IN THE SUPREME COURT OF FLORIDA

RORY ENRIQUE CONDE,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

_____/

CASE NO. SC00-789

T.C. 95-19816

APPELLEE'S ANSWER BRIEF

ON APPEAL FROM THE CIRCUIT COURT,
11TH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY

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PRELIMINARY STATEMENT

Appellant, defendant in the trial court below, will be referred to as “Appellant”, “Defendant”, or “Conde”. Appellee, the State

of Florida, will be referred to as the "State". References to the record will be by the symbol "R", to the transcript will be by the symbol "T", to any supplemental record or transcript will be by the symbols "SR" or "ST", and to Conde's brief will be by the symbol "IB", followed by the appropriate page numbers.

STATEMENT OF THE CASE AND FACTS

Appellee accepts Appellant's statements of the case and facts for purposes of this appeal, subject to the additions, corrections, and/or clarifications set out in the Argument section.

SUMMARY OF THE ARGUMENT

POINT I- The trial court properly denied Conde's "for cause" challenges to 6 jurors.

POINT II- The trial court properly exercised a cause challenge against venire person Aguirregaviria.

POINT III- Conde was not entitled to a judgment of acquittal because there was sufficient evidence of premeditation.

POINTS IV & X- Williams rule evidence was admitted properly.

POINT V- The trial court properly admitted certain evidence.

POINTS VI & X- The prosecutor did not make improper arguments during guilt and penalty phase.

POINT VII- Conde's confession was free and voluntarily

given.

POINT VIII- The trial court properly found CCP and HAC.

POINT IX- The trial court properly rejected statutory and non-statutory mitigators.

POINT XI- Chaplain Bizarro's testimony was excluded properly.

POINT XII- The death sentence is proportional.

POINTS XIII- Apprendi does not apply to this case.

POINT I

THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S CAUSE CHALLENGES TO JURORS WHO DEMONSTRATED IMPARTIALITY AND THE ABILITY TO RENDER A VERDICT BASED UPON EVIDENCE PRESENTED (Restated).

The trial court did not commit manifest error by denying defense counsel's cause challenges to six prospective jurors-Groom, William Hernandez, Huey, Owen, Rolle, and Fuentes--against whom Conde was required to exercise peremptory challenges. See Looney v. State, 803 So.2d 656, 665 (Fla. 2001)("[i]t is within a trial court's province to determine whether a challenge for cause is proper, and the trial court's determination of juror competency will not be overturned absent **manifest error**."); Fernandez v. State, 730 So. 2d 277, 281 (Fla. 1999)(same); Mendoza v. State, 700 So.2d 670, 675 (Fla. 1997).

The standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Wainwright v. Witt, 469 U.S. 412, 424-26 (1985) (quoting Adams v. Texas, 448 U.S. 38 (1980)). See Morrison v. State, 27 Fla.L.Weekly S253, S257 (Fla. March 21, 2002); Looney, at 665. It does not require that a juror's bias be proved with "unmistakable clarity." Witt, 469 U.S. at 424-26. Whether or not a juror should be stricken for cause is a question for the trial judge and this Court "must give deference to the judge's determination of a prospective juror's qualifications." Looney, at 665, citing Castro v. State, 644 So.2d 987, 989 (Fla. 1994). The decision is "based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province." Witt, 469 U.S. at 428. "A trial court has latitude in ruling upon a challenge for cause because the court has a better vantage point from which to evaluate prospective jurors' answers than does this Court in [its] review of the cold record." Mendoza, at 675.

Thus, "[d]espite [a] lack of clarity in the printed record, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to

faithfully and impartially apply the law . . . this is why deference must be paid to the trial judge who sees and hears the juror." Witt 469 U.S. at 425-26. See Gore v. State, 706 So.2d 1328, 1332 (Fla. 1997)("a trial court has great discretion when deciding whether to grant or deny a challenge for cause based on juror incompetency"); Wainwright, at 424-26 ("because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism . . . deference must be paid to the trial judge who sees and hears the juror").

Initially, it must be noted that Conde's contention regarding William Hernandez is not preserved for appeal because defense counsel never moved to strike William Hernandez for cause. The examples used by Conde refer to Juror **John** Hernandez not **William** Hernandez. (T 4685). John Hernandez was subsequently dismissed for cause while William Hernandez, an impartial juror, was accepted by both sides. (T 5547, 5805-06, R6-1061). The argument is also unpreserved because defense counsel failed to identify William Hernandez as an objectionable juror who would have been stricken had defense counsel's peremptory challenges not been exhausted (T 5902). See Mendoza, 700 So.2d at 674-75 (noting that in order for there to be reversible error based upon denial of a challenge for cause, appellant must have

exhausted all peremptory challenges and identified an objectionable juror who had to be accepted and sat on the jury); Trotter v. State, 576 So.2d 691, 692-93 (Fla. 1990)(same); Pentecost v. State, 545 So.2d 861, 863 n. 1 (Fla. 1989)(same); Griefer v. DiPietro, 625 So.2d 1226,1228 (Fla. 4th DCA 1993)(same).

Turning to the other prospective jurors, Conde's argument fails as the record in this case verifies that no manifest error occurred since all of the jurors in question possessed an impartial state of mind and the ability to follow the law.

1. Prospective Juror Groom. Conde lists examples of Juror Groom's alleged "perjury and proclivity toward the death penalty." A review of these examples, when read in the context of Groom's entire questioning, reveals no perjury or bias. Groom's questioning demonstrates candor and truthfulness.

The trial court began Groom's questioning, explaining that the law requires jurors to wait until the second part of the trial to weigh the aggravating and mitigating circumstances and asking Groom whether he would be capable of doing that. Groom responded that "yes" he would. He agreed he would not automatically decide that the defendant deserved the death penalty if he returned a verdict of guilty (T 4151).

The prosecutor followed up on that point, explaining to

Groom that they were looking for “jurors who even though they have already found the defendant guilty, are willing to listen to whatever else is presented before making a recommendation, . . . capable of keeping an open mind” even if he returns a verdict of guilty.” (T 4152-53). Groom again responded affirmatively, and noted he was willing to listen (T 4153).

Defense counsel asked Groom to explain what his view of the death penalty was, and Groom responded that he thought it should be mandatory in some circumstances. He believed that murder and rape in some instances, such as the abduction and rape of a juvenile, were such circumstances (T 4154). Defense counsel then asked him to explain the particular types of murder he believed deserving of the death penalty and Groom responded that he did not think that there was “an alternate type of murder. Murder is murder.” (T 4154). However, Groom noted that Conde’s background, the type of life he has lead or “anything of that sort” might “possibly” make a difference in his recommendation, so that even if he was convinced that Conde had killed Rhonda with premeditation he could recommend life (T 4155-56). After defense counsel reviewed the law concerning aggravators and mitigators, Groom stated he could “follow the Court’s instructions” in terms of weighing that evidence (T 4157-58). Further, he averred he would focus on the one murder, and not

the other five, if instructed to do so by the court (T 4159-60).

Because Groom unequivocally stated he could follow the court's instructions (T 4157-4158) his belief that the death penalty should be imposed in "some circumstances", did not impair his ability to be a competent juror. See Kearse v. State, 770 So.2d 1119, 1128-29 (Fla. 2000)(affirming denial of cause challenge to juror who initially expressed belief in death penalty and frustrations with justice system, but, after further instruction, unequivocally stated he would follow law); Johnson v. State, 660 So.2d 637, 644 (Fla. 1995)(upholding trial court's denial of cause challenge to juror who strongly favored death penalty, but later noted she could follow sentencing instructions); Castro v. State, 644 So.2d 987, 990 (Fla. 1994) (same); Reaves v. State, 639 So.2d 1, 4 (Fla. 1994)(same).

Conde also alleged, as grounds for the cause challenge, that Groom committed perjury by stating on his questionnaire that he had never been arrested. (T 4950). An examination of this testimony, however, reveals his truthfulness. While reviewing his answers to the questionnaire with the Court, Groom volunteered that he had been arrested: "I put no there, but I misread the question." His ex-wife had had him arrested so she would get their house. With regard to Groom's failure to reveal his arrests for driving while intoxicated and possession of

alcohol by a juvenile, the record establishes no attempt by him to defraud the court or to commit perjury (T 4950; SR1 23-24, 28-31). Further, as the prosecution pointed out respecting these undisclosed arrests, it was uncertain whether the jurors understood "traffic related matters" were criminal. (T 5436).

Moreover, Groom's nondisclosure of his DUI or "arrest" for unlawful possession of alcohol by a minor cannot be considered "material" here because defense counsel exercised a peremptory against him and he did not sit on the jury. (T 5437).

> A juror's nondisclosure of information during voir dire warrants a new trial if the defendant establishes the information is relevant and material to jury service in this case, the juror concealed the information during questioning, and failure to disclose the information was not due to defendant's lack of diligence.... Nondisclosure is considered material if it is substantial and important so that if the facts were known, the defense may have been influenced to peremptorily exclude the juror from the jury.

James v. State,751 So.2d 682, 684 (Fla. 2000) (citations omitted). In denying the cause challenge to Groom, the trial court noted that "[s]ometimes jurors answer questions in a vacuum. When they hear additional information their answer will... change." (T 5437).

2. Prospective Juror Huey. Appellant lists selected responses Mr. Huey ("Huey") gave during venire, apparently to

exemplify an alleged bias for the death penalty. However, when Huey's testimony is read in context, it shows no bias for the death penalty. In fact, Huey demonstrates his ability to be impartial and consider all evidence.

Upon the trial judge's questioning, Huey agreed to wait until the completion of the penalty phase and the presentation of aggravation and mitigation before considering a sentence (T 3680-81). The prosecutor followed up on that point, and Huey affirmed that he had the capacity and was willing to wait until the close of the second phase, to evaluate the evidence and make a sentencing recommendation (T 3681-82).

In response to defense question regarding his comments regarding the death penalty and that murderers give up their right to live, Huey explained that "anyone that would be found guilty of taking someone else's life I think gives up their right to live. I believe an eye for an eye." (T 3682). He later replied: "Well, as I have stated ... I believe that I can decide based on the aggravating or mitigating circumstances whether life imprisonment or the death penalty should be the appropriate choice." (T 3682). When pressed by the defense as to what else Huey would need to hear in order not to recommend death, Huey explained that he "guess[ed] that would be the definition of what mitigating circumstances are. If perhaps there was some

evidence presented that for whatever reason qualified as a mitigating circumstance, then that would be weighed in my judgment." (T 3683). Huey agreed that there were mitigators that would have weight with him and make him believe Conde had not forfeited his right to live (T 3684). He explained he would look at Conde's "frame of mind, whether he was under the influence of drugs . . . how the ladies were killed, and I think just the general review of his overall life up until that point." (T 3684-85). Huey also agreed it would be hard to disregard the other five murders, but after instruction by the trial judge that those murders were not aggravating factors, Huey affirmed that he could follow the Court's instruction by noting that his view of "an eye for an eye" would not interfere with his ability to sit as a juror. (T 3685-88).

The relevant question is whether a juror can set aside opinions or impressions and base a verdict solely on the evidence. Irwin v. Dodd, 366 U.S.717 (1961). See Smith v. Phillips, 455 U.S. 209, 217 (1982) (ruling that a juror cannot be totally shielded from all influences that may affect their verdict). As the prosecutor noted, "many jurors are going to initially say that certain things are going to be very difficult for them. But the ultimate issue is whether or not they have the capacity to follow the Court's instructions on the law." (T

3689).

Huey unequivocally averred that he could listen and weigh the evidence to make the appropriate sentencing recommendation. He agreed to be impartial and follow the court's instructions, despite any preconceived notion of "an eye for an eye". Accordingly, the trial court correctly denied Conde's motion to strike Huey for cause. Kearse, 770 So.2d at 1128-29; Johnson, 660 So.2d at 644; Castro, 644 So.2d at 990; Reaves, 639 So.2d at 4.

3. Prospective Juror Owens. Appellant gives no specific reason why the trial court erred by denying the cause challenge against prospective juror Owens ("Owens"). As such, Conde has failed to establish a claim for relief. Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990) (finding issue waived and reasoning that the "purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues"). Nonetheless, it is clear Owens was unbiased.

Ms. Owens, too, agreed, that she could await the penalty phase to listen to and weigh the aggravators and mitigators (T 3960). She avowed to keep an open mind for the penalty phase, even after Conde were found guilty. (T 3962). Initially, Owens noted she was for the death penalty and stated she "would

automatically vote for the death penalty" for first-degree murder. However, she later clarified that she "would **definitely** have to hear everything before [she] agreed to the death penalty" and that she would "wait and listen to all the mitigating and aggravating factors before she made up her mind." (T 3964, 3968) (emphasis added).

Without question, the record establishes that Owens would listen to all the evidence before making a recommendation. It was only upon later suggestive questioning by defense counsel that she agreed that she would vote for the death penalty if there was no reasonable doubt of a person committing first degree murder. (T 3964). However, Owen was rehabilitated when she confirmed that she would "definitely" listen to the aggravating and mitigating factors, before making a recommendation. (T 3968). Conde suggests that "this line of rehabilitation" was used repeatedly by the trial court to establish "that the venire persons would wait until all of the penalty phase evidence was in before allowing their bias for death determine their recommendation." (IB-31, f.n.10).

An individual who indicates an agreement with the death penalty cannot be said to have a bias for death.[1] Indeed, if a

[1] It is hard to imagine whether any reasonable person has a true "bias for death." Obviously, Appellant is referring to

person indicates he does not believe in the death penalty and could not make such a recommendation, the prospective juror would be dismissed for cause. "A person who has beliefs which preclude her or him from finding a defendant guilty of an offense punishable by death shall not be qualified as a juror in a capital case." §913.13, Fla.Stat. (2002). Likewise, a juror may be dismissed for cause where he has a preconceived opinion and states he would automatically recommend death if the defendant is found guilty. See Floyd v. State,569 So.2d 1225 (Fla. 1990) (Only "[a juror's] unqualified predisposition to impose the death penalty for all premeditated murders warranted excusal for cause."). Simply agreeing with the use of the death penalty in Florida, does not, by itself, establish a reason for dismissing a juror.

Owens was clear in her responses that she would listen to all the evidence before making a decision. She would "definitely have to hear everything before [agreeing] to the death penalty." (T 3968). Thus, she was qualified to sit as a juror and the "for cause" challenge was denied properly. See Kearse, 770 So.2d at 1128-29; Johnson, 660 So.2d at 644; Castro, 644 So.2d at 990; Reaves, 639 So.2d at 4.

4. Prospective Juror Rolle. Venire person Rolle ("Rolle")

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a preference toward the death penalty over life imprisonment.

did not give testimony which in any manner shows an irrevocable commitment to vote for the death penalty upon a finding of guilt. Rolle's testimony demonstrates a willingness and a sense of responsibility to listen to all the evidence before making a sentencing determination.

Rolle confirmed that she **would not** make up her mind as to sentencing until after contemplating the aggravation and mitigation presented during the penalty phase. (T 3922). In fact, when questioned by the State on whether she "wouldn't, be able to recommend the death penalty, Rolle responded, "[n]o. I don't have those feelings right now **because I haven't heard or, you know, the evidence wasn't presented before me....**" (T 3925, emphasis added). This evinces that Rolle understood she had to listen and weigh all of the evidence that would be presented during the penalty phase.

Even when questioned by the defense, Rolle refused to "automatically" impose the death penalty. She stated she could not recommend death at that time: "... because I would have to ... know, see all the evidence and I would want to be sure." (T 3927). Even if she was sure that Conde did the killing, her recommendation would be either life or death (T 3927). None of her subsequent answers varied from the above responses. Rolle's explanation of wanting to wait and listen to all of the evidence

before making a recommendation serves as a strong indication of a unbiased potential juror. She further specifically stated that she would listen to the court's instructions. The trial court properly denied the motion to strike Rolle for cause. See Kearse, 770 So.2d at 1128-29; Johnson, 660 So.2d at 644; Castro, 644 So.2d at 990; Reaves, 639 So.2d at 4.

6. Juror Fuentes "(Fuentes"). The juror agreed that he was capable of listening to both the aggravating and mitigating factors and waiting until the penalty phase before making a sentencing recommendation to the court (T 4897-98). He further stated that he could follow the court's instructions about not using evidence of the other murders as aggravators (T 4899-4900). Under defense questioning, Fuentes reported that not all first-degree murder convictions deserve the death penalty, "but the majority of them" do deserve death (T 4901). Fuentes refused to commit to a predisposition for the death penalty, instead replying: "[w]ell, I don't know much about the case to make a comment like this, at that this time. (T 4901).

Defense counsel asked: "If you were persuaded Mr. Conde had strangled Rhonda Dunn with premeditation and killed her would you be predisposed to the death penalty?" Mr. Fuentes responded: "Yes I would." (T 4902). Defense counsel then lead Mr. Fuentes by asking: "And therefore you would place a burden

on the defense to please you not to give the death penalty?" Mr. Fuentes responded: "That's the defenses job, yes." (T 4902). Continuing, defense counsel asked: "You won't be able to consider those factors [Conde's background, life history] as mitigating factors?" Fuentes responded in the negative (T 4902).

Later, Fuentes was rehabilitated; he clarified that he was capable of waiting to hear all the penalty phase evidence before making a recommendation (T 4904). He further stated that he would follow the court's instruction on the aggravating/mitigating circumstances and disregarding the evidence of the other murders before making a recommendation. (T 4905). Fuentes clearly expressed his ability to listen to all of the evidence before making a recommendation. Thus, the trial court properly denied Conde's for cause challenge to Fuentes. See Kearse, 770 So.2d at 1128-29; Johnson, 660 So.2d at 644; Castro, 644 So.2d at 990; Reaves, 639 So.2d at 4.

"The decision to deny a challenge for cause will be upheld on appeal if there is support in the record for the decision." Hertz v. State, 803 So.2d 629, 638 (Fla. 2001). The instant record clearly supports the trial court's denial of cause challenges to all five jurors questioned here as each demonstrated his/her impartiality and ability to follow the law. See Lusk v. State, 446 So.2d 1038, 1041 (Fla.1984) (test of

juror competency is whether juror can “lay aside any bias or prejudice and render his [or her] verdict solely upon the evidence presented and the instructions on the law given to him [or her] by the court").

As this Court noted in Overton v. State, 801 So.2d 877, 893-94 (Fla. 2001), the average jury in a death penalty case is uninformed and needs instruction on the “bifurcated process by which defendants may be tried and ultimately sentenced to the death penalty.” The “average juror” described in Overton, is precisely the type of jurors Conde questions here. The death penalty sentencing process had to be explained to all of the objected to jurors and each one expressed his ability to listen to all of the evidence before making a recommendation. Despite their alleged “pro-death sentiments”, none of the jurors in this case demonstrated an irrevocable commitment to recommend death upon conviction. Actually, a review of the record reveals that several venire persons were dismissed because they conveyed their inability to listen to aggravating and mitigating factors before being committed to recommending death. Given the trial court’s superior vantage point, this Court should defer to its determination and affirm Conde’s conviction and sentence of death. See Overton, 801 So.2d at 893-94 (upholding denial of cause challenge to juror who stated during voir dire that he

favored the death penalty, but eventually stated "he would 'start from a clean slate,' follow the law and abide by the sentencing scheme which required him to consider aggravating and mitigating circumstances."); Mendoza, 700 So. 2d at 675 (affirming denial of for cause challenge because none of the challenged juror had indicated he would not follow judge's instructions or would recommend the death penalty automatically).

However, should the Court find that it was error to deny the for cause challenges, such was harmless error. Conde does not challenge on appeal any of the jurors who actually served on the jury. Rather, he challenges five jurors whom he excused peremptorily. In Ross v. Oklahoma, 487 U.S. 81 (1988), the United States Supreme Court noted that defendants do not have a constitutional right to peremptory challenges, they have a right to an impartial jury. Thus, any claim that the jury was not impartial must focus not on the jurors who were ultimately excused, but on those who actually served. Id. at 85-86. "So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated." Id. at 88. That the jury might have been different had these jurors been excused for cause cannot, by itself, mandate reversal. See

id. at 87.

Conde has failed to allege, in any respect, that his jury was unfair. Thus, even if any of the foregoing jurors should have been excused for cause, any error was harmless where Conde has failed to show any prejudice by the jury that actually served. See Ross, 487 U.S. at 91; Penn v. State, 574 So. 2d 1079, 1081 (Fla. 1991).

POINT II

THE TRIAL COURT CORRECTLY STRUCK VENIRE PERSON AGUIRREGAVIRIA FOR CAUSE (restated).

Conde argues that the trial court erroneously granted the state's cause challenge to potential juror Aguirregaviria ("Aguirregaviria"). This assertion is incorrect. Aguirregavira gave confused/equivocal responses to questions concerning her opinion of the death penalty. A record review reveals this confusion, and later opposition to the death penalty:

> THE COURT: ... Do you have any moral, religious or philosophical views where you would be prevented from considering the death penalty?
>
> THE JUROR: Well, I don't really know if I believe in it or not.
>
> **THE COURT: Okay. Well, let's talk about that. Do you support it or not?**
>
> **THE JUROR: No**.

> THE COURT: Okay. And is that based on religious or philosophical?
>
> THE JUROR: No, that is just a feeling, you know ---
>
> THE COURT: Now, as you heard me say, in this case the State of Florida is seeking the death penalty. And if, in fact, you served on this jury and the jury returns a verdict as to first degree murder, the second part of the trial will require you to listen to aggravating and mitigating circumstances. Aggravating being those things that suggest death is the appropriate penalty and mitigating those things that suggest that life is the appropriate penalty. What I need to know is can you, in spite of your views, listen to those aggravating and mitigating circumstances, weigh them and make an appropriate recommendation to the Court.
>
> **THE JUROR: I can try, that is all I can say.**
>
> THE COURT: Let's assume the state proves the aggravating circumstances beyond a reasonable doubt, and they outweigh the mitigating factors. The law requires you to return a verdict or recommendation or death. Can you do that based on your views?
>
> **THE JUROR: I don't know.**

(T 3735-38) (emphasis added.).

When questioned by the State, Aguirregaviria reaffirmed she was not sure whether she could vote for the death penalty (T 3737). Aguirregaviria could not say whether she could recommend death even were Conde found guilty (T 3738). These equivocal

response continued during defense counsel questioning. Aguirregaviria could not think of a crime where she though the death penalty was appropriate (T 3738). Defense counsel then went through examples of horrific crimes and the most Aguirregaviria would say is that she "guessed" or "might" vote for the death penalty (T 3738-39). She "guessed" that she could engage in the weighing process and "guessed" that she could vote for the death penalty (T 3739).

Additionally, Aguirregaviria did not fully commit herself to listening and weighing the evidence before making a recommendation. She gave no clear indication about her state of mind which created a reasonable doubt as to her impartiality. Based on her answers, the trial court properly excused Aguiregaviria for cause. A juror is not required to state that she would never vote for the death penalty in order to be properly excused for cause nor does a trial court have to accept a juror as qualified who says that she "might" vote for the death penalty under certain personal standards. Morrison, 27 Fla.L.Weekly at S257-58.

In Morrison, the juror initially stated that "he would prefer to see a person rehabilitated, even if they have murdered somebody," and said he did not "know if [he] could push for the death penalty." Like Aguiregaviria, the juror in Morrison was

"not sure" if he could recommend death, even if he found that the aggravators outweighed the mitigators and "still was not sure" whether he could follow the law, even after the trial court explained the law to him. This Court held that such equivocation, i.e., being "not sure" was sufficient to support excusal for cause. Id. See Sims v. State, 681 So.2d 1112, 1117 (Fla. 1996) (upholding excusal for cause of juror who stated that she was "not sure" whether she would be able to vote for the death of the defendant); Castro, 644 So.2d at 989 (upholding excusal for cause where juror stated he was "not sure" he could follow instructions).

Conde's reliance upon Farina v. State, 680 So.2d 392 (Fla. 1996) is misplaced as such is distinguishable from the instant matter. He argues that Aguiregaviria's responses were no more equivocal than those of the venire person, Hudson, in Farina. Yet, review of Farina indicates that the challenged juror, while having "mixed feelings" said she would "try" to consider the state's request for a death recommendation. Id., 680 So.2d at 396-98. (IB at 35). Also, that juror indicated she fairly and in an unbiased manner consider recommending death and would vote to convict if she were convinced of the defendant's guilt. Id. at 396-97. The Farina juror's unequivocal agreement to consider a death recommendation are not at all similar to Aguiregaviria's

response here where she only gave a definitive answer when she expressed her opposition to the death penalty. Otherwise, Aguiregavira stated she "didn't know" or at best that she "guessed" she could vote for the death penalty. The trial court properly excused her for cause. See Fernandez v. State, 730 So.2d 277 (Fla. 1999) (no manifest error in excusing for cause jurors who gave equivocal responses as to whether they could follow the law and set aside personal beliefs concerning death penalty); San Martin v. State, 705 So.2d 1337, 1343 (Fla.1997) (finding excusals proper where jurors expressed personal opposition to death penalty and responded equivocally when asked if they could put aside personal feelings and follow law); Kimbrough v. State, 700 So.2d 634, 639 (Fla. 1997)(opining "although the prospective juror did respond in the affirmative to a question by the defense attorney asking if she could follow the oath she would be administered and apply the law as instructed by the judge, she had clearly expressed uncertainty several times during the interview."); Smith v. State, 699 So.2d 629, 636 (Fla. 1997) (finding no error in excusing juror for cause where he equivocally expressed impaired ability to follow the law).

POINT III

THE TRIAL COURT DID NOT ERR BY DENYING

APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL ON THE FIRST-DEGREE MURDER CHARGE (RESTATED).

Appellant argues that the state failed to present sufficient evidence to establish premeditation, and therefore, the trial court should have granted his motion for judgment of acquittal on the first-degree murder charge.

A de novo standard of review applies to motions for judgment of acquittal. Pagan v. State, 27 Fla.L.Weekly S299, S301 (Fla. April 4, 2002). This Court has repeatedly reaffirmed the general rule, established in Lynch v. State, 293 So.2d 44 (Fla.1974), that a motion for judgment of acquittal will not be granted unless there is no legally sufficient evidence upon which a jury could base a verdict of guilty. See Morrison v State 27 Fla.L.Weekly S253 (Fla. March 21, 2002); Gordon v. State, 704 So.2d 107, 112 (Fla. 1997). "In moving for a judgment of acquittal, a defendant admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence." Darling v. State, 808 So.2d 145, 155 (Fla. 2002).

Conflicts in the evidence and the credibility of the witnesses is a matter to be resolved by the jury; the granting of a motion for judgment of acquittal cannot be based on

evidentiary conflict or witness credibility. Id. at 155. See Davis v. State, 425 So.2d 654, 655 (Fla. 5th DCA 1983) (the fact that the evidence is contradictory does not warrant a judgment of acquittal since the weight of the evidence and the witnesses' credibility are questions solely for the jury); Lynch v. State, 293 So.2d 44, 45 (Fla. 1974) (holding that where reasonable minds may differ as to proof of ultimate fact, courts should submit the case to the jury).

Further, a "claim of insufficiency of the evidence cannot prevail where there is substantial and competent evidence to support the verdict and judgment." Darling, 808 So.2d at 155. See Pagan, 27 Fla.L.Weekly at S301("[g]enerally, an appellate court will not reverse a conviction which is supported by competent, substantial evidence."); Terry v. State, 668 So.2d 954, 964 (Fla.1996)(same). "If, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, sufficient evidence exists to sustain a conviction." Pagan, 27 Fla.L.Weekly at S 301, citing Banks v. State, 732 So.2d 1065 (Fla. 1999).

When the State's evidence is wholly circumstantial, however, the evidence must also be inconsistent with the defendant's version of events. Pagan 27 Fla.L.Weekly at S301. The State is

not required to "rebut every possible variation" of events which could be inferred from the evidence or to completely disprove the defendant's theory of innocence. Rather, the State is required only to introduce competent evidence which is inconsistent with the defendant's theory of events. The jury is free to disbelieve the defendant's version of events when the State presents evidence conflicting with that theory. DeAngelo v. State, 616 So.2d 440 (Fla. 1993); Cochran v. State, 547 So. 2d 928, 930 (Fla. 1989); Hampton v. State, 549 So. 2d 1059, 1061 (Fla. 4th DCA 1989).

Contrary to Appellant's assertion, the State's premeditation evidence in this case is not wholly circumstantial. "A confession is direct, not circumstantial evidence." Woodel v. State, 804 So.2d 316, 321 (Fla. 2001). The State relied upon both Conde's confession and circumstantial evidence to establish premeditation in this case. When there is both direct and circumstantial evidence, "it is unnecessary to apply the special standard of review applicable to circumstantial evidence cases." Pagan, at S301. Consequently, Appellant's first-degree murder conviction must be sustained if there is competent and substantial evidence of premeditation supporting the verdict.

A review of the record shows that there is competent and substantial evidence of premeditation in the instant case

supporting the verdict. In Asay v. State, 580 So.2d 610, 612 (Fla. 1991), this Court defined premeditation as "a fully formed conscious purpose to kill that may be formed in a moment and need only exist for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of that act." There is no minimum amount of time required to form premeditation; all that is needed is enough time to permit reflection and that may be only a few seconds.

Here, Appellant confessed to murdering six (6) prostitutes within a 4 month period, between September, 1994 and January, 1995 (T 7203-08). Rhonda was the last prostitute murdered. Regarding her death, Appellant stated in his confession that he was on his way home from a doughnut shop when he saw Rhonda standing on the north side of 8th street, close to the cemetery (T 7475-76). It was a weeknight, at around midnight (T 7475). He stopped the car and arranged a "date" with her, agreeing to pay $100 for vaginal sex (T 7477). He took her back to his place and they had sex in his bedroom (T 7478-79). They watched television after having sex the first time (T 7481). Thereafter, they had sex for a second time and afterwards, he and Rhonda laid in bed together for about five minutes (T 7480-81). Rhonda was lying at the foot of the bed (T 7481).

According to Conde, Rhonda then got up and was walking towards the bathroom when he **got out of bed and got behind her** (T 7482). He put his arm around her neck in the same manner that he had the others (T 7482). Rhonda struggled so Conde used both arms and hands (T 7482). She continued to struggle, hitting him, on his forehead, with a glass pear (a knick-knack that was sitting on top of the television)(T 7483). Appellant kept squeezing Rhonda's neck as she was getting weaker (T 7483-84). He pulled the glass pear out of her hand. According to Conde, the glass pear fell on top of her head and they both fell to the floor-- Conde wasn't sure whether Rhonda fell to her knees first (T 7484, 7486). The medical examiner, Dr. Rao, reported that Rhonda sustained severe blows to her head, consistent with being hit with a baseball bat (T 7128-42).

As revealed in Conde's confession, his left arm was still around Rhonda's neck and he continued squeezing her neck (T 7484). She was still struggling; her arms were flailing (T 7486). Conde got on top of her and persisted in squeezing her neck until she died (T 7486, 7484). He claimed that it took only 20-30 seconds to strangle Rhonda, but Dr. Bell explained that an airway has to be obstructed for 3-4 minutes for a person to die from strangulation (T 7485, 6487-94).

The foregoing direct evidence shows that Appellant had

sufficient time to reflect upon his actions and that he made a conscious decision to kill Rhonda. Conde had to decide to get up out of bed, follow Rhonda, get behind her, and then put his arm around her neck to strangle her. When she struggled, he consciously decided to put both arms and hands around her neck. Likewise, he deliberately continued strangling Rhonda as she fought to get away, hitting him with the glass pear. Both fell to the floor during the struggle and Appellant consciously decided to pin Rhonda there so that she could not escape and methodically strangled her until she died. Such actions were purposeful, showing a conscious design to effect Rhonda's death. Conde knew that the probable result of putting his arms around Rhonda's neck and strangling her would be her death. If her murder was not premeditated, Appellant could have stopped at any point during the struggle. Thus, the jury could reasonably infer, from Conde's own account of Rhonda's murder, that he consciously decided to kill her.

The jury also learned from Conde's confession that he had murdered five (5) other prostitutes before killing Rhonda. Appellant's murder spree took place over a four-month period, beginning in September, 1994 and culminating with Rhonda's murder in January 1995. His confession describes each murder in detail and reveals that they all followed the same pattern.

Conde would pick up a prostitute, bring him/her back to his apartment, have sex with them and then after the sex act was completed, without any provocation, Appellant would manually strangle them to death. Conde even admitted to writing a message to the police on the third victim's body because he hadn't seen any media coverage on the murders and wanted the police to know that the murders were connected. Taunting the police, Conde wrote "Third, I will call Dwight, CHAN 10, see if you can catch me." (T 7304-7314). Based on the fact that he had killed five (5) other prostitutes, in exactly the same manner, and had taunted the police to "catch him if they could," the jury could reasonably infer from Appellant's own words that he intended to kill Rhonda.

In addition to the direct evidence, there was overwhelming circumstantial evidence in this case from which the jury could reasonably infer that Appellant had a fully formed conscious purpose to kill Rhonda. "Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted." Sochor v. State, 619 So.2d 285, 288 (Fla. 1993), quoting Larry v. State, 104 So.2d 352, 354 (Fla. 1958).

Unquestionably, there was no provocation in this case. Rhonda was not arguing or fighting with Appellant and had done nothing to anger him. Instead, as Appellant admitted, Rhonda was just walking to the bathroom when he got up, got behind her, put his arm around her neck and strangled her. Further, there could not be any previous difficulties between the parties because, as Conde confessed, he met Rhonda for the first time that night. The manner in which the murder was committed also shows premeditation. Appellant lured Rhonda to his apartment by coolly arranging a "date" with her. Once inside his apartment, he waited until after they had sex for a second time to catch her off-guard with his attack. Rhonda struggled hard during the attack, even after Conde bashed in her head, knocked her to the floor and pinned her there. The nature and manner of the wounds inflicted, likewise, show premeditation. The jury heard testimony from Dr. Valerie Rao who performed Rhonda's autopsy. She testified that Rhonda's neck had hemorrhaging through several layers of muscle and beneath the esophagus, all the way down to the base of her skull. (T 7099, 7131-42). The hyoid bone in her neck was also fractured, which is hard to break in young people like Rhonda because the bone is very elastic (T 7131-42). Rhonda also sustained severe blows to her head, which Dr. Rao described as consistent with the kind of injury you

would sustain if hit with a baseball bat or kicked in the head as hard as possible (T 7128-42). The damage was extensive, going all the way into her skull and her ear was bluish/purplish (T 7121-30).

Additionally, Rhonda had abrasions and bruises on her left arm, left hand, right elbow and knees, which were consistent with a struggle (T 7108-20). Several of Rhonda's artificial nails were broken off and her left pinky finger nail was ripped (T 7120-22). The broken finger nails also indicated to Dr. Rao that there had been a struggle (T 7121-23). Rhonda also broke two (2) teeth during the struggle (T 7123-25). These injuries were defensive wounds, consistent with Rhonda fighting for her life.[1]

In Woodel v. State, 804 So.2d 316, 321 (Fla. 2001), a defendant who had also confessed to the murders, raised the same argument that Appellant has here, namely, that there was no direct evidence of premeditation and that the State's circumstantial evidence was insufficient. Noting that a confession is direct, not circumstantial, evidence, this Court found that Woodel's taped confession provided competent,

[1] Appellant's "weapon" of choice were his hands, which were just as deadly as a gun, knife or other instrument. See Sexton v. State775 So.2d 923, 934 (Fla. 2000)(noting that the defendant's "weapon" of choice was his son, over whom he had complete and total control).

substantial evidence upon which the jury could base a finding of premeditation. Woodel indicated in his confession that he had reflected on his actions prior to killing the victim, stating: "I was hoping to hit her on her head to make her pass out, and then I was going to leave. I thought that's what would happen if you got hit in the head, you know." Id. at 321. Further, Woodel smashed the victim on the head with the porcelain toilet rim and cut or stabbed her fifty-six times, and also stabbed the male victim eight times. See Middleton v. State, 426 So.2d 548 (Fla.1982) (confession that shooting was a "snap decision" sufficient to sustain premeditation).

Similarly, here, the jury could reasonably infer, from Conde's confession alone, that he had the requisite premeditation. Conde admitted to murdering 5 prostitutes before Rhonda so it was reasonable for the jury to infer that Rhonda, too, would end up dead when she went with Conde that night. Further, he admitted to writing on the third victim's body because he hadn't seen any media coverage on the story and wanted the police to know that the murders were connected. The writing taunted the police to "catch him" if they could. Conde also admitted that he struggled with Rhonda for some time and had to "pin her to the ground" before he could strangle her to death. Adding to the direct evidence in this case is compelling

circumstantial evidence which further shows the presence of premeditation. Rhonda's injuries show that a violent, rather lengthy struggle occurred during which Conde had time to reflect upon his actions. Rhonda's head was bashed in and she had numerous defensive wounds--abrasions, bruises, two broken teeth, and broken artificial nails. Dr. Bell also explained that it takes approximately 3-4 minutes for someone to die from strangulation. Thus, there is substantial, competent evidence supporting the jury's finding of premeditation.

There are numerous circumstantial evidence cases where a jury's finding of premeditation was upheld under the more stringent circumstantial evidence standard of review. For example, in Holton v. State, 573 So.2d 284, 289-90 (Fla. 1990), the victim was found with a ligature securely tied around her neck and her house was burned, presumably to conceal the crime. The medical examiner determined that the cause of death was strangulation. Scratch marks on the defendant's chest indicated that the victim had struggled during the attack. Although the defendant had claimed that he did not intend to kill the victim and that the murder was an accident, this Court held that the evidence was sufficient to support the jury's verdict of premeditated murder. Based on the State's evidence to the contrary, the jury chose not to believe the defendant's version

of events.

Similarly, in DeAngelo v. State, 616 So.2d 440 (Fla. 1993), the defendant claimed that he killed the victim in a blind rage during an argument, but the State presented evidence at trial contradicting the defendant's story. The medical examiner testified that the defendant had to have choked the victim for five to ten minutes to kill her. In addition, evidence revealed that the victim was strangled manually and choked with a ligature. In light of these factors, this Court upheld the defendant's conviction for first-degree premeditated murder, finding substantial competent evidence to support the jury's verdict. Likewise, Conde's conviction in the instant case must be upheld. See Blackwood v. State, 777 So.2d 399, 406-07 (Fla. 2000)(upholding jury's finding of premeditation where the defendant claimed that he did not intend to kill the victim based on the fact that the defendant used manual strangulation, strangulation by ligature, suffocation by stuffing a washcloth and bar of soap down the victim's throat and suffocation by pillow); Hitchcock v. State, 413 So.2d 741, 745 (Fla. 1982)(finding that defendant's statement to jailmate that he choked the victim, took her outside, then choked her again--all to quiet her--supported a finding of premeditation); Czubak v. State, 570 So.2d 925 (Fla. 1990) (finding jury properly found

premeditation where victim manually strangled and defendant made comments about victim being dead); Sochor v. State, 619 So.2d 285 (Fla. 1993) (finding premeditation supported where defendant reflected during attack but chose to continue).

In support of his argument, Appellant relies solely on circumstantial evidence cases which are clearly distinguishable from this case. Hoefert v. State, 617 So.2d 1046 (Fla. 1993), is distinguishable because of the sheer lack of evidence. In Hoefert, the victim was found dead in Hoefert's apartment. Because the body was so badly decomposed, the State was not able to prove the manner in which the homicide occurred or even the nature and manner of the wounds inflicted. The medical examiner was only able to say that the cause of death was "probably asphyxiation based upon the lack of finding anything else." Id. at 1048. There was no medical evidence or physical trauma to the victim's neck, no evidence of sexual activity, and no evidence of genital injuries. As a result, this Court could not find sufficient evidence to prove premeditation.

The opposite is true here. The state not only proved the manner in which Rhonda's homicide occurred, but also the nature and manner of the wounds inflicted. There was no decomposition thwarting the medical examiner's ability to definitively state the cause of death. In fact, the medical examiner unequivocally

stated that the manner of death was homicide and the cause of death was asphyxiation. What is more, there was ample medical evidence of physical trauma to Rhonda's head and neck as reported by the medical examiner. Based upon the manner of death and the nature of Rhonda's wounds, there is no question that sufficient evidence existed to prove premeditation.

Similarly, Randall v. State, 760 So.2d 892, 901-02 (Fla. 2000), is distinguishable because all the State presented in that case, in support of premeditation, was evidence that the victims had died of asphyxiation through manual strangulation, had bruises and abrasions and that the defendant had a history of choking women to heighten sexual arousal. Randall argued that he began forcefully choking the murder victims during consensual sex and then when they struggled more than his girlfriend or ex-wife would have struggled, Randall became enraged and continued to choke them. This Court noted that because the other women that Randall choked during sexual activity did not die, it was reasonable to infer that Randall intended for his choking behavior to lead only to sexual gratification, not to the deaths of his sexual partners.

This Court concluded that there was insufficient evidence of premeditation because there was no suggestion that Randall exhibited, mentioned, or possessed an intent to kill the victims

at any time prior to the homicides. Moreover, there was no evidence that either of the two murders was committed according to a preconceived plan. See Kirkland v. State, 684 So.2d 732, 734 (Fla. 1996)(evidence that victim suffered severe neck wound that caused her to bleed to death, and suffered other injuries that appeared to be result of blunt trauma was insufficient to establish premeditation because there was: no suggestion that defendant possessed intent to kill victim, no witnesses to events immediately preceding homicide, no evidence suggesting special arrangements were made to obtain murder weapon in advance of homicide; and State presented scant, if any, evidence to indicate that defendant committed the homicide according to a preconceived plan); Carpenter v. State, 785 So.2d 1182 (Fla. 2001)(evidence that defendant had arranged threesome at which victim was killed, that victim died as result of blunt trauma and neck compression and that defendant made statements to his cellmate implicating himself in the victim's murder were insufficient to establish premeditation because evidence did not exclude the reasonable hypothesis that the victim was killed, without premeditation, after she rebuffed sexual advances made by the defendant and other man).

Conde's argument that he did not contemplate killing Rhonda, but instead, killed her as a result of an "internal combustion"

of wrenching emotions is belied by his admitted actions and defies logic and common sense. The record shows that Appellant's actions were not committed in a fit of rage or emotion. The severity and length of the continuing attack shows that, at some point during the attack, Conde reflected and decided to kill Rhonda. Clearly, this is not a case where "blind and unreasoning passion" momentarily occluded his ability to form a premeditated design to kill. He obviously had the opportunity to reflect for at least a moment during this lengthy struggle. Notably, Conde admits in another portion of his Initial Brief (Point IV) that intent was not "a particularly contested issue at trial," and that "Mr. Conde's confession admitted his intent to murder Rhonda Dunn." (IB 43).

POINTS IV & X

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING WILLIAMS RULE EVIDENCE AT THE GUILT PHASE. ALTERNATIVELY, THE EVIDENCE WAS PROPERLY ADMITTED BECAUSE IT IS "INEXTRICABLY INTERTWINED." FINALLY, ANY ALLEGED ERROR WAS HARMLESS. (Restated).

The trial court did not abuse its discretion by admitting the five (5) uncharged homicides as Williams rule[2] evidence at

[2] Williams v. State, 110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847 (1959).

the guilt phase.[3] See Ray v. State, 755 So.2d 604, 610 (Fla. 2000) (admissibility of evidence is within the sound discretion of the trial court, and standard of review on appeal is abuse of discretion); Zack v. State, 753 So.2d 9, 25 (Fla. 2000); Cole v. State, 701 So.2d 845 (Fla. 1997); Jent v. State, 408 So.2d 1024, 1039 (Fla. 1981). The evidence was properly admitted to prove Appellant's motive, intent, plan, knowledge, and the absence of mistake or accident. Alternatively, the evidence was admissible because it was "inextricably intertwined" with Rhonda's murder. Finally, even if it were error to admit the evidence, it was harmless.

The Williams rule is codified in section 90.404(2)(a), Florida Statutes (2001), as follows:

> Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

"Similar fact evidence that reveals other crimes is relevant and 'admissible if it casts light upon the character of the act

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[3] Appellant argues, in Point X, that the evidence was improperly admitted at the penalty phase also; however, it is clear that the 5 homicides were not introduced again at the penalty phase and the jury was instructed to not consider them as aggravators.

under investigation by showing motive, intent, absence of mistake, common scheme, identity or a system or general pattern of criminality' and should be admitted if 'relevant for any purpose save that of showing bad character or propensity.'" Schwab v. State, 636 So.2d 3, 7 (Fla. 1994) (quoting Williams v. State, 110 So.2d 654, 662 (Fla. 1959). In Williams v. State, 621 So.2d 413 (Fla.1993), this Court explained that:

> As a general rule, such evidence is admissible if it casts light on a material fact in issue other than the defendant's bad character or propensity.... Evidence of other crimes or acts may be admissible if, because of its similarity to the charged crime, it is relevant to prove a material fact in issue. But it may also be admissible, even if not similar, if it is probative of a material fact in issue. Although similarity is not a requirement for admission of other crime evidence, when the fact to be proven is, for example, identity or common plan or scheme it is generally the similarity between the charged offense and the other crime or act that gives the evidence probative value. Thus, evidence of other crimes, whether factually similar or dissimilar to the charged crime, is admissible if the evidence is relevant to prove a matter of consequence other than bad character or propensity.

Id., at 414. Similarly, in Bryan v. State, 533 So. 2d 744, 746 (Fla. 1988), this Court explained that

> So-called similar fact crimes are merely a special application of the general rule that all relevant evidence is admissible unless specifically excluded by a rule of evidence.

> The requirement that similar fact crimes contain similar facts to the charged crime is based on the requirement to show relevancy. This does not bar the introduction of evidence of other crimes which are factually dissimilar to the charged crime if the evidence of the other crimes is relevant.

Thus, evidence of a collateral crime need not be factually identical or uniquely similar to the charged offense when such evidence is relevant to prove the defendant's motive to commit the charged offense. See Finney v. State, 660 So.2d 674, 682 (Fla. 1995). Similar fact evidence of collateral crimes may be admitted as relevant even if it is not uniquely similar. E.g., Bryan, 533 So.2d at 744-46; Gould v. State, 558 So.2d 481 (Fla. 2d DCA 1990), rev'd on other grounds, 577 So.2d 1302 (Fla. 1991); State v. Ayala, 604 So.2d 1275 (Fla. 4th DCA 1992). Only where Williams rule evidence is offered to prove identity by modus operandi or common plan or scheme, must the evidence establish a high level of similarity and also uniqueness in nature. See Drake v. State, 400 So.2d 1217 (Fla.1981), appeal after remand, 441 So.2d 1079 (1983).

Conde argues that the Williams rule evidence was inadmissible here because it was not relevant to proving identity, intent or modus operandi and because it impermissibly became a feature of the trial. Contrary to his first assertion, the Williams rule evidence was properly admitted because it was

relevant to proving motive, intent, plan, knowledge, identity and the absence of mistake or accident. See Finney, 660 So.2d at 681-82; Evans v. State, 693 So.2d 1096, 1101 (Fla. 3d DCA 1997).

The State had to prove that Rhonda's killing was a crime and not the result of an accident. Additionally, it had to prove the degree of the crime, i.e., that Rhonda's killing was premeditated first-degree murder, not second-degree or third-degree murder. The best way for the State to prove those things was by showing the **pattern** of homicides. In other words, the fact that Conde had killed 5 prostitutes before Rhonda, in exactly the same manner (manual strangulation), helped to show that he planned and intended to kill her, i.e., had a fully formed conscious purpose to kill her and that her death was not accidental. See Bradley v. State, 787 So.2d 732, 741-42 (Fla. 2001) (holding Williams rule evidence that defendant vandalized the victim's girlfriend's car the week before the murder was relevant to proving intent and premeditation).

There are specific links between Rhonda's murder and the 5 previous homicides which show a calculated plan for all 6 victims: they were prostitutes; they were picked up in the same part of town and taken back to Conde's apartment for sex; they were murdered after the sex acts were completed and in the same

fashion, i.e., by manual strangulation; they were re-dressed after being killed and their bodies dumped face-down in grassy swales. Also 4 of the 6 victims contained DNA and/or fiber evidence linking Conde to the crime. Proof of his plan and intent is also found in what he wrote on victim, Charity Nava's, back: "this is the third, see if you can catch me."

The Williams rule evidence was also relevant to rebutting the defense that Rhonda's murder was not premeditated. See Wuornos v. State, 644 So.2d 1000, 1006-07 (Fla. 1994) (holding that similar crime evidence, in the form of 6 other homicides committed by the defendant, was admissible to rebut the defendant's "claims regarding her level of intent and whether she acted in self-defense"; defendant testified that she was the actual victim in the circumstances leading up to the murder, which could have led the jury to conclude that she lacked the requisite intent had it believed her testimony); Hoefort v. State, 617 So.2d 1046, 1049 (Fla. 1993)(holding that similar fact testimony, from four (4) of defendant's prior victims, was relevant to the issue of motive and to counter the defense's contention that the absence of visible trauma negated asphyxiation as the cause of death) .

Appellant argued at trial and continues to argue here that Rhonda's death was not premeditated. (IB 35-37). Instead, he

argues, it was the result of an "internal combustion" of the wrenching emotions he felt because he blamed the prostitutes for his wife leaving him. The best evidence the State had to disprove his defense theory and to show that the killings were not committed during a fit of emotional rage, were the 5 uncharged homicides–- they show conclusively that Conde planned and intended to kill Rhonda and that he did so with cool, calm reflection. The 5 uncharged murders also reveal Appellant's motive for the murders– proof, possibly to his wife, of how powerful he was. That is why he taunted the police by writing on Charity Nava's back "catch me if you can." Had the State tried Rhonda's murder alone, Appellant could have argued that Rhonda's death was accidental, perhaps the result of rough consensual sex. See Townsend v. State, 420 So.2d 615 (Fla. 4th DCA 1982) (upholding admission of Williams rule evidence where defendant was on trial for the murders of two prostitutes by strangulation and the State admitted collateral crimes evidence of 6 other murders which court found relevant to proving identity and motive).

Further, the 5 uncharged murders also helped strengthen the State's identity evidence. The State's physical and scientific evidence linking Appellant to Rhonda's murder was that much stronger because it was shown that Conde was linked to 4 of the

6 victims (DNA and fiber evidence linked to 4 of the 6 victims). Had the State not been able to present the Williams rule evidence linking Appellant to 4 of the 6 victims by DNA and fiber evidence, the defense surely would have launched a more aggressive attack on that evidence regarding Rhonda's murder and could possibly have created reasonable doubt. Finally, the 5 uncharged homicides were admissible to corroborate Conde's confession, wherein he admitted to each and every one of the 5 homicides and provided specific details about them. See Townsend, 420 So.2d at 617 (noting that evidence of 6 collateral homicides of prostitutes, in trial of defendant for 3 murders of prostitutes, was relevant to corroborating defendant's confession wherein he admitted the 6 collateral homicides).[4]

Alternatively, the State notes that the evidence was admissible regardless of the Williams rule, as "inextricably intertwined," to prove the entire context within which the charged crime was committed. In Griffin v. State, 639 So. 2d 966, 968 (Fla. 1994) (citations omitted), this Court distinguished between evidence admitted under section 90.404(2)(a) of the Florida Evidence Code--so-called Williams

[4] Conde incorrectly includes the 175 pages of his confession in calculating the pages devoted to the 5 other murders. His confession is not Williams rule evidence.

rule evidence--and evidence admitted to establish the entire context of the charged crime:

> In the past, there has been some confusion over exactly what evidence falls within the Williams rule. The heading of section 90.404(2) is "OTHER CRIMES, WRONGS, OR ACTS." Thus, practitioners have attempted to characterize all prior crimes or bad acts of an accused as Williams rule evidence. This characterization is erroneous. The Williams rule, on its face, is limited to "[s]imilar fact evidence." § 90.404(2)(a), Fla.Stat. (1991) (emphasis added)." Thus, evidence of uncharged crimes which are inseparable from the crime charged, or evidence which is inextricably intertwined with the crime charged, is not Williams rule evidence. It is admissible under section 90.402 because "it is a relevant and inseparable part of the act which is in issue. . . . [I]t is necessary to admit the evidence to adequately describe the deed."

See Coolen v. State, 696 So.2d 738, 742-43 (Fla. 1997) ("evidence of uncharged crimes which are inseparable from the crime charged, or evidence which is inextricably intertwined with the crime charged, is not Williams rule evidence"); Hunter v. State, 660 So.2d 244 (Fla. 1995)(same).

"Inseparable" or "inextricably intertwined" evidence includes evidence that is "inseparably linked in time and circumstance," Erickson v. State, 565 So. 2d 328, 333 (Fla. 4th DCA 1990), and which is "necessary to fully describe the way in which the criminal deed happened," T.S. v. State, 682 So. 2d 1202 (Fla. 4th DCA 1996). Admissible "inseparable crime"

evidence "explains or throws light upon the crime being prosecuted" and allows the State "to present an orderly, intelligible case . . ." Tumulty v. State, 489 So. 2d 150, 153 (Fla. 4th DCA 1986). See Ferrell v. State, 686 So. 2d 1324, 1329 (Fla. 1996)(evidence completing the story of the crime on trial is admissible under §90.402).

Here, the 5 previous homicides were "inextricably intertwined" with Rhonda's because they were relevant and necessary to fully describe her murder, to place it in proper context and to complete the story of the crime. "Inseparable" crime evidence clearly includes evidence describing the events **prior to** or **leading up to** the crime. See Zack v. State, 753 So.2d 9, 16-17 (Fla. 2000)(upholding "inextricably intertwined" evidence of other crimes defendant committed during **two-week period** prior to the murder for which he was being tried); Damren v. State, 696 So.2d 709 (Fla. 1997)(holding evidence that defendant had stolen from the mine, for which he was currently being tried for burglary, several weeks earlier was "inextricably intertwined"); Ferrell, 686 So.2d at 1329(holding evidence the defendant had robbed the murder victim two days before her death was "inextricably intertwined").

THE WILLIAMS RULE EVIDENCE DID NOT BECOME A FEATURE OF THE TRIAL.

The major focus of Appellant's argument is that the evidence of the other crimes impermissibly became a "feature" of the trial. Collateral crime evidence impermissibly becomes a "feature" of the trial where it transcends the bounds of relevancy to the offenses being tried. Williams, 117 So.2d at 475-76. In other words, where it is unduly emphasized, resulting in prosecutorial "overkil." "[S]imilar fact evidence will not be considered to be a feature of the case merely because a large amount of it comes before the jury. More is required for reversal than a showing that the evidence is voluminous." Snowden v. State, 537 So.2d 1383, 1385 (Fla. 3d DCA 1989).

Whether the collateral crime evidence became a focal point of the trial should be determined, not solely from the order in which the witnesses were presented, the number of witnesses who testified, or the number of transcript pages their testimony filled, but, rather, by the **substance** of the collateral crime evidence presented. Townsend, 420 So.2d at 617 ("the number of pages of testimony and exhibits should not be the sole test by any means'); Johnson v. State, 432 So. 2d 583 (Fla. 4th DCA 1981) (same); Green v. State, 228 So. 2d 397, 399 (Fla. 2d DCA 1969) (mere volume of collateral crime evidence does not make it a "feature"; whether a limiting instruction was given

must also be considered).

Also, this court should consider the *necessity* of presenting the Williams Rule witnesses who testified; i.e., whether the State committed "needless 'overkill.'" Wuornos, supra; Sias v. State, 416 So. 2d 1213, 1216 (Fla. 3d DCA 1982)(although more time was spent and more evidence presented on the collateral crime, there was no error since the testimony which the state elicited was "confined to that which was necessary to establish its relevancy.")

This case falls within the acceptable quantum of collateral crime evidence, and was not "overkill." The testimony was curtailed to that necessary to prove that Conde committed the 5 other murders and a limiting instruction was given every time before the Williams rule evidence was admitted. Dibble v. State, 347 So.2d 1096 (Fla. 1964)(noting State has burden of establishing that the defendant was perpetrator of the collateral crimes by *clear and convincing evidence)*. In order to establish that Conde was the perpetrator of the five collateral crimes in this case, it was necessary for the State to present each of the collateral witnesses.

The trial court relied upon Townsend, 420 So.2d at 615, a strikingly similar case, in determining that the Williams rule evidence would not become a "feature" of the trial. Townsend

was charged with murdering three prostitutes, two by strangulation and one by stabbing. At trial, the jury heard his taped confessions wherein he admitted killing the three women. In addition, he took the police to the scene of the crime for 2 of the victims but was unable to locate the crime scene for the third, which is no doubt the reason why the jury found him not guilty of that crime. All of the victims were young black women; their lower torsos were naked when found and they were generally lying with their legs in spread eagle fashion.

In order to corroborate Townsend's confession, the State introduced evidence of **six other homicides** which occurred in 1979 involving black women, except for one white woman, all between the ages of 13 and 30.

> The victims were either known prostitutes or had been seen walking the streets leading Townsend to believe they were prostitutes. All of the incidents occurred in the same geographical area of Northwest Fort Lauderdale--except for two which occurred in Miami in close proximity to each other. All of the homicides occurred on open lots surrounded by debris or weeds or a structure to hide the victims. They were all found partially nude or nude from the waist down with their clothing located nearby. Most of them were lying on their backs with their legs in spread eagle fashion. The crimes generally happened at night. In all but two of the homicides, the cause of death was strangulation.

Id. at 616-17. Townsend confessed to all of the collateral

crimes, showed the police the crime scenes and corroborated facts which only the killer would know. The Fourth District concluded that the Williams rule evidence had not become a feature of the trial, reasoning:

> It is true that the transcript contains over twice as many pages of testimony relative to the collateral crimes as there are pages relative to the crimes for which Townsend was on trial. It is also true that a majority of the exhibits involve the collateral crimes. However, given the number of similar crimes Townsend admitted committing which were so similar to the three for which he was being tried, the number of pages of testimony and exhibits should not be the sole test by any means.

The Court also noted that is not unusual in presenting Williams rule evidence to have victims of the other crimes testify, citing Espey v. State, 407 So.2d 300, 301 (Fla. 4th DCA 1981) (where defendant was charged with sexual battery of his granddaughter, 6 victims of same family testified to numerous instances of sexual battery committed on them by defendant); Dean v. State, 277 So.2d 13 (Fla.1973) (four other rape victims were allowed to testify to the defendant's assault upon them and his modus operandi). Surely, the testimony of victims of collateral crimes has a stronger emotional impact and would tend to make them more of a “feature” of the trial than the professionals who testified in this case, i.e., police, crime scene technicians, medical examiners and forensic scientists.

Similarly, in Wuornos, 644 So.2d at 1007, this Court held that the nature of **six prior murders** was "relevant in establishing a pattern of similarities among the homicides," which, in turn, was relevant to the State's theory of premeditation and to rebut the defendant's claim that she was attacked first. This Court held that the relevance of the testimony "clearly outweigh[ed]" the prejudice, thus, the introduction of the "extensive" Williams rule evidence was "fair" within the requirements of the law, i.e., was not unduly prejudicial. In so holding, this Court noted that "[a]ll evidence of a crime . . . prejudices the defense case." Id. at 1007. See Epsey, 407 So.2d at 301(upholding admission of countless prior acts of coerced sexual abuse against *five* other children, as well as the house pet, where the evidence demonstrated a common scheme or plan).

Townsend and Wuornos are directly on point with this case. The 5 other homicides in the instant case were relevant to establishing the **pattern** of Conde's murders which, in turn, was vitally relevant to the State's theory of premeditation and to rebut Conde's claim that he lacked premeditation. The collateral crimes were also relevant to corroborating Conde's confession and to the State's identity and motive evidence. Further, a limiting instruction was given each time the Williams

rule testimony was admitted. See Oats v. State, 446 So. 2d 90, 94 (Fla. 1984)(noting that since the jury was given a limiting instruction on the use of the collateral crime evidence before it was introduced, any undue emphasis upon the collateral crimes evidence was corrected). This was not a case where the emotional impact of prior victims' testimony was admitted, but rather, one where only professional testified, i.e., police, crime scene technicians, medical examiners and forensic scientists. Thus, given the **number** of collateral crimes in this case, the quantity of the testimony was not overwhelming.[5] See Wilson v. State, 330 So. 2d 457 (Fla. 1976)(holding that "extremely extensive," 600 transcript pages, of evidence of prior crimes was properly admitted because it established a pattern of conduct); Dean v. State, 277 So. 2d 13 (Fla. 1973) (lengthy testimony regarding four other rapes was properly admitted under Williams); Headrick v. State, 240 So. 2d 203 (Fla. 2d DCA 1970) (rejecting defense's contention that State's collateral crime evidence (nine witnesses to establish six burglaries) became feature of trial; various crimes established criminal course of conduct).

[5] Conde incorrectly includes the 175 pages of his confession in calculating the pages devoted to the 5 other murders. His confession is not Williams rule evidence.

Unlike Steverson v. State, 695 So.2d 687 (Fla. 1997), relied upon by Conde, where extensive details of the collateral crime, shooting of a police officer, including the police officer's injuries and recovery, were admitted for no real purpose, the testimony in this case, as explained above, was vitally relevant. See Zack v. State, 753 So.2d 9 (Fla. 2000)(holding that collateral crimes evidence did not become a "feature" of the trial because it was necessary to rebut the defendant's defense and to piece together the sequence of events leading up to the crime).

HARMLESS ERROR

Even if this Court were to find that the Williams rule evidence was erroneously admitted, it was harmless beyond a reasonable doubt and there is no reasonable probability that the alleged error affected the outcome of this case. See § 924.051(7), Fla. Stat. (Supp. 1996). Cf. Wyatt v. State, 641 So. 2d 1336, 1340 (Fla. 1994)(any error in the mention of the witness protection program and defendant's demeanor while in jail was harmless). The focus of a harmless error analysis "is on the effect of the error on the trier-of fact." State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986). "The question is whether there is a reasonable possibility that the error affected the verdict." Id.

Here, any error in admitting the testimony could not have contributed to the jury's verdict because the State introduced Conde's confession to Rhonda's murder and also introduced DNA and fiber evidence linking Conde to the crime. Considering the evidence introduced, it is clear that the Williams rule evidence, even if erroneous, did not contribute to the verdict.

POINT V

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING CERTAIN EVIDENCE (Restated)

The trial court did not abuse its discretion by admitting the following evidence: (1) limited evidence about G.M., another of Conde's victims, who led to his arrest; (2) evidence from Vice Detecitve Martinez that he warned Rhonda, approximately 36 hours before her death, to stay close to the other prostitutes because there was a person strangling prostitutes in the area; and (3) evidence that at the time of his arrest, in his grandmother's apartment, Appellant was found crouching behind a bed. See Thomas v. State, 748 So.2d 970, 982 (Fla. 1999)(trial judge is afforded wide discretion regarding the admissibility of evidence and a ruling admitting or excluding evidence will not, generally, be reversed unless there has been a showing of an abuse of discretion); Sexton v. State, 697 So.2d 833 (Fla. 1997).

Defense counsel filed a pre-trial motion in limine to prevent the State from eliciting any testimony about G.M. See State v. Polak, 598 So.2d 152 (Fla. 1st DCA 1992)(noting that the standard of review on a ruling on a motion in limine is abuse of discretion). The trial court denied the motion but allowed limited evidence about G.M. to prove the sequence of events leading to Conde's arrest. G.M. was found, on June 19, 1995, duct-taped from head-to-toe, in Conde's apartment and it was her identification of Conde that led to his arrest.(T 6536-40). Conde's neighbors had heard a pounding or tapping noise coming from the apartment and called emergency services (T 6536-40). Fire rescue worker, Marie Osaba, responded to the call and used a sledge hammer to break down the front door. Inside G.M. was found duct-taped from head-to-toe. Osaba showed G.M. a picture of Appellant that was on the refrigerator and G.M. identified him as the man who had been in the apartment (T 6536-48).[6]

This limited evidence about G.M. was admissible under section 90.402, Florida Statutes (2000), because it was "inextricably intertwined," with the crime charged; necessary to complete the story of the crime, to present an orderly and

[6] Conde argues that Dr. Kahn intimated during his testimony that there was DNA evidence linking G.M. to Conde but a review of the record reveals there was no such testimony (R 6717-20).

intelligible case and to explain why the State immediately requested that Conde consent to a search of his home and condominium when he was found and arrested one (1) week later. See Coolen, 696 So.2d at 742-43 ("evidence of uncharged crimes which are inseparable from the crime charged, or evidence which is inextricably intertwined with the crime charged, is not Williams rule evidence"); Hunter, 660 So.2d at 244 (same).

As noted in Point IV, "inseperable" or "inextricably intertwined" evidence includes evidence that is "inseparably linked in time and circumstance," Erickson, 565 So.2d at 333, and which is "necessary to fully describe the way in which the criminal deed happened," T.S., 682 So.2d at 1202. See Tumulty, 489 So.2d at 153; Ferrell, 686 So.2d at 1329.

Here, Conde had killed 6 prostitutes over a 4 month period, September, 1994 through January, 1995, but the police had not focused on him as a suspect. The police knew that there was DNA evidence linking the same perpetrator to all 6 victims and when they discovered G.M., also a prostitute, duct-taped, from head-to-toe, in Conde's apartment on June 19, 1995, they knew they had their prime suspect in the murders. Thus, the limited account of G.M. was necessary to describe adequately the investigation leading up to Conde's arrest and subsequent statements. See Henry v. State, 574 So.2d 73, 75 (Fla.

1991)(noting that some reference to the son's murder 9 hours after mother's was necessary to describe adequately the investigation leading up to the defendant's arrest); Consalvo v. State, 697 So. 2d 805, 809 (Fla. 1996)(holding that evidence of a robbery that the defendant committed 12 days after the murder for which he was being tried was relevant as "inseparable from the crime charged.").

Alternatively, the evidence was admissible under section 90.404(2)(a), as evidence of "other crimes, wrongs or acts."[7] Williams rule evidence is not limited to "other crimes, wrongs or acts" with similar facts. See Bryan, 533 So.2d at 746; Finney, 660 So.2d at 682.

> Our view of the proper rule simply is that **relevant** evidence will not be excluded **merely** because it relates to similar facts which point to the commission of a separate crime. The test of admissibility is relevancy.

Williams, 110 So.2d at 659. Thus, "[s]o-called similar fact crimes are merely a special application of the general rule that all relevant evidence is admissible unless specifically excluded by a rule of evidence . . . . [E]vidence of other crimes which are factually dissimilar to the charged crime is not barred if the evidence of other crimes is relevant." Bryan 533 So.2d at

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[7] Although this was not asserted as a ground, the State relies on the "right for the wrong reason" principle to support the trial court's ruling.

746. See Williams v. State, 621 So.2d 413, 414 (Fla.1993) (evidence of other crimes or acts may be admissible, even if the facts are not similar, if they are relevant to prove a matter of consequence other than bad character or propensity); Evans v. State, 693 So.2d 1096, 1102 (Fla. 3d DCA 1997).

Here, the limited evidence about G.M. was also relevant to show Conde's motive and intent. See Zack v. State, 753 So.2d 9, 16-17 (Fla. 2000)(holding that evidence of crimes which the defendant committed in the two (2) weeks preceding the murder were relevant to show motive, intent, modus operandi and the entire context from which the murder arose).

Conde's reliance upon the line of cases culminating with Keen v. State, 775 So.2d 263 (Fla. 2000), is misplaced. Keen involves the principle that an extrajudicial statement to a police officer is generally not admissible for the purpose of explaining the logical sequence of events leading up to an investigation and arrest. Here, however, the limited testimony about G.M., including her identification of Conde[8] **was admitted into evidence through a fire rescue employee**, **Ms. Marie Osaba**. Thus, the cases relied upon by Conde (IB 50), do not apply. Further, the extremely limited nature of the testimony ensured

[8] G.M.'s identification of Conde was admitted through the "excited utterance" exception to the hearsay rule.

that it did not become a “feature” of the trial.

Finally, even if error, the admission of the evidence was harmless beyond a reasonable doubt and there is no reasonable probability that the alleged error affected the outcome of this case. See DiGuilio, 491 So.2d at 1139. Considering the evidence presented in this case–Conde’s confession to Rhonda’s murder and the other 5, which was corroborated by forensic evidence, including DNA, fiber and tire evidence-- there is no doubt that the very limited testimony about G.M. did not affect the jury’s verdict. Conde next challenges testimony from Detective Martinez about a warning he gave Rhonda approximately 36 hours before her murder. Detective Martinez testified that his biggest concern for Rhonda was that she was working alone and he told her to not work alone, to try to work with the rest of the girls and he made sure that she was aware that a person was strangling prostitutes on S.W. 8th street (T 6797-98). Rhonda would just smile and laugh every time he told her (T 6798).

This testimony was relevant to corroborating the State’s theory of premeditation. Because Rhonda had been warned about a strangler, it is reasonable to assume that she would have been careful about who she decided to “date.” Conde’s demeanor had to be calm and non-threatening for Rhonda to enter his car. He

could not have been on the verge of an "internal combustion" of emotions. That supports the State's theory that Conde's actions were deliberate and premeditated, part of a plan. Further, the testimony supports the State's identity evidence. Conde is soft-spoken and non-threatening and the person who Rhonda voluntarily went with had to be the same. Finally, it was relevant to prove Rhonda's state of mind. See Brooks v. State, 787 So.2d 765, 771 (Fla. 2001)(victim's state of mind may be relevant to an element of the crime or may become an issue if used to rebut the defendant's theory of defense).

Conde's last challenge is to the introduction of testimony, from Detective Estopinan that when he walked into Conde's grandmother's apartment to arrest him, he saw Conde kneeling by the side of the bed, trying to conceal himself (T 6975). Although Conde objected to this testimony prior to trial, he failed to renew his objection at the time of the testimony; thus, his objection is not preserved. See Maharaj v. State, 597 So.2d 786, 790 (Fla. 1992)(holding that defendant had failed to preserve issue for review when he filed a motion in limine pre-trial but did not renew his objection when the evidence was introduced). The admission of this evidence cannot be fundamental error as it merely describes how and where Conde was found and arrested.

POINT VI & X

THE PROSECUTOR'S VARIOUS COMMENTS DURING OPENING AND CLOSING ARGUMENT DID NOT DEPRIVE APPELLANT OF A FAIR TRIAL (Restated).

Appellant complains that the prosecutor made several improper comments during opening and closing arguments, the cumulative effect of which deprived him of a fair trial and fair sentencing hearing. The State submits that the comments in question are either procedurally barred because they were not preserved for appellate review, are not improper, or if improper, do not constitute fundamental error.

Appellant failed to preserve all but three of the allegedly improper comments for appellate review. The proper procedure to preserve review of an allegedly improper comment is to object, request a curative instruction, and/or move for a mistrial. Kearse v. State, 770 So.2d 1119 (Fla. 2000); Spencer v. State, 645 So. 2d 377, 383 (Fla. 1994); Duest v. State, 462 So. 2d 446 (Fla. 1985). Here, Conde failed to object to all but one (1) of the allegedly improper opening statement comments and did not move for a mistrial. Further, of the eleven (11) improper comments Conde claims were made during closing argument, he objected to only two. Again, he did not seek a mistrial. Having failed to object and move for a mistrial, Conde has preserved only 3 comments for appellate review.

This Court has long held that absent a showing of fundamental error, the failure to object to an alleged improper comment bars review. See Brooks v. State, 762 So.2d 879, 905 (Fla. 2000); McDonald v. State, 743 So.2d 501, 505 (Fla. 1999); Wyatt v. State, 641 So.2d 355 (Fla. 1994); Street v. State, 636 So.2d 1297 (Fla. 1994); Waterhouse v. State, 596 So.2d 1008 (Fla. 1992). "Fundamental error has been defined as the type of error which 'reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.'" Urbin v. State, 714 So.2d 411, 418 n. 8 (Fla.1998)). See Crump v. State, 622 So.2d 963, 972 (Fla.1993) (holding that since prosecutorial comments did not constitute fundamental error, absence of preservation of issue by defense counsel precluded review); Pacifico v. State, 642 So.2d 1178, 1182 (Fla. 1st DCA 1994).

Even where a challenged comment is the subject of a contemporaneous objection, this Court has repeatedly recognized that wide latitude is permitted in arguing to a jury. Breedlove v. State, 413 So.2d 1, 8 (Fla. 1982); Thomas v. State, 326 So.2d 413 (Fla. 1975). Logical inferences may be drawn, and prosecutors are allowed to advance all legitimate arguments within the limits of their forensic talents in order to

effectuate their enforcement of the criminal laws. Spencer v. State, 133 So.2d 729 (Fla. 1961). The control of comments is within the trial court's discretion, and an appellate court will not interfere unless an abuse of such discretion is shown. Thomas; Paramore v. State, 229 So.2d 855 (Fla. 1969), modified, 408 U.S. 935 (1972). Each case must be considered on its own merits, however, and within the circumstances surrounding the complained of remarks. Id.

ATTACKS ON CONDE'S CHARACTER

Conde complains that, during opening argument, the prosecutor unfairly attacked his character by referring to him as "this strangler," "their attacker," "their killer," "the man who went out hunting for victims," the man the police had dubbed "the Tamiami strangler" and referred to the police task force as "the strangler task force." These unpreserved comments were not improper and do not constitute fundamental error. Read in context, they cannot be construed as a direct or implicit attack upon defendant's character, but rather, as a description of what happened and an outline or preview of what the evidence would show. The prosecutor began his opening by describing where Rhonda's body was found and its condition (T 6136-39). He informed the jury that Rhonda was a prostitute, but that she had never consented or agreed to give up her life (T 6139). The

prosecutor then noted that because Rhonda worked alone, the police had warned her about a man in the area who they had called **the Tamiami strangler. That he was out there killing prostitutes**." (T 6139). The police made sure that she "**knew that five other prostitutes had been murdered**. And that each of them had been murdered in the same way. Each of them had been strangled. Strangled by that I mean, not with a rope around their neck or anything else using hands or arm in physically **manually strangled** to death." (T 6139).

Continuing the prosecutor went over what the police knew, how and where the victims were found and the condition of their bodies. The prosecutor explained that some of them held semen evidence, "[e]vidence left by **their attacker, their killer**." (T 6140). The prosecutor stated that the police "new (sic) about **this strangler** . . . ." (T 6140). A little later the prosecutor discussed how Conde became a suspect, how the police were in his apartment, in response to the emergency call from G.M., and how they observed the green beeper that had belonged to victim Charity Nava and suddenly realized that "they [were] standing inside the strangler's home." (T 6143).

Discussing the DNA evidence, the prosecutor explained how the task force geared up once they were told that the DNA was from the same perpetrator for 4 of the 6 victim's, "the

detectives who had been workng on the strangler task force for months were now ready to look for one man . . . .” (T 6145). Finally, the prosecutor told the jurors that this case was about Rhonda’s murder, not about whether the police or some scientific expert didn’t do the right thing, “**this is about a man who went out hunting for victims**.”

These unpreserved comments do not amount to attacks on Conde’s character. The purpose of opening argument is to “outline what an attorney expects the evidence will establish . . . .” Bush v. State, 809 So.2d 107, 118 (Fla. 4th DCA 2002). That is exactly what the prosecutor was doing here, none of his comments directly referred to or mentioned Conde, all the prosecutor was doing was describing what had happened to Rhonda which entailed mentioning her killer.

The only comment that was objected to during opening was the prosecutor’s statement, made while discussing the fiber evidence, that “each and every one of the victims of the Tamiami strangler were found to have these fibers [from the bathroom carpeting] on them.” (T 6149). Again, this comment was not directly linked to Conde and was simply a reference to the man who had killed these victims.

Conde also argues that several attacks on his character were made during closing argument including an unpreserved comment

made while the prosecutor was telling the jurors that they knew what the truth was, they knew that "this defendant went out hunting for victims. That was his thing." (T 7822). Again, read in context, this was not an attack on Conde's character, but rather, a comment on the evidence and "fair reply" to defense counsel's closing argument that Conde killed all six victims, but did so in an emotional rage, not in a premeditated fashion. See Hazelwood v. State, 658 So.2d 1241, 1243 (Fla. 4th DCA 1995) (it is "universal that counsel is accorded a wide latitude in making arguments to the jury particularly in retaliation to prior comments made by opposing counsel.").

There was an objection to the prosecutor's reference, during closing argument, to the fact that Conde's wife found out that he was an adulterer: "[t]he defendant broke his marriage vows by going out with prostitutes and as a result of that his wife discovers it. And what does --she obviously learns first of all he is an **adulterer**, but second of all even worse look who else he is having unprotected sex with." (T 7776). Discussing how Conde blamed the prostitutes for breaking up his marriage, the prosecutor stated: "he is the one who created the situation. He is the one who should be convicted. He is the one who is a **sociopath."**

The trial court gave a curative instruction, telling the

jury to disregard those two labels-- adulterer and sociopath (T 7789). In Moore, 27 Fla. L. Weekly S186 (Fla. March 7, 2002), this Court noted that it has continually expressed its intolerance for improper prosecutorial arguments and comments, especially in death cases. However, the court found two isolated references to Moore as "the devil," in that case, although ill advised, to be less problematic than the pervasive and extensive conduct condemned in other cases, like Brooks v. State, 762 So.2d 879, 905 (Fla.2000) and Urbin v. State, 714 So.2d 411, 418-22 (Fla.1998). See Chandler v. State, 702 So.2d 186, 191 n. 5 (Fla.1997) (holding that a prosecutor's isolated comments that defense counsel engaged in "cowardly" and "despicable" conduct and that the defendant was a "malevolent ... a brutal rapist and conscienceless murderer" was not so prejudicial as to vitiate the entire trial); Carroll, 815 So.2d 601 (Fla. 2002)(finding prosecutor's isolated statements that defendant was the "boogie man" and a "creature that stalked the night" who "must die" not so egregious or cumulative in scope to be error).

THE REFERENCE TO "UNCHARGED OFFENSES"

Next, Conde argues that the prosecutor made reference to the 5 collateral homicides in opening statement and reminded the jury about them in closing argument. Again, all of these

alleged errors are unpreserved as Conde failed to object to them. Further, it is clear that most of these statements were referring to what Conde said in his confession, his own words, which is not Williams rule evidence. The remaining statements, read in context, were merely proper comments on the evidence and were “fair reply” to the defense counsel’s argument wherein he asserted that Rhonda’s murder was not premeditated and that there was no proof of that. See Hazelwood, 658 So.2d at 1243.

Appellant did object to the prosecutor’s reference to the testimony about G.M. in closing; however, that too, was merely a comment on the evidence. See also White v. State, 377 So. 2d 1149, 1150 (Fla. 1979)(“[i]t is proper for a prosecutor in closing argument to refer to the evidence as it exists before the jury and to point out that there is an absence of evidence on a certain issue").

”ATTACKS” ON DEFENSE COUNSEL

The last argument raised here is that the prosecutor’s closing unfairly attacked defense counsel. Again, these are unpreserved and do not constitute fundamental error. Defense counsel’s closing focused on all the alleged mistakes the police, medical examiners and forensics people had made and tried to use that to create a reasonable doubt about the

credibility of the physical evidence. In reply, the prosecutor pointed out that defense counsel was trying to obscure the real issues, leading the jury down the wrong path. These cannot reasonably be construed as attacks on defense counsel. They were fair reply to defense counsel's closing and fair comment on the evidence presented. See Chandler, at 191 n. 5 (holding that a prosecutor's isolated comments that defense counsel engaged in "cowardly" and "despicable" conduct were not reversible error).

PENALTY PHASE

Appellant's final point, raised under Point X, is that he was denied a fair sentencing hearing because the prosecutor made impermissible arguments during the penalty phase closing argument. In order for improper comments made in the closing arguments of a penalty phase to constitute fundamental error, they must be so prejudicial as to taint the jury's recommended sentence. Brown v. State, 124 So.2d 481, 484 (Fla.1960); Thomas v. State, 748 So.2d 970, 985 (Fla.1999)

In discussing the sexual abuse that Conde allegedly suffered as a child, the prosecutor noted that whatever Conde may have felt before, he now feels the power of killing "and he killed, and he killed and he killed," and he killed Rhonda because he had the power to do so (T 9102). This alleged error was not objected to and therefore is unpreserved. Read in context, the

prosecutor was trying to rebut Conde's mental health experts and their testimony that he killed in an emotional rage, not because he derived pleasure from it. The jury had already decided that Conde was a killer; thus, this comment is not fundamental error.

Conde did object to the prosecutor's characterization of him as a "brutal person who committed serial murders." However, this likewise is not reversible error. See Moore v. State, 27 Fla. L. Weekly at S186 (Fla. Mar. 7, 2002) (finding that two isolated references to Moore as "the devil" were not reversible); Chandler, 702 So.2d at 191 n. 5 (holding that a prosecutor's isolated comments that defendant was a "malevolent ... a brutal rapist and conscienceless murderer" was not so prejudicial as to vitiate the entire trial). As already noted, Conde had already been convicted of Rhonda's murder by the penalty phase. Finally, Conde objected to the prosecutor's statement, while discussing Conde's attempts to conceal his crime, that "no serial murderer was ever that concerned with killing that they did it in front of a police officer" (T 9153). Again, neither of these comments deprived Conde of a fair sentencing hearing.

POINT VII

THE TRIAL COURT CORRECTLY DENIED CONDE'S

MOTION TO SUPPRESS HIS CONFESSION (Restated).

Prior to trial, Conde unsuccessfully attempted to suppress his confession to Rhonda's murder. He now seeks to overturn that ruling; however, it is clear that the trial court properly denied the motion to suppress the confession. The standard of review applicable to a trial court's ruling on a motion to suppress is that "a presumption of correctness" applies to a trial court's determination of historical facts, but a ***de novo*** standard of review applies to legal issues and mixed questions of law and fact that ultimately determine constitutional issues. See Smithers v. State, 27 Fla.L.Weekly S477 (Fla. May 16, 2002), citing Connor v. State, 803 So.2d 598, 608 (Fla. 2001).

"When, as here, a defendant challenges the voluntariness of his or her confession, the burden is on the State to establish by a preponderance of the evidence that the confession was freely and voluntarily given." DeConingh v. State, 433 So.2d 501, 504 (Fla. 1983). "In order to find that a confession is involuntary within the meaning of the Fourth Amendment, there must first be a finding that there was coercive police conduct." State v. Sawyer, 561 So.2d 278, 281 (Fla. 2d DCA 1990), citing Colorado v. Connelly, 479 U.S. 157 (1986). "The test of determining whether there was police coercion is determined by

reviewing the totality of the circumstances under which the confession was obtained." Sawyer 561 So.2d at 281.

Here, Conde has not established improper police coercion. Instead, the totality of the circumstances surrounding the confession demonstrate its voluntary nature and that it was given of Conde's free will. See Traylor v. State, 596 So.2d 957, 965 (Fla. 1992) (opining "[w]e adhere to the principle that the state's authority to obtain freely given confessions is not an evil, but an unqualified good.").

Length Of Interrogation- A factor to be considered in reviewing the totality of the circumstances surrounding a confession is the length of time Conde spoke with the police prior to confessing. Initially, Conde mischaracterizes the manner in which he spent his time at the police station during the questioning process. He was not subject to continuous interrogation by rotating teams of police officers, as he suggests. Further, his "interrogation" room was a standard police interview room (8 x 10) and he was provided with a sports jacket when he complained of being cold.[9] The transcript of the hearing on the motion to suppress reveals that the evidence presented contradicts Conde's version of events.

[9] Detective Romangi admitted that the room was cold and that 3-4 hours into the interview he had to get a sports coat for Conde (SR 225).

Conde did not testify at the suppression hearing. The facts admitted at the suppression hearing revealed an alert, intelligent, and cooperative Appellant. He was given breaks for the restroom, food and drink, and multiple breaks throughout the interview process, including several opportunities to telephone his family. Conde waived his rights no less than three times in this period. No facts to the contrary were presented to the trial court. Ignoring the factual evidence before the lower court, Conde now argues that his confession was involuntary. However, it should be reiterated that there is no evidence that Appellant's free will was overborne at any time by any of the detectives.

Arriving at the police station at approximately 11:50 a.m. on Saturday, June 24, 1995, Conde was placed inside an interview room and his handcuffs were removed (SR 123, 127). Detective Romangi described the room as clean, carpeted, and well-lit, with a 3x5 table and chairs (SR 122-23). Detectives Romangi and Estopinan initiated their first interview with Conde at that time. (SR 122-25). They immediately reviewed a Miranda rights warning form, reading it aloud with Conde (SR 127-28). After reading it, Appellant signed the form at 12:03 p.m. (SR 127-28). In response to questioning, he revealed that he had a twelfth grade education and one (1) year of junior college (SR 127, 129-

30). He understood and had no problem communicating in English (SR 131-32). Conde told the officers that he was not intoxicated or under the influence of any alcohol, illegal narcotics or other substances (SR 129). Further, he did not have any mental problems and was not receiving any psychiatric care (SR 129-30). Conde also executed consent to search forms for his house and car, at 12:05 p.m. and 12:07 p.m., respectively (SR 138, 142-43). He later agreed to give DNA samples (blood and oral swab) (SR 144).

The interview with Detectives Romangi and Estopinan lasted a total of 12 hours, until midnight, during which time Conde was given numerous breaks, including time to use the restroom, telephone his grandmother (he spoke to her for 15-20 minutes), and to rest (SR 162, 170). Approximately 3-4 hours into the interview, Conde complained of being cold and was given a sports jacket to wear (SR 225). Conde did not thereafter complain about being cold (SR 263). The detectives also bought Conde a hamburger and french fries, which he ate in the interview room (SR 161). Several hours into this first interview, the detectives discovered that Conde was being represented by an Assistant Public Defender on a separate case (robbery case) (SR 148). Upon finding the public defender's business card in Conde's wallet, the detectives asked whether Conde would like to

call him, to which Conde responded “no” – that he didn’t wish to speak to any lawyers (SR 149-50).

Conde was cooperative during the interview, he did not hesitate to speak with the detectives about the sexual battery of GM but steadfastly denied any involvement with the homicides (SR 150, 156-57). The interview with Detectives Romangi and Estopinan ended once Conde said that he was tired (SR 166). Conde told the detectives that he would think about what they had discussed and agreed to speak with them again (SR 166).

Sergeant Jimenez then spoke with Conde for 1 ½ hours during which Conde continued to deny any involvement with the homicides (SR 165-66). Before questioning Conde, Sergeant Jimemez offered him pastries, something to drink or to use the restroom, all of which Conde declined (SR 508). The interview ended after Conde began to cry and then became silent, non-responsive, while they were discussing his family (SR 511). Conde was then transported to the TGK holding facility, which is about 2 miles from headquarters at approximately 3:00 a.m. that Sunday, June 25, 1995. (SR 265).

Eleven hours later, at around 2:00 p.m., Sergeant Jimenez and Detective Romangi returned to the TGK facility to see whether Conde would speak with them again (SR 172, 514). Conde did not hesitate in agreeing to speak with them (SR 515).

Further, he did not appear tired (SR 517). On the way back to headquarters, the officers took him to McDonald's and bought him a hamburger and french fries, which Conde ate in the car (SR 174, 517-18). They arrived at headquarters at 2:25 p.m. and Conde was put in an interview room and re-Mirandized (SR 177, 517-18). He executed another rights waiver form at 2:30 p.m. (SR 177). Again, Conde did not ask to speak to a lawyer; however he did ask to speak with his family during the interview, which request was promptly granted (SR 179, 518-19). He agreed to tell the officers the truth after the phone calls (SR 520). Conde phoned his family (grandmother, wife and kids) and spoke for about 45 minutes, the conversations concluded at approximately 5:00 p.m. (SR 179-80, 519-20).

Conde was relieved after the phone conversations– his whole demeanor changed, he was relaxed and looked directly at the officers, making eye contact (SR 181-82, 520). Conde then began talking with the officers about the homicides and giving them details about it (SR 183-84, 520). They started talking about the homicides at about 5:00 p.m. (SR 184). Conde was not refused any personal needs request– he was allowed to use the bathroom and was given food and beverages (SR 186-87). In fact, the officers even bought Conde a chocolate cake when he asked for a piece (SR 186).

The officers did not take any notes the first time Conde confessed to the murders (SR 188-92). They were in the process of taking handwritten notes the second time around when they were told that Conde would have to be transported to the Dade County jail for a first appearance hearing the next morning (SR 190-92, 201). At that point they decided to bring in a stenographer to record the confession and at approximately 11:45 p.m., began taking a stenographic statement from Conde. (SR 193). Before giving the formal stenographic statement, Conde was re-Mirandized (SR 194, 197-99). The statement was finished near 2:50 a.m., but Conde was transported to the Dade County jail before it was transcribed (SR 193, 201). He agreed to read and sign the statement when finished, but then refused to do so once represented by counsel (SR 203, 04). Conde was represented by an Assistant Public Defender at the first appearance hearing and indicated afterwards, for the first time, that he did not want to speak with the officers (SR 204-05).

The length of Conde's interrogation in the instant case does not render his confession involuntary. This Court has recently upheld the voluntariness of a confession where the defendant was subjected to a period of continuous police custody for more than 54 hours. Chavez v. State, slip opinion #SC94586 (Fla. May 30, 2002). This Court noted that the 54 hour detention did not

render Chavez's confession involuntary for the following reasons: Chavez was permitted frequent breaks; he was provided with food, drink, and cigarettes (as requested) at appropriate times; his interrogation was interspersed with time away from police facilities for visits to various facilities; he was provided with a six hour rest period(during which time Chavez slept); he was given times when he was left alone for quiet reflection; and he was repeatedly given Miranda warnings, in Spanish.

Here, the longest time Conde was in continuous police custody was **16 hours** on Saturday, June 24th, 1995, and he did not confess to the homicides during that time. Further, during that 16 hour period, the police provided Conde with food, drink, use of the telephone, and frequent breaks, including restroom breaks. Like Chavez, Conde was informed of his Miranda rights during that time and knowingly waived them. He was then transported to a holding facility to sleep and given an 11 hour break from interrogation. He agreed to talk to the police again the next day and was being interrogated **for only about 3 hours**, on Sunday, June 25, 1995, when he confessed to the murders. Importantly, **more than 45 minutes of that 3 hour period** was spent talking on the telephone with his family and eating a hamburger and french fries. Additionally, no personal

needs request was denied to Conde. He was also re-Mirandized before the interrogation began and before making his formal statement; again, he waived his rights.

A comparison of the length of Conde's interrogation with that of Chavez shows that Conde's interrogation did not result in an involuntary confession. He was not in police custody for a long time before confessing on Sunday, June 25, 1995. His 16 hour interrogation the day before, Saturday, June 24, 1995, did not result in a confession, and was interspersed with regular breaks for food, drink, and to use the telephone and restroom. Conde was then given an 11 hour break, during which time he was transported to the TGK holding facility, presumably for some sleep. The officers picked him up the next day, took him to McDonald's for a hamburger and french fries and then back to the interview room. Conde confessed 3 hours later, only after he spoke to his family on the telephone for 45 minutes. There was nothing cocercive about the length of Conde's confession. See also Walker v. State, 707 So.2d 300, 311 (Fla. 1997) (finding a confession voluntary where the defendant was questioned for 6 hours during the morning and early part of the day, was provided with drinks and bathroom breaks, and was never threatened with capital punishment, or promised anything).

Given the overwhelming evidence establishing that Conde's

Appellant's confession in this case was voluntary, the authority provided by him is inapplicable. For instance, in State v. Sawyer, 561 So. 2d 278, 281 (Fla. 2d DCA 1990), the facts are markedly distinguishable from the instant case. Initially, the actual length of Sawyer's interrogation cannot be compared to Appellant's. Sawyer was interrogated *continuously* over a period of sixteen hours by several cadres of detectives. Id, at 281. Further, Sawyer suffered numerous and egregious violations of his constitutional rights. To begin with, Sawyer did not receive his first Miranda rights until four hours into the interrogation. Thereafter, the police ignored two requests for counsel and refused to stop questioning when Sawyer insisted he no longer wanted to talk and said he needed sleep. Id, at 281-82. No such errors occurred in the instant case.

Also, in Sawyer, the interrogation was available on tape which:

> reveal[ed] that Sawyer was harangued, yelled at, cajoled, urged approximately fifty-five times to confess to an accidental killing, promised assistance . . . if he did "tell the truth," threatened with first degree murder and its attendant consequences if he did not cooperate ....

Sawyer, at 288. No such evidence was presented here.

Finally, Sawyer was sleep-deprived-- the tapes revealed "loud sounds of yawning by Sawyer as the early morning hours

arrived, his protestations of wanting to sleep, to rest, to lie down, all ignored and deliberately utilized by the detectives to taunt Sawyer into confessing so that he, and they, could get some needed rest." Sawyer, at 288. Conde was not sleep-deprived, he had an 11 hour break to sleep and did not appear tired at any time.

Under the particular circumstances of this case, the mere length of time involved fails to establish that the trial court improperly denied the motion to suppress the confession.

DECEPTION-Another factor to be considered in reviewing the totality of the circumstances surrounding a confession is any deception used by the police prior to the defendant confessing. Florida courts have **not** generally found **verbal** deception to render a confession involuntary. See e.g. Bowen v. State, 565 So.2d 384 (Fla. 5th DCA 1990); State v. Moore, 530 So.2d 349 (Fla. 2d DCA 1988). Mere verbal deception is all that Conde alleges occurred in the instant case.

Conde first complains about the homicide officers who came to arrest him, without a warrant, at his grandmother's house, for the sexual battery of G.M. Conde argues that the officers, who had just learned that Conde was the prime suspect in their serial murder investigation, had a "manifest" intent to interrogate him about the homicides and obtain a confession

which they did not disclose to his grandmother upon entering her apartment.

The officers were not required to tell Conde's grandmother they were planning to ask Conde about the homicides at a later time in order to obtain her consent to enter the apartment. Warrantless arrests are authorized by section 901.15, Florida Statutes (2001), which allows a police officer who reasonably believes that a person has committed a felony to arrest that person without a warrant. See U.S. v. Watson, 423 U.S. 411 (1976)(warrantless arrest requires only probable cause). While an arrest made in a home requires a warrant to be reasonable, there are recognized exceptions to that requirement, the most common of which is consent. See Payton v. New York, 445 U.S. 573 (1980) (absent valid consent or exigent circumstances, law enforcement may not cross the threshold of a residence without a warrant); Saavedra v. State, 622 So.2d 952, 956 (Fla.1993)(same).

Undoubtedly, Conde's warrantless arrest in this case was legal. The police had probable cause to arrest Conde for the sexual battery of G.M. since the victim was found bound and duct-taped in Conde's apartment and identified him as her assailant. Further, Conde's grandmother consented to the homicide detectives entering her apartment after they told her,

in Spanish, who they were (SR 552). There was no testimony to the contrary at the suppression hearing. The grandmother's consent to enter her apartment is not affected by anything the officers desired to question Conde about at a later time. The fact remains that the homicide detectives did not question Conde about the homicides at his grandmother's apartment; rather, they waited until he was taken to headquarters, given his Miranda rights and had waived those rights before questioning commenced.

Conde also complains that the police exaggerated and lied about the strength of their case against him. Detective Romangi told Conde that there was an exact DNA match to him on the homicides, even though he had only a preliminary match at the time (SR 228). Misrepresentations of fact regarding the crime being investigated; however, do not render the conversation involuntary. Bowen v. State, 565 So.2d 384 (Fla. 5th DCA 1990); La Rocca v. State, 401 So.2d 866 (Fla. 3d DCA 1981))(misrepresentations made by the polygraph examiner to the defendant that someone else fired the fatal shot and that the defendant's involvement would be minimized, did not render the confession involuntary).

Conde's next complaint, that the police impermissibly used

a customized "Christian Burial Technique," is meritless.[10] Here, none of the victims' bodies were missing; therefore, the police had no need to use that technique and did not employ that technique. What the police told Conde is that the perpetrator would be portrayed in the press as a "monster" and that he would be better off telling his "side" of the story for the press. This was more akin to the police portraying themselves as a "friend" of Conde's, which the courts have found to be of such a low level of deceit that it could not be coercive. See Cannady v. State, 427 So.2d 723 (Fla. 1983). Further, none of these ploys resulted in Conde making a statement and therefore, did not render his confession involuntary.

Propriety Of Miranda Rights.-Next, appellant argues that his confession is involuntary because he did not "knowingly and intelligently" waive his Miranda rights. This Court has repeatedly held that "a determination of the issues of both the voluntariness of a confession and a knowing and intelligent waiver of Miranda rights requires an examination of the totality

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[10] The so-called "Christian Burial Technique" is used when a victim's body is missing and the police suggest that it should be found and given a proper burial. Even in cases where the "Christian" burial technique has been used, this Court has found that it did not coerce the confession or render it involuntary. See Chavez; Lukehart v. State, 776 So.2d 906 (Fla. 2000).

of the circumstances." Lukehart v. State, 776 So.2d 906, 917 (Fla. 2000).

Conde relies upon the same facts he argued in support of his involuntary confession claim to support this argument. However, for the reasons outlined above, the trial court's finding that Conde voluntarily made his statements after validly waiving his Miranda rights, is supported by the record and must be upheld. Conde's three waivers of his rights were free choices, made with the full awareness of the rights and consequences involved.

THE VIENNA CONVENTION TREATY-Conde next complains that his confession should be suppressed because his rights under "The Vienna Convention" international treaty were violated when the police failed to contact the Columbian consulate and inform them that a Columbian citizen had been arrested and failed to inform Conde of his right to contact the Columbian consulate.

In Maharaj v. State, 778 So.2d 944, 959 (Fla. 2000), this Court rejected the same claim holding that Maharaj did not have **standing** to raise the issue "as treaties are between countries, not citizens." Thereafter, in Darling v. State, 808 So.2d 145, 165 (Fla. 2002), this Court noted that "[i]t is unclear that the Vienna Convention creates individual rights enforceable in judicial proceedings," but that it didn't need to decide the issue because it did not affect the disposition of the case

since Darling had failed to show that he was **prejudiced** by the claimed violation. Id. at 166 f.n. 19. to In so holding, this Court relied upon Breard v. Greene, 523 U.S. 371, 372 (1998), for the proposition that "it is extremely doubtful that the violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial." Murphy v. Netherland, 116 F.3d 97, 100 (4th Cir. 1997) (noting that to establish any entitlement to relief based on the notification requirement in the treaty, a defendant must "establish prejudice" by "explain[ing] how contacting the...consulate would have changed . . . his sentence."

As this Court noted, "[i]t remains an open question whether the Vienna Convention gives rise to any individually enforceable rights." U.S. v. Minjares-Alvarez, 264 F.3d 980, 986 (10th Cir. 2001). Several federal courts of appeal have considered the question but declined to address it directly. Id. However, all agree that even if the Vienna Convention does create individual rights, **suppression is not an appropriate remedy for a violation of those rights.** Id. See U.S. v. Chanthadara, 230 F.3d 1237, 1255-56 (10th Cir. 2000).

Appellant has not cited a case which holds that suppression of statements/evidence is an appropriate remedy for violation of

"The Vienna Convention." In fact, he cites to only one federal case in support of his argument, Faulder v. Johnson, 81 F.3d 515 (5th Cir.), wherein the State of Texas admitted that it had violated "The Vienna Convention." Despite that admission, though, the Fifth Circuit declined to reverse the case because the evidence that would have been obtained by the Canadian authorities was the same as or cumulative to the evidence that defense counsel had or could have obtained. Moreover, subsequent to Faulder, the Fifth Circuit issued U.S. v. Jimenez-Nava, 243 F.3d 192, 198-99 (5th Cir. 2001) wherein it found that the Vienna Convention creates no individual rights and that suppression of evidence is inappropriate even if such individual rights were created.

Finally, Conde's claim as to how he was prejudiced by the failure to consult with the Columbian consulate is utterly without merit. He claims that he would have invoked his right to counsel and silence upon proper advice and recommendation by the consulate; however, Conde was specifically asked whether he wanted to contact his current lawyer, an Assistant Public defender for a robbery case, and declined stating that he did not want to call any lawyers. He also waived his Miranda rights no less than 3 times before making his confession.

FIRST APPEARANCE- Conde next complains that his confession

should be suppressed because he was not provided with a first appearance hearing within 24 hours of his arrest, as required by Florida Rule of Criminal Procedure 3.130 and the failure to provide that hearing resulted in his confession. See Keen v. State, 504 So.2d 396, 400 (Fla. 1987), disapproved in part on other grounds, Owen v. State, 596 So.2d 985, 900 (Fla. 1992) ("[W]hen a defendant has been advised of his rights and makes an otherwise voluntary statement, the delay in following the strictures of [rule 3.130] must be shown to have induced the confession.").

This Court recently rejected the same argument in Chavez v. State, slip opinion SC94586 (Fla. May 30, 2002). In that case, Chavez argued, as does Conde, that his confession was improperly coerced through a deprivation of his right to a first appearance within 24 hours of arrest. This Court disagreed noting that "where, as here, a defendant has been sufficiently advised of his rights, a confession that would otherwise be admissible is not subject to suppression merely because the defendant was deprived of a prompt first appearance." Id. at slip op. 39.

Relying upon its analysis in Keen, this Court noted that there is no per se rule requiring suppression of voluntary statements made after 24 hours without a first appearance. Rather, each case must be examined individually to determine

whether a violation of the rule induced an otherwise voluntary confession. This Court concluded "that the failure to provide Chavez with a first appearance within twenty-four hours after his arrest did not compel his confession," because, "as in Keen, the record reflects that Chavez was repeatedly advised of his Miranda rights, and knowingly, intelligently, and voluntarily waived them prior to confessing."

Similarly, here, Conde was repeatedly advised of his Miranda rights before giving his statement. At the beginning of the questioning, he was advised of his rights and waived them in writing. At the same time he gave consent to search his house and car. The second day, he was re-Mirandized and again waived his rights. Finally, before giving his formal statement Appellant was re-Mirandized and again waived his rights.

Not one of the factors raised by Appellant negatively impacted the voluntariness of his confession, either individually or collectively. Thus, the trial court's ruling on the motion to suppress must stand.

POINT VIII

THE EVIDENCE WAS LEGALLY SUFFICIENT TO ESTABLISH THE AGGRAVATORS CCP AND HAC.

There is substantial, competent evidence supporting the trial court's findings of CCP and HAC. See Hildwen v. State,

727 So.2d 193, 196 (Fla. 1998)(whether an aggravator exists is a factual finding reviewed under the competent, substantial evidence test); Gordon v. State, 704 So.2d 107 (Fla 1997); Alston v. State, 723 So.2d 148, 160 (Fla. 1998)(court is not to reweigh evidence, only to determine whether competent, substantial evidence supports the trial court's finding).

CCP- The judge's finding that the elements of "coldness" i.e., calm and cool reflection, were met is supported by substantial, competent evidence. The trial court concluded that Conde "did not act out of emotional frenzy, panic or a fit of rage." Rather, his "actions were spawned by his ongoing separation with his wife, Carla, which did not involve any level of intensity of emotion. It involved however the defendant experiencing feelings of sadness." (R9 1730). In so finding, the trial court noted that Conde's confession on this point was to the contrary, but rejected that as self-serving and contrary to the facts that could be inferred from the similar crimes evidence, relying upon Wuornos.

Conde attacks this finding on several grounds. First, he contends that the trial court could not reject the unrebutted testimony from his mental health experts that he was incapable of calm and cool reflection. This Court has held that "uncontroverted expert opinion testimony may be rejected where

it is difficult to square with the other evidence in the case." Morton v. State, 789 So.2d, 324, 330 (Fla. 2001), citing Foster v. State, 679 So.2d 747, 755 (Fla.1996); Wuornos, 644 So.2d at 1010. Here, the experts' testimony of Conde's inability to coolly and calmly reflect cannot be squared with the fact that Appellant went out on 6 different occasions, picked up prostitutes, brought them back to his house, had sex a couple of times and then after the sex acts were complete strangled the victims to death.

Appellant next argues that the trial court could not reject his confession as self-serving because it was uncontroverted and internally consistent. Again, the trial court was entitled to reject that portion of the confession which it found supported a lack of cool and calm refelction as self-serving and contrary to the facts that could be inferred from the similar crimes evidence. In Hertz v. State, 803 So.2d 629, 650 (Fla. 2001), this Court noted that the "cold" element is only not found if the crime is a "heated" murder of passion, in which loss of emotional control is evident from the facts...." Conde's confession reveals absolutely no anger, rage or other loss of emotional control. Further, it is clear that during the lengthy struggle with Rhonda, Conde had time to reflect upon his actions. Finally, his claim that the judge's finding that

Conde's actions "did not involve any level of intensity of emotion" is not supported by the record, is also without merit. Conde relies solely upon his experts' testimony and his confession in support of that argument.

The second element of CCP, a careful prearranged plan, was found by the trial court to exist based upon the fact that all of the victims, including Rhonda, were prostitutes, all were picked up in the same part of town, taken back to Conde's place for sex, strangled after the sex acts were completed, redressed and then dumped in a residential neighborhood near Eighth Street. Further, Conde wrote on the third vicitm's back because he wasn't receiving any publicity and wanted the police to know that the murders were connected. Conde taunted the police to "catch him if they could." Conde argues that a finding on the second element cannot rest exclusively on collateral crimes evidence (IB 70-71). Here, the trial court's finding is based on the facts of Rhonda's murder, which are buttressed by the other 5 crimes and admitted to in Conde's confession.

The trial court's finding that the third element, "heightened premeditation," was established is also supported by substantial, competent evidence. The trial court found that the manner of the killing here indicated heightened premeditation based on the manner in which Conde: (1) approached Rhonda from

behind; (2) wrapped his arms around her neck; (3) subdued her after she initially broke free, and (4) manually strangled her with such tremendous force that it fractured her hyoid bone. These factors, along with the similar crimes evidence, evince heightened premeditation.

The final requirement to establish CCP is that the defendant had no pretense of moral or legal justification. Appellant does not even attempt to argue that he has a justification for a brutal murder. His argument is that the "spur of the moment decision" to begin strangling Ms. Dunn "appears to be the result of an emotional spur of the moment decision, not 'coldness' contemplated by CCP." (IB-67-68). Evidence established during the trial, proves otherwise. There is no moral or legal justification for such a horrific crime.

HAC- There is also substantial, competent evidence supporting the trial court's finding of HAC. This Court has repeatedly stated that fear, emotional strain, mental anguish or terror suffered by a victim before death is an important factor in determining whether HAC applies. See James v. State, 695 So.2d 1229, 1235 (Fla. 1997); Pooler v. State, 704 So.2d 1375, 1378 (Fla. 1997); Preston v. State, 607 So.2d 404, 410 (Fla. 1992). Further, the victim's knowledge of his/her impending death supports a finding of HAC. See Douglas v.

State, 575 So.2d 165 (Fla. 1991); Rivera v. State, 561 So.2d 536, 540 (Fla. 1990). In evaluating the victim's mental state, common-sense inferences from the circumstances are allowed to be drawn. See Swafford v. State, 533 So.2d 270, 277 (Fla.1988)).

This Court agrees that "strangulation when perpetrated upon a conscious victim involves foreknowledge of death, extreme anxiety and fear, and that this method of killing is one to which the factor of heinousness is applicable." Sochor v. State, 580 So.2d 595, 603 (Fla. 1991), rev'd on other grounds. Sochor v. State, 112 S.Ct 2114 (1992). (R-1729). Conde admits that this Court has held that death by strangulation is nearly per se heinous, see Hitchcock v. State, 578 So.2d 285, 692 (Fla. 1990), Johnson v. State, 465 So.2d 499, 507 (Fla. 1985), but argues it should be considered heinous only when the victim was conscious when strangled to death, citing Overton v. State, 801 So.2d 877 (Fla. 2001). This conclusion is true, yet in Overton and here, **the evidence firmly establishes that the victim was conscious when strangled to death.**

Thee trial court found that the state's evidence made it clear that Rhonda was conscious of being strangled, due to the nature of the struggle which occurred. Rhonda had 30 separate fresh injuries and had been warned 36 hours before her murder about the strangler. It is clear that she fought for her life

and was acutely aware of her impending death. (R9-729-30).

Conde attempts to use Dr. Rao's testimony to argue that Rhonda was unconsciousness. Rao never testified, however, with any certainty, that Rhonda was unconscious, or that the injuries to her head rendered her unconscious. (T v137 8276-7). What is certain is that Rhonda "consciously" fought with Conde; an unconscious victim does not fight with her attacker. See Tompkins v State, 502 So.2d 415 (Fla. 1986)(finding death by strangulation is not instantaneous and evidence of struggle supports finding of HAC).

Rhonda was not only conscious, but struggling and fighting to get away from Conde. Dr. Bell testified that it takes 3-4 minutes to strangle someone to death. It is not known for certain how long the struggle lasted here but it was surely enough time for Rhonda to suffer extreme anxiety and fear.

POINT IX

THE TRIAL COURT PROPERLY EVALUATED AND REJECTED THE STATUTORY AND NON-STATUTORY MITIGATION OFFERED (restated).

It is Conde's position that the trial court erred in rejecting his statutory mitigation of (1) extreme emotional or psychological disturbance, (2) capacity to appreciate the criminality of his conduct or the conform his conduct to the requirements of the law was substantially impaired, and (3) his

non-statutory mitigation involving Conde's "family background" factors (IB 76-88). A review of the record reveals that the trial court's conclusions are supported by competent, substantial evidence and that this Court should affirm Conde's sentence of death.

Mitigators are "established by the greater weight of the evidence." Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990); Nibert v. State, 574 So. 2d 1059, 1061 (Fla. 1990)(finding judge may reject mitigator if record contains competent substantial evidence supporting decision). In Campbell, this Court established relevant standards of review for mitigators: (1) whether a circumstance is mitigating is a question of law, subject to de novo review; (2) whether a mitigator has been established is a question of fact, subject to the competent substantial evidence standard; and (3) the weight assigned to a mitigator is within the judge's discretion, subject to the abuse of discretion standard. See, Kearse v. State, 770 So.2d 1119, 1134 (Fla. 2000) (observing whether mitigator exists and weight to be given it are matters within sentencing court's discretion); Trease v. State, 768 So.2d 1050, 1055 (Fla. 2000) (receding in part from Campbell; holding that though judge must consider all mitigators, "little or no" weight may be assigned). At issue here is the propriety of the trial court's rejection

of mitigation. Thus, the standard of review is the competent, substantial evidence test where an appellate court is to pay overwhelming deference to the trial judge's ruling. Guzman v. State, 721 So.2d 1155, 1159 (Fla. 1998).

Whether a mitigator is established lies with the judge and "[r]eversal is not warranted simply because an appellant draws a different conclusion." Sireci v. State, 587 So.2d 450, 453 (Fla. 1991); Stano v. State, 460 So.2d 890, 894 (Fla. 1984). Resolution of evidentiary conflicts is the trial court's duty; "that determination should be final if supported by competent, substantial evidence." Id.

Conde maintains that the trial court erroneously rejected his claim that the murder was committed under the influence of extreme mental or emotional disturbance (IB 76). While the statutory mitigator was rejected, the trial court found that the evidence supported non-statutory mitigation and gave that factor little weight (T 1744-45) However, in rejecting the statutory mitigator, the trial court examined the evidence presented by Drs. Golden and Berlin along with Olga Hervis and Conde's family and friends (T 1733-38). It was the trial court's opinion that Conde's full scale I.Q. of 109, his ability to hold two jobs, have a good employment record, and maintain good relationships with his family, friends, and co-workers all indicated that

there was no extreme mental or emotional disturbance supporting the statutory mitigator even "assuming the defendant was experiencing some form of depression." (T 1735). This is supported by the record which reveals that family and friends merely noted that Conde seemed depressed or sad at his separation from his wife and children. None reported a major change in Conde's personality, especially one which could be described as extreme (T 8062-64, 8068-70, 8075, 8085-87, 8090-95, 8097-107, 8110, 8124-26, 8133, 8135-39, 8154-55, 8174-78, 8180-86). Wuornos, 644 So.2d at 1010 (noting the even uncontroverted testimony can be rejected where it does not square with case facts); Walls v. State, 641 So.2d 381, 390 (Fla. 1994) (recognizing that expert testimony, even if uncontroverted, is not binding on court and its weight/force diminishes were factual support is lacking). Because those who interacted with Conde near the time of the murders reported that he was functioning well, although a little depressed, undercut completely the opinions of doctors who interviewed Conde some four years after the murder while he awaited trial on first-degree murder charges. Likewise, the report of Olga Hervis, relating hearsay, rumor and innuendoes of abuse and a difficult childhood could be rejected in light of the eye-witness testimony of friends and co-workers who reported Conde was

acting normal. As such, the trial court's decision to reject the mitigation of extreme mental or emotional disturbance has record support and should be affirmed.

Turning to Conde's challenge to the trial court's rejection of the mitigator substantial impairment in capacity to apprecite criminality or conform conduct to requirements of the law, the Court will find that the trial judge's decision is supported by substantial competent evidence. Affirmance is required.

As the trial court found, Conde's behavior and actions belie a finding of substantial impairment. Conde's actions show that he knew that his actions were wrong. This is established when he wrote on the back of his third victim "catch me if you can." Clearly, Conde knew that such was a crime and was taunting the police to find him, if they could. However, to avoid the risk of detection, Conde took Rhonda to the safety and secrecy of his home rather than having sexual relations in an open car. Similarly, he bound and duct taped GM so that she could not escape while he attended to his court appearance for an unrelated robbery charge. Further, Conde selected Rhonda because she worked alone, making it easier to avoid detection and capture. Moreover, Conde's ability to maintain to jobs where he interacts with customers and co-workers on a daily basis without killing, shows that he is able to conform his

conduct to the requirements of law. In spite of the defense experts' opinions to the contrary, Conde's actions show that he knew that murder was criminal. Rose v. State, 787 So. 2d 786, 802 (Fla. 2001) (finding no error in rejecting mental mitigator where state undermined mental mitigation and impeached defense expert); Knight v. State, 746 So. 2d 423, 436 (Fla. 1998) (concluding there was no error in judge's rejection of mental mitigation where court weighed evidence presented and resolved conflicts against defendant).

Conde's final challenge is to the trial court's rejection of "family background" factors (IB 86). Here the trial court concluded that the evidence was conflicting. The fact finder's duty is to resolve such conflicts. Sireci, 587 So.2d at 453 (reasoning that whether a mitigator is established lies with the judge and "[r]eversal is not warranted simply because an appellant draws a different conclusion"); Stano v. State, 460 So.2d 890, 894 (Fla. 1984) (recognizing that resolution of evidentiary conflicts is trial judge's duty and his "determination should be final if supported by competent, substantial evidence").

In rejecting the mitigation of "a violent unsafe and unstable environment while living in Columbia as a child", the trial court noted that although Conde's mother had died when he

was an infant and his father was living in the United States, both his grandmothers actively cared for and raised him and provided schooling, housing, food, and clothing (T 8330-31, 8335-42, 8362, 8375-76, 8443, 8463). Specifically, there was testimony that Conde's paternal uncle provided him with a "wonderful and loving" home that included a maid and private schools (T 8463, 8903-05, 8711-12, 8716, 8905). Conde's Uncle Carlos treated him as "a golden child," and was loving. Aside from providing money, Uncle Carlos protected Conde from those who might have harmed him (T 8716-21, 8895-97). The sexual abuse that Conde alleges he suffered by Uncle Carlos was never confirmed (T 8721-22).

Regarding the mitigator that Conde was "repeatedly abandoned

his father during his life," there was, again, conflicting testimony. Although Conde's father moved to the United States and left his children in Columbia, he did return annually for visits and periodically sent money (T 8443-44). Eventually Conde's father had he and his sister come live with him, their step-mother and step-brother and sister (T 8202-05). Conde's former step-mother Irene, described his relationship with his father as loving and caring, his father never abused him (T 8216-17).

POINT XI

THE TRIAL COURT CORRECTLY EXCLUDED CERTAIN EVIDENCE.

Appellant argues that the trial court erred by denying him the right to present to the jury testimony from jail Chaplain Bizarro that Conde had confided in him, in 1995, that he was sexually abused as a child. This was intended to rebut the allegation that Conde's claim of sexual abuse to Dr. Hervis was recently fabricated. Because Chaplain Bizarro was not listed as a witness, and only revealed 4 days into the penalty phase, the trial court was correct to find a discovery violation and that the state would be prejudiced. This Court should affirm.

When the trial court is given notice of an alleged failure to disclose witnesses, it has a duty to conduct an inquiry as to the nature of the violation to determine whether the violation was willful or inadvertent and whether there was undue prejudice. See Richardson v. State, 246 So.2d 771, 775 (Fla.1971); Webber v. State, 510 So.2d 1210, 1211 (Fla. 2d DCA 1987). Such an inquiry took place in this case, and the trial court determined there had been a Richardson violation (T 8579-89, 9022-23).

The trial court's decision on a Richardson hearing is subject to reversal only upon a showing that it abused its

discretion. See State v. Tascarella, 580 So.2d 154, 157 (Fla.1991). The trial court did not abuse its discretion in this case in excluding Chaplain Bizarro's testimony[11] on the ground that the State would be prejudiced because they were 4 days into the penalty phase. Finally, Chaplain Bizarro did testify at the Spencer hearing. Thus, any alleged error does not warrant reversal.

POINT XII

THE DEATH SENTENCE IS PROPORTIONAL IN THIS CASE

The State submits that Appellant's sentence of death is proportional. The trial court found the existence of three (3) aggravating factors and applied great weight to each of them: (1) prior violent felony; (2) HAC and (3) CCP. The trial court found only one (1) statutory mitigating factor, "no significant prior criminal history," and gave it moderate weight. The trial court gave moderate weight to the following non-statutory mitigating factors: (1) Conde's employment background; (2) Conde's family background; and (3) Conde's relationship with his children. He gave little weight to the non-statutory mitigators of (1) being a model inmate, and (2) the fact that Conde will

[11] According to defense counsel, the alleged disclosure to the Chaplain occurred in 1995-96 but he was not put on the witness list until December 9, 1999).

be imprisoned for the rest of his life.

As this Court has repeatedly held, 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). Here, the evidence established that Appellant lured Rhonda, a prostitute, to his apartment, had sex with her twice and then manually strangled her to death after a violent, lengthy struggle. Appellant had murdered 5 other prostitutes prior to Rhonda in exactly the same manner.

To mitigate this senseless murder, Appellant presented the testimony of 3 mental health experts, family, friends and co-workers. The mental health experts concluded that Conde was in the throes of a major depression at the time he murdered Rhonda and was ”in the midst of an extreme mental and emotional disturbance.” They opined that Conde “snapped” after the first victim (the male Comensana). One expert also found that Conde suffers from post-traumatic stress disorder. Conde’s family, friends and co-workers testified that he appeared depressed and sad.

It is well-established that this Court’s function is not to

reweigh the facts or the aggravating and mitigating circumstances. Gunsby v. State, 574 So.2d 1085, 1090 (Fla. 1991); Hudson v. State, 538 So.2d 829, 831 (Fla. 1989). Rather, as the basis for proportionality review, this Court must accept, absent demonstrable legal error, the aggravating and mitigating factors found by the trial court, 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 Conde's sentence is too harsh in light of other decisions based on similar circumstances. Alvord v. State, 322 So.2d 533 (Fla. 1975).

The state relies upon Blackwood v. State, 777 So.2d 399, 388-89 (Fla. 2000), in support of proportionality. In that case, the female victim was strangled and suffocated to death after a lengthy struggle. There was only **one aggravator**, HAC. The trial court found the same statutory mitigator as in this case, "no significant history of prior criminal conduct' which it afforded "significant weight." It also found 8 non-statutory mitigators from moderate to very little weight. Likewise, in Sexton v. State, 775 So.2d 929 (Fla. 2000), the victim also died from strangulation. The trial court found three (3) aggravators: prior violent felony (robbery); (2) avoiding or preventing a lawful arrest; and (3) CCP. In mitigation, the

trial court found one statutory mitigator, "extreme mental or emotional disturbance" and 5 non-statutory mitigators. See Overton v. State, 801 So.2d 877 (Fla. 2001)(2 victims died from strangulation and had numerous defensive wounds indicating a struggle; court found 5 aggravators-- HAC, CCP, prior violent felony, felony murder, and avoid arrest--no statutory mitigators and 2 nonstatutory mitigators which it accorded little weight); Reese v. State, 768 So.2d 1057, 1058 (Fla. 2000)(finding death sentence proportionate where there were three aggravators--felony murder, HAC, and CCP, no statutory mitigators and seven nonstatutory mitigators to which the trial court assigned minimal or very little weight). Proportionality was found in all.

ISSUE XIII

APPRENDI DOES NOT APPLY TO FLORIDA'S CAPITAL SENTENCING SCHEME. (Restated)

Relying upon Apprendi v. New Jersey, 530 U.S. 466 (2000), Petitioner argues that Florida's capital sentencing scheme is unconstitutional because it violates due process and the right to trial by jury. The State's first argument is that Conde has failed to preserve this issue for appeal. Although Conde challenged the constitutionality of section 921.141 below he do so in terms of his right to jury trial and did not expressly

raise Apprendi. As such, he cannot raise the argument for the first time on appeal. Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982).

However, if the merits are reached, Apprendi does not invalidate Florida's sentencing scheme. This Court has squarely rejected Petitioner's arguments and the notion that Apprendi applies to Florida's capital sentencing scheme in Mills v. Moore, 786 So.2d 532 (Fla. 2001), Mann v. Moore, 794 So.2d 595 (Fla. 2001), Bottoson v. State, 27 Fla. L. Weekly S119 (Fla. Jan 31, 2002), and Sireci v. Moore, 2002 WL 276292 (Fla. Feb 28, 2002).

The State notes that the United States Supreme Court's decision in Ring v. Arizona, Slip Op. 01-488 (June 24, 2002), was issued on the day this brief was due to be filed. The State asserts that Ring does not apply to this case or to Florida's capital sentencing scheme. Ring involves an Arizona statute and clearly overruled only one case, Walton. The case applies only to those states where juries are not involved. That is not Florida, we have a hybrid system. See Ring f.n.6.

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities cited herein, the State respectfully requests this honorable Court to **AFFIRM** Appellant's convictions and sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Answer Brief" has been furnished by U.S. mail, postage prepaid, to: BENJAMIN WAXMAN, Esq., 2250 Southwest Third Ave., 4th Floor, Miami, Fl. 33129 on June 24, 2002.

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with the Florida Supreme Court Administrative Order Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for the State of Florida, Appellee herein, hereby certifies that the instant brief has been

prepared with 12 point Courier New type, a font that is not spaced proportionately.