IN THE SUPREME COURT OF FLORIDA

CASE NO. 94,154

RICARDO GONZALEZ,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF CITATIONS iv

STATEMENT OF TYPE SIZE AND STYLE 1

STATEMENT OF THE CASE AND FACTS 2

SUMMARY OF THE ARGUMENT 42

ARGUMENT 44

I. THERE IS NO BASIS FOR REVISITING THIS COURT'S PRIOR HOLDING THAT THE ADMISSION OF THE CODEFENDANTS' CONFESSIONS DURING THE GUILT PHASE WAS HARMLESS ERROR, WHERE THIS COURT CONDUCTED THE ANALYSIS THAT DEFENDANT ASSERTS SHOULD HAVE BEEN CONDUCTED AND THE CASE UPON WHICH DEFENDANT RELIES IS SILENT REGARDING THE ISSUE OF HARMLESS ERROR. 44

II. DEFENDANT'S CLAIM THAT THE CONSIDERATION OF AGGRAVATING CIRCUMSTANCE THAT DEFENDANT KILLED A LAW ENFORCEMENT OFFICER, WHO WAS ENGAGED IN THE PERFORMANCE OF OFFICIAL DUTIES, WAS IMPROPER IS UNPRESERVED AND WITHOUT MERIT. 50

III. THE TRIAL COURT'S REJECTION OF THE EXTREME MENTAL OR EMOTIONAL DISTRESS MITIGATOR IS SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE AND SHOULD BE AFFIRMED. 53

IV. ANY ISSUE REGARDING THE STATE'S COMMENTS IN CLOSING DOES NOT MERIT REVERSAL, WHERE THE COMMENTS WERE LARGELY UNOBJECTED TO, OBJECTIONS WERE SUSTAINED WHEN MADE, CURATIVE INSTRUCTIONS WERE GIVEN AND THE COMMENTS WERE PROPER COMMENTS ON THE EVIDENCE. 61

V. DEFENDANT'S SENTENCE IS PROPORTIONAL. 69

CONCLUSION 77

CERTIFICATE OF SERVICE 77

TABLE OF CITATIONS

CASES **PAGE**

Armstrong v. State,
642 So. 2d 730 (Fla. 1994),
cert. denied, 514 U.S. 1085 (1995) 71

Blanco v. State,
706 So. 2d 7 (Fla. 1997),
cert. denied, 119 S. Ct. 96 (1998) 52,53
69

Brown v. United States,
411 U.S. 223 (1973) 48

Brunner Enterprise v. Department of Revenue,
452 So. 2d 550 (Fla. 1984) 44

Burns v. State,
699 So. 2d 646 (Fla. 1997),
cert. denied, 118 S. Ct. 1063 (1998) 70,76

Campbell v. State,
571 So. 2d 415 (Fla. 1990) 53,69

Carter v. State,
576 So. 2d 1291 (Fla. 1989),
cert. denied, 502 U.S. 879 (1991) 72

Castor v. State,
365 So. 2d 701 (Fla. 1978) 61,65

Cave v. State,
727 So. 2d 227 (Fla. 1998),
cert. denied, 1999 WL 73704 (U.S. 1999) 53,69

Clark v. State,
443 So. 2d 973 (Fla. 1983),
cert. denied, 467 U.S. 1210 (1984) 51

Cook v. State,
581 So. 2d 141 (Fla.),
cert. denied, 502 U.S. 890 (1991) 72

Craig v. State,
510 So. 2d 857 (Fla. 1987) 62,65
66

Curtis v. State,
685 So. 2d 1234 (Fla. 1996),
cert. denied, 521 U.S. 1124 (1997) 74

Davis v. State,
698 So. 2d 1182 (Fla. 1997) 62,65
66

DuBoise v. State,
520 So. 2d 260 (Fla. 1988) 67

Echols v. State,
484 So. 2d 568 (Fla. 1985),
cert. denied, 479 U.S. 871 (1986) 51

Ferguson v. State,
417 So. 2d 639 (Fla. 1982) 67

Franqui v. State,
699 So. 2d 1312 (Fla. 1997) 2,45

Freeman v. State,
563 So. 2d 73 (Fla. 1990),
cert. denied, 501 U.S. 1259 (1991) 74

Gonzalez v. Florida,
118 S. Ct. 1393 (1998) 2,4
44

Gonzalez v. State,
700 So. 2d 1217 (Fla. 1997),
cert. denied, 118 S. Ct. 1393 (1998) 2,44
45,47

Harrington v. California,
395 U.S. 250 (1969) 47

Hawk v. State,
718 So. 2d 159 (Fla. 1998) 74

Heath v. State,
648 So. 2d 660 (Fla. 1994),
cert. denied, 515 U.S. 1162 (1995) 71

Hudson v. State,
538 So. 2d 829 (Fla.),
cert. denied, 493 U.S. 875 (1989) 69

Idaho v. Wright,

497 U.S. 805 (1990) 46

Johnson v. State,
660 So. 2d 637 (Fla. 1995),
cert. denied, 517 U.S. 1159 (1996) 51,67

Jones v. State,
569 So. 2d 1234 (Fla. 1990) 51

Kearse v. State,
662 So. 2d 677 (Fla. 1995) 51,62

Knowles v. State,
632 So. 2d 62 (Fla. 1993) 75

Larzelere v. State,
676 So. 2d 394 (Fla.),
cert. denied, 512 U.S. 1043 (1996) 50

Lilly v. Virginia,
119 S. Ct. 1887 (1999) 44,45

Livingston v. State,
565 So. 2d 1288 (Fla. 1998) 75

Lowe v. State,
650 So. 2d 969 (Fla. 1994),
cert. denied, 516 U.S. 887 (1995) 72

Lowenfield v. Phelps,
484 U.S. 231 (1988) 52

Menendez v. State,
419 So. 2d 312 (Fla. 1982) 51

Morgan v. State,
639 So. 2d 6 (Fla. 1994) 75

Ohio v. Roberts,
448 U.S. 56 (1980) 46

Palmes v. Wainwright,
460 So. 2d 362 (Fla. 1984) 69

Parker v. State,
641 So. 2d 369 (Fla. 1994),
cert. denied, 513 U.S. 1131 (1995) 51

Porter v. State,

564 So. 2d 1060 (Fla. 1990),
cert. denied, 498 U.S. 1110 (1991) 69

Reaves v. State,
639 So. 2d 1 (Fla.),
cert. denied, 513 U.S. 990 (1994) 71

Riechmann v. State,
581 So. 2d 133 (Fla. 1991),
cert. denied, 506 U.S. 952 (1992) 63,66

Robinson v. State,
487 So. 2d 1040 (Fla. 1986) 62

Rose v. State,
461 So. 2d 84 (Fla. 1984),
cert. denied, 471 U.S. 1143 (1985) 61,64

Schneble v. Florida,
405 U.S. 427 (1972) 46,48

Shellito v. State,
701 So. 2d 837 (Fla. 1997) 62,65
66

Simmons v. South Carolina,
512 U.S. 154 (1994) 51

Sims v. State,
681 So. 2d 1112 (Fla. 1996),
cert. denied, 520 U.S. 1199 (1997) 51

Smith v. State,
641 So. 2d 1319 (Fla. 1994),
cert. denied, 513 U.S. 1163 (1995) 71

State v. DiGuilio,
491 So. 2d 1129 (Fla. 1986) 62,64,65

State v. Henry,
456 So. 2d 466 (Fla. 1984) 70

Steinhorst v. State,
412 So. 2d 332 (Fla. 1982) 62

Stewart v. State,
588 So. 2d 972 (Fla. 1991),
cert. denied, 503 U.S. 972 (1992) 51

Strazzulla v. Hendrick,
177 So. 2d 1 (Fla. 1965) 44

Toole v. State,
479 So. 2d 731 (Fla. 1985) 64

Valle v. State,
581 So. 2d 40 (Fla.),
cert. denied, 502 U.S. 986 (1991) 64

Walker v. State,
707 So. 2d 300 (Fla. 1997) 59

Walls v. State,
641 So. 2d 381 (Fla. 1994) 54

Watts v. State,
593 So. 2d 198 (Fla.),
cert. denied, 505 U.S. 1210 (1992) 73

Wickham v. State,
593 So. 2d 191 (Fla. 1991),
cert. denied, 505 U.S. 1209 (1992) 72

STATEMENT OF TYPE SIZE AND STYLE

This brief is typed in 12 point Courier New font.

INTRODUCTION

Appellant, RICARDO GONZALEZ, was the defendant below. Appellee, THE STATE OF FLORIDA, was the prosecution below. The parties will be referred to as they stood in the trial court. The symbols “R.” and “T.” will refer to the record on appeal and transcript of proceedings, respectively.

STATEMENT OF THE CASE AND FACTS

Defendant was charged, in an indictment filed on February 14, 1992, in the Eleventh Judicial Circuit of Florida in and for Miami-Dade County, Florida, case number 92-2141D, with committing, on January 3, 1992: (1) first degree murder of a law enforcement officer, (2) armed robbery, (3) aggravated assault, (4) two counts of grand theft and (5) two counts of burglary.[1] (R. 1-5) Defendant was tried jointly with codefendants, Leonardo Franqui and Pablo San Martin. (R. 11) Defendant was convicted on all counts and sentenced to death for the murder. *Gonzalez*, 700 So. 2d at 1218.

On appeal, Defendant contended that the trial court had erred in denying a motion for severance based upon the admission of the confessions of Franqui and San Martin. *Id.* This Court found:

> Gonzalez also asserts that the trial court erred by permitting the confessions of his codefendants Franqui and San Martin to be admitted against him in their joint trial and by denying his motion to sever his trial from that of his codefendants. In *Franqui v. State*, 699 So. 2d 1312 (Fla. 1997), we discussed in detail the law applicable to the admissibility of a codefendant's confession. In this case, there is no question that both Franqui's confession and San Martin's confession interlocked with Gonzalez's

[1] Defendant was also charged with possession of a firearm during a criminal offense and an additional count of aggravated assault. (R. 1-4) However, the State entered a nolle prosequi to these charges after opening statement at Defendant's original trial. *Gonzalez v. State*, 700 So. 2d 1217, 1217 n.1 (Fla. 1997), *cert. denied*, 118 S. Ct. 1393 (1998) and 118 S. Ct. 1856 (1998).

confession in many respects and was substantially incriminating to Gonzalez. Moreover, we cannot say that the totality of the circumstances under which Franqui and San Martin made their confessions demonstrated the particularized guarantee of trustworthiness sufficient to overcome the presumption of unreliability that attaches to accomplices' hearsay confessions which implicate the defendant.

Thus, the admission of the confessions of Franqui and San Martin was error. However, with respect to guilt, we conclude that the error was harmless beyond a reasonable doubt. Not only did Gonzalez confess to participating in the robbery, he also admitted shooting the victim. He does not contest the legality of his confession in this appeal. In addition, it was determined that the fatal bullet came from the gun that Gonzalez was carrying. Gonzalez admitted being with Franqui, and an eyewitness identified Franqui as the driver of one of the stolen cars leaving the scene of the crime. Further, Franqui's fingerprints were found on one of the stolen vehicles. Moreover, Gonzalez consented to a search of his apartment which revealed $1200 of the stolen money in his bedroom closet. Thus, we conclude that there is no reasonable possibility that the erroneous admission of the confessions of Franqui and San Martin contributed to Gonzalez's conviction for felony murder.

PENALTY

We agree, however, that Gonzalez's sentence must be reversed. In Franqui's confession, he said that upon approaching the bank, Gonzalez pulled out a gun and told the security guard not to move. Thereafter, he heard a shot, so he also shot his gun. He said he did not know if the shot he heard was fired by Gonzalez or the security guard, but the evidence later developed that the security guard never fired his gun. On the other hand, Gonzalez said it was Franqui who told the security guard not to move and that Franqui shot the security guard before Gonzalez shot him. He said Franqui fired three or four

> shots and that he only shot once. Consequently, in determining whether or not Gonzalez should be sentenced to death, we cannot say that the erroneous admission of Franqui's confession which portrayed Gonzalez as the aggressor who had precipitated the shooting was harmless beyond a reasonable doubt.

Id. at 1218-19. As such, this Court affirmed Defendant's conviction but vacated his death sentence and remanded for a new penalty phase proceeding. *Id.* at 1219. Both parties sought certiorari review in the United States Supreme Court, with the State contending that there was no error in the admission of the codefendants' confessions and Defendant asserting that the error in the admission was harmful in the guilt phase. Both petitions were denied. *Florida v. Gonzalez*, 118 S. Ct. 1856 (1998); *Gonzalez v. Florida*, 118 S. Ct. 1393 (1998).

On remand, the matter proceeded to the new penalty phase on August 10, 1998. (T. 1) During individual voir dire of the first panel, prospective juror Richard McIver indicated that knowing from the media that a police officer had been killed and left a family would have affect his ability to be fair in determining a defendant's guilt but would not affect his ability to recommend a sentence. (T. 51-55) Prospective juror Pamela Saylor indicated that she had worked for the police with Detective Diecidue, her ex-husband was a police officer and she could not be fair. (T. 68-71) Prospective juror Adolfo Romagosa indicated that he believed Defendant should be sentenced to death because he killed a police

officer. (T. 74-78) Ms. Saylor and Mr. Romagosa were excused for cause by agreement of the parties. (T. 92)

During questioning of the first panel with the entire venire present, prospective juror Jodi Brown indicated that she would not be able to be fair in a case where a police officer was killed. (T. 127-28) Mr. McIver indicated that he was in favor of the death penalty but understood that it was not appropriate in all cases and stated that he would follow the law. (T. 180-81) Prospective juror Jesus Oro stated that he would be more inclined to impose the death penalty because his son was a police officer. (T. 181-82) Ms. Brown and Mr. Oro were also excused for cause by agreement of the parties. (T. 166, 201) Defendant did not attempt to excuse Mr. McIver for cause and instead chose to exercise a peremptory challenge. (T. 371)

During individual voir dire of the second panel, prospective juror John Golden indicated that he felt strongly about the murder of a police officer in the line of duty but agreed to follow the law. (T. 415-16) Mr. Golden was excused by the agreement of the parties. (T. 517-18)

During individual questioning of the third panel, prospective juror Beatriz Bermudez indicated that she would be influenced by the fact that the victim was a police officer because her husband was a police officer. (T. 680-84) Prospective juror William Johnson stated that he had been a police officer and believed that the death penalty was the appropriate penalty for anyone who killed

a police officer. (T. 723-24) However, Mr. Johnson indicated that he would still consider mitigation and if the mitigation outweighed the aggravation "would have no problem, putting aside my personal beliefs and voting for a life sentence." (T. 724-25, 728, 847-48, 875) Prospective juror Christy Banfield indicated that she was against the death penalty and that she believed the law required the imposition of the death penalty for killers of police officers. (T. 736-38) She also stated that she would consider mitigation and would vote for life if the mitigation outweighed the aggravation. (T. 738-39)

Ms. Bermudez was excused for cause by agreement of the parties. (T. 740) Defendant did not attempt to challenge Mr. Johnson for cause and instead chose to exercise a peremptory challenge when he was considered as a alternate juror. (T. 899-900) Defendant made no attempt to challenge Ms. Banfield is any manner. (T. 900) Defendant also did not renew any objections after the jury was selected and before it was sworn. (T. 900-21)

LaSonya Hadley testified that at the time of the crime, she was a drive-through teller at Kislak National Bank. (T. 948-49) Every day, she would arrived at work before 8:00 a.m., would meet with the other drive-through teller, Michelle Chin Watson, and get their money trays, which usually contained no more than $20,000, from the vault. (T. 952, 954) A police officer in full uniform would then meet Ms. Hadley and Ms. Watson at the side door of the bank, escort them to the drive-through booths, wait for them to get

ready and then remove the chain and pole blocking the drive-through entrances. (T. 953-54) On Fridays, the officer assigned to this duty was Steven Bauer, a personal friend of Ms. Hadley. (T. 958-59)

Friday, January 3, 1992, was a particularly busy day at the bank because it was a payday and a day when social security checks were cashed. (T. 959) Ms. Hadley arrived at the bank around 7:30 a.m. and joined Officer Bauer in eating doughnuts in the lunchroom while they awaited the arrival of Ms. Watson. (T. 960) Around 7:45 a.m., Ms. Watson arrived, and she and Ms. Hadley got their money trays from the vault. (T. 960-61)

They told Officer Bauer they were ready to go to the drive-through, and he met them at the side door. (T. 961) Officer Bauer looked out the window in the door to assure that no one was near it and then opened it. (T. 962) Ms. Hadley exited first with Ms. Watson behind her, followed by Officer Bauer, who was singing a song about how busy they were going to be. (T. 963) After Officer Bauer made sure the side door was secure, they started toward the booths. (T. 963)

Just as Ms. Hadley arrived at her booth and started to put her key in the lock, she heard the sound of people rushing toward her. (T. 963-64) She turned toward the noise and saw four men running at them with guns drawn. (T. 964, 973-74) Ms. Hadley checked to she where Officer Bauer was, unlocked her booth, dove into it and hit the alarm button. (T. 964) Ms. Hadley heard three to four

gunshots, followed by Officer Bauer yelling that he had been shot. (T. 964-65) Ms. Hadley came out of her booth and saw Officer Bauer lying on the ground. (T. 968)

Ms. Hadley went to Officer Bauer, and he immediately asked if she was alright. (T. 965) Ms. Hadley responded that she was fine and inquired about his condition. (T. 965) Officer Bauer stated that he was only shot in the leg and would be fine. (T. 965) Ms. Hadley knelt next to Officer Bauer, placed his head in her lap and realized from the amount of blood surrounding them that Officer Bauer's injuries were more serious. (T. 965-66) For a brief period of time, Officer Bauer was still able to speak and continually inquired about the safety of Ms. Hadley and Ms. Watson. (T. 966-67) Thereafter, Officer Bauer lost consciousness. (T. 970)

Ms. Hadley stayed with Officer Bauer until the police arrived. (T. 969) The police took Ms. Hadley and Ms. Watson inside the bank. (T. 969) Shortly thereafter, the police had Ms. Hadley and Ms. Watson accompany them to another area to view two cars. (T. 969) Ms. Hadley was unable to recognize the car and told that Officer Bauer had died when she returned to the bank. (T. 970-71)

Michelle Chin Watson confirmed Ms. Hadley's account of the general procedure. (T. 978-83) She added that each officer assigned to the bank had one day of the week when that officer worked at the bank. (T. 981)

Ms. Watson stated that she arrived at the bank around 7:50

a.m. on the day of the murder, got her cash tray, which contained approximately $17,000, and met Ms. Hadley and Officer Bauer at the door. (T. 983-84) Ms. Watson confirmed that they exited the door and started toward the booths with Ms. Hadley in front, her in the middle and Officer Bauer in back. (T. 984) Ms. Watson stated that she heard a yell, stopped, turned and saw four men, at least two of whom had guns, standing outside of two cars. (T. 984, 989, 996) She again started toward her booth when she heard gunfire. (T. 984) Ms. Watson immediately crouched down and put her head down and her cash tray in front of her. (T. 984-85) One of the men ran up and took her cash tray. (T. 985)

After the cash tray was taken, Ms. Watson heard Officer Bauer, realized that Ms. Hadley had already got to his side, walked over toward them and knelt down. (T. 990-91) Ms. Watson agreed with Ms. Hadley about the conversation with Officer Bauer and his lapse into unconsciousness. (T. 991-92) Ms. Watson stated that when the first police officer arrived, he took Officer Bauer's pulse and Ms. Watson realized the gravity of the situation. (T. 992-93) She immediately became hysterical and was taken into the bank with Ms. Hadley. (T. 993)

After Ms. Watson calmed down, she accompanied the police and Ms. Hadley to the view some cars. (T. 993) However, she was unable to recognize the cars. (T. 994)

Officer Patricia Pereira testified that she was nearing the end of her shift on the day of the crime when she heard a radio

call that shots had been fired at Kislak National Bank. (T. 998-1004) Officer Pereira was concerned because she knew an officer from her department was working off-duty at the bank and immediately headed to the bank. (T. 1004-05) On route, dispatch advised "possible officer down." (T. 1006) Officer Pereira activated her emergency equipment and sped to the scene. (T. 1006-07) As a result, she was one of the first officers at the scene. (T. 1007)

When she approached the drive-through area, Officer Pereira saw Officer Bauer lying on his back in a pool of blood with his gun next to his head. (T. 1008) Officer Bauer was so blue that Officer Bill Prieto told Officer Pereira that Officer Turner, an African-American, was the person who had been shot. (T. 1008-09) The officers tried to remove Officer Bauer's gun belt and shirt to facilitate attempts to save him. (T. 1013) As they did so, Officer Bauer's knife fell out of his gun belt. (T. 1016) As they were removing the shirt and gun belt, Officer Pereira went to remove his watch, and Officer Bauer grabbed her hand and took two final breaths. (T. 1028-29) Fire rescue then arrived, and Officer Pereira moved away so they could work. (T. 1029-30)

Within five to ten minutes, a car matching the description of one of the cars used in the crime was found abandoned about three blocks from the bank. (T. 1032-33) Officer Pereira was dispatched to this location. (T. 1032-33) When she arrived, she noticed a second car that was almost identical across the street. (T. 1033)

Both cars were parked awkwardly, and Officer Pereira noticed that the second car was still running and had a broken window when she approached it. (T. 1033) Officer Pereira secured the area, and arrangements were made for the cars to be processed by crime scene technicians. (T. 1034) She later determined that both cars had been recently stolen. (T. 1035)

Detective Ron Pearce testified that he was working as a crime scene officer on the day of the crime and went to the crime scene when he heard the dispatch that an officer was down at the bank because he knew that Officer Bauer was working there that day. (T. 1046-54) When he arrived, fire rescue was attending to Officer Bauer. (T. 1056-59)

Detective Pearce was then sent to the area were the cars had been found abandoned. (T. 1059) He found two gray Chevrolet Caprices, both of which had their engines running and neither of which had keys in the ignition. (T. 1060) The car on the east side of the street had a partial open rear passenger door and a piece of the ignition on the floor board. (T. 1060) The rear window of one of the cars was broken. (T. 1061) Detective Pearce had the cars towed to the secured garage at the Medical Examiner's office to facilitate processing the cars for evidence. (T. 1062)

After the cars were towed, Detective Pearce returned to the bank. (T. 1063-64) The pillar next to where Officer Bauer was lying had two marks on it where it had been struck by bullets. (T. 1066-68) The higher of the two marks was 58½ inches from the

ground; the lower one was 31 inches above the ground. (T. 1067, 1095-96)

Detective Pearce found two bullet fragments and a casing from a .9 mm. shell. (T. 1071-73) The bullets would have fragmented from hitting something such as the pillar. (T. 1072) Detective Pearce also recovered Officer Bauer's service weapon, which was loaded with 16 live rounds. (T. 1074-75) Officer Bauer's gun's capacity was 16 rounds, as such it did not appear to have been fired. (T. 1075) Detective Pearce also took custody of Officer Bauer's gun belt, his keys and his police identification. (T. 1076-77) Officer Bauer's handcuffs were on his gun belt. (T. 1081)

The clothing Officer Bauer had been wearing had been cut off of him, and Detective Pearce recovered it. (T. 1077-78) The shirt was a uniform shirt and had official police patches sewn on each shoulder. (T. 1078) There was also a badge on the left breast area of the shirt. (T. 1079) The shirt had a bullet hole in the rear neck area. (T. 1078) Officer Bauer was also wearing a police radio, which Detective Pearce impounded. (T. 1079)

On February 7, 1992, Detective Pearce went to the Pisces Hotel to meet with divers from Metro-Dade Police, who were searching the canal behind the hotel. (T. 1082-83) The divers recovered the money tray that was stolen from the bank. (T. 1083-84)

Detective Donald Diecidue testified that he was a homicide investigator with the North Miami Police Department and went to the

scene the morning of the crime. (T. 1088-90) When he arrived, fire rescue was working on Officer Bauer and told Detective Diecidue that it did not look good. (T. 1092-93) He conducted an area canvas and interviewed witnesses. (T. 1093) The witnesses described three cars fleeing the scene: a red Cougar and two gray Chevrolets. (T. 1094) It was later determined that the Cougar had been in line to go through the drive-through behind the gray Chevrolets, and the driver had fled for his own safety when he heard the gun shots. (T. 1094)

During the two weeks after the crime, a reward was offered for information leading to the arrest and conviction of the perpetrators of this crime. (T. 1096-97) The reward eventually reached the amount of $100,000. (T. 1097) On January 17, 1992, a Santero, a priest in a Hispanic religion, came forward with the name of someone who had information about the crime. (T. 1097-98) This person was interviewed and charged with the crime. (T. 1098) After speaking to this person, the police did further investigation and came into contact with Defendant. (T. 1098-99)

The following morning Defendant was found, taken to Metro-Dade Police Headquarters, and interviewed. (T. 1099-1100) Prior to questioning, Defendant was read his *Miranda* rights, waived them and executed a waiver form. (T. 1102-07) Defendant was not threatened to obtain the waiver, and no promises were made to him. (T. 1107-08) Defendant never requested an attorney. (T. 1108) Defendant

did not seem to be intoxicated at the time. (T. 1126-27) Defendant did not claim to have any mental problems, did not exhibit any such problems and did not appear to have any symptoms of any deficits as the result of having been a fighter. (T. 1127-31) Defendant gave both an oral statement and a tape recorded statement. (T. 1108-09)

In his statement, Defendant asserted that he met Leonardo Franqui around Christmas and that Franqui told him that he was planning a bank robbery. (T. 1109-11) Franqui informed Defendant that the plan was to take cash boxes from two tellers who would be accompanied by an armed guard. (T. 1110-11) Defendant willingly agreed to participate. (T. 1110)

On the morning of the murder, Franqui picked up Defendant in his white Buick Regal, which was repainted to blue after the crime. (T. 1112) They then picked up Pablo San Martin. (T. 1112-13) They drove to where the two gray Chevrolets have been left, Defendant and Franqui got into one, two other participants got into the other and Pablo Abreu took Franqui's Buick. (T. 1113) Defendant assumed that the Chevrolets had been stolen but did not know the details of the taking. (T. 1150) They drove the Chevrolets to the bank, parked them in the drive-through lanes, went to a bakery and discussed the plan. (T. 1113-14) Before the bank opened, they returned to the cars. (T. 1114) Defendant and Franqui were at one car, and San Martin and Fernando Fernandez were at the other. (T. 1114)

When Officer Bauer and the tellers emerged from the bank, Franqui and Defendant jumped out of the car, and Franqui yelled freeze in Spanish. (T. 1115) They started toward Officer Bauer, and Officer Bauer went for his gun. (T. 1115) Defendant and Franqui started firing their guns. (T. 1115) Franqui's gun was a chrome .9 mm semi-automatic, and Defendant's gun was a black .38 revolver. (T. 1115, 1151-52) Defendant never described any of the other participants as having a gun or possessing the revolver. (T. 1125-26) Defendant stated that Franqui gave him the gun between the time he went to the bakery and the time they returned to the bank. (T. 1151) Defendant claimed that he only fired once and that Franqui fired three or four shots. (T. 1123) Defendant stated that in approaching Officer Bauer, he got close enough to hear Officer Bauer moaning. (T. 1125)

The only motive Defendant reported for his participation in this crime was his desire for money. (T. 1131-32) Defendant did not claim that anyone forced him to participate. (T. 1132)

On cross examination, Detective Diecidue stated that he ran a computer check of Defendant. (T. 1145) He found that Defendant had no outstanding warrants and no prior convictions. (T. 1145)

Detective Diecidue admitted that Defendant had claimed that he did not know he would be armed until he was given the gun. (T. 1153) Instead, Defendant asserted that he thought that he would only be responsible for taking one of the cash trays. (T. 1153-54) Defendant claimed that Franqui was supposed to handle security.

(T. 1155) Defendant asserted that Franqui and Fernandez planned the crime. (T. 1154-55)

On redirect, Detective Diecidue testified that Defendant knew the plan. (T. 1157) Detective Diecidue stated that the plan was altered at the bakery and that Defendant willingly accepted the gun when it was given to him without any attempt to resist. (T. 1157)

Detective Albert Nabut testified that he heard the radio dispatch regarding the shooting of Officer Bauer as he was driving to work and went to the bank. (T. 1158-60) As a result, he became a part of the task force investigating the crime. (T. 1160)

On January 21, 1992, Detective Nabut went to a drainage canal near the corner of N.W. 18th Avenue and 10th Street. (T. 1161-62) He went there to find a couple of guns. (T. 1162) However, he decided to continue the search the next day because he arrived there in the evening and the water was murky. (T. 1161-62) The next morning, Detective Nabut returned to the site with a team of divers. (T. 1162-63) At first the divers were unable to find anything because of the condition of the water, the condition of the canal bed and the amount of debris in the canal. (T. 1162) However, they immediately located the guns after moving slightly south. (T. 1163) The guns were wrapped in plastic. (T. 1164)

One of the recovered guns was a Smith & Wesson .357 caliber revolver, which is capable of firing .38 caliber bullets. (T. 1165-66) The other gun was a Smith & Wesson .9 mm semiautomatic. (T. 1166-67) The guns were taken directly to a ballistics

examiner. (T. 1167)

Lieutenant Richard Spotts, Officer Bauer's partner, testified that he arrested Defendant on January 18, 1992, took him to the police station and sat with him until Detective Diecidue could arrive to interview him. (T. 1168-78) During this time, Defendant appeared normal, was asked if he wanted any food or drink, and was given the glass of water he requested. (T. 1175-78) When Detective Diecidue arrived, Lt. Spotts left the interview room. (T. 1178)

After Defendant gave his statement, Lt. Spotts went back in the room and requested and obtained consent to search the 1983 Toyota Defendant was driving at the time of his arrest and Defendant's residence. (T. 1173, 1178-81) Lt. Spotts then went to Defendant's home and searched it. (T. 1181-82) In a gym bag in Defendant's bedroom closet, Lt. Spotts found $1,200 wrapped in tissue paper. (T. 1182-84) He also found a 12 gauge shotgun in Defendant's room. (T. 1237)

As a result of the search, a decision was made to reinterview Defendant. (T. 1238) Lt. Spotts again read Defendant his *Miranda* rights, Defendant waived those rights and he executed another waiver form. (T. 1238-43) Defendant appeared to be alert, awake and coherent at the time. (T. 1239-40) Defendant was not threatened, no promises were made to him and he did not request a lawyer at any time. (T. 1244)

Defendant then made additional oral and tape recorded statements. (T. 1244-47) In these statement, Defendant asserted that after the robbery, the perpetrators when to Pablo Abreu's apartment and split the proceeds. (T. 1245-46) Defendant received $1,500 as his share. (T. 1246)

After getting the statement, Lt. Spotts explained to Defendant that he had been Officer Bauer's partner and asked him to explain what happened. (T. 1250) Defendant responded that he and Franqui arrived at the bank in a stolen gray Caprice and they had two other accomplices at the bank with them. (T. 1250) When Officer Bauer and the tellers exited the bank, he and Franqui exited the car. (T. 1250) He had a black .38 caliber revolver and Franqui had a semiautomatic. (T. 1250) Defendant stated that they told Officer Bauer not to move, and Officer Bauer ducked behind a pillar. (T. 1250) However, Defendant and Franqui were on opposite sides of the pillar so Officer Bauer was unable to hide. (T. 1250-51) Defendant claimed that Franqui fired first and that he then fired, aiming low, and thought he striking the pillar. (T. 1251) At the time he fired, Defendant was close enough to Officer Bauer to hear him moaning. (T. 1252)

During the rendition of this account to Lt. Spotts, Defendant did not claim that his wife made him commit the crime. (T. 1252) Defendant did not assert that he was sick, suffered from headaches or was unable to work. (T. 1252) Defendant appeared to be coherent, calm and cooperative. (T. 1252)

Lt. Spotts explained that working at the bank was Officer Bauer's permanent off-duty job. (T. 1254) The job was considered official police business, and full police uniforms were worn while performing it. (T. 1254) Frequently, officers take other work with them while on these type of assignments. (T. 1255) In fact, Lt. Spotts had to retrieve files that Officer Bauer had with him at the bank that day after the crime. (T. 1255)

Detective Gregory Smith testified that he had reviewed the police reports, depositions of various police officers and those officers' prior trial testimony. (T. 1265-70) Based on this review, Detective Smith stated that the guns recovered by the divers with Detective Nabut were a Model 19 Smith & Wesson revolver and a Model 39 Smith & Weason .9mm semiautomatic pistol. (T. 1270-71) These guns, the casing found at the scene, the bullet fragments found at the scene and the bullets recovered from Officer Bauer's body during the autopsy were all submitted for ballistics examination. (T. 1273-75) The casing and the bullet recovered from Officer Bauer's left thigh were conclusively matched to the .9mm pistol. (T. 1276) The bullet recovered from Officer Bauer's chest was conclusively matched to the .38 caliber revolver. (T. 1277) Detective Smith also stated that the firearms examiner had determined that the bullets were fired from at least 30 inches from Officer Bauer. (T. 1276)

Dr. Michael Bell, a Board Certified forensic pathologist testified that he was the Deputy Chief Medical Examiner for Dade

County. (T. 1280-85) He stated that Dr. Jay Barnhart had performed the autopsy on Officer Bauer but had since retired. (T. 1285-88) Dr. Bell reviewed Dr. Barnhart's reports, file and prior testimony to prepare for his testimony in this matter. (T. 1286-87) They reflected that at the time fire rescue arrived at the bank, they found that Officer Bauer had no pulse, blood pressure or respiration. (T. 1289) They ran an EKG and found no heart activity. (T. 1289-90)

Once Officer Bauer arrived at the hospital, the doctors performed open heart surgery and repaired the gun shot wound to the heart. (T. 1290) However, they were unable to save Officer Bauer's life. (T. 1290)

As part of his examination, Dr. Barnhart had examined Officer Bauer's shirt. (T. 1290-91) He found a hole in the back of the shirt near the neck, which corresponded with an entrance wound on Officer Bauer's upper back. (T. 1291)

On external examination, Dr. Barnhart found abrasions on Officer Bauer's knuckles and right elbow. (T. 1294) They were consistent with having been sustained in a fall. (T. 1295) He also found two gunshot wounds. (T. 1296) One was an entrance wound on the left hip. (T. 1296) The second was an entrance wound in the back at the base of the neck. (T. 1306-07) Dr. Bell opined from the shape of the wound on the hip that the bullet that caused the wound had struck something else before entering Officer Bauer's body. (T. 1297-99) He asserted from the shape of the wound on the

back that the bullet had entered the body at an angle. (T. 1307-08) From the fact that the head was not struck, the head had to be forward at the time of the shot. (T. 1308-09) This was consistent with Officer Bauer falling or stumbling as a result of the hip wound at the time he was struck in the back. (T. 1309)

During the internal examination, the bullets were removed from the body. (T. 1299) The bullet recovered from the hip wound had been flatten longitudinally. (T. 1300-01) This flattening was not consistent with path the bullet took through the body. (T. 1301) It was consistent with the bullet having struck the edge of pillar that Officer Bauer was trying to get behind in the area of the lower mark on that pillar. (T. 1301-02)

The bullet that entered Officer Bauer's left hip lodged in the outer portion of the bone and did not fracture it. (T. 1303) The bullet did not pass through any other vital structures, such as blood vessels, in the body. (T. 1303) This wound would have been painful but would not have impaired Officer Bauer's mobility and would have been life threatening. (T. 1303-04) However, Officer Bauer may have reacted to the pain by falling or doubling over. (T. 1303) Cloth fibers were also found in the wound track, which was consistent with the bullet having ricocheted and not with it having entered directly. (T. 1304-05)

The bullet that entered the back had a downward trajectory, consistent with the shooter having been above the victim or with the victim having been bend down. (T. 1307) It fragmented once

inside the body. (T. 1310-11) The bullet passed through the back muscles, struck a rib, went through the left lung, through the left ventricle of the heart and came to rest next to the diaphragm. (T. 1312-14)

All of the injuries resulting from this gunshot would have been survivable except the injury to the heart. (T. 1313-14) However, the injury to the heart was not survivable because it would prevent the heart from circulating blood properly and would bleed profusely. (T. 1314-15) Death from this type of wound would not be instantaneous but would have occurred within two to four minutes. (T. 1316, 1322) A person receiving this type of wound would be conscious until he lost a sufficient amount of blood, which would take a minute or two. (T. 1316-17, 1322) The bullet that entered Officer Bauer's back was the cause of his death. (T. 1318)

After the State rested, Defendant presented the testimony of Hilario Andino. Andino's testimony had been videotaped and was played for the jury. (T. 1335) Andino stated that he was Defendant's paternal grandfather and a retired truck driver, who had been employed by the City of San Juan. (T. 1336-37, 1343)

Andino testified that Defendant was born in Puerto Rico and that Defendant lived on and off with Andino and his wife as a child, starting when Defendant was three months old. (T. 1337-38) When Defendant was not living with his grandparents, he would live with his mother, who initially lived in Puerto Rico and then moved

to New York. (T. 1338) When Defendant lived with his grandparents, they provided him with everything he needed and were affectionate toward him. (T. 1339) When Defendant lived with his mother, he was always in contact with his grandparents by phone and letter. (T. 1342)

Andino recalled Defendant complaining of headaches. (T. 1339) However, Andino could not recall when Defendant first raised these complaints but knew it was when Defendant was a little boy. (T. 1339, 1351-52) Andino stated that Defendant had never been seriously injured when he lived with them. (T. 1351) Andino and his wife sought medical treatment for Defendant's headaches. (T. 1352) The headaches did not affect Defendant's temperament. (T. 1352)

Defendant never caused any problems when he lived with them. (T. 1339-40) He did not stay out or come home late. (T. 1341) He never had any problems with the neighbors or the police. (T. 1341) Defendant was always respectful to his grandparents. (T. 1341) Defendant was very religious and attended church regularly with his grandparents when he lived with them. (T. 1345)

When Defendant was 15 or 16 years old, he came to live with his grandparents and remained there for two or three years. (T. 1340) During this time, Defendant was practicing boxing. (T. 1340) His grandparents did not like the fact that Defendant was boxing but permitted him to do so because that was what he wanted. (T. 1340-41)

Andino stated that Defendant had always been quiet and respectful, was a noble person and had never reacted in an angry or aggressive manner. (T. 1344) Defendant was adored by both Andino and his wife. (T. 1345-46)

When Defendant lived with his grandparents, they made sure he got a good education. (T. 1349) At their home, Defendant had his own room and visited with his father daily. (T. 1350-51) When Defendant was eighteen or nineteen, Defendant returned to the United States, which may have been Defendant or his mother's idea. (T. 1351) Since that time, Andino had not seen Defendant but had been in contact with him. (T. 1354) Defendant's grandparents did not attend his wedding and had never met his wife. (T. 1354)

Dr. Wagschul's testimony from the prior trial was read to the jury. (T. 1359-60) Dr. Wagschul, a Board Certified Neurologist, stated that he examined Defendant. (T. 1360-62) He also reviewed Defendant's medical records, which showed a history of headaches, dizziness and near fainting episodes starting in 1990. (T. 1363) At that time, Defendant was found to be neurologically normal, and the headaches were diagnosed as tension headaches. (T. 1363)

When Dr. Wagschul took Defendant's history, Defendant claimed that he had struck the front of his head against a wall when he was between 10 and 14 years old. (T. 1364) Defendant asserted that he lost consciousness for several hours as a result and was hospitalized for a day. (T. 1364) Defendant claimed that a scar on his head was from this incident. (T. 1364-65) Defendant stated

that between the ages of 14 and 20, he suffered from severe intermittent headaches. (T. 1364)

Defendant also claimed that he had received multiple blows to the head when he was boxing. (T. 1364) Defendant also asserted that he was struck in the head in 1988, while working and that he was knocked to the ground as a result of the blow but did not lose consciousness. (T. 1364)

Dr. Wagschul did a neurological and general physical examination on Defendant. (T. 1365) He also performed an electroencephalogram (EEG) on Defendant, which yielded normal results. (T. 1365-66) However, Dr. Wagschul decided to have an MRI done of Defendant's brain. (T. 1366) The MRI showed two cavities in the middle of Defendant's brain that were filled with spinal fluid, which is common in boxers. (T. 1368-69) This type of injury could cause sudden changes in mood and behavior. (T. 1370) Dr. Wagschul diagnosed Defendant as suffering from pugilistic encephalopathy. (T. 1370-71)

On cross examination, Dr. Wagschul admitted that Defendant performed perfectly normally on all of the neurological tests. (T. 1372-74) He also acknowledged that the literature he had read did not show a link between pugilistic encephalopathy and commission of robbery or murder. (T. 1374-75)

When Defendant attempted to call Dr. Brad Fisher, the State objected on the ground that his testimony did not satisfy *Frye*.

(T. 1391) The State asserted that predictions of future dangerousness were not scientifically accepted. (T. 1392) Defendant proffered that Dr. Fisher had done his thesis in prediction future dangerousness and had researched in the area for 20 years. (T. 1394-99) In response to questions from the trial court, Dr. Fisher stated that he had been qualified as an expert many times and had never failed to be qualified. (T. 1400-01) He was not aware of any case in which he had testified being reversed because of his testimony. (T. 1401)

In response to questions from the State, Dr. Fisher stated that he could not guarantee that his predictions would be correct. (T. 1401-02) He admitted that had he evaluated Defendant the day before the crime, he would not have predicted that Defendant would have killed Officer Bauer. (T. 1403-04) Dr. Fisher also acknowledged that a lay person could have looked at the same factors he did not reach his own conclusion. (T. 1402)

The trial court admitted that it had no evidence before it to show that Dr. Fisher's theories were generally accepted in the scientific community. (T. 1408-09) However, the trial court decided to admit the testimony. (T. 1409)

Before the jury, Dr. Fisher testified that he developed a system for predicting future dangerousness. (T. 1416) To make the determination, one looks at the defendant's past criminal activity in terms of severity, recency and frequency and the defendant's past behavior while incarcerated. (T. 1417-18) Some experts also

look at the defendant's drug use and his family circumstances. (T. 1418)

To prepare for his testimony in this case, Dr. Fisher reviewed Defendant's prison records, his medical records, his school records and the reports of the other experts in this case. (T. 1424-25) He also interviewed Defendant. (T. 1423) He also reviewed the police reports and Defendant's confession. (T. 1425)

Dr. Fisher found Defendant was not psychotic, had no major mental disturbance, was not retarded, and did not use drugs or alcohol. (T. 1423-24, 1428, 1436-37) Dr. Fisher admitted that he saw no signs that Defendant had suffered any damage as a result of having boxed. (T. 1440-41) Dr. Fisher believed that Defendant had no prior criminal history and had received no disciplinary reports while incarcerated. (T. 1426-27) Based on this information, Dr. Fisher opined that Defendant would make a good adjustment to prison. (T. 1428)

On cross, Dr. Fisher admitted that he had never testified for the prosecution and frequently testified for defendants seeking to avoid death sentences. (T. 1432-33) He admitted that he had testified that Manuel Valle would be a model prisoner before his escape attempt and that Valle would be nonviolent after it. (T. 1437-39)

Dr. Fisher acknowledged that Defendant was kept in an extremely restricted environment in prison, with little interaction with other inmates and a great deal of security. (T. 1439-40)

However, Dr. Fisher still considered it surprising that Defendant had no disciplinary reports. (T. 1440)

Dr. Fisher admitted that his predictions could be wrong. (T. 1443) Further, he acknowledged that he would have been wrong had he been asked to predict Defendant's future dangerousness the day before the crime. (T. 1444-45)

Before the trial court only, Dr. Fisher admitted that Defendant's other expert was going to claim that he did not have the ability to control his actions. (T. 1449-50) However, Dr. Fisher did not think this affected his opinion because Defendant had never been impulsive either before or after the crime. (T. 1450)

Dr. Hyman Eisenstein, a neuropsychologist, testified that he became involved in this matter because of a recommendation from Dr. Merry Haber. (T. 1464-70) He read Defendant's school records, medical records, the police reports and his confession, interviewed Defendant and gathered information about his family history. (T. 1470-71)

In the interview, Defendant stated that he was raised with a great deal of love and concern by both his mother and his paternal grandparents. (T. 1472) He averred that he had worked for Sola Pan American Optical lens for 2½ to 3 years and had then taken a job as a delivery truck driver. (T. 1473) He claimed that he struck his head on a wall when he was 10 years old and started having migraines when he was 12 years old. (T. 1473) He stated

that he had begun boxing at age 13, had 10 major bouts and was once nearly knocked unconscious. (T. 1474)

Defendant stated that he had been married for a year and a half and that the marriage was stressful. (T. 1475) His wife wanted the good things in life and he had to provide them. (T. 1476)

Dr. Eisenstein tested Defendant's motor functions and found a weakness in the grip strength in his left hand. (T. 1481-82) On the finger tap test, Defendant scored in the high normal range with his right hand and in the normal range with his left hand despite the fact that he had lost his left index finger in an accident. (T. 1483-84) On the pegboard test, he was normal with his right hand and mildly impaired with the left hand. (T. 1484) This again could have been due to his hand injury. (T. 1484-85)

Dr. Eisenstein tested Defendant's sensory perceptions. (T. 1485) On the Ray Complex Figure test, Defendant scored in the high normal range. (T. 1485) On the Hooper visual test, the results were normal, as they were on the trail making test. (T. 1485-86) However, he found a mild impairment in matching numbers to letters. (T. 1486)

In the language testing, Defendant performed in the profoundly impaired range on the Boston Naming test. (T. 1498) However, Defendant scored in the normal range in the fluency test. (T. 1500) On reading articulation, Defendant scored in the mildly retarded rangle. (T. 1500) On the receptive language test, the

results were borderline. (T. 1500) On the WAIS-R, Defendant had a verbal IQ of 76, a performance IQ of 89 and a full scale IQ of 80, in the lower average range. (T. 1501)

On the Minnesota Multi-Phasic Personality Inventory (MMPI), Defendant had difficulty reading the questions. (T. 1502) However, Defendant did not appear to be malingering. (T. 1504) It showed Defendant was severely anxious, implusive and introverted. (T. 1505)

Defendant also responded to stress from his incarceration, his trial and his marriage. (T. 1507) According to Dr. Eisenstein, these stressors and Defendant's implusivity and poor frustration tolerance caused him to use poor judgment. (T. 1511) Defendant also scored in the mildly impaired range on a decision-making test. (T. 1512)

Defendant's school records showed that he was learning disabled. (T. 1513) It indicated that at 12 years old, Defendant's verbal IQ was 64, his performance IQ was 91 and his full scale IQ was 75. (T. 1513)

Defendant's medical records included a normal head CT. (T. 1516) It indicated that Defendant had been treated for anxiety, tension head aches and depression. (T. 1516-17)

Dr. Eisenstein opined that Defendant was under extreme mental or emotional distress at the time of the crime. (T. 1518) Dr. Eisenstein claimed that this was a result of the stress of his marriage, having grown up in two countries, his language deficits,

his learning disability, his anxiety and his brain injury. (T. 1518) Dr. Eisenstein believed Defendant committed the crime to get money to make his wife happy. (T. 1519)

On cross examination, Dr. Eisenstein admitted that Defendant had a score of 93 on the Beta IQ test. (T. 1522) He admitted that at the time he examined Defendant he had been convicted and was facing the possibility of a death penalty. (T. 1523-24) As such, the fact that Defendant was nervous, anxious and depressed was not unusual. (T. 1523-24) He acknowledged that Defendant had told him that he committed the crime for money to please his wife and that he had falsely confessed because of pressure from the codefendants. (T. 1524-25) However, he did not consider this contradiction uncommon. (T. 1525) He also stated that Defendant had lied to him regarding his grades in school. (T. 1528)

Dr. Eisenstein also admitted that Defendant's headaches were controlled with Tylenol and Motrin. (T. 1525) He acknowledged that there was information that the headaches had occurred since Defendant was a yound child and were unrelated to any alleged head injury. (T. 1526)

Dr. Eisenstein stated that he devoted a percentage of his time testifying for defendants facing the death penalty but had never testified for the State in a penalty phase. (T. 1527) He admitted that he had not attempted to learn the facts of the crime prior to reaching his conclusions. (T. 1527-28)

He admitted that the difference in the grip tests might have

been normal due to the difference between use of one's dominant hand. (T. 1529-30) Further, the loss of the finger could have affected the tests. (T. 1530) He acknowledged that the movement between the United States and Puerto Rico was not frequent and that Defendant was well loved and cared for in both places. (T. 1531-32) He stated that there was no evidence of abuse or neglect in either family setting. (T. 1539-40) In fact, he acknowledged the possibility that Defendant was spoiled. (T. 1540) He admitted that Defendant was never knocked unconsious as a result of his boxing. (T. 1532)

Dr. Eisenstein acknowledged that the desire of a spouse that her spouse would get a better paying job was not unusual. (T. 1534) He stated that Defendant's wife did not suggest that he commit the crime. (T. 1534-35) Instead, the idea to participate was Defendant's own. (T. 1535) In fact, Dr. Eisenstein had to admit that Defendant used some of the proceeds on himself and kept the rest without sharing with his wife. (T. 1535)

Dr. Eisenstein stated that Defendant's score on the figure copying test was extremely high. (T. 1537-38) He admitted that he was assuming that his tests indicated Defendant's level of performance at the time of the crime despite the fact that they were not performed until two and a half years later. (T. 1538) However, changes in a person's life over that time, including increases in anxiety and depression, could have affected the scores. (T. 1538)

Dr. Eisenstein admitted that Defendant knew right from wrong, and claimed that he simply used bad judgment in being involved in the crime. (T. 1538-39) He acknowledged that the same was true of most criminals. (T. 1539)

Dr. Eisenstein admitted that most of the disfunction he found in Defendant were verbal and language problems. (T. 1540-41) These difficulties might be accounted for by the fact that Defendant spoke English as a second language. (T. 1541)

Dr. Eisenstein admitted that he had previously defined "extreme" in the context of the extreme mental or emotional disturbance mitigator as "a little bit more than a little." (T. 1542) However, he now described Defendant as profoundly impaired because he was too implusive to contemplate the consequences of his actions. (T. 1545) He believed this despite the fact that Defendant agreed to participate in the crime 10 days in advance and that Defendant had never needed any treatment for this implusivity. (T. 1543, 1545)

Juan Rivero, Defendant's half-brother on his mother's side, testified that Defendant was loved and cared for when he lived with his mother. (T. 1556-58) Rivero saw Defendant box four times, and Defendant received injuries to his face as a result. (T. 1559-60) When they were little, Defendant had chased Rivero, missed him and struck his head on a wall, cutting his forehead. (T. 1561) After this, Defendant complained of headaches, which got worse after the boxing. (T. 1562) Rivero stated that Defendant was quiet and

nonviolent. (T. 1562-63)

Rivero stated that Defendant's wife wanted the good things from life and he could not provide them. (T. 1564) As a result, they argued, and she pressured him to get a better job. (T. 1564) The relationship caused Defendant to be unhappy. (T. 1565)

Cynthia Santana's prior testimony was read to the jury. (T. 1568) She is Defendant's cousin and reiterated that Defendant came from a loving family and that Defendant's wife pressured him to make more money. (T. 1568-72)

Rafael Santana, Defendant's stepfather, stated that Defendant was a calm, quiet, respectful, hard-working person. (T. 1575) He stated that he once saw Defendant knocked dizzy in a boxing match. (T. 1576) He agreed that Defendant's wife demanded that he make more money and that he became depressed as a result. (T. 1578-80)

Margarita Santana, Defendant's mother, testified that Defendant was the product of an affair she had with his father. (T. 1582-84) Because her mother was sick, Ms. Santana left Defendant in his grandparent's care. (T. 1584-85) After her mother died, Ms. Santana moved to the United States and sent for Defendant. (T. 1585-86) When he lived with her, Defendant was a calm, quiet, shy child who did not cause any trouble. (T. 1586-87) She confirmed that Defendant had an accident and struck his head as a child. (T. 1587) She also agreed that Defendant boxed and injured his face doing so. (T. 1588-89) She also confirmed that Defendant's wife wanted a better life and that he was depressed.

(T. 1589-90)

Sonia Gomez, Defendant's stepmother, confirmed that Defendant was quiet and good. (T. 1670-71) She also stated that she saw Defendant struck in the head while boxing. (T. 1671-73)

Cruz Gonzalez, Defendant's aunt, agreed that Defendant was a sweet, quiet boy. (T. 1681) When Defendant was with his grandparents, his father visited him every day. (T. 1682) She was aware that Defendant had headaches from the time he was young. (T. 1683)

The prior testimony of Defendant's father Carlos Gonzalez was read to the jury. (T. 1686) He claimed that Defendant lived with his mother until he was 9 months old and accompanied her when she moved to the United States. (T. 1688-89) Thereafter, he lived with his grandparents. (T. 1689) He confirmed that he saw Defendant every day when he lived there. (T. 1691) Defendant was returned to live with his grandparents because his mother could not afford to keep him and he might have had behavior problems. (T. 1683)

He admitted that Defendant boxed and was struck in the face. (T. 1698) However, he denied that Defendant's face was ever injured. (T. 1698-99) He admitted that Defendant had headaches but stated that they did not affect his behavior. (T. 1700)

After Defendant completed the presentation of his case, the jury was informed of the sentences given Pablo Abreu and Pablo San Martin. (T. 1709) During the charge conference, Defendant did not

argue that the aggravating factors related to Officer Bauer's status as a police officer were precluded by the fact that the life sentence had already been enchanced. (T. 1641-65, 1712-43)

During closing argument, the State contended the fact that Officer Bauer was a police officer was particularly weighty aggravation. (T. 1747-49) The State then asked the jury in considering the mitigation to use their common sense. (T. 1749-51) The State then pointed out that the testimony of the defense experts did not make common sense. (T. 1751) Defendant did not object to this comment. (T. 1751) The State then suggested that Dr. Eisenstein's testimony that Defendant acted implusively was contrary to the evidence that he agreed to participate in the crime ten days in advance. (T. 1754) Further, the fact that Defendant and Franqui outflanked Officer Bauer as he sought cover behind the pillar. (T. 1754)

The State also pointed out that Defendant did not state that he was stressed by his wife's alleged demand for more money until 2½ years after the crime. (T. 1778-79) Further, the State explained that Defendant did not give any of the money to his wife or use it for her benefit. (T. 1179) The State also argued that Defendant did not show any signs of damage because of his boxing and there was a huge time lapse between the boxing and the crime. (T. 1780)

When the State argued that the capacity to conform mitigating factor was not supported by the evidence, Defendant objected to the

"form of the argument." (T. 1781-82) The trial court informed the jury that it was argument and it would instruct the jury on the law. (T. 1782) The State asserted that if Defendant truly could not conform his conduct to the requirements of the law, he would have had problems before or after the crime. (T. 1782)

The State outlined the fact that no connection had been made between the fluid filled cavities in Defendant's brain and any actual impairment. (T. 1784-85) The State then started to comment on the defense experts. (T. 1785) In doing so, the State asserted, "[t]here's a quote from Frank Lloyd Wright, who was a famous architect, about experts. And I think in one sentence or two, he summarizes my beliefs about the next few people I'm going to talk about." (T. 1785) Defendant objected to the State's expression of beliefs, and the trial court sustained it and admonished the prosecutor. (T. 1785) Contrary to Defendant's assertion, the State then quoted Wright regarding experts not being logical. (T. 1785) The State then argued that Dr. Fisher's prediction of future dangerousness was not scientific. (T. 1786-87)

The State pointed out that Dr. Fisher's opinion that Defendant had no major mental illness and was not retarded conflicted with Dr. Eisenstein. (T. 1787) The prosecutor then noted that his trial partners had urged him to cross examine Dr. Fisher more vigorously, and Defendant objected. (T. 1787-88) The trial court overruled the objection. (T. 1788) The State asserted that Dr.

Fisher was unreliable because he would have predicted that Defendant would not have committed this crime. (T. 1788) The trial court reversed its prior ruling and instructed the jury to disregard the comment regarding the thoughts of the prosecutors. (T. 1788-89)

Prior to the comencement of jury deliberations, the trial court excused the alternate jurors, including Ms. Banfield. (R. 180, T. 1840) After the jury had retired to deliberate, Defendant moved for a mistrial because of comments in closing. (T. 1843-45) Defendant asserted that the comment regarding the dispute between the prosecutors was improper. (T. 1844) The trial court agreed but noted that it had given a curative instruction. (T. 1844-45) Further, the trial court noted that this motion was not timely given the number of recesses since the comment. (T. 1845) As such, the trial court denied the motion. (T. 1845) After deliberating, the jury returned an advisory sentence of death by a vote of 8 to 4. (R. 219, T. 1851-52)

At the *Spencer* hearing, Defendant proffered his jail records to establish that he had not received any disciplinary reports while in custody. (R. 308-09) Defendant also personally addressed the trial court and claimed that he had been rehabilitated and was remorseful. (R. 310)

The State presented a statement from Michael Bauer, the victim's brother, who was emotionally unable to address the court

himself. (R. 313) In the statement, Mr. Bauer expressed the devastation that had been visited upon his family by the loss of Officer Bauer. (R. 313-22) Mr. Bauer explained that the stress from the incident had caused him to have a heartattack and forced him into early retirement. (R. 317-18)

The trial court sentenced Defendant to death. (R. 245-60, 364) The trial court found in aggravation that: (1) Defendant had committed prior violent felonies, based on the contemporanous armed robbery and aggravated assault; (2) the murder was committed during the course of a robbery; (3) the murder was committed for pecuniary gain; (4) the murder was committed to avoid a lawful arrest; (5) the murder was committed to hinder the enforcement of laws; and (6) the victim was a law enforcement officer engaged in the lawful performance of his duties. (R. 245-48, 346-49) The trial court merged the pecuinary gain and during the course of a robbery aggravators and gave them great weight. (R. 246, 346-47) The trial court also merged the prevent lawful arrest, the hinder law enforcement and murder of a law enforcement officer aggravtors and gave them great weight. (R. 247-48, 348-49) The trial court also gave some weight to the prior violent felony aggravator. (R. 246, 346)

In mitigation, the trial court found: (1) Defendant had no significant prior criminal history - some weight; (2) Defendant’s brain damage, learning disability and below average intelligence - little weight; (3) Defendant’s remorse - little weight; (4)

Defendant’s cooperation with the authorities - little weight; (5) the life sentences given to two codefendants - little weight; and (6) Defendant’s good conduct while incarcerated and potential for rehabilitation - little weight. (R. 249, 257-58, 349-50, 360-62) The trial court considered and rejected the extreme mental or emotional distress mitigator, the minor participation mitigator, the duress mitigator, the capacity to conform mitigator, and the age mitigator. (T. 249-55, 350-59) The trial court also rejected the claim that Defendant’s family background should be considered mitigating. (T. 256, 359-60)

This appeal follows.

SUMMARY OF THE ARGUMENT

Any issue regarding the admissibility of the codefendants' confessions is barred by law of the case. The fact that the United States Supreme Court has now agreed with this Court's analysis of why admitting the confessions was error does not present a compelling reason to revisit this Court's ruling that the error was harmless. Moreover, any error was indeed harmless.

The fact that the Legislature has eliminated parole eligibility for murderers of police officers does not result in double consideration of an aggravating circumstance. Lack of parole eligibility is a mitigating, not an aggravating, factor. Further, the use of the police officer victim aggravating factor does limit the class of defendants for whom death is appropriate.

The trial court's rejection of the extreme mental or emotional distress mitigating factor is supported by competent, substantial evidence. The testimony in support of this factor was contradicted by the facts of the case, Defendant's life history and the testimony of other defense witness.

Issues related to the comments by the prosecutor during closing are unpreserved. Defendant either did not object or his objection was sustained and he did not contemporaneously request any further relief. Further, the comments were proper, and any error was harmless.

Defendant's sentence is proportionate. This Court has

affirmed death sentences in similar circumstances. The cases relied upon by Defendant were less aggravated and more mitigated.

ARGUMENT

I. THERE IS NO BASIS FOR REVISITING THIS COURT'S PRIOR HOLDING THAT THE ADMISSION OF THE CODEFENDANTS' CONFESSIONS DURING THE GUILT PHASE WAS HARMLESS ERROR, WHERE THIS COURT CONDUCTED THE ANALYSIS THAT DEFENDANT ASSERTS SHOULD HAVE BEEN CONDUCTED AND THE CASE UPON WHICH DEFENDANT RELIES IS SILENT REGARDING THE ISSUE OF HARMLESS ERROR.

Defendant initially asserts that this Court should revisit its determination that the admission of the codefendants' statements during the guilt phase of Defendant's trial was harmless error. Defendant relies on *Lilly v. Virginia*, 119 S. Ct. 1887 (1999), to claim that this Court should not have considered the interlocking nature of the statements in determining their admissibility. However, such reliance is misplaced, and the issue is entirely devoid of merit.

Under principals of law of the case, an appellate court should not consider a prior decision in a case except in exceptional circumstances. *Strazzulla v. Hendrick*, 177 So. 2d 1 (Fla. 1965); *see also Brunner Enter. v. Dept. of Revenue*, 452 So. 2d 550 (Fla. 1984). Here, Defendant raised the propriety of the admission of the codefendants' confessions during the guilt phase in his last appeal. *Gonzalez v. State*, 700 So. 2d 1217 (Fla. 1997), *cert. denied*, 118 S. Ct. 1393 (1998) and 118 S. Ct. 1856 (1998). This Court found that the admission of the confessions was error but was harmless in the guilt phase. While Defendant contends that the

United States Supreme Court changed the law governing this issue in *Lilly*, that Court itself made it clear that it was not doing so. *Lilly*, 119 S. Ct. at 1899 n.5. The Court stated that it was merely reaffirming its prior holdings. *Id.* As such, there is no reason to revisit this issue, which is barred by law of the case.

Moreover, the basis of Defendant's argument is that this Court analyzed the admissibility of the codefendants' confession under the statement against penal interest hearsay exception and not under the Confrontation Clause. However, a review of this Court's opinion shows that it did exactly the opposite. This Court relied upon its decision in *Franqui v. State*, 699 So. 2d 1312 (Fla. 1997). *Gonzalez*, 700 So. 2d at 1218-19. In *Franqui*, this Court rejected the claim that the hearsay exception for statements against penal interests was firmly rooted in Florida law. *Franqui*, 699 So. 2d at 1319. This is in accordance with the United States Supreme Court's rejection of this claim in *Lilly*. *Lilly*, 119 S. Ct. at 1897-99.

Having rejected the hearsay analysis, this Court then proceeded to determine that the codefendants' confessions were not made under circumstances that provided particularized guarantees of trustworthiness. *Gonzalez*, 700 So. 2d at 1219. Again, this analysis is in accordance with the second step of the Confrontation Clause analysis used in *Lilly*. *Lilly*, 119 S. Ct. at 1894, 1899-1901 (plurality opinion); *Id.* at 1901-03 (Breyer, J., concurring); *Id.* at 1903-05 (Rehnquist, C.J., concurring in judgment); *see also*

Ohio v. Roberts, 448 U.S. 56 (1980). As such, this Court's analysis of the admissibility of the codefendants' confessions is exactly the analysis endorsed by the United States Supreme Court in *Lilly*. *Lilly* does not provide a basis for revisiting this issue.

Further, this Court determined that the admission of the codefendants' confessions was error but harmless. *Lilly* did not address the standard to be used in conducting such an analysis. In fact, the Court remanded *Lilly* to the Supreme Court of Virginia to conduct such a harmless error analysis because the Virginia court had not previously done so, having found the admission of the statement was not error. *Id.* at 1901. Thus, *Lilly* again supports this Court's use of the harmless error analysis and does not demonstrate that it was error to have conducted such an analysis.

While Defendant contends that this Court should not have considered the corroboration of the codefendants' confessions under *Lilly*, there is nothing in *Lilly* to support this contention. In fact, *Lilly* cites to *Idaho v. Wright*, 497 U.S. 805 (1990). In *Wright*, the Court noted that the presence of corroborating evidence was relevant to the harmless error analysis. *Id.* at 823 ("[T]he presence of corroborating evidence more appropriately indicates that any error in admitting the statement might be harmless."); *see also Schneble v. Florida*, 405 U.S. 427, 432 (1972)(fact that codefendant's confession was consistent with defendant's confession relevant to harmless error analysis). As such, this Court could

properly have considered the corroborative evidence in making its determination that the error was harmless.

Moreover, this Court did not even do so. Instead, this Court looked at the overwhelming nature of the evidence against Defendant. *Gonzalez*, 700 So. 2d at 1219. The United States Supreme Court has itself used such considerations in determining that the error in the admission of a codefendant's confession was harmless. In *Harrington v. California*, 395 U.S. 250, 254 (1969), the defendant admitted (in his own confession) to being present at the scene of a robbery murder, but did not admit participating in the crime. The improperly admitted confessions of two codefendants identified him as a participant. One codefendant testified at trial that the defendant was there and was armed, but did not indicate whether he participated. Two eyewitnesses who identified the (white) defendant had previously stated that all the participants were black. The Court nevertheless concluded that the evidence of the defendant's guilt apart from the improper confessions was overwhelming, and as such any error was harmless beyond a reasonable doubt. *Harrington*, 395 U.S. at 253-54. The Court cautioned that the question of harmlessness is not merely one of "overwhelming evidence," but rather, of what the probable impact of the improper evidence would have been on the jury in light of the entire record. 395 U.S. at 254. Plainly, however, as the Court's analysis in *Harrington* demonstrates, that "probable impact" will

usually diminish in inverse proportion to the weight of the remaining, properly admitted, evidence.

As in *Harrington*, the Court observed in *Schneble v. Florida*, 405 U.S. 427, 432 (1972):

> In some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error.

Schneble, 405 U.S. at 430. In *Schneble*, the petitioner's (second)[2] confession was detailed, internally consistent, and corroborated by the objective evidence. 405 U.S. at 431. The court concluded that not only, as in *Harrington*, was the other evidence of guilt overwhelming, but because the codefendant's statement merely corroborated Schneble's, the error was harmless. *Id.* Under such circumstances, the Court concluded that "an average jury would not have found the State's case significantly less persuasive had" the codefendant's confession been excluded, and the error was therefore harmless. 405 U.S. at 432. In *Brown v. United States*, 411 U.S. 223, 231 (1973), the error was also determined to be harmless where there was "other overwhelming and largely uncontroverted evidence properly before the jury." 411 U.S. at 231. As this Court conducted a proper analysis of the harmlessness of the error in this matter, there is no reason for this Court to reconsider its

[2] Unlike Defendant, Schneble had given an initial statement denying complicity.

prior decision, and Defendant’s request that this Court do so should be rejected.

II. DEFENDANT'S CLAIM THAT THE CONSIDERATION OF AGGRAVATING CIRCUMSTANCE THAT DEFENDANT KILLED A LAW ENFORCEMENT OFFICER, WHO WAS ENGAGED IN THE PERFORMANCE OF OFFICIAL DUTIES, WAS IMPROPER IS UNPRESERVED AND WITHOUT MERIT.

Defendant next contends that the trial court erred in instructing the jury on, and considering, the aggravating factor related to Officer Bauer's status as a police officer. Defendant asserts that this aggravating factor was improper because the Legislature had authorized an enhancement to the possible life sentence because the victim was a law enforcement officer. However, this claim is unpreserved and meritless.

In the trial court, Defendant did not move to preclude consideration of this aggravating factor. Defendant did not object to the giving of a jury instruction on the aggravating factor that Officer Bauer was a law enforcement officer, engaged in the performance of his official duties. Defendant did not argue to the trial court during the *Spencer* hearing that consideration of this aggravating factor was improper. As such, this issue is not preserved. *Larzelere v. State*, 676 So. 2d 394, 407 & n.7 (Fla.), *cert. denied*, 512 U.S. 1043 (1996)(claim that consideration of aggravating factor improper unpreserved if not raised in trial court).

Even if this issue had been preserved, it is meritless. The fact that the Legislature elected to remove parole eligibility from the possible life sentence does not make the lack of parole

eligibility an aggravating factor. §921.141(6), Fla. Stat. As such, no impermissible doubling of aggravating factors occurred. *See Echols v. State*, 484 So. 2d 568, 574-75 (Fla. 1985), *cert. denied*, 479 U.S. 871 (1986)(impermissible doubling occurs when the same aspect of the crime or of defendant's character is used to support two aggravating factors). In fact, the lack of parole eligibility is generally considered a mitigating factor. *Simmons v. South Carolina*, 512 U.S. 154 (1994); *Jones v. State*, 569 So. 2d 1234, 1239-40 (Fla. 1990). It was argued as such here. (T. 1804) Thus, the removal of parole eligibility did not result in double consideration of any aggravating factor, and Defendant's claim should be rejected.

Defendant's attempt to analogize this aggravating factor to the aggravating factor of during the commission of a felony is particularly unavailing. This Court has repeatedly rejected the claim that the during the course of felony aggravating circumstance is improper. *E.g.*, *Sims v. State*, 681 So. 2d 1112 (Fla. 1996), *cert. denied*, 520 U.S. 1199 (1997); *Kearse v. State*, 662 So. 2d 677 (Fla. 1995); *Parker v. State*, 641 So. 2d 369 (Fla. 1994), *cert. denied*, 513 U.S. 1131 (1995); *Johnson v. State*, 660 So. 2d 637 (Fla. 1995), *cert. denied*, 517 U.S. 1159 (1996); *Stewart v. State*, 588 So. 2d 972 (Fla. 1991), *cert. denied*, 503 U.S. 972 (1992); *Clark v. State*, 443 So. 2d 973 (Fla. 1983), *cert. denied*, 467 U.S. 1210 (1984); *Menendez v. State*, 419 So. 2d 312 (Fla. 1982); *see*

also Lowenfield v. Phelps, 484 U.S. 231 (1988). As such, if this aggravating factor was considered analogous to that aggravating factor, there would be no basis for finding the factor improper.

Further, even the rationale behind Justice Anstead's concurrence in *Blanco v. State*, 706 So. 2d 7, 12-15 (Fla. 1997), *cert. denied*, 119 S. Ct. 96 (1998), does not justify Defendant's argument here. There, Justice Anstead was concerned that the felony murder aggravator did not genuinely narrow the class of persons eligible for the death penalty. He believed that since the fact that the murder was committed during the course of an enumerated felony made the murder a first degree murder, the inclusion of the felony murder aggravator did not limit the class of death-eligible defendants.

The same cannot be said of the law enforcement aggravator. Defendant's crime did not become a first degree murder because he killed a police officer and not all first degree murders involve the killing of a police officer. As such, the application of this aggravator does limit the class of death-eligible defendants, and the rationale behind Justice Anstead's concurrence is inapplicable to this situation. Therefore, Defendant's claim should be rejected.

III. THE TRIAL COURT'S REJECTION OF THE EXTREME MENTAL OR EMOTIONAL DISTRESS MITIGATOR IS SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE AND SHOULD BE AFFIRMED.

Defendant next asserts that the trial court erred in finding that the statutory mitigating circumstance of extreme mental or emotional distress had not been established. However, this finding of fact by the trial court is supported by competent, substantial evidence and must therefore be affirmed.

Initially, Defendant appears to confuse the standard of review in this case. As this Court has repeatedly stated, "whether a mitigating circumstance has been established by the evidence is a question of fact and subject to the competent, substantial evidence standard." *Cave v. State*, 727 So. 2d 227, 230 (Fla. 1998), *cert. denied*, 1999 WL 73704 (U.S. 1999); *Blanco v. State*, 706 So. 2d 7, 10 (Fla. 1997), *cert. denied*, 199 S. Ct. 96 (1998); *Campbell v. State*, 571 So. 2d 415, 419 & n.5 (Fla. 1990). As this Court noted in *Campbell*, the trial court's finding is presumptively correct if supported by competent, substantial evidence. *Campbell*, 571 So. 2d at 419 n.5. Thus, it is the trial court's finding that must be supported by competent, substantial evidence; not the mitigating circumstance itself.

Here, the trial court's findings regarding this circumstance were:

> Dr. Hyman Eisenstein, a board certified clinical neuro-psychologist testified on behalf of the defendant at the hearing. Dr.

Eisenstein opined that the defendant acted in a state of extreme mental and/or emotional disturbance due to his martial demands, developmental history of shuffling back and forth between family members, educational and language deficiencies, emotional state, history of boxing and brain damage, inability to control impulses, and lack of judgment.

In order to properly evaluate Dr. Eisenstein's ultimate opinion, a thorough discussion of his testimony, and a comparison of it to the other evidence in the case, is appropriate. As the Florida Supreme Court stated in *Walls v. State*, 641 So. 2d 381 (Fla. 1994):

> "[A] distinction exists between factual evidence, and opinion testimony. As a general rule, uncontroverted factual evidence cannot simply be rejected unless it is contrary to law, improbable, untrustworthy, unreasonable or contradictory....Opinion testimony, on the other hand, is not subject to the same rule... Certain kinds of opinion testimony clearly are admissible -- and especially qualified expert opinion testimony -- but they are not necessarily binding even if uncontroverted. Opinion testimony gains its greatest force to the degree it is supported by the facts at hand, and its weight diminishes to the degree such support is lacking."

Dr. Eisenstein had the defendant perform a number of tests. These tests allowed the doctor to evaluate the defendant's intelligence, motor skills, cognitive skills and language skills. The court will discuss the result of many of these tests.

The doctor first asked the defendant to perform a grip strength test. The test showed that the right hand was in the normal range but the left hand was slightly impaired. Dr. Eisenstein opined that the damage to the right hemisphere of the defendant's brain could account for the lesser strength in his left

hand. On cross-examination, however, the doctor admitted that the defendant's left index finger had been severed years earlier when a car battery exploded and this hand injury could account for the difference in grip strength between one hand and the other.

The next test was a finger tapping test. In this test, the defendant is asked to perform a number of taps with his index finger. With his right hand, he performed in the high normal range. With his left hand, the defendant used his middle finger since he had no index finger. Even using that finger, the defendant scored in the normal range.

On the pegboard test, the defendant was required to place a number of pegs into the board. With his right hand, he scored in the normal range. With his left hand, he was slightly impaired.

In a complex figure sensory perception test, the defendant performed in the high normal range.

On a trailmaking test he scored in the normal range on one part of the test and mildly impaired on another part of the test.

Thus, on most of the performance tests the defendant scored in the normal or high normal range.

On one language test – a naming test – the defendant scored in the profoundly impaired range placing him in the bottom 1 to 2 per cent of the population. However, he scored in the normal range on the fluency test and in the upper end of the mildly mentally retarded on the reading articulation test. While the defendant's language scores were not as high as his performance scores, Dr. Eisenstein admitted that the fact that Spanish was the defendant's primary language could account for lower scores in the language tests given in English.

In an IQ test given by Dr. Eisenstein, the defendant's full scale IQ was 80, or at the lower end of average. In a test given to the defendant four months later, he scored a 93.

On personality tests, the defendant demonstrated that he was suffering from severe anxiety, nervousness, impulsivity, that he was

shy, inhibited, was socially withdrawn and had difficulty with socialization skills. The personality test depends on honest responses from the defendant. The defendant, however, lied to Dr. Eisenstein about his grades in school and lied about his proclaimed innocence of this murder so the court has concerns about the validity of these test results. Also, these tests were given to the defendant while he was in jail and after he had already been convicted of first degree murder of a police officer and was facing the death penalty or – at best – spending the rest of his life in prison. Common sense dictates that anyone in that situation would be under stress and suffer from anxiety and nervousness.

On the memory tests the defendant scored in the mildly mentally retarded range.

His school records showed an IQ of 79 and a clear learning disability.

Dr. Eisenstein summarized his findings by opining that all of these factors caused the defendant to act impulsively on January 3, 1992. However, there are no facts at hand which support this opinion. As the Supreme Court held in discussing the value of opinion testimony in *Walls*, "its weight diminishes to the degree such support is lacking." *Walls* at 385. The defendant's own confession established that he was aware of the planned robbery for 10 days before the crimes. The day before the crimes the defendant again met with his co-defendants and discussed the plan. The day of the crime the defendant and co-defendants drove the getaway car and the two stolen cars to the area of the bank early enough to make sure their cars were first in line. They then went to a bakery and waited for the bank to open. The defendant exited the vehicle with his gun drawn, pointed, and ready for action. These are not facts which support an act of impulsivity.

Further, in spite of his brain damage, learning disability and stresses, the defendant was able to conform his conduct to the law every day of his life prior to January 3, 1992 and for all the days since.

Even the testimony of the defendant's

> other expert, Dr. Alan Wagshul, a board certified neurologist, fails to lend support to Dr. Eisenstein's opinion. Dr. Wagshul ordered that an MRI be performed by Dr. Thomas Naidich on the defendant's brain. That MRI revealed that the defendant has two cavities in the middle of his brain which are filled with spinal fluid. This condition is generally abnormal but is commonly found in boxers. Dr. Wagshul opined that the defendant's boxing injuries caused organic brain damage which he classified as pugilistic encephalopathy. Dr. Wagshul opined that this injury can lead to impulsiveness. However, he stated that it would not cause someone to rob a bank and kill a police officer.
>
> More significantly, Dr. Wagshul testified that the defendant's brain wave activity was normal and that he suffered no neurological difficulty as a result of this brain injury. His gait was normal and his neurological examination was completely normal. This diagnosis was confirmed by the detective who spoke to the defendant in 1992 as well as another defense expert, Dr. Brad Fisher, who examined the defendant in 1998. Each of those witnesses noticed no abnormalities in the defendant's speech, movement, or mannerisms.
>
> Furthermore, the defendant was able to hold different jobs for long periods of times, even working as a technician in an optical laboratory. His responses to all the doctors and all the police he spoke to were logical. Even though the defendant lost some boxing matches, he was never knocked out. Although the defendant scored poorly on some tests, he scored extremely highly on other tests and overall his scores were about average.
>
> The testimony and evidence did not reasonably establish the existence of this mitigating circumstances. At best, the evidence established that the defendant had a physical abnormality in his brain. But, this physical condition did not cause any diminished mental capacity or physical impairment.

(R. 249-53) These findings are supported by competent, substantial

evidence.

Dr. Eisenstein did testify that he gave Defendant a number of tests. (T. 1481-1516) The tests of Defendant's motor functions have normal results in the right hand and some impaired results in the left. (T. 1481-85) However, Dr. Eisenstein not only admitted that this could have be due to the injury to Defendant's left hand that resulted in the loss of his left index finger but also conceded that it could be normal due to the dominance of Defendant's right hand. (T. 1484-85, 1529-30) Defendant's sensory perception test scores were normal except for one test that required the matching of numbers to letters. (T. 1485-86) Defendant did perform in the impaired range in two language tests. (T. 1498-1500) However, Dr. Eisenstein did admit that this could be accounted for by the fact that English was Defendant's second language. (T. 1541) Dr. Eisenstein also acknowledged that the results of his testing were dependent on Defendant's honesty and best efforts and that Defendant lied to him. (T. 1524-25, 1528)

Further, Defendant claims that the trial court should not have rejected Dr. Eisenstein's testimony that Defendant was impulsive. Defendant asserts that the fact that the robbery was not impulsive does not show that the murder was not and the fact that Defendant's alleged impulsiveness had never caused him to commit another criminal act does not demonstrate that he was not impulsive. However, this argument ignores the fact that Dr. Eisenstein based his claim that Defendant was impulsive on his brain abnormality.

(T. 1519) Both Dr. Wagshul and Dr. Eisenstein admitted that the brain damage was permanent. (T. 1369-71, 1480) Yet, Dr. Fisher, another defense psychologist, testified that Defendant had never done anything impulsive before or after the crime. As such, if Dr. Eisenstein's diagnosis were truly correct, one would not expect Defendant only to have been impulsive at the moment that he shot and killed Officer Bauer. Thus, Dr. Eisenstein's opinion is contrary to the facts and was properly rejected on this basis. *Walker v. State*, 707 So. 2d 300 (Fla. 1997); *Walls*.

Moreover, while Defendant asserts that it "is uncontroverted that [he] had no awareness that guns were to be involved until one was handed to him," Initial Brief of Appellant at 26, this is not what the record reflects. Instead, the record reflects that Defendant was well aware ten days before the crime that he and his cohorts would be attacking an armed guard. (T. 1110-11) Further, Defendant knew the plan for the robbery, knew that some people had been assigned to be gunmen and claimed that Franqui was supposed to be "taking care of security." (T. 1155-57) The record only reflects that Defendant did not expect to be one of the gunmen until the morning of the crime but willing agreed to act in this capacity. (T. 1153, 1157) Thus, the record simply does not support Defendant's assertions.

While Defendant appears to contend that the trial court rejected Dr. Wagshul's diagnosis of pugilistic encephalopathy, this

is again untrue. The trial court accepted Dr. Wagshul's finding that "defendant has a physical abnormality in his brain." (R. 253) It considered this abnormality, as well as Defendant's low average IQ and his learning disability, as a nonstatutory mitigating circumstance. (R. 256-57) Thus, the trial court did not reject Dr. Wagshul's opinion.

IV. ANY ISSUE REGARDING THE STATE'S COMMENTS IN CLOSING DOES NOT MERIT REVERSAL, WHERE THE COMMENTS WERE LARGELY UNOBJECTED TO, OBJECTIONS WERE SUSTAINED WHEN MADE, CURATIVE INSTRUCTIONS WERE GIVEN AND THE COMMENTS WERE PROPER COMMENTS ON THE EVIDENCE.

Defendant next asserts that the State's closing argument was improper because the State denigrated the defense experts and interjected the personal opinion of the prosecutors. However, this claim is unpreserved, the comments were proper and any error did not affect the outcome of the proceedings.

First, Defendant contends that the State improperly claimed Defendant presented the testimony of his experts because he was desperate. However, Defendant did not object to this comment. (T. 1779) When Defendant moved for a mistrial after all arguments were complete, several recesses were taken, and the jury had been instructed on the law and retired to deliberate, he did not raise this claim. (T. 1843-45) As such, this issue is not preserved. *Rose v. State*, 461 So. 2d 84 (Fla. 1984), *cert. denied*, 471 U.S. 1143 (1985); *Castor v. State*, 365 So. 2d 701 (Fla. 1978).

Even if the issue regarding this comment had been preserved, it was proper. This comment was made in the context of explaining the timing of the claims in support of the alleged mitigation. At the time Defendant confessed to committing the crime, no mention was made of any problems with his wife influencing his participation in the crime. (T. 1131-32, 1252) In fact, this claim of duress did not come to light under two and a half years

after the crime. Given these circumstances, commenting that the use of Dr. Eisenstein to buttress this belated claim was contrived was proper. *See Shellito v. State*, 701 So. 2d 837, 841 (Fla. 1997); *Davis v. State*, 698 So. 2d 1182, 1190 (Fla. 1997); *Craig v. State*, 510 So. 2d 857, 865 (Fla. 1987). Further, even if the comment was erroneous and the issue had been preserved, any error was harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). The comment was brief and was focused on the belated assertion of the duress claim. Moreover, the evidence in support of the aggravating factors was largely uncontroverted, and the mitigation evidence was weak.

Defendant also asserts that the State's comment that the jury was "going to get instructions from the Judge and I'm going to tell you right now, they have nothing to do with the case," encouraged the jury to disregard its instructions. (T. 1781) Again, any claim regarding this comment is not preserved. Shortly after this comment, Defendant objected to the form of the argument. (T. 1781-82) Thus, the objection did not specify the grounds now asserted, and it is not preserved. *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982); *see also Kearse v. State*, 662 So. 2d 677 (Fla. 1992); *Robinson v. State*, 487 So. 2d 1040 (Fla. 1986). The trial court responded to the objection, "All right. It's just argument, ladies and gentlemen. I will read you the instructions on the law." (T. 1782) Again, this was not a basis for Defendant's motion for

mistrial. (T. 1843-45) Therefore, to the extent the trial court ruled on the objection at all, it sustained it, issued a curative instruction and no further relief was sought. The claim is not preserved. *Riechmann v. State*, 581 So. 2d 133, 138-39 (Fla. 1991), *cert. denied*, 506 U.S. 952 (1992).

Further, this comment was entirely proper. Defendant presented no evidence that he was unable to conform his conduct to the requirements of the law. He never asked Dr. Eisenstein or Dr. Wagshul about this mitigating factor. (T. 1359-75, 1464-86, 1497-1548) In fact, Dr. Fisher's testimony was that Defendant had conformed his conduct and was capable of continuing to do so. (T. 1428, 1449-50) Despite this lack of evidence, the trial court elected to instruct the jury on this mitigating factor. (T. 1731-32)

Moreover, the trial court also gave an instruction on duress at Defendant's request. The alleged duress was Defendant's wife's desire that he make more money. However, there was no evidence that Defendant's wife forced him to rob a bank and kill a police officer. In fact, Defendant did not claim that he committed the crime to satisfy his wife when he confessed.[3] (T. 1131-32) Even Dr. Eisenstein admitted that Defendant's wife did not suggest that

[3] Interestingly, Defendant did not even share any of the proceeds of the robbery with his wife. (T. 1535) Instead, he spent some of the money on himself. (T. 1247-48) The remainder he wrapped in tissue paper and hid in a gym bag in his closet. (T. 1182-84)

he commit crimes in order to get more money. (T. 1534-35) Instead, Dr. Eisenstein acknowledged that Defendant decided to participate in the robbery and murder of his own accord. (T. 1535) As this Court has noted, "'Duress' is often used in the vernacular to denote internal pressure, but it actually refers to external provocation such as imprisonment or the use of force or threats." *Toole v. State*, 479 So.2d 731, 734 (Fla. 1985). Given the lack of evidence to support these mitigating circumstances, the State's comment that the jury would be given instructions that had nothing to do with the case was a proper comment. *Valle v. State*, 581 So. 2d 40, 46-47 (Fla.), *cert. denied*, 502 U.S. 986 (1991)(state permitted to comment that defendant did not prove mitigation).

Even if this comment had not been proper and had been preserved, any error was again harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). The comment was brief, and the jury was informed that the trial court would provide the instructions on the law. Further, the evidence that death was appropriate was overwhelming.

Defendant also quotes a comment regarding the gullibility of Dr. Eisenstein and Dr. Fisher. (T. 1751) Defendant does not explain why he asserts that this particular comment was error. Moreover, the comment was again not objected to at trial and was not part of Defendant's belated motion for mistrial. Thus, any issue regarding it was not preserved. *Rose v. State*, 461 So. 2d 84

(Fla. 1984), *cert. denied*, 471 U.S. 1143 (1985); *Castor v. State*, 365 So. 2d 701 (Fla. 1978).

Even if the issue had been preserved, the comment was not error when read in context. Immediately before the comment, the State urged the jury to use its common sense in evaluating the evidence. (T. 1750) The State then pointed out that Dr. Fisher and Dr. Eisenstein had not used their common sense in reaching their opinions. Dr. Fisher had to admit that his estimation of Defendant's capacity for violence was contrary to Defendant's admitted participation in this crime. (T. 1444-45) Yet, he insisted that his prediction was accurate. Dr. Eisenstein claimed that Defendant was impulsive as a result of a chronic brain injury but there was no evidence that Defendant had ever done anything impulsive. He was also adamant about his opinion. As such, commenting that these opinions did not make sense was appropriate. *See Shellito v. State*, 701 So. 2d 837, 841 (Fla. 1997), *cert. denied*, 118 S. Ct. 1537 (1998); *Davis v. State*, 698 So. 2d 1182, 1190 (Fla. 1997), *cert. denied*, 118 S. Ct. 1076 (1998); *Craig v. State*, 510 So. 2d 857, 865 (Fla. 1987), *cert. denied*, 484 U.S. 1020 (1988). Even if the comment was error, it was harmless because the comment was brief. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). Moreover, the evidence in support of the mitigating factors was weak and internally inconsistent while the evidence in support of the aggravating circumstances was mostly uncontroverted.

Finally, Defendant referred to two comments that allegedly interjected the prosecutor's personal beliefs into argument in his statement of the facts. With regard to the comment mentioning Frank Lloyd Wright, Defendant objected, the trial court sustained the objection and admonished the prosecutor, and the prosecutor rephrased his comment to avoid mentioning his personal beliefs. (T. 1785) Defendant did not request a curative instruction and did not mention this comment in his belated motion for mistrial. (T. 1785, 1843-45) Thus, the issue is not preserved. *Riechmann*, 581 So. 2d at 138-39.

Further, while the phrasing of the comment may have left something to be desired, the comment was merely a comment on the evidence. As described above, both Dr. Fisher's opinion regarding Defendant's future dangerousness and Dr. Eisenstein's opinion regarding his alleged impulsiveness were suspect. Under these circumstances, remarking that the experts' testimony was illogical[4] was merely a comment on the evidence. *See Shellito*, 701 So. 2d at 841; *Davis*, 698 So. 2d at 1190; *Craig*, 510 So. 2d at 865. Further, any error in the comment was harmless given the brevity of the comment and the overwhelming nature of the evidence that death was the appropriate sentence.

With regard to the comment about the discussion between the

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[4] Contrary to Defendant's contention, the State did quote Frank Lloyd Wright as having said, "An expert is a man who has stopped thinking. Why should he, he is an expert." (T. 1785)

prosecutors in reference to Dr. Fisher, the trial court sustained the objection and instructed the jury to disregard the comment. (T. 1788-89) Defendant did not contemporaneously request any further relief. Instead, he waited for the prosecutor to finish his argument, recesses to be taken, defense closing to be given, jury instructions to be read and jury deliberating to begin before moving for a mistrial. Given the belated motion, the issue is not preserved. *See Johnson v. State*, 660 So. 2d 637, 646 (Fla. 1995), *cert. denied*, 517 U.S. 1159 (1996)(where motion for mistrial based on comment in closing was not made until after jury retired to deliberate, issue not preserved); *DuBoise v. State*, 520 So. 2d 260, 264 (Fla. 1988)(same).

Moreover, "[a] motion for mistrial is addressed to the sound discretion of the trial judge and '. . . should be done only in cases of absolute necessity.'" *Ferguson v. State*, 417 So. 2d 639, 641 (Fla. 1982)(citing *Salvatore v. State*, 366 So. 2d 745, 750 (Fla. 1978), *cert. denied*, 444 U.S. 885 (1979)). Here, there was no absolute necessity. While the prosecutor should not have mentioned conversations between the State's lawyers, this was not the focus of the comment. Instead, the focus was that Dr. Fisher's opinion had no scientific basis and was contradicted by the fact that Defendant committed this crime. (T. 1787-88) A six line comment regarding the prosecutor's discussion, which the jury was instructed to disregard, in an argument that encompasses 56 pages

of transcript did not create an absolute necessity for a mistrial. (T. 1745-1801) Thus, the trial court did not abuse its discretion in denying a motion for one.

V. DEFENDANT'S SENTENCE IS PROPORTIONAL.

As his final contention, Defendant claims that his sentence is disproportionate. Initially, Defendant asks this Court to reweigh the aggravating and mitigating circumstances in this matter. However, that is not this Court's function. *Hudson v. State*, 538 So. 2d 829, 831 (Fla.), *cert. denied*, 493 U.S. 875 (1989)(not prerogative of the Florida Supreme Court, in conducting proportionality review, to "reweigh the mitigating evidence and place greater emphasis on it than the trial court did."); *see also Cave v. State*, 727 So. 2d 227, 230 (Fla. 1998), *cert. denied*, 1999 WL 373704 (U.S. 1999); *Blanco v. State*, 706 So. 2d 7, 10 (Fla. 1997), *cert. denied*, 119 S. Ct. 96 (1998); *Campbell v. State*, 571 So. 2d 415, 419 & n.5 (Fla. 1990). As such, any claim that this Court should do so in the guise of proportionality review should be rejected.

Instead, "[p]roportionality review compares the sentence of death with other cases in which a sentence of death was approved or disapproved." *Palmes v. Wainwright*, 460 So. 2d 362, 362 (Fla. 1984). The Court must "consider the totality of circumstances in a case, and compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances." *Porter v. State*, 564 So. 2d 1060, 1064 (Fla. 1990), *cert. denied*, 498 U.S. 1110 (1991). "Absent demonstrable legal error, this Court accepts those aggravating factors and

mitigating circumstances found by the trial court as the basis for proportionality review." *State v. Henry*, 456 So. 2d 466, 469 (Fla. 1984).[5]

Here, the trial court found three aggravating circumstances: (1) prior violent felonies - some weight; (2) during the course of a robbery and pecuniary gain, merged - great weight; and (3) avoid arrest, hinder law enforcement and murder of a police officer, merged - great weight. (R. 245-48) The trial court found one statutory mitigator - no significant criminal history - and assigned it some weight. (R. 249) It also found five nonstatutory mitigating circumstances: (1) brain damage, learning disability and low average intelligence - little weight; (2) remorse - little weight; (3) cooperation with authorities - little weight; (4) life sentences of the codefendants - little weight; and (5) good prisoner - little weight. (R. 257-58)

In *Burns v. State*, 699 So. 2d 646 (Fla. 1997), *cert. denied*, 118 S. Ct. 1063 (1998), this Court found a death sentence proportionate in similar circumstances. In *Burns*, only the merged aggravating circumstance of avoid arrest and hinder law enforcement

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[5] Defendant does not challenge the trial court's findings as to the aggravating and most of the mitigating circumstances. The only finding regarding mitigation that had been challenged is the rejection of the extreme mental or emotional distress mitigator. However, for the reasons asserted in Issue III, *supra*, this claim should be rejected. The trial court's thorough discussion of the factors argued in aggravation and mitigation and findings thereon, (R. 245-60), are well-supported by the record and should be accepted.

was found. Here, Defendant not only had the merged law enforcement aggravator, but he also had the prior violent felony aggravator and the merged during the course of a felony and for pecuniary gain aggravator. The mitigation in *Burns*, as here, involved only the statutory mitigating circumstance of no significant criminal history, and in significant nonstatutory mitigation. As such, Defendant's sentence should be deemed proportionate consistent with *Burns.*

In *Armstrong v.* State, 642 So. 2d 730 (Fla. 1994), *cert. denied*, 514 U.S. 1085 (1995), this Court found a death sentence proportionate, where a police officer was killed during the course of a robbery. There, as here, the same three aggravating factors were found. There, as here, Defendant claimed a brain injury but did not show how it affected his conduct. Further, the same type of mitigation was presented. Given the similarities, Defendant's sentence should be found proportional. *See also Reaves v. State*, 639 So. 2d 1 (Fla.), *cert. denied*, 513 U.S. 990 (1994)(aggravators: prior violent felony and avoid arrest; mitigators: honorable military service, good reputation in community and good family man).

Additionally, this Court has affirmed the death sentences in numerous cases where the murder was committed during the course of a robbery. *See*, *e.g.*, *Smith v. State*, 641 So. 2d 1319 (Fla. 1994), *cert. denied*, 513 U.S. 1163 (1995); *Heath v. State*, 648 So. 2d 660

(Fla. 1994), *cert. denied*, 515 U.S. 1162 (1995); *Carter v. State*, 576 So. 2d 1291 (Fla. 1989), *cert. denied*, 502 U.S. 879 (1991); *Cook v. State*, 581 So. 2d 141 (Fla.), *cert. denied*, 502 U.S. 890 (1991); *Lowe v. State*, 650 So. 2d 969 (Fla. 1994), *cert. denied*, 516 U.S. 887 (1995); *Wickham v. State*, 593 So. 2d 191 (Fla. 1991), *cert. denied*, 505 U.S. 1209 (1992).

In *Smith*, the defendant received the death sentence for the killing of a cab driver. The trial court found the existence of two aggravating circumstances: (1) the murder was committed during an attempted robbery; and (2) the defendant had a previous conviction for a violent felony. If anything, the aggravation in *Smith* is less than here, where the additional factor of killing a policeman/witness elimination was found. As here, in *Smith* the court also found one statutory mitigating circumstance -- no significant history of criminal activity -- and (unlike here) *several* nonstatutory mitigating circumstances relating to Smith's background, character and record. This Court rejected Smith's claim of disproportionality. Here, with considerably more aggravation and less mitigation, and a basically similar situation of a murder during armed robbery, the case is more compelling for the imposition of the death sentence.

In *Heath*, the two aggravating circumstances were the commission of the murder during the course of an armed robbery, and the existence of a prior conviction for second-degree murder. As

in *Smith*, the murder was not accompanied by the additional aggravating factor. The court found substantial mitigating factors, including the influence of extreme mental or emotional disturbance, based upon consumption of alcohol and marijuana, as well as minimal nonstatutory mitigation. In *Heath*, this Court determined that the death sentence was appropriate.

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

Other cases similarly support the conclusion that the death sentence was proper in the instant case. *Watts v. State*, 593 So.

2d 198 (Fla.), *cert. denied*, 505 U.S. 1210 (1992)(aggravators: prior violent felonies; murder during course of sexual battery; murder committed for pecuniary gain; mitigation: low IQ reduced judgmental abilities; defendant 22 at time of offense); *Freeman v. State*, 563 So. 2d 73 (Fla. 1990), *cert. denied*, 501 U.S. 1259 (1991)(aggravators: prior violent felony; murder during course of burglary/committed for pecuniary gain; mitigation: low intelligence; abuse by stepfather; artistic ability; enjoyed playing with children); *Cook* (aggravators: murder during course of robbery; prior violent felony; mitigation: no significant history of criminal activity and minor nonstatutory mitigation). In view of the foregoing, the imposition of the death sentence here is clearly proportionate with death sentences approved in other cases. Defendant's sentence should be affirmed.

The cases relied upon by Defendant are not comparable. Each of those cases involve more mitigation and less aggravation. *Compare Hawk v. State*, 718 So. 2d 159 (Fla. 1998)(aggravators: prior violent felony and pecuniary gain; mitigation: impaired capacity, age, brain damage, mental and emotional distress, loss of hearing, bad childhood, and lack of education); *Curtis v. State*, 685 So. 2d 1234 (Fla. 1996), *cert. denied*, 521 U.S. 1124 (1997)(aggravators: during the course of a robbery and pecuniary gain and prior violent felony; mitigation: age, not having killed victim, disparate sentence of codefendant who did kill the victim,

helpfulness to others, and adjustment to prison); *Morgan v. State*, 639 So. 2d 6 (Fla. 1994)(aggravators: HAC and during the course of a felony; mitigation: both statutory mental mitigators, age, marginal intelligence, immaturity, illiteracy, substance abuse, intoxication, brain damage and no history of violence); *Livingston v. State*, 565 So. 2d 1288 (Fla. 1998)(aggravators: prior violent felony and during the course of a robbery; mitigation: childhood abuse, age, substance abuse, marginal intelligence); and *Knowles v. State*, 632 So. 2d 62 (Fla. 1993)(aggravator: contemporaneous murder; mitigation: both statutory mental mitigators, intoxication, brain damage, limited education, substance abuse, low average intelligence, two failed marriages, poor memory, inconsistent work habits, and love of his father) *with* this case (aggravators: prior violent felony, during the course of a robbery and pecuniary gain merged, and avoid arrest, hinder law enforcement and murder of a police officer; mitigation: lack of a prior criminal history, brain damage, learning disability, below average intelligence, remorse, cooperation with authorities, codefendants' sentences and good prisoner). Significantly, most of these cases involve teenaged defendants. *Hawk* (19); *Curtis* (17); *Morgan* (16); *Livingston* (17). Here, Defendant was fourteen days short of his twenty-second birthday on the day of the crime. (R. 255) He had been married and had worked steadily. As such, he is simply not comparable to a teenager. Further, none of these cases involved

the murder of a law enforcement officer to avoid arrest and hinder law enforcement. As this Court has noted, this is a particularly weighty aggravating circumstance. *Burns*, 699 So. 2d at 649. Given the stark differences between the cases relied upon by Defendant and this matter, they do not compel a finding that Defendant's sentence is disproportional. Thus, the sentence should be affirmed.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by U.S. mail to William M. Norris, 3225 Aviation Avenue, Suite 300, Miami, Florida 33133, this 1st day of November, 1999.

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