IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-800

MICHAEL SEIBERT,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, CRIMINAL DIVISION

BRIEF OF APPELLEE

CHARLES J. CRIST, JR.
Attorney General
Tallahassee, Florida

SANDRA S. JAGGARD
Assistant Attorney General
Florida Bar No. 0012068
Office of the Attorney General
Rivergate Plaza -- Suite 950
444 Brickell Avenue
Miami, Florida 33131
PH. (305) 377-5441
FAX (305) 377-5654

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STATEMENT OF THE CASE AND FACTS

On March 16, 1998, 18 year old Karolay Adrianza left her home in Cutler Ridge to go to South Beach with her boyfriend Daniel Korkour Mavarres, who was also the nephew of a friend of Ms. Adrianza's mother, around 10 p.m. (T. 2344-54) Around 12:30 a.m., William Ace Green, Defendant's roommate, arrived at their apartment and found Defendant, Ms. Adrianza and Mavarres were there. (T. 2458-73) Defendant, Ms. Adrianza and Mavarres were around the coffee table sniffing cocaine. (T. 2474-76) Green joined them and did one line of cocaine. (T. 2481) At one point, Defendant left to get more cocaine and returned with the additional cocaine. (T. 2483)

Green had previously seen Ms. Adrianza and Mavarres at the apartment with Defendant on three occasions in the week before the murder. (T. 2477) Defendant appeared to be interested in Ms. Adrianza sexually and flirted with her. (T. 2486)

Around 3 a.m., Green and Mavarres left the apartment to buy beer and cigarettes. (T. 2486, 2551) Mavarres drove Green to the store and back but stayed in the car when they returned. (T. 2486-89) Mavarres told Green that he was going to get something else and would return. (T. 2489) When Green returned to the apartment without Mavarres, Ms. Adrianza inquired where Mavarres was and then tried to call him repeatedly. (T. 2490, 2493-94)

During these calls, Ms. Adrianza occasionally went into the hallway in front of the apartment. (T. 2494-95)

After about half an hour later, Defendant asked Green to leave the apartment, go downstairs, watch for Mavarres and warn him telephonically if Mavarres returned. (T. 2496-97) Green went downstairs but stayed in the apartment building for a while. (T. 2497-98) He then returned to the apartment to find Ms. Adrianza still making phone calls. (T. 2498) Around 4 a.m., Defendant then asked Green to give him some time alone with Ms. Adrianza, which Green did. (T. 2499, 2553)

At 3:51 a.m., 4:48 a.m and 4:56 a.m., Arcelis Korkour, Mavarres's aunt, received phone calls during which no one spoke. (T. 2745-52) After the third call, Ms. Korkour hit star 69 to return the call, and an American man answered. (T. 2752-54) Ms. Korkour gave the phone to her husband because she did not speak English and heard her husband speaking to Ms. Adrianza. (T. 2754) Mr. Korkour got up, went to Mavarres's room and found it locked from the inside. (T. 2755) Mavarres usually locked the door when he was home and left it unlocked when he was not there. (T. 2755-56) Mavarres did not answer the door. (T. 2756)

Green visited with a friend at an all night laudromat for a while and then started paging Defendant. (T. 2499-2500) When Defendant did not respond to the pages, Green called the

apartment and received no answer. (T. 2500-01) Green also went up to the apartment and knocked on the door. (T. 2501) Green alternated between calling and going to knock on the door. (T. 2501) The first couple of times he knocked, Defendant would tell Green to come back later through the door, and Green would hear Ms. Adrianza in the apartment. (T. 2501-02) Thereafter, Green would hear movement in the apartment but did not get a response. (T. 2502-03) Defendant did respond to one of Green's calls to the apartment from the laundromat and told Green, "Give me ten minutes and I will be in that pussy." (T. 2504)

Around 6:30 a.m., Marsha Hill, Defendant's downstairs neighbor, was awakened by a banging noise coming from upstairs. (T. 2727-25) The noise went on for six or seven minutes. (T. 2735) A minute after the banging stopped, Ms. Hill heard a woman screaming for help, a pause and another scream for help. (T. 2738-39) Around 7:20 a.m., Jeanette Sosa, the occupant of the apartment across the hall from Defendant, saw Green trying to get Defendant to open the door. (T. 2603-10)

On Green's last visit to the apartment door, Defendant asked Green to get him cigarettes and pushed money under the door, but Green refused and pushed the money back. (T. 2505-07) Defendant then told Green that Green looked crazy and that Defendant thought Green would harm him if he opened the door. (T. 2507-08)

When Green told Defendant that he did not believe him and that Defendant should open the door, Defendant changed his story and said he was going to kill himself. (T. 2508) Green then called the police at 10:55 a.m. (T. 2507, 2538)

Around 11 a.m., Off. Douglas Bales responded to Defendant's apartment building about an attempted suicide call. (T. 22399-2401) When he arrived, he spoke to Green. (T. 2401-03, 2511) Green told the police that Defendant did not have a gun in the apartment but that he did have a knife. (T. 2511-12) As the conversation was going on, Sgt. Howard Zeifman arrived, and the officers proceeded to Defendant's apartment. (T. 2403-04, 2511-13, 2664-66) They knocked on the door to the apartment and received no answer. (T. 2405-08, 2667-68) However, after a couple of minutes, Off. Bales noticed that the light coming through the peephole of the door changed. (T. 2408-09, 2668) As such, he spoke to Defendant through the door. (T. 2410) After four or five minutes, Defendant opened the door three to four inches, said he was ok and closed the door. (T. 2410-11, 2669-70)

Off. Bales spoke to Defendant through the door again. (T. 2412, 2670) After two or three minutes, the door opened again, and the officers pushed their way into the apartment, moving a couch that was blocking the door. (T. 2412, 2670-72) They had

Defendant sit on a bed. (T. 2412-13, 2673) As Off. Bales asked if anyone else was in the apartment, he looked around and saw a severed foot sitting on the edge of the tub in the bathroom. (T. 2416) Off. Bales told Sgt. Zeifman that it was a 31, the code for a homicide. (T. 2417, 2683) As Off. Bales said it was a 31, Defendant jumped off the bed and ran out the door. (T. 2683)

Sgt. Zeifman chased Defendant into the hallway and managed to grab Defendant's pants. (T. 2683-84) Defendant and Sgt. Zeifman tripped and fell to the floor. (T. 2684) Off. Bales went into the hallway and found Defendant and Sgt. Zeifman struggling. (T. 2417, 2684-85) He joined the struggle, and eventually Defendant was subdued and handcuffed. (T. 2417-19, 2685-86) After he was subdued, Defendant claimed to be having a heart attack, and Sgt. Zeifman had him examined by fire rescue, who found nothing wrong with Defendant. (T. 2688-89, 2825-26) Defendant also asked for a shirt, and Sgt. Zeifman gave him a shirt that had been sitting on the couch. (T. 2686, 2688, 2690)

Off. Bales lit a cigarette, and Defendant asked him if he could have his "last cigarette." (T. 2419-20) When Defendant was taken from the apartment, he was not wearing the same clothing he had on when Green last saw him. (T. 2492-93)

When Chany Adrianza, Ms. Adrianza's sister, awoke the following morning around 6:30 a.m., she realized her sister was

not at home. (T. 2359) She thought her sister might have stayed at a friend's house and told her mother this. (T. 2359-60) Karolay never showed up at school that day, so Chany told her mother she did not know where she was when her mother picked her up from school. (T. 2360-61) Ms. Adrianza's mother then called Karolay's friends in an attempt to locate her. (T. 2361)

Around 3 p.m., Ms. Korkour ate lunch with Mavarres at her home, Mavarres then went to buy some CD's, returned home and washed his car. (T. 2757) As Mavarres was washing his car, Chany and her mother called. (T. 2758) Ms. Korkour told the Adrianzas that Mavarres was not at home, but Mavarres returned the call when he got home. (T. 2361-62, 2758-60) Mavarres told Chany that he was going to the Miami Beach Police Station, and Ms. Adrianza's parents eventually went there too after receiving a call. (T. 2362-64, 2760) Ms. Korkour went to the police station as well. (T. 2761-63) Mavarres was at the police station before Ms. Korkour arrived about 8 p.m. and remained there after Ms. Korkour left around 4 a.m. (T. 2763-64)

Around 7:00 p.m., Dr. Emma Lew, the medical examiner, arrived at the scene. (T. 3536-37) She found Ms. Adrianza's body in the bathtub. (T. 3539) Ms. Adrianza's shirt was still on her body and her panties were partially around her body. (T. 3539-40, 3604) Most of the soft tissue from the waist down had been

removed from the body. (T. 3547) The left hand and foot had been severed. (T. 3547) A knife was stuck into Ms. Adrianza's chest. (T. 3610)

As a result, Defendant was charged by indictment with the first degree murder of Karolay Adrianza on April 1, 1998. (R. 1-2) On January 11, 2002, Defendant filed a motion to suppress all evidence. (R. 121-26) In the motion, Defendant asserted that the police had no credible evidence of an emergency to justify entering the apartment and that the search of the apartment exceeded the scope of the emergency. *Id*. He also filed a separate motion to suppress his statements. (R. 127-33) In this motion, Defendant argued, *inter alia*, that his statements were the result of his illegal arrest. *Id.*

At the suppression hearing, Off. Douglas Bales testified that he went to Defendant's apartment building in response to a call about an attempted suicide around 11 a.m. on March 17, 1998. (T. 1074-76) When he arrived at the scene, he met Sgt. Zeifman and spoke to Green. (T. 1076-79) He then went to Defendant's apartment and knocked on the door. (T. 1079-80) He received no response but did notice by a change in light through a peephole, which indicated that someone looked out the peephole, after two or three minutes. (T. 1081) Off. Bales then called Defendant's name, told him that Green was concerned about

him and that they needed to see that he was not hurt. (T. 1081) Shortly thereafter, Defendant opened the door three to four inches, which allowed Off. Bales to see only his torso, said he was alright and closed the door. (T. 1082)

Standard procedure required that the entire body of the individual be viewed before a suicide call was cleared. (T. 1082-83) Moreover, Off. Bales believed that the most likely parts of the body to be injured in a suicide attempt were the arms. (T. 1083) However, the view he had through the partially opened door was insufficient to confirm that Defendant had not slashed his wrists. (T. 1083) As a result, Off. Bales continued to attempt to get Defendant to open the door so that his entire body could be viewed. (T. 1083) He also told Sgt. Zeifman to stick his baton in the door if it opened again. *Id.*

A short time later, the door opened again, Sgt. Zeifman stuck his baton in the door, and the officers pushed their way into the apartment. (T. 1084) They found Defendant had blocked the door with a couch. (T. 1084) The officers then had Defendant sit on a bed while Off. Bales stood four or five feet in front of him and Sgt. Zeifman stood on his right. (T. 1085) Off. Bales asked if anyone else was in the apartment for his safety. (T. 1087-88) As he asked this question, Off. Bales turned to his right and saw a severed foot sitting on the edge of the bathtub

through the partially open bathroom door, which was three to six feet from where Off. Bales was standing talking to Defendant. (T. 1088-90)

Off. Bales excitedly told Sgt. Zeifman that it was a 31, a homicide. (T. 1091-92) When he turned around, Off. Bales realized that Defendant and Sgt. Zeifman had run out of the apartment. (T. 1092) He heard a struggle in the hallway, ran outside and found Sgt. Zeifman struggling with Defendant on the ground. (T. 1093) Off. Bales managed to get handcuffs on one of Defendant's arms but could not get the other as Defendant continued to struggle. (T. 1093) As a result, the officers hit their emergency buttons and other officers arrived at the scene. (T. 1093) After Defendant was subdued, Off. Bales lit a cigarette, and Defendant asked Off. Bales for his "last cigarette." (T. 1094) Off. Bales did not respond to the request or have any other conversations with Defendant. (T. 1094)

On cross, Off. Bales stated that he did not recall asking Green if Defendant was armed or the response but stated that he generally asked that question. (T. 1096) He stated that he would not have entered Defendant's apartment had Defendant shown the officers his entire body when they first arrived. (T. 1098) The officers asked Green to get a key from the apartment manager when Defendant refused to allow them to see all of him. (T.

1095) Defendant was told that the officers would get a key and enter the apartment if he did not show himself fully. (T. 1098) He was also told that the officers would see him one way or another. (T. 1099) Off. Bales stated that Defendant's refusal to allow the police to see all of his body made him more apprehensive that something was wrong. (T. 1099)

On redirect, Off. Bales stated that he look around as he was standing in the apartment to make sure that there was nothing out that Defendant could have used to commit suicide. (T. 1107-08) This included guns, knives and pills. (T. 1107-08) He also wanted to speak to Defendant enough to see that he appeared mentally stable. (T. 1108)

Sgt. Howard Zeifman testified he arrived at Defendant's apartment building as Off. Bales was speaking to Green. (T. 1188-89) He confirmed that after Off. Bales knocked on the door, someone looked through the peephole but did not answer the door. (T. 1190-92) The officers informed Defendant that they had been called about a potential suicide and wanted to make sure he was ok. (T. 1192) He stated that Defendant opened the door three to four inches, said he was ok and shut the door. (T. 1193) Sgt. Zeifman did not see Defendant when he cracked the door. (T. 1194) Off. Bales told Defendant the officers needed to see him fully. (T. 1193)

Off. Bales used sign language to signal to Sgt. Zeifman to use his baton to block the door if Defendant opened it again. (T. 1195) After some time, the door opened again, Sgt. Zeifman did so, and Defendant tried to close the door. (T. 1195, 1216) The officers then pushed the door open. (T. 1195) This took some force as Defendant had blocked the door with a couch. (T. 1195)

Once inside the apartment, the officers had Defendant sit on a bed so that they could talk to him to make sure he was not suicidal. (T. 1196) Sgt. Zeifman placed himself between Defendant and the kitchen area to make sure that Defendant did not get a weapon from the kitchen to harm himself. (T. 1196-97) Sgt. Zeifman stated that the officers did not leave the apartment immediately after seeing that Defendant had not yet harmed himself because they needed to assure themselves that Defendant would not harm himself as soon as they left. (T. 1198) Off. Bales was looking around to make sure that no one else was in the apartment when he said that it was a 31. (T. 1200)

Upon hearing Off. Bales, Defendant got up and ran out of the apartment, and Sgt. Zeifman followed him. (T. 1200) Sgt. Zeifman tried to grab Defendant but could not because Defendant was sweaty and not wearing a shirt. (T. 1200-01) Eventually, Off. Bales joined the struggle, but the officers were still unable to handcuff Defendant. (T. 1201-02) Both officers hit the emergency

buttons on their radios, and other officers were dispatched. (T. 1202-03) Eventually, Defendant was subdued. (T. 1203)

On cross, Sgt. Zeifman stated that Green told the officers that Defendant did not have a gun. (T. 1206-07) Sgt. Zeifman stated that the second time Defendant opened the door, the officers still could not see his arms until they forced their way into the apartment. (T. 1213-14)

Based on this testimony, the State argued that the officers' entry into Defendant's apartment was justified by the exigency of the suicide call and did not exceed the bounds of checking on Defendant's welfare. (T. 1304-06) Defendant argued that responding to a suicide call did not create an emergency, that the police should have asked Defendant to come outside, and that the police should not have looked around the apartment once they saw Defendant was not injured or in possession of any weapon. (T. 1306-11) The trial court found the police had reason to believe that it was an emergency based on the report of the potential suicide and the barricading of the front door. (T. 1311) The trial court also found that the officers' actions did not exceed the scope of the emergency, particularly given that it was a small studio apartment and the officers barely moved when they saw the foot. (T. 1311-12) As such, the trial court denied the motion to suppress physical evidence. (T. 1312)

Beginning before trial and continuing throughout the proceedings, Defendant moved to declare Florida's capital sentencing statute unconstitutional in light of *Ring v. Arizona*, 536 U.S. 584 (2002), and to continue the proceedings. (R. 162-64, 328-31, 359-63, 435-55, 997-1013, T. 1381-82) The trial court denied these motions. (T. 734-36, 776-77, 3943-46, 3955-56) However, the trial court did refer to the jury's advisory recommendation of death as a verdict and the jury as cosentencers over Defendant's objection. (T. 1732-36, 1748-49, 3064-75, 4907-88)

Prior to trial, the testimony of Green for both the guilt and penalty phases was perpetuated because Green was incarcerated in Ecuador. (T. 396-546, 649-701) During the perpetuation of the penalty phase testimony, Green was asked if he knew that Defendant was supporting himself at the time of the crime by having a man named Bill and others pay his expenses because Defendant was having relationships with these individuals. (T. 671-75) Defendant objected to this line of questioning. *Id*. The State responded that this testimony was relevant to rebut Defendant claim that his abuse of drugs in the weeks preceding the murder rendered Defendant incapable of functioning. *Id*. The trial court tentatively allowed the testimony. *Id.*

At a pretrial hearing on a motion in limine regarding crime scene and autopsy photographs, the State questioned the medical examiner about the semen found in the victim's vagina. (T. 1024-26) During argument, Defendant mentioned the State's use of this evidence and was told that he would have to make a separation motion in limine regarding that evidence. (T. 1050-53) Immediately before opening statement, Defendant moved in limine to exclude evidence that Defendant raped the victim, while admitting that the evidence of the semen in the vagina could be admitted. (T. 2306) The trial court ruled that the State could introduce evidence regarding the presence of semen in the vagina and that people heard a struggle in the apartment at the time of the crime. (T. 2306-07) However, the trial court precluded the State from using the words rape and sexual battery. *Id.*

At trial, Green testified that when he left the apartment, the shower curtain was hanging in its normal position, two rugs were on the bathroom floor, and a trash can, plants and towels were in the bathroom. (T. 2519-22) Three bars of soap were not in the soap dish and another bar of soap was not next to the sink when Green was last in the apartment. (T. 2524-25) There had also been toilet paper on the roll. (T. 2525-26) There were no clear gloves in the sink. (T. 2526)

He recognized the trash can, plants and rugs in a picture

of the closet of the apartment. (T. 2522-23) He believed the towel on the bathroom floor was from the kitchen. (T. 2526) A towel shown as being in the kitchen was from the bathroom. (T. 2527) Green also noted that the couch and bed in the main room of the apartment had been moved and a pillow was lying on the dining room floor. (T. 2528)

Green stated that Defendant, Mavarres and Ms. Adrianza each used an equal amount of cocaine and drank an equal amount of beer. (T. 2547) The group shared more than an eighth of an ounce of cocaine and less than three beers. (T. 2548, 2565) The cocaine was not pure. (T. 2571)

Green stated that he saw Mavarres when both of them were at the police station during the days following the murder. (T. 2572) Mavarres was with a family member and appeared to be upset and crying. (T. 2574-75)

Michael Smith confirmed that Green came to the laudromat where he worked around 5 a.m. on March 17, 1998. (T. 2592-94) He acknowledged that Green attempted to contact Defendant while he was at the laundromat and that Defendant called Green back there once. (T. 2594-95)

Claudia Aguilar, who worked at the store next to the apartment building, confirmed that Green was sitting outside the apartment building when she arrived around 9:30 a.m. (T. 2708-

12) She saw Green go into the apartment building around 10:30 a.m. and heard him arguing with someone about opening a door. (T. 2712-14) She then saw Green come back out of the apartment building, wait for someone and speak to the police when they arrived. (T. 2714-16)

The telephone records showed repeated calls from Defendant's apartment to Mavarres's cell phone beginning at 3:03 a.m. (T. 2612-30, 2635-40) These calls were answered by the cell phone's voice mail. (T. 2641-42, 2648)

Ms. Korkour testified that Mavarres arrived at her home about half an hour after she did on March 18, 1998. (T. 2764) Mavarres was crying when he got home and kept crying. (T. 2765) Ms. Korkour called Mavarres's parents, who came to the United States, stayed a week and then left, taking Mavarres with them. (T. 2765-66) Ms. Korkour had not seen Mavarres since that time, and his parents would not communicate with the Korkours. (T. 2766)

Det. Jaccarino testified that he was assigned as one of the lead detectives on this case. (T. 2816-19) He went to the scene the day of the murders, spoke to other officers and went into the apartment to where he could look into the bathroom. (T. 2819-24) He then returned to the police station. (T. 2829-30)

When he got to the station, Det. Jaccarino found Defendant

in a conference room, where he was observed continually through a one way mirror. (T. 2832-33) He noticed blood on Defendant's pants and seized them. (T. 2835-36) Det. Jaccarino introduced himself to Defendant and told Defendant to ask if he needed anything. (T. 2837-38) During this brief conversation, Defendant appeared alert, responsive and not intoxicated. (T. 2837)

Det. Jaccarino then spoke to Green and seized Green's clothing as well. (T. 2829-40) Det. Green questioned Green and received information about places Green had been during the previous night and people who could confirm this information. (T. 2841) Det. Jaccarino then followed up on the information Green had provided. (T. 2842)

One of the pieces of information that Green provided was that Mavarres had been at the apartment that night. (T. 2842) Det. Jaccarino gave information about Mavarres to his sergeant, so that Mavarres could be located. (T. 2843)

Around 4 p.m., Det. Jaccarino obtained a search warrant for Defendant's apartment. (T. 2838-39, 2843) He then went to the apartment and search it, as well as the trash dumpster and the common areas of the apartment building. (T. 2843-45) In the apartment, Det. Jaccarino found a piece of paper with Mavarres's cell phone number on it. (T. 2845-46) He also found envelops used to carry illegal drugs and a bottle of lidocaine. (T. 2867)

He seized the tape from Defendant's answering machine. (T. 2869)

The answer machine had two messages from Green, one at 6:14 a.m. and the other at 6:28 a.m., seeking admission to the apartment. (T. 2870-71) Both of these messages were left during calls from the laundromat. (T. 2871-72) Det. Jaccarino also learned that two phone calls had been placed to the apartment from the pay phone on the first floor of the apartment building: one at 7:48 a.m. and another at 9:30 a.m. (T. 2865-66, 2872)

Det. Jaccarino stated that he recovered a match book from Ms. Adrianza's pants pocket. (T. 2874) The match book had Defendant's name, home phone number and pager number written on it. (T. 2874-75) When Det. Jaccarino checked Defendant's pager, it had three pages on it: two with a code for Green and one with the number of the laudromat. (T. 2876-77)

Det. Jaccarino then returned to the police station and found Defendant in a holding cell. (T. 2849) Around 6 p.m., Det. Jaccarino was informed that Defendant wished to speak to him, so he went to the holding cell and found out Defendant was hungry. (T. 2852-54) Defendant was given two piece of pizza and a drink. (T. 2854) Defendant was also given a blanket when he said he was cold. (T. 2855)

During the entire time that Defendant was in the police station, he was observed. (T. 2854) Det. Jaccarino saw Defendant

sleeping in the holding cell during the afternoon. (T. 2855-56)

Around 8:20 p.m., Det. Jaccarino and Det. Zacharias approached Defendant to interview him. (T. 2856) Defendant was informed of his rights and agreed to speak to the officers. (T. 2857-58, 2895-98) Defendant stated that he was not under the influence of drugs or alcohol at that time and did not appear to be under the influence. (T. 2858-59) In fact, Defendant appeared to be calm, collected and intelligent. (T. 2861) During this interview, Defendant informed the police that Mavarres had nothing to do with the crime. (T. 2899) Around 9 p.m., Det. Jaccarino was informed that Mavarres was at the station, and the interview stopped. (T. 2861-62)

Det. Zacharias and Det. Guy Sanchez went to interview Mavarres. (T. 2862) Det. Jaccarino took Defendant back to the holding cell. (T. 2863) When Defendant was informed he was being arrested, Defendant stated that he had screwed up and was going to prison. (T. 2882-83) As Det. Jaccarino was escorting Defendant, Defendant asked if he was going to jail immediately and was informed that paperwork needed to be completed. (T. 2863-64) Defendant then stated that he belonged in jail. (T. 2864)

During cross, Defendant brought out that he was arrested before Green’s alibi was check and before the police knew of

Mavarres. (T. 2909-15) He also elicited that fingernail scrapings were taken from Defendant and Green but not Mavarres. (T. 2916) He elicited from Det. Jaccarino that he initially considered Green and Mavarres suspects but later confirmed they had alibis. (T. 2939-40) He questioned Det. Jaccarino about the specifics of Green's alibi. (T. 2941-43) He also inquired about the specifics of Mavarres's alibi. (T. 2945-46, 2948) He elicited that Mavarres had left the country and the nature of the efforts to find Mavarres. (T. 2949-53)

During redirect, the State inquired about checking the alibis and suspecting Defendant and the reasons therefore. (T. 2972-74) As part of that inquiry, the following occurred:

> [The State:] So, is it fair to say you have to use your skills as an investigator and your skills as a person to decide whether you are going to accept what they say or whether you have to go further and investigate further what they have to say.
> [Defense Counsel:] Objection.
> THE COURT: Sustained.
> [The State:] When did your investigation, an upon learning the information from the Korkours, and you talked to Ace Green, and you saw the crime scene, and all these other things, was there anything that leads you to believe that you should do more in terms of Danny Mavarres Korkour?
> [Defense Counsel:] Objection.
> THE COURT: Sustained.

(T. 2974) Defendant then asked for leave to make a motion, and the trial court informed Defendant that he could make a motion at the conclusion of the testimony. (T. 2974)

After redirect and recross concluded, a sidebar conference was held. (T. 2977) During that sidebar, Defendant moved for a mistrial, claiming that it was improper for the State to ask the same question after an objection was sustained. (T. 2980) The trial court denied the motion for mistrial, finding that objections were sustained and that the State moved on after the objection was sustained. (T. 2980)

Gary McCullough, a former FDLE crime scene technician and latent print examiner, testified that he was sent to help with the crime scene analysis on this case on March 25, 1998. (T. 2982-85) He went to Defendant's apartment to process it for latent prints and blood stains. (T. 2985-86) At that time, there was still dried blood on the bathtub and bathroom floor. (T. 2987) He found what appeared to be a latent fingerprint print but turned out to be a footprint on the tile area of the tub. (T. 2987-88) The print was just below the right faucet and was made by a foot that was pointed up toward the ceiling as if the person was lying in the tub. (T. 2988-89) The print was bloody. (T. 2989)

Tech. McCullough also processed the apartment using an ultralight to determine if semen was present in the apartment. (T. 2990-93) Items that the police had previously seized were also tested with the ultralight. (T. 2993) No semen was found on

anything, including Green's clothing. (T. 2993-96) No blood or semen was found on another shirt. (T. 3004-05)

Tech. McCullough also tested the bottles of cleansers, the bed sheets, Green's clothing, the towel and a pair of shorts for the presence of blood. (T. 2996-97) The bathroom was also tested for blood, which came back presumptively positive. (T. 2997-98) Suspected body tissue was also collected from the toilet in the bathroom. (T. 2998-99)

Tech. McCullough was also given a nail scrapping kit from Defendant, a nail scraping kit from Ms. Adrianza, samples from the toilet handle, samples from the toilet bowl rim, the rape kit from Ms. Adrianza, a blood sample from Ms. Adrianza, a blood sample from Green, a knife found in the victim's body, a shoelace taken from Ms. Adrianza's neck and a vial containing a powdery substance from Defendant's apartment to take to his lab and test. (T. 3000-02, 3006) Tech. McCullough arranged for this items to be tested at FDLE labs. (T. 3002)

After processing the apartment, Tech. McCullough went to Mavarres's home and inspected his car for blood, tissue samples and trace evidence. (T. 3002-03) Nothing of evidentiary value was found in the car. (T. 3004)

Tech. Marsha Knowles testified that she processed Defendant's apartment on the day of the crime. (T. 3013-15)

First, she photographed the scene. (T. 3015-17) Inside the apartment, the only doors were the bathroom and closet doors. (T. 3018) Tech. Knowles also swabbed areas of what appeared to be blood in the bathroom. (T. 3029) Among the areas swabbed were the floor behind the toilet bowl, the toilet bowl rim, the toilet handle, and the toilet seat. (T. 3029, 3034-37) The soap dish in the bathtub appeared to have blood spatter on it. (T. 3057-58)

Tech. Knowles collected Ms. Adrianza's earrings from the floor of the living room area of the apartment. (T. 3038) She collected Ms. Adrianza's pants, socks and shoes from the closet area. (T. 3039-41) One of the shoes was missing a shoelace. (T. 3040) The pants were folded. (T. 3041) Tech. Knowles also collected the blanket from the bed, the bed sheets, the shirt Defendant was wearing when Green left the apartment, a pant of boxer shorts from the dining room, and the clothes seized from Defendant at the police station. (T. 3042-46) She also impounded the trap from the bathroom sink and the toilet. (T. 3058-61)

From the kitchen garbage, Tech. Knowles collected a razor blade, some small green envelops, some beer bottles and a tissue with what appeared to be human hair on it. (T. 3047-49) She impounded one unused plastic glove from the top of a dresser and two used plastic gloves from the bathroom sink. (T. 3050-54) She

also collected a pillow from the kitchen floor. (T. 3061-62)

Tech. Knowles also processed the apartment for fingerprints. (T. 3253-55) She lifted eight latent prints and processed one newspaper with prints. (T. 3256-57)

Tech. Linda Shows collected the dirty laundry from Defendant's closet, a hammer from the top of his dresser, the bathroom rugs from Defendant's closet, a towel from outside the bathroom, another towel from Defendant's kitchen, and empty bleach and cleanser bottles from Defendant's kitchen. (T. 3090-3106) She also recovered a vial with white powder from Defendant's kitchen. (T. 3104-05)

Tech. Anne Douglas testified she participated in processing Defendant's apartment on the day of the murder and attended Ms. Adrianza's autopsy. (T. 3313-15) Tech. Douglas took fingernail scrapings from both of Ms. Adrianza's hands, including the one that was severed. (T. 3118-22) She also collected at the autopsy a ring from Ms. Adrianza's finger, a charm, a shoelace removed from Ms. Adrianza's neck, her shirt, her bra, her panties, a rape kit and a knife removed from Ms. Adrianza's chest. (T. 3122-29, 3136-41) She also impounded blood and saliva samples taken from Defendant. (T. 3130-36)

One leg of Ms. Adrianza's panties had been cut. (T. 3138-39) There were also holes in the panties. (T. 3139) During cross,

Defendant elicited that Tech. Douglas could not say whether the holes and cuts in the panties were made while Ms. Adrianza was alive. (T. 3144)

Jennifer McCue, an DNA analyst and serologist, testified that she conducted RFLP DNA testing on semen found on the vaginal swab, cervical swab, vaginal slide and cervical slide from the rape kit. (T. 3222-48) She compared the DNA to that of Ms. Adrianza, Green and Defendant. (T. 3295-98) The test revealed that the semen matched Defendant's DNA. (T. 3298-3305) The likelihood of the match was 1 in 7,040,000 in the Caucasian population, 1 in 6,760,000 in the African American population and 1 in 15,300,000 in the Hispanic population. (T. 3305-06)

Ms. McCue submitted blood found under Ms. Adrianza's fingernails for PCR DNA testing. (T. 3263-67) Ms. McCue found blood on the swab of the toilet handle and the swab of the floor behind the toilet. (T. 3267-68, 3270) She also found blood on the shoelace found on Ms. Adrianza's neck and on her clothes. (T. 3271-75, 3276-77) However, she did not submit this blood for DNA testing because it appeared that these swabs, the shoelace and the clothes would contain the victim's blood from the description of the crime scene. (T. 3268-69, 3271, 3272-75) She also found blood on a towel from the closet but did not submit for DNA testing because she had on indication that it was

connected with the crime. (T. 3275) She did not find blood on the toilet seat swab or the towel from the kitchen. (T. 3270, 3287-88)

In Ms. Adrianza's pants, Ms. McCue found a quarter and a matchbook cover with Defendant's name and phone and pager numbers on it. (T. 3278-79) On the top of the pants near the zipper, Ms. McCue found a piece of human tissue. (T. 3279) She submitted it for DNA testing. (T. 3279)

Ms. McCue found no blood on the shirt Defendant was wearing when he was arrested or the shirt Defendant was wearing before the murder but did find blood on the front leg of Defendant's jeans. (T. 3280-81, 3288-89) She cut the bloody portions of the jeans and submitted them for PCR DNA testing. (T. 3282-83)

Ms. McCue tested swabs taken of Green's hands and found no blood. (T. 3283-85) Ms. McCue did find blood on one of the swabs of Defendant's hands and his face. (T. 3286-87, 3294) However, no blood was found in his fingernail scrapings. (T. 3292-93)

Ms. McCue believed that the amount of semen found was considerable. (T. 3245) Ms. McCue also processed the blanket from the bed and Ms. Adrianza's pants for the present of semen and found none. (T. 3259-61) She noted that if Ms. Adrianza had put her clothing on after having sex, semen could leak into the clothing. (T. 3261)

She found saliva from a pillow case and submitted it for DNA testing. (T. 3289-90, 3291) Ms. McCue did not test Defendant's sheets because of the amount of semen found in Ms. Adrianza and the inability to determine the age of any semen stain on the sheets. (T. 3290-91)

On cross, Defendant elicited that Ms. McCue's DNA test results indicated that Ms. Adrianza had sexual relations with Defendant. (T. 3319) However, her results did not indicate anything more than that. (T. 3319) Defendant also elicited that Ms. McCue could have attempted to conduct DNA testing on the shoelace had the police or State asked. (T. 3316-19) On redirect, the State elicited without objection that Ms. Adrianza could have been dead at the time of the sexual relations. (T. 3320) When the State elicited that anyone could have asked for further testing on the evidence, Defendant objected and asked to reserve a motion. (T. 3321)

After Ms. McCue was excused, Defendant made a motion for mistrial, claiming that the State's entire redirect was improper and pointed to the question about sex with a dead body and the questions regarding requests for testing. (T. 3323) The trial court responded that it had sustained the objection to the question about testing and instructed the jury on the State's burden of proof but that it did not feel that showing that both

sides had the ability to test the evidence required a mistrial or was necessarily improper given the cross. (T. 3323-25) As such, the trial court denied the motion without Defendant presenting any argument or requesting a separate ruling regarding the question about the timing of the sexual relations. (T. 3323-27)

Chris Whitman, a DNA analyst, testified that she conducted the PCR DNA analysis on the items submitted by Ms. McCue. (T. 3351-60, 3372-73) She tested the samples against Ms. Adrianza, Green and Defendant. (T. 3372-73)

The DNA from Ms. Adrianza's fingernail scrapings was consistent with her own DNA. (T. 3372) The DNA from the pillow was consistent with Green's DNA. (T. 3373) The DNA from the swab of Defendant's face was consistent with his own DNA. (T. 3374) The DNA from one part of Defendant's jeans was consistent with Defendant's DNA and the DNA from the other part of the jeans was consistent with Ms. Adrianza's DNA. (T. 3374-75) The DNA from the tissue found on Ms. Adrianza's pants was consistent with Ms. Adrianza's DNA. (T. 3376-77) No one else's DNA was found on any of the objects Ms. Whitman tested. (T. 3378)

The frequency of Ms. Adrianza's profile was 1 in 106,000 African Americans, 1 in 8,550 Caucasians and 1 in 8,260 Hispanics. (T. 3376) The frequency of Defendant's profile was 1

in 30,200 African Americans, 1 in 5,080 Caucasians, and 1 in 4,080 Hispanics. (T. 3376) The frequency of Green's profile was 1 in 249,000 African Americans, 1 in 4,100 Caucasians, and 1 in 3,700 Hispanics. (T. 3376)

Brian Higgins, a serologist, testified that he retested some of the evidence originally subjected to PCR DNA testing with STR DNA tests. (T. 3401-10) The DNA from one part of Defendant's jeans again was consistent with Ms. Adrianza's DNA profile. (T. 3410) The frequency of that profile was one in eighty-three quadrillion Caucasians, one in one point four quintillion African Americans and one in two hundred eighty quadrillion Hispanics. (T. 3410-11)

Tech. Charles Losey testified that he took fingerprint and palm print standards from Mavarres between midnight and 6:30 a.m. on March 18, 1998. (T. 3345-50) The parties stipulated that Tech. Laura Figiola would testified that she took fingerprint standards from Green, nail scrapings from Green, hand swabs from Green, nail clippings from Defendant and face swabs from Defendant. (T. 3514-16)

Paul Martinez, a fingerprint analyst, testified that he compared the fingerprints lifted from the crime scene, found six of comparison value and identified three of them as belonging to Ms. Adrianza and one as belonging to Mavarres. (T. 3190-3202,

3208-09, 3213) Ms. Adrianza's prints were found on a beer can and a dirty glass, and Mavarres's prints were found on an empty box of cigarettes. (T. 3210-11)

Tech. Ismael Mami, a toxicologist, testified that he tested the white powder found in the vial recovered from Defendant's kitchen. (T. 3388-94) The powder in the vial was lidocaine. (T. 3394) Tech. Mami testified that lidocaine was frequently used to cut cocaine. (T. 3395-96)

Scott Hanks, the morgue supervisor, testified that Ms. Adrianza's body was fingerprinted and palm printed on its arrival at the morgue. (T. 3462-69) The remains were also measured and weighed. (T. 3470) The body was five feet tall and weighed 101 pounds. (T. 3470-72)

Dr. Lee Hearns, a toxicologist, testified that he received blood samples, ocular fluid, stomach contents, liver, bile and brain tissue samples and nasal swabs taken from Ms. Adrianza. (T. 3479-85) He tested the blood samples, ocular fluid and stomach contents. (T. 3486) Ms. Adrianza's blood has a .05 percent alcohol level, and her ocular fluid had a .09 percent alcohol level. (T. 3488-89) These level indicated that Ms. Adrianza had stopped drink a while before her death and that she had drank about three drinks. (T. 3289) These finding were consistent with Ms. Adrianza having her last drink about 3:00

a.m. and dying between 6:30 and 7:00 a.m. (T. 3490-91)

Ms. Adrianza's stomach contents, blood serum, aorta blood, brain tissue and ocular fluid was tested for the presence of drugs. (T. 3491-93) A metabolite of cocaine was found in Ms. Adrianza's blood and serum and traces of cocaine were found in her brain tissue and ocular fluid. (T. 3494) The half life of cocaine varies between 45 and 90 minutes in a human. (T. 3495) The half life of the metabolite is around five to six hours. (T. 3495) The results from the tests on Ms. Adrianza indicated that she had only used a small amount of cocaine many hours before her death. (T. 3497-98)

Dr. Hearns stated that lidocaine is used to dilute cocaine. (T. 3500-01) One of the reasons for using lidocaine is that it also acts as a local anesthetic and makes the purchaser believe that the cocaine is more pure than it is when tested on a tongue. (T. 3502-03) Ms. Adrianza's body had lidocaine in it and the lidocaine concentrations were ten times the cocaine concentrations. (T. 3501-02) Given Green's testimony concerning the amount of drugs and the number of persons using them and the evidence that the cocaine use stopped around 3 a.m. and Ms. Adrianza died between 6:30 and 7:00 a.m., the cocaine must have been a minor component of the powder they were using. (T. 3505-06)

The effects of the same amount of cocaine decreased with an increase in body mass. (T. 3498-99) Given the limited cocaine found in Ms. Adrianza's body, a large person using the same about of cocaine would not have had his judgment or memory impaired and would be able to function. (T. 3506-08)

Dr. Lew testified that she conducted the autopsy on Ms. Adrianza. (T. 3532-36) In addition, Dr. Lew drew blood from Ms. Adrianza. (T. 3597) At the scene, Dr. Lew observed that the bathtub was extremely bloody but that the rest of the bathroom was neat and clean with only one or two spots of blood on the floor. (T. 3544-45)

Dr. Lew estimated that Ms. Adrianza would have weighed between 140 and 150 pounds when she was live based on her height and clothing size. (T. 3549) As such, she believed that between 40 and 50 pounds of body tissue had been removed from Ms. Adrianza's body. (T. 3549-50) The knife found in Ms. Adrianza's chest could have been used to remove the body tissue given the edges of the wound, and the removal would probably would have taken more than an hour. (T. 3551, 3600) If the removed tissue had been disposed by flushing down the toilet, blood would have dripped from the tissue as it was moved. (T. 3551) Given the condition of the bathroom floor, it had to be cleaned or the tissue wrapped in something if the toilet was used to dispose of

it. (T. 3351-52)

Additionally, the blood near the drain of the bathtub appeared to have been diluted with water. (T. 3609) The amount of blood in the tub was not sufficient to account for the amount of blood that would have been lost during the dismemberment. (T. 3609-10)

Dr. Lew stated that Ms. Adrianza's hand was severed with a knife and that the bones of the forearm were cut through to remove the hand. (T. 3601) One of the bones of the lower leg was cut and the other broken to sever the foot. (T. 3601) Dr. Lew could not say whether the foot was removed before Ms. Adrianza died because the soft tissue had been removed. (T. 3602)

Dr. Lew stated that she could not determine if Ms. Adrianza had suffered any injuries to her lower body because the tissue had been removed. (T. 3559-60) On her head, face and voice box, Ms. Adrianza had numerous petechial hemorrhages. (T. 3564-66) The amount of hemorrhages indicated that Ms. Adrianza had struggled. (T. 3567-68) Ms. Adrianza also had scrapes on her neck that were consistent with manual strangulation. (T. 3568-69) Ms. Adrianza's neck and fingernails also had injuries and evidence associate with Ms. Adrianza's fingernails scraping her own neck as she attempted to remove the hand of the person strangling her. (T. 3602-03) However, Ms. Adrianza had no

premortem injuries to her hands. (T. 3613) Based on this evidence, Dr. Lew opined that Ms. Adrianza died of manual strangulation. (T. 3560) Dr. Lew stated that it would have taken between seconds and minutes for Ms. Adrianza to have died. (T. 3604)

Dr. Lew also found four blunt force trauma injuries to Ms. Adrianza's head: two were to the top of the head, one to the right frontal region and one to the corner of her left eye. (T. 3571-73) These injuries were consistent with being punched or knocked into the floor or bathtub. (T. 3573) Ms. Adrianza also had bruising to her lower left lip. (T. 3574) This injury was consistent with being punched in the mouth or having someone force a hand to her mouth to keep her from screaming. (T. 3574) Ms. Adrianza also bit her tongue. (T. 3575) There were bruising and abrasion behind Ms. Adrianza's right ear, which were consistent to being punched or knocked into a wall, bathtub or floor. (T. 3575) There was also bruising and abrasions to the back of her neck and her back along the spine and the left side. (T. 3577-79) Ms. Adrianza's right upper arm had bruises and abrasions consistent with being forcibly held and pushed. (T. 3579-80) Ms. Adrianza was alive when these injuries were inflicted. (T. 3571, 3578, 3579, 3581)

While the soft tissues around the vaginal area had been

removed, the tissues around the vagina itself remained, and Dr. Lew was able to collect semen from Ms. Adrianza's vagina. (T. 3583) Ms. Adrianza's panties showed signs of having been cut or torn. (T. 3605) Ms. Adrianza also had a stab wound on her hip consistent with one of the cuts in the panties. (T. 3605-06) Dr. Lew testified without objection that she could not say whether Ms. Adrianza was alive or not when the sexual activity occurred. (T. 3606)

Dr. Lew found a shoelace and dental floss tied around Ms. Adrianza's neck. (T. 3606-07) The ligature appeared to have been applied after death. (T. 3608) The knife also appeared to have been stuck in Ms. Adrianza's chest after death. (T. 3611-12)

Dr. Lew also found incised wounds below Ms. Adrianza's breast. (T. 3599) These wounds were associated with slicing by a sharp instrument. (T. 3599) Dr. Lew could not say whether these wounds were made before or after death. (T. 3599-3600)

Dr. Lew stated that she frequently gets blood on her clothing in the area from the abdomen to the chest when she is conducting autopsies. (T. 3554) She conducts these autopsies on a table that is waist high. (T. 3552-53) The blood on the top part of Defendant's jeans was consistent with the type of blood that Dr. Lew gets on her. (T. 3555)

After Dr. Lew had finished direct, cross, redirect and re-

cross examination, the State had rested, the trial court had colloquied Defendant about testifying and presenting other witnesses, the parties had discussed sequestration and Defendant had moved for judgment of acquittal, Defendant moved for mistrial based on the questioning of Dr. Lew regarding the timing of the sexual intercourse. (T. 3656) The trial court denied the motion. (T. 3656)

After the charge conference, Defendant moved that the State be precluded from mentioning that the sexual activity may have occurred after the victim was dead on the ground that there was no evidence to support such an argument. (T. 3677-78) The trial court indicated that Dr. Lew had testified about it. (T. 3678) The State pointed out that another witness had offered similar testimony and that the testimony was elicited in response to Defendant's claim in opening that after he had consensual sex with the victim, he passed out and someone else committed the murder. (T. 3678) The trial court found that it was fair for the State to comment that no one could tell when the sexual activity occurred. (T. 3679) Defendant claimed that it was another crime and that he was not charged with such a crime. (T. 3679) The State responded that it was inextricably intertwined. (T. 3679) The trial court agreed with the State and also indicated that it did not believe that it was overly prejudicial. (T. 3679)

During his initial closing argument, Defendant mentioned that he was not charged with a crime for having sexual relations with Ms. Adrianza either while alive or after she was dead. (T. 3701-02) Defendant also made a major theme of his argument that the police investigation of Mavarres was inadequate and that the Korkours lied because they bought Mavarres's family's home after the murders. (T. 3709-18) Defendant even claimed that Mavarres returned to the apartment and killed her, while admitting that he had no evidence to support the claim. (T. 3724-28)

During its closing argument, the State briefly pointed out that there was no evidence that Mavarres killed Ms. Adrianza. (T. 3735) The State pointed out, however, that it was natural that Mavarres would be upset after the murder because he introduced Defendant and Ms. Adrianza and left Ms. Adrianza with Defendant on the night of the murder. (T. 3736)

In discussing reasonable doubt, the State pointed out that everyone had a reasonable doubt concerning the timing of the sexual activity but that it was not an issue in the case and should not affect the jury during deliberations. (T. 3739-40)

The State averred that the fact the bathroom was cleaned after the dismemberment and that items that could have gotten bloody were removed indicated that a resident of the apartment was responsible. (T. 3742-43) The State also pointed out that

Defendant himself had exculpated Mavarres in his statement to the police. (T. 3744)

After deliberating, the jury returned a verdict of guilty of first degree murder. (R. 299, T. 3831) The trial court adjudicated Defendant in accordance with the verdict. (R. 316-18, T. 3838)

At the penalty phase, the State presented a victim impact statement composed by Ms. Adrianza's family. (T. 4109-14) The State that introduced a certified copy of Defendant's conviction and sentence for attempted kidnapping and burglary in case no. 86-11454CF. In connection with that case, the statements of the victims were introduced. (T. 4117-18)

In his statement, Leon Golden stated that around 1:45 a.m. on May 8, 1986, he and Michelle Kendricks stopped at a 7-11 on Dania Beach Boulevard. (T. 4119-20) Mr. Golden got out of the car and went into the store. (T. 4120) He heard wheels burning and Ms. Kendricks screaming. (T. 4120) Mr. Golden ran out of the store and found Ms. Kendricks getting up from the ground, having jumped out of the car. (T. 4120) Mr. Golden ran after the car but could not see who was in the car because of the tinted windows. (T. 4120) The car sped off and was found the next day on Miami Beach. (T. 4120-21)

In her statement, Ms. Kendricks stated that she and Mr.

Golden stopped at the 7-11 and that Mr. Golden went into the store. (T. 4123) As Ms. Kendricks sat in the car listen to the radio, Defendant got into the car and started to back out. (T. 4123) Ms. Kendricks screamed and jumped out of the car. (T. 4123) Defendant put the car in drive and came toward Ms. Kendricks as if he was going to run her over. (T. 4123) Ms. Kendricks moved, and Defendant drove away. (T. 4123)

The State next submitted a certified copy of Defendant's conviction and sentence for attempted first degree murder and kidnapping in case number 86-7179CF. (T. 4125-26) In connection with this case, the State presented the testimony of Sgt. Robert Hundevadt. (T. 4127-39) Sgt. Hundevadt testified that the police received a call regarding the kidnapping of a British tourist around 6:30 a.m. on May 12, 1986. (T. 4128) The investigation revealed that Catherine Jones had been using a pay phone on the street near her hotel when Defendant approached her and forced her at knife point into a car. (T. 4128-29)

About 15 minutes later, Defendant stopped near two children waiting at a bus stop and asked for directions. (T. 4129-30) One of the children, Andrea Henderson, walked over to the car and saw Defendant and a naked woman Defendant was holding in a head lock with her head in his lap. (T. 4130) Defendant lifted Ms. Jones's head and revealed that his pants were undone and his

penis was exposed. (T. 4131) Ms. Jones was crying. (T. 4131)

Between 5 and 6 p.m. the following day, Ms. Jones was found unconscious and naked from the waist down in a wooded area in Broward County. (T. 4132-33, 4136) Ms. Jones had injuries to her head cause by being hit with a porcelain toilet seat. (T. 4134-35) Ms. Jones's ankles had injuries consistent with having been bound. (T. 4137-38)

Dr. Lew testified that the condition of Ms. Adrianza's body indicated that she had struggled with Defendant as he strangled her. (T. 4139-44, 4147) The abrasions on Ms. Adrianza's neck from her own fingernails indicated that she was conscious when strangled. (T. 4148) She stated that strangulation caused a great deal of physical pain both from the force placed around the neck and the deprivation of oxygen. (T. 4166) Defendant strangled Ms. Adrianza while facing her and applied sufficient force while doing so to bruise the area above her collar bones. (T. 4146-47) Ms. Adrianza was also punched and banged into a surface repeatedly before her death. (T. 4148-60) All of these injuries would have caused physical pain and emotional suffering. (T. 4164-65)

Defendant called Sgt. Paul Acosta. (T. 4179) Sgt. Acosta testified that he arrived at Defendant's apartment just after Defendant was subdued and handcuffed. (T. 4179-80) Agt. Acosta

transported Defendant to the police station. (T. 4181) When Sgt. Acosta walked Defendant into the police station, Defendant told Sgt. Acosta to be careful of his elbow because he had needle marks, and Sgt. Acosta saw some marks. (T. 4182)

Sgt. Acosta had training in field sobriety testing. (T. 4181) He thought Defendant might be under the influence because of Defendant's statement and the fact that Defendant was staring. (T. 4183) Sgt. Acosta also believed that Defendant was attempting to manipulate him. (T. 4187) Sgt. Acosta watched Defendant for about four hours. (T. 4184) While they were in the detective's bureau, Defendant asked where he was. (T. 4184-85) Defendant also inquired about the whereabouts of Green, Mavarres and Ms. Adrianza and expressed concern that they may have stolen from him while he was knocked out. (T. 4186)

On cross, Sgt. Acosta admitted that given the situation Defendant found himself in and his prior encounters with law enforcement, it was possible that Defendant was attempting to set up a defense. (T. 4190-92) He also acknowledged that Defendant was not simply talking nonstop in an erratic manner but was making statements and waiting for a response. (T. 4188-89) Sgt. Acosta admitted that Defendant was not staring at a wall but watching what the detectives were doing. (T. 4192)

Green testified that he moved in with Defendant a month

before the murder. (T. 4209-11) While living there, Green claimed that he helped Defendant with money for rent and food. (T. 4210) Green stated that during the month he lived with Defendant, Defendant began to use more cocaine and also used alcohol and marijuana but not heroin. (T. 4211-12) Defendant either injected or inhaled the cocaine. (T. 4213)

Green claimed Defendant got to the point where he was either using drugs and looking for money to get more. (T. 4212) He claimed that Defendant ceased to care about his personal hygiene, sleep or eat. (T. 4212) Green stated that Defendant did not have a job at the time of the murder but had previously worked in construction. (T. 4213)

On cross, Green admitted that he was not really paying for rent or food but was simply giving Defendant a little money when he had money. (T. 4218-19) The State then inquired if rent was not paid by a friend of Defendant, and Green stated that he had heard of Bill and that he did not believe that Bill was paying the rent but had paid the deposit on the apartment. (T. 4219) The State then attempted to ask if Defendant got money by hustling men in gay bars, and Defendant objected and requested a sidebar. (T. 4220)

At sidebar, the State explained that it was attempting to show that Green was not being truthful concerning the nature of

his relationship with Defendant or that Defendant supported himself by working. (T. 4220) Defendant moved for mistrial, claiming that he had not asked Green about Defendant's character. (T. 4220-21) The trial court indicated that it did not believe that Green had portrayed Defendant as a worker and that the prejudicial effect outweighed the probative value. (T. 4221) The State pointed out that Defendant had questioned Green about working and that it was merely attempting to rebut that testimony. (T. 4221-22) The trial court found the question unduly prejudicial and sustained the objection. (T. 4223) However, the trial court denied the motion for mistrial. (T. 4223) The trial court did permit the State to ask questions about Defendant's sources of income without mentioning hustling. (T. 4223-24) The trial court then instructed the jury to disregard the last question and any answer that may have been given. (T. 4225)

Green then admitted that Defendant received money from selling drugs and from a woman he knew. (T. 4225-26) Green also acknowledged that he did not see Defendant much because they did not spend much time together in the apartment. (T. 4226) He admitted that Defendant was showering but claimed Defendant was not shaving or cutting his hair. (T. 4226) After being shown a picture of Defendant, Green stated that what he really meant by

not caring about personal hygiene was that Defendant did not take as much time grooming and that he would “easy into his day.” (T. 4227-28) Green admitted that there was food in the apartment and that Defendant could have eaten when Green was not there or when Defendant was out. (T. 4230)

Dr. Ronald Wright, a pathologist, stated that Ms. Adrianza was dead when she was dismembered and stabbed. (T. 4235-45) He also believed that the blunt trauma injury to Ms. Adrianza’s back were caused minutes or hours before her death. (T. 4245-47) Dr. Wright claimed that it was not possible to tell if Ms. Adrianza suffered or knew she was going to die. (T. 4247-49) He claimed that Ms. Adrianza would have lost consciousness within 13 to 15 seconds. (T. 4249-50)

Dr. Wright claimed that cocaine causes people to be euphoric and dysphoric. (T. 4253-54) He stated that some people are affected more than others. (T. 4253-54)

On cross, Dr. Wright admitted that his opinion about the age of the injury to the back was based on injuries to the heart and that heart muscle was not the same as skeletal muscle. (T. 4261-62) He acknowledged that he had no idea about Defendant’s use of cocaine. (T. 4270) He admitted that he did not know about the witness who heard the struggle and screams. (T. 4269)

Sgt. Arthur Clemons, a jail guard, testified that he had

known Defendant as an inmate for 3 to 3½ years and that he had never known Defendant to commit a violent act during that time. (T. 4273) He did know of an incident in which Defendant had gotten into an argument with another inmate and the other inmate had stabbed Defendant. (T. 4274) On cross, Sgt. Clemons admitted that Defendant was housed in a cell by himself and his only contact with other inmates was in the yard or shower. (T. 4277-78) Despite this, Defendant had been disciplined for having or attempting to obtain illegal drugs. (T. 4278)

Myra Torres testified that she met Defendant in 1998, and became friendly with him. (T. 4284-85) She saw Defendant on March 17, 1998, and he appeared to have to flu, to have lost weight and not to be himself. (T. 4285) She thought Defendant might be going through withdraw. (T. 4285) She gave Defendant $400 because he claimed he was being evicted. (T. 4285-86)

On cross, Torres admitted that while the relationship with Defendant started as a friendship, it turned into a sexual relationship, and Defendant actually stay with her for a couple of days when he did not have a place to live. (T. 4289-90) She acknowledged that she visited Defendant in jail on a regular basis and considered herself Defendant's mentor. (T. 4290-91) She had met Defendant's friend Bill from California but claimed not to know that Bill paid Defendant's rent. (T. 4291-92) Torres

had used marijuana with Defendant on one occasion. (T. 4292) Defendant wrote Torres letters saying he loved and missed her but Torres did not consider them love letters. (T. 4292-93)

Dr. Bill Mossman, a psychologist, testified that he was hired to evaluate Defendant for competency, sanity and mitigation. (T. 4319-25) In evaluating Defendant, Dr. Mossman looked at his family history, juvenile history and drug history, interviewed Defendant, his adoptive father, his adoptive stepmother, his adoptive brother and one of Defendant's adoptive sisters and conducted testing. (T. 4326-28, 4332-33) Dr. Mossman claimed that he had difficulty finding information about Defendant because he was adopted in a secretive manner and his adoptive family was dysfunctional. (T. 4329)

Dr. Mossman stated that Defendant was adopted by Bill and Florence Seibert. (T. 4331) At the time of the adoption, the Seiberts had three children of their own: Chuck, about 11 years old; Paula, about 10 years old and Sandra, about 8 years old. (T. 4331) Florence's parents lived next door to the family. (T. 4331) Defendant was cared for by his grandparents because both of his parents worked and his father also had affairs and would be away for days. (T. 4331-32) Defendant developed a close relationship with his grandfather. (T. 4332-33)

Defendant's natural mother, June Lange, became pregnant when

she was 14½ years old and hid the pregnancy from her family until she was 8½ months pregnant. (T. 4333-35) Lange's father arranged through his sister to have the Seiberts adopt the baby and to keep Lange until she gave birth. (T. 4335-36) After she gave birth, Lange immediately returned to her own family. (T. 4336) Lange never saw Defendant. (T. 4341) Lange signed a consent to the adoption in which she stated that she was 17. (T. 4340)

Dr. Mossman claimed that Defendant was adopted because his adoptive mother wanted to keep her husband in the marriage. (T. 4351) He claimed that Bill Seibert resented Defendant because of this. (T. 4351) When Defendant was 5, his parents separated for 10 months to a year. (T. 4352) Until that time, Defendant was a happy, well behaved child. (T. 4352-53) Defendant's parents fought, resulting in Chuck and Sandra siding with their father and Defendant and Paula siding with their mother. (T. 4353) Additionally, Florence's method of discipline was to have Bill spank the children. (T. 4353) Dr. Mossman claimed that this created problems between Defendant and Bill. (T. 4353) Dr. Mossman claimed that Bill reacted to these problems by calling Defendant a bad kid. (T. 4355) Dr. Mossman also claimed that Defendant's siblings resented him because their mother treated Defendant differently and used Defendant against their father.

(T. 4354)

When Defendant was 7, his grandfather died, which affected Defendant. (T. 4355) When he was 9, his grandmother died and his sister Paula left the home to go to school. (T. 4355) Dr. Mossman claimed around this same time, Bill told Defendant that he was adopted and then left the house. (T. 4356-57) Defendant allegedly became withdrawn and started using beer and marijuana. (T. 4357-58)

At the age of 14, Defendant was admitted to a psychiatric institute. (T. 4366) The record of the admission stated that Defendant was depressed and having increasing episodes of being verbally abusive and having temper tantrums at home and school. (T. 4367) Dr. Mossman claimed that this hospitalization was done by Defendant's parents at Defendant's request. (T. 4372)

The report stated that Defendant's parents reported that his behavior was the cause of the stress in the family and that a social worker believed that the family was under emotional strain because of unresolved conflicts and confrontations between the parents. (T. 4369) The doctor who saw Defendant found him to be distrustful of others, withdrawn and depressed with a poor self-image. (T. 4371) He stated that Defendant blamed himself for problems at home but blamed others for his problems at school. (T. 4373) Defendant claimed that his father

drank and fought with his mother and that Defendant tried to protect his mother but that Defendant also thought his mother was mean. (T. 4373) Defendant also told the doctors at the time that he ran away from home and used marijuana. (T. 4374) The report indicated that Defendant was found to have a learning problem that caused him to have difficulty expressing himself verbally. (T. 4375) The report suggested that Defendant should be given family and individual therapy and placed in a program for emotionally disturbed children. (T. 4378)

Dr. Mossman claimed that Defendant was then transferred to a more intensive inpatient facility because he attempted suicide. (T. 4378) The suicide attempt consisted of beating his arms against a wall until he broke them because he was angry and grabbing a lightbulb, breaking it. (T. 4378-79, 4381) The report from this hospitalization indicated that Defendant was beyond his parents' control and doing poorly in school. (T. 4381) Defendant was diagnosed as being depressed, abusing drugs and alcohol, having a conduct disorder and having borderline personality disorder. (T. 4382-83) After a month in this facility, Defendant's mother took him out against medical advice to attend a family reunion. (T. 4384-86) Dr. Mossman claimed that Defendant did not receive further treatment thereafter. (T. 4386)

A statement by Defendant's mother in the report of this hospitalization indicated that Defendant had difficulty with the deaths of some family members and that Defendant acted out to get his father's attention. (T. 4387-89) Among the things Defendant had done was vandalizing a trailer near where his father lived. (T. 4389-90) By the time of the incident and the hospitalizations, Defendant's parents had divorced, and Defendant's mother had sent him to live with his father. (T. 4390-91)

Dr. Mossman claimed that Defendant began using drugs and alcohol as a form of self-medication. (T. 4391) He stated that the drug use began when Defendant was told he was adopted and escalated. (T. 4391) Dr. Mossman claimed that Defendant was clinically depressed because he blamed himself for the problems in the family and that using drugs and behaving badly was Defendant's way of coping. (T. 4391-93)

Shortly after Defendant left the second hospital, he was arrested for theft and burglary. (T. 4394) As part of Defendant's involvement with the juvenile justice system, he was again evaluated psychologically. (T. 4394) The evaluation found that Defendant was emotionally disturbed, had low self esteem and was anxious and depressed. (T. 4395) It was recommended that Defendant be placed in a school for emotionally disturbed

students. (T. 4396) Instead, the juvenile court sent Defendant to a juvenile detention facility. (T. 4418) Defendant ran away from this facility. (T. 4418) When Defendant surrendered himself almost a year later, he was sent to an adult prison. (T. 4418-19) A year after that, Defendant was paroled with an expectation of drug treatment. (T. 4420) However, 3 months later, Defendant absconded from parole and moved to Florida with his mother's assistance. (T. 4420-21)

After Defendant committed the crimes connected with his prior violent felonies, Defendant was imprisoned in Florida. (T. 4422) While in prison, Defendant attended college and married one of his drug counselors. (T. 4422) Defendant stopped attending treatment after 30 days. (T. 4423) While he was in prison, Defendant's mother and grandmother died. (T. 4423)

In addition to collecting a social history, Dr. Mossman administered the MMPI, the MCMI, twice, the FST and the TOMM, a test of malingering. (T. 4425) Dr. Mossman also reviewed the results of another doctor's administration of the MMPI and a neuropsychological test battery. (T. 4425-26)

Dr. Mossman diagnosed Defendant as suffering from a depressive disorder, cocaine dependence, alcohol abuse, a personality disorder with borderline and compulsive components and an unspecified cognitive disorder. (T. 4429-31) Dr. Mossman

believed that Defendant committed the murder under extreme emotional disturbance and that Defendant's ability to conform his conduct to the requirements of the law was substantially impaired at that time. (T. 4436-39) He also believed that Defendant came from a dysfunctional family. (T. 4439-40)

On cross, Dr. Mossman admitted that Lange had given a sworn statement in her consent for the adoption that she was 17 and that report of Defendant's first hospitalization said his birth mother was 17. (T. 4485, 4492) However, Dr. Mossman believed that she was younger because she said she was when she spoke to him. (T. 4883-85)

Dr. Mossman claimed to know what was true in the hospitalization reports even though he had never spoke to the authors of the reports and they contained contradictory information. (T. 4486-89) Dr. Mossman admitted that the report of the first hospitalization showed that Defendant was abusive towards peers and authority figure, that he was failing out of school, that he was truant, that his parents reported he was not using drugs and that Defendant was destroying property, stealing and breaking and entering. (T. 4489-92) Dr. Mossman acknowledged that Defendant's family did seek help for Defendant from mental health professionals as a result of this behavior. (T. 4492) Dr. Mossman also admitted that Defendant had received counseling

around the time his grandfather died and when his parents divorced. (T. 4900-4500) The reports indicated that Defendant was resistant to treatment. (T. 4502)

Dr. Mossman acknowledged that the report indicated that Defendant behaved in a oppositional fashion since at least age 7, that Defendant had continued to be a problem since that time and that the behavior increased dramatically when he was 11. (T. 4495) Another report indicated that Defendant had been oppositional since he was a young child. (T. 4502) He admitted that Defendant and his sister Paula had claimed that his father told Defendant that he was adopted at age 9, but that there was no report of any such incident or trauma associated with it in the report. (T. 4495-97)

Dr. Mossman admitted that when Defendant ran away from the juvenile detention center, Defendant actually committed an escape, a criminal offense. (T. 4507) At the time Defendant turned himself in for this escape, Defendant had also was arrested for a different crime, where he went into a bar and stole money and liquor. (T. 4508) It was this other crime that resulted in the adult prison sentence. (T. 4507-08)

Dr. Mossman acknowledged that knowing Defendant’s juvenile history could be important. (T. 4536-37) However, he did not know what Defendant’s history was. (T. 4537) He admitted that he

had intentionally omitted details about that history that he did know in his direct testimony. (T. 4540-43) One of the things that Dr. Mossman omitted was that Defendant had committed two armed robberies while wearing a mask on a single day in 1983. (T. 4543-45) He also omitted that Defendant had committed arson by burning a car and had threatened to burn down a school. (T. 4548) However, he admitted that robberies and arsons were consistent with conduct disorder, a diagnosis that had been given to Defendant. (T. 4545-50) He acknowledged that Defendant ran away from home, which was another symptom of a conduct disorder. (T. 4569-70)

Dr. Mossman admitted that while he had given an opinion regarding the applicability of the two statutory mental mitigators, he did know why Defendant killed the victim or what he was feeling at the time. (T. 4554-55) He also considered it unusual that a mother would defer disciplining a child to a father. (T. 4557) He had not looked at the record that indicated that Defendant was not attempting to commit suicide but claim to have been on several occasions when incarcerated in an attempt to be transferred to a different facility. (T. 4557-62)

Dr. Mossman admitted that the reports indicated that Defendant saw his father frequently even though Dr. Mossman had claimed that his father was absent. (T. 4562-63) He also

acknowledged that Defendant's mother did provide him with a home, food, clothing and mental health treatment. (T. 4564-65)

Dr. Mossman admitted that Defendant could, and did on occasion, use the fact that he had been labeled as disturbed to manipulate people and situations. (T. 4741) He acknowledged that being under arrested for a crime would be a situation in which manipulation would be likely. (T. 4741-42) He admitted that Defendant's statements to the police regarding drug use may have been an attempt to manipulate. (T. 4742-43)

Dr. Mossman claimed that the results of his testing did not show that Defendant was antisocial. (T. 4744) However, Dr. Mossman admitted that Defendant scored high on the antisocial scale on the MMPI and MCMI tests that he had seen. (T. 4744-52, 4756-64) Dr. Mossman admitted that one of the diagnostic criteria for antisocial personality disorder was that the person was at least 18, and another was that there had to evidence of conduct disorder before the age of 15. (T. 4754) He admitted that Defendant's IQ was between 100 and 93. (T. 4764)

Dr. Mossman admitted his knowledge of the crime came from reading depositions and reports and that he used that knowledge in formulating his opinions about the mental mitigators. (T. 4765, 4773-74) However, he did not consider the inconsistencies in Defendant's statement, the content of the statements that

indicated that Defendant knew what he had done or the crime scene evidence as contrary to his opinions. (T. 4774-4802)

Dr. Mossman admitted that Defendant's father had told him that Defendant did not learn he was adopted in the manner Dr. Mossman described. (T. 4808) Instead, Defendant's father stated that Defendant was told in a calm and gentle conversation when he was two or three. (T. 4808)

On redirect, Dr. Mossman stated that antisocial personality disorder could not be diagnosed unless there was evidence of the disorder in childhood. (T. 4809) He stated that the doctors who examined Defendant as a child did not diagnose Defendant with a connected disorder but that Defendant had many characteristics of antisocial personality disorder. (T. 4809-10) He acknowledged that these tendencies were manifested when Defendant was a child. (T. 4813) However, Dr. Mossman believed that these manifestations were the result of depression. (T. 4813)

Dr. Brad Fisher, a psychologist, testified that he evaluated how Defendant should be classified as a prison inmate. (T. 4836-44) He found that Defendant was not crazy and did not suffer from any neurological impairments. (T. 4844) He did not believed that Defendant had been violent while incarcerated. (T. 4844) He stated that the reports of Defendant being involved in fights were from when he first entered prison in 1986, and were

indicative of an adjustment period. (T. 4845) Dr. Fisher opined that Defendant would not be violent in the future. (T. 4853-54)

In rebuttal, the State called Dr. Daniel Martell, a psychologist. (T. 4960-65) Dr. Martell reviewed crime scene photographs, police reports, witness statements, depositions, Defendant's school records, his mental health records, prison records and the reports, test data and depositions of the other experts. (T. 4971-75) He also listened to phone conversations with Defendant's biological mother, putative biological father and his adoptive father. (T. 4971, 4977)

Dr. Martell stated that a defendant's failure to discuss the crime with an expert limits the expert's ability to determine the defendant's mental state at the time of the crime. (T. 4978) Without such information, an expert must look at the evidence of the defendant's behavior in the crime scene and the statements of witnesses. (T. 4978-79)

Dr. Martell stated the incident in which Defendant broke his arms occurred because Defendant asked his mother to have him discharged from the hospital, his mother refused and Defendant acted out by banging his fists into a wall. (T. 4984) Dr. Martell stated that there was an indication that this was not a suicide attempt but an attempt to manipulate his circumstances. (T. 4984-85) Defendant had engaged in this same type of behavior

during his imprisonment in Florida. (T. 4985) Such behavior is commonly used by individuals to manipulate their placement. (T. 4985)

Dr. Martell stated that Defendant was hospitalized for evaluations because he was destroying property, stealing, committing burglaries, being truant, using drugs and alcohol, fighting and had low self esteem. (T. 4987) When he was removed from the hospital after two months, Defendant embarked on a crime spree. (T. 4988-89)

Dr. Martell stated that the reasons why Defendant was taken to the hospital are consistent with conduct disorder, which was the original diagnosis of Defendant at the time. (T. 4991-92) Dr. Martell did not understand why the diagnosis was dropped but stated that having the features of conduct disorder as a child was sufficient to diagnose antisocial personality disorder as an adult. (T. 4991-92) Dr. Martell stated that the number of encounters with the justice system and the escalating severity of the crimes was significant. (T. 4995-97)

Dr. Martell saw evidence of family problems. (T. 4997) However, he also noted that the family had attempted to obtain counseling for Defendant but that Defendant remained out of control. (T. 4997)

Dr. Martell stated that the designation of a child as

emotionally disturbed was an educational designation. (T. 4998) It was used to differentiate between children who were difficult to educate because of behavioral problems from children with other problems. (T. 4998)

Dr. Martell stated that the facility that Defendant was sent to as a child was a juvenile detention facility and not a mental health facility. (T. 4999) He stated that if the facility had determined that Defendant was in need of treatment, Defendant could have been referred to a treatment facility. (T. 4999-5001) Dr. Martell stated that Defendant's escape from this facility was typical of an antisocial person. (T. 5001)

Dr. Martell stated that there was no evidence that Defendant suffered from depression or psychosis. (T. 5008-10, 5013) In fact, Defendant's test results were below average from depression. *Id*. Instead, the testing was consistent with problems with drugs and alcohol and antisocial personality features. (T. 5010-11) The crime scene show evidence that Defendant was organized, which is inconsistent with emotional disturbance. (T. 5015-16) Evidence that Defendant ordered Green and Mavarres to leave and that Defendant made efforts to prevent anyone from entering the apartment indicated that Defendant's behavior was goal directed and not the product of emotional disturbance. (T. 5017-25) That evidence, Defendant's attempt to

dispose of the body and Defendant's statements to the police also indicated that Defendant appreciated the criminality of his conduct. (T. 5025-37)

During its closing argument, the State did not mention anything about Defendant hustling gay men or receiving money from his friend in California. (T. 5089-5127) After deliberating, the jury returned a 9-3 recommendation of a death sentence. (R. 625, T. 5179)

The trial court followed the jury's recommendation and sentenced Defendant to death. (R. 792-818) In doing, the trial court found that the State had proven two aggravating factors: prior violent felony convictions, based upon the attempted first degree murder and kidnapping of Katherine Jones and the kidnapping and burglary of Michelle Kendricks - great weight; and heinous, atrocious and cruel (HAC) - great weight. *Id*. In mitigation, the trial court found emotional problems, including having a personality disorder and history of substance abuse - some weight; Defendant would be a nonviolent prisoner - moderate weight; Defendant's adoption and family history - little weight; psychological history - moderate weight; history of substance abuse - little weight; Defendant was a good friend - minimal weight; and Defendant behaved appropriately in court - minimal weight. *Id*. It also considered and rejected as mitigation that

Defendant was under extreme mental or emotional disturbance at the time of the crime, that Defendant's ability to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantial impaired, that Defendant's age was 30, that the victim was a participant in Defendant's conduct or consented to the act, and that Defendant was intoxicated at the time of the crime. *Id.*

This appeal follows.

SUMMARY OF THE ARGUMENT

The officers reasonably believed that they were responding to an emergency situation and responded reasonably to that emergency. Looking around themselves as they confirmed that Defendant was not suicidal did not exceed the scope of the emergency. As such, the motion to suppress was properly denied.

The issue regarding the denial of a motion for mistrial based on the testimony was not preserved. Moreover, the trial court did not abuse its discretion in denying the motion for mistrial.

The issue regarding the denial of a motion for mistrial based on a question that was allegedly designed to bolster a witness was also not preserved. Moreover, the trial court did not abuse its discretion in denying the motion for mistrial.

Defendant's death sentence is proportionate. When the facts

as found by the trial court are considered, this Court has affirmed death sentences in similar cases.

The trial court did not abuse its discretion in denying a motion for mistrial during the penalty phase. The trial court sustained the objection to the question, which was designed to clarify an incorrect impression that the witnesses direct testimony had created, and gave a curative instruction.

The *Ring* claim is without merit. Defendant's death sentence is supported by the prior violent felony aggravator.

ARGUMENT

I. THE MOTION TO SUPPRESS WAS PROPERLY DENIED.

Defendant first asserts that the trial court erred in denying his motion to suppress. Defendant asserts that the trial court should not have found that exigent circumstances justified the warrantless entry into his apartment. He also contends that even if the entry was proper, the officers' conduct once inside the apartment exceed the scope of the emergency. However, the motion to suppress was properly denied.

Both the United States Supreme Court and Florida Courts have recognized that the police have a right to enter a premises without a warrant in response to an emergency situation. *Mincey v. Arizona*, 437 U.S. 385, 392-93 (1978); *Zeigler v. State*, 402 So. 2d 365, 371-72 (Fla. 1981); *Webster v. State*, 201 So. 2d 789

(Fla. 4th DCA 1967). In determining whether the emergency exception applies, a court looks at the reasonableness of the officer's belief that an emergency existed and not whether an emergency in fact existed. *State v. Boyd*, 615 So. 2d 786, 789 (Fla. 2d DCA 1993); *Webster*, 201 So. 2d at 792. The determination of "the reasonableness of the officer's response to an emergency situation is a question of fact for the trial court." *J.B. v. State*, 621 So. 2d 489, 491 (Fla. 4th DCA 1993). The "search must be 'strictly circumscribed by the exigencies which justify its initiation.'" *Mincey v. Arizona*, 437 U.S. 385, 393 (1978). However, "the police may seize any evidence that is in plain view during the course of their legitimate emergency activities." *Id.* Moreover, in reviewing a trial court's denial of a motion to suppress, a reviewing court defers to the trial court's findings of fact to the extent that they are supported by competent, substantial evidence but reviews the ultimate legal conclusions de novo. *Conner v. State*, 803 So. 2d 598, 608 (Fla. 2001).

In this case, the officers came to Defendant's home in response to a call from his roommate Green that Defendant was threatening suicide. When they arrived, the officers spoke to Green, who confirmed the content of his call and informed the

officers that Defendant did not have a gun.[1] When the officers went to the door, they knocked, but Defendant did not answer even after coming to the door and looking through the peephole. He did not initially respond when the officers called him by name, told him they needed to check on his welfare because of the suicide threat. When he did finally came to the door after several minutes, he opened it only a crack, stated he was ok and immediately closed the door. Contrary to Defendant's contention, the officers could not determine whether Defendant was uninjured because the door was only opened a crack and the officers could only see his torso. As the officers testified, they were particularly concerned because they could not see his arms to determine if he had slashed his wrist. Moreover, as the officers testified and the trial court found, Defendant's actions when the police attempted to determine if he was suicidal heightened, not allayed, the officers' concerns, contrary to Defendant's suggestion.

Defendant first appears to suggest that the trial court should not have found that an emergency existed because they did not have a basis to determine the reliability of Green and

[1] Contrary to Defendant's suggestion, there was no evidence that the police were informed that Defendant did not have any weapon. In fact, it was noted that Defendant was in an apartment and that there were numerous objects that Defendant could have used to harm himself.

because a threat of suicide was insufficient to create an emergency. However, Green called the police about Defendant's threat of suicide and was there, identified, speaking to the police when they arrived. This placed Green in the category of a citizen informant. *State v. Maynard*, 783 So. 2d 226 (Fla. 2001). Citizen informants are considered highly reliable, and the information they provide does not generally have to be corroborated. *See Maynard*, 783 So. 2d at 230; *State v. Gonzalez*, 884 So. 2d 330, 334 (Fla. 2d DCA 2004); *State v. Vallone*, 868 So. 2d 1278 (Fla. 4th DCA 2004); *Charles v. State*, 871 So. 2d 927 (Fla. 3d DCA 2004); *Chappell v. State*, 838 So. 2d 645 (Fla. 5th DCA 2003). Moreover, Green was not even providing information linking Defendant to a crime but merely informing the police that Defendant might need their aid. While Green did tell the officers that Defendant did not have a gun,[2] people can, and do, commit suicide without using guns. Indications that an individual is suicidal is sufficient to create an emergency. *See United States v. Korda*, 36 M.J. 578 (A.F.C.M.R. 1992); *State v. Yoshida*, 986 P.2d 216, 218 (Ariz. Ct. App. 1998); *State v. Nemeth*, 23 P.3d 936 (N.M. Ct. App. 2001); *State v. Luipold*, 2000 Ohio App. Lexis 3594 (Ohio Ct. App. 2000). Under these

[2] At trial, Sgt. Zeifman testified that Green did tell the officers that Defendant had a knife. (T. 2511-12)

circumstances, the trial court properly found that an emergency existed.

Defendant next suggests that his briefly cracking the door and saying he was ok should have allayed the officers concerns for his safety and that they should have left. However, courts have held that an officer is entitled to conduct a sufficient investigation to ensure that an emergency is not occurring, particularly when they are not investigating a crime. *J.B. v. State*, 621 So. 2d 489 (Fla. 4th DCA 1993)(officer responding to 911 hangup entitled to investigate even though respondent stated that everything was ok and no one had called 911); *see also United States v. Barone*, 330 F.2d 543 (2d Cir. 1964)(officer responding to loud screams entitled to investigate source of scream even though apartment residents denied screaming); *Yoshida*, 986 P.2d at 217-18 (officer responding to call that person had tried to step in path of car entitled to call crisis team and remain with person until they arrived even though person said she was ok). Here, until the officers forcibly entered the apartment, they could not see any more than Defendant's torso. They were unable to see even if he had slit his wrists. Moreover, Defendant's actions when the police arrived heighten the officers' concern that Defendant might truly be suicidal and trying to avoid the police preventing him

from killing himself. The trial court properly determined that the officers' response to the threat of suicide was reasonable. It should be affirmed.

In *State v. Nemeth*, 23 P.3d 936 (N.M. Ct. App. 2001), the court was confronted with a similar situation. There, as here, the police were responding to a 911 call that the defendant was suicidal. There, as here, the defendant did not initially answer the door when the police knocked and finally answered the door after the police had indicated that they knew the defendant was in the house. There, as here, the defendant opened the door briefly and tried to convince the officers to leave. There, as here, the police persisted and eventually entered the premises forcefully. There, the court found that a motion to suppress based on the entry into the house was properly denied because the officers were acting reasonably in response to an emergency situation. The same result should obtain here.

Defendant next contends that even if the police were lawfully in his apartment, the evidence still should have been suppressed because the police exceeded the scope of the emergency in looking around themselves. Defendant appears to assert that the officers should have immediately left the apartment as soon as they saw that Defendant had not injured himself yet. Again, an officer is entitled to conduct enough of

an investigation to ensure that an emergency does not exist. *J.B.*; *Barone*; *Yoshida*. The officers had been told that Defendant was suicidal and observed his refusal to allow the officers to check on his welfare. They had also now observed that Defendant had barricaded the front door to the apartment. (T. 1084) As they testified, they were simply attempting to see that Defendant did not have any implements out that he could use to kill himself and to speak to Defendant long enough to assess his mental state. (T. 1107-08, 1196-98) Given everything known to the officers at that point, the officers' actions were a reasonable response to the emergency they reasonably believed existed, as the trial court found. *J.B.*; *Barone*; *Yoshida*.

Moreover, the officers' actions did not exceed the scope of the emergency. In *Arizona v. Hicks*, 480 U.S. 321, 325-26 (1987), the Court explained the interaction between the limitations on an emergency search and the plain view exception to the warrant exception:

> On this aspect of the case we reject, at the outset, the apparent position of the Arizona Court of Appeals that because the officers' action directed to the stereo equipment was unrelated to the justification for their entry into respondent's apartment, it was ipso facto unreasonable. That lack of relationship always exists with regard to action validated under the "plain view" doctrine; where action is taken for the purpose justifying the entry, invocation of the doctrine is superfluous. *Mincey v. Arizona*, *supra*, in saying that a warrantless search must be "strictly

> circumscribed by the exigencies which justify its initiation," 437 U.S., at 393 (citation omitted), was addressing only the scope of the primary search itself, and was not overruling by implication the many cases acknowledging that the "plain view" doctrine can legitimate action beyond that scope. We turn, then, to application of the doctrine to the facts of this case. "It is well established that under certain circumstances the police may seize evidence in plain view without a warrant," *Coolidge v. New Hampshire*, 403 U.S., at 465 (plurality opinion) (emphasis added). Those circumstances include situations "[where] the initial intrusion that brings the police within plain view of such [evidence] is supported . . . by one of the recognized exceptions to the warrant requirement," ibid., such as the exigent-circumstances intrusion here.

Here, the scope of the search was within these parameters. The officers had entered the apartment to make sure that Defendant was not attempting to kill himself. To do so, they looked around themselves to make sure that Defendant did not have anything available to use to kill himself and to ensure their own safety as they spoke to Defendant to assess his mental condition. As the trial court found, Off. Bales barely moved as he looked around himself. As he looked around, Off. Bales saw in plain view Ms. Adrianza's severed foot on the edge of the bathtub. Under *Hicks*, the motion to suppress was properly denied. The trial court should be affirmed.

United States v. Brand, 556 F.2d 1312 (5th Cir. 1977), upon which Defendant relies, supports the denial of the motion to suppress. In *Brand*, the police had responded to a call

concerning a drug overdose, and an officer entered the defendant's home to assist the ambulance attendants. *Id.* at 1314. In affirming the denial of a motion to suppress evidence seized pursuant to a warrant issued based on the officer's observations while in the house, the court excluded from consideration those items that had originally been in the bedroom of the house. *Id.* at 1318-19. The court's rationale for doing so was that the emergency only permitted the police to be in the living room of the house and the record was not clear whether the items were in plain view from the living room. *Id*. The court indicated that if the items had been in plain view from the living room, they would have been properly considered. *Id.* at 1318 & n.10. Here, the emergency justified the entry into Defendant's studio apartment as argued above. Off. Bales observed the severed foot in plain view from that room. As the trial court found, Off. Bales barely moved in looking around himself to ensure that no one was going to harm him and that there were no implements that Defendant could have used to kill himself readily available. (T. 1088-90, 1107-08) Given the facts, *Brand* supports the trial court's denial of the motion to suppress.

Given that Off. Bales did little more than look around himself while barely moving, the cases relied upon by Defendant

do not compel a different result. Unlike *Anderson v. State*, 665 So. 2d 281 (Fla. 5th DCA 1996), and *Campbell v. State*, 477 So. 2d 1068 (Fla. 2d DCA 1985), the officers did not search through objects in the apartment. Unlike *Vasquez v. State*, 870 So. 2d 26 (Fla. 2d DCA 2003), *Runge v. State*, 701 So. 2d 1182 (Fla. 2d DCA 1997), and *Newton v. State*, 378 So. 2d 297 (Fla. 4th DCA 1979), the officers did not go into areas outside the area in which they were speaking to Defendant. Unlike *Gonzalez v. State*, 578 So. 2d 729 (Fla. 3d DCA 1991), the police did not claim to have consent to enter and then conduct a room to room search. Moreover, *Maryland v. Buie*, 494 U.S. 325, 334 (1990), allows the police to look around the immediate area they are in without probable cause or reasonable suspicion to ensure their safety. As the trial court found, Off. Bales barely moved when he saw Ms. Adrianza's foot. Thus, none of these cases compel reversal of the denial of the motion to suppress. It should be affitmed.

II. THE ISSUE REGARDING TESTIMONY ABOUT WHEN DEFENDANT DEPOSITED HIS SEMEN IN THE VICTIM'S VAGINA IS UNPRESERVED AND WITHOUT MERIT.

Defendant next asserts that the trial court abused its discretion in allowing testimony that Defendant's semen, which was found in the victim's vagina, made have been deposited there after the victim's death. Defendant asserts that such testimony

implicated other bad acts and was admitted solely to attack his character. However, this issue is unpreserved and without merit.

In order to preserve an issue regarding the admission of evidence, a defendant must object contemporaneously with the admission of the evidence. *Castor v. State*, 365 So. 2d 701 (Fla. 1978). While this Court has stated that the object does not have to be lodged as soon as "an examination enters impressible areas of inquiry," this Court has stated that the objection must be made during the impressible line of inquiry such that the trial court can instruct the jury or consider a motion for mistrial if it sustains the objection. *Jackson v. State*, 451 So. 2d 458, 461 (Fla. 1984); *see also Brooks v. State*, 762 So. 2d 879 (Fla. 2000). Objections that are not contemporaneous with the admission of the evidence are insufficient to preserve an issue for review. *Parker v. State*, 456 So. 2d 436, 442-43 (Fla. 1984). Moreover, the object must be on the same grounds asserted on appeal. *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982). A defendant must also obtain a ruling on objection to preserve a issue for review. *Richardson v. State*, 437 So. 2d 1091, 1094 (Fla. 1983).

Here, Defendant did not contemporaneously object to the testimony of Ms. McCue, raise the grounds he now asserts concerning her testimony or obtain an ruling about the admission

of this evidence. During the redirect examination of Ms. McCue, Defendant did not object when the State questioned her concerning when the sexual activity could have occurred. (T. 3320) Two questions later when the State was questioning Ms. McCue about another subject, Defendant did object. *Id*. However, that objection was to the form of a leading question that had just be asked. He also subsequently objected and reserved a motion for mistrial when the State questioned whether evidence that had not been tested could still be tested at anyone's request. (T. 3321)

When Defendant made his reserved motion, he stated:

> Your Honor, at this time, we have a motion for a mistrial, based on the improper redirect examination questions, in their entirety, but specifically as to sexual relations with a dead body and whether or not the ligature had been tested by the defense.

(T. 3323) The trial court responded to this motion by stating that there had been no comment about defense testing, and proceeded to discuss the testing issue with the parties at length. (T. 3323-27) Throughout this discussion, Defendant presented no further comment or argument about the testimony concerning the timing of the sexual activity. He did not request a ruling on that issue. As such, this issue is unpreserved.

Defendant also did not contemporaneously object to the testimony of Dr. Lew. Instead, Dr. Lew testified without

objection on direct that she could not say whether Ms. Adrianza was alive when Defendant's semen was deposited in her vagina or where the sexual activity occurred. (T. 3606) Defendant did not mention this issue until after the State had finished its direct examination, he had conducted his cross examination, the State had conducted its redirect examination, Defendant had conducted a re-cross examination, the State had rested its case, a twenty minute recess had been taken for Defendant to consult with is counsel, the trial court had colloquied Defendant about his right to testify and to present other witnesses, the issue of sequestering the jury during deliberations was discussed and Defendant had moved for a judgment of acquittal. (T. 3606-56) Moreover, Defendant made no argument in support of his motion. (T. 3656) As such, this issue is unpreserved.

To the extent that Defendant's action preserved any issue, it would have been the issue that Defendant raised in the lower court: the denial of a motion for mistrial. "A motion for mistrial is addressed to the sound discretion of the trial judge and '. . . should be done only in cases of absolute necessity.'" *Ferguson v. State*, 417 So. 2d 639, 641 (Fla. 1982)(citing *Salvatore v. State*, 366 So. 2d 745, 750 (Fla. 1978), *cert. denied*, 444 U.S. 885 (1979)). Such absolute necessity is demonstrated when the granting of a mistrial "'is necessary to

ensure that the defendant receives a fair trial.'" *Gore v. State*, 784 So. 2d 418, 427 (Fla. 2001)(quoting *Goodwin v. State*, 751 So. 2d 537, 547 (Fla. 1999)). Here, the trial court did not abuse its discretion in denying the motion for mistrial as there was no absolute necessity.

The initial reason why there was no absolute necessity for a mistrial is that the evidence was properly admitted. Evidence that suggests that a defendant committed bad act with which he is not presently charged is admissible if it is relevant to a material fact in issue other than bad character. *Bryan v. State*, 533 So. 2d 744, 745-48 (Fla. 1988); *see also Lugo v. State*, 845 So. 2d 74, 103 (Fla. 2003); *Williamson v. State*, 681 So. 2d 688, 694-96 (Fla. 1996); *Pittman v. State*, 646 So. 2d 167, 170-71 (Fla. 1994); *Caruso v. State*, 645 So. 2d 389, 393-94 (Fla. 1994). Moreover, the State is permitted to elicit evidence that implicates a defendant's bad acts when that evidence is an inseparable part of the criminal episode such that an accurate picture of the crime is provided to the jury. *Smith v. State*, 699 So. 2d 629, 645 (Fla. 1997)(evidence that defendant committed uncharged sexual battery admissible); *Williamson*, 681 So. 2d at 694-96; *Griffin v. State*, 639 So. 2d 966, 968-70 (Fla. 1994).

Here, the evidence was relevant to the facts of the case. Defendant's semen was found in Ms. Adrianza's vagina. Defendant never contested below that this evidence was relevant to the identity of her murderer. Instead, he attempted to explain the presence of the semen by claiming that he had consensual sex[3] with Ms. Adrianza and fell asleep. (T. 2342) He asserted that while he was asleep someone else came into the apartment, followed Ms. Adrianza into the bathroom where we was dressing and beat and strangled her. (T. 2342-43) In support of these claims, Defendant elicited from Ms. McCue during cross examination that she could not say anything more than that Ms. Adrianza and Defendant had sexual relations. (T. 3319) Only after Defendant elicited this testimony and put the timing of the sexual relations in issue did the State elicit testimony from Ms. McCue and Dr. Lew. Because the evidence was relevant to a material issue other than Defendant's propensity to commit crime, the evidence was properly admitted. *Bryan*; *Griffin*. The proper admission of this evidence did not create an absolute

[3] While Defendant asserts that the State presented no evidence that the sex was not consensual, this is untrue. Evidence was presented that Ms. Adrianza's panties were cut or torn partially off her body, there was a corresponding knife wound in her hip, the lack of semen on her clothing indicated that she had not redressed and there was testimony and evidence of an extensive struggle. (T. 3138-39, 3605-06, 2993-96, 3004-05, 3259-61)

necessity for a mistrial, and the trial court did not abuse its discretion in denying one. It should be affirmed.

Even if the evidence had not been properly admitted, there would still have been no absolute necessity to justify granting a motion for mistrial. The State's questions were brief. They did not accuse Defendant of having sex with a dead body. Instead, they only emphasized that there was no way of determining when Defendant had sex with Ms. Adrianza. The only mention of these questions in the State's closing was that while there was clearly a reasonable doubt about the time of the sexual battery, it was not an issue in this case. (T. 3739-40) It was Defendant who discussed in his closing sexual relations with a dead body. (T. 3701-02) Moreover, Defendant was found locked and barricaded in his second floor apartment with Ms. Adrianza's dead and partially dismembered body. Green had been unable to re-enter the apartment during the time Ms. Adrianza was killed despite repeated attempts to do so. As soon as Off. Bales saw the severed foot and reacted, Defendant attempted to flee. Ms. Adrianza's blood was on Defendant's jeans in a pattern consistent with the jeans having been worn during at least part of the dismemberment. Objects that could have become bloody during the dismemberment had been removed from the bathroom before the dismemberment began, and the bathroom had been

cleaned after the dismemberment. Moreover, Defendant made inculpatory statements while in police custody. Given the brevity of the questions, the limited use of the evidence in closing and the overwhelming evidence against Defendant, there was no absolute necessity for a mistrial. The trial court did not abuse its discretion in denying one and should be affirmed. *Gore*; *Ferguson*; *Salvatore*.

The cases relied upon by Defendant do not compel a different result. In *Gore v. State*, 719 So. 2d 1197 (Fla. 1998), this Court reversed not merely because the State had used evidence in impeachment that was only marginally relevant but also because the State introduced other irrelevant collateral crimes evidence and committed numerous acts of misconduct in closing argument and during its questioning of Defendant. In *Ellis v. State*, 622 So. 2d 991, 1000 (Fla. 1993), *Hudson v. State*, 745 So. 2d 1014 (Fla. 5th DCA 1999), *Thomas v. State*, 701 So. 2d 891 (Fla. 1st DCA 1997), *Carter v. State*, 687 So. 2d 327 (Fla. 1st DCA 1997), *Mudd v. State*, 638 So. 2d 124 (Fla. 1st DCA 1994), *Wilkins v. State*, 607 So. 2d 500 (Fla. 3d DCA 1992), and *Gonzalez v. State*, 559 So. 2d 748 (Fla. 3d DCA 1990), the evidence was found not to be relevant to any material issue. In *Donaldson v. State*, 369 So. 2d 691 (Fla. 1st DCA 1979), the court stated that the evidence was admitted only for propensity. In *McClain v. State*,

516 So. 2d 53 (Fla. 2d DCA 1987), the court found that a statement was improper because there was a mere accusation. Here, evidence that Defendant's semen was in Ms. Adrianza's vagina was relevant to Defendant's identity as her murder. Defendant put the timing of the deposit of that semen at issue. As such, the evidence was relevant to a material issue and put the entire crime in context. As such, the cases relied upon by Defendant are inapplicable.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE MOTION FOR MISTRIAL BASED UPON QUESTIONS ASKED OF DET. JACCARINO.

Defendant next asserts that the trial court abused its discretion in denying a motion for mistrial after it had sustained objections to questions of the lead detective. Defendant asserts that these questions were designed to improperly bolster the testimony of another witness. However, this issue is unpreserved and without merit.

"[I]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below." *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982). In moving for a mistrial based on the questions to Det. Jaccarino, Defendant asserted as his grounds merely that it was improper for the State to ask same question after an objection had been sustained. (T. 2980)

Defendant now claims that the asking of these questions invaded the fact finding province of the jury by having Det. Jaccarino bolster the testimony of Ms. Korkour. As this was not the grounds asserted below in support of the motion for mistrial, this issue is not preserved.

Even if the issue had been preserved, Defendant's conviction should still be affirmed. "A motion for mistrial is addressed to the sound discretion of the trial judge and '. . . should be done only in cases of absolute necessity.'" *Ferguson v. State*, 417 So. 2d 639, 641 (Fla. 1982)(citing *Salvatore v. State*, 366 So. 2d 745, 750 (Fla. 1978), *cert. denied*, 444 U.S. 885 (1979)). Such absolute necessity is demonstrated when the granting of a mistrial "'is necessary to ensure that the defendant receives a fair trial.'" *Gore v. State*, 784 So. 2d 418, 427 (Fla. 2001)(quoting *Goodwin v. State*, 751 So. 2d 537, 547 (Fla. 1999)). Here, the trial court did not abuse its discretion in denying the motion for mistrial as there was no absolute necessity.

The trial court sustained Defendant's objections to the questions to Det. Jaccarino. As such, Det. Jaccarino was never allowed to bolster the credibility of Ms. Korkour. Moreover, Defendant had elicited during his cross examination of Det. Jaccarino that Det. Jaccarino had considered Mavarres a suspect

until he confirmed his alibi and that the Korkours were critical alibi witnesses for Mavarres. (T. 2939-30, 2945) Defendant also attempted to show that Det. Jaccarino had accepted their statements without question. (T. 2945-46, 2948-49) Thus, the implication that Det. Jaccarino believed Ms. Korkour had already been placed before the jury by Defendant before these questions were asked.

Additionally, the State did not comment on Det. Jaccarino's opinion of Ms. Korkour's credibility in closing. (T. 3732-75) Instead, the State pointed out that there was no evidence that Mavarres had any involvement in Ms. Adrianza's murder, that Ms. Korkour's testimony indicated that Mavarres was home before Ms. Adrianza was killed, that Defendant had himself told the police that Mavarres was not involved in the crime and that Mavarres's return to Venezuela as a result his devastation at having introduced Defendant to Ms. Adrianza and having left her with him was natural. (T. 3734-37, 3744-46)

Moreover, the evidence in this case was overwhelming.[4] Ms. Adrianza's body was found, partially dismembered, in the bathtub

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[4] While Defendant does not challenge the sufficiency of the evidence, the evidence described below, and the properly admitted evidence from Ms. Korkour that indicated Mavarres was home at the time of the murder, was sufficient to support Defendant's conviction. *See Johnston v. State*, 863 So. 2d 271, 283-86 (Fla. 2003); *Jones v. State*, 652 So. 2d 346 (Fla. 1995).

in Defendant's locked, second floor apartment. The door to the apartment had been barricaded with a couch. Defendant refused to open the apartment for many hours around the time of the murder. Ms. Adrianza's body indicated that she had been rammed into a hard surface. Defendant's downstairs neighbor was awakened by the sound of this beating, which lasted for six and seven minutes and was followed by the sound of Ms. Adrianza screaming. Defendant's semen was in Ms. Adrianza's vagina, and her panties had been partially removed from her body by being cut and torn. Prior to dismembering the body, those objects that were normally kept in the bathroom that might had become blood spattered were removed and placed neatly away. The dismemberment of the body was meticulously conducted, such that the toilet used to dispose of the body pieces never became clogged. Ms. Adrianza's blood was found on Defendant's jeans in a pattern consistent with the jeans having been wore at some point during the dismemberment. The bathroom was subsequently cleaned, and the cleaning products were returned to their proper places. When Off. Bales saw Ms. Adrianza's severed foot on the edge of Defendant's bathtub and reacted, Defendant attempted to flee. While in police custody, Defendant made numerous inculpatory statements.

Moreover, Defendant admitted that there was no evidence to support his theory that Mavarres killed Ms. Adrianza. (T. 3724-

28) In fact, Defendant informed the police that Mavarres was not involved in this murder. (T. 2899) Additionally, the theory that Mavarres committed the murder while Defendant slept was inconsistent with the evidence that the second floor apartment was locked and had its door barricaded with a couch, that Green was unable to enter the apartment despite repeated attempts to do so, that Ms. Adrianza was repeatedly beaten over a six to seven minute time period, that this beating was loud enough to wake Defendant's neighbor, that Ms. Adrianza was screaming loud enough for the neighbor to hear and that the extensive dismemberment of Ms. Adrianza would have taken hours.

Given the brevity of the questions, the fact that objections to the questions were sustained, the fact that Defendant had already implied that Det. Jaccarino believed Ms. Korkour, the overwhelming nature of the evidence, the lack of support for the alleged defense and the inconsistency of the defense with the evidence, the mere asking of the questions did not create an absolute necessity for a mistrial. The trial court did not abuse its discretion in denying the motion. *Gore*; *Ferguson*; *Salvatore*. Defendant's conviction should be affirmed.

The cases relied upon by Defendant are all inapplicable. In each of these cases, the trial courts admitted the improper testimony, in all but one case over defense objection. *Lee v.*

State, 873 So. 2d 582, 583 (Fla. 3d DCA 2004); *Olsen v. State*, 778 So. 2d 422, 423 (Fla. 5th DCA 2001); *Page v. State*, 733 So. 2d 1079, 1081 (Fla. 4th DCA 1999); *Johnson v. State*, 682 So. 2d 215, 216 (Fla. 5th DCA 1996); *Williams v. State*, 619 So. 2d 1044, 1046 (Fla. 4th DCA 1993); *Hernandez v. State*, 575 So. 2d 1321, 1322 (Fla. 4th DCA 1991); *Boatwright v. State*, 452 So. 2d 666, 668 (Fla. 4th DCA 1984). As this Court pointed out in *Gore*, the legal analysis of the alleged error is vastly different when the trial court has sustained an objection. *Gore*, 784 So. 2d at 427-28. Here, the trial court sustained the objection. Moreover, most of the cases, in which the convictions were reversed because of the testimony,[5] involved situations where the credibility of the witness whose testimony was improperly bolstered was critical to the defendants' convictions.[6] *Lee*, 873 So. 2d at 583 (bolstered witness only person who saw the defendant commit the crime); *Olsen*, 778 So. 2d at 423 (bolster witness only person who testified about use of firearm); *Page*, 733 So. 2d at 1080 (bolstered witness only person who testified

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[5] In *Williams* and *Boatwright*, the court had already determined that reversible error occurred in closing argument before it addressed the issue concerning the testimony.

[6] It is unclear whether there was other properly admitted evidence in *Hernandez*. However, the bolstered witnesses were the victims of a lewd assault, and three witnesses were used to bolster their testimony.

to drug transaction); *Johnson*, 682 So. 2d at 217 (bolstered witness only person in house with defendant when crimes committed). Here, Ms. Korkour was not a critical witness. As outlined above, there was overwhelming evidence of Defendant's guilt and his theory of defense was unsupported, contrary to his own statement to the police and contradicted by ample other evidence. As such, none of these cases compel a finding that the trial court abused its discretion in denying the motion for mistrial.

IV. DEFENDANT'S SENTENCE IS PROPORTIONATE.

Defendant next asserts that his death sentence is disproportionate. However, this claim is without merit.

"Proportionality review compares the sentence of death with other cases in which a sentence of death was approved or disapproved." *Palmes v. Wainwright*, 460 So. 2d 362, 362 (Fla. 1984). The Court must "consider the totality of circumstances in a case, and compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances." *Porter v. State*, 564 So. 2d 1060, 1064 (Fla. 1990), *cert. denied*, 498 U.S. 1110 (1991).

Defendant devotes much of his argument on this issue to a recitation of the testimony of the various experts. However, "[a]bsent demonstrable legal error, this Court accepts those

aggravating factors and mitigating circumstances found by the trial court as the basis for proportionality review." *State v. Henry*, 456 So. 2d 466, 469 (Fla. 1984).

Here, the trial court found two aggravating circumstances: prior violent felony convictions and HAC. The trial court analyzed the proffered mitigation:

> 1. Extreme Mental Or Emotional Disturbance.
>
> * * * *
>
> The court recognizes that the statutory mitigating circumstance of extreme mental or emotional disturbance does not require evidence of insanity or lack of legal responsibility. *Francis v. State*, 808 So. 2d 1140 (Fla. 2002). This circumstance is established if there is evidence of a mental or emotional condition that interfered with, but did not obviate the Defendant's knowledge of right and wrong. *Ponticelli v. State*, 593 So. 2d 483 (Fla. 1991). Evidence that the Defendant was intoxicated or under the influence of narcotics can also establish this factor.
>
> The court find that the Defendant does have an emotional disturbance, a personality disorder with antisocial features, and a history of substance abuse. The court also finds, however, that the greater weight of the evidence reflects that the Defendant's condition did not rise to the level of an "extreme" mental or emotional disturbance at the time of the crime. The Defendant's thinking was not disturbed, as he was fully aware of his actions. The Defendant exhibited goal oriented behavior in arranging for the victim to be alone in his apartment, and keeping out any witnesses. He then meticulously dismembered the victim's body and disposed of the parts to hide his actions. He was careful to remove any items which could be bloodied from the bathroom, and did a thorough clean-up of the blood to removed evidence of his crime. [FN13] Upon his arrest, the Defendant then concocted a story about having been "knocked out," and

under the influence of narcotics. Moreover, the evidence herein also reflects that the Defendant's use of cocaine at the time of the crime was not substantial. The testimony was that the Defendant, Danny and the victim all ingested equal amounts of cocaine, which was greatly diluted. Subsequent testing of the victim's blood, brain tissue, and ocular fluid reflects that the amount of cocaine found was insignificant, with a minor, if any, effect on judgment. Likewise, the amount of alcohol consumed was minimal; several beers shared among four (4) people.

Accordingly, the court find that the greater weight of the evidence herein does not establish this statutory mitigating factor. The court also find, however, that the Defendant did have some psychological problems in his adolescence. As an adult, he had a personality disorder with antisocial features, and a history of substance abuse. The court has considered this evidence, however, under the "catchall" factor, as well, and had given it some weight.

2. The Capacity Of The Defendant To Appreciate The Criminality Of His Conduct Or To Conform His Conduct To The Requirements Of The Law Was Substantially Impaired.

Dr. Mossman also testified, based on the same reasons for his opinion of extreme mental or emotional disturbance, that the Defendant did not appreciate the criminality of his conduct and was also unable to conform his conduct to the requirements of the law. The Defendant's background, psychological history, substance abuse, and his actions at the time of the crime have been set forth in the previous analysis of the statutory mitigating factor of extreme mental or emotional disturbance, at pp. 13-20. For the reasons set forth in that analysis, the court finds that the defendant did appreciate the criminality of his conduct, and could have conformed his conduct to the requirements of the law. This statutory mitigating circumstance has not been reasonably established by the greater weight of the evidence.

3. The Age Of The Defendant At The Time Of The Crime.

Where a defendant is not a minor, "no per se rule

exists which pinpoints a particular age as an automatic circumstance in mitigation, Instead, the trial judge is to evaluate the defendant's age based on the evidence adduced at trial and at the sentencing hearing." *Shellito v. State*, 701 So. 2d 837, 843 (Fla. 1997)(citations omitted). There was no testimony or evidence that the Defendant's age of 30 was mitigating, or that his emotional or psychological age was less than his chronological age at the time of the crime. *See Echols v. State*, 484 So. 2d 568 (Fla. 1985); *Sims v. State*, 681 So. 2d 1112, 1117 (Fla. 1996). The evidence herein reflects that the Defendant is a street-smart individual. He has average intelligence, with an IQ of 98, and no significant mental impairment. The court finds that this statutory mitigating [sic] has not been established by the greater weight of the evidence.

* * * *

5. Other Factors In The Defendant's Background That Would Mitigate against Imposition Of The Death Penalty.

5(a) Defendant Has Been a Non-Violent Prisoner And Poses No Threat Of Harm To Staff Or Inmates If Given A Life Sentence.

The Defendant presented evidence that a sentence of life imprisonment means that there is no early release. A corrections officer testified that the Defendant has not committed any violent acts during pretrial incarceration for the instant case, Dr. Brad Fisher, a clinical forensic psychologist who specializes in inmates' behavior in prison, also testified. He stated that a review of the Defendant's 16-year history in various correctional settings was not generally violent. The Defendant had some fights when he initially entered the correction system, which is not unusual, and he then adjusted with violence. [FN14] Dr. Fisher opined that based on his prior prison history, the Defendant will not be violent towards staff and inmates, if given a life sentence. Dr. Fisher candidly concedes, however, that there are no guarantees of future behavior. He acknowledged that the Defendant's prior incarcerations were different,

as he had an expectation of release every time. There would be no such expectation, in a situation involving a life sentence. The court nonetheless accepts the evidence of the Defendant's prior behavior and probability of non-violence in a prison setting as mitigating, and gives it moderate weight.

5(b) Adoption And Dysfunctional Family Background.

The evidence presented with respect to the Defendant's childhood and family background has been detailed herein at pp. 14-19. The mere fact that one is adopted is not mitigating in nature. In the instant case, however, the Defendant argues that his adoptive family did not want him, and he was informed of his adoption by his father, after a fight between his parents. [FN15] The Defendant was, however, cared for by loving grandparents during his formative years. He was also loved by his adoptive mother. While the parents may have argued with each other, before getting divorced, the court is not persuaded that anyone abused Defendant, physically or emotionally. There was no evidence that the Defendant lacked the necessities, or even the non-necessities of life, during his childhood. Moreover, while the divorce and multiple deaths of family members indicate some lack of stability in the family, the evidence also showed that the parents were trying to seek assistance from counselors, social workers, doctors, hospitals, etc., to help the Defendant. The court finds the Defendant's adoption and family background to be of little weight.

5(c) History Of Psychological Problems

The court previously detailed the evidence presented with respect to the Defendant's psychological history. During adolescence, the Defendant was diagnosed with SED, substance abuse, conduct disorder, and depressive mood disorder. While the evidence reflected attempted suicide, the Defendant himself stated that he had not meant to harm himself, and wanted to attract attention. In adulthood, the Defendant's condition has become a borderline personality disorder with antisocial features. The court finds the Defendant's

psychological history to be of moderate weight.

5(d) History Of Drug Abuse And Intoxication At The Time Of The Crime

The evidence of the Defendant's cocaine and beer use in the hours before the crime was previously detailed at pp. 2-5. The court does not find that the Defendant was intoxicated at the time of the crime. As previously noted, the Defendant was fully aware of his actions. The Defendant exhibited goal oriented behavior in arranging for the victim to be alone in his apartment, and keeping out any witnesses. He then meticulously dismembered the victim's body and disposed of the parts to hide his actions. He was careful to removed any items which could be bloodied from the bathroom, and did a thorough clean-up of the blood to remove evidence of his crime. Upon his arrest, the Defendant then concocted a story about having been "knocked out," and under the influence of narcotics. Moreover, the evidence herein also reflects that the Defendant's use of cocaine at the time of the crime was not substantial. The testimony was that the Defendant, Danny and the victim all ingested equal amounts of cocaine, which had been greatly diluted. Subsequent testing of the victim's blood, brain tissue, and ocular fluids reflected that the amount of cocaine found was insignificant, with a minor, if any, effect on judgment. Likewise, the amount of alcohol consumed was minimal; several beers shared among four (4) people. As such, the circumstance of intoxication at the time of th crime has not been established by the greater weight of the evidence.

The evidence with respect to the Defendant's history of substance abuse has also been previously detailed at pp. 13-19. The Defendant experimented with marijuana, Quaaludes, and other substances during adolescence. The Defendant, however, then spent the majority of his adulthood in prison, where he could not abuse drugs or alcohol on a regular basis. The evidence did demonstrate that in the year before the murder, the Defendant increasingly used marijuana and cocaine, despite having received treatment. The court finds that the mitigating circumstance of a history of substance abuse has been established, but gives it little weight.

* * * *

> [FN13] A factual summary of the circumstance of the crime and the Defendant's action had been previously set forth on pp. 2-7, and is relief upon herein.
>
> [FN14] Dr. Fisher noted that the Defendant does have disciplinary reports. Theses have been for masturbating in front of a female mental health worker and for possession of contraband.
>
> [FN15] Based on the conflict in evidence, the court has given this argument limited credence.

(R. 804-16)

Defendant does not assert that the trial court committed any legal error in its analysis, and none is apparent. Moreover, its findings are supported by the testimony of Green, Dr. Hearns, Dr. Martell, Dr. Fisher, Sgt. Clemons and the evidence introduced during the testimony of Dr. Mossman. The testimony of Dr. Martell and Dr. Mossman conflicted and Dr. Mossman was extensively cross examined regarding those matters he chose to ignore in formulating his opinion. As such, the trial court's decision to reject Dr. Mossman's opinion does not provide a basis for this Court to overturn that decision.[7] ***Cave v. State***,

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[7] While Defendant asserts that Dr. Mossman testified that a person could not be diagnosed as antisocial unless they had been diagnosed as antisocial as a child, this is untrue. Consistent with the DSM IV-TR, Dr. Mossman testified that a person could not be diagnosed as antisocial unless they had signs of the disorder as a child. (T. 4809) AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 701-06 (4th Ed. Text Rev. 2000).

727 So. 2d 227, 230 (Fla. 1998); *Walls v. State*, 641 So. 2d 381 (Fla. 1994).

When the actual finding of the trial court are considered, this Court has affirmed death sentences in similar situations. In *Lemon v. State*, 456 So. 2d 885 (Fla. 1984), this Court found a death sentence proportionate, where the defendant had strangled and stabbed a woman to death after having been released from prison for assaulting another woman with the intent to kill her. This resulted in the finding of the same two aggravating circumstances found in this case. In mitigation the *Lemon* court had found the extreme mental or emotional disturbance statutory mitigator. In *Singleton v. State*, 783 So. 2d 970 (Fla. 2001), this Court found a death sentence proportionate where the prior violent felony aggravator was supported by a prior attempted murder, and HAC was also found. In mitigation, the trial court had found, *inter alia*, both statutory mental mitigators, the defendant was under the influence of drugs and alcohol, the defendant was an alcoholic and the defendant had been a model prisoner. In *Spencer v. State*, 691 So. 2d 1062 (Fla. 1996), a death sentence based on the prior violent felony aggravator and HAC was found proportionate despite the presence of both statutory mental mitigators and a number of nonstatutory mitigators, including

childhood sexual abuse and alcohol and drug abuse. *See also Bowden v. State*, 588 So. 2d 225 (Fla. 1991)(aggravators: HAC and prior violent felony; mitigation: terrible childhood); *King v. State*, 436 So. 2d 50 (Fla. 1983)(aggravators: HAC and prior violent felony; statutory mental mitigation rejected).

Here, the prior violent felony aggravator was supported not only by the attempted murder and kidnapping of one prior victim but the attempted kidnapping of another. Moreover, the trial court rejected the statutory mental mitigators, all other statutory mitigation and found the defendant was not intoxicated. Given the similaries between this case and the above mentioned cases, the sentence is not disproportionate and should be affirmed.

The cases relied upon by Defendant do not show that his sentence is disproportionate. *Sager v. State*, 699 So. 2d 619 (Fla. 1997), *Voorhees v. State*, 699 So. 2d 602 (Fla. 1997), *Kramer v. State*, 619 So. 2d 274 (Fla. 1993) and *Deangelo v. State*, 616 So. 2d 440 (Fla. 1993), involved fights between the defendants and the victims. Here, there was no evidence of a fight. *Sager*, *Voorhees*, *Kramer* and *Neibert v. State*, 574 So. 2d 1059 (Fla. 1991), involved intoxicated defendants. Here, the trial court rejected the claim that Defendant was intoxicated. *Deangelo v. State*, 616 So. 2d 440 (Fla. 1993), and *Hawk v.*

State, 718 So. 2d 159 (Fla. 1998), involved brain damaged defendants. There was no evidence that Defendant was brain damaged. Moreover, Defendant was 30 years old when he committed this crime. As such, he was not a minor like *Hawk*, *Cooper v. State*, 739 So. 2d 82 (Fla. 1999), and *Robertson v. State*, 699 So. 2d 1343 (Fla. 1997). In *Larkins v. State*, 739 So. 2d 90 (Fla. 1999), and *Terry v. State*, 668 So. 2d 954 (Fla. 1996), the only aggravator was the prior violent felony aggravator, which was either remote in time or consisted of a contemporaneous conviction as a principal. Here, HAC was properly found and the prior violent felonies were neither remote or contemporaneous. As such, none of these cases show Defendant's sentence is disproportionate. It should be affirmed.

V. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING A MOTION FOR MISTRIAL BASED ON AN ISOLATED QUESTION.

Defendant next contends that the trial court abused its discretion in denying a motion for mistrial based upon a question asked by the State of Ace Green during cross examination. Defendant argues that the question implied nonstatutory aggravation. However, the trial court did not abuse its discretion in denying the motion for mistrial.

"A motion for mistrial is addressed to the sound discretion of the trial judge and '. . . should be done only in cases of

absolute necessity.'" *Ferguson v. State*, 417 So. 2d 639, 641 (Fla. 1982)(citing *Salvatore v. State*, 366 So. 2d 745, 750 (Fla. 1978), *cert. denied*, 444 U.S. 885 (1979)). Such absolute necessity is demonstrated when the granting of a mistrial "'is necessary to ensure that the defendant receives a fair trial.'" *Gore v. State*, 784 So. 2d 418, 427 (Fla. 2001)(quoting *Goodwin v. State*, 751 So. 2d 537, 547 (Fla. 1999)). Here, the trial court did not abuse its discretion in denying the motion for mistrial as there was no absolute necessity.

The trial court sustained Defendant's objection to the question. (T. 4220-22) It instructed the jury to disregard the question and any answer that may have been given, despite the fact that the record reflects that the question was not answered. (T. 4225) The State did not mention the question in closing. (T. 5089-5127) In *Gore*, the trial court sustained an objection to a question by the State and instructed the jury to disregard it. The State did not mention the area concerning the question in closing. This Court found that the mere asking of an improper question was insufficient to require a mistrial, given the isolated nature of the question and the curative instruction. *Gore*, 784 So. 2d at 427-28. As the question here was just as isolate and there was a curative instruction, the trial court did not abuse its discretion in denying the motion

for a mistrial.

Moreover, the jury heard how Defendant beat and strangled Ms. Adrianza to death. The jury also heard that Defendant had previously abducted a woman, beaten her so badly she sustained a fracture skull and left her for dead. Defendant also attempted to abduct another young woman. These facts supported the prior violent felony and HAC aggravators. In mitigation, the jury heard that Defendant had been hospitalized for engaging in antisocial behavior as a child and that he had been adopted and was loved by his mother and her parents but resented by his father, that Defendant had been incarcerated for most of his life and behaved nonviolently while in prison and that Defendant used drugs. Given the strength of the aggravation presented in this case and the weakness of the mitigation, there was no absolute necessity to grant a mistrial based on one isolated question that was not answered and that the jury was instructed to disregard. *Gore*; *Ferguson*; *Salvatore*. The trial court did not abuse its discretion in denying the motion for mistrial and should be affirmed.

The cases relied upon by Defendant do not compel a different result. In all of these cases, the evidence complained of was actually admitted. *Perry v. State*, 801 So. 2d 78, 89-91 (Fla. 2001); *Bowles v. State*, 716 So. 2d 769 (Fla. 1998); *Kormandy v.*

State, 703 So. 2d 454, 460-64 (Fla. 1997); *Hitchcock v. State*, 673 So. 2d 859, 860-63 (Fla. 1996); *Geralds v. State*, 601 So. 2d 1157, 1161-63 (Fla. 1992).[8] Here, the evidence was not admitted. The trial court sustained Defendant's objection and instructed the jury to disregard the question.

Moreover, in *Perry* and *Bowles*, the evidence was admitted during the State's case in chief at the penalty phase and in *Kormandy*, the evidence was admitted in support of aggravation. This Court has recognized that evidence that may have been inadmissible in the State's case in chief is admissible in rebuttal during a penalty phase to rebut mitigation. *Gore*, 784 So. 2d at 433 (evidence of collateral crimes for which no conviction had been obtained properly used to impeach defendant's testimony that he was not violent); *Singleton v. State*, 783 So. 2d 970, 978-79 (Fla. 2001)(evidence of lack of remorse admissible to rebut claims of remorse and rehabilitation in mitigation); *Valle v. State*, 581 So. 2d 40, 46 (Fla. 1991)(evidence of acts of prison misconduct admissible to rebut claim that defendant would be a good prisoner); *Hildwin v.*

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[8] In *Bowles*, the trial court did sustain an objection to testimony that the defendant "rolled faggots," but admitted a wealth of other evidence regarding the defendant's hatred of homosexuals. In *Geralds*, the trial court sustained an objection to the number of prior convictions the defendant had but allowed the State to state that the defendant had multiple convictions.

State, 531 So. 2d 124, 127-28 (Fla. 1988)(evidence of prior acts of violence that did not prove prior violent felonies admissible to rebut claim of nonviolent nature). Here, Defendant presented Green during his penalty phase case. Defendant elicited from Green that Defendant had previously been gainfully employed but that he had lost his job before the crime. (T. 4213) He had Green testify that Defendant was in a downward spiral at the time of the crime due to drug use. (T. 4212-13) This left the jury with the impression that Defendant was lawfully supporting himself before his drug use caused him to use his job and ultimately led Defendant to murder Ms. Adrianza. As the State explained to the trial court at the time the question was asked, the State was attempting to correct this incorrect impression by showing that Defendant never really supported himself by legitimate means. (T. 4220-23)

Given the fact that the evidence was not admitted and that the attempt to admit the evidence was not during the State's case in chief but as rebuttal to Defendant's claims of mitigation, the cases relied upon by Defendant are inapplicable. The trial court did not abuse its discretion in denying the motion for mistrial and should be affirmed.

IV. THE *RING* CLAIMS WERE PROPERLY DENIED.

Defendant final asserts that Florida capital sentencing

statute is unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002). Specifically, Defendant contends that the statute is infirmed because the jury is not required to specify the aggravators that it found or to return a unanimous recommendation.

However, this Court has repeatedly rejected claims that *Ring* invalidated Florida's capital sentence scheme, particularly in cases involving the prior violent felony aggravator. *Huggins v. State*, 29 Fla. L. Weekly S752, S761 (Fla. Dec. 2, 2004); *Rodgers v. State*, 29 Fla. L. Weekly S724, S730 (Fla. Nov. 24, 2004); *Crain v. State*, 29 Fla. L. Weekly S635, S641 (Fla. Oct. 28, 2004). In fact, this Court has specifically rejected claims that the jury must specify the aggravators that it found and that the jury must unanimously recommend death. *Monlyn v. State*, 29 Fla. L. Weekly S741, S743 (Fla. Dec. 2, 2004); *Hernandez-Alberto v. State*, 29 Fla. L. Weekly S521, S525 (Fla. Sept. 23, 2004); *Porter v. Crosby*, 840 So. 2d 981, 986 (Fla. 2003). Other than expressing his disagreement with this Court's precedent, Defendant presents no reason to depart from them. Given this Court's repeated rejections of these claims, the trial court properly denied Defendant's *Ring* motions. It should be affirmed.

CONCLUSION

For the foregoing reasons, the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

CHARLES J. CRIST, JR.
Attorney General
Tallahassee, Florida

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SANDRA S. JAGGARD
Assistant Attorney General
Florida Bar No. 0012068
Office of the Attorney General
Rivergate Plaza -- Suite 950
444 Brickell Avenue
Miami, Florida 33131
PH. (305) 377-5441
FAX (305) 377-5654

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by U.S. mail to Scott Sakin, 1411 N.W. North River Drive, Miami, Florida 33125, this 10th day of February, 2005.

_____
SANDRA S. JAGGARD
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is type in Courier New 12-point font.

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SANDRA S. JAGGARD
Assistant Attorney General