IN THE SUPREME COURT OF FLORIDA



CASE NO. 87,469

**NICHOLAS HARDY,**

Appellant,

vs.

**THE STATE** OF **FLORIDA,**

Appellee.

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AN APPEAL FROM THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA CRIMINAL DIVISION

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# BRIEF OF APPELLEE

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## STATEMENT OF THE CASE AND FACTS

I. **INTRODUCTION** Defendant was indicted on April 14, 1993, in the Circuit Court of the Fifteenth Judicial Circuit, Palm Beach County, Case No. 93-2357 CF A02 R, and charged with having committed on February 25-26, 1993: (1) the premeditated murder of Palm Beach County Deputy Sheriff Sergeant James Hunt; **(2)** the taking of the firearm of a law enforcement officer; and (3) the grand theft of Hunt's firearm. (R. 145-47). Count (3) was dismissed before trial. (T. 887).

**II. THE GUILT PHASE**[1] The evidentiary portion of trial commenced on October **31,** 1995. On February 25, 1993, Sergeant Hunt radioed that he was investigating a bank alarm.[2] Later, Hunt radioed that he had detained four suspicious juveniles, and requested back-up, (T. **2252).** When Deputy Dale Fox arrived at Jog Road and Lantana Road about two minutes later, he found Hunt's patrol vehicle parked on the side of the road. Hunt was on the ground on the driver's side of the cruiser, (T. **2255)** . He had been shot in the head, and his service weapon, a 9mm pistol, was

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[1] The extensive competency proceedings are discussed infra, at Part IV, pp. **16-45**

[2] The alarm later turned out to have been false. (T. 2439).

missing. (T. 2259-60, 2272).

Ricky Rodriguez, who would have been 14 or 15 at the time of the murder, had known Defendant for approximately four or five months on February 25, 1993. (T. 2332). On that evening, Rodriguez was with Glen Wilson and Scott Allen. (T. 2332). Eventually they went over to Defendant's house, (T. 2333). There, Defendant placed a .38 under the seat of the car when and got in. (T. 2334, 2364). They left and drove around until the car broke down. They pushed it into a supermarket parking lot, and began walking through the parking lot. Defendant showed him the .38 while they were walking, but Rodriguez did not want to hold it and gave it back to Defendant. (T. 2334-35). As they approached Jog Road, a deputy pulled up next to them. (T. 2335). The deputy got out and told them to stand in front of the car, and patted them down. (T. 2336). After patting Wilson down, Hunt began to pat down Rodriguez. As Rodriguez was telling him he had some cigarettes and sunglasses, Rodriguez saw a flash to the right, and grabbed his right ear, because it was ringing. Rodriguez had grabbed his ear and was yelling about it when he heard a second shot. Hunt fell. (T. 2338-39). Then they began running. Allen and Wilson were in front of him and Defendant was behind, although Rodriguez never looked back. They ran and all four of them caught up at the fence behind the

shopping center. (T. 2340). When they got to the fence, Defendant began to chant "you're going to fry, you're going to die." Defendant had two guns in his hands. (T. 2341). Rodriguez had seen Defendant with the .38 before, but he had never seen the 9mm. They all went over the fence. (T. 2342). They ran through a tomato packing plant to a trailer park. They had to climb several fences, When they got to the trailer park, they split up. (T. 2343). He did not see where Allen went. Wilson tried to get into a trailer. Rodriguez and Defendant ended up near the canal at the edge of the park. (T. 2344). A person who lived in the park confronted them. At that point Rodriguez realized Defendant no longer had the .38. They crossed the canal. (T. 2345). There was a holly thicket on the other side of the canal. (T. 2346). They pushed through the bushes into an open field, but they saw a helicopter going over the holly thicket. He turned around and went back into the holly thicket. At that point Rodriguez and Defendant separated. (T. 2347). Rodriguez laid down in the bushes. Then he heard a gunshot. (T. 2348). He called Defendant's name, but got no response. He was laying there when the cops found him with dogs, and he was arrested, (T. 2349). Rodriguez was taken to the Sheriff's office where he gave a statement. (T. 2350). The next morning he did a reenactment of the crime on video, which was played for the jury.

(T. 2351, 2376). Rodriguez identified Defendant's .38. (T. 2353). He also identified a gun which looked like the 9mm Defendant had. (T. 2355). Rodriguez was never charged with a crime as a result of the murder. (T. 2355).

Fourteen-year-old Scott Allen had known Defendant for two to three months in February 1993. (T. 2378, 2388). Allen described the same series of events that led to the encounter with Hunt, including Defendant's bringing of a gun into the car, and flashing it as they walked across the parking lot. (T. 2379-80). Hunt patted down Wilson, and then as he **was** patting down Rodriguez, Defendant came up behind him and shot him twice. He shot past the right side of Rodriguez's face. (T. 2381). Then they all began to run. Allen and Wilson were first, followed by Rodriguez. As Allen went between the Winn-Dixie and the fence, he **saw** Defendant huddled over the deputy. Defendant eventually caught up to them, saying, "We're going to die, we're going to die." Defendant had the officer's gun. (T. 2382-83). Then they jumped the fence and ran toward the Plantation trailer park. They had to jump several fences. (T. 2384). Allen walked toward the main entrance of the park, where he ran into another deputy.[3] At that point he heard a shot coming from

[3] Deputy John Navarro testified that he encountered Allen at the entrance to the trailer park around 11:17 p.m. (T. 2442).

the rear of the park. (T. 2385). Allen also participated in the videotaped reenactment the next day. (T. 2386).

Glen Wilson had known Defendant for two to three months at the time of the murder. (T. 2404). He related the same series of events leading up to his car breaking down near the Winn-Dixie. (T. 2404-05). While they were walking through the parking lot, Defendant took out a gun and tried to pass it to him. Wilson declined to take it. (T. 2405). He identified the .38 as Defendant's. He had seen Defendant with it before the night of the murder. (T. 2406). When they encountered Hunt, he patted Wilson down first, then Allen. Then Defendant shot him. (T. 2408). Everybody began to run, and then Defendant went back and got Hunt's gun. They all ran behind the Winn-Dixie, and Defendant kept saying they were going to die, (T. 2409). Defendant had two guns when they got to the fence. Wilson also identified the second gun. Then they jumped over two fences to the trailer park. (T. 2410). They all split up and Wilson went to the home of a girl he knew in the trailer park. He was

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When asked, Allen identified himself and said he was visiting the house of a friend in the park. (T. 2443). While talking to Allen, he heard a gunshot and radioed dispatch to note the time at 11:19. He patted Allen down at the time he saw him at the entrance and he had no weapons. (T. 2445). Allen was subsequently found at home, at 3:15 a.m., and taken to the Sheriff's office. (T. 2439-40).

arrested there.[4] After he was taken to the Sheriff's office, he gave a statement. (T. 2411). He also participated in the video reenactment. (T. 2412). At some point during the two months before the murder, Wilson and Defendant were talking and Wilson asked him how he felt about being "mixed" [race] and Defendant responded that the only race thing that ever made him angry was the Rodney King incident, (T. 2430). Defendant then stated "that if it ever came down to him or a cop it was the cop." (T. 2431).

On February 25, 1993, local resident Earnest Scott went to the Winn-Dixie for a pack of cigarettes around 11:00 p.m. He saw a deputy with four juveniles in the spotlight at the front of his car. Because one of them looked like his neighbor's son, Scott pulled into the parking lot and watched for several minutes. When he came out of the store, there was another cruiser, and Scott assumed that the kids had run. (T. 2282-83) . When Scott first **saw** them, the four were facing the deputy, who was writing down information. He did not see any deputies when he came out. (T. 2284). Kenneth Gallon, a courier, **was** stopped at the light at Jog and Lantana around 11:00 on February 25, 1993. Gallon was just pulling away from the light when he **saw** a muzzle flash, and heard

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[4] Deputy Frederick Rifflard testified that he arrested Wilson in a carport at the Plantation trailer park. (T. 2436-37).

a pop. Then he saw the police officer on the ground. Four people ran away. One of them came back, bent down, picked something up, and then took off again. Gallon was headed south on Jog Road at the time . He drove to the next intersection, and turned around. He drove by again and confirmed that the officer was on the ground. He then summoned help. (T. 2287-88, 2291, 2293, 2295). Craig Matthews resided at the Plantation trailer park at the time of the murder. (T. 2448). A bit after 11:00 he confronted two people in the yard next to his trailer. (T. 2450). One was tall and skinny,[5] the other was short and hispanic-looking. (T. 2451). They jogged across the street, across an empty lot,, and across the canal, (T. 2452). The tall skinny one had a gun he was attempting to conceal. Matthews called 911. (T. 2453). The other kid did not have a gun. Later that night Matthews saw the police putting the shorter kid into a cruiser. (T. 2454).

K-9 unit deputy Buckley's dog located Rodriguez in the holly thicket, and he was arrested. (T. 2592). Deputy Bechtel's dog then alerted. (T. 2592). The dog attempted to pull Defendant from the bushes, and Bechtel ordered Defendant to show his hands. There was no response, so they crawled into the bushes, patted down, and

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[5] Defendant was six feet tall and weighed 150 pounds. (R. 105).

cuffed Defendant. (T. 2593). They determined that Defendant was still alive, dragged him out of the bushes, and called a medical team. (T. 2595). As Defendant was being dragged out, Deputy Araujo saw the 9mm come from behind his head, hit a mound, and fall out. (T. 2633). It bounced up from under Defendant's body. (T. 2634).

Detective William Bruffey recovered Defendant's clothes and personal items at the scene. Included were a baseball cap with a bullet hole in it and twelve .38 lead tip bullets. (T. 2686). They were recovered in the vicinity of the holly thicket. (T. 2690). The police searched the entire area for several days for the .38 revolver, but without success. (T. 2692) . Ultimately the manager of the property abutting the Winn-Dixie found the gun when he moved a semi-trailer that had been parked against the fence separating his property from the shopping center. (T. 2695-98, 2714-18).

Jose Nieves was at the home of Joe Ybarra when his son, Steven Ybarra showed him a the .38 that belonged to his father. (T. 2744). Defendant was with Nieves a couple of times when he went over to the Ybarra house. Nieves later returned and broke into the house and stole .38. (T. 2745-46). After the burglary, he traded the .38 to Defendant for a .25. (T. 2747). Joe Ybarra's house was burglarized and he had a .38 stolen. (T. 2724). Ybarra identified the gun recovered from behind the Winn-Dixie as his.

Deputy Ralph Beach was assigned to the day room area where Defendant was housed at the Palm Beach County Jail. (T. 2765). He observed another inmate ask Defendant what kind of gun he used and Defendant said a .38 special. The inmate asked where he shot the deputy, and Defendant pointed to his temple. Defendant then rubbed his legs and said, "The cop searched me down." (T. 2776). They said something that Beach could not hear, and then the inmate said "by the Great Western Bank?" and Defendant replied, "no, further down." (T. 2777).

Medical Examiner James Benz examined Hunt's body at 11:30 on February 26, 1993. (T. 2641). Hunt had two gunshot wounds, one entered the left side of his head, above the hairline. The other entered his left eye. (T. 2642-43). There was gunpowder residue and evidence of scorching at the entrance wound near the left eye. (T. 2644). Benz characterized the wound to the eye **as** near-contact. (T. 2665). The bullet which entered through the top of Hunt's head went from left to right, slightly front to back and angled downward. It went through Hunt's skull and brain and lodged in his sinus. (T. 2655) . The cause of death was multiple gunshot wounds. (T. 2668).

Firearms examiner Sergeant John O'Rourke concluded that small abrasions on Rodriguez's face and lead in his hair, consistent with a revolver being fired next to his face. (T. 2497-99). He concluded

that the .38 was between three and twelve inches from the side of Rodriguez's face. (T. 2537). O'Rourke tested the .38 revolver, which had two fired and four live rounds in it. (T. 2518). He concluded that the bullet removed from Hunt's head could only have been fired from that .38, to the exclusion of every other gun in the world. (T. 2521). Based upon test-firing of the .38, and the stippling patterns, O'Rourke concluded that Hunt was shot at a range of one to six inches. (T. 2532). O'Rourke examined the spent 9mm casing from near Defendant's head and determined that it had been ejected from Hunt's gun to the exclusion of all other firearms. (T. 2542-44, 2583, 2671).

Defendant presented a defense to the effect that someone else committed the crime. The defense called Kenneth Hyde, who denied killing Hunt, or telling anyone that he had. (T. 2912-15). The defense then called a series of witnesses who testified that Hyde said he had killed Hunt. Robert Wiggins, who already had four felony convictions at age 20, testified that at the end of 1993 or early 1994 he was at a party at Earl Lusk's house, and Hyde said he killed the deputy and then shot Defendant. (T. 2923). Hyde said he was watching from across the street when he saw the cop patting the four down. He crossed the street and yelled at the cop and shot him when he turned around. Defendant said he would turn him in, so Hyde

claimed he shot Defendant while the others held him down. (T. 2923). Wiggins told Defendant's investigator on July 17, 1995, however, that he did not believe Hyde. (T. 2926). Carl Parks, who had 13 felony convictions, testified that he was medicated at time Hyde made statements to him and therefore could not recall much. Hyde told him that he was glad someone else was taking the rap for an unspecified crime. (T. 2931-32, 2937). Hyde had declined to elaborate too much, although Hyde had said it **was** too bad someone was in jail for the crime, and that Defendant was playing dumb (T. 2933, 2939). Kristy Scott, who was 15 **years** old at time of murder, stated that while at the Lusk party Hyde just said he shot the cop and then the boy. Hyde did not supply any other details. (T. 2941-44). Jacqueline Skeen, who at trial was 17, stated that in December 1993, Hyde said he had been driving with Defendant and stopped at a bank. Then a cop stopped them, and Hyde shot the cop. Hyde said he then shot Defendant (T. 2945-47). She told police her story after she and Hyde broke up.

After 51 minutes of deliberation, the jury found Defendant guilty **as** charged. (T. 3068, 3075, 3078).

**III. PENALTY PHASE** At the sentencing hearing before jury, the State presented the testimony of Hunt's widow, Judith, his sister, Katherine Smith, Undersheriff Joseph Bradshaw, and Sheriff's

Sergeant Matt Eisenberg, who testified briefly about Hunt's qualities. (T. 3246-34, 3250-51, 3254-57, 3259-60).

The State also presented evidence of a crime spree in which Defendant had participated the night before the murder. On February 24, 1993, at about 2:00 a.m., Kenneth Speranza was driving home from work. (T. 3262). A late model Cadillac with a Michigan tag pulled at a 45-degree angle, blocking both lanes of the road in front of him, (T. 3263-65). The passenger jumped out with a rifle. (T. 3266). The man then pointed the rifle at him. He then started shooting, ten to twelve times. Speranza was not hit. (T. 3268). The Cadillac left, and Speranza went and called the police. (T. 3269). Robert Forbis owned the silver Cadillac with the Michigan tag, which was stolen on February 23, 1993, from the Boynton Beach Mall. (T. 3278). It was found two days later. (T. 3280). David Cook was riding a bicycle down the sidewalk on Military Trail near 45th Street around 3:00 a.m. on February 24, 1993. He was headed home with a bag of doughnuts. (T. 3282). A silver Cadillac pulled up next to him. (T. 3283). Defendant, who was driving, told him to give him the doughnuts or be shot. (T. 3284). As he handed Defendant the bag, Cook saw a revolver between Defendant's legs. Defendant then shot him three times. (T. 3285). After he was shot, Cook crossed the road and played dead, and the cars left. Cook then

got up and went and called the police. (T. 3286). Ryan Sexton, a classmate of Defendant's, read newspaper accounts of the shootings on February 25. (T. 3291). That afternoon Defendant said he was the one that did the shootings. (T. 3292). Defendant also said he stole the car. He said that they had dumped it; they drove to the location and saw one unmarked and two marked police cars and a silver Cadillac being towed away, and Defendant observed that they had "found it." (T. 3293). Later that day Defendant showed Sexton a .38 pistol. (T. 3295). Detective Clarence Backherms took Sexton's statement at 9:00 p.m. on February 25, 1993. During that meeting, Backherms received the call on the Hunt murder. (T. 3300) . There is **a** Great Western Bank a "little ways down" from Jog and Lantana. Prior to meeting with Sexton, Backherms was working on the theft of the silver Cadillac. (T. 3301). It was recovered across the street from the German Club. Backherms **was** at the scene in his unmarked **car**, along with two marked cruisers. (T. 3302).

Defendant presented the testimony of his mother and sister who described Defendant's childhood, the shooting of Defendant, and his **convalescence.** (T. 3309-91). She felt Defendant **was** a different person after the injury, (T. 3391). Alexandra Shell, Defendant's half-sister, gave similar testimony. (T. 3401-23).

Psychologist Earl McKenzie described the mentally retarded

defendants program at Chattahoochee, which he created. (T. 3430-41). He described Defendant's stay in the program. (T. 3442-52). He did not believe Defendant was dangerous. (T. 3452). Several Chattahoochee employees found Defendant to be a pleasant and nonviolent person. (T. 3467-3550). Several County Jail employees testified regarding Defendant's docile nature. (T. 3554-89). Circuit Judge Roger Colton, formerly Defendant's attorney ad litem during Defendant's incompetency, testified regarding Defendant's appearance and behavior during the time he represented him. (T. 3594-04).

Neurologist Mark Goldstein discussed Defendant's injury and surgeries. (T. 3617-40). He believed Defendant was a different person than he was when he murdered Hunt. (T. 3546). On cross, it was pointed out that 65% of Defendant's frontal lobes were still intact. It was also observed that although Defendant was originally not expected to live, then not to come out of a coma, then not eat, walk or talk, he in fact was able to do all these things. (T. 3649-63). Neuropsychologist Laurence Levine examined Defendant and testified regarding Defendant's limitations as a result of the bullet wound, primarily difficulty with verbalization, reading and attention span. (T. 3672-3729). Levine felt Defendant would function well in a structure environment. (T. 3729). He felt that

the person who killed Hunt died that day also. (T. 3731).

In rebuttal, the State presented corrections deputy Ralph Beach, who testified regarding Defendant's ability to interact and communicate with the other inmates and staff at the jail. Defendant would also watch TV and read magazines and books. (T. 3771-73).

The jury recommended a sentence of death by a vote of 9 to 3. (T. 3892). A sentencing hearing was held before the court on January 8, 1996. The State presented victim impact testimony from various family and fellow officers. (T. 3910-3926). In response to a defense objection that the testimony was improper, the court assured counsel that it would only consider the aggravators and mitigators in reaching its decision. (T. 3927). The defense called guilt-phase defense counsel, Dean Willbur, testified regarding his impressions of Defendant and his alleged amnesia. (T. 3967-79). Defendant addressed the court, denied any memory of shooting Hunt or himself, and apologized to Hunt's family. (T. 3981-82). Defendant's mother and sister testified regarding Defendant's memory of the crime and asked the court for mercy. (T. 3982-93).

On February 14, 1996, the court sentenced Defendant. (T. 4021). In its sentencing order, the court found the State had established as aggravating factors that the victim was a law enforcement officer engaged in his official duties, and that the

murder was cold calculated and premeditated. (R. 1020-22). The court found the statutory mitigator of Defendant's age, which it gave "some" weight. (R. 1023). As nonstatutory mitigation, the court found Defendant's background, and his "self-inflicted punishment," which it gave little weight. (R. 1023-1024). It gave the fact that it had the option of sentencing Defendant to life without parole some weight. (T 1024). Finally, it found that Defendant now behaves well, and his present state of mind, which it gave considerable weight, (T. 1024-25). The court rejected the proffered mitigation that Defendant did not understand his punishment, that his alleged co-perpetrators were not punished (finding that he had acted alone), and that the crime **was** not for pecuniary gain or heinous atrocious or cruel. (T. 1024).

The court concluded that the aggravation proved " far" outweighed the mitigation: "Each, standing alone, is of such great weight **as** to outweigh the mitigating circumstances." (T. 1025). The court therefore sentenced Defendant to death. This appeal followed.

**IV. COMPETENCY PROCEEDINGS** Defendant had shot himself in the head after killing Sergeant Hunt, and accordingly, his competency **was** addressed at length before trial. Three separate competency hearings were conducted. The first was held on August

13, 1993 (T. 202). Psychologist Lawrence Salmansohn "reported that on overall IQ testing, without relying on verbal ability, Defendant scored 87-90, which is in the low average range. (T. 232). Salmansohn concluded that Defendant appreciated the nature of the charges facing him. He also appreciated the maximum penalty he was facing, (T. 239). Defendant was also aware if the adversarial process, based upon prior experience with "the system." He knew his attorney's role. (T. 241). Both Salmansohn and speech therapist Ross, with whom he had consulted felt that based upon his dramatic improvement over a short period of time, that it was possible Defendant would eventually be competent to proceed. (T. 242). Defendant would probably engage in appropriate courtroom behavior,

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[6] Defendant's alleged dyslexia would have had an effect on his ability to read and right prior to the wound to his brain. (T. 211). Based on the mother's report, Defendant had also been placed in special classes in fourth and fifth grades because of behavioral problems and a short attention span. (T. 212). Also, Defendant's learning disability would have had a substantial impact on his abilities prior to the injury. (T. 213). Salmansohn projected Defendant's premorbid IQ to be in the low average range, 80-89. (T. 214). Salmansohn further opined that the "gap" in Defendant's knowledge was not consistent with post-traumatic amnesia. (T. 225). Salmansohn also concluded, accepting as true that Defendant was dyslexic, that Defendant's premorbid verbal functioning was somewhat below his non verbal abilities. (T. 232). Overall his nonverbal abilities, post-trauma, were not impaired. Defendant was not "a vegetable." Defendant was able to recite the alphabet, and could count to 20, but from 20 to 1. Defendant could reproduce up to six sequences of unrelated information, with an "IQ-E" of 91. (T. 233).

i.e., not act out, Salmansohn's final conclusion was that Defendant was borderline incompetent. (T. 245).

Dr. Stephen Alexander, a psychologist, examined Defendant on April 28, 1993, and on August 7, 1993. Defendant had made a "tremendous recovery" between the first and second interviews. (T. 268). Alexander found the most striking improvements in the area of Defendant's verbal skills. Defendant was able to answer questions reasonably and rationally in single words or short sentences. His language showed a higher order of abstract thinking than he would have expected, given his abilities at the time of the first interview. (T. 269).

Alexander did not feel that Defendant was always forthcoming and truthful. (T. 271). He did not feel that it rose to the level of malingering as defined by the DSM III, but he did feel that Defendant was withholding on a purposeful and conscious level. Defendant also showed an awareness of what information might be harmful to his position. (T. 271). Alexander did not find Defendant competent to stand trial. (T. 273).

Dr. Hyman Sternthal, a psychologist, met with Defendant on May 6, July 2, and July 23, 1993. Defendant improved between the first and second visits. There was a substantial improvement by the third interview. (T. 274, 276). Defendant's ability to verbalize had

improved over time. (T. 278). He was surprised at Defendant's improvement because he thought the brain damage was more to the motor control of the mouth, but it turned out to be more to the speech processing area. (T. 279). He concluded that Defendant was not competent. (T. 287-323).

It was stipulated that three pages of phone log from Defendant's cell would be admitted. Defendant had a phone in his medical ward cell. (T. 344). The log showed 31 phone calls of over five minutes duration, of which 25 were over ten minutes and of which 15 were over fifteen minutes. (T. 344).

San Jeana Rodgers, mental health administrator for the Palm Beach County Sheriff's Office, had met Defendant on July 8, 1993, the day after he was admitted to the jail. She asked him if he knew where he was, and he said in jail. She asked him why, and he responded, "Yeah, 'cause I fucking killed a cop." She asked him how he was alleged to have killed the deputy, and he pointed his finger to his head and said a gun. (T. 345-47). Rodgers felt that Defendant was capable of independent thought. He also could answer questions with responses that could not be echolalic. (T. 349).

Ronald Delpaldo, a deputy with the county corrections unit, overheard a conversation between Defendant and a nurse. (T. 350). He was escorting Defendant to the shower. Defendant picked up a

towel and a bar of soap, The nurse asked Defendant if he had not gotten a bar of soap the previous day. Defendant smiled then put the soap back, went to his room and got the old bar from the drawer of his bedside stand. (T. 351). Defendant did this with any prompting. (T. 352).

Lawrence McGaughlin, another corrections deputy describe escorting Defendant to the shower on one occasion. McGaughlin asked Defendant what size uniform he wore, and Defendant responded 'small." All his behavior was responsive to McGaughlin's commands. (T. 354) . One day, during inspections, McGaughlin asked Defendant if he wanted to clean his room, Defendant nodded in the affirmative, and was given a broom and dust pan. He properly swept the floor, and dumped the pan in the trash. Defendant then proceeded to mop the floor. Defendant did it properly, and did not have to be shown how. He performed like any other prisoner. (T. 355). He did what he was told, and did not have to be spoken to in one-word sentences like a moron. (T. 356).

Corrections deputy Wayne Williamson was assigned to the transportation unit. After an office visit to a doctor in Boca Raton, Defendant led them back from the office to the car, a trip that involved several walkways, corners, and an elevator. (T. 357-58). They then proceeded to Delray Beach Community Hospital, When

they arrived, Defendant observed that his mother worked there. (T. 359).

Corrections deputy Andrew Presco spent one shift with Defendant. (T. 361). Defendant demonstrated everyday common sense during that time. When he got up, he said he wanted to take a shower. He pointed out that there was no soap and asked for some. He took his shower. He did not need any instruction on any of these activities. He knew what to do with his dirty clothes, and to ask for clean ones. He knew when it was time for lunch. (T. 362). He asks that his empty lunch tray be removed when he is done eating. He asked his room to be cleaned when it was dirty. When he needed to shave, he asked for a razor. He then tried to shave with just water, because he did not have any shaving cream. (T. 363). Presco told him he needed to make a lather. Defendant immediately picked up the soap and did so. When he was done, Presco told him he needed to have the razor back. Defendant handed it too him blade first. Presco asked if wanted to cut him. Defendant nodded yes, and Presco asked him why, (T. 364). Defendant then turned and put the safety cap back on the razor and handed it to him. (T. 365) . Defendant generally did not use long sentences. (T. 365) . He could say short sentences such as "Can I have a clean uniform?" (T. 366).

Corrections deputy Richard Moran was under the impression that

Defendant was unable to speak when he first met him on July 13, 1993, because only pointed when he wanted something. (T. 367). The next time Moran saw him, however, on July 16, he asked him if he could speak and he nodded yes. He told him to say something to the nurse, and he did. Moran told Defendant that if he could speak he needed to verbalize it when he wanted something. Thereafter, he did. (T. 368). Defendant used relatively short sentences, but Moran did not have to speak to him as if he were a child. He spoke to him like he did the other inmates. (T. 369). Defendant would respond appropriately. (T. 370).

Corrections deputy Kevin Baker was seated outside the window of Defendant's cell one day. Defendant was not paying attention to the television until he heard his name mentioned on the news. Then he rolled over "and watched the broadcast until the segment about him was over. (T. 374). Defendant then realized Baker was watching Defendant's TV. Defendant got up, turned off the TV, and as he was walking back to his bunk, smiled and shot Baker a "bird." (T. 372).

The defense called Defendant's mother, Julie Shell. She gave Defendant her phone number so he could call her. It took her three sessions to teach him the number. (T. 378). They would discuss his lunch; he would say it was good but he could not remember what it was. (T. 379). On cross, she stated that since Defendant was first

incarcerated, Shell's phone number changed. (T. 381). When Defendant first began calling on July 13, it took him several tries to get the number right. However when he got the new number, he did not make any mistakes. (T. 382). She did not have to teach him how to dial the new number. (T. 383). Defendant was usually responsive in their conversations, other than not remembering what he had for lunch or breakfast. (T. 385).

At the conclusion of the testimony, the court found Defendant incompetent, (T. 397), and ordered a referral to HRS per 916.11(1)(d). (T. 400). On December 2, 1993 a status hearing was conducted regarding findings of the HRS diagnostic team. (T. 431). As a result of the team's findings and recommendations, on December 15, 1993, Defendant was ordered committed to the Chattahoochee program. (R. 378).

After receiving a letter in January 1995 that Defendant was believed by the Chattahoochee staff to be competent, the court ordered new evaluations, and set a second competency hearing for February 23, 1995. (T. 596).

The senior psychologist at Chattahoochee's mentally retarded defendant program, Ray McKenzie, testified that Defendant attended the trial competency training program at Chattahoochee. The program teaches defendants the definitions and consequences of crimes. The

program also teaches social and adaptation skills, as well as language skills. (T. 619). The program issued a report on November 21, 1994, that it felt Defendant **was** competent to stand trial and should be returned to Palm Beach County. The conclusion was based upon McKenzie's interview with Defendant, observations of him in different situations, examining the collateral data, and speaking with various staff who worked with him. (T. 620). Among the "collateral data" were Defendant's test scores. On the WAIS-R Defendant had a full-scale IQ of 81. As such Defendant **was** no longer considered retarded, the cut-off being at 70. (T. 621). McKenzie had no concern about Defendant's ability to proceed to trial in that his performance score was 96 and his verbal was 74. (T. 622).

McKenzie also asked Defendant as series of questions regarding his understanding of the process. He asked Defendant what charges he was facing, and Defendant replied murder. Defendant stated he thought the charges were serious because he could get death or life in prison. Defendant said that he was accused of killing a police officer. (T. 623). McKenzie again **asked** him if he understood the range of penalties, and he said that he could get life in prison or the electric chair. (T. 623). He said if he were found innocent, he could go home, (T. 625). Asked what would happen if his attorney

could plea bargain for him, Defendant stated that he could do less time. Defendant explained that his lawyer's job was to help him out of trouble by convincing the court that he did not do the crime. He described the State Attorney's role as attempting to convince the court that Defendant did the crime. He said the judge's job was to listen to the case and instruct the jury, and to give the sentence. He said the judge was neutral. He said the jury's job was to listen to the case and decide if he was guilty or innocent. (T. 625). The court reporter types down everything that is said. Witnesses tell about what they know about the crime. As to his capacity to disclose relevant information to his attorney, Defendant denied any memory of the incident. McKenzie belie-ved that Defendant understood his attorney's role in the courtroom. (T. 626). McKenzie did not believe that Defendant had a problem understanding, just expressing. Defendant would get frustrated if he was spoken to in overly complex sentences, but was all right if they were kept simple. Likewise he would often answer "I don't know," but then answer the question. Also, he will give a wrong answer, and after hearing himself, correct it. Defendant had the ability to think abstractly. He could play the card game spades with other inmates and staff members. (T. 627). He would watch the cards his partner was playing, and understood which cards to play. McKenzie rejected

the suggestion that Defendant's responses to the McGarry criteria were merely a parroting of what he had been taught, He explained that their curriculum was different from the McGarry instrument, so that he would not be able to simply parrot. His evaluation was designed to make sure the defendant understands the concepts. (T. 628). So long as the questions were not too long, and so long as he was given sufficient time to respond, Defendant would have the ability to communicate with his attorney. He also had the ability of independent thought. (T. 629). McKenzie had seen him having conversations with people, If the staff had seen Defendant having a 20-minute phone conversation, or seen Defendant check his food order and sign for it, such would be consistent of McKenzie's observations of Defendant. (T. 630). The staff overheard Defendant's mother telling him that he did not want to come back and stand trial because he could get the electric chair. Afterwards, Defendant began to have second thoughts about wanting to go to trial. Previously he wanted to go to trial to get it over with. (T. 631). One of Defendant's teachers reported that Defendant was friendly, easy-going and an interesting conversationalist. McKenzie spoke with the teacher, who stated that they had two-way conversations, and Defendant appeared to enjoy them. Defendant had only two behavior problems during his time at Chattahoochee. (T.

632). One was for staying in bed, the other for not wanting to take a shower. McKenzie did not consider them serious. He had no concerns about Defendant's ability to behave properly in a courtroom. (T. 633). McKenzie had no question as to Defendant's competency so long as he was spoken to in a simple, direct fashion. McKenzie believed that if Defendant's lawyer instructed him to state if a witness said something he did not think was true, Defendant would do that. (T. 634). The time needed for a response as discussed previously would be 15-20 seconds, maybe less. (T. 648). McKenzie felt that even were the conditions not met, Defendant would be competent to proceed. (T. 635). McKenzie had no hesitancy in recommending that Defendant be returned for trial.

Psychologist James Barnard spent seven hours on five separate occasions, at his office and in the jail, with Defendant. (T. 657). Barnard administered the WAIS-R and obtained a verbal IQ of 72, a performance score of 89 and a full-scale IQ of 77. These scores put him above the mental retardation range. (T. 659). When asked orally, Defendant could compute change from a purchase. (T. 662). Barnard's report indicated that Defendant could speak in full sentences, articulate clearly, and relate experiences. (T. 664). Defendant had a history of learning-disabled placement before the gunshot wound. Barnard administered a McGarry-type competency

instrument. (T. 665). On the instrument he used, a score below 20 would raise concerns about competency. Defendant scored a 31. The test involves open-ended sentence-completion type questions. (T. 666). The following questions were asked, with Defendant's responses indicated by italics:

(1) The lawyer told Bill that he was *guilty.*

Barnard asked Defendant if there was anything else. Defendant responded no the first time, and when asked again later, (T. 667), responded:

(1) [second response] The lawyer told Bill *don't say nothing unless you are asked to.*

The questions then continued:

(2) When I go to court the lawyer will *find me innocent until proven guilty or give you a plea bargain.*
(3) Jack felt that the Judge *didn't like him.*
(3) [second response] Jack felt that the Judge *didn't give him a sentence he could live with.*
(4) When Phil was accused of the crime, *got a* **lawyer,** *he got a lawyer.*
(5) When I prepare to go to court with my lawyer I *will fight for my rights.*
(6) If the jury finds me guilty, *what do they call it when they take the jury out of the room and put a new jury in; what is it called when they get a new jury, I know there are two words to describe it.*

(T. 668).

(7) The way a court trial is decided, a *verdict, verdict is guilty* OK *not guilty.*

Barnard asked Defendant how the verdict was decided and Defendant replied, "Go to a room, guard out there, it takes weeks or it takes a little over a day." He was asked again and responded that the case was decided, "by listening to your case." Barnard asked who listened, and Defendant replied, "the judge, the jury, the judge and the jury." He was asked what they listened to, and Defendant responded, "the testimony." The questions continued:

> (8) When the evidence in George's case was presented to the jury, *the jury found him guilty.*

(T. *669).*

> (8) [second response] When the evidence in George's case was presented to the jury, *the judge and jury found him not guilty.*
> (9) When a lawyer questions his client in court, the client said *the truth.*
> (10) If Jack has to try his own **case,** *he'll get killed, get smothered.*

Barnard asked Defendant whether he meant that literally, and Defendant responded "no, he would get killed in courts. He would get smothered in paperwork."

> (11) Each time the DA asks me a question,

Defendant asked who the DA was. Barnard tried "prosecuting attorney," which Defendant was also confused by Finally he posed the question:

> (11) Each time the State Attorney asks me a question, I *tell the truth.*

(12) While listening to the witness testify against me, *I lean over to my lawyer and say that's not right, that's not right,* **because** *you are lying.*

(T. 670).

(13) When the witness testified against Harry gave incorrect evidence, *his lawyer stood up and said 'I object. He gave the wrong evidence."*

(14) When Bob disagreed with his lawyer on his defense, he *got a new* ***lawyer.***

(14) [second response] When Bob disagreed with his lawyer on his defense, he *stood up and disagreed with his lawyer.*

(15) When I was formally accused of the crime, I thought to myself, *I am going to jail for good.*

(16) If Ed's lawyer suggests that he plead guilty, *he'll plead guilty.*

(17) What concerns Fred most about his lawyer is, *am I going to get off on this crime.*

(18) When they say a man is innocent until proven guilty, *a man is innocent until proven guilty.*

(T. 671). Defendant was unable to define the term in other words,

(19) When I think of being sent to prison, *I don't mind.*

(19) [second response] When I think of being sent to prison, ***I get scared.***

(20) When Phil thinks of what he's accused of, *he runs* **away,** *he runs away.*

(20) [second response] When Phil thinks of what he's accused of, *he gets scared.*

(21) When the jury hears my case, *will find me not guilty.*

(22) If I had **a** chance to speak to the judge, I *would say I'm sorry for everything I did.*

(T. 672). Barnard did not feel that Defendant's responses were the product of rote memorization, Barnard further noted that rote

learning, in any event, was not necessarily bad, and that the competency screening items did not have any qualifier in that regard. (T. 673).

Barnard also twice administered to Defendant an additional competency screening device, called the trial competency instrument. It was a structured interview that reviews the nine criteria pertaining to competency. (T. 674). Barnard concluded that Defendant had an acceptable appreciation of the charges against him, including first-degree murder and unlawful possession of a law enforcement officer's weapon. Defendant could define "trial," "guilty," and "innocent." He was able to define other crimes, and understood the distinction between felonies and misdemeanors. Defendant understood the seriousness of the charges against him, Given pairs of randomly selected crimes, Defendant could accurately identify the more serious of the pair 87% of the time, (T. 675).

As to Defendant's emotional appreciation of the charges against him, Barnard found Defendant in 1995 to be much more guarded and appropriately defensive than when he had previously interviewed him in 1993. Defendant's "silly affect" was much less present than it had been in 1993. Then Defendant had appeared distressed, reporting depression, now he continued to report feeling depressed, but his affect was much more consistent with

such feelings. Overall, his behavior appeared more "appropriately somber." (T. 676).

Barnard also reported that Defendant's appreciation of the range and nature of the possible penalties was acceptable. (T. 678). Defendant had an understanding of time, and knew the average human lifespan. He could tell time on a clock. When asked what the consequences of a guilty verdict might be, Defendant responded that they might electrocute him. Alternatively, he said he could get life in prison. He was also able to state the penalties for various crimes such as robbery or rape. (T. 679). He basically understood that the more serious the crime, the more time he could get. He stated that murder was the most serious crime a person could commit. Defendant also understood what the concept of incarceration entailed.

Barnard also found that Defendant's appreciation of the adversarial process was acceptable. (T. 680). He knew he had a lawyer and what his job was, although he had difficulty remembering defense counsel's name. (T. 681). Defendant stated that his attorney's job was "to get me off." Defendant also understood that he should be truthful with his attorney, even if he had done something wrong, and that his attorney was on his side. (T. 682). Defendant stated, in response to what his attorney might tell the

judge to make things easier for him, that his "client was not competent." Barnard interpreted that response as indicating that Defendant understood the purpose of the competency hearing. Defendant also told Barnard that he understood that he should not volunteer information not requested of him because he could get himself into trouble. (T. 683). Barnard felt this demonstrated Defendant's understanding of the adversarial nature of the proceedings. Barnard was concerned that if the claim of no memory was accurate, it might make it difficult for him to disclose pertinent facts to his attorney. (T. 684). Barnard also felt that Defendant's capacity to realistically challenge prosecution witnesses was 'questionable. Defendant did agree that it was important for him to pay attention to the witness's testimony, although it took more than one series of questions to get to that point. (T. 685). Defendant also understood that he needed to let his attorney know if he disagreed with the witness's testimony.

Finally Barnard felt that Defendant's ability to testify relevantly was acceptable. Although Defendant had continued expressive aphasia, and took time to answer, he did have the ability to effectively communicate. He also had intact long-term memory. (T. 686). Further, Defendant was able to define perjury, and understood that it was a crime. (T. 687). Barnard was

ultimately of the opinion that Defendant was competent to proceed and should be returned for trial. (T. 688).

On cross, Barnard rejected defense counsel's suggestion that Defendant had a processing or understanding problem. He felt his main difficulty was expression. (T. 692). Defendant could not read nor write well. (T. 696). Defendant stated that he had difficulty reading and writing even before he gunshot, (T. 697). Barnard also rejected counsel's suggestion that Defendant was unable to spontaneously **answer questions.** He could require some prompting or request for elaboration, but Barnard found that he answered the majority of questions spontaneously. (T. 701). As to the ability to disclose relevant facts to his attorney criterion, Barnard's primary concern was Defendant's alleged amnesia. (T. 732).

Psychologist Hyman Sternthal examined Defendant and felt that Defendant suffered from severe aphasia or impaired ability to communicate. (T. 744) . Sternthal felt that Defendant had a problem in receiving or assimilating information. (T. 745). Sternthal felt that the problems affected Defendant's competence to stand trial. On the California Verbal Learning Test, Sternthal got results which were less than those a person with and IQ of 70 should have received. (T. 746). Sternthal felt that Defendant's memory functioning was thus impaired to the point that he would not be

competent to stand trial. Defendant allegedly could not recall that he had been at Chattahoochee for a year. (T. 747). Defendant's ability to learn nonverbal material was "okay." (T. 752). On the Woodcock-Johnson test, which involved identifying pictures and characters, Defendant scored in the low average range, (T. 753). Defendant's memory of words alone was terrible. (T. 753).

Sternthal found that Defendant had an appreciation of the charges he was facing, and understood the seriousness. He was unable, however, to give any "quantitative value" to their seriousness. Sternthal then stated that he did not believe that Defendant fully understood the seriousness of the charges because of his euphoria. (T. 754). Sternthal believed the same thing about the possible penalties. (T. 756).

Sternthal also did not believe Defendant had "much of a clue" about the adversarial nature of the process. The only response he could get from Defendant was that they would lock him up. Defendant did know who the State Attorney was, He felt that Defendant had just memorized the term. (T. 756). Defendant was unable to describe what would happen at a trial. (T. 757).

Sternthal did not believe that Defendant would be able to communicate with his attorney, even absent his alleged memory loss. (T. 758). Sternthal did not think Defendant was capable of

recognizing his attorney's role. (T. 759). He did not believe Defendant would be able to express himself even if given time. (T. 761). Sternthal did not believe that Defendant would be able to assist his attorney in his defense. For example he would be completely unable to understand the concept of a plea negotiation. (T. 762). Sternthal **also** felt that Defendant would be unable to challenge prosecution witnesses for the same reasons. (T. 763). Sternthal did not believe that Defendant could perform on cross-examination. (T. 767). Sternthal concluded that Defendant was not competent to stand trial. (T. 768).

On cross, it **was** noted that Sternthal **was** defense counsel's choice in both court-ordered evaluations, and that he had sat at the defense table and assisted defense counsel during the testimony of the other experts during the first competency hearing. (T. 769-70). He also asked Dr. McKenzie to explain his testimony to him during Barnard's testimony, in violation of the "rule." (T. 770). Sternthal conceded that contrary to his report, Defendant had manifested appropriate courtroom behavior during the competency hearing. Defendant was also appropriately serious throughout most of the hearing. (T. 771). Sternthal did not believe that Defendant was answering by rote, a misstatement in his report. Rather he believed that Defendant "shaped" his response to satisfy the

examiners. (T. 773). It was pointed out that at one point in his report Sternthal believed that Defendant was unable to remember anything new, yet later he felt that Defendant's responses were merely memorization with no understanding. (T. 776). Sternthal felt that Defendant's improvement since 1993 was "very weak." (T. 777). On the Woodcock, which Sternthal compared to an IQ, Defendant scored a 93 on the verbal, a 99 for memory of sentences, an 89 on incomplete words, an 89 on visual closure, a 94 on analysis synthesis, and a 91 for delayed recall vision for auditory learning. On that test 100 would be average and 90 would be low average. Defendant thus could not be considered retarded. (T. 778).

Sternthal felt that Defendant's answers to Barnard's testing were merely "bits and pieces" without understanding. (T. 780). Sternthal did not review all of the reports from Chattahoochee. (T. 784). Sternthal did not feel that the findings from Chattahoochee were correct. (T. 785).

Defendant's reports of amnesia to Drs. Salmansohn and Barnard were discussed. As to the fact that Defendant remembered everything but the actual shooting of the deputy, Sternthal attributed it to Defendant's tendency to claim to know more than he actually did. (T. 787). As for Dr. Barnard's 1993 report that Defendant seemed to know specifics of the shooting despite denying memory of it,

Sternthal avoided responding to the posed question of whether Defendant was faking and stated that Defendant only recalls fragments. Sternthal maintained that although amnesia as to the events of the crime was not a basis for a finding of incompetency, in Defendant's case it also resulted in him being unable to learn new information verbally. He could learn visually. Defendant's learning at Chattahoochee, which was verbal was merely "fragments." (T. 788). Sternthal maintained that Defendant had "tricked" Barnard, who had 20 years of experience, into believing he understood concepts despite his inability to verbalize. (T. 789).

After hearing all the evidence the trial court concluded that Defendant was competent. (T. 807). A third competency hearing was held during the voir dire on October 26, 1995. (T. 1563).

Psychologist Gary Heiken interviewed Defendant for three hours on October 25, 1995. Before being contacted by defense counsel, he had not heard of Defendant or his case. (T. 1578-79). When being tested, if Defendant gave a wrong answer, he would continue "reworking" the answer until he got it correct. (T. 1579). Heiken administered an IQ test, the Bender-Gestalt drawing test. He attempted to give the Wechsler Memory Scale, but Defendant's inability to read presented a problem. (T. 1581).

Heiken obtained an overall IQ score of 79, which was low

average, (T. 1581). Defendant's verbal score was 70 and his nonverbal was 98, the latter being average. Heiken reviewed Dr. Barnard's earlier reports, He thought Defendant showed significant improvement in nonverbal performance, but about the same in verbal. (T. 1582, 1596).

On the Bender test, Defendant "reversed" the first drawing, which Heiken took as an indication not of a visual/motor coordination problem, but of a processing deficit. (T. 1584). Heiken concluded that Defendant had neurological as opposed to emotional problems. (T. 1585).

Defendant was unable to complete the timed mental control portion of the Wechsler memory scale. (T. 1585). He started laughing uncontrollably. The test involved, inter alia, counting backwards and reciting the alphabet, and Heiken felt that Defendant's response was extremely unusual. He felt Defendant's response was the result of the neurological damage. He did not feel it was indicative of aphasia, i.e., the inability to express thoughts. (T. 1586). Heiken felt that Defendant had a minimal understanding of the charges and allegations against him. He thought Defendant understood what was going on. He felt that Defendant was being truthful about not remembering the circumstances of the crime. (T. 1587). Defendant was able to state

what possible penalties he was facing, but Heiken did not know if Defendant "truly comprehend[ed]" them. He felt Defendant had a lot of rote memory. (T. 158'8). The only criterion of what made a good juror Defendant could identify was that they opposed the death penalty, which Heiken related to the fact that Defendant had spent the week observing the death-qualification of the jury. (T. 1588). Defendant understood the adversarial nature of the process. (T. 1589). Heiken was unable to hypothesize whether Defendant would be able to assist his counsel assuming he had a memory of the events of the crime, He felt that Defendant had no memory and as such his ability to assist was very limited. (T. 1589). Heiken felt that Defendant would be able to behave appropriately in the court room, but noted that when Defendant **was** confused, he tended to smile and nod his head. (T. 1590). Heiken felt Defendant's ability to testify relevantly was minimal at best. He did not feel Defendant could withstand cross-examination. (T. 1591).

Overall, Heiken felt Defendant was "lost" and did not understand the "whole picture." He felt that is was "a fairly marginal call" as to whether Defendant was competent to stand trial, but ultimately felt that he was not,

On cross Heiken stated that Defendant was cooperative with him. He had no evidence that he was not cooperative with his

attorneys. (T. 1593). Heiken did not think that Defendant appeared to be "guarded" about discussing the case. He would have been surprised to learn that Defendant recited the circumstances of the case to another doctor without being lead. He would have been surprised to learn that Defendant told a doctor which gun he used to shoot the deputy and which he used to shoot himself, and was able to differentiate between a .38 and a 9mm. Heiken would not have assumed such a result from his testing. (T. 1594). Defendant's IQ scores were consistent with those obtained previously by other doctors. (T. 1595). Defendant's reversal of the picture on the Bender test could "absolutely" be attributable to Defendant's dyslexia, of which Heiken had apparently been unaware. Heiken did not have a chance to review any of the medical or neurological findings to determine the exact amount of brain damage. (T. 1597).

Defendant knew the respective roles of his counsel and the State Attorney, that the jurors came from the voting list, that he was charged with killing a cop, but did not remember it, and that he had previously been convicted of three burglaries. (T. 1599). Defendant told him that he had had a trial on one of the charges. When asked if he was presently on trial, Defendant stated that he was not yet, but he would be if they got a jury. He knew the function of the jury, that the lawyers questioned the witnesses,

and what a witness was. When asked what kind of jury he wanted, Defendant stated a preference for one that did not believe in the death penalty. (T. 1600). Heiken nevertheless stood by his opinion because he did not believe Defendant understood his own responses. (T. 1601).

Prior to Defendant's being sent to Chattahoochee, psychologist James Barnard had found Defendant to be not competent. (T. 1621). Upon Defendant's return, in January 1995, Barnard examined him and concluded that Defendant was then competent. He examined Defendant again for an hour and a half the morning of the hearing. (T. 1622). Barnard did not feel that Defendant had shown any significant change since his previous examination. It was his impression that Defendant's responses were not as complete or as forthcoming as they had been the previous January. (T. 1623). He felt Defendant appeared to be more guarded, and somewhat defensive. His WAIS results reflected a verbal IQ of 72, which was consistent with his last exam, and those of other doctors. His results on the competency screening instrument were virtually the same. Defendant's score of 32 (versus 31 in January) was well above the competency cut-off of 20. (T. 1625-26). Barnard reviewed the jail log the night before the examination. (T. 1626). Defendant was frequently noted to be assisting people, playing cards, chess and

checkers, and watching TV. On one occasion he was noted to be discussing his case with fellow inmates. (T. 1627). Barnard felt that he had to provide Defendant less "instruction" or prompting than he did in January. Barnard felt that Defendant was processing information, but that because of the aphasia he sometimes had difficulty expressing himself. (T. 1630). During the examination, Defendant was seated opposite Barnard at a table. On occasion, Defendant would point to the correct answer to a question by pointing to the word, which was upside-down from Defendant's perspective. (T. 1631). When deliberately presented with misinformation, Defendant would spontaneously correct Barnard. (T. 1633). Barnard's purpose was to ensure that Defendant was not simply agreeing with him. Barnard felt that Defendant's ability to give a chronological recitation of what happened to him, where he was, what hurt, and who came to visit him at the hospital after he shot himself reflected that Defendant had both long- and short-term memory. (T. 1634).

Defendant stated he was charged with shooting an officer and taking his gun. Defendant understood that the charge was first-degree murder, was able to define the crime, and stated that it was the worst crime a person could commit. (T. 1635). He was also able to define most other crimes. (T. 1636). Defendant also understood

the nature of the penalties, that he could get life or the electric chair, (T. 1636). Defendant understood the correlation between the seriousness of an offense and the potential penalty. (T. 1637). Defendant understood the adversarial nature of the proceedings, and the roles of the attorneys, judge and jury, He knew Judge Broome's name. He also understood who the court reporter was, and the function of witnesses and evidence. (T. 1638-40). Defendant understood what a plea bargain **was.** (T. 1640). Barnard felt that Defendant's ability to disclose information to his attorney was unacceptable to questionable, based upon his alleged amnesia. Defendant was, however, able to describe growing up in California and Nevada, knew what school he went to, knew that he was studying welding before the crime, and recalled everything that happened in the hospital, including who came to visit him. Defendant did not have any **overall** memory incapacity, he merely claimed not to remember what happened on the day of the murder. (T. 1641).

Barnard felt that Defendant had the ability to manifest appropriate courtroom behavior. (T. 1641). He knew how to behave, what to wear, and that if there were any problems during the trial to address them to his lawyer. (T. 1642). Defendant would correct himself when he "retrieved" the wrong word in response to a question, or indicate that he was having trouble "finding" a label

or fact. (T. 1642). Barnard felt that Defendant was more similar than dissimilar to normal individuals. He did feel, however, that it would be helpful to have someone summarizing and explaining to him what was occurring at trial. (T. 1644). Barnard continued to believe that Defendant remained competent to stand trial, (T. 1645). Barnard had the impression that Defendant was reluctant to talk about the specifics of the murder or the specifics of his alleged memory problems. (T. 1646). Barnard felt that Defendant was more normal than abnormal in receiving and processing information. His deficit lay in his ability to express it. Even then, based upon his verbal scores Defendant could not be considered disabled or retarded, (T. 1652).

The court concluded that nothing presented provided a basis for changing its previous conclusion that Defendant was competent. The court found that the evidence **was,** in fact, more compelling. The court gave great weight to Barnard's findings in that Barnard had seen Defendant both before and after Defendant's stay at Chattahoochee. Barnard's report reflected that Defendant was aware that he was now only facing two charges. The court felt that Defendant's awareness that it had dismissed one of the charges reflected a sophisticated understanding of the proceedings. The court gave Heiken's determination less weight because he was new to

the case. The court also found that Barnard's opinion was buttressed by the jail logs reflecting Defendant's activities which the court felt were "clear-cut indications of competency." (T. 1667). Moreover, the court noted that it had "carefully" watched Defendant during the "grueling examination" of over 150 prospective jurors, and that his demeanor and affect had at all times been completely appropriate. Defendant was therefore found competent to stand trial, (T. 1668) .

## SUMMARY OF THE ARGUMENT

(1) The trial court initially determined that Defendant was not competent to stand trial, and sent him to the mentally retarded defendants program at Chattahoochee. After 14 months, the staff recommended his return. The court conducted a hearing at which two experts opined that Defendant was competent, and one that he was not. The trial court properly found Defendant competent. Eight months later, on the eve of trial, Defendant was again examined. After hearing more divided opinions, the trial court reaffirmed its determination of competency. (2) Defendant's unpreserved Neil claim is without merit where the State provided a neutral, nonpretextual reason for the strike. (3) The trial court properly admitted Defendant's statement to the effect that if it ever came down to him or a cop, it would be the cop, as probative of intent. (4)

There was no error in admitting evidence that Defendant possessed a gun not used in the murder where the information came in in direct response to a question posed by defense counsel. (5) Evidence that Defendant had engaged in a crimes spree the night before the murder was properly admitted as proof of his intent in support of the CCP aggravator, and as rebuttal to claims that he was now a sweet and docile person. (6) Defendant's claims regarding the prosecutor's penalty-phase closing are not preserved. (7) The evidence, including Defendant's previous statement of intent, his knowledge that he had committed several violent crimes the day before, and that he shot the deputy execution-style, point blank to the head, without provocation all support the trial court's conclusion that this murder was cold, calculated and premeditated. (8) No error occurred when the victim's relatives exceeded the proper bounds of victim impact evidence where the testimony was not heard by the jury and the judge explicitly stated she would not consider any victim impact evidence in her sentencing calculus. (9) Defendant's sentence of death is proportional.

## ARGUMENT

### I.

### THE TRIAL COURT'S FINDING THAT DEFENDANT WAS COMPETENT TO STAND TRIAL WAS SUPPORTED BY THE RECORD.

Defendant's first contention is that his self-inflicted gunshot wound rendered him incompetent to stand trial. The trial court conducted three competency hearings, and after the second and third hearings found Defendant competent. Although there was conflicting testimony, the evidence presented supports the trial court's conclusions. Its decision should therefore not be disturbed.

The first competency hearing was conducted on August 13 1993. The three doctors who examined him, psychologists Lawrence Salmansohn, Stephen Alexander and Hyman Sternthal all concurred that Defendant was not competent to stand trial. (T. 206-323). Defendant's IQ scores were in the retarded range, and accordingly, pursuant to §916.11(1)(d), Fla. Stat., the court found Defendant incompetent and referred him to an HRS evaluation team. (T. 397, 400). On December 15, 1993, upon the advice of team psychologist James Barnard, the court ordered Defendant committed to the Mentally Retarded Defendants Program (MRDP) at Florida State Hospital at Chattahoochee. (T. 460-514, R. 378).

In November 1994, the court was informed that the

Chattahoochee staff felt that Defendant was now ready to return for trial. (T. 595). With the agreement of the parties, the court ordered Defendant examined by psychologist and MRDP director Ray McKenzie, psychologist James Barnard, who had examined Defendant prior to his entry into the program, and psychologist Hyman Sternthal, who had examined Defendant and testified at the original competency hearing. (T. 596, R. 428).

McKenzie determined that Defendant now had a full scale IQ of 81, with a performance scale of 96, and a verbal score of 74, all of which were above the retarded range. McKenzie administered the McGarry criteria to Defendant and was satisfied that Defendant was competent to stand trial. (T. 6623-28). He rejected the notion that Defendant was merely parroting responses he had learned by rote. He testified that Defendant understood what was said to him and what was going on around him. Defendant's deficits as a result of his injury were in the area of expression, not comprehension. (T. 627). In addition to his testing, McKenzie' also relied on the anecdotal evidence of Defendant's functioning which he and his staff had observed at Chattahoochee. Defendant could play card games such as spades, and would watch the cards his partner laid down, and respond appropriately. (T. 628). Defendant was capable of twenty-minute phone conversations, and could perform transactions such as

ordering and paying for food. (T. 630). McKenzie had "no hesitancy" in recommending that Defendant be returned for trial.

Barnard also determined that Defendant was competent. (T. 688). Barnard spent seven hours interviewing Defendant. He obtained a verbal IQ of 72, a performance score of 89 and a full- scale score of 77, (T. 659). Barnard administered an objective competency instrument, on which Defendant obtained a score of 31. Only scores below 20 would raise any concerns. (T. 666). Barnard also administered a lengthy sentence-completion exercise,[7] and felt that Defendant's responses reflected a good understanding of the criminal process. (T. 667-72). Barnard further found that Defendant's emotional appreciation of his predicament had substantially improved over his last examination. (T. 676). He went through the statutory criteria of competence, and found that Defendant met them. (T. 678-87). Barnard's only reservations related to Defendant's ability to relate to his attorney or assist in his defense. However, his concerns were not with Defendant's functioning, but with his alleged amnesia, (T. 685-86). He nevertheless felt that overall Defendant was competent to stand

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[7] A more detailed account of the testing and conclusions of the experts is set forth in the Statement of the Case and Facts, supra, at pp. 16-45.

trial. (T. 732).

Sternthal concluded that although Defendant's condition had improved, he was still not competent to stand trial. Indeed, Sternthal did not feel that Defendant met any of the statutory criteria. (T. 744-768). On cross-examination, Sternthal conceded that contrary to the prediction in his report, Defendant's courtroom behavior had been appropriate during the hearing, as was his affect. (T. 771). It was also pointed out that in his report Sternthal inconsistently stated at one point that Defendant was unable to remember any new information, yet elsewhere Sternthal opined that all of Defendant's responses were merely memorized answers. (T. 776). Finally it was pointed out that Defendant was in the average range on the Woodcock test, which Sternthal compared to an IQ test. (T. 778). Sternthal also felt that Defendant's answers to Barnard's testing were merely "bits and pieces" without understanding. (T. 780). Sternthal did not review all of the reports from Chattahoochee. (T. 784). He nevertheless felt that the findings from Chattahoochee were incorrect:

> Q: The classroom process is verbal. The teachers stand in front of the room and provide information verbally to the students. These reports indicate that he assimilated that information, understood it, and it's your testimony that all the doctors up in Chattahoochee and all the counselors up there

are wrong and you are right?
A: Yeah.

(T. 785). Finally, Defendant's previous reports of amnesia to Drs. Salmansohn and Barnard were discussed. As to the fact that Defendant remembered everything but the actual shooting of the deputy, Sternthal attributed it to Defendant's tendency to claim to know more than he actually did. (T. 787). As for Dr. Barnard's 1993 report that Defendant seemed to know specifics of the shooting despite denying memory of it, Sternthal avoided responding to the posed question of whether Defendant was faking and stated that Defendant only recalled fragments. Sternthal maintained that although amnesia as to the events of the crime was not a basis for a finding of incompetency, in Defendant's case it also resulted in him being unable to learn new information verbally. He could only learn visually. He opined that Defendant's learning at Chattahoochee, which was verbal, was merely "fragments," and maintained that Defendant had "tricked" Barnard, who had 20 years of experience, into believing he (Defendant) understood concepts despite his inability to verbalize. (T. 788-89).[8]

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[8] It was also observed that Sternthal had assisted defense counsel, including sitting at the defense table during the testimony of the other experts at the previous hearing, and noted that during this hearing, Sternthal, in violation of the "rule," had asked McKenzie to discuss his testimony while Barnard was

At the conclusion of the hearing, the court concluded that Defendant was competent and prepared a written finding:

> This Court has considered the testimony of Dr. McKenzie, Dr. Barnard, and Dr. Sternthal, along with their reports which are in evidence, and the reports from the hospital at Chattahoochee, which are in evidence. All the doctors testified that the defendant's I.Q. was above 70, and accordingly, the Court finds that the defendant no longer meets the definition of "retardation" in Florida Statute 393.063(41).
>
> Drs. McKenzie and Barnard found the defendant to be competent to stand trial. Dr. Sternthal found the defendant incompetent. The Court finds the testimony of Dr. McKenzie and Dr. Barnard more credible than that of Dr. Sternthal. The evidence established that the defendant has an adequate understanding of how the criminal justice system works. He appreciates the charge he is facing. He knows he is charged with first degree murder and that he faces the possibility of the death penalty. He has the ability to testify relevantly, even though he says he has amnesia as to the facts of the murder. He has the capacity to relate and disclose to his attorney, to assist in the preparation of his defense, and to understand the adversary nature of the legal process.
>
> Mr. Hardy has a problem with word retrieval rather than understanding. Mr. Hardy talks in complete sentences. He behaves appropriately in Court. His answers to a competency test included saying that his attorney's job was 'to protect me, to get me Off." To what his attorney might tell the Judge, he replied: "He is not competent;" to

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testifying. (T. 769-70).

what is perjury, 'lying under Oath."

(R. 459-461).

During voir dire,[9] a third competency hearing was held. Psychologist Gary Heiken, who had examined Defendant for the first time the previous day, concluded that although it was "a fairly marginal call," he did not feel that Defendant was not competent. (T. 1578-79, 1592). On the objective testing, Heiken obtained IQ results comparable to those of the other experts. (T. 1581-96). Heiken concluded that Defendant had a processing deficit based upon his reversal of a drawing on the Bender test. (T. 1584). He conceded on cross, however, that this reversal could "absolutely" be attributable to Defendant's pre-injury dyslexia, which Heiken had not been aware of. (T. 1597). Heiken felt that Defendant marginally met most of the competency criteria, including understanding the charges against him, the possible penalties, the adversarial nature of the process, and being able to behave properly in court. (T. 1587-90). He felt Defendant would be unable to properly assist his attorney due to his alleged amnesia as to the events surrounding the crime. (T. 1589).

Barnard again examined Defendant the morning of the third

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[9] The record does not disclose what prompted this third competency hearing.

competency hearing, and essentially found no basis for changing his previous opinion that Defendant was competent. (T. 1645). He concluded that despite some difficulty in word-retrieval, Defendant was more similar than dissimilar to normal individuals. (T. 1644).[10]

After hearing all the testimony, the court concluded that nothing presented provided a basis for changing its previous conclusion that Defendant was competent.[11] The court found that the evidence of competence was, in fact, more compelling. The court gave great weight to Barnard's findings in that Barnard had seen Defendant both before and after Defendant's stay at Chattahoochee. Barnard's report reflected that Defendant was aware that he was now only facing two charges. The court felt that Defendant's awareness that it had dismissed one of the charges reflected a sophisticated understanding of the proceedings. The court gave Heiken's determination less weight because he was new to the case. The court also found that Barnard's opinion was buttressed by the jail logs

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[10] A third expert, psychiatrist McKinley Cheshire, also testified that Defendant was competent. (T. 1602-1611). Upon Defendant's objection to the manner in which he conducted his examination, however, the State ultimately agreed to strike his testimony, which was then not considered by the court in reaching its conclusions. (T. 1661).

[11] A presumption of competency attaches from a previous determination of competency to stand trial. Durocher v. Singletary, 623 So. 2d 482, 484 (Fla. 1993).

reflecting Defendant's activities which the court felt were "clear-cut indications of competency." (T. 1667). Moreover, the court noted that it had "carefully" watched Defendant during the "grueling examination" of over 150 prospective jurors, and that his demeanor and affect had at all times been completely appropriate. Defendant was therefore again found competent to stand trial. (T. 1668).

Where there is conflicting expert testimony presented on the issue of competency, it is the trial court's responsibility, as the finder of fact in such proceedings, to resolve the disputed factual issues. Absent an abuse of discretion, the decision of the trial court will be upheld on such matters. Hunter v. State, 660 So. 2d 244, 247 (Fla. 1995); Watts v. State, 593 So. 2d 198, 202 (Fla. 1992); Ponticelli v. State, 593 So. 2d 483, 487 (Fla. 1991).

In his brief, Defendant presents no basis for concluding that the trial court abused its discretion. Defendant relies solely upon the opinions of Drs. Heiken and Sternthal, whom the court specifically found to be less credible than the other experts. Defendant wholly ignores the testimony of Dr. McKenzie, under whose care and supervision Defendant spent 14 months, and discounts that of Dr. Barnard, who also had the benefit of having evaluated Defendant three times over a period of more than two years.

Likewise, Defendant ignores the non-expert evidence of his statements regarding the crime, For example, in addition to telling some of the experts, even before he was found competent, about the circumstances of the crime, Defendant **was** overheard describing them to a fellow inmate and when asked if it was near the Great Western Bank, replied, "no, further down." (T. 2777).[12] There was also testimony regarding Defendant's ability to have conversations, play cards, and otherwise interact with his fellow inmates, both at Chattahoochee and after his return to the Palm Beach County Jail. Finally, despite his nominal court appointment, Sternthal was plainly a partisan defense expert, and Heiken, who was also contacted by the defense, saw Defendant very briefly, and was not aware of much of Defendant's background. All of this evidence supports the trial judge's conclusion that Defendant was competent to stand trial, and thus it cannot be said that she abused her discretion in rejecting the conflicting evidence upon which Defendant relies as less reliable. Hunter; Watts; Ponticelli.

Defendant's claim that his purported amnesia impaired his

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[12] Although this quote was introduced during the guilt-phase testimony, it was taken from a jail log that Barnard reviewed before testifying. Penalty-phase testimony revealed that there was indeed a Great Western Bank down Jog Road from the scene of the murder, a fact unrelated to any of the events adduced at trial. (T. 3301).

defense in developing mental mitigation is also without merit. At no time prior to the penalty phase was this issue ever raised below. The State therefore submits that this claim may not be presented on appeal. Even assuming, arguendo, that the claim were properly before the court, amnesia as to the events of the crime is not a basis for a finding of incompetency, as Defendant concedes. (B. 48). Moreover, even assuming, arguendo, that his amnesia could be so considered, the evidence adduced at trial clearly reflects that Defendant was not under any mental disturbance at the time of the murder. The three eyewitnesses testified that they were simply walking across a parking lot when they were stopped by Sergeant Hunt. After first trying to pawn his stolen weapon off on his peers, Defendant calmly stood at the front of the patrol car with the others while they were patted down, and then coolly shot Hunt point-blank in the head, twice, a fact corroborated by the forensic evidence. Afterward, he had the presence of mind to steal the officer's weapon, and hide the murder weapon so that it was not found until three months after the murder. Nor was there any evidence of duress. Indeed, none of his friends even realized that Defendant was going to shoot Hunt until he did. The State never charged the three others with any crime relating to the murder, Finally, Defendant clearly appreciated the criminality of his

conduct, exclaiming that they were "going to fry" for shooting Hunt, and fleeing the scene. Ultimately he shot himself when capture was imminent. There simply was no basis on which to base any mental mitigation.

Moreover, other than Defendant's alleged inability to remember the facts of the crime,[13] the majority of the experts concluded that Defendant was able to assist his attorney. As such the record fully supports the trial court's finding of competency, This contention is therefore wholly without merit.

## II.

## EVEN ASSUMING THE ISSUE WERE PRESERVED FOR APPEAL, THE TRIAL COURT DID NOT CLEARLY ERR IN PERMITTING THE STATE TO PEREMPTORILY CHALLENGE JUROR GIBSON.

Defendant's second claim is that the trial court erred in allowing the State to exercise a peremptory challenge over his Neil[14] section. The gravamen of his claim, that the challenge was pretextual in nature was not presented to the trial court **and** therefore should not be considered on appeal. Moreover, this claim **was** not properly preserved by the defense, where the jury was sworn

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[13] The judge determined in her sentencing order that "it **was** not established" that he had no memory of the crime, (R. 1025).

[14] State v. Neil, 457 so. 2d 481 (Fla. 1984).

without objection, and as such may not now be presented on appeal. Further, even assuming that the claim were properly before the court, the record reflects that the trial court properly allowed the strike.

At the conclusion of jury selection, the defense interposed no objection to the constitution of the jury prior to the panel being sworn. (T. 2205). As such Defendant has waived any Neil issue. Joiner v. State, 618 So. 2d 174, 176 (Fla. 1993) (acceptance of jury without reservation of objection waives Neil issue); Melbourne v. State, 679 So. 2d 759, 765 (Fla. 1996) (same).

Moreover, even had Defendant renewed his objection before the jury was sworn,. Defendant now claims that the reasons proffered by the state were pretextual, a claim he never asserted below. Although this court has not addressed this precise issue, it has held that the trial court's only obligation, after a race-neutral reason has been proffered, is to review the record for support for the reason, if the explanation is challenged by opposing counsel. Floyd v. State, 569 So. 2d 1225, 1229-30 (Fla. 1990). It thus follows that the objecting party has the burden of raising the issue of pretext. See also, Joiner, which reflects the policy that the trial court be given an opportunity to correct error, and Bowden v. State, 588 So. 2d 225 (Fla. 1991), which held that

failure to object to the reason waives the Neil issue.[15]

Upon the court's Neil inquiry, the State indicated that it felt Ms. Gibson, at age 19 was too immature. (T. 2197). Defendant's only objection below was that age was not a valid reason, which is not asserted here. (T. 2197). Moreover, the State also proffered the reason that she was an instructional aide, and that the State did not want teachers, especially young teachers. (T. 2197). No further complaint was registered from the defense. As such the issue of pretext has not been preserved.

Assuming, arguendo, that this claim were preserved for review, Defendant has not shown reversible error. In Melbourne, this court recently reiterated and clarified the procedure to be followed when a party raises a Neil/Slappy[16] challenge to the exercise of a

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[15] Out-of-state and federal jurisdictions that have considered the issue have held that the claim of pretext must be raised in the trial court. See, People v. Allen, 629 N.Y.S.2d 1003, 1008-09, 653 N.E.2d 1173 (N.Y. 1995); State v. Antwine, 743 S.W.2d 51, 64 (Mo. 1987)(en banc), cert. denied, 486 U.S. 1017, 108 S. Ct. 1755, 100 L. Ed. 2d 217 (1988) ("If the State comes forth with a neutral explanation, 'the presumption raised by the prima facie case is rebutted and the factual inquiry proceeds to a new level of specificity.' Defendant now has the obligation to demonstrate that the State explanations are merely pretextual and, thus, not the true reason for the use of the State's peremptory challenges."); U.S. v. Alvarado-Sandoval, 997 F.2d 491 (8th Cir. 1993); Jones v. Jones, 938 F.2d 838 (8th Cir. 1991).

[16] State v. Slawwv, 522 So. 2d 18 (Fla. 1988).

peremptory strike. If a party makes a timely objection, indicating the protected class to which the juror belongs, the court must conduct an inquiry of the other party's reasons for the strike. Melbourne, 679 So. 2d at 764. That is precisely what occurred below with regard to juror Gibson. The State then proffered its reasons: that at 19 years old, the State did not feel she was mature enough, (T. 2196), and that she was in the teaching profession. (T. 2198).

The Court explained in Melbourne, 679 So. 2d at 764, that the focus of the court's determination is not the reasonableness of the reason, but its genuineness. Further, because the trial court's determination turns primarily on assessments of credibility, it will be affirmed on appeal unless clearly erroneous. Id. Here, the trial court accepted the State's reasons, which are not facially invalid. (T. 2198).

Moreover, even under Slappy, it cannot be said that the State's reasons were pretextual. Gibson's age is clearly relevant where the Defendant was virtually the same age as her at the time of the murder. Moreover immaturity is not an attribute apt to be readily apparent from the face of the record, but one which may be observable by the parties present in the courtroom, who can observe the juror's demeanor, the precise reason for the Melbourne Court's grant of considerable discretion to the trial judge. The claim of

pretext is further refuted by the State's peremptory strike of Tsiantos, the only other prospective juror of whom there was any record indication of youth (a full-time student).

Likewise, the State peremptorily struck every other juror in the counseling and teaching professions except for Paul, whose service Defendant cites as evidence of pretext: Smith (taught handicapped children); Tobey (counselor); Knight (teacher); and Cross (school board case manager for developmentally challenged preschoolers, stricken for cause). Even the failure to strike Paul does not speak of pretext; the State stated that it particularly did not like young teachers. Paul had a child in high school, (T. 1962), and thus presumably was not a young teacher. This claim should be rejected.

## III.
## THE TRIAL COURT PROPERLY ADMITTED DEFENDANT'S STATEMENT REGARDING WHAT HE WOULD DO "IF IT EVER CAME DOWN TO HIM OR A COP."

Defendant's third claim is that the trial court erred in allowing Glen Wilson to testify that Defendant stated "if it ever came down to him or a cop, that it was going to be the cop." Defendant did not object below on the grounds now proffered, and as such the claim pursued on appeal has not been preserved for review. Moreover, the statement was properly admitted to show intent.

Finally, any error would be harmless beyond a reasonable doubt.

At the time the State sought to introduce the testimony in question, it first had Wilson testify in a proffer outside the presence of the jury. (T. 2425-27). At the conclusion of the proffer, defense counsel objected that the statement was 'non specific. It's tangential in time, no specific circumstances or facts to warrant it. It's and [sic] incredible reference [sic] that it was a trait or some act that was going to be committed upon a confrontation." (T. 2428-29). The same objection was renewed after Wilson testified in front of the jury. (T. 2432). Yet Defendant now argues that Wilson's testimony was more probative than prejudicial because it injected the issues of racial fear and the Rodney King incident into the trial. (T. 54-55). He further asserts that the testimony was irrelevant to rebut any defense presented. (B. 56). These claims were in no way raised below. As such they may not now be raised. Fersuson v. State, 417 So. 2d 639, 641 (Fla. 1986). Furthermore, any claims that the State's closing argument comments regarding this evidence were improper are also foreclosed by the lack of any contemporaneous objection whatsoever. Id.

Moreover, even were the claim preserved, it would be without merit. The testimony in question was brief and properly admitted to show intent and motivation. Defendant asserts that the only defense

raised was that another individual killed Hunt. He further postulates that because Defendant's statement did not resolve the question of identity, it was irrelevant. Defendant conveniently overlooks that the State had the burden of proving premeditated murder, of which intent is an element, and of which motive is probative, Defendant's statement demonstrated his self-avowed intent as to how to resolve any police confrontation in which he might find himself. Particularly when coupled with evidence that the .38 revolver, which he was in possession of when he was approached by the sergeant, was stolen, this statement **was** highly relevant to the State's theory of the case, that Hunt was murdered because Defendant would rather kill than be arrested. Maharaj v. State, 597 So. 2d 786, 790 (Fla. 1992) (newspaper articles containing earlier statements of defendant relevant to show motivation and intent). Defendant's contention in his brief that the statement was merely an expressed intent not to be battered by a police officer,[17] is not a matter affecting the admissibility of the evidence, but one of fact for the jury to resolve. Gore v. State, 599 So. 2d 978, 983 (Fla. 1992) (whether defendant's prior statement was probative of his intent or not was a matter for the

[17] Defense counsel made exactly that argument on cross-examination, (T. 2432).

jury to determine). This evidence was properly admitted.

Likewise, Defendant's unpreserved argument concerning racial fear would be meritless, There is more reference to Rodney King and racial fear in the two pages of Defendant's brief than there was at trial. The only reference to Rodney King during the trial was one brief mention during the direct examination of Wilson which provided the context for the comment, (T. 2430), and once during cross, when defense counsel pointed out that the King case was about police violence. (T. 2432). These two brief references came during three full days of guilt-phase testimony, and can hardly be said to have become a feature of the trial. Nor was race in any way made an issue at any point during trial. Defendant is waving a red flag that simply did not exist.

Finally, even if the statement should not have come in, any error would be harmless beyond a reasonable doubt. Three eyewitnesses testified that Defendant shot Hunt without warning at point-blank range, which was corroborated by the forensic evidence. Moreover, the witnesses were all separated immediately after the crime and could not have had time to "get their stories straight."[18]

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[18] The police were initially concerned because the three boys all said that Defendant shot Hunt twice whereas they thought he had only been shot once in the eye. The discrepancy was resolved when, during the autopsy, the medical examiner shaved Hunt's head

Defendant was found within minutes of the crime with Hunt's gun after having shot himself, and had in his pockets 12 bullets that were of the same type and brand as those used in the murder weapon. The evidence also showed that the murder weapon was recently stolen and had been traded to Defendant by the thief who stole it from the father of a mutual friend, giving Defendant reason to not want to be caught with it.[19] In view of the foregoing, it cannot be said that the introduction of this brief testimony constitutes reversible error.

IV.

THE TRIAL COURT DID NOT ERR IN PERMITTING THE STATE TO ELICIT THAT DEFENDANT WAS ALSO IN POSSESSION OF A .22 RIFLE THE NIGHT OF THE CRIME.

Defendant's fourth claim is that the State was improperly permitted to elicit testimony regarding Defendant's possession of a .22 rifle on the night of the crime. Defendant fails to present the context in which this evidence was admitted, which will show the propriety of its admission. Moreover, any error would be harmless.

During the testimony of Rodriguez and Allen, the State

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and realized he had also been shot above the hairline.

[19] Defendant tried to pass it off to the others as they were crossing the parking lot.

scrupulously avoided mention of the rifle, and obtained permission to lead the boys through their initial testimony to avoid any mention of it. (T. 2333, 2379). Allen testified on direct that he saw Defendant with a gun in the car and in the Winn-Dixie parking lot. (T. 2379-80). Defense counsel on cross, knowing what the response would be, engaged in the following colloquy:

> Q. Do you remember telling them [the police], at that time [that he gave his statement], sir that, "I didn't know he had a pistol," he being Nicholas Hardy? "I didn't know he had the pistol while we were in the car but when we got out of the car he flashed it."
>
> Do you remember saying that?
>
> A. Yes.
>
> Q. Previously under the prosecutor's questioning, you said you saw him get in the car with a firearm; correct?
>
> A. Yes.
>
> Q. And you told them back in 1993 the first time you knew?
>
> A. It was a different firearm.
>
> Q. It was a different firearm.
>
> MR. WILLBUR: I think Mr. Krischer's [sic] is trying to object here.
>
> MR. KRISCHER: Well, I believe at this point the door had [sic] been opened so I don't have an objection.

(T. 2390-91). Even at that point, counsel continued:

> Q. "I didn't know he had the pistol while we were in the car."
>
> Do you recall saying that back in 1993?
>
> A. I read the statement.
>
> Q. That's not what I asked you.
>
> A. Oh, yes.

Q. Is that what you said back in 1993?
A. Yes.

(T. 2391). The prosecutor then briefly touched on the issue on redirect. (T. 2395). Plainly, defense counsel knew, or should have known, [20] that when Allen indicated he saw a gun in the car[21] he was not referring to the .38, which he had stated before trial he did not see until the parking lot. Counsel nevertheless chose to attempt to impeach Allen's credibility by suggesting that he had changed it from before trial. Since that was most emphatically not the case, the State had the right and the duty to explain the situation to avoid misleading the jury. See, Herzos v. State, 439 So. 2d 1372, 1376 (Fla. 1983)("this testimony was in direct response to defense counsel's questions on cross-examination and, therefore, defendant cannot be heard to take issue with it on appeal"); see also, Irizarrv v. State, 496 So. 2d 822, 825 (Fla. 1986) (admission of evidence concerning two weapons, which were connected to the defendant but neither of which was murder weapon, were admissible in the defendant's prosecution for first degree

[20] As noted, the prosecutor had previously specifically expressed concern about avoiding the mention of the other guns.

[21] There was no suggestion below that the prosecutor was laying a trap when he asked Allen if he saw the gun in the car. It appears from the transcript that he expected a "no" answer. (T. 2397).

murder where testimony established that the defendant used weapons); Henry v. State, 649 So. 2d 1361, 1365 (Fla.1994) (evidence of other criminal activity admissible if necessary to avoid confusion or misapprehension of the relevant facts); Hunter v. State, 660 So. 2d 244, 251 (Fla. 1995) (admission of other crimes evidence proper to place matters in context); Griffin v. State, 639 so. 2d 966, 969 (Fla. 1994) (same).

Moreover, even if it were error to admit the testimony, it would be harmless beyond a reasonable doubt. There was one mention of the .22 during Allen's testimony, and a second equally, brief mention during Nieves's testimony regarding Nieves's burglary of the Ybarra residence.[22] The rifle was never mentioned during the State's closing or rebuttal arguments. As noted with regard to the previous issue, (supra, at 66-67), the evidence of Defendant's guilt was overwhelming. To suggest that the jury convicted because he might have had a second gun is preposterous. Defendant was convicted because the State showed, beyond all doubt, that Defendant, coolly and without provocation, put two bullets in the head of Sergeant Hunt. See, Jackson v. State, 522 So. 2d 802, 806 (Fla. 1988) (Improper admission into evidence of references to

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[22] Nieves testified that he traded the murder weapon to Defendant. His testimony never connected Defendant to the .22.

murder defendant's possession of weapons and bulletproof vests was harmless error in light of ample evidence establishing guilt and discrediting his alibi defense); Griffin v. State, 639 So. 2d 966, 970 (Fla. 1994) (brief but ambiguous reference to inadmissible bad acts evidence that was not argued in closing harmless); Haliburton v. State, 561 So. 2d 248, 251 (Fla. 1990) (improper testimony by witness that defendant had raped her harmless in light of strength of State's case); Craig v. State, 585 So. 2d 278, 280 (Fla. 1991) (irrelevant evidence that defendant obtained and used cocaine on night of murder harmless in light of substantial evidence of guilt); Lawrence v. State, 614 So. 2d 1092, 1095 (Fla. 1993) (improper testimony regarding defendant's cocaine use and "jiggling" of old ladies for money harmless were reference was brief and did not become a feature of the trial); Mordenti v. State, 630 So. 2d 1080, 1084-85 (Fla. 1994) (reference to defendant's purported "mob" association harmless where not emphasized). Under the circumstances, this claim must be rejected.

## V.
## THE TRIAL COURT PROPERLY ALLOWED THE ADMISSION OF RELEVANT COLLATERAL CRIME EVIDENCE DURING THE PENALTY PHASE.

Defendant's next contention is that the trial court erred in allowing in evidence of Defendant's criminal acts that occurred on

the day before the crime. However, this evidence was relevant to show Defendant's state of mind, a critical component of the cold, calculated and premeditated (CCP) aggravating factor.

Defendant's first premise is that the evidence was insufficiently definite in that the "only" evidence was that Defendant had told his classmate that he was "involved" in the shooting of Cook and Speranza. Defendant minimizes the evidence presented and further misapprehends the State's theory in support of which the evidence was introduced. Speranza testified that he was shot at by persons in a silver Cadillac with Michigan tags. Cook positively identified Defendant and testified that Defendant, while driving a silver Cadillac, accosted him on the side of the road, and threatened to shoot him if he did not give him his doughnuts. After Cook surrendered the doughnuts, he observed a .38 in Defendant's lap, and before he could flee was shot three times. The next day Sexton, Defendant's classmate, commented on the newspaper account of the shootings to Defendant, who told him that he was the one who did the shootings. Defendant then took Sexton to where he had abandoned the stolen Cadillac, and they watched as the police towed the vehicle away. The investigating officer corroborated Sexton's description of the scene of the towing. Defendant also showed Sexton the guns they used. Thus, contrary to

Defendant's assertion, the evidence clearly and conclusively implicated Defendant in the crimes.

In any event, even if the evidence was only that Defendant "was involved" with the crimes, Defendant's contentions would be without basis. The State's theory was that Defendant was motivated to avoid apprehension by the police, resulting in his execution of Hunt, by his knowledge that he had participated in the crimes and knew that the police had already recovered the stolen vehicle. Defendant's particular role, as opposed to his clear involvement, was thus irrelevant. See, Griffin v. State, 639 So. 2d 996, 972 (Fla. 1994)(collateral crimes evidence combined with avowed intent to kill police officer if confronted established CCP); Heiney v. State, 447 So. 2d 210, 214 (Fla. 1984)(evidence of participation in other crimes relevant to show desire to avoid apprehension and motive to kill); Jackson v. State, 522 So. 2d 802, 806 (Fla. 1988) (same); Craig v, State, 510 So. 2d 857, 863 (Fla. 1987) (same).

Defendant's reliance on Finnev v. State, 660 So. 2d 674 (Fla. 1995), is also misplaced. Contrary to Defendant's assertions, Finney holds that collateral crime evidence is properly admissible in the penalty phase so long as it is relevant to prove an element of one of the aggravating circumstances proffered by the State. Finney merely held that in that case, the evidence admitted failed

to meet that standard. Id., 660 So. 2d at 681. Moreover Finney specifically approved the use of collateral crimes evidence to prove motive or intent. Id. 660 So. 2d at 682. Here, the evidence of Defendant's participation in the crime spree of the previous night was directly relevant to Defendant's heightened intent in support of the CCP aggravator.

Defendant's reliance on Power v. State, 605 So. 2d 856 (Fla. 1992), for his contention that the CCP aggravator cannot be proven through the use of collateral crimes evidence is also misplaced. Power held that "similar fact evidence" of cold calculated planning of crimes where the collateral crimes did not include a murder did not support the CCP aggravator. As the Court in Finnev explained, the "similar fact evidence" case law applies only where the collateral act is used to prove identity* Finnev, 660 So. 2d at 681. Where the collateral acts are used to show intent or motive, the requirement that the acts be truly similar does not apply. Id. At no time did the State ever suggest that Defendant's crime spree two days earlier was similar or probative of identity. The State clearly and consistently argued that Defendant's guilty knowledge was part of his motivation to kill Hunt, or any other officer who might have been unfortunate enough to stop him. Moreover, even if Power can be read as holding that the CCP aggravator may not rest

on collateral crimes evidence alone, it does not help Defendant's cause. Other evidence, including Defendant's statement that "it would be the cop," the execution-style shooting, and the carrying of twelve extra bullets all support the aggravator. Griffin; see also, Point VII, infra.

Nor does Defendant's argument that the collateral crimes evidence became a feature of the penalty phase proceedings have merit. All the evidence presented at the penalty phase, with the exception of the victim impact testimony, did pertain to the collateral crimes. However, all of the State's other evidence supporting the aggravators, namely Hunt's status a an on-duty law enforcement officer, as well as the other links in the chain showing CCP, i.e., Defendant's statements, the circumstances surrounding the shooting, that the murder weapon was stolen, that Defendant had tried to hand off the gun, that he had enough bullets to reload twice, etc., were all properly admitted during the guilt phase as part of the res sestae of the crime. As such, the evidence concerning the crime spree, which as discussed above, was relevant, was the only evidence not yet presented to the jury. Had any other evidence been presented it would have been merely cumulative.

Moreover, the evidence presented was not "overkill." Speranza gave a brief account of being fired at, as did Cook. The nature of

Cook's injuries was not delved into. Sexton testified only to Defendant's statements, and Defendant's showing him the guns used and the location of the vehicle. The officer testified that Sexton had reported the crime, and corroborated Sexton's description of the scene. The owner of the Cadillac merely identified the car as stolen. In short, no evidence beyond that necessary to portray the nature of Defendant's activities the previous night was presented. As such it cannot be said that the collateral crimes evidence became a feature of the trial, See, Wilson v. State, 330 So. 2d 457 (Fla. 1976) (extremely extensive similar fact evidence that spanned over 600 pages approached but did not reach over boundary where prejudice begins to outweigh probative value); Dean v. State, 277 so. 2d 13 (Fla. 1973)(no error where four other victims used to prove one rape charge); Stano v. State, 473 So. 2d 1282 (Fla. 1987) (evidence of eight prior murders used to prove aggravating factor in sentencing phase proceedings); Rogers v. State, 511 So. 2d 526 (Fla. 1987)(detailed evidence of two other robberies did not become feature of case); Burr v. State, 466 So. 2d 1051 (Fla. 1985) (evidence of three other incidents); Talley v. State, 160 Fla. 593, 36 So. 2d 201 (1948)(eight other victims used to prove one rape); Headrick v. State, 240 So. 2d 203 (Fla. 2d DCA 1970) (nine witnesses called to establish six collateral burglaries); Johnson

v. State, 432 So. 2d 583 (Fla. 4th DCA 1983) (no feature merely from volume of testimony); Espey v. State, 407 so. 2d 300 (Fla. 4th DCA 1981) (score of sexual batteries committed on five other victims to prove one charged crime); Snowden v. State, 537 so. 2d 1383 (Fla. 3d DCA 1989) (detailed evidence of two prior sexual batteries used to prove charged offense); Oats v. State, 446 So. 2d 90 (Fla. 1984) (five witnesses rebutted defendant's claim that a collateral shooting was accidental).

Finally, any error would be harmless in that the evidence could have been presented in rebuttal to the extensive evidence Defendant presented purporting to show that Defendant would not be a danger to society in the future. Defendant presented two theories of mitigation: that Defendant had had a difficult childhood, and that as a result of his self-inflicted injuries, he was no longer the dangerous person who killed Sergeant Hunt. Defendant presented twenty-one s s e s , the general tenor of whose testimony is summed up in Dr. Levine's statement that the person who killed Hunt died that day as well. In response, the State pointed out that at each stage, the experts had repeatedly opined that Defendant would not recover from his injury: that they had said he would be a vegetable, that he would never walk, that he would never talk, etc. Yet evidence was presented that each of these prediction had proven

wrong. Evidence was presented that Defendant could play cards, could converse, could watch and understand television. (See, e.g., T. 3649-63). The experts having been proven wrong on the other predictions of Defendant's ability to recover, the State was fully entitled to argue that Defendant's alleged change into a sweet and non-violent person was not permanent either. As the defense had put on a score of witnesses to testify to his newly peaceful character, the jury was entitled to know who Defendant truly had been. Wuornos v. State, 644 So. 2d 1012, 1017 (Fla. 1994) (after defense presented evidence tending to show conversion to nonviolence, State entitled to present evidence that defendant had been violent in the past); Johnson v. State, 660 So. 2d 637, 646 (Fla. 1995)("when the defense puts defendant's character in issue in penalty phase, the State is entitled to rebut with other character evidence, including collateral crimes"); Valle v. State, 581 So. 2d 40, 45 (Fla. 1991) (where the defense presented expert opinions that the defendant would be a good prisoner, the State could introduce rebuttal evidence of specific prior acts of violence). As noted in his brief, Defendant had specifically waived the statutory mitigator of lack of prior criminal behavior. However, that waiver cannot not permit Defendant to then present endless testimony to the effect that he would not engage in future criminal behavior,

and expect the State to refrain from presenting relevant information about his true character. Wuornos; Johnson; Valle. As such because the collateral crimes evidence could have been presented in rebuttal, any purported error would be harmless beyond a reasonable doubt. Valle, 581 So. 2d at 46 (admission, during State's case in chief, of evidence that would have been proper in rebuttal was harmless).

## VI.
## THE PROSECUTOR'S PENALTY PHASE CLOSING ARGUMENT DOES NOT PRESENT ANY BASIS FOR REVERSAL.

Defendant's sixth claim is that the prosecutor's penalty-phase closing argument **was** improper. However, the vast majority of the comments now complained of were not objected to below. Moreover, none of the comments were improper, and even if they were any error would be harmless beyond a reasonable doubt.

### A. The alleged "message to the community" argument.

Neither of the two comments which Defendant asserts exhorted the jury to send **a** message to the community, (B. 65), were objected to at trial. **As** such they may not now be raised as error. Johnson v. State, 660 So. 2d 637, 646 (Fla. 1995); 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).

Moreover, when viewed in context, it is clear the prosecutor was not urging the jury to send a message to the community. Rather he was explaining why the legislature had created the "murder of a law enforcement officer" aggravator, and why the State felt that the factor, which was clearly established, should be accorded great weight. Defendant's reliance on Campbell v. State, 679 So. 2d 720 (Fla. 1996), and Bertolotti is thus misplaced. In Campbell, not only did the prosecutor specifically and repeatedly argue that a "message [would be] sent to certain members of our society," he also improperly injected the unrelated issue of local "cop-killers" into the trial. The errors 'combined" required reversal.[23] Campbell, 679 So, 2d at 724. Here, as noted, the statements did not ask that any message be sent, and as discussed in the other sub-points was not combined with any errors so egregious as to warrant reversal. See, Bertolotti, 476 So. 2d at 133 (prosecutorial conduct must be so outrageous as to taint the jury's recommendation before reversal is warranted),

Finally, even assuming, arguendo, that the comments were preserved and improper, any error would be harmless. The only

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[23] Note that in Campbell the comments were properly preserved for review.

statutory mitigation presented to the jury was Defendant's age, which the trial court accorded "some weight." (R. 1023). The State argued, and the trial court found, that two aggravating circumstances existed: (1) that the victim was a law enforcement officer acting in the course of his legal duties, and (2) that the murder was cold, calculated and premeditated. Defendant has not challenged the first aggravator, which **was** clearly supported by the evidence, and the second was amply supported by the record as more thoroughly discussed at Point VII, infra. The trial court found that the aggravation "far" outweighed the mitigation, and that each aggravator, standing alone, would outweigh the mitigation. (R. 1025). Finally, after only barely an hour of deliberation, the jury returned a 9-3 recommendation of death. (T. 3890-91). There is simply no possibility that these brief comments could have affected the jury's recommendation. Given the evidence, the instructions, and the overall argument with which the jury was presented it cannot reasonably be said that absent the cited comments the outcome of the proceedings would be different. As such any purported error would be harmless, even had this claim been properly preserved. See, Jackson v. State, **522** So. 2d 802, 809 (Fla. 1988) (request "to show that the community cares" harmless).

**B. The alleged improper use of collateral crimes evidence**

**and alleged urging of nonstatutory aggravating circumstances.**

Again, all but three of the seven comments cited were not objected to at trial. Allen v. State, 662 So. 2d 323, 331 (Fla. 1995) (claim that prosecutor allegedly argued nonstatutory aggravating circumstance waived for appeal where not properly preserved below); Sochor v, State, 619 So. 2d 285, 291 (Fla. 1993) (same). Further, the objections that were raised were not the complaints being pursued on appeal: "facts not in not in evidence," (T. 3826, 3839), and "inappropriate." (T. 3837). Such objections are insufficient to preserve **a** wholly different claim on review. Lawrence v. State, 691 So. 2d 1068, 1074 (Fla. 1997) (objection that prosecutor's argument was not supported by facts in evidence not preserve claim for review that comments urged jury to consider improper factors).

Furthermore, even if these comments were preserved for review, they were not improper. The references to Defendant as a violent person, (B. 66), were well supported by the facts of this crime. Moreover, the comments Defendant alleges constituted argument on improper nonstatutory aggravating factors were in fact proper rebuttal, and discussed in the context of, Defendant's proffered mitigation, which was essentially that the person who killed Hunt "died" that night as well. Having made the centerpiece of his

presentation in mitigation the notion that Defendant was no longer the violent individual who killed the officer, Defendant may not complain when the State properly attempts to rebut that contention. Mann v. State, 603 So, 2d 1141, 1143 (Fla. 1992) (prosecutorial argument that Defendant was pedophile was not argument of improper nonstatutory aggravator, but proper discussion of and rebuttal to defendant's proffered mitigation); Johnson v. State, 660 So. 2d 637, 646 (Fla. 1995) (argument rebutting proffered defense mitigation proper).

Finally, any error would be harmless beyond a reasonable doubt. In addition to the factors discussed above at sub-point "A," the jury was instructed that the enumerated aggravators were the only ones they could consider. The trial court likewise stated that it did not consider any aggravating circumstance not enumerated in its sentencing order. (R. 1022). In view of the foregoing any alleged error was harmless beyond a reasonable doubt, Allen, 662 so. 2d at 331 (any improper argument harmless in view of strong aggravation, minimal mitigation and trial court's statement that it only considered statutory aggravating circumstances) ; Sochor, 619 so. 2d at 291 (comments harmless where when considered in their totality, they did not "pinpoint" a nonstatutory aggravator).

C. **Allegedly improper denigration of mitigation.**

Again, none of the comments to which Defendant refers in his brief, (B. 68-70), were objected to. As such they do not present a basis for reversal.

Moreover, these comments were not improper. They specifically addressed mitigation raised by the defense, and addressed the weight which the State felt the jury should ascribe to them. Such is proper. Valle v. State, 581 So. 2d 40, 46 (Fla. 1991) (the State may properly argue that the defense has failed to establish a mitigating factor); Mann, 603 So. 2d at 1143 (same).

**D. No fundamental error justifying the disregard of the procedural bar occurred below.**

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

## VII.
## THE TRIAL COURT PROPERLY FOUND THAT THIS KILLING WAS COLD, CALCULATED AND PREMEDITATED.

Defendant asserts that the trial court erred in finding that the killing of Sergeant Hunt was cold, calculated and premeditated (CCP). This contention is without merit, and even if the finding were error, it would be harmless beyond a reasonable doubt.

Defendant asserts that there was a lack of evidence in support of the aggravator. However, what his brief actually focuses on is conflicts which existed in the evidence and the inferences to be drawn from them. As this court has previously noted however, such matters are for the trier of fact. On appeal, the facts are to be examined in the light most favorable to the prevailing party, here, the State. The evidence below showed that a few weeks before the murder, Defendant stated that if it ever came to a confrontation between him or a cop, 'it would be the cop," which Defendant's friend took to mean he would kill him. Defendant asserts that that statement is ambiguous and does not speak of an intent to kill. Perhaps before the events of February 25, 1993, there was some ambiguity. Defendant's actions that night resolved any question as to his meaning, however.

Defendant then engaged in a course of conduct which could only lead to a confrontation with the law, stealing a car and shooting

at people, The very next night, he armed himself with a gun he knew to be stolen, and carried an extra twelve rounds in his pockets, Confronted by a police officer, knowing he was carrying a stolen gun, knowing that the police had already recovered the car he had stolen and used to shoot at people, wounding one, Defendant could have fled, but did not. Instead he calmly waited as the officer patted down his friends. At the opportune moment, he **was** true to his word and placed his gun to the Sergeant's head and fired. He fired not once, but twice, and again directly to the head. He then grabbed Hunt's gun and fled. During his flight, Defendant had the presence of mind to hide the murder weapon, so that it was not found for three months.

These facts amply support the trial court's conclusion that this murder was cold, calculated and premeditated. Griffin v. State, 639 So. 2d 966, 971 (Fla. 1994) (previously expressed intent supported CCP aggravator); Johnson, 438 So. 2d 774, 779 (Fla. 1983) (same); Dufour v. State, 495 So. 2d 154, 164 (Fla. 1986) (prior statement of intent and subsequent killing supported CCP); Cruse v. State, 588 So. 2d 983, 992 (Fla. 1991) (prior acquisition of weapon, statement of intent, extra ammunition, and calm demeanor supported CCP); Treaal v. State, 621 So. 2d 1361, 1367 (Fla. 1993) (CCP properly found where evidence showed advance

procurement of weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course); Brown v. State, 565 So. 2d 304, 308 (Fla. 1990)(prior voicing of intent, prior procurement of weapon supported CCP); Porter v. State, 564 so. 2d 1060, 1064 (Fla. 1990) (prior statement of intent and prior procurement of weapon supported CCP); Swafford v. State, 533 So. 2d 270, 277 (Fla. 1988)(CCP properly found where evidence showed advance procurement of weapon, lack of resistance or provocation, extra ammunition, and the appearance of a killing carried out as a matter of course).

Finally, even, assuming arsuendo that the evidence did not support the finding of CCP, any error would be harmless beyond a reasonable doubt. In addition to the CCP factor, the trial court also found that the victim was a law enforcement officer engaged in his official duties. The court further found that the aggravation "far outweigh[ed]" any mitigating circumstances present, and further concluded that each aggravator standing alone outweighed the mitigation. (R. 1025). As such even without the finding of CCP there is no reasonable probability that the outcome of the sentencing proceeding would have been different. See, Hill v. State, 643 So. 2d 1071, 1074 (Fla. 1994) (erroneous finding of CCP harmless where remaining aggravation outweighed mitigation); Young

v. State, 579 So. 2d 721, 724 (Fla. 1991) (same). Moreover, the jury was given the proper instruction prescribed by Jackson v. State, 648 So. 2d 85, 89 n.8 (Fla. 1994), and courts will not presume sentencing error where the jury was instructed on a factually unsupported aggravating factor, so long as the instruction itself was legally correct. Sochor v. Florida, 504 U.S. 527, 538 (1992); Jackson, 648 So. 2d at 90. The trial court properly found the CCP aggravating factor, and even if it did not, Defendant's sentence should be affirmed.

VIII.

NO REVERSIBLE ERROR OCCURRED FROM THE PRESENTATION OF VICTIM IMPACT EVIDENCE AT THE SENTENCING HEARING BEFORE THE COURT WHERE THE TRIAL JUDGE EXPLICITLY STATED SHE WOULD DISREGARD IT.

Defendant's eighth claim is that his sentence should be reversed because the testimony of the victim's widow, family members, and colleagues allegedly exceeded the bounds of proper victim impact testimony. This claim is unpreserved and without merit in that the vast majority of the testimony was proper, and the trial court in any event explicitly based its sentencing solely on the aggravation and mitigation presented,

Despite the defense characterization of the evidence, the bulk of the testimony focused on Sergeant Hunt's roles as a leader in

the Sheriff's Office and father to his two sons. (T. 3910-26). Moreover, at the conclusion of the presentation, upon a defense motion to strike alleging that the testimony exceeded the bounds of permissible victim impact testimony under §921.141(7), Fla. Stat., the court specifically stated that it would not be considering any victim impact evidence it in its decision:

> Let me assure you that I'm only going to consider, in rendering my opinion, the aggravating factors and the mitigating factors both statutory and non statutory that were shown.

(T. 3927). In essence, Defendant's motion to strike was granted. No further relief, e.g., a motion for mistrial or recusal was requested. As such, Defendant got the relief he requested, and he may not now complain on appeal. Grossman v. State, 525 So. 2d 823, 842 (Fla. 1988) (complaints regarding victim impact evidence subject to contemporaneous objection rule).

Even if the issue were properly before the Court, the trial judge specifically avowed that she would not consider the evidence, and reaffirmed that position in her sentencing order:

> Nothing except factors [§921.141(5)] (j) and (i) were considered in aggravation. All letters regarding Defendant's sentence were kept by this Court's judicial assistant and have not been read by the Court.

(R. 1022). Moreover, the court clearly understood the proper

boundaries of victim impact evidence. During the penalty phase proceedings before the jury, the State presented the widow's testimony first as a proffer outside the hearing of the jury. At the conclusion of the proffer, the court limited the widow's testimony:

> THE COURT: It appears to me that the [U.S. Supreme] Court [in Payne v. Tennessee, 501 U.S. 808 (1991),] particularly frowned on any comments about the crime and any recommendation as to sentencing; you are not attempting to do any of those things, which are clearly objectionable. Therefore I **am** going to allow you to present the testimony that you have already proffered in that the evidence about the two children of the officer seems to be relevant to his uniqueness in the community; were he there as a strong and caring father, that anger [of his sons] would not be taking place.
> MR. GALO: What about the death [of the widow's other family members] issue?
> THE COURT: I think you should leave that out.

(T. 3244). In Grossman, this court held that the erroneous admittance of victim impact evidence was subject to harmless error analysis. Id., 525 So. 2d at 845. The Court found that the evidence admitted in that case was harmless, noting that **a** "salient" factor in its determination **was** that the evidence in question **was** heard only by the judge, after the jury had already recommended death. Such is the case here. Moreover, here, as in Grossman, the court's

written sentencing order showed that there was no reliance by the trial court on the victim impact evidence in reaching its decision. Id. 525 So. 2d at 846. Finally, the Court noted that the jury did not receive any improper evidence of victim impact, but nevertheless recommended death.[24] Id. As in Grossman, any error in admitting improper victim impact evidence would be harmless beyond a reasonable doubt. See also, Parker v. Dugger, 537 So. 2d 969 (Fla. 1988)(improper admission of victim impact evidence harmless where judge made clear that it would not be considered in sentencing decision); LeCroy v. State, 533 So. 2d 750, 755 (Fla. 1988) (same); Scull v State, 533 so. 2d 1137, 1143 (Fla. 1988) ("when a judge merely sees a victim impact statement . . . but does not consider the statements for purposes of sentencing, no error has been committed").

[24] Defendant does not now allege that the testimony presented to the jury was improper, and indeed it was limited to those factors enumerated in §921.141(7), Fla. Stat. and Payne. See, Windom v. State, 656 So. 2d 432, 438 (Fla. 1995); Bonifay v. State, 680 So. 2d 413, 419 (Fla. 1996).

## IX.
## DEFENDANT'S SENTENCE IS PROPORTIONAL

Defendant's final claim is that his sentence is disproportionate. This claim is without merit. "Proportionality review compares the sentence of death with other cases in which a sentence of death was approved or disapproved," Palmes v. Wainwrisht, 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. St-ate, 564 so. 2d 1060, 1064 (Fla. 1990) . "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) CCP and (2) the murder of a law enforcement officer engaged in his official duties. (R. 1020-22). The trial court found as statutory mitigation Defendant's age, which it gave 'some" weight. (R. 1023). As nonstatutory mitigation, the trial court gave "little weight" to Defendant's childhood and self-inflicted injury, and "considerable weight" to the defendant's present state of mind and behavior,

which resulted from his injury. (T. 1023-25). A comparison of these findings to similar cases reveals that Defendant's sentence is proportional.

In Jackson v. State, 648 So. 2d 85 (Fla. 1994), the trial court found in aggravation CCP and that the victim was a law enforcement officer, contrasted with mitigation of a difficult childhood including sexual abuse, domestic abuse as an adult, and drug and alcohol abuse. Although the sentence was reversed due to the infirmity of the CCP instruction, it is notable that the Court did not direct imposition of a life sentence on remand, which it presumably would have done had it considered the sentence disproportionate.

In Kearse v. State, 662 So. 2d 677 (Fla. 1995), a case with remarkably similar facts involving the shooting of an officer and the taking of his gun, the aggravating factors of during a robbery (based on the taking of the officer's gun), victim a law enforcement officer, and CCP, were weighed against statutory mitigation of extreme mental or emotional distress, incapacity to appreciate the criminality of conduct, and nonstatutory mitigation of impoverished and culturally deprived background, severe emotional disturbance as a child, and an IQ barely above retarded. Although the Court vacated the sentence because of the infirmity of

the CCP jury instruction, it again remanded for resentencing, not life.

In Griffin v. State, 639 So. 2d 966 (Fla. 1994), this court found that the aggravating circumstances of CCP, avoid arrest (based on the killing of a police officer) and a prior violent felony existed. Mitigation consisting of the defendant's age, remorse, a traumatic childhood, and a learning disability was also found. The Court concluded that the sentence was proportional. Id., 639 So. 2d at 971. In Hodges v. State, 595 so. 2d 929 934-35 (Fla. 1992), this court approved a sentence of death based upon CCP and murder committed to hinder law enforcement weighed against mitigation of the defendant's character as a good father and husband, a good employee, a contributing member of society, lack of criminal history and his normally nonviolent nature. In Valle v. State, 581 So. 2d 40 (Fla. 1991), the sentence was upheld based upon aggravation of CCP, the murder of a police officer, and a prior violent offense, which the trial court believed would outweigh any proffered mitigation of the defendant's mental state, remorse and harsh childhood. See also, Carter v. State, 576 So. 2d 1291 (Fla. 1989) (disproportionality argument rejected in view of aggravation of contemporaneous violent felony, on parole, and during a robbery versus mitigation of deprived childhood).

Defendant's reliance on the alleged infirmity of the CCP aggravating factor is misplaced because as discussed above, see Point VII, supra, the trial court properly found that aggravator. That contention thus has no place in this proportionality review. As such it is therefore readily apparent that Defendant's sentence of death is proportionate to that approved in other cases.

Moreover, even if the CCP aggravator were stricken, Defendant's sentence would still be proportional when compared to similar cases. For example, in Burns v. State, 609 So. 2d 600 (Fla. 1992), the trial court found in aggravation that the murder was heinous, atrocious and cruel and that the victim was a law enforcement officer, contrasted with statutory mitigation of no prior criminal history and nonstatutory factors of a bad childhood, remorse, support of his family, and an honorable discharge from the service. Although the sentence was reversed when this court found the HAC factor inapplicable, leaving only the victim's status as a police officer in aggravation, as in Kearse and Jackson, the Court did not direct imposition of a life sentence on remand. In Randolph v. State, 463 So. 2d 186 (Fla. 1984)(only proper aggravation pecuniary gain, statutory mitigation of inability to appreciate the criminality of conduct and age) the court likewise ordered a new sentencing rather than a life sentence.

Based upon his claim that CCP is invalid, Defendant also asserts that his sentence is disproportional because the "mitigation clearly outweighs" the remaining aggravating factor. (B. 84). However, this contention was explicitly rejected by the trial court in its sentencing order: "Each [aggravating circumstance] standing alone, is of such great weight as to outweigh the mitigating circumstances." (R. 1025). This portion of Defendant's argument is not truly a proportionality claim, but rather that the trial court's conclusions as to the relative weight of the aggravation and the mitigation were incorrect. such, however, is not a proper topic of appellate review. Jones v. State, 648 So. 2d 669, 680 (Fla. 1994); Slawson v. State, 619 So. 2d 255, 260 (Fla. 1993); Johnson v. State, 660 So. 2d 637, 646 (Fla. 1995). This portion of Defendant's claim must therefore be disregarded.

Finally, the **cases** upon which Defendant relies for his conclusion that his sentence is disproportionate are not on point. Wright v. State, 688 So. 2d 298 (Fla. 1996), Maulden v. State, 617 So. 2d 298 (Fla. 1993), and Blakely v. State, 561 So. 2d 560 (Fla. 1990), all involved a murder during the course of **a** long-standing domestic dispute where the defendant was under the influence of extreme emotional distress. These cases are in no **way** comparable to the unprovoked, execution-style murder of Hunt.

**Nor** is Sonser v, State, 544 so, 2d 1010 (Fla. 1989), comparable. In that case the only aggravator was that Defendant was under a prior sentence of imprisonment, weighed against three statutory mitigating circumstances: extreme mental disturbance, inability to appreciate the criminality of his conduct, and **age.** Additionally, there were seven nonstatutory factors, including remorse, drug dependency, adaptation to prison life, positive change of character, bad childhood, positive influence **on** his family, and strong spiritual and religious beliefs.

Other than age, Defendant did not proffer or establish any statutory mitigators. Likewise, his nonstatutory mitigation established only two factors, his childhood, and his post-injury change in behavior and personality. The former was not established to be as traumatic as Defendant's brief intimates. Although his sister and mother were abused, the abusive father was gone from his life at an early age. The only abuse to which Defendant himself was subjected consisted of two incidents during the course of many years in which his stepfather struck him. Furthermore, in evaluating the results of Defendant's injury as mitigation, the trial court was not convinced that Defendant **was** "a different person," and noted that despite his self-inflicted injury, Defendant had nevertheless been found competent, his IQ **was** low-

average, and he functioned outside the retarded range. (R. 1025). Defendant postulates in his brief that he does not really understand the nature of his punishment. However this factual issue was also decided adversely to him below,

Morgan v. State, 639 so. 2d 6 (Fla. 1994), is similarly dissimilar to Defendant's case. In that case, this court found three statutory mitigators, that the defendant was only 16 years old, that he was under extreme mental disturbance at the time of the crime, and that he was unable to appreciate the criminality of his conduct, and numerous nonstatutory circumstances, including marginal intelligence, extreme immaturity, illiteracy, substance abuse, including at the time of the murder, brain damage, and no history of violence, weighed against aggravators of heinous, atrocious and cruel, and commission during a felony, In Livingston v. state, the evidence established the mitigating factors of a prior conviction and murder was committed during a robbery, In contrast he was a minor, had grown up to regular severe beatings, had an extensive history of cocaine and other drug abuse, and was only marginally functional intellectually. In Kramer v. State, 619 so. 2d 274 (Fla. 1993), the court found that the HAC and prior violent felony aggravators applied, weighed against two statutory mitigators, extreme mental disturbance and incapacity to conform to

the requirements of the law in addition to being a model prisoner, alcoholism and drug abuse.

None of these cases is comparable to Defendant's, where a cold-blooded, execution-style murder[25] is offset by no significant statutory mitigation. Most involve significant statutory mental mitigation in the form of extreme mental or emotional disturbance, incapacity to appreciate the criminality of conduct, or both. In Morgan, Livingston, Thompson, and Sinclair, the murders were all the result of a "robbery gone awry." In Songer, the only aggravator was under sentence of imprisonment.[26] The Kramer Court described the crime as a spontaneous fight between an alcoholic and a drunken victim. In short, these cases are simply not comparable to the unprovoked murder of a police officer which Defendant committed. Defendant's sentence should be affirmed.

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[25] Even if this court determines that the CCP aggravator does not apply, the evidence nevertheless is uncontradicted that Defendant calmly shot Hunt in the head at point-blank range.

[26] It was noted that the underlying conviction on which that prior sentence was based had since been declared invalid by the Oklahoma courts, so that if the death sentence had not been vacated, it would have been in the future on collateral attack. Songer, 544 So. 2d at 1012 (Ehrlich, C.J., concurring).

## CONCLUSION

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

Respectfully submitted,
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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by U.S. mail to **CAREY HAUGHWOUT**, Attorney for Appellant, Suite **250, 324 Datura Street,** West Palm Beach, Florida 33401, this 20th day of June, 1997.

**RANDALL SUTTON**
Assistant Attorney General

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