IN THE SUPREME COURT OF FLORIDA



OSVALDO ALMEIDA,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.
_____/

Case No. 89,402

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

# ANSWER BRIEF OF APPELLEE

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## PRELIMINARY STATEMENT

Appellant, OSVALDO ALMEIDA, was the defendant in the trial court below and will be referred to herein as "Appellant." Appellee, the State of Florida, was the petitioner in the trial court below and will be referred to herein as "the State." Reference to the pleadings will be by the symbol "R," reference to the transcripts will be by the symbol "T," and reference to the supplemental pleadings and transcripts will be by the symbols "SR[vol.]" or "ST[vol.]" followed by the appropriate page number(s).

## STATEMENT OF THE CASE AND FACTS

The State accepts Appellant's statement of the case and facts as reasonably accurate, but provides the following additions or corrections as they relate to the penalty phase:

1. During Appellant's confession to the Leath murder, the tape of which was played for the jury during the penalty phase, Appellant admitted that he had to take his gun out from under the seat and remove it from a zippered case before shooting Marilyn Leath. (T 1751).

2. Regarding the Leath case, Appellant confessed that he shot Leath after she got out of the car. (T 1745-55). Detective Abrams testified that other witnesses told him that Appellant left and came back before shooting Leath. (T 1768).

3. Contrary to Appellant's brief, Dr. Macaluso did not "gather[] information as to Appellant's background and conduct[] a clinical interview with Appellant." **Brief of Appellant** at 8. Rather, Dr. Macaluso testified that he knew nothing about the case prior to the interview. (T 1773-74). He obtained background information from Appellant during the interview. (T 1778).

4. Dr. Macaluso found no evidence to suggest that Appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (T 1798).

5. On cross-examination, Dr. Macaluso testified that Appellant had received no treatment for depression while in jail awaiting trial. (T 1808).

6. Dr. Macaluso also admitted that the only evidence of alcohol abuse was from Appellant's self-report. (T 1811).

7. Dr. Macaluso further admitted that those family members who testified in deposition that Appellant was abused in Brazil were living in the United States at the time. (T 1821-22).

8. He did not speak with any of the family members personally.

9. And he did not review Dr. Bukstel's report, relating all of the results from Appellant's neuropsychological testing, but he spoke to Dr. Bukstel at some point. (T 1838).

10. Contrary to Appellant's brief, Dr. Strauss did not "review[] the materials in this case and [meet] with Appellant three times for psychiatric interviews." **Brief of Appellant** at 11. Rather, Dr. Strauss testified that he had been sent "some police reports." (T 1860). He was also sent "the psychological reports," but he did not remember when he received them. (T 1860).

11. Dr. Strauss alluded to a diagnosis of Dysthymia, but did not specifically diagnose Appellant with such. In fact, when asked on cross-examination to name the mental disease or defect suffered by Appellant, Dr. Strauss would not do so:

> Q [By the prosecutor] And it's your opinion that Mr. Almeida suffered a mental disease or defect?
>
> A [By Dr. Strauss] Yes.

> Q What is that mental disease or defect that he suffered?
>
> A There was a culmination of all the past psychiatric trauma, plus the alcohol.
>
> Q What is the clinical diagnosis of the disease or defect?
>
> A It's very hard to give a specific term, as I talked earlier, sir, one can talk about Dysthymia, perhaps the post traumatic stress disorder, there are other terms that are being used now, such as neuroplasticity.
>
> The point is that he became psychologically tense, to use the term, and with an impulse disorder, which was the ability to control that impulse disorder was weakened by the alcohol.

(T 1900).

12. Dr. Strauss admitted on cross-examination that the only evidence of alcohol abuse came from Dr. Bukstel's report and from Appellant. (T 1881). The only evidence of alcohol use prior to Marilyn Leath's murder was from Appellant, but Appellant never quantified the amount. (T 1895).

13. Dr. Strauss believed that Appellant knew prior to killing Counts that he had killed Leath the week before. (T 1896).

14. Although Dr. Strauss did not evaluate Appellant for sanity and competency, he believed that "there were, for brief periods of time, a marked impairment of his ability to function in a reasonable and appropriate manner." (T 1897). He would not "go so far as to say" Appellant was insane, because "that's a term which we get into discussions about what it actually means." (T 1897). He then opined that "for a brief period of time [Appellant]

was not in control of his faculties, and by our definition that is insanity. He could not control his behaviors." (T 1899). When asked if Appellant knew right from wrong, Dr. Strauss opined that "in his own way, he did know right from wrong, but the psychological motivations for what he was doing, took over, and he ignored that sense of right and wrong." (T 1904).

15. Dr. Bukstel testified that he did not find any evidence of organic brain syndrome or brain damage. Rather, he found "neuropsychological deficits that are probably related to some kind of disorder in mental development." (T 1940). He believed that unspecified areas of the brain did not develop normally, producing mental deficits in certain areas. (T 1940). He did not pinpoint the cause of the abnormal development, but suggested several possibilities, such as birth trauma, a minor head injury in his youth, systemic infections, toxic exposures, genetic predisposition, or environmental considerations such as his cultural background. (T 1940-41). Other than the minor head injury, he had no evidence to suggest any particular cause or causes.

16. Contrary to Appellant's brief, Dr. Bukstel did not testify that Appellant had learning problems in school. **Brief of Appellant** at 14. Rather, Dr. Bukstel testified that Appellant's abnormal development "probably resulted in some learning problems in school, although the school records did not specifically identify learning problems." (T 1941). He found "some hint of at

least a variability in his grades" and, from that, speculated that Appellant had learning difficulties. (T 1941-42).

17. Contrary to Appellant's brief, Dr. Bukstel did not testify that Appellant "had problems in reasoning and problem solving." **Brief of Appellant** at 14. Rather, he testified that Appellant has a deficit in "complex abstractive reasoning and problem solving, . . . particularly those that are more complex or novel." (T 1944). On the other hand, Dr. Bukstel opined that Appellant does have some "normal abilities" and some "really good abilities." (T 1944).

18. Unlike Dr. Macaluso, Dr. Bukstel diagnosed Appellant as having a mixed personality disorder with prominent paranoid features. (T 1943). However, the doctor had to interpret cautiously Appellant's results from the MMPI II, a personality inventory test, because Appellant tried to present himself in a favorable light. (T 1942-43).

19. As did Dr. Macaluso, Dr. Bukstel found no evidence to suggest that Appellant's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (T 1956).

20. Appellant reported that he was only "a little bit buzzed" at the time of the murder, so alcohol use did not contribute to Dr. Bukstel's finding that Appellant was under the influence of an extreme mental or emotional disturbance at the time of the murder. (T 1972).

21. Dr. Bukstel admitted that the evidence of child abuse came from the depositions of family members and were only "allegations." (T 1962-63).

22. Dr. Bukstel also admitted that the only evidence of Appellant's severe depression at the time of the murder came from Appellant's self-report. (T 1982). The depositions of family members related only to Appellant's early life. (T 1983). He did not speak to Appellant's wife or read her deposition, nor did he speak to Appellant's mother or sister with whom he lived just prior to the murder, nor did not speak to Appellant's co-workers. (T 1985-87).

23. Finally, according to Dr. Bukstel's written report, even though Appellant tried to present himself in a more favorable light, the MMPI showed that he may have trouble dealing with authority, he may be suspicious, overly sensitive, and argumentative, he may not like to be told what to do and thus may rebel, and he may have trouble conducting himself in a responsible and dependable way. (T 1989).

24. According to Appellant's mother, he returned with her to the United States when he was 13 years old. (T 2012). Appellant was very happy then. (T 2019).

25. Over the State's hearsay objection, Appellant's mother related allegations of abuse by Appellant's stepmother in Brazil that were related to her by Appellant's sister, Sara, who heard them from Appellant. (T 2013-17).

26. According to his mother, when Appellant was 13, he was playing with a piece of paper when he accidentally stabbed himself in the leg. She had no reason to believe he was unhappy at the time. (T 2023).

27. The trial court instructed the jury on all eleven of Appellant's statutory and nonstatutory mitigating circumstances. (T 2086-93). The jury recommended death by a vote of nine to three. (T 2099-2101).

28. At the Spencer hearing, Appellant's stepfather denied that he beat Appellant. (T 2130).

29. In its independent analysis of the case, the trial court found the existence of the "prior capital conviction" aggravator and gave it "significant" weight. (R 2489). In mitigation, the trial court found (1) that Appellant committed this murder while under the influence of extreme mental or emotional disturbance--which it gave "little weight"; (2) that he was nineteen years old at the time of the murder--which it gave "little weight"; (3) that he had a capacity for rehabilitation--which it gave "very little weight"; (4) that he behaved well while incarcerated in the county jail--which it gave "little weight"; (5) that he cooperated with the police after his arrest--which it gave "little weight"; (6) that he waived his right to remain silent and gave voluntary statements after his arrest--which it gave "little weight"; (7) that he had abused alcohol for two years prior to the murder and that he had consumed alcohol on the night of the murder--which it gave "little weight"; (8) that he had an abusive childhood--which

it gave "some weight"; (9) that he has shown remorse--which it gave "little weight"; and (10) that he has exhibited genuine religious beliefs--which it gave "little weight." (R 2484-89). Ultimately, the trial court determined that "the mitigating circumstances [did] not outweigh the aggravating circumstances," and thus imposed a sentence of death. (R 2490). This appeal follows.

## SUMMARY OF ARGUMENT

Issue I - This Court rejected Appellant's arguments in the appeal from his conviction for the murder of Marilyn Leath. In any event, Appellant's comment during interrogation regarding a lawyer was merely rhetorical or, at worst, an equivocal comment that did not require clarification under Davis v. United States, 512 U.S. 452 (1994). Moreover, the comment was not made during Miranda warnings, as Appellant contends, since Appellant had previously signed a written waiver and substantive questioning had begun. Finally, Davis can be applied retroactively to Appellant's case.

Issue II - Appellant had been given formal Miranda warnings and had signed a written waiver prior to questioning regarding this murder. Thus, the detectives on this case were not required to re-advise Appellant of his Miranda rights.

Issue III - Appellant failed to preserve this issue for review by failing to seek a curative instruction. To the extent he makes arguments here that he failed to make before the trial court, those arguments are procedurally barred. Regardless, all are without merit. The prosecutor did not mislead the jury by implying that only those factual circumstances outlined in the hypotheticals qualified as second-degree murder, nor did he argue "facts not in evidence" as that objection is commonly understood, misstate the law, or relate his personal opinion that Appellant was guilty only of first-degree murder. Were the comments improper, however, they were harmless beyond a reasonable doubt in light of Appellant's confession that he premeditated the murder of Chiquita Counts.

Issue IV - Under the rule of completeness, the trial court did not abuse its discretion in ruling that the State could introduce all or parts of the other confessions, or question the lead detective about them, in order to rebut Appellant's claim to the jury that his confession was involuntary. Even if it were error, it was harmless beyond a reasonable doubt given the colloquy during Appellant's confession to the Counts murder regarding his understanding of his rights.

Issue V - Appellant's sentence is proportionate to those in other cases under similar facts. Appellant had one weighty aggravator based on his prior murder of Marilyn Leath, which the trial court found "significant." In contrast, Appellant's mitigation was collectively of little weight.

Issue VI - The weight accorded each mitigating factor is within the discretion of the trial court. Where, as here, no reasonable person could say that Appellant's mitigation was not entitled to little (or some) weight, the trial court did not abuse its discretion. That Appellant disagrees does not require reversal.

Issue VII - Appellant's conviction for the Leath murder was reinstated by the Fourth District Court of Appeal following remand from this Court. Therefore, Appellant's "prior violent felony" aggravator remains intact.

Issue VIII - When read in its entirety, the trial court's written sentencing order establishes that the trial court did not give undue weight to the jury's recommendation.

Issue IX - The trial court enumerated its findings in its written sentencing order as required by law.

Issue X - When read in its entirety, the trial court's written sentencing order establishes that the trial court did not apply a presumption of death upon finding the existence of a single aggravating factor.

Issue XI - The trial court did not abuse its discretion in refusing to allowing additional voir dire during the penalty phase regarding the existence of, and facts underlying, the "prior violent felony" aggravating factor.

Issue XII - The amendment to the capital sentencing statute providing for life without parole as a sentencing option did not become effective until after the date of commission of Appellant's crime. Absent a specific request by Appellant that the trial court instruct his jury on this option, the trial court would have committed an ex post facto violation by instructing on it sua sponte.

Issues XIII and XIV - This Court has provided sufficient guidance in the admission of facts underlying a prior violent felony conviction in the penalty phase. Limited facts were admitted at Appellant's trial, and they did not become the feature of the trial.

Issue XV - Appellant opened the door to the State's questioning of Detective Abrams during the penalty phase regarding discrepancies in Appellant's confession to the Leath murder. Regardless, hearsay is admissible in the penalty phase where

Appellant had ample opportunity to question the testifying witness. To the extent admission of such testimony was error, it was harmless beyond a reasonable doubt.

Issue XVI - By questioning Dr. Macaluso about Appellant's sanity at the time of the crime, Appellant opened the door to the State's questioning of Dr. Strauss regarding same. Moreover, Appellant put his mental state at issue. Thus, the State was properly allowed to question Dr. Strauss about the bases for his opinions. Were the testimony allowed in error, however, such error was harmless beyond a reasonable doubt.

Issue XVII - This Court has repeatedly upheld the use of electrocution as a constitutional method of execution.

## ARGUMENT

### ISSUE I

WHETHER APPELLANT MADE AN EQUIVOCAL REQUEST FOR COUNSEL DURING POLICE QUESTIONING, WHETHER APPELLANT MADE THE ALLEGED REQUEST DURING THE GIVING OF MIRANDA WARNINGS OR DURING SUBSTANTIVE QUESTIONING, AND WHETHER DAVIS AND OWEN SHOULD APPLY RETROACTIVELY TO APPELLANT'S CASE (Restated).

The identical issues raised by Appellant in this case were raised by him before this Court in his appeal from his conviction for the murder of Marilyn Leath. State v. Almeida, 22 Fla. L. Weekly S521 (Fla. Aug. 28, 1997). Although the opinion itself does not detail the precise arguments that Almeida made, this Court should take judicial notice of the briefs in that case, as the arguments are identical. See § 90.202(6) & 90.203, Fla. Stat. (1995).

In an abundance of caution, however, the State responds to Appellant's arguments in this case as follows: Detective Mink of the Sunrise Police Department testified at the suppression hearing that he and Detective Allard began interviewing Appellant at the police station at 5:16 p.m. (T 127-28). After providing Appellant a copy of a rights waiver form, Detective Mink read each individual right to Appellant and asked him if he understood them. Appellant responded that he did and initialed each right as it was read. After the detective read the entire form, Appellant agreed to speak to them without an attorney and signed the waiver section of the form. (T 128-36). At that point, the Miranda warnings were complete, and the waiver was in effect.

Thereafter, Detective Mink questioned Appellant about the murder of Frank Ingargiola at Higgy's Restaurant. After initially denying any involvement, Appellant confessed that he killed Mr. Ingargiola. (T 136-37). At 5:30 p.m., they turned on a tape recorder to memorialize Appellant's confession. (T 137). At the beginning of the tape, the following colloquy occurred:

> Q [By Detective Mink] All right. Prior to us going on this tape here, I read your Miranda rights to you, that is the form that I have here in front of you, is that correct? Did you understand all of these rights that I read to you?
>
> A [By Appellant] Yes.
>
> Q Do you wish to speak to me now without an attorney present?
>
> A Well, what good is an attorney going to do?
>
> Q Okay, well you already spoke to me and you want to speak to me again on tape?
>
> Q (By Detective Alllard [sic]) We are, we are just going to talk to you as we talked to you before, that is all.
>
> A Oh, sure.

(ST 5-6) (emphasis added). Detective Mink testified that he interpreted Appellant's remark as "[a] comment, not a question. Just a comment," which he did not believe he needed to clarify. (T 143). Detective Allard testified that he interpreted Appellant's remark similarly: "I basically took it as like he was commenting on the fact, not as much as - I trying to - just like a negative comment towards having an attorney or something like that. I took

that as a negative comment." (T 177). He did not interpret it as a request for counsel. (T 177).

Appellant alleged in his motion to suppress, and renews his allegation now, that he made an equivocal request for counsel, which Detectives Mink and Allard should have clarified more thoroughly prior to continued questioning. (R 2321-26; T 340-44, 360-63; **Brief of Appellant** at 31-33). The trial court ruled that Appellant's comment was "no more than a rhetorical question at best. As such, it did not require a response from law enforcement." (R 2357-58). The State maintains, as it did below, that Appellant's comment was more of a statement than a question and was not intended by Appellant to invoke, even equivocally, his right to counsel.[1] Even were it an equivocal request, it was not an unequivocal request, which the law requires before the police must clarify with questions and/or cease the interview. See State v. Owen, 22 Fla. L. Weekly S246 (Fla. May 8, 1997); Davis v. United States, 512 U.S. 452 (1994).

Appellant alleges, however, that Owen and Davis do not apply to his case because those defendants made equivocal or ambiguous requests for counsel "during substantive questioning," whereas Appellant made his equivocal request "during the process of giving or waiving Miranda rights." **Brief of Appellant** at 23 (emphasis omitted). He believes the timing of the defendants' responses in

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[1] The Fourth District Court of Appeal, however, found that the comment was an equivocal request for counsel "under the relevant case law." Almeida v. State, 687 So. 2d 37, 37-38 (Fla. 4th DCA 1997), quashed, 22 Fla. L. Weekly S521 (Fla. Aug. 28, 1997).

Owen and Davis was crucial to the Courts' analyses and that the same analyses would not, and should not, apply to his case. Id. at 23-29. To support his contention, Appellant relies on Utah v. Leyva, 906 P. 2d 894 (Utah App. 1995), rev. granted, 919 P. 2d 909 (Utah 1996).

This Court need not address this allegation, however, because the record does not support Appellant's characterization that he made an equivocal request "during the process of giving or waiving Miranda rights." Detective Mink's uncontroverted testimony was that he read Appellant his rights, Appellant acknowledged his understanding of each as they were read, and Appellant waived his rights in writing before the detective began any questioning. (T 128-36). Once the reading and waiver were complete, Detective Mink began substantive questioning. Appellant confessed to the murder of Frank Ingargiola, and Detective Mink obtained Appellant's consent to tape-record the confession. It was during the subsequent tape-recording that Appellant made the allegedly equivocal request for counsel. However, given Appellant's previous waiver of his rights, and the intermediate substantive questioning, Appellant's characterization that he made an equivocal request for counsel "during the giving or waiving of Miranda rights" is belied by the record. Thus, it is unnecessary for this Court to consider and resolve this argument on the basis of this record.

Alternatively, Appellant claims that, were there no factual distinction between his case and Owen or Davis, this Court should not apply Owen and Davis retroactively to him. **Brief of Appellant**

at 29-31. This Court obviously rejected that argument in the Leath appeal. Almeida, 22 Fla. L. Weekly at 521. See also Owen, 22 Fla. L. Weekly at 247 (applying Davis retroactively to a 1986 confession). As in Owen, reliance on the original Owen opinion and its progeny would result in manifest injustice to the people of this state. Since Appellant has established no legitimate reason why this Court should not apply Davis (through Owen) retroactively to him, this Court should affirm the trial court's denial of his motion to suppress, and his conviction for the first-degree murder of Chiquita Counts.

## ISSUE II

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTION TO SUPPRESS BASED ON THE DETECTIVE'S ALLEGED FAILURE TO RE-ADVISE APPELLANT OF HIS RIGHTS BEFORE QUESTIONING (Restated).

Appellant claims that the trial court abused its discretion in denying his motion to suppress, which alleged, in part, that Detectives Abrams and Walker improperly failed to re-advise Appellant of his Miranda rights prior to questioning on the Counts murder. **Brief of Appellant** at 33-39. The record reveals, however, that Detective Mink read Appellant his rights, and Appellant signed a written waiver of his rights, at 5:16 p.m. (T 127-36). After Appellant confessed to the murder of Frank Ingargiola, Mink taped the confession. During the tape-recording, Appellant acknowledged that he understood all of the rights that the detective had previously read to him from the form, and he agreed to continue on tape. (ST 5-6). When the tape ended at 5:51 p.m., Detective Mink called Detectives Abrams and Walker into the room, so that they could question Appellant about the murders of Marilyn Leath and Chiquita Counts. (T 144-45). As Detectives Abrams and Walker entered, Detective Mink told them that he had informed Appellant of his rights and showed them the waiver form. (T 225, 253). Detective Abrams confirmed with Appellant that he had, in fact, been read his rights: "When Detective Mink was in there, like I said, the rights were gone over, that [Almeida] had already been read his rights, and I confirmed that with him. I did ask him that." (T 225). Thereafter, Detective Abrams asked Appellant if

he knew anything about the murders. Appellant confessed his involvement in the Leath murder and agreed to repeat his confession on tape. (T 227-29). During the taped confession, which began at 6:08 p.m., the following discussion occurred:

> Q [By Detective Abrams]. I told you when I came in here a couple of minutes ago that I'm a Fort Lauderdale detective and I'm investigating a murder that happened in Fort Lauderdale, is that right? I need a response.
>
> A [By Appellant]. Okay.
>
> Q. And you agreed to talk to me, is that correct?
>
> A. Yes.
>
> Q. And before talking to me, you talked to the Sunrise detectives?
>
> A. Yes.
>
> Q. Detective Mink and Detective Mike [sic], right?
>
> A. Yes.
>
> Q. They gave you your rights, is that correct?
>
> A. Yes.
>
> Q. You read a form, they read it to you. Did you sign the bottom of the form?
>
> A. Yes.
>
> Q. Did you understand your rights?
>
> A. Yeah, I understand.
>
> Q. Do you have any questions about them at all?
>
> A. No.

(T 233-34). Appellant's second taped confession regarding the Leath murder ended at 6:26 p.m., and Abrams and Walker left the room. (T 253-54).

At 7:00 p.m., Detective Abrams returned with Detective Palazzo to question Appellant about the Counts murder. (T 255). Appellant initially denied involvement, but ultimately confessed to killing her. (T 256-58). The taped confession to this murder began at 7:24 p.m. (T 258-59). Appellant explained that he was initially hesitant to confess because he was ashamed of what he had done and was scared and confused. (T 265-66). He was not confused about what was happening during the interview and was not afraid of the detectives. Rather, he was scared and confused about his future. (T 266-67). The detectives clarified Appellant's understanding of his rights:

> Q. (By Sgt. Palazzo) When Detective Abrams [sic] read you your rights earlier, did you understand everything that he told you?
>
> A. Yes.
>
> Q. (By Sgt. Palazzo) You understood that you could have a lawyer if you wanted one?
>
> A. Yes.
>
> Q. (By Sgt. Palazzo) And that you don't have to talk to us if you don't want to?
>
> A. Yes.
>
> Q. (By Sgt. Palazzo) And then it's been explained to you by myself and Detective Abrams that everything that you say tonight is going to be repeated in court?
>
> A. Yes.

Q. (By Detective Abrams) You're not confused about any of that?

A. No.

(T 267). Appellant's third taped statement regarding the Counts murder ended at 7:50 p.m. (T 290).

After Appellant signed a written waiver of his rights at 5:16 p.m., he was questioned about his understanding of those rights no less than four times by 7:24 p.m. when he confessed on tape to the Counts murder.[2] The law is well-settled that an accused need not be continually reminded of his rights once he has intelligently waived them. Bush v. State, 461 So. 2d 936, 939 (Fla. 1984); Nixon v. State, 572 So. 2d 1336, 1344 (Fla. 1990); Herring v. Dugger, 528 So. 2d 1176, 1178 (Fla. 1988). This is true even where the police question the accused about different criminal offenses. Herring, 528 So. 2d at 1178 (citing Colorado v. Spring, 479 U.S. 564 (1987)). Despite the lack of a requirement to re-advise Appellant of his previously waived rights, each team of detectives confirmed with Appellant that he understood his rights and was willing to speak with them. At no time during those interviews did Appellant unequivocally invoke his rights. Thus, the trial court properly determined that Appellant understood his rights and knowingly and intelligently waived them before confessing his involvement in the

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[2] During Appellant's trial for the murder of Chiquita Counts, which is the subject of this appeal, the State admitted only the taped confession relating to the Counts murder. It did not relate Appellant's pre-tape confession to this murder, or any other confession. Thus, Appellant's challenge on appeal relates only to the taped confession relating to the Counts murder.

Counts murder. Cf. Nixon, 572 So. 2d at 1343-44 (upholding denial of suppression where detective renewed questioning of defendant without re-advising of rights eight hours after initial interviews wherein defendant had been fully advised of rights and had waived them orally and in writing); Herring, 528 So. 2d at 1177-79 (finding statement about murder made to probation officer in county jail without benefit of Miranda warnings admissible where defendant had waived rights in earlier interview with detectives at jail); Bush, 461 So. 2d at 938-39 (upholding denial of suppression where defendant initially waived Miranda rights and alleged an alibi, but confessed to murder eleven hours later after merely acknowledging previous giving and waiver of rights). This Court should deny this claim and affirm Appellant's conviction for the murder of Chiquita Counts.

## ISSUE III

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR MISTRIAL DURING THE STATE'S GUILT-PHASE CLOSING ARGUMENT (Restated).

The State submits that this issue was not preserved for appeal, but notes conflicting case law regarding preservation. When defense counsel objected to the State's guilt-phase closing argument, he made only a motion for mistrial. (T 1587-91). In Duest v. State, 462 So. 2d 446, 448 (Fla. 1985), this Court held that "[t]he proper procedure to take when objectionable comments are made is to object and request an instruction from the court that the jury is to disregard the remarks." This holding was applied recently in Parker v. State, 641 So. 2d 369, 376 & n.8 (Fla. 1994). Several weeks after Parker, however, this Court issued Spencer v. State, 645 So. 2d 377, 383 (Fla. 1994), wherein this Court held that "a defendant need not request a curative instruction in order to preserve an improper comment issue for appeal. The issue is preserved if the defendant makes a timely specific objection and moves for a mistrial." This holding in Spencer was recently affirmed in James v. State, 695 So. 2d 1229 (Fla. 1997) ("As we explained in Spencer . . . , defense counsel may conclude upon objection that a curative instruction will not cure the error and choose not to request one."). Despite the primacy of James, the State maintains that Appellant failed to satisfy his burden when he failed to seek a curative instruction.

Alternatively, the State argues lack of preservation because Appellant makes arguments on appeal that he did not make before the trial court. When the State used factual hypotheticals to explain the difference between first-degree and second-degree murder and manslaughter, the only argument defense counsel made was that the prosecutor was misleading the jury because the hypotheticals implied that only those factual circumstances qualified as second-degree murder:

> [DEFENSE COUNSEL]: Mr. Donnelly is proposing factual situations he believes establishes certain crimes. We're not faced with those factual situations in this case. And what he is posing to the jury are factual scenarios that basically he is saying this is what fits this crime, this is what fits this crime. If you don't have that, then it isn't it. Then it doesn't fit in this case.
>
> And what he is doing is invading the province of the jury in making a factual determination for the jury, in making what facts fit the element of the crime. That's improper and I move for a mistrial.
>
> [THE STATE]: I think they got the facts before them. For our offense I explain to them how the law works. I think I am entitled to continue how facts fit. Well, this is manslaughter, this is murder in the second degree and it's up to them to make that decision ultimately.
>
> [DEFENSE COUNSEL]: It is for that jury to make that determination. It is not for the State to say what facts are needed, what criteria for what facts are needed for second degree and manslaughter. That is for the jury's province.
>
> THE COURT: If the facts that the State is arguing are the facts of this case, they are entitled to apply it to the law as they see it. It's ultimately the jury's

> determination to do that. But I don't think that he is invading the province of the jury by reviewing the facts of the case and explaining what the law is, giving his determination of how he thinks he --
>
> [DEFENSE COUNSEL]: I agree with you. That's not what he's doing. He's taking factual scenarios, not having anything to do with this case and saying this factual scenario, that is a murder two, that is a manslaughter. What he is explaining to the jury is, he is indicating in his opinion based on what he believes the law is, this is the only factual scenario that fits murder two, this is the only scenario that fits manslaughter.
>
> He is telling the jury what they should be finding in this case based on the facts that are not present in this case. For those reasons I move for a mistrial.
>
> THE COURT: Motion for mistrial is denied.

(T 1589-91).

On appeal, Appellant makes three additional arguments: (1) that the prosecutor's factual hypotheticals were "improper as arguing facts not in evidence," (2) that they were misstatements of the law because "a husband shooting his wife in the heat of passion was . . . a classical manslaughter," not second-degree murder, and (3) that they were comments on the prosecutor's personal opinion that second-degree murder was not applicable in this case. **Initial brief** at 39-41. Since only those arguments made in the trial court can be made on appeal, these three additional arguments were not preserved for review. See Tillman v. State, 471 So. 2d 32 (Fla. 1985); Steinhorst v. State, 412 So. 2d 332 (Fla. 1982).

Regardless, none require reversal. During Appellant's initial closing argument, defense counsel disputed the proof of premeditation and discussed the elements to the lesser-included offenses of second- and third-degree murder, and manslaughter. (T 1547-53). In rebuttal, the prosecutor likewise discussed the applicability of the lesser-included offenses and tried to distinguish them with factual hypotheticals. He did not, however, indicate that his factual hypotheticals were the only way to prove those lesser-included offenses. Rather, he merely gave examples to distinguish the different mens rea elements:

> We need to talk about the lesser included offenses so that you will not be surprised or confused when you look at them on the instructions that are going to go back with you.
>
> Murder in the second degree. Second degree is different from murder in the first degree in that there is no premeditation here. Murder in the second degree has three elements. Chiquita Counts is dead. The death was caused by the criminal act or agency of Osvaldo Almeida. Those two elements are the same. But the third element is the killing was done with a depraved mind. Let me make sure I get that language correct for you.
>
> There was an unlawful killing of Chiquita Counts by an act imminently dangerous to another and evincing a depraved mind, regardless of human life. A lot of legal words[. W]hen you get back there, read through them and they become a little easier to understand when you read them.
>
> If for instance, if a husband goes in the house, he finds his wife in bed with someone, he takes out his gun and he shoots. What have we seen there? We have seen that there is no premeditation. . . .

> Another way second degree murder could be is if you shoot somebody in the leg, well, you may not have the intent to kill them. The first element is the person is dead. The second element is the act or agency of another. If you shoot somebody in the leg and they bleed to death, you don't have the intent to kill, but you have the third element of murder in the second degree, there was an unlawful killing by an act imminently dangerous to another, evincing a depraved mind, regardless of human life.
>
> When you say what is evincing a depraved mind? Get us a Webster's dictionary. We have no idea what you are talking about. It's defined here for you. An act is one that is imminently dangerous to another and evincing a depraved mind regardless of human life if it is an act or series of acts that a person of ordinary judgment would know is reasonable certain to kill or do serious bodily injury to another.
>
> Shooting someone in the leg --
>
> [DEFENSE COUNSEL]: Judge, can we approach sidebar?

(T 1587-89) (emphasis added). When taken in context, the comments were not improper. See Breedlove v. State, 413 So. 2d 1, 8 (Fla. 1982).

Nor did the prosecutor argue "facts not in evidence" as that objection is commonly understood. He did not rely on evidence de hors the record to prove the elements of first-degree murder. Rather, he presented factual scenarios to illustrate the difference between premeditation and heat of passion. It would not have been reasonable for any juror to believe that the factual scenarios provided additional evidence to support Appellant's conviction.

Similarly, the factual scenarios were not, as Appellant suggests, misstatements of the law. A husband shooting his wife upon finding her in bed with someone else is not "classically" manslaughter. Depending on the particular circumstances, such a scenario can be second-degree murder. Importantly, such a scenario, as it was presented by the State, was not first-degree murder.

Finally, the prosecutor did not relate his personal opinion that Appellant was guilty of first-degree murder only. Rather, he was applying the facts as presented to the law and drawing a logical inference that the facts did not support any lesser-included offense. Such an argument is proper. See Breedlove, 413 So. 2d at 8; Taylor v. State, 330 So. 2d 91, 93 (Fla. 1st DCA 1976) ("An attorney should . . . be allowed to explain to the jury those instructions which are relevant to his theory of the case and to emphasize any portion of the jury charge that he feels to be pertinent.").

Even if the hypotheticals were improper, however, this Court has said many times that "prosecutorial error alone does not warrant automatic reversal of a conviction unless the errors involved are so basic to a fair trial that they can never be treated as harmless." State v. Murray, 443 So. 2d 955, 956 (Fla. 1984). Appellant confessed to shooting Ms. Counts because she ridiculed him. There was no question that Appellant premeditated this murder. Moreover, following the State's closing argument, the trial court read the jury the law. Any misperception was cured by

this event. Cf. Rhodes v. State, 638 So. 2d 920, 926 (Fla. 1994), cert. denied, 115 S. Ct. 642, 130 L. Ed. 2d 547 (1995); Parker v. Dugger, 537 So. 2d 969, 970-71 (Fla. 1988). Since it cannot be said that the prosecutor's comments, if error, vitiated the entire trial, this Court should affirm Appellant's conviction for the murder of Chiquita Counts.

## ISSUE IV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN RULING THAT THE STATE COULD PUBLISH APPELLANT'S ENTIRE TAPED CONFESSION RELATING TO A COLLATERAL MURDER IF APPELLANT PUBLISHED ONLY PART OF THE TAPED CONFESSION (Restated).

During the State's case-in-chief, Detective Mink testified only to establish that he had read Appellant his Miranda rights at the police station, and that Appellant had signed a written waiver at 5:16 p.m.[3] (T 1392-1401). On cross-examination, defense counsel wanted to question Detective Mink about Appellant's alleged equivocal request for counsel during Detective Mink's interview of Appellant, to show that Appellant did not waive his rights "without incident." Such questioning, he claimed, was relevant to the jury's assessment of the voluntariness of Appellant's later confession to Detective Abrams about the Counts murder. (T 1401-03, 1405-11, 1412-21). The State responded that it would then be entitled either to introduce Appellant's taped confessions to the Ingargiola and Leath murders or to question Detective Mink about those interviews. Its purpose would not be to rely on the truth of Appellant's statements, but to show Appellant's state of mind, i.e., that he was cogent, understood his rights, and had voluntarily waived them. (T 1403-05, 1411-12, 1414-16, 1420). Ultimately, the trial court agreed with the State and ruled that it

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[3] Detectives Mink and Allard questioned Appellant about the Ingargiola murder, then Detectives Abrams and Walker questioned Appellant about the Leath murder, then Detectives Abrams and Palazzo questioned Appellant about the Counts murder. Thus, Detective Mink was not involved in the Counts investigation.

would be able to admit any relevant evidence, including the other confessions, to rebut defense counsel's assertion that Appellant's confession to the Counts murder was not voluntary. (T 1420-21). Thereafter, defense counsel declined to question Detective Mink about the alleged equivocal request for counsel. (T 1421-22).

In this appeal, Appellant claims that the trial court's ruling was too broad. He argues, as he did below, that the State should have been allowed to play only that part of Minks' taped interview surrounding the alleged equivocal request for counsel. **Initial brief** at 42. Under the rule of completeness, however, "[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement that in fairness ought to be considered contemporaneously." § 90.108, Fla. Stat. (1993). "Fairness" then, not relevancy, is the key. See Larzelere v. State, 676 So. 2d 394, 401-02 (Fla. 1996). Appellant wanted to argue to the jury that his confession to the Counts murder (during his third interview) was not voluntary, because of his rhetorical comment during his taped confession to the Ingargiola murder (during his first interview). During the three successive interviews, however, there were several conversations with Appellant about his rights and his understanding of them. For example, after Appellant made the alleged equivocal request for counsel during the Ingargiola interview, Detectives Abrams and Walker questioned Appellant about his rights at the beginning and at the end of the Leath interview. (T 233-34, 251-53). And when

Detective Abrams returned with Detective Palazzo to interview Appellant about the Counts murder, he again questioned Appellant extensively about his understanding of his rights. (T 262-68).

In fairness, the trial court properly agreed to allow the State to rebut Appellant's argument with Appellant's three taped confessions if Appellant opened the door. They were not going to be admitted or argued for their substance, but merely to show that Appellant was cogent, understood his rights, and voluntarily waived them. After all, the jury was later instructed that it should consider the totality of the circumstances when determining whether Appellant's confession was voluntarily and freely made:

> A statement claimed to have been made by the defendant outside of court has been placed before you. Such a statement should always be considered with caution and be weighed with great care to make certain it was freely and voluntarily made. Therefore, you must determine from the evidence that the statement was voluntarily and freely made.
>
> In making this determination, you should consider the total circumstances, including but not limited to whether when the defendant made the statement he had been threatened in order to get him to make it, and whether anyone had promised him anything in order to get him to make it.
>
> If you conclude the defendant's out of court statement was not freely and voluntarily made, you should disregard it.

(T 1639) (emphasis added). It could not have considered the total circumstances in assessing the voluntariness of the Counts confession if it were precluded from hearing the colloquies during the three confessions regarding his rights. Cf. Johnson v. State,

660 So. 2d 637, 642 (Fla. 1995) (finding that defendant's decision to challenge confession based on alleged misconduct during polygraph testing was strategic one because it would open door to "all matters associated with the challenged examination"); Johnson v. State, 653 So. 2d 1074, 1075 (Fla. 3d DCA 1995) (emphasis in original; quoting Eberhardt v. State, 550 So. 2d 102, 105 (Fla. 1st DCA), rev. denied, 560 So. 2d 234 (Fla. 1989) (holding that rule of completeness "is not limited to segments of *one* conversation, but also allows admission of 'other related conversations that in fairness are necessary for the jury to accurately perceive the whole context of what has transpired between the two.'"); Chao v. State, 661 So. 2d 1246, 1247 (Fla. 3d DCA 1995) (reversing trial court's limitation on party to admit only portion of statement deemed appropriate to "make it fair" since rule allows admission of all or part), rev. denied, 670 So. 2d 940 (Fla. 1996); Dragovich v. State, 492 So. 2d 350, 353 (Fla. 1986) (finding that defense opened door to questions regarding defendant's invocation of his Miranda rights when it questioned officer about his failure to tape certain statements); Morgan v. State, 520 So. 2d 105, 106-07 (Fla. 2d DCA 1988) (finding that defense had opened door to questions regarding basis for defendant's arrest to show why detective arrested defendant, not for truth of information).[4]

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[4] Unlike in Christopher v. State, 583 So. 2d 642, 646 (Fla. 1991), cited to by Appellant, all three interviews were relevant to the issue of voluntariness raised by Appellant.

Should the trial court have permitted Appellant to introduce the alleged equivocal request for counsel without rebuttal by the State, however, its failure to do so was harmless beyond a reasonable doubt. The jury properly heard Appellant's taped confession to the Counts murder. At the beginning of that taped confession, Appellant confirmed that he understood his rights and reaffirmed his rights waiver. (T 262-68). Given this discussion, there is no reasonable possibility that the jury would have found Appellant's confession involuntary based on the ambiguous comment during the Ingargiola confession. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

## ISSUE V

WHETHER APPELLANT'S SENTENCE IS PROPORTIONATELY WARRANTED UNDER THE FACTS OF THIS CASE (Restated).

In this case, the State argued and the trial court found only one aggravating factor: Appellant's prior conviction for a capital felony. One week before this murder, Appellant had murdered another woman under similar circumstances. Regarding this aggravator, the trial court stated, "The Court . . . finds the aggravator established by the evidence 'significant.'" (T 2489). In mitigation, the trial court found (1) that Appellant committed this murder while under the influence of extreme mental or emotional disturbance--which it gave "little weight"; (2) that he was nineteen years old at the time of the murder--which it gave "little weight"; (3) that he had a capacity for rehabilitation--which it gave "very little weight"; (4) that he behaved well while incarcerated in the county jail--which it gave "little weight"; (5) that he cooperated with the police after his arrest--which it gave "little weight"; (6) that he waived his right to remain silent and gave voluntary statements after his arrest--which it gave "little weight"; (7) that he had abused alcohol for two years prior to the murder and that he had consumed alcohol on the night of the murder--which it gave "little weight"; (8) that he had an abusive childhood--which it gave "some weight"; (9) that he has shown remorse--which it gave "little weight"; and (10) that he has exhibited genuine religious beliefs--which it gave "little weight." (R 2484-89). Ultimately, however, the trial court determined that

"the mitigating circumstances [did] not outweigh the aggravating circumstances." (R 2490).

In performing proportionality review, this Court's function is to "view each case in light of others to make sure the ultimate punishment is appropriate." Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989). It should not 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). In fact, this Court must accept, absent demonstrable legal error, the aggravating and mitigating factors found by the trial court, and the relative weight accorded them. See 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).

As the trial court recognized, the weighing process is not a numbers game. Rather, when determining whether a death sentence is appropriate, careful consideration should be given to the totality of the circumstances and the weight of the aggravating and mitigating circumstances. Floyd v. State, 569 So. 2d 1225, 1233 (Fla. 1990), cert. denied, 501 U.S. 1259 (1991). While it is true that this Court has required there to be little or no mitigation for a case to withstand proportionality review with a single

aggravator,[5] this Court has also stressed that it is the weight of the aggravators and mitigators that is of critical importance. See, e.g., Windom v. State, 656 So. 2d 432, 440 (Fla. 1995) (stating in a single aggravator case that "it is not the number of aggravating and mitigating circumstances that is critical but the weight to be given each of them.").

Here, the trial court gave "significant" weight to Appellant's prior conviction for a capital felony. (T 2489). This Court has previously found that the "prior violent felony" aggravating factor is a "weighty" aggravating factor, especially when predicated on a prior murder. E.g., Ferrell v. State, 680 So. 2d 390, 391 (Fla. 1996) (finding prior second-degree murder of woman under similar circumstances "especially weighty" in proportionality analysis); Henderson v. Singletary, 617 So. 2d 313, 315 (Fla. 1993) (finding that contemporaneous and prior murders support the "weighty aggravating factor of prior conviction of a capital felony"); Parker v. Dugger, 537 So. 2d 969, 972 (Fla. 1988) (finding one prior and one subsequent murder "weighty aggravation").

And in assigning a relative weight to each factor, the trial court can consider the circumstances underlying each factor. Slawson v. State, 619 So. 2d 255, 259-60 (Fla. 1993). In fact, as in some of the cases cited to by Appellant, the underlying facts can minimize the weight of an aggravating factor. See, e.g.,

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[5] See, e.g., Songer, 544 So. 2d at 1011 ("We have in the past affirmed death sentences that were supported by only one aggravating factor, but those cases involved either nothing or very little in mitigation." (citation omitted)).

Songer, 544 So. 2d at 1011 ("Even the gravity of the one aggravating factor [under sentence of imprisonment] is somewhat diminished by the fact that Songer did not break out of prison but merely walked away from a work-release job."); Chaky v. State, 651 So. 2d 1169, 1173 (Fla. 1995) (finding that "the circumstances surrounding [his 1971 conviction for attempted murder] mitigate the significant weight that such a previous conviction would normally carry.").

Importantly, there was nothing in this record to reduce the weight of Appellant's prior murder. By his own admission, Appellant procured a prostitute one week prior to this murder, but changed his mind because she had "a dirty physical appearance" and bad breath. (T 1743-44). When she took his car keys, demanded his wallet in return for the keys, and then threw his wallet in his face after taking his money, he became "very upset." (T 1744-45). So he pulled his .44 Magnum out from under the seat, removed it from its carrying case, and shot her. (T 1745, 1751-55). In the present case, he again procured a prostitute, received oral sex, and drove Chiquita Counts to her motel. When she ridiculed him because he refused to give her more money, he pulled his .44 Magnum out from under the seat, removed it from its carrying case, called her over to the car, and shot her. (T 1437-51). Again, the trial court found the prior murder "significant" in its analysis.

As for Appellant's mitigation, the trial court gave the two statutory and seven of the eight nonstatutory mitigating factors "little weight" or "very little weight." He gave only one

nonstatutory factor "some weight." Unlike the cases relied on by Appellant, the mitigation presented in this case was neither extensive nor deserving of greater weight.

**Extreme mental or emotional disturbance**

Although the trial court found the existence of the "extreme mental or emotional disturbance" mitigator, the opinions of Appellant's experts regarding this factor, and their bases for their opinions, varied greatly. Dr. Macaluso, a clinical psychiatrist, admittedly knew nothing about Appellant, or the case, prior to his first interview with Appellant in early 1995--fifteen months after the murder. (T 1773-74). His interview lasted for only an hour and a half. (T 1777-78). During this interview, Appellant reported acts of childhood abuse, both during his stay in Brazil with his father and stepmother, and upon his return to the United States by his stepfather. (T 1778). Appellant also reported being depressed at the time of the murder because of his separation from his wife and child. (T 1779-80). In fact, Appellant reported being under the influence of demons at the time of the killings. (T 1780).

Between this interview and the next interview a year later (six days prior to his testimony), Dr. Macaluso reviewed only the depositions of family members and spoke only with Dr. Bukstel, a neuropsychologist. (T 1776, 1782, 1838). Although he claimed that these depositions corroborated some of Appellant's claims of childhood abuse, he admitted on cross-examination that all of the family members were in the United States when the alleged abuse in

Brazil occurred. (T 1783-89, 1821-22). As for any claims that Appellant was abused by his stepfather in the United States (T 1778, 1784), Appellant's stepfather testified at the Spencer hearing that he did not abuse Appellant (T 2130).

Dr. Macaluso ultimately diagnosed Appellant with Dysthymic Disorder, a chronic depressive condition, which caused Appellant's extreme mental or emotional disturbance at the time of the murder. (T 1790, 1795-96). He believed that this condition began in adolescence, as evidenced in part by Appellant's self-inflicted stab wound in his early teens. (T 1793-94). However, Appellant's mother testified later that, when Appellant stabbed himself in the leg at thirteen, he told her that he was playing with a piece of paper and accidentally stabbed himself. She believed him and had no reason to think that he was unhappy about anything at the time. He was very happy when he returned to the United States to be with her and her husband. (T 2019, 2022-23).

As for Dr. Macaluso's belief that Appellant's mother and stepfather were extremely negligent in procuring a prostitute for Appellant's twelfth birthday (T 1783), Appellant's mother testified that she asked Appellant what he wanted for his birthday, and Appellant responded that he wanted to be with a woman. She conferred with her husband and decided "it was good for him to learn about life about woman [sic]." (T 2012). Obviously, her motivation was founded on her love for her son.

Dr. Strauss, a forensic psychiatrist, met with Appellant on three separate occasions in August and September 1995 (two years

after the murder), for a total of four to six hours. (T 1860, 1880). He also received police and psychologists' reports, which he "guessed" he received prior to his interviews with Appellant. (T 1860). From his interviews, he opined that Appellant had a significant history of alcohol abuse, that he came from a dysfunctional family, and that he was physically, emotionally, and sexually abused as a child. (T 1863, 1866-67). As a result of this family history and alcohol abuse, he concluded that Appellant was under an extreme mental or emotional disturbance at the time of the murder. (T 1873).[6]

On cross-examination, Dr. Strauss testified that he was not appointed to assess sanity or competency, but was appointed for a "general evaluation." (T 1880). Regarding his opinions about Appellant's prior alcohol abuse and use of alcohol at the time of the murder, Dr. Strauss admitted that the only evidence of such came from Appellant's self-report and from Dr. Bukstel's report.[7] (T 1881, 1895-96). He also admitted that Appellant knew what he had done after he killed Marilyn Leath a week prior. (T 1896). He knew right from wrong, but ignored it. (T 1904). He believed that Appellant suffered from a mental disease or defect, but he simply could not pinpoint the diagnosis. (T 1900).

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[6] He also believed that Appellant's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired by his alcohol use at the time of the murder. (T 1875-76).

[7] Dr. Bukstel testified that he based his finding of alcohol abuse and use on _____. (T ____).

Finally, Dr. Bukstel, a clinical psychologist and neuropsychologist, testified that he spent 55 to 60 hours over a 13 month period, interviewing and testing Appellant and reviewing materials. (T 1935-38). He reviewed police reports regarding the Leath and Counts murders, Appellant's confessions to both murders, medical records, some school records, and numerous depositions of family and friends. (T 1937). Unlike Drs. Macaluso or Strauss, Dr. Bukstel diagnosed Appellant as having a mixed personality disorder with prominent paranoid features. (T 1943). However, he had to interpret Appellant's answers "cautiously" on the MMPI II, a personality inventory test, because Appellant tried to present himself in a favorable light. (T 1942-43). According to Dr. Bukstel, Appellant does not have organic brain syndrome or brain damage, although he had a minor head injury as a child, which "could have" affected brain development. (T 1940). Appellant has some normal and "really good" functioning abilities, but has some deficiencies as well. (T 1944). For example, Dr. Bukstel opined that Appellant is deficient in his complex abstractive reasoning, in that he has difficulty solving problems of a complex or novel nature. (T 1944).[8]

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[8] This alleged deficiency obviously cannot account for Appellant's mental functioning at the time of the murder since there was nothing complex or novel about his situation with Chiquita Counts. He had found himself in a similar situation a week prior when another prostitute, Marilyn Leath, angered him. He chose in this case, as he had done with Ms. Leath, to kill the source of his anger. His decision did not result from either a complex or novel situation.

Of the mental mitigators, Dr. Bukstel agreed with Dr. Macaluso that only the "extreme mental or emotional disturbance" mitigator applied. (T 1955). He did not agree with Dr. Strauss that the "capacity to appreciate" mitigator applied. (T 1956). The former mitigator was based on Appellant's abusive childhood, severe depression at the time of the murder, and his alcohol use at the time of the murder. He admitted, however, that evidence of childhood abuse came from the depositions and were merely allegations, uncorroborated by other evidence. (T 1962-63). He also admitted that the only evidence of severe depression came from Appellant. (T 1982-85). Dr. Bukstel did not speak to Appellant's wife, mother, or sister, with whom Appellant lived prior to the murder, nor did he speak to Appellant's co-workers. (T 1986-87). The depositions of friends and family related only to Appellant's early life. (T 1983). As for Appellant's use of alcohol at the time of the murder, Dr. Bukstel admitted that Appellant denied being severely intoxicated. In fact, Appellant said that he was only "a little bit buzzed" at the time of the murder. (T 1972).

To the extent that each expert found severe depression to be the underlying cause of Appellant's extreme mental or emotional disturbance, none had any evidence beyond Appellant's self-report that he was depressed at the time of the murder. No one had spoken to or otherwise had contact with <u>anyone</u> in Appellant's life at the time of the murder who could have corroborated Appellant's self-report. Similarly, there was <u>no</u> evidence, other than Appellant's self-report, that he had been abusing alcohol in the past or using

it at the time of the murder. Finally, the experts concluded that Appellant's alleged abuse as a child contributed to his severe depression. But, again, the depression was never corroborated. Nor were the claims of abuse. In fact, some of the allegations were refuted. Others, such as the allegations of abuse in Brazil, were dubious given that the family members resided in the United States at the time. Other than Appellant's self-report, no one with direct knowledge testified to Appellant's alleged abuse. Together, these circumstances lessened the weight of this mitigating factor.

**Age**

Regarding this mitigator, the trial court made the following comments:

> The defendant was nineteen years old when the murder was committed. Not only was he no longer a minor at that time, but he was a married man, albeit separated from his wife, as well as a father. He lived on his own and was self-supporting, maintaining steady employment at two jobs. There is no evidence to suggest that the defendant's mental or emotional age did not match his chronological age. Therefore, while the Court finds this mitigator to exist, it gives it little weight.

(R 2487).

The trial court was generous to even find this mitigator. Though only nineteen at the time of the crime, Appellant was a responsible husband and father. As the trial court noted, there was nothing to suggest, much less establish, that Appellant's mental or emotional functioning, or maturity level, were below that of his chronological age. More importantly, there was nothing to

suggest that Appellant's age played a role in the murder of Chiquita Counts. Under these circumstances, the trial court properly exercised its discretion in ascribing "little weight" to this mitigator. See Blanco v. State, 22 Fla. L. Weekly S575, 576 (Fla. Sept. 18, 1997).

**Capacity for rehabilitation**

Regarding this mitigator, the trial court made the following comments:

> Dr. Macaluso and Dr. Bukstel testified that the defendant's depression would be difficult but not impossible to treat. However, Dr. Bukstel also stated on the record that the defendant's problems are long-standing and that he would always have certain neuropsychological deficiencies. While the defendant's prospects for complete recovery remain a question, there was evidence that rehabilitation could occur once he had been examined and a treatment plan addressed. The Court finds this mitigator to exist, but gives it very little weight.

(R 2487).

The record supports the trial court's findings. Dr. Macaluso testified that Appellant's Dysthymic Disorder "is difficult to treat, because of its chronic nature." (T 1801). However, he believed that Appellant could be treated with antidepressant medication and psychotherapy. (T 1801). Dr. Bukstel testified that Appellant will maintain neuropsychological deficiencies forever: "He is going to be this way no matter what." (T 1975). Dr. Bukstel suggested that Appellant learn to maximize his attributes to compensate for his deficiencies, and to learn to speak English better, but, unlike Dr. Macaluso, he did not

recommend medication: "[I]t does not appear that medication is necessarily going to be what is needed in this case." (T 1975). As for Appellant's personality disorder, Dr. Bukstel recommended psychotherapy, but admitted that characterological problems are difficult to treat. (T 1976). Importantly, neither doctor, nor any other witness, testified that antidepressant medication and/or psychotherapy would be available to Appellant if he were sentenced to life imprisonment. Regardless, given both doctors' admission that Appellant's psychological problems are difficult to treat, this mitigating factor was entitled to no more than very little weight. See Blanco, 22 Fla. L. Weekly at 576.

**Good behavior while incarcerated**

As the trial court noted, Appellant presented several jail guards to testify that Appellant had been a model prisoner while awaiting trial. (R 2487). Such evidence, however, although mitigating in nature, requires one to make a leap of faith and infer that Appellant will maintain his good behavior while in general population at a maximum security state penitentiary for the rest of his life. Such a conclusion is difficult at best, especially given Dr. Bukstel's opinion that Appellant may have difficulty dealing with authority, may be suspicious, overly sensitive and argumentative, may not like to be told what to do, and thus may rebel, and may have trouble conducting himself in a responsible, dependable way. (T 1989). Nothing supports giving this factor any more than little weight.

**Cooperation with police**

Regarding this mitigator, the trial court made the following comments:

> The evidence presented by the testifying officers indicates that the defendant initially denied any knowledge of the crime. He later confessed and gave the police a taped statement. During the taped interview, the defendant apologized for giving the detectives a "hard time". In addition, he misled the interviewing detectives by claiming that he had never been with a prostitute before, even though he previously admitted to the murder of Marilyn Leath who was also a prostitute. The Court finds that the defendant's cooperation was at best inconsistent. Therefore, although the mitigating factor was established, the Court gives it little weight.

(R 2488). While a defendant's cooperation with the police may be mitigating in nature, Appellant's initial evasion and then less than completely truthful confession does not merit more than little weight. See Blanco, 22 Fla. L. Weekly at 576.

**Use and abuse of alcohol**

The trial court generously found that Appellant had a history of alcohol abuse, and that he had used alcohol on the night of the murder. Other than Appellant's self-report of same, there was no evidence to support such a finding. Absent such corroborating evidence, the trial court could have rejected this mitigating factor, see Robinson v. State, 574 So. 2d 108, 111 (Fla. 1991), but nevertheless found it to exist and gave it some--though little--weight. Given Appellant's admission to Dr. Bukstel that he was only "a little bit buzzed" at the time of the murder, this factor was not worthy of more than little weight.

**Abusive childhood**

The trial court considered the testimony of Appellant's three mental health experts who recounted instances of alleged physical, emotional, and sexual abuse. (R 2488-89). However, evidence of such abuse came solely from Appellant and depositions of friends and family members. (T 1782, 1824, 1962-63, 1986-87). None of the three experts attempted to corroborate the allegations. (T 1824, 1962-63). In fact, Dr. Macaluso characterized the evidence as mere "allegations." (T 1962-63).

Some of the evidence was refuted. For example, Appellant's stepfather denied that he ever beat Appellant. (T 2130). Appellant's mother testified that Appellant was very happy when he returned with her to the United States after spending several years in Brazil with his father. (T 2019). While Dr. Macaluso believed that Appellant stabbed himself in the leg as an act of self-mutilation and used this incident to support his theory that Appellant's depression was long-standing (T 1793-94, Appellant's mother testified that Appellant told her that he stabbed himself accidentally while playing with a piece of paper (T 2022-23). Finally, Dr. Macaluso testified on cross-examination that reports of abuse while Appellant was in Brazil came solely from family members who resided in the United States, and who thus had no personal knowledge of such abuse. (T 1821-22).

Despite the lack of corroboration, the refutation of some of the allegations, and the dubious nature of other allegations, the trial court nevertheless gave such evidence "some weight." (R

2488-89). Under the circumstances, it was not entitled to more weight. Nor was it sufficient by itself or in conjunction with the other mitigation to outweigh the fact that Appellant had premeditatedly killed two women within a week's time.

**Remorse**

Although Appellant's expert witnesses testified that Appellant expressed remorse during their interviews for the murder of Chiquita Counts, the trial court found significant the fact that Appellant had murdered another woman a week before he murdered this one. (T 2489). And though not cited to by the trial court as a reason for reducing the weight of this mitigating circumstance, it is important to note that Appellant made no effort, and took no opportunity, to express remorse to the victim's family directly. Appellant was given numerous opportunities to speak to the court or otherwise make a statement in his behalf. He chose not to. Consequently, his claim of remorse was entitled to no more than little weight.

**Religious beliefs**

Appellant's experts testified to his religious conversion while in jail awaiting trial. Dr. Bukstel speculated that Appellant's preoccupation with religion was a way to keep his defenses together--to keep his world from falling apart. (T 1950-51). As with evidence of his good behavior in jail while awaiting trial, one must make a leap of faith that Appellant will sustain his religious devotion and remain a peaceful follower throughout the remainder of his life. Such is a fairly large leap given Dr.

Bukstel's opinion that Appellant may have difficulty dealing with authority, may be suspicious, overly sensitive and argumentative, may not like to be told what to do, and thus may rebel, and may have trouble conducting himself in a responsible, dependable way. (T 1989). This factor, too, was deserving of no more than little weight.

**Other mitigation**

Appellant claims that there were "a number of other unrebutted mitigating circumstances present in this case," namely, that "Appellant was passed back and forth between families and never had the opportunity to be raised by a positive role model," and that "Appellant's death would be traumatic for his son." **Brief of Appellant** at 53. Appellant never articulated these mitigating circumstances, however, to the jury or the trial court. The trial court agreed to give jury instructions on every nonstatutory mitigating factor Appellant requested; these were not among the list. (R 2405-20, 2431-32). At the end of the Spencer hearing, the trial court also requested sentencing memoranda from both parties and made the following request of defense counsel: "I would like you to outline and enumerate each and every non-statutory mitigator you believe was presented and supported by the evidence, either at the penalty phase trial or anything that was presented here." (T 2143). Appellant's sentencing memo does not enumerate these particular circumstances. (R 2460-73). As this Court held in Lucas v. State, 568 So. 2d 18, 23-24 (Fla. 1990), "the defense must share the burden and identify for the court the

specific nonstatutory mitigating circumstances it is attempting to establish." Having failed to do so, Appellant cannot now claim on appeal that additional mitigation existed and should be factored into the proportionality equation.

**Conclusion**

Both the jury and the trial court considered Appellant's mitigation and weighed it against the fact that Appellant had murdered two women in less than one week. Neither were persuaded that Appellant deserved a life sentence. When deciding whether Appellant's sentence is proportionate to those of other defendants under similar circumstances, this Court should compare Appellant's case to those where the defendant committed a prior murder and had equally minimal mitigation. Two such cases are Ferrell v. State, 680 So. 2d 390 (Fla. 1996), and Duncan v. State, 619 So. 2d 279 (Fla. 1993). Ferrell killed his live-in girlfriend and had been convicted previously of "a second-degree murder bearing many of the earmarks of the present case." 680 So. 2d at 391. This Court found Ferrell's lone aggravator "weighty." In mitigation, the trial court found that Ferrell "was impaired, was disturbed, was under the influence of alcohol, was a good worker, was a good prisoner, and was remorseful." Id. at 392 n.2. In considering this mitigation, this Court noted that the trial court assigned little weight to each of the mitigating factors. Id. at 391. Ultimately, this Court found Ferrell's sentence proportionate, citing to Duncan, King v. State, 436 So. 2d 50 (Fla. 1983), cert. denied, 466 U.S. 909 (1984), Lemon v. State, 456 So. 2d 885 (Fla.

1984), cert. denied, 469 U.S. 1230 (198), and Harvard v. State, 414 So. 2d 1032 (Fla. 1982), cert. denied, 459 U.S. 1128 (1983), all of which involved prior violent felony convictions similar to the charged offense.

In Duncan, the defendant murdered his fiancee and had been convicted previously of the second-degree murder of an inmate in 1969. In mitigation, the trial court found that Duncan's "childhood and upbringing saddled him with an emotional handicap," the killing was not for financial gain, Duncan did not create a great risk of death to others, the killing was not committed during the course of another crime, the victim was not a stranger or a child, Duncan was a good worker and friend, he had satisfactorily completed parole, he had confessed to the crime, the murder resulted from a domestic dispute, and the victim had chosen him as her husband. 619 So. 2d at 281.[9] In performing its proportionality analysis, this Court distinguished those cases cited to by Duncan which involved mental mitigation and drug or alcohol abuse, and those that did not involve a prior conviction for murder or similar prior violent offense. 619 So. 2d at 284. Citing to Lemon, this Court found Duncan's sentence proportionately warranted.

Appellant attempts to distinguish Ferrell and Duncan based on the fact that the Leath murder was only a week prior to this

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[9] The trial court also found two mental mitigators and that Duncan was under the influence of alcohol at the time of the murder, which this Court struck pursuant to the State's cross-appeal. Id. at 282-84.

murder, and thus Appellant had no time to change his behavior and reform, as did both Ferrell and Duncan. **Brief of Appellant** at 58-59. Such is a distinction without a difference. Drs. Macaluso and Bukstel both testified that Appellant could appreciate the criminality of his conduct and conform his conduct to the requirements of law when he shot Chiquita Counts. (T 1797-98, 1956). Although Dr. Strauss disagreed that Appellant could conform his conduct to the requirements of law because of his alleged use of alcohol on the night of the murder, he conceded that Appellant was aware that he had killed Marilyn Leath a week earlier. (T 1875-76, 1896). In a week's time, Appellant could have contemplated his behavior and reformed. He could have prevented himself from engaging the services of another prostitute and could have decided not to kill Chiquita Counts after she left his vehicle. Instead, he made a conscious, premeditated decision to call her back to the car and shoot her. That he had killed Marilyn Leath under similar circumstances only a week earlier should in no way diminish the weight of that prior murder.

Appellant seeks this Court to impose a life sentence because there was only a single aggravator and what he believes to be weighty mitigation. He cites to numerous cases remanded by this Court for a life sentence where there was only one, or even two, aggravators. What is significant about each case, however, is that either the aggravators were weak or weakened by certain facts, or the mitigators were incredibly weighty. For example, the "felony murder" aggravator, which is probably the least weighty aggravating

factor of them all, was the only aggravator in several of Appellant's cases.[10] In two other cases, the weight of the single aggravating factor was minimized by underlying facts.[11] And in the remainder of Appellant's cited cases, this Court characterized the defendants' mitigation as "vast," "extensive," or "substantial."[12]

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[10] E.g., McKinney v. State, 579 So. 2d 80 (Fla. 1991) (finding defendant's lack of criminal history plus "substantial mitigating evidence relating to [defendant's] mental deficiencies and alcohol and drug history" more weighty than single "felony murder" aggravator); Clark v. State, 609 So. 2d 513 (Fla. 1992) (finding nonstatutory mental disturbance, extensive history of substance abuse, excessive consumption of alcohol, crack cocaine and antipsychotic medication on day of murder, and abusive childhood more weighty than single "felony murder" aggravator); Rembert v. State, 445 So. 2d 337 (Fla. 1984) (finding that facts and circumstances of case warranted life sentence, despite lack of mitigation, where only aggravator was "felony murder"); Lloyd v. State, 524 So. 2d 396 (Fla. 1988) (finding defendant's lack of prior criminal history more weighty than single "felony murder" aggravator).

[11] E.g., Chaky v. State, 651 So. 2d 1169 (Fla. 1995) (finding that "the circumstances surrounding [his 1971 conviction for attempted murder] mitigate the significant weight that such a previous conviction would normally carry"); Songer v. State, 544 So. 2d 1010 (Fla. 1989) (finding "under sentence of imprisonment" aggravator diminished by fact that defendant did not break out of prison but merely walked away from work-release job; two mental mitigators, defendant's age (23), dependency on drugs, remorse, positive change in attitude, adaptation to prison, emotionally impoverished upbringing, positive influence on family, and religious beliefs found more weighty).

[12] E.g., Nibert v. State, 574 So. 2d 1059 (Fla. 1990) (finding defendant's lack of criminal history, two statutory mental mitigators, chronic and extreme alcohol abuse, heavy drinking on day of murder, below-average I.Q., remorse, and good potential for rehabilitation more weighty than single HAC aggravator); Smalley v. State, 546 So. 2d 720 (Fla. 1989) (finding all three statutory mental mitigators plus abusive childhood, good work record, and remorse more weighty than single HAC aggravator); Robertson v. State, 22 Fla. L. Weekly S404 (Fla. July 3, 1997) (finding defendant's age, impaired capacity due to drug and alcohol use, abusive childhood, history of mental illness, and borderline intelligence more weighty than HAC and "felony murder"

Appellant simply does not have the quality or quantity of mental mitigation that this Court has found compelling in so many of his referenced cases. Appellant is a serial killer who knew right from

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aggravators); Penn v. State, 574 So. 2d 1079 (Fla. 1991) (finding defendant's lack of criminal history, extreme mental or emotional disturbance, and heavy drug use prior to and at the time of the murder more weighty than single HAC aggravator); DeAngelo v. State, 616 So. 2d 440 (Fla. 1993) (finding defendant's bilateral brain damage, hallucinations, delusional paranoid beliefs, mood disturbance, and ongoing quarrel with victim more weighty than single CCP aggravator); Klokoc v. State, 589 So. 2d 219 (Fla. 1991) (finding defendant's lack of criminal history, extreme emotional distress, mental disorder, and family history of emotional disturbance and alcoholism more weighty than single CCP aggravator); Sinclair v. State, 657 So. 2d 1138 (Fla. 1995) (finding defendant's low intelligence and emotional disturbances more weighty than single merged aggravating factor of "pecuniary gain" and "felony murder"); Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988) (finding defendant's substantially impaired capacity, extreme emotional disturbance, low emotional age (between nine and twelve), and extensive brain damage more weighty than five aggravators); Besaraba v. State, 656 So. 2d 441 (Fla. 1995) (finding defendant's "vast mitigation," including his lack of criminal history, extreme mental or emotional disturbance, extensive history of drug and alcohol abuse, severe physical problems, badly deprived and unstable childhood, good character, reliable employment and good conduct in prison more weighty than contemporaneous murder and attempted murder); Livingston v. State, 565 So. 2d 1288 (Fla. 1988) (finding defendant's youth, inexperience and immaturity, his "marginal" intellectual functioning caused by severe beatings, and his extensive use of cocaine and marijuana more weighty than contemporaneous convictions for attempted murder and armed robbery and his commission of the murder during an armed robbery); Voorhees v. State, 22 Fla. L. Weekly S357 (Fla. June 19, 1997) (finding defendant's extreme mental or emotional disturbance, age, minor participation, abusive childhood and fact that murder occurred after a "drunken episode" more weighty than HAC and "felony murder" aggravators); Kramer v. State, 619 So. 2d 274 (Fla. 1993) (finding defendant's alcoholism, mental stress, severe loss of emotional control and potential for productive functioning in prison plus the fact that victim's death resulted from spontaneous fight between disturbed alcoholic and drunken victim more weighty than HAC and prior attempted murder conviction).

wrong when he murdered Marilyn Leath and Chiquita Counts. As Dr. Strauss testified, he simply ignored it. (T 1904).

Appellant repeatedly characterizes this murder as "a drunken episode which culminated in an argument between Appellant and Chiquita Counts." **Brief of Appellant** at 56-57. Although Appellant told the police that he had consumed a six-pack of beer prior to meeting Ms. Counts (T 1457), Dr. Bukstel testified that Appellant denied being severely intoxicated and, in fact, told him that he was only "a little bit buzzed" at the time of the murder. (T 1972). More importantly, any exchange between Appellant and Counts had terminated. By Appellant's own account, Counts was out of his car and walking towards the motel lobby when Appellant pulled his car around to leave, called her back to the car, and then shot her before driving off. (T 1446-51). Based on Ferrell and Duncan, and cases cited therein, this Court should affirm his sentence of death.

## ISSUE VI

WHETHER THE TRIAL COURT GAVE APPROPRIATE WEIGHT TO APPELLANT'S MITIGATING CIRCUMSTANCES (Restated).

In its written sentencing order, the trial court discussed each of the three statutory and eight nonstatutory mitigating circumstances that Appellant presented. (R 2484-89). After analyzing whether Appellant had established each circumstance, it indicated how much weight it accorded each circumstance that it found to exist. For example, it gave the "extreme mental or emotional disturbance" factor "little weight" (R 2485), but it gave Appellant's abusive childhood "some weight" (R 2489).[13]

In this appeal, Appellant challenges the weight the trial court accorded each mitigating circumstance. **Brief of Appellant** at 62-69. While he acknowledges that the weight to be accorded a mitigating circumstance is within the trial court's discretion, he claims that the trial court "failed to exercise any discretion in weighing the mitigating circumstances," but instead "merely designated the mitigating circumstances to have little weight." Id. at 61.

This Court recently reaffirmed that "the weight assigned to a mitigating circumstance is within the trial court's discretion and subject to the abuse of discretion standard." Blanco v. State, 22

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[13] It also accorded little weight to Appellant's capacity for rehabilitation, his good behavior while incarcerated, his post-arrest cooperation with the police, his waiver of rights and voluntary confession, and his abuse of alcohol and use of alcohol on the night of the murder. (R 2487-88).

Fla. L. Weekly S575, 576 (Fla. Sept. 18, 1997). "[D]iscretion is abused only where no reasonable man would take the view adopted by the trial court." Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990) (cited in Blanco). "Reversal is not warranted simply because an appellant draws a different conclusion." Sireci v. State, 587 So. 2d 450, 453 (Fla. 1991).

Appellant simply disagrees with the weight accorded to his mitigating circumstances. Such a disagreement, however, does not authorize this Court to go behind the trial court's judgment and reweigh the circumstances. In any event, the State thoroughly discussed each mitigating factor and its respective weight in the previous issue. As in Blanco, this Court cannot say that no reasonable person would give Appellant's mitigating circumstances little (or some) weight in the calculus of this crime. 22 Fla. L. Weekly at 576 (affirming "little weight" given to defendant's impoverished background); see also Elledge v. State, 22 Fla. L. Weekly S597, 599-600 (Fla. Sept. 18, 1997) (affirming "little weight" given to defendant's child abuse). Therefore, this Court should affirm Appellant's sentence of death for the first-degree murder of Chiquita Counts.

## ISSUE VII

WHETHER APPELLANT'S DEATH SENTENCE MUST BE VACATED BECAUSE THE CONVICTION TO SUPPORT THE "PRIOR VIOLENT FELONY" AGGRAVATING FACTOR WAS VACATED AND REMANDED FOR A NEW TRIAL (Restated).

The State used Appellant's conviction for the Leath murder to support the "prior violent felony" aggravating factor. (T 1731-32, 1732-69). On appeal from the Leath conviction, the Fourth District Court of Appeal reversed, finding a technical violation of Miranda. Almeida v. State, 687 So. 2d 37 (Fla. 4th DCA 1997). Since the filing of Appellant's initial brief, this Court has quashed the Fourth District's decision and remanded for further proceedings. State v. Almeida, 22 Fla. L. Weekly S521 (Fla. Aug. 28, 1997). As a result, the Fourth District must reinstate the conviction. Once it does so, the predicate felony for the "prior violent felony" aggravator will remain intact.

## ISSUE VIII

WHETHER THE TRIAL COURT GAVE UNDUE WEIGHT TO THE JURY'S DEATH RECOMMENDATION (Restated).

Prior to trial, Appellant sought to preclude the State from arguing or requesting an instruction "that the jury only has an advisory role in the sentencing hearing." (R 2227). At a hearing prior to the penalty phase, the trial court granted Appellant's motion to the extent that it gives capital juries a Caldwell instruction "as a matter of routine." (T 1685, 1698). Then, at the charge conference, defense counsel indicated that he had received the "standard package of instructions" provided by the State. (T 1698). At no time, either at the preliminary charge conference, at the final charge conference, or after the court read the instructions, did defense counsel object to the court's instructions regarding the jury's role in sentencing.[14]

In its written sentencing order, the trial court also made the following comments regarding the jury's recommendation:

> The jury recommended that this Court impose the death penalty by a majority of nine to three. A jury recommendation must be given great weight by the sentencing judge and should not be overruled unless no reasonable basis exists for the recommendation. The ultimate decision as to whether the death penalty should be imposed, however, rests with the trial judge. Death is presumed to be the

[14] As part of the preliminary and final instructions, the trial court informed the jury as follows: "Your advisory sentence as to what sentence should be imposed on this defendant is entitled by law and will be given great weight by this court in determining what sentence to impose in this case. It is only under rare circumstances that this court could impose a sentence other than what you recommend." (T 1720-21, 2091).

> proper penalty when one or more aggravating circumstances are found, unless they are outweighed by one or more mitigating circumstances. Upon carefully evaluating all of the evidence presented, it is this Court's reasoned judgment that the mitigating circumstances do not outweigh the aggravating circumstances.

(R 2490).

In this appeal, Appellant claims that his sentence is unconstitutional because the trial court applied the wrong legal standard to the jury's recommendation, giving "virtually complete deference to the jury's death recommendation," and shifted the burden to him to show that no reasonable basis exists for a death recommendation. **Brief of Appellant** at 69-71. To the extent he challenges the court's comments in its preliminary and final instructions to the jury, such challenge is disingenuous. He fought for and obtained special instructions on the weight to be accorded a jury's sentencing recommendation. The trial court provided him a copy of the instructions, and he made no challenge, as he does now, to their propriety. Thus, he should not use these instructions to bolster his argument that the trial court applied the wrong legal standard.

Be that as it may, it is apparent from the entire record that the trial court understood and properly performed its function in imposing sentence. In its summary paragraphs, it recognized that it was not to "engage in a mere counting procedure" in evaluating aggravating and mitigating circumstances. (R 2489). It also stated that "[a]fter independently evaluating all of the evidence

presented," it must make "a reasoned judgment as to what factual situations require imposition of the death penalty, and which can be satisfied by life imprisonment, in light of the totality of the circumstances." (R 2489-90). Finally, it recognized that "[t]he ultimate decision as to whether the death penalty should be imposed . . . rests with the trial judge." (R 2490). These comments, and others, amply illustrate its understanding of its role. Appellant has made no showing to the contrary. See Elledge v. State, 22 Fla. L. Weekly S597, 599 (Fla. Sept. 18, 1997) (finding no error where trial court made comments identical to present case). Thus, this Court should affirm Appellant's sentence of death for the first-degree murder of Chiquita Counts.

## ISSUE IX

WHETHER THE TRIAL COURT'S FAILURE TO EXPLICITLY STATE IN ITS WRITTEN ORDER THAT SUFFICIENT AGGRAVATING FACTORS EXISTED TO SUPPORT THE DEATH PENALTY REQUIRES VACATING THE SENTENCE AND IMPOSING A LIFE SENTENCE (Restated).

In this appeal, Appellant claims that the trial court failed to explicitly state in its written sentencing order (1) that sufficient aggravating factors existed to support the death penalty and (2) that the mitigating factors presented did not outweigh the aggravating factors. **Initial brief** at 73-75. In the order, however, the trial court analyzed the single aggravating factor upon which the State relied and concluded that "this aggravating factor was proven to exist beyond and to the exclusion of every reasonable doubt." (R 2483-84). After analyzing all of the mitigation, it summarized its findings:

> In summary, the Court finds that one aggravating circumstance was presented, and it is applicable. The Court further finds the aggravator established by the evidence is significant. As to the mitigating circumstances, the Court finds two statutory and eight nonstatutory mitigating circumstances have been established, considered, and weighed. In evaluating aggravating and mitigating circumstances, this Court does not engage in a mere counting procedure of so may aggravating and so may mitigating circumstances. After independently evaluating all of the evidence presented, the Court must make a reasoned judgment as to what factual situations require the imposition of the death penalty, and which can be satisfied by life imprisonment, in light of the totality of the circumstances. . . . Upon carefully evaluating all of the evidence presented, it is this Court's reasoned judgment that the

mitigating circumstances do not outweigh the aggravating circumstances.

(R 2489-90) (emphasis added; citations omitted).

It is clear from the trial court's order that it understood its statutory duty and performed that duty accordingly. It found one aggravating factor of significant weight, and it found that Appellant's mitigation did not outweigh that aggravating factor. In substance, that is what the statute requires. Neither it nor this Court requires any magic words. Therefore, this Court should reject Appellant's claim and affirm his death sentence for the first-degree murder of Chiquita Counts.

## ISSUE X

WHETHER THE TRIAL COURT APPLIED AN IMPROPER PRESUMPTION OF DEATH UPON FINDING A SINGLE VALID AGGRAVATING FACTOR (Restated).

In the concluding paragraphs of its written sentencing order, the trial court made the following comments:

> In summary, the Court finds that one aggravating circumstance was presented, and it is applicable. The Court further finds the aggravator established by the evidence is significant. As to the mitigating circumstances, the Court finds two statutory and eight nonstatutory mitigating circumstances have been established, considered, and weighed. In evaluating aggravating and mitigating circumstances, this Court does not engage in a mere counting procedure of so may aggravating and so may mitigating circumstances. After independently evaluating all of the evidence presented, the Court must make a reasoned judgment as to what factual situations require the imposition of the death penalty, and which can be satisfied by life imprisonment, in light of the totality of the circumstances.
>
> The jury recommended that this Court impose the death penalty by a majority of nine to three. A jury recommendation must be given great weight by the sentencing judge and should not be overruled unless no reasonable basis exists for the recommendation. The ultimate decision as to whether the death penalty should be imposed, however, rests with the trial judge. Death is presumed to be the proper penalty when one or more aggravating circumstances are found, unless they are outweighed by one or more mitigating circumstances. Upon carefully evaluating all of the evidence presented, it is this Court's reasoned judgment that the mitigating circumstances do not outweigh the aggravating circumstances.
>
> It is, therefore, the sentence of this Court that you, OSVALDO ALMEIDA, be sentenced to death for the murder of Chiquita Counts.

(R 3796-97) (emphasis added; citations omitted).

Appellant seizes on the underscored sentence to claim that the trial court improperly presumed that death was the appropriate sentence where the State had proven at least one aggravating factor. **Brief of Appellant** at 75-79. It is clear from the order in its entirety, however, that the trial court properly performed its function of independently weighing the aggravating and mitigating factors. Given the depth of its analysis, it cannot be said that the trial court failed to perform its duty under the statute. See Elledge v. State, 22 Fla. L. Weekly S597, 599 (Fla. Sept. 18, 1997) (finding no error where trial judge allegedly applied presumption of death upon finding single aggravating factor). Therefore, this Court should affirm Appellant's sentence of death for the first-degree murder of Chiquita Counts.

## ISSUE XI

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO ALLOW SUPPLEMENTAL VOIR DIRE PRIOR TO THE PENALTY PHASE TO DETERMINE WHETHER APPELLANT'S PRIOR CAPITAL CONVICTION WOULD UNDULY INFLUENCE THE JURY'S DELIBERATIONS (Restated).

Following the jury's verdict in the guilt phase, defense counsel filed a motion for supplemental voir dire prior to the penalty phase.[15] He wanted to ask each juror whether his prior conviction for first-degree murder, standing alone, would cause them to automatically vote for death without regard to any potential mitigation. He claimed that he was unable to question the jury on this matter in voir dire because to do so would have prejudiced Appellant in the guilt phase.

At the hearing on the motion, the State responded that the parties had questioned the jury in general about their ability to consider and weigh aggravating and mitigating factors. It also noted that the parties were not allowed to question the jury about specific aggravators and mitigators. (T 1671-74). Eventually, defense counsel conceded that he would not be able to ask specifically about the prior conviction for murder, but wanted to ask if the existence of any one aggravator would cause them to automatically vote for death. (T 1674-76). The trial court denied the motion, finding that additional voir dire, which was aimed at

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[15] This motion does not appear in the record on appeal in this case, but appears in the record pertaining to the Ingargiola murder. The State has moved to supplement the record in this case with this motion and has appended it to this brief for the Court's convenience.

disqualifying members, was inappropriate at this stage of the process. Moreover, it found that the parties were not allowed to question jurors about specific evidence in aggravation or mitigation. (T 1676-77).

Appellant has failed to show an abuse of discretion. As the State noted, the parties questioned the venire extensively about their views of the death penalty, whether they would consider evidence in aggravation and mitigation before reaching a conclusion, and whether they could and would follow the law. (T 628-98, 762-99, 893-934, 968-90, 1081-1109, 1138-54). The parties are not allowed to question jurors about specific facts in aggravation or mitigation. See Franqui v. State, 22 Fla. L. Weekly S373, 376-77 (Fla. June 26, 1997) (finding no abuse of discretion where trial court prohibited defense counsel from questioning venire about its consideration of defendant's age in mitigation). Rather, the questions must relate to the jurors' ability to follow the law. See id.

In Melton v. State, 638 So. 2d 927, 929 (Fla. 1994), this Court held that defendant's are not entitled to separate juries for the guilt and penalty phases so that they can question the jury effectively about the effect of a prior murder conviction. In keeping with Melton, Appellant was not entitled to a bifurcated voir dire, which could have produced a separate jury if enough members had been disqualified. The time to question jurors about their propensity to automatically vote for death upon proof of a single aggravating factor was during initial voir dire. Such a

question would have been proper and would not have prejudiced Appellant during the guilt phase since nothing in the question would have intimated a prior murder conviction. This Court should affirm the trial court's ruling and Appellant's sentence for the first-degree murder of Chiquita Counts.

## ISSUE XII

WHETHER THE TRIAL COURT WAS REQUIRED TO SUA SPONTE CONSIDER, AND INSTRUCT THE JURY ON, LIFE WITHOUT PAROLE AS A SENTENCING OPTION WHERE APPELLANT COMMITTED THE MURDER BEFORE AMENDMENT OF THE DEATH PENALTY STATUTE (Restated).

Appellant committed this murder on October 13, 1993. (R 3334-35). At that time, the possible penalties for first-degree murder were death or life imprisonment without the possibility of parole for 25 years. § 775.082(1), Fla. Stat. (1993). On May 25, 1994, an amendment to this statute became effective making the possible penalties for a first-degree murder death or life imprisonment without the possibility of parole. Ch. 94-228, § 1, at 1577, Laws of Fla. Appellant's penalty phase proceedings occurred in January 1996.

In this appeal, Appellant claims that the trial court committed fundamental error by failing to instruct the jury on the sentencing option of life without parole, and by failing to consider this sentencing option in determining the proper sentence. **Brief of Appellant** at 85-92. He raises this claim as one of fundamental error because admittedly he made no request for such an instruction or consideration of this option. The State submits that had the trial court instructed the jury on this option or considered this option in its independent analysis without consent of Appellant it would have committed an *ex post facto* violation.

Article I, section 10, of the Florida Constitution, and Article I, section 10, clause 1, of the United States Constitution,

prohibit the Florida legislature from passing any "ex post facto Law." In order to constitute an *ex post facto* law, it must be retroactive, i.e., apply to events occurring before its enactment, and it must disadvantage the defendant by its application. Weaver v. Graham, 450 U.S. 24, 29 (1981). "Critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." Id. at 30. See also Miller v. Florida, 482 U.S. 423 (1987); Dobbert v. Florida, 432 U.S. 282 (1977).

Here, the legislature increased the severity of the minimum sentence available, so that if defendants are sentenced to life imprisonment under the amendment they are no longer eligible for parole. Since Appellant was not given fair notice of this increased penalty at the time he committed his offense, the State could not apply this amended provision to him at the time of sentencing. Appellant could have, however, waived any *ex post facto* challenge and requested instruction and consideration under the amended statute, but he did not do So. Cf., e.g., Larzelere v. State, 676 So. 2d 394, 403 (Fla. 1996) (holding that defendant can waive fundamental right to conflict-free counsel); State v. Upton, 658 So. 2d 86, 87 (Fla. 1995) (holding that defendant can waive constitutional right to trial by jury); Armstrong v. State, 579 So. 2d 734, 735 (Fla. 1991) (holding that defendant can waive challenge to fundamentally erroneous jury instruction by requesting

instruction). Therefore, he cannot complain that the trial court did not apply the amendment to his case.

To support his argument to the contrary, Appellant cites to numerous cases from Oklahoma, the principal case being Allen v. State, 821 P.2d 371 (Okla. Crim. App. 1991). In Allen, the court explained that the possible penalties for first-degree murder at the time Allen committed his crimes were life imprisonment (with a possibility of parole) and death. Subsequent to the offense, but prior to Allen's sentencing, the state legislature amended the statute to include an intermediate option--life imprisonment without parole. So the sentencing options became life imprisonment (with parole), life imprisonment without parole, and death. Allen waived any *ex post facto* challenge and sought an instruction on and consideration of life imprisonment without parole, but the trial court denied the request. On appeal, the Court of Criminal Appeals held that the amendment did not disadvantage the defendant because he was not subjected to a harsher penalty than was available at the time he committed his crime. Id. at 375-76. In other words, the minimum (life with parole) and the maximum (death) did not change; the legislature merely added an intermediate option (life without parole). Thus, given the defendant's waiver, the appellate court held that the trial court fundamentally erred in refusing to instruct on and consider this sentencing option. Id. at 376-77. See also Wade v. State, 825 P.2d 1357, 1363 (Okla. Crim. App. 1992) (reaffirming Allen, but noting there would be no error if defendant did not request or object to instruction on and consideration of

life without parole option); but see Salazar v. State, 852 P.2d 729, 736-41 (Okla. Crim. App. 1993) (reaffirming Allen and Wade, but finding failure to instruct on range of penalty options fundamental error not subject to waiver).

Critical to the Oklahoma court's analysis was the fact that the amendment did not affect the minimum and maximum penalties to which a defendant would be subjected. In Florida, on the other hand, the legislature replaced the minimum penalty (life with the possibility of parole after 25 years) with one more harsh (life without parole). This amendment, if applied retroactively to Appellant without his consent, would have resulted in an *ex post facto* violation.[16] Given that Appellant did not request application of the amendment and waive any *ex post facto* challenge, the trial court cannot be said to have fundamentally erred in failing to instruct on and consider the amended sentencing option. Therefore, this claim must fail.

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[16] After the legislature amended the statute, this Court amended the jury instructions to reflect these changes. In re Standard Jury Instructions in Criminal Cases, 678 So. 2d 1224 (Fla. 1996). After quoting the statutory changes, this Court noted the following in a footnote: "Section 775.082(1), as amended in 1994, became effective on May 25, 1994. Ch. 94-228, Laws of Fla. Therefore, it applies to offenses committed on or after that date." Id. at 1224 n.1 (emphasis added). In addition, in the amended instructions, this Court added the following "Note to Judge": "For murders committed prior to May 25, 1994, the penalties were somewhat different; therefore, for crimes committed before that date, this instruction should be modified to comply with the statute in effect at the time the crime was committed." Id. at 1225. Thus, this Court has implicitly assessed the *ex post facto* implications of the amendments and has cautioned the trial courts accordingly.

## ISSUES XIII AND XIV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING MORE THAN THE FACT OF CONVICTION REGARDING APPELLANT'S PRIOR VIOLENT FELONY OFFENSE AND WHETHER SUCH EVIDENCE WAS UNDULY PREJUDICIAL (Restated).

Appellant concedes that this Court has repeatedly upheld the introduction of evidence to show the underlying facts of a prior violent felony to support that aggravating factor. He claims, however, that this Court has provided "little or no firm guidance to trial judges or litigants as to when this testimony is admissible." Citing to an Oklahoma case, he suggests that this Court should provide defendants "an opportunity to stipulate to the validity of his prior violent felony convictions," thereby making the certified copy of conviction the only evidence to support the factor. If the defendant refuses to stipulate, then the State should be allowed to introduce the most minimal amount of evidence necessary to prove that the prior felony involved the use or threat of violence. **Brief of Appellant** at 93-94.

Contrary to Appellant's perception, such is the standard in Florida. Although the State does not have to accept a defendant's stipulation, it is not unlimited in the amount or type of information that it can introduce to show the underlying facts. Rather, such evidence must not violate the defendant's confrontation rights, and its prejudicial effect must not outweigh its probative value. Finney v. State, 660 So. 2d 674, 683 (Fla. 1995), and cases cited therein. Moreover, "the details of the

collateral offense must not be emphasized to the point where that offense becomes the feature of the penalty phase." Id.

Evidence of the facts underlying the conviction, if admitted within these confines, is relevant to determine whether the ultimate penalty is appropriate. "Propensity to commit violent crimes surely must be a valid consideration for the judge and jury." Elledge v. State, 346 So. 2d 998, 1001 (Fla. 1977) (quoted in Lockhart v. State, 655 So. 2d 69, 72 (Fla. 1995)). A mere fact of conviction, contrary to Appellant's contention, does not provide a sufficient basis upon which to determine the weight such a factor should receive. Nor does it provide a sufficient basis upon which to weigh the aggravating factor against the mitigating evidence.

In this case, the State introduced only the testimony of the detective who investigated the prior murder, and Appellant's confession to that murder. (T 1732-68). Since Appellant's prior conviction was for the murder of a prostitute, the similarities between the two murders were highly relevant. These similarities, however, were not discoverable from the face of the certified copy of conviction. Given that the State admitted only the barest of evidence to establish the use or threat of violence inherent in this prior crime, it did not become a "feature" of the penalty phase proceedings and unduly prejudice Appellant. Cf. Finney, 660 So. 2d at 683; Lockhart, 655 So. 2d at 72. Therefore, this Court should reject this claim and affirm Appellant's sentence of death for the first-degree murder of Chiquita Counts.

## ISSUE XV

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

During his cross-examination of Detective Abrams in the penalty phase, defense counsel asked the detective whether Appellant's statement about the Leath murder comported with the physical evidence. Detective Abrams responded, "Portions of it, there was some discrepancies in what he had said versus the witnesses." (T 1765). Defense counsel continued to question Detective Abrams about Appellant's statements in relation to other evidence, including witnesses' statements, linking him to the crime. (T 1765-67). On redirect, the State asked Detective Abrams the following questions:

> Q. (By Mr. Donnelly) Detective, in the statement that Mr. Almeida gave now, it indicated that he did not know this individual before, Ms. Leath?
>
> A. That's what he said, yes.
>
> Q. Did your investigation reveal otherwise?
>
> [DEFENSE COUNSEL]: I am going to object to hearsay.
>
> THE COURT: Overruled.
>
> THE WITNESS: I located at least two witnesses that had seen him prior in the same area with Ms. Leath.

(T 1767-68).

Appellant claims that the trial court abused its discretion in admitting this hearsay testimony, which resulted in a Confrontation

Clause violation. **Initial brief** at 96-97. He fails to acknowledge, however, that this Court has repeatedly rejected similar arguments where defense counsel had the opportunity to examine the testifying witness. See, e.g., Spencer v. State, 645 So. 2d 377, 383-84 (Fla. 1994) (affirming admission of hearsay in penalty phase where evidence was relevant and defendant hod opportunity to examine detective); Wuornos v. State, 644 So. 2d 1012, 1018 (Fla. 1994) (affirming admission of hearsay in penalty phase where defense opened door to such testimony). Here, defense counsel opened the door to Detective Abrams' testimony, and defense counsel had the opportunity to question him about the substance of the hearsay. Thus, the trial court properly overruled the hearsay objection.

Even if Detective Abrams' testimony regarding other witnesses were admitted in error, it was harmless beyond a reasonable doubt. Appellant confessed to the prior murder of Marilyn Leath, and such confession was played for the jury. Any testimony that other witnesses contradicted details of Appellant's confession would not have affected, within a reasonable possibility, the existence of the "prior violent felony" aggravating factor. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Therefore, this Court should affirm Appellant's sentence of death for the first-degree murder of Chiquita Counts.

## ISSUE XVI

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING THE STATE TO CROSS-EXAMINE APPELLANT'S MENTAL HEALTH EXPERT REGARDING APPELLANT'S SANITY (Restated).

During the penalty phase, Appellant presented the testimony of, among others, Dr. Macaluso and Dr. Strauss. Dr. Macaluso opined that Appellant was under the influence of an extreme mental or emotional disturbance at the time of the murder, and that such disturbance was based on a chronic depressive condition. (T 1790, 1795-97). However, he found no evidence to suggest that Appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (T 1798). Dr. Macaluso also testified, on direct examination, that he evaluated Appellant "on the entire spectrum of mental illness" and determined that he was not insane at the time of the offense. (T 1797).

Dr. Strauss, on the other hand, who had performed only a "general evaluation," opined that both mental mitigating circumstances existed. In his opinion, Appellant's mental or emotional disturbance was based on his dysfunctional family history and alcohol abuse. (T 1873). And he believed Appellant's capacity to appreciate the criminality of his conduct was substantially impaired because of his alcohol use at the time of the murder. (T 1875-76).

On cross-examination, the State wanted to question Dr. Strauss about the bases for his conclusions. It apparently knew from the

doctor's deposition that Dr. Strauss believed not only that both mental mitigators applied, but that Appellant was insane at the time of the murder. (T 1897-99, 1901-04). Thus, Dr. Strauss' opinions contradicted those of Dr. Macaluso not only as to the "capacity to appreciate" mitigator, but also as to sanity.

Appellant claims that the State's questioning of Dr. Strauss as to sanity was improper because such testimony was irrelevant. **Brief of Appellant** at 97-98. Appellant, however, put his mental state at the time of the murder into issue. He also raised during Dr. Macaluso's testimony the issue of sanity. Since Dr. Strauss' opinions were more far-reaching than Dr. Macaluso's, the State was entitled to question Dr. Strauss about his overall evaluation of Appellant's mental health. His overall opinions and the bases for those opinions were relevant to the issue of mental mitigation. Therefore, the trial court properly allowed the State's questioning in this regard. See Geralds v. State, 674 So. 2d 96, 99-100 (Fla. 1996); Cruse v. State, 588 So. 2d 983, 988 (Fla. 1991) ("The appropriate subjects of inquiry and the extent of cross-examination are within the sound discretion of the trial court."); Johnson v. State, 608 So. 2d 4, 10-11 (Fla. 1992) (holding that the state was properly allowed to question defense expert about defendant's prior drug use to probe bases for opinions and to rebut finding of mental mitigating factors).

Even if the State's questioning of Dr. Strauss were improper, any error was harmless beyond a reasonable doubt. Although the defense questioned Dr. Macaluso about Appellant's sanity, sanity

was not an issue per se in the penalty phase. And despite Dr. Strauss's testimony, the trial court specifically found that "[n]one of the examining experts found the defendant to be insane." (R 2486). Finally, the trial court did not apply a sanity standard to Appellant's mental mitigation. Regarding the "mental or emotional disturbance" mitigator, the trial court stated, "The standard required to establish this factor is less than insanity but more than the emotions of an average man, however inflamed." (R 2484). And for the "capacity to appreciate" mitigator, the trial court stated, "This circumstance applies when the defendant is not legally insane, but has mental problems that limit his capacity to conform his conduct to the requirements of law." (R 2486). Thus, even if the State were improperly allowed to question Dr. Strauss about Appellant's sanity, there is no reasonable possibility that Appellant's sentence would have been different had it not been allowed to do So. State v. DiGuilio, 429 So. 2d 1129 (Fla. 1986). Consequently, this Court should affirm Appellant's sentence of death for the first-degree murder of Chiquita Counts.

## ISSUE XVII

WHETHER ELECTROCUTION IS CRUEL AND UNUSUAL PUNISHMENT (Restated).

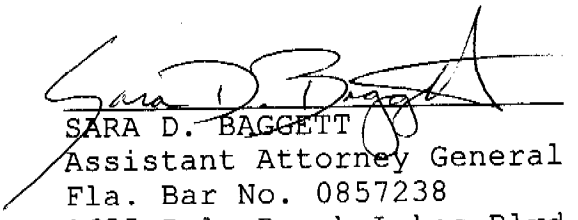
Appellant renews his argument made in the trial court that Florida's method of execution constitutes cruel and unusual punishment. **Brief of Appellant** at 98-99. However, Appellant has presented nothing in his two-paragraph argument which would warrant receding from this Court's long line of cases, most recently that of Jones v. Butterworth, 22 Fla. L. Weekly S659 (Fla. Oct. 20, 1997). See also Blanco v. State, 22 Fla. L. Weekly S575, 576 & nn. 8, 19 (Fla. Sept. 18, 1997); Buenoano v. State, 565 So. 2d 309, 311 (Fla. 1990); Fotopoulos v. State, 608 So. 2d 784, 794 & n.7 (Fla. 1992); cf. Whitton v. State, 649 So. 2d 861, 867 n.9 (Fla. 1994) (finding no valid reason to overrule precedents regarding "heinous, atrocious, or cruel" aggravating factor instruction), cert. denied, 116 S. Ct. 106, 133 L. Ed. 2d 59 (1995). Therefore, this Court should affirm Appellant's sentence of death for the first-degree murder of Chiquita Counts.

## CONCLUSION

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

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



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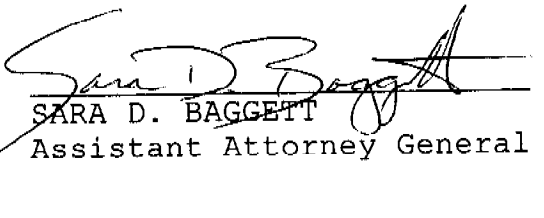
## CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail, postage prepaid, to Jeffrey L. Anderson, Assistant Public Defender, Criminal Justice Building, 421 Third Street, Sixth Floor, West Palm Beach, Florida 33401, this 31st day of October, 1997.



SARA D. BAGGETT
Assistant Attorney General

IN THE CIRCUIT COURT OF THE
17TH JUDICIAL CIRCUIT, IN AND
FOR BROWARD COUNTY, FLORIDA.

CASE NO: 93-20808CF10A
93-21249CF10A
JUDGE: BACKMAN

STATE OF FLORIDA,

Plaintiff,

vs.

OSVALDO ALMEIDA,

Defendant.
_____/

**MOTION FOR SUPPLEMENTAL VOIR DIRE**

COMES NOW, the Defendant, OSVALDO ALMEIDA, by and through his undersigned counsel pursuant to Florida Rules of Criminal Procedure and Florida Statutes 921.141 and moves this Honorable Court to grant this motion and enter an Order permitting the Defendant to engage in supplemental voir dire questioning of a specific and limited nature with the jurors in the above styled cause and as grounds therefore would allege as follows:

1. The Defendant has been convicted of Murder in the First Degree by a jury empaneled to try the Defendant with regard to his guilt or innocence as to the murder of one Chequita Counts.

2. That prior to the trial, although the Defendant and the State were aware that a potential aggravating factor existed, specifically that the Defendant had previously been convicted of a Murder in the First Degree, the Defendant never asked jurors any questions with regard to their qualifications to serve on the jury knowing that previous murder conviction existed.

3. That the reason the Defendant did not ask questions of the prospective panel about their feelings with regard to a

previous homicide, is that it would have been unmistakably clear, upon being questioned about a previous homicide, that the Defendant was convicted of a previous homicide, and therefore any questions would have prejudiced the Defendant's right to a fair trial on his guilt phase.

4. That the law is well settled in the area of capital sentencing, that where a Defendant has one aggravating circumstance, although that may be considered and may be sufficient to warrant the imposition and the recommendation of the death penalty, standing alone any one factor is not sufficient to result in the imposition of the death penalty. Eddings vs. State of Oklahoma, 455 US 104 (1982), Proffitt vs. State of Florida, 428 US 1242 (1976), State vs. Dixon, 283 S 2d 1, (Fla. 1977).

5. That in Woodson vs. North Carolina, 428 US 280, the Supreme Court of the United States rejected the notion of an automatic aggravator with respect to the killing of a police officer. Likewise, there can be no automatic aggravator for a previous homicide.

6. That the Defendant now desires the opportunity to question each juror, where the Defendant stands convicted of a previous homicide, that being Murder in the First Degree, whether that factor alone, regardless of anything else, would cause those jurors to vote for the imposition of the death penalty without regard for any further information, and without regard to any potential mitigation.

7. That some of the jurors that presently are seated on the panel were sought to be excused by the defense, by reason of the

fact that they had indicated a strong likelihood that they were in favor of the death penalty for premeditated, First Degree Murder. However, said jurors were able to avoid a strike for cause by reason of their indication that they would be willing to listen to mitigation. Those jurors were not permitted to be excused in that the defense had previously used all peremptory challenges.

8. That had the defense asked the jurors on voir dire prior to the guilt phase of the trial, the defense believes some of the jurors presently seated would have indicated their inability to consider mitigation upon learning the Defendant has been convicted of a previous charge of Murder in the First Degree.

9. That the Defendant should be entitled to excuse any juror for cause, upon that jurors' response that the state of mind of that juror is that there exists an intent to impose the death penalty upon learning of the Defendant's prior conviction for Murder in the First Degree, without regard to any mitigation or any other factors that should and must be considered according to law.

10. That these questions about prior convictions for Murder in the First Degree could not have been asked during the voir dire portion of this trial prior to the guilt phase, by reason of the fact that said questions would have prejudiced the Defendant's right to a fair trial as to his guilt or innocence in the above styled cause.

WHEREFORE, the Defendant, OSVALDO ALMEIDA, prays this Honorable Court will grant this motion and enter an Order permitting the Defendant to engage in supplemental voir dire questioning of a specific and limited nature with the jurors in the

above styled cause.

I HEREBY CERTIFY, that a true and correct copy of the above and foregoing was hand delivered to the State Attorneys Office, 201 S.E. 6th Street, Fort Lauderdale, Florida 33301, on this 29th day of December, 1995.

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11/4/97 filed 11/3/97

OSVALDO ALMEIDA
v.
STATE OF FLORIDA

CASE NO. 89,402

I have this date received the below-listed pleadings or documents:

Answer Brief of Appellee (original & 7 copies)

Appellant's reply brief shall be served on or before January 5, 1998. If counsel does not intend to file a reply brief, please notify this Court in writing prior to the above date.

Per this Court's Administrative Order In re: Filing of Briefs in Death Penalty Direct and Post-Conviction Relief Appeals dated October 15, 1997, counsel are directed to include a copy of all briefs on 3-1/2 inch diskette in Word Perfect 5.1 or higher format or ASCII text format. **PLEASE LABEL ENVELOPE TO AVOID ERASURE.**

Please make reference to the case number in all correspondence and pleadings.

Most cordially,

Clerk, Supreme Court

**ALL PLEADINGS SIGNED BY AN ATTORNEY MUST INCLUDE THE ATTORNEY'S FLORIDA BAR NUMBER.**

SJW/tsc
cc: Mr. Jeffrey L. Anderson