IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,700

FERNANDO FERNANDEZ,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

AMENDED BRIEF OF APPELLEE

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POINTS ON APPEAL
(Restated)

I.

THE TRIAL COURT PROPERLY GRANTED THE STATE'S CAUSE CHALLENGES OF JURORS MENDEZ, ST. VICTOR, ARMAND AND GILLUM, WHERE EACH STATED THAT HE OR SHE WOULD BE UNABLE TO RECOMMEND THE DEATH PENALTY UNDER ANY CIRCUMSTANCES.

II.

DEFENDANT WAS NOT ENTITLED TO A MISTRIAL BASED UPON THE PROSECUTOR'S OPENING STATEMENT.

III.

THE TRIAL COURT PROPERLY ALLOWED THE ADMISSION OF OFFICER BAUER'S CLOTHING, WHICH WAS RELEVANT TO SHOW THAT HE WAS AN ON-DUTY LAW ENFORCEMENT OFFICER, AND TO SHOW THE LOCATION OF THE BULLET HOLES.

IV.

THE TRIAL COURT PROPERLY ADMITTED DEFENDANT'S STATEMENTS OVER HIS OBJECTION THAT THEY WERE PROTECTED BY THE COMMUNICATION-WITH-CLERGY PRIVILEGE.

V.

THE TRIAL COURT DID NOT IMPROPERLY LIMIT DEFENDANT'S CROSS-EXAMINATION OF PRADO AND HERNANDEZ.

VI.

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION, AFTER 75 DAYS OF PREPARATION TIME HAD ALREADY BEEN ALLOWED, FOR AN ADDITIONAL CONTINUANCE.

VII.

THE TRIAL COURT'S FINDINGS AS TO THE AGGRAVATING CIRCUMSTANCES ARE SUPPORTED BY THE RECORD.

VIII.

THE TRIAL COURT PROPERLY ADDRESSED THE PROFFERED MITIGATION.

IX.

THE TRIAL COURT PROPERLY DETERMINED THAT DEFENDANT'S ACTIONS SATISFIED THE ENMUND/TISON CULPABILITY REQUIREMENTS.

X.

DEFENDANT FAILED TO PRESERVE HIS CLAIMS AS TO THE PENALTY-PHASE JURY INSTRUCTIONS FOR APPELLATE REVIEW.

XI.

THE PROSECUTOR'S CLOSING ARGUMENT WAS NOT IMPROPER.

XII.

DEFENDANT'S UNPRESERVED ATTACKS ON THE CONSTITUTIONALITY OF THE DEATH PENALTY SHOULD BE REJECTED.

STATEMENT OF THE CASE AND FACTS

As has Defendant, the State will rely upon its statement of the case and facts as presented at pages 2-25 of its original brief.[1]

Defendant notes in his statement of the case that the death sentences of codefendants Franqui and Gonzalez have been reversed. (Am. B. 2). As the court is no doubt aware, those sentences were reversed due to the Court's finding of Bruton error based upon the admission of the codefendant statements at their joint penalty phase, and remanded for new penalty-phase proceedings. Franqui v. State, 22 Fla. L. Weekly S374 (Fla. June 26, 1997); Gonzalez v. State, 22 Fla. L. Weekly S593 (Fla. Sept. 18, 1997). As Defendant's trial was partially severed and tried before a different jury than were Franqui and Gonzalez, the reversal of their sentences has no bearing on any issue presented by Defendant.

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[1] On the State's motion, the record was supplemented with excerpts from the transcript in codefendant Franqui's case. In the State's original answer brief, these supplemental transcript pages were referred to as "Fr. T." Although the supplemental record has been repaginated with a Bates-stamp number at the bottom of each page, the original number referred to in the previous brief remains at the top of each page. As this dual pagination will allow easy reference to the cites in the original brief, the State will not set forth any corrected references herein. In this brief, however, the transcripts contained in the Supplemental Record will be referred to by the official page numbers, and designated as "S.R."

SUMMARY OF THE ARGUMENT

1. No reversible error occurred when the trial court granted the State's cause challenge of jurors Mendez, St. Victor, Armand and Gillum, where the claim was not preserved for review, and where each had stated that he or she would be unable to recommend the death penalty under any circumstances, and where defense counsel's "rehabilitation" of the jurors did not address whether any of them could ever vote to recommend a sentence of death.

2. The prosecutor's opening statement, as discussed in the original answer brief, was not improper where it was supported by the evidence adduced, without objection, at trial. As such, no error occurred. Moreover, any error would be harmless beyond a reasonable doubt in view of the overwhelming evidence of Defendant's guilt.

3. The trial court did not abuse its discretion in allowing into evidence the victim's bloody uniform shirt where it was relevant to show that he was identifiable as a police officer, and was used by a state expert to explain his testimony. Moreover, its probative value did not outweigh the prejudicial effect where the blood was not commented on, and the shirt was in no way made a feature of the trial.

4. The trial court properly found that Defendant had not met his burden of demonstrating that statements made to a santeria priest and to an alleged santeria "novice" in the presence of third

parties were privileged communications. As such the statements were properly admitted at trial.

5. The trial court did not abuse its discretion in refusing to allow Defendant to cross-examine the santeria priest as to whether his testimony violated any oath of confidentiality where it was irrelevant because the priest did not testify as to any confidences, and where such cross examination would have been improper "bad acts" impeachment.

6. The trial court did not abuse its discretion in refusing a defense continuance of the penalty phase where the defense team had had 2½ years to prepare before trial, and three months between the verdict and the penalty phase, particularly where the defense was given additional money and time to obtain and present additional evidence to the trial court and never did.

7. The trial court properly found that this murder during a bank robbery was motivated by pecuniary gain. It also properly found that the in-uniform victim who was shot during the holdup was a law enforcement officer acting in his official capacity. The trial court additionally did not err in concluding that the murder of the officer was to avoid arrest, which it merged with the previous factor. Finally, the court did not improperly double the during-a-felony and prior violent felony aggravators by considering separately that the murder was committed during a robbery (which it merged with pecuniary gain) and Defendant's contemporaneous

conviction for the aggravated assault of a second victim.

8. (a)(i) The trial court properly rejected the statutory mitigating circumstance that Defendant was a minor accomplice in the offense where the evidence showed that Defendant instigated the robbery plan, stole the vehicles used in the plan, acquired the murder weapons, was physically present at the scene, and fully shared in the proceeds of the crime.

(ii) The trial court properly rejected the statutory mitigator as to Defendant's capacity to appreciate the criminality of his conduct where there was absolutely no evidence supporting the factor, and his actions otherwise belied it.

(iii) The trial court properly rejected the statutory mitigator that Defendant acted under extreme duress where, despite Defendant's self-serving claims to the contrary, the evidence overwhelming established Defendant as the prime motivator of the crime.

(iv) The trial court acted within its discretion in giving Defendant's family history little weight as a nonstatutory mitigator.

(v) The trial court properly rejected Defendant's relatively low IQ where there was no evidence that Defendant was otherwise impaired, but was merely antisocial.

(vi) The trial court properly addressed Defendant's claims as to his potential for rehabilitation.

(vii) The trial court applied the correct standard of proof to the mitigation.

(viii) The trial court properly gave little weight to Defendant's alleged cooperation with the authorities, and evidence allegedly relating to this factor, consisting of an irrelevant hearsay threat offered by a witness who was unable to identify the maker of the threat, was properly excluded.

(ix) The trial court properly excluded hearsay attributed to codefendant Abreu where Abreu was available as a witness, but Defendant chose not to call him.

(x) The trial court properly considered Defendant's failure to accept any responsibility for the crime in rejecting his purported remorse as mitigation.

8. (b) Finally, in view of the three strong factors established in aggravation, which Defendant has not challenged, any error claimed with regard to the mitigators would be harmless beyond a reasonable doubt.

9. (a)(i) The trial court applied the correct legal standard in determining that Defendant was a major participant and that his state of mind was one of reckless indifference for human life, warranting the death penalty.

(ii) The trial court's conclusion that Defendant was a major participant in the crime was well supported by the record.

(iii) The trial court's conclusion that Defendant

evinced a reckless disregard for human life well supported by the record.

(iv) The trial court did not apply an incorrect legal standard in determining Defendant's mental state.

(v) The trial court properly allowed the State to present additional rebuttal evidence at the post-recommendation hearing before the court.

(vi) The trial court did not consider any extra-record evidence in making its sentencing determination.

9. (b) Defendant's sentence is proportional when compared to other death-sentenced defendants.

10. None of Defendant's claims as to the penalty-phase jury instructions were preserved for review or have merit.

11. The State's penalty-phase closing argument properly commented on the evidence adduced at trial and the nature of the aggravation proven; as such Defendant's unpreserved claim to the contrary is without merit.

12. Defendant's unpreserved attacks on the constitutionality of the death penalty are without merit.

Defendant's convictions and sentences should be affirmed.

ARGUMENT

I.

THE TRIAL COURT PROPERLY GRANTED THE STATE'S CAUSE CHALLENGES OF JURORS MENDEZ, ST. VICTOR, ARMAND AND GILLUM, WHERE EACH STATED THAT HE OR SHE WOULD BE UNABLE TO RECOMMEND THE DEATH PENALTY UNDER ANY CIRCUMSTANCES.

Defendant's first contention is that the trial court erred in granting the State's cause challenges of jurors Mendez, St. Victor, Armand and Gillum. This claim is not preserved for review, and in any event, is without merit.

A. PRESERVATION

The contemporaneous objection rule applies to challenge-for-cause claims in Florida. Wainwright v. Witt, 469 U.S. 412, 431, n. 11 (1985), citing Brown v. State, 381 So. 2d 690, 693-94 (Fla. 1980); see also Maxwell v. State, 443 So. 2d 967, 970 (Fla. 1983); Turner v. State, 645 So. 2d 444 (Fla. 1994); Cummings-el v. State, 684 So. 2d 729 (Fla. 1996). The objection must be made at the time of the State's challenge and prior to the potential juror being excused. Brown, 381 So. 2d at 693. Moreover, the objection must be made with clarity. Nebulous statements, such as, "'For the record, I don't believe [potential juror] indicated she had a fixed opinion as to whether she could give [the penalty] or not'", do not constitute "an objection to the state's challenge or the court's granting it." Turner, 645 So. 2d at 446.

When the State ultimately[2] moved to challenge Mendez, St. Victor, Armand, and Gillum for cause, the following took place:

> THE COURT: Grounds on Mr. Mendez?
>
> MR. LAESER: Mr. Mendez [sic] answers to the questions was [sic] that he could not impose or recommend the imposition of the death penalty at all; period. He did not think he could do it.
>
> MR. GURALNICK: That's not what he said today. I covered that, just like I did with Ms. Duarte, and he said he could follow the law, whether it troubled him or not.
>
> ***
>
> THE COURT: Grounds on Ms. St. Victor?
>
> MR. LAESER: The state's position as to Agnes St. Victor is that she also was adamant she is not going to recommend the death penalty. She is against it, in spite of counsel's question as to whether or not she could follow the Judge's instructions. I don't think she ever said she could follow it to the point of making a recommendation to the death penalty.
>
> MR. GURALNICK: For each of these witnesses, that's the first thing I started off with, was whether they could vote for the death penalty, in spite of the fact that it would be difficult for them to do, and they all said, except for the one person that I agreed, Ms. Kotzen, they all said they would follow the law, difficult or not.
>
> THE COURT: Mr. Armand, grounds?
>
> MR. LAESER: Same grounds; as to the death penalty. I think the answer he gave today was that "If the law requires me to do it, I guess I can." And, clearly the

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[2] At the conclusion of the first session of voir dire, the trial court attempted to determine if there were any "agreed" cause strikes. The State indicated that it wished to strike, inter alia, the four jurors who are the subject of this claim. (T. 635). Asked if he agreed, defense counsel replied "no" as to Mendez, St. Victor, and Armand. (T. 635-36). Counsel expressed no opinion at that time as to the State's motion to strike Gillum.

law is not going to require him to do anything.

THE COURT: Response?

MR. GURALNICK: Same response.

THE COURT: Grounds on Ms. Gillum?

MR. LAESER: Same grounds. And I think the quote I wrote down, "I guess I can go along with the Judge."

MR. GURALNICK: Same response.

(T. 688-89, 692-93). As in Turner, defense counsel's statements were not sufficient to constitute an objection to the strikes, particularly in that they did not even purport to address the prosecutor's specific concern that "law is not going to require" the jurors to vote for death. Moreover, at the time the strikes were actually granted, counsel's only comment was a request for "a standing objection to those that [the court was] excusing." (T. 693). The court did not address the request for the "standing objection." (T. 693).

This claim is also barred because after another day of jury selection, the defense affirmatively accepted the jury wholly without objection. (T. 1080, 1088). The affirmative acceptance of the jury without any reservation waives any alleged voir-dire issues on appeal. See Joiner v. State, 618 So. 2d 174, 176 n.2 (Fla. 1993)(Neil issue not preserved for review when, after objection to a peremptory challenge, defense affirmatively accepted the jury immediately prior to its being sworn, without reservation of the earlier objection). In Joiner the Court noted that the

absence of an objection may reflect that counsel may have become satisfied with the jury due to the change in the composition of the panel between the time of the strike and the swearing of the jury, and no longer wished to press the issue. Joiner, 618 So. 2d at 176. Here, another 39 jurors were examined and stricken or accepted, (R. 181-82), before the jury was sworn. Only two of the 14 jurors who ultimately served came from the original panel from which Mendez, St. Victor, Armand and Gillum were drawn. (R. 180, T. 1080). Under these circumstances, Joiner's observation that the defense may well have reevaluated the desirability of these jurors is particularly compelling. Finally, whatever the motive in accepting the panel, failure to renew the objections before swearing must bar review because if the Court were "to hold otherwise, [the defendant] could proceed to trial before a jury he unqualifiedly accepted, knowing that in the event of an unfavorable verdict, he would hold a trump card entitling him to a new trial." Joiner, 618 So. 2d at 176 n.2.

B. THE MERITS

Assuming, arguendo, that these claims were preserved, they would be meritless. All four jurors unequivocally stated that they would be unable to recommend a sentence of death. Counsel's alleged rehabilitation failed to address whether the jurors could in fact ever vote to recommend the death penalty, and, indeed, counsel specifically informed them that following the law did not mean that they would "have to render a death penalty." (T. 647). Under the

circumstances it cannot be said that the court abused its discretion in excusing these jurors.

1. Legal Standards

To prevail upon a claim of erroneous exclusion under Witherspoon,[3] "a defendant must show that the trial court, in excusing the prospective juror for cause, abused its discretion." Hannon v. State, 638 So. 2d 39, 41 (Fla. 1994). "The inability to be impartial about the death penalty is a valid reason to remove a prospective juror for cause." Id. In light of the narrowed standards in capital sentencing schemes, "it does not make sense to require simply that a juror not 'automatically' vote against the death penalty." Witt, 469 U.S. at 422. Jurors who have stated their opposition to imposing the death penalty may serve "so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." Lockhart v. McCree, 476 U.S. 162, 176 (1986)(emphasis added). Thus, such a juror's mere statement that he or she can "'follow the law'" is not dispositive of whether the juror can fairly deliberate the death sentencing issues. Morgan v. Illinois 504 U.S. 719, 734-35 (1992); see also Taylor v. State, 638 So. 2d 30, 32 (Fla. 1994)(no abuse of discretion in striking juror who indicated that her beliefs would impair her ability to impose the death penalty, despite her agreement "after encouragement from defense counsel," that she

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[3] Witherspoon v. Illinois, 391 U.S. 510 (1968).

could follow the law); Trotter v. State, 576 So. 2d 691, 694 (Fla. 1990)(whether trial court acted within its discretion must be considered in light all the juror's responses during voir dire; therefore, that a juror "responded affirmatively to a question regarding his ability to follow the law as instructed does not eliminate the necessity to consider the record as a whole").

Despite a juror's equivocal statement to the contrary, "'there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law.'" Hannon, 638 So. 2d at 41, quoting Witt, 469 U.S. at 425-26. "'[T]his is why deference must be paid to the trial judge who sees and hears the juror.'" Id. Thus, where a prospective juror's responses are conflicting or vacillating with respect to the death penalty, this court has upheld the decision of the trial judge exclude the juror. See Johnson v. State, 1997 WL 228421, **6 (Fla. 1997)(no abuse of discretion where juror "twice affirm[ed] that he would be unable to recommend the death penalty")(emphasis the Court's); Foster v. State, 679 So. 2d 747 (Fla. 1996)(no abuse of discretion in striking juror who equivocated as to whether she could impose the death penalty); Taylor v. State, 638 So. 2d at 32 (same); Trotter, 576 So. 2d at 694 (same); Randolph v. State, 562 So. 2d 331, 335-37 (Fla. 1990)(no abuse of discretion where juror stated she could not impose death penalty, despite elicitation on questioning by defense

counsel that there might be circumstances under which she could).

2. Juror Mendez.

Based on the foregoing authorities, the trial court was well within its discretion in excusing Juror Mendez. When initially questioned by the court, Juror Mendez stated that he would be unable to recommend that Defendant be sentenced to death:

> THE COURT: ... [I]s there no possibility of you ever voting for the death penalty, or could you, if the aggravating circumstances are such that you determine that they exist and they outweigh the mitigating circumstances, is there a possibility that you could vote for the death penalty or that you would not, under any circumstances, ever do so?
>
> ***
>
> Mr. Mendez?
>
> PROSPECTIVE JUROR: I don't think I can vote for that.

(T. 440). He reiterated that position to the prosecutor:

> MR. LAESER: ... Mr. Mendez, you told us that you personally did not think that you could recommend the death penalty. Is that correct?
>
> PROSPECTIVE JUROR: That's correct.
>
> MR. LAESER: Do you still feel that way, even after thinking about it?
>
> PROSPECTIVE JUROR: Yes, sir.
>
> MR. LAESER: And it's not a question of whether this is a strong case or weak case, you just couldn't do it?
>
> PROSPECTIVE JUROR: Just couldn't do it.

(T. 565).[4] Defense counsel attempted to rehabilitate the juror, but

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[4] Mendez also expressed difficulty with the doctrine of principals, an important issue in this case where Defendant was neither the actual shooter nor one of the individuals who snatched

never asked him if he could actually recommend the death penalty, only whether he could follow the judge's instructions:

> MR. GURALNICK: And Mr. Mendez, you had also indicated that it would be difficult for you to do that. And we can all agree on that. But if we ever got to that phase of the case, you will listen to the Judge, will you not, and you will follow the law, even though it's difficult for you, even though you felt the death penalty should not be imposed. Is that correct?
>
> PROSPECTIVE JUROR: That's correct.

(T. 643-44).

Thus, Mendez clearly stated, twice, that he would be unable to recommend a sentence of death. His agreement, at the prodding of defense counsel, that he could "follow the law," without ever stating that he would in fact be able to recommend the death penalty, is precisely the sort of response held inadequate in

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the cash drawer:

> MR. LAESER: ... no matter how small or how great this defendant's participation may have been in these acts, under the law, if he meets the standard as a principal, he is legally responsible for everything that all of the people did. Does anybody have any difficulty -- would anybody have any difficulty following that type of rule? Mr. Mendez?
>
> PROSPECTIVE JUROR: Yes I would have difficulty.
>
> MR. LAESER: In what way?
>
> PROSPECTIVE JUROR: Because I don't believe he should be charged with the same.
>
> MR. LAESER: It seems unfair that he might be charged with the same thing?
>
> PROSPECTIVE JUROR: Right.

(T. 559-60).

Morgan. Moreover, Mendez's statement was in response to a leading question by defense counsel. Even were it construed as a declaration by Mendez that he could set aside his personal beliefs, the best that can be said is that Mendez vacillated on the issue. Under such circumstances, this court has repeatedly refused to disturb the trial court's exercise of its discretion. Johnson; Foster; Taylor; Trotter; Randolph.

3. Juror St. Victor.

Juror St. Victor also told the court she could not vote to impose the death penalty:

> THE COURT: ... is there anyone who under no circumstances, would vote for the death penalty? Ms. St. Victor? No set of circumstances?
>
> PROSPECTIVE JUROR: No.

(T. 441). She, too, reiterated that belief to the prosecutor:

> MR. LAESER: Let me go to Ms. St. Victor. One word that I wrote down yesterday was "No." Is that how you feel, you could not personally recommend for the death penalty? Is that correct?
>
> PROSPECTIVE JUROR: Yes, that's correct.
>
> MR. LAESER: I assume if I give you an example or if I tell you what kind of case it is or something like that, it's not going to change your mind, is it?
>
> PROSPECTIVE JUROR: No.

(T. 568). The defense's rehabilitation attempt again failed to address the critical issue of whether she could ever vote to recommend a sentence of death:

> MR. GURALNICK: Ms. St. Victor, good morning. I know it's

difficult for you too; you said that. My basic question is, will you follow the Judge's instructions on the law? PROSPECTIVE JUROR: Yes, I will.

MR. GURALNICK: Even though its hard?

PROSPECTIVE JUROR: Yes.

(T. 646). For the same reasons as discussed with juror Mendez, the trial court did not abuse its discretion in excusing St. Victor.

4. Juror Armand.

Juror Armand was also unequivocally unable to recommend a sentence of death:

THE COURT: ... is there anyone who under no circumstances, would vote for the death penalty? ... Mr. Armand.

PROSPECTIVE JUROR: No I can't.

THE COURT:: Under no circumstances?

PROSPECTIVE JUROR: No.

(T. 441-42).

MR. LAESER: ... Is that how you feel, you could not personally recommend for the death penalty? Is that correct? ... Mr Armand, I pretty much have the same kind of answers from you. Is that still how you feel?

PROSPECTIVE JUROR: Yes.

(T. 568). The defense's questioning on the sentencing issue followed the same pattern:

MR. GURALNICK: And Mr. Armand, will you also follow the Judge's instructions on the law? You said it would be difficult, if we ever got to that position.

PROSPECTIVE JUROR: It will be difficult for me, but if its the law, they require me to do it, okay.

MR. GURALNICK: You all understand that the Judge is going to give you instructions. But that doesn't mean you have to render a death penalty, that means you have to follow his instructions as whether or not it should be imposed. That's your decision. Each one of you has to make that individual decision. That doesn't mean you have to render that penalty. Do you understand that?

PROSPECTIVE JUROR: Yes.

(T. 646-47). As with Jurors Mendez and St. Victor, Juror Armand stated that he could not vote to recommend the death penalty. Moreover, defense counsel's rehabilitation was even less persuasive, in that counsel specifically told Armand that he would not have to render the death penalty. Thus rather that being silent as to whether the juror could set aside his beliefs, as with the two previous jurors, the questioning allowed the juror to state that he could follow the law and that following the law would never require an affirmative vote for death. Under the circumstances, the trial court did not abuse its discretion striking this juror.

5. Juror Gillum.

Juror Gillum, like the other three jurors, stated she would be unable to recommend the death penalty when asked by the trial court:

THE COURT: ... is there anyone who under no circumstances, would vote for the death penalty? ... Ms. Gillum?

PROSPECTIVE JUROR: No.

THE COURT: No set of circumstances that you could ever vote for the death penalty?

PROSPECTIVE JUROR: No.

(T. 441-42). She reiterated that position to the prosecutor:

> MR. LAESER: ... Is that how you feel, you could not personally recommend for the death penalty? Is that correct? ... And Ms. Gillum, how about yourself.
>
> PROSPECTIVE JUROR: Yes.

(T. 568). While defense counsel was interviewing the jurors, she volunteered that she could not impose the death penalty:

> MR. GURALNICK: Yes, kind lady, you had your hand raised?
>
> MS. GILLUM: It's too much responsibility. I don't want to hurt nobody, and I want to go by -- nobody is telling me to say --
>
> MR. GURALNICK: The death penalty is what you're referring to.
>
> MS. GILLUM: Yes.

(T. 623). Finally, defense counsel's "rehabilitation" never addressed whether she could recommend the death penalty, only whether she could follow the judge's instructions, and indeed counsel specifically told her that she would <u>not</u> have to recommend the death penalty under the judge's instructions:

> MR. GURALNICK: You all understand that the Judge is going to give you instructions. But that doesn't mean you have to render a death penalty, that means you have to follow his instructions as whether or not it should be imposed. That's your decision. Each one of you has to make that individual decision. That doesn't mean you have to render that penalty. Do you understand that? ... And Ms. Gillum good morning. You indicated it would be very difficult for you. We understand that. But we want to know, will you follow the instructions of the Judge?
>
> PROSPECTIVE JUROR: Yes.
>
> MR. GURALNICK: Even though its hard, you will follow his instructions?

PROSPECTIVE JUROR: Yes.

MR. GURALNICK: That doesn't mean you have to give that penalty.

PROSPECTIVE JUROR: No, I go along with the Judge.

(T. 646-47). Gillum, like the previous jurors, told the court and the prosecutor that she could not recommend a sentence of death. Additionally, she volunteered during defense counsel's examination of the venire, without being asked, for the third time, that she could not vote to sentence Defendant to death. Further, like Armand, her "rehabilitation," was made under the belief that "following the law" would not include being able to recommend a death sentence. As with the three other jurors, the trial court clearly did not abuse its discretion in excusing her.

For the foregoing reasons, the trial court properly excused these jurors for cause. Defendant's sentence[5] should be affirmed.

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[5] Contrary to Defendant's claim, (Am. B. 11), even if Witherspoon error occurred, Defendant would only be entitled to the reversal of his death sentence, not his convictions. Gray v. Mississippi, 481 U.S. 648, 672 n.3 (1987)(Powell, J., concurring); Farina v. State, 680 So. 2d 392, 396 n.3 (Fla. 1996).

II.

DEFENDANT WAS NOT ENTITLED TO A MISTRIAL BASED UPON THE PROSECUTOR'S OPENING STATEMENT.

Defendant's second claim is that the trial court erred in failing to grant a mistrial based upon the prosecutor's opening statement. Defendant incorporates, by reference, Point I of his original brief. In response, the State would incorporate the argument set forth in Point I of its original answer brief at 30-32. Additionally, Defendant cites further comments in the opening statement, testimony during trial, and the State's closing argument as improper. This additional claim is largely unpreserved for review, and is without merit.

A. PRESERVATION

No objection was lodged below at the time any of the newly-cited comments were made, when most of the evidence to which they referred was introduced, or during closing. The claim based upon them is thus unpreserved for review. Franqui v. State, 22 Fla. L. Weekly S391 (Fla. July 3, 1997)(holding similar comment regarding this testimony and that cited in the original brief unpreserved in codefendant's appeal); Ferguson v. State, 417 So. 2d 639, 641 (Fla. 1982). See also Bertolotti v. State, 476 So. 2d 130 (Fla. 1985)(where comments were not objected to, proper remedy is sanction against offending attorney, not reversal).

B. THE MERITS

Moreover, as with the related comments cited in the initial

answer brief, the prosecutor was merely stating what she expected the evidence to show, and, as such, the trial court would not have abused its discretion in overruling the objections or denying a motion for mistrial had such been made by Defendant below. The control of opening comments and the admission of evidence is within trial court's discretion. Occhicone v. State, 570 So. 2d 902, 904 (Fla. 1990). Where the prosecutor does no more than make a good faith attempt to outline what she expects the evidence to show, it is no abuse of discretion to overrule defense objections to the State's opening remarks. Id. Here. as Defendant notes, (Am. B. 13-14), evidence supporting the prosecutor's remarks was introduced at trial. No objection was made at the time most of the evidence was received. Even had an objection been made, the comments now cited as improper related to evidence properly adduced at trial.

1. Statement as to bullet's trajectory.

Defendant first asserts, (Am. B. 12), that the prosecutor improperly stated that the evidence would show that the victim died after one bullet lodged in his leg and a second entered through his neck and "exploded" his heart, killing him. (T. 1097). The medical examiner testified that one bullet lodged in Bauer's thigh. (T. 2041). The second entered his neck and moved downward internally through his neck and through his heart. (T. 2046). This second shot was fatal. (T. 2052-53). Thus, the prosecutor's statement, while colorful, accurately described what the evidence would show, and

was therefore not improper. Hartley v. State, 686 So. 2d 1316, 1321 (Fla. 1996)(no error where opening comment that defendant was the "area tough guy" was supported by the evidence); Jackson v. State, 545 So. 2d 260, 265 (Fla. 1989)(prosecutor's reference in opening to defendant's defense as being that defendant was "barbecuing" at the time of the crime where the victims were found charred did not warrant a mistrial).

2. Statement and evidence that Officer Bauer inquired of tellers' well-being.

This comment referred to brief testimony by the tellers that the murder victim, Officer Bauer, had inquired as to their well-being after he had been shot. As this evidence was admitted at trial, the prosecutor's comments were proper. Hartley; Dufour v. State, 495 So. 2d 154, 159 (Fla. 1986)(no error in commenting on properly admitted testimony); Occhicone.

Moreover, no error occurred in admitting this evidence. This testimony was an integral part of the events surrounding the shooting of Officer Bauer and showed that even after he was shot he continued to perform his lawful duties. That he was exercising these duties when he was killed is an element of the crime of murder of a law enforcement officer as set forth in §775.0823, Fla. Stat., under which Defendant was charged. (R. 1). The testimony was thus properly admitted as part of the res gestae of the crime. Mills v. Dugger, 574 So. 2d 63 (Fla. 1990); Garcia v. State, 492 So. 2d 360, 365 (Fla. 1986); Knight v. State, 338 So. 2d 201 (Fla.

1976), relief granted on other grounds, 863 F.2d 705 (11th Cir. 1988). Under such circumstances the trial court would properly have declined to grant a mistrial, had one been requested. Occhicone; Dufour.

As noted, this evidence was relevant, and further, even assuming any objection below at the time the evidence was admitted,[6] had been made on the grounds that the evidence was hearsay, such an objection would have been without merit. The comments made by Bauer fall within both the excited utterance and dying declaration exceptions to the hearsay rule.[7] The comments were made immediately after Bauer had been fatally shot and he was lying on the ground, bleeding. Under such circumstances the statement was properly admitted as an excited utterance. Pope v. State, 679 So. 2d 710, 713 (Fla. 1996)(statement of murder victim within minute of fatal attack qualified as an exited utterance); Torres-Arboleda v. State, 524 So. 2d 403, 408 (Fla. 1988)(statement

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[6] The only objection at the time Hadley testified was by San Martin's counsel that "renewed our final objection" that had been lodged pre-trial. (T. 1160). No objection was lodged at the time Chin-Watson testified, thus even if the objection to Hadley's testimony could be considered to preserve the issue, Hadley's testimony was merely cumulative to Chin-Watson's wholly-unobjected to testimony. Feller v. State, 637 So. 2d 911, 914 (Fla. 1994)(preservation of issue for appeal requires renewal of pre-trial objection at time evidence is offered); Lindsey v. State, 636 So. 2d 1327, 1328 (Fla. 1994)(same).

[7] In his motion in limine, San Martin's counsel only argued (without explanation) that the statement was not a dying declaration. (T. 1100). He never responded to the State's assertion that the statement was an excited utterance. (T. 1101).

of murder victim shortly after he was shot properly admitted as an excited utterance); Garcia v. State, 492 So. 2d 360, 365 (Fla. 1986)(statement of shooting victim, made shortly after she was shot, was properly admitted). It was also a dying declaration. Pope, 679 So. 2d at 713 (deceased does not have to make express utterance that he is dying for statement made while death is imminent to qualify as dying declaration).

3. Evidence of Chin-Watson's "friendship" with the Officer.

The evidence that Defendant asserts, (Am. B. 13), "enhanced" the alleged errors discussed supra consisted wholly of the following questions and answers:

Q. How did you get along with Steve?

A. Pretty good.

Q. What kind of relationship did you have with him?

***

A. It was very friendly. We joked around a lot. We had fun.

(T. 1168-69). This testimony was extremely brief and was not improper. Stein v. State, 632 So.2d 1361, 1367 (Fla.1994)(brief humanizing comments not improper). Nor was it referred to again at trial. Thus, even assuming, arguendo, that the comments discussed above were error, this brief testimony could not have "enhanced" that error.

4. Closing argument was not improper.

Nor is Defendant's similar claim that the purported error was exacerbated by the closing argument availing. Indeed, his assertion that "improper evidence ... was further argued during closing argument," (Am. B. 13), is without support in the record. The closing argument comprised 33 pages. (S.R. 65-98). The argument was overwhelmingly directed to the elements of the many offenses with which Defendant was charged and to responding to defense counsel's assertions made during his argument. Only one reference was made which could even be remotely characterized as relating to the comments and evidence of which Defendant presently complains, in which the prosecutor briefly pointed out that the victim was carrying out his job as a police officer when he was killed.[8] (S.R. 97). Plainly none of these comments or evidence were made a feature of either the trial or the State's closing argument. This contention is thus factually unsupported.

C. HARMLESS ERROR

As discussed in the initial answer brief, even assuming, arguendo, that the comments were preserved and improper, they were brief, mere seconds in the course of a week-long trial, and not such as to vitiate the entire trial. Given the overwhelming evidence, including Defendant's confessions, as well as eyewitness, fingerprint, and ballistic evidence tying Defendant to this crime, it cannot reasonably be argued that these brief comments could have

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[8] As noted, such was an element of the offense charged.

affected the jury's verdict. Franqui v. State, 22 Fla. L. Weekly S391 n.4, citing Stein v. State, 632 So.2d 1361, 1367 (Fla.1994)("the potential error in allowing Ms. Chin-Watson, another bank teller whom the victim in this case was escorting when he was shot, to testify about her friendship with Officer Bauer was objected to at trial. Nevertheless, we find that Chin-Watson's brief statement, even if improper, was harmless beyond a reasonable doubt"); Allen v. State, 662 So. 2d 323, 328 (Fla. 1995)(error in eliciting testimony regarding murder victim's children and her close relationship with her grandchildren was harmless); King v. State, 623 So. 2d 486, 488 (Fla. 1993)(conviction will not be overturned unless prosecutor's comment is so prejudicial that it vitiates the entire trial; any error is harmless if there is no reasonable possibility that the comments affected the jury's verdict); Watson v. State, 651 So. 2d 1159, 1163 (Fla.1994)(no error in denying mistrial after prosecutor made repeated references to the effect of finding the victim's body on her widower, in view of substantial evidence); Dailey v. State, 594 So. 2d 254, 256 (Fla. 1991)(improper reference to defendant's resisting extradition, where comment was extremely brief, was harmless); Williams v. State, 492 So. 2d 1501, 1503 (Fla. 1986)(comment in opening that defendant was caught in a high-crime area not comprise such substantial prejudice as to vitiate the entire trial). Defendant's convictions should be affirmed.

III.

THE TRIAL COURT PROPERLY ALLOWED THE ADMISSION OF OFFICER BAUER'S CLOTHING, WHICH WAS RELEVANT TO SHOW THAT HE WAS AN ON-DUTY LAW ENFORCEMENT OFFICER, AND TO SHOW THE LOCATION OF THE BULLET HOLES.

Defendant's third contention is that the trial court erred in admitting Officer Bauer's bullet-riddled uniform shirt into evidence. This claim is without merit.

Defendant apparently concedes that the uniform shirt was relevant and admissible, citing Pope v. State, 679 So. 2d 710, 713 (Fla. 1996), for the proposition that photographs of the victim's bloody clothes are admissible. (Am. B. 15-16). He contends, however, that the admission of the actual clothing was error, asserting that the same point could have been made through the admission of a photo showing the bullet hole. (Am. B. 16). However, the test for admissibility is not need, but relevance. Pope, 679 So. 2d at 713; Jones v. State, 648 So. 2d 669, 679 (Fla. 1994); Straight v. State, 397 So. 2d 903 (Fla. 1981). Further, Defendant offers no authority for the startling proposition that a photograph may be admissible, yet the physical subject of the photograph would not be. In any event, his contention that a photograph would do is belied by the record, where in overruling the defense objection below, the trial court specifically noted that the bullet hole was not visible in the photograph. (T. 1271).

Moreover, although Defendant appears to concede the relevance of this evidence, it should be noted that the uniform was relevant

both to establish that the victim was a law enforcement officer, an element under the crime charged, as discussed in Point II, supra. The evidence was also used by the firearms examiner[9] to help explain how the shooting occurred. Under very similar circumstances, a bevy of cases have held that the actual clothing is admissible. Larkins v. State, 655 So. 2d 95, 99 (Fla. 1995)(admission of victim's bloody smock properly admitted to assist in explanation of shooting); Reaves v. State, 639 So. 2d 1, 4 (Fla. 1994)(admission of deputy's clothing relevant to show he was identifiable as an officer at the time he was shot); Hannon v. State, 638 So. 2d 39, 43 (Fla. 1994)(no abuse of discretion in admitting victim's bloody clothing where it helped explain the blood-spatter expert's testimony).

The thrust of the objection below was that the blood on Bauer's shirt caused the evidence to be excessively prejudicial. However, almost all evidence introduced during a criminal prosecution is prejudicial to the defendant. Williamson v. State, 681 So. 2d 688, 696 (Fla. 1996). Whether evidence objected to under §90.403, Fla. Stat., is excessively prejudicial is a matter to be weighed by the trial court, and its decision will not be disturbed absent a showing that the court abused its discretion. Id.; Duest v. State, 462 So. 2d 446, 449 (Fla. 1985). Here, the blood was not

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[9] Robert Kennington opined that based upon the lack of gunshot residue on the shirts, the fatal shot was fired from more than 30 inches away. (T. 2012).

commented on, the shirt itself was in no way made a feature of the trial, and as noted above, the shirt was relevant to prove an element of the offense, and to assist the expert explain his testimony. As such, it cannot reasonably be said that the probative nature of this evidence was outweighed by its prejudicial effect.[10] See Hannon, 638 So. 2d at 43 (prejudicial effect of bloody clothing used by expert to explain testimony did not outweigh evidence's probative value); see also Gudinas v. State, 693 So. 2d 953, 963 (Fla. 1997)(photo showing stick protruding from deceased victim's vagina was not more prejudicial than probative where photo assisted expert's testimony and supported element of HAC factor); Pope, 679 So. 2d at 713-14 (photographs of bloody bathroom, autopsy, and victim's bloody clothes were not more prejudicial than probative where they assisted the witnesses explain their testimony); Jones, 648 So. 2d at 679 (photos of victim's body after recovered from a pond and autopsy photos were not more prejudicial than probative where they assisted expert in his testimony); Mordenti v. State, 630 So. 2d 1080, 1084 (Fla. 1994)(morgue photos which helped medical examiner explain nature of victim's wounds were not more prejudicial than probative).

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[10] The physical evidence was not taken into the jury room during deliberations. See S.R. 144, where the trial court informed the jury that if it wished to examine the physical evidence, it would be provided on request. No such request was ever made.

IV.

THE TRIAL COURT PROPERLY ADMITTED DEFENDANT'S STATEMENTS OVER HIS OBJECTION THAT THEY WERE PROTECTED BY THE COMMUNICATION-WITH-CLERGY PRIVILEGE.

Defendant's fourth claim is that the trial court erroneously failed to exclude statements Defendant made to a santeria babalao, Lazaro Hernandez, because the statements were allegedly protected under the clergy-communication privilege, §90.505, Fla. Stat. The admitted statements were made in the presence of third parties, and the privilege was therefore, as conceded below, not established. Defendant additionally asserts that statements made to Claudio Prado were also admitted in violation of the privilege because Prado allegedly was a santeria "novice." This claim was not raised below and is therefore waived.

The thrust of Defendant's claim is that the trial court erred in finding the clergy privilege was waived because "[n]one of the alleged eavesdroppers ever testified that they overheard" Defendant's statement. (Am. B. 20). This claim misapprehends both the facts and the law.

The burden of establishing that a communication is privileged is upon the party asserting the privilege. Southern Bell Tel. & Tel. Co. v. Deason, 632 So. 2d 1377, 1383 (Fla. 1994); State v. Rabin, 495 So. 2d 257 (Fla. 3d DCA 1986). Section 90.505(2), Fla. Stat. provides for a privilege protecting "confidential" communications with a member of the clergy acting in his capacity

as a spiritual advisor. "Confidential" is defined as:

> [M]ade privately for the purpose of seeking spiritual advice from the member of the clergy in the usual course of his or her practice or discipline and not intended for further disclosure except to other persons present in furtherance of the communication.

§90.505(1)(b). Because the confidentiality of the statements is one of the elements of the clergy privilege, it thus follows that Defendant had the burden of establishing it. See In re Walsh, 623 F.2d 489, 494 (7th Cir. 1980)(privilege holder's burden includes establishing that the communication was confidential). Defendant therefore may not now complain that the evidence below was insufficient on the issue, particularly where the lack of confidentiality was tacitly conceded below.[11]

Before examining the proceedings below, one final point must be emphasized. The discussion below and in Defendant's brief

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[11] Defendant's reliance on Cafritz v. Koslow, 167 F.2d 749, 751 (D.C. Cir. 1948), for the proposition that there is a "presumption of confidentiality," (Am. B. 20), is misplaced. Even assuming this 50-year-old case interpreting a common-law privilege had relevance here, the citation is taken out of context. The court's full statement was:

> If the circumstances do not imply confidentiality to a communication between the client and his attorney the privilege does not attach, and the presence of a third person ... generally rebuts the presumption of confidentiality.

Id. (emphasis added). Plainly the confidentiality must be established before any "presumption" would arise. Any other reading of this case would be contrary to the plain language of §90.505, Fla. Stat., which confers the privilege only when the communication has been determined to be confidential. As noted, Defendant has not established the confidentiality of his statements.

regarding "waiver" of the privilege as a result of the presence of third parties is an unfortunate choice of words that tends to cloud the issue. The question is not whether the State proved that Defendant "waived" the privilege by making the statement in front of third parties. The correct inquiry is whether Defendant failed to establish that the communications were confidential, and as such, failed to establish the existence of the privilege. The record shows that Defendant did not even attempt to meet his burden below.

The only testimony elicited by the State regarding the meeting between the babalao and Defendant was that while Defendant was sitting in the babalao's living room, a "crime-stoppers" advertisement regarding the murder of Officer Bauer came on the television. Defendant became visibly agitated and exclaimed that he had been involved in the crime. (T. 1408, 1416, 1427-28). Present in the room when Defendant made this announcement were the babalao, Prado, Defendant's girlfriend, her children, and the babalao's wife and children. (T. 1406-07, 1427). The babalao specifically testified on cross that their conversation "was not so private." (T. 1434).

During the hearing on Defendant's motion in limine, defense counsel conceded that any communication not privately made was not protected, and further never asserted that the statements actually introduced were made in confidence. Moreover, the State

specifically disavowed any intent to delve into any matters actually discussed privately between Defendant and the babalao:

> MR. GURALNICK [defense counsel]: I have read the rule and obviously I have to agree with the rule, except for one thing, and that is part of what he said was not waived because it was privately with the priest. The part that was not and the other people were present, I would have to agree with the rule.
>
> THE COURT: Are you disputing the fact that Mr. Rosenberg and Miss Levine recited?
>
> MR. GURALNICK: What I'm saying is everything that he told the priest was -- a good part of it, I would say most of it was private, just with the priest, whereas he made some other comments, but those -- there were some other people present, so I would say if we follow this rule that there is no privilege as to that which he said in front of other people. That is not as to what he said in private with that priest.
>
> THE COURT: Mr. Rosenberg, you are seeking to introduce statements?
>
> MR. ROSENBERG [prosecutor]: I will tell you statements I'm seeking to introduce so the Court understands specifically.
>
> The only statements I'm seeking to introduce is Mr. Hernandez said the defendant comes to him, they speak in private. When the defendant's wife puts the TV on, something comes on the television. The defendant gets upset, stands up, yells out, "that is the car I was driving. I was involved in the robbery. I need protection." Those are the statements.
>
> THE COURT: Those were made in the presence of Mr. Prado and Miss Sanchez [Defendant's girlfriend].
>
> MR. ROSENBERG: Yes.
>
> THE COURT: And children?
>
> MR. ROSENBERG: And the children.

(T. 1378-79)(emphasis supplied). When the court inquired, Defense

counsel did not dispute the State's proffer. The court, because it had "heard no factual dispute" that third parties were present, allowed the State to present the statement of Defendant made in front of them. (T. 1381-82). At the time the testimony was introduced, on direct, the State limited its examination to the statement Defendant had made in front of the third parties. Defendant raised no objection whatsoever.

In view of the foregoing, it is plain that counsel conceded that the statements at issue were made in the presence of third-party witnesses and were not privileged. The State did not introduce any statement of Defendant other than those Defendant conceded were not privileged. Thus, assuming, arguendo, that any of the communication here at issue satisfies the requirement that it was made for the purpose of seeking spiritual advice,[12] the only communication of Defendant the State sought to introduce was clearly not made privately. As such the privilege was neither established nor violated.

Defendant's ruminations concerning eavesdroppers, (Am. B. 20),

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[12] Section 90.505(1)(b), Fla. Stat., requires that to be privileged, the communication must have been made "for the purpose of seeking spiritual counsel and advice." The babalao testified on cross-examination that Defendant sought and received a charm to ward off the police or "justice." (T. 1436, 1452). This would appear to be more a concern with this world than the next. See Com. v. Stewart, 690 A.2d 195 (Pa. 1996)(holding that clergy-communications privilege only applies where the communication is motivated by spiritual or penitential considerations).

in no way alter the foregoing conclusions. Although in Proffitt v. State, 315 So. 2d 461 (Fla. 1975) and U.S. v. Blackburn, 446 F.2d 1089 (5th Cir 1971), which Defendant cites, the witnesses in question were eavesdroppers, those cases establish no rule that the testimony of the so-called eavesdroppers[13] is a predicate to finding that the statements were not confidential. Moreover, as discussed above, the burden was on Defendant to establish that the communication was confidential, not on the State to establish that it was not.

Finally, on cross, defense counsel specifically asked the babalao, "what did you talk about for two hours ... [w]hat did you talk about during the time Fernando was at your house?" (T. 1434). Thus, Defendant specifically waived whatever privilege existed by asking the babalao, without limitation, to testify regarding what he and Defendant had discussed. §90.507, Fla. Stat.

Defendant also asserts that Prado's testimony should not have been admitted. No objection of any kind was raised prior to or at the time Prado testified. As such any claim of privilege is waived. Palm Beach County School Board v. Morrison, 621 So.2d 464, 469 (Fla. 4th DCA 1993). Even assuming that any privilege that might have existed had not been thus waived, this claim would be without

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[13] Clearly here, the third parties were not "eavesdroppers" where Defendant was present in the same room with the so-called "eavesdroppers" while in their home and by all accounts the statements made were exclamatory.

merit. Prado testified as to two incidents where Defendant became agitated and indicated an involvement in the crime. The first time occurred at Prado's house when a "crime-stoppers" ad came on while they were watching television. The second was the same incident to which the babalao testified. The latter was properly admitted for the reasons discussed above.

In addition to the arguments regarding the babalao, Defendant additionally avers that these statements should also have been found privileged because Prado was allegedly a "novice" training to become a santeria priest. (Am. B. 17). Defendant presents no authority for the proposition that the clergy privilege should be extended beyond formally ordained members of the clergy. The statute itself defines the clergy as "regular ministers" of a church, which suggests that a minister-in-training or "novice" does not meet the definition. Other jurisdictions have held that the privilege only applies to full ministers or priests. See, e.g., U.S. v. Napoleon, 46 M.J. 279, 285 (C.M.A. 1997)("lay minister" at base chapel not member of the clergy); State v. Buss, 887 P.2d 920, 923 (Wash. App. 1995)(statement to a non-ordained catholic "family minister" not within clergy privilege); In re Murtha, 279 A.2d 889, 893 (N.J. Super. App. Div. 1971)(communication with a catholic nun not privileged).

Moreover, the contention that Prado was a "novice," such that the clergy privilege would apply to him is an extremely broad

reading of the record. It is based upon testimony that he was new to the religion, and that he aspired one day to be a babalao. There was absolutely no evidence that Prado was currently undergoing any training to become a babalao; there was no evidence as to what training or procedures a "novice" would undergo to become a babalao in the santeria faith; there was no evidence as to the extent to which a so-called novice would be empowered to act as a spiritual advisor, or that Prado had ever done so; and there was absolutely no evidence that Prado was acting as anything more than a mutual friend when he referred Defendant to the babalao.[14] As such, even if a "novice" could meet the definition of a "member of the clergy" as defined in §90.505(1)(a), Fla. Stat., Defendant has not met his burden of demonstrating that Prado was one. Southern Bell; Rabin; Napoleon, 46 M.J. at 284 (burden of proving status as member of the clergy is on holder of privilege).

Finally, even assuming that Prado could be considered a member of the clergy, the privilege would not have applied because Defendant's statements were again made in the presence of a third party, Defendant's girlfriend. (T. 1404).

Based on the foregoing, the testimony of Hernandez and Prado was properly admitted. Even if it were not, any error would be harmless beyond a reasonable doubt in view of the forensic evidence

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[14] On the contrary, Prado specifically testified that Defendant did not ask him for any assistance or help. (T. 1406).

tying Defendant to the crime, the testimony of Gary Cromer regarding Defendant's planning of the crime, and the testimony of Luis Sanchez, who related to the jury a far more detailed confession of Defendant's guilt than the brief statements presented through Prado and Hernandez. Defendant's conviction should be affirmed.

V.

THE TRIAL COURT DID NOT IMPROPERLY LIMIT DEFENDANT'S CROSS-EXAMINATION OF PRADO AND HERNANDEZ.

Defendant's fifth contention is that the trial court allegedly erred in limiting the cross-examination of Prado and the babalao Hernandez. The record reflects, however, that Defendant was permitted to fully cross examined both men to the extent permissible by law. This claim is therefore without merit, and further any putative error would be harmless beyond a reasonable doubt.

Defendant asserts that the trial court erred in refusing to allow him to examine Prado or the babalao about whether either had violated an oath in testifying against Defendant. (Am. B. 22). Defendant's claim, however, is predicated on a false premise that the trial court properly rejected below. The gravamen of this claim is that Defendant should have been permitted to elicit whether the santeria religion required the babalao to maintain the confidence of any communications he had with Defendant. This inquiry was wholly irrelevant because the babalao never testified about or reported to the police any confidential statements, as thoroughly discussed at Point IV, supra. As such, the trial court did not abuse its discretion in sustaining the State's objection to this line of questioning. Morgan v. State, 415 So. 2d 6, 10 (Fla. 1982)(no abuse of discretion in limiting cross examination where matters on which defense sought to inquire had no relevance); Cook

v. State, 391 So. 2d 362 (Fla. 1st DCA 1980)(no abuse of discretion in limiting cross of State's witness where subject matter of inquiry was not relevant to witness's testimony).

Furthermore, even assuming that this inquiry had some relevance, it would run afoul of §§90.608 & 90.610, Fla. Stat., which prohibit impeachment by reference to specific bad acts other than convictions for felonies or misdemeanors involving dishonesty. Farinas v. State, 569 So. 2d 425, 429 (Fla. 1990)(attempted impeachment of witness on grounds that he had acted unethically was improper); Hitchcock v. State, 413 So. 2d 741, 744 (Fla. 1982), reversed on other grounds, 481 U.S. 393 (1987)(the defendant's right to confront and cross examine witnesses does not include the right to impeach witnesses through presentation of particular bad acts); Taylor v. State, 139 Fla. 542, 549 190 So. 691 (1939)(no error in limiting cross-examination of State's witness where question went solely to alleged bad acts of witness). The only exception to this rule is where the act would provide the witness with a motive to curry favor with the State, and would thus be relevant to show bias. Torres-Arboleda v. State, 524 So. 2d 403, 408 (Fla. 1988). Here, had the babalao violated any religious oath, it would not have subjected him to any prosecution and therefore had no relevance to the issue of bias. Id. (proposed defense impeachment properly disallowed where the alleged bad acts were not related to any pending charges that would have given the witness a

motive to curry favor with the State).

Finally, as to Prado, this claim does not reflect what actually occurred below. At trial, defense counsel was not attempting to impeach Prado, but the babalao. Compare Defendant's amended brief at 22: "[t]his proposed inquiry was directed towards Mr. Prado and his credibility" with the transcript at 1413-14, where counsel discussed his proposed examination of Prado:

> I want to be able to show, even though when the court already ruled about the admissibility[15] of the Santeria priest's testimony, I just want to be able to show that one can and is supposed to hold, when a priest takes information, that it is supposed to be confidential.

Prado, however, did not have a basis for providing the information counsel was seeking:

> Q [by defense counsel] Do you have -- if you know the answer to this -- a high priest in the Santeria religion, is that, in your religion, considered like a priest in the Catholic religion; yes or no?
>
> A [Prado] Well, I couldn't tell you.
>
> Q You don't know?
>
> A I don't know.

(T. 1413). Assuming, arguendo, that whether any prohibition on revealing confidences had any relevance here where no confidence was revealed, and assuming further that evidence of the violation of a religious oath were not inadmissible bad acts testimony, and assuming finally that it would be appropriate to impeach Hernandez

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[15] Recall from the Point IV that the defense never challenged the admissibility of Prado's testimony.

by what would amount to expert testimony by Prado regarding the Santeria faith, it is clear that Prado did not have sufficient expertise to competently offer such an opinion. As such the State's objection to the cross examination of Prado was properly sustained, both because, as discussed above, the matter was irrelevant and improper impeachment, and further because Prado did not have the predicate knowledge to testify as sought.

Finally, even assuming that any error occurred, it would be harmless beyond a reasonable doubt. Prado was substantially cross-examined. Counsel elicited that Defendant never gave either man any details of the crime or Defendant's level of participation. (T. 1416). He elicited, without any apparent proper purpose, that the santeria religion sacrifices animals, and that Prado was an alien. (T. 1412, 1417). Counsel belabored the point that both Prado and Hernandez were receiving a substantial reward for their testimony:

> Q ... Now, this reward, so far there was -- you received $40,000; you got 20 and the Santeria priest got 20?
>
> A Yes.
>
> Q And you are expecting more?
>
> A Yes.
>
> Q After this case is over?
>
> A Um-hum.
>
> Q And how much are you expecting?
>
> A The rest of it.

Q Another 80,000, another 60,000?

A Yes.

Q That is a lot of money, isn't it?

A Yes.

Q $20,000 is a lot of money, isn't it?

A Yes.

Q How much do you earn a year?

A 18, 16, 18.

Q So just $20,000 alone is a whole years' salary to you isn't it?

A Yes.

Q And if you get $100,000, that is many years salary, isn't it?

A Yes.

Q I'm sure you can use the money, correct?

A Yes.

Q I'm sure you would like to get the money.

A Yes.

Q Right?
Are you going to split that with Lazaro, the priest?

A Yes.

Q 50/50?

A Yes.

Q So then you are going to get another 30,000 and he's going to get another 30,000?

A Yes.

Q And you really want that money, don't you?

A Yes.

Q And Lazaro really wants it, doesn't he?

A Himself, also.

Q Do you have any independent information about how much money Lazaro earns a year?

A No.

(T. 1417-18). Counsel then spent four transcript pages grilling Prado as to why they consulted with a lawyer before contacting the police about Defendant's statements. (T. 1419-22). He then returned to the issue of the money again:

Q And you don't get the rest of the money until this case is over?

A Yes.

Q Right?
Isn't it true, sir, that it has to be a conviction before you get the balance of the reward?

A Yes.

Q So, if he's not convicted you don't get the rest of the money, isn't that true?

A Yes.

Q So it is in your interest to see that he gets convicted, correct?

A If he is guilty, yes.

Q Sir you don't get the money unless he gets convicted, correct?

A Yes.

Q And you want the money. You have already said that.

Right?

A No. No. No.

Q You don't want the money?

A We want the money, but not if he is not convicted.

Q Sir, you have already testified that unless he gets convicted you don't get the rest of the money. That is what you just said under oath, right?

A Um-hum.

Q That is correct, right?

A Yes.

Q So it is in your interest for this boy to get convicted because you will get the money, isn't it true?

A Well, it's not in my interest.

Q It is not in your interest?

A Not because of my interest.

Q You are not the one who is going to get the money if he gets convicted?

A It's okay.

Q Okay, it's just okay?
You make $50,000 and it's just okay?

A Okay.

Q Okay?

A Okay.

Q Wouldn't you say better than okay, that it was great, $50,000?

A Yes.

Q Tremendous, right?

A Tremendous.

(T. 1422-24). Counsel also thoroughly cross examined Hernandez.[16] Despite the court's earlier ruling on this issue, he again attempted to get the babalao to admit he had violated his clerical duties:

Q You are a holy man?

A What do you mean by "holy"?

Q Well, in religion, in a religious sense, right?

A Yes.

Q And you are a person, being a holy man, who is supposed to be trustworthy, right?

A Yes.

Q You are supposed to look after your flock?

A What do you mean by that?

Q I'm sorry. What I mean by look after your flock --

MR. ROSENBERG: I object to any line of this questioning, Judge. We have already had a sidebar.

(T. 1449). Counsel brought out the limited nature of Defendant's statements, and that Hernandez did not know the details of the crime, several times. (T. 1433-35, 1445-48, 1454-55). He established that Defendant had paid the babalao $10 for the amulet

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[16] Again, counsel also included examination of questionable propriety. After determining that babalao is the highest "rank" in the santeria religion, counsel compared santeria to Catholicism and facetiously remarked, "So I'm looking at the pope right now?" (T. 1431). He further attempted to get into a discussion on "the location of the pope at the present." (T. 1432). As with Prado, he brought out that the babalao was an alien. (T. 1433).

he gave him to ward off justice. (T. 1437). As with Prado, counsel intensively inquired as to the reward, and the babalao's desire for money:

Q And when people come before you do you always charge a fee?

A Always.

Q It's a business?

A Of course.

Q You like business?

A Of course.

Q You like to make money?

A Of course.

Q You like to make as much money as you can?

A As always -- I mean as long as it is decently obtained.

* * *

Q You indicated you like to make as much money as you can?

A Yes.

Q How much did you earn last year?

A I'm in bankruptcy because of with this problem. I have had to move like six times and I haven't even been able to do my income tax.

Q How much did you earn the year before last?

A I don't have an exact -- what it is.

Q Well, do you report to the IRS how much you earn a year?

A Yes.

Q Do you have an accountant?

A Yes, of course.

Q Approximately how much did you earn the year before last, approximately?

A I don't know. $20,000. $30,000. $15,000. I don't know. It's different.

Q But we all go up and down. I understand that. But certainly it wasn't more than $20,000, was it?

A It could be. Of course.

Q Well, what is the most you ever earned in a year? I'm not talking reward money.

A $35,000.

Q That s the maximum? Okay. So then even $20,000, that is a lot of money to you?

A But not together.

Q What do you mean, "not together"?

A You see, one year you can make a certain amount of money; another year you make another certain amount of money.

Q Well, in any year, if you earn $35,000, the highest you ever earned, wouldn't you say, sir, that $20,000 in one shot is a lot is a lot of money?

A But I have not gotten $20,000 in one shot.

Q All right. How much did you get for the reward for telling the police about what Fernando said?

A Up until now they have given me $40,000.

Q And you got 20 of that?

A Yes.

Q So then so far you got $20,000?

A Um-hum.

Q And that is a lot of money, isn't it?

A If you think that.

Q What do you think? I want to know what you think.

A For me, a lot of money is $1 million.

Q $600,000 would not be enough to be a lot of money?

A It's good.

Q How about $300,000?

A Good. Good. $100,000 is good.

Q $100,000 is a lot of money, right?

A Whatever. People kill somebody for $100,000.

* * *

Q You are saying $20,000 to you is not a lot of money?

A Could be, according to the situation. You can tell him that I have four sons.

Q Let's talk about your situation. Right now you are in bankruptcy, so wouldn't you say right now $20,000 is a lot of money?

A Good.

Q Okay. Now, if you get the balance of this reward, which since they have already paid 40, that is another 60?

A Yes.

Q And you are going to split that $60,000 with Claudio, correct?

A True.

Q So that means you got this year another $30,000 coming?

A When they pay it, if they pay it. If they don't pay it --

Q But if they pay it you are going to get another 30, that's what I'm saying.

A Yes, that's good.

Q I know it's good.
And when you add that 30,000 to the 20 that you already got, now we've got $50,000.

A Yes.

Q Would you agree that that is a lot of money?

A A little.

Q A Little. A little, a lot. Okay.
Now, you are looking forward to getting the rest of this money, aren't you?

A Everybody wants money.

Q The question is: Are you looking forward to it, sir?

A If I deserve it, yes.
If I don't deserve it, no.

Q Isn't it correct, sir, that unless this boy is convicted you don't get the rest of your money?

A I don't know how the thing works.

(T. 1437, 1438-41). Counsel again delved into the issue on recross examination:

Q You just stated that you think you earned your money decently.
Why weren't you so decent immediately after he made those statements to you.

* * *

Let me restate it.

You said that you think you earned this money decently, so I want you --

A Yes.

Q -- as decent as you think you are, right after he told you that and go right to the police instead of waiting to get money?

A Well, you think that.

Q Decent depends on how much you get, isn't that right, sir?

A If you want to think that, also.

Q Can you answer the question? It's not what I think. I want to know what you think.

A I can't answer that question.

Q You can't answer it?

A I've told you already a little while ago why.

Q So you can't answer whether money makes you more decent or not; that is what you said?

A I don't know how you are dealing with me or how you are treating me.

Q I'm treating you like a witness. I'm asking you questions.

A You are telling me that money makes me decent or does not make me decent. I'm a man without a record. I'm a decent man.

* * *

Q You still haven't answered this question, sir.

Why weren't you decent right after Fernando made those statements to you and go right to the police instead of waiting for money?

(T. 1452-54). Counsel also extensively discussed the two men's

consultation with their attorney before going to the police. (T. 1442-45, 1448-49). Finally, as noted in Point IV, supra, the testimony of these two men was limited compared to the extensive confession testimony of Sanchez, the planning evidence presented by Cromer, and the physical evidence tying Defendant to the crime. In view of the foregoing, any error would be harmless beyond a reasonable doubt. Larzelere v. State, 676 So. 2d 394, 400 (Fla. 1996)(any error in limiting defense impeachment of key state witness harmless where counsel conducted an extensive cross examination of the witness).

VI.

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION, AFTER 75 DAYS OF PREPARATION TIME HAD ALREADY BEEN ALLOWED, FOR AN ADDITIONAL CONTINUANCE.

As his sixth claim, Defendant incorporates Claim II from his original initial brief. In response, the State incorporates its original Point II. See Original Answer Brief at 33-37.

VII.

THE TRIAL COURT'S FINDINGS AS TO THE AGGRAVATING CIRCUMSTANCES ARE SUPPORTED BY THE RECORD.

Defendant's seventh claim is that the trial court erred in finding that the murder was committed for pecuniary gain, for the purpose of avoiding arrest, and that the victim was a law enforcement officer. He further asserts that the prior violent felony and commission during a felony aggravators should have been merged. None of these contentions has merit.

A. PECUNIARY GAIN

Defendant asserts that because the gunplay that resulted in Bauer's death was a result of a shootout that began after the defendants attempted 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 Bauer came into contact with the defendants was because he had the misfortune to be present when the defendants chose to rob the Kislak National Bank. The attempt to rob the bank led directly to his death. The assertion that the "motivation" for Bauer's death was that a "shootout began once Officer Bauer went for his gun," (Am. B. 26), is revolting. There was no shootout. This was an execution designed to eliminate the only obstacle to the money

Defendant and his cohorts were intent on taking. Bauer never even fired his gun. Rather, the defendants chose to rob two tellers whom the defendants knew were accompanied by an armed guard whose job it was to protect them and prevent anyone from taking the money. The trial court thus properly applied this factor. Mendoza v. State, 22 Fla. L. Weekly S655, S658 (Fla. Oct. 16, 1997)(rejecting claim that murder was not pecuniary gain where defendant shot murder/robbery victim only after victim shot codefendant in self defense); 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 that factor in its sentencing order with the commission during a robbery aggravator. (R. 543). The jury was also given a merger instruction. (S.R. 271). Defendant does not argue that the trial court erred in finding that Bauer's murder occurred during a 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.

B. AVOID ARREST

Defendant also asserts that the trial court erred in concluding that the murder was committed to avoid arrest. The trial court made the following findings as to this aggravator:

> The state has proven beyond and to the exclusion of every reasonable doubt that Officer Stephen Bauer was a law enforcement officer with the North Miami Police Department; that he was in full uniform on the day he was killed and that his identity as a police officer was evident. It is clear that in those last fateful seconds of his life, Officer Bauer, upon realizing that the bank was about to be robbed, reached for his service revolver in an effort to defend the lives of those he was bound to protect and to apprehend the perpetrators. It is equally clear that to avoid their own arrest the defendant's accomplices, Leonardo Franqui and Ricardo Gonzalez, shot and killed the officer. The court finds the existence of this aggravator and gives it great weight.

(R. 543). Defendant presents the specious argument that Officer Bauer was only protecting the tellers and that there was no evidence that he was attempting to arrest the defendants. To accept this premise it must be concluded that had Bauer not been killed, he simply would have allowed the defendants to leave once he had

"protected" the tellers.[17] He would not have pursued them; he would not have attempted to disarm them; he would not have used the police radio he was wearing on his belt, (T. 1257), to call in assistance; he would have simply said, "You boys be good and go play now." The police are invested with a broad degree of discretion to determine whether to arrest wrongdoers or not. It is not plausible, however, that the defendants could have reasonably believed that an officer would allow four men who had just attempted to rob a bank to simply leave. Indeed, the evidence was uncontroverted that the officer had drawn his gun at the time he was killed. (T. 1158-59, 1178).

Moreover, Defendant's proposition is unreasonable even if his claim that the defendants thought Bauer was "only" an armed security guard is credited. That claim was properly rejected below, however. See Subpoint C, infra. In any event, regardless of whether the guard was a commissioned officer or not, his obvious job was to ensure that bank robbers would not be successful, either during or after their robbery. As such his murder clearly helped the defendants avoid arrest.

Finally, Defendant's attempt to distinguish Cruse v. State, 588 So. 2d 983 (Fla. 1991), on the ground that in that case sirens were heard before the police arrived is unpersuasive. The Court

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[17] Defendant does not explain how Bauer would have protected the tellers from a gang of armed men without either shooting or arresting them.

specifically found this aggravator was supported by evidence that the defendant intentionally shot at uniformed police officers. Id. at 993. The Court cited the sirens not as necessary evidence of the aggravator, but rather in rejection of Cruse's claim that the killing of the officer was a random shooting.[18] Id. Here, there was absolutely no suggestion that the defendants were not aware that Bauer (regardless of his official job title) was a major obstacle to the success of their plans. Further, as in Cruse, this factor is supported by evidence that the shooting of Officer Bauer was successful, at least for several weeks, in helping the defendants to avoid justice. Id. (factor supported by fact that defendant "was successful in avoiding arrest and carrying on with what he evidently intended to do").

C. VICTIM A LAW ENFORCEMENT OFFICER

Defendant next asserts that the trial court erred in concluding that the murder was victim was a law enforcement officer engaged in the performance of his official duties. Defendant contends that the aggravator did not apply because Bauer was not involved in the performance of his official duties. (B. 28). The courts that have considered whether a police officer was performing his official duties under circumstances like those presented here have concluded that the officer was. See Hughes v. State, 400 So.

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[18] Cruse had been engaged in the random shooting of supermarket patrons when the police arrived.

2d 533, 534-35 (Fla. 1st DCA 1981)(deputy sheriff employed as a department store security guard was acting in the performance of his duties as a police officer when he attempted to arrest a shoplifter); State v. Robinson, 379 So. 2d 712, 715 (Fla. 5th DCA), cert. denied, 388 So. 2d 1117 (Fla. 1980)(uniformed off-duty officer working security at a jai-alai fronton within the city that employed him "was engaged in the lawful performance of his duty as a police officer" when he attempted to arrest an individual who was involved in a brawl); State v. Williams, 297 So. 2d 52 (Fla. 2d DCA 1974)("off-duty but uniformed" city police officer acting as a bouncer at a dance club acted as an agent of the state when he searched a patron's purse). In Robinson, the court found dispositive that §790.052, Fla. Stat., authorizes off-duty officers to carry their weapons and to perform any law enforcement functions that they normally perform during duty hours. 379 So. 2d at 714. Here, as noted above, at the time Bauer was shot, he had drawn his gun and was actively trying to protect the tellers, apprehend the defendants, or both. These actions were clearly those of a law enforcement officer carrying out his sworn duty. Further, testimony was adduced that the murder occurred within the territorial jurisdiction of the city that employed Bauer, North Miami. (T. 1111, 1275). Finally, it should be noted that Defendant was convicted of the murder of a law enforcement officer. (R. 451). The jurors were instructed that before they could return that verdict

they had to find that the "crime arose out of or in the scope of the officer's duty as a law enforcement officer." (R. 441). Defendant has not challenged that conviction. In view of the foregoing, the trial court properly determined that §921.141(5)(j) applied in this case.

Defendant also asserts that there was no evidence the defendants knew Bauer was a police officer. (B. 28). Assuming that there is even any requirement of scienter under §921.141(5)(j),[19] this claim is belied by the evidence, including the fact that Bauer was in full uniform when he was killed, (T. 1153, 1167, 1269-76), and, as noted, was rejected by the finder of fact below in both the guilt and penalty phases. (R. 543). Defendant himself, in his own statement, noted that Bauer was dressed in a blue uniform with a gun and a badge. (S.R. 308). Defendant's reference to alleged

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[19] The Court has held that scienter is an element under §784.07(3), which provides for an enhanced sentence for the conviction of the attempted murder of a police officer. Thompson v. State, 695 So. 2d 691, 692-93 (Fla. 1997). That conclusion, however, was based on the unique statutory language of that statute. The Court found that because subsection (2) of the statute explicitly required a "knowing" act, and because the alternative basis in subsection (3) at least impliedly required scienter, it would be "unreasonable and illogical" to not read the knowledge requirement into the remaining language of subsection (3). Section 921.141(5)(j), on the other hand, contains no such language:

> Aggravating circumstances shall be limited to the following:
>
> * * *
>
> (j) The victim of the capital felony was a law enforcement officer engaged in the performance of his official duties.

contrary evidence, (T. 1838, B. 27), was not even adduced at the proceedings involving Defendant, but before the jury trying his codefendants. Indeed, the reference is to part of codefendant San Martin's statement to the police, which also credited Defendant as being the prime mover in the plan to rob the bank. (T. 1826). That statement's content was the main reason Defendant was granted a severance from the other defendants. Having successfully sought to have the evidence excluded from his case, Defendant may not now use that same evidence to support the notion that this aggravator does not apply to him.[20] As such the trial court properly concluded that the aggravator applied. See Wuornos v. State, 644 So. 2d 1012, 1019 (Fla. 1994)(where evidence is conflicting, the Court on appeal views the record in the light most favorable to the prevailing theory); Wuornos v. State, 644 So. 2d 1000, 1009 (Fla. 1994)(fact finder may reject defendant's theory of the case where based on defendant's own statements where such statements were inconsistent with the other facts shown); see also Thompson, 695 So. 2d at 693 (whether defendant knew of the victim's status as a police officer

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[20] Defendant claimed, in his own statement, that he learned Bauer was a police officer "I think by hearing it by the news or something like that." (S.R. 332). However, the entire remainder of Defendant's "confession" was an attempt to blame Franqui for allegedly forcing Defendant to participate in the crime. That claim was wholly refuted by the direct testimony of Cromer and Sanchez. As such, the trial court would have been well within its discretion in not crediting Defendant's statement, particularly since even in the statement Defendant conceded that Bauer was in uniform with both a badge and a gun.

is a question for the trier of fact). Defendant's reliance on Castor v. State, 587 N.E.2d 1281, 1289-90 (Ind. 1992), (B. 29), is misplaced. In Castor, the Indiana Supreme Court held that under the circumstances of that case, where the victim was an undercover officer, the state had failed to prove the aggravator.[21] In reaching that conclusion, however, the court distinguished its earlier holding in Moore v. State, 479 N.E.2d 1264, 1275-76 (Ind. 1985), wherein it had held that the defendant's knowledge that the victim was a law enforcement officer could be presumed where the officer was in uniform "with a badge and radio clipped to the front." 479 N.E.2d at 1276. Such is precisely the situation here, and the trial court did not err in reaching the same conclusion.

Finally, even were the aggravator improperly found, any error would be harmless, in that the trial court merged this factor with the avoid-arrest aggravator, (R. 544), which, as discussed above at Subpoint B, was properly found. Downs.

D. MERGER

Defendant's final claim as to the aggravators is that the trial court should not have separately considered the during a

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[21] Section 35-50-2-9(b)(6), Ind. Code, provides that it is an aggravating circumstance where:

> The victim of the murder was a corrections employee, fireman, judge, or law-enforcement officer, and either (I) the victim was acting in the course of duty or (ii) the murder was motivated by an act the victim performed while acting in the course of duty.

robbery and prior felony conviction factors. He alleges that because the latter factor was based on the contemporaneous robbery and aggravated assault, the judge impermissibly found two aggravators based on the same aspect of the offense. This claim is without merit.

The cases Defendant cites are inapposite. As this court explained in Toole v. State, 479 So. 2d 731 (Fla. 1985), improper doubling only occurs where one aggravator necessarily encompasses the conduct subsumed in the other; thus, e.g., pecuniary gain and robbery will usually require merger:

> Appellant also argues that his death sentence is unconstitutionally founded upon an improper doubling of the aggravating circumstances of creating a great risk of death to many persons and committing the capital felony while engaged in the commission of an arson. This argument is without merit. Although arson may, as in this instance, involve a great risk of death to many persons, this aggravating factor is dependant on proof adduced at trial and is not necessarily encompassed by the felony of arson. By contrast every robbery necessarily involves pecuniary gain, so that when these two factors are both found there is an improper doubling.

479 So. 2d at 731. See also, Trepal v. State, 621 So. 2d 1361 (Fla. 1993)(same). Here, Defendant was convicted, in addition to the murder of Officer Bauer, of the armed robbery of Chin-Watson and the bank, as well as the aggravated assault of Hadley. (R. 452). As in Toole, although aggravated assault may be included in the offense of robbery, it is not necessarily so. Robbery may be accomplished either by the use of force or violence as well as by putting in fear. §812.13. Fla. Stat. Here, the indictment was

charged in the alternative. (R. 2). As in Green v. State, 641 So. 2d 391, 395 (Fla. 1994), where the Court found there was no improper doubling of the kidnaping and pecuniary gain aggravators where evidence supported the alternatively-charged theory that the kidnaping was for purposes other than robbery or pecuniary gain, the jury here could easily have found that the robbery was accomplished through the use of force -- the shooting of Officer Bauer. As such, the putting in fear of Hadley subsumed in the aggravated assault conviction was not an essential part of the robbery of the bank and Chin-Watson. Indeed, Hadley's money tray was not even taken. Thus, the contemporaneous aggravated assault of a wholly separate victim was properly considered as an aggravating circumstance separate from the during a robbery factor. Armstrong v. State, 642 So. 2d 730, 738 (Fla. 1994)(during a robbery and prior conviction factors not duplicative where there was a conviction in addition to the contemporaneous robbery); see also LeCroy v. State, 533 So. 2d 750, 754 (Fla. 1988)(approving finding, as separate factors, of (1) contemporaneous murder and robbery of second victim as prior violent felonies and (2) during the commission of a robbery based on the robbery of the two victims).

Finally, even if these two circumstances should have been merged, any error would be harmless beyond a reasonable doubt. The two remaining circumstances, during the commission of a robbery and committed to avoid arrest/victim a law enforcement officer are

weighty. In mitigation, the trial court found no statutory aggravating circumstances, and only two nonstatutory circumstances: Defendant's "confession"[22] and that Defendant's parent's allowed him to use drugs at home. The trial court found that both of these circumstances were entitled to "little weight." (R. 549, 551). In contrast, the trial court gave "great weight" to the during a robbery aggravator[23] and victim a law enforcement officer/avoid arrest aggravator. (R. 542-44). Moreover, the court explained that it was not merely tabulating the number of factors in aggravation, but was looking to their "nature and quality." (R. 555). Thus, whether the court had merged the prior conviction factor with the robbery factor or not, it is apparent beyond a reasonable doubt that it would have followed the jury's recommendation[24] and sentenced Defendant to death.

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[22] Defendant's statement largely attempted to shift the blame to others, echoing his claims at the sentencing hearing before the court. (S.R. 173, 286-326).

[23] The court only stated that it was "considering" the prior violent felony aggravator. (R. 542).

[24] Any claim as to the lack of a merger instruction would be procedurally barred as no such instruction was requested.

VIII.

THE TRIAL COURT PROPERLY ADDRESSED THE PROFFERED MITIGATION.

As his eighth claim, Defendant avers that the trial court erred in either rejecting proffered mitigation or in failing to give the mitigation it found sufficient weight. As to the claims from Point III of his original brief that he has incorporporated by reference, the State would rely on its response thereto at pp. 38-58 of the original answer brief. In addition to the claims originally raised, Defendant also asserts numerous claims relating to the trial court's findings as to mitigation, the weight given to the mitigation found, and the court's evidentiary rulings during the penalty phase. A review of the proceedings, however, shows that the trial court properly rejected certain proposed mitigation and adequately weighed the remainder, and did not err in excluding certain hearsay.

A. DEFENDANT'S CLAIMS

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

> [W]hen a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved. A trial court may reject a defendant's claim that a mitigating circumstance has been proved,

> however, provided that the record contains "competent substantial evidence to support the trial court's rejection of these mitigating circumstances."

Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1992); San Martin v. State, No. 83,611, slip op. at 10 (Fla. December 24, 1997)(trial court's exercise of discretion determining whether a mitigator has been established will not be disturbed where its conclusion is supported by competent substantial evidence). See also, 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"). Finally, once it has been established, 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). With the foregoing principles in mind, the State will address Defendant's contentions.

1. Defendant was an Accomplice ... his Participation was Relatively Minor. (§921.141(6)(d), Fla. Stat.)

Defendant asserts that the trial court erred in rejecting the statutory mitigating circumstance that he was a mere accomplice whose participation was minor. (B. 32). Defendant specifically declined to have the jury instructed on this factor, (T. 2303), did

not argue the factor to the jury, (S.R. 249-69), and did not argue the factor to the judge in his post-recommendation memorandum of law. (R. 514-33). The trial court nevertheless considered the record, and properly determined that this factor had not been established. (R. 546).

In arguing that this factor should have been found, Defendant principally asserts that the trial court erred in concluding that Defendant was the middleman who connected Cromer, who originated the plan, with the remaining defendants. He avers that the trial court's conclusion as to Defendant's role was in error because "the prosecutor agreed that it was Cromer who told the co-Defendants about the plan to rob the bank." (Am. B. 33). Actually, the prosecutor's objection to defense counsel's misstatement of Cromer's prior testimony during cross was wholly consistent with the trial court's conclusion:

> [THE PROSECUTOR]: That's not what he [Cromer] said. He said that he would not have told the other four [defendants] in the van about the plan <u>if not for Fernando Fernandez</u> being in the van.

(T. 1496). Moreover, Cromer's testimony as a whole made it quite clear that he did not know any of the codefendants, and would not have shared the plan with them but for Defendant. (T. 1494). Furthermore, the initial planning took place at the home of Defendant's girlfriend, (T. 1466), and only Defendant was present at the planning meetings; the others were not. (T. 1493).

Defendant also states that "in the scale of participation

during the actual robbery" he is next to last. (Am. B. 33). Regardless of which rung Defendant occupied on the ladder of the crime, his participation cannot be characterized as "minor." As noted, he was the bridge between the plan and the other accomplices. By his own admission, he stole both of the vehicles used in the crime, one without any assistance, and obtained the murder weapons. (S.R. 290-91, 319-20, T. 1499). On the day of the crime, he drove one of the two cars. (S.R. 322). Defendant's assertion, (Am. B. 33), that like Abreu, Defendant was only one of the getaway drivers is not an accurate reading of the record. Abreu waited in Franqui's Buick several blocks away. Meanwhile, the four other accomplices, including Defendant, went in the two stolen Chevies to the actual scene of the murder and robbery, with Franqui driving one, and Defendant driving the other. Thus, while Abreu was a "true getaway driver," Defendant was, in contrast, one of the men actually present at the scene. Finally, his allegedly minor participation in no way stopped him from taking his share of the loot, $2600.00, which he spent on clothes, furniture, and other items. (T. 1504, S.R. 307). In view of the foregoing, the trial court properly followed defense counsel's lead and rejected this mitigator. Valdes v. State, 626 So. 2d 1316, 1324 (Fla. 1993)(trial court properly rejected this factor where evidence showed Defendant was a substantial participant in the crime; that codefendant was "major participant" did not mean that defendant's participation was

minor).

2. The Capacity of the Defendant to Appreciate the Criminality of his Conduct, etc. (§921.141(6)(f), Fla. Stat.)

Defendant next asserts that the trial court erred in rejecting the statutory mitigating circumstance that his capacity to appreciate the criminality of his conduct was substantially impaired. As with the previous subclaim, Defendant specifically declined to have the jury instructed on this factor, (T. 2303), did not argue the factor to the jury, (S.R. 249-69), and did not argue the factor to the judge in his post-recommendation memorandum of law. (R. 514-33). The trial court nevertheless considered the record, and properly determined that this factor had not been established. (R. 548).

Defendant argues, (Am. B. 34), that the trial court's analysis of this factor is "confusing," and that "[s]ince it is not clear if the trial court used the test for insanity in the present case, this matter must be remanded for clarification." The problem with this argument is that the trial court's analysis could not be more clear:

> **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.**
>
> There is absolutely nothing in the record to suggest the existence of this mitigating factor. The court has reviewed the testimony of Dr. Schwartz and does not find that the doctor ever concluded that this defendant's ability to appreciate the criminality of his conduct or

> to conform his conduct to the requirements of the law was substantially impaired.
>
> In addition to the absence of expert testimony to substantiate the existence of this mitigator, the facts of the case and the defendant's conduct on the day of the crime, as set forth above, clearly rebut the suggestion that this mitigating circumstance exists. The court is NOT reasonably convinced that this mitigator exists.

(R. 548). Defendant's reliance on Ferguson v. State, 417 So. 2d 631, 638 (Fla. 1982), is clearly misplaced. In that case the judge rejected this factor solely because he found the defendant was competent under the M'Naughten rule. Id. Here, however, even assuming, arguendo, that the court's order can even be construed as applying the M'Naughten criteria, such was not the sole basis for the court's rejection of the circumstance as mitigation. The court also noted that there was no evidence, even from Defendant's own expert, that the factor applied. The court's reasoning was proper. Ponticelli v. State, 593 So. 2d 483, 490 (Fla. 1991), vacated on other grounds, 506 U.S. 802 (1992)(trial court properly considered M'Naughten criteria along with other factors in rejecting this mitigator). Moreover, regardless of what legal standard Defendant imagines that the trial court applied, the defense never asserted this factor below, its expert never suggested it applied, the trial court, considering the factor sua sponte, found nothing in the record to support it, and Defendant does not now point to any evidence that would. No error occurred. See San Martin, Slip op. at 9 (trial court properly rejected this mitigating circumstance based

upon absence of expert testimony supporting it and in consideration of defendant's actions on the day of the murder).

3. The Defendant Acted under Extreme Duress, etc. (§921.141(6)(e), Fla. Stat.)

The trial court properly rejected this mitigator, as the State has already extensively discussed in its original answer brief at 41-43. Defendant further asserts that the trial court erred in rejecting this claim because it mistakenly stated that Officer Bauer would not have died had Gonzalez not participated because he fired the fatal shot, and because contrary to the court's conclusions, Cromer was the true "driving force" behind the robbery, not Defendant. (Am. B. 35). Defendant picks at nits. The thrust of the trial court's conclusion was that but for Defendant, the originator of the plan, Cromer, and the (literal) executioners of it would not have come together. This conclusion, while disputed by Defendant, is wholly supported by the record, and as the prevailing theory below, must be accepted on appeal. Wuornos, 644 So. 2d at 1019. Moreover, regardless of the tangential points Defendant cites, the central question was whether Defendant was under duress. Although he claimed duress in court and in his statement to the police, Defendant told his cellmate otherwise, and his coconspirator testified that Defendant was involved in the planning of the crime before Franqui ever arrived on the scene. The trial court's decision was supported by competent substantial evidence and should be sustained. Id.; Valdes, 626 So. 2d at 1324

(trial court properly rejected defendant's claim of duress where contradicted by other evidence).

Defendant also avers that the trial court committed a "blatant violation" of due process in allowing Detective Nabut to testify before the court, in rebuttal of this factor, regarding Defendant's confession to planning the robbery that resulted in the murder of Raul Lopez, which San Martin, Franqui and Abreu carried out.[25] (Am. B. 35). The law is well-settled, however, that either party may present additional witnesses during the post-recommendation hearing before the court. Cochran v. State, 547 So. 2d 928, 931 (Fla.1989)(trial court may consider evidence not presented to jury); Spaziano v. State, 433 So. 2d 503, 511 (Fla. 1983)(same); Porter v. State, 429 So. 2d 293 (Fla. 1983)(same).

Likewise, his sub-sub-contention that the evidence was improper because he received no notice is unfounded. Detective Nabut was listed as a witness and testified at the guilt phase. (S.R. 180, T. 1931). Counsel thus could not reasonably claim surprise as to anything he might have said. As noted above, the propriety of presenting testimony to the court alone had been established for years at the time of trial.

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[25] See Franqui v. State, 22 Fla. L. Weekly S374 (Fla. June 26, 1997); San Martin.

Finally, Defendant's only alleged claim of prejudice is logically unsound. He fails to explain how he could have been harmed by not being permitted to "challenge this evidence in front of the jury," (Am. B. 36), where the evidence, undeniably harmful to his case, was never presented to the jury. Moreover, regardless of anything that he might have brought out on cross of the detective, it must be assumed that Defendant's case would have been more harmed than helped by the presentation of evidence to the jury that after being advised of his rights, Defendant confessed to planning another strikingly similar robbery that was carried out by the same accomplices, and resulted in another murder, just a month before Officer Bauer was killed. This contention must be rejected.

4. Weight Ascribed to Defendant's Family History

As discussed in the original answer brief at 45-46, the trial court acted well within its discretion in giving little weight to the mitigation based on Defendant's family history. Defendant's assertions that the court failed to consider particular items of testimony are without merit. These points were noted in Defendant's sentencing memorandum, (R. 522-23), and the trial court used the same point heading in addressing this factor in its sentencing order. That it did not specifically address each item of testimony is of little moment, given that the court found the circumstance to exist. Thompson v. State, 648 So. 2d 692, 697 (Fla. 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"). As noted above, and in the original answer brief, the weight ascribed to factors found to exist is within the court's discretion. Defendant's reliance on Brown v. State, 526 So. 2d 903, 908 (Fla. 1988), is thus misplaced. In that case, the Court was discussing the trial court's rejection, as a matter of law, of such mitigation in the context of reviewing the propriety of the trial court's override of the jury's life recommendation. The Court was not speaking to the weight the trial court should or should not have given to the factor when, as here, the court found the mitigation to exist and followed the jury's recommendation. Indeed, in Brown the Court observed that "family background and personal history may be given little weight." 526 So. 2d at 908. This subpoint should be rejected.

5. Psychological and Educational History

Defendant next asserts that the trial court erred in refusing to find Defendant's psychological and educational history as mitigating. Given the evidence presented, the trial court did not err in rejecting this proposed mitigation, as discussed in the original answer brief at 47-48. Defendant asserts, in addition to the claims made in his original brief, that the court should have found this circumstance because of Defendant's relatively low IQ. This contention is without merit. See San Martin, Slip op. at 10, in which the Court affirmed the trial court's rejection of the same

circumstance as mitigating in the face of virtually identical evidence (San Martin's IQ of 77 versus Defendant's IQ of 75). The other alleged evidence cited by Defendant, (Am. B. 39), was refuted by his own expert on cross examination. Thus, although the doctor testified that Defendant might have a mood disorder, he also conceded that Defendant's mood fluctuations could be the attributed to the discomfort anyone might experience when facing the electric chair. (T. 2273). Likewise, the suicide attempt appeared to have been only an attention-getting device. (T. 2274). As for the alleged bipolar disorder, Defendant's own expert testified that Defendant suffered from no major mental illness, although he was antisocial. (T. 2278-80). Plainly the court acted within its discretion in concluding that Defendant had not established this factor. San Martin, Slip op. at 10; Patten v. State, 598 So. 2d 60, 62 (Fla. 1992)(trial court properly rejected mental mitigation were expert testimony established that defendant was merely antisocial); Walls, 641 So. 2d at 391 (trial court properly rejected mental mitigation where its existence was, at best, "debatable").

6. Potential for Rehabilitation

Defendant next asserts that the trial court erred in wholly failing to address the alleged mitigation of Defendant's potential for rehabilitation. As discussed in the original answer brief at 51-52, this factor, while it was not given a separate point heading in the sentencing order, was referred to and rejected in the

context of the proposed remorse aggravator, in discussion of the one piece of evidence that Defendant cited in his memorandum as supporting the rehabilitation factor -- his letter to his teacher. (R. 524, 550). As noted in the original brief, Defendant's repeated and continuing refusal to accept responsibility for his actions, his juvenile recidivism, and his refusal to avail himself of remedial educational opportunities when offered to him fully support the trial court's rejection of this factor.

7. Standard of Proof

Defendant next asserts that the trial court used the wrong standard in determining whether Defendant had established mitigation -- "reasonably convinced" rather than "reasonably established." Given that the judge was the trier of fact it seems obvious that if he was not "reasonably convinced" that the mitigation was proven, then the mitigation was not "reasonably established." Moreover, the term "reasonably convinced" is that used in the standard jury instructions.

8. Weight as to Cooperation with Authorities

As his eighth subpoint, Defendant again claims that too little weight was given to an established mitigator. As has been noted above and repeatedly in the original answer brief, the weight ascribed to a particular mitigating circumstance is within the trial court's discretion. Moreover, as discussed in detail in the original answer brief at 50-51, given that Defendant's cooperation

consisted of a self-serving statement proven to be inconsistent with the facts as established at trial, as well as Defendant's attempts to have God himself intercede in avoiding arrest, and his repeated refusal to accept responsibility for his actions, the factor was properly given little weight. Agan v. State, 445 So. 2d 326, 329 (Fla. 1983), grant of habeas corpus aff'd on other grounds, 12 F.3d 1012 (11th Cir. 1994)(alleged cooperation with authorities was properly rejected as mitigation where it had self-serving motivation).

Defendant also asserts that this factor was supported by evidence that he avers the trial court improperly excluded: alleged evidence of a threat by codefendant San Martin against Defendant's sister. The trial court correctly determined that this hearsay was inadmissible where counsel proffered that the sister did not know San Martin, and the statement was based solely on the caller's alleged self-identification as San Martin. (T. 2210). Zeigler v. State, 402 So. 2d 365, 374 (Fla. 1981)(to be competent, evidence of a telephone conversation must be accompanied by evidence of the identity of the caller); Manuel v. State, 524 So. 2d 734, 735 (Fla. 1st DCA 1988)(without other identifying evidence, mere self-identification by telephone caller is insufficient to lay predicate for admission of statement by caller); Hargrove v. State, 530 So. 2d 441, 443 (Fla. 4th DCA 1988)(same); Byer v. Real Estate Comm'n., 380 So. 2d 511 (Fla. 3d DCA 1980)(same). As Defendant correctly

notes, the rules of evidence have been somewhat relaxed for penalty-phase proceedings. However, "they emphatically are not to be completely ignored." Johnson v. State, 660 So. 2d 637, 645 (Fla. 1995); Griffin v. State, 639 So. 2d 966, 971 (Fla. 1994)(same); Hitchcock v. State, 578 So. 2d 685, 690 (Fla. 1990), rev'd on other grounds, 614 So. 2d 483 (Fla. 1993)(same). Moreover, even had Defendant established the proper predicate to overcome the authenticity and hearsay problems, he has failed to explain how the fact that he was threatened after he was arrested and implicated his codefendants, (T. 2209), was in any way relevant to the issue of his alleged cooperation with the authorities, or in any way overcomes the abundant evidence that he cooperated solely in an effort to put the blame on the others and save his own hide. Indeed, given that Defendant was most definitely no longer cooperating with the authorities at the time the threat was allegedly made, the most this evidence would have proven was the obvious point that people do not appreciate being ratted out by their friends. In any event, the trial judge was aware of the alleged threat and still saw fit to give the factor little weight, which, as noted, was not an abuse of discretion. This subclaim should be rejected.

9. Exclusion of Threat Evidence as to Duress

Defendant also asserts that the sister's alleged threat testimony was relevant to his claim of duress. As discussed above,

this evidence was properly excluded. Moreover, even if it should have been admitted, any error would have been harmless beyond a reasonable doubt in view of the overwhelming evidence, as discussed above and in the original answer brief, that refuted any claim of duress.[26]

Defendant additionally asserts that the trial court improperly excluded the hearsay testimony of an investigator to the effect that codefendant Abreu had said that Franqui had threatened him. However, Abreu was available to testify but counsel elected not to call him. (T. 2314-15). As noted above, although the rules of evidence are relaxed in penalty-phase proceedings, they still exist. Johnson; Griffin; Hitchcock. Particularly here, were the declarant was available to testify, but was not called, there simply was no reason to allow this blatant hearsay in. As such no error occurred. Finally, even if the testimony was improperly excluded, any error would be harmless beyond a reasonable doubt, given the overwhelming evidence that Defendant was in no way coerced, as discussed previously.

10. Remorse

Defendant asserts that the trial court erred in considering Defendant's refusal to accept responsibility for his actions in

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[26] The relevance of evidence that San Martin threatened Defendant's sister would also be questionable considering that Defendant's entire theory of duress was based on Franqui allegedly forcing him to participate in the crime.

rejecting his contention that he was remorseful. (Am. B. 44). Remorse is defined as "a gnawing distress arising from a sense of guilt for past wrongs (as injuries done to others)," and is synonymous with "penitence." Webster's Third New International Dictionary 1921 (Merriam-Webster 1986). In the usage guide following the term "penitence," it is explained that penitence and remorse describe "a state of mind of one who acknowledges and deeply regrets his wrongs." Id. at 1670. Plainly one, such as Defendant, who refuses to acknowledge his responsibility does not have a "sense of guilt" and has not "acknowledge[d] ... his wrongs." As such, the trial court was well within its discretion in determining that the evidence did not reflect that Defendant was remorseful. Defendant asserts that only one case, Valle v. State, 581 So. 2d 40, 49 (Fla. 1991), has construed remorse as involving the acceptance of responsibility. Notably, however, he cites none that hold it does not. Defendant as much as concedes that the trial court's rejection of his post-arrest claims of remorse was proper, but further asserts that it erred in overlooking the babalao's testimony that Defendant was sorrowful before his arrest. (Am. B. 45). What Defendant overlooks, however, was that Defendant went to the babalao because he was afraid of his own apprehension and was seeking protection in the form of a spell or amulet. (T. 1436, 1452). Plainly Defendant's sorrow related as much to his fear of getting caught as to any concern for the death of Officer Bauer.

The trial court properly rejected remorse as mitigation. Agan, 445 So. 2d at 329 (alleged evidence of remorse was properly rejected where other facts showed defendant's behavior to have had self-serving motivation).

B. HARMLESS ERROR

Finally, even assuming, arguendo, that any of Defendant's claims regarding the factors in mitigation had merit, any error would be harmless beyond a reasonable doubt. The trial court found three strong aggravating factors: (1) prior convictions for felonies involving violence; (2) murder committed during the course of a robbery, merged with the motive of pecuniary gain, to which it gave great weight; and (3) murder of a law enforcement officer, merged with witness elimination. (R. 542-44). The court also found no statutory mitigating circumstances, and minimal nonstatutory mitigation, to which the court gave little weight: Defendant's family history and cooperation with the authorities. (R. 544-52). Finally, the court concluded that the aggravation "far outweigh[ed]" the mitigation. (R. 555). See Wickham v. State, 593 So. 2d 191 (Fla. 1991)(in light of very strong case of aggravation any error in weighing of mitigators was harmless beyond a reasonable doubt).

IX.

THE TRIAL COURT PROPERLY DETERMINED THAT DEFENDANT'S ACTIONS SATISFIED THE ENMUND/TISON CULPABILITY REQUIREMENTS.

Defendant's ninth claim is that the trial court erred in determining that Defendant was sufficiently culpable to warrant imposition of the death penalty under Enmund v. Florida, 458 U.S. 782 (1982), and Tison v. Arizona, 481 U.S. 137 (1987). As discussed in the original answer brief at 58-63, this claim is without merit. In addition to his original claims in this regard, Defendant also asserts that the trial court misread Enmund and its progeny, (Am. B. 47), that it erred in finding that Defendant was a major participant in the offense, (Am. B. 48), that it erred in finding that Defendant's state of mind was one of reckless indifference, (Am. B. 49), that it applied the wrong legal standard in determining Defendant's mental state, (Am. B. 50), that the State "sandbagged" the defense on this issue, (Am. B. 51), and that the trial court considered extra-record facts. Id. Defendant also asserts that his sentence is disproportionate. Although this claim is largely addressed in the original answer brief at 63-67, several of Defendant's present assertions as to the record are inaccurate and will therefore also be addressed.

A. CULPABILITY

1. Enmund and Its Progeny

Defendant's first subpoint is that the trial court erred in its Enmund/Tison analysis because it considered whether Defendant

intended that lethal force be used. Defendant asserts that under Jackson v. State, 575 So. 2d 181 (Fla. 1991) and Tison itself, the "lethal force ... analysis has been rendered void." (Am. B. 47). The State would question whether Defendant's reading is correct. Regardless of whether it is or not, however, Jackson clearly holds that the death penalty may be imposed "if the evidence shows both that the defendant was a major participant in the crime, and that the defendant's state of mind amounted to reckless indifference to human life." 575 So. 2d 191. Thus, whether the lethal force inquiry is relevant or not, the trial judge's calculus was correct because in addition to finding that lethal force was intended, the court specifically found that the Jackson criteria had been satisfied:

> The facts of this case clearly establish that, at the very least, the defendant intended lethal force to be used and that he was a major participant in a felony that resulted in Officer Bauer's death and his mental state was one of reckless indifference."

(R. 554)(emphasis supplied).[27] As discussed in the original answer brief, the trial court's conclusions were amply supported by the record. This contention must be rejected.

2. Factual Findings as to Defendant's Participation

Defendant next asserts that the trial court erred in determining that Defendant was a major participant in the offense. This contention has been thoroughly refuted, supra, in the

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[27] The trial court's Enmund/Tison analysis is quoted in full in the original answer brief at 59-61. Note that the judge specifically quoted the language from Tison referred to in Jackson.

discussion of the aggravating and mitigating factors, as well as throughout Point III of the original answer brief.

3. Factual Findings as to Defendant's Mental State

Defendant also asserts that the trial court's conclusion as to Defendant's mental state is not supported by the record. As discussed in the original answer brief, the trial court's conclusion was amply supported by the evidence that Defendant knew about the prior Lopez murder, had "brokered" both crimes, had provided the weapons for both crimes, and had previously staked out the bank. Regardless of whether Cromer testified that they knew about the guard or not, the evidence that they had observed the activities at the bank before the day of the murder, combined with the testimony of the tellers that they were always accompanied by a guard fully support the judge's conclusion as to Defendant's reckless disregard for human life.

4. Legal Standard as to Defendant's Mental State

Defendant next asserts that the trial court erred utilizing a "reasonable person" standard in determining Defendant's state of mind, and in so doing failed to take into account his alleged low intelligence and averred impulsiveness. In fact the court made no reference at all to any such standard, instead basing its conclusions on Defendant's actions as reflected in the evidence. Moreover, in view of his own expert's equivocal testimony, as well as the highly planned nature of the crime, and Defendant's role as

originator of the equally highly-planned Lopez crime, the trial court properly rejected Defendant's claimed mental mitigation generally, and his allegations of impulsiveness in particular.

5. Presentation of Evidence to the Court After the Jury's Recommendation

As he did with regard to the mitigation, Defendant again complains about Detective Nabut's "surprise" testimony before the court. As discussed, supra, this contention is meritless.

6. Alleged Consideration of Extra-Record Facts

Defendant's final complaint as to the Enmund/Tison analysis is that the trial court improperly considered its own recollection of Franqui's confession as to Defendant's role in the Lopez murder.[28] The trial court did nothing of the kind. In the cited passage, the trial court was responding to counsel's claim that Nabut's testimony that Defendant had brokered the Lopez murder was a surprise by pointing out that counsel had a copy of Franqui's statement, and that the same information was contained therein. (S.R. 181). The court's conclusions as to Tison, on the other hand are explicitly based on Nabut's in-court testimony as reflected in the sentencing order, where the court states: "See testimony of Albert Nabut on September 30, 1994." (R. 554 n.5). Nabut's testimony in fact supports the trial court's conclusions. (S.R. 175-79).

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[28] The trial judge was also the judge in the Lopez case.

B. PROPORTIONALITY

The State fully addressed the issue of proportionality in its original answer brief. In his amended brief, however, Defendant bases his argument on several invalid premises that must be addressed. The first is the notion that Defendant was merely the "getaway driver." (Am. B. 53). This is simply not true. Defendant instigated the entire crime, he procured the murder weapons, he procured the vehicles used in the crime, and he shared fully in the proceeds. Defendant also asserts that he had no participation in the killing. Id. As noted, he was the driving force behind the crime, and while he did not pull the triggers, he supplied the guns. Defendant finally asserts that the "victim resisted." Id. By defendant's reasoning, homicide is justifiable if the robbery victims have the temerity to defend themselves. This notion has recently been rejected by the court. Mendoza. Moreover, even if resistance could in any way be an appropriate consideration in proportionality analysis, it would not be here, where the victim's job was to resist, and the jury and court have concluded that the defendant knew that. As his premises are invalid, it quickly becomes clear that the cases upon which Defendant relies have no application to the facts here. The cases that defendant cites were essentially reversed because, unlike Defendant's case, the facts were insufficient to support the death penalty under Enmund and Tison. As discussed above, Defendant was sufficiently culpable to

be sentenced to death. As such, the appropriate cases for comparison are cited in the original answer brief, and they dictate that Defendant's sentence be deemed proportional.

Finally, Defendant presents the specious assertion that because the shooters' death sentences have been overturned, so must his. The sentences of Franqui and Gonzalez were reversed because the court found Bruton[29] error, not because their sentences were found disproportionate. Indeed, their cases were remanded for a new penalty proceeding. Franqui v. State, 22 Fla. L. Weekly S391 (Fla. July 3, 1997); Gonzalez v. State, 22 Fla. L. Weekly S593, S594 (Fla. Sept. 18, 1997). Plainly their reversal in no way warrants overturning Defendant's sentence.

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[29] Bruton v. United States, 391 U.S. 123 (1968).

X.

DEFENDANT FAILED TO PRESERVE HIS CLAIMS AS TO THE PENALTY-PHASE JURY INSTRUCTIONS FOR APPELLATE REVIEW.

Defendant asserts various claims as to the penalty-phase jury instructions. None of these claims was objected to below, and as such they are waived. Even had they been preserved, however, they would be without merit.

A. TISON INSTRUCTION

No objection was lodged as to the "lethal force" language of the Tison instruction, either at the charge conference or at the time the jury was charged. (T. 2301, S.R. 278). Indeed counsel stated that the instruction was "fine." Id. As such the issue is waived. Larzelere v. State, 676 So. 2d 394, 407 (Fla. 1996)(objections to penalty-phase jury instructions must be raised at trial to be preserved for appellate review). Moreover, it is substantively without merit. The state would note that the instruction given was that specifically prescribed by this court in Jackson v. State, 502 So. 2d 409, 413 (Fla. 1986). Although Defendant avers that Jackson v. State, 575 So. 2d 181 (Fla. 1991),[30] changed the analysis to applied, the Court, although it mentioned the first Jackson case, in no way suggested that the jury instruction was to be altered. Jackson 575 So. 2d at 193. Finally,

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[30] The 1991 case involved the conviction and sentence of Clinton Jackson, the brother and accomplice of Nathaniel Jackson, whose conviction and sentence were affirmed in the 1986 opinion.

even were this issue preserved, and even were the instruction faulty, any error would be harmless beyond a reasonable doubt, because, in view of the abundant evidence that Defendant was a major participant in the crime and that his mental state was one of reckless indifference to human life, it is apparent that Defendant was sufficiently culpable to be sentenced to death under any formulation of the Enmund/Tison standard. See Point IX, supra; Larzelere, 676 So. 2d at 408 (faulty instruction regarding intent necessary for CCP aggravator was harmless were facts established Defendant's mental state would have met requirements of aggravator under any definition).

B. ALLEGED CALDWELL[31] VIOLATION

No objection was lodged as to the standard instruction on the jury's role in the penalty phase, either at the charge conference or at the time the jury was charged. (T. 2295, S.R. 278). Indeed, counsel specifically assented to it. Id. As such the issue is waived. Sochor v. State, 619 So. 2d 285, 292 (Fla. 1993)(Caldwell claim must be raised at trial to be heard on appeal). Moreover, it is substantively without merit. Id. (standard jury instructions properly advise jury of its role and do not violate Caldwell); Johnson v. State, 660 So. 2d 637, 647 (Fla. 1995)(same).

C. ALLEGED BURDEN-SHIFTING

No objection was lodged as to the standard weighing

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[31] Caldwell v. Mississippi, 472 U.S. 320 (1985).

instruction that was given, either at the charge conference or at the time the jury was charged. (T. 2301, S.R. 278). As such the issue is waived. Sochor. Moreover, it is substantively without merit. Johnson, 660 So. 2d at 647 (standard instruction as to weighing of aggravation and mitigation does not improperly shift burden of proof; moreover such an argument "evinces a misunderstanding of the law of proof" in that the burden only goes to the establishment of the factors, not their relative weight once they are found to exist, which is wholly in the discretion of the finder of fact). Moreover, as no error occurred, Defendant's complaints about the State's argument in that regard would be equally without merit, had this sub-issue been preserved by any objection below. As the comment was not the subject of an objection below, it could be the basis for relief only if the error were fundamental. As the argument tracked the instruction, which was proper, it follows that no error, fundamental or otherwise, occurred. Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985)(were no objection was made, prosecutorial conduct must be so outrageous as to taint the jury's recommendation before reversal is warranted).

D. TISON INSTRUCTION REDUX

No objection was lodged as to the instruction regarding Defendant's state of mind under Tison, either at the charge conference or at the time the jury was charged. (T. 2301, S.R.

278). Indeed counsel stated that the instruction was "fine." Id. As such the issue is waived. Moreover, as discussed above with regard to subpoint 1, any purported error would be harmless beyond a reasonable doubt.

E. SPECIAL VERDICT

No objection was lodged as to the form of the verdict, either at the charge conference or at the time the jury was charged. (T. 2309, S.R. 278). As such, this substantively meritless issue is waived. Hunter v. State, 660 So. 2d 244, 253 (Fla. 1995)(claim regarding special verdict form as to aggravators and mitigators procedurally barred where not raised below, and meritless).

F. BURDEN OF PROOF -- MITIGATION

No objection was lodged as to the satndard instruction that was given on the burden of proof, either at the charge conference or at the time the jury was charged. (T. 2306, S.R. 278). As such the issue is waived. Moreover, the instruction given was the standard instruction. Further, the jury was specifically instructed that, in contrast to the aggravating circumstances, the mitigation need not be established beyond a reasonable doubt, but should be considered if the jurors felt it was "reasonably convinced" that it existed. (S.R. 273). Defendant fails to explain how a circumstance could not be "reasonably established" if the jurors were not "reasonable convinced" of its existence. This semantic gambit should be rejected.

XI.

THE PROSECUTOR'S CLOSING ARGUMENT WAS NOT IMPROPER.

Defendant's eleventh claim is that the prosecutor's penalty-phase closing argument was improper. As he concedes, this claim was not preserved below by the interjection of a contemporaneous objection. Johnson v. State, 660 So. 2d 637, 646 (Fla. 1995); Ferguson v. State, 417 So. 2d 639, 641 (Fla. 1982). Moreover, the comments were not error, fundamental or otherwise.

Defendant first complains that the prosecutor stated that Defendant's greed caused a death. This was an entirely proper and accurate comment on the evidence before the court. Burr v. State, 466 So. 2d 1051, 1054 (Fla. 1985)(argument that defendant "executes" people, and that people are afraid properly ruled fair comment by trial court; statements in any event not so unduly inflammatory or prejudicial as to warrant reversal).

Defendant next asserts that reversal is required because the prosecutor briefly commented on the unselfish nature of the victim. This comment was brief and supported by the evidence and as such was not improper. Muehleman v. State, 503 So. 2d 310 (Fla. 1987)(reference to "feeble, sickly, 97-year-old man" not improper despite tendency to excite passion of jury, where it was an accurate statement of the facts); Jackson, 522 So. 2d at 809 (similar comments held not sufficiently egregious to warrant a new trial); Stein v. State, 632 So.2d 1361, 1367 (Fla.1994)(brief

humanizing comments are not improper).[32] Moreover, the prosecutor was not attempting to argue a nonstatutory aggravating factor. (See Am. B. 65). Rather, he arguing why the jury should give weight to a statutory aggravating factor: that the victim was a law enforcement officer -- and that he had unselfishly given his life in the line of duty. Such argument is proper. Patten v. State, 598 So. 2d 60, 62 (Fla. 1992). Defendant's next complaint is with the prosecutor's discussion of the penalties imposed for the killing of a police officer, which Defendant asserts was intended to inflame the jury. However, when viewed in context, it is clear the prosecutor was not attempting to improperly influence the jury. Rather he was again explaining why the State felt that the factor, which was clearly established, should be accorded great weight.

Finally, even assuming, arguendo, that the comments were preserved and improper, any error would be harmless. The only mitigation found was Defendant's upbringing and his "confession," which the trial court accorded little weight. The State argued, and the trial court found, that three aggravating circumstances existed: (1) that the victim was a law enforcement officer/avoid arrest, (2) that the murder was for pecuniary gain/during a robbery, and (3) that Defendant had prior violent felony

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[32] Defendant cites Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985), for the proposition that the State may not excessively focus on the victim's characteristics. Curiously, however, Brooks held that comments such as those cited here, which note the victim's positive qualities, were proper. 762 F.2d at 1409.

convictions, the first two of which were given great weight. The trial court found that the mitigation "pale[d]" in comparison to the aggravation, which "far outweighed" the mitigating factors. (R. 555). There is simply no possibility that these brief comments could have affected the jury's recommendation. Given the evidence and the overall argument with which the jury was presented it cannot reasonably be said that absent the cited comments the outcome of the proceedings would be different. As such any purported error would be harmless, even had this claim been properly preserved. See Jackson v. State, 522 So. 2d 802, 809 (Fla. 1988)(request "to show that the community cares" harmless).

As noted above, none of these claims were properly preserved for appellate review. As such they present a basis for reversal only if the error was fundamental. Crump v. State, 622 So. 2d 963, 972 (Fla. 1993); Pope v. Wainwright, 496 So. 2d 798, 803 (Fla. 1986)(unpreserved improper comments must be so egregious as to fundamentally undermine the reliability of the jury's recommendation). As discussed above, the comments complained of here were either not improper or any impropriety was harmless. It follows a fortiori therefore, that any purported error could not have been fundamental. This claim should be rejected.

XII.

DEFENDANT'S UNPRESERVED ATTACKS ON THE CONSTITUTIONALITY OF THE DEATH PENALTY SHOULD BE REJECTED.

Defendant's final claim presents a variety of claims regarding the constitutionality of the death penalty. These claims were not raised below and are therefore barred. Fotopoulos. In any event, they are also without merit. Defendant first asserts that his sentence is disproportionate. This claim was refuted at Point IX, supra. He next avers that capital punishment is per se cruel and/or unusual and therefore unconstitutional, a claim that is without merit. Dixon v. State, 283 So. 2d 1 (Fla. 1973); Proffitt v. Florida, 428 U.S. 242 (1976); Thompson v. State, 619 So. 2d 261, 267 (Fla. 1993). He also asserts that electrocution is unconstitutional, a claim recently rejected by this court. Jones v. Butterworth, 22 Fla. L. Weekly S659 (Fla. Oct. 20, 1997). Defendant finally urges the Court to consider the questions of whether modern capital jurisprudence contains a fundamental paradox and whether inordinate delay between sentencing and execution renders that system unconstitutional. The only support cited for these claims is two dissenting opinions in the U.S. Supreme Court. The majority of the members of that body obviously have found these claims to be without merit. Finally, as to the claim of delay, Defendant is without standing to complain, as there has, of yet, been no inordinate delay between sentence and execution.

CONCLUSION

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

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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 **ALFONSO M SALDANA**, One Brickell Square -- Suite 900, 801 Brickell Avenue, Miami, Florida 33131, this 9th day of January, 1998.

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