IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC04-857

RONNIE KEITH WILLIAMS,

Appellant,

VS.

STATE OF FLORIDA,

Appellee.

****

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

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ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Ronnie Keith Williams, defendant below, will be referred to as "Williams". Appellee, State of Florida, will be referred to as "State". References to the appellate record will be by "ROA" and "S" will designate supplements, followed by the volume and page number(s). Williams' brief will be referenced as "IB", followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

On March 4, 1993, Williams was indicted for first-degree murder for the January 26, 1993 attack upon Lisa Dyke which resulted in her February 14, 1993 death (ROA.1 1-2). His first conviction and death sentence were reversed. Williams v. State, 792 So.2d 1207 (Fla. 2001) (finding substitution of deliberating juror improper). Retrial commenced November 3, 2003, but ended December 3, 2003 in a mistrial (ROA.4 352-60). The instant trial began January 27, 2004 and on February 12, 2004, the jury convicted him of first-degree murder, finding both premeditated and felony murder (ROA.4 382).

The penalty phase commenced on March 1, 2004 and ended with the jury recommending death by a vote of ten to two. (ROA.5 399). On April 8, 2004, a Spencer v. State, 615 So.2d 688 (Fla. 1993) hearing was held and on April 16, 2004, the court sentenced William to death (ROA.5 413-28).

Guilt Phase - In January, 1993, Lisa Dyke ("Lisa") moved

into Ruth Lawrence's ("Ruth") apartment. She was dating Ruth's brother, Julius Lawrence ("Julius"), and was pregnant with his child. Ruth's sister, Stephanie Lawrence ("Stephanie"), was seeing Williams who lived about a 15 minute drive from Ruth's apartment. Stephanie and Julius lived with their father. They all socialized together. About a week before Lisa's attack, Ruth and Williams had a disagreement and he was told not to return to her apartment. On January 23, 1993 Ruth and Williams had another argument, which Ruth promised not to disclose to Stephanie. Nonetheless, on January 25th, Ruth, in a three-way call with Stephanie, Lisa, and Williams, revealed the argument, and Stephanie broke-up with Williams. During the conversation, Lisa, who had mediated prior reconciliations, remained quiet (ROA.14 822-35, 828-29,876-84, 886-88).

The next morning, January 26th, there were no blood stains in the apartment, nor had Williams bled there before, when Ruth left for school about 7:15 a.m. At about 8:00 a.m., and for about five minutes that morning, Courtney Mylott heard a woman screaming for help from the apartment. Lisa placed a 911 call near 8:30 a.m. and was heard on the tape to say that about 20 minutes earlier, Ronnie had stabbed her with a big knife. She wanted the paramedics to hurry as she was bleeding everywhere, was in great pain, and could not breathe. Lisa advised she knew "Ronnie", a black man, but not his last name, but she gave a

phone number where information about him could be given. Near 8:33 a.m., Officers Gillespie and Costello responded, followed shortly by paramedics (ROA.13 707-10 717-18; ROA.14 832-35, 846-52 871-75; SROA - evidence envelope).

Gillespie testified that upon arriving, the door was opened by Lisa, an 18 year-old pregnant black female with ashen skin, suffering from multiple stab wounds to her chest and back, holding clothing to cover her nude, wet, and bloody body. She was very upset, spoke of her fear of dying, and began to lose consciousness; there was blood everywhere. When he asked who had done this, Lisa, over the noise of police radios, emergency personnel, and the oxygen mask, replied "**Rodney**." She added he was "Ruth's sister's boyfriend." Detective James overheard Lisa respond: "**Ronnie** did this to me and he is Ruth's sister's boyfriend." Lisa said she had been raped by him and gave the number for Ruth's sister. Within five minutes of the paramedics arriving, she was taken to the hospital and rushed to surgery. (ROA.13 714-25; ROA.14 909-10).

Near 6:30 p.m., after her emergency surgery, Lisa regained consciousness and was met by Detective James in the Intensive Care Unit ("ICU"). Because she was on a ventilator with tubes in her mouth and nose, Lisa communicated with James, as he devised, by nods and shakes of her head. She was alert, understood the system created, and was willing to answer

questions. She indicated she knew her attacker and picked Williams' picture from the photo array. When James saw Lisa on January 28th, he noted bite marks on her chest, breast, arm, and shoulder. She pointed to her groin as having another bite mark. James obtained a blood sample and, except for the one to the groin, photographed the bite marks. (ROA.14 913-16, 919-25).

On January 26th, Detectives Jones and Lewis met with Stephanie, who showed them where Williams lived. Surveillance was set up, and contact was made with Beamon Lawrence, not relation to Ruth's family, who directed them to his wife, Clinita ("Clinita") regarding her brother's whereabouts. While speaking to Clinita about the incident, Jones noted freshly laundered clothes on Williams' bed. Upon learning a crisis center had become involved in this case about noon that day, he went there to eliminate Williams as a suspect. However, the time of Williams' arrival at the center did not eliminate him. Jones saw Williams at the center after calling out "Ronnie"; Williams responded fully dressed with fresh band-aids on both hands. Williams was arrested and taken to the station. He needed no help getting into the cruiser and exhibited no slurred speech or motor problems. After acknowledging his Miranda v. Arizona, 384 U.S. 436 (1966) rights, he admitted knowing Lisa, having issues with Stephanie, and using Lisa as a go-between when he had prior problems with Stephanie. He denied being in

Lisa's apartment and offered he cut his hands on a knife while doing dishes (ROA15 1050-1068).

The forensic team processed the scene, where it found and collected fingerprint evidence, bloody bed linen, clothing, and a knife for later processing for prints and DNA (ROA.13 733-811, 893-905; ROA.14 947-49, 959-66; ROA.15 1082-90). DNA testing showed Lisa's DNA was on the knife and dust ruffle; Williams' DNA was on a child's shirt and a pair of sweat pants (ROA.16 1100, 1193-97, 1207-08). The print comparisons showed Williams bloody print near the bathroom (ROA.15 1021, 1031-40, 1042).

On February 14, 1993, after lingering for 19 days, Lisa succumbed to her injuries. According to Dr. Wright, the autopsy revealed Lisa suffered multiple stab wounds to her chest and back, but, due to the days she survived and healing that took place, it was difficult to determine initial wound sizes. She had defensive wounds to her hands and fingers and one stab wound penetrated her sternum, pierced her pericardial sac, but slid passed her heart barely missing the right ventricle. She had six stab wounds to her back, some penetrated her lungs. All the wounds were made by a knife, but, whether it was a single or double edged weapon could not be determined. The knife in evidence was consistent with having made the stab wounds. Dr. Wright noted bite marks to Lisa's body. The cause of death was multiple stab wounds. (ROA.16 1064, 1136-40, 1145-60, 1166-67)

Dr. Wright noted the wounds to Williams' hands were caused by "slippage." When a hilt-less knife is stabbed into hard bone, such as the sternum, but also ribs, "slippage" may occur. The stabber's hand slips down the knife and onto the blade, cutting him. (ROA.16 1166-72).

A forensic odontologist testified that only the bite mark on Lisa's breast was of sufficient detail to make a comparison to Williams' dental casts. However, the same set of teeth left the marks on Lisa's breast, arm, and back. Williams' teeth left the mark on Lisa's breast. (ROA.16 1226-30, 1232-39, 1244-51).

The defense was voluntary intoxication. In support, Mr. Matregrano, Director of Medical Records for the jail medical provider, produced a record noting Williams had been placed in the infirmary for detoxification on the day of his arrest. Yet, he could not confirm this actually occurred. (ROA. 17 1291).

Clinita, Williams' older sister, testified that on the morning of January 26th, Williams was not himself. She did not see or hear him until 8:00 a.m., but believed he was home between 6:00 and 8:00 a.m., although it was odd for his bedroom door to be shut. When she finally saw him, he was dressed, but appeared to be hallucinating, and could barely stand or control his limbs. While she did not know this, she believed he was on drug due to his speech and affect. She took him to the crisis clinic, 20-25 minutes away, and waited for about 35-40 minutes

before being seen at 10:00 or 10:30 a.m.[1] at which time, he was put in a straight jacket. (ROA.17 1293-98, 1300-06, 1309-17).

Williams testified about Stephanie and that he had been to Ruth's apartment many times. He knew Lisa through the Lawrence sisters and knew she lived with Ruth. He averred he did not know she was on the phone on January 25th when Stephanie broke off their relationship. He was up-set by this, drank heavily, and took 15 of his 30 crack rocks and cocaine power through 7:00 a.m on the 26th. Williams did not recall anything between taking the drugs that morning and talking to the police at the clinic. Although he recalled with specificity the amount of drugs/alcohol taken and his weak condition, he had no recollection of going to Ruth's or stabbing Lisa. He thought he was home. (ROA.17 1330-43, 1351)

In rebuttal, Michael Ewell averred that a person high on drugs, reporting hallucinations, incapable of controlling himself, attempting to leave, and needing help to walk would not have been admitted to his facility unless first cleared by an emergency room. He avowed straight jackets had not been used there in 30 years, although the two or four point restraints were used to hold patients in bed. (ROA.18 1396-97, 1399, 1401).

Penalty Phase - The state offered as prior violent

[1]Based on this time frame it appears Clinita saw Williams for the first time near 9:00 to 9:30 a.m.

felonies, Williams' 1985 conviction for second-degree murder, wherein he stabbed the sister of the girl who had recently ended her relationship with him[2] and the conviction for a 1982 lewd assault on a child under twelve.[3]

In mitigation, Clinita described Williams' difficult childhood following the death of his mother when he was seven-years old and the complete absence of his father. Clinita raised Williams and they lived out of a car for several months while the paperwork was collected and processed to obtain assistance. She explained Williams' drug use, difficulties in school, and being picked on by classmates (ROA.20 1612-21).

Deputy Powell described Williams as a model inmate, who attended jail religious services. Deputy Ruise noted Williams was not a problem, having only three disciplinary reports, and that he got along well with others. Dorothea Simmons, a friend of 20 years, averred she had spoken to him about Christianity and life. Williams had difficulty getting work after his last

[2]In 1984, Williams was seeing Sybil Jeffrey. With the backing of her sister, Gaynell, Sybil told Williams their relationship was over. A few nights later, after the family retired to bed, leaving Gaynell watching television, Williams stabbed her nine time in the chest and back, puncturing her lungs and heart. He left a bloody trail to the family car. Gaynell's body was found in a nearby construction site. (ROA.20 1568-78, 1581-88, 1591).

[3]Williams lured the girl into a small room, threatened to kill her, and penetrated her vagina digitally causing her to bleed (ROA.20 1574-78, 1592-98).

prison release. (ROA.20 1604-07; 1609-11, 1630-31).

Defense psychologist, Dr. Walczak, met with Williams, Clinita, and a defense investigator regarding mitigation. He reviewed the probable cause affidavit and police statements, including Williams'; he had a collection of material including school records. The doctor opined Williams had a troubled background due to the death of his mother, growing up in a "bad area", being taken in by his pregnant 19 year-old sister, and having to live out of a car for more than three months while the paperwork could be straightened out for government assistance. Due to Williams' small stature, he was abused in school, causing him to skip school. He started drinking at age 18 and taking cocaine by 20. Williams worked for grocery stores, but lost his jobs for stealing money for drugs. (ROA.20 1632-36, 1656).

Dr. Walczak thought taking 15 crack rocks and a fifth of rum would create mind altering experiences, possible blackouts, but it was unlikely someone would blackout, remember an event, and blackout again. Given the amount of intoxicants Williams self-reported, he was unable to function normally. When asked about Williams' capacity to appreciate the criminality of his conduct, Dr. Walczak stated Williams was religious, but just could not remember events, which did not mean he did not commit something. Dr. Walczak conceded Williams' self-report to the intake clerk was that **he had not done** drugs for 48 hours before

January 26th. (ROA.20 1636-39, 1649-52).

The jury recommended death by a vote of ten to two. The court found in aggravation: (1) prior violent felony; (2) felony murder (sexual battery); (3) heinous, atrocious, or cruel ("HAC"); and (4) cold, calculated, and premeditated ("CCP").[4] (ROA.5 414-23). In mitigation (little weight assigned), the court found the statutory factors of: (1) under influence of extreme mental or emotional disturbance; (2) capacity to appreciate criminality of conduct or to conform conduct to the law was substantially impaired. (ROA.5 423-25). The court rejected the statutory age mitigator as Williams was 30 years-old at the time of the murder. (R)A.5 425). The non-statutory mitigation found consisted of the following five factors and each was assigned "slight weight": (1) model jail prisoner; (2) attended jail's religious services; (3) deprived childhood; (4) loving person; and (5) Williams was slight of stature and frequently beaten and robbed on way to school. (ROA.5 425-26). The death sentence was imposed (ROA.5 427) and this appeal followed.

[4]Sentence was not contingent upon CCP. (ROA.5 423).

SUMMARY OF THE ARGUMENT

Point I - Lisa's communications were admitted properly as dying declarations and excited utterances. Their admission did not violate Williams' confrontation rights.

Point II - The record shows the court was impartial.

Point III - The use of a transcript of the 911 tape as a demonstrative aid was proper.

Point IV - Lisa's pregnancy was admitted properly to support the underlying felony of sexual battery for felony murder and for proof of aggravated battery for the lesser offense of third-degree murder requested by the defense.

Point V - The court correctly submitted a felony-murder case to the jury.

Points VI and VII - The court correctly denied Williams' motion for judgment of acquittal and properly instructed the jury on felony-murder. Further, there is competent, substantial evidence supporting the jury's felony-murder conviction.

Point VIII - Williams' motion for judgment of acquittal on premeditation was denied properly. The State had produced a *prima facia* case of premeditation.

Points IX and X - The indictment gave proper notice of first-degree murder allowing the state to argue both the premeditated and felony murder theories.

Point XI - The jury was instructed properly regarding the

presumption of innocence.

Point XII - The standard instruction on the requirement of unanimity was given and it properly instructed the jury.

Points XIII and XIV - The jury was instructed properly regarding the standards of proof for weighing of aggravation and mitigation. The instruct does not shift the burden to the defense.

Point XV - The CCP aggravator is supported by the evidence and was found properly.

Point XVI - The court made the requisite findings for imposing the death sentence.

Point XVII - The jury was given the standard instruction regarding the standard of proof necessary to establish mitigation, and it met constitutional muster.

Point XVIII - Williams' indecent assault conviction was used properly to support the prior violent felony aggravator.

Point XIX - The HAC aggravator is supported by the evidence.

Point XX - Williams' death sentence is proportional.

Points XXI and XXII - Florida capital sentencing is constitutional.

ARGUMENT

POINT I

LISA DYKE'S COMMUNICATIONS TO THE 911 OPERATOR, OFFICER GILLESPIE, AND DETECTIVE JAMES WERE ADMITTED PROPERLY (restated)

Williams contends Lisa's statements: (1) to the 911 operator, were not "excited utterances"; (2) to Officer Gillespie and Detective James were inadmissible as they were neither "excited utterances" nor "dying declarations" and they violated his confrontation rights under Crawford v. Washington, 541 U.S. 36 (2004) (IB 17). The record shows, there was no abuse of discretion[5] in admitting her communications as they were both dying declarations and excited utterances given while she was under the stress of having been stabbed recently, begging for assistance knowing she was near death, or from her hospital bed at a time when she was on a ventilator and other devices and knowing she was in grave condition and fearing for her life. Further, excited utterances and dying declarations are not "testimonial" as defined by Crawford, thus, their admission is not barred. This Court should affirm.

[5]Admission of evidence is within the court's discretion, and its ruling will be affirmed unless there has been an abuse of discretion. Ray v. State, 755 So.2d 604 (Fla. 2000); Zack v. State, 753 So.2d 9 (Fla. 2000); Cole v. State, 701 So.2d 845 (Fla. 1997). Discretion is abused when the judicial action is arbitrary, fanciful, or unreasonable. Trease v. State, 768 So.2d 1050, 1053, n.2 (Fla. 2000); Huff v. State, 569 So.2d 1247 (Fla. 1990).

Williams suggests the court entered its ruling before the parties offered argument (refuted by record-ROA.4 320, 331-32; SROA.1 154-55, 164-66), and *sua sponte* found the statements were excited utterances (IB 16). These issues were raised in **Point II**. The State addresses them there.

After listening to the 911 tape and hearing from law enforcement officers and nurses who had contact with Lisa shortly after the attack and during her ICU hospitalization, (ROA.6 464-577; SROA.1 63-148) the court found Lisa's statements both dying declarations and excited utterances, reasoning:

> The Court finds that the 911 statements of Lisa Dyke and her statements made shortly after the police and emergency medical personnel arrived at her apartment to police; and the call she made to Julius Lawrence, identifying Ronnie as the person who stabbed her, are admissible under the excited utterance exception to the hearsay rule. In Pope v. State, 679 So. 2d 710 (Fla. 1996), the Florida Supreme Court held that statements made by the victim of beating, who eventually died as a result of that beating, to neighbor and to police officer about the identity of her attacker, were properly admitted as an "excited utterance." Citing to its decision in State v. Jano, 524 So. 2d 660, 661 (Fla. 1988), the Court stated:
>
> > "To fall within the excited utterance exception to the hearsay rule as set forth in section 90.803(2), Florida Statutes (1993), there must be an event startling enough to cause nervous excitement; the statement must be made before there is time to contrive or misrepresent; and the statement must be made while the person is under the stress of excitement caused by the event. Alice made her statement to Tice within a minute after she saw him. She was lying on his couch covered in blood,

> slurring her speech, moaning, and having trouble breathing. Tice called the police immediately and they arrived within the next two to three minutes. Before the paramedics arrived ten to fifteen minutes later, officer Wright interviewed Alice. During this brief interview, Alice made a statement to Wright which we also find to be an excited utterance. In both cases, Alice's statements were made while she was under the stress of excitement caused by the attack. The circumstances belie the suggestion that she had time to contrive or misrepresent. Her statement merely identified Pope as her attacker and described the attack."

In the present case Officer Gillespie was dispatched at 8:30 A.M., and arrived at the apartment four minutes later. On his arrival he found Lisa Dyke naked, covered in blood, and suffering stab wounds to her front and back. The Court finds that the statements of Lisa Dyke to the 9-11 operator, to Julius Lawrence, and to police officers and emergency medical personnel in her apartment, constituted "excited utterances" within 90.803(2) of the Florida Evidence Code.

As to the head nods wherein Lisa Dyke identified the Defendant's picture in a photo line-up as the person who stabbed and bit her, the court finds that they should come into evidence either as "excited utterances" or as "dying declarations'. Lisa Dyke at the time that she was stabbed was pregnant. She stated that she was in fear of dying to the police and paramedics. The paramedics believed that her wounds would be fatal. Ms. Dyke upon arriving at the hospital was immediately rushed to surgery. From the time that she arrived at the hospital on January 26, 1993, to the time that she passed away on February 14, 1993, she continually had tubes in her mouth and nose. Because she was pregnant, she had an emergency cesarean procedure performed in an effort to save her child. From the very instance that she called 9-11 and called Julius Lawrence to say that she had been stabbed, to the time she passed away, she remained under the stress of the excitement caused by her stabbing. There is no testimony introduced at the

> evidentiary hearing which would indicate that she contrived or misrepresented the subject matter of her statements.
>
> In Pope v. State, supra, the court states:
>
> > "Statements made concerning the cause or circumstances of what the declarant believes to be his or her impending death are admissible as hearsay exception. Section 90.804(2)(b), Fla. Stat. (19993). (sic) Although it is not required that the declarant make express utterances that she knew she was going to die, the court should satisfy itself "that the deceased knew and appreciated her condition as being that of an approach to certain and immediate death." Henry v. State, 613 So. 2d 429, 431 (Fla. 1992) The trial court's determination that the predicate for dying declaration was sufficient should not be disturbed unless clearly erroneous, and Pope has not demonstrated error. *See i.d.* We find that the court's admission of the statements as dying declarations was reasonably based on the totality of the circumstances."
>
> The Court finds that in the present case, that the totality of the circumstances set forth at the evidentiary hearing, that the State has laid a sufficient predicate for the declarations and statements of Lisa Dyke to come into evidence as "dying declarations."

(ROA.4 329-31).

Excited utterance - Notwithstanding section 90.802, Florida Statutes, which prohibits admission of hearsay, certain exceptions exist; specifically, statements found to be "excited utterances" are admissible. Section 90.803(2), Florida Statutes defines an excited utterance as: "A statement or excited utterance relating to a startling event or condition made while

the declarant was under the stress of excitement caused by the event or condition." The essential elements of an excited utterance are: an event startling enough to cause nervous excitement, a statement made before there was time to contrive or misrepresent and a statement made while under the stress of excitement. Henyard v. State, 689 So.2d 239, 251 (Fla. 1996); Rogers v. State, 660 So.2d 237 (Fla. 1995); State v. Jano, 524 So.2d 660 (Fla. 1988). "While the length of time between the event and the statement is a factor to be considered in determining whether the statement may be admitted under the excited utterance exception...the immediacy of the statement is not a statutory requirement." Henyard, 689 So.2d at 251.

Dying declaration - "Before a hearsay statement is admissible as a dying declaration the court must be satisfied that the deceased declarant, at the time of its utterance, knew that his death was imminent and inevitable." Torres-Arboledo v. State, 524 So.2d 403, 407-08 (Fla. 1988); Teffeteller, 439 So.2d at 843; Lester v. State, 37 Fla. 382, 385, 20 So. 232, 233 (1896). "Whether a proper and sufficient predicate has been laid for the admission in evidence of a dying declaration is a mixed question of law and fact and will not be disturbed unless clearly erroneous." Teffeteller, 439 So.2d at 843-44.

Lisa's 911 tape - Asserting Lisa's 911 statements were the result of reflection, Williams questions their admissibility.

He bases this on the fact Lisa called her boyfriend, Julius, before she called 911 and the 911 call was placed 20 to 30 minutes after the event. He points to Lisa's modesty with the police and suggests she showered after the attack. (IB 22).

Below, Williams failed to take issue with the court's finding of an excited utterance exception. Hence, the matter is unpreserved. Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982) (holding for issue to be cognizable on appeal, it must be specific contention asserted below). Even if the merits are reached, the record does not bear out all of Williams' allegations. Rather, it supports the finding that the 911 statement was an excited utterance and a dying declaration, thus, under either theory, admitted properly. See Muhammad, 782 So.2d 343, 359 (Fla. 2001) (opining "court's ruling on an evidentiary matter will be affirmed even if the trial court ruled for the wrong reasons, as long as the evidence or an alternative theory supports the ruling").

The police investigation did not confirm Lisa called Julius (SROA.1 96, 106-07, 112), nor that she actually showered after the attack. Yet, even if these events occurred, including a 20 to 30 minute delay in calling for help and responding to questions posed by the operator, Lisa's 911 statements qualify as excited utterances. Admission of 911 and police statements under similar circumstances have been affirmed.

The victim's statements in Henyard, 689 So.2d at 243 were admitted properly as excited utterances. Regaining consciousness two hours after being raped and shot, the victim reached a nearby house for help. In finding her statements to the responding officer excited utterances, this Court stated:

> ... When the officer arrived, he found Ms. Lewis, who was hysterical but coherent. At trial, the officer was permitted to recount statements Ms. Lewis made to him on the front porch immediately after his arrival. The police officer testified that Ms. Lewis told him she had been raped and shot, identified her assailants as two young black males who fit the description of Henyard and Smalls, and said they had taken her children. Given these circumstances, we find that Ms. Lewis was still experiencing the trauma of the events she had just survived when she spoke to the officer and her statements were properly admitted under the excited utterance exception to the hearsay rule.

Id. at 251.

The test regarding the time elapsed is not a bright-line rule of hours or minutes; but where the time interval is long enough to permit reflective thought, the statement will be excluded in the absence of some proof the declarant did not engage in reflective thought. Rogers, 660 So.2d at 662. The additional evidence tending to prove there was no reflection, even though hours had passed between the event and the statement, "is that at the time of the statement, the declarants were either 'hysterical,' severely injured, or subject to some other extreme emotional state sufficient to prevent reflective thought indicating they were still suffering under the stress of

the event. Blandenburg v. State, 890 So.2d 267, 270 (Fla. 1st DCA 2004). See, Sliney v. State, 699 So.2d 662, 669 (Fla. 1997) (affirming admission of 911 call); Davis v. State, 698 So.2d 1182, 1190 (Fla. 1997) (same); Pope v. State, 679 So. 2d 710 (Fla. 1996) (admitting victim's statement to police); Turner v. State, 530 So.2d 45, 50 (Fla. 1987).

Here, Dyke made her 911 call 20 to 30 minutes of the attack, with the police arriving less than five minutes later.[6] There is no evidence that, during the interval between the stabbing and the call, she contrived her subsequent statements. Even if it is assumed she called Julius, such does not detract

[6]Williams reliance on Hutchinson v. State, 882 So.2d 943 (Fla. 2004); Blandenburg v. State 890 So.2d 267 (Fla. 1st DCA 2004); State v. Skolar, 692 So.2d 309, 310 (Fla. 5th DCA 1997)is misplaced. In Hutchinson, the statement was found not to be admissible because the 30 minute delay was sufficient time for the victim to reflect, but more important, there was no other evidence to elucidate what transpired during delay. Conversely here, Lisa had tried to call for help earlier, was bleeding profusely, going in and out of consciousness, and having difficulty breathing. The reasonable inference is that she could not get to the phone sooner. The stress, pain, and fear expressed on the 911 tape, show there was no reflection by Lisa. Likewise unsupportive of Williams position are State v. Skolar, 692 So.2d 309, 310 (Fla. 5th DCA 1997)(statement made hours prior to murder by anonymous caller and there was no stress involved); Blandenburg v. State 890 So.2d 267, 270 (Fla. 1st DCA 2004)(one witness statement given after he was hospitalized and stated in "patently rational manner" he did not want his mother prosecuted while another witness clearly gave consideration first as to whether her mother would go to prison for a parole violation, which showed reflection). In fact, the discourse on the law in that area contained in Blandenburg, 890 So.2d at 270, supports a finding of admissibility as Lisa's injuries were so severe and she was so upset, there was no reflection.

from the court's ruling because Lisa was fading in and out of consciousness, could not breathe, and was in physical distress from the attack. Moreover, in response to the operator's question about the time delay, Lisa confided that she had tired to call, and she "can't make it anymore." (SROA.1 70). Both the 911 tape and the police officers' accounts confirm this -- the operator even noted she could not get anything out of Lisa. Lisa was going in and out of consciousness, was very upset, in severe pain, bleeding profusely, and unable to breathe. When lucid, Lisa answered the operator's questions, but asked her to get the information from others, and cried repeatedly for help to hurry; moments later she stressed to the police she did not want to die. The medical testimony verifies Lisa's critical condition from the stabbing.

Under similar circumstances, the victims' admission have been found admissible. See Power v. State, 605 So.2d 856, 862 (Fla. 1992)(finding witness' statements to police an excited utterance); Pope, 679 So. 2d at 710 (finding statement given to neighbor before police arrived did not cause later account to police to fall outside excited utterance definition); Rogers, 660 So.2d at 240 (finding statement excited utterance in spite of fact victim sat on couch for 10 minutes and had a soda before giving police statement because at no time did she appear relaxed; she was hysterical while giving account); Werley v.

State, 814 So.2d 1159, 1161 (Fla. 1st DCA 2002) (finding admissible 911 call made an hour after battery and victim still visibly shaken/frightened when police arrive); Pedrosa v. State, 781 So.2d. 470, 473 (Fla. 3rd DCA 2001) (holding statement excited utterance made while bleeding profusely and in distressed state). This Court should affirm.

Furthermore, the 911 statement was found to be a dying declaration, which Williams does not challenge here (ROA.4 331), and the evidence supports this. Muhammad, 782 So.2d at 359 (noting judge's ruling will be upheld if right for the wrong reason). Lisa was bleeding profusely from stab wounds to her lungs, and nicking her pericardial sac; she thought she had been stabbed in the heart. When calling for help, she voiced her fear of dying and told the operator she could not breathe, and could not "make it anymore." (SROA.1 70) Such qualifies as a dying declaration. See Henry v. State, 613 So.2d 429 (Fla. 1992) (finding statement of victim with burns over 90% of her body given after drive to hospital to be dying declaration); Teffeteller, 439 So.2d at 842-43 (affirming dying declaration of victim who remained conscious for three hours after shooting, was consoled, and told not to worry); Anderson v. State 182 So. 643 (Fla. 1938)(finding victim's statement defendant "killed me, I am dying" made about 30 minutes after attack supported dying declaration exception - victim died 14 days later).

Assuming the 911 statements were inadmissible, there is no merit to Williams suggestion he was harmed by Lisa identifying him as her attacker or by an alleged reference on the tape to being raped.[7] Both Lawrence sisters testified as to Stephanie's recent break-up with Williams, thus, his motive for the attack was plain. Lisa selected Williams' photo from the array Detective James produced. She was found stabbed seven times, and Williams' hands, consistent with "slippage" were cut recently. His blood (matched by DNA analysis), and bloody fingerprint were found in the apartment where he had not bleed previously. (ROA.14 828-33, 844-45, 880-84, 919-20; ROA.15 1033-34, 1059-60, 1063, 1100; ROA.16 1145-56, 1166-72, 1207-08, 1226-30, 1240-45, 1251, 1256-57). With this overwhelming evidence, admission of Lisa's statements was harmless. Hamilton v. State, 547 So.2d 630 (Fla. 1989); State v. DeGuilio, 491 So.2d 1129 (Fla. 1986). This Court should affirm.

Statement to Officer Gillespie - Lisa's statements to

[7]Williams' asserts Lisa told the 911 operator she was rapped. The tape was transcribed four times - suppression hearing, trial, replay during deliberations, and as a demonstrative tool (ROA.14 871; ROA.19 1527; SROA.1 66; SROA-evidence envelope). Only the transcript of the replay during deliberations contains a reference to "raped." (ROA.19 1527). This appears to be in error based upon counsel's playing of the tape in the State Attorney's possession. Moreover, the jury was instructed to rely upon what it heard on the tape, and it never saw the appellate record. Williams cannot claim error arising from the transcription in this instance.

Officer Gillespie upon his arrival at the crime scene within minutes of the 911 call qualify as excited utterances and dying declarations.[8] The State would incorporate its arguments regarding the 911 tape and the circumstances of her condition in support of its position. This Court has found victim's statements to be dying declarations and/or excited utterances under like situations. It should do so here. See Pope, 679 So.2d at 713; Henry, 613 So.2d at 431; Teffeteller, 439 So.2d at 842-43; Anderson 182 So. at 643.

Williams suggests Lisa engaged in reflective thought from the time of the stabbing through her statements to Gillespie.[9] He also asserts the State failed to show Lisa believed she was under an historical "oath-like obligation" and, that she had no

[8]Just before the police arrived; Lisa clearly is heard on the tape begging for the paramedics to hurry and noting she had been stabbed in the back and heart (ROA.14 872-73; SROA.1 66-70). Gillespie testified there was blood everywhere and Lisa, naked and bloody, was very upset, beginning to lose consciousness, spoke of her fear of dying, and that she did not want to die (ROA.13 715-18). Detective James noted Gillespie was trying to calm Lisa who was very agitated, upset, "hyper", and "speaking fast". She was worried she may die. (ROA.6 545-47). Such support the finding of excited utterances and dying declarations.

[9]Again, the state incorporates its arguments regarding Lisa's 911 call. The suggestion Lisa's modesty represents reflection is pure conjecture. In any event, the state contends this action or any other suggested by Williams is not reflective thought, certainly not the reflective thought contemplated under the excited utterance exception. See Hamilton,547 So.2d at 630. There is no evidence her story was contrived or manipulated. It should be found admissible. Power, 605 So.2d at 862.

hope of recovery. There is nothing in section 90.805 (2)(b) requiring the declarant be a "religious person or that she believed in God" as Williams contends (IB 27). He has provided no case law as authority on this point. Further, he misstates the law regarding dying declarations when he writes "there must be absence of all hope of recovery" and argues that assurances from the first responders negated any dying declaration.[10] Rather, a victim's statement is admissible as a dying declaration even though she may have received encouragement; Teffeteller, 439 So.2d at 843 (no expression about pending death); Pope, 679 So.2d at 713 (long period between event and statement); Henry, 613 So.2d at 430 (relying on severity of injury to prove victim knew of pending death); Lester, 20 So. at 233. As outlined above, the totality of the circumstances prove Lisa gave a dying declaration. See Price v. State, 538 So.2d 486 (Fla. 3d DCA 1989) (finding dying declaration based on victim bleeding profusely, terrorized demeanor, asking if he would die, even though he asked to go to hospital); Labon v. State, 868 So.2d 1222 (Fla. 3d DCA 2004)(finding statement dying

[10]Williams cites McCrane v. State, 194 So. 632 (Fla. 1940). While McCrane has not been specifically overruled, since 1940 the Florida Rules of Evidence have been codified and the aforementioned element "absence of all hope of recovery" is not enunciated in the codified exception. Although the state disagrees with Williams' analysis, just by re-iterating it, he implicitly concedes Lisa believed her death imminent, particularly given her severe wounds.

declaration where victim's condition severe enough he could have believed he would die). This Court should affirm.

With the exception of the reference to ROA.14 919-20, the State relies on and incorporates its DeGuillo analysis provided when discussing the 911 tape. No harm resulted.

Statements to Officer James - The State reincorporates its foregoing arguments and submits Lisa's statements to Detective James were both excited utterances and dying declarations. Her declarations were given just after her surgery and as she lay in her ICU bed, anxious state, concerned for her well being and connected to a ventilator and other tubing/machines.

Just after becoming alert following her January 26th emergency surgery, James met a very anxious Lisa in the ICU. She had to communicate by nod/shakes of her head as she was connected to a ventilator, surrounded by various medical equipment, and had tubes in her nose, throat, and body. When shown a photo-array, she picked Williams photo as her attacker (ROA.6 470-73, 479-80, 503-04, 508-10, 550-534). When James saw Lisa on January 27th and 28th in the ICU, he noted bite marks on her body and Lisa confirmed, by pointing, she had a bite to her groin area, and that Williams had done this. Except for the mark to the groin, photographs were taken (ROA.6 555-59, 572-73). Throughout her ICU stay, prior to being put into a medical coma in early February, Lisa expressed to the nurses her fear

for her condition, and concern for her baby. (ROA.6 465-72, 475-86, 508-09, 523-24, 527-30, 534-35, 536).

Williams submits that "11 hours after the incident" allowed "plenty of time for reflection". (IB 33). This is disingenuous as for most of that time Lisa was in surgery/recovery. Further, the totality of the evidence from the 911 call, statement to Gillespie at the scene, and actions/communications in the ICU while connected to a ventilator and other devices, Lisa was under the constant stress of the attack and feared her demise. Unabated, she expressed fear, and anxiety over her condition.

This Court has held the decedent's comments after arriving at the hospital are admissible as dying declarations. See Covington v. State, 145 Fla. 680 (Fla. 1941) (finding admissible victim's identification of defendant even though given after surgery and administration of morphine); Teffeteller, 439 So.2d at 843; Labon, 868 So.2d at 1223 (finding statement dying declaration in spite of declarant's failure to announce his fear based on circumstances where gunshot victim was in pain, had tubes in veins and knew he was set for surgery).

Should this Court find the statements inadmissible, the overwhelming evidence noted for the DeGuillo analysis above, including Williams' bloody fingerprint, his blood (DNA), and bite marks on the victim support (ROA.14 828-33, 844-45, 880-84, 919-20; ROA.15 1033-34, 1059-63, 1100; ROA.16 1145-56, 1166-72,

1207-08, 1226-30, 1240-45, 1251, 1256-57), supports affirmance.

Crawford v. Washington issue - Williams contends Lisa's statements made to Gillespie and James were testimonial, did not constitute dying declarations, and denied him his right to confrontation under the Sixth Amendment as discussed in Crawford. (IB 25-27, 31-32). This issue is unpreserved,[11] but should the merits be reached, the State disagrees with Williams' premise and incorporates its analysis above showing that the statements were both dying declarations and excited utterances. Moreover, dying declarations are exempted from Crawford and do

[11]At trial, Williams did not raise a Sixth Amendment challenge to the admission of Lisa's statements. He merely claimed such were not dying declarations. Because this is a different argument than was raised below, it is unpreserved. Steinhorst, 412 So. 2d at 338. See Mencos v. State, 909 So.2d 349, 351 (Fla. 2005) (finding Sixth Amendment/confrontation claim under Crawford not preserved where only hearsay objection raised below) (citing Lopez v. State, 888 So.2d 693, 697 (Fla. 1st DCA 2004)). Though not specifically addressing the preservation issue, Williams alludes to Evans v. State, 838 So.2d 1090(Fla. 2000) wherein this Court noted that although counsel did not raise a Sixth Amendment claim, his hearsay objection was closely related to a confrontation rights challenge Id. at 1097 n.5. However, in Evans, counsel argued the State needed to have a witness in court to testify to the evidence the defense claimed was hearsay. Yet, in neither his pre-trial motions nor argument at the hearing (ROA.2 55-56, 74-75; SROA.1 164-66), did counsel, remotely or technically, argue a Sixth Amendment claim. Mencos, supports lack of preservation, where the court reasoned: "As Mencos points out, he could not have specifically objected based on Crawford because the Supreme Court issued its ruling after Mencos' trial. Nevertheless, as Justice Scalia discussed [in Crawford, 541 U.S. at 49-50], arguments predicated on the right to confrontation have been made in cases throughout this nation's history" Mencos, 909 So.2d at 351-52) (denying rehearing).

not pose a confrontation Clause violation. Further, by the very definition of excited utterance, those statements too fall outside the Crawford definition of "testimonial", thus, making those statements admissible. Moreover, by killing Lisa, Williams has forfeited his right to complain about a lack of confrontation. This Court should affirm.

In Crawford, the Supreme Court held that the Confrontation Clause prohibits the admission of testimonial hearsay against a criminal defendant without a showing that the witness who made the statement is unavailable, and that the defendant had a prior opportunity to cross-examine the witness. Crawford, 541 U.S. at 67-68.[12] Analyzing the history of the confrontation clause, the Court stated "there is scant evidence that exceptions [to hearsay rule] were invoked to admit testimonial statements against the accused in a criminal case." Id., at 56. More important here is that:

> The one deviation we have found involves dying declarations. The existence of that exception as a general rule of criminal hearsay law cannot be disputed. ... Although many dying declarations may not be testimonial, there is authority for admitting even those that clearly are. ... We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this

[12]Prior to Crawford, admission of an unavailable witness' statement against a defendant did not violate the Confrontation Clause provided it fell within a firmly rooted hearsay exception or bore a particularized guarantee of trustworthiness. Ohio v. Roberts, 448 U.S. 66 (1980).

> exception must be accepted on historical grounds, it is *sui generis*."

Id., at 56, n.6. This should end the inquiry, because as dying declarations, there is no confrontation problem.[13] However, should this Court go further, the following shows the statements did not violate Crawford

Under Crawford, the threshold inquiry is whether the statement is "testimonial." The Supreme Court chose not to comprehensively define testimonial hearsay finding only "it applies at a minimum to "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." Crawford, 541 U.S. at 67. The State contends Lisa's statements are not testimonial.

Many jurisdictions *post*-Crawford have grappled with factual scenarios, similar to the one here, the majority finding the

[13]Williams contends only U.S. Jordan, 2005 U.S. Dist. LEXIS 3289 (D. Colo. 2005) analyzed the change in the dying declarations after Crawford, and found they were not excepted (IB 27). Jordan, is a ruling on a motion *in limine* to bar testimony at trial. Accordingly, it's precedential value is minimal. Furthermore, the court in Jordan not only found dying declarations applicable *per se* to Crawford, but even disputed the United States Supreme Court's historical underpinnings for such an exception. Id., 2005 U.S. Dist. LEXIS 3289 at 10. Nonetheless, multiple jurisdictions have analyzed this issue and found Crawford inapplicable to dying declarations. People v. Gilmore, 828 N.E. 2d 293 (Ill. 2005); State v. Martin, 695 N.W. 2d 578, 586 (Minn. 2005); People v. Monterroso, 101 P.3rd 986(2004)(victim knew he had been shot, identified defendant and died 11 days after); Walton v. State, 278 Ga. 432 (2004); State v. Nix, Ohio 5502, P71 (Ohio Ct. App. 2004); Virginia v. Salaam, 65 Va. Cir. 405 (Vir. 2004).

statement to be non-testimonial. See Williams v. State, 909 So.2d 599 (Fla. 5th DCA 2005) (holding statement to 911 operator were excited utterances and non-testimonial under Crawford); Anderson v. State, 111 P.3rd 350 (Alaska Ct. App. 2005) (finding response to officers inquiry to be excited utterance not interrogation, nor testimonial under Crawford); State v. Anderson, 2005 Tenn. Crim. App. LEXIS 62, 2005 WL 174441 (Tenn. Crim. App. 2005) (holding excited utterances to responding officer are not "testimonial").[14] Lisa's hysterical call to 911

[14]See also People v. Cage, 120 Cal. App. 4th 770 (Cal. App. 2004) (holding hearsay statement made at hospital to police that defendant had cut him was not testimonial because the interview was "unstructured" and "informal and unrecorded"); Leavitt v. Arave, 371 F.3d 663, 683 n.22 (9th Cir. 2004) (finding victim's call to police the night before her murder to complain defendant broke into her home was non-testimonial, excited utterance because victim initiated contact, was not interrogated, and her motivation was to get help) Demons v. State, 595 S.E.2d 76, 80-81 (Ga. 2004)(finding no constitutional error under Crawford for admitting excited utterance); Fowler v. State, 809 N.E.2d 960, 961-66 (Ind. App. 2004) (holding statements to police in response to informal questioning at scene shortly after crime are not testimonial); State v. Barnes, 854 A.2d 208, 211-12 (Me. 2004) (in earlier incident, mother went to police station in tears stating defendant, who eventually killed her, had tried to kill her. Mother's statements non-testimonial because she had gone to the police on her own while under the stress of the alleged assault and police only asked questions to determine why she was upset); People v. Moscat, 777 N.Y.S.2d 875, 880 (N.Y. City Crim. Ct. 2004) (911 call made by domestic violence victim to obtain emergency help is non-testimonial because it was to get help not start prosecution); Hammon v. State, 809 N.E. 2d 945,951 (Ind. Ct. App. 2004)(holding statements given to police answering call for aid are not testimony when questions posed were made to assess situation police faced); United States v. Griggs, 2004 U.S. Dist. LEXIS 23695 (SDNY 2004), (declarant's statement to police defendant "had a gun" and pointed to him was

call and statements to Gillespie that qualify as non-testimonial irrespective of the general questioning posed by the operator and later the police. See Anderson, 111 P.3rd at 350. Her excitement and concern for the life continued unabated at the hospital given the totality of her circumstances in the ICU, thus, rendering those statements non-testimonial as well. People v. Cage, 120 Cal. App. 4th 770 (Cal. App. 2004).

Williams relies on Lopez v. State, 888 So.2d 693 (Fla. 1st DCA 2004) as authority for his assertion Lisa's statements to Gillespie were testimonial. In Lopez, the upset, but uninjured kidnapping victim identified the defendant, standing 25 yards behind him, as his assailant who also had a gun. By the trial, the victim had absconded. While the court found the statements excited utterances, it concluded their admission violated Crawford. The facts in Lopez differ markedly with those here.[15] Lisa injuries were life-threatening; her primary purpose in making the 911 call which resulted in Gillespie's presence at

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excited utterance and agreeing that declarant's statements are testimonial if they are "knowing responses to structured questioning in an investigative environment or a courtroom setting where the declarant would reasonably expect that his or her responses might be used in future judicial proceedings); Rogers v. State, 814 N.E. 695 (Ind. Ct. App. 2004); Moscat, 777 N.Y.S. 2d 875; People v. Corella, 122 Cal. App. 4th 461 (Cal. App. 2d Dist. 2004)(preliminary questions by police at scene of crime not interrogation); Barnes, 854 A.2d 208, 211-12 (statements not given in structured police interrogation).

[15]Lopez did not have to consider dying declarations, which Crawford referred to as historical exceptions.

the apartment was to get medical treatment. She did not abscond, but was unavailable as she died as direct result of Williams' actions. Also, in the area of excited utterances, Lopez appears to be out of step with other jurisdictions which have analyzed this issue as outlined above. See Williams, 909 So.2d at 599. Even if the Court finds Lisa's excited utterances testimonial, her dying declarations fall outside Crawford.

Another exception Crawford explicitly preserved in its ruling was forfeiture by wrongdoing.[16] The Court noted forfeiture by wrongdoing applies when a criminal defendant is responsible for the witness's unavailability, thereby "extinguishing" his Confrontation Clause rights "on essentially equitable grounds." Id., at 62. In U.S. v. Mayhew, 380 F.Supp.2d 961 (S.D. Ohio 2005), the court held that, if, by a preponderance of the evidence, the declarant is unable because the defendant murdered her, he forfeits his Sixth Amendment claim, regardless of whether he was on trial for the murder

[16]The forfeiture by wrongdoing doctrine was codified in Rule 804(b)(6), Fed.R.Evid.(providing: "statements offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness."). While Florida's Evidence Code does not contain an identical provision, Florida retained the common law. Charles W. Ehrhardt, Florida Evidence, § 102.1 (2002 ed.)(explaining "if the provisions of the Code are not on point, the common law applies"). The common law of both England and the United States recognized the doctrine of forfeiture by wrongdoing. Lord Morley's Case, 6 State Trials, 770 (1666); Reynolds v. U.S, 98 U.S. 145, 159 (1878).

which caused the declarant's unavailability. See State v. Meeks, 88 P.3d 789, 794-95 (Kan. 2004) (basing holding on Crawford acceptance of forfeiture by wrongdoing); People v. Giles, 123 Cal. App. 4th 475 (2004). Williams forfeited any possible confrontation with Lisa when he killed her. He should not be heard to complain under these circumstances.

POINT II

THE COURT REMAINED NEUTRAL, AFFORDING WILLIAMS DUE PROCESS AND A FAIR TRIAL (restated)

It is Williams' position the court departed from its neutral position[17] by: (1) entering its suppression order before the parties argued; (2) finding a hearsay exception not raised by the State; and (3) finding CCP not requested by the State (IB 33-34). These issues unpreserved and without merit.

Suppression hearing order - The suppression hearing was bifurcated with several days between witness presentations and arguments. On April 7, 2003, the day the parties expected oral argument, the court admitted it had written its order believing it had received everything the parties were offering, yet, the court provided: "maybe I jumped the gun, but I read over all my notes (your motion, memoranda) and I thought I had taken it

[17]Review of a court's neutrality is *de novo*; Porter v. State, 723 So.2d 191, 196 (Fla. 1998), but to the extent the rulings address the conduct of the trial and evidence, review is abuse of discretion. Ray, 755 So.2d at 604.

under advisement ... I have it (order) on the computer ... but I'm willing to listen to these arguments. If anybody sways my mind, I'll be more than happy to deal with it." (SROA.1 154).

The defense did not object (SROA 155, 164, 166). Following the arguments, the court provided the parties with its order, signed and filed in open court on April 7th (ROA.4 320, 331-32; SROA.1 164, 166). Clearly, the parties had an opportunity to argue before the final decision was rendered. Any challenge to this procedure is unpreserved. Steinhorst. Likewise, there is no showing of partiality, as the court heard from the parties.

Sua sponte finding of hearsay exception - Williams submits a court is no longer impartial when it finds a basis for admission of evidence not raised by the State. Yet, Williams did not object to the court's order or seek a rehearing. The issue is unpreserved. Steinhorst. Even so, Williams has not cited a case which holds a judge cannot contemplate an alternate basis for admission of evidence. In fact, under Muhammad, 782 So.2d at 359 a "an evidentiary matter will be affirmed even if the trial court ruled for the wrong reasons, as long as the evidence or an alternative theory supports the ruling."

The cases cited by Williams[18] have the judge taking

[18]McFadden v. State, 732 So.2d 1180 (Fla. 4th DCA 1999) (informing prosecutor on how to establish case and what questions to ask); In re: McMillan, 797 So.2d560 (Fla. 2001)(making campaign promises in favor of police and

affirmative steps to assist the State by questioning witnesses, ordering evidence, or giving advice. That is not the case here. The state sought admission of Lisa's statements as a dying declaration; the court found the statements admissible as such (ROA.4 320-32), but also found the alternate ground of excited utterances. The result did not *sua sponte* add to the evidence, nor afford the State a better trial or appellate case. Muhammad, 782 So.2d at 359. The court was impartial.

CCP finding - Williams complains CCP was found in violation of due process, because the State did not ask for it and it was imposed before counsel was given an opportunity to argue the point. The claim is unpreserved[19] and refuted from the record.

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prosecution); Peek v. State, 488 So.2d 52 (Fla. 1986)(using racial slur when refering to witnesses); Chastine v. Broome, 629 So.2d 293 (Fla. 4th DCA 1993) (noting court passed note to prosecutor giving litigation advice); Williams v. State,901 So.2d 357 (Fla. 2d DCA 2005)(*sua sponte* suggesting amendment to information); Evans v. State, 831 So.2d 808 (Fla. 2d DCA 2002)(suggesting areas on inquiry); Lyles v. State, 742 So.2d 842 (Fla. 2d DCA 1999)(*sua sponte* ordering production of evidence); Asbury v. State, 765 So.2d 965 (Fla. 4th DCA 2000)(suggesting areas of inquiry for State); Sparks v. State, 740 So.2d 33 (Fla. 1st DCA 1999)(informing prosecutor how to impeach witness); J.F. v. State, 718 So.2d 251 (Fla. 4th DCA 1998) (*sua sponte* ordering evidence produced). Here, the court was not asking for added evidence; it was not giving advise. It merely noted there was another ground for the admission of the evidence beside the one successfully argued for by the State.

[19]The defense did not object to the court *sua sponte* considering CCP, nor did it claim a lack of notice to be heard at either the Spencer hearing or at sentencing. The matter is unpreserved. Steinhorst. Further, the court noted it would consider the defense memorandum; sentencing took place April

At the conclusion of the March 1, 2004 penalty phase, the court noted it thought the "pre-meditated aggravator" supported by the evidence, and wanted the parties to consider it. During the April 8th Spencer hearing, defense counsel noted he had found dicta in "Addison versus State" that all aggravation must go to the jury and that not submitted would violate Apprendi. Counsel stated he found no case addressing the instant situation (ROA.20 1721; ROA.21 1726-30). Clearly, the defense had notice and an opportunity to be heard. The issue is without merit.

Further, a court is not constrained to consider only aggravators presented to the jury, Davis v. State, 703 So.2d 1055, 1060 (Fla. 1997), Hoffman v. State, 474 So.2d 1178 (Fla. 1985); White v. State, 403 So.2d 331 (Fla. 1981). This Court on appeal may consider aggravators supported by the evidence, though not argued to and found by the judge, in accordance with the "responsibility to review the entire record in death penalty cases and the well-established appellate rule that all evidence and matters appearing in the record should be considered which support the trial court's decision." Echols v. State, 484 So.2d 568, 576-77 (Fla. 1986). Hence, there is no error for the judge to consider an aggravator *sua sponte*.

Williams has suffered no harm; the sentence was not

16th (ROA.22 1732-53).

contingent upon CCP, and three other aggravators were found. The State incorporates its **Point XV** and submits CCP was found properly. The sentence should be affirmed. See Hurst v. State, 819 So.2d 689, 694 (Fla. 2002) (refusing to reach issue of whether court may consider aggravator not sought by State as issue was unpreserved and aggravator was stricken on other grounds, but affirming sentence because valid aggravation remained and jury had not heard invalid aggravator); Hoffman v. State, 474 So.2d 1178, 1182 (Fla. 1985).

POINT III

THERE WAS NO ABUSE OF DISCRETION IN PERMITTING THE JURY TO USE A TRANSCRIPT OF THE 911 TAPE (restated)

Williams asserts it was error to permit the jury to use a transcript of the 911 tape as it: (1) contained exclamation points; and (2) invaded the jury's province by noting Lisa identified her attacker as "Ronnie." There was no abuse of discretion as the transcript was a demonstrative aid, authenticated by the 911 operator, and the jury was instructed properly on how the tape and transcript should be considered.[20]

The defense did not challenge the authenticity or clarity of the tape; rather, it asserted the State should not have its version of what was said placed before the jury (ROA.14 859-60).

[20]The standard of review for a demonstrative aid is abuse of discretion. See McCoy v. State, 853 So.2d 396 (Fla. 2003); Martinez v. State, 761 So.2d 1074 (Fla. 2000).

It argued the transcript, noting Lisa named "Ronnie", invaded the jury's province, and use of exclamation points when Lisa says she in pregnant was improper. The court heard the 911 tape during the suppression hearing[21] (SROA.1 66-71), and before the jury was provided a copy, the 911 operator averred she compared the transcript against the tape and found it accurate (ROA.14 866-70, 895). The court instructed: that the transcript was provided "merely [as] an aid to aid you in listening to the tape that is in evidence.... So, if there's a conflict between the transcript that is not in evidence, and the tape that is in evidence, you are to rely on the tape that is in evidence." (ROA.14 870-71). After the tape was played, the transcripts were collected (ROA.14 875). This procedure satisfies McCoy, 853 So.2d 402-06; Martinez, 761 So.2d at 1083-86; Macht v. State, 642 So.2d 1137, 1138-39 (Fla. 4th DCA 1994).[22]

In Martinez, 761 So.2d at 1083, this Court held: "the jury may view an accurate transcript of an admitted tape recording as an aid in understanding the tape so long as the unadmitted transcript does not go back to the jury room or become a focal

[21]The court heard the tape multiple times; this is the third time Williams has been tried. Williams v. State, 792 So.2d 1207 (Fla. 2001) (ROA.1 3-18; ROA.4 360; SROA.3-17).

[22]Williams cites to Stanley v. State, 451 So.2d 897 (Fla. 4th DCA 1984), but it was abrogated by Macht v. State, 642 So.2d 1137 (Fla. 4th DCA 1994) to the extent it was read to preclude use of transcripts with a tape.

point of the trial." "[W]here a transcribed version of an audio-video tape is used as an aid to the jury and there is no stipulation as to its accuracy, trial courts should give a cautionary instruction to the jury regarding the limited use to be made of the transcript." Id. at 1086 (citations omitted). This Court, in McCoy, 853 So.2d at 402, 4004-05 found the use of the transcript proper, even absent a stipulation, based on later witnesses authenticating it and the jury was instructed properly regarding use of the transcript.

The two challenges to the transcript Williams raised are different than stating that the transcript was inaccurate. Further, it is important, Williams does not find error with any other portions of the transcript, and the judge had heard the tape during the suppression motion, where the court reporter transcribed that Lisa identified "Ronnie" as her attacker.[23]

[23]When the 911 tape was transcribed during the suppression hearing and during trial, Lisa was credited with naming "Ronnie." This comported with what was provided to the jury as an aid. (SROA-evidence envelope). During the suppression hearing, the court reporter had Lisa as stating "Ronnie" stabbed her, but the 911 operator heard "Rodney" (SROA.1 66). This is the same transcription presented in the demonstrative aid (SROA-evidence envelope). During the trial, the court reporter noted both Lisa and the operator stated "Ronnie." (ROA.14 872). The disagreement between the court reporters as to how the operator responded to Lisa does not call into question the use of the demonstrative aid as the pith of Williams' complaint was what Lisa reported to the operator and what the jury saw. All transcripts agree Lisa said "Ronnie." The jury saw the transcript indicating the operator heard "Rodney", thus, supporting the defense at trial. Nonetheless, the jury heard

(SROA.1 66). The court did not abuse its discretion in using the demonstrative aid even though the parties did not stipulate. The proper cautionary instruction was given.

Even if Lisa's naming her attacker is discounted, she identified him by his relationship -- her attacker was a black male she knew to be dating the person who could be reached at the telephone number she supplied (ROA.14 872-73; ROA.19 1527; SROA.1 66; SROA-evidence envelope). Both Officer Gillespie and Detective James her Lisa identify her attacker as "Ruth's sister's boyfriend" (ROA.13 719-23; ROA.14 910). The use of the transcript as a demonstrative aid was proper, but if this Court finds otherwise, it use was inconsequential to the outcome of the trial given the officers' testimony combined with the fact Williams' print and blood were found in the apartment, his bite marks were on Lisa, and he had knife cuts to his hands, (ROA. 15 1033-34, 1059-63, 1100; ROA.16 1207-08, 1227-28, 1244-45).

POINT IV

LISA PREGNANCY WAS ADMITTED PROPERLY (restated).

Williams submits it was error to admit the 911 tape noting Lisa pregnancy as such was irrelevant and prejudicial[24] (IB 40 ROA.13 664, 724; ROA.14 872; ROA.20 1677). Contrary to his

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the tape and was instructed to make a decision based upon it, not the transcript.

[24]Admission of evidence is within court's discretion. Ray, 755 So.2d at 610.

claim, Lisa's pregnancy was relevant and admissible to prove aggravated battery for Williams' requested instruction for third-degree murder and for felony murder/sexual battery.

Under section 782.04(4), Florida Statutes (1991), third-degree murder may be proven by showing the underlying felony was an aggravated battery. Section 784.045(1)(b), Florida Statutes (1991) provides: "A person commits aggravated battery if the person who was the victim of the battery was pregnant at the time of the offense and the offender knew or should have known that the victim was pregnant." Williams socialized with Lisa and her boyfriend Julius. Given she was in her third trimester, Williams knew of her pregnancy, thereby making it relevantand admissible for the defense requested third-degree murder charge.[25] Discretion was not abused.

Moreover, the pregnancy supports sexual battery for felony murder (ROA.16 1260-62; ROA.18 1355-92, 1403-05), as noted in a pre-trial hearing before the second trial. There the court

[25]Although contained in the defense argument for a new penalty phase jury, the court's findings are instructive. There, the court found Williams could not complain about the jury hearing of Lisa's pregnancy when the defense had asked for the lesser charge of third-degree murder. In response to the defense allegation that they asked for third-degree murder only after Lisa's pregnancy was revealed, the court stated: "No, in other words you requested Third degree murder, and you knew in advance that one of the elements was that the state had to prove an aggravated battery. ... And one of the elements of aggravated battery is that there was a battery, and the woman was pregnant. So, it seems like you sort of invited that." (SROA.1 203-04).

stated: “the state is bringing in the pregnancy of Lisa Dyke for pre-emptive reasons ... that felony murder took place, and that felony was rape ... the fact that she was pregnant, ready to give birth, is evidence of a lack of consent that the state is trying to prove.” (SROA.11 1292). See Muhammad v. State, 782 So.2d 343, 359 (Fla. 2001) (opining court’s evidentiary ruling will be upheld even if the ruling was for the wrong reasons as long as evidence or alternative theory supports ruling).

The fact Lisa was nearly eight months pregnant with another man’s baby was relevant to show her lack of consent to Williams. See Thomas v. State, 328 S.E.2d 422, 424 (1985) (opining while mere fact rape victim was pregnant may not be relevant, when the victim is in her 40th week both sides may argue the matter of consent); People v. Cook, 186 A.D.2d 879, 880-81 (1992) (finding evidence of non-consent in part based on victim being eight months pregnant). The pregnancy was relevant to show use or threat of use of deadly or actual physical force likely to cause serious personal injury. See Thompson v. State, 258 So.2d 926 (Ala. 1972) (finding evidence, including pregnancy, supports rape conviction); State v. Gray, 556 So.2d 661, 667 (La.Ct.App. 1990) (affirming rape where victim pregnant); People v. Cook, 186 A.D.2d 879, 880-81 (1992) (finding evidence of forcible compulsion based in part on eight-months pregnancy and fear for baby); Commonwealth v. Jones, 672 A.2d 1353, 1355 (1996) (same).

Williams claims the pregnancy was irrelevant an more prejudicial to the penalty phase (IB 40, 43; ROA.20 1677). The court found the pregnancy relevant to HAC in that it increased Lisa's anxiety due to her concern for the health of her child (ROA.5 417). Contrary to Williams instant challenge, evidence of Lisa's pregnancy was relevant to HAC, and not unduly prejudicial. Hall v. State, 614 So.2d 473, 482 (Fla. 1993) (finding crime heinous wwere seven month pregnant woman killed); cf. Muehleman v. State, 503 So.2d 310, 317 (Fla. 1987)(finding portrayal of victim as "feeble, sickly, 97-year-old man" was "highly relevant" in aggravators including HAC). Lisa's pregnancy was relevant to HAC; there was no abuse of discretion.

The State does not agree that the mere mention of pregnancy is more prejudicial than probative.[26] "[C]riminal takes his victim as he finds him and 'can not be excused from guilt and punishment because his victim was weak and could not survive the torture he administered.'" Brate v. State, 469 So.2d 790, 795

[26]The mere mention of pregnancy is not *per se* reversible. See Jackson v. State, 545 So.2d 260, 265 (Fla. 1989)(rejecting claim revealing pregnant victim killed was unduly prejudicial); Bolden v. State, 404 So.2d 417, 418 (Fla. 1st DCA 1981) (finding pregnancy admitted properly in attempted murder case); Valentine v. State, 688 So.2d 313, 315 (Fla. 1996)(same); Slawson v. State, 619 So.2d 255, 256 (Fla. 1993)(finding evidence admitted without objection that defendant shot eight-month-pregnant victim, slit her open, and left dead fetus near couch); Keen v. State, 504 So.2d 396 (Fla. 1987); Ruffin v. State, 589 So.2d 403 (Fla. 1991); Pulido v. State, 566 So.2d 1388 (Fla. 3d DCA 1990).

(Fla. 2d DCA 1985) (quoting Swan v. State, 322 So.2d 485, 487 (Fla. 1975)); Maynard v. State, 660 So.2d 293, 296 (Fla. 2d DCA 1995). The pregnancy was an intrinsic fact which could no more have been excised from the evidence than the fact Lisa was an 18 year-old female. Sex and age, are so inherent, no one thinks to keep them from the jury. Cf. Allen v. State, 662 So.2d 323, 328 (Fla. 1995) (referencing victim's family proper where defense depicted victim as "nice, old grandmother" with "large family"). Unless the fact is used to evoke sympathy, its existence does not render it inadmissible. As reasoned in Muehleman, 503 So.2d at 317, referring to the victim as a "feeble, sickly, 97-year-old man" could tend to excite the jury's passion, but this Court could not "rewrite on the behalf of the defense the horrible facts of what occurred or make the slaying appear to be less reprehensible than it actually was." Cf. Henderson v. State, 463 So.2d 196, 200 (Fla. 1985) (rejecting presumption gruesome photographs will inflame jury -- defendants "should expect to be confronted by photographs of their accomplishments").

The same is true here. Although Williams could have picked a less sympathetic victim, he picked Lisa, an 18 year-old pregnant female. Just as a defendant should not be shielded from the prejudice inherent in crime photographs, he should not be protected from the victim's inherent physical attributes. See Muehleman, 503 So.2d at 317. Cf. Parker v. State, 641 So.2d

369, 377 (Fla. 1994) (finding no error in mentioning defendant left victim to bleed to death in street with children watching); United States v. Salameh, 152 F.3d 88, 122-23 (2d Cir. 1998) (affirming use of testimony and photo of pregnant victim as such probative of crime and expert's conclusions).

Williams' reliance on Lewek v. State, 702 So.2d 527 (Fla. 4th DCA 1997), Vaczek v. State, 477 So.2d 1034 (Fla. 5th DCA 1985); and Campbell-Eley v. State, 718 So.2d 327 (Fla. 4th DCA 1998), is misplaced. In Lewek, 702 So.2d at 530, the defendant was charged with vehicular homicide in the deaths of "young pregnant mother and her eighteen-month-old son" and in a pre-trial ruling, the mother's pregnancy was admissible, but her delivery date (three days after the accident) was not. Notwithstanding, the victim's mother blurted out the victim had been shopping for clothes for her baby who had been due in three days. The court denied a mistrial, but gave a cautionary instruction. Id. at 533-34. The district court reversed, noting the irrelevancy of the pregnancy, but pointing to the deciding factor being the mother's outburst regarding the due date and clothes shopping coupled with an inadequate curative. Id. Had the mother not blurted out these facts, it is unclear whether the court would have reversed.

In Vaczek, the state agreed not to seek evidence the defendant stabbed a pregnant co-worker, who lost her baby and

the court granted the defense motion in limine. Despite this, the state elicited the information. In reversing, the court found the state's actions reprehensible in light of the ruling and found the unborn child's death an inflammatory fact which could not be cured by an instruction and the evidence of guilt was not overwhelming. Vaczek, 477 So.2d at 1035. See Campbell-Eley, 718 So.2d at 327-29 (permitting voir dire on jurors' feelings about fetus' death proper even though not relevant to second-degree murder). Unlike Vaczek, Lisa's pregnancy was relevant, there was overwhelming evidence of guilt, and the child's health after the cesarean was undisclosed.

In Lewek, Vaczek, and Campbell-Elly, the fact the victim was pregnant, was not, by itself, the basis for reversal. Rather, it was the introduction of more inflammatory information, namely, the child's death. Here, Lisa's pregnancy was mentioned six times in the guilt and penalty phases.[27] It was not a feature of the trial, nor used to inflame the jury.

There was overwhelming evidence of Williams' guilt; and Lisa's pregnancy pales in comparison to the facts: (1) she identified Williams as her attacker to the 911 operator and

[27](1) State's guilt phase opening as identifying feature (2) Gillespie's description of initial encounter; (3) Lisa on 911 tape; (4) State's guilt phase closing when tape replayed; (5) jury's playback of 911 tape; and (6) penalty phase in support of HAC (ROA.13 684, 725; ROA.14 871-75 ROA.18 1480; ROA.19 1527-30; ROA.20 1676-78; SROA-evidence envelope).

police including picking out his photo; (2) Williams' bloody print and blood were found in the apartment, which less that an hour earlier was pristine; (3) Lisa and Ruth were involved in prior night's conversation precipitating Stephanie's break-up with Williams; (4) knife found in the apartment was consistent with the stab wounds to Lisa's chest and back; (5) there were cuts to Williams' hands consistent with "slippage" down a hilt-less knife when the knife hit the sternum and ribs; and (6) Williams' bite marks were found on Lisa (ROA.13 720-24; ROA.14 828, 830-33, 844-45, 871-75, 880-84, 910915-16, 919-20; ROA.15 1033-34, 1059-60, 1063, 1100; ROA.16 1145-56, 1166-72, 1207-08, 1226-30, 1244-45, 1251). The quality and quantity of evidence refutes any claim the few references to Lisa's pregnancy caused the conviction or death recommendation. This Court should affirm the conviction and sentence.

POINT V

THE TRIAL COURT CORRECTLY SUBMITTED A FELONY-MURDER CASE TO THE JURY (restated)

Conceding he failed to raise this argument below (IB 44), Williams argues it was fundamental error to submit a felony murder case to the jury because felony murder requires the death to occur before the felony ends, and Lisa's death did not occur until 19 days later. This Court will find the felony murder case submitted properly because there was "no break in the chain

of events" between the underlying felony and Lisa's death; thus, her death fell under the purview of felony murder.

Williams admits he failed to raise this argument below, either in his motion for a judgment of acquittal (JOA") on the felony murder charge or in his challenge to the felony murder jury instruction (ROA 17, 1355-66). Hence, he is not entitled to relief unless he can prove fundamental error. Steinhorst, 412 So. 2d at 338; Castor v. State, 365 So.2d 701, 703 (Fla. 1978).

Williams has failed to demonstrate fundamental error[28] from the felony murder cases going to the jury. First-degree felony murder is defined in section 784.02 (1)(a), Florida Statutes as killing a human during the course or escape from one if of the enumerated felonies (here sexual battery). Parker v. State, 641 So.2d 369, 376 (Fla. 1994). This Court has held "**in the absence of some definitive break in the chain of circumstances beginning with the felony and ending with the killing, the felony, although technically complete, is said to continue to the time of the killing**." Id., at 376, citing Parker v. State, 570 So.2d

[28]Fundamental error is the type of error that "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Brown v. State, 894 So.2d 137, 159 (Fla. 2004). See J.B. v. State, 705 So.2d 1376, 1378 (Fla. 1998). It "should be applied only in rare cases where a jurisdictional error appears or where the interests of justice present a compelling demand for its application." Smith v. State, 521 So.2d 106, 108 (Fla. 1988).

1048, 1051 (Fla. 1st DCA 1990) and Mills v. State, 407 So. 2d 218, 221 (Fla. 3rd DCA 1981).[29] This Court "focus[es] on the time, distance, and causal relationship between the underlying felony and the killing" in determining whether there has been "a break in the chain of circumstances" between the killing and the felony. Williams, 776 So.2d at 1070, citing Parker, 570 So.2d at 1051. "Neither the passage of time nor separation in space from the felonious act to the killing precludes a felony murder conviction when it can be said ... that the killing is a predictable result of the felonious transaction." Williams, 776 So.2d at 1070, citing Mills, 407 So. 2d at 221.

Here, it is undisputed there was "no definite break in the chain of circumstances" between the underlying felony, i.e., the sexual battery, and Lisa's death from the stab wounds inflicted during that sexual battery. Indeed, her death was the "predictable result" of the numerous, life-threatening stab wounds Williams inflicted during the sexual battery. During the rape, he inflicted at least seven stab wounds to Lisa's chest and back, which went through her sternum and ribs, puncturing her pericardial sac and lungs. She was rushed to the hospital

[29]See State v. Williams, 776 So.2d 1066 (Fla. 4th DCA 2001), citing McFarlane v. State, 593 So. 2d 305, 306 (Fla. 3d DCA 1992) (holding that no "break in the chain of events" occurred to relieve the defendant of "criminal responsibility for the deal of his accomplice").

where emergency surgery was performed and other extraordinary measures taken in an attempt to save her life; she was put on a ventilator to breathe and later into a drug induced coma so that her body might heal. Lisa spent the next 19 days in ICU, fighting for her life. She ultimately succumbed to the massive injuries, having never left the hospital. Lisa's death was the direct result of the brutal stabbing she suffered while being raped and clearly constitutes felony murder.

Stephens v. State, 787 So.2d 747 (Fla. 2001),[30] cited by Williams in support of his argument that felony murder requires the death to occur before the felony ends, is inapplicable. On appeal, the defendant argued it was error to deny his motion for JOA on the felony murder because the kidnapping ended when he left the child alive in the car prior to his death by hyperthermia. This Court rejected that argument, holding, under the facts of this case, "it cannot be said that the kidnapping had ceased prior to the child's death since the child, based on his age and the totality of the circumstances, was never at a

[30]In Stephens, the defendant broke into a home, robbed its occupants and kidnapped the homeowner's 3 year-old son as "insurance," telling the father he would leave the child at the corner if he were not followed. Later, the child was found dead, in a car parked a few blocks away. The State's theory was that the boy had been suffocated, but the defendant argued that the boy was alive when he left him at about 2:30 p.m. in the car with the windows rolled up, doors locked, on a sunny, 82-degree day. The defendant argued the child died of hyperthermia, while the medical examiner listed the cause of death as asphyxiation.

place of safety before he died." Id. at 754. In so holding, this Court noted "[t]his was a three-year old child who was left in an automobile with the windows and doors closed. Earlier, the child had observed his kidnapper as he brandished a gun and threatened the other members of the household." Id. This Court concluded the kidnapping had not ended before death occurred.

Stephens holds only that the felony/kidnapping, was still taking place at the time the child died (because the child had never reached a place of safety) and thus, felony murder was properly submitted to the jury. It does not hold that a death must occur before the felony ends to qualify as felony murder. Consequently, it is inapplicable to the case at bar where the felony had ended, but there was "no break in the chain of events" between it and Lisa's death. Because the kidnapping in Stephens was still occurring when the child died, this Court did not analyze the case under the "no break in the chain of events" standard; yet, it is clear nothing in Stephens calls into doubt this Court's holding in Parker and the holdings of the district courts. Williams' argument lacks merit; this Court must affirm.

POINTS VI AND VII

THERE WAS SUFFICIENT EVIDENCE OF SEXUAL BATTERY TO SUPPORT AN INSTRUCTION ON FELONY MURDER IN THE GUILT PHASE AND TO SUPPORT AN INSTRUCTION ON THE FELONY MURDER AGGRAVATOR IN THE PENALTY PHASE (Restated).

Williams raises two arguments in **Point VI.** In the Point-

Heading he argues the court erred by instructing the jury on felony murder during the guilt phase and on the felony murder aggravator during the penalty phase because there was insufficient evidence of the underlying sexual battery. Yet, in the body of the argument, he claims the court erred by denying a JOA on the felony murder charge. The State will address both arguments and maintains this Court will find the judge correctly denied the JOA and properly instructed the jury.

Motion for JOA, Jury instruction on felony murder and evidence supporting felony murder conviction - A *de novo* standard of review applies to motions for JOA. Pagan v. State, 830 So.2d 792, 803 (Fla. 2002). This Court has stated:

> In reviewing a motion for judgment of acquittal, a *de novo* standard of review applies. ... Generally, an appellate court will not reverse a conviction which is supported by competent, substantial evidence. ... If, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, sufficient evidence exists to sustain a conviction. ... However, if the State's evidence is wholly circumstantial, not only must there be sufficient evidence establishing each element of the offense, but the evidence must also exclude the defendant's reasonable hypothesis of innocence. ... Because the evidence in this case was both direct and circumstantial, it is unnecessary to apply the special standard of review applicable to circumstantial evidence cases.

Pagan, 830 So.2d at 803 (citations omitted). See Conde v. State, 860 So.2d 930, 943 (Fla. 2003) (noting where State produced direct evidence, court's determination will be affirmed

if record contains competent, substantial evidence to support ruling); Crump v. State, 622 So.2d 963, 971 (Fla. 1993). Williams argues the evidence of sexual battery here was wholly circumstantial and thus, the "circumstantial evidence" standard applies. However, as will be discussed below, he State presented direct and circumstantial evidence of the sexual battery in this case; consequently, "it is unnecessary to apply the special standard of review applicable to circumstantial evidence cases." Pagan, 830 So.2d at 803.

When a defendant seeks a JOA, he "admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence." Lynch v. State, 293 So.2d 44, 45 (Fla. 1974). "The credibility and probative force of conflicting testimony should not be determined on a motion for judgment of acquittal." Lynch, 293 So.2d at 45. This Court will find the court properly denied the JOA, properly instructed the jury on felony murder, and there is competent, substantial evidence supporting the felony murder finding.

The sole count in the indictment was first-degree murder. The State proceeded under both premeditated and felony murder, with sexual battery as the underlying felony. Williams moved for a JOA on felony murder, arguing there was insufficient

evidence of the sexual battery.[31]

When taken in the light most favorable to the State, the evidence shows Williams killed Lisa during the commission of, or attempt to commit, a sexual battery. At 8:33 a.m., about three minutes after Lisa's 911 call, Gillespie was the first to arrive on scene, only to find 18 year-old pregnant Lisa nude, holding clothing to cover herself. She was wet and bloody, with multiple stab wounds to her chest and back, very upset, and beginning to lose consciousness. In the apartment, noisy with police radios and paramedic equipment, Gillespie heard Lisa respond to him that "Rodney" did this, but Detective James, overheard Lisa say the name "Ronnie" (ROA.13 715-16, 720-23 ROA.14 932-33). Lisa added her assailant was "Ruth's sister's boyfriend" and unsolicited, reported "he raped me."[32] She gave the police the telephone number of Ruth's sister. Lisa's

[31]Pursuant to section 794.011, Florida Statutes (2005), sexual battery is non-consensual "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object...." Under section 782.04, Florida Statutes, felony murder occurs when a person is killed during the perpetration of, or in the attempt to perpetrate any of 17 enumerated felonies, including sexual battery. In order to prove felony murder here, the State had to prove Lisa was killed during the perpetration of or attempt to perpetrate sexual battery.

[32]Without giving a record cite, Williams alleges "[t]he foremost piece of evidence [of sexual battery] is Lisa Dyke's statement in the 911 call that Ronnie Williams 'raped her.'" (IB 47). However, as noted under **Point I, fn. 7** the 911 tape does not contain a reference to being "raped." Instead, that information comes in through the first responding officers.

statement to the officers about what she experienced, admitted as a "dying declaration," was **direct evidence** of a sexual battery as she was an eyewitness to the crime. See Thomas v. State, 894 So.2d 126, 132 (Fla. 2004) (noting State's evidence regarding sexual battery was circumstantial because there was no eyewitness testimony regarding sexual act).

In addition to Lisa's statement, the State presented circumstantial evidence showing the commission of a sexual battery. Lisa had bite marks on her left breast, back, right arm near her shoulder, inside left arm and groin/vaginal area which were made by a "ripping type bite, a pulling." (ROA.14 922-25; ROA.16 1156-60, 1240-44). An expert odontologist testified the cast of Williams' teeth matched the bite marks on Lisa's left breast and back. (ROA.16 1227-28, 1245-48, 1251). Further, Lisa had defensive wounds, including cuts between her fingers from grabbing the knife (ROA.16 1166-67). Ms Mylott, who lived in the next door apartment, testified she heard a woman screaming, at about 8:00 a.m., which lasted about five minutes. About 20 to 30 minutes later, the police/paramedics arrive (ROA.14 846-58). Moreover, as analyzed in **Point IV** and incorporated here, Lisa was almost eight months pregnant, which is relevant to show lack of consent and threat or use of force. See Thomas, 328 S.E.2d at 424; Cook, 588 N.Y.S.2d at 920-21; Jones, 672 A.2d at 1355; Thompson, 258 So.2d 926.

Based on this, the court correctly denied Williams' motion for JOA (ROA.16 1259-62). This Court has affirmed similar denials of JOA's where the evidence of **an attempt** to commit a sexual battery was much less compelling than here, including attempts where the evidence was wholly circumstantial. See Gudinas v. State, 693 So.2d 953, 962-63 (Fla. 1997)(finding undisputed witness testimony that defendant followed victim, thrice tried to forcibly enter car, attempted to smash window while screaming, "I want to f__ you," and only ceased when victim blew horn was sufficient to send attempted sexual battery to jury); Barwick v. State, 660 So.2d 685, 695 (Fla 1995), overruled in part, on other grounds, Topps v. State, 865 So.2d 1253, 1258 (Fla. 2004)(finding deplacement of victim's bathing suit and semen stain near body sufficient to prove attempted rape); Sochor v. State, 619 So.2d 285, 290 (Fla. 1993)(finding sufficient evidence of attempted sexual battery where last time victim seen alive she was being held and kissed by defendant).

Further, the court properly instructed the jury on the felony murder, and there is substantial, competent evidence a sexual battery was being committed or attemped at the time Lisa was stabbed (ROA 1355-92, 1403-06, 1492-94). There is both direct and circumstantial evidence of sexual battery by Williams. Whether to believe Lisa, what weight to accord her dying declaration, and the inferences drawn from the evidence

were issues for the jury. See Donaldson v. State, 722 So.2d 177, 182 (Fla. 1998) (finding contradictory evidence does not warrant acquittal as weight/credibility of evidence are jury questions); State v. Law, 559 So.2d 187, 189 FLA. 1998) (noting evidence and reasonable inferences therefrom, must be taken in light most favorable to State); Woods v. State, 733 So.2d 980 (Fla. 1999).

This Court has affirmed cases where evidence of sexual battery was much less compelling, including where the evidence was wholly circumstantial. See Boyd v. State, 910 So.2d 167 (Fla. 2005) (circumstantial evidence that victim did not know Boyd was last seen alive with him, bruising consistent w/ consensual/non-consensual sex, Boyd's semen found on victim's thighs, bruising on victim's inner thighs and vaginal area, victim's blood was found in defendant's apartment; and Boyd's DNA under the victim's fingernails sufficient to overcome JOA); Fitzpatrick v. State, 900 So.2d 495, 508-09 (Fla. 2005)(finding circumstantial evidence sufficient where defense of consensual sex with victim was contravened by circumstances under which victim's body found, including penetrating wound in victim's breast area that was either another stab wound or bite mark, along with bruising and scratches on victim's arms and legs).[33]

[33]See also Thomas v. State, 894 So.2d 126 (Fla. 2004) (finding circumstantial evidence of witness seeing defendant and victim arguing and defendant snatching victim's keys as he pushed her into car contravened defendant's theory of innocence

Not only was there circumstantial evidence, Lisa was found nude, with bite marks to her breast and groin area, but there was direct evidence, from her, that she was raped by Williams. This evidence was sufficient to submit the felony murder/sexual battery charge to the jury. The cases relied upon by Williams are inapposite as they involve "wholly circumstantial" evidence and the attendant standard of review (IB 47). While Cox v. State, 555 So.2d 352, 353 (Fla. 1990) and Hall v. State, 107 So. 246 (1925), stand for the proposition "[c]ircumstantial evidence must lead to a reasonable and moral certainty that the accused and no one else committed the offense charged," none state "circumstantial evidence must lead to a reasonable and moral certainty" of sexual intercourse, as Williams argues (IB 47).[34]

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of consensual sex); Carpenter v. State, 785 So.2d 1182, 1186, 1195-96 (Fla. 2001)(finding sufficient evidence shown to prove sexual battery where deceased had bruises to her body and head, no defensive wounds, and medical examiner agreed it was possible vaginal injuries were result of consensual/non-consensual sex).

[34]Even if this were analyzed as a "circumstantial evidence" case, this Court would find the evidence sufficient to uphold the denial of the motion for JOA. Williams' "hypothesis of innocence," was that he was intoxicated on drugs and alcohol so he was unsure if he had been to the apartment (ROA.17 1445, 1456-65). Williams was advised and acknowledged that voluntary intoxication was not a defense to felony murder (ROA. 17 1279). There is sufficient evidence contradicting this theory. Lisa identified Williams as the man who raped and stabbed her and Williams' fingerprint and blood were found in the apartment; his bite marks were on Lisa's body. Lisa's identification of Williams as her attacker and the physical and circumstantial evidence collected showed he was present in the apartment that morning, and adequately refuted his "hypothesis." Williams

Finally, his contention that the court agreed Lisa's statements could not form the basis of a rape conviction and that the other evidence was insufficient to show a sexual battery is meritless. The record reflects the court initially refused to give the felony murder instruction as it was applying the wrong legal standard, i.e., requiring proof beyond a reasonable doubt of a rape or attempted rape in order to warrant a jury instruction (ROA 1355-66). However, the State correctly pointed out "proof beyond a reasonable doubt" is an issue for the jury and not the test for whether a jury instruction is warranted and the court agreed (ROA 1369-92, 1403-05).[35]

Admissibility of Lisa's statement (Points VI and VII) - Williams claims the "foremost piece of evidence" of sexual battery was Lisa's statement, in the 911 call, that Williams "raped her." (IB 47)(see Point I, fn 7, *supra*) He argues that statement is inadmissible opinion testimony on a legal matter, which should not have been considered in deciding both the motion for JOA and whether to give a felony murder instruction.

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alternative defense, that if he was present at the apartment, he was too intoxicated on drugs and alcohol to know what he was doing, is akin to a "diminished capacity" defense which is inadmissible in Florida and which does not negate his culpability for felony murder.

[35]Williams' claim that it was error to instruct on the felony-murder aggravator is without merit. In addition to not raising this argument below, the jury found Williams guilty of both premeditated and felony-murder.

The State notes **Point VII** contains a separate challenge to the admissibility of Lisa's 911 statement; but because the same arguments regarding admissibility are raised in **Points VI and VII**, both will be addressed herein.

Williams' challenge to the admissibility of Lisa's 911 statement should be found unpreserved. While he challenged the evidence relied upon to prove sexual batty on hearsay and sufficiency grounds, he did not claim the statement constituted impermissible opinion testimony.[36] Because he failed to raise the issue below, he cannot raise it now. Steinhorst.

Moreover, even if this Court were to consider the merits, it is clear Lisa's statement was admissible.[37] As discussed under **Point I** and incorporated herein, Lisa's statement to Gillespie that she was "raped" by Williams qualifies as both a

[36]Rather, in his Motion to Suppress, Williams argued Lisa's statements to 911 and to the police were inadmissible hearsay. Thereafter, at trial, Williams requested, prior to opening statements, that the State be prohibited from referring to Lisa's statement that she was "raped" in its opening, arguing there was "no evidence" of a sexual battery in this case and "the claim that she was raped in and of itself" was not sufficient to get it to a jury." (ROA.12 664-65). Williams filed a Motion in Limine but did not challenge the admissibility of Lisa's statement that she was "raped" therein (ROA.2 74-75; 292-99, 320-32). Instead, he waited until just prior to opening statements to preclude the State from referencing Lisa's statement that she was "raped."

[37]The admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion. Ray, 755 So.2d at 610; Zack, 753 So.2d at 25.

"dying declaration" and an "excited utterance," and thus, was admitted properly. Despite that finding, Williams claims the statement constitutes inadmissible opinion testimony. The State disagrees that Lisa's statement is an opinion, rather than a factual assertion. "Rape" is a non-legal term which is defined in Webster's dictionary as "the unlawful act of forcing a female to have sexual intercourse," or "any act of sexual intercourse that is forced upon a person." It is commonly and universally understood, in the everyday vernacular; "rape" means non-consensual sexual sex. When Lisa told Gillespie she had been "raped" she was describing what she had suffered as best she could. It would not make sense for Lisa to tell Gillespie that Williams inserted his penis into her vagina against her will. That would be an unnatural and extremely embarrassing way for her to express what he had done to her. By reporting she had been "raped," Lisa fully and adequately conveyed what she had suffered in the most widely understood way.

Also, even if this Court agrees it constitutes an opinion, it was admissible lay opinion testimony under section 90.701(1), Florida Statutes (2005).[38] For the reasons expressed previously,

[38]A lay opinion is admissible, when "(1) [t]he witness cannot readily, and with equal accuracy and adequacy, communicate what he or she has perceived to the trier of fact without testifying in terms of inferences or opinions and the witness's use of inferences or opinions will not mislead the trier of fact to the prejudice of the objecting party; and (2)

it would be most difficult and humiliating for Lisa to describe to Gillespie the sex acts she suffered, as she lay bleeding from multiple knife wounds. Instead, the best way for her to adequately and readily communicate Williams actions was to report being rapped. The statement was admissible.[39]

Williams' reliance upon State v. Larson, 389 N.W.2d 872 (Minn. 1986), Farley v. State, 324 So.2d 662 (Fla. 4th DCA 1975), Libby v. State, 540 So.2d 171 (Fla. 2d DCA 1989), Nichols v. State, 340 S.E.2d 654 (Ga. Appeals 1986), and Brooks v. City of Birmingham, 488 So.2d 19 (Ala. Appeals 1986), is misplaced as all are immediately distinguishable from this case and do not render the statement improper lay opinion testimony. For example, in Larson,[40] the victim was giving her lay legal opinion

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[t]he opinions and inferences do not require a special knowledge, skill, experience or training."

[39]By analogy, this Court has consistently held that non-expert witnesses can detail facts known to them which show insanity and thereupon *express* an opinion as to the sanity of the person whose mental condition is being investigated. The value of such testimony would depend largely upon the opportunities of the witnesses to observe the appearances and conduct of the person whose mind is claimed to be unsound. Brown v. State, 245 So.2d 68 (Fla. 1971); Garron v. State, 528 So.2d 353 (Fla. 1988) (detective allowed to give opinion testimony as to defendant's sanity); Hixon v. State, 165 So.2d 436, 441 (Fla. 2d DCA 1964)

[40]The issue in Larson was whether a sexual battery victim could be cross-examined about a letter she had written to the prosecutor asking that the charges be dropped against the defendant, her former boyfriend and father of her children. In the letter, the victim opined that the defendant's conduct did not fall within the statutory definition of first or third

about the statute in order to convince the state to drop the charges against he former boyfriend and father of her children. She was not describing what happened to her as Lisa was here. Similarly, Farley; Nichols; and Brooks are distinguishable.[41]

Even assuming the statement was inadmissible, the conviction should be affirmed as the jury found premeditation. See San Martin v. State, 717 So.2d 462, 470 (Fla. 1998) (opining "reversal is not warranted where the general verdict could have rested upon a theory of liability without adequate evidentiary support when there was an alternative theory of guilt for which

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degree criminal sexual conduct. The Minnesota court held that the victim's lay opinion about whether the defendant's conduct "fit" the statutory definition of criminal sexual conduct did not meet Minnesota's definition of admissible lay opinion testimony as would not have been helpful to the jury in determining whether force or coercion existed or in understanding her factual testimony about the night's events.

[41]In Farley, the district court held that it was impermissible for a medical expert to opine a woman had been raped based solely upon the presence of semen in her vagina and the fact the defendants admitted beating her (after consensual sex) for attempting to steal from them. See Libby (citing Farley in approving court's disallowance of an opinion from a doctor as to whether the defendant committed lewd acts). Similarly, in Nichols, the court held it was impermissible for a doctor to testify the victim had been raped based upon the fact that a vaginal tear indicated "force" had been used. The court found it permissible for the doctor to testify force was used, in his opinion, but it was not proper to opine about the ultimate legal conclusion which necessarily involved issues, such as lack of consent, which his examination did not reveal. Brooks is inapposite as it involved characterizations of telephone calls as being "harassing or obscene" in a business record, which the court found to be harmless as the victim testified the calls were harassing and obscene.

the evidence was sufficient"). The State incorporates its **Point VIII** to support the finding of premeditation.

POINT VIII

MOTION FOR JUDGMENT OF ACQUITTAL RESPECTING PREMEDITATION WAS DENIED PROPERLY (restated)

Williams contends his motion for JOA on premeditation should have been granted because: (1) a weapon was not brought to the scene; (2) there was no forced entry; (3) there were no lethal wounds; and (4) Lisa was left ambulatory, able to seek aid (IB 54-55). The State disagrees and submits the direct and circumstantial evidence, analyzed in favor of the State, is *prima facia* case of premeditation supporting the court's ruling.

As noted in **Point VI,** Pagan, 830 So.2d at 803, sets forth the standard of review for the denial of a motion for JOA. Likewise, the less stringent test should be applied as we have direct evidence in the form of the victim's 911 statement that Williams stabbed her multiple times in the chest and back and her similar report to the responding officers (ROA.14 871-75; SROA-evidence envelope). Pagan, 830 So.2d at 803. Even if the circumstantial evidence standard is used, the evidence is overwhelming that premeditation was proven. The State's evidence rebuts Williams' hypothesis of innocence, although it would submit, his hypothesis was unreasonable.

Williams' defense was voluntary intoxication from large

amounts of alcohol and drugs taken after his break-up with Stephanie so he was unsure if he had been in the apartment that morning, but if he had, he was too intoxicated to form an intent to kill. He discounted the bite marks as not being photographed properly to make comparisons, and he had been to the apartment previously, thus the fingerprint match should be minimized. Counsel argued there was no intent to kill because the perpetrator did not go to the apartment armed. (ROA.17 1445, 1448-49, 1452, 1456-65).

As this Court noted in Boyd:

> Premeditation may "be formed in a moment and need only exist 'for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of that act.'"... Premeditation can be inferred from circumstantial evidence such as "the nature of the weapon used ... the manner in which the homicide was committed, and the nature and manner of the wounds inflicted." ... Moreover, "[t]he deliberate use of a knife to stab a victim multiple times in vital organs is evidence that can support a finding of premeditation."

Boyd, 910 So.2d at 182. See Jimenez v. State, 703 So.2d 437 (Fla. 1997); Sochor v. State, 619 So.2d 285, 288 (Fla. 1993).

In addition to Lisa's statements that Williams stabbed her in the chest and back, raped her, and bit her (ROA.14 871-75; SROA-evidence envelope), there was evidence Williams was motivated to attack Lisa because Ruth was not home. He armed himself and stabbed and bit Lisa. The fact Williams' DNA and bloody finger prints were in the apartment, which had been

pristine less than an hour before, refutes his hypothesis of innocence. The fact that Williams can remember in detail his actions before the crime including exactly how much he allegedly drank and how many crack cocaine rocks he used, further refutes his hypothesis of innocence.

The attack was made the morning after Lisa and Ruth were involved in a conversation resulting in Williams' break-up with Stephanie, which up-set him greatly. His bloody fingerprint, blood, and DNA were found in the apartment where he had not bled before, and there were cuts to his hands consistent with "slippage" on a knife similar to the one found at the scene. Williams' bite marks were found on Lisa's body. (ROA.13 779-81; ROA.14 827-28, 830-31, 871-75, 880-84, 897-901; ROA.15 1013-20, 1033-34, 1059-60, 1063; ROA.16 1167-71, 1244, 1251, 1256-57). He armed himself with a knife found in the apartment, and this knife had Lisa's blood on it. (ROA.14 832-33; ROA.15 1100). She was stabbed seven times in the chest and back, and had defensive wounds.[42] She cried for help, and a blood trail from room to room was found (ROA.13 791; ROA.14 848-51, 912-13). All this

[42]Dr. Wright found Lisa suffered defensive wounds and seven stab wounds – one to the chest, which was four inches deep, went through the sternum, one of the stronger bones, and punctured the pericardial sac, slicing along the heart itself, barely missing the right vertical and six to the back going through ribs and into the lungs. The knife recovered was consistent with making these wounds and had Lisa's blood on it. (ROA.16 1145-50, 1152-54, 1166-67, 1171-72, 1207-08).

points to a thoughtful, sustained attack.

Moreover, he was able to navigate from his home to Lisa's and back again, a 15 minute drive each way, and get to the second floor apartment, unseen. Further, he was able to bandage his cut hands. The mere fact she did not die immediately, does not diminish the intent with which Williams acted, only his efficiency. Not only does the sustained attack, placement of stab wounds to the heart area and lungs prove premeditation,[43] but the blood, fingerprint, and bite mark evidence place him at the scene and his ability to recall his actions before and after the crime, refute his hypothesis of innocence that he was so incapacitated he did not know what he was doing. This Court has found premeditation under similar circumstances.[44] See Perry v.

[43]Lisa's death was a direct result of the stab wounds she received from Williams, the person she identified as her attacker. The placement of the wounds to vital organs, the lungs and almost hitting the heart, shows premeditation. These wounds caused the loss of so much blood, Lisa was unable to recover. Officer Gillespie noted Lisa, a black female, had ashen-grey skin color when she opened the door (ROA.13 715). Although Williams was not immediately successful in killing Lisa, she died, nonetheless, as a result of his stabbing her. Further, while Lisa did not die immediately, the stabbing caused her eventual demise due to inflammatory systemic response syndrome and acute respiratory distress syndrome. According to Dr. Wright, the cause of death "was the disease or injury which initiated the lethal chain of events, which is multiple stab wounds" and the manner of death was homicide. (ROA.16 1172-74).

[44]See also Morrison v. State, 818 So.2d 432, 452 (Fla. 2002) (finding two stab wounds to throat show premeditation); Henry v. State, 574 So.2d 73, 74 (Fla. 1991) (finding

State, 801 So.2d 78, 86 (Fla. 2001) (determining evidence showed victim was stabbed in deliberate manner to effect death where stab wounds were to chest and neck, both areas where grievous wounds would be created) Jimenez, 703 So.2d at 440 (finding premeditation based on victim being beaten and stabbed eight times; one wound was four inches deep penetrating her heart).

In support of his claim premeditation was unproven, Williams cites Kirkland v. State, 684 So.2d 732 (Fla. 1996) and Green v. State, 715 So.2d 940 (Fla. 1998). Both are distinguishable. In Kirkland, the defendant resided with the victim and was tempted by her sexually. Id. at 735. While Williams socialized with Lisa, they saw other people, did not live together, and there was no evidence of temptation. It was less than 12 hours after Ruth and Lisa were involved in Williams break-up from Stephanie, that he raped and stabbed Lisa. The force needed to inflict the major wounds, and the fact the attack progressed from room to room is proof of premeditation.

Green does not further Williams' position in that the victim there was drunk and "got crazy." Id. 943. The weapon was never located, nor was there testimony the defendant possessed a knife. Id. Here, the weapon was found, and Williams had fresh cuts to his hand consistent with slippage down the blade. Lisa

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premeditation from repeated stabbing to victim's throat after an argument)

was not drunk; there was no indication she provoked the attack.

Even if this Court finds premeditation was not proven, felony murder/sexual battery was established (ROA.4 382) as addressed in **Points V - VII** and reincorporated herein. Hence, this Court should affirm. See San Martin, 717 So.2d at 470 (finding reversal unnecessary where alternative theory of first-degree murder is supported by sufficient evidence).

POINTS IX AND X

THE INDICTMENT GAVE PROPER NOTICE OF FIRST-DEGREE MURDER, THEREBY, PERMITTING THE STATE TO OFFER ALTERNATE THEORIES OF PREMEDITATED AND FELONY MURDER (restated)

In **Point IX**, Williams makes a Fifth Amendment claim suggesting the indictment was constructively amended when the State argued both premeditation and felony murder, even though the indictment charged only "premeditated design." (ROA.1 1-2; IB 57-60). Continuing in **Point X**, he challenges the dual theory of prosecution claiming he had insufficient notice in violation of his Fifth and Sixth Amendment rights.[45] (IB 60-61). Both points challenge his conviction under Article I of the Florida Constitution. Williams failed to move to dismiss the indictment, thus, the claim is not preserved. Moreover, these challenges have been denied repeatedly.

[45]The standard of review for the denial of a motion for a bill of particulars is abuse of discretion. See Harrison v. State 557 So.2d 151, 151 (Fla. 4th DCA 1990).

On July 2, 2002, prior to the retrial, Williams filed a motion for a statement of particulars as to aggravators and theory of prosecution (ROA.2 235-41). When the pre-trial motions were argued, he merely mentioned those challenging the death penalty. He did not argue for a statement of particulars or for the State to elect a theory of prosecution (SROA.1 59-63). He failed to get a ruling on this matter and it is unpreserved.[46] Even assuming there was a denial, the matter remains unpreserved because he never moved to dismiss his indictment. See Carver v. State, 560 So. 2d 258, 260 (Fla. 1st DCA) (opining "where the charging allegations are merely incomplete or imprecise, the failure to timely file a motion to dismiss under Rule 3.190(c) waives the defense, and it cannot be raised for the first time on appeal"), rev. denied, 574 So. 2d 139 (Fla 1990); White v. State, 446 So. 2d 1031, 1035-36 (Fla. 1984); Huene v. State, 570 So. 2d 1031, 1031-32 (Fla. 1st DCA 1990). The pith of Williams' complaint is that the indictment was incomplete because it did not allege felony murder separately, and the court's instruction on felony murder improperly amended the indictment.

Although Williams filed a motion relating to a request for

[46]Armstrong v. State, 642 So. 2d 730, 740 (Fla. 1994) (finding claim procedurally barred where judge heard motion, but never ruled); Richardson v. State, 437 So. 2d 1091, 1094 (Fla. 1983); State v. Kelley, 588 So. 2d 595, 600 (Fla. 1st DCA 1991).

the State to identify its theory of prosecution, he did not move to dismiss the indictment. Subsequently, he moved to preclude the giving of the felony murder instruction claiming the State had not proven sexual battery, but he did not argue lack of notice. Williams never moved to dismiss the indictment; this issue is unpreserved. Steinhorst, 412 So.2d at 338.

Even were his allegations preserved, they are meritless. Not only did Williams have notice,[47] but the law permits the State to prosecute under dual theories of premeditated and felony murder. In Woodel v. State, 804 So.2d 316, 322 (Fla. 2001), relying upon Gudinas v. State, 693 So.2d 953, 964 (Fla. 1997), this Court rejected the claim that the indictment was constructively amended when the court gave the premeditated and felony murder instructions. See Consalvo v. State, 697 So.2d 805, 812 (Fla. 1996); Wright v. State, 688 So.2d 298, 301 n.4 and 6 (Fla. 1996); Kearse v. State, 662 So. 2d 677, 682 (Fla. 1995); Armstrong v. State, 642 So.2d 730 (Fla. 1994).

[47]To the extent Williams claims he did not have notice, this Court should take judicial notice of the original trial, which counsel informed the judge he read, as well as the mistrial wherein premeditated and felony murder/sexual battery were argued (Supreme Court case number 89,886; ROA.4 360; SROA.2; SROA.10 1223-38; SROA.11 1292; SROA.12 1346). In the ruling on admission of Lisa's pregnancy, the judge noted the State was alleging felony murder/sexual battery. (SROA.11 1292). The prosecutor, in opening statement for the second trial, mentioned the sexual battery and multiple stab wounds (SROA.12 1329-30, 1339-43). Williams was well aware of the State's theories.

POINT XI

THE JURY WAS INSTRUCTED PROPERLY REGARDING THE PRESUMPTION OF INNOCENCE (restated)

Again Williams claims the indictment failed to allege felony murder and this asserted defect caused fundamental error as the standard instruction[48] on the presumption of innocence failed to inform the jury the presumption applied to the felony murder. The State disagrees. This Court should affirm.

Williams did not raise this issue below; he did not ask to have the standard instruction changed or given before each offense defined. It is unpreserved. State v. Delva, 575 So.2d 643, 644 (Fla. 1991) (instructions "are subject to the contemporaneous objection rule, and, absent an objection at trial, can be raised on appeal only if fundamental error occurred"). "Fundamental error is the type of error which 'reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.'" Globe v. State, 877 So.2d 663, 677 (Fla. 2004) (citations omitted). See Battle v. State, 911 So.2d 85, 88-89 (Fla. 2005).

After outlining the elements of each charged and lesser included crime, the court gave the standard instruction:

[48]The standard of review applied to a decision to give a jury instruction is abuse of discretion. See James v. State, 695 So.2d 1229, 1236 (Fla. 1997); Kearse, 662 So.2d at 682.

> The defendant has entered a plea of not guilty. This means you must presume or believe that the defendant is innocent. The presumption stays with the defendant, as to each material allegation in the indictment, through each stage of the trial, unless it has been overcome by the evidence, to the exclusion of and beyond a reasonable doubt.

(ROA.19 1500-01). See Standard Jury Instruction 3.7. Standard instructions are "presumed correct and preferred over special instructions." Stephens v. State, 787 So.2d 747, 755 (Fla. 2001). See Freeman v. State, 761 So.2d 1055, 1071 (Fla. 2000); Elledge v. State, 706 So.2d 1340 (Fla. 1997). Williams has not shown the instruction was erroneous or caused his conviction. Rather, it fully advised the jury of the presumption of innocence and burden of proof for the crimes charged.

Before the court instructed the jury on the presumption of innocence, it outlined each of the charges and lesser offenses to be considered. In that listing were the elements of premeditated and felony murder.[49] Given that the presumption instruction was given after all charges were read, the jury would not be confused as to the State's burden of proof or when Williams was stripped of his presumption of innocence. Fundamental error has not been proven as it was clear the instruction covered proof of first-degree murder. The verdict

[49]The jury heard: "There are two ways by which a person may be convicted of first degree murder. One is known as pre-meditated murder, the other is known as felony murder." (ROA.19 1491).

form provided: “The defendant is guilty of First Degree Murder as charged in the Indictment. The jury further finds that the First Degree Murder was” both premeditated and felony murder. (ROA.4 382). It would be an unreasonable construction of events to find the presumption of innocence instruction was not understood to have applied to the charged offense of first-degree murder or that the court had repeat the instruction after each theory of first-degree murder and lesser included charge.

McKenna v. State, 161 So. 561 (Fla. 1935) does not further Williams’ position. In it, the court failed to instruct the jury on the lesser included offense or on the presumption of innocence. Initially, this Court found it was not error to have omitted the presumption instruction, in part because the matter was unpreserved. McKenna, 161 So. at 563. However, due to the error in not instructing on petit theft, including the value of the property taken, along with the failure to give the presumption of innocence instruction, a new trial was ordered. Here, the presumption of innocence instruction was given and all lesser charges were outlined. This Court must affirm.

POINT XII

THE JURY WAS INSTRUCTED CORRECTLY REGARDING UNANIMITY OF ITS VERDICT (restated)

Williams maintains it was reversible error, a denial of due process and a fair trial, for the court not to instruct the jury

it must find premeditation or felony murder unanimously[50] (IB 64), but he fails to give a record cite where the matter was raised below.[51] The jury was informed its verdict had to be unanimous and it found both premeditated and felony murder.

Relying solely upon Judge Harris' opinion concurring in part and dissenting in part from the *en banc* opinion in State v. Reardon, 763 So.2d 418 (Fla. 5th DCA 2000), Williams seeks relief. At issue in Reardon was a challenge to the court's determination that conviction for both aggravated battery and first-degree burglary under the theories of burglary while armed "and/or" burglary with an assault or battery violated double jeopardy under Crawford v. State, 662 So.2d 1016 (Fla. 5th DCA 1995). The *en banc* court noted the verdict form, with its "and/or" option for the underlying felony, it found that it would not have to decide under what theory the jury convicted Reardon of burglary because it did not "preclude the imposition of the aggravated battery conviction on double jeopardy grounds." Reardon, 763 So.2d at 419, n.3. Judge Harris' opinion

[50]The standard of review applied to a decision to give or withhold a jury instruction is abuse of discretion. See James, 695 So. 2d st 1236; Kearse, 662 So.2d at 682.

[51]No objection was raised to the jury instruction on this ground nor was the court asked to inform the jury its determination how the murder was perpetrated (felony or premeditated) had to be unanimous. (ROA.16 1263-72; ROA.17 1279-83, 1355-66; ROA.19 1487-88). This matter is not preserved for appeal, and this Court should so find. See Steinhorst.

does not establish precedent for the issue before this Court. Likewise, the citation to Valentine v. State, 688 So.2d 313 (Fla. 1996) in the dissent does not further Williams' position where one of the theories, attempted felony murder, was found to be legally unsupportable under State v. Gray, 654 So.2d 552 (Fla. 1995). Such is not the case here. Not only has this Court permitted a general verdict where the theory of the first-degree murder was not identified; San Martin, 717 So.2d at 470; but here, the jury noted both premeditation **and** felony murder were proven. Neither Reardon nor Valentine apply.

Williams points to the judge's comments (ROA.18 1383-1384) for support that if the jury found both felony and premeditated murder proven it would be "unclear how much of the decision was based on felony murder." (IB 66). The court was discussing the propriety of giving an instruction on felony murder/sexual battery based on the bite marks and Lisa's allegation of "rape". (ROA. 18 1369-92). The court's mere speculation as to the import of a possible result does not establish a legal conclusion or error when neither the issue nor the law was before the court, especially when the speculation did not comport with the law on this matter.

The law is settled, there does not need to be a unanimous verdict as to the method (felony or premeditated murder) used in the homicide, only that there was a homicide for which the

defendant was responsible. Schad v. Arizona, 501 U.S. 624, 644-45 (1991) (rejecting contention general verdict which fails to differentiate between premeditated and felony murder is inadequate; jury need not agree on precise theory of murder); Parker v. State, 641 So.2d 369, 375 (Fla. 1994) (finding "instruction requiring jury unanimity as to whether a premeditated or felony murder was committed" was not required "because special verdicts identifying the type of murder are not required"); Haliburton v. State, 561 So.2d 248 (Fla. 1990). In finding a general verdict for first-degree murder was permissible, this Court has effectively determined the method of committing murder is not an independent element of the crime, but merely a means of satisfying the *mens rea* element. Schad, 501 U.S. at 637. The mere fact the jury made added findings here does not require it be found unanimously, nor does the absence of a specific instruction or proof of unanimity for that method render the verdict unconstitutional. Williams' jury was instructed its verdict had to be unanimous, and it so found. (ROA.4 382; ROA.19 1505-08). The conviction should be affirmed.

Even though not constitutionally required, the record reveals that not only was the verdict unanimous, but the jurors all agreed as to the method used to commit the murder. After the court instructed on first-degree murder under both theories, the jury was informed of the lesser offenses it could consider.

Only after all crimes were outlined did the court instruct the verdict had to be unanimous and the "verdict must be the verdict of each juror, as well as the jury as a whole." (ROA. 19 1505-08). The jury determined Williams was guilty of first-degree murder and the method of committing that murder was shown to be both premeditated and felony murder. (ROA.4 382).

Jurors are presumed to follow the court's instructions. U.S. v. Olano, 507 U.S. 725, 740 (1993)(finding presumption jurors follow instructions); Burnette v. State, 157 So.2d 65, 70 (Fla. 1963) (same). The instant verdict was unanimous, as were the findings on the methods used to accomplish the murder. The decisions were the verdict of each juror and the jury as a whole.[52] (ROA.4 382; 1533-34).

POINTS XIII AND XIV

JURY WAS INSTRUCTED PROPERLY REGARDING AGGRAVATION, MITIGATION, AND SENTENCING (restated)

In these points, Williams challenges the penalty phase instructions as unconstitutional for: (1) imposing an incorrect standard of proof for the jury's finding mitigation outweighs aggravation (**Point XIII**); (2) shifting the burden to the defense to prove a life sentence is appropriate; and (3) fails to

[52]The State relies on its responses to **Points V-VIII** to show both premeditated and felony murder were established by the evidence, but if one method is found unproven, reversal is not required under San Martin, 717 So.2d at 470.

address when the aggravation and mitigation are in "equipoise" (**Point XIV**). Not only has Williams failed to preserve his challenge to the standard instructions[53] given by making a contemporaneous objection, but he failed to present his "equipoise"[54] argument below, Delva, 575 So.2d at 644; Steinhorst. Further, his reliance upon out-of-state cases and cited federal cases[55] is misplaced as those courts were

[53]To the extent these claims may be interpreted as general objections to the statute, as he made in his multifaceted motion below (ROA.2 98-155), they have been rejected consistently.

[54]Williams cites to State v. Kleypas, 40 P.3d 129 (Kan. 2001) and State v. Marsh, 102 P.3d 445) (Kan. 2004). Marsh is pending before the United States Supreme Court (case number 04-1170). However, these cases are inapplicable. See Proffitt v. Florida, 428 U.S. 242, 245-46 (1976). The jury is not told death is proper if the aggravation and mitigation are in balance. Also, the defendant has at least three opportunities to obtain a life sentence: (1) the jury is reminded aggravation must be proven beyond a reasonable doubt, while mitigation is by the lower preponderance of the evidence standard, and that if aggravation is insufficient to warrant death, life must be recommended; (2) the judge independently evaluates the evidence before sentencing,; if a life sentence is imposed, even where death was recommended, the State may not appeal; (3) this Court conducts proportionality review to verify death is appropriate.

[55]State v. Wood, 648 P.2s 71, 83-84 (Utah 1981); State v. Rizo, 833 A.2d 363 (Conn. 2003); People v. Young, 814 P.2d 834 (Colo. 1991); State v. Biegenwald, 524 A.2d 130 (N.J. 1987); Hulsey v. Sargent, 868 F.Supp 1090 (E.D. Ark. 1993); State v. Kleypas, 40 P.3d 129 (Kan. 2001) (noting Kansas' statute is not like Florida's statute); State v. Marsh, 102 P.3d 445 (Kan. 2004) (same). Williams' reliance upon Mullaney v. Wilbur, 421 U.S. 648 (1975); In re: Winship, 397 U.S. 358 (1970); Cage v. Louisiana, 498 U.S. 39 (1990); Sandstrom v. Montana, 442 U.S. 510 (1979); and Francis v. Franklin, 471 U.S. 307 (1985) is misplaced. Proffitt v. Florida, 428 U.S. 242, 245-46, 255-56 (1976) resolved these matters when it reviewed Florida's capital sentencing and found it constitutional.

interpreting foreign statutes dissimilar to Florida's. Moreover, this Court has rejected these arguments repeatedly.

This Court has rejected the instant challenges repeatedly. Williams has offered no persuasive authority calling into question Florida's capital sentencing. See Proffitt, 428 U.S. at 255-56; Rodriguez v. State, 2005 WL 1243475, *20 (Fla. 2005); Elledge v. State, 911 So.2d 57 (Fla. 2005);[56] Griffin v. State, 866 So.2d 1, 14 (Fla. 2003); Cox v. State, 819 So.2d 705, 725 (Fla. 2002); Freeman v. State, 761 So.2d 1055, 1067 (Fla. 2000); Shellito v. State, 701 So.2d 837 (Fla. 1997); Fotopoulos v. State, 608 So.2d 784, 794 & n. 7 (Fla. 1992).

POINT XV

THE COLD, CALCULATED, AND PREMEDITATED FINDING IS SUPPORTED BY THE EVIDENCE (restated)

Williams asserts the CCP aggravator does not apply as his

[56]This Court rejected challenges that: "Florida's capital sentencing statute fails to provide a necessary standard for determining that aggravating circumstances 'outweigh' mitigating factors, does not define 'sufficient aggravating circumstances,'... does not have the independent reweighing of aggravating and mitigating circumstances...." and "that Florida's capital sentencing scheme violates the Sixth and Fourteenth Amendments because ... the jury is not instructed as to the reasonable doubt standard for two of the three elements required to render him death-eligible-that sufficient aggravating circumstances exist and that mitigating circumstances do not outweigh the aggravating circumstances.... and that the jury instructions shift the burden of proof to the defendant to prove that mitigating circumstances outweigh the aggravating circumstances." Ellege v. State, 911 So.2d 57, 78-80, n.28-29 (Fla. 2005)

actions do not meet "the spirit or the literal requirements for this aggravator." (IB 80).[57] The State disagrees noting Williams' prior killing, upon which the court relied to find CCP, is so eerily similar to the instant murder it shows the cold, calculated method of how and why he selects his victim, and the heightened premeditation he employs to in perpetrating his revenge killing. However, should this Court find the aggravator misapplied, the sentence should be affirmed as the court noted the imposition of the death sentence was not contingent upon finding CCP.[58]

Review of the finding of aggravation is to determine if the right rule of law was applied and whether competent, substantial evidence supports the court's finding. Boyd, 910 So.2d at 191. This court stated:

> In order to establish the CCP aggravator, the evidence must show that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold), and that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated), and that the defendant exhibited heightened premeditation (premeditated), and that the defendant had no pretense of moral or legal justification.
>
> ... While "heightened premeditation" may be inferred from the circumstances of the killing, it also

[57]Williams takes issue with the fact the state did not seek CCP. The State relies upon its answer in Point II.

[58]The State incorporates its Point XX, proportionality review, to show the sentence is proper even if CCP were stricken.

> requires proof beyond a reasonable doubt of "premeditation over and above what is required for unaggravated first-degree murder." ... The "plan to kill cannot be inferred solely from a plan to commit, or the commission of, another felony." ... However, CCP can be indicated by the circumstances if they point to such facts as advance procurement of a weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course.

Philmore v. State, 820 So.2d 919, 933 (Fla. 2002) (quoting Farina v. State, 801 So.2d 44, 53-54 (Fla. 2001).

Significant to the court was the fact Williams had committed an almost identical murder in 1984, for exactly the same reason,[59] and had targeted a person of the same familial relationship. (ROA. 418-23). The court cited and applied the correct law. Its findings are supported by the evidence.

In the second-degree murder case, Williams was rejected by his girlfriend, Robin Jeffrey, whose sister, Gaynell, told Williams not to return to the Jeffrey home. A few days later, he returned and killed Gaynell by stabbing her nine times in the chest and back. (ROA.20 1568-71, 1577-78, 1580-83, 1585-88,

[59]Williams complains his second-degree murder cannot support heightened premeditation here because premeditation was not proven there. Merely because a prior jury, viewing the evidence drew a different conclusion, does not mean that heightened premeditation was not proven in the second case. The heightened premeditation comes from Williams committing the same crime for the same reason, in the same manner. Williams' first jury did not have the benefit of seeing Williams' pattern for exacting revenge as did his instant jury. The fact he responds in the same deadly, revengeful manner when spurned shows his calculating nature and premeditated design.

1591). Here, Ruth and Lisa lived together at the time Williams dated Ruth's sister, Stephanie. Stephanie's rejection of Williams was precipitated by an argument he had with Ruth and the break-up was accomplished during a telephone conversation in which Ruth and Lisa participated. The next morning, he went to Ruth's apartment to exact revenge, only to find she had left for school. Still intent upon vengeance, he turned his focus to Lisa who was carrying Stephanie's brother's child, stabbing her seven times in the chest and back. Williams retaliates after a relationship ends, by inflicting violence upon the relative, and in this case, friend, of his former love-interest. The reason, manner, and method of the killings show the attacks are cold, calculated, and premeditated. He dislikes being rebuffed, selects a sister/friend of his former girlfriend to kill, surreptitiously makes his way to his target's abode, and uses a knife to stab her multiple times in vital organs (heart and lungs). This supports CCP.

The time between the break-up gave Williams time to reflect cooly upon his intended target and deed - his attack was not hastened; he was not thrown into a rage. Rather, he waited until the next morning to exact his revenge, just as he had waited a few days to attack Gaynell when her sister likewise spurned him. His calculated plan to kill is evidence by his focus on a relative or friend of an ex-girlfriend whom he thinks

responsible for his ended relationship. The attack is designed to inflict emotional pain on the ex-girlfriend. Also, the strategically placed stab wounds - to the lungs and heart show a calculated plan to kill Lisa, one that had been successful previously with Gaynell.[60] Further, Williams' weapon of choice is a knife, and having been in the apartment previously, he knew where one could be obtained. The fact he did not come to the apartment armed does not detract from the conclusion that he had a motive and prearranged plan to kill.

Williams' reliance on Burr v. State, 550 So.2d 444 (Fla. 1989) is misplaced as the single gunshot wound to the head in a robbery case did not show heightened premeditation. Here however, heightened premeditation was shown by Williams' transfer of his lust for revenge from Ruth to Lisa when Ruth was not home. See Owen v. State, 862 So.2d 687, 701 (Fla. 2003) (finding heightened premeditation for CCP based on fact defendant had opportunity to leave scene without killing, but instead, murdered victim); Alston v. State, 723 So.2d 148, 162 (Fla. 1998); Jackson v. State, 704 So.2d 500, 505 (Fla. 1997). When Williams found Ruth had left, he could have abandoned his plan to kill. Instead, he chose to kill Lisa who he knew was

[60]While Williams penetrated Gaynell's heart, he was not as accurate with Lisa, only piercing the pericardial sac and just missing the right ventricle. He punctured Lisa's lungs as he had with Gaynell. Lisa had seven stab wounds and Gaynell nine.

carrying Julius Lawrence's child.

Likewise, Geralds v. State, 601 So.2d 1157 (Fla. 1992) does not further Williams' position. First, the intent for the crime was for revenge, not burglary/robbery as it was in Geralds. Second, the evidence showed that while Lisa assisted in prior reconciliations, she was not helping here as was evidence by her actions during the telephone conversation. Neither Ruth nor Stephanie testified that Lisa was reconciling the panties and Williams claimed she was silent. This Court should affirm.

POINT XVI

THE COURT MADE THE REQUIRED FINDING TO IMPOSE THE DEATH PENALTY (restated)

Williams claims the court failed to find sufficient aggravating circumstances exist to justify death. The State disagrees, and submits the requisite findings were made for the aggravating and mitigating factors and the judge completed the appropriate analysis. The death sentence should be affirmed.

Under subsection 921.141(3), Florida Statutes (1993), notwithstanding the jury's recommendation, the court must weigh the aggravation and mitigation, and if it finds death the appropriate sentence, put in writing its finding as to the facts "(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and (b) That there are insufficient mitigating circumstances to outweigh the

aggravating circumstances." Williams has not cited a case where this Court has overturned a death sentence because the sentencing court failed to included the phrase "sufficient aggravating circumstances exist" to justify the death sentence. Rather, he offers Rembert v. State, 445 So.2d 337 (Fla. 1989) and Terry v. State, 668 So.2d 954 (Fla. 1996). Yet, neither support his claim as both are proportionality decisions, not decisions on the sufficiency of the court's sentencing order or its failure to include the subject phrase.

Review of orders imposing death sentences have not been for the use of talismanic incantations, but for the content of the written orders outlining the factual findings as to aggravation and mitigation, the weight assigned each factor, and the reasoned weighing of those factors in determining the sentence. This Court has explained that to comply with section 921.141(3), the judge "must (1) determine whether aggravating and mitigating circumstances are present, (2) weigh these circumstances, and (3) issue written findings." Layman v. State, 652 So.2d 373, 375 (Fla. 1995). As provided in Bouie v. State, 559 So.2d 1113, 1115-16 (Fla. 1990) the written justification of a death sentence "provides 'the opportunity for meaningful review' in this *Court. ...* Specific findings of fact based on the record must be made ... and the trial judge must 'independently weigh the aggravating and mitigating circumstances to determine

whether the death penalty or a sentence of life imprisonment should be imposed.'" Expounding further upon the details needed for a meaningful review, this Court required that each statutory and non-statutory mitigator be identified, evaluated to determine if it were mitigating and established by the evidence, and to assess the weight each proven mitigator deserved. Ferrell v. State, 653 So.2d 367, 371 (Fla. 1995). See Trease v. State, 768 So. 2d 1050, 1055 (Fla. 2000) (receding in part from Campbell and holding court may assign mitigator no weight). The sentencing order in Ferrell was found lacking because the court had not set forth its factual findings and rationale for imposing death in other than conclusory terms. Ferrell, 653 So.2d at 371. Such is not the case here.

The sentencing order meets the dictates of Campbell v. State, 571 So.2d 415 (Fla. 1990) and section 921.141 as each aggravator and mitigator is discussed with its attendant weight assignment and the court's factual findings are provided (ROA.5 413-27). Only after this analysis, did the court balanced the factors before imposing the death penalty (ROA.5 427). The proper analysis was completed; the sentence should be affirmed.

It is presumed the court follows the instructions it gave the jury. See Groover v. State,640 So.2d 1077, 1078 (Fla. 1994); Johnson v. Dugger, 520 So.2d 565, 566 (Fla. 1988). Here, the court instructed the jury properly regarding its sentencing duty

including that the jury first had to determine "whether sufficient aggravating circumstances exist, to justify the imposition of the death penalty" (ROA.20 1703-13) and based on those instructions the judge is presumed to have followed, found sufficient aggravating circumstances existed to justify death.

Further, the court gave factual support to the aggravators found (ROA.5 414-23). During this discussion, the court stated: "The imposition of the sentence in the present case is not contingent on the Court's finding the statutory aggravating factor of cold, calculating (sic) and premeditated." (ROA.5 423). This shows the remaining aggravators were found to be sufficient to impose a death sentence. The Court should reject Williams' claim that absence of the "talismanic" phrase of "sufficient aggravating circumstances exist" death is improper.

POINT XVII

THE JURY WAS GIVEN A PROPER, CONSTITUTIONAL INSTRUCTION ON THE PROOF NECESSARY FOR MITIGATION (restated)

Here he maintains the standard instruction[61] informing the jury it may consider mitigation only when "reasonably convinced" of its existence is unconstitutional because: (1) the Jury Instruction Committee, not the Legislature, set the standard;

[61]He challenges the instruction: "mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established." (ROA.20 1706).

(2) it imposes an incorrect standard and (3) the standard of proof unconstitutionally limits consideration of mitigation. (IB 84-85).[62] While Williams challenged the constitutionality of section 921.141, he did not object to the standard instructions used (ROA.2 98-155; ROA.20 1665-67) and the matter should be found unpreserved[63] and meritless.

Williams claims the use of the phrase "reasonably convinced" in defining the standard of proof is a violation of the separation of powers doctrine. Separation of powers is intended to preserve the system of checks and balances built into the government as a safeguard against the encroachment or aggrandizement of one branch at the expense of the other. Buckley v. Valeo, 424 U.S. 1, 122 (1976). Surely, the judiciary has the power to promulgate standard instructions putting into effect the legislative intent.

Under section 921.141(1), both parties are permitted to put on evidence relevant to the nature of the crime and character of the defendant including evidence related to aggravating and mitigating circumstances. Section 921.141(2), requires the jury

[62]The standard of review applied to a decision to give or withhold a jury instruction is abuse of discretion. See James, 695 So.2d at 1236; Kearse, 662 So.2d at 682.

[63]To preserve for review a jury instruction challenge, an objection must have been raised below or an alternate instruction offered. See San Martin v. State, 705 So.2d 1337, 1350 (Fla. 1997); Hodges v. State, 619 So.2d 272 (Fla. 1993). If unpreserved, fundamental error must be shown. Steinhorst.

determine: "(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5); (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and (c)Based on these considerations, whether the defendant should be sentenced to life imprisonment or death." Thus, in order to give guidance as to whether aggravators and/or mitigators exist, this Court has determined the State must prove the aggravator beyond a reasonable doubt, but the defendant need only reasonably convince the jury of the existence of mitigators. See Robertson v. State, 611 So.2d 1228, 1232 (1993); Walls v. State, 641 So.2d 381, 390 (Fla. 1994). The state's burden is higher than the defendant's and it is only logical that the jurors must be reasonably convinced of a fact before they may use it as a basis for advising the court of the appropriate penalty. The promulgation of this instruction does not violate the separation of powers doctrine, but gives effect to the legislative intent.

The State submits the standard instructions for mitigation are proper and reflect the law accurately. Walls, 641 So.2d at 389 (reaffirming validity of instruction on penalty phase mitigation in capital murder case and finding it has been upheld repeatedly upheld by this and federal courts). This Court found the standard penalty phase jury instructions describes Florida law properly. See Jackson v. State, 502 So.2d 409, 410 (Fla.

1986). The "reasonably convinced" standard advises the jury correctly and is a proper instruction. Walls, 641 So.2d 389-90.

The State disagrees with Williams complaint that the instruction precludes the jury from considering "all" the mitigating evidence. (IB 85). The instruction requires the jury to look at all the evidence, both aggravating and mitigating, to determine what facts have been established. If the jurors are convinced a mitigating fact exists, they are to assume it has been established. Clearly, the jury is not precluded from considering all mitigation presented. It is only logical the mitigating facts which have been established should be considered in rendering an advisory opinion and those that do not exist should have no bearing upon the sentence. Without some burden of proof for mitigation, the advisory sentence would be meaningless. Because the jury instruction describes the law accurately, this Court should affirm.

POINT XVIII

THE COURT PROPERLY RELIED UPON WILLIAMS INDECENT ASSAULT TO SUPPORT THE PRIOR VIOLENT FELONY AGGRAVATOR (restated)

Williams asserts it was error for the court to rely on the indecent assault conviction to find the prior violent felony aggravator because violence was not inherent in the elements of the offense. He also complains it was error to present the

underlying facts of the crime.[64] The State disagrees.

In its sentencing order, the court focused on the fact Williams entered the child's home, took her to a separate room, threatened to hurt her, removed her clothes, inserted his finger into her vagina, and made her bleed (ROA.5 414-15).[65] To no avail, Williams points to Elam v. State, 636 So.2d 1312, 1314 (Fla. 1994); Mahn, 714 So.2d at 399; and Lewis v. State, 398 So.2d 432 (Fla. 1981)[66] because the elements of the crime are not the deciding factor, and the court is permitted to look at the underlying facts to determine if the crime were violent. "[W]hether a previous conviction of burglary constitutes a felony involving violence ... depends on the facts of the

[64]Reviewing an aggravator, this Court considers whether the judge "applied the right rule of law for each aggravating circumstance and, if so, whether competent, substantial evidence supports its finding." Boyd, 910 So.2d at 191.

[65]The court also found proven beyond a reasonable doubt Williams' second-degree murder conviction for the death of Gaynell Jeffrey. (ROA.5 415). Williams does not challenge this finding, thus, there is at least one valid basis for finding the prior violent felony aggravator, and should this Court strike the indecent assault, the aggravator remains valid. Mahn v. State, 714 So.2d 391, 399 (Fla. 1998)(finding harmless error where court relied improperly upon robbery/prior violent felony when other factors supported aggravator).

[66]In Lewis, this Court determined convictions for breaking and entering, escape, grand larceny, and possession of a firearm by a convicted felon did not involve a threat of violence. Yet, there was no discussion of the facts underlying those convictions. Lewis, 398 So.2d at 438. Neither Elam, nor Mahn, discussed the facts surrounding the criminal convictions relied upon in their finding aggravation; they are not dispositive.

previous crime. Those facts may be established by documentary evidence, including the charging or conviction documents, or by testimony, or by a combination of both." Johnson v. State, 465 So.2d 499, 505 (Fla. 1985), overruled on other grounds, In re Instructions in Criminal Cases, 652 So.2d 814, 815 (Fla. 1995). See Gore v. State, 706 So.2d 1328 (Fla. 1998) (armed trespass sufficient to support prior violent felony); Rhodes v. State, 547 So.2d 1201 (Fla. 1989) (finding facts of prior conviction may be considered to prove aggravator).

Indecent assault, by its very terms is a *per se* violent felony. It may involve a touching of or assault upon a child in a lewd/lascivious manner. Should this Court find otherwise, there is ample evidence of violence. Dennis Edwards averred, the nine-year old victim reported being lured into a small room by Williams, who then threatened to kill her. He penetrated her vagina digitally causing her to bleed. (ROA.20 1574-78, 1592-98). The violent felony was shown. This Court should affirm.

POINT XIX

HEINOUS, ATROCIOUS OR CRUEL WAS FOUND PROPERLY (restated)

Williams challenges the HAC finding, claiming the facts do not satisfy the definition of HAC.[67] The State disagrees.

[67]"In reviewing a trial court's finding of an aggravating factor, we review the record to determine whether the trial court applied the right rule of law for each aggravating

The court concluded that HAC was proven based on:

> The evidence reflects that Lisa Dyke suffered great fear, emotional strain, and terror during the events leading up to her death. Ronnie K. Williams stabbed Ms. Dyke multiple times in her chest and back, viciously bit her on her breast and vaginal area. The Defendant's actions were designed to inflict unnecessary pain and suffering upon Lisa Dyke.
>
> The repeated stab wounds and bites ... coupled with the level of force necessary to penetrate Lisa Dyke's sternum, reflects that the murder of Lisa Dyke was consciousness and pitiless crime which was prolonged, and was unnecessarily torturous to the Victim. The evidence further reflects, that Ms. Dyke sustained defensive wounds in an unsuccessful attempt to defend herself against the Defendant's vicious attack. Thus, the defensive wounds support the fact that Ms. Dyke was alive while being stabbed by Mr. Williams.
>
> The evidence reflects that Lisa Dyke suffered extreme mental anguish as the result of her anxiety and concern over the state of health of her unborn child following the stabbing by the Defendant. The evidence reflects that Mr. Williams knew that Lisa Dyke was pregnant prior to the stabbing....
>
> The murder of Lisa Dyke was committed in such a manner as to cause unnecessary and prolonged suffering of the Victim. The evidence reflects that Lisa Dyke languished in the hospital for nineteen days before passing away. During this time she expressed constant fear of her impending death, and was forced to endure the discomfort and fear of having tubes inserted in her throat ... The evidence reflects that Lisa Dyke remained conscious throughout the Defendant's vicious attack upon her, that she was aware of the seriousness of her wounds, and that she was also aware of the likelihood of her impending death.

(ROA.5 416-17). The court's findings are supported by

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circumstance and, if so, whether competent, substantial evidence supports its finding." Boyd, 910 So.2d at 191.

substantial, competent evidence.[68]

This Court should affirm. HAC findings have been upheld consistently where the victim was stabbed repeatedly and was conscious during a portion of the attack. See Boyd, 910 So.2d at 191 (recognizing HAC aggravator found consistently where victim stabbed repeatedly and was conscious during portion of attack); Owen v. State, 862 So.2d 687, 698 (Fla. 2003); Duest v. State, 855 So.2d 33, 47 (Fla. 2003); Cox v. State, 819 So.2d 705, 720 (Fla. 2002); Jimenez, 703 So.2d at 441; Derrick v State, 641 So.2d 378, 381 (Fla. 1994); Floyd v State, 569 So.2d 1225, 1232 (Fla. 1990); Haliburton v. State, 561 So.2d 248, 252 (Fla. 1990); Hansborough v. State, 509 So.2d 1081, 1086 (Fla. 1987).

POINT XX

THE DEATH SENTENCE IS PROPORTIONAL (restated)

Pointing to Terry v. State, 668 So.2d 954 (Fla. 1996) and claiming his sentence is disproportional, Williams focuses on the mitigation presented during the penalty phase. The State

[68]Lisa was stabbed seven times and was conscious during the attack based on her defensive wounds. She voiced concern for her health and that of her unborn child, and languished in the hospital for days contemplating her demise. She suffered bite wounds to her breast, arms, back, and vaginal area that were inflicted by a "ripping type of bite, a pulling." The stabbing was so painful, breaking through her sternum and ribs, and perforating her lungs, she reported she could not move or breathe. ROA.16 1137-67, 1171-74, 1181-82, 1225-30, 1244-45, 1251, 1256-57; SROA-evidence envelope).

disagrees; not only were four aggravators proven, but mitigation was of little to slight weight. This Court found death sentences proportional under similar conditions.[69]

The court found four agravators: (1) prior violent felony; (2) felony murder; (3) HAC; and (4) CCP[70] outweighed two statutory mitigators of little weight: (1) under influence of extreme mental/emotional disturbance; (2) capacity to appreciate criminality of his conduct or to conform conduct to the law was substantially impaired, and five non-statutory mitigators of slight weight: (1) model prisoner; (2) attended religious services in jail; (3) deprived childhood; (4) loving person; and (5) slight of stature, frequently beaten and robbed on way to school. (ROA.5 414-26).

Terry does not further Williams' position as this Court found the circumstances surrounding that shooting were

[69]Proportionality review is to consider the totality of the circumstances in a case compared with other capital cases. Urbin v. State, 714 So.2d 411 (Fla. 1998). It is not a comparison between the number of aggravators and mitigators, but is a "thoughtful, deliberate proportionality review to consider the totality of the circumstances in a case, and to compare it with other capital cases." Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990). The function is not to reweigh the factors, but to accept the jury's recommendation and the judge's weighing. Bates v. State, 750 So.2d 6, 14 (Fla. 1999).

[70]The court stated: "imposition of the sentence in the present case is not contingent on the Court's finding the statutory aggravating factor of cold, calculated and premeditated." (ROA.5 423). The State maintains CCP was found properly and incorporates its answer to **Point XV**, but submits that should it be stricken, the sentence remains proportional.

"unclear", discounted the strength of the prior violent felony because it was a contemporaneous, and labeled the murder a robbery-gone-bad. This Court stated: "we simply cannot conclusively determine on the record before us what actually transpired immediately prior to the victim being shot. Likewise, although there is not a great deal of mitigation in this case, the aggravation is also not extensive given the totality of the underlying circumstances." Terry, 668 So.2d at 965. In the instant case, there were two prior violent felonies, one being a eerily similar prior murder,[71] along with three other aggravtors. The circumstances of the crime, a revenge killing with sexual battery, were well developed and mitigation was only of little to slight weight. The concerns of Terry are absent here.

This Court found sentences proportional in cases with similar factors. See Boyd, 910 So.2d at 193 (stabbing death with felony murder/sexual battery, HAC, one statutory and five non-statutory mitigators); Cox, 819 So.2d 705 (stabbing death based on CCP, HAC, and "nineteen of the thirty-two nonstatutory mitigating factors were accorded slight or little to some

[71]The second-degree murder of Gaynell Jeffery who supported her sister's breaking off of her relationship with Williams. (ROA.20 1579-98). The State relies on its discussion of this in **Point XV**. The rehabilitation provided though Williams' prior incarceration for murder was to no avail. See Harvard v. State, 414 So.2d 1032 (Fla. 1982) (noting defendant attempted to kill first wife because she had sued him and after release from prison, killed second wife during their marriage separation).

weight"); Mansfield v. State, 758 So.2d 636 (Fla. 2000)(HAC, felony murder, and five non-statutory mitigators); Geralds v. State, 674 So.2d 96 (Fla. 1996) (HAC, felony murder and both statutory and nonstatutory mitigation afforded little weight); Spencer v. State, 691 So.2d 1062 (Fla. 1996) (prior violent felony, HAC, two statutory mental mitigators and several nonstatutory mitigators); Jimenez, 703 So.2d at 438, 442 (stabbing death with four aggravtors, one statutory and two non-statutory mitigators); Hudson v. State, 538 So.2d 829 (Fla. 1989) (stabbing death of ex-girlfriend's roommate); Lemon v. State, 456 So.2d 885 (Fla. 1984) (HAC and prior violent felony outweighing statutory mental mitigator).

POINTS XXI AND XXII

FLORIDA'S CAPITAL SENTENCING STATUTE IS CONSTITUTIONAL (restated)

In **Point XXI**, Williams asserts the determination "death eligibility" occurs upon conviction renders Florida's capital sentencing unconstitutional under Furman v. Georgia, 408 U.S. 238 (1972). (IB 90). Continuing in **Point XXII**, he argues that if this Court finds an aggravator is required before a defendant is "death eligible," section 921.141 is unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002).[72] Williams failed to

[72]Questions of law, are reviewed *de novo*. Elder v. Holloway, 510 U.S. 510, 516 (1994.

preserve all his arguments, and they have been rejected.

Below, Williams failed to claim death eligibility at time of conviction violated Furman. (ROA.1 50-54; ROA.2 98-157). Except for the complaint the jury's decision should be unanimous under a Ring analysis (ROA.1 51), his constitutional arguments presented in **Point XXII** are unpreserved. The merits should not be reached. Steinhorst, 412 So.2d at 338

Both the Sixth and Eighth Amendment challenges have been rejected. Death eligibility occurs at time of sentencing Mills v. Moore, 786 So.2d 532, 537 (Fla. 2001); and the required narrowing occurs during the penalty phase. Porter v. Crosby, 840 So.2d 981 (Fla. 2003) (noting death in maximum penalty and repeated rejection of arguments aggravators had to be charged in indictment, submitted to jury and individually found by unanimous jury).[73] Moreover, Williams has prior violent felony. This Court has rejected challenges under Ring in these situations. Jones v. State, 855 So.2d 611, 619 (Fla. 2003).

CONCLUSION

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

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[73] See Perez v. State, 2005 WL 2782589, 23 (Fla. 2005) (rejecting challenges to capital sentencing under Ring and Furman); Bottoson v. Moore, 833 So.2d 693 (Fla. 2002); King v. Moore, 831 So.2d 143 (Fla. 2002); Proffitt, 428 U.S. at 251; Hildwin v. Florida, 490 U.S. 638 (1989; Spaziano v. Florida, 468 U.S. 447 (1984).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Jeffrey L. Anderson, Esq. Office of the Public Defender, Fifteenth Judicial Circuit of Florida, 421 Third Street, 6th Floor, West Palm Beach, Fl 33401 on January 24, 2006.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately on January 18, 2006.

_____

LESLIE T. CAMPBELL