IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,180

LANCELOT ARMSTRONG,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

****

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

****

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellee was the prosecution and appellant was the defendant in the Criminal Divsion of the Circuit Court for the Seventeenth Judicial Circuit, in and for Broward County, Florida. In the brief, the parties will be refered to as they appear before this Honorable Court.

The Followign symbols will be used:

"R" Record on appeal

"1SR Supplemental Record (received August , 1992)

"2SR Second Supplemental Record (received March, 1993).

STATEMENT OF THE CASE

Appellee accepts appellant's statement of the case.

STATEMENT OF THE FACTS

Appellee accepts appellant's statement to the extent that it represents a nonargumentative rendition of the facts as adduced at trial. Appellee would however make the following additions and clarifications.

Bobby Norton an employee of Church's Fried Chicken testified that appellant and Kay Allen were in his car arguing and that Kay looked scared. (R 620-621).

Katrina Thomas saw appellant and Kay in appellant's car prior to her leaving the restaurant. Kay looked like she did not want Katrina to leave. (R 638).

Nora Whitehead saw appellant and Kay arguing in appellant's car. Kay looked as if she did not want Nora to leave. Appellant was at the store for 35-40 minutes prior to the employees leaving. (R 652-655).

Appellant told Ruel Allen that he shot at the cops. (T 1303-1303, 1320).

Officer Sallustio heard Officer Greeny order appellant out of his car three times. Appellant did not obey the command until Sallustio then ordered him to do so. (R 797-798). Officer Greeny then holsterd his gun. (R 800).

Sallustio then was shot twice by Coleman from the restaurant. (R 804). Kay Allen was standing in front of Coleman when he was firing at Sallustio. (R 743). While Sallutio returned

the fire, he then heard gunfire from the car. (R 806). Sallustio noticed that Greeny was on the ground, Sallustio also was shot twice from the car. (R 807-808). Appellant chased Sallustio while Sallustio was crawling for cover. Sallustio shot appellant twice. (R 807).

Coleman returned fire from inside the restaurant. He left for about 30 seconds, came back in, grabbed the money and left. (R 778).

Appellant was seen with a machine gun before and after the shooting. (R 706, 1382, 1569). Coleman was firing a revolver. (R 714). Appellant purchased a Tech 9 millimeter semiautomatic on January 14, 1990. He also bought a larger clip for the gun. (R 1549-1551). When apprehended, appellant had in his possession a receipt for the Tech 9 and a receipt for ammunition for that particular gun. (R 1418, 1486-1487).

Officer Greeny died from two fatal shots to his neck and chest. (R 918, 927, 930). The shots were fired from a distance of six to nine inches. (R 1623). The shots were fired from Tech 9 millimeter gun. The same gun was used to shoot Officer Sallustio twice. (1614-1621).

At the penalty phase Rose Flynch testified that appellant sexually assaulted twice. (R 1843-1845).

Pastor Kelly knew appellant when he was between the ages of seven and fifteen. (R 1869). Kelly has seen appellant for a total of fifteen minutes between 1984 and the time of trial in 1991. Their brief encounter occurred in 1987. (R 1867). It

was during that fifteen minutes that Kelly was able to determine that appellant was spiritually intact. (R 1867).

SUMMARY OF THE ARGUMENT

1. Appellant is now complaining about the procedure utilized by the trial court regarding imposition of sentence. He is precluded from doing so given that there was no objection during the penalty phase to the court's actions. In any event there was no error as appellant was provided every opportunity to be heard from regarding his plea for a life sentence. Appellant cannot demonstrate that the trial court failed to consider all the evidence presented.

2 & 3. The trial court did not err in considering as separate factors that the crime was committed to avoid arrest and the victim was a law enforcement officer. To the extent there was impermissible doubling, any error must be considered harmless given the strength of the remaining aggravating factors balanced against weak nonstatutory mitigating evidence.

4. & 5. The trial court considered all the nonstatutory evidence presented. Furthermore, the trial court did not abuse its discretion in failing to find that the evidence presented did not outweigh the existence of the aggravating factors.

6. The trial court did not abuse its discretion in denying appellant't motion for new trial.

7. The death sentence in the instant case is proportionally warranted, given that appellant was found guilty of executing a police officer during the commission of a robbery to avoid arrest. There were no statutory mitigators that

applied. The nonstatutory mitigating factors of good family member, religious background, suffering from dyslexia and favorable prediction regarding his behavior in prison did not militiate against imposition of death.

8. The trial court properly denied appellant's request for an MRI given that any results would not have shed light on appellant's character, record or circumstances of the crime. At best it may have explained the organic cause for appellant's dyslexia.

9. The trial court did not impermissibly rely on victim impact information. This issue is not preserved for appeal as there was no objection to same at trial.

10. After a proper inquiry, the trial court properly denied appellant's request to dismiss counsel.

11. The trial court did not err in allowing the state to attempt to refresh a witness with two prior statements. This issue is not preserved for appeal. Furthermore if any error existed, it must harmless given that the evidence was cumulative to other admissible evidence.

12. The trial court properly denied appellant's carte blanche request for a transcript of the entire grand jury proceedings.

13. The trial court properly allowed the in-court identification of appellant by one his victims. This issue has not been preserved for appeal.

14. One of the victims was properly allowed to testify regarding her actions during the crime by relating what was said to her by a co-defendant. Her testimony was not hearsay but was a verbal act needed to explain her subsequent behavior. If the trial court erred in admitting the statement any error must be considered harmless given the overwhelming evidence of the robbery.

15. The trial court properly allowed a witness to testify regarding a statement made to her by appellant that he hated cops. The statement was not collateral crime evidence but admissible to demonstrate appellant's motivation for subsequent acts. If error it must be considered harmless given that there was no emphasis placed on it and the overwhelming evidence that appellant shot and killed Officer Greeny.

16. The trial court properly denied appellant's requested jury instruction regarding mitigating evidence.

17. The trial court properly denied appellant's requested jury instruction regarding reasonable doubt.

18. The trial court properly allowed the state to proceed under a theory of felony murder and premeditated murder.

19. The trial court properly instructed the jury regarding the their role at sentencing. This issue is not preserved for appeal as there was no objection to the actual charge given.

20. The trial court properly denied appellant's requested jury instruction regarding each and every nonstatutory mitigator.

21. The trial court properly instructed the jury regarding the sentencing scheme in Florida. The instructions do not impermissible shift the burden to appellant to prove that death is not warranted.

22. The trial court did not abuse its discretion in denying appellant's request for co-counsel.

23. Florida's death penalty statute is constitutional.

24. The aggravating factors applied in the instant case are constitutionally sound.

ARGUMENT

ISSUE I

THE TRIAL COURT AFFORDED APPELLANT THE OPPORTUNITY TO BE HEARD PRIOR TO IMPOSITION OF THE SENTENCE

Appellant alleges that the trial court failed to give him an opportunity to present additional argument and evidence prior to imposing sentence. Specifically he alleges that the judge ignored appellant's request to rebut the P.S.I., he ignored additional evidence, i.e., a letter written by appellant, and the judge failed to take into account additional argument. Relying on Spencer v. State, 18 Fla.L. Weekly S162 (Fla. March 18, 1993) and Grossman v. State, 525 So. 2d 883 (Fla. 1988), appellant claims that the trial court's actions warrant a reversal. A review of the record demonstrates that appellant is precluded form raising this issue as there was never any objection at trial. Furthermore, the record belies all of appellant's substantive allegations as the court did consider all that was presented.

The penalty phase was completed on May 9, 1991 at which time the judge noticed both sides that sentencing would commence on June 20, 1991. Appellant was also aware that the judge ordered a P.S.I. (R 1954). Appellant's counsel received the PSI prior to the sentencing hearing. (R 2035-2037). On June 18, 1991, appellant litigated his motion for a new trial, claiming among other things that one of the state's witness's,

Kay Allen, committed perjury. (R 1963-1984).[1] On June 20, 1991 the sentencing hearing was held. (R 2007-2059). Initially defense counsel made a general objection to the P.S.I., requesting an opportunity to be heard. (R 2034). The judge did not immediately respond to the request, he first made sure that the appropriate people were all present. (R 2034-2035). He then stated:

> THE COURT: After hearing the advisory sentence, the Court deferred sentence and ordered a presentence investigation report as well as to allow for a period of thoughtful reflection.
>
> The Department of Corrections, in its presentence investigation report, has recommended that this Court abide by the advisory sentence of the jury.
>
> Copies of this presentence report have been supplied to counsel for the State and counsel for the defense.
>
> In addition to the PSI which I have received, read, and studied, which also contained the letters which have been supplied to both counsel, I have in addition thereto, received a communication from Mr. Malavenda which I have also read, which contains letters from Mrs. English, a letter from Vera Stevens, Miss P. Denay, Nevel Foster, Coral James, and petition directed to the officials of the State of Florida, and also a petition from the Church containing a number of signatures, which I have also read and studied.

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[1] Allen's alleged purjured testimony, forms the basis for one of the arguments appellant now claims was not considered by the judge at sentencing.

> Having gone through the information supplied, I have also received further communication from Mr. Statz and Mr. Malvenda.
>
> So I would now inquire whether or not you or anyone on your behalf have any further, legal or other cause to show why sentence should not now be announced. Mr. Malavenda?
>
> MR. MALVENDA: Judge, I have some comments I wish to make about the P.S.I.
>
> THE COURT: All right.
>
> MR. MALVENDA: At this point judge I would have to object to this P.S.I.

(R 2035-2037).

Appellant's counsel then took the opportunity to make the following three arguments and present additional evidence; 1.) appellant objected to pages three through five of the P.S.I. claiming that the rendition of the facts were based on the co-defendant's statements rather than the defendant's. (R 2037-38). 2). He then argued that there was insufficient evidence to establish the aggravating factor that the crime was committed during the course of a robbery.[2] (R 2039). 3.) Next appellant challenged the sufficiency of the evidence to establish the aggravating factor of prior violent felony[3] based on a letter from appellant's prior counsel. (R 2039-2040). 4.) The final

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[2] This argument was based on the testimony of Kay Allen who testified at the motion for new trial.

[3] Section 921.141(5)(b) Fla. Stat.

The prior violent felony was the sexual battery of a fourteen year old in Massachusettes.

argument was that the aggravating factors of avoid arrest[4] and the victim was a law enforcement officer[5] should have been merged. 5.) Appellant counsel then presented additional evidence, i.e., a three page letter written by appellant. (R 2040-2045).

Appellant claims that the trial judge did not take into account all the above. This issue is not preserved for appeal as appellant never objected to the procedure employed by the court. Gunsby v. State, 574 So. 2d 1085, 1088 (Fla. 1991)(failure to object to procedure utilized by trial court in removing prospective jurors precludes issue form appellate review). Most importantly, the record demonstrates that appellant was provided the forum to present any evidence/argument that he wished. The record also demonstrates that appellant did in fact present and the judge did consider all the evidence/argument that he now claims was ignored.

As stated above, appellant never objected to the procedure employed by the trial judge and never requested an additional hearing to present yet further argument or testimony.

A review of the arguments made by appellant at sentencing, reveal that same were already made prior to then, either at the penalty phase or at the motion for new trial.[6]

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[4] Section 921.141(5)(e)

[5] Section 921.141(5)(j).

[6] Appellant waived the opportunity to make any additional argument at the motion for new trial as he declined the judge's invitation t do so. (R 1831).

Appellant's first argument is that the circumstance of the crime as described in the P.S.I. are taken from the co-defendant's statement. Simply because appellant disagrees with Coleman's rendition of the events does not mean the judge cannot consider them.[7] In any event the judge stated that he relied on the facts as presented at trial in making his determination and not on Coleman's statement, consequently Coleman's statement is irrelevant and therefore not prejudicial.(R 2050). Mann v. State, 603 So. 2d 1141, 1144 (Fla. 1992)(no merit to claim that judge relied upon inadmissible evidence simply because he was exposed to same, especially since trial judge stated that such was not a basis for decision).

Trial counsel's next argument was in regards to the sufficiency of the evidence to establish the aggravating factor that the crime was committed during the course of a robbery.[8] At the motion for new trial, appellant' s counsel argued that Allen's latest testimony that appellant did not rob her, negates the finding of the aggravating factor that the felony was committed during the course of a robbery. (R 2039). Appellant could have made this argument when he was afforded the opportunity to do so at the motion for new trial. (R 1983).

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[7] Furthermore, the time to litigate appellant's culpability for the murder of Officer Greeny was at the guilt phase of the trial. Appellant's statement regarding the facts of the crime also appear in the P.S.I.. (SR 496).

[8] 921.141(5)(d). (1985)

Appellant cannot now complain that the court did not consider his argument when he declined the previous invitation to do so. Sullivan v. State, 303 So. 2d 632 cert. denied, 428 U.S. 911 (1976)(when trial court extends opportunity to correct error and invitation os declined, issue waived for appeal); Rivera v. State, 547 So. 2d 143, 146-147 (Fla. 1989)(failure to advise court of additional evidence precludes complaint on appeal that same should have been considered). In any event, the argument is totally without merit. Allen's latest testimony does not negate the finding that she was robbed during the murder of Officer Greeny. (R 1976, 1981). She testified at trial and at the motion for new trial that the co-defendant robbed her.(R 705, 714-723, 1976, 1981).[9] Coleman pulls out a gun and forces Allen from the car and into the restaurant. (R 706-715). Coleman then threatens Ms. Allen. (R 715). Appellant then comes into the restaurant as well. Appellant climbs over the glass partition separating the dining area from the office area and opens the door. (R 718). Coleman then pointed the gun at Allen's head and demanded that she open the safe. (R 721-723). Appellant elicited the aid of Ruel Allen to assist the robbery. (R 1303) After the murder/robbery, appellant told Allen that he shot at the police officers. (R 1320). Appellant and the co-defendant were found in

[9] The only change in Allen's testimony was the following; at trial she stated that appellant showed her the murder weapon. He kept it under the seat of his car. (R 705). At the motion for new trial, Allen stated that appellant never showed her the gun, but she knew it was there. (R 1976, 1977, 1980).

Maryland the following day with approximately a thousand dollars in cash. (R 1418, 1480).

The trial court considered this evidence at the motion for new trial, and found it unpersuasive. (R 1986). There is no evidence that the trial court, already aware of the evidence and it's significance vel non ignored or refuse to consider appellant's argument regarding the impact of Allen's latest testimony.

Next appellant argues that the trial court did not properly consider the argument regarding the aggravating factor of prior violent felony.[10] The argument was simply that the judge should consider a letter of appellant's former counsel, John Miller. Mr. Miller represented appellant for the sexual battery.(R 2039). The record establishes that the court did consider all that letters that were sent to the judge. Appellant counsel made it clear that the letter from Mr. Miller was attached the P.S.I. and it was received by the judge. (R 2039, 2050).

The final argument raised at the sentencing was that the trial court should not consider the aggravating factors of avoid arrest and the victim was a law enforcement officer as separate factors as they both involve the same aspect of the

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[10] During the penalty phase of the trial, appellant challenged the aggravator by claiming that the sexual battery was not a felony.(R 1809-1813). The victim of the sexual battery,testified regarding the circumstances of the assault and she was subject to cross-examination. (R 1837-1856).

crime. The judge has already considered this argument as it was raised at the penalty phase. (R 1814). The judge clearly rejected it as evidenced by the sentencing order. (R 2429-2435).

Lastly, appellant claims that the trial court failed to consider a letter he had written to the judge that was presented to him at the sentencing hearing. (R 2041-2045).[11] In any event there is no indication that the judge did not consider it. He stated that it's contents were cumulative as to what he already heard through the presentation of appellant's witnesses. (R 2045). Appellant cannot establish any error let alone any prejudicial error.

Appellant's reliance on Spencer, supra is misplaced. In Spencer, there were ex parte communications between the prosecutor and the judge regarding the sentencing order prior to the sentencing hearing. Id. Furthermore, the order was drafted prior to litigation of the motion for new trial. Id. In the instant case none of the above improprieties occurred. There is no allegation that any ex parte communications were conducted between the state and the judge. Unlike Spencer, the trial court did not impose sentence until after litigation of the motion for a new trial. More persuasive however is the fact that appellant was given the opportunity to make additional argument. He rebutted information in the P.S.I. regarding the prior violent

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[11] Appellant was aware of when he was to be sentenced. If he wanted the judge to consider his letter prior to the formal sentencing herring he should have notified counsel of the letter earlier than minutes before the sentencing hearing. (R 2040).

felony of sexual battery by attaching a letter from his former counsel. The dictate of Grossman v. State, 525 So. 2d 883 (Fla. 1988), cert. denied, 489 U.S. 1071 (1989) has been adhered to in the instant case. In summary, appellant cannot now complain of a procedure that he never objected to before. Furthermore the arguments now alleged to have been relevant and ignored were in fact all considered by the trial court. This claim is without merit.

ISSUES II AND III
(Restated)

THE TRIAL DID NOT ERR IN REFUSING TO GIVE APPELLANT'S REQUESTED LIMITING INSTRUCTION REGARDING THE "DOUBLING" OF AGGRAVATING FACTORS, FURTHERMORE APPELLANT'S DEATH SENTENCE WAS NOT ADVERSELY EFFECTED BY THE TRIAL COURT'S CONSIDERATION OF THE CONTESTED FACTORS

Relying on Castro v. State, 597 So. 2d 259 (Fla. 1992), appellant claims that the trial court erred in denying his request for a limiting instruction in regards to the aggravating factors of : 1.) the crime was committed to avoid arrest[12] and 2.) the victim was a law enforcement officer engaged in the lawful performance of his duties.[13] Appellant is not entitled to the benefit of Castro given that appellant's charge conference occurred one year prior to this Court's opinion in Castro.[14] The prevailing law at the time of appellant's trial was Suarez v. State, 481 So. 2d 1201 (Fla. 1985), cert. denied, 476 U.S. 1178 (1986), which held that such a limiting instruction was not required to be read to the jury. Id. 481 So. 2d at 1209. Given that Castro, is not a fundamental change in the law, as defined in Witt v. State, 387 So. 2d 922, 929 (Fla. 1980), it does not require retroactive application to the instant case. See generally, Gilliam v. State, 582 So. 2d 610 (Fla. 1991)(the rule

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[12] Section 921.141(5)(e), Fla. Stat. (1989).

[13] Section 921.141(5)(j), Fla. Stat. (1989).

[14] Appellant's penalty phase was conducted on May 9, 1991. This COurt's decision in Castro v. State, 597 So. 2d 259 (Fla. 1992) was not final until May 26, 1992.

of Campbell v. State, 571 So. 2d 415 (Fla. 1990) requiring detailed list of mitigating evidence in sentencing order not to be given retroactive application). See also Stewart v. State, 558 So. 2d (Fla.)(the requirement of a contemporaneous written sentencing order at the time of oral pronouncement of same not subject to retroactive application.)

The judge's sentencing order makes it clear that he was relying on two separate aspects of the crime when he found the existence of both of those factors. Appellant killed Officer Greeny in order to avoid arrest. (R 2431-32). The victim need not be a police officer in order to establish this factor. Fotopoulos v. State, 608 So. 2d 784 (Fla. 1992). The facts also support a finding that the victim was a police officer. (R 2433). This factor does require that the victim be a police officer but there is no requirement that the motivation for the killing was to avoid arrest.

If this Court should determine that the trial court erred in finding the existence of both factors, any error must be considered harmless, given the existence of three remaining aggravating factors balanced against very little mitigating evidence. Jackson v. State, 498 So. 2d 406, 413 reversed on other grounds, Jackson v. Dugger, 547 So.2d 1197 (Fla. 1992)(improper doubling of committed to avoid arrest and committed to disrupt any governmental function harmless error given the existence of one other aggravator and very little mitigation); Simms v. State, 444 So. 2d 922, 926 (Fla. 1984)(improper doubling of two sets of

aggravating factors leaving three factors to balanced against little mitigating evidence was harmless); Cherry v. State, 544 So. 2d 184, 186 (Fla. 1989)cert. denied, 110 S. Ct. 1835, 108 L. Ed. 2d 963 (1989)(impermissible doubling of two aggravators leaving two valid factors is harmless given the strength of remaining factors balanced against little mitigation); Mills v. State, 476 So.2d 172 (Fla. 1985)cert. denied, 106 S. Ct. 1241 (1985)(error in finding that capital murder was committed during burglary and for pecuniary gain harmless given the existence of three valid aggravators weighed against no valid mitigation); Vaught v. State, 410 So. 2d 147 (Fla. 1982)(improper doubling harmless error when defendant shot a store clerk to eliminate a witness to a robbery).

Appellant claims that any error cannot be considered harmless based on the mitigating evidence presented. The cases relied upon by appellant are distinguishable. First of all three of them involve an improper override of a jury's life recommendation. Reilly v. State, 601 So. 2d 222 (Fla. 1992); Dolinsky v. State, 576 So. 2d 271 (Fla. 1991) and Fead v. State, 512 So. 2d 176 (Fla. 1987). The significance of the override is that a jury has already determined that the mitigating evidence was important enough to warrant a life recommendation. A review of the judge's rejection of same and subsequent imposition of death must then take into account the jury's lofty view of the evidence. Tedder v. State, 322 So. 2d 908 (Fla. 1975). The context or frame of reference is therefore focused/skewed in

favor of mitigating evidence that has already been found to be significant. In the instant case the jury has determined that the mitigating evidence is not significant enough to warrant a life recommendation. A harmless error analysis does not start with the premise that the mitigating evidence was found to be compelling. Quite to the contrary, the mitigating evidence was not compelling. The initial focus then is on the strength of the remaining aggravating factors balanced against the mitigating evidence presented.

A fourth case relied upon by appellant is, Maxwell v. State, 603 So. 2d 490 (Fla. 1992) which involves a Hitchcock [15] error. There a jury was precluded from considering any of the mitigating evidence presented, consequently there is no reliable recommendation. In other words, the jury's death recommendation may not have taken into account the mitigating evidence presented. Without knowing what was actually considered it becomes somewhat difficult to assess the effect a particular error may have had on a sentencing determination. In the case sub judice, there is no claim or concern that the jury or judge was precluded from considering all the nonstatutory mitigating evidence that was presented.[16]

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[15] Hitchcock v. Florida, 481 U.S 393 (1987).

[16] Another case relied upon by appellant, Lamb v. State, 532 So. 2d 1051 (Fla. 1988), is not dispositive for the same reason. This Court could not determine what evidence the judge took into account when making the sentencing determination. Harmless error analysis was made more difficult because of that fact.

Appellant argues that mitigating evidence presented in the instant case has been found to be significant in other cases. For example, hard worker and helpful to one's family may constitute valid mitigating evidence. Fead, supra; Maxwell, supra. Overcoming serious adversities or possessing a favorable prognosis for model prison behavior may also be considered mitigating evidence. The state does not contend that such evidence should not be considered in mitigation. Simply the evidence presented here does not militiate against imposition of death.[17]

In Reilly, supra, appellant seizes on the fact that the defendant suffered from an eye impairment a somewhat similar handicap to appellant's dyslexia. However, in Reilly, the evidence also established that the defendant was borderline retarded and suffered from chronic mental impairments. Id, at 223-224, furthermore there was also no evidence that the murder was not premeditated. In the instant case there was no evidence presented to even suggest that appellant suffers from any mental impairment or retardation. Quite the contrary, appellant in spite of his reading impairment was able to successfully run his own construction business which included reading blueprints. (R 25, 62, 136).

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[17] The United States Supreme Court has stated that evidence of difficult family history and emotional disturbance is relevant, however it may be given little weight in some cases. Eddings v. Oklahoma, 455 U.S. 104, 115 (1982).

Appellant's reliance on Dolinsky, supra, is also unavailing. Although similar in the fact that the defendant to some extent overcame some serious adversities,[18] there existed in Dolinsky, compelling mitigating evidence which warranted a life sentence. The defendant's participation in the murder was relatively minor and two more culpable actors received either life or probation. Id. In the instant case, appellant's dyslexia and "sickly" childhood do not counter the aggravating factors.

Appellant also claims that Fead, supra, and Maxwell, supra, warrant a life sentence based on the mitigating evidence that the defendant was a hard worker and assisted his family. Again, although appellant may have been a hard worker and he helped his family members does not warrant a similar result. Both Fead and Maxwell contain additional mitigating circumstances which distinguish those cases from the instant case. In Fead, the facts of the crime indicate that the defendant was under the influence of alcohol and the murder was the result of a lovers quarrel. Id. The facts in Maxwell are also very different, thereby making any comparison irrelevant. There were only two aggravating factors found and disparate treatment of an equally culpable co-defendant.[19]

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[18] Appellant was stabbed by his brother during a sibling argument. Appellant suffered from a hemotma as an infant.

[19] In the instant case, appellant's co-defendant was sentenced to life. Such cannot be considered disparate treatment given that appellant was the actual shooter.

Nor is appellant's reliance on Lamb v. State, 532 So.2d 1051 (Fla. 1988) persuasive. The defendant was seventeen years old, the co-defendant received a seventeen year sentence. Furthermore, as stated above, this Court was concerned that the trial court did not considered all the mitigation that was presented, consequently harmless error was difficult to asses.

In summary, the doubling of two of the factors did not render appellant's unreliable. Consolidation of the two factors still leaves three valid aggravators along to be balanced against very little mitigation.[20] Any error was harmless beyond a reasonable doubt. Jackson; Simms.

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[20] See State's charactrerization of mitigaitng evidence in Issues IV and V.

ISSUES IV AND V
(restated)

THE TRIAL COURT PROPERLY CONSIDERED ALL THE MITIGATING EVIDENCE THAT WAS PRESENTED AND GAVE IT THE WEIGHT DEEMED WARRANTED

Appellant contends that the trial court failed to consider the nonstatutory evidence presented. Appellant basis this claim on the fact that the sentencing order does not list verbatim all of appellant's mitigation evidence by "name". A review of the sentencing order belies appellant's contention. After discussing the factual findings regarding the aggravating factors, the trial court's order then makes specific reference to each of the nine witnesses called by appellant. (R 2434). The court then characterized the nature of their testimony as follows:

> "All the witnesses for the Defendant testified as to a troubled and sickly childhood; and to the extent of the Defendant's assistance to his family members; and to his general good character and religious upbringing."

(R 2434).

Appellant's claim is without merit. Sochor v. State, 18 Fla. L. Weekly S274 (Fla. May 6, 1993); Valle v. State, 581 So. 2d 40, 49 (Fla. 1991).

Appellant also takes exception to the trial court's determination regarding the importance of the mitigating evidence. In essence, appellant disagrees with the trial court's findings, arguing that the evidence presented warranted a life

sentence. The record supports the judge's findings to the contrary. Sochor, supra; Johnson v. State, 608 So. 2d 4, 11 (Fla. 1991).

Appellant lists nine categories of mitigating evidence alleged to exist. The state does not take exception to the potential relevancy of these mitigators in principle, however, in the instant case, the evidence was either nonexistent, rebutted by the record, or simply not deserving of much consideration.

Appellant's childhood aliments including; hematoma, sibling attack resulting in stabbing, loss of a portion of a finger at the age of ten, aspiration at eight months old and dyslexia have been presented through the testimony of appellant's family. Although such evidence may exist, there has been no explanation as to how any of it diminishes appellant's culpability for the murder of Officer Greeny. Rogers v. State, 511 So. 2d 526, 535 (Fla. 1987)(childhood trauma of defendant must be relevant to his character, record or circumstances of the crime in order to be considered mitigating evidence). Appellant's own expert admitted that his hematoma does not in anyway explain his criminal actions. (R 142). In the same vein, there has been no explanation how appellant's dyslexia is relevant to appellant's sentencing determination. Appellant's reliance on Ford v. Strickland, 696 F. 2d 804, 813 (11th Cir. 1981) is of no moment. When assessing a Hitchcock error, the circuit court found that the jury's failure to consider a defendant's dyslexia was harmless. In other words, the impact of

such evidence would not have caused a jury to recommend life. Ford. Dyslexia[21] is not indicative of lack of intelligence, as a matter of fact, appellant has a normal IQ. (R 95). Simply because such circumstances exist does not automatically translate into meaningful/relevant mitigating evidence. For all of appellant's physical problems he has been able to create and maintain a successful construction company. (R 36, 61, 134). The trial court was correct in failing to attach any great weight to same. Thompson v. State, 553 So. 2d 153, 156-157 (Fla. 1989)(claim that defendant meets the statutory mitigating factor regarding mental health properly rejected by the trial court given defendant's ability to run a successful drug smuggling business employing many people).

Likewise, appellant's mitigating evidence that he is religious, he attended church on a regular basis between the ages of five and thirteen, he was a good son and brother, gave financial and emotional support to mother[22] and siblings, and he

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[21] Appellant also charactrerizes as a separate category of mitiation the lack of care and treatment that he recieved for his problems. (R 1927). A review of the record indicates that appellant's mother was refering to his problem with dyslexia. (R 1927). Relying on Eddings v. Oklahoma, 455 U.S. 104 (1982) appellant claims that this evidence warrants a life sentence. In Eddings the Court recognized as potential mitigating evidence a defendant's family history. The defendant in Eddings, was a sixteen year old child, with a history of beatings by his father, a turbulent family history and severe emotional problems. Id. 455 U.S. at 115.

[22] Appellant lists as a separate category of mitigation that he witnessed the abuse of his mother and "acted as a doctor". In reality, appellant as a child, would provide his mother with a wet cloth in order to comfort her after she was physically abused

has potential for productive life in prison is not entitled to great weight. Harmon v. State, 527 So.2d 182, 189 (Fla. 1988)(unreasonable for a jury to recommend life based on nonstatutory mitigating factors of good father, model prisoner, intelligent and religious, arbiter in prison disputes, and contributor to society); Daughterty, 419 So. 2d 1067, 1071 (Fla. 1982)(finding that mitigating evidence of remorse, previous suicide attempts, conversion to Christianity, unstable family life was insuffcient to outweigh aggravating factors was within the province of the trial court). Furthermore, there has been no direct testimony that appellant has been or would continue to be a productive prisoner with rehabilitative qualities.[23] Other than appellant counsel's assertions that appellant possess such qualities, there has been no such testimony.[24] The record portions cited by appellant pertain to appellant's expertise at carpentry and how he taught same to others. (R 1887, 1881, 1916).

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by her husband. (R 1915). Appellant relying on Evans v. Cabana, 821 F. 2d 1071 claims that this evidence warrants a life sentence. Although the court in Evans, recognized the potential mitigating effect of such evidence, the court concluded that it was not compelling enough to outweigh the aggravating factors found in that case.

[23] Appellant argues that the alternative sentence of life in prison without the possibilty of parole is possible mitigating evidence. Again, in priniciple the state does not take exception with that concept. The jury and judge were well aware of the alternative sentence. Simply because it did not motivate the jury to recommend or the judge to sentence appellant to life is not significant. They are not compelled to do so.

[24] Appellant's assertion that he was teased by other children is also not supported by the record. There has been no such testimony. (R 1859-1929).

Any prediction as to his ability to demonstrate those qualities in prison in the future is not present. To the extent that appellant's family members made such a prediction, credibility of same would have to be questioned. Skipper v. South Carolina, 476 U.S. 1, 8 (1991)(disinterested witness testimony regarding future prison behavior entitled to more weight rather than same testimony from family members).

In summation, appellant has failed to establish either that the trial court did not consider the mitigation evidence presented or that the court's findings are not supported by the record. Johnson v. State, 608 So. 2d 4, 11 (Fla. 1992); Sochor v. State, 18 Fla. L. Weekly S273, 276 (Fla. L. Weekly May 6, 1993); Daughtery, supra.

ISSUE VI

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR A NEW TRIAL

Appellant claims that the trial court erred in denying his request for a new trial. He basis this claim on the alleged recantation of material facts by a state witness, Kay Allen. This issue is not preserved for appeal as the motion for new trial was not filed within ten days form rendition of the verdict. Appellant was adjudicated guilty on April 17, 1991. The motion for new trial was not filed until May 17, 1991. (R 2415). Given that the motion was untimely review is precluded. State v. Robinson, 417 So. 2d 760, 761 (Fla. 1st DCA 1982)(time limits for filing motions for new trial are jurisdictional).

A motion for new trial is discretionary with the trial court, and a reversal of that ruling must be based on an abuse of discretion. Glendening v. State, 604 So. 2d 839, 840 (Fla. 2nd DCA 1992). The trial court properly denied the motion, as the testimony was either not false, Routley v. State, 590 So. 2d 397, 400 (Fla. 1991), or the new testimony would not probably produce an acquittal on retrial. Jones v. State, 591 So. 2d 911 (Fla. 1991).

The first alleged fabrication of a material fact is that Allen admitted that she lied at trial when she said that appellant took out a machine gun from under the seat and "He holds like to the side like and tells me, he said look now, I want you to go in there like nothings happening and get the

money, you know, and bring it out and I tell him no. We sat there for awhile." (R 706). At the motion for new trial, Ms. Allen said that appellant never showed her the gun. (R 1976, 1977, 1980). Ms. Allen also stated at that the motion for new trial that she knew that appllant kept the gun under the seat. (R 1976 lines 17-25). Whether he showed her the gun or not, is immaterial. Allen still stated that gun was under the seat. Other evidence established that appellant was seen with a machine gun, he purchased a Tech 9 machine gun and Officer Greeny was killed with a Tech 9 machine gun at close range. Whether she saw the gun in the car or not, does not negate appellant's use of same to murder Officer Greeny and attempt to murder Officer Sallustio.

Appellant next claims that Allen lied at trial when she stated that appellant ordered her out of the car and told Coleman to take her out of the car. (Initial brief at page 44). Allen never testified at trial that appellant ordered her out of the car or told Coleman to get her out of the car. Her actual testimony was:

> "We sit and talk about two minutes, if that long, and he signals his friend out.
> Q: You say he signals, you're talking about--
> A Lance signals Wayne out.
> Q: Coleman? How does he signal?
> A: He hand-singles him come outside and he tells him I'm not cooperating with him or something.
> Q: That's what Armstrong tells Coleman?
> A: Yes.(R 713).Q: All right. So Coleman comes out. When he comes out, how does he approach the car?

> A: He approaches the driver's side of the car and after Lance makes the statement, he pulls his gun out and approaches the passenger side and tells me to get out of the car.

(R 714).

> Allen then testified that Coleman said:
>
> He told me to get out. He said; bitch, get out of the car and I stand up like and I walk around, and he said you want to play rough.

(R 714).

At that point appellant tells Allen to do what Coleman says. (R 715). The entire statement taken in context does not reveal that appellant ordered anyone to do anything. Allen testified at the motion for new trial that appellant did call Coleman out to the car, (R 1982-1983) but then she says she can't remember. (R 1983). She doesn't say she lied when she testified at trial that appellant didn't tell Coleman that she was *not cooperating*. (R 1983 lines 5-8). She never recants her testimony that appellant accompanied her and Coleman into the restaurant and he climbs over the glass partition to open the office door. A comparison of Allen's testimony at trial and her testimony at the motion for new trial are very consistent and virtually the same. She said at both that Coleman threatened her and robbed her. (R 705, 714-715, 721-723, 1976, 1981).

The next alleged recantation deals with the paternity of her children. Appellant claims that Allen lied at trial when she said Fitzgerald Jones was the father of her kids. Appellant

has failed to demonstrate how this information is material.[25] Furthermore there was no fabrication. At trial Allen stated that appellant may be the father of the children and they discussed a possible blood test to prove paternity. (R 705). She also testified at trial that appellant thought the children were his and at one point she told him they were his. (R 764).

Lastly at the, motion for new trial Allen said that appellant could not be guilty given the order of the gun fire. Ms. Allen's opinion regarding appellant's guilt or innocence is neither evidence or material. At trial she stated that Coleman fired first. (773), that has been corroborated by Officer Sallustio. (R 804). Ms. Allen took cover under a table and did not see anything else. (R 744). Her opinion does not negate the physical evidence that Officer Greeny was shot with a Tech 9 machine gun.

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[25] If Allen would have testified at trial that appellant was the father of her twins, such informationm would have benefited the state and not appellant. Here this woman was tetifying against the father of her children. This would have given more credibilty to her testimony.

ISSUE VII

THE SENTENCE OF DEATH IS PROPORTIONALLY WARRANTED IN THE INSTANT CASE

Appellant claims that his sentence of death is disproportional based on various aspects of the crime and the case law. Appellant assessment is incorrect.

The trial court properly found the existence of at least three aggravating factors and very weak nonstatutory mitigating evidence.[26] Under the circumstances of this crime death is the appropriate sentence. Valle v. State, 581 So. 2d 40, 48-49 (Fla. 1991)(death sentence proportionally warranted in the cold and calculated murder of a police officer killed to avoid arrest balanced against model prison behavior and dysfunctional family); Van Poyck v. State, 564 So. 2d 1066 (Fla. 1990)(death sentence proportional in the unprovoked killing of a prison guard in order to free a prisoner balanced against difficult childhood); Jones v. State, 580 So. 2d 143, 146 (Fla. 1991)(killing of a police officer by an escapee weighed against cultural deprivation and poor home environment warrants death sentence).

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[26] Appellee does not concede that the trial court impropperly found the existence of four aggravating factors. See Issues II and III. However for efficiency sake, the argument regarding the propriety of the death sentence will be made with three aggravating circumstances in mind so as avoid a redertmionation of that issue if an aggravtor is struck. The only aggravating factor challenged is doubling. A review of the initial brief, reveals that the doubling aspect is the only challenge to the propriety of the aggravating factors.

The cases cited be appellant are all distinguishable. In Brown, the jury recommended life, the defendant suffered from severe emotional disturbance, he was only eighteen years old, he was borderline retarded, and there was a struggle for the weapon. Id, at 905-906. As demonstrated in issues IV and V, appellant's weak nonstatutory mitigating evidence does not outweigh the valid aggravating evidence present. Appellant's actions portray a premeditated murder motivated by greed. Officer Greeny was shot at least four times at close range while his gun was still in its holster. Appellant then attempted to kill Officer Sausilito by tracking him down while he lay wounded. Officer Greeny lost his life so appellant could steal money and avoid apprehension for that crime.

Also without merit is appellant's reliance on Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988). This Court found the existence of statutory mitigating evidence including that the defendant suffered from extreme emotional disturbance and possessed the emotional age of nine-twelve year old. Appellant has not alleged let alone attempt to present such evidence. Likewise in Livingston v. State, 565 So. 2d 1288 (Fla. 1988) there existed two aggravating factors and weighed against a family background that included sever beatings, marginal intelligence, and immaturity. Appellant's actions are not the result of any such defect or shortcomings.

Appellant also relies on Jackson v. State, 575 So.2d 181 (Fla. 1991). However that case is distinguishable given that

there existed only one aggravating factor to be weighed against appellant's minor participation in the felony murder. In the instant case, appellant's co-defendant received life in prison, however, appellant is the one who shot Officer Greeny four times. Cook v.State, 581 So. 2d 141, 143 (Fla. 1991). For that same reason Scott v. Dugger, 604 So. 2d 465 (Fla. 1992) is also distinguishable. In Scott, the co-defendant was equally culpable and received a life sentence.

Appellant's reliance on Washington v. State, 432 So. 2d 44 (Fla. 1983) is also unpersuasive. This Court reduced his sentence to life based on the fact that the jury recommended life, there existed two statutory and one nonstatutory mitigating factor, balanced against two aggravating factors.

Lastly appellant's reliance on Kramer v. State, 18 Fla. L. Weekly S266, 267 (Fla. April 29, 1993) is also not dispositive. This Court found death to be disproportional because there existed two statutory mitigating factors, two nonstatutory mitigating factors. Furthermore, the murder was the result of a spontaneous fight between a disturbed alcoholic and a someone who was legally drunk.

In summary, appellant's death sentence is proportionate. Jones,supra; Valle,supra.

ISSUE VIII

THE TRIAL COURT DID NOT ERR IN ITS DETERMINATION REGARDING APPELLANT'S REQUEST FOR A MAGNETIC RESONANCE IMAGING EXAMINATION

Appellant claims that the trial court erred in denying appellant's request for an MRI. This claim is without merit both procedurally and substantively. During litigation of the competency motion, appellant requested that a MRI be given. (R 125). After some discussion including no objection from the state, (R 125, 142-147),the trial court decided to take the issue under advisement. (R 147). The record does not indicate that the motion was ever revisited by appellant. Since appellant never obtained a ruling form the court regarding the motion, this issue has not been preserved for appeal. Richardson v. State, 437 So. 2d 1091, 1094 (Fla. 1983)(failure to pursue motion to strike even though judge failed to rule not preserved for appeal); State v. Barber, 301 So. 2d 7, 9 (Fla. 1974)(motion not ruled on by trial court, not cognizable on direct appeal);Watts v. State, 593 So. 2d 198, 202 (Fla. (1992)(counsel's failure to bring to court's attention its failure to comply with a defense request that was mandated by statute waives review of trial court's actions).

Even if preserved appellant cannot demonstrate that he was entitled to the requested test. Appellant was evaluated by three psychologists and one psychiatrist Three stated that appellant was competent to stand trial. (R 24, 65-66, 86-87,

145). One expert, Dr. Appel, a clinical psychologist, stated that appellant was incompetent to stand trial based on his inability to read or write. (R 118, 124, 125, 145). The requested MRI was made during Dr. Appel's testimony.(R 125). It was suggested that an MRI may establish the cause of appellant's inability to read and write. Dr. Appel stated that the MRI would only shed light on the possible origin of appellant's dyslexia and would not contribute any information whatsoever regarding the crime. (R 125, 142). Dr. Spencer stated that nothing in Appel's report would change his mind as her report was not helpful. (R 86, 146-147). The MRI was simply not relevant to competency. Dr. Appell's conclusion that appellant was incompetent based on an inability to read or write is legally faulty. (R145). Whether he can read or write has very little impact on his ability to assist in his defense.[27] A fortioari, any additional information regarding the origin of appellant's reading/writing difficulty would also be not be relevant. Given that testimony must be relevant to an issue, trial court was correct in precluding the test. Hall v. State, 568 So. 2d 882, 885 (Fla. 1990)(expert testimony that defendant suffered from mental infirmity without a conclusion that the defendant could not distinguish between right and wrong is irrelevant).

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[27] Appellant was provided with a reader.(R 925).

ISSUE IX

THE TRIAL COURT DID NOT RELY ON IMPERMISSIBLE VICTIM IMPACT EVIDENCE

Appellant claims that the trial court relied on impermissible victim impact evidence in violation of Booth v. Maryland, 482 U.S. 496 (1987). This issue is not preserved for appeal as there was no objection at trial to any of the statements or letters presented by the family. Grossman v. State, 525 So. 2d 833, 842 (1988) cert. denied, 489 U.S. 1071 (1989)(Booth error must be preserved by objection at trial); Parker v. Dugger, 550 So. 2d 459 (Fla. 1989)(to be cognizable in collateral appeal, Booth error must have been preserved at trial); ; Porter v. State, 559 So. 2d 201, 202 (1990)(erroneous admission of victim impact information must be preserved at trial).

Briefly regarding the merits, appellant has failed to demonstrate that the trial court considered any of the victim impact statements. The "evidence" in question amounts to three letters sent to Ms. Henderson of D.O.C. who was responsible for completing appellant's PSI, (R 509-512); and a very brief statement from the victim's family asking the judge to follow the jury's recommendation.[28] (R 2048-2049). There is no indication that the trial court considered these statements when imposing sentence. (R 2034-2037, 2050-2058, 2430-2436). As a matter of

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[28] There was never any testimony admitted at any phase of the proceedings nor was any of the contested information brought before the jury.

course such letters appear in the PSI, that does not indicate that the trial court ignored the law and considered such evidence. Grossaman v. State, 525 So. 2d at, 846 n.9 (Fla. 1988) cert. denied, 489 U.S. 1071 (1989)(judges routinely are exposed to inadmissible and irrelevant evidence but are able to block out influence of same); Scull v. State, 533 So. 2d 1137, 1142-43 reversed on grounds, (Fla. 1988)(Merely viewing victim impact information contained in PSI is not error). Appellant has failed to establish that the trial court considered improper evidence. Grossman

If this Court determines that the trial court did consider such evidence, any error must be considered harmless. The court found the existence of four valid aggravators balanced against no statutory mitigating evidence and very weak nonstatutory mitigating evidence.[29] The brief statements at the final hearing were made after the judge had already written the sentencing order but prior to oral pronouncement of same. Finally the jury, who was not exposed to any of the information, voted for death absent the impermissible information. (R 1953-1954). Any error must be considered harmless. Grossman; Davis v. State, 586 So. 2d 1038, 1040-1041 (Fla. 1991)(admission of victim impact evidence harmless where jury recommended death even though

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[29] Even if this Court determines that one of the aggravting factors is invalid based on imporper doubling, there still remained three aggravating factors balanced against little mitigating evidence.

they were not exposed to information and judge's sentencing order does not make reference to the inadmissible evidence).

ISSUE X

THE TRIAL COURT PROPERLY INQUIRED OF APPELLANT REGARDING HIS MOTION TO DISMISS COUNSEL

Appellant claims that the trial court failed to adequately inquire of the appellate and other appropriate parties regarding his motion to dismiss counsel based on a claim of ineffective assistance of counsel. The record belies appellant's contention. Furthermore, such claims are better suited for a motion for postconviction relief, particularly considering the possibility for an evidentiary hearing. Ventura v. State, 560 So. 2d 217, 220 (Fla. 1990).

On May 29, 1991, almost three weeks after the evidentiary portion of the penalty phase, appellant filed a motion to discharge counsel. (SR 493).[30] The motion was very general complaining that counsel was to busy to represent appellant and he had lost confidence in him. (SR 493). During litigation of the motion for new trial, the court inquired of appellant regarding his motion to dismiss counsel. (R 1993). Appellant addressed three particular allegations. The first one was that defense counsel should have investigated/pursued a defense centered around appellant's inability to fire the murder weapon based on an accident he was involved in three days before

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[30] The identical motion was then again filed on June 19, 1991. (SR 540). At the sentencing hearing the following day, appellant did not address his second motion. (R 2033-2034). Appellant's counsel informed the court that it existed but appellant never attempted to discuss his allegations.

the murder. (R 1995-1994). Defense counsel was aware of appellant's position as he explained it to the judge. (R 1994). Although, defense counsel did not offer an explanation as to why he did not pursue such a defense, the record is clear that same was simply not viable or credible. There was direct testimony that appellant was the only one in possession of the murder weapon, and he shot Officer Greeny at close range. (R 706, 800-808, 1482, 1569). He then chased after Officer Salustio and was shot by Sallustio. (R 810-811). Any claim that appellant could not lift his arms to fire the gun was not credible. The trial court did not abuse its discretion in denying this claim. Kott v. State, 518 So. 2d 957 (Fla. 1st DCA 1988)(no evidence existed that there was a lack of communication during the trial between the defendant and counsel which would indicate that defendant did not receive a proper defense).

Next appellant complains that the trial counsel failed to provide appellant with the depositions of all the people disposed in the case. Defense counsel stated that he read the pertinent ones to appellant. (R 1996-1997). Appellant makes no attempt to demonstrate how counsel was ineffective in this regard. The trial court was correct in denying appellant's motion to discharge counsel on the basis of this claim. Watts v. State, 593 So. 2d 198, 203 (Fla. 1992)(allegation that defense attorney did not visit defendant enough, and response by attorney that he had but there was simply a misunderstanding did not require appointment of new counsel).

Lastly, appellant claims that a list of people from Massachusetts would have testified at the penalty phase, however, defense counsel in some way precluded them from doing so. (R 1999 2000). Appellant does not indicate who these people are and what they would testify about. Given the cursory nature of appellant's allegation, and the inability to address the claim based on the record before this court, this claim is better suited in a motion for postconviction relief. Ventura, 560 So. 2d at 220.

If there was any error, it must be considered harmless given the untimeliness of appellant's motion. The penalty phase had already been conducted three weeks prior to the filing of the motion. The bulk of counsel's work was complete. The trial court properly denied appellant's motion. (R 2003). Ventura; Kott.

ISSUE XI

THE TRIAL COURT PROPERLY ALLOWED THE PROSECUTOR TO QUESTION THE WITNESS REGARDING WHETHER OR NOT SHE RECALLED MAKING A CERTAIN STATEMENT

Appellant claims that the trial court erred by allowing the prosecutor to question the witness about two previous statements she had made. This issue is not preserved for appeal as there was never any specific objection to the witness's responses when they were made. In the alternative, the gratuitous remarks made by the witness were harmless and did not effect the verdict.

During the direct testimony of Yvonne Hutchinson, appellant's girlfriend, she stated what appellant has told her regarding the events of that night. (R 1124). When she was finished the prosecutor asked her if she had given a statement earlier that included anything else that appellant had said to her. She responded:

> I probably did but right now that's what I remember. (R 1125).

The prosecutor then begins to show the witness her prior statement. Appellant's counsel objects:

> Your Honor I'm going to object. This is his own witness and he is trying to rehabilitate at this point. (R 1125).

The Court overrules his objection. The trial court 's ruling is correct. See Fla. R. Crim. Pro. 90.613; Refreshing the Memory of a Witness.

The prosecutor then shows Ms. Hitchinson her statement of April 18, 1990. The trial court tells her to read it to herself and see if it helps. The prosecutor then states:

> Does this refresh your memory?
> No.
> It doesn't?
> No.
> Do you remember giving that statement?
> DEFENSE ATTORNEY; Your Honor, she already answered it doesn't refresh her memory.
> THE COURT: She can answer that question.
> WITNESS: I remember giving this statement, but I don't remember saying that he said that he shot a police officer. (R 1125-1126).

At this point there is no objection to the statement, consequently, appellant is precluded from challenging the admissibility of same. Long v. State, 610 So. 2d 1268, 1275 (Fla. 1992)(challenge to admissibility of witness statement not preserved where no objection was made at the time the statement was uttered); Farinas v. State, 569 So. 2d 425, 429 (Fla. 1990)(failure to make objection to improper line of questioning at time of questioning waived issue for review).

The prosecutor then shows the witness another statement she made on April 6, 1990. He asks her if it refreshes her memory, and asked her to read it to herself. (R 1126).

> WITNESS: No.
> PROSECUTOR: That says the same thing as the other statement, doesn't it?
> WITNESS: Yes.

No objection by appellant, even though a reference is made to the contents of the statement.

The prosecutor then asks:

And it still doesn't refresh your memory?

> WITNESS: No. (R 1126).
> PROSECUTOR: Are you saying that you didn't say it? (R 1227 line 2-3).
> DEFENSE COUNSEL: Judge I'm going to object. She's already said it doesn't refresh her memory.
> COURT: He asked another question.

Appellant's objection went to the fact that the question had already been asked and answered. It had nothing to do with the grounds now raised on appeal, i.e., inadmissibility of the contents of the prior statement. This has not been preserved for appeal. Sapp v. State, 411 So. 2d 363, 363 (Fla. 4th DCA 1982). The witness then responded:

> WITNESS: I remember giving this statement, but I don't remember saying that he said that he shot a police officer.
>
> DEFENSE ATTORNEY: Judge, I am going to object to that, and I would ask that it be stricken from the record. (R 1127 lines 8-9).

This objection also does not preserve this issue for appeal as the objection is not specific. See Fla. R. Crim. Pro. 90. 104. Nor did appellant request a curative instruction. Brown v. State, 550 So. 2d 527, 529 (Fla. 1st DCA 1989)(failure to seek curative instruction or motion for new trial waives issue for appeal). To the extent that it was a proper objection it was too late. Farinas, 569 So. 2d at 429. It should have been made at the time the objectionable statement was first made.

The Court, before ruling on the objection wanted to make sure what question was being asked by the prosecutor:

> COURT: If you will let me hear what's being said up here, maybe I can make a ruling.
>
> He asked her if she's saying she did not say that. Isn't that your question?
>
> PROSECUTOR: Yes, Your Honor, it is.(R 1127).

Obviously, the Court thinks that the objection went to the question posed by the prosecutor and not the answer given by the witness. Defense counsel did not explain his objection any further. Review is precluded. Farinas; Brown.

The prosecutor then was permitted to ask his question;

> PROSECUTOR: Are you saying you did not say that?
> WITNESS: No. I am saying I remember giving this statement, but I don't remember saying that he said that he shot the police officer.
> COURT: She said she doesn't remember saying that.
> PROSECUTOR: Okay. But it says that in both of these statements, right?
> (R 1127).
> WITNESS: Uh-huh.
> PROSECUTOR: Okay.
> DEFENSE ATTORNEY: Your Honor, I would ask that what she said be stricken from the record.
> COURT: Motion denied. (R 1128 line 3-4).

Appellant's objection was not specific enough to apprise the judge of the alleged error. It is clear the judge was concentrating on the questions asked and not the answers given. This issue is procedurally barred. Farinas; Brown; Sapp; Long.

To the extent that this Court finds the witness's statement to be inadmissible, any error must be considered harmless beyond a reasonable doubt. Appellant also told Ruel Allen that the he shot a police officer, consequently the statement was cumulative and therefore harmless.(R 1302-04, 1319-1320). Kight v. State, 512 So. 2d 922, 926 (Fla. 1987). (improper admission of confession harmless error were statement was cumulative). The physical evidence also unequivocally establishes that appellant and not his co-defendant killed Officer Greeny.

Appellant was ordered out his car by Officer Greeny at least three separate times before he complied. (R797-798). Officer Greeny, out his gun in his holstered and began to frisk appellant. (R 800). A shot was fired at Officer Saluistio from inside the restaurant by co-defendant Coleman. (R 743, 804). Sallustio then turned his attention to Coleman who then fired another shot. (R 743-744). Coleman was in possession of a revolver.(R 714). Shots were then heard coming from the car. Sallustio was shot from the direction of the car. (R 807). Greeny was seen laying on the ground. (R 808). Greeny received two fatal wounds from very close range, to his neck and chest. (R 918, 927, 930, 1623). The bullets were from a nine millimeter Tech 9. (R 1614-1621). Two of the four shots fired at Sallustio were also fired form the same weapon that killed Officer Greeny. (R 1614-1621). Appellant purchased a 9 millimeter Tech 9 on January 14, 1990 (R 1549-1551). He still

had the receipt for the gun in his wallet as well as the receipt for ammunition for the gun. (R 1418, 1486-1487). Appellant was seen holding machine gun right after the incident.(R 1382, 1569). The physical evidence without a doubt establishes that appellant killed Officer Greeny. His statement to Yvonne Hucthinson did little to contribute to the verdict. This claim must be denied. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

ISSUE XII

THE TRIAL COURT PROPERLY DENIED APPELLANT'S REQUEST FOR ALL GRAND JURY TESTIMONY

Appellant argues that the trial court erred in denying his request for all the grand jury testimony, or at the very least an in camera review of same. The trial court properly denied the request.

Appellant does not possess any right to any pretrial grand jury testimony simply to afford him the opportunity to embark on a fishing expedition or to generally aid in his defense. Jent v. State, 408 So. 2d 1024 (Fla. 1982); Brookings v. State, 495 So. 2d 135 (Fla. 1986); Section 905.27 Florida Statutes.

Appellant's reliance on Pennsylvania v. Ritchie, 480 U.S. 39 (1987) is not dispositive. The defendant must still establish a predicate that the testimony contains material evidence. Ritchie.[31] Furthermore, there must be some specificity to the request. United States v. Bagley, 105 S. Ct. 3375 (1985). More compelling is that Section 905.27 Florida

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[31] The requested material in Pennsyvania v. Ricthie, 480 U.S. (1987) was not grand jury testimony, but records from a child abuse agency. The Supreme Court recognized that under Pennsylvania law, there were exceptins to the confidentiality of the records. Ritchie, 480 U.S. at 58. One of those exceptions existed in Ricthie, consequently, there was no state policy in effect in favor of nondisclosure. In the instant case, there is no applicalble exception to appellant's carte blanche request for all the grand jury testimony.

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Statutes is still constitutional in light of Butterworth v. Smith, 494 U.S. 624 (1990), wherein it was held that only the portion of the statute which precluded a witness form disclosing his own testimony was unconstitutional. Id.

Appellant's reliance on Miller v. Dugger, 820 F. 2d 1135, 1136 (11th Cir. 1987) is also misplaced. The 11th Circuit required disclosure of an eyewitness's grand jury testimony in light of the fact that there already existed two different versions of his testimony. There was no speculation as to the possible usefulness of the testimony. Miller, 820 F. 2d at 1137. In the instant case, appellant is requesting the grand jury testimony of all those who testified without any hint or speculation that there may be something useful in the testimony.

Appellant's "compromise" request for an in camera inspection does not transform his demand into any legal entitlement. State v. Gillespie, 227 So. 2d 550 (Fla. 2nd DCA 1969); Minton v. State, 113 So. 2d 361 (Fla. 1959). The trial court properly denied the request.

ISSUE XIII

THE TRIAL COURT CORRECTLY ALLOWED SALLUSTIO TO IDENTIFY APPELLANT IN COURT

Appellant claims that Officer Sallustio should not have been allowed to make an in court identification of appellant because of the likelihood of misidentification. Neil v. Biggers, 409 U.S. 188 (1972). This issue is not preserved for appeal as there was no objection at the time Officer Sallustio made the in-court identification of appellant. (R 799-800). Farinas v. State, 569 So. 2d 425, 429 (Fla. 1990)(failure to object to alleged improper line of questioning not preserved for appeal). Long v. State, 610 So. 2d 1268, 1275 (Fla. 1992)(failure to object to alleged impermissible answer not preserved for appeal); Owens v. State, 349 So. 2d 197, 198 (Fla. 1st DCA 1977)(failure to object to identification testimony at time it was made is waived).

If this Court determines that this issue is preserved for appeal, appellee will address the merits. The basis of this allegation is that Officer Sallustio stated in his grand jury testimony that it was Coleman who chased him after Officer Greeny was shot and not appellant. (R 184). The identification of the suspect who chased Sallustio in no way negates the fact that appellant was present, robbed the restaurant, shot and killed Officer Greeny at point blank range with a Tech 9 millimeter machine gun and also shot Sallustio.[32] Sallustio has never

[32] The physical evidence establishes that both appellant and Coleman shot Sallustio. (R 800-810).

waivered on whether or not appellant was an active participant in this murder/robbery, consequently, appellant can not establish that any harmful error occurred.

In any event, the in court identification of appellant was proper. The factors to be considered in determining whether there is a likelihood of misidentification include the opportunity of the witness to view the defendant at the time of the crime, the witnesses' prior description of the defendant, the level of certainty demonstrated at the time of the confrontation and the length of time between the crime and the confrontation. Neil v. Biggers, 409 U.S. 188, 199-200 (1972). During the crime, Sallustio observed appellant[33] form a distance of fifteen feet, in a well lighted area for approximately one to one and half minutes. (R 171, 173). His attention was solely on appellant as he was covering him to protect Officer Greeny. (R 800-808). There was no hesitation on the part of Officer Sallustio during the in court identification. Officer Sallustio successfully picked appellant out of a photo lineup four months after the incident. (R 174). Sallustio unequivocally stated that his identification of appellant at the photo lineup was not based on seeing him on the news. (R 174-175). The trial court properly found the identification to be credible. McKenney v. State, 529 So. 2d 367, 368 (Fla. 1st DCA 1988)(in court identification of defendant proper where victim had opportunity to view defendant

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[33] He testified that he was able to see appellant's full face. (R 179).

at time of crime and made a successful identification of appellant at photo lineup); Paschal v. State, 251 So. 2d 257 (Fla. 1971)(opportunity to view defendant during crime and successful photo identification of defendant prior to trial sufficient basis to allow in-court identification of defendant); Lewis v. State, 572 So. 2d 908 (Fla. 1990)(in-court identification admissible given victim's opportunity to view defendant during defendant's threats to victim along with witness's successful photo identification of defendant).

ISSUE XIV

THE TRIAL COURT PROPERLY OVERRULED APPELLANT'S OBJECTION TO ALLEN'S STATEMENT AS IT WAS NOT HEARSAY

Appellant claims that the trial court erred in allowing Kay Allen's statement that Coleman wanted her to open the safe. Appellant's argument is without merit.

Ms. Allen, the victim of the robbery was testifying as to what happened that night. In response to the question: "What did and Coleman do?" Ms. Allen explained that she and Coleman went into the office and he told her to open the safe. (R 719-720). At that point, Ms. Allen pulled the silent burglar alarm. (R 720). Ms. Allen's statement is admissible as it was a verbal act which formed the basis of her subsequent action in opening the safe and pulling the alarm. Zeigler v. State, 402 So. 2d 365 (Fla. 1981)(witness testimony that defendant and he discussed purchase of guns over the phone held to be admissible in order to explain witness's subsequent acts of purchasing guns).

If this Court determines that the statement was inadmissible, any error must be considered harmless beyond a reasonable doubt. Just prior to the robbery appellant attempted to elicit the help of Ruel Allen in the robbery. He told him that they were going to rob the manager at Church's and asked if wanted to participate. (R 1300-1301). There was also extensive eyewitness testimony from the victim of the robbery and the victim of the attempted murder. Kay Allen testified that appellant asked her to get the money from the store which she

refused to do. (R 706). The co-defendant then forced her from the car at gunpoint and all three went into the restaurant. (R 714-716). Appellant then climbed over a glass partition to open the office door which contained the safe. (R 718-719). Allen opened the safe and pulled the silent alarm. She gave the money to the co-defendant (R 723). At this time appellant was back in the car. Shortly after Cloeman took Allen and went to the front window were he noticed the police. (R). Coleman then fired a shot at Officer Salustio. (R 804, Sal.) Sallustio returned fire and then heard gunfire from the car. (R 806). Sallustio then saw Officer Greeny down on the ground. (R 808). Coleman runs from the restaurant still shooting his revolver and joins appellant at the car. (R 809). Appellant then starts chasing after a wounded Sallustio. Appellant is able to return the fire and ultimately hits appellant. At that time appellant retreated (R 810-811). Sallustio was shot by both Coleman and appellant. (R 800- 810). With the help of a stranger and later his friends, Coleman and appellant leave town the next day. The following day they were captured in Maryland. (R 1413-14). Appellant is in possession of over a thousand dollars in cash. (R 1418). Also found in the car are his clothes, a receipt for a machine gun matching the type of gun that killed Officer Greeny and wounded Officer Sallustio. Also found was ammunition used in the same type of gun.

Given the overwhelming evidence to establish appellant's participation in the robbery, admission of Allen's statement was harmless error; Hayes v. State, 581 So. 2d 121,

124-125 (Fla. 1991)(inadmissible hearsay harmless given the testimony of co-defendant's relating to defendant's participation); State v. DiGiulio, 491 So. 2d 1129 (Fla. 1987).

ISSUE XV

THE TRIAL COURT DID NOT ERR IN PERMITTING THE WITNESS TO TESTIFY REGARDING APPELLANT'S STATEMENT TO HER THAT HE HATED COPS

Appellant claims that the trial court erred in allowing Ms. Allen to testify to a statement that appellant made to her approximately one year prior to the murder. While Allen and appellant were driving a police officer was behind them. Appellant told Allen that he hated police. (R 756).

The statement was offered as evidence of appellant's then existing state of mind to prove or to explain subsequent behavior. Section 90.803(3), Fla. Stat. (1979). (R 665-669). As such the statement was admissible. State v. Escobar, 570 So. 2d 1343, 1345 (3rd DCA 1990); Jones v. State, 440 So. 2d 570, 577, reversed on other grounds, 591 So. 2d 911 (Fla. 1991).

Appellant's attempt to distinguish Escobar is unavailing. In Escobar, the statement that he would shoot police if they tried to stop him, ultimately came to fruition. He was intent on killing a policeman if one got in his way. In the case at bar, appellant's long standing hatred of police, sheds some light on why appellant executed Officer Greeny who had his weapon holstered at the time of his murder. (R 808).

Also unavailing is appellant's distinction that in Escobar the statement was made four months prior to the murder and in the case at bar, the murder was approximately one year after the statement was made. Appellee would argue that the time

frame goes to weight of the evidence and not admissibility. There is no evidence that appellant's adversion to police waned over the intervening months prior to Officer Greeny's execution. The trial court properly admitted the statement.[34]

If this Court determines that the statement was inadmissible, any error must harmless. There was no emphasis placed on the statement and it was not referred to in the prosecutor's closing argument. (R 753, 1663-1692). The evidence of appellant's guilt is overwhelming.

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[34] Appellant's claim that the state failed to comply with the ten day notice requirement of section 90. 404 (b)(1) Fla. Stat. (1989) is without merit. The statement was not offered as Williams Rule evidence, as it is not evidence of bad acts. (R 667, 670).

ISSUE XVI

THE TRIAL COURT PROPERLY DENIED APPELLANT'S REQUESTED JURY INSTRUCTION THAT MITIGATING EVIDENCE DOES NOT HAVE TO BE FOUND UNANIMOUSLY

Appellant claims that the trial court erred in denying his requested instruction that mitigating evidence may be found independently, regardless of the other jurors findings. The trial court properly rejected the instruction as the standard instructions correctly state the juror's role. Waterhouse v. State, 596 So. 2d 1008, 1017 (Fla. 1992)(Florida law does not require a jury instruction that each juror must make an individual determination regarding mitigating circumstance.)

The standard instructions adequately instruct the jury regarding their role in finding mitigating circumstance. Johnson v. State, 520 So. 2d 565 (Fla. 1988).

ISSUE XVII

THE STANDARD REASONABLE DOUBT INSTRUCTION WAS CORRECT

Appellant claims that the reasonable doubt instruction misstates the burden of proof. This issue is not preserved for appeal as no objection was made at trial regarding the reasonable doubt instruction. Sochor v. State, 18 Fla. L. Weekly S273 (Fla. May 6, 1993). Appellant's claim is also without merit. In Woods v. State, however, the Fourth District recently rejected an identical claim:

> Nothing in the Cage opinion . . . causes us to question a reasonable juror's ability to properly interpret the Florida instruction as requiring that the jury find the defendant not guilty if there is a reasonable doubt as to guilt. Nor does Cage place in doubt the effort in the Florida instruction to assist a juror in evaluating the circumstances in which a doubt may not be reasonable. We also note that just prior to the U.S. Supreme Court opinion in Cage, Florida's reasonable doubt instruction was again examined and upheld by the Florida Supreme Court in Brown v. State, 565 So.2d 304 (Fla.), cert. denied, ___ U.S. ___, 111 S.Ct. 537, 112 L.Ed. 547 (1990).

596 So.2d 156, 158 (Fla. 4th DCA 1992). As noted in Woods, this Court recently rejected a challenge to the "reasonable doubt" instruction in Brown: "According to Brown the standard instruction dilutes the quantum of proof required to meet the reasonable doubt standard. We disagree. This Court has previously approved use of this standard instruction. The standard instruction, when read in its totality, adequately defines 'reasonable doubt,' and we find no merit to this point."

565 So.2d at 307. In keeping with Brown and Woods, this Court should affirm Appellant's conviction and sentence of death.

ISSUE XVIII

THE TRIAL COURT PROPERLY ALLOWED THE STATE TO PROCEED UNDER A FELONY-MURDER THEORY

Appellant claims that the trial court erred in allowing the state to proceed under a felony-murder theory without sufficient notice. Appellant's argument has been consistently and repeatedly rejected by this Court. Knight v. State, 338 So. 2d 201 (Fla. 1976); Buford v. State, 492 So. 2d 355, 358 (Fla. 1986); Brown v. State,. 473 So. 2d 1260, 1265 (Fla.), cert.denied, 474 U.S. 1038, 106 S. Ct. 607, 88 L. Ed. 2d 585 (1985) The state may proceed under either theory at trial. This Court has also held that a defendant is not prejudiced by not knowing under what theory the state may be proceeding. Bush v. State, 461 So. 2d 936 (Fla. 1984). As long as there was evidence to establish that Officer Greeny was shot during the perpetration of a robbery, the jury was properly instructed regarding felony murder. Middleton v. State, 426 So. 2d 548, 552 (Fla. 1983). Lastly, appellant is not even entitled to a special verdict form to determine under what theory the jury determined his guilt.[35] Haliburton v. State, 561 So. 2d 248, 250 (Fla.)

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[35] Appellant claims there was insuffcient evidence to establish premeditation. Appellant is incorrect. The evidence established that Officer Greeny was shot at close range four times. Two of the shots, one to his neck and the other to his chest were each fatal. Both shots were fired from a range of six to nine inches away from the victim. The evidence also establishes that it was appellant who fired the fatal shots with a 9mm semi automatic machine gun. Officer Greeny's weapon was holstered at the time he wa shot. Such evidence establishes premeditation beyond a

cert. denied; Schad v. Arizona, 501 U.S. __, 115 L. Ed. 2d 555, 111 S. Ct. __ (1991).

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reasonable doubt. Griffin v. State, 474 So. 2d 777, 780 (Fla. 1985)(evidence that victim was shot twice with a 9mm automatic at close range with no provocation from the victim suffcient to establish premeditation).

ISSUE XIX

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY REGARDING THEIR ROLE IN FLORIDA'S SENTENCING SCHEME

Appellant claims the trial court erred in instructing the jury regarding their advisory role in sentencing.[36] (R 1947). At the charge conference, the trial court stated that he would include in his instructions the following:

The Court will give great, great great, weight to your recommendation. (R 1804).

Appellant then objected to the fact that the court was giving the requested instruction as part of the standard instructions rather than as a separate one. (R 1804-1805).

During the actual jury charge the court instructed the jury based on the standard instruction without appellant's requested instruction. (R 1947). Since appellant did not object, the issue os precluded from review. Watts v. State, 593 So. 2d 198, 202 (Fla. 1992)(failure to bring error to court's attention waives the issue for appeal).

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[36] In his initial brief, appellant cites to aportion of the jury voir dire where he objects to the court's instruction ot the prosepective panel. (R 217-219). The Court then stated to the panel:

I do instruct you that, under the law, the Court is not required to follow the recommendation of the advisory sentence of the jury, but I do and I am required to give what ever recommendation that you make to me great weight. (R 219). There was no further objection. Appellant cannot now complain after he acquiecsed to the instruction goven. Gunsby v. State, 574 So. 2d 1085, 1088 (Fla. 1991).

In any event there is no merit to the claim as the instruction given to the jury, properly defined their role under Florida law and is not a violation of Calwell v. Mississippi, 472 U.S. 320 (1985). Grossman v. State, 525 So.2d 833, 839 (Fla. 1988), cert. denied, 489 U.S. 1-71, 109 S. Ct. 1354, 103 L. Ed. 2d 822 (1989); Robinson v. State, 574 So. 2d 108, 113 (Fla. 1991).

ISSUE XX

THE TRIAL COURT WAS NOT REQUIRED TO GIVE SEPARATE AND INDIVIDUAL JURY INSTRUCTIONS ON EACH PROPOSED NONSTATUTORY MITIGATING FACTOR

Appellant claims the trial court erred on denying his request for separate jury instructions regarding each and every proposed mitigator. This court has repeatedly rejected this request. Jones v. State, 612 So. 2d 1370, 1375 (Fla. 1992); Randolph v. State, 562 So. 2d 331 (Fla.), cert. denied, 498 U.S. 992, 111 S. Ct. 538, 112 L. Ed. 2d 548, (1990); Jackson v. State, 530 So. 2d 269 (Fla. 1988), cert. denied, 488 U.S. 1050, 109 S. Ct. 882, 102 L. Ed. 2d 1005 (1989).

The jury was properly instructed regarding nonstatutory mitigating evidence. (R 1949). Johnson v. State, 520 So. 2d (Fla.). During closing argument defense counsel argued which specific mitigators appellant wanted to be considered by the jury. (R 1940-1947). Defense counsel discussed appellant's religious background, physical handicaps including dyslexia and the fact that he lost a finger (R 1942-1943). Defense counsel also discussed the fact that appellant assumed the role of head of the household and helped out his family. (R 1943). The jury was also told to consider the life sentence received by the co-defendant, Coleman, and that the killing was not intentional but a spontaneous action the result of panic. (R 1943, 1945). Defense counsel also argued that the alternative sentence would be life in prison and that appellant would be productive in the

jail system based on his artistic, plumbing and carpentry skills. (R 1945).(R 1945).

Appellant cannot establish any error in what the jury was instructed regarding their consideration of the proposed mitigators.

ISSUE XXI

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY REGARDING THE CORRECT STANDARD OF PROOF AT THE PENALTY PHASE

Appellant claims that the jury was the standard instructions impermissibly shift the burden of proof. (R 1948-1949). This claim has been rejected by this Court. Robinson v. State, 574 So. 2d 108, 113 n.6 (Fla. 1991). A sentencing scheme like Florida's that requires aggravating factors in support of a death sentence to be balanced against mitigating factors in support of a life sentence does not create an unconstitutional presumption against the defendant. Walton v. Arizona, 497 U.S. 639, 651; Blystone v. Pennsylvania, 494 U.S. 299 (1990); Florida's sentencing scheme including is constitutional. Proffitt v. Florida, 428 U.S. 242 (1976).

ISSUE XXII

THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT APPELLANT'S REQUEST FOR CO-COUNSEL.

Appellant claims that the trial court erred in granting his request for co-counsel. The record is not clear as to why defense counsel felt he was entitled to co-counsel.[37] Mr. Tobin, counsel for co-defendant Coleman requested co-counsel on August 23, 1990 based on the need to maintain credibility at both phases of trial. (R 9-10). Counsel for appellant was not at that hearing, no is there anything in the record to suggest or apprise the court that Malvenda was joining in that motion. (R 4). Tobin again asked for co-counsel on January 3, 1991 based on the lack of time required to be ready for trial.[38] (2SR 82). Malavenda states that he needs co-counsel because the court has set a motion hearing for a day that he will be out of state.[39]

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[37] Mr. Malavenda filed a motion for co-counsel on June 21, 1990. His request seems to be based on the American Bar Associations recommendations. (2SR 317-319).

[38] The record is clear that Tobin was requesting co-counsel for Coleman's trial only. Malavenda did not join in that request for that reason. As amatter of fact, a motion to sever the co-defendants had just be filed. (2SR 82).

[39] There is no allegation let alone evidence that Malavenda was ever precluded from arguing any motion based on his inability to be present.

The record demonstrates that Malavenda was able to file and argue some forty (40) pre-trial motions. (2SR 30-42). He also litigated a motion to supress statements and identification, (2SR 42-244), and litigated a competency hearing motion. (R 15-147).

Counsel was successful in obtaing the grand jury testimony of a key state witness, Robert Sallustio to use during cross-

(2SR 80). Consequently, Malavenda's request for co-counsel as presented to the trial court appears to be based on a conflict with his calendar. (2SR 80).

Appellant has failed to demonstrate that the trial court abused its discretion in denying appellant's request for co-counsel. While there is some authority for the appointment of more than one attorney for one defendant in a capital case, see, Fla. Stat. Section 925.035(1) (1991); Schomer v. Bentley, 500 So. 2d 118 (Fla. 1096); but see Board of County Comm'rs of Collier County v. Hayes, 460 So. 2d 1007, 1009-1010 (Fla. 2nd DCA 1984), "[t]rial and appellate judges, well aware of the complexity of a given case and the attorney's effectiveness therein, know best those instances in which justice requires departure" from the norm. Makemson v. Martin County, 491 So.2d 1109, 1115 (Fla. 1986). In other words it is wholly within the trial court's discretion to determine whether additional counsel is warranted, considering both the defendant's right to effective representation and the taxpayer's right to restrict unnecessary fiscal expenditures. While it is this Court's "duty to firmly and unhesitatingly resolve any conflicts between the treasury and fundamental constitutional rights in favor of latter," id. at

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examination.

He litigated a motion for new trial based on the recanted testimony of another key state witness, Kay Allen. (R 1955-2000).

Defense counsel also proposed twenty-eight (28) penalty phase special jury instructions, (R 2377-2404) and presented nine witnesses at the penalty phase. (R 1825-1926).

1113, trial courts must be given broad discretion to determine the necessity for multiple counsel.

Given that appellant has failed to demonstrate how he received ineffective assistance based on the reason presented to the trial court, the trial court properly denied the request.

If this Court should determine that Malavenda adopted Tobin's reason based on credibility with the jury, appellant is still not entitled to relief. Stewart v. State, 558 So. 2d 416, 419 (Fla. 1990)(a requirement to appoint additional counsel based on credibility when there is a conviction after a not guilty plea is impractical and unnecessary). Appellant's claim that he is entitled to co-counsel by virtue of the fact that this is capital case was properly denied.

ISSUE XXIII

FLORIDA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL

Appellant challenges several aspects of Florida's death penalty statute. This entire issue is not preserved for appeal a no objection was made to the trial court. Johnson v. Singletary, 18 Fla. L. Weekly S90 (Fla. Jan. 29, 1993). His first claim that the death penalty in Florida is both arbitrary and capricious has previously been rejected by this Court. Jones v. State, 569 So.2d 1234 (Fla. 1991); Young v. State, 579 So.2d 721 (1990), cert. denied, 117 L.Ed.2d 112 S.Ct. 1198 (1992).

Appellant next attacks the constitutionality of the jury instructions regarding the aggravating factors of "heinous, atrocious, and cruel", "cold, calculated, and premeditated", and "committed during the course of a felony". This issue has not been preserved for appeal, consequently review is denied. Sochor v. State, 18 Fla. L. Weekly S274 (Fla. May 6, 1993).[40]

Appellant claims that the sentencing scheme is also unconstitutional because the jury's recommendation of death need not be unanimous, and a death recommendation need only be by a bare majority. This argument has been explicitly rejected in

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[40] Appellant also attacks the constitutionality of several aggravating factors; "heinous, atrocious and cruel", "cold calculated and premeditated", "committed during the course of a robbery", and hinder government function or enforcement of law". All aggravating factors have been upheld as constitutional. Preston v. State, Sochor v. Florida, ; Klokoc v. State, 589 So. 2d 219 (Fla. 1991); Hodges v. State, 595 So. 2d 929 (Fla. 1992); Mills v. State, 484 So. 2d 172 (Fla. 1985); Lowenfield v. Phelps, 484 U.S. 231 (1988); Jones v. State, 569 So. 2d 1234 (Fla. 1991).

Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984).

The jury's role in Florida's sentencing scheme is accurately described in the standard instructions. Combs v. State, 525 So. 2d 853 (Fla. 1988).

Appellant's general attack on the quality of attorneys that represent capital defendants is without merit. If appellant wishes to attack the effectiveness of his counsel, the proper standard is articulated in Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984), and the appropriate forum is in a collateral proceeding. McKinney v. State, 579 So.2d 80, 82 (Fla., 1991).

Next appellant attacks the role and quality of the trial court in Florida's capital sentencing scheme. The actual sentencer in Florida's scheme is the judge. Smalley v. State, 546 So.2d 720 (Fla. 1989); Grossman v. State, 525 So.2d 833 (Fla. 1988); Section 921.141 (3), Fla. Stat. (1989). A sentence of death can be upheld regardless of either the jury's recommendation or their written findings. Grossman, supra; Hildwin v. Florida, 490 U.S. 638, 104 L.Ed.2d 728, 109 S.Ct. (1989).

Appellant has also failed to establish that this Court does not conduct a proper appellate review. The United States Supreme Court has recently stated that this Court continues to narrowly construe aggravating factors. Sochor v. Florida, 119 L.Ed.2d at 339-49 (1992).

Florida's sentencing scheme does not presume death to be the appropriate penalty. Robinson v. State, 574 So.2d 108, 113, n.6 (Fla. 1991); Boyde v. California, 494 U.S. 370, 108 L.Ed.2d 316, 110 S.Ct. 1190 (1990); Blystone v. Pennsylvania, 494 U.S. 299, S.Ct. 1078, 108 L.Ed.2d 255 (1990). A capital defendant has the opportunity to present any and all relevant mitigating evidence. Hitchcock v. Florida, 481 U.S. 393, 95 L.Ed.2d 347, 107 S.Ct. 1821 (1987); Jackson v. State, 530 So.2d. 269, 273 (1988), cert. denied, 488 U.S. 1051, 109 S.Ct. 882, 102 L.Ed.2d 1008 (1988). There is no constitutional requirement to a jury's unfettered discretion. Boyd, supra. Likewise there is no constitutional requirement to special verdict form. Schad v. Arizona, 111 S. Ct. 2491 (1990). Death by electrocution is not unconstitutional. Buenoano v. State, 565 So.2d 309 (Fla. 1990). Appellant's claim is without merit and should be denied.

ISSUE XXIV

THE AGGRAVATING CIRCUMSTANCES USED APPLIED IN THE INSTANT CASE ARE CONSTITUTIONAL

Appellant's attack on the constitutionality of the following aggravating factors has been previously rejected by this Court felony murder aggravator is without merit and has been repeatedly rejected by this Court. Stewart v. State, 588 So. 2d 972, 973 (Fla. 1991); Robinson v. State, 574 So. 2d 108, 112-113 & 113 n. 7 (Fla. 1991);Henry v. State, 586 SO. 2d 1033, 1037, n.1 (Fla. 1991); Jones v. State, 569 So. 2d 1234, 1238 (Fla. 1990); Tompson v. State, 18 Fla. L. Weekly S212, 214 (Fla. April 1, 1993); Lownefield v. Phelps, 484 U.S. 231, 98 L. Ed. 2d 568, 108 S. Ct. 546 (1988).

CONCLUSION

WHEREFORE, based on the above articulated facts and relevant law, appellant's conviction for first degree murder and sentence of death should be **AFFIRMED.**

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Answer Brief of Appellee" has been forwarded by courier to: **JEFFREY ANDERSON, ESQUIRE**, Assistant Public Defender, 421 Third Street, West Palm Beach, Florida 33401, this **22nd** day of September, 1993.

Of Counsel

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