the jury in Florida does not reveal the aggravating factors on which it relies, we cannot know whether this jury actually relied on the [unsupported] factor. If it did not, there was no Eighth Amendment violation. Thus Sochor implicitly suggests that, if the jury was allowed to rely on any of two or more independent grounds, one of which is infirm, we should presume that the resulting general verdict rested on an infirm ground and must be set aside. Just this Term, however, we held it was no violation of due process that a trial court instructed a jury on two different legal theories, one supported by the evidence, the other not. We reasoned that although a jury is unlikely to disregard a theory flawed in law, it is indeed likely to disregard an option unsupported by the evidence. We see no occasion for different reasoning here, and accordingly decline to presume jury error.

Sochor, 119 L. Ed. 2d at 340 (Citations omitted).

Finally, assuming arguendo that the finding of the CCP factor were erroneous, any such error would be harmless beyond a reasonable doubt. The lower court specifically cautioned that the death sentence herein was warranted even in the absence of this factor. (R. 1116). 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," (Id.), which were of a de minimis nature. See 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). Defendant's tenth claim must be rejected.

XI.

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

Defendant's eleventh contention is that the trial court erred in refusing to allow instruction or argument regarding Defendant's potential sentences on the non-capital counts. This claim is wholly without merit.

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. 2530-32). The trial court ruled that such arguments would be improper. (T. 2533). The trial court was correct.

In Marquard v. State, 641 So. 2d 54 (Fla. 1994), this court rejected a virtually identical claim. Defense counsel sought to present argument to the jury about the sentence that the defendant could receive for the noncapital armed robbery. The prosecution objected, and the judge precluded further argument. On appeal, the 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." Id., at 58, citing Nixon v. State, 572 So. 2d 1336, 1345 (Fla. 1990), dert.n i e d , __ U.S. ___, 112 S.Ct. 164, 116 L.Ed. 2d 128 (1991)("As to offenses in which the jury plays no role in sentencing, the jury will not be advised of the possible penalties").

Simmons v. South Carolina, 512 U.S. ___, 114 S.Ct. ___, 129 L.Ed. 2d 133 (1994),

does not compel a contrary conclusion. In Simmons, 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 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.

Here, however, neither future dangerousness nor ineligibility for parole are 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 -- here, whether or not defendant would receive consecutive sentences was purest speculation. If a life sentence for the murder were imposed, the trial court would have had complete discretion as to whether to run it consecutively or concurrently with any noncapital or prior offenses. See, 921.16(1), Fla. Stat. Thus, any argument or instruction to the jury on this question would simply leave the jury where it already was -- without any knowledge of 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 a vailable, how the jury's knowledge of parole a vailability 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 Defendant's jury should have been given was that in the event of imposition of a life sentence, Defendant would serve at least 25 years before becoming eligible for parole.[22] The trial court 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. 2552).

In addition to the above information provided to the jury by the trial court, which is accurate under Florida law, Defendant's attorney also argued the issue to the jury:

> Pablo Abreu and Pablo San Martin. And they, he [the prosecutor] already told you that Pablo Abreu is going to spend his whole life in jail. In prison. That is what he said in his closing argument.
>
> My client has been convicted of attempted murder. Which is a life felony. Attempted Kidnapping [sic], which is a life felony. Robbery which is a life felony. He's already been convicted of those. And he stands to get convicted in this case and I suggest to you that a life sentence in this case with twenty-five years minimum mandatory without the possibility of parole will keep my

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

client in jail forever.

(T. 3487). Accordingly, Simmons has no bearing on the instant case, and the principles of Nixon and Marauard are controlling, This claim must be rejected.

XII,
NEITHER DEFENDANT'S RIGHT TO CROSS-EXAMINE WITNESSES NOR HIS RIGHT TO PRESENT CLOSING ARGUMENT WAS IMPAIRED.

In his twelfth claim, Defendant inexplicably contends that his right to cross-examine prosecution witnesses regarding his prior convictions was impaired when the trial court sustained State objections to his closing argument. The State is somewhat confused as to the substance of this claim, but regardless of whether Defendant is asserting an impairment of his right to confront witnesses or his right to argue to the jury, or both, the claim is without merit.

Defendant first notes that the trial court prohibited "residual doubt" argument to the jury, and concedes that that was not error. (B. 89); see Preston v. State, 607 So. 2d 404 (Fla. 1992). He then alleges that the trial court "prohibited defense counsel from arguing in summation regarding details of the past crimes." (Id.) This, he avers, unfairly restricted counsel's efforts to minimize the impact of the past crimes evidence. (Id.) In support of this proposition he alleges violation of his right to cross-examine State witnesses. (Id.)

As to the claim regarding cross-examination, it is plain that Defendant was granted ample opportunity to crossexamine the State's witnesses during the Penalty Phase, of which he in fact took advantage. See T. 2570-2572 (Craig Van Nest); T. 2591-96 (Det. Mantecon); T. 2613-17 (Pedro Santos); T. 2635-37 (Det. Nazario); T. 2760-63 (Pablo Abreu); & T. 3272-3302 (Dr. Mutter). He does not indicate where, if at all, his cross-examination was improperly limited. The State submits that it was not. It would further submit that this contention has not been preserved for review and that if any error occurred in this regard, it is harmless beyond a

reasonable doubt.

As to the claim regarding the court's conduct of closing argument, the court did not in fact, as he avers, "restrict his efforts to minimize the effects of the State's prior crimes evidence." (B. 89). On the contrary, the court instructed him that he was free to discuss Defendant's role in the prior crimes, and to argue that it was minimal. The only thing which the court disallowed was counsel's repeated attempt to argue that Defendant had not in fact committed an attempted murder in the Bird Road case, when he had in fact been convicted of that crime. (T. 3468-70). After a sidebar, counsel acceded to the court's limitation: "MR. VASQUEZ: Okay." (T. 3471). Thereafter, the trial court overruled the State's further objections to similar argument, instructing the jury that they would remember what the evidence was. (T. 3471-72). As such the State would submit that the issue is not preserved; that in any event no error occurred, and that if it did, it was harmless. This claim should be rejected.

XIII.
DEFENDANT WAS NOT ENTITLED TO A SPECIAL INSTRUCTION FOR EACH INDIVIDUAL NONSTATUTORY MITIGATING FACTOR HE CLAIMED.

Defendant's thirteenth claim is that he was entitled to have his penalty-phase jury instructed on the individual nonstatutory mitigating factors he was claiming. This claim is entirely without merit.

The trial court below gave the jury the standard instruction on nonstatutory mitigation. (T. 3499). In Jones v. State, 612 So. 2d 1370, 1375 (Fla. 1992), cert. denied, ___ U.S. ___, 114 S. Ct. 112, 126 L. Ed. 2d 78 (1993), this court held that where the evidence was insufficient to support a charge on the statutory mitigator of extreme mental or emotional disturbance, the standard general jury instruction on nonstatutory mitigation was sufficient. Accord, Jones v. State, 652 So. 2d 346, 351 (Fla. 1995). Further, the contention that so-called catch-all instructions such as those given here are insufficient because they do not apprise the sentencing jury that it may consider non-enumerated mitigating circumstances was specifically rejected by the U.S. Supreme Court in Boyde v. California, 494 U.S. 370, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990). The contention has been likewise rejected by this court:

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

Robinson v. State, 547 So. 2d 108, 111 (Fla. 1991)(quoting Boyde, 110 S. Ct., at 1198). Defendant's thirteenth contention is without merit and must be rejected.[23]

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[23] Defendant's assertion that the lack of the instructions to which he claims entitlement resulted in a "pitiful" closing argument, (B. 50), is specious. Counsel extensively argued the nonstatutory mitigating factors he was claiming. (T. 3478-3481, 3486-3493).

XIV.

NEITHER THE WEIGHING PROVISIONS OF 'THE FLORIDA DEATH PENALTY STATUTE, NOR THE INSTRUCTIONS DERIVED THEREFROM, ARE UNCONSTITUTIONAL.

Defendant's fourteenth claim is that he is required to "prove" that the mitigating circumstances outweigh aggravating circumstances under 921.141, Fla. Stat., and further that this requirement shifts the burden of proof to him, rendering both the statute and the jury instruction derived therefrom unconstitutional. Defendant's contentions are at least in part unpreserved for review and are in any event without merit.

At no point did Defendant challenge the constitutionality of 921.141 based upon the allegation that it impermissibly shifts the burden to the defense to prove the mitigation outweighs the aggravating factors. As such to the extent that Defendant is challenging the statute itself, (B. 92), this claim is not preserved for review.

In any event, Defendant's current claim has repeatedly been rejected by this court and the U.S. Supreme Court. Arango v. State, 411 So. 2d 172, 174 (Fla.), cert. denied, 457 US. 1140, 102 S. Ct. 2973, 73 L. Ed. 2d 1360 (1982), rev'd on other grounds, 467 So. 2d 692 (Fla. 1985); Stewart v. State, 549 So. 2d 171, 174 (Fla. 1989); Robinson v. State, 574 So. 2d 108, 113, n. 6 (Fla. 1991); Walton v. Arizona, 497 U.S. 639, 649-651, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990).

XV.
FLORIDA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL AND DEFENDANT'S SENTENCE IS PROPORTIONAL.

A" The death penalty statute is constitutional.

Defendant argues that Florida's death penalty is arbitrarily and discriminatorily applied on the basis of the race, sex and economic status of 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 for 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 for 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), where 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 on 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).

Defendant 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. This claim must be rejected.

B. Defendant's sentence is proportional.

Although Defendant has not explicitly raised the issue in his brief, because this court conducts proportionality review in every death penalty case, Messer v. State, 439 So. 2d 875 (Fla. 1983), the State will briefly address the issue. "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, 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 trial court found the following aggravating factors: (1) prior convictions for felonies involving violence; (2) murder committed during the course of an attempted robbery, merged with the motive of pecuniary gain; and (3) 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, that Defendant is loved

by his family.

Numerous 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).

In Smith, the defendant received the death sentence for the killing of a cab driver. Id., at 1319. 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 here, where the additional factor of CCP was found. 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. Here, with considerably more aggravation, less mitigation - as there were no statutory factors found - and a basically similar situation of a murder during armed robbery, the case is more compelling for the imposition of the death sentence.

In Heath, 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 trial 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. In Heath, as here, although the defendant was not determined to be the actual shooter, he was at least a co-equal participant in the underlying crime. This court determined that the death sentence was appropriate.

In Lowe, the defendant was convicted of 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 Defendant's additional CCP factor. The Lowe trial judge's sentencing order was somewhat ambiguous as to whether he 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 nevertheless 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/committed for pecuniary gain; 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, 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 here is clearly proportionate with death sentences approved in other cases. With respect to the alleged mitigating factors which the lower court concluded were not established, the lower court's conclusions were proper. (see Point IX, supra). purported circumstances -- 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; I-owe; Defendant's sentence should be affirmed.

XVI
THE PROSECUTOR'S CONDUCT DID NOT DEPRIVE DEFENDANT OF A FAIR TRIAL.

Defendant's final contention is that alleged instances of prosecutorial misconduct rendered his trial unfair. However, most of the alleged improprieties were not objected to below and hence are not preserved for review. In any event the claims are without merit.

Defendant's first contention is that the prosecutor "concocted" (B. 95) Abreu's testimony regarding the plan to kill Lopez. There is certainly no evidence that anyone "concocted" anything below. The parties took the deposition of Abreu before trial. Had his testimony differed, presumably defense counsel would have brought this fact out on cross-examination. They did not. This hyperbole must be disregarded, In the same vein, Defendant objects to the prosecutor's characterization of Abreu's description of the crime as the "planned murder of Raul Lopez." (B. 95, T. 3387). This statement was not objected to and therefore was not preserved for appeal. Ferguson v. State, 417 So. 2d 639, 641 (Fla. 1986). Furthermore, even were the claim preserved, the argument was a fair comment on the evidence. Defendant cites to the following passage as evidence that the above reference was inaccurate:

> Q. Now, you had told us before that Franqui had told you that he was going to run the bodyguard into the embankment, shoot him, is this his role in this thing?
>
> MR. MATTHEWMAN (Franqui's counsel): Objection. That's not what he testified to.

(T. 2727, B. 95-96). The court overruled that objection, noting that the jury would remember what Abreu had testified to. Undoubtedly they would have remembered the following passage which occurred prior to the above quoted:

A. [Abreu] He [Franqui] said not to worry about it, that the only one that could shoot there was the bodyguard, not the others.

Q. [the prosecutor] 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. 2717-18). Perhaps there is a fine distinction between crashing someone against a curb and shooting them and crashing them against an embankment and doing so, or as was ultimately done, blocking them in and shooting them. Regardless, Raul Lopez is dead. The foregoing testimony well supports the characterization of his death as a preplanned murder. This claim is without merit. See Mueleman v. State, 503 So, 2d 310 (Fla.)(reference to "feeble, sickly, 97-year-old man" not improper despite tendency to excite passion of jury, where it was an accurate statement of the facts), cert. denied, 484 U.S. 882, 108 S. Ct. 39, 98 L. Ed. 2d 170 (1987); Burr v. State, 466 So. 2d 1051, 1054 (Fla.)(argument that, defendant "executes" people, and that people are afraid properly ruled fair comment by trial court; statements in any event not so unduly inflammatory or prejudicial to warrant mistrial), cert. denied, 474 U.S. 879, 106 S. Ct. 201, 88 L. Ed. 2d 170 (1985).

Defendant's next claim of prosecutorial misconduct is that the State allegedly brought it to the jury's attention that Defendant refused to give a formal statement and supposedly relied

on cases not on point in support of its actions. (B. 98). The cases cited in the record, (T. 2125-27), are directly on point and hold that the giving of an oral statement waives the Fifth Amendment right to silence, and that further testimony that the defendant declined to given a formal statement but consented to an oral one is not an improper comment on silence. See Walker v. State, 484 So. 2d 1322 (Fla. 3d DCA), cause dism., 488 So, 2d 832 (Fla. 1986); Love v. State, 438 So. 2d 142 (Fla. 3d DCA 1983); McCoy v. State, 429 So. 2d 1256 (Fla. 1st DCA), rev. denied, 438 So. 2d 833 (Fla. 1983).

Defendant's next point, (B. 96), is that the State allegedly improperly asked Dr. Marina about statutory mitigating circumstances which were not raised on direct. The upshot of this claim appears to be that such questioning turned the nonexistence of the mitigator into an improper nonstatutory aggravator. This question was not objected to and therefore was not preserved for appeal. (T. 3016). Ferguson. In any event this contention is without merit. The aggravator inquired after was claimed to exist by Dr. Herrera. The State was properly bringing to light the inconsistencies in their testimony.

Defendant's next point is that the prosecutor incorrectly commented on the presumption of innocence in his penalty phase opening statement, (T. 3380), and that he engaged in an attack upon defense counsel in his closing. (T. 3428). The first statement was actually also made in closing. Neither of these statements was objected to either, and as such may not now be considered. Ferguson. Likewise, the prosecutor's statement, (B. 97). that the jurors had to come to a legal decision was not objected to and is not preserved. (T. 3382). Defendant

himself concedes that the leading question claim was not preserved. (B. 97). Furthermore, these statements were not improper. The statement regarding the Defendants being not presumed innocent was entirely accurate. The prosecutor noted that the Defendants had been found guilty of first-degree murder and then went on to point out that the jurors faced a very solemn duty. Likewise the "legal decision" comment, when taken in context was a plea for the jurors to make their decision on "legal" grounds as opposed to emotion, a "reasoned judgment." (T. 3382). Neither of these comments was improper. See Bertolotti v. State, 565 So. 2d 1343 (Fla. 1990)(appeals to common sense and for justice not improper). Likewise, the alleged attack on counsel, which obviously did not offend counsel, who showed a prodigious ability to object at trial, sufficiently to warrant complaint, was not improper. In context, he prosecutor was addressing the defense claims of remorse. (T. 3427-28). Plainly, if the defendants had maintained their innocence up until the time of the verdict, their subsequent claims of remorse post-verdict rang a little hollow.

Finally, to the extent that any of the prosecutor's actions were improper, any error was harmless beyond a reasonable doubt. The aggravating factors were unquestionably established by the evidence. The now-objected to passages were limited in number, and did not cause counsel to object at the time. Under the circumstances it cannot be said that any of the comments, alone or collectively, were so egregious as to fundamentally undermine the reliability of the jury's recommendation or verdict. Davis v. State, 604 So. 2d 794 (Fla. 1992); Bertolotti v. State, 476 So. 2d 130 (Fla. 1985)(where comments were not objected to proper remedy is sanction against offending attorney, not reversal), Defendant's final claim should be rejected.

CONCLUSION

For the foregoing reasons, the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by U.S. mail to, Lee Weissenborn, 235 Northeast 26th Street, Oldhouse, Miami, Florida 33137, this 7th day of August, 1995.

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