IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC03-1651

DANIEL ELY PEREZ,

Appellant,

VS.

STATE OF FLORIDA,

Appellee.

****
*** ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, IN AND FOR ST. LUCIE COUNTY, FLORIDA, (Criminal Division)
****
***

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PRELIMINARY STATEMENT

Appellant, Daniel Ely Perez, the defendant at trial, will be referred to as "Appellant" or "Perez". Appellee, State of Florida, will be referred to as "State". References are as follows: the record as "R", the transcripts as "T", any supplemental record or transcripts as "SR" or "ST", and to Perez's brief, as "IB", followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

On August 29, 2001, Perez was indicted for the first degree murder, burglary of a dwelling with an assault or battery while armed, and robbery with a deadly weapon of Susan Martin ("Martin"). Trial commenced April 28, 2003, and on May 8 the jury returned guilty verdicts on felony murder, burglary with an assault and battery while armed, and robbery with a deadly weapon (R 3-4; T 1880-83).

The penalty phase was on May 12, 2003 The jury recommended death by a nine to three vote (T 2187). The Spencer v. State, 615 So.2d 688 (Fla. 1993) hearing was conducted on June 13, 2003. The trial court sentenced Perez to death for the murder of Martin on July 21, 2003. Perez received consecutive life sentences on the burglary and robbery counts (T 1465).

On August 29, 2001, the body of Martin, a partially deaf,

52 year old single woman, was discovered near the front doorway of her home. A welfare check of her residence was initiated by a friend who had tried to contact her (T 875-77). Investigation revealed she had been burglarized, robbed and stabbed 94 times. The prime suspect was her 23 year old nephew by marriage, Perez.

These crimes were preceded by a prescient event in July, when Martin reported a theft of jewelry. She believed Perez had stolen the ring and jewelry (T 890). Confronted with this accusation, Perez denied involvement in the theft and indicated Martin's former roommate might be a suspect for the jewelry theft (T 891).

On September 4, about a week after the discovery of Martin's murder, jewelry from the July burglary was discovered at A Quality Pawn (T 1208). The discovery, reported to lead detective Michael Beath ("Beath"), was made by Martin County Deputy Rani Beasley, friend of Martin, familiar with her jewelry (T 1207-08, 1210).

Ioannis Fraziskakis ("Fraziskakis"), owner of A Quality Pawn, identified the jewelry and was acquainted with Perez (T 1235) who had pawned both the ring and earrings (T 1233). On August 29 or 30th, Perez tried to pawn coins he received from a "Cumberland Farms guy" (T 1234) asking how much he could get for them and was told a value could not be given, sight unseen(T

1235).

Beath discovered Martin had two telephone land lines and a cellular phone account(T 901). Martin's last call was on August 28, made on her cell phone at 1:04 a.m. to speak with a Bell South repair to ascertain trouble to her phone. The call ended at 1:20 a.m.(T 906-07). Her last words to the technician in a "somewhat scared, low tone" were "I have to go"(T 926). In reality, Martin's phone lines had been stealthily cut(T 908). Less than two feet from Martin's lifeless body, laid her cell phone, still powered (T 990).

Ronald Schoner ("Schoner") supervised the crime scene investigation. Martin's body was in a large quantity of blood directly inside the front door, face up, her hands above her head (T 963,990). Contents of Martin's purse were strewn across the kitchen floor and the dresser drawers of the master bedroom ransacked. In the master bathroom laid a walking cane with a large brass duck head (T 996-97). A gray silver sock was recovered in the hallway and a white sock was located near the victim's head (T 1000). An exterior check of the home revealed the side entrance door to the garage ajar; the window screen cut; and, exterior security lights disabled. *The Port St. Lucie News* had a bloody shoe imprint on it. Another shoe print,

dissimilar, was located in the hallway.[1] (T 970,, 1005, 1008, 1002, 1020).

Beath looked at over 100 different shoes to match the bloody shoe print concluding that a pair of Nike K's matched (T 1554). Dale Burns, Perez's father-in-law, could identify shoes Perez had been wearing prior to Martin's murder. A former school counselor and pastor, Burns "positively" and without suggestion, selected the same shoes as Beath (T 1677-78).

Michael Kelley, a veteran forensic firearm and toolmark examiner with special training in footwear identification (T 1679-80) compared the shoes given him by Beath to the photographed imprint. He opined that the Nike K's purchased by Beath were "very, very close... give or take an eighth of an inch or so just by the photography." Only one type of shoe print was left at the scene by the perpetrator (T 1682-84).

Detective Yvonne Kelso ("Kelso") viewed a video from Wal-Mart showing Perez purchasing a pair of shoes after the murder. She seized Calvin Green's ("Green"), Perez's co-defendant, shoes after his arrest (T 16, 1559-60).

Dr. Roger Mittleman ("Mittleman"), chief medical examiner, testified Martin received a blow to the head, leaving a partial

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[1] It turned out this *other* shoeprint was made by Officer Garrison from Ft. Pierce assisting at the crime scene (T 1020).

evulsion, suffering a concussion at most (T 1632-33). She suffered 94 stab wounds averaging about half-an-inch in length with overall penetration depth of one-half-inch to one and-a-half inches (T1631) as follows: eight stab wounds to her left neck, four striking the left jugular vein which were fatal (T 1641); 24 stab wounds to her right lateral torso, penetrating her liver and hemorrhaging her right lung cavity[2] (T 1664); 20 stab wounds to her left side, 18 to her abdominal area, and 24 to her middle and lower back (T 1645-46). She had a defensive wound to her left index finger (T 1650). All wounds were inflicted by the same weapon(T 1647). From minimal blood in tissues associated with the back and left abdominal wounds, she could have been moving on the floor or moved by someone else as the stabbing reached it's zenith (T 1652).

Martin wore jewelry including an amethyst necklace/pendant, ring, bracelet, earrings and watch(T 938,955). Red marks on Martin's right neck indicated something was pulled against it

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[2]Asked by the State if she could have survived the stab wounds that perforated the liver and lung, the pathologist answered: "Well, she has a better chance but there were so many of them that had the heart continued to beat I think that she would have. In other words, it takes longer to die from that than it does the jugular vein being struck, but they are so bad and so many of them that I would expect within a course of minutes that she would die from that. How long is hard to say. Ten minutes, fifteen minutes. Less, more. It's very variable." (T 1649).

such as a thin necklace(T 1645). She collected coins, Disney memorabilia and a Picasso ceramic plate (T 938-39).

Beath conducted 15 to 20 interviews (T 1274). Perez appeared voluntarily at the Port St. Lucie police station twice to speak with Beath about the case. Martin was Perez's wife's "Aunt Sue", (T 1301) and he had been to her home before (T 1303). Perez mentioned "Aunt Sue" had spoke of a Picasso in her home (T 1303). Beath noticed Perez's new sneakers (T 1280)and Perez acknowledged he wore size 12, 12-1/2 to 13 and that he got them at Wal Mart. He told Beath he owned a "little locked-blade knife, not even 3" and carried it in his pocket after he used it at work (T 1307-09).

Prior to his arrest, Perez voluntarily spoke to Beath again on September 5 (T 25). He was Mirandized and agreed to continue speaking (T 1315). Denying any involvement with the July burglary from Martin, when confronted with evidence that he pawned the stolen jewelry, he explained they were in a pill bottle he took from the house (T 1326-1327). Told he was under arrest he denied any involvement in the murder or it's underlying felonies until confronted with stolen coins he attempted to pawn (T 1330-1332). He then told Beath he gave two of "his boys", Man-Man ("Reed") and his cousin Calvin Green ("Green") directions to Martin's home to steal her Tahoe the

night of the murder (T 1332) and they would cut Perez in on proceeds from a 'chop shop' (T 1336). Thereafter, Perez changed his story admitting he <u>actually</u> drove to the house. After waiting 15 to 20 minutes, he went by the house and saw Reed and Green running from the house, Green covered in blood. Perez started "tripping", took off and drove home (T 1341-42). Revising his story again, he <u>actually</u> stayed on the scene, opened the door and saw Green straddling the victim holding a "six-inch" switchblade, striking her with a stick (T 1346, 1348). There was blood everywhere, like "Lake okee-fucking-chobee"(T 1371-72) so he ran away (T 1348). Confronted with the size 12 shoe-prints found in the house, he then stated he <u>actually</u> went into the house (T 1353). He admitted he told Reed and Green about Martin's Picasso painting prior to the murder (T 1356). Reciting his new version of events (T 1357) "all bullshit aside"[and]"straight up" (T 1410), Perez said Reed was <u>never</u> at Martin's house and that Perez drove only Green to her home (T 1388-1400). Perez put socks on his hands, entered the house wearing shoes that looked like Nikes and related how the security lights and phone lines were impaired (T 1376-79, 1422-23, 1466-68). He describes Green stabbing the victim, "jugging the shit out of her" (T 1414). Perez claimed he was not the actual stabber and heard Martin "gargling in her own blood" (T

1414) as she fought off her attacker (R 469-70). Just “two steps behind him all the way ”, Perez watched Green ransack rooms and fill Martin’s bag with items (T 1415). He drove Green to a Cumberland Farms store where Green tells him he disposed of his bloody clothes (T 1433-34, 1436). Protesting he didn’t want any of the stolen items (T 1452), when told by Kelso the Martin family “deserves” the stolen purple amethyst, Perez replies “I have it” (T 1434). He also attempts to pawn collectable coins taken in the burglary (T 1234).

Perez voluntarily took the police on a ‘drive-around’ attempting to prove to them that he was not the actual stabber and to show them where the bloody knife was thrown from a bridge into a canal. Perez also took the police to a wooded area where Green allegedly disposed of his bloody clothes . Searches of the canal and wooded area revealed nothing (T 1509-10). He also took them to other areas where incriminating items were located, including Martin’s Disney bag taken in the burglary, and, took them to his place of employment where her watch, pen and Tahoe key were discovered (T 1512-13).

Green told Beath he reached Martin’s door with Perez, saw the attack from the laundry room and fled towards his house four or five blocks away (T 1523, 1583). Beath spoke with a woman in Georgia, alleged by Perez to have received some of the stolen

jewelry from Green, but she had been sent nothing (T 1438,1602).

The penalty phase commenced May 12, 2003. The State proved Perez was convicted of a previous stabbing, attempted second degree murder, in 1995 (T 1959). They also called Margie Ann Barnes, a friend of Martin's, and Grace Burns, Martin's niece (T 1966, 1969).

Family, including his mother, father, sister and wife testified on behalf of Perez (T 1970-2004). He also called a psychologist, Dr. Michael Riordan("Riordan"), to testify about the results of his evaluation of Perez (T 2065-2109.)

In rebuttal the State presented Dr. Gregory Landrum ("Landrum"), a forensic and clinical psychologist (T 2114) who gave his mental health assessment of Perez (T 2113-2125).

The jury was instructed on four aggravators: the murder was especially heinous, atrocious and cruel ("HAC"); being involved in the commission of the crime of robbery or burglary as an accomplice; pecuniary gain; and, being previously convicted of a felony involving the use of threat or violence to another. They were given a catch-all mitigating circumstance instruction, and a list of mitigating factors requested by the defense (T 2175-2177). The jury recommended death by a nine to three vote (T 2187).

At the Spencer hearing of June 13, 2003 other than a

statement by the victim’s sister, Jane Martin, the State presented no evidence (T 2195-99). The defense presented letters from family members and Perez’s mother.[3] They submitted Riordan’s written report (T 2211).

Sentencing was held July 21, 2003 with the court finding four aggravating circumstances: prior conviction of a violent felony (attempted second degree murder); commission of the capital felony during the course of a robbery or burglary at a dwelling; murder committed for pecuniary gain (merged with previous aggravator); and the murder was HAC (T 1446-49). The court considered and gave the following weights to one statutory mitigator:“under the influence of extreme mental or emotional disturbance” (little weight)(T 2271); Consideration of non-statutory mitigators and weight(s) given to them:(1)unstable upbringing and family history (little);(2)loving husband, father and family member (moderate); (3)long term mental health difficulties (little);(4) gainfully employed (moderate);(5) Perez was incarcerated in an adult facility as a juvenile (little), (6) drug addiction (little); (7) Perez was a boy scout receiving merit badges (some); (8)Perez obtained GED in prison(some);(9)defendant was not the actual killer(little);(10)

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[3]Rosa Perez testified that Perez protected her from an abusive boyfriend when he was nine years old, taking a knife from him.

cold, calculating and mitigating factor absent (little);(11) cooperation with police (little);(12) good attitude and conduct during trial (little);(13)impact of death penalty on defendant's family(some). It was the court's conclusion the three aggravators outweighed the statutory and non-statutory mitigation, and that death was the appropriate sentence (T 2299-31).

SUMMARY OF THE ARGUMENT

Issue I - The Court did not abuse it's discretion and properly denied Perez's cause challenge to Juror Nicosia who did not conceal on *voir dire* a material fact as to her relationship with a witness and who demonstrated impartiality and the ability to render a verdict based upon the evidence presented.

Issue II - The Motion to Suppress was properly denied and appellants statement, under the totality of the circumstances, was not procured due to misleading him as to his custody status, length of interrogation, police coercion and improper Miranda warnings.

Issue III - The trial court did not abuse it's discretion in not granting a mistrial as to the prosecutor's opening statement and Detective Beath's testimony regarding their characterizations of appellant "carrying" his knife. There was direct evidence of such for prosecutor's opening argument and Beath's testimony.

Issue IV and V - The State did obtain the predicate finding that Perez was a major participant in the felony acting with a reckless disregard for human life and the jury found so at guilt phase, where they were only to determine death eligibility.

Issue VI - The trial court, in it's sentencing order, clearly outlined the overwhelming evidence for finding Perez to be a major participant in the burglary, robbery and felony murder of

Susan Martin. Perez was armed and present when the killing took place, orchestrated and planned the underlying felonies, concealed and appropriated items taken in the burglary and robbery.

Issue VII - The 94 stab wounds, blunt force injury defensive wound and movement of the victim from which one can reasonably infer the victim was conscious during the attack reflects substantial and competent evidence supporting the heinous, atrocious and cruel aggravator and, accordingly, such was proven beyond a reasonable doubt under Alston v. State, 723 So.2d 148 (Fla. 1998).

Issues VIII and IX - The trial court did not abuse it's discretion
and properly evaluated statutory and non-statutory mental health mitigators, giving them "little weight", after considering all the testimony and evidence presented during the penalty phase.

Issue X - The rejection of the statutory mitigator inability to conform conduct to the requirements of law substantially impaired was supported by substantial and competent evidence.

Issue XI - The court did not abuse it's discretion in disallowing and not considering the victim's sister's letter regarding the appropriate sentence for appellant under Payne v. Tennessee, 501 U.S. 808 (1991). See Florida Statute 921.141 (7).

Issue XII - This Court's conclusion that death eligibility occurs at time of conviction does not violate the Eighth Amendment. 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).

Issue XIII - Appellant's death sentence is proportional.

ARGUMENT

ISSUE I

THE COURT PROPERLY DENIED PEREZ'S CAUSE CHALLENGE TO JUROR NICOSIA WHO DEMONSTRATED IMPARTIALITY AND THE ABILITY TO RENDER A VERDICT BASED UPON THE EVIDENCE PRESENTED (Restated).

Perez argues the trial court improperly allowed Juror Nicosia ("Nicosia") to remain on the jury after she informed the court of her recognition of a state's witness. Perez claims he was denied his right to strike Nicosia for cause and is entitled to a new trial pursuant to De La Rosa v. State, 659 So.2d 239 (Fla. 1995) in that the juror concealed material information which he would have considered during the initial *voir dire.*

First, the State contends that this issue specifically raised by Perez on appeal is not preserved for review. Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982) (holding in order for issue to be cognizable on appeal, it must be

specific contention asserted below as ground for objection). Defense counsel specifically requested the juror be struck for cause.[4] On at least three occasions(T 1223-24,1498,1740), counsel did not avail themselves of the opportunity to inform the court as grounds the test enunciated in De La Rosa.[5] All that was asked of the court was that Nicosia be struck for cause and the court's analysis was correct in light of that request. The requirement of an objection at trial avoids "the creation of 'gotchas' whereby the defense is allowed to sit on its rights, saying nothing until after it sees whether the jury returns an adverse verdict." Jones v. State, 571 So.2d 1374, 1376 n.3 (Fla. 1st DCA 1990). A trial court has great discretion when deciding whether to grant or deny a challenge for cause based on juror competency. Barnhill v. State, 834 So.2d 836, 844 (Fla.2002). This is because trial courts have a unique vantage point in their observation of jurors' *voir dire* responses. Therefore, this Court gives deference to a trial court's determination of

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[4]It is clear defense counsel moved to strike Nicosia *for cause*. Mr. Harllee stated: "We are still maintaining she should be removed for cause as a biased juror..."(T 1503).

[5]For instance, after the court asked for authorities whether the juror could be made an alternate or struck for cause, the defense provided none. When the court acknowledged, after receiving materials from the state that, under Florida Rule of Criminal Procedure 3.310 a juror could not be struck for cause after evidence had been presented, the defense did not respond(T 1499).

a prospective juror's qualifications and will not overturn that determination absent manifest error. Hertz v. State, 803 So.2d 629, 638 (Fla. 2001).

The competency of a juror challenged for cause presents a mixed question of law and fact to be determined by the trial court. Manifest error must be shown to overturn the trial court's finding. Ault v. State, 866 So.2d 674 (Fla. 2003). Furthermore, Perez waived his objection to Nicosia prior to deliberations. The record indicates that the defense agreed at the moment when it was re-addressed that it was no longer an issue and waived any objection to her remaining a juror in the case.[6] (T 1740-41) However, the State will address all unpreserved issues challenging the court's decision allowing Nicosia to remain on the jury.

The issue presented to the court when Nicosia forwarded her note is whether she was qualified to continue serving as a juror.[7]

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[6]Mr. Mirman:"...if the defense is still asking that she be disqualified, if we have 13 jurors...we would rather go that route and disqualify her and go with the alternate."

Mr. Harllee: " Well, Judge, I think that is basically doing what the Court determined it could not do in it's discretion and if the court has made a finding that the State is agreeing with that finding that if there is no cause challenge then nothing should change." (T 1740-41).

[7]Perez states the court indicated it would have struck Nicosia for cause just to avoid any risk had the matter come up

The court did not abuse it's discretion and commit manifest error by denying defense counsel's cause challenge nor allowing Nicosia to remain on the panel during the course of the trial.

Upon receipt of Nicosia's note the court discussed the matter with counsel and solicited questions for her (T 1216). Conducting an extensive *voir dire* of Nicosia she stated she recognized the witness but did not know her last name and was more an acquaintance than a friend. She said Beasley had played in a band with some friends of hers, that a couple of years before Nicosia had given the witness a "painting bid" which was in "mid-air" and that Nicosia would probably do it if "they ever got the money" but she was not really sure. She had only seen her twice over the last twenty months face-to face (T 1218, 1222, 1219). Noting she had not spoken with the other jurors about her recognition of the witness, Nicosia stated she did not notice the witness go over to the victim's family after the witness testified. Informing the court she could remain fair and impartial, she was not concerned about any potential impact

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during jury selection (T 1225). It is implicit from the court's comments that the court would have granted a motion to strike for cause *only* in terms of judicial expediency. Under Florida Statute 913.03, there are *were no* grounds to strike Nicosia for cause. Hence, the court's comments in this regard were gratutitous.

about her verdict on the paint bid. The court once again asked for inquiries from the defense and they responded negatively (T 1220, 1222).

The court believed Nicosia still had the ability to render a fair and impartial verdict and ruled she should remain on the jury, but allowed the defense the opportunity to renew it's motion before the jury was charged if they found the juror's behavior to compromise her position of impartiality. The defense agreed it was no longer an issue (1740-41), but the court, in it's discretion, still wanted to consider whether she was fit to serve based upon her demeanor and behavior during trial. Just prior to deliberations the court ruled she was a fit juror (T 1821).

The court noted under <u>Jennings v. State</u>, 512 So.2d 169 (Fla. 1987), a court has broad discretion in deciding whether a jury should sit on a case. <u>Jennings</u> at 172, citing <u>Calloway v. State</u>, 189 So.2d 617 (Fla. 1966). This Court found the Judge properly removed the juror from the penalty phase because mid-way through the trial the juror had informed the court that while she could render an impartial verdict in the guilty phase, she could <u>not</u> recommend the death sentence. The court allowed her to remain a juror during the guilt phase but struck her, *per* the State's request, from the penalty phase. Appellant in <u>Jennings</u> wanted

juror for the penalty phase arguing his right to a fair trial was abridged, interfering with the jury's "magical" composition in the middle of the trial. Jennings at 172. As this Court observed: "Aside from the fact that neither side requested it, we see no compelling reason why the judge should have excused the juror from the guilt phase. She said that despite her feelings about imposing the death penalty she would render a verdict as to guilty or innocence based solely on the law and evidence." Jennings at 172.

Nicosia forthrightly told the court she would be unbiased and not allow her acquaintanceship with the witness Rani Beasley ("Beasley") to influence her verdict. See Mills v. State, 462 So.2d 1075 (Fla. 1985) (where the prospective juror's distant relationship to the victim's family and his acquaintance with Mills and his family did not negate his impartiality).

Perez argues pursuant to De La Rosa he is entitled to a new trial. However, in accepting the court's decision (T 1740-41), any prejudice as to his jury selection on initial *voir dire* is moot. Nevertheless, the State will address the three-part test enunciated in De La Rosa. Citing Skiles v. Ryder Truck Lines, Inc. 267 So. 2d 379 (Fla. 2d DCA 1972), De La Rosa imparts a three prong test in determining whether a juror's non-disclosure of information during *voir dire* warrants a new trial: First,

that the complaining party must establish that the information is relevant and material to jury service in the case. Second, that the juror concealed the information during questioning. Lastly, that the failure to disclose the information was not attributable to the complaining party's lack of diligence. De La Rosa at 380.

The State contends Nicosia concealed nothing material in this case, advertently or inadvertently. Her relationship with Beasley was minimal, she did not recognize her name, her paint bid a couple of years old and Nicosia immediately informed the court of her facial recognition of the witness.

Materiality - Cases cited by Perez are distinguishable as Nicosia's paint bid with Beasley did not concern itself directly on point with the litigation: Lebron v. State, 799 So.2d 997 (Fla. 2001) (juror had expressed view during deliberations that all police were bad, contrary to his negative response during *voir dire* after being asked whether he had any bias due to his experiences with the juvenile justice system); De La Rosa,659 So.2d 239 (new trial where juror failed to disclose he was a defendant in at least six lawsuits; juror may sympathize with defendants or develop a bias against legal proceedings in general); Bernal v. Lipp, 580 So.2d 315 (Fla. 3d DCA 1991) (plaintiff entitled to a new trial where juror failed to

disclose that he had been a defendant in a personal injury case one year previously); Industrial Fire & Casualty Ins. Co. v. Wilson, 537, So.2d 1100 (Fla. 3d DCA 1989) (where juror failed to disclose that he had been insured by the defendant insurance company which denied his claim for benefits).

Florida courts have addressed pecuniary interest being material as to jurors struck for cause, but those pecuniary relationships vastly transcend, if any, this case. In Martin v. State Farm, 392 So.2d 11 (Fla. 5th DCA) a juror was improperly paneled in a personal injury case. After reviewing this extensive litany of pecuniary and employee relationships the court noted: "No matter how objective the juror might think she would be,it is unquestionable she would be less than objective about a case involving her employer, her hospital, her mutual insurance company and regarding an insurance claim she processed." Martin at 12 (emphasis added); Terry v. State, 651 So.2d. 756 (Fla. 1st DCA)(error where juror, eight year employee of a victim-witness, could not state unequivocally he could render a fair and impartial verdict).

Nicosia's personal and business relationship with the witness was minimal and benign. In describing her interest with Beasley, Nicosia indicated she had given a paint bid " a couple years ago", that they originally "didn't have the money to do

it” and she felt it was in “mid-air right now”. She further noted: “ As soon as, I guess, they get the money, I’m supposed to do it. You know, I don’t know. She never contacted me back. Like I said, I know her through an ex-girlfriend really.”[8](T 1222).

Assuming *arguendo* that Nicosia even had a cognizable pecuniary relationship with the witness, unlike the jurors in Terry and Martin, neither Nicosia’s economic stability or actual employment was affected by a minimal pecuniary interest with this witness. To the contrary, as Nicosia emphatically and unequivocally stated in the following colloquy with the court:

> THE COURT: Are you going to have any concern your decision in this case if it’s going to have any impact on that paint bid?
>
> JUROR NICOSIA: No, not at all. I’ve got plenty of work. (T 1222)

Moreover, she had no financial interest with the Martin family, the Perez family, defense counsel, the prosecutor or the court. Her relationship with Beasley was not material.

No "bright line" test for materiality has been established and must be based on the facts and circumstances of each case. Leavitt v. Krogen,752 So.2d 730 (Fla. 3d DCA 2000)(concluding

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[8]Even defense counsel stated:”...it sounds like pretty much decided, business agreement with.” (T 1223)

that the juror's undisclosed collection claim, which had arisen more than ten years previously, was not material). From Nicosia's and defense counsels' comments it's reasonable to assume that "mid-air" meant when the job was to be done, not whether the bid had been accepted.

Alternatively, from her responses, Nicosia's bid had long expired. In either case, analogized to Leavitt, her bid was remote and no longer an issue.

Concealment - When the state read off names of witnesses, including Rani Beasley (T 410), this was not information within Nicosia's knowledgeable purview. The concealment prong of De La Rosa has not been satisfied.

Though at first blush the question propounded to Nicosia appears straightforward, it was susceptible to misinterpretation particularly in terms of the minimal relationship between Nicosia and Beasley.[9] Unless the witness had been present in the courtroom and identified on *voir dire*, there would have been no possibility Nicosia would have recognized her. Perez has not met the threshold test set forth in De La Rosa and this Court must affirm the court's decision. The only issue before the trial

[9] Drew v. Couch, 519 So.2d 1023 (Fla. 1st DCA 1988).

court was Nicosia's fitness to be an impartial juror.[10]

ISSUE II

THE TRIAL COURT PROPERLY FOUND PEREZ'S STATEMENT WAS VOLUNTARY (restated)

Prior to trial, Perez unsuccessfully attempted to suppress his statement to the police regarding the burglary, robbery and murder of Martin. A hearing was held on the suppression motion on April 8 and 14, 2003 (T 3-103) and upon review of the audio and videotapes of Perez's statement, the trial court denied Perez's motion (R 329-339).On appeal, Perez maintains the court erred in denying his Motion to Suppress, particularly statements to investigating officers on September 5 and 6.[11] As grounds for suppression on appeal, Perez claims: he was not fully and properly advised of his Miranda rights in that he was not advised of his right to have a lawyer present during interrogation; police did not obtain a waiver either orally or

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[10]It is noteworthy responding to Question 23 and 24 on her questionnaire Nicosia wrote she would want to know "what was his [defendant] family upbringing like" before imposing death and the death penalty is "appropriate in some cases, inappropriate in some cases"(R 632). One can conjecture that these fair, open-minded responses by Juror Nicosia resulted in her not being preemptorily struck nor challenged for cause by the defense at the beginning of trial, in light of a possible penalty phase.

[11]The defense acknowledged they did not have a strong argument for any statements given by Perez prior to September 5 (T 95). Accordingly, Perez offers no argument on the pre-September 5 and 6, 2001 statements.(IB Issue III).

in writing from appellant; an arrest warrant had been issued for appellant, the officers had him in custody and did not so advise him therefore "misleading him". Other actions of the police officers further supported suppression in that they raised the specter of the death penalty; denied appellant his right to make a phone call; made comments to appellant "presenting a process as one of a co-operative endeavor in which they were trying to help appellant"; and, suggested his life was in danger, promising to protect his family if he co-operated. (IB 40-46). Many of these arguments and grounds for suppression were not presented to the court, are unpreserved and waived. See Archer v. State, 613 So.2d 446 (Fla. 1993) (specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved); Steinhorst v. State, 412 So. 2d 332, 338. The only grounds presented to the court upon which it made it's factual findings and based it's denial were that, in and of itself, the length of the interrogation was coercive and the police misled Perez as to his custody status. However, for the Court's convenience each argument will be addressed.

The standard of review applicable to a court's ruling on a motion to suppress is that "a presumption of correctness" applies to a court's determination of historical facts, but a *de*

novo standard applies to legal issues and mixed questions of law and fact that ultimately determine constitutional issues. See Smithers v. State, 826 So.2d 916, 924-25 (Fla. 2002); Connor v. State, 803 So.2d 598, 608 (Fla. 2001). "When, as here, a defendant challenges the voluntariness of his or her confession, the burden is on the State to establish by a preponderance of the evidence that the confession was freely and voluntarily given." DeConingh v. State, 433 So.2d 501, 504 (Fla. 1983). "In order to find that a confession is involuntary within the meaning of the Fourth Amendment, there must first be a finding that there was coercive police conduct." State v. Sawyer, 561 So. 2d 278, 281 (Fla. 2d DCA 1990), citing Colorado v. Connelly, 479 U.S. 157 (1986). "The test of determining whether there was police coercion is determined by reviewing the totality of the circumstances under which the confession was obtained." Sawyer 561 So.2d at 281.

Additionally, a reviewing court should defer to the fact-finding authority of the trial court and not substitute its judgment for that of the trial court. DeConingh at 504. The totality of circumstances surrounding appellant's confession demonstrates its voluntary nature and that it was given by appellant's free will. Traylor v. State,596 So.2d 957 (Fla. 1992). As this Court stated in Traylor, "[w]e adhere to the

principle that the state's authority to obtain freely given confessions is not an evil, but an unqualified good." Traylor at 965.

In view of the applicable standard of review, this Court must affirm the ruling of the lower court which denied Perez's motion to suppress his confession.

The Arrest Warrant -Perez contends he was 'misled' as to his custody status because Beath knew a warrant existed for his arrest when Perez arrived voluntarily at the police station the evening of September 5. Hence, any statements made by Perez once he walked into the interrogation room should be suppressed. Beath did not inform Perez of the warrant and indicated he did not advise him of it because he wanted to talk and continue the interview process with him (T 56).

Perez contends that because a warrant existed for his arrest, in actuality, he was not free to leave at the point he entered the police station. Perez cites Ramirez v. State,739 So.2d 538 (Fla. 1999) and Smith v. State, 363 So.2d 21 (Fla. 3rd DCA) as authority for improper police tactics and misleading Perez as to his situation, both cases distinguishable from the case at bar. In Ramirez, the defendant was a juvenile, never told he was free to leave and had already turned over physical evidence prior to his interrogation. Id.,at 574. Smith concerns

itself, under the circumstances of that case, whether a warrantless arrest was proper when an officer had probable cause to arrest the defendant after observing marijuana cigarettes in the car. After the arrest, cocaine was found on his person. Even though the defendant was a passenger in the vehicle the court found the officer had probable cause to make the arrest noting that a felony had occurred. Id., at 23.

Smith is not on point with the instant case. Beath knew there was a warrant procured for Perez's arrest for the July burglary (T 56). Perez, without any implied or explicit coaxing by the police, appeared voluntarily at the police station on the evening of September 5. Perez agreed voluntarily to speak with Beath further about Martin's case. Not told about the warrant, he was told he was free to go. Indeed, Perez acknowledged such (SR 155-116). Whether an actual warrant for his arrest existed is neither crucial nor relevant to Perez's own knowledge of whether he was in custody or free to leave the interview. There is nothing in the record to show otherwise.

A similar claim was made in Davis v. State,698 So.2d 1182 (Fla.1997). In Davis, the body of an eleven year old girl had been found dead in a dumpster not far from her home. The next day, police questioned Davis, a former boyfriend of the victim's mother and he denied any knowledge of the incident. He was re-

interviewed that same day and again denied any involvement in the killing but did agree to give a blood sample. While being questioned, police obtained blood-stained boots which was consistent with the victim's blood and obtained a DNA match of the defendant. A warrant was issued for his arrest and thirteen days later, March 18, Davis agreed to go to the police station for more questioning. Not told about the arrest warrant, he spoke with the police for about fifteen minutes and again denied any involvement. When told about the DNA sample he insisted they had the wrong person and wanted to know if he was being arrested, to which the response was affirmative. He was placed in custody and later confessed to the killing on tape after being given Miranda warnings. In upholding the March 18 confession this Court observed:

> Although custody encompasses more than simply formal arrest, the sole fact that police had a warrant for Davis's arrest at the time he went to the station does not conclusively establish that he was in custody. Rather, there must exist a "restraint on freedom of movement of the degree associated with a formal arrest." Roman v. State, 475 So.2d 1228, 1231 (Fla. 1985). The proper inquiry is not the unarticulated plan of the police, but rather how a reasonable person in the suspects position would have perceived the situation. Davis at 1188, citing Roman v. State, 475 So.2d 1228, 1231 (Fla.1985)(emphasis added).

The factual underpinnings of Davis are eerily similar to the case at bar: Perez met with the police voluntarily on at least three occasions wherein he denied any involvement in any crimes

associated with Martin. Confronted with evidence that he had taken the ring and earrings from Martin's home in July, Perez asked if he were under arrest at which point he was told he was(SR 134).

Correlative, in State v. Manning, 506 So.2d 1094, 1096 (Fla. 3DCA 1987), a defendant's waiver of his rights was valid even though the officers had not informed him of an outstanding arrest warrant. The defendant had interviewed voluntarily with the police twice even though he had been informed that he was a suspect. The police officer secured an arrest warrant for Manning, of which he was not informed. Subsequently, Manning signed a waiver of right's form. Upon being re-interviewed Manning admitted to the police he had a venereal disease (a material fact), which he had previously denied. The court ruled:

> The fact that Manning was not immediately informed that he was under arrest is insufficient to find that his waiver was not voluntary. When a defendant has not been placed under arrest, determining whether he is constructively under arrest or in custody is necessary for the purpose of determining whether a defendant must be read his rights. See New York v. Quarles, 467 U.S. 649, 104 S.Ct. 2626, 81 L. Ed.2d 550 (1984); Oroxco v. Texas, 394 U.S. 324, 89 S.Ct. 1095, 22 L. Ed.2d 311 (1969). There is no question that Manning was read his rights many times. The trial court confused Manning's custodial status with the timing of the officer's acknowledgement to Manning that a warrant for his arrest had been procured.
>
> Just as an undercover investigation may continue, notwithstanding the fact that a search warrant had been issued, United States v. Alvarez, 812 F. 2d 668

> (11th Cir. 1987), if all other criteria have been satisfied, an interrogation may take place notwithstanding the fact that an arrest warrant has been issued. Manning, 506 So.2d at 1095-1097 (emphasis added).

A review of the record supports the court's findings Perez clearly was under the impression he was not in custody when he voluntarily arrived at the police station and began to speak with Beath at 9:37 p.m., on September 5. As the court noted, he had developed a "friendly rapport" with Beath, who had spoken with Perez on at least three occasions prior (R 333). Perez knew he was free to leave at anytime until he was advised he was not free to go at 10:52 p.m.(SR 164):

> BEATH: Is there anybody else in the room with us?
>
> PEREZ: No, and the door's unlocked and the other door outside is unlocked, I know how to get out of here.
>
> BEATH: Okay
>
> PEREZ: I'm here on my own free will
>
> BEATH: Okay
>
> PEREZ: Cool

Later, prior to being Mirandized, Perez acknowledged from the "get-go" that Beath wanted to find the murderer and stated: "Oh, I'm not worried about anything like that. I know you're gonna do your job to the fullest. It's just, I'm trying to let you see that, that, okay, you're doing your job, there's a lot

of things going on, so , there's some things that you're gonna miss." (SR 120).

Consequently, even if Beath had no intention of allowing Perez to leave the station[12] upon his arrival, it has no relation to whether the interview constituted a custodial interrogation. Custody is viewed from the perspective of the defendant, not that of the investigating officers. See Traylor, 596 So.2d at 966 (a person is in custody if a reasonable person placed in the same position would believe that his or her freedom of action was curtailed to a degree associated with actual arrest). Though a warrant existed for Perez on September 5, this court must affirm the trial court's ruling.

Length of Interrogation - The length of Perez's interrogation

does not render his confession involuntary. His interrogation lasted approximately twenty-five hours, from September 5 at 9:37 p.m. to September 6 ending at 10:30 p.m. with intermittent breaks as discussed below. Under the circumstances of this case, his interrogation was not coercive and unduly lengthy.

This Court has upheld the voluntariness of a confession

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[12] There is no indication in Beath's testimony that he would have detained Perez if he had wanted to leave prior 10:52 p.m. when Perez implicated himself in the July burglary.(T. 3-74)

where the defendant was subjected to a period of continuous police custody for more than 54 hours. Chavez v. State, 832 So.2d 730 (Fla. 2002). In Chavez this Court noted that the 54 hour detention did not render Chavez's confession involuntary for the following reasons: Chavez was permitted frequent breaks; he was provided with food, drink, and cigarettes at appropriate times; his interrogation was interspersed with time away from police facilities for visits to various facilities; he was provided with a six hour rest period(during which time Chavez slept); he was given times when he was left alone for quiet reflection; and he was repeatedly given Miranda warnings, in his native language.

Here, the longest time Perez was in continuous police custody was **25 hours** from the evening hours of September 5 to the evening hours of September 6, less than half the time Chavez was in custody. During that 25 hour period, the investigating officers provided Perez with food, drink, allowing him smoking and restroom breaks (T 40). He was given rest breaks where he could go in another room and rest or sleep on a recliner chair(T 41). At 11:00 p.m. on September 5, Perez left the custody of Detective Beath for almost two hours to voluntarily take a polygraph examination(T 30). He was given the opportunity to sleep for approximately six to eight hours (T 70). The morning

of September 6, Perez was allowed to sleep and had an "Egg McMuffin" for breakfast(T 41, SR 456). Thereafter he took the police on a 'drive-around' to locate evidence related to the case and had a lunch break (T 41, SR 456). He was taken to Cumberland Farms for a drink of Power Aid he had requested(T 34). Arriving back at the police station and prior to continuing the interrogation, Perez "hung out" and smoked cigarettes (T 35). Like Chavez, Perez was informed of his Miranda rights, was re-Mirandized and knowingly waived them (SR 134, 489-90).

The court found at "no time did Perez express a desire to stop the interview process. The court finds that Perez wanted to participate in the interviews with Dets. Beath and Kelso because he hoped to persuade them that he was not the person who stabbed Sue Martin to death." (R 333). Verification of the courts comments can be gleaned from Perez's own words towards the end of the interrogation on September 6 after his 'drive-around' with the police: "I just went and did all this stuff to show you that I was telling you the truth. I'm sitting here showing you all these things, everything. I went through all this here so you can pin this shit on me when I didn't fuckin' to it?" (SR 468).

Accordingly, there was nothing coercive about the length of appellant's confession. See Conde v. State,869 So.2d 930

(Fla. 2003) (upholding confession's voluntariness where defendant was in custody for 16 hours and given breaks); Walker v. State, 707 So.2d 300, 311 (Fla. 1997) (finding a confession voluntary where the defendant was questioned for 6 hours during the morning and early part of the day, was provided with drinks and bathroom breaks, and was never threatened with capital punishment, or promised anything); Roberts v. State, 164 So.2d 817, 819-20 (Fla. 1964) (upholding voluntariness of confession where interrogation lasted from 6:30 p.m. to 1:30 a.m. on first day, defendant maintained innocence, interrogation began again after 9:30 a.m. on second day, and defendant showed no inclination to confess until confronted by accomplice).

Perez did not testify at the suppression hearing. Evidence the trial court had before it was Beath's testimony along with the tapes of Perez's statement. All establish that the length of the interrogation was not coercive. Such did not render Perez's confessions and statement involuntary.

COERCIVE POLICE TACTICS - Perez recites a litany of alleged coercive tactics and statements by police in their interrogation of Perez(IB 43-5) and refers to this Court's ruling in Brewer v. State, 386 So.2d 232 (Fla. 1983) (IB 46,n.19) wherein he contends questioning is very similar to this case. Brewer is similar only in the following factual regards: Brewer was

convicted of murder and sentenced to death; initially Brewer told the police that he had witnessed the stabbing, that he knew the attacker only by first name, struggled with him briefly and fled the scene; and, upon further interrogation made incriminating statements captured on audio-tape. However, this factual litany is where the similarity ends.

In Brewer, the issue was whether the prior improper threats and coercive influences affected Brewers subsequent written confession or was such prior impropriety negated by intervening appearance before a judicial officer thereby rendering the written confession voluntary. Finding not, this Court implicitly accepted findings of the trial court as to the first confession noting: “The officers raised the spectre of the electric chair, suggested that they had the power to effect leniency, and suggested to the appellant that he would not be given a fair trial.” Id.,at 235.

In Brewer, the police stated to the defendant: “But, if you you know, if you committed second degree murder, it’s what? Five? What? Twenty? Twenty years to life and you’re eligible for parole at five or seven, see? That’s second degree. That’s what you did. Second degree murder...If you done it, tell us, and tell us right now, and we’ll help you out on this thing. They are going to come to us and they are going to say, “Did you

cooperate?" We are going to say, " yes, he did. He's sorry for what he done. We believe he can be rehabilitated." That's what we will tell the parole people when the (sic) come to us...We'll get you'll get out of this thing on second degree murder." Id., at 233, 234, 235.

At no point during the trial or in his Initial Brief has Perez produced any statements by Beath or Kelso that promises of leniency or helping him with authorities to plead to a lesser charge and receive a lesser sentence were made. Comments to Perez regarding assisting them with the investigation and telling the truth as outlined by appellant (IB 44)in no way mirror the promises of leniency for cooperation in Brewer. A police questioner's indication to a suspect that he or she would benefit from cooperation does not, itself, constitute coercion. Maqueira v. State, 588 So.2d 221 (Fla. 1991). A confession is not rendered inadmissible because the police tell the accused that it would be easier on him if he told the truth. Bush v. State, 461 So.2d 936, 939 (Fla. 1984); State v. Mallory, 670 So.2d 103 (Fla. 1st DCA 1996); Bova v. State, 392 So.2d 950 (Fla. 4th DCA 1980), modified on other grounds, 410 So.2d 1343 (Fla. 1982).

This case is distinguishable from Brewer where the police actually threatened the defendant with the death penalty telling

him that twelve prospective jury members “will string you up by the nape of your neck right now if they get their hands on you.” Id., at 234 . Kelso’s comments “a long time in jail” were in response to Perez’s observation that a person could get death for stabbing someone 94 times(SR 145). Merely informing a suspect of realistic penalties and encouraging him to tell the truth does not render a confession involuntary. United States v. Mendoza-Cecelia, 963 F.2d 1467 (11th Cir. 1992) (confession admissible despite custom official's threat to defendant that "if you don't cooperate with us, ten years can be a long time in jail. Anything can happen and something can happen to your family ..."). See Milton v. Cochran, 147 So.2d 137 (Fla. 1962) (officer's statements that only by confessing could defendant escape death penalty would not of themselves invalidate confession); Nelson v. State, 688 So.2d 971 (Fla. 4th DCA 1997) (where police told defendant he could get electric chair stating: “And you think they don't kill people in this state, look at Bundy ... Do you want to die?", turning lights ‘on and off’ in the interrogation room simulating the electric chair, it was found under the totality of the circumstances, a voluntary statement).

Unlike Brewer, there was absolutely no allegation raised below or in his Initial Brief that the investigating officers

ever suggested to Perez that he would not be given a fair trial. However, Perez contends the police were coercive in their practices to obtain statements. To the contrary, Perez was allowed to take breaks, sleep and eat and acknowledges same during the interrogation (SR 456,489). Transcripts of his statements show Perez as clear, alert and willing to cooperate with the officers to show that he was not the actual killer. At one point Perez even offers advice to the police as to how to conduct their investigation: "Shit, if you come to him (Calvin Green) for real and tell him straight out, 'Listen, I got your fingerprints, I got DNA on you, I got this on you, I got that on you', Oh, yeah, he's gonna start sweatin' sooner or later" (SR 231). Perez made statements about the crime corroborated by evidence of his involvement such as buying new shoes and his shoe size (SR 22), secreting items taken in the crime and attempting to pawn other items for value(SR 1486-87). He described disabled security lights; cut phone lines; ransacked rooms; even described the duck cane-facts only known to police and perpetrator of the crime (SR 1480, 1365).

Perez claims he was held incommunicado, a statement that belies the facts. After stating "I just want to see my wife" (SR 165), Perez was allowed to personally speak with her (SR 171-173).

Finally, neither Beath nor Kelso ever promised Perez they would protect his family in return for a confession. It was Perez who raised the specter of Reed hurting his family, not the officers. See Thomas v. State,456 So.2d 454 (Fla. 1984) (delusion or confusion must be visited upon suspect by his interrogators; if it originates from suspect's own apprehension, mental state, or lack of factual knowledge, it will not require suppression). Before the officers even acknowledged his fears, Perez stated he was now “ready to make a statement whenever you want it”(SR 403). There was clearly no “quid pro quo”. Moreover, Perez had already given statements to the police regarding his direct connection to the crime before he even mentioned his fear of Reed. Even though Perez had already stated he wanted to speak further and there were some intimation by Beath that he would try to follow through on Perez’s request (SR 403) that is an insufficient basis to suppress a confession. See Stokes v. State, 403 So.2d 377 (Fla. 1981) (that defendant may have been motivated to confess because of his concern for the welfare of his family in the face of reprisal threats by the Outlaws Motorcycle Gang is an insufficient basis on which to predicate a motion to suppress); Coleman v. State, 245 So.2d 642 (Fla.1st DCA 1971) (that defendant motivated to confess because of concern for girlfriend does not, as a matter of law, amount of

sufficient coercion that confession is involuntary).

It is clear from Perez's various comments to the police during his interrogation that he was speaking to the police of his own free will. Evidence can be found in the following representations occurring at the beginning and towards the end of the interview: "But what I'm trying to tell you is I have no idea what, seriously, I have no idea what happened...If I was there, then hell yeah, if I, if you guys came to me and told me that you had something on me, damn right I'm gonna fucking tell you, where (unintelligible) is. I have a very high IQ, I'm not a moron."(after first being advised of his Miranda rights)(SR 148); "Nobody's forcing me to do anything. I'm showing you everything that I've shown you on my free will."(during the drive around where Perez took police to items from Martin's home)(SR 451).

ADVICE AND WAIVER OF MIRANDA RIGHTS - In denying the motion to suppress, the court made the factual overall findings as to custody: the interrogation began as a non-custodial interrogation after Perez came to the police department unsolicited by Beath or anyone else in law enforcement on September 5, 2001; the interview began at 9:37 p.m. in the same room Perez twice before met Beath; Perez was on notice prior to September 5 that Beath wanted to speak with him about anything

useful he might provide regarding the circumstances of Susan Martin's death; at 10:07 p.m. Perez was fully and properly administered Miranda warnings by Beath; the interrogation did not become custodial until 10:52 when Perez was told he no longer was free to go and was under arrest for theft of Martin's jewelry. (R 329-339).

Perez clearly had knowledge of Miranda, waiving his rights when they were given to him the first time at 10:07 p.m. on September 5 (SR 134):

> PEREZ: You're gonna Mirandize me?
>
> BEATH: Yes.
>
> PEREZ: So, I'm under arrest?
>
> BEATH: No, you're not, okay? Not right now. You have the right to remain silent, anything you say can be used against you in court, you have the right to an attorney, if you can't afford an attorney, one will be appointed to you. You have the right to stop talking at any time. Okay? You understand that?
>
> PEREZ: Understood.

Mirandized for a second time later in the interrogation on September 6 and after their drive-around, Perez acknowledged his rights saying "okay" and agreed to continue talking (SR 490).

Perez contends he was not informed he had a right to an attorney during questioning, in accordance with Miranda. This issue was not raised at trial. In order to be preserved for further review by a higher court, specific legal argument or

ground to be argued on appeal or review must be part of that presentation. Tillman v. State, 471 So2d 32 (Fla. 1985); Steinhorst, 412 So.2d 332, 338; See Phillips V. State, 877 So.2d 912 (Fla. 4th DCA 2004) (issue regarding adequate advice of right to counsel during interrogation not preserved and fundamental error not found). However, if this Court were to find it preserved, Perez's claim is meritless.

The court made factual findings that Perez was properly advised of Miranda twice. In both instances he was first informed of his right to remain silent and, thereafter, advised of his right to an attorney. Twice he was advised if he wanted an attorney the interview would stop (SR 165,490) and if he decided not to speak anymore, the interview would stop. In essence, he was advised of his right to an attorney on at least three occasions.

The Miranda warning in the case at bar comports with the language of Miranda wherein a person in custody "must be warned prior to any questioning that he has the right to the presence of an attorney. Miranda, 384 U.S. at 479-480. In Dickerson v. United States, 530 U.S. 428 (2000), the Court re-affirmed the import of the rights as outlined in Miranda that a " suspect has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the

presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." 384 U.S. at 479 (emphasis added).[13]

Perez contends this discussion between Perez and Beath thwarted appellant's right to have an attorney present (SR 135):

> PEREZ: So, let me ask you this, should I be call my, uh, attorney or something like that because I'm under arrest now?
>
> BEATH: It's up to you , if you want an attorney, then we stop
>
> PEREZ: Then I can't leave anyhow

Law enforcement officers are not required to act as legal advisors for suspects during custodial interrogations. If, at any point during custodial interrogation, a suspect asks a clear question concerning his or her rights, an officer must stop the interview and make a good-faith effort to give a simple and straightforward answer. Isom v. State, 819 So.2d 154 (2002)(waiver of counsel not knowing and intelligent where defendant, convicted of various serious traffic offenses, asked if he needed lawyer for hitchhiking and officer only answered "no" and continued questioning); Almeida v. State, 737 So.2d 520 (Fla.

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[13]The State is aware that the Fourth District has recently ruled on a similar issue in Roberts v. State, 874 So.2d 1225 (Fla. 4th DCA 2004), *et al*. These facts are distinguishable.

1999) (police did not answer defendant's question); Cf. Glatzmayer v. State, 789 So.2d 297(Fla. 2001) (police acted properly responding to defendant's question about obtaining counsel in a straightforward way that "it was his decision to make", not theirs).

In fact, Beath stopped the interview and answered appellant's question properly. Perez knew what he was being asked about but never asked to telephone counsel, contrary to his assertions (IB 41). Beath told him it was up to him and if he chose to obtain counsel he would immediately stop the interrogation. Perez knew the simple, reasonable truth he was under arrest and could obtain counsel.

Perez's statement was not the result of being misled, police coercion, or duress as a result of the length of his interrogation. No facts to the contrary were presented to the trial court and Perez did not testify. Ignoring the factual evidence before the lower court, Perez now argues that his confession was involuntary. It should be reiterated that there is no evidence, particularly in light of Perez's statements, that his free will was overborne by either of the investigating officers.

Furthermore, to say his statements were an act of "compulsory self incrimination" due to defective Miranda

warnings where he was told on three occasions of his right to counsel and was properly given Miranda warnings does not comport with the substantial and competent evidence in this case. The trial court's ruling should stand and the motion to suppress denied.

ISSUE III

THE COURT DID NOT ERR IN NOT GRANTING A MISTRIAL AS TO THE PROSECUTORS OPENING ARGUMENT AND DETECTIVE BEATH'S TESTIMONY (restated)

Perez contends it was error for the court to deny a mistrial where the state, in opening argument and through witness testimony, stated inaccurately that Perez always or regularly carried a knife. He says this error was prejudicial both at guilt and penalty phase.

Perez's claim is meritless as the prosecutor's opening argument was a proper comment on the evidence which he, in good faith, believed would be presented through witness testimony and through appellant's statement to the police regarding Perez's ownership and transportation of his knife. Beath's testimony was not prejudicial in light of Perez's taped statement to the police and the court's curative instruction. Neither is error and provide no basis for a mistrial.

A trial court's ruling on a motion for mistrial is subject to an abuse of discretion standard of review. Goodwin v. State,

751 So.2d 537, 546 (Fla. 1999); Thomas v. State, 748 So.2d 970, 980 (Fla. 1999) (explaining that a ruling on a motion for mistrial is within the trial court's discretion and should not be reversed absent an abuse of that discretion); Hamilton v. State, 703 So.2d 1038, 1041 (Fla. 1997) (noting that a ruling on a motion for mistrial is within the trial court's discretion).

Moreover, wide latitude is permitted in arguing to a jury. Breedlove v. State, 413 So.2d 1, 8 (Fla. 1982). It is within the judge's discretion to control the comments made to a jury, and we will not interfere unless an abuse of discretion is shown. Occhicone v. State, 570 So.2d 902, 904 (Fla. 1990); Breedlove, 413 So.2d at 8. Under the abuse of discretion standard of review, the appellate court pays substantial deference to the trial court's ruling. A trial court's determination will be upheld by the appellate court "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." Trease v. State, 768 So.2d 1050, 1053, n. 2 (Fla. 2000), citing Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990); Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980).

Prosecutors Opening Statement - In anticipation of opening statement, the State intended to introduce Perez's statement to

the police wherein he admitted "owning a little (not even 3") lock blade which he left in his pocket when he got off work" (R 1070-71) and that appellant had been working[14] (R 1062). Additionally, the State planned to call Joseph Burns, Perez's brother-in-law, who had been deposed previous to trial, about Perez's propensity to carry a knife. Though Burn's testimony was subsequently ruled inadmissable (T 1261) he testified on proffer he knew Appellant to be in the habit of carrying a knife. On cross-examination while conceding upon first meeting Appellant he did not carry a knife (T 1259) he continued: "the last ten times, if it was ten times or more, the last of the time that I knew him since he was free, he carried a pocket knife with him, yes" (T 1260). The court indicated it was aware of this assertion previous to the State's opening argument(T 859).

The prosecuting attorney may outline evidence which he in good faith he expects the jury will hear during presentation of the state's case. Rutledge v. State,374 So.2d 975 (Fla. 1979). See Haws v. State, 590 So. 2d 1125 (Fla. 5th DCA 1992)(prosecutor acted in good faith, referencing in opening, statements of incompetent witness he planned to introduce through her brother and later ruled inadmissible); Randolph v. State, 556 So.2d 808 (Fla. 5th DCA 1990)(no grounds for mistrial

[14]Perez worked the Monday before the Tuesday morning murder.

when no evidence was established at trial where state in opening said stolen purse found in same area where defendant was arrested).

Perez contends that the prosecutor's opening remarks were irrelevant and contrary to the evidence in the case and for authority cites Miller v. State, 782 So. 2d 426 (Fla. 2nd DCA 2001) which he claims presents an "analogous situation." (IB 50) Appellant's reliance upon Miller is misplaced and distinguishable from this case. In Miller, the defendant was charged with three counts of manslaughter when three occupants of a motor vehicle were killed as a result of a stop sign that was removed from an intersection. Investigators discovered that several local young people (defendant among them) had been involved in stealing other community traffic signs. Though admitting involvement in the disappearance of the traffic signs, the defendant denied any involvement in stealing the stop sign at the fatal accident scene. The defendant argued that the stop sign was still up the day before the accident and other traffic signs unrelated to the incident had been taken a couple of days before the incident. Acknowledging that this was an "extremely close case" the Second District pointed to the only two pieces of evidence from which the jury could infer that the defendant had taken the stop sign. First, the investigating officer who

spoke with the defendant indicated he could tell whether a defendant was lying by watching the movement of the speaker's eyes, even though he had <u>not</u> been qualified as an expert in body language. Second, a friend of the co-defendants testified he <u>believed</u> they told him the day after the accident they had taken the signs the day before. The court noted: "This testimony, if accepted by the jury, notwithstanding the other testimony to the contrary, provided the required competent, substantial evidence to tie the circumstances of the other thefts to the subject sign... Accordingly, we conclude that, even though the sufficiency depends on Jarrard's rather equivocal testimony, the record supports the trial judge's discretionary denial of the motion for a judgement of acquittal...the evidence had not been tainted by the prosecutor's closing remarks, the effect of which poisoned the resulting verdict." <u>Miller</u> at 429-430. The prosecutor's "poisonous" closing remarks were the deputy's testimony was referred to inaccurately, in that the jury was to apply the officer's "expertise" in evaluating the defendant's credibility and the prosecutor mis-characterized twice to the jury that the witness (Jarrad) was "relatively certain" that the signs had been taken the night before. The court concluded: "Because there is an absence of any direct evidence connecting Miller and his co-defendants with the sign in question, each

link in the chain of circumstances presented in the State's case is essential." Miller at 432.

A procedural distinction between Miller and the case at bar is when the comments occurred. Here, the prosecutor's comments were made in opening when he summed up to the jury what he believed, in good faith, the evidence would show. In Miller, the prosecutor's inappropriate comments were stated during closing argument, the ultimate summation of evidence which had been presented during the trial. In closing argument the State accurately summed up the evidence about Perez's knife: "He enters her house armed with his knife. You heard in the video the evidence of his interrogation early on he described the knife that he carries with him at work. He knows it well. His words, it's a little locked blade. It's like not even a three-inch blade and the medical examiner in this case describes the 94 stab wounds as being from half an inch to an inch and-a-half long, consistent with a very small blade" (1783);"... Perez carries such a knife that he described. Yet he said it was a six-inch switchblade that Mr. Green had. Another lie."(T 1789). It was an accurate statement so there was no objection. Moreover, at no point in both their pre and post closing arguments *vis a vis* the State, did either defense counsel choose to make any comment regarding the inaccuracy of the State's

claim or that their client did not own or carry a "little locked blade" knife(T 1753-1763, 1792-1820).

Additionally, unlike Miller, this is not an "extremely close case" where crucial evidence was mis-characterized by the State. Perez admitted he owned and carried to work a knife and that he would leave it in his pocket after he got off work. He orchestrated the underlying felonies to occur at Martin's home and knew she had other items of value. Perez knew the sensor lights had been disabled, the phone lines cut and the garage side door broken into. He entered the house with socks on his hands, was present during her murder and got blood from the victim on the bottoms of his tennis shoes, which he discarded. Perez attempted to pawn items taken in the burglary soon after the night of the murder and had admitted taking jewelry from the victim's home in a previous burglary approximately one month earlier. Finally, he took police on a drive-around to retrieve items taken in the burglary. Considering this evidence in conjunction with other evidence presented by the State, particularly the medical examiners testimony that there were 94 wounds perpetrated by a weapon similar to Perez's knife, comments regarding "the knife" in opening were not only on point but relevant as well.

More akin to this case is Hartley v. State, 686 So.2d 1316

(Fal. 1997). In Hartley, the prosecutor during opening stated: "I submit to you the evidence will show that (Hartley) was the "area tough guy", people in the area where this occurred were afraid of him". There was no specific testimony he was the "area tough guy". Noting comments regarding the defendant's character were more appropriate during closing than opening, the court denied a mistrial. In denying Hartley a new trial the court observed:

> "The State made these comments in attempting to explain that its witnesses had refused to come forward immediately because they were afraid of Hartley... Hartley asserts that the State never produced any evidence to reflect that the witnesses were afraid of Hartley or that Hartley "was the area tough guy". We find no merit to this argument. A number of witnesses testified that they did not come forward immediately because they were afraid. Moreover, Hartley himself made statements to witnesses that he hoped to get away with the crime because the witnesses were afraid to testify. Because evidence was admitted to support the comments made by the State in opening, we do not find that the comments entitle Hartley to a new trial." Id., at 1321.

Here, the jury was instructed twice prior to trial, in final instructions and during closing argument they were only to decide the case from the testimony of the witnesses, evidence in the form of exhibits and that arguments of counsel were not evidence (T 843,857,1809, 1845). See Rutledge, 374 So.2d 975.

Even if this Court finds the prosecutors remarks improper, such error was harmless. The prosecutor, in closing, accurately

summarized Perez's relevant statement, the court's instructions were curative and there was overwhelming, corroborative evidence in the case. The focus of a harmless error analysis "is on the effect of the error on the trier-of fact." State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986).

Detective Beath's Testimony - Beath testified as a preamble to the video and audiotape presented to the jury and stated Perez told him that he owned and carried a small, lock blade style knife on a regular basis and kept it sharp (T 1281). This is not a substantive mis-statement of Perez's statements in that Perez clearly indicated he owned a small locked blade knife, used it at work, left it in his pocket afterwards, kept it sharp and still owned it. Unless he was able to defy the laws of physics, if Perez owned the knife the only way he could use it at work was to transport it to and from work daily. The State contends Perez mis-characterized Beath's testimony as it was a "habit on the part of the defendant of carrying a knife" (T 1281). In fact, Perez has expounded several characterizations of "carrying" the knife, i.e., "always carried a knife","regularly carried a knife","carried it (the knife) on a regular basis"; "routinely carried a knife" or "habitually carried a knife".(IB 46,52,54).It is axiomatic from the various constructs of the word "regularly" noted in Perez's brief, he is attempting to

create semantically a prejudicial effect in terms of Beath's testimony. However, the record refutes any claim of prejudice arising from Beath's testimony. As well, the court gave a clarifying instruction immediately after Beath's testimony:

> Members of the jury, the exhibit 52 admitted into evidence is the videotape of portions of the interview with Mr. Perez. It is the best evidence of what Mr. Perez said so you need to rely on your determinations about what is said off that videotape. (T 1282)

"Generally speaking, the use of a curative instruction to dispel the prejudicial effect of an objectionable comment is sufficient." Rivera v. State, 745 So.2d 343 (Fla. 4th 1999) citing Buenoano v. State, 527 So.2d 194 (Fla. 1988) See Adams v. Wainwright, 709 F.2d 1443 (11th Cir. 1983), cert. denied, 464 U.S. 1063, (a curative instruction purges the taint of a prejudicial remark because a jury is presumed to follow jury instructions). Even if this court found Beath's comments inaccurate, a mistrial was not required as Beath's comments do not undermine confidence in the verdict and is harmless. The comments were put in proper perspective by the court's instruction and the evidence was overwhelming as to Perez's guilt. DiGuilio,491 So. 2d 1129, 1139.

ISSUES IV AND V

THE COURT DID NOT ERR IN SENTENCING PEREZ TO DEATH BECAUSE THE STATE DID OBTAIN THE PREDICATE JURY FINDING THAT PEREZ WAS A MAJOR PARTICIPANT IN THE FELONY (restated)

Prefacing his arguments on **Issues IV** and **V** Perez maintains there was substantial evidence in Perez's statement that Green was the actual stabber of the victim and the guilty verdict at bar did not encompass the necessary facts to justify a death sentence (IB 58). Perez is clearly wrong on this point as there was no forensic evidence implicating Green as the stabber, other than Perez's self-serving statement. Any finding as to who the actual stabber was is irrelevant to Perez, found to have acted as a major participant with a reckless disregard for human life satisfying the constitutional requirements of Enmund v. Florida, 458 U.S. 782 (1982) and Tison v. Arizona, 481 U.S. 137 (1987) making him death eligible. See Van Poyck v. State, 564 So.2d 1066 (Fla. 1990)(court found defendant major participant even though he was not the actual shooter).

In DuBoise v. State, 520 So.2d 260 (Fla.1988), this Court summarized the principle established in Enmund/Tison:

> In Tison the Court stated that Enmund covered two types of cases that occur at opposite ends of the felony-murder spectrum, i.e., "the minor actor in an armed robbery, not on the scene, who neither intended to kill nor was found to have had any culpable mental state" and "the felony murderer who actually killed, attempted to kill, or intended to kill." The Tison brothers, however, presented "the intermediate case of the defendant whose participation is major and whose mental state is one of reckless indifference to the value of human life."... Commenting that focusing narrowly on the question of intent to kill is an unsatisfactory method of determining culpability, the

> Court held "that major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the Enmund culpability requirement." Id. at 265-66 (citations omitted, emphasis added) (quoting Tison v. Arizona, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987)).

The jury returned these verdicts: felony murder; burglary of a dwelling (defendant made an assault and battery upon any person armed or did arm himself within the dwelling with a dangerous weapon); and, robbery (defendant carried a deadly weapon) (T 1881-1882). The jury received the following instructions:

> **Principal Instruction**
>
> If the Defendant helped another person or persons commit or attempt to commit a crime, the Defendant as a principal and must be treated as if he had done all the things the other person or persons did if the Defendant had a conscious intent that the criminal act be done and the Defendant did some act or said some word which was intended to and which did incite, cause, encourage, assist or advise the other person or persons to actually commit or attempt to commit the crime. (T 1840)
>
> **Independent Act Instruction**
>
> If you find that the crimes alleged were committed an issue in this case is whether the crimes were the independent acts of a person other than the Defendant. An independent act occurs when a person other than the Defendant commits or attempts to commit a crime which the Defendant did not intend to occur and in which Defendant did not participate and which was outside of and not a reasonably foreseeable consequence of the common design or unlawful act contemplated by the Defendant. If you find that the Defendant was not present when the crimes occurred, that does not in and of itself establish that the crimes were the

> independent act of another. If you find that the crimes were independent acts of another, then you should find Daniel Perez not guilty of those crimes.(T 1840-41)

Perez's defense was that Green had the knife, he was not the actual stabber, and had no intent to burglarize Martin's home. In rejecting the crimes were the independent acts of another, the jury disbelieved Perez's story thereby rejecting his defense. In accord with other instructions, they disbelieved Perez when he stated he never physically harmed the victim;[15] his only intent was assisting others in stealing Martin's vehicle parked outside her home;[16] had no intent to rob Martin, wanting no part of what was taken;[17] and, did not enter Martin's home with a knife.[18]

Findings of battery and robbery with a deadly weapon provide irrefutable support that the jury found Perez to be a major

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[15] "...A battery is an intentional touching or striking of another person against that person's will" (T 1833).

[16] "...at the time of the entering of the structure Daniel Perez had a fully-formed conscious intent to commit theft or homicide in that structure." (T 1830-31)

[17] "...the State must prove [Perez] took the property from the person or custody of Susan Martin...[by] force, violence, assault or putting in fear...appropriate the property of Susan Martin to his use or to the use of any person not entitled to it." (T 1836)."

[18] "If you find that the defendant carried a knife in the course of committing the robbery and the knife was a deadly weapon, you should find him guilty of robbery with a deadly weapon." (T 1838)

participant with a reckless disregard for human life. Perez claimed Green "used a knife about six inches long".(R 1109). The wounds were inflicted by the same weapon and a knife capable of inflicting those injuries was Perez's knife carried to and from work which he left in his pocket at workday's end.[19] The criminal information specifically referred to a knife as a deadly weapon and the court's instructions were specific to a knife (R 1-2; T 1838).

The verdict regarding the assault and battery is telling. Perez maintained throughout his interrogation he did not threaten, strike, or stab his "Aunt Sue". In fact, he did nothing to assist her. Hence, the battery to Martin consisted of 94 stab wounds to her body, a defensive wound to her hand, a blow from a cane, the forcible, physical taking of the necklace and watch from her person.

Perez was the only perpetrator acquainted with Martin, had stolen from her before, and if not for his relationship with her, the murder would never have occurred. He planned and orchestrated the underlying felonies, provided the knife used in the murder and was present when it occurred, assisted in the destruction of incriminatory evidence afterwards and concealed items near his place of employment as well as attempting to pawn

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[19]The murder occurred in the early hours of Tuesday morning.

items of value.

This court has consistently upheld the death penalty where, as in the case at bar, the appellant did not actually commit the subject homicide. E.g.,Chamberlain v. State, No. SC02-1150 (Fla. June 17, 2004); Van Poyck, 564 So.2d 1066; Copeland v. Wainwright, 505 So.2d 425 (Fla.1987); Jackson v. State, 502 So.2d 409 (Fla.1986); Cave v. State, 476 So.2d 180 (Fla.1985); State v. White, 470 So.2d 1377 (Fla.1985); Bush v. State, 461 So.2d 936 (Fla.1984)); James v. State, 453 So.2d 786 (Fla. 1984).

Perez's reliance upon Jackson v. State, 575 So.2d 181(Fla.) is misplaced. In Jackson, no evidence showed defendant personally possessed or fired a weapon during a robbery where the murder took seconds to occur. Furthermore, Jackson involved two co-defendant's where a reasonable inference could be made that either one fired the gun. Id. at 190-191. Likewise, other cases cited by Perez are inapplicable: Benedith v. State, 717 So.2d 472 (Fla. 1998) (no evidence appellant procured the firearm for use in the robbery, possessed the firearm before or during the robbery or that he could have prevented the use of the firearm while the robbery was being committed); State v. Lacy, 929 P2d. 1288 (Az. 1996) (defendant not present when victim bound and gagged and no other evidence indicating what

defendant may have known); White v. State, 532 So.2d 1207 (Miss. 1988)(no evidence defendant contemplated lethal force would be employed); State v. Rodriguez, 656 A.2d 262 (Del.Super. 1994)(defendant not principal in shooting and co-defendant's statement implicating him as shooter was suspect).

Perez argues at penalty phase the jury made a non-unanimous decision that Perez was a major participant acting with a reckless disregard for human life. Though Perez concedes that their finding on the facts may have been made in accordance with Enmund and Tison, that in light of Apprendi v. New Jersey, 530 U.S. 466 (2000)as applied by Ring v. Arizona, 536 U.S. 584 (2002)[20], the jury's decision was non-unanimous. This issue has not been preserved for review and is waived. Perez specifically agreed that an instruction be given to the jury (T 2141). Steinhorst, 412 So.2d 332, 338.

However, should this Court find it preserved, Perez's specious argument is meritless, at odds with the jury's verdict and this Court must affirm his sentence. The jury only determines at penalty phase what punishment should be imposed for felony murder which they had found unanimously, and based upon their verdict(s), the State contends they found Perez to be

[20]The state would reference further arguments regarding the constitutionality of Ring in **Issue XII**.

a major participant under Edmund/Tison. However, the jury does not have to make that finding. Section 921.141, Florida Statutes, affords the sentencer guidelines to determine which punishment is appropriate and provides accepted circumstances to be considered. An Edmund/Tison determination does not make a murderer eligible for the death penalty in that the determination is a limiting factor, not an enhancing factor. If not met, the death penalty is not appropriate. After Ring, an Edmund/Tison ruling may still be made by a court. Brown v. State, 67 P.3rd 917 (Okla.Crim.App. 2003) Trial courts are to make analysis for Edmund/Tison finding. Pearce v. State, 880 So.2d 561 (Fla. 2004); Diaz v. State, 513 So.2d 1945, 1948 (Fla. 1987) ((findings) may be made in an "adequate proceeding before some appropriate tribunal--be it an appellate court, a trial judge, or a jury." citing Cabana v. Bullock, 474 U.S. 376 (1986)). See Van Poyck, 564 So.2d 1066 (not error for court failing to direct the jury to make a mandatory factual determination concerning Van Poyck's participation as prescribed by Edmund/Tison).

Based on their findings at the guilt phase the jury had previously determined that Perez was death eligible and any further instruction that they were to find Perez a major participant acting with a reckless disregard for human life, was

extraneous. This Court must affirm the sentence.

ISSUE VI

THE COURT FOUND PEREZ TO BE A MAJOR PARTICIPANT IN THE MURDER ACTING WITH RECKLESS DISREGARD FOR HUMAN LIFE AND APPROPRIATELY APPLYING HAC (restated)

Perez contends the HAC aggravator should not be applied. The State did not establish that appellant was the killer or a major participant in the crime. The State disagrees for the reasons provided in **ISSUES IV** and **V** in addition to the following analysis.

A trial court can make an Edmund/Tison finding based on substantial and competent evidence . Pearce, 880 So.2d 561(noting trial court's analysis of defendant's role/culpability in murder satisfies Edmund/Tison discussion). See Diaz, 513 So.2d 1945,1948.

The court was specific in it's sentencing order about Perez's major participation:

> ***Capital felony committed while the defendant was engaged, or was an accomplice, in the commission of, or attempt to commit or in flight after committing or attempting to commit a robbery or a burglary of a dwelling*** Perez admitted to law enforcement that he planned to commit a crime against Susan Martin the night she was killed and he is the one who took himself and his co-defendant, Calvin Green, to her residence. In other words, it's Daniel Perez who selected the target of the criminal activity. The evidence further showed beyond a reasonable doubt that Susan Martin's house was entered by stealth. The telephone lines into the home were cut and the

security light which reacts to motion was unscrewed before entry was made. The evidence also showed beyond a reasonable doubt that a screen to an outside door to her garage was cut. In statements made by Daniel Perez to law enforcement Perez admitted that Susan Martin was watching an infomercial on television at the time entry was made into the home. Perez also admitted that he put socks on his hands before entering her house. Perez admitted Susan Martin was stabbed numerous times with a knife. He also admitted to helping dispose of the knife. Bloody foot prints matching shoes Perez was known to wear at the time of the murder were found next to the body of Susan Martin. Perez admitted to throwing the shoes in the dumpster the same night of the murder. Only one other identifiable bloody footprint was found at the scene of the crime in a hallway some distance away from the body and that footprint was inadvertently made by law enforcement while the crime scene was being processed.

The evidence at trial also proved beyond a reasonable doubt that prior to being murdered Susan Martin accused Daniel Perez of burglarizing her home and stealing from her approximately one month earlier. Perez knew that prior to the date Susan Martin was murdered that she had made that accusation to law enforcement.

The evidence at trial also proved beyond a reasonable doubt that on a prior occasion Perez had used a knife to attempt to kill someone by stabbing him and he had a personal awareness of the vitality of the knife and the high probability of danger when the knife is used to confront someone.

The evidence further showed beyond a reasonable doubt that at a minimum he knew the high probability of danger and that a life was in jeopardy when he entered Susan Martin's house knowing that she was awake, knowing she knew who he was, knowing that either himself or his co-defendant was armed with a knife used to cut the telephone lines and the screen and knowing that after entry was made she sustained a serious blow to the head by a cane.

The only evidence presented at trial which connected

> Perez' co-defendant, Calvin Green, to the crimes committed was Perez' statement to law enforcement. The only eyewitness version of the events presented at trial were the statements made by Perez to law enforcement in which Perez emphatically denied being the one who stabbed Susan Martin to death. However, the description of the events given by Perez changed several times as he was confronted by law enforcement with various items of physical evidence. The various permutations in his statement of his involvement in the crimes against Susan Martin do not make his final version credible.
>
> By interrogatory responses on the verdict form the jury unanimously decided beyond a reasonable doubt that in the course of committing the burglary, Perez made an assault or battery upon Susan Martin. The jury also unanimously decided that Perez was armed or armed himself with a deadly weapon in the course of committing the burglary. The only two deadly weapons described in the evidence were the knife used to stab Susan Martin and the duck head cane used to strike her on the head.

Cases cited by appellant including, Williams v. State,622 So.2d 456 (Fla. 1993); Archer v. State, 613 So.2d 446 (Fla. 1993), and Omelus v. State, 584 So.2d 563 (Fla. 1991) are distinguished from the case at bar in they all factually concern defendants who were not present when the killings took place but ordered or initiated contract killings, and, the state had failed to prove beyond a reasonable doubt the particular manner in which the defendants either knew or ordered the manner in which the victims were killed. Here, Perez was not only present, he planned and participated in the underlying felonies and provided the knife used in the murder, as discussed in **Issues**

III, IV and **V.**

This Court has affirmed the death penalty where the defendant is not the actual killer: Cave v. State, 727 So.2d 227 (Fla. 1998)(HAC found for non-shooter and stabber); Copeland v. State, 457 So.2d 1012, 1019 (Fla. 1984) (aggravating factors, including HAC, were imputed to defendant even though co-defendant killed victim because defendant was principal in and fully participated in crimes), habeas granted on other grounds, 565 So.2d 1348 (Fla. 1990).

ISSUE VII

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

Perez claims the heinous, atrocious and cruel ("HAC") aggravator was not proven because there was nothing to show Martin was conscious to experience prolonged suffering.

In contrast to Perez's position, Martin was fearful for her safety at 1:20 a.m. as a result of her cut phone lines. Thereafter, she was struck on her forehead by a brass duck cane handle and experienced 95 sharp force injuries including a defensive wound as she struggled with and tried to evade her attacker. In her last moments she made sounds of "gargling in her own blood". This court will find after a review of the record that HAC is supported by substantial, competent evidence

and the correct rule of law was applied by the trial court. Hence, the death sentence should be affirmed.

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. 1997).

In it's sentencing Order, the court made the following detailed findings regarding the HAC aggravator (R 1448-49):

> ***The capital felony was especially heinous, atrocious or cruel.*** The evidence at trial presented by the medical examiner proved beyond a reasonable doubt that Susan Martin was stabbed to death. Altogether she was stabbed ninety-four times. There were eight stab wounds to the left side of her neck, four of which cut her jugular vein. There were twenty-one stab wounds to the right side of her abdomen, some of which were lethal because they cut her liver and her right lung. There were twenty stab wounds to the left side of her abdomen, some of which were lethal because they cut her left lung. There were twenty four stab wounds on the back-side of the abdomen and eighteen stab wounds on the front side of the abdomen. There was one defensive wound to a finger on her left hand. She also sustained a blunt trauma injury over her left

> eye causing a V-shaped laceration and bruising and there were scratches on her neck. The blow to her head did not cause brain damage or skull fracture and was not a fatal. The bruising on her forehead and the hemorrhaging to her right lung cavity showed she was still alive at the time she was hit on the head and her right lung was punctured.
>
> The medical examiner could not conclude with a reasonable degree of certainty what was the sequence of the stab wounds, but more likely than not the stab wounds to the neck and the right abdomen were inflicted first given where the blood went as Susan Martin died. As to the fatal stab wounds to the neck the medical examiner concluded that she would have lost consciousness within a matter of a few seconds to as much as two minutes. As to the stab wounds to the right abdomen Susan Martin could have lived as long as fifteen minutes. In his statements to law enforcement Perez admitted to hearing Susan Martin gurgling in her blood.
>
> Based on the medical evidence and the defensive wound to Susan Martin's hand as well as the admissions by Perez the Court finds beyond a reasonable doubt that Susan Martin was alive and conscious during some of the multiple stab wounds and the State has proven beyond a reasonable doubt that her murder was unnecessarily tortuous, consciousless and pitiless. Davis v. State, 620 So.2d 152 (Fla. 1993); Pittmann v. State, 646 So.2d 167 (Fla. 1994); Francis v. State, 808 So.2d 110 (Fla. 2002.(emphasis added)

Referring to "Perez's admissions", the court was aware not only of evidence presented to the jury during the case-in-chief, but had a full opportunity to view the video and audio taped statements by Perez.

The last *known* spoken words by Martin were " I have to go", spoken in a somewhat scared voice at 1:20 a.m. on August 27, 2001. Unbeknownst to the victim, her phone lines had been cut

but she was aware of a problem with her phone and mentioned same to Bell South. Just after her fearful words, she was struck by a duck cane handle, disabling her but not rendering her unconscious and stabbed 95 times.

The mode and circumstances of Martin's death were adduced through the testimony of Dr. Roger Mittleman ("Mittleman") Chief Medical Examiner for the 19th Judicial Circuit, as well as through Perez's statements. Mittleman testified Martin had suffered a blunt force injury to the head which occurred while she was alive and most probably would have survived, noting bruising underlying the laceration (T 1633). The injury would have been consistent with a blow from the duck cane (T 1640). Mittleman described Martin's stab wounds: four stab wounds to the left neck, four striking the left jugular vein; 24 stab wounds in the right lateral torso which went into the liver and into the right lung and as a result she hemorrhaged in the right lung cavity, indicating that she was still alive when struck there. On the left side of the body were 20 stab wounds; 24 stab wounds on her middle to lower back; 18 stab wounds to the abdominal area; and a stab wound on her index finger which he characterized as a defensive wound consistent with her trying to ward off an attack (T 1650). Mittleman believed the wounds to the neck and the wounds that perforated the liver and lung in

her right lateral torso were fatal and probably occurred first due to less bleeding in the other wounds (T 1648). The eight knife wounds to the neck (specifically the four striking her jugular vein) would result in the victim losing consciousness within seconds to a minute or two with death subsequent (T 1651). As regards the 24 wounds perforating her liver and lung, the victim had a better chance of surviving and may have survived for variables of ten minutes or less to fifteen minutes or more. The gist of Mittleman's testimony regarding these wounds was that it would take longer to die from those than from the jugular vein injuries (T 1649). However, he could not state with certainty which fatal wounds were inflicted first chronologically: he could not say that the neck injuries were first, thus, there is substantial and competent evidence Martin suffered stab wounds to her chest and abdomen before her jugular was perforated. Insofar as the wounds to her back and around her torso Martin would have <u>had</u> to have been either moving or moved by someone else (T 1653). Logic dictates that if a person is moving, she is alive and conscious of her situation.

Perez described to police, upon arriving at the scene of the murder, he saw Green repeatedly stab Martin and that she could be heard the "gargling in her own blood"(SR 406). He repeatedly indicated there was blood everywhere (SR 470, 1107, 1009, 1110).

Perez reported he saw from the doorway Green on top of the victim surrounded by vast amounts of blood (SR 1109). He stated:

> "Man Man's cousin was on top of her. She was laying on her back. All I saw was blood. In his hand there was a blade. It was a switchblade, black handle, silver, like a six-inch, about that fucking long...Okay? There was, uh-he hit her on top of the hear with-with a fucking stick or some shit. It was, like, uh, brown with, like, a gold tip on it or some shit." (SR 1109)

He indicated Martin <u>was fighting off</u> her attacker (SR 469-70):

> A. I walked in. I went around the corner into the little-the little room. When I came through the main door towards the living room, she was there. He was there. Okay? I told you that the damn duck thing was right beside her. Okay?
>
> Q. Where-
>
> A. I'm saying, he's straddled on top of her.
>
> Q. What position is she in?
>
> A. She was-she was face up at the time.
>
> Q. Where were her arms?
>
> A. Uh-
>
> Q. Come on, man.
>
> A <u>Under-underneath him</u>. <u>Underneath him</u>. <u>She was fighting him</u>.
>
> Q. Was she screaming?
>
> A. No, not when I went in. No. No.
>
> Q. You heard gargling. Is that all you heard?
>
> A. That's all I heard.

Q. What was he doing?

A. He kept on hitting her. And I fuckin' grabbed him. I said," What the fuck, man? What the fuck?"

Q. What was he saying? What was he saying?

A. He just kept on saying, "She bucked. She bucked. She bucked." That's all he kept on saying. " She bucked, man." She started yelling. She started screaming. That's it. She bucked, bro'. <u>She kept on fighting to get him</u>.

Clearly discernable from Perez's comments is that Martin was conscious for a significant duration of the stabbing as "there was blood everywhere", callously characterizing it as "Lake-okee-fucking-chobee" and stating "she kept on fighting him". He did nothing to stop the carnage. From his statement to the police, two facts are clear: First, Martin was conscious in that she was "fighting off her attacker" and, second, the attack on her must have gone for at least several minutes. As noteworthy, upon discovery of Martin's body her hands were above her head (T 963). A reasonable inference can be made that if, during the attack her arms were "underneath" her assailant as he was "straddling her", she moved her arms at some point afterwards. Equally important, the fact the arms are pinned explains the finding of a single defensive wound, which does not detract from the finding of HAC. The totality of the circumstances prove the mitigator.

The number and extent of the wounds inflicted upon the victim, 94, show a total indifference to human life, complete brutality and torture to which our Supreme Court has previously alluded. Guzman v. State, 721 So.2d 1155 (Fla. 1998).

As explained in Guzman:

> 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)(emphasis added).

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).

Perez is incorrect when he states the cases cited by the court in it's aforementioned Sentencing Order do not support the circumstances in this case (IB 73). In Pittman, where the defendant testified he was not the stabber the court found the multiple stab wounds in and of themselves sufficient for HAC and stated:

> The record reflects that each victim was stabbed

> numerous times and bled to death. In addition, Bonnie Knowles' throat was cut. We have previously held that numerous stab wounds will support a finding of this aggravator. See, e.g., <u>Haliburton v. State</u>, 561 So.2d 248 (Fla. 1990), <u>cert. denied</u>, 501 U.S. 1259, 111 S.Ct. 2910, 115 L.Ed.2d 1073 (1991); <u>Hardwick v. State</u>, 521 So.2d 1071 (Fla.), <u>cert. denied</u>, 488 U.S. 871, 109 S.Ct. 185, 102 L.Ed.2d 154 (1988); <u>Johnston v. State</u>, 497 So.2d 863 (Fla.1986). We find no error in the application of this aggravator under the facts of this case.

In <u>Davis v.State</u>, 620 So.2d 152 (Fla. 1993) the victim was stabbed 25 times about the chest, back, and neck and was conscious during the infliction of the wounds which the court found clearly supported HAC. Here, the court found the victim conscious during some of the multiple stab wounds, whose total was 94, three times the number of wounds in <u>Davis</u>.

With 94 wounds, based on Mittleman's testimony, it would stand to reason that if the eight neck wounds were inflicted first, Martin could have survived and fought off her attacker two minutes as the other 76 wounds were serially inflicted. If the 24 wounds to the liver and lung came first, she could have survived a maximum of fifteen minutes or more, causing Martin to suffer another 70 knife wounds. Martin was clearly subject to a torturous and pitiless death. Such supports the HAC aggravator.

Perez argues Martin "didn't move. She didn't do shit. She was just gone"(T 1355)and those observations comported with Mittleman's testimony as to time of survival from her wounds.

Self-serving lay observations regarding her physical condition are not necessarily consistent with death, as one could still be conscious. His contention the initial blow could have rendered Martin unconscious or semi-conscious is not supported by the record as the medical examiner never testified to that supposition (T 1628-53).

Perez's reliance upon cases lacking prolonged suffering are readily distinguishable from this case. For example, in Elam v. State, 636 So.2d 1312 (Fla. 1994), the victim, as a result of an altercation was struck by defendant's fist knocking him to the ground and subsequently bludgeoned to death by a brick. He could have been knocked out and killed in 30 seconds. Id., 1314. Elam involved several blows by a brick as opposed to 94 stabbings with a small blade and involved a passage of time from consciousness to unconsciousness whose outer boundary was less than a minute. Likewise, in Rhodes v.State, 547 So.2d 1201 (Fla. 1989), the victim was semiconscious at the beginning of the attack. Zakrzewski v. State, 717 So.2d 488 (Fla. 1998) cited by Perez suggesting HAC does not exist is distinguishable as the victim was possibly rendered immediately unconscious, as attested to by the medical examiner, after being struck by a crowbar before being murdered. In the case at bar, Martin was on the phone, voiced her fear, suffered a blow to the head (which

did not render her unconscious) and multiple stab wounds from her nephew she had accused previously of theft before losing consciousness up to fifteen minutes after the attack. Fighting off her attacker, as admitted by Perez in his statement, shows consciousness of her impending doom. See Rolling v. State, 695 So.2d 278, 296 (Fla. 1997)(affirming HAC finding where victim was conscious for less than a minute).

Perez contends that an aggravating circumstance may not rest on mere speculation and argues that the trial court's conclusion as to HAC was speculative. However, Perez's description of the murder in conjunction with the medical examiners testimony cited herein provides substantial and competent evidence for non-speculation as to the prolonged and unnecessarily tortuous suffering of the victim.

Cases cited by Perez are distinguishable. Hamilton v. State, 547 So.2d 630 (Fla. 1989) (no basis for aggravating factor where facts based only on speculation); Bundy v. State, 471 So.2d 9 (Fla. 1985) (no proof establishing cause of death); Diaz v. State, 860 So.2d 960() (murder occurred quickly and reloading of gun did not establish intent to inflict high degree of pain or evidence torture of victim as cited by the court, citing gunshot cases resulting in instantaneous and near instantaneous death as consistently not being HAC); and, Brown v. State, 644

So.2d 52 (Fla. 1994) (badly decomposed body of victim stabbed non-fatally three times without any further evidence crime was pitiless or unnecessarily).

In Francis v. State, 808 So.2d 110 (Fla. 2002), 66 year old twin sisters were stabbed sixteen times and twenty-three times, respectively. Because the victim's had not been moved and were in close proximity to each other this court found that no speculation was required to conclude that both victims were subjected to appalling amounts of fear and stress before their deaths. Id.,at 135. This Court found these facts to " buttress" the courts finding of HAC but did not negate, as Perez suggests, the threshold finding of HAC based solely on the stab wounds. As this Court wrote :

> The HAC aggravator has been consistently upheld where, as occurred in this case, the victims were repeatedly stabbed. See, e.g., Guzman v. State, 721 So.2d 1155, 1159 (Fla.1998); Brown v. State, 721 So.2d 274, 277 (Fla.1998); Atwater v. State, 626 So.2d 1325, 1329 (Fla.1993).
>
> In this case, the medical examiner testified that Mrs. Brunt was stabbed sixteen times and Mrs. Flegel was stabbed twenty-three times. Although Mrs. Flegel's lack of defensive wounds does not necessarily indicate that she was unconscious throughout her attack, Mrs. Brunt's defensive wound tends to indicate that she was conscious during at least some part of her attack. Additionally, Francis' contention that the victims "may have been instantaneously killed" is not supported by the record. The medical examiner's testimony in this respect was that the victims could have remained conscious for as little as a few seconds and for as long as a few minutes. It is important to

> note that we have upheld a finding of HAC where the medical examiner has determined that the victim was conscious for merely seconds. See Rolling v. State, 695 So.2d 278, 296 (Fla.1997) (upholding HAC where medical examiner concluded that victim was conscious anywhere between 30 and 60 seconds) Francis at 134.

Furthermore, Mittleman's testimony along with the number and overall placement of the stab wounds is enough to sustain a finding of HAC. In Floyd v. State, 569 So.2d 1225 (Fla. 1990) a similar case regarding the medical examiner's testimony at trial and where other evidence (improperly admitted but found to be harmless error) was introduced to establish HAC, this Court found sufficient HAC in the circumstances of a victim who had 12 stab wounds culminating in her death. Reaching it's decision this Court held:

> To support the contention that this murder was heinous, atrocious, or cruel, the state presented the medical examiner's testimony describing the twelve stab wounds Anderson received to the abdomen, the chest, and to her left wrist. Although the medical examiner could not establish the sequence of those wounds, the wound to the chest was fatal "within a matter of minutes at the most," whereas the other wounds to her abdomen were "potentially fatal, [from which she] would take a longer time to die." The jury also heard that Anderson received a bruise to her nose that was consistent with a fight or struggle. There was no objection to any of this testimony....Floyd argues that the police officers should not have been permitted to testify to medical matters. We agree that the officers here were not qualified to give such testimony.
>
> Although we conclude that there was error on this point, we determine that it was harmless in light of the medical examiner's testimony. DiGuilio, 491 So.2d at 1135. Independent of the police officers' improper

> testimony, the state produced sufficient evidence to adequately establish the existence of the aggravating circumstance of heinous, atrocious, or cruel beyond a reasonable doubt. Johnston v. State, 497 So.2d 863, 871 (Fla.1986). Floyd at 1232 (emphasis added).

HAC is supported by competent and substantial evidence in this

case and this court should affirm. However, as noted in **Issues XII** and **XIII**, and incorporated here, if HAC is stricken the death sentence is constitutional. See Ferrell v. State, 680 So.2d 390 (Fla. 1996); Hunter v. State, 660 So.2d 244 (Fla. 1995).

ISSUES VIII AND IX

THE TRIAL COURT PROPERLY EVALUATED AND REJECTED THE STATUTORY AND NON-STATUTORY MENTAL MITIGATORS (restated).

Perez claims the trial court erred and abused it’s discretion in giving little weight to the statutory mitigator that the defendant was under the influence of extreme mental or emotional disturbance (**ISSUE VIII**) and the non-statutory mitigators of an unstable family upbringing and sexual abuse as a child (**ISSUE IX**). It is Perez’s position the court made rulings contrary to the evidence in giving little weight to these mitigators inappropriately applying a standard of future dangerousness in his determination of the weight each should be given. Taking each mitigator individually, this Court will find the court’s rationale and conclusions supported by competent,

substantial evidence and there was no abuse of discretion in the weight assigned. The sentence must be affirmed.

While aggravators must be proven beyond a reasonable doubt, Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992), mitigators are "established by the greater weight of the evidence." Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990); Nibert v. State, 574 So. 2d 1059, 1061 (Fla. 1990)(finding judge may reject mitigator if record contains competent substantial evidence supporting decision). In Campbell, this Court established relevant standards of review for mitigators: (1) whether a particular circumstance is truly mitigating in nature is a question of law and subject to ***de novo*** review by this Court; (2) whether a mitigator has been established is a question of fact, subject to the competent substantial evidence standard; and (3) the weight assigned to a mitigator is within the trial court's discretion and subject to the abuse of discretion standard. See Kearse v. State, 770 So. 2d 1119,1134 (Fla. 2000)(observing whether mitigator exists and weight assigned it are matters within court's discretion); Trease v. State, 768 So. 2d 1050,1055 (Fla. 2000) (receding in part from Campbell; holding that though judge must consider all mitigators, "little or no" weight may be assigned); Cole v. State, 701 So.2d. 845 (Fla. 1997)(deciding mitigator’s weight is within judge’s discretion).

In analyzing mitigation at the trial level, the judge must (1) determine whether the facts alleged as mitigation are supported by the evidence; (2) consider if the proven facts are capable of mitigating the punishment; and if the mitigation exists, (3) determine whether it is of sufficient weight to counterbalance the aggravation. Rogers v. State, 511 So. 2d 526, 534 (Fla. 1987). The trial court "must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of non-statutory factors, it is truly of a mitigating nature." Campbell, 571 So. 2d at 419. Whether a mitigator is established lies with the judge and "[r]eversal is not warranted simply because an appellant draws a different conclusion." Sireci v. State, 587 So. 2d 450, 453 (Fla. 1991); Stano v. State, 460 So. 2d 890, 894 (Fla. 1984). Resolution of evidentiary conflicts is the trial court's duty; "that determination should be final if supported by competent, substantial evidence." Id.

ISSUE VIII - Extreme Mental or Emotional Disturbance - The trial court, after extensive analysis of the defendant's mental health history stated in it's sentencing order:

> Based on all the material and information he reviewed Dr. Riordan opined that at the time of Susan Martin's murder Perez was suffering from Bipolar Disorder, Attention Deficit Disorder and Hyperactivity

Disorder and Borderline Personality. On cross-examination by the State Dr. Riordan admitted that he did not review the 25 hours of taped interview of Perez pertaining to Susan Martin's murder. Dr. Riordan also admitted on cross-examination that in 1996 Perez was diagnosed as suffering from Antisocial Disorder due to his manipulative behavior. Further, on cross-examination Dr. Riordan acknowledged that Perez has been diagnosed with having a conduct disorder due to the aggressiveness towards others. He also acknowledged a conduct disorder is a serious behavior disorder.

Dr. Landrum is the forensic psychologist who testified for the State. He first evaluated Perez in 1996 in connection with the 1995 charge of Second Degree Murder. In addition to the materials he reviewed in 1996, Dr. Landrum also reviewed the medical records from several hospitalizations for psychological problems, the police records pertaining to this case and the reports concerning Perez's behavior while in jail for this case. He also conducted a two-hour interview of Perez and reviewed a transcript of the deposition of Rachel Burns, a transcript of an interview of Rachel Burns and a 25 hour taped interview of Perez by law enforcement in this case. During his evaluation in 1996 Dr. Landrum diagnosed Perez as suffering from Bipolar Disorder with features of antisocial personality and borderline personality. Dr. Landrum explained that Bipolar Disorder is a mood disorder. He further explained that a personality disorder is more pervasive than a mood disorder. A mood disorder such as Bipolar Disorder will fluctuate in terms of how pronounced it will manifest itself. However, a personality disorder indicates how the new disorder will be expressed in terms of action. Daniel Perez has been diagnosed with having antisocial personality disorder and a borderline personality disorder. A key symptom of Perez' antisocial personality is an indifference to hurting others and a willingness to violate the rights of others. The key symptom of his borderline personality is his manipulative behavior. At the trial of this case Dr. Landrum's diagnosis remained the same as it was in 1996. He also agreed with Dr. Riordan's conclusion that the psychological problems exhibited

by Perez are well documented over the years and they are not recently fabricated.

> The Court is reasonably convinced from the evidence that at the time of Susan Martin's murder Daniel Perez was under the influence of extreme mental or emotional disturbance. However, the mental or emotional disturbance Perez suffered from is one of the most dangerous types.
>
> There was no evidence presented in this case that Daniel Perez is not able to conform his conduct to the requirements of law. Thus, while the Court finds that this mitigating circumstance of Daniel Perez participating in a murder while he was under extreme mental or emotional disturbance has been adequately proven, the Court gives little weight to this mitigating circumstance because there is no showing that Perez is unable to conform his behavior to the requirements of law and because the antisocial personality and borderline disorder makes him dangerous.

Perez contends, due to the defense and state's position,that it should be considered a "substantial mitigating factor" (T 2215-16) the court erred in giving this mitigator "little weight". However, merely because the State indicates it should be considered a "substantial mitigating factor" should not be construed as assigning weight to the factor which is solely in the court's discretion, see Campbell. In fact, the State never suggested what weight should be assigned to the mitigator. The court did not abuse it's discretion in that it found the mitigator existed, but gave it little weight.

The court viewed 25 hours of the videotape interview with

Perez[21] and observed Perez lacked emotion and displayed manipulative behavior regarding his involvement in the crime. Moreover, there was no allegation by Perez, or anyone else, that alcohol or drugs played a part the evening of the murder. Perez never indicated he was suffering depression or any physical manifestation which would have shown he was under severe, emotional distress as a result of his bipolar condition. In his largely self-serving statement he presented himself as a man fully cognizant of his actions the night of the murder. Admitting he drove his co-defendant to the crime scene he claimed he did not know a murder would take place and denied any further nefarious purpose other than to steal Martin's Tahoe.

Both Drs. Riordan and Landrum agreed Perez suffered from a bipolar disorder. Neither suggested in their testimony that Perez's bipolar disorder was of such severe mental or emotional disturbance while he was committing the crime. Landrum indicated that Perez's general antisocial behavior may have caused his criminal activity. Riordan, though not specifically asked about antisocial behavior, did agree with Landrum that Perez was previously diagnosed with the disorder. From viewing the tapes of Perez and after considering the testimony of Riordan and

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[21]In actuality, the statement of Perez did not last the full 25 hours in that there were many breaks as noted in the State's response in **Issue III**.

Landrum the court found the evidence supported more the conclusions of Landrum that Perez's antisocial personality was the reason for the criminal behavior. Roberts v. State, 510 So. 2d 885, 894 (Fla. 1987) (opining "[i]n determining whether mitigating circumstances are applicable in a given case, the trial court may accept or reject the testimony of an expert witness just as he may accept or reject testimony of any other witness.").

Contrary to assertions that the court failed to consider and give sufficient weight to the bipolar disorder, the sentencing order reveals otherwise. The court considered Perez's mental condition including his bipolarism and found it to be a statutory mitigator.[22] Such a finding complied with Campbell and Trease. However, due to certain aspects of Perez's personality disorders especially the borderline personality disorder and antisocial personality, less weight was assigned. There was no evidence Perez was unable to conform his conduct to the requirements of the law but had an antisocial personality. That Perez is able to conform his conduct to the requirements of the law, but is indifferent to hurting and mistreating others

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[22]On five occasions: (1) as a statutory mitigator of extreme emotional distress; and as non-statutory mitigators (2) suffering from mental health problems, (3) unstable upbringing, (4) previous drug addiction, and (5) sexual abuse as child (R 1445-65).

clearly diminishes the weight of this mitigator. No reasonable jurist would not come to the same conclusion. Cole v. State,701 So.2d. 852 (Fla. 1997)

The court noted Riordan's written report in it's sentencing order. Addressing this mitigator, Riordan wrote that Perez was experiencing a "high level of stress for the weeks preceding the incident and up to and during the incident. His stress exacerbated his Bipolar Disorder, which interfered with his thought processes. Despite his stress and exacerbated mental illness, he attempted to meet the needs of his family. While his decisions were faulty, his attempt to provide for his family while experiencing stress and mental illness can be viewed as mitigating" (R 1383). During an examination with Riordan, Perez described the "stress" he was under at the time of the murder which Riordan alluded to in his report. According to Perez, "he had not slept for 40 hours before the incident and was feeling stressed because he had relatives living at his house. He was having financial difficulties and his wife was pregnant and was worried about her condition as she had been placed on bed rest during a previous pregnancy" (R 1375). Surely, given the doctors reliance on such average daily stresses, the court was well within it's discretion to reduce the weight of the mitigator.

In light of Perez's statement of "stress" to Riordan, Landrum's testimony regarding bipolar disorder, which the court considered in reaching it's decision, is especially noteworthy: "We have plenty of people that are diagnosed with bipolar disorder that function fine, that are well educated and comply with the medication and do fine. The personality disorder is what has been consistent and persists with him [Perez] over time."(R 2124). Landrum indicated a goal of an antisocial personality individual was to manipulate (R 4221).

Haliburton v. State, 691 So.2d 466 (Fla. 1997) is enlightening on the issue of assessing the weight between bipolar and personality disorders given to this statutory mitigator. In Haliburton, counsel was found to have rendered effective assistance even though he did not present evidence in mitigation at penalty phase that Haliburton probably had brain damage, an organic disorder, because that same mental health expert would have testified that Haliburton was an extremely dangerous person likely to kill again. In light of the compelling aggravation in that case, this Court found even if the mental health expert had testified the penalty of death would not have been different. Id., at 471.

Perez argues when the court states "there is no evidence presented in this case that Daniel Perez is not able to conform

his conduct to the requirements of the law", the court was raising the level of culpability to the legal definition of insanity. This argument is fallacious. The court never mentioned insanity as applied to Perez in it's order and the cases cited by the court do not sustain that application.[23] Second, the court based it's decision on the cumulative testimony of Riordan and Landrum. Seen from the entirety of the court's analysis, Perez has interpreted the analysis in a spurious context.

Regarding Perez's contentions that the trial court abused it's discretion by diluting the statutory mitigator with a non-statutory aggravator of future dangerousness, the State would incorporate the facts and arguments elucidated in **Issue IX**.

ISSUE IX - Non-statutory Mitigators of Defendant's Unstable Upbringing and Family History and Sexual Abuse as a Child - Perez argues the court's reference in both non-statutory mitigators that "Daniel Perez is a dangerous person", applies an impermissible non-statutory aggravator of future dangerousness. Perez cites Miller v. State, 373 So.2 882 (Fla. 1979) and Walker v. State,707 So.2d 300(Fla.1997)as analogous authority for this proposition. Those cases are inapplicable to the case at bar.

In Miller, unlike the instant case, the trial court clearly

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[23]Rose v. State, 675 So.2d 567 (Fla. 1966); Hildwin v. Dugger, 654 So.2d 107 (Fla. 1995); Santos v. State, 629 So.2d 838 (Fla. 1994).

considered the defendant’s allegedly incurable and dangerous mental illness as a non-statutory aggravator when he stated at sentencing: “Thus, in weighing the aggravating and mitigating factors, I have to conclude that the aggravating factors are such that the reality of Florida law wherein life imprisonment is not, in fact ,life imprisonment; and, in fact, the defendant would be subject to be released into society...[and] the only assurance society can receive that this man never commits to another human being what he did to that lady, is that the ultimate sentence of death be imposed.” Id., at 885. Walker is wholly inapplicable in that it concerns an improper question by the State implying future dangerousness to a defense psychiatrist(“Well, do you think that [Walker] may kill again?) Id., at 313.

No comparable situation exists here. In it’s sentencing order, the court never referred to future dangerousness or made an inference of protecting other future victims. More salient, the trial court only relied on the weighing of proper aggravators and mitigators in reaching it’s sentence. See Allen v. State, 662 So2d 323 (even if defense counsel had preserved issue of the prosecutor's improper argument inferring future dangerousness during the sentencing proceeding, any error would be harmless because the sentencing order specifically provides

that the courts decision to impose the death sentence was based solely on the three statutory aggravating factors; imprisonment, pecuniary gain and HAC). Moreover, Perez has misconstrued the trial court's reference to him being a "dangerous person". Such merely was part of the analysis of the weight to be assigned to the mitigator not an assessment of the aggravation. Riordan agreed with Landrum that Perez suffered from a conduct disorder in his youth and had been diagnosed just several years before as having an antisocial personality disorder.(T 2105-06). Riordan conceded a conduct disorder "would involve more descriptors along the lines of being cruel to others, being – using, I think it said, using a weapon in here" (T 2106). Landrum testified aspects of antisocial personality disorder can be "aggression, fighting, stealing" and agreed an indifference to hurting and mistreating others is another characteristic (T 1221, 1224). He stated that a conduct disorder is a prerequisite to adult antisocial personality disorder (T 2122).

Accordingly, the court did not create a non-statutory aggravator for future behavior. In the context of his unstable family upbringing and sexual abuse that had occurred in Perez's youth, the trial court was simply making an observation based upon the testimony of both psychologists describing Perez's personality disorders, whose genesis was a troubled youth which

further materialized in adulthood.

The court was correct in finding evidence for the non-statutory aggravators of prior sexual abuse and an unstable family upbringing. The court did not inculcate a non-statutory aggravator in it’s sentencing scheme and it’s conclusions in giving both non-statutory mitigators little weight was based on substantial and competent evidence and not an abuse of discretion.

Issue X

IT WAS NOT ERROR TO REJECT MITIGATOR OF INABILITY TO CONFORM CONDUCT TO REQUIREMENTS OF LAW (restated)

Perez contends that the court erred in rejecting statutory mitigation that Perez did not conform his conduct to the requirements of law, particularly due to defense expert, Riordan, not testifying to same. Perez further contends, that in light of Stewart v. State, 558 So.2d 416 (Fla. 1990), the court erroneously believed it could find this mitigator based only on expert testimony. A review of the record reveals that the trial court's conclusion was correct as rejection of this mitigator is supported by competent, substantial evidence. The court stated in conjunction with Riordan’s report: “There is no evidence of such impairment in the record, and the Court does not find that this mitigating circumstance applies in this case.”(R 1453)

Mitigators are "established by the greater weight of the evidence." Campbell, 571 So. 2d at 419; Nibert, 574 So. 2d at 1061 (finding judge may reject mitigator if record contains competent, substantial evidence supporting decision). See Kearse, 770 So.2d at 1134 (observing whether mitigator exists and weight to be given it are matters within sentencing court's discretion); Trease, 768 So.2d at 1055 (receding in part from Campbell; holding that though judge must consider all mitigators, "little or no" weight may be assigned). At issue here is the propriety of the trial court's rejection of mitigation, the standard of review being competent and substantial evidence, subject to an abuse of discretion. Whether a mitigator is established lies with the judge and "[r]eversal is not warranted simply because an appellant draws a different conclusion." Sireci,587 So.2d 450 at 453.

Perez cites Stewart and contends it's holding applies here. Stewart concerned the absence of a jury instruction because the expert stated the appellant was "impaired but not substantially so" even though he had indicated the defendant was drunk at the time of the shooting and that control over his behavior was reduced by his alcohol abuse. The court declined to give an instruction on the mental health mitigators Id., at 420. The court noted:

> The qualified nature of Dr. Merin's testimony does not furnish a basis for denying the requested instruction. As noted above, an instruction is required on all mitigating circumstances "for which evidence has been presented" and a request is made. Once a reasonable quantum of evidence is presented showing impaired capacity, it is for the jury to decide whether it shows "substantial" impairment. Cf. Cooper v. State, 492 So.2d 1059 (Fla.1986), cert. denied, 479 U.S. 1101, 107 S.Ct. 1330, 94 L.Ed.2d 181 (1987) (no instruction required upon bare presentation of controverted evidence of alcohol and marijuana consumption, without more). To allow an expert to decide what constitutes "substantial" is to invade the province of the jury. Nor may a trial judge inject into the jury's deliberations his views relative to the degree of impairment by wrongfully denying a requested instruction. Stewart at 416.

In the case at bar, the court followed the holding in Stewart and instructed the jury on the mental mitigators. Contrary to Perez's position, the court considered the entire record in this case (R 1453)and any analogy to Stewart is not on point.

In rejecting the statutory mitigator, the court examined the evidence presented by the doctors along with other testimony. Neither doctor was asked nor volunteered any position as to Perez's ability to conform his behavior to the requirements of law or appreciate the criminality of his conduct. Both agreed Perez suffered from bipolar disorder. Riordan testified Perez had a borderline personality, but the bipolar disorder was more significant. Beyond his agreement with Riordan regarding the bipolar disorder, Landrum found Perez to also have an anti-

social personality disorder.

As a result of the aforementioned diagnoses of mental health problems, the court did properly consider them in the context of statutory and non-statutory mitigation (R 1450-65). The court found Perez was under the influence of extreme mental or emotional disturbance when the crime was committed but assigned it little weight (R 1452). In an extensive rendition of the evidence before it, the court noted the testimony of Riordan and Landrum but gave more weight to Landrum's psychological evaluation because he evaluated Perez previously as well as in this case, and reviewed the taped police interviews. Upon it's review of those tapes, the court credited the "lack of emotion displayed by Perez during the interview process and manipulative way Perez would change his story when confronted with physical evidence support the conclusions of Dr. Landrum (antisocial and borderline personality features) more than the conclusions of Dr. Riordan."(R 1452).

To reiterate, a court's findings in mitigation will not be disturbed absent an abuse of discretion. Preston v. State, 607 So.2d 404 (Fla. 1992). As long as the court considered all of the evidence, the judge's determination of lack of mitigation will stand absent a palpable abuse of discretion. Provenzano v. State, 497 So.2d 1177, 1184 (Fla. 1986).

Though neither Riordan or Landrum testified Perez was not so substantially impaired that he could not conform his conduct to the requirements of law, any diagnoses by either doctor, i.e. bipolar disorder which Perez cites as evidence of this mitigator, is not binding on the court in terms of expert opinion. See Walls v. State, 641 So.2d 381, 390 (Fla. 1994) (recognizing expert testimony, even if uncontroverted, is not binding on court and its weight/force diminishes where factual support is lacking).

The evidence in this case as to Perez's culpability and mental state is plain. During his police discussions, when confronted with evidence against him from the crime scene, Perez attempted to manipulate the facts and his own precarious situation in blaming his co-defendant for the murder, stating his involvement was peripheral and that the horrible reality of what happened was not his original intent, which was to just steal a vehicle. Attempting to limit one's culpability for the worst elements of a crime is not the mind-set of one who is substantially impaired. Perez admits knowing when the felony was to occur and gives an explanation as to how it occurred, including where surreptitious entry was made, disabling security lights and cutting phone lines. He drove the co-defendant to the house, was completely cognizant of the murder then drove around

Stuart to conceal items taken in the burglary and concealed evidence, including disposing of the knife and bloody shoes. There is no allegation of drug or alcohol use the night of the murder.

Perez fails to note in his argument further evidence presented by Riordan in his written report regarding this issue. Riordan's report was entered into evidence by defense at the Spencer hearing, and is referred to extensively in the court's sentencing order (R 1456-58;T 2211). Riordan wrote:

> While the defendant was found to be suffering from mental infirmity, his infirmity was not found to have caused him to commit his alleged offenses... he was not found to be under such a defect of mind so he was unable to distinguish right from wrong, appreciate what he was doing, not know that what he was doing was wrong and not fully appreciate the consequences of his actions. Based upon current results, while Mr. Perez was mentally infirm, his infirmity was not found to have caused him to commit the alleged offenses." (R 1379)(emphasis added)

Given the testimony, and the judge's analysis of the evidence,

it cannot be said error occurred.

Even if this Court were to find that the court erred in not finding this statutory mitigator any error would be harmless. The focus of a harmless error analysis "is on the effect of the error on the trier-of fact." State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986). "The question is whether there is a reasonable possibility that the error affected the verdict."

Id.

The jury recommended death by a vote of nine to three. The court found three aggravators: prior conviction of a violent felony; felony murder; and, HAC (T 1446-49). 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). See Pope v. State, 679 So.2d 710, 716 (Fla.1996) (holding death penalty proportionate in stabbing death where two aggravating factors of commission for pecuniary gain and appellant's prior violent felony conviction outweighed two statutory mitigating circumstances of commission while under the influence of extreme mental or emotional disturbance and impaired capacity to appreciate the criminality of the conduct, as well as non-statutory mitigating circumstances of intoxication and that defendant acted under the influence of mental or emotional disturbance); Geralds v. State, 674 So.2d 96,105 (Fla.1996) (affirming the death sentence where the murder was HAC and committed during the commission of a robbery, and where both statutory and non-statutory mitigation including antisocial behavior and a bipolar manic personality was afforded little weight). This Court must affirm the sentence of death.

ISSUE XI

PRECLUDING EVIDENCE OF VICTIM'S OPPOSITION TO DEATH PENALTY WAS PROPER (restated)

Perez argues the court abused it's discretion in disallowing him to present to the penalty phase jury a letter written by the victim's sister, Jane Martin, regarding her opposition and her family's opposition to the death penalty (T 2004). He claims the State opened the door to the victim's character, through victim impact. Thus, the jury should have been permitted to hear the victim's views of the death penalty. In accordance with Payne v. Tennessee,501 U.S. 808 (1991), Section 921.141 (7),Florida Statutes and applicable Florida case law, the court did not abuse it's discretion at either the penalty phase or Spencer hearing. Moreover, the matter is unpreserved for appeal.

At the May 13, 2003 Spencer hearing, the State called Jane Martin to testify at which time she read her letter. While "acknowledging the overwhelming amount of evidence indicating the guilt in this horrible case," she further wrote "both her and her deceased sister and parents" have strong opposition to the death penalty and they have "never felt a life should be discarded, regardless of the circumstances" (T 2196-99). Even though her position on the death penalty in this case was diametrically opposed to the state's position, the state felt compelled to call her pursuant to Section 960, Florida Statutes

giving next of kin the right to address the court. The state did not consider this evidence *per se* and argued at the Spencer hearing that Jane Martin's testimony regarding the family's philosophical position regarding the death penalty should not be considered a mitigating factor (T 2219).

The court made two rulings on this issue. During penalty phase, the court ruled it was improper for the jury to consider the wishes of the victim's family concerning the appropriate sentence (T 2006). At the July 21, 2003 sentencing, the court remarked upon Jane Martin's letter read at the Spencer hearing stating Florida law "does not allow the viewpoints of the victim and her family on the death penalty to be a mitigating circumstance." (T 2296; R 18).

At trial, Perez argued that Jane Martin's letter was relevant as "reverse impact evidence"[24]...as to how the family feels not only in this situation, but in punishment at large." (T 2006). The State contends this issue was not preserved below and not subject to review. Steinhorst, 412 So.2d at 338. On appeal, as noted, Perez offers a different reason why the

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[24] A curious phrase, not defined by counsel. The state conjectures counsel was referring to the family's opposition to the death penalty as opposed to it's encouragement in this case.

evidence should have been presented.[25] However, the State will address the issue on the merits.

The admissibility of evidence is within the sound discretion of the court, and it's ruling will not be reversed unless there has been a clear abuse of that discretion. Ray v. State, 755 So. 2d 604, 610 (Fla. 2000); Zack v. State, 753 So. 2d 9, 25 (Fla. 2000); Cole,701 So. 2d at 854.

In Payne, the United States Supreme Court held that where state law permitted its admission, the Eighth Amendment to the United States Constitution did not prevent the State from presenting evidence about the victim, evidence of the impact of the murder on the victim's family, and prosecutorial argument on these subjects. However, Payne further noted:

> Our holding today is limited to the holdings of Booth v. Maryland, 482 U.S. 496. 107 S.Ct 2529. 96 L.Ed.2d 440 (1987), and South Carolina v. Gaithers, 490 U.S. 805, 109 S. Ct. 2207, 104 L.Ed. 876 (1989), that evidence and argument relating to the victim and the impact fo the victim's death on the victim's family are inadmissible at a capital sentencing hearing, Booth also held that the admission of a victims family members' characterization s and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment. No evidence of the latter sort was presented at the trial in this case. Payne at 2611, n.2

Hence, Payne did not overturn Booth in this regard.

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[25] Perez filed a Motion to Allow Impact Evidence Before the Judge Alone (R 200)and Motion to Limit Victim Impact Evidence and Argument (R 210).

Section 921.141(7) allows the State to introduce "victim impact" evidence, which shows "the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death." See Damren v. State, 696 So.2d 709, 713 (Fla.1997). But there are limits to this testimony and 921.141 (7) states: "Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of the victim impact evidence." See Card v. State, 803 So.2d 613 (Fla. 2001) (victim's granddaughter improperly gave opinion as to appropriate punishment for defendant at Spencer hearing; Floyd v. State, 569 So.2d 1225 (Fla. 1990) (victim's daughter precluded from giving opinion defendant should not be given death penalty).

Cases cited by appellant have no applicability, either factually or procedurally, to this case and Perez's argument is pure sophistry. Section 921.141 (7) statutorily prohibits informing the jury about the victim's or her surrogates desire for a particular sentence.

Gore v. State, 784 So.2d 418 (Fla. 2001), cited by Perez, involved a defendant who argued that the State could not ask him about prior crimes committed against other women (other than the victim in the case). The court disagreed because it felt the defendant had opened the door stating he was "not a violent

person”. Id., at 433. In Gore, the aggrieved party was the defendant facing the penalty of death and legally capable of presenting non-statutory mitigating circumstances, a far cry from this case i.e., a deceased victim regarding her *apparent* philosophical viewpoints on capital punishment clearly prohibited under section 921.141 (7). Other cases cited by Perez are also inapplicable: Butler v. State, 842 So.2d 827 (Fla. 2003) (impeachment may be through questioning prior acts of misconduct in a situation where the defendant has testified on direct examination that he has not or would not participate in such misconduct); Carter v. State, 687 So.2d 327 (Fla. 1st DCA 1997) (trial court erred by admitting testimony from aunt of 13-year-old sexual assault victim that defendant said "if you're old enough to bleed, you're old enough to breed" which testimony constituted evidence of bad character and defendant's character had not been put in issue); Lusk v.State, 531 So.2d 1377 (Fla. 2d DCA 1988) (defense should have been allowed to impeach victim with prior acts of violence as victim testified he was not violent person).

Perez has cited no case on point with the threshold issue presented in this case: whether the victim’s position that death is never a proper sentence should be presented to the jury and considered as a mitigator at a Spencer hearing. Moreover, one’s

opposition or lack thereof to capital punishment is not character evidence. It represents an individual's philosophical position.

Even if this Court finds merit in Perez's argument that ones opposition to the death penalty could be presented as character evidence, it would remain an improper consideration for the jury as the sentence must only be based on aggravators and mitigators presented and the resulting balancing of those factors. The court did not abuse it's discretion and this Court in rejecting Jane Martin's testimony in this area should affirm the court's ruling.

ISSUE XII

FLORIDA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL (restated)

Relying upon Ring v. Arizona, 536 U.S. 584 (2002) and Furman v. Georgia, 408 U.S. 238 (1972), Perez contends the death penalty statute is unconstitutional under the Sixth and Eighth Amendments to the United States Constitution. He suggests death eligibility occurs in the penalty phase and that Bottoson v. Moore, 833 So.2d 963 (Fla. 2002) renders capital sentencing unconstitutional under the Eighth Amendment. Perez asserts that his individual aggravators do not render him death eligible. (IB at 95-97).

The Eighth Amendment claim is not preserved as the exact

issues presented here, the narrowing of the class of those subject to death, was not presented below. Steinhorst, 412 So.2d at 338. Nonetheless, the instant challenges have been rejected repeatedly.

This Court has confirmed that the statutory maximum for first degree murder is death, and such determination is made in the guilt phase when a person is convicted of that charge. Mills v. Moore, 786 So. 2d 532, 536-38 (Fla. 2001).

> Under section 921.141, Florida Statutes (1987), a defendant is eligible for a sentence of death if he or she is convicted of a capital felony. This Court has defined a capital felony to be one where the maximum possible punishment is death. ... The only such crime in the State of Florida is first-degree murder, premeditated or felony.

Shere v. Moore, 830 So. 2d 56 (Fla. 2002). See Porter v. Crosby, 840 So.2d 981, 986 (Fla. 2003) (opining "maximum penalty under the statute is death and have rejected the other... arguments" that aggravators need to be charged in indictment, submitted to jury and individually found by unanimous jury). Perez's suggestion death eligibility occurs during the penalty phase has been rejected.

As recognized in Bottoson, 833 So. 2d at 694-95,[26] Florida's

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[26]Perez's suggestion Bottoson failed to strictly construe the statute is not well taken. Bottoson, assessed the impact of Ring on the statute and found no impact because the United States Supreme Court did not overturn Florida's statute. It was Mills, in which this Court employed the appropriate method of

capital sentencing, has not been called into question by Ring as it did not overrule prior Supreme Court decisions rejecting challenges to Florida's capital sentencing. Hildwin v. Florida, 490 U.S. 638 (1989); Spaziano v. Florida, 468 U.S. 447, 472 (1984); Proffitt v. Florida, 428 U.S. 242 (1976). Since deciding Bottoson, this Court repeatedly has denied relief requested under Ring.[27] See Sochor v. State, 29 Fla.L.Weekly S363 (Fla. Jul. 8, 2004); Blackwelder v. State, 851 So.2d 650, 653-54 (Fla. 2003) (rejecting contention aggravators "must be alleged in the indictment, submitted to the jury, and individually found by a unanimous jury verdict"); Conahan v. State, 844 So.2d 629, 642 n.9 (Fla. 2003); Cole v. State, 841 So. 2d 409, 429 (Fla. 2003); Anderson v. State, 841 So. 2d 390, 408-09 (Fla. 2003); Chavez v. State, 832 So.2d 730, 767 (Fla. 2002); Fotopoulos v. State, 838 So.2d 1122 (Fla. 2002); Porter, 840 So.2d at 986; Spencer v. State, 842 So.2d 52, 72 (Fla. 2003). Ring is inapplicable here. Perez's claim is meritless.

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statutory construction in determining the statutory maximum and the timing of death eligibility. He has not shown that analysis to be error.

[27]See Harris v. Alabama, 513 U.S. 504, 515 (1995) (holding "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.)

Aggravators and mitigators are sentencing selection factors used to determine which of the two authorized punishments is appropriate. Poland v. Arizona,476 U.S. 147, 156 (1986) (explaining aggravators are not penalties or offenses, but are standards to guide sentencer in choosing between death or life imprisonment). Section 921.141, Florida Statutes, affords the sentencer the guidelines by providing accepted circumstances to be considered. Given the fact a defendant faces the statutory maximum of death upon conviction, Mills, 786 So.2d at 538, the employment of further proceedings to examine the sentencing selection factors, does not call into question Florida's capital sentencing statute.

A sentencer may be given discretion in determining the appropriate sentence, so long as the jury has convicted the defendant of a crime for which the selected sentence is within the statutory maximum. Aggravators do not increase a defendant's penalty, but are constitutionally mandated guidelines, limitations on the sentencer, created to satisfy the Eighth Amendment and protect against capricious and arbitrary sentences. Death eligibility and sentencing selection do not have to happen simultaneously. Section 921.141 clearly secures significant jury participation in narrowing the class of individuals subject to a death penalty. The jury's role is so

vital to the sentencing process it has been characterized as a "co-sentencer." Espinosa v. Florida, 509 U.S. 1079 (1992). Merely because narrowing may take place during the penalty phase does not raise the sentencing selection factors to elements of the crime or detract from the determination death eligibility occurs at conviction. Hence, Jurek v. Texas, 428 U.S. 262 (1976) and Lowenfield v. Phelps, 484 U.S. 231 (1998) do not further Perez's position. His Eighth Amendment challenge is meritless and the use of aggravators to narrow the class of subject to the death penalty meets constitutional muster.[28]

With respect to the challenge under Edmund/Tison, and HAC the State relies on its analysis in Issues IV - VII and XIII. Either the prior violent felony, contemporaneous felony, or HAC would be sufficient to support the death penalty. Not only is death eligibility determined at conviction, thus Ring agrees judge sentence alone is appropriate, but this Court has affirmed death sentences where there has been a prior violent felony,

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[28]It is the absence of aggravation that narrows the sentence to life. While the statutory maximum is death, and remains so regardless of the sentence, it is the aggravators in light of mitigators which determine whether the maximum or some lesser sentence will be imposed. Tuilaepa v. California, 512 U.S. 967, 979 (1994) (noting "[o]nce the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty...the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment").

felony murder, or HAC. See Duest v. State, 855 So.2d 33 (Fla. 2003; Lugo v. State, 845 So.2d 74, 119 n.79 (Fla. 2003); Kormondy v. State, 845 So.2d 41, 54 n. 3 (Fla. 2003) (concluding simultaneous felony convictions form basis for aggravator sufficient to satisfy Ring); Davis v. State, 859 So.2d 465 (Fla. 2003); Butler v. State, 842 So.2d 817, 834 (Fla. 2003) (rejecting Ring and affirming sentence HAC). Further, the single aggravator of prior violent felony has supported a death sentence. Ferrell, 680 So.2d 390. This Court must affirm.

ISSUE XIII

PEREZ'S DEATH SENTENCE IS PROPORTIONAL

Although Perez has not challenged proportionality, the Court is required to complete such a review. Gore, 784 So. 2d 418, 438 (recognizing even absent challenge, Court has an independent duty to review the proportionality)

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). It is not a comparison between the number of aggravators and mitigators. Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990). The Court's function is not to re-weigh the aggravators and mitigators, but to accept the jury's recommendation and the judge's weighing. Bates v. State, 750 So.2d 6, 14-15 (Fla.

1999).

Here, the jury recommended death by a vote of nine to three. The court found three aggravators: prior conviction of a violent felony;felony murder; and, HAC (T 1446-49). This Court has previously observed that HAC and prior violent felony are weighty aggravators. Maxwell v. State, 603 So.2d 490, 494 n.4 (Fla. 1992); Ferrell, 680 So.2d 390. The court found one statutory mitigator: "under the influence of extreme mental or emotional disturbance" (little weight)(T 2271-79) The court found non-statutory mitigators.[29] The judge balanced these factors and imposed the death penalty (T 1464-1465).

This Court has upheld death sentences in cases similar to this one. See Duest, 855 So2d. 33 (affirming sentence in felony murder conviction based on three aggravators: HAC, pecuniary gain and a prior violent felony in light of 12 non-statutory mitigators, among them being a physically/emotionally abusive

[29](1) An unstable upbringing and family history (little); (2) loving husband, father and family member (moderate); (3) long term mental health difficulties (little); (4) gainfully employed (moderate);(5)incarceration in an adult facility as a juvenile, even though crime occurred when he was a juvenile (little) (6) drug addiction (little); (7)recipient of boy scout merit badges (some);(8)obtained GED in prison(some); (9) was not the actual killer (little); (10) cold, calculating and mitigating factor absent(little); (11)cooperation with police (little);(12) good attitude and conduct during trial (little);and, (13) impact of death penalty on defendant's family (some) (R 1453-63).

childhood, substance abuse, and corruption in the Massachusetts prison system); Bates, 750 So.2d at 12 (death penalty proportionate in stabbing death where the court found three aggravators, including murder was committed during kidnaping and sexual battery, pecuniary gain, and HAC, versus two statutory mitigators and eight non-statutory mitigators); Geralds, 674 So.2d 96, 105 (affirming the death sentence where murder was HAC and committed during the commission of a robbery, and both statutory and non-statutory mitigation including antisocial behavior and a bipolar manic personality was afforded little weight). Spencer v. State, 691 So.2d 1062, 1066 (Fla. 1996) (death penalty proportionate where the victim was beaten/stabbed and the court found two aggravators of prior violent felony and HAC versus two statutory mental mitigators plus six non-statutory mitigators); Pope v. State, 679 So.2d 710, 716 (Fla.1996) (death penalty proportionate in stabbing where two aggravators of pecuniary gain and prior violent felony outweighed two statutory mental health mitigators as well as non-statutory mitigators of intoxication and extreme mental or emotional disturbance). Even if this court were to find HAC inapplicable, the sentence would be proportional. Ferrell, 680 So.2d 390 (lone aggravator, prior violent felony, was weighty, in that the prior offense was a second-degree murder bearing

many earmarks of the present crime); Hunter, 660 So.2d 244 (statutory aggravators of prior violent felony and capital felony outweighed 10 non-statutory mitigators).

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 Gary Lee Caldwell, Esq. Office of the Public Defender, 421 Third Street, 6th Floor, West Palm Beach, Fl 33401 on November 2, 2004.

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 October 6, 2004.

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