IN THE SUPREME COURT OF FLORIDA

CASE NO. 94,269

LEONARDO FRANQUI,

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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INTRODUCTION

Appellant, LEONARDO FRANQUI, 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 92-2141B, 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 Ricardo Gonzalez and Pablo San Martin. (R. 11) Defendant was convicted on all counts and sentenced to death for the murder.

On appeal, Defendant contended, *inter alia*, that the admission of Gonzalez's confession at their joint trial was error. *Id.* at 1335. This Court agreed that the admission of the confession was error but found that it was harmless in the guilt phase. Accordingly, this Court affirmed Defendant's conviction but vacated his death sentence and remanded for a new penalty phase proceeding. *Id.* at 1336. Both parties sought certiorari review in the United States Supreme Court, which was denied. *Florida v. Franqui*, 523 U.S. 1040 (1998); *Franqui v.*

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[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. *Franqui v. State*, 699 So. 2d 1332, 1333 n.1 (Fla. 1997), *cert. denied*, 523 U.S. 1040 (1998) and 523 U.S. 1097 (1998).

Florida, 523 U.S. 1097 (1998).

On remand, the matter proceeded to the new penalty phase on August 24, 1998. (T. 1) During voir dire, the trial court explained the weighing process to the venire. (T. 17-18) Defendant did not object to this explanation. (T. 17-18) After the trial court had inquired of the venire if anyone knew the court personnel or the witnesses and if anyone had any knowledge of the case, Defendant objected to the trial court's comments regarding the weighing process, claiming that the jury was never required to recommend death. (T. 31) The trial court reserved ruling on this objection. (T. 31-32) During individual voir dire, the trial court repeated its explanation of the weighing process to veniremembers Atash, Hernandez and Pereira. (T. 39, 42, 59) Defendant did not object to these comments. (T. 39, 42, 59) After the trial court completed individual voir dire, took a lunch break and the State argued a number of motions in limine, Defendant renewed his objection to the trial court's opening description of the weighing process. (T. 90) Defendant asked that the trial court instruct the venire that a jury has the discretion to impose a life sentence even if the aggravating factors outweighed the mitigating factor. (T. 90-91) The trial court refused to do so, believing such an instruction would tell the venire to ignore the law. (T. 91)

During the State's questioning, it discussed the weighing process. (T. 301) Defendant objected, and the trial court overruled the objection. (T. 301) The trial court then discussed what should occur if the mitigation and aggravation were of equal weight. (T. 302) Defendant did not object to this comment. (T. 302)

When asked for her views on the death penalty, veniremember Pereira, a bank teller, stated that she did not believe that anyone had the right to kill anyone else. (T. 58) She averred that she was not going to sentence anyone to death. (T. 59) However, she acknowledged that the death penalty was necessary at this time. (T. 59) She stated that she would be able to recommend death if the aggravating factors outweighed the mitigating factors. (T. 59) She later reiterated that the death penalty was necessary and stated that she could vote for it "under the right circumstances." (T. 296-97)

When asked if she would regret having voted for the death penalty after trial, Ms. Pereira admitted that she would. (T. 297) She stated that she did not know if Defendant had committed a crime yet. (T. 297) When reminded that Defendant had already been convicted, she responded that she did not yet know the circumstances. (T. 297-98) Ms. Pereira acknowledged that she was already leaning toward imposition of a life

sentence and that the State would have to go to extraordinary lengths to convince her that death was appropriate. (T. 298-99)

During questioning of another veniremember, the State noted that Ms. Pereira was nodding her head when the other person stated that she would never impose the death penalty. (T. 312-13) The State inquired if Ms. Pereira shared this opinion, and she admitted that she did. (T. 313)

During the defense questioning, Ms. Pereira stated:

> If I understand, that the circumstances when the crime was committed, he had the opportunity to don't shoot but he shoot the policeman, I think that I could – I would consider the death penalty.

(T. 320) She added that the aggravating circumstances would have to be "overwhelming" for her to consider the imposition of the death penalty. (T. 320)

Veniremember Lopez stated that she was in favor of the death penalty but could never cast the deciding vote for a death recommendation. (T. 121-22, 305) The trial court suggested that Ms. Lopez should be removed for cause after the initial questioning. (T. 138) However, Defendant asked for the opportunity to rehabilitate her, which was granted. (T. 138) After an overnight recess, Ms. Lopez volunteered that she was "under a lot of stress because of this trial. I even cried last night." (T. 244) She also pointed out a problem with her teeth.

(T. 244) She stated that this was caused by having to decide about the death penalty. (T. 245)

On defense questioning, Ms. Lopez stated that she would be able to recommend the death penalty if the voting was done by secret ballot. (T. 341) Ms. Pereira and Ms. Lopez both also indicated that they would not consider recommending the death penalty for anyone involved in a felony murder except the person who actually killed the victim. (T. 274-75)

During jury selection, the State moved to exclude Ms. Pereira for cause, and Defendant objected. (T. 348) The trial court granted the cause challenge, finding:

> Well, I have a reasonable doubt about her ability to be fair based upon her going back and forth and always you gave your last example, you what you were trying to tell her, would you be able to go through the weighing process and against the mitigating, she threw in the aggravating would have to be overwhelming. I have a reasonable doubt about her ability to serve.

(T. 348)

The State also moved to exclude Ms. Lopez for cause, and Defendant objected. (T. 349) The trial court granted the cause challenge, finding:

> I think on a number of occasions, said she couldn't do it. She said she cracked a molar last night, she was so worried about her possibility of being selected and I have a reasonable doubt about her ability to be fair so I'll excuse her for cause.

(T. 349)

During its introductory remarks to a second panel of veniremembers, the trial court again explained the weighing process. (T. 366-67) Defendant did not object to these comments. (T. 366-67) The trial court reexplained the weighing process while questioning the veniremembers about their feelings on the death penalty. (T. 380, 387) Defendant did not object to these comments either. (T. 380, 387) After the trial court completed questioning of all the veniremembers about their feelings on the death penalty and had excused a number of veniremembers for cause and had declared a recess, Defendant renewed his "objection from yesterday" regarding the statements about the weighing process. (T. 436) The trial court responded that it had modified its comments after the initial objection and had only stated that death should be recommended if the aggravating factors outweighed the mitigating factors. (T. 436) As such, the trial court overruled the objection. (T. 436)

During individual questioning of veniremember Taylor, Mr. Taylor indicated that he would have difficulty making a recommendation without having been through the entire guilt phase of the trial. (T. 482-84) The trial court then attempted to inquire if he could apply the law despite these feelings. (T. 484) Defendant did not object to this comment. (T. 484-85)

The following morning, the State asserted that it had done research on the issue of whether the comments about the weighing process were proper. (T. 506) The State averred that it was only improper to inform the venire that it must vote for a particular recommendation and that telling the venire that it should follow the law was proper. (T. 506) It asserted that jury pardons were aberrations and that the venire did not have to be instructed on the ability to grant a jury pardon. (T. 507) The trial court agreed with the State's analysis and stated that it had changed the form of its comments after the objection was originally raised. (T. 507)

At the conclusion of jury selection and prior to the jury being sworn, Defendant did not renew his objection to the excusal of any veniremembers. (T. 639-54) In fact, Defendant personally stated that he was satisfied with the jury. (T. 639) At that time, the State had two peremptory challenges left. (T. 637-38)

LaSonya Hadley testified that she and Michelle Chin Watson were drive-through tellers at Kislak National Bank in 1992. (T. 667-80) Ms. Hadley's routine was to arrive at the bank between 7:00 and 7:30 a.m. and wait for Ms. Watson to arrive. (T. 680) When Ms. Watson arrived, they retrieved their money tray, containing no more than $20,000, from the vault and informed

their police escort that they were ready to go to the drive-through. (T. 680-81) The escort was always a uniformed police officer but a different officer was assigned to each day of the week. (T. 681-83) The officer assigned to Friday was Steven Bauer. (T. 681-83)

On Friday, January 3, 1992, Ms. Hadley and Officer Bauer waited in the kitchen area of the bank for Ms. Watson to arrive and ate doughnuts. (T. 683-84) Ms. Watson arrived around 7:50 a.m., she and Ms. Hadley retrieved their cash trays, and they met Officer Bauer at the back door. (T. 684) Through the window in the back door, Ms. Hadley saw that cars were already lined up in front of the drive-through area. (T. 685) She was expecting a busy day because it was a payday and a day on which social security checks would be cashed. (T. 686)

Officer Bauer opened the door, and Ms. Hadley exited, followed by Ms. Watson and then Officer Bauer. (T. 687) Officer Bauer was joking with them about how busy they would be as they approached the drive-through. (T. 687) Just as Ms. Hadley got to her booth, which was closer to the bank, she heard the sound of people exiting a car and running at them. (T. 687-88) Ms. Hadley looked in the direction of the noise and saw four men running at them with guns in their hands. (T. 688, 699) Ms. Hadley also observed Officer Bauer in the middle of

the drive-through area, reaching for his gun. (T. 688) Ms. Hadley quickly unlocked her booth and dove into it. (T. 688-69) Ms. Hadley reached for the alarm in the booth and heard three or four gunshots. (T. 689) Officer Bauer called out that he had been shot. (T. 689)

Ms. Hadley exited her booth, saw Officer Bauer lying on the ground and went to him. (T. 689-90) Ms. Hadley knelt next to Officer Bauer and placed his head in her lap. (T. 690, 694) Officer Bauer inquired if Ms. Hadley and Ms. Watson were unharmed and was reassured that they were. (T. 690) Officer Bauer then stated that he had only been shot in the leg but Ms. Hadley believed that he was wrong because of the amount of blood. (T. 690) Ms. Hadley stayed with Officer Bauer, speaking to him, until the police arrived. (T. 694-95)

The police then took Ms. Hadley and Ms. Watson into the bank. (T. 695) Later, the police took them to an area near the bank to see if they could identify some cars. (T. 695-96) The cars appeared to be the same ones that the assailants had exited. (T. 697-98) After identifying the cars, they returned to the bank and learned that Officer Bauer had died. (T. 698)

Michelle Chin Watson confirmed Ms. Hadley's testimony regarding the routine of the drive-through tellers and the fact that they were accompanied by a police officer in full uniform.

(T. 699-705) Ms. Watson agreed that the officer assigned to Fridays was Officer Bauer, who was friendly and had a good sense of humor. (T. 706-07)

Ms. Watson testified consistently with Ms. Hadley regarding her arrival at the bank on the day of the crime and what occurred before they exited the bank. (T. 707-08) Ms. Watson stated that as they walked toward the booths, she heard someone yell something, turned and saw four men standing outside the first two cars in the drive-through lanes. (T. 708-09, 717-18) She turned to continue toward her booth when she heard gunfire. (T. 709) She crouched down with her cash tray in front of her, and one of the men approached and took the tray. (T. 709, 713)

After the shots stopped, Ms. Watson heard Officer Bauer say, "oh, God." (T. 710) She went over to him, and he asked if she and Ms. Hadley were alright. (T. 710) She responded that they were alright but that he appeared to be badly injured. (T. 710) Officer Bauer stated that he was only shot in the leg. (T. 710) When Ms. Watson realized the seriousness of Officer Bauer's injuries, she became hysterical. (T. 710-11) Ms. Watson also testified consistently with Ms. Hadley's testimony about being taken into the bank and identifying the cars. (T. 716-17)

Detective Ron Pearce, a crime scene technician with the North Miami police, testified he and Officer Bauer worked

together. (T. 719-24) On Fridays and Saturdays, Officer Bauer worked off-duty at Kislak National Bank in his capacity as a police officer. (T. 724) While doing this job, Officer Bauer would have been dressed in full uniform and would have been working under a contract between the bank and the police department. (T. 724-25)

On the day of the murder, Detective Pearce arrived at the police station at 7:30 a.m. to begin work. (T. 726) Between 7:50 a.m. and 7:55 a.m., Detective Pearce heard a call over his police radio that shots had been fired and an officer was down at the bank. (T. 727) Detective Pearce immediately got his equipment together and went to the bank. (T. 727-28)

When he arrived at the bank, he found that the scene had been secured and that fire rescue was attending to Officer Bauer. (T. 728) Detective Pearce then spoke to Sergeant Lynch and was directed to another area, where the two cars that were seen leaving the bank had been left. (T. 728-29) At that scene, Detective Pearce observed two gray Chevrolet Caprices, parked on opposite sides of the street. (T. 731-32) The engines were running in both cars but neither car had a key in its ignition. (T. 732) A rear vent window had been broken out of each of the cars: one on the passenger’s side and the other on the driver’s side. (T. 732) Detective Pearce found a piece

of one of the car's ignition under the driver's seat. (T. 733) After observing and photographing the cars, Detective Pearce had them towed to the secured garage at the Medical Examiner's office for further processing. (T. 733-34)

After having the cars towed, Detective Pearce returned to the bank. (T. 737) In examining the drive-through area, Detective Pearce found one of the pillars had been damaged by gunshots. (T. 739) That pillar had two distinct marks where it had been struck by bullets. (T. 743-44) One bullet struck the pillar straight on its southern corner, approximately 58" above the ground. (T. 744) The other struck the pillar at an angle approximately 31" above the ground and ricocheted off the pillar. (T. 745) Parts of this bullet were found near the pillar. (T. 746, 751) Another projectile was recovered from the scene. (T. 750-51) Detective Pearce also recovered one .9 mm casing. (T. 751-52)

Near where Officer Bauer had been lying, Detective Pearce recovered Officer Bauer's uniform shirt and pants, his gun, his gunbelt and his keys. (T. 753) The shirt was a standard police uniform shirt with patches on each sleeve and Officer Bauer's badge pinned to the front. (T. 754, 759) The gunbelt contained two extra, fully loaded magazines, Officer Bauer's police radio, and handcuffs. (T. 756-57) Officer Bauer's gun was fully

loaded, and there was no indication that it had been fired. (T. 758-59)

On February 7, 1992, Detective Pearce accompanied police divers from the Metro-Dade Police Department to the Pisces Hotel. (T. 759) The divers searched the canal behind the hotel and recovered the cash tray taken from Ms. Watson during the crime. (T. 759-60)

Officer Patricia Pereira testified that she heard a police dispatch that shots had been fired at Kislak National Bank shortly before 8:00 a.m. on the day of the crime. (T. 767-69) She started going to the bank when she heard a second dispatch that a shooting was in progress and an officer was down. (T. 769)

When she got to the bank, she saw that Officer Bauer's firearm had been removed from its holster. (T. 769-70) Officer Bauer was unable to speak by the time Officer Pereira arrived. (T. 770) Realizing the severity of Officer Bauer's condition, Officer Pereira removed his shirt, his gunbelt and his watch to prepare him for treatment by fire rescue. (T. 770-71)

After fire rescue arrived, Officer Pereira went to an area where another officer had found one of the Caprices. (T. 772-73) When she got there, she noticed the other Caprice parked across the street from the first one. (T. 773) A check of both

cars' license plates revealed that they had been stolen. (T. 773-74)

Lieutenant Richard Spotts testified that businesses and associations in the City of North Miami make requests to the chief of police to have officers assigned to them on days when the officers have scheduled days off. (T. 775-76) The chief reviews these requests and approves them. (T. 776) The officers doing these jobs are required to check in with the dispatcher, as they would when assigned to normal police duties. (T. 776) The officers are also required to be in full uniform when doing these jobs. (T. 776-77) As such, the department considers these assignments to be part of the officers' official duties. (T. 777)

Detective Albert Nabut testified that he heard a dispatch regarding this crime on his way into work on January 3, 1992. (T. 778-82) As a result, he went directly to the bank. (T. 782-83) On hearing the facts of this crime, it reminded him of a murder he was investigating that occurred on December 6, 1991. (T. 784)

In his case, Danilo Cabanas, Sr. and Danilo Cabanas, Jr. had gone to their bank in Hialeah to get money for their check cashing business. (T. 784-85) It had been the Cabanases' practice to take $70,000 to $75,000 from the bank every Friday.

(T. 786) However, after an earlier robbery, they had reduced the amount to $25,000 to $30,000. They also had a person named Raul Lopez who would follow them in another vehicle as a guard. (T. 786)

As the Cabanases and Lopez were returning to the business on December 6, 1991, they were ambushed by three men in matching Chevrolet Suburbans. (T. 785, 787-88) Once the assailants had forced the Cabanases to stop, they opened fire on them. (T. 784-85, 788-) The Cabanases returned the fire, and the assailants fled. (T. 788-89) Thereafter, the Cabanases discovered that Mr. Lopez has been shot and killed. (T. 789)

The bullet that killed Mr. Lopez was recovered, and was matched to a bullet recovered from the murder of Officer Bauer. (T. 789, 792) The Suburbans were found abandoned a short distance from the scene of the crime. (T. 790) The ignitions to the Suburbans had been damaged so that they could be started without keys. (T. 790-91)

On January 18, 1992, Detective Nabut interviewed Defendant at Metro-Dade Police headquarters. (T. 792-93) During the interview, Defendant was relaxed, coherent and spoke fluently in both English and Spanish. (T. 793-94) Defendant did not appear to under the influence of drugs or alcohol. (T. 795)

After initially denying any knowledge of the robbery of the

Cabanases and the murder of Mr. Lopez, Defendant admitted that a person had told him about the Cabanases and their trips to the bank. (T. 796) Defendant and this person began casing the Cabanases but delayed their planned robbery when they learned that someone else had robbed the Cabanases in the summer of 1991. (T. 796)

In late November 1991, they resumed their planning to rob the Cabanases, including surveiling them the week before the crime. (T. 797) As a result, they learned the Cabanases' routine in going to the bank and returning therefrom and knew that the Cabanases were carrying less money than before the first robbery. (T. 798) Defendant stated that a couple of days before the crime, they stole two matching General Motors vehicles to use in the crime to confuse the police. (T. 798-99)

On the morning of the Hialeah murder, Defendant got up early and met his cohorts. (T. 799) They picked up the stolen Suburbans and drove them and a van to a prearranged rendezvous point. (T. 799) They parked the van, got into the Suburbans and proceeded to the area of the bank. (T. 799) When the Cabanases left the bank, Defendant's cohorts got in front of them in their Suburban, and Defendant, who was armed with a .357, followed behind them. (T. 800) When they reached the area where they had planned to rob the Cabanases, the front

Suburban cut them off, and Defendant blocked their exit. (T. 800-01) Defendant's cohorts opened fire on the Cabanases with their .9 mm handguns. (T. 801-02) According to Defendant, Lopez then came up in his pick-up and opened fire, so Defendant shot at Lopez. (T. 801) After emptying his gun, Defendant drove his Suburban back to the van, abandoned it and got into the van. (T. 802) After giving this oral confession, Defendant also provided a stenographically recorded confession. (T. 802-03)

On January 20, 1992, Detective Nabut went to an area near the expressway to retrieve some guns. (T. 804-05) Because it was late in the afternoon, Detective Nabut decided to return the following morning when the lighting would be better. (T. 805) The next morning, he returned with divers from Metro-Dade police, and they recovered two guns from a canal. (T. 805-07) One was a Smith and Wesson .357 revolver, and the other was Smith and Wesson .9 mm semi-automatic. (T. 806-07) The .9 mm recovered from the canal was matched to casings recovered from the scene of the Hialeah murder and the casing recovered from Kislak National Bank. (T. 808-09) The other .9 mm used in the Hialeah murder was never recovered. (T. 808)

At the conclusion of Detective Nabut's direct testimony, a stipulation was read to the jury. (T. 810) In the stipulation,

the parties agreed that Defendant was convicted for the first degree murder of Raul Lopez and the attempted armed robbery of the Cabanases. (T. 810)

On cross examination, Detective Nabut stated that Fernando Fernandez was the person who approached Defendant with the information about the Cabanases. (T. 813) He also acknowledged that Pablo San Martin and Pablo Abreu were the people in the other Suburban. (T. 813) Detective Nabut stated that Defendant had claimed that the plan in the Hialeah case did not involve anyone firing the guns. (T. 813-14)

Pedro Santos, a seventy-six year old security guard for Republic Bank, testified that he was robbed on November 29, 1991. (T. 823-25) On that day, Mr. Santos was taking an empty money bag to the drive-through to pick up money from the drive-through tellers. (T. 825-27) As he did so, he was approached by a white car with two men in it. (T. 827-28) One of the men got out of the car with a gun in his hand. (T. 827-29) The man told Mr. Santos to let go of the bag or he would die and fired a shot. (T. 827-29) Mr. Santos pulled his gun, and a gunfight ensued. (T. 829-30) The man then returned to the white car and fled without the bag. (T. 830) Mr. Santos was unharmed. (T. 830)

Detective Ralph Nazario testified that he also interviewed

Defendant on January 18, 1992. (T. 832-37) At the time, Defendant was coherent and did not appear to be under the influence of drugs or alcohol. (T. 837-38) Defendant had already been read his *Miranda* rights and agreed to speak without having a lawyer present. (T. 838)

Defendant informed Detective Nazario that he and two other people had been eating in a restaurant in front of Republic National Bank two days before the attempted robbery. (T. 840) As they ate, they noticed the elderly guard carrying a bag across the parking lot. (T. 840) Defendant believed that there was money in the bag, so the group decided to rob him. (T. 840) Two days later, they located and stole a car for use in the robbery. (T. 840) Defendant's two cohorts got into the stolen car and drove to the bank. (T. 840) Defendant followed them and parked where he could watch the attempted robbery. (T. 840-41)

When the guard appeared, the stolen car approached him, and the passenger got out. (T. 840-41) The passenger demanded the bag, threatened the guard and fired twice at him. (T. 841) The passenger got back into the car and fled. (T. 841) Defendant met the stolen car a couple of blocks from the bank. (T. 841) The other two men got back into the car with Defendant, and they went home. (T. 841)

Defendant described the gun used in the attempted robbery as a gray .9 mm. (T. 841) Casings and bullets from the scene of the Republic National Bank robbery were found. (T. 842) They were matched to the .9 mm Smith and Wesson that Detective Nabut recovered from the canal. (T. 842-43) This gun was also matched to the casing found at Kislak National Bank. (T. 843) It was stipulated that Defendant was convicted of attempted armed robbery and aggravated assault in connection with the Republic National Bank incident. (T. 943-44)

On cross examination, Detective Nazario admitted that Defendant identified the driver of the stolen car as Ricardo Gonzalez. (T. 845) Defendant identified the passenger of the stolen car as Pablo San Martin. (T. 845)

Detective Boris Montecon testified that he investigated a robbery and kidnapping that occurred on January 14, 1992. (T. 846-47) In that case, Craig Van Ness, an employee of a Pompano Beach auto parts company, came to Miami to deliver parts to Eloy Motors. (T. 847) As Mr. Van Ness approached Eloy Motors, a van pulled up next to him, and an occupant flashed a badge at him. (T. 848) Mr. Van Ness did not believe that the van contained police officers, so he continued to Eloy Motors. (T. 848)

When he parked his van at Eloy Motors and exited it, the other van pulled up, and two men got out of it. (T. 848) One

of the men produced a gun, took Mr. Van Ness' bag, hit him on the head and forced him into the van. (T. 848-50) Defendant and another assailant got into their van with Mr. Van Ness, where Defendant held Mr. Van Ness at gunpoint and demanded money. (T. 848-50, 857-58) A third assailant got into Mr. Van Ness' van and drove it away from Eloy Motors, with the van containing Mr. Van Ness following. (T. 848-50)

As they were driving, they passed a police car, and the officer noticed something was wrong in the van containing Mr. Van Ness. (T. 851) The officer began to follow the van to run a check on the license tag. (T. 851) The van began to drive evasively. (T. 852) Eventually, the officer was able to get close enough to read the tag, and the van sped up, ran a stop sign, went the wrong way down a street and crashed into a chain link fence. (T. 852) Defendant and the other assailant fled on foot and were apprehended a short distance away. (T. 852-53) It was stipulated that Defendant was convicted of armed kidnapping and armed robbery in connection with this incident. (T. 854)

Detective Montecon testified that the other two individuals involved in this crime were Carlos Vasquez and Pablo San Martin. (T. 855-56) He stated that while Mr. Van Ness was in the van, the gun went off. (T. 856-57)

Detective Gregory Smith testified that he reviewed the case file regarding the murder of Officer Bauer. (T. 866-70) The file showed that Oscar Roque, a police diver, located the two guns in a canal that were identified by Detective Nabut. (T. 870-71) The guns were wrapped in plastic. (T. 871) There were submitted to the firearms lab. (T. 871-72)

The firearms lab matched the shell casing recovered from Kislak National Bank to the .9 mm Smith and Wesson recovered from the canal. (T. 873-74) The bullet fragment recovered from Officer Bauer's body was also matched to the .9 mm. (T. 874-75) The bullet recovered from Officer Bauer's chest was matched to the .357 revolver recovered from the canal. (T. 875-76) The firearms technician also reported that the bullet that killed Mr. Lopez could have been fired by the same .357 revolver. (T. 876-77) Two other bullets from the scene of the Lopez murder were fired by the same .357 revolver. (T. 877-78)

On January 18, 1992, Detective Smith was summoned to the police station to interview Defendant. (T. 870, 878-81) After speaking to Detective Montecon, Detective Smith went to the jail and asked Defendant if he was willing to accompany him to the police station. (T. 881-82) Defendant agreed and was transported to the police station. (T. 882) After obtaining background information from Defendant, he was read his *Miranda*

rights and waived them. (T. 884-92)

During the interview, Defendant indicated that he had been unemployed since being fired from his job as a golf course attendant in December 1991. (T. 894) He stated that he had worked periodically for his uncle at the uncle's tire store. (T. 895)

At first, Defendant disclaimed any knowledge of the robbery of Kislak National Bank and the murder of Officer Bauer. (T. 897) Instead, Defendant asserted that he was with his wife on that day and that she would verify this. (T. 897-98) Detective Smith then informed Defendant that four other named individuals had implicated him in the robbery and murder and that the police would check with his wife. (T. 898) Defendant responded by telling the police to leave his wife alone and admitting that he had been involved. (T. 898-99)

In his confession, Defendant stated that a week before the crime, he had been approached by Fernando Fernandez. (T. 900) Fernandez informed Defendant that he had a friend who knew of a bank that would be easy to rob. (T. 900) Defendant willingly agreed to accompany Fernandez to his friend's home. (T. 900-01) The three of them discussed the robbery and went to the bank to check it out. (T. 901) Fernandez's friend told Defendant that they needed to steal two similar cars for use in the robbery.

(T. 901) This was intended to confuse the police. (T. 902) The night before the crime and the day before that, the cars were stolen by breaking a window and using a tool on the ignitions. (T. 902, 916)

The day before the crime, Defendant and a group of people went to the bank. (T. 903) They initially planned to commit the robbery that day but decided to postpone their plans a day when other people were already waiting in the drive-through lines. (T. 903) As such, they pulled into a gas station across the street and observed the routine for opening the drive-through. (T. 903)

At 7:00 a.m. on the day of the crime, the gang gathered at Pablo San Martin's home. (T. 904) The other assailants got into the stolen Chevrolet Caprices, and Defendant drove a blue Buick Regal to a predetermined spot near the bank. (T. 904) One of the assailants was left at this spot with the Buick, while Defendant took over driving one of the Caprices from Ricardo Gonzalez. (T. 904-05) Pablo San Martin and Fernando Fernandez were in the other Caprice. (T. 918) Defendant stated that he was armed with a .9 mm semiautomatic pistol, loaded with eight copper jacketed bullets. (T. 905-06) Ricardo Gonzalez had the only other gun among the perpetrators, a .357 revolver. (T. 906-07)

The Caprices were then driven to the bank. (T. 907) No one else was at the bank, so they parked the cars immediately in front of the chains blocking the entrance to the drive-through. (T. 907) When the tellers and their escort exited the bank, Defendant and Gonzalez exited their Caprice and drew their guns. (T. 908) Defendant described the teller's escort as wearing a blue or black shirt and pants and a gun belt containing a holstered .9 mm. (T. 908-09) They rushed toward the tellers and Officer Bauer, and Gonzalez yelled "freeze." (T. 909-10) Officer Bauer reached for his gun and moved behind a pillar in the drive-through area. (T. 910-11) Defendant moved to one side of the pillar, and Gonzalez moved to the other. (T. 921) According to Defendant, he heard a shot before Officer Bauer could unholster his weapon, so he fired at Officer Bauer. (T. 911)

Defendant then returned to his Caprice with Gonzalez, and they drove to the spot where they had left the Buick. (T. 912) They abandoned the Caprices at this location, and all got into the Buick and drove to Pablo Abreu's home. (T. 912) At the Abreu home, Defendant realized that one of his cohorts had taken money from one of the tellers. (T. 912) The group divided the money, and Defendant received $2,400. (T. 912)

Initially, Defendant claimed that the Buick had been stolen.

(T. 904) Eventually however, Defendant admitted that the Buick belonged to his father-in-law. (T. 913) After the robbery, the Buick was repainted white to disguise it. (T. 913)

During the interview, Defendant asked Detective Smith if he knew who had killed Officer Bauer. (T. 914) Detective Smith had his supervisor check and learned that the .38 caliber bullet had been the fatal bullet and that the .9 mm bullet had injured Officer Bauer but not fatally. (T. 915) Defendant also informed Detective Smith that the group had purchased the .9 mm semiautomatic the previous summer from a person on the street. (T. 915)

After giving the oral confession, Defendant initially refused to give a recorded statement. (T. 921-22) Detective Smith then introduced Defendant to Detectives Nabut and Nazario and went home. (T. 922-23) When he got home, he was paged and informed that Defendant had changed his mind and decided to give a stenographically recorded statement. (T. 923) Detective Smith returned to the station, and Defendant gave a recorded statement. (T. 923-26)

In the recorded statement, Defendant reiterated the information about the planning of the robbery and the stealing of the cars. (T. 928-39) Defendant claimed that the police officer guarding the tellers on the day they surveiled the bank

was dressed in a blue shirt, tie and blue pants. (T. 939) Defendant denied that the officer was in uniform. (T. 939) Defendant also described the events of the day of the crime in accordance with his earlier statement. (T. 940-52) Defendant claimed that Officer Bauer was dress in black and wearing a gunbelt. (T. 943-44) However, he denied that Officer Bauer was wearing a uniform and claimed not to see his badge or patches. (T. 944)

Dr. Michael Bell, the deputy chief medical examiner, testified that he reviewed the file on the autopsy of Officer Bauer prepared by Dr. Jay Barnhart. (T. 963-70) The records showed that, at the time fire rescue arrived at the bank, Office Bauer exhibited no signs of life: his EKG was flat, and he had no pulse or blood pressure. (T. 971-72) Dr. Barnhart also went to the crime scene, where he observed the bullet marks on the pillar. (T. 970-73)

On external examination, Dr. Barnhart saw signs of gunshot wounds on the body and scrapes on the right knuckles and back of the right elbow. (T. 974-75) The scrapes appeared to be recent and were consistent with being caused by a fall. (T. 975-76)

X-rays of Officer Bauer showed a bullet lodged next to his left femur near the hip and no fracture of the femur. (T. 976-77) This bullet entered Officer Bauer’s left hip, penetrated

the hip muscles and ended up in the outer portion of the bone. (T. 978) Given the shape of the entrance wound on Officer Bauer's hip, the fact that a fragment of clothing entered his body and the shape of the recovered bullet, Dr. Bell opined that the bullet that caused this wound had struck something else before striking Officer Bauer. (T. 978-83) This evidence was consistent with the bullet having struck the pillar at the bank as Officer Bauer sought cover behind it and then striking Officer Bauer. (T. 983-84)

The wound caused by this bullet would have been extremely painful and would normally cause a reaction by the person, such as falling. (T. 984) However, this wound would not have caused any permanent injuries. (T. 994)

The second bullet entered Officer Bauer's body at the base of his neck at a downward angle. (T. 986) The second bullet was a hollow point bullet and fragmented as it entered Officer Bauer's body. (T. 990) It passed through Officer Bauer's back muscles, struck one of the ribs in his back, went through his lung and the left ventricle of his heart and lodged in his diaphragm. (T. 987) In order for this bullet to have entered Officer Bauer's body in this manner, the shooter either had to be on a roof or Officer Bauer had to be leaning forward. (T. 985) This wound was consistent with Officer Bauer having been

struck by the bullet in his hip, falling to the ground and then being struck by the second bullet. (T. 985)

The injury to the heart caused by this bullet would cause the heart to be unable to circulate blood. (T. 987-88) This wound would not have caused Officer Bauer to lose consciousness immediately, and Officer Bauer would have been able to speak and move until he went into shock. (T. 988-89)

The emergency room personnel attempted to repair the injury to Officer Bauer's heart. (T. 991) However, they were unable to save Officer Bauer's life. (T. 991) The medical personnel would have been unable to prevent Officer Bauer's death even if they had been immediately able to provide care after he had been shot. (T. 991) Dr. Bell opined that the second bullet resulted in the fatal wound. (T. 992)

Dr. Bell opined that it was unlikely that Officer Bauer was struck in the neck first. (T. 995) The neck wound would have caused Officer Bauer to have collapsed almost immediately, and the bullet mark on the pillar was at the level of Officer Bauer's hip wound. (T. 995)

The jury was then read a stipulation that Defendant was convicted of first degree murder, armed robbery and aggravated assault in connection with the Kislak National Bank incident. (T. 997-98) Thereafter, the State rested its case. (T. 998)

Defendant called Mario Franqui, Sr., his uncle, to testify on his behalf. (T. 998-1000) Mr. Franqui was an air conditioning and refrigeration technician and owned a car tire business. (T. 998-99) He came to the United States with his wife, children, mother-in-law and sister-in-law in 1980. (T. 999)

Mr. Franqui's brother met Defendant's mother when she was pregnant with Defendant, and they began a relationship. (T. 1000) Mr. Franqui's brother assumed the role of Defendant's father, and Defendant was treated as a member of the Franqui family. (T. 1001) Defendant, his mother and Mr. Franqui's brother lived with Mr. Franqui's mother for the first two years of Defendant's life. (T. 1002) After that, Defendant's mother left the home, taking Defendant's younger brother with her but leaving Defendant. (T. 1002) Eventually, Defendant's mother returned his younger brother to the Franqui family. (T. 1003) After Defendant's mother left the household, Mr. Franqui's sister Celina cared for the children. (T. 1003)

A few days after Mr. Franqui left Cuba, Defendant, his brother, father and grandmother joined Mr. Franqui in the United States. (T. 1003) Defendant's Aunt Celina did not come to the United States with the rest of the family. (T. 1004) Defendant, his father, brother and 64 or 65 year old grandmother

lived together in this country. (T. 1004)

About a year after the family moved here, Defendant's brother died from a heart condition he had had since birth. (T. 1004) Defendant's father started drinking and using crack as a result. (T. 1004) Defendant's father remained in the house for a long period of time and then took to the streets. (T. 1005) Mr. Franqui tried to get his brother into a drug treatment program. (T. 1005) The rest of the family objected to placing Mr. Franqui's brother being placed in a drug treatment facility, and Mr. Franqui became estranged from them. (T. 1006)

During this time, Defendant was involved in a car accident and broke his leg. (T. 1006) As a result, he was hospitalized for a long time and had a piece of metal inserted in his leg. (T. 1006)

When Defendant was about 16 years old, Mr. Franqui moved his mother and Defendant into his home. (T. 1007) While living there, Defendant had to obey the rules of the house, go to school and work with Mr. Franqui. (T. 1008) Defendant got along well with Mr. Franqui's wife and children. (T. 1009) Defendant behaved in a respectful, loving and kind manner with the family.

Eventually, Defendant formed a marital relationship with Vivian. (T. 1008) He moved out of Mr. Franqui's home. (T.

1008) Defendant and Vivian had two children together. (T. 1009) Mr. Franqui saw Defendant with his children before Defendant was arrested. (T. 1009) Mr. Franqui believed Defendant was a good father and a loving person. (T. 1009)

In all the time Mr. Franqui had known Defendant, he had never known Defendant to drink or use drugs. (T. 1009) In fact, he had never seen Defendant smoke. (T. 1009)

Mr. Franqui had remained in contact with Defendant since his arrest because he considered Defendant a member of his family. (T. 1010-11) Mr. Franqui was aware that Defendant attempted to maintain a relationship with his children since his arrest by calling them even though he cannot see them. (T. 1011)

On cross examination, Mr. Franqui admitted that his brother was loving and affectionate to Defendant when they lived in Cuba. (T. 1012) Defendant's grandmother was also loving and affectionate to Defendant when she cared for him. (T. 1012)

Mr. Franqui admitted that he would have employed Defendant in his business if Defendant needed. (T. 1013) When Defendant lived and worked with Mr. Franqui, Defendant was expected to follow rules and did so. (T. 1013) Mr. Franqui believed that Defendant always did so. (T. 1014)

Alberto Gonzalez testified that he worked as a grounds attendant at parks for the City of Miami. (T. 1015) He had

known Defendant for approximately five years. (T. 1016) He met Defendant when Defendant started coming to Mr. Gonzalez's neighbor's house, and Defendant and the neighbor became friends with Mr. Gonzalez's daughters. (T. 1016)

Eventually, Defendant fell in love with Mr. Gonzalez's daughter Vivian. (T. 1017) Mr. Gonzalez checked into Defendant's background, believed that he was a nice boy and allowed him to date Vivian. (T. 1017) During the courtship, Defendant would come to Mr. Gonzalez's house every day and always behaved appropriately. (T. 1017-18)

After some time, Defendant and Vivian moved in together and formed a marital relationship. (T. 1018) However, they never officially married. (T. 1018) Defendant and Ms. Gonzalez had two daughters together. (T. 1018) In Mr. Gonzalez's opinion, Defendant was a good father and husband. (T. 1019) Mr. Gonzalez helped Defendant get a better home and got Defendant a job working with him. (T. 1019-20) Even knowing that Defendant has been convicted of serious crimes, Mr. Gonzalez's opinion of Defendant was unchanged, and Defendant would still be welcome in his home. (T. 1020)

On cross examination, Mr. Gonzalez acknowledged that Defendant had never told him that he had confessed to all of his crime. (T. 1021) Mr. Gonzalez claimed not to know that

Defendant had been convicted in four separate cases. (T. 1021) Defendant had never explained why he used Mr. Gonzalez's car in the commission of his crimes. (T. 1023-24) Defendant has also never explained why he had turned to a life of crime. (T. 1025)

Mr. Gonzalez admitted that Vivian would no longer have anything to do with Defendant. (T. 1022) He acknowledged that Defendant was arrested when one of Defendant's daughters was two and the other was only a couple months old. (T. 1022-23)

When asked if he was aware that Defendant had lost the job that Mr. Gonzalez had gotten for him, Mr. Gonzalez replied that Defendant had been working two jobs. (T. 1022) Mr. Gonzalez had never seen any signs that Defendant suffered from any mental disability. (T. 1023)

Mario Franqui, Jr., Defendant's cousin, testified that he had known Defendant his whole life. (T. 1025-26) Since Defendant was arrested, he had called or written Mr. Franqui. (T. 1027) In his letters, Defendant had asked Mr. Franqui for self-help type books on psychology, exercise, fitness and mental health. (T. 1027) During his phone calls with Mr. Franqui, Defendant talked about his family and how much he misses his daughters. (T. 1027) Mr. Franqui believes that Defendant has matured in prison and has found God. (T. 1028)

On cross, Mr. Franqui admitted that Defendant's father

treated Defendant as if he were his biological son when the family lived in Cuba. (T. 1028) Defendant was a normal child in Cuba, did well in school and was provided for. (T. 1028-29)

Mr. Franqui believed that Defendant was associated with the wrong crowd when Defendant was in his early teens. (T. 1029) However, by the age of 17 or 18, Defendant appeared to have turned his life around. (T. 1029) Defendant became clean cut and stable and appeared to be on the right path. (T. 1029-30) Defendant got a job and seemed to be hard working. (T. 1030)

Defendant and Mr. Franqui had not spoken about how Defendant became involved in these crimes or why he chose to commit them. (T. 1030) Defendant only told Mr. Franqui that what he had done was stupid. (T. 1030)

Cynthia Gonzalez testified that she was Mr. Gonzalez's youngest daughter. (T. 1031-32) She met Defendant when she was nine years old through her neighbor. (T. 1032) Ms. Gonzalez believed that Defendant was a great guy because of the way he behaved with her and his own children. (T. 1033) She also felt that Defendant was a person with whom she could discuss her problems. (T. 1033)

Ms. Gonzalez believed that Defendant treated her sister Vivian wonderfully. (T. 1034) In fact, Defendant got along well with the entire Gonzalez family. (T. 1034)

Ms. Gonzalez thought that Defendant was a great father and that he needed to be with his children. (T. 1034) Defendant sent his canteen money from prison to be used for the benefit of his children. (T. 1035-36) Prior to his arrest, Defendant was the primary caretaker for the children. (T. 1035) Since his arrest, Ms. Gonzalez has taken his children to see him, and Defendant has called the children every day. (T. 1036) However, the children were not able to see Defendant when he was in state prison. (T. 1039-40) When he was unable to call, Defendant sent cards and letters, which Ms. Gonzalez read to the children. (T. 1037) Ms. Gonzalez assisted the children in buying and sending cards to Defendant. (T. 1037-38)

Ms. Gonzalez admitted that Defendant had been fired from his job at a golf course. (T. 1041) Ms. Gonzalez claimed that Defendant had left work without clocking out because his daughter was stuck in a car. (T. 1041) However, she admitted that she had testified in her deposition that Defendant had not clocked out because the clock was broken. (T. 1042) Ms. Gonzalez denied that Defendant had blamed an unnamed black guy for breaking the clock. (T. 1042) However, she admitted that she had given deposition testimony to that effect. (T. 1042)

The jury was then informed that the parties had stipulated that Pablo Abreu had received a life sentence in exchange for

testifying against all the other defendants. (T. 1043) It was also stipulated that Abreu was the getaway driver who did not go to the bank and that everyone involved stated that he was unarmed. (T. 1043) Additionally, the jury was told by stipulation that Pablo San Martin had received one life sentence in connection with this crime and had been ordered to receive a second life sentence that could be concurrent or consecutive. (T. 1044-45)

Defendant then rested his case. (T. 1043) Defendant was colloquied outside the presence of the jury and stated that it was his personal decision not to testify and that he did not think that any other evidence should have been presented. (T. 1046-47)

During the charge conference, the trial court proposed giving an *Enmund/Tison* instruction, and Petitioner voiced no objection to the form of the instruction. (T. 1055) The trial court also proposed giving the standard jury instruction on nonstatutory mitigation. (T. 1055-56) Defendant stated that he had no objection to this instruction but requested additional instruction on the issue. (T. 1056) The trial court responded that it would not list every nonstatutory mitigating circumstance. (T. 1056) Defendant stated that he was not requesting that, and the trial court agreed to give the form of

instruction on nonstatutory mitigation that Defendant requested. (T. 1056-57)

Petitioner also submitted a written request for an instruction that provided, “The fact that the codefendants Pablo San Martin and Pablo Abreu were sentenced to life in prison, and did not receive the death penalty, is a mitigating factor for you to consider in this case.” (R. 129) The trial court refused to give this instruction, finding that this matter was covered by the instruction on nonstatutory mitigation. (T. 1062-63) Defendant did not object to this ruling or make an argument on this request. (T. 1062-63)

In his closing argument, Defendant argued that a life sentence was appropriate so that Defendant could contribute to the lives of his children. (T. 1131-32) Defendant also asserted that he never intended for anyone to be injured in any of his crimes, and that because of all of the sentences for all of his crimes, Defendant would never be released from prison. (T. 1138-39) Further, Defendant asserted that since Defendant had already been punished for the robbery, the pecuniary gain factor should not apply. (T. 1139) Defendant also alleged that he did not know Officer Bauer was a police officer. (T. 1140) Defendant alleged that the jury should consider that Defendant did not fire the fatal bullet. (T. 1140-42)

In mitigation, Defendant argued that he had family members who loved him. (T. 1144-45, 1146-48) He also urged the jury to consider his age of 21 at the time of the crime. (T. 1145) Defendant admitted that he had loving, non-abusive family but asserted that the jury should consider the loss of his mother, brother and father and the temporary absence of his uncle. (T. 1145-46) He alleged that he was a good father. (T. 1147-50) Further, he asserted that he was trying to improve himself and had found faith in God. (T. 1150) Finally, Defendant asked the jury to consider the life sentences of Pablo San Martin and Pablo Abreu. (T. 1151-53)

The trial court instructed the jury:

> Among the mitigating circumstances you may consider, if established by the evidence are:
> The age of the defendant at the time of the crime.
> Mitigating circumstances are factors that in part or in the totality of the defendant's life or character, may be considered as extenuating or reducing of moral culpability for the crime committed.
> Among the mitigating circumstances you may have, if established by the evidence, are any other aspect of the defendant's character, record or background and any other circumstance of the offense.

(T. 1157, R. 142-144) The trial court also read the *Enmund/Tison* instruction. (T. 1156, R. 141) After the instructions were read, Defendant did not object. (T. 1167-68) After

deliberating, the jury recommended that Defendant be sentenced to death by a vote of 10 to 2. (R. 155, T. 1172)

At the *Spencer* hearing, Defendant elected to present no further evidence. (R. 191-92) Defendant asserted that the nonstatutory mitigation presented was "his family history, his relationship with his children, his cooperation and the life sentences of the co-defendants," as well as "the maturity he had found while in custody." (R. 204)

The State presented a statement from Michael Bauer, the victim's brother, who was emotionally unable to address the court himself. (R. 193) In the statement, Mr. Bauer expressed the devastation that had been visited upon his family by the loss of Officer Bauer. (R. 193-202) Mr. Bauer explained that the stress from the incident had caused him to have a heart attack and forced him into early retirement. (R. 197)

The trial court followed the jury's recommendation and sentenced Defendant to death. (R. 158-75, 225-47) The trial court found three aggravating factors: (1) prior violent or capital felonies, including a prior attempted armed robbery and aggravated assault of Pedro Santos, a prior first degree murder of Raul Lopez and attempted armed robbery of the Cabanases, and a prior armed robbery and armed kidnapping of Craig Van Ness, as well as the contemporaneous armed robbery and aggravated assault

in this case; (2) during the commission of an armed robbery and for pecuniary gain, merged; and (3) avoid arrest, hinder law enforcement and murder of a law enforcement officer, merged. (R. 158-65, 226-37) The trial court accorded great weight to each of these factors. (R. 158-65, 226-37) The trial court found as nonstatutory mitigating circumstances: (1) Defendant was a good father - little weight, (2) he cooperated with authorities - little weight, (3) Abreu and San Martin received life sentences - little weight, and (4) Defendant had sought self improvement and found faith in custody - some weight. (R. 166-72, 237-45) The trial court considered and rejected Defendant's age as mitigation because of his maturity. (R. 167, 238-39) The trial court also rejected Defendant's family history as mitigation because he was never abused and was able to maintain relationships. (R. 167-69, 239-42) Finally, the trial court rejected the fact that Defendant did not fire the fatal bullet as mitigation. (R. 172, 244-45)

This appeal follows.

SUMMARY OF THE ARGUMENT

The trial court did not manifestly err in excusing two veniremembers for cause. The totality of the comments of these veniremembers raised a reasonable doubt that their feelings about the death penalty would prevent or substantially impair their ability to follow the law.

The issue regarding the comments about the weighing process were not preserved by contemporaneous objections. Moreover, the majority of the comments were proper, and any error in the remaining comments was unpreserved.

The issue related to a jury instruction regarding a specific item of nonstatutory mitigation was unpreserved. Moreover, the trial court did not abuse its discretion in denying this instruction, as the subject matter was adequately covered by the instructions already.

The trial court properly considered all of the proposed nonstatutory mitigating evidence. Further, the trial court did make the appropriate findings under *Enmund/Tison*, which are amply supported by the record and which show that death is proper for Defendant.

Defendant's sentence is proportionate. This Court has affirmed death sentences in similar circumstances. The cases relied upon by Defendant are not comparable to the circumstances

of this matter.

ARGUMENT

I. THE TRIAL COURT DID NOT MANIFESTLY ERR IN GRANTING THE STATE'S CAUSE CHALLENGES TO TWO VENIREMEMBERS.

Defendant first asserts that the lower court improperly excused Ms. Pereira and Ms. Lopez for cause. However, this issue is meritless.

A veniremember whose views regarding the death penalty would prevent or substantial impair that person from following the law in applying the death penalty is not qualified. *Wainwright v. Witt*, 469 U.S. 412 (1985); *Fernandez v. State*, 730 So. 2d 277 (Fla. 1999). The trial court must excuse for cause any veniremember if it has a reasonable doubt regarding that persons qualifications to serve on the jury. *Bryant v. State*, 656 So. 2d 426, 428 (Fla. 1995). Because of the trial court's ability to observe the demeanor of the veniremember in responding to voir dire questioning, a trial court's determination on this issue is not to be disturbed absent manifest error. *Smith v. State*, 699 So. 2d 629, 635-36 (Fla. 1997); *Foster v. State*, 679 So. 2d 747, 752 (Fla. 1996). The fact that a veniremember might eventually state that he would follow the law "does not eliminate the necessity to consider the record as a whole." *Trotter v. State*, 576 So. 2d 691 (Fla. 1990).

With regard to Ms. Pereira, Defendant asserts that her final

response during voir dire indicates that Ms. Pereira could set aside her personal beliefs about the death penalty and follow the law. However, even in this response, Ms. Pereira did not indicate that she could follow the law. Ms. Pereira indicated that she would require the State to show that the aggravating factors overwhelmed the mitigating factors before she would recommend death. (T. 320) The law only requires that the State show that the aggravating factors outweigh the mitigating factors. §921.141(2), Fla. Stat. (1991); Fla. Std. Jury Instr. (Crim) Penalty Proceedings-Capital Cases. As this response itself does not indicate that Ms. Pereira could follow the law, the trial court did not manifestly err in granting the State's cause challenge. *See Kearse v. State*, 25 Fla. L. Weekly S507 (Fla. Jun. 29, 2000).

Moreover, this was not Ms. Pereira's only statement during voir dire. Ms. Pereira initially stated that she did not believe in the death penalty but thought it was necessary given the state of current events. (T. 58-59) She thought she could recommend the death penalty if the aggravators outweighed the mitigators. (T. 59) Ms. Pereira then indicated that she would not recommend death for anyone who did not actually kill the victim. (T. 274) Later, Ms. Pereira indicated that she could vote for the death penalty if she felt Defendant deserved it.

(T. 296-99) However, she admitted that she was already predisposed to recommend a life sentence, that the State would have to work extraordinarily hard to convince her that death was appropriate and that she would probably regret voting for death if she did so. (T. 296-99) A few moments later Ms. Pereira indicated that she agreed with another veniremember, who had stated that she would never vote for death. (T. 312-13) Considering all of Ms. Pereira's voir dire responses, the trial court did not manifest err in finding a reasonable doubt that Ms. Pereira's views on the death penalty would prevent or substantial impair her ability to follow the law. *See Bryant*, 656 So. 2d at 428 (veniremember's statement that he would follow the law insufficient to remove doubt about qualifications because of other statements during voir dire); *Taylor v. State*, 638 So. 2d 30, 32 (Fla. 1994)(same); *Trotter*, 576 So. 2d at 694 (same).

With regard to Ms. Lopez, she initially indicated that she was in favor of the death penalty but could not cast the deciding vote. (T. 121-22) After an overnight recess, Ms. Lopez indicated that the mere possibility of sitting on the jury had caused her to cry and have a problem with her teeth. (T. 244-45) The mere fact that Ms. Lopez later agreed to follow the law did not remove the reasonable doubt about her ability to do so.

See Bryant v. State, 765 So. 2d 68 (Fla. 4th DCA 2000)(veniremember's emotionally charged responses to voir dire questioning sufficient to justify removal for cause).

The cases relied upon by Defendant are inapplicable. In *Farina v. State*, 680 So. 2d 392, 396-98 (Fla. 1996), the veniremember in question expressed concerns about the death penalty but never stated that she would not follow the law. In fact, that veniremember consistently averred that she would fairly consider the death penalty and could vote to impose the death penalty depending on the circumstances. *See also Waterhouse v. State*, 596 So. 2d 1008, 1016 (Fla. 1992)(cause challenge properly denied where juror indicated that he would follow the law despite his personal beliefs). Here, Ms. Pereira continuously vacillated over whether she could vote for death and did not agree to follow the law. Ms. Lopez demonstrated great emotional distress at the thought of making a decision regarding the death penalty. As neither *Farina* nor *Waterhouse* involve veniremembers who changed their minds or expressed such emotional distress, these cases are inapplicable here.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION REGARDING ANY OF THE COMMENTS IN VOIR DIRE.

Defendant next asserts that the trial court erred in commenting about the weighing process during voir dire and in permitting the State to comment on the weighing process during voir dire. Specifically, Defendant asserts that informing the venire that if the aggravating factors outweighed the mitigating factors, death was the lawful recommendation misstated the law. However, this issue is unpreserved and meritless as claims regarding comments are reviewed for an abuse of discretion. *Fernandez v. State*, 730 So. 2d 277, 281 (Fla. 1999).

Of the eleven comments about which Defendant complains, Defendant only objected contemporaneously with the comment once. (T. 17, 39, 42, 59, 301, 302, 366-67, 380, 387, 484-85) Defendant did not object to the first comment until after the trial court concluded all of its introductory remarks, questioned the venire about their knowledge of any of the trial participants and pretrial publicity, excused the venire for the courtroom, and discussed the manner in which individual voir dire would be conducted. (T. 31) Defendant waited for the trial court to complete individual voir dire, take a lunch break and hear argument on the State's motions in limine before again raising an objection. (T. 90) Even at that point, Defendant did

not mention the comments made after the initial objection. Instead, Defendant merely referred to the argument on his first objection. (T. 90) With the second venire panel, Defendant did not object until the trial court had completed its introductory remarks, discussed the death penalty with each veniremember individual, excused for cause several veniremember and declared a recess. (T. 436) As Defendant did not object at the time these comments were made, this issue is unpreserved. *Norton v. State*, 709 So. 2d 87, 94 (Fla. 1997)(motion for mistrial at conclusion of witness's testimony not sufficient to satisfy contemporaneous objection rule regarding answer to question on cross examination); *Johnson v. State*, 660 So. 2d 637, 646 (Fla. 1995)(waiting until after jury was instructed and retired to deliberate to object did not satisfy contemporaneous objection rule); *DuBoise v. State*, 520 So. 2d 260, 264 (Fla. 1988)(same); *Jones v. State*, 612 So. 2d 1370, 1373 (Fla. 1992)(contemporaneous objection rule applied to comments by trial judge).

With regard to the comment to which a contemporaneous objection was made, the State commented:

> The rule is first you decide whether there are any aggravating circumstances. You may decide there are none but if you decide that beyond a reasonable doubt, there are some aggravating circumstances that were proven

> to you, you then look at mitigation. Only if mitigation outweighs the aggravation is there a change, should there be a change in your position. In other words, if the mitigation never outweighs the aggravation, in your mind, if the aggravation is always more than the mitigation, then you vote to recommend for the death penalty.

(T. 301) This comment did not state that the jury must recommend death, that the law required a recommendation of death or that the jury had a duty to recommend death. In fact, the comment used the word "should."[2] As has been noted, "should" indicates that something is discretionary and not mandatory. *State v. Thomas*, 528 So. 2d 1274, 1275 (Fla. 3d DCA 1988); *University of South Florida v. Tucker*, 374 So. 2d 16, 17 (Fla. 2d DCA 1979).

In *Henyard v. State*, 689 So. 2d 239, 249-50 (Fla. 1996), this Court held that it was improper for the State to comment to the jury during voir dire that "[i]f the evidence of the aggravators outweighs the mitigators by law your recommendation must be for death." *Id.* at 249. This Court found that the comment was improper because "a jury is neither compelled nor required to recommend death where aggravating factors outweigh mitigating factors." *Id.* at 249-50. *See also Brooks v. State*, 762 So. 2d 879, 902 (Fla. 2000)(State commented that death

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[2]Eight of the ten unpreserved comments also used the word "should," and the same analysis would apply to these comments.(T. 39, 59, 302, 366-67, 380, 387, 484-85)

"must" be imposed); *Urbin v. State*, 714 So. 2d 411, 421 n.12 (Fla. 1998)(State commented in closing regarding jury's "duty"). As the comment regarding which the issue was preserved and a majority of the comments regarding which the issue was not preserved did not state that the jury was compelled or required to recommend death, these comments were not improper under *Henyard* and its progeny.

Moreover, *Garron v. State*, 528 So. 2d 353, 359 (Fla. 1988), is inapplicable. In *Garron*, the prosecutor stated, "The law is such that when the aggravating factors outnumber the mitigating factors, then death is an appropriate penalty." *Id.* This Court noted that this comment misstated the law. *Id.* at 359 n.7. While at first blush this case appears to indicate that the State may not inform the jury that death is even an appropriate penalty, it must be remembered that the prosecutor used the word "outnumber." As this Court has noted, "the sentencing scheme requires more than a mere counting of aggravating and mitigating circumstances." *Floyd v. State*, 569 So. 2d 1225, 1233 (Fla. 1990). As such, the reason why the comment in *Garron* was improper was that it implied that the weighing process was a counting process and not because it stated that death was an appropriate sentence.

Moreover, extending *Henyard* and its progeny to include

statements that do not indicate that death should be recommended when the aggravating factors outweigh the mitigating factors would lead to an absurd result. It must be remembered that the comments at issue occurred during voir dire. The purpose of these comments was to explain the weighing process to the venire such that they could be questioned about whether they would lay aside their biases about the death penalty and follow the law. If the State and trial court were precluded from informing the venire in any manner as to the standard for recommending a death sentence, it would be impossible to determine whether a veniremember could set aside his bias and determine the appropriate recommendation based upon the law. As such, the comments during which the venire was merely informed what recommendation should be returned were proper. Defendant's sentence should be affirmed.

With regard to the two comments that did assert that recommending death was other than discretionary, the trial court still did not err in denying Defendant the relief he requested. When Defendant finally presented the *Henyard* decision to the trial court, the trial court inquired what remedy Defendant was requesting. (T. 90) Defendant asked that the trial court instruct the venire "that even if the aggravating circumstances outweigh the mitigating circumstances, it is always within their

discretion to return a recommendation of life." (T. 91) The trial court properly refused to give such an instruction. *See Dougan v. State*, 595 So. 2d 1, 3-4 (Fla. 1992); *Mendyk v. State*, 545 So. 2d 846, 849-50 & n.3 (Fla. 1989). As such, Defendant's sentence should be affirmed.

Further, any error in these comments was harmless. There were only two comments during the extensive voir dire in this matter that indicated that a death recommendation was mandatory. (T. 17, 42) Of these two comments, only one was made in the presence of the entire venire. (T. 17) The other occurred during individual voir dire of Mr. Hernandez, who was subsequently removed for cause without objection from Defendant. (T. 42, 347) The final jury instructions were consistent with the standard jury instructions. (R. 132-54) As such, any error in the isolated comments during voir dire was harmless. *See Henyard*, 689 So. 2d at 250; *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986).

III. THE COMMENTS IN CLOSING WERE PROPER INFERENCES FROM THE EVIDENCE AND ANY ERROR WAS HARMLESS.

Defendant next asserts that the trial court abused its discretion in overruling his objections to comments made during the State's closing argument. However, the comments were proper inferences from the evidence, and any error in the comments was harmless.

First, Defendant asserts that the State commented on facts that were not in evidence. However, the courts permit wide latitude during closing argument to argue logical inferences from the evidence. *Thomas v. State*, 748 So. 2d 970, 984 (Fla. 1999); *Breedlove v. State*, 413 So. 2d 1, 8 (Fla. 1982). Moreover, an appellate court's review of a trial court's ruling on closing argument are reviewed for an abuse of discretion. *Fernandez v. State*, 730 So. 2d 277, 281 (Fla. 1999).

Here, the State commented during closing argument about the money Defendant received as his share of the proceeds of the robbery:

> Some of it went to paint that car so that they wouldn't be arrested and the went rest of it went to buy a gun so they could rob Greg Van Ness later.

(T. 1079) The evidence showed that Defendant was unemployed at the time he committed this crime and had been so since December

1991. (T. 894) Defendant had Mr. Gonzalez's Buick, which Defendant had used in perpetrating this crime, repainted after the crime to disguise it. (T. 913) After this crime, the guns, which had been used in this crime and Defendant's two prior crimes, were discarded. (T. 950) Yet, Defendant had a new gun when Defendant robbed and kidnapped Mr. Van Ness eleven days later. (T. 846-48) As Defendant had no job and the money to repaint the car and buy the gun had to come from somewhere, the State was merely making a logical inference that the money came from the robbery proceeds. Thus, the trial court did not abuse its discretion in finding that this comment was a permissible inference for the evidence. *Thomas*, 748 So. 2d at 984; *Breedlove*, 413 So. 2d at 8.

Second, Defendant asserts that the State commented that Defendant intended to kill Mr. Van Ness. However, this comment was made in the context of responding to Defendant's assertions that he did not intend to kill Officer Bauer and did not fire the fatal shot. (T. 1102-10) The State was merely pointing out that even after having been involved in three crimes where guns were fired and two people had been killed, Defendant continued to engage in crimes of violence. As such, while the State's comment may have been poorly worded, it did not constitute reversible error. *See Johnson v. State*, 696 So. 2d 326, 334

(Fla. 1997); *see also Kearse v. State*, 25 Fla. L. Weekly S507 (Fla. Jun. 29, 2000).

Even if these comments could be considered erroneous, any error was harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). These comments were brief and made during the course of an argument that spanned more than sixty pages of transcript. (T. 1067-1130) Moreover, the fact that Defendant had eight prior violent felony convictions, including a prior murder, was uncontroverted. Defendant also did not challenge that the murder occurred during a robbery and for pecuniary gain. While Defendant asserted that he did not realize Officer Bauer was a police officer, the record demonstrated that he had surveilled the bank previously, that a uniformed police officer always guarded the teller and that Officer Bauer was in full uniform when he was killed. The mitigation presented was mainly the testimony of his family members that he was a good person and was raised by a loving family. Under these circumstances, any impropriety in the brief comments by the State did not affect the jury's recommendation and should be deemed harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986).

IV. THE CLAIM THAT THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO GRANT A SPECIAL INSTRUCTION ON SPECIFIC NONSTATUTORY MITIGATION IS UNPRESERVED AND MERITLESS.

Defendant next asserts that the trial court erred in not instructing the jury specifically that it could consider the sentences of the codefendants as nonstatutory mitigation. However, this issue was not preserved and is meritless.

While Defendant submitted a written request for an instruction on this issue, Defendant informed the trial court during the charge conference that he was not requesting specific instructions on all of the nonstatutory mitigators. (T. 1056) Instead, Defendant merely requested that the trial court expand the standard jury instruction, which the trial court agreed to give. (T. 1056-57) When the trial court specifically addressed the written request for this instruction, Defendant made no argument or objection to the trial court's announcement that it felt that this issue was already covered by the jury instruction on nonstatutory mitigation. (T. 1062-63) Moreover, Defendant's written request for this instruction did not contend that such an instruction was necessary because the matter was not covered by the standard instruction on nonstatutory mitigation. (R. 129) The cases cited in support of the request merely state that codefendants' sentences can be considered as a mitigating circumstance but do not address the necessity of a jury

instruction on this mitigating circumstance. *See Demps v. Dugger*, 874 F.2d 1385, 1390-91 (11th Cir. 1989)(discussing harmlessness of instructing the jury that the only mitigators that could be considered were the statutory mitigators); *Brookings v. State*, 495 So. 2d 135, 142-43 (Fla. 1986)(discussing propriety of jury override based on disparate treatment of codefendants). Defendant now asserts that the requested instruction should have been given because it was not covered by the general instruction on nonstatutory mitigation. As Defendant not only never raised this issue in the trial court but affirmatively informed that court that all he was seeking was an expanded instruction on nonstatutory mitigation, which was given, this claim was not preserved. *See Gore v. State*, 706 So. 2d 1328, 1334 (Fla. 1997)(Where argument in support of instruction raised on appeal not the same as argument advanced in trial court, issue not preserved).

Even if the claim could be considered preserved, Defendant's sentence should still be affirmed. The decision regarding what jury instructions to give is reviewed for an abuse of discretion. *James v. State*, 695 So. 2d 1229, 1236 (Fla. 1997). This Court has repeatedly held that the "catch-all" instruction regarding nonstatutory mitigation is all that is required and that the trial court is not required to give a specific

instruction on every claimed nonstatutory mitigator. *Zakrzewski v. State*, 717 So. 2d 488, 495 (Fla. 1998); *James v. State*, 695 So. 2d 1229, 1236 (Fla. 1997); *Jones v. State*, 612 So. 2d 1370, 1375-76 (Fla. 1992). Here, the catch-all instruction covered the issue of the codefendants' sentences as "other circumstances of the offense," which the trial court instructed the jury it could consider in mitigation. (R. 144, T. 1157) As such, the trial court did not abuse its discretion in refusing to grant a special jury instruction on this issue, and Defendant's sentence should be affirmed.

Defendant's reliance on *O'Callaghan v. State*, 542 So. 2d 1324 (Fla. 1989), is misplaced. There, this Court granted habeas relief based on *Hitchcock* error. In *Hitchcock v. Dugger*, 481 U.S. 393 (1987), the Court found error in instructing the jury that the mitigating factors that could be considered were those listed in §921.141, Fla. Stat., without any reference to nonstatutory mitigation. As such, the error found in *O'Callaghan* was not the failure to instruct the jury on a particular proposed nonstatutory mitigating circumstance but the failure to inform the jury that it could consider mitigating factors other than those listed in the statute at all. As the jury here was instructed that it could consider nonstatutory mitigating circumstances, *O'Callaghan* is inapplicable, and

Defendant’s sentence should be affirmed.

V. THE TRIAL COURT'S FINDINGS WITH REGARD TO NONSTATUTORY MITIGATION WERE PROPER.

Defendant next asserts that the trial court failed to consider, find and weigh certain items of nonstatutory mitigation. Specifically, Defendant claims that the trial court should have found and weighed his alleged abandonment by his parents, his family history, his alleged new found maturity and the fact that the shot fired by Defendant did not cause the fatal wound. However, these issues are meritless as the trial court did consider the proposed mitigation and properly found or rejected them.

With regard to findings in mitigation, the standard of review is:

> 1) Whether a particular circumstance is truly mitigating in nature is a question of law and subject to de novo review by this Court; 2) whether a mitigating circumstance has been established by the evidence in a given case is a question of fact and subject to the competent substantial evidence standard; and finally, 3) the weight assigned to a mitigating circumstance is within the trial court's discretion and subject to the abuse of discretion standard.

Blanco v. State, 706 So. 2d 7, 10 (Fla. 1997)(footnotes omitted).

With regard to the alleged abandonment and family history, the trial court did, in fact, consider this evidence:

The defense presented the testimony of two family members, Mario Franqui, Sr. and Mario Franqui, Jr., who provided the following information about the defendant's family background:

The defendant's mother, Sylvia Rivera, had a relationship with the defendant's biological father and became pregnant with the defendant. While pregnant with the defendant, his mother began a relationship with Fernando Franqui. The defendant never knew his biological father but Fernando acted as a real father to the defendant. Fernando and the defendant's mother had a child together -- the defendant's half-brother, Fernando, Jr.

When the defendant was between the ages of one and two, his mother left Fernando and took Fernando, Jr. with her. She left the defendant in the care of Fernando and his family. Fernando's mother and sister then helped raise the defendant. Fernando's sister, Celine, became a surrogate mother for the defendant.

In 1980, at the age of ten, the defendant came to the United States with Fernando, Fernando, Jr., and Fernando's mother - who was 65 years old at the time. They lived with Fernando's brother, Mario Franqui, Sr. The defendant's Aunt Celine, who had raised the defendant since his own mother left, did not come to the United States.

One to two years after arriving in the United States, Fernando, Jr. died. Fernando was devastated by this loss and began drinking heavily and doing crack cocaine. He soon began living in the streets. The defendant continued to reside with Mario Franqui, Sr. And Fernando's mother. At one point, Mario Franqui, Sr. wanted to put Fernando in a rehabilitation program. Other family members disagreed and Mario, Sr. became estranged from the rest of the family. Thus, the defendant then lived alone with Fernando's mother until the age

of sixteen. At that point, he moved into Mario Franqui, Sr.'s house.

Mario Franqui imposed rules upon the defendant while the defendant lived with him. The defendant abided by those rules. The defendant did not use drugs, did not drink alcohol, and did not smoke. In his early teens, the defendant was hanging around with the wrong crowd but by the time he was sixteen, he seemed to have straightened himself out.

The reason the defendant stopped living with Mario Franqui, Sr. is because he became involved in a common law relationship and he left to live with his wife/girlfriend.

The defense argued that these facts show that the defendant never knew his natural father and lost contact with his stepfather when the defendant was ten years old. He lost contact with his mother at the age of one to two and lost contact with his surrogate mother, Celine, at the age of ten when he came to the United States. He also lost contact for several years with another father figure, Mario, Sr., when Mario, Sr. became estranged from the rest of the family.

While those facts were established, it was also established that the defendant led a normal life as a child, that he was never physically, emotionally or verbally abused, and that he suffered no psychological damage as a result of his upbringing. The defendant was able to maintain a long term common law relationship with his girlfriend and was able to hold steady jobs. He was able to give love, attention and care to his two children.

He was given opportunities to work and was under no financial pressure. Both his uncle, Mario Franqui, Sr., who operated a tire business, and his common law father-in-law, Alberto Gonzalez, presented him with the ability to obtain gainful employment.

While the upbringing of this defendant is different from the average person, there

> is nothing about his background that would in any way explain or justify his activities in late 1991 and early 1992. The court finds that the defendant has not reasonably established that his family history is a non-statutory mitigating circumstance.

(R. 167-69) The trial court's rejection of this mitigating circumstance was proper. *See Jones v. State*, 652 So. 2d 346, 351 (Fla. 1995); *see also Beasley v. State*, 25 Fla. L. Weekly S915, S922-23 (Fla. Oct. 26, 2000); *Sochor v. State*, 619 So. 2d 285, 293 (Fla. 1993); *Valle v. State*, 581 So. 2d 40, 49 (Fla. 1991).

In *Jones*, this Court rejected a similar claim. There, the defendant had been abandoned by his mother into the care of relatives. The trial court rejected this childhood history as a mitigating factor because the defendant had been loved by the relatives, raised in a decent home, did well in school and was a good child. This Court found the rejection of this proposed mitigation was proper. Similarly, here, Defendant claimed at trial that his childhood should have been considered mitigating because he was raised by a series of relatives. However, Defendant was loved and cared for by everyone responsible for his upbringing. All of the witnesses testified that Defendant was never abused in any manner, that Defendant was a good child and that he did well in school. (T. 1012-14, 1028-29) As such,

the trial court properly rejected this mitigation under *Jones*. *See also Beasley*, 25 Fla. L. Weekly at S922-23 (deprived childhood properly rejected, where defendant had good childhood and did well in school); *Miller v. State*, 770 So. 2d 1144, 1149 (Fla. 2000)(trial court properly rejected child abuse as a mitigator, where evidence merely showed occasional corporal punishment). Defendant's sentence should be affirmed.

Moreover, any error in the failure to find this mitigating factor was harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). As noted by the trial court, Defendant was raised in a loving family that did not abuse him. Giving this mitigation any weight would still not have resulted in the mitigation outweighing the aggravation. Defendant engaged in a series of well planned crimes that resulted in two deaths. The death of Officer Bauer occurred during the course of his duties to prevent him for arresting Defendant and his companions and to disturb a governmental function. Moreover, this murder occurred during the course of a robbery, which was committed for pecuniary gain. No statutory mitigation was found, and the only statutory mitigator that was even argued was Defendant's age. The nonstatutory mitigation was relatively weak. As such, any error in failing to find Defendant's family situation mitigating was harmless.

With regard to the alleged new found maturity, Defendant claimed at trial that the testimony of his cousin Mario Franqui, Jr. supported this mitigating circumstance. (T. 1150-51) Defendant's cousin had testified that Defendant sought self-improvement and found faith while incarcerated. (T. 1025-30) Defendant now asserts that the trial court failed to consider this proposed mitigation. However, the trial court not only considered this evidence, it found it mitigating and weighed it:

> Mario Franqui, Jr. testified that the defendant has been reading books on psychology, exercise, fitness and mental health since he has been in jail and that he has found religion and prays at night. This testimony was uncontroverted and the court accepts it as true. The court finds that this mitigating circumstance has been reasonably established and is entitled to some weight.

(R. 171) As the trial court did find this evidence mitigating and weighed it, the trial court cannot be faulted for failing to do so. The mere fact that the trial court did not refer to this mitigation in the manner in which Defendant did does not show that the trial court failed to consider this evidence. *See Campbell v. State*, 571 So. 2d 415, 419 n.3 (Fla. 1990)(trial court is permitted to classify nonstatutory mitigation into groups); *see also Cole v. State*, 701 So. 2d 845, 852-53 (Fla. 1997)(rejecting claim regarding consideration of mitigation,

where trial court's detailed evidence, found evidence established mitigating circumstances and assigned circumstances weight). Thus, Defendant's sentence should be affirmed.

Moreover, any error in the failure to also consider this evidence as evidence of maturity was harmless. Considering this same evidence under a different name would not have added to the weight of the mitigator. Thus, the weighing process would not have been affected. As such, any error was harmless. ***State v. DiGuilio***, 491 So. 2d 1129 (Fla. 1986).

With regard to the fact that the bullet fired by Defendant did not cause the fatal wound, the trial court found:

> The defense argues that the fact that the defendant did not fire the fatal shot should be considered as a non-statutory mitigating circumstance. The evidence is uncontroverted that Franqui did not fire the fatal bullet. This fact, then, has been reasonably established. However, whether this proven fact is in any way mitigating is a different matter. This defendant was personally present during two prior robbery attempts during which he and/or his accomplices opened fire upon the intended victims without hesitation. On December 6, 1991 this defendant personally killed another person during a robbery attempt. On January 2, 1992, with full knowledge that a uniformed police officer guarded the tellers, Franqui leapt out of his vehicle, pointed a gun and fired a shot which struck Officer Bauer in the hip. This injury caused the officer to fall towards Gonzalez, who then delivered the fatal blow. Franqui was prepared to use lethal force to

> eliminate any impediment to his robbery plan. He did not hesitate to use actually use [sic] such force. This defendant's willingness to open fire on Officer Bauer sealed Officer Bauer's fate on that sad day and this defendant is as responsible for his death as the person who fired the fatal bullet. Because his bullet luckily did not strike any vital organ does not equate to a mitigating circumstance, This court is not reasonably convinced that this mitigating circumstance has been established.

(R. 172)[3] Defendant asserts that these finding are insufficient to satisfy *Enmund/Tison*. However, this claim is meritless.

In *Enmund v. Florida*, 458 U.S. 782, 797 (Fla. 1982), the Court found that the death penalty could not be imposed on a defendant who did not "himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." In *Tison v. Arizona*, 481 U.S. 137, 158 (1987), the Court found that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement." Here, the trial court expressly found that Defendant "was prepared to use lethal force" and that he "did not hesitate to use actually use [sic] such force." (R. 172) As such, the trial court found that

[3]The trial court also considered the life sentences given to codefendants Abreu and San Martin. (R. 171) The trial court found the codefendants' sentences mitigating but accorded little weight to this factor, given Defendant's greater degree of participation.

Defendant, at a minimum, intended that lethal force be employed. This finding is supported by the fact that Defendant, by his own admission, came to the bank armed with a gun, that Defendant fired that gun at Officer Bauer, that Defendant admitted to having previously surveilled the bank, and that a fully uniformed police officer always guarded the teller. (T. 905, 911, 681-83, 702-03) As the trial did make the appropriate finding under *Enmund/Tison* and that finding is amply supported by the record, Defendant's sentence should be affirmed.

Defendant also assails the trial court for having considered Defendant's prior criminal activity in determining Defendant's intent. However, the fact that Defendant had been involved in a prior attempted robbery of a security guard for tellers at a bank during which shots were fired and had previously shot and killed Raul Lopez, who was acting as a body guard at the time, during an attempt to robbery the Cabanases was certainly relevant to Defendant's intent here. Defendant has every reason to know that attempts to rob armed guards resulted in gunfire and death since he had already been involved in two such gunfights and had personally killed one of the guards. *See Wuornos v. State*, 644 So. 2d 1000, 1008-09 (Fla. 1994)(evidence of similar crimes relevant to show intent).

In *San Martin v. State*, 705 So. 2d 1337, 1345-46 (Fla.

1997), this Court found that *Enmund/Tison* was satisfied in similar circumstances. There, San Martin, along with Defendant and Pablo Abreu, ambushed the Cabanases and Lopez. All three defendants opened fire during the robbery, and Lopez was shot to death. The fatal bullet was fired by Defendant. However, this Court found that San Martin's participation in the attempted robbery was sufficient to satisfy the *Enmund/Tison* culpability requirement. Here, Defendant and Ricardo Gonzalez opened fire on Officer Bauer during a robbery. In fact, Defendant and Gonzalez each approached Officer Bauer from opposing sides of a pillar, behind which Officer Bauer was seeking cover. Defendant aimed at Officer Bauer and shot him, causing Officer Bauer to fall into Gonzalez's line of fire. Thus, *Enmund/Tison* is also satisfied here, and Defendant's sentence should be affirmed. *See also Van Poyck v. State*, 564 So. 2d 1066, 1070 (Fla. 1990)(*Tison* satisfied where defendant instigated escape attempt and came to scene armed); *DuBoise v. State*, 520 So. 2d 260, 265-66 (Fla. 1988)(*Tison* satisfied where defendant actively participated in robbery, kidnapping and rape of victim); *Diaz v. State*, 513 So. 2d 1045, 1048 (Fla. 1987)(*Enmund/Tison* satisfied where defendant came to scene of robbery armed with gun and fired it during robbery).

Moreover, any error in the failure to find the fact that

Defendant did not fire the fatal bullet as mitigating was harmless. As the trial court's analysis shows, the fact that Officer Bauer was not killed by a bullet fired by Defendant was merely fortuitous. As such, this mitigation would not have been entitled to much weight had it been found. Given the strength of the aggravation in this case and the weakness of the mitigation, adding this factor to the weighing process would not have resulted in a different sentence. As such, any error was harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986).

VI. DEFENDANT'S SENTENCE IS PROPORTIONAL.

Defendant next claims that his sentence is disproportionate. "Proportionality review compares the sentence of death with other cases in which a sentence of death was approved or disapproved." *Palmes v. Wainwright*, 460 So. 2d 362, 362 (Fla. 1984). The Court must "consider the totality of circumstances in a case, and compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances." *Porter v. State*, 564 So. 2d 1060, 1064 (Fla. 1990), *cert. denied*, 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).[4]

Here, the trial court found three aggravating circumstances: (1) prior violent and capital felonies - great weight; (2) during the course of a robbery and pecuniary gain, merged - great weight; and (3) avoid arrest, hinder law enforcement and

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[4]Defendant does not challenge the trial court's findings as to the aggravating factors or the lack of statutory mitigation. For the reasons asserted in Issue V, *supra*, Defendant's claims regarding the findings regarding the nonstatutory mitigation are without merit and should be rejected. The trial court's thorough discussion of the factors argued in aggravation and mitigation and findings thereon, (R. 157-75), are well-supported by the record and should be accepted.

murder of a police officer, merged - great weight. (R. 158-65, 226-37) The trial court found no statutory mitigation. (R. 166-67) It did find four nonstatutory mitigating circumstances: (1) Defendant was a good father - little weight, (2) he cooperated with authorities - little weight, (3) Abreu and San Martin received life sentences - little weight, and (4) Defendant had sought self improvement and found faith in custody - some weight. (R. 166-72, 237-45)

Defendant asserts that the death penalty is disproportionate in cases where the murder occurred during the course of a robbery. However, this Court has affirmed the death sentences in numerous cases where the murder was committed during the course of a robbery. *See, e.g., Lowe v. State*, 650 So. 2d 969 (Fla. 1994), *cert. denied*, 516 U.S. 887 (1995); *Heath v. State*, 648 So. 2d 660 (Fla. 1994), *cert. denied*, 515 U.S. 1162 (1995); *Smith v. State*, 641 So. 2d 1319 (Fla. 1994), *cert. denied*, 513 U.S. 1163 (1995); *Wickham v. State*, 593 So. 2d 191 (Fla. 1991), *cert. denied*, 505 U.S. 1209 (1992); *Cook v. State*, 581 So. 2d 141 (Fla.), *cert. denied*, 502 U.S. 890 (1991); *Carter v. State*, 576 So. 2d 1291 (Fla. 1989), *cert. denied*, 502 U.S. 879 (1991).

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. In *Smith*, the court also found more mitigation including one statutory mitigating circumstance -- no significant history of criminal activity -- and *several* nonstatutory mitigating circumstances relating to Smith's background, character and record. This Court rejected Smith's claim of disproportionality. 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.

Moreover, this case involves the murder of a police officer in the lawful performance of his duties. 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. Further,

the greater type of mitigation was presented, including claims related to the defendant's mental health. Given the similarities, Defendant's sentence should be found proportional.

In *Burns v. State*, 699 So. 2d 646 (Fla. 1997), *cert. denied*, 522 U.S. 1211 (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 was found. Here, Defendant not only had the merged law enforcement aggravator, but he also had the prior violent and capital felony aggravator and the merged during the course of a felony and for pecuniary gain aggravator. The mitigation in *Burns* involved the statutory mitigating circumstance of no significant criminal history, and insignificant nonstatutory mitigation; more than was presented here. As such, Defendant's sentence should be deemed proportionate consistent with *Burns. 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).

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 inapplicable. In *Sinclair v. State*, 657 So. 2d 1138, 1142 (Fla. 1995), only one aggravating factor was found: during the course of a robbery and for pecuniary gain, merged. This lone aggravator was weighed against several nonstatutory mitigating circumstances, which included low intelligence and emotional disturbances. In *Thompson v. State*, 647 So. 2d 824, 827 (Fla. 1994), again, only one valid aggravator was found: during the course of a robbery. Again, there were several nonstatutory mitigating factors. In *Terry v. State*, 668 So. 2d 954, 965 (Fla. 1996), two aggravating

factors were found: during the course of a robbery and for pecuniary gain, merged, and prior violent felony, based on a contemporaneous aggravated assault conviction. Again, several nonstatutory mitigators were present. In *Curtis v. State*, 685 So. 2d 1234, 1237 (Fla. 1996), again two aggravating factors were found: during the course of a robbery and for pecuniary gain, merged and prior violent felony. Several mitigating factors were present, including that Defendant was 17 years old, that he only shot the victim's foot after the codefendant had fired the fatal shot and that the codefendant was sentenced to life.

Here, in contrast, three aggravating factors were found: prior violent felony, during the course of a robbery and for pecuniary gain merged and avoid arrest, murder of a law enforcement officer and disrupt governmental function, merged. The prior violent felony aggravator here was supported by convictions arising from three separate criminal episodes, as well as the contemporaneous convictions in this matter. These convictions included a prior first degree murder conviction. Defendant was not a teenager, no evidence of any mental or emotional problems was presented. The codefendant who fired the fatal shot, Ricardo Gonzalez, was also sentenced to death. Defendant did not merely shot at a nonvital region of Officer

Bauer after Gonzalez had already fatally wounded Officer Bauer. Instead, the hip wound from Defendant's shot caused Officer Bauer to fall into Gonzalez's line of fire so that he could be fatally wounded.

Moreover, this murder occurred during a well planned robbery of bank tellers, who were always guarded by a uniformed police officer. Defendant had previously observed the routine at this bank and would have seen an officer guarding the tellers. The shooting began almost as soon as the robbery commenced and before Officer Bauer could even unholster his gun. Defendant had also twice previously attempted robberies involving armed guards. In both of these prior crimes, shots had been fired, and Defendant had previously personally killed one of the guards. Under these circumstances, *Sinclair*, *Thompson*, *Terry* and *Curtis* are all inapplicable, and Defendant's sentence should be affirmed.

Defendant also asserts that his sentence is disproportionate because he did not fire the fatal shot and the trial court did not make adequate findings under *Enmund/Tison*. However, the trial court did, in fact, make the required *Enmund/Tison* findings, as argued in Issue V, *supra*. These findings are amply supported by the record, as argued in Issue V. The fact that Defendant did not fire the fatal bullet should not preclude the

imposition of a death sentence upon him, where Defendant did fire at Officer Bauer, Officer Bauer was struck by a bullet fired by Defendant, the wound from that bullet caused Officer Bauer to be in a position where Gonzalez's shot was fatal, the killing occurred during a planned robbery of tellers who were always guarded by uniformed police officer and Defendant was well acquainted with the lethal consequences of this type of behavior, having previously killed during the course of a similar robbery. As such, Defendant's sentence is not disproportinate under *Enmund/Tison*. *See also San Martin v. State*, 705 So. 2d 1337, 1345-46 (Fla. 1997)*; Van Poyck*, 564 So. 2d 1066, 1070 (Fla. 1990); *DuBoise v. State*, 520 So. 2d 260, 265-66 (Fla. 1988); *Diaz v. State*, 513 So. 2d 1045, 1048 (Fla. 1987). Defendant's sentence should be affirmed.

CONCLUSION

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

Respectfully submitted,

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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 John Lipinski, 1502 N.W. 14th Street, Miami, Florida 33125, this 26th day of January, 2001.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is in compliance with Fla.

R. App. P. 9.210(a)(2).

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