IN THE SUPREME COURT OF FLORIDA

RAYMOND BRIGHT,

Appellant,

v. CASE NO. SC09-2164

STATE OF FLORIDA,

Appellee.

_____/

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

ANSWER BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

Appellant, RAYMOND BRIGHT, was the defendant in the trial court; this brief will refer to Appellant as such or by name. Appellee, State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State.

The record on appeal consists of eleven 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. All citations are followed by any appropriate page number.

All bold-type emphasis is supplied, and all other emphasis is contained within original quotations unless the contrary is indicated.

STATMENT OF THE CASE

On April 24, 2008, a Duval County Grand Jury indicted Bright on two counts of first degree murder (I 20). The charges stemmed from the February 19, 2008 murders of twenty year old Derrick King and sixteen year old Randall Brown. At the time of the murders, Bright was 54 years old (I 1-3).

Bright pleaded not guilty and proceeded to trial. Richard Kuritz and James Nolan represented Bright at trial. At the time of trial, both Mr. Kuritz and Mr. Nolan had more than thirteen years of experience as a Florida lawyer.[1]

Trial began on August 24, 2009 with jury selection. Bright admitted that he killed King and Brown. Bright contended, however, that the murders were justifiable. Bright claimed he killed King and Brown in self-defense.

The State called fourteen witnesses. At the conclusion of the State's case, Bright moved for judgment of acquittal, on the ground that the State failed to offer proof of premeditation. Bright claimed that "even in the light most favorable to the State, everything has been that it was a result of a combat as of result of ... him being assaulted by a weapon" (XI 641). The trial court denied the motion (XI 642).

Bright called two witnesses and rested his case (XI 644-650, 656). Bright did not testify. Bright renewed his motion for

[1]**Error! Main Document Only.**http://www.floridabar.org

a judgment of acquittal, again arguing that the State presented insufficient evidence of premeditation to go to the jury (XI 658). The trial court denied the motion (XI 658).

The trial court instructed the jury only on premeditated murder. The court did not instruct the jury on felony murder (XI 760-761). The trial judge also instructed the jury on self-defense (XI 765-769).

On August 26, 2009, the jury found Bright guilty of two counts of first degree murder (II 333-336, XI 788-789). The penalty phase commenced on September 1, 2009 and lasted one day (V 812-940, VI 941-1039).

The State called several witnesses to testify at the penalty phase. The State's first witness was Sergeant Robert Bell of the Pensacola Police Department, who testified about the facts underlying Bright's 1990 conviction for armed robbery (V 826-831). After Sergeant Bell testified, the parties stipulated that Bright had previously been convicted of armed robbery in January 1990 (V 831-832).

The State also called three victim impact witnesses who testified about Randall Brown's uniqueness and how his death caused a loss to the community (V 832-843). Three others testified about Derrick King's uniqueness and how his death caused a loss to the community (V 843-853). All of the victim impact witnesses read prepared statements. Bright posed no

objection to the victim impact testimony (V 818). Bright called eight witnesses in mitigation and rested his case.

The trial judge instructed the jury on two aggravators for both murders; prior violent felony and HAC (VI 1022-1024). The trial judge instructed the jury on one statutory mental mitigator (extreme emotional distress) and the catch-all mitigator (VI 1025). The trial court also instructed the jury it could not consider the victim impact testimony in aggravation or in rebuttal to a mitigating circumstances (VI 1025).

On September 1, 2009, the jury returned a recommendation of death for both murders. The jury vote was 8-4 for each murder (III 520-521).

On October 6 and October 15, 2009, the trial judge held a *Spencer* hearing. Bright called five witnesses, including Dr. Ernest Miller, to testify on his behalf (VII 1110-1208).

On November 6, 2009, Bright filed a motion for a new trial (IV 704-705). On November 12, 2009, the trial court denied the motion (IV 705).

On November 19, 2009, the trial judge held a sentencing hearing in Bright's case. The trial judge sentenced Bright to death for both murders (VI 1053-1061). The trial court advised Bright he had found two statutory aggravators for each murder and considered 22 mitigators (VII 1057).

The same day of the sentencing hearing, the trial judge entered his sentencing order (IV 710-732). Although the trial judge had orally pronounced that he had found two statutory aggravators, his sentencing order listed three aggravators: (1) prior violent felony (contemporaneous murder against other victim) (2) prior violent felony (armed robbery) and (3) the murder was especially heinous, atrocious or cruel (HAC). The trial judge assigned great weight to each aggravator (V 710-717).

In mitigation, the trial court found that at the time of the murder, Bright was under the influence of an extreme emotional disturbance at the time of the murder (V 718). The trial court gave this statutory mitigator some weight (V 719).

The trial court rejected Bright's suggestion that at the time of the murder, his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired. The trial court found the mitigator had not been proven and assigned it no weight (V 721).

In non-statutory mitigation, the trial court considered all twenty-one (21) factors suggested by Bright in his sentencing memorandum (V 680-699). The court found nineteen (19) of those mitigators had been established and assigned weight to each one. The court found: (1) Bright has a long and well documented history of drug abuse (some weight); (2) Bright has repeatedly

sought help for his problems (some weight); (3) Bright is remorseful (little weight); (4) Bright was afraid of the victims and took steps to get them out of his house (little weight); (5) Bright served 10 years in the Marine Corps with two honorable discharges and a third discharge under honorable conditions (considerable weight); (6) Bright has skills as a mechanic and served as an aviation mechanic in the Marine Corps (some weight); (7) Bright's actions as a USMC aviation mechanic most likely saved lives (some weight); (8) Bright mentored young mechanics (some weight); (9) Bright was a good employee (some weight); (10) Bright was a loving, caring, and giving boyfriend (slight weight); (11) Bright was a good brother (some weight); (12) Bright is a good father and a sentence of death would have serious negative impact on others (slight weight); (13) Bright shares love and support with his family (slight weight); (14) Bright was a good friend (slight weight); (15) Bright was an exceptional inmate (some weight); (16) Bright has demonstrated good behavior throughout the court proceedings (slight weight); (17) Bright maintained gainful employment (considerable weight); (18) Bright is amenable to rehabilitation and a productive life in prison (slight weight); and (19) Bright bonded with another inmate and taught him to read (slight weight) (V 719-729).

The trial judge found that two of the non-statutory mitigators suggested by trial counsel had not been proven.

Accordingly, the trial court assigned no weight to: (1) Bright has attempted to have a positive influence on family members despite his incarceration (not proven, no weight) and (2) Bright provided information that helped resolve this case (not proven, no weight) (V 723, 727-728).

Bright did not move for rehearing on the grounds the trial judge erred in separating the two prior violent felony convictions into two aggravators. Instead, on the same day the sentencing order was entered, Bright filed a notice of appeal (VI 1040). This appeal follows.

STATEMENT OF THE FACTS

On February 19, 2008, Raymond Bright murdered 16 year old Randall Brown and 20 year old Derrick King. Bright murdered both young men by beating them to death with a hammer.

Bright did not dispute that he killed Brown and King. Bright's theory at trial was that he killed Brown and King in self-defense. The State's theory was that Bright killed both men as they lay sleeping on a recliner and chair.

Michael Majors testified that he and Randall Brown went over to Bright's home about 3:00 in the afternoon on February 18, 2008 (IX 327). Derrick King was already there. King and Bright were playing chess. Nothing seemed amiss (IX 327-328). Bright and King seemed to be getting on fine together and Majors saw no argument between them (IX 328). Bright never asked King, Majors, or Brown to leave (IX 329).

While at the house, Majors saw Bright doing drugs. Bright had a "stem" in front of him. Majors explained that a stem is used to smoke crack cocaine (X 329).

About eight o'clock in the evening, Majors and Brown left.[2] A friend of Majors picked them up from Bright's house and

[2]Majors left the house between the time he first arrived and the time he left the house for the last time that evening. Majors went to McDonalds. When he returned, he noticed that Brown, King and Bright had ordered pizza (IX 329).

dropped Brown off at Brown's house (IX 331). Majors never saw Brown alive again (IX 331).

Brown did not stay at home, however. After taking a shower and a phone call, Brown asked his mother if he could use the car she had rented to attend a revival in Georgia (IX 317-318). Reverend Brown gave her son the keys to the car. Brown left the house between 9:00 p.m. and 9:30 p.m. At about 11:00 p.m., Reverend Brown called her son. Brown told her that he was on his way home. He never came home (IX 319).

Michael Majors got worried the next morning when he discovered that Brown had not come home the night before (IX 332). Majors tried to call both Brown and Derrick King. There was no answer (IX 331-332).

Majors went over to Bright's house. A friend named Jermaine drove Majors over to Bright's home. Majors saw that Reverend Brown's rental car was parked near Bright's house (IX 333).

Majors went up to the door and knocked. There was no answer (IX 332-333). Majors went around the house and found the bathroom window was up. He climbed into the window (IX 332).

Majors saw signs that someone had been scrambling through clothes (IX 335). Majors grabbed a candleholder in case someone was in the house (IX 335).

Majors walked into the living room and then the den. He saw his two friends there dead in the family room (IX 336). There

was blood all on the walls (IX 336). Majors ran out of the house and called 911.

When the Crime Scene Investigation team arrived at Bright's home, Detective Deborah Brookins found Brown and King dead (X 449). One victim (Brown) was in a recliner and the other (King) was on the floor (X 449, 452).

King was wrapped in a comforter. The couch was saturated with blood (X 452). Blood was spattered all over the couch, on the wall behind the couch and on the lampshades (X 453). The main concentration of blood around King's body was around the couch (X 457).

Detective Brookins found Randall Brown's body in a recliner. A blanket was over the top of his head (X 455). The chair was saturated with blood primarily to the left and lower back. There was blood spatter on the back of the wall and some significant bloodletting where Brown's head had been. Detective Brookins told the jury that she found a pool of blood on the floor by the chair. There was also blood on the ceiling (X 464).

In addition to the blood evidence, Detective Brookins recovered a fired 9mm projectile and a shell casing (X 471, 475). The bullet went through a chair and into a doorframe (X 471-474). The shell casing was found in the master bedroom on the bedding (X 475). A live 9mm round was found under the couch

(X 463). Another live round (a 7.62mm) was found on the top of the television (X 459).

On one area of the carpet, Detective Brookins found suspected gunshot residue (X 463, 471). Detective Brookins told the jury that in her opinion the gunshot residue on the carpet indicated the gun was fired from an area within inches of the floor (X 484). This means the gun was fired when the weapon was on the carpet or very near to the carpet (X 484).

Outside the home, the crime scene technicians found a loaded 9mm pistol and a loaded SKS assault rifle (X 443-444). The weapons were covered up with leaves (X 445). The rifle was still dirty from where it had been in the ground (X 445-446). A live round was found nearby (X 496).

Crime scene technicians did not find the murder weapon immediately. The hammer was not visible. The next day, detectives located the hammer hidden outside (X 496). Bright's ex-wife, Bridget Bright, told the police where the hammer was (X 523).

The parties stipulated that DNA analysis of blood found on the hammer revealed a mixture of DNA with a major and minor contributor. Derrick King was the major donor and Randall Brown could not be excluded as the minor donor (X 508). No fingerprints were lifted from the guns, the shell casing, the live rounds, or the hammer for fingerprint analysis (X 513-514).

Dr. Margarita Arruza performed the autopsy of the body of Randall Brown on February 20, 2008 (IX 366). The cause of death was blunt head trauma (IX 368). Brown was 5’10" and he weighed 147 pounds (IX 368). He was sixteen years old (IX 369). Dr. Arruza described injuries both to Brown’s body and to his head and face. First, his head and face. Dr. Arruza told the jury that most of Brown’s injuries were to the top and right side of his head. Brown had lacerations, fractures, and contusions. Dr. Arruza told the jury she had a “long list” of Brown’s injuries (IX 370).

Dr. Arruza testified that she found semi-circumferential (curved) wounds to the top of Brown’s head. Brown would have been alive when the injuries were inflicted (IX 372-373).

On the right side of Brown’s head, Dr. Arruza found a laceration on the top of the head and additional lacerations below the ear, around the front of the ear, on the ear, on the back of the head. She pointed out four abrasions as well. Pointing to State’s exhibit 125, Dr. Arruza pointed to lacerations and one displaced fracture (IX 372). At least one laceration goes all the way from the skin to the bone (IX 371). He had bruising around the right eye, several partial thickness lacerations, frontal scalp lacerations, and a partial thickness laceration of the ear (IX 379). In all Brown suffered about 8-10 skull fractures if not more (IX 381-382). Brown also suffered

one cave-in injury. If he had suffered the cave-in injury first, he would not have been fighting any more. She suspects therefore the cave-in injury was not the first blow (IX 379).

Brown's jaw was fractured. The jaw fracture would have been painful (IX 380). All his injuries would have been painful (IX 380).

Next, his body. Apart from his head injuries, Brown suffered 14 injuries to his body (IX 370).

Brown's left arm was fractured (IX 382). Dr. Arruza opined that Brown's arm was probably broken when Brown tried to defend himself (IX 382). Superficial wounds on Brown's left arm could be consistent with defensive wounds (IX 374-376).

Dr. Arruza also found abrasions and superficial lacerations on Brown's right arm. In total, Brown had nine separate injuries to his right arm through the arm to the fingers (IX 375). It is possible those wounds are defensive wounds (IX 375).

A toxicology screen was done on Brown's blood and urine. Brown was "clean." He had no alcohol or drugs in his system (IX 385).

Dr. Arruza opined that Brown's injuries were consistent with him being seated in the recliner, someone coming up to him and hitting him over and over with the hammer and Brown attempting to defend himself until he succumbed (IX 385). The

injuries are also consistent with Brown being in pain until the final fatal blow was inflicted (IX 385).

Dr. Eugene Scheuerman testified that he did the autopsy on Derrick King. Like Brown, the cause of King's death was blunt head trauma (IX 393).

At the time of his death, King was 6'5" and 163 pounds. He was 20 years old.

Dr. Scheuerman described the wounds to King's head, face, and body. First, King's head and face. King had multiple head wounds. Dr. Scheuerman described these as wounds that were "all over his head" (IX 394). There were more wounds on the front and left side of King's head than there were on the back, the top or the right side but there were wounds on all sides (IX 394). In all, Dr. Scheuerman found 38 contusions, lacerations, abrasions, and fractures to King's head (IX 394).

Using State's Exhibit 130, Dr. Scheuerman pointed out King's injuries. King had a bruise of the lip, a laceration of the right eyebrow, a laceration of the right upper eyelid, a large laceration of the mid forehead, an abrasion above and to the left of that as well as a laceration. Further to the left but still on the front of the face is another laceration. Just above that and actually involving a little bit of the eyebrow is another laceration and there is a laceration in the medial

canthus (the soft tissue and skin between the eye and nose) (IX 395).

Dr. Scheuerman told the jury that State's Exhibit 130 shows that Mr. King's face was misshapened by blunt impact (IX 396). That impact combined with the blunt impact that caused a big sort of Y laceration on King's forehead, resulted in a number of facial and skull fractures (IX 396). King's frontal bone (forehead) was fractured as were the sphenoid sinuses. Dr. Scheuerman described this as an open fracture with bone missing (IX 396). King's nose was fractured and the left orbit was fractured. (IX 396).

On the left side, King had a bruise on the jaw line and on the left side of his neck. He had a bruise on his ear (IX 397).

Dr. Scheuerman found a starburst or star-like laceration on the top of King's head that exposed brain and bone (IX 397-398). The bone beneath the laceration had been fractured and some of the bone was driven into the brain resulting in tears or lacerations of the surface of the brain (IX 398). King had multiple lacerations coming all the way down to the ear (IX 398). Behind the ear, there was a bruise with an abrasion and below that another abrasion (IX 398).

A number of lacerations to King's head had a curved nature to them (IX 399). King had a large bruise on the left side of

the neck that extends around toward the back of the neck (IX 400).

Dr. Scheuerman cannot tell which of the head injuries were fatal. With a constellation of blows to the head, multiple pressure waves are passing through the brain. There are a couple of head injuries that resulted in open skull fractures with brain lacerations. Those could be lethal injuries but he cannot exclude others. In his opinion, the constellation of blunt impact to King's head caused his death (X 411). Assuming he was conscious, the wounds would have been painful (X 411). He cannot tell at what point King would have been rendered unconscious (X 412). The injuries inflicted to King were consistent with being inflicted by a hammer (X 412).

In addition to 38 wounds to his head, Dr. Scheuerman described about 20 other wounds to King's body. Dr. Scheuerman found a bruise in the center of his back (IX 398).

Dr. Scheuerman testified that King had a large red-purple bruise that involved most of King's left forearm on top. There are a number of small abrasions and a larger abrasion that is curvilinear (X 406).

King also had a bruise that involved most of the back of the hand (X 407). Within that bruise are several abrasions. State's Exhibit 139 depicted wounds to King's right arm. Dr. Scheuerman described those as four abrasions that run alongside

the ulnar side of the forearm. The wounds would have been consistent with being struck with an instrument four separate times (IX 407).

King also had a large abrasion over the top right index finger and an abrasion on the right long finger (X 408). King had an abrasion to each knee (X 408). They were not consistent with carpet burns (X 423).

The blunt injuries to King's extremities are consistent with defensive wounds (X 409). He can only say consistent because to actually call them defensive wounds you would have to see the beating and the attempt to defend oneself (X 409). In all, King had 38 wounds of the head and neck and at least 20 individual wounds to the extremities (X 415).

Toxicology results showed no alcohol in King's system. In the iliac veins, there was a trace of cocaine and a trace of a breakdown product of cocaine (X 415-416). King's urine tested positive for cannabinoids. Dr. Scheuerman said it is likely the cocaine ingestion was close in time to his death because it metabolizes quickly and it was not all metabolized (X 416).

Dr. Scheuerman testified that King's wounds were not consistent with him lying in one position throughout the whole attack (X 417). King had head wounds on all surfaces, front, back, right, left, and the top of the head (X 417). The wounds to the back of the head would be consistent with King having his

head down at some point during the attack (X 417). Dr. Scheuerman cannot tell if the wounds to the front of King's head were inflicted while King was laying down or standing up (X 417-418).

Bridget Bright, Bright's ex-wife, testified that she picked up Bright about 7:30 in the morning on the morning of the murder (X 517). She spoke to him the night before just after midnight and made the arrangements to meet (X 537).

The clothing Bright was wearing, when she picked him up, had blood on them. She threw them away after Bright was arrested (X 518-519). Ms. Bright told the jury that before she threw the clothes away, she told the police about them. They did not want the bloody clothes (X 532).[3]

The police came to Ms. Bright's house to arrest Bright in the early morning hours of February 20, 2008. When the police arrived, Bright went toward the back of the house. Ms. Bright lied to the police and told them Bright was not at home (X 520). Ms. Bright told the jury that she and Bright had already

[3]Detective Dan Jansen was one of the arresting officers. Jansen testified that Ms. Bright never attempted to turn over Bright's clothes to him. No one on his team refused an offer of bloody clothes (X 543-544). The officers later learned that Ms. Bright had thrown away the clothes. They did a search of the trash can on the side of Ms. Bright's home. However, the trash had already been picked up and the clothes were never recovered (X 547-548).

consulted with an attorney and made arrangements to go and talk to the police the next day (X 523-524).

Bright told Benjamin Lundy that he killed King and Brown (X 561). Lundy and Bright had worked together at Asbell Truck Center (X 558-559).

Ms. Bright came up to him on the afternoon of February 2008, and got him from the shop to talk to Bright. Bright told Lundy that he was in big trouble (X 561). Bright told Lundy he had “screwed up” (X 561). Bright told Lundy that he thought he killed two guys (X 561).

Lundy told the jury that some gentlemen had been renting his house and they were doing something they shouldn’t be (X 561). Bright told Lundy that he woke up in the middle of the night to get a drink. Bright reported that one man was on the couch and the other one was on the chair. According to Bright, the one on the couch (King) woke up and accused Bright of stealing his drugs. An argument broke out. The other fellow got up and somewhere a gun was produced and they were arguing over the gun. The gun went off and somehow Bright wound up with the gun. Bright tried to use the gun and it would not fire (X 563). Bright told Lundy that he tried to leave the house but tripped and fell. When he fell, he found a hammer. Bright told Lundy that he got up and one of them grabbed the gun and came at him. Bright hit him. When the other guy went for a gun, he hit him

too. Bright told Lundy that he did not really know what happened after that but he hit them every time they moved (X 563). Later he woke up “or something” and he was all covered in blood (X 564).

In Mr. Lundy’s view, Bright was an outstanding individual. He would give you the shirt off his back and would help you out. Bright was a mechanic. He knew his job (X 566).

Lundy told Bright that he needed to turn himself in (X 572). Bright told Lundy that he had already contacted a lawyer and was going to meet with him the next day to turn himself in. He got arrested before then, however (X 567).

Bright also told an inmate about the incident. However, the inmate told an entirely different story.

Mickey Graham knew Bright before meeting him again in jail on February 20, 2008. They were friends (X 581). In jail, they hung out together. He and Bright played chess and checkers together (X 581). Bright told him what happened at his home on February 19, 2008.

Bright told Graham that he had been drinking the night before. He got up about 2:00 to go get some more ice for his glass. Bright told him about two men who were in the den. According to Bright, the older one was lying on the couch and the younger one was in the chair (X 582). Bright told Graham that the younger one (Brown) asked “Uncle, what are you doing?

What you doing in there?" (X 583). Bright told Brown he was getting ice for his glass (X 583).

Bright told Graham that Brown had a gun in his hand and was waving it around (X 583). Bright did not say anything about either young man accusing him of stealing his drugs (X 586). Nor did Bright tell Graham he had an argument with Brown.

Bright told Graham that the older one (King) woke up and admonished Brown about waving the gun around. According to Bright, King took the gun away from Brown (X 584).

Once King got the gun, Bright tried to take the gun away from King. Bright did not tell Graham that King or Brown were threatening him in any way (X 584). Bright told Graham that he and King struggled over the gun when Bright tried to take it away from King. Bright told him that during the struggle he put his hand over the slide so it would not fire (X 585). However, during the struggle, the gun went off (X 585). King was startled by the shot and let go of the gun. Bright now had the gun, pointed it at King, and tried to fire it again (X 585). It misfired (X 585). Bright told Graham they were both standing up when the gun fired (X 588). Graham did not recall Bright telling him that he was on the floor when the gun went off (X 588).

Bright told Graham that when the gun misfired, he dropped it and tried to run out of the house. He headed for the kitchen and tripped and fell (X 586). He came up with the hammer (X

586). Bright told Graham that he started hitting King back into the den area and back toward the couch where King had originally been lying (X 586-587). Bright told Graham that he turned around and saw Brown on the floor trying to pick up the gun. Bright started hitting him with the hammer (X 587). After he hit him, Bright turned back around and saw King reaching underneath the sofa where there was an AK-47. Bright started hitting King again (X 587).

Bright told Graham that after the attack, he sat down in a chair. He was out of breath and thought he was having a heart attack (X 588). Bright told Graham that as he was recovering, he heard a gurgling sound and then it got quiet (X 589).

Bright told Graham that he threw the two guns out the bathroom window and buried the hammer (X 589). Graham came forward on March 12, 2008, and again on March 26, 2008, and told the police what Bright had told him. At that point, he had not seen any police or news reports about the murders (X 590).

Graham told the jury that he came forward because he hoped to help himself in his own cases (X 593). At the time of trial, he was pending robbery charges and sentencing on drug charges for which he entered a plea (X 593-598).

Bright told him that a man named Lavelle Cooper had moved into his house and was bringing his friends around.[4] Graham told the jury that Bright told him that Cooper and his friends had taken over his house, cooking crack and running a crack operation out of his house (X 599). Bright told Graham that he was calling the police to try to get these people out of his house. Bright did not want them in his house (X 600). Bright never mentioned that King was one of Cooper's friends (XI 608). Bright did say that Brown just sat on the recliner and covered himself with a blanket to protect himself while Bright was hitting him (XI 608).

The parties stipulated that gunshot residue kits were taken from both victim's hands (XI 610). Gunshot residue was not found on either victim's hands (XI 610). A person who shoots a gun will not necessarily have gunshot residue on his hands (XI 627).

David Warniment testified that the bullet recovered from the doorframe was fired by the 9mm pistol found outside Bright's home (XI 622). During testing, Warniment found the weapon to be in good working order (XI 616). He found no reason for the gun to misfire (XI 616-617, 619).

[4]Michael Majors was apparently a friend of Cooper's and had come over to Bright's house on February 18, 2008, to see Cooper. Cooper was not there because he was in jail. King was also a friend of Cooper's (IX 323-324).

Warniment told the jury that if someone got their hand on the slide and prevented a fired casing from ejecting, the gun would jam the next time someone pulled the trigger (XI 629). Depending where on the slide this person had their hand, a person may or may not get his hand pinched (IX 630).

Warniment also examined the area of carpet that contained gunshot residue (XI 622). In his opinion, given the shape of the stain and the amount of gunshot residue on the carpet, the gun was fired within three to six inches from that spot on the carpet (IX 626).

The parties stipulated that fingernail clippings were taken from both King and Brown after death. No foreign DNA were found on either man (IX 639). In other words, Bright's DNA was not found on or underneath King or Brown's fingernails (IX 639-640).

Bright called two witnesses to testify on his behalf. Bright's sister, Janice Jones, testified that Bright enlisted in the Marine Corps. He was not in the Marine Corps at the time of the murder (XI 645).

Michael Bossen testified that he is a defense lawyer in Jacksonville. He was a criminal defense lawyer on February 18-19, 2008. Mr. and Ms. Bright contacted him on February 19, 2008 (XI 650). Mr. Bossen did not report the substance of his conversation with Bright and Ms. Bright (XI 650).

SUMMARY OF THE ARGUMENT

ISSUE I: By waiting until the conclusion of the State's closing to object, and by failing to obtain a ruling on the objection, Appellant has failed to preserve this issue for review. Even if the issue were preserved, the court did not err in denying the motion for mistrial because a more rational interpretation of the prosecutor's remark shows that it was a comment on the evidence, not a comment on Bright's failure to testify. Finally, even if the court had erroneously denied Bright's objection to the comment, such error was harmless beyond a reasonable doubt.

ISSUE II: First, the issue was not preserved for appeal. Bright did not file a motion for rehearing or otherwise bring this alleged error to the trial court's attention. Had he done so, any error could have been resolved before this matter came before this Court. Second, the record as a whole, including the written jury instructions, the instructions read to the jury, and the trial judge's oral pronouncements at the sentencing hearing, supports a finding the trial judge actually considered both of Bright's prior violent felony convictions as one aggravator, not two. Third, even if this Court were to find the judge improperly doubled the prior violent felony aggravator, any error is harmless beyond a reasonable doubt.

ISSUE III: The record includes ample evidence to support the HAC aggravating circumstance.

ISSUE IV: Comparing this case to similar capital cases, it is clear that the death sentence was proportional to the murder.

ISSUE V: This Court has repeated rejected the Ring claims Appellant asserts here, and should do so again in this case.

ARGUMENT

ISSUE I

DID THE TRIAL COURT ABUSE ITS DISCRETION IN RULING THAT A PROSECUTOR'S COMMENT IN CLOSING WAS NOT A COMMENT ON APPELLANT'S EXERCISE OF HIS RIGHT NOT TO TESTIFY? (Restated)

Standard of review:

A ruling that evidence does not constitute an impermissible comment on the defendant's right to remain silent is reviewed for abuse of discretion. See *Duncan v. State*, 659 So. 2d 1283 (Fla. 4th DCA 1995).

A decision on a motion for a mistrial is within the discretion of the trial judge and such a motion should be granted only in the case of absolute necessity. *Snipes v. State*, 733 So.2d 1000, 1005 (Fla. 1999).

Under the abuse of discretion standard, a trial court's ruling will be upheld unless the "judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable [person] would take the view adopted by the trial court." *Trease v. State*, 768 So.2d 1050, 1053 n. 2 (Fla. 2000).

Trial court ruling:

The disputed comment occurred during the prosecution's initial closing argument. The full context of the comments was as follows:

Keep in mind that the defendant had hours, 8 to 12 or so depending on when the crime occurred, to come up with a version of what he would tell happened in his home, plenty of time for him to come up with a story, a story that as I just told you does not match at all with the physical evidence.

Let's consider one thing that he told to Mickey Graham. If you recall, he told Mickey Graham that this victim, Mr. Brown, fell back into the chair and then grabbed a blanket to put over his face to protect himself. Does that make any sense at all? How would Randall Brown have picked up a blanket if he's being hit repeatedly in the head? Because you already know that all of Mr. Brown's injuries were to his face and to his forearm where he was protecting himself.

It's clear that this blanket is on top of him, not under him. So in order for that to have even occurred, for him to be able to pick a blanket up to protect himself, he would have had to already be in the chair with the blanket on top of him as he was sleeping or watching television. It is completely ludicrous to believe that Mr. Brown somehow picks a blanket up off the floor or scoots a blanket out from under him as he's being hit in the head. That makes absolutely no sense with the physical evidence at the scene.

The defendant cannot admit to you that it was planned. He can't admit to his friends and family members that it's planned, and yet he could not escape the crime. It was in his home with his hammer. People knew that Derrick King was at his house. Michael Majors told you that he had been there that night and that Derrick King was there and that when Michael Majors left the home, Derrick King was still there. The defendant couldn't escape his actions, and yet he couldn't admit the truth.

The brutal nature of this crime shows you the defendant's intent. He told you a story through his friend and the inmate from the Duval County Jail, but that doesn't mean

> that that's what happened. That just means that's what he said happened. It's completely absurd when taken in light of the physical evidence found at the scene.
>
> The physical evidence doesn't lie and the defendant could not change the pattern of injuries that his victims had. He could not change that their wounds were all on their face and head and arms as they tried to protect themselves from his brutal attack.
>
> His victims remained exactly where he left them with the injuries that he inflicted. And his intent is shown all over their heads and their faces. And he is guilty of first-degree premeditated murder.

(XI 691-693).

Bright did not object during this portion of the prosecutor's argument. Instead, Bright's counsel waited until the prosecutor had finished, then asked to go to side-bar. Counsel objected and moved for a mistrial, claiming that the prosecutor's comment that Bright "can't admit to you that he planned it" was an improper comment on his right to remain silent (XI 694). The prosecutor responded that the comment was "said in context with the stories that he told to the people, and the point was that he wasn't going to admit that he did it, meaning there were statements from him that were brought to the light of the jury" (XI 694-95).

The court denied the motion for mistrial, finding that "the argument was in the context of what the defendant said to other people," that the prosecutor was "just explaining those

conversations," and ruling that it was "clearly not a comment on his right to remain silent" (XI 695). The court did not sustain or overrule the objection.

Preservation

"In order to preserve a claim of improper prosecutorial argument, '[c]ounsel must contemporaneously object to improper comments.'" *Hayward v. State*, 24 So.3d 17, 40 (Fla. 2009), citing *Bailey v. State*, 998 So.2d 545, 554 (Fla. 2008). In *Nixon v. State*, 572 So.2d 1336 (Fla. 1990), this Court explained why a belated mistrial motion does not preserve a complaint regarding the prosecution's closing argument for appellate review.

The prosecutor in *Nixon* made a comment during closing that the defense characterized as a "Golden Rule" argument. *Nixon* at 1340. At the close of the State's argument, defense counsel moved for a mistrial, claiming that a curative instruction would be ineffective at that point. *Id.* The trial court denied the motion, finding that the comment at issue was not a Golden Rule argument. *Id.* This Court found that the motion was not timely and, therefore, did not preserve the issue for review. Noting that "[t]he requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of the judicial system," in that it "places the trial judge on notice that an error may have been committed and thus, provides the opportunity to correct the error at an early stage of the

proceedings," this Court held, "[w]hile the motion for mistrial may be made as late as the end of the closing argument, a timely objection must be made in order to allow curative instructions or admonishment to counsel." *Id.* at 1341. See also *Norton v. State*, 709 So.2d 87 (Fla. 1997)(holding that the failure to raise a contemporaneous objection to a comment at the time it was made waived the right to argue the issue on appeal; "despite appellant's motion for mistrial at the close of the witness's testimony, his failure to raise an appropriate objection at the time of the impermissible comment failed to adequately preserve the issue for appellate review"). See also *Deliford v. State*, 505 So.2d 523, 524 (Fla. 3d DCA 1987)(rejecting claim that the trial court erred in denying a defense motion for a mistrial based on the prosecuting attorney's closing argument to the jury because "the defendant did not object to the complained-of argument until after the prosecuting attorney had completed his argument, and, accordingly, the point has not been properly preserved for appellate review").

Nixon and *Norton* apply here. Rather than objecting to the offending remark when it was made, when it could have resulted in "curative instructions or admonishment to counsel," Appellant simply waited until after the prosecutor concluded her closing

argument and then objected and moved for mistrial.[5] The issue is not preserved for review.

Merits:

Even if the issue were preserved for review, Appellant could still not demonstrate that the comment vitiated the entire trial.

A mistrial is appropriate only when the error committed was so prejudicial as to vitiate the entire trial. *See Duest v. State*, 462 So. 2d 446, 448 (Fla. 1985). A motion for a mistrial should be granted only in the case of "absolute necessity." *Snipes v. State*, 733 So.2d at 1005. "In order for the prosecutor's comments to merit a new trial, the comments must either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise." *Spencer*

[5]The State cannot accept trial counsel's suggestion that he did not object at the time because he "didn't want to draw attention to [the prosecutor's remark] as it was happening" (XI 694). This argument may apply where an improper comment could have escaped the jury's notice and a curative instruction would not genuinely cure the error. However, an improper suggestion to the jury to draw a negative inference from the defendant's failure to testify is an ideal situation for a curative instruction on that point of law, as well as an extra opportunity to have the court remind the jury about the defendant's right not to testify.

v. State, 645 So.2d 377, 383 (Fla. 1994). Applying these standards, the court did not abuse its discretion in denying Appellant's motion for mistrial.[6]

The United States Constitution provides that "[n]o person shall ... be compelled in any criminal matter to be a witness against [one]self." U.S. Const. Amend. V. To support this right, the prosecution is prohibited from commenting on the defendant's invocation of this right by choosing not to testify. *Griffin v.*

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[6]The State is applying the mistrial standard rather than the erroneous-ruling standard here. Although Bright's counsel did object to the comment (albeit not contemporaneously) in addition to moving for mistrial, Bright never secured a ruling on the objection. Instead, the court only ruled on the motion for mistrial. Pursuant to *Poole v. State*, 997 So.2d 382, 391, fn.3 (Fla. 2008), this Court reviews such claims under the mistrial standard:

> **However, the [erroneous-ruling] standard does not apply here because after defense counsel simultaneously objected and moved for a mistrial, the trial judge never ruled on the objection, but simply denied defense counsel's motion for mistrial.** As a result, the trial court's ruling on the motion for mistrial is reviewed under an abuse of discretion standard.

Dessaure v. State, 891 So.2d 455, 464-65, n.5 (Fla. 2004), reaches the same conclusion. Defense counsel objected to the comment and moved for mistrial simultaneously, but "never waited for or requested a ruling on his objection prior to moving for a mistrial," and the trial judge "never expressly ruled on the objection." Under these circumstances, this Court reviewed the comment under the mistrial standard.

California, 380 U.S. 609, 85 S.Ct. 1229 (1965).[7] "Any comment on, or which is fairly susceptible of being interpreted as referring to, a defendant's failure to testify is error and is strongly discouraged." *Rodriguez v. State*, 753 So.2d 29, 37 (Fla. 2000). However, this Court draws a distinction between impermissible comments on silence and permissible comments on the evidence in the case. *Id.*

The comment here was a fair comment on the evidence rather than an impermissible comment on Bright's failure to testify. *Dessaure v. State*, 891 So.2d 455 (Fla. 2004), aptly addresses these principles and demonstrates that the court here did not err. In opening statement in *Dessaure*, the prosecutor remarked that Dessaure had said that "only two people knew what happened in the victim's apartment," so the State had to reconstruct what happened with scientific and other evidence. *Dessaure*, 891 So.2d at 464. Defense counsel objected and moved for a mistrial, arguing that the State had commented on Dessaure's right to

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[7]After noting in closing argument several questions the evidence raised to which the defendant "would know" the answer, the prosecutor in *Griffin* stated the following:

> These things he has not seen fit to take the stand and deny or explain.
>
> And in the whole world, if anybody would know, this defendant would know.
>
> Essie Mae is dead, she can't tell you her side of the story. The defendant won't.

Griffin, 380 U.S. at 611, 85 S.Ct. at 1231.

remain silent. The State responded that the evidence would show that Dessaure had told a fellow inmate "there [are] only two people that know, her and me." In fact, the fellow inmate did testify that Dessaure had told him, "Don't nobody know what happened but him and her." *Id*. at 465.

This Court held that the trial court did not err in denying Dessaure's motion for mistrial, calling the prosecutor's statement "a fair characterization of the evidence that was presented at trial." *Id.* at 466. This Court also noted that the trial court had issued the following instruction before opening statements:

> In every criminal proceeding, a Defendant has an absolute right to remain silent. At no time is it the duty of the Defendant to prove that he is innocent. From the exercise of the Defendant's right, you are not permitted to draw any inference of guilt and the fact that the Defendant did not take the stand to testify must not influence your decision in any way.

Id. This Court also noted that the comments were made during opening statements and not closing argument; they were not repeated in closing argument; and the statement was made in passing. *Id.*

The prosecutorial comment here was similar to the one in *Dessaure*; in fact it was less susceptible of interpretation as a comment on the right not to testify than the comment in *Dessaure*. A review of the comment in its context verifies the

prosecutor's explanation that it was a comment on the evidence. See *State v. Jones*, 867 So.2d 398 (Fla. 2004)(holding that the prosecutor's actions must be evaluated in context rather than focusing on the challenged statement in isolation). The prosecutor was specifically speaking about Bright's statement to Mickey Graham, that although he had composed a story for his family and friends about what happened with Brown and King, he could not admit to them that it was a planned killing. The prosecutor's point was that this statement did not establish that the killing was unplanned, because Bright would never admit to a planned killing, even to his friends. While the prosecutor did use the word "you" in the challenged statement, it did appear that she was referring to the family and friends, and may in fact have corrected herself with the second sentence of the disputed comment. Again, the argument was a fair comment on the evidence and in no way a comment on Bright's failure to testify.

Moreover, the same cautionary instruction about the defendant's right to remain silent and the admonition to the jury not to draw any inference of guilt to the fact that the defendant did not take the stand that was read in *Dessaure* was read in this case as well (IX 284). And while the comment was made during closing argument, it was not repeated and was "made in passing," as in *Dessaure*.

While the State asserts that the prosecutor's comment was not fairly susceptible of being interpreted as a comment on Bright's choice not to testify, comments that have been viewed as improper, but were more inflammatory than the comment here, have been held not to warrant a mistrial. See *Smith v. State*, 7 So.3d 473, 509 (Fla. 2009)(holding that prosecutor's comment "nobody knows better, who killed Leon Hadley, than Mr. Smith," while improper, did not merit mistrial, because it was an "isolated comment" that "was not so prejudicial as to require reversal"); *Poole v. State*, 997 So.2d 382, 390-391 (Fla. 2008) (holding that prosecutor's comment "and if Mr. Poole wants to tell the state and Detective Grice that somebody helped him commit this crime, then let him come forward because....," while improper, did not merit mistrial because "in light of the evidence linking Poole to the crimes, the error was not "so prejudicial as to vitiate the entire trial").

Bright cites several cases supporting general propositions regarding comment on the failure to testify, but the only case in which he cites facts is *Brock v. State*, 446 So.2d 1170 (Fla. 5th DCA 1984), where the prosecutor stated that "Today is the day he has to stand up and, 'fess to what happened and pay for what he did"). First, this comment was a much more direct comment regarding the defendant's failure to testify, telling the jury that the defendant was there to confess to his crimes.

More importantly, *Brock* preceded *State v. DiGuilio*, 491 So.2d 1129 (Fla. 1986), which held that improper comments on the failure to testify are subject to harmless-error analysis. As such, *Brock* cannot support Bright's position.

Harmless error:

As noted above, *Poole* and *Dessaure* specifically hold that harmless-error analysis does not apply to this issue, because Bright simultaneously objected and moved for mistrial, but did not secure a ruling on his objection. This rule should apply with even greater force in this case, since the objection and mistrial motion did not occur contemporaneously with the disputed comment. While the court did not believe that the comment was sufficient to warrant a mistrial, there is no compelling reason to believe that it would not have sustained a contemporaneous objection, if only for the purpose of issuing a curative instruction to the jury reminding them that the defendant had no duty to testify and that they could not draw unfavorable inferences from his failure to testify.

However, even if the objection was "effectively overruled" without an explicit ruling, see *Salazar v. State*, 991 So.2d 364 (Fla. 2008)(Pariente, J., specially concurring), there is "no reasonable possibility that the error contributed to the

verdict." *State v. DiGuilio*, 491 So.2d at 1135.[8] A single comment in closing argument that, at worst, only implies that the defendant should have testified, is only barely prejudicial. Moreover, even if the comment could reasonably be construed as a comment on Bright's failure to testify, it related only to an observation about the probative force of the testimony of Bright's witnesses, and not particularly compelling one at that. Bright's counsel himself, by choosing not to request a curative instruction in order to prevent "drawing attention" to the remark, must have believed that the comment escaped the jury's notice. These factors, combined with the strength of the State's case against Bright, demonstrate that the alleged error was "unimportant in relation to everything else the jury considered," and therefore, harmless. Bright has failed to demonstrate reversible error.

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[8]The *DiGuilio* standard, requiring the State to demonstrate "no reasonable possibility that the error contributed to the verdict," is taken directly from *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824 (1967). The Supreme Court clarified the *Chapman* standard in *Yates v. Evatt*, 500 U.S. 391, 403, 111 S.Ct. 1884, 1893 (1991) (disapproved of on other grounds by *Estelle v. McGuire*, 502 U.S. 62 (1991)):

> To say that an error did not "contribute to the ensuing verdict is not, of course, to say that the jury was totally unaware of that feature of the trial later held to have been erroneous. ... **To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.**

ISSUE II

DID THE TRIAL COURT ERR IN FINDING AND WEIGHING BRIGHT'S TWO PRIOR VIOLENT CONVICTIONS AS SEPARATE AGGRAVATORS? (Restated)

Standard of review:

As a pure issue of law, standard of review is *de novo*.

Merits:

In this issue Bright claims that the court improperly doubled an aggravator. Improper doubling occurs when two separate aggravators rely on the same essential feature or aspect of the case or crime. *Spann v. State*, 857 So.2d 845 (Fla. 2003). Facts in any given case may support multiple aggravators as long as they are separate and distinct. When considering a claim of improper doubling, the focus is on the aggravators themselves, not on the overlapping facts. *Spann v. State*, 857 at 856.

To illustrate, if a defendant has been previously convicted of a violent felony and is on parole from that same felony at the time of the murder, it would be proper to find two aggravating circumstances; prior violent felony and under a sentence of imprisonment. *Rose v. State*, 787 So.2d 786, 801 (Fla. 2001). If, on the other hand, in addition to first degree murder, the defendant was found guilty of both robbery and burglary, it would be improper to split the "murder in the

course of a felony" aggravator into two separate aggravators: (1) murder in the course of a burglary and (2) murder in the course of a robbery. *Id.*

Bright claims that the trial court erred in finding and weighing Bright's two previous violent felony conviction as two separate aggravators. There are two places where this alleged error may be found. First, the trial judge noted in the sentencing order that he only allowed the state to present three aggravators to the jury (IV 714). Next, in the "aggravating circumstances" section of the sentencing order, the court listed three aggravating factors, two of which were based on Bright's prior violent felony convictions (IV 714-715).

Bright does not contend the trial judge erred in finding the "prior violent felony" aggravator (IB 38). Bright claims only that the trial judge should have considered and weighed both of Bright's previous convictions as one aggravator rather than two (IB 38). This claim can be denied for three reasons.

First, the issue was not preserved for appeal. Bright did not file a motion for rehearing or otherwise bring this alleged error to the trial court's attention. Had he done so, any error could have been resolved before this matter came before this Court. Instead, on the day of sentencing, Bright filed his notice of appeal (V 1040).

To be preserved for appeal, "the specific ground upon which a claim is based must be raised at trial and a claim different than that will not be heard on appeal." *Rodriguez v. State*, 609 So.2d 493, 499 (Fla. 1992). Bright's failure to object to the sentencing order on the grounds the trial court improperly "doubled" the prior violent felony aggravator into two separate aggravators failed to preserve this issue for appeal. See *Spann v. State*, 857 So.2d 845, 856 (Fla. 2003).[5]

Second, this claim may also be denied because the record as a whole, including the written jury instructions, the instructions read to the jury, and the trial judge's oral pronouncements at the sentencing hearing, supports a finding the trial judge actually considered both of Bright's prior violent felony convictions as one aggravator, not two. In other words, while he wrote the order in a way that suggested he considered Bright's two prior violent felony convictions as two separate aggravators, there is record support for a finding that in fact, he considered and weighed them as one.

[5]This Court ruled in *Spann* that Spann's failure to object did not preserve the "improper doubling" error for appeal. However, without really explaining why, this Court did go on to consider and then reject the claim on the merits as well. *Spann*, 857 So.2d at 856. It is clear, however, that the reason is not because an improper doubling claim is fundamental error. This Court has held that improper doubling errors are subject to a harmless error analysis. *Armstrong v. State*, 642 So.2d 730, 739 (Fla. 1994).

During the jury instructions, the trial court instructed the jury on two aggravating factors, prior violent felony and HAC. The record reflects that the court instructed the jury as to Mr. King as follows:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence, first, substantially the same as to Count 1, that is, the death of Mr. Derrick King. First, the defendant has been previously convicted of another capital offense or of felony involving the use or threat of violence to the person, the crime of murder in the first degree as to Mr. Raymond Bright is a capital offense. Secondly, the crime of armed robbery is a felony involving the use or threat of violence to another person.
>
> Secondly, the crime for which the defendant is to be sentenced was especially heinous, atrocious and cruel. ...

(VI 1023).

As to the murder of Mr. Brown, the court instructed the jury as follows:

> As to Count 2, the aggravators as to that count, that is, dealing with the death of Mr. Randall Brown, once again are the same, that is, the defendant has previously been convicted of another capital offense or of a felony involving the use of threat or force of violence to the person, and I would instruct you again the crime of murder in the first degree only this time as to Mr. Derrick King as a capital offense and that the crime of robbery is a felony involving the use or threat of violence to another person. And the **second** aggravator is the crime for which the defendant is to be

> sentenced was especially heinous, atrocious or cruel ...

(VI 1024)(emphasis supplied).

The written jury instructions in the record also support the position that the trial court instructed the jury on two aggravators (III 513-514). The written jury instructions found in the record list two aggravators for each victim; prior violent felony with both prior violent felonies listed under one aggravator and HAC (III 513-514).

During the sentencing proceeding, the trial court told the parties that he did not intend to read the sentencing order in its entirety but instead would provide the parties, including Bright personally, with a copy of the order which he had already prepared (VI 1057). The trial judge told the parties that his order thoroughly addressed "every fact dealing with aggravation and every fact that has been brought to my attention in mitigation," and "there are 22 different mitigators that I have considered, as well as the **two** statutory aggravators." *Id.* (emphasis supplied).

Although the sentencing order does suggest the trial court considered Bright's two prior violent felony convictions as two separate aggravators, all of the other relevant portions of the record support a finding the court did not actually improperly

double the prior violent felony aggravator into two. As such, this Court may deny the claim on the merits.

Third, even if this Court were to find the judge improperly doubled the prior violent felony aggravator, any error is harmless beyond a reasonable doubt. There is no question the judge could properly consider and give great weight to both felony convictions, albeit under the umbrella of one aggravator.[6] See *Lukehart v. State*, 776 So.2d 906 (Fla. 2000)(holding that improper doubling of victim under twelve years of age and murder in the course of aggravated child abuse aggravators was harmless because the fact the victim was under the age of 12 was properly considered in weighing the aggravating factor that the murder occurred while Lukehart was engaged in the commission of aggravated child abuse).

Any suggestion the error cannot be harmless because the judge weighed three aggravators rather than two, is without merit. Determining an appropriate sentence upon conviction for first degree murder is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances. Instead, capital sentencing requires the judge to engage in a reasoned judgment as to what factual situations

[6]This Court has ruled that prior violent convictions are among the most weighty in Florida. *Sireci v. Moore*, 825 So.2d 882, 887 (Fla. 2002)(noting that HAC and prior violent felony are some of the most weighty aggravators in Florida).

require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present. *Franqui v. State*, 804 So.2d 1185, 1194 (Fla. 2001). A review of the order reveals that is exactly what the trial judge did in this case.

Moreover, any error is harmless because the trial judge found the murders were especially heinous, atrocious, or cruel and told the defendant the fact the murders were HAC was the most significant factor in his sentencing decision (V 1057-1058). As such, there is simply no reasonable possibility the trial judge's counting error was the difference between life and death. This Court should reject Bright's claim on appeal.

Finally, the only remedy for this error, if any, is remand for the judge to reweigh two aggravators, one of which will include consideration of both prior felony convictions, against the mitigation found to exist.

ISSUE III

DID THE TRIAL COURT ABUSE ITS DISCRETION IN GIVING GREAT WEIGHT TO THE HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATOR? (Restated)

Standard of review:

This Court's review of claims that the trial court improperly found an aggravating circumstance is limited to determining whether the trial judge applied the correct rule of law and, if so, whether competent, substantial evidence supports the finding. *England v. State*, 940 So.2d 389, 402 (Fla. 2006) (citing *Hutchinson v. State*, 882 So.2d 943, 958 (Fla. 2004)).

Merits:

In this claim, Bright claims that the trial judge erred in giving great weight to the heinous, atrocious, and cruel (HAC) aggravator. Without actually conceding that there is competent substantial evidence to support HAC, Bright does not seem to disagree that the trial judge properly found the State had proven that the murders were especially heinous, atrocious, or cruel (IB 45). Instead, Bright claims that the trial court erred in giving the HAC aggravator great weight because the evidence was consistent with a frenzied attack and a loss of control (IB 43). Bright also points to the fact the "extreme mental or emotional disturbance" mitigator is present in this case (IB 45).

This Court should deny this claim for two reasons. First, to the extent Bright is attacking the sufficiency of the HAC aggravator, there is competent substantial evidence to support it.

The HAC aggravator does not focus on the mental state of the defendant. Instead, "unlike the cold, calculated and premeditated aggravator, which pertains specifically to the state of mind, intent and motivation of the defendant, the HAC aggravator focuses on the means and manner in which death is inflicted and the immediate circumstances surrounding the death." *Brown v. State*, 721 So.2d 274, 277 (Fla. 1998)(citing *Stano v. State*, 460 So.2d 890, 893 (Fla. 1984)).

Both Mr. King and Mr. Brown were beaten to death. Dr. Scheuerman, the Chief Medical Examiner for the Florida Keys, testified that Derrick King died of blunt impact to the head (IX 393). Dr. Scheuerman told the jury Mr. King had 38 head wounds (IX 394). He had at least 20 injuries to his extremities. (X 415). King was 77 inches tall (6'5") and 163 pounds at the time of his death. He was 20 years old (IX 394).

Dr. Scheuerman described the wounds he found on King's body (IX 395). Dr. Scheuerman testified that, among other wounds, King has a bruise to the lip, a laceration of the right eye brow, a laceration of the right upper eyelid, and a large laceration of the mid forehead (IX 395). King's face looked

misshapen because of blunt impact that caused a big Y-shaped laceration on the forehead and resulted in a number of facial and skull fractures (IX 396). Mr. King suffered a constellation of head injuries (IX 411).

Dr. Scheuerman told the jury that King's forehead was fractured, as were his sphenoid sinuses. This latter fracture was an "open fracture" with bone missing. Mr. King's nose was fractured (IX 396). His left orbit was fractured (IX 396).

Dr. Scheuerman showed the jury an injury to King's head. There was a star-like laceration. Brain and bone were exposed. The skull was fractured to the extent that bone was driven into King's brain. The bone tore or lacerated the surface of the brain (IX 398). King had multiple lacerations coming all the way down to the ear. Behind the ear, there was an abrasion with a bruise with it and below that, another abrasion (IX 398). A number of lacerations to King's head were curved in what Dr. Scheuerman called "curvilinear" (IX 399).

King also suffered other injuries. Dr. Scheuerman showed the jury a large red-purple bruise that involved most of the left forearm on top. There were also a number of small abrasions and a larger abrasion that was curvilinear (X 406). Mr. King also had injuries to his right arm on the ulnar side of the forearm. These injuries were consistent with being inflicted by an instrument four separate times (X 407). He also had a large

abrasion over the top of the right index finger and the right long finger (X 408). Mr. King had abrasions to each knee (X 408).

Injuries to King's extremities were consistent with defensive wounds (X 409). Some of King's injuries, such as the abrasions on his knees, could be consistent with a struggle (X 424).

In Dr. Scheuerman's opinion, King's injuries were consistent with being inflicted with a hammer-type instrument (X 412). The results of King's toxicology was negative for alcohol and positive for cocaine and marijuana. Dr. Scheuerman testified that Mr. King likely ingested the cocaine shortly before his death (X 415-416, 421).

Dr. Arruza, Chief Medical Examiner, testified that Randall Brown, was 70 inches tall (5'10") and weighed 147 pounds at the time he was murdered. He was 16 years old (IX 368-369). When Dr. Arruza was asked to tell the jury how many lacerations, bruises, contusions and fractures she found on Brown's body, she told the jury she had a "long list" (IX 369). Brown had nine separate injuries to his right arm. These wounds were possibly consistent with defensive wounds (IX 375). Brown had one abrasion on his left elbow and one on his left hand. These were consistent with defensive wounds (IX 376). Brown had a curved abrasion on his right thigh at the top of the knee (IX 376).

Dr. Arruza testified that Brown suffered head injuries during the beating. Brown also suffered 14 other injuries (IX 370). Brown's jaw was fractured (IX 379). Dr. Arruza found bruising around the right eye, several partial thickness lacerations, frontal scalp lacerations, and a partial thickness laceration of the ear (IX 379). Lacerations on Mr. Brown's head went "all the way from the skin to the bone" (IX 371). Some of the injuries were semi-circumferential and some were more linear (IX 372-374).

Dr. Arruza told the jury that Mr. Brown suffered 8-10 skull fractures. He had one big one she referred to as a "cave-in" (IX 379). Brown's left arm was broken, which likely occurred when he tried to defend himself (IX 382). Dr. Arruza testified death was not immediate in light of evidence that Brown tried to defend himself (IX 382). The toxicology screen on Brown showed no alcohol or drugs (IX 385).

The evidence adduced at trial demonstrated that Bright beat his victims to death. Both victims suffered multiple head fractures as a result of the beating Bright administered and both had multiple wounds to their arms and hands consistent with defensive wounds. This Court has "consistently upheld HAC in beating deaths" under similar circumstances. *Douglas v. State*, 878 So.2d 1246, 1261 (Fla. 2004)(quoting *Lawrence v. State*, 698 So.2d 1219, 1222 (Fla. 1997)); (*Dennis v. State*, 817 So.2d 741,

766 (2002)(competent substantial evidence supported the HAC aggravator when medical examiner testified both victims suffered skull fractures as a result of the brutal beating they endured and the evidence demonstrated the victims were conscious for at least part of the attack as evidenced by defensive wounds to their hands and forearms); *Bogle v. State*, 655 So.2d 1103, 1109 (Fla. 1995)(upholding HAC where the victim was struck seven times on the head, victim was alive during infliction of most of the wounds, and the last blows caused death); *Wilson v. State*, 493 So.2d 1019, 1023 (Fla. 1986)(upholding HAC where the victim was brutally beaten while attempting to fend off the blows before being fatally shot).

To the extent Bright challenges only the weight given to the HAC aggravator, this Court should deny this claim. Bright claims that the trial court erred in giving the HAC aggravator great weight because there was evidence that Bright suffered from an extreme mental or emotional disturbance at the time of the murder (IB 44). Bright points to evidence that at the time of the murder Bright was so angry he “lost it,” testimony from Dr. Miller that Bright’s probable paranoid ideation may have caused him to perceive a threat where none existed, and evidence that Bright likely suffered from neurological problems stemming from his alcohol and drug abuse (IB 44-45).

The weight to be given aggravating factors is within the discretion of the trial court and is subject to the abuse of discretion standard. *Carter v. State*, 980 So.2d 473, 483 (Fla. 2008). A court abuses its discretion only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable [person] would take the view adopted by the trial court. *Trease*, 768 So.2d at 1053.

The HAC aggravator does not turn on the mental state of the defendant. Rather, this aggravator focuses on the victim's suffering. Bright repeatedly and brutally beat two young men to death with a hammer. Both men fought for their lives and lost. The medical examiner's testimony supported the trial judge's conclusion that the attack on King and Brown was repeated, brutal and merciless (IV 717). Indeed, even if Bright's state of mind were relevant, the trial court found there was no evidence that Bright was substantially impaired or that his ability to control his actions was reduced at the time of the murders (IV 722).

Bright cannot show the trial judge abused his discretion in assigning great weight to the HAC aggravator, an aggravator this Court has, on numerous occasions, found to be one of the most weighty in Florida. *Offord v. State*, 959 So.2d 187, 191 (Fla. 2007)("HAC is a weighty aggravator that has been described by

this Court as one of the most serious in the statutory sentencing scheme."); *Sireci v. Moore*, 825 So.2d at 887-88 (noting that HAC is one of the most weighty in Florida).[5] Appellant has failed to demonstrate error.

[5]In his initial brief, Bright cites to several cases from this Court, none of which stand for the proposition that the trial court errs in giving "great weight" to the HAC aggravator if the attack on the victim is a result of a frenzied attack or if the statutory mental mitigators are found to exist (IB 44). Instead, in all but of one of the cases Bright cited, this Court found the sentences to death disproportionate for various reasons. For instance, this Court remanded the case back for resentencing when the judge improperly considered the defendant's future dangerousness as a non-statutory aggravator. *Miller v. State*, 373 So.2d 882 (Fla. 1979)(remanding for resentencing when the court improperly considered future dangerousness as a non-statutory aggravator). See also *Penn v. State*, 574 So.2d 1079 (Fla. 1991)(death sentence disproportionate when only valid aggravator was HAC, defendant had no significant history of prior criminal activity, and defendant acted under the influence of extreme mental or emotional disturbance when he killed his sleeping mother with a hammer); *Ross v. State*, 474 So.2d 1170 (Fla. 1985)(death penalty was not proportionate in one-aggravator case [HAC] in light of mitigating factors that defendant was an alcoholic, was intoxicated at the time of the homicide, and homicide was the result of an angry domestic dispute); *Jones v. State*, 332 So.2d 615 (Fla. 1976)(death not proportionate when jury recommended life and the evidence demonstrated Jones suffered from paranoid psychosis at the time of the murder).

ISSUE IV

IS THE DEATH SENTENCE PROPORTIONATE? (Restated)

"In deciding whether death is a proportionate penalty, the Court makes a 'comprehensive analysis in order to determine whether the crime falls within the category of both the most aggravated and the least mitigated of murders, thereby assuring uniformity in the application of the sentence.'" *Simpson v. State*, 3 So.3d 1135 (Fla. 2009), *citing Anderson v. State*, 841 So.2d 390, 407-08 (Fla. 2003). The death penalty is reserved only "for the most aggravated and least mitigated murders." *Anderson*, 841 So.2d at 408. Proportionality review is not a comparison between the number of aggravating and mitigating circumstances; rather, this Court considers the totality of circumstances compared to other capital cases. *Tillman v. State*, 591 So.2d 167, 169 (Fla. 1991). The State asserts that the death sentence is proportionate to this murder.

The trial judge found two aggravators: the murder was especially heinous, atrocious or cruel and the defendant had previously been convicted of a violent felony (armed robbery and the contemporaneous murder of the other victim), both of which are supported by competent substantial evidence. The trial judge gave great weight to both aggravators (IV. 5-8) Likewise this Court has held that HAC and prior violent felony are among the

most weighty aggravators. *Sireci v. Moore*, 825 So.2d at 887 (noting that HAC and prior violent felony are some of the most weighty aggravators in Florida).

Balanced against the aggravators, the trial court found one statutory mitigator was proven: at the time of the murder, Bright was under the influence of an extreme emotional disturbance stemming primarily from Bright's drug dependency. The trial judge gave some weight to this mitigator (IV 719). The court also considered and found 19 non-statutory mitigators, including Bright's work and family history, drug abuse, military service in the Marine Corps, remorse, and amenability to jail life (IV 718-729).[6]

Bright cites to several cases that he claims demonstrate that his sentences to death are disproportionate. In none of these did the defendant kill two victims by beating them to death with a hammer. As such, none of these cases are comparable.

For instance in *Nibert v. State*, 574 So.2d 1059 (Fla. 1990), a case where the defendant stabbed a drinking buddy to

[6]The trial judge considered but found three of Bright's proposed mitigators were not proven: at the time of the murder his capacity to conform his conduct to the requirements of the law was substantially impaired, Bright provided information that helped to resolve this murder case, and Bright has attempted to have a positive influence on his family despite his incarceration (X 720-729).

death, this Court reduced a death sentence to life on proportionality grounds. *Nibert* was a one-aggravator case. Among the factors that this Court considered was that Nibert had a below average IQ, he showed a great deal of remorse, he had a good potential for rehabilitation, and he had been physically and psychologically abused for many years. This Court also noted that uncontroverted evidence showed that Nibert had suffered from chronic and extreme alcohol abuse since his pre-teen years, Nibert had been drinking heavily on the day of the murder, and had been drinking when he attacked the victim.

In contrast to *Nibert*, the trial court found here two weighty aggravators: HAC and prior violent felony. There was no evidence that Bright had a low IQ or suffered from physical or psychological abuse as a child. While there was some evidence Bright voluntarily used cocaine at the time of the murder, the trial court found that there was no evidence Bright was substantially impaired or that his ability to control his actions was reduced at the time of the murders (IV 722). As such, the reversal of the death sentence in *Nibert* does not demonstrate that Bright's sentence was disproportionate.

This Court found a death sentence disproportionate in *Kramer v. State*, 619 So.2d 274 (Fla. 1993), where the murder, in its "worst light," suggested nothing more than a spontaneous fight, occurring for no discernible reason, between a disturbed

alcoholic and a man who was legally drunk. In contrast, the case here in its "worst light" involves a defendant beating two men to death with a hammer, one of whom he struck 58 times and the other 34 times. The evidence suggested that at the time of the attack, both victims were sleeping and posing no threat to Bright. Accordingly, *Kramer* does not demonstrate disproportionality of Bright's sentence.

More similar cases demonstrate that the death sentences imposed here were proportionate. For instance, in *Sliney v. State*, 699 So.2d 662 (Fla. 1997), this Court held that Sliney's death sentence for the stabbing and beating death of a pawnshop owner was proportionate. Like Mr. Brown and Mr. King here, the victim in *Sliney* was beaten to death with a hammer.

In *Sliney*, the trial court found in aggravation that the murder was committed while Sliney was engaged in or was an accomplice in the commission of a robbery; and (2) the murder was committed for the purpose of avoiding or preventing a lawful arrest. In mitigation, the trial court found the statutory factors of (1) youthful age (19) and (2) no significant prior criminal history. However, the court afforded little weight to Sliney's age, which was nineteen at the time of the crime. *Sliney v. State*, 699 So.2d at 667. As to non-statutory mitigators, the trial court gave some weight to the fact that Sliney was a good prisoner but gave only little weight to the

following factors urged by Sliney: (1) his politeness; (2) his status as a good neighbor; (3) his being a caring person; (4) his good school record; and (5) his gainful employment. *Id.*

In finding Sliney's death sentence proportionate, this Court noted that although the trial court did not find the aggravating circumstance that the murder was especially heinous, atrocious, or cruel, this was a particularly brutal murder. This Court went on to note that the victim was beaten with a hammer to the face and was found with a pair of scissors stuck in his neck, with fractured ribs, and with a fractured backbone. *Sliney v. State*, 699 So.2d 662 (Fla. 1997).

While the aggravators and mitigators found in this case are not an exact match to the aggravators and mitigators in *Sliney*, *Sliney* is instructive. Sliney was only 19 years old at the time of the murder and had no significant criminal history while Bright was 54 years old at the time of the murder and had been previously convicted of armed robbery. Further, the trial court in *Sliney* did not find the murder was HAC while in his case, the trial court found and the evidence supports, the murder was especially heinous, atrocious or cruel. This Court has repeatedly said both the prior violent felony aggravated and HAC are some of the most weighty in Florida. *Sireci v. Moore*, 825 So.2d at 887 (noting that HAC and prior violent felony are some of the most weighty aggravators in Florida).

Additionally, while the court in *Sliney* did not find either mental mitigator and in this case the trial court found one, the court only gave it some weight (V 719). At the *Spencer* hearing, Dr. Miller testified that Bright was not psychotic and Dr. Miller offered no opinion that Bright actually suffered from any major mental illness (V 753-754). Dr. Miller testified Bright was intelligent (V 771).

Way v. State, 760 So.2d 903 (Fla. 2000), also supports proportionality. Way called his wife and daughter into the garage, hit them in the head with a hammer and lit them on fire. This Court found Way's sentence to death was proportionate. In aggravation, the trial court considered that: (1) Way was previously convicted of a felony involving the use or threat of violence (Carol Way's murder); (2) the capital felony was committed while Way was engaged in the commission of arson; and (3) the murder was HAC. The trial court also found the murder was CCP, but did not rely upon that finding. The trial court considered two statutory mitigating circumstances, no significant history of prior criminal activity and age at the time of the crime (38 years old). The court also considered the following nonstatutory mitigation: (1) difficult childhood-father died at an early age, family was poor; (2) four years of service in the Air Force and twelve years of service in the Air Force Reserves; (3) successful employment history with the FAA;

(4) reputation for peacefulness and hard work; (5) a hearing impairment and possibly a mental impairment; (6) good behavior in prison; (7) all other mitigating circumstances asserted by the defendant. *Way*, 760 So.2d at 920. While the aggravators and mitigators found in this case are not an exact match to the aggravators and mitigators in *Way*, *Way* is a valid comparator case. In *Way*, the defendant had no significant criminal history while Bright had a previous conviction for armed robbery. Way's social and employment history, as does Bright's, included a good work and family history, and good behavior in prison. Both Way and Bright's history referenced the possibility of mental problems but in neither case was their solid evidence of mental illness. Way was thirty-eight years old and Bright was fifty-four at the time of the murders. Way, like Bright, served in the military. Unlike Way, however, Bright was kicked out of the Marine Corps (administratively discharged) with a general discharge under honorable conditions because of his failure to rehabilitate his alcohol abuse (V 890-891, 893). Accordingly, *Way* supports proportionality.

Robinson v. State, 761 So.2d 269 (Fla. 1999), also supports proportionality. Robinson murdered his girlfriend with a claw hammer while she was sleeping. Robinson admitted waiting till she fell asleep to hit her. The trial judge found in aggravation that: (1) the murder was committed for pecuniary gain; (2) the

murder was committed to avoid arrest; and (3) the murder was cold, calculated and premeditated. *Id.* The trial court also found two statutory mitigating factors, extreme emotional distress (some weight) and substantial impairment of ability to conform conduct to the requirements of the law due to history of excessive drug use (great weight). Of the nonstatutory mitigation presented, the trial court found: (1) brain damage to Robinson's frontal lobe (given little weight because of insufficient evidence that brain damage caused Robinson's conduct); (2) Robinson was under the influence of cocaine at the time of murder (discounted as duplicative because cocaine abuse was considered in statutory mitigators); (3) remorse (little weight); (4) belief in God (little weight); (5) alcoholic father (some weight); (6) verbal abuse of family members by Robinson's father (slight weight); (7) personality disorders (between some and great weight); (8) emotionally disturbed childhood, including a diagnosis of ADD and high doses of Ritalin, special education classes, changed schools five times in five years, and difficulty making friends (considerable weight); (9) family history of mental health problems (some weight); (10) G.E.D. obtained while in a juvenile facility (given minuscule weight); (11) model inmate (very little weight); (12) extreme duress based on fear of returning to prison because he was previously raped and beaten (some weight); (13) confessed to the murder and

assistance to police (little weight); (14) admission of a drug problem and sought counseling (given no additional weight to that already given for history of drug abuse); (15) the justice system failed to provide requisite intervention (given no additional weight to that already given for history of drug abuse); (16) successful completion of a sentence and parole in Missouri (minuscule weight); (17) ability to adjust to prison life (very little weight); and (18) love of others (extremely little weight). *Robinson*, 761 So.2d at 272-273.

This Court held that Robinson's death sentence was proportionate. Once again, while the aggravators and mitigators are not exactly the same, *Robinson* is instructive. In *Robinson*, while the Court found the murder was CCP, the trial court did not find the murder was HAC. In this case, the trial judge found both murders were especially heinous, atrocious, or cruel. Moreover, in *Robinson*, both mental mitigators were found, one of which was given great weight and the other some weight. Here, the trial court found one mental mitigator and gave it only some weight (V 718-719). In *Robinson*, there was no finding that Robinson had previously been convicted of a violent felony while Bright was previously convicted of armed robbery. Both Robinson and Bright had a long history of substance abuse.

Robinson has mild brain damage while no evidence was offered that Bright had any brain damage. While Robinson did not

have any military service, Robinson's childhood was traumatic. Robinson's father was an alcoholic who verbally abused family members. Moreover, Robinson was an emotionally disturbed child who was diagnosed with ADD, placed on high doses of Ritalin, and placed in special education classes. In contrast, Bright presented no evidence of childhood abuse or trauma. The holding in *Robinson* supports the conclusion that Bright's death sentence is proportionate. See also *Smithers v. State*, 826 So.2d 916 (Fla. 2002);[7] *Pope v. State*, 679 So.2d 710 (Fla. 1996)(finding death sentence proportionate for beating and stabbing death of girlfriend where there were two aggravators-previous violent felony conviction and pecuniary gain, both statutory mental mitigators, and nonstatutory mitigators).

[7]Like Bright, Smithers was convicted of killing two victims. It is notable that for one of the victims, the only aggravators were the contemporaneous murder and HAC, with no CCP. *Smithers*, 826 So.2d at 931.

ISSUE V

DID THE TRIAL COURT ERR IN FINDING THAT BRIGHT'S DEATH SENTENCES WERE NOT UNCONSTITUTIONAL PURSUANT TO *RING V. ARIZONA*? (Restated)

In this claim, Bright avers his death sentence is unconstitutional pursuant to *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002). Bright acknowledges this Court has rejected the same type of claim but invites this Court to reconsider. This Court should decline the invitation.

In this case, Bright had previously been convicted of a prior violent felony; a 1990 armed robbery. The trial court also found, in imposing the death sentence for each victim, that Bright was previously convicted of the contemporaneous murder of the other victim.

This Court has repeatedly held that *Ring* does not apply to cases where the prior violent felony is applicable and Bright has offered no good reason to recede from those line of cases. Given that the aggravating factor of prior violent felony indisputably applies in the instant case, Bright is not entitled to relief on the basis of *Ring*. *Hodges v. State*, --- So.3d ----, 2010 WL 4878858, 35 Fla. L. Weekly S689 (Fla. 2010). See also *Duest v. State*, 855 So.2d 33, 49 (Fla. 2003)(noting that this Court has previously rejected claims under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000) and *Ring* in cases

involving the aggravating factor of a previous conviction of a felony involving violence). This Court should reject Bright's final claim on appeal.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm Appellant's judgments and sentences entered in this case.

Respectfully submitted,

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I certify that a copy hereof has been furnished to William C. McLain, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, by U.S. Mail, on this 18th day of April, 2011.

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CERTIFICATE OF COMPLIANCE

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

_____
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