IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC09-1659

LANCELOT URILEY ARMSTRONG

APPELLANT

VS.

STATE OF FLORIDA

APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA, (CRIMINAL DIVISION)

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Lancelot Uriley Armstrong, Defendant below, will be referred to as "Armstrong" and Appellee, State of Florida, will be referred to as "State". Reference to the appellate record will be by "R and supplemental materials will be designated by the symbol "SR" followed by the appropriate volume and page number(s). Armstrong's initial brief will be notated as "IB".

STATEMENT OF THE CASE AND FACTS

On March 7, 1990, Armstrong was indicted with Ercely Wayne Coleman for the February 17, 1990 first-degree murder of Sheriff Deputy John Greeney, attempted first-degree murder of Sheriff Deputy Robert Sallustio, and armed robbery. (R.1 1-2). The jury returned a guilty verdict and a nine to three death recommendation which the trial court followed. This Court affirmed the conviction and sentence on direct appeal. Armstrong v. State, 642 So.2d 730 (Fla. 1994), cert. denied, 514 U.S. 1085 (1995). Subsequently, Armstrong's motion for postconviction relief was denied by the trial court. On appeal, this Court affirmed the denial of collateral relief on the guilt phase issues, however, it vacated the death sentence and remanded for a new penalty phase upon finding that a prior violent felony conviction used in aggravation had been

invalidated. Armstrong v. State, 862 So.2d 705, 715 (Fla. 2003).

Armstrong's new penalty phase commenced on April 10, 2007 with jury selection and on April 16, 2007, the jury was sworn. (R.20 24; R.23 414). Following the State's presentation (R.23 - R.28), the defense presented mitigating evidence including Armstrong's testimony asserting that he was neither involved in the robbery nor was he the shooter of the two deputies. (R.28 - R.30) On April 25, 2007, the jury recommended death by a nine to three vote. (R.2 448; R.34 1862-65). The Spencer[1] hearing was held on September 7, 2007, November 15, 2007, November 21, 2007, and November 30, 2007 where Armstrong presented additional witnesses and sought the mercy of the trial court. (R.36 - R.37; SR-1-2). On August 7, 2009, the trial judge imposed a death sentence for the first-degree murder of Deputy John Greeney having independently found three aggravators, no statutory mitigators, and five non-statutory mitigating factors. (R.5 758-95; SR-3 54-126).

On direct appeal from the first trial, this Court found the following facts in affirming the conviction:

> The record reflects the following facts. In the early morning hours of February 17, 1990, Armstrong called a friend and asked him to go with him to rob Church's Fried Chicken restaurant. The friend refused. According to several employees of Church's,

[1] Spencer v. State, 615 So.2d 688 (Fla. 1993).

around two o'clock that same morning, Armstrong and Michael Coleman came to the restaurant asking to see Kay Allen, who was the assistant manager of the restaurant and Armstrong's former girlfriend. The restaurant employees testified that Allen did not want to see Armstrong[2] and asked him to leave. Armstrong and Coleman, however, remained at the restaurant and eventually Allen accompanied Armstrong to the vehicle he was driving while Coleman remained inside the restaurant. The employees additionally testified that Allen and Armstrong appeared to be arguing while they were sitting in the vehicle.

Allen testified that, while she was in the car with Armstrong, he told her he was going to rob the restaurant, showed her a gun under the seat of the car, and told her he might have to kill her if she didn't cooperate. Coleman then came out to the car, and Armstrong, Coleman, and Allen went back into the restaurant. Allen was responsible for closing the restaurant, and by this time, the other employees had left. Coleman and Armstrong ordered Allen to get the money from the safe. Before doing so, she managed to push the silent alarm. Shortly thereafter, Armstrong returned to the car. Coleman remained in the restaurant with Allen to collect the money from the safe.

Other testimony reflected the following facts. When the alarm signal was received by the alarm company, the police were notified and Deputy Sheriffs Robert Sallustio and John Greeney went to the restaurant where they found Armstrong sitting in a blue Toyota. Greeney ordered Armstrong out of the car and told him to put his hands on the car. After Greeney ordered Armstrong to put his hands on the car, Greeney holstered his

[2] Although the Florida Supreme Court identified Armstrong's co-defendant as Michael Coleman, the indictment was of Ercely Wayne Coleman (R.1 1-2).

gun to “pat down” Armstrong. Sallustio then noticed movement within the restaurant, heard shots being fired from the restaurant and from the direction of the car, and felt a shot to his chest. Apparently, when the movement and shots from the restaurant distracted the officers, Armstrong managed to get his gun and began firing at the officers.

According to Allen, when Coleman noticed that police officers were outside the building, he started firing at the officers. Allen took cover inside the restaurant, from where she heard Coleman firing more shots and heard a machine gun being fired outside the restaurant. Sallustio was shot three times, but still managed to run from Armstrong and radio for assistance. When other officers arrived, they found Greeney dead at the scene. Greeney had died instantly. Allen was found inside the restaurant; Coleman and Armstrong had fled.

That same day, Armstrong told one friend that he got shot and that he returned a shot; he told his girlfriend that a police officer had asked him to step out of his car and that, when he did so, the officer pulled a gun on him and tried to shoot him; and he told another friend that someone shot him while trying to rob him. Thereafter, Armstrong and Coleman fled the state but were apprehended the next day in Maryland. Before being apprehended, Armstrong had two bullets removed from his arm by a Maryland doctor.

A number of shell casings were recovered from the scene. All of the bullets removed from Sallustio and Greeney were fired from a nine-millimeter, semi-automatic weapon; Greeney had been shot from close range. Evidence reflected that Armstrong had purchased a nine-millimeter, semi-automatic weapon the month before the crime. Armstrong's prints were found in the blue

> Toyota as well as on firearm forms found in the car. Additional ballistics evidence reflected that the shots fired from the restaurant did not come from a nine-millimeter, semi-automatic weapon. This indicated that only someone near the car could have fired the shots that wounded Sallustio and killed Greeney. Additionally, testimony was introduced to show that Armstrong was seen with a nine-millimeter, semi-automatic gun right after the incident. Armstrong was convicted as charged.FN1
>
> FN1. Coleman was tried and convicted separately and received a sentence of life imprisonment.

Armstrong, 642 So.2d at 733-34.[3] It was on this evidence that

[3] With regard to Kay Allen's guilt phase trial testimony and her post-trial recantation, this Court reasoned on direct appeal as follows:

> Recantation by a witness called on behalf of the prosecution does not necessarily entitle a defendant to a new trial. *Brown v. State*, 381 So.2d 690 (Fla. 1980), *cert. denied*, 449 U.S. 1118, 101 S.Ct. 931, 66 L.Ed.2d 847 (1981); *Bell v. State*, 90 So.2d 704 (Fla. 1956). In determining whether a new trial is warranted due to recantation of a witness's testimony, a trial judge is to examine all the circumstances of the case, including the testimony of the witnesses submitted on the motion for the new trial. *Bell*. "Moreover, recanting testimony is exceedingly unreliable, and it is the duty of the court to deny a new trial where it is not satisfied that such testimony is true. Especially is this true where the recantation involves a confession of perjury." *Id*. at 705 (*quoting Henderson v. State*, 135 Fla. 548, 561, 185 So. 625, 630 (1938) (Brown, J., concurring specially)). Only when it appears that, on a new trial, the witness's testimony will change to such

this Court affirmed Armstrong's conviction. Id. at 740.

In the pre-penalty phase, the State filed a Motion in Limine seeking to preclude Armstrong from presenting testimony, evidence, and arguments concerning his innocence, as such arguments would be considered improper under Preston v. State, 607 So.2d 404, 411 (Fla. 1992). (R.2 370-76). Such motion was granted. (R.2 392-93). However, as will be evident from the following, Armstrong was permitted to challenge the extent of his involvement in the robbery/homicide based on the mitigating circumstances he raised. Armstrong was claiming mitigation addressed to his culpability in relationship Coleman, that Coleman was the shooter, and that whatever Armstrong's involvement was in the crimes, it was minor and under duress.

> an extent as to render probable a different verdict will a new trial be granted. *Id*. When taking the evidence of this case as a whole, we find that the trial judge correctly denied Armstrong's motion for a new trial. Allen's testimony was consistent from the time of the incident to the conclusion of the trial. Her testimony did not change until she found through a blood test that Armstrong was the father of her twins and until she began communicating with him after the trial. Additionally, even without her testimony, sufficient testimony exists to support, beyond a reasonable doubt, Armstrong's conviction, and it is not probable that a different verdict would be reached if Allen's change of testimony were to be introduced at a new trial. Consequently, we deny this claim.

Armstrong v. State, 642 So.2d 730, 735-36 (Fla. 1994).

At the new penalty phase, the State presented evidence and witnesses to educate the jury about the facts of the crime and to establish aggravating factors. In this endeavor, Broward Sheriff Deputy Robert Sallustio ("Sallustio") testified that at 3:23 a.m. on February 17, 1990 Broward Sheriff Deputy John Greeney ("Greeney") responded to a silent hold up alarm from the Church's Chicken restaurant at 3351 West Broward Boulevard, Fort Lauderdale and Sallustio was Greeney's back up. (R.23 457-58). Sallustio carried a .9mm Smith & Wesson gun which held a clip of fourteen rounds and one in the chamber. He also had a five-shot Smith & Wesson revolver in an ankle holster. (R.23 459).

Upon the deputies' arrival on scene, Greeney informed Sallustio that he saw a blue car in the parking lot with a black male, later identified as Armstrong, in the driver seat and moving inside the vehicle. As Sallustio covered him, Greeney, with gun drawn, approached Armstrong's car. From his vantage point, Sallustio did not see anyone inside the restaurant. (R.23 461-63). Greeney ordered the man to exit his vehicle and to put his hands where they could be seen. Instead of complying, Armstrong responded by stating he was there to pick up his girlfriend. (R.23 463-64). Greeney gave several more commands to Armstrong who failed to comply with the deputy's orders. It was not until Sallustio moved to within 15 feet of the vehicle, aimed at Armstrong, and also demanded that he exit the vehicle,

that Armstrong complied and put his hands on the roof of the car. (R.23 463-65, 478, 487-88). Holstering his weapon, Greeney approached, put his hand on Armstrong's shoulder, and started to frisk Armstrong. (R.23 465).

From his covering position, Sallustio saw Armstrong standing at the open driver's door with Greeney starting the pat down. Out of the corner of his eye, Sallutsio saw the kitchen door inside the restaurant open and a black female, Kay Allen ("Allen"), poked her head out. At the same time Greeney ordered Armstrong to put his hands back on the car, Sallustio turned back to Armstrong and Greeney. Less than a second later, Sallustio, wearing a bullet proof vest, was hit in the chest by a bullet fired from the restaurant. (R.23 465-67, 472, 479, 488-89). Turning back to the restaurant, Sallustio saw a black male, later identified as Wayne Coleman ("Coleman") with his arm around Allen using her as a shield. Sallustio saw a muzzle flash and the window glass break just before he was hit in the wrist with another bullet followed shortly thereafter by two rounds coming from the direction of the car hitting his foot and back next to his spine. Sallustio was aware other bullets were being fired from the restaurant and from the car. (R.23 466-69). Falling to the ground, Sallustio could see Greeney lying on his back motionless. Armstrong, using a .9 millimeter semi-automatic weapon with a 32-round clip, and Coleman, with a

revolver, continued to fire upon Sallustio, who emptied his .9 millimeter weapon. Being unable to re-load his .9 millimeter due to his wrist injury, Sallustio resorted to his .38 caliber ankle revolver to return fire. Armstrong followed Sallustio as he crawled on his hands and knees seeking cover. When Armstrong realized Sallustio was still armed, he turned and fled the scene with Coleman. (R.23 469-72, 482-83).

Shortly after hearing gunfire, Vincent Rozier ("Rozier"), who had been selling crack cocaine in front of his home, saw Armstrong and Coleman drive into a vacant lot. Armstrong, claiming he had been involved in a drug deal gone bad, asked for a ride. Armstrong was carrying a "Uzi-like" weapon and Coleman had a revolver. (R.25 732-36). Rozier agreed to drive Armstrong and Coleman. Armstrong directed Rozier to a home in North Lauderdale where Armstrong changed his clothes. Next, Armstrong asked for a ride to Miami, and Rozier took the men to an apartment off Seventh Avenue and 183rd Street. For his troubles, Rozier received $40. (R.25 736-39).

Between 8:30 and 9:00 a.m. on February 17, 1990, Armstrong and Coleman arrived at Doris Harvard's ("Harvard") home. Harvard noticed Armstrong had been shot. He tried to remove the bullet and to treat his injury while at Harvard's residence. Armstrong told her he had been shot when someone tried to rob him and now the two men were dead. (R.26 850-51). While at

Harvard's home, Armstrong removed a long clip from his weapon which looked like a "machine gun." The other weapon had a brown handle and black barrel. The guns, bullets, and clip were put in a plastic bag and Coleman left the premises with the bag. When Coleman returned five minutes later, he no longer had the weapons. (R.26 852-54). Harvard also noted that Armstrong and Coleman had a bag of money in different denominations, but she did not know how much they had. Armstrong gave her some of the cash to give to his girlfriend. (R.26 854-56)

Greeney died at the scene from his gunshot wounds (R.24 531-34; R25 675), and Sallustio survived even though he was shot three times. (R.23 492-93). Sallustio's arm was fractured by the through and through gunshot wound. He also had a gunshot wound to his left flank which traversed his body crossing over the third and fourth lumbar vertebrae before lodging in his right hip muscle. (R.23 493-96). According to Dr. Villa who performed Greeney's autopsy, the deputy suffered a grazing gunshot wound to his ear and two penetrating gunshot wounds shot from close range.[4] Based on stippling, and other factors, Dr. Villa estimated the shots were fired within 12 to 18 inches of

[4] One of the penetrating wounds was to Greeney's anterior neck which passed through his trachea, esophagus, carotid artery and spinal cord before exiting through the back of his neck and landing in the back of his bullet proof vest. The other entered his left side under his shoulder and went through the bone, aorta, and lungs before lodging under the skin of his lower back. (R.25 676-82, 684-85, 689-91).

Greeney who could have survived only a few minutes after being hit. (R.25 676-82, 684-85, 689-91).

The ballistics from the scene revealed that bullets fired from inside the restaurant were from a revolver (R.23 469-72, 482-83, R.24 542; R.25 623, 630, 779-84), Greeney did not fire his weapon and Sallustio fired 19 shots. (R.24 554-56). The remaining rounds were from a .9 millimeter weapon similar to the one Armstrong possessed. All of the projectiles recovered from the deputies were fired from a .9 millimeter Intertech, Tech-nine weapon (R.23 498-504; R24 531-35), consistent with the one purchased by Armstrong in January 1990. Greeney was shot at close range based upon the stippling around his wounds and the searing/burning of the fabric of his shirt. (R.24 536-39). The bullets recovered from Sallustio and Greeney, along with the stippling noted on Greeney's wounds establish that they were fired by Armstrong from a Tech-nine weapon. (R.25 635-36; R.27 986-87, 995-1001, 1010).

It was established, based on footwear analysis, that Armstrong had stepped on a table in the Church's Chicken restaurant before the deputies arrived on scene. (R.27 953-54, 966-69). From the car Armstrong was sitting in when confronted at the restaurant, the police collected money and coins from the robbery, a gun pouch, and .38 caliber and .9 millimeter bullets (R.25 639-42, 701-02, 706-09). The monetary loss suffered by

Church's Chicken totaled $2,594.10 in paper currency and rolled coins. (R.25 694-95). Swabs taken from the vehicle were tested for DNA. Greeney's blood was identified from the stain found on the driver's seat of the car. (R.25 802)

The next day, Armstrong and Coleman were apprehended in Maryland, with Armstrong driving. When arrested Armstrong was carrying almost $1000.00 in cash and had a receipt for a .9 millimeter Intertech Tech-nine pistol with a 32-round clip purchased on January 14, 1990 from AB Pawn and Gun Shop. An inventory was done of Armstrong's vehicle and bags of clothing were seized. Also, the shoes Armstrong and Coleman were wearing were collected. (R.25 751-57, 767-71; R.26 830-31, 833-35, 838). While in custody in Maryland, Armstrong underwent surgery to remove the projectile fragments from his upper right arm. The items removed were turned over to the Broward County authorities. Due to their size and the fact that together there was not a complete bullet, nothing could be determined from the projectiles other than that they were bullet fragments. However, Armstrong admitted that he was shot by Sallustio. (R.25 716-19, 723-25, 728-29; R.27 1001-02; R.28 1154-56).

The State also presented evidence that Armstrong was convicted not only of the related violent felonies in the instant case, but of an armed robbery which occurred on February 4, 1990. (R.26 917-18; R.27 946). Victim impact statements

regarding Greeney were offered by Retired Deputy Ed Werder and Greeney's sister, Patricia Hubrig. (R.28 1037-49).

In mitigation, the defense offered Dr. Rupert Rhodd to discuss the chaotic political and poor socio-economic conditions that existed in Jamaica in the late 1970's and early 1980's. (E.28 1051-75) Dr. Rhodd did not interview Armstrong about his alleged involvement with the police force in Jamaica. In fact, Dr. Rhodd saw Armstrong for about an hour and he did not know what happened to Armstrong after Armstrong left Jamaica for the United States. (R.28 1067, 1069, 1073).

Armstrong was born on July 29, 1963, and testified on his own behalf. He admitted he had been convicted of first-degree murder and had been on death row since then, and that he was convicted of an armed robbery after the murder conviction (R.28 1076-77, 1123; R.29 1209-10, 1322-23). He offered that he suffered several accidents and has had several medical problems, including dyslexia, since childhood and currently has medical conditions. Also, he complained that being on death row was very stressful. (R.28 1077-82, 1097-98; R.29 1210) Armstrong discussed his impoverished childhood growing up in Jamaica, his home life, siblings, and the punishment he suffered at the hands of his step-father. (R.28 1082-97) He also reported about his education, various employment opportunities and political unrest in Jamaica, artwork he completed, and his religious beliefs.

(R.28 1097, 1099-1108, 1137; R.29 1230, 1305-06).

In 1983, Armstrong followed his mother to the United States. (R.28 1103, 1107). In Boston, he took up construction work, eventually creating his own business there, and later in Miami only to lose them when he was arrested for the instant crimes. (R.28 1108-11, 1113-21, 1130). Armstrong claimed he always helped the police and that in both Jamaica and the United States, he tried to stop children from becoming involved with drugs. (R.28 1109-11; R.29 1321-22). He reported that in 1985, his daughter broke her neck in a car accident; in 1988, his brother on his father's side was murdered; and in late 1989, there was an attempt on his life. (R.28 1110-12, 1121-22; R.29 1258-62). Armstrong also discussed the children he had with his wife and several girlfriends, including twins he had with Kay Allen, the assistant manager of the Church's Chicken he robbed on the night Greeney was killed and Sallustio was shot investigating the silent alarm Allen was able to activate. He also noted how he supported these women and purchased presents and cars for them (R.28 1123-26; R.29 1245-46, 1248-55, 1257, 1262-65, 1266-67, 1266-68)

It was through his construction business that Armstrong met Coleman who he employed, but found not to be a reliable worker (R.28 1118-20). Armstrong was permitted to offer that he had a successful construction business with sufficient cash to allow

him to buy a Toyota for his then girlfriend, Yvonne Hutchinson. He also claimed that his financial situation negated any motive to rob the Church's Chicken. Instead, he was a victim of circumstances as Coleman was with him the night he was to pick up Allen from Church's Chicken[5] and only informed Armstrong once they were at the restaurant that he, Coleman, had decided to rob the establishment. It was Armstrong's claim that he complied with all of the orders of the deputies. Armstrong refuted Sallustio's version of events, and instead offered that it was Coleman who shot both officers or that Greeney died from friendly fire. (R.28 1126-35, 1137-38, 1141-60, 1188-89; R.29 1214, 1220-22, 1226-27, 1229, 1231, 1233-37, 1268-71, 1273, 1276-77, 1287-88, 1301-02, 1305, 1323-25).

Armstrong attempted to explain why he continued to accompany Coleman, driving him to New York, without seeking medical attention or reporting the shooting to the police[6] (R.28 1156-57, 1159-68, 1171-72, 1190-91; R.29 1291-94, 1302-03, 1305-07, 1311, 1316-18). He also admitted to purchasing a Tech-nine pistol with a 32-round clip from A&B Pawn as well as other guns and ammunition prior to the February 1990 killing, however, he

[5] Armstrong admitted that during his 1991 trial, Charles Scott, Kay Allen's then boyfriend, testified that he was going to pick her up from work at the end of her shift. (R.29 1258)

[6] However, Armstrong also offered that he did contact the police about the shooting, but that the officer told him to get a lawyer before he gives a police statement. (R.29 1309-10)

offered that they were for security purposes. (R.28 1180-84, 1186-88; R.29 1230-31, 1242-43, 1258-60, 1319-21) Armstrong claims that he fired no shots that night and denied shooting Sallustio, but claimed Sallustio shot him twice in the arm by accident. (R.28 1188; R.29 1194, 1207-08, 1213, 1224-25, 1321). Additionally, Armstrong suggested that evidence was planted against him. (R.29 1285-87).

The final defense witness before the jury was Dr. Michael Morrison who testified that Armstrong had a benign/non-cancerous lymphoma in his hip and groin area. The biopsy revealed that the mass contained no malignant cell, and such lymphoma generally will not become cancerous, but Dr. Morrison recommended that it be watched. Dr. Morrison estimated that Armstrong had had the lemon-sized mass (4 cm x 6 cm) for two or three years by the time of his 2006 examination. (R.30 1356-57, 1364-65, 1370-71). Following Dr. Morrison's testimony, the defense rested. (R.30 1373)

As a result of Armstrong's original penalty phase and postconviction allegations, the State requested, and the trial court inquired whether Armstrong had any other witnesses he wished to present. Armstrong affirmed that he had discussed strategy and defenses with counsel and that he had nothing further to present in mitigation. (R.30 1374). Also, Armstrong confirmed that this was his opportunity to present mitigation to

the jury, that he knew he could call friends and family members, but that he elected not to call these witnesses. (R.30 1382-83). Again, Armstrong averred that he had conferred with counsel in formulating the defense mitigation case and that counsel had answered all his questions and presented the case that he wanted presented with the exception of alleging prosecutorial misconduct.[7]

Additionally, Armstrong agreed that in his postconviction litigation he had raised the claim of ineffective assistance of counsel for failing to present mental health issues in the original 1991 penalty phase, he had received an evidentiary hearing on the matter, and has now chosen not to present the mental health information to the instant jury. (T.30 1382-85, 1388). Following the State's listing of the 15 names on the defense witness list from the postconviction litigation, Armstrong affirmed that he was aware of the witnesses and with counsel decided not to call those witnesses, but instead, to present just those presented to the instant jury. (R.30 1389-90). The trial court found Armstrong was making a knowing and

[7] The trial court questioned defense counsel about this matter and counsel reported that he believed prosecutorial misconduct would fall under the "catch all" mitigator, but in this case he did not find evidence to support such a mitigation factor. Both defense counsel, David Rowe and Donovan Parker, discussed the matter and reached the same conclusion that there was no evidence of prosecutorial misconduct and that they would not participate in any filings alleging prosecutorial misconduct. (R.30 1385-86)

intelligent waiver of additional witnesses and further mitigation. After being given additional time to confer with counsel, Armstrong reaffirmed he was waiving the presentation of his children and further mitigation. (R.30 1390-91).

Subsequently, the parties gave closing statements (R.30 1416-29, 1437-54) and the jury was instructed and sequestered. (R.30 1457-68, 1520-21). Following the trial court's response to several jury questions (R.30 1487, 1502, 1506-08, 1516, 1520-21; R.33 1858) and a read back of the testimony of Sallustio and Armstrong (R.31 1526-60, 1585-1685, 1693-1721; R.32 1729-47, 1752-1804, 1806-29; R.33 1841-57) the jury recommended death by a vote of nine to three. (R.3 448; R.34 1862-65).

On May 31, 2007, between the end of the penalty phase and commencement of the Spencer hearing, Armstrong moved to discharge counsel and to appoint new counsel. (R.3 468-75; R.35 2-3). The trial court conducted a Nelson[8] hearing during which Armstrong complained that counsel had not interviewed certain witnesses he wanted and that he had not been given all of the witness lists to compare when he waived further testimony at the end of the penalty phase. (R.35 4-6) Armstrong announced the names of the witnesses he alleged to have asked counsel to contact, and complained that counsel had not provided him with a

[8] Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973).

copy of the postconviction evidentiary hearing transcript. The matter was taken under advisement, and the Spencer hearing continued. (R.35 13).

On July 2, 2007, the trial court denied the motion to discharge counsel. (R.3 525-26; R.362-3) The Spencer hearing commenced on September 7, 2007 at which time Armstrong presented Davis Massar ("Massar"), a film maker who corresponded with Armstrong beginning in 2002 and met him in April, 2003 via a pen pals program for death row inmates which was almost 13 years after the murder of Greeney (SR.1 at 6-8, 15-16). According to Massar, Armstrong seemed to be a gentle, moral man with a big heart who Massar came to like. (SR.1 10-11, 26). It was Massar's wife who first corresponded with Armstrong and has written approximately 20 letters; Massar has written only two or three letters to Armstrong and has spent between two and three hours with him. (SR.1 16-17).

Also presented at the September Spencer Hearing was Avia McKenzie ("McKenzie"). (SR 21) She met Armstrong in 1990 while he was incarcerated. McKenzie described Armstrong as a very nice person who was polite, loving, and gentle. (SR.1 22) ON the occasion of her daughter's death in a car accident, Armstrong called to comfort and encouraged her not to give up. (SR 23-24) Since then, McKenzie visits Armstrong when he is in the Broward County jail and sends him money; she has never

visited Armstrong on death row, however, he has called her from Raiford twice. (SR.1 24-27). McKenzie did not know Armstrong before Greeney's murder. (SR.1 26).

It was agreed by the parties that Armstrong was permitted to give an allocution to the trial court and would not subject to cross-examination by the State. (SR.1 28). When addressing the trial court, Armstrong requested the opportunity to re-file his motion to discharge counsel and noted again that he did not get the State's witness list and that there were some witnesses he wanted to present to the jury, but counsel failed to secure those witnesses for court, and Armstrong was denied access to an investigator. (SR.1 29-36) Again, the court took the issue under advisement and continued the Spencer hearing. (SR.1 44).

On November 15, 2007, Armstrong testified before the trial court at the continued Spencer Hearing. (R.36 4). He offered that he erred on February 17, 1990 by leaving the crime scene, apologized to the Sallustio family, noted his sorrow for Greeney's death, and asked the trial court for mercy. (R.36 3-10, 16-18). As he did in his testimony before the jury, Armstrong discussed his dyslexia, religion, and self-reported involvement in helping children stay away from drugs. He averred that he did not plan to kill anyone, but was at Church's Chicken merely to pick up the manager. (R.36 10-17) Armstrong offered that he did not have any disciplinary reports filed

against him while on death row or in the Broward County Jail. (R.36 18). Following this testimony, Armstrong noted that he also wanted his mother and daughter to testify. The State agreed that additional time should be afforded Armstrong. (R.36 22-24)

At the continued Spencer Hearing of November 30, 2007, defense counsel announced that Armstrong's mother would testify, but he was unable to make contact with Ranita, Armstrong's daughter, as she disconnected her telephone after learning that her father was seeking her testimony. (R.37 5-6, 18-21).

Armstrong's mother, Dorrett English ("English") testified that she loved her son. Armstrong had been dyslexic as a child, and she was not able to get him treatment in Jamaica, so eventually she brought him to the United States in 1982; English had left Jamaica in 1978. (R.37 9-10). English taught Armstrong and her other children to be religious. (R.37 11). It was English's position that executions are barbaric, and that God is the ultimate judge. She noted her sympathy for Greeney's family and prayed for mercy for her son. (R.37 12-14).

Upon completion of the Spencer Hearing testimony, written sentencing memoranda were ordered and submitted by the parties. (R.4 727-46, 747-50; 751-53; R.37 22-26). On August 7, 2009, the trial court entered its sentencing order. (R.5 758-95; SR.3 55-126) The trial court found three aggravators, (1) "[t]he

Defendant was convicted of another capital felony or of a felony involving the use or threat of violence to the person. Florida Statute 921.141(5)(b).” based on the attempted murder of Sallustio and the February 4, 1990 armed robbery of an establishment at 427 West Sunrise Boulevard (R.5 762-71); (2) “[t]he capital felony was committed while the Defendant was engaged, or was an accomplice, in the commission of, or the attempted commission of, or an attempt to commit the crime of robbery. Florida Statute 921.141(5)(d)” based on the armed robbery of Kay Allen at Church’s Chicken (R.5 771-76); and (3) “[t]he victim in this capital case was a law enforcement officer engaged in the performance of his duties. Florida Statute 921.141(5)(j).” (R.5 776-78). Each aggravating factor was accorded great weight. (R.5 771, 776, 778).

The trial court also explained:

> This Court specifically instructed the jury about improperly doubling aggravators, explaining that if the jury found that two or more of the aggravating circumstances were proven beyond a reasonable doubt by a single aspect of the offense, “you are to consider that as supporting only one aggravator.” As an example, this Court used the aggravator of commission of the crime for the purpose of avoiding a lawful arrest or effective an escape from custody and the aggravator that the victim of the crime for which the Defendant is to be sentenced is a law enforcement officer engaged in the performance of the officer’s official duties. The jury was informed that the aggravating circumstance related to the same

> aspect and could only be considered as a single aggravating circumstance. See Penalty Phase Instructions in the instance case, filed on April 23, 2007 in open court.
>
> This Court cannot improperly double aggravators. The State argued that there was another aggravating circumstance which was supported beyond a reasonable doubt by the evidence, the avoid the (sic) arrest aggravator under Florida Statute 921.141(5)(j), but it merged with the aggravating circumstance of Florida Statute 921.141(5)(e), **the victim in this capital felony case was a law enforcement officer engaged in the performance of his duties**.
>
> This Court finds that the jury was not instructed with the language of "merging" of aggravators rather, the jury was instructed as to the improper doubling of aggravators. The example provided to the jury would not have permitted a finding of both aggravators. Additionally, the same aggravating circumstances were raised on appeal after the first penalty phase because the trial court found both aggravators 921.141(5)(e) and 921.141(5)(j), which the Supreme Court found to be duplicative "since the only evidence supporting the aggravating circumstance was the fact that the victim was a law enforcement officer." ARMSTRONG I. In the instant case, this Court finds as did the Florida Supreme Court in ARMSTRONG I, that the only evidence supporting the "avoid arrest aggravating circumstance" was the fact the murder victim was a law enforcement officer. Even though the Defendant also attempted to murder Deputy Sallustio, this Court only finds 921.141(5)(e) beyond a reasonable doubt and declines to "merge" the two aggravators.

(R.5 778-79)(emphasis in original).

The statutory mitigation offered by Armstrong was rejected

by the trial court as either not proven, not applicable, or contradicted by the record evidence (R.5 781-86). The following non-statutory factors were found and weighed as follows: (1) born and raised in an impoverished country (little weight); (2) problematic health history and suffering from dyslexia (little weight); (3) physically abused as child (some weight); (4) good prisoner and is religious (very little weight); and (5) helped raise siblings (some weight). (R.5 786-92). In sentencing Armstrong to death, the trial court stated "that the aggravating circumstances in this case far outweigh the mitigating circumstances. The aggravating circumstances in this case are overwhelming." (R.5 793) The court also ran the life sentences, with their minimum mandatory sentences, for attempted first-degree murder of Sallustio (Count II) and armed robbery (Count III) imposed on June 20, 1991 consecutive to each other and consecutive to the death sentence. (R.5 793-94).

Upon weighing the aggravating and mitigating factors, the trial court sentenced Armstrong to death for the first-degree murder of Deputy John Greeney. This appeal followed.

SUMMARY OF THE ARGUMENT

Issue I - The trial court did not abuse its discretion in admitting into evidence a vial of the decedent's blood or photographs of Greeney taken at the scene and at the medical examiner's office.

Issue II - There was no abuse of discretion where the trial court admitted the remaining bullet fragment removed from Armstrong's shoulder even though two fragments the size of dots apparently had been lost sometime after their admission into evidence at the 1991 trial and 2007 new penalty phase. There was a reasonable explanation for the loss and there was no bad faith shown for the loss of inculpatory evidence. The remaining fragment was properly identified, relevant, and admitted properly. However, even if the remaining fragment should have been excluded, such was harmless error beyond a reasonable doubt in this re-sentencing proceeding.

Issue III - The jury was instructed properly regarding the credit Armstrong would receive for time served should he be sentenced to life without the possibility of parole for 25 years. There was no abuse of discretion in deciding not to instruct the jury on the likelihood of parole after 25 years.

Issue IV - There is no cumulative error arising from the evidentiary rulings challenged on appeal.

Issue V - The death sentence in this case is proportional.

ARGUMENT

ISSUE I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING INTO EVIDENCE TWO PHOTOGRAPHS OF GREENEY AND A VIAL OF HIS BLOOD (restated)

Armstrong asserts that it was error for the trial court to admit into evidence State Exhibits 23 and 92, photographs of Greeney's head) and State's Exhibit 22 (vial of Greeney's blood). He argues that the two photographs, the vial of blood, Greeney's bloody shirt (State's Exhibit 1), and Dr. Villa's testimony that he observed Greeney lying in a pool of blood,[9] were presented for no purpose other than to inflame the jury. The State disagrees as the evidence was relevant to establish for the facts of the crime, aggravating circumstances, and to rebut Armstrong's claimed mitigation that he was a minor participant and/or that he was under duress from Coleman. Specifically, the photographs and shirt were relevant to Greeney's status as a law enforcement officer in the performance of his duties, the distance from which Greeney was shot, and established that only Armstrong shot and killed Greeney, thus,

[9] Armstrong did not object to the admission of Greeney shirt (State's Exhibit 19) or to Dr. Villa's testimony as to how Greeney was found and the amount of blood on the scene. (R.24 530-31; R.25 675) As such, those challenges are not preserved for appeal, and should not form a basis for a claim of error. See Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982) (holding for issue to be cognizable on appeal, it must be specific contention asserted below).

negating Armstrong's mitigation noted above. Additionally, the vial of blood was relevant for DNA testing and to show that Greeney's blood was found inside Armstrong's Toyota used during the robbery-homicide. Given that the evidence was relevant and the probative nature outweighed the prejudicial effect, the trial court did not abuse its discretion in admitting such exhibits.

In Rose v. State, 787 So.2d 786 (Fla. 2001), this Court stated:

> As recently stated in *Zack v. State*, 753 So.2d 9, 16 (Fla. 2000), relevant evidence is ordinarily admissible unless it is barred by a rule of exclusion or its admission fails a balancing test to determine whether the probative value is outweighed by its prejudicial effect. This standard is equally applicable to photographs. *See Pangburn v. State*, 661 So.2d 1182, 1188 (Fla. 1995). Hence, we have held that autopsy photographs, even when difficult to view, are admissible to the extent that they fairly and accurately establish a material fact and are not unduly prejudicial. *See id*. Absent a clear showing of abuse of discretion by the trial court, a ruling on admissibility of such evidence will not be disturbed. *See Gudinas v. State*, 693 So.2d 953, 963 (Fla. 1997).

Rose, 787 So.2d at 794.

Although a defendant may not argue lingering or residual doubt as mitigation,[10] Armstrong alleged in mitigation that

[10] It is well settled that a defendant does not have the right to present evidence of lingering or residual doubt as mitigation.

Coleman was the driving force behind the robbery and shooting, that Armstrong did not shoot and kill Greeney, and that his involvement, in anything, was minor and under duress. (T.28 1134-57). As a result, the State was obligated to present the facts of the crime to the jury who had not heard the original guilt phase evidence, and to rebut Armstrong's mitigation, even though Armstrong's role as the shooter was established at the original trial and was so found by this Court on direct appeal.[11] In furtherance of its case, the State offered evidence to educate the re-sentencing jury on the facts of the crime, and to

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See Bates v. State, 750 So.2d 6, 9 n.2 (Fla. 1999) (following Franklin v. Lynaugh, 487 U.S. 164 (1988) and concluding there is no constitutional right to present "lingering doubt" evidence); Sims v. State, 681 So. 2d 1112, 1117 (Fla. 1996) (finding lingering doubt not an appropriate mitigating circumstance and rejecting argument that court should have considered and instructed the jury on defendant's claim of imperfect self-defense because "the jury heard and rejected Sims' claim of self-defense during the guilt phase of the trial and the judge characterized this argument in the penalty phase as "lingering doubt"); Preston v. State, 607 So. 2d 404, 411 (Fla. 1992) (same); King v. State, 514 So. 2d 354, 357-58 (Fla. 1987)(same), cert. denied, 487 U.S. 1241 (1988); Aldridge v. State, 503 So. 2d 1257, 1259-60 (Fla. 1987) (same).

[11] In addressing Armstrong's challenge to Sallustio's testimony and denial of a review of the grand jury testimony, this Court stated: "Moreover, clear, direct evidence unquestionably places Armstrong at the restaurant on the night of the crime and physical evidence supports a finding that Armstrong fired the fatal shots." Armstrong v. State, 642 So.2d 730, 736 (Fla. 1994). In conducting a proportionality review, this Court found: "[t]he facts of this case reflect that Armstrong shot Officer Greeney at least four times at close range even though Greeney never removed his gun from his holster to return fire. Id. at 739.

rebut Armstrong's defense. Toward this end, the State showed that Greeney was shot by Armstrong at close range, 12 to 18 inches, with a nine-millimeter semi-automatic weapon, as they stood together near Armstrong's Toyota when the shooting started. The State established that Armstrong had a nine-millimeter weapon and that Greeney was not shot by Sallustio who also used a nine-millimeter. The distance was established through evidence of stippling around Greeney's wounds and searing to his uniform shirt near the bullet entry locations. (R.23 465-72, 478, 530-31, 535-39) Additionally, the blood sample provided DNA evidence for comparison with blood stains collected from the blue Toyota involved in the criminal events. (R.25 796, 801-02).

Detective Charles Edel ("Edel"), with 20 years of crime scene investigation experience, collected Greeney's shirt, vest, and the fatal bullets removed during the autopsy (R.23 505-06, 530-31). Edel's examination of Greeney's shirt revealed that the left epaulet was seared which indicated that the gun was fired from very close range, approximately three to six inches, burning the epaulet. (R.24 536-37). From the autopsy photograph of Greeney (State's Exhibit 23 - R.24 538-39; R.38 19-20), Edel, who has been trained to recognize stippling and has seen evidence of stippling some 200 to 300 times, could see stippling around Greeney's neck which was caused by burning gunpowder

coming in contact with Greeney's skin. (R.24 538-39).

Dr. Villa reported that Greeney had a gunshot wound to his anterior neck and one to his left under his shoulder. The autopsy revealed that both gunshot wounds were fatal and were fired from close range (12 to 18 inches) based on the stippling found. Pointing to Greeney's shirt (State's Exhibit 19) Dr. Villa showed where the soot was found and how it was the same as the soot found around Greeney's neck. Similarly, Dr. Villa opined that the photograph of Greeney's ear with soot in it would help illustrate the wounds found and to estimate the distance from which the bullets were fired. (R.25 676-85, 691).

Richard Valentime testified that on January 14, 1990, he sold an Intertech Tech-nine semiautomatic weapon to Armstrong (R.26 833-35). Shortly after the shootout at Church's Chicken, Vincent Rozier met Armstrong and Coleman; Armstrong was carrying an Uzi-like weapon and Coleman had a black revolver. (R.25 735-36). Balistics from the scene confirmed that Coleman was firing a revolver from inside the restaurant, Sallustio was firing into the restaurant and at Armstrong, and Armstrong was firing at Sallustio and Greeney, wounding both deputies and killing Greeney. (R.27 985-94, 996-1002).

Under section 921.141(1), Florida Statutes, "evidence may be presented as to any matter that the court deems relevant to the nature of the crime." This Court has affirmed the

admissibility of even gruesome photographs when they are "independently relevant or corroborative of other evidence." Czubak v. State, 570 So.2d 925, 928 (Fla.1990). To be relevant, "a photo of a deceased victim must be probative of an issue that is in dispute ." Almeida v. State, 748 So.2d 922, 929 (Fla. 1999). "[I]t is within the sound discretion of the trial court during resentencing proceedings to allow the jury to hear or see probative evidence which will aid it in understanding the facts of the case in order that it may render an appropriate advisory sentence." Teffeteller v. State, 495 So.2d 744, 745 (Fla. 1986). As reasoned in Henderson v. State, 463 So.2d 196, 200 (Fla.), cert. denied, 473 U.S. 916 (1985), "[t]hose whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments." The admission of photographic evidence is within the trial court's sound discretion, and will not be overturned absent a showing of clear abuse. Pangburn v. State, 661 So.2d 1182, 1187 (Fla. 1995); Wilson v. State, 436 So.2d 908 (Fla. 1983).

Here, the penalty phase jury was presented with a photograph of Greeney at the crime scene, one depicting Greeney's head and neck area taken during the autopsy, and a vial of Greeney's blood. The photographs were relevant and were not more prejudicial than probative. In fact, as outlined above, they were necessary to help establish the distance from

which Greeney was shot and that only Armstrong could have been the shooter. The blood was evidence in the case and established that Greeney was shot near Armstrong's Toyota; the location where Greeney confronted Armstrong and was starting to frisk him when the shooting started.

The mere fact a photograph is gruesome does not preclude its use. Thompson v. State, 565 So.2d 1311, 1314-15 (Fla. 1990) (reasoning fact "photographs are gruesome does not render their admission an abuse of discretion"). Where the court has viewed the evidence and determined it relevant and necessary for a complete understanding of the testimony, the ruling should not be overturned. Lott v. State, 695 So.2d 1239, 1243 (Fla.)(finding no error where judge viewed prints and found them necessary and relevant to demonstrate manner of death, nature of injuries, and how they were inflicted), cert. denied, 522 U.S. 986 (1997); Larkins v. State, 655 So.2d 95, 98 (Fla. 1995)(same). See generally Charles W. Erhardt, Florida Evidence § 401.2, at 108 (2010 ed.) (stating that "[p]hotographs are admissible both as being illustrative of the testimony of a witness and as having independent evidentiary value so that they can speak for themselves").

Defendant's reliance upon Reddish v. State, 167 So.2d 858, 863 (Fla. 1964) and Dyken v. State, 89 So.2d 866 (Fla. 1956) as in those cases, the photographs were found not to have any

relevancy. Conversely, here, the photographs helped corroborate the events of the crime, establish the identity of the shooter, i.e., Armstrong, and rebut Armstrong's claims of innocence and offered mitigation. This situation is more akin to Rose, 787 So.2d at 794, where autopsy photographs were found to be relevant and admissible as they assisted the medical examiner in his testimony during a resentencing and helped establish an aggravating factor. See England v. State, 940 So.2d 389, 399 (Fla. 2006) (finding that trial court did not abuse its discretion in admitting autopsy photos of victim's head, torso, and hands in a moderately decomposed state which were relevant to establish manner and cause of death and HAC).

This Court has recognized in Henderson v. State, 463 So.2d 196, 200 (Fla. 1985) that "[i]t is not to be presumed that gruesome photographs will so inflame the jury that they will find the accused guilty in the absence of evidence of guilt. Rather, we presume that jurors are guided by logic and thus are aware that pictures of the murdered victims do not alone prove the guilt of the accused." Here, Armstrong's guilt had been established in his 1991 trial and affirmed on direct appeal. The instant jury was making a sentencing recommendation and had to assess Armstrong's version that he was not the shooter, but was at best a minor participant suffering under duress. This was weighed against the strong aggravation in the case, prior

violent felonies, felony murder, and killing of a law enforcement officer. The fact that the jury saw a picture of Greeney's head and neck which depicted stippling, even though it was taken during the autopsy, was not something which would inflame the passions of the jury to render a death recommendation even if the blood vial and photographs should not have been admitted. If error is found, it was harmless beyond a reasonable doubt under State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). This Court should affirm.

ISSUE II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING INTO EVIDENCE THE REMAINING BULLET FRAGMENT FROM THE ORIGINAL THREE FRAGMENTS OF TRIAL EVIDENCE (restated)

At issue here is the admissibility of the remaining fragment of the original three fragments of evidence, whose chain of custody and relevant inculpatory value were established at the original 1991 guilt phase of Armstrong's capital case, admitted into evidence and held by the evidence clerk until the evidence was offered in the 2007 resentencing and it was discovered that the two "dot-size" fragments were missing/lost during the intervening years. Armstrong claims that under Murray v. State, 838 So.2d 1073, 1082 (Fla. 2002) the largest remaining fragment of three fragments collected from his arm should not have been admitted into evidence at the penalty phase

because he showed "probable tampering" through the loss of the two minute fragments that were nothing more than the size of dots and could not be weighed. The State disagrees, and maintains that there was no abuse of discretion in admitting the remaining fragment. An adequate explanation for the missing fragments was presented to the trial court under Murray v. State, 3 So.3d 1108, 1115-16 (Fla. 2009) and the circumstances of their loss undercuts any claim of tampering with evidence. Moreover, the remaining fragment was admissible under Arizona v. Youngblood, 488 U.S. 51, 58 (1988) as there was no bad faith by State shown for losing properly admitted inculpatory evidence **after** the conviction.

Contrary to Armstrong's position, the evidence was admitted properly upon the trial court's implicit rejection of the claim of tampering, and instead, accepted the State's explanation as to how the two fragments, each the size of a dot and originally wrapped in tissue paper since their admission into evidence at the 1991 trial, may have been lost. The State proved there had been no tampering, merely a loss of two minute, "dot-size" fragments of a bullet during the 17 years they were in the evidence custodian's possession.[12](R.26 823-25; R.27 929-32,

[12] In context determining whether a new rule should be held to apply retroactively, this Court recognized that the passage of time may result in the loss of evidence where there is no nefarious intent or bad faith on the part of the State. Cf.

1001-02). The trial court found neither bad faith by the State nor prejudice arising from the loss of two "dot-size' fragments. As such, the remaining fragment was relevant and admissible under Youngblood.

Admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion. Ray v. State, 755 So.2d 604, 610 (Fla. 2000); Zack v. State, 753 So.2d 9, 25 (Fla. 2000); Cole v. State, 701 So.2d 845, 854 (Fla. 1997). Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court. Trease v. State, 768 So.2d 1050, 1053, n. 2 (Fla. 2000) (citing Huff v. State, 569 So.2d 1247, 1249 (Fla. 1990)).

In Murray v. State, 3 So.3d 1108, 1115-16 (Fla. 2009), this Court stated: "Generally, relevant physical evidence can be admitted unless there is evidence of probable tampering. Taylor

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Windom v. State, 886 So.2d 915, 952 (Fla. 2004) (J. Cantero concurring) (agreeing Ring v. Arizona was not retroactive in part because the difficulties of resentencing each capital defendant would be an enormous undertaking which would "include lost evidence and unavailable witnesses"); Williams v. State, 421 So.2d 512, 515 (Fla. 1982)(refusing to apply a new rule retroactively because it would entail hearings with "evidence possibly long since destroyed, misplaced, or deteriorated" and witnesses who "may not be available or [whose] memory might be dimmed").

v. State, 855 So.2d 1, 25 (Fla. 2003). Once the objecting party produces evidence of probable tampering, the burden shifts to the proponent of the evidence "to establish a proper chain of custody or submit other evidence that tampering did not occur." Id. (quoting Taplis v. State, 703 So.2d 453, 454 (Fla. 1997))." Once an adequate explanation is given for the discrepancy in the evidence, there is no abuse of discretion in admitting the evidence. Murray, 3 So.3d. at 1115-16. Under Youngblood, "unless a criminal defendant can show bad faith of the police, failure to preserve potentially useful evidence does not constitute denial of due process." Youngblood, 488 U.S. at 58.

As the State provided in Issue I and incorporates here, Armstrong's offered mitigation involved claims that he was not the shooter, that Coleman was the instigator and driving force for the robbery/homicide, and that if Armstrong had any involvement it was minor and under duress. Given that the instant jury had not heard the original guilt phase presentation, but was there merely for re-sentencing, it was necessary for the State to show the facts of the crime establishing Armstrong's guilt to prove aggravation. Likewise, the State was permitted to rebut the offered mitigation. The bullet fragments supported Armstrong's guilt and intimate involvement in the execution of the robbery, wounding of Sallustio, and first-degree murder of Greeney. Such were

relevant and probative of the aggravation and mitigation offered at the penalty phase.

In the original trial, the three bullet fragments removed from Armstrong's arm were admitted into evidence and held by the evidence custodian. Two of the fragments were the size of dots. (R.27 927-31) In fact, they were so small, they could not be weighed. (R.1001-02) During the 17 years between the initial 1991 admission/conviction and the 2007 penalty phase, the two small fragments originally wrapped in tissue were lost, however, the largest fragment removed from Armstrong's shoulder after the February 17, 1990 shooting remained in the container. There was nothing exculpatory about the fragment. (R.26 823-29; R.27 931). The fact that the fragments were so small and that they had been admitted properly at the first trial, but turned up missing 17 years later undercuts any claim of tampering by the State. Further, Armstrong's argument against the admission of the remaining fragment is most telling. He is not stating that the evidence is exculpatory nor that he requested further testing, only that the remaining large fragment should not be admitted because the two "dot-size" fragments are missing.

The State offered a reasonable explanation for the "dot-size" items to have been lost in the packing and storage of the evidence for 17 years. The fact that the Clerk had custody of the evidence since the time of the 1991 trial (R.26 823-29) cuts

against any allegation that the tiny fragments were knowingly tampered with or discarded by the State to withhold them from Armstrong's use. Under Murray, 3 So.3d at 1115-16, the allegation of tampering was rebutted and the remaining evidence was admissible. The evidence was not exculpatory, and there was no incentive to destroy the evidence after trial.

Armstrong's reliance on Murray, 838 So.2d 1073, 1082 (Fla. 2002); Dodd v. State, 537 So.2d 626 (Fla. 3d DCA 1988); and State v. Taplis, 684 So.2d 214 (Fla. 5th DCA 1996) do not further his position under the circumstances of this case. First, each is dealing with the admission of evidence at trial prior to an adjudication of guilt. Here, Armstrong has been convicted and that conviction affirmed, and the instant issue is one of sentencing. Second, the evidence admitted at trial was properly authenticated via the chain of custody and was admitted as evidence Armstrong was involved in the February 17, 1990 shootout with Sallustio and was injured at that time. The bullet fragments in Armstrong's arm were inculpatory, not exculpatory. Third, the State offered a reasonable explanation for the two missing fragments. The analysis should then, as the trial court reasoned, be conducted under a Youngblood standard where the State's bad faith must be shown in the destruction or loss of evidence.

"Under Youngblood, bad faith exists only when police

intentionally destroy evidence they believe would exonerate a defendant. Youngblood explained that the 'presence or absence of bad faith ... must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed.'" Guzman v. State, 868 So.2d 498, 509 (Fla. 2003). Here, the fragments were not exculpatory. Instead, they placed Armstrong at the site of the murder. The fact that two "dot-size" fragments were lost after 17 years in storage did not call into question the relevancy of the remaining fragment identified by the surgeon, medical personnel, and law enforcement officers who collected, tested, and maintained the evidence before it was admitted during Armstrong's initial trial. (R.25 716-19, 722-25; R.26 823-25, 888).

Furthermore, Sallustio testified he fired upon Armstrong, and Armstrong admitted he was shot by Sallustio. (R.23 469-72; R.28 1154-56) The balance of the ballistics evidence and testimony established Armstrong, using a Tech-nine semiautomatic weapon, wounded Sallustio and killed Greeney. (E.27 996-1002) The missing fragments were not shown to have been lost by the State in bad faith nor were they exculpatory. Armstrong never requested testing of these fragments nor offered how they may be exculpatory. Also, no prejudice can be shown as Armstrong's conviction had been affirmed by the time of his resentencing and the balance of the evidence established he committed prior

violent felonies for the attempted murder of Sallustio and a prior armed robbery (prior violent felony aggravator), committed an armed robbery at the time of the shooting (felony murder aggravator), and Armstrong was the person who shot and killed Greeney as the sheriff's deputy was performing his duties (victim was law enforcement officer engaged in the performance of his duties aggravator). This Court should reject the instant claim and affirm the death sentence imposed upon Armstrong.

ISSUE III

THE JURY WAS INSTRUCTED PROPERLY REGARDING THE TERMS OF A LIFE SENTENCE AND THE TRIAL COURT DID NOT ABUSE ITS DESCRETION IN ANSWERING THE JURY'S QUESTION REGARDING CREDIT FOR TIME SERVED (restated)

The trial court instructed the jury that there were two sentencing options available, death or life without the possibility for parole for 25 years. The trial evidence revealed that Armstrong had been incarcerated in 1990 and sentenced in 1991. During deliberations, the jury asked "Will the 17 yrs [Armstrong] served be included in the 25 yrs (sic) sentence?" (R.3 446; R.30 1487-1501). After argument from the parties, and considering Downs v. State, 572 So.2d 895 (Fla. 1991); Gore v. State, 706 So.2d 1328 (Fla. 1997); and Green v. State, 907 So.2d 489 (Fla. 2005), the trial court instructed the jury "[t]he defendant will receive credit for the time served on

this charge." (R.30 1501-02, 1506). Armstrong asserts on appeal that this instruction was incomplete and misleading and that the trial court abused its discretion when it failed to inform the jury that that parole was not guaranteed "at or after" 25 years. (IB 26-27).

As provided in Green, "Abuse of discretion is the standard we apply when reviewing a trial court's instructions given during jury deliberations. See Perriman v. State, 731 So.2d 1243, 1246 (Fla. 1999). Discretion is abused 'only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court.' White v. State, 817 So.2d 799, 806 (Fla.2002); see also Trease v. State, 768 So.2d 1050, 1053 n. 2 (Fla. 2000)." Green, 907 So.2d at 496..

Waterhouse v. State, 596 So.2d 1008, 1015 (Fla. 1992) and Green are dispositive of this issue. In Waterhouse), this Court addressed whether it was error for the trial court to decline to answer the jury's questions on whether the defendant was eligible for parole and if he were, would he be credited with the time he had served in prison. This Court determined that the trial court did not abuse its discretion in informing the jury that it would have to rely on the instructions given previously and the evidence adduced at trial. The trial court

was found to have acted properly because the jury instructions adequately informed the jury that a life sentence carried a minimum mandatory sentence of twenty-five years. Waterhouse, 596 So.2d at 1015.

In Green, the jury asked similar questions as to credit for time served toward the minimum mandatory life sentence before parole eligibility as were asked in Waterhouse. This Court concluded:

> This Court has concluded that a trial judge does not abuse his discretion in refusing to answer a jury's questions regarding a defendant's eligibility for parole if sentenced to life in prison. *See Bates v. State*, 750 So.2d 6, 11 (Fla. 1999) (approving the trial court's decision to refer the jury to the written jury instructions in response to the question "are we limited to the two recommendations of life with minimum 25 years or death penalty ... [o]r can we recommend life without a possibility of parole"); *Whitfield v. State*, 706 So.2d 1, 5 (Fla. 1997) (approving the trial court's decision to reread the previously given instruction in response to the question "[d]oes life in prison without parole really mean 'no parole' under any circumstances [and that] [h]e will never be allowed back into society again"); *Waterhouse v. State*, 596 So.2d 1008, 1015 (Fla. 1992) (approving the trial court's decision to advise the jury to rely on the evidence and the instructions already given in response to the questions "[i]f he's sentenced to life, when would he be eligible for parole," "[d]oes the time served count towards the parole time," and "[i]f paroled from [Florida] would the defendant then be returned to [New York] to finish his sentence there"). **Therefore, the**

> **trial judge in the instant action would not have abused his discretion if he had simply reread the initial instructions to the jury**.

Green, 907 So.2d at 496-97 (emphasis supplied).

However, in Green, the trial court answered the jury's questions and instructed that credit for time served would be given and adding that there was no guarantee that parole would be granted. Green, 907 So.2d at 496. Relying on Downs v. State, 572 So.2d 895 (Fla. 1990), this Court found no abuse of discretion in the trial court informing the jury credit for time served would be given based on the reasoning that:

> this Court has previously approved a similar response provided by a trial court. In Downs, this Court addressed whether a trial court abused its discretion in responding to the following question posed by the jury during deliberations: "Would the life sentence with no chance of parole for 25 years begin right now, or would the 11 years he's already spent in prison be subtracted from the 25 years?" *Downs*, 572 So.2d at 900. The trial court consulted with both counsel and, over defense counsel's objection, instructed the jury that Downs "would receive credit for time served on this charge." *Id*. at 900-01. This Court, without analysis, concluded that the trial court did not abuse its discretion. *See id.* at 901.

Green, 907 So.2d at 497. As such, Green supports a finding that Armstrong's trial court did not abuse its discretion in informing the jury credit would be given for time served. The jury did not ask about the probability of parole, and the standard instruction adequately advised the jury parole was a

possibility after the minimum term was served. See Waterhouse, 596 So.2d at 1015.

While this Court in Green also concluded that the trial judge did not abuse its discretion in telling the jury parole was guaranteed, it did not make the finding that the jury must be so instructed. In fact, based on Waterhouse and Downs, it is clear that an instruction on the probability or likelihood of being granted parole was not required, and there would be no abuse of discretion in declining to give such an instruction. Here, the trial court gave the standard instruction on life without the possibility of parole alternative to a death recommendation, and directly answered the jury's question on credit for time served which accurately and completely informed the jury that credit would be applied. There was no abuse of discretion and this Court should affirm.

Moreover, the decision not to instruct the jury beyond the question asked even if deemed error should be found harmless beyond a reasonable doubt. The jury was properly told that parole was provided under the statute and at no time has this Court required that a guarantee or probability of receiving parole be given as an instruction. It cannot be said that had the jury been informed that there was no guarantee of parole in addition to the instruction that there was no possibility of parole for 25 years (less time served) that the jury would have

recommended a life sentence. If error, it was harmless beyond a reasonable doubt. Armstrong's death sentence should be affirmed.

ISSUE IV

CUMULATIVE ERROR HAS NOT BEEN SHOWN (restated)

Armstrong points to the two evidentiary issues he raised (Issues I and II) and claims cumulative error has been shown. The State disagrees as the admission of the photographs and remaining bullet fragment was not error, and the aggravators were supported with additional admissible evidence. Moreover, if either issue is found to be meritless, then a cumulative error claim cannot stand where only one error is deemed to have been committed by the trial court.

In Penalver v. State, 926 So.2d 1118 (Fla. 2006), this Court explained the cumulative error analysis as follows:

> The commission of an error by the trial court is only considered harmless where there is no reasonable possibility that the error contributed to the verdict. *See Walton v. State*, 847 So.2d 438, 446 (Fla. 2003). Moreover, even when we find multiple harmless errors, we must still consider whether "the cumulative effect of [the] errors was such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation." *Brooks v. State*, 918 So.2d 181, 202 (Fla. 2005) (*quoting Jackson v. State*, 575 So.2d 181, 189 (Fla. 1991)). In assessing the cumulative effect of such errors, we have considered whether (1) the errors were fundamental, (2) the errors went

> to the heart of the State's case, and (3) the jury would still have heard substantial evidence in support of the defendant's guilt. *Id.*

Penalver, 926 So.2d at 1137. Moreover, where the individual errors asserted are meritless or are procedurally barred, a claim of cumulative error fails. Griffin v. State, 866 So.2d 1, 22 (Fla. 2003). See Downs v. State, 740 So. 2d 506, 509 (Fla. 1999) (finding where allegations of individual error are found to be without merit, a cumulative error argument based on the asserted errors must likewise fall); Melendez v. State, 718 So. 2d 746, 749 (Fla. 1998) (same).

Here, Armstrong's guilt was not at issue, only which sentence was appropriate for the first-degree murder of a law enforcement officer. In addition to the photographs of Greeney, Sallustio gave direct testimony that Armstrong was the shooter who killed Greeney based on Armstrong's proximity to Greeney at the time of the shooting. Such was supported by the ballistics evidence and medical examiner's testimony that the shots that killed Greeney were from a Tech-nine weapon fired at close range. Additional testimony placed the Tech-nine in Armstrong's possession, and placed Armstrong next to Greeney at the time the shooting occurred. Also, Vincent Rozier and Doris Harvard reported that Armstrong had a gunshot wound on the morning of February 17, 1990 shortly after the wounding of Sallustio and

the killing of Greeney. Likewise, Armstrong admitted that Sallustio shot him during the incident at Church's Chicken. As such, even if the photographs and bullet fragments should not have been admitted, there was other substantial, competent evidence to rebut Armstrong's claim that he was not the person who shot Greeney. The claim of cumulative error must fail.

ISSUE V

THE DEATH SENTENCE IS PROPORTIONAL

Although Armstrong did not challenge his sentence on proportionality grounds, this Court independently reviews death sentences for proportionality. See Floyd v. State, 913 So.2d 564, 578 (Fla. 2005); Porter v. State, 564 So.2d 1060 (Fla. 1990). For this Court's convenience, the following is provided.

Proportionality review is to consider the totality of the circumstances in a case compared with other capital cases. Urbin v. State, 714 So.2d 411 (Fla. 1998). It is not a comparison between the number of aggravators and mitigators, but is a "thoughtful, deliberate proportionality review to consider the totality of the circumstances in a case, and to compare it with other capital cases." Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990). The function is not to reweigh the factors, but to accept the jury's recommendation and the judge's weighing. Bates v. State, 750 So.2d 6, 14 (Fla. 1999).

Here the jury recommended death by a nine to three vote.

The trial court found three aggravators, (1) "[t]he Defendant was convicted of another capital felony or of a felony involving the use or threat of violence to the person. Florida Statute 921.141(5)(b)." based on the attempted murder of Sallustio and the February 4, 1990 armed robbery of an establishment at 427 West Sunrise Boulevard (R.5 762-71); (2) "[t]he capital felony was committed while the Defendant was engaged, or was an accomplice, in the commission of, or the attempted commission of, or an attempt to commit the crime of robbery. Florida Statute 921.141(5)(d)" based on the armed robbery of Kay Allen at Church's Chicken (R.5 771-76); and (3) "[t]he victim in this capital case was a law enforcement officer engaged in the performance of his duties. Florida Statute 921.141(5)(j)." (R.5 776-78). Each aggravating factor was accorded great weight. (R.5 771, 776, 778). The statutory mitigation offered by Armstrong was rejected by the trial court as either not proven, not applicable, or contradicted by the record evidence (R.5 781-86). The following non-statutory factors were found and weighed as follows: (1) born and raised in an impoverished country (little weight); (2) problematic health history and suffering from dyslexia (little weight); (3) physically abused as child (some weight); (4) good prisoner and is religious (very little weight); and (5) helped raise siblings (some weight). (R.5 786-92). In sentencing Armstrong to death, the trial court stated

"that the aggravating circumstances in this case far outweigh the mitigating circumstances. The aggravating circumstances in this case are overwhelming." (R.5 793)

This Court has affirmed death sentences with similar aggravation and mitigation. See Kearse v. State, 770 So.2d 1119, 1134 (Fla. 2000) (finding death sentence proportional for killing of law enforcement officer with aggravation of felony murder/robbery and merged avoid arrest, hinder law enforcement officer, and victim law enforcement and one statutory mitigator/age and three non-statutory mitigators of acceptable behavior at trial;, difficult childhood, resulting psychological and emotional problems); Burns v. State, 699 So.2d 646, 651 (Fla. 1997) (finding proportionality based on the merger of (1) victim was highway patrol trooper engaged in his official duties; (2) avoid arrest; and (3) disrupt lawful exercise of or enforcement of laws, two statutory mitigators including no significant history of prior criminal activity and three non-statutory mitigating factors); Reaves v. State, 639 So.2d 1 (Fla. 1994) (affirming capital sentence for murder of law enforcement officer based on prior violent felony, avoid arrest and three non-statutory mitigators of (1) honorable discharge; (2) good reputation in the community up until the age of sixteen; and (3) good family relations).

Additionally, on the same factors, this Court upheld

Armstrong's initial death sentence on proportionality grounds. See Armstrong v. State, 642 So.2d 730, 733-34, 739 (Fla. 1994), cert. denied, 514 U.S. 1085 (1995). While the original sentence included a prior violent felony for a sexual battery later vacated, the instant case contains a prior violent felony for an armed robbery as well as the contemporaneous attempted murder of fellow officer, Sallustio. This Court should find the instant sentence proportional.

CONCLUSION

Based upon the foregoing, the State requests respectfully this Court affirm Armstrong's death sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to: John Cotrone, Esq., 509 SE 9th Street, Fort Lauderdale, FL 33316 this 17theday of December 2010.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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