IN THE SUPREME COURT OF FLORIDA

NELSON SERRANO,

Appellant,

v. **CASE NO. SC07-1434**
Lower Tribunal No. CF01-03262A-XX

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, STATE OF FLORIDA

AMENDED ANSWER BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

The record on appeal consists of 61 volumes; 6 supplemental volumes, and 9 volumes of evidence. Citations to the record on appeal will be referred to by the appropriate volume number followed by the page number "V__:__". Citations to the supplemental volumes will be referred to as "SV_:__," and citations to the evidence volumes will be referred to as "EV_:___."

STATEMENT OF THE CASE AND FACTS

A. Statement of the Case

On May 17, 2001, Appellant was indicted under seal with four counts of first degree murder for the deaths of George Gonsalves, Frank Dosso, George Patisso and Diane Patisso. (V2:151-55). The murders occurred on December 3, 1997, at Erie Manufacturing and Garment Conveyor System's [hereafter "Erie"] Bartow warehouse sometime after 5:15 p.m.[1] Appellant, a United States citizen, was eventually arrested in Ecuador on August 21, 2002, and deported to the United States the next day. (V37:2573-79; V17:2392-400; V50:4384; V52:4732-66).

Prior to trial, defense counsel filed several motions for a change of venue based on pretrial publicity, but after the court conducted a number of hearings and a mock jury selection, Appellant's trial counsel acknowledged that "based on the record established today [at the mock jury selection], I cannot in good faith say that we have established that basis." (V2:183-88, 193-96, 213-17; V4:378-92, 394-411; V6-7:799-917). After

[1] Numerous employees testified to clocking out from Erie shortly after 5 p.m. while the victims remained behind. (V41:3211-16; V42:3259, 3307). Diane Patisso left work in downtown Bartow between 5:15 – 5:20 p.m. to pick up her husband, George Patisso, who worked at Erie. (V42:3348). After family members had not heard from the victims, they began calling at 5:45 p.m. and received no answer. (V43:3453). The victims were ultimately discovered by worried relatives around 7:30 p.m. (V44:3556-74).

conducting the actual voir dire proceedings in this case (V19-37), defense counsel renewed his motion for change of venue without presenting any new argument. (V37:2582).

On June 30, 2004, Appellant filed numerous death penalty motions attacking the constitutionality of various aspects of Florida's death penalty statute. (V2-4:218-392). After hearing argument on these motions, the trial court entered orders denying the majority of these motions.

Prior to trial, Appellant also filed a motion to dismiss the indictment and for the trial court to divest itself of jurisdiction based on allegations that Appellant was illegally seized and arrested in Ecuador in violation of his Fourth Amendment constitutional rights. (V10:1284-1312). On September 5, 2006, the trial court conducted a hearing on Appellant's motion to dismiss the indictment and ultimately issued an order denying his motion. (V37:2558-82). Appellant amended and renewed his motion after the jury trial, and the trial court again denied the claim. (V17-18:2260-66, 2371-2445, 2459-60).

Appellant's case proceeded to a jury trial before the Honorable Susan W. Roberts on September 5 – October 11, 2006. The jury found Appellant guilty on all four counts of first degree murder. (V11:1406-09). The penalty phase was conducted on October 23-24, 2006, and the jury recommended the death

penalty by a vote of 9-3 on each count. (V11:1500-03). The trial court conducted a Spencer hearing on January 2-3, 2007. Thereafter, on June 26, 2007, the trial court sentenced Appellant to death for each of the four murders finding three aggravating factors: (1) the murders were committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification; (2) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest (as to victim Diane Patisso only); and (3) Appellant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person. (V18:2509-15). The trial court found two statutory mitigating factors, no significant history of prior criminal activity and Appellant's age at the time of the crime, and found numerous nonstatutory mitigators.[2]

B. Guilt Phase Evidence[3]

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[2] Appellant was 59 at the time of the murders. The nonstatutory mitigating factors were: (1) good school performance; (2) good social history, (3) no history of alcohol or drug abuse; (4) successful Hispanic immigrant; (5) positive behavior during pretrial incarceration; (6) positive behavior during court appearances; (7) remorse; (8) good employment history; (9) good husband; (10) good father; (11) positive religious involvement; (12) significant history of good works; and (13) significant stressors at the time of the incident.

[3] As will be discussed in detail throughout this section and in Issue I, infra, the circumstantial evidence in this case is extensive and voluminous. In an effort to assist this Court in understanding the relevant timelines involved, Appellee has

In 1962, Felice "Phil" Dosso and George Gonsalves started a tool and die business, Erie Manufacturing Cooperative, in New York. (V43:3481-86). Eventually, their business began providing parts to support the garment industry. In the 1980s, Phil Dosso met Appellant, who was working for a New Jersey company selling slick rail systems for the garment industry. Appellant wanted the two partners to expand their business to include the installation segment of the slick rail industry. Ultimately, the three men created a separate company, Garment Conveyor Systems, in the middle of the 1980s. (V43:3486-92). Under this company, Appellant was responsible for designing and selling the slick rail systems and Dosso and Gonsalves' Erie company built the parts.

In the late 1980s, the partners moved their business to Bartow, Florida. At that time, they closed Erie Manufacturing Coop, and transferred all the assets to Erie Manufacturing, Inc. As part of their oral agreement, Appellant "bought" into the Erie partnership and agreed to pay both Dosso and Gonsalves $75,000 each.[4] Appellant's son, Francisco Serrano, began working at Erie soon after they relocated to Bartow and he was responsible for handling the company's books. (V43:3503-04).

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attached a five-page exhibit that was utilized by the State as a demonstrative aid during closing arguments. See Appendix A1-5.

[4] Garment Conveyor Systems remained the same with all three men being equal partners. (V43:3501).

Phil Dosso's son, victim Frank Dosso, began working for Erie in 1993 or 1994. (V43:3504).

Although business was slow at the start, by the early 1990s, their business was doing well and making money. Despite being paid twice as much as the other two partners (V41:3195-95), Appellant failed to pay the $150,000 to the two partners and this created friction. Additionally, the partners were upset because Francisco Serrano started his own import/export company and was doing work for that company while on Erie's time. (V44:3505-06). As a result, Dosso and Gonsalves fired Francisco Serrano in June, 1997, while Appellant was out of town on business. Soon thereafter, on June 16, 1997, Appellant opened a separate business checking account with a different bank and deposited two Erie checks totaling over $270,000. (V51:4433-65). The firing of Francisco Serrano and the opening of a separate bank account further increased tensions to the point that Appellant was ousted from the company and the locks were changed on the building. (V44:3541-52; V48:4171-72; V52:4680-725).

Numerous employees testified to the strained relations between Appellant and the other two partners, particularly Appellant's dislike of Gonsalves. (V42:3313-21, 3356-57; V43:3364-65; V49:4211, 4277-78, 4289). Appellant often referred

to Dosso and Gonsalves by derogatory names, and made a number of statements indicating his wish that Gonsalves would die. Additionally, Phil Dosso testified that he heard Appellant threaten to kill Gonsalves. (V44:3530).

On the evening of December 3, 1997, numerous Erie employees left work at 5:00 p.m., see footnote 1 supra, and as was his usual practice, co-owner George Gonsalves worked late and was one of the last to leave. (V41:3219). David Catalan, an employee at Erie, testified that when he left with another employee shortly after 5 p.m., George Gonsalves' car was the only car in the parking lot. (V41:3219). Although George Patisso and Frank Dosso remained at Erie with Gonsalves, they did not have a car parked in front because George's wife, Diane Patisso, had plans to pick them up and take them to Frank Dosso's home for his twins' birthday party.[5] (V43:3427-33, 3450-53). Diane Patisso left work at 5:15 or 5:20 and drove a short distance to Erie to pick up her husband and brother. When family members began calling Frank Dosso at 5:45 p.m. and could not get an answer, Phil Dosso and his wife decided to drive to Erie and check on things. (V43:3435).

When Phil and Nicoletta Dosso arrived at Erie, the front door was unlocked, and as they entered, they discovered the

[5] Diane Patisso was co-owner Phil Dosso's daughter, and sister to victim Frank Dosso.

deceased body of their daughter, Diane Patisso, in a doorway in a pool of blood. Phil Dosso called 911 and ran to another office to check on George Patisso. Phil Dosso discovered that George Gonsalves, George Patisso, and Frank Dosso had all been shot in the office and were dead. (V43:3437-38; V44:3559-81).

As Phil Dosso was speaking with the 911 operator, Bartow Police Department officers began to respond to the scene. (V39:2854-56). When the first officers arrived, there were only three cars parked in front of the entrance (Phil Dosso's car, Diane Patisso's car, and George Gonsalves' car). (V40:2943-44). Inside Erie, law enforcement discovered 12 shell casings (11 from a .22, and one from a .32).[6] (V40:2962-63). In the office containing the three male victims (Appellant's old office when he worked at Erie) (V41:3218), officers discovered a blue vinyl chair with shoe impressions on the seat, and directly above the

[6] All of the victims were shot in the head with .22 bullets, and Diane Patisso was also shot once with a .32 bullet. (V47:3955-68, 3975-4042). As will be discussed infra, the State's theory was that Appellant kept a .32 firearm hidden in the ceiling of his office, and after he was ousted from the company and the locks were changed, he was unable to retrieve it until the night of the murders. After Appellant had shot the three male victims in the back office and was leaving the scene, Diane Patisso entered the building and was shot with both weapons.

Although neither of the murder weapons were discovered, the State introduced voluminous evidence regarding Appellant's possession and ownership of multiple .22 and .32 caliber firearms. Law enforcement conducted two searches of his house and discovered 7 firearms and 16 permits reflecting purchases of other firearms which were not located. (V55:5113-39).

chair, the ceiling tile had been dislodged. (V40:2980, 3038). David Catalan testified that on one occasion when he was leaving work at night, he saw Appellant in his office with a gun. Appellant was standing on a chair and moving a ceiling tile.[7] (V41-42:3221-25). Appellant told Catalan he liked the gun because "it held a lot of rounds." (V42:3225).

The State introduced evidence from an Erie employee, Velma Ellis, that the blue chair in the office was never used and always remained under a desk. There were papers and a box piled on top of the chair's seat. Ellis testified that when she left work on December 3, 1997, at 5 p.m., the chair was in its usual position under the desk. (V51:4579-80). FDLE crime analysts tested the shoe impressions on the seat and found that the class characteristics were consistent with a pair of shoes Appellant owned. (V56:5287-99).

When officers first discovered the four victims at Erie, their investigation immediately focused on Appellant and his son, Francisco Serrano. One of the arriving paramedics testified that either Mrs. Dosso or George Gonsalves' wife told her that "the partner" had done it because he tried to buy out the other partners, and when they refused, he told them he would

[7] After his arrest, Appellant told FDLE agent Tommy Ray that he would often hide a gun in the ceiling when he was out-of-town on business.

kill them. (V42:3282). At around 11 p.m. that evening, law enforcement officers interviewed Francisco Serrano, but they could not get in contact with Appellant at that time because he was in Atlanta. (V45:3678-83).

As soon as Appellant returned to his home on December 4, 1997, at approximately 8:30 p.m., detectives were waiting for him and requested that he come to the police station for an interview. Appellant told Detective Steve Parker about the problems he had with the owners of Erie and informed the detective that he had learned of the murders the previous evening when he had called his wife from his Atlanta hotel. (V45:3687-88). She informed Appellant that there had been an "accident" at Erie and four people were dead.[8] Appellant stated that he called another person, Louis Velandia, to find out more information about what had happened at Erie. According to Appellant, Velandia worked at Erie and told Appellant that when he left work on the evening of December 3, there were only three people there (George Gonsalves, Frank Dosso, and George Patisso), and George Gonsalves' car was the only car parked outside. (V45:3689).

[8] In a subsequent phone call, Appellant stated that his wife told him three men and one woman had been shot. (V45:3700-01).

Maureen Serrano, Francisco Serrano's wife, testified that Appellant spoke to her that night and told her that he did not think the police would ever find out who committed the murders. (V48:4112).

Appellant detailed for Detective Parker his business trip itinerary, which included leaving Lakeland early on the morning of December 2, flying to Washington, D.C., and on the evening of December 2, flying from Washington to Atlanta. Appellant claimed that he remained in Atlanta until he returned on December 4, 1997. (V45:3688). Appellant stated that he had a business meeting with Larry Heflin of Astechnologies on December 3, but had to reschedule it until 10:00 a.m. on December 4th, because Appellant had a migraine headache. (V45:3690). When asked by the detective what he thought may have happened at Erie, Appellant replied that "somebody is getting even; somebody they cheated, and George is capable of that." Thereafter, Detective Parker took Appellant's taped statement, which was played for the jury. (V45:3693-726). During his statement, when discussing the female victim, Appellant stated that maybe "she walked in the middle of something." (V45:3704; V46:3842-43). At the time of Appellant's interview, no information had been released about the location of the victims' bodies, specifically the fact that Diane Patisso was found in a location different from that of the three male victims. (V45:3727).

Law enforcement officers investigating Appellant's alibi traveled to Atlanta and obtained surveillance video from Appellant's La Quinta Inn airport hotel and also met with Larry

Heflin of Astechnologies regarding his business meeting with Appellant. Heflin testified that he met Appellant on December 3, at about 9:45 a.m., and the meeting lasted about one hour. (V49:4350-51). In addition to meeting with Heflin, investigators also interviewed La Quinta Inn employees and obtained the hotel's surveillance videotapes. The video showed Appellant in the hotel lobby at 12:19 p.m. (approximately an hour and a half after his business meeting with Heflin). Ten hours later, at 10:17 p.m., Appellant was again seen on the video, entering the hotel lobby from the outside, wearing the same sweater and jacket as earlier in the afternoon. (V50:4392-95; V62:6137-40).

Alvaro Penaherrera, Appellant's nephew, testified that he knew Appellant while growing up in Ecuador. Penaherrera ultimately moved to Florida and lived with Appellant and his family. Appellant hired Penaherrera to work at Erie during this time. (V53:4865-68). On two separate occasions, Appellant asked Penaherrera to rent a car for him so that Appellant's wife would not find out. (V53:4884-89).

On October 29, 1997, Appellant drove Penaherrera to the Orlando International Airport where Penaherrera picked up a rental car from Dollar Rental. Penaherrera drove the car to a nearby valet lot, Rainbow Parking, and left the car, and

Appellant then drove Penaherrera back to his apartment which was only a few minutes away from the airport. (V53:4890-94; V59:5710-14). Penaherrera had no further contact with the rental car and did not know who returned it on October 31, 1997, at 7:30 p.m. (V59:5711-12).

Around Thanksgiving 1997, Appellant again asked Penaherrera to rent a car for him under Penaherrera's name because Appellant allegedly had a girlfriend from Brazil coming into town to spend a weekend with him. (V53:4884-86). Penaherrera told Appellant that his credit card was almost maxed out, but Appellant told him that he would pay him back. (V53:4887-88). On November 23, 1997, Penaherrera made a telephone reservation for a rental car for December 3, 1997. (V59:5714-18). On December 3, 1997, at 7:53 a.m., Appellant, while in Atlanta, called Penaherrera and had him call to confirm the rental car reservation. (V59:5722-23). Appellant called Penaherrera back at 8:06 a.m. to verify that the rental car would be ready. (V59:5723-25). Penaherrera drove to Orlando's airport and parked his car in the parking garage, rented the car from the terminal dealership, and drove the rental car back to the parking garage and left it there per Appellant's instructions. (V59:5726-34). Later that day, Appellant called Penaherrera and he told Appellant where the car was located and where the keys were hidden. (V59:5735-37).

Like the previous time in October, Penaherrera did not expect to have any further involvement with the rental car after he left it at the airport parking garage. (V59:5737-39). However, Appellant made numerous calls to Penaherrera the next day, December 4, and ultimately reached Penaherrera and told him that the rental car was in Tampa, not Orlando, and Penaherrera needed to drive to Tampa and return the car there. (V59:5740-42). Penaherrera told Appellant that he would not do that, but Appellant would not accept that for an answer. (V59:5744). Appellant told Penaherrera if he went to Tampa and returned the car, Appellant would pay off Penaherrera's entire credit card bill of approximately $2500, and Penaherrera could pay him back without interest.[9] (V59:5745). Penaherrera faked an illness and left his job and ultimately returned the rental car in Tampa at 2:10 p.m. on December 4, 1997. (V59:5746-47). Penaherrera next saw Appellant when he was visiting relatives in Ecuador for Christmas. Appellant informed Penaherrera of the murders at Erie and told Penaherrera that he could not say anything about the rental cars because it would jeopardize his marriage and the police would "frame" him for the murders. (V59:5752-59).

Penaherrera had little to no contact with Appellant

[9] Gustavo Concha, Appellant's lifelong friend and distant cousin, subsequently paid off Penaherrera's $2240 Visa bill. (V50:4401; V59:5635).

following their encounter in Ecuador in December, 1997. (V59:5761). However, in June 2000, Penaherrera, his girlfriend and his brother, were all subpoenaed to testify before the grand jury in Bartow. Appellant informed them that they could all spend the night at his house the night before their testimony. (V60:5762-65). Appellant gave Penaherrera and his brother suits and dress shoes to wear to court.[10] Appellant told Penaherrera to lie when he testified before the grand jury about who he rented the cars for. (V60:5766-71). In addition to testifying before the grand jury on June 15, 2000, Penaherrera also spoke for the first time with law enforcement officers regarding the December, 1997, rental car transaction. (V60:5767-69). After his testimony, Penaherrera returned home to Orlando where Appellant immediately began attempting to contact him to find out what information he had given to the grand jury and law enforcement officers. (V59:5676-77; V60:5769-70; EV9:968). Shortly after Penaherrera testified before the grand jury, Appellant sold his home, car and assets and moved to Ecuador. (V48:4117-21).

As previously noted, Appellant flew from Orlando to Washington, D.C., and then to Atlanta, on December 2, 1997, and

[10] The pair of DeRizzo shoes Appellant gave Alvaro Penaherrera in 2000 were seized by law enforcement, and forensic testing indicated that the right shoe could have made the impression on the blue chair at the scene of the murders. (V56:5295-300).

claimed to have stayed in Atlanta until he flew back to Orlando on December 4, 1997. The State introduced evidence regarding Appellant's air travel on this business trip (V54:5049-51), and also introduced evidence showing that Appellant drove his car and parked it at Orlando International Airport's parking garage during this period of time.[11] (V54:4992-93). However, contrary to his statements to law enforcement, the State also introduced evidence that Appellant traveled back to Orlando on the day of the murders.

Shortly after noon on December 3, 1997, Appellant was observed in the La Quinta Inn's lobby. According to Appellant's statements to FDLE agent Tommy Ray, he returned to his hotel room for the next ten hours because he was suffering from a migraine headache. However, at 1:36 p.m., "Juan Agacio"[12]

[11] Appellant's vehicle entered the parking garage on December 2, 1997, at 6:29 a.m. Appellant wrote on the back of the parking ticket "level five, row G, fifth spot." (V55:5175, 5184). On December 4, 1997, after Appellant's flight from Atlanta to Orlando arrived, Appellant's car exited the parking garage at 6:09 p.m. (V54:4993).

[12] In 1960, Appellant fathered a son, Juan Carlos Serrano, with his wife, Gladys Agacio Serrano. When Gladys Agacio Serrano divorced Appellant her maiden name was restored to her, Gladys Agacio, and she was granted sole custody of Juan Serrano. (EV6:629-30). Gladys Agacio subsequently married John Greeven, and when Juan Carlos Serrano was three or four years old, he was adopted and his name was legally changed to John Greeven. John Greeven testified at trial that he had never gone by the name "Juan Agacio," he had never even met Appellant until he graduated from college, and he had never taken any flights from Atlanta to Orlando. (V41:3164-81).

boarded Delta flight 1807 in Atlanta, scheduled to depart at 1:41 p.m. for Orlando.[13] At 3:05 p.m., "Juan Agacio" arrived in Orlando on flight 1807, and at 3:49 p.m., the rental car that Penaherrera had left for Appellant that morning exited the parking garage. Appellant's fingerprint was located on the parking garage ticket indicating a departure time stamp of 3:49 p.m. (V54:4997; V56:5251-53; 5278-79; 5329-31). The distance between Orlando's airport and Erie's building was 80 miles and took approximately and hour and fifteen minutes to drive. (V61:5918).

At approximately 5:30 p.m., a person matching Appellant's description was seen standing off the side of a road near Erie's building. (V43:3378-81). When John Purvis left work on December 3, 1997, he noticed the man wearing a suit and white sweater standing in the grassy area, with no car in the vicinity. (V43:3379, 3396). The man was holding his coat and hands in front of his face as if he were lighting a cigarette. (V43:3381, 3403). Both Alvaro Penaherrera and Maureen Serrano

[13] As reflected on the Summary of Events on November 23, 1997, Exhibit A at 4, a round-trip ticket for this Atlanta-to-Orlando flight was purchased with cash at the Orlando International Airport on November 23, 1997; the same date and location that Alvaro Penaherrera reserved a rental car for December 3, 1997. Appellant's vehicle left the Orlando airport's parking garage about twenty minutes after the round-trip ticket was purchased. The return portion of the flight was never used. (V54:4998-91; 5029-34).

testified that Appellant smoked.[14] (V48:4122; V60:5767). Mr. Purvis eventually described the man so that law enforcement officers could make a composite sketch.[15] (EV7:744).

Approximately two hours after the murders, at 7:28 p.m., "John White" arrived at Tampa International Airport and checked into Delta Airlines for flight 1272 to Atlanta.[16] Similar to the ticket purchasing process for "Juan Agacio," "John White" purchased a round-trip ticket with cash at Tampa International Airport on November 23, 1997, and never used the return portion of the ticket. (V54:5034-42). Flight 1272 was scheduled to arrive in Atlanta at 9:41 p.m. (V54:5042). At 10:17 p.m., Appellant was observed on videotape walking into the La Quinta Inn airport hotel lobby from the outside, wearing the same

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[14] Contrary to Appellant's assertion in his amended brief at 17, footnote 2, Appellee has never claimed that these witnesses testified that Appellant smoked *cigarettes*. Maureen Serrano testified that Appellant smoked a pipe, and Penaherrera simply testified that he smoked tobacco. Of course, it must further be noted that Mr. Purvis testified that the individual he saw was holding his jacket in front on his face as if he were lighting a cigarette, but Mr. Purvis did not see a cigarette or a lighter. (V43:3403).

[15] Although Mr. Purvis testified that the person he saw appeared to be between the ages of 25-30, the jury could obviously compare the composite sketch of the person Mr. Purvis described to Appellant's appearance in the hotel surveillance tapes and Appellant's appearance in court nine years after the fact and note the striking similarities.

[16] The distance from Erie's building to Dollar Rental at Tampa International Airport was 50 miles and took officers 58 minutes to drive when doing the speed limit. (V53:4838).

clothes he had been wearing 10 hours earlier.[17] Immediately thereafter, Appellant began using his cell phone again to call numerous people, including multiple calls to Alvaro Penaherrera the next morning telling him he had to return the rental car that was now located at Tampa International Airport.[18]

Shortly after Alvaro Penaherrera testified before the grand jury in June, 2000, Appellant moved to Ecuador. In May, 2001, the grand jury returned a sealed indictment charging Appellant with the four murders. (V49:4300). On August 31, 2002, Appellant was apprehended in Quito, Ecuador by the Ecuadorian National Police and deported to the United States the following day. (V52:4738-52).

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[17] Appellant mistakenly states numerous times in his brief that the flight arrived **28 minutes** before Appellant was seen on the hotel video surveillance. The evidence established that the flight was "scheduled" to arrive at 9:41 p.m., and there were no records of the actual arrival time. Furthermore, even assuming that the flight actually arrived at the gate at 9:41 p.m., it was **36 minutes** later that Appellant was seen on the hotel video at 10:17 p.m.

Appellant also mistakenly states at p.25 that the La Quinta hotel is five miles from the airport. During the questioning of FDLE agent Tommy Ray, the hotel was often referred to as being "in" or "near" the Atlanta airport. (V50:4389, 4396). Appellant's bill for the hotel references the address for the "La Quinta – Atlanta Airport" as 4874 Old National Highway, College Park, Georgia. (EV6:613). A current Google internet search of this address reveals that the hotel is now an Econo Lodge and is advertised as being exactly one (1.0) mile from the airport.

[18] The rental car had been driven 139 miles. (V55:5105). The distance from Orlando's airport to Erie was 80 miles (V61:5918), and the distance from Erie to Tampa's airport was 50 miles for a total of 130 miles (53:4386).

While incarcerated in jail awaiting trial in late 2005, early 2006, Appellant spoke to fellow inmate Leslie Jones about his case. Appellant denied any involvement in the murders and told Jones that he believed a Mafia hitman may have committed the murders, or in another scenario, that Frank Dosso wanted to take over the business from George Gonsalves. (V57:5472-78, 5570-71). The main theory Appellant described involved a hitman Appellant knew only as "John," who was owed a substantial amount of money by the Dosso and Gonsalves family. (V57:5590-94). According to Appellant, the younger Dosso owed over a million dollars to the Mafia in drug money. (V57:5472-75). Appellant and John drove to the airports in Tampa and Orlando and John purchased tickets under the names of Todd White and Juan Agacio.[19] (V57:5476). Appellant told inmate Jones that John had planned to approach the business partners on Halloween night, but it was raining and the business was closed.[20] (V57:5477). Appellant also told Jones about his fingerprint being found on a parking ticket in Orlando, but Appellant claimed that FDLE agent Tommy Ray had planted his fingerprint. (V57:5478).

[19] Appellant stated that, although he went to the airport with John, he did not know why John was going, but he subsequently learned that John had bought airline tickets under the aliases. (V57:5572).

[20] As will be discussed in more detail, infra, the State introduced evidence regarding the Halloween incident including the fact that there was almost 2 inches of rain recorded on October 31, 1997. (V59:5677-78).

After law enforcement learned about the Halloween 1997 incident from inmate Jones, they began investigating events at this time and discovered almost an identical pattern of activity as the events surrounding the December 3, 1997, murders. Appellant once again was traveling on a business trip from Orlando to Charlotte on October 30 - November 2, 1997. (V56:5231-33). As previously discussed, supra at 17, on October 29, Appellant took Alvaro Penaherrera to the Orlando airport where Penaherrera rented a car for Appellant and left it at a nearby valet lot. The next morning, October 30, 1997, Appellant flew from Orlando to Charlotte with his flight arriving in Charlotte at 8:34 a.m. (V56:5233). The following day, Halloween, "Juan Agacio" took a flight departing from Charlotte at 1:40 p.m., and arriving in Orlando at 3:07 p.m.[21] (V56:5228-31). Later that Halloween evening, at 6:40 p.m., "John White" called US Airways and asked that they hold flight 1538 because he was held up in traffic because of an over-turned tractor-trailer. At 7:30 p.m., "John White" was scheduled to depart a flight from Tampa to Charlotte.[22] (V56:5219-38).

After the State rested its case in chief, Appellant moved

[21] This Charlotte-to-Orlando ticket had been purchased at Orlando's airport. (V56:5230).

[22] The airline agent testified that, at this time, a person could board a flight even without photo identification. (V56:5237-38).

for a judgment of acquittal which the trial judge denied. (V61:5951-74). Thereafter, the defense rested without presenting any evidence. (V61:6016). The jury subsequently returned a verdict finding Appellant guilty on four counts of first degree murder. (V63:6287-88).

C. Penalty Phase Proceedings

On October 23-24, 2006, the trial court conducted the penalty phase proceedings before the jury. The State presented victim impact statements from family members and friends of the four victims. (SV5-6:134-205). The parties stipulated that Appellant was 59 at the time of the murders and was 68 at the time of the penalty phase proceedings. The parties further stipulated that Appellant had no significant prior criminal history (SV6:238). The defense's mitigation specialist, Tony Maloney, testified that she had reviewed the Polk County Jail records covering Appellant's period of incarceration, and found no evidence that Appellant had ever received any disciplinary reports. (SV6:239-43).

After consulting with his attorneys, Appellant chose not to testify at the penalty phase before the jury. (SV2:187-90). After hearing argument from counsel and the jury instructions, the jury returned an advisory verdict recommending death by a vote of 9-3 on each of the four murder counts. (SV2:283-84).

On January 2-5, 2007, the court conducted a Spencer hearing wherein Appellant presented numerous live witnesses and videotaped testimony from 24 witnesses from Ecuador. (V11-16:1529-2256). On April 9, 2007, the trial court heard argument regarding the appropriate sentence (V18:2463-500), and on June 26, 2007, the trial court sentenced Appellant to death on each of the four counts of first degree murder.

SUMMARY OF THE ARGUMENT

Issue I: The trial court properly denied Appellant's motion for judgment of acquittal on the four counts of first degree murder. The substantial circumstantial evidence introduced in this case established beyond a reasonable doubt that Appellant committed the charged murders. Contrary to Appellant's reasonable hypothesis of innocence that he was in an Atlanta hotel room suffering from a migraine headache at the time of the murders, the State's evidence established that Appellant flew to Orlando, Florida under an alias shortly before the murders and drove to the murder scene and ruthlessly shot four victims in execution-style murders. Because there is substantial, competent evidence to support the verdicts in this case, this Court should affirm the trial court's ruling denying Appellant's motion for judgment of acquittal.

Issue II: The trial court properly denied Appellant's motion to suppress his post-Miranda statements to FDLE agent Tommy Ray. The totality of the circumstances establish that agent Ray scrupulously honored Appellant's right to remain silent after Appellant indicated that he did not want to talk "at this time." Approximately an hour and half after being advised of his rights, and while still sitting next to agent Ray on a plane flight back to Florida, Appellant initiated

conversations with agent Ray regarding his case. Given these facts, the trial court correctly denied Appellant's motion to suppress.

Issue III: The trial court properly denied Appellant's motion to dismiss the indictment and divest itself of jurisdiction. Appellant's motion was untimely and did not present a valid legal basis for relief. Furthermore, Appellant's claim that he was unlawfully arrested and kidnapped in Ecuador and extradited in violation of international law is refuted by the record. The evidence established that Appellant, an American citizen, was arrested by Ecuadorian National Police in Ecuador and was deported by Ecuadorian officials. As the trial court properly found, the court's jurisdiction was not defeated by an assertion that there may have been an illegal procurement of Appellant's presence in the jurisdiction.

Issue IV: The trial court acted within its discretion in denying Appellant's motions for mistrial after allegedly improper comments by the prosecutor. The comments by the prosecutor were not improper, and even if this Court were to find that any of the comments were improper, any error was harmless.

Issue V: The trial court did not abuse its discretion in denying Appellant's motions for a change of venue based on

pretrial publicity. Appellant made numerous pre-trial motions for change of venue, and after conducting a mock voir dire, defense counsel noted that, based on the mock answers, his motion could not be made in good faith. After conducting the actual voir dire, defense counsel renewed his motion without any argument. In this case, as a review of the voir dire proceedings indicates, the pretrial publicity was not so pervasive as to result in prejudice. Accordingly, this Court should affirm the trial court's ruling denying Appellant's motions to change venue based on pretrial publicity.

Issue VI: Appellant's right to confront witnesses was not violated by the State's bloodstain expert's testimony which was based, in part, on measurements taken by different individuals. The bulk of the expert's testimony was based on his own independent analysis of crime scene photographs, but he testified that he did rely on measurements obtained from the medical examiner and another FDLE agent. The parties agreed that the bloodstain expert could testify provided the State "tied up" the evidence by subsequently calling the medical examiner and the other FDLE analyst. The State subsequently presented evidence from a different medical examiner, without objection, because the medical examiner who performed the autopsies was unavailable. The State also presented the

testimony of the FDLE agent, but neither the State nor defense counsel inquired as to the measurements relied on by the bloodstain expert. However, Appellant's confrontation rights were not violated because he had the opportunity to inquire regarding the measurements, and even if his confrontation rights were violated, any error was harmless.

Issue VII: Appellant has not shown any reversible error based on the State's cross examination of Appellant's character witnesses at the Spencer hearing. Even if this Court finds that the prosecutor's inquiry was improper, any error was harmless as the trial judge did not consider the evidence when sentencing Appellant to death for the four murders.

Issue VIII: The trial court properly instructed the jury on the avoid arrest aggravating circumstance and there is substantial competent evidence to support the trial court's factual finding regarding this aggravator. The evidence clearly established that Appellant travelled to Florida and killed three men that worked at his former company, and then shot and killed Diane Patisso as he was leaving the scene. Appellant acknowledged that he knew the victim. She unfortunately was entering the business as Appellant was leaving, and the sole motivation for killing her was to avoid detection and arrest.

Issue IX: Appellant implicitly acknowledges that this

Court has repeatedly rejected his constitutional attacks to Florida's death penalty statute and jury instructions. Appellant has offered no argument in opposition to this Court's precedent and has simply raised this issue for preservation purposes. Because Appellant's arguments have previously been rejected and have no merit, this Court should deny this claim.

ARGUMENT

ISSUE I

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL BECAUSE THE CIRCUMSTANTIAL EVIDENCE REBUTTED APPELALNT'S HYPOTHESIS OF INNOCENCE AND THE STATE'S EVIDENCE WAS SUFFICIENT TO SUPPORT HIS FOUR CONVICTIONS FOR FIRST DEGREE MURDER.

After the State rested its case in chief, Appellant moved for a judgment of acquittal and argued that the State had failed to prove that Appellant committed the four murders. (V61:5952-74). The trial court denied the motion after hearing argument from counsel. (V61:5974). Appellant now argues on appeal that the trial court erred by denying his motion. The State submits that the trial court properly denied the motion based on the circumstantial evidence presented by the State which established beyond a reasonable doubt that Appellant committed the charged murders.

As this Court noted in Crain v. State, 894 So. 2d 59, 71 (Fla. 2004) (citations omitted):

> A judgment of conviction comes to this Court with a presumption of correctness and a defendant's claim of insufficiency of the evidence cannot prevail where there is substantial competent evidence to support the verdict and judgment. The fact that the evidence is contradictory does not warrant a judgment of acquittal since the weight of the evidence and the witnesses' credibility are questions solely for the jury. It is not this Court's function to retry a case or reweigh conflicting evidence submitted to the trier of fact.

This Court further stated in Tibbs v. State, 397 So. 2d 1120,

1123 (Fla. 1981):

> An appellate court should not retry a case or reweigh conflicting evidence submitted to a jury or other trier of fact. Rather, the concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment. Legal sufficiency alone, as opposed to evidentiary weight, is the appropriate concern of an appellate tribunal.

In State v. Law, 559 So. 2d 187, 188 (Fla. 1989), this Court noted that where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. See also Ballard v. State, 923 So. 2d 475 (Fla. 2006) (noting that "[i]t is the actual exclusion of the hypothesis of innocence which clothes circumstantial evidence with the force of proof sufficient to convict"). The question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and where there is substantial, competent evidence to support the jury's verdict, this Court will not reverse.[23] Heiney v. State, 447 So. 2d 210 (Fla. 1984). Appellee submits that there is substantial, competent circumstantial evidence to

[23] When reviewing a trial court's ruling on a motion for judgment of acquittal, this Court applies a *de novo* standard of review. Pagan v. State, 830 So. 2d 792, 803 (Fla. 2002).

support the jury's verdict on the four counts of first degree murder.

In this case, Appellant's hypothesis of innocence was that he was in his Atlanta hotel at the time of the murders suffering from a migraine headache. Appellant acknowledges that he was seen on an Atlanta hotel video surveillance camera at 12:19 p.m., and again at 10:17 p.m., but asserts that there was insufficient time for him to travel to Bartow to commit the murders. The State's evidence, however, clearly refuted Appellant's hypothesis of innocence and established that Appellant did in fact travel from Atlanta during this time period and committed the instant murders.

The State's evidence established that the murders of George Gonsalves, Frank Dosso, George Patisso, and Diane Pattiso were motivated by a bitter business dispute between Appellant and the other two business partners of Erie Manufacturing: George Gonsalves and Felice Dosso.[24] After Appellant failed to make his promised "buy-in payment" of $75,000 each to Gonsalves and Dosso, the business partnership deteriorated, particularly Appellant's feelings toward George Gonsalves. Numerous witnesses testified that Appellant often referred to the

[24] Felice Dosso and George Gonsalves started their dye and parts business in New York in the 1960s. After meeting Appellant in the 1980s, Appellant convinced the two men to expand to the installation segment of the garment industry.

partners by derogatory names, and Dosso testified that Appellant made a threat to kill Gonsalves on one occasion. The strained business relationship ultimately ended with Dosso and Gonsalves firing Appellant's son and ousting Appellant from the company in the summer of 1997.

In addition to the extensive motive evidence introduced by the State, the evidence also refuted Appellant's defense theory that he was in his Atlanta hotel room at the time of the murders on December 3, 1997. The State's circumstantial evidence established that Appellant went to extreme efforts to purchase plane tickets under different names[25] and arranged for his nephew, Alvaro Penaherrera, to obtain a rental car for his use on the day of the murders. Contrary to Appellant's theory that he was in his Atlanta hotel room on the afternoon/evening of

[25] As noted in the statement of facts, Appellant utilized two aliases on his flights, John White and Juan Agacio. In 1960, Appellant fathered a son, Juan Serrano, with his then-wife, Gladys Agacio. (EV6:630). The State introduced photographs found in a search of Appellant's residence indicating that two passport-sized photographs had been removed from a strip of photographs. (EV6:634). As this was prior to the increased airline security measures implemented after the September 11, 2001, terrorist attacks, testimony from an airline agency employee indicated that it was not very difficult to fly without any photo identification in 1997, let alone fake identification. (V56:5237-38).

Additionally, the evidence established that both "Juan Agacio" and "John White" purchased round-trip tickets with cash and never used the return portion. The "Juan Agacio" Atlanta-to-Orlando round-trip tickets were purchased at the Orlando airport while Appellant was at that location having Penaherrera reserve a rental car for him.

December 3, 1997, the physical evidence of his fingerprint on the Orlando airport parking ticket conclusively established that Appellant was in the rental car at the Orlando International Airport on December 3, 1997, leaving the Orlando airport parking garage at 3:49 p.m. Soon thereafter, around 5:30 p.m., a man matching Appellant's description was seen standing off the roadway near Erie's building in Bartow.

Appellant attacks the State's fingerprint evidence and asserts that the State's expert had "serious reservations" about the fingerprints left on the airport parking tickets. The State called the two FDLE analysts who developed and identified the fingerprints left on the two parking tickets. The analysts testified that Appellant's right index finger left a print on each of the two tickets.[26] (V56:5247-55; 5317-34). The FDLE analysts did not have any reservations about the fingerprints, rather they testified that it would be virtually impossible for someone to "plant" Appellant's print on these parking tickets. (V56:5269-71, 5331-32). The State also called a private

[26] As noted, one parking ticket indicated that Appellant left his fingerprint when exiting the Orlando parking garage at 3:49 p.m. on December 3, 1997. The other parking ticket was linked to November 23, 1997, the date that Serrano's Honda was at the Orlando parking garage when Penaherrera reserved the rental car for Appellant's December 3rd trip to Orlando. This was also when the "Juan Agacio" round-trip plane ticket from Atlanta-Orlando was purchased, with cash, and the return flight ticket was never used. See Appendix at A4.

forensic consultant, James Hamilton, who verified that the prints on the two tickets came from Appellant's right index finger, but on cross-examination, he expressed reservations because he could not understand why someone's right finger would be on a parking ticket they received in an airport parking garage, presumably from their left driver's side. (V56:5272-79). Mr. Hamilton testified that it was possible to obtain a person's fingerprint on another object, place tape on the powder, and then transfer the tape to a different item. (V56:5279-83). The FDLE expert, however, testified that if such a method were utilized to plant a fingerprint, it would produce a print that was backwards. (V56:5269).

On December 3, 1997, after the vast majority of employees had left Erie around 5:00 p.m., only one car remained in the parking lot: victim George Gonsalves' car.[27] The circumstantial evidence established that Appellant entered the unlocked building and utilized a .22 firearm to shoot and kill George Gonsalves, Frank Dosso, George Patisso, and as he was exiting the building, Diane Patisso. Eleven empty .22 shell casing were discovered at the crime scene, and testimony indicated that a Browning .22, Appellant's favorite brand of weapon, held eleven

[27] The evidence established that it was common knowledge that Gonsalves often worked late by himself. Although victims Frank Dosso and George Patisso were still at Erie, they did not have a car there because Diane Patisso was picking them up.

bullets. (V40:2963; V42:3324; V51:4605-06; V55:5123). An examination of the eleven .22 shell casings indicated that they were all fired from the same semiautomatic gun and were .22 long rifle Remington bullets,[28] the same type of ammunition found during a search of Appellant's home. (V44:3631-34; V55:5122).

The three male victims were all shot in the office that used to be Appellant's office when he worked at Erie. While in the office, Appellant moved a blue office chair and stood on it to retrieve something from the ceiling, likely the .32 caliber weapon he left behind when he was ousted from the company.[29] The .32 caliber weapon, along with the .22 firearm, was utilized in the murder of Diane Patisso. The State's theory, which is supported by the physical evidence, is that Appellant utilized all eleven shots from his .22, and then utilized the .32 caliber weapon he had obtained from the ceiling.

Shortly after the murders, Appellant returned the rental car to Tampa's airport, rather than returning it to Orlando

[28] Despite the term "long rifle," these bullets were designed for a firearm. (V55:5119-22).

[29] An Erie employee, Velma Ellis, testified that when she left work shortly after five, the blue chair was in its normal spot under a desk piled high with paper. When FDLE processed the crime scene, the blue chair had been moved under a ceiling tile that had been dislodged, and agents discovered shoe prints on the chair. The prints were consistent with a pair of shoes Appellant owned, and subsequently loaned to Penaherrera in 2000 for his grand jury testimony. Appellant told FDLE agent Ray that he would hide a gun in the ceiling when he went out of town. (V61:5908).

where Penaherrera had rented it. The circumstantial evidence indicated that Appellant had previously paid cash to buy a round-trip plane ticket from Tampa to Atlanta.[30] Contrary to Appellant's assertion that he could not have accomplished driving to the Tampa airport during rush hour in this period of time, the testimony at trial indicated that it was only 50 miles from Erie to the Tampa airport, and took officers only 58 minutes to drive this distance while maintaining the legal speed limit. (V53:4838). As Appellant did not arrive for the Tampa flight until 7:28 p.m., and the murder occurred around 5:30 p.m., he would have had approximately two hours to make the 50 mile drive to Tampa.[31]

After arriving in Atlanta, Appellant began making numerous phone calls, including repeated calls to his nephew, Alvaro Penaherrera. Appellant eventually talked Penaherrera into driving to Tampa to return the rental car; using as incentive the promise to pay off Penaherrera's $2500 credit card debt. Obviously, it was of vital importance for Appellant to cover his

[30] Similar to the Juan Agacio round-trip plane ticket for the flight from Atlanta to Orlando, the return portion of the round trip ticket for John White from Tampa to Atlanta was never used. Further, this round-trip ticket was purchased with cash from the Tampa airport on the same day of the Juan Agacio ticket purchase.

[31] It should also be noted that the mileage on the rental car was almost a perfect match to having been driven from Orlando's airport to Erie and then to Tampa's airport. See footnote 18, supra.

tracks by timely returning the rental car and flying out of Tampa so he could return to his Atlanta hotel room that evening. A little over **thirty six** minutes after "John White" was scheduled to arrive in Atlanta, Appellant was seen on the hotel lobby surveillance camera for the first time in ten hours, entering from the outside and wearing the same sweater and jacket he was wearing earlier in the day.[32]

Although law enforcement officers immediately investigated Appellant as the main suspect in these homicides, a sealed indictment was not forthcoming until May, 2001. However, shortly after Appellant became aware that Penaherrera testified before the grand jury in June, 2000, Appellant moved to Ecuador, and left his wife and family behind to sell his assets. After Appellant was eventually arrested, he told FDLE agent Ray that he was never in Florida on the day of the murders, December 3, 1997. (V61:5905).

While incarcerated awaiting trial, Appellant discussed his case with another inmate, Leslie Jones, and claimed that a Mafia hitman named John may have committed the murders. According to Appellant's story to Jones, Appellant and the unknown hitman

[32] The description of the man seen by John Purvis standing off the roadway near Erie's building at approximately 5:30 p.m. on the day of the murders was wearing a sweater and jacket. Obviously, the jury was able to view the police sketch based on Purvis' description (EV7:744) and could compare it to Appellant's appearance on the videotape.

went to the airports in Tampa and Orlando and, unbeknownst to Appellant, the hitman purchased plane tickets under the names of Juan Agacio and John White. Appellant also told Jones about the hitman's failed attempt to commit the murders on Halloween, 1997, because of heavy rain.

After law enforcement officers heard about the Halloween incident for the first time from Jones in 2006, they discovered an identical pattern regarding the purchasing of plane tickets and renting cars. See Appendix at A5. At this time, Appellant was travelling on business from Orlando to Charlotte. On October 31, 1997, while Appellant was allegedly in Charlotte, "Juan Agacio" flew from Charlotte to Orlando in the afternoon and utilized a rental car that Penaherrera had previously rented for Appellant, and later that evening, "John White" flew from Tampa to Charlotte. The State introduced evidence that it rained almost two inches in the area around Erie's building on October 31, 1997.

Based on the circumstantial evidence presented by the State that rebutted Appellant's hypothesis of innocence that he was in Atlanta at the time of the murders, the trial court properly denied Appellant's motion for judgment of acquittal. As this Court stated in State v. Allen, 335 So. 2d 823, 826 (Fla. 1976):

> We are well aware that varying interpretations of circumstantial evidence are always possible in a case

> which involves no eye witnesses. Circumstantial evidence, by its very nature, is not free from alternate interpretations. The state is not obligated to rebut conclusively every possible variation, however, or to explain every possible construction in a way which is consistent only with the allegations against the defendant. Were those requirements placed on the state for these purposes, circumstantial evidence would always be inadequate to establish a preliminary showing of the necessary elements of a crime.

Furthermore, in Orme v. State, 677 So. 2d 258, 262 (Fla. 1996), this Court observed that the "sole function of the trial court on motion for directed verdict in a circumstantial evidence case is to determine whether there is a prima facie inconsistency between (a) the evidence, viewed in the light most favorable to the State and (b) the defense theory or theories." The Orme Court found that the State presented sufficient evidence to rebut the defendant's theory that another person entered the hotel room and murdered the victim after Orme had robbed the victim. This Court observed:

> [N]othing anywhere in the record suggests that another person was present in the motel room. Based on this record, the State's theory of the evidence is the most plausible that Orme was the one who had attacked and killed Redd. Put another way, competent substantial evidence supports the conclusion that the State had presented adequate evidence refuting Orme's theory, creating inconsistency between the State and defense theories. Accordingly, we may not reverse the trial court's determination in this regard.

In the case at bar, as in Orme, "nothing anywhere in the record" suggests that another individual went to Erie and

murdered four people in an execution-style manner. Rather, the circumstantial evidence established that Appellant flew from Atlanta to Orlando under the name of "Juan Agacio," drove the rental car that he had previously arranged for to Erie's building in Bartow, committed the murders and retrieved his .32 firearm from the ceiling, and then drove to Tampa's airport where he boarded a flight as "John White" and returned to his Atlanta hotel. Not surprisingly, this same exact scenario played out at Halloween when Appellant had planned an out-of-town business trip, but Appellant was unable to commit the crime at that time. Based upon this record, as in Orme, the "State's theory of the evidence is the most plausible" that Appellant committed the four murders in this case. As the prosecutor argued extensively during closing argument, the extensive lists of coincidences that are present in this case point to the inescapable conclusion that Appellant is guilty of the instant murders. (V62:6100-71).

In Benson v. State, 526 So. 2d 948 (Fla. 2d DCA), rev. denied, 536 So. 2d 243 (Fla. 1988), the defendant claimed that the circumstantial evidence linking him to the first degree murders of his mother and brother by car bomb was insufficient to submit the case to the jury. The evidence linking the defendant to the murders consisted primarily of evidence

establishing motive and opportunity, along with evidence that the defendant had purchased some materials identical to those used to make the pipe bombs. Palm prints found on two receipts for pipes from a hardware store matched the defendant's prints. At the funeral for his mother and brother, the defendant stated that he had "made and exploded bombs composed of copper pipe and gunpowder." Benson, 526 So. 2d at 950-51. The defendant argued that if this statement was made it "could have referred only to firecrackers." The defendant "also argued other interpretations of other aspects of the evidence." Id. at 951. The defendant argued that "there was no evidence directly showing that the particular pipe materials used in the bombs were the same as those purchased from Hughes Supply and that there was no evidence directly showing that defendant had constructed and detonated the bombs." Benson, 526 So. 2d at 952. However, the Second District Court of Appeal noted that "permissible inferences do not require the exclusion of all other possible hypotheses." Id. (citation omitted). The court concluded that certain conduct of the defendant, some of which was not particularly incriminating by itself, as a whole, constituted substantial, competent evidence of guilt. "As to whether there was a reasonable hypothesis of innocence and whether the evidence failed to eliminate such a hypothesis were issues for

the jury to decide and were argued to the jury." Id. (citations omitted).

In Benson, the court rejected the defendant's pyramiding of inferences argument in its well-reasoned decision. Benson, 526 So. 2d at 952-55. The court observed that the evidence must be looked to as a whole to determine whether or not it is sufficient to establish the defendant as the perpetrator of the crimes:

> The defendant cautions us against 'piling inference upon inference.' As interpreted by the defendant this means that a conviction could rarely be justified by circumstantial evidence. See 1 Wigmore, Evidence, § 41 (3d ed. 1940). The rule is not that an inference, no matter how reasonable, is to be rejected if it, in turn, depends upon another reasonable inference; rather the question is merely whether the total evidence, including reasonable inferences, when put together is sufficient to warrant a jury to conclude that defendant is guilty beyond a reasonable doubt. [Citations omitted]. **If enough pieces of a jigsaw puzzle fit together the subject may be identified even though some pieces are lacking**. Reviewing the evidence in this case as a whole, we think the jury was warranted in finding beyond a reasonable doubt the picture of the defendant Dirring." (emphasis added).

Benson, 526 So. 2d at 954 (quoting Dirring v. United States, 328 F.2d 512, 515 (1st Cir. 1964) (emphasis added)). Based upon all of the evidence presented, the Second District Court of Appeal found that the evidence was sufficient to conclude that Benson was the perpetrator of the crimes.

In this case, the State possessed enough pieces of the

"jigsaw puzzle" to support the jury's finding that Appellant committed the murders. Similar to Benson, the State in the instant case developed a great deal of evidence establishing Appellant's motive to murder George Gonsalves. In addition to the motive evidence, the other jigsaw pieces established that Appellant had the opportunity to commit the murders given the elaborate steps he took to arrange for flights and a rental car, and the other circumstantial evidence establishing his presence in central Florida on the day of the murders. Although law enforcement officers were never able to locate the actual murder weapons nor any forensic evidence conclusively establishing Appellant's presence inside Erie's building on the day of the murders, these lacking pieces are not fatal to the State's case when viewed in the context of the other evidence presented. When all of the pieces of the circumstantial evidence are put together, the picture is clear – Appellant was the perpetrator of these four murders. See also Gordon v. State, 704 So. 2d 107 (Fla. 1997) (rejecting defendant's contention that the trial court erred in denying his motion for judgment of acquittal when the State's evidence could only place him near the scene around the alleged time of the murder and the scientific evidence did not place him in the apartment where the murder took place). Accordingly, this Court should affirm the trial court's ruling

denying Appellant's motion for judgment of acquittal.

Although not raised by Appellant, the State would further note that Appellant's death sentences are proportionate. In conducting its proportionality review, this Court has noted that its review does not involve a recounting of aggravating factors versus mitigating circumstances but, rather, compares the case to similar defendants, facts and sentences. Tillman v. State, 591 So. 2d 167 (Fla. 1991). This Court compares the case under review to others to determine if the crime falls within the category of both (1) the most aggravated, and (2) the least mitigated of murders. Almeida v. State, 748 So. 2d 922, 933 (Fla. 1999).

A review of the aggravating and mitigating evidence established in the instant case demonstrates the proportionality of the death sentences imposed. In this case, the court found three aggravating factors: (1) the murders were committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification (CCP); (2) Appellant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person; and (3) as to Diane Patisso only, the murder was committed for the purpose of avoiding or preventing a lawful arrest. (V18:2509-15). The court found two statutory mitigating factors, no significant

history of prior criminal activity and Appellant's age at the time of the crime, and numerous nonstatutory mitigators.

As the trial court noted when discussing the CCP aggravator, Appellant made intricate plans to commit the instant murders, including what turned out to be a "practice" run on Halloween, 1997. This Court would be hard-pressed to find a more detailed and carefully planned murder plot than the instant case. Compare Deparvine v. State, 995 So. 2d 351 (Fla. 2008) (defendant planned robbery of truck and murder of owners for months by responding to newspaper advertisement and corresponding with victims); Gordon v. State, 704 So. 2d 107 (Fla. 1997) (victim's ex-wife hired defendant to commit murder and he conducted "extensive surveillance" of victim prior to robbery/murder); Franqui v. State, 699 So. 2d 1312 (Fla. 1997) (defendant who shot victim during robbery of check-cashing business knew victims' schedule for five or six months in advance). Furthermore, the execution-style method of shooting the victims clearly establishes that these murders were the product of cool, calm reflection.

This Court has previously noted that the CCP aggravating factor is one of the most serious aggravators set out in the statutory sentencing scheme. Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999). This aggravating factor, coupled with the other

two aggravating factors of preventing a lawful arrest and previous convictions of another capital felony, outweigh the mitigation present in this case. The trial court found two statutory mitigators, that Appellant had no significant history of prior criminal activity and his age, and other nonstatutory mitigation related to his background. Although found by the trial court as having been established, the court did not state how Appellant's age (59 at the time of the murders) was truly mitigating in nature. As this Court has previously noted, "age is simply a fact, every murderer has one. . . . However, if it is to be accorded any significant weight, it must be linked with some other characteristic of the defendant or the crime such as immaturity or senility." Echols v. State, 484 So. 2d 568, 575 (Fla. 1985). In Echols, this Court found that there was "nothing in the record that would warrant finding any truly mitigating significance in the appellant's age. On the contrary, appellant's age, along with the other evidence, suggests that appellant is a mature, experienced person of fifty-eight years, of sound mind and body who knew very well what he was undertaking and, equally, that the undertaking was without any pretense of moral or legal justification." Id.

Similarly, there is nothing in the record that establishes that Appellant's age should be given any significant weight when

conducting proportionality review. The other nonstatutory mitigating circumstances indicate that Appellant has been a successful immigrant and businessman, involved in the community, and was a good family member. The strong aggravating factors in this case clearly outweigh the mitigation present in this case. See Foster v. State, 778 So. 2d 906 (Fla. 2000) (two strong aggravators of avoid arrest and CCP outweighed nonstatutory mitigation where crime is "a classic example of a cold and ruthless execution-style killing").

The instant case is similar to Echols where the mitigation evidence established that the defendant was "outwardly a businessman, churchgoer, family man, and generally a law abiding citizen," but the evidence established that his real character was entirely different; the defendant was "a cunning, conscienceless, criminal, capable of carrying out a sophisticated murder without a twinge of regret." Echols, 484 So. 2d at 575. The evidence in this case demonstrates that although Appellant has been a successful businessman and generally lived a law-abiding life, he cunningly planned an almost flawless murder plot to kill his ex-business partner and co-workers in execution-style murders. Given the substantial aggravation in this case compared to the insignificant mitigation, this Court should find that Appellant's four death

sentences are proportionate. See also Cruse v. State, 588 So. 2d 983 (Fla. 1991) (upholding 59-year-old's death sentences for murdering two law enforcement officers where mitigation included extreme mental or emotional disturbance).

ISSUE II

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO SUPPRESS HIS STATEMENT TO FDLE AGENT TOMMY RAY.

During trial, defense counsel orally moved to suppress Appellant's post-Miranda statements made to FDLE agent Tommy Ray after he was arrested and placed on a commercial flight in Ecuador bound for Florida. (V52:4677-79). The trial court conducted a hearing on Appellant's motion and issued a written order denying Appellant's motion to suppress. (V10:1338-66; V11:1401-02). The State submits that the trial court properly denied Appellant's motion based on Appellant's valid waiver of his right to remain silent.

In discussing the appropriate standard of review to a trial court's ruling on a motion to suppress, this Court has stated that "appellate courts should continue to accord a presumption of correctness to the trial court's rulings on motions to suppress with regard to the trial court's determination of historical facts, but appellate courts must independently review mixed questions of law and fact." Globe v. State, 877 So. 2d 663, 668-69 (Fla. 2004) (citations omitted). In this case, the essential facts are undisputed: Appellant was arrested and placed on an airplane in the custody of FDLE Agent Tommy Ray at approximately 7:30 or 7:45 a.m. on September 1, 2002; Appellant was read his Miranda rights in both English and Spanish; when

asked if he wanted to make a statement, Appellant responded **"I have nothing to say to you at this time;"** approximately an hour or so into the flight, Appellant initiated contact with agent Ray by asking him how much he had paid the Ecuadorian police to do this to him; after this exchange, agent Ray and Appellant discussed matters for approximately a half hour; after the two discussed where Appellant stored a gun at Erie, Appellant told agent Ray that he was "starting to talk business now, I don't want to talk business."[33] (V10:1338-50).

In denying Appellant's motion, the trial court stated, in pertinent part:

> In making a determination whether the Defendant has validly waived his *Miranda* rights when he made his statements to Officer Ray, the Court must look at the totality of the circumstances. See Globe v. State, 877 So. 2d 663 (Fla. 2004) and State v. Pitts, [936 So. 2d 1111 (Fla. 2d DCA 2006)]. **After advising the Defendant of his *Miranda* Rights and being told by the Defendant that he had nothing to say at this time, Officer Ray did not engage the Defendant in conversation related to this case until the Defendant initiated the conversation.** Even though Officer Ray did not readvise the Defendant of his *Miranda* Rights at that time, it is not a requirement that an additional warning be given for a waiver of Miranda rights to be valid. See Ahedo v. State, 842 So. 2d 868 (Fla. 2d DCA 2003). The circumstances indicate the Defendant validly waived his *Miranda* Rights. Less than two hours had passed since the Defendant had been advised of his Miranda Rights. The Defendant engaged

[33] Defense counsel agreed with these facts at the suppression hearing, but argued that agent Ray was required to readvise or remind Appellant of his rights after Appellant initiated contact with the agent. (V10:1350-51).

> Officer Ray in conversation **on a matter related to this case** and talked freely to Officer Ray until the point he said they were starting to talk about matters he described as business. At that point the communication ceased. This demonstrates that the Defendant was aware of his *Miranda* rights when he made statements to Officer Ray and had reached a point where he thought he should stop the conversation. At that point the communication ended and nothing indicates that Officer Ray pursued the matter beyond that point. The Court finds that the Defendant validly waived his *Miranda* rights when he made statements to Officer Ray.

(V11:1401-02) (emphasis added). As the trial court properly found, agent Ray read Appellant his Miranda rights and scrupulously honored Appellant's right to remain silent after Appellant informed him that he had nothing to say at that time. After sitting next to the officer on a commercial flight for an hour and a half, Appellant initiated contact by asking agent Ray about the instant case. Agent Ray was not required to readvise Appellant of his right to remain silent after this brief hiatus.

The facts of the instant case are very similar to those in Globe v. State, 877 So. 2d 663 (Fla. 2004). In Globe, the defendant indicated to law enforcement that he did not wish to make a statement "at this time." Seven hours later, the defendant gave a statement to another detective. Id. at 669-70. This Court, addressing relevant factors set forth by the United States Supreme Court in Michigan v. Mosley, 423 U.S. 96, 104 (1975), and by this Court in Henry v. State, 574 So. 2d 66, 69

(Fla. 1991), found that the trial court did not err in admitting Globe's statement because law enforcement "scrupulously honored" his right to cut off questioning. Id.

Similar to the facts in Globe, agent Ray scrupulously honored Appellant's right to remain silent. The undisputed testimony established that the agent did not question Appellant at all once informed that he did not want to make a statement "at this time." Approximately an hour and a half later, Appellant initiated contact with the agent by asking him how much he had paid Ecuadorian police to arrest him. Obviously, as the trial court properly found, Appellant initiated the conversation with agent Ray on a matter related to this case and talked freely to him until the point he said they were starting to talk "business," at which point the communication ceased because Appellant invoked his right to remain silent. The fact that Appellant stopped the conversation once they started talking about details of the crime clearly demonstrates that he was aware of his Miranda rights. Agent Ray scrupulously honored Appellant's request and no further conversations took place. Based on the totality of these facts, the trial court properly denied Appellant's motion to suppress.

Appellant incorrectly argues in his amended brief that this issue is controlled by the United States Supreme Court's

decision in Oregon v. Bradshaw, 462 U.S. 1039, 103 S. Ct. 2830 (1983), a case involving the defendant's waiver of his right to **counsel**. The invocation of the right to counsel requires more onerous safeguards than a defendant's invocation of his right to remain silent. See Arizona v. Roberson, 486 U.S. 675, 683, 108 S. Ct. 2093 (1988) (stating that a suspect's decision to cut off questioning, unlike his request for counsel, does not raise the presumption that he is unable to proceed without a lawyer's advice); Traylor v. State, 596 So. 2d 957, 966 (Fla. 1992). In Bradshaw, when the defendant invoked his right to **counsel**, questioning ceased, and the defendant later asked an officer, "Well, what is going to happen to me now?" Bradshaw, 462 U.S. at 1042. The Court found that "there can be "no doubt" that in asking this question, the defendant "initiated" further conversation with law enforcement. Id. at 1045.

> Although ambiguous, the respondent's question in this case as to what was going to happen to him evinced a willingness and a desire for a generalized discussion about the investigation; it was not merely a necessary inquiry arising out of the incidents of the custodial relationship. It could reasonably have been interpreted by the officer as relating generally to the investigation.

Id. at 1046-47; see also Welch v. State, 992 So. 2d 206 (2008) (holding that, after invoking right to remain silent, a defendant's unsolicited question to law enforcement officer, "What is going to happen to me now?" was an initiation of

further conversation which "evinced a willingness and a desire for a generalized discussion about the investigation."). After determining that the accused initiated the conversation in a manner evincing a willingness to engage in a generalized discussion of the case, the Court next determined that, under the totality of the circumstances, the accused knowingly and intelligently waived his right to counsel and his right to remain silent by discussing the investigation. Bradshaw, 462 U.S. at 1045-47 (noting that "the police made no threats, promises or inducements to talk, that the defendant was properly advised of his rights and understood them and that within a short time after requesting an attorney he changed his mind without any impropriety on the part of the police").

Unlike Bradshaw, the instant case does not involve an invocation of Appellant's right to **counsel**. Given that the standard is more onerous when a defendant requests counsel than when he invokes his right to remain silent, and given the fact that the United States Supreme Court found the statement in Bradshaw was a re-initiation of conversation, there can be no question that Appellant reinitiated contact with agent Ray when he asked agent Ray how much he had paid Ecuadorian police to arrest and deport him. Furthermore, even assuming the Bradshaw analysis is applicable to Appellant's invocation of his right to

remain silent, the lower court properly found that, under the totality of the circumstances, Appellant waived his right to remain silent. After boarding the flight and being advised of his Miranda rights, Appellant indicated that he had "nothing to say at this time." As the trial court properly found after hearing all the testimony, Agent Ray "scrupulously honored" Appellant's request to remain silent, but after sitting next to agent Ray on the commercial flight to Miami for approximately an hour and a half, Appellant initiated conversation "on a matter related to this case and talked freely to Officer Ray until the point he said they were starting talk business." Because the trial court properly applied the applicable law to this issue and the facts support the trial court's finding, this Court should affirm the trial court's denial of Appellant's motion to suppress.

Even if this Court were to find that the trial court erred in allowing the statements, the error was harmless. See Arizona v. Fulminante, 499 U.S. 279, 111 S. Ct. 1246 (1991) (holding that the admission of a coerced confession is subject to harmless error analysis); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). In this case, the State introduced Appellant's statements to agent Ray that were generally exculpatory in nature and cumulative to other evidence introduced during the

State's case-in-chief. Appellant asserts that there can be no finding of harmless error because Appellant informed agent Ray that, while working at Erie, he would hide a firearm in the ceiling while out of town on business, and this information contributed to his conviction. However, the jury heard evidence from David Catalan that he observed Appellant at Erie one evening with a gun in his office, and Appellant was standing on a chair, moving a ceiling tile, to get papers out of the ceiling. (V42:3221-25). The witness did not know whether the gun was also hidden in the ceiling. Even if Appellant's statements were not introduced, the jury would have still undoubtedly convicted Appellant of the four murders given the substantial circumstantial evidence introduced by the State. Because there is no reasonably possibility that the admission of Appellant's statements to agent Ray contributed to the verdict given the other cumulative testimony, any error in admitting his statement was harmless.

ISSUE III

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTIONS TO DISMISS THE INDICTMENT AND DIVEST ITSELF OF JURISDICTION.

Appellant next claims that the trial court erred in denying his motions to dismiss the indictment and divest itself of jurisdiction based on his allegations that he was illegally kidnapped from Ecuador and brought back to the United States. Appellant filed a motion to dismiss prior to trial (V10:1284-1312), and after conducting a hearing on the motion, the trial court denied the motion. (V17:2296-97; V37:2558-82).

After Appellant was convicted of four counts of first degree murder, defense counsel filed an amended motion to dismiss the indictment and presented evidence from FDLE agent Tommy Ray and Claudio Mueckay, an ombudsman from the Republic of Ecuador.[34] (V17-18:2260-66, 2371-2445). FDLE agent Tommy Ray testified that Ecuadorian National Police officers arrested Appellant in Ecuador, and after he was legally deported, the Ecuadorian police turned Appellant over to Florida law enforcement.[35] (V17:2394-98). Ombudsman Mueckay testified that

[34] Mueckay was not representing the government of Ecuador in an official capacity when he testified at the hearing, and he was unaware that the United States Department of State had informed Ecuador that if they wanted to have any involvement in Appellant's case, they needed to go through the embassy. (V18:2425-26).

[35] Contrary to Appellant's assertions, Ray testified that

he conducted an investigation regarding the events and concluded that Appellant held dual citizenship and was improperly deported. (V18:2411-14, 2434). After hearing the testimony and the argument of counsel, the trial court again denied Appellant's motion to dismiss the indictment. (V18:2459-60).

The State submits that Appellant's motion to dismiss was untimely filed under Florida Rule of Criminal Procedure 3.190(c), based on the grounds raised in the motion. See Fla. R. Crim. P. 3.190(c) (stating that a motion to dismiss must be filed before or at arraignment, however, a court may entertain a motion at any time if based on any of the following grounds: defendant charged with an offense for which he has been pardoned, placed in jeopardy, or granted immunity or there are no disputed material facts and the undisputed facts do not establish a prima facie case of guilt against the defendant). Although the trial court did not base its denial of the motion on this ground, this Court has previously affirmed a trial court's ruling when correct for any reason. See generally Robertson v. State, 829 So. 2d 901, 906 (Fla. 2002) (The "tipsy coachman" doctrine allows an appellate court to affirm a trial court that "reached the right result, but for the wrong reasons"

Appellant was never housed in an animal cage, but rather, was housed in an office complex located at the police canine unit. (V17:2396-97).

so long as there is any basis which would support the judgment in the record). Alternatively, the State submits that the trial court properly denied the motions because Appellant's argument lacks merit.[36]

In his brief, Appellant reasserts the allegations made below by trial counsel that Appellant has dual citizenship of both the United States and Ecuador, that he was illegally arrested and kidnapped by Ecuadorian police, physically abused during his brief detention and held in an animal cage, and ultimately unlawfully extradited to the United States. Contrary to Appellant's allegations, the State strongly disputes Appellant's representations. The evidence at the motion hearing and at trial established that Appellant was an American citizen who was arrested by Ecuadorian police and held overnight in an office. Appellant appeared before a Politico Attendente, or immigration judge, and was thereafter deported to the United States after a hearing.

As the trial court properly found, "[t]he Court's jurisdiction of the matter is not defeated by an assertion that there may have been an illegal procurement of the Defendant's presence in the jurisdiction. See United States v. Alvarez-

[36] The standard of review for a trial court's order regarding a motion to dismiss is *de novo*. State v. Pasko, 815 So. 2d 680, 681 (Fla. 2d DCA 2002).

Machain, 504 U.S. 655, 112 S. Ct. 2188, 119 L. Ed. 2d 441 (1992); United States v. Arbane, 446 F.3d 1223 (11th Cir. 2006), and Grimes v. State, 244 So. 2d 130 (Fla. 1971)." Furthermore, the court properly noted that Appellant failed to demonstrate that the government violated Appellant's constitutional rights in some manner that the holding in United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974), might have some applicability to this matter. (V18:2460).

In United States v. Alvarez-Machain, 504 U.S. 655, 112 S. Ct. 2188 (1992), relied on by the lower court, the defendant, a Mexican citizen, was forcibly kidnapped from Mexico and flown to Texas where he was arrested by the United States Drug Enforcement Agency. The defendant moved to dismiss the indictment based on a violation of an extradition treaty between Mexico and the United States. Id. at 657-59. Given the formal protest by Mexico, the district court granted the motion and discharged the defendant and ordered that he be repatriated to Mexico. The United States Supreme Court reversed the decision and noted that, although the defendant's abduction may have been "shocking" and in violation of international law principles, his abduction did not violate the terms of the treaty and did not prohibit his trial in the United States. Id. at 669-70. See also Frisbie v. Collins, 342 U.S. 519 (1952) (holding that the

power of a court to try a person for a crime is not impaired by the fact that the defendant had been brought within the court's jurisdiction by reason of a "forcible abduction"); Ker v. Illinois, 119 U.S. 436, 7 S. Ct. 225 (1886) (finding that due process of law is complied with when the defendant is indicted by the proper grand jury in the state trial court, has a trial according to the forms and modes prescribed for such trials, and when, in that trial and proceedings, he is deprived of no rights to which he is lawfully entitled); United States v. Matta, 937 F.2d 567 (11th Cir. 1991) (rejecting defendant's challenge that court lacked jurisdiction over him because he was illegally kidnapped from Honduras and tortured before being transported to the United States).

Unlike the facts in Alvarez-Machain, Appellant was a citizen of the United States when he was deported from Ecuador; he was not forcibly kidnapped, but was arrested by the Ecuadorian National Police and subsequently turned over to Florida law enforcement officials after his deportation hearing; and there was no evidence of any formal protest from the government of Ecuador at the time. Thus, the trial court properly refused to dismiss Appellant's indictment and divest itself of jurisdiction.

Furthermore, contrary to Appellant's assertion in his

brief, the extradition treaty between the United States and Ecuador is not dispositive. Appellant's reliance on this treaty is misplaced because Appellant was not extradited, but was deported after an immigration judge conducted a deportation hearing. (V52:4745-51). Additionally, as this Court noted in Maharaj v. State, 778 So. 2d 944, 959 (Fla. 2000), the defendant failed to establish that he had standing to raise a violation of the Vienna Convention, because "treaties are between countries, not citizens." See also Lugo v. State, 2 So. 3d 1 (Fla. 2008) (finding no Vienna Convention violation where American citizen in Bahamas was sought by American officials for crimes committed in the United States). Because Appellant has failed to establish that the trial court abused its discretion in denying his untimely motion to dismiss the indictment, this Court should affirm the lower court's ruling.

ISSUE IV

THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN DENYING APPELLANT'S MOTIONS FOR MISTRIAL BASED ON ALLEGEDLY IMPROPER COMMENTS BY THE PROSECUTOR.

Appellant next argues that the cumulative effect of prosecutorial misconduct denied him of a fair trial and penalty phase. Appellant complains of comments made by the prosecutor which trial counsel objected to and moved for a mistrial. Additionally, Appellant claims that unobjected-to comments should be considered by this Court in addressing the cumulative effect of the alleged misconduct.

In Thomas v. State, 748 So. 2d 970, 980 (Fla. 1999), this Court explained that a ruling on a motion for mistrial is within the trial court's discretion and should not be reversed absent an abuse of that discretion. "Discretion is abused only 'when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable [person] would take the view adopted by the trial court.'" Trease v. State, 768 So. 2d 1050, 1053 n.2 (Fla. 2000) (citing Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990)).

Regarding unobjected-to comments, this Court noted in Card v. State, 803 So. 2d 613, 622 (Fla. 2001), that a contemporaneous objection is required to preserve an issue surrounding a prosecutor's comments during closing argument.

This Court stated:

> As a general rule, the failure to raise a contemporaneous objection when improper closing argument comments are made waives any claim concerning such comments for appellate review. See, e.g., Brooks v. State, 762 So. 2d 879, 898 (Fla. 2000); McDonald v. State, 743 So. 2d 501, 505 (Fla. 1999). A timely objection allows the trial court an opportunity to give a curative instruction or to admonish counsel for making an improper argument. See Nixon v. State, 572 So. 2d 1336, 1341 (Fla. 1990). The exception to the contemporaneous objection rule is where the unobjected-to comments rise to the level of fundamental error, which has been defined as error that reaches down into the validity of the trial itself to the extent that a verdict of guilty or jury recommendation of death could not have been obtained without the assistance of the alleged error. See McDonald, 743 So. 2d at 505 (quoting Urbin, 714 So. 2d at 418 n.8); Chandler v. State, 702 So. 2d 186, 191 n.5 (Fla. 1997) (holding that for an error to be raised for the first time on appeal, the error must be so prejudicial as to vitiate the entire trial).

In the instant case, Appellant points to a number of comments made by the prosecutor that defense counsel preserved by raising an objection. Appellant first asserts that the prosecutor improperly commented on Appellant's right to remain silent. During his opening statement, the prosecutor stated that, immediately after the murders, Appellant was located in Atlanta and was interviewed by detectives the next day. "The very next day is Mr. Serrano's opportunity to tell the police what happened at Erie Manufacturing." (V38:2707). Defense counsel objected on the grounds that the prosecutor had indirectly commented on Appellant's right to remain silent.

(V38:2707). The prosecutor explained that the comment was not improper because Appellant had actually made a statement to law enforcement. The trial court agreed and overruled the objection and denied Appellant's motion for mistrial. (V38:2707-10; V39:2841-48).

Also during opening statement, the prosecutor began discussing inmate Leslie Jones' anticipated testimony and stated that Appellant had to "come up with a story" to explain his fingerprint on a parking ticket. (V38:2733). Appellant again objected and moved for mistrial arguing that the prosecutor's comment was an improper comment on Appellant's right to remain silent. The prosecutor responded that Leslie Jones would testify at trial that Appellant told him he needed to come up with a way to deal with the fingerprint evidence. As such, the comment was not improper. The trial court overruled the objection and denied Appellant's motion for mistrial. (V38:2733-41).

Appellant also asserts that the prosecutor improperly commented on Appellant's right to remain silent when he asked FDLE Agent Tommy Ray if Appellant appeared before the grand jury. Defense counsel objected and moved for mistrial before the witness answered the question. (V49:4301-02). After hearing lengthy argument from the parties, the trial court

sustained the objection, denied Appellant's motion for mistrial, and gave the jury curative instructions requested by defense counsel. (V49:4302-42).

The State acknowledges that this Court has stated the "very liberal rule" that "any comment on, or which is fairly susceptible of being interpreted as referring to, a defendant's failure to testify is error and is strongly discouraged." Rodriguez v. State, 753 So. 2d 29, 37 (Fla. 2000). However, as noted in Rodriguez, this Court has attempted to draw a distinction between impermissible comments on silence and permissible comments on the evidence. Id. In the instant case, the prosecutor's comments were not improper comments on Appellant's right to remain silent. Appellant gave a statement to law enforcement officers immediately upon his return to Florida and the prosecutor properly stated in his opening that this was Appellant's first opportunity to tell law enforcement officers what had happened. See San Martin v. State, 705 So. 2d 1337 (Fla. 1997) (noting that because San Martin had already freely and voluntarily discussed the crime with law enforcement officers, his later refusal to commit his statement to tape was not an exercise of his Fifth Amendment right to remain silent). Additionally, the prosecutor's comments during opening statement regarding Leslie Jones' anticipated testimony were entirely

proper given the fact that this was his actual trial testimony. At the trial, Jones testified that Appellant told him he needed to come up with a story to explain how his fingerprint was found on the parking ticket. (V57-58:5477-81). Finally, the prosecutor's question to agent Ray regarding Appellant appearing before the grand jury went unanswered and did not implicate Appellant's right to remain silent.

Even if this Court finds that the prosecutor's comments were "fairly susceptible" of being interpreted as a comment on Appellant's right to remain silent, the error is clearly harmless under the facts of this case.[37] See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). The jury heard testimony surrounding Appellant's statement to law enforcement officers and also heard from Leslie Jones regarding Appellant's statements. Furthermore, immediately prior to the State's opening statement, and again at the close of the evidence, the trial judge instructed the jury that the burden rested entirely with the State and that Appellant had the absolute right to remain silent and the jury could not make any inferences of

[37] As this Court made clear in State v. Murray, 443 So. 2d 955, 956 (Fla. 1984), prosecutorial misconduct is the proper subject of bar disciplinary action, not reversal and mistrial. See also Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985) (stating that "it is appropriate that individual professional misconduct not be punished at the citizens' expense, by reversal and mistrial, but at the attorney's expense, by professional sanction.").

guilt if Appellant exercised his right to remain silent. (V37:2602-05; V63:6269-73). Given the trial court's instructions and the strength of the State's circumstantial evidence against Appellant, the prosecutor's comments, even if found to be improper, could not have contributed to the jury's verdict.

Appellant's next preserved complaint relates to the prosecutor allegedly vouching for the credibility of David Catalan when, during re-direct examination, the prosecutor asked the witness if, during their pre-trial discussions, the prosecutor told the witness to tell the truth when he testified. (V42:3248-51). Defense counsel objected and moved for a mistrial. The trial court denied the motion for mistrial, but sustained the objection and gave a curative instruction.

Although the trial court sustained the objection, the State submits that the question did not result in the prosecutor vouching for the credibility of the witness. The prosecutor simply informed the witness prior to his testimony to tell the truth; the same exact instruction given to every witness by the trial court in front of the jury. Appellant's claim of prosecutorial misconduct based on this innocuous question is without merit.

Likewise, Appellant's assertion of prosecutorial misconduct

based on the prosecutor allegedly vouching for the credibility of inmate Leslie Jones is without merit.[38] During redirect, the prosecutor attempted to clarify a question asked by defense counsel, and inquired of Jones if he was testifying for the State pursuant to a plea agreement. (V58:5587). The State asked the witness if his plea agreement specified that he was to testify truthfully, and in the event that he did not, whether he could have his probation violated. The trial court sustained defense counsel's objection and instructed the jury that it was their job to determine who is telling the truth. (V58:5590). Even if the prosecutor's questions were improper, any error was harmless given the trial court's curative instruction.

Appellant next claims that the prosecutor improperly commented on the defendant's lack of remorse when he elicited testimony that Appellant did not cry when he was interviewed by law enforcement officers. Detective Parker testified that he interviewed Appellant the day after the four murders and Appellant was confident, almost to the point of arrogance. (V45:3728). The prosecutor then asked the detective if

[38] Appellant also argues "prosecutorial misconduct" based on Jones' unresponsive answer to the prosecutor's question that Appellant was housed in protective custody; a section where people accused of murder and sex crimes were housed. The witness' unresponsive answer is not attributable to any prosecutorial misconduct, and as the trial court noted, the jury was well aware that Appellant was charged with murder. (V57:5468-72).

Appellant cried during the statement, and the prosecutor indicated that he planned on asking the detective if Appellant laughed, but he was prevented by defense counsel's objection and motion for mistrial. (V45:3728, 3745, 3752). After hearing argument from counsel, the trial judge denied the motion for mistrial, but sustained the objection and instructed the jury to disregard the last question and answer.

Contrary to Appellant's assertion, the prosecutor's question did not imply that defendant had a lack of remorse. The prosecutor inquired of Appellant's demeanor during his statement to law enforcement officers the day after the murders; an obviously relevant inquiry. When Detective Parker testified that Appellant was confident to the point of arrogance, the prosecutor followed those responses by asking more detailed questions about Appellant's demeanor. Unlike the situation in Robinson v. State, 520 So. 2d 1 (Fla. 1988), and Pope v. State, 441 So. 2d 1073 (Fla. 1983), relied on by Appellant, the prosecutor in this case did not argue to the jury that Appellant lacked remorse for the killings. Even if the prosecutor's question to the detective could be found to imply a lack of remorse, it was not so prejudicial as to vitiate Appellant's entire trial. Accordingly, this Court should find that the trial court acted within its discretion in denying Appellant's

motion for mistrial.

Appellant next argues that the prosecutor improperly implied that Appellant had committed a crime or bad act by opening a bank account with corporate checks. (V37:2635). Appellant objected to the comment and moved for mistrial. (V37-38:2635-95). After lengthy arguments, the trial court denied the motion for mistrial, but granted defense counsel's request for a curative instruction. The court instructed the jury that they were to disregard the prosecutor's comments regarding the bank employee's thoughts about Appellant opening a bank account and further instructed the jury that his attempt to open a corporate account were not criminal acts.[39]

The State's comment that the bank teller knew something was not "right" when Appellant attempted to open a corporate bank account without the proper paperwork was not an improper comment on the evidence. As such, the trial court properly denied Appellant's motion for mistrial. As the State properly argued, the evidence established that Appellant attempted to open a corporate bank account at a different bank than Erie utilized

[39] The prosecutor objected to the court instructing the jury that Appellant's acts were not criminal because a grand jury had indicted Appellant based on this incident and a trial judge had signed an arrest warrant indicating that there was probable cause for Appellant's arrest. The prosecutor informed the court that the State had nol prossed the charges and did not intend to present any evidence regarding the arrest and charges unless the defense opened the door to this evidence.

without ever providing the proper paperwork. When Gonsalves and Dosso discovered Appellant's actions, Dosso testified that this increased the tension between the partners and Appellant was soon ousted from the company. Even if this Court were to find that the comment was somehow improper, it was cured when the trial court instructed the jury to disregard the comment.

Appellant further argues that it was prosecutorial misconduct to elicit testimony regarding Appellant's ownership of guns and to then argue to the jury the fact that the victims were shot with a .22. (V55:5115-29; V62:6155-56). Over defense counsel's objection, the State properly introduced evidence of Appellant's gun ownership during its case in chief. Because the evidence was properly admitted, the State argued its relevance during closing argument.[40] There is nothing improper about the prosecutor's argument.

Finally, Appellant also raises two claims of prosecutorial misconduct based on statements for which defense counsel did not object to preserve the issue for appellate review. Specifically, Appellant claims that the prosecutor improperly argued to the jury during closing argument that Appellant was "diabolical," and a "liar," and shifted the burden of proof by

[40] As the trial court properly found, the fact that Appellant owned numerous .22 caliber weapons and also possessed licenses to other .22 weapons that were never recovered, was relevant to the State's case.

arguing that there was no evidence for the jury to rely on that the murders were the result of a professional hit. Appellant's unpreserved claims are without merit.

As this Court has previously held, a timely objection puts the trial court and the prosecutor on notice that a line of argument is objectionable or is breaching the bounds of propriety. It also provides the trial court the opportunity to admonish the prosecutor or remedy the situation through a curative instruction. See Card v. State, 803 So. 2d 613, 622 (Fla. 2001). In order for Appellant to obtain relief based on the unobjected-to comments, he must establish that the comments rise to the level of fundamental error. Fundamental error is error that "reach[es] down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Archer v. State, 934 So. 2d 1187, 1205 (Fla. 2006). None of the comments mentioned in Appellant's brief, either alone or collectively, rise to the level of fundamental error. See Sims v. State, 681 So. 2d 1112, 1116-17 (Fla. 1996) (stating that claimed errors when prosecutor referred to the defendant as a liar and accused defense counsel of misleading the jury were not properly before the Court on appeal without an objection); Craig v. State, 510 So. 2d 857, 865 (Fla. 1987) ("When counsel refers

to a witness or a defendant as being a 'liar,' and it is understood from the context that the charge is made with reference to testimony given by the person thus characterized, the prosecutor is merely submitting to the jury a conclusion that he is arguing can be drawn from the evidence."). Because Appellant has failed to establish fundamental error based on these comments, this Court should deny the instant claim.

ISSUE V

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR A CHANGE OF VENUE.

Prior to trial, defense counsel filed several motions for a change of venue based on pretrial publicity, but after the court conducted a number of hearings and a mock jury selection, Appellant's trial counsel acknowledged that "based on the record established today [at the mock jury selection], I cannot in good faith say that we have established that basis." (V2:183-88, 193-96, 213-17; V4:378-92, 394-411; V6-7:799-917). After conducting the actual voir dire proceedings in this case (V19-37), defense counsel renewed his motion for change of venue without presenting any additional argument. (V37:2582). Appellant argues in his brief that the trial court abused its discretion in denying the motion, but only makes conclusory allegations that the jury was improperly influenced by the pretrial publicity.

In Henyard v. State, 689 So. 2d 239, 245-46 (Fla. 1996), this Court set forth the appropriate standard for addressing a trial court's ruling denying a motion for change of venue based on pretrial publicity:

> In McCaskill v. State, 344 So. 2d 1276, 1278 (Fla. 1977), we adopted the test set forth in Murphy v. Florida, 421 U.S. 794, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975), and Kelley v. State, 212 So. 2d 27 (Fla. 2d DCA 1968), for determining whether to grant a

change of venue:

> Knowledge of the incident because of its notoriety is not, in and of itself, grounds for a change of venue. The test for determining a change of venue is whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely upon the evidence presented in the courtroom.

344 So. 2d at 1278 (quoting Kelley, 212 So. 2d at 28). See also Pietri v. State, 644 So. 2d 1347 (Fla. 1994), cert. denied, 115 S. Ct. 2588, 132 L. Ed. 2d 836 (1995). In Manning v. State, 378 So. 2d 274 (Fla. 1980), we further explained:

> An application for change of venue is addressed to the sound discretion of the trial court, but the defendant has the burden of . . . showing that the setting of the trial is inherently prejudicial because of the general atmosphere and state of mind of the inhabitants in the community. A trial judge is bound to grant a motion for a change of venue when the evidence presented reflects that the community is so pervasively exposed to the circumstances of the incident that prejudice, bias, and preconceived opinions are the natural result. The trial court may make that determination upon the basis of evidence presented prior to the commencement of the jury selection process, or may withhold making the determination until an attempt is made to obtain impartial jurors to try the cause.

Id. at 276 (citation omitted). Ordinarily, absent an extreme or unusual situation, the need to change venue should not be determined until an attempt is made to select a jury.

During the actual voir dire here, each prospective juror was questioned thoroughly and individually about his or her exposure to the pretrial publicity surrounding the case. While the jurors had all read or heard something about the case, each stated that he or she had not formed an opinion and would consider only the evidence presented during the trial in making a decision. Further, the record demonstrates that the members of Henyard's venire did

> not possess such prejudice or extensive knowledge of the case as to require a change of venue. Therefore, we find that on the record before us, the trial court did not abuse its discretion in denying Henyard's motions for a change of venue.

In the instant case, although the media covered Appellant's trial, the major news coverage of the events occurred at the time of the murders (December, 1997), and when Appellant was eventually arrested for the crime (August, 2002). Here, the voir dire took place in August, 2006, almost a decade after the murders. A number of jurors who were familiar with the case were struck for cause. (V20-28:121-22, 123, 138, 141, 307, 335-36, 395, 435, 464, 498, 501-02, 580-81, 587, 591, 618, 635, 645, 668, 685, 688, 691, 749, 760, 763, 769, 818, 1022, 1197, 1245, 1283, 1316, 1343-44, 1350, 1357).

As noted, defense counsel merely made a perfunctory renewal of his motion for change of venue at the conclusion of voir dire because, as the record reveals, there is no evidence from the actual voir dire which demonstrates that the venire was so "pervasively exposed to the circumstances of the incident that prejudice, bias, and preconceived opinions were the natural result." Henyard, 689 So. 2d at 245 (quoting Manning v. State, 378 So. 2d 274, 276 (Fla. 1980)). In fact, to the contrary, the voir dire proceedings indicate that a large number of the venire had never heard *any* of the details of the case. Although the

trial was covered by the media and broadcast on television, the trial court made sure that the media coverage was as unobtrusive as possible and did not affect the proceedings. Because Appellant failed to carry his burden of showing that the pretrial publicity was so pervasive as to result in prejudice, the trial court acted within its discretion in denying his motion to change venue. Accordingly, this Court should affirm the trial court's ruling.

ISSUE VI

APPELLANT HAS FAILED TO ESTABLISH ANY VIOLATION OF HIS CONSITITUIONAL RIGHT TO CONFRONT WITNESSES.

In his sixth claim, Appellant asserts that the State violated his constitutional right to confront witnesses because the State's bloodstain expert, LeRoy Parker, testified regarding information he obtained from other witnesses in violation of Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354) (2004). Contrary to Appellant's assertion, his constitutional right to confront witnesses regarding this information was not violated in any manner.

The State called an expert in bloodstain analysis, FDLE crime analyst supervisor LeRoy Parker, regarding his review of the crime scene. (V46:3845-925). Mr. Parker, who did not go to the crime scene, testified regarding his opinion on the bloodstain evidence as reflected in photographs that were admitted into evidence. After Mr. Parker testified at length regarding his training and bloodstain evidence in general, the trial recessed for lunch, and upon returning, defense counsel raised an objection based on LeRoy Parker referring to a report authored by FDLE agent John Wierzbowski.[41] (V46:3878-89).

[41] Prior to defense counsel's objection, the State had introduced Wierzbowski's report for identification purposes only, and LeRoy Parker had testified regarding general bloodstain terms that would be involved in his testimony. (V46:3871-77; EV7:795-99)

Defense counsel argued that Parker could only testify to his own analysis and he could not rely on information obtained from others as that would be hearsay and a violation of Appellant's confrontation rights as set forth in Crawford. During the argument on the objection, it was noted that Mr. Parker conducted his bloodstain analysis on his own by examining the crime scene photographs and only relied on measurements obtained from the medical examiner and from FDLE agent Lynn Ernst when she placed pieces of standard 3cm tape on the wall as a matter of routine. The prosecutor informed the court that he would be calling the medical examiner and FDLE agent Ernst and would bring out the measurements during their testimony. (V46:3886-87). Both defense counsel and the court agreed that would be acceptable.

Thereafter, Mr. Parker testified regarding his bloodstain analysis obtained on his own review of the crime scene photographs. (V46:3889-99). At one point, the prosecutor inquired if Mr. Parker was aware of measurements from FDLE agent Lynn Ernst regarding a 3cm stick of tape, at which time the trial court *sua sponte* stated that the witness was talking about something that he was not supposed to talk about. (V46:3889-

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The definitions of these terms, although contained in the report, were obviously generalized knowledge that this expert possessed. (V46:3871-72; EV7:795-99).

90). The prosecutor indicated that defense counsel did not raise an objection and all the witness testified to was that a 3cm piece of tape was placed on the wall.[42] (V46:3899-900). Mr. Parker also testified regarding victim Diane Patisso and testified that he relied on measurements obtained from the medical examiner to opine that Mrs. Patisso was standing when she was shot in the head. (V46:3906-17).

After LeRoy Parker testified, the State presented the testimony of medical examiner Stephen Nelson,[43] who testified that the wound to Diane Patisso entered her head above the left ear, 62 inches off the ground, and exited an inch and a half lower by the right cheekbone.[44] (V47:4027-28). FDLE agent Ernst also subsequently testified regarding her identification of Appellant's fingerprint on the airport parking garage tickets, but neither the State nor defense counsel inquired about her placing standard 3cm pieces of tape at the crime scene when

[42] Presumably, defense counsel did not raise an objection because he had previously indicated that if the State subsequently called agent Ernst regarding the measurements, it would satisfy his objection.

[43] Medical examiner Nelson was not the medical examiner who conducted the autopsies of the four victims at the time of the murders in 1997. Doctor Alexander Malamud performed the autopsies on December 4, 1997, but he was unavailable for trial due to health concerns and had retired in 2003. (V47:3955-56). Defense counsel acknowledged that Doctor Malamud was unavailable to testify and did not raise any Crawford objections to Doctor Nelson's testimony.

[44] These were the measurements relied on by LeRoy Parker.

taking the photographs. (V56-57:5313-46).

In Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004), the United States Supreme Court found that the admission of "testimonial" hearsay statements pursuant to the "adequate indicia of reliability" test espoused in Ohio v. Roberts, 448 U.S. 56, 100 S. Ct. 2531 (1980), violated the Confrontation Clause of the Sixth Amendment to the United States Constitution. The Roberts Court had allowed hearsay evidence in a criminal trial, even absent the opportunity for the defense to cross-examine the witness, if the declarant was unavailable, and if the evidence either fell within one of the "firmly rooted hearsay exceptions," or was otherwise shown to have "particularized guarantees of trustworthiness." Roberts, 448 U.S. at 66-74. The Crawford Court held, however, that the Confrontation Clause excludes from evidence any out-of-court "testimonial" statements unless, first, the witness is unavailable, and second, the defense is provided with a prior opportunity to cross-examine the declarant. The Crawford Court did not set forth a comprehensive definition of "testimonial," finding only that "it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." 541 U.S. at 68.

Recently, in Melendez-Diaz v. Massachusetts, 129 S. Ct.

2527 (2009), the United States Supreme Court extended Crawford to reports issued by analysts indicating that a substance was cocaine:

> In short, under our decision in Crawford the analysts' affidavits were testimonial statements, and the analysts were "witnesses" for purposes of the Sixth Amendment. Absent a showing that the analysts were unavailable to testify at trial and that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to "'be confronted with'" the analysts at trial.

Id. at 2532; see also State v. Johnson, 982 So. 2d 672 (Fla. 2008) (holding that an FDLE lab report indicating substance seized from defendant was illegal was testimonial hearsay, and if preparer of report was unavailable, the admission of the report via testimony from preparer's supervisor violated defendant's Sixth Amendment right to confrontation); Martin v. State, 936 So. 2d 1190 (Fla. 1st DCA 2006).

In the instant case, even if the measurements from the medical examiner and agent Ernst were testimonial hearsay, there has been no violation of Crawford and its progeny. As defense counsel acknowledged, the medical examiner was unavailable to testify at trial and there is no indication in the record whether he was ever deposed prior to trial. Nevertheless, defense counsel did not raise a Crawford objection when Doctor Nelson testified regarding the measurements on Diane Patisso. As to the measurements performed by FDLE Agent Ernst, she

actually testified at trial and could have been confronted by defense counsel regarding the 3cm sticks of tape she placed at the crime scene. Although the State apparently forgot to ask any questions on direct examination of agent Ernst regarding the 3cm sticks of tape, defense counsel certainly could have inquired into this area of testimony on cross-examination without objection. Because Appellant's confrontation rights were not violated, this Court should deny the instant claim.

Additionally, even if this Court were to find a confrontation clause violation in this case, any error was harmless. The testimony from LeRoy Parker was based almost exclusively on his own independent analysis of photographs from the crime scene, and the only direct reference to any measurements obtained from another source was the testimony regarding the wounds to Diane Patisso and the measurements obtained from the medical examiner. Clearly, the crime scene and autopsy photographs supported the testimony that Diane Patisso was shot while standing in the hallway. Thus, there is no reasonable possibility that LeRoy Parker's brief reliance on outside information contributed in any manner to the jury's verdict. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

ISSUE VII

APPELLANT WAS NOT DENIED A FAIR SENTENCING HEARING BASED ON THE STATE'S CROSS-EXAMINATION OF APPELLANT'S CHARACTER WITNESSES AT THE SPENCER HEARING.

Appellant argues that the prosecutor engaged in misconduct during the penalty phase by questioning three of Appellant's character witnesses regarding their knowledge of allegations that Appellant had sexually molested his daughter. (V12:1578-85, 1686-87; V13:1741-51). Appellant makes numerous allegations in his brief that the prosecutor's questions were improper and unduly prejudicial to the jury. Appellant's argument is disingenuous to this Court, as the record clearly establishes that the incidents occurred before the judge only at the Spencer hearing and did not occur before the penalty phase jury that recommended Appellant's death sentences.[45]

When questioning Appellant's character witnesses, Francisco Serrano, Maria Serrano, and Alfredo Luna, the State asked the witnesses on cross-examination if they knew that Appellant's daughter had alleged that Appellant sexually abused her, and if

[45] Appellant's brief cites to defense counsel's argument at V12:1582-84 where defense counsel specifically states "[w]e are not in front of [the] jury, but in front of a Judge who has the intelligence to make a decision based on what is relevant." (V12:1583). Furthermore, Appellant's prior appellate counsel made the same factual misrepresentations to this Court in his Initial Brief, and the State noted those misrepresentations in its Answer Brief which was provided to Appellant's current appellate counsel.

they did not know of these allegations, would it change their opinion regarding his character. As the prosecutor noted, and as was acknowledged by defense counsel, Appellant's fifteen-year-old daughter filed a police report in Ohio regarding the sexual misconduct and Appellant wrote a letter to inmate Leslie Jones claiming that he was checking his daughter to see if she was a virgin by inserting his finger into her vagina. (V12:1583-84; V13:1746-47). Defense counsel argued that the State had stipulated that Appellant had no significant criminal history and it was improper to ask the witnesses about the sexual abuse allegations, and the prosecutor responded that he was entitled to cross examine the witnesses regarding their opinion that Appellant had good morals and character. (V12:1584-85). The trial court overruled Appellant's objection provided the State rephrased the questions. (V12:1579-80, 1686-87; V13:1741-42).

A trial court's ruling on the scope of cross-examination is subject to an abuse of discretion standard. McCoy v. State, 853 So. 2d 396, 406 (Fla. 2003). The State recognizes that in Poole v. State, 997 So. 2d 382, 393 (Fla. 2008), this Court "reiterate[d] the rule that the State cannot introduce inadmissible nonstatutory aggravation under the guise of impeachment." In Poole, the prosecutor asked the defendant's

character witness if he was aware of the defendant's arrests in other states and if he was aware of a "Thug Life" tattoo on the defendant's stomach. This Court held that the prosecutor's questioning denied Poole of a fair sentencing proceeding because the jury was made aware of Poole's criminal history and the information regarding the tattoo "prejudiced Poole in the eyes of the jury and could have unduly influenced the jury in recommending the death penalty." Id. at 393; see also Hitchcock v. State, 673 So. 2d 859, 861 (Fla. 1986); Geralds v. State, 601 So. 2d 1157, 1162-63 (Fla. 1992).

In the instant case, unlike Poole, the jury was not influenced in any manner by the prosecutor's questioning because it occurred at the Spencer hearing before the judge only. The trial court did not rely on this information in sentencing Appellant to death for the four murders. In fact, the trial judge found that Appellant had no significant history of criminal activity and, as nonstatutory mitigation, that Appellant was a successful Hispanic immigrant and a good father that "loved and cared for his children." (V18:2513-14). Thus, even if this Court finds that the prosecutor improperly questioned the three character witnesses at the Spencer hearing, any error is harmless as it did not affect the jury's recommendation or the trial court's decision to sentence

Appellant to death. See Mendoza v. State, 700 So. 2d 670, 678 (Fla. 1997) (stating that "erroneously admitted evidence concerning a defendant's character in the penalty phase is subject to a harmless error review under State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986)").

ISSUE VIII

THE TRIAL COURT PROPERLY ALLOWED THE "AVOID ARREST" AGGRAVATOR TO BE SUBMITTED TO THE JURY AND COMPETENT SUBSTANTIAL EVIDENCE SUPPORTS THE COURT'S FINDING OF THIS AGGRAVATOR.

Appellant argues that the trial court erred in submitting the avoid arrest aggravator to the jury and finding its existence as to victim Diane Patisso. In Preston v. State, 607 So. 2d 404, 409 (Fla. 1992), this Court held that in order to establish this aggravating factor, where the victim is not a law enforcement officer, the State must show that the sole or dominant motive for the murder was the elimination of the witness. This Court has additionally said that this factor may be proven by circumstantial evidence from which the motive for the murder may be inferred. Id. (citing Swafford v. State, 533 So. 2d 270, 276 n.6 (Fla. 1988)). In the instant case, the trial court properly submitted this aggravating factor to the jury and found its existence when sentencing Appellant to death.

In finding the avoid arrest aggravating factor, the trial court noted:

> The victim, Diane Patisso, was found murdered in the front vestibule. The room where the three male victims were murdered could be reached from that vestibule. The defendant, in a taped statement, given to Bartow Police Detective Steve Parker the day after the murders said ". . . I know Diane. Diane is a tall woman." In that same taped statement, the defendant remarked that he "assumed" she was murdered because "she walked in, in the middle of something."

> She was shot with a .32 caliber pistol and a .22 caliber pistol. The pattern of the .22 caliber bullet placement was similar to that seen on the other victims. Neither of the murder weapons has been located.

(V18:2512). There is competent, substantial evidence to support the trial court's finding as to this aggravator.[46] Appellant asserts that the evidence is insufficient to support this aggravating factor because the State failed to refute the hypothesis of innocence that Diane Patisso was the target of the murder due to her position as a prosecutor. Appellant's argument is without merit because the evidence supports the jury's finding that Appellant committed the instant murders, not a vengeful former defendant prosecuted by Diane Patisso. The evidence establishes that Appellant travelled to Florida to murder his ex-business partner, George Gonsalves, and after murdering George Gonsalves, Frank Dosso and George Patisso,[47] Appellant shot Diane Patisso as she walked in on him. Appellant acknowledged that he knew Diane Patisso and that she probably walked in on the murders.

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[46] In considering a challenge to the finding of an aggravating circumstance, this Court's function is to review the record to determine whether the trial court applied the right rule of law in finding the aggravating circumstance and, if so, whether competent substantial evidence supports its finding. Willacy v. State, 696 So. 2d 693, 695-96 (Fla. 1997).

[47] As the State argued to the trial court, this aggravating factor was also applicable to the murders of Frank Dosso and George Patisso.

In the instant case, the circumstantial evidence supports the lower court's finding of the avoid arrest aggravating circumstance. Appellant shot and killed Diane Patisso as he was leaving Erie because, as she entered the building and encountered Appellant, she would have obviously been able to identify him as the killer of her husband (George Patisso), brother (Frank Dosso), and George Gonsalves.

Even if the court erred in finding the avoid arrest aggravator, any possible error would be harmless in this case, given the other strong aggravating factors present and the lack of any significant mitigation. See Hill v. State, 643 So. 2d 1071, 1073 (Fla. 1994) ("When this court strikes one or more aggravating circumstances relied upon by a trial judge in sentencing a defendant to death, we may conduct a harmless error analysis based on what the sentencer actually found in determining whether the sentence of death is still appropriate."). The fact that Appellant committed four murders in a cold, calculated, and premeditated manner, one of the most serious aggravators set out in the statutory sentencing scheme, Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999), clearly outweighs the slight mitigation presented in this case. For these reasons, Appellant is not entitled to any relief on this issue.

ISSUE IX

APPELLANT'S CONSTITUTIONAL ATTACK TO FLORIDA'S DEATH PENALTY STATUTE AND JURY INSTRUCTIONS IS WIHTOUT MERIT.

Pursuant to this Court's procedure set forth in Sireci v. State, 773 So. 2d 34, 41 n.14 (Fla. 2000), Appellant raises eleven (11) separate constitutional issues in order to preserve these claims and designates them as such without providing any analysis. As Appellant implicitly concedes, these claims are without merit and have previously been rejected by this Court. The State submits that this Court should once again deny these claims. See generally Kormondy v. State, 845 So. 2d 41, 54 (Fla. 2003) (Ring does not encompass Florida procedures or require either notice of the aggravating factors that the State will present at sentencing or a special verdict form indicating the aggravating factors found by the jury); State v. Steele, 921 So. 2d 538 (Fla. 2005) (noting that the lack of notice of specific aggravating circumstances in an indictment does not render a death sentence invalid); Coday v. State, 946 So. 2d 988 (Fla. 2006) (rejecting claim that jury's death recommendation must be unanimous); Doorbal v. State, 837 So. 2d 940 (Fla. 2003) (Ring not applicable when jury convicts defendant on contemporaneous prior violent felony charged in indictment); Schoenwetter v. State, 931 So. 2d 857 (Fla. 2006) (rejecting

claim that jury instructions unconstitutionally shift burden of proof); Hunter v. State, 8 So. 3d 1052 (Fla. 2008) (rejecting defendant's broad challenge to this Court's proportionality review); Lightbourne v. McCollum, 969 So. 2d 326 (Fla. 2007) (Florida's lethal injection procedures are constitutional). Because this Court has repeatedly rejected the issues raised by Appellant in Claim IX, this Court should once again deny the constitutional challenges to Florida's death penalty procedures.

CONCLUSION

Based on the foregoing facts, arguments and citations of authority, Appellant's convictions and death sentences should be AFFIRMED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Marcia J. Silvers, 2937 Southwest 27th Avenue, Suite 101, Miami, Florida 33133, and to John Aguero, Assistant State Attorney, Polk County State Attorney's Office, 255 North Broadway Avenue, Bartow, Florida 33830 this 16th day of December, 2009.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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