IN THE SUPREME COURT OF FLORIDA

CASE NO, 84,701

LEONARD0 FRANQUI,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

BRIEF OF APPELLEE

ROBERT A, BUTTERWORTH
Attorney General
Tallahassee, Florida

RANDALL SUTTON
Assistant Attorney General
Florida Bar No. 0766070
Office of Attorney General
Department of Legal Affairs
Post Office Box 013241
Miami, Florida 33101
PH. (305) 377-5441
FAX (305) 377-5655

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Introduction

Defendant was charged, along with codefendants Pablo San Martin, Fernando Fernandez, Ricardo Gonzalez, and Pablo Abreu, in an indictment filed on February 4, 1992, in the Eleventh Judicial Circuit in and for Dade County, Florida, case number 92-2141(B), with: (1) the premeditated or felony murder with a firearm of Steven Bauer, a law enforcement officer acting in the course of his duties; (2) the armed robbery with a firearm of the Kislak Bank and Michelle Chin; (3) the aggravated assault with a firearm of Michelle Chin; (4) the aggravated assault with a firearm of LaSonya Hadley; (5) the unlawful possession of a firearm during the commission of a felony; (6) the grand theft of the motor vehicle of Rafael Armengol; (7) the burglary of the motor vehicle of Rafael Armengol; (8) the grand theft of the motor vehicle of Elias Cantero; and (9) the burglary of the motor vehicle of Elias Cantero. Counts (3) and (5) were nolle prossed before trial. (R. 15-19).

Abreu pled guilty prior to trial, and Defendant moved to sever his trial from that of the remaining codefendants based upon their allegedly inconsistent statements given to the police. (R. 115). The motion was granted as to codefendant Fernandez, (R. 124), and the court ruled that the case would be tried jointly with two juries, (A) for Fernandez and (B) for the remaining defendants. As to the confessions of San Martin and Gonzalez, the court held they were admissible against Defendant and each other:

> Unlike FERNANDEZ' confession, the confessions of the remaining defendants are indistinguishable as concerns the material issues in the case. Indeed the confessions of the defendants FRANQUI and SAN MARTIN are virtually identical in every

way. FRANQUI and SAN MARTIN told police that the idea of robbing the Kislak Bank was originated by a black male they met through FERNANDEZ; that they met with the black male and FERNANDEZ approximately one week before the day of the robbery; that they planned to steal two cars; that the cars were stolen by breaking the windows, removing the ignition switch and starting the car with a wrench; that they went to the bank the day before (SAN MARTIN says they went the day before then corrects himself and says they went the week before); that on the day they went to check the bank they observed a tall man wearing a shirt and tie exit the bank in the company of two tellers; that on the day of the robbery they met at SAN MARTIN's house at approximately 7;00 [sic] am; that they drove to where the stolen cars had been parked in FRANQUI's Buick Regal; that FRANQUI and SAN MARTIN drove the stolen cars (both Chevrolet Caprices) and the other three men rode in FRANQUI's Buick Regal; that they met at a location approximately two blocks away from the bank; that codefendant PABLO ABREU remained in the Buick Regal at that location; that they drove to the bank and parked in front of the drive through but could not pull into same because chains were blocking the way; that they saw a security guard exit the bank with two females they presumed to be the cashiers; that FRANQUI and GONZALEZ exited the car and approached the security guard; that upon seeing FRANQUI and GONZALEZ the security guard reached for his gun; that shots were exchanged between FRANQUI and GONZALEZ and the security guard; that they all got back to their cars and left the bank; that they returned to where the Buick Regal was waiting with PABLO ABREU at the wheel; that they abandoned the stolen Chevrolets at that location; that they fled the scene and went to the home of PABLO ABREU where they split the money they had just stolen.

Although there are small details which both defendants did not relate in exactly the same way, the overwhelming bulk of the statements are identical.

The confession of GONZALEZ although not as rich in detail as those of FRANQUI and SAN MARTIN is also indistinguishable from those of his codefendants as concerns the material aspects of the case. GONZALEZ told the police that some time before the robbery FRANQUI and SAN MARTIN went to his house to "feel him out" about money. Some time after that they again met and GONZALEZ was told that "something was going down" but he was not told *exactly* what. Ultimately

GONZALEZ was told that the job involved a robbery at the drive through of a bank and that a security guard and two women would be involved. He was additionally told that two boxes of cash would be involved and that the robbery would be done on Thursday or Friday. On the day of the robbery GONZALEZ was picked up by FRANQUI. They in turn went to pick up SAN MARTIN and from there proceeded to the location where the stolen cars had been parked. GONZALEZ describes the stolen cars as long, four door, gray and blue cars. He knew they were stolen because FRANQUI had previously told him that two cars would be stolen for the robbery. They drove to the two stolen cars in FRANQUI's Buick Regal. When they arrived at the stolen cars GONZALEZ met two men, one he did not know and the other he knew was related to SAN MARTIN, i.e. PABLO ABREU. They all left in FRANQUI's Regal and the two stolen cars. At some time thereafter FRANQUI designated who would go to the bank and told ABREU that he would stay in the Regal "on the corner." Once they got to the bank in the two stolen cars they parked in front of the drive through. FRANQUI handed GONZALEZ a gun. They observed the two women come out of the bank carrying boxes. FRANQUI exited the car and headed straight for the security officer with GONZALEZ following approximately five feet behind. FRANQUI then shot the guard and so did GONZALEZ. GONZALEZ told police that he saw the officer fall to the ground and then observed the defendant SAN MARTIN take the box one of the two women was carrying. GONZALEZ then returned to his car with FRANQUI and SAN MARTIN returned to his car. Both cars then fled the area. They returned to where the regal was parked with ABREU at the wheel. There they left the stolen cars and drove away in the Regal. They returned to ABREU's house and there divided the money.

As stated above, although GONZALEZ's confession is not quite as rich in detail as FRANQUI and SAN MARTIN's it is, as concerns all material details, indistinguishable.

The court first finds that the defendants herein are "unavailable"as contemplated by the United States Supreme Court in Lee (supra).

The court further finds that the confessions of the defendants FRANQUI, SAN MARTIN and GONZALEZ contain indicia of reliability necessary to allow their introduction during a joint trial as direct evidence against each of the three defendants.

> Their motions for severance are accordingly DENIED. The motion for severance filed by the defendant FERNANDEZ is GRANTED.
>
> The court rejects the State's suggested redactions of the defendant **FRANQUI's** and GONZALEZ's confessions except for those sections that make reference to the defendants' prior criminal activity. The court rejects these redactions because the facts set forth therein are immaterial. The majority of the redactions concern the issues of who secured the guns used in the robbery, who, as between FRANQUI and GONZALEZ, fired the first shot and who, as between FRANQUI and GONZALEZ, said "don't move" to the victims in the case. In view of the fact that both defendants admitted participating in the robbery and shooting the homicide victim, these details are totally insignificant and do not in any way detract from the indicia of reliability which makes the introduction of these confessions at a joint trial possible.

(R. 122-128).

A. Guilt Phase

The trial of Defendant and San Martin commenced on May 26, 1994. (T. 845). Those portions of the voir dire relevant to the issues herein will be discussed in the body of the argument. (T. 258-839).

Dorrett Ellis banked at the Kislak National Bank off 135th Street in North Miami. (T. 908). On the morning of January 3, 1992, she went to the bank to make a deposit. She was in her car in the drive through lane around **7:55.** The bank was not yet open and she waited in her car. (T. 909). There was a car in front of her with two men in it. There was also a car on the left side with two men in it. The car ahead was bluish gray with four doors. Ellis did not get a full view of the men, but they looked latin.

The officer walked out the door of the bank building with the tellers. (T. 910). He was wearing a police uniform. The two men jumped out of the cars, and ran in front of the cars, firing a gun. They jumped out of the car and fired simultaneously. Ellis heard three or four shots. Then the officer went down. The men ran toward the officer and then they ran back to the car and drove off in a southerly direction. Ellis backed up her car and headed west on 7th Avenue, then returned to the bank, left again and then went to work. She was driving a red Cougar. (T. 911-12).

Elijah Battle was a medical lab technician employed by HRS who took the bus to work which traveled northbound on 7th Avenue in front of the bank. (T. 924). On the date in question, he was seated on the left side of the bus when it stopped in front of the bank, He heard three gunshots. He looked out the window to the west and saw a light-colored Chevrolet come screeching out of the bank. Battle saw the driver in the car, a young latin. He could not see the passenger side of the car from up in the bus. The car turned southbound, and then turned right, to the west. (T. 925-28). Battle also saw a red Cougar come out right after the Chevy, and then come back. (T. 931).

Several days later, Elijah Battle was recalled and testified that prior to trial he was never shown any photos. After testifying, he had informed the prosecutor that he had seen the driver of the Caprice in court; he did not say anything at that time because no one asked him. Battle then identified Defendant as the driver. (T. 1869). In court was the first time he had seen Defendant since the murder. (T. 1870).

In January of 1992, LaSonya Hadley was a drive-through teller at the Kislak National Bank branch at 134th Street and 7th Avenue. She arrived at work each morning at 7:45. (T. 948). When her coworker Michelle arrived they would get the money from the vault and go to the outside booths. The money was kept in a cash drawer. (T. 949). It would have $15,000-20,000 in it, never more than $20,000. They would wait for the police officer to come and take them outside. The police officer always dressed in a North Miami Police Department uniform. The officer had patches on his shirt and carried a gun on a belt holster. (T. 950). The officer would look out the small window on the door to check if it was safe and then they would go. (T. 95 1). The officer would walk them to the drive through booth and make sure the door was locked. He would give them a few minutes to set up, then move the chains to let the cars in. (T. 952).

On January 3, 1992, the weather was sunny. Michelle was her coworker that day. Michelle arrived around 7:50 a.m. They went to the vault and got their cash trays, and then told Officer Bauer they were ready to go. Bauer went to the door to check on the parking lot. Then he unlocked the door. Hadley went first, then Michelle, then Bauer. As Hadley was putting the key into the lock to the drive-through booth, she heard people getting out of a car. (T. 955). There were two men coming toward her from the cars. When they drew closer she saw their guns. Each one had a gun. Bauer was trying to get his gun out. Hadley dived for the booth. (T. 956). She went for the alarm, and lay there waiting, because she still had her money in her hand.

Then Hadley heard three or four shots. She heard Bauer cry out. He said he was shot. She got up and went back outside. He asked her if she was all right. (T. 957). Hadley asked Bauer if he was all right, and he said not to worry because he was only shot in the leg. She realized that there was too much blood; that it had to be more than that. She was kneeling inside the drive through area. She had him resting in her lap from the waist up. He bled all over her. Then Michelle came over and the branch manager arrived, and they waited for the police to come. After a few minutes, Bauer stopped responding to questions. (T. 958). Then the police arrived and took over. (T. 958).

Michelle Chin Watson worked as a drive through teller for Kislak National Bank in January, 1992. (T. 963). She worked with LaSonya Hadley . She detailed the same morning procedures as Hadley . (T. 964-65) .

On the date in question Steven Bauer was the officer who escorted them. He had a uniform with patches and a gun on his belt. (T. 965). Bauer opened the back door as usual. They went outside, Hadley first, then Watson, then Bauer, who closed the door. Then they were walking forward and she heard a yell from some men in the drive through. She continued to walk toward the drive through. She kept walking until she heard shots. Then she got down on the floor. (T. 967). She squatted down with her head toward the floor and set the cash drawer down in front of her. Then someone came and took the cash drawer from her. (T. 968). She only saw the person's hands and feet. She stayed where she was until she heard the car drive away. Then she turned to where Bauer was. She walked over to him and heard him say "Oh,

God." He also asked if they were okay. He talked about where he had been shot and tried to get them not to worry about him. (T. 969).

Bauer's 9mm Sig-Sauer semi-automatic service weapon was recovered at the scene. (T. 1046). The weapon had 15 rounds in it, which was its capacity, it had not been fired. (T. 1048, 1058). Also recovered at the scene were Bauer's service-issue gunbelt, watch, knife, handcuffs, hand-held radio, at the scene. (T. 1049-1054). There were projectile holes through both the uniform shirt and the t-shirt just below the collar. (T. 1070, 1073).

The two vehicles used in the robbery were located shortly after, two blocks west of the bank on 10th Avenue between 134th and 135th Streets. (T. 990). The vehicles were both gray Chevrolet Caprices, (T. 991). Both engines were running, but neither had keys in the ignition. One had a right rear vent window broken; the other had the left rear. The were parked on either side of 10th Avenue, facing opposite directions. There were no people present. (T. 992). There is an alley which runs from the bank parking lot up to and past 10th Avenue. (T. 993).

North Miami Police Detective Donald Diecidue met codefendant Gonzalez at Metro Police HQ around 11 a.m. on January 18, 1992, and placed him under arrest for the robbery of the Kislak National Bank and the murder of Officer Bauer, and then read him his Miranda rights (T. 1392-99). Gonzalez then gave a statement regarding the crimes. He met Defendant around Christmas 1991, who advised him they were doing a "job" and asked him if he wished to join. The job involved a robbery of a bank drive-through, two female tellers with cash boxes with a

lot of money. Defendant said it would be easy, but there was security. (T. 1409). Gonzalez said that Defendant said it would be on a Thursday or Friday. It ended up being the latter. Defendant said the plan was to steal two cars. Defendant and Gonzalez would be in one car and two others would be in the other car. Gonzalez identified a photo of Defendant. (T. 1411).

On January 3, 1992 Defendant picked up Gonzalez and they met with codefendant San Martin. Gonzalez also identified San Martin. (T, 1412). Then they drove to where the Chevys were to meet the other two people. Then they went and parked near the bank. (T. 1413). Defendant drove the car Gonzalez was in. Gonzalez had a .38 and Defendant had a 9mm. When the tellers and the officer exited the bank, Defendant jumped out of the car, and so did Gonzalez. Defendant ran within 12 feet of the officer and told him not to move, in Spanish. The officer went for his gun and Defendant fired. Gonzalez said he fired also. (T. 1414-15). Gonzalez was supposed to run up and get the cash boxes, but San Martin got there first, grabbed the box and ran back to the car. (T. 1415). Gonzalez then agreed to give a recorded statement, which was played for the jury. (T. 14161456).

After obtaining consent from Gonzalez, Detective Spotts and Special Agent Lee searched the bedroom of Gonzalez's house. (T. 1534-38). Spotts found money wrapped in tissue paper and taped up in a gym bag in the top of the closet. (T. 1540). There was approximately $1200 in twenty-dollar bills. (T. 1542). Spotts subsequently re-mirandized Gonzalez and reinterviewed him. (T. 1543-49). Gonzalez said they had divided the money at Abreu's apartment and he got

$1500, in tens, fives and twenties. He had spent the other $300. (T. 1549-50). A tape of the interview was played for the jury. (T. 1551-62).

After they were done taping, Gonzalez recounted what had occurred the day of the murder. He explained that he and Franqui had Bauer in the crossfire and there was no place for him to go. Defendant fired his semiauto first. Gonzalez also fired his .38. Bauer just moaned after he was shot, and San Martin grabbed the money tray. Then they fled the scene, ditched the Chevys and got away in Defendant's Regal. (T. 1567-70).

Detective Mike Santos of the Metro-Dade Police Department and FDLE Special Agent Dorothy Ingraham interviewed codefendant San Martin on January 18, 1992. (T. 1587). Santos told San Martin that codefendant Fernandez has said San Martin was involved in the Kislak Bank case. San Martin conceded that he was involved. (T. 1603). San Martin stated that the planning of the robbery was from a friend of Fernandez's, a black male whom San Martin could not or would not identify. However the rest of the participants eventually cut him out and carried it out without him. The persons involved were Gonzalez, Defendant, and Fernandez, and San Martin's cousin Pablo Abreu. (T. 1604). San Martin was assigned the job of snatching the money trays from the tellers. (T. 1605). The day before the robbery they stole two Chevrolets to use in the robbery. On the morning of January 3, 1992, they met at San Martin's house. (T, 1606). In addition to the two Chevys, Abreu drove Defendant's Buick. (T. 1607). The four defendants went to the bank in the two Chevys and Abreu waited a few blocks away in Defendant's Buick. When they got to the bank, San Martin crouched behind one of the drive-through pillars. Then the two women and the police officer came out. Then

suddenly shots were fired at the officer. After the shooting stopped, the officer was laying in the drive-up area, apparently wounded and San Martin ran up and grabbed the money tray that was dropped by one of the tellers. Then he ran and got into one of the Chevrolets. They took off and went to meet Abreu. They dumped the stolen cars and took off in the Regal. (T. 1608-0% Later that day they counted the money, and there was $14-15,000 in it. San Martin received $3,000. (T. 1620). San Martin's stenographically recorded statement was then read to the jury. (T. 1615-44).

On January 18, 1992, Detectives Jared Crawford and Greg Smith of the Metro-Dade Police Department interviewed Defendant. (T. 1668-71). After receiving his Miranda rights, Defendant agreed to discuss the Kislak case with them. (T. 1672-78). Defendant denied any involvement in the crimes, claiming he was at home with his wife Vivian. Defendant denied knowing Abreu, Fernandez and Gonzalez. (T. 1683). Smith informed Defendant that the others were in custody and naming him. At that point Defendant confessed. (T. 1684). He admitted to knowing Abreu, San Martin, Gonzalez and Fernandez. He said they were all involved in the robbery but that only he and Gonzalez were armed. (T. 1685). Defendant said that he first became aware of the plan between Christmas and New Years, from Fernandez. A black man who was a friend of Fernandez's originally came up with the plan. The plan was to steal two similar vehicles. (T. 1687).

On the morning of January 3, 1992, they met at San Martin's house. (T. 1690). From there they went to the bank, first stopping to leave Defendant's Buick Regal with Abreu nearby

while the other four went on to the bank in the two stolen Caprices. Defendant and Gonzalez were in one, with Defendant driving; San Martin and Fernandez were in the other. (T. 1692). Fernandez drove the second vehicle. Defendant said that he had a 9mm and Gonzalez had a .357 revolver. (T. 1693). Defendant's car was closest to the bank and the other was next to it. All four exited the vehicles, and both Defendant and Gonzalez pulled their guns after the tellers came out of the bank building. (T. 1694). Gonzalez yelled freeze, and then he heard a gunshot. The guard was unholstering his 9mm, but Defendant was not sure who shot first. Defendant then fired once toward the guard and fled back to the vehicle. Then they drove to where Abreu was waiting and all five fled in the Buick. (T. 1697). The job of Fernandez and San Martin was to actually take the money. (T. 1698). When they split the money up, Defendant received $2400. Both guns were left at Abreu's house and he never saw them again. (T. 1698). Defendant also claimed that the Regal was stolen but it was later learned that it in fact belonged to Defendant's girlfriend. (T. 1699).

Hialeah Police Department Albert Nabut met with Defendant later in the same day of his interview with Smith. Defendant told him that Abreu kept the guns after the crimes. (T. 1728-29). Defendant also told him that Fernandez stole the Caprices. (T. 1730). The Pablos had told Defendant that the guns had been thrown in the water somewhere. (T. 1732). After Nabut interviewed Defendant, Smith returned and took Defendant's stenographically recorded statement. (T. 1740). The statement was read to the jury. (T. 1743-67).

On January 21, 1992, Nabut met with San Martin. (T. 1770). After being given his Miranda rights, San Martin, after first telling him he threw them in the ocean, eventually told Nabut that he had thrown the guns into the Miami River. (T. 1775). He told him they were near the mental hospital at 19th Avenue just off the Dolphin Expressway. (T. 1775). The next day Nabut went to he location indicated with divers from Metro-Dade, who found the guns. (T. 1779).

Robert Kennington, a firearms examiner with the Metro-Dade Crime Laboratory, examined a semi-jacketed hollowpoint projectile, "C" from a .38 revolver, and some fragments which were recovered from the scene. (T. 1886). The fragments "D" were not consistent with a revolver, but were consistent with a 9mm semiautomatic. (T. 1887). The casing "M" which was recovered from the scene was also from a 9mm. (T. 1888). Kennington also received the two guns from the river. The first was a .357 magnum, capable of firing .38 projectiles, (T. 1891). The other was a 9mm semiautomatic. (T. 1892). Kennington also examined two projectiles and some fragments which were taken from Bauer's body and submitted to him by the medical examiner's office. (T. 1897). "A" was a .38; "B" was a 9mm bullet. (T. 1899).

Kennington determined that the "A" bullet was fired from the .357 found in the river. The "B" bullet was fired from the 9mm found in the river, (T. 1900). Bullet "C" from the scene was also fired from the ,357. (T. 1901). All three matches were to the exclusion of any other gun in the world. Fragments "D" were consistent with the 9mm, but were insufficient to positively exclude their having been fired by any other 9mm. (T. 1902). Casing "M" was

conclusively fired by the 9mm from the river, to the exclusion of any other gun in the world. (T. 1903). "A" and "C" were separate bullets. Therefore the .357 was fired twice at the scene, Likewise, fragments "D" were not part of bullet "B" which was whole. (T. 1904). Therefore a minimum of four shots were fired at the scene. (T. 1906).

Forensic Pathologist Dr. Jay Barnhart of the Dade County Medical Examiner's Office, performed the autopsy on Bauer on January 3, 1992. (T. 1908-11). Bauer had a gunshot wound to his left thigh. There was an entrance wound and no associated exit. (T. 1913). Bullet "B" was located in Bauer's hip. (T, 192 1). An additional gunshot wound entered the back of Bauer's neck and went downward through his heart and lodged where the ribs joined with the abdominal organs. (T. 1918). This was bullet "A". (T. 1923).

Wound "B" would not have been fatal, but would have been quite painful. Wound "A" was fatal standing alone. (T. 1924). The cause of death was gunshot wounds. (T. 1925). Wound "A" was not consistent with Bauer and the shooter standing and facing each other. The wounds were consistent with Bauer being first shot in the leg, and then falling either face down or back down and then being shot in the back of the neck. (T. 1926).

Crime Scene Technician Mike Melgarejo of the Metro-Dade Police Department processed the two tone charcoal over gray Chevy, tag number FIV 13C. (T. 1119). He retrieved 15 latents from the vehicle. (T. 1124). Crime Scene Technician Thomas Charles of the Metro-Dade Police Department processed the maroon-topped gray Chevy, tag number JMI 86J. (T.

1143-44). He retrieved 12 latents from the vehicle. (T. 1149). Metro-Dade fingerprint technician Richard Laite compared various latents with standards of the defendants. There were eight latents of value from the Caprice, tag number FIV 13C. (T. 1850). Five were matches. (T. 1851). One from Fernandez was on the outside right front door, the outside left front window, the rear edge of the driver's window frame, and the outside of the hood. (T. 1852). There was one match with Defendant, from the outside left front door. (T. 1853). There were 12 latents from the second Caprice, tag number JMI 86J. Seven were of value. None matched any of the defendants. (T. 1853).

The jury returned a verdict of guilty as charged on all counts. (T. 2324-25).

B. Penalty Phase[1]

The penalty phase commenced on September 19, 1994. (T. 2343). Through Craig Van Nest and City of Miami Detective Boris Mantecon, it was established that Defendant had proposed and participated in an unrelated armed robbery in which Van Nest, who was driving an auto parts van, was pursued and confronted by Defendant, San Martin, and a third individual, Vasquez. Defendant had proposed "to take over a van," and he and his companions expected

[1] Prior to the penalty phase, the State moved to admit "victim impact" evidence pursuant to § 921. 141, Fla. Stat. (R. 52-57). The court denied the motion and found the statutory provision unconstitutional. (R. 104-113). The State sought certiorari review in the district court. The Third District denied relief but certified its decision as being in direct conflict with State v. Maxwell, 647 So. 2d 871 (Fla. 4th DCA 1994). State v. Fernandez, 643 So. 2d 1094 (Fla. 3d DCA 1994). This court ultimately reversed that ruling. State v. Fernandez, no. 84,373 (Fla. July 20, 1995). However, the penalty phase below was conducted during the pendency of the appeal, and consequently no "victim impact" evidence was adduced.

Van Nest's van to be carrying a lot of money. (T. 2400-03). Van Nest eluded the men, who were driving a Toyota Previa van, after they tried to get Van Nest to pull over by flashing a police badge. (T. 2378, 2403, 2407). Van Nest proceeded to his destination and left his Chevy Astro van to make a delivery. (T. 2379-80, 2403). As he was entering the building he turned and saw that the Previa had returned. Defendant and the other men were searching through his van and removing items. When Van Nest offered resistance, Vasquez hit Van Nest on the head with a gun. (T. 2381-83, 2403, 2407). Van Nest was then forced into the Previa. (T. 2384, 2403, 2407). Vasquez stole Van Nest's Astro van. During the ensuing flight, the gun, which Vasquez had given to Defendant, went off inside the Previa, which was occupied by San Martin and Defendant (T. 2386-90, 2404, 2407). The prosecution introduced into evidence certified copies of Defendant's convictions for armed kidnapping and armed robbery, with respect to the Van Nest Case. (T. 2409-10).

Pedro Santos and Detective Nazario provided testimony as to another unrelated attempted robbery and aggravated assault which Defendant had participated in and for which he had previously been convicted. Defendant, San Martin, and had been at a restaurant, when they observed a security guard carrying a cash bag near the Republic National Bank, on Bird Road in Dade County. They decided to rob the guard. (T. 2423-24, 2432). went to the bank and waited for the guard to make his appearance, while Defendant remained nearby the Buick Regal (T. 2426, 2432). Santos, 73, was the security guard, (T. 2417). A car pulled up as he was delivering the (empty) cash bag to the drive-through. San Martin got out of the passenger side and demanded the bag. After the cash bag was demanded, Santos was threatened and shots

were fired. The guard, Santos, was not hit, and held onto the bag. He reached for his own gun, and several more shots were fired at him, when the offenders fled. (T. 2419-20, 2426-28, 2434-35). Copies of the judgments of conviction for aggravated assault and attempted robbery with a firearm were introduced into evidence. (T. 2435-36).[2]

Hialeah Police Department Detective Albert Nabut and Metro-Dade Police Department Detective Mike Santos testified regarding the murder of Raul Lopez and the attempted murders and robbery of Danilo Cabanas, Sr. and Jr. (T. 2440-42, T. 2476-77). They described how Defendant, San Martin and Pablo Abreu, driving a pair of Chevrolet Suburbans, boxed in the Blazer driven by the Cabanases and the pickup driven by Lopez. The Cabanases were making their weekly run from the bank to their check-cashing business with a large quantity of cash. Lopez was along for protection. Abreu and San Martin dismounted from the forward Suburban, and began firing their guns toward the Cabanases. Defendant, who was in the second Suburban, stopped alongside the victim's vehicles, and fired at Lopez, killing him. Lopez was not able to fire his gun before being shot. The elder Cabanas returned tire, and Defendant and his cohorts fled. The gun Defendant used to kill Lopez was the same gun which Gonzalez used to kill Bauer. (T. 2443-62, 2478-83). The prosecution introduced into evidence certified copies of Defendant's convictions for the first degree murder of Raul Lopez, the attempted first degree murder of the Cabanases (two counts), and attempted robbery with a firearm. (T. 2466-67).[3]

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[2] Defendant's convictions in the Van Nest and Bird Road cases were affirmed sub nom. San Martin v. State, 629 So. 2d 1077 (Fla. 3d DCA 1994).

[3] This conviction is currently on appeal before this court. Franqui v. State, case number 83,116 (opinion pending) .

Alberto Gonzalez, Defendant's father-in-law, described Defendant as "marvelous" husband. (T. 2492-95). Defendant had two young children, and was a dedicated father, who gave the children food, changed diapers and cleaned the house. He did not smoke drink or do drugs. (T. 2495). Defendant got along well with the family. (T. 24%). Defendant had also worked with Gonzalez, and was described as an excellent worker. (T. 2497).

Mario Franqui Suarez was Defendant's uncle, and he related Defendant's family history. Defendant's mother, while living in Cuba, came to live with Mario's family's home when she was pregnant with Defendant. Fernando Franqui, Mario's brother, was not the biological father of Defendant, but raised Defendant in a parental capacity, and was viewed by all as Defendant's father. (T. 2508).

When he was two years old, Defendant's mother left the Franqui household, taking Defendant's younger half-brother, Fernando, Jr., and leaving Defendant behind with Fernando, Sr. and the Franqui relatives. About one year later, the mother returned Fernando, Jr., to the Franqui household. During the mother's absence from the Franqui household, she periodically visited. (T. 2509-10).

While in Cuba until 1980, Defendant remained in the Franqui household, being brought up primarily by his aunt and father, who was "a very good father." He received a lot of love from the family members. (T. 2511). Mario always felt that Defendant was not normal, a slow

learner. (T. 2512). In 1980 Defendant came to the United States with his father, grandmother and brother. (T. 2513).

Within one year after the family came to the United States, Defendant's younger brother died after surgery. (T. 2514). Defendant's father then started taking drugs and used alcohol excessively. (T. 2516). At various times, throughout Defendant's youth and teenage years in the United States, he lived with an aunt, Mario's sister, or his grandmother, or Mario. (T. 2518-2520). At age 15, Defendant started living with Mario, and was able to comply with the rules Mario set up. Defendant started working with Mario, in a family refrigeration/auto tire business. He was a good worker. (T. 2520). Mario had no problems of any kind with Defendant when he was living with him. (T. 2521). Mario considered Defendant a good father. (T. 2522). Defendant was described as "tranquil" and "respectful," who did not smoke, drink or do drugs, (T. 2523). Everyone in the family always worked for a living. They tried to instill in each other the difference between right and wrong. (T. 2526).

Defendant's next witness was Robert Barrechio, a supervisor for the City of Miami at the Miami Springs Golf Course. He met Defendant in June, 1991. (T. 2532). Barrechio was transferred by the city to Miami Springs at that time and supervised Defendant until Defendant's departure in October, 1991. (T. 2533). Defendant was a very conscientious employee. Were it not for his current "legal problems" Barrechio would have rehired Defendant, whom he decribed as a "fun-loving carefree young man." (T. 2533). Under the current circumstances, however, Barrechio wold not rehire Defendant (T. 2534).

By a vote of 9-3 the jury recommended that Defendant be sentenced to death. (T. 3 105). On September 30, 1994 the court held a sentencing hearing at which counsel presented argument and declined the opportunity to present further witnesses. (T. 3 1 13-50) . On October 11, 1994, the trial court sentenced Defendant, (T. 3 152-70).

The court found the existence of three aggravating circumstances: (1) Defendant's multiple prior violent and/or capital felonies; (2) that the murder was committed during the course of a robbery, which the court merged with the pecuniary gain aggravator; (3) that the murder victim was a law enforcement officer in the course of his official duties, merged with the avoid arrest aggravator. The court gave all three circumstances great weight. (R. 589-91).

The trial court found that no statutory mitigating circumstances existed, finding that the defense proffered only one statutory mitigating circumstance, Defendant's age. (R. 591). As to that factor, the trial court concluded that it was inapplicable under the circumstances presented, where Defendant had two children and his relatives testified that he was a conscientious parent. (R. 594).

The trial court's order also extensively reviewed the nonstatutory mitigating circumstances asserted by the defense. The court accepted, as nonstatutory mitigation, that Defendant suffered hardships during his youth, including the abandonment by the mother, the death of the brother, and the father's resort to drugs and alcohol. (R. 596). The court also accepted that Defendant was a caring husband, father, brother and provider, (R. 595). Both of these mitigators were

given little weight . All other alleged nonstatutory mitigation was found not to exist. The order extensively details the reasons for rejecting, the claim of mental or emotional problems which do not reach the level of statutory mitigation, the life sentence received by codefendant Abreu, as well as several other alleged categories of nonstatutory mitigation (R. 592-99).

The sentencing judge then concluded:

> [T]he aggravating circumstances in this case far outweigh the mitigating circumstances. The prior capital or violent crime aggravator standing alone would suffice to outweigh the de minimis nature of the nonstatutory mitigators found by the court herein. The existence of the other two aggravators irrevocably seal the defendant's fate.

(R. 600).

This appeal followed.

SUMMARY OF THE ARGUMENT

1. Defendant's contention that the trial court erred in refusing to allow defense strikes of jurors Andani and Diaz is without merit. Upon **Neil** objection by the State, the defense was unable to proffer neutral reasons ("I don't like him" for Diaz, and Andani's "love" for the prosecutor) for striking either juror. The defense's much-later proffer of reasons regarding Diaz were clearly pretext. Further, as to Andani, this Defendant opted out of the joint defense strikes, and may not now complain. Neither the district court cases Defendant relies upon in asserting that the court had no authority to conduct the **Neil** inquiry nor their reasoning were asserted below, and may not be raised for the first time now. Moreover, the cases are contrary to this court's precedent and reason, and in any event, even following them the record here is sufficient to support the court's action. Finally, Defendant's contentions regarding sequestered voir dire, sequestration, and his entitlement to additional peremptories are without merit and/or not preserved.

2. Defendant's claim that the State's strike of juror **Pascual** is barred as the defense did not renew the objection to Pascual's removal prior to the swearing of the jury. In any event the strike was proper. The State's reason for striking her was valid -- she equivocated on whether she could impose the death penalty upon a nontriggerman. Furthermore, the reason given was not **pretextual.**

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

4. Defendant's claims that prosecutorial conduct resulted in an unfair trial, in addition to being largely barred, is wholly without record foundation. The evidence adduced and the argument presented focussed almost exclusively upon the objective facts of the crime herein.

5(a). The trial court did not abuse its discretion and properly rejected the proffered mitigation which was inconsistent and contradicted by the State's evidence.

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

5(c). The attacks on the constitutionality of the death sentence are unpreserved and have been repeatedly rejected,

ARGUMENT

I.

THE TRIAL COURT PROPERLY DISALLOWED THE DEFENSE'S ATTEMPTED PEREMPTORY STRIKES OF JURORS DIAZ AND ANDANI WHERE THE DEFENSE FAILED TO GIVE NEUTRAL, NON-PRETEXTUAL REASONS IN RESPONSE TO THE STATE'S REQUEST FOR A *NEIL* INQUIRY.

Defendant's first contention is that the trial court erred in refusing to grant his peremptory challenges of jurors Diaz and Andani. The State challenged the attempted strikes pursuant to State v. Neil, 457 So. 2d 48 1 (Fla. 1984), and defense counsel was unable to proffer neutral, non-pretextual reasons for the strikes. The trial court therefore properly disallowed them.

The standard of appellate review of a trial court's finding that a defendant's exercise of a peremptory challenge would violate Neil is abuse of discretion. Files v. State, 613 So. 2d 1301 (Fla. 1992). Where "reasonable persons could arguably agree with the trial court's action, " the result will not be disturbed on appeal. Id., at 1302. The only exception is where the reason proffered for the strike is facially invalid as a matter of law. Id., at 1304. This standard applies to the determination of both the question of whether the reason is neutral, as well as whether it is non-pretextual. Id., at 1304.

When the State challenged the peremptory strike of juror Diaz, the proffered reason was that defense counsel did not "like him." (T. 797). Such is not a valid race-neutral reason as a matter of law, and was properly the basis for the trial court to reject the strike. See Wright v. State, 586 So. 2d 1024, 1028 (Fla. 1991)(counsel feeling "uncomfortable" not neutral reason).

Counsel proffered additional reasons substantially later (thirty pages later in the transcript). (T. 827). The trial court rejected these newly discovered reasons. Plainly, the very delay in hatching the reasons strongly suggests that they are pretextual.

Furthermore, the reasons proffered were shared with jurors accepted by the defense. They claimed primarily that he had worked for a long time for Metro-Dade County, which also employed many of the State's witnesses. However, this was not a characteristic unique to Diaz. Of the seated jurors, Pierre-Louis's wife worked for Metro-Dade, (T. 428); Hill's 3 daughters taught for Dade County Schools and her son worked for Metro-Dade Parks, (T. 430); Jenning and his wife worked for the State D.O.T., (T. 459); and Burroughs, the alternate, worked for Metro-Dade, and his wife was a child support enforcement clerk for the county. (T. 505). Of other venire members not rejected by the defense, both Stephens's godparents were Metro-Dade police officers, (T. 466), yet the defense attacked the State's use of a peremptory strike on her, (T. 816); and Neloms's husband worked for the Dade County School Board, (T. 489), but the defense attacked that State peremptory strike also. (T. 824) .

Nor was Diaz alone in having good kids. Smith's child was an engineer, (T. 422). Dowdell produced a restaurant manager, a hospital worker, a UPS man, a minister, and a U.S. Marine. (T. 450). Nelom's children worked for the county school board and AT&T. (T. 489). Bringle had and administrative assistant at the housing authority, a fireman, and a cabinet maker. (T. 503). None expressed any suggestion that their children were not as "idyllic and obedient, " (B. 17), as Diaz's.

Likewise, the suggestion that he lacked life experience, (T. 827), is puzzling. He was originally from Cuba, went to college there, lived in New York and New Jersey, then worked in Miami in both the private and public sectors, (T. 757-59). Apparently a 21-year-old from the suburbs who has been in school his whole life has "life experiences. " (McMulling T. 413, 753). See also Alacan, (24-year-old nursing student, T. 418); Hill, (50 year resident of Dade County, retired school system employee, T. 430); Andrews, (lifetime resident and produce manager of market, T. 438); Stephens, (19 year old student, lifetime resident, T. 466); Simms, (retired consultant 41-year resident, T. 484).

Given the delay in coming up with the "neutral" reasons, combined with the fact that several accepted jurors shared the same or similar attributes, the trial court clearly did not abuse its discretion in disallowing the strike of Diaz. Files.

As for the strike of Andani, the State would submit that Defendant has not preserved this claim for review. Although the defendants were generally acting in concert during jury selection, the Andani claim appeared to have been based upon an alleged animosity by Andani toward Gonzalez's counsel, Mr. Diaz. When the State challenged the strike Defendant's counsel specifically declined to be heard. (T. 792). As such the State would submit that Defendant has waived any claims regarding this juror. Joiner v. State, 618 So. 2d 174, 176 (Fla. 1993)

Likewise, the claim of being a victim of auto theft or other crime was not asserted below as a reason for the strike, and may not now be asserted. In any event that quality was shared

with many accepted jurors: McMulling, (girlfriend's father murdered during crime, car stereo stolen, T. 413); Alacan, (car stolen, robbed, T. 418); Smith, (car burglarized, friend purse-snatched, T. 422); Pierre-Louis, (car burglarized multiple times, T. 428); Andrews, (car burglarized, T. 438); Rocha, (house burglarized, T. 448); Dowdell, (house burglarized, T. 450); Jenning, (car stolen, T. 459); Tarnowicz, (robbed at gunpoint, car stolen, house burglarized, mother mugged and elbow broken, T. 462); Stephens, (house burglarized, sister robbed at gunpoint, T. 466); Martinez, (car stolen, T. 471); Simms, (house burglarized, T. 484); Neloms, (car stolen, T. 489); Slater, (car stolen, T. 491); Swain, (truck stolen, T. 500); Bringle, (robbed at gunpoint, house burgled, T. 503); Burroughs, (car burglarized, wife robbed, wife's car burglarized, T. 505); Block, (family robbed twice, family friend murdered, T. 506).

The only grounds asserted below, regarding Andani's "love" for the prosecutor and demeanor are untenable, if not offensive. The trial court specifically rejected this claim as unfounded:

> THE COURT: I, to be frank found her to be one of the brightest and most receptive jurors to all sides. According to my notes, she indicated death penalty would not affect her verdict. That every First Degree Murder should not get the death penalty, she specifically said she understood one mitigating factor, could outweigh two or three aggravating factors, I saw no particular affinity toward [the prosecutor], and I don't find it to be I suppose gender neutral.
>
> * * *
>
> I have not observed any of these things that you have, you are mentioning, all I have in my notes is and from my recollection

> is that this is a very bright and apparently fair juror who can follow the law as she repeatedly asserted.

(T. 792-93). Looks or gestures are not valid neutral reasons to exercise peremptory challenges unless observed by the trial judge and confirmed by the judge on the record. Wright, at 1029. 1991). Here the judge specifically rejected the existence of the "looks."[4] The court's observations regarding Andani are supported by the record. (See T. 669-7 1, 743, 762, 77 1). Note also T. 671, where attorney Diaz, who raised the strike, noted "she's got it down," after Andani stated that if the mitigation outweighed the aggravators, the sentence would be "obviously life." As such this claim must fail. Id.

Defendant also asserts that the trial court was without authority to deny the strikes because the State's Neil demand was not sufficiently precise. This claim was not raised below and is therefore waived. Joiner. In any event the claim is without merit. For authority, Defendant relies on a recent line of cases emanating from the Third District Court of Appeal. See Betancourt v. State, *650 So.* 2d 1021 (Fla. 3d DCA 1995); Portu v. State, 651 U.S. 791 (Fla, 3d DCA 1995). The State submits that these cases are in direct conflict with this court's recent (but pre-trial) holding in Johans v. State, 613 So. 2d 1319 (Fla. 1993):

> [W]e hold that from this time forward a *Neil* inquiry is required when an objection is raised that a peremptory challenge is being used in a racially discriminatory manner. We recede from *Neil* and its progeny to the extent it is inconsistent with this holding.

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[4] One page earlier in the transcript, the judge granted a challenge for cause based upon juror Collier's "bad attitude" and "body language" toward Attorney Diaz. (T. 790-91).

Id., at 1321. The district court has rendered meaningless this per se rule designed to alleviate the previous uncertainty which existed in the trial courts as to when a "strong likelihood" of improper motive, the threshold under Neil, had been established. See id., at 1321 . Plainly the challenge raised by the State was a Neil challenge. Indeed, the State is unaware of any other challenge which may be directed at an opposing party's use of a peremptory. The rationale of the Third's cases is thus unclear. Further, the State would submit that given the underpinnings of Neil and its progeny, the holding of those cases is unsound.

While it is well-established that a party may not assert an improper use by the opponent of a peremptory unless the issue is preserved by a timely and specific objection, see, Joiner v. State, at 176, Statelom v. , 20 Fla. L. Weekly S200, S201 (April 27, 1995), the converse is not true. That is, it does not follow that the failure to clearly assert a Neil challenge renders the trial court's subsequent Neil inquiry and disallowance of the strike improper. It must be recalled that Neil was crafted not merely to protect the right of the defendants to an improperly constituted jury. Rather, the right of the juror not to be discriminated against is also vindicated. See Abshire v. State, 642 So. 2d 542, 544 (Fla. 1994). That being the case, the State would submit that the trial court would have both the right and the duty to conduct a sua sponte Neil inquiry if the circumstances called for it. The State would posit the following example: suppose both the prosecutor and defense counsel came to the same misguided conclusion that it was in their interest to exclude group X from the jury. Under such circumstances, neither party would object, because its will was being done. The court, however, on perception of the pattern would

surely be permitted, and perhaps obligated,' to inquire on behalf of the X jurors. If the court may act sua sponte, surely no reversible error occurs where a request, albeit abbreviated, is made, which all parties clearly understand to be seeking a **Neil** inquiry, and the court grants the inquiry .[6]

The State would further point out that even if the district court's ruling is to be adopted, that a large number of trials have been conducted since **Johans** was decided. Of those cases the courts undoubtedly concluded that **Johans**, like **Richardson**, required only a request sufficient to apprise the court of its nature to trigger the requirement of a hearing, And in what was undoubtedly perceived to be an abundance or caution, many courts have committed what **Betancourt** and its progeny would deem error. Under these circumstances, any broadening, or actually, more narrowly tailoring, of the language in **Johans** should be applied prospectively only, as was the original language.

Finally, the State would submit that even under **Betancourt**, the State's objections below were sufficient.' As to **Andani**, the State objected:

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[5] The State does not suggest that defendants would in any way be entitled to appeal the trial court's failure to act in such circumstances.

[6] This assumes of course that the court's subsequent ruling on the merits is correct. Note that in **Betancourt** the court alternatively held that reversal was required because the reason given was race neutral. Such is not the case here, as discussed, ante.

[7] They were clearly more explicit that the defense's assault on the State's striking of **Pascual** which consisted in its entirety of "Challenge.' (T. 800).

MS. BRILL: Judge, we would challenge. She gave no answers that I could see that would even be a basis for a peremptory challenge.

* * *

THE COURT: ... gender neutral. Is that your --

MS. BRILL: Yes.

THE COURT: Gender neutral.

(T. 791-92). Further, Ms. Andani was clearly a woman As to Diaz the State made a similar objection, which the court plainly understood to be as to race. (T. 797). Defendant's claim that Diaz was not a member of a cognizable class despite that fact he had a Spanish surname and Cuban nativity is specious. See State v. Alen, 616 So. 2d 452 (Fla. 1993). See also Windom, at S201, noting that predicate to Neil inquiry is only that class to which juror belongs must be clear from face of record. The trial court did not abuse its discretion and should be affirmed.

Finally, Defendant's suggestions, (B. 16), that his request for individual requested voir dire, motion to sequester the jury, and motion for additional peremptory challenges, must be rejected. The granting of individual and sequestered voir dire and the sequestering of the jury are within the trial court's sound discretion. Randolph v. State, 562 So. 2d 331, 337 (Fla. 1990); Davis v. State, 461 So. 2d 67, 69 (Fla. 1984); Stone v. State, 378 So. 2d 765, 768 (Fla. 1980). Defendant has made no showing that there was any adverse pretrial publicity, nor made any showing that he was in any way prejudiced. As such his claim must fail. See, Davis, at 70 ("Davis has demonstrated neither the partiality of his jury nor an abuse of discretion by the trial court, and we find no merit to this claim."); Mu'Min v. Virginia, 500 U.S. 415, 425-426,

11 S. Ct. 1899, 114 L. Ed. 2d 493 (1991)("it is not enough that such questions might be helpful. Rather, the trial court's failure to ask these questions must render the defendant's trial fundamentally unfair."); Pietri v. State, 644 So. 2d 1347 (Fla. 1994)(same). Finally, the claim regarding the extra peremptories is clearly not preserved where the defendants pooled their thirty peremptories and only used 11 of their 30 available challenges. Hall v. State, 614 So. 2d 473 (Fla. 1993).

II.
THE DEFENSE HAS NOT PRESERVED FOR REVIEW ITS CLAIM THAT THE STATE IMPROPERLY STRUCK JUROR PASCUAL, AND IN ANY EVENT THE REASON GIVEN FOR THE PEREMPTORY STRIKE WAS GENDER-NEUTRAL AND NON-PRETEXTUAL.

Defendant's second claim is that the trial court erred in allowing the State to strike juror Pascual peremptorily. This claim was not preserved for review, and even if it were, it would be without merit.

In order to preserve alleged Neil error, counsel must reserve earlier-made objections before accepting the jury, prior to the jury being sworn. Joiner v. State, 618 So. 2d 174, 176 (Fla. 1993). Here, when the jury was finally constituted, defense counsel again raised the issue of the proposed defense strike of Diaz.[8] (T. 827). The court again denied the challenge. (T. 827). The defense then accepted the panel "Subject to our prior objections," which the court defined as "Diaz Andani and Weaver ... ." At no point did counsel in any way suggest that the defense sought to renew the objection to the strike of Pascual. Nor did it in any way seek to disabuse the trial court of the idea that its only objection was to Diaz, Andani, and Weaver. As such, Defendant has not preserved the issue of the State's strike of Pascual, and he may not pursue the question now. Joiner, at 176, & n. 2 (strict construction of rules of preservation required or defense could proceed to trial before accepted jury, "knowing that in the event of an unfavorable verdict, he would hold a trump card entitling him to a new trial").[9]

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[8] See Point I, supra.

[9] The State would also point out that defense counsel argued below that Neil did not apply to gender. (T. 828).

Even assuming, arguendo, that this issue were properly before the Court, it would be without merit. The standard of appellate review of a trial court's finding that the State's exercise of a peremptory challenge did not violate Neil is abuse of discretion. Files v. State, 613 So. 2d 1301 (Fla. 1992). Where "reasonable persons could arguably agree with the trial court's action," the result will not be disturbed on appeal. Id., at 1302. The only exception is where the reason proffered for the strike is facially invalid as a matter of law. Id., at 1304. This standard applies to the determination of both the question of whether the reason is neutral, as well as whether it is non-pretextual. Id., at 1304.

Here, the reason proffered by the State was that Pascual had first stated that she could not vote for the death penalty for a non-triggerman, and then later said that she would weigh the aggravating versus the mitigating factors. (T. 803). Juror equivocation regarding the ability to impose the death penalty is recognized as a valid neutral reason for exercising a peremptory. Kramer v. State, 619 So. 2d 274, 276, n. 2 (Fla. 1993). n p r e s e n t e d i s whether the trial court abused its discretion in allowing the strike. Files. The defense responded that Pascual was no different than Pierre-Louis or Smith, who had not been stricken, and as such the strike was pretextual. The prosecutor responded that while Pascual had unequivocally asserted an inability to apply the death penalty to a nontriggerman, Pierre-Louis had never made such an assertion. The State further noted that Smith would be stricken next, for the same reason, (T. 805), which in fact occurred. (T. 810).

Defendant now asserts that because the State struck Pascual, but not Smith, Pierre-Louis, or Valdes, the strike was pretextual. (B. 29). The State would first note that Valdes was stricken early in the proceedings by the defense. (T. 788). As noted above, Smith was also stricken, without defense objection. (T. 810).[10] The State also struck, without defense objection, juror Alacan, (T. 796), who provided equivocal answers on the subject, (T. 590). Juror Simms also had grave reservations on, among other things, the subject of death sentencing nontriggermen. (T. 568-69). The State's challenge for cause was granted. (T. 822). The State also moved to excuse juror Neloms because of her difficulty in recommending death for a nontriggerman. (T. 597, 822). The challenge was denied and the State sought to strike her peremptorily. (T. 824). The defense challenged the strike, and the State advanced the same reasons presented with regard to Pascual, which were accepted by court and not objected to by the defense. (T. 825). The State also successfully challenged juror Block, who stated she could probably not impose the death penalty on nontriggermen, for cause. (T. 603-04, 831).

On the other hand, of the jurors seated, who had been asked about recommending death for the non-triggerman, none, other than Pierre-Louis, expressed any hesitation in considering the possibility: McMulling, (T. 591); Hill, (T. 582); biaz, (T. 582); Andrews, (T. 584); Weaver, (T. 594); Slater, (T, 598); and Bringle, (T. 558). Although the prosecutor himself never re-addressed the issue with Pierre-Louis, the juror later made it clear that he could follow the law. (T. 700-702). It is also noteworthy that Pierre-Louis had several friends who were law

[10] The State later agreed to accept Smith as the second alternate when the venire was exhausted. (T. 831).

enforcement officers, had previously served on a criminal jury, and had been a crime victim. (T. 428). Further, a native of Haiti, he had worked his way to this country and had eventually obtained citizenship and a responsible position with Florida Power & Light. All these factors would suggest an individual less tolerant of the take-the-money-and-run school of self-improvement favored by the defendants here, and would perhaps overshadow any views on the death penalty. Given that Pierre-Louis was the only juror seated who expressed any difficulty with the concept, and given that every other juror, male or female, who had reservations concerning the recommendation of death for a non-shooter was stricken, the trial court's finding that the reason given was not pretextual was not an abuse of discretion. Furthermore, under Slappy v. State, 522 So. 2d 18, 22 (Fla. 1988), all the remaining indicators that the strike was non-pretextual arc satisfied: (1) Pascual shared the alleged bias -- problems with recommending death for a non-triggerman; (2) Pascual was thoroughly examined on the subject matter, indeed, it was her equivocation which the State cited, (T. 587-589); (3) Pascual was not singled out -- as noted above, the majority of the jurors were questioned on the issue; and (4) the prosecutor's reason was not unrelated to the facts of the case -- here, codefendant San Martin had not shot, and Defendant, although he shot the victim, did not fire the fatal bullet.

As the Court observed in Files, because the determination of the pretextual nature vel non of a peremptory strike is not easily made from a cold record, Slappy may not be applied in a mechanical fashion at the appellate level:

> Within the limitations imposed by *State v. Neil, the* trial *court* necessarily *is vested with broad discretion in determining whether peremptory challenges are racially intended. Only one* who is

> present at trial can discern the nuances of the spoken word and the demeanor of those involved....
>
> ... In trying to achieve the delicate balance between eliminating racial prejudice and the right to peremptory challenges, we must necessarily rely on the inherent fairness and color blindness of our trial judges who are on the scene and who themselves get a 'feel' for what is going on in the jury selection process.

Files, at 1303, quoting Reed v. State, 560 So. 2d 203, 206 (Fla.), cert. denied, 498 U.S. 882, 111 S. Ct. 230, 112 L. ed. 2d 184 (1990)(emphasis and omissions the Court's); see also Fotopolous v. State, 608 So. 2d 784, 788 (Fla. 1992)(trial court has broad discretion to determine whether challenge is improperly motivated). In view of the record herein, it cannot be said that the trial court's conclusions were unreasonable. Defendant's second claim must be rejected.

III.

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

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

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

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[11] Defendant concedes that San Martin's statement was properly admitted against him. (B. 33). Codefendant Fernandez was severed.

Lee holds that a non-testifying codefendant's statement is generally considered hearsay and may not be admitted without violation of the Sixth Amendment unless it is supported by a showing of a particularized guarantee of trustworthiness. Where the codefendants' statements are "thoroughly substantiated by the defendant's own confession, " i.e., where any discrepancies between the statements are not significant, the codefendant's confession may be admitted. Id., 476 U.S. at 546. Because the statements in Lee differed in material aspects, e.g., the roles of the defendants in the crime and the issue of premeditation, and because the surrounding circumstances did not provide any indicia of reliability, the Court found that the statement should not have come in. See Grossman v. State, 525 So. 2d 833, 383 (Fla. 1988). Further, the courts will look to the circumstances surrounding the making of the out-of-court statement in determining its reliability. Lee; Idaho v. Wright, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990).

Contrary to Defendant's assertions, and unlike the statements in Lee, the statements in question here did not differ in any material respect. On the contrary, a comparison of these statements, each taken by a different detective several weeks after the crime, shows that they are to a remarkable degree identical.

Defendant stated that he, San Martin, Gonzalez, Fernandez and Abreu were all involved in the robbery but that only he and Gonzalez were armed. (T. 1685). Defendant said that he first became aware of the plan between Christmas and New Years, from Fernandez. A black

man who was a friend of Fernandez's originally came up with the plan. The plan was to steal two similar vehicles. (T. 1687).

Gonzalez said he met Defendant around Christmas 1991, who advised him they were doing a "job" and asked him if he wished to join. The job involved a robbery of a bank drive-through, two female tellers with cash boxes with a lot of money. Defendant said it would be easy, but there was security. (T. 1409). Gonzalez said that Defendant said it would be on a Thursday or Friday. It ended up being the latter. Defendant said the plan was to steal two cars.

According to Defendant, on the morning of January 3, 1992, they met at San Martin's house. (T. 1690). From there they went to the bank, fist stopping to leave Defendant's Buick Regal with Abreu nearby while the other four went on to the bank in the two stolen Caprices. Defendant and Gonzalez were in one, with Defendant driving; San Martin and Fernandez were in the other. (T. 1692). Fernandez drove the second vehicle. Defendant said that he had a 9mm and Gonzalez had a .357 revolver. (T. 1693). Defendant's car was closest to the bank and the other was next to it. All four exited the vehicles, and both Defendant and Gonzalez pulled their guns after the tellers came out of the bank building. (T. 1694).

According to Gonzalez, on January 3, 1992, Defendant picked up Gonzalez and they met with codefendant San Martin. (T. 1412). Then they drove to where the Chevys were to meet the other two people. Then they went and parked near the bank. (T. 14 13). Defendant drove

the car Gonzalez was in. Gonzalez had a .38 and Defendant had a 9mm. When the tellers and the officer exited the bank, Defendant jumped out of the car, and so did Gonzalez.

According to Defendant, Gonzalez yelled freeze, and then he heard a gunshot. The guard was unholstering his 9mm, but Defendant was not sure who shot first. Defendant then fired once toward the guard and fled back to the vehicle. (T. 1697). Gonzalez said that Defendant ran within 12 feet of the officer and told him not to move, in Spanish. The officer went for his gun and Defendant fired. Gonzalez said he fired also. (T. 1414- 15). San Martin grabbed the cash box and ran back to the car. (T. 1415).

According to Defendant they then drove to where Abreu was waiting and all five fled in the Buick. (T, 1697). The job of Fernandez and San Martin was to actually take the money. (T. 1698). When they split the money up, Defendant received $2400. Both guns were left at Abreu's house and he never saw them again. (T. 1698). Defendant also said that Fernandez stole the Caprices. (T. 1730). Gonzalez said they had divided the money at Abreu's apartment and he got $1500. (T. 1549-50). Bauer just moaned after he was shot, and San Martin grabbed the money tray. Then they fled the scene, ditched the Chevys and got away in Defendant's Regal. (T. 1567-70).

Defendant offers several reasons which he contends required severance: (a) Defendant and Gonzalez put the blame on each other for firing the fatal shot; (b) Gonzalez allegedly described Defendant as the "mastermind; " (c) the identity of the fatal shooter remained a

"central issue" throughout trial. (B. 38-39). These arguments are creative, yet without factual substance.

In fact, neither party blamed the other for firing the fatal shot. Indeed, Defendant plainly was unsure as to who had fired the fatal shot, asking the detective which gun had fired the killing round. (T. 1700). The only discrepancy in the statements regarding the shooting was who fired first. Both defendants admitted shooting, neither could say whether the officer had fired. Both said Defendant had the 9mm, both said that Gonzalez had the .357.[12]

Equally insubstantial is the "mastermind" claim. Gonzalez undisputedly asserts that he became involved in the "job" through acquaintance with Defendant. Yet that fact does not render the statement unreliable for the simple reason that Defendant's statement is not inconsistent. Although Defendant states that he got into the plan through Fernandez, nowhere does he assert that he did not in turn involve Gonzalez, As to the other "masterminding" activities, such as who drove what car, etc., the statements are also consistent.

Finally, while who shot the fatal bullet may have been an issue, at least at the beginning of the trial, its resolution was in no way affected by the statements of Defendant and Gonzalez. Both were absolutely consistent -- Defendant had the 9mm and Gonzalez had the ,357 or .38. The medical and forensic evidence was equally unequivocal: the 9mm lodged in Batter's leg;

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[12] Although Gonzalez referred to a .38, both a .38 and a .357 are revolvers as opposed to semiautomatics, like a 9mm. Further, the bullets fired from the .357 were .38 caliber, which will fit either a .38 or a .357. (T. 1891-93).

the .38 pierced his heart, while he was in a prone position, and killed him. The statements are absolutely clear that both fired, and as to who had which gun. Defendant's "central issue" is thus clearly exposed as a chimera.

Defendant's reliance on Roundtree v. State, 546 So. 2d 1042 (Fla. 1989), is thus clearly misplaced. There the discrepancy was which defendant was even present at the scene of the crime. Each accused the other of committing a murder he had no part in. Here, both defendants admitted to being at the scene; both admitted shooting; both agree as who had which gun. Neither accuses the other of being the sole perpetrator, which was the situation which rendered the statements unreliable in Roundtree.

Additionally, unlike the situation in Lee, the circumstances surrounding the taking of the statements do not call into question their reliability. The statements were given to different officers, and although the defendants were informed their cohorts were confessing, the statements as given do not reflect any attempt to cast responsibility on the others. Rather, both Defendant and Gonzalez consistently state who had which gun (despite the fact that both guns were at the time of the confessions under ten feet of water in the Miami River). Both defendants consistently describe a final planning period occurring during the week after Christmas, both share the same sequence of events, and most importantly, both admit to shooting the officer. Furthermore, there is no evidence that either defendant was encouraged to incriminate the other. These statements are independently reliable and were properly admitted at the joint trial.

Finally, assuming arguendo, that Gonzalez's statement was not sufficiently reliable to be admitted substantively against Defendant, rendering the failure to sever a Bruton[13] violation, any error is subject to harmless error analysis. See Cruz, 95 L. Ed. 2d, at 172; Harrington v. California, 395 U.S. 250, 89 S. Ct. 1726, 23 L. Ed. 2d 284 (1969); Grossman v. State, 525 So. 2d 833 (Fla. 1988). As discussed, ante, Defendant's confession corroborated Gonzalez's in every material aspect. Furthermore, the testimony of the eyewitnesses and the physical evidence was overwhelming and also corroborated the statements.[14] As noted above, both defendants identified guns which were in the river at the time their statements were given.[15] The bullets removed from Bauer's body were fired, one each from those guns, to the exclusion of "every other gun in the world." Likewise, the casing found at the scene was positively identified as coming from Defendant's gun. Two other spent bullets were recovered from the scene -- a .38 positively matched to Gonzalez's gun, and a 9mm which was consistent with Defendant's gun.[16] Battle and Ellis corroborated the type of vehicles which were used. Of course, the stolen vehicles themselves, one bearing the fingerprints of Fernandez and Defendant, were found,

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

[14] To the extent the confessions are inconsistent with the physical evidence, the physical evidence shows a greater degree of culpability than either statement. For example while Defendant claimed he only shot once, the evidence was clear that both defendants fired twice, and that Bauer did not fire at all.

[15] Although Defendant may have professed ignorance as to the source of the .38, it should be noted that the evidence established that this was the same gun which Defendant himself used previously to murder Raul Lopez in the Hialeah case.

[16] Defendant's 9mm is the only 9mm of which there is any evidence of having been fired at the scene. Bauer carried a 9mm also, but as noted above, it was completely full of unfired cartridges, which means Bauer could not have fired. There is no evidence of any other 9mm's having been present.

engines running and column locks punched out, two blocks from the scene, in the direction Battle and Ellis said they headed, Further Battle positively identified Defendant as the driver of one of the cars. Likewise the teller and Ellis both testified that the men had their guns drawn when they emerged from the drive through. In short, the admission of Gonzalez's testimony could not have had any probable impact on the jury. Harrington. Defendant's convictions should be affirmed.

IV.
THE PROSECUTION DID NOT IMPROPERLY APPEAL TO THE JURY'S SYMPATHY, AND IN ANY EVENT, THE BULK OF THIS CLAIM WAS NOT PRESERVED FOR REVIEW.

Defendant's final guilt phase issue is that the prosecution's alleged appeals to sympathy rendered his trial fundamentally unfair. As the framing of the issue suggests, this claim was not preserved below. The two witness responses which were objected to below were not improper. Finally, any error would be harmless beyond a reasonable doubt.

Defendant cites three instances of alleged misconduct. As he concedes, the comments during the opening statement were not preserved for review. As such, they may not now be considered. Ferguson v. State, 417 So. 2d 639, 641 (Fla. 1986). 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).

Defendant next objects to the following testimony:

(1) by Hadley that Bauer asked if she was all right and said he was only shot in leg;

(2) by Hadley that Bauer's concern at that point made her feel good; and

(3) by Chin-Watson regarding her working relationship with Bauer.

The first testimony cited was not objected to. (T. 957-58). As such it may not now be raised as error. Ferguson. As to the second statement by Hadley, it was not preserved either. Counsel's only objection was "We would renew our final objection." (T. 957). The previously-raised objection in the motion in limine was that the officer's statements should not

come in. (T, 876). As such this objection, which states no basis, is insufficient to preserve the issue for review. Ferguson. Furthermore, neither this testimony, nor Chin's, was improper. Brief humanizing comments are not improper. &in v. State, 632 So, 2d 1361, 1367 (Fla. 1994). The comments here were an integral part of the testimony which described the shooting of Officer Bauer, and which 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 under § 775.0823, Fla. Stat., under which he was charged. (R. 15). The testimony was thus also 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).

Even if the comments or testimony were improper, any error, individually or cumulatively, was harmless beyond a reasonable doubt.[17] Defendant has tried mightily to portray this trial as one big sympathy-fest for Officer Bauer, claiming that the State, "[f]rom opening statement to closing argument . . . infected this trial with utterly improper and gratuitously inflammatory comments and tactics," and "made shameless appeals to the jury's sympathy for no apparent reason but to inflame it, contrary to law." (B. 43). If anything is shameless, it is Defendant's resort to such hyperbole without any record support. Aside from the three instances identified in Defendant's brief, there were no other personal allusions to Officer Bauer. The remainder of the 1 100-plus pages devoted to the guilt-phase trial were

[17] Obviously if the error is harmless, Defendant's allusions to fundamental error are without merit.

limited to the circumstances of the crime. Three comments in eleven hundred pages hardly suggests an overwhelming appeal to sympathy. The State's closing argument, which covers twenty-nine transcript pages, was overwhelmingly devoted to a discussion of the evidence as it applied to the charged crimes. (T. 2207-36).[18] Given the overwhelming evidence, including Defendant's confession, as well as eyewitness, fingerprint, and ballistic evidence tying Defendant to this crime, it cannot reasonably be argued that these brief comments could have affected the jury's verdict. Davis v. State, 604 So. 2d 794 (Fla. 1992); Sireci v. State, 587 So. 2d 450 (Fla.), cert. denied, ___ U.S. ___, 112 S. Ct. 1500, 117 L. Ed. 2d 639 (1991); Stein; State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

[18] The only statement in the closing regarding Bauer's personality was brief and not inflammatory:

> You see Steve Bauer didn't lay dead for any real good reason. No he laid dead for greed, for money but ultimately Steve did and I guess what Mr. Cohen said about LaSonya, how brave and how good she was, she still doesn't come close to Steve. He did his job. I am asking you ladies and gentlemen to do yours.

(T. 2236).

V.

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

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

Defendant argues that the trial court improperly failed to find the existence of the statutory mitigating factor of age as well as several alleged nonstatutory mitigating factors, including the fact that Defendant was a good worker, Defendant's conduct in jail, and that he had "mental problems. " A review of the record reflects that the lower court carefully considered all of these alleged factors and properly concluded that they were not established by the evidence.

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

> [W]hen a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must fmd 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).

Defendant first asserts that the trial court erred in rejecting his age, 21, as a mitigating factor. This factor was explicitly rejected in the sentencing order. (R. 594). That conclusion is consistent with this court's decisions. The finding of age as a mitigating factor is a decision

which rests within the discretion of the trial court, and numerous decisions have upheld the refusal to treat ages of 20 or more as mitigating. See e.g., Cooper v. State, 492 So. 2d 1059, 1063 (Fla. 1986) (trial judge acted within discretion in rejecting age of 18 as mitigating factor); Kokal v. State, 492 So. 2d 13 17, 13 19 (Fla, 1986) (no abuse of discretion in not finding age of 20 as mitigating); Garcia v. State, 492 So. 2d 360 (Fla. 1986) ("The fact that a murderer is twenty years of age, without more, is not significant, and the trial. court did not err in not finding it as mitigating."); Scull v. St@, 533 So. 2d 1137, 1143 (Fla. 1988) ("This Court has frequently held that a sentencing court may decline to find age as a mitigating factor in cases in which the defendants were twenty to twenty-five years old at the time their offenses were committed. "); Mills v. State, 476 So. 2d 172, 179 (Fla. 1985)(defendant 22 at time of offense). As noted, infra, the lower court rejected evidence of mental difficulties. The court, based upon evidence of Defendant's responsible handling of marriage and parenthood, as well as evidence of the high level of planning which he contributed to the present and prior offenses, could further conclude that age was not a mitigating factor.

With respect to the failure to give a jury instruction regarding age as a statutory mitigating factor, the court did instruct that the jury could consider "any other aspects of the defendants' character or record, and any other circumstance of the offense." (R. 464). Thus, defense counsel was free to argue age as a mitigating factor under that instruction. Defense counsel however must have also realized that Defendant's age was not mitigating here: he did not argue the factor to the jury. (T. 3014-33). Insofar as age was not even argued as mitigation to the jurors, despite their being given an instruction which would have enabled them to consider

it if they chose to do so, and insofar as Defendant's age is clearly of de minimis significance at best, given the propriety of the court's rejection of this factor, it must further be concluded that there was no error in failing to give an express instruction on age.

Assuming, arguendo, that there were any error regarding giving the instruction, it would be harmless beyond a reasonable doubt in light of (a) the catchall instruction permitting the jury to consider the factor; (b) additional instructions to the jury that, "[m]itigating circumstances are factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed," (R. 460), and that it could give all mitigation whatever weight it chose to (R. 467); (c) the strength of the aggravators herein; and (d) the de minimis evidence of mitigation in this case.

Likewise, Defendant's claims regarding the nonstatutory mitigating circumstances are also without merit. Defense counsel submitted a written memorandum regarding sentencing, in which he asserted eight nonstatutory mitigating circumstances: (1) Defendant's "ability to form loving relationships," (R. 482), which the court found existed but gave little weight, (R. 595); (2) Defendant's "good employment background," (R. 483); which the court found not to exist, noting the only evidence presented was from one person who had supervised Defendant for a period of months, (R. 595); (3) Defendant's "'tranquil' nature," (R. 483), which the court rejected as "insulting" in view of Defendant's history of brutal robberies and murders, (R. 596); (4) Defendant's "troubled youth," (R. 483), which the court found to be established, but gave little weight, (R. 596); (5) Defendant's confession, (R. 484), which the court rejected as not

being mitigating under the circumstances of the case, (R. 594); (6) Defendant's behavior while incarcerated, (R. 485), the court found this mitigator not to exist where Defendant had been in a single cell and there was no way to judge his interaction with other inmates, (R. 597); (7) Defendant's age (R. 485), the court rejected this factor for the same reasons it rejected it as a statutory factor, (R. 597); (8) Defendant's "mental problems," (R. 485), the court rejected this alleged factor for the same reason it rejected it as a statutory factor, i.e., the only evidence was the uncle's testimony that Defendant never seemed normal, which was contradicted by the father-in-law's testimony regarding what a great person Defendant was, (R. 597, 592-93).

Defendant now avers that numbers (2), (6), and (8) should have been found. As to Defendant's "mental problems," he refers to the uncle's testimony that Defendant was "slow." That testimony was of course inconsistent with the testimony of Defendant's employment supervisor, Robert Barrechio, his father in law, and of course his conduct both here and in the Bird Road, Hialeah and Van Nest crimes, all of which display a capacity for planning and complex thought. See also, Defendant's argument to the jury, where he states that his alleged mental problems are "not . . . severe. We did not call a doctor to talk about it." (T. 3027). Under the circumstances, the court was well within its discretion to reject this proffered mitigation. Valle v. State, 581 So. 2d 40, 48-49 (Fla. 1991)(trial court properly weighed and rejected evidence of dysfunctional family and abusive childhood as mitigating factors); Cook v. State, 581 So. 2d 141, 143-44 (Fla. 1991) (proper rejection of mental mitigating circumstances in light of conflicting and contradictory evidence).

As for the employment claim, the only testimony regarding that factor was that Defendant was a good worker for a five month period. This fact is hardly probative of long-term potential. Indeed Defendant for unexplained reasons ceased to work at the golf course and embarked on the crime spree which has brought him to his present straits. Indeed the evidence reflected that the planning for the Hialeah murder overlapped with this sterling employment history. Defendant also posits his alleged work history with his relatives. However their testimony was very general, and reflected a fondness for Defendant which bordered on blindness. As such their testimony could be given little weight. Further in that regard, the relatives' testimony could be fully subsumed under the "relationships" mitigator, which the court found but gave little weight. Likewise, the model prisoner claim also was without credible evidentiary support, and was properly rejected. To the extent Defendant impressed the prison guards, the evidence was equally supportive of his ability to form relationships.[19] The trial court did credit that factor, but gave it little weight. Defendant's claims regarding the nonstatutory mitigation should be rejected.

In any event, given the aggravation herein, which Defendant does not challenge, of four separate prior capital and violent felonies, that the motive was pecuniary gain combined with commission during a robbery, and that an additional motive was witness elimination combined with the murder of a law enforcement officer, and given that the court felt that the first aggravator alone would outweigh the "de minimis" mitigation, any error regarding the allegedly

[19] Given his relatives' apparent blindness to his faults, it might also be further evidence of his sociopathic ability to ingratiate himself with others when it suits him. Obviously Raul Lopez and Steven Bauer were not so charmed.

wrongfully rejected mitigation would be harmless beyond a reasonable doubt, particularly given its redundancy to the mitigation actually found. Defendant's sentence should be **affirmed.**

B. THE SENTENCE OF DEATH IS NOT DISPROPORTIONATE IN THE INSTANT CASE.

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

The aggravating factors found below were: (1) prior convictions for capital and violent felonies; (2) murder committed during the course of an attempted robbery, merged with murder committed for pecuniary gain; and (3) murder of a law enforcement officer acting in the course of his official duties, merged with witness elimination. There were no statutory mitigating circumstances, and there was minimal nonstatutory mitigation: hardships during Defendant's youth, including abandonment by the mother, the death of a younger brother, and the father's drug and alcohol abuse after the brother's death; and the fact that Defendant was a caring husband, father, brother and provider.

Defendant's principal contention is that the sentence of death is generally inappropriate for murders committed during armed robberies. Defendant primarily relies upon a series of jury override cases in which this court found that the trial court improperly rejected the jury's life

recommendation. See, e.g., Cannady v. State, 427 So. 2d 723 (Fla. 1983); McCaskill v. State, 344 So. 2d 1276 (Fla. 1977); Williams v. State, 344 So. 2d 1276 (Fla. 1977). Jury override cases, however, are irrelevant to proportionality review here. See, Hudson v. State, 538 So. 2d 829, 831-32 (Fla. 1989); Lemon v. State, 456 So. 2d 885, 888 (Fla. 1984).

Numerous cases have affirmed death sentences where the murder was committed during the course of a robbery. See, e.g., Smith v. State, 641 So. 2d 1319 (Fla. 1994); Heath v. State, 648 So. 2d 660 (Fla. 1994); Carter v. State, 576 So. 2d 1291 (Fla. 1989); Cook v. State, 581 So. 2d 141 (Fla. 1991); Lowe v. State, 650 So. 2d 969 (Fla. 1994); Freeman v. State, 563 So. 2d 73 (Fla. 1990) (murder during course of burglary/for pecuniary gain); Wickham v. State, 593 So. 2d 191 (Fla. 1992) (murder committed during an armed robbery/ambush of a vehicle alongside a road).

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

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

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

In **Lowe**, the defendant murdered a convenience store clerk during the course of an attempted armed robbery. Two aggravating factors existed, prior conviction of a violent felony and commission during an attempted robbery. Once again, a virtually identical case to the instant one, minus the additional factor, In **Lowe**, the trial court's sentencing order was somewhat ambiguous as to whether it was rejecting all of the mitigation or whether it was treating it as established but outweighed by the aggravation. This court assumed that the various mitigating factors were established (age; functioned well in controlled environment; responsible employee; family background; participation in Bible studies) and nevertheless found that the death sentence was warranted. See also Watts **v. State**, 593 So. 2d 198 (Fla. 1992) (prior violent felonies, during course of sexual battery, pecuniary gain; versus low IQ, reduced

judgmental abilities, and age); Freeman v. State, 563 So. 2d 73 (Fla. 1990) (prior violent felony, during course of burglary/pecuniary gain; versus low intelligence, abuse by stepfather, artistic ability, and enjoyed playing with children); Mordenti v. State, 630 So. 2d 1080 (Fla. 1994) (pecuniary gain and CCP; versus age, no significant history of prior criminal activity, defendant's father died when he was young, defendant abandoned by mother, defendant a good stepson to stepparents defendant supported woman he lived with and her children, and other nonstatutory mitigation); Cook, (during course of robbery and prior violent felony; versus no significant history of criminal activity and minor nonstatutory mitigation).

In view of the foregoing, the imposition of the death sentence is clearly proportionate with death sentences approved in other cases. As with the jury override case, the few remaining cases upon which Defendant relies are also inapplicable. While Carruthers v. State, 465 So. 2d 496 (Fla. 1985), involved a murder committed during an armed robbery, after this court found two other aggravators improper, just one aggravating circumstance remained, as opposed to one substantial statutory mitigating factor (no significant history of prior criminal activity) and several nonstatutory mitigating factors. With considerably fewer aggravating factors, both in terms of substance and number, and a greater level of mitigation, with one very substantial statutory factor, Carruthers offers no basis of comparison with the instant case.

Defendant also compares his case to Livingston v. State, 565 So. 2d 1288 (Fla. 1990), where the aggravation consisted of two factors: murder during an armed robbery; prior violent felony. Mitigation included the defendant's age (17), and his unfortunate home life and rearing. This court, in Smith, distinguished Livingston, pointing out the severe beatings and neglect

Livingston had been subjected to, as well as the marginal nature of Livingston's intellectual functioning. Smith at 1322, the instant case involves more extensive aggravating circumstances, as it adds murder of an officer to the otherwise same factors found in Livingston.

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

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

With respect to Defendant's reliance on alleged mitigating factors which the lower court concluded were not established, as noted above, the trial court's conclusions were proper. Such alleged factors therefore have place function in this proportionality review .It is therefore readily apparent that the sentence of death imposed herein is proportionate to that approved in other cases. See, Smith; Lowe; Cook.

C. THE DEATH PENALTY IS NOT UNCONSTITUTIONAL.

Defendant argues that Florida's death penalty is arbitrarily and discriminatorily applied on the basis of the race, sex and economic status of the victim as well as the offender. This claim has never been presented in the trial court; no facts, figures or studies were ever adduced, and none are offered now. As such, this claim is unpreserved for appellate review. See, e.g., Tavlor v. State, 601 So, 2d 540 (Fla. 1992) (sentencing errors requiring resolution of factual matters not contained in record cannot generally be raised for first time on appeal). The application of that principle in the instant context is implicit in Foster v. State, 614 So. 2d 455, 463-65 (Fla. 1992), as this Court held that the trial court properly refused to conduct an evidentiary hearing on a similar claim, where the defendant had presented studies and figures which this Court concluded did not make out a prima facie case. Furthermore, similar claims have routinely been denied on the merits. See, McClesky v. Kemp, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed. 2d 262 (1987); Roberts v. State, 510 So. 2d 885, 895 (Fla. 1987); King v. State, 514 So. 2d 354, 359 (Fla. 1987); Cochran v. State, 547 So. 2d 928, 930 (Fla. 1989).

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

CONCLUSION

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

Respectfully submitted,
ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

RANDALL SUTTON
Assistant Attorney General
Florida Bar No. 0766070
Office of Attorney General
Department of Legal Affairs
Post Office Box 013241
Miami, Florida 33101
PH. (305) 377-5441
FAX (305) 377-5655

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by mail to **GEOFFREY C. FLECK, 5 115** Northwest **53rd** Street, Gainesville, Florida 32653, on this 14th day of August, 1995.

RANDALL SUTTON
Assistant Attorney General