IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,370

MARBEL MENDOZA,

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[1]

A. PRETRIAL PROCEEDINGS

Defendant, along with codefendants Humberto Cuellar and Lazaro Cuellar, was charged, by indictment filed on March 31, 1992, in the Eleventh Judicial Circuit, Dade County, case number 92-9940, with (1) the premeditated or felony murder of Conrado Calderon on March 17, 1992, (2) conspiracy to commit the robbery of Calderon with a deadly weapon, (3) the attempted armed robbery of Calderon, (4) the armed burglary of Calderon's dwelling or curtilage, (5) the use of a firearm in the commission of a felony, and (6) (as to Defendant alone) the possession of a firearm by a convicted felon. (R. 1-4).

On May 20, 1993, Lazaro pled to manslaughter, conspiracy and attempted armed robbery, and was sentenced to 10 years in state

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[1] The State has filed a (second) motion to supplement the record contemporaneously with the filing of this brief. The proposed supplemental record consists of Defendant's judgments and sentences in several other cases. The matters contained therein will be referred by the reference "(S.R. ___)." Additionally, at the time of filing, the State had not received the officially-paginated versions of the supplemental transcripts that this court ordered prepared on December 27, 1996. Therefore, those transcripts will be referred to by date and the pagination in the copies that were attached to the State's (first) motion to supplement served on November 21, 1996, i.e., "(3/11 S.T.)," or "(6/22 S.T.)."

prison. (T. **197, 202).** On January 18, 1994, Humberto pled to second-degree murder, conspiracy, attempted armed robbery, burglary, and the use of a firearm in the commission of a felony, and was sentenced to 20 years in state prison, with a three-year minimum mandatory term. (T. **237).**

B. GUILT PHASE

Defendant's trial commenced on January 31, 1994. The relevant portions of the voir dire will be addressed in the body of the argument.

At trial, the evidence showed that Defendant formulated the plan to rob Conrado Calderon, and involved an acquaintance, Humberto Cuellar, in the scheme. Humberto in turn recruited his brother, Lazaro, as the getaway driver. Before dawn on March 17, 1992, the trio parked near Calderon's Hialeah home. Defendant and Humberto secreted themselves behind a hedge and accosted Calderon as he opened his car door. Calderon shot Humberto, who fled to the car. Defendant then shot Calderon four times in the chest, point blank.

Calderon's fiancé, Rosario Estrada, testified that she had

known him for 22 years, and had lived with him for 3½ years at the time of his murder. Calderon got up at 5:30 a.m. every day and left for work at 5:45. (T. 767). Calderon carried a bank bag every morning and kept a gun in his right pants pocket. (T. 770). He brought the bag home very night with the daily sales from the market in it. The market opened at 6:00 a.m. Around 10:00 a.m., he would go to the bank and deposit the money. (T. 771).

On March 17, 1992, he walked out the front door at 5:45, as usual. (T. 767). She heard the heard the sound of the Bronco's alarm deactivating. About two seconds later she heard several shots go off. She immediately ran out of the house, but she did not see anything. (T. 769). She called to Calderon and he did not respond. Her son then called the police. (T. 770).

Humberto Cuellar, age 23, testified that he was incarcerated in state prison.[2] (T. 1030). Lazaro Cuellar, his brother, was 26. (T. 1031). Humberto had known Defendant for about three years.

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[2] Humberto testified that he had pled guilty to second degree murder, attempted armed robbery, armed burglary, conspiracy to commit armed burglary and the use of a firearm in the commission of a felony. He was sentenced to 20 years in state prison with a three-year minimum mandatory for the gun. (T. 1061-62).

They had met drag racing motorcycles on the street. (T. 1032). Several weeks before the murder, they were at a race and Defendant asked him if he wanted to make some money. Defendant told him Calderon was a bolitero, and always had about $6000 on him. (T. 1034-35). Humberto had never heard of Calderon before Defendant told him about the robbery plan, (T. 1039, 1071). Because he did not have any money at the time, Humberto agreed to participate in the robbery. (T. 1035). Defendant said they would split whatever they got, Defendant did not tell him at that time where Calderon was. Defendant said he would beep Humberto when it was time to do it.

They went by Calderon's house near Miami Lakes once before the murder to check out the scene.[3] (T. 1037). Humberto asked Lazaro to drive them to the site of the robbery because Lazaro needed money too. Humberto told him he would split whatever he got with him. (T. 1038).

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[3] Estrada testified that she had seen a small white car with very dark windows drive by the house very slowly a few days before the murder. (T. 773). She could see there were two people in the car, but could not see their faces because of the tinting. (T. 774). The photographic evidence reflects that Lazaro's car was a small, white vehicle with black-tinted windows. (R. 267).

Defendant beeped Humberto during the afternoon of March 16, 1992. (T. 1041). Humberto called him and told him he would beep him later when it was time to do the robbery. (T. 1042). Defendant beeped him around 4:00 a.m. and Humberto called him.[4] (T. 1042). He then went and picked Defendant up at his house on 11th Street. Then they called Lazaro and told him it was time. Humberto left his car at Lazaro's house and they took Lazaro's car because it was smaller and faster. (T. 1044). They drove to Calderon's house. It was still dark when they got there. (T. 1045). They parked one house down and across the street and turned off the lights, (T. 1046-47).

Defendant and Humberto got out of the car and went behind the hedge. (T. 1047). Defendant had a chrome .38 revolver. (T. 1067). Lazaro had a 9mm gun in his car. (T. 1040). Humberto took it when they got out of the car. (T. 1041). They got behind the Bronco and when Calderon opened the door to the car, they approached him. (T. 1048). They grabbed him and he struggled. (T. 1049). Humberto took out his gun and hit Calderon in the head and Calderon shot him. (T. 1050). Humberto ran to the car and

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[4] The memory of his beeper, which was found in his brother's car at the hospital corroborated Defendant's calls.

laid down in the back seat because he became dizzy, He heard some other shots when he was running to the car. (T. 1052-53). After about 30 seconds to a minute Defendant got into the car. Defendant told Humberto that he was going to be okay and that he had shot Calderon. (T. 1055).

They drove to the hospital and Lazaro and Defendant helped him inside. (T. 1056). On the way to the hospital, Defendant told him to say he got shot when they were at the Pink Pussycat and that they were robbed. (T. 1058). Humberto Cuellar was admitted to Palmetto General Hospital at 5:59 a.m. on March 17, 1992. (T. 735). He was discharged at 9:30 a.m. (T. 736). Both Cuellars were apprehended while at the hospital, (T. 829). Defendant was not.

On March 17, 1992, at 6 a.m., Jack McColpin was working as an admissions clerk at Palmetto General Hospital when a man came in with a gunshot wound. (T. 725). He was crying and in a lot of pain. The man with him was also crying and kept repeating that the man he was with had been shot. (T. 725). Later McColpin was presented with a photo lineup. (T. 727). He identified Defendant as the man who came in with the wounded man. (T. 729, 812).

At the hospital, the police recovered Lazaro's Datsun, which contained a 9mm automatic with a full clip and hair caught in the slide,[5] a Beeper that Humberto testified was his, and Humberto's phone book which listed an address and phone number for Defendant. (T. 695-98, 702, 819).

The police recovered various items of evidence from the scene, including a bank bag, which was directly under the victim, and which contained $2089. (T. 679). The victim also had $197 in his pockets and $106 in his wallet. (T. 680). Also recovered from the scene were Defendant's fingerprints from the side of the Cadillac adjacent to where Calderon **was** found." (T. 1151-53).

Finally, Calderon's five-shot Taurus .38 special revolver was found under his body, and several casings and projectiles were recovered from the scene and from Calderon's body. (T. 694, 957-58, 960). An x-ray of Humberto revealed that the bullet lodged near his spine was consistent with Calderon's gun, i.e. a .38

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[5] Humberto testified that he had left Lazaro's gun in the car when they got to the hospital. (T. 1071).

[6] Estrada testified that she had had the Cadillac washed the previous Saturday, and had only driven it once since in the intervening two days. (T. 771).

special. (T. 1018). The projectiles recovered from the scene and from Calderon's body were .38's, but were not fired by Calderon's gun, and clearly were not fired by Lazaro's 9mm. (T. 975-77).

The State's firearms expert testified that based upon the residue found on Calderon's clothing, three of the four shots were at point-blank range; the last was from less than six inches away. (T. 997-1001).

The State presented the testimony of Medical Examiner Dr. Emma Lew, who arrived at the murder scene at 10:00 a.m. on March 17, 1994. (T. 886). She found Calderon in a kneeling position with his face toward the ground. Calderon was 5'8" tall, weighed 142 pounds, and was 62 years old. (T. 891). Calderon had a 2% by 1 inch abrasion on his forehead, which was consistent with his head hitting the driveway. (T. 892). He also had two small parallel abrasions on the left side of his forehead, each less than one-half inch long, (T. 892.). He also had a two lacerations above the hairline, one long and straight, the other stelliform. (T. 893). Lew testified that the gun from the glove box was consistent with the wound to Calderon's head. (T. 903). The distance between the slide release button and the slide was the same as the distance

between the two lacerations,, with the slide corresponding to the long wound and the button to the small stelliform one. (T. 905).

Calderon had bullet wounds in his chest and in both hands. (T. 906). Lew retrieved a projectile from Calderon's right back. (T. 908). She **also** recovered three gold necklace links from his neck, which were consistent with the bullet going through the necklace. Calderon was alive when he received all the wounds. (T. 909). Gunshot wound "A" was in Calderon's upper chest. "B" was toward the midline from "A". (T. 915). The trajectory of "A" **was** front to back and slightly downward and to the right. Projectile "A" did not exit the body. (T. 918). Lew recovered the projectile from in front of the spine. "B"'s path was similar to "A"'s except that its angle was more downward by a couple of inches. (T. 919). That would be consistent with Calderon leaning forward as he was being shot. "B" exited from Calderon's upper right back. (T. 920). Gunshot wound "C" was also on the left side of Calderon's chest. (T. 921). The path went from front to back, left to right and downward, Lew recovered a projectile from wound "C" in Calderon's right mid-back, next to the spine. (T. 923). Wound "D" is in the mid chest. (T. 924). No projectile was recovered from wound "D". (T. 925). Wound "F" entered Calderon's right thumb,

with no stippling. (T. 925). The projectile exited through the inside of the thumb, breaking the bone in the process. (T. 926). The chip on Calderon's gun would have been caused by that projectile. (T. 927). Wound "E" was on the back of Calderon's left hand. There was stippling. (T. 928). Wound "E" was consistent with Calderon having placed his hand over his chest and the bullet passing through his hand causing wounds "A", "B", or "C". It could not be "D" because it had stippling. (T. 929).

Humberto's Beeper's memory (from the night before the murder) and his phone book showed Defendant's phone number as 643-4165. (T. 848-49). The phone company listed that number as being assigned to Defendant's wife, Niurka Barrera, at 1716 SW 11th Street, in Miami, (T. 862, 865). The day after the murder a surveillance team observed a woman arrive at that address in a van[7] and take away several bags of personal belongings. (T. 830-31). Defendant's mother testified that shortly before his arrest, Defendant told her he had a problem and he came to live with her. (T. 874). When Defendant arrived, his head was completely shaven.

[7] Humberto had testified that Defendant drove a van.

(T. 875). Humberto testified that at the time of the murder, Defendant had long **wavy** hair. (T. 1068, 1070).

The jury returned a verdict of guilty as charged on **all** counts. (T. 1409).

C. PENALTY PHASE

At the penalty phase of the trial, which commenced on March 11, 1994, the State presented the testimony of Robert Street, who in 1992 **was** the owner of the Coconuts Comedy Club in the Coconut Grove section of Miami. (T. **1476).** On February 14, 1992, Street left the club and went home to his nearby townhouse on Tigertail Avenue. He arrived home between 11:30 and 11:45 p.m. When he got out of his car two men approached him. One of them had a gun. (T. **1477).** Street identified Defendant as one of the two men who attacked and robbed him. (T. 1483). Defendant was the one with the gun. (T. 1484). They instructed him to turn around and not look at them. The ordered him back into the shadows and forced to lay face-down on the ground, (T. 1477). They screamed at him to give them his money and poked him several times in the face with the barrel of the gun. They took his watch, his wallet, his keys, $100 in cash and his wedding ring. (T. **1478)** . They were expecting

him to have a lot of money on him from his business, and demanded that he give it to them. They went and ransacked his car, but did not find anything to take. (T. 1479). When they could not find anything in the car, they "went crazy" and began poking him with the gun and punching him in the back of the head. He told them he gave them everything he had, but they did not believe him, They asked him who was in the house and he told them his wife. They said they were going to go in there and get the money. Defendant's accomplice said to "just shoot him," twice. Defendant then pistol-whipped Street in the left eye, and again threatened to go into the house. (T. 1480, 1485).

The State admitted Defendant's April 16, 1993, convictions for robbery with a firearm, aggravated battery, burglary of a conveyance with a firearm and the use of a firearm in the commission of a felony in Eleventh Judicial Circuit case number 92-10836(B). (T. 1486-87, R. 468).[8]

The State also introduced the judgments of conviction in the

[8] Defendant's convictions in the Street case were affirmed on appeal on May 17, 1994, Mendoza v. State, 638 So. 2d 954 (Fla. 3d DCA 1994).

instant case, and rested. (T. 1488-89).

Nilia Mendoza, Defendant's mother, testified that Defendant was the only child of her and Marbel Mendoza, Sr. (T. 1493). Defendant was born September 23, 1966 in Havana, Cuba. She related various medical problems Defendant had while a child in Cuba, (T. 1494-98).

The family sought asylum in the Peruvian embassy in April 1980. (T. 1504). It took a week before they could leave. (T. 1505). Then, after a layover in Costa Rica they went to Peru. They lived in a tent in a park there for two years. (T. 1507). Eventually, they traveled over land from Peru to the United States and crossed the border illegally, arriving in Miami on August 7, 1982. Her husband got a work permit, and worked construction. (T. 1513-14). She worked in factories and took care of children. Defendant was enrolled at Miami High School. Defendant eventually left school, but completed school at night.

She testified that she eventually realized that Defendant was doing drugs. (T. 1515). They found cigarette butts in his bedroom. Defendant was always asking her for money. Defendant

eventually married Niurka Barrera and had two children. (T. 1516). The girl is five and the boy is three. (T. 1517). The girl was born with a birth defect. (T. 1517). Defendant had a "nervous crisis" when the girl was born. (T. 1518).

On cross, the mother admitted that neither parent was ever charged with a crime and were always hard-working. They taught their son right from wrong. (T. 1519). The doctors never said Defendant would grow up to be a criminal. (T. 1520). The "nervous crisis" consisted of Defendant yelling and throwing things. He never hurt any of the family members or hit them. (T. 1521). She never took Defendant to any mental health program in the United States because Defendant did not want to. (T. 1521). She told Defendant to go to drug programs, but he never went. (T. 1522). The only thing they ever found was marijuana residue. She never saw any evidence of cocaine -- powder or razor blades. She never saw him drink. (T. 1523). Defendant worked for KFC full time for two years. (T. 1528). He worked as a construction and plumbing assistant for a while. She saw Defendant several times a month before the murder. Defendant acted normal when she saw him. (T. 1529).

Jethro Toomer, PhD, interviewed Defendant on four occasions. (T. 1558). Defendant stated that he had come to the U.S. from Cuba at around the age of 11. He had psychiatric treatment from around age 7 in Cuba. He could not provide the specifics regarding that. He believed it had something to do with having multiple personalities. He also described "after some questioning" an extensive drug history beginning at age 19 involving the use of alcohol, marijuana, and some crack. (T. 1562). Defendant claimed that whenever he had the problems he had in Cuba he used drugs because they calmed him down. Toomer referred to this as self-medication. (T. 1564). Defendant was given the Bender-Gestalt test. Toomer felt the results indicated poor impulse control and high levels of anxiety and aspects of poor judgment. (T. 1570). He also believed the results indicated some level of organic impairment. (T. 1571). Toomer had some difficulty communicating with Defendant not because of a language barrier, (the interviews were conducted in English) but because Defendant had a good bit of emotional stress. (T. 1572).

Toomer also administered the Carlson Psychological Survey. Toomer felt the results indicated that Defendant suffered from feelings of inferiority and poor self-esteem, impulsivity and irrational behavior, mood shifts and behavioral changes from time

to time. He also felt brain damage was suggested. (T. 1574). Defendant fell into the 99 percentile range for chemical abuse, based on self-report. (T. 1575). Defendant was unable to provide specific information as to the frequency of drug use, other than 'significant." (T. 1576). Defendant also scored, based on self-report in the 99th percentile for thought disturbances, i.e., he claimed past, and present, visual and auditory hallucinations. (T. 1577). He found that Defendant had anti-social tendencies, but not anti-social personality disorder. Toomer stated that the disorder referred to persons who had no conscience and were very ego-oriented, (T. 1578). Defendant on the other hand had anti-social tendencies, (85th percentile) which meant that he had manifested a tendency to violate societal norms, such as chemical abuse and thought disturbance. (T. 1579). Finally, Defendant scored in the 95th percentile on the self-depreciation scale, meaning that he had poor self-esteem.

Toomer's ultimate opinion was that Defendant was "suffering from very significant deficits in terms of his reality testing and they are reflected in impairment both in terms of cognitive ability as well as affective or emotional ability." He also indicated some evidence of brain damage which would be consistent with a history

of drug abuse. He could not, however, offer that ultimate conclusion without neurological testing. Finally, Toomer felt he could be rehabilitated because he did not suffer from anti-social personality disorder. (T. 1583).

Toomer did not speak to the police or Defendant's family, He did not review any school records. (T. 1592). He did not inquire into the Defendant's "potential criminal past." (T. 1593). Defendant is not schizophrenic. Defendant is not manic-depressive. (T. 1598). Toomer conceded that being convicted of first-degree murder and facing the death penalty could lead to depression. (T. 1601).

In rebuttal, the State called Dr. Anastasio Castiello, a psychiatrist who had examined Defendant. (3/11 S.T.[9] 3). Dr. Castiello interviewed Defendant in Spanish. (3/11 S.T. 5). Dr. Castiello found Defendant to be a totally unreliable informant. (3/11 S.T. 6). Dr. Castiello felt that Defendant's alleged hallucinations were dreams or fantasies. (3/11 S.T. 8). He also felt that Defendant was malingering. (3/11 S.T. 8). The only

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[9] See n.1, supra.

information which Dr. Castiello did not have to "pry out of" Defendant was that he was allegedly using drugs prior to the time of the murder. (3/11 S.T. 15).

The State also called Detective Roberto Navarro, who had arrested and interviewed Defendant on March 24, 1992. (T. 1639). Defendant asserted at that time that he did not use drugs or alcohol. Defendant did not appear to be under the influence of anything at the time of his arrest, Defendant did not have any trouble communicating. He appeared normal. (T. 1642). His memory was accurate and he appeared relaxed. (T. 1643).

The jury returned a recommendation of death by a vote of 7-5. (T. 1694).

On June 22, 1994, a sentencing hearing was conducted before the court. (6/22 S.T.[10] 3). The Defense noted that Dr. Eisenstein's report, which concluded that Defendant was mildly psychologically impaired, if at all, was part of the record. The doctor was not called as a witness. (6/22 S.T. 7). The State also submitted Dr.

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[10] See n.1, supra.

Eisenstein's May 23, 1994, deposition. (6/22 S.T. 8).

The State then called neuropsychologist Gisella Aguilar-Puentes. (6/22 S.T. 10). She interviewed Defendant on June 3, 1994. (6/22 S.T. 20). Prior to meeting Defendant, she reviewed Dr. Eisenstein's report and test data. (6/22 S.T. 20). She found some inconsistencies in Eisenstein's report. His conclusion that there was left hemisphere involvement was not supported by his own test data. She was also concerned that the test results could have been influenced by Defendant's English-language deficits. (6/22 S.T. 21). She conducted her interview and all the testing with Defendant in Spanish. (6/22 S.T. 22). Based on her observation of Defendant speaking to others in English, she did not believe he was fluent in that language. (6/22 S.T. 22).

Dr. Aguilar-Puentes administered three subtests of the Wechsler Adult intelligence exam. (6/22 S.T. 22). She also attempted to administer the MMPI in Spanish, but Defendant did not wish to spend the time. (6/22 S.T. 23). Defendant further explained to her that Dr. Eisenstein had allowed him to take the MMPI test booklets back to his cell to work on them. (6/22 S.T. 24). There, Defendant had the assistance of four or five people in answering the questions. (6/22 S.T. 25). Dr. Aguilar-Puentes

stated that it was "totally out of the norm" to conduct the test in that manner. (6/22 S.T. 25).

Dr. Aguilar-Puentes compared her Spanish-language test data with Eisenstein's English-language test data, and concluded that none of Eisenstein's findings of neurological deficits existed when Defendant was tested in Spanish. (6/22 S.T. 26). She concluded that what was interpreted as impairment was merely a language barrier. (6/22 S.T. 26). For example, Eisenstein concluded from the Wechsler that Defendant's intellectual functioning was in the borderline defective range. In Spanish, however, Defendant scored in the average to low-average range, (6/22 S.T. 27). Likewise, while Eisenstein's results from the English-language Peabody Picture vocabulary test indicated that Defendant was profoundly defective, in Spanish, Defendant scored in the average range. (6/22 S.T. 28).

The only test in which Defendant displayed any deficit was the right hand squeeze test. However, the deficit was not significant enough, when compared with the left-hand results to indicate any brain damage. (6/22 S.T. 28). In addition, the impairment was inconsistent with all the other tests she administered. It was

therefore not a reliable basis upon which to base a finding of impairment. (6/22 S.T. 29). Finally, Defendant insisted to her that he was not guilty, that the Cuellars did it, and that his defense should have brought this out more. (6/22 S.T. 32).

Defendant's mother spoke briefly to the court, (6/22 S.T. 42), and Defendant declined to testify. (6/22 S.T. 43-44).

A hearing was held on August 2, 1994, at which the court pronounced sentence. The court determined that the State had established as aggravation that Defendant had a prior conviction for armed robbery (in the Street case), and that the murder was committed during the course of an attempted robbery, which it merged with pecuniary gain. (R. 932). The court additionally found that the defense had not established any statutory mitigation. (T. 934-37). The court further gave "little weight" to Defendant's alleged drug use, (R. 938), and "minimal" weight to his mental health claims as nonstatutory mitigation. (R. 939). Finally, the court concluded that the aggravation outweighed the mitigation, and sentenced Defendant to death. (R. 941).

This appeal followed.

SUMMARY OF THE ARGUMENT

1. Defendant first alleges that the State failed to establish burglary because it did not establish that he entered the curtilage of the Calderon house. This claim was not preserved below. On the contrary, the position below was that the State had only established that Defendant entered the curtilage. Further, the evidence showed that the defendants concealed themselves behind a hedge which enclosed the driveway before attacking Calderon, Finally, even if burglary were not proven, Defendant's death sentence would not be infirm because the felony-murder aggravator was supported by the attempted robbery conviction, which Defendant does not challenge.

2. Defendant's second claim, that the State should not have been permitted to admit the sworn statement made by codefendant Humberto Cuellar at the time of his arrest, is without merit. On cross-examination of this State witness, Defendant repeatedly questioned the veracity of Humberto's in-court testimony, suggested his purportedly "sweetheart" deal with the State on the eve of trial was the motive, and read misleading excerpts from his sworn statement. Under the circumstances, the statement, taken the day of the crime, was properly admitted both under the doctrine of

completeness, and ♋♦ a prior consistent statement.

3. A brief conversation between the trial judge and some members of the jury in the courthouse cafeteria, where the subject matter (Tonya Harding) was unrelated to trial, and where the judge informed the jurors that he could not answer their questions there, was not the basis for reversal, even assuming that the claim had not been waived below.

4. Defendant's cause challenge claims were not preserved below where Defendant had an outstanding peremptory at the time the jury was sworn. In any event, none of the jurors in question ever indicated that they would be unable to follow the law.

5. The trial court properly refused to admit an immigration asylum application into evidence, through a witness who neither prepared it nor was its custodian, where there were no indicia of reliability as to the contents of the document and where the application for asylum as an act was testified to by Defendant's mother, and corroborated by the introduction of Defendant's passport.

6. The State properly impeached the defense expert witness, who testified that Defendant was capable of rehabilitation, with evidence of other crimes. Any purportedly improper reference to uncharged crimes would be harmless where Defendant was subsequently convicted of the crimes in question, and the issue was not a focus of the trial.

7. The evidence amply supported the conclusion that this murder, which was committed during an attempted robbery, was committed for pecuniary gain. Any error would be harmless where the pecuniary gain factor was explicitly merged with the felony murder aggravator, which Defendant does not challenge.

8. The trial court properly rejected Defendant's proposed statutory mental health mitigation where his expert's testimony was contradicted by the testimony of the State experts, and where it was supported in part by Defendant's uncorroborated self-report of drug usage at the time of the murder. The alleged nonstatutory mitigation of defendant's ability to be rehabilitated was not presented to the trial court below, and in any event was refuted by Defendant's criminal history. The trial court properly rejected the proffered mitigation of Defendant's childhood and family

problems where there was no nexus between these problems and the crime. Further, the court was well within its discretion in giving little weight to Defendant's alleged drug use and mental health history in light of the scant and contradictory evidence supporting these factors. Finally, the trial court's 12-page sentencing order, which discussed all the factors advanced by Defendant, was clearly adequate.

9. Defendant's sentence is proportional.

ARGUMENT

I.

DEFENDANT'S CLAIM THAT THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE CRIME OF BURGLARY IS UNPRESERVED AND WITHOUT MERIT.

Defendant's first claim is that the evidence was insufficient to prove that a burglary occurred. He alleges that no structure was entered and that there was no evidence showing that Defendant and his cohorts entered the curtilage of the Calderon residence. This contention was not raised below, and thus may not now be raised. Furthermore, the claim is without merit. Finally, even if Defendant's claim were well taken, it would not require the setting aside of Defendant's felony murder convictions or sentence of death.

Defendant's claim is predicated upon this court's holding in State v. Hamilton, 660 So. 2d 1038, 1044 (Fla. 1995), which held that there must be "some form of an enclosure" in order for the area entered to be considered part of the curtilage. Curtilage is relevant because §810.011(2), Fla. Stat., defines a dwelling which may be the subject of a burglary as including "the curtilage thereof." It is undisputed that Defendant and his accomplices did not enter Calderon's house. Therefore Defendant may be found

guilty of burglary only if he or his codefendants were shown to have entered the curtilage of Calderon's house.

Defendant's claim that the State has not proven that Defendant entered the curtilage of Calderon's house under Hamilton has not been preserved for appellate review. Defendant claim below **was** that the State had only proven that Defendant had entered the curtilage, but not the house:

> [Defense Counsel] : With respect to Count IV of the indictment, wherein the defendant is charged with armed burglary with an assault, obviously the state is relying on the curtilage, and there has been no testimony elicited other than that this occurred in the curtilase of the dwelling.

(T. 1158-59). Having argued below that the State had only proved that Defendant entered the curtilage, Defendant now seeks reversal on the grounds that he had not entered the curtilage. Defendant has thus waived this issue for appellate review. Showers v. State, 570 so. 2d 377, 378 (Fla. 1st DCA 1990) (argument regarding sufficiency of evidence may not be raised for the first time on appeal); Daley v. State, 374 So. 2d 59 (Fla. 3d DCA 1979) (claim regarding sufficiency of evidence not preserved for review where not raised below); Terry v. State, 668 So. 2d 954, 961 (Fla. 1996) (claim waived where argument on appeal was different than that

presented below).

Even assuming arsuendo that this issue were properly before the court, the evidence below was sufficient to present a question for the jury under Hamilton and the cases cited with approval therein. The assault on Calderon took place in his driveway, between the two vehicles parked directly in front of the garage.[11] (T. 638-39). The photographic evidence showed that Calderon's driveway was bordered by a fence and a tall hedge. (R. 182, 351). Humberto Cuellar testified that they went behind the hedge and concealed themselves in the bushes beside the house until Calderon got to his car. (T. 1047-48). Hamilton only requires "some form of an enclosure." Hamilton, 660 so. 2d at 1044. There is no requirement that the area be enclosed on all sides. Indeed, in Hamilton the court cited with approval DeGeorge v. State, 358 So. 2d 217 (Fla. 4th DCA 1978), in which the Fourth District affirmed

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[11] Defendant's suggestion that Calderon was "possibly on the street," (B. 22), is groundless. He cites to T. 621, but the only reference there to the street was a question by defense counsel, who was inquiring as to the location of women who were present when the first officer arrived. Counsel asked, "Where were they? Were they where the body was on the street?" (T. 621). The officer responded, "They were walking on the sidewalk." Id. There is simply no record evidence or testimony that Calderon was in the street.

a burglary conviction based the on entry of a "curtilage" consisting of paved area partially enclosed by fence and wall. Hamilton, 660 So, 2d at 1044. Here,. the **area** entered was also a paved area directly adjacent to the entry to the dwelling. It was also enclosed on one side by a fence and hedge, which Calderon's assailants used as cover, and on another by the dwelling itself. The jury plainly could have found, and indeed did find, that the curtilage of Calderon's home was breached.[12]

Even assuming, arsuendo, that this claim were preserved and had merit, Defendant would not be entitled to discharge. The evidence was plainly sufficient to support the charge of armed trespass, a lesser included offense. Bain v. State, 650 So. 2d 83 (Fla. 4th DCA), approved, 661 So. 2d 1215 (Fla. 1995).

Finally, contrary to Defendant's assertions, the alleged infirmity of his burglary conviction would not require the setting aside of either Defendant's felony-murder conviction or his sentence of death. The State alleged in the indictment, and the jury was accordingly instructed, that the murder occurred during

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[12] Unlike the jury in Hamilton, the jury here was instructed that the curtilage was "an enclosed space." (T. 1372).

the course of a burglary or an attempted robbery. Defendant in no way challenges his attempted robbery conviction. As such, even without the burglary conviction, Defendant would have been properly convicted of felony murder. Kearse v. State, 662 So. 2d 677, 682 (Fla. 1995) (any failure of proof of underlying felony of escape harmless with respect to felony murder conviction where evidence also showed felony murder based on underlying felony of robbery).

Likewise, the jury was instructed on the aggravating circumstances of commission during a burglary or attempted robbery and murder for pecuniary gain, and further instructed that they were only to consider these factors as one if they found them to exist, (T. 1688). The State clearly proved that this murder was committed during an attempted robbery and/or for pecuniary gain, and indeed the bulk of the evidence and testimony was addressed to these issues rather than the burglary. See, Valentine v. State, 22 Fla. L. Weekly S10 (December 19, 1996)(invalid conviction of felony supporting aggravator not affect sentence where valid basis for aggravator remained). Moreover, the trial court did not find commission during a burglary as an aggravating circumstance, finding only commission of a robbery merged with pecuniary gain. The court also found the prior commission of another remarkably

similar and violent armed robbery of a man for his business proceeds in the parking area of his home as an additional aggravator. (R. 932). If Defendant were resentenced, the State would also be entitled to admit into evidence Defendant's June 8, 1995, convictions, in five separate cases, of armed robbery, of four counts of robbery, and of three counts each of aggravated battery and kidnapping. (See S.R.[13] 1-23). Finally, the trial court found that Defendant had failed to establish any mitigation entitled to more than minimal weight. Under these circumstances, there is no reasonable probability that had the trial court granted Defendant's motion for judgment of acquittal, the outcome of the sentencing proceedings would have been different. Valentine. Defendant's conviction for burglary should stand, and even if it does not, his convictions for murder and sentence of death should.

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[13] See n.1, supra.

11.

HUMBERTO CUELLAR'S SWORN STATEMENT WAS PROPERLY ADMITTED UNDER THE DOCTRINE OF COMPLETENESS, AND AS A PRIOR CONSISTENT STATEMENT UNDER SECTION 90.801(2)(B), FLORIDA STATUTES.

Defendant's second claim is that the trial court erred in admitting into evidence the sworn statement given by former codefendant Humberto Cuellar on the day of the murder. The cross examination consisted of two primary components: that Humberto had fabricated his in-court testimony against Defendant in exchange for his plea deal, and that his in-court testimony was inconsistent with selected excerpts of the prior statement which is the subject of the present claim. Under the circumstances, the statement was thus properly admitted either under the doctrine of completeness, to avoid misleading the jury as to Humberto's prior statements, or as a prior consistent statement.

The doctrine of completeness provides that when a party presents part of a recorded statement, the other party may have the remainder introduced in the interest of fairness. §90.108, Fla. Stat.; Lons v. State, 610 So. 2d 1276, 1280 (Fla. 1992); Christopher v. State, 583 So. 2d 642, 645 (Fla. 1991). The determination as to whether fairness requires the contemporaneous

admission of the statement is within the discretion of the trial court. The judge's determination will not be disturbed absent an abuse of discretion, Larzelere v. State, 676 So. 2d 394, 402 (Fla. 1996).

Here, Defendant's counsel extensively cross-examined Humberto based upon the statement in question, reading questions and answers at random from throughout the statement, (T. 1085-94). The plain impression left with the jury was that Humberto's original statement to the police differed vastly from his trial testimony. The seven instances cited by defense counsel from the statement of more than thirty pages were misleading however, in that the statement and trial testimony were overwhelmingly in agreement. The State was thus entitled to have the statement admitted in the interest of fairness under the doctrine of completeness. Chao v. State, 661 So. 2d 1246 (Fla. 3d DCA 1995) (trial court erred in refusing to allow introduction of entire recorded statement of witness where statement was previously used during cross-examination of witness).

Additionally, it is well settled that where defense counsel insinuates during the cross examination of an accomplice that the

witness's testimony was fabricated in order to obtain a favorable plea agreement, statements made by the accomplice at or around the time of the crime are properly admitted to rebut the inference raised. Rodriguez v. State, 609 so. 2d 493, 500 (Fla. 1993) (statements given prior to commencement of plea negotiations properly admitted because "defense counsel's references to plea agreements during cross-examination . . . were sufficient to create an inference of improper motive to fabricate"); Jackson v. State, 599 So. 2d 103, 107 (Fla. 1992)(same); Anderson v. State, 574 so. 2d 87, 92 (Fla. 1991) (statement made at time of arrest properly admitted to rebut defense implication that accomplice changed her story after making plea agreement). These cases are controlling.

Here, on cross-examination of Humberto, defense counsel asked whether the "first thing" Humberto did on his arrival from prison was to have a conversation with the prosecutor about his testimony. (T. 1081). Counsel also suggested that during the pendency of the case before trial, Humberto's attorneys apprised him of the facts of the case. (T. 1083-84). He then asked numerous questions relating to the plea agreement, his brother Lazaro's plea agreement, and the fact that he was not required to testify against Lazaro as part of the agreement. (T. 1083-87). After counsel

retired, Defendant's other lawyer got up and placed a large blackboard in front of the jury, (T. 1096), on which he set forth the various charges and sentences Humberto originally faced. The second attorney then compared them to the charges that Humberto pled to, concluding that in exchange for his testimony Humberto would serve a three year minimum mandatory and thereafter be eligible for gain time and early release, rather than the life with a 25-year minimum that he originally faced.[14] (T. 1096-1119). Counsel were plainly suggesting that Humberto's testimony was fabricated in exchange for the plea agreement. Additionally, Humberto's statement was given on the day of the crime, March 17, 1992. (R. 307). Humberto did not enter into the plea agreement until nearly two years later, on January 18, 1994, which was two weeks before trial, (T. 235-237). As such, the statement was properly admitted as a prior consistent statement under §90.801(2)(b), Fla. Stat. Rodriguez; Jackson; Anderson.

Finally, any purported error would be harmless beyond a reasonable doubt. The statement, in the overall scope of trial, was brief, and largely cumulative to Humberto's trial testimony.

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[14] Counsel initially got Humberto to concede he was facing the death penalty, a misstatement the State corrected. (T. 1097).

Defendant's fingerprints were recovered from the Cadillac adjacent to Calderon's body, placing Defendant at the scene. Finally, Defendant was positively identified by the ER employee as one of the men who brought Humberto into the hospital. See, Jackson v. State, 599 So. 2d 103, 107 (Fla. 1992); Anderson v. State, 574 So. 2d 87, 93 (Fla. 1991); Alvin v. State, 548 So. 2d 1112, 1114 (Fla. 1989). This claim must be rejected.

111.

THE TRIAL JUDGE PROPERLY DENIED DEFENDANT'S MOTION FOR MISTRIAL AFTER DISCLOSING THAT DURING LUNCH THE JUDGE HAD HAD A BRIEF CONVERSATION, UNRELATED TO THE TRIAL, WITH THE JURORS.

Defendant asserts that the judge's brief encounter with the jurors in the courthouse cafeteria required the court to grant a mistrial. In that nothing relating to the case was discussed, Defendant's claim is without merit.

Dealing with the conduct of jurors, and the determination as to whether a mistrial is warranted is left to the sound discretion of the trial court. Dovle v. State, 460 So. 2d 353, 357 (Fla. 1985). Further, impropriety by the jurors[15] or exposure of the jury to extrajudicial information does not warrant a mistrial unless prejudice results. White v. State, 462 So. 2d 52, 53 (Fla. 1st DCA 1984). Prejudice exists only where there is a reasonable possibility that the communication affected the jury's verdict. McKinney v. State, 579 so. 2d 80 (Fla. 1991).

Here the judge was confronted with two questions: (1) why the

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[15] The court did not initiate the conversation. (T. 1073)

jurors could not ask questions; and (2) what he thought of the Tonya Harding case. As to the first, the judge told the jurors that if they had any questions to present them in writing at the end of trial for consideration, an instruction they had previously received in court. As to the latter, they were told that they had to be fair and impartial and wait until they heard everything, good advice with regard to both Tonya as well as Defendant. Plainly this innocuous discourse could not have affected the verdict in any conceivable way. Indeed, counsel moved for a mistrial only "in an abundance of caution." (T. 1073). When asked by the trial court on what basis, counsel merely requested the court to rule. Id. Further, when the court asked if defense counsel desired a cautionary instruction, both declined the offer, one observing that he would have been more concerned if the jurors had spoken to any of the prosecutors. (T. 1074). This claim should be rejected.

IV.

DEFENDANT DID NOT PRESERVE HIS CAUSE CHALLENGE CLAIMS FOR APPELLATE REVIEW, AND EVEN IF HE HAD, THE CHALLENGES WERE PROPERLY DENIED WHERE ALL THE JURORS IN QUESTION UNEQUIVOCALLY STATED THEY WOULD FOLLOW THE LAW.

Defendant's fourth claim is that the trial court erred in denying challenges for cause of jurors Calejo, Culp, Bravo and Falcon. However, as Defendant had a peremptory challenge remaining when the jury was sworn, the issue has not been preserved for appellate review. Further, even if it had, none of the allegedly objectionable jurors ever indicated that the could not follow the law. As such the challenges were properly denied.

Under Trotter v. State, 576 So. 2d 691 (Fla. 1991), a defendant may only assert error based upon the denial of a cause challenge if, after the denial of the challenge, he used a peremptory to strike the challenged juror, subsequently used all his peremptories, and thereafter requested an additional peremptory to challenge an identified juror. Id. Here, when Defendant exhausted his challenges, he requested an additional peremptory to strike juror Cannan, which was granted. Defendant then declined to exercise the challenge unless another was granted to him. The trial court stated that it would not give Defendant an additional

challenge unless he used the one he had. (T. 587-89). Defendant never exercised the remaining challenge, and as such, the requisites of Trotter have not been met, and he may not now complain of the denial of cause challenges.

Further, even were Defendant deemed to have exhausted his peremptories, juror Calejo was peremptorily stricken by the State. (T. 576). Thus, because Calejo did not serve and Defendant did not use a peremptory to strike him, if the challenges of Bravo, Falcon, and Culp were properly denied, no reversible error occurred under Trotter; Kearse v. State, 662 So.2d 677, 683 (Fla. 1995).

Finally, even were the propriety of the challenges of Culp, Bravo and Falcon properly before the court, Defendant's claims would be without merit. The trial court is granted wide latitude in determining cause challenges, which are a mixed question of law and fact, and absent manifest error, its conclusions should not be disturbed. Castro v. State, 644 So. 2d 987, 990 (Fla. 1994); Hooser v. State, 476 So. 2d 1253, 1256 (Fla. 1985).

Defendant asserts that because jurors Bravo, Falcon and Culp were so pro-capital punishment that they favored the imposition of

the death penalty for "lesser offenses," (B. 32), they should have been stricken for cause below. Although all three jurors were able to identify other crimes, specifically, sexual battery of children, which they though might be properly punishable by death, none ever suggested in any way that they had prejudged Defendant or would be unable to follow the law, as the relevant passages make clear when put in context:

> MR. CULP: I don't believe revenge is appropriate in most cases.
>
> [DEFENSE COUNSEL]: What about the death penalty, are you for it or against it?
>
> MR. CULP: I think it depends on the-crime.
>
> [DEFENSE COUNSEL] : When you say it depends on the crime, what does it depend on?
>
> MR. CULP: I would say first degree murder would be appropriate.
>
> [DEFENSE COUNSEL] : First degree murder is the only crime that the death penalty can be imposed for in the State of Florida.
>
> What I need to ask is, if, in fact, Marbel Mendoza were convicted of first degree murder and you were one of the twelve jurors, would YOU automatically impose the death penalty?
>
> MR. CULP: No.
>
> [DEFENSE COUNSEL] : What would you look to?
>
> MR. CULP: I would look to the facts of the crime

(T. 336) (emphasis supplied).

[DEFENSE COUNSEL] : Mr. Bravo what is your position?

MR. BRAVO: I believe in the death penalty.

[DEFENSE COUNSEL] : You have a strong belief, What do you mean?

MR. BRAVO: I believe the death penalty should be used for more things than just murder.

[DEFENSE COUNSEL] : What do you believe it should be used for?

MR. BRAVO: Rape of small children.

[DEFENSE COUNSEL] : Why?

MR. BRAVO: I think people who do things like that do not deserve to be here,

[DEFENSE COUNSEL] : Where should they be?

MR. BRAVO: Not living amongst us.

[DEFENSE COUNSEL] : When I ask the panel collectively if anyone would automatically vote to impose death upon a first desree murder conviction, vou didn't respond to that.

Why is that?

MR. BRAVO: I wouldn't make it automatic either.

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[DEFENSE COUNSEL]: Mr. Falcon, let me ask you.

What kind of crimes do you think warrant the death penalty?

MR. FALCON: Like he said, rape of little children.

[DEFENSE COUNSEL] : Anything else?

MR. FALCON: I can't think of all of them.

[DEFENSE COUNSEL] : Do you think the death penalty keeps people from murdering?

MR. FALCON: Probably, yes.

[DEFENSE COUNSEL] : That being the case, I will get to you, so we will have to wait until a little later.

What is your position on the death penalty? If you were one of the twelve people chosen to serve on the jury and you found Marbel guilty, uld YOU automatically vote for the death senaltv?

MR. FALCON: No.

[DEFENSE COUNSEL] : You wouldn't take the position that you don't want to waste vour monev with him sitting in prison, so let's iust give him death?

MR. FALCON: No.

(T. 353-56)(emphasis supplied).

MR. CULP: I agree that the rape of a small child and kidnapping and things of that nature should be given the death penalty.

[DEFENSE COUNSELI: Now, that being the case, how would that affect your ability to evaluate the vidence?

MR. CULP: I would certainly be fair.

[DEFENSE COUNSEL]: Now Mr. Calejo said something which I found very interesting, which is why we should spend our tax dollars to keep people in prison.

How does that affect you?

MR. CULP: Well, I can't agree a hundred percent, but I understand what he is talking about.

[DEFENSE COUNSEL] : What do you disagree with?

MR. CULP: There are some people I believe who should be locked up, but not necessarily killed.

[DEFENSE COUNSEL] : Even if that would be the case, even if they were convicted of first-desree murder?

MR. CULP: Sure.

(T. 357-58) (emphasis supplied).

[DEFENSE COUNSEL] : Mr. Bravo let me come over here to you.

If you were chosen and you based your opinion on whether we should extend the death penalty, would that in any way affect your ability to determine at the first stase quilt or innocence?

MR. BRAVO: No.

[DEFENSE COUNSEL] : Do you think you can listen to the facts and the testimony, because the state has decided charge first-degree murder and seek the death penalty, you could still presume Marbel innocence [sic]?

MR. BRAVO: Yes.

(T. 361) (emphasis supplied).

[DEFENSE COUNSEL]: Mr. Falcon, we spoke very briefly, and you indicated you would expect to vote for the death penalty?

MR. FALCON: Yes.

[DEFENSE COUNSEL] : If that were the case and you were one of the twelve members on the jury and you found Marbel guilty of first-degree murder, would you automatically--

MR. FALCON: No.

[DEFENSE COUNSEL]: You would obviously keep an open mind; is that what you are saying?

MR. FALCON: Yes

[DEFENSE COUNSEL] : Do you believe that the death penalty should be extended beyond first-degree murder?

MR. FALCON: There are other times that more horrible acts occur than murder.

[DEFENSE COUNSEL]: What you are saying is -- and correct me if I am wrong -- that if you commit a crime that is a bad crime like -- 1 believe the example that was used before was--

THE COURT: Rape of a child.

[DEFENSE COUNSEL] : --the rape of a child -- and you felt that even though no one was killed that the death penalty would be appropriate, right?

MR. FALCON: Right.

[DEFENSE COUNSEL] : Now we are facing a case where you would be on a jury and you would hear facts and evidence and circumstances and you probably -- let's assume you would find Marbel guilty of first-degree murder because somebody was murdered. You make a decision that he was in someway responsible for that murder.

Knowing that, would vou automaticallv vote for the death penaltv, and the reason I guess vou would is because somebodv was murdered and vou would vote for the death aenaltv?

MR. FALCON: I wouldn't automaticallv do that

[DEFENSE COUNSEL] : Could you on those two positions vote for the death penalty in a case where someone wasn't killed?

MR. FALCON: Yes that is different.

[DEFENSE COUNSEL] : If it's not a **case** where someone was killed, how do vou make that distinction?

MR. FALCON: Hearing the case, hearing all the details of the case and what was involved,

[DEFENSE COUNSEL]: Do you think that all first de--es deserve the death penalty?

MR. FALCON: No.

[DEFENSE COUNSEL]: Can you tell me what kind of case wouldn't be deserving of the death penalty?

MR. FALCON: I'm not sure.

[DEFENSE COUNSEL]: Let's assume that I am not telling you what the law is, because the Judge will do that, and you will hear all the law. The Judge will instruct you on the law and you will hear the testimony and the evidence.

Suppose you have now seen everything and the Judge instructs you to go back and deliberate with your fellow jurors. You've made a decision he is guilty of first-degree murder, which is the most serious and highest level of murder there is.

Knowing that, can you answer any question when asked, do you think that all first-degree murders is the most serious level of murder and deservins the death genaltv?

MR. FALCON: I would have to see and weigh it for myself.

[DEFENSE COUNSEL]: You can keep an open mind?

MR. FALCON: Yes.

(T. 381-83) (emphasis supplied).

None of these jurors in any way indicated that he would be unable to follow the law. Each merely, in the context of a philosophical discussion, indicated that he thought the death

penalty might be appropriate for the rape of a child.[16] None ever said that he could not follow the court's instructions in this case; indeed, each affirmatively stated that he would not apply the death penalty automatically in cases of first-degree murder. As such, the trial court properly denied Defendant's cause challenges of Culp, Falcon and Bravo. Walls v. State 641 So.2d 381, (Fla. 1994)(cause challenge of juror who stated that she favored the death penalty but, on further questioning, also stated that she could follow the judge's instructions regarding the law properly denied); Waterhouse v. State, 596 So.2d 1008, 1016 (Fla. 1992) (juror who said that he would only vote to impose the death penalty if it were "justified" met the test of juror competency, and therefore trial judge did not abuse his discretion in refusing to excuse juror for cause); Penn v. State, 574 So.2d 1079, 1080 (Fla. 1991) (cause challenge of juror who indicated that he strongly favored the death penalty properly denied where he said he would follow the law as instructed).

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[16] Note that the issue of child sexual abuse was not present in any way in this case.

V.

DURING THE PENALTY PHASE, THE TRIAL COURT PROPERLY REFUSED TO ALLOW DEFENDANT TO INTRODUCE AN UNAUTHENTICATED DOCUMENT THROUGH A LAY WITNESS WHO HAD NOT PREPARED THE DOCUMENT.

Defendant's fifth claim is that the trial court erred in refusing to admit an asylum application through Defendant's mother. The application had not been prepared by her, and Defendant offered no other witnesses to authenticate it. Further, even if the court erred, any error would be harmless, in that the document was cumulative to the witness's testimony and other documentary evidence presented by the defense during the penalty phase.

Defendant argues that the application should have been admitted to corroborate his mother's testimony regarding Defendant's childhood. (B. 34). As Defendant correctly notes, the rules of evidence have been somewhat relaxed for penalty-phase proceedings. They have not, however, been rescinded. Hitchcock v. State, 578 So. 2d 685, 690 (Fla. 1990), reversed on other grounds, **614** So. 2d 483 (Fla. 1993). This court rejected a claim similar to that presented here in Griffin v. State, 639 So. 2d 966 (Fla. 1994). In Griffin, the defense presented testimony from a witness concerning the defendant's background and character. The witness

had also written a newspaper article concerning the same subject matter. This court held that the trial court properly excluded the article itself from evidence. Id., at 971.

Here, Defendant's mother testified regarding the conditions under which Defendant's family had lived in Cuba and Peru. The State did not attempt to impeach this testimony on cross-examination. The asylum application, like the article in Griffin, was merely self-serving corroboration of the witness's unchallenged testimony. Further, the witness here was not even the author of the document.[17] (T. 1509). Defendant simply advanced no valid exception to the hearsay rule which would have warranted the admission of the document.[18] As such it was properly excluded below.

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[17] As such, even had the testimony been challenged, the application would not have constituted a prior consistent statement under §90.801(2)(b), Fla. Stat.

[18] The document was also plainly not a "public record" within the meaning of §90.803(8), Fla. Stat., as suggested by counsel below. (T. 1544). The reliability of such records is based upon their generation in accordance with the public duties of the agency. The mere fact that this document was purportedly filed with INS does not confer reliability on it. Indeed, Defendant's family members were applying for asylum based upon political persecution, which could well have encouraged them to exaggerate or even fabricate the circumstances reported in the application,

Finally, even assuming, arguendo, that the document was improperly excluded, its contents were at best cumulative to the mother's testimony and of the information contained in the Cuban hospital reports and Defendant's passport which were admitted into evidence. As such any error would be harmless beyond a reasonable doubt. Hitchcock, 578 So. 2d at 690.

VI.

THE STATE PROPERLY IMPEACHED THE TESTIMONY OF DEFENDANT'S EXPERT WITNESS BY ASKING HIM, AFTER HE TESTIFIED THAT DEFENDANT COULD BE REHABILITATED, WHETHER HE HAD CONSIDERED DEFENDANT'S CRIMINAL HISTORY.

Defendant's sixth claim is that the trial court erred in permitting the State to ask Defendant's expert, after he had testified that defendant could be rehabilitated, whether he had considered the fact that defendant had other pending robberies. Defendant further asserts that **it was error** for the **State to** comment on this testimony in closing. The State's inquiry was proper impeachment, and it follows, therefore, that the arguments in closing were proper. Furthermore, any error would be harmless beyond a reasonable doubt.

Defendant asserts that the prosecutor should not have asked Dr. Toomer whether he had considered Defendant's prior and pending robberies in forming his opinion. In support, he relies upon case law which holds that evidence of crimes for which no conviction has been obtained may not be introduced in support of the prior **violent** felony conviction aggravator,[19] or that evidence of bad acts may not

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[19] See, Perry v. State, 395 So. 2d 170, 174 (Fla. 1981); Dousan v. State, 470 So. 2d 697, 701 (Fla. 1985).

be used to impeach lay witness testimony where the acts did not contradict the witness's testimony on direct.[20] These cases are not, however, on point.

On direct examination, Dr. Toomer testified that he believed Defendant to be a suitable candidate for rehabilitation. (T. 1583). In direct response to this testimony[21] the State asked Dr. Toomer if he had considered Defendant's prior and present criminal acts.[22] Such is proper impeachment. Valle v. State, 581 So. 2d 40, 46 (Fla. 1991) (State properly rebutted expert testimony that Defendant would be a good prisoner with evidence of prior bad acts for which defendant was not convicted); Sochor v. State, 580 So. 2d 595, 602 (Fla. 1991) (penalty phase testimony as to uncharged crime admissible where the defendant opened the door to this type of evidence); Hildwin v. State, 531 so. 2d 124, 127 (Fla.

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[20] See, Robinson v. State, 487 So. 2d 1040, 1042 (Fla 1986); Geralds v. State, 601 So. 2d 1157, 1161 (Fla. 1992).

[21] The prosecutor prefaced the questions to which Defendant objects with: "[Y]ou concluded that . . . he could be rehabilitated; correct?" (T. 1618).

[22] The doctor stated he was aware of Defendant's record, but did not consider it in formulating his conclusions. (T. 1619-20). The fact of multiple, serial, criminal acts is relevant to the defendant's potential for rehabilitation. Mills v. State, 462 So. 2d 1075, 1082 (Fla. 1985).

1988) (same); Johnson v. State, 660 so. 2d 637, 646 (Fla. 1995)(where defendant puts his character in issue during penalty phase, State may impeach with other character evidence); Wuornos v. St-ate, 644 So. 2d 1012, 1018 (Fla. 1994)(once defense advances theory of mitigation, State may rebut with relevant evidence of collateral bad acts); Parker v. State, 476 So. 2d 134, 139 (Fla. 1985) (no error in admitting evidence of prior juvenile criminal offenses to impeach expert conclusions); Muehleman v. State, 503 S. 2d 310, 315-16 (Fla. 1987)(admission into evidence, during penalty phase, of a "'Juvenile Social History Report' detailing [defendant's] juvenile criminal record" was proper, where "psychiatric expert witness for the defense stated that he had considered the report in formulating his opinion"). As the examination was proper, it follows that counsel's brief, one-sentence reference, (T. 1662), to the robberies during closing was also a proper comment on the evidence.[23]

Finally, even if the reference to any pending robbery charges were improper, any error would be harmless beyond a reasonable doubt. As noted, the questions and argument were very brief, and

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[23] Defense counsel argued in closing that Defendant could be rehabilitated. (T. 1675).

clearly made solely in reference to the question of whether Defendant could be rehabilitated.[24] The jury also had before it evidence of Defendant's extremely similar surveillance, assault and attempted robbery of Robert Street, (1576-87), which was clearly properly admitted. The State established the existence of the aggravating circumstances of murder during the course of a felony (merged with pecuniary gain), and two prior violent felony convictions. (R. 932). The court found nothing in mitigation. (R. 934-39). Finally, were this case remanded for a new sentencing hearing, the State would now be entitled to introduce Defendant's June 8, 1995, convictions, in five separate cases, of armed robbery, of four counts of robbery, and of three counts each of aggravated battery and kidnapping. (See. S.R. 1-23). See, Elledge v. State, 408 So. 2d 1021, 1022 (Fla. 1981)(resentencing jury entitled to know of relevant convictions entered subsequent to previous sentencing); Oats v. State, 446 So. 2d 90, 96 (Fla. 1984) (erroneous reliance on conviction which was reversed on appeal harmless where defendant was subsequently reconvicted). Plainly any error could not have affected the outcome. This claim should

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[24] During closing, the court emphasized that the robberies were to be considered solely for the purpose of impeachment. (T. 1662). The defense specifically declined a limiting instruction at the time the information was originally elicited. (T. 1633).

be rejected.

VII.

THE EVIDENCE AMPLY SUPPORTED THE TRIAL COURT'S CONCLUSION THAT THE MURDER OF CONRADO CALDERON WAS COMMITTED FOR PECUNIARY GAIN.

Defendant's seventh claim is that because the gunplay that resulted in Calderon's death thwarted the defendants' attempt to rob him, the murder was not committed for pecuniary gain. This claim is without substance. Furthermore, even if the trial court erred in finding pecuniary gain, any error would be harmless.

The evidence in this case clearly supports the pecuniary gain aggravating factor. Ample evidence showed that the only reason Calderon came into contact with the defendants was because he had the misfortune to be selected as Defendant's next robbery prey. The attempt to rob Calderon led directly to his death. The trial court thus properly applied this factor. Allen v. State, 662 So. 2d 323, 330 (Fla. 1995) (factor proper where evidence showed defendant's "entire association" with victim was motivated by financial gain); Finney v. State, 660 So. 2d 674, 680 (Fla. 1995) (aggravator proper where defendant was motivated at least in part by pecuniary gain); Preston v. State, 607 So. 2d 404, 409 (Fla. 1992) (same); Harmon v. State, 527 So. 2d 182 (Fla. 1988) (same).

Furthermore, even if the trial court improperly found the pecuniary gain aggravator, it merged the pecuniary gain aggravator in its sentencing order with the commission during an attempted robbery aggravator. (R. 932). The jury was also given a merger instruction. (T. 1688). Defendant does not argue that the trial court erred in finding that Calderon's murder occurred during an attempted robbery. Nor would he have basis to do so. As such, even assuming error, arguendo, there is no reasonable possibility that the trial court's finding of pecuniary gain, or instruction of the jury thereon, could have affected the outcome of the proceedings. Downs v. State, 572 So. 2d 895, 901 n.6 (Fla. 1990) (no reversible error in finding improper aggravating factor where allegedly erroneous factor was merged with factor defendant did not challenge); Johnson v. State, 608 So. 2d 4, 13 (Fla. 1992) (any error in finding of pecuniary gain harmless where during robbery also found). This claim must be rejected.

VIII.

THE TRIAL COURT ADEQUATELY CONSIDERED DEFENDANT'S PROPOSED MITIGATION.

Defendant next avers that the trial court erred in "refus[ing] to consider evidence of nonstatutory mitigating circumstances. (B. 42). He further contends that the trial court should have found the existence of the extreme mental or emotional distress and lack of capacity to conform to the requirements of law statutory mitigators. (B. 46). However, the trial court did consider Defendant's proffered evidence, at length, but was unpersuaded that it established the existence of mitigation sufficient to outweigh the aggravation. The trial court's conclusions are supported by the record.

A. ALLEGED STATUTORY MITIGATION[25]

1. Extreme emotional distress (§921.141(6)(b), Fla. Stat.)

The trial court considered the opinions of Drs. Toomer and

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[25] In his written memorandum, Defendant also cited the victim's participation or consent, §921.141(6)(c), that he (Defendant) was an accomplice whose participation was relatively minor, §921.141(6)(d), and his age. §921.141(6)(g). (R. 921). These factors were properly rejected by the trial court for the reasons set forth in the sentencing order. (R. 935-36, 937). Defendant does not now challenge these conclusions of the trial court.

Eisenstein to the effect that' Defendant suffered from various mental impairments.[26] (R. 933-34). The court also considered, however, the testimony of State expert Dr. Aguilar-Puentes, who, unlike the defense doctors, conducted her testing of Defendant in Spanish, (6/22 S.T. 22). When examined in his native tongue, Defendant was found to be in the normal ranges. (6/22 S.T. 26-28). Dr. Aguilar-Puentes concluded that Defendant was not mentally impaired. Id. The trial found Dr. Aguilar-Puente's testimony more credible. (R. 934). In addition to the language problem, Dr. Aguilar-Puentes also found inconsistencies between Dr. Eisenstein's data and his conclusions. (6/22 S.T. 21). Dr, Castiello felt that Defendant was probably malingering. (3/11 S.T. 8). The court's findings were thus well within the its discretion. See, Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990) (trial court is only obligated to find, as mitigating circumstances, those proposed factors which are mitigating in nature and have been reasonably established by the greater weight of the evidence); Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1992) ("when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance

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[26] Dr. Eisenstein was of the opinion that Defendant was not impaired or suffered from mild impairment. Dr. Eisenstein was unable to offer an opinion on the existence of the statutory mitigators. (6/22 S.T. 7-8, 49, 62).

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'"); 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").

2. Capacity to conform (§921.141(6) (f), Fla. Stat.)

Although Defendant withdrew his request that the jury be instructed on this factor, (T. 1623), he did claim this mitigator in his written sentencing memorandum to the court. The court, however, rejected the defense's contention that this mitigating circumstance was established through evidence of Defendant's drug use. The court properly noted that there was no evidence, other than Defendant's self-serving statements to his experts, of drug

use at the time of the crime. (R. 936). Dr. Castiello concluded that Defendant's self reports were not reliable. (3/11 S.T. 6) Moreover, the objective evidence showed that immediately after the crime, Defendant fled the hospital and concealed himself, disposed of the murder weapon, told Humberto to give the hospital and police a false story, and altered his appearance by shaving his head. The trial court properly concluded that these actions demonstrated Defendant's awareness of the impropriety and illegality of his actions. (R. 937). Furthermore, it must be recalled that this murder was the result of a carefully researched and planned robbery attempt, belying any claim that the crime was the result of impairment. As such, the trial court could properly have found that Defendant's purported drug use at the time of the crime, and allegedly resulting mental impairment, was not established as mitigation. Sochor v. State, 619 so. 2d 285, 293 (Fla. 1993) (whether intoxication establishes a mitigating circumstance is within the trial court's discretion); Duncan v. State, 619 So. 2d 279, 283-84 (Fla. 1993) (intoxication not established as mitigation where no witnesses observed defendant to be intoxicated at time of crime; defendant's own self-serving statements insufficient); Johnson v. State, 608 So. 2d 4, 12 (Fla. 1992) (drug use on night of crime properly rejected as not mitigating where evidence showed

careful and purposeful conduct on part of defendant); Ponticelli v. State, 593 So. 2d 483, 491 (Fla. 1991) (claims of drug use properly rejected as mitigating where there was no evidence of drug use on night of murder and Defendant's action were inconsistent with impairment).

B. ALLEGED NONSTATUTORY MITIGATION

1. Ability to be rehabilitated

This factor was not presented in the written sentencing memorandum or in the oral argument to the court. Therefore, the trial court cannot be faulted for failing to find it. Hodges v. State, 595 so. 2d 935 (Fla. 1992) ("defendants share the burden of identifying nonstatutory mitigators, and we will not fault the trial court for not guessing which mitigators Hodges would argue on appeal"). Furthermore, Defendant's repeated criminal episodes refute any claim that he might have made. Mills v. State, 462 So. 2d 1075, 1082 (Fla. 1985).

2. Drug usage

As noted above with regard to the reduced capacity statutory mitigator, there was no credible independent evidence of drug use on Defendant's part at or around the time of the murder. As such

the court properly concluded that Defendant's alleged drug use was entitled to little weight as mitigation. The weight to be ascribed to a particular mitigating factor is a matter for the jury and judge to determine. Jones v. State, 648 So. 2d 669, 680 (Fla. 1994); Slawson v. State, 619 So. 2d 255, 260 (Fla. 1993). Here, the judge would have been well within his discretion, in view of the paucity of the evidence that Defendant used drugs at the time of the murder, to have rejected the proffered mitigator in its entirety. Preston v. State, 607 So. 2d 404, 412 (Fla. 1992) (trial court properly rejected drug use as nonstatutory mitigation where no evidence defendant used drugs on night of murder); Sochor; Duncan; Johnson. As such, the court was clearly within its discretion in ascribing little weight to this circumstance.

3. Childhood problems and daughter's birth defect

Defendant advanced as mitigatidn his own difficult childhood and his daughter's medical problems. (R. 922). The trial court rejected these circumstances as mitigating, (R. 938).

As to Defendant's childhood, the testimony at trial described only events which had occurred 10 years previously. The crime here was not a case of sudden lashing out or reaction. This was a

carefully planned robbery of someone known to Defendant to carry a large amount of cash home every night. It was orchestrated in advance, and Defendant took the precaution of arming himself. History shows that he had no compunction against using his weapon. Finally, this crime was remarkably like the Street case. There Defendant again believed that a man carried cash home from his business. Again he laid in wait and attacked the man in his driveway. And again he displayed no qualms in using force, brutally pistol-whipping Street. No evidence **was** presented that these carefully planned crimes had anything to do with Defendant's childhood. Indeed, there was no evidence of deprivation in the ten years preceding the crime. Rather, Defendant earned his GED, married, fathered two children, and held a steady job. Nothing in his background prevented this progress, and as noted by Dr. Aguilar-Puentes, Defendant suffered no mental impairments. As such, whatever deprivation Defendant had suffered as a child failed to mitigate his conduct at the age of nearly 26 years. Lara v. State, 464 So. 2d 1173, 1180 (Fla. 1985) ("the trial court could properly conclude the appellant's actions in committing this murder were not significantly influenced by his childhood experience so as to justify its use as a mitigating circumstance"); Kisht v. State, 512 So. 2d 922, 933 (Fla.1987) (same); Valle v. State, 581 So. 2d

40, **48-49** (Fla. 1991) (trial court properly weighed and rejected evidence of dysfunctional family and abusive childhood as mitigating factors).

Any evidence tying Defendant's alleged distress over his daughter's problems was likewise absent. The only testimony was that Defendant was upset at the time the daughter was born, as any parent would be. However, that event had occurred 4 years earlier. There was absolutely no testimony that Defendant had remained inconsolable over it, And indeed, as discussed with regard to Defendant's own childhood problems, there was absolutely no evidence tying the daughter's problems to the calculated crime which resulted in Calderon's death. Lara; Kight; Valle; See also, Hill v. **State, 515 so.** 2d 176, 178 (Fla. 1987) (health problems of family members not proper subject for consideration as mitigation).

4. Mental health problems not reaching statutory level

Given the lack of credibility of Defendant's experts whose findings were rebutted by the State expert, as discussed above, the trial court properly concluded that Defendant's purported mental deficiencies were entitled to "minimal" weight. (R. 939). Johnson

v. State, 660 So. 2d 637, 646 (Fla. 1995)(trial court was within its discretion to give proposed nonstatutory mitigation of history of mental health problems little weight where lay testimony did not correlate problems with crime and where expert testimony was disputed); Cook v. State, 581 So. 2d 141, 143-44 (Fla. 1991) (rejection of mental mitigating circumstances proper in light of conflicting and contradictory' evidence).

C. THE TRIAL COURT'S SENTENCING CALCULUS WAS ADEQUATE

Finally, any contention Defendant raises regarding the sufficiency of the sentencing order[27] is without merit. In view of the foregoing it can not be said that the trial court's 12-page sentencing order provides an inadequate basis for review. Barwick v. State, 660 So. 2d 685, 696 (Fla. 1995) (no error despite failure of court to mention child abuse as mitigating where court stated that it had weighed the mitigation established); Lowe v. State, 650 So. 2d 969, 977 (Fla. 1994) (contention that trial court failed to adequately address proposed mitigation invalid where trial court stated it had considered mitigation and found it outweighed by aggravation); Thompson v. State, 648 So. 2d 692, 697 (Fla.

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[27] See Defendant's point heading, "THE TRIAL COURT ERRED IN ENTERING ITS SENTENCING ORDER." (B. 42).

1994) ("While a trial judge must consider all mitigating evidence that is supported by the record, it is not error for the judge to fail to delineate all such evidence in the sentencing order"); Jones v. State, 648 So. 2d 669, 679 (Fla. 1994) (claim that trial court failed to consider intoxication as mitigation meritless where court addressed intoxication in context of discussion of statutory mitigation); Green v. State, 641 So. 2d 391, 396 (Fla. 1994) (no error where order did not "not strictly comply with the requirements of Campbell,[28] [where] the trial judge clearly gave careful consideration to the mitigating factors"); Johnson, 608 so. 2d at 12 (consideration of drug abuse in context of statutory mitigation adequate) ; Pettit v. State, 591 So. 2d 618, 620 (Fla. 1992) (defendant contended "that the trial judge failed to consider nonstatutory mitigation. The sentencing order itself [did] not mention the word 'nonstatutory.' We conclude, however, that by his treatment of Pettit's physical condition and by allowing the testimony of the grandfather, the judge fully understood the requirement of considering, and did consider nonstatutory mitigating evidence"); Krawczuk v. State, 634 So. 2d 1070, 1073

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[28] Campbell v. State, 571 So. 2d 415 (Fla. 1990) (holding that trial court must expressly consider mitigating circumstances established by the evidence).

(Fla. 1994)(no error in trial court's failure to find nonstatutory mitigation where order reflected that trial court carefully considered evidence presented in mitigation). Cf., Ferrell v. State, 653 So. 2d 367, 371 (Fla. 1995)(court's one paragraph sentencing order insufficient to provide basis for meaningful review); Larkins v. State, 655 So, 2d 95, 100 (Fla. **1995)** (brief page-and-one-half sentencing order that did not address any mitigating factors proposed by defendant inadequate basis for appellate review). Defendant's sentence should be affirmed.

IX.

DEFENDANT'S SENTENCE IS PROPORTIONAL

Defendant's final claim is that his sentence is disproportionate. This claim is without merit. "Proportionality review compares the sentence of death with other cases in which a sentence of death was approved or disapproved." Palmes v. Wainwright, 460 So. 2d 362, 362 (Fla. 1984). The Court must "consider the totality of circumstances in a case, and compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances." Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990), cert. denied, U.S. ___, 111 s. ct. 1024, 112 L. Ed. 2d 1106 (1991). "Absent demonstrable legal error, this Court accepts those aggravating factors and mitigating circumstances found by the trial court as the basis for proportionality review," State v. Henry, 456 So. 2d 466, 469 (Fla. 1984).

The aggravating factors found below were: (1) prior conviction for a violent felony that was very similar to the instant crime; (2) murder committed during the course of a robbery, merged with murder committed for pecuniary gain. (R. 932). The court found no statutory mitigation and gave little to minimal weight to the

nonstatutory factors of Defendant's drug use and mental history. (R. 938-39). The trial court concluded that the aggravation outweighed the mitigation, and followed the jury's recommendation of death. (R. 941).

Numerous cases have affirmed death sentences where the murder was committed during the course of a robbery and mitigation similar to that found here was presented. See, e.g., Lowe v. State, 650 so. 2d 969 (Fla. 1994)(prior conviction of a violent felony and murder committed during the attempted robbery; mitigation evidence that defendant was 20 years old at time of crime, functioned well in controlled environment, was a responsible employee, and participated in Bible studies); Heath v. State, 648 So. 2d 660 (Fla. 1994)(commission of murder during the course of an armed robbery and prior violent felony conviction; substantial mitigating factors, including extreme mental or emotional disturbance, and minimal nonstatutory mitigation) ; Smith v. State, 641 So. 2d 1319 (Fla. 1994) (murder committed during an attempted robbery and a previous conviction for a violent felony versus no significant history of criminal activity and several nonstatutory mitigating circumstances relating to Smith's background, character

and record);[29] Watts v. State, 593 So. 2d 198 (Fla. 1992)(aggravators: prior violent felony; murder during course of felony and for pecuniary gain; mitigation: low IQ reduced judgmental abilities; defendant 22 at time of offense); Cook v. State, 581 So. 2d 141 (Fla. 1991) (murder committed for pecuniary gain and robbery merged into one factor; defendant previously convicted of another violent felony; mitigation included absence of significant prior criminal activity); Freeman v. State, 563 So. 2d 73 (Fla. 1990)(murder committed for pecuniary gain and during burglary merged into one factor; previous violent felony conviction; nonstatutory mitigation including low intelligence and abuse by stepfather); Hudson v. State, 538 So. 2d 829 (Fla. 1989) (previous conviction of violent felony; murder committed during armed robbery; minimal weight given to statutory mitigating factors of extreme mental or emotional disturbance, impaired capacity to conform conduct to requirements of law, and age of defendant).

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[29] In Smith, this court distinguished Livingston v. State, 565 So. 2d 1288 (Fla. 1990), upon which Defendant relies, pointing out the severe beatings and neglect Livingston had been subjected to, as well as the marginal nature of Livingston's intellectual functioning. Smith, at 1322.

With respect to Defendant's reliance on alleged mitigating factors which the lower court concluded were not established, (B. 52), as noted above, the trial court's conclusions were proper. Such alleged factors therefore have no place in this proportionality review. It is therefore readily apparent that the sentence of death imposed below is proportionate to that approved in other cases, See, smith; Lowe; Cook. Defendant's sentence should be affirmed.

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 **JOHN LIPINSKI, 1455** Northwest 14th Street, Miami, Florida 33125, this 6th day of January, 1997.

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