IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-1375

VICTOR CARABALLO,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

ANSWER BRIEF OF APPELLEE/INITIAL BRIEF OF CROSS-APPELLANT

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STATEMENT OF CASE AND FACTS

On April 27, 2002, Ana Maria Angel, who emigrated from Columbia about 7 years earlier with her mother Margarita Osorio and who was six weeks short of her high school graduation, went out for the evening with Nelson Portobanco around 8 p.m. to celebrate their four month anniversary. (T. 732-33, 735-37, 739, 775, 776-77) After eating dinner, Ana wanted to go for a walk on the beach, so they drove to Penrod's on Miami Beach and walked down a sand pathway to the beach. (T. 777-80) After about a half hour, Ana got cold, and they decided to go back to Nelson's car, following the same path they took to get on to the beach. (T. 756-57, 779-83) Nelson saw that it was 12:30 a.m. the next day and observed a white Ford F150 pickup truck with dark tinted windows in the parking lot. (T. 759-60, 782-83)

Unbeknownst to Ana and Nelson, they were approaching Defendant, his brother Hector Caraballo, Joel Lebron "Lucifer," Jesus Ramon "Tito," the 16 year old nephew of Lebron, and Cesar Mena "Sammy," who had driven from Orlando and were trying to sneak into Penrod's through the back door.[1] (T. 758-59, 763, 909, 1183, 1227, 1355, 1436, 1439, 1453-54, 1462) Having already decided to rob someone to obtain funds to get into Penrod's,

[1] Defendant will be referred to throughout as "Defendant," his brother Hector Caraballo will be referred to as "Hector," and the remaining co-defendants will be referenced by their last names.

Lebron and two other co-defendants accosted Ana and Nelson at knife and gun point, and forced them into the truck. Once inside the truck, Ana and Nelson were sandwiched in between the co-defendants. (T. 784-89, 792-95, 909, 1183, 1227-28, 1230-34, 1238, 1297-98, 1442, 1454) Mena drove, and Defendant sat in the front passenger seat. (T. 786-88, 1231-34, 1238)

The co-defendants demanded that Ana and Nelson give them their belongings at gunpoint. (T. 789, 1239-42, 1455-56) Ana gave them her cell phone, bracelets, jewelry and wallet. Nelson gave them his gold chain with a crucifix, watch, wallet and cell phone. (T. 790, 842-43, 1446) After being held for 10 or 15 minutes, the truck drove north away from Penrod's. (T. 791-93) Ana and Nelson were told to put their heads down, bend over at the waist and to put their chests on their knees. (T. 792-95) After driving another 15 minutes, the truck stopped at a gas station and the co-defendants demanded Ana's PIN number for her ATM card. (T. 795, 1431) Money could not be withdrawn, so they drove an additional 10-15 minutes to another gas station, where Defendant and Mena took out $160.00. (T. 797, 1431) They were concerned about a police cruiser following them, but it eventually turned in a different direction. (T. 799)

Lebron then told Ana and Nelson to kiss. (T. 799, 1253-56, 1455-56) When Nelson did not comply, he was hit in the back of

his head with a fist several times. (T. 800) Nelson then kissed Ana. (T. 800) Nelson was told to grab Ana's breasts and touch her vagina. (T. 800, 1254-57) When Nelson refused, he was hit in the back of his head again. (T. 800) Nelson was then forced onto the floorboard behind the driver's seat and a shirt was pulled over his head. (T. 800-01, 831-32, 1257)

Lebron pointed a gun at Ana and told her to remove her panties and demanded that Ana give him oral sex. (T. 801-02, 1256, 1258, 1456) Ana cried; she asked them not to do anything to her or hurt her, and explained that she had already been raped by her stepfather. (T. 802-03, 1256, 1456) Ana cried out several times in pain. She pleaded with them to not penetrate her in the anus, but Lebron did anyway. (T. 802, 1457) Then Ramon penetrated Ana in her vagina. Then Hector penetrated Ana in her vagina. (T. 1457) Defendant moved to the backseat, switching places with one of his co-defendants to "get his turn." (T. 803-04) Ana pleaded with them to stop, but they continued to take turns having vaginal and anal sex with Ana for 15 minutes to a half hour in the backseat of the truck while Mena drove. (T. 802-03, 804, 1261) When they were finished, Ana got dressed again. (T. 804-05)

Then the truck stopped. Defendant and Lebron got out of the truck and pulled Nelson out of the truck by grabbing his

shoulders. (T. 805-06, 833, 1457) They were on the side of I-95 at Sample Road in Broward County. Nelson was instructed to hold onto the belt of the co-defendant in front of him as they walked down the embankment to the retaining wall where it was dark and secluded by bushes. (T. 806-09, 835-36, 849, 1308-09, 1425-26, 1457) Defendant and Lebron told Nelson to get on his knees right in front of the wall. Nelson still had his eyes closed and was not looking at them. Defendant and Lebron told Nelson to turn his head and look at them, but Nelson refused. One of them said to go back to the truck and get the gun. Nelson then turned around and was stabbed in the head with a knife. Nelson was stabbed in the back of his head, each side of his neck, and several times in his back. Nelson did not know how many times he was stabbed but felt that he was bleeding. (T. 808-811, 1457) No one was coming to Nelson's aid. (T. 813-14, 1457) Nelson fell to the ground and curled up in a fetal position. (T. 811) They stomped on Nelson's head. (T. 812, 1457) Nelson did not move and sustained each blow for five minutes, hoping they would think he was dead. (T. 812) After the beating stopped, Nelson waited an additional 5 minutes, until he no longer heard them around him, before walking to the edge of the roadway. (T. 812-13)

The truck was pulled over 50 yards north of him but it drove off when he reached the road. (T. 812-13) Nelson flagged

down a passing car and got help, explaining that he and Ana had been kidnapped and truck was up the road. (T. 814-16)

Meanwhile, Defendant and Lebron returned to the truck. (T. 1458) Ana continued to cry, begged for them not to kill her and asked to be let go anywhere. (T. 1186, 1262-63, 1457) They drove north to Exit 38, in Palm Beach County. (T. 1320-1322, 1352) There, Ana was taken to the side of the road and hit in the face. (T. 1328-29) Ana screamed for them not to kill her. (T. 1458) Ana was down on her knees, her hands clasped together with her fingers interlaced, and her head titled down. (T. 1323-26, 1349, 1353-54) Lebron shot Ana in the back of her head at point-blank range. (T. 1348) Ana fell over behind a clump of bushes near the retaining wall, which was not visible from the roadway. (T. 1349, 1353, 1438) After killing Ana, the co-defendants returned to Orlando, arriving at 6:00 a.m. (T. 1431-32, 1458)

Unaware of Ana's fate, Nelson was taken by ambulance to a hospital where staples were used to seal his stab wounds, one of which was less than a centimeter from his artery. (T. 815-19) He was swollen, cut all over his body and neck, nervous and crying. (T. 741, 846-47) Nelson told police about the stolen property and described the truck. (T. 819-20)

Police traced Nelson's cell phone and learned that it was used to dial Hector at an apartment in Orlando. (T. 846-53, 894-

96, 909, 990, 1022, 1201, 1429-30) Someone also attempted to use Ana's ATM card at a 7-Eleven near this apartment at 6:30 a.m. (T. 929-30, 1426-28, 1431-32) Police went to what they believed was Hector's apartment, which was actually leased to Luis Diaz Ramos, around 1 p.m. (T. 857-58, 894-95, 909, 999, 1169, 1170) There, Agt. Francisco Hidalgo spoke to Manuel Caraballo who gave him Mena's telephone number. (T. 1170-72)

Meanwhile, Agt. Susan Koteen went to the apartment complex's office and met Michelle Cora, one of the leasing agents, who informed her that she did not know Hector, but knew Defendant, who had the same last name. (T. 855, 858-59, 860-62, 897-98) Ms. Cora explained that Defendant had been evicted and moved out of the apartment. (T. 862-64, 882, 899-900) Another property manager, Christine Butts, confirmed that Defendant no longer lived in the apartment; he relinquished his keys upon notification of eviction proceedings, the locks had been changed and the apartment was considered abandoned. (T. 862-64, 882-85, 890-92, 900-01, 980, 1019)

Upon approaching the apartment, police did not initially reveal their presence as they were still looking for Ana. (T. 978, 999, 1168) Eventually, they started banging on the apartment door very loudly in order to get any occupant's attention but received no response. (T. 979)

When police attempted to enter Defendant's former apartment, the key provided by Ms. Cora did not work. Ms. Cora contacted the maintenance worker Steve West to open the door. Mr. West tried additional keys, but the lock on the door was completely different from the lock placed on the door after Defendant relinquished his keys and the uniform locks on other doors. (T. 862-64, 875-76, 901-02, 978-79) Drilling through the lock also did not work, so Agt. Thomas King kicked down the door. It took ten kicks to get the door open wide enough to get inside the apartment as the door had been blockaded by Defendant from the inside with wood and a tire jack. (T. 901-02, 904, 908-09, 980-81, 1002, 1048, 1190-91)

Upon entering at 2:25 p.m., the police found a barren apartment, except for the items that had been used to block the door and Defendant, who was lying on the bedroom floor on a mat. (T. 850-853, 902-05, 910, 928, 986, 1004, 1053, 1174) Defendant said that he did not hear them knocking because he was asleep, but there was a smoldering cigarette butt next to him. (T. 911, 984) Police thought Defendant was trespassing, and Defendant understood that he was being evicted from the apartment, therefore Defendant was initially handcuffed. (T. 899-900, 912, 940, 980, 1004-05, 1188-89)

Agts. Koteen, King and Sgt. Brick spoke to Defendant and

determined that Defendant would be more comfortable speaking in Spanish, so Agt. Hidalgo arrived to speak with Defendant in Spanish. (T. 853, 909-11, 932-33, 984-86, 1174) Defendant's handcuffs were removed, and he waived his *Miranda* rights. (T. 913-15, 919-20, 1177-1181, 1195-96) Defendant was afforded bathroom breaks, food and his Bible. (T. 910, 928, 988-89, 1014, 1053, 1175-76)

Defendant denied knowing where Hector was and told Agt. Hildago that he last saw his brother the day before. (T. 1176, 1182) Defendant talked about his trip to Miami, stating that Lebron, Ramon and Mena came to Hector's apartment the previous day, told Hector and he that they were going to Miami to a party and asked whether they wanted to go, as Mena had rented a truck from Budget rental car. (T. 1182-83, 1445) Once in Miami, they went to the beach, parked near a club and tried to enter the club without paying. (T. 1183) As they were doing this, they came upon Nelson and Ana, and Defendant stated that Lebron grabbed Nelson, Ramon and Mena grabbed Ana, and they put them in the truck. (T. 1183) Once inside the truck, Lebron and Ramon held knives to the backs of Nelson and Ana and threatened them. (T. 1184) Defendant stated Lebron suggested that they beat up Nelson and leave him in Miami. (T. 1184) Defendant explained that Lebron and Ramon got out of the truck with Nelson, and Ana

screamed not to hurt him or kill him. (T. 1184) When Lebron and Ramon came back to the truck, they said they beat up Nelson. (T. 1184) Defendant stated a couple of times that Ana continued to beg and cry, asking them to please let her out anywhere. (T. 1186) Defendant never included either his brother Hector or himself in the activities of the evening and never discussed any sexual activity. (T. 1183-85) Finally, Defendant claimed that Ana was still alive and that they arrived back in Orlando at around 1:00 a.m. that morning. (T. 1185)

Defendant then discussed the items taken from Nelson and Ana, identifying where each was located within the apartment but claiming that Lebron and Ramon had put the items in the apartment. (T. 1185-86, 1187) Ana's driver's license and ATM card were on a shelf in the kitchen, her purse was in the vanity cabinet, her cell phone was found in the master bedroom of the apartment inside a pair of pants on top of a duffle bag and Ana's and Nelson's wallets were found in Ziploc bags in the toilet tank. Defendant's clothing worn the night of Ana and Nelson's kidnapping was also recovered from the apartment. (T. 923-24, 985-88, 1046-49, 1052, 1054-55, 1077-78, 1085, 1185-87) Ana's shoes were found in a dumpster at the apartment complex. (T. 747-49, 1033-35)

Believing that Ana was still alive, Agt. Hidalgo asked if

Defendant thought Lebron, Ramon or Mena were capable of killing Ana. Defendant responded affirmatively, began crying and asked for his Bible. (T. 1190)

Later, Defendant was taken to the FDLE office in Orlando and was questioned by Det. Larry Marrero along with Agt. Hidalgo, who recorded the interview. (T. 850-53, 1192-93) Defendant's *Miranda* rights were again read and he waived those rights. (T. 1303-05) Defendant altered a few things from his previous statement and added more details. Defendant stated that he had not met Lebron or Ramon prior to the day before. (T. 1222-24) The co-defendants began consuming beer in Orlando, and they drove straight to Miami. (T. 1224-25, 1229-30) When they tried to sneak in to the club around 12 a.m., they were prevented by a security guard (T. 1227, 1243)

Defendant stated that he was outside the truck, arguing with Lebron and Ramon over how to best get into the club when Nelson and Ana walked by. (T. 1227-1228, 1230-31) He watched as Lebron and Ramon forced Nelson and Ana in the truck against their will but later stated that he was far away from the truck and that everyone was outside the truck. (T. 1229-30, 1273) Defendant sat up front in the passenger seat and maintained that he did not sit in the back. (T. 1231, 1238) Defendant identified their locations in the truck as Mena driving, himself in the

front passenger seat, Lebron behind the driver in the backseat, then Ana, then Ramon, then Hector behind the passenger seat, and Nelson on the floor. (T. 1242, 1297-98)

Defendant knew that they stole Nelson and Ana's belongings and specifically asked Ana for her credit cards and code for her ATM card. (T. 1239-40) Defendant added that they stopped at a gas station and used Ana's card to get gas. (T. 1240-42) Defendant heard Lebron tell Hector not to use Ana's cell phone because the police could find them that way. (T. 1244-45)

Defendant added how Ana was told to take off her clothes, panties and blouse, and Nelson was ordered to touch her and have sex with her. (T. 1253-1256) Lebron took Ana's panties to smell them. (T. 1275) At that point, Nelson was put on the floor of the backseat. (T. 1257, 1262) Defendant heard Lebron say that he was going to have anal sex with Ana and told her to give him oral sex. (T. 1257-58) Defendant also averred that Ramon and Mena also had sex with Ana. (T. 1242, 1258-59, 1297-98) Ana cried, said no and moaned when penetrated. (T. 1260)

Defendant explained that when they were done, they told Ana to put her clothes back on. (T. 1261) He claimed that a half hour later, Lebron and Ramon took Nelson to the side of the road in the area of retaining wall where trees covered the area and beat him. (T. 1262, 1263) (T. 1246-47) He knew one of them had a

revolver. (T. 1248-49) Then, after getting rid of Nelson, Defendant stated that they stopped a little further on up the highway to use Ana's ATM card again. (T. 1263-1265) At that point, Defendant started telling them that he wanted to go home. (T. 1265) He stated first that Ana asked them to let her go, but later claimed that Ana did not say anything the whole time. (T. 1262-63, 1268)

Defendant explained that Lebron took all the things they stole, including Ana's shoes, and put them in a dumpster at the apartment complex. Defendant altered his prior statement, explaining that since he liked to drink, he decided to keep the cell phone to try and sell it and that it was he who hid everything in the apartment. (T. 1268-70) He later stated that he did not get anything distributed to him. (T. 1277-78)

Defendant then discussed how he was still living in the apartment and stated that he was already supposed to move out of the apartment, but had not done so, and that he received the eviction letter on the 17th. (T. 1271-72) Finally, Defendant stated that he thought Lebron was capable of killing Ana but did not know whether he had. (T. 1279-80)

Police learned the location of Ana's body from Mena at 3:15 a.m. on April 29, 2002. (T. 1351-52, 1437-38) She was found off the northbound side of I-95 near Exit 38 by a retaining wall

behind a clump of trees and shrubs, hidden from passing traffic. (T. 1320-22, 1353-54, 1437-38) Her fingers were still laced together, and her face was bruised. (T. 1323-29, 1353-54)

As a result, Defendant was charged one with (1) the first degree murder of Ana, (2) the attempted first degree murder of Nelson, (3) the armed kidnapping of Ana, (4) the armed kidnapping of Nelson, (5) the armed robbery of Ana with a firearm, (6) the armed robbery of Nelson with a firearm, and (7) the armed sexual battery of Ana. (R. 73-78)

Prior to trial, Defendant filed a Motion to Suppress Physical Evidence and Statements. (R. 330-4, 450-51) Defendant claimed that police were not granted voluntary access to the apartment by either Defendant or apartment personnel, that the subsequent searches and seizure was unlawful and that the later-obtained consent from Defendant was invalid and not freely and voluntarily given. (R. 338-40) Defendant additionally alleged that the statements given by Defendant subsequent to the search of the apartment should likewise be suppressed as fruits of the poisonous tree. (R. 340-42) The State filed a Response to the motion to suppress. (R. 477-506, 652-81) Regarding Defendant's suppression claim, the State argued that Defendant was not lawfully within the apartment on April 28, 2002, having abandoned the apartment previously, that exigent circumstances

were created by the necessity to locate Ana and that Defendant consented after waiving his *Miranda* rights. (R. 478-81; 653-56)

At the suppression hearing, Ms. Butts testified that Defendant leased apartment 8 at 9900 Sweepstakes Lane. (41TMS. 21, 24-25)[2] On April 5, 2002, Defendant had not paid his rent, and a three-day notice was placed on his door, which expired on April 10, 2002. (41TMS. 25-26) After the posting, Defendant moved out, and the lock on the apartment was changed to a blue lock so that cleaners and other maintenance workers could enter. (41TMS. 26, 28-29, 31-33, 39, 49-51) Defendant would not normally have been given a key to this lock, however, Ms. Butts lent Defendant the key on April 26, 2002 so that he could remove the last of his belongings from the apartment. (41TMS. 29-33, 50-51) Formal eviction proceedings were instituted on April 18, 2002, and Defendant had until April 26, 2002 to respond. (41TMS. 30)

Mr. West explained that he went to the apartment around April 10, 2002, and saw nothing within the apartment to indicate that someone lived there: no toiletries, nothing in the kitchen to eat or cook with, no furniture, and there was trash thrown around the apartment. (41TMS. 53-55) He believed that the

[2] References to the motion to suppress transcripts will be made first by the volume number of the Record and then by the transcript page number through the symbol "[Vol. #]TMS."

apartment was abandoned and changed the lock to the blue lock. (41TMS. 26, 28-29, 55) When Mr. West accompanied police to the apartment on April 28, 2002, the lock was changed to a silver lock, which was not permitted by the apartment complex and the key to the blue lock did not work. (41TMS. 56) He testified that drilling through the non-compliant lock was unsuccessful and that he told police kicking the door down was just as easy as any other method of getting in the apartment. (41TMS. 56-58) Upon entry, Mr. West saw items in the apartment: a suitcase, clothing, a blanket for a bed and pillow, patio furniture, and food in the kitchen. The blue lock was in a kitchen drawer. (41TMS. 58-62, 67)

On cross examination, Defendant attempted to impeach Mr. West with his prior deposition testimony that he had told management that there was no evidence that renter had moved out and that he was aware the renter had changed the lock. (41TMS. 63-71)

Ms. Cora testified that Defendant was being evicted and that she recalled him coming in on April 26, 2002 to request a key to the apartment to collect his washer and dryer, which he stated was the last of his belonging left in the apartment as he was moving. (41TMS. 77-83) Defendant did not return the borrowed key. (41TMS. 87-88) When police arrived, they were looking for

Hector, but Ms. Cora informed them that she only knew Defendant, whom she told the officer had already vacated the apartment and was being evicted. (41TMS. 81-83, 92-93)

Det. Marrero testified that he believed Ana could still be alive and immediately contacted FDLE and other agencies to search for Ana. (41TMS. 101) Det. Marrero did not arrive in Orlando until 4:30 p.m. on April 29, 2002, after Defendant was located. (41TMS. 109-10) He testified that he did not advise Defendant of his *Miranda* rights prior to taking the statement because he had been advised of his rights at 4:10 p.m. (41TMS. 112-13; 42TMS. 8, 27) The statement began at 10 p.m. and lasted approximately 55 minutes. (42TMS. 8, 31) Defendant's recorded statement was admitted into evidence. (41TMS. 13)

Agt. John Burke led the operation at the apartment complex. He testified that they learned the location of Hector's apartment through reverse 911 based on a phone number dialed from the victim's cell phone. (42TMS. 38-40) He first went to Hector's apartment, was later told by Agt. Koteen about Defendant's eviction from another apartment within the same complex and sent agents to check on that apartment. (42TMS. 49-50, 69) He understood that Defendant did not have a possessory interest in the apartment since he was evicted. (42TMS. 66-68) He stated that Defendant was handcuffed because they believed

that he was trespassing, were concerned with officer safety and wanted to interview him regarding the whereabouts of his brother. (42TMS. 69-70) Agt. Burke had the handcuffs removed once he arrived and there was no officer safety concern. (42TMS. 69-70) He recalled that Defendant emphatically stated Ana was brought to Orlando alive and told the agents where to find the stolen items within the apartment. (42TMS. 54, 73-74)

Agt. Koteen testified that their entire purpose was to try and find Ana alive. (42TMS. 101-02, 116-17) She went to the leasing office and spoke with Ms. Cora for approximately 15-20 minutes. Ms. Cora informed her that Defendant previously subleased in Hector's apartment before getting his own apartment but had since been evicted, moved out, and returned the keys. (42TMS. 80-82) Ms. Cora gave her the key that could not open the lock. (42TMS. 83)

Once in the apartment, Agt. Koteen sat down with Defendant to talk to him. (42TMS. 86) Although she was able to communicate with Defendant in English, he preferred Spanish, so she requested that a Spanish speaking officer come over to the apartment to speak with Defendant. (42TMS. 88-89) She testified that Agt. Hidalgo arrived at the apartment to speak with Defendant after 10-15 minutes, and she had already been at the apartment 45 minutes to an hour. (42TMS. 89) She knew enough

Spanish to understand the *Miranda* waiver form read to Defendant and sign the form as a witness. (42TMS. 90-91) Defendant also signed a consent to search form. The questioning was calm, Defendant was afforded bathroom breaks, smoked, read his Bible, and ate. (42TMS. 96-100)

On cross examination, Agt. Koteen testified that Defendant directed them to the eviction notice that the apartment complex served on him in response to inquiry regarding what the officers did to determine whether Defendant had a right to be in the apartment. (42TMS. 111)

Agt. King testified that he arrived at the apartment at 1:45 p.m. and knocked and announced police presence at 2:00 p.m., but did not hear anything from within the apartment. He was assured that the apartment was vacant. (42TMS. 121-23) He kicked the door down when it could not otherwise be opened and noted the door was being blocked from within by plywood and a hydraulic jack. (42TMS. 123-25) The officers went in with guns drawn. (42TMS. 125) They came upon Defendant in the bedroom, lying on a mat on the floor. Agt. King performed a pat-down and cuffed Defendant as he was being detained. Within Defendant’s reach was the bedroll, a Bible, a pair of women’s underwear, clothing, and other personal effects. He thereafter went through the apartment, including the attic, looking for Ana or other

people, opening drawers and cabinets, but did not look in the bathroom cabinet or drawers. During this search, he observed a cell phone on the kitchen counter and discovered Ana's driver's license and ATM card in an upper kitchen cabinet. The purpose of this search was to look for Hector, the victim, or any evidence relating to the whereabouts of Ana. (42TMS. 126-134, 175-179, 181-84; 43TMS. 201) He asked Defendant initial identification questions and Defendant identified Hector as his brother. He was sent to get Defendant food. (42TMS. 132-133)

Finally, Agt. Hidalgo testified that they were still looking for Ana. (49TMS. 45-46) He understood from the other agents that Defendant was detained for trespassing. (49TMS. 73, 89-90) Upon entering the apartment, Agt. Hidalgo observed that there was no furniture within the apartment; only a suitcase and a bag of clothes on the floor of the bedroom. (49TMS. 18, 74) Agt. Hidalgo read Defendant his *Miranda* rights in Spanish from a *Miranda* waiver form, and Defendant waived each of his rights at 4:10 p.m. (49TMS. 23-25, 79-81)

Defendant told Agt. Hidalgo that he believed police were "there to investigate his trespass and living in the apartment where he was not supposed to be living." (49TMS. 20, 77-78) Defendant began explaining what occurred the previous night, and told Agt. Hidalgo where to find Nelson's and Ana's stolen

property. (49TMS. 25-29) At that point, Agt. Hidalgo wrote out a consent form that Defendant signed, authorizing law enforcement to search the apartment and his belongings at 5:15 p.m. on April 28, 2002. (49TMS. 27-29, 90-91) The interview lasted one hour. (49TMS. 30)

In closing, defense counsel argued that the State's theory regarding Defendant's lack of standing was a fallacy because the evidence showed that the landlord did not have access to the apartment. (49TMS. 199-200; 50TMS. 201-02) He argued that Defendant had not yet been evicted, the notices placed on the door did not constitute a legal eviction, and Defendant still had a valid lease and a right to live in the apartment. (50TMS. 201-03, 210) Based on this lease, defense counsel further argued that the landlord could only enter for certain purposes and providing police access was not one of those purposes. (50TMS. 203-04, 208) After hearing the trial court's inquiry regarding Defendant having to come back and request access to the apartment to obtain his washer and dryer, defense counsel argued that there was nothing in the record indicating when they expected the keys to be returned, that they never requested that the keys be returned and that providing the keys gave Defendant permission to live in the apartment. (50TMS. 207, 209) Based on this permission, defense counsel argued that Defendant was not

trespassing and could not be arrested for doing so. (50TMS. 209, 212-13) Defense counsel argued further that it was Defendant's subjective expectation of privacy that mattered in the analysis, noting that the items found along with Defendant in the house indicated that he had an expectation of privacy. (50TMS. at 207-08)

In response, the State argued first that there were exigent circumstances due to the need to find Ana. (50TMS. 219-21) During this argument, the trial court raised a question about Mr. West's testimony from his deposition. In response, the State suggested that Mr. West's deposition could only be used to impeach or contradict and could not be used as substantive evidence. (50TMS. 223-24) Thereafter, the State argued that the veracity of the testimony did not really affect the analysis because police could still properly rely on the apparent authority of the management, even if erroneous in hindsight, and the absent blue lock and presence of a non-compliant lock indicated a trepassing. (50TMS. 224-28) The State additionally argued that Defendant's own subsequent acknowledgment that he was a trespasser indicated his subjective belief was that he did not have any expectation of privacy. (50TMS. 229-32) The State finally argued that there are several theories under which the evidence should not be suppressed, including exigent

circumstances, apparent authority, and Defendant's status as a trespasser. (50TMS. 236-37)

In rebuttal, defense counsel continued to argue that the issue hinged on the legal ability of Defendant to be in the apartment based on the valid lease, and that, because the police had no probable cause to believe that Defendant was a trespasser, everything occurring after the entry was illegal. (50TMS. 237-38) Regarding the credibility of Mr. West, defense counsel indicated that it would provide the deposition. (50TMS. 238-39) Defense counsel also argued that the subsequent formal statement should be suppressed because Defendant was not given his *Miranda* warnings again prior to that statement. (50TMS. 240-41)

The trial court denied Defendant's motion and ruled that Defendant abandoned the apartment prior to police's entry on April 28, 2002, and that he, therefore, had no expectation of privacy in the premises at the time of the search. (R. 1516-20) The trial court based its ruling in part on the testimony of Ms. Cora, explaining that Defendant informed her of his having already moved out, requested to borrow the blue lock key to remove his final belongings, and his statement of intent to move out. (R. 1516-17) The trial court also cited the testimony of Mr. West that he went to the apartment after the three-day

notice was posted and found an empty apartment. (R. 1517-18.) Additionally, the trial court discussed how the lock on the door had been changed, the condition of the apartment upon police's entry, and Defendant's own admission that he was "where he was not suppose[d] to be living." (R. 1518-19.) Finally, the trial court found that Defendant "conceded the eviction and abandoned the apartment[,]" thus making his return to the apartment without the management's consent a trespass, depriving him of any expectation of privacy within the apartment. (R. 1520.)

Defendant additionally filed an objection to the imposition of the death penalty based on mental retardation prior to trial. (R. 1567-70) At the hearing on the motion, Dr. Manuel Alvarez, a psychologist, testified that he met with Defendant three times, and administered the WAIS-III normed in Spain in 1999. (TR. 24, 32-33)[3] Dr. Alvarez testified that the WAIS was one of the tests specified under Florida law to be used when testing an individual for mental retardation and was the gold standard. (TR. 33) He administered the Spanish WAIS-III because there is no test normed for persons of Puerto Rican decent and the Spanish WAIS-III would best approximate Defendant's IQ. (TR. 37)

Dr. Alvarez reviewed Defendant's medical records. (TR. 38) At his first meeting with Defendant, Dr. Alvarez observed that

[3] The symbol "TR." will refer to the retardation hearing transcript, found in volumes 55 and 56 of the record.

he was actively psychotic, delusional, and hallucinating, but testified that he was not malingering because if he were he would have exaggerated his tumultuous past instead of denying any knowledge. (TR. 40-41)

On the second visit, Dr. Alvarez administered the WAIS. (TR. 43) Dr. Alvarez explained that the WAIS is divided into two parts, verbal and performance, and consisted of several subtests. (TR. 43-48) Dr. Alvarez testified that on each section, an average score would be 10. (TR. 48) Dr. Alvarez then testified that Defendant obtained the following scaled scores: verbal, 3; similarities, 2; arithmetic, 6; digits, 4; information, 4; comprehension, 2; incomplete figures, 4; matrix, five; and sequencing, 5. (TR. 48-49) Defendant scored 58 on verbal, 62 on performance, and received a full scale IQ of 56. (TR. 49) However, Dr. Alvarez explained that Defendant's active psychosis affected his ability to concentrate and that his IQ was probably higher, around 71, the borderline range, which was calculated by adding the standard deviation of 15 to the IQ score. (TR. 50-53) He did not believe Defendant's IQ was 56, but considered the test to be a valid test, thought that Defendant was within the mentally retarded range and opined that Defendant was mentally retarded. (TR. 58, 78-79)

Regarding Defendant's adaptive ability, Dr. Alvarez

administered the Adaptive Behavioral Scale Residential and Community (ABAS) and obtained historical data from Defendant himself. (TR. 54-55) Dr. Alvarez testified that the test was designed for use only with those suspected of retardation. (TR. 55) Dr. Alvarez testified that Defendant performed superior, above average, and average on most of the subtests of the ABSRC, but obtained below average on pre-vocational, vocational, social behavior, sexual behavior, and self-abusive behavior, and poor on disturbing interpersonal behavior. (TR. 56-57) After speaking with family members the morning of the hearing, Dr. Alvarez opined that their recollection of Defendant's childhood ability was consistent with Defendant's scores on the ABAS: his inability to handle money and reliance on others to do so; his ability to learn to weld and fish, but inability to obtain an education otherwise, and his lack of good hygiene habits. (TR. 59-66) Defendant had more than two concurrent adaptive functioning deficits. (TR. 134)

Dr. Alvarez additionally administered the Woodcock-Johnson test, which measures learning disorders, and Defendant scored somewhere between kindergarten to fourth grade. (TR. 72-73) Dr. Alvarez later acknowledged on redirect that Defendant had not completed the fifth grade and was held back several times in school. (TR. 134-35)

On cross, Dr. Alvarez acknowledged that his entire understanding of what Defendant was like prior to the age of 18 was obtained from Defendant while he was actively psychotic. (TR. 90) He explained that 56 was not a valid score because an IQ test administered when the subject is actively psychotic would not produce a valid test. He could not say how much higher Defendant would score if the test was administered when he was not actively psychotic; although it could be one standard deviation higher, it could be even higher than that. (TR. 90-92, 131-32) Dr. Alvarez acknowledged that his own opinion was that Defendant's actual IQ score could be 76. (TR. 94) The higher IQ score would place Defendant outside of the mentally retarded range. (TR. 140-41)

Next, Defendant called Dr. Michael Hughes, a psychiatrist. (TR. 144) Prior to meeting with Defendant, Dr. Hughes reviewed some materials regarding Defendant's hospitalizations the year prior to his arrest, as well as historical summaries provided by counsel that were prepared by an investigator who interviewed family members. (TR. 14) Dr. Hughes testified that he did not administer an IQ test on Defendant and deferred to Dr. Alvarez's testing, but conducted his own interview to evaluate the etiology of Defendant's alleged mental retardation. (TR. 148-56) Dr. Hughes opined that he believed Defendant was mentally

retarded based on the IQ score obtained by Dr. Alvarez, the diminished functional capacity evidenced through Dr. Alvarez's testing and his own evaluation of Defendant's mental status. He opined further that Defendant's hospitalizations in the year prior to the crime indicated someone with diminished functioning, and finally that Defendant's familial, social, and education history prior to age 18 all indicated that Defendant was in the mildly mentally retarded range, with an IQ ranging from 54 to 70. (TR. 156-58, 160-164, 173-74) Defendant met the diagnostic criteria for mental retardation in the DSM-IV. (TR. 176)

Dr. Hughes opined that he did not believe Defendant was malingering because, while Defendant is not always factually truthful, he was emotionally truthful. (TR. 158-59) Regarding the fact that the IQ score was obtained when Defendant was actively psychotic, Dr. Hughes testified that he took that into consideration in performing his evaluation to try and determine Defendant's ability to grasp reality and focus, and opined that while Defendant was distant at times, at other times he was not and could focus. (TR. 164-65) Defendant's history of an alcoholic mother, sexual molestation by his brother and a neighbor, imaginary friends, drug use, and beatings from his father all indicated that he was not taken care of, never

learned how to take care of himself, and presently could not care for himself. Combined, these historical facts indicated a deficit in adaptive ability. (TR. 169-71)

On cross, Dr. Hughes testified that if Defendant was actively delusional or psychotic at the time of IQ testing, then the test would not be reliable and have no meaning. (TR. 177-78) Dr. Hughes testified that Defendant's past involvement with a car selling scam, moving to Orlando to avoid drug dealers or fall-out from the failed scam, moving to Alaska to get additional money, stealing a car there and getting lost in the wilderness, were all not very smart, but that having the moral belief to not steal and a map to not get lost would help Defendant no longer be retarded. (TR. 185-87) He also acknowledged that Defendant was never placed in special education classes. (TR. 189)

Defendant next called his sister, Wanda Rodrigo, who is three years younger than Defendant. (TR. 210-11) Ms. Rodrigo testified that Defendant was always alone. When he did play, he would play with an imaginary friend or sit in a corner and punch walls. Defendant did not want to bathe, and their father would force him to take a shower. She tried to help Defendant with schoolwork but could not because Defendant would not learn and would skip classes. However, she did not know what happened with

Defendant at school because their parents were not involved. (TR. 213-220)

Although Ms. Rodrigo testified that Defendant would get lost and be brought back home by the police, this did not occur until Defendant was 18 or 19 years old. (TR. 217) Finally, Ms. Rodrigo testified that Defendant only passed the welding course because his girlfriends would write the answers to the tests on his arms. (TR. 221-23)

On cross, Ms. Rodrigo explained that Defendant would not go to school in order to swim in a lake. (TR. 226-27) She was aware of the auto theft scam, which involved Defendant obtaining cars and fixing them up with the help of his brother in order to sell them, so they could steal them back to be sold again. (TR. 229-30) Finally, Ms. Rodrigo testified that the first time any one raised the issue of whether Defendant was mentally retarded was during this case. (TR. 231)

In rebuttal, the State called Dr. Cristian Del Rio, Psy.D. (TR. 233) Dr. Del Rio did not do any preliminary review of Defendant’s past so as not have any bias regarding mental retardation but would have explored Defendant’s background further if the testing indicated a borderline case, explaining that mental retardation is very rare within the population. (TR. 238-39, 244)

Dr. Del Rio administered the Wisconsin Card Sort test to test for mental retardation because the other primary tests, the Stanford-Binet and WAIS, were inappropriate for Defendant. Dr. Del Rio testified that the Stanford-Binet was in English and Defendant spoke Spanish, the Spanish language WAIS normed in Puerto Rico 40 years ago was obsolete as a result, and the WAIS-III normed in Spain was inappropriate because of the language, education and social differences between Spain and Puerto Rico. (TR. 236-37) He chose the Wisconsin Card Sorting test because it assesses a person's reasoning but is not based on prior learning. (TR. 245) The test scores are congruent to the WAIS, with the advantage that the Wisconsin Card Sorting test is not affected by prior learning and better approximates how the person operates in real life. (TR. 245-50) He additionally evaluated Defendant's executive functioning, which is the real-world ability of people to function, and explained that a person with good adaptive functioning would not have a low IQ score and be mentally retarded. (TR. 258-59)

Dr. Del Rio testified that Defendant scored in the 45th percentile, which was average and correlated to an IQ of 98 on the WAIS. (TR. 250-52) Dr. Del Rio testified that the Wisconsin Card Sort test exposes mental retardation by the person's inability to change, continually choose the wrong type of answer

despite being informed by the computer that the answer is wrong, which Defendant did not do – Defendant adapted. (TR. 254-57)

Dr. Del Rio opined that Defendant did not behave like a mentally retarded person. Defendant requested that Dr. Del Rio verify his ability to meet with Defendant and kept the court order authorizing the testing. As Defendant was keeping track of who tested him, Dr. Del Rio thought this was a very methodical approach to controlling what was happening to him. (TR. 241-44, 257-58, 307-08) He also opined that Defendant's history of living on his own since 2001, having social relationships, working as a welder and auto mechanic and for the phone company, all indicated that Defendant functioned above the threshold for mental retardation. (TR. 258-61) Likewise, Dr. Del Rio opined that Defendant's confession letter was inconsistent with someone who is mentally retarded and only achieved a 5th grade education, because it showed that Defendant improved on his own beyond a 5th grade education. (TR. 263-65) Nothing he saw or reviewed indicated that Defendant was mentally retarded. (TR. 266) Defendant never required assistance to live and lived independently, Defendant's abilities were incongruent with a mentally retarded person and further testing would be fruitless. (TR. 303-06)

Dr. Del Rio explained that he had several problems with Dr.

Alvarez's report because it was unclear what WAIS was administered, Defendant should not have been given an English language test like the Woodcock-Johnson and it indicated that Defendant was tested while he was psychotic. According to Dr. Del Rio, testing an individual while he was psychotic would not produce an accurate estimate of intellectual functioning, and he would disregard the results. (TR. 266-69) Dr. Del Rio further explained that the guidelines of his profession dictated that any difficulties encountered during administration of an IQ test has to be accounted for and that in this instance Defendant's IQ would be higher due to Defendant's psychosis. However, Dr. Del Rio explained that a specific number could not be obtained using a standard deviation. (TR. 269-275)

On cross, Dr. Del Rio agreed that he previously testified that mentally retarded people do not learn well and cannot maintain jobs. (TR. 275-85) He maintained upon questioning that he remembered Defendant requesting the order sending him to evaluate Defendant and verification of his identity because it was unusual. (TR. 295-98) When asked about the tests approved by Florida law, he explained that he did not perform those specific tests but pointed out that the statute permits administration of other tests where appropriate. (TR. 300-02)

The trial court ruled that Defendant had not proven any

element of mental retardation. (R. 1814-17) Regarding the first element, the trial court rejected the testimony of the defense experts because they admitted that Dr. Alvarez's IQ score was inaccurate and were guessing about an accurate score. (R. 1815-16) The trial court noted demonstrated abilities were inconsistent with Defendant having deficits in adaptive function. (R. 1816-17)

At trial, the State also presented evidence that Mena was located through the phone number given to Agt. Hidalgo, interviewed and arrested on the same evening as Defendant. (T. 990, 1008, 1006, 1017, 1023-24, 1173) Two knives and a .38 caliber revolver that were used in the crimes were found in the apartment where Mena was located. (T. 990-95, 1012, 1025-27, 1151, 1153-57, 1161, 1164, 1315-16, 1438) Defendant's underwear worn the night of the crime had his semen on them. (T. 1114-15, 1125) The fingerprints of Mena and Lebron were in the vehicle, and semen was found on the backseat. (T. 1067-68, 1071-73, 1100-01, 1112-14)

In addition to Defendant's statements to the police, a videotape of an interview Defendant voluntarily gave to a TV station after his arrest and without the knowledge of police was admitted. (T. 1439-45; R. 2070-86) On this tape, Defendant acknowledged that he was part of the group that kidnapped Ana

and Nelson, tried to kill Nelson and killed Ana. *Id.* However, he claimed that he tried to stop Lebron from stabbing Nelson and remained in the truck when Ana was killed. (T. 1443) Yet, he averred that he has the ability to see the trajectory of the bullet that killed Ana from there. (T. 1443; R. 2070-86) Defendant asked Ana's mother's forgiveness. (T. 1444)

The State also introduced a letter Defendant sent it, the trial court, his counsel and the media on October 22, 2002, stating:

> I, Victor Caraballo, hereby want to confess to the prosecution everything that happened in my case and without the help of my attorney since I do not need his professional help, or, presence to confess the following. This is a voluntarily confession written in my own handwriting.
> On April 27, 2002, I, Victor Caraballo, was at my brother Hector Caraballo's apartment Cesar Mena and Joel Lebron and the minor whose name I really don't know arrived at the apartment.
> They, together with my brother Hector Caraballo began talking about coming to a discothèque in Miami since it was Saturday and they invited me to come with them so I yielded to the invitation. At about 4:30 PM we went to Cesar Mena's house to get some money for gasoline and to say good-by to Mena's wife. It was 6:00 p.m. already we got on our way to Miami we stopped at a (7) Seven Eleven to buy vodka and orange juice and continued on our way to Miami; at about 7:00 P.M. Mena asked me to drive the pick up truck until we arrived at Miami when Mena began driving again because he knew the City of Miami. By then it was about 10:30 p.m. already when Mena stopped the pick-up truck in the back of the discothèque that was next to the beach. We walked on the beach for to while away the time for the security guards to be distracted so we could go in through the back since we didn't have enough money for all of us to go in. Then Mena, Joel

and the minor, decided that somebody had to be held up to take away their money and credit cards. Mena said that in back of the car he had (2) weapons I think it was a 38 caliber revolver and one (1) 45 caliber pistol. (By then I began to get nervous because I did not expect us to do anything of what happened).
Joel took the pistol with the charger and about ten minutes later the minor said that there were two approaching walking on the beach. Cesar said, let's take these two and get them on the pick up truck and take their money and their credit cards. Joel came out to meet them pointing at them with the 45 and the minor on their back with a knife. They forced them to get up on the pick up truck and we got out of the area by then the young woman was asking Joel please not to hurt them, Joel and the others said that as long as they cooperated they were not going to do anything to them.
Mena got on the driving wheel and I next to the driver, Joel, the minor, my brother Hector and the couple were in the back of the pick-up truck on the way they took what they had including the young woman's credit cards. Joel asked the young man what his job was and he answered construction but his father kept his money for him. We stopped at a gas station and Mena asked for the card's number. Cesar and I went to the teller and only withdrew $100.00, we went back and asked the young woman and she said that maybe there was a mistake. We went back to the teller and withdrew $60.00, then Cesar filled up the tank with the credit card for a cost of [$35.00] dollars. On the way I asked the young fellows if they knew how to swim because I told the rest to leave them at a river or a canal while they left: but they did not pay attention to me.
It was then that Joel told the young man to make love to the young woman and he was forced to begin kissing her but he did not penetrate her because he had not made love to the young woman because he had the intention of marrying her. Joel asked the young woman if she had made love before, and she answered no but, that once when she was 8 years old her stepfather had sexually violated her and that he had done it on two (2) occasions, Joel had the pistol in his hand and aimed it at her and told her to take off her panties; in fear and crying she took them off, Joel said that

we all were going to have sexual relations with her. Then Joel penetrated her from the back (the anus), and then the minor penetrated her from the front, successively my Hector penetrated her from the front, I didn't penetrate her because I knew that my brother was infected with "AIDS", and what I did was to masturbate and throw the sperm on her. (I was forced to do all of this because Joel told me that if I didn't do it things were going to go real bad for me).
We stopped the pick-up truck and Joel said he was going to kill them, Menas told him to take the knife with him and I got off the pick-up truck with Joel and the young man; I got in the middle trying to bring Joel to his senses and leave both of them alive, the young man and her, but Joel was like "possessed by a demon" and pushed me out of the way and began to stab him and kick him everywhere, I intervened and told him to leave him alone but the young man was already dead knowing that he was still alive, we left him and kept on going in the pick-up truck and the young woman was asking if we had killed him, they said no but she saw blood in Joel's hands. The young woman was crying and was asking them not to kill her. 15 minutes later Cesar let's stop around here, get her out and take one of the pistols with you; the minor got off the pick-up truck with Joel and the young woman, she was screaming for them not to kill her but they did not listen to the young woman's plea, they stopped close to the road between the plants and I saw when Joel shot her in the head. The minor and Joel came back to the pick-up truck and the minor was saying, ("he opened quite a hole in her head and the blood was going up in the air") and Joel said ("these are not the first and the ones yet to be carried out")
I became very nervous and told Cesar Menas to drive. We got on our way to Orlando. We arrived at my brother's house at about 6:00 A.M. I left for my apartment and Joel, the minor, and Cesar Menas kept on going for their house in the pick-up truck.
I was detained about 11:00 a.m. until this date.
This has been my confession, without any kind of manipulation by anybody, my confession is a voluntarily one and I am aware of the prejudice of my case for which I am accused and the sentence I may receive in case of a trial in front of a jury I would like to turn into a witness for the prosecution.

(R. 2089-2107; T. 1453-59) Defendant rested without presenting any evidence. (T. 1475-76)

During closing argument, Defendant asserted that the evidence showed that Lebron was the one who committed the kidnapping, rape, robbery, murder and attempted murder. (T. 1493-1506) He insisted that there was no evidence to show that he was a principle in these crimes based on a lack of evidence that he intended the kidnapping to occur before it started, the fact that his semen was not found in or on the truck, Ana or her clothing and the fact that his fingerprints were not found on the stolen property or weapons. *Id.* He insisted that the fact that he was in the truck did not show that he participated in any crime and averred that he had to be in the truck to get back to Orlando. *Id.* He asserted that his possession of the victims' property and his confessions to police should be ignored because they were allegedly illegally and involuntarily obtained. (T. 1506-11)

The State began closing argument by describing Defendant's involvement in the crimes and explaining how that evidence showed Defendant was a principle, involved in the crimes from the beginning. (T. 1511-28) The State then argued to the jury:

> There are very few impositions that society making [sic] on us.
> This is one, this is one where we ask you to assist us

> in formulating justice. Assist us in coming to a right decision. This is a difficult order. I think every juror maybe when they come in for jury duty might have a fear, a fear that they are placed on a jury and they might be in a situation where they were deliberating a case and they really thought the person was innocent.
> They didn't want to get involved in the possibility that a truly innocent person could be the victim of a crime. That's justice. That juror should fight all day and all night to acquit the innocent person. That's your duty. That's your obligation.
> But justice has two halves to that scale and the other half of that scale is it is just to convict the guilty. It is right to convict the guilty. That is the jury's obligation as well. And for those people who are guilty, it would be wrong for the jury to acquit them.

(T. 1528-29) The State thereafter commented on how the jury needs to use its "good common sense" in coming to a decision, how the lawyers are not there to trick them but guide them and how all they needed to look at Defendant's confessions. (T. 1529-30) No objection was made to any of these arguments. (T. 1528-1530)

The State continued to discuss the evidence presented regarding the entry into the apartment. (T. 1530-32) The State then commented that Defendant's cross examinations of the witnesses involved in the entry into the apartment centered on legal issues that were not for the jury to decide. (T. 1533) Defendant objected that the issue was voluntariness, and the trial court sustained the objection. (T. 1533)

The State pointed out that Defendant's actions that night

and the evolution of his statements showed consciousness of guilt and a desire to cooperate to shift blame away from himself. (T. 1535-37) During this argument, the State commented that no evidence was presented to show that the police forced Defendant to do anything. (T. 1535-36) Defendant did not object. (T. 1533-37)

The State averred that the questions posed to Agt. Koteen regarding the time it took to get a Spanish interpreter were attempts to distract the jury from the fact that Defendant was involved in the crimes and urged the jury not to get distracted. (T. 1537-38) At that point, Defendant objected and moved for a mistrial, asserting that the comments about the subject matter of cross disparaged "counsel or the questions" asked. (T. 1538-39) The State responded it was not discussing counsel and was merely attempting to argue that the evidence presented was not relevant but was presented because the case was overwhelming. *Id.* The trial court found that there was no basis for a mistrial but expressed concern with the manner in which the State was expressing itself and cautioned the State to avoid discussing defense counsel. (T. 1539-42)

The State then discussed how the lack of physical evidence was unimportant given Defendant's confession, the time lag between the crime and the efforts to find the evidence and the

likelihood that the truck had been cleaned. (T. 1542-45) The State also pointed out that Defendant's actions in giving the TV interview and writing the letter and the evolution of his statements showed that he acted voluntarily in making statements. (T. 1545-49) The State then discussed how Defendant's own statements showed that he was guilty of all of the crimes charged and was a principle and not any lesser included offenses. (T. 1549-64)

Finally, the State argued regarding coming to a verdict:

> The Judge decides which evidence you should hear and then you decide whether or not there is guilt. Justice is not something that you or anybody else can give on those people who were hurt that night. There is no justice for Nelson Portobanco. Those wounds don't go away, psychological or physically. There is no justice for Ana Angel. So what are we searching for? The only place we can find justice is with a truthful verdict. That's your job. You are the judges of the facts.
> You tell the Judge what is the truth as you understand it about what really took place for those few hours from roughly midnight on the 27th to about 3 a.m. to the 28th of April, 2002 and by your verdict, you will be creating justice.
> You will be saying we, the jurors, believe this is a just result for what has occurred.

(T. 1564) No objection was made to this comment. (T. 1564)

After considering the evidence and arguments of counsel, the jury found Defendant guilty as charged on all counts. (T. 1639-40; R. 2148-54) The trial court adjudicated Defendant in accordance with the verdicts. (T. 1647; R. 2677-79)

At the beginning of the penalty phase, Defendant moved to

exclude victim impact testimony on the basis that it was irrelevant and inflammatory. (T. 1663-64) After listening to argument and a proffer, the trial court overruled the objection. (T. 1664-73)

During the opening statement in the penalty phase, the State explained the purpose of a jury recommendation. (T. 1681-82) There was no objection made. (T. 1681-82)

The State presented victim impact evidence through Ana's mother, Ms. Osorio. (T. 1706-16) Ms. Osorio described Ana's school achievements, her participation in school and community activities, her work history, her religious devotion and her plans for the future. (T. 1708-12) She discussed the impact of Ana's death on her family members and friends. (T. 1712-14) She mentioned that one grandparent went blind on hearing of Ana's death, another became depressed and both died shortly thereafter. T. 1713-14)

After Ms. Osorio provided this testimony, Defendant objected and moved for a mistrial, claiming that the testimony was irrelevant and that he did not have a fair opportunity to rebut this testimony. (T. 1714, SR. 14-19)[4] After considering argument, the trial court overruled Defendant's objection, noting that the testimony did not suggest that Ana's death

[4] The Supplemental Record on Appeal will be cited through the symbol "SR."

caused her grandparents' deaths. (SR. 15, 19)

Defendant then presented Dr. Alvarez, who mainly reiterated his testimony from the retardation hearing. (T. 1716-19, 1722, 1741-44, 1749-50, 1779, 1782-84) He added that Defendant claimed his brother had a stated a psychiatric problem, although he initially denied any family history of psychological disorders. (T. 1727-28) Defendant denied any family history of neurological problems, alcohol or substance abuse. (T. 1728) On the ABS, an adaptive functioning test, Defendant scored in a very broad range, from superior to very poor. (T. 1745, 1750) Dr. Alvarez opined that Defendant's poor academic performance in the past, history of head injuries and drug use, all contributed to the diagnosis that Defendant is mentally retarded. (T. 1748-49) He further opined that it was possible that Defendant suffered from post-traumatic distress disorder, schizo-affective disorder and a major depressive disorder with suicidal attempts. (T. 1750-53)

Dr. Alvarez discussed Defendant's numerous involuntary hospitalizations for mental health issues in the year prior to the crime. (T. 1755-1774) He criticized the evaluations reflected in the resulting hospital records and opined that there were misdiagnosis. (T. 1762, 1763-64, 1771) He initially opined that Defendant suffered from a list of symptoms upon admission on April 6, 2002, but then later explained that those

items were just checked-off on admission, and that his present illness was not a suicide attempt but a desire to sleep. (T. 1754, 1757-62) These records indicated Defendant served a 3½ year sentence for possession of a firearm, which Dr. Alvarez presumed was noted because it indicated Defendant was dangerous. (T. 1771, 1793) Dr. Alvarez finally opined the extreme mental disturbance mitigator applied and Defendant was a follower, who could adapt to inprisonment. (T. 1771-73)

On cross, Dr. Alvarez admitted that some of the hospitalizations were for non-psychiatric problems, including eye pain, chest pain, and cutting a finger.[5] (T. 1792-98) He also explained that he had not reviewed all of Defendant's jail medical records, did not know that Defendant had made several hand-written requests for treatment, did not know if he was a hypochondriac, and was unaware that he denied hallucinations, suicidal or homicidal thought upon incarceration. (T. 1798-1801) He also acknowledged Defendant lied to him about reading a newspaper and admitted he does not return borrowed items, likes to break into places and take belongings and twists the truth to his own advantage. (T. 1809-11)

Defendant's father, Manuel Caraballo, testified that he did not know if or when Defendant finished school and that he was

[5] These incidents were attributed to Defendant's alcohol and drug consumption, and a detox program was recommended. *Id.*

under treatment for his own mental health issues. (T. 1822-25) Defendant talked to himself and had to go to the hospital as a child. (T. 1825-26) He explained that he worked nights, was not home often and would hit Defendant with an oar when Defendant was disrespectful. (T. 1827-28) Finally, he explained that Hector caught him cheating on his wife with his eldest son's wife. (T. 1828-29) On cross, he indicated that he knew Defendant left home at 14 years old and that he sought to raise his children to be law-abiding individuals. (T. 1830-31)

Defendant's mother, Mercedes Rodriguez Rivera, testified that she was an alcoholic when Defendant was young, drank a bottle of rum every day and drank through the pregnancies of each of her children except the eldest three. (T. 1838-39) Defendant stopped going to school in the fifth grade, and she did not re-enroll him in class. (T. 1840) She would hit her children when they misbehaved. (T. 1841-42) At one point, Hector called a social worker due to his mother locking them in a room, which upset Mrs. Rivera so she locked him in the room again. (T. 1842-43) Mrs. Rivera also admitted to having a secret affair with their neighbor, leaving Defendant in his care and being confronted by police that Defendant had been sexually abused by that neighbor. (T. 1844-45)

On cross, she explained that Defendant left school to hang

out in the streets and go fishing. (T. 1846) Defendant also went to jail and when he got out, Mrs. Rivera put him in a welding course so that Defendant could learn to live his life and got Defendant religious counseling. (T. 1847) Defendant would call her in Puerto Rico and send money there from his work in the United States. (T. 1847) After the crime, she received a letter from Defendant, stating that he saw Ana naked during the crime and lost his mind because she was very pretty. (T. 1848)

Defendant's sister, Ms. Rodrigo, reiterated her retardation hearing testimony, adding that she never saw her parents getting along or expressing any affection. (T. 1849-50) Their father would hit her brothers with an oar for no reason at all, or to discipline them. (T. 1850-51) Her father was a nervous person and stated that he would hit people if they caught him off guard. (T. 1851) She explained that her family has a history of mental illness and that Defendant tried to kill himself in a hospital when he was older. (T. 1852) She remembered her mother hitting the woman her father had an affair with and imagined Defendant was aware of the affair. (T. 1856-57) She also described how she was molested by her eldest brother, fled to another brother and told him, but acknowledged that Defendant had already moved out by then. (T. 1853, 1858-60) When asked what this had to do with explaining Defendant's conduct in the

crimes, she said she did not know. (T. 1860) No objection was made to this inquiry. (T. 1860)

Dr. Hughes testified similarly to his testimony at the retardation hearing regarding Defendant's IQ score. (T. 1861-70, 1891-97, 1900-01) He further opined that Defendant suffered from impairments in cognitive function, reactive attachment disorder, post-traumatic stress disorder, borderline personality disorder and intrusive thoughts and was addicted to illicit drugs and anhedonistic. (T. 1874-79, 1881-84, 1886, 1887-90, 1909) Dr. Hughes could not rule out schizophrenia despite acknowledging that Defendant did not have any symptoms. (T. 1890-91) Regarding Defendant's adaptive functioning, Dr. Hughes opined that because Defendant was unable to maintain employment for long periods, he does not function well and has several deficits indicating that he is retarded. (T. 1898-1900) Dr. Hughes additionally testified regarding Defendant's physical ailments. (T. 1905-07) Finally, Dr. Hughes opined that Defendant has severe environmental stressors, biological and psychiatric issues. (T. 1907)

Based on Defendant's self-reporting, Dr. Hughes discussed how Defendant moved out of the house at 14 and lived with his girlfriend in a shack, but then tried to commit suicide when she double crossed him. (T. 1911) Defendant was molested by his brother at age 8 or 11 and began consuming marijuana, rum and

beer. (T. 1886-87, 1910) By age 13, Dr. Hughes stated that Defendant was addicted to drugs, was stealing, and made his first suicide attempt. (T. 1911) Defendant was later convicted of armed burglary and spent three years in jail in Puerto Rico at age 23. (T. 1912, 1914) Thereafter, Defendant got through a welding course and maintained two girlfriends, before his functioning deteriorated. (T. 1913-14) However, Dr. Hughes testified that he believed that Defendant exaggerated his symptoms at times. (T. 1916-17) Dr. Hughes went through Defendant's medical records in detail, describing how Defendant was Baker Acted several times due to drug overdoses, as well as other behaviors, and described Defendant's varying global assessment of functioning (GAF) scores throughout the hospitalizations. (T. 1917-42)

On cross, Dr. Hughes acknowledged that he spent so much time with defense counsel preparing the case that they were on a first name basis. (T. 1944-45) Dr. Hughes charged defense counsel $400 per hour, for a total of approximately $35,000. (T. 1950-52) Defendant's objection to this questioning was overruled. (T. 1971-72) He later explained that payment came from the State and he would not "fudge" his testimony due to the payment. (T. 1988-89)

During cross, the State noted twice that Dr. Hughes'

answers were non-responsive. (T. 1983-85, 1995-96) He testified that he had been mistaken about the GAF score Defendant received at the end of one of the hospitalizations and agreed that it was higher than he testified to on direct. (T. 1945-46) Dr. Hughes also explained that of the hospitalizations reviewed, Defendant was actually taken in twice due to chest pains, in addition to the incident where he was not wearing the welding shield, and that the suicide attempts included attempting to cut off his pinky finger and ingesting Vitamin C, E, and Tylenol, and that no one ever petitioned a court to commit Defendant. (T. 1951-57)

Dr. Hughes admitted that it was Defendant's decision to go into robbery and burglary as a way to make easy money, as opposed to working legitimately, and by age 16, Defendant was selling drugs and carrying a gun. (T. 1948-50) Dr. Hughes also discussed how Defendant was incarcerated for three years. (T. 1949) Then, before coming to the United States, Defendant was involved in a car scam where he would sell a car to one person and then steal it back. (T. 1950) Defendant fled Puerto Rico to avoid repercussions from the scam and drug dealers he had angered. (T. 1950)

Finally, Dr. Hughes clarified that his opinion regarding Defendant's present mental state was one that was beyond significant repair. (T. 1985) When he testified that Defendant

was under extreme emotional disturbance, Dr. Hughes explained that he was basing his opinion on the fact that Defendant has been in his present mental state for years, and was disturbed at the time of the crime, and had been disturbed for six months prior and subsequent to the crime. (T. 1986-88) Although Defendant did not tell the factual truth, he told the emotional truth, and the confession letter was Defendant at his best. (T. 1963-68, 1978-81)

Before the presentation of the State's rebuttal, Defendant renewed his objections regarding the testimony of Dr. Lazaro Garcia, who did a competency evaluation of Defendant. (T. 1647-48, 1998-2001; R. 1588-89) Defendant previously moved to preclude Dr. Lazaro Garcia from testifying other than at a hearing regarding Defendant's competency prior to the retardation hearing held before trial. (R. 1745-47; TR. 17-24) At that time, the trial court precluded the testimony of Dr. Garcia, and he did not testify at the mental retardation hearing. (TR. 23-24) However, after renewed argument prior to the penalty phase and the State's rebuttal, the trial court ruled that Dr. Garcia would be permitted to testify regarding Defendant's malingering, and specifically instructed the State to have its witness not identify that he evaluated Defendant for competency. (T. 1647-49, 1998-99, 2001; SR. 56-57) Defendant

argued that it would be impossible to litigate the underlying issues without Dr. Garcia identifying the purpose of his evaluation, and the trial court responded that it was Defendant's decision what to do regarding identifying Dr. Garcia's purpose. (T. 1999-2001)

Dr. Garcia testified that during his interviews with Defendant, Defendant reported several types of hallucinations occurring at the same time, which would be very unlikely to occur simultaneously. Defendant also reported a hallucination that he did not pursue further, which indicated to Dr. Garcia that Defendant was not actually hallucinating. (T. 2005-08) Dr. Garcia administered the Test of Memory Malingering (TOMM) and opined that Defendant purposefully answered incorrectly, which indicated malingering. (T. 2008-12) Dr. Garcia did not state why he was asked to evaluate Defendant. (T. 2001-12)

On cross, Defendant asked Dr. Garcia about Defendant's medical records. (T. 2013-14) Dr. Garcia indicated that he had not previously been given or seen Defendant's records, and responded that he "could have [requested medical records], but [he] was basically evaluating [Defendant] for competency." Defendant objected to this testimony, but did not wait for a ruling before continuing questioning Dr. Garcia regarding the medical records he had not reviewed. (T. 2014-18) Dr. Garcia

explained that the records would be useful to render an opinion regarding Defendant's mental illness but testified that he was only "asked to given an opinion regarding [Defendant's] competency." (T. 2018) No objection was made to this statement. (T. 2018) Dr. Garcia repeated that his opinion was limited to Defendant's exaggeration of symptoms. (T. 2018) On redirect, Dr. Garcia explained that the purpose of a competency evaluation is to determine whether Defendant was able to consult with his attorney. (T. 2020-22)

Dr. Del Rio testified as he did at the mental retardation hearing regarding the tests performed and opinion that Defendant was borderline, adding that Defendant did not have good attention. (T. 2031-39, 2041-45, 2046-49, 2051-52, 2068-69) On cross, Dr. Del Rio explained that the IQ scores were estimates of Defendant's intelligence at the bottom of the range of what they could be. Defendant, in Dr. Del Rio's opinion, had been malingering and did not act as a retarded person would, and was a unique individual given that he learned how to read and write essentially on his own, despite his low level of education. (T. 2057-63)

During the penalty phase closing arguments, the State began by explaining to the jury what their role was in the penalty phase, which was to come up with the right result and ensure

that justice was carried out. (T. 2102-05) The State then argued that the attorneys were like champions fighting for their parties. (T. 2104-05) No objection was made to this argument. (T. 2104-05)

The State then discussed Ms. Osorio's testimony about Ana as an unique individual with an unknown future, commenting that Defendant and his co-defendants did not contemplate Ana's possibilities or stop and weigh the aggravating and mitigating circumstances when they killed her. (T. 2107-08) The State commented about the difficulties many people face in life, and inquired whether Defendant's past can "be an excuse" and commented about how even person with a difficult childhood should then be given a "free ride" because they are not responsible for their actions. (T. 2109-10) There was no objection to this argument. (T. 2107-10)

The State argued that Defendant chose to lead a life of crime, commenting that Ana's life was hard and she had choices in front of her, too. Argument then turned to Defendant's mitigation evidence, and the State commented about how Defendant's parents came in and testified regarding the terrible things that happened in their family and their own mistakes to get the jury to "do something on their own son's behalf." The State then commented that the evidence that Defendant's younger

sister was molested by one of their brothers three years after the crime has nothing to do with why Defendant committed the crimes. No objection was made. (T. 2110-14)

Argument turned to the retardation evidence and the State discussed the testimony of Dr. Alvarez. The State commented that Dr. Alvarez acknowledged that 56 was not Defendant's IQ and that it could be 15 points higher, or 71, which is above the cut-off score for mental retardation. (T. 2116-17) No objection was made. (T. 2116-17)

Argument then turned to the evidence presented by Defendant regarding his mental state. (T. 2117-20) The State inquired whether that evidence had any relationship with what Defendant did on the night of the crime: "Is there a cause and effect between what happened to Ana and how the defendant grew up or was raised or anything else?" (T. 2121) No objection was made to this argument. (T. 2121)

The State began a long soliloquy regarding Defendant's statements, pointing out that if he was disturbed on the night of the crime, he would not have driven, would not have gotten money from the ATM machine and would not have ended up with all the property stolen from Ana and Nelson, commenting that the law requires a lesser sentence for the less culpable and arguing that Defendant was an active participant in the crimes. (T.

2121-24) No objection was made. (T. 2121-24) The State then discussed how Defendant had the capacity to commit the crimes and commented about Defendant's inability to tell the truth. (T. 2123-25) The State pointed out how Defendant lied during testing, and argued that Dr. Hughes' description of Defendant's test scores were not valid. (T. 2125) The State then pointed out specific examples in the evidence of Defendant's lack of truthfulness, about how the evidence showed that Defendant must have been close by during the shooting because of the bushes, how he told police that Ana was still alive when they came to Orlando, and commented upon Dr. Hughes' opinion that Defendant does not tell the factual truth, but tells the emotional truth. The State concluded this soliloquy by inquiring what the right result is for a person who does not tell the truth and is "damaged beyond repair." (T. 2128-29) There was no objection during this argument. (T. 2121-29)

State immediately continued its soliloquy regarding Defendant's veracity by discussing the evidence presented through Dr. Garcia that Defendant malingered. (T. 2130) The State commented that Defendant knew Dr. Garcia had not evaluated him for mental retardation, commented about the cross examination conducted and inquired about this distraction. (T. 2130) The objection was overruled. (T. 2130)

The State continued by arguing that Defendant did not behave like a mentally retarded person until months before the trial. During this argument, the State commented that it did not hire the defense experts and pointed out how Dr. Hughes was on a first-name basis with defense counsel and was paid $35,000. (T. 2132-33) Defendant objected to the latter comment and was overruled by the trial court. (T. 2133) Thereafter, the State continued its argument regarding Dr. Hughes and commented that he may have been kinder to Defendant because of the money being paid. (T. 2133)

Thereafter, the State commented that the last 15 minutes of Ana's life was longer than other 15 minute periods of life because of what she endured. (T. 2136-37) The State then informed the jury that, although the final decision rested with the judge, the State wanted the jury to choose the right decision, quoting the Reverend Billy Graham, "There are not many ways of life; there's the right way and the wrong way." (T. 2137-38) The State continued to address the jury regarding its role, and the oath it took, and commented that they said they would consider the evidence, and vote based upon the weight of the aggravators and mitigators. (T. 2138) During this argument, the State commented regarding the mitigation presented, stating that the Defendant was not retarded nor suffering from a mental

disturbance, rather, he was effected by some of the seven deadly sins. (T. 2138-39) No objection was made to this argument. (T. 2136-39)

During the charge conference, Defendant requested the lack of significant criminal history mitigator but objected to the portion of the jury instruction allowing the jury to consider evidence of criminal acts that did not prove the prior violent felony aggravator. (T. 2081-82) During the ensuing argument, the trial court indicated that it understood this portion of the instruction to refer to other offenses in this case that could be considered. (T. 2082) Defendant argued that he was entitled to argue lack of significant criminal history unless the State presented certified convictions of other offenses and that the State could not argue about other crimes and convictions about which he had presented evidence before withdrawing his request for the instruction. (T. 2082-84)

After considering the evidence, the jury recommended the Defendant be sentenced to death by a vote of 9 to 3. (T. 2180-82; R. 2641) At the *Spencer* hearing, the State recalled Ms. Osorio to present additional victim impact evidence. (T. 2197-2207) Defendant stated that he was sorry for what happened but that he did not kill Ana. Defendant equated Ana’s mother’s pain to how he felt about recently losing a brother. (T. 2207-08)

In its sentencing memo, the State argued that the lack of significant criminal history mitigator should be rejected because Defendant had presented evidence that he had a significant criminal history. (R. 2801) Defendant did not argue this mitigator in his sentencing memo. (SR. 27-30)

The trial court followed the jury's recommendation and sentenced Defendant to death. (T. 2244-45; R. 2819-22) It found 5 aggravator: prior violent felony–great weight; during the commission of a robbery, sexual battery and kidnapping–great weight; avoid arrest–great weight; pecuniary gain–some weight; heinous, atrocious or cruel (HAC)–great weight. (T. 2221-29; R. 2744-49) The trial court rejected the cold, calculated and premeditated aggravator (CCP). (T. 2229-31; R. 2749-50) In mitigation, it found: no significant criminal history–little weight; extreme mental or emotional disturbance–great weight; Defendant's deprived and abusive childhood–some weight; lack of prior criminal history–no additional mitigation; Defendant was convicted based on his participation as a principle-some weight; general mental health–great weight. (T. 2331-33, 2236-43; R. 4750-52, 2754-60) It considered and rejected the minor participant and capacity to conform statutory mitigators and retardation as nonstatutory mitigation (T. 2233-36; R. 2752-54, 2757-59) He was also sentenced to life imprisonment for the

attempted murder, kidnappings and sexual battery and 30 years for the armed robberies; all sentences to run concurrently. (T. 2244-45; R. 2760-61, 2819-22) This appeal follows.

SUMMARY OF THE ARGUMENT

The trial court properly denied Defendant's motion to suppress based on a lack of standing. The claim regarding the *Miranda* warnings is unpreserved and meritless.

The trial court did not abuse its discretion in denying Defendant's motion for mistrial based on prosecutorial comments in closing, nor did the trial court abuse its discretion in overruling objections to other comments, where the comments were proper response to the arguments made by defense counsel and fair commentary on the evidence presented. Defendant's other complaints have not been preserved as the majority of the comments complained of in this appeal were not objected to in the trial court.

The trial court did not abuse its discretion in admitting victim impact evidence. Moreover, it was proper to allow limited rebuttal testimony from Dr. Garcia. Defendant's claim regarding his inability to establish mental retardation is without merit. The *Ring* claim is meritless. Defendant's sentence is proportionate. The trial court erred in rejecting CCP and finding no significant criminal history.

ARGUMENT

I THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS.

Defendant claims that his motion to suppress should have been granted because he was lawfully within the apartment and the apartment management did not have the apparent authority to provide access. However, the trial court properly denied the motion to suppress based on a lack of standing.

In reviewing a trial court's ruling on a motion to suppress, this Court accepts the trial court's factual findings if they are supported by competent, substantial evidence. *Connor v. State*, 803 So. 2d 598, 608 (Fla. 2001). However, this Court reviews the application of the law to those facts *de novo*. *Id.*

Here, the trial court denied the motion to suppress, finding that Defendant had no standing because Defendant abandoned the apartment after being served with the eviction notice, was trespassing in the apartment at the time of the entry and had no standing to contest the search. (R. 1516-20) It based this ruling on findings that Mr. West found the apartment empty and abandoned after the eviction notice was posted, the lock on the apartment had been changed, Defendant had to obtain a key to re-enter the apartment, Defendant informed the apartment manager that he wanted the key to move the last of his possessions out of the apartment and Defendant informed the

officers who entered the apartment that he was trespassing. *Id.* These findings are supported by the testimony of Ms. Cora, Mr. West and Agt. Hildago. (41TMS. 53-55, 77-79, 81-83, 49TMS. 20, 77-78)

Despite the record support for the findings, Defendant insists that they should be ignored because the trial court allegedly refused to consider the prior deposition testimony of Mr. West. However, the record reflects that the trial court indicated it would consider the deposition. (41TMS. 63-71; 45TMS. 169-70) As such, the fact that the trial court chose to accept Mr. West's testimony instead of his prior deposition testimony does not provide a basis for rejecting the trial court's finding. *Anderson v. City of Bessemer*, 470 U.S. 564, 574 (1985).

Given the facts, the trial court properly found that Defendant relinquished standing to complain about the entry into and search of the apartment. *Abel v. United States*, 362 U.S. 217, 241 (1960); *Smith v. Maryland*, 442 U.S. 735, 740 (1979); *Jones v. State*, 332 So. 2d 615, 617-18 (Fla. 1976). Defendant did not have any legitimate objective expectation of privacy in the apartment as a squatter. *Rakas v. Illinois*, 439 U.S. 128, 142-43, 143 n.12 (1978). Likewise, Defendant's own subjective expectation indicates he did not have a legitimate expectation

of privacy. *Rawlings v. Kentucky*, 448 U.S. 98, 104-05 (1980); *Smith*, 442 U.S. at 740; 49TMS. 77-78. Like anything else abandoned, the person abandoning loses any right to complain about the legality of the search and seizure of the thing abandoned. *See California v. Greenwood*, 486 U.S. 35, 39-40 (1988). Having no reasonable, legitimate, objective or subjective expectation of privacy, the inquiry ends, as Defendant did not and does not have standing to complain about the entry and search. *Rawlings*, 448 U.S. at 104-05; *Rakas*, 439 U.S. at 143 n.12; *Flanagan v. State*, 440 So. 2d 13 (Fla. 3d DCA 1983). This Court should affirm.

Defendant's reliance on his legal right to be within the apartment based on the lease agreement and lack of final eviction order is without merit and not determinative. Whether Defendant could have lawfully been in the apartment based upon Florida's landlord/tenant law is not the inquiry; the inquiry is whether Defendant had a legitimate expectation of privacy within the apartment at the time of the search. *Rakas*, 439 U.S. at 143 n.12. As stated above, it is clear that Defendant did not have either a legitimate objective or subjective expectation of privacy. The fact that he could have remained in the apartment until the eviction was final does not undo the fact that he chose to abandon the apartment, commit crimes, and then seek to

use the apartment as a hiding place. This Court should affirm.

Regardless, Ms. Cora and the apartment management had the apparent authority to consent to the entry and search of the apartment. A person has the apparent authority to authorize a search where the facts surrounding the circumstances of the consent would cause a law enforcement officer to reasonably believe that the consent is valid. *Illinois v. Rodriguez*, 497 U.S. 177, 188 (1990); *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968); *see also Jones*, 332 So. 2d at 617-18; *State v. Scott*, 774 So. 2d 794, 796 (Fla. 3d DCA 2000).

When law enforcement arrived at the apartment complex, Ms. Cora provided law enforcement with information regarding Defendant, a former tenant and brother of Hector, who had the same last name as Hector. Ms. Cora explained that eviction proceedings were instituted against Defendant, he left the apartment, Mr. West verified Defendant's abandonment of the apartment, Defendant requested temporary access to remove the last of his personal belongings, and Defendant himself indicated he was moving out prior to April 28, 2002. (41TMS. 56-58, 81-83, 92-93; 42TMS. 66-68, 80-81.) Upon arrival at the apartment, law enforcement discovered that the blue universal lock was removed and replaced with a non-compliant lock, that the door was blockaded from within, and that there was no furniture or other

items indicating habitation. (41TMS. 41, 58-62, 67; 42TMS. 123-25) Accordingly, law enforcement reasonably believed that they had the right to enter the apartment, having gained consent from the person who had authority over the apartment, the apartment manager, and observing nothing to negate that authority. *Rodriguez*, 497 U.S. at 188; *Terry*, 392 U.S. at 21-22; *see also Jones*, 332 So. at 617-618; *Scott*, 774 So. 2d at 796. This Court should affirm.

Moreover, it is clear that Ms. Cora and the apartment management had actual authority over the apartment, which is implicit within the conclusion that Defendant did not have any authority. The locks had been changed, and Defendant had to request permission to access the apartment himself, acknowledging that he was moving out and taking the last of his belongings. Defendant's present assertion that he was given a license to enter the apartment would, if accurate, merely alter management's authority to one of common authority, rather than sole authority. It does not alter the final conclusion that Ms. Cora had the apparent authority to consent to law enforcement's access. *See, e.g., United States v. Matlock*, 415 U.S. 164, 171 n.7 (1973). This Court should affirm.

Defendant additionally claims that the motion to suppress should have been granted because his arrest was illegal, the

search was outside the scope permitted by a search incident to arrest, the items seized were otherwise not in plain view, all of the items seized and statements made were fruits of the poisonous tree, and the consent form signed was untimely. These claims are meritless as Defendant has no standing in the first instance.

Furthermore, Defendant has not properly preserved these claims. In order to preserve an issue for appeal, Defendant must have secured a ruling from the trial court so that the factual findings could be reviewed. *Lipe v. City of Miami*, 141 So. 2d 738, 743 (Fla. 1962). While Defendant's arguments below did graze upon some of these claims, Defendant failed to secure a ruling on any of them. (R. 1516-20) Moreover, Defendant's claims regarding probable cause to arrest defendant, the scope of any search incident to that arrest and the scope of any protective sweep were not preserved as they were not argued to the trial court. *Castor v. State*, 365 So. 2d 701, 703 (Fla. 1978). (R. 330-343; 49TMS. 199-50TMS. 243) Accordingly, Defendant has waived these claims. This Court should affirm.

Regardless, none of the claims have any merit. Exigent circumstances exist when the police reasonably believe that there is someone within the apartment in need of aid or some emergency exists justifying the entry, and such search must be

limited in scope to the emergency situation. *Mincey v. Arizona*, 437 U.S. 385, 392 (1978); *Illinois v. Rodriguez*, 497 U.S. 177 (1990); *Seibert v. State*, 923 So. 2d 460, 469-70 (Fla. 2006). This Court has previously noted that one of the most urgent exigent circumstances is the need to preserve life. *Seibert*, 923 So. 2d at 469. Here, law enforcement lawfully entered the apartment due to the existing exigent circumstance that Ana needed to be rescued to save her life based on what happened to Nelson. Upon entry, Agt. King was looking for people within the apartment, including in the attic. The only items located were a cell phone on the counter and Ana's ATM card and driver's license. (41TMS. 41; 42TMS. 101-02, 116-17, 126-131, 175-179, 182-83; 43TMS. 201) Accordingly, an exigent circumstance existed to justify the entry and initial search.

Additionally, law enforcement had probable cause to arrest Defendant for trespass based on their reasonable belief that the apartment was vacant and their discovery of him inside upon entry. While probable cause requires less than the evidence needed for conviction, finding Defendant in an apartment that was not his without permission to be there is the very definition of trespass. *Brinegar v. United States*, 338 U.S. 160, 175 (1949); *see also* § 810.08, Fla. Stat. (2000); *Chavez v. State*, 832 So. 2d 730, 747-48 (Fla. 2002); *Popple v. State*, 626

So. 2d 185, 186 (Fla. 1993).

Having the ability to arrest Defendant lawfully, a search incident to arrest was likewise lawful. *Chimel v. California*, 395 U.S. 752, 762-63 (1969). Likewise, any protective sweep was lawful as law enforcement conducted the sweep with the knowledge that someone had barricaded themselves within the apartment, Ana may still be alive, Nelson was attacked by five perpetrators, and one of the perpetrators called Hector, who had the same last name as Defendant and was his brother. *Maryland v. Buie*, 494 U.S. 325, 327 (1990). Furthermore, having lawfully gained entry through either Defendant's trespass or Ms. Cora's apparent authority, the discovery and seizure of anything incriminating in plain view was lawful.[6] *Horton v. California*, 496 U.S. 128, 136-37 (1990).

However, Defendant claims that, even if the entry was lawful, the "search incident to arrest" and protective sweep conducted were unlawful because they exceeded a lawful scope. These claims were not preserved as they were not made in the motion to suppress or argued at the hearing, and, as a result there is no evidence to support the claims. Defendant merely

[6] Defendant's argument regarding the cell phone in plain view is a red herring as this cell phone was not Ana's cell phone that was introduced at trial. (T. 1046)

makes a factually inaccurate[7] and conclusory argument that the agents searched in places where persons could not be found. However, the evidence actually presented reveals nothing regarding the size of the areas searched. Moreover, Agt. King testified that he did not look in the bathroom drawers or cabinets, and there was no testimony regarding searching the toilet tank or duffle bag observed next to Defendant. (42TMS. 126-134, 175-179, 181-84; 43TMS. 201) There is simply no evidence regarding the scope of the searches conducted, therefore, this issue cannot be reviewed. *Booker v. State*, 969 So. 2d 186, 194-95 (Fla. 2007); *Tillman v. State,* 471 So. 2d 32, 35 (Fla. 1985). This Court should affirm.

Finally, Defendant's arguments regarding fruits of the poisonous tree, although preserved, depend upon his lawful presence within the apartment in the first instance, for there has to be some initial illegality for there to be any fruit of that illegality. *Wong Sun v. United States*, 371 U.S. 471 (1963). As there was no initial illegality, there was no illegal fruit. Even if there was an initial illegality, the circumstances of each case must be scrutinized to determine whether that illegal

[7] Defendant argues that agents looked in cabinets, drawers and toilet tanks during the search incident to arrest or protective sweep. Only the first two were actually looked in during the initial search, the toilet tank was not "searched" until Defendant told Agt. Hidalgo where to find the stolen wallets.

act poisoned subsequent evidentiary discoveries. Providing *Miranda* warnings and other neutralizing forms of consent can sufficiently negate any initial illegality to render those subsequent discoveries valid and admissible. *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975); *see also United States v. Crews*, 445 U.S. 463, 471 (1980). Defendant's arguments ignore that he provided officers with the information to locate the items associated with the crime after he waited for Agt. Hidalgo to talk to him in his chosen language, his cuffs were removed, he was given food, drink and the ability to smoke, being read and waiving his *Miranda* rights, and in conjunction with a consent to search.[8] *Brown*, 422 U.S. at 603-04; 49TMS. 27-29, 90-91. Any initial illegality here in the entry and protective sweep/search incident to arrest searches was destroyed. Therefore,

[8] Defendant additionally complains that the consent form was invalid because it was untimely obtained and was a product of coercion. However, this position is belied by the record wherein Agt. Hidalgo indicated that he wrote out the consent form when Defendant started indicating where items were within the apartment. Defendant voluntarily provided his consent as he was not handcuffed, was not aware that officers already found anything incriminating within the apartment, volunteered the location of the stolen items, and signed the form. *Reynolds v. State*, 592 So. 2d 1082, 1086-87 (Fla. 1992); *Norman v. State*, 379 So. 2d 643, 647-48 (Fla. 1980). Regardless, the items located within the apartment would have been discovered eventually, given that officers already had Defendant's statement, obtained Mena's phone number separately, and were on the trail of Hector. Any of these would have eventually led to knowledge regarding Defendant's involvement and search of the apartment.

Defendant's statements to Agt. Hidalgo and subsequent search were not tainted by the initial entry under the circumstances of this case as they were sufficiently separated from any initial illegality.

Additionally, Defendant's associated poisonous fruit claims regarding his subsequent recorded statement are likewise without merit, assuming there was any initial illegality. Subsequent confessions are not tainted fruit where there is no relationship with the initial illegality. *New York v. Harris*, 495 U.S. 14, 19 (1990); *Crews*, 445 U.S. at 471. Here, law enforcement was interested in questioning Defendant because of his status as Defendant's brother. Defendant's initial confession occurred after *Miranda* warnings were given and waived, and his subsequent recorded statement was taken based on that waiver.[9] As in *Harris* and *Crews*, the recorded statement was not a product of "the exploitation of . . . [Defendant's] Fourth Amendment rights[.]" *Crews*, 445 U.S. at 471 (quoted in *Harris*, 495 U.S. at 19).

However, regardless of the validity of the arguments above, Defendant never sought to suppress the confessions made on television and in the letter sent to the State attorney. Of the confessions obtained, these admitted more involvement than any

[9] At the suppression hearing Det. Marrero testified that he did not re-read the *Miranda* rights, but he testified during trial that he did. (42TMS. 8, 27; T. 1304-05.)

of the prior confessions, as Defendant admitted his own involvement, added his participation in the sexual battery and altered his story with each additional confession. (*Compare* R. 1944-2052 *with* R. 2070-86 *and* 2089-2106.) Defendant would still have been convicted based on these confessions and the other evidence properly admitted. *State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986). This Court should affirm.

II THE CLAIM REGARDING THE *MIRANDA* WAIVER IS UNPRESERVED AND MERITLESS.

Defendant next claims that any *Miranda* waiver was negated by the promises allegedly made by police during the sworn statement, which rendered his statement involuntary. This claim has not been preserved and is meritless.

To preserve a claim, Defendant must raise the specific claim in the trial court, present evidence in support and argue its merits. *Booker*, 969 So. 2d at 194-95; *Tillman,* 471 So. 2d at 35. Here, Defendant only made general references to *Miranda* in his motion to suppress. (R. 330-343) During the suppression hearing, Defendant presented no evidence or argument regarding alleged promises or coercion during the statement. (41TMS. 94-114; 42TMS. 5-36; 49TMS. 199; 50TMS 199-243) As such, this issue is not preserved.

Moreover, the admission of this confession was not error. *Miranda* warnings do not need to be repeated to a Defendant.

Johnson v. State, 660 So. 2d 637, 642 (Fla. 1995). This Court has held that promising to let a defendant's cooperation be known or suggesting that it would be easier for a defendant if he told the truth do not render a confession involuntary, particular where there was no evidence that the statements were made as a *quid pro quo* for the confession. *Blake v. State*, 972 So. 2d 839, (Fla. 2007); *see also Fare v. Michael C.*, 442 U.S. 707, 727-28 (1979). "Moreover, a statement is not rendered involuntary if the officers inform a suspect of realistic penalties, encourage the suspect to tell the truth, or tell the suspect that things would be easier if the suspect told the truth." *State v.* Walters, 970 So. 2d 848, 851 (Fla. 2d DCA 2007). Claims that making statements about the truth making it easier on the defendant make an earlier *Miranda* waiver invalid have been rejected, where the statements were not made in conjunction with the rights advisement and waiver. *United States v. Bezanson-Perkins*, 390 F.3d 34 (1st Cir. 2004). In fact, in *Hart v. Attorney General*, 323 F.3d 884, 894-95 nn. 19, 21 (11th Cir. 2003), the case upon which Defendant relies, the Court stressed that the problem with the statements was that they were made during a clarification of Defendant's rights.

Here, Defendant admits that the waiver occurred hours before the comments on which Defendant relies, which were not

made in conjunction with a clarification of a right. When read in context, the statements about which Defendant complains were nothing more than suggestions that his cooperation would be made known and that it would be easier for him if he told the truth. (R. 747-48, 762-63, 785-87, 791) Moreover, the statements about going to jail merely indicated that the interrogation would cease, Defendant would be booked and some of his co-defendants might not be, and were merely reflections of the officers' intent, not a threat of more serious charges or punishment or a promise of leniency. (R. 780, 785) Further, while Defendant suggests that he was interrogated despite being tired and hungry, the record actually reflects that when Defendant said he was tired and hungry, the interrogation ended. (R. 835-36) As such, the admission of this confession was not error.

Moreover, even if there was error, it would not qualify as fundamental error. *Brooks v. State*, 762 So. 2d 879, 899 (Fla. 2000). Defendant's far more incriminating confession letter rendered this statement cumulative. This Court should affirm.

III DEFENDANT IS NOT ENTITLED TO RELIEF BASED ON THE STATE'S COMMENTS.

Defendant next claims that the State made improper comments during its guilt and penalty phase closing arguments. However, Defendant did not preserve issues regarding most of the comments that he alleges were improper. Further, the trial court did not

abuse its discretion in ruling on the issues that were preserved, and Defendant is entitled to no relief even if the unpreserved comments are considered.

In order to preserve an issue regarding a comment in closing, it is necessary for a defendant to object to the comment contemporaneously and obtain an adverse ruling on the objection. *Richardson v. State*, 437 So. 2d 1091, 1094 (Fla. 1983); *Castor v. State*, 365 So. 2d 701 (Fla. 1978). When an objection is sustained, a defendant must then move for a mistrial to preserve the issue. *Rose v. State*, 787 So. 2d 786, 797-98 (Fla. 2001). Further, the objection must be based on the same grounds asserted on appeal for an issue to be preserved. *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982).

Here, of all of the comments about which Defendant presently complains, he only objected to 4. (T. 1532-33, 1538, 2130, 2132-33) Of those objections, one was sustained, and no motion for mistrial was made. (T. 1533) Further, Defendant did not obtain a ruling on one objection independent of a ruling on a motion for mistrial, (T. 1538-42), thus preserving only the ruling on the motion for mistrial. Moreover, those objections were not based on the same grounds as raised on appeal. (T. 1533) As such, Defendant has only preserved the denial of one motion for mistrial and the propriety of two comments. The

remaining comments are unpreserved and should be rejected as such.

"A motion for mistrial is addressed to the sound discretion of the trial judge and '. . . should be done only in cases of absolute necessity.'" *Ferguson v. State*, 417 So. 2d 639, 641 (Fla. 1982)(citing *Salvatore v. State*, 366 So. 2d 745, 750 (Fla. 1978)). Such absolute necessity is demonstrated when the granting of a mistrial "is necessary to ensure that the defendant receives a fair trial." *Gore v. State*, 784 So. 2d 418, 427 (Fla. 2001). Furthermore, a trial court has broad discretion over the scope of closing argument and the parties are allowed to draw fair inferences from the evidence. *Breedlove v. State*, 413 So. 2d 1, 8 (Fla. 1982).

Here, the trial court did not abuse its discretion in denying the motion for mistrial. (T. 1541) Defendant questioned Agt. Koteen about the time it took Agt. Hidalgo to arrive. (T. 932-33) During his initial closing, Defendant suggested that this time period suggested that the police had coerced his confession. (T. 1506-07) As such, the State was merely pointing out that Agt. Koteen waiting for a Spanish speaking officer did not show that she was coercing Defendant and was a fair response. *See Pace v. State*, 854 So. 2d 167, 179 (Fla. 2003); *Garcia v. State*, 644 So. 2d 59, 62-63 (Fla. 1994). Moreover,

after the motion was denied, the State dropped the subject. Thus, the lower court did not abuse its discretion in denying the motion for mistrial.

The trial court also did not abuse its discretion in overruling the objections to the other preserved comments. During the penalty phase, the State presented Dr. Garcia to testify regarding the limited issue of the result of malingering tests. During cross, Defendant, who was fully aware of the limited nature of Dr. Garcia's evaluation and testimony, questioned him regarding why his evaluation did not include other areas. The first argument regarding "why the distraction" came at the end of argument regarding the cross examination of Dr. Garcia wherein Defendant brought out that Dr. Garcia's examination was limited to a competency evaluation. (T. 2130) During closing, the State was merely pointing out that these questions did not prove anything because of the limited nature of the evaluation and testimony. (T. 2130) As such, the argument was a proper response[10] to Defendant's attempt to impeach Dr. Garcia and lessen the weight of his testimony regarding

[10] Defendant's reliance on *Adams v. State*, 830 So. 2d 911 (Fla. 3d DCA 2002), *Lewis v. State*, 780 So. 2d 125 (Fla. 3d DCA 2001), and *Landry v. State*, 620 So. 2d 1099 (Fla. 4th DCA 1993), is misplaced. Each of those cases involved demeaning comments on defense counsel's behavior and the frivolity of the defense presented. *Adams*, 830 So. 2d at 915; *Lewis*, 780 So. 2d at 130; *Landry*, 620 So. 2d at 1101. Here, there were no personal attacks on counsel and the arguments were fair responses.

malingering. *See Pace*, 854 So. 2d at 17; *Garcia*, 644 So. 2d at 62-63. The trial court, therefore, did not abuse its discretion in overruling the objection. *Breedlove*, 413 So. 2d at 8.

The trial court likewise did not abuse its discretion in overruling the objection made to the statement that Dr. Hughes "spent 87 hours with defense counsel preparing the case." Pointing out biases is completely appropriate argument, if it is supported by the evidence.[11] *Garrette v. State*, 501 So. 2d 1376, 1378 (Fla. 1st DCA 1987); *Francis v. State*, 384 So. 2d 967, 968 (Fla. 3d DCA 1980). Here, Dr. Hughes testified that he spent 87 hours preparing for the case, billed $35,000 and called defense counsel by his first name. (T. 1950-52) The State's argument centered on Dr. Hughes' bias based on the funds received. (T. 2132-33) Accordingly, the trial court did not abuse its discretion in overruling the objection made[12] and this Court

[11] While Defendant suggests that the State alleged he was suborning perjury, this is not true. The State's comment that Dr. Hughes said "what [he] want[ed] to say" during cross, (T. 2133), was directed to Dr. Hughes' non-responsiveness, which was pointed out at the time. (T. 1983-85, 1995-96) As such, there was no argument that Defendant himself or through Dr. Hughes presented false testimony. *See Cooper v. State*, 712 So. 2d 1216, 1217 (Fla. 3d DCA 1998); *Chavers v. State*, 964 So. 2d 790, 792 (Fla. 4th DCA 2007).

[12] Defendant additionally complains that the comparison between the payments to Dr. Hughes and the experts whose testimony supported the State was improper bolstering. However, it is completely appropriate to argue that Defendant's experts were paid more than the State's experts to attack credibility. This is not a case where the State argued that its witnesses are

should affirm. *Breedlove*, 413 So. 2d at 8.

While Defendant also argues that he is entitled to relief based on unpreserved comments and the cumulative effect of the comments, he is not. In order to obtain relief based on unpreserved comments or their cumulative effect, a defendant must prove fundamental error, which requires proof that the alleged errors deprived the defendant of a fair trial. *Brooks v. State*, 762 So. 2d 879, 899 (Fla. 2000). Here, that standard is not met because the comments were largely proper and the evidence was overwhelming.

While Defendant asserts that the State suggested that the jury could only acquit him if it believed he was innocent, (T. 1528-30, 1564), this is not true. Instead, the State was merely pointing out that justice is done both when the innocent were acquitted and when those who have been proven guilty were convicted. Additionally, this comment came in the middle of the State's analysis of Defendant's theory – that the evidence presented indicated that he was not responsible for the crimes – wherein it commented that it was not the attorney's job to mislead them, but to guide them "to come to the right decision." Finally, the State inquired:

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credible because they are the State's witnesses. *Gorby v. State*, 630 So. 2d 544, 547 (Fla. 1993).

> what is the right decision for [Defendant]? You have three confessions in front of you that tell you the answer. You know this is not an innocent person. But I want to go through those pieces of evidence slowly and develop them.

(T. 1528-30) The State thereafter continued to discuss what the evidence demonstrated. (T. 1530-37) Defendant complains that these additional arguments disparaged counsel because the argument was that defense counsel was lying and trying to mislead the jury.

As stated previously, Defendant's theory was that he was not to blame for the crimes and did not participate in them. (T. 1493-1511) Defendant also asked questions on cross regarding the legal technicalities of lawfulness of law enforcement's entry into the apartment. Arguing that it is the jury's duty to formulate justice, that the jury should fight for an innocent person, use its common sense, and not be mislead was appropriate commentary in response to Defendant's theory and cross examination conducted. *Pace*, 854 So. 2d at 179; *Garcia*, 644 So. 2d at 62-63. It had nothing to do with the standard required to acquit Defendant; in fact, the State, at the end of its argument regarding the evidence proven, went on to explain to the jury that it returns a verdict for each crime based on what it believes the evidence has proven and the jury was instructed that Defendant is presumed innocent and must be proven guilty

beyond a reasonable doubt. (T. 1553, 1582) The comments did not disparage counsel, as defense counsel was not even mentioned. This Court should affirm. *Brooks*, 762 So. 2d at 899

Defendant next complains that the State commented on Defendant's right to remain silent when it argued about an imaginary situation where Defendant was innocent and decided not to call the police, and argued that Defendant did not really waive his rights to an attorney. (T. 1533-37) "[W]hen determining whether a statement impermissibly comments on the defendant's right to remain silent during trial, the court should examine the statement in the context in which it was made." *State v. Jones*, 867 So. 2d 398, 400 (Fla. 2004). Not all statements are inappropriate comments on silence. *See id.* Here, "[t]he prosecutor was not commenting on [the defendant's silence] but was rather commenting on the inconsistencies in the hypothesis of innocence that [the defendant] presented at trial." *Pace*, 854 So. 2d at 179. Defendant's theory was to negate his participation as a principle and blame his co-defendants, mainly Lebron, for the crimes. Arguing that Defendant's theory of innocence is inconsistent with his behavior at the time police discovered him in the apartment is completely appropriate. The State's argument immediately prior to this statement was that the facts hurt Defendant, and the

argument immediately after this comment was that Defendant tried to come up with more and more differing versions of the crime to eliminate his culpability. (T. 1533-37) In context, the argument was appropriate.

The comment about the lack of support for the claim that Defendant acted involuntarily was also proper. As recognized in *Rodriguez v. State*, 753 So. 2d 29, 39 (Fla. 2000), an additional exception exists when the prosecutor's comments are responsive to prior attacks by the defense. *See also Caballero v. State*, 851 So. 2d 655, 660 (Fla. 2003). This comment came at the end of the State's argument that Defendant was trying to come up with a story to minimize his involvement, not realizing that the police knew about the crime because Nelson lived. (T. 1533-37) During Defendant's closing, he attacked the voluntary nature of his statements and consents. (T. 1506-09) Commenting about what evidence was actually presented and responding to Defendant's prior arguments was appropriate. *Caballero*, 851 So. 2d at 660; *Rodriguez*, 753 So. 2d at 39. This Court should affirm.

Defendant next complains about several arguments during the penalty phase. The purpose of penalty phase closing argument is to discuss what aggravating and mitigating circumstances have been proven and what weight should be assigned to each. *See Bertolotti v. State*, 476 So. 2d 130, 134 (Fla. 1985). Further,

the State may argue that mitigating factors have not been proven and argue that the jury should not be swayed by sympathy. *Valle v. State*, 581 So. 2d 40, 47 (Fla. 1991).

While Defendant argues that the State misstated the law regarding the weighing process, this is not true. In *Franqui v. State*, 804 So. 2d 1185, 1192-94 (Fla. 2001), this Court held that only those comments that informed the jury that it must, or was required by law to, return a recommendation of death if the aggravators outweighed the mitigators were improper. This Court did not hold that comments that informed the jury that it should[13] do so were improper. *See also Gonzalez v. State*, 990 So. 2d 1017, 1026 (Fla. 2008). Here, the State's comments discussed what the jury should do. (T. 2138) The comments were not improper.

Defendant additionally alleges that the State misstated the definition of mitigation. He claims that the State inappropriately argued that Defendant's childhood could not "excuse" his criminal acts, analogizing that every orphan or child of the inner city should get a "free ride" because society understands why "people like [them] would commit crimes[,]" and

[13] Such comments are, in fact, not improper because "should" indicates that something is discretionary and not mandatory. *State v. Thomas*, 528 So. 2d 1274, 1275 (Fla. 3d DCA 1988); *University of South Florida v. Tucker*, 374 So. 2d 16, 17 (Fla. 2d DCA 1979).

posing the question as to whether there is a cause and effect relationship between Defendant's childhood and mental state and Ana's death. (T. 2109-10, 2121) As the State never argued that Defendant's childhood or evidence regarding his mental state could not be considered in mitigation, Defendant's claim is without merit.[14] The argument appropriately called the weight of the mitigation into question by suggesting that Defendant's mitigation could not outweigh the aggravating factors. *Bertolotti*, 476 So. 2d at 134. This Court has previously rejected the argument that similar commentary warranted relief. *Griffin v. State*, 866 So. 2d 1, 15 (Fla. 2003); *Jones v. State*, 652 So. 2d 346, 352 (Fla. 1995). The comments were proper.

Defendant's final claim asserts that the State converted mitigation into aggravation and argued about Defendant's future dangerousness by arguing that the testimony from Defendant's family indicated that his family was close to him and were trying to get the jury to do something for their son and commenting about Dr. Hughes' opinion that Defendant was "damaged beyond repair." (T. 2112-13, 2128-29) The first comment regarding the family's testimony was a fair comment on the evidence presented and the weight it should be given in

[14] Even if this was the State's argument, it would not require reversal under the facts of this case. *See Hitchcock v. State*, 775 So. 2d 638, 643 (Fla. 2000).

mitigation. *Bertolotti*, 476 So. 2d at 134. The State's argument, in context, was to indicate that the purpose of the family's testimony was to appeal to the jury to not impose the death penalty by making the jury "feel bad for" Defendant. (T. 2112-14) This was completely proper argument to not be swayed by sympathy. *Valle*, 581 So. 2d at 46-47.

The second argument regarding Dr. Hughes's testimony is proper in context, as the State's surrounding argument[15] dealt with the Defendant's veracity in general and capacity to commit the crimes. (T. 2127-30) This argument was completely unlike the situation where the prosecutor repeatedly calls for the death penalty in order to prevent the defendant from killing again. *See, e.g., Teffeteller v. State*, 493 So. 2d 840 (Fla. 1983). It was proper commentary on Defendant's capacity to commit the crimes and the veracity of the mitigation evidence. *Bertolotti*.

Defendant next claims that the State improperly asked the jury to show Defendant the same mercy he showed Ana by arguing that Ana's dreams and possibilities were snuffed out by the action of Defendant and his co-defendants. (T. 2107-08) This argument has no relation to the type of inappropriate call to a jury to show a defendant the same mercy he or she showed the

[15] The State's argument was that Defendant's actions did not make sense, he was not telling the factual truth, and highlighted the malingering testimony. (T. 2128-30)

victim. *Brooks v. State*, 762 So. 2d 879, 901 (Fla. 2000). The argument properly stated what the jury is permitted to do: consider victim impact evidence in making its recommendation. *See Bonifay v. State*, 680 So. 2d 413, 419-20 (Fla. 1996). This argument was not an inappropriate appeal for sympathy based on Ana's inability to grow old. *Lewis v. State*, 780 So. 2d 125 (Fla. 3d DCA 2001). The argument was fair commentary on the evidence presented. This Court should affirm.

Next, Defendant complains that the State's argument regarding the last 15 minutes of Ana's life was inappropriate Golden Rule argument. (T. 2136-37) This argument never requested that the jury place themselves in Ana's shoes; it was argument about how long each minute felt to Ana based on what she was going through and asked the jury to consider whether it was cruel to put Ana through those 15 minutes. *Id*. This Court has previously rejected similar claims that references to the victim's manner of suffering was improper golden rule argument. *Nixon v. State*, 572 So. 2d 1336, 1340-41 (Fla. 1990). This was not a case where the argument requested that the jurors place themselves in the victim's position. *Hutchinson v. State*, 882 So. 2d 943, 954 (Fla. 2004). Rather, it was appropriate argument regarding HAC. *Bertolotti*, 476 So. 2d at 134. This Court should affirm.

Defendant additionally complains that the State's argument that "the final choice is up to the person" and subsequently comparing Defendant's decision to lead a life of crime with Ana's choice to follow the "right way" was an inappropriate use of victim impact evidence and suggested that the jury disregard mitigation evidence. (T. 2110-12) The State's argument was that the jury should not give the mitigating evidence presented any weight; the argument complained of came after discussion regarding Defendant's changed lifestyle after being incarcerated the first time and was an introduction to discussion regarding the evidence presented by Defendant in mitigation, i.e. his father, mother, sister, and doctor's testimony. (T. 2110-13) This argument was appropriate comment on the mitigation evidence presented. *Bertolotti*, 476 So. 2d at 134. This Court should affirm.

Finally, Defendant complains about several references to religion.[16] However, the references were not erroneous as they were proper within context: the reference to God was within the State's discussion about how both side's attorneys were champions for their respective causes; the reference to Billy Graham referred to the author of a quote regarding choosing the

[16] Although placed within argument regarding comments in closing, Defendant references Ms. Osorio's testimony regarding Ana's church attendance. (T. 1710) This was appropriate victim impact testimony. *Bonifay*, 680 So. 2d at 419-20.

right way to live within argument discussing how Defendant made the choice to live a life of crime; and the reference to the "seven deadly sins" was within argument regarding how Defendant admitted seeing Ana naked and going crazy, and that greed and lust were not explanations for crime. (T. 2104-05, 2137-39); *Lawrence v. State*, 691 So. 2d 1068, 1074 (Fla. 1997). This Court should affirm.

Moreover, each of the objected to comments were brief. Comments on silence do not necessitate reversal. *Pace*, 854 So. 2d at 179. This Court has repeatedly found that a brief statement regarding what the jury is required to do if the aggravating factors outweigh the mitigating factors does not require reversal. *Franqui*, 804 So. 2d at 1193-94. Furthermore, juries are instructed to follow the law and juries are instructed to weigh the aggravating and mitigating circumstances. (T. 2170-71); Fla. Std. Jury Instr. (Crim.) 2.09; Fla. Std. Jury Instr. (Crim.) Penalty Phase Proceedings. Even if this argument could be considered to convert Defendant's mitigation evidence as a reason for imposing the death penalty, the jury was instructed on the aggravating factors it could consider. (T. 2168-69) The isolated comment regarding Defendant's veracity and capacity requires inferences in order to have any sinister implication, and, as a result was harmless.

Walker v. State, 707 So. 2d 300, 314 (Fla. 1997); *State v. DiGuilio,* 491 So. 2d 1129 (Fla. 1986)

Additionally, there was overwhelming evidence presented at trial, including Nelson's eye witness account of the crimes, Defendant's four confessions, his possession of the victims' property and the semen found indicating Defendant's sexual activity.[17] Given that the comments were largely proper, they were brief and there was overwhelming evidence of Defendant's guilt for these horrible crimes, it cannot be said that the comments deprived Defendant of a fair trial and were fundamental error. *Brooks*, 762 So. 2d at 899. This Court should affirm.

IV THE VICTIM IMPACT TESTIMONY PRESENTED WAS PROPERLY ADMITTED

Defendant next claims that the trial court abused its discretion in allowing the State to present victim impact evidence that allegedly exceeded the permissible scope of such evidence and which he did not have the opportunity to rebut.[18] However, this is not true.

Victim impact evidence is admissible to show a victim's uniqueness and loss to the community by virtue of her death. §921.141(7), Fla. Stat.; *Payne v. Tennessee,* 501 U.S. 808, 827

[17] Clearly, this evidence was sufficient to establish Defendant's guilt. *Thomas v. State*, 894 So. 2d 126 (Fla. 2004).
[18] A trial court's decision to admit evidence is reviewed for an abuse of discretion. *Ray v. State*, 755 So. 2d 604, 610 (Fla. 2000).

(1991); *Windom v. State*, 656 So. 2d 432, 438 (Fla. 1995). Evidence that falls within the permissible type includes the impact of the victim's death on her family members. *See, e.g., Franklin v. State*, 965 So. 2d 79, 97-98 (Fla. 2007)(evidence that victim's "death had devastated his family" appropriately admitted within statutory definition); *Farina v. State,* 801 So. 2d 44, 52 (Fla. 2001).

Here, the testimony briefly regarded the impact Ana's murder had on her grandparents – the depression suffered, the loss of eyesight and the subsequent death of both her grandparents. Clearly this testimony falls squarely within the type of victim impact evidence permitted as it states the impact that Ana's murder had on her family. *Franklin*, 965 So. 2d at 97-98; *Farina,* 801 So. 2d at 52. Defendant's sentence should be affirmed. This is particularly true, as the testimony did not suggest that Defendant caused the grandparents death, such that there was no reason for Defendant to rebut such a claim.

V THERE WAS NO ERROR IN PERMITTING DR. LAZARO GARCIA TO TESTIFY.

Defendant claims that the trial court erred in permitting Dr. Lazaro Garcia to testify during the penalty phase because Dr. Garcia was hired to evaluate Defendant's competency. However, claim is wholly without merit.

In *Phillips v. State*, 894 So. 2d 28, 40-41 (Fla. 2004),

this Court explained that an expert who was hired to perform a competency evaluation could testify to rebut mitigation evidence without violating the tenants of Fla. R. Crim. P. 3.211(e). *See also Dillbeck v. State*, 643 So. 2d 1027, 1030-31 (Fla. 1994). The facts of this case fall squarely within *Phillips*. Dr. Garcia concluded, *inter alia*, that Defendant was malingering based on his failing a malingering test. (T. 2004-08) Under *Phillips*, this was proper rebuttal of Defendant's mitigation evidence.

Furthermore, Defendant invited any error in the mentioning of the purpose of the evaluation. *San Martin v. State*, 705 So. 2d 1337, 1347 (Fla. 1997) Dr. Garcia's direct testimony was limited to the malingering testing performed. It was Defendant's cross that elicited the purpose of the evaluation by questioning its scope. (T. 2014, 2018) Having opened the door to Dr. Garcia's responses regarding the limited purpose of his evaluation, Defendant cannot now complain. *See Rodriguez v. State*, 753 So. 2d 29, 42 (Fla. 2000). This Court should affirm Defendant's sentence.

VI THE RETARDATION CLAIM IS MERITLESS.

Defendant next asserts that his sentence should be reversed because the definition of retardation in Florida is allegedly unconstitutional. Defendant bases this contention on the assertion that the statute and rule defining retardation and

this Court's interpretation of the plain language of the statute and rule made it impossible for him to prove his claim. However, this is simply untrue.

Pursuant to both the statute and rule, one of the elements of a claim of retardation is that the defendant has significantly subaverage general intellectual functioning. They further define significantly subaverage general intellectual functioning as:

> performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities.

§ 921.137, Fla. Stat.; Fla. R. Crim. P. 3.203(b). In turn, the Agency for Persons with Disabilities has specified the standardized intelligence tests to be used. Fla. Admin. Code 65G-4.011 (renumbered from 65 B-4.032). This Court has interpreted the plain language of these provisions as requiring that Defendant actually present an IQ score that is truly two standard deviations below the mean on such a test, or stated otherwise a score that is 70 or below. *Jones v. State*, 966 So. 2d 319, 325-27 (Fla. 2007); *Cherry v. State*, 959 So. 2d 702, 712-13 (Fla. 2007).

Defendant contends that these provisions are unconstitutional because the administrative code provision and the cutoff score deprive him of an opportunity to attempt to

show that he is retarded. However, the statute and rule merely delegated to the Agency for Person with Disabilities the responsibility for determining what IQ tests could be used. They did not delegate to the agency the decision regarding whether the results achieved on those tests were credible. As such, all Defendant needed to show was that there was credible evidence that he had taken a WAIS, Stanford-Binet or other IQ test that was individually administered and that he could show credibility as accompanied "by the published validity and reliability data for the examination."

Here, Defendant was, in fact, allowed to present his claim. He took the WAIS and scored a 56. As such, had this evidence been credible, Defendant would have shown that he met the requirements for retardation. Because all Defendant had to do was show that his evidence was credible, the statute and rule did not unconstitutionally deprive Defendant of the opportunity to attempt to prove that he was retarded.

Defendant's real problem is not that the statute and rule deprived him of an opportunity to present his claim of retardation. Instead, his problem is that his score was so low that even his own experts could not claim that it accurately measured his intelligence. As such, they sought to explain the score by claiming that Defendant was actively psychotic during

the testing. Of course, if this had been true, the experts could have easily discontinued the testing and started over once Defendant was no longer psychotic. Doing so would have been consistent with the actual standards of their profession. (R. TR. 266-75) Thus, stripped of its constitutional pretensions, Defendant's argument is that his experts were not credible. However, merely because a litigant fails to present credible evidence does not show a statute is unconstitutional. The sentence should be affirmed.[19]

VII THE *RING* CLAIM IS MERITLESS.

Defendant next asserts that his death sentence should be reversed because the judge made factual findings, allegedly in violation of *Ring v. Arizona*, 536 U.S. 584 (2002). This Court has continuously and repeatedly rejected similar arguments that Florida's death sentencing scheme violates *Ring*, particularly where, as here, one of the aggravators is based on a prior conviction. *Doorbal v. State*, 837 So. 2d 940, 963 (Fla. 2003). This Court should affirm Defendant's sentence.

VIII CUMULATIVE ERROR.

Defendant argues that he is entitled to relief based on the

[19] Moreover, an error in rejecting his expert's testimony about his IQ did not harm Defendant, as the lower court found that he did not prove any element of retardation. (R. 1814-17) Its findings regarding the other elements is supported by competent substantial evidence and precludes a finding of retardation. *Jones*, 966 So. 2d at 325-27; *Cherry*, 959 So. 2d at 712-13.

cumulative effect of the alleged errors. However, this is not true, where, as here, individual errors are unpreserved and meritless. *Downs v. State*, 740 So. 2d 506, 509 n.5 (Fla. 1999)

IX DEFENDANT'S SENTENCE IS PROPORTIONATE.

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

Here, the trial court found 5 aggravators: (1) prior violent felony convictions, based on the contemporaneous crimes on Nelson; (2) during the course of robbery, kidnapping or sexual battery; (3) avoid arrest; (4) pecuniary gain; and (5) HAC. (T. 2221-29; R. 2744-49) This Court has recognized that prior violent felony and HAC are among the weightiest aggravators. *Larkins v. State*, 739 So. 2d 90, 95 (Fla. 1999); *see also Sireci v. Moore*, 825 So. 2d 882, 887 (Fla. 2002). The mitigation was limited to no significant criminal history–little weight; extreme mental or emotional disturbance–great weight;

Defendant's deprived and abusive childhood–some weight; lack of prior criminal history–no additional mitigation; Defendant was convicted based on his participation as a principle-some weight; general mental health–great weight. (T. 2331-33, 2236-43; R. 4750-52, 2754-60) Moreover, as argued, *infra*, the trial court should have also found CCP and erred in finding no significant criminal history.

This Court has affirmed other death sentences in cases with comparable aggravation and mitigation. *Huggins v. State*, 889 So. 2d 743, 769-71 (Fla. 2004)(aggravators: prior violent felony, during the course of a kidnapping, pecuniary gain, HAC; nonstatutory mitigation); *Cole v. State*, 701 So. 2d 845, 849, 852-53 (Fla. 1997)(aggravators: prior violent felony, during the course of a kidnapping, pecuniary gain, HAC; nonstatutory mitigation: organic brain damage, abused and deprived childhood). Further, this Court has upheld the imposition of the death penalty even where there was extensive mental mitigation. As such, Defendant's sentence is proportionate.

X TRIAL COURT ERRED IN REJECTING CCP.

The trial court erred in rejecting CCP.[20] This error

[20] This Court reviews a trial court's findings regarding mitigation to determine whether the trial court applied the correct rule of law and whether its factual findings are supported by competent, substantial evidence. *Willacy v. State*, 696 So. 2d 693, 695 (Fla. 1997).

occurred because the trial court did not apply the correct law.

In its sentencing order, the trial court rejected CCP based on a finding that Defendant was not the person who killed Ana and that the murder occurred during the commission of other felonies. (R. 2749-50) However, in that same order, the trial court also found that "Defendant knew that the killing was about to take place," as he watched Ana being taken from the truck, "forced to her knees," had a gun place to the back of her head and being shot execution style. (R. 2752-53) As such, it appears that the trial court rejected CCP because it believed that CCP only applied to the person who actually did the shooting and only when there were no other crimes being committed.

However, this Court has held that CCP is properly applied to all of the perpetrators who were involved in committing a murder in a cold, calculated and premeditated fashion; not just the person who actually committed the murder. *Lugo v. State*, 845 So. 2d 74, 113-14 (Fla. 2003); *San Martin v. State*, 705 So. 2d 1337, 1349 (Fla. 1997). Moreover, this Court has held that CCP is properly applied even where the murder was committed during the course of the commission of another felony, where the evidence showed that a plan to kill the victim was fully and coldly planned before the murder. *Wickham v. State*, 593 So. 2d 191, 193-94 (Fla. 1991); *San Martin*, 705 So. 2d at 1349.

Moreover, this Court has not required a long period of time elapse between the formulation of the plan and its execution, so long as the time was sufficient to allow reflection. *Valle*, 581 So. 2d at 48. In fact, in *Knight v. State*, 746 So. 2d 423, 436 (Fla. 1998), this Court found that CCP applied where a defendant kidnapped the victims to facilitate a robbery, noting that the defendant had time after the robbery was accomplished to decide to kill the victims execution style. *See also Buzia v. State*, 926 So. 2d 1203, 1216 (Fla. 2006). Moreover, this Court has held that CCP is applicable to execution style murders. *Mahn v. State*, 714 So. 2d 391, 398 (Fla. 1998); *McCrary v. State*, 416 So. 2d 804, 807 (Fla. 1982).

Here, as the trial court itself found, there was a plan to kill Ana before she was taken from the truck, forced to her knees and shot execution style. Moreover, Defendant was aware of that plan before it was executed. In fact, the record reflects that Ana remained alive for approximately 15 minutes after Nelson was beaten stabbed and left for dead on the side of the road. During this time, the group could have acceded to Ana's pleas and left her. Instead, they decided to kill her execution style. Further, there is no evidence that Ana was resisting her attackers, such that her death could be said to have been done in a panicked response to resistance. *See Geralds v. State*, 601

So. 2d 1157, 1163-64 (Fla. 1992)(where evidence showed that victim could have been shot because of resistance to burglary no CCP). Under these circumstances, the trial court erred in rejecting CCP merely because Defendant was not the person who actually committed the fatal act and because another crime was occurring. It should be reversed.

XI THE TRIAL COURT ERRED IN FINDING THE NO SIGNIFICANT CRIMINAL HISTORY MITIGATOR.

The trial court erred in finding the no significant criminal history mitigators.[21] This error occurred because the trial court did not apply the correct law and ignored uncontroverted evidence.

In its sentencing order, the trial court twice discussed Defendant's criminal history, once as a statutory mitigator and once as a nonstatutory mitigator, even though Defendant had not argued this mitigation. (R. 2751-52, 2756) It stated:

> In addition to the conviction for first degree murder of Ana Maria Angel, the Defendant was also convicted by the same jury of attempted first degree murder of Nelson Portobanco, armed kidnapping, armed robbery and armed sexual battery. If this Court were to disregard contemporaneous convictions, the fact that [Defendant] has no significant history of other prior criminal activity is a factor which this court gives little weight.

[21] This Court reviews a trial court's findings regarding mitigation to determine whether the trial court applied the correct rule of law and whether its factual findings are supported by competent, substantial evidence. *Willacy*, 696 So. 2d at 695.

* * * *

> There was no evidence to suggest that Mr. Caraballo has a significant history of prior criminal activity separate and apart from the crimes in this case. Therefore, this Court finds that this mitigator has been established by the great weight of the evidence. However, this Court has previously considered Mr. Caraballo's lack of significant history of prior criminal activity and assigned it a value. Therefore, no additional mitigation will be assigned to this non-statutory mitigator.

Id.

However, in making these findings, the trial court ignored uncontroverted evidence that Defendant did have a significant criminal history. During their direct testimony, both Dr. Alvarez and Dr. Hughes testified that Defendant had previously served at least three years in prison. (T. 1771, 1912, 1914) Dr. Hughes admitted that Defendant had a prior conviction for armed burglary. (T. 1912) He further admitted that Defendant sold drugs and claimed to have made a career of committing robberies and burglaries and was involved in a scam where he sold a car, stolen it and then re-sold it. (T. 1948-50, TR. 191, 194) Moreover, Dr. Hughes admitted at the retardation hearing that Defendant stole a car in Alaska. (TR. 186)

As this Court has recognized, evidence of all prior criminal activity is relevant to whether a defendant qualifies for the no significant criminal history mitigator. *Dennis v.*

State, 817 So. 2d 741, 763-64 (Fla. 2002); *Perry v. State*, 522 So. 2d 817, 821 (Fla. 1988). Further, uncontroverted factual evidence cannot be rejected "unless it is contrary to law, improbable, untrustworthy, unreasonable, or contradictory." *Walls v. State*, 641 So. 2d 381, 390 (Fla. 1994). As the trial court here ignored uncontroverted, relevant evidence in finding the no significant criminal history mitigator, it erred and its finding should be reversed.

Moreover, the penalty phase charge conference reveals that the reason the trial court ignored the uncontroverted, relevant evidence is that it did not understand the correct rule of law regarding this mitigator. When the jury instruction on the no significant criminal history mitigator was discussed, Defendant objected to the portion of the standard jury instruction concerning the use of prior convictions that did not support the prior violent felony aggravator as rebuttal of this mitigator. (T. 2081-82) The trial court then evidenced its lack of understand of the law regarding this mitigator by stating that it understood this portion of the instruction to be referring to Defendant's other convictions in this case. (T. 2082) Defendant then fostered the misunderstanding by asserting that the mitigator always applied unless the State presented certified copies of prior convictions and that the law prohibited the

State from relying on other evidence of criminal activity. (T. 2082-84) However, as noted above, the evidence of criminal activity did not even need to result in a charge. *Dennis*, 817 So. 2d at 763-64; *Perry*, 522 So. 2d at 821. Further, having misinformed the trial court regarding the law, Defendant then allowed this incorrect statement of the law to stand by withdrawing his request for the instruction and not arguing the mitigator in his sentencing memo. (T. 2084, SR. 27-30) Given these circumstances, it is apparent that the trial court applied the wrong rule of law regarding this mitigator. Its finding of the mitigator should be reversed.

CONCLUSION

For the foregoing reasons, the judgment and sentence of the trial court should be affirmed but the rejection of CCP and finding of no significant criminal history should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing ANSWER BRIEF OF APPELLEE/INITIAL BRIEF OF CROSS-APPELLANT was furnished by U.S. mail to Andrew Stanton, Assistant Public Defender, Eleventh Judicial Circuit of Florida, 1320 N.W. 14th Street, Miami, FL 33125, this 4th day of December, 2008.

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

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