IN THE SUPREME COURT OF FLORIDA

LUTHER DOUGLAS,

Appellant,

v. CASE NO. SCO2-1666

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

CURTIS M. FRENCH
SENIOR ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 291692

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050

COUNSEL FOR APPELLEE

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PRELIMINARY STATEMENT

Luther Douglas appeals his conviction and death sentence for the first-degree murder of 18-year-old Mary Ann Hobgood. He raises one guilt-phase issue and four penalty issues. The record on appeal consists of 17 volumes of pleadings and transcripts, numbered in Roman numerals from I to XVII. The State will cite to the record by volume number (converted to arabic numerals) and page number.

STATEMENT OF THE CASE

Douglas was arrested on January 24, 2000, for the murder of Mary Ann Hobgood (1R 1). He was thereafter indicted for, and tried on, charges of first degree murder and sexual battery (1R 20; 2r 265; 8R 265). The case was tried March 11 through 15, 2002. Twenty-one witnesses testified for the State at trial; the defense rested without calling a witness. On March 15, 2002, a jury found Douglas guilty on both counts (14R 1219).

On April 4, 2002, a two-day sentencing hearing began. The State called three witnesses who gave victim impact testimony. The defense called 12 witnesses, all of whom were friends and/or family. No mental-health or other expert witnesses testified for either side. On April 5, 2002, the jury recommended a death sentence by a vote of eleven to one (3R 407, 17R 1518).

The trial court conducted a Spencer hearing on April 26, 2002 (7R 1303-18). The court issued its written sentencing order on June 14, 2002 (3R 427-41). The court found two aggravating circumstances (murder was committed during a sexual battery and was HAC, each given "great weight"), and two statutory mitigating circumstances: (1) no significant history of prior criminal activity, which the court deemed established by Douglas' lack of a prior conviction, but entitled to little weight in light of evidence that Douglas had engaged in illegal activities for which he had not been arrested or convicted, and (2) the catchall Section 921.141(6)(h), Fla. Stat., under which the court found some 16 mitigating factors, none of which, in the courts' view, merited more than "little" weight, except for two factors (that Douglas "can be rehabilitated," and "can be a productive prison inmate"), to which the court assigned "moderate" weight. The court summarized the mitigation as "based mainly on the unfortunate circumstances of the first ten (10) years of the Defendant's life and bad decisions he made later in life" (3R 440). Noting that Douglas was 25 years old when he murdered Mary Ann Hobgood, the court concluded that the mitigation, "when considered collectively, is relatively insignificant" (3R 440). Finding that the aggravating

circumstances substantially outweighed the mitigating circumstances, the court imposed a death sentence (3R 440-41).

STATEMENT OF THE FACTS

Guilt Phase

Eighteen-year old Mary Ann Hobgood was the seventh and youngest child of William H. and Ruby Lee Hobgood (9R 377-79). Mary Ann spent Christmas day of 1999 with her family, but went out that evening with Misty Jones and Jones' boyfriend Luther Douglas (9R 379, 10R 551-56). Her parents never saw her alive again (9R 380).

Misty Jones testified that she had known Mary Ann Hobgood since elementary school and Mary Ann had been her "best friend" (10R 552). In November of 1999, Jones met Luther ("Luke") Douglas when her sister Wendy brought him to her house (10R 553). Although Wendy Jones had been dating Douglas, Misty Jones soon began dating him (10R 553). Misty Jones testified that she called Mary Ann on Christmas day and made plans to go out that evening (10R 554). That afternoon, Douglas visited Jones at her home; when told that Jones had made plans to go out that evening with Mary Ann, Douglas asked to be included (10R 555). Douglas picked Jones up that evening at her house, wearing a maroon jacket and driving a red Ford Escort with a manual transmission (10R 555-58). Douglas had no car of his own; he told Jones he had borrowed this one from Jimela ("Mimi") Dozier - his "baby's

mother" (10R 556).[1] Jones testified that she did not have a driver's license and could not drive a "stick shift" car (10R 557).

Douglas drove to Mary Ann's house; Mary Ann got in the back, behind Jones (10R 557). Mary Ann had never met Douglas; Jones introduced them (10R 557-58). Mary Ann was wearing a leather jacket and had on jewelry (10R 558).

Jones testified that they drove to a liquor store, where Douglas bought rum and soda (10R 5587-59). He and Mary Ann began drinking; Jones abstained (10R 559). They visited a couple of pool halls before ending up at the "Brass Anchor" in Mayport (10R 560). After leaving there because Jones did not feel well, Douglas took her home, dropping her off shortly after midnight (10R 561). Jones watched as Douglas drove off with Mary Ann in the car (10R 563). Jones never saw or heard from Mary Ann again (10R 563).

At about 4-4:20 a.m., Douglas called Jones (10R 564). According to Jones, Douglas first said, "I hope you are happy,

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[1] Jimela's mother Wilene Dozier testified that she had bought this Escort for Jimela to use (11R 689). She also testified that she had planned to loan the Escort to her son-in-law Timothy Hightower so he could drive it to Macon, Georgia for Christmas while Jimela and Wilene were in Tampa, but someone had borrowed it before Hightower got there (11R 690-91). She testified that Douglas later had apologized to her for having borrowed the Escort (11R 693).

she's not with me anymore, I left her at a bar on the south side" (10R 564). Then, according to Jones, Douglas "turned around and said that he did take her home" (10R 564).

Douglas stopped by to see Jones late that morning; he had scratch marks on his neck that had not been there the previous evening (10R 565). Jones called Mary Ann's mother and discovered that Mary Ann had not made it home (10R 566). Later, while Douglas was still present, Mary Ann's sister called, wanting to know who they had been out with the previous night (10R 566-67). Jones told her they had been with Timothy Hightower, who was Jones' ex-boyfriend (10R 567).

Jones testified that she then confronted Douglas about Mary Ann (19R 568). He told her that, while they were at a place called "Raggae Central," Mary Ann had "disrespected him," and he had hit her, pulled her into the car, "beat her all over the car," and thrown her out for dead (10R 569-70). He told her that if the police questioned her, she should "[b]lame it on Timothy Hightower" (10R 570).

Mary Ann's body was discovered late that afternoon (December 26) by the railroad tracks near Evergreen Avenue (9R 392). Not far from her body police found a maroon jacket, a lug wrench and

a rubber car part (10R 425, 442, 444; 13R 1021).[2] Mary Ann was unclothed from the waist down (10R 467) and had suffered "extensive . . . blunt trauma" (10R 467). Associate Medical Examiner Dr. Matthew Areford, who viewed Mary Ann at the scene and then later conducted the autopsy at the Medical Examiner's office, testified that Mary Ann had suffered "multiple contusions, abrasions and lacerations" while still alive, and had been further injured following her death (10R 487-88, 494-96).

Dr. Areford testified that Mary Ann's jaw and nose had been broken and several teeth had been dislocated (10R 487, 494-95). In his opinion, she was still alive when these injuries were inflicted (10R 496). As Dr. Areford began describing the various injuries to Mary Ann's face, he noted that he was "not going to be able to describe individually every little injury" and that the jury would "get a better impression looking at the photographs" than he "could ever give" with his "words" (10R 490-91). Asked if he could estimate how many blows Mary Ann had received to her face while still alive, Dr. Areford testified:

> I can with the following caveat: The way I'm going to do that is by essentially

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[2] The rubber car part was later visually matched to an identical part on the Escort Douglas had been driving (13R 1023, 1025-26). Jones identified the maroon jacket as the one Douglas had been wearing Christmas evening (10R 558).

> assigning a blow to each one of these lacerations. That's going to result in a low number. And there are ten lacerations to the face that I can, definitely, you know, definitely say there is a blow associated with each one of those. Likely there are additional blows in these areas of abrasion and these areas of contusion. So ten is a very - it's a conservative estimate of the number of blows.

(10R 496-97).

In addition to the numerous facial injuries, Dr. Areford observed blunt trauma to Mary Ann's left ear and abrasions on the left side of her head (10R 500). Further, on the back of her head was a "large laceration that's very irregular," extending across the entire back of her head, with "ragged edges, multiple branches and lacerations off of it" (10R 500). Although he could not say for sure, it was "quite likely that this is due to multiple blows" (10R 501). The "subgaleal hemorrhage" resulting from these blows was so extensive that, when the scalp was reflected back, "the entire subgaleal space was filled with blood" (10R 501). Dr. Areford noted that the extensive hemorrhaging established that Mary Ann was alive when the injuries to the back of the head were inflicted: "If someone' head is injured after they die, they don't develop subdural or subarachnoid hemorrhages" (10R 505-06). The injury to the back of the head was so extensive and diffuse that Dr. Areford could not "count up all of those blows" and could only

count the lacerations (many of which were so deep that one could see "skull shining through" them) for a "minimum ball park number for how many blows were involved" (10R 501-02). Dr. Areford counted at least five separate lacerations on the back of the head (10R 502).

Dr. Areford observed still more pre-mortem injury on the right side of Mary Ann's head, including a large "M-shaped" laceration "covering most of the right side of the head," and another "J-shaped" laceration just to the rear of that (10R 503). These lacerations were "probably caused by multiple blows, not just one blow" (10R 503). There were also "multiple lacerations" to the right ear (10R 503).

Looking inside the head, Dr. Areford noted that Mary Ann's skull had been fractured "in what's called the parietal bone and occipital bone," and that a linear skull fracture extended to the base of the skull, "right through the area where this spinal cord leaves the brain" (10R 504). These fractures were not likely caused by a closed fist, but were of "such severity" that they were "probably caused by blows from some kind of blunt object" (10R 504).

The injuries to the head were not the only ones inflicted while Mary Ann was still alive. There were, in addition, multiple abrasions and contusions on the shoulders caused by

blunt blows to these areas (10R 497-98). Further, Mary Ann was in Dr. Areford's opinion still alive when her shoulder was dislocated, and still alive when her right clavicle was broken (10R 497-98).[3] Asked if the broken bones Mary Ann had suffered could have been caused by blows from a fist, Dr. Areford testified:

> It could be a fist. It's probably unlikely that it's a fist, though, because it's pretty hard. Even someone who has relatively gracile or feminine bones, it's pretty hard to break their bones with a closed hand.

(10R 499).

Dr. Areford testified that he found many defensive wounds on Mary Ann's body (10R 506). There were lacerations and contusions on the palms of her right hand and fingers, abrasions and contusions on her forearms, and a laceration to the web between the thumb and index finger (10R 507-11). Dr. Areford testified that "the ones on the palms of her hands" were consistent with her having tried "to grab an object that was being used to hit her," while the injuries to her arms were "consistent with that idea of fending off blows, you know, covering the head, protecting the head, the face" (10R 511-12).

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[3] However, she was probably dead when her left clavicle was broken (10R 498).

Dr. Areford testified that Mary Ann had received a "bare minimum" of "24 to 27 blows" to her head and upper body area while she was still alive, and there were likely more, because many of the lacerations were "caused by multiple, overlapping blows" (10R 517-18, 536-37). At least some of the injuries could have been inflicted by State's Exhibit 10 - a lug wrench (10R 518).[4]

In addition to the injuries inflicted while Mary Ann was still alive, she had numerous abrasions to her body that (along with the broken ribs) were consistent with her having been run over by a car after she died (10R 512-17, 532).

Dr. Areford testified that Mary Ann's blood alcohol level was .05 milligrams per deciliter and that she had "barely detectable" trace amounts of a drug whose street name was "Ecstasy" (10R 528-29).

Finally, although Dr. Areford testified that some of the head injuries were severe enough to have caused unconsciousness (10R 534), in his opinion she was not rendered unconscious immediately at the onset of the attack (10R 545). The "most glaring problem" with such a theory was the presence of the numerous defensive wounds to the hands and arms, which indicated

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[4] In particular, there was an "arc shaped or semilunar shaped wound" at the base of the right thumb that was the same size as the cup-like part of the lug wrench (10R 518-19).

that she was aware enough to try to protect herself from blows; further, the injuries all around the head indicated that she was turning her head and trying to roll away from the blows (10R 545-46).[5]

When initially contacted by police on December 27, Misty Jones told them that Timothy Hightower had been with her and Mary Ann Christmas evening (13R 1015-16). However, police eventually determined from their investigation that Hightower could not have been with them that evening (13R 1027; 11R 669-70, 690). Further, they learned that Douglas had given Jimela Dozier a black jacket and jewelry which was subsequently identified as having belonged to Mary Ann Hobgood (9R 381; 11R 672-73, 709-12). On January 24, 2000, police questioned Jones

[5] Douglas states as fact that "Dr. Areford could not sequence the head injuries and testified that Ms. Hobgood could have been rendered unconscious by the initial blow." Initial Brief of Appellant at 3-4. It is true that Dr. Areford did not claim to be able to state with certainty the exact order in which the many blows had been administered. Moreover, he responded affirmatively when asked on cross-examination if one particularly severe blow could have rendered Mary Ann unconscious *if* it had been "the first blow" (10R 534-35). It was plainly his opinion, however, that, although Mary Ann obviously was rendered unconscious by the blows at some point (her death, after all, was the result of blunt force trauma to the head (10R 519)), she had not been rendered unconscious by the initial blow, but only after *many blows* had been administered (10R 545-46).

further, and she at that point identified Douglas as the person who had last been with Mary Ann (13R 1027-29; 10R 575).[6]

Police then questioned Douglas. Douglas admitted borrowing Jimela Dozier's red Ford Escort over the 1999 Christmas holidays (13R 1034). He claimed that he had bought the jacket and jewelry "from a baser downtown" (13R 1035). He explained blood found inside the Escort as having come from a friend who had got into a fight at a club and whom Douglas had taken to the hospital (13R 1035). Douglas admitted being with Misty Jones Christmas evening, but denied knowing Mary Ann Hobgood when shown her picture (13R 1035-36, 1040-42). After he was arrested, Douglas volunteered that he had been with Jones and another woman, whose name he did not know; they had gone to a couple of different bars and then had had become ill and had gone home (13R 1043). He remembered taking Jones home, but did not remember taking the other girl home (13R 1043).

A semen sample obtained from the victim's vagina during the autopsy was identified by DNA analysis as having come from Douglas (12R 935).[7] Blood on the black jacket Douglas had given

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[6] Ultimately, Jones was charged with, and pled guilty to, the offense of accessory after the fact to murder (10R 548-49).

[7] Douglas states in his brief that Dr. Areford "found no evidence of sexual trauma and could not say whether a rape had occurred." Initial Brief at 4, citing 10R 520 of the transcript. It is true that Dr. Areford testified that he

to Jimela Dozier was identified by DNA analysis as having come from the victim, as was blood found on the maroon jacket Douglas had left at the scene and blood found on a rock found near her body (12R 873, 938-39, 957). Finally, blood in the interior and on the underside of the red Ford Escort that Douglas had been driving that evening was identified by DNA analysis as the victim's (12R 871-72, 938-39, 973).[8]

Thomas Brown met Douglas in jail in August of 2000 (12R 988). Initially, Douglas told him he had "run her over because she wouldn't move" (12R 990). Later, Douglas told Brown that he had "run her over with the car . . . because he had beat her to death and he wanted to make it look like vehicular homicide because he would only get a five year sentence" (12R 994). Douglas also said "he took the pussy, that's why - the only reason why he's got so much evidence against him, that would

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observed no sign of genital trauma (10R 474-75). However, he also noted that "many ... victims of rape do not show any [genital] injury at the time they are examined clinically" (10R 475). Further, it is unsurprising that Dr. Areford could not say whether a rape had occurred "based on [his] medical exam"(10R 520); on the basis of *his examination*, he could not even determine whether *sexual intercourse*, much less *rape*, had occurred, because all he did was take and preserve a vaginal sample, which was later analyzed by *other witnesses* (and **not** by Dr. Areford) for the presence of sperm and for DNA analysis.

[8] Blood on the lug wrench found at the crime scene was identified as human, but DNA testing yielded no further results (12R 854-55, 872-73, 939, 958).

probably be the only thing that gets him convicted" (12R 994). Brown interpreted "took the pussy" to mean that Douglas had raped the victim (12R 995).[9]

Penalty Phase

As noted previously, the State presented the testimony of three witnesses (Mary Ann's sister, brother, and father) who gave victim impact testimony (16R 1252-60). The State then rested (16R 1260). The defense presented the testimony of twelve witnesses, all friends and/or family of the defendant.

Charles McCloud is married to Douglas' sister Lawanta (16R 1262). Douglas had lived with them off and on for six or seven years, since his early teen years (16R 1262, 1265). Douglas had worked with McCloud (who currently is an assistant manager at Captain D's) "quite often," at Long John Silvers, Apperson Chemicals and other places (16R 1263). Douglas was an "extremely" good worker (16R 1264). He also helped McCloud and his wife around the house (16R 1264-65). Douglas did not spend a lot of time with his father; they got along fine when the father came by but, although McCloud had not discussed it with Douglas, he did not think Douglas and his father had a good relationship, (16R 1265-66). McCloud was kind of a "father

[9] Douglas raises no issue of the sufficiency of the evidence to support his conviction for murder and sexual battery. The evidence clearly suffices on each count.

figure" to Douglas; he tried to provide guidance, and took up time with Douglas, taking him bowling and to movies and to church, playing basketball and grilling, and trying to teach him right from wrong (16R 1267-68, 1271). Douglas was a "positive, upbeat kind of person," and could be a "productive person," even in prison (16R 1268-69). Douglas had a good family support group, and had not been deprived when he was with McCloud (16R 1270). McCloud was aware that Douglas had two children, by different mothers, which he support by buying diapers and talking to them (16R 1271-72). McCloud did not know whether Douglas had ever made regular child support payments to either of the mothers, but did acknowledge that, while Douglas had worked at a number of different jobs, he was also unemployed a lot of the time (16R 1271-72). To McCloud's knowledge, Douglas had no physical or mental disabilities and was "pretty smart" (16R 1272).

Janice Williams is Douglas' aunt (his mother's sister) (16R 1275). She is "in the ministry" with her husband (16R 1280). She saw Douglas regularly as he was growing up (16R 1276). She saw him after he was grown, too, at family gatherings and the like, but not as often as when he was a child (16R 1276). Douglas "grew up in church" (16R 1277). His mother took him and his brothers and sisters to church regularly (16R 1277).

Douglas and the others “were good children,” but “especially” Douglas (16R 1277). They were well mannered and obedient; people complimented them on their behavior (16R 1277-78). Mrs. Williams described her sister as “the ideal mother” (16R 1278). Douglas’ father, by contrast, was strict and not always pleasant to be around (16R 1278). Mrs. Williams had not observed any domestic violence in her sister’s family, but had informed by her sister that there was (16R 1278). What she recalled in this regard was that her sister sometimes “had to sneak” to do certain things for her children she did not want the father to know about, because he was a “very strict man” (16R 1284). Mrs. Williams thought that he was too strict; she believed that children ought to be “freer” (16R 1285). She described Douglas as having at least “average” intelligence (16R 1279). He had been a “sweet” child and was a “pleasant” and “very respectful” adult (16R 1279-80). She did acknowledge, however, that Douglas “has a temper” and that he had never kept a job for very long (16R 1282-83).

John Williams is Janice Williams’ husband (16R 1286). He has known Douglas since he was a baby; he and his wife used to baby-sit Douglas and the other children and take them to church (16R 1287). Douglas “had one of the best families you could come to” (16R 1290). Williams described Douglas as a well

mannered, “good fellow,” who could be productive in prison (16R 1287-88). Douglas had been “brought up to do right” and had been “taught [in] the ways of God” (16R 1288). He had got “on the wrong path,” but could be “redeemed” when he got “back on the right road” (16R 1288).

Tammy Wright is a close friend who has known Douglas since he was 17 (16R 1291). She met him, and got to know his family, through his sister Lawanta (16R 1292). The only thing missing in Douglas’ life was “stability with his children” (16R 1293). He “loved his children” and was a “good father” who spent time with them (16R 1293). Douglas was honest, positive, comical, passionate, and supportive, and could be rehabilitated (16R 1294). She did not know for sure how many children Douglas had; she was aware of three, all by different mothers (16R 1296). She did not know whether Douglas had made regular child support payments for any of them (16R 1296).

Joyce Douglas is married to the defendant’s brother James (16R 1300). She has known the defendant since 1992 or 1993 and has seen him regularly (16R 1300-01). Since his arrest, the defendant is “more subtle, more focussed,” and has developed a closer relationship with the Lord (16R 1301). The defendant is “patient,” “compassionate,” a “hard worker,” “pleasant to be around” and a “good listener,” who likes to laugh and joke and

have a good time, and is “outgoing” and “positive” (16R 1302-03). He was “very close” to his mother and siblings (16R 1302-03). He loved his father, but did not build “any type of relationship” with him (16R 1303). She acknowledged that although she had described the defendant as a hard worker, there were long periods of time in his adult life that he would not work (16R 1310).

Sandra Wright is a family friend, who has known Douglas through church since he was 5-6 years old (16R 1313). Douglas was “very docile” (16R 1314). He and the other kids were “almost like . . . robots” (16R 1315). They were never dirty and never “wrestled around”; they were “too perfect” (16R 1315). It was in her view “unnatural” for a kid to “be that good” (16R 1317). She attributed this behavior to the father, who she thought was a strict disciplinarian (16R 1316-18). She “never saw any scars on any of them, but there was definitely emotional abuse” (16R 1318). At some point she had counseled Douglas’ sister Lawanta about having been sexually molested by her father from age seven to age 14 (16R 1314). Lawanta and her mother were “all mixed up” and Wright “worked with them” to “straighten it out” (16R 1320). No one thought about Luther Douglas, and Wright did not know what, if anything, he knew about it (16R 1320). The father left home after that, and the family seemed

"to be free and relieved" (16R 1320). Douglas was well mannered and was a good person who never "had a real life" (16R 1321). When the father left home, the children "finally got a chance to run rabbit," and so "they just did whatever" (16R 1321). Wright felt that Douglas was a victim, too, and should have a psychiatrist (16R 1321).[10] In her opinion, Douglas was a "time bomb" waiting to go off (16R 1322). On cross-examination, she stated that Douglas was about 9-10 years old when his father moved out (16R 1322). She acknowledged that she knew very little about Douglas after about age 13, and did not know either of his two stepfathers (16R 1323). She acknowledged that none of the children had been deprived of food or clothing or shelter, and that the mother had been very loving and caring, especially after the father moved out (16R 1324). She acknowledged that there was no allegation of sexual abuse against Douglas himself, and that she was unaware of any violence between the mother and father (16R 1324). Nor had she

[10] Although Wright claimed to have "counseled" Douglas' sister, there is no evidence or testimony in the record to show that Wright had any kind of mental-health or counseling training or expertise. It bears noting, in light of her expressed opinion about the necessity for a psychiatrist, that the trial court granted a defense request for a confidential psychiatric evaluation (1R 118-21), but no psychiatrist or psychologist testified in this case.

ever seen any marks, welts, cuts or scratches on Douglas (16R 1324).

Lavern Montgomery is married to Douglas' sister Lavonia (16R 1326). He had known Douglas for about four years (16R 1326). The Douglas family was a "very close, a very loving family" (16R 1326). Douglas himself was a "sweet," "kindhearted man," and a "loving person," who could be redeemed and could be a productive person in prison (16R 1327).

Matthew McKever is married to Douglas' mother (16R 1334). They have been married seven years, and he has known Douglas for twelve years (16R 1334). Douglas lived with them off and on (16R 1335). He helped around the house when he was there, doing such things as taking out garbage and mowing grass, or cooking breakfast (16R 1335, 1339). Douglas has a nice personality, and he and McKever have a "good time" when they are together (16R 1336). Douglas was "real close" to his mother; they have a "loving relationship" (16R 1336). Since his arrest for murder, Douglas has been "more into God" and liked to "read a lot of books," which his mother sends him in jail (16R 1336). McKever does not know much about Douglas' father; he never comes around (16R 1337). He had heard that the father was "very abusive" and had "heard" that Douglas "had been dropped down the stairs" (16R 1338). Douglas never talked back to McKever, and

was a hard worker who deserved another chance (16R 1340). On cross-examination, McKever testified that he had been a father figure to Douglas for the past 12 years; he had been a positive role model for Douglas, had never abused him, and had always been there to talk to him or counsel him (16R 1341). McKever acknowledged that despite Douglas' capacity for hard work, there were a lot of times that Douglas did not go to work (16R 1342). He described Douglas as "very smart" (16R 1342). Finally, he acknowledged that he knew very little about Douglas' real father (16R 1342).

James Douglas is the defendant's younger brother (by a year) (16R 1343). He and the defendant and their sisters were close (16R 1344). The defendant had the "ability to take the positive out of any negative situation" (16R 1346). He was "very outgoing" and friendly and could get along with just about anyone (16R 1346-47). Looking back, he guessed their father "probably wasn't the ideal father" (16R 1347). Their father was a strict disciplinarian; if "he said it, you did it," and if you did not, there were "consequences" (16R 1348). Asked if their father was physically abusive, James answered, "looking back on it, I would probably say yes" (16R 1349). One thing he thought was "definitely abusive" was a punishment called an "air stool," in which you acted like you were sitting on a stool but there

was none there (16R 1350). Looking back, James realized that the defendant got "in trouble way much more than I did," and "took a lot of spankings for me" (16R 1350-51). One time, their father hit the defendant "in the mouth for I think something he said or something, or he thought he was talking back to him" (16R 1354). They all loved their father, but they also feared him (16R 1348). James was probably eight or nine when their father left, after the discovery that he had been sexually abusing their sister (16R 1348, 1354). They were all sad initially, but then realized his leaving was a "good thing," even though they missed having a father around (16R 1354-55). Their sister Lawanta took care of them while their mother worked (16R 1356). Their mother raised them to attend church; they were a religious family (16R 1360). James was unaware of any learning disabilities that the defendant had, although he did not think the defendant could read or write very well (16R 1357). James thought his brother has been a good father to his children, although James was not sure just how many children the defendant has, nor whether he has ever paid any child support for any of them (16R 1359, 1364-65). James acknowledged that he had grown up in the same household as his brother, but, unlike his brother, had finished school, got a job, got married, and hasn't been in trouble with the law (16R 1362-63). James also

acknowledged that, although he had described their father as "distant," their father had worked six and seven days a week and would only be home in the evening for a couple of hours before he went to bed (16R 1365-66). James had moved in with their father when he was a senior in high school; he did so because he "wanted to have a close relationship with my father" (16R 1363, 1369). Both Lewis Bryant and their mother's present husband, Matthew McKeever, had been positive role models and neither were physically or emotionally abusive to anyone in the family (16R 1366-67).

Lavonia Montgomery is one of Luther Douglas' sisters; younger than Lawanta, but older than James or Luther (16R 1369-70). She described their family as "close" and had, at least at the time, regarded their childhood as "normal" (16R 1370). She has "just . . . one" memory of domestic violence; something happened in the kitchen and their father got upset when their mother tried to clean it up, and "they started fighting" (16R 1370). When Luther Douglas was a teenager, he moved in with his older sister Lawanta; she was more lenient and he could "get away with more" (16R 1370-71). Douglas was the kind of person who could get a job easily - more easily than Lavonia could; he knew "the right things to tell people" (16R 1371). Douglas was "very outgoing" and loved to "joke around" and have fun (16R

1371). He is a good father to his children; he is always talking about them and what he wants to do with them (16R 1372). He has been a good son to their mother, and a good brother to his brother and sisters (16R 1372). Since his arrest, he is wiser and calmer (16R 1372-73). Lavonia acknowledged that both Lewis Bryant and Matthew McKeever had been positive role models for all of the children (16R 1374). Their mother has always provided for her children, and their real father, despite his faults, was a hard worker (16R 1376-77). Lavonia had observed their father put Douglas on an air stool and also spank him, but had never personally observed the father actually hit Douglas with his hand (16R 1375). She was not sure how many children Douglas has; she thinks "like maybe four" (16R 1376). She does not think any of these children has the same mother, and does not know if Douglas has paid child support to any of the mothers of his children (16R 1376). Douglas was "very smart" and could have pursued his education if he had chosen to do so (16R 1376).

Roy Hartman is Douglas' uncle (his mother's brother) (16R 1378). Once, while his sister (Douglas' mother) was pregnant with Douglas, she got kicked in the stomach by Douglas' father; she called Hartman, who came by to take her to the hospital, but Douglas father took her instead (16R 1380). Hartman was suspicious early on that something was "going on" between

Lawanta and Douglas' father (16R 1380). When Hartman tried "to find out exactly what was going on," Douglas' father pulled a gun on him (16R 1381). Douglas' father was "very strict" and controlling (16R 1381-82). The children were more "joyful" when their father wasn't around (16R 1382). Luther Douglas, Hartman thought, "wasn't as quick" as his brothers and sisters; you had to explain things to him "in a more simplified way for him to understand" (16R 1383-84). The father was a hard worker, but he only worked five days a week; on Saturdays he would go to the east side of town and pick up young girls (16R 1385). The revelations of the father's sexual abuse of Lawanta "devastated the entire family" (13R 1384-85). That was "the start of the downfall," because no one could explain to Douglas why the sexual abuse could have happened (16R 1385-86). Douglas was, notwithstanding, "very positive" (16R 1388). Hartman never had any "major problems" with him other than "just being defiant" and "rebellious" (16R 1388-89). Hartman left Jacksonville in 1993 or 1994, and has had no contact with Douglas except by telephone since then (16R 1391).

The final witness was Douglas' mother **Sheryl McKever**. She explained that her daughter Lawanta, who lives in Tampa, could not attend and testify for "financial reasons" (16R 1394).[11]

[11] She did not explain what those "financial reasons" were.

Mrs. McKever did not have a clear memory of her son's childhood; she had blocked out the bad times (16R 1395). The defendant was "very close" to her; he was "loving, giving and compassionate" (16R 1395). At times he was "strong willed" when she would ask him to do something, but eventually he would come around and do as she asked (16R 1395). His father, "Big Luke," was a "perfectionist" who did not "interact" with the children; all they knew about him was that he was "hard and cruel" (16R 1396-97). When her son would be on the "air stool," she could not help him because if she did Big Luke would beat on her (16R 1397). Her son was abused; he "would take whoopings and take spankings and his father would beat on him until he would cry" (16R 1397). Big Luke would use a belt; one time Luther had "belt marks on his back and on his buttocks and on his arms" from being beaten with a belt; charges were filed, but the "Judge just told him that next time spank the child on the buttocks," and it "was dismissed" (16R 1398). She herself was "like a punching bag," but she never told anyone except her brother (16R 1398). Big Luke eventually left home after being charged with "having sex with a minor" and all her neighbors "knew what had happened" (16R 1399). Mrs. McEver divorced him after that (16R 1399). The physical and verbal abuse stopped, but the defendant changed; he was angry and did not understand

(16R 1400). He probably should have received counseling (16R 1401). He stayed with his mother for a while, but then "started indulging in drugs and he would run away from home and would cut class" (16R 1401). To buy a pair of shoes he wanted, he sold drugs (16R 1401). He stayed with his sister Lawanta, and then "started partying" and "having fun with the ladies" (16R 1402). He had trouble with reading and math; when he was 10 years old, he was in a program to help him but was "discouraged" because he "had a secret that he couldn't tell" (16R 1402, 1404-05). Nevertheless, he was recognized for doing a "good job" in the program (16R 1404). The defendant has been a good son, a good brother and a good father to his own children (16R 1409). She advised him not to marry Jimela Dozier because "he was still dating other women" (16R 1410). Mrs. McKever has kept in touch with her son since his arrest; she sends him books and they "correspond" regularly (16R 1411). The defendant now likes to read, and reads everything he can, including newspapers (16R 1411). Even before his arrest, he had gone to school downtown for a short time, but got distracted because he "wanted to party and hang with the girls" (16R 1411). In fact, he had "tried many times" to go back to school, but had not succeeded "because he love to party" (16R 1412). However, he has matured since his arrest, and would be a "good inspiration to younger people"

because he knows what “the street life was like as far as selling drugs and being out there” (16R 1411-12). She believes that he can now “complete his education” and that he had “made a big change” (16R 1413). On cross-examination, Mrs. McEver testified that she thought she had been a good mother (16R 1416). Although she maintained that her first husband had been more abusive to the defendant than to his brother James (16R 1416-17), she acknowledged having testified in a pre-trial deposition that Big Luke had treated both his sons the same (16R 1417-18). She acknowledged having divorced Big Luke when the defendant was 9 or 10, and that she thereafter had a five-year relationship with Lewis Bryant, who was not violent and who was a positive role model for her children and treated the defendant like a son (16R 1418-19). Her present husband, Matthew McKever, is another good man and positive role model who also treated the defendant like a son (16R 1420). Neither Bryant nor McKever had ever verbally or physically abused any of her children (16R 1420-21). The defendant dropped out of school in the 7th grade; he could have gone back, but chose not to (16R 1421). Mrs. McKever thought that was because of his poor reading skills, but he could read now, having taught himself (16R 1421). He had four children by four different mothers, none of whom he had married; he was “too young to marry” (16R 1422). He “liked

being around the ladies, laughing, telling jokes, having a good time” (16R 1421).

SUMMARY OF THE ARGUMENT

Douglas raises five issues:

1. The admission of photographic evidence is within the trial court's discretion. There was no abuse of discretion in this case. The one crime-scene photograph of the victim showed her in the condition that Douglas had left her. The autopsy photographs assisted the medical examiner in explaining the injuries to the victim. The number of photographs are a consequence of the numerous injuries inflicted by Douglas. Douglas argues for the first time on appeal that some of these autopsy photographs should have been excluded because they showed primarily injuries inflicted after the victim's death, when Douglas ran over her with his car. This argument is procedurally barred for failure to preserve it below. It is also meritless. It was important to the medical examiners' conclusions about the cause of death to differentiate between the pre-mortem and post-mortem injuries. Further, the post-mortem injuries identified Douglas as the assailant, because they explained why the underside of the car he was driving had the victim's blood on it and corroborated the testimony of inmate Thomas Brown about statements made by Douglas indicating that he had run over the victim with his car to avoid arrest for murder.

2. The trial court considered, analyzed and addressed all of Douglas' proposed mitigation. The trial court was, if anything, overly generous in finding and assigning weight to mitigation, given the lack of any expert testimony about why or how the shortcomings of Douglas' biological father, who left home when Douglas was nine or ten, might have contributed to this brutal murder. Douglas in fact had what was universally described as a loving and close knit family. There is no credible evidence in this case that Douglas has any intellectual shortcomings, and no evidence at all that he suffers from any sort of mental or personality disorders. Although Douglas was described as positive, upbeat, outgoing and friendly, the trial court was authorized to concluded that the facts of this crime belie this description. The trial court was also authorized to conclude that the evidence utterly failed to show that Douglas was a good father who loved and took care of his children. Finally, the court was authorized to conclude that there was no sufficient evidence in this case to establish that Douglas was impaired by alcohol on the night of the murder. The evidence showed no more than that Douglas had been drinking that night; it failed to show that he had drunk enough to have become intoxicated.

3. The victim in this case was savagely beaten to death with a rock and an automobile lug wrench. She suffered multiple skull fractures, a broken nose, a broken jaw, broken teeth, a broken clavicle, and numerous lacerations and bruises. She was so battered as to be unrecognizable. Her injuries were so numerous and extensive that an accurate determination of the total number of blows cannot be calculated, but she was struck a minimum of 24-27 times. Multiple defensive wounds on her hands and arms, as well as the fact that she suffered injuries on all sides of her head, demonstrate that she struggled against her assailant, trying to fend off and to avoid the many blows being rained down upon her. The trial court properly found this murder to be heinous, atrocious and cruel.

4. Death is a proportionate sentence for this horribly brutal rape/murder.

5. Florida's capital sentencing procedures are not unconstitutional for any reason alleged.

ARGUMENT

I

THE TRIAL COURT PROPERLY ADMITTED PHOTOGRAPHS OF THE VICTIM TO DEMONSTRATE HOW SHE APPEARED AT THE SCENE AND TO ILLUSTRATE THE NATURE AND EXTENT OF HER INJURIES

Douglas first complains about the introduction of a crime-scene photograph of the victim (State's Exhibit 1) and thirteen autopsy photographs (State's Exhibits 21-33). Douglas argues that, because "the nature of the victim's injuries was not an issue in dispute at trial," and the photographs were "extremely gruesome," their probative value was outweighed by their prejudicial effect and the trial court abused its discretion in admitting them. Initial Brief of Appellant at 19.

As Douglas concedes, the admission of photographic evidence is within the trial court's discretion, and a ruling on this issue will not be disturbed on appeal absent a clear showing of abuse. Gudinas v. State, 693 So.2d 953 (Fla.1997); Pangburn v. State, 661 So.2d 1182, 1187 (Fla.1995). There was no abuse of discretion in this case.

It is well settled that photographs which demonstrate the condition of the crime scene when police arrive are properly admitted over an objection that they are inflammatory. Looney v. State, 803 So.2d 656, 669 (Fla. 2001). The (lone) crime-scene photograph introduced in this case (State's exhibit 1)

depicts Mary Ann Hobgood's body as Douglas had left it, lying face up next to some brush, nude from the chest area down and massively injured. This photograph was highly relevant to the nature of the crime and the identity of the victim, and Douglas has identified no "unusual circumstances" in this case that would preclude its admission in evidence.[12]

As for the autopsy photographs, it bears noting the State proffered nowhere near all the autopsy photographs in its possession; instead, the prosecutor culled through them and picked out those showing distinct injuries (10R 483). The trial court reviewed the photographs and, noting that Douglas had "raised the defense that Misty Jones committed this homicide," which, in the court's view, "factor[ed] in the 403 analysis here," found that the photographs were not "unduly prejudicial" and would assist the medical examiner in explaining wounds found on a murder victim (10R 483-84).

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[12] In Czubak v. State, 570 So.2d 925 (Fla. 1990), the victim's body had not been discovered until it unrecognizable due to decomposition and having been ravaged (and probably moved at least to some extent) by animals; the photographs did not show any wounds and, because the condition and location of the body were "caused by factors apart from the crime itself," they were not probative of the cause of death or identity. This Court acknowledged that crime scene photographs were generally admissible even if gruesome, but held that under the "unusual circumstances presented" id. at 929, the probative value of the photographs was "at best extremely limited," and they should not have been admitted.

The record shows that Dr. Areford used these photographs to explain the injuries to Mary Ann Hobgood, how those injuries had been inflicted and how much force had been used, and to differentiate for the jury which injuries were pre-mortem and which post-mortem (88T 4420-21, 4443-44, 4428-29, 4417-20). The trial court did not abuse its discretion in admitting these photographs, gruesome though some of them may have been. This court has "consistently upheld the admission of allegedly gruesome photographs where they were independently relevant or corroborative of other evidence." Czubak v. State, supra, 570 So.2d at 928-29. Accord, e.g., Dennis v. State, 817 So.2d 741, 763 (Fla. 2002)(emphasizing that the "test for admissibility is relevance, not necessity," quoting Mansfield v. State, 758 So.2d 636, 648 (Fla. 2000)); King v. State, 623 So.2d 486 (Fla.1993)(test of admissibility of photographs is relevance, and they are admissible "where they assist the medical examiner in explaining to the jury the nature and manner in which the wounds were inflicted," quoting Bush v. State, 461 So.2d 936, 939 (Fla. 1984)); Vargas v. State, 751 So.2d 665, (Fla. 3rd DCA 2000) ("Almost any photograph of a homicide victim is gruesome. But the medical examiner used the photographs during his testimony to illustrate the nature of the wounds and the element of premeditation for the first degree murder charges. Because

the photographs were relevant to the medical examiner's testimony, the trial court did not abuse its discretion in admitting them."); Lott v. State, 695 So.2d 1239 (Fla.1997) (no abuse of discretion where admitted photographs were probative of the premeditated murder charge); Gudinas v. State, supra (pictures were necessary to explain location and extent of wounds); Sanchez-Basulto v. State, 601 So.2d 1263 (Fla. 3d DCA 1992) (admittance of photographs was probative of the nature of the victim's wounds, type of weapon used, and cause of victim's death). Douglas contends that even if some of the photographs were properly admitted, it was error to have admitted photographs depicting damage done to the victim's body after her death, citing Looney v. State, supra. Douglas did not make this objection at trial, however, so it is not preserved for review. F.B. v. State, no. SC02-1156, Fla., decided July 11, 2003 ("In general, to raise a claimed error on appeal, a litigant must object at trial when the alleged error occurs. [Cit.] Furthermore, in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal

ground for the objection, exception, or motion below. [Cit.]").[13]

Even if the issue had been preserved, however, the trial court would have committed no abuse of discretion by admitting these photographs. It was important to the medical examiner's conclusions about the nature of the attack and the cause of death to differentiate between the pre-mortem and post-mortem injury. Moreover, the post-mortem injuries (which, in Dr. Areford's opinion were consistent with someone having run over her with a car) were independently relevant (a) to identify Douglas as the assailant, by explaining how the victim's blood ended up on the underside of the Ford Escort that Douglas had driven the night of the murder, and (b) to corroborate Thomas Brown's testimony that Douglas admitted that he had run over the victim with his car after killing her in the belief that he could make it look like she had been the victim of a vehicular homicide rather than the more serious crime of murder. See Thomas v. State, 748 So.2d 970, 982 (Fla. 1999) ("concealment"

[13] Douglas' trial counsel did not object to any specific autopsy photo; his objection was directed to *all* of them on the ground that, because Dr. Areford could "testify to all these injuries verbally without having to introduce photographs" the photographs should be excluded, despite their relevance, because they were gruesome(10R 482-83). There was no objection that specific photographs were irrelevant because they showed only post-mortem injuries.

or other actions taken after crime which indicate desire to evade prosecution admissible to show consciousness of guilt).[14]

Even if the trial court abused its discretion as to one or more of the photographs, any error was harmless given the totality of the evidence in this case. Looney, supra at 670-71; Thompson v. State, 610 So.2d 261 (Fla. 1993).

II

THE TRIAL COURT PROPERLY REVIEWED AND WEIGHED MITIGATING CIRCUMSTANCES PROPOSED BY THE DEFENDANT

Douglas contends the trial court abused its discretion by rejecting some of Douglas' proffered mitigating circumstances, and by failing to give sufficient weight to others. Specifically, Douglas argues that the trial court failed to give

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[14] Hence, the cases Douglas cites are inapposite, because they involve photographs which were not relevant. Pottgen v. State, 589 So.2d 390 (Fla. 1st DCA 1991) (which Douglas erroneously cites as a case from this Court), is not a murder case, but involves a conviction for disturbing the contents of a grave; the district court found a gruesome videotape of the body not to have been relevant because neither the identity of the body nor the method of its disposal was relevant to the crime charged. Ruiz v. State, 743 So.2d 1 (Fla. 1999), was a case primarily about improper prosecutorial argument and other serious prosecutorial misconduct; it tangentially involved one photograph submitted at the penalty phase by the State without any explanation or justification and no discernible purpose other than simply to inflame the jury. Finally, in Rosa v. State, 412 So.2d 891 (Fla. 3rd DCA 1982), the district court concluded that photographs of the deceased showing the results of emergency surgery, including protruding surgical tubes and sutures, should not have been admitted because they were irrelevant.

enough weight to his abusive childhood, and that the court erroneously rejected the proffered mitigating circumstances "that Douglas loves his children; is a good father to his children; supports his children by buying food, diapers, and other items for them; is a positive, upbeat person; has an outgoing, friendly personality; and has always been respectful of his elders" (Initial Brief of Appellant at 23); that Douglas "was a good son and a good brother" (Initial Brief of Appellant at 26); that Douglas had "worked at a variety of jobs" (Initial Brief of Appellant at 27); that Douglas "was impaired by alcohol at the time of the crime" (Initial Brief of Appellant at 27-28); and that Douglas had no "relationship with his father" after the "removal of the father from the home" (Initial Brief of Appellant at 27).

It is clear that the trial court fully considered, thoughtfully analyzed, and expressly evaluated in its written sentencing order each of Douglas' proffered mitigating circumstances. In conducting this evaluation, the trial court is not required to find every proposed mitigator; instead, the trial court must "determine whether [the proffered mitigator] is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature." Campbell v. State, 571 So.2d 415, 419 (Fla. 1990). There are

"no hard and fast rules about what must be found in mitigation in any particular case . . . . Because each case is unique, determining what evidence might mitigate each individual's sentence must remain with the trial court's discretion." Lucas v. State, 568 So.2d 18 (Fla. 1990). Nor must a trial court assign any particular amount of weight to a mitigator it has found. The relative weight given to each mitigating factor is within the discretion of the trial court. Campbell. In fact, "there are circumstances where a mitigating circumstance may be found to be supported by the record, but given *no* weight." Trease v. State, 768 So.2d 1050, 1055 (Fla. 2000) (emphasis supplied). So long as the trial court conducts a "thoughtful and comprehensive analysis," Walker v. State, 707 So.2d 300, 319 (Fla. 1997), of the defendant's proffered mitigators, the trial court's "determination of lack of mitigation will stand absent a palpable abuse of discretion." Foster v. State, 654 So.2d 112 (Fla. 1995). Accord, e.g., Bonifay v. State, 680 So.2d 413 (Fla. 1996) (decision as to whether a mitigating circumstance has been established, and the weight to be given to it if is established, are matters within the trial court's discretion); Wyatt v. State, 641 So.2d 355 (Fla. 1994) (decision whether any mitigating circumstances had been established was within trial court's discretion); Arbelaez v. State, 626 So.2d 169 (Fla.

1993) (trial court has broad discretion in determining applicability of mitigating circumstances).[15]

Douglas argues that the trial court should have accepted and weighed *all* of his 30-some-odd proposed mitigators. Initially, the State would note that Douglas has, in essence, really

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[15] These cases are fully consistent with constitutional standards requiring "individualized sentencing." The premise explicitly underlying the United States Supreme Court's decisions in Mills v. Maryland, 486 U.S. 367 (1988) and McKoy v. North Carolina, 494 U.S. 433 (1990), which struck down unanimity requirements as to juries' mitigation findings, is that reasonable persons can differ both as to what circumstances are mitigating at all and, as well, as to the weight to be given to such circumstances. Thus, each juror must be allowed to determine for himself or herself what is mitigating. So long as the sentencer is not precluded as a matter of law from giving effect to proffered mitigation, the "requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence." Blystone v. Pennsylvania, 494 U.S. 299, 307 (1990). The Constitution "does not require a State to ascribe any specific weight to particular factors, either in aggravation or mitigation, to be considered by the sentencer." Harris v. Alabama, 513 U.S. 504 (1995). In fact, the Court's decisions "suggest that complete jury discretion is constitutionally permissible." Buchanan v. Angelone, 522 U.S. 269 (1998). See, also, Burger v. Kemp, 483 U.S. 794 (1987) ("mitigation may be in the eye of the beholder"); Tuilaepa v. California, 512 U.S. 967 (1994)(Souter, J., concurring)("refusing to characterize ambiguous evidence as mitigating or aggravating is . . . constitutionally permissible"). Although Douglas attempts to equate the rejection of mitigation with the failure to "consider" mitigation, it is clear that the sentencer constitutionally may reject mitigation after having considered it, so long as the sentencer is not *legally precluded* from either considering or giving effect to mitigation. If the sentencer is able to consider and to give effect to proposed mitigation, the rejection of proposed mitigation by the sentencer does not give rise to any constitutional issue.

offered only three proposed mitigators - good family, bad father, and Douglas' good character - which by minute parsing he has expanded into more than 30 different proposed mitigating factors. However, mitigation should be about substance, not artificially generated numbers. In the State's view, Douglas' proffered mitigation is not only duplicitous and overlapping, but is for the most part short on substance, and the trial court was, if anything, overly generous in finding and assigning weight to the proffered mitigation.

For example, despite the testimony Douglas relies upon to argue that he had a terrible father, whose misbehavior and subsequent absence had a devastating effect on him, no expert mental health testimony was offered about the psychological effect of his allegedly bad childhood. Although such expert testimony may not be essential, its absence is suspect. Cf. Shellito v. State, 701 So.2d 837, 844 (Fla. 1997) (noting that defendant had "presented no medical or other expert testimony to support his claims of organic brain damage or other impairment). All Douglas presented was the testimony of family members and two friends, who guessed that Douglas was "probably" aware of his father's sexual abuse of his sister Lawanta (who did not testify in this case, although her husband did), and who thought that the father sometimes disciplined Douglas too severely

(although none reported ever seeing bruises or other evidence of physical abuse). None of these witnesses could describe any psychological impairment to Douglas as the result of anything his biological father did or did not do; on the contrary, they all seemed to think that Douglas had turned out rather well, except for this one rather brutal little murder that he had committed. It was undisputed that Douglas himself was not sexually abused, that the father had left home when Douglas was only 9-10 years old, and that Douglas had experienced a very good family life after that time. In fact, Douglas proffered his good, close-knit family as the basis for several proposed mitigating circumstance. Nevertheless, the court found that Douglas had "established" several mitigators relating to the allegedly abusive father and the family fear of him, while additionally finding several mitigators relating to Douglas' good, supportive family (3R 435-36). Douglas is in no position to complain about these findings, or the weight given to them, and does not. Cf. Miller v. State, 770 So.2d 1144 (Fla. 2000) (trial court did not abuse its discretion in declining to find proposed mitigator of abusive childhood where evidence showed only occasional administration of corporal punishment that ceased when defendant was 13); Banks v. State, 700 So.2d 363, 365 (Fla. 1997) (upholding trial courts' conclusion that Banks'

good family background was not entitled to significant weight).

Douglas does complain about the trial court's rejection of the proposed mitigator that the removal of his biological father from the home and his absence thereafter somehow ameliorated Douglas' culpability for the brutal murder of Mary Ann Hobgood. Initial Brief of Appellant at 27. But if, as Douglas contended, his biological father was violent and abusive, then surely the trial court could reasonably conclude, as it did (3R 436-37), that removal of that violent and abusive father could only have had a positive effect on Douglas, especially given the extensive testimony about the loving and caring home life that Douglas experienced after his father left home.

Douglas' primary complaint is that the trial court rejected his proposed mitigating factors relating to Douglas's allegedly good character. Of course, as noted above, Douglas did not simply argue "good character," but proposed many (often overlapping) different ways of saying, in essence, that he is a fine fellow and a good family man, including: Douglas loves his children; Douglas is a good father to his children; Douglas supports his children; Douglas is a positive, upbeat person; Douglas is out-going and friendly; Douglas respects his elders; Douglas is a good son; Douglas is a good brother; Douglas is

helpful to his stepfather around the house; and Douglas is a good worker. The trial court rejected most of this, and properly so.

It is true, as Douglas contends, that several of his witnesses testified that Douglas was a good father who loved and supported his children. However, most of these witnesses did not even know how many children he had. Nor could they say whether he actually supported them, beyond perhaps buying diapers every once in a while. In fact, Douglas had fathered four different children by four different mothers, **none of whom** (mothers or children) testified in mitigation on Douglas' behalf. Thus, Douglas has presented no testimony from anyone in a position really to know that he loved, or was in any reasonable sense of the term a "good father" to, his children. Nor is there any evidence whatever in this record that Douglas had paid child support or otherwise supported these children on any regular basis. The trial court did not err in finding that Douglas had failed to establish this proposed mitigation.

Likewise for the testimony that Douglas was an outgoing, friendly, positive and upbeat person who was a good worker and respectful to his elders. Douglas may have been a good worker when he wanted to be, but despite having the demonstrated ability to get a job, there were long periods in his life when

he chose not to work. It is apparent from the testimony of his own mitigation witnesses, including in particular his own mother, that he chose to bum around, staying first with one family member and then another, selling drugs to support himself, and spending his time partying with the “ladies” and siring children by them. And despite the descriptions by Douglas’ family of his upbeat and positive attitude, these same witnesses acknowledged that he had a bad temper, too. The trial court committed no abuse of discretion in concluding that the crime Douglas committed in this case, along with consideration of his lifestyle, negates testimony (from witnesses who were wholly unfamiliar with the facts of the crime) describing him as outgoing, friendly, upbeat and positive; it is perfectly reasonable to conclude that someone - like Douglas - who has chosen to live a selfish and self-oriented lifestyle of doing just enough to get by so he can spend most of his time partying and carousing, who fails to spend Christmas day with any of his family or any of his four children or any of the mothers of his four children, who without permission “borrows” one girlfriend’s mother’s car so he can go out on a date with another girlfriend, who spends much of that date (apparently) flirting with his girlfriend’s friend, who rapes and brutally murders his girlfriend’s lifelong friend because she “disrespected” him by

refusing to have sex with him, and who then runs over the girl's dead body to make it look like a vehicular homicide rather than a murder, is the antithesis of "outgoing, friendly, upbeat, and positive."

Nor did the trial court err in rejecting the proffered mitigator that Douglas committed the murder while he was "impaired." Although the State suspects that this Court will not agree with the trial court's suggestion that, because voluntary intoxication is no longer a defense to any crime, it cannot be mitigating, the proposed mitigator clearly was nevertheless rejected properly because there is no evidence in this record to support a finding that Douglas was intoxicated or measurably impaired at the time of the murder. Both Douglas and the victim had been drinking, to be sure, but there is no evidence that they did more than split one bottle of rum over a period of several hours. Misty Jones, who had observed Douglas throughout the evening, did not testify that Douglas displayed any signs of drunkenness, such as slurred speech or stumbling, and Douglas certainly was not too intoxicated to drive a manual-shift car all over town, or to impregnate the victim, or to use two different weapons to bludgeon her to death, or to attempt to cover up his actions after the murder. It bears noting that Mary Ann's blood alcohol was only .05 grams milligrams per

deciliter - insufficient to make her presumptively too intoxicated to drive; in fact, such a blood-alcohol level warrants a presumption that she was *not* impaired by alcohol. Section 316.1934(1)(a), Fla. Stat. (2002). There is no reason to believe (and no evidence that would support a conclusion) that Douglas' blood alcohol level was any higher than hers. The mere fact that Douglas drank some undetermined amount of alcohol the evening of the murder is insufficient, by itself, to warrant a finding of impairment. Banks v. State, supra, 700 So.2d at 368 (proposed mitigator of intoxication properly rejected where evidence showed only that defendant had drunk alcohol over a period of several hours, and displayed no visible signs of drunkenness); Johnson v. State, 608 So.2d 4, 13 (Fla. 1992) ("too much purposeful conduct for the court to have given any significant weight" to alleged intoxication).

The State recognizes that a defendant's good behavior can be mitigating; a defendant may well deserve credit for having led an exemplary life except for one aberrational act committed while under great stress, mental disorder, extreme intoxication and the like. But Douglas' behavior can hardly be described as exemplary even before the horrible murder he committed, and there is no evidence that he was under any sort of acute distress at the time of this murder, or that he suffers from any

mental disorders at all, or that he was measurably impaired by alcohol at the time of this crime. In these circumstances, the trial court did not err in rejecting the proposed good-character mitigators.

Douglas is not entitled to appellate relief as to his sentence merely because he disagrees with the judgment of the trial court. Lucas v. State, supra. He must show an abuse of the trial court's broad discretion. Ibid. He has failed to do so. And even if the rejection of one or more of Douglas' proposed mitigators was error, it was harmless in light of the brutality of the murder and the relative insignificance of the proffered mitigation. Banks v. State, supra (upholding "little weight" given to contributions to community and family that were no more than society expects from the average individual).

III

THE TRIAL COURT PROPERLY FOUND THE HAC AGGRAVATOR

Douglas argues here that this murder, despite its overwhelming brutality, was not heinous, atrocious or cruel, because it may have been a "sudden, frenzied attack by someone too intoxicated to contemplate the consequences of his actions," and because Mary Ann "[n]ot only was intoxicated," but she might have lost consciousness immediately. Initial Brief of Appellant at 31.

Initially, the State would note that, as discussed above, although both Douglas and Mary Ann had been drinking, there is no evidence in this record that either of them were intoxicated. Mary Ann's blood alcohol level was in fact low enough that she was presumptively *not* impaired by alcohol, and there is no reason to believe (and no evidence that would support a conclusion) that Douglas' blood alcohol level was any higher than hers. Certainly, Douglas' actions that evening exhibited considerable "purposeful conduct." Johnson v. State, supra. Indeed, the focused brutality of the crime is itself evidence that he was not so intoxicated that he could not appreciate the consequences of his actions. White v. Singletary, 972 F.2d 1218, 1221 (11th Cir. 1992). In any event, however, it is the manner and means in which death was inflicted and the immediate circumstances surrounding the death which are controlling, not the state of mind, intent or motivation of the defendant. Morrison v. State, 818 So.2d 432, 455 (Fla. 2002).

The manner and means by which Douglas murdered Mary Ann Hobgood, and the circumstances surrounding her death, overwhelmingly support the HAC aggravator. Contrary to Douglas' argument, the evidence does not leave open a "reasonable possibility" that Mary Ann lost consciousness after the initial blow. On the contrary, the defensive wounds on her hands and

forearms, as well as the fact that she was injured on all sides of her head while still alive, demonstrate that she was conscious and trying to fend off and to avoid the blows being rained down on her by Douglas (10R 545-46). Dennis v. State, 817 So.2d 741, 766 (Fla. 2002) (argument that "victims were struck with such force that they were likely rendered unconscious well before their deaths" rejected as "wholly without merit"; evidence "supports trial court's finding that victims were alive for at least part of the attack as they had defensive wounds to their hands and forearms"); Belcher v. State, 28 Fla.L.Weekly S575 (Fla. July 10, 2003) (although victim was probably only conscious for sometime between thirty seconds and a minute before her strangulation and drowning death, the evidence of a struggle between the victim and her attacker establishes that she was likely conscious at the outset of the strangling and was aware of her impending death; HAC properly found).

The photographs of Mary Ann, coupled with the testimony of the medical examiner, establish that she suffered horrid injuries while still alive, including multiple skull fractures, a broken nose, a broken jaw, many broken teeth and multiple lacerations and bruises, all from having been beaten about the head, with some object harder than a fist, an absolute minimum

of 24-27 times.[16] Her face was disfigured by this brutal onslaught to the point that it was hardly recognizable. This was by any standard an extremely brutal beating murder and such murders are properly found to be HAC. E.g., Dennis v. State, supra (where victims suffered "horrid" injuries, beating murders were HAC); Lawrence v. State, 698 So.2d 1219, 1221-22 (Fla. 1007) ("We have consistently upheld HAC in beating deaths."); Willacy v. State, 696 So.2d 693, 696 (Fla. 1997) (where victim was beaten, strangled and burned, this Court noted that "each of these factors has been ruled dispositive of HAC"); Geralds v. State, 674 So.2d 96, 102 (Fla. 1996) (HAC properly found where victim was severely beaten prior to death); Whitton v. State, 649 So.2d 861 (Fla. 1994) (HAC properly found where victim was beaten and stabbed to death); Atkins v. State, 497 So.2d 1200, 1201 (Fla. 1986) (HAC properly found where victim beaten to death with steel rod, crushing his skull); Davis v. State, 461 So.2d 67 (Fla. 1984) (HAC properly found where, inter alia,

[16] The likely instruments were the rock and the lug wrench found at the crime scene. As noted previously, blood on the rock was identified by DNA analysis as the victim's. While the blood on the lug wrench was insufficient to support a DNA analysis, it was identified as human blood; further, at least one injury on Mary Ann's body had a distinctive circular pattern the same size and shape as the socket end of the lug wrench.

victim was beaten on head with pistol almost beyond recognition).[17]

A "trial court's ruling on an aggravating circumstance will be sustained on review as long as the court applied the right rule of law and its ruling is supported by competent, substantial evidence in the record." Gore v. State, 784 So.2d 418, 432 (Fla. 2001) (quoting Bell v. State, 699 So.2d 674, 677 (Fla. 1997)). Competent, substantial evidence supports the trial court's finding of the HAC aggravator, and Douglas' attack on that finding is meritless.

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[17] The cases cited by Douglas in which an HAC finding was rejected on appeal (Initial Brief of Appellant at 34) can be readily distinguished. In Bundy v. State, 471 So.2d 9 (Fla. 1985), the victim's body was not found for two months; it was so deteriorated that no cause of death could be determined and from all that appeared the victim could have died instantly. Brown v. State, 644 So.2d 52 (Fla. 1994) did not involve a beating murder. This Court's opinion in Elam v. State, 636 So.2d 1312 (Fla. 1994) does not indicate that Elam's victim had significant defensive wounds or that there were other indications of an extended struggle such as appear in this case (including, for example, the fact that Mary Ann had injuries on all sides of her head, and evidence that she had been bludgeoned with two different weapons).

IV

DEATH IS A PROPORTIONATE SENTENCE IN THIS CASE

Douglas argues that death is a disproportionate sentence because the HAC factor was improperly found, leaving only one valid aggravator. Alternately, he argues that even if the HAC aggravator is valid, the "substantial mitigation" presented in this case compels a life sentence. Neither argument has merit. The murder is clearly HAC, and the mitigation is not substantial.

There has been no demonstration whatever that Douglas suffers from any significant mental or emotional disorders or disabilities, either generally, or at the time of the crime. Moreover, despite the shortcomings of Douglas' biological father (who left home when Douglas was only 9-10 years old), Douglas was never deprived of food, clothing or shelter, and grew up surrounded by a family who loved him and protected him and tried to give him moral guidance. There is nothing in his background or his abilities in the circumstances of this offense that would provide any significant diminution of his moral culpability for the horrid way he treated Mary Ann Hobgood.

For purposes of proportionality review, this Court does not "reweight or reevaluate the evidence presented as to aggravating or mitigating circumstances," Hudson v. State, 538 So.2d 829,

831 (Fla. 1989), but must "accept the jury's recommendation and the trial judge's weighing of the aggravating and mitigating evidence." Bates v. State, 750 So.2d 6, 12 (Fla. 1999). This case involves the rape and incredibly brutal murder of an innocent young woman. The two aggravating circumstances found in this case (HAC and murder committed during the commission of a sexual battery) are more than sufficient to outweigh the minimal mitigation, and to warrant a death sentence; considering the "totality of the circumstances" in this case, compared to "other capital cases," Beasley v. State, 774 So.2d 649, 673 (Fla. 2000), death is a proportionate sentence in this case. E.g., Lawrence v. State, supra, 698 So.2d at 1221 (death penalty proportionate for "extraordinarily brutal" murder); Orme v. State, 677 So.2d 258, 263 (Fla. 1996) (death penalty proportional where defendant beat and strangled victim in a motel room, murder was HAC and committed for pecuniary gain and during sexual battery, and trial court found two statutory mental mitigators--substantial impairment and extreme emotional disturbance); Geralds v. State, 674 So. 2d 96, 105 (Fla. 1996) (affirming death sentence where victim was severely beaten before death, murder was especially heinous, atrocious, or cruel and committed during the commission of a robbery, and both statutory and nonstatutory mitigation was afforded little

weight); Butler v. State, 842 So.2d 817, 832-33 (Fla. 2003) (stabbing murder; death penalty proportionate where HAC was sole aggravator, given high degree of brutality shown by number of wounds inflicted).

V

FLORIDA'S DEATH SENTENCING PROCEDURES REMAIN CONSTITUTIONALLY VALID AND UNAFFECTED BY THE DECISION OF THE UNITED STATES SUPREME COURT IN RING V. ARIZONA

Douglas contends that the decision of the United States Supreme Court in Ring v. Arizona, 536 U.S. 584 (2002), invalidates Florida's long upheld capital sentencing structure. He has three specific complaints about Florida's sentencing procedures: the judge, not the jury makes the sentencing findings; the jury's advisory sentence need not be unanimous; the aggravating circumstances are not charged in the indictment. His argument fails for several reasons: the statute under which Douglas was convicted, unlike the statute under which Ring was convicted, provides that, upon conviction for capital murder, the maximum sentence is death; following Douglas' conviction, a jury determined that aggravating circumstances existed and recommended a death sentence, in contrast to Ring's trial, in which the jury played no part in sentencing; and Douglas was convicted of sexual battery by a unanimous jury.

Initially, it must be noted that Ring left intact all prior opinions upholding the constitutionality of Florida's death penalty scheme, including Proffitt v. Florida, 428 U.S. 242 (1976), Spaziano v. Florida, 468 U.S. 447 (1984), Hildwin v. Florida, 490 U.S. 638 (1989), Barclay v. Florida, 463 U.S. 939 (1983), and Dobbert v. Florida, 432 U.S. 282 (1977). As the Court has recognized, "[t]he Supreme Court has specifically directed lower courts to 'leav[e] to this Court the prerogative of overruling its own decisions.' Agostini v. Felton, 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (*quoting* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989))." Mills v. Moore, 786 So. 2d 532, 537(Fla. 2001).

Secondly, in contrast to the Arizona Supreme Court's interpretation of Arizona law, this Court has repeatedly "held that the maximum penalty under (our first-degree murder) statute is death," Porter v. Crosby, 840 So.2d 981 (Fla. 2003), and has held that, because this is so, Ring is inapplicable to Florida's capital sentencing procedures.

An additional distinction between Florida law and Arizona law is that in, in contrast to Arizona, Florida gives the jury a significant role in sentencing. In this case, after considering aggravation and mitigation, the jury recommended a

death sentence by an 11-1 vote. By its recommendation, the jury necessarily found the existence of sufficient aggravating circumstances to warrant a death sentence. Jones v. United States, 526 U.S. 227, 250-51 (1999) (when a Florida jury makes a sentencing recommendation of death, it "necessarily engag[es] in the factfinding required for imposition of a higher sentence, that is, the determination that at least one aggravating factor had been proved").[18]

Furthermore, the jury in this case convicted Douglas of sexual battery. This unanimous finding takes this case outside any conceivable ambit of Ring. Belcher v. State, No. SC01-1414, slip opinion at 15 (Fla. July 10, 2003) (because "a unanimous jury found Belcher guilty of both and sexual battery," the guilt phase verdict "reflects that the jury independently found the aggravator of the murder being committed in the course of a sexual battery").

Nothing in Ring requires jury sentencing. Once the jury has determined that a defendant is death eligible, it is permissible for the trial court to make any and all remaining findings and

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[18] Nothing in Ring requires *written* factual findings. Nor does Ring require unanimous jury findings, or overrule precedent allowing juries to find elements of crime by less than a unanimous verdict. Johnson v. Louisiana, 406 U.S. 356 (1972); Apodaca v. Oregon, 406 U.S. 404 (1972). See also, Butler v. State, 842 So.2d 817, 834 (Fla. 2003) (Wells, J., concurring).

to impose a death sentence. Ring, 122 S.Ct. at 2245 (Scalia, J., concurring) ("today's judgment has nothing to do with jury sentencing"; "States that leave the ultimate life-or-death decision to the judge may continue to do so").[19] Thus, Florida's capital sentencing procedures are constitutionally acceptable, as this Court has consistently held when addressing numerous Ring-based attacks upon Florida's capital sentencing procedures. E.g., Pace v. State, 28 Fla. L. Weekly S415 (Fla. May 22, 2003); Jones v. State, 28 Fla. L. Weekly S395 (Fla. May 8, 2003); Chandler v. State, 28 Fla. L. Weekly S329 (Fla. April 17, 2003); Lugo v. State, 845 So.2d 74, 119 (Fla. 2003); Kormondy v. State, 845 So.2d 41, 54 (Fla. 2003); Conahan v. State, 844 So.2d 629 (Fla. 2003); Butler v. State, 842 So.2d 817 (Fla. 2003); Banks v. State, 842 So.2d 788 (Fla. 2003); Spencer v. State, 842 So.2d 52 (Fla. 2003); Grim v. State, 841 So.2d 409 (Fla. 2003); Anderson v. State, 841 So.2d 390 (Fla. 2003); Porter v. Crosby, 840 So.2d 981 (Fla 2003).

There is no merit to Douglas' Ring-based attack on Florida's capital sentencing procedures.

CONCLUSION

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[19] Nor does Ring require States to charge aggravators in the indictment. The Fifth Amendment right to indictment has never been applied to the States, Hurtado v. California, 110 U.S. 516 (1884), and nothing in Ring changes this.

For all the foregoing reasons, Douglas' conviction and death sentence should be affirmed.

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

_____
CURTIS M. FRENCH
Senior Assistant Attorney General
Florida Bar No. 291692

OFFICE OF THE ATTORNEY GENERAL
The Capitol
32399-1050
(840) 414-3300

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Nada M. Carey, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, FL 32301, this 4th day of August, 2003.

_____
CURTIS M. FRENCH
Senior Assistant Attorney General

CERTIFICATE OF TYPE SIZE AND STYLE

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CURTIS M. FRENCH
Senior Assistant Attorney General