IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC02-1920

WILLIAM CODAY,

Appellant,

VS.

STATE OF FLORIDA,

Appellee.

****
*** ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA, (Criminal Division)
****
***

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, William Coday, was the defendant at trial and will be referred to as "Defendant" or "Coday". Appellee, the State of Florida and the prosecution below, will be referred to as "State". References to the record on appeal will be by the symbol "R", to the transcripts will be by the symbol "T", to any supplemental record or transcripts will be by the symbols "SR[vol.]" or "ST[vol.]", and to the Appellant's brief will be by the symbol "IB", followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

On November 13, 1997, Coday was indicted for the July 11, 1997 first-degree premeditated murder[1] of Gloria Gomez ("Gomez") committed by inflicting upon her 144 blunt and sharp force trauma injuries (R.1: 8-9). The jury trial commenced March 25, 2002 and on April 10, 2002, a guilty as charged verdict was rendered (R.4: 633; T.9: 2; ST.35: 166-69). The penalty phase was held on June 2 and 6, 2002 with the jury returning a death recommendation by a vote of nine to three (R.4: 716; T.32: 3035-38). The Spencer v. State, 615 So.2d 688 (Fla. 1993) hearing was held on July 7 and 8, 2002 at which the defense presented six mental health doctors and Coday. (T.34-36: 3110-3412). At

[1]The State did not proceed under the felony murder theory.

the July 26, 2002 sentencing the court imposed the death penalty upon finding of the heinous, atrocious, and cruel ("HAC") aggravator outweighed the statutory mitigator of "under the influence of extreme mental or emotional disturbance" (moderate weight) and ten non-statutory mitigators ranging in weight from minimal to moderate. (R.5: 831-43; T.37: 3419-34). Coday's motion for new trial was denied August 12, 2002 and he filed his notice of appeal August 15, 2002. (R.5: 847-50).

The trial facts reveal that some time between April and June of 1997, Coday met his then estranged wife, Tooska Amiri ("Amiri") in San Francisco. He appeared to have lost a lot of weight and seemed depressed as he spoke of his relationship with "Gloria." Amiri suggested he go to Paris. Coday thought it a good idea, but noted it would not make him better (T.21: 1705-06, 1719-20).

At the time of her death, Gomez was engaged to marry Roger Laverde ("Roger"), Oriola Laverde's son. According to Oriola Laverde ("Oriola"), with whom Gomez was living, on July 9, 1997, "Bill" called Gomez. Oriola, listening in on the conversation, overheard "Bill" tell Gomez he was dying of cancer. When Gomez ended the call, she told Oriola about "Bill's" cancer and that he wanted to talk with her. The next day, July 10, 1997, "Bill" again called for Gomez. As they were finishing their

conversation, Oriola overheard Gomez promise to meet him by 2:00 p.m. the next day (July 11, 1997). It was Oriola's belief "Bill" was Coday. Coday's telephone records establish he called the Laverde's on July 8, 9, and 10, 1997. Gomez was last seen alive on July 11, 1997, just before she left at 11:30 a.m. to see a sick friend/"Bill" in Fort Lauderdale (T.18: 1296-1303; 1335-39; T.19: 1497-1503).

On July 10, 1997, Coday reserved a July 12, 1997 round trip flight from JFK Airport, New York to Charles DeGaull Airport, Paris,[2] but by not purchasing it by 11:00 p.m on July 11, 1997, the reservation lapsed. However, near 9:00 a.m. on July 12, 1997, at JFK Airport in New York, Coday reinstated the reservation and purchased the ticket. (T.19: 1411-13). Telephone records show Coday called Delta Airlines, American Airlines, and Brazilian Airlines on July 9 and 10, 1997. He called US Airways on July 9, 1997 and United the following day. (T.19: 1497-1503).

Also on July 10, 1997, Coday withdrew $6,000 from his savings account, leaving a balance of $645, and $632 from his checking. On the same day, he purchased $2,000 in Traveler's Checks. Two days later, he withdrew another $301 from his

[2]Delta's policy was to sell international flights only on a round trip basis (T.19: 1412).

checking account via an ATM withdrawal at Fleet Bank. This left him with about $600 in his checking account (T.19: 1471-83).

When Gomez arrived at his apartment on July 11, 1997, she and Coday spoke of their relationship. According to his written statement, he professed his love, and pled with Gomez to return to him. In Coday's bedroom, Gomez rejected him and said she had never loved him. With this, he attacked her. As Coday explained:

> We sat down on the bed. I told her I had no interest in any of my things.
>
> And once [Coday was] dead, she could have everything. Then I began to talk about us again.
>
> ... I began to cry, I did not want to go away and die. I want to stay and be with her.
>
> Why had she left[?] ... Why had she not come back[?] ...
>
> Why was she tormenting me, with all the uncertainty, being without me[?] ...
>
> If she loved me as she had told me, and had wanted to get married and have children with me, why was she then treating me this way[?] ...
>
> Could she not just come back to me, and thus restore our relationship[?] ...
>
> She remained silent. Then she told me that I had idolized her. That I had overidealized the relationship.
>
> ["]but you love me, you told me so me so many times. You left a message on my phone["] I said.
>
> She paused. And she told me that she had never

loved me the way I thought.

Then she said she had to get her things from my apartment, and leave.

... I was there, fearing those words of hers would run through my mind, that she had never loved me the way she had made me think.

And then felt like a shock, when I go into a rage, a demonic rage.

I hit her with my fist. I went and picked up a hammer, lying in my bedroom, on top of the yellow pages.

I struck her on the head. She fell.

I stand again, yelling, screaming, lost my balance.

I landed on top of her, she grabbed the hammer from my hand. I went and picked up another hammer,[3] and struck her again.

And she was bleeding and trying to get up. She screamed and kicked me.

I had gotten a knife lying on the kitchen top, and ... I don't remember exactly when ... came back and began to stab her.

We were both screaming. She scratched me, and I stabbed her in the neck, and held the knife there.

She reached out, and held my arm. I heard her mutter some words, but I don't know what she said.

In her hand, next to mine, I knew she was dead. I thought (sic) myself returning to normal, all rage leaving my body almost immediately.

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[3]Tooska Amari, Coday's estranged wife, reported that he kept a hammer in his bedroom, and one in the kitchen (T.21: 1704-05).

I was still over her, and I dropped her slowly, knowing she had died.

I cried out, oh, no, not Gloria, not this demon.

... I stood over her for a period of time, finally, I looked up, realized that I had killed her, that I had committed a monster, horrible crime.

And decided that I must die. I wondered why all that amount of rage did not turn itself upon myself. I decided to run, to take my diaries, my things, my photos, and leave the country, to write about all this.

To leave behind a testimony for those left behind us. Perhaps, in writing, I would come to understand how all of this happened. I took off my clothes, showered, and put on new clothes.

I left the apartment, took Gloria's pocketbook, for the purpose of trying to identify this [“]Roger[“]...

And also to see if I could understand where in this, relative to our relationship, and my concerns.

I drove her car to Miami Airport. I purchased a ticket and flew to Paris.

My intention was to write my testimony of our relationship, then, hopefully, kill myself.

If I did not succeed in killing myself, I would return myself -- I would return to turn myself into the police.

I had in my possession money, ... five to six thousand dollars ...

This I had withdrawn on the 10th, for the purpose of the trip I had planned to take on Saturday, and am going to do the 12th. ...

(T.20: 1610-14).

On July 11, 1997, at Miami International Airport, Coday purchased a one way ticket on the 5:30 p.m. American Airlines flight from Miami to LaGuardia Airport, New York (T.19: 1401-04). He sat next to Maria Stofka on that flight. According to her, Coday did not exhibit unusual behavior nor were injuries visible on his hands or face (T.21: 1668-71). The next day, July 12, 1997, he boarded the 1:40 p.m. Delta Airlines flight from JFK Airport, New York, to Paris. (T.19: 1411-13).

Coday was scheduled to work at the Broward County Library on July 12, 1997. When he did not arrive, his co-workers became concerned. Coday had not sought authorization for either business travel or vacation leave. When they could not reach him by phone, contact was made with the apartment management and Coday's apartment was entered (T.15: 889-92; T.19: 1429-38). When the caretaker, Thaddeus Janik, gained entry he saw blood on the bedroom door and a body lying on the floor. Hastily, he exited to call the police. (T.15: 892-95).

The initial responding officer, Chris Reyes ("Reyes"), found the air conditioning running in Coday's small apartment and located a female lying in the bedroom in a pool of blood. In the puddle of blood was a knife. (T.15: 898-01). With the exception of the bedroom, Reyes saw no signs of struggle (T.15: 902-03). Before conducting further investigation, the police

secured a search warrant (T.15: 909-11; T.20: 1623-27). They then documented the scene, collected blood evidence, Gomez's body, bloody fingerprints, footprints, clothing, towel, Gomez's tooth, and weapons. Also collected was a photograph of Gomez found on Coday's bed and a purse which contained letters addressed to her. Detective Hill photographed the blood spatter from the bedroom and other blood evidence. (T.16: 1000-03, 1005-23, 1025-32, 1037-53, 1056-58, 1063-66, 1087-88). According to print examiner, Carl Ciotola, Coday's finger prints, apparently in blood, were found on a phonebook in the bedroom, and footprints, again apparently in blood, were in the kitchen, bathroom, and towel area of the apartment (T.17: 1160-65).

The car Gomez had been driving was located at the Miami International Airport, and Crime Scene Investigator, Carol Coval, processed the vehicle. (T.16: 1092-98; T.18: 1296; T.20: 1532-33, 1628-29). Fingerprints, parking garage ticket, and other evidence were found and collected (T.16: 1096-1105). Latent print examiner, Ciotola, determined Coday's prints were on the parking garage ticket and driver's side seat belt (T.17: 1145-48).

The medical examiner, Dr. Price, visited the crime scene. He viewed Gomez's body lying face up on the bedroom floor

covered in blood with multiple blood smear patters. The blood spatter was concentrated on the lower portion of the walls nearest the body and on the books and bookshelf nearby. Also observed were two hammers and a knife. (T.17: 1177-79). Gomez suffered multiple injuries to her head, face, torso, and extremities from blunt and sharp force injuries which were both stab and incised wounds. The blunt force injuries were consistent with use of the head and claw of a hammer. The sharp force injuries were consistent with use of a knife. (T.17: 1180-82). Dr. Price located 144 external injuries, 57 from blunt trauma, 41 stab wounds, and 46 incised injuries. The blunt trauma caused contusions, abrasions, lacerations, and fractures. (T.17: 1187-88, 1191-98). The visible external injuries were to Gomez's head, face, lips, teeth, neck, chest, abdomen, pelvis, thigh, supra pubic area, both shoulders, and arms, and to the hands. (T.17: 1191-98; T.18: 1214-17, 1223).

The stab wound to Gomez's right chest entered near her armpit and traversed through the entire right lung into the hilum which is attached centrally to her heart as well as the airway. (T.17: 1195-96). All but one of the 144 wounds were antemortem (T.18: 1207-08). Although there was life threatening hemorrhaging between the brain and dura matter, Gomez could have been conscious and feeling pain (T.18: 1224-27). The stab

wounds to the neck penetrated the neck muscle, two of which went into the airway the full thickness of the larynx and trachea, and three went through to the vertebrae (C-3, 6, and 7) incising those bones (T.18: 1227-29). Both the blunt and sharp force trauma caused fractures to the skull (T.18: 1228-30). While there were some hammer blows to the chest, most of the injuries were from the knife. Several chest stab wounds were deep; one penetrated the full thickness of the upper left lung lobe, another cut the pulmonary vein running from the heart to the lungs and third penetrated the left lower lobe of the lung. There were two stab wounds to the diaphragm and one to the left lobe of the liver. The stab wound to the bowel penetrated to the muscle in Gomez's back. (T.18: 1230-32). The lung, liver, and brain injuries were life threatening (T.17: 1195-96; T.18:1224-27, 1232-33, 1244-47). Petechia was noted in Gomez's eyes which could have been caused by someone manually compressing her neck or sitting on her chest (T.18: 1247-49).

The injuries to Gomez's hands and arms were defensive wounds and would have caused pain, as would have the other injuries which penetrated the skin. (T.18: 1216-17, 1223-25, 1241-42). Gomez was alive for all but one of the 144 wounds, and could have been conscious for all of them. (T.18: 1242-43).

Upon Coday's October 1997 return to the United States, he

went to the apartment of Tooska Amiri ("Amiri"), his estranged second wife. Amiri, who was entertaining Christina Wood ("Christina") and her husband, when Coday called, asked her guests to leave so Coday could visit. (T.21: 1684-85, 1689-96, 1702). Coday spent the night saying he wanted to call family and friends before turning himself in the next morning. (T.21: 1697-98) Before Coday called the police, Christina had summoned them. When the police arrived, Coday offered them his possessions; Coday told the police "everything you need is in that bag." The night before, Coday had told Amiri he had written a diary and it should go to the police. (T.21:1698-1700).

New York City Sergeant Russell ("Russell") assisted Detective Greco ("Greco") with Coday's October 15, 1997 arrest. Greco had received a telephone call from Christin,[4] a friend of Amiri. Greco and Russell met with Christin whose report alerted the officers to look for a particular person (Coday). (T.20: 1582-86). Greco spoke to Amiri and then headed up the stairs to her apartment; Russell followed. Finding the door open, the police entered with guns drawn. Coday was in the apartment and confirmed he was wanted by the police. As he was being arrested, Coday pointed to his bag, which included a written

[4]The record facts indicate Christin is Christina Wood.

confession, and it was seized. He offered no resistance; he was cooperative (T.20: 1587-90, 1615-16). After being given Miranda[5] warnings, Coday spoke to the police voluntarily and wrote a multi-page statement admitting to killing Gomez (T.20: 1594-98; 1603-19).

Just after Coday's arrest, Amiri informed Fort Lauderdale Detective, Mike Walley ("Walley"), of the event. Walley and Detective Gittman went to New York and met with the New York officers and Coday. (T.20: 1630-33). After reminding Coday of his previously signed Miranda waiver form and confirming he recalled and understood his rights, Walley and Coday spoke. When informed that an attorney had been retained for him by his family and asked that Coday not be questioned, Coday responded that he had nothing to do with the hiring of counsel and wanted to cooperate. They then conversed for about 30 minutes (T.20: 1633-42).

At the close of the State's case, and again after the defense rested without presenting evidence, the defense motions for judgment of acquittal were denied. (T.21: 1745-46, 1749-50). Prior to charging the jury, the court inquired of Coday regarding the defense strategy of admitting guilt to a lesser included charge. Coday informed the court he understood the

[5]Miranda v. Arizona, 384 U.S. 436 (1966).

strategy of admitting to either second-degree murder or manslaughter, that he discussed it with counsel, and had consented to the strategy. (T.22: 1790). Upon the above evidence, the jury returned a guilty verdict. (R.4: 633; ST.35: 166-69).

Before the penalty phase, the court addressed the admissibility of the 1979 criminal conviction for manslaughter Coday had from Germany stemming from his killing Lisa Hollinger ("Hollinger"). When she made it clear she did not want to see him, Coday brought her to his apartment to reconcile. Becoming increasingly excited, he attacked Hollinger when she told him she no longer loved him. Following the initial confrontation, Coday left his apartment to retrieve a hammer from his landlady's basement. Returning, he attacked Hollinger striking her five times about the head, fracturing her skull. Lisa lingered for two weeks before succumbing. On June 18, 1979, Coday was convicted in Germany of manslaughter and received a three year sentence (Defense Exhibits 1 - 6 admitted at the May 17, 2002 hearing; T.24: 2064-66). Under German law, except in limited circumstances, if a person has no criminal incidents for 15 years after the expiration of his sentence, the record is expunged, and the person may testify he has no prior record.

Expungement in Coday's case occurred on June 19, 1997[6] (T.24: 2064-71).

The court found the German system similar enough to the United States/Florida criminal system that a fair trial was received. However, because the German conviction could not be used in Germany for sentencing once expunged, the court concluded it could not be used as a prior violent felony aggravator here. (T.25: 2246-54, 2264-69). In response to defense counsel's inquiry, the facts of the German crime would be admissible in cross-examination of any defense mental health experts who reviewed those files. (T.26: 2275-88; T.28: 2566-67, 2588; T.29: 2776-82).

Friends, family, and others testified for Coday in the penalty phase. Their evidence revealed that Coday had been in countries in Europe from which extradition to the United States would have been blocked due to the possibility of a death sentence. (T.28: 2463-71). Chaplin Guzman noted Coday had expressed remorse over Gomez's death. During their hour-long conversations, Coday's demeanor was respectful (T.28: 2477, 2480, 2484).

Rayma Coday ("Rayma"), the second wife of William Coday, Sr.

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[6]Gloria Gomez was killed July 11, 1997, less than a month after Coday's German case was considered expunged.

("Coday, Sr."), noted that Coday and his father loved each other, but their relationship was more formal; each had difficulty expressing emotion. Coday was always polite and after Coday Sr.'s marriage to Rayma, he saw his son every two to four weeks between 1975 and 1980 before he moved out of state. There was not much contact after that. During their time together, Coday never lost control. (T.28: 2485-88).

Coday Sr. reported that his son was born prematurely, had respiratory problems when young which caused him to miss a great deal of school before he was ten years old, and required some hospital visits. Missing school made it difficult for Coday to make friends. Coday was intelligent, having taught himself chess, and was fascinated with Greek mythology. In highschool, Coday taught French to elementary school children. As Coday got older, he played baseball and football. (T.28: 2505-11) Coday, Sr. helped his son work through his early childhood difficulties by providing medical and emotional support. Coday, Sr. did not abuse his son; he never expressed disappointment. Coday's mother had a close relationship with her son, and spent a lot of time nursing him when he was sick. After the divorce, Coday never said anything negative about his mother. Coday was never out of control. Coday, Sr. sent money to his son for his return trip from Europe and hired an attorney for him. (T.28: 2515-16,

2520-26, 2528-29, 2531-32).

Pauline Sauer Coday ("Sauer") and Coday, Sr.'s have visited their son in jail. Sauer loves her son, but recognizes that there were times when they were not close. She has been proud of Coday's accomplishments in life and school and noted he has helped those who did not speak English. Coday was born prematurely and spent two to three weeks in an incubator. (T.29: 2674-80). Sauer conflicted with Coday, Sr. to the extent that she felt he was hard on Coday, cold, and rarely affectionate; Coday was closer to Sauer than to his father. (T.29: 2680-82). The Codays had unhappy years before they divorced when Coday was 16 years old, but they tried to keep this from their children. (T.29: 2683-86).

Amiri testified that when she and Coday were together between 1989 and 1995, they had a good relationship. Coday was a partner who opened the most beautiful door to art, literature, and music. About a week before the murder, she saw him in San Francisco and remarked at his weight loss and apparent sadness. It was Amiri's suggestion he take a Paris vacation. When Coday was in Europe after the murder, he called her and spoke of surrendering; when he arrived in New York, he told her he would surrender. . One of the reasons their marriage ended was because Coday was "playing around" with other women. Coday

claimed Gomez's murder was due to his "terribly severe attachment" (T.29: 2721-27, 2731-33).

Coday's first wife, Abnash Kaur Coday has remained in touch with him. She reports he made a large impact on her life, and on her daughter's, through art and music. She believed she could call on Coday if she had a problem. (T.30: 2795-97).

A co-worker with Coday, Ruby Beatty, saw him at work frequently, although they were not friends. She noted how poorly Coday looked in July 1997; he was not dressed well and seemed angry. He spoke of his break-up with Gomez. (T.28: 2493-95).

Charles Edwards ("Edwards") knew Coday from their days at Michigan where they had formed a friendship. Edwards found Coday intelligent, sophisticated, and bookish. The night before Coday's arrest they talked. Edwards thought the murder was out of character. Coday had never met a person he did not like; he was charming. According to Edwards, Coday was remorseful. He also reported feeling that Coday's parents may have been a bit distant when he was young. (T.29: 2641-47, 2649, 2651-52).

Another librarian co-worker, Marjorie Louise ("Louise") felt Coday was like a son to her. He was an excellent librarian and had good attendance. However, a few weeks before the murder, Coday became very depressed, lost weight, and took no interest

in his appearance and grooming. It was Louise, who became concerned when Coday failed to show up for work on July 12, 1997, and it was she who made the initial trip to his apartment, but could find no one there. Louise also recalled Gomez. Coday and Gomez appeared to be a happy couple. Just before the murder, Coday was very happy to hear from her. Since being in jail, Coday has sent two illiterate inmates to Louise and she got them into a reading program (T.29: 2654-64, 2667). In the days before the murder, Coday did not mention a Paris trip. Louise noted that part of Coday's depression had to do with his job. Coday dated several girls while Louise knew him. Even though depressed, Coday interacted with Louise; he was not rude and he kept control of himself (T.29: 2667-69).

At the penalty phase the defense did not put on mental health testimony from doctors who had examined Coday as a strategy to avoid rebuttal from the State encompassing the German manslaughter case. Defense counsel presented Dr. Brannon, who explained he had no contact with Coday and knew nothing of the case. (T.30: 2803-06). Dr. Bannon pointed out two conditions noted in the DSM-4 text: (1) Severe Depression with Psychotic Features and (2) Borderline Personality Disorder.[7]

[7]In his initial brief at 17, Coday misapprehended the record when indicating Dr. Brannon diagnosed Coday with mental conditions. Instead, Dr. Brannon testified he did no work on

He noted that Severe Depress with Psychotic Features involved at least two weeks of extreme sadness and having more than one episode of this. During an episode, a person would exhibit a majority of these symptoms: (1) disturbed sleep; (2) irritability; (3) loss of interest in life; (4) excessive weight gain/loss; (5) possible suicidal ideation; (6) feeling of worthlessness; and (7) lack of energy/fatigue. Also, the person would show a break from reality and have hallucinations. (T.30: 2806-09). A major depressive disorder would make it difficult for a person to work, perform a job, engage in social activities, or leave his home. (T.30: 2812-15). The Borderline Personality Disorder was described as being different from a major mental disorder in that a person with a personality disorder has very mal-adaptive traits. A doctor would look at the person's ability to relate to others, relationships, views of self, and personal affect. (T.30: 2910-12).

The jury was instructed on the HAC aggravator, the two mental heath mitigators along with the catch-all mitigating circumstance instruction, and a list of 15 non-statutory mitigating factors requested by the defense (T.31: 2958-62). During penalty phase deliberations, the jury inquired of the

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the case, but merely explained two conditions contained in the DSM-4 text.

meaning of an undecided vote. The court re-read the instructions, but upon further inquiry by the jury, instructed that an un-decided vote was a legal matter for the court to decide. (T.31: 2976-86; T.32: 2989-3034). Subsequently, the jury recommended death by a nine to three vote. (R.4: 716; T.32: 3035-38).

At the Spencer hearing, the defense presented six mental health experts, five psychologists, and one psychiatrist. With the exception of Dr. Walker, each expert opined Coday suffered from two mental health problems: (1) Severe Depression with Psychotic Features and (2) Borderline Personality Disorder (T.33: 3117-18, T.34: 3224-26, 3246-52; T.35: 3321-25; T.36: 3395-3401). Dr. Walker found Coday had a Paranoid Delusional Disorder instead of a Borderline Personality Disorder (T.34: 3177-78) Also, the experts cited two statutory mitigators: (1) under the influence of substantial mental/emotional disturbance at the time of the crime and (2) ability to conform conduct to the requirements of law substantially impaired (T.33: 3117; T.34: 3176, 3222-23, 3245; T.35 3327-28; T.36: 3390). In response to the court's question, Dr. Vicary testified that in forensic psychology and psychiatry, the expert tries to trace the history of a person to see if there is a relationship between a current rage crime and any prior mental disorders.

Most rage crimes are explained by situational factors, and it is the rare case where the mental disorder is the driving force behind crime. (T.36: 3404).

Sentencing was held July 26, 2002 with the court finding the HAC aggravator, the statutory mitigator of "under the influence of extreme mental or emotional disturbance" (moderate weight) and the non-statutory mitigators: (1) crime committed under the influence of mental or emotional disturbance (moderate); (2) Coday was depressed and suicidal while awaiting trial in jail (minimal); (3) Coday returned to the United States voluntarily, cooperated with the police, voluntarily confessed, and voluntarily consented to the search (minimal); (4) good employment history (moderate); (5) Coday severely sick in elementary school/missed a great deal of school (little); (6) Coday will not endanger others in prison (little); (7) society would be protected by Coday spending life in prison (little); (8) Coday will use foreign language skills to help others (little); (9) Coday is a voracious reader and is an example to others (little); (10) remorse (little). It was the court's conclusion the HAC aggravator outweighed the mitigation, and that death was the appropriate sentence. (R.5: 831-43; T.37: 3419-34).

SUMMARY OF THE ARGUMENT

Point I - There was no abuse of the trial court's discretion in denying Coday's special instruction on "heat of passion" as the standard instruction adequately explained the elements of murder and the defense of excusable homicide. Kilgore v. State, 688 So.2d 895, 897-98 (Fla. 1997).

Point II - In Spencer v. State, 645 So.2d 377, 382 (Fla. 1994) the Court found the standard premeditation instruction properly informed the jury. There was no abuse of discretion in giving the standard instruction here.

Point III - The judgment of acquittal was denied properly. There was both direct and circumstantial evidence of premeditation.

Point IV - The arrest was legal based upon the existence of a Florida warrant for Coday's arrest. Moreover, the New York police had probable cause to arrest based upon information received from citizen informants and the exigent circumstances which existed due to Coday's obvious flight from justice and murder charge.

Point V - Admission of Coday's handwritten statement was proper as it was authenticated under Section 90.901, Florida Statutes as it contained facts known only to the author.

Point VI - Coday's death sentence is proportional under

Blackwood v. State, 777 So.2d 399 (Fla. 2000).

Point VII - The rejection of the statutory mitigator is supported by substantial, competent evidence as Coday conformed his conduct to the requirements of law for 20 years, he worked, socialized, married, and divorced without incident.

Points VIII and IX - This Court's conclusion that death eligibility occurs at time of conviction does not violate the Eighth Amendment. Also, Florida's capital sentencing statute is constitutional and is not implicated by Ring v. Arizona, 120 S.Ct. 2348 (2002). See Porter v. Crosby, 840 So.2d 981 (Fla. 2003).

Point X - The 144 blunt and sharp force injuries inflicted during a struggle where the victim wrested away the first hammer and defended herself against the second hammer and knife Coday subsequently procured established HAC beyond a reasonable doubt.

Point XI - The sentencing order is sufficiently detailed and complies with section 921.141(3).

Point XII - Under the rationale of Blackwood, 777 So.2d at 405, a single aggravator death sentence is authorized.

Point XIII - The trial court did not abuse its discretion in finding that the State could cross-examine Coday's mental health experts about the German manslaughter conviction.

Points XIV and XVI - The court did not abuse its discretion

in denying individual voir dire of the deliberating jurors, rejecting the request for a special verdict, and in telling the jury that the import of a non-votes was a legal matter for the judge. So informing the jury did not violate Caldwell v. Mississippi.

ARGUMENT

POINT I

THERE WAS NO ABUSE OF DISCRETION IN DENYING CODAY'S REQUEST FOR A "HEAT OF PASSION" INSTRUCTION (restated)

Coday asserts it was error to deny his request for a special jury instruction on "heat of passion." (R.4: 606-07; T.21: 1755; T.22: 1893-97). For support he relies on a district court case which failed to recognize this Court's Kilgore v. State, 688 So.2d 895, 897-98 (Fla. 1997) opinion which is directly on point, and affirms that the standard jury instructions on premeditation and excusable homicide adequately inform the jury. There was no abuse of discretion in denying Coday's requested special instruction.

The standard of review applied to a decision to give or withhold a jury instruction is abuse of discretion. See Parker v. State, 873 So.2d 270, 294 (Fla. 2004); James v. State, 695 So. 2d 1229, 1236 (Fla. 1997) (noting court has wide discretion in instructing jury). A court's ruling will be upheld "unless the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court." Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980). See Trease v. State, 768 So.2d 1050, 1053, n. 2 (Fla.

2000).

Coday points to the district court case of Palmore v. State, 838 So.2d 1222 (Fla. 1st DCA 2003) to support his position that a heat of passion instruction should have been given. Palmore was charged with second-degree murder in the death of his estranged girlfriend who had asked him to return home. Upon arriving home, Palmore found her in bed with another man. Palmore, 838 So.2d at 1223. Palmore sought an instruction on heat of passion as his defense was that the depraved mind element was negated by his heat of passion. Instead, the court gave the standard instruction. Id. at 1224. The district court concluded the standard instruction "neither explains the term 'heat of passion,' in relation to second degree murder, nor recognizes Appellant's theory of defense...." Id. at 1225. However, the court did not discuss this Court's Kilgore, 688 So.2d at 897-98 opinion that the instruction for excusable homicide properly instructs the jury of the defenses to a homicide charge. Consequently, to the extent Palmore limited its analysis to a determination of the instruction's impact on a second-degree depraved mind instruction and failed to address case law directly on point, this Court should reject Palmore and follow its precedent, Kilgore, 688 So.2d at 897-98 (finding no error in denying heat of passion instruction as standard

instruction sufficiently explained premeditation).

The purpose behind the heat of passion instruction is to negate the intent element of the homicide instruction. See Kilgore, 688 So.2d at 897-98. Such is adequately explained through the premeditation and excusable homicide instructions. Id. The argument in Palmore that the instruction did not permit a finding of manslaughter if heat of passion were shown as an excuse for second degree murder is not well taken for the instant case. Here, the jury was informed that in the event it did not find Coday guilty of the main crime charged, it should consider lesser crimes. (T.22: 1893) The jury was told that excusable homicide is a defense to both first and second-degree murder and manslaughter (T.22: 1894-97). Consequently, the jury was not precluded or misinformed; the jury was required to look at the lesser charges in the event the higher charge was not proven, and reassess each lesser charge in light of the excusable homicide instruction. Palmore is not applicable to the instant case.

Moreover, in Kilgore, this Court rejected the need for a special instruction on heat of passion. Kilgore was charged with the first-degree murder of his homosexual lover as he was leaving his jail cell. Kilgore, 688 So.2d at 897. The court denied Kilgore's request for a more detailed heat of passion

instruction and gave the standard for excusable homicide. On review, this Court found no error stating:

> Kilgore avers that he was denied due process under both the state and federal constitutions when his request for a special heat-of-passion instruction was denied. The special instruction would have explained heat of passion in the context of intentional homicide. Essentially, the instruction would have clarified that a person acting under the heat of passion is, in some circumstances, incapable of premeditation.[5] Instead, the trial judge utilized the standard jury instructions. Included in these instructions was a discussion of heat of passion in the context of excusable homicide. Further, the requirement of premeditation in a first-degree murder conviction was repeatedly emphasized. This Court has acknowledged that the standard jury instructions are sufficient to explain premeditation. *Spencer v. State*, 645 So.2d 377, 382 (Fla. 1994). We also have ruled that the trial court does not necessarily abuse its discretion in denying a special heat-of-passion instruction. *Kramer v. State*, 619 So.2d 274, 277 (Fla. 1993). After viewing these facts, we conclude that there is no indication that the trial court erred by refusing the requested instruction. The necessary elements of premeditation were presented with the standard instruction and the trial court was well within its prerogative to refuse a separate, and possibly confusing, instruction.

Kilgore, 688 So.2d at 897-98 (footnote omitted).

A similar result was reached in Hunt v. State, 753 So.2d 609, 613-15 (Fla. 5th DCA 2000). There, the court recognized Kilgore and agreed the standard instructions on premeditation and excusable homicide were proper negating the need to elaborate further on the definition of heat of passion. Hunt, 753 So.2d at 615. Based upon the foregoing, the conviction

should be affirmed.

However, even if the special instruction should have been given, such was harmless beyond a reasonable doubt. State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986) (noting focus of a harmless error analysis "is on the effect of the error on the trier-of fact" and the "question is whether there is a reasonable possibility that the error affected the verdict."). The evidence established Coday pre-planned his escape from the crime scene. The day before the murder, he withdrew approximately $6,000.00 in cash and travelers checks, and checked with airlines regarding flights to New York and Paris. He had his bags packed before Gomez arrived and confessed that when she said she had never loved him, he punched her and hit her with a hammer. When Gomez succeeded in taking the hammer from Coday, he went for another and continued the attack. Later, he obtained a knife and stabbed her. She suffered blunt, sharp force, and defensive wounds. It was not until close to the last of the 144 wounds that Gomez succumbed to the attack and died still holding Coday's arm. Coday then showered and changed clothing before taking Gomez's car to the Miami Airport and boarding a flight to New York. The prior planning for the murder and flight therefrom negates the heat of passion defense. Any error in not giving the special instruction is harmless.

(T.17: 1177-82, 1187-88, 1191-98; T.18: 1207-08, 1214-17, 1223-32, 1241-49; T.19: 1411-13, 1429-32, 1471-83, 1497-1503; T.20: 1610-14).

POINT II

THE PREMEDITATION INSTRUCTION WAS CORRECT (restated).

Coday claims an inadequate instruction regarding premeditation was given, and should have given the instruction he offered (IB at 35-37).[8] The standard instruction on premeditation was given which fully advised the jury of the factors required. See Spencer v. State, 645 So.2d 377 (Fla. 1994). There was no abuse of discretion.

Because standard jury instructions are presumed correct and are preferred over special jury instructions, the proponent has the burden of proving the court abused its discretion in giving the standard instruction. Stephens v. State, 787 So.2d 747, 755-

[8]On July 10, 1998, as one of many pre-trial motions, Coday filed an objection to the use of the standard premeditation instruction (R.1: 168-72). When the instructions were being discussed in the charge conference, Coday had no objection to the premeditation instruction, although he requested and challenged other instructions. (T.21: 1755, 1771-75). Such would lead to the conclusion the matter is not preserved. Cf. Cardenas v. State, 867 So.2d 384, 390 (Fla. 2004) (recognizing contemporaneous objection rule for jury instructions). However, because the pre-trial hearing on the death penalty motions and others could not be ascertained, the Prosecutor stipulated that all motions filed on July 10, 1998 and September 7, 1999 were either denied or overruled.

56 (Fla. 2001). See Parker, 873 So.2d at 294; James, 695 So.2d at 1236; Elledge v. State, 706 So.2d 1340 (Fla. 1997). A ruling is an abuse of discretion “where no reasonable man would take the view adopted by the trial court." Canakaris, 382 So.2d at 1203. See Trease, 768 So.2d at 1053, n. 2.

Recently, this Court defined premeditation as:

> "a fully-formed conscious purpose to kill, which exists in the mind of the perpetrator for a sufficient length of time to permit of reflection, and in pursuance of which an act of killing ensues." .... Premeditation 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.'" ... Premeditation can be established by circumstantial evidence.

Blackwood v. State, 777 So.2d 399, 406 (Fla. 2000) (citations omitted). Such language mirrors the standard instruction. Citing McCutchen v. State, 96 So.2d 152 (Fla. 1952), Coday asserts that the standard premeditation instruction fails to properly inform the jury about “premeditated design” and that there must be proof of deliberations both before and at the time of the killing, thus, it is misleading (IB at 34-38).

In Spencer, 645 So.2d at 382, this Court quoted McCutchen for the definition of premeditation and reasoned:

> Spencer also argues that the standard instruction on first-degree murder is constitutionally deficient because it fails to adequately instruct the jury that a "premeditated design" is a statutory element of first-degree murder. We find no merit to this

> argument. Section 782.04(1)(a), Florida Statutes (1991), defines premeditated first-degree murder as the unlawful killing of a human being "[w]hen perpetrated from a premeditated design to effect the death of the person killed or any human being." ...
>
> ...
>
> The standard first-degree murder instruction, which was given to the jury in the instant case, provides in relevant part that "killing with premeditation" is
>
> > killing after consciously deciding to do so. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.
>
> Fla.Std. Jury Instr. (Crim.) 63. This instruction addresses all of the points discussed in *McCutchen*, and thus properly instructs the jury about the element of premeditated design.

Spencer, 645 So.2d at 382. See Henyard v. State, 689 So.2d 239, 245, n.5 (Fla. 1996) (finding standard premeditation instruction proper); Brown v. State, 565 So.2d 304, 307 (Fla. 1990). A similar determination was reached in Default v. State, 800 So.2d 647, 650 (Fla. 5th DCA 2001) wherein the defendant's challenge to the standard premeditation instruction (that it did not instruct the jury regarding deliberations or opportunity to reflect), again was rejected. This Court must reject this latest challenge to the premeditation instruction.

However, if a modified instruction should have been given, the failure to do so is harmless beyond a reasonable doubt. DiGuilio, 491 So.2d at 1139. The State incorporates its harmless error argument presented in Point I and notes that the evidence shows Coday planned for a rapid escape with cash and Traveler's Checks, using Gomez's car. During the attack, Coday was forced to stop to procure a second hammer and knife when he lost his first hammer to Gomez. Upon his return, he stabbed and bludgeoned Gomez, fracturing her skull and penetrating her lungs, pulmonary vein, liver, bowel, larynx and trachea, all while she was alive and struggling against the attack. (T.17: 1177-82, 1187-88, 1191-98; T.18: 1207-08, 1214-17, 1223-32, 1241-49, 1296-1303, 1335-39; T.19: 1411-13, 1429-32, 1471-83, 1497-1503; T.20: 1610-14).

The use of the knife and/or hammer shows premeditation. See Jimenez v. State, 703 So.2d 437, 440 (Fla. 1997) (opining "[t]he deliberate use of a knife to stab a victim multiple times in a vital organ is evidence that can support a finding of premeditation."), receded from on other grounds in Delgado v. State, 776 So.2d 233 (Fla. 2000); Ross v. State, 474 So.2d 1170, 1174 (Fla. 1985) (finding use of blunt instrument to brutally beat victim about head and extremities while she tried to defend herself shows premeditation); Preston v. State, 444 So.2d 939,

944 (Fla. 1984) (concluding evidence supported premeditated murder where defendant brutally stabbed victim multiple times, severing her carotid arteries and jugular vein); Heiney v. State, 447 So.2d 210, 215 (Fla. 1984) (upholding finding of premeditation based upon circumstantial evidence where there were at least seven blows to the victim's head inflicted by a claw hammer); Dawson v. State, 139 So.2d 408, 413 (Fla. 1962) (finding premeditation where victim suffered multiple cerebral contusions and skull fractures, fractured jaw, knocking out of tooth, and that "[w]hatever the appellant's state of mind might have been at the beginning of the 'tussling,' the number of blows struck, the force employed, the unarmed status of [the victim] and the other circumstances surrounding the unfortunate incident indicate that there was sufficient time for appellant to have formed the intent to kill [the victim] and that he did form and carry out this design"), criticized on other grounds, State ex rel. Carty v. Purdy, 240 So.2d 480, 481 (Fla. 1970). The conviction should be affirmed.

POINT III

THE JUDGMENT OF ACQUITTAL WAS DENIED PROPERLY AS THE STATE PROVED PREMEDITATION (restated)

Coday asserts the judgment of acquittal (“JOA”) should have been granted because the State did not prove premeditation. He

suggests the killing was in a heat of passion. This Court should reject the claim as there was both direct and circumstantial evidence proving premeditation in the form of Coday's statements and evidence of planning for an escape and procuring a second and third weapon after Gomez defended herself and grabbed the first hammer, in addition to the number and nature of the life threatening wounds. Such is sufficient evidence upon which the jury could have determined Coday premeditated the murder. This Court should affirm.

Recently, this Court explained:

> In reviewing a motion for judgment of acquittal, a *de novo* standard of review applies. ... Generally, an appellate court will not reverse a conviction which is supported by competent, substantial evidence. ... 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. ... However, if the State's evidence is wholly circumstantial, not only must there be sufficient evidence establishing each element of the offense, but the evidence must also exclude the defendant's reasonable hypothesis of innocence....

Pagan v. State 830 So.2d 792, 803 (Fla. 2002) (citations omitted). See LaMarca v. State, 785 So.2d 1209, 1215 (Fla. 2001). Where direct evidence is provided, such as in the case of a defendant's confession, "this Court need not apply the special standard of review applicable to circumstantial evidence cases." Conde v. State, 860 So.2d 930, 943 (Fla. 2003) (citing

Pagan, 830 So.2d at 803-04). See Hardwick v. State, 521 So.2d 1071, 1075 (Fla. 1988) (noting confession is direct, not circumstantial, evidence).

Here, Coday confessed he struggled with Gomez and hit her with a hammer. When she took it from him, he went for another and later for a knife and continued the attack (T.20 1610-14). Consequently, there is direct evidence, in the form of a confession to the crime and Cochran v. State, 547 So.2d 928, 930 (Fla. 1989), and its application of the circumstantial evidence standard is not implicated. In Cochran, the statement was that the shooting was accidental and he returned to try to help the victim he had left at the roadside. Id. at 929. The analysis of the JOA standard discussed in Conde, 860 So.2d 930, 943 and Pagan, 830 So.2d at 803-04 more closely match the instant case and control.

The record establishes that Coday had withdrawn approximately $6,000 cash, almost his entire savings, before the murder and checked Paris flights. However, he never informed his employer he would be leaving on a vacation. He admitted his bags were packed for the trip before Gomez arrived after being lured to his apartment upon the ruse he was dying of cancer. Gomez's announcement that she never loved Coday precipitated the hammer attack. Of significance is that when Coday lost control

of the hammer to Gomez, he went for another and then for a knife. In spite of her defensive efforts, Gomez was killed as a result of hammer and knife injuries. (T.19: 1411-13, 1429-32, 1471-83, 1497-1503; T.20: 1610-14)

The medical examiner reported seeing two hammers and a knife at the crime scene. The 144 blunt and sharp force injuries were consistent with being inflicted by these weapons. There were life threatening blunt and sharp force injuries to Gomez's brain, lungs, and liver. There were skull fractures caused by the hammer blows and stab wounds to the head. Both the right and left lobes of the lung were penetrated. The right lung was transected to the hilum and the pulmonary vein was cut. (T.17 1177-82, 1187-88, 1191-98; T.18: 1207-08, 1224-33, 1244-47). Defensive wounds were visible on Gomez's hands and arms (T.18: 1216-17, 1223-25, 1241-42).

Coday confessed he convinced Gomez to visit him in Fort Lauderdale, had checked flights for Paris, packed his bags, and withdrew money before Gomez arrived at his apartment. (T.20: 1610-14). The banking transactions, and airline reservations/flights were confirmed by the bank and airlines (T.19: 1401-04; 1411-130. Coday's admission to punching, bludgeoning, stabbing, and falling on Gomez were confirmed by the medical and forensic evidence of the use of two types of

weapons as well as blockage of the airway by possibly sitting on Gomez's chest.(T.17: 1177-82, 1187-88, 1191-98; T.18: 1207-08, 1214-17, 1223-32, 1241-49; T.19: 1411-13, 1429-38, 1471-83, 1497-1503; T.20: 1610-14; T.21: 1668-71).

The use of a hammer and/or knife shows premeditation. See Ross, 474 So.2d at 1174 (finding use of blunt instrument to brutally beat victim about head and extremities while she tried to defend herself is sufficient evidence to find premeditation. In Morrison v. State, 818 So.2d 432, 437-38 (Fla. 2002), this Court upheld the denial of a JOA noting premeditation was supported where the victim suffered numerous "contusions and abrasions to the head, chest, arms, and hand ... [and] died from the loss of blood due to two lethal knife wounds to the throat." This Court stated "[g]iven the nature of the weapon used [knife] and the manner in which the homicide was committed, as well as the nature and manner in which the wounds were inflicted, the jury was amply justified in concluding that it demonstrated Morrison's intent to kill. *See* Jimenez v. State, 703 So.2d 437, 440 (Fla. 1997) (deliberate use of a knife to stab a victim multiple times in vital organs, alone, is evidence that can support a finding of premeditation)" Morrison, 818 So.2d at 452. See Woodel v. State, 804 So.2d 316, 321 (Fla. 2001) (finding denial of JOA proper and concluding there was sufficient

evidence to support premeditation for both victims based on facts showing defendant “smashed Bernice on the head with the porcelain toilet rim and cut or stabbed her fifty-six times, and also stabbed Clifford eight times). The State reincorporate its analysis in Point II for further support of premeditation.

In Conde, this Court took into account Conde’s confession as direct evidence of premeditation and coupled it with the medical examiner’s testimony in determining the JOA was denied properly.

> Conde's confession detailed the events of the night Dunn was murdered. Those details, including that he spent considerable time with Dunn before attacking her and that she struggled during the attack, indicate that Conde had the time to reflect upon his actions but nonetheless continued to take the steps necessary to murder Dunn. Conde's confession together with medical testimony regarding Dunn's numerous defensive wounds, testimony indicating it takes approximately three minutes to strangle someone to death, and other evidence establishing a definite pattern of similar crimes, provide competent, substantial evidence that Conde had the time to reflect upon his actions and premeditated Dunn's murder. Accordingly, we find no error in the trial court's denial of Conde's motion for judgment of acquittal.

Conde, 860 So.2d at 943. These factors are present in Coday’s case. He spent time with Gomez before the attack, she struggled against the attack, and Coday had time to reflect upon his actions as he sought additional weapons, Gomez defended herself, while he was inflicting 144 wounds. The JOA was denied properly.

The assertion Coday was overcome by an uncontrollable heat of passion is refuted from the record. He struggled with Gomez hitting her with his fist and a hammer. When Gomez fended off this attack and gained control of the hammer, instead of retreating, Coday got another hammer, presumably in the kitchen where he was known to keep a second one, and a knife, to continue the attack. The placement of the blows, to the head, chest, and abdomen resulted in life threatening injuries to the brain, both the right and left lobes of the lungs, liver, and bowel. The blood spatter showed there was a great struggle in the bedroom; Gomez moved against Coday, the walls, and floor during the attack (T.16: 1023-28, 1037-43; T.17: 1177-82, 1187-88, 1191-98; T.18: 1207-08, 1214-17, 1223-32, 1241-49, 1296-1303, 1335-39; T.19: 1411-13, 1429-32, 1471-83, 1497-1503; T.20: 1610-14). Florida law recognizes that use of multiple weapons during a prolonged struggle is evidence of premeditation. See Francis v. State, 808 So.2d 110, 132 (Fla. 2001) (concluding premeditation established where victim stabbed 23 times with some wounds penetrating the liver and another severing the jugular vein); Kramer v. State, 619 So.2d 274, 276 (Fla.1993) (noting blood spatter and victim injuries provide basis for finding of premeditation); Bedoya v. State, 779 So.2d 574, 578 (Fla. 5th DCA 2001) (finding premeditation where victim stabbed

74 times with seven weapons, struggle was prolonged, and defendant expended much energy inflicting wounds and obtaining different weapons); Sireci v. State, 399 So.2d 964, 967 (Fla. 1981) (premeditation shown from evidence defendant beat victim in the head with a wrench, then stabbed victim 57 times in chest, head, back, and limbs before slitting victim's throat).

Coday points to Tien Wang v. State, 426 So.2d 1004 (Fla. 3d DCA 1983) and Austin v. U.S., 382 F.2d 129 (U.S. App. D.C. 1967) for support. Coday's case is different. He planned an escape out of the country, investigating airline flights and withdrawing about $6,000 in cash and Traveler's Checks, but never informing his employer he would be taking leave. During the course of the murder, he obtained two additional weapons when his first weapon was taken from him. Afterwards, he calmly showered, changed clothes, and left for the airport. (T.17: 1177-82, 1187-88, 1191-98; T.18: 1207-08, 1214-17, 1223-32, 1241-49, 1296-1303, 1335-39; T.19: 1411-13, 1429-32, 1471-83, 1497-1503; T.20: 1610-14; T.21: 1668-71). In Tien Wang, a third party, the victim's father, interfered in defendant's impassioned attempts for the victim to return to him. A violent quarrel erupted resulting in the father's stabbing. No direct evidence was presented, unlike in Coday's case. where prior planning of an escape was shown along with the procurement of

multiple weapons during the murder.

Similarly, Austin does not assist Coday. There, the evidence showed the defendant used a knife he always carried, while in the instant case, Coday had to get two other weapons to continue his attack upon Gomez after she had grabbed his first weapon, a hammer. Such shows time for deliberations which is even noted in Austin. "A sudden passion, like lust, rage, or jealousy, may spawn an impulsive intent yet persist long enough and in such a way as to permit that intent to become the subject of a further reflection and weighing of consequences and hence to take on the character of a murder executed without compunction and 'in cold blood" such as where a person's passions are inflamed and he leaves to procure a weapon. Austin, 382 F.2d at 137. Consequently, Austin is not an impediment to Coday's conviction. Although not a required element, the evidence reveals Coday's motive was based upon Gomez's refusal to return to him and her statement she had never loved him. This further distinguishes Coday's case from Austin wherein the parties had been drinking/socializing without incident before the murder.

For these same reasons, Kirkland, v. State, 684 So.2d 732, 734-35 (Fla. 1996) is distinguishable. Unlike in Kirkland, there was friction between Coday and Gomez before the murder;

she had stopped seeing him. Coday gave direct evidence of the events surrounding the homicide. He explained how he procured two additional weapons which he did not normally carry, which further distinguishes this case from Kirkland. While recognizing that Kirkland's low IQ was not controlling, Coday was later reported as having a 120 IQ in the superior range. (T.34: 3185).

Green v. State, 715 So.2d 940 (Fla. 1998) and the finding of lack of premeditation is distinguishable. The victim in Green was angry, intoxicated, fought with her boyfriend that night, and resisted arrest. The testimony suggested Green did things to the victim and she became crazy. She was later found with blunt trauma and having been stabbed and strangled. Id. at 944. Here, Gomez was not intoxicated, she and Coday were discussing their relationship quietly, as there were no signs of struggle in the living room or on th way to the bedroom. Once in the bedroom, he struck the first blow. Gomez suffered defensive wounds in the attack and Coday was forced to obtain additional weapons to kill her. Prior to the attack, Coday had planned an escape to Paris without obtaining leave from his employer. (T.17: 1177-82, 1187-88, 1191-98; T.18: 1207-08, 1214-17, 1223-32, 1241-49, 1296-1303, 1335-39; T.19: 1411-13, 1429-32, 1471-83, 1497-1503; T.20: 1610-14). Again, unlike Green,

Coday had a superior IQ. These events distinguish the cases.

Coday's reliance upon Coolen v. State, 696 So.2d 738 (Fla. 1997) is misplaced. The State would submit that Coday's pre-planned trip, his enticement of Gomez to come to his apartment, and the decision to get two other weapons when his first weapon was taken from him distinguishes Coolen, wherein the combatants were intoxicated men who let their hostilities erupt over Coolen's paranoid preemptive self-defense strike. There was no planning shown or intent established from the procurement of additional weapons. These factors in Coday are evidence of premeditation which the jury rightfully could find.

Even under the circumstantial evidence standard, the conviction was proper. Coday planned his escape to Europe before the killing. While he may assert he had planned to go there no matter the outcome, it is telling he did not pay for the flights until after the murder and never informed his employer that he was planning a vacation. (T.19: 1429-36). From this the jury could have rejected his claim of a pre-planed vacation and heat of passion killing. The conviction should be affirmed.

POINT IV

THE COURT PROPERLY DENIED THE MOTION TO SUPPRESS (restated)

It is Coday's claim that the suppression motion[9] should have been granted as neither probable cause or exigent circumstances were not shown for the warrantless arrest and it was improper to rely on the fellow officer rule. The trial court's findings of fact are supported and the law was applied properly in denying the motion. This Court must affirm.

Recently this Court discussed the standard of review for a motion to suppress stating:

> Generally, in reviewing a trial court's ruling on a motion to suppress, this Court accords a presumption of correctness to the trial court's findings of historical fact, reversing only if the findings are not supported by competent, substantial evidence, but reviews de novo "whether the application of the law to the historical facts establishes an adequate basis for the trial court's ruling." *Connor v. State*, 803 So.2d 598, 608 (Fla. 2001), cert. denied, 535 U.S. 1103, 122 S.Ct. 2308, 152 L.Ed.2d 1063 (2002).

Parker v. State, 873 So.2d 270, 279 (Fla. 2004). Whether exigent circumstances exist is a question of fact, therefore, the standard of review is whether there is competent,

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[9]Coday sought to have his police statement and his confession in the form of Crepusculo suppressed based upon an alleged warrantless arrest and search. It is interesting to note that in his sentencing memorandum, Coday claimed the evidence and his confession and writings showed he returned to the United States voluntarily and surrendered to law enforcement, cooperated with the police, and voluntarily confessed to the crime. (R.5: 792-93).

substantial evidence to support the ruling. Napoli v. State, 596 So. 2d 782, 784 (Fla. 1st DCA 1992) (finding competent, substantial evidence to support determination exigent circumstances existed).

Walker v. State, 707 So.2d 300, 312 (Fla. 1997), provides:

> Probable cause for arrest exists where an officer "has reasonable grounds to believe that the suspect has committed a felony. The standard of conclusiveness and probability is less than that required to support a conviction." *Blanco v. State*, 452 So.2d 520, 523 (Fla. 1984). The question of probable cause is viewed from the perspective of a police officer with specialized training and takes into account the "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Schmitt v. State*, 563 So.2d 1095, 1098 (Fla. 4th DCA 1990).

See Chavez v. State, 832 So.2d 730, 747-48 (Fla. 2002) (finding probable cause to arrest based on tips from citizen informants); McCarter v. State, 463 So.2d 546, 548-49 (Fla. 5th DCA 1985) (opining "[p]robable cause to arrest exists when facts and circumstances within an officer's knowledge and of which he had reasonably trustworthy information are sufficient to warrant a person of reasonable caution to believe that an offense has [been] or is being committed.").

During the suppression hearing, New York City Detective Vincent Greco (“Greco”) explained that he received a telephone call from a citizen informant, and he and Sergeant Russell

("Russell") met the witness at a pre-ordained location. Upon meeting her, Christina Woods ("Woods") identified herself, pointed out the apartment where her friend, Tooska Amiri ("Amiri"), resided, noted she feared for her friend's safety, and informed the officers Coday was inside, that he was wanted for a Florida homicide and had killed years before. (T.7: 937-41, 943, 953-54). Russell testified consistently with Greco's account. (T.7: 989-91). Armed with this information, Greco and Russell had Woods telephone Amiri who met the officers on the street and confirmed Coday was inside. (T.7: 941, 956-57) She motioned the officers upstairs, which Greco took as permission to enter the apartment. Arriving at the apartment door, the police found it open and could see Coday inside. They entered, determined Coday's identity, and he confirmed he was wanted by the police. Greco then gave Coday his Miranda warnings. (T.7: 961-64, 965-68, 1004, 1006).

During the police contact in the apartment, Coday pointed out his bag, indicating the police would want it. (T.7: 942, 970, 1004-05). Russell did not recall when he received confirmation about Coday's arrest warrant, but it was before the start of the 10:00 a.m. interview at the station. The police did not discuss the case until Coday was at the station and had been Mirandized and signed the waiver (T.7: 1005-06, 975).

While the officers were still at the apartment, Tooska telephoned Fort Lauderdale Detective, Mike Walley ("Wally"). It was Walley's testimony that he spoke to Amiri, Coday and Russell at 8:38 a.m. on the morning of Coday's arrest. Coday told Walley he would return to face justice. Walley next spoke to Russell and informed him that a warrant for Coday's arrest existed, gave him a short synopsis of the facts, and made arrangements for Russell to call Walley upon his return to the station. Greco confirmed that he received facsimile confirmation of the warrant before the interview commenced. (T.7: 975-78, 993-94, 997-98, 1011-13, 1026-28).

The court found Coday was arrested at approximately 8:30 a.m. (R.4: 581). Citing Johnson v. State, 660 So.2d 648 (Fla. 1995) and its application of the "fellow officer rule", the court concluded that "although Detective Greco did not have actual knowledge of the Florida arrest warrant, a valid Florida arrest warrant existed. Probable cause for the arrest existed, he just did not know about it. He was told of the existence of the warrant after he returned to Precinct 112 and before the interview with the Defendant took place." (T.4: 583-84). The court also found that even in the absence of a valid warrant, the police had the owners consent to enter her apartment, and found the door open. Having information that a dangerous

fugitive was inside, the police made a lawful entry, and conducted a lawful arrest and search. (T.4: 584).

As the court found, Johnson is on point. There the question was "whether an officer who himself lacks any personal knowledge to establish probable cause, who has not been directed to effect an arrest, and who does not know a valid warrant has been issued nevertheless can lawfully arrest a suspect." Johnson, 660 So.2d 657. This Court found the officer had probable cause to arrest: "we believe the existence of a valid warrant prior to arrest is itself sufficient to justify the arrest under the facts at hand." Id. at 658.

Coday's reference to Whiteley v. Warden, Wyoming State Penitentiary, 91 S.Ct. 1031 (1971) and his suggestion the fellow officer rule cannot apply because the New York officers had no communication with Florida officers should not invalidate the arrest here. While the officers did not have communication before the arrest, they were informed by an identifiable citizen informant that Coday was wanted. Both Woods and Amiri confirmed Coday was in the apartment. Woods gave the police Coday's name, that he was wanted in Florida for a murder and that he had committed another murder years before. She also noted that she

had seen this on America's Most Wanted.[10] She said she feared for Amiri. When Amiri was called to the street, she gave the officers permission to enter her apartment.[11] Coday immediately confirmed he was wanted, and then within minutes of his arrest, when Walley spoke to Coday and Russell, further confirmation was received. There has been no challenge to the validity of the Florida warrant, thus, the application of the exclusionary rule

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[10]Coday's citing of Maxwell v. City of Indianapolis, 998 F.2d 431 (7th Cir. 1993) for the proposition "America's Most Wanted" does not constitute probable cause is too simplistic a view. In Maxwell, the officers were facing civil charges from a arrest precipitated by reports that Maxwell was the person profiled on America's Most Wanted. The officers received information about the fugitive Moore and then contacted Maxwell who denied being the person wanted. Also, the description did not match Maxwell. Nonetheless, Maxwell was arrested, only to be exonerated through fingerprint comparison. The court did not make a blanket rejection of the use of America's Most Wanted to help establish probable cause, but found that th totality of the circumstances had to be taken into account and in this case, the description was so different from Maxwell that, in a review of the denial of a civil summary denial, probable cause could not be determined as a matter of law; it would have to be determined by a jury.

[11]It is Coday's position that the court did not find there was consent to enter the apartment, however, the court found that Amari came downstairs and confirmed for the police that Coday was upstairs. By opening the door to the police and pointing where her apartment was is tantamount to consent, although not verbalized. See Taylor v. State, 855 So.2d 1, 17 (Fla. 2003) (recognizing gestures may indicate consent)(citing United States v. Stewart, 93 F.3d 189, 192 (5th Cir.1996); United States v. Wilson, 895 F.2d 168, 172 (4th Cir.1990); United States v. Griffin, 530 F.2d 739, 742 (7th Cir.1976)); Jimenez v. State, 643 So.2d 70, 72 (Fla. 2d DCA 1994) (opening purse for officers without comment is non-verbal consent to search).

under these circumstance would be draconian.[12]

Moreover, the totality of the circumstances gave the police probable cause to take Coday into custody. In State v. Maynard, 783 So.2d 226, 230 (Fla. 2001), this Court noted: "A citizen-informant is one who is 'motivated not by pecuniary gain, but by the desire to further justice.' State v. Talbott,

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[12]See Arizona v. Evans, 514 U.S. 1, 13-14 (1995) (emphasis supplied, citations omitted) stating:

> Although *Whiteley* clearly retains relevance in determining whether police officers have violated the Fourth Amendment, *see Hensley, supra*, 469 U.S., at 230-231, 105 S.Ct., at 681-682, **its precedential value regarding application of the exclusionary rule is dubious**. In *Whiteley*, the Court treated identification of a Fourth Amendment violation as synonymous with application of the exclusionary rule to evidence secured incident to that violation. 401 U.S., at 568-569, 91 S.Ct., at 1037-38. Subsequent case law has rejected this reflexive application of the exclusionary rule. ... These later cases have emphasized that the issue of exclusion is separate from whether the Fourth Amendment has been violated, *see e.g., Leon, supra*, 468 U.S., at 906, 104 S.Ct., at 3411-3412, and exclusion is appropriate only if the remedial objectives of the rule are thought most efficaciously served....

Based upon this, the mere fact that the New York police did not confirm the existence of the valid warrant before confronting Coday, but at the latest point in time had a facsimile copy of the warrant within an hour and before a second set of Miranda warnings were given, the arrest was proper and the resulting statements or evidence should not be suppressed. As noted in Johnson v. State, 660 So.2d 648, 648 (Fla. 1995), while the officer may have "'jumped the gun' in terms of technical protocol ...[there is] little remedial good that would come from applying the exclusionary rule in this context."

425 So.2d 600, 602 n. 1 (Fla. 4th DCA 1982) (quoting Barfield v. State, 396 So.2d 793, 796 (Fla. 1st DCA 1981)).” “Tips from known reliable informants, such as an identifiable citizen who observes criminal conduct and reports it, along with his own identity to the police, will almost invariably be found sufficient to justify police action” J.L. v. State, 727 So.2d 204, 206 (Fla. 1998). When the officers met with Coday, he confirmed his identity and admitted he was wanted by the police. Clearly, the officers properly arrested Coday.

Exigent circumstances also existed. The police were informed that the murder for which Coday was wanted took place in Florida. Coday was in New York, thus clearly he was an immediate flight risk as he was already “on the run.” Furthermore, the police were told by Woods that this was the second time Coday had killed. Factors to be considered in determining if exigent circumstances exist are: (1) the gravity or violent nature of the offense charged; (2) a reasonable belief the suspect is armed; (3) probable cause to believe the suspect committed the crime charged; (4) strong basis to conclude the suspect is at the location being entered; and (5) a likelihood delay could allow the suspect’s escape, destruction of evidence, or jeopardize the safety of others. See United States v. Standridge, 810 F.2d 1034, 1037 (11th Cir.), cert.

denied, 481 U.S. 1072, 107 S.Ct. 2468, 95 L.Ed.2d 877 (1987). Coday's reliance on Minnesota v. Olsen, 110 S.Ct. 1684, 1690 (1690) does not further his position. The Supreme Court was merely recognizing that the Minnesota Supreme Court applied the correct law to the facts and found that exigent circumstances did not exist. A factor which entered the analysis was that the suspect was not the murderer and that no arrest warrant existed. Here, Coday was the murderer and an arrest warrant had been issued, although the New York police did not have confirmation of that fact from Florida.

Because the arrest was constitutional, the seizure of Coday's bag containing Crepusculo, his written account, was proper.[13] Likewise, his post-Miranda statement was voluntary based upon the case facts noted above.[14] However, if it is found that the New York police acted prematurely, any taint was dissipated by intervening factors which rendered the arrest,

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[13]The facts establish Coday volunteered his belongings, and thus, the Fourth Amendment is not implicated. When Coday saw the police and heard they wanted to talk, he offered his bag noting all they needed was there. (R.7: 942, 1004-05; T.21: 1699-1700).

[14]The record is replete with references to Coday's desire to turn himself in and confess. He supposedly spent time in Europe so that he could write Crepusculo, a 200 page confess to explain what happened. He gave Amiri directions that Crepusculo was for the police. Additionally, when Coday was offered the attorney his father hired, he specifically rejected him.

confession, and seizure of Crepusculo proper. Brown v. Illinois, 422 U.S. 590, 603-04, 95 S. Ct. 2254 (1975).[15] Walley spoke to the parties just minutes after the police confronted Coday and while they were still at Amiri's apartment. He arranged to send a facsimile of the Florida warrant to New York. See Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407 (1963), noting:

> We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'

83 S. Ct. at 417. The discovery of Crepusculo falls under the "inevitable discovery" cases. The police had citizen informants and once the warrant was transmitted to New York, the police would have arrested Coday and examined his bag, thereby, discovering the 200 page confession. See Nix v. Williams, 467 U.S. 431 (1984). The second Miranda warnings preceded the New York confession, which was voluntary as shown through Coday's understanding of each right.

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[15]Coday cites to Taylor v. Alabama, 457 U.S. 687 (1982) to support his claim of no intervening cause to attenuate the allegedly illegal arrest. However, as noted above, the police had a copy of the warrant before Coday signed his Miranda waiver and wrote his confession. This breaks any claim of illegality.

Even absent the confessions, the evidence establishes Coday's guilt of premeditated murder. DiGuilio, 491 So. 2d at 1139. He prepared for a quick escape to Paris with thousands in cash and traveler's checks. Coday did not tell his employer he was leaving. He lured Gomez to his home, attacked her, and when thwarted, went for additional weapons, finally inflicting fatal wounds to the head, lungs, pulmonary vein, and liver. His clothes were found covered in blood. (T.17: 1177-88, 1191-98; T.18: 1207-08, 1214-17, 1223-32, 1241-49, 1296-1303, 1335-39; T.19: 1411-13, 1429-32, 1471-83, 1497-1503).

POINT V

A PROPER FOUNDATION WAS LAID FOR ADMISSION OF CODAY'S HANDWRITTEN POLICE STATEMENT (restated)

Coday alleges it was error to admit his October 15, 1997 written police statement because the State did not lay the proper foundation. The State called one of the officer's who witnessed Coday writing his statement and the statement itself contained information which only the perpetrator of the crime would know. The proper foundation was laid and authenticity was established.

The admissibility of evidence is within the sound discretion of the trial court, and its ruling will not be reversed unless there has been an abuse of discretion. Ray v. State, 755 So.2d

604, 610 (Fla. 2000); Zack v. State, 753 So 2d 9, 25 (Fla. 2000); Cole v. State, 701 So 2d 845, 854 (Fla. 1997). A court's ruling is an abuse of discretion "where no reasonable man would take the view adopted by the trial court." Canakaris, 382 So.2d at 1203. See Trease, 768 So.2d at 1053, n. 2.

Section 90.901, Florida Statutes, provides that authentication of evidence is a condition precedent to admissibility. In State v. Love, 691 So.2d 620 (Fla. 4th DCA 1997), the district court reviewed whether the state had made a *prima facie* case for the authenticity of the defendant's unsigned letter to a co-defendant. In resolving this issue the district court stated:

> Section 90.901 of the Florida Statutes (1995) requires authentication or identification of evidence as a condition precedent to its admission as evidence. *Prima facie* evidence must be introduced in order to prove that the evidence is authentic. *ITT Real Estate Equities, Inc. v. Chandler Insurance Agency, Inc.*, 617 So.2d 750, 750- 51 (Fla. 4th DCA 1993). In order to set forth a *prima facie* case of authenticity, the proponent of the evidence can utilize both direct and circumstantial evidence. *Yates v. Bass Ranch, Inc.*, 379 So.2d 710 (Fla. 4th DCA 1980). **Evidence may be authenticated by appearance, contents, substance, internal patterns, or other distinctive characteristics taken in conjunction with the circumstances. Circumstances recognized as sufficient to meet the test of authenticity include when a letter is written disclosing information which is likely known only to the purported author**. *ITT Real Estate Equities v. Chandler Insurance Agency, Inc.*, 617 So.2d at 751.

Love, 691 So.2d at 621-22 (emphasis supplied). In finding *prima facie* evidence of authenticity, the court noted the letter contained specific details which would be known only to the defendant. Id. at 622. Love is instructive here.

Coday points to Louis v. State, 647 So.2d 324 (Fla 2d DCA 1994) to support his claim his written confession was not authenticated. However, a rolled fingerprint card is vastly different from a confession written by a defendant which contains information which would be known only to him. Love, 691 So.2d at 621-22 is on point and supports admissibility.

While Sergeant Russell testified he did not know Coday's hand writing nor did he know what Coday wrote, Russell was in the interview room periodically and witnessed Coday writing a document. His fellow officer, Detective Grecco, asked that he sign Coday's statement (T.20: 1561-68). This testimony, along with a review of the statement, establishes *prima facie* proof of authenticity. The statement noted the time Gomez arrived, which corresponds with the time she promised Coday she would arrive (T.18: 1297-99; T.20 1610-14). It noted that a "medical situation" was discussed which comports with the conversation overheard by Ms. Laverde (T.18: 1299-1302; T.20: 1610). The confession identified where Gomez was killed, the manner she was killed (using two hammers and a knife) and that she was struck

in the head with a hammer, stabbed in the back, and stabbed in the throat, all of which comports with the medical examiner's testimony and forensic evidence. (T.16: 996-1085; T.17: 1169-1254; T.20: 1612-13). The written statement notes Coday showered and changed his clothes before leaving for the Miami Airport in Gomez's car and taking a flight to Paris (T.20: 1613-14). Again, this information was confirmed by the investigation (T.16: 1013-18, 1046-47; 1092-95; T.19: 1411-13) and establishes the authenticity of the written confession. It was admitted into evidence properly. The conviction should be affirmed.

POINT VI

THE DEATH SENTENCE IS PROPORTIONAL (restated)

Contrary to Coday's position, the death sentence is proportional. This Court has affirmed other death sentences which have a single aggravator.

Proportionality review is to consider the totality of the circumstances in a case compared with other capital cases to ensure uniformity. Urbin v. State, 714 So.2d 411, 416-17 (Fla. 1998); Terry v. State, 668 So,2d 954 (Fla. 1996). It is not a comparison between the number of aggravators and mitigators, but is a "thoughtful, deliberate proportionality review to consider the totality of the circumstances in a case, and to compare it with other capital cases." Porter v. State, 564 So.2d 1060,

1064 (Fla. 1990). This Court's function is not to reweigh the aggravators and mitigators, but to accept the jury's recommendation and the judge's weighing of the evidence. Bates v. State, 750 So.2d 6 (Fla. 1999).

While it is true this Court has required there to be little or no mitigation for a case to withstand proportionality review with a single aggravator,[16] it also has stressed that it is the weight of the aggravation and mitigation that is of critical importance. See Windom v. State, 656 So.2d 432, 440 (Fla. 1995) (finding in single aggravator case, the number of aggravating and mitigating circumstances is not critical, but rather the weight given them).

Here, although the court found only HAC in aggravation, it obviously assigned significant weight to it. This conclusion is implicit in the sentencing order:

> The number and extent of the wounds the Defendant inflicted upon the victim, in this case, including defensive wounds, show a total indifference to human life and complete brutality and torture to which our Supreme Court has previously alluded. Guzman v. State, 721 So.2d 1155 (Fla. 1998). The Defendant, William Coday, was wholly unfazed and committed to completing this most heinous, atrocious, or cruel attack on Gloria Gomez.

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[16]See Songer v. State, 544 So.2d 1010, 1011 (Fla. 1989) (noting "[w]e have in the past affirmed death sentences that were supported by only one aggravating factor, but those cases involved either nothing or very little in mitigation." (citation omitted))

> This aggravating factor has been proven beyond all reasonable doubt and the Court accords it great weight.

(R.5: 836). Moreover, this Court has previously observed that "[b]y any standards, the factors of heinous, atrocious, or cruel, and cold, calculated premeditation are of the most serious order." Maxwell v. State, 603 So.2d 490, 494 n.4 (Fla. 1992).

The State reincorporates its analysis in Point X including its discussion of Dr. Goldstein's testimony to support the court's HAC finding and the weight assigned to establish proportionality. Also, the State directs this Court to Blackwood, 777 So.2d 405, 412-13[17] as providing evidence of proportionality. In Blackwood, this Court found proportional the sentence based upon the single aggravator, HAC, balanced against:

> one statutory mitigator (no significant history of prior criminal conduct), which it gave "**significant weight**", and **eight nonstatutory mitigators**: (1) emotional disturbance at the time of the crime (moderate weight); (2) capacity for rehabilitation (very little weight); (3) cooperation with police (moderate weight); (4) murder resulted from lover's

[17]The State recognizes Mr. Blackwood's postconviction appeal is before this Court and that one of the issues is the propriety of granting a new penalty phase based upon a finding of ineffective assistance of counsel in the penalty phase. See case number SC03-1553. However, such would not undermine the analysis and findings of this Court in the direct appeal proportionality analysis.

> quarrel (no specific weight given but considered this factor to the extent that the killing was borne out of a prior relationship and was fueled by passion); (5) remorse (some weight), (6) appellant is good parent (some weight); (7) appellant's employment record (some weight); and (8) appellant's low intelligence level (some weight).

Blackwood, 777 So.2d at 405. Such is quite similar to the findings below where one statutory mitigator of moderate weight and ten non-statutory mitigators ranging from minimal (six factors) to moderate weight (two factors).[18] The court found the statutory aggravator of under the influence of extreme mental or emotional disturbance (moderate weight) and the non-statutory mitigation of: (1) under the influence of mental or emotional disturbance (moderate); (2) Coday was depressed and suicidal while awaiting trial (minimal); (3) Coday returned to the United States voluntarily, cooperated with the police, voluntarily confessed, and voluntarily consented to the search (minimal); (4) good employment history (moderate); (5) Coday severely sick in elementary school/missed a great deal of school (little); (6) Coday will not endanger others in prison (little); (7) society would be protected by Coday spending life in prison (little); (8) Coday will use foreign language skills to help others

[18]The court rejected: (1) “no significant criminal history” (based upon the German crime); (2) “capacity to appreciate the criminality of conduct/conform conduct to the law”(based on 20 years of abiding by law after German crime); and (3) five other non-statutory factors. (R.5: 836-37).

(little); (9) Coday is a voracious reader and is example for others (little); (10) remorse (little). It was the court's conclusion HAC outweighed the mitigation, and that death was the appropriate sentence. (R.5: 831-43; T.37: 3419-34).

In Blackwood, there was an altercation between the romantically involved parties. Just prior to the murder by strangulation, Blackwood had had sex with the victim. Afterwards they began to argue over her leaving him and having aborted six of his children. Blackwood, 777 So.2d at 405. From the standpoint of the sexual tension between Blackwood and his victim coupled with the potential ending of their relationship, Blackwood and Coday are closely aligned. Also, the same aggravator and similarly weighted mitigators were found. Coday's case should be found proportional.

Likewise, in Ferrell v. State, 680 So.2d 390 (Fla. 1996), the defendant killed his live-in girlfriend and was previously convicted of a second-degree murder. This Court found the sole aggravator "weighty" and the mitigation that Ferrell "was impaired, was disturbed, was under the influence of alcohol, was a good worker, was a good prisoner, and was remorseful" supported the death sentence imposed. Id. at 391-92, n.2. This was based in part on the fact the mitigation was assigned little weight by the trial judge. Id. at 391. In finding

proportionality, this Court cited Duncan v. State, 619 So.2d 279 (Fla. 1993); King v. State, 436 So.2d 50 (Fla. 1983); Lemon v. State, 456 So.2d 885 (Fla. 1984); and Harvard v. State, 414 So.2d 1032 (Fla. 1982).

Cardona v. State, 641 So.2d 361 (Fla. 1994), denial of postconviction relief reversed, 826 So.2d 968 (Fla. 2002), also supports proportionality. Cardona's death sentence was affirmed based upon the HAC aggravator, the statutory mitigators of "under the influence of extreme mental or emotional disturbance" and "ability to conform her conduct to the requirements of the law may have been substantially impaired" along with little non-statutory mitigation.[19] The child victim in Cardona suffered for an extended period of time. Here, Gomez was attacked by Coday with two hammers and a knife and suffered 143 wounds before succumbing. See Arango v. State, 411 So.2d 172 (Fla. 1982), rev'd on other grounds, 497 So.2d 1161 (Fla. 1986). Consequently, this Court should find Coday's sentence proportional.

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[19]"The court also considered that 1) Cardona did not meet her father until she was twelve; 2) she claimed that she was raped when she was eleven but her mother and father did not believe her; and 3) a guardian ad litem for Cardona's other two children recommended that a life sentence would be in the surviving children's best interest." Cardona v. State, 641 So.2d 361, 363 (Fla. 1994).

Coday cites various cases where proportionality was not found. However, the distinguishing factors are that the aggravation was weakened by certain facts, it was stricken, the death sentence was for the rape of a child under eleven, there was long-standing domestic conflict which is no longer recognized to the same degree, or the mitigators were incredibly weighty. For example, in Wilson v. State, 493 So.2d 1019 (Fla. 1986), it appears the domestic confrontation nature of the case played a part in finding the matter disproportionate. Such analysis is no longer good law. Rather, as reaffirmed in Evans v. State, 838 So.2d 1090, 1098 n.6 (Fla. 2002) "While the evidence reveals a close, almost familial type of relationship between Evans and Johnson, this factor alone does not render Evans' death sentence disproportionate. As we explained in Spencer v. State, 691 So.2d 1062 (Fla.1996), 'this Court has never approved a 'domestic dispute' exception to imposition of the death penalty.' *Id.* at 1065." Also, this Court stated "[t]o the extent that the proportionality analysis in ... Wilson v. State, 493 So.2d 1019 (Fla.1986), rests on a "domestic dispute exception to imposition of the death penalty" that this Court has disavowed in Spencer and subsequent cases, we recede from ... Wilson." Evans, 838 So.2d at 1098 n.6. Hence, Wilson does not support Coday's position here.

Similarly, in Farinas v. State, 569 So.2d 425 (Fla. 1990) the cold, calculated, and premeditated aggravator was stricken, the previously found non-statutory mitigator of under the influence of mental/emotional distress was raised to statutory level, and reliance was placed on the domestic violence nature of the case with reference was made to Wilson. Because, this Court has receded from Wilson, Farinas should have no bearing on the proportionality of Coday's sentence.

Huckaby v. State, 343 So.2d 29 (Fla. 1977) involved the vacating of a death sentence imposed for a rape of a child under eleven years of age. Thus, on that point alone the matter is distinguishable. See Lawrence v. State, 846 So.2d 440, 455 n.12 (Fla. 2003) (finding Huckaby distinguishable based on fact it was a death sentence for a rape). Moreover, in Huckaby, the trial court ignored completely the mental heath evidence. Such is not the case here. The instant court reviewed it, gave weight to some evidence, and gave reasons for the rejection of others. As such, Huckaby does not further Coday's position. See Israel v. State, 837 So.2d 381, 393 (Fla. 2002) (finding Huckaby distinguishable in proportionality review where court did not completely disregard mental health evidence).

Further examples of the non-applicability of Coday's cases is due to those courts failing to consider mental health

testimony, giving weight to domestic violence circumstances, or where weighty aggravators, such as cold, calculated, and premeditated are stricken. See Penn v. State, 547 So.2d 1079 (Fla. 1991); Wright v, State, 688 So.2d 298, 301 (Fla. 1997); and Ross, 474 So.2d at 1174. See Evans, 838 So.2d at 1098 n.6 (noting domestic violence aspect of murder is not impediment to death sentence). These cases are distinguishable from Coday's, Because of these factors, they should not be an impediment to the affirmance of Coday's sentence.

POINT VII

THE COURT PROPERLY REJECTED CODAY'S MITIGATOR OF ABILITY TO CONFORM CONDUCT TO THE REQUIREMENTS OF THE LAW WAS SUBSTANTIALLY IMPAIRED (restated)

Coday would have this Court find the judge erred in rejecting the mitigator that Coday's ability to conform his conduct to the requirements of law was substantially impaired. The rejection of the mitigator is supported by the record. Coday conformed his conduct to the requirements of the law for 20 years after the German manslaughter. He held down jobs, married, divorced, and dated/socialized without incident.

In Campbell v. State, 571 So.2d 415 (Fla. 1990), this Court established the relevant standard of review for mitigation: (1) whether a particular circumstance is truly mitigating in nature is a question of law and subject to *de novo* review; (2) whether

a mitigator has been established in a given case is a question of fact and subject to the competent, substantial evidence standard; and (3) the weight assigned a mitigator is within the judge's sound discretion. See Kearse v. State, 770 So.2d 1119, 1134 (Fla. 2000) (observing whether mitigator exists and weight assigned are matters within sentencing court's discretion); Trease, 768 So.2d at 1055 (receding in part from Campbell and holding that, though court must consider all mitigating circumstances, it may assign "little or no" weight to mitigator); Mansfield v. State, 758 So.2d 636 (Fla. 2000) (explaining court may reject mitigator provided record contains competent substantial evidence to support rejection).

Coday claims his experts were uncontroverted, yet, the facts developed in the guilt and penalty phases support the rejection of this mitigator. As stated in Foster v. State, 679 So.2d 747, 755 (Fla. 1996): "[E]xpert testimony alone does not require a finding of extreme mental or emotional disturbance. **Even uncontroverted opinion testimony can be rejected**, especially when it is hard to reconcile with the other evidence presented in the case. As long as the court considered all of the evidence, the trial judge's determination of lack of mitigation will stand absent a palpable abuse of discretion." (citations omitted, emphasis supplied).

Here, the testimony established that upon Coday's release from the German prison for the manslaughter conviction and his return to the United States, he followed a course of mental health treatment until 1985 when he decide to stop taking his medication and stop seeing a doctor. From that time forward, he completed law school, held down jobs, married and divorced, and had rewarding relationships with co-workers and friends alike. He led a lawful life. Also, Dr. Jacobson did not find that Coday did not know what he was doing was wrong (T.34: 3272-74) and Dr. Goldstein opined that Coday knew he was hitting Gomez and such would cause pain, severe injuries, and/or death. Dr. Goldstein ruled out insanity because Coday knew he was hitting Gomez, that she was struggling, and that he was causing serious injury. (T.35: 3362-63). Also, co-worker, Marjorie Louise ("Louise"), found Coday to be an excellent librarian with good attendance. In the days before the murder, Coday did not mention a Paris trip. Coday dated several girls while Louise knew him. Even though depressed, Coday interacted with Louise; he was not rude and he kept control of himself (T.29: 2654-56, 2667-69). All this cuts against the finding of this mitigator. See Conde, 860 So.2d at 956 (rejecting mitigator of inability to conform conduct to requirements of law based on defendant's interaction with family, friends, and holding down jobs); Rose

v. State, 787 So.2d 786, 802 (Fla. 2001) (finding no error in rejecting mitigator where state undermined mental mitigation and impeached expert); Knight v. State, 746 So.2d 423, 436 (Fla. 1998) (concluding there was no error in rejection of mental mitigation where court weighed evidence presented and resolved conflicts against defendant); Gudinas v. State, 693 So.2d 953, 966-67 (Fla. 1997) (rejecting mitigation from apparently uncontroverted expert because data relied not supported by facts).

Coday's reliance on Irizarry v. State, 496 So.2d 822, 824 (Fla. 1986) and the finding of impaired capacity in that case is not the question. Instead, the focus must be on whether the facts in Coday's case support such a finding. Similarly, because there was evidence of mental mitigation not considered by the court in Kampff v. State, 317 So.2d 1007 (Fla. 1979), again is not the question. The issue to be resolved is whether the rejection of the mitigation here, is supported by the evidence. As noted above, given the fact Coday could hold down a job, socialize, and marry without committing criminal acts for 20 years undermines the finding of mitigation. This Court should affirm.

To the extent that Coday challenges the rejection of the non-statutory mitigator of "suffered emotional abuse as a

child," the record supports the court's conclusion. The judge found:

> While the Defendant did not have an ideal relationship with his parents, the evidence did not suggest it was abusive. The Defendant did not have a poor upbringing or a deprived childhood. On the contrary, the evidence at the penalty phase suggests that Defendant's parents loved and cared for him. This non-statutory mitigating factor has not been established and the Court assigns it no weight.

(R.5: 840). The record, in a light favoring Coday, indicated his father, William Coday, Sr. ("Coday, Sr.") was cold and lacked emotion, however, Rayma Coday ("Rayma"), observed Coday, Sr. loved his son, but they had a formal relationship. When Coday, Sr. left Coday's mother and married Rayma, he saw his son every two to four weeks between 1975 and 1980. After that, they moved to another state. (R.28: 2485-88)

Coday, Sr. testified he helped his son work through his difficulties early in life. Medical and emotional support was given, but as every father would say, he could have done better. While not emotionally involved, Coday, Sr. did not abuse his son or express disappointment in him - they discussed education and career decisions. Coday's mother nurtured him when he was sick. At no time did Coday complain about his relationship with his mother (T.28: 2520-26). Such is substantial, competent evidence supporting the rejection of the "emotional abuse" mitigator. The sentence should be affirmed.

Even if the mitigators should have been found, it is clear that court would have given it minor, if any, weight considering its initial rejection. As such, the sentence remains proper. The State reincorporates its proportionality analysis from Point VI.

POINTS VIII AND IX

FLORIDA'S CAPITAL SENTENCING IS CONSTITUTIONAL (restated)

Citing to Furman v. Georgia, 408 U.S. 238 (1972) in **Point VIII**, Coday asserts that death eligibility cannot be set at time of conviction. In **Point IX** he challenges his death sentence claiming is violates Ring v. Arizona, 120 S.Ct. 2348 (2002). Coday's challenge to the death penalty statute as a violation of the Eighth Amendment under Furman is not preserved for appeal. Moreover, this Court has rejected all of Coday's challenges to Florida capital sentencing. His sentence must be affirmed.

While Coday challenged his sentence under the Sixth Amendment as discussed in Ring, he did not challenge the sentence as a violation of Furman which analyzed capital sentencing statutes under the Eighth Amendment. It is well established that for an issue to be preserved for appeal, it must be presented to the lower court, and "the specific legal argument or ground to be argued on appeal must be part of that

presentation if it is to be considered preserved." Archer v. State, 613 So.2d 446 (Fla. 1993), quoting Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985).

By failing to expound upon his claim that death eligibility at time of conviction violates Furman, Coday has waived the issue. Cf. Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990) (opining "purpose of an appellate brief is to present arguments in support of the points on appeal" otherwise they will be deemed waived); Cooper v. State, 856 So.2d 969, 977, n.7 (Fla. 2003); Roberts v. State, 568 So.2d 1255 (Fla. 1990).

However, while Furman resulted in Legislatures identifying aggravating factors to assist in channeling capital sentencing does not invalidate the finding that death eligibility occurs at time conviction. Such is based on statutory construction and does not impact the Eighth Amendment. Moreover, quoting Proffitt v. Florida, 428 U.S. 242, 252 (1976), Ring acknowledged that "[i]t has never [been] suggested that jury sentencing is constitutionally required",[20] rather Ring involves only the requirement that the jury find the defendant death-eligible.

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[20]See Harris v. Alabama, 513 U.S. 504, 515 (1995) (holding "[t]he Constitution permits the trial judge, acting alone, to impose a capital sentence. It is thus not offended when a State further requires the sentencing judge to consider a jury's recommendation and trusts the judge to give it the proper weight.)

Ring, 122 S.Ct. at 2447, n.4. In Florida, such takes place at time of conviction. See Porter v. Crosby, 840 So.2d 981, 986 (Fla. 2003); Mills v. Moore, 786 So.2d 532 (Fla. 2001) (finding death eligibility occurs at time of conviction). Further, the jury determination is for the guilt phase, while sentencing rests with the trial court. See Spaziano v. Florida, 468 U.S. 447 (1984) (finding Sixth Amendment has no guarantee of right to jury on sentencing issue).

In his **Point IX**, Coday asserts Ring, based upon Apprendi v. New Jersey, 530 U.S. 466 (2000), requires jury fact findings of aggravation, sufficient to support a death sentence, and not outweighed by mitigation before a defendant is death eligible. (IB 65). Arguing for a life sentence, Coday maintains the advisory verdict cannot be used to uphold the death sentence because it did not make finding of fact and was by simple majority (IB 66-72). He complains that: (1) the jury failed to make a finding of aggravation, which would support the death sentence; (2) the court failed to instruct the jury that its findings must be made beyond a reasonable doubt; (3) that the recommendation was not unanimous; and (4) the indictment did not contain notice of aggravators. These issues have been addressed previously and rejected.

This Court has clearly rejected the argument that Ring

overruled its earlier opinions upholding Florida's sentencing scheme. See e.g. Mills v. Moore, 786 So.2d 532, 537 (Fla. 2001). In Bottoson v. Moore, 833 So.2d 693 (Fla. 2002), this Court stated:

> Although Bottoson contends that he is entitled to relief under *Ring*, we decline to so hold. The United States Supreme Court in February 2002 stayed Bottoson's execution and placed the present case in abeyance while it decided *Ring*. That Court then in June 2002 issued its decision in *Ring*, summarily denied Bottoson's petition for certiorari, and lifted the stay without mentioning *Ring* in the *Bottoson* order. The Court did not direct the Florida Supreme Court to reconsider *Bottoson* in light of *Ring*.

See King v. Moore, 831 So. 2d 143 (Fla. 2002).

Ring does not apply here because Florida's death sentencing statute is very different from the Arizona statute at issue in Ring. The statutory maximum sentence under Arizona law for first-degree murder is life imprisonment. See Ring, 122 S.Ct. at 2437. In contrast, this Court has previously recognized the statutory maximum sentence for first-degree murder in Florida is death, and has repeatedly denied relief requested under Ring. See Porter v. Crosby, 840 So.2d 981 (Fla. 2003) (stating "we have repeatedly held that the maximum penalty under the statute is death and have rejected the other Apprendi arguments [that aggravators had to be charged in the indictment, submitted to the jury and individually found by a unanimous jury"]); Patton

v. State, 29 Fla. L. Weekly S243, (Fla. May 20, 2004); Reed v. State, 875 So.2d 415 (Fla. 2004); Globe v. State, 29 Fla. L. Weekly S345 (Fla. March 18, 2004); Pace v. State, 854 So.2d 167 (Fla. 2003); Chandler v. State, 848 So.2d 1031 (Fla. 2003); Banks v. State, 842 So.2d 788 (Fla. 2003); Lugo v. State, 845 So.2d 74, 119 n. 79 (Fla. 2003); Jones v. State, 845 So.2d 55 (Fla. 2003); Cole v. State, 841 So.2d 409 (Fla. 2003) Anderson v. State, 841 So.2d 390 (Fla. 2003); Cox v. State, 819 So.2d 705 (Fla. 2002); Conahan v. State, 844 So.2d 629 (Fla. 2003); Spencer v. State, 842 So.2d 52 (Fla. 2003); Fotopoulos v. State, 838 So.2d 1122 (Fla. 2002); Doorbal v. State, 837 So.2d 940 (Fla. 2003); Bruno v. Moore, 838 So. 2d 485 (Fla. 2002); Bottoson v. State, 813 So.2d 31 (Fla. 2002); Hertz v. State, 803 So.2d 629, 648 (Fla. 2001) (2002); Looney v. State, 803 So.2d 656, 675 (Fla. 2002); Shere v. Moore, 830 So.2d 56 (Fla. 2002); Brown v. Moore, 800 So. 2d 223 (Fla. 2001); Mann v. Moore, 794 So. 2d 595 (Fla. 2001); Mills, 786 So. 2d at 536-38. Because death is the statutory maximum penalty for first-degree murder, Apprendi and Ring do not impact Florida's capital sentencing statute.

This Court further noted in Bottoson that "the United States Supreme Court repeatedly has reviewed and upheld Florida's capital sentencing statute over the past quarter of a century,

and ... has specifically directed lower courts to 'leav[e] to [the United States Supreme] Court the prerogative of overruling its own decisions." Bottoson, 833 So.2d at 695 (quoting Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484). The fact the Supreme Court has declined to disturb its prior decisions upholding the constitutionality of Florida's capital sentencing scheme, and that only it may overrule its precedent also shows that Coday is not entitled to relief based on Ring.

Furthermore, the claims that the death penalty is unconstitutional for failing to require juror unanimity, the charging of the aggravating factors in the indictment, findings of fact in the jury's recommendation, or specific findings of aggravating factors, are without merit. These issues are not addressed in Ring, and in the absence of any Supreme Court ruling to the contrary, there is no need to reconsider this Court's well established rejection of these claims. Sweet v. Moore, 822 So.2d 1269 (Fla. 2002); Cox v. State, 819 So.2d 705, 724 n.17 (Fla. 2002) (noting prior decisions on these issues need not be revisited "unless and until" the United States Supreme Court recedes from Proffitt v. Florida, 428 U.S. 242 (1976)). Moreover, this Court has already rejected these arguments post-Ring. Porter v. Crosby, 840 So.2d at 986

(rejecting argument that aggravators must be charged in indictment, submitted to jury, and individually found by unanimous verdict); Doorbal, 837 So.2d at 940 (same).

To the extent Coday asserts that the majority vote was insufficient because it was "eight to four", he is mistaken as the vote was nine to three. Further, his reliance upon Ring is misplaced as such has no impact on Florida capital sentencing. This Court has held that the jury's advisory sentence need not be unanimous. See Way v. State, 760 So. 2d 903, 924 (Fla. 2000) (Pariente, J., concurring) (noting jury's death recommendation need not be unanimous); Thomson v. State, 648 So. 2d 692, 698 (Fla. 1984) (holding simple majority vote of death constitutional). Even in the context of guilt, jury unanimity is not required under the United States Constitution. Cf. Johnson v. Louisiana, 406 U.S. 356 (1972) (finding nine to three verdict for guilt was not denial of due process or equal protection); Apodaca v. Oregon, 406 U.S. 404 (1972) (holding conviction by non-unanimous jury did not violate Sixth Amendment). Schad v. Arizona, 501 U.S. 624, 631 (1991) (plurality opinion) (addressing felony murder and holding that due process does not require unanimous determination on theories of liability). Based upon this, Coday's sentence should be affirmed.

POINT X

SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE, THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATOR WAS FOUND PROPERLY (restated)

Here, Coday claims the HAC aggravator was not proven because there was nothing to show he intended to cause undue and prolonged suffering or that Gomez was conscious so as to experience prolonged suffering. Contrary to Coday's position, Gomez experienced 144 blunt and sharp force injuries which included defensive wounds. Coday used two hammers and a knife to inflict the wounds as Gomez fought off her attacker. The crime scene and blood evidence as well as Coday's confession establish she struggled for her life and only succumbed at the end of the attack. Such supports the HAC finding and this Court should affirm.

Whether an aggravator exists is a factual finding reviewed under the competent, substantial evidence test. When considering the standard of review, this Court noted it "is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt—that is the trial court's job. Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence

supports its finding." Alston v. State, 723 So.2d 148, 160 (Fla. 1998) (quoting Willacy v. State, 696 So.2d 693, 695 (Fla.), cert. denied, 522 U.S. 970 (1997).

After recounting Dr. Price's testimony and summarizing the 144 blunt and sharp force injuries (R.5:833-35), court made the following findings regarding the HAC aggravator:

> The manner in which the Defendant murdered the victim indicates, at the very least, a complete disregard for the suffering of another human being. The Defendant inflicted 144 wounds upon the victim using both sides of two different hammers and a knife. The evidence indicates the victim was aware of her impending death. The brutality of the attack, coupled with the defensive wounds, bodily movements, and blood spatter suggest the victim knew she was fighting for her life. According to the Defendant's confession, the victim even managed to grab the first hammer out of Defendant's hands. At this point, the Defendant grabbed another hammer, and then a knife, and continued his attack, stabbing and hitting her.
>
> There were other signs that the victim struggled for her life. The victim had multiple defensive wounds on the palms of her hands and on her arms from blocking the blows and grabbing the weapon. The floor of the bathroom was covered in blood and the walls in the room had blood spatter patterns on them. Even the two closets in the bedroom had blood smear patterns on them. The victim was covered in blood. In the victim's ultimately futile attempts to evade the Defendant's blows, the phone cord became wrapped around her body, also evidencing a violent struggle.
>
> Throughout the time the victim was struggling with the Defendant and enduring numerous defensive injuries, the victim was conscious and aware of her impending death. Dr. Price testified that the victim was alive for 143 of the 144 stab wounds and hammer blows the Defendant dealt her. One can only imagine the terror and anguish the victim endured while

> conscious, and the pain and suffering she endured at the hands of the Defendant as he inflicted blow after blow.
>
> The number and extent of the wounds the Defendant inflicted upon the victim , in this case, including defensive wounds, show a total indifference to human life and complete brutality and torture to which our Supreme Court has previously alluded. Guzman v. State, 721 So.2d 1155 (Fla. 1998). The Defendant, William Coday, was wholly unfazed and committed to completing this most heinous, atrocious, or cruel attack on Gloria Gomez.

(R.5: 835-36).

As explained in Guzman v. State, 721 So.2d 1155 (Fla. 1998):

> The HAC aggravator applies only in torturous murders--those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another. ... The crime must be conscienceless or pitiless and unnecessarily torturous to the victim. ... The HAC aggravating circumstance has been consistently upheld where the victim was repeatedly stabbed.

(citations omitted). See Owen v. State, 862 So.2d 687, 698 (Fla. 2003) (affirming HAC based upon multiple stab wounds); Duest v. State, 855 So.2d 33, 47 (Fla. 2003); Brown v. State, 721 So.2d 274, 277 (Fla. 1998); Finney v. State, 660 So.2d 674 (Fla.1995); Pittman v. State, 646 So.2d 167 (Fla. 1994); Derrick v. State, 641 So.2d 378, 381 (Fla. 1994); Atwater v. State, 626 So.2d 1325 (Fla. 1993). Beating the victim with a hammer has been held to support HAC. See Ross, 474 So.2d at 1174 (finding beating with hammer while victim conscious, in pain, and trying to defend

herself for period of time, and where blood spatter corroborated death was not instantaneous, HAC finding proper). Also, in determining HAC, this Court found "fear and emotional strain" preceding the victim's death could contribute "to the heinous nature of a capital felony." Adams v. State, 412 So.2d 850, 857 (Fla. 1982); Rivera v. State, 561 So.2d 536, 540 (Fla. 1990)(finding fear/emotional strain supports HAC).

Here, Dr. Price opined that both a hammer and knife were used to inflict 144 wounds, 143 of which were antemortem. Gomez had defensive wounds and such wounds would be painful. Dr. Price stated that there would be pain associated with the injuries to Gomez's head, the loss of her tooth, and other wounds to her body which penetrated the skin. It was noted that there were signs of either strangulation from compression of the airway or from sitting on Gomez's chest. (T.17: 1180-82; T.18: 1207, 1216-17, 1223-25, 1242, 1247-49). Such supports the HAC aggravator.

Coday's reliance upon cases involving rapid gunshot deaths are readily distinguishable from a prolonged attack with two hammers and a knife leaving 144 injuries as the victim battles for her life. For example, in Porter v. State, 564 So.2d 1060, 1063 (Fla. 1990), the victims were shot during a short struggle by a defendant who was intoxicated. Likewise, Bonifay v. State,

626 So.2d 1310, 1311 (Fla. 1993), is distinguishable is there was a break in the initial attack when Gomez gained control of the first hammer, but Coday returned with a second hammer and later a knife to continue his attack. In Santos v. State, 591 So.2d 160 (Fla. 1991); Cheshire v. State, 568 So.2d 908 (Fla. 1990); Mills v. State, 476 So.2d 172 (Fla. 1985) and Lloyd v. State, 524 So.2d 396 (Fla. 1988), the deaths were relatively quick from gun fire. Similarly, Smally v. State, 546 So.2d 720 (Fla. 1989), where a two year old child was rendered unconscious and later died of cerebral hemorrhaging does not call into question the prolonged attack with hammers and a knife as establishing HAC.

Also relied upon by Coday is Dr. Goldstein's opinion that he was so disassociated that he was not focusing on causing pain to Gomez. (IB at 81). However, Coday's actions prove otherwise as supported by Dr. Jacobson's refusal to say Coday did not know what he was doing was wrong (T.34: 3272-74) Also, according to Dr. Goldstein, Coday knew he was hitting Gomez and such was going to severely injure and perhaps cause death. Coday knew that the hammering and stabbing would cause pain and Dr. Goldstein admitted it was possible Coday did not care if he caused Gomez pain. Further, Dr. Goldstein ruled out the insanity

defense[21] because Coday knew he was hitting Gomez, that she was struggling, and that he was causing serious injury, yet refused to stop his attack except to get other weapons, shows his intent to inflict torturous pain. (T.35: 3362-63). Far for undercutting the HAC aggravator. these doctors establish Coday had the capacity to understand what he was doing would cause pain, was angry with Gomez for spurning him, and was willing to take whatever measures necessary to follow through on his attack.

Coday cites Buford v. State, 403 So.2d 943, 952 (Fla. 1981) for the proposition that killing in an emotional rage is not HAC, however, Buford was discussing Halliwell v. State, 323 So.2d 557 (Fla. 1975) where this Court rejected HAC. Such was based on the determination that the blows were struck after death and that the body was later dismembered, while showing premeditation, did not prove HAC. This Court did not indicate why the judge found HAC, but this Court's focus on the postmortem dismemberment indicates that such was the basis for

[21]Dr. Goldstein admitted the last time Coday was on psychotropic medication was in 1985-1986; there was no medication from that time to the 1997 murder. During that time Coday was reported to have had incidents of psychotic events and violence toward his two wives, but he did not kill them. Also during this time, Coday went to college, received his degree, and held down various jobs while relating well to others. (T.35: 3367-71).

HAC. In the instant case, there was only one postmortem injury, the other 143 were antemortem, most of which the evidence supports were inflicted while Gomez was conscious and struggling for her life. Hence, neither Buford nor Halliwell is an impediment to the HAC finding. Moreover, this Court has looked to the victim's pre-death fears to support HAC. See Derrick v. State, 641 So.2d 378, 381 (Fla. 1994)(finding HAC aggravator where victim stabbed multiple times, wounds would have been extremely painful, and defensive wounds indicated victim experienced pre-death apprehension and pain).

As noted above, Huckaby, 343 So.2d at 29 is distinguishable because the court completely ignored offered mitigation and because the death sentence did not arise from a murder, but from a rape. Lawrence, 846 So.2d 440, 455 n.12; Israel, 837 So.2d at 393.

While Coday points to the fact Dr. Price could not opine as to the sequence of injuries or for how long Gomez was conscious, the doctor, and crime scene investigator, Detective Hill, noted a great struggle was clear from the blood evidence. Dr. Price pointed to the number of defensive wounds. Coday admitted Gomez fought against him, scratching him and grabbing the first hammer. Dr. Price observed that one of Gomez's defensive wounds came from grabbing the knife, the third weapon used. Pain would

have been felt by each blow which cut the skin. (T.16: 1023-28, 1037-43; T.17: 1177-82, 1187-88, 1191-98; T.18: 1207-08, 1214-17, 1223-32, 1241-49, 1296-1303, 1335-39). Clearly, if Gomez is resisting Coday, she must be alive and conscious. Coday's suggestion that the evidence does not support a prolonged confrontation in which painful injuries were inflicted is not well taken.

The cases Coday cites suggesting HAC is not applicable are distinguishable based upon the above referenced facts. For example, in Clark v. State, 443 So.2d 973, 977 (Fla. 1983) the victim suffered a single gunshot wound not a prolonged hammer/knife attack. To the extent Coday cites King v. State, 514 So.2d 354 (Fla. 1987) for the proposition aggravating factors cannot be speculative, the facts refute this claim. Based on Dr. Price's testimony alone, HAC was established beyond a reasonable doubt. Likewise, Zakrzewski v. State, 717 So.2d 488, 493 (Fla. 1983); Jackson v. State, 451 So.2d 458, 463 (Fla. 1984); Cherry v. State, 781 So.2d 1040, 1055 (Fla. 2000); and Diaz v. State, 860 So.2d 960 (Fla. 2003) are distinguishable because Gomez was alive and conscious for a long enough period of time to fight off Coday, thereby forcing him to get additional weapons, to receive defensive wounds from both types of weapons, and to have blood spatter and smears throughout the

bedroom indicating a struggle. These facts are substantial, competent evidence that Gomez was feeling pain and comprehended her impending doom.

POINT XI

THE SENTENCING ORDER CONTAINS THE REQUISITE FINDINGS TO SUPPORT THE DEATH SENTENCE (restated)

Coday asserts the sentencing order is deficient because it does not contain the independent phrase that the aggravator justifies the imposition of the death penalty. Whether an aggravator exists is a factual finding reviewed under the competent, substantial evidence test. Alston, 723 So.2d at 160 (noting "task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding"). A review of the order establishes that the requisite findings were made. This Court should affirm the death sentence.

In its sentencing order, the court outlined the facts, aggravation, and mitigation, before imposing the death penalty upon the conclusion:

> **THIS COURT** has carefully considered and weighed the statutory aggravating factor and statutory mitigating and non-statutory mitigating factors found to exist in this case. This Court, having given great

> weight to the jury's recommendation, finds that the aggravating factor was proven beyond a reasonable doubt and outweighs the mitigating factors found to exist.

(R.5: 843). Such evaluation and analysis meets the dictates of section 921.141(3). Coday points to nothing to the contrary which is on point.

Reliance on Rembert v. State, 445 So.2d 337, 340 (Fla. 1989) and Terry v. State, 668 So.2d 954 (Fla. 1996) is misplaced. Both address proportionality[22] arguments without discussing the sufficiency of the court's sentencing order. Ferrell v. State, 653 So.2d 367, 371 (Fla. 1995) and Bouie v. State, 559 So.2d 1113 (Fla. 1990) by contrast establish that the instant order is proper. In Ferrell, the sentencing court merely made conclusory statements about the aggravating and mitigating circumstances; the court failed to identify what its factual finding were. Ferrell, 653 So.2d at 371. This Court, in Bouie, considered the statutory requirements for written capital sentencing orders under section 921.141(3) finding that "specific findings of fact based on the record must be" included in the sentencing order in addition to recognition that the court independently weighed the aggravation and mitigation found to "determine whether the

[22]To the extent Coday asserts that a single aggravator cannot support a death sentence, the State incorporates its argument in Points VI and XII.

death penalty or a sentence of life imprisonment should be imposed." Bouie, 559 So.2d at 1116. The sentencing order in Bouie provided: "The court has considered the aggravating and mitigating circumstances presented in evidence in this cause and determines that sufficient aggravating circumstances exist, and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Id. Such order was found deficient because:

> There is no indication of which aggravating circumstances and which mitigating circumstances, if any, were deemed applicable. Neither the oral nor the written findings recite any facts upon which the trial judge based Bouie's sentence. They are merely conclusory statements which fail to show the independent weighing and reasoned judgment required by the statute and case law and do not meet our requirements.

Bouie, 559 So.2d at 1116. See Campbell, 571 So.2d at 419, receded from in part, Trease, 768 So.2d at 1055 (outlining mitigation review required). Such is not the case with the order issued here.

The instant sentencing order does outline the case facts (R.5: 831-33), identify and explain the finding of the HAC aggravator beyond a reasonable doubt (R.5: 833-36), and identify, discuss, and give weight to the mitigation offered (R.5: 836-42). It is only after this analysis that the court finds the mitigation does not outweigh the aggravation.

Moreover, the court properly instructed the jury on the requisite findings, thus, it may be assumed the court followed the same legal analysis. Consequently, it is a proper order upon which this Court can conduct its mandated review of the sentence.

POINT XII

A SINGLE AGGRAVATING FACTOR IS SUFFICIENT TO SUPPORT A DEATH SENTENCE (restated)

It is Coday's position that section 921.141 does not contemplate the imposition of a death sentence based upon a single aggravator. This Court has rejected such claims and Coday has not offered a basis for rejecting such precedent.

Initially it must be noted that this issue is not preserved for appeal. It is well established that for an issue to be preserved for appeal, it must be presented to the lower court and "the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved." Archer v. State, 613 So.2d 446 (Fla. 1993). See, Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982). In the defense sentencing memorandum, Coday noted that this Court has affirmed single aggravator cases; he did not argue that such was a violation of Florida's capital sentence. The matter is unpreserved for appeal.

However, should this Court reach the merits, the sentence

was proper in this case. Legal issues are reviewed de novo. Connor v. State, 803 So.2d 598, 607 (Fla. 2001).

Coday claims section 921.141 does not provide for single aggravator cases and focuses on the plural word **circumstances** in the phrase "sufficient aggravating circumstances" found in section 921.141(2)(a) and (3)(a). He posits that had the Legislature contemplated single aggravator cases it could have enacted explicit language to that effect. Coday suggests the statute should be strictly construed against the State. (IB 86-88). Coday's cases discussing statutory construction do not come into play here as section 921.141 is not ambiguous and this Court has found previously that single aggravator cases are constitutional.

In 1973, this Court was called upon to determine if Florida's death penalty statute was constitutional. State v. Dixon, 283 So.2d 1, 2-3 (Fla. 1973), superseded by statute as stated in State v. Dene, 533 So.2d 265 (Fla. 1988). Before this Court in Dixon was the exact language at issue here. Interpreting the statute, in light of a challenge that the aggravators were vague and did not "provide meaningful restraints and guidelines for the discretion of judge and jury," this Court stated: "[w]hen one or more of the aggravating circumstances is found, death is presumed to be the proper

sentence unless it or they are overridden by one or more of the mitigating circumstances provided....” Dixon, 283 So.2d 1, 8-9. Based upon this interpretation, a single HAC aggravator sentence was affirmed in LeDuc v. State, 365 So.2d 149, 152 (Fla. 1978). Since then, this Court has affirmed several single aggravator cases. See Butler v. State, 842 So.2d 817, 832-34 (Fla. 2003); Blackwood v. State, 777 So.2d 399 (Fla. 2000); Cardona v. State, 641 So.2d 361 (Fla. 1994), denial of postconviction relief reversed, 826 So.2d 968 (Fla. 2002). This Court must affirm.

POINT XIII

THE TRIAL COURT CORRECTLY FOUND THAT CODAY'S GERMAN MANSLAUGHTER CONVICTION COULD BE USED IN CROSS-EXAMINATION OF DEFENSE MENTAL HEALTH EXPERTS (restated)

Coday maintains it was improper for the court to rule that his prior conviction for manslaughter in Germany was admissible in cross-examining of his mental health experts. (IB 91-93). However, those experts had used the German material in formulating their opinions, even though they later professed that the German incident merely bolstered their opinion of the existence of mental mitigation. The trial court did not abuse its discretion in this matter and the sentence should be affirmed.

Admissibility of evidence is within the sound discretion of the court, and its ruling will not be disturbed unless there has

been an abuse of that discretion. Ray, 755 So.2d at 610; Zack, 753 So.2d at 25. A court's ruling is an abuse of discretion "where no reasonable man would take the view adopted by the trial court." Canakaris, 382 So.2d at 1203. See Trease, 768 So.2d at 1053, n. 2.

Coday proffered testimony from three of his mental health experts who had reviewed the German manslaughter case in rendering an opinion here. The purpose was to determine whether such testimony would open the door to the State cross-examining the experts on the German case. (T.25: 2258-81, T.26: 2289-93; T28: 2554-60; T.29: 2752-63, 2766-74). In response to whether he was able to opine about Coday's mental health with respect to Gomez's murder based only on his two contacts with Coday in jail following a suicide attempt, Dr. Goldstein stated:

> I would need to know additional information. I think I wouldn't want to base an opinion solely on two interviews and on fact that a Defendant was apparently psychotic some four years after a crime, it would not be very ethical or professional.
>
> I would need to administer psychological tests to him, observe him over a longer period of time, read police reports and the like, and consider other people's recollections of his behavior, both before and after the crime to reach that opinion.

(T.28: 2561-62). Dr. Goldstein added he could render an opinion by separating out the German information, but "leaving that out I think detracts from the strength of my opinion ... the

elimination of that is, for me, an important piece of data." (T.28: 2562).

Dr. Shapiro testified his opinion would be "completely the same" without the German case. (T.29: 2760). However, Dr. Shapiro admitted that he considered Coday's reaction to the receipt of divorce papers in jail as relevant to how he reacted on July 11, 1997 (with Gomez) as well as the German incident to get a full and accurate assessment of Coday's mental condition. (T.29: 2762-63).

Dr. Vicary reviewed various materials including Coday's psychiatric records from the United States and Germany (T.29: 2768). This doctor could separate out the German information and still render the same opinion on mental health mitigation (T.29: 2769, 2772-73). However, Dr. Vicary admitted that the German information was important in his assessment as to whether Coday suffered the same mental condition in Germany and on July 11, 1997. Dr. Vicary also confessed that he wants to make an accurate assessment and would not want to ignore the German case information. (T.29: 2773-74).

In ruling after hearing from Dr. Goldstein, the court noted:

> First of all, with respect to the cross examination, I don't think that it's ... for the Court to say, what is or is not an important factor for an expert to consider.
>
> And I think simply the fact that the expert says,

> I can consider it, but it would only strengthen my opinion -- I don't think unilaterally that this means that the Court should just accept that, and then the other side would have no right to cross examine on that.
>
> I understand the prejudicial effect of it, but I think that if he is going to testify, and render an opinion, I think the side against whom that opinion is being offered, if you will, is entitled to a full and extensive cross examination on the information that they take into account in rendering that opinion.

(T.28: 2570-71). Following the other doctors' testimony, the court reiterated:

> I'm just going to say it again that I see the latitude that the State would have on cross examination on the mental health issue, or aspects of the matter as different than the matter being presented as a statutory aggravator. I think it becomes at some point a 403 bouncing (sic) test and I do see it as so fundamental. If appropriate, I will inject myself and ask you to come to sidebar without an objection being made if I think it's going as a point beyond what I think is appropriate.
>
> We'll wait and see as we get there, but as to the issue of cross examination, you each have an opportunity to fully and effectively cross examine the other side's witnesses and I'm not going to limit you. Neither of you can have all worlds in that regard.

(T.29: 2776).

This Court has reaffirmed that a defense expert may be cross-examined by the State on those substances which were used in formulating his opinion. See Rimmer v. State, 825 So.2d 304, 326 (Fla. 2002) (permitting examination of defense mental health doctor regarding defendant's criminal history); Davis v. State,

698 So.2d 1182, 1191 (Fla. 1997); Jones v. State, 612 So.2d 1370, 1374 (Fla. 1992) (finding defense opened door to cross examination by expert's reliance on defendant's criminal history); Muehleman v. State, 503 So.2d 310 (Fla. 1987); Parker v. State, 476 So.2d 134, 139 (Fla. 1985) (opining "it is proper for a party to fully inquire into the history utilized by the expert to determine whether the expert's opinion has a proper basis."). As the record reflects, the experts utilized the German case in forming their opinion, hence such is proper fodder for cross examination and would allow the jury to assess the credibility and weight of the experts' conclusions.

Coday points to Schwartz v. State, 695 So.2d 452 (Fla. 4th DCA 1997), for the proportion that an expert's testimony could be limited when certain portions are unfair or prejudicial. The case is not on point in that it rests upon a finding that an expert may not bolster his opinion on direct examination by reporting other experts had agreed with him. Such is not the case here. The State was merely interested in testing the experts' opinions based upon the material each reviewed. Moreover, to limit the alleged prejudicial effect, the court had agreed to stop the proceedings should it find that the State was approaching prejudicial information. Absent such conclusion, full cross examination on the material the experts used was

appropriate.

Also relied upon by Coday is Erwin v. Todd, 699 So.2d 275, 277-78 (Fla. 1997). However, Erwin is distinguishable. At no point did the court find that the German records were inadmissible for mental health consideration. They just could not be used as evidence of a prior violent felony conviction. As such, Erwin is not an impediment to the court's ruling below.

Moreover, to the extent that Erwin suggests that an expert's testimony could be curtailed, such does not apply in this case. These doctors all reviewed and relied upon the German manslaughter material to develop their opinions regarding statutory mitigation and in describing it, used such phrases as: (1) "an important piece of data"; (2) necessary "to get a full and accurate assessment;" and "important" information. The mere fact the doctors reviewed and relied on this information on some level makes the matter proper for cross-examination. To permit the defense to try and excise that information later and obtain the benefit of the experts' opinions without subjecting them to full cross-examination is unfair and leaves the jury with an incomplete picture.

Even if the court should have ruled that the German case was not an appropriate topic for cross examination, the matter is harmless beyond a reasonable doubt. DiGuilio, 491 So.2d at 1139.

The defense presented Dr. Brannon, a psychologist, who defined and explained the two mental health conditions which would later be presented at the Spencer hearing. He also identified certain personality traits which, according to the DSM-4 manual, went along with those conditions. (T.30: 2803-12). The defense presented lay witnesses who discussed Coday's history and interactions with friends/family. (T.28: 2476-2533; T.29: 2639-70, 2673-86, 2700-34, 2782-2801). From this, the defense argued in closing that without the mental illnesses Coday has, there would have been no crime and the statutory mitigators of "severe mental/emotional disturbance" and "ability to conform conduct to the requirements of the law were substantially impaired" were established (T.31: 2922-23, 2926-41). Thus, the same basic information was presented to the jury from which it could determine whether the statutory mitigation was established. Hence, the court's ruling on the German case was harmless beyond a reasonable doubt.

POINTS XIV - XVI

THERE WAS NO ABUSE OF DISCRETION IN DENYING THE DEFENSE REQUEST TO INTERVIEW DELIBERATING JURORS, IN REJECTING A SPECIAL VERDICT FORM, INSTRUCTING THAT NON-VOTES WERE LEGAL ISSUES FOR THE COURT TO DECIDE (restated)

Defense counsel sought to interview the penalty phase jury during its deliberations stemming from a question posed by the

jury regarding the need for all jurors to cast a vote. Because of the jury question, counsel sought a special verdict form which would allow for non-votes, and objected to the court explaining that non-votes were a legal matter for the court's concern only. It is these rulings which Coday asserts as error necessitating a new penalty phase. The court did not abuse its discretion in denying individual voir dire of the deliberating jurors, rejecting the defense request for a special verdict, or in telling the jury the meaning of non-votes was a legal matter for the judge to determine. So informing the jury did not violate Caldwell v. Mississippi, 105 S.Ct. 2633 (1988). This Court should affirm.

Review of a decision to deny juror interviews is abuse of discretion. Shere v. State, 579 So.2d 86 (Fla. 1991); Gonzalez v. State, 511 So.2d 700 (Fla. 3d DCA 1987). Whether a special verdict form is appropriate rests within the trial court's discretion. Patten v. State, 598 So.2d 60 (Fla. 1992) (finding no constitutional basis to require special penalty phase verdict forms); Castro v. State, 472 So.2d 796, 798 (Fla. 3d DCA 1985) (concluding where special verdict forms are not mandated, denial is left to court's discretion). The instructing of the jury is reviewed for abuse of discretion. Parker, 873 So.2d at 294; James, 695 So.2d at 1236. Discretion is abused only when the

judicial action is arbitrary, fanciful or unreasonable. Trease, 768 So.2d at 1053, n. 2.

Upon greeting the jurors each day, the court inquired of them as a whole, whether they had followed the court's admonitions about contacts outside of court regarding the case. (see example T.29: 2638-39, T.31: 2881-82) Due to the defense concern about publicity between the guilt and penalty phases, individual voir dire was conducted (T.27: 2327-2436). Such resulted in the excusal of three jurors. (T.27: 2406-09, 2413, 2426-27). After the jury had been deliberating for a period of time, a note was sent to the court asking to break for the evening and inquiring if all jurors must cast a vote. (R.5:710; T.30: 2976-86). The judge excused the jury for the night without answering the question so that the parties could research how best to respond. (T.30: 2976-86).

The next morning the defense reported that an Allen[23] charge would not be appropriate, but that no case had been found on point. Counsel asked for individual voir dire to determine if each juror were comfortable in the deliberations, if any felt pressure, and whether the jury had discussed excluded information, i.e., the German manslaughter conviction. (T.32: 2989-93). Relying on Derrick v. State, 641 So.2d 378 (Fla.

[23]Allen v. United States, 164 U.S. 492 (1896).

1994), the court re-read the jury instructions related to an advisory verdict and that such did not have to be unanimous; that a death recommendation must be by majority vote, and that a tie vote would be a life recommendation as would a majority vote for life. (T.32: 3013). This answer prompted further inquiry by the jury resulting in the court instructing:

> Ladies and gentlemen, whether an undecided vote is deemed a life vote, that is a legal matter for me to decide, and you should not concern yourself with that. It's simply a question and a legal matter for me to decide and you should not concern yourself with that. I encourage you to vote. I cannot force you to vote. I will not force you to vote.
>
> Your verdict forms should reflect the votes of those of you that you feel that you can vote. Nobody is being forced to vote. We encourage you to vote. Again, the verdict form will reflect the vote of those of you that feel you are capable and in a position to vote. But what the affect of a non vote is, that's a legal matter for me to be concerned with.
>
> Don't concern yourself with that.

(T.32: 3033-34). During the discussion on how best to instruct the jury, the court denied the defense request for a verdict form allowing for the recording of a non-vote (T.32: 3025-26, 3030-31). Subsequently, the jury returned a nine to three vote for death (R.5: 716; T.32: 3035-38).[24]

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[24]The jury's note, in a light most favorable to the defense, indicated that at most two jurors were considering not voting. Given the final jury vote, nine to three, even a two vote swing in the voting would not result in a life recommendation.

In support of his request for juror interviews, Coday cites Robinson v. State, 438 So.2d 8 (Fla. 5th DCA 1983). Such does not further his position. The interviews requested in Robinson dealt with possible juror misconduct or tainting from outside sources.[25] Here, the jury question indicated no outside influence, even though defense counsel tried to spin the facts in that direct. Moreover, the jury had been questioned when they had arrived for court that day (T.31: 2881-82)[26] and had been sequestered after that (T.31: 2984-86), so it cannot be said there was outside influence from that point onward. As such, the need for interviews was not supported by the evidence.

It is well settled matters which inhere in the verdict will not be made subject to juror inquiry. Marshall v. State, 854 So.2d 1235 (Fla. 2003). As stated in Marshall:

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[25]The record reflects the dictates of Robinson v. State, 438 So.2d 8, 9 (Fla. 5th DCA 1983) were met when the jurors were questioned upon their return for the penalty phase. (T.27: 2327-2436). The judge was not required to question the jurors a second time on the oft chance they may report something different merely because the jurors had yet to reach a sentencing verdict and possible two jurors were undecided at one point in time. See Derrick v. State, 581 So.2d 31, 35 (Fla. 1991) (finding admonitions that jurors should not read media reports on case and later acknowledgment by jurors that they had not read articles cured any error in not questioning jurors sooner).

[26]Only Juror Rooney reported being approached, but such did not even imply that the comment was about Coday's trial. No other contacts or improprieties were noted. (T.31: 2874-76, 2881-82).

> A juror is not competent to testify about matters inhering in the verdict, such as jurors' emotions, mental processes, or mistaken beliefs. *See Baptist Hosp. v. Maler*, 579 So.2d 97, 99 (Fla. 1991); *State v. Hamilton*, 574 So.2d 124, 128 (Fla.1991); see also § 90.607(2)(b), Fla. Stat. (1999). However, jurors may testify as to "overt acts which might have prejudicially affected the jury in reaching their own verdict." *Hamilton*, 574 So.2d at 128;

Marshall, 854 So.2d at 1240 (footnote omitted). Matters that "inhere in the verdict" have been defined as "'those which arise during the deliberation process.'" Sconyers v. State, 513 So.2d 1113, 1115 (Fla. 2d DCA 1987). See Mitchell v. State, 527 So.2d 179, 181 (Fla. 1988). Thus, the statute forbids judicial inquiry into the jurors' emotions, mental processes, mistaken beliefs, or understanding of the applicable law. See Devoney v. State, 717 So.2d 501, 502 (Fla. 1998); Baptist Hosp. v. Maler, 579 So.2d 97, 99 (Fla. 1991); State v. Hamilton, 574 So.2d 124 (Fla. 1991).

Here, the defense was seeking exactly what it was not permitted to seek, i.e., how the jury felt about its deliberations, what they were discussing, and what evidence they were relying upon in deliberations. There had been no allegation of impropriety on the part of the jurors. The jury was merely noting that some jurors were as yet undecided, and inquired whether everyone had to vote. The jury was not stating that any one juror would/could not vote. Such question was

asking for guidance, not reporting outside influence or misconduct. Consequently, there was no basis for invading the jury process to inquire about the jurors deliberative process. The juror interviews were denied properly.

Similarly, there is no provision for a verdict form which provides for undecided votes. The instructions call for deliberations on the sentencing issue and informs the jury that a majority is required for a death recommendation as a tie vote would be a life recommendation. As a related matter, an Allen charge in a capital penalty phase is improper. See Phillips v. State 705 So.2d 1320, 1322 (Fla. 1997); Derrick, 641 So.2d at 35-36; Patten v. State, 467 So.2d 975 (Fla.1985); Rose v. State, 425 So.2d 521, 524-25 (Fla. 1981), disapproved on other grounds, Williams v. State, 488 So.2d 62 (Fla. 1986). While an Allen charge is improper, case law provides that the judge should re-instruct the jury on the law when there is an inquiry about voting and that such does not amount to an Allen charge. See Derrick, 641 So.2d at 35-36. That was done in this case.

What Coday complains should not have been done was to inform the jury that the manner in which an undecided vote would be counted was a legal matter for the court's consideration only. Coday asserts the second notification amounted to an Allen charge. However, as the record reflects, the court was not

telling the jury it had to deliberate further or that any juror had to cast a vote. The court was merely telling those jurors who felt they could vote to so indicate and how the non-votes were to be counted was not their concern. This is in no way equivalent to an Allen charge, in fact, it was merely a continuation of the initial re-reading of the standard instruction and answered the jury's question directly.

While the trial court may have thought the re-reading of the standard instruction could be construed as an Allen charge, this Court has resolved the matter differently. Coday has not offered anything to undermine that conclusion. See Phillips 705 So.2d at 1322 (finding no harm in telling jury, with two jurors refusing to vote, that the remaining were "to take a vote from the ten jurors willing to vote and to record the vote as it stood. The trial court noted that it would consider any refusal to vote as a vote for life imprisonment."); Derrick, 641 So.2d at 380.

Coday's citing of Warren v. State, 498 So.2d 472 (Fla. 3d DCA 1986) and States v. Seawall, 550 F.2d 1159 (9th Cir. 1977) is not persuasive. Both dealt with guilt phase deliberations and repeated Allen charges. Here, it has already been established that re-reading the standard instruction is not an Allen charge. Derrick, 641 So.2d at 380. Moreover, the jury

was told the verdict form should reflect the votes of those who felt they could vote, but the court would not force anyone to vote. Phillips 705 So.2d at 1322.

Likewise, Rose, 425 So.2d at 521, as found in Derrick, is distinguishable. In Rose the jury was indicating a deadlock, seeking guidance, but had not concluded its deliberations. Here, there was no deadlock even suggested as the jury clearly indicated that it wanted to continue deliberating, as there were some undecided jurors, and wondered if every vote had to be recorded as a life or death vote (R.4: 710). Under Derick, the proper response was given. See Phillips, 705 So.2d at 1322.

Moreover, as recognized in Derrick, the jury had not completed its deliberations. Consequently, when the final recommendation was reported, the vote was n1ne to three and constituted the jury's recommendation. See Derrick, 641 So.2d at 380; Rose v. State, 461 So.2d 84, 85-86 (Fla. 1985)

Coday's suggestion that the failure to provide a line for the undecided votes is not well taken. The jury was told to place on the verdict the tally of those who could vote. There was no need to identify the number of undecided votes as that could be calculated from the final count. The trial court followed the precedent of this Court in Derrick and it has not been shown erroneous. The resulting recommendation is valid.

As his final point, Coday suggests the instruction that the undecided votes were not to be of concern to the jury as they were a legal matter for the court was error under Ring v. Arizona and Caldwell v. Mississippi, 105 S.Ct. 2633 (1988). He has not pointed to a cite in the record where the trial court was advised of a potential Caldwell violation. As such, the matter is not preserved. Archer, 613 So.2d at 446; Steinhorst, 412 So.2d at 338.

However, if this Court reaches the merits, the State reincorporates its response to Points VIII and IX to re-establish that Ring is not applicable to Florida's capital sentencing. Also, Ring is a Sixth Amendment case, where as Caldwell is an Eighth Amendment issue, thus, the instructing of the jury regarding its sentencing responsibility is not implicated by Ring.

"To establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." Dugger v. Adams, 489 U.S. 401, 407 (1989). This Court has recognized repeatedly that the jury's sentencing role is advisory, and the standard instructions adequately, correctly, and constitutionally advise the jury of its responsibility. Cook v. State, 792 So.2d 1197, 1201 (Fla. 2001); Brown v. State, 721 So. 2d 274, 283 (Fla.

1998). The judge here gave the standard instruction and his subsequent direction for the jury not to concern itself with the consequences of an undecided vote does not diminish or detract from the responsibility.

CONCLUSION

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

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 to Jeffrey L. Anderson, Esq. Office of the Public Defender, Fifteenth Judicial Circuit of Florida, The Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, Fl 33401 on August 18, 2004.

_____
LESLIE T. CAMPBELL

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with

12 point Courier New type, a font that is not spaced proportionately on August 18, 2004.

_____
LESLIE T. CAMPBELL