IN THE SUPREME COURT OF FLORIDA

PHILLUP ALAN PARTIN

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC08-2348
Lower Tribunal No. 03-03888 CFAWS
Death Penalty Case

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PASCO COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF APPELLEE

BILL McCOLLUM
ATTORNEY GENERAL

KATHERINE MARIA DIAMANDIS
Assistant Attorney General
Florida Bar No. 69116
katherine.diamandis@myfloridalegal.com

KATHERINE V. BLANCO
Assistant Attorney General
Florida Bar No. 0327832
katherine.blanco@myfloridalegal.com

3507 E. Frontage Road, Suite 200
Tampa, Florida 33607
Telephone: (813) 287-7910
Facsimile: (813) 281-5501

CO-COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF THE CASE AND FACTS

On September 13, 2003 a Pasco County grand jury indicted Phillup Alan Partin for the first-degree murder of Joshan Marie Ashbrook. (V1/9-10).[1] The trial that is the subject of the instant appeal commenced on March 10, 2008 and concluded on March 18, 2008 with the jury finding Partin guilty of first-degree murder.[2] (V18/3030; V39; V48/1873). A penalty phase took place on March 19, 2008 and concluded with the jury recommending that Partin be sentenced to death by a vote of nine to three. (V17/2890; V26/4355-56). A Spencer[3] hearing was held on August 28, 2008 and September 3, 2008. (V26/4402-12; V/27). Partin's sentencing took place on December 1, 2008 wherein the trial court followed the jury's recommendation and sentenced Partin to death. (V21/3551-56; V47/4571-88). In doing so, the trial court found the following aggravating circumstances: (1) the capital felony was especially heinous, atrocious, or cruel and (2) Partin was previously convicted of a felony involving the use of

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[1] The record on appeal contains 56 volumes and will be cited as follows: (V#/page#); two additional supplemental volumes will be cited as follows: (Supp. V#/page#).

[2] The instant trial is a retrial of Partin's first trial that ended when the trial court declared a mistrial due to an inadvertent discovery violation wherein no bad faith was imputed upon the State. (V56/1554-59). During the instant trial the testimony would reveal that the subject of the mistrial, a possible blood stain in the roadway, was either not human blood or was too degraded to obtain a sample. (V43/996-1000).

[3] Spencer v. State, 615 So. 2d 688 (Fla. 1993).

violence to a person. (V21/3551-52). Both aggravating circumstances were afforded great weight by the trial court. (V21/3551-52). The trial court did not find any statutory mitigation, but considered six non-statutory mitigating circumstances affording them some to little weight. (V21/3552-54).

Tara Ramsdell, Joshan's mother, testified she last saw her daughter alive at 2:30 a.m. on July 31, 2002. (V41/511). Ramsdell reported Joshan as a runaway later that day. (V41/510). Joshan lived with her mother in New Port Richey. (V41/509-10). At the time of her murder, Joshan was sixteen years old. (V41/509).

At approximately 8:20 a.m. on July 31, 2002, Iris Mancero, the mother of Joshan's boyfriend, received a call from Joshan. (V41/477-78). The phone number Joshan called from was recorded on Ms. Mancero's caller ID. (V41/479). Minutes after the call, Joshan arrived at the Mancero home, and stopped in quickly to leave a note for her boyfriend. (V41/479-80). Mancero described the vehicle Joshan arrived and left in as a new, burgundy, Ford F150 pickup truck. (V41/480). Mancero viewed a photo of a truck at trial that she testified looked like the truck Joshan was in, however, its tires were old, and Mancero noted the vehicle she

saw looked too new to have those kind of tires.[4] (V34, pt. 1/5680-81; V41/481). Mancero gave the phone number recorded on her caller ID to Pasco County Sheriff's Detective Lisa Mazza. (V41/482-83).

At 8:54 a.m. on July 31, 2002 a Port Richey Wal-Mart security video camera captured Partin, his seven-year-old daughter Patricia and Joshan exiting the store and driving away in Partin's truck. (V41/495-96, 499-500, 503-05, 511; V42/606, 710).[5] Later that morning, Partin was issued a warning ticket for fishing without a license. (V41/512-15).[6] Florida Fishing Wildlife Conservation Officer Ed Chambers recalled that Partin was with a female and a small child. (V41/515).

During the time of Joshan's murder, Partin and his daughter were living in a room at the home of Fred and Diane Kaufman. (V41/558-59, 580). On the afternoon of July 31, 2002, Diane walked by Partin's room and saw a female sitting on the floor playing video games. (V41/584-85).[7] Diane did not see the face

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[4] The truck in the photo would later be identified as belonging to Partin. It was found September 14, 2002 abandoned at a Plant City Wal-Mart; the truck's tires had been removed and replaced with old and worn mismatched tires. (V34, pt. 1/5680-81; V41/564; V42/761, 765, 790-93).

[5] The video was entered into evidence and played for the jury. (V34, pt. 1/4682; V41/497-99).

[6] The warning was issued at 10:45 a.m. (V34, pt. 1/5687-88).

[7] Partin's daughter Patricia testified she remembered meeting Joshan, that she, Joshan and her father went to Wal-Mart, went

of the female, but recalled she had dark hair, and was wearing a light-colored tank top, shorts, and tennis shoes. (V41/585). That evening, Diane went to bed between 9:00 p.m. and 9:30 p.m. (V41/587). Partin's truck was in the driveway. (V42/620). Diane's husband Fred was already in bed, and when his alarm went off later that evening to go to work, Diane got up with him. (V41/583, 587-88). When Fred left for work Partin's truck was not there. (V41/588). Diane testified Fred left the home for work between 10:00 p.m. and 10:30 p.m. as he had to be at his job cleaning restaurants at 11:00 p.m. (V41/583). Just before 1:00 a.m. Diane saw Partin come home. (V41/588-91).

The following morning, sometime between 8:00 and 8:30 a.m., Diane told Partin she did not appreciate that he brought somebody into their home and didn't introduce them to her and Fred. (V41/586, 592). Partin responded by saying she was weird and didn't want to meet anybody. (V41/592). Diane saw Partin for the last time on August 5, 2002 when Partin left the Kaufman home for work, leaving Patricia behind. (V41/594-96). About a week later, Fred left with Patricia and Diane did not see the young girl again. (V41/596). According to Diane's testimony,

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swimming, and then returned to the Kaufman home. (V42/712, 714, 716-17). Patricia recalled that her father left the home with Joshan while she remained behind. (V42/719-20). Patricia testified that Joshan did not meet Fred Kaufman. (V42/723).

her husband did not come in contact with Joshan. (V42/630).

Arthur White recalled that on August 1, 2002 between 4:15 a.m. to 4:30 a.m. he observed a dark colored pickup truck backed up to the woods off Shady Hills Road. (V43/856-58, 863). White described the truck as fairly clean with a shiny grill. (V43/860). White, familiar with trucks, was shown photos of Partin's truck and testified that could have been the type of vehicle he observed. (V34, pt. 1/5774-75, 5778-79; V43/861).[8] The location where White indicated he saw the truck was approximately eight to ten feet away from where Joshan's body was found. (V43/881).

On August 1, 2002 at approximately 9:20 a.m., Randal Tolle, a Withlacoochee River Electric Company employee, was on duty driving northbound on Shady Hills Road. (V40/331-34). Tolle observed what he believed to be a nude body laying on the east side of the roadway. (V40/334). Tolle pulled his vehicle to the side of the roadway and he and fellow co-worker Robert Killian ran to where the body was to see if it was real. (V40/334-35, 354-55). Tolle observed a female lying on her left side, nude but for a white tank top that was pulled up to her shoulders. (V33/5635-38; V40/335-36, 344-45, 358-59). Kilian checked her

[8] White testified the vehicle he saw was not a Silverado and was not a Montero SUV. (V43/861, 864).

carotid artery and verified she was dead. (V40/336, 355). Tolle and Killian both observed tire tracks backed up within a few feet of the body. (V40/337, 355-56). The tire tracks ran in an east to west direction right up to the body. (V40/337). Based on his experience working with tires in a service station, Tolle's opinion was that the tires belonged to a truck. (V40/337-38).[9] Tolle called his employer who notified law enforcement. (V40/336).

Pasco County Sheriff's Detective Jeffrey Bousquet responded to the scene where the body was discovered. (V40/356-57). Bousquet found the female's semi-nude body in a wooded area about 50 feet off the roadway. (V33/5641-44; V40/358-59, 364-65). It was obvious the female was dead and she was pronounced dead at the scene. (V40/359). At trial, the State and the defense stipulated that the body found was Joshan's. (V41/538).

Bousquet observed injuries to Joshan's body. There was a large laceration under her neck, and she appeared to have defensive wounds on her hands. (V40/359). As Bousquet looked at Joshan's left hand he noticed a hair "embedded" into a defensive wound. (V33/5639-40; V40/362-64). Bousquet also observed

[9] Forensic investigator John Bateman arrived later and made casts of the truck tire track impressions. (V41/448, 452).

ligature marks around her wrists and ankles. (V40/367).[10]

Crime scene technician Denice Weigand arrived and examined Joshan's body for trace evidence. (V40/391). Weigand observed four hairs in her left hand. (V40/391-93). One hair was found in her right hand. (V40/393). A hair was found on her right shoulder, and possible hairs were found on her buttocks and stomach. (V40/397-99). Weigand collected the hairs, including the one embedded in the left hand defensive wound for analyses. (V40/364, 393-400).

Medical Examiner Noel Palma responded to the Shady Hills Road area where Joshan's body was discovered at 11:30 a.m. (V44/1037, 1039). Palma approximated the time of Joshan's death to be 3:30 a.m. (V44/1041). He could not determine if Joshan was murdered at the location or if her body was simply dumped there. (V44/1042-43).

Joshan had multiple injuries to her body. There was a large gaping incised wound across her neck and six other incised wounds on her face. (V34, pt. 1/5793-94; V44/1043, 1045-47). Additionally, there was a ligature mark around her neck, and linear contusions consistent with ligature marks around her wrists and ankles. (V33/5655-56; V34, pt. 1/5795-96; V44/1043,

[10] Four photographs depicting the marks were entered into evidence. (V33/5651-58; V40/367-68). A video of the crime scene was then played for the jury. (V33/5659; V40/369-71).

1048-50). Abrasions and contusions were on her forehead, she had an abrasion on the right side of her face, and an abrasion on her left back. (V44/1044).

Palma found two incised wounds on Joshan's right forearm, and five defensive incised wounds on the fingers of her left hand. (V44/1044, 1054). Palma testified incised wounds are sharp force injuries caused by a sharp instrument. (V44/1044). He explained that defensive wounds usually are in the hands when someone is trying to protect oneself from an assailant say by grabbing a knife. (V44/1054). Palma believed that the wounds were most likely caused by some form of knife. (V44/1045). However, Palma opined that the incised wound across Joshan's neck did not cause her death. (V44/1048).

The following day Dr. Palma performed the autopsy. (V44/1051). The cause of death was determined to be blunt head and neck trauma. (V44/1051-52). Palma testified a blunt object caused hemorrhage to the scalp and brain. (V44/1052). Additionally, there were petechial hemorrhages to Joshan's eyeballs. (V44/1053). These hemorrhages, Palma explained, would occur when you have some sort of occlusion or ligature around the neck causing the blockage of veins from the head to the heart. (V44/1057). The blockage can rupture the blood vessels of the eyes and is consistent with strangulation-type injuries.

Palma observed these injuries on Joshan. (V44/1058).

Palma explained that Joshan's vertebrae was dislocated from the base of her skull. (V44/1052). When asked his opinion on how the dislocation was caused, Palma opined "in this particular case, most likely there was as struggle" and during the struggle her head moved back and forth "causing dislocation of the first cervical vertebra and the skull." (V44/1052-53).

Palma further testified that all Joshan's injuries were inflicted upon her prior to death. (V44/1053-54). When asked his opinion on as to how the injuries occurred, Palma opined that most likely the incised wounds occurred first, and the neck dislocation last. (V44/1055-56). Palma opined the incised wounds were followed by the blunt force trauma to the head. (V44/1056-57). The blunt trauma caused subcranial hemorrhages and some arachnoid hemorrhages to the brain. (V44/1057). Palma opined then the ligature marks would have occurred. The dislocation of the head would have occurred last, ultimately causing Joshan's death. (V44/1057). He explained that the dislocation would have been last because if it occurred first Joshan would not have been able to raise her hands. (V44/1070). While Palma ruled the manner of Joshan's death to be a homicide, he could not say how long it took to inflict the multiple injuries. (V44/1059-60; 1071). A toxicology report indicated

that Joshan consumed alcohol prior to her death and nicotine was detected consistent with smoking cigarettes. (V44/1058-59).

Detective Mazza determined the phone number Joshan called from when she called her boyfriend's mother, Iris Mancero, the morning of July 31, 2002 - the day she was with Partin - was registered to Susan Salmon in North Carolina. (V41/486).[11] On August 3, 2002 Mazza called the number, identified herself as a detective with the Pasco County Sheriff's Office and the male who answered the phone identified himself as "Phillup Thompson." (V41/486-488). Mazza would later determine the male was Partin. (V41/486-87). Mazza asked Partin if he let someone use his phone on July 31st and he said he had. (V41/487). Partin said that he was driving along Ridge Road and a young girl asked him for a ride and he agreed to give her one. (V41/487-88). Partin told Mazza he drove the girl to her boyfriend's home and then dropped her off at approximately 9:00 a.m. (V41/488). When asked what type of vehicle he was driving, Partin told Mazza he was driving a 1972 blue Chevy pickup truck. (V41/488-89). Mazza asked Partin where he was living so she could meet with him, and Partin told her he was a transient and did not have an address. (V41/489). She asked him to come to the Sheriff's Office

[11] Salmon and Partin had lived together and Partin used a cell phone belonging to Salmon. (V41/553-54, 561-62).

explaining to him the girl he was with was found dead and she needed to speak to anybody who had seen her in the past forty-eight hours. (V41/489). Partin would not come to meet Mazza. (V41/489-90). Three days passed and Partin called Mazza. He was very upset because officers had contacted Susan Salmon. (V41/490). Mazza told Partin she knew he gave a false name and told him again it was important for him to meet with her. (V41/490-91). Partin refused, saying he did not trust police. Mazza did not hear from Partin again. (V41/491).

On August 5, 2005, Partin went to work for Vortex Heating and Air. (V42/685-88). It was Partin's first day of employment. (V42/698). At the job site, Partin appeared flustered and aggravated as he spoke on his cell phone. (V42/688).[12] Partin left the job site without explanation, and did not return. (V42/688-90). An employee recalled someone in an SUV picking up Partin. (V42/689).

On August 10, 2002, Fred Kaufman and Partin took Patricia to Jean Edenfield's home in Wauchula. (V42/720, 744-45). Edenfield, Patricia's former foster mother, was not expecting Partin or Patricia at her home. (V42/744; V44/1140). Patricia was left there, and Partin told her he loved her and would come

[12] Partin later told a Detective that the day he started working Susan Salmon called him and told him the police were looking to speak to her. (V45/1279-80).

back for her. (V42/720-21). Partin asked Edenfield to keep Patricia and let no one have her other than Fred or Diane Kaufman. (V42/746). Partin did not know how long he wanted Edenfield to keep Patricia. Partin appeared very upset. (V42/747). Partin asked Edenfield not to tell anybody about their conversation and at one point asked Edenfield for money saying thousands of dollars or a million dollars would not be enough. (V42/748-49, 758-59). Partin did not say where he was going or when he would return. (V42/758). Partin did not call nor return for his daughter. (V42/721, 752).

In July 2002, Fred and Diane Kaufman lived in a two bedroom, two bathroom home on Buchanan Drive in Port Richey. (V41/574-75). Diane drove a silver Silverado truck and Fred, a black Mitsubishi Montero SUV. (V34, pt. 1/5717-18; V41/576, 579). In July 2002, Partin and his daughter arrived in Partin's maroon Ford F150 pickup truck to stay with them. (V34, pt. 1 5689-90; V41/580-81). The spare bedroom was cleaned and painted prior to Partin's arrival. (V41/580).

On August 12, 2002, an investigator from the Sheriff's Office went to the Kaufman home and secured a box containing hair cuttings from Partin's room. (V41/519-24). A disposable camera found in the room was also collected as evidence. (V41/529-30). The negatives from the camera were developed and

identified by Susan Salmon. (V41/534-37, 567-72).

Salmon lived with Partin prior to July 2002 in North Carolina and South Carolina. (V41/553-54).[13] She identified Partin's maroon Ford F150 pickup truck, the home they lived in, and Partin's daughter from the photographs. (V34, pt. 1/5689-5702; V41/567-72).[14] The photos were taken in or around December, 2001 or January, 2002. (V41/569-71). Sometime after August, 2002, Partin contacted Salmon and asked her for her ex-husband's Social Security number to use; Salmon refused his request. (V41/559-60). During this time, Partin communicated to Salmon he did not want to tell her where he was in order to protect her and he could not stay in one place. (V41/559-62). During one phone call, Partin acknowledged that the police were after him for killing a girl. (V41/562). Partin told Salmon he had nothing to do with the girl's death. (V41/565). Salmon communicated to Partin that the police wanted to talk to him and Partin indicated to Salmon he did not want to cooperate with the police because he did not trust them. (V41/564, 565-66).

Pasco County Sheriff's Detective Scott Gattuso had phone

[13] Salmon's testimony was presented by way of taped video depositions taken in August and September, 2007. (V34, pt.2/5801-02; V41/552-53, 566).

[14] In 2000, Salmon purchased the maroon Ford F150 pickup truck for Partin. (V41/554-56, 567, 573). After purchasing the truck, Salmon had new tires placed on the truck. (V41/555).

conversations with Partin on August 27, 2002, September 4, 2002, and September 15, 2002. (V44/1098-99, 1101-02). Tapes of the calls were played for the jury. (V34, pt. 2/5798-00; V44/1102-08).

During the first call Gattuso attempted to set up a meeting with Partin (V44/1109-13). Partin did not agree to a meeting, but he did agree to answer some questions and confirmed he was with Joshan. (V44/1113-15). Partin called Gattuso again on September 4, 2002 and told Gattuso he stopped calling Fred Kaufman because he knew the calls were being monitored. (V44/1118-19). During this call, Partin admitted he was not truthful when he spoke to Detective Mazza. The following exchange took place:

> Gattuso: Okay. Now, you told us that you took her to her friend's house, you dropped her off -- you let – you allowed her to use your cellphone for a minute, you dropped her off to a friend's house where she dropped the note off, and then you took her and left her by the Wal-Mart up on 19; is that correct?
>
> Partin: That's what I told you.
>
> Gattuso: Okay. And that was the last time you saw this young girl?
>
> Partin: That's what I told you.
>
> Gattuso: Okay. Now, is that true?
>
> Partin: In all actuality, no. You want to know about going fishing, is that what you want to know about?

> Gattuso: I just want to know about the truth. What is your – what is your - when you met this girl, what happened? All right, so explain to me, you took her to a Wal-Mart, what happened? Did you spend the day with her? What happened between you guys?

(V44/1121-22).

Partin told Gattuso that they did go fishing and swimming but did not spend the entire day together. (V44/1122, 1125). Partin said that after they went swimming, he took Joshan back to "the same area where I picked her up at." (V44/1125). The following exchange then took place:

> Gattuso: Okay. Was that the last time –
>
> Partin: Uh, wait a minute, wait a minute, I take that back. Let me – let me - retract that. We went back to uh - Joe Fred's and – and she horsed around and played on the Nintendo a little bit.
>
> Gattuso: Uh-huh.
>
> Partin: And uh, then, uh, she took a shower and shit and put on her clothes, and a little bit after that is when I took her back to that street whenever I picked her up.

(V44/1125-26).

Partin told Gattuso he went back home after he dropped Joshan off and "just hung out at house for the rest of the day." (V44/1126-27). Gattuso told Partin that Diane Kaufman remembered that his truck was gone for several hours that night, to which Partin responded that this was not true. (V44/1127). When asked what time he dropped Joshan off, Partin said he was

not real sure, then he answered, “around dark time,” “not real dark,” “sunset area time.” Gattuso then asked Partin if he took his daughter with him when he dropped her off, to which he responded he did not. (V44/1132).

Gattuso asked Partin if there was anything he could tell him that would clear him from any suspicion. (V44/1133). Partin only could tell him that he was at home when Fred Kaufman went to work. (V44/1133-34). Gattuso confronted Partin with Diane’s statement that she got up from bed around 11:00, 11:30 p.m. and his truck was not there, and at 1:00, 1:30 a.m. she watched him pull into the driveway and walk into the home. (V44/1134). Partin denied Diane’s account of the evening, again stating he was there when Fred Kaufman went to work. (V44/1134-35).

When discussing why and how Partin left Florida, Partin said he had to get away from “you all” “until you get the son-of-bitch that did this shit.” (V44/1139, 1141). Partin acknowledged that he called Gattuso at times when he knew Gattuso wass not prepared to speak to him. (V44/1137). Gattuso again attempted to set up a meeting with Partin on Partin’s terms, and Partin said he would think about it. (V44/1142). Later, the following exchange regarding the death penalty took place:

Partin: All right, and let me tell you something

> else, another thing I know, because it's this high profile case, I know whoever the fuck you guys get for this is going to get the death sentence. Am I lying?
>
> Gattuso: Well, murdering a 16-year-old girl, wouldn't you think that would be appropriate?
>
> Partin: Oh, uh, I mean, am I lying? And if it gets pinned on me, what happens to me?
>
> Gattuso: Well, uh –
>
> Partin: Just so you know where I'm coming from and why I'm not sticking around. I mean at the time, hell, I didn't know she was 16.

(V44/1146-47).

The last call between Detective Gattuso and Partin took place on September 15, 2002. Gattuso asked Partin if anyone could vouch for him and say he was home that evening. (V44/1165). Partin said he was there when Fred Kaufman went to work. (V44/1165). Gattuso let Partin know that Kaufman said he did not see him. (V44/1165-66). Later in the conversation, Gattuso found out Joshan was wearing Partin's shorts when she was last seen in the Kaufman home. (V44/1169-70). Despite Gattuso's attempts, Partin never came to meet with him.

After Partin and Patricia left the spare bedroom at the Kaufman home, Diane's daughter Lacey asked if she could live in the bedroom. (V41/597). On October 18, 2002, Lacey told her mother she found something unusual in the bedroom. (V41/597-98). Lacey had moved an Oriental rug and noticed a large bleach stain

under the rug.[15] (V34, pt. 1/5732-35; V42/649-52). A beach towel had been placed between the rug and the stain. (V42/649-52). Diane contacted the Sheriff's Office and allowed detectives to come into the bedroom. (V41/598).

Pasco County Sheriff's Office Forensic Investigator Susan Miller noticed that the area on the carpet beneath the Oriental rug and beach towel was discolored. (V34, pt. 1/5736-37; V42/657-61, 679-80). A presumptive test on the discolored area for blood was positive. (V42/661-62). Miller also observed two small spots of possible blood on the walls. (V42/664-66). Presumptive tests for blood were positive. (V42/669).

On October 20, 2002, Pasco County Deputy Sheriff Stephen Foshey went to Plant City. (V42/775). Plant City is approximately 35-40 miles from New Port Richey. (V42/769). Foshey went to an impound lot where he found Partin's pickup truck (V42/775-76).[16] Partin's abandoned truck had been removed from a Plant City Wal-Mart by a local wrecker service in September. (V34, pt. 1/5680-81; V42/759-61, 765). Inside the truck, Foshey saw a knife with a two or three-inch blade.

[15] When the Kaufmans prepared the room for Partin's arrival, the rug was rolled up in the garage. (V42/605). The Kaufmans did not place the rug into the bedroom. (V42/605).

[16] Photographs of the truck at that time showed it had a North Carolina license plate and its tires were old and worn. (V34, pt. 1/5744-67; V42/776-78, 781).

(V42/780).

Paul Mancini, of Mancici Automotive, had been in the automotive business since 1982. (V42/786). Mancini was familiar with the type of tires placed on a Ford F150. (V42/787). Mancini was asked to review the Wal-Mart video from July 31, 2002, showing Partin's truck and the photographs of the truck taken in the Plant City impound lot, and make certain conclusions. (V42/786-88). Mancini testified there was a difference in the tires from the Wal-Mart video and the Plant City impound lot. Mancini testified that when the truck was at Wal-Mart it had larger, different tires. (V42/789). He described the tires as nice, clean, and shiny, with a more prominent roll in the wheel opening. (V42/790). Mancini was showed State's Exhibit 48, identified by Susan Salmon as the truck Partin drove. (V34, pt. 1/5689-90; V42/790). Mancini observed that the tire brand was Wild Country. (V42/790-91). Mancini compared the photos of Partin's truck identified by Salmon and the truck found abandoned and concluded these were completely different tires. (V42/791-92). The tires on the abandoned truck were old and worn, were from three different manufacturers, and one was a different size than the other three. (V42/792-93).

Florida Department of Law Enforcement (FDLE) senior crime

laboratory analyst Lynn Ernst testified as an expert in the area of tire impressions and tire comparisons. (V43/805-06). Ernst received tire impression casts of the east to west tire impressions closest to Joshan's body. (V43/806, 827-28). She also received photographs of the tire impressions. (V43/806). Ernst took the cast impressions and researched different tread designs to determine what type of tires could have made the impressions. (V43/807-08). Ernst was able to locate seven similar tire tread designs. (V43/808). Wild Country tires was among the seven. (V43/810). Ernst was also shown State's Exhibit 48; the tires read "Wild Country" and Ernst testified that that type of tire could have made the east to west tire impressions left by Joshan's body. (V34, pt. 1/5689-90; V43/810-11).

On October 31, 2002, Partin's pickup truck was submitted to the FDLE lab. (V34, pt. 1/5768-79; V43/811). Ernst noticed that the truck had tires from three different manufacturers and they were all very worn. (V43/811-12). Ernst testified the driver's side tire pictured in Exhibit 48 was not the same tire on the truck at the lab. (V43/812). She compared the east to west impressions with the truck at the lab and concluded the truck at the lab could not have made the impressions. (V43/813-14). Ernst found a knife, screwdrivers, and wire cutters on the

floorboard of the truck. (V34, pt. 1/5780-81; V43/812-13). Three pieces of rope were also collected from the truck. (V43/815). On February 26, 2003, Ernst also received Fred Kaufman's Mitsubishi Montero SUV. (V1/1-8; V43/814; V47/1604-05). Ernst concluded that the tire impressions that led to Joshan's body could not have been made Kaufman's Montero. (V43/814).

Mark Thomas, an engineer with Cooper Tire and Rubber Company for over thirty-eight years, had previously testified as an expert in the area of tire design. (V43/835-36). Thomas determined the tire that made the east to west tire track impressions was manufactured by Cooper Tire. (V43/836-37). Thomas was able to determine what type of tires would have left the impressions. (V43/838). The tires could have been a Wild Country Radial RVT, Wild Spirit Radial RVT, or a Stampede Radial XT. (V43/838). After examining Exhibit 48, Thomas concluded that the type of tire pictured could have left the east to west tire impressions. (V43/839).

In August 2002, Brian Higgins was a forensic DNA examiner with the Florida Department of Law Enforcement. (V43/902-03, 907). Higgins had testified as an expert in DNA analysis and profiling over forty times. (V43/906-07). In August 2002, Higgins received submissions relating to the murder of Joshan.

(V43/907). Among the items sent for analysis were the hairs found on Joshan's body and in her left hand, Partin's hair recovered from the cigar box in his room, and samples taken from the east and north walls and carpet in Partin's room. (V43/907-11). The wall and carpet samples tested positive for the presence of blood. (V43/911-12).

The samples from the east and north walls were compared with Joshan's DNA profile. (V43/908, 912-14). The east wall sample matched Joshan's DNA profile at all 13 STR loci. The frequency of such a profile is 1 in 100 trillion Caucasians. (V43/915).[17] The north wall sample matched Joshan's DNA profile at 10 of 13 STR loci. (V43/916-17). The frequency of such a profile is 1 in 64 billion Caucasians. (V43/917-18). Higgins did not perform DNA analysis on the carpet. (V43/918).

The hair found on Joshan's body and in her hand were tested to determine if they were suitable for DNA analysis. (V43/919, 924). One hair found in Joshan's left hand contained enough root tissue making it suitable for nuclear DNA analysis. (V43/922-24). The hair matched Partin's DNA profile at 7 STR loci. (V43/925-26). The population genetic frequency of such a match is 1 in 23 million Caucasians. (V43/926-27).[18]

[17] Joshan is Caucasian. (V34, pt. 1/5730-31).
[18] Partin is Caucasian. (V1/16).

Suzanna Ulery was employed by the Florida Department of Law Enforcement from 2002-2005. (V43/967-68). At the time of trial, Ulery was the forensic DNA technical leader of a private lab in San Diego. (V43/967). Ulery had testified as an expert in DNA analysis approximately thirty-five times. (V43/969). In October 2002, Ulery was given the two carpet samples for DNA testing that Higgins had tested and found to be presumptive for blood. (V43/969-970). One sample yielded a DNA profile that Ulery was able to compare with Joshan's DNA profile. (V43/970-71). Ulery testified the sample matched Joshan's DNA profile. (V43/971).

Ulery was able to formulate a genetic frequency between the carpet profile and Joshan's profile. The probability of such a match would be 1 in 100 trillion Caucasians. (V43/972). The second carpet sample was too small and degraded to obtain a DNA profile from. The sample also had an odor of bleach which Ulery testified could destroy DNA. (V43/972-73).

Ulery compared Partin's DNA[19] to the DNA profile FDLE analyst Higgins obtained from the hair found in Joshan's hand. (V43/973-74). The samples matched at every location. Ulery testified the frequency of this occurrence is approximately 1 in 14 trillion Caucasians. (V43/974).

Shawn Weiss, the Associate Technical Director of the

[19] Ulery received an oral swab taken from Partin. (V43/973).

forensic identity department of Lab Corporation of America, also testified regarding hair and other evidence. (V43/986). Weiss had testified as an expert in DNA analysis 120 times in 25 states. (V43/987-88). Weiss received hair found on Joshan's body, including the hair found in her left hand. (V43/989-90). Weiss also received an oral swab from Partin, and an oral swab from Fred Kaufman. Weiss performed mitochondrial DNA testing on the items. (V43/990).

Some of the hairs found on Joshan did not yield a DNA profile. (V43/991, 994-95). Out of the seven hairs she received, five yielded a result. (V43/1015-16). Of the five, Weiss determined four of the hairs found on Joshan's body were consistent with her own DNA profile. (V43/991-94). The other hair that yielded a result was the hair found in Joshan's left hand, and it was consistent with Partin's DNA. (V43/992-93). Fred Kaufman was excluded as a contributor or source of the hairs. (V43/995).

On November 7, 2002, Partin, identifying himself as "Fred Kaufman," purchased a blue and silver Jeep Cherokee in Billingham, Washington. (V44/1022-26).[20] Partin forged Kaufman's signature on the sales receipt. (V34, pt. 1/5727-29; V42/606-08;

[20] Douglas Sande identified Partin, as the person who represented himself to be Fred Kaufman, in open court. (V44/1025).

V44/1025-26). In October 2003, Pasco County Sheriff Detective Jim Medley arranged for Fred Kaufman to tape calls from Partin. (V45/1229). An October 26th conversation between Kaufman and Partin was entered into evidence and played for the jury. (V34, pt. 3/5850; V45/1230-41, 1234-35).

During the conversation, Partin was concerned about who knew about his Jeep purchase, and when he found out Diane knew, he asked Fred if she had said anything to "them." (V45/1236-37). Partin recognized that "I know one day, you know, this shit is going to knock me in the face, I know it is. I just don't know when. I'm stretching it, you know." (V45/1240). He told Kaufman how he had been everywhere, from the "east to the west to the north," and had even gone back to Florida. (V45/1240). Partin told Kaufman how things were "fucked up," and that he was scared because he was a "fucking dead man." (V45/1242-43).

Partin acknowledged he had changed his appearance and that Kaufman would not recognize him. (V45/1261). When Kaufman told Partin that that they'd been "fucking with me forever, since day fucking one," Partin replied that he was sorry. (V45/1262). Regarding the murder of Joshan, the following exchange took place near the end of their conversation:

> Kaufman: Dude, dude, can I...can I...I got to ask you something, man. I...I know, you know, it's just me and you talking on the phone, man, but, like

they’re...they’re saying that she was killed in my room, man, dude.

Partin: Dude, man, I can’t talk to you.

(V45/1264).

On October 28, 2003, Pasco County Sheriff Sergeant Brian Garner and Detective Jim Medley, acting on information they received from Kaufman, traveled to Fayettville, North Carolina and located and arrested Partin. (V44/1074-78). When Partin was arrested he told the officers he had a gun at a friend’s home; the officers would later retrieve a .9 millimeter handgun where Partin told them it would be. (V44/1079-80, V45/1229). The officers also went to the motel room where Partin was staying and found Fred Kaufman’s Social Security card. (V34, pt. 1/5797; V44/1083). A friend of Partin’s testified that Partin called him, told him he was going to jail and that “they’re probably going to kill me for this.” (V44/1086-88). After Partin was arrested, he agreed to speak to Detective Medley. (V45/1266-67). The interview was video recorded and played for the jury. (V34, pt. 3/5851; V45/1267-70).

Medley explained to Partin that he was under arrest for homicide, and he was there to talk to him about Joshan’s death. (V45/1270, 1272). When asked if he remembered Joshan or being with her in the Kaufman home, Partin responded, “I don’t know.”

(V45/1276). Partin then admitted that he left Florida because some cop wanted to talk to him about somebody being killed. (V45/1276-77). Partin also admitted that he provided false information when questioned. (V45/1279).

Medley told Partin the physical evidence pointed to him, and he was there to hear "why this happened." (V45/1277, 1286-87). Partin said again and again he did know what happened, and he really did not know who Joshan was. (V45/1278-79, 1281-82, 1287-88, 1292-93, 1295, 1315-18, 1327). He claimed not to remember Joshan being with him. (V45/1287). When confronted with the fact that the Wal-Mart video showed them together and a witness saw them together, Partin replied, "I did not know what happened." (V45/1287-88).

When asked if he remembered going to Wal-Mart and fishing with Joshan, Partin still replied he did not know. (V45/1281-82). Partin explained he left his daughter behind because she needed to be in a safe place, and that he had the cops after him. (V45/1284-85). Partin admitted to Medley he abandoned his truck at the Plant City Wal-Mart. (V45/1283-86, 1307-08). Additionally, Partin told Medley he left his personal property in a storage unit and that "he can walk away from shit." (V45/1285).

When asked if anyone else would be involved in Joshan's

death, and whether Fred Kaufman would do something like this, or was with him, Partin continued to evade answering. (V45/1290). Medley asked Partin what he wanted from him, and Partin wanted to know if the State of Florida was going to try to kill him. (V45/1293). When questioned about whether he remembered what happened, Partin replied, "Okay. Well, I - I don't remember nothing about killing somebody, okay, down there. I just - don't remember. I don't know." (V45/1318).

When confronted with Diane's statement she saw him, Trisha, and Joshan in the bedroom, Partin claimed not to remember. (V45/1320, 1335). A second detective questioned Partin, and asked if Joshan could have sexually teased him and then things went "south." (V45/1320). He asked if something like this could have happened to which Partin twice replied, "I don't know." (V45/1320). The second detective asked who else could have done this besides him, and Partin responded, "I don't know." (V45/1328-29). During the questioning, Partin admitted that he did carry a knife. (V45/1333-34). After the interview, Medley arrested Partin and he was placed in the Cumberland County Jail. (V45/1338).

While in jail, Partin made a call which was played for the jury. (V34, pt. 3/5852; V45/1338-39). During the call, Partin appeared to suggest if he had the chance he would escape, and

commented that it took them a year and half to get him and it would take them longer next time. (V34, pt. 3/5852; V45/1344).

In June 2005, Medley obtained an order for handwriting exemplars. Medley wanted to compare the "Fred Kaufman" signature to a known sample from Partin. (V45/1346). Partin was at the Pasco County Detention Center at the time and Medley went there and read him a copy of the court order. (V45/1346-47). Partin refused and yelled profanity towards Medley. (V45/1348).

The State's case against Partin concluded with the testimony of Fred Kaufman's employer who vouched for Kaufman's whereabouts on July 31, 2002 from just before midnight to approximately 5:50 a.m. (V45/1356-60, 1363).

Partin did not testify but the defense called several witnesses. (V47/1607-12). Pasco County Sheriff Patrol Deputy Raymond Meddaugh testified that it was raining over a mile away from where Joshan's body was found. (V45/1375-79). However, he had no idea what the conditions were where Joshan was found and could not recall any puddles in that area. (V45/1379-81).[21]

Investigator Bateman, who was involved in processing

[21] Eight State witnesses previously testified that the area where Joshan was found was dry and it did not appear to have rained there. (V40/333, 342-43, 349-50, 354, 356, 371-72, 379-80, 383-84, 400-01, 405; V41/455, 465; V43/857, V44/1040, 1176. Pasco County Forensic investigator William Carsins, called by defense, testified on cross-examination that there was nothing to indicate it had rained. (V46/1479, 1491-92).

Partin's bedroom, testified that he did not process any other rooms at the Kaufman home as he was only allowed entry into Partin's room. (V46/1449, 1458). Donna Dystra, who owns the cleaning company that employed Fred Kaufman, testified that Diane Kaufman told her that she, Fred and Joshan were playing cards together. (V46/1504-05). However, when the defense called Fred Kaufman he denied having any contact with Joshan. (V46/1572). Additionally, when the State re-called Detective Brian Gardner in rebuttal, he testified that when he interviewed Donna Dystra she never told him that Diane Kaufman said she and Fred Kaufman played cards with Joshan. (V47/1624, 1627).[22] After closing arguments, the jury returned its verdict finding Partin guilty of first-degree murder. (V18/3030; V48/1873).

During the penalty phase proceedings, the State presented the testimony of Daniel Borrego who was a homicide bureau detective in 1987. (V26/4275). Borrego responded to a call in North Miami and found the decomposed body of Gary Thorne. (V26/4276-77). A telephone cord was found wrapped around his neck. (V26/4278). Borrego later found Partin with Thorne's vehicle. (V26/4279-80).

[22] During the State's case, Diane's testimony was that Joshan was not introduced to her or her husband and she did not tell Dystra that they were playing cards with Joshan. (V41/586, 592; 42/605).

Partin admitted to Borrego that he met Thorne at a gay bar where Partin went to "hustle" men. (V26/4283-85). Partin later went to Thorne's apartment. (V26/4286-87). Once at the apartment, Partin confessed he choked and eventually strangled Thorne to death with a telephone cord. (V26/4290-92). Partin took items from Thorne's apartment, and left in his car. (V26/4292). Partin pleaded guilty to second degree murder, armed robbery and burglary. (V26/4293-94, 4298; V36/6117-20).

During the defense's case, Susan Salmon's videotaped testimony was played. (V26/4299-4301). Salmon testified she thought Partin was a great father. (V26/4302). She recalled an incident when Partin helped nurse a sick dog back to health. (V26/4305-06). Upon cross-examination, Salmon indicated that if she would have known about the murder that Partin committed in Miami that she would not have allowed him to move in with her. (V26/4310). Additionally, she indicated that she does not have any contact with Partin and wants to keep it that way. (V26/4311). A videotape of Partin's daughter was played where she identified a hand sign she and her father would use to indicate "I love you." (V26/4337-38). Partin decided not to testify during the penalty phase. (V26/4316, 4327, 4333-34). The jury returned with a nine to three advisory sentence in favor of the death penalty. (V17/2890; V26/4355-56).

At the Spencer hearing, Partin's daughter Patricia, Dr. Valerie McClain, Partin's friend Vicki Gray, and Dr. Hyman Eisenstein testified on Partin's behalf. (V26/4405-07; V27/4418-4555). The State presented the trial court with the deposition of Partin's sister Catherine Beakley to impeach the statements of the hearsay declarant to Dr. Eisenstein. (V27/4564-66; V37/6343-93).

At Partin's sentencing, the trial court followed the jury's recommendation and sentenced Partin to death. (V27/4571-92). This appeal follows. (V21/3544).

SUMMARY OF THE ARGUMENT

Issue I – The "Collateral Crimes" Claim

The trial court did not abuse its discretion in admitting evidence that Partin avoided law enforcement, attempted to evade prosecution, and conceal his identity. This evidence was admissible as relevant to Partin's consciousness of guilt.

Issue II – The Former Testimony Claim

The trial court did not abuse its discretion in admitting Suzanne Ulery's former testimony. Ulery testified at Partin's first trial, and was subjected to cross-examination. At Partin's retrial Ulery was unavailable. Assuming error, any error would be harmless as Ulery's testimony was cumulative to that of other witnesses.

Issue III – The Indictment Claim

The trial court did not abuse its discretion when it did not send a copy of the indictment to the jury room after deliberations had commenced. Likewise, the trial court did not abuse its discretion in not reading the indictment to the jury after deliberations had commenced.

Issue IV – The Jury Instruction Claim

The trial court did not err in utilizing the standard penalty phase instructions which had been repeatedly upheld by this Court and were in effect at the time of Partin's trial.

Issue V – The Proportionality Claim

The aggravators in this case - prior violent felony and HAC- are among the weightiest aggravators in the statutory sentencing scheme and the six categories of non-statutory mitigating circumstances were afforded from some to little weight. Partin's death sentence is proportional in relation to other death sentences that this Court has upheld.

Issue VI – The Ring Claim

The trial court correctly recognized and applied this Court's abundant precedent in denying Partin's challenge to the constitutionality of Florida's capital sentencing scheme. Furthermore, the aggravating circumstances in this case include a prior violent felony. See Frances v. State, 970 So. 2d 806, 822 (Fla. 2007) ("Ring did not alter the express exemption in Apprendi v. New Jersey, 530 U.S. 466 (2000), that prior convictions are exempt from the Sixth Amendment requirements announced in the cases.")

Issue VII – Sufficiency of the Evidence Claim (Supplemental)

There was sufficient evidence to support Partin's conviction for first-degree murder, both as premeditated and felony murder. Partin was last seen with Joshan the night before her body was discovered. Partin's tire tracks led to Joshan's dead body. Partin's hair was found in Joshan's bloody

hand. Joshan's blood was found in Partin's room. Joshan's injuries revealed during a struggle her throat was slit, severe trauma was inflicted upon her head, she was strangled and her neck was snapped. Partin then took numerous steps to conceal this murder and evade prosecution.

ARGUMENT

ISSUE I

THE TRIAL COURT PROPERLY ADMITTED EVIDENCE WHICH DEMONSTRATED PARTIN'S CONSCIOUSNESS OF GUILT. (Restated by Appellee).

In Partin's first enumeration of error, Partin asserts irrelevant evidence of alleged collateral crimes and bad acts were improperly admitted. As will be demonstrated, each of Partin's contentions are without merit. A trial court's ruling on the admission of evidence is reviewed for an abuse of discretion. Ray v. State, 755 So. 2d 604, 610 (Fla. 2000); Zack v. State, 753 So. 2d 9, 25 (Fla. 2000). Based on the facts of Partin's case, the trial court did not abuse its discretion.[23]

Motion in Limine IV/Phone conversation between Partin and Detective Scott Gattuso:

Prior to trial, Partin filed Motion in Limine IV to exclude a number of statements made during three phone conversations between Partin and Detective Scott Gattuso. (V10/1734-42). However, the statement Partin complains of on appeal, consisting of Partin indicating he had firearms, that he knows he is not supposed to have firearms, and that he is now unarmed, was not

[23] Partin's reliance on Gore v. State, 719 So. 2d 1197 (Fla. 1998), Valley v. State, 860 So. 2d 464 (Fla. 4th DCA 2003), and Acevedo v. State, 787 So. 2d 127 (Fla. 3d DCA 2001) is misplaced as these cases do not involve evidence of flight, concealment or resistance. See generally Looney v. State, 803 So. 2d 656, 668 n. 7 (Fla. 2001) (discussing Gore).

among the statements he asked the trial court to exclude.[24] As such, Partin is barred from claiming this statement was introduced in error for the first time on appeal. Archer v. State, 613 So. 2d 446, 448 (Fla. 1993); Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982).

Even had Partin included this statement in his motion, he still would not be entitled to any relief. The statement Partin complains of was made in response to Gattuso's desire to set up a meeting with Partin. Partin is informed he is wanted for questioning in the murder investigation. Partin attempts to draw the parameters for the meeting, telling Gattuso he will come alone, be watched, and come unarmed. (V44/1109-11). It is then Partin makes the statement regarding his firearms. Partin's statement is relevant as it demonstrates that Partin had no intention of meeting with Gattuso. It would be patently unreasonable for Gattuso to come unarmed to meet Partin, a suspect in a murder investigation.

When read in context with Partin's other statements he would make to Gattuso, it is even more clear he was intent on avoiding a meeting with Gattuso. When Gattuso explains he would

[24] Prior to the tapes being played for the jury, when queried by the trial court, counsel did not raise any additional grounds beyond those in his motion nor lodge a contemporaneous objection when the statement was played for the jury. (V44/1105, 1111).

not meet a murder suspect unarmed and that unless Partin did something to make him fear for his life, he would not hurt him, Partin responds by telling Gattuso he does not trust him. (V44/1112). And during the second conversation, the following exchange would take place:

> Gattuso: Well, my invitation is still open. If you – if you want to set up a meeting that's reasonable for both of us, I mean not out of – not out of some movie or something like that where I walk through the woods with no gun, crap like that. If you want to set up someplace where you and I can meet and talk face-to-face, I'll do it, as long as it's reasonable and safe for both of us.
>
> Partin: I don't - I don't feel safe. I don't trust you.

(V44/1136).

Additionally, Partin would state he needed to get away from "you all," "I don't want to be dealing with this shit, man," "all's I want is for, you know, you all to leave me the fuck alone," and ". . .I don't want to fucking get involved with you." (V44/1141, 1162). Partin would also express his belief that he would be killed and would not walk away from a meeting with Gattuso. (V44/1136, 1164). The un-objected-to complained statement, read in context with Partin's other statements, evidence his desire to avoid meeting with law enforcement and thus were admissible as relevant to his consciousness of guilt. See generally Looney v. State, 803 So. 2d. 656, 666-68 (Fla.

2001) (discussing consciousness of guilt). Partin's barred and meritless claim must be denied.

Assuming for the sake of argument, Partin submits this comment constitutes fundamental error, he is still entitled to no relief. In order for Partin to obtain relief based on the unobjected-to statement, he must establish that the comments rise to the level of fundamental error. Fundamental error is error that "reach[es] down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Archer v. State, 934 So. 2d 1187, 1205 (Fla. 2006). Partin's statement does not constitute fundamental error. This is particularly true where Partin was the last person seen with Joshan, he fled when notified he was wanted for questioning, his truck tire impressions led to her dead body, and his hair was found clutched in her bloody lifeless hand.

The State also would note that Partin cannot complain of an error that he invited on appeal. Downs v. State, 977 So. 2d 572, 574 (2007). Partin asserts that the statement regarding firearms was irrelevant, prejudicial and that some of the jurors may have inferred that he was a convicted felon as he stated he

was not supposed to have any firearms.[25] During the hearing on Partin's motion, the prosecutor, defense counsel and the trial court went over the transcripts of the calls between Partin and Gattuso. (V24/3899-3911, 3920-51). Defense counsel admits his Motion in Limine does not relate to the August 27, 2002 conversation which contains the statement now at issue but states there is one paragraph "that should be looked at." (V24/3920). However, the paragraph was never identified. During the hearing, the prosecutor agreed to delete Partin's statement he had a pistol, statements regarding Partin being in jail, having an arrest record, and being previously convicted of murder. (V24/3930, 3940, 3945, 3946-47). Clearly, the prosecutor made every effort to exclude statements indicating Partin was armed and was a convict. Defense counsel failed to include the statement now asserted as error in his motion, he failed to argue it at the hearing, and failed to object to it at the time of trial. Assuming the statement was error, Partin surely cannot now complain when he sat silently as the prosecutor took every step to exclude the same type of statements he now asserts as error.

[25] Partin's argument that the jury "may have inferred" that he was not supposed to carry firearms because he was a convicted felon is meritless as error cannot be based upon conjecture. Initial Brief at p. 53. Sullivan v. State, 303 So. 2d 632, 635 (Fla. 1974).

Motion in Limine VI/Videotaped interview after Partin's arrest:

In Motion in Limine VI, Partin sought to exclude, among other statements, his statement that he contemplated shooting it out if police found him. (V10/1747-48). Partin asserts this evidence included an irrelevant discussion of guns and was prejudicial. Initial Brief at p. 54. During the hearing on Partin's motion, the prosecutor argued Partin's statement indicated a consciousness of guilt and the trial court agreed, denying Partin's motion in regard to this statement. (V13/2314; V24/3964-65).

The trial court did not abuse its discretion in admitting this statement. The facts and circumstances surrounding the pursuit and subsequent arrest of Partin was relevant evidence to explain the circumstances surrounding his capture. Partin is entitled to no relief as to this claim. In Thomas v. State, 748 So. 2d 970, 982 (Fla. 1999), this Court held:

> This Court has stated that the admission of evidence is within the trial court's discretion and will not be reversed unless defendant demonstrates an abuse of discretion. See Medina v. State, 466 So.2d 1046 (Fla. 1985); Jent v. State, 408 So.2d 1024 (Fla. 1991). **The law is well settled that '[w]hen a suspected person in any manner attempts to escape or evade a threatened prosecution by flight, concealment, resistance to lawful arrest, or other indication after the fact of a desire to evade prosecution, such fact is admissible, being relevant to the consciousness of guilt which may be inferred to such circumstance**.' Straight v. State, 397 So.2d 903, 908 (Fla. 1981). However, we have held

> that in order to admit this evidence, there must be a nexus between the flight, concealment, or resistance to a lawful arrest and the crime for which the defendant is being tried in that specific case. See Escobar v. State, 699 So.2d 988 (Fla. 1997). Moreover, such an interpretation should be made with a sensitivity to the facts of the particular case. See Bundy v. State, 471 So.2d 9 (Fla. 1985) (citing United States v. Borders, 693 F.2d 1318, 1325 (11th Cir. 1982)).
>
> In prior cases, we have upheld the introduction of similar flight evidence as consciousness of guilt where the defendant flees from police after committing a murder. See Shellito v. State, 701 So.2d 837, 840 (Fla. 1997) (even though defendant committed several robberies between the murder and his arrest, evidence that defendant resisted arrest the day after the murder was admissible as consciousness of guilt of the murder); Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990) (even though defendant escaped after being arrested for misdemeanor traffic warrants, evidence of escape could be used as consciousness of guilt of the murder); Bundy, 471 So.2d at 20 (evidence of defendant's attempt to flee officers six days after the murder was admissible as consciousness of guilt even though defendant was wanted for several murders in other states). In these cases, we upheld the introduction of flight evidence even though the flight could have been attributed to different crimes or warrants.

Thomas, 748 So. 2d at 982 (emphasis supplied).

This Court, following a detailed account of the high-speed chase and pursuit of Thomas, concluded that the facts supported the trial court's admission of flight evidence to show consciousness of guilt. The same is true in the instant case. Here, Partin knew he was a suspect in Joshan's murder, he avoiding meeting with detectives, fled the state, abandoned his

job, daughter, and life in Florida. Partin's statement indicated his desire to further evade prosecution and resist arrest. As such, it was properly admitted as relevant to his consciousness of guilt. See Wyatt v. State, 641 So. 2d 355, 358 (Fla. 1994) (defendant's statement to officer he was glad he did not have a gun when he was stopped, as he would have shot him properly admitted as evidence of flight); Straight v. State, 397 So. 2d. 903, 907-908 (Fla. 1981) (testimony that defendant was willing to use deadly force to avoid arrest was properly admitted as relevant to consciousness of guilt); see also United States v. DeParias, 805 F.2d 1447, 1454 (11th Cir. 1986) *overruled on other grounds by* United States v. Kaplan, 171 F.3d 1351 (11th Cir. 1999) (evidence of resistance to arrest including possession of firearms admissible as relevant to consciousness of guilt); Escobar v. State, 570 So. 2d 1343, 1345 (Fla. 3d DCA 1990) (evidence of defendant's willingness to use deadly force to avoid arrest admissible as probative of defendant's state of mind). Partin is not entitled to any relief on this issue.

Motion in Limine VII/Partin's jail phone call statement regarding escape:

In Partin's Motion in Limine VII, Partin sought to exclude a portion of a phone conversation recorded while Partin was

incarcerated in the Cumberland County Jail after his arrest. In pertinent part, his motion sought to exclude his statement that if he had the opportunity to escape, he would and it would take the Sheriff's office longer to find him. (V12/2115-16). The prosecutor filed a written response arguing Partin's statement was relevant to consciousness of guilt. (V12/2108-10). After a hearing, the trial court denied Partin's motion. (V12/2128; V22/3629-48).

When the audio tape was played for the jury, the word "escape" was not transcribed and does not appear in the record. (V45/1344). Partin notes this and suggests this matter must be resolved at the trial court level.[26] Initial Brief at p. 54. Assuming Partin used the word "escape", or words to that effect, Partin would nonetheless not be entitled to any relief on this claim. In Taylor v. State, 630 So. 2d 1038 (Fla. 1994), this Court held it was not error to admit the testimony of Taylor's cellmate regarding Taylor's desire to escape from the Duval County jail. As this Court stated:

> "Evidence that a suspected person in any manner endeavors to evade a threatened prosecution by any *ex post facto* indication of a desire to evade prosecution is admissible against the accused where the relevance of such evidence is based on consciousness of guilt

[26] The State notes that Partin to date has not filed any motion in this Court to relinquish jurisdiction to reconstruct any alleged discrepancies in the record.

> inferred from such actions". . . We find that evidence of the planning of or preparation for an escape is admissible as evidence of an attempt to evade prosecution.

Taylor, 630 So. 2d at 1042. (internal citations omitted); see also Jackson v. State, 18 So. 3d 1016, 1030-31 (Fla. 2009) (solicitation of cellmate for aid in escape relevant to consciousness of guilt where defendant attempting to escape before his pending prosecution on capital offenses).

Partin was arrested for the murder of Joshan Ashbrook and placed in the Cumberland County Jail when this jail phone call was recorded and later played for the jury.[27] Partin's expression of his desire to escape from prosecution for Joshan's murder was certainly relevant and admissible. See generally Randall v. State, 760 So. 2d 892, 899-900 (Fla. 2000) (evidence of flight admissible where nexus exists between flight and crime defendant is being tried for); Macias v. State, 673 So. 2d 176, 184-85 (Fla. 1996) (escape admissible and relevant to consciousness of guilt). The trial court did not abuse its discretion in allowing Partin's jail phone call into evidence.

Partin appears to assert this evidence infected the penalty phase of his trial as the jury would have been less likely to vote for life if they were concerned he might escape from

[27] The audio tape was not sent to the jury room during guilt or penalty phase deliberations. (V46/4349; V48/1838).

prison. Initial Brief at pp. 54-55. This argument should be rejected for a number of reasons. First of all, Partin never raised this issue to the trial court by was of his Motion in Limine or by way of his Motion for a New Penalty Phase. (V12/2115-16; V20/3365-70). Archer, 613 So. 2d at 448; Steinhorst, 412 So. 2d at 338. Second, the prosecutor never argued that this circumstance should be considered by the jury in deciding whether Partin should face the death penalty. (V26/4339). Lastly, the trial court properly advised the jury which factors to consider in determining their sentence, and the consideration of escape was absent from any jury charge. (V46/4339-44). Moreover, Partin's assertion on appeal is based purely on speculation which cannot form the basis for error. Sullivan v. State, 303 So. 2d 632, 633 (Fla. 1974). Partin is not entitled to any relief on this claim.

Motion in Limine IX/Partin's request to use Social Security number of Susan Salmon's husband/Objection to testimony that Fred Kaufman's Social Security card was found in Partin's room after arrest:

Partin sought to exclude testimony from his ex-girlfriend that he asked her for her husband's Social Security number. (V13/2274-75). After a hearing, wherein it was argued Partin's request was relevant to consciousness of guilt, the trial court denied Partin's motion. (V13/2276; V22/3709-13). In a related

ruling, the trial court denied Partin's trial objection to the admission of testimony that Fred Kaufman's Social Security card was found in his motel room after arrest. (V44/1081-83). Partin asserts this evidence was irrelevant and suggested that he committed or contemplated committing fraud. Initial Brief at pp. 55, 57-58.

The trial court properly admitted testimony regarding Partin's attempt to assume an alias, and testimony regarding Fred Kaufman's Social Security card was both relevant to Partin's attempts to evade prosecution, law enforcement detection and consciousness of guilt.

Indeed, in Murray v. State, 838 So. 2d 1073, 1086 (Fla. 2003) this Court found no error in the admission of false identification cards found at the time of Murray's arrest. As this Court stated:

> It would not be unreasonable to conclude that appellant used these cards to conceal his true identity so as to further evade capture and prosecution. The use of false identification, therefore, constituted additional evidence relevant to appellant's guilty knowledge at the time of his arrest.

Murray, 838 So. 2d at 1096; cf. United States v. Borders, 693 F.2d 1318, 1324 (11th Cir. 1982) ("Courts have long rejected the argument that evidence of flight is inherently unreliable. Over three quarters of a century ago, the Supreme Court announced

that 'the law is entirely well settled that the flight of the accused is competent evidence against him as having a tendency to establish his guilt.' Allen v. United States, 164 U.S. 492, 499, 17 S.Ct. 154, 156, 41 L.Ed. 528 (1896). We have on numerous occasions affirmed the validity of our statement in United States v. Ballard, 423 F.2d 127, 133 (5th Cir. 1970) (quoting Wigmore) that: '[I]t is today universally conceded that the fact of an accused's flight, escape from custody, resistance to arrest, **concealment, assumption of a false name, and related conduct, are admissible as evidence of consciousness of guilt, and thus of guilt itself.**'") (emphasis supplied); Samuels v. State, 11 So. 3d 413, 417 (Fla. 4th DCA 2009) (evidence of passport issued in the name of another properly admitted as relevant to consciousness of guilt).

Assuming error, any error was harmless as Partin was identified during trial as the person who represented himself to be Fred Kaufman; and testimony established Partin forged Kaufman's signature on a sales receipt while he was on the run while he was wanted for questioning in Joshan's murder. See Erickson v. State, 565 So. 2d 328, 334 (Fla. 4th DCA 1990) ("It is well settled that even incorrectly admitted evidence is deemed harmless and may not be grounds for reversal when it is essentially the same as or merely corroborative of other

properly considered testimony at trial."). Based on the evidence at trial evidencing Partin's assumption of an alias, there is no reasonable possibility that Partin's complaints regarding the Social Security cards affected the jury's verdict. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Partin is not entitled to any relief on this issue.

Motion in Limine X/Gun found upon Partin's arrest:

Partin's Motion in Limine X sought to exclude evidence that law enforcement retrieved a firearm after his arrest in North Carolina. (V13/2277-78).[28] During the hearing on Partin's motion, the prosecutor argued the finding of the gun corroborated Partin's statement he contemplated shooting it out with police, and was relevant to consciousness of guilt. (V22/3713-19). The trial court denied Partin's motion. (V13/2279; V22/3719). Partin submits this evidence was not relevant. Initial Brief at pp. 55-56.

Where Partin admitted he contemplated shooting it out with police if he was found, the finding of Partin's gun was relevant as it demonstrated his ability to carry through with his resistance to arrest. As such, it was properly admitted as relevant to his consciousness of guilt. See Wyatt, 641 So. 2d

[28] Partin's motion also sought to exclude evidence of a firearm Partin possessed in Florida, and the prosecutor agreed not to offer this evidence. (V22/3714).

at 358; Straight, 397 So. 2d. at 907-908; see also De Parias, 805 F.2d at 1454. Partin is not entitled to any relief on this issue.

Motion in Limine XII/Phone conversation with Fred Kaufman:

Partin filed Motion in Limine XII to exclude portions of a taped phone conversation with Fred Kaufman wherein he discussed a fight and an encounter with police. (V2283-85). During the hearing on Partin's motion, the prosecutor argued the encounter was relevant to consciousness of guilt, in that Partin knowing he was wanted for questioning, avoided identifying himself. (V22/3673-09). The trial court denied Partin's motion entering an order, and finding in pertinent part, the portion of the tape relating to a "physical altercation involving the defendant is relevant and material in that it is inextricably intertwined with information showing the defendant's efforts to avoid detection and arrest, hence his consciousness of guilt." (V13/2325).

During the phone conversation with Kaufman, Partin seemingly brags about his encounter with police who were responding to a fight where Partin was present. He tells Kaufman how the police "did not even ask" for his name, and tells how they took statements from "everybody else" because he told them he was "just walking by." (V45/1238, 1259). Partin

also proudly exclaims how the police “fucking patted me on the back, no shit, man,” and concludes with him stating he does not “give a fuck about the goddamn cops.” (V45/1259-60). The facts indicate Partin concealed himself and avoided making a statement, all in his quest to avoid detection and eventual arrest. As such, the statements Partin made were quite relevant to Partin’s consciousness of guilt. See Straight, 397 So. 2d at 908 (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). The trial court did not err.

ISSUE II

THE TRIAL COURT PROPERLY ADMITTED THE FORMER TRIAL TESTIMONY OF SUZANNA ULERY. (Restated by Appellee).

Suzanna Ulery, a former Florida Department of Law Enforcement analyst, previously testified in Partin's 2007 trial. (V54/1030-45). Ulery was subject to cross-examination. (V54/1037-42, 1044-45). At the time of Partin's 2008 retrial, Ulery was residing in San Diego, California, was pregnant and unable to fly. Ulery contacted the prosecutor informing him she was not available to testify, that it would be a hazard to her health to fly and provided supporting documentation from her physician. (V26/4215-16, 4223-24; V33/5627-30). The State filed a Motion to Admit Former Testimony. (V14/2389-91). After a hearing on the motion, the trial court made the following findings: (1) Partin is the same party in both the retrial, as well as the 2007 trial, (2) the issue is identical in both instances, (3) Ulery appeared voluntarily as an expert witness at the previous trial and the evidence confirms that she intended to appear at this retrial, but for her medical impediment, (4) Ulery is unavailable, and (5) the defense had the opportunity to cross-examine her at the prior trial. (V26/4246-47). An order granting the State's motion was entered and stated, "the State shall be permitted to read Suzanna

Ulery's former testimony to the jury at trial." (V14/2419).

Partin argues that Ulery's testimony was improperly admitted hearsay which violated his Sixth Amendment right of confrontation, that the inability to fly due to pregnancy did not constitute unavailability and that the State did not show it exercised "due diligence" in trying to secure the appearance of Ulery. Initial Brief at pp. 62-63. The trial court's decision to admit Ulery's former testimony is reviewed for abuse of discretion. Muehleman v. State, 3 So. 3d 1149, 1162 (Fla. 2009). Discretion is abused only when the judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court. Trease v. State, 768 So. 2d 1050, 1053 n.2 (Fla. 2000).

Former testimony is a "firmly rooted and reliable hearsay exception." Geralds v. State, 2010 WL 3582955, at *19 (Fla. Sept. 16, 2010). Florida Statutes Section 90.804(2) provides:

> **Hearsay exceptions.--**The following are not excluded under s. 90.802, provided that the declarant is unavailable as a witness:
>
> (a) *Former testimony*.--Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the

testimony by direct, cross, or redirect examination.

Ulery's testimony was properly admitted as a hearsay exception under Fla. Stat. § 90.804(2)(a) Ulery testified at Partin's 2007 trial and Partin had the opportunity to cross-examine Ulery. As such, her testimony was properly admitted. See Murray v. State, 3 So. 3d 1108, 1123-24 (Fla. 2009) (former trial testimony properly admitted where testimony was taken in course of judicial proceeding, party now was party in former proceeding, issues are similar, a substantial reason is shown why witness is not available, and witness was subject to cross-examination); Henry v. State, 649 So. 2d 1366, 1368 (Fla. 1995) (during retrial transcript of testimony admissible where witness incarcerated in another state and defendant had the opportunity to rebut testimony during first trial); see also Muehleman, 3 So. 3d at 1162-64 (former testimony properly admitted where testimony was from prior judicial proceeding, on the same issues, subject to cross-examination, and the unavailability of the witnesses was established). Ulery was clearly unavailable as she was not able to attend the trial due her pregnancy. See Fla. Stat. § 90.804(1)(d) (witness is unavailable if the witness "[i]s unable to be present or to testify at the hearing because of death or because of a then-existing physical or mental

illness or infirmity."); see also Happ v. Moore, 784 So. 2d 1091, 1101-02 (Fla. 2001) (witness who was not mentally and physically able to testify was unavailable).

Furthermore, as Ulery was unavailable and Partin previously had the opportunity to cross-examine her, Partin's Sixth Amendment right of confrontation was not violated. Muehleman, 3 So. 3d at 1162-64 (principles of Crawford v. Washington, 541 U.S. 36 (2004) not violated where witness unavailable and was subject to cross-examination in previous judicial proceeding); see also Thompson v. State, 995 So. 2d 532 (Fla. 2d DCA 2008); Essex v. State, 958 So. 2d 431 (Fla. 4th DCA 2007). Lastly, Partin's argument that the State was required to establish that it exercised "due diligence" in trying to secure the appearance of Ulery must fail. The due diligence showing Partin argues in favor of is required in cases where the proponent of an unavailable witness' testimony seeks to rely on the definition of unavailability wherein the witness is "absent from the hearing, and the proponent of a statement has been unable to procure the declarant's attendance or testimony by process or other reasonable means." Fla. Stat. § 90.804(1)(e) ; see Jackson v. State, 575 So. 2d 181, 187 (Fla. 1991); Essex, 958 So. 2d at 432. Ulery was not an errant, missing or absent witness. To the contrary, she contacted the State prior to

trial, and as the trial court found, voluntarily appeared at Partin's first trial. As Ulery's testimony was properly admitted as former testimony, Partin is not entitled to any relief on this issue.

Even if Ulery's testimony was erroneously admitted, any error was harmless. Ulery testified a carpet sample from Partin's room, which had tested positive for the presence of blood, matched Joshan's DNA profile and the probability of such a match would be 1 in 100 trillion Caucasians. (V43/911-12, 972). While this testimony placed Joshan's blood in Partin's room, it was simply cumulative to Brian Higgins' more extensive trial testimony which established blood from the east and west walls of Partin's room matched Joshan's DNA profile. (V43/908, 911-17). Regarding the east wall match, Higgins testified the frequency of such a profile is 1 in 100 trillion Caucasians. (V43/915). Regarding the north wall match, Higgins testified the frequency of such a profile is 1 in 64 billion Caucasians. (V43/917-18).

Ulery's testimony regarding the hair found in Joshan's left hand is likewise cumulative to Higgins' testimony and that of Shawn Weiss. Ulery compared Partin's DNA to the DNA profile Higgins obtained and found the samples matched at every location and the frequency of such occurrence is approximately 1 in 14

trillion Caucasians. (V43/973-74). Higgins testified the hair matched Partin's DNA profile at 7 of 13 STR loci, and the population genetic frequency of such a match is 1 in 23 million Caucasians. (V43/915, 925-27). Weiss also testified the results of her DNA testing established that the hair was consistent with Partin's DNA. (V43/991-93). As Ulery's testimony was cumulative to that of DNA analysts Wiggins and Weiss, any error in its admission must be deemed harmless. See Blanton v. State, 978 So. 2d 149, 156-57 (Fla. 2008) (hearsay testimony which violated defendant's Sixth Amendment right under Crawford harmless where testimony was cumulative); Rodgers v. State, 948 So. 2d 655, 665-666 (Fla. 2006) (same); see also Floyd v. State, 850 So. 2d 383, 400 (Fla. 2002) (any error in admitting hearsay statement harmless where testimony was cumulative). Partin is not entitled to any relief on this issue.

ISSUE III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT INFORMED THE JURY A COPY OF THE INDICTMENT WOULD NOT BE GIVEN OR READ TO THEM. (Restated by Appellee).

The trial court read the prospective jury venire the indictment. (V39/88-89). After the jury panel was sworn, the trial court proceeded with its preliminary instructions and properly instructed the jury that "[t]he [i]ndictment is not evidence and is not to be considered by you as any proof of guilt." (V40/239). Fla. Std. Jury Instr. (Crim.) 2.1.

After the jury began its deliberations, the jury asked the trial court for a copy or the indictment and later asked the trial court to read the indictment. The trial court informed the jury it was unable to comply with either request. (V48/1858, 1864-71). Partin argues the trial court abused its discretion in denying these requests. Initial Brief at p. 65.

It is within the trial court's discretion to permit a copy of the indictment to be delivered to the jury. See Fla. R. Crim. P. 3.400(a) (court may permit the jury to take a copy of the charges against the defendant to the jury room). "A trial court has discretion in instructing the jury during deliberations, and an appellate court will disturb a trial court ruling only where the judicial action is arbitrary, fanciful or

unreasonable." McGirth v. State, 2010 WL 4483506, at *7 (Fla. Nov. 10, 2010) (internal quotations and citations omitted). Indeed, in Donaldson v. State, 356 So. 2d 351, 352-53 (Fla. 1st DCA 1978) the court found the trial court did not abuse its discretion in denying defendant's request that the jury be permitted to take the indictment to the jury room as Florida Rule of Criminal Procedure 3.400 is *permissive not mandatory*. Likewise, it would be within the trial court's discretion to read a copy of the indictment to the jury. See generally Fla. R Crim. P. 3.410 (within trial court's discretion to read additional instructions or testimony to jury).

While Partin appears to acknowledge it was within the trial court's discretion not to comply with the jury's requests, he attempts to distinguish Donaldson as it was the jury that requested a copy of the indictment. This is a distinction without a difference as Florida Rule of Criminal Procedure 3.410(a) applies generally to which materials may be permitted into the jury room without regard to whom requested the materials. Partin then speculates regarding the jury's requests and asserts their "concerns" were not put to "rest" and such amounted to an abuse of discretion. Initial Brief at p. 65. However, "[r]eversible error cannot be predicated upon conjecture." Sullivan v. State, 303 So. 2d 632, 635 (Fla.

1974). In Ford v. Wainwright, 451 So. 2d 471, 473-75 (Fla. 1984), this Court applied this principle and concluded that a defendant's assertion regarding the jurors' deliberations which was based upon conjecture could not form the basis for error. Here, the trial court clearly acted within its discretion and there was no error. Partin's speculation regarding the jurors' deliberations cannot form the basis for any relief.

Moreover, where Partin's jury was read the standard jury instructions and apprised of the essential and material elements of first-degree murder, the trial court's responses were harmless. (V48/1824-27). See generally Stephens v. State, 787 So. 2d 747, 755 (Fla. 2001) (noting standard jury instructions are presumed to be correct). The trial court did not abuse its discretion.

ISSUE IV

THE TRIAL COURT DID NOT ERR IN UTILIZING THE STANDARD PENALTY PHASE JURY INSTRUCTIONS IN EFFECT AT THE TIME OF PARTIN'S TRIAL. (Restated by Appellee)

The decision on whether to give a particular jury instruction is within the trial court's discretion, and, absent "prejudicial error," such decisions should not be disturbed on appeal. Card v. State, 803 So. 2d 613, 624 (Fla. 2001), citing Goldschmidt v. Holman, 571 So. 2d 422, 425 (Fla. 1990); see Alston v. State, 723 So. 2d 148, 159 (Fla. 1998) (holding trial court did not abuse its discretion in denying defendant's request for a special jury instruction).

Partin's penalty phase was conducted in March of 2008. (V26/4255-4372). Partin now relies on revisions to the standard jury instructions which were approved on October 29, 2009, more than a year after Partin's trial had ended. See In re Standard Jury Instructions in Criminal Cases-Report No. 2005-2, 22 So. 3d 17 (Fla. 2009). Partin has failed to demonstrate how the trial court abused its discretion in relying on the standard jury instructions which had been upheld repeatedly by this Court and were in effect at the time of Partin's trial.

At the outset of jury instructions, the trial judge informed the jury that "it is your duty. . . to render to the court an advisory sentence based upon your determination as to

whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist." (V26/4340). This Court has repeatedly upheld the standard instructions used in this case. See Stewart v. State, 37 So. 3d 243, 262 (Fla. 2010), citing Johnson v. State, 969 So. 2d 938, 961-62 (Fla. 2007) (rejecting arguments that standard instructions unconstitutionally place burden of proof on defendant to prove death sentence is inappropriate and improperly restrict evidence that jury may consider in mitigation); Lebron v. State, 982 So. 2d 649, 666 (Fla. 2008) (noting this Court has repeatedly held that Florida's standard jury instructions do not violate Caldwell).

The trial court did not abuse its discretion in denying Partin's request for an alternative jury instruction. As to the defense-proposed "never required to recommend" language, Partin admits that the defense proposed instruction does not even conform to the newly-approved revised instruction. And, as to the State's initially proposed instruction on the "great weight" to the jury's advisory sentence, based on Taylor v. State, 937 So. 2d 590 (Fla. 2006) (V26/4329-4330; 48/1887-1890), the defense made a tactical decision to decline this instruction. (V26/4331-4333; V48/1888-1890). Therefore, it was withdrawn and

this jury instruction claim has been affirmatively waived by the defense and is procedurally barred on appeal.

Lastly, Partin alleges that one word of the transcribed oral instruction may – or may not - be an error in transcription and "may have to be resolved at the trial court level." Initial Brief at 69-70. Partin admits there was no objection to the oral instructions. Therefore, any alleged jury instruction complaint, based on the oral instructions, is procedurally barred. Jury instructions "are subject to the contemporaneous objection rule, and, absent an objection at trial, can be raised on appeal only if fundamental error occurred." Garzon v. State, 980 So. 2d 1038, 1042 (Fla. 2008) (quoting State v. Delva, 575 So. 2d 643, 644 (Fla. 1991)). Furthermore, Partin has not asked to relinquish this matter to the trial court and, therefore, any claim based on an alleged inaccuracy in the transcript is procedurally barred. Lastly, this possible scrivener's error could not justify relief on appeal and even if there had been an isolated stumble in the oral instruction - on the use [of abuse, sic] of violence - any alleged error is procedurally barred, inconsequential and harmless. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

ISSUE V

PARTIN'S DEATH SENTENCE IS PROPORTIONATE. (Restated by Appellee)

Partin next alleges that this case "is not one of the most aggravated and least mitigated" to come before this Court. Therefore, Partin argues that his death sentence should be vacated on proportionality grounds. Initial Brief at 71.

Legal Standards

As this Court recently emphasized in McGirth v. State, 2010 WL 4483506, at *15 (Fla. Nov. 10, 2010), in reviewing a death sentence for proportionality, this Court ensures that the death penalty

> . . . is "reserved only for those cases where the most aggravating and least mitigating circumstances exist." Terry v. State, 668 So.2d 954, 965 (Fla. 1996). Our review on proportionality is not a comparison between the number of aggravators and mitigators. See Barnes v. State, 29 So.3d 1010, 1028 (Fla. 2010), cert. denied, No. 10-5054 (U.S. Oct. 4, 2010). Instead, we engage in a qualitative review of the totality of the circumstances and compare the present case with other capital cases. Wright, 19 So.3d at 303.

In sentencing Partin to death, the trial court found two weighty aggravating circumstances: (1) the capital felony was especially heinous, atrocious, or cruel and (2) Partin was previously convicted of a felony involving the use of violence to a person. (V21/3551-52). Both aggravating circumstances were afforded great weight. (V21/3551-52). The trial court did not

find any statutory mitigation, but did consider six categories of non-statutory mitigating circumstances and gave them from some to little weight. (V21/3552-54). The trial court's sentencing order states, in pertinent part:

AGGRAVATING CIRCUMSTANCES

The capital felony was especially heinous, atrocious, or cruel.

The evidence surrounding the homicide of fifteen year old Joshan Ashbrook showed that she suffered defensive type wounds consisting of two (2) incise wounds to the right forearm as well as five (5) incise wounds to the fingers of her left hand. The medical examiner, Dr. Noel Parma, further testified that the victim also experienced a large gaping incisor wound (9.5 cm in length and 3 cm in width) across the front of her neck, six (6) incisor wounds on her face, and blunt trauma to her head causing subdural and sub cranial bleeding. None of the aforesaid injuries however were fatal to the victim.

Ligature marks around the victim's neck and the presence of petechial hemorrhages indicated that she was strangled and linear contusions on her wrists and ankles were consistent with having been bound.

Lastly, the medical examiner testified that Joshan Ashbrook suffered trauma to her neck which caused an AO (atlanto-occipital) dislocation and a resulting brain stem injury which was the cause of her death. Dr. Palma, the medical examiner, when asked as to the mechanism of the child's death, stated that in a struggle the victim's head was moved forward or backward causing dislocation of her first cranial vertebra and the skull.

A crime must be both conscienceless or pitiless and unnecessarily torturous to the victim in order for it to be considered to be especially heinous, atrocious, or cruel. Nelson v. State, 748 So.2d. 237

(Fla. 1999). Dr. Parma, the medical examiner, conceded on defense cross examination that he was unable to determine how long the attack on the child/victim took. Dr. Parma was, however, able to furnish a logical sequence of injuries to the victim based upon the nature of the injuries; pointing out that although the victim's hands were bound, they obviously were not bound when she was attacked with a knife, otherwise she couldn't get defense wounds. Likewise, the Medical Examiner concluded that the AO dislocation was the last injury inflicted on the victim since with it the victim could not have raised her hands.

Multiple wounds and less than an instantaneous death may, none the less, establish the heinous, atrocious, or cruel aggravator. In both Rolling v. State 695 So.2d. 278 (Fla 1997) and Mahn v 5tate 714 So.2d. 391 (Fla. 1998), the victim suffered multiple stab wounds, including those of a defensive nature over the course of only minutes (Mahn), less than a minute (Rolling), with a finding of heinous, atrocious or cruel.

The child/victim, Joshan Ashbrook, suffered multiple defensive incisor wounds to her arm and hand, as well as incisor wounds to her face, a large gaping incisor wound across her neck, blunt trauma to her head, binding of her hands and feet and strangulation all taking place before the dislocation of her skull and the first cranial vertebra, which was the cause of her death. Joshan Ashbrook clearly suffered a high degree of pain, fear, and terror prior to her death.

The Court has considered all the circumstances of this case and finds that this aggravating circumstance has been proved beyond a reasonable doubt and it is given great weight.

The defendant was previously convicted of a felony involving the use of violence to the person.

A certified copy of defendant's conviction for Murder in the Second Degree, Robbery, and Burglary from Dade County, Florida, (Miami) dated March 31, 1989 was received into evidence during the penalty

stage of trial. The defendant was identified by retired Miami-Dade police Lt. Burego as having stated to him that he had choked and then strangled the victim to death with a telephone cord in the victim's residence and took the victim's belongings, including safe deposit keys. The defendant pleaded guilty and was convicted of Murder in the Second Degree, Robbery and Burglary.

The Court has considered all of the circumstances of this case and finds this aggravating circumstance has been proven beyond a reasonable doubt and it is given great weight.

MITIGATING CIRCUMSTANCES

The defendant has the ability to be productive and be a positive influence on others while in prison.

The evidence supports the defendant's claim that he only served five and a half (5 1/2) years in the Department of Corrections on his seventeen (17) year sentence for Murder in the Second Degree, Robbery and Burglary. The defendant's inmate records from the Department of Corrections demonstrate that the defendant did, while incarcerated, complete several programs, work projects, and as argued by defense counsel "generally thrived in the prison environment." The defendant's conduct in the Department of Corrections contributed to his having been released after serving only five and one half years in prison on a seventeen year sentence.

The evidence supports the defense contention that the defendant generally worked when not incarcerated.

These factors have been established but the Court gives these mitigators little weight.

The defendant is a good father and a good provider.

The evidence is clear that the defendant's then seven (7) year old daughter, Patricia, lived with the defendant in a room of a friend's house that he rented. It is equally clear that his daughter was with

him when he picked up the fifteen year old victim on the street, went fishing, and entertained the victim in his rented room. The evidence is unclear as to the defendant's daughter's location when he murdered the victim, but when he determined that law enforcement wanted to question him regarding Joshan Ashbrook's murder, it is certainly clear that he dropped his daughter off at her former foster mother's residence prior to leaving his truck and fleeing the area.

The evidence supports defendant's contention that he provided for his daughter when she resided with him. The Court accepts these factors as mitigating and assigns little weight to them.

The defendant is a good friend, a good boyfriend, and a compassionate person.

The evidence established that the defendant had a boyfriend-girlfriend relationship with Susan Salmon for several years and has been friends with several individuals over time. One of the defendant's friends, Vicki Gray, testified that she was told by the defendant that he had "done State time" for a murder conviction and even with defendant's second murder conviction in this case that the "defendant will continue as her friend, regardless of what he does". The Court accepts these factors as mitigating and assigns little weight to them.

The defendant has maintained steady and consistent employment throughout the non-incarcerated periods. (Employment Record)

The evidence shows that the defendant has worked various and sundry occupations when not incarcerated. The evidence also shows that after committing the murder of Joshan Ashbrook and fleeing this jurisdiction, he worked in various trades under different alias. The Court accepts this mitigating circumstance as established but it is given little weight.

The defendant has diminished mental capacity, mental disorders, and brain abnormalities.

The evidence in support of the defense assertion of the above mitigating factors included the testimony of Dr. Valerie McClain, a psychologist, who found the defendant guarded and suspicious. She concluded that the defendant had polysubstance abuse, a cognitive disorder, and a major depressive disorder. These diagnoses, per Dr. McClain, caused the defendant to lack control over his emotions, and to have an explosive anger.

Dr. McClain, however, was either unaware or didn't request defendant's videotaped statement to Detective Medley after his arrest, which shows the defendant to be cunning and only conceding incriminating facts when confronted with irrefutable facts. Dr. McClain conceded that the defendant's I.Q. tests showed a high average result with the highest scores in performance I.Q. The defendant was described by Dr. McClain as "having a short fuse" and having intense angry feelings with minimal ability to control it.

The defendant was also examined at the behest of defense counsel by Dr. Hyman Eisenstein, a psychologist. He was of the opinion that the defendant's current diagnosis was:

1. Bipolar (depressed)
2. Intermittent explosive personality

Dr. Eisenstein found the defendant in January of 2007 to be "hostile, angry, and mistrusting". However, in August of 2008, in preparation for defendant's Spencer Hearing, he found the defendant to be pleasant and cooperative. Dr. Eisenstein, like Dr. McClain, relied almost entirely upon the defendant's statements as to prior trauma, injuries, and other childhood and adult events. Dr. Eisenstein, like Dr. McClain, conceded that their opinions supported the need to perform a petscan and a brain MRI on the defendant. Both defense witnesses, however, when confronted with the normal Petscan and brain MRI results stated they had not changed their opinions. Dr. Eisenstein conceded, as did Dr. McClain, that he had not reviewed or considered defendant's presentence

Investigation, depositions including that of the defendant's sister, defendant's numerous taped telephone calls with Pasco Sheriff's Office detectives while he was a fugitive, in which he verbally fenced with the detectives, as well as his videotaped statement after his arrest in this case in which he cunningly parried questions by Detective Medley. Dr. Eisenstein conceded that the defendant's actions were "consistent with defendant being a very violent man" and that the defendant could be "extremely aggressive physically at times". This mitigating circumstance (mental disorder) has been established, and it is given some weight. The evidence shows that the PET scan performed upon the defendant was normal. A CAT scan performed upon the defendant suggested the need for a MRI to be done on the defendant's brain. The result of the brain MRI was normal. The mitigating circumstance of brain abnormalities has only been suggested by the defendant's CAT scan results which in turn were negated by the normal brain MRI. However, if this mitigator has been established it is given little weight. Brain damage or diminished mental capacity as to the defendant has not been established.

The defendant's upbringing and childhood constitute a mitigating circumstance.

The evidence concerning the defendant's childhood and upbringing has been considered by this Court. The defense has attempted to show that the defendant's childhood and upbringing caused or contributed to the cause of his aggression, violence, and acting in a vicious, sadistic manner. The evidence of defendant's childhood, however, depicts him setting fire to a liquor store at age seven years; stealing from family members and others, physically assaulting family members, sexually assaulting his sister, and expressing satisfaction at participating in more than one hundred street fights/brawls. This mitigating circumstance has been established and it is given little weight.

The non-unanimous verdict recommending the imposition of the death penalty is a mitigating circumstance.

The Court has considered the defense contention that the jury recommendation (9 to 3) in favor of imposition of the death penalty is a mitigating circumstance. The Court concludes that a jury's recommendation is neither an aggravating nor a mitigating circumstance but rather should be given great weight by this Court. However, additional evidence introduced at the Spencer hearing may reduce the weight to be given to the recommendation. If the jury's non-unanimous recommendation were to be viewed however as a mitigating circumstance as proposed by the defense; it has obviously been established, but would be given only some weight.

In summary the Court finds the following aggravating and mitigating factors and assigns the weight given to each:

AGGRAVATING CIRCUMSTANCES

1. The capital felony was especially heinous, atrocious, or cruel.
   - Great weight

2. The defendant was previously convicted of a felony involving the use of violence to the person.
   - Great weight

MITIGATING CIRCUMSTANCES

1. The defendant has the ability to be productive and be a positive influence on others while in prison.
   - Little weight

2. The defendant is a good person, a good boyfriend, and a compassionate person.
   - Little weight

3. The defendant has maintained steady and consistent employment throughout the non- incarcerated periods (employment record).
   - Little weight

4. The defendant has diminished mental capacity, mental disorder, and brain abnormalities.

- Some weight as to mental disorder
- Neither brain damage, nor diminished mental capacity have been established.
- Brain abnormalities suggested by the CAT scan results, but negated by the normal brain MRI results; if established, are given only little weight.

5. The defendant's upbringing and childhood constitute a mitigating circumstance.
- Little weight

6. The non-unanimous verdict recommending the imposition of the death penalty is a mitigating circumstance.
- Neither a mitigating, nor aggravating circumstance, but rather should be given great weight by this Court, however, additional evidence introduced at the Spencer Hearing may reduce the weight given to the recommendation. If said jury recommendation were viewed as a mitigating circumstance, it would only be given some weight.

Having reviewed all of the aggravating and mitigating circumstances, the Court finds that the Aggravating circumstances outweigh the Mitigating circumstances for the murder of Joshan Ashbrook. . .

(V21/3551-3555)

Partin candidly admits that the trial court found two significant aggravating factors in this case - prior violent felony (based on Partin's prior guilty plea and convictions for second degree murder, robbery and burglary) and HAC.[29] The HAC

[29]Partin does not challenge the existence of either the prior violent felony aggravator or the HAC aggravator. Nor could he credibly do so. The prior violent felony aggravator was based on Partin's undisputed guilty plea and convictions for Murder in the Second Degree, Robbery and Burglary. This Court has

aggravator is among the most serious aggravators in the statutory sentencing scheme. See Douglas v. State, 878 So. 2d 1246, 1262 (Fla. 2004). In this case, sixteen-year-old Joshan suffered, among other things, multiple defensive wounds, stab wounds to her face and neck, blunt trauma to her head, binding of her hands and feet, and strangulation - all before the brutal dislocation of her skull and cranial vertebrae, the ultimate blow that finally ended her young life.

In deciding whether death is a proportionate penalty, the Court must consider the totality of the circumstances of the case and compare the case with other capital cases. Sexton v. State, 775 So. 2d 923, 935 (Fla. 2000). Aside from a single reference to Williams v. State, 37 So. 3d 187, 205 (Fla. 2010) for the well-settled proposition that this Court's

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previously upheld the HAC aggravating factor in cases where a conscious victim was beaten or strangled prior to his or her death. See Zommer v. State, 31 So. 3d 733, 747 (Fla. 2010); Conde v. State, 860 So. 2d 930, 955 (Fla. 2003) ("Strangulation with great force applied around the victim's neck after a violent beating until unconsciousness takes over [is] heinous, atrocious, or cruel." (quoting trial court's order)); Randolph v. State, 562 So. 2d 331, 338 (Fla. 1990) (affirming HAC where defendant repeatedly hit, kicked, strangled, and knifed victim who was conscious during various stages of the attack); Perry v. State, 522 So. 2d 821, 821 (Fla. 1988) (HAC aggravator established where victim was choked and repeatedly stabbed while she attempted to ward off a knife attack);" Dennis v. State, 817 So. 2d 741, 766 (Fla. 2002) (HAC was supported by evidence that the victims suffered skull fractures and were conscious for at least part of the attack).

proportionality review requires that the death penalty "be reserved only for those cases that are the most aggravated and least mitigated," Partin does not cite to any case supporting his proportionality claim. Instead, Partin asserts that the prior violent felony aggravator – which included his prior conviction for second degree murder - is "tempered somewhat" by having occurred in 1987. Thus, Partin's complaint is essentially a challenge to the weight given this aggravating factor. The weight to be accorded an aggravator is within the discretion of the trial court and will be affirmed if based on competent, substantial evidence. See Sexton v. State, 775 So. 2d 923, 934 (Fla. 2000).

Qualitatively, prior violent felony and HAC are among the weightiest aggravators set out in the statutory sentencing scheme. See Zommer v. State, 31 So. 3d 733, 751 (Fla. 2010), cert. denied, 79 U.S.L.W. 3200 (U.S. Oct. 4, 2010). This Court has described the prior violent felony aggravating circumstance as "especially weighty." Ferrell v. State, 680 So. 2d 390, 391 (Fla. 1996) (affirming death sentence where single aggravating circumstance of prior violent felony was "weighty"); Duncan v. State, 619 So. 2d 279, 284 (Fla. 1993) (affirming death sentence where sole aggravating factor was prior second-degree murder). Here, as in Rodgers v. State, 3 So. 3d 1127, 1134 (Fla. 2009),

Partin's prior crimes were indicative of the same total disregard for human life evidenced in this case. The fact that Partin had killed another person before – by choking and strangling the prior victim with a telephone cord – was properly afforded great weight. Partin has not demonstrated any abuse of discretion in the weight accorded this aggravating factor.

Partin also concludes that the jury's recommendation should be tempered because the jury did not hear additional mitigation presented at the Spencer hearing. Partin's complaint is procedurally barred. The defense elected to present additional mitigation evidence to the trial court at the Spencer hearing only and, therefore, Partin in estopped from claiming that the jury should have heard the additional mitigation, too.

In conducting its proportionality analysis, this Court "will not disturb the sentencing judge's determination as to 'the relative weight to give to each established mitigator' where that ruling is 'supported by competent substantial evidence.'" Barnes v. State, 29 So. 3d 1010, 1028 (Fla. 2010). Under the totality of the circumstances, Partin's death sentence is proportional in relation to other death sentences that this Court has upheld. See Blackwood v. State, 777 So. 2d 399 (Fla. 2000) (death sentence proportionate for strangulation murder where trial court found HAC aggravator, one statutory mitigator,

and eight nonstatutory mitigators); Banks v. State, 2010 WL 2195718, at *9 (Fla. June 3, 2010) (death sentence proportionate for stabbing murder with three aggravators [prior violent felony, HAC and CCP] and five mitigating circumstances [low IQ; brain deficit; antisocial personality traits; not the only participant and difficult youth]); Merck v. State, 975 So. 2d 1054 (Fla. 2007) (death sentence proportionate for stabbing murder where trial court found prior violent felony and HAC aggravators, statutory age mitigator, and several nonstatutory mitigators, including: a difficult family background, alcohol use the night of the murder, and a capacity to form positive relationships); Singleton v. State, 783 So. 2d 970 (Fla. 2001) (death sentence proportionate for stabbing murder where trial court found prior violent felony and HAC aggravators as well as substantial mitigation, including: extreme mental or emotional disturbance, impaired capacity to appreciate criminality of conduct or to conform conduct to requirements of law, and under influence of alcohol and possibly medication at time of offense); Pope v. State, 679 So. 2d 710, 713, 716 (Fla. 1996) (upholding death penalty as proportionate in stabbing death where trial court found two aggravating factors [pecuniary gain and prior violent felony] and two statutory mitigating factors [extreme mental or emotional disturbance and substantially

impaired capacity], as well as nonstatutory mitigating circumstances such as intoxication at the time of the offense); Hauser v. State, 701 So. 2d 329 (Fla. 1997) (aggravators: HAC, CCP and pecuniary gain; mitigation: no significant history of prior criminal activity, good attitude and conduct in jail, cooperated fully with police, was under the influence of drugs or alcohol and emotional or mental health problems since he was fourteen years old); Rogers v. State, 783 So. 2d 980 (Fla. 2001) (two aggravating circumstances, pecuniary gain and HAC; statutory mitigating circumstance of substantially impaired capacity; and several nonstatutory mitigating circumstances); Brant v. State, 21 So. 3d 1276, 1286-1288 (Fla. 2009) (death sentence proportional where Brant choked victim, strangled her and then suffocated her, Brant had a substantially impaired capacity to conform his conduct to the requirements of law, diminished impulse control, and periods of psychosis due to methamphetamine abuse); Ocha v. State, 826 So. 2d 956, 965-66 (Fla. 2002) (death sentence for strangulation murder was proportional, Ocha had a prior violent felony aggravator [from a prior robbery and attempted murder] and HAC aggravator, weighed against fifteen non-statutory mitigators stemming from Ocha's background).

ISSUE VI

THE TRIAL COURT CORRECTLY DENIED PARTIN'S CHALLENGE TO FLORIDA'S CAPITAL SENTENCING STATUTE BASED ON RING AND APPRENDI. (Restated by Appellee)

This Court reviews a trial court's ruling on the constitutionality of a Florida statute *de novo*. See Miller v. State, 42 So. 3d 204, 214 (Fla. 2010).

Partin argues that Florida's capital sentencing scheme violates Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428 (2002) and Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000). The trial court denied Partin's "Motion to Declare Florida's Capital Sentencing Statute Unconstitutional under Ring v. Arizona" (V9/1526-1548, 1549; V9/1558; V26/4318-4323, 4330-4333) and emphasized that "since Ring, in every single case up until now [the Florida Supreme Court has] rejected this defense argument. (V25/4135). See Turner v. State, 37 So. 3d 212, 229 (Fla. 2010) citing Marshall v. Crosby, 911 So. 2d 1129, 1134 n. 5 (Fla. 2005) (listing over fifty cases since Ring's release where this Court has rejected similar Ring claims).

Furthermore, Ring does not apply to these facts because the "prior violent felony" is present here. See Frances v. State, 970 So. 2d 806, 822 (Fla. 2007) ("Ring did not alter the express exemption in Apprendi v. New Jersey, 530 U.S. 466 (2000), that

prior convictions are exempt from the Sixth Amendment requirements announced in the cases.") In Miller, 42 So. 3d at 214-219, this Court set forth a comprehensive analysis rejecting the same defense arguments Partin repeats here. In Miller, this Court explained, in pertinent part:

> **Constitutionality of Florida's Capital Sentencing Scheme**
>
> Miller asserts that Florida's capital sentencing scheme requires findings of "sufficient aggravating circumstances" and "insufficient mitigating circumstances," and that those facts must be alleged in the indictment and unanimously found to exist beyond a reasonable doubt by a twelve-person jury to satisfy constitutional standards. . .
>
> **Indictment**
>
> Miller first contends that under Florida law and Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), [FN2] an indictment must allege the required factual findings in support of a death sentence, which are stated in section 921.141(3). He bases this assertion on the premise that the indictment must contain an allegation of every essential element of the crime to be punished, and that under Apprendi, this includes the factual findings the trial court must make during the penalty phase of Florida's bifurcated capital proceedings. Specifically, Miller maintains that the indictment must expressly contain the statutory language of section 921.141(3), which provides:
>
> FN2. In Apprendi, the U.S. Supreme Court held, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490, 120 S.Ct. 2348.

> Findings in support of sentence of death. Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:
>
> (a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and
>
> (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.
>
> Miller contends that because these are the respective findings of fact necessary for the imposition of the death sentence, Apprendi requires them to be alleged in the indictment.

We find no merit to this argument. **Florida's capital sentencing scheme withstands constitutional scrutiny because it provides sufficient notice of the charges against the accused.** The purpose of an indictment is to provide the accused with sufficient notice of the nature and cause of the offense charged. See art. I, § 16, Fla. Const. [FN3] For a charging document "to sufficiently charge a crime it must follow the statute, clearly charge each of the essential elements, and sufficiently advise the accused of the specific crime with which he is charged." Price v. State, 995 So.2d 401, 404 (Fla. 2008). Therefore, procedural due process is afforded when an accused receives sufficient notice of these allegations.

> FN3. "In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation."

An indictment that charges first-degree murder immediately places a defendant on notice that he or she is charged with a capital felony punishable as provided by the statute. See Sireci v. State, 399 So. 2d 964, 970 (Fla. 1981), overruled on other grounds by

Pope v. State, 441 So. 2d 1073, 1077-78 (Fla. 1983). In Sireci, we held that section 921.141(5) specifically defines the aggravating circumstances that may be considered by the judge and the jury, thereby rebutting any contention that a defendant lacked notice of the aggravating circumstances on which the State would rely. Applying this reasoning in Hitchcock v. State, 413 So. 2d 741 (Fla.1982), we concluded that because "[t]he statutory language [of section 921.141(5)] limits aggravating factors to those listed,. . . there is no reason to require the state to notify defendants of the aggravating factors that the state intends to prove." Id. at 746 (citations omitted); see also Cox v. State, 819 So. 2d 705, 725 (Fla. 2002); Mann v. Moore, 794 So. 2d 595, 599 (Fla.2001); Vining v. State, 637 So. 2d 921, 927 (Fla. 1994); Medina v. State, 466 So. 2d 1046, 1048 n. 2 (Fla. 1985); Tafero v. State, 403 So. 2d 355, 361 (Fla.1981); Menendez v. State, 368 So. 2d 1278, 1282 n. 21 (Fla.1979) (citing Spinkellink v. Wainwright, 578 F.2d 582, 609 (5th Cir. 1978)).

After Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), we reaffirmed this principle in Kormondy v. State, 845 So.2d 41 (Fla.2003), and held that "Ring does not require. . . notice of the aggravating factors that the State will present at sentencing." Kormondy, 845 So.2d at 54; see also Grim v. State, 971 So.2d 85, 103 (Fla.2007); Coday v. State, 946 So.2d 988, 1006 (Fla.2006); Ibar v. State, 938 So.2d 451, 473 (Fla. 2006); Winkles v. State, 894 So.2d 842, 846 (Fla. 2005); Hodges v. State, 885 So.2d 338, 359 nn. 9-10 (Fla. 2004); Blackwelder v. State, 851 So.2d 650, 654 (Fla. 2003); Lynch v. State, 841 So.2d 362, 378 (Fla. 2003); Porter v. Crosby, 840 So.2d 981, 986 (Fla. 2003).

* * *

Lastly, Miller asserts that a constitutional implementation of our capital sentencing statute would require the indictment to include the allegations that "sufficient aggravating circumstances exist as enumerated in subsection (5)," and that "there are insufficient mitigating circumstances to outweigh the

aggravating circumstances." § 921.141(3) (emphasis supplied). This interpretation elevates form over substance in contradiction to the nature of the grand jury. If this express statutory language were included in an indictment, a grand jury would have to find that sufficient evidence of these allegations existed. See Fla. Std. Jury Instr. (Grand Jury) 2.1, 2.4. This is a misdirected interpretation of the capital sentencing statute. A grand jury session is an ex parte proceeding which usually does not consider both sides of an issue. See Fla. Std. Jury Inst. (Grand Jury) 2.3. The function of the grand jury is to obtain evidence as to a charge of crime, by the State, and to determine whether the person so charged should be brought to trial. See id. Generally, the defendant is not even present unless testifying as a witness. See § 905.17(1), Fla. Stat. (2005). [FN5] The State presents witnesses and evidence, whereas the defendant is not afforded that opportunity. See § 905.19, Fla. Stat. (2005).

FN5. (omitted).

* * *

Given that the defendant is not present or represented by counsel during the grand jury proceeding, Miller's contention would require the State to present evidence that there are insufficient mitigating circumstances. This is contrary to the operation of our criminal system. We have discussed the countervailing relationship of aggravating and mitigating circumstances, as follows:

> We note substantive differences, however, between proving aggravating circumstances and proving mitigators. To obtain a death sentence, the State must prove beyond a reasonable doubt at least one aggravating circumstance, whereas to obtain a life sentence the defendant need not prove any mitigating circumstances at all. Moreover, the defendant may invoke "[t]he existence of any other factors in the defendant's background that would mitigate against the imposition of the death penalty." The State, on the other hand, is limited to the specific aggravating factors listed in

> section 921.141(5). Therefore, even if it could be required, pretrial notice of specific nonstatutory mitigation could prove unwieldy.

State v. Steele, 921 So. 2d 538, 543-44 (Fla. 2005) (citations omitted) (quoting §921.141(6)(h), Fla. Stat. (2004)). The State cannot refute information that is exclusively within the possession of the defendant. Accordingly, it would be illogical to require the State to demonstrate that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances" at that stage of the proceeding, which would be necessary if we were we to adopt the position maintained by Miller. § 921.141(3).

Therefore, for the reasons expressed above, we deny relief on this issue.

Unanimous Jury Finding of Sufficient Aggravating Circumstances and Insufficient Mitigating Circumstances

Next, Miller contends that Apprendi requires that a unanimous twelve-person jury make the findings of fact necessary to determine eligibility for the death penalty. In his view, these findings are specified in section 921.141(3); therefore, a constitutional interpretation of Florida's capital sentencing scheme requires the jury to unanimously determine that sufficient aggravating circumstances exist and that insufficient mitigating circumstances exist to outweigh the aggravating circumstances.

Miller's argument cannot prevail under the factual circumstances of this case. Even if this Court were to determine that the statute requires a unanimous jury to conduct the findings of fact articulated in section 921.141(3), the death sentence in this case satisfies Miller's interpretation of the application of Apprendi in Florida. . .

In addition, this Court has repeatedly held that where a death sentence is supported by the prior violent felony aggravating circumstance, Florida's capital sentencing scheme does not violate Ring or Apprendi.

> **See, e.g., Frances v. State, 970 So.2d 806, 822 (Fla. 2007) (citing Apprendi, 530 U.S. at 490, 120 S.Ct. 2348); Jones v. State, 855 So. 2d 611, 619 (Fla. 2003)**. . . . Therefore, the trial court found that the death sentence was supported by the prior violent felony aggravating circumstance, which satisfies express exemptions to Apprendi that were unaltered by Ring.
>
> In sum, Miller's prior and contemporaneous violent felonies established three aggravating circumstances. . . . Therefore, Miller's contention that a unanimous jury did not find sufficient aggravating circumstances is unavailing because several aggravating circumstances stemmed from his prior and contemporaneous violent felonies.
>
> **Lastly, this Court has repeatedly rejected the assertion that Apprendi and Ring require that aggravating and mitigating circumstances be found individually by a unanimous jury**. See, e.g., Frances, 970 So. 2d at 822; Rodgers v. State, 948 So.2d 655, 673 (Fla. 2006); Hernandez-Alberto v. State, 889 So.2d 721, 733 (Fla. 2004). **Miller's attempt to distinguish his argument from those previously rejected by this Court is attenuated and unpersuasive. Under Florida's bifurcated capital proceeding, the jury considers the sufficiency of the aggravators and the insufficiency of the mitigating circumstances when issuing an advisory sentence under section 921.141(2). The plain language of section 921.141(3) refers to the duty of the trial court with regard to the required written findings for imposing a death sentence. Miller has failed to provide a persuasive argument in support of the penalty phase jury making findings with regard to the trial court's weighing process specified in section 921.141(3). Accordingly, we deny relief on this issue.**

Miller, 42 So. 3d at 214-219 (emphasis supplied).

Partin has not established any basis on which this Court should reconsider the established points of law with regard to

Florida's capital sentencing scheme. Accordingly, this Court should deny his Ring/Apprendi claim. See also, Zommer v. State, 31 So. 3d 733, 752 (Fla. 2010); Hodges v. State, 2010 WL 4878858 (Fla. Dec. 2, 2010) (citing Victorino v. State, 23 So. 3d 87, 107-08 (Fla. 2009)).

ISSUE VII (Supplemental)

THE EVIDENCE WAS SUFFICIENT TO CONVICT PARTIN.

While Partin has not contested the sufficiency of the evidence to sustain his conviction, this Court has a duty to address the sufficiency of evidence in each capital case. See Overton v. State, 801 So. 2d 877, 905 (Fla. 2001); Fla. R. App. P. 9.142(a)(6). As such, the State submits that the evidence was sufficient to support Partin's conviction.

The jury found Partin guilty of first-degree murder on a general verdict form. (V18/3030). "A general guilty verdict rendered by a jury instructed on both first-degree murder and felony murder alternatives may be upheld on appeal where the evidence is sufficient to establish either felony murder or premeditation." Blake v. State, 972 So. 2d 839, 850 (Fla. 2010) (quoting Crain v. State, 894 So. 2d 59, 73 (Fla. 2004).[30]

Evidence is insufficient "in a circumstantial evidence case if the State fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt." Orme v. State, 677 So. 2d 258, 262 (Fla. 1996). "The question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and where there is

[30] Partin's jury was instructed on premeditation and felony murder, with aggravated child abuse as the underlying felony. (V48/1824-27).

substantial, competent evidence to support the jury verdict," reversal is not required. Darling v. State, 808 So. 2d 145, 155 (Fla. 2002) (quoting State v. Law, 559 So. 187, 188 (Fla. 1989). To meet this burden, the State is not required to "rebut conclusively, every possible variation of events;" it only has to present evidence that is inconsistent with defendant's reasonable hypothesis. Darling, 808 So. 2d at 156. The circumstantial evidence rule does not require a jury to believe a defendant's version of events where the State has produced conflicting testimony. Spencer v. State, 645 So. 2d 377, 381 (1994). Moreover, the State is entitled to a view of any conflicting evidence in the light most favorable to the jury's verdict. Cochran v. State, 547 So. 2d 928, 930 (Fla. 1989). Premeditation may be shown by evidence such as "the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted." Green v. State, 715 So. 2d 940, 943 (Fla. 1998); Johnston v. State, 863 So. 2d 271, 285-86 (Fla. 2003) (evidence of premeditation sufficient where victim was strangled and injuries indicated victim struggled). Lastly, this Court has indicated aggravated child abuse can serve as the underlying felony in a first-degree felony murder case.

Lukehart v. State, 776 So. 2d 906, 921-22 (Fla. 2000); see also Brooks v. State, 918 So. 2d 181, 198-99 (Fla. 2005) (noting where there are multiple injuries aggravated child abuse can serve as the underlying felony in a felony murder case).

The day before the body of 16-year-old Joshan Ashbrook was found, she was last seen with Partin in his bedroom. That evening a violent struggle would ensue with young Joshan fighting for her life. Joshan's multiple wounds, abrasions, and contusions indicated she fought as Partin slit her throat, bound and strangled her, and ultimately snapped her neck. Defensive incised wounds found on her left hand indicated she attempted to fend off Partin's attack with a knife. As she further fought to fend off Partin, she would rip hair from his head. DNA analysis would confirm Partin's hair in Joshan's left bloody hand. The injuries revealed Partin then inflicted severe trauma to Joshan's head, and bound and strangled her before ultimately snapping her neck and causing her death.

Partin would dump Joshan's body off Shady Hills Road, his tire tracks leading to her semi-nude body. His truck would be identified there by Arthur White, within one hour of Joshan's approximated time of death. Partin then took multiple steps to cover-up the murder he committed, evade and avoid law enforcement, and prosecution.

When Partin returned home from disposing of Joshan's body, Joshan's blood was on his clothes, and a small amount of transfer would occur with spots of Joshan's blood being identified in his bedroom through DNA analyses. A more visible amount of blood on the floor Partin would attempt to get rid of with bleach, and then hide with a beach towel, and an Oriental rug. The following details Partin's actions over the fourteen months after Joshan's murder when Partin went to great lengths to avoid detection and prosecution:

August 1, 2002 » Joshan's body is found.

August 3, 2002 » Detective Mazza calls Partin, he gives a false name, a false description of his truck, and says he is homeless when she wants to come meet with him to discuss Joshan's murder.

August 5, 2002 » Abandons first day on job after finding out police are looking to speak to ex-girlfriend Susan Salmon.

August 6, 2002 » Partin refuses to meet with Mazza.

August 10, 2002 » Abandons daughter and asks former foster mother for money.

After August 2002 » Contacts Salmon, indicates he is on the run from police who want to speak with him regarding Joshan's murder and asks to use her husband's Social Security number.

August-September 2002 » Three calls with Detective Gattuso wherein Partin acknowledges lying to Mazza and being with Joshan; refuses to meet with Gattuso.

October 20, 2002» Partin's abandoned truck found in

Plant City, Partin has changed the tires.

November 7, 2002 » Partin represents himself to be Fred Kaufman and purchases SUV in Washington.

October 26, 2003 » Phone call with Fred Kaufman, Partin talks about how he has been on the run, tells how he has changed his appearance, and has avoided law enforcement.

October 28, 2003 » Partin arrested in North Carolina, now says he does not know who Joshan is, admits he contemplated shooting it out with police; weapon and Fred Kaufman's Social Security card are found after his arrest.

In North Carolina jail » Makes phone call wherein he expresses desire to escape.

Partin's hypothesis of innocence was that Fred Kaufman murdered Joshan. (V40/330-31; V45/1367; V47/1692-93). However, the State presented evidence that conclusively refuted this hypothesis.

Fred Kaufman was working at 3:30 a.m., the time of Joshan's murder. Arthur White testified the truck he saw backed up to where Joshan's body was found was not a Mitsubishi Montero, the type of SUV Kaufman drove. The tire tracks that led to Joshan's body were not made by a Montero and Kaufman was excluded as the source of the hairs found on Joshan's body. Additionally, Kaufman did not even meet Joshan. Lastly, while Partin was on the run, it was Kaufman who allowed law enforcement to come into his home and even agreed to allow his phone conversation with

Partin to be recorded.

Under these circumstances, the State presented sufficient evidence to show that Partin was guilty of first-degree murder. His conviction should be affirmed.

CONCLUSION

Based on the foregoing facts, arguments and citations of authority, the State respectfully requests that this Honorable Court affirm Appellant's conviction and sentence.

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL

_/s/ Katherine Maria Diamandis_____
KATHERINE MARIA DIAMANDIS
Assistant Attorney General
Florida Bar No. 69116
katherine.diamandis@myfloridalegal.com

_/s/ Katherine V. Blanco_____
KATHERINE V. BLANCO
Assistant Attorney General
Florida Bar No. 0327832
katherine.blanco@myfloridalegal.com
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
(813) 287-7900
(813) 281-5500 Facsimile

CO-COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Robert F. Moeller, Assistant Public Defender, Post Office Box 9000 - Drawer PD, Bartow, Florida 33831-9000, this 7th day of December, 2010.

CERTIFICATE OF FONT COMPLIANCE

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

/s/ Katherine Maria Diamandis____
COUNSEL FOR APPELLEE