IN THE SUPREME COURT OF FLORIDA

BILLY LEON KEARSE,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 79,037

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINETEENTH JUDICIAL CIRCUIT,
IN AND FOR ST. LUCIE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Billy Leon Kearse, was the defendant in the trial court and will be referred to herein as "Appellant." Appellee, the State of Florida, was the prosecution in the trial court and will be referred to herein as "the State." References to the pleadings will be by the symbol "R," references to the transcripts will be by the symbol "T," references to the supplemental records will be by the symbol "SR," and references to Appellant's taped statements will be by the symbol "TS" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

The State is in substantial agreement with Appellant's statement of the case and facts, but would add the following:

1. After Appellant was arrested, he was taken to the police station, where he waived his Miranda rights and gave a taped statement. Initially, Appellant indicated that he was driving home from Pizza Hut with Rhonda Pendleton when he pulled over because of car trouble. Officer Parrish drove up and asked him his name and date of birth. At first, Appellant told him, "David Dixon Fuller," because he was driving without a license and he was "in the wrong." Officer Parrish left and came back, and told Appellant that he could not find a driver's history under that name, so Appellant told him his real name. Officer Parrish left again and returned with three tickets. For a third time, Officer Parrish went to his car. When he came back, he asked Appellant to step out of the car and put his hands on top of the car. As Appellant was doing so, Officer Parrish hit Appellant above the eye with his handcuffs. Appellant asked him what was wrong, and Officer Parrish hit him again with the handcuffs. Appellant pushed him, and Officer Parrish grabbed him around the neck, scratching him. When Officer Parrish reached for his handgun, Appellant "grabbed it before he did and went off and the gun just -- just started shooting. And the last word he said was, "Come on, man, don't do it, don't do it"; that's when I drove off, went home, parked the car, then I backed it up and I throwed the gun over the railing at Taylor Creek on the right-hand side across the rail, came back home, flat the tire."

Appellant took the remaining two bullets out of Officer Parrish's gun before he threw it into the canal. He flattened the tire on the car "[t]o keep the police off [him]." He said he shot the officer because "I thought he was trying to take me, so, why me first before him?" (TS 4-24).

2. After the initial interview, the investigating officers discovered certain information that was inconsistent with Appellant's story. As a result, they interviewed Appellant again after he waived his Miranda rights. (T 1387-89). During this second interview, the officers confronted Appellant with information regarding a fight Appellant had had earlier with his stepfather. Appellant admitted that they had fought and that he had received the scratches on his neck from his stepfather and not from Officer Parrish grabbing him around the neck. (TS 26-31). Regarding the shooting of Officer Parrish, Appellant admitted that he did not think Officer Parrish intentionally hit him in the eye with the handcuffs; rather, he got hit during the struggle when Officer Parrish had the handcuffs in his hand. (TS 37-39). Once he grabbed the officer's gun and "put it in the right position to shoot" (TS 39), Appellant intentionally pulled the trigger the first and second time, but after that he was holding it tight "and it just jumped." (TS 32-33). Officer Parrish started to go down after the first shot and Appellant continued to shoot him after he was on the ground. (TS 34). Appellant also admitted that he lied about throwing the gun into the canal because he was worried about his fingerprints being on it. (TS 34). He told them that the gun was hidden in a paper bag underneath a clothesline pole at 1718 Avenue K, where he was

arrested. (TS 34-36). He stated that he shot Officer Parrish because he was on probation and he did not want to go back to jail. (TS 41).

3. Rhonda Pendleton, who was riding in the car with Appellant when he got pulled over, testified that Officer Parrish asked Appellant for a driver's license and registration, but Appellant said that he had left his license at home. Appellant told the officer that his name was "Duane D. Fuller." Officer Parrish left, but returned and said that he found no record under that name. Appellant told him the name again, and the officer left. When he returned, he told Appellant that if he would admit his license was suspended he would let him go with three citations because he did not want to do paperwork. Officer Parrish then asked Appellant to step out of the car and put his hands on top of the car. Ms. Pendleton heard Appellant say, "Don't touch me, man." Then she heard a shot and Officer Parrish said, "Oh, God." When she looked, she saw Appellant shooting the officer. She saw them struggling, but she did not see how Appellant got the gun. Appellant was holding the gun with both hands, pointing down at an angle. Appellant then jumped into the car and drove off. When she asked Appellant why he did it, Appellant responded "that his probation was suspended and the police were looking for him already." (T 1458-70).

4. Dr. Hobin, the medical examiner, testified that thirteen bullets struck the victim's body--nine penetrated, four did not. Officer Parrish's spinal nerves were completely severed. (T 1537-54).

5. Daniel Nippes, a criminologist, testified that all the shots to the front of the victim's body originated from four or more feet away. One shot to the back was a contact shot, and another shot to the back was from approximately an inch away. (T 1627-29).

6. During the penalty phase, Sharon Craft, a guidance counselor at Port St. Lucie High School, testified on cross-examination by the State that Appellant was an angry, disruptive child, who fought with others. (T 1911-13). Appellant's school records indicated that one of Appellant's teachers thought that Appellant was "capable of doing better work, he like[d] to play quote "dumb," and trie[d] to work as little as possible. Billy [was] very, quote "street wise," and ha[d] a problem aggravating, talking out and talking back. He will attempt to establish the leadership role among his peers." (T 1913).

7. Also during the penalty phase, Dr. Angeline Desai, a psychiatrist who evaluated Appellant when he was nine years and eleven months old, testified on cross-examination that, at that time, Appellant blamed his problems on other people. He also "never extends himself to others when no immediate advantage is likely." In addition, "he expressed and had no guilt or remorse when confronted with things that he had done." He had "established a persistent pattern of aggressive conduct in which the basic rights of others were violated." (T 2192-93).

8. The jury recommended a sentence of death by a vote of eleven to one. (T 2361; R 2671).

9. After conducting an independent evaluation, the trial court found the existence of five aggravating factors: "felony

murder," "avoid arrest," "HAC," "hinder law enforcement," and "murder of a law enforcement officer." "Avoid arrest" and "hinder law enforcement" were merged and treated as one aggravating factor. (R 2715-24). In mitigation, the trial court found the existence of both mental mitigators, but accorded them little weight. (R 2724-28). Similarly, although it found that Appellant came from an impoverished and culturally deprived background, that he was a severely emotionally disturbed child, and that his I.Q. was just above the retarded level, it concluded that "these factors, or circumstances[,] when considered in the totality of the Defendant's life and character, can not [sic] be considered as extenuating or reducing the degree of the Defendant's moral culpability for the murder of Officer Parrish, when considered and weighed with the evidence presented at both phases of the trial." (R 2729-30). Consequently, it sentenced Appellant to death. (R 2731-32).

SUMMARY OF ARGUMENT

Issue I - Under the law at the time of trial, the jury could be instructed on similar aggravating factors as long as the trial court did not give them double weight. Because a recent ruling requiring an instruction to the jury, if requested, on doubling aggravating factors was not a fundamental change in the law, it should not be applied retroactively to this case. Regardless, any error in failing to give Appellant's requested instruction on doubling was harmless beyond a reasonable doubt.

Issue II - Because different facts are used to support "murder of a law enforcement officer" and "avoid arrest/hinder law enforcement," the trial court did not err in failing to merge these three aggravating factors. If it did err, however, such error was harmless beyond a reasonable doubt.

Issue III - Appellant failed to present any evidence that linked his age at the time of the crime with his maturity or the crimes he committed. Thus, the record supports the trial court's rejection of age as a mitigating factor. Regardless, any error in failing to consider this factor was harmless beyond a reasonable doubt.

Issue IV - The record supports the trial court's finding that Appellant's robbery of Officer Parrish's firearm was not merely incidental to the murder. Thus, the "felony murder" aggravating factor was properly found. If not, however, its consideration was harmless beyond a reasonable doubt.

Issue V - The record supports the trial court's finding that the murder was especially heinous, atrocious, or cruel. Even if

it does not, however, any consideration of this aggravating factor was harmless beyond a reasonable doubt.

Issue VI - The standard instruction on the "cold, calculated, and premeditated" aggravating factor is not unconstitutionally vague; thus, the trial court did not abuse its discretion in rejecting Appellant's special requested instruction. Even if it did, however, such error was harmless beyond a reasonable doubt.

Issue VII - Appellant failed to preserve two of the three instances of misconduct he alleges the State committed during its penalty-phase closing argument. The third instance, relating to its objection to Appellant's doubling instruction, was not improper. Even if it were, however, it was harmless beyond a reasonable doubt.

Issue VIII - Because different facts support the aggravating factors of "felony murder" and "avoid arrest/hinder law enforcement," the trial court did not err in considering these aggravating circumstances separately. Even if it did, however, such error was harmless beyond a reasonable doubt.

Issue IX - Appellant's sentence is proportional to sentences in other cases under similar facts.

Issue X - By failing to make timely objections to the State's questions to Dr. Petrilla regarding whether Appellant was under the influence of an extreme mental or emotional disturbance at the time of trial, he has failed to preserve this issue for review. Even if it were sufficiently preserved, it is wholly without merit. The State's questions were a proper subject of cross-examination in light of the doctor's testimony on direct.

Even if they were not, however, they were harmless beyond a reasonable doubt.

Issue XI - The trial court did not abuse its discretion in giving the State's special requested instruction on premeditation since it was supported by the evidence and did not improperly highlight the State's theory of the case. Even if it were error, however, it was harmless beyond a reasonable doubt.

Issue XII - The State does not have to give defendants notice that it intends to prosecute under an alternative theory of felony murder; thus, it does not have to give them notice of the specific underlying felony upon which it will rely. Here, the evidence supported an instruction on escape as an underlying felony for felony murder. Even if it did not, however, such error was harmless beyond a reasonable doubt.

Issue XIII - By failing to specify any members of the jury panel whom he would strike peremptorily if given the opportunity, Appellant failed to preserve his claim that the trial court erred in denying his challenges for cause. Even now, Appellant makes no claim that the jury that sat on his case was partial; thus, he has failed to show that he was denied a fair and impartial jury.

Issue XIV - Testimony regarding the purpose of a two-handed grip on a firearm was relevant to prove premeditation and to disprove any claim of accident or mistake. Thus, the trial court did not abuse its discretion in allowing this testimony. Even if it did, however, such error was harmless beyond a reasonable doubt.

Issue XV - The totality of the facts and circumstances as known by Colonel Mann, a thirty-one year veteran of law

enforcement, would have led a person of reasonable caution to believe that Appellant committed the offense for which he was arrested. In other words, Colonel Mann had sufficient probable cause to arrest Appellant for the murder of Officer Parrish; thus, Appellant's statements to the police and any physical evidence gathered as a result were properly admitted at the trial. Even if they were not, however, such error was harmless beyond a reasonable doubt.

Issue XVI - Appellant failed to preserve any claim of error regarding the reasonable doubt instruction. Regardless, this Court has previously found the instruction valid.

Issue XVII - Detective Tedder's testimony regarding alias names given by Appellant to Officer Parrish, and an audio tape containing the transmissions between Officer Parrish and 911, were not offered to prove the truth of the matters asserted, but were offered to show the sequence of events immediately preceding and immediately following the shooting. If their admission was error, however, it was harmless beyond a reasonable doubt.

Issue XVIII - Since Dr. Petrilla relied upon Appellant's juvenile record to support his findings, the State was allowed to inquire about the nature of the offenses and the fact of any conviction. Even if such questioning was improper, however, such error was harmless beyond a reasonable doubt.

Issue XIX - Appellant's disciplinary report was relevant to show that Appellant was not the passive follower that his witness portrayed him to be. Consequently, it was proper impeachment evidence. If this Court finds otherwise, however, its admission was harmless beyond a reasonable doubt.

Issue XX - Appellant's claim that the "felony murder" aggravating factor constitutes an "automatic" aggravator has long-since been rejected.

Issue XXI - This Court has repeatedly stated that the standard instructions fully advise the jury of the importance of its role and correctly state the law. Thus, the trial court did not abuse its discretion in denying Appellant's special requested instruction.

Issue XXII - This Court has recently reaffirmed that the standard instruction on nonstatutory mitigators is sufficient. Thus, the trial court did not abuse its discretion in denying Appellant's special requested instructions.

Issue XXIII - This Court has previously rejected Appellant's argument that the standard instructions improperly shift the burden of proof to the defendant to establish that the mitigating factors outweigh the aggravating factors.

Issue XXIV - This Court has repeatedly found Florida's death penalty statute constitutional.

Issue XXV - None of the aggravating factors found in this case are unconstitutionally vague.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S SPECIAL REQUESTED INSTRUCTION ON THE DOUBLING OF AGGRAVATING FACTORS (Restated).

During the penalty phase charge conference, defense counsel requested the following special instruction on "doubling" of aggravating factors:

> The State may not rely upon a single aspect of the offense to establish more than a single aggravating circumstance. Therefore; if you find that two or more of the aggravating circumstances are supported by a single aspect of the offense, you may only consider that as supporting a single aggravating circumstance.

(R 2616; T 2241-47). Defense counsel wanted the jury to consider "avoid arrest," "hinder law enforcement," and "murder of a law enforcement officer" as a single aggravating circumstance. The trial court denied defense counsel's requested instruction. (T 2247).

In this appeal, Appellant relies on Castro v. State, 597 So.2d 259 (Fla. 1992), to support his proposition that the trial court erred. However, at the time of this trial in October of 1991, Castro had not yet issued. Thus, Suarez v. State, 481 So.2d 1201 (Fla. 1985), cert. denied, 476 U.S. 1178 (1986), which held that the jury could be instructed on similar aggravators as long as the trial court did not give them double weight, was the law at the time. In keeping with Suarez, the trial court merged the aggravating factors of "avoid arrest" and "hinder law enforcement," but found that "murder of a law enforcement officer" was a separate aggravating circumstance.

It was not until several months after Appellant's trial that this Court "clarif[ied] the holding" of Suarez in Castro and held that the trial court should have given a requested limiting instruction such as the one proposed in the instant case.[1] The State submits, however, that Castro is not a fundamental change of law requiring retroactive application. See Gilliam v. State, 582 So.2d 610 (Fla. 1991). As this Court stated in Gilliam, "only 'fundamental and constitutional law changes which cast serious doubt on the veracity or integrity of the original trial proceeding'--in effect, 'jurisprudential upheavals'--require retroactive application; 'evolutionary refinements' do not." Id. at 612 (quoting Witt v. State, 387 So.2d 922, 929 (Fla. 1980)). As this Court noted in Castro, it was merely clarifying its holding in Suarez. Thus, this evolutionary refinement should not be applied retroactively to the instant case.

Even assuming, however, that the trial court erred in failing to give the special requested instruction, such error was harmless beyond a reasonable doubt. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). As this Court has stated many times, "our sentencing statute requires a weighing rather than a mere tabulation of factors in aggravation and mitigation." Jackson v. State, 498 So.2d 406, 411 (Fla. 1986). Here, the record supports

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[1] This Court somewhat distinguished Suarez because it "did not involve a limiting instruction, but only the question of whether in that case it was reversible error when the jury was instructed on both aggravating factors." Castro, 597 So.2d at 261. However, in Robinson v. State, 574 So.2d 108, 113 & n.7 (Fla. 1991) (citing Suarez), decided a year before Castro, this Court found no error in the trial court's rejection of Robinson's special requested jury instructions, which included a limiting instruction on doubling aggravating factors.

the aggravating factors of "felony murder, "HAC," "murder of a law enforcement officer," and "avoid arrest/hinder law enforcement." In contrast, the record supports very little in mitigation. The trial court engaged in a completely independent evaluation of the evidence and, after properly merging two of the aggravating circumstances, imposed a sentence of death. Thus, since the error in instructing the jury, if corrected, reasonably could not have resulted in a lesser sentence, reversal is not warranted. Rogers v. State, 511 So.2d 526, 535 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). See also Capehart v. State, 583 So.2d 1009, 1015 (Fla. 1991), cert. denied, 112 S.Ct. 955 (1992).

ISSUE II

WHETHER THE TRIAL COURT ERRED IN REFUSING TO MERGE "MURDER OF A LAW ENFORCEMENT OFFICER" WITH "AVOID ARREST/HINDER LAW ENFORCEMENT" (Restated).

As noted in Issue I, defense counsel sought to have the aggravating factors of "avoid arrest," "hinder law enforcement," and "murder of a law enforcement officer" considered as a single aggravating circumstance. Ultimately, the trial court considered "avoid arrest" and "hinder law enforcement" as a single aggravating factor, but considered "murder of a law enforcement officer" separately. (R 2717-21). Appellant claims this was error. **Brief of Appellant** at 30-32. The State disagrees.

It is well-established that to prove the aggravating factors of "avoid arrest" and "hinder law enforcement," the victim need not be a law enforcement officer. Rather, the victim may be an eyewitness or some other person associated with the crime. To prove the aggravating factor of "murder of a law enforcement officer," however, the victim must be an officer engaged in his or her official duties. Thus, there is an element to the latter factor that is distinct from the other two. In other words, different facts are used to support "murder of a law enforcement officer." Consequently, this aggravating factor can be considered separately from the other two.

Even assuming, however, that the trial court should have merged these three factors together, there is no reasonable possibility that the sentence would have been different. Besides these three factors, which constitute substantial aggravation in

themselves, the trial court found two other aggravating circumstances--"felony murder" and "HAC." It is clear from the trial court's order that all of these factors outweighed the minimal evidence in mitigation: "The Court . . . finds the mitigating circumstances are not substantial and are found not to be of sufficient support and weight to outweigh any of the aggravating circumstances proved beyond a reasonable doubt." (R 2731) (emphasis added). Therefore, even if the trial court had merged "murder of a law enforcement officer" with "avoid arrest/hinder law enforcement," there is no reasonable possibility that it would have imposed a life sentence. See Rogers v. State, 511 So.2d 526, 535 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). See also Capehart v. State, 583 So.2d 1009, 1015 (Fla. 1991), cert. denied, 112 S.Ct. 955 (1992); Jackson v. State, 498 So.2d 406, 411 (Fla. 1986) ("[C]onsolidation of ["avoid arrest" and "hinder law enforcement"] does not render the sentence invalid, in that our sentencing statute requires a weighing rather than a mere tabulation of factors in aggravation and mitigation."). As a result, Appellant's sentence of death should be affirmed.

ISSUE III

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S REJECTION OF APPELLANT'S AGE AS A MITIGATING FACTOR (Restated).

During the penalty-phase charge conference, Appellant asked for an instruction on age as a mitigating factor, and the jury was so instructed. (T 2251, 2353). In its order, however, the trial court rejected Appellant's age as a mitigating factor, finding it insufficiently proven:

> The Court finds no evidence in the record to support this statutory mitigating circumstance.
>
> Our facts indicate clearly the Defendant was nineteen (19) years old when the homicide took place. He was an adult under the law. The Defendant had previously been convicted of a crime and placed on probation with the Department of Corrections. Even though competency was never an issue in this case, we do have testimony from Dr. Fred Petrilla that the Defendant did know the nature of his acts and the consequences of them. The Defendant is a competent adult and his conduct should be held to the same standard as any other adult.

(T 2729).

Appellant claims that, by finding him "an adult under the law," the trial court "utilized the wrong standard to avoid finding age as a mitigating factor." **Brief of Appellant** at 32-34. The State submits, however, that the trial court applied the correct standard and that its rejection of this mitigating factor is supported by the record.

In Songer v. State, 322 So.2d 481, 484 (Fla. 1975), this Court upheld the trial court's rejection of age as a mitigating factor, stating that "Appellant is 23 years old, and today one is

considered an adult responsible for one's own conduct at the age of 18 years." Later, in Eutzy v. State, 458 So.2d 755, 759 (Fla. 1984), this Court adopted the following standard: "[A]ge is a mitigating circumstance when it is relevant to the defendant's mental and emotional maturity and his ability to take responsibility for his own acts and to appreciate the consequences flowing from them." Similarly, in Echols v. State, 484 So.2d 568, 575 (Fla. 1985), cert. denied, 479 U.S. 871 (1986), this Court addressed age as a mitigating factor:

> It should be recognized that age is simply a fact, every murderer has one, and it can be considered under the general instruction that the jury may consider any aspect of the defendant's character or the statutory mitigating factor . . . . However, if it is to be accorded any significant weight, it must be linked with some other characteristic of the defendant or the crime such as immaturity or senility.

Here, as in Echols, there is nothing significant about Appellant's age as it relates to his maturity or the crimes he committed. Although Dr. Petrilla testified that Appellant's tested IQ was in the borderline retarded range (T 2054, 2077-78), he did not make any correlation between Appellant's age and his maturity level. In fact, as the trial court noted, Dr. Petrilla believed that Appellant understood the nature and consequences of his actions. (T 2090). Moreover, Appellant's own evidence in mitigation established that he was able to take care of himself, having lived on the streets for most of his teenage years, and was well-acquainted with the legal system, having been arrested multiple times. Such evidence tends to establish that Appellant was relatively mature for his age. Consequently, because there

was no link between his age and some other characteristic of Appellant or his crimes, the mitigating factor was not sufficiently established, and thus properly rejected. Echols. See also Washington v. State, 362 So.2d 658, 667 (Fla. 1978), cert. denied, 441 U.S. 937 (1979); Peek v. State, 395 So.2d 492, 498 (Fla. 1980); Simmons v. State, 419 So.2d 316, 320 (Fla. 1982); Mills v. State, 462 So.2d 1075 (Fla.), cert. denied, 473 U.S. 911 (1985); Cooper v. State, 492 So.2d 1059, 1063 (Fla. 1986); Kokal v. State, 492 So.2d 1317, 1319 (Fla. 1986).

Even if the trial court should have considered Appellant's age as a mitigating factor, there is no reasonable possibility that the sentence would have been different. The trial court gave substantial weight to all of the aggravating factors in this case. Conversely, it gave minimal weight to Appellant's mitigating evidence. It is clear from the trial court's order that death was the appropriate penalty: "The Court . . . finds the mitigating circumstances are not substantial and are found not to be of sufficient support and weight to outweigh any of the aggravating circumstances proved beyond a reasonable doubt." (R 2731) (emphasis added). Therefore, even if the trial court had considered Appellant's age as a mitigating factor, there is no reasonable possibility that it would have imposed a life sentence. See Rogers v. State, 511 So.2d 526, 535 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). See also Capehart v. State, 583 So.2d 1009, 1015 (Fla. 1991), cert. denied, 112 S.Ct. 955 (1992). As a result, Appellant's sentence of death should be affirmed.

ISSUE IV

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S FINDING OF THE "FELONY MURDER" AGGRAVATING FACTOR (Restated).

In this appeal, Appellant claims that the trial court erred in finding that the murder was committed while he was engaged in the commission of a robbery. Specifically, Appellant contends that the robbery of Officer Parrish's service pistol was merely incidental to the murder, and not the dominant motive for it. **Brief of Appellant** at 34-35. In its sentencing order, however, the trial court made the following findings regarding the "felony murder" aggravating factor:

> This aggravating factor was proven beyond a reasonable doubt. The evidence presented establishes clearly that the defendant snatched Officer Parrish's service pistol from him as the officer was attempting to arrest and handcuff the Defendant. The defendant fired fourteen (14) shots at Officer Parrish, thirteen (13) shots struck him, killing him. The Defendant, as supported by his own taped statement, and the testimony of the passenger in his vehicle, Rhonda Pendleton, got in the vehicle he was driving, set Officer Parrish's gun on the front seat and drove away. He then returned to the residence of Derrick Dickerson, the owner of the vehicle being driven by the Defendant, where the Defendant hid the vehicle behind the house so it would be out of sight, flattened a tire to give the impression the car was inoperable, and then buried Officer Parrish's gun in the backyard. Before burying the gun, the Defendant removed two unspent cartridges from the clip of the gun. The clip held sixteen (16) cartridges. The two unspent cartridges were found in the Defendant's pocket when arrested later. Initially, in the Defendant's first statement to Colonel Mann of the St. Lucie County Sheriff's Office, the Defendant said he "threw the gun in the canal"; the Defendant was cognizant and concerned about his

> fingerprints being found on the gun. He later told the officers where he buried the gun and the officers retrieved it.
>
> From the evidence, and particularly the Defendant's own statement, the Court finds the Defendant feared his probation would be violated, resisted the officer's arrest, by force and violence, forcibly stole the officer's service pistol, then turned the weapon on the officer killing the officer to facilitate his escape from the scene. The robbery of the weapon did create an independent reason for the defendant to kill Officer Parrish. The gun provided the instrument to eliminate one who could now identify the Defendant and permitted the Defendant to flee the scene. The armed robbery was not incidental to the killing; on the contrary, the armed robbery, according to the Defendant's own taped statement, revealed the Defendant did not wish to be arrested and have his probation revoked and for this reason the murder was precipitated.

(T 2715-17) (emphasis added).

As he did below, Appellant cites to Jones v. State, 580 So.2d 143 (Fla. 1991), to support his proposition that the robbery was merely incidental to the murder. Jones, however, is factually distinguishable, and thus legally inapplicable. In Jones, the defendant shot Officer Ponce de Leon, who was attempting to run a tag check on the vehicle in which Jones was a passenger, and then, while receiving gunfire from Officer Armstrong, took Officer Ponce de Leon's service revolver and fled the scene. Id. at 144. Here, on the other hand, Appellant grabbed the gun out of Officer Parrish's hand while Officer Parrish was attempting to place him under arrest, turned the gun on the officer, shot him fourteen times, then fled with the gun, later burying it and concealing its location from the police. Clearly, Jones does not apply to these facts. Rather, the facts

of this case are almost identical to those in Grossman v. State, 525 So.2d 833 (Fla. 1988), in which the "felony murder" aggravating factor was upheld.

In Grossman, a wildlife officer confronted the defendant, who was on probation from a recent prison term and who was in a wooded area shooting a handgun the defendant had recently stolen during a burglary. When the officer attempted to contact the police, the defendant beat the officer with her flashlight. He then gained control over her weapon, shot her in the head, and fled with her gun, later burying it when he returned home. As noted, this Court upheld the trial court's finding that the murder was committed during the commission of a robbery or burglary, stating that "it is clear from the evidence that appellant's handgun and driver's licence and the victim's handgun were forcibly taken and that the struggle occurred at least in part inside the victim's vehicle. Thus, both a burglary and a robbery occurred." Id. at 840 (emphasis added). As in Grossman, Officer Parrish's handgun was forcibly taken. Thus, the record supports the trial court's finding of the "felony murder" aggravating factor.

Assuming for argument's sake, however, that the record does not support this aggravating factor, there is no reasonable possibility that the sentence would have been different. The trial court gave substantial weight to all of the aggravating factors in this case. Conversely, it gave minimal weight to Appellant's mitigating evidence. It is clear from the trial court's order that death was the appropriate penalty: "The Court . . . finds the mitigating circumstances are not substantial and

are found not to be of sufficient support and weight to outweigh any of the aggravating circumstances proved beyond a reasonable doubt." (R 2731) (emphasis added). Therefore, even if the trial court had not considered the "felony murder" aggravating factor, there is no reasonable possibility that it would have imposed a life sentence. See Rogers v. State, 511 So.2d 526, 535 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). See also Capehart v. State, 583 So.2d 1009, 1015 (Fla. 1991), cert. denied, 112 S.Ct. 955 (1992). As a result, Appellant's sentence of death should be affirmed.

ISSUE V

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S FINDING OF THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING FACTOR (Restated).

In its sentencing order, the trial court made the following findings regarding the HAC aggravating factor:

> From the following evidence this Court concludes without any reasonable doubt that the aggravating factor set out in Chapter 921.141(5)(h) has been proven.
>
> (a) The Defendant obtained Officer Parrish's service gun and shot fourteen (14) times at the Officer, striking him thirteen (13) times; four (4) shots struck the officer's body armor, and nine (9) shots struck the officer's body.
>
> (b) Dr. Fred Hobin, the medical examiner, testified in his opinion the first shot, probably knocked Officer Parrish to the ground; the gun and ammunition constituted a powerful weapon.
>
> (c) The Officer was struck twice in the back as the autopsy report reveals large bruises on the victim's back even though the bullets were stopped by the body armor. Dr. Hobin's testimony indicates the shots were fired from very close range; he could not give an opinion on actual distance; as the Officer lay on the ground the remaining shots were fired; one shattered Officer Parrish's left elbow, one shattered his left leg. Other bullets penetrated the abdomen beneath the bullet proof vest; one bullet severed the Officer's spinal cord. From the Defendant's own statement it is reported that the Officer was conscious through this ordeal, and even after his body had been struck by those many bullets, Officer Parrish pleaded with the Defendant not to shoot him! . . .
>
> (c) [sic] . . . The evidence supports the fact beyond a reasonable doubt that the Defendant fired a shot, then after a definite pause squeezed the trigger again and again until the remaining thirteen (13) additional shots were fired at the downed officer, all

> but one of the fourteen (14) shots hit the victim. If the defendant had simply wished to kill the officer, silencing the lone witness, he could have dispatched the officer with a round to the head and fled. Instead he chose to fire, almost point blank, thirteen (13) additional rounds inflicting a high degree of pain into the victim with each bullet that struck unprotected bone and abdomen, while Officer Parrish lay conscious, suffering immensely as the victim contemplated his death.
>
> (d) [sic] . . . The Defendant had to deliberate; he had to think, if only for a few seconds, or even for a partial second, before firing each of the last thirteen (13) of the fourteen (14) rounds he fired at the victim. Each shot heightened the defendant's level of premeditation, as the shots struck and shattered bone and penetrated the abdominal cavity, inflicting a higher and more intense degree of pain upon the victim; Defendant's actions displayed a conscious and total indifference to the suffering of Officer Parrish. In effect the Defendant torturously executed the victim. This capital felony and the facts surrounding it are beyond the pale of the normal 'one shot capital felony', and sets this case apart from what is not contemplated as heinous, atrocious or cruel by the decision of Cheshire v. State 568 So2d. 908 (Fl 1990), and placed it into what is contemplated as heinous, atrocious or cruel by State v. Dixon, 283 So2d 1 (Fla. 1973).

(R 2721-24).

In this appeal, Appellant claims that this aggravating factor does not apply to the facts of this case. Specifically, Appellant claims that he "did not design to inflict a high degree of pain or to torture the officer." **Brief of Appellant** at 36-39. The State submits, however, that the record supports the trial court's finding of this aggravating factor.

While it is true that the murder must be committed in a manner that sets it apart from the norm of other capital felonies

for the HAC factor to apply, this case meets that heightened requirement. When Officer Parrish attempted to arrest Appellant for a misdemeanor traffic offense, Appellant resisted with force, gained control of the officer's weapon, and shot him once. Witnesses testified that this single shot was followed by a slight pause and then a succession of shots. After fourteen shots were fired, Officer Parrish pleaded for his life, begging Appellant not to shoot him any more. After Appellant left, the officer tried to drag himself to safety, but could not; his spinal cord had been severed.

As this Court has previously stated, "[t]he mindset or mental anguish of the victim is an important factor in determining whether this aggravating circumstance applies." Phillips v. State, 476 So.2d 194 (Fla. 1985). Here, the facts strongly suggest that the victim knew he was going to die. While lying on the ground with Appellant standing over him firing thirteen shots at his body, Officer Parrish pled for his life. Unable to move because of a severed spinal cord, Officer Parrish suffered in pain while he bled to death in the street.

Contrary to Appellant's assertion, this case contains the combination of additional factors that set this case apart from the norm of capital felonies: a law enforcement officer as a victim, an awareness of imminent death, pleas for mercy by the victim, an opportunity for the defendant to flee after shooting the officer down, multiple gunshot wounds causing extensive internal injuries, and a painful, lingering death. Based on these additional facts, the trial court did not abuse its discretion in finding the heinous, atrocious, or cruel

aggravating factor. See Huff v. State, 495 So.2d 145, 153 (Fla. 1986); Cooper v. State, 492 So.2d 1059, 1062 (Fla. 1986); Routly v. State, 440 So.2d 1257 (Fla. 1983).

Even if these circumstances are not sufficient to sustain the trial court's finding, however, Appellant's sentence should nevertheless be affirmed. Without this aggravating factor, there remain three valid aggravating circumstances--"felony murder," "avoid arrest/hinder law enforcement" and "murder of a law enforcement officer"--and minimal mitigating circumstances. The three aggravating factors should be accorded great weight. Not only did Appellant murder a law enforcement officer while the deputy pled for his life, but he gunned the officer down in the street after robbing him of his service weapon. Thus, even without the HAC aggravating factor, there is no reasonable possibility that jury would have recommended, or the trial court would have given, a lesser sentence. See Rogers v. State, 511 So.2d 526, 535 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). See also Capehart v. State, 583 So.2d 1009, 1015 (Fla. 1991), cert. denied, 112 S.Ct. 955 (1992). Consequently, Appellant's sentence of death should be affirmed.

ISSUE VI

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN REJECTING APPELLANT'S SPECIAL INSTRUCTION ON THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING FACTOR (Restated).

During the penalty-phase charge conference, Appellant sought an amendment to the CCP aggravating factor instruction, claiming that the jury should be advised of the heightened premeditation required for this aggravating factor. (T 2239). The trial court denied the special requested instruction (T 2240), and Appellant now claims that its rejection was error because the instruction as given was unconstitutionally vague. **Brief of Appellant** at 39-41. To support his proposition, Appellant cites to the United States Supreme Court's application of Espinosa v. Florida, 120 L.Ed.2d 854 (1992), to the CCP instruction given in Hodges v. State, 595 So.2d 929 (Fla. 1992), cert. granted, 121 L.Ed.2d 6 (1992). On remand, however, although this Court found Hodges's attack on the CCP aggravating factor and corresponding instruction unpreserved for review, it nevertheless noted that similar claims had been previously rejected on the merits. Hodges v. State, 18 Fla. L. Weekly S255 (Fla. April 15, 1993) (citing to Fotopoulos v. State, 608 So.2d 784 (Fla. 1992); Klokoc v. State, 589 So.2d 219 (Fla. 1991)).[2]

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[2] In a footnote, this Court stated, "We have never addressed the issue of whether the standard jury instruction itself was vague . . . ." However, in Brown v. State, 565 So.2d 304, 308 (Fla. 1990), the defendant specifically argued "that the standard instruction on the cold, calculated, and premeditated aggravating circumstance is unconstitutional." Rejecting Brown's attempt to apply Maynard v. Cartwright, 486 U.S. 356 (1988), to the CCP instruction, this Court found "no error regarding the penalty instructions." Id.

Relying on Brown v. State, 565 So.2d 304 (Fla. 1990), the State submits that the standard jury instruction on CCP is not unconstitutionally vague. As this Court stated in Vaught v. State, 410 So.2d 147, 150 (Fla. 1982), the standard instructions are legally sufficient even though they do not "reflect the refinements provided by the decisions of this Court." See also Valle v. State, 474 So.2d 796, 805 (Fla. 1985) ("This Court has consistently held that the standard jury instructions on aggravating and mitigating circumstances, which were given in this case, are sufficient and do not require further refinements.").

Were this Court to find, however, that the trial court should have given Appellant's requested instruction on CCP, the State submits that its failure to do so constitutes harmless error. After an independent examination of the evidence, the trial court rejected the CCP aggravating factor and, instead, found the existence of four others. Although it also found the existence of both mental mitigators and some nonstatutory mitigating circumstances, it nevertheless concluded that the mitigating circumstances did not outweigh those in aggravation. Based on these findings, which are supported by the record, there is no reasonable possibility that the recommendation or the ultimate sentence would have been different. Therefore, Appellant's sentence of death should be affirmed. See Rogers v. State, 511 So.2d 526, 535 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). See also Capehart v. State, 583 So.2d 1009, 1015 (Fla. 1991), cert. denied, 112 S.Ct. 955 (1992).

ISSUE VII

WHETHER THE STATE DEPRIVED APPELLANT OF A FAIR TRIAL AS A RESULT OF ITS ARGUMENTS TO THE JURY DURING THE PENALTY PHASE (Restated).

In this appeal, Appellant claims that "the prosecution was guilty of gross misconduct" during the penalty-phase closing arguments. Specifically, Appellant cites to the State's argument regarding the existence of the CCP aggravating factor, which it later decided not to pursue; the State's opposition to an instruction on "doubling" the aggravating factors of "avoid arrest," "hinder law enforcement," and "murder of a law enforcement officer," even though it later argued to the trial court to merge these factors; and a comment that the victim did "not have a jury to consider aggravating and mitigating circumstances before he was sentenced." **Brief of Appellant** at 42-44. The only argument objected to at trial, however, was the one regarding the "doubling" of aggravating factors. Since the other two were not challenged below, Appellant has failed to preserve these claims for review. Castor v. State, 365 So.2d 701 (Fla. 1978); Clark v. State, 363 So.2d 331 (Fla. 1978).

Even if he had properly preserved them, they are wholly without merit. While it is true that the State argued the existence of the CCP aggravating factor to the jury and then reconsidered its application when arguing for a sentence of death to the trial court, "we can presume that the jury disregarded the factors not supported by the evidence." Fotopoulos v. State, 18 Fla. L. Weekly S18, 21 (Fla. Dec. 24, 1992) (citing to Sochor v. Florida, 112 S.Ct. 2114, 2122 (1992)). As for the prosecutor's

comment regarding the victim, the State submits that, if improper, it does not constitute fundamental error. See Richardson v. State, 604 So.2d 1107, 1109 (Fla. 1992); Davis v. State, 604 So.2d 794, 797 (Fla. 1992); Hodges v. State, 595 So.2d 929, 934 (Fla. 1992), vacated on other grounds, 121 L.Ed.2d 6 (1993). Based on the quality and quantity of evidence in aggravation and the dearth of evidence in mitigation, there is no reasonable possibility that the recommendation or sentence would have been different absent this isolated comment, which was not eve deemed appropriate for objection at the time it was made.

As for the State's opposition to Appellant's "doubling" instruction and its argument to the jury that "avoid arrest," "hinder law enforcement," and "murder of a law enforcement officer" should be considered separately, even though it argued to the trial court that all three should be merged, the State submits that the law at the time was followed correctly. As discussed in Issue I, supra, Suarez v. State, 481 So.2d 1201 (Fla. 1985), cert. denied, 476 U.S. 1178 (1986), was the law at the time. Pursuant to Suarez, the jury could be instructed on similar aggravators as long as the trial court did not give them double weight. In other words, the jury could find that similar aggravating circumstances were individually proven by the evidence, but the trial court was required to merge them if the same evidence was used to prove each one. In keeping with Suarez, the State objected to an instruction on "doubling," argued to the jury the independent existence of each aggravating factor, but acknowledged to the trial court that these three

aggravating circumstances should be merged.[3] This was not "gross misconduct."

If this Court finds, however, that the prosecutor should not have argued the separate existence of each aggravating factor to the jury, the State submits that such error was harmless beyond a reasonable doubt. As this Court has stated numerous times, "our sentencing statute requires a weighing rather than a mere tabulation of factors in aggravation and mitigation." Jackson v. State, 498 So.2d 406, 411 (Fla. 1986). Even though the jury may have found all three factors separately, they may have been persuaded by defense counsel's closing argument that they should be considered as one. (T 2311-15). Regardless, the trial court performed an independent examination of the evidence and, having merged "avoid arrest" and "hinder law enforcement" as required, found the existence of four aggravating factors. Although it also found the existence of both mental mitigators and some nonstatutory mitigating circumstances, it nevertheless concluded that the mitigating circumstances did not outweigh those in aggravation. Based on these findings, which are supported by the record, there is no reasonable possibility that the recommendation or the ultimate sentence would have been different. Therefore, Appellant's sentence of death should be affirmed. See Rogers v. State, 511 So.2d 526, 535 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). See also Capehart v. State,

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[3] Actually, the State believed that "murder of a law enforcement officer" could be considered separately from "avoid arrest" and "hinder law enforcement." However, out of an abundance of caution, it believed the prudent course of action would be to merge all three. (T 2376-82)

583 So.2d 1009, 1015 (Fla. 1991), cert. denied, 112 S.Ct. 955 (1992).

ISSUE VIII

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S FINDING OF THE "FELONY MURDER" AGGRAVATING FACTOR (Restated).

In this issue, Appellant challenges the trial court's finding that the murder was committed during the course of a robbery, i.e., the "felony murder" aggravating factor.[4] Appellant does not claim that the facts do not support a robbery of the officer's weapon; rather, Appellant claims that the robbery was "merely an aspect of his attempt to avoid arrest and hinder law enforcement." Thus, "[w]here the commission of one aggravating circumstance is for the sole purpose of committing another aggravating circumstance, it is reversible error to consider both aggravating circumstances separately." **Brief of Appellant** at 45. In effect, Appellant is arguing that the "felony murder" aggravating factor should have been merged with "avoid arrest" and "hinder law enforcement." This argument, however, was not raised below, and thus has not been preserved for appeal. Regardless, it is wholly without merit.

As this Court stated in Echols v. State, 484 So.2d 568, 575 (Fla. 1985), "[t]here is no reason why the facts in a given case may not support multiple aggravating factors provided the aggravating factors are themselves separate and distinct and not merely restatements of each other . . . ." Here, Appellant's murder of Officer Parrish to steal his weapon was separate and distinct from his murder of Officer Parrish to avoid

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[4] This is Appellant's second challenge to the finding of this aggravating factor. See Issue IV.

arrest/hinder law enforcement. Contrary to Appellant's assertion, the sole purpose for taking Officer Parrish's weapon was not to avoid arrest; it was merely one purpose. Once Appellant gained control of the weapon, he turned it on the officer and shot him once, knocking him to the ground. At that point, Appellant could have fled, leaving the gun behind. Appellant chose, however, in those few seconds of reflection, to kill Officer Parrish and take the gun with him. In keeping with his intentions, Appellant stood over the downed officer, took a two-handed grip on the weapon and pulled the trigger thirteen more times, at least one of which was at point-blank range to the back. Twelve shots struck the officer, nine of which penetrated his body. After shooting Officer Parrish, Appellant took the gun with him, emptied the remaining two cartridges out of the gun's magazine, and hid the gun in the backyard of Derrick Dickerson's home. Clearly, Appellant wanted to permanently deprive Officer Parrish of the gun, which he took by force and violence. Based on these facts, the "felony murder" aggravating factor was properly found and should not have been merged with "avoid arrest" and "hinder law enforcement."

Were this Court to find, however, that the trial court should have merged "felony murder" with "avoid arrest/hinder law enforcement," the State submits that its failure to do so constitutes harmless error. After an independent examination of the evidence, the trial court found the existence of three other aggravating factors. Although it also found the existence of both mental mitigators and some nonstatutory mitigating

circumstances, it nevertheless concluded that the mitigating circumstances did not outweigh those in aggravation. Based on these findings, which are supported by the record, there is no reasonable possibility that the recommendation or the ultimate sentence would have been different. Therefore, Appellant's sentence of death should be affirmed. See Rogers v. State, 511 So.2d 526, 535 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). See also Capehart v. State, 583 So.2d 1009, 1015 (Fla. 1991), cert. denied, 112 S.Ct. 955 (1992).

ISSUE IX

WHETHER APPELLANT'S SENTENCE IS PROPORTIONAL TO SENTENCES IN OTHER CASES UNDER SIMILAR FACTS (Restated).

Regarding the murder of Officer Parrish, the trial court found the existence of four aggravating factors. Although it also found the existence of both statutory mental mitigators, as well as several nonstatutory mitigating factors, it ultimately determined that "the mitigating circumstances are not substantial and are found not to be of sufficient support and weight to outweigh any of the aggravating circumstances proved beyond a reasonable doubt." (R 2731). As this Court has repeatedly held, the weighing process is not a numbers game. Rather, when determining whether a death sentence is proportionately warranted, the facts should control.

Here, the evidence established that Officer Parrish pulled Appellant and his female passenger over for driving the wrong way down a one-way street. When Appellant could not produce a driver's license and would not provide his legal name, Officer Parrish attempted to arrest him for a misdemeanor offense. Afraid that he was wanted for probation violation, Appellant resisted arrest and ultimately gained control over the officer's gun, using it to shoot him thirteen times. Appellant then fled with the officer's gun, returned to the home of the car's owner, flattened a tire on the car to make it appear inoperable, removed the remaining two cartridge's from the officer's gun, and hid the gun in the backyard. Upon his arrest shortly thereafter, Appellant maintained that he threw the gun into a canal, only later revealing its true location.

Although Appellant sought to mitigate this senseless murder with evidence that he was under an extreme mental or emotional disturbance at the time of its commission because of a fight he had had with his stepfather three hours earlier, the trial court made the following findings:

> This could constitute a mental or emotional disturbance; however absent the Defendant's statement and Dr. Petrilla's testimony, there were no other independent facts presented to support the influence and extremity of this particular mitigating circumstance. There is little or no testimony from witness Rhonda Pendleton, who was with the Defendant from the time he left the Dickerson home to purchase pizza, that indicated she observed the Defendant laboring under, or being influenced by, some extreme mental or emotional disturbance, as set out in Chapter 921.141(6)(b) F.S., that in some way could mitigate the conduct engaged in by the Defendant when stopped for a traffic violation. Yet from the evidence, we know a fight occurred and therefore this mitigating circumstance has been proven by the greater weight of the evidence; however, the weight to be accorded this mitigating circumstance is not substantial.

(R 2726).

Similarly, Appellant tried to mitigate his sentence with evidence that his ability to appreciate the criminality of his conduct and his ability to conform his conduct to the requirements of the law were substantially impaired. As to this evidence, the trial court found:

> Even though Dr. Petrilla testified that the Defendant has a low I.Q. and learns from a rote process, Dr. Petrilla testified the Defendant does have the ability to comprehend the nature and consequences of his acts. Nevertheless, from the above facts, the Court determines the Defendant has established by the greater weight of the evidence the mitigating circumstance of Chapter

> 921.141(6)(f), although this finding is not supported substantially by any recent factual data developed by a testing paradigm.

(R 2728).

Finally, as to Appellant's evidence in mitigation of his poor home environment, his severe emotional handicap as a child, his borderline I.Q., and his functional illiteracy, the trial court made the following comments:

> From the taped statements given by the Defendant, the Court heard the Defendant speak coherently and deliberately. The Defendant was able to quickly flee the scene of [the] crime, devising a scheme to avoid detection. He parked the vehicle behind a house so it could not be detected from the street; he flattened a tire so it would appear the vehicle was inoperable; he buried the gun, admitting he was concerned about his fingerprints being on the gun. Initially the defendant lied about throwing the gun into the canal; at a later interview, he answered clearly, comprehensively and normally as to the gun's correct location. Neither Defendant's borderline I.Q., nor his emotionally, culturally and physically deprived childhood prevented the Defendant from being able to quickly execute the logistics of his plan to avoid detection.
>
> The Court in specifically weighing all the facts in the mitigating circumstances, statutory and non-statutory, proven by the greater weight of the evidence, finds the mitigating circumstances are not substantial and are found not to be of sufficient support and weight to outweigh any of the aggravating circumstances proved beyond a reasonable doubt.

(R 2730-31).

It is well-established that this Court's function is not to reweigh the facts or the aggravating and mitigating circumstances. Gunsby v. State, 574 So.2d 1085, 1090 (Fla. 1991), cert. denied, 116 L.Ed.2d 102 (1992); Hudson v. State, 538

So.2d 829, 831 (Fla. 1989), cert. denied, 493 U.S. 875 (1990). Rather, as the basis for proportionality review, this Court must accept, absent demonstrable legal error, the aggravating and mitigating factors found by the trial court. State v. Henry, 456 So.2d 466 (Fla. 1984). It is upon that basis that this Court determines whether the defendant's sentence is too harsh in light of other decisions based on similar circumstances. Alvord v. State, 322 So.2d 533 (Fla. 1975), cert. denied, 428 U.S. 923 (1976). The four aggravating factors found in this case are supported by competent, substantial evidence and, according to the trial court, far outweigh the mitigating evidence presented. As a result, the trial court conscientiously concluded that death was warranted. Contrary to Appellant's assertion, his sentence is not disproportionate to other defendants' sentences for similar murders. See Jones v. State, 580 So.2d 143 (Fla. 1991); Rivera v. State, 545 So.2d 864 (Fla. 1989).

ISSUE X

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING TESTIMONY DURING THE PENALTY PHASE THAT APPELLANT WAS NOT UNDER THE INFLUENCE OF AN EXTREME MENTAL OR EMOTIONAL DISTURBANCE AT THE TIME OF TRIAL (Restated).

During the penalty phase, Appellant sought to portray himself as an emotionally handicapped person who is impulsive and unable to interpret and to react to social situations correctly. Through teachers and counselors, he chronicled his early childhood development to show his troubled youth, which included physical and emotional neglect, illiteracy, and lawless behavior. Appellant also offered the testimony of a psychiatrist, Dr. Petrilla, who used all of this evidence, as well as interviews with Appellant, to opine that Appellant was under the influence of an extreme mental or emotional disturbance at the time of the murder. (T 2087).

During cross-examination, the State sought to clarify Dr. Petrilla's opinion and asked him the following question: "Are you saying he was only like that back on the 18th of January 1991 when all this happened or are you saying that as we, as he sits there today, he's operating under severe mental or emotional disturbance?" (T 2106). Without objection from counsel, Dr. Petrilla answered, "I'm saying he operates like that in general and that situation exacerbated his preexisting condition." (T 2106). Dr. Petrilla explained that Appellant had a "short fuse" and that his confrontation with Officer Parrish "set him off." (T 2107). When confronted with another doctor's opinion that Appellant "had the ability to anticipate the consequences of his

acts in situations," Dr. Petrilla maintained that, while that might have been true when Appellant was eight or nine years old, it was not true when he tested Appellant after the murder. (T 2108-09). At which point, the following colloquy occurred:

> Q [BY THE STATE] All right, fine. But anyway, the bottom line, I guess my point is as we are all standing here right now, he's operating under extreme emotional conditions, is that your testimony? I mean those situations exist now?
>
> A [BY DR. PETRILLA] I think he has --
>
> Q You used the words, excuse me, Doctor, influence of extreme mental or emotional disturbances.
>
> A He has emotion disturbances without a doubt.
>
> Q Are they extreme?
>
> A Yes.

(T 2109). Again, Appellant made no objection to this testimony.

Thereafter, the State questioned Dr. Petrilla about the MMPI and the types of mental disorders it allegedly detects. Dr. Petrilla agreed that Appellant's MMPI results did not indicate the existence of any of those disorders. (T 2109-11). At that point, the State again asked, "[A]s we speak, he is operating under extreme mental or emotional disturbance. I just want to make sure we're clear on that. Is that your testimony within a reasonable degree of psychological certainty?" Dr. Petrilla responded without objection by defense counsel: "I think he has severe emotional problems, yes. Personality disorder, yes." (T 2111). The State then asked, "Well, I've got to pin you down to whether or not he fits that language of what doctor or what

[defense counsel] asked before. Is he, as we're sitting here, under the influence of extreme mental or emotional disturbances?" (T 2111-12). It was only at this point that defense counsel raised a relevancy objection, which was overruled. (T 2112). By this time, it was far too late. See Castor v. State, 365 So.2d 701 (Fla. 1978); Clark v. State, 363 So.2d 331 (Fla. 1978).

Regardless, it is obvious when read in context that the State was trying to impeach the whole underpinning of Dr. Petrilla's opinion regarding Appellant's mental state before, during, and after the murder. While it is true that this mental mitigating factor relates only to the time of the offense, the State's focus was on trying to show that his actions during the offense and immediately thereafter were inconsistent with his claim that he had permanent emotional disorders that prevented him from interpreting social situations correctly and reacting appropriately. Thus, the fact that Appellant was not under the influence of any mental or emotional disturbance at the time of trial tended to negate his statutory and nonstatutory mitigating evidence of emotional disorders.

Assuming for argument's sake, however, that Appellant sufficiently preserved his objection and that the State's questions were inappropriate, any error in allowing their admission was harmless at worst. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). After all, the substance of the witness' testimony was that Appellant was, in fact, under the influence of extreme emotional or mental disturbance at the time of trial. Thus, the testimony was hardly prejudicial to Appellant's case. Regardless, because the quality and quantity of evidence in

aggravation far outweighed that in mitigation, there is no reasonable possibility that the sentence would have been different had the complained-of testimony not been elicited from the witness. Therefore, Appellant's sentence of death should be affirmed.

ISSUE XI

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN GIVING THE STATE'S SPECIAL REQUESTED INSTRUCTION ON PREMEDITATED MURDER (Restated).

During the charge conference at the close of the guilt phase, the State proposed a special instruction on premeditation. (T 2637). After much discussion and over objection by defense counsel, the trial court granted the State's request in part. (T 1663-73). As a result, the following instruction was read to the jury:

> Killing with premeditation is killing after consciously deciding to do so. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the Defendant. The premeditated intent to kill must be formed before the killing.
>
> Among the ways that premeditation may be inferred is from evidence as to the nature of the weapon used, the manner in which the murder was committed and the nature and manner of the wounds inflicted. The question of premeditation is a question of fact to be determined by you from the evidence. It will be sufficient proof of premeditation if the circumstances of the killing and the conduct of the accused convince you beyond a reasonable doubt of the existence of premeditation at the time of the killing.

(T 1842) (emphasis added).[5]

Below, Appellant argued that the language added by the State was not a correct statement of the law and that it "limit[ed] the

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[5] The emphasis denotes the State's amendment to the standard instruction on premeditation.

jury to what they may look at in inferring the existence of premeditation." (T 1665). In response to his complaint, the State agreed to modify its proposed instruction in order to correct its limiting effect. Nevertheless, defense counsel maintained that the instruction was "internally inconsistent," although he declined to explain in what way. (T 1665-67, 1673).

On appeal, Appellant now raises new grounds for his objection to the special instruction: (a) the added language improperly highlighted the State's evidence, (b) the phrase "the manner in which the murder was committed" constituted a comment on the evidence by the trial court, and (c) the instruction "permitted the jury to infer premeditation based on insufficient evidence." **Brief of Appellant** at 52-57. Although the first ground could arguably be interpreted as an extension of the ground raised below, the other two grounds were clearly not raised below, and thus cannot be raised for the first time on appeal. Tillman v. State, 471 So.2d 32, 35 (Fla. 1985) ("In order to preserve for review an issue arising from a trial court's ruling on a question of admissibility of evidence, the specific ground to be relied upon must be raised before the court of first instance."); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982) ("[I]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below.").

As for Appellant's claim that the added language improperly highlighted the State's theory of prosecution, this contention is wholly without merit. It is well-established that the trial court has the responsibility for determining the applicable

substantive law and instructing the jury accordingly. Rosales v. State, 547 So.2d 221 (Fla. 3d DCA 1989). Although the standard instructions exist to assist the trial court in performing its function, they are only a guide and do not relieve the trial court of its responsibility. Steele v. State, 561 So.2d 638 (Fla. 1st DCA 1990).

In the instant case, premeditation was the foremost issue in dispute. Consequently, the State sought to more carefully define this element of the offense. From this Court's detailed definition of premeditation in Sireci v. State, 399 So.2d 964 (Fla. 1981), cert. denied, 456 U.S. 984 (1982), the State modified the standard instruction to include the sentence highlighted in the excerpt above. Contrary to Appellant's assertion, it did not highlight the State's theory of prosecution,[6] but rather more fully defined an element of the offense. Its acceptance was well within the trial court's discretion, and thus not error.

Even if it were error, however, it was harmless beyond a reasonable doubt. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). There is no question that Appellant gained control of Officer Parrish's semiautomatic handgun by force and shot him once. He then paused for a few seconds before pulling the trigger thirteen more times. Not only was premeditation proven beyond a reasonable doubt, but there was no doubt that Appellant committed this murder during the commission of a felony. Thus, there is no reasonable possibility that the verdict would have

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[6] The State was proceeding under both a theory of premeditation and a theory of felony murder.

been different had the State's special requested instruction not been given. Consequently, Appellant's conviction should be affirmed.

ISSUE XII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN INSTRUCTING THE JURY ON ESCAPE AS AN UNDERLYING FELONY OF FELONY MURDER (Restated).

In this appeal, Appellant claims that the trial court abused its discretion in instructing the jury on escape as an underlying felony of felony murder. Specifically, he contends, as he did below, that he had insufficient notice and that the elements of escape had not been proven. **Brief of Appellant** at 58-62. The State disagrees.

As for his claim of lack of notice, it is well-established that the State does not even have to charge felony murder in the indictment in order to prosecute a defendant under alternative theories of premeditated and felony murder. O'Callaghan v. State, 429 So.2d 691, 695 (Fla. 1983). In other words, a charge of first-degree murder puts a defendant on notice that either theory of prosecution may be used. Thus, it stands to reason that, if the State does not even have to charge felony murder, then it does not have to give notice of the underlying felonies upon which it will rely to prove felony murder. After all, since the list of underlying felonies upon which the State can rely is exclusive, a defendant is put on notice of the possible underlying felonies, of which escape is one. Consequently, "appellant was not prejudiced by the manner in which he was charged in the indictment or by the instructions give to the jury on the crime as charged in the indictment." Id. (emphasis added).

Appellant's second claim that the corpus delicti of escape was not sufficiently proven independently of Appellant's confession is equally without merit. As this Court noted in Keyser v. State, 533 So.2d 285, 287 (Fla. 1988) (quoting Melton v. State, 75 So.2d 291, 294 (Fla. 1954)), there are four elements necessary to demonstrate an arrest, which is the element of escape being challenged by Appellant: 1) "A purpose or intention to effect an arrest under a real or pretended authority," 2) "An actual or constructive seizure or detention of the person to be arrested by a person having present power to control the person arrested," 3) "A communication by the arresting officer to the person whose arrest is sought, of an intention or purpose then and there to effect an arrest," and 4) "An understanding by the person whose arrest is sought that it is the intention of the arresting officer then and there to arrest and detain him."

The evidence in this case established that Officer Parrish stopped Appellant for a traffic infraction and tried unsuccessfully to obtain Appellant's legal name for a driver's license check. At that point, according to Detective Tedder, Appellant could have been arrested for the misdemeanor offense of failing to produce a driver's license. (T 1116). Thus, Officer Parrish had a purpose or intention to effect an arrest.

Rhonda Pendleton, Appellant's companion in the car, then testified that Officer Parrish asked Appellant to get out of the car and put his hands on top of the car. Officer Parrish's handcuffs were found on the ground near his body. Rhonda Pendleton also testified that, when she asked Appellant why he

shot the officer, Appellant stated "that his probation was suspended and the police were looking for him already." (T 1470). Thus, there was an actual seizure by an authorized person, a communication of an intention to effect an arrest, and an understanding by Appellant that Officer Parrish intended to arrest him. Together, these facts constitute competent, substantial evidence of the arrest element of escape independently of Appellant's confession. Consequently, the trial court did not err in instructing the jury on escape as an underlying felony of felony murder. Even if it were error, however, it was harmless beyond a reasonable doubt based on the quality and quantity of evidence establishing premeditated murder, and felony murder based on the underlying felony of robbery. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

ISSUE XIII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S CHALLENGES FOR CAUSE (Restated).

During jury selection, defense counsel sought to challenge for cause Mr. Hancock, Mr. Bridwell, Mrs. Smith, Mr. Goodwin, Mrs. Shawl, Mrs. Pond, and Mr. Gwathmey. (T 877, 877-80, 882-83, 887-89, 897-98, 899-900). His challenges to Mr. Hancock and Mrs. Pond were granted. (T 877, 897-98).[7] Of those against whom challenges for cause were denied, defense counsel struck all but Mrs. Shawl peremptorily. (T 890, 894, 901).

Eventually, defense counsel exercised all of his allotted peremptory challenges and sought an unspecified number of additional ones because "certain of [the] challenges for cause were improperly denied." (T 902). Believing that defense counsel wanted to strike the next person on the panel, the State had no objection to giving defense counsel one additional peremptory for that purpose. Defense counsel reiterated, however, that he wanted additional peremptories because "there are jurors sitting on there in the first twelve that should have been, that were challenged for cause which were improperly denied." (T 903). When pressed by the State to name them, defense counsel named only Mrs. Shawl. (T 903). The State

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[7] Mr. Hancock was challenged based on his belief that persons convicted of first-degree murder should automatically receive a sentence of death. (T 877). Mrs. Pond, on the other hand, was challenged based on her perceived inability to render an impartial verdict because of her previous working relationship with the victim's wife. (T 897-98).

nevertheless maintained that he was not entitled to more, and the trial court made the following findings:

> The law gives both sides -- and I agree in this case there have been challenges for cause. Some have been granted, some have not. I'm not going to grant any additional under either side. The State's willing to grant you another one and I'll go along with that. But they're conditioning that on striking the next prospective juror.
>
> * * * *
>
> I think for the record now, we had this request and it comes up all the time, you want more challenges. You know, looking over the venire -- and this has been very close questioning of forty-three or forty-four that we had. There's no basis or any compelling reason that any additional jurors that are down the line or already in the group that would really require any concern in this situation to give either side another challenge preemptorily [sic] other than the ten that you're required to have.

(T 904-05).

Ultimately, defense counsel rejected the State's offer for an additional peremptory to strike the twelfth juror. (T 905). After questioning a second panel for an alternate, however, the following colloquy occurred:

> THE COURT: Let me say the State has one additional preemptory [sic] for the alternate. That's basically where we're going right now.
>
> [THE STATE]: Except that [defense counsel] had earlier requested that he be given additional preemptory [sic] challenges as to the original twelve jurors and cited as a reason the fact that you denied his challenge for cause. And I checked my notes and I think there's one more juror and I don't have any problem if he wants to excuse Mrs. Shawl --
>
> [DEFENSE COUNSEL]: It's Mrs. Shawl.

THE COURT: You're willing to concede that?

[THE STATE]: Well, I mean, I'm willing to --

* * * *

[DEFENSE COUNSEL]: I think the only ones I challenged for cause that were denied that are still remaining are Mrs. Shawl. Understanding I may be wrong in the law, it doesn't change our position that even if she weren't there, we are still entitled to additional challenges. And I may be wrong on the law on that.

THE COURT: The point has been made.

[DEFENSE COUNSEL]: What's the quid pro quo, though?

[THE STATE]: There is none. If you are truly unhappy with the jury you have and felt forced into it because you don't have any more preemptory [sic] challenges, and I think that would mean that all you'd need is one more to get what you want, then I'd rather have you do that so that wouldn't even be an issue as an appellate issue.

(T 982-83).

Understanding that Mrs. Ortiz, from the new panel, would take Mrs. Shawl's place if challenged, defense counsel accepted the State's offer and struck Mrs. Shawl. (T 983-85). The State then used its tenth peremptory challenge on Mrs. Ortiz, which moved Mr. Schick into her place, and then used its one additional peremptory challenge to strike Mr. Schick, which moved Mr. Gurka into that spot. (T 985-92). At that point, the twelve-member jury was complete. Before swearing in the jury, the court asked both sides whether they had any comments or objections; none were made. (T 991-92).

In this appeal, Appellant claims that the trial court abused its discretion in denying his challenges for cause, thereby forcing him to use peremptory challenges to remove the objectionable jurors from the jury. **Brief of Appellant** at 62-70. The State submits, however, that Appellant has failed to preserve this issue for review.

In Trotter v. State, 576 So.2d 691, 693 (Fla. 1990) (footnotes omitted; emphasis added), this Court enunciated the precise procedural requirements for preserving this kind of issue for review on appeal:

> Under Florida law, '[t]o show reversible error, a defendant must show that all peremptories had been exhausted and that an objectionable juror had to be accepted. Pentecost v. State, 545 So.2d 861, 863 n. 1 (Fla. 1989). By this we mean the following. Where a defendant seeks reversal based on a claim that he was wrongfully forced to exhaust his peremptory challenges, he initially must identify a specific juror whom he otherwise would have struck peremptorily. This juror must be an individual who actually sat on the jury and whom the defendant either challenged for cause or attempted to challenge peremptorily or otherwise objected to after his peremptory challenges had been exhausted. The defendant cannot stand by silently while an objectionable juror is seated and then, if the verdict is adverse, obtain a new trial. In the present case, after exhausting his peremptory challenges, Trotter failed to object to any venireperson who ultimately was seated. He thus failed to establish this claim.

Although Appellant *identified Mrs. Shawl, he* was ultimately given an additional peremptory challenge with which to excuse her. With the exception of Mrs. Shawl, he identified no others on the jury that he would have stricken if given the opportunity. Nor did Appellant indicate that an objectionable juror had

ultimately been selected. Even now, Appellant makes no claim that a biased juror was seated, and a perusal of the record would defy such a claim. Without a showing of need, the trial court had no reason to grant Appellant's request for an unspecified number of additional peremptory challenges to strike unspecified persons. Thus, as in Trotter,[8] by failing to satisfy his burden, Appellant has failed to preserve this issue for review.

Similarly, Appellant's complaint that "[a]s a result of the procedure used, the state received an extra peremptory challenge for absolutely no reason," thereby giving the State "an inappropriate advantage over the defense in the number of peremptory challenges used on the jury," **Brief of Appellant** at 67-68, is unpreserved and unavailing. Appellant raised no such objection below. Thus, he is precluded from raising it for the first time on appeal. Tillman v. State, 471 So.2d 32, 35 (Fla. 1985); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982). Regardless, Appellant overlooks the rule that authorizes an equal number of additional peremptory challenges to both sides. Florida Rule of Criminal Procedure 3.350(c) specifically states:

> If an indictment or information contains 2 or more counts or if 2 or more indictments or informations are consolidated for trial, the defendant shall be allowed the number of peremptory challenges that would be permissible in a single case, but in the interest of justice the judge may use judicial

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[8] This Court specifically found in Trotter that "Trotter's request for an additional peremptory challenge was not made in connection with a particular venireperson; it was a general request for a challenge that could be exercised in the future." 576 So.2d at 693 n.7.

> discretion in extenuating circumstances to grant additional challenges to the accumulated maximum based on the number of charges or cases included when it appears that there is a possibility that the state or the defendant may be prejudiced. The state and the defendant shall be allowed an equal number of challenges.

(Emphasis added). Here, the indictment contained three counts, two of which were being tried together. Thus, when the trial court acquiesced to the State's offer and gave Appellant an additional peremptory to use on Mrs. Shawl, the State was entitled to one as well. Appellant offered no complaint. Even if a complaint had been raised, however, it would have been without merit based on Rule 3.350(c).

Even assuming arguendo that Appellant made a sufficient showing pursuant to Trotter and that the trial court erred in denying his challenges for cause, neither of which the State concedes, such error was harmless. See Ross v. Oklahoma, 487 U.S. 1 (1988); Penn v. State, 574 So.2d 1079 (Fla. 1991) (applying Ross' harmless error analysis). Every juror whom the trial court refused to excuse for cause was ultimately excused peremptorily. In the end, Appellant raised no objection to the panel selected. Thus, although the trial court may have erred in refusing to excuse several jurors for cause, "the error did not deprive [Appellant] of an impartial jury or of any interest provided by the State." Ross, 487 U.S. at 91. See also Penn, 574 So.2d at 1081 ("Even assuming that the court erred in refusing to excuse these prospective jurors, however, we would find such error harmless because Penn has shown no prejudice,

i.e., that he had to accept an objectionable juror."). Consequently, Appellant's conviction and sentence should be affirmed.

ISSUE XIV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING TESTIMONY THAT THE PURPOSE OF A TWO-HANDED GRIP ON A GUN IS FOR BETTER CONTROL AND ACCURACY (Restated).

During the State's case-in-chief, Colonel Mann recounted Appellant's description of the shooting, which included a physical demonstration of the actions of both Appellant and the victim. During this description, as relayed to him by Appellant, Colonel Mann indicated that, after Appellant gained control of Officer Parrish's gun, he fired once, holding the gun with one hand. After the officer fell to the ground, Appellant positioned himself over the officer and, with a two-handed grip on the weapon, shot him thirteen more times, missing only once. (T 1391-97). At that point, the State asked Colonel Mann, "What would be the purpose of taking a two-handed grip on a firearm?" (T 1397). Defense counsel's objection was overruled, and the witness answered, "Better control, better accuracy." (T 1397-98).

Appellant now complains that the trial court abused its discretion in allowing the witness to answer, because "the testimony as to Officer Mann's reasons for holding a gun with two hands was not probative of Appellant's mindset during the incident." **Brief of Appellant** at 71. The State disagrees. To rebut any potential defense of accident or mistake as a result of the struggle for the gun, the State sought to show that Appellant deliberately positioned himself over the downed officer, took careful aim at his victim, and fired until he was sure that the

officer was dead. The fact that Appellant, through his own admission, used two hands to steady the gun after initially firing with a one-handed grip tends to prove premeditation and disprove accident or mistake. Thus, the trial court did not abuse its discretion in allowing Colonel Mann to testify that a two-handed grip provides better control and better accuracy.

Even if it were error, however, it was harmless beyond a reasonable doubt. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). There is no question that Appellant gained control of Officer Parrish's semiautomatic handgun by force and shot him once. He then paused for a few seconds before pulling the trigger thirteen more times. Not only was premeditation proven beyond a reasonable doubt, but there was no doubt that Appellant committed this murder during the commission of a felony. Thus, there is no reasonable possibility that the verdict would have been different had the witness' testimony not been elicited. Consequently, Appellant's conviction should be affirmed.

ISSUE XV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO SUPPRESS HIS CONFESSIONS (Restated).

Prior to trial, Appellant filed a motion to suppress post-arrest statements and physical evidence, namely, the victim's gun, the car Appellant was driving at the time of the murder, and the contents of that car. (R 2538-45, 2565-66). At a hearing on the motion, the trial court denied the motion, finding, among other things, that the police had probable cause to arrest Appellant at the home of Derrick Dickerson without a warrant. (T 173-77). In this appeal, Appellant claims that the trial court abused its discretion in denying the motion based on the finding of probable cause.[9] **Brief of Appellant** at 71-74. The State disagrees.

At the suppression hearing, Colonel Mann of the St. Lucie County Sheriff's Office testified that he received a BOLO for a black male named "Dwight Dixon Phillips" or "Dwight Dixon Fuller,"[10] driving a dark blue 1979 Cheverolet Monte Carlo with a tag number of DJR 94C, which was registered to someone at 1718 Avenue K in Fort Pierce. They knew that the suspect had stolen Officer Parrish's service weapon. The suspect had also given an

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[9] In the trial court, Appellant raised numerous grounds for the motion. In this appeal, however, he renews only the claim relating to the arresting officer's alleged lack of probable cause for his arrest. As a result, all of the other grounds are waived. Jackson v. State, 575 So.2d 181, 189 n.5 (Fla. 1991); Everett v. State, 97 So.2d 241 (Fla. 1957), cert. denied, 355 U.S. 941 (1958).

[10] At trial, evidence revealed that the suspect gave a first name of "Duane," not "Dwight."

address of 2603 N. 19th Street. (T 95, 100-01). Officers were dispatched to both addresses.

At 1718 Avenue K, officers discovered a car matching the description in the BOLO parked behind the house. Because the car was backed into the driveway, however, they could not read the tag on the car. The lights were on in the house, and the front door was standing open. An officer on the scene had earlier approached a person leaving the house and had learned that there was a person inside the house named "Dwight" or "Derrick." (T 96-101). When Colonel Mann attempted to approach the car to verify the license plate, two black males exited the house through the front door. The two men saw him, and one of the two men whom he identified as Appellant, walked back inside. Colonel Mann approached the other man, who was later identified as Derrick Dickerson, and said, "Where's Dwight?" The man responded, "I'm Derrick. The guy you want is in the house." He offered to go get him and walked inside the house. Colonel Mann took up a position to the right side of the door and looked inside. He saw an infant lying on a couch in the living room. Shortly thereafter, Appellant walked out into living room. From outside the door, Colonel Mann identified himself as a police officer and ordered Appellant to put his hands on his head. Colonel Mann then stepped inside, advised Appellant that he was under arrest, and advised him of his rights. (T 104-10).

Based on these facts, the police had probable cause to arrest Appellant without a warrant. As this Court has recently stated in Schmitt v. State, 590 So.2d 404, 409 (Fla. 1991) (citations omitted):

> As a legal concept, 'probable cause' is not capable of a bright-line test. Rather, it involves a fact-intensive analysis that necessarily varies from context to context. In particular, the courts are required to weigh two interests that usually are in conflict: society's recognition that its police forces should be given discretion to investigate any reasonable probability that a crime has occurred, and the individual's interest in not being subjected to groundless intrusions upon privacy.
>
> In the past, we have defined 'probable cause' as a reasonable ground of suspicion supported by circumstances sufficiently strong to warrant a cautious person in the belief that the person is guilty of the offense charged. The reasons cited by the police must be sufficient to create a reasonable belief that a crime has been committed.

Here, the totality of the facts and circumstances as known by Colonel Mann, a thirty-one year veteran of law enforcement, would have led a person of reasonable caution to believe that Appellant committed the offense for which he was arrested. Within thirty minutes of the shooting, the perpetrator's car was traced to Derrick Dickerson's house, where two black males emerge, and one quickly retreats back into the house at the site of Colonel Mann approaching. This person is immediately identified by Derrick Dickerson as the person they are looking for, and he offers to go inside and get him. While standing outside the open front door, Colonel Mann heard the two men talking and then Appellant, who was the same person that had just retreated into the house, walked out into the living room. At that point, Colonel Mann had probable cause to arrest him for the murder of Officer Parrish.

In State v. Flonory, 566 So.2d 310 (Fla. 5th DCA 1990), probable cause was established under similar facts. In Flonory, an eyewitness to a drive-by shooting described the assailants as two black males driving a maroon Cutlas. Friends of the eyewitness, who were at the scene of the shooting, had been in a fight earlier with two other men, one of whom, Clark, was seen with a handgun. Clark told an officer that he gave the gun to a guy named Cooper at the scene of the fight. Clark drove the officer to Cooper's house where they discovered a maroon Cutlas parked in the driveway. Cooper told the officer that the defendant, Flonory, had been with him the night of the drive-by shooting, and showed the officer where Flonory lived. Flonory was arrested at his home and later confessed to the shooting. On appeal, the Fifth District held that "there was sufficient information available to the arresting officers to indicate that Flonory was involved in criminal activity, as either the driver or gunman, in regard to the shooting of [the victim]." Id. at 311.

As in Flonory, the investigating officers in this case were given a general description of a car and the race and sex of the suspect. They traced the car to Derrick Dickerson, who told the police that the person they were looking for was inside the house. Based on this information, which was sufficient to indicate that Appellant was involved in criminal activity, the officers validly arrested Appellant inside the house. Incident to this arrest, they frisked Appellant's person for a weapon and found two 9mm bullets like those used in Officer Parrish's service weapon. Also, after waiving his Miranda rights several

times, Appellant gave several statements to the police regarding the shooting and eventually led them to the officer's gun, which was hidden behind the house at 1718 Avenue K. Because the arrest was valid, the physical evidence obtained pursuant to the search of Appellant incident to his arrest was admissible. Likewise, his statements regarding the murder and the location of the gun were admissible based on his voluntary waiver of his Miranda rights. See New York v. Harris, 495 U.S. 14 (1990).

Even assuming for argument's sake, however, that the police did not have probable cause to arrest Appellant, thereby rendering the statements and physical evidence inadmissible as fruits of the poisonous tree, such error in their admission would have been harmless beyond a reasonable doubt. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Rhonda Pendleton was an eyewitness to the crime. From inside the car that Appellant was driving, she saw Appellant shoot Officer Parrish. When she asked him why he did it, Appellant responded that "his probation was suspended and the police were looking for him already." (T 1470). Thus, based on her eyewitness account of the murder and the statement made to her by Appellant which established premeditation, there is no reasonable possibility that the verdict would have been different had Appellant's confessions and the physical evidence seized as a result not been admitted. See Pericola v. State, 499 So.2d 864, 868 (Fla. 1st DCA 1986) ("While it is true that, when the error affects the constitutional rights of the appellant, the reviewing court may not find it harmless if there is a reasonable possibility that the error may have contributed to the accused's conviction or if the error may not

be found harmless beyond a reasonable doubt, even such constitutional error may be treated as harmless where the evidence of guilt is overwhelming."). Consequently, Appellant's conviction should be affirmed.

ISSUE XVI

WHETHER THE INSTRUCTION ON REASONABLE DOUBT DEPRIVED APPELLANT OF A FAIR TRIAL (Restated).

Appellant claims that the standard jury instruction on "reasonable doubt" is "infirm" and denied him a fair trial. **Brief of Appellant** at 74. Appellant made no objection to the instruction below; thus he has failed to preserve this issue for appeal. Tillman v. State, 471 So.2d 32, 35 (Fla. 1985); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982). Regardless, this Court, and others, have previously held that the standard instruction adequately defines "reasonable doubt." See, e.g., Brown v. State, 565 So.2d 304 (Fla.), cert. denied, 112 L.Ed.2d 547 (1990). Thus, Appellant's argument has no merit.

ISSUE XVII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING HEARSAY STATEMENTS DURING THE GUILT PHASE (Restated).

As its first witness, the State called Detective James Tedder of the Fort Pierce Police Department. Detective Tedder testified that the department's standard operating procedure when an officer effects an automobile stop is to approach the driver of the car and obtain a driver's license, or at least a name, in order to determine whether the driver has a valid driver's license. (T 1020, 1027-30). In this regard, the State asked Detective Tedder the following questions:

> Q [BY THE STATE]: Now, again, based upon your investigation and what you were able to gather from your entire investigation, were you able to determine not just what the normal procedure is, but what Officer Parrish did in trying to obtain information on the person's driver's license in this case?
>
> A [BY DETECTIVE TEDDER] Yes, sir, as per procedure, he did go to channel 3 to call in the driver's license checks.
>
> Q And did he give information regarding a name or names for the driver of the vehicle in trying to determine whether he had a driver's license?
>
> A Yes, he gave several names.
>
> Q And where would he have, where did you determine that he had obtained those names?

(T 1031-32). At that point, defense counsel objected, claiming that "[n]one of this is based on his own personal observation and they can get it in in other ways. . . . The witness should testify based on his own personal knowledge. It's not based on his personal knowledge." (T 1032-33). The State responded that

it was based on his investigation of the case, which included records containing the information, and that it was being offered to show the progression of the investigation. (T 1033). The trial court overruled the objection, conditioning the testimony's admission on the State tying it to other evidence. (T 1033). The State did nothing more at that point than to reconfirm that Officer Parrish had obtained several names from Appellant. Based on this fact, then, according to Detective Tedder, Officer Parrish had the authority to arrest Appellant for the misdemeanor offense of failing to produce a driver's license. (T 1033-35).[11]

The State's next witness was Carolyn Dill, the 911 coordinator for St. Lucie County. Ms. Dill testified without objection that she made an audio tape containing all of the transmissions concerning the shooting of Officer Parrish, beginning with the officer's stop of Appellant's car and ending with an unidentified person's call for help over the officer's radio. (T 1079-90). Ms. Dill also testified without objection that, pursuant to instructions by an officer in charge, she dispatched the following BOLO to all units: "'79 Cheverolet Monte Carlo, blue in color, one headlight out, black male, Duane D. Fuller or Phillips, 10-26 of '69. Suspect 10-41 of officer's gun, which means he's in possession of the officer's gun." A tag number of DJR-94C was also included. (T 1093). A printout

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[11] Detective Tedder also attempted to testify to the location of physical evidence at the scene, including the victim's body which had already been removed by the time he arrived. Appellant objected on hearsay grounds, but the objection was overruled. (T 1042-43).

containing this BOLO was admitted into evidence without objection. (T 1094).

After authenticating the audio tape of the 911 dispatch calls through the 911 operator who took the calls, the State sought to introduce the audio tape into evidence and to play the tape for the jury. Defense counsel objected to its admission on hearsay grounds:

> [DEFENSE COUNSEL]: Judge, for the record, we object to them playing the tape. We think that's hearsay. I have no problem if you overrule my objection on hearsay grounds to them reading the transcript.
>
> [THE STATE]: Wait a minute now.
>
> [DEFENSE COUNSEL]: Object to the admission of the tape on the grounds of hearsay.
>
> [THE STATE]: Right.
>
> [DEFENSE COUNSEL]: If the Court overrules my objection, I have no problem with the jury being allowed to see the transcript.

(T 1105-06). The trial court overruled the objection, and the tape was played for the jury with the benefit of the transcript. (T 1106). The substance of the transmissions between Officer Parrish and the 911 dispatcher related to their inability to match a driver's license record with the names supplied to the officer by Appellant. The tape also contained, however, pleas for help from Bruce Heinsson, who stopped to help Officer Parrish. (SR 2-4).

In this appeal, Appellant claims that "[t]he introduction of the hearsay evidence in this case, individually and cumulatively, constitutes reversible error which denied Appellant's rights to confrontation, due process, and a fair trial." **Brief of**

Appellant at 75. For the following reasons, the State submits that Appellant's complaints are wholly without merit, or, in the alternative, that any error in the admission of such evidence was harmless beyond a reasonable doubt.

With respect to Detective Tedder's testimony that Officer Parrish radioed to dispatch for a driver's license check on several names that were supplied to him by Appellant, the State submits that this does not constitute inadmissible hearsay testimony. Through Detective Tedder, the State was trying to establish the sequence of events leading up to the shooting without relying entirely on Appellant's statements. The fact that Appellant gave several alias names that did not match a driver's license history gave Officer Parrish the authority to have Appellant exit the car so that he could effectuate an arrest. It was during his attempt to arrest Appellant that a struggle ensued and Officer Parrish was killed.

In Crump v. State, 18 Fla. L. Weekly S331 (Fla. June 10, 1993), the State offered the testimony of a detective relating to a previous murder committed by the defendant. The detective testified that his investigation of the previous murder focused on the defendant's truck because of tire tracks found at the scene and an eyewitness' description of the truck. The trial court overruled the defendant's objection to the testimony on hearsay grounds "because it found that the State offered the testimony to explain the detective's subsequent acts in focusing on Crump's truck and not to prove the truth of the matter asserted." This Court affirmed the trial court's ruling. Id. at 332. See also Boykin v. State, 601 So.2d 1312 (Fla. 4th DCA 1992).

As in Crump, Detective Tedder's testimony was not offered to prove that Appellant gave alias names; rather, it was offered to show what occurred as a result of him doing so. Consequently, its admission was not an abuse of discretion.

Similarly, the audio tape of the transmissions between Officer Parrish and dispatch were not offered to prove that no driver's license histories matched the names reported. Rather, they were offered to establish the sequence of events immediately preceding and immediately following the shooting, and to establish the basis upon which the investigation focused on Appellant as the perpetrator. All of the events leading up to Appellant's arrest helped to establish probable cause for his arrest. Since this was an issue in dispute, as evidenced by Appellant's motion to suppress his statements and the physical evidence, which had an effect on the acceptance of Appellant's statements by the jury, see **Fla. Stand. Jury Instr. in Crim. Cases** 2.04(e), these events were crucial to the State's case.

If it was error, however, to admit Detective Tedder's testimony and the audio tape of the 911 transmissions, such error was harmless beyond a reasonable doubt. First, this evidence was cumulative to other evidence which was not objected to by Appellant. For example, Rhonda Pendleton, who was in the car with Appellant, testified that Appellant gave Officer Parrish at least one alias name, which did not check out, and that Officer Parrish asked Appellant to give him his real name or he would arrest him. (T 1461-65). Similarly, Officer Parrish's ticket book and notepad containing the alias names and biographical information relating to Appellant were admitted into evidence

without objection, as was a printout of the BOLO transmitted by dispatch. (T 1135-40, 1153-54, 1094). Thus, since the objected-to information was cumulative to other information admitted without objection, any error in its admission was harmless.

Similarly, any testimony by Detective Tedder regarding where someone told him Officer Parrish's body was lying (T 1042-43) was cumulative, and thus harmless. Sergeant Lasenby testified that he found Officer Parrish lying on his back in the middle of 5th Street just north of Avenue A. (T 1128). Thus, if erroneously admitted, Detective Tedder's testimony did not reasonably affect the jury's verdict. Ultimately, the quality and quantity of permissible evidence upon which the jury could have relied to find Appellant guilty of both premeditated and felony murder was such that there is no reasonable possibility that the verdict would have been different had the complained-of evidence not been admitted. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Consequently, Appellant's conviction should be affirmed.

ISSUE XVIII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING THE STATE TO ELICIT TESTIMONY THAT APPELLANT HAD PREVIOUSLY BEEN CONVICTED OF ROBBERY (Restated).

Prior to trial, Appellant filed a motion in limine, seeking to preclude the State from relying on a prior robbery conviction to support the "prior violent felony" aggravating factor, because Appellant had been uncounseled at the time the conviction was entered. (R 2512-14; T 28-89). The State stipulated that it would not use that conviction to support the aggravating factor. Appellant waived the "no significant history" mitigating factor. (T 1879).

To support the existence of both statutory mental mitigators, Appellant called Dr. Fred Petrilla, a licensed psychologist, as a witness. Dr. Petrilla testified that, in forming his opinions, he relied upon, among other things, Appellant's detention center records. (T 2027-28, 2047, 2086, 2089). On cross-examination, the State sought to challenge the doctor's opinion that Appellant has trouble sequencing and integrating information and that on the night of the murder he misinterpreted Officer Parrish's instructions to him and reacted inappropriately. In attempting to do so, the State asked the witness, "[D]o you think the Defendant misunderstood the officer when he asked him for his name and thought maybe the officer wanted him to give him some different names?" Dr. Petrilla responded, "No, I don't think he misunderstood that. What I'm saying is he's having difficulty sequencing, integrating

information, and he gets things mumble jumbled in his brain." (T 2095). Following this line of questioning, the State elicited the following testimony:

> Q What about something that's not necessarily recent but something that's repetitive with him that's happened consistently over his lifetime. Would he be able to do something like that again? For example, if he had been told before that night, January 18th, to put his hands on the top of a car so he could be handcuffed, do you think he would be able to do that again on January 18th when he was asked to do it by Officer Parrish?
>
> A Sure.
>
> Q I mean, that's not the kind of thing that you're saying he would misinterpret?
>
> A No. That's a one statement direct, put your hands on top of the car. And he could do that.
>
> Q Okay. Now, you also considered the detention center records, is that correct?
>
> A Yes, sir.
>
> Q And you said they were rather detailed.
>
> A Yes.
>
> Q And they indicate, do they not, consistent over, since Mr. Kearse was eight or nine years old, consistently that he's been arrested and put in the detention center for various things?

(T 2096-97). At that point, defense counsel objected and moved for a mistrial, which was denied. (T 2097-99). Thereafter, the witness testified, over continued defense objection, that the records showed that Appellant had a lot of behavioral and emotional problems as a youngster and that he was in the detention center "a great deal of time." (T 2099-2102). When

the State asked what he was in the detention center for, defense counsel again objected. The State maintained, however, that, if Dr. Petrilla relied on the records in forming his opinions, then the State was allowed to question him about this source of information. The objection was overruled, but the State did not pursue the question. Instead, the State elicited the fact that Appellant's numerous arrests were relied upon by the witness in forming his opinions regarding the existence of both mental mitigators. (T 2102-06). The substance of those arrests were never elicited.

On redirect examination, however, defense counsel pursued this line of questioning further:

> Q Now, the defendant stayed at the detention center, a number of those were referrals for ungovernability or negligent [sic] or abuse, isn't that correct? Isn't that what the record shows?
>
> A That's right.
>
> Q And no referrals were ever made for any violent crimes, correct?
>
> A That's right.
>
> Q And there were no incidents in which any weapons were ever used, correct?
>
> A Never.
>
> Q And no sexually related offenses?
>
> A No sexually related offense.
>
> Q Theft crimes like he stole a bike or broke into a house or broke into a car.
>
> A Took seven cents off a boy.
>
> Q That's one of the crimes, as [the prosecutor] referred to, for which he went to the detention center, because he took seven cents from a kid?

A That's right.

[DEFENSE COUNSEL]: I have no further questions.

(T 2122) (emphasis added). On recross, the State asked the following questions:

Q There were a bunch of crimes, weren't there? More than just seven cents off a boy. Burglaries, grand thefts?

A There were burglaries in there.

Q Robbery?

A I think the one was -- I don't know what you call it when you take seven cents off someone.

Q What do you call [it] when you take it by force? That's what we're talking about.

A What happened was, if I remember right, one boy held the boy's arms to the side and Mr. Kearse reached in the pocket and took seven cents.

Q The point is he was charged and convicted of robbery, right?

A Yes.

(T 2123). Defense counsel immediately objected and moved for a mistrial. Believing that defense counsel opened the door, the trial court denied the motion, and both parties pursued the details of the crime during redirect and recross examination of the witness. (T 2124-28).

In this appeal, Appellant claims that the State's reference to his conviction for robbery denied him a fair sentencing hearing because the State had stipulated that it could not be used to support the "prior violent felony" aggravating factor and because Appellant had waived the "no significant history" mitigating factor. **Brief of Appellant** at 76-79. The State

submits, however, that the questioning was proper, in that it was not elicited to support the aggravating factor or to rebut the mitigating factor, but, rather, to impeach the doctor's opinion testimony. As this Court held in Parker v. State, 476 So.2d 134, 139 (Fla. 1985) (citations omitted),

> the testimony of the defense expert that he based his opinion regarding appellant's non-violent nature on the appellant's past personal and social developmental history, including a prior criminal history, opened the door for this cross-examination by the state. We find that it is proper for a party to fully inquire into the history utilized by the expert to determine whether the expert's opinion has a proper basis. We conclude that the trial court properly allowed the cross-examination of the psychologist on the contents of the case history.

See also Jones v. State, 18 Fla. L. Weekly S11, 12 (Fla. Dec. 17, 1992) (finding no abuse of discretion in admission of juvenile offenses where "[t]he defense opened the door to this testimony through the expert's reliance on Jones' background"); Muehleman v. State, 503 So.2d 310, 315 (Fla. 1987) (finding no abuse of discretion in admission of 'Juvenile Social History Report' which detailed defendant's juvenile criminal record where "[t]he evidence became relevant when a psychiatric expert witness for the defense stated that he had considered the report in formulating his opinion."); **Fla. Stat. §** 90.705(1) (1991) (providing that an expert witness "shall be required to specify the facts or data" upon which he bases his opinion).

In the present case, Dr. Petrilla specifically stated that he relied upon Appellant's detention reports in forming his opinions. Consequently, whatever information the detention center records contained were open for examination by the State.

Therefore, the trial court did not abuse its discretion in allowing the State to elicit the complained-of testimony. Even if it were error, however, there is no reasonable possibility that the recommendation by the jury, or the sentence by the court, would have been different, based on the quality and quantity of evidence in aggravation and the dearth of evidence in mitigation. Therefore, Appellant's sentence should be affirmed.

ISSUE XIX

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING A DISCIPLINARY REPORT RELATING TO APPELLANT DURING THE PENALTY PHASE (Restated).

In presenting mitigating evidence during the penalty phase, Appellant focused on his physical and emotional neglect as a child, and his resulting emotional disorders which allegedly caused him to kill Officer Parrish. To rebut that perception, the State attempted to show that Appellant was a very aggressive, street-wise person. During the testimony of Danny Dye, who was the dean at St. Lucie School when Appellant was a sixth-grade student there, defense counsel established that Appellant was a severely emotionally handicapped child, that he was unkempt and malnourished, and that his mother seemed unconcerned with his emotional problems. Mr. Dye's review of Appellant's school records indicated numerous recommendations that Appellant be placed in a group home, but that he was never so placed. (T 1972-76).

On cross-examination, Mr. Dye disagreed with Appellant's former teacher that Appellant "was capable of doing better work, that he liked to play dumb, that he tried to work as little as possible. He was street wise and had a problem aggravating, talking out and talking back." (T 1977). Mr. Dye, who was in charge of discipline at the school, portrayed Appellant as a follower who was provoked by other children, although he did not remember Appellant as being a disciplinary problem. (T 1977-78). At that point, the State had Mr. Dye identify a disciplinary

report concerning Appellant for the following school year when Appellant was placed in a less-restrictive setting at Dan McCarty School. (T 1978-80). When the State sought to admit this report, Appellant objected and the following colloquy occurred:

> [DEFENSE COUNSEL]: He doesn't know what that document is. He didn't write it.
>
> [THE STATE]: He just testified he read it, number one; it's admissible, number two. He testified it was a disciplinary record for Billy Leon Kearse for a set time frame. It's certainly fairly rebuttable since [defense counsel] has all those records from that time frame.
>
> [DEFENSE COUNSEL]: Did he say who wrote that?
>
> [THE STATE]: He said it was a disciplinary printout.
>
> [DEFENSE COUNSEL]: Okay. I object not so much on the grounds it's hearsay is we don't even know who that came from. We have no idea the standards under which that document was produced.
>
> [THE STATE]: Just for the record, this document is a school record among the school records that were provided to [defense counsel]. [Defense counsel] had back subpoenaed the records custodian, I think, from the school records. So he knows those documents came from that person. It's very clear that record came from those records.
>
> Secondly, hearsay is admissible as long as it's fairly rebuttable. And we've provided not only that record to [defense counsel] but all the other records from that time frame. So clearly anything [defense counsel] wants to rebut, he can call teachers to do that, deasn [sic] to do that, and clearly he's done that here today.
>
> THE COURT: All right. Over objection, it will be admitted.

(T 1980-82).

In this appeal, Appellant complains that the trial court abused its discretion in admitting the report because (a) it was "irrelevant to any issue to which Dye was testifying," (b) "the record was pure hearsay" which Appellant had no opportunity to rebut, and (c) it "constitute[d] a non-statutory aggravating factor which the jury may have considered." **Brief of Appellant** at 79-80. As is apparent from the above-quoted excerpt, Appellant did not raise a relevancy objection below. Nor did he claim that this report constituted nonstatutory aggravating evidence. Thus, he has failed to preserve these grounds for review. Tillman v. State, 471 So.2d 32, 35 (Fla. 1985); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982). Regardless, this report was clearly relevant to show that Appellant was not the passive follower that the witness portrayed him to be. It was not offered to establish nonstatutory aggravation; rather, it was offered to impeach the witness' testimony. See McCrae v. State, 395 So.2d 1145, 1152 (Fla. 1980) (one of the objects of cross-examination is to elicit the whole truth of matters which are only partly explained on direct examination).

As for Appellant's hearsay claim, which was arguably not preserved either, the State submits that Florida Statutes § 921.141(1) provides the authority for the report's admission. This section provides that "[a]ny such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements." See also Waterhouse v. State, 596 So.2d 1008, 1016

(Fla. 1992). In Hodges v. State, 595 So.2d 929, 933 (Fla. 1992) (quoted sources omitted), this Court stated:

> Although we have held that [the hearsay statements of the victim introduced through two detectives and the victim's sister] should not have been admitted during the guilt phase, '[b]oth the state and the defendant can present evidence at the penalty phase that might have been barred at trial because a "narrow interpretation of the rules of evidence is not to be enforced."'

Not only did Appellant have the opportunity, which he used, to cross-examine the witness who had identified the record, but he had the opportunity to rebut the hearsay by calling other witnesses. In fact, he could have called the dean or a teacher from Dan McCarty School to rebut or explain Appellant's disciplinary record, but he chose not to. Under the circumstances, Appellant's rights were preserved. If, however, the disciplinary report was improperly admitted, there is no reasonable possibility that the recommendation by the jury, or the sentence by the court, would have been different, based on the quality and quantity of evidence in aggravation and the dearth of evidence in mitigation. Consequently, Appellant's sentence of death should be affirmed.

ISSUE XX

WHETHER THE "FELONY MURDER" AGGRAVATING FACTOR INSTRUCTION IS CONSTITUTIONAL (Restated).

Prior to trial, Appellant filed a motion to declare the "felony murder" aggravating factor unconstitutional because it constituted an "automatic" aggravator. (R 2573-81). The trial court denied the motion at the penalty-phase charge conference. (T 2214-16). Appellant now renews his challenge to this aggravating factor. **Brief of Appellant** at 81-82. This issue, however, has long-since been resolved against Appellant, a fact he fails to even acknowledge. See Lowenfield v. Phelps, 484 U.S. 231 (1988); Parker v. Dugger, 537 So.2d 969, 973 (Fla. 1988); Bertolotti v. State, 534 So.2d 386, 387 n.3 (Fla. 1988). Based on these cases, Appellant's sentence of death should be affirmed.

ISSUE XXI

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN REJECTING APPELLANT'S SPECIAL REQUESTED INSTRUCTION REGARDING THE WEIGHT OF THE JURY'S RECOMMENDATION ON THE TRIAL COURT (Restated).

Prior to trial, and again during the penalty-phase charge conference, Appellant proposed a special instruction which elaborated on the weight that the jury's recommendation would be accorded by the trial court:

> Your advisory sentence recommendation is extremely important. The judge is required to give great weight to your verdict.

(R 2623; T 2232). The trial court rejected the proposed instruction in favor of the standard one. (T 2232).

In this appeal, Appellant renews his argument that the standard instructions violate the principles of Caldwell v. Mississippi, 472 U.S. 320 (1985). Rejecting an identical claim, this Court has previously stated that it was "satisfied that [the standard] instructions fully advise the jury of the importance of its role and correctly state the law." Grossman v. State, 525 So.2d 833 (Fla. 1988), cert. denied, 489 U.S. 1071 (1989). See also Combs v. State, 525 So.2d 853 (Fla. 1988). Thus, Appellant's claim must fail.

ISSUE XXII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S SPECIAL REQUESTED INSTRUCTION REGARDING MITIGATING EVIDENCE (Restated).

Prior to trial, and again at the penalty-phase charge conference, Appellant proposed two special instructions which expanded the standard instructions regarding the "catchall" mitigating factor and the burden of proof:

> Mitigating circumstances are those factors which in fairness and mercy may be considered as extenuating or reducing the degree of blame for the offense. Mitigating circumstances also incude [sic] any aspect of Billy Kearse's background and life which may create a reasonable doubt about the question of whether death by electrocution is the only appropriate sentence for Billy Kearse.
>
> The mitigating circumstances which I have read for you for your consideration are factors that you may take into account as reasons for imposing a sentence of life imprisonment. You must pay careful attention to each of these factors. Any one of them, standing alone, may be sufficient to support a decision that life imprisonment is an appropriate punishment for Billy Kearse. However, you should not limit your consideration of mitigating circumstances to those mentioned. You may also consider any other circumstance relating to the case, or to Billy Leon Kearse as reasons for imposing a sentence of life imprisonment.

(R 2621-22; T 2229-32). The trial court rejected the proposed instructions in favor of the standard ones. (T 2232).

In this appeal, Appellant claims that the trial court abused its discretion in denying the requested instructions. **Brief of Appellant** at 83-84. This Court has recently reaffirmed, however, that "the standard jury instruction on nonstatutory mitigators is sufficient." Jones v. State, 18 Fla. L. Weekly S11, 13 (Fla. Dec. 17, 1992). Thus, Appellant's claim must fail.

ISSUE XXIII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN REJECTING APPELLANT'S SPECIAL REQUESTED INSTRUCTION REGARDING THE BURDEN OF PROOF IN THE WEIGHING OF AGGRAVATING AND MITIGATING FACTORS (Restated).

Prior to trial, and again during the penalty-phase charge conference, Appellant proposed a special instruction which shifted the burden of proof to the State to establish that the aggravating factors outweighed the mitigating factors:

> Should you find that aggravating circumstances exist, you must determine whether the aggravating circumstances outweigh the mitigating circumstances beyond and to the exclusion of every reasonable doubt in reaching your decision to advise the Court whether the Defendant should be sentenced to life imprisonment or to death, by electrocution.

(R 2631; T 2237-38). The trial court rejected the proposed instruction in favor of the standard one. (T 2238).

In this appeal, Appellant renews his argument that the standard instruction improperly shifts the burden of proof to the defendant. **Brief of Appellant** at 84. Appellant neglects to mention, however, that this Court has previously rejected this claim several times. Arango v. State, 411 So.2d 172, 174 (Fla. 1982), cert. denied, 474 U.S. 1015 (1983); Stewart v. State, 549 So.2d 171, 174 (Fla. 1989), cert. denied, 118 L.Ed.2d 313 (1990); Robinson v. State, 574 So.2d 108, 113 n.6 (Fla. 1991), cert. denied, 116 L.Ed.2d 99 (1992). It should do so once again and affirm Appellant's sentence of death.

ISSUE XXIV

WHETHER FLORIDA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL (Restated).

In this appeal, Appellant claims that Florida's death penalty statute is unconstitutional for the following reasons: 1) the penalty-phase jury instructions relating to the HAC, CCP, and "felony murder" aggravating factors "assure arbitrariness" because they merely mirror the language of the statute, which is itself unconstitutionally vague, (2) the jury's vote of 11 to 1, a bare majority, "is so unreliable as to violate due process," (3) "[t]he lack of unanimous verdict as to any aggravating circumstance" is unconstitutional, (4) "[t]he standard instructions do not inform the jury of the great importance of its penalty verdict," (5) "[t]he failure to provide adequate counsel assures uneven application of the death penalty," (6) "[t]he trial court has an ambiguous role in our capital punishment system," (7) this Court does not provide meaningful appellate review because (a) its attempts at construing the HAC, CCP, and "felony murder" aggravating factors have led to contrary results, (b) it refuses to reweigh the aggravating and mitigating evidence, (c) the contemporaneous objection rule and retroactivity principles have institutionalized disparate application of the law in capital sentencing, and (d) it inconsistently judges the appropriateness of a jury override, (8) the law does not provide for special verdicts, (9) a condemned inmate's inability to seek mitigation of sentence under Florida Rule of Criminal Procedure 3.800(b) "violates the constitutional presumption against capital punishment and disfavors mitigation,"

(10) "Florida law creates a presumption of death where but a single aggravating circumstance appears," (11) the jury instruction which prohibits jurors from basing their recommendation on sympathy violates the principles of Locket v. Ohio, 438 U.S. 586 (1978), and (12) death by electrocution is cruel and unusual. **Brief of Appellant** at 85-97. Of these twelve claims, however, the only one raised in the trial court below related to the "felony murder" aggravating factor constituting an "automatic" aggravator. (R 2573-81). This claim has been previously addressed in Issue XX, supra. None of the other claims have been preserved for review; thus, they are not cognizable in this appeal. Johnson v. Singletary, 18 F.L.W. S90 (Fla. Jan. 29, 1993); Fotopoulos v. State, 18 F.L.W. S18 (Fla. Dec. 24, 1992); Kennedy v. Singletary, 602 So.2d 1285 (Fla.), cert. denied, 120 L.Ed.2d 931 (1992). Even if they had been preserved for review, they have been repeatedly decided adversely to him. See Hodges v. State, 18 Fla. L. Weekly S255 (Fla. April 15, 1993); Preston v. State, 17 F.L.W. S669 (Fla. Oct. 29, 1992); Power v. State, 17 F.L.W. S572 (Fla. Aug. 27, 1992); Fleming v. State, 374 So.2d 954, 957 (Fla. 1979); Schad v. Arizona, 501 U.S. ___, 115 L.Ed.2d 555, 564 (1991); Hudson v. State, 538 So.2d 829, 831 (Fla. 1989), cert. denied, 493 U.S. 875 (1990); Copeland v. State, 457 So.2d 1012, 1015-16 (Fla. 1984), cert. denied, 471 U.S. 1030 (1985); State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974); Sireci v. State, 399 So.2d 964 (Fla. 1981), cert. denied, 456 U.S. 984 (1982); Campbell v. State, 571 So.2d 415 (Fla. 1990); Jones v. State, 569 So.2d 1234, 1238 (Fla. 1990); Remeta v. State, 522 So.2d 825 (Fla.), cert. denied, 488

U.S. 871 (1988); Patten v. State, 598 So.2d 60, 62 (Fla. 1992); Alford v. State, 307 So.2d 433 (Fla. 1975), cert. denied, 428 U.S. 912 (1976); Sims v. State, 444 So.2d 922 (Fla. 1983), cert. denied, 467 U.S. 1246 (1984); White v. State, 446 So.2d 1031 (Fla. 1984), cert. denied, 111 L.Ed.2d 818 (1985). As a result, Appellant's sentence of death should be affirmed.

ISSUE XXV

WHETHER THE AGGRAVATING FACTORS FOUND IN THIS CASE ARE CONSTITUTIONAL (Restated).

In this appeal, Appellant challenges all six of the aggravating factors found in this case on constitutional grounds. With the exception of his first claim relating to the "felony murder" aggravating factor, none of these claims were raised in the trial court; thus, he has failed to preserve them for review. See Johnson v. Singletary, 18 F.L.W. S90 (Fla. Jan. 29, 1993); Fotopoulos v. State, 18 F.L.W. S18 (Fla. Dec. 24, 1992); Kennedy v. Singletary, 602 So.2d 1285 (Fla.), cert. denied, 120 L.Ed.2d 931 (1992). Even if he had preserved them, they are wholly without merit.

First, Appellant claims that the "felony murder" aggravating factor "does not serve the limiting function required by the Constitution and arguably creates a presumption of death for the least-aggravated form of first-degree murder." **Brief of Appellant** at 97-98. As previously discussed in Issue XX, supra, this issue has long-since been rejected. See Lowenfield v. Phelps, 484 U.S. 231 (1988); Parker v. Dugger, 537 So.2d 969, 973 (Fla. 1988); Bertolotti v. State, 534 So.2d 386, 387 n.3 (Fla. 1988).

Second, Appellant claims that the CCP aggravating factor is vague and "does not narrow the class of death eligible persons. **Brief of Appellant** at 98. As previously discussed in Issue VI, supra, this Court has previously rejected this argument. See Hodges v. State, 18 Fla. L. Weekly S255 (Fla. April 15, 1993);

Fotopoulos v. State, 608 So.2d 784 (Fla. 1992); Klokoc v. State, 589 So.2d 219 (Fla. 1991); Kelley v. Dugger, 597 So.2d 262 (Fla. 1992).

Third, Appellant claims that the HAC aggravating factor "does not rationally narrow the class of persons eligible for death, cannot be consistently applied, and is unconstitutionally vague." **Brief of Appellant** at 98-99. It is interesting to note that Appellant proposed a special requested instruction on HAC which is identical to the newly amended standard instruction, which was read in this case. (R 2634). As such, he can hardly complain that the instruction he sought, and got, was unconstitutional. Regardless, this Court has recently reaffirmed the constitutionality of this aggravating factor and the amended standard instruction which was given in this case. See Lucas v. State, 18 Fla. L. Weekly S15, 16 (Fla. Dec. 24, 1992); Hall v. State, 18 Fla. L. Weekly S63, 65 (Fla. Jan. 14, 1993).

Fourth, Appellant claims that the "hinder law enforcement" aggravating factor is applied more broadly than for what it was intended and that it is applied when it should be merged with other factors. **Brief of Appellant** at 99. First, the aggravator is applied based on the plain meaning of its words. If, as Appellant suggests, the original purpose of the aggravator was to apply to political assassinations and terrorist acts, then the legislature would have defined the aggravator to apply to those specific situations; it did not do so. Second, this Court has previously stated that "consolidation of ["avoid arrest" and "hinder law enforcement"] does not render the sentence invalid,

[since] our sentencing statute requires a weighing rather than a mere tabulation of factors in aggravation and mitigation." Jackson v. State, 498 So.2d 406, 411 (Fla. 1986).

Fifth, Appellant claims that the "avoid arrest" aggravating factor "is vague and prone to erroneous application," but neglects to explain in what way. **Brief of Appellant** at 99. Regardless, this aggravating factor is applied according to the plain meaning of its words which are easily defined by persons of ordinary intelligence.

Finally, Appellant claims that the "murder of a law enforcement officer" aggravating factor "is susceptible to application in cases where (as here) it should be merged with other aggravating circumstances. **Brief of Appellant** at 100. As previously noted, consolidation of two aggravating factors does not render the sentence invalid. Jackson. Thus, Appellant's sentence of death should be affirmed.

CONCLUSION

Based on the foregoing arguments and authorities, the State respectfully requests that this Honorable Court affirm Appellant's conviction and sentence of death.

Respectfully submitted,

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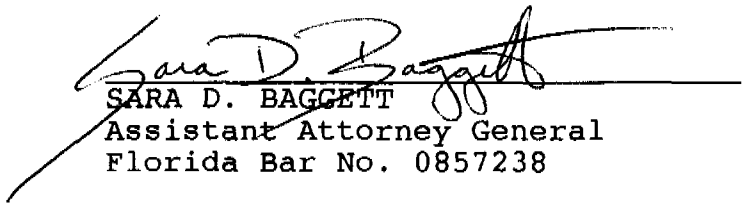
ATTORNEY GENERAL



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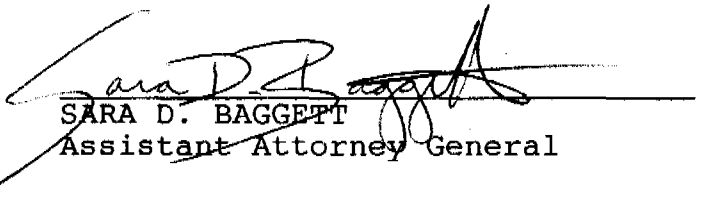
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Jeffrey L. Anderson, Assistant Public Defender, Criminal Justice Building, 421 Third Street, Sixth Floor, West Palm Beach, Florida 33401, this 8th day of July, 1993.



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