

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-1002

VICTOR GUZMAN,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

BRIEF OF APPELLEE

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STATEMENT OF CASE AND FACTS

Servina "Lola" Fernandez lived in apartment 6 at SW 5th Street in Miami for over 30 years. (V75/1638-40, 1663-64, 1673) Her apartment was on the second floor of the building and had a glass door with a wood door behind it. (V75/1639, 1665-66) During the day, Ms. Fernandez kept the glass door locked and the wood door open so she could see outside but shut and locked the wood door every night before going to bed. (V75/1665-66)

For Ms. Fernandez, walking was difficult and painful because she had flat feet and poor circulation. (V75/1640-41, 1666) She worked as a teacher in Cuba, earned a PhD, and after moving to Miami, worked as a seamstress from her home. (V75/1643) While she could drive, she was no longer doing so in December of 2000. (*Id.*)

Every afternoon, Ms. Fernandez would walk downstairs and meet a local storeowner who brought her the daily newspaper. (V75/1642-43, 1664-65) After getting the paper, Ms. Fernandez would return to her apartment, fold the paper to the crossword, get herself a bowl of sherbet from the kitchen and sit at the dining room table, doing the crossword. (V75/1643)

On December 9, 2000, Ms. Fernandez's niece, Maria Isabel Reyes, had planned to pick up her "Tia Lola" later that day. (V75/1644-46) Between 3:30 and 4:00 pm, Delfina Rodriguez, Ms.

Fernandez's first floor neighbor, saw Ms. Fernandez walk downstairs to get her paper and then walked back upstairs to her apartment alone. (V75/1667-68) Around 6:00 pm, Ms. Rodriguez, her husband and another neighbor went to Ms. Fernandez's apartment and saw that the door was open. (V75/1669-70) Upon entering, they discovered Ms. Fernandez dead, lying on the bed with her feet hanging off the edge, her panties dangling off her right leg and numerous stab wounds. (V75/1671-72)

After the police were called, Ms. Rodriguez returned to her apartment. (V75/1673-74) She did not see anyone else head toward Ms. Fernandez's apartment during the short 5 minutes between the 911 call and the arrival of the police. (V75/1674)

Crime scene technician LaTanya Martin responded to Ms. Fernandez's apartment at 6:47 pm, and after being informed that Ms. Fernandez had been stabbed and sexually assaulted, she began processing the apartment for evidence. (V75/1675-76, 1680-83, 1688; V76/1802) She observed that the entire apartment was pretty neat and tidy except for a cup that appeared to be out of place, lying in the middle of the living room recliner. (V75/1698-99, 1710) Blood was on the inside of the glass door, on the floors and furniture in the living and dining room and inside the kitchen sink. (V75/1699-1709) Two bloody throw pillows, a bloodstained cushion and a pair of eyeglasses were on

the living room couch. (V75/1692, 1700) On the kitchen counter sat a bowl with melted sherbet in it and a container with melted sherbet with a spoon on top of the lid. (V75/1708-09; V76/1745-50, 1768-69)

In the bedroom, Ms. Fernandez was lying face up with her legs hanging over the front end of the bed. (V75/1713-14; V78/2100-01) Blood was on the light switch, the wall, the bed, the bed pillows, the floor and the dresser. (V75/1714-19; V78/2100-01) Ms. Fernandez was unclothed and her bloodied panties were pulled down around her right leg with 4 visible stab marks in them. (V76/1743-44, 1782-83) Underneath her body was her bloody dress with a torn zipper and stab marks in it. (V76/1744, 1770-83)

Tech. Martin took samples of bloodstains for DNA analysis from Ms. Fernandez's left thigh and face and throughout Ms. Fernandez's apartment. (V76/1753-65) Tech. Martin also lifted latent prints from items and doorways in the apartment. (V76/1785-89, 1791; V77/1846-48)

Ms. Fernandez's autopsy revealed that she had 58 stab wounds, fractures to both sides of her hyoid bone, blunt force trauma injuries to the top of her head and prominent bruising around her face and neck. (V78/2101-02, 2106-07, 2109, 2113) Ms. Fernandez died as a result of the combined effects of the stab

wounds and strangulation. (V78/2107)

In 2003, the case was assigned to Detective Andres Arostegui, a member of the cold case homicide division. (V77/1851-52; V78/2147-49) Det. Arostegui determined there was no match to the prints taken from the crime scene and met with Florida Department of Law Enforcement investigators about reviving the murder investigation. (V78/2149-50) During this time, Det. Arosetgui learned of information and decided to interview Defendant. (V78/2158-59)

On March 16, 2004, Det. Arostegui travelled to Jacksonville and spoke with Defendant. (V78/2159-60) After Defendant waived his *Miranda* rights, Det. Arostegui showed Defendant photos of Ms. Fernandez and the apartment building in which she had lived and where she was murdered. (V78/2160-66, 2167-69) Defendant denied knowing Ms. Fernandez or ever having been at her apartment building. (V78/2168, 2169) He also denied having any involvement in Ms. Fernandez's murder. (V78/2171) During the last 45 minutes of their conversation, Defendant repeated that he was sorry but did not provide an explanation for his apologies, and began asking for bathroom breaks. (V78/2172-73)

On April 20, 2004, crime scene technician Carolyn Grayer took cheek swabs from Defendant in the presence of Det. Arostegui. (V77/1830-34, 1842-45, 1852-55) DNA analyst and

commander of the Miami-Dade crime lab Stephanie Stoiloff compared the sample from Defendant and a standard developed from a known sample of Ms. Fernandez's blood to the DNA from the swabs which had been taken from Ms. Fernandez's apartment and a rape kit. (V77/1872-73, 1882-86, 1897-1908, 1910-13, 1916-18, 1920-35, 1943-47, 1956-60) Her examination of the rape kit provided no viable evidence. (V77/1914-16) The samples of the dining room table and chair and Ms. Fernandez's left thigh had DNA profiles that matched the DNA profile of Ms. Fernandez. (V77/1947, 2004) The samples from the kitchen sink, the bedroom floor, the bedroom dresser and the pink feathered container on top of the dresser had DNA profiles that matched the DNA profile of Defendant. (V77/1947-48, 1956-59, 1965-66, 1968-69, 2004) The cup on the living room recliner had a DNA mixture consistent with the DNA profile of Defendant as a major contributor. (V77/1948-50, 1959-60) The likelihood of a random match between Defendant's profile and the nonmixture profile from the evidence was one in 153 trillion. (V77/1971, 2005)

Criminalist Toby Wolson later examined additional samples that were collected from Ms. Fernandez's apartment because the lab was using a new DNA test kit that tested more loci. (V78/2015-31, 2043-44) The samples taken from the living room recliner, the living room couch, the living room floor in front

of the couch, the floor between the living room and dining room and the floor near the front door had DNA that matched Ms. Fernandez. (V78/2029-31, 2040-41) The samples taken from the bedroom floor near the bed and the dining room floor in front of the kitchen doorway had DNA that matched Defendant. (V78/2030-31, 2040-41) Tech. Wolson opined that the DNA profile matched Defendant because the probability of a random match exceeded 1 in 300 billion. (V78/2040-41) He also reexamined the DNA mixture from the cup and agreed that Defendant matched the major profile obtained from the DNA mixture. (V78/2033-37) The likelihood of a random match between Defendant and the mixture contribution was 1 in 5,099,000. (V78/2038-39)

As a result, Defendant was charged by Indictment for the first degree murder of Ms. Fernandez on June 1, 2004. (V1/25-28) The State filed its notice of intent to seek the death penalty on June 8, 2004. (V1/32)

Over the course of several pretrial hearings, the State and Defendant had been discussing the possibility of entering into a plea negotiation. (V51/227-28; V52/235-38; V53/242-43; V55/221; V56/255-56) During a 2010 pretrial hearing, the trial court indicated the case would be given a 30-day reset in the hope that plea efforts would be resolved by then. (V51/227) In response, Defendant announced that "as it stands now [Defendant]

is on board as far as the - if there is a plea offer as we had discussed, that he would be willing to accept it at that time," and have the sentencing on the date of the plea colloquy. (V51/227-28) At the following hearing, the State notified the trial court that the parties had previously had conversations with Defendant and that they were hopeful that this matter would be resolved but Defendant needed to prepare a mitigation packet to justify a death penalty waiver based on his priors. (V52/235) After receiving the packet, the State indicated that based on information therein, it needed to get more information about Defendant since he's been arrested. (V56/255) Following an off the record discussion, there is no mention of plea negotiations.

On August 2, 2012, Defendant moved to declare Florida's capital sentencing scheme unconstitutional, alleging that a death sentence recommendation by a 7-5 jury vote violated *Ring v. Arizona*, 536 U.S. 584 (2002). (V2/289-94) He also moved to have the trial court find the sentencing scheme unconstitutional under *Ring* because the judge wrote the sentencing order, the judge made additional findings of fact and the jury recommendation did not have to be unanimous. (V2/295-304) In a separate motion, Defendant alleged the death penalty violated the 8th Amendment based on claims of undue delays in executions, racial bias and continued arbitrary imposition of death

sentences. (V3/475-85) In response to his claims based on *Ring*, the State argued that such allegations were foreclosed by binding precedent and requested the trial court deny his motions because there is no legal requirement for unanimous jury recommendations. (V3/754-56)

During his opening statement, Defendant reminded the jury that he was entitled to a presumption of innocence and that he was not waiving the burden of proof that remains with the State. (V75/1622) Defendant asserted that the jury should consider the State's opening as a promise to present the evidence it had mentioned to meet its burden to prove the charges beyond a reasonable doubt. (V75/1623-33) While Defendant then admitted that the evidence presented by the State would establish the facts of Ms. Fernandez's murder, Defendant contested whether the evidence established that it was Defendant who committed the murder. (V75/1633) He argued that the State would be presenting DNA evidence and that there was no reasonable explanation for the presence of his DNA in Ms. Fernandez's apartment. (V75/1633-34) Defendant claimed the DNA evidence would not prove his identity as the murderer because the DNA tests were conducted by imperfect human beings 4 years after the murder. (V75/1634-35)

Tech. Martin testified she had 14 years of experience as a crime scene technician, received on the job and classroom

training and continuing education on processing crime scenes. (V75/1675-76, 1678-79) She explained that the process of collecting DNA samples consisted of taking a q-tip like swab, wetting it with distilled water and wiping it on the area where the sample was being taken. (V75/1677) Tech. Martin collected 17 samples at Ms. Fernandez's apartment and placed each swab in a separate paper envelope that listed the exact location from where the swab was collected, which Tech. Nelson then placed inside of one inclusive package. (V76/1802, 1813, 1816-17) Tech. Martin also photographed the crime scene and captured Ms. Fernandez's naked body lying on the bed in her bedroom as she had been found. (V75/1685-86, 1738-40; V76/1802)

On cross, Defendant had Tech. Martin explain that she impounded evidence by taking it to the property room, having them log it into a computer and receiving a receipt in return. (V76/1798-99) This process was important to prove that the evidence had been collected by Tech. Martin from the crime scene. (V76/1799-1800) Defendant accused Tech. Martin of not impounding the swabs, which she denied. (V76/1800) He then attempted to impeach her with a document that referenced the swabs but Tech. Martin explained it was not the property receipt from when she impounded the swabs but a document created by the officer who transported the impounded evidence to the lab.

(V76/1800-01)

On redirect, Tech. Martin averred explained that all crime lab processing was conducted by the MDPD crime lab. (V76/1809-10) As a result, when evidence is transported to the MDPD crime lab, MDPD creates its own document to include the Miami police property receipt number. (*Id.*)

While testifying about taking DNA swabs in this case, Tech. Grayer stated, "I went with Detective Arostegui to Metro West jail." (V77/1835) Defendant objected, moved to strike her response and moved for a mistrial because the word jail had been used. (*Id.*) The State argued that the jury knew Defendant had been in custody for the first degree murder of Ms. Fernandez and that there had been no mention of another crime. (V77/1836-38) Defendant claimed that because the State was relying on DNA evidence in charging him with this crime and Tech. Grayer was testifying about taking his DNA at a jail, the jury would infer that he had been arrested for another crime. (*Id.*) The trial court granted the motion to strike, denied the motion for mistrial and told the jury to disregard the last question and answer, adding "[w]here this incident occurred with regard to the DNA swab is of no concern to you, and it shouldn't be considered further by you." (V77/1835, 18399, 1841-42)

During cross, Det. Arostegui testified that when

investigating an unsolved crime, the case is referred to by the victim's name when submitting lab analysis request forms. (V77/1859) Det. Arostegui followed that procedure in submitting lab requests for analysis of other individuals' DNA samples in this matter. (V77/1859-61) However, Det. Arostegui identified Defendant on the lab request when he submitted Defendant's DNA sample for analysis. (V77/1861-62) When Defendant asked if this was done to bias the lab, Det. Arostegui averred that he had not done so and could provide a reason for the difference. (V77/1862) When Defendant continued to press the issue, Det. Arostegui started to explain, and Defendant cut him off. (V77/1862-63)

When Defendant continued to press the issue, Det. Arostegui indicated there was an explanation, and the trial court had the parties approach and warned Defendant that he was opening the door to evidence regarding the CODIS hit because the reason Defendant's name was placed on the request was that he had been identified from the CODIS hit. (V77/1863-65, 1866-69)

When Defendant indicated he would not be inquiring about the issue further, the trial court ruled that the CODIS hit was not admissible because Defendant had not yet opened the door through his prior questioning. (V77/1868) The State requested permission to ask whether Defendant had been identified as a

suspect prior to the oral swab being taken from him without explaining how, alleging that merely identifying Defendant as a suspect was proper rebuttal. (V77/1869) After confirming the lab request with Defendant's name on it had not been admitted into evidence, the trial court denied the State's request. (*Id.*)

In discussing his investigation, Det. Arostegui mentioned that he was informed of a possible DNA match on March 9, 2004. (V78/2150-51) Defendant first objected on hearsay grounds, and then in response to the trial court's statement that it was similar to the "jail" issue, he asked the court to strike the response and to give a curative instruction. (*Id.*) He then moved for a mistrial asserting that the implication of the answer coupled with the prior reference to a jail was prejudicial. (V78/2153) The trial court granted his motion to strike and gave the requested curative, but denied the motion for mistrial. (V78/2150-53) It also instructed the jury to disregard the last response given by Det. Arostegui and informed the State to proceed by eliciting that Det. Arostegui decided to interview Defendant based on information received, which the State did. (V78/2157-58)

In discussing the instruction about the response, Defendant stated he understood the relevance of Det. Arostegui's testimony was that, after Defendant was shown a photo of Ms. Fernandez and

asked a series of questions, he denied knowing her or having done anything wrong. (V78/2155) He added that the conversation with Det. Arostegui was more extensive than his denial and involved being confronted with the DNA evidence. (V78/2155-56) While the State had initially planned on eliciting testimony about the entire conversation, it agreed not to inquire about the CODIS match confrontation. (V78/2155-57)

When questioning resumed, Det. Arostegui stated that, over the last 45 minutes, Defendant continued saying he was sorry and requested bathroom breaks, which, was then followed by Defendant's request for an attorney and immediate termination of the interview. (V78/2172-73) Defendant made no objection.

On cross, Defendant elicited that he agreed to speak with Det. Arostegui after knowing his rights and being fully advised that he could reinvoke them at any time. (V78/2177-78) Det. Arostegui acknowledged that he repeatedly accused Defendant of committing the murder, that Defendant repeatedly denied the accusation and that Defendant's nervous behaviors could have been in response to the repeated accusations. (V78/2178-79) Defendant elicited that he could have chosen to terminate the interview because he was tired of being accused. (V78/2184)

Tech. Stoiloff testified that for a crime lab to be accredited, board members come on site and conduct a thorough

review to ensure the lab was following standard protocols to yield the best possible results and that this process had to redone every 5 years for a lab to keep its accreditation. (V77/1878-81) Moreover, the DNA Unit conducts an internal audit every year, and every other year there is an external audit. (V77/1880) The MDPD crime lab is the only accredited public lab in Miami-Dade County. (V77/1881)

The MDPD crime lab had specific protocols to prevent contamination and maintain the integrity of the evidence. (V77/1935-36) The standard operating procedures mandated that only one item is to be analyzed at a time. (V77/1936) To ensure that the evidence was not contaminated by foreign materials, every time an evidence bag is opened and an item was processed, an analyst was required to put on new gloves, clean the work area and place a new piece of butcher paper on a table in a separate area. (*Id.*) After putting each individual swab into the foil-lined sealed envelope, it is placed in short term storage for that particular type of evidence. (V77/1937) Moreover, the evidence is processed first and the standards are processed last so there was no contamination with the standards. (V77/1936) Tech. Stoiloff followed those procedures in processing the evidence in this case. (V77/1935-37)

Moreover, there are specific lab protocols for processing

DNA evidence that include using 2 different controls, a positive control, which involves processing a known DNA profile, and a negative control, which involves testing the reagents used in breaking down and replicating the DNA to ensure that they are not contaminated with extraneous DNA. (V77/1962-64) The positive control will yield its expected profile if the process was conducted correctly. (V77/1962-63) The negative control will yield no data if there was no contamination in the reagents. (V77/1963-64) In this case, both controls yielded the expected results. (V77/1964-67)

On cross, Defendant elicited that the purpose of the controls was to ensure that the lab did not contaminate the samples. (V77/1976-77) However, Tech. Stoiloff admitted that the lab had no control over how an item is submitted to the lab or any problems that predated the evidence arriving at the lab. (V77/1977) While Tech. Stoiloff admitted the integrity of the crime scene processing was important, she averred that any problems from the crime scene would not affect the reliability of the lab's results. (V77/1978-79)

While she admitted that DNA is too small to be visible, Tech. Stoiloff stated DNA did not travel through the air independently and that the standard operating procedures regarding changing gloves and lab coats ensured that DNA was not

transferred by the analysts. (V77/1979-81) While the analysts were required to document that they followed the procedures, the documentation did not indicate every action done, such as changing gloves and cleaning the workstation. (V77/1981-82) Any problems encountered during the processing of evidence would be documented in the case file and might also be documents in the quality control manager's files as well. (V77/1982-84)

Tech. Stoiloff admitted her testimony was not that everything at the lab has been perfect and mistakes had been made because analysts are human but that there is a standard operating procedure for reporting and correcting those situations. (V77/1984) Defendant elicited that she remembered an incident where there was a reagent problem in numerous cases, but Tech. Stoiloff averred that it was not an analyst specific or lab issue and it was prior to her taking command of the lab in 2005. (V77/1985) When Defendant asked whether it had taken a long time for the incident to become known, Tech. Stoiloff stated that to her recollection it had not. (V77/1985-86)

On redirect, Tech. Stoiloff testified that DNA analysis is a reliable forensic endeavor to establish the identity of defendants. (V77/2003) She averred that according to all the documented records and information she was aware of in this case, there was no single issue or problem that arose with the

DNA analysis in this case. (V77/2004) Tech. Stoiloff reaffirmed that the DNA profile from those evidence samples matched the samples of the standard taken from Defendant. (*Id.*) When asked about whether science confirmed Defendant's blood was inside of Ms. Fernandez' apartment, Tech. Stoiloff averred that science proved the chance of finding Defendant's DNA profile in the population at random was 1 in 153 trillion. (V77/2005)

Criminalist Wolson has been working for the MDPD crime lab for 30 years and remains vigilant in keeping apprised about the latest updates about the lab's standard operating procedures and in DNA analysis through his training, certification and yearly education courses. (V78/2017-21) His involvement in this case began in 2005 after the lab received a request to conduct additional testing on the retained evidence that was previously analyzed by Tech. Stoiloff. (V78/2022-28)

During cross, Defendant asked Tech. Wolson whether a contamination problem would exist on the samples years later if there had been a problem when the evidence was initially processed at the lab, Tech. Wolson averred that, by following the mandatory standard operating procedures, the lab ensured that there were no such problems. (V78/2048-49) He noted that any possible contamination issue would have predated the evidence arriving at the lab. (V78/2049) While Tech. Wolson

admitted that people have the potential to make a mistake, he averred that when an analyst follows the standard operating procedures, there should be no errors. (V78/2049-50)

During redirect, Tech. Wolson confirmed that all the samples were single source profiles except for the one mixture found on the cup on the recliner. (V78/2070) Tech. Wolson opined that, if the samples had been contaminated, there would be DNA mixtures and not single source profiles. (*Id.*)

The Deputy Chief Medical Examiner Dr. Emma Lew opined that it took a while for Ms. Fernandez to die given the number of wounds on her body and the fact that there was blood in multiple rooms of the apartment. (V78/2102-03, 2105, 2122) Further, the amount of blood around the apartment indicated that Ms. Fernandez was not in her bedroom when she was first attacked. (V78/2105) Moreover, Dr. Lew opined that the presence of Defendant's blood at the apartment was consistent with his hand sliding onto the blade and cutting himself while he was stabbing Ms. Fernandez. (V78/2105-06)

Dr. Lew opined that Ms. Fernandez was dressed when the stabbing began but was unclothed while the stabbing continued because the number of stab marks on the front of her discarded dress was less than the number of stab wounds inflicted on the front of her body. (V78/2103, 2108) Evidence supporting an

attempted sexual assault included Ms. Fernandez's clothes being torn off her body with her bloodied panties found around her right ankle while she was still wore her stockings and sandals. (V78/2103-04, 2108, 2135) Matching bloodstains on her abdomen and left thigh showed that her left leg had been raised up to her body. (V78/2104) Moreover, blood smears found on the inside of her thighs was consistent with the assailant using their bloodied hands to grab the inside of her thighs and push them apart. (V78/2104, 2135) However, the examination of her vaginal exam revealed no trauma. (V78/2131)

Dr. Lew opined that Ms. Fernandez sustained blunt force trauma on the top of her head with such force to have caused dark red almost black bruising under her scalp. (V78/2109) Because bruising does not appear instantaneously, Dr. Lew opined that Ms. Fernandez must have been alive for some time after sustaining these blows. (V78/2109-10) There was also prominent bruising on the right side of her chin. (V78/2101, 2112-13)

Ms. Fernandez had abrasions around her neck. (V78/2115, 2130) There was internal fracturing to both sides of her hyoid bone consistent with Defendant having applied sufficient pressure to at least momentarily incapacitate her. (V78/2107, 2112-13, 2130) However, there was no indication that the strangulation was necessarily sufficient to have independently

caused Ms. Fernandez's death, but it may have related to a fainting-like loss of consciousness. (V78/2113, 2131-32)

Given the existence of the internal and external bleeding, Ms. Fernandez was alive when all 58 stab wounds were inflicted on her body. (V78/2116-17, 2122) Of the 9 stab wounds to her neck and upper chest, there were also 2 incise wounds to her neck consistent with slices made by the blade itself, which would have caused her to bleed but not caused her immediate death. (V5/945-46, 949-50; V78/2115, 2117-19) Ms. Fernandez had 2 fatal stab wounds to her upper chest, which had penetrated 4 to 6 inches into her body, deep enough to have severed her aorta. (V5/951-52; V78/2115, 2120) She sustained 28 stab wounds on her lower chest and abdomen, which had penetrated her abdominal cavity but had not been deep enough to cause injuries to her internal organs, except for 2 that had nicked her liver. (V5/947-48; V78/2115-17, 2123) However, none of the wounds would have been fatal, incapacitated Ms. Fernandez or caused her to lose consciousness during the attack. (V78/2117) The location of 5 defensive wounds on her hands and fingers indicated that Ms. Fernandez was not only standing upwards but also lying down when she was being stabbed by Defendant. (V78/2120-24, 2133, 2136-37)

On redirect, Dr. Lew averred that the blood covering Ms. Fernandez's body were blood smears and not drops of blood or

blood pooling. (V78/2137-38) Dr. Lew opined that the blood smears were consistent with the killer spreading the blood around using his hands even though no prints were found because lifting prints from skin and blood was extremely difficult. (V78/2138) The killer could have also been wearing gloves, using his forearm or spreading the blood around with a foreign object to have caused the blood smears. (*Id.*)

After the State rested, Defendant indicated that he would not be presenting any evidence and rested his case, and moved for a judgment of acquittal on the felony murder charge. (V78/2191-92, 2195-96) While Defendant conceded that this was a case of premeditated murder, he claimed that there was insufficient evidence supporting the underlying felonies to pursue a felony murder charge. (V79/2202) Defendant alleged there was insufficient evidence to establish an attempted sexual battery because there was allegedly no evidence of penetration or an attempt to penetrate. (V79/2202-04) In response, the State argued that Dr. Lew's testimony about Ms. Fernandez's torn clothing, along with her panties being pulled down and the movement and manipulation of her legs being raised, established an attempted sexual battery. (V79/2204) The trial court granted Defendant an acquittal on the felony murder with the underlying felony being aggravated abuse of an elderly person but denied

his motion on the felony murder with attempted sexual battery being the underlying felony. (V79/2207-08)

In its closing, the State began its discussion of the evidence by describing the murder of Ms. Fernandez as a horrific, gruesome, ghastly and grizzly atrocity, which was followed by the State reminding the jury that it should consider the evidence presented and not what was said during closing arguments. (V79/2251) Defendant made no objection.

In describing the images that depicted the numerous stab wounds and the extreme trauma that Ms. Fernandez had endured, the State recounted that most of the wounds were not lethal but painful. (V79/2251-54) The State noted how these images were just some of the evidence proving that Defendant was guilty of premeditated first degree murder and felony murder with the underlying felony being attempted sexual battery. (V79/2253-54) After describing how the blood evidence established the route Defendant had taken in attacking Ms. Fernandez throughout her apartment, the State noted that describing what happened to Ms. Fernandez as a tragedy was underselling the vicious murder that occurred 12 years earlier. (V79/2254-57) Defendant made no objection.

The State noted that Defendant had discussed credibility using his student hypothetical during voir dire. (V79/2257-58)

However, the State argued there was no credibility issue in this case because the DNA evidence was consistent and without conflict. (V79/2258) Defendant objected, without stating any grounds, and reserved a motion which the trial court acknowledged by saying okay. (*Id.*)

In response to Defendant's opening statement about the State needing to deliver on its promise to present evidence of Defendant's guilt, the State averred that under the reasonable doubt standard, there was no doubt that Defendant's DNA was inside of Ms. Fernandez's apartment. (V77/2259-60) In discrediting the unproven theories presented by Defendant about the unreliability of DNA analysis, the State summarized the testimony of the crime scene technicians and DNA experts which proved that the DNA analysis was reliable and there was no contamination in this case. (V77/2259-70) The State added that there had been no presentation of evidence showing contamination in this case. (V77/2270-71) Defendant made no objection.

In concluding, the State implored the jury to give Defendant the fair deliberation to which he was entitled, after having posited that Defendant had likely appeared polite and well mannered when Ms. Fernandez opened her apartment to Defendant and ultimate death. (V79/2273) Defendant made no objection.

In his closing, Defendant stated he was glad that the State embraced the idea of having to pay on the State's promise to present evidence of Defendant's guilt and that if the State left any unanswered questions, the answer was that Defendant was not guilty. (V79/2275) He asked whether the State had presented evidence of somebody seeing Defendant at Ms. Fernandez's apartment or whether the State presented evidence that proved what happened in her apartment. (V79/2276) Defendant asked the jury whether the purported presence of his DNA being at the crime scene was enough to show Defendant had been in the area or knew Ms. Fernandez. (V79/2280-81) He attempted to discredit the reliability of DNA analysis being that human beings had gathered the evidence. (V79/2284) Defendant claimed that there were inconsistencies in the testimony provided by the State's experts. (V79/2284-88) Defendant asserted that the time of the interview and the constant accusations made by Det. Arostegui caused Defendant to say he was sorry and request bathroom breaks. (V79/2289-91) Defendant claimed that his apologies to Det. Arostegui could have been because he was not telling Det. Arostegui what he wanted to hear just as reasonably as Defendant apologizing for having committed the murder. (V79/2290) Defendant again referenced the student hypothetical to argue that Defendant had a right to silence and the State had the

burden of proof. (V79/2291-93) In remarking on the credibility of experts, Defendant asked what evidence was presented by the testimony of the State's experts and how reliable was the evidence in this case coming from an expert. (V79/2293)

After Defendant finished his closing, he moved for a mistrial, claiming the student hypothetical reference in the State's closing was an improper comment on his right to silence and improper burden shifting. (V79/2296) The trial court denied the motion for mistrial, finding the reference was a proper comment about a perceived inconsistency in the testimony of its DNA experts and was not about his credibility. (V79/2296-97)

After considering the evidence, the jury found Defendant guilty as charged on September 10, 2012. (V6/1013; V79/2332-33) The trial court adjudicated Defendant in accordance with the verdict on September 27, 2103. (V6/1057-59; V79/2338)

Prior to the penalty phase, the State moved in limine to exclude references to subjects that were not relevant during the penalty phase. (V6/1092-93) Amongst the subjects were references to plea negotiations. (*Id.*) At the hearing, the trial court granted this portion and excluded references to plea negotiations. (V85/2468) Defendant stated "for the record" that he had offered to plead guilty to life without parole years ago. (*Id.*) The trial court stated it remembered that. (*Id.*) Defendant

claimed he did not think it was a plea negotiation. (V85/2468) However, the trial court ruled that it was, even if it was one sided. (V85/2459) Defendant responded that "it took 2 to tango." (*Id.*) Defendant made no proffer of any evidence he would have presented.

Moreover, in discussing the prior violent felony aggravator, Defendant asked the State whether it still intended on relying on the crimes committed on CC only and not also the crimes Defendant committed on another named victim. (V85/2465) After the State confirmed it still intended on doing so, Defendant made no further comment or objection about the State presenting his underlying convictions for the crimes on CC as proof of this aggravator. (*Id.*)

During its case, the State admitted by stipulation certified copies of the amended information and judgment for the attempted felony murder, lewd and lascivious battery of a minor 12 to 16 years old and aggravated battery causing great bodily harm on CC, and photos of CC that showed the bruising on her neck after Defendant's crimes. (V7/1153-54, 1155-58, 1159-64; V85/2514-16) When asked by the trial court, Defendant affirmatively stated he had no objection to the evidence being admitted. (V85/2514) Further, the State presented victim impact testimony through the testimony of Ms. Reyes and Ms. Rodriquez.

(V85/2516-27, 2529-39) Moreover, Dr. Lew was recalled to provide further testimony about the suffering that Ms. Fernandez endured. (V85/2544-61)

In mitigation, Dr. Merry Haber a clinical psychologist testified that she had been retained in 2005 to evaluate Defendant and develop mitigation. (V86/2575-86) Her evaluation of Defendant was based on reviewing statements made by Defendant to his mitigation specialists, numerous police reports, statements from various family members and employers, a video of the area where Defendant was raised, the indictment, a list of Defendant's priors, a newspaper article, a letter Defendant had written a friend, a death penalty memo prepared by defense counsel and Dr. Quiroga's report. (V86/2586-90) Dr. Haber also interviewed Defendant on 5 occasions and administered the Minnesota Multiphasic Personality Inventory-II ("MMPI-II") twice, the Personality Assessment Inventory ("PAI") twice, the Millon Clinical Multiaxial Inventory III ("MCMI-III"), and the Beck Depression Inventory on him. (V86/2591-95)

Dr. Haber opined that Defendant's test results showed he consistently provided infrequent responses and exaggerated symptoms of hearing voices when he had been drinking but there was no evidence he was malingering. (V86/2596, 2628-29) The results from the first administration of the MMPI-II and PAI

showed that his character was not quite normal but did not show signs of severe mental illness. (V86/2627-28) The MCMI-III results suggested that Defendant had a severe mental disorder and showed he was defiant and an escape risk. (V86/2629) However, Defendant's jail records did not support the results. (V86/2629-30) As a result, Dr. Haber readministered the tests on Defendant, and the results produced a different profile, which were consistent with that of a normal inmate. (V86/2630-32) The results of the first Beck test showed he was depressed but the second test results showed he was not. (V86/2632-33)

Based on information learned, Dr. Haber opined that Defendant was under extreme emotional distress when he murdered Ms. Fernandez because she believed that, after Defendant's brother was deported, Defendant was periodically living on and off at different peoples' homes and was drinking a lot which caused him to become enraged and snap. (V86/2633-34) She believed that being a victim of poverty, having poor childhood nutrition, witnessing domestic abuse, being neglected and abandoned by his parents, being inadequately supervised by his grandmother, having substance abuse problems, lacking an education, lacking judgment, being angry and resentful with his father, improving his behavior while in jail and reuniting with his family were applicable nonstatutory mitigators. (V86/2635-

37) Dr. Haber diagnosed Defendant with a substance abuse disorder, adult antisocial behavior, and a personality disorder not otherwise specified with antisocial, narcissistic, and borderline personality traits. (V86/2638-42) She noted that whether he had a cognitive disorder that was not otherwise specified needed to be ruled out. (V86/2640)

During cross, the State elicited testimony that Dr. Haber provided different diagnoses of Defendant during two separate depositions that had occurred shortly after one another, on November 29, 2012, and December 5, 2012. (V86/2667-69, 2672) She stated that she had diagnosed Defendant with alcohol abuse rather than alcohol dependency because his jail records indicated there were no symptoms of withdrawal. (V86/2672-74) Dr. Haber admitted that none of his mental health experts diagnosed Defendant with having brain damage. (V86/2685-86) She conceded that her diagnosis and presentation of his history was based on Defendant's self report and other statements taken by third parties. (V86/2691, 2693)

Dr. Haber believed that Defendant chose convenient and easy victims and that women are easy victims but admitted there was no evidence supporting this theory. (V86/2679-80) She insisted that she knew all the facts of the murder because she had read all the police reports but subsequently admitted she had relied

on information about the crime that Defendant self reported. (V86/2680-81, 2701) Dr. Haber believed Defendant was drunk when he committed the murder but admitted there was no evidence supporting her belief. (V86/2681-83)

Dr. Brad Fisher a clinical psychologist testified that his main source of data in formulating his opinion came from Defendant's jail records from his 2003 incarceration and prior incarceration records. (V86/2711-28) Dr. Fisher testified that there was no suggestion of Defendant having disciplinary issues but admitted that there was documentation of Defendant being disciplined once in 2011. (V86/2727-28) However, he did not believe the report to be out of the ordinary because he did not consider it violent. (V86/2728-29) Dr. Fisher testified that he saw nothing to indicate Defendant would be a danger and he would continue to behave while imprisoned. (V86/2731-32, 2738-39)

On cross, Dr. Fisher admitted his opinion was based solely on the time Defendant was incarcerated and had not considered his background or criminal history, which he conceded should be part of an assessment of future dangerousness. (V86/2742-44, 2746-47, 2753, 2757-58)

Samuel Ramos, a volunteer prison chaplain, testified that he conducted religious services at Metro West almost every Saturday. (V87/2767-70) Defendant never discussed the crimes he

committed or personally expressed remorse to Ramos. (V87/2770) Ramos met Defendant, who was already involved in religious activities, about 8 or 9 years earlier. (V87/2771) Other inmates told Ramos that Defendant conducted religious services in his absence. (V87/2771-73)

Jorge Montero, a volunteer prison chaplain, testified that he turned to God after being imprisoned and conducted his religious sessions over the phone at the jail because he was not allowed to enter the jails for some time. (V87/2778-85) Gustavo Canales, a volunteer prison chaplain, testified that he met Defendant about six or seven years earlier when Defendant was becoming religious. (V87/2800-06) Defendant assisted with religious services and mentored other inmates. (V87/2806-07)

Bryan Ansley, an inmate, testified that he met Defendant after being incarcerated and deciding to join a Bible study group. (V87/2819-21) Ansley considered Defendant to be his religious advisor and believed Defendant had helped him and other inmates turn their lives around. (V87/2822-28) While he believed Defendant was remorseful, Ansley admitted Defendant had never said so and only that Defendant stabbed his victim 52 times. (V87/2832, 2839-41) Ansley admitted that alcohol and drugs are easily available in jail. (V87/2844, 2849)

Dr. Michele Quiroga a neurophysiologist testified that her

evaluation of Defendant was based on reviewing records, interviewing Defendant and administering neuropsychological tests. (V87/2852-58) Her review of written materials included notes from mitigation specialists, Defendant's jail records, legal records, police reports and depositions of Defendant's family members. (V87/2857-58, 2872) In 2007, Dr. Quiroga gave Defendant the Test of Memory Malinger ("TOMM"), and believed the results showed that he was not malingering. (V87/2859) Defendant obtained an IQ score of 75, which was in the borderline range. (V87/2862) Dr. Quiroga opined that the overall profile showed mild to borderline impairment, consistent with his IQ score. (V87/2862) In 2011, Dr. Quiroga retested Defendant, and while his results improved, her diagnosis did not change since she attributed the improvements to alcohol and drug abstention. (V87/2874-76, 2878-79)

Dr. Quiroga diagnosed Defendant with a cognitive disorder not otherwise specified, a depressive disorder, and a substance abuse disorder. (V87/2873-74, 2879) Dr. Quiroga opined that extreme emotional distress and alcohol abuse were applicable statutory mitigators. (V87/2880) She also believed that having fetal alcohol affects, living in an unstable environment, being transient, suffering from malnutrition, observing and suffering from domestic violence, having alcoholic and absentee parents,

and having head injuries were applicable nonstatutory mitigators. (V87/2880-81)

On cross, the State elicited that in conducting her evaluation, Dr. Quiroga had not conducted personal interviews of Defendant's family but instead relied on unauthenticated reports from mitigation specialists. (V87/2899-2902) Dr. Quiroga insisted that she was familiar with Peruvian culture but then admitted she could not provide answers to specific questions about it. (V87/2904-07) She averred there was no indication that Defendant had brain damage. (V87/2907-11)

Pablo Guzman, Defendant's uncle, testified that Defendant's father had died after an accidental electrocution. (V89/2970) Defendant's father joined the Navy before Defendant was born and left his mother after Defendant was 7 years old. (V89/2972) Pablo saw Defendant's father hit his mother once or twice. (V89/2972-73) Pablo also saw Defendant's father hit Defendant with a whip when he misbehaved or got bad grades. (V89/2973-74)

After leaving his mother, Defendant's father married another woman, and Defendant and his brother were sent to live with their paternal grandmother. (V89/2974-75) At times, Defendant and his brother were shuffled from living with their grandmother and their mother. (V89/2975, 2996) Defendant's father used to visit his grandmother's house to give her money

and disciplined Defendant when he misbehaved or was doing poorly in school. (V89/2975-76, 2990-91) Defendant was angry at his father for leaving and showed signs of rebellion and violence towards his father. (V89/2976-77) Defendant started drinking when he was 15 or 16 because Pablo believed he felt rejected by his father and stepmother. (V89/2977-78)

Defendant moved with Pablo to Argentina. (V89/2981-82) During that time, Defendant drank a lot and would cut himself when he was drunk. (V89/2982-83) Pablo tried convincing Defendant to stop drinking but Defendant would not listen. (V89/2982) When Pablo returned to Peru, Defendant stayed in Argentina until being deported back to Peru. (V89/2983)

About 5 years later, Defendant moved to California to see his father but his stepmother would not let Defendant live at their home so Defendant went to live with one of Pablo's brothers. (V89/2979-80, 2984) After Defendant continued to drink and become violent, he went and lived with Pablo. (V89/2984) Defendant worked at a warehouse for a few months but left after he continued to drink, misbehave and was arrested for a DUI. (V89/2980-81, 2984) Pablo would visit Defendant while incarcerated but he had not seen him in many years. (V89/2987)

Lucia Guzman, Defendant's aunt, testified that Defendant's father punished him with a whip when he misbehaved. (V89/3002,

3009-11) When Defendant's mother started drinking, Defendant went to live at his grandmother's home. (V89/3004) Lucia testified that Defendant had good relationships with women and had many girlfriends. (V89/3008, 3074) Lucia had not seen Defendant since 1998. (V89/3001, 3008)

Veronica Hinostroza, Defendant's cousin, testified that Defendant's father would punish Defendant when they did poorly in school. (V89/3031-32) Defendant was often drunk and would cut himself when drunk. (V89/3036) In California, Veronica worked with Defendant and was told by their employer that Defendant was a very good worker but was fired because of his drinking. (V89/3037) Before his arrest, Defendant was not religious, but afterward, he spoke to Veronica about God. (V89/3037-38) She had not seen Defendant in 12 years. (V89/3045)

Bridgette Billarv, Defendant's paternal aunt by marriage, testified that Defendant resented his father. (V89/3052-53, 3060) In Argentina, Defendant had a job and was always being complimented on his work but Defendant started to get drunk. (V89/3054-55, 3058-59) Bridgette believed that Defendant was deceived by his father after he went to California and his father and stepmother refused to let Defendant live with them. (V89/3056-58) Bridgette and Pablo tried to get Defendant help for his drinking but it was not enough. (V89/3059, 3061) While

incarcerated, Defendant corresponded with Bridgette about his religious beliefs but never about the murder. (V89/3062-63) Bridgette wanted to remain in contact with Defendant while incarcerated but admitted that she had not been in contact with him for 7 years. (V89/3064-65; 3069)

Deysi Montoya, Defendant's paternal cousin, testified that she had only seen Defendant drink once in Peru. (V89/3079-81) Deysi began communicating with Defendant after his arrest. (V89/3082) Deysi and Defendant only discussed his religious studies and God. (V89/3085-86)

Defendant introduced a recording that showed his hometown and his mother's current home. (V87/2923, 2926-29; V90/3114) Defendant also presented the following perpetuated familial testimonials: (S1/1-80)

Geraldine Ascencio-Gomez, Defendant's 20 year old daughter, testified that she never met Defendant and did not know that he was her father until she was 16. (S1/3-4) At 17, Geraldine decided to contact Defendant while incarcerated. (*Id.*) During their phone calls, Defendant talked about God and his religious teachings. (S1/4-5) Geraldine said that Defendant asked for forgiveness from her for not being around during her childhood. (S1/5) She wanted to remain in contact with Defendant. (S1/6-7)

Juan Carlos Guzman-Carranza, Defendant's brother, testified

that that he remembered their father being in the Navy while he and Defendant were growing up. (S1/11-12) Juan Carlos said that after their father left for another woman, he and Defendant went to live with their paternal grandmother for 9 or 10 years and their father would punish them. (S1/12-14) After moving to Miami, Defendant called and said he was abandoned by the family, so Juan Carlos sent him money to come live in Miami. (S1/19-20)

Lisa Juliana Huaminani-Apolinario, the mother of Defendant's son, testified that Defendant provided emotional help and support when she was pregnant. (S1/29) When she met Defendant, he was a hard worker and very responsible. (*Id.*) She wanted her son to form a relationship with Defendant while incarcerated but admitted she had not been in contact with Defendant for many years. (S/30-31)

Victor Julio Matos-Huanca, Defendant's uncle, lived with Defendant, his brother and mother at their grandmother's home. (S1/35-36) When Defendant returned to Peru, he continued to drink and was drunk on the weekends. (S1/36-37) Defendant told Victor that he was depressed about his father and Victor believed Defendant felt abandoned by his father. (S1/39) That day, he called Defendant and they talked about religion. (S1/40)

Vanessa Isabel Huanca-Carranza, Defendant's maternal stepsister, testified that Defendant was a loving brother.

(S/45-46) Defendant was supportive of his mother and would send her money. (S/47) Defendant called her and spoke about God while incarcerated. (*Id.*)

Carmen Juana-Raya, Defendant's maternal grandmother, testified that she said she felt sorry for Defendant and the family missed him. (S/54-55) She said that Defendant had been a hard worker, done well and had helped his mother. (S/55)

Fannie Isabel Carranza-Huanca, Defendant's mother, testified that after meeting his father, Fannie gave birth to Defendant at 16. (S1/59-63) Fannie lived with her sons in their paternal grandmother's home and said Defendant's father would be away for long periods of time. (S1/62-63) Defendant's father would discipline him for not paying attention. (S1/64) Fannie admitted that she started drinking after his father left for another woman. (S1/65) After his father left, they continued living at Defendant's grandmother's home and then they lived with Fannie's mother for 4 years. (S1/67-69) Defendant was 13 when Fannie moved to the area outside of the city. (S1/72-74)

Defendant then rested his case. (V90/3117) The State elected not to present any rebuttal evidence. (*Id.*)

During the charge conference, Defendant objected to instructing the jury that its recommendation did not need to be unanimous, which was overruled by the trial court. (V88/2934-35)

In discussing the prior violent felony aggravator, Defendant objected to an instruction on his aggravated battery conviction, claiming the State failed to provide evidence of his sentencing. (V88/2940) The State argued the amended information and judgment was sufficient. (V88/2941) The trial court overruled the objection and said it would give the instruction. (V88/2941-42)

In discussing nonstatutory mitigation, the trial court stated it would give the standard catchall instruction. (V88/12953-54) Defendant agreed. (V88/2954) However, after pondering about possibly listing specifics, Defendant asked to provide such a list. (*Id.*) The State objected, stating at most he could provide was a generalized grouping. (V88/2924-25) The trial court allowed Defendant to provide such a list because it could be useful in preparing a sentencing order, which Defendant later provided. (V8/1520-22; V88/2954-58; V90/3105)

In closing, the State summarized the mitigation presented by Defendant and related his personal history to experiences shared by others in discussing the weighing process. (V90/3124-26) It then discussed how it had proved the aggravators beyond a reasonable doubt. (V90/3130-34) In discussing how the State had proved HAC, it summarized the evidence and noted that it had shown the jury what a heinous, atrocious, or cruel murder looks like in real life through the photos taken of Ms. Fernandez and

her apartment after Defendant committed the tortuous crimes against her rather than presenting a witness who had looked in books and told them stuff that they had read to try and account for what happened. (V90/3135) Defendant made no objection.

In discussing the prior violent felony aggravator, the State noted that the amended information and judgment showed that Defendant had been previously convicted of attempted first degree murder, lewd and lascivious battery and aggravated battery on CC after he tried to kill CC, a child. (V90/3136) Defendant made no objection. After referring to testimony about Defendant being convicted for improper sex, the State explained that Defendant's conviction for lewd and lascivious battery, meaning without consent, was not about sex. (V90/3136-37) Defendant made no objection.

In discussing the remorse mitigator, the State noted that Defendant's remorse in this case is a mitigating circumstance that may reasonably indicate that the death penalty is not appropriate. (V90/3142) The State recounted that there had been no testimony about Defendant seeking personal forgiveness or expressing remorse, and reminded the jury that it needed to consider the evidence presented and not what the attorneys said during closings. (V90/3142-44) It then noted that Defendant had a conversation with fellow inmate Brian Ansley and there was no

recording where someone might have overheard the alleged conversation where Defendant told Ansley he committed the murder. (V90/3144) Defendant made no objection.

In addressing the testimony elicited from Defendant's mental health expert witnesses about being hired to find mitigation, the State explained that it had not offered its own psychological evidence because the State believed such evidence had no role in this case and mental health experts would not add to an understanding of mitigation. (V90/3147-54) Defendant made no objection. Moreover, Defendant made no objection to any of the State's comments in closing nor did Defendant move for a mistrial based upon any of the State's comments.

Defendant discussed that it was very important that the State had not called experts to rebut what his experts said because there was no one who said that his mental health experts were wrong. (V90/3168) In response to the remorse mitigator, Defendant recounted how the chaplains who testified said that the protocol of the clergy seems to be that past crimes are not discussed because their expression of past sins are to God. (V90/3184-88) He then commented that Brian Ansley testified that Defendant was remorseful and that Defendant told him about his crimes and he was remorseful. (V90/3188)

After considering the evidence, the jury rendered its

advisory sentence recommending that Defendant be sentenced to death by a vote of 7 to 5. (V8/1523; V90/3225)

During the *Spencer* hearing, Defendant gave a personal statement to the trial court in which he claimed that he was remorseful and that finding God had changed his life. (V93/3288-93) Defendant then indicated he wanted to make a proffer of the evidence supporting a jury pardon as addressed in his sentencing memo, which he then did. (V9/1534-1674; V93/3281-88) In doing so, Defendant requested that the trial court take judicial notice of his remorsefulness and that Defendant had said he wanted to plead guilty to life without parole 3 years ago but the State would not agree to plea negotiations. (V93/3286-87) He also noted that he presented "almost 30 or so nonstatutory mitigators" and "the statutory mitigator that was presented through Dr. Haber." (V93/3283)

The State sought to admit the 2012 transcript of CC's prior testimony about the crimes Defendant committed on her. (V93/3293) Defendant objected, claiming the State could only present evidence that could not be presented during the penalty phase. (V93/3295) In overruling the objection, the trial court noted that when it presided over that trial, Defendant and his current trial counsel had also been present. (V9-10/1679-1751; V93/3295-96) In confirming that the objection was limited to the

transcript, Defendant acknowledged that he had no objection to his underlying convictions for the crimes on CC being used to establish the prior violent felony aggravator. (V93/3295-96)

The State then made its argument, and filed its sentencing memo after the hearing. (V93/3296-3300; V11/1960-82) Defendant subsequently filed a sentencing memo response, which acknowledged that the prior violent felony aggravator was sufficiently proven by the amended information and judgment for the crimes on CC, presented the testimony of Dr. Haber in support of the statutory mitigator and made arguments about the nonstatutory mitigation as 4 generalized groupings. (V11/1983-2017) He made no argument about his willingness to plead guilty as mitigating evidence of his remorse nor did he offer the testimony of Dr. Quiroga in support of the statutory mitigator.

The trial court followed the jury's recommendation and sentenced Defendant to death. (V11/2071-80; V12/2146-47; V94/3316) In doing so, the trial court found that the State proved 4 aggravators beyond a reasonable doubt: HAC-extremely great weight; prior violent felony-great weight; committed while engaged in sexual battery-some weight; and victim was particularly vulnerable due to advanced age or disability-considerable weight. (V11/2071-80) It found no statutory aggravators, after having considered and rejected the extreme

mental or emotional disturbance mitigator. (*Id.*) It found 22 nonstatutory mitigators: Defendant has cognitive deficits-little weight; he has borderline intellectual functioning-minimal weight; he has mental impairments that impair his functioning-miniscule weight; he witnessed domestic abuse-slight weight; he was abused by his father-little weight; he had an alcoholic mother-slight weight; he was neglected by his mother and abandoned by his father-little weight; he was not allowed to live with his father-minor weight; he was angry with his father-little weight; he abused alcohol-slight weight; his personality disorder inferred with his ability to form relationships-little weight; he suffered from a number of mental problems-minor weight; he was uneducated-slight weight; his daughter wanted to have a relationship with him-little weight; he had a son whose mother wanted him to know him-minimal weight; he behaved well in jail-little weight; he posed no future danger in jail-slight weight; he was not using alcohol in jail-minor weight; he preached to other inmates-slight weight; he dedicated his life to God-slight weight; he expressed remorse-little weight; he was raised in poverty-miniscule weight; his mother wanted to have a relationship with him-little weight; family wanted to have a relationship with him-little weight; he has lasting emotional scars-slight weight. (*Id.*) It rejected mitigation claims that

his brain had not fully developed, he suffered from malnutrition, he had changed his life before he was arrested, and he would provide parental guidance to his children. (*Id.*)

Moreover, the trial court found that HAC and the prior violent felony aggravator each taken individually substantially outweighed all the mitigation. (*Id.*) This appeal follows.

SUMMARY OF THE ARGUMENT

The trial court did not abuse its discretion in denying the complained about motions for mistrial as there was no absolute necessity and any potential prejudice was alleviated by the curative instructions.

The trial court did not abuse its discretion in denying Defendant's belated motion for mistrial about the student hypothetical references. Defendant's other claims about the comments in guilty phase closing are unpreserved and meritless. The comments are proper and not constitute fundamental error.

The trial court properly excluded plea negotiation references as inadmissible evidence. Defendant's claim is also procedurally barred and refuted by the record. Defendant's claim regarding comments in penalty phase is unpreserved and meritless. The comments are proper and not fundamental error.

The trial court properly found the prior violent felony aggravator. Defendant's other claims are barred and

noncognizable. Defendant's sentence is proportionate.

The trial court did not abuse its discretion in the sentencing order because its findings are supported by competent, substantial evidence and comports with the requirements of *Campbell*.

Defendant's claim about applying *Strickland's* reasonable probability test is specious. This Court reviews unpreserved errors for fundamental error on direct appeal. The *Ring* claim is meritless. Defendant's cumulative error argument merits no relief because when viewed individually, the claims are unpreserved and meritless. Moreover, the evidence is sufficient to sustain Defendant's convictions.

ARGUMENT

I. DENIAL OF MISTRIALS

While testifying about taking DNA swabs in this case, Tech. Grayer stated, "I went with Detective Arostegui to Metro West jail." (V77/1835) In discussing the steps Det. Arostegui had taken in his investigation of this case, he mentioned he was informed of a possible DNA match on March 9, 2004. (V78/2150-51)

Defendant now claims that the trial court erred in refusing to grant the motions for mistrial and claims the suggestion of improper collateral crime evidence deprived him of a fair trial and a reliable sentencing procedure. (IB/20) However, the trial court properly denied the motions for mistrial as any potential prejudice was alleviated by the curative instructions.

As this Court has held, "a motion for mistrial is addressed to the sound discretion of the trial judge and '. . . should be done only in cases of absolute necessity.'" *Ferguson v. State*, 417 So. 2d 639, 641 (Fla. 1982) (quoting *Salvatore v. State*, 366 So. 2d 745, 750 (Fla. 1978)). A trial court's ruling on a motion for mistrial is subject to an abuse of discretion standard of review. *Braddy v. State*, 111 So. 3d 810, 837 (Fla. 2012). 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) (quotation omitted). "[A] motion for

mistrial is to be granted only when an error is so prejudicial as to vitiate the entire trial." *Fletcher v. State*, 168 So. 3d 186, 207 (Fla. 2015). Further, passing remarks about a defendant's prior imprisonment alleged to show the defendant's bad character "may be erroneously admitted yet not so prejudicial as to require reversal." *Ferguson*, 417 So. 2d at 642. This Court has recognized that where a trial court denied the defendant's motion for mistrial but instructed the jury to disregard the remark, "any alleged prejudice which may have resulted from a reference to prior incarceration was fully alleviated when the trial court gave the curative instruction." *Johnston v. State*, 497 So. 2d 863, 869 (Fla. 1986); *Ferguson*, 417 So. 2d at 642. Here, the trial court did not abuse its discretion in denying the motions for mistrial as there was no absolute necessity and the curative instructions alleviated any potential prejudice.

Defendant first complains that Tech. Grayer's use of the word jail in clarifying her testimony about where she had obtained Defendant's DNA profile in this case suggested that he may have been jailed on other charges. (IB/21) However, no mention was ever made of any crimes other than the ones Defendant committed in this case. Instead, Tech. Grayer testified about taking DNA swabs from Defendant in this case.

(V77/1834-35) Tech. Grayer stated, "I went with Detective Arostegui to Metro West jail." (V77/1835) Defendant objected, moved to strike her response and moved for a mistrial because the word jail had been used. (*Id.*) The trial court granted the motion to strike, denied the motion for mistrial and told the jury to disregard the last question and answer, adding "[w]here this incident occurred with regard to the DNA swab is of no concern to you, and it shouldn't be considered further by you." (V77/1835, 1839, 1841-42)

Here, there was no testimony that Defendant had been convicted or charged with any prior crimes. Instead, Tech. Grayer's use of the word "jail" was a brief, isolated, and inadvertent reference, the trial court promptly sustained the objection and gave a curative removing any alleged prejudice. *Fletcher*, 168 So. 3d at 207; *Ferguson*, 417 So 2d at 639.

After informing the jury to disregard the last question and answer, the trial court specifically instructed the jury that "[w]here this incident occurred with regard to the DNA swab is of no concern to you, and it shouldn't be considered further by you." (V77/1841-42) Here, this curative statement was sufficient to remove any possible impression in the minds of the jurors that Defendant may have been in prison for other crimes or charges. *Suggs v. State*, 644 So. 2d 64, 68 (Fla. 1994); *Snipes*

v. State, 733 So. 2d 1000, 1005 (Fla. 1999) (“[A] reasonable juror would know that [Defendant] had been in jail for at least some period of time prior to trial because he was charged with first-degree murder.”). Accordingly, in light of the curative instruction, the trial court properly denied the motion for mistrial. *Perez v. State*, 919 So. 2d 347, 364 (Fla. 2005). As such, this claim fails.

Defendant next complains that the reference made by Det. Arostegui in explaining the steps he had taken in his investigation that he was informed of a possible DNA match on March 9, 2004, had the “unmistakable effect” of telling the jury that Defendant’s DNA was already in a database of criminal offenders. (IB/22) At trial, Defendant first objected on hearsay grounds, and then in response to the court’s statement that it was similar to the “jail” issue, he asked the court to strike and asked for a curative. (V78/2150-51) He then moved for a mistrial asserting that the implication of the answer coupled with the prior reference to a jail was prejudicial. (V78/2153) The trial court granted his motion to strike and gave the requested curative, but denied the motion for mistrial. (V78/2150-53) It also instructed the jury to disregard the last response given by Det. Arostegui and informed the State to proceed by eliciting that Det. Arostegui decided to interview

Defendant based on information received, which the State did.
(V78/2157-58)

However, once again, there was no evidence that Defendant had been convicted or charged with any prior crimes nor was there any evidence that his DNA was in a database of criminal offenders. Instead, Det. Arostegui was testifying about the information received that led to his decision to interview Defendant. (V78/2150) The testimony did not implicate Defendant being involved in prior criminal activity but was "most likely be interpreted in context as referring to the facts of the crime that was being investigated." *Braddy*, 111 So. 3d at 837. Further, the response was an isolated, inadvertent and unfocused on comment in a 3-day trial and the trial court promptly instructed the jury to disregard the last response. *Fletcher*, 168 So. 3d at 207-08; *Perez*, 919 So. 2d at 364-65. Moreover, the trial court promptly sustained the objection and instructed the jury to disregard the last response, which alleviated any potential prejudice. *Johnston*, 497 So. 2d at 869. Accordingly, any alleged error was rendered harmless. *Perez*, 919 So. 2d at 364-65.

Given that any potential prejudice the prior reference made by Tech. Grayer and the answer given by Det. Arostegui may have created was alleviated by the curative instructions, the trial

court did not abuse its discretion in not finding the brief implication of this answer about a possible DNA match that predated the prior isolated reference to a jail, did not create an absolute necessity for a mistrial. *Fletcher*, 168 So. 3d at 207; *Perez*, 919 So. 2d at 364; *Suggs*, 644 So. 2d at 68.

Accordingly, Defendant's conviction should be affirmed.

II. COMMENTS IN GUILT PHASE CLOSING

Defendant next claims the State's improper comments deprived him of a trial by an impartial jury. (IB/23)

Defendant first claims that the State improperly shifted the burden when it "told [the] jurors that the defense needed to answer some definite questions." (V79/2270-71) He also asserts that the "[State's] challenge-questions (Why did Defendant Guzman apologize to Detective Arostegui?)" implicated Defendant's right to remain silent and his right not to testify. (V79/2071) Defendant's final complaint challenges the reference to the student hypothetical used by Defendant during voir dire in support of his allegation that the prosecutor improperly commented on Defendant's right to silence. (V79/2257-58) For the following reasons, relief should be denied.

First, Defendant did not object on the specified basis of which he now complains and move for a mistrial on that basis. (V79/2257-58, 2270-71) In order to preserve an issue regarding a

comment in closing, it is necessary for a defendant to object to the comment contemporaneously on the grounds asserted on appeal, obtain a ruling on the objection and simultaneously move for a mistrial on that specified basis. *Bell v. State*, 108 So. 3d 639, 650 (Fla. 2013). The first two comments were not objected to at trial and are clearly barred on appeal. *Wade v. State*, 41 So. 3d 857, 868 (Fla. 2010).

The student hypothetical comment presented by Defendant during voir dire is also barred. When the State referred back to the example, Defendant merely stated, "Objection, Your Honor: Reserve a motion" to which the trial court responded, "Okay." (V79/2257-58) No ruling was requested or basis for the objection suggested. Subsequently, after Defendant finished his closing and prior to the State's rebuttal, Defendant moved for a mistrial asserting that the reference was a comment on Defendant's failure to testify and present evidence and that it shifted the burden. (V79/2295-96) The trial court denied the motion finding that even though it had initially "thought that's where [the State] was going too," the comment turned out to be about contrasting the credibility of the two DNA experts that testified as opposed to trying to judge the credibility and believability of the State and Defense case. (V79/2296)

This Court has made it clear that a motion for mistrial at

the end of closing argument, absent a contemporaneous objection that puts the trial court on notice as to the nature of the objection, is insufficient to preserve this claim. *Nixon v. State*, 572 So. 2d 1336, 1340-41 (Fla. 1990); see also *Braddy*, 111 So. 3d at 855; *Norton v. State*, 709 So. 2d 87, 94 (Fla. 1997). Because Defendant did no more than reserve an objection and then wait until not only the end of the State's closing but also his own to ask the court for relief, this claim was not properly preserved and should be denied as procedurally barred.

Furthermore, no error has been shown. Regarding the student hypothetical reference, the record supports the trial court's ruling that the comment was proper in the context of this case. (V79/2296-97) In its closing, prior to discussing the DNA evidence that it had presented, the State noted that Defendant had discussed credibility using his student hypothetical during voir dire. (V79/2257-58) However, the State argued that there was no credibility issue in this case because the DNA evidence was consistent and without conflict. (V79/2258) At this point, Defendant objected, without providing any grounds, and reserved a motion. (*Id.*) The State continued by responding to Defendant's opening statement about the State needing to deliver on its promise to present evidence of Defendant's guilt, and averred that under the reasonable doubt standard, there was no doubt

that Defendant's DNA was inside Ms. Fernandez's apartment. (V77/2259-60) In discrediting the unproven theories presented by Defendant about the unreliability of DNA analysis, the State summarized the testimony of the crime scene technicians and DNA experts which proved that the DNA analysis was reliable and that there was no contamination in this case. (V79/2259-71)

In his closing, Defendant stated he was glad that the State embraced the idea of having to pay on the State's promise to present evidence of Defendant's guilt and that if the State left any unanswered questions, the answer was that Defendant was not guilty. (V79/2275) He attempted to discredit the reliability of the DNA evidence being that human beings had gathered the evidence. (V79/2284) Defendant claimed that there were inconsistencies in the testimony provided by the State's experts and attempted to discredit the DNA analysis. (V79/2284-88) Defendant again referenced the student hypothetical to argue that Defendant had a right to silence and that the State had the burden of proof. (V79/2292-93) In remarking on the credibility of experts, Defendant asked what evidence was presented by the testimony of the State's experts and how reliable was the DNA evidence in this case coming from an expert. (V79/2293)

As the trial court noted in denying the belated motion for mistrial, the reference was a proper comment about a perceived

inconsistency in the testimony of its DNA experts and was not about Defendant's credibility. (V79/2296-97) "The proper exercise of closing argument is to review the evidence and to explicate those inferences which may be reasonably drawn from the evidence." *Wade*, 41 So. 3d at 868 (quotation omitted). Further, this Court has recognized that comments made in fair reply to a defense argument are proper. *Id.* at 869.

Here, the jury was aware that Defendant's theory of defense was that there was no reasonable explanation for the presence of his DNA being discovered in Ms. Fernandez's apartment but that the State's DNA evidence was unreliable and its two DNA experts were incredible. (V75/1633-35; V79/2284-88, 2293) Defendant also attempted to elicit testimony from the State's two DNA experts about possible contamination of the DNA in this case. (V77/1976-86; V78/2048-50) Further, in his closing, Defendant again referenced the student hypothetical to argue that Defendant had a right to silence and that the State had the burden of proof. (V79/2292-93) As such, the trial court did not abuse its discretion in not finding the isolated reference to the student hypothetical about the credibility of the State's DNA experts did not create an absolute necessity for a new trial. *Salazar v. State*, 991 So. 2d 364, 371-72 (Fla. 2008). Accordingly, no relief is warranted.

Moreover, the other comments Defendant complains about on appeal are unpreserved for review because Defendant failed to object or move for a mistrial. *Wade*, 41 So. 3d at 868. When an issue regarding a comment is not preserved for review, this Court will only consider the issue if the comment constitutes fundamental error. *Id.* In demonstrating fundamental error, a defendant has a high burden of showing that the error was so prejudicial that it "reaches down into the validity of the trial itself such that a guilty verdict or death recommendation could not have been obtained without the alleged error." *Id.*

Defendant complains that the prosecutor's posing numerous "challenge questions" that told jurors "the defense had to answer some definite questions" constitutes burden shifting. (V79/2270-71) However, when viewed in context, the State posed hypothetical questions in response to Defendant's theory of defense that the DNA evidence was unreliable and was a fair comment on the evidence adduced at trial. *Wade*, 41 So. 3d at 868-69. In response to Defendant's comment during his opening that the DNA evidence would not prove his identity as the murderer because the DNA tests were conducted by imperfect human beings 4 years after the murder, the State replied by asking "Mr. White, on the first theory, imperfect human beings, what evidence is there, other than the possibility that mistakes were

made in this case since they had been in trial." (V75/1634-35; V79/2270) Contrary to the claim that the State expressly told the jury Defendant had a duty to meet a burden, the State simply pointed out there was no evidence supporting the theories promulgated by Defendant. Just as in *Bell*, 108 So. 3d at 648-49, there was no suggestion that that evidence could have only come from Defendant or even his counsel. Because this was an invited reply to the theory presented by Defendant, it was a proper comment and not fundamental error. *Id.*

In the next paragraph, Defendant takes issue with the questions regarding contamination. "Mr. White, what evidence in this case is there of contamination?" and "Mr. White did not take out any of this evidence and show you, ah, this is what happened, this is where the contamination took place, because there's no contamination in this case." (V79/2270) Again, as this is an invited reply to Defendant's argument about the DNA analysis being unreliable and the alleged theory about contamination, that did not suggest where this evidence had to come from, there is no error. *Bell*, 108 So. 3d at 648-49; *Barwick v. State*, 660 So. 2d 685, 694 (Fla. 1995).

The final unpreserved comment appears to be the last of the "prosecutor's challenge-questions (Why did Defendant Guzman apologize to Detective Arostegui?)." (V79/2071) In context, it

is clear that this is not a comment on the failure to testify nor put did it place the burden of proof on Defendant but a proper comment on the evidence adduced at trial. *Wade*, 41 So. 3d at 868-69. Further, as this Court has recognized, the defendant must remain silent for the State to comment on such silence. *Hudson v. State*, 992 So. 2d 96, 110-11 (Fla. 2008). As such, where, as here, a defendant has made a statement, the State may comment on the content of the statement. *Id.* Also, Defendant affirmatively acknowledged the relevancy of admitting his apologies through Det. Arostegui, elicited possible reasons for apologizing to Det. Arostegui on cross and posited alternative reasons for his apologies during his closing. (V78/2155, 2177-80; V79/2289-92) Given these circumstances, this was not an improper comment on Defendant's right to silence but rather a fair reply to a defense argument and merely summarized the evidence introduced at trial, it was proper comment and not fundamental error. *Braddy*, 111 So. 3d at 840.

To the extent Defendant attempts to mischaracterize the State's closing by quoting Det. Arostegui's testimony elicited by the State on direct and not reference the comments actually made by the State during closing, it must be noted that the State did not comment on Defendant's invocation of his right not to answer questions in its closing. (V78/2172-73; IB/28)

Further, while Defendant attempts to use this heading on appeal to improperly allege that Det. Arostegui's testimony was "tantamount to a confession," this claim is unpreserved and meritless. (IB/28) At trial, Det. Arostegui stated that, over the last 45 minutes, Defendant continued saying he was sorry and requested bathroom breaks, which were then followed by Defendant's request for an attorney and immediate termination of the interview. (V78/2172-73) However, as Defendant failed to object or move for a mistrial, this claim is barred for review. *Hitchcock v. State*, 578 So. 2d 811, 814-15 (Fla. 1991).

Even if this was preserved, Defendant would be entitled to no relief. At trial, Defendant acknowledged his understanding that Det. Arostegui was being called to testify that, after Defendant was shown a photo of Ms. Fernandez and asked a series of questions, he denied knowing her or having done anything wrong. (V78/2155) Additionally, on cross, Defendant elicited testimony from Det. Arostegui that Defendant agreed to speak with Det. Arostegui after knowing his rights and being fully advised that he could reinvoke them at any time, that Det. Arostegui repeatedly accused Defendant of committing the murder and that his nervous behaviors could have been in response to the repeated accusations. (V78/2177-80) Defendant also elicited that he could have chosen to terminate the interview because he

was tired of being accused. (V78/2184) Moreover, during his closing, Defendant addressed the testimony by Det. Arostegui and posited that his repeated apologies could have been offered because Defendant was not telling Det. Arostegui what he wanted to hear just as reasonably as Defendant apologizing for committing the murder. (V79/2289-91) As such, Defendant's attempt to allege error fails. *Rodriguez v. State*, 753 So. 2d 29, 36-40 (Fla. 2000); *Hitchcock*, 578 So. 2d at 813-14.

Defendant next challenges prosecutorial comments on the basis that "the comments intended to and do inject emotion and fear into the jury's deliberations, the prosecutor has ventured outside the scope of proper argument." (IB/31) He first challenges the statement made to the "members of the jury, horrific, an atrocity, gruesome, ghastly and grizzly. What word would you use to describe this indescribable and unthinkable murder?" (V78/2251) He next complains that the State criticized defense counsel for not sufficiently using emotional language in commenting "[s]o when defense counsel tells you in his opening that this is a tragedy, of course it's a tragedy, but he undersells it a bit. This is the most vicious of vicious murders that happened about 12 years ago." (V78/2257) Defendant finally alleges that the State named Defendant as a personification of evil in noting "[a]nd Lola unwittingly opened that door to

death, destruction, torture, and pain, and his name is Victor Guzman, and he knows it." (V78/2273) However, Defendant failed to preserve these comments for appeal by an objection at trial. *Wade*, 41 So. 3d 869-70. Because Defendant failed to show how these unpreserved comments constitute fundamental error, no relief is warranted. *Id.* at 871.

Defendant first claims that the State violated the rule against inflammatory arguments in drawing attention to the evidence adduced during the murder trial in saying "members of the jury, horrific, an atrocity, gruesome, ghastly and grizzly. What word would you use to describe this indescribable and unthinkable murder?" (V78/2251) However, this was not an inflammatory argument because the State characterized the manner of the killing and did not refer to Defendant as such. *Breedlove v. State*, 413 So. 2d 1, 8 n.10 (1982). As the State described the murder based on evidence introduced at trial which was relevant to the circumstances of the murder, the comment was proper and not fundamental error. *Gonzalez v. State*, 136 So. 3d 1125, 1152-53 (Fla. 2014).

Defendant next argues that the State criticized defense counsel for not sufficiently using emotional language when it commented "[s]o when defense counsel tells you in his opening that this is a tragedy, of course it's a tragedy, but he

undersells it a bit. This is the most vicious of vicious murders that happened about 12 years ago.” (V79/2257) Here, however, the State did not comment on the personal integrity of Defendant’s counsel or on the manner Defendant’s counsel had conducted the defense. Rather, the State’s comment was made in direct response to Defendant’s opening statement. *Merck v. State*, 975 So. 2d 1054, 1063 (Fla. 2007). Moreover, the comment did not suggest that defense counsel was misrepresenting the evidence but instead was a proper inference drawn from the evidence adduced at trial and did not rise to the level of fundamental error. *Chandler v. State*, 702 So. 2d 186, 191 n.5 (Fla. 1997).

Finally, Defendant asserts that the State named Defendant as a personification of evil when it commented that “[a]nd Lola unwittingly opened that door to death, destruction, torture, and pain, and his name is Victor Guzman, and he knows it.” (V77/2273) However, here, the comment did not personify Defendant as evil, but was a proper inference of the evidence regarding the murder that was supported by the evidence adduced at trial. *Poole v. State*, 151 So. 3d 402, 416 (Fla. 2014); *Breedlove*, 413 So. 2d at 8 n.10; *Davis v. State*, 698 So. 2d 1182, 1190-91 (Fla. 1997). As such, no relief is warranted.

Defendant has not carried his heavy burden of showing that any impropriety in the comments, either individually or

cumulatively, deprived him of a fair trial. *Wade*, 41 So. 3d at 868. Accordingly, Defendant's conviction should be upheld.

III. PLEA NEGOTIATION REFERENCES WERE PROPERLY EXCLUDED

Defendant next alleges that the trial court erred in excluding evidence of his willingness to plead guilty for the crime during the penalty phase. (IB/32) This claim is not only procedurally barred but is also refuted by the record. While it is true that the trial court granted a motion in limine that excluded references to plea negotiations in the penalty phase, without objection by Defendant, the record also shows that Defendant did not attempt to present evidence of Defendant's offer to plead guilty in exchange for a life sentence before the sentencing jury. However, Defendant did argue the plea offer in support of a claim of remorse, which was found in mitigation, during the *Spencer*¹ hearing. No relief is warranted.

Over the course of several pretrial hearings, the record reflects that the State and Defendant had been discussing the possibility of entering into a plea negotiation. (V51/227-28; V52/235-38; V53/242-43; V55/221; V56/255-56) During a 2010 pretrial hearing, the trial court indicated the case would be given a 30-day reset in the hope that plea efforts would be resolved by then. (V51/227) In response, Defendant announced

¹*Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

that "as it stands now [Defendant] is on board as far as the - if there is a plea offer as we had discussed, that he would be willing to accept it at that time," and have the sentencing on the date of the plea colloquy. (V51/227-28) At the following hearing, the State notified the trial court that the parties had previously had conversations with Defendant and that the parties were hopeful that this matter would be resolved but Defendant needed to prepare a mitigation packet in order to justify a waiver of the death penalty based on Defendant's priors. (V52/235) After Defendant stated that he had provided the State with the packet, the State noted that due to information therein, issues were raised by its office and it needed to get additional information about Defendant since he's been arrested. (V56/255) Following an off the record discussion, there is no mention of plea negotiations. (V56/255-56)

Thereafter, prior to the penalty phase, the State moved in limine to exclude references to subjects that were not relevant during the penalty phase. (V6/1092-93) Amongst the subjects were references to plea negotiations. (*Id.*) At the hearing, the trial court granted this portion of the motion and excluded references to plea negotiations. (V85/2468) Defendant noted "for the record" that he had offered to plead guilty to life without parole years ago. (*Id.*) The trial court stated it remembered

that. (*Id.*) Defendant claimed he did not think it was a plea negotiation. (*Id.*) However, the trial court ruled that it was, even if was one sided. (V85/2459) Defendant merely responded that "it took two to tango." (V85/2469)

As this claim is barred, Defendant is entitled to no relief. Defendant did not object to the granting of the motion in limine excluding plea negotiations or assert that he had planned to present such evidence as a mitigating factor. This Court has held that "it is incumbent upon the [defendant] to raise a timely objection and thereby allow the trial court to specifically rule on the issue." *Lucas v. State*, 376 So. 2d 1149, 1151-52 (Fla. 1979). Here, as in *Lucas*, the record reflects that while Defendant simply noted that his offer to plead guilty was not a plea negotiation, he "did not interpose an objection; but rather, he deferred to the trial court's statement of the applicable law." *Id.* at 1152. Because this Court "will not indulge in the presumption that the trial judge would have made an erroneous ruling had an objection been made and authorities cited contrary to his understanding of the law[,] " this claim was waived. *Id.*; *Booker v. State*, 969 So. 2d 186, 195-95 (Fla. 2007) ("When a defendant fails to pursue an issue during proceedings before the trial court, and then attempts to present that issue on appeal, this Court deems the

claim to have been abandoned or waived."). Moreover, "[t]his claim has not been preserved for appellate review because [Defendant] did not raise the now-presented ground in the trial court." *Hitchcock v. State*, 578 So. 2d 685, 692 (Fla. 1990). No relief is warranted.

Moreover, Defendant made no proffer of any evidence he would have presented. "Generally, a ruling on the admission or exclusion of evidence is reviewed for an abuse of discretion." *Baker v. State*, 71 So. 3d 802, 816 (Fla. 2011). However, "[i]n order to preserve a claim based on the trial court's refusal to admit evidence, the party seeking to admit the evidence must proffer the contents of the excluded evidence to the trial court." *Id.* (quotation omitted). Accordingly, even assuming Defendant's willingness to plead guilty had any mitigating value, his failure to proffer any admissible evidence that he would have presented renders the claim unpreserved. *Id.* As such, the trial court should be affirmed.

Even if this claim was preserved for review, Defendant is still entitled to no relief. The trial court properly granted the motion in limine to exclude evidence of plea negotiations as they are statutorily inadmissible and statements made in furtherance thereof are not mitigating in nature.

This Court "requires that a sentencer not be precluded from

considering as a *mitigating factor*, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Hitchcock*, 578 So. 2d at 689 (quotation omitted). However, "[m]itigating circumstances must, in some way, ameliorate the enormity of the defendant's guilt." *Lucas*, 568 So. 2d at 23 (quotation omitted). Thus, no limits are imposed on "the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record or the circumstances of the offense." *Hitchcock*, 578 So. 2d at 689 (quotation omitted). Given these principles, this Court has held that statements made in furtherance of plea negotiations are properly excluded as mitigating evidence because such statements are irrelevant as relating to the defendant's character, prior record or to the circumstances of the crime. *Donaldson v. State*, 722 So. 2d 177, 188 (Fla. 1998); *Hitchcock*, 578 So. 2d at 690-91. Here, the statement made by Defendant, that he was willing to plead guilty if the State would waive the death penalty, does not relate to Defendant's character, prior record or the circumstances of the offense, but instead merely reflects an attempt to save his own life in the face of overwhelming evidence of guilt.

Further, Defendant's statement falls within the prohibition

of the admission of evidence of an offer to plead guilty. § 90.401, Florida Statutes, (2010); Fla. R. Crim. P. 3.172(i). Also, the exclusion of such evidence is not dependent on whether the State was the initiator. *Calabro v. State*, 995 So. 2d 307, 317-18 (Fla. 2008) (“[A] unilateral offer by the defendant to plead guilty in exchange for some governmental concession would not be admissible.”). Moreover, “while no magic words [are] necessary, virtually all statements made by a defendant that are preceded by an explicit request for plea negotiations should be excluded from evidence.” *Id.* at 317. As such, the court did not abuse its discretion in excluding evidence of statements made in furtherance of plea negotiations during the penalty phase.

More importantly, despite the trial court’s granting the motion in limine, the fact is that Defendant, who never objected or sought to introduce this evidence before the jury, was allowed to present Defendant’s offer to plead as mitigation. (V93/3286-87) He argued that it supported a finding of remorse; not that it was mitigation in itself as he does now, but, the fact that Defendant attempted to negotiate his way out of facing the death penalty by offering to plead guilty was presented during the *Spencer* hearing as evidence of remorse. (V93/3287) And, the trial court found that Defendant was remorseful based on evidence presented at the *Spencer* hearing. (V11/2071-80)

Since Defendant did not seek to introduce evidence of his willingness to plead guilty before the jury and the evidence was considered in mitigation, Defendant can hardly assert error now on that basis. *Davis v. State*, 2 So. 3d 952, 962-63 (Fla. 2008). Further, the record suggests that this was the strategy intended by Defendant's counsel, which may explain why there was no request to present the evidence before the jury. During the *Spencer* hearing, while reminding the trial court that Defendant had made an offer to plead guilty, Defendant's counsel clearly recognized its weaknesses as evidence of mitigation and how presentation to a jury would open the door to the State's rebuttal argument:

Victor stood up in this jury box, this very jury box one day without talking to Mr. White and I and he addressed the Court, and he said, I want to plead guilty to life with no parole. Well, you could look at it like he wanted to do that to save his life, or now knowing something about Victor Guzman, you can probably believe that he wanted to do the right thing and accept his responsibility, because the Court knows that a guilty plea in a case is the first step toward accepting responsible for what you did in the past.

The State's position is that maybe the formula for someone who wants to express remorse is to plead guilty, forego the innocence/guilt phase and go into a penalty phase, but I don't think the intention of Florida law is, you know, is that formula, is that protocol. He wanted to do the right thing in his mind. He just wasn't permitted to do it, because the State would not agree to plea negotiations to resolve this case.

(V93/3287)² Thus, counsel recognized Defendant's offer to plead guilty was not without motivations other than remorse that would be subject to rebuttal.

Finally, even if there was some error in granting the motion in limine, any error would be harmless beyond a reasonable doubt. There is no likelihood that the exclusion of Defendant's willingness to plead guilty before the jury alone would have resulted in a different sentence in light of the weighty aggravators in this case and the fact that the trial court heard and considered the evidence. *Ault v. State*, 53 So. 3d 175, 187 (Fla. 2010). Here, this one nonstatutory mitigator, coupled with other mitigation in the record found to have existed, would not outweigh the four weighty aggravators found to exist in this case, two of which are the most weighty. *Singleton v. State*, 783 So. 2d 970, 977 (Fla. 2001).

In following the jury's sentencing recommendation and sentencing Defendant to death, the trial court found that the State proved the following four aggravators beyond a reasonable doubt: HAC-extremely great weight; prior violent felony-great weight; committed while engaged in sexual battery-some weight; and victim was particularly vulnerable due to advanced age or

² After this argument, Defendant gave a personal statement to the trial court in which he claimed that he was remorseful and that finding God had changed his life. (V93/3288-93)

disability-considerable weight. (V11/2071-80) It found no statutory aggravators, after having considered and rejected the extreme mental or emotional disturbance mitigator. (*Id.*) It rejected nonstatutory mitigation claims that his brain had not fully developed, he suffered from malnutrition, he had changed his life before he was arrested, and he would provide parental guidance to his children. (*Id.*) It found 22 nonstatutory mitigators all of which were assigned little to miniscule weight. (*Id.*) Moreover, the trial court found that HAC and the prior violent felony aggravator each taken individually outweighed all the mitigation. (*Id.*) In the context of this case, there is no reasonable possibility that error, if any, contributed to the sentence. *Ault*, 53 So. 3d at 195. Based on the foregoing, Defendant's sentence should be affirmed.³

IV. COMMENTS IN PENALTY PHASE CLOSING

Defendant next claims that the State made improper comments during its penalty phase closing. (IB/35)

Defendant first claims that the State improperly "told jurors that the expert testimony of Drs. Haber and Quiroga had no role in this case" in arguing:

³ Given these 4 strong aggravators and the weak mitigation, Defendant's death sentence is proportionate. *Brant v. State*, 21 So. 3d 1276, 1288 (Fla. 2009); *Singleton v. State*, 783 So. 2d 970, 972-73 (Fla. 2001).

State has not offered psychological evidence in this case. State doesn't believe its got a role in this case. It's not going to explain why he murdered Lola. It's not going to explain that this was not heinous, atrocious, and cruel. Use your common sense. These experts don't add to your understanding of the case.

(V90/3154) He also asserts that the State improperly "characterized the aggravation" which "only served to denigrate the psychological mitigation offered on" Defendant's behalf:

This is what heinous, atrocious, and cruel looks like in real life. Not in the mind of someone who's got their head buried in some kind of book and tells you some stuff that they've read and try to account for what happened. This is real and this is what heinous, atrocious, and cruel looks like.

(V90/3136) For the following reasons, relief should be denied.

First, these comments are not preserved for appeal because Defendant failed to object or move for a mistrial. *Bell*, 108 So. 3d at 650; *Wade*, 41 So. 3d at 868. When an issue regarding a comment is not preserved for review, this Court will only consider the issue if the comment constitutes fundamental error. *Wade*, 41 So. 3d at 868. In demonstrating fundamental error, a defendant has a high burden of showing that the error was so prejudicial that it "reaches down into the validity of the trial itself such that a guilty verdict or death recommendation could not have been obtained without the alleged error." *Id.* Because Defendant failed to show how these comments constitute fundamental error, no relief is warranted.

In closing, the State summarized the mitigation presented by Defendant and related his personal history to experiences shared by others in discussing the weighing process. (V90/3124-26) It then discussed how it had proved the aggravators beyond a reasonable doubt. (V90/3130-34) In discussing how HAC was proved beyond a reasonable doubt, the State summarized the evidence and noted that it had shown the jury what a heinous, atrocious, or cruel murder looks like in real life through the photos taken of Ms. Fernandez and her apartment after Defendant committed the tortuous crimes against her rather than presenting a witness who had looked in books and told them stuff that they had read to try and account for what happened. (V90/3135) Defendant made no objection.

After recounting that Defendant's mental health expert witnesses testified that they were hired and paid to find mitigation, the State explained that it had not offered its own psychological evidence because the State believed such evidence had no role in this case and mental health experts would not add to an understanding of the mitigation, which was then followed by the State commenting that any weight assigned to the mitigators would be little when considering the aggravators. (V90/3153-54) Defendant made no objection.

When viewed in context, the comment referring to the reason

for the State not presenting its own mental health expert was a proper response to the presentation of Defendant's mental health mitigation and relates to the sufficiency of the HAC aggravator. *Merck*, 975 So. 2d at 1062-63. "The proper exercise of closing argument is to review the evidence and to explicate those inferences which may be reasonably drawn from the evidence." *Mann v. State*, 603 So. 2d 1141, 1143 (Fla. 1992) (quotation omitted). As such, this Court has recognized there is no error when "arguments are made in support of the State's position that the HAC aggravator was established by the evidence and supported a recommendation of death." *Merck*, 975 So. 2d at 1063-64. Moreover, this Court has recognized that where it is clear from the record that the State made statements to negate a mental health expert's conclusion that the statutory mental mitigators applied to the defendant, the comments were proper. *Mann*, 603 So. 2d at 1143. Given these principles, the comment was a proper comment made to negate the statutory mental health mitigator and a reasonable inference from the evidence adduced at trial to support the HAC aggravator, and not fundamental error. *Id.*

Defendant next insists that the unpreserved comment contrasted the aggravation, which was "real," with "some stuff" the doctors had fished out of some kind of book," in support of his allegation that this comment only served to denigrate the

psychological mitigation offered on Defendant's behalf. "While the State may not improperly denigrate or attempt to invalidate mitigation evidence by characterizing it as an excuse, flimsy, or phantom, the State may comment on the validity of the mitigation evidence and assert that it should be afforded less weight." *Fletcher*, 168 So. 3d at 214. In doing so, the State may comment on the evidence produced and rebut the closing argument of Defendant, as long as such comments are a fair representation of what was presented at trial. *Id.* Further, "[m]erely arguing a conclusion that can be drawn from the evidence is permissible fair comment." *Griffin v. State*, 866 So. 2d 1, 16 (Fla. 2003). Given these circumstances, it cannot be said that the jury would not have sentenced Defendant to death had the State not mentioned the validity of the mental health mitigation. This is particularly true, given the strength of the aggravation and weakness of the mitigation. As such, no relief is warranted.

Defendant next alleges that the State "misstated the evidence" to dispute the remorse mitigator. (IB/37) He complains that the "there are no jailhouse recordings" and detainees "cannot be overheard" has no basis in the record:

He had a conversation with the convict Ansley, and there's no jailhouse recordings where someone might have overhear him, he told him he committed this murder. He didn't express an iota of remorse to the convict, Ansley, and there was nothing preventing him from doing it.

(V90/3145) In closing, the State agreed that Defendant's apologies showed some remorse but asked whether the evidence of remorse was entitled to the same great weight of the four aggravators. (V90/3143) The State recounted that there had been no testimony about Defendant seeking personal forgiveness or expressing remorse, and reminded the jury that it needed to consider the evidence presented and not what the attorneys said during closings. (V90/3142-44) It then noted that the jury heard Defendant had a conversation with fellow inmate Brian Ansley and there was no recording where someone might overhear when Defendant told Ansley he committed this murder, but that Defendant did not express an iota of remorse to the convict, Ansley, and there was nothing preventing him doing it, which was followed by the State noting that this should be considered when assessing a weight to this little bit of remorse. (V90/3144-45) Again, Defendant did not object on the specified basis of which he now complains nor did he move for a mistrial based on the comments he now challenges. *Bell*, 108 So. 3d at 650.

This comment was in fair reply to Defendant's claim that the mitigating circumstances supported his claim that he was remorseful. *Diaz v. State*, 132 So. 3d 93, 116 (Fla. 2013). Contrary to Defendant's claim that this misstated the evidence, the comment was a reasonable inference on the evidence adduced

at trial in fair reply to Defendant's mitigation presentation. *Bell*, 108 So. 3d at 648-49. Given these circumstances, it cannot be said that the jury would not have sentenced Defendant to death had the State not mentioned that Defendant had not confessed his crimes or remorse to his fellow inmate Brian Ansley. *Chandler*, 702 So. 2d at 191 n.5. No relief is warranted.

Moreover, while Defendant insists that the evidence shows that he had expressed remorse to Ansley, Defendant ignores that the two record citations refute this claim. (V87/2382, 2840-31) In fact, the record clearly shows that Ansley did not testify that Defendant had expressed personal remorse to him. (V87/2382-31) Rather, Ansley testified that, while he believed Defendant was remorseful, Defendant had never said so. (V87/2832, 2839-41)

Defendant finally asserts that the State improperly commented on his prior violent felony convictions in stating that Defendant "tried to kill CC, a child" and that "he was convicted of "lewd and lascivious battery, meaning without consent." (IB/39; V90/3137) However, this claim fails as well.

During its closing, the State noted that the amended information and judgment showed that Defendant had been previously convicted of attempted first degree murder, lewd and lascivious battery and aggravated battery on CC after he tried to kill CC, a child. (V90/3136) Defendant made no objection.

After referring to the testimony about Defendant being convicted for improper sex, the State explained that Defendant's conviction for lewd and lascivious battery, meaning without consent, was not about sex. (V90/3136-37) Again, these comments are unpreserved for review because Defendant failed to object or move for a mistrial. *Wade*, 41 So. 3d at 868.

Moreover, these were proper comments based on facts adduced at trial in support of the prior violent felony aggravator. *Franqui v. State*, 59 So. 3d 82, 97 (Fla. 2011). At trial, the State admitted by stipulation certified copies of the amended information and judgment for showing Defendant had been convicted for attempted felony murder, lewd and lascivious battery on a minor between 12 to 16 year old and aggravated battery causing great bodily injury on CC, as set forth in sections 782.05(1), 800.04, 784.045(1)(a)1, Florida Statutes, and included factual allegations for which the crimes were committed, along with photos of CC depicting the bruising around her neck after Defendant's crimes. (V7/1153-54, 1155-58, 1159-64; V85/2514-16) Because Defendant's "[s]tate of mind is immaterial for the felony is said to supply the intent[,]" the comment that he "tried to kill C.C., a child," was a proper comment on the evidence of his attempted felony murder conviction, and not fundamental error. *Fleming v. State*, 374 So.

2d 954, 967 n.1 (Fla. 1979); see also *Salazar*, 991 So. 2d at 377. Moreover, being that consent is not a defense to Defendant's lewd and lascivious battery on a minor conviction, the comment that "he was convicted of lewd and lascivious battery, meaning without consent," was a reasonable conclusion of the evidence adduced at trial. *Davis*, 698 So. 2d at 1190-91. Thus, these were proper comments and not fundamental error. *Id.*

Defendant has not carried his heavy burden of showing that any impropriety in the comments, either individually or cumulatively, deprived him of a fair trial. *Wade*, 41 So. 3d at 871. Accordingly, Defendant's sentence should be upheld.

V. THE PRIOR VIOLENT FELONY AGGRAVATOR IS VALID

Defendant next claims that the prior violent felony aggravator is invalid because the underlying convictions are invalid. (IB/40) As this claim basis is not properly before this Court and any claim about this aggravator is barred, noncognizable and meritless, no relief is warranted.

As this claim is based on evidence outside of the appellate record, Defendant is entitled to no relief. On July 20, 2015, Defendant attempted to supplement the record with a copy of an information from his prior conviction in an attempt to use this document to validate his noncognizable claim in which he alleges that his prior violent felony convictions should be invalidated.

(Motion, 7/20/15). The State filed its response and objection to this Court asserting that the record reflects that the amended information regarding the prior convictions was the only information that the State submitted in this case by stipulation. (V7/1161-64; V87/2765-66; Response, 7/21/15.)

"It is fundamental that an appellate court reviews determinations of lower tribunals based on the records of the lower tribunals." *Altchiler v. State, Dep't of Prof'l Altchiler v. State, Dep't. of Prof'l Regulation, Div. of Professions, Bd. of Dentistry*, 442 So. 2d 349, 350 (Fla. 1st DCA 1983). Moreover, "[t]hat an appellate court may not consider matters outside the record is so elemental that there is no excuse for any attorney to attempt to bring such matters before the court." *Id.* The submission of non-record materials in an attempt to support a fact on appeal is blatantly improper. *Id.* Under these principles, this Court denied Defendant's attempt to supplement the record on July 23, 2015. (Order, 7/23/15) Thus, it is not clear if the information that is claimed to be defective would support Defendant's noncognizable claim. As the record does not sufficiently demonstrate the necessary facts that would be needed to resolve the issue being raised by Defendant, no relief is warranted. *State v. S.M.*, 131 So. 3d 780, 784 (Fla. 2013) (quoting *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d

1150, 1152 (Fla. 1979)) (“[T]he decision of a trial court has the presumption of correctness and the burden is on the [defendant] to demonstrate error.”). No relief is warranted.

To the extent that Defendant is attempting to argue a *Johnson* claim, Defendant is still entitled to no relief, as his claim is not cognizable. *Johnson v. State*, 104 So. 3d 1010, 1025 (Fla. 2012); *Lukehart v. State*, 70 So. 3d 503, 513 (Fla. 2011). This Court has made clear that an attempt to argue that a prior conviction is improper as allegedly invalid is not cognizable until a court with jurisdiction over the prior conviction has invalidated that conviction. *Johnson*, 104 So. 3d at 1025; *Lukehart*, 70 So. 3d at 513; *Taylor v. State*, 3 So. 3d 986, 999-1000 (Fla. 2009); *Nixon v. State*, 932 So. 2d 1009, 1023 (Fla. 2006); *Buenoano v. State*, 708 So. 2d 941, 951-52 (Fla. 1998). Here, Defendant has not succeeded in vacating his three underlying convictions in a court with jurisdiction over the prior convictions, as Defendant concedes on appeal. (IB/45) As this claim is not cognizable, no relief is warranted. *Lukehart*, 70 So. 3d at 513.

Moreover, even if this claim was not barred, unpreserved and cognizable, Defendant is still entitled to no relief because the trial court properly found the prior violent felony aggravator. “The standard of review this Court applies to a

claim regarding sufficiency of the evidence to support an aggravating circumstance is that of competent, substantial evidence." *King v. State*, 130 So. 3d 676, 683 (Fla. 2013). Moreover, "[i]t is the Court's task on appeal to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding." *Id.* (quotations omitted).

Here, the State admitted by stipulation the amended information and judgment to show Defendant was conviction of attempted felony murder, lewd and lascivious battery of a minor 12 to 16 years old and aggravated battery causing great bodily harm on CC, as set forth in sections 782.05(1), 800.04 94 0, 784.045(1)(a)1, Florida Statutes, and included factual allegations upon which the three charges were committed, as well as photos of CC after Defendant's crimes. (V7/1153-54, 1155-58, 1159-64; V85/2514-16) During a penalty phase proceeding, the trial court has discretion to admit evidence with regard to the details of a defendant's previous conviction for a felony involving the use or threat of violence." *Miller v. State*, 42 So. 3d 204, 225 (Fla. 2010). Given that this Court has repeatedly held the State is not restricted to the admission of a conviction when presenting evidence in support of a felony

aggravator, which was done in this case, it cannot be said that the trial court abused its discretion in admitting the amended information and judgment submitted by stipulation to establish this aggravator. *Id.*; *Braddy*, 111 So. 3d at 859.

Moreover, Defendant's prior felony convictions are still valid. *Owen v. State*, 986 So. 2d 534, 559 (Fla. 2008). As such, the trial court's finding of the prior violent felony aggravator applied the right rule of law and is supported by competent, substantial evidence. *Johnson*, 104 So. 3d at 1025; *Nixon*, 932 So. 2d at 1023; *Buenoano*, 708 So. 2d at 951-52. Accordingly, Defendant's sentence should be affirmed.

Error, if any, is harmless beyond a reasonable doubt. *Williamson v. State*, 994 So. 2d 1000, 1016 (Fla. 2008). "[T]his Court, in engaging in a harmless error analysis after elimination of an aggravating circumstance, must consider all remaining aggravating circumstances, and all statutory and nonstatutory mitigating circumstances." *Hill v. State*, 643 So. 2d 1071, 1074 (Fla. 1994) (citation omitted). Here, even assuming that this aggravator was found in error, three other aggravators found by the sentencer still remain valid, including one being the weightiest. (V11/2061-71) It also found that HAC taken individually substantially outweighed all of the mitigation. (V11/2061-70) Given that there was no statutory

mitigation and little to miniscule weight assigned to the nonstatutory mitigation, any error would be harmless beyond a reasonable doubt. (*Id.*) In aggravation, the evidence reflects that Defendant, during the course of a sexual battery or an attempt sexual battery, committed a heinous, atrocious and cruel murder on an 80-year old vulnerable woman. (*Id.*) Moreover, the contemporaneous conviction for during the course of a felony and the victim was particularly vulnerable due to advanced age would have supported this aggravator.⁴ *Buzia v. State*, 926 So. 2d 1203, 1209 (Fla. 2006); *LeCroy v. State*, 533 So. 2d 750, 755 (Fla. 1988); *Correll v. State*, 523 So. 2d 562, 568 (Fla. 1988). As such, eliminating this factor would make no difference in Defendant's sentence. *Valentine v. State*, 688 So. 2d 313, 317 (Fla. 1996) (holding defendant was not entitled to new penalty phase trial even where the court reversed his conviction for attempted first degree murder based on *State v. Gray*, 654 So. 2d 552 (Fla. 1996)).

Accordingly, Defendant's sentence should be affirmed.

VI. THE CLAIM ABOUT THE SENTENCING ORDER FAILS

Defendant next contends that he is entitled to a resentencing because of errors in the sentencing order. (IB/45) He alleges that the trial court failed to expressly evaluate the

⁴In addition, the State had evidence of Defendant's crimes committed on another named victim. (V85/2465)

proffered mitigators, the sentencing order imposed an unlawful nexus requirement and that the order relies on facts the State never proved. (*Id.*) For the following reasons, this claim fails.

Defendant first insists that the trial court failed to expressly evaluate the extreme mental or emotional disturbance statutory mitigator because the order addressed the testimony by Dr. Haber and not Dr. Quiroga. (IB/46-47) As Defendant waived this alleged claim of error, the order analyzed the testimony that was pertinent to this mitigator and explicitly stated its reasons for not finding the statutory mitigator in compliance with *Campbell*, no relief is warranted.

Defendant abandoned any claim that the testimony given by Dr. Quiroga supported this mitigator in his sentencing memo, and no request was made for the trial court to make its finding based on Dr. Quiroga's testimony. *Ellerbee v. State*, 87 So. 3d 730, 745-46 (Fla. 2012). Defendant did not put forth any argument that references the testimony of Dr. Quiroga as support of this mitigator. (V9/1534-1674; V11/1983-2017, 2018-58) Defendant's strategy in not offering Dr. Quiroga as supporting this mitigator is all the more true in context of his sentencing memo response. (V11/1983-2017) While Defendant did not reference Dr. Quiroga as evidence of this mitigator, Defendant did argue that her testimony supported evidence of nonstatutory

mitigators. (*Id.*) Accordingly, as any alleged error was waived, no relief is warranted. *Ellerbee*, 87 So. 3d 730 at 745.

Even if this claim was not waived, Defendant is still entitled to no relief. This statutory mitigator "has been defined as less than insanity, but more than the average man, however inflamed." *State v. Dixon*, 283 So. 2d 1, 10 (Fla. 1973). As codified in Florida Statutes, this mitigator is applicable when "the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance." § 921.141(6)(b), Fla. Stat. (1993) (emphasis added). Further, "[t]he trial court may disregard expert opinion where it determines that the opinion is unsupported by the facts or conflicts with other evidence." *Heyne v. State*, 88 So. 3d 113, 125-26 (Fla. 2012).

Here, the record is void of any evidence by Dr. Quiroga about Defendant's actual or probable mental state at the time of the murder or evidence of a pervasive mental condition that affected him every day. *Duest v. State*, 855 So. 2d 33, 42 (Fla. 2003); *Geralds v. State*, 674 So. 2d 96, 101 (Fla. 1996). While Dr. Quiroga opined that two statutory mitigators were applicable, extreme mental and emotional disturbance and alcohol abuse, she never provided any factual support for her finding. (V87/2880) Further, Dr. Quiroga admitted there was no indication

that Defendant had brain damage, and that she had not ordered a CT scan or a MRI because she believed it would not be helpful. (V87/2907-11) Given the total absence of Defendant's "actual or probable mental condition at the time of the murder as contemplated by the statute[,]” there was no error in rejecting the testimony by Dr. Quiroga. *Duest*, 855 So. 2d at 42.

Finally, “[f]or this Court to sustain a trial court’s final decision in its sentencing order, competent, substantial evidence of record must support the trial court’s weighing process [of aggravation against mitigation].” *Davis v. State*, 148 So. 3d 1261, 1275 (Fla. 2014) (alteration in original). Thus, the “sentencing order must reflect ‘reasoned judgment’ by the trial court as it weighed aggravating and mitigating circumstances.’” *Id.* (quotations omitted). Here, the sentencing order reflects that the trial court expressly “analyzed the testimony that was pertinent to the alleged mitigating circumstance and explicitly stated its reasons for not finding the statutory mitigating circumstance.” *Id.* “[T]his analysis satisfies the requirements this Court has articulated for a trial court’s sentencing order and that [Defendant’s] claim is therefore without merit.” *Id.*

Defendant next alleges that the “nonstatutory mitigation received even less analysis.” (IB/47-49) Defendant first faults

the analysis and assigned weight regarding the following four mitigators: Defendant witnessed domestic abuse-slight weight; he was not allowed to live with his father-minor weight; he behaved well in jail-little weight; he posed no future danger in jail-slight weight; he expressed remorse-little weight. (IB/47-48) Next, Defendant alleges that the order omitted any basis for finding the following 3 mitigators: he was angry with his father-little weight; he was uneducated-slight weight; he dedicated his life to God's services and has repented-slight weight. (IB/48-49) Finally, Defendant claims error because the order omitted any mention of whether the mitigator had been proven and skipped straight to the weight as to the following two mitigators: Defendant's family wanted to have a relationship-little weight; and his emotional scars-slight weight. (IB/49)

Because "mere disagreement with the force to be given the [mitigation] is an insufficient basis for challenging a sentence, this portion of the [defendant's] claim must fail." *Cox v. State*, 819 So. 2d 705, 723 (Fla. 2002). Further, "[t]his Court reviews a trial court's assignment of weight to proven mitigating factors under an abuse of discretion standard." *Merck*, 957 So. 2d at 1065. Moreover, "[t]hat a court's findings of fact did not specifically address [Defendant's] evidence and

arguments does not mean they were not considered." *Lucas v. State*, 568 So. 2d 18, 23-24 (Fla. 1990) (quotation omitted).

Here, a review of the order reveals that "[t]he trial court set out the evidence, determined that the circumstances were both proved by the evidence and mitigating, and assigned weight." *Ault*, 53 So. 3d at 186. "This approach complies with the requirements set out by this Court." *Id.* Further, the trial court necessarily determined that the evidence proved the existence of the mitigators since the mitigators were given an assigned weight on an individualized basis. *Merck*, 975 So. 2d at 1054. Moreover, the wording of the order itself shows that the trial court sufficiently analyzed the evidence in considering and finding these mitigators. *Armstrong v. State*, 64 So. 2d 730, 739 (Fla. 1994) ("Although the trial judge's articulation of how he considered the mitigating circumstances and aggravating circumstances is somewhat less than a model of clarity, [This Court] believe[s] that he properly considered all nonstatutory mitigating circumstances in imposing the death penalty.").

Defendant also complains that the trial court failed to acknowledge the nature of his abuse when it assigned little weight to the mitigator that Defendant was abused by his father. However, the order shows there was no abuse of discretion in assigning little weight to this mitigator because the trial

court's finding is supported by competent, substantial evidence.

Since the sentencing order shows the trial court explicitly stated its reasons for rejecting the statutory mitigator, and expressly considered and found the proposed nonstatutory mitigators, giving them an assigned weight on an individualized basis in compliance with *Campbell*, this claim fails.

While Defendant claims that the trial court devalued the mitigating effect of Defendant's IQ score and borderline functioning in assigning a weight, Defendant fails to recognize that the trial court properly attempted to place the weight assigned to this mitigation in context. *Cox*, 819 So. 2d at 723. Further, "[a] trial court does not abuse its discretion when it explains why a proposed nonstatutory mitigator is truly not mitigating or warrants little weight." *Trease*, 768 So. 2d at 1055. Moreover, this Court has recognized the importance of the connection between assigning significant weight to unrefuted mental health experts directly tying a defendant's mental defects to his functioning at the time of the murder. *Crook v. State*, 908 So. 2d 350, 358-59 (Fla. 2005). Here, Defendant's mental health mitigation did not offer unrebutted link, tying his mental health issues to his conduct at the time he murdered Ms. Fernandez. Thus, the trial court did not abuse its discretion in explaining that the mitigator was assigned little

weight by a comparison to similarly situated persons. *Williamson v. State*, 681 So. 2d 688, 698 (Fla. 1996). As such, this fails.

While Defendant finally asserts that the trial court relied on facts not supported in the record in discussing the findings of the aggravators, this claim is equally meritless. (IB/50-52)

Defendant first claims that there was no record evidence to support the finding that Defendant "rubbed his hands against [Ms. Fernandez's] wounds, for his own satisfaction." (IB/50-51) Here, Dr. Lew testified that blood smears found on the inside of Ms. Fernandez's thighs was consistent with the killer using his bloodied hands to grab the inside of her thighs and push them apart. (V78/2104, 2135) Further, blood smears were consistent with the killer spreading the blood around with his hands which could have been gloved, his forearm or with an object. (V78/2138) Moreover, defensive wounds, positioning of Ms. Fernandez's hands and blood evidence were all consistent with Defendant having wanted to torture Ms. Fernandez and force her into having sex with him. (V85/2559) This Court recognizes that factual inaccuracies in a sentencing order do not merit reversal where the inaccuracies are inconsequential to the findings on aggravators and mitigators. *Dennis v. State*, 817 So. 2d 741, 763-65 (Fla. 2002). Since any error with use of the word "satisfaction" is inconsequential, and no relief is warranted.

Defendant also insists that there was no evidence that he had a prior conviction for "lewd and lascivious assault on a child under the age of 12" but that the evidence showed Defendant was convicted of a lewd and lascivious assault on a "person 12 years of age or older but less than 16 years of age." (IB/51) Here, the amended information and judgment admitted into evidence by stipulation was sufficient proof of this aggravator. (V7/1155-58; 1159-64) In discussing how this evidence supported the prior violent felony aggravator, the trial court used "under" in describing Defendant's conviction for lewd and lascivious assault on a minor 12 to 16 years old. Since this inaccuracy was inconsequential to its finding, this claim fails.

Defendant next alleges that the trial court erred in regards to the felony murder aggravator in noting that "the blood hand print on her abdomen matched the blood handprint on her thigh." (IB/51) However, Defendant again fails to recognize that Dr. Lew testified that there were matching bloodstains on Ms. Fernandez's abdomen and left thigh which showed that her left leg had been raised up to her body. (V78/2104; V85/2557-58)

Defendant finally claims that when the trial court rejected the extreme mental or emotional statutory mitigator, it rejected the possibility that Defendant had been drinking. (IB/51) Once again, this claim is meritless. Here, the findings regarding

Defendant's alcohol abuse are supported by competent substantial evidence. The trial court, in properly analyzing the testimony of Dr. Haber, determined that the basis for her finding the statutory mitigator, i.e., that Defendant was drunk at the time of the murder, was unsupported by the record. (V86/2633-34, 2681-83, 2701) Further, the finding that Defendant was not drunk at the time of the murder is supported by the fact that at the time, he had been able to maintain employment, which also supported Dr. Haber's testimony that Defendant's ability to maintain employment when he was not drunk was "pretty consistent throughout his inconsistent employment history." (V86/2618-19; V89/3037) Moreover, the order reflects that the trial court found that Defendant's history of alcohol abuse as a mitigating factor and assigned it slight weight. (V11/2077) As such, this claim fails. *Bowles v. State*, 804 So. 2d 1173, 1182 (Fla. 2001).

Error, if any, would be harmless beyond a reasonable doubt. *Ault*, 53 So. 3d at 187. The sentencing order allows this Court to conduct an independent review of the trial court's reasoning and determination as to its sentencing determination because the trial court identified each mitigator presented by Defendant, stated its findings and gave an assigned weight on an individualized basis. Moreover, the court weighed the mitigators against the aggravators, finding that the four aggravators

outweighed the mitigation and that the HAC aggravator and the prior violent felony aggravator each taken individually outweighed all the mitigation presented. Further, even if the trial court had found the statutory mitigator, which it would assign no weight, coupled with the other mitigation found to have existed and assigned little to miniscule weight, would not outweigh the four weighty aggravators found in this case, two of which are the most weighty. *Ellerbee*, 87 So. 3d at 746; *Singleton*, 783 So. 2d at 977; *Bowles*, 804 So. 2d 1173 at 1183.

Because the sentencing order reflects factual findings by the trial court as supported by the record, Defendant is entitled to no relief. Defendant's sentence should be affirmed.

VII. DIRECT APPEAL REVIEW OF UNPERSERVED ERRORS

Defendant alleges that this Court should use the *Strickland* reasonable probability test in determining whether the allegedly unpreserved errors raised on appeal constitute error. (IB/53) As this claim is baseless and unsupported by law, this claim fails.

It appears that Defendant urges this Court to utilize this standard because he believes that it is an easier burden to overcome. However, this Court has never applied this proposed standard on direct appeal. Further, Defendant fails to provide any legal basis as to why this Court should disregard years of legal precedent and adopt this unsupported claim.

Defendant's reliance on *Chandler v. State*, 848 So. 2d 1031 (Fla. 2003), in which this Court reviewed an ineffective assistance of counsel claim, is misplaced. In *Chandler*, this Court directly quoted the standard for adjudicating claims of ineffective assistance of counsel from *Strickland*, and held that where it had determined on direct appeal that the error did not deprive a defendant of a fair trial because the alleged error did not constitute fundamental error, it followed that the defendant could not show that but for counsel's failure to preserve the error for appeal, resulted in prejudice. *Id.* This Court, however, did not find the converse; on direct appeal, if the defendant can demonstrate the *Strickland* prejudice prong, then this Court can find the alleged error was fundamental.

Moreover, this Court has never equated the "fundamental-error requirement that a defendant show that a guilty verdict could not have been obtained in the absence of the error" with "*Strickland's* reasonable probability standard" on direct appeal. Instead, this Court has consistently reviewed claims of alleged unpreserved errors in closing for fundamental error on direct appeal. *Bell*, 108 So. 3d at 650; *Merck*, 975 So. 2d at 1063. Because application of this proposed rule would run afoul of the legal principle, as set forth by this Court, which applies a fundamental error review to unpreserved comments alleged to be

erroneous on direct appeal, this claim fails.

VIII. THE *RING* CLAIM IS MERITLESS

While Defendant argues that Florida's sentencing scheme is unconstitutional under *Ring*, 536 U.S. 584 (2002), this Court has consistently denied relief on this basis. *Gonzalez v. State*, 136 So. 3d 1125, 1168 (Fla. 2014); *Francis v. State*, 970 So. 2d 806, 822 (Fla. 2007). Also, this Court has held that it is not unconstitutional for a jury to recommend death on a simple majority vote. *Kopsho v. State*, 84 So. 3d 204, 220 (Fla. 2012); *Parker v. State*, 904 So. 2d 370, 383 (Fla. 2005). Further, this Court has repeatedly rejected *Ring* claims when the death sentence was based on the during the course of a felony and prior violent felony aggravators. *Zack v. State*, 911 So. 2d 1190, 1192 (Fla. 2005); *Rodriguez v. State*, 919 So. 2d 1252, 1283-84 (Fla. 2005). Here, two of the aggravators included the prior violent felony conviction and that the killing was committed while engaged in the commission of a felony.

Moreover, the claim that the 8th Amendment requires that the death penalty be imposed by a unanimous jury is barred and meritless. Defendant did not include argument about the implications of *Ring* in his pretrial motion. (V3/475-85) Regardless, as Defendant concedes on appeal, the United States Supreme Court rejected this argument in *Spaziano v. Florida*, 468

U.S. 447 (1984), and *Proffitt v. Florida*, 428 U.S. 242 (1976).

IX. CUMULATIVE ERROR CLAIM IS MERITLESS

While Defendant finally claims that the cumulative effect of the errors raised on appeal deprived him of a fair trial and a reliable sentencing process. However, because the alleged errors, when viewed individually, are either procedurally barred, facially insufficient, or without merit, this claim also fails. *Gonzalez v. State*, 136 So. 3d 1125, 1166-67 (Fla. 2014).

X. SUFFICIENT EVIDENCE FOR CONVICTION

While Defendant has not addressed the sufficiency of the evidence to sustain his conviction, this Court has a duty to address the sufficiency of the evidence in each capital case. *Beasley v. State*, 774 So. 2d 649, 659 (Fla. 2000). In reviewing circumstantial evidence cases, this Court determines whether "the record contains competent, substantial evidence which is inconsistent with [the defendant's] theory of innocence as argued at trial." *Id.* "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 verdict, [this Court] will not reverse." *Johnston v. State*, 863 So. 2d 271, 283 (Fla. 2003) (quotations omitted). "In meeting its burden, the State is not required to 'rebut conclusively, every possible variation of

events,' which could be inferred from the evidence, but must introduce competent evidence which is inconsistent with the defendant's theory of events." *Id.* (quotations omitted). As such, the State submits that there was competent substantial evidence to support Defendant's conviction.

Here, Defendant offered no innocent explanation for the presence of his DNA at the crime scene. While he admitted that the evidence presented by the State would establish the facts of Ms. Fernandez's murder, Defendant contested the reliability and credibility of the DNA evidence found inside Ms. Fernandez's apartment that matched Defendant. Further, after the State rested, in moving for a judgment of acquittal, Defendant conceded that this was a case of premeditated murder.

There is competent substantial evidence that Defendant killed Ms. Fernandez as his blood was found in her apartment and Defendant provided no innocent explanation for his presence at the crime scene. DNA analysts involved in this case testified that the DNA samples taken from Ms. Fernandez's apartment matched Defendant because the probability of a random match exceeded 1 in 300 billion. The cup on the living room recliner had a DNA mixture, Defendant matched the major profile and the likelihood of a random match between Defendant and the mixture contribution was 1 in 5,099,000. Also, Defendant denied knowing

Ms. Fernandez or being in her apartment. Further, to counter the claim regarding the reliability of DNA testing in this case, the State elicited testimony about the lab's standard operating procedures that ensured there was no contamination, which were followed in this case. Thus, the State presented competent substantial evidence inconsistent with Defendant's theory of innocence. This Court has previously found such evidence sufficient to sustain convictions. *Johnston*, 863 So. 2d at 283-86; *Holton v. State*, 573 So. 2d 284, 290 (Fla. 1990). Thus, the evidence is sufficient to sustain Defendant's conviction.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by email to Andrew Stanton, Assistant Public Defender, appellatedefender@pdmiami.com, astanton@pdmiami.com, 1320 NW 14th Street, Miami, Florida 33125, this 26th day of October 2015.

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CERTIFICATE OF COMPLIANCE

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

/s/Blair Dickert

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