IN THE SUPREME COURT OF FLORIDA

MICHAEL JACKSON

Appellant,

v. CASE NO. SC07-2008

STATE OF FLORIDA,

Appellee.

_____/

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

ANSWER BRIEF OF THE APPELLEE

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CASE SNAPSHOT

This is a double murder case. In this direct appeal, Michael Jackson challenges his conviction for two counts of first degree murder, two counts of robbery and two counts of kidnapping.

Jackson, along with three others, murdered Reggie and Carol Sumner, a retired elderly couple living in Jacksonville, Florida. Jackson and his accomplices murdered the Sumners by invading their home, binding them with duct tape, stuffing them into the trunk of their own Lincoln Town Car, driving them some 30 miles into Southern Georgia, and burying them alive in a grave dug days before the planned murder. Over the next several days, Jackson withdrew a significant sum of money from the Sumners' bank account, using the victims' A.T.M. card.

At trial, Jackson admitted that he planned and participated in robbing the Sumners but denied any active role in the kidnappings and murders.[1] Nonetheless, the jury found Jackson guilty of two counts of first degree murder, two counts of robbery and two counts of kidnapping.

[1] Jackson told the court, in an *ex parte* hearing, that he agreed to the defense strategy to admit to the robbery but claim the kidnapping and murder were independent acts of Bruce Nixon and Alan Wade. The court conducted a colloquy with Jackson. Jackson advised the trial court that he understood that he would be convicted of robbery, that he had enough time to discuss the matter with his counsel, had no questions about the strategy, and was satisfied with trial counsel's representation. (TR Vol. VI 416).

The State presented victim impact evidence at the penalty phase but put on no additional evidence in aggravation. Jackson refused to allow trial counsel to put on mitigation at the penalty phase. The court conducted an extensive inquiry before permitting the waiver. At the conclusion of the penalty phase, the jury recommended Jackson be sentenced to death, for both murders, by a vote of 8-4.

In sentencing Jackson to death for both murders, the trial court found eight aggravators to exist beyond a reasonable doubt. In mitigation, the trial court found and gave some weight to one statutory mitigator - the defendant's age - and three non-statutory mitigators, including Jackson's capacity to live a productive life in prison, abandonment by his parents, and a criminal history that contained no incidents of violence. The trial judge found the aggravators far outweighed the mitigators and sentenced Jackson to death for both murders. On appeal, Jackson raises nine issues.

PRELIMINARY STATEMENT

References to the appellant will be to "Jackson" or "Appellant". References to the appellee will be to the "State" or "Appellee".

The nineteen (19) volume record on appeal in the instant case will be referenced as "TR" followed by the appropriate volume and page number. References to Jackson's initial brief will be to "IB" followed by the appropriate page number.

STATEMENT OF THE CASE

On or about July 8, 2005, Jackson, along with Tiffany Cole, Alan Wade, and Bruce Nixon murdered Reggie and Carol Sumner. Jackson, Cole, and Wade were arrested on July 14, 2005 in South Carolina. The Sumners' bodies were found two days later, on July 16, 2005, in south-east Georgia.

On August 18, 2005, a Duval County Grand Jury handed down a six count indictment charging Jackson with two counts of first degree murder, two counts of armed kidnapping, and two counts of armed robbery. (TR Vol. I 3-4). Prior to trial and without objection from the defense, the State deleted a portion of the indictment that alleged the use of a weapon during the kidnappings and robberies. (TR Vol. III 434,437).

Trial commenced on April 30, 2007. Jackson was represented at trial by Richard Kuritz, a 15-year member of the Florida Bar and Greg Steinberg, then a 14 year member of the Florida Bar.

Opening statements began on May 1, 2007. On May 7, 2007, the jury returned a verdict of guilty on all six counts of the indictment. (TR Vol. 146-151). The penalty phase commenced on May 30, 2007. The same day, Jackson filed a motion for new trial. (TR Vol. I 166-167).

During the penalty phase, the State called two victim impact witnesses, Revis Sumner, Reggie Sumner's brother, and Rhonda Alford, Carol Sumner's daughter. (TR Vol. XIII 1636-1639, 1640-1643). The trial court instructed the jury on how it could consider victim impact evidence both before the witnesses testified and during its final instructions. (TR Vol. XIII 1635-1636, 1679-1680). Both witnesses read prepared statements.

Jackson waived his right to present evidence in mitigation. The trial court conducted an extensive inquiry into the waiver, questioning Mr. Jackson and both trial counsel. (TR Vol. XIII 1613-1616). Trial counsel explained the mitigation evidence he was prepared to offer should his client allow mitigation evidence to be presented. (TR Vol. XIII 1616-1621).

After another colloquy with the defendant, the trial court found Jackson's waiver of his right to put on mitigation evidence freely and voluntarily made. (TR Vol. XIII 1621-1627).

The Court found that, prior to waiving his right to present evidence in mitigation, Jackson was well informed by both counsel and the trial court of the ramifications of his decision. (TR Vol. XIII 1627). Jackson does not challenge his waiver on appeal.

The trial court instructed the jury on eight aggravators: (1) the defendant had been previously convicted of a felony and was on felony probation/parole at the time of the murder; (2) Jackson was previously convicted of a violent felony, specifically the murder of the other victim; (3) the murder was committed in the course of a kidnapping; (4) the murders were especially heinous, atrocious, or cruel; (5) the murders were cold, calculated, and premeditated; (6) the murders were committed for financial gain; (7) the murders were committed to avoid or prevent a lawful arrest; and (8) the victims were particularly vulnerable due to advanced age or disability. (TR Vol. XIII 1675-1678). The trial judge instructed the jury on the "catch-all" mitigator and instructed the jury that in mitigation it could consider "any aspect of the defendant's character or his record or background or other evidence presented during the course of the trial or the penalty phase today which you find to be mitigating." (TR Vol. XIII 1679).

After penalty phase closing arguments, the jury retired to deliberate. The jury returned an 8-4 recommendation of death for both murders. (TR Vol. XIII 1685-1686).

A Spencer hearing was held on June 18, 2007. The state presented additional victim impact evidence. Revis Sumner testified as did Carolyn Sumner, Reggie Sumner's sister-in-law. (TR Vol. XV 1697-1700, 1700-1704). Additionally, Sabrina Gouch, a victim advocate, read a letter from Carol Sumner's son, Frederick William Hallock. (TR Vol. XV 1704-1707). The State also showed a video of the memorial service conducted for the Sumners and introduced several letters into evidence for the record. (TR Vol. XV 1708-1718).

Jackson testified at the Spencer hearing. (TR Vol. XV 1720-1727). Trial counsel had additional witnesses standing by to testify if Jackson permitted it, including Jackson's grandparents, and a family friend who had known Jackson since Jackson was a small child. Trial counsel advised the court he had mental health records and school records which would show Jackson was on medication (Ritalin) and school records which, according to trial counsel, would put Jackson in a more favorable light. (TR Vol. XV 1729, 1733). Trial counsel told the court that Jackson would not permit counsel to put on the evidence. (TR Vol. XV 1728). Once again, the trial court

engaged in an extensive colloquy with Jackson about his decision. (TR Vol. XV 1728-1734).

A subsequent hearing was held on August 13, 2007. Trial counsel told the trial court his client did not want to put on additional mitigation evidence at this subsequent hearing. Trial counsel told the court, however, that Jackson's grandmother, father and other family members and friends were present to offer testimony on his behalf if Mr. Jackson would allow it. Mr. Jackson told the court that he did not want them to testify. (TR Vol. XVIII 1765).

At the hearing, the trial court also heard Jackson's motion for new trial. No additional argument was presented. The trial court denied Jackson's motion. (TR Vol. XVIII 1774).

On August 29, 2007, the trial court sentenced Michael Jackson to death for the murders of Reggie and Carol Sumner. In sentencing Jackson to death, the trial court found eight aggravators: (1) Jackson had previously been convicted of a felony and was on felony probation/parole at the time of the murder; (2) Jackson had previously been convicted of a violent felony (contemporaneous murder of other victim); (3) the murders were committed in the course of a kidnapping; (4) the murders were especially heinous, atrocious or cruel; (5) the murders were cold, calculated, and premeditated; (6) the murders were committed for financial gain; (7) the murders were committed to

avoid arrest; and (8) the victims were especially vulnerable due to age and infirmity. (TR Vol. II 270-274).[2]

The court found Jackson's age in statutory mitigation. The court afforded the mitigator some weight. The court observed, however, that there was no evidence that Jackson's youth contributed to minimizing his participation in the murders. (TR Vol. II 276).

The court found that even at 23 years of age, Jackson was more than capable of planning the death and subsequent thefts which are the basis for this case. (TR Vol. II 276). The trial judge noted that the defendant's testimony before the jury and at other hearings reveal that Jackson has an articulate command of the English language and has full control of his mental faculties. The court rejected the defense's suggestion that Jackson is "far from a sophisticated, mature adult." (TR Vol. II 276).

The court also considered, in statutory mitigation, the defendant's suggestion he was only an accomplice in the murders which were committed by his co-defendants. The trial court concluded that the mitigator had not been established. (TR Vol. II 276).

[2] Jackson does not challenge the sufficiency of the evidence to sustain any of the eight aggravators.

In non-statutory mitigation, the court found: (1) Jackson was amenable to rehabilitation and could lead a productive life in prison (some weight); (2) Jackson had a troubled childhood, which included parental abandonment, being a problem child in elementary school who was put on Ritalin (some weight); and (3) Jackson had no violent criminal history (some weight). (TR Vol. II 276-277).

On August 29, 2007, Jackson filed a notice of appeal. He filed a subsequent notice of appeal on October 18, 2007 because the original notice of appeal could not be found in the Clerk's Office. (TR Vol. II 300).

On August 18, 2008, Jackson filed his initial brief. Jackson raised nine issues: (1) the state failed to prove beyond a reasonable doubt the kidnapping and murders were not the independent acts of the co-defendants; (2) the trial judge erred in failing to suppress evidence found in a locked safe inside Jackson's motel room; (3) the trial judge erred in failing to suppress recorded conversations between Jackson and his grandmother while he was incarcerated in South Carolina awaiting extradition; (4) the trial judge erred in admitting evidence that Jackson attempted to escape from jail; (5) the trial court erred in introducing hearsay testimony of non-testifying defendants; (6) the trial judge erred in giving great weight to the jury's recommendation after the defendant waived his right

to present mitigating evidence; (7) this court's proportionality review is unconstitutional; (8) Jackson's sentence to death is disproportionate; (9)Jackson's death sentence violates due process, the Sixth Amendment and Ring v. Arizona 536 U.S. 584 (2002) and its progeny. This is the State's answer brief.

STATEMENT OF THE FACTS

Michael Jackson, born on May 12, 1982, was 23 years old when he, along with Tiffany Cole, Alan Wade, and Bruce Nixon, murdered James (Reggie) and Carol Sumner. Tiffany Cole was also 23 years old. Alan Wade and Bruce Nixon were both 18 years old.

Reggie Sumner, born on September 18, 1943 was 61 years old at the time of his death. Carol Sumner, born on February 16, 1944 was also 61 years old at the time of her death.

The Sumners were not victims chosen at random nor were they in the wrong place at the wrong time. Jackson targeted the Sumners because he believed they were vulnerable due to their age and infirmity and because they were people of some means.

Both Reggie and Carol Sumner were in frail health. At the time of her death, Carol Sumner had liver cancer. She also had high blood pressure and osteoporosis. (TR Vol. VI 480, Vol. X 1271).

Reggie Sumner had diabetes and was insulin dependent. (TR Vol. VI 481). Mr. Sumner had a history of Hepatitis C and liver problems. (TR Vol. X 1270) Shortly before the murder, Mr.

Sumner had fractured his tibia. (TR Vol. VI 484). He needed a walker to get around outside and used a cane inside the house. (TR Vol. VI 492).

Upon autopsy, Carol Sumner weighed 90 pounds. Reggie Sumner weighed 105 pounds. (TR Vol. X 1263, 1267-1268).[3]

The Sumners died a horrible death. In the days prior to the murder, the four co-defendants dug a grave, some six feet deep and four feet wide. (TR Vol. IX 1159). After the murderers kidnapped the Sumners from their home and drove over 30 miles into Georgia, the Sumners were placed in the makeshift grave. (TR Vol. IX 1175-1183).

They were still alive. The Sumners huddled together with their heads draped in a protective posture. (TR Vol. X 1276). As they huddled together, the killers filled the pre-dug grave with dirt. (TR Vol. IX 1183). The Sumners were still alive when the dirt reached their necks. (TR Vol. X 1278).

Once they were completely buried and their heads, mouths, and noses covered, the Sumners struggled to breathe. (TR Vol. X 1276). They would have been unconscious within some seconds. (TR Vol. X 1297). Death would have occurred in 3-5 minutes. (TR Vol. X 1298).

[3] Dr. Clark, the medical examiner, testified that decomposition and the manner in which they are measured likely rendered them a few pounds lighter than they were in real life. (TR Vol. X 1264).

The Sumners died as a result of both suffocation and mechanical asphyxiation. Suffocation occurred as the Sumners inhaled dirt into their noses and mouths. (TR Vol. X 1278). Mechanical asphyxiation occurred as the weight of the dirt covering their bodies compressed the Sumner's lungs and abdominal area making it impossible for them to take sufficient breaths to get air into their lungs. (TR Vol. X 1273, 1296).

The evidence against Jackson was considerable. Bruce Nixon, one of Jackson's co-defendants, testified before the jury. Nixon entered into a plea agreement with the state. Pursuant to the plea agreement, Nixon pled guilty to two counts of second degree murder, two counts of robbery, and two counts of kidnapping. (TR Vol. IX 1196). Nixon was to be sentenced after he testified. (TR Vol. IX 1196).[4]

Nixon told the jury that sometime before July 8, 2005, Alan Wade called him and asked him to participate in a robbery. He agreed. (TR Vol. IX 1155). Nixon and Wade were best friends. They grew up together and went to school together. (TR Vol. IX 1193).

Nixon agreed to do the robbery because he wanted money. He was told the take could be about $200,000. (TR Vol. IX 1167).

[4] Nixon was eventually sentenced to six 45 year terms in the Department of Corrections.

To effectuate the plan, Nixon stole four shovels; a snow shovel, two regular shovels and a small shovel. (TR Vol. IX 1155-1156). Nixon knew they took the shovels to dig a hole. He did not yet know the details of the plan to rob and murder the Sumners.

Nixon met Michael Jackson and Tiffany Cole for the first time when they dug the hole. A couple of nights before Jackson and his cohorts murdered the Sumners, Alan Wade, Bruce Nixon, Tiffany Cole, and Michael Jackson drove to Georgia. All four were looking for a remote place to dig a hole. (TR Vol. IX 1158).

Jackson was in charge. (TR Vol. IX 1159). Jackson rejected several spots that were not out of the way enough. (TR Vol. IX 1158). Eventually, they found a place that was satisfactory. Nixon, Wade, and Jackson dug the hole. The hole was about six feet deep and about four feet wide. (TR Vol. IX 1159). Tiffany Cole held a flashlight while the men dug. (TR Vol. IX 1160). They left the shovels at the hole. (TR Vol. IX 1179).

After they dug the hole, Wade filled Nixon in on the plan. Nixon told Wade he would go with him to the Sumner home. Wade sought, and got, Jackson’s permission to allow Nixon to take part in the Sumner robbery/murder. (TR Vol. IX 1161).

The four made other preparations. They bought gloves, duct tape, and plastic wrap. Nixon found a toy gun in Cole's rental car, a Mazda RX-8. (TR Vol. IX 1164).

One of the tools the four murderers used was Nextel phones. Nixon called them "beep beeps." (TR Vol. IX 1165). The phones have a walkie-talkie feature that allows Nextel phone users to "call" or "beep" each other over a walkie-talkie rather than making a normal phone call.

Prior to going to the Sumner home, the four murderers discussed how to best carry out the home invasion. One dilemma was whether to break into the Sumners' home and lay in wait or go to the door when the Sumners were at home and gain entry by subtrefuge. (TR Vol. IX 162).

The plan was to get credit cards, the A.T.M. card and stuff. (TR Vol. IX 1162). They also intended to take the Sumners. Jackson was to take care of the Sumners. Jackson told Nixon that he would give the Sumners a shot or something to make them die. (TR Vol. IX 1163).

Ultimately, the four murderers decided to wait until the Sumners were at home. The four cased the house a couple of days before the murder.

On July 8, 2005, the night of the murder, Wade, Nixon, Cole, and Jackson drove to the Sumner home in Cole's rental car, a Mazda RX-8. Wade and Nixon got out of the car, went up to the

Sumner home and knocked on the door. (TR Vol. IX 1168). Ms. Sumner opened the door. Wade asked Ms. Sumner if they could use the phone. (TR Vol. IX 1169). Ms. Sumner let Wade and Nixon into her home. (TR Vol. IX 1169).

Wade walked over to the phone and pulled the cord from the wall. Wade grabbed Mr. Sumner and put him on the chair. Nixon put Ms. Sumner on the couch. Nixon pointed the toy gun at the Sumners. Nixon and Wade had gloves on their hands so they would not leave fingerprints. (TR Vol. IX 1170).

Nixon and Wade duct taped the Sumners' legs, arms, mouth and eyes and put them in an adjoining room. It was Nixon's job to watch the Sumners. Jackson beeped Nixon on the Nextel and asked if the Sumners were secure. Nixon reported they were. (TR Vol. IX 1172).

Jackson came into the Sumners' house in accord with the pre-arranged plan. Nixon heard Jackson come into the house and heard him talking to Wade. Jackson and Wade walked around the house looking for A.T.M. cards and bank statements. (TR Vol. IX 1173). Jackson and Wade found Mr. Sumner's wallet and the other stuff they were looking for.

Jackson beeped Nixon and asked him for the keys. He told Nixon to ask Mr. Sumner how to pop the trunk of his Lincoln Town Car. Mr. Sumner told Nixon there was a button on the key ring. (TR Vol. IX 1175).

Nixon and Wade brought the Sumners to their own car and put them in the trunk. The Sumners were still bound with duct tape. (TR Vol. IX 1175). Nixon knew they were heading for the hole the four killers had dug in the Georgia woods. (TR Vol. IX 1176). The Sumners were to be killed. (TR Vol. 1176).

In addition to a wallet and the A.T.M. card, the four murderers took jewelry, coins, and a lockbox full of rare coins from the Sumner home. They also took a bunch of papers. (TR Vol. IX 1179). They did not take the computer. They would, however, return for it later.

The four killers left the Sumner home together. Wade drove the Lincoln and Nixon rode shotgun. Jackson and Cole followed in Cole's rental car. Enroute, Wade and Nixon noticed the Lincoln was nearly out of gas. They drove to a gas station and filled up the car. (TR Vol. IX 1177). Jackson and Cole paid for the gas. (TR Vol. IX 1222).

The four murderers knew it was dangerous to drive around with two people in the trunk. They had a contingency plan in case there was a police presence. If they saw the police, Cole and Jackson were to speed off so that the police would give chase, leaving the Lincoln alone. (TR Vol. IX 1192).

Wade drove the Town Car close to the pre-dug hole and stopped the car. Cole and Jackson also stopped. When they arrived, Jackson popped the trunk of the Lincoln.

The Sumners had freed themselves, in part, from their bindings. The duct tape that Nixon had put on the Sumners had come loose. Nixon had not taped them very well. (TR Vol. IX 1180). Jackson was angry. He cussed at Nixon and told him to duct tape the Sumners again. Nixon complied. (TR Vol. IX 1180).

They closed the trunk and backed the Lincoln up next to the hole. (TR Vol. IX 1181). Nixon backed up the Lincoln because Wade could not do it. (TR Vol. IX 1181). He stopped ten feet from the hole. (TR Vol. 1182).

When they stopped, Jackson grabbed a pad of paper and told Nixon to go check on Tiffany Cole. Cole was still in the Mazda. Wade and Jackson stayed at the grave site.

Nixon told the jury that he did not see the Sumners go into the hole. He knows they got killed. (TR Vol. IX 1183).

When Nixon saw Jackson again, Jackson told him he got the Sumners' A.T.M. numbers. The shovels were placed in the trunk of the Town Car and the killers left their victims to die. Wade drove the Lincoln and Nixon rode shotgun. Cole and Jackson followed in the rented Mazda. (TR Vol. IX 1185).

The four killers drove to Sanderson, Florida and dumped the Lincoln. They wiped every place they thought they might have touched. (TR Vol. IX 1186).[5]

After dumping the Lincoln, Wade, Nixon, Cole, and Jackson drove back to Jacksonville in Cole's rented Mazda. They went to an A.T.M. Jackson used the Sumners' A.T.M. card to get money from the Sumners' account. Nixon got part of the money. (TR Vol. IX 1187).

Jackson always had control of the A.T.M. card. (TR Vol. IX 1231). Michael Jackson was the one with the plan. (TR Vol. IX 1233).

The four murderers went to a motel when they returned from Georgia. Wade and Cole left. They returned to the Sumners' house to get the Sumners' computer. The computer was eventually pawned. (TR Vol. IX 1188).

Nixon stayed with the group only one more day after the murders. After that, he went home to Baker County. He never saw Cole, Jackson or Wade again. (TR Vol. IX 1189-1190). He did hear from Wade though. Wade called him and told Nixon that the car had been found. (TR Vol. IX 1192). Nixon took the police to the grave site.

[5] The car was found 20 to 25 miles from the site the Sumners' bodies were eventually discovered. (TR Vol. VI 517). Four shovels were in the trunk of the car. Also in the car was some duct tape and pieces of tape. (TR Vol. VI 529).

Nixon's testimony was not the only evidence linking Jackson to the Sumner murders. The evidence at trial showed that Tiffany Cole was Michael Jackson's girlfriend.

Cole rented a car so that she and Jackson could drive down to Jacksonville from South Carolina. The car, a Mazda RX-8, was equipped with a GPS system. The system allows the rental car company to track the vehicle. The State introduced the vehicle's GPS records into evidence at trial. The GPS records showed the Mazda within blocks of the Sumners' Reed Avenue home on July 8, 2005. (TR Vol. VI 569).

Jackson used the Sumners' A.T.M. card multiple times on July 9, 10, 11, 12 and on July 13, 2005. (TR Vol. VI 522). The first use on July 9, 2005 was at 3:30 in the morning, just hours after the Sumners were murdered. Photographs taken from the various A.T.M.s revealed that Michael Jackson used the Sumners' card over and over again. In addition to Jackson's face, other photos taken at the A.T.M. show Jackson getting in and out of what appeared to be Cole's rented Mazda RX-8. (TR Vol. VI 523,526).

In total, between July 9 and July 13, 2005, $5,077.75 was withdrawn from the Sumner's account. (TR Vol. VII 683). On July 13, 2005, someone called into the bank's call center, identifying himself as Mr. Sumner. The caller reported he was

having trouble with his A.T.M. card. The caller was advised he had exceeded his daily limit. (TR Vol. VII 683).

On or about July 13, 2005, Wade told Jackson the Sumners' car had been found and the police were looking for the missing Sumners. Jackson also had been unable to use the Sumners' ATM card. He believed the card had been turned off. (TR Vol. X 1388).

To remedy this situation, Jackson called the Jacksonville Sheriff's Office. (TR Vol. X 1388). Detective Meachem returned the call.

Jackson pretended to be Reggie Sumner. Jackson's goal was clear; to keep the Sumners' A.T.M. card active so he could continue to drain the Sumners' bank account. Jackson knew he could do that only if he convinced the Jacksonville Sheriff's Office that Reggie and Carol Sumner were still alive and well. Detective Meachem recorded the call and played the call for the jury. (TR Vol. VI 531).

In that call, Jackson told Detective Meachem that he was James Sumner. Jackson told Detective Meachem a neighbor had called him and advised that his garage door was open and his Lincoln was missing. Jackson reported that Ms. Sumner's sister had died and the couple was in Coros, Delaware. (TR Vol. VI 544-545). Detective Meachem attempted to locate Coros, Delaware. It does not exist. (TR Vol. VI 564).

Detective Meachem asked to speak to Carol Sumner. Jackson put Tiffany Cole on the line to impersonate Carol Sumner. (TR Vol. VI 549). Detective Meachem inquired about her family and then asked Cole what her social security number was. Cole provided Carol Sumner's social security number. (TR Vol. VI 552).

Jackson also inquired about the Sumners' A.T.M. card. Jackson told Detective Meachem that he was unable to use the card, it would not work. Detective Meachem told "Mr. Sumner" that he should contact his bank. Eventually, Jackson hung up on the detective. (TR Vol. VI 564).

Detective Meachem did not believe for one minute that he had been talking to Reggie and Carol Sumner. (TR Vol. VI 564). He knew, however, that he could track Jackson by way of the A.T.M. card.

The next day, Detective Meachem spoke with Heritage Credit Union. Detective Meachem asked the bank to keep the Sumner's A.T.M. card active. Detective Meachem knew that every time Jackson withdrew money, he could be tracked. (TR Vol. VI 566).

The credit union kept the Sumner's ATM card active until July 15, 2005 at the request of the police. (TR Vol. VII 677). After Jackson spoke with Detective Meachem, Jackson used the Sumners' A.T.M. card in South Carolina. (TR Vol. VI 566).

Jackson's cell phone records also linked him to the Sumner murders. On July 4, 2005, Jackson, using the name David Jackson, opened an account with Nextel using a pre-paid phone. Jackson's phone number was (843) 202-5449. (TR Vol. VI 582). This was the same number that Michael Jackson gave to members of the Jacksonville Sheriff's Office when he called and pretended to be Reggie Sumner. (TR Vol. VI 530).

Records retrieved from Nextel show that on July 8, 2005, Jackson made three calls to the Sumner residence at 9:49 p.m., 10:07 p.m. and 10:15 p.m. (TR Vol. VI 589). The calls were made from Jacksonville, Florida and bounced off a tower less than .5 miles from the Sumner home.

Just after midnight on July 9, 2005, Jackson phoned the Heritage Credit Union, the bank where the Sumner's banked. That call bounced off a tower close to the site where the Sumner's bodies were found. (TR Vol. VI 593).

On July 14, 2005, the police located Jackson, Cole and Wade in South Carolina. Cole had rented two rooms at the Best Western motel in Ladsden, South Carolina. (TR Vol. VII 687). Tiffany Cole and Michael Jackson were staying in one room. Wade was in a separate room. (TR Vol. VII 688).

James Rowan, a police detective for the North Charleston Police Department and Deputy U.S. Marshall, David Alred, a member of the fugitive task force, knocked on Cole's door.

Jackson opened the door. Rowan recognized Jackson immediately from the A.T.M. photos. Jackson was detained and patted down. In his pocket, there was an A.T.M. card and some other papers. The A.T.M. card was from Heritage Credit Union. (TR Vol. VII 688-689). The card was not immediately seized. (TR Vol. VII 689).

The officers did a sweep of Cole and Jackson's motel room. Cole was on the bed. The officers handcuffed Cole and detained her for officer safety. (TR Vol. VII 689). The officers detained both Jackson and Cole in the doorway of the motel room and obtained a search warrant.

Once the warrant was obtained, the officers searched the motel room. In the room, in a suitcase, the officers found paperwork and mail belonging to the Sumners. (TR Vol. VII 690). Numerous items of evidence were seized and several photographs taken. (TR Vol. VII 690-691). Also in the room were several newly purchased items, including a watch, sports jerseys, hats and a game console. (TR Vol. VII 695).

A key ring was found in Wade's room. The key ring belonged to the Sumners. (TR Vol. VII 692). In the trunk of Cole's vehicle, the police found Reggie Sumner's coin collection. (TR Vol. VII 692).

The police also searched a locked safe in Cole and Jackson's room. In the safe, police officers found more

personal items belonging to the Sumners. (TR Vol. VII 693). Among the items were the Sumners' credit cards and checkbook. (TR Vol. VII 693).

Jackson, Cole and Wade were transported to the police station. Jackson was placed in an interview room. While in the interview room, Jackson took the Sumners' ATM card that he had in his pocket and disposed of it in a trashcan located in the interview room. Jackson covered the card with a paper towel in an attempt to conceal the card. The police later recovered the card from the wastebasket. (TR Vol. VII 696, 705).

Jackson waived his rights and spoke with the police. During the recorded interview, which was played for the jury, Jackson initially denied any involvement in the Sumner robbery/murders at all. Eventually, Jackson admitted being in the driveway of the Sumner home when Wade and Nixon went into the home and playing a role in the robbery. He also admitted following Wade and Nixon to a pre-dug grave site, using the Sumners' A.T.M. card and phoning the police in order to keep the card active. Jackson maintained, however, he had not known Wade and Nixon intended to kidnap or murder the Sumners until they arrived at the grave site. (TR Vol. VII, 740-800 VIII 808-882).

During the time Jackson was in jail awaiting trial, Jackson did several things evidencing his consciousness of guilt. Jill Kessinger testified that she knows Michael Jackson. She spoke

with him while he was awaiting trial in the Duval County Jail. Kessinger met Jackson through the efforts of her ex-husband who was also an inmate at the Duval County Jail. Eventually, Jackson called her every day collect. Jackson also wrote her letters and asked Kessinger to visit him. She did. (TR Vol. IX 1097). Jackson asked Kessinger to lie to the police and give him an alibi for the murders. Jackson offered her $10,000 in return for her assistance. (TR Vol. IX 1098).

In a letter July 24, 2006, Jackson told Kessinger the details of his "alibi." Kessinger was to tell the police that she picked him up at 7:30 p.m. on July 8, 2005. She was to report that they had gone to Waffle House to eat and then driven to Jacksonville Beach. She also was to report that Alan Wade called him after midnight and that, thereafter, she took Jackson back and dropped him off at Wade's apartment. Jackson told Kessinger his grandmother and "Kevin" would work with her on the story. (TR Vol. IX 1105). Jackson wrote Kessinger another letter restating the details of the alibi.

The letters were introduced into evidence as State's Exhibit 132. (TR Vol. IX 1102). At trial, Jackson admitted soliciting Jill Kessinger to provide him with a false alibi for the night of the murder. (TR Vol. XI 1411).

Jackson also attempted to escape from jail. Robert Bailey testified that just prior to his own release from jail, Jackson

approached him and asked Bailey to help him escape. Prisoners in the Duval County Jail wear armbands to identify inmates by name and number.

The plan was simple. Jackson and Bailey would switch armbands. On the day Bailey was to be released, Jackson would go the jail officials, show them the armband, and walk out of jail. (TR Vol. IX 1128).

Bailey was concerned that if he went along with the plan, he would not be released. Jackson told Bailey to give him a couple of hours head start, go to jail officials, and report he had overslept and lost him armband. Bailey would then be released as well. (TR Vol. IX 1128).

Jackson offered Bailey $10,000 if Bailey helped him to escape. Bailey demurred. (TR Vol. IX 1129). At trial, Jackson admitted soliciting fellow inmate Robert Bailey to help him escape from jail. (TR Vol. XI 1411-1413).

Finally, Jackson called his grandmother, Dimples Inabinat. During the phone call, Jackson solicited his grandmother's help.

A recorded voice advised both parties the call was monitored or recorded. (TR Vol. IX 1064,1071). Ms. Inabinat told Jackson that Nixon had taken the police to the Sumners' bodies. Jackson was incredulous.

Jackson told his grandmother that "Bruce just killed us all." (TR Vol. IX 1066). Jackson told Ms. Inabinat that he was

going to give Alan Wade and Tiffany Cole her number. He wanted to make sure they "all have the same fucking story, man." (TR Vol. IX 1077).

Jackson asked his grandmother to relay messages for him. Jackson told Ms. Inabinat that when he got back to Jacksonville, he would tell Wade and Cole to call. Jackson reiterated that "[w]e all have to have the same fucking story." (TR Vol. IX 1078).

At trial, Jackson admitted calling his grandmother. He tried to explain his demeanor on the phone. She caught him off guard. He was upset. (TR Vol. X 1398).

At trial, Jackson testified he participated in planning the robbery. Jackson told the jury that he and Tiffany Cole stayed at the Sumner home. Afterward, he called Alan Wade and told him the Sumners had got TV's and stuff at their home. (TR Vol. X 1367). A few weeks later, he and Cole hatched the plan to rob the Sumners. (TR Vol. X 1369-1370).

Jackson told the jury that he and Cole knew they could not go into the house because the Sumners knew them. They drafted Alan Wade to help. Jackson told Wade he could not do it alone. Bruce Nixon was brought in to help Wade.

Jackson sat down with Cole, Wade and Nixon and talked about how to do the robbery. (TR Vol. X 1375). The plan was to rob the Sumners of their credit cards, A.T.M. cards and things of

that nature. (TR Vol. X 1377). Jackson testified that Wade and Nixon were told to subdue the Sumners and get their PINs. Jackson told Wade and Nixon not to leave any prints in the Sumners' home. (TR Vol. XI 1423). Jackson gave Wade and Nixon advice about how to do the robbery. (TR Vol. XI 1424).

Jackson told the jury that after the robbery, the plan was to hit the A.T.M., get as much money as possible, then call the police and tell them the Sumners' address. Jackson testified the phone call to the police would ensure the police went to the Sumner home to untie them. (TR Vol. X 1378).

Jackson denied knowing that Wade or Nixon intended to kidnap and kill the Sumners. He denied any participation in pre-digging the grave. (TR Vol. XI 1406-1407). Jackson testified the only thing he participated in was the robbery and using the A.T.M. card after the murder.

In addition to Michael Jackson, the defense put on several witnesses. Ricky Pitts testified that he is a logger. He lives 80 miles from Jacksonville. Mr. Pitts took a vacation, he believes, the week of July 4, 2005. He was not absolutely sure of the date. Prior to going home one day, before his vacation, he was looking through the woods. He saw two shovels and a pile of dirt in the woods. (TR Vol. X 1301). His brother called him while he was on vacation and told him about what had happened to

the Sumners. Mr. Pitts reported what he had seen to the police. (TR Vol. X 1301).

Detective Conn testified that he processed Cole's rented RX-8. He found sand in the back two seats as well as the back seat floorboards. Conn also found sand in the front seat of the Lincoln. (TR Vol. X 1317). Conn testified that at the grave site, he found three cigarette packs, a number of .45 and 9 millimeter shell casings, and a beer can or two. (TR Vol. X 1318).

Alec Griffis testified that he knows Bruce Nixon. He saw Nixon at a party sometime after July 8, 2005. Nixon told Griffis that he killed people and buried those people alive. (TR Vol. X 1321-1322). Nixon told Griffis he was going to get $20,000 the following week. Nixon was planning on buying a Mercedes. (TR Vol. X 1322). Nixon never said that anyone else participated in the killings. (TR Vol. X 1323). Mr. Griffis got the impression Nixon was trying to impress people. (TR Vol. X 1325). Nixon showed him about $200 in cash, all in 20s. Griffis admitted he was drunk at the party. Nixon did not provide any details of the murders. (TR Vol. X 1327).

Thomas Ackeridge testified that he saw Bruce Nixon at the same party that Alec Griffis attended. Nixon had about a half a bag of pills with him. Nixon told him he had gotten the pills from an old couple. (TR Vol. X 1330). Nixon told Ackeridge

that he killed the couple. (TR Vol. X 1331). Nixon said he buried the people alive. (TR Vol. X 1331). Nixon said that he and Alan Wade were together at the time. (TR Vol. X 1332). Nixon did not mention Michael Jackson's name. (TR Vol. X 1333). Ackeridge told the jury that he drank a lot at the party. He drank a case and some keg shots. (TR Vol. X 1336). He also did some of the pills that Nixon brought. (TR Vol. X 1336). He was messed up. (TR Vol. X 1336). Nixon was messed up too. (TR Vol. X 1337). Nixon was not bragging about killing the people. He just said it one time. (TR Vol. X 1340).

Ricky Wisner testified that in July 2005, he saw Alan Wade driving a Mazda RX-8. He was alone and came by Mr. Wisner's house. (TR Vol. X 1343). They went riding around in the car at times. (TR Vol. X 1343).

Wisner also knows Bruce Nixon. Bruce went off with Alan Wade and did not come back for several days. When he came back he had a lot of money and new clothes. (TR Vol. X 1343). Nixon had a couple thousand dollars. Nixon told him he got the money by robbing some old people. Nixon told Wisner that they buried the bodies. (TR Vol. X 1345).

Nixon told Wisner that Wade had asked him to be a part of it and that it was Michael Jackson, Tiffany Cole, and Alan Wade's idea. (TR Vol. X 1351). Nixon told Wisner that Cole and Jackson did not come into the house. (TR Vol. X 1353).

At trial counsel's request, the trial judge instructed the jury on the independent act doctrine. The jury was also instructed on the law of principals. (TR Vol. XI 1565).

The jury convicted Jackson as charged. The jury found Jackson guilty of murder under both theories of murder (premeditated murder and felony murder). (TR Vol. XI 1596-1597).

SUMMARY OF THE ARGUMENT

ISSUE I: In this claim, Jackson alleges the trial judge erred in denying his motion for a judgment of acquittal because the State failed to overcome his reasonable hypothesis of innocence, in particular, his claim the murder of Reggie and Carol Sumner were the independent acts of his co-defendants. This claim may be denied for two reasons. First, the issue was not preserved because trial counsel made a bare bones motion for a judgment of acquittal. Second, this claim should be denied because there is competent, substantial evidence to support the jury's verdicts.

ISSUE II: In this claim, Jackson alleges the trial judge erred in failing to suppress evidence found in a locked safe inside Jackson's motel room. Jackson does not dispute the police had a valid warrant to search Jackson's motel room. Likewise, Jackson does not dispute the warrant permitted the police to search for items that reasonably could have been secreted in the motel room

safe. Instead, Jackson claims only that a second warrant was required to open the safe. Jackson is mistaken.

The South Carolina police had a valid search warrant to search Jackson's motel room. The law is well established that, if officers have a valid warrant to search fixed premises, the police may search any area or container that could reasonably contain objects of the search. No second warrant is required.

Even if a second warrant was required, the items would have been inevitably discovered after the defendants had been arrested and the motel room returned to the control of motel management staff. Should this Court find, however, that the trial court erred in denying Jackson's motion to suppress; any error would be harmless beyond a reasonable doubt.

ISSUE III: In this claim, Jackson avers the trial judge erred in failing to suppress recorded jailhouse telephone conversations between Jackson and his grandmother. Jackson claims South Carolina jail officials violated South Carolina law when they turned over the taped telephone calls to officers from the Jacksonville Sheriff's Office. Jackson also claims the interception of his jailhouse telephone conversation violated his Fourth Amendment right against unreasonable search and seizure.

Jackson's claim should be denied for three reasons. First, Jackson failed to properly preserve the issue for appeal.

Second, Jackson cannot show that jail officials violated South Carolina law by recording Jackson's jailhouse telephone conversations and turning them over to Florida law enforcement officers. Third, Jackson can show no Fourth Amendment violation because Jackson had no legitimate expectation of privacy in his telephone conversations he knew were being recorded and monitored.

ISSUE IV: In this claim, Jackson alleges the trial judge erred in admitting evidence that Jackson solicited an inmate to assist him in escaping from the Duval County jail. This Court has consistently held that an attempt to flee from prosecution is admissible as long as there is a nexus between the flight and the crime for which the defendant is being tried. At the time Jackson was planning his escape, Jackson had been indicted for the murders of Reggie and Carol Sumner and was in the Duval County jail awaiting trial. Pursuant to well-established case law from this Court, evidence of Jackson's escape plan was relevant to show Jackson's consciousness of guilt.

ISSUE V: In this claim, Jackson alleges the trial judge erred in permitting the state to introduce the hearsay statements of a non-testifying co-defendant, Tiffany Cole, in violation of Crawford v. Washington, 541 U.S. 36 (2004). The statements at issue were heard by the jury during a taped statement taken from the defendant. In the statement, on four occasions, police

officers from the Jacksonville Sheriff's office confronted Jackson with statements that Tiffany Cole allegedly told the police. Jackson admitted that what Tiffany Cole said was true.

This claim may be denied because Tiffany Cole's statements were not admitted as substantive evidence against Jackson. The jury was told that any statements of the detectives during the taped statement were only to be considered in terms of their effect on the defendant. Moreover, any error in admitting the statement was harmless when Jackson admitted, both in his taped statement, and at trial, that each of Tiffany Cole's allegations were true.

ISSUE VI: In this claim, Jackson alleges a violation of Muhammad v. State, 782 So.2d 343 (Fla. 2001). This case is distinguishable from Muhammad. During the guilt phase, Jackson put on evidence that could have been considered in mitigation by the jury. Likewise, trial counsel argued this same mitigating evidence during penalty phase closing arguments. Finally, nothing in the trial judge's sentencing order provides support for Jackson's claim the trial judge put undue influence on the jury's recommendation.

ISSUE VII: In this claim, Jackson alleges that this Court's comparative proportionality review of death sentences is unconstitutional. This Court has recently rejected this same

argument in Hunter v. State, ___ So.2d ___, 33 Fla. L. Weekly S 745 (Fla. Sep. 25, 2008).

ISSUE VIII: In this claim, Jackson presents no persuasive argument to support his allegation his sentence of death is disproportionate. Instead, Jackson makes a general plea for mercy on the grounds he was only 23 years old at the time of the murder, was born to a substance abusing mother, was abandoned by his parents and raised by his grandmother, and was a problem child in elementary school. Well-established case law from this court demonstrates Jackson's sentence of death is proportionate.

ISSUE IX: In this claim, Jackson makes various allegations in support of his argument his sentence to death is unconstitutional pursuant to the dictates of Ring v. Arizona, 536 U.S. 584 (2002) and its progeny. This Court has consistently rejected each of the arguments Jackson raises in this claim. Accordingly, Jackson is entitled to no relief on this claim.

ARGUMENT

ISSUE I

WHETHER THE STATE PROVED BEYOND A REASONABLE DOUBT THAT JACKSON WAS GUILTY OF FIRST DEGREE MURDER, ROBBERY, AND KIDNAPPING.

In this claim, Jackson alleges the trial judge erred in denying Jackson's motion for a judgment of acquittal. (IB 19). Jackson alleges the State failed to overcome the defense's

evidence that the defendant only planned and agreed to commit a robbery and the subsequent kidnapping and murder of the Sumners by his co-defendants constituted an independent act for which he is not responsible. (IB 20).

The standard of review is *de novo*. McDuffie v. State, 970 So. 2d 312, 332 (Fla. 2007). In conducting its review, this Court must consider the evidence and all reasonable inferences from the evidence in a light most favorable to the State. Id.

Ordinarily, a trial court properly denies a motion for judgment of acquittal if the conviction is supported by competent, substantial evidence. Baugh v. State, 961 So. 2d 198, 204 (Fla. 2007).[6] There is sufficient evidence to sustain a conviction if, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt. Banks v. State, 732 So. 2d 1065 (Fla. 1999).

In a case consisting entirely of circumstantial evidence, however, a motion for judgment of acquittal should be granted if the State fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt. Orme

[6] Direct evidence is that to which the witness testifies of his own knowledge as to the facts at issue. Circumstantial evidence is proof of certain facts and circumstances from which the trier of fact may infer that the ultimate facts in dispute existed or did not exist. Davis v. State, 90 So. 2d 629, 631 (Fla. 1956).

v. State, 677 So. 2d 258, 262 (Fla. 1996). 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. Darling v. State, 808 So. 2d 145, 155-156 (Fla. 2002). Once the State meets this threshold burden, it becomes the jury's duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt. Id.

While Jackson does not cite to any supporting case law, Jackson claims a judgment of acquittal should have been granted because the defendant had a reasonable hypothesis of innocence (independent act) that the State did not overcome. (IB 20). Accordingly, without directly saying so, Jackson seems to be arguing that this case is entirely circumstantial. Contrary to Jackson's contention, this is not a circumstantial evidence case.

In this case, the State presented the eyewitness testimony of Bruce Nixon. Nixon testified that Jackson planned and, along with Alan Wade, Tiffany Cole, and Bruce Nixon executed the robbery, kidnapping and murders of Carol and Reggie Sumner. A case is not entirely circumstantial when there is an eyewitness to the murder. Larkins v. State, 655 So. 2d 95, 95 (Fla. 1995).

See also Fitzpatrick v. State, 900 So. 2d 495, 506 (Fla. 2005) (noting that the special standard of review applicable to circumstantial evidence cases did not apply because the State presented direct evidence in the form of eyewitness testimony.").

Given that this is a case in which the State presented direct evidence that Jackson, along with three others, robbed, kidnapped, then murdered Reggie and Carol Sumner by burying them alive, this Court does not have to determine whether the State introduced evidence from which the jury can exclude every reasonable hypothesis except that of guilt. Instead, the sole determination this Court must make is whether there was competent, substantial evidence for the jury to make such a determination. *See* Darling, 808 So. 2d at 156.

This claim may be denied for two reasons. First, the claim was not preserved for appeal. While defense counsel made a motion for a judgment of acquittal at the end of the State's case-in-chief and again after the defense rested, Jackson presented no argument in support of his motion. (TR Vol. X 1304, XI 1543-1544).

After the State rested its case, trial counsel made his initial motion stating "At this time we make our Motion for Judgment of Acquittal, Your Honor, and I do so without additional argument." (TR Vol. X 1304). At the conclusion of

the defense case-in-chief, trial counsel renewed his motion for a judgment of acquittal. Trial counsel told the court, "We talked earlier and I didn't actually put in on the record my renewing my Motion for Judgment of Acquittal. Just renew it without argument." (TR Vol. XI 1543-1544).

This claim is not preserved for appeal because Jackson made a bare bones motion for a judgment of acquittal. Certainly, he did not allege the State had failed to overcome Jackson's evidence that the murder and kidnapping were the independent acts of his co-defendants.

This Court has held that in order to preserve this issue for appeal, more than a mere boilerplate motion must be presented to the trial court. Indeed, this Court has held on many occasions that to preserve an argument for appeal, it must be asserted as the legal ground for the objection, exception, or motion below. Stephens v. State, 787 So.2d 747, 753 (Fla. 2001). *See also* Archer v. State, 613 So.2d 446, 448 (Fla. 1993) (ruling that Archer's claim, that the trial judge should have granted a JOA because the victim's murder was independent of the agreed-upon plan, was not preserved for appeal because Archer did not make the same argument to the trial court in his motion for a judgment of acquittal); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982). Jackson's bare bones motion did not preserve this issue for appeal.

While, Jackson's first issue on appeal is not preserved, this Court may also deny the claim on the merits. Bruce Nixon's testimony, standing alone provides competent substantial evidence to sustain the jury's verdict. However, as set forth in the State's statement of the facts, the State introduced ample additional evidence of Jackson's guilt. Given there is competent, substantial evidence to support the jury's verdicts of guilt, this claim should be denied.

ISSUE II

WHETHER THE TRIAL JUDGE ERRED IN DENYING JACKSON'S MOTION TO SUPPRESS ITEMS FOUND IN A SAFE INSIDE JACKSON'S MOTEL ROOM.

In this claim, Jackson alleges the trial court erred in denying his motion to suppress items found in a safe inside Jackson's motel room. The safe was one installed and maintained by the motel for use by guests while occupying a motel room.

Inside the motel safe, the police found Reggie Sumner's identification and the Sumners' credit cards and checkbook. (TR Vol. VII 693). Other items belonging to the Sumners were found in the motel room, itself, including paperwork, mail, billing statements, and personal effects that had the Sumner's name on it. (TR Vol. VII 690). The police also found various purchases that Jackson made with the Sumners' money, including a watch, jewels, electronics, sports jerseys and hats. (TR Vol. VII 691-695).

The police found a coin collection belonging to the Sumners in the trunk of Tiffany Cole's car. (TR Vol. VII 692). An A.T.M. card from the Sumners' credit union, Heritage Trust, was found in Jackson's pocket. (TR Vol. VII 688). The car keys to the Sumners' car were found in Alan Wade's room. (TR Vol. VII 692).

Jackson raised this same claim below. On April 30, 2007, Jackson filed a motion to suppress evidence seized from Jackson's motel room safe. (TR Vol. I 90-92). Jackson did not challenge the search and seizure of items found in his motel room. Instead, Jackson claimed only that a second warrant was required to open the safe. Jackson averred the search was unlawful because a second warrant was not obtained. (TR Vol. I 90-92).

The trial court held a hearing on the motion. During the hearing, the trial court observed that the warrant specified objects that one would reasonably think would be in a safe such as checkbooks, I.D. card, A.T.M. receipts, documents, and sales receipts. (TR Vol. V 393). Jackson did not dispute this factual finding.

The court read a portion of the search warrant into the record. The warrant permitted police to search for items such as any and all checkbooks, identification cards, bank statements, bank registers or other documents or papers in any

way related to James Reginald Sumner or Carol Sumner. (TR Vol. V 393). The court went on reading, noting the warrant also allowed for the search of any and all documentation bearing the names of the defendants, any and all A.T.M. receipts, sales receipts, transaction records related to the Heritage Trust A.T.M. card, weapons or instruments that may be used as a weapon, duct tape, or any material that can be used to bind a person or persons. (TR Vol. V 393).

The State argued that the warrant to search the motel room was sufficient to allow the police to search the safe. Alternatively, the State argued the evidence would be admissible, in any event, because the contents of the safe would have been inevitably discovered after the defendants had all been arrested and the rental period for Jackson's motel room had expired. (TR Vol. V 395). The trial court denied Jackson's motion to suppress. (TR Vol. VI 406-407).

Before this Court, Jackson does not deny the police had a valid warrant to search his motel room. Likewise, Jackson does not deny the items found in the safe were items fairly described by the warrant and which reasonably could have been found in the safe.

Instead, Jackson claims the search warrant only authorized police to search the room. Jackson avers the search of his

motel room safe was unlawful because a separate warrant was required to search the locked safe. (IB 21).

This Court may deny this claim for three reasons. First, Jackson offers no authority for the notion a second warrant was required. Indeed, the only case law cited by Jackson, a case from the Second District Court of Appeal, State v. Ridgway, 718 So.2d 318, 319-320 (Fla. 2d DCA 1998) supports a conclusion the search warrant in this case authorized the police to search Jackson's entire room, including the motel room safe. (IB 21).

In Ridgway, the police developed probable cause to believe Mr. Ridgway was selling methamphetamine from his mobile home. The police also suspected Ridgway had engaged in sexual misconduct with a 15-year-old girl. This latter suspicion did not rise to the level of probable cause.

The police obtained and then executed a warrant to search Ridgway's home. The search warrant permitted the police to search Ridgway's home for drugs, paraphernalia, and serialized money used in the controlled drug buys. The warrant did not contain any specific provision allowing the officers to search for photographic proof of the sexual misconduct.

When the police arrived, Ridgway readily showed the officers the methamphetamine stored in his refrigerator. Nonetheless, the police continued the search.

During the course of the search, the police found a cooler in Ridgway's master bedroom. The detectives opened the container and discovered several small baggies with trace amounts of methamphetamine.

In the same container, the detectives found photo albums with Polaroid photographs of what appeared to be nude teenage girls. Some of the photographs contained images of the suspected sexual misconduct with a teenage girl. The detectives also found two other sets of photographs in the master bedroom during the search for drugs. As a result, the State charged Mr. Ridgway with three counts of lewd and lascivious conduct involving a child under the age of sixteen, and two counts of possession of photographs of a child sexual performance. State v. Ridgway, 718 So.2d at 319.

Prior to trial, Ridgway sought to exclude the photographs. The trial court suppressed the photographs. The trial court concluded the warrant was a pretext for a search for child pornography, the scope of the search exceeded the warrant, and the duration of the search was extended to search for the nude photographs. Id.

The Second District Court of Appeal reversed. The Court found the police had the right to search the entire premises including areas and containers that might reasonably hold the objects of the search. State v. Ridgway, 718 So.2d 318, 319-320

(Fla. 2d DCA 1998).[7] Accordingly, the Court ruled, the photographs were lawfully seized.

The United States Supreme Court has also spoken on this issue. In United States v. Ross, 456 U.S. 798 (1982), the Court observed that a lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search. The Court noted that "a warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chests, drawers, and containers in which the weapon might be found." Id. at 820-821.

In this case, the police had a warrant to search Jackson's motel room for evidence linking Jackson and his co-defendants to the kidnapping, robbery and murders of Reggie and Carol Sumner. A safe was located in Jackson's hotel room. The trial court found, and Jackson does not dispute, that the warrant authorized a search for items that reasonably could have been secreted in the safe. Upon opening the safe, law enforcement officials found objects of the search, as described in the warrant, inside the safe.

[7] Jackson cites to Ridgway in support of the notion that contraband not listed in the search warrant cannot be seized unless it is in plain view. While this may be true, it is of no import here. The items seized from the safe in Jackson's room undisputedly were listed in the warrant. (TR Vol. V 393).

Pursuant to the observations of the United States Supreme Court in United States v. Ross, 456 U.S. 798 (1982) and the Second District Court of Appeals holding in State v. Ridgway, 718 So.2d 318, 319-320 (Fla. 2d DCA 1998), the search was lawful. As such, the evidence was properly admitted at trial and Jackson's claim before this Court should be denied. *See also* United States v. McKreith, 140 Fed. Appx. 112, 115 (11th Cir. 2005)(concluding a search warrant that provided for the search of the house and its contents permitted the officers to search a safe located inside the house); United States v. Pringle, 53 Fed. Appx. 65, 71 (10th Cir. 2002) (warrant that permitted search of defendant's home permitted search of two locked safes in the home); United States v. Gonzalez, 940 F.2d 1413, 1420 (11th Cir. 1991) (valid warrant to search defendant's house for documents and currency authorized police to search locked briefcase found in house); United States v. Snow, 919 F.2d 1458, 1461 (10th Cir. 1990) (warrant which allowed officers to search lower level of defendant's place of business permitted officers to open and search locked safe discovered in the basement); United States v. Morris, 647 F.2d 568, 572-73 (5th Cir. Unit B 1981)(valid warrant to search defendant's home for proceeds of bank robbery authorized search of locked jewelry box); Michael v. State, 437 So. 2d 138 (Fla. 1983) (police who had warrant to search Michael's home authorized to seize small

gray box containing personal papers as well as the decedent's will); Alford v. State, 307 So.2d 433, 439 (Fla. 1975)(search warrant that authorized a search of defendant's dwelling for spent .38 caliber cartridge casings and various items of clothing, including a floppy white hat would have reasonably included a search of closets, drawers, clothes piles, and any other conceivable nook and cranny in which they could be found); State v. Weber, 548 So. 2d 846, 847 (Fla. 3d DCA 1989)(police officers are authorized to search throughout the specified premises for the items described in the warrant, so long as the areas and containers searched are ones in which the described items might reasonably be found).

This Court may also deny Jackson's second claim on appeal because even if this Court were to find a second warrant was required to open the safe, the evidence found inside the safe was admissible under the inevitable discovery doctrine. Under this exception, "evidence obtained as the result of unconstitutional police procedure may still be admissible provided the evidence would ultimately have been discovered by legal means." Maulden v. State, 617 So. 2d 298, 301 (Fla. 1993). In seeking to admit evidence under the inevitable discovery doctrine, the State must show that, at the time the constitutional violation occurred, an investigation was already under way. Moody v. State, 842 So. 2d 754, 759 (Fla. 2003)

(quoting Nix v. Williams, 467 U.S. 431, 457, 81 L. Ed. 2d 377, 104 S. Ct. 2501 (1984) (Stevens, J., concurring in the judgment). In other words, the case must be in such a posture that the facts already in the possession of the police would have led to this evidence notwithstanding the police misconduct.[8]

In this case, by the time the South Carolina police arrived at Jackson's motel room, the South Carolina police were actively investigating Jackson's involvement in the use of the Sumners' A.T.M. card in the Charleston area. (TR Vol. VII 687). Law enforcement officials from the Jacksonville Sheriff's Office in Florida were actively investigating the robbery, murders, and kidnapping of Reggie and Carol Sumner. Michael Jackson, Tiffany Cole, and Alan Wade were suspects in the crimes. Prior to the South Carolina police officers' arrival at Jackson's hotel room, Detective Rowan had spoken with law enforcement officers from the Jacksonville Sheriff's Office and the United States Marshall's Office about the investigation. (TR Vo. VII 686).

During the undisputedly lawful search of Jackson's motel room, the police found items belonging to the Sumners as well as

[8] The inevitable discovery doctrine recognizes that exclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial. Nix v. Williams, 467 U.S. 431, 446 (1984). The evidence also would have been admissible under the good faith exception to the warrant requirement because the warrant undisputedly allowed a search for materials that could have been secreted in the hotel room safe.

items newly purchased with the Sumners' money. Jackson, Tiffany Cole, and Alan Wade were all arrested.

Once Jackson and his cohorts had been arrested and the rental period for the motel rooms had expired, contents of the safe would have been removed by motel management officials so another guest could occupy the room. Pursuant to the on-going police investigation, of which hotel management officials were aware, the contents could have, and would have, been turned over to North Charleston police officials. As such, even if police officials exceeded the scope of the warrant when they searched the safe inside Jackson's motel room, the items would have been inevitably discovered. The Sumners' property, found in the safe, was properly admitted into evidence.

Finally, if this Court were to find a second search warrant was required and the evidence was inadmissible under the inevitable discovery doctrine, any error in admitting the evidence was harmless. In addition to materials found in the safe, much evidence linking Jackson to the murder was found in Jackson's motel room. At trial, Detective Rowan testified that a search of the motel rooms where Jackson, Cole, and Wade were staying revealed mail and documents belonging to the Sumners, as well as the car keys to the Sumners' Lincoln Town Car. The Sumners' coin collection was found in the trunk of Tiffany Cole's car. Jackson had the Sumners' A.T.M. card in his pocket

when he was arrested. Merchandise newly purchased with the Sumners' money was also found. (TR Vol. VII 688-696).

At trial, Jackson admitted his involvement in the robbery and his use of the Sumners' A.T.M. card and credit cards to steal from the Sumners after the defendants buried them alive. Given all the evidence linking Jackson to the crimes, any error in admitting the contents of the safe was harmless beyond a reasonable doubt. State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986) (stating that application of the harmless error test includes an "examination of the permissible evidence on which the jury could have legitimately relied").

ISSUE III

WHETHER THE TRIAL COURT ERRED IN RULING THAT THE JAILHOUSE RECORDED TELEPHONE CONVERSATION BETWEEN JACKSON AND HIS GRANDMOTHER WAS ADMISSIBLE.

In this claim, Jackson alleges the seizure and introduction into evidence of a telephone conversation between Michael Jackson and his grandmother was unlawful. (IB 21-22). Jackson called his grandmother on a recorded and monitored line from the Charleston County Detention Center in South Carolina. During that conversation, Jackson made several incriminating statements including requesting his grandmother to act as a go-between so that he and co-defendants Alan Wade and Tiffany Cole could "all have the same fucking story." (TR Vol. IX 1077-1078).

Jackson avers a warrant or written certification that a warrant is not needed was required before South Carolina jail officials could seize the recordings and turn them over to the Jacksonville Sheriff's Office. In support of his claim before this Court, Jackson cites to a South Carolina statute concerning the interception of wire, electronic, or oral communications. (IB 21-22). Jackson also claims suppression of the recorded telephone call is required by "normal Fourth Amendment exclusionary rule jurisprudence." (IB 22).

A. **Preservation**

This claim may be denied because it was not properly preserved for appeal. On April 30, 2007, Jackson filed a motion to suppress the recorded phone call.

Jackson claimed these recordings were illegally seized without a warrant. (TR Vol. I 92). Jackson relied solely on South Carolina law to support his claim. (TR Vol. I 92). Jackson made no claim the admission of the recorded conversations would violate the Fourth Amendment to the United States Constitution. (TR Vol. I 92).

After the jury was selected, the trial court held a hearing on Jackson's motion to suppress the recorded phone call. In his motion, Jackson did not identify the South Carolina law he claimed prohibited the use of the recorded phone call. Instead, Jackson alleged that a South Carolina police officer, Detective

Rowan, testified during his deposition that a warrant is required to seize recordings of telephone calls made by inmates from jail. (TR Vol. I 92).

At the hearing, the trial court inquired about Detective Rowan's deposition testimony. Mr. Steinberg told the trial court that Detective Rowan testified that, to his knowledge, South Carolina law and "jail policy" required a warrant to obtain recordings of inmates' telephone conversations. (TR Vol. V 398). The State objected to the detective's testimony as determinative of South Carolina law. (TR Vol. V 399).

The trial court agreed and requested trial counsel to provide him with the applicable South Carolina statute. Counsel did not do so. (TR Vol. V 399). The trial judge noted he was hesitant to rule based on the understanding of a police officer. The trial judge asked counsel, once again, to provide him with the relevant South Carolina statutory authority that would support a finding the recordings were illegally seized. Once again, Jackson demurred. (TR Vol. VI 405). The trial judge denied Jackson's motion. (TR Vol.VI 407-408).

Subsequently, at Jackson's request, the trial court took the matter up again. Before the recording of Jackson's telephone conversation with his grandmother was played for the jury, trial counsel told the court the defense team had gotten "additional information that indicates that perhaps we were

correct regarding the status of the law in South Carolina…" (TR Vol. VIII 954). Trial counsel told the court he would like to research the issue during the overnight recess. The trial court granted the request.

The next morning, trial counsel told the trial court he "searched and searched" and could not find anything that would change the court's previous ruling. (TR Vol. VIII 960). The court told the parties his previous ruling would stand. (TR Vol. VIII 960).

On appeal, Jackson, for the first time, cites to the South Carolina law he alleges supports his position. Before this Court, Jackson avers, without elaboration, the admission of the taped telephone call violates South Carolina Code 1976 Section 17-30-25(B)(2). (IB 22). Additionally, for the first time, Jackson alleges the seizure and subsequent use of the recording violated the Fourth Amendment to the United States Constitution. (IB 22).

An argument is preserved for appeal only if the same argument was made below. Reynolds v. State, 934 So. 2d 1128, 1140 (Fla. 2006), *cert. denied,* 127 S. Ct. 943, 166 L. Ed. 2d 721 (2007); Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982). Jackson did not present the trial court with the same argument he presents here.

At the hearing on his motion to suppress, Jackson made no mention of South Carolina's Interception of Wire, Electronic or Oral Communications Statute. Likewise, Jackson presented no case law to support his claim that, under South Carolina law, a warrant is required for jail officials to record and then use recordings of inmates' telephone conversations. Finally, Jackson offered no support for the notion that suppression of the recorded phone call was mandated by the Fourth Amendment to the United States Constitution. Indeed, at no time did Jackson proceed, before the trial court, on a claim the recording was seized in violation of the Furth Amendment.

In failing to provide the trial court with any authority by which it could make findings of fact and conclusions of law regarding the admissibility of the recordings under South Carolina law, Jackson failed to preserve the issue for appeal. Likewise, Jackson's failure to allege a Fourth Amendment violation precludes his Fourth Amendment claim on appeal. Reynolds v. State, 934 So. 2d 1128, 1140 (Fla. 2006), *cert. denied,* 127 S. Ct. 943, 166 L. Ed. 2d 721 (2007); Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982).

B. **South Carolina Law**

Before this Court, Jackson avers the seizure, and subsequent introduction, of his telephone conversation into evidence was unlawful pursuant to South Carolina law. (IB 21-

22). Jackson cites to South Carolina Code 1976, § 17-30-25(B)(2) which governs providers of wire or electronic communications services.

This statute, in pertinent part, allows providers of wire or electronic communications services to provide information, facilities, or technical assistance to a person authorized by law to intercept wire, oral, or electronic communications if the provider has been furnished with a court order directing such assistance or a certification in writing by a person specified in Section 17-30-95 that no warrant or court order is required by law. Id. Jackson alleges that under this statute, the State' use of the taped conversation would be lawful only if South Carolina prison officials obtained a warrant or court order and served it on themselves or issued a written certification to themselves that a warrant or court order was not required.

Jackson is not entitled to relief because Jackson cannot show South Carolina's Interception of Wire, Electronic or Oral Communications Statute prohibited South Carolina jail officials from turning over the recording to the Jacksonville Sheriff's Office. Indeed, Jackson cannot show this provision of law, applicable to providers of wire and electronic communications, even applies to county detention facilities that allow inmates to use facility telephones to make personal calls.

Even if the statute did apply, Jackson's claim must fail because Jackson consented to the monitoring and recording of his phone call. Accordingly, intercepting Jackson's conversation with his grandmother was lawful.

South Carolina Code § 17-30-30(B) provides that it is lawful for a person acting under the color of law to intercept a wire, oral, or electronic communication if the person is a party to the communication or one of the parties to the communication has given prior consent to the interception. South Carolina Code § 17-30-30(C) provides that it is lawful for a person not acting under the color of law to intercept a wire, oral, or electronic communication if the person is a party to the communication or one of the parties to the communication has given prior consent to the interception.

At the beginning of the call to his grandmother, an automated voice advised both participants that the call is recorded or monitored. (TR Vol. IX 1064). Accordingly, when Jackson continued his conversation, despite the warning his call would be recorded or monitored, Jackson impliedly consented to the recording and monitoring of his conversation.

Jackson has failed to show that South Carolina authorities violated South Carolina law when they provided an audio tape of Jackson's jailhouse telephone conversation with his grandmother

to the Jacksonville Sheriff's Office. This Court should reject this claim.

C. **The Fourth Amendment**

Jackson claims that admission of his jailhouse telephone conversations with his grandmother violates "normal Fourth Amendment exclusionary rule jurisprudence." (IB 22).[9] Jackson's argument must fail because Jackson cannot show he had a legitimate expectation of privacy in his telephone call to his grandmother.

In order to demonstrate a Fourth Amendment violation, a defendant must first show he had a legitimate expectation of privacy in the conversation, place, or thing he seeks to suppress. State v. Smith, 641 So. 2d 849 (Fla. 1994). This Jackson cannot do.

In order to have a legitimate expectation of privacy, a person must have both a subjective expectation of privacy and an

[9] Jackson cites to the Fourth District Court of Appeals decision in Wells v. State, 975 So.2d 1235, 1238 (Fla. 4th DCA 2008). Wells is inapposite. Wells does not involve a jailhouse telephone recording or any type of wire interception. Instead, the Fourth District, in Wells, considered whether a state witness's testimony should have been excluded because an illegal stop of the defendant's car led, eventually, to the discovery of the witness who both turned physical evidence over to the police and testified against the defendant at trial. The Court rejected Well's argument that the witness's testimony should be suppressed. The Court found there was sufficient attenuation between the challenged evidence and the illegal stop of the defendant's car to allow admission of the witness's testimony. Wells v. State, 975 So.2d at 1240.

objective expectation of privacy. In this context, Jackson would have a subjective expectation of privacy if he actually believed the conversation with this grandmother would not be overheard, monitored, or recorded. Jackson would have an objective expectation of privacy if his subjective expectation of privacy was one that society recognizes as reasonable. Id at 851.

Here, Jackson had no legitimate expectation of privacy because he cannot demonstrate he actually believed the conversation with his grandmother would not be overheard, monitored, or recorded. Indeed, Jackson does not even dispute that an automated voice advised him his telephone call was being recorded or monitored. (TR Vol. IX 1064). Because Jackson was on clear notice his jailhouse conversation was being monitored or recorded, Jackson failed to show he had a subjective expectation of privacy in his conversation with his grandmother.

Jackson's claim must also fail because any expectation he may have had in the privacy of his conversations with friends or family members is not one that society recognizes as reasonable. This is so, because at the time of his telephone conversation, Jackson was incarcerated at the Charleston County Detention Center.

This Court has recognized that a prisoner's right of privacy, in activities conducted while in custody, is not one

that society recognizes as reasonable. This is so because areas of confinement do not share the same attributes as a private car, home, office, or hotel room. Moreover, any expectation that a prisoner may wish to assert must give way to the paramount interest of institutional security. State v. Smith, 641 So. 2d 849, 851 (Fla. 1994).

This Court has, as have the United States Supreme Court and other Florida district courts of appeal, applied this rule of law in several contexts, including in a jail cell, the back of a patrol car, a police interview room, a jailhouse visitor's room, and a holding cell. Hudson v. Palmer, 468 U.S. 517 (1984) (no reasonable expectation of privacy in jail cell); Lanza v. New York, 370 U.S. 139 (1962) (jailhouse does not share attributes of privacy of a home; surveillance in prison "has traditionally been the order of the day"); Pestano v. State, 980 So. 2d 1200 (Fla. 3d DCA 2008)(no reasonable expectation of privacy in the defendant's conversation with his co-defendant held in a police interview room); State v. Smith, 641 So.2d 849 (Fla. 1994) (no reasonable expectation of privacy in conversations conducted in a police car); Allen v. State, 636 So. 2d 494 (Fla. 1994) (no reasonable expectation of privacy in conversation between two inmates in a holding cell); Williams v. State, 982 So. 2d 1190 (Fla. 4th DCA 2008) (Williams had no reasonable expectation of privacy in a telephone call made to his girlfriend made while

Williams was in a police interview room); State v. Russell, 814 So. 2d 483 (Fla. 5th DCA 2002)(no reasonable expectation of privacy in conversation with his step-daughter conducted in jail visitor's room). See also Black v. State, 920 So. 2d 668, 670 (Fla. 5th DCA 2006)("noting that because Black was warned in advance that his jail house telephone call to his attorney was being monitored or recorded, the trial court properly found the conversation was not confidential).

In this case, Jackson had no objective expectation of privacy in a monitored and recorded conversation conducted while he was incarcerated in a South Carolina jail. His claim should be denied.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN PERMITTING THE STATE TO INTRODUCE EVIDENCE THAT JACKSON SOLICITED A CELLMATE TO HELP HIM ESCAPE FROM JAIL.

In this claim, Jackson alleges the trial judge erred in admitting testimony that Jackson tried to solicit a cellmate to help him escape from jail. At the time of the solicitation, Jackson was incarcerated, awaiting trial for the murders of Reggie and Carol Sumner.

Prior to trial, the defense filed a motion *in limine* to exclude this evidence on the same grounds Jackson raises before

this Court on appeal. The trial court denied the motion. (TR Vol. I 84, Vol. III 394).

At trial, the State called Robert Bailey to testify about Jackson's escape attempt. (TR Vol. IX 1114-1151). Bailey testified that he and Michael Jackson were cellmates from the beginning of May till mid June, 2006. Jackson spoke to him about the Sumner murders and showed Bailey his indictment. (TR Vol. IX 1119).

Jackson offered Bailey $10,000 to help him escape. Bailey told the jury that inmates in the Duval County Jail were issued armbands. The armbands have a prisoner's name and number within the system on them. The armbands allow jail officials to readily identify each inmate. (TR Vol. IX 1127). Jackson asked Bailey to remove his armband and tell the guards he had lost the band. Bailey was to ask the guards for a replacement.[10]

Jackson would take Bailey's old band and wear it. When Bailey's release time came, Jackson would walk out in Bailey's place. (TR Vol. IX 1128).

Bailey was concerned he would not be released if he did what Jackson asked. Jackson told him that on the day of his release, he should pretend to oversleep, give Jackson a couple

[10] Bailey told the jury that it was not uncommon for prisoners to lose their armband so his claim would not have aroused suspicions. (TR Vol. IX 1128). At trial, Jackson admitted asking Bailey to help him escape. (TR Vol. XI 1413).

of hours, then go to the guards and tell them he was supposed to be released. (TR Vol. IX 1128). Bailey pretended to agree with Jackson's plan. He did not, however, intend to go through with it. (TR Vol. IX 1130).

Before this Court, Jackson alleges this evidence was not relevant to any issue at trial. Alternatively, Jackson alleges that, even if evidence of Jackson's escape plan was "technically" relevant, its minimal relevance was outweighed by its prejudicial effect. (IB 23).

The trial court properly denied Jackson's motion. Evidence of Jackson's escape plan was relevant to show Jackson's consciousness of guilt. This Court has consistently held that evidence of consciousness of guilt is admissible at trial. Indeed, this Court has specifically recognized a defendant's attempt to escape is relevant to show the defendant's consciousness of guilt.

In Murray v. State, 838 So. 2d 1073 (Fla. 2002), the defendant was charged and convicted for the murder of Alice Vest. Murray was also charged and convicted of sexual battery and burglary in connection with the murder of Ms. Vest.

At trial, the State introduced evidence that some two years after Murray murdered Ms. Vest and seven months after he was indicted for the murder, Murray escaped from the Duval County Jail. Murray was apprehended in Las Vegas. Upon arrest, Murray

had two identification cards in his possession under the name of Doyle White. Id. at 1085.

On appeal, Murray argued the trial court committed reversible error by allowing the State to introduce evidence that Murray had escaped from prison and used false identification cards. Murray argued that, given the time delay between the murder and indictment for that crime (almost 2 years) and the date the escape occurred, the jury could not reasonably infer that Murray escaped from prison to avoid prosecution for the murder.

This Court found no error in the trial judge's decision to admit the evidence. This Court noted that "[t]he law is well established that 'when a suspected person in any manner attempts to escape or evade a threatened prosecution by flight, concealment, resistance to lawful arrest, or other indications after the fact of a desire to evade prosecution, such fact is admissible, being relevant to the consciousness of guilt which may be inferred from such circumstance.'" Murray v. State, 838 So.2d at 1085, citing to Straight v. State, 397 So. 2d 903, 908 (Fla. 1981) and Thomas v. State, 748 So. 2d 970, 982 (Fla. 1999). In order to be admissible, however, the State must establish a sufficient nexus between the flight or escape and the crime for which the defendant is being tried in the instant case in order to demonstrate relevance and materiality. Id.

In Murray, this Court found a sufficient nexus between Murray's escape attempt and the crime for which he was charged and convicted, specifically the murder of Alice Vest. This Court noted that at the time of his escape, Murray had been indicted for Ms. Vest's murder. The escape occurred some seven months after Murray was indicted and while he was awaiting trial on the charges for which he was ultimately convicted. This Court found that, under the circumstances, even though significant time had passed since the date the murder occurred, the jury could reasonably infer that Murray escaped from jail to avoid being prosecuted for Vest's murder. Murray v. State, 838 So.2d 1073, 1086 (Fla. 2002).

In this case, the evidence showed that Jackson hatched his escape plan less than a year after the murders of Reggie and Carol Sumner, some ten months after he was indicted for those same murders on August 18, 2005, and only seven months after he was arrested, in Florida, on the indictment in November 2005. The evidence also showed that at the time of the escape attempt, Jackson was in jail awaiting trial for murdering the Sumners. (TR Vol. I 1-4,7).

Pursuant to this Court's decision in Murray, Bailey's testimony established a nexus between the escape attempt and the murders for which Jackson was ultimately tried and convicted. Jackson's escape plan was hatched after his indictment and at a

time when a trial on the charges was imminent. Under the circumstances, a jury could reasonably infer that Jackson hatched a plan to escape from jail to avoid being prosecuted for the Sumner murders, the same charges that landed him in the Duval County Jail. In accord with Murray, the trial court committed no error in admitting this evidence. This Court should affirm.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE THE DEFENDANT'S TAPED INTERVIEW WITH LAW ENFORCEMENT BECAUSE IT CONTAINED STATEMENTS OF THE CO-DEFENDANTS WHICH WERE NOT SUBJECT TO CROSS-EXAMINATION.

In this claim, Jackson alleges the trial judge erred in permitting the State to introduce the defendant's taped statements to the police because, during the interrogation, the police confronted Jackson with statements made by co-defendant, Tiffany Cole. Jackson alleges the admission of Cole's statements violated the dictates of Crawford v. Washington, 541 U.S. 36 (2004) because the statements were testimonial and he did not have the opportunity to cross-examine Miss. Cole. (IB 24).

The defendant preserved this issue for appeal by filing a motion in *limine* to exclude hearsay statements of the co-defendants that the State may seek to admit through the detectives that interviewed Jackson. (TR Vol. I 88). Jackson

cited to Crawford v. Washington, 541 U.S. 36 (2004) in support of his motion. (TR Vol. I 88).

A hearing was held on Jackson's motion on April 24, 2007. (TR Vol. III 366, 396-397). During the course of the hearing, the State advised the trial court the State would have no objection if the Court instructed the jury that what the detectives say during the course of the interview with Jackson was not evidence and that the jury should consider the statements only in terms of their effect on Jackson. (TR Vol. III 403).

After hearing arguments from both sides, the court took the motion under advisement. (TR Vol. I 88, III 419). Two days later, the Court denied the motion. (TR Vol. III 433).

At trial, Robert Mark Gupton testified before the jury. Through Detective Gupton, the State introduced a taped statement taken from Michael Jackson on July 14, 2005 shortly after his arrest in South Carolina.

The jury was provided a transcript to allow them to follow the tape but advised the transcript was not evidence and could not be taken into the jury room. The jury was also advised that, on the tape, it would hear statements made by members of the law enforcement community.

The Court instructed the jury that it should not speculate on the accuracy of the officers' statements. (TR Vol. VII 740).

The Court advised that the officers' statements are only to be considered in the context of Jackson's reactions and responses to those statements. (TR Vol. VII 740).

Three detectives from the Jacksonville Sheriff's Office (Gupton, Hill and Meachem) interviewed Jackson. The interview focused on three main areas of interest; Jackson's presence at the Sumner home, Jackson's use of the Sumners' A.T.M. card after the murders, and Jackson's phone calls to the Detective Meachem at the Jacksonville Sheriff's Office. During the calls, Jackson pretended to be Reggie Sumner. Jackson had been thwarted in using the Sumners' A.T.M. card at times after the murder. Jackson called Detective Meachem to ensure he could still use the card.

During the interview, Jackson's story evolved. The only consistency was Jackson's attempt to minimize his culpability.

Initially, Jackson persisted in his claim he was not at the Sumner home on the night of the murders. Jackson told the detectives that he and Tiffany Cole met Alan Wade and Bruce Nixon at Wade's home on Friday night, July 8, 2005. (TR Vol. VII 755). Wade told him about the murders and burying the Sumners. (TR Vol. VII 755, 760). Jackson told the detectives that he made Wade and Nixon take him to the gravesite to "prove that shit." (TR Vol. VII 777).

When Jackson persisted in his denials that he was at the Sumner home on the night of the murders, Detective Gupton confronted Jackson. Detective Gupton implied that Tiffany Cole had given him up.

Detective Gupton asked Jackson "[w]hat if Tiffany told me that she dropped you, Alan and Bruce off-that you were with her in the car but she dropped you off, the three of ya'll off on Reed Avenue and that—that Alan and Bruce drove the Lincoln and you and Tiffany followed them out to I-10 west?" Jackson said that would not be true. (TR Vol. VII 797).

A short time later, Jackson's story changed. Jackson told detectives that while he was not at the Sumner home at the time of the murder, he was at the burial site when Wade and Nixon buried the Sumners alive in a pre-dug grave site. (TR Vol. VIII 820-827). He and Tiffany met up with Wade and Nixon, already driving the Lincoln, somewhere on Phillips Highway. Wade and Nixon called them on the Nextel and told him to meet them there. (TR Vol. VIII 83). The only thing Jackson did was bring the pair a flashlight. (TR Vol. VIII 834).

Later in the interview, Gupton returned to Jackson's presence at the Sumner home. Jackson persisted in his denial. Gupton told Jackson that "according to Tiffany you were." (TR Vol. VIII 847). Gupton also told Jackson that the rental car's GPS system put Tiffany's car near the Sumner's Reed Avenue home.

Jackson asked Gupton whether Tiffany had told him that they (he and Cole) were both at the Sumner home. (TR Vol. VIII 848). Gupton told Jackson that Tiffany was saying Jackson was there because it was the truth. (TR Vol. VIII 848).

Jackson finally admitted he was, indeed, at the Sumner home. Jackson denied going inside the home. (TR Vol. VIII 853).

Jackson told Detective Gupton that he was in the driveway with Tiffany Cole while Wade and Nixon went into the house. Jackson claimed that he saw the Sumners' Lincoln Town Car backing out of the driveway. (TR Vol. VIII 858). He and Cole had no idea that Wade and Nixon had kidnapped the Sumners. (TR Vol. VIII 858).

He and Cole followed Wade and Nixon to the gravesite. Jackson thought Wade and Nixon intended to bury the stuff they stole and ditch the Town Car. (TR Vol. VIII 859, 860). Jackson told the detectives he was surprised to see Wade and Nixon bury the Sumners alive in a pre-dug grave. (TR Vol. VIII 860).

Jackson's claim about his use of the A.T. M. card also evolved. While Jackson admitted from the beginning that he used the card, Jackson claimed, initially, that he thought it was Wade's mother's card. (TR Vol. VII 763-766,768). The card did not have a name on it.

Eventually, Jackson told the detectives he was almost certain that the card belonged to the Sumners. (TR Vol. VIII 865). Jackson also admitted using the card to get as much money as he could from the Sumners' bank account. (TR Vol. VIII 864-865, 872).

The last area of interest to the detectives was Jackson's phone call to the Jacksonville Sheriff's Office. During questioning on this issue, Detective Gupton confronted Jackson with something Detective Gupton said that Tiffany told the police.

Detective Gupton asked Jackson whether he called the Jacksonville Sheriff's Office and talked to a detective on the phone. Jackson denied it. (TR Vol. VIII 817-818). Detective Gupton told Jackson, "Tiffany said you did." (TR Vol. VIII 818). Jackson denied it again.

A bit later, the interviewing detectives returned to Jackson's phone call to the Sheriff's Office. This time, Detective Meachem asked Jackson whether he called the Sheriff's Office pretending to be Reggie Sumner.

Jackson, once again, denied it. Jackson posited the caller was Alan Wade. (TR Vol. VIII 866).

Detective Meachem told Jackson that "Tiffany said it was you." (TR Vol. VIII 866). Jackson said "Why in the fuck would Tiffany say it was me." (TR Vol. VIII 866). Detective Meachem

answered, “You tell us.” (TR Vol. VIII 866). Detective Meachem told Jackson that Tiffany Cole “talked to us.” (TR Vol. VIII 867).

Jackson then admitted he had called the Sheriff’s Office and spoke with Detective Meachem. (TR Vol. VIII 867). Jackson admitted that he provided Mr. Sumner’s personal information and even put his “wife” on the phone. (TR Vol. VIII 867-868).

None of Tiffany Cole’s statements were improperly heard by the jury because none of Cole’s alleged statements to the police violated the dictates of Crawford v. Washington. In Crawford v. Washington, 541 U.S. 36 (2004), the defendant was tried for assault and attempted murder. The charges stemmed from an incident during which Crawford stabbed a man who allegedly raped his wife. During Crawford’s trial, the state sought to introduce a recorded statement that petitioner’s wife, Sylvia, had made during police interrogation. The state offered Sylvia’s statement to prove the stabbing was not in self-defense. Sylvia did not testify at trial.

Over objection, the trial court admitted the statement. Crawford was convicted and the state Supreme Court upheld the conviction.

The United States Supreme Court reversed. The Court held that testimonial statements of witnesses absent from trial are admissible only where the declarant is unavailable, and only

where the defendant has had a prior opportunity to cross-examine. Id.

In this case, Tiffany Cole's alleged statements did not violate Crawford because they were not admitted against Jackson as substantive evidence. The trial court advised the jury that anything the officers said was not evidence and could only be considered insofar as their effects on Jackson. As Cole's alleged statements were not admitted as substantive evidence, Crawford is not implicated.

Even if this Court were to find the trial court should have required the State to redact any mention of what Tiffany Cole allegedly told the police, any error is harmless. During his statement to police, Jackson admitted that he was at the Sumner home, used the Sumners' A.T.M. card, and called the Sheriff's Office and impersonated Reggie Sumner.

Jackson also testified at trial. Jackson admitted planning to rob the Sumners. (TR Vol. X 1368-1370, 1374). One of the goals of the robbery was to obtain the Sumners' A.T.M. card and things of that nature. (TR Vol. X 1377). Jackson admitted using the Sumners' A.T.M. card. (TR Vol. X 1388). Jackson also admitted calling the Sheriff's Office to try to make sure he could continue using the Sumners' card. (TR Vol. X 1388-1389).

As Jackson admitted all of the things that Tiffany allegedly said he did, both during his taped statement taken on

July 14, 2005 and at trial, any error in allowing Tiffany Cole's statements to be heard by the jury is harmless beyond a reasonable doubt. This Court should reject this claim.

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN GIVING GREAT WEIGHT TO THE JURY'S ADVISORY RECOMMENDATION WHEN THE DEFENDANT WAIVED HIS RIGHT TO PRESENT EVIDENCE IN MITIGATION.

In this claim, Jackson alleges the trial court violated the dictates of Muhammad v. State, 782 So. 2d 343 (Fla. 2001), when it gave great weight to the jury's recommendation despite the fact that Jackson refused to put on mitigation evidence before the jury. In Muhammad v. State, 782 So. 2d 343 (Fla. 2001), this Court found reversible error occurred when the trial court afforded "great weight" to the jury's recommendation when the jury did not hear any evidence in mitigation and the defendant attempted, unsuccessfully to waive his right to an advisory jury. Muhammad v. State, 782 So.2d at 363. In Muhammad, the trial court instructed the jury that its recommendation would be given great weight. Additionally, the sentencing order specifically stated that the jury's recommendation was given great weight in the final sentencing decision. Id.[11]

Jackson did not object to the trial court's instructions when it instructed the jury it was required to give the jury's

[11] The remedy for a Muhammed error is a remand for re-sentencing before the trial judge.

recommendation great weight. (TR Vol. XIII 1674-1684). Nor did Jackson point out in his sentencing memorandum, when he discussed the trial judge's responsibilities, that the trial court was prohibited by this Court's decision in Muhammad v. State, 782 So.2d 343 (Fla. 2001) from giving the jury's recommendation great weight. (TR Vol. XIII 212-214). Likewise, Jackson made no objection to the trial judge's consideration of the jury's recommendation after the sentencing order was entered. By failing to object, Jackson failed to preserve this issue for appeal.

Even if Jackson had properly preserved the issue, Muhammad does not mandate reversal because Jackson's case is distinguishable from Muhammad in several respects. First, Jackson did not attempt to waive his right to his penalty phase jury. Accordingly, unlike Muhammad, Jackson did not make any attempt to preclude the trial court from giving weight to the jury's recommendation.

Second, Jackson put on evidence at the guilt phase that the jury could have considered in mitigation. During the penalty phase jury instructions, the trial court instructed the jury that its sentence should be based on the evidence heard during both phases of Jackson's capital trial. (TR Vol. XIII 1675).

During the guilt phase, Jackson testified he did not intend to kill the victims and that his only planned role was

participation in the robbery. (TR Vol. X 1368, 1374, 1376-1377). Jackson told the jury he had no idea that two of his co-defendants, Nixon and Wade, had kidnapped the Sumners until they got to the murder site. (TR Vol. X 1379). He claimed he was shocked when they arrived at the murder site and he discovered Wade and Nixon had kidnapped the Sumners. (TR Vol. X 1382). He was more shocked when Wade and Nixon buried the Sumners alive. (TR Vol. X 1382). He told the jury he took no part in the burial.

When asked why he did not intervene to save the Sumners, Jackson said he did nothing because he was afraid he might be the next one going in the hole. (TR Vol. X 1384). He was afraid Wade and Nixon might crack the back of his head with the shovel. (TR Vol. X 1384).

Jackson testified that he never expected anyone to be killed. (TR Vol. X 1387). Jackson told the jury that he never would have participated in the plan to rob the Sumners if he knew someone was going to get killed. (TR Vol. X 1387). Jackson told the jury he did not kill or kidnap anyone. (TR Vol. X 1394).

Jackson testified he cooperated with the police from the beginning and he was willing to cooperate and show the police where the Sumners' bodies were. (TR Vol. X 1366, 1394). He

testified that he also became aware that the State had made a deal with Bruce Nixon. (TR Vol. XI 1408).

Jackson testified that Nixon and Wade were the primary actors in the murder. (TR Vol. X 1368-1387). Jackson also told the jury that although he had been convicted of several felonies he had never been convicted of a violent crime. (TR Vol. X 1369).

Consistent with his testimony at the guilt phase, Jackson argued, during the penalty phase, that the fact a more culpable co-defendant, Bruce Nixon, was allowed to plead guilty to second degree murder should be considered by the jury in making its recommendation. (TR Vol. XIII 1669).[12] Jackson argued that he played a minor role in the murder as compared to his co-defendants and never had any intent to kidnap or murder the Sumners. (TR Vol. XIII 1670-1671). Jackson also pointed out that he had no violent criminal history. (TR Vol. XIII 1670). Finally, Jackson argued that a life sentence was sufficient to punish Jackson and protect society. (TR Vol. XIII 1673).

Jackson's mitigating testimony, and trial counsel's argument during the penalty phase distinguishes this case from Muhammad. Jackson's jury heard more than the one-sided case

[12] Jackson's theory of the case was that Wade and Nixon were the actual killers.

presented by the State.[13] Boyd v. State, 910 So. 2d 167, 189 (Fla. 2005)(Muhammad not applicable when Boyd limited but did not waive mitigation).

Finally, this case is distinguishable from Muhammad because the trial court, in its order, made no reference to the weight it afforded to the jury recommendation. Certainly, the trial court did not state it was affording the jury's recommendation great weight. Instead, the trial court discussed its efforts to persuade Jackson to allow counsel to present mitigation and to explain the consequences of his failure to do so. (TR Vol. XIII 2274-275). The trial court noted specifically that he had conducted a "separate" analysis of the aggravating and mitigating factors and concluded the aggravating circumstances far outweighed the mitigating circumstances. (TR Vol. XIII 278).

The length, thoroughness, and tone of the sentencing order strongly imply the trial judge's sentencing determination was based on the jury's recommendation and the judge's independent weighing of the aggravating and mitigating factors. Brooks v. State, 918 So. 2d 181, 210 (Fla. 2005) (rejecting Muhammad claim when the sentencing order makes no reference to the weight

[13] The State put on no aggravation evidence during the penalty phase. (TR Vol. XIII). Prior to the commencement of the penalty phase, the parties stipulated that, at the time of the murder, Jackson was on felony probation. (TR Vol. I. 165, XIII 1625).

actually accorded the recommendation and the order's contents implied the judge based his sentence on the jury's recommendation and his own independent weighing of the aggravating and mitigating factors).[14] This Court should conclude the trial court properly sentenced Jackson despite the lack of mitigation presented for the jury's consideration in the penalty phase. Grim v. State, 841 So. 2d 455, 461 (Fla. 2003).

ISSUE VII

WHETHER THIS COURT'S COMPARATIVE PROPORTIONALITY REVIEW OF DEATH SENTENCES IS UNCONSTITUTIONAL.

In this claim, Jackson alleges this Court's proportionality review in every capital case, including his own, is constitutionally infirm because this Court limits its proportionality review to cases in Florida where a death sentence has been imposed. Jackson suggests, instead, that this Court must include a review of cases, in every state and federal court, in which a death sentence has been imposed, in which the death penalty was sought but not imposed, and in which the death penalty could have been sought, but was not. (IB 30).

Jackson argues the failure to engage in this multifaceted analysis deprives every capital defendant of a meaningful

[14] In Brooks, the trial court did not instruct the jury it was required to give its recommendation great weight while in this case the trial court did do so. Of course, if the jury would have recommended life, the judge would have been obligated to give the jury's recommendation great weight.

proportionality review, denies due process, results in "unusual" punishments in derogation of article I, Section 17 of the Florida Constitution and creates a risk the imposition of a death sentence will be arbitrary. In support of his position, Jackson cites to a September 2006 ABA report (*Evaluating Fairness and Accuracy in the State Death Penalty System: The Florida Death Penalty Assessment Report*) and this Court's decision in Simmons v. State, 934 So. 2d 1100, 1122 (Fla. 2006).

Jackson has presented no convincing argument or persuasive authority that should sway this Court to ignore decades of its own precedent. For instance, while Jackson cites to the ABA report to support his claim, this Court has consistently held that there is nothing in the report that would cause this Court to recede from its past decisions upholding the facial constitutionality of the death penalty. Rutherford v. State, 940 So. 2d 1112 (Fla. 2006); Rolling v. State, 944 So. 2d 176, 181 (Fla. 2006); Diaz v. State, 945 So. 2d 1136, 1146 (Fla. 2006).

Likewise, while Jackson implies that this Court's holding in Simmons v. State, 934 So. 2d 1100 (Fla. 2006) renders this Court's current proportionality review unconstitutional, nothing in Simmons requires this Court's proportionality review to include cases where the death sentence was neither sought nor imposed. Certainly, Simmons provides no support for the notion

that this Court must examine every death case and potential death case from every state and federal court in the nation. In Simmons, this Court held:

> The Court performs a proportionality review to prevent the imposition of "unusual" punishments contrary to article I, section 17 of the Florida Constitution. See Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991). "The death penalty is reserved for 'the most aggravated and unmitigated of most serious crimes.'" Clark v. State, 609 So. 2d 513, 516 (Fla. 1992) (quoting State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973)). In deciding whether death is a proportionate penalty, we consider the totality of the circumstances of the case and compare the case with other capital cases.

Simmons v. State, 934 So. 2d 1100, 1122 (Fla. 2006). As is clear from Simmons, this Court looks properly to other capital cases in Florida when conducting its proportionality review because this Court conducts its proportionality review in accord with Florida law. To do as Jackson suggests would introduce factors unrelated to this Court's determination whether Jackson's sentence is disproportionate pursuant to Article 1, Section 17 of Florida's Constitution.

Finally, this Court has recently rejected this same argument in Hunter v. State, ___ So.2d ___, 2008 Fla. LEXIS 1615 (Fla. Sep. 25, 2008). Jackson's claim should be denied.[15]

[15] While Jackson acknowledges that the United State Supreme Court in Pulley v. Harris, 465 U.S. 37 (1984) has determined that a comparative proportionality review is not constitutionally required, Jackson suggests that this decision should be overruled. (IB 33). This Court has recently rejected this same

ISSUE VIII

WHETHER JACKSON'S DEATH SENTENCE IS PROPORTIONATE.

In his eighth issue on appeal, Jackson challenges the proportionality of his sentences to death. In deciding whether death is a proportionate penalty, this Court considers the totality of the circumstances of the case and compares it with other capital cases. *See* Urbin v. State, 714 So. 2d 411, 416-17 (Fla. 1998); Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991). Guiding this Court's proportionality review, in every case, is the notion that the death penalty is reserved for the most aggravated and least mitigated of first-degree murders. State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973).

In the instant case, death is a proportionate sentence. The evidence in this case clearly supports a conclusion this case is one of the most aggravated and least mitigated.

In sentencing Jackson to death for each murder, the trial court found eight (8) aggravating factors had been proven beyond a reasonable doubt: (1) the defendant had been previously convicted of a felony and was on felony probation/parole at the time of the murder; (2) Jackson was previously convicted of violent felony, specifically the murder of the other victim; (3) the murder was committed in the course of a kidnapping; (4) the

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argument in Hunter v. State, ___ So.2d ___, 2008 Fla. LEXIS 1615 (Fla. Sep. 25, 2008).

murders were especially heinous, atrocious, or cruel; (5) the murders were cold, calculated, and premeditated; (6) the murders were committed for financial gain; (7) the murders were committed to avoid or prevent a lawful arrest; and (8) the victims were particularly vulnerable due to advanced age and disability. (TR Vol. II 250-254). On appeal, Jackson offers no challenge to the sufficiency of the evidence as to any of the eight aggravators found by the trial court.

In mitigation, the trial court considered Jackson's age (23) in statutory mitigation. The trial court found, however, that Jackson's age played no role in the murder. The trial judge concluded that the defendant's suggestion, in his argument in support of a life sentence, he is "far from a sophisticated mature adult" was refuted by the evidence adduced at trial. (TR Vol. II 256). Nonetheless, the trial court gave the mitigator some weight. (TR Vol. II 256).

The trial court also considered three non-statutory mitigators: (1) the defendant is amenable to rehabilitation and can lead a productive life in prison (some weight); (2) the defendant had a difficult early childhood that included being born to a mother who was a substance abuser, being abandoned by his parents, and being an unruly problem child at school for which Ritalin was prescribed; and (3) the defendant's prior criminal record was non-violent. The trial court gave some

weight to each of these non-statutory mitigators. (TR Vol. II 255-258). On appeal, Jackson makes no challenge to the trial court's consideration of the offered mitigation or the weight given to each mitigator.

The trial court found the aggravators far outweighed the mitigating circumstances. The trial court also found that death was the appropriate penalty for both murders. (TR Vol. II 258-259).

In support of his argument his sentence is disproportionate, Jackson alleges the 8-4 vote for death was "weak", especially given that no mitigation was presented. (IB 36). Additionally, Jackson avers he was only 23 years old at the time of the murder, is able to live a productive life in prison, behaved well during court proceedings, and has no history of violent crime. Jackson also points to a troubled early childhood. Jackson claims the "horrible actions" in this case were aberrant behavior. (IB 35).

Jackson points to only one case in support of his claim. Jackson asks this Court to compare the instant case to Johnson v. State, 720 So.2d 232, 238 (Fla. 1998). (IB 35). In Johnson, this Court reversed Johnson's death sentence, finding that under the circumstances, death was not a proportionate sentence.

The instant case bears not the slightest resemblance to the Johnson case, save for the age of the defendants.[16] In Johnson, the trial court gave substantial weight to at least one of Johnson's mitigators. In the instant case, the trial court gave substantial weight to none of the mitigation suggested by Jackson in his post-trial sentencing memorandum. (TR Vol. II 212-227)

In Johnson, the court did not find the murder was cold, calculated, and premeditated. Here, the trial court found that both murders were cold, calculated and premeditated. (TR Vol. II 251-252). This Court has noted, on many occasions, that CCP is one of the most weighty aggravators in Florida. Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999) (noting that CCP is one of the most serious aggravators set out in the statutory sentencing scheme).

In Johnson, the trial court did not find the murders were especially heinous, atrocious, or cruel (HAC). In this case, the trial court found both murders were especially heinous, atrocious, or cruel.

Both victims were bound and gagged, then buried alive. (TR Vol. II 251). The Sumners huddled together in a protective posture, in a hole six feet deep, until the dirt shoveled on top

[16] Johnson was 22 years old at the time of the murder and Jackson was 23.

of them completely covered their mouths and noses. They both suffocated to death and mechanically asphyxiated as the weight of the dirt made it impossible to take breaths deep enough to force oxygen into their lungs. This Court has noted, on many occasions, that HAC is one of the most weighty aggravators in Florida. Rodgers v. State, 948 So. 2d 655, 671 (Fla. 2006); Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999) (noting that HAC and CCP are "two of the most serious aggravators set out in the statutory sentencing scheme"); Sireci v. Moore, 825 So. 2d 882, 887 (Fla. 2002) (noting that the prior violent felony conviction and HAC aggravators are "two of the most weighty in Florida's sentencing calculus").

In Johnson, the evidence demonstrated the murder of one man and the attempted murder of another occurred during a robbery allegedly precipitated by some sort of debt owed by the victims. In this case, the evidence showed that Jackson, with premeditation and forethought, murdered two people rendered defenseless by age and infirmity.

While Johnson is not a proper "comparator", there are cases to which this Court can look in deciding whether Jackson's sentence to death is proportionate. For instance, in Looney v. State, 803 So.2d 656 (Fla. 2001), Looney along with two others (Hertz and Dempsey) broke into the home of Melanie King and Keith Spears. After immobilizing the victims by binding and

gagging both victims with duct tape and placing them face down on their bed, the three soon-to-be murderers searched the victims' home and removed a significant amount of the victims' property, including a VCR, a television, jewelry, furniture, CDs, and $1500 in cash. After loading the victims' property into their own vehicle and the victim's Black Mustang, Looney and the two other men spread accelerant through the house intending to leave no witnesses.

When done, the men re-entered the bedroom where the victims lay helpless on the bed. Ms. King begged Looney and the others not to shoot them and told them she would rather burn to death than be shot. Ignoring her pleas, Looney and the other two men opened fire, killing both Ms. King and Mr. Spears. Before they left, the killers burned the King/Spears home in order to cover their tracks. Looney v. State, 803 So.2d 656, 662-663 (Fla. 2001).

The trial court sentenced Looney to death. The court found as aggravating factors that: (1) Looney was previously convicted of a felony involving the use or threat of violence to the person; (2) the capital felony was committed while Looney was engaged in the commission of a burglary, arson, and robbery; (3) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; (4) the crime was committed for financial or pecuniary gain (the

court merged this aggravating factor with the fact that the capital felony was committed during the course of a burglary, arson, or robbery); (5) the murder was especially heinous, atrocious, or cruel, and (6) the murder was cold, calculated, and premeditated without any pretense of moral or legal justification. Id at 664.

The trial court considered Looney' youth as a statutory mitigator. The trial court gave Looney's age moderate weight. The trial judge also considered and gave significant weight to non-statutory mitigation including: (a) Looney's difficult childhood was given significant weight; (b) the fact that Looney had no significant criminal history or no history of violence and the fact that he posed no problems since being incarcerated were given marginal weight; (c) that Looney was remorseful was given moderate weight; (d) the fact that society would be adequately protected if he were to be given a life sentence without the possibility of parole was entitled to little weight, and (e) the fact that a codefendant, Dempsey, received a life sentence following a plea. Looney v. State, 803 So.2d at 664.

This Court found Looney's sentences to death proportionate. This Court found that in light of the circumstances of this case, including the existence of five aggravating circumstances (i.e., previous conviction of a violent felony; commission during robbery and arson and for pecuniary gain; commission to

avoid arrest; CCP; and HAC) and only one statutory mitigating circumstance, Looney's sentence to death was proportionate when compared to other similar cases. Id. at 682-683.

This case is, in many ways, strikingly similar to Looney. In Looney, the trial court found the murders were cold, calculated and premeditated. In this case, the trial court found the murders were CCP. (TR Vol. II 251-252). In Looney, the trial court found the murders were especially heinous, atrocious or cruel. In the instant case, the trial court found the murders were especially heinous, atrocious, or cruel. (TR Vol. II 251).

In Looney, the court found Looney's age in statutory mitigation but found no statutory mental mitigation. The same is true in the case at bar. While the trial court gave Looney's age of 20 substantial weight, the trial court in this case considered Jackson's age, three years older than Looney, but only gave it some weight.

Looney's non-statutory mitigation included a difficult childhood, remorse, amenability to life in prison, and no significant criminal history, much of which mirrored the non-statutory mitigation found by the trial court in the instant case. Unlike was the case in Looney however, Jackson's criminal history, albeit it non-violent, was extensive and Jackson was on

felony probation/parole at the time of the murder. (TR Vol. II 250, 257).

The trial court in Looney gave significant weight to two of the non-statutory mitigators found to exist by the trial court and moderate weight to one more. Looney v. State, 803 So.2d at 664. In the instant case, the trial court gave significant or moderate weight to none of the mitigators offered by Jackson.

In addition to Looney, this Court may look to a more recent case in determining whether Jackson's sentence is proportionate. In Frances v. State, 970 So. 2d 806 (Fla. 2007), David Frances and his younger brother, Elvis, broke into a condominium occupied, at the time, by two women (Charles and Mills). One of the women, Ms. Charles, was just 16 years old. Frances and Elvis strangled Ms. Charles and Ms. Mills with their hands and with electrical cord. Ms. Mills had multiple fresh abrasions on her face. The Frances brothers took a PlayStation and some jewelry and stole one of the victims' cars.

The court found two aggravating circumstances applicable to Mills' murder: a prior violent felony based on the contemporaneous conviction for the murder of the other victim and the murder was committed during the course of a robbery. The court found the same two aggravators applicable to Charles' murder, plus the heinous, atrocious, or cruel aggravating circumstance. The trial court found and gave unspecified

weight to David's "relative youth [twenty years old] together with other factors," but did not specify these other factors; the relative personalities of the two brothers (David being quiet and gentle; Elvis being aggressive and bad); and David's pathologically dependent relationship with Elvis. The court also gave "serious weight" to David being abandoned by his mother shortly after birth and being raised by his grandmother in poverty; David's lack of a positive male role model; David's pathological relationship with Elvis, and Elvis's dominant role in the brothers' relationship. The trial court ruled that the aggravating circumstances greatly outweighed the mitigating and sentenced Frances to death for both murders. Frances v. State, 970 So.2d at 818.

This Court found Frances' sentence to death proportionate. This Court noted that "this was not a 'robbery gone bad.'" Frances and his brother went to the victims' house to take the car and immediately "jumped" the victims and began strangling them. Moreover, rather than leave the victims unconscious from the strangling, Frances and his brother strangled them again to make sure they were dead." Id. at 820.

Like in Frances, the trial court in this case found the murders to be HAC. Like in Frances, the only statutory mitigation found was the defendant's age. Like in Frances, the trial court in this case considered Jackson's childhood and gave

it some weight. Like in Francis, the defendants could have taken simple steps to hide their identity during the robbery and left the elderly and helpless Sumners bound and gagged, yet unharmed. Instead, Jackson, without any pretense of moral or legal justification, murdered the Sumners in one of the most cruel and heartless manners that this Court has likely ever seen.

As it did in Looney and Frances, this Court should find Jackson's death sentence for the cold-blooded and senseless murders of Reggie and Carol Sumner to be proportionate. *See also e.g.*, Salazar v. State, 991 So. 2d 364 (Fla. 2008) (death sentence appropriate where five aggravators, including CCP and HAC were weighed against six non-statutory mitigators, including a difficult and impoverished childhood); Walker v. State, 957 So. 2d 560, 585 (Fla. 2007) (determining that the death sentence was proportionate where three aggravators (during the course of a felony, HAC, and CCP) outweighed four non-statutory mitigators (defendant's drug use/bipolar personality/sleep deprivation, codefendant's life sentence, defendant's statement to police, and defendant's remorse); Guardado v. State, 965 So. 2d 108 (Fla. 2007) (five aggravating factors, including CCP and HAC and nineteen non-statutory mitigating factors including amenability to prison life and a traumatic childhood); Delgado v. State, 948 So. 2d 681, 691 (Fla. 2006) (affirming the death sentences where

the three aggravators (HAC, CCP, and prior violent felony conviction outweighed four non-statutory mitigating circumstances (non-use of drugs or alcohol, difficult childhood and physical/emotional abuse at the hands of defendant's parents, stepfather, the Cuban government, and neighbors, defendant's love of his family, and good behavior throughout the trial); Lugo v. State, 845 So.2d 74 (Fla. 2003) (two murders, CCP, avoid arrest, murder in the course of a kidnapping and murder committed for pecuniary gain for both murders, and HAC for one of the murders, no statutory mitigators and five non-statutory mitigators given little or no weight).

ISSUE IX

WHETHER FLORIDA'S DEATH PENALTY SCHEME VIOLATES DUE PROCESS, THE SIXTH AMENDMENT, AND THE DICTATES OF RING V. ARIZONA AND ITS PROGENY.

In his final claim, Jackson avers that Florida's capital sentencing scheme violates due process, the Sixth Amendment and the United States Supreme Court's decision in Ring v. Arizona, 536 U.S. 584 (2002). Jackson points to several aspects of Florida's capital sentencing statute about which he takes issue. This Court has consistently rejected each of the same claims Jackson makes here.

Jackson first alleges that Florida's capital sentencing statute violates the dictates of Ring because Ring requires the aggravators to be charged in the indictment and proven beyond a reasonable doubt. (IB 38) This Court has consistently held that Ring does not require that aggravating circumstances be charged in the indictment. Blackwelder v. State, 851 So. 2d 650, 654 (Fla. 2003). *See also* Porter v. Crosby, 840 So. 2d 981 (Fla. 2003).

Next, Jackson alleges that Ring and its progeny demand that the jury, and not the judge, make the necessary findings of fact to determine eligibility for the death penalty, as well as the ultimate question of whether death shall be imposed. (IB 39).

Jackson's claim must fail because, in his case, death eligibility was determined by the jury, unanimously, beyond a reasonable doubt, when it found Jackson guilty of the contemporaneous murders of two victims. Doorbal v. State, 837 So. 2d 940, 963 (Fla.2003)(rejecting Ring challenge when defendant was charged and convicted of contemporaneous crimes by unanimous jury). Moreover, as noted in Frances v. State, 970 So. 2d 806, 822 (Fla. 2007), this Court has rejected similar Ring claims in over 50 cases.[17] *See also* Duest v. State, 855 So. 2d 33, 50-51 (Fla. 2003) (J. Pariente specially concurring) (noting that Ring does not hold that either the Sixth or the Eighth Amendment requires jury sentencing).

Jackson also claims that Florida's capital sentencing statute is constitutionally infirm because Florida does not require a special interrogatory verdict form requiring jurors to identify which aggravators they found to exist beyond a reasonable doubt and the vote as to each aggravator. (IB 39). Jackson cites to State v. Steele, 921 So. 2d 538 (Fla. 2005) in support of his claim. (IB 39).

[17] The jury also found Jackson to be death eligible, unanimously, and beyond a reasonable doubt when it found Jackson guilty of robbery and kidnapping. Troy v. State, 948 So. 2d 635, 653 (Fla. 2006) (denying Ring relief because the trial court found the "course of a felony aggravator" based on the jury's verdict finding defendant guilty of two counts of armed burglary, two counts of armed robbery, and attempted sexual battery in addition to first-degree murder).

Steele provides no support for Jackson's claim. In Steele, a majority of this Court ruled that a trial court departs from the essential requirements of law, in a death penalty case, by using a penalty phase special verdict form that details the jurors' determination of the applicable aggravating factors. State v. Steele, 921 So. 2d at 540. The trial court's denial of Jackson's request for a special verdict form was in accord with established case law of this State.

Jackson next alleges the Sixth Amendment requires juries to unanimously find the existence of aggravating factors and to unanimously recommend that death be imposed. (IB 78) This same claim was rejected by this Court in Frances v. State, 970 So. 2d 806, 822 (Fla. 2007) (rejecting Frances' argument that Ring requires a unanimous death recommendation or the jurors to find the aggravating circumstances unanimously). *See also* Coday v. State, 946 So. 2d 988, 1006 (Fla. 2006)("This Court has repeatedly held that it is not unconstitutional for a jury to be allowed to recommend death on a simple majority vote".).

Jackson also alleges that the standard penalty phase jury instructions unconstitutionally shift the burden to the defendant to show that life is the appropriate sentence. Jackson complains the instructions result in a presumption of death. (IB 39).

This Court has already rejected the same claims Jackson presents here. This Court has repeatedly rejected the argument the standard penalty phase jury instructions impermissibly shift the burden to the defense to prove that death is not the appropriate sentence. Williams v. State, 967 So. 2d 735, 761 (Fla. 2007). *See also* Rodriguez v. State, 919 So. 2d 1252, 1280 (Fla. 2005) (rejecting the claim that the standard jury instructions impermissibly shift the burden to the defendant to prove that death is not the appropriate sentence). This Court has also repeatedly rejected the notion that the standard penalty phase jury instruction creates a presumption of death. Walton v. State, 847 So. 2d 438, 444 (Fla. 2003) ("Walton's claims relating to the constitutionality of Florida's death penalty scheme - that Florida's death penalty statute shifts the burden to the capital defendant during the penalty phase, presumes that death is the appropriate punishment and imposes an unconstitutional "automatic aggravator" when a defendant is prosecuted under a theory of felony murder--have been rejected by this Court numerous times and are entirely devoid of merit.")

Next, Jackson argues that Florida's standard penalty phase instructions are unconstitutionally vague because they fail to provide proper guidance on the weighing process and do not sufficiently define each of the aggravating factors. Jackson

does not point to any particular instruction he believes is not sufficiently defined.

Jackson's claim is without merit. Attacks on Florida's capital sentencing scheme, including challenges based on vagueness and overbreadth of aggravating and mitigating circumstances, have been consistently rejected. Proffitt v. Florida, 428 U.S. 242 (1976) (upholding constitutionality of Florida's death penalty statute against multiple challenges, including challenge based on vagueness and overbreadth of aggravating and mitigating circumstances and the lack of guidance for the jury in weighing such factors); Asay v. Moore, 828 So. 2d 985, 993 (Fla. 2002)(rejecting Asay' claims that Florida's capital sentencing statute is unconstitutionally vague and overbroad on its face, and that the invalidity was not cured by specific instructions; Castro v. State, 644 So. 2d 987, 991 (Fla. 1994).

Finally, Jackson alleges that Florida's capital sentencing scheme is unconstitutional because it: (1) does not have independent reweighing of aggravating and mitigating factor as required by Proffitt v. Florida, (2) violates due process by being the only state in the nation to allow the death penalty to be imposed by a majority vote, and (3) fails to prevent the arbitrary and capricious imposition of the death penalty, violates due process, and constitutes cruel and unusual

punishment. Jackson's claims have been consistently rejected by this Court. Miller v. State, 926 So. 2d 1243, 1260 (Fla. 2006) (finding these same claims to be without merit).

In any event, Jackson's sentence of death satisfied the requirements of the Sixth Amendment and the dictates of Ring because one of the aggravating factors found to exist, for each of the murders, was that Jackson had previously been convicted of a violent felony, specifically the contemporaneous murder of the other victim. This Court has consistently held that Ring will not act to disturb a death sentence when one of the aggravating circumstances is a "prior violent felony" conviction. Bevel v. State, 983 So. 2d 505 (Fla. 2008) (denying Ring challenge when one of the aggravating factors found to exist was a prior violent felony, specifically the contemporaneous murder of a second victim). This Court should reject Jackson's final claim.

CONCLUSION

Based upon the foregoing, the State requests respectfully that this Court affirm Jackson's convictions and sentence to death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Ryan Thomas Truskoski, P.O. Box 568005, Orlando, Florida 32856-8005, this 17th day of November 2008.

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MEREDITH CHARBULA
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CERTIFICATE OF COMPLIANCE

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

_____
MEREDITH CHARBULA
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