IN THE SUPREME COURT OF FLORIDA

PAUL DUROUSSEAU,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. SC08-68

APPELLEE'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Appellee, the State of Florida, the prosecuting authority below will be referenced in this brief as the prosecution, or the State. Appellant, PAUL DUROUSSEAU, the defendant below, will be referenced in this brief as Appellant.

The record on appeal consists of 40 volumes, which will be referenced according to the respective Roman numeral designated in the Index to the Record on Appeal. "IB" will designate Appellant's Initial Brief. Each symbol will be followed by the appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

According to the arrest and booking report, on June 23, 2003 Appellant was indicted on five counts of first-degree murder for the deaths of Nichole Williams, Nikia Kilpatrick, Shawanda McCallister, Jovanna Jefferson, and Surita Cohen (I 1). Based on these charges, the Jacksonville Sheriff's Office began researching "homicides with similar characteristics and methodology consistent with" the charged crimes. Id. DNA evidence led the Sheriff's Office to the homicide of Tyresa Mack, and a re-investigation of that homicide led investigators to conclude that she was the "6th victim in Jacksonville" linked to Appellant, and led to his arrest for her murder (I 1-2).

On September 4, 2003, Appellant was charged by separate indictment with the first-degree murder of Tyresa Mack (I 10). The State filed Notice of Intent to Seek the Death Penalty (I 15).

Prior to trial, the State filed a "Notice of Other Crimes, Wrongs or Acts Evidence," pursuant to section 90.404(2), Florida Statutes (II 360-61). The Notice indicated that the State wished to introduce evidence at trial that Appellant murdered Nikia Kilpatrick and Shawanda McCalister, and unlawfully confined Denarious Brown. Appellant subsequently filed a motion in limine to exclude this evidence, on the ground that the crimes were not similar enough to the charged murder support admissibility (V 789-791). At the conclusion of the hearing on the motion (XIV 2555-2653), the court ruled that the evidence was admissible (XIV 2649).

Appellant proceeded to jury trial on May 23, 2007.

In 1999, Tyresa Mack lived in an apartment in Jacksonville with her three small children, Derrick Roderickreia, and Rodriequez Holmes (XXIII752). Mack kept her apartment very clean (XXIII 757, XXIV 935).

On July 26, Mack's children were picked up by the daycare around 7:30 in the morning (XXIII 766, XXV 1088). Adam Moss, a friend of the family who did handyman work for them, arrived at the apartment to fix a lock for Mack (XXIII 761). The apartment was clean that day (XXIV 906).

Mack had a television in her apartment that was working (XXIII 758, XXIV 936).

Nicole Jackson also came by Ms. Mack's apartment that morning. She and Ms. Mack left the apartment to look for work together (XXIV 903-04). Moss also left, prior to Mack and Jackson leaving (XXIV 910).

Ms. Mack was wearing a black and white outfit when she went out with Jackson, and an X and O necklace with a heart pendant and a matching bracelet (XXIV 908-09). Jackson and Mack submitted job applications, ate at McDonalds, and continued looking for jobs (XXIV 911-15). They then returned to Mack's apartment around 1:00 (XXIV 916). It was very hot, Jackson's car had no working air conditioning, and Mack was "shiny" with sweat and appeared tired. Id. Jackson dropped off Mack, who went into her apartment, and Jackson left (XXIV 916-17).

Around 1:00, Mack spoke with her friend Tezalyn McFadden on the phone about getting a ride to a doctor's appointment for Mack's son Rodriequez (XXIV 944). At 1:25, McFadden called Mack back, and asked her to call later in case she fell asleep (XXIV 945).

Joy Williams was a neighbor of Tyresa Mack's and knew her (XXIV 974). Around 1:00 to 2:00 that afternoon, Ms. Williams saw a tall, skinny brown-skinned man with a noticeable Adam's apple, whom she identified as Appellant, walk out of Mack's building carrying a television toward a red, four-door car (XXIV 974-79). Rufus Pinkney was also at the scene at that time. Mr. Pinkney also knew Tyresa Mack and was waiting for a bus some time after 1:00 that day (XXIV 993-999). Pinkney saw a tall, light-skinned, skinny black man, whom he identified as Appellant, wearing a blue work outfit (XXIV 999-

XXV 1006-07). Pinkney saw Appellant get something out the trunk of a red car, and then walk upstairs to Tyresa Mack's apartment (XXV 1007).

In 1999, Glenn Simpson sold Appellant a red Mazda RX-6 in 1999 (XXV 1045-46). Appellant had a red Mazda registered to him in 1999 (XXV 1049-52). Moreover, Appellant worked at Goodyear at that time, where he wore a navy blue work uniform (XXV 1058, 1066-67).

Tyresa Mack did not call Tezalyn McFadden back as they had agreed, so McFadden attempted to call Mack at 2:50, but Mack did not answer (XXIV 947). McFadden tried to contact Mack several more times, but never got an answer (XXIV 947-49).

At some point, Sharabia Mack, Tyresa Mack's sister, became worried because all of Tyresa's children came home from daycare even though Tyresa was supposed to have taken one of them to the doctor (XXIII 763).

Sharabia went to Tyresa's apartment, but no one answered the door (XXIII 764-65). Later, Sharabia returned to her sister's apartment with Lamar Odom, her stepfather (XXIII 765). They still received no answer, so they broke in (XXIII 766-67).

While Tyresa's bedroom had been neat when Sharabia visited two days earlier, it was now "a disaster" (XXIII 767). The bedroom had been ransacked, with a chest of drawers pulled out, and an emptied purse (XXIV 838-39). Tyresa was dead, lying on the bed wearing a shirt but no bottom with a white telephone cord wrapped around her neck. (XXIII 767-68, XXIV 839-40). Sharabia recognized Tyresa's shirt as one that she wore for interview (XXIII 767-68).

Tyresa's underwear were found underneath her, torn (XXIV 840-43). The cord had a jack at one end, but appeared to have been torn at the other end. The cord appeared to match Tyresa's phone, which had the cord missing, torn off the base (XXIV 845-47).

Sharabia later noticed that the television in the living room was missing (XXIII 769). There was dust on the entertainment center, but no dust where the television had been (XXIV 834-35). Sharabia also noticed that Tyresa was not wearing an X and Os heart pendant necklace that she wore "every day" and a matching bracelet (XXIII 770-72).

Also, Tyresa had a green phone in her living room, but the cord was missing (XXIII 759, XXIV 829-32).

Dr. Margaret Arruza conducted the autopsy on Tyresa Mack. Mack was 5'4" and weighed 122 pounds. She had petechiae in her eyes, and abrasions on her nose, cheek and tongue. The abrasions were on both sides, indicating that she was moving her head back and forth. She had marks on her arm consistent with restraints being placed on them. While there was a cord around her neck, Dr. Arruza could not determine whether the cord contributed to the death. Dr. Arruza opined that Mack died of asphyxia. The asphyxia could have been caused by strangulation or suffocated. Dr. Arruza also found sperm in Mack's vagina, but no vaginal trauma. However, lack of vaginal trauma is not necessarily inconsistent with a forcible sexual battery. (XXX 1970-1995).

A single source full profile on the vaginal swabs matched Appellant (XXIX 1810-1819).

Detective McKean testified that the he informed Appellant that he was being charged with the murder of Tyresa Mack (XXV 1043). Appellant responded, "I don't know no [Tyresa] Mack." When told that Tyresa Mack was the girl killed on Florida Avenue, Appellant responded, "I don't know that girl." Id.

From March through June of 1999, Appellant's children as well as Tyresa Mack's children attended Tina's Little Angels daycare (XXV 1080-87). Sonya Core, the daycare center director, had observed Appellant picking up his children there and Tyresa Mack picking up her children there (XXV 1088-89).

In addition to evidence relating to the murder of Tyresa Mack, the State introduced similar-fact evidence of the murders of Nikia Kilpatrick and Shawanda McCalister.

Nikia Kilpatrick

Nikia Kilpatrick was living at Spanish Oaks apartments along with Shantrell Green and Sara Anthony in the fall of 2002 (XXVI 1239, 1242). Kilpatrick and Green met Appellant one day when he pulled up to them as they were walking home from the store (XXVI 1239-40). Green went out with Appellant that night (XXV 1242). Appellant picked up Green at the apartment of Sara Anthony, and Kilpatrick was there (XXV 1118-19, XXVI 1242-43). Appellant told the women that he sold lingerie, and Kilpatrick went to Appellant's car to see it (XXV 1119-20, XXVI 1244-45).

Phone records indicated numerous calls from Appellant to Nikia Kilpatrick during December 2002. However, Appellant's last call to

Kilpatrick was made at 9:03 p.m. on December 29, 2002. (XXVI 1129-36, XXXI 2209-2216).

Nikia Kilpatrick's sister Rhonda Sherrer came to Kilpatrick's apartment on the evening of December 29, 2002 between 9:00 and 10:00 to pick up her children. The apartment was clean. Id. While Sherrer was there, Kilpatrick received a phone call. Kilpatrick spoke quietly so that Sherrer could not hear, and seemed to Sherrer to be talking to a man. Sherrer left, and when she called after she got home, Kilpatrick cut off the call, as if she had company or was expecting company. (XXVI 1211-15).

Notica Durousseau, Appellant's wife, drove Appellant to an apartment off Arlington Expressway around 8:30 or 9:00 onm December 29. Appellant told her he was going to watch a football game with friends. Appellant returned sometime after 1 or 2 a.m. (XXVI 1259-66).

Rhonda Sherrer attempted to call Kilpatrick several times over the next two days, but Kilpatrick never answered (XXVI 1215-17).

Sara Anthony walked by Kilpatrick's apartment at 6:00 a.m. the next morning and saw the bedroom light on, and noticed a strange smell (XXV 1126). When Anthony returned from work, she knocked on Kilpatrick's door, but got no response (XXV 1128-29). Nor did Kilpatrick answer Anthony call later (XXV 1130). The following evening December 31, Kilpatrick still did not answer her door, and the smell was much worse (XXV 1133). Around midnight, Anthony returned to Kilpatrick's apartment and beat on the window. Kilpatrick's two-year old son appeared at the window, crying.

Anthony could see Kilpatrick lying on the floor with her 11-month old son lying on her. Anthony called 911 from her apartment. (XXV 1126-38).

The apartment was in "total disarray" (XXV 1167). Kilpatrick was nude and lying partly in the bathroom, and partly in the hallway next to the bedroom. She had ligature marks on her hands and a coaxial cable around her neck. A heater in Kilpatrick's bedroom had a cut cord, but the cord was not found. The scene showed no sign of forced entry, and no latent prints of value were found. (XXV 1166-86).

Dr. Arruza conducted the autopsy on Kilpatrick. Kilpatrick was 5'5" and weighed 145 pounds. Kilpatrick was decomposing by the time of the autopsy. She had a cable wrapped tightly around her neck in a slipknot, and trauma to her head. Dr. Arruza did not find any binding marks on her hands or feet, but this could have been attributable to decomposition. The same was true for the presence of petechiae. Sperm was present,but no vaginal trauma. The cause of death was asphyxia by strangulation (XXX 1995-2001, 2005-14).

The vaginal swabs matched Appellant at eight markers, and the genital swabs matched Appellant at seven markers (XXVIII 1834, 1840).

When Appellant was questioned by Detective Smith, he denied that he had ever seen Nikia Kilpatrick before, and denied that he had ever been to Spanish Oaks other than one cab fare (XXVIII 1554-55).

Shawanda McCalister

Larry Lake of Gator City Taxi Company trained Appellant to drive a taxicab on January 9, 2003. During the training, Lake and Appellant

picked up Shawanda McCalister, and took her to an address on Arco Drive (XXVII 1463-71).

At that time McCalister lived with her boyfriend Rasheed Topey in an apartment on Arco Drive. On that date, Topey helped McCalister with laundry and then went to school, arriving at school at 7:00. Topey spoke with McCalister once on the phone while he was at school. Topey arrived home at around 9:00 or 9:30. Topey could not get into the apartment because he had left his key in the car of another girlfriend, Victoria. Topey saw a light on and heard a television. He banged on the door but got no answer, and when he called McCalister from his cell phone, he could hear it ringing inside but McCalister did not answer. Topey left, went to McDonald's and Winn-Dixie, and returned to the apartment again. This time the light was off. Topey knocked and called again, but again received no answer. Topey attempted to enter the apartment from a window, but heard a black male say "Shawanda don't want to see you no more." Topey responded to McCalister, mentioning that she was pregnant, and the male voice said "What, you're pregnant?" Topey asked for his work clothes, which were pushed through the window. At the window, McCalister told Topey to come back at 1:00 in the morning. (XXVII 1341-56).

Topey asked a neighbor, Shaquita Jones, if he could use a phone because his cell phone battery died. Topey used the phone and then went to the Winn Dixie, where he used the pay phone to call his cousin and Victoria. (XXVII 1357-58).

Topey returned to the apartment and, because no one answered the door, entered through the window 1359. Topey found McCalister dead, face down with her hands and legs tied together. (XXVII 1359-1363).

McCalister was nude from the waist down. A cord was wrapped around her neck. A condom was found on the floor. The cord to the television set had been cut. (XXXII 1412-1229).

The DNA on the condom found at the scene matched Appellant (XXIX 1848-1859).

Dr. Arruza conducted McCalister's autopsy. McCalister was 5'5" and 161 pounds. She had a bloody nose and petechia. She had an extension cord looped into multiple knots around her neck. Her feet were bound with a cord and marks on her wrists consitent with having been bound. The cause of death was asphyxia by strangulation. (XXX 2014-2040).

Around 9:30 or 10:00 that evening, Lanita Hicks saw a Gator City Cab parked in front of her apartment on Matanzas Way near Arco Drive. Around 35 to 45 minutes later, Hicks took out her trash, and encountered Appellant hurrying to his cab. Twenty to 30 minutes later, Hicks heard a man screaming "somebody call the police, my girlfriend has been killed." (XXVII 1496-1503).

Darryl Lemon saw the Gator City taxicab park on Matanzas, a around 10:20 to 10:30, and a tall, skinny black man get out and walk around to Arco Drive. Around 11:30, Lemon saw the man quickly return to his cab and drive off (XXVIII 1534-40).

The following morning, Kimberly Barron, while working as a 911 operator, received a call from a pay phone. Detective Smith, who

interviewed Appellant after his arrest, listened to the recoding of the call and recognized the caller as Appellant. Appellant told Barron that he had information about "that incident in Arlington last night," and accused her boyfriend "Rashad" of killing McCalister because she was pregnant and he did not want the baby. Appellant refused to speak to a homicide detective gave no further information. (XVIII 1558, 1563-64, 1570-71).

When Appellant was questioned by Detective Smith, he testified that he had taken Shawanda McCalister for a cab fare, but denied that he had ever seen her again, or that he knew where she lived, or that he had sex with her (XXVIII 1554-55).

At the close of the State's case, Appellant moved for judgment of acquittal, arguing that the evidence was insufficient to prove either premeditated murder or felony murder, which the Court denied (XXX 2109-2117).

Defense case

In short, Appellant presented numerous witnesses to support his claim that others had murdered Tyresa Mack and the collateral-crimes victims. Appellant suggested that Adam Moss, or Johnny Parker, or Lamar Odom could have killed Tyresa Mack. Appellant suggested that Frampton Brown could have killed Nikia Kilpatrick. Appellant directly accused Rasheed Topey of killing Shawanda McCalister. Appellant also presented the testimony of Dr. Stanton Kessler, a

forensic pathologist, which disagreed with substantial portions of Dr. Arruza's testimony.[1]

Appellant testified. Appellant claimed that he met Tyresa Mack at the hospital. He had sex seven to ten times with her in her apartment. He stopped by to see her on July 26, 1999, and had sex with her. Mack told him that her television was broken and asked him to take it to the dumpster, but that Appellant could keep it if he wanted. Appellant took the television and put it in his car and left. (XXXIV 2801-08).

When Appellant found out about a week later that Tyresa Mack had been killed, he did not call police because he "didn't have any information to give them. When I left, she was still alive." When he was asked by a detective in 2003 whether he knew Tyresa Mack, Appellant denied it because he was "scared," because he had been charged with "two first-degree murders" (XXXIV 2807-09).

Appellant also admitted having a sex with Nikia Kilpatrick on December 29, 2002. The bedroom was in disarray when he arrived at her apartment that evening. Appellant planned to spend the night, but at 3:00 a.m. a man later identified as Frampton Brown arrived, angry at Kilpatrick and "grabbing" at her. Appellant was concerned for Kilpatrick's safety, but when she told him she would be fine, he

[1]Because the only guilt phase issues involve sufficiency of the evidence and one evidentiary issue for which the State is not claiming harmless error, the State is presenting only this short summary of the defense case. The State is providing a longer summary of Appellant's testimony.

left. Appellant claimed that he continued calling Kilpatrick, but from a pay phone rather than his cell phone. (XXXIV 2810-2822).

When Appellant found out four or five days later that Kilpatrick had been killed, he did not call police because he "didn't know the circumstance how she died or when she died."

Appellant also admitted that he had sex with Shawanda McCalister on January 9, 2003 in her apartment, the same day he met her as a cab fare. Afterward, McCalister into a fight with Rasheed Topey, who tried to enter the apartment through the window. Appellant left the apartment, but later returned and found McCalister dead. He called 911 the following morning, but did not identify himself because he did not want to get involved (XXXIV 2830-51).

After Appellant rested, he renewed his motion for judgment of acquittal, which the Court again denied (XXXIV 2912 - XXXV 2922) The jury c committed in the course of both a sexual battery and a robbery (XXXVI 3125, 3140; VIII 1418).

The penalty phase commenced on June 26, 2007. The State introduced a judgment showing Appellant's 2003 conviction for aggravated assault (XXXVI 3190). Tyresa Mack's mother and sister testified for the State (XXXVI 3192-3196).

Appellant presented the testimony of his father, Joseph Durousseau (XXXVI 3218-3244), his uncle, James Moton (XXXVI 3266-3273), his brother Dennis Paige (XXXVI 3315 - XXXVII 3354), his cousin Eric Moten (XXXVII 3373-3381), and his mother Debra Paige (XXXVII 3387-3438), and numerous other lay witnesses.

Dr. Jonathan Pincus conducted a physical examination, a neurological examination, and a "mini-mental status" examination of Appellant (XXXVII 3498). After describing the physical exam, Pincus concluded that Appellant suffered a "congenital abnormality" because his arm span was three inches longer than his height, while they should normally be the same, and that his chest tapered too much toward the breastbone. Pincus noted that persons with such "abnormalities" often have congenital brain abnormalities (XXXVII 3498-3502).

Pincus noted that Appellant had been diagnosed with hypothyroidism, which may indicate that the brain does not work properly (XXXVIII 3522-23). Pincus found that Appellant read at a sixth grade level (XXXVIII 3527). Pincus stated that the mini-mental status exam showed Appellant to be "defective," indicating a significant loss of brain function (XXXVIII 3525). Pincus opined that Appellant suffers from brain damage (XXXVIII 3530).

The jury advised the court by a 10 to 2 vote to impose the death penalty upon Appellant (XL 3832, VIII 1550).

The Spencer hearing was held August 2, 2007 (XVI 2997-3076), Dr. Imran Rajwani testified that Appellant was treated for hypothyroidism at the pretrial detention facility (XVI 3000-03).

The court took judicial notice of the court file relating to the aggravated assault conviction, and an affidavit from an investigator setting forth facts regarding the facts of that case XVI 3004-3011, 3012-3023).

On December 13, 2007, the court adjudicated Appellant guilty and sentenced him to death (XVIII 3273-3311, IX 1577-1581, IX 1583-1610).

The court found four aggravating factors: 1) heinous, atrocious, and cruel; 2) committed while engaged in a robbery and sexual battery; 3) committed for pecuniary gain; and 4) prior violent felony. The court found 18 mitigating factors: (1) The defendant was raised in a broken home (little weight); (2) The defendant was raised without the benefit of his natural father and lost the love and support of his stepfather at an early age. (little weight); (3) The defendant grew up in poverty and came from a deprived background (little weight); (4) The defendant was raised in a very violent neighborhood and was exposed to violence and the threat of violence to his person on a daily basis (little weight); (5) The defendant personally witnessed his stepfather physically abuse his mother (moderate weight); (6) The defendant was disciplined by being beaten as a child (little weight); (7) The defendant's normal social development was retarded by his family's frequent moves, by his mother's restriction of a social circle to primarily family and friends, and by his physical appearance (No evidence to support); (8) The defendant has worked continuously through his adult life (little to moderate weight); (9) The defendant enlisted and served in the United States Army for approximately six years (moderate weight); (10) The defendant has supported his two children, Jasmine and Teresa, and was a loving and caring father (little weight); The defendant has been a loving and respectful son to his mother, Debra Paige, and cared for her during several periods of illness and incapacitation (moderate weight); (12) The defendant has been a good brother to his siblings and to other family members, helping to care and watch over his cousins Edward and

Matthew (moderate to significant weight); (13) The defendant saved his cousin's life and his brother's life (moderate weight); (14) The defendant has the support of family and friends who continue to love him (little weight); (15) The defendant has alcohol abuse issues on both his mother and father's side of his family (little weight); (16) Society can be protected by a life sentence without parole (very little weight) (17) The defendant has exhibited good behavior during the trial of this cause (little weight); (18) The defendant's ability to conform his conduct to the requirements of the law was substantially impaired at the time of the commission of the crime and the defendant was suffering from an extreme emotional disturbance: (a) the defendant suffers from a major mental illness; (b) the defendant has an abnormal brain either due to genetic defects or to exposure to brain-damaging situations prior to birth; (c) the defendant has other genetic abnormalities that affect both his physical appearance and his mental status; (d) the defendant had learning difficulties resulting in poor achievement in school; (e) defendant suffered from hypothyroidism prior to treatment in 2004; (f) the defendant has suffered from anemia since he was a child (little to moderate weight). Id.

Appellant filed a timely notice of appeal.

SUMMARY OF ARGUMENT

ISSUE I.

The numerous and striking similarities between the three murders, combined with evidence that Appellant sexually battered each

of the victims around the time of their deaths, constituted clear and convincing evidence that Appellant murdered Nikia Kilpatrick and Shawanda McCalister, such that they could be admitted at trial. Moreover, numerous, exhaustive, and specific similarities pervade the murders, showing that evidence of the Kilpatrick and McCalister murders were relevant to prove Appellant's identity as the murderer, as well as his intent and premeditation to kill. The court did not abuse its discretion in admitting this evidence.

ISSUE II.

The State presented sufficient evidence from which the jury could conclude that the theft of items from Tyresa Mack's apartment was not a mere afterthought. As such, the evidence was sufficient to show that the murder was "in the course of" the theft to support the felony-murder underlying offense of robbery theft. Likewise, the evidence showed that theft was at least part of the motive for the killing, supporting the pecuniary-gain aggravator. Florida law does not prohibit a finding that a murderer has more than one motive for the killing. The fact that Appellant was also motivated by a sexual battery does not foreclose a motivation of theft.

Even if the evidence were insufficient, it would have no effect on the conviction because the jury explicitly found both premeditated murder and felony murder with sexual battery as the underlying offense. Likewise, even if the pecuniary-gain aggravator were erroneous, the error would be harmless beyond a reasonable doubt given the other, more serious aggravators found by the court.

ISSUE III.

Appellant contends that the trial court abused its discretion by rejecting one of the expert'S opinion testimony regarding one aspect of the mental mitigation where the lay testimony conflicted with that expert's testimony. The trial court properly rejected the both the bipolar mood disorder and the schizoaffective disorder. A trial court may reject unrebutted expert opinion testimony. Moreover, the expert testimony was contradicted by lay testimony. Additionally, the trial court did not reject this expert's testimony entirely. The trial court accepted this expert's testimony as the basis of a finding of brain damage. Moreover, even if the trial court should have accepted all aspects of this expert's testimony, any error in failing to do so was harmless. The trial court properly rejected certain aspect of the mental mitigation.

ISSUE IV.

Appellant contends that the trial court erred by denying the motion for judgement of acquittal on the first degree murder count because the State only proved sexual battery, not murder (IB 95). Appellant asserts as his hypothesis of innocence that, while he had sex with the victim, another person later raped and murdered her. The State is not required to rebut this hypothesis. While in a wholly circumstantial evidence case, the State is required to rebut a reasonable hypothesis of innocence, this is not a totally circumstantial evidence case. This is a DNA case. The semen found was Appellant's semen. As this Court had repeatedly held, the

special test for circumstantial evidence cases does not apply in DNA cases. Moreover, even if the circumstantial evidence test applied to this case, Appellant's hypothesis of innocence is not reasonable. Any hypothesis of innocence that depends on three woman, who the defendant has recently had sex with, being murdered by someone else shortly after his having sex with them, simply is not reasonable. Furthermore, ss this Court has held, if a defendant originally denies knowing the victim but his semen, as determined by DNA, is found on the murdered victim and he then admits to having sex with the victim, the evidence is sufficient to send the case to the jury. Additionally, the State rebut the hypothesis of consensual sex based on the condition of the victim's clothes and her being bound. Thus, the trial court properly denied the motion for judgment of acquittal.

ISSUE V.

Appellant asserts Florida's capital sentencing scheme is unconstitutional in light of Ring v. Arizona, 536 U.S. 584 (2002). Appellant urges this Court to recede from its prior precedent in Bottoson v. Moore, 833 So.2d 693 (Fla. 2002) and King v. Moore, 831 So.2d 143 (Fla. 2002). Ring does not invalidate Florida's death penalty. This Court has consistently rejected Ring claims. Moreover, Appellant's jury recommended the death penalty. Even if Ring applied in Florida, a jury's recommendation of death necessarily means that the jury found at least one aggravator, as both this Court and the United States Supreme Court have explained. Furthermore, one of the aggravators in this case is the prior violent

felony aggravator. As this Court has repeatedly explained, Ring does not apply to cases where the prior violent felony aggravator is present. Additionally, the jury unanimously found an aggravator in the guilt phase. The jury's special verdict in this case finding felony murder is a finding of the murder in the course of a felony aggravator. Florida's death penalty statute is not unconstitutional. Thus, the trial court properly denied the motion.

ARGUMENT

ISSUE I

DID THE TRIAL COURT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE OF OTHER MURDERS COMMITTED IN A MANNER SIMILAR TO THE CHARGED MURDER? (Restated)

STANDARD OF REVIEW

"The admissibility of collateral crime evidence is within the discretion of the trial court, and the trial court's ruling shall not be disturbed upon review absent an abuse of that discretion." Hodges v. State, 885 So.2d 338, 357 (Fla. 2003).[2]

THE TRIAL COURT'S RULING

The State filed a "Notice of Other Crimes, Wrongs or Acts Evidence," pursuant to section 90.404(2), Florida Statutes (II 360-61). The Notice indicated that the State wished to introduce evidence at trial that Appellant murdered Nikia Kilpatrick and Shawanda McCalister, and unlawfully confined Denarious Brown. Appellant subsequently filed a motion in limine to exclude this evidence, on the ground that the crimes were not similar enough to the charged murder support admissibility (V 789-791).

The parties entered a joint stipulation of fact for the "'similar fact evidence' hearing" as follows:

[2]Appellant cites Nardone v. State, 798 So.2d 870 (Fla. 4th DCA 2001), for the proposition that the trial court's discretion in admitting similar-fact evidence is "narrowly limited by the rules of evidence" (IB 58). While the State agrees with this general proposition, the "rules of evidence" do not "narrowly limit" relevance determinations, for which a trial court maintains broad discretion.

TYRESA MACK FACTS

1. Family members found Tyresa Mack dead in her apartment at 8:05 P.M. July 26, 1999.
2. She leased an apartment at 816 A. Phillip Randolph Blvd., which is on the west side of the St Johns River near downtown Jacksonville.
3. Her apartment was a two bedroom apartment and one of two apartments located above businesses on a street that is the commercial area for that neighborhood.
4. She lived with her three children ages 7,3 and 1 1/2 at the time of her death.
5. She was a black female, 24 years old, 5'4", and weighed 122 lbs. She had short, black, curly hair.
6. She was a graduate of Andrew Jackson High School, a Jacksonville public school.
7. She had a misdemeanor criminal record including arrests for resisting without violence and no valid driver's license.
8. She was unemployed at the time of her death and had been looking for a job on the day of her death.
9. She was not pregnant at the time of her death.
10. She lived in the same neighborhood she grew up in and in which still lived her grandmother and one of her sisters.
11. She was not married. The father of two of her children was in jail at the time of her death. The father of the third child lived in Jacksonville.
12. She was found in the master bedroom of her apartment on her bed lying on her left side in a semi-fetal position nude from the waist down. She was wearing a black and white top as well as a bra. Her breasts were covered and not exposed.
13. A severed telephone cord was loosely wrapped around her neck. The male end of the cord was intact.
14. Her face showed evidence of abrasions to her cheeks, lips, nose and gums. There was no evidence of blunt trauma to the head.
15. Her children were not present in the apartment at the time of her death, or at the time her body was discovered.
16. The contents of one of her purses had been dumped out both on the bed and on the floor in front of the bed.
17. Money was present at the scene in a "Victoria's Secret" bag which the victim used as a purse.
18. No wrist or ankle bindings were present on the body when she was found. There were marks on her wrists. There were no marks on her ankles. A ring mark was on her left ring finger, but no ring was present.

19. In the master bathroom, an empty Victoria's Secret bag was located on the bathroom floor.
20. No condom or finger cot was located in her apartment. In addition, no fingerprints that could be identified to the Defendant were located in her apartment.
21. A cigar butt was located in the apartment common area in the upstairs landing. DNA typing conducted on this cigar butt was inconclusive at all areas tested except the locus amelogenin, which was consistent with being from a female.
22. There was no vaginal trauma.
23. There were no spermatozoa in the anal or oral cavities. There was no evidence of recent trauma to either orifice.
24. Spermatozoa with intact tails were located on a vaginal smear slide and on the vaginal swab.
25. Defendant Durousseau's DNA has been identified as being present on the vaginal swab.
26. There are no records of phone calls between Defendant and victim.
27. There are no witnesses who place Defendant in the presence of the victim at any time.
28. Two witnesses, Joy Williams and Rufus Pinkney, place Defendant in the vicinity of victim's apartment on the day of her death.
29. Following her death, police interviewed Gregory Williams, Johnny Parker, and Adam Moss as potential suspects.

NIKIA KILPATRICK FACTS

1. Family members found Nikia Kilpatrick dead in her apartment at 10:30 P.M. January 1,2003.
2. She leased a two bedroom apartment at 7557 Arlington Expressway #D110, the Spanish Oaks Apartments, in the Arlington area of Jacksonville which is located on the southeast side of the St. John's river.
3. Her apartment was one of many in a large apartment complex located on a service road to a busy expressway. She lived on the first floor of a three-story building.
4. She lived with her two children, ages 2 1/2 and almost one year.
5. She was a black female, twenty years old, 5'5", and weighed 145 lbs. She had black, short, curly hair and was wearing hair weaves.
6. She dropped out of a Jacksonville public school in the eighth grade, then went into Job Corps, followed by some trade schools for persons on public assistance.
7. She had no adult criminal history but did have a juvenile arrest.

8. She was due to start a new job in the housekeeping department of a hotel.
9. She was eleven weeks pregnant with a male child. The father is unknown.
10. She lived in the same apartment complex as a cousin. No other family lived nearby. This was not located in the neighborhood in which she was reared.
11. She was not married. The father of both of her children was in Colorado at the time of her death.
12. She was found on the hallway floor between her bedroom and the bathroom lying on her back, face up. Her feet and lower body extended into the bathroom. She was nude from the waist down. Her breasts were completely exposed. The top she was wearing was pulled back behind her body and was a light blue silky pajama type top.
13. A black coaxial cable was tightly wrapped around her neck but placed over clothing on the right side of her neck. The knot was also on the right side.
14. There was no evidence of facial abrasion or blunt trauma to the head.
15. Both children were present in the apartment at the time her body was discovered. It is unknown whether the children were present at the time of her death.
16. A purse is alleged to be missing from her apartment according to her father.
17. It is unknown if money was present in the apartment.
18. No wrist or ankle bindings were present on the body when the victim was found. No marks of any kind are present on the ankles.
19. A finger cot was found on the bedroom floor. No condom was found in the apartment.
20. No fingerprints identified to the Defendant were located within the apartment.
21. A cigar butt was found on a windowsill on the back patio. DNA typing conducted on this cigar butt was inconclusive at all loci tested.
22. There was no evidence of vaginal trauma.
23. There was spermatozoa found in the anal and oral cavities, but no evidence of trauma to either orifice.
24. Spermatozoa without tails were found on vaginal, anal and oral smear slides.
25. Defendant’s DNA has been identified as being present on her vaginal swab.
26. Phone records show phone calls between victim and Defendant.
27. Defendant and victim knew one another and were seen in one another’s company by a relative and friends of the victim.
28. A witness places Defendant in the vicinity of the apartment complex on a night between the time she was

last seen alive and the time her body was found which was a period of several days.
29. Victim was known to associate with other men including Terrance Raspberry, Frampton Brown, Cornelius Robinson and Ivory Durham. Frampton Brown had a history of domestic assault against victim.

SHAWANDA MCCALLISTER FACTS

1. Shawanda McCallister was found dead in her apartment on January 10, 2003, shortly after midnight, by her fiance and her next door neighbors.
2. She leased a one bedroom apartment at 912 Arco Drive, which is located in the Arlington area on the southeastern side of the St. Johns River.
3. Her apartment was one of six apartments to face Asco Drive and was on the first floor of a small two-story apartment building.
4. She lived there with her fiance, Rasheed Topey. She had no children.
5. She was a black female, 20 years old, 5'5", and weighed 161 lbs. She had short, curly, black hair.
6. She was a graduate of Marianna High School in Marianna, Florida.
7. She does not appear to have a criminal record.
8. She was employed at the time of her death at St. Catherine's Laboure Manor.
9. She was pregnant at the time of her death with a male child 12 weeks old. The father was Rasheed Topey.
10. She did not live in the same neighborhood or city as her relatives. She was not from Jacksonville but was reared in Marianna, Florida.
11. There are no fathers of her children because she had no children.
12. She was found at the foot of her bed on the bedroom floor. She was positioned on her stomach. She was nude from the waist down. She was wearing a white shirt with a white bra. Her breasts were not exposed.
13. A white extension cord was looped around her neck in a slipknot. It was intertwined with a pink T-shirt. All knots were on the left side.
14. There were no abrasions to her head and no evidence of blunt trauma to the head.
15. No children were present at the time her body was found.
16. Her purse was present at the scene and nothing appeared to be missing.
17. She had made an ATM withdrawal the evening of January 9,2003. That money has not been located.
18. At the time her body was found, a multicolored Gait belt was present on her right wrist. There were marks on both the left and right wrist. An electrical cord cut from a television bound her left ankle to her right. There were marks on each ankle. Rings were

> present on her fingers and there is no mark indicating any were missing.
> 19. A condom was located on the bedroom floor to the right of the bed underneath the bed spread. A finger cot was located on the living room floor.
> 20. No fingerprints identified to the Defendant were located within the apartment.
> 21. No cigar butts were located at or near the apartment.
> 22. There was no evidence of vaginal trauma.
> 23. There were no spermatozoa on the anal or oral slides and no evidence of trauma to either orifice.
> 24. Spermatozoa were found on the condom and on a vaginal smear slide and vaginal swab.
> 25. Defendant's DNA was located on the condom.
> 26. There are no records of phone calls between Defendant and victim.
> 27. Defendant picked victim up as a taxi cab fare on January 9,2003, in a Gator City taxi cab.
> 28. Witnesses place a cab in the vicinity of victim's apartment the evening of her death.
> 29. Rasheed Topey was dating another woman at the time of the victim's death that he subsequently married. He was present at the apartment prior to the victim's death and at or near the time of her death. He was initially interviewed as a suspect immediately following her death.

(V 912-925). At the conclusion of the hearing on the motion (XIV 2555-2653), the court ruled that the evidence was admissible (XIV 2649).

MERITS

In accordance with to § 90.404(2)(a), Florida Statutes, which codified Williams v. State, 110 So. 2d 654 (Fla. 1959):

> Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

This Court in Williams enunciated the following standard for admitting such evidence:

> Our view of the proper rule simply is that *relevant* evidence will not be excluded *merely* because it relates to similar facts which point to the commission of a separate crime. The test of admissibility is relevancy. The test of inadmissibility is a lack of relevancy.

Id. at 659-60 (emphasis in original).

"[B]efore even considering whether to allow evidence of prior acts to be presented to the jury, the trial court must find that the prior acts were proved by clear and convincing evidence." McLean v. State, 934 So.2d 1248, 1262 (Fla. 2006).

When collateral-crime evidence is offered to establish identity, the State may only introduce evidence of a collateral crime "based on both the similarity of and the unusual nature of the factual situations being compared." Drake v. State, 400 So.2d 1217, 1219 (Fla. 1981).

> A mere general similarity will not render the similar facts legally relevant to show identity. There must be identifiable points of similarity which pervade the compared factual situations. Given sufficient similarity, in order for the similar facts to be relevant the points of similarity must have some special character or be so unusual as to point to the defendant.

Id. While "there must be identifiable points of similarity which pervade the compared factual situations," Id., this Court "has never required the collateral crime to be absolutely identical to the crime charged." Gore v. State, 599 So.2d 978, 984 (Fla. 1992). When dissimilarities are "the result of differences in the opportunities with which [the defendant] was presented, rather than differences in

modus operandi," they do not require exclusion. Id. "[W]here the common points, when considered in conjunction with each other, establish a pattern of criminal activity which is sufficiently unique to be relevant to the issue of identity," the similar-fact evidence may be admitted. Id.

Appellant first argues that the State failed to demonstrate that he murdered Nikia Kilpatrick or Shawanda McCalister such that evidence of those murders were admissible against him at trial. In making this argument, Appellant suggests that the State must present evidence completely independent of the charged crime in order to establish that the defendant committed the collateral crimes, and that any evidence relating to the similarity between the collateral and the charged crimes is improper "bootstrapping," citing Acevedo v. State, 787 So.2d 127 (Fla. 3d DCA 2001); and Bell v. State, 650 So.2d 1032 (Fla. 5th DCA 1995), for this proposition. The State agrees that it must demonstrate by clear and convincing evidence that the defendant committed a collateral crime before it may be admitted as similar-fact evidence. The State further agrees that evidence showing only "mere suspicion" that the defendant committed the collateral crime, coupled with its similarity to the charged crime, is insufficient to permit its introduction into evidence. However, the State disagrees with any suggestion that Florida law, as a general principle, prohibits evidence of similarities between the collateral crime and the charged crime as proof that the defendant committed the collateral crime. The State suggests that such an approach is particularly unsound in a prosecution involving a serial

murderer, where the similarities between the various murders, as well as evidence linking the defendant to each of the murders, are critical to demonstrate that the defendant murdered each of the victims. While similarity to the charged crime is obviously not sufficient alone to permit introduction of collateral crimes, similarity between individual murders committed by a serial killer cannot be deemed irrelevant to demonstrate that the defendant committed the collateral crimes.

Applying these principles, the trial court did not abuse its discretion in permitting the State to introduce evidence of the Kilpatrick and McCalister murders. The similarities between the Kilpatrick and McCalister murders and the Mack murder, as reflected in the stipulation used at the hearing, are numerous, exhaustive, and specific, and pervade the murders. Moreover, the evidence linking Appellant to the murders is clear and convincing.

The similarities begin with the victims themselves. Tyresa Mack was a 24-year old African-American female. She was 5'4" tall and weighed 122 lbs. She had short, black, curly hair. Nikia Kilpatrick also was a young African-American female, 20 years old. She was 5'5" tall and weighed 145 lbs. She too had short, black, curly hair. Shawanda McCalister, likewise, was a 20-year old African-American female, 5'5" tall and weighing 161 lbs.[3] She also had short, black, curly hair.

[3]The difference in the victims' weights is likely attributable to the fact that Kilpatrick and McCalister were pregnant.

Each victim leased her own apartment, and each apartment was within a five mile radius of the other apartments.

Apart from the distinct victim similarities, the murders were similar. Each victim was killed by the same method, ligature strangulation.[4] In each case, the ligature used was similar, an electrical cord from the victim's apartment. In the Tyresa Mack case, the ligature was a severed telephone cord. In the Nikia Kilpatrick case, the ligature was a coaxial television cable. In the Shawanda McCalister case the ligature was a white extension cord. Each ligature was left wrapped around the victim's neck. In the Tyresa Mack case and the Shawanda McCalister case, the male plug end of the ligatures was located on the left side of the victim's body. In the Nikia Kilpatrick case and the Shawanda McCalister case, the ligature was formed into a slip knot.

Each murder also presented evidence of the victim struggling and being bound by ligatures. Tyresa Mack had ligature binding marks on her wrists, although no ligature was present. She also had injuries to her face, and the top she was wearing was ripped. While Nikia Kilpatrick had no ripped clothing, she did have injuries to her head, and male DNA material underneath a fingernail on her left hand. She also had unknown linear pattern dust marks on one of her arms.

[4]With regard to the charged offense, the medical examiner could not tell whether the ligature around the victim's neck contributed to the death by asphyxiation. Nonetheless, the appearance of a similar ligature around the victim's neck and her similar manner of death are sufficient similarities for this purpose.

Shawanda McCalister had a ligature around her wrist, a ligature around her ankles, and her bra was ripped.

Each case included evidence of a sexual battery. Tyresa Mack had spermatozoa with tails, identified as Appellant' through DNA testing, in her vagina. Tyresa Mack also had a red ring around her anal cavity. Similarly, Nikia Kilpatrick had spermatozoa in her vagina, also found to be Appellant's through DNA testing. Nikia Kilpatrick also had semen in her anal cavity. Shawanda McCalister had no semen in any orifice, but a used condom was located on the floor in the room where her body was found, and Appellant's DNA was present on this condom.

Like the victims and the murders, the crime scenes exhibited distinct similarities. Each scene was a small apartment. None of the scenes exhibited evidence of forced entry. Each victim was found nude from the waist down. Tyresa Mack was wearing only a shirt and a bra; Nikia Kilpatrick was wearing only pajama-type top; and Shawanda McCalister was wearing only a sweater top and a bra. In each scene, the victim was found inside or immediately in front of her own bedroom. Tyresa Mack and Shawanda McCalister were both found partially nude in their own bedrooms. Nikia Kilpatrick was found partially nude in the hallway immediately in front of her bedroom. Tyresa Mack's and Nikia Kilpatrick's bedrooms were found in a state of complete disarray with papers and personal items strewn all over the room.

In all three cases, it appears that the assailant took active steps to avoid leaving fingerprints. None of the Appellant's

fingerprints were recovered at any of the crime scenes, in spite of the fact that his DNA was. In addition, at two of the scenes, a small finger cot was found in the apartments of Nikia Kilpatrick and Shawanda McCalister, which may have been used to avoid leaving fingerprints.

In addition, two of the scenes disclosed evidence of theft. Tyresa Mack was missing a ring from her finger and a television. Nikia Kilpatrick was missing a Victoria's Secret gift purse and lotion set. Although no items were known missing from Shawanda McCalister, the absence of theft may have been attributable to the fact that the assailant had to leave the scene in haste due to the arrival of Shawanda McCalister's boyfriend, Rasheed Topey.

In addition to victim, death, and scene similarities, Appellant's ties to the murders were similar. Most importantly, as stated above, in all three cases the Appellant's DNA was found inside or right next to the victims.

Finally, in each case Appellant manifested a consciousness of guilt by denying he ever knew the victims, despite the presence of his DNA. In both the Kilpatrick and McCalister cases, Appellant was specifically questioned about knowing the victims by name. Appellant was also shown photographs of those victims, and Appellant denied ever knowing them. In the Tyresa Mack case, when Appellant was arrested he made the spontaneous statement that he did not know any Tyresa Mack.

In addition to the DNA evidence linking Appellant to each murder, Appellant did have prior contact with Nikia Kilpatrick and Shawanda McCalister. Kilpatrick was seen with Appellant by two friends and

a relative. In addition, Appellant had extensive telephone contact with Kilpatrick on the days leading up to her murder. More notably, this phone contact ceased upon Kilpatrick's death. Shawanda McCalister was a cab fare of Appellant on the very day she was murdered.

Appellant was also seen by others at each scene shortly before or after the murders. Joy Williams and Rufus Pinkney saw Appellant exiting Tyresa Mack's apartment building on the day of her murder. Appellant's wife, Natoca Durousseau, gave Appellant a ride to Nikia Kilpatrick's apartment complex on the night of her murder. Witnesses reported seeing a Gator City cab parked near the Shawanda McAllister's apartment complex and a tall, black male leaving the complex hastily on the night of her murder. Thus, Appellant was directly linked by his DNA and eyewitness testimony to each of the scenes.

In summary, distinct, specific and identifiable similarities pervade the victims, the murders, the murder scenes demonstrate that the same person killed Tyresa Mack, Nikia Kilpatrick, and Shawanda McCalister. Moreover, evidence linking Appellant to each of these murders demonstrates that it was he who murdered these women. The evidence was relevant to the identity of Appellant as the murderer of Tyresa Mack and his premeditation of the murder, so the trial court did not abuse its discretion in permitting the State to introduce such evidence at trial.

This Court has specifically addressed the admissibility of similar-fact evidence in the context of serial homicides at least three times. The Fourth District has also addressed that issue. In

each case, the court upheld the admissibility of other murders as part of the state's proof of the murder at issue.

In Townsend v. State, 420 So. 2d 615 (Fla. 4th DCA 1982), the defendant was on trial for the strangulation murder of two women and the stabbing murder of a third. At trial, the State introduced evidence of six other murders committed by the defendant. The Fourth District court described the facts as follows:

> [Tlhe victims were all young black women; Gamble and Brown had both been strangled while Bell was stabbed; their lower torsos were naked and they were generally lying with their legs in spread eagle fashion. Townsend had told the police that the women he killed were all prostitutes and he intended to help rid the world of them. In his mind they were all old enough to work instead of taking an honest man's money! In confessing these crimes and his motive therefor, Townsend told the police that if he gets out of jail for these crimes, he would do the same thing again-as he put it "you all going to have to come and get me again." In order to corroborate appellant's confession regarding the homicides for which he was on trial, the State adduced evidence of six other homicides which occurred in 1979 involving black women, except for one white woman, all between the ages of 13 and 30. The victims were either known prostitutes or had been seen walking the streets leading Townsend to believe they were prostitutes. All of the incidents occurred in the same geographical area of Northwest Fort Lauderdale-except for two which occurred in Miami in close proximity to each other. All of the homicides occurred on open lots surrounded by debris or weeds or a structure to hide the victims. They were all found partially nude or nude from the waist down with their clothing located nearby. Most of them were lying on their backs with their legs in spread eagle fashion. The crimes generally happened at night. In all but two of the homicides, the cause of death was strangulation.

Id. at 617. The Fourth District upheld the admission of this evidence over defendant's objection that the murders were not similar. The court

> **One would suppose that no two crimes could be identical; thus, the key is similarity, not identity.** The similarity in the commission of the collateral crimes referred to above is no mere general likeness. Rather, we hold the similar facts are identifiable and they pervade the compared factual situations. Therefore, the collateral crime evidence was relevant to prove identity and similar mode of operation as well as motive." (e.s.)

Id.

Appellant's murders exhibit more similarities than the crimes in Townsend. For instance, all of Appellant's victims were African-American females, and all of them were in their early twenties. All of Appellant's victims were strangled, whereas two of Townsend's victims were stabbed. All of Appellant's victims were nude from the waist down. Although Townsend's victims were partially nude, this was not always from the waist down. All of Appellant's victims were killed within a five mile radius of each other, whereas Townsend's victims were killed Broward and Dade County. Thus, the similarities between Appellant's murders likewise involve "no mere general likeness." The similar facts were specific and identifiable, and they pervade the three homicides at issue.

This Court addressed the admissibility of similar-fact evidence of other murders in a murder prosecution in Buenoano v. State, 527 So.2d 194 (Fla. 1988). During Buenoano's trial for the 1971 murder of her husband James Goodyear, the State was permitted to introduce evidence that she murdered her common-law husband Bobby Joe Morris

in 1978 and attempted to murder her fiancé John Gentry in 1982. In each instance, the victim was poisoned, and in each instance. This Court affirmed the admission of the evidence:

> [W]e find poisoning to be a particularly unusual modus operandi to warrant the introduction of the collateral crimes evidence. When compared, the details of each offense are strikingly similar. All three victims established a close relationship with Buenoano either as her husband, common-law husband or fiance. While living with her, each victim became seriously ill, requiring hospitalization upon displaying similar symptoms. A poison was used in all three cases. Buenoano was the beneficiary under a number of life insurance policies issued on the lives of the three victims and was also entitled to other monetary benefits upon the victims' deaths. These details are not merely evidence of a general similarity between the charged offense and the collateral crimes. "These points of similarity 'pervade the compared factual situations' and when taken as a whole are 'so unusual as to point to the defendant.'" Under these facts the collateral crimes evidence was admissible to prove motive, opportunity, identity, intent, and absence of mistake, and to show a common plan or scheme.

Buenoano at 197 (citation omitted).

The unusual cause of the deaths, the relationships between Buenoano and her victims, and her receipt of or right to receive financial benefits from the victims' deaths, were the only noted similarities between the three murders. While these similarities were substantial, they were far less numerous than the similarities between the murders in the instant case.[5]

[5]Regarding the "particularly unusual" method of murder, Appellant claims that "[h]ome use cord strangulation is not an unusual method of killing women," and cites five appellate decisions involving strangulation with an electrical cord (IB 66). The State disagrees that five reported decisions demonstrate that "home use cord strangulation" is not an unusual method of murder. In fact, the

This Court again addressed the admissibility of similar-fact evidence of other murders in Wuornos v. State, 644 So. 2d 1000 (Fla. 1994). Wuornos was charged with the murder of Richard Mallory, and the trial court permitted the State to introduce evidence of six collateral murders.

Wuornos argued that the "extensive" similar-fact evidence unlawfully prejudiced her case. This Court disagreed:

> Wuornos' own testimony at trial portrayed her as the actual victim here. She claimed Mallory viciously abused her and then engaged in actions suggesting he intended to kill her. This was the only eye-witness testimony of the actual murder and, within itself at least, was consistent. Had the jury believed this testimony, it might have concluded that Wuornos lacked premeditated intent and thus should be convicted of some lesser degree of homicide or acquitted.

Id. at 1006 (footnote omitted). This Court further held that "[t]he nature of the various crimes was relevant in establishing a pattern of similarities among the homicides." Id. at 1007. "This, in turn, was relevant to the State's theory of premeditation and to rebut Wuornos' claim that she was the one attacked first." Id. Of course, the same is true here. The similar-fact evidence established

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State can find five reported decisions beside the Buenoano case involving murder by poisoning, see Sybers v. State, 841 So.2d 532 (Fla. 1st DCA 2003); Trepal v. State, 621 So.2d 1361 (Fla. 1993); Everage v. State, 504 So.2d 1255 (Fla. 1st DCA 1986); Smith v. State, 464 So.2d 1340 (Fla. 1st DCA 1985); Nelson v. State, 450 So.2d 1223 (Fla. 4th DCA 1984); and yet this Court opined that poisoning is a "particularly unusual modus operandi." Likewise, the State disagrees with Appellant's extraordinary claim that "[t]he strangulation rape/murder of young women is ... a fairly common event" (IB 72).

a "pattern of similarities among the homicides" even more striking than the similarities in Wuornos.

Moreover, as in Wuornos, the collateral crimes to showed more than identity. The collateral murders show Appellant's intent and premeditation. Appellant claimed that he only had sex with the three victims, but did not kill them. The fact that Appellant's DNA was found in three separate homicide victims, was seen at all three scenes near the time of the murders, and denied ever knowing any of the women, belied Appellant's claim. As noted by the First District, "[tlhe more frequently an act is done, the less likely it is innocently done." Jensen v. State, 555 So.2d 414 (Fla. 1st DCA 1989).

Finally, this Court again affirmed the admission of similar-fact evidence in the context of serial homicides in Conde v. State, 860 So.2d 930 (Fla. 2003). The evidence at Conde's trial for the murder of Rhonda Dunn, showed that Conde had sexual relations with the victim, a prostitute, strangled her, and then dumped her body along the side of a road. The trial court permitted evidence of five other similar homicides committed by Conde. The Supreme Court described the asserted similarities of this evidence as follows:

> (1) that each victim was a prostitute who worked within a limited area and was killed by strangulation late at night; (2)each body was found within a small radius of Conde's home, re-dressed and face down in a seemingly posed position; (3) the lividity patterns of each body indicated it had been initially on its back and then turned face down; (4) matching fiber, tire, DNA, and semen evidence was found on many of the bodies; and (5) the word "third" was written on the third victim, indicating the serial nature of the crimes.

Conde at 944.

This Court first concluded that "the collateral crimes evidence established the fact that Conde had committed substantially similar crimes on five prior occasions, which in turn was relevant to numerous material issues, such as identity, intent, and premeditation." Id. at 945.

This Court further noted that the message Conde wrote on the back of his third victim indicating that she was the "third" and "[see] if you can catch me," "was evidence of premeditated intent to kill." Id. "This evidence was clearly relevant given Conde's theory of defense that he killed in an 'instantaneous combustion' of unexpected and unplanned emotions." Id.

Appellant's murders contain as many meaningful similarities, as the murders described in Conde. Like Conde, all of the Appellant's victims were killed by strangulation. All of Appellant's victims were found within a five mile radius of each other in their apartments, nude from the waist down, with ligatures wrapped around their neck. Conde's victims were all found face-down and redressed. Matching DNA evidence was found on each of the Defendant's three victims. Matching DNA evidence was found in only some of Conde's victims. As with Conde, these similarities demonstrate that the court below did not abuse its discretion in admitting the similar-fact evidence.

In short, the numerous and striking similarities between the three murders, combined with evidence that Appellant sexually battered each of the victims around the time of their deaths,

constituted clear and convincing evidence that Appellant murdered Nikia Kilpatrick and Shawanda McCalister, such that they could be admitted at trial below.[6] Moreover, numerous, exhaustive, and specific similarities pervade the murders, showing that evidence of the Kilpatrick and McCalister murders were relevant to prove Appellant's identity as the murderer, as well as his intent and premeditation to kill. The court did not abuse its discretion in admitting this evidence.

Moreover, the trial court did not abuse its discretion in determining that the danger of unfair prejudice outweighed the probative value of the evidence. As this Court noted in Wuornos, "[a]ll evidence of a crime, including that regarding the murder in question, 'prejudices' the defense case. Wuornos at 1007. "The real question is whether that prejudice is so unfair that it should be deemed unlawful." Id. The State disagrees with Appellant's contention that the "probative value of the Williams rule evidence is minimal" (IB 74). As in Wuornos, "[t]he nature of the various crimes was relevant in establishing a pattern of similarities among the homicides." Id. The State submits that the similar-fact evidence was highly probative of the matters for which the State sought its admission, as argued above. While the evidence certainly "prejudiced" Appellant's case, such prejudice was not "unfair."

[6]Regarding Appellant's argument that he was no more than a "likely suspect" in the Kilpatrick and McCalister murders (IB 64), it should be noted that Appellant was indicted for both murders.

Nor did the similar-fact evidence become an impermissible "feature of the trial." First, it should be noted that Appellant had been charged with the murders of Nikia Kilpatrick and Shawanda McCalister, as well as Nichole Williams, Jovanna Jefferson, and Surita Cohen, by separate indictment. In its memorandum supporting the admissibility of the simiar-fact evidence, the State asserted that evidence of each of these homicides was admissible as similar-fact evidence in this trial, but chose to limit the similar-fact evidence to the Kilpatrick and McCalister homicides, in order to "facilitate more streamlined discovery and a quicker, more efficient trial and (2) to avoid similar crime evidence becoming a feature of the trial" (VI 1024).

Second, while Appellant correctly notes that more of the guilt-phase testimony was dedicated to the similar-fact evidence than to the charged offense, this fact alone does not show that the similar-fact evidence became an "impermissible feature of the trial." The court in Townsend addressed this matter as follows:

> We next turn our attention to Townsend's contention that the Williams rule evidence became a feature of the trial. It is true that the transcript contains over twice as many pages of testimony relative to the collateral crimes as there are pages relative to the crimes for which Townsend was on trial. It is also true that a majority of the exhibits involve the collateral crimes. However, given the number of similar crimes Townsend admitted committing which were so similar to the three for which he was being tried, the number of pages of testimony and exhibits should not be the sole test by any means.

Townsend at 617. The same is true here. Counting the transcript pages devoted to the similar-fact evidence does not *ipso facto* demonstrate that such evidence became an impermissible feature of the trial.

Nor is the mere number of collateral crimes presented determine this matter, as this Court recognized in Wuornos. In response to Wuornos' argument that the similar-fact evidence amounted to "needless overkill," this Court noted that the evidence of a "pattern of similarities among the homicides" rebutted her suggestion that she was the victim in the charged crime, which would likely have been accepted by the jury without the substantial amount of similar-fact evidence. Wuornos at 1006. Again, the same is true here.

Instead, a proper "feature of the trial" analysis examines whether collateral crime evidence "was given undue emphasis by the state and was made a focal point of the trial." State v. Lee, 531 So.2d 133 (Fla. 1988). The State here limited the similar-fact evidence to that necessary to convince the jury that Appellant killed Nikia Kilpatrick and Shawanda McCalister, and to show the similarities. An examination of the State's opening statement and closing argument shows that the prosecution did not unduly emphasize the similar-fact evidence. The closing focuses upon Appellant's guilt of the charged crime, as well as the similarities between the charged crime and the collateral crimes. Any substantial discussion of the collateral crimes addresses only Appellant's arguments that he did not kill Kilpatrick and McCalister. Accordingly, the State neither gave undue emphasis to the similar-fact evidence, nor made it a focal point

of the trial. The trial court did not abuse its discretion in permitting the State to admit the similar-fact evidence, or in denying the motion for new trial on the ground that such evidence became an impermissible feature of the trial.

ISSUE II

> DID THE TRIAL COURT ERR IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL OF FELONY MURDER WITH ROBBERY AS THE UNDERLYING OFFENSE, AND WAS THERE LEGALLY SUFFICIENT EVIDENCE THAT THE MURDER WAS MOTIVATED BY PECUNIARY GAIN? (Restated)

STANDARD OF REVIEW

A trial court's denial of a motion for judgment of acquittal is reviewed on appeal by the *de novo* standard of review to determine solely if the evidence is legally sufficient. Jones v. State, 790 So.2d 1194 (Fla. 1st DCA 2001).

MERITS

In considering legal sufficiency of evidence, the trial court and appellate court must consider the evidence and all reasonable inferences from the evidence in a light most favorable to the State. Jones v. State, 790 So.2d 1194, 1197 (Fla. 1st DCA 2001). See Tibbs v. State, 397 So.2d 1120, 1123 (Fla. 1981):

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

In short, if the State has presented evidence to support every element of the crime, then a motion for judgment of acquittal must be denied and affirmed on appeal. See State v. Williams, 742 So.2d 509, 511 (Fla. 1st DCA 1999). The trial court cannot grant the motion

unless, when viewed in a light most favorable to the State, the evidence does not establish a prima facie case of guilt as a matter of law. Dupree v. State, 705 So. 2d 90, 93 (Fla. 4th DCA 1998).

Moreover, where the evidence of guilt is wholly circumstantial, the evidence is legally sufficient only if it is inconsistent with any reasonable hypothesis of innocence. Darling v. State, 808 So.2d 145, 155 (Fla. 2002); see State v. Law, 559 So. 2d 187 (Fla. 1989). However, "[t]he state is not required to 'rebut conclusively every possible variation' of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the Defendant's theory of events. Law at 189 (footnote and citation omitted). "Once that threshold burden is met, it becomes the jury's duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt." Id. Stated differently, "the sole function of the trial court on motion for directed verdict in a circumstantial-evidence case is to determine whether there is prima facie inconsistency between (a) the evidence, viewed in the light most favorable to the State and (b) the defense theory or theories. If there is such inconsistency, then the question is for the finder of fact to resolve. Orme v. State, 677 So.2d 258, 262 (Fla. 1996).

Furthermore, an aggravating factor may be supported entirely by circumstantial evidence, but the circumstantial evidence must be inconsistent with any reasonable hypothesis which might negate the aggravating factor. Hildwin v. State, 727 So.2d 193, 194 (Fla. 1998).

The State presented sufficient evidence of robbery to support its use as an underlying offense for felony murder, and to support the pecuniary gain aggravator. "Robbery" is defined as a theft when in the course of the taking there is the use of force, violence, assault, or putting in fear. § 812.13(1), Fla. Stat. "In the course of the taking" means the theft occurs "either prior to, contemporaneous with, or subsequent to the taking of the property and if it and the act of taking constitutes a continuous series of acts or events." § 812.13(3)(b), Fla. Stat.

If Appellant's use of force against Ms. Mack was motivated by the theft, he committed a robbery. If, on the other hand, the theft was merely an "afterthought" and did not motivate the homicide, the theft does not constitute a robbery. See e.g. Beasley v. State, 774 So.2d 649 (Fla. 2000). The jury here received an "afterthought" instruction,[7] but rejected the theory, finding that Appellant killed Ms. Mack during the course of a robbery.

The State presented evidence that Appellant stole a television and jewelry at the time he murdered Tyresa Mack (XXIII 758, 770-72, XXIV 973-980). Appellant does not dispute this evidence (for purposes of this issue), but claims that the State presented no evidence inconsistent with his "afterthought" hypothesis. Appellant cites language in Beasley in support of his argument:

[7]"If the evidence shows that the defendant took the victim's property, but that the taking of the victim's property was an afterthought to the use of force or violence which resulted in the death of the victim, the taking of the victim's property does not constitute robbery" (XXXV 3104).

> Where an "afterthought" argument is raised, the defendant's theory is carefully analyzed in light of the entire circumstances of the incident. If there is competent, substantial evidence to uphold the robbery conviction, and no other motive for the murder appears from the record, the robbery conviction will be upheld. Conversely, in those cases where the record discloses that, in committing the murder, the defendant was apparently motivated by some reason other than a desire to obtain the stolen valuable, a conviction for robbery (or the robbery aggravator) will not be upheld.

Beasley, 774 So.2d at 662 (citation and footnote omitted). Because "the record presented in this case disclosed another apparent motivation for the killing," Appellant contends that the evidence was insufficient to support the robbery predicate and the pecuniary gain aggravator.

The State does not read Beasley to mean that evidence of any other motive for a murder necessarily precludes theft as a motive and, as such, robbery as a felony-murder predicate. While evidence of another motive is certainly relevant to the question of whether theft was a motive, it defies reason to assert that a murderer cannot have more than one motive for a murder. Moreover, as long as there is "an inconsistency between the evidence and appellant's assertion that any theft occurred as an afterthought," this Court has affirmed felony murder convictions based upon robbery as the underlying felony. Hess v. State, 794 So.2d 1249 (Fla. 2001).

The evidence here was sufficient to create an inconsistency between the State's theory of robbery and Appellant's assertion of afterthought. Not only were items missing from the scene, but the Ms. Mack's bedroom had been ransacked, and the contents of her purse

dumped on the bed (XXIV 838). Such evidence supports the State's position that Appellant did not merely snatch a couple of items on his way out of the victim's apartment, but actively searched for items to steal. Such evidence was absent in Hill v. State, 549 So.2d 179 (Fla. 1989), which Appellant cites in support of his argument that the evidence was insufficient to support robbery and pecuniary gain.

Even if the evidence were insufficient to support robbery as the underlying offense, it would have no effect on the conviction. The jury specifically found that the State had proven felony murder with sexual battery as the underlying offense beyond a reasonable doubt, and found that the State had proven premeditated murder beyond a reasonable doubt. This was not a general verdict; those findings are set forth in the verdict (VIII 1418).

Likewise, even if the pecuniary gain aggravator were not supported by sufficient evidence, such error would be harmless beyond a reasonable doubt. Three valid aggravating circumstances remain: 1) heinous, atrocious and cruel; 2) committed while engaged in a sexual battery; and 3) prior violent felony conviction.

This Court has called prior violent felony conviction and heinous, atrocious, or cruel "two of the most weighty in Florida's sentencing calculus." Sireci v. Moore, 825 So.2d 882 (Fla. 2002). See also Larkins v. State, 739 So.2d 90, 95 (Fla. 1999) (recognizing the presence of the prior violent felony aggravator and heinous, atrocious and cruel as among the most serious aggavators). As such, the presence of these aggravating factors is more likely to render an erroneous aggravating factor harmless. See Sireci

(erroneous cold, calculated, and premeditated aggravator is harmless where those "weighty" aggravators remained); Zack v. State, 753 So.2d 9 (Fla. 2000)(erroneous "avoiding a lawful arrest" aggravator harmless error where four other valid aggravators-prior violent felonies; pecuniary gain; heinous, atrocious, and cruel; and cold, calculated, and premeditated, existed); Guzman v. State, 721 So.2d 1155 (Fla. 1998)(erroneous CCP aggravator was harmless with remaining aggravators of prior violent felony; committed in the course of a robbery; heinous, atrocious, or cruel; and avoiding arrest-existed). Accordingly, even if the evidence were insufficient to support the pecuniary-gain aggravator, such error is harmless beyond a reasonable doubt.

ISSUE III

DID THE TRIAL COURT ABUSE ITS DISCRETION BY REJECTING AN EXPERT'S OPINION TESTIMONY REGARDING ONE ASPECT OF THE MENTAL MITIGATION WHERE THE LAY TESTIMONY CONFLICTED WITH THAT EXPERT'S TESTIMONY? (Restated)

Appellant contends that the trial court abused its discretion by rejecting one of the expert'S opinion testimony regarding one aspect of the mental mitigation where the lay testimony conflicted with that expert's testimony (IB 80. The trial court properly rejected the both the bipolar mood disorder and the schizoaffective disorder. As this Court has held in a capital case, trial courts are free to reject unrebutted expert opinion testimony. Moreover, the expert testimony was contradicted by lay testimony. Additionally, the trial court did not reject this expert's testimony entirely. The trial court accepted this expert's testimony as the basis of a finding of brain damage. Moreover, even if the trial court should have accepted all aspects of this expert's testimony, any error in failing to do so was harmless. The trial court properly rejected certain aspects of the mental mitigation.

Standard of review

Whether a mitigating circumstance exists is reviewed for abuse of discretion. Caballero v. State, 851 So.2d 655, 661 (Fla. 2003) (explaining that a trial court is free to reject age as a mitigating circumstance and noting that under the abuse of discretion standard, "we will uphold the trial court's determination unless it is "arbitrary, fanciful, or unreasonable"). Discretion is abused "only where no reasonable man would take the view adopted by the trial court." Buzia v. State, 926 So.2d 1203, 1216 (Fla. 2006).

Penalty phase/mental mitigation

Defense counsel called two experts at penalty phase: (1) Dr. Jonathan Pincus, a medical doctor who was chief of neurology at a VA Hospital and (2) Dr. Dorothy O. Lewis, a psychiatrist. (XXXVII 3483 - XXXVIII 3556; XXXVIII 3557-3653).

Dr. Lewis examined Appellant in February of 2006, again in March and April (XXXVIII 3562). She interviewed him for 20-30 hours (XXXVIII 3563). She interviewed the defendant's mother and brother (XXXVIII 3570). Dr. Lewis concluded that Appellant suffered from brain damage including frontal lobe dysfunction (XXXVIII 3570-3574, 3575-3577). Dr. Lewis believed that Appellant's full scale I.Q. was 82 which was "borderline" (XXXVIII 3574). Dr. Lewis testified that Appellant had the "signs and symptoms of a bipolar mood disorder" (XXXVIII 3579). Dr. Lewis also testified that Appellant was "extremely paranoid" and had "pervasive paranoia" (XXXVIII 3582). Dr. Lewis explained that the combination of the thinking disorder with the pervasive paranoia that is characteristic of schizophrenia made the diagnosis of schizoaffective disorder appropriate (XXXVIII 3582-3583). Dr. Lewis diagnosed Appellant as suffering from schizoaffective disorder (XXXVIII 3583,3624). Dr. Lewis rejected malingering (XXXVIII 3584). Dr. Lewis testified that both statutory mental mitigators applied (XXXVIII 3599-3600).

On cross-examination, Dr. Lewis testified that she had two pages of Appellant's school records (XXXVIII 3609). While Appellant's mother told Dr. Lewis that he was in special education classes, Appellant's high school records did not contain any notation

regarding special education (XXXVIII 3615). He graduated from Reseda High School with a C average (XXXVIII 3616-3617). Dr. Lewis considered and rejected a diagnosis of anti-social personality disorder because the other diagnosis excluded it (XXXVIII 3625-3629; 3648). Dr. Lewis also rejected a diagnosis of sexual sadist (XXXVIII 3629-3633; 3649). The prosecution did not present the testimony of a mental health expert.

The sentencing order

The trial court's sentencing order concerning the mental mitigation provides:

> Dr. Jonathan Pincus, currently the director of neurology at the VA Hospital in Washington, D.C., conducted a two-hour examination of the Defendant on May 14th, 2006, at the Duval County Jail. His examination included a regular physical examination and a mini-mental status examination. He took the Defendant's blood pressure and pulse, recorded his height and weight, measured his arm span and the circumference of his head, examined his cranial nerves, checked his eye movements, and administered a battery of neurological tests.
>
> He measured whether the Defendant's eyes were wide open to the same degree, whether his face was symmetrical, and whether he can move his head symmetrically. He determined that his arm span was greater than his height and that his chest configuration was abnormal. He attributed these findings either to factors that were congenital, an abnormal gene, or the possibility that his mother was exposed to an x-ray before birth. He also testified that people with these abnormalities usually have brain damage.
>
> Based upon the neurological testing and physical examination, Dr. Pincus concluded that the Defendant had brain damage primarily in the frontal lobe area and the right side of the brain. He also testified that people with this type of brain damage usually have difficulty in using judgment and keeping their behavior within social and sometimes legal bounds. He further stated that someone who has hypothyroidism and is brain damaged and mentally ill may have "very, very florid psychotic behavior."
>
> Dr. Pincus did not provide an opinion as to the degree of the Defendant's brain damage. He did not testify as to how

it impacted the Defendant's life; nor relate it to this murder (or Williams Rule murders) committed by him. He identified his role was only to focus on the Defendant's neurological status. He did state that "not everybody with the same degree of neurological dysfunction does exactly the same thing."

The Defendant also called to testify Dr. Dorothy Lewis, a board certified adult psychiatrist licensed in Connecticut, New York, and California. Dr. Lewis testified that she received her medical degree from Yale University and was a professor of medicine at the New York University School of Medicine from 1979 to 2003. She is also a colleague of Dr. Pincus, the neurologist, who examined the Defendant at her request.

Dr. Lewis conducted interviews with the Defendant that she estimated lasted 20 to 30 hours. She inquired of his past medical history, social history, prior accidents, injuries, and illnesses. She examined the Defendant in February 2006 and then again in March or April of 2006. Accompanying her to these interviews was Dr. Catherine Yager, a neuropsychologist, who conducted neuropsychological testing of the Defendant to measure motor functioning, frontal lobe functioning, and what Dr. Lewis referred to as a variety of "different mental kinds of phenomena."

Dr. Lewis requested records of the Defendant, including school records, Army records, medical history records, information about the offense, and interviews with family and friends. Other than the two-page school record containing the Defendant's grades (2.0 average), class ranking (256 out of 310), and what could be notations that he passed certain standardized testing (Topics Test, Sharp Test, and Objective Test) before graduation from high school, none of the records or information relied upon by Dr. Lewis is part of this record.

Dr. Lewis also conducted interviews with the Defendant's mother, Debra Paige, and one of his brothers. It is assumed by the Court that Dr. Lewis considered the results of Dr. Pincus's examination and any neuropsychological testing done by Dr. Yager. However, only the results of the Defendant's IQ test (an overall score of 82) administered by Dr. Yager were mentioned in her testimony.

Based upon the information provided to her and her own psychiatric examination of the Defendant, Dr. Lewis provided many opinions relating to the mental health of the Defendant, including the following:

> A. The Defendant has diffuse brain damage including frontal lobe dysfunction.
>
> B. The Defendant has exhibited signs and symptoms of bipolar mood disorder since early childhood.

C. The Defendant has a psychotic disorder and pervasive paranoia supporting a diagnosis of schizoaffective disorder.

D. At the time the Defendant murdered Tyresa Mack, his ability to conform his conduct to the requirements of law was substantially impaired.

E. At the time the Defendant murdered Tyresa Mack, he was under an extreme mental or emotional disturbance.

The Court will review each of these opinions.

A. The Defendant has diffuse brain damage including frontal lobe dysfunction.

Dr. Lewis testified that there were numerous insults to the Defendant's central nervous system, making it impossible to determine exactly which incident caused his brain damage and frontal lobe dysfunction. She considered all of the following to be reasonable possibilities:

1. The Defendant's mother was battered by her husband when she was pregnant with the Defendant.
2. The Defendant was severely jaundiced at birth and was held three extra days at the hospital because of this condition. Dr. Lewis testified that this condition, if left untreated, could contribute to brain damage.
3. As a toddler the Defendant was in a baby stroller which tipped backwards, causing the Defendant to strike the back of his head. Although he did not lose consciousness, he sustained a balloon-like swelling at the back of the head. He was rushed to the hospital and his mother was advised to monitor him for several months. Dr. Lewis's theory was that the brain, which sits inside the skull, could have been jarred forward within the skull from the fall, causing injury to the front part of the brain where the frontal lobes are located. She compared it to injuries sustained by infants in shaken baby syndrome cases.
4. The Defendant has thyroid disease (hypothyroidism), which can be damaging to a developing brain. This disease is prevalent in the Defendant's family and may have gone undiagnosed since childhood, although no records exist to substantiate this possibility. Hypothyroidism would make the Defendant predisposed to have brain damage, and according to Dr. Lewis, recent studies suggest that it would also make him predisposed to have bipolar mood disorder.
5. The defended also has anemia. Dr. Lewis testified that this medical condition can

sometimes prevent sufficient oxygen from reaching the brain, causing brain damage. Dr. Lewis reviewed a medical record indicating that the Defendant, on examination at age 16, was found to be anemic.

6. Turner's Syndrome. The Defendant's mother has Turner's Syndrome, which is a genetic abnormality found in some women. In Ms. Paige's case, some of her cells do not have the normal 46 chromosomes. This condition in women has been associated with hypothyroidism and ulcers. The Defendant had part of his stomach removed due to ulcers. Dr. Lewis also testified, according to recent studies, this condition has also been associated with bipolar mood disorder.

B. The Defendant has exhibited signs and symptoms of bipolar mood disorder since early childhood.

To support this opinion, Dr. Lewis relied upon information that the Defendant cried a lot as a young child, would fool around and was kind of difficult to manage, took many risks, talked in class, and sometimes talked and talked without being able to shut up. She described him as having grandiose ideas about his own persona, citing his statement to her that he was "irresistible to women." She considered interviews with girlfriends who testified that sometimes he wanted sex constantly, and then other times he did not seem interested. She also considered the Defendant's statements that sometimes he just stayed in his room and didn't want to go out and see people. She also considered the Turner Syndrome studies and hypothyroidism, as previously discussed.

The Court is aware that it may not have received the identical information regarding the Defendant's history that was received by Dr. Lewis, however, it did receive penalty phase testimony from many witnesses, including family and friends. Those who knew the Defendant years ago gave vastly different accounts of the Defendant's younger days than those relied upon by Dr. Lewis.

Dr. Lewis stated that the Defendant was difficult to manage as a child. Delores Sheen, the principal at Sheenway Educational and Cultural Center, where the Defendant attended school from 1985 to 1987, testified that she never once had to discipline him. Although records substantiate that he was not a good student, he participated in all school activities and attended school there five or six days per week.

June Orr, a close family friend of his mother, described him as humorous, a nice child, always willing to help and lend a hand to others. Family friends Latonya Street and Kiana Michelle Williams Medina testified he was also respectful, courteous, and polite.

Dr. Lewis had information that the Defendant was a risk taker. John Simms, a close friend of Defendant's brother Dennis Paige, testified the Defendant shied away from physical contact because he was afraid of getting hurt. Because of this fear, he did not participate in sports other than running track. According to Mr. Simms, he was kind of shy and meek, but he was always positive.
His cousin, Eric Moten, who was raised with the Defendant and his brothers, described him as always together and the one who was "the easiest going of us all." He further stated, "I never saw him do anything out of line." Mrs. Medina described him this way:

> He made every effort to keep things balanced. I mean, that was one thing that as a young man and as a man, he was very even-keeled. He wanted things to be smooth sailing, easygoing, very laid back. You know, if things were in a despair mode, that all you could see was despair, he had a joke for you.

Although witnesses did verify the Defendant cried a lot as a young child, these descriptions are not consistent with Dr. Lewis's information, nor indicative, from a layperson's viewpoint, of a person with a mood disorder. Dr. Lewis found in her interviews with the Defendant that he has a grandiose opinion of his own persona. In reaching this conclusion, she referenced his statement that he is irresistible to women. She found that this supported her opinion that he was in a manic state. Accepting that this was not said in jest, but noting that more than one witness described the Defendant as humorous, the Court finds Dr. Lewis's conclusion that this is indicative of a person in a manic state to be highly improbable.
The Defendant, in his testimony in the guilt phase of the trial, claimed to have had a very active sex life with a significant number of partners. He has fathered four children from three different women. Regardless of his opinion about himself, the evidence established that there are women who are attracted to him, or at least willing to have sexual relations with him, which might form a basis for his own conclusions.

C. The Defendant has a psychotic disorder and pervasive paranoia supporting a diagnosis of schizoaffective disorder.
Dr. Lewis gave two examples of the Defendant exhibiting signs of what she described as psychotic behavior. The first occurred around 1992 in Oklahoma where, during basic training in the Army, the Defendant was involved in an outdoor exercise in freezing temperatures. There he refused to sleep inside of his sleeping bag, choosing

instead to sleep outside the bag despite the bitter cold. The Defendant failed to give an explanation for this behavior, and Dr. Lewis determined it to be psychotic behavior.

The Court agrees that this is certainly bizarre behavior. However, the Defendant was then in basic training at the beginning of his military career. He remained in the Army about five more years. He received a bad-conduct discharge. He did not receive a medical or mental-health discharge. There were no other psychotic episodes mentioned by Dr. Lewis in her testimony from this period until her interview with the Defendant in 2006, which covers a span of approximately 14 years.

After 20 to 30 hours of interviewing the Defendant, Dr. Lewis concluded that the Defendant has pervasive paranoia. She referred to the Defendant's claim that he hears people talking behind his back all the time, but when he turns around and confronts these people, they deny it. This is the second example she identified as being psychotic behavior.

The Court accepts that hearing voices when there are no voices to be a sign of paranoia. However, this Defendant has been in the Duval County Jail since the early part of 2003. During most of his incarceration, he was charged by indictment with the murder of several different women. His cases received extensive publicity. He has a distinctive appearance. He is six feet six inches tall, thin, angular, with a protruding Adam's apple, making him easily identifiable. In short, it is certainly possible that people are talking about this Defendant behind his back and that they might deny it if confronted by him. His belief that people are possibly talking about him does not seem to this Court to be illogical or based upon any irrational thought process. Of course, if he hears voices when there are none, this would be evidence of paranoia. However, as he readily admitted during the guilt phase, he is not always truthful.

D, E: At the time the Defendant murdered Tyresa Mack, his ability to conform his conduct to the requirements of the law was substantially impaired, and he was under an extreme mental and emotional disturbance.

When asked whether someone with the sort of brain damage like the Defendant's could engage in conversation, play simple card games, and appear perfectly normal, Dr. Lewis responded "that it depends on the individual, but it is such a hard question because it is a general question." When asked whether a person with the problems that she finds the Defendant to have could sit in a courtroom and appear to be interested and listen to what people are saying and even take the stand and testify and whether they had the ability to rescue their brother from a swimming pool and give CPR

to a cousin, she responded, “It depends. I don’t think you can generalize.” Yet when asked if the Defendant’s ability to conform his conduct to the requirements of the law was substantially impaired when he killed Tyresa Mack and whether he was under an extreme mental and emotional disturbance when he killed her, she was unequivocal in responding “yes.”

The Defendant killed Tyresa Mack on July 26, 1999. His psychotic episode relating to the sleeping bag occurred seven years earlier. His description of hearing voices, people talking behind his back, was reported seven years after this murder. The Court finds this to be an insufficient factual basis to support the conclusions reached by Dr. Lewis regarding the Defendant’s mental health on the day he killed Tyresa Mack. Dr. Lewis, although not specifically asked, never offered one detail from this murder that supported her conclusions about this event that happened seven years before she interviewed the Defendant.

Dr. Lewis indicated that lay people might not recognize the Defendant’s serious disturbances because there are times when his disorder’s in remission and he functions and acts normally. If so, and excluding the evidence of this murder (and the Williams Rule murders), the sleeping bag incident, and his recent claim that he hears voices of people talking behind his back, his remission covers all of his life.

The Defendant is in the borderline range of intellectual functioning and is not retarded. He has some limitations in learning, which explain the special education curriculum that he completed in high school. He is, according to his brothers, knowledgeable in electronics. He has worked as a security guard, tire mechanic, bus driver, and cab driver. He is married with children. He lasted in the Army for about six years, and the Court assumes he had some specialty or duty while in the military. There is no evidence that he was ever diagnosed with any mental health problems, aside from learning difficulties in school, until Dr. Lewis and Dr. Pincus examined him seven years after this murder. In this record, there is not one page from a medical record, school record, or a military record, aside from the sleeping bag incident, indicating any concern about this Defendant’s mental health by a physician, counselor, teacher, parent, sibling, friend, or acquaintance.

The Court has also considered Dr. Lewis’s opinion that people with bipolar mood disorder will sometimes appear perfectly normal in their demeanor and function, which could possibly explain why the observations and opinions of the Defendant’s family and friends are different from the description of the Defendant given by Dr. Lewis. However, if the Defendant had bipolar mood disorder, such raises further questions as to how Dr. Lewis was able to

conclude that the Defendant was not in remission when he killed Tyresa Mack on July 26, 1999.

The evidence admitted during the guilt phase of the trial demonstrates that this Defendant is manipulative, devious, and crafty. The "Williams Rule" evidence paints a picture of a man who knows how to gain the trust of women. He met Nikia Kilpatrick and her friend, Chantel Green, while they walked along the Arlington Expressway. He was soon taking Ms. Green out, according to him as a favor to Ms. Kilpatrick, and giving lingerie to Ms. Kilpatrick. He was able to keep most of his affairs hidden from his wife but deceived her into taking him to Ms. Kilpatrick's apartment complex on the night he murdered her. Another victim, Shawanda McCallister, was a cab fare from earlier in the day, and he was soon driving her to an ATM machine and then was in her bedroom.

He reports that he had sexual relationships with 20 different women between 1999 and 2002. Usually such activity requires a certain degree of charm not often associated with individuals who have severe brain damage. The Court has also considered the evidence of his statements to the police. He appears calm, rational, and cool in his false denials of his knowledge of these victims and his denials of ever having sex with them. He is neither nervous nor hesitant and appears completely relaxed in what should have been an extraordinarily stressful situation. The Court has also carefully reviewed the Defendant's entire testimony at the trial. Despite Dr. Lewis's description that his thought process is extremely disjointed and illogical, his answers to questions were always responsive, notwithstanding that they also often lacked credibility. There were no exchanges in which it appeared that the Defendant was irrational, confused, illogical, or disjointed in his thinking.

He used words like "clientele," "anonymous," "silhouette," "extension," "protrudes," "conversation," and "petite." Although Dr. Pincus found that the Defendant reads on a sixth-grade level, his vocabulary appears far better, and he testified that he read all of the depositions in this case and most of the reports.

While being cross-examined on the witness stand, he demonstrated that he not only knew what was being asked by the questioner but why the question was being asked. On one occasion, in an effort to bolster his own credibility, the Defendant had the presence of mind to offer, without solicitation, that his testimony in court was the same as what he told his lawyers and investigators when he was first arrested. On cross-examination regarding the killing of Shawanda McCallister, the Defendant gave testimony that at one point while he was present in her apartment, she was walking in front of a large open window wearing only her white shirt. The Defendant testified that her shirt

covered her private area. The prosecutor showed him the small white shirt, which did not appear large enough to cover her private area, that she was wearing when her body was found. The Defendant responded that when he was there, she was wearing a different white shirt. The Court found his response not to be credible but noted at the time he gave it that it demonstrated the Defendant's keen ability to think quickly. Again, an ability not often associated with people who have severe brain damage.

In *Walls v. State*, 641 So.2d 381, 390-91 (Fla. 1994), a death penalty case, the Florida Supreme Court stated:

[A] distinction exists between factual evidence or testimony and opinion testimony. As a general rule, uncontroverted factual evidence cannot simply be rejected unless it is contrary to law, improbable, untrustworthy, unreasonable, or contradictory. "Opinion testimony, on the other hand, is not subject to the same rule. Certain kinds of opinion testimony clearly are admissible, and especially qualified expert opinion testimony, but they are not necessarily binding even if uncontroverted. Opinion testimony gains its greatest force to the degree it is supported by the facts at hand, and its weight diminishes to the degree such support is lacking.

The Court finds there is factual support for the conclusion reached by the Defendant's mental health experts that he has some brain damage, including frontal lobe damage. However, other than his schooling and level of intelligence, the Court does not find any adverse impact on his life from this condition. Of greater importance is the fact that no evidence has been presented, other than in a very general way, that links this condition to this murder. The fact that people with frontal lobe damage "generally" have lower impulse control or have difficulty in judgment or keeping their behaviors within social or legal bounds does not explain this murder nor significantly mitigate it.

The Court does not find sufficient factual support in the record to accept Dr. Lewis's other opinions that the Defendant has other mental illnesses such as bipolar mood disorder and schizoaffective disorder manifested by psychotic behaviors like paranoia. The Court finds that the Defendant has thyroid disease (hypothyroidism) and anemia, but does not assign these conditions, standing alone, much weight as mitigation. However, the Court has considered the relationship of these conditions to the brain damage of the Defendant.

Though the Court accepts Dr. Lewis's conclusions regarding the existence of the Defendant's brain damage, it must reject her conclusions that such fact is related to this murder. Therefore, the Court finds that the Defendant's

> brain damage and low intellectual functioning should only be given little to moderate weight.
> Further, the Court does not find it was reasonably established that on July 26, 1999, when the Defendant murdered Tyresa Mack, that the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired or that he suffered from extreme mental or emotional disturbance. Although the Court finds that the Defendant has an abnormality in his brain, the Court does not find this disturbance to be an extreme disturbance or one that affected his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

(IX 1595-1609).

The trial court's ruling

The trial court found that Appellant suffered from "some brain damage including frontal lobe damage" (IX 1608). The trial court accepted "Dr. Lewis's conclusion regarding the existence of the Defendant's brain damage" and gave it "little to moderate weight" (IX 1609). The trial court rejected "other mental illness, such as bipolar mood disorder and schizoaffective disorder" finding insufficient factual support for Dr. Lewis' opinion (IX 1609). The trial court cited and quoted this Court's decision in Walls v. State, 641 So.2d 381, 390-391 (Fla. 1994) as legal support for rejecting the expert's unrebutted opinion testimony (IX 1608).

Merits

Constitutionally, while a sentencer, whether a jury or a judge, must be free to consider any and all mitigating circumstances, a sentencer is not required to find that the mitigating circumstance exists or that fact to be mitigating. The United States Supreme Court has held that the sentencer is not required to credit a particular mitigator nor give it any particular weight. Buchanan v. Angelone,

522 U.S. 269 (1998) (holding that a capital jury need not be instructed on the concept of mitigating evidence generally, or on particular statutory mitigating factors, including age, and explaining this Court's decisions suggest that complete jury discretion regarding consideration of mitigation is constitutionally permissible); Harris v. Alabama, 513 U.S. 504, 512 (1995)(observing: "[e]qually settled is the corollary that the Constitution does not require a State to ascribe any specific weight to particular factors, either in aggravation or mitigation, to be considered by the sentencer"). As practical matter, a trial court must be free to reject a fact as mitigating, otherwise, a defendant could propose the fact that he was born on Tuesday as mitigating and require the trial court to weigh such meaningless facts.

A trial court is not only free to reject a fact as mitigation, it is also free to reject unrebutted mental mitigation testimony. According to long established Florida law, a trial court may not reject the testimony unrebutted of a fact witness. Brannen v. State, 94 Fla. 656, 114 So. 329 (1927). Assuming Brannen applies to capital cases,[8] there was no violation of the Brannen rule. As this Court

[8]Much of the basis for the Brannen rule is to facilitate appellate review. In a capital case, however, this is not a concern. The judge in a capital case is required by statute to make written findings regarding aggravating and mitigating circumstances. While a trial court in a capital case should be required to give the reasons and basis for rejecting uncontraverted evidence in the sentencing order, that should be the limit of the *Brannen* rule in capital cases. If a trial court explains his reasons for rejecting even a fact witnesses' uncontradicted testimony, that should be seen as complying with the Brannen rule. Gonzalez v. State, 786 So.2d 559, 566 (Fla. 2001)(finding that the written sentencing order shows that the trial judge adequately considered the evidence presented in mitigation and

has explained, the Brannen rule applies to the testimony of fact witnesses only, not the opinion testimony of experts.

In *Walls v. State*, 641 So.2d 381, 390-391 (Fla. 1994), this Court, in a capital case, explained that a trial court may reject unrebutted opinion testimony. Walls was convicted of two counts of first-degree murder, burglary of a structure, armed burglary of a dwelling, and two counts of kidnapping and petit theft. Walls v. State, 926 So.2d 1156, 1162 (Fla. 2006). He was sentenced to life imprisonment for one of the murders but sentenced to death for the other murder. On appeal from a retrial, Walls contended that the trial court improperly rejected expert opinion testimony that he was suffering extreme emotional disturbance and that his capacity to conform his conduct to the law's requirements was substantially impaired. Walls, 641 So.2d at 390. This Court explained that in Florida, as in many states, a distinction exists between factual evidence or testimony, and opinion testimony. As a general rule, uncontroverted factual evidence cannot simply be rejected unless it

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concluding "[g}iven the detailed analysis provided", the trial court did not err). In this case, the judge gave numerous reasons for his rejection of Dr. Lewis' testimony. Indeed, nearly 16 pages of the 28 page sentencing order is devoted to the issue. Appellate review was not thwarted in any manner whatsoever. While Brannen is understandable in the average criminal case when the only findings by a jury is a general finding of guilt with no specific findings or detailed explanation for the finding of guilt. But in a capital case, there are specific findings regarding the death sentence and detailed explanation for the findings regarding the aggravators and mitigators. *Brannen* should be limited to criminal case and only be applied to capital case where there were no findings made regarding the credibility of the fact witness accompanied by an explanation for the trial court finding that fact witness to be incredible.

is contrary to law, improbable, untrustworthy, unreasonable, or contradictory. Walls, 641 So.2d at 390 citing Brannen v. State, 94 Fla. 656, 114 So. 429 (1927). The Walls Court noted that this rule applies equally to the penalty phase of a capital trial. But this Court then explained that opinion testimony is not subject to the Brannen rule. This Court observed that certain kinds of opinion testimony clearly are admissible - and especially qualified expert opinion testimony - but they are not necessarily binding even if uncontroverted. "Opinion testimony gains its greatest force to the degree it is supported by the facts at hand, and its weight diminishes to the degree such support is lacking." Walls, 641 So.2d at 390-391. "A debatable link between fact and opinion relevant to a mitigating factor usually means, at most, that a question exists for judge and jury to resolve." This Court noted that the evidence was debatable. Walls, 641 So.2d at 391. In a footnote, this Court explained that a reasonable person could conclude that the facts of the murder were inconsistent with the presence of the two mental mitigators. Walls, 641 So.2d at n.8. This Court observed that while the facts may be consistent with some degree of emotional impairment, which the trial court surely recognized in finding emotional handicap and brain dysfunction as nonstatutory mitigators, the facts were nonetheless consistent with the conclusion that any impairment Walls suffered was nonstatutory in nature. Walls, 641 So.2d at n.8. The Walls Court affirmed the trial court's rejection of both statutory mental mitigators although supported by unrebutted expert testimony. See also Gonzalez v. State, 786 So.2d 559, 566 (Fla.

2001)(citing Walls and finding the trial court did not err in rejecting the mental health expert's diagnosis of pugilistic encephalopathy).

Here, as in Walls and Gonzalez, the trial court was free to reject the expert's opinion. Dr. Lewis' testimony was opinion testimony, not factual testimony and therefore, the Brannen rule does not apply.

Moreover, this expert's testimony was based mainly on the defendant's self-reporting, especially Dr. Lewis' testimony regarding the defendant's paranoia. The trial court, however, specifically found Appellant to be "manipulative, devious, and crafty." Surely, a trial court is not require to credit an expert's testimony that depends in turn on information supplied by a person that the trial court has determined to be devious, *i.e.*, a liar.

Moreover, even the unrebutted testimony of a fact witness may be rejected by the trial court under Brannen, if the fact witness' testimony is "contrary to law, improbable, untrustworthy, unreasonable or contradictory." The expert's testimony in this case was controverted - both by the lay witnesses and by the facts of the murder.

As the trial court's sentencing order explained, Dr. Lewis' diagnosis was contradicted by the testimony of the lay witnesses. Durosseau asserts that lay witness testimony cannot be the basis of contradictory evidence (IB 84). Lay testimony can contradict expert testimony and did in this case. Obviously, the lay witness testimony did not specifically contradict the expert's diagnosis, but the lay witness testimony did contradict the expert's testimony on

the manifestations of that diagnosis. The testimony of the friends and family contradicted Dr. Lewis' testimony.

Furthermore, the facts of the murders contradicted the opinion testimony. This Court has explained that "expert testimony alone does not require a finding of extreme mental or emotional disturbance. Even uncontroverted opinion testimony can be rejected, especially when it is hard to reconcile with the other evidence presented in the case." Philmore v. State, 820 So.2d 919, 936 (Fla. 2002)(quoting Knight v. State, 746 So.2d 423, 436 (Fla. 1998)). In Philmore, the defense mental health expert, Dr. Berland, testified that Philmore suffered from a chronic mental illness and was mildly to moderately psychotic. Philmore, 820 So.2d at 937. The trial court had rejected the statutory mental mitigators because the "facts and circumstances of the homicide indicate a coherent and well thought out plan which spanned over the course of two days" and "the abduction and homicide were part of a deliberate plan." The trial court concluded that "[t]here simply is no record evidence to suggest the defendant was under the influence of extreme mental or emotional disturbance at the time of commission of the homicide." Philmore, 820 So.2d at 936. This Court concluded that "the trial court's rejection of this statutory mitigator is supported by competent substantial evidence." Philmore, 820 So.2d at 937; See also San Martin v. State, 705 So.2d 1337, 1347-1348 (Fla. 1997)(affirming trial court's rejection of extreme emotional disturbance and substantially diminished capacity mitigator, despite expert testimony in support

of such mitigation, where evidence in the record showed purposeful conduct which contradicted such mitigation).

Here, as in Philmore and San Martin, the facts of these series of rape and murder establish purposeful conduct and rebut any notion that Appellant was suffering from an extreme mental illness.

Opposing counsel mischaracterizes the trial court's sentencing order in implying that the trial court misunderstood Dr. Lewis' testimony as diagnosing the defendant with only a bipolar mood disorder by selectively quoting the trial court's rejection of other mental illness including both bipolar mood disorder and schizoaffective disorder (IB 85 n.12). The trial court's sentencing order rejects both bipolar mood disorder and schizoaffective disorder (IX 1609). Schizoaffective disorder is a combination diagnosis involving aspects of both a mood disorder and schizophrenia (psychosis defined by paranoia or delusions). DSM-IV-TR. The trial court was not confused by Dr. Lewis' testimony. Rather, the trial court exercised its discretion in rejecting that aspect of the expert's testimony.

Furthermore, the trial court did not reject the mental mitigation or Dr. Lewis' testimony entirely. The trial court found that Appellant suffered from "some brain damage including frontal lobe damage" (IX 1608). The trial court accepted "Dr. Lewis's conclusion regarding the existence of the Defendant's brain damage" and gave it "little to moderate weight" (IX 1609).

Appellant's reliance on Campbell v. State, 571 So.2d 415, 419 (Fla. 1990) and Nibert v. State, 574 So.2d 1059, 1062 (Fla. 1990) for

the proposition that when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance is misplaced. This Court has clarified this line of case to make it clear that a trial court is free to assign no weight to a particular mitigator. Trease v. State, 768 So.2d 1050 (Fla. 2000)(overruling Campbell).

Harmless error

Any error was harmless. Bowles v. State, 804 So.2d 1173, 1180-1183 (Fla. 2001)(finding that, even if the trial court erred in the weighing and evaluation of the proposed mitigation, the error was harmless because the aggravators "patently overwhelm" the mitigation). Even if the trial court should have found schizo-affective disorder as non-statutory mitigation, the error was harmless. The aggravators, including HAC and prior violent felony, patently overwhelm the mitigation of a schizoaffective disorder.

Remedy

If this Court concludes that the order violates Brannen in rejecting Dr. Lewis' testimony and that the error is not harmless, the correct remedy is to remand for the judge to enter a new sentencing order. Reese v. State, 694 So.2d 678 (Fla. 1997) (remanding for entry of new sentencing order expressly discussing and weighing evidence offered in mitigation where the original sentencing order contained inadequate discussion of the mitigation); *Cf.* Dillbeck v. State, 882 So.2d 969, 972 (Fla. 2004) (remanding to the trial court for entry of a new order denying postconviction relief where the trial court's

original order contained no findings of fact or conclusions of law). The remedy is not a new penalty phase nor even a new *Spencer* hearing. Of course, on remand, the trial court could find that the mitigation of schizoaffective disorder exists but assign it no weight under Trease.

ISSUE IVDID THE TRIAL COURT ERR IN DENYING THE MOTION FOR JUDGMENT OF ACQUITTAL? (Restated)

Appellant contends that the trial court erred by denying the motion for judgement of acquittal on the first degree murder count because the State only proved sexual battery, not murder (IB 95). Appellant asserts as his hypothesis of innocence that, while he had sex with the victim, another person later raped and murdered her. The State is not required to rebut this hypothesis. While in a wholly circumstantial evidence case, the State is required to rebut a reasonable hypothesis of innocence, this is not a totally circumstantial evidence case. This is a DNA case. The semen found was Appellant's semen. As this Court had repeatedly held, the special test for circumstantial evidence cases does not apply in DNA cases. Moreover, even if the circumstantial evidence test applied to this case, Appellant's hypothesis of innocence is not reasonable. Any hypothesis of innocence that depends on three woman, who the defendant has recently had sex with, being murdered by someone else shortly after his having sex with them, simply is not reasonable. Furthermore, ss this Court has held, if a defendant originally denies knowing the victim but his semen, as determined by DNA, is found on the murdered victim and he then admits to having sex with the victim, the evidence is sufficient to send the case to the jury. Additionally, the State rebut the hypothesis of consensual sex based on the condition of the victim's clothes and her being bound. Thus, the trial court properly denied the motion for judgment of acquittal.

Standard of review

A trial court's denial of a motion for judgment of acquittal is reviewed on appeal by the *de novo* standard of review to determine solely if the evidence is legally sufficient. Jones v. State, 790 So.2d 1194 (Fla. 1st DCA 2001).

The trial court's ruling

After the State rested, Appellant moved for judgment of acquittal on the charge of first degree murder regarding both the premeditated and felony murder theories (XXX 2109). Appellant argued that the *Williams* rule evidence should not be considered as part of the JOA (XXX 2110-2111). He argued that there was no evidence of the identity of the murderer (XXX 2111). Rather, Appellant asserted, the State had only established that the defendant had sex with the victim (XXX 2111). Appellant argued, based on the medical examiner's testimony that sperm could live up to a week in a dead person, that the State had not proven that the sex occurred contemporaneously with the murder (XXX 2111-2112). Appellant argued that the *Williams* rule evidence did not show the identity of the murderer either because the proof in the *Williams* rule cases suffered from the same flaw as the charged murder. The State, while proving that the defendant also had sex with the *Williams* rule victims, had not proven the identity of the murderer in those cases either (XXX 2112).

Appellant also claimed that the evidence was insufficient regarding the felony murder theory because the State had not proven that a sexual battery occurred, only that the defendant had had sex with the victim (XXX 2112-2113). Defense counsel stated that there

was no evidence of "tears or lacerations or bruising" and therefore no evidence of "forceful sexual activity" (XXX 2113). Appellant asserted that all the State had proven was that the defendant had had consensual sex with the victim before her death (XXX 2114).

The prosecutor countered that the *Williams* rule evidence should be considered, and noted the DNA evidence (XXX 2115). The prosecutor noted the testimony of Appellant's wife that she drove him to an area near victim Kilpatrick's apartment complex on the night of that victim's murder (XXX 2117). The prosecutor also noted the testimony of an eyewitness placing Appellant in the vicinity of victim McCallister (XXX 2116).

The prosecutor noted the evidence establishing the sexual battery supporting the felony murder theory (XXX 2116). The prosecutor described the condition of the victim's clothes, including torn panties and the hole in the top that the victim had been wearing, to establish that a sexual battery occurred (XXX 2116). The State point to an eyewitness, Joy Williams, who saw Appellant, coming out of the victim's apartment, near the time of the murder, carrying a television (XXX 2117). The trial court denied the motion for JOA (XXX 2117).

Appellant presented his case which included his own admission on cross-examination that he had lied twice to the officer when he stated that he did not know victim Mack (XXXIV 2862). The defense then rested (XXXIV 2911). The State did not present any rebuttal (XXXIV 2911). Appellant then renewed the motion for JOA (XXXIV 2912). Appellant asserted that the witnesses who saw Appellant near

the time of the murder were contradictory with each other and the other evidence in the case (XXXIV 2912-2913). Appellant argued there was no link between him having sex with the victim and the murder (XXXIV 2913). Appellant also argued there was no link between him having sex with the *Williams* rule victims and the identity of their murderer either (XXXIV 2914). Appellant asserted that the state failed to prove identity (XXXIV 2914). Appellant also asserted that there was insufficient evidence of felony murder because the sexual activity was not linked to the death (XXXIV 2916-2917). Appellant's view was that the presence of semen did not establish that the sex occurred at the same time as the murder (XXXIV 2917). Appellant asserted there was no evidence of sexual battery, there was "no lacerations, no tears, no vaginal of genital bruising, no evidence of any trauma that could be associated with a violent, forcible sexual assault" (XXXIV 2917).

The prosecutor responded that the victim was found with a ripped top, ripped underwear and Appellant's DNA in her vagina (XXXV 2921). The victim had marks on her wrists from being bound (XXXV 2921). The trial court denied the renewed JOA (XXXV 2922).

Merits

The Due Process Clause requires proof of each element of a criminal offense beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970); Jackson v. Virginia, 443 U.S. 307 (1979)(explaining that evidence is sufficient to support a conviction as a matter of due process if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the

essential elements of the crime beyond a reasonable doubt"). Therefore, appellate courts review the sufficiency of the evidence.

This Court has explained the test for the sufficiency of the evidence on several occasions. If, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, sufficient evidence exists to sustain a conviction. In moving for a judgment of acquittal, a defendant "admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence. Courts should not grant a motion for judgment of acquittal unless the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law. See Reynolds v. State, 934 So.2d 1128, 1145 (Fla. 2006).

However, the legal test is different for direct evidence cases and wholly circumstantial evidence cases. Traditionally, direct evidence cases involve eyewitnesses or a confession; whereas, circumstantial evidence cases do not. Floyd v. State, 850 So.2d 383, 406 (Fla. 2002)(noting a confession constitutes direct evidence of guilt); Kidwell v. State, 730 So.2d 670, 671 (Fla. 1998)(explaining that kike an eyewitness observation, a direct confession is direct evidence of a crime). When direct evidence of guilt is introduced, the State is not required to rebut a reasonable hypothesis of innocence. Fitzpatrick v. State, 900 So.2d 495, 496 (Fla. 2005). But where a conviction is based wholly upon circumstantial evidence, a special standard of review applies. Reynolds, 934 So.2d at 1145. A

motion for judgment of acquittal should be granted in a case based wholly upon circumstantial evidence if the state fails to present evidence from which the jury could exclude every reasonable hypothesis except that of guilt. Reynolds, 934 So.2d at 1146 (citing Darling v. State, 808 So.2d 145, 155-156 (Fla. 2002)).

While a special test applies to wholly circumstantial evidence cases, this is not a wholly circumstantial evidence case as that term is defined by this Court. In Reynolds v. State, 934 So.2d 1128, 1145-1147 (Fla. 2006), this Court held that a case involving DNA is not a wholly circumstantial evidence case and the special standard applicable to entirely circumstantial evidence cases does not apply. Reynolds asserts that the evidence of his guilt offered by the State in this case was entirely circumstantial and, therefore, the special standard should apply. Reynolds contended that the case against him rests solely on the evidence that his finger was injured and "tainted and inconsistent DNA evidence." Contrary to this assertion, this Court found additional evidence including that Reynolds denied ever being in the victims' residence -a statement that was clearly inconsistent with the considerable DNA evidence presented at trial which placed him inside the trailer This Court found that the evidence was not entirely circumstantial. Because the evidence was not entirely circumstantial, this Court did not apply the special standard of review applicable to cases based solely on circumstantial evidence citing Fitzpatrick v. State, 900 So.2d 495, 506 (Fla. 2005)(stating: "this Court need not apply the special standard of review applicable to circumstantial evidence cases because the State

presented direct evidence in the form of DNA evidence and eyewitness testimony."). This Court then concluded that the motion for acquittal was properly denied because the "significant DNA evidence" was sufficient. Reynolds, 934 So.2d at 1147. See also Orme v. State, 677 So.2d 258, 261-62 (Fla. 1996)(holding that case involving evidence such as eyewitness testimony placing the defendant at the scene, acknowledgment by the defendant of a dispute with the victim and theft of the victim's purse, and DNA evidence suggesting that the defendant had engaged in sexual relations with the victim could not be deemed entirely circumstantial).

Because the case is not a wholly circumstantial evidence case as that term is defined by this Court, the State is not required to rebut Appellant's hypothesis of innocence. The DNA evidence alone provides sufficient evidence.[9]

[9] Of course, in the age of DNA, the distinction between direct and circumstantial evidence is unwarranted. The distinction developed at common law when direct evidence cases were the strong cases and circumstantial cases were the weak cases. This caused courts to treat the two types of evidence differently and develop the rule that circumstantial evidence must exclude any hypothesis of innocence. William Wills, An Essay on the Principles of Circumstantial Evidence 171 (Philadelphia, T. & J.W. Johnson, 1853). Due to scientific advances, these days, circumstantial evidence cases are the strongest cases. Both DNA and fingerprints are considered circumstantial evidence. *Bedoya v. State*, 779 So.2d 574, 577 (Fla. 5th DCA 2001)(noting that fingerprint and DNA evidence are generally considered a species of circumstantial evidence). However, circumstantial evidence cases involving either DNA or fingerprints are now the strongest cases. John Henry Wigmore, 2 Evidence in Trials at Common Law s 414, at 483 (1979) (arguing that, according to scientific principles, fingerprints have the highest degree of certainty); *People v. Wesley*, 140 Misc.2d 306, 533 N.Y.S.2d 643, 644 (N.Y.Sup.Ct. 1988)(observing that DNA evidence has been called the "single greatest advance in the search for the truth ... since the advent of cross-examination.").

Even applying the special test for wholly circumstantial evidence cases, Appellant's reasonable hypothesis of innocence fails. The hypothesis is not reasonable. And even if it were reasonable, the State rebut the hypothesis of consensual sex based on the condition of the victim's clothes and her being bound.

The "reasonable hypothesis of innocence" must be reasonable. Henderson v. State, 679 So.2d 805, 806 (Fla. 3d DCA 1996) (emphasizing that the State was not required to rebut an *unreasonable* hypothesis). Appellant's hypothesis of innocence - that on three different dates, three different women that he had had sex with where each raped (with no semen left by the other man) and killed by some other person within hours of his having sex with them - is not reasonable. His hypothesis also requires that the "real" rapists did not leave any semen on the victim. Cf. Johnson v. State,

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The United States Supreme Court abolished the common law distinction between direct and circumstantial evidence cases in *Holland v. United States*, 348 U.S. 121, 140, 75 S.Ct. 127, 99 L.Ed. 150 (1954). Most states have abolished the distinction as well. Cf. *State v. Adcock*, 310 S.E.2d 587, 602-08 (N.C. 1983); *State v. Jenks*, 574 N.E.2d 492, 496-503 (Ohio 1991); *State v. Gosby*, 539 P.2d 680, 684-86 (Wash. 1975). Florida has abandoned giving any jury instruction based on the distinction but inexplicably has retained the distinction in the sufficiency of the evidence analysis. *In re: Use by the Trial Courts of the Standard Jury Instructions in Criminal Cases*, 431 So. 2d 594, 595 (Fla. 1981). The rule requiring the State to rebut the defendant's reasonable hypothesis should not apply to cases where there is DNA or fingerprint evidence. Quite simply, DNA beats an eyewitness. There is no logic in requiring the State to rebut a hypothesis of innocence in a case with DNA results but not requiring the State to rebut any hypothesis where there is an eyewitness. The distinction between direct evidence cases and circumstantial evidence cases no longer has any justification and should be abrogated. The prosecution should only be required to produce evidence supporting each element of the crime.

969 So.2d 938, 956 (Fla. 2007)(finding the trial court did not err in denying the motion for judgment of acquittal on kidnapping or sexual battery, or first-degree felony murder based on these offenses because the circumstantial evidence of sexual battery was legally sufficient to contradict Johnson's hypothesis of consensual sex). This hypothesis of innocence is not reasonable and therefore, the State is not required to rebut it.

In Fitzpatrick v. State, 900 So.2d 495, 506-508 (Fla. 2005), this Court rejected a similar hypothesis of innocence. Fitzpatrick was convicted of first degree murder and sexual battery and sentenced to death. On appeal, Fitzpatrick asserts that the trial court erred in denying his motion for judgment of acquittal because the circumstantial evidence was not inconsistent with Fitzpatrick's reasonable theory of innocence. Fitzpatrick, 900 So.2d at 506. Fitzpatrick contended that he had a consensual sexual encounter with the victim fifteen to eighteen hours before she was found naked and bleeding on the side of the road but that the victim was killed by someone else. Fitzpatrick, 900 So.2d at 507. This Court noted that the evidence included numerous injuries and markings to the victim establishing that a sexual battery occurred; the defendant's DNA matched the DNA from vaginal swabs of the victim; the defendant repeatedly denied having sex with the victim until confronted with the DNA evidence; two eyewitnesses saw the defendant and the victim together three hours before the victim was discovered on the side of the road with her with her throat slit; the defendant admitted being with the victim earlier on the day of the murder and that the defendant

requested that his sister, who was a nurse, obtain vials of blood for him. Fitzpatrick, 900 So.2d at 507. This Court emphasized that Fitzpatrick denied any involvement with the victim only to change his story when confronted with DNA evidence. Fitzpatrick, 900 So.2d at 508. This Court concluded that the State presented competent, substantial evidence to support the conviction and therefore, the trial court did not err in denying Fitzpatrick's motion for judgment of acquittal. Fitzpatrick, 900 So.2d at 508.

As in Fitzpatrick, this Court should reject Appellant's hypothesis of innocence that he had sex with the victim but that someone else murdered her (or really that three other someones killed the three victims). Here, as in Fitzpatrick, Appellant denied knowing the victim only to change his story when confronted with DNA evidence. Here, as in Fitzpatrick, the evidence established a sexual battery occurred. The condition of the victim's clothes established a sexual battery occurred and that it occurred contemporaneously with the murder. Here, as in Fitzpatrick, the defendant's DNA matched the DNA from all three victims. Here, as in Fitzpatrick, there were eyewitnesses. In this case, Joy William saw Appellant coming out of the victim's apartment, near the time of the murder, carrying a television. Here, as in *Fitzpatrick*, the defendant admitted being with the victims before their respective murders. But here, unlike *Fitzpatrick* where there was only one victim, there are three victims. Here, as in Fitzpatrick, the trial court properly denied the motion for judgment of acquittal and properly sent the case to the jury.

Moreover, the defendant's own trial testimony is affirmative evidence of guilt. In Wright v. West, 505 U.S. 277 (1992), the United States Supreme Court held that the evidence was sufficient, as a matter of due process, to support a conviction for grand larceny. Someone broke into the victim's home and stolen $3,500 worth of items, including an imitation mink coat with the name "Esther" embroidered in it. Fifteen days later, some of these items were found in West's house and he was charged with grand larceny. West testified at trial on his own behalf, he admitted to a prior felony conviction, but denied having taken anything from victim's house. *West*, 505 U.S. at 280. West testified that he bought the items from "several guys" at "flea bargain places" and then, on cross, he testified that he bought some of the items from a Ronnie Elkins. He was impeached with a prior conviction. The Fourth Circuit had granted habeas relief, finding the evidence was insufficient. The Fourth Circuit reasoned, in part, that items were recovered two weeks after they were stolen; that the items were not hidden or concealed in West's home and there was no corroborating evidence (such as fingerprints or eyewitness testimony) beyond the fact of mere possession. The United States Supreme Court reversed.

The Supreme Court concluded that "there was more than enough evidence to support West's conviction." Indeed, the Court characterized the case against West as "strong." The Court reasoned that the jury was entitled to disbelieve West's "uncorroborated and confused testimony" and to discount West's credibility on account of his prior felony conviction. The Court noted that the prosecution

was not required to "rule out every hypothesis except that of guilt." The Court also explained that the jury was permitted to consider what it concluded to be perjured testimony as affirmative evidence of guilt. West, 505 U.S. at 296, (citing Wilson v. United States, 162 U.S. 613, 620-621 (1896); United States v. Zafiro, 945 F.2d 881, 888 (7th Cir. 1991) and Dyer v. MacDougall, 201 F.2d 265, 269 (2d Cir. 1952). see also Finney v. State, 660 So.2d 674, 680 (Fla. 1995)(concluding that in "light of Finney's inconsistent statements concerning his interactions with the victim and his activities on the day of the murder, the jury was free to reject Finney's version of events as unreasonable."); Carpenter v. State, 785 So.2d 1182, 1195 (Fla. 2001)(explaining that where defendant has made several inconsistent statements, "we have routinely held that the jury was free to reject the defendant's version of the events.").

Here, as in West, Finney, and Carpenter, the jury was entitled to reject Appellant's version of events. Here, Appellant admitted during his testimony that he had denied even knowing the victim to the officer. Appellant's jury was entitled to use the defendant's story about having consensual sex with the three women, which they no doubt viewed as perjury, as affirmative evidence of guilt.

Furthermore, even if the State was required to rebut the hypothesis, the State did so. The condition of the victim's clothes negates the hypothesis of consensual sex. The victim was found naked from the waist up with the top she was wearing with a hole in it and her panties torn. Additionally, the victim had marks on her wrists

from being bound. This rebuts any claim of consensual sex. The trial court properly denied the motion.

ISSUE V

WHETHER THE TRIAL COURT PROPERLY DENIED THE MOTION TO DECLARE FLORIDA'S CAPITAL SENTENCING SCHEME UNCONSTITUTIONAL BASED ON *RING V. ARIZONA*, 536 U.S. 584 (2002)? (Restated)

Appellant asserts Florida's capital sentencing scheme is unconstitutional in light of *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). IB at 97. Appellant urges this Court to recede from its prior precedent in *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002) and *King v. Moore*, 831 So.2d 143 (Fla. 2002). *Ring* does not invalidate Florida's death penalty. This Court has consistently rejected *Ring* claims. Moreover, Appellant's jury recommended the death penalty. Even if *Ring* applied in Florida, a jury's recommendation of death necessarily means that the jury found at least one aggravator, as both this Court and the United States Supreme Court have explained. Furthermore, one of the aggravators in this case is the prior violent felony aggravator. As this Court has repeatedly explained, *Ring* does not apply to cases where the prior violent felony aggravator is present. And additionally, the jury unanimously found an aggravator in the guilt phase. The jury's special verdict in this case finding felony murder is a finding of the murder in the course of a felony aggravator. Florida's death penalty statute is not unconstitutional. Thus, the trial court properly denied the motion.

The trial court's ruling

Appellant filed a motion to declare Florida's capital sentencing procedure unconstitutional under Ring v. Arizona (IV 714-729). The

motion acknowledged this Court's controlling precedent of Bottoson v. Moore, 833 So.2d 693 (Fla. 2002) and King v. Moore, 831 So.2d 143 (Fla. 2002), but argued that the statute was unconstitutional because the judge, not the jury, makes the specific written factual findings required by the statute (IV 714-715). The motion also asserted that an unanimous jury recommendation was required (IV 720-721). The motion additionally contended that the aggravators had to be alleged in the indictment (IV 722-723). The trial court denied the motion (IV 730).

Standard of review

Whether a statute complies with the Sixth Amendment right to a jury trial is a question of law reviewed *de novo*. Cf. United States v. Seymour, 519 F.3d 700 (7th Cir. 2008)(concluding that an "Apprendi issue is subject to *de novo* review."); United States v. Salazar-Lopez, 506 F.3d 748, 750-751 (9th Cir. 2007)(noting that preserved Apprendi challenges are reviewed *de novo*).

Standing

Appellant lacks standing to make an unanimity challenge to Florida's death penalty statute. A defendant whose jury unanimously recommends death or whose jury unanimously finds an aggravator in the guilt phase may not raise such a challenge. Burch v. Louisiana, 441 U.S. 130, 132, n.4 (1979)(holding that one of the defendants who was convicted by a unanimous six-person jury lacked standing to raise a non-unanimous challenge to his conviction).

Merits

The Sixth Amendment to the federal constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

In Ring v. Arizona, 536 U.S. 584, 589 (2002), the United States Supreme Court held "capital defendants ... are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." This Court has repeatedly held that Florida's death penalty scheme does not violate Ring. Poole v. State, 997 So.2d 382, 396 (Fla. 2008)(noting that "since the Ring decision, we have rejected similar arguments that Florida's death penalty statute is unconstitutional based on Ring" citing Marshall v. Crosby, 911 So.2d 1129 (Fla.2005); Bottoson v. Moore, 833 So.2d 693 (Fla. 2002) and King v. Moore, 831 So.2d 143 (Fla. 2002)).

Appellant's argument completely ignores the reasoning of this Court's decision in State v. Steele, 921 So.2d 538, 547 (Fla. 2005). In *Steele*, this Court explained that, even if Ring applied in Florida, it would require only that the jury make a finding that at least one aggravator existed. Given the requirements of section 921.141 and the language of the standard jury instructions, such a finding is implicit in a jury's recommendation of a sentence of death. Steele, 921 So.2d at 546. The Steele Court relied on Jones v. United States, 526 U.S. 227, 250-251 (1999), in which the United States Supreme Court explained that, in Hildwin v. Florida, 490 U.S. 638 (1989), "a jury made a sentencing recommendation of death, thus necessarily engaging

in the factfinding required for imposition of a higher sentence, that is, the determination that at least one aggravating factor had been proved." So, according to this Court in Steele, a jury's recommendation of death means that the jury found an aggravator, which is all Ring requires. See also Poole v. State (rejecting a request that this Court reconsider the holding in Steele that the finding of at least one aggravator is implicit in the jury's recommendation of death). Both this Court and the United States Supreme Court have explained that a jury's recommendation of death means the jury necessarily found one aggravator. Here, Appellant's jury recommended death. Therefore, his jury necessarily found an aggravator which is all that Ring requires.

Furthermore, as this Court has repeatedly explained, due to the Almendarez-Torres v. United States, 523 U.S. 224 (1998) exemption, Ring does not apply to cases where the prior violent felony aggravator is found. Peterson v. State, 2 So.3d 146, 160 (Fla. 2009)(stating: "[t]his Court has repeatedly held that where a death sentence is supported by the prior violent felony aggravating factor ... Florida's capital sentencing scheme does not violate Ring."); Marshall v. Crosby, 911 So.2d 1129, 1135 (Fla. 2005)(stating, in a jury override case, that: "We have repeatedly relied on the presence of the prior violent felony aggravating circumstance when denying Ring claims" citing numerous cases in a footnote and concluding that Marshall's nine prior violent felonies are an aggravating circumstance that takes his sentence outside the scope of Ring's requirements); Weaver v. State, 894 So.2d 178, 201,

n.21 (Fla. 2004)(explaining, "[a]s we have previously held many times, even if *Ring* applied in Florida, the jury's unanimous determination that the defendant committed other violent felonies involving another victim would make the defendant eligible for the death penalty, thus complying with Ring.); Belcher v. State, 851 So.2d 678, 685 (Fla. 2003)(explaining that the prior violent felony aggravator is exempted from an Apprendi analysis citing Almendarez-Torres v. United States.

Additionally, Appellant's jury unanimously found an aggravator in the guilt phase when they convicted him of felony murder. By special verdict, this jury unanimously convicted him of felony murder with both sexual battery and robbery as the underlying felonies. The jury checked both premeditated and felony murder and furthermore, checked both sexual battery and robbery as the felonies underlying the felony murder conviction (VIII 1418). By doing so, the jury necessarily found the murder during a course of a felony aggravator. This Court has repeatedly rejected Ring claims in cases where the "murder in the course of a felony" aggravator is supported by the jury's verdict. Aguirre-Jarquin v. State, - So.3d -, n.8, 2009 WL 775388,34 Fla. L. Weekly S299 (Fla. 2009)(rejecting a Ring claim because the jury's unanimous verdict on the burglary charge was the basis for the trial court's finding of the "in the course of a felony" aggravator); Davis v. State, 2 So.3d 952, 966 (Fla. 2008)(rejecting a Ring claim where the jury unanimously found Davis guilty of first-degree murder under a felony-murder theory, which supports the aggravating factor of murder in the course of a felony); Johnson v.

State, 969 So.2d 938, 961 (Fla. 2007)(concluding "Johnson is not entitled to relief under *Ring* because the 'murder in the course of a felony aggravator' rests on the separate convictions of kidnapping and sexual battery, which satisfies Sixth Amendment requirements."); Cave v. State, 899 So.2d 1042, 1052 (Fla. 2005)(rejecting a Ring claim in part because one of the aggravating circumstances found by the trial court was that the murder was committed in the course of two felonies and Cave had been found guilty by a unanimous jury of both felonies).

Florida's death penalty statute is not unconstitutional under Ring. Thus, the trial court properly denied the motion.

PROPORTIONALITY

Although not raised as an issue on appeal, this Court has an independent duty to address the proportionality of the death sentence. England v. State, 940 So.2d 389, 407 (Fla. 2006)(noting: "this Court conducts a review of each death sentence for proportionality, regardless of whether the issue is raised on appeal."); Fla. R. App. P. 9.142(a)(6)(stating: "In death penalty cases, whether or not insufficiency of the evidence or proportionality is an issue presented for review, the court shall review these issues and, if necessary, remand for the appropriate relief."). Here, there are four aggravators including the HAC and the prior violent felony aggravator. As this Court has stated, the prior violent felony aggravator and HAC aggravators are "two of the most weighty in Florida's sentencing calculus." Sireci v. Moore, 825 So.2d 882, 887 (Fla. 2002). This Court has found the death sentence to be proportionate in factually similar cases involving a serial murderer or a serial rapists/murderer. Conde v. State, 860 So.2d 930, 959 (Fla. 2003)(concluding a death sentence was proportionate for a serial murderer of six prostitutes); Rolling v. State, 695 So.2d 278, 297 (Fla. 1997)(concluding a death sentence was proportionate for a serial rapists/murderer convicted of five counts of first-degree murder and three counts of sexual battery citing cases). The death sentence in this case is proportionate.

CONCLUSION

Based on the foregoing, the State respectfully requests this court to affirm the conviction and death sentence.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Nada Carey, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, by MAIL on June 15, 2009.

Respectfully submitted and served,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

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