IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,841

RICARDO GONZALEZ,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

A. Introduction

Defendant was charged, along with codefendants Leonardo Franqui, Fernando Fernandez, Pablo San Martin, 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(D), 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. 1-5).

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. 110-

12). The motion was granted as to codefendant Fernandez, (R. 221), 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 Franqui and San Martin, 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 PABLG ABREU where they split the money they had just stolen.

Although there are small details which bcth 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 'chat 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 **said** "don't move" and the officer reached for his gun. 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. 217-221).

B. Guilt Phase

The trial of Defendant commenced on May 26, 1994. (T. 841). Those portions of the voir dire relevant to the issues herein will

be discussed in the body of the argument. (T.254-839)

Dorrett Ellis banked at the Kislak National Bank off 135th Street in North Miami. On the morning of January 3, 1992, she went to the bank to make a deposit. (T. 892) 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. 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. (T. 893) Ellis did not get a full view of the men, but they looked Latin. (T. 894).

The officer walked out the door of the bank building with the tellers. He was wearing a police uniform. The two men jumped out of the cars, and ran in front of the cars, firing a gun. (T. 894). 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. 895-96).

Elijah Battle was a medical lab technician employed by HRS who

took the bus to work that traveled northbound on 7th Avenue in front of the bank. (T. 907). 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. 908-12). Battle also saw a red Cougar come out right after the Chevy, and then come back. (T. 914).

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 Franqui as the driver. (T. 1853). In court was the first time he had seen Franqui since the murder. (T. 1854).

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. When her coworker

Michelle arrived, they would get the money from the vault and go to the outside booths. (T. 931-32). The money was kept in a cash drawer. It would have had $15,000-20,000 in it, never more than $20,000. They would wait for the police officer to come and take them outside. (T. 933). 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. The officer would look out the small window on the door to check if it was safe and then they would go. (T. 934). The officer would walk them to the drive through booth and make sure the door was locked. (T. 935). He would give them a few minutes to set. up, then move the chains to let the cars in. (T. 936).

On January 3, 1992, the weather was sunny. Michelle was her coworker that day. (T. 937). 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. (T. 938). 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. There were two men coming toward her from the cars. When they drew closer, she saw their guns. (T.

939). Each one had a gun. Bauer was trying to get his gun out. Hadley dived for the booth. She went for the alarm, and lay there waiting, because she still had her money in her hand. (T. 940).

Then Hadley heard three or four shots. She heard Bauer cry out. He said he was shot. She got up and went back outside. (T. 940). He asked her if she was all right. 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 kneeliny inside the drive through area. She had him resting in her **lap** from the waist up. He **bled** all aver her. Then Michelle came over and the branch manager arrived, and they waited for the police to come. (T. 941). After a few minutes, Bauer stopped responding to questions. Then the police arrived **and** took over. (T. 942).

Michelle Chin Watson worked as a drive through teller for **Kislak** National Bank in January, 1992. (T. 947). She worked with LaSonya Hadley, She detailed the same morning procedures as Hadley. (T. 948-49).

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. Bauer opened the back door as usual. (T.948-49) 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. (T. 950). She continued to walk toward the drive through. She kept walking until she heard shots. Then she got down on the floor. She squatted down with her head toward. the floor and set the cash drawer down in front of her. (T. 951). Then someone came and took the cash drawer from her. 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. (T. 952). 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. 953).

Bauer's 9mm Sig-Sauer semi-automatic service weapon was recovered at the scene. (T. 1030). The weapon had 15 rounds in it, which was its capacity; it had not been fired. (T. 1032, 1042). Also recovered at the scene were Bauer's service-issue gunbelt, watch, knife, handcuffs, hand-held radio. (T. 1033-39). There were projectile holes through both the uniform shirt and the

t-shirt that Bauer had worn, just below the collar. (T. 1054, 1057).

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. 973). The vehicles were both gray Chevrolet Caprices. 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. 975-76). There is an alley which runs from the bank parking lot up to and past 10th Avenue. (T. 977).

North Miami Police Detective Donald Diecidue met Defendant 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. 1376-83). Defendant then gave a statement regarding the crimes. He met Franqui 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. Franqui said it would be easy, but

there was security. (T. 1390). Defendant said that Franqui said it would be on a Thursday or Friday. It ended up being the latter. Franqui said the plan was to steal two cars. Franqui and Defendant would be in one car and two others would be in the other car. Defendant identified a photo of San Martin. (T. 1392-93).

On January 3, 1992 Franqui picked up Gefendant and they met with San Martin. (T. 1393). Then they drove to where the Chevys were to meet the other two people. Then they went and parked near the bank. Franqui drove the car in which Defendant rode. (T. 1394). Defendant had a .38 and Franqui had a 9mm. When the tellers and the officer exited the bank, Franqui jumped out of the car, and so did Defendant. San Martin ran within 12 feet of the officer and told him not to move, in Spanish. (T. 1395). The officer went for his gun and Franqui fired. Defendant said he fired also. Defendant 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. 1396). Defendant then agreed to give a recorded statement, which was played for the jury. (T. 1397-1440).

After obtaining consent from Defendant, Detective Spotts and Special Agent Lee searched the bedroom of Defendant's house. (T.

1518-22). Spotts found money wrapped in tissue paper and taped up in a gym **bag** in the top of the closet. (T. 1523). There was approximately $1200 in twenty-dollar bills. (T. 1526). Spotts subsequently re-mirandized Defendant and reinterviewed him. (T. 1527-32). Defendant 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. 1533-34). A tape of the interview was played for the jury. (T. 1535-46).

After they were done taping, Defendant 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.* Franqui fired his semiauto first. Defendant 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 Franqui's Regal. (T. 1551-54).

Detective Mike Santos of the Metro-Dade Police Department and FDLE Special Agent Dorothy Ingraham interviewed San Martin on January **18,** 1992 after he had previously been *Mirandized.* (T. 1571). 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. 1585). 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 Fernandez's friend out and carried it out without him. The persons involved were Defendant, Franqui, and Fernandez, and San Martin's cousin Pablo Abreu. (T. 1586). San Martin was assigned the job of snatching the money trays from the tellers. All of them had previously gone to the bank to observe the tellers' routine. (T. 1587). 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. 1588). In addition to the two Chevys, Abreu drove Franqui's Buick. (T. 1589). The four defendants went to the bank in the two Chevys and Abreu waited a few blocks away in Franqui'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 cf the tellers. (T. 1590). 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. 1591). Later that day they counted the money, and there was $14-15,000 in it. San Martin received $3,000. (T. 1592). San Martin's stenographically recorded statement was then read to the jury. (T. 1598-1628).

On January 18, 1992, Detectives Jared Crawford and Greg Smith of the Metro-Dade Police Department interviewed Franqui. (T. 1665). After receiving his *Miranda* rights, Franqui agreed to discuss the Kislak case with them. (T. 1656-62). Franqui denied any involvement in the crimes, claiming he was at home with his wife Vivian, Franqui denied knowing Abreu, Fernandez and Defendant. (T. 1667). Smith informed Franqui that the others were in custody and naming him. At that point Franqui confessed. (T. 1668). He admitted to knowing Abreu, San Martin, Defendant and Fernandez. He said they were all involved in the robbery but that only he and Defendant were armed. Franqui said that he first became aware of the plan between Christmas and New Years, from Fernandez. (T. 1669). A black man who was a friend of Fernandez's originally came up with the plan. (T. 1670). The plan was to steal two similar vehicles. (T. 1671).

On the morning of January 3, 1992, they met at San Martin's

house. (T. 1674). From there they went to the bank, first stopping to leave Franqui's Buick Regal with Abreu nearby while the other four went on to the **bank** in the two stolen Caprices. (T. 1675). Franqui and Defendant were in one, with Franqui driving; San Martin and Fernandez were in the other. Fernandez drove the second vehicle. Franqui said that he had a 9mm and Defendant had a .357 revolver. (T. 1676-77). Franqui's car was closest to the bank and the other was next to it. All four exited the vehicles, and both Franqui and Defendant pulled their guns after the tellers came out of the bank building. (T. **1678).** Defendant yelled freeze, and then he heard a gunshot. The guard was unholstering his 9mm, but Franqui was not sure who shot first. Franqui 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. 1679-81). The job of Fernandez and San Martin was to actually take the money. (T.1681). When they split the money up, Franqui received $2400. Both guns were left at Abreu's house and he never saw them again. (T.1682). Franqui also claimed that the Regal was stolen but it was later learned that it in fact belonged to Franqui's girlfriend. (T. 1693).

Hialeah Police Department Albert Nabut met with Franqui later

in the same day of his interview with Smith. (T. 1712). Franqui told him that Abreu kept the guns after the crimes. (T. 1713). Franqui also told him that Fernandez stole the Caprices. (T. 1714). San Martin and Abreu had told Franqui that the guns had been thrown in the water somewhere. (T. 1716). After Nabut interviewed Franqui, Smith returned and took Franqui's stenographically recorded statement. (T. 1724). The statement was read to the jury. (T. 1727-51).

On January 21, 1992, Nabut met with San Martin. (T. 1754). 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. He told him they were near the mental hospital at 19th Avenue just off the Dolphin Expressway. (T. 1755-59). The next day Nabut went to he location indicated with divers from Metro-Dade, who found the guns. (T. 1763).

Robert Kennington, a firearms examiner with the Metro-Dade Crime Laboratory, examined a semi-jacketed hollow point projectile, "C" from a .38 revolver, and some fragments which were recovered from the scene. (T. 1868). The fragments "D" were not consistent

with a revolver, but were consistent with a 9mm semiautomatic. (T. 1871). The casing "M" which was recovered from the scene was also from a 9mm. (T. 1872). Kennington also received the two guns from the river. The first was a .357 magnum, capable of firing .38 projectiles. (T. 1875). The other was a 9mm semiautomatic. (T. 1876-77). 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. 1881). "A" was a .38 and "B" was a 9mm bullet. (T. 1883).

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. 1884). Bullet "C" from the scene was also fired from the .357. (T, 1885). 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. **1886).** Casing "M" was conclusively fired **by** the 9mm from the river, to the exclusion of any other gun in the world. (T. **1887).** "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. 1888). Therefore a minimum of four shots were

fired at the scene. (T. 1890).

Forensic Pathologist Dr. Jay Barnhart of the Dade County Medical Examiner's Office, performed the autopsy on Bauer on January 3, 1992. (T. 1892-94). Bauer had a gunshot wound to his left thigh. There was an entrance wound and no associated exit. (T. 1897). Bullet "B" was located in Bauer's hip. (T. 1905). 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. This was bullet "A". (T. 1902, 07).

Wound "B" would not have been fatal, but would have been quite painful. Wound "A" was fatal standing alone. (T. 1908). The cause of death was gunshot wounds. (T. 1909). 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. 1910).

Crime Scene Technician Mike Melgarejo of the Metro-Dade Police Department processed the two tone charcoal over gray Chevy, tag

number FIV 13C. (T. 1102). He retrieved 15 latents from the vehicle. (T. 1108). Crime Scene Technician Thomas Charles of the Metro-Dade Police Department processed the maroon-topped gray Chevy, tag number JMI 86J. (T. 1128). He retrieved 12 latents from the vehicle. (T. 1133). 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. Five were matches. Fernandez's fingerprints matched those found 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. There was one match with Franqui, from the outside left front door. (T. 1834-36). There were 12 latents from the second Caprice, tag number JMI 86J. Seven were of value. None matched any of the defendants. (T. 1837).

The jury returned a verdict of guilty as charged on all counts. (T. 2307-08).

C. *Penalty Phase*[1]

At the commencement of the penalty phase, the jury was specifically instructed, twice, that it was consider the evidence presented as to each defendant only as to that defendant, and to give each defendant a completely individual consideration. (T. 2359, 2360).

The State presented no additional evidence regarding Defendant at the penalty phase. Defendant.

Juan Rivera, Defendant's half-brother, (T. 2523-42), Cruz Gonzalez, Defendant's aunt, (T. 2546-58), Sonia Gomez, Defendant's step-mother, (T. 2560-69), Carlos Gonzalez, Defendant's father, (T. 2569-91), Rafael Santana, Defendant's

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[1] Prior to the penalty phase, the State moved to admit "victim impact" evidence pursuant to § 921. 141, Fla. Stat. (R. 88-93). The court denied the motion and found the statutory provision unconstitutional. 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,*** 657 So. 2d 1160 (Fla. 1995). However, the penalty phase below was conducted during the pendency of the appeal, and consequently no "victim impact" evidence was adduced.

stepfather, (T. 2605-19), and Margarita Santana, Defendant's mother, (T. 2620-34), described Defendant's loving upbringing, tranquil nature, participation in boxing, and the headaches he had suffered since childhood, for which he had received medical treatment. Rivera and the Santanas also testified regarding Defendant's marriage to Marisol de Vega. Cynthia Santana, the granddaughter of Defendant's stepfather, testified that Defendant took care of her when she was young and about Defendant's marriage. (T. 2634-39). Defendant also presented the videotaped testimony of Defendant's grandfather, Hilario Gonzalez, who testified in the same vein. (T. 2643-67). Most of the witnesses refused to believe that Defendant had committed the robbery and murder.

Defendant also called Dr. Alan Wagshul, a neurologist. (T. 2668). He reviewed Defendant's medical records and observed that he had been complaining of headaches since 1990, which were determined to be caused by tension. (T. 2672). Wagshul. examined Defendant on August 2, 1994. Defendant stated that he had hit his head sometime between ages 10 and 13 and began to experience headaches from age 14 until 20. He also said he had received blows to the head while boxing and had had a job-related head injury in 1988. (T. 2673). Wagshul administered a neurological

examination and an EEG. (T. 2674). The EEG was normal. He also administered an MRI. (T. *2675).* The doctor who performed the MRI, Dr. Thomas Naditch, reported to Wagshul that Defendant had two cavities in the middle of his brain that contained spinal fluid, which was common among boxers. (T. 2678-79). Wagshul opined that this type of injury could cause sudden changes in mood or behavior. He diagnosed Defendant as suffering from pugilistic encephalopathy, which is chronic trauma from blows to the brain. (T. 2681).

On cross, Wagshul testified that "chronic" simply meant that the injury had been present for a long time and was permanent. He further explained that it did not mean that the abnormality present in Defendant's brain had resulted in any changes physically to his body or to his mental state. (T. 2682-83). Defendant's EEG was "perfectly normal," reflecting the absence of abnormal brain **wave** or seizure activity. (T. *2683).* The neurological exam was also "completely normal." (T. *2685).* The doctor also was unable to identify anything about Defendant which **was** different from anyone else as a result of the brain abnormality. *Id.* Further, there was nothing in the literature that indicated that those suffering Defendant's condition, which is common among boxers, causes them to commit criminal acts. *Id.* On redirect Wagshul stated that although

the condition had not been linked to criminal behavior, it could cause impulsivity or sudden behavior changes. (T. 2686).

In response to questioning by the court,[2] Wagshul testified that there was no evidence that Defendant was under the influence of any extreme mental or emotional distress at the time that he was examined or at the time of the murder. (T. 2689). Likewise, Wagshul found no evidence that Defendant's capacity to appreciate the criminality of his conduct was in any way impaired. (T. 2690).

Finally, Defendant presented the videotaped testimony of Dr. Hyman Eisenstein, a neuropsychologist. (T. 2702). On June 7, 1994, Dr. Eisenstein conducted a basic clinical evaluation of Defendant. (T. 2708). Defendant's motor skills were all normal, except for mild impairment of his left grip. (T. 2721-22). The sensory/perceptual test results were likewise normal with the exception of part B of the trail making test, which r-elates to left brain functioning, which was mildly impaired. (T. 2722-23). Eisenstein found Defendant's results in the naming test, which measures visual/language memory skills, to show profound

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[2] The court questioned the witness outside the presence of the jury, without defense objection. (T. 2687-88).

impairment. (T. 2724-25)s "Despite" Defendant's normal scores on "several different" fluency tests, which measure his ability to speak fluently, Eisenstein determined that Defendant was mentally defective in the areas of spelling, reading articulation, and receptive **language,** *i.e.* his language skills were in the borderline to mildly mentally retarded range. (T. 2725). Defendant had **a** full-scale IQ score of 70, which the doctor described as "mildly impaired." (T. 2726). Eisenstein noted, however, that Defendant's performance IQ was 89 and that average started at 90. This meant that although Defendant could function normally, he was "not as well-versed in reading or expressing himself." *Id.* Based upon the results of the MMPI which he administered, Eisenstein concluded that Defendant suffered "from a variety of varying degrees of severe psychological stressors." (T. 2729) . He attributed them mainly to the stress of his incarceration and being cut off from his previously productive life, although he believed that "some" of them "always existed." *Id.* Defendant was also given the Wechsler Memory scale which again showed that although Defendant's verbal skills were mildly defective, his other functioning was normal. (T. *2730).* He also felt Defendant displayed impulsivity, that he was one "who tends to act out and then the consequences become apparent after the fact." Finally, Defendant was administered the

Halsted-Reitan neuropsychological battery, which showed mild to moderate impairment in problem-solving skills, and cognitive shifting. (T. 2731). His visual-spatial ability, however, was normal. (T. 2732). Eisenstein concluded that Defendant presented "evidence of severe emotional and psychological disturbance." (T. 2737). He felt that the mitigating factor of severe mental or emotional disturbance applied. (T. 2741). He also felt that Defendant had potential for rehabilitation in prison because in a correctional setting "the stressors are all removed." (T. 2744-45).

On cross, Eisenstein stated that Defendant had told him that his confession **was** not true. (T. 2747). Eisenstein conceded that Defendant's poor language skills could be a product of English being his second language. (T. 2749). He also conceded that Defendant's depression and other results on the MMPI could have been influenced by the fact that Defendant had already been convicted and knew that he was facing either life imprisonment or execution. (T. 2750). He noted that a pre-conviction MMPI conducted by Dr. Merry Haber also reflected some dysfunction, but not to the same extent. It **was** also noted that Defendant had had sufficient functioning to hold a job as an optical technician and

wholesale delivery driver for more than two years. (T. 2751). Defendant was employed at the time of the crime. (T. 2756). Defendant himself never blamed his wife for his problems. (T. 2753). Nor did accept responsibility himself. *Id.* In terms of extreme mental or emotional disturbance, Eisenstein defined "extreme" as meaning "more than a little." (T. 2757). It was pointed out that Defendant was able to function to the extent that he drove a car the day of the murder, he took some of the money, he knew to hide the money he got, and he used some of it pay for a new radiator. (T. 2758-59). Eisenstein stated that he was personally opposed to the death penalty, and he had only ever testified in death penalty proceedings on behalf of defendants. (T. 2761). Finally, Defendant's only statement regarding remorse to Eisenstein was in response to a question asked of Defendant by counsel, the day the doctor's testimony was perpetuated. (T. 2762).

After closing arguments, instruction, including two renewed admonitions that the defendants were to be treated individually, (T. 3243, 3250), and deliberation, the jury, by a vote of seven to five, recommended that Defendant be sentenced to death. (R. 559, T. 3259). On September 30, 1994, a hearing was held before the court, at which time Defendant testified, (T. 3280-82), and counsel

presented additional argument to the court. (T. 3282-84).

On October 11, 1994, the trial court sentenced Defendant. (T. 3324-48). The court found the existence of three aggravating circumstances: (1) Defendant's contemporaneous violent felony convictions; (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 circumstances (2) and (3) great weight. (S.R. 2-4).[3]

The trial court found that the statutory mitigating circumstance of no significant prior criminal activity existed. (S.R. 4). Following **an** extensive analysis of the defense evidence, the court rejected the statutory circumstance of extreme mental or emotional disturbance, (S.R. 5-13). It also rejected the

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[3] The sentencing order herein was not made a part of the record on appeal. The State has moved contemporaneously with the filing of this brief to supplement the record with **a** copy of the order. This supplemental record will be referred to by the symbol "(S.R. ___)." For the convenience of the court a copy of Defendant's sentencing order has been attached hereto as Appendix 1.

remaining statutory factors. (S.R. 14-15). Of four nonstatutory mitigating circumstances proffered by the defense, the court found that Defendant had proven one: that Defendant is a good son, brother, and grandson. (S.R. 16-17). The court also addressed three circumstances not raised in Defendant's sentencing memorandum, but which had been argued at the penalty phase, and concluded that they were not established. (S.R. 17-19).

The court concluded that the mitigating factors "pale[d]" in comparison to the aggravating circumstances, and accordingly sentenced Defendant to death. (S.R. 19).

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.

Defendant's claim that the State's strike of juror Eascual was improper under *Neil* is barred as the defense did not renew the objection tc the striking of Pascual 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 nontrigyerman. Furthermore, the reason given was not pretextual.

2. Defendant claims that the trial court erred in failing to grant his motion for severance based upon the fact that his nontestifying codefendants' statements were introduced at trial. However, the statements were virtually identical in all material

aspects and the surrounding circumstances were such that it was proper to admit the statements at the joint trial. Even if they should not have been admitted, the error would be harmless beyond a reasonable doubt where all the forensic and eyewitness evidence fully corroborated the statements.

3. Defendant's third claim is that he was entitled to a severance of his penalty phase trial. However, Defendant never moved for such severance below, and may not raise the issue for the first time on appeal. Further, even if he could be considered to have joined in his codefendants' severance motions, the grounds raised below were different from those now advanced, which therefore cannot now be considered.

Moreover, as discussed at Point II, he was not entitled to severance because of the admission of his codefendants' statements at the guilt phase, and even if he were the admission of the statements was harmless beyond a reasonable doubt. Finally, the trial court's refusal to allow Defendant to attack the credibility of San Martin's expert, who testified solely regarding San Martin, was neither a proper basis for severance, nor for reversal. In view of the evidence presented, the argument of counsel and the

instructions of the court, Defendant was in no way denied an individualized, "fair determination" of his sentence.

4. Defendant's sentence is proportional.

Defendant's convictions and sentences should be affirmed.

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, AND PROPERLY ALLOWED THE STATE TO EXERCISE A PEREMPTORY CHALLENGE AGAINST JUROR PASCUAL WHERE IN RESPONSE TO A DEFENSE-INITIATED *NEIL* INQUIRY, THE STATE PROFFERED NON-PRETEXTUAL, GENDER-NEUTRAL REASONS FOR THE STRIKE.

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 481 (Fla. 1984), and defense counsel was unable to proffer neutral, non-pretextual reasons for the strikes. The trial court therefore properly disallowed them. He also claims that the trial court erred in allowing the State to exercise a peremptory challenge of juror Pascual over a defense ***Neil*** objection. This latter claim has not been preserved for review, and is substantively without merit.

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.

A. *Juror Diaz*

When the State challenged the peremptory strike of juror Diaz, the proffered reason was that defense counsel did not "like him."; (T. 793). 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. 823). 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. The defense 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. 424); Hill's 3 daughters taught for Dade County Schools and her son worked for Metro-Dade Parks, (T. 427); Jennings and his wife worked for the State DOT, (T. 455); and Burroughs, the alternate, worked for Metro-Dade, and his wife was a child support enforcement clerk for the county. (T. 501). Of other venire members not rejected by the defense, both Stephens's godparents were Metro-Dade police officers, (T. 462), yet the defense attacked the State's use of a peremptory strike on her, (T. 812) ; and Neloms's husband and two children worked for the Dade County School Board, (T. 485), but the defense attacked that State peremptory strike also. (T. 820).

Nor was Diaz alone in having good kids, the defense's other proffered reason for the strike. Smith's child was an engineer. (T. 418). Dowdell produced a restaurant manager, a hospital worker, a UPS man, a minister, and a U.S. Marine. (T. 447). Neloms's children worked for the county school board and AT&T. (T.

485). Bringle had and administrative assistant at the housing authority, a fireman, and a cabinet maker. (T. 500). None expressed any suggestion that their children were not as decent and hard-working as Diaz's.

Likewise, the suggestion that Diaz lacked life experience, (T. 823), 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. 753-55). Apparently a 21-year-old from the suburbs who has been in school his whole life has "life experiences." (McMulling, T. 409, 749). See also Alacan, (24-year-old nursing student, T. 414); Will, (50 year resident of Dade County, retired school system employee, T. 426); Andrews, (lifetime resident and produce manager of market, T. 434); Stephens, (19 year old student, lifetime resident, T. 462); Simms, (retired consultant 41-year resident, T. 480).

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.*

B. Juror Andani

As for the strike of Andani, the claims now asserted, that she was a victim of auto theft or other crime and favored the death penalty, were not proffered below as reasons for the strike, and may not now be raised. In any event, being a crime was a characteristic shared with many other jurors who were acceptable to the defense: McMulling, (girlfriend's father murdered during crime, car stereo stolen, T. **410-11);** Alacan, (car stolen, robbed, T. 415); Smith, (car burglarized, friend purse-snatched, T. **418);** Pierre-Louis, (car burglarized multiple times, T. 425); Andrews, (car burglarized, T. 435); Rocha, (house burglarized, T. 445); Dowdell, (house burglarized, T. 447); Jennings, (car stolen, T. 455); Tarnowicz, (robbed at gunpoint, car stolen, house burglarized, mother mugged and elbow broken, T. 459); Stephens, (house burglarized, sister robbed at gunpoint, T. 464); Martinez, (car stolen, T. 467); Simms, (house burglarized, T. 480); Neloms, (car stolen, T. 485); Slater, (car stolen, T. 487); Swain, (truck stolen, T. 497); Bringle, (robbed at gunpoint, house burgled, T. 500); Burroughs, (car burglarized, wife robbed, wife's car burglarized, T. 501); Block, (family robbed twice, family friend murdered, T. 503). As to the death penalty claim, note T. 667, where attorney Diaz, who raised the strike, noted "she

has got it down," after Andani stated that if the mitigation outweighed the aggravators, the sentence would be "obviously life." ***Id.***

The only ground asserted below, Andani's "love" for the prosecutor and demeanor is 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*** mentioni.ng, 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. 788-89). 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, 586 So.*** 2d at 1029. Here the judge specifically rejected the existence of the

"looks. "[4] The court's observations regarding Andani are supported by the record. (See T. 665-67, 738-42, 758, 767-68). As such this claim must fail. ***Wright.***

C. Juror Pascual

Defendant also claims 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, 1'76 (Fla. 1993). Here, when the jury was finally constituted, defense counsel again raised the issue of the proposed defense strike of Diaz. (T. ***823).*** The court again denied the challenge. ***Id.*** The defense then accepted the panel "Subject to our prior objections," which the court defined as "Diaz Andani and Weaver -- ." (T. ***824).*** At no point did counsel in any way suggest that the defense sought

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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. 786-87).

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,*** ***618*** So. 2d 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").[5]

Even assuming, arguendo, that this issue were properly before the Court, it would be without merit. As discussed above, 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.*** 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

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[5] The State would also point out that defense counsel argued below that ***Neil*** did not apply to gender. (T. ***824)***.

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. 797). 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). As such the question presented is 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 ncntriggerman, Pierre-Louis had never made such an assertion. The State further noted that Smith would be stricken next, for the same reason, (T. 799), which in fact occurred. (T. 806).

Defendant now asserts that because the State struck Pascual, but not "male jurors," the strike was pretextual. (B. 15). The State would first note that Valdes was stricken early in the

proceedings by the defense. (T. 784). As noted above, Smith was also stricken, without defense objection. (T. 806).[6] The State also struck, without defense objection, juror Alacan, (T. 792), who provided equivocal answers on the subject. (T. 586). Juror Simms also had grave reservations on, among other things, the subject of death sentencing nontriggermen. (T 564-66). The State's challenge for cause was granted. (T. 818). The State also moved to excuse juror Neloms because of her difficulty in recommending death for a nontriggerman. (T. 593, 818). The challenge was denied and the State sought to strike her peremptorily. (T. 820). 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. 820). The State also successfully challenged juror Block, who stated she could probably not impose the death penalty on nontriggermen, for cause. (T. 597-98, 827).

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

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

possibility: McMulling, (T. 587); Hill, (T. 578); Diaz, (T. 578); Andrews, (T. 580); Weaver, (T. 590); Slater, (T. 594); and Bringle, (T. 554). 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. 696-97). It is also noteworthy that Pierre-Louis had several friends who were law enforcement officers, had previously served on a criminal jury, and had been a crime victim. (T. 424-25). 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. Al! 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 are 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. 583-85); (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, 613 ***so.*** 2d 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 claim regarding Pascual must also be rejected.

II.
THE TRIAL COURT PROPERLY REFUSED TO SEVER DEFENDANT'S TRIAL FROM THAT OF CODEFENDANTS FRANQUI AND SAN MARTIN.

Defendant contends the trial court erred in failing to sever his trial from that of non-testifying codefendants Franqui and San Martin. He asserts that the statements of Franqui and Defendant should not have been admitted against him because they only "interlocked" with his after the inconsistencies were "sandpapered" away by the trial court. (B. 21). Contrary to Defendant's assertions, however, the only "sandpapering" of the statements was the redaction of references to other crimes. A review of the three statements, as well as the other evidence presented shows that the codefendants'[7] statements were independently **reliable** and thus admissible against Defendant. Under such circumstances, severance was not mandated. Further, any alleged error would be harmless beyond a reasonable doubt.

In Cruz v. New ***York,*** 481 U.S. 186, 107 S. Ct. 1714, 95 L. Ed. 2d 162 (1987), the Supreme court held that a nontestifying

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[7] In the interest of brevity, the **term** "codefendants" will be used, for the purposes of Argument IT, to refer only to Franqui and San Martin.

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, the codefendants' statements would have been admissible against Defendant under Lee, and as such, the denial of severance was proper

Under' ***Lee,*** 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 codefendant's statement is "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; ***Farina v. State,*** 21 Fla. L. Weekly S176 (Fla. April 1.8, 1996) ("the defendant's confession may be considered at trial in assessing whether the codefendant's statements are supported by sufficient indicia of reliability to be directly admissible against the defendant"). 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); ***Farina.***

Unlike the statements in Lee, the statements in question here did not differ in any material respect. Rather, 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. Moreover, this identity existed without redaction. Despite Defendant's averment tc the contrary, the only redactions made removed references to other crimes:

> 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. 221). A review of the statements reveals the correctness of the trial court's conclusions.

San Martin stated that he, Franqui, Defendant, Fernandez and Abreu were involved. The idea of robbing the bank was originated by a friend of Fernandez's, a black male. (T. 1585). They had come up with the plan about a week earlier." (T. 1587). They stole two Chevrolets to carry out the robbery. (T. 1688).

Franqui stated that he, San Martin, Defendant, Fernandez and Abreu were all. involved in the robbery but that only he and Defendant were armed. (T. 1669). Franqui said that he first became aware of the plan between Christmas and New Years, from Fernandez. *Id.* A black man who was a friend of Fernandez's originally came up with the plan. (T. 1670). The plan was to steal two similar vehicles. (T. 3.671) .

Defendant said he met Franqui around Christmas 1991, who

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[8] The crime took place on January 3, 1992.

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. Franqui said it would be easy, but there was security. (T. 1390). Defendant said that Franqui said it would be on a Thursday or Friday. It ended up being the latter. Franqui said the plan was to steal two cars. (T. 1392-93).

San Martin stated that on the morning of January 3, 1992, they met at San Martin's house. (T. 1588). In addition to the two Chevys, Abreu drove Franqui's Buick. (T. 1589). The four defendants went to the bank in the two Chevys and Abreu waited a few blocks away in Franqui'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. (T. 1590).

According to Franqui, on the morning of January 3, 1992, they met at San Martin's house. (T. 1674). From there they went to the bank, first stopping to leave Franqui's Buick Regal with Abreu nearby while the other four went on to the bank in the two stolen Caprices. (T. 1675). Franqui and Defendant were in one, with

Franqui driving; San Martin and Fernandez were in the other. Fernandez drove the second vehicle. Franqui said that he had a 9mm and Defendant had a .357 revolver. (T. 1676-77). Franqui's car was closest to the bank and the other was next to it. All four exited the vehicles, and both Franqui and Defendant pulled their guns after the tellers came out cf the bank building. (T. 1678).

According to Defendant, on January 3, 1992, Franqui picked up Defendant and they met with San Martin. (T. 1493). Then they drove to where the Chevys were to meet the other two people. Then they went and parked near the bank. Franqui drove the car Defendant was in. (T. 1394). Defendant had a .38 and Franqui had a 9mm. When the tellers and the officer exited the bank, Franqui jumped out of the car, and so did Defendant. (T. 1395).

San Martin could not see who was shooting. 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, as was planned. (T. 1587, 1590). Then he ran and got into one of the Chevrolets. (T. 1591).

According to Franqui, Defendant yelled freeze, and then he heard a gunshot. The guard was unholstering his 9mm, but Franqui was not sure who shot first. Franqui then fired once toward the guard and fled back to the vehicle. (T. 1679-80). The job of Fernandez and San Martin was to actually take the money. (T. 1681).

Defendant said that Franqui ran within 12 feet of the officer and told him not to move, in Spanish. The officer went for his gun and Franqui fired'. Defendant said he fired also. San Martin grabbed the cash box and ran back to the car. (T. 1396).

Per San Martin, they fled and went to meet Abreu. They dutnped the stolen cars and took off in the Regal. (T. 1591). Later that day they counted the money, and San Martin received $3,000. (T. 1592). San Martin first stated that he had thrown the guns into the ocean, and then said they were in the Miami River. (T. 1755-59). Franqui also stated that they then drove to where Abreu was waiting and all five fled in the Buick. (T. 1679-80). When they split the money up, Franqui received $2400. (T. 1681). Both guns were left at Abreu's house and he never saw them again, but Abreu and San Martin told him that they had thrown them into the water

somewhere. (T. 1682, 1716). Defendant likewise stated that they then fled the scene, ditched the Chevys and got away in Franqui's Regal. (T. 1551-54). Defendant said they had divided the money at San Martin's apartment and he got $1500. (T. 1533-34).

As is clear from the foregoing, these statements were virtually identical in their description of the plan, the carrying out of the robbery, including the roles each player carried out, and the ultimate disposition of the loot and the weapons. In addition to their interlocking nature, none of the codefendants was present when the others confessed, and further neither Franyui nor San Martin attempted to inculpate Defendant in the actual s'hooting.

In sum, the statements of the three defendants were fully consistent in every ma *teria.2* aspect. 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 Franqui and Defendant

consistently stated 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).[9] All three defendants consistently described a final planning period occurring during the week after Christmas, and all share the same sequence of events. Furthermore, there is no evidence that any defendant was encouraged to incriminate the other. These statements are independently reliable and were properly admitted at the joint trial.

Finally, assuming, *arguendo*, that the codefendants' statements were not sufficiently reliable to be admitted substantively against Defendant, rendering the failure to sever a ***Bruton***[10] 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); ***Farina; Grossman v. State, 525 So.*** 2d 833 (Fla. 1988). As discussed, Franqui's and San Martin's confessions corroborated Defendant's in every material aspect. Furthermore, the testimony of the eyewitnesses and the physical

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[9] San Martin did not know who shot or who had which gun. However, all three stated that San Martin's only job was to snatch the money.

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

evidence was overwhelming and also corroborated the statements. As noted above, both codefendants identified guns which were in the river at the time their statements were given. 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 Franqui's gun. Two other spent bullets were recovered from the scene -- a .38 positively matched to Defendant's gun, and a 9mm which was consistent with Franqui's gun.[11] Battle and Ellis corroborated the type of vehicles which were used. Of course, the stolen vehicles themselves, one bearing the fingerprints of Fernandez and Franqui, were found, 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 Franqui 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. Finally, all. three testified identically as to Defendant's role. In short, the admission of the

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[11] Franqui'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.

statements could not have had any probable impact on the jury, *Harrington.* Defendant's convictions should be affirmed.

III.
THE TRIAL COURT PROPERLY REFUSED TO SEVER DEFENDANT'S PENALTY PHASE TRIAL FROM THAT OF CODEFENDANTS FRANQUI AND SAN MARTIN.

Defendant next contends that he was entitled to have his penalty-phase proceeding severed from that of his codefendants. He first claims that he was entitled to the severance because of the introduction of the codefendants' confessions during the guilt phase. He further avers that the trial court's refusal to allow him to cross-examine San Martin's expert witnesses also required severance. Both these contentions are unpreserved and substantively without merit.

Contrary to Defendant's assertion, (B. 22), he did not move to sever at the commencement of the penalty phase. *San Martin's* counsel moved to sever San Martin's trial on the basis that *Defendant* would be "pointing the finger" at San Martin. (T. 2331). Additionally, *Franqui's* counsel joined the motion, also expressing concern that *Defendant* would be claiming that Franqui, not Defendant, fired the fatal shot.[12] (T. *2332).* At the conclusion

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[12] According to Franqui's counsel, his concern was that Abreu had stated, contrary to the confessions of both Defendant and Franqui, that Franqui, not Defendant, had the .357 which fired the (continued...)

of counsels' presentations, the court inquired if the defense had anything further. *Id,* Defendant's counsel, who had remained mute since appearances where made for the record responded, "No." (T. 2333). As such it is plain that although both codefendants moved to sever,[13] Defendant did not. As such the claim has not been preserved for review. ***Steinhorst v. State, 412 So.*** 2d 332, 338 (Fla. 1982) (issue must be raised below to preserve issue for appeal); ***Tillman v. State,*** 471 So. 2d 32, 34 (Fla. 1385) (same); ***Fotopolous v. State,*** 608 so. 2d 784, 791 (Fla. 1992) (claim regarding severance of offenses waived as to penalty phase where not renewed prior to same) ; *cf.* ***Roundtree v. State, 546 So.*** 2d 1042, 1045 (Fla. 1989) (penalty-pnase severance claim considered on appeal where motion to sever **was** renewed at penalty phase) . Further, even were counsel's silence interpreted as a joinder in the motions, the basis for severance Defendant argues on appeal was not that presented by his codefendants to the trial court. It is well-settled that new or different legal grounds may not be

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[12] (...continued)
fatal bullet. Abreu never testified.

[13] Neither codefendant has raised this issue in his presently pending appeal. See Brief of Appeliant in ***Franq-ui v. State,*** and ***San Martin v. State,*** Nos. 84,701 & 84,702, respectively.

presented for the first time on the appeal of adverse action by the trial court. ***Steinhorst, 412 So.*** 2d at 338 (legal grounds different from those asserted below ***may*** not be raised for the first time on appeal); ***Tillman, 471*** So. 2d at 35 (same); ***Harmon v. State, 527*** So. 2d ***182, 185*** (Fla. 1988) (same); ***Occhicone v. State, 570*** So. 2d 902, 906 (Fla. 1990) (same) .

Further, although Defendant's counsel objected to not being permitted to attack the qualifications and conclusions of San Martin's experts on cross examination, he did *not* move for severance on that basis. (T 2806, ***2808,*** 2880). In his brief, (B. 24), Defendant correctly notes that San Martin moved for mistrial and severance at this point. However, the basis was that his counsel "didn't know that Mr. Gonzalez was going to prosecute my client." (T. 2803) .[14] As with the preliminary motion by San Martin to sever, this request clearly did not raise the severance issue as to Defendant, and likewise did not advance the basis for severance now proffered As such Defendant has not preserved the **this** claim for review. ***See Bertolotti v. State, 565 So.*** 2d 1343, 1345 (Fla.

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[14] San Martin, based on Defendant's closing, and Franqui, based on the closings of both codefendants again moved for mistrial and severance after the jury had retired for deliberation. (T. ***3255-56).*** Defendant's counsel aqain stood mute.

1990) (raising evidentiary objection not preserve distinct and separate issue for review); ***Steinhorst, 412 So.*** 2d at 338 (legal grounds different from those asserted below may not be raised for the first time on appeal); ***Tillman***; ***Harmon***; ***Occhicone.***

The first prong of Defendant's argument is that the penalty phase proceedings should have been severed because of the introduction of the codefendants' statements at the guilt-phase trial. As discussed above, this claim was not raised as a basis for severing the penalty- phase trials by any of the defendants, as such it may not now be raised. Assuming, *arguendo,* that the issue were preserved, the admissibility of the confessions during the guilt phase was proper, as fully discussed at Point II, *supra*. Nothing warrants a differing conclusion as to the penalty phase.[15]

Defendant relies upon **Roundtree *v.* State, 546 So.** 2d 1042 (Fla. 1989), in support of his claim that he was entitled to severance. The facts in ***Roundtree,*** however, were markedly different from those presented here. In that case, the defendants

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[15] The confessions were not readmitted during the penalty phase.

both claimed the other was the actual shooter, and that the other **was** the only one actually present. Under such circumstances, where the only evidence that Roundtree was the actual killer was his codefendant's accusation, this court held that Roundtree should have been granted a penalty-phase severance. Id. at 1045. Here, however, all three defendants' statements stated that all three were present, that Defendant and Franqui were the shooters, and that Franqui had the 9mm semiautomatic and Defendant had the .38 or .357 ***revolver.*** The ballistics evidence conclusively demonstrated that Defendant's gun fired the fatal bullet. Under such circumstances, there simply was no basis for severance.

Finally, even were the confessions improperly admitted any error in this regard would have been harmless. As discussed above, Defecdant's ***own*** statement, combined with the forensic evidence, conclusively established that Defendant fired the fatal shot. None of the other issues argued by the State or Defendant during the penalty phase was in any way related to the contents of the codefendants' statements. Thus there is no conceivable way the introduction of these statements could have affected the outcome of the penalty-phase proceedings. As such, their admission does not present a basis for reversal. ***Cruz v. New York, 481*** U.S. 186, 107

S. Ct. 1714, 95 L. Ed. 2d 162 (1987); ***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).

The second sub-claim is that Defendant ***was*** entitled to severance because he was essentially not permitted to show that San Martin's experts were not as good as his. As discussed above, this point has not been preserved for appeal, Further, it is substantively without basis.

A severance may be granted only when failure to do so would deny the defendant a "fair determination" of the issues by the jury. ***McCray v. State, 416 So.*** 2d ***804, 806*** (Fla. 1982); ***Espinosa v. State, 589 So.*** 2d 887, 891 (Fla. 1391). No severance is necessary when the circumstances are such that the jury will not become confused:

> This fair determination may be achieved when all the relevant evidence regarding the criminal offense is presented in such a manner that the jury can distinguish the evidence relating to each defendant's acts, conduct, and statements, and can then apply the law intelligently and without confusion to determine the individual defendant's [sentence].

Espinosa, 589 So. 2d at 891, *quoting* ***McCray, 416 So.*** 2d at 806.

The Court further explained that in the non-***Bruton*** context[16] certain "general rules" apply. These "rules" provide that a better chance of acquittal, strategic advantage, or hostility among defendants are not valid bases for severance. Id. Yet plainly such factors are the very basis of Defendant's claim. Furthermore, the record reflects that there was no chance that the jury was unable to provide him with a "fair determination" of his sentence.[17]

The jury was instructed on several occasions, both before and after the presentation of the evidence, that it was to give each defendant individual consideration:-

> You will recall that during the initial phase of the trial I instructed you that each defendant needs individual consideration of the facts as the facts and the evidence applied to that individual,

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[16] As discussed above, the codefendants' confessions were properly admitted here, and in any event their admission was harmless.

[17] Defendant cites to Justice Barkett's dissenting opinion in ***Espinosa*** in support of his position. (B. 24). Obviously that opinion is not the law. Furthermore, even if it were, severance was not mandated here for the simple reason that the defenses were not "antagonistic" here. On the contrary, the evidence presented by all three defendants focused on the family life and mental health of the individual defendants. Likewise, as has been observed on numerous occasions throughout this brief, the statements of the three defendants were in accord as to the role and participation of each defendant.

Please listen to this instruction which reaffirms that. It is important that you remember that you are to conduct an individual analysis as to each of the defendants. You should weigh the evidence, excuse me, you should weigh the circumstances that apply to each defendant separately and carefully.

Your decision on the proper sentence to recommend as to one defendant mustn't effect [sic] your recommendation as to the other. Each defendant is an individual human being and is entitled to an individual sentencing determination.

* * *

You must remember that you are going to be asked, you are going to be asked to make three decisions. One as to each of the defendants. As I read I will give you everything that I read to you to take back for your deliberations, you-will notice that as it concerns both the aggravating factors and the mitigating factors there are different ones, As they ably [sic] or may apply to each individual defendant.

You must be very attentive to that and make sure that you consider each defendant individual [sic]. Is that very clear to you?

* * *

It is important that you remember that you are to conduct an individual analysis as to each of the defendants. You should weigh the circumstances that apply to each defendants [sic] separately and carefully. Your decision on the proper sentence to recommend as to one defendant must not effect [sic] your recommendation as to the other.

> Each defendant is an individual human being and is entitled to an individual sentencing determination.

(T. 2359-60, 3243, 3250). Further, Defendant sought, and was granted, with State agreement, a motion in limine that the State would not use any alleged deficiency on the part of San Martin's experts against Defendant in closing. (T. 2880-81). In accord with this ruling, the State treated each defendant wholly individually, and, indeed, reminded the jury of its duty to do so:

> Now remember what I told you, defendants can bring up any, any part of their character or record as a mitigator. So what we are going to do now is, we are going to touch each defendant separately and ***remember*** *when* ***you go back there, each*** *defendant* ***is*** *considered* ***each separately by you. Not*** *as* ***a*** *group,* ***not as one. Each one is considered*** *separately* ...
>
> * * *
>
> What I am asking you to do is this, ***I am asking you to judge each defendant individually.***

(T. 3149-50, 3164) (emphasis supplied). Likewise, defense counsel also reminded the jurors of their duty to consider Defendant individually:

> Your verdicts can be different as to each of the defendants. And **as** you know, the evidence has been brought forward in this **case**, each of the defendants have different things in their background, their [sic] complete individuals where your verdicts are separate and apart for

each one.

(T. 3191). Finally, the jury instructions as to the individual aggravators and mitigators were tailored so that they only referred to the defendant(s) to whom they were applicable. (T. 3245-50). In short, every precaution was taken, and there was no **way** that the jurors could have been unaware of their responsibility to judge the defendants individually. Moreover, the jurors plainly took seriously the admonitions to give the defendants individual consideration, as demonstrated by the differing vote counts in their death recommendations as to Defendant and Franqui, and their life recommendation as to San Martin. (T. 3259).

Likewise, the alleged shortcomings of San Martin's experts[18] could not have adversely affected Defendant. Defendant's experts plainly only examined and discussed Defendant and San Martin's only examined and testified regarding him. The State did not seek opinions from Defendant's experts regarding San Martin or vice versa. Finally, the mitigators that were proffered by the respective experts were wholly different. San Martin did not argue

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[18] Franqui did not present any expert testimony, and Defendant has not argued any basis for severance from Franqui in his brief, except for the admission of Franqui's statement, which issue has been discussed above.

that the statutory mitigator of extreme mental or emotional disturbance[19] applied. (No. 84,702, R. 760).[20] Rather, San Martin argued that he was unable to conform his conduct to the requirements of the law.[21] (Id., R. 762). Defendant's expert, Dr. Wagshul, on the other hand, opined that that there was no evidence that Defendant was unable to conform his conduct to the 'Law. (T. 2689). Defendant's other expert, Dr. Eisenstein, stated only that Defendant was under the influence of extreme mental or emotional disturbance.[22] (T. 2741). As noted above, the jurors' recommendations clearly reflect that they treated the defendants individually. Defendant was not denied a "fair determination" of his sentence. This claim must be denied.

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[19] § 921.141(6)(b), Fla.Stat.

[20] The State asks the Court to take judicial notice of the record in ***San* Martin *v. State, No.*** 84,702, which is currently pending before the Court on appeal. The sentencing order therein, which contains the cited pages, is attached hereto as Appendix 2 for reference.

[21] § 921.141(6)(f), Fla. Stat.

[22] Dr. Wagshul found no evidence to that effect. (T. 2689)

IV.

DEFENDANT'S SENTENCE IS PROPORTIONAL.

As his final contention, Defendant claims that his sentence is disproportionate when compared to the sentences of other similarly-situated defendants. This contention is without merit.

"Proportionality review compares the sentence of death with other cases in which a sentence of death was approved or disapproved." **Palmes v. *Wainwright***, 460 **So.** 2d 362, 362 (Fla. 1984). The Court must "consider the totality of circumstances in a case, and compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances." ***Porter* v. State,** 564 so. 2d 1060, 1064 (Fla. 1990), *cert. denied, - - U.S.* , 111 S. Ct. 1024, 112 L. Ed. 2d 1106 (1991). "Absent demonstrable legal error, this Court accepts those aggravating factors and mitigating circumstances found by the trial court as the basis for proportionality review." ***State v. Henry,*** 456 So. 2d 466, 469 (Fla. 1984).[23]

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[23] Defendant does not challenge the trial court's findings as to the aggravating and mitigating circumstances. The trial court's thorough discussion of the factors argued in aggravation (continued...)

The trial court found the following aggravating factors: (1) prior convictions for felonies involving violence; (2) murder committed during the course of a robbery, merged with the motive of pecuniary gain; and (3) murder of a law enforcement officer, merged with witness elimination. The court gave circumstances (2) and (3) great weight. (S.R. 2-4). The trial court found that the statutory mitigating circumstance of no significant prior criminal. activity existed. (S.R. 4). The court gave this factor little weight, in view of Defendant's participation and role as the fatal shooter in the present crime. (S.R. 4). The also court found that Defendant had proven one nonstatutory mitigating circumstance: that he is a good son, brother, and grandson. (S.R. 16).

This court has affirmed the death sentences in numerous cases where the murder ***was*** committed during the course of a robbery. See, *e.g.*, ***Smith v. State, 641 So.*** 2d 131.9 (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); ***Wickham v. State, 593 So.*** 2d 191 (Fla.

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[23] (...continued)
and mitigation and findings thereon, (S.R. 2-19), are well-supported by the record and should be accepted.

1992).

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 here, where the additional factor of killing a policeman/witness elimination ***was*** found. As here, in ***Smith*** the court ***also*** found one statutory mitigating circumstance -- no significant history of criminal activity -- and (unlike here! *several* nonstatutory mitigating circumstances relating to Smith's background, character and record. This court rejected Smith's claim of disproportionality. Here, with considerably more aggravation and less mitigation, and a basically similar situation of a murder during armed robbery, the case is more compelling for the imposition of the death sentence.

In ***Heath,*** the two aggravating circumstances were the commission of the murder during the course of an armed robbery, and the existence of a prior conviction for second-degree murder. As in ***Smith,*** the murder was not accompanied by the additional

aggravating factor. 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. In *Heath,* this court determined that the death sentence was appropriate.

In Lowe, the defendant was convicted of the murder of a convenience store clerk during the course of an attempted armed robbery. Two aggravating factors existed: (1) prior conviction of a violent felony; and (2) murder committed during the attempted robbery. Once again, the sentence was affirmed in a case virtually identical to the instant one, minus Defendant's additional witness elimination/law enforcement officer factor. The Lowe trial judge's sentencing order was somewhat ambiguous as to whether he was rejecting all of the mitigation or whether he was treating it as established but outweighed by the aggravation. This court, on appeal, assumed that the various mitigating factors were established (defendant 20 years old at time of crime; defendant functions well in controlled environment; defendant a responsible employee; family background; participation in Bible studies) and nevertheless proceeded to find that the death sentence was warranted.

Other cases similarly support the conclusion that the death sentence was proper in the instant case. ***Watts v. State, 593 So.*** 2d 198 (Fla. 1992)(aggravators: prior violent felonies; murder during course of sexual battery; murder committed for pecuniary gain; mitigation: low IQ reduced judgmental abilities; defendant 22 at time of offense); ***Freeman v. State,*** 563 so. 2d 73 (Fla. 1990) (aggravators: prior violent felony; murder during course of burglary/committed for pecuniary gain; mitigation: low intelligence; abuse by stepfather; artistic ability; enjoyed playing with children); ***Cook*** (aggravators: murder during course of robbery; prior violent felony; mitigation: no significant history of criminal activity and minor nonstatutory mitigation) . In view of the foregoing, the imposition of the death sentence here is clearly proportionate with death sentences approved in other cases. Defendant's sentence should be affirmed.

CONCLUSION

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

Respectfully submitted,
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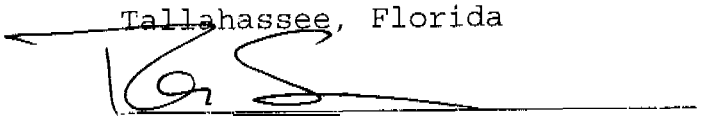

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE was** furnished by **U.S.** mail to, **WILLIAM M. NORRIS,** 1390 South Dixie Highway, Suite 1305, Coral Gables, Florida 33146, this 6th day of May, 1996.

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