IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,700

FERNANDO FERNANDEZ,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

****

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

****

AMENDED INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant was the Defendant and Appellee was the Prosecution in the Criminal Division of the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida. Honorable Rodolfo Sorondo, Jr., Presiding. In this brief, the parties will be referred to as they appear before this Honorable Court.

The following symbols will be used:

"R" Record on Appeal As Prepared By The Clerk Of The Circuit Court.

"T" Transcript of the Trial Proceedings and of the Sentencing Proceedings.

"SR1" First Supplemental Record on Appeal.

"SR2" Second Supplemental Record on Appeal.

STATEMENT OF THE CASE AND FACTS

Appellant will adopt and incorporate by reference the Statement of the Case and Facts as set forth in pgs. 4-12 of the Initial Brief filed by Andrew M. Kassier with the following clarifications and additions:

1. The witness referred to in pg. 6 of the Initial Brief is Claudio Prado and not Claudia Prado.

2. The advisory jury recommended the death penalty by a vote of **seven to five** after deliberating for approximately two hours and twenty minutes (S.R.2-278-279, S.R.1-170).

3. Fernando Fernandez was indicted along with Leonardo Franqui, Ricardo Gonzalez, Pablo San Martin, and Pablo Abreau (R. 1). This Court has reversed the sentences of death in the cases of co-Defendants Franqui, Case No. 84,701, and Gonzalez, Case No. 84,841, respectively.

SUMMARY OF THE ARGUMENT

GUILT PHASE

POINT I.

The trial court committed reversible error when it permitted the prosecution's challenges for cause against prospective jurors who were opposed to the death penalty but who stated that they could temporarily set aside their own beliefs and properly apply the law. There was no indication that the beliefs of these jurors regarding the death penalty would prevent them from applying the law and discharging their sworn duty.

POINT II.

The defendant's motion for mistrial during the prosecution's opening statement should have been granted where the argument was an appeal to the bias, prejudice, and sympathy of the jury, including a reference to the defendant as "a murderer." The opening statement further contained references to Officer Bauer's words after he was shot which amounted to hearsay and which were irrelevant and inflammatory. These errors were further enhanced by improper testimony by Ms. Chin-Watson regarding her friendship with Officer Bauer.

POINT III.

The trial court committed reversible error when it allowed admission of the bloody clothing worn by Officer Bauer as any relevance as to this clothing was substantially outweighed by the danger of unfair prejudice. The proper procedure would have been to introduce photographs of the clothing indicating the bullet holes which the prosecution sought to show, rather than introducing the actual bloody clothing.

POINT IV.

The trial court committed reversible error when it permitted Claudio Prado and Lazaro Hernandez to testify as to inculpatory statements made by Mr. Fernandez in their presence. Both Mr. Prado and Mr. Hernandez were members of the clergy for the purpose of making these communications privileged and no predicate was ever established showing that any waiver of the clergyman privilege ever occurred.

POINT V.

The trial court committed reversible error when it did not allow counsel for appellant to cross-examine state witnesses Claudio Prado and Lazaro Hernandez regarding whether they violated any Santeria oaths when

they revealed the statements made by Mr. Fernandez in their presence. The jury was entitled to have this information since such inquiry would deal with credibility, which is a proper area of inquiry during cross-examination.

PENALTY PHASE

POINT VI.

Appellant will adopt and incorporate by reference Point II as set forth in pgs. 16-18 of the Initial Brief filed by Andrew M. Kassier.

POINT VII.

The trial court committed error in finding that certain aggravating circumstances had been proven beyond a reasonable doubt. The capital felony was not committed for pecuniary gain. The capital felony was not committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from justice. Officer Bauer, at the time of his death, was not involved in his official duties. The two remaining aggravating circumstances must be merged into one aggravating circumstance.

POINT VIII.

The trial court erred in imposing the death penalty where a weighing of the aggravating and mitigating circumstances supported a sentence of life

imprisonment. The trial court committed several errors in failing to give sufficient weight to proven mitigating circumstances and in failing to even consider one mitigating circumstance. The trial court also erred in using the wrong standard in considering whether mitigating circumstances had been sufficiently proven and in failing to properly consider Mr. Fernadez's substantial cooperation with the authorities and whether Mr. Fernandez acted under extreme duress or under the substantial domination of another person.

POINT IX.

The Enmund/Tison culpability requirement has not been met in this case making the death penalty improper and furthermore, the death penalty is not proportional under the facts of this case. In cases in which there exists the factual scenario present in Mr. Fernandez's case, a sentence of death has not survived challenge.

POINT X.

The jury instructions given to the advisory jury during the sentencing phase were improper as they were either in violation of the United States Constitution or in violation of United States Supreme Court caselaw. The

advisory jury was instructed as to an element which is no longer valid law in Florida, the role of the jury was denigrated, the instructions created a presumption that death was the proper sentence and shifted the burden to Mr. Fernandez to show that death was not the proper sentence, the trial court misread to the jury the proper standard under Tison v. Arizona, the jury was not directed to specify its findings regarding aggravating and mitigating circumstances and regarding its findings under Enmund/Tison thus precluding meaningful appellate review of the death sentence, and the jury was given the wrong standard regarding the burden of proof for considering mitigating circumstances.

POINT XI.

Reversible error was committed by the prosecutor during closing argument to the advisory jury during the penalty phase as the prosecutor made improper comments which were an appeal to the advisory jury's sympathy and which sought to inflame the passions of the advisory jury. The improper comments regarded a personal characteristic of the victim and involved the prosecutor arguing that Mr. Fernandez killed one of our protectors.

POINT XII.

The death sentence imposed on Mr. Fernandez violates both the cruel and unusual punishment clause of the United States Constitution and the cruel or unusual punishment clause of the Florida Constitution. The death sentence is disproportionate under the facts of this case, the death sentence itself amounts to "cruel or unusual" or "cruel and unusual" punishment thus violating both the Florida and United States Constitution, and the manner in which the death sentence is carried out in Florida-by electrocution-is also in violation of the Florida and United States Constitutions.

ARGUMENT

GUILT PHASE

POINT I.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT PERMITTED THE PROSECUTION'S CHALLENGES FOR CAUSE AGAINST PROSPECTIVE JURORS WHO WERE OPPOSED TO THE DEATH PENALTY BUT WHO STATED THAT THEY COULD TEMPORARILY SET ASIDE THEIR OWN BELIEFS AND PROPERLY APPLY THE LAW.

During jury selection, the prosecution exercised a challenge for cause on Mr. Mendez (T. 694). During defense questioning regarding the death penalty, Mr. Mendez stated that if he got to the sentencing phase, he would listen to the judge and follow the law even though it would be difficult for him to do so (T. 643-644). The prosecutor also exercised a challenge for cause as to Ms. St. Victor (T. 694). During defense questioning regarding the death penalty, Ms. St. Victor stated that she would follow the judge's instruction on the law even though it is hard (T. 646). The prosecutor also exercised a challenge for cause as to Mr. Armand (T. 694). During defense questioning regarding the death penalty, Mr. Armand stated that he would

also follow the judge's instructions on the law even though it would be difficult (T. 646). The prosecutor also exercised a challenge for cause as to Ms. Gillum (T. 694). During defense questioning regarding the death penalty, Ms. Gillum stated that she would follow the judge's instructions even though it would be very difficult (T. 647). In permitting these challenges for cause, the trial court committed reversible error.

A motion to excuse a venire member for cause must be supported by specified causes or reasons that demonstrate that, as a matter of law, the venire member is not qualified to serve. Gray v. Mississippi, 481 U.S. 648, 652 at n.3, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987). The inquiry for dealing with challenges for cause in death sentence situations is whether "the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath". Gray v. Mississippi, at U.S. 658 (quoting Wainwright v. Witt, 469 U.S. 412 (1985)). Those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of

law. Gray v. Mississippi, at U.S. 658 (quoting from Lockhart v. McCree, 476 U.S. 176 (1986)).

In Randolph v. State, 562 So.2d 331, 335 (Fla.), cert. denied, 498 U.S. 992 (1990), this Court stated that prospective jurors who believe that the death penalty is unjust may serve as jurors and cannot be excluded for cause because of that belief. However, continued this Court, if that belief prevents them from applying the law and discharging their sworn duty, the trial court is obliged to excuse them for cause.

In the present case, the trial court committed reversible error because these potential jurors all clearly stated that they were willing to temporarily set aside their own beliefs in deference to the rule of law. There was no indication that the beliefs of these jurors regarding the death penalty would prevent them from applying the law and discharging their sworn duty. Accordingly, Mr. Fernandez's convictions and sentence must be set aside and this case remanded for a new trial.

POINT II.

THE DEFENDANT'S MOTION FOR MISTRIAL DURING THE PROSECUTION'S OPENING STATEMENT SHOULD HAVE BEEN GRANTED WHERE THE ARGUMENT WAS AN APPEAL TO THE BIAS, PREJUDICE, AND SYMPATHY OF THE JURY, INCLUDING A REFERENCE TO THE DEFENDANT AS "A MURDERER".

Appellant will adopt and incorporate by reference Point I as set forth in pgs. 14-15 of the Initial Brief filed by Andrew M. Kassier and will add the following: The motion for mistrial was made on T. 1098-1099 and denied on T. 1100.

The improprieties continued when the prosecutor made the following statement: "His breathing became shallow, his life began to leave his body. A bullet from one of the men with guns lodged in his leg, another entering his neck ripping down into his tissues and exploding his heart, the heart of a human being, the heart of a police officer, the heart of Steven Bauer" (T. 1097). This was a further improper appeal to the passions of the jury and a brazen attempt to further inflame the jury during this early phase of the trial.

During the prosecution's opening statement, the prosecutor further argued that after Officer Bauer was shot, one of the bank tellers walked over to Officer Bauer and that the officer asked "Are you guys all right?" (T. 1096). This statement further tainted this already prejudicially tainted closing argument posing as an opening statement.

The inquiry of Officer Bauer regarding the well being of the tellers was hearsay under s. 90.801, Fla. Stat. and no hearsay exception is applicable. Furthermore, even if this statement was not hearsay, it was certainly irrelevant evidence under s. 90.401, Fla. Stat. as it did not tend to prove or disprove a material fact. Finally, even if this evidence is somehow found to be relevant, it was certainly inadmissible under s. 90.403, Fla. Stat. as any probative value that this statement may have had was substantially outweighed by the danger of unfair prejudice. This improper evidence was further hammered into the jury when the tellers who had been with the officer related this evidence to the jury (T. 1160, 1172) and was further argued during closing argument (S.R.1-207).

The errors committed during the opening statement were further enhanced, when during the testimony of bank teller Michelle Chin-Watson,

the prosecutor elicited evidence of Ms. Chin-Watson's friendship with Officer Bauer (T. 1168-1169). In the case of co-Defendant Franqui, this Court has already held this testimony to amount to harmless error, even if improper. Franqui v. State, No. 84, 701 (Fla. July 3, 1997). However, when this improper testimony is considered in the context of Mr. Fernandez's case, and combined with the other improprieties during the prosecution's opening statement, it can not be said that this error is harmless beyond a reasonable doubt.

This was an emotionally charged proceeding. The improprieties of the entire opening statement, which appellant submits would be improperly inflammatory as a closing argument, unfairly tilted the scales in favor of the prosecution. The motion for mistrial was improperly denied and Mr. Fernandez's convictions must be reversed.

POINT III.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT ALLOWED ADMISSION OF THE BLOODY CLOTHING WORN BY OFFICER BAUER AS ANY PROBATIVE VALUE AS TO THIS CLOTHING WAS SUBSTANTIALLY OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE.

Over defense objection (T. 1271), the trial court allowed the admission into evidence of Officer Bauer's blood stained police shirt and undergarment that the officer was wearing during these offenses (T. 1271). The prosecutor argued that this was important evidence because the jury would be able to see the bullet hole in the back of the neck (T. 1270). The trial court found that it was significant that the bullet hole could not be seen in the photos of the clothing which had been admitted into evidence (T. 1270). Accordingly, the trial court overruled the objections and admitted these articles of clothing into evidence (T. 1271). In so doing, the trial court committed reversible error.

In Pope v. State, 679 So.2d 710, 713 (Fla. 1996), cert. denied, 117 S.Ct. 975 (1997), this Court upheld the ruling of the trial court admitting photographs of the victim's bloody clothes. In Mr. Fernandez's case,

however, the actual bloody clothes were admitted into evidence and Appellant submits that this goes beyond what is permitted by Pope v. State.

While photographs of the victim's bloody clothing may be admissible if relevant, the admission of the actual bloody clothing is simply so inflammatory that even if the clothing is relevant for some purpose, its probative value is substantially outweighed by the danger of unfair prejudice. See, s. 90.403, Fla. Stat.

This is especially true in the present case as there was medical testimony that Officer Bauer was shot in the back of the neck (T. 2054-2055). In Pope, this Court stated that relevant evidence which is not so shocking as to outweigh its probative value is admissible. Pope at pg. 713. The admission of this clothing certainly violated that principle.

The proper procedure would have been to introduce photographs of the clothing with a marking indicating the bullet hole. The admission of the actual bloody clothing further improperly prejudiced Mr. Fernandez and accordingly, he is entitled to a new trial.

POINT IV.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT PERMITTED CLAUDIO PRADO AND LAZARO HERNANDEZ TO TESTIFY AS TO INCULPATORY STATEMENTS MADE BY MR. FERNANDEZ IN THEIR PRESENCE.

During the state's case, Claudio Prado testified that his intention is to become a "Babalao" or a Santeria Priest (T. 1412). The record showed that the purpose of Mr. Fernandez's visit to Mr. Prado on January 3, 1992 was for Mr. Prado to take Mr. Fernandez to see a "Babalao" or Santeria Priest (T. 1406). Mr. Prado testified that during Mr. Fernandez's visit, a notice came on the television regarding Officer Bauer's death and that in response to this notice, Mr. Fernandez stated that "he was one of them" (T. 1405).

Mr. Prado further testified that he took Mr. Fernandez to see a "Babalao" named Lazaro Hernandez (T. 1406). At Mr. Hernandez's house, the following people were present: Mr. Hernandez's family, Maritza, Mr. Prado, and Mr. Fernandez (T. 1406). Maritza was apparently Mr. Fernandez's girlfriend (T. 1407). Everyone was in the living room watching television (T. 1407-1408). Once again, the notice regarding Officer Bauer's

death came on the television and Mr. Fernandez stated that he was involved in that (T. 1408).

Lazaro Hernandez testified that he is a "Babalao" (T. 1425). On January 3, 1992, he met Mr. Fernando Fernandez (T. 1426). Mr. Fernandez came to Mr. Hernandez's house with his girlfriend (T. 1427). Mr. Hernandez practices Santeria inside his home (T. 1427). During the conversation with Mr. Fernandez, the other people were watching television and the news about the bank robbery came on the television and at that point, Mr. Fernandez stated that he was involved in the robbery and that the car showed was in the robbery (T. 1427-1428).

The purpose of Mr. Fernandez's visit was for Mr. Hernandez to protect Mr. Fernandez from being apprehended so Mr. Hernandez put a bracelet on Mr. Fernandez and performed a ritual on Mr. Fernandez (T. 1436).

The trial court found that any claim to a privilege with respect to communications to clergy under s. 90.505, Fla. Stat. was waived since Mr. Fernandez's statement was made in the presence of Mr. Prado, Ms.

Sanchez, and Mr. Hernandez (T. 1382-1383). In so doing, the trial court committed reversible error.

Although the trial court found that the clergyman privilege did apply to the communications with Mr. Hernandez (T. 1381-1383), the same privilege should have applied to the communications with Mr. Prado as the record showed that he was in training to become a Santeria priest and that Mr. Fernandez approached him in order to seek a Santeria priest for protection.

Appellant submits that these communications with Mr. Prado were with a "member of the clergy" "privately for the purpose of seeking spiritual counsel" under s. 90.505, Fla. Stat. This situation would be analogous to someone visiting a student at a seminary and seeking advise as to whom the student would recommend as a priest for confession. Appellant submits that any such communications to the seminary student in the course of obtaining a recommendation for a priest would be privileged.

Accordingly, Appellant submits that all of the communications with both Mr. Prado and with Mr. Hernandez came under the protection of s.

90.505, Fla. Stat. as communications to clergy and that the issue is whether a waiver ever occurred.

The record does not support any predicate for finding that a waiver ever occurred. When dealing with privileges, there is a presumption of confidentiality. Cafritz v. Koslow, 167 F.2d 749, 751 (D.C. Cir. 1948). Appellant submits that this presumption was never rebutted in the present case as no predicate was established that Mr. Fernandez was ever overheard. None of the alleged eavesdroppers ever testified that they overheard the statement so this statement was still privileged and both Mr. Prado and Mr. Hernadez violated this privilege by testifying regarding these statements.

In Proffitt v. State, 315 So.2d 461, 464 (Fla. 1975), it was the eavesdropper who was attempting to testify regarding the privileged communications. In United States v. Blackburn, 446 F.2d 1089, 1091 (5th Cir. 1971), cert. denied, 404 U.S. 1017 (1972), it was also the eavesdroppers whose testimony was at issue regarding a privileged communication.

Appellant submits that since none of the alleged eavesdroppers ever testified that they overheard the statement, much less actually testified to the contents of the statement, no predicate ever existed for finding a waiver and the testimony of both Mr. Prado and Mr. Hernandez regarding Appellant's admissions were improperly admitted.

Accordingly, not only was the private communication with Mr. Prado improperly admitted, but the statement made by Appellant at Lazaro Hernadez's home was also improperly admitted. The admission of these statements were simply devastating and Appellant submits that the harmless error doctrine is not applicable under these circumstances.

POINT V.

THE TRIAL OCCUR COMMITTED REVERSIBLE ERROR WHEN IT DID NOT ALLOW COUNSEL FOR APPELLANT TO CROSS EXAMINE STATE WITNESSES CLAUDIO PRADO AND LAZARO HERNANDEZ REGARDING WHETHER THEY VIOLATED ANY SANTERIA OATHS WHEN THEY REVEALED THE STATEMENTS MADE BY MR. FERNANDEZ IN THEIR PRESENCE.

During the cross-examination of Claudio Prado, defense counsel attempted to question Mr. Prado about whether when a priest takes information, if it is supposed to be confidential since the jury was entitled to have the information that this person may have violated his oath and that that affects the person's credibility (T. 1414-1415). This proposed inquiry was directed towards Mr. Prado and his credibility (T. 1415). The trial court did not allow this inquiry (T. 1415).

During the cross-examination of Lazaro Hernandez, defense counsel also tried to question Mr. Hernandez about whether in the Santeria religion, there is anything analogous to confession in the Catholic faith (T. 1437). The state entered an objection to this area of questioning and the trial court

sustained this objection (T. 1438). In precluding the defense to fully cross-examine these witnesses regarding their credibility, reversible error was committed.

Well established is the law that cross-examination of a witness extends to the subject matter on direct examination and matters affecting the credibility of the witness. Green v. State, 688 So.2d 301, 305 (Fla. 1996). As trial counsel argued, even if there was a waiver of confidentiality as to the communications between Mr. Fernandez and these witnesses, the jury was still entitled to have the information that these witnesses may have violated an oath and if a person violates an oath, that certainly had something to do with credibility (T. 1414-1415).

Counsel for Appellant has not been able to locate any authorities to the effect that the violation of such an oath would be relevant to a witness' credibility. However, the reasoning behind such a proposition is sound and Appellant submits that the failure of the trial court to permit such full and fair cross-examination denied Mr. Fernandez his right to fully defend himself and amounted to reversible error.

PENALTY PHASE

POINT VI

THE COURT ERRED IN DENYING THE DEFENDANT'S REQUEST FOR A CONTINUANCE OF THE PENALTY PHASE, WHERE DEFENSE COUNSEL HAD A RESTRICTED PERIOD OF TIME WITHIN WHICH TO COMPLETE HIS INVESTIGATION AND NEEDED FURTHER TIME TO INVESTIGATE MORE THAN TWO DOZEN OTHER POTENTIAL WITNESSES.

Appellant will adopt and incorporate by reference Point II as set forth in pgs. 16-18 of the Initial Brief filed by Andrew M. Kassier.

POINT VII

THE TRIAL OCCUR COMMITTED ERROR IN FINDING THAT CERTAIN AGGRAVATING CIRCUMSTANCES HAD BEEN PROVEN BEYOND A REASONABLE DOUBT.

The law is well settled that aggravating circumstances must be proved beyond a reasonable doubt. State v. Wilson, 686 So.2d 569, 570 (Fla. 1996). With this standard in mind, the record is certain that the trial court committed error when ruling as to the aggravating circumstances in this case.

The first error committed by the trial court was to find that the capital felony was committed for pecuniary gain (R. 542). This aggravator is only properly found where there is sufficient evidence to prove a pecuniary motivation for the murder itself beyond a reasonable doubt. Simmons v. State, 419 So.2d 316, 318 (Fla. 1982). However, the evidence showed that when the robbery began, co-Defendant Franqui told Officer Bauer, in Spanish, not to move at which time Officer Bauer went for his gun and co-Defendants Franqui and Gonzalez opened fire (T. 1158, 1618, 1646-1647).

Accordingly, the evidence showed that the motivation for the murder was that a shootout began once Officer Bauer went for his gun and at that point, it became a matter of who would fire first. The fact that Franqui told Officer Bauer not to move at which time Officer Bauer went for his gun is crucial evidence showing that the original plan was to commit a robbery and not to kill anyone. Since the motivation for the murder was to fire at Officer Bauer before the officer opened fire on the co-Defendants, this aggravating circumstance has not been proven beyond a reasonable doubt.

The second error committed by the trial court was to find that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from justice (R. 543). The trial court's discussion as to this aggravating circumstance states that Officer Bauer's identity as a police officer was evident. Appellant denies this characterization. Indeed, the evidence showed that the Defendants thought that Officer Bauer was a security guard and not a police officer (R. 1838, 1841). The trial court correctly notes that Officer Bauer was defending the tellers but there is no evidence whatsoever to support beyond a reasonable

doubt the proposition that Officer Bauer was attempting to arrest the Defendants.

In Cruse v. State, 588 So.2d 983 (Fla. 1991), cert. denied, 504 U.S. 976 (1992), this aggravator was found to exist when Cruse killed two police officers who were arriving at the scene with the intent to arrest Cruise. Id. at 993. This Court stressed the fact that sirens were heard approaching, that the officers approached in marked patrol cars, and that Cruse knew that these were police officers as evidenced by statements by Cruse to rescuers to "get away from the cop. I want the cop to die." Id. at 993.

This knowledge is not present in the present case as the evidence showed that the Defendants did not know that Officer Bauer was a police officer but rather thought that he was a security guard (T. 1838). Appellant submits that such knowledge is a prerequisite for this aggravating circumstance to apply. Cf. Castor v. State, 587 N.E. 2d 1281, 1290 (Ind. 1992) (societal rationale for imposing death for one who kills a law enforcement official is promoted only if the defendant knew that the victim was a law enforcement official at the time of the killing). Furthermore, the evidence showed that Officer Bauer was not engaged in an arrest of the

Defendants but was rather involved in defending the bank tellers. Accordingly, this aggravating circumstance was never proven beyond a reasonable doubt.

The third error committed by the trial court was to find beyond a reasonable doubt that the victim was a law enforcement officer engaged in the performance of his official duties (R. 543). The evidence showed that Officer Bauer was not involved in his official duties. During opening statement, the prosecutor stated that Officer Bauer worked five days a week as a detective for the City of North Miami and that on a day that could have been his day off, he worked an eleven hour shift at the Kislak National Bank (T. 1092).

Accordingly, the evidence showed that Officer Bauer was not on duty that day but rather that he was working at the bank in an off-duty capacity. The plain language of this aggravating circumstance thus shows that it is not applicable to this case.

Furthermore, there is no evidence that the Defendants had knowledge that Officer Bauer was a police officer. The evidence is to the contrary as the Defendants thought that Officer Bauer was a security guard (T. 1838,

1841). Appellant submits that for this aggravating circumstance to apply, the evidence must show beyond a reasonable doubt that the Defendants knew that Officer Bauer was a police officer.

Indeed, in Castor v. State, 587 N.E.2d 1281 (Ind. 1992), the Supreme Court of Indiana held that for this aggravating circumstance to apply, the defendant must know that the victim was a law enforcement officer. Id. at 1290. Accordingly, this aggravating circumstance was never proven beyond a reasonable doubt.

The only remaining aggravating circumstances are that the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person (which referred to actions taken during this robbery) and that the capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit or in flight after committing or attempting to commit a robbery (R. 542).

Appellant submits that these aggravating circumstances must be considered as one aggravating circumstance and not as two separate aggravating circumstances. These aggravating factors are duplicative

because both factors are based on a single aspect of the offense, that being the robbery of Kislak Bank. Kearse v. State, 662 So.2d 677, 685 (Fla. 1995). Furthermore, improper doubling occurs when aggravating factors refer to the same aspect of the crime. Green v. State, 641 So.2d 391, 395 (Fla. 1994), cert. denied, 115 S.Ct. 1120 (1995). Accordingly, we are left with just one aggravating circumstance in this case.

Should this Court nevertheless find that the capital felony was committed for pecuniary gain, Appellant submits that this aggravator would merge with the one remaining aggravator for a total of one aggravating circumstance. See, Jackson v. State, 575 So.2d 181, 189-190 (Fla. 1991) (murder committed while Jackson was engaged in, or was an accomplice in, the crime of robbery; the murder was committed for financial gain; and Jackson had been previously convicted of a violent felony-this robbery-merged into one aggravating circumstance because each stemmed from a single criminal act. Although held that armed robbery improperly used in aggravation, this Court did not disapprove of the merging of the three aggravators).

In Nibert v. State, 574 So.2d 1059, 1063 (Fla. 1990), this Court stated that it has affirmed death sentences supported by one aggravating circumstance only in cases involving either nothing or very little in mitigation. As shall be seen, there is substantial mitigation present in this case making the death sentence an improper punishment.

POINT VIII.

THE COURT ERRED IN IMPOSING THE DEATH PENALTY ON THE DEFENDANT, WHERE A WEIGHING OF THE AGGRAVATING AND MITIGATING CIRCUMSTANCES SUPPORT A SENTENCE OF LIFE IMPRISONMENT.

Appellant will adopt and incorporate by reference Point III as set forth in pgs. 19-30 of the Initial Brief filed by Andrew M. Kassier with the following additions: The law is settled that a mitigating circumstance must be reasonably established by the greater weight of the evidence. Nibert v. State, 574 So.2d 1059, 1061 (Fla. 1990). Moreover, this Court has made clear that when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved. Knowles v. State, 632 So.2d 62, 67 (Fla. 1993). In analyzing the possible mitigating circumstances, the trial court committed several errors.

The first error that the trial court committed occurred in failing to find the mitigating circumstance that the defendant was an accomplice in the capital felony committed by another person and that his participation was

relatively minor (R. 546). In finding that Mr. Fernandez was a major player in the bank robbery, the trial court relied on the fact that it was the Defendant who brought the idea to rob the bank to his co-Defendants (R. 546). This statement is misplaced as the record showed that although Mr. Fernandez purportedly introduced Mr. Cromer to the co-Defendants, the prosecutor agreed that it was Cromer who told the co-Defendants about the plan to rob the bank (T. 1496). In addition, the evidence was abundant that the plan to rob the bank was Cromer's plan (T. 1473), Cromer agreed that he initiated the plan for the robbery of the bank (T. 1475), and Cromer agreed that he planned the robbery (T. 1477).

In the scale of participation during the actual robbery, Mr. Fernandez is next to last from the bottom. Franqui and Gonzalez accosted the tellers and shot Officer Bauer. Pablo San Martin ran up to the teller and grabbed the money tray. Mr. Fernandez drove one of the getaway cars and Pablo Abreau drove the final getaway car. Accordingly, the evidence showed that during the offense, there were three individuals who had a greater involvement than Mr. Fernandez. Compared to these three individuals, Mr.

Fernandez's participation was relatively minor since he did not shoot anybody and he did not accost anybody.

The second error committed by the trial court occurred during the consideration of whether the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired (R. 548). The analysis of the trial court is confusing as it appears that the trial court may have considered the test for insanity under the McNaughton Rule or at the very least, the trial court did not make it clear that it was not considering the test for insanity. In Ferguson v. State, 417 So.2d 631 (Fla. 1982), it was held that if the trial court improperly uses the test for insanity in considering this mitigating circumstance, the case must be remanded to the trial court for resentencing. Since it is not clear if the trial court used the test for insanity in the present case, this matter must be remanded for clarification of the consideration of this mitigating circumstance.

The third error committed by the trial court occurred when the court considered the mitigating circumstance of whether the Defendant acted under extreme duress or under the substantial domination of another person

(T. 546-548). In considering this mitigating circumstance, the trial court analyzed the relative participation of each defendant and in so doing, stated that had Ricardo Gonzalez not played his part in the bank robbery, Officer Bauer would probably still be dead (T. 547). This is absolutely wrong as the evidence established that it was Gonzalez's bullet that killed Officer Bauer (T. 1896, 2028, 2055). The court also erred when it stated that it was convinced that Mr. Fernandez was the driving force behind the events that led to the death of Officer Bauer (R. 547). This is an erroneous conclusion as the true driving force behind this crime was state witness Gary Cromer, who masterminded this offense.

Furthermore, Appellant fails to understand where the information regarding Raul Lopez, which the trial court mentions in its order, came from (R. 547). Apparently, it was testified to by Detective Nabut when the state sandbagged the defense and elicited the testimony of Detective Nabut in front of the court once all the evidence had been presented in front of the advisory jury in the sentencing phase, with no notice to the defense that this evidence would be presented, and over defense objection (S.R.1-174-181). This was a blatant violation of the super due process that a defendant is

entitled to in a death sentence proceeding, and as argued by Mr. Fernandez's trial counsel, it deprived Mr. Fernandez the opportunity to challenge this evidence in front of the advisory jury and allowed the state to present rebuttal evidence which it did not have to place in front of the advisory jury (S.R.1-174-175). Accordingly, this case must be remanded for proper consideration of this mitigating circumstance without this inadmissible evidence being considered.

The fourth error on the part of the trial court occurred when it considered Mr. Fernandez's family history as a non-statutory mitigating circumstance and found that it existed but gave it little weight (R. 549). The trial court failed to consider the testimony of Mayling Fernandez, Mr. Fernandez's seventeen-year old sister, in which she testified that she was currently involved in a program called "New Life" which was a program for recovering addicts (T. 2174). Ms. Fernandez was a recovering cocaine addict (T. 2175). Ms. Fernandez also testified about having run away from home and about the lack of discipline in the household (T. 2180-2181). This evidence was crucial to the determination of the severe problems which existed in Mr. Fernandez's home.

The trial court also failed to consider the testimony of Ms. Fernandez regarding the adverse effect on the Fernandez children when their great-grandmother passed away (T. 2176-2179). This adverse effect was especially pronounced in Mr. Fernandez's situation (T. 2178). The trial court found this mitigating circumstance to exist but gave it little weight. Appellant submits that considering the evidence which the trial court failed to consider, this mitigating circumstance is entitled to greater weight.

In Brown v. State, 526 So.2d 903, 908 (Fla. 1988), it was held that family background and personal history may be particularly significant mitigating evidence in a case where the defendant at the time of the crime was a borderline defective eighteen-year old functioning emotionally as a disturbed child.

This language from the Brown opinion is stunning in its applicability to the present case as Mr. Fernandez was nineteen years old at the date of the crime (R. 548) and the evidence established that Mr. Fernandez's I.Q. was 75 which is considered to be at the borderline of intelligence (T. 2255-2256). It is one step above mental retardation and below the category of someone that is in the low average range of intelligence-in other words,

somewhere in between the low average and mentally retarded (T. 2255-2256). Such persons often times just act rather than thinking through what the consequences might be (T. 2257). Accordingly, Appellant is entitled to greater weight as to this mitigating circumstance.

The fifth error committed by the trial court concerned the Defendant's psychological and educational history and the court's finding that this mitigating circumstance did not exist (R. 549-550). Mr. Fernandez was not of low average intelligence, as the trial court found (R. 549). Rather, Mr. Fernandez's intelligence level is one step above mental retardation and below someone in the low range of intelligence (T. 2256). Ninety-two out of every one-hundred people would have a higher I.Q. than Mr. Fernandez (T. 2256). Such people don't have a great deal of insight and often times they just act rather than thinking about the consequences (T. 2257). Mr. Fernandez also suffered from a personality disorder resulting in impulsiveness (T. 2266-2268) and had even tried to poison himself in 1986 or 1987 (T. 2152). There was also evidence that Mr. Fernandez had been previously diagnosed with bipolar disorder, which is a major mental illness

having to do with a mood disorder and is characterized by mood swings and in Mr. Fernandez's case, also included auditory hallucinations (T. 2262).

In Thompson v. State, 648 So.2d 692, 697 (Fla. 1994), cert. denied, 115 S.Ct. 2283 (1995), it was held that low intelligence is a significant mitigating factor with the lower scores indicating the greater mitigating influence. Accordingly, the trial court erred in giving no weight to the evidence of Mr. Fernandez's extremely low intelligence and finding that this mitigating circumstance did not exist. This mitigating circumstance was more than reasonably established by the greater weight of the evidence. See, Ferrell v. State, 653 So.2d 367, 371 (Fla. 1995) ("some weight must be given to all established mitigators").

The sixth error committed by the trial court was failing to even consider the non-statutory mitigating circumstance of the Defendant's potential for rehabilitation. This was presented to the trial court for consideration in Mr. Fernandez's sentencing memorandum (R. 524) but the trial court failed to consider it at all in its sentencing order. The law is settled that the sentencer may determine the weight to be given relevant mitigating evidence, but they may not give it no weight by excluding such

evidence from their consideration. Eddings v. Oklahoma, 455 U.S. 104, 114, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). Accordingly, this case must be remanded for consideration of this relevant and applicable mitigating circumstances.

The seventh error committed by the trial court is that in rejecting various statutory and non-statutory mitigating circumstances, the court used the standard of being reasonably convinced as to the existence of the mitigating circumstance. The proper standard for proving mitigating circumstances is whether it is reasonably established by the greater weight of the evidence. Nibert v. State, 574 So.2d 1059, 1061 (Fla. 1990). Accordingly, since the court used the wrong standard in rejecting the mitigating circumstances, this case must be remanded to the trial court for proper consideration of the mitigating circumstances.

The eight error committed by the trial court was in giving too little weight to the non-statutory mitigating circumstance of Mr. Fernandez's cooperation with authorities (R. 551). The trial court found that Mr. Fernandez was "instrumental" in securing the arrests of the co-Defendants;

the trial court did find the existence of this mitigating circumstance but decided to give it only "little weight" (R. 551).

The record showed that Mr. Fernandez was the first of the co-Defendants to cooperate with the police and he showed the police where the co-Defendants lived (T. 2207-2208). As a result of Mr. Fernandez's cooperation and assistance, the co-Defendants were arrested and brought to justice (T. 2208). Appellant submits that as a matter of law, this mitigating circumstance was entitled to far greater weight than what was given by the trial court because but for Mr. Fernandez, the other co-Defendants would not have been brought to justice.

The extent of Mr. Fernandez's cooperation was further illustrated by evidence of a telephone threat to Ms. Fernandez, Appellant's sister, by co-Defendant San Martin (T. 2209). Mr. Fernandez risked his safety and his family's safety by his instrumental cooperation with the authorities and this risk should have been considered by the trial court but was not done.

Unfortunately, the trial court did not allow this evidence of the threat to Ms. Fernandez because it found that Ms. Fernandez had never met Mr. San Martin hence she could not testify as to the telephone call (T. 2210).

Appellant submits that the proper evidentiary foundation is not whether Ms. Fernandez had met Mr. San Martin but whether she was familiar with his voice. See, Brown v. City of Hialeah, 30 F.3d 1433, 1437 (11th Cir. 1994) (once a witness establishes familiarity with an identified voice, it is up to the jury to determine the weight to place on the witness' voice identification).

Since the trial court misconstrued the evidentiary foundation necessary for admission of this threat by San Martin, this mitigating circumstance could not be properly corroborated and fully presented and had this evidence of the threat been admitted, the trial court may have given greater weight to this mitigating circumstance of cooperation with the authorities.

Accordingly, it is necessary to remand these proceedings for proper determination of this mitigating circumstance after proper consideration of whether evidence of this threat should be admitted or in the alternative, as a matter of law, to find that this mitigating circumstance was entitled to greater weight.

The ninth error committed by the trial court was that this evidence of the threat by co-defendant San Martin to Ms. Fernandez, which as

mentioned, was erroneously excluded, was also relevant to the mitigating circumstance of whether Mr. Fernandez acted under extreme duress or under the substantial domination of another person. This threat related back to and corroborated Mr. Fernandez's contention that he was forced to participate in this robbery or else be killed (T. 2203-2205).

The court further erred in excluding the testimony of Mr. Fuentes, an investigator, who would have testified that during the course of his investigation, Pablo Abreau indicated to him that there had been threats against Abreau and Appellant Fernandez by co-Defendant Franqui to the effect that it was too late to back out and either you continue or we kill you or threaten your families (T. 2131). Counsel for Mr. Fernandez argued that this evidence was relevant to corroborate what Mr. Fernandez had stated regarding having been threatened into committing this offense and did not amount to hearsay as it was an operative fact and did not come in for the truth of the matter asserted (T. 2133-2134). Mr. Fernandez testified during the penalty phase that Franqui forced Mr. Fernandez to go through with the robbery under threats to both Mr. Fernandez and to the Fernandez family (T. 2203-2204).

The trial court ruled that this proposed testimony of Mr. Fuentes was hearsay and did not allow this testimony (T. 2140). The court did allow the production of Mr. Abreau himself but counsel for Mr. Fernandez decided not to put Mr. Abreau on the stand (T. 2314-2315). The trial court committed error as the law is settled that hearsay is admissible during the penalty phase of death sentence proceedings under the relaxed rules of evidence applicable to these proceeding. Cannady v. State, 620 So.2d 165, 169 (Fla. 1993).

Accordingly, this proposed mitigating circumstance could not be fully presented and was not adequately considered by the trial court. It is thus necessary to remand this case for proper consideration of the mitigating circumstance of whether Mr. Fernandez acted under extreme duress or under the substantial domination of another person.

The tenth error committed by the trial court came when in considering the non-statutory mitigating circumstance of remorse (R. 550), the trial court improperly intertwined it with acceptance of responsibility and ruled that acceptance of responsibility was the first step in assessing remorse on the

part of the defendant (R. 550). Appellant submits that this interpretation on the part of the trial court is not supported by the law of this state.

Valle v. State, 581 So.2d 40, 49 (Fla. 1991) is the only opinion that Appellant can locate where remorse and acceptance of responsibility were treated contemporaneously. However, nothing in that opinion indicates that remorse and acceptance of responsibility are to be considered together. Indeed, Appellant submits that the weight of the law in this state is to the contrary in that remorse is an independent mitigating circumstance.

The trial court further erred when in considering remorse, it failed to consider the testimony during the guilt phase of Lazaro Hernandez, who stated that when Mr. Fernandez made the statement regarding his involvement in the robbery, Mr. Fernandez seemed sorrowful (T. 1436).

This was a crucial statement because it showed Mr. Fernandez's remorse before his arrest. The trial court only considered post-arrest statements of remorse and was clearly skeptical as it felt that this evidence could be an effort to establish mitigation for the trial and sentencing hearing (R. 550). Accordingly, the failure to consider this pre-arrest manifestation of remorse along with the misinterpretation of the law regarding remorse

precluded a full and fair consideration of this mitigating circumstance. This matter must be remanded for a proper consideration of remorse.

The multitude of errors committed by the trial court in dealing with the mitigating circumstances mandates that Mr. Fernandez's sentence of death be vacated.

POINT IX.

THE ENMUND/TISON CULPABILITY REQUIREMENT HAS NOT BEEN MET IN THIS CASE MAKING THE DEATH PENALTY IMPROPER AND FURTHERMORE, THE DEATH PENALTY IS NOT PROPORTIONAL UNDER THE FACTS OF THIS CASE.

Appellant will adopt and incorporate by reference the Enmund/Tison discussion set forth in pgs. 28-30 of the Initial Brief filed by Andrew M. Kassier and will add as follows:

The first Enmund/Tison finding made by the trial court was that Mr. Fernandez intended that lethal force be used during the commission of the robbery (R. 554). In making this determination the trial court relied on Jackson v. State, 502 So.2d 409 (Fla. 1986) (R. 552-553). However, Appellant submits that the lethal force portion of the Enmund analysis has been rendered void by the subsequent Tison opinion.

In Jackson v. State, 575 So.2d 181, 190-191 (Fla. 1991), this Court held that Tison had eliminated this portion of the Enmund analysis when this Court deleted the language regarding lethal force from the list of factors to be considered under Enmund (leaving whether defendant actually killed,

intended to kill, or attempted to kill) and went on to state that mere participation in a robbery that resulted in murder is not enough culpability to warrant the death penalty, even if the defendant anticipated that lethal force might be used, because the possibility of bloodshed is inherent in the commission of any violent felony and this possibility is generally foreseeable and foreseen. Accordingly, the trial court in the present case considered a factor that is no longer valid in deciding that the Enmund/Tison culpability requirement had not been met.

The second erroneous Enmund/Tison finding by the trial court was that Mr. Fernandez was a major participant in this offense (R. 554). In the scale of participation, Mr. Fernandez was fourth out of a possible five in levels of participation during the actual robbery. In Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), the Supreme Court stated that for purposes of imposing the death penalty, a defendant's criminal culpability must be limited to his participation in the offense. Enmund at 458 U.S. 801. Accordingly, the evidence shows that Mr. Fernandez can not be classified as a major participant in this offense as he

was not involved in the shooting of Officer Bauer and he was not involved in accosting the tellers and in taking the money tray from the teller.

The third erroneous Enmund/Tison finding of the trial court was that Mr. Fernandez's mental state was one of reckless indifference (R. 554). Indeed, one of the underpinnings of the trial court's analysis was that Mr. Fernandez knew that there would be a police officer or armed guard protecting the tellers and that the "officer" would not just allow the robbery to happen (R. 553-554). The record does not support this determination.

Gary Cromer testified that when showing the Defendants the drive-through teller area, he did not mention that the tellers were accompanied by anyone (T. 1471). Accordingly, as stated in the Initial Brief, there was no evidence introduced against Mr. Fernandez that before the actual moments immediately preceding the robbery, Mr. Fernandez knew that there would be a need to employ deadly force. The fact that Officer Bauer was told not to move, and was shot after going for his gun, buttresses Appellant's position that the original plan did not include using deadly force.

The fourth erroneous Enmund/Tison finding committed by the trial court was that in finding that Mr. Fernandez's mental state was one of

reckless indifference, the court used the standard of a reasonable person and failed to take into account Mr. Fenandez's substantial mental handicap which included extremely low intelligence, bordering on retardation, and impulsiveness which precluded thoughtful forethought of the consequences of his actions (T. 2256-2260). Mr. Fernandez also suffered from a personality disorder resulting in impulsiveness (T. 2266-2268). In Enmund, the Supreme Court held that punishment must be tailored to a defendant's personal responsibility and moral guilt. Enmund, at 458 U.S. 800, 102 S.Ct. 3378. Appellant submits that this is a highly individualized determination that must subjectively focus on the defendant as opposed to objectively focusing on the defendant, the way in which the trial court did.

The fifth error committed by the trial court in performing the Enmund/Tison analysis was in considering the testimony of Detective Nabut (R. 554, n. 5), who as previously discussed, was a surprise witness after the advisory jury had already reached a verdict, and whose testimony was used by the state to sandbag the defense, all over defense objection (S.R.1-173-181). As trial counsel for Mr. Fernandez argued, the state was basically allowed to present rebuttal evidence without putting it in front of

the advisory jury and without allowing the defense the opportunity to challenge this evidence in front of the advisory jury (S.R.1-174-176). This evidence was also not available to the advisory jury when it performed its own Enmund/Tison analysis.

This sandbagging was totally at odds with the super due process that a defendant is entitled to in a death sentence proceeding and the use by the trial court of this evidence in its Enmund/Tison analysis renders this entire analysis null and void. Mr. Fernandez is entitled to a new sentencing proceeding for proper determination of the Enmund/Tison culpability requirement without consideration of this testimony.

The sixth error committed by the trial court came when in improperly considering the testimony of Detective Nabut during its Enmund/Tison analysis, the trial court made the assertion that Mr. Fernandez had helped to set up another robbery, the Cabana robbery, from behind the scenes (R. 554). The origin of this assertion was a recollection by the trial court, confirmed by the prosecutor, that in his confession, co-Defendant Franqui had stated that Mr. Fernandez had given the information on the Cabanas in order to do the robbery (S.R.1-181).

This recollection on the part of the trial court came during the improper testimony of Detective Nabut and further tainted the trial court's Enmund/Tison analysis as the advisory jury also never had an opportunity to consider this evidence in making its own analysis under Enmund/Tison and the defense never had the opportunity to challenge this evidence in front of the advisory jury.

The cumulative effect of the trial court's errors during the Enmund/Tison analysis warrants a remand of this case for proper determination of this crucial culpability requirement.

Furthermore, a death sentence under the facts of this case fails a proportionality analysis. In reviewing the proportionality of a death sentence, this Court must consider the totality of the circumstances in a case and compare it with other capital cases. Sliney v. State, No. 83, 302 (Fla. July 17, 1997). Proportionality review is not simply a comparison between the number of aggravating and mitigating circumstances. Sliney v. State, (Kogan, C.J., dissenting). With these principles in mind, a proportionality analysis does not support a sentence of death in this case.

The three major factual factors present in this case, for purposes of a proportionality analysis, are as follows: 1)the Defendant was a "getaway driver"; 2) the Defendant had no participation in the killing done by a co-Defendant or co-Defendants during a robbery; and 3) the victim resisted the robbery. In cases where this factual scenario has been found to exist, a sentence of death has not survived challenge.

In Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed. 2d 1140 (1982), the defendant was the driver of a getaway car and his co-defendants had gone to a house to commit an armed robbery, and the co-defendants shot and killed the victims after being fired on by one of the residents. The United States Supreme Court held that the death penalty could not be lawfully imposed under these facts.

In Jackson v. State, 575 So.2d 181 (Fla. 1991), the defendant was the getaway driver but there was no evidence to show that Jackson personally possessed or fired a weapon during the robbery or that he harmed the victim. There was no evidence that Jackson intended to harm anybody when he walked into the store, or that he expected violence to erupt during the robbery. There was no real opportunity for Jackson to prevent the murder

since the crime took only seconds to occur, and the sudden single gunshot was a reflexive reaction to the victim's resistance. Id. at 192-193.

This Court went on to hold that to give Jackson the death penalty for felony murder on these facts would quality every defendant convicted of felony murder for the ultimate penalty. Id. at 193. Accordingly, the sentence of death was vacated.

In State v. Rodriguez, 656 A.2d 262 (Del.Super. 1993), the defendant was a getaway driver in the robbery of a liquor store. Rodriguez was placed at the scene of the murder with a gun in his hand. In vacating the sentence of death, the Court held that there was no evidence of an anticipated killing. The evidence was consistent with the theory that the victim resisted the robbery, inducing the gunman to fire his weapon. There was no evidence of a fully-formed conscious purpose to kill and there was no evidence that Rodriguez fired the shots that killed the victim. There was also no evidence that Rodriguez expected violence to erupt during the robbery and there was no real opportunity for Rodriguez to prevent the murder since it occurred suddenly without apparent deliberation. In brief, the evidence fell short of demonstrating beyond a reasonable doubt a reckless indifference to human

life on the part of Jose Rodriguez and it followed that a death sentence could not constitutionally be imposed in this case. Id. at 278.

The failure of a sentence of death to survive proportionality review in these circumstances so analogous to Mr. Fernandez's case conclusively shows that a death sentence may not be constitutionally imposed on Mr. Fernandez.

Furthermore, the fact that this Court has reversed the death sentences against two of the co-Defendants in this case, Franqui and Gonzalez, **who were the actual shooters**, further goes to show that the death sentence against Mr. Fernandez is disproportional and must also be reversed. See, Franqui v. State, No. 84,701 (Fla. July 3, 1997) and Gonzalez v. State, No. 84,841 (Fla. Sept. 18, 1997).

POINT X.

THE JURY INSTRUCTIONS READ TO THE ADVISORY JURY WERE IMPROPER AS THEY WERE EITHER IN VIOLATION OF THE UNITED STATES CONSTITUTION OR IN VIOLATION OF UNITES STATES SUPREME COURT CASELAW.

The first problem with the jury instructions during the penalty phase was that the trial court instructed the jury that before it could recommend a sentence of death, it must find that the defendant killed or attempted to kill or intended that a killing take place or intended that lethal force be employed (S.R.2-271).

As previously argued, in Jackson v. State, 575 So.2d 181, 190 (Fla. 1991), this Court held that the United States Supreme Court in Tison v. Arizona had rendered the portion of Enmund v. Florida dealing with the use of lethal force void as in Jackson, this Court deleted the lethal force portion of the Enmund analysis and further went on to state that mere participation in a robbery that resulted in murder is not enough culpability to warrant the death penalty, even if the defendant anticipated that lethal force might be

used, because the possibility of bloodshed is inherent in the commission of any violent felony and this possibility is generally foreseeable and foreseen.

Accordingly, the advisory jury was instructed as to an element which is no longer valid law in Florida and Mr. Fernandez's sentence must be reversed and remanded. This error was further compounded as the prosecutor argued this voided lethal force factor to the advisory jury during closing argument (S.R.2-246).

The second problem with the jury instructions during the penalty phase was that the trial court stated the following to the jury: "As you have been told, the final decision as to what punishment that'll be imposed is the responsibility of the judge" (S.R.2-268). The court went on to state as follows: "Your recommendation as to what sentence should be imposed on this defendant will be given great weight by this court in determining what sentence to impose in this case (S.R.2-269). Prior to the commencement of the penalty proceedings, the trial court also told the advisory jury that "[t]he final decision as to what punishment shall be imposed rests solely with the judge of this court. However, the law requires that you the jury render to the court an advisory sentence as to what punishment should be imposed

upon the Defendant and I will give great weight and consideration to your advisory sentence" (T. 2146).

In Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), the United States Supreme Court held that it was constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere and that such a determination is in violation of the Eight Amendment. Id. at 472 U.S. 328, 340. It has also been held that the concerns voiced in Caldwell are triggered when a Florida sentencing jury is misled into believing that its role is unimportant. Mann v. Dugger, 844 F.2d 1446, 1454 (11th Cir. 1988), cert. denied, 489 U.S. 1071 (1989).

The instructions given by the trial court violated the principles set forth in Caldwell and Mr. Fernandez's sentence of death must be vacated.

The third problem with the jury instructions during the sentencing phase was that the trial court instructed the jury that it was the jury's duty to render an advisory sentence based upon its determination as to whether sufficient aggravating circumstances exist to justify the imposition of the

death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist (S.R.2-269). The court further instructed the advisory jury that should it find sufficient aggravating circumstances do exist, it will then be its duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances (S.R.2-271).

Appellant submits that these instructions instructed the jury that once it found aggravating circumstances, then there existed a presumption that death was the appropriate penalty and that it then became Mr. Fernandez's burden to rebut this presumption by showing, through mitigating circumstances, that the death sentence was not the appropriate penalty. Accordingly, these instructions shifted the burden of proof to Mr. Fernandez to show that death was not the appropriate penalty.

In Sandsrom v. Montana, 442 U.S. 510, 524, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), the United States Supreme Court held that a presumption found in jury instructions, even if not conclusive, which has the effect of shifting the burden of persuasion to the defendant, would be constitutionally deficient as it would deprive a defendant of due process of

law. Since the jury instructions used in Mr. Fernandez's case contained such a burden-shifting presumption, Mr. Fernandez's due process rights were violated and his sentence of death must be vacated. This error was further compounded by the prosecutor's closing argument during the penalty phase in which he stated that "...nothing he can ever show you in mitigation could ever overcome (emphasis added) the aggravation of an unselfish human being who's taken on the responsibility of protecting us" (S.R.2-248). This argument further made it clear to the jury that it was Mr. Fernandez's burden to rebut the presumption that death was the appropriate penalty.

The fourth problem with the jury instructions during the penalty phase was that the trial court instructed the advisory jury that, in making its determination under Tison v. Arizona, that it had to determine whether the defendant was a major participant in a felony that resulted in the victim's death and his mental state was one of reckless intent (S.R.2-271). The proper standard to use is major participation in the felony combined with reckless indifference to human life. Tison, 481 U.S. at 158. Since the trial court erroneously instructed the jury to consider reckless intent instead of

reckless indifference, the advisory jury was improperly instructed as to this crucial culpability requirement and Mr. Fernandez's sentence of death must be vacated.

The fifth problem with the jury instructions during the penalty phase was that they failed to direct the jury to specify which aggravating factors authorized the imposition of the death sentence, to specify which mitigating circumstances it found and which it rejected, and to specify its finding under Enmund/Tison. The failure of the jury to make these determinations, when its verdict will be given great weight by the trial court, precludes meaningful appellate review of the sentence of death thus violating the due process of law provisions of both the Fifth and Fourteenth Amendments of the United States Constitution.

The sixth problem with the jury instructions during the penalty phase was that the trial court instructed the jury that "[a] mitigating circumstance need not be proved beyond a reasonable doubt by the evidence. If you are reasonably convinced (emphasis added) that a mitigating circumstance exists, you may consider it as established." (S.R.2-272).

These instructions used the wrong standard regarding burden of proof of mitigating circumstances as the proper standard is that a mitigating circumstance must be "reasonably established by the greater weight of the evidence." Nibert v. State, 574 So.2d 1059, 1061 (Fla. 1990). Accordingly, the advisory jury was never given the proper standard to use in considering mitigating circumstances.

The various errors which occurred during the jury instructions in the penalty phase mandates that the sentence of death be set aside.

POINT XI.

REVERSIBLE ERROR WAS COMMITTED BY THE PROSECUTOR DURING CLOSING ARGUMENT TO THE ADVISORY JURY AS THE PROSECUTOR MADE IMPROPER COMMENTS WHICH WERE AN APPEAL TO THE ADVISORY JURY'S SYMPATHY AND WHICH SOUGHT TO INFLAME THE PASSIONS OF THE ADVISORY JURY.

During closing argument in the penalty phase, the prosecutor stated that Mr. Fernandez's selfish greed caused a death (S.R.2-238). The prosecutor went on to state that Officer Bauer was not selfish and continued as follows:

> He didn't take the job because money, that job indicates by the job itself the unselfishness ability of a human being to go out and risk their lives to protect other human beings. It shows the unselfishness of a human being to go out and try to make their community a safer place to live.

(S.R.2-238).

The prosecutor then went on to argue as follows:

> You see, automatically when you kill a police officer you say something to all of us. Automatically when you are involved in the death of a police officer you say something

> different to anyone else in any other murder. Because what you say to us is this. That no matter what authority we put to you, that no matter what laws we set forth in front of you, police officers are recognized as our protectors. If you are willing to kill the protector, that's why that is there.

(S.R.2-245-246).

Although no objection was entered to these comments, they nevertheless amounted to fundamental error. The comment regarding Officer's Bauer's lack of selfishness was error because the law is settled that excessive focus on the characteristics of the victim, even if no explicit link is drawn between those factors and the punishment sought, may also be improper when the effect is to inject irrelevant considerations into the sentencing decision. Brooks v. Kemp, 762 F.2d 1383, 1409 (11th Cir. 1985), vacated on other grounds, 478 U.S. 1016, judgment reinstated, 809 F.2d 700 (11th Cir.), cert. denied, 483 U.S. 1010 (1987).

In the present case, Officer Bauer's lack of selfishness had absolutely no bearing on any aggravating or mitigating circumstances, which is what the prosecutor was supposed to be arguing, but rather was a not so subtle attempt to draw sympathy and as such was improper argument. See,

Rhodes v. State, 547 So.2d 1201, 1206 (Fla. 1989) (improper to use closing argument as an unnecessary appeal to the sympathies of the jurors, calculated to influence their sentence recommendation). In essence, the prosecutor argued a non-statutory aggravating circumstance, lack of selfishness of the victim, which was absolutely improper and amounted to error.

The comment about Mr. Fernandez killing one of our protectors was also an improper argument as in Bertolotti v. State, 476 So.2d 130 (Fla. 1985), this Court stated that the proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law. Id. at 134.

The prosecutor's comment that Mr. Fernandez had killed one of our protectors was used to inflame the minds and passions of the jurors and also amounted to error. The cumulative effect of these two improper arguments denied Mr. Fernandez his right to a fair sentencing proceeding and

amounted to reversible error. Mr. Fernandez's death sentence must be vacated.

POINT XII.

THE DEATH SENTENCE IMPOSED ON MR. FERNANDEZ VIOLATES BOTH THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE UNITED STATES CONSTITUTION AND THE CRUEL OR UNUSUAL PUNISHMENT CLAUSE OF THE FLORIDA CONSTITUTION.

The death sentence imposed on Mr. Fernandez violates both the United States and Florida Constitutions because it qualifies as being both "cruel or unusual" under Fla. Const. Art. I, s. 17 and "cruel and unusual" under the Eight Amendment to the United States Constitution. These provisions are violated in at least three different ways in this case.

The first violation of these provisions is because the death sentence is disproportionate under the facts of this case (See, Point IX regarding proportionality, supra.).

The second violation of these provisions is because the death sentence itself amounts to "cruel or unusual" or "cruel and unusual" punishments thus violating both the Florida and United States Constitutions.

The third violation of these provisions is that because of the manner in which the death sentence is carried out in Florida, by electrocution, it is also

in violation of the Florida and United States Constitutions. Electrocution is a cruel and archaic method of punishment which should have no place in an enlightened society on the eve of the twenty-first century.

Appellant recognizes that this Court has repeatedly rejected constitutional challenges to capital punishment. However, this Court has never specifically considered the primary argument advanced by former Justice Blackmun in his landmark dissent form denial of certiorari in Callins v. Collins, 510 U.S. 1141, 114 S.Ct. 1127, 127 L.Ed.2d 435 (1994) (capital punishment unconstitutional in view of paradoxical constitutional commands of non-arbitrariness and need for jury discretion to consider all mitigation). Nor has this Court discussed the larger issue suggested by Justice Stevens' opinion respecting the denial of certiorari in Lackey v. Texas, 514 U.S. 1045, 115 S.Ct. 1421, 131 L.Ed. 2d 304, subsequent proceedings, 514 U.S. 1093, 115 S.Ct. 1818, 131 L.Ed.2d 741 (1995)-namely, that capital punishment today may be unconstitutional because of the inordinate delays between sentencing at trial and actual execution, which are now inherent in our system.

Even jurists in favor of capital punishment have questioned its present usefulness and validity as a result of such delays. See, e.g. Ninth Circuit Judge Alex Kozinski, *For an Honest Death Penalty*, New York Times, March 8, 1995, at p. A15 ("We have constructed a [death penalty] machine that is extremely expensive, chokes our legal institutions, visits repeated trauma on victims' families and ultimately produces nothing like benefits we would expect from an effective system of capital punishment.").

Thus, in light of these recent developments in legal thought, this Court should reconsider whether, at least as currently administered, capital punishment violates the United States and/or Florida Constitutions.