IN THE SUPREME COURT OF FLORIDA

MATTHEW LEE CAYLOR

Appellant,

v. CASE NO. SC09-2366

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTEENTH JUDICIAL CIRCUIT
IN AND FOR BAY COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

Appellant, MATTHEW LEE CAYLOR, raises six issues in this direct appeal from his convictions and sentence to death. Caylor was convicted of one count of first degree murder, one count of sexual battery involving great physical force and one count of aggravated child abuse.

References to the appellant will be to "Caylor" or "Appellant". References to the appellee will be to the "State" or "Appellee". References to the victim in this case will be to M.H. References to her older brother will be to C.H.

The twenty-five (25) volume record on appeal in the instant case will be referenced as "TR" followed by the appropriate volume number and page number. The one volume of exhibits will be referred to as "Ex Vol." followed by the appropriate page number. References to Caylor's initial brief will be referred to as "IB" followed by the appropriate page number.

STATEMENT OF THE CASE

Matthew Lee Caylor was born on May 25, 1975. He was thirty-three (33) years old when he raped and murdered 13 year old M.H. on July 8, 2008. (TR Vol. I 1). Caylor was arrested, two days after the murder, on the same day M.H's body was found stuffed under a bed in, what was up until the day of the murder, Caylor's motel room. (TR Vol. I 1). Caylor confessed to the killing.

On July 24, 2008, a Bay County Grand Jury indicted Caylor on one count of first degree murder, one count of sexual battery with great physical force, and one count of aggravated child abuse. (TR Vol. I 3). Four days later, the State filed a notice of its intent to seek the death penalty. (TR Vol. I 11).

Walter Smith, an Assistant Public Defender with the Office of the Public Defender, 14th Judicial Circuit, represented Caylor at all critical stages of the proceedings. As of the time, Mr. Smith commenced his representation, Mr. Smith had been a member of the Florida Bar for nearly 30 years.[1]

Trial began on October 26, 2009 with jury selection. The State called some thirteen witnesses to testify.[2] At the

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[1] http://www.floridabar.org.

[2] Quitina Adams, Margaret Davis, Daryl Lawton, Scott Heinze, Paul Atwell, Vince Wallace, Pamela Hatcher, David Williams, Brenda Pelfrey, Ron Plenge, Mark Smith, Trevor Seifert, and Dr. Michael Hunter.

conclusion of the State's case in chief, Caylor made a motion for a judgment of acquittal on various grounds. (TR Vol. XX 618-638). The trial court denied the motion. (TR Vol. XXI 641-642).

Caylor called no witnesses and did not testify himself. On October 29, 2009, a Bay County jury found Caylor guilty of first degree murder, sexual battery with great physical force, and aggravated child abuse as charged. (TR Vol. I 75, TR Vol. XXI 769).[3]

The penalty phase commenced on October 30, 2009. The penalty phase lasted one day. The State called one witness. Probation Officer Thomas Shakita testified that at the time of the murder, Caylor was on felony probation in Georgia. (TR Vol. XXII 793-796). Caylor stipulated that he had been previously convicted of a felony in the State of Georgia.

Caylor called four witnesses in mitigation. Caylor presented the testimony of his mother, Kim Caylor; his father, Kerry Caylor; former employer Michael Cato, and Dr. Noah Zellman, a veterinarian for whom Caylor worked. (TR Vol. XXII 797-841). Caylor's mitigation evidence had two themes; (1) he was a good and conscientious employee when he had a job and (2) the effects of a dysfunctional family and various mental problems including PTSD and bipolar disorder plagued Caylor

[3] A general verdict form was used. (TR Vol. I 75).

during his lifetime. Caylor did not testify.

The trial judge instructed the jury on three aggravators: (1) the capital felony was committed by a person previously convicted of a felony and on felony probation; (2) the capital felony was committed while the defendant was engaged in the commission of a sexual battery or aggravated child abuse; and (3) the capital felony was especially heinous, atrocious, or cruel (HAC). (TR Vol. I 118). The trial court instructed the jury on the catch-all mitigator. (TR Vol. I 120).

On October 30, 2009, Caylor's jury recommended that Caylor be sentenced to death by a vote of 8-4. (TR Vol. I 123). On November 18, 2009, the Court held a Spencer hearing. The State presented testimony from M.H.'s mother and step-mother. Caylor also testified at the Spencer hearing. (TR Vol. XXIII 895-933).

On December 11, 2009, the trial court followed the jury's recommendation and sentenced Caylor to death. (TR Vol. I 154-158). The court found the State had proven three aggravators beyond a reasonable doubt: (1) the capital felony was committed by a person previously convicted of a felony and on felony probation; (2) the capital felony was committed while the defendant was engaged in the commission of a sexual battery or aggravated child abuse; and (3) the capital felony was especially heinous, atrocious, or cruel. (TR Vol. I 155-156).

The Court considered one statutory mitigator; extreme emotional disturbance. The court found that Caylor had some mental health issues and gave this mitigator some weight. (TR Vol. I 157). The trial court also considered four non-statutory mitigating factors: (1) the defendant came from a dysfunctional family (little weight); (2) Caylor was compassionate to animals and a good employee (little weight); (3) Caylor had learning difficulties in school (very little weight); and (4) Caylor showed remorse for the murder (little weight). (TR Vol. I 156-157).

On December 14, 2009, Caylor filed a notice of appeal. (TR Vol. I 164). The record in this case was prepared by the Clerk of the Court, in and for Bay County, Florida, and forwarded to this Court on March 16, 2010.

On July 14, 2010, Caylor filed his initial brief, raising six issues in a forty (40) page brief. This is the State's answer brief.

STATEMENT OF THE FACTS

M.H. was 13 years old when Matthew Caylor sexually assaulted and murdered her. At the time of her death, on July 8, 2008, M.H. lived in Room 211 at the Value Lodge Motel in Panama City, Florida. Four other people lived in the room with her; her mother, Rhonda McNallin, her older brother C.H., Billy Patterson and Daryl Lawton. (TR XIX 369).

Matthew Caylor also lived at the Value Lodge Hotel in Panama City. He lived in Room 140. (TR XIX 353, 357). Caylor lived a couple of doors down from Scott Heinze and Jay ("Tater") Nichols.

Heinze and Nichols lived in Room 144. (TR Vol. XIX 370-371). Both Heinze and Nichols worked during the day. (TR Vol. XIX 389, 391). Both also owned dogs. (TR Vol. XIX 390). As a sort of part-time job, M.H. walked their dogs, mostly while the two men were at work. (TR Vol. XIX 391).

M.H. was not particularly outgoing or overly friendly with strangers. Instead, she was more reserved. It would take a while before M.H. would go up and meet new people. (TR Vol. XIX 386). M.H.'s brother, C.H., was very protective of M.H. Scott Heinze noticed that M.H. would talk mostly with the people to whom her older brother talked. When she became more comfortable with someone, she might come alone to talk. Most of the time, however, M.H. was with her brother. (TR XIX 392).

The testimony at trial establishes the likelihood that M.H. had never met or even talked to Caylor until the day he killed her. Even though Scott Heinze lived two doors down from Caylor, Mr. Heinze never saw M.H. talk to Caylor or go into his room. (TR Vol. XIX 392, 394).

A member of the Value Lodge's housekeeping staff, Ms. Davis, saw M.H. all the time. Ms. Davis knew that M.H. frequently walked the dogs from Room 144. M.H. would sit near Caylor's room but Ms. Davis never saw M.H. go into Room 140. (TR Vol. XIX 364-365).

Caylor told the police that the first time he even noticed M.H. was on July 4, 2008, at a holiday cook-out held at the Value Lodge Motel. According to Caylor, M.H. was drinking and smoking pot at the cook-out and was "acting like a fool." (TR Vol. XX 495). That was the only time he had really seen her. (TR Vol. XX 519). Caylor had seen M.H. hanging out with Scott Heinze and Jay Nichols. According to Caylor, M.H. would drink and smoke cigarettes with Heinze and Nichols. (TR Vol. XX 479).[4] Caylor saw M.H. and C.H. the day he killed M.H. when he borrowed some duct tape and a knife from Daryl Lawton. (TR Vol. XIX,

[4] Mr. Heinze testified that he never saw M.H. drink. Although he saw her smoke a cigarette, she never asked him for one nor did he give her one. If she had asked, he would have said no. (TR Vol. XIX 393, 400). Daryl Lawton was at the July 4th cook-out. He did not see M.H. drink alcohol at the cook-out. (TR Vol. XIX 384).

373-374, TR Vol. XX 509).[5]

M.H. spent the last day of her life as she typically did. She went to the pool and walked the dogs that lived with Heinze and Nichols in Room 144. (TR Vol. XIX 364, 376, 395).

M.H. was last seen alive about 5:00 p.m. on July 8, 2008. M.H. stopped by Scott Heinze and Jay Nichol's room shortly after Mr. Heinze got home from work. M.H. asked Heinze whether she could take his dog out for a walk. He readily agreed. M.H. returned the dog at about 5:00 p.m. and left. Mr. Heinze never saw M.H. again. (TR Vol. XIX 394-395).

Two days later, sometime before noon on July 10, 2008, M.H.'s body was found secreted under the bed in Caylor's former room.[6] She was lying face down. M.H. was naked. (TR Vol. XIX

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[5] Caylor told Detective Smith that he borrowed the duct tape and knife from C.H and M.H. while Daryl Lawton testified that Caylor asked him first to borrow the duct tape and then later called him to borrow a knife. Lawton testified he personally took the items to Caylor and that M.H. and C.H. came with him one of those times. (TR Vol. XIX, 373-374, TR Vol. XX 509). Caylor used these items, before the murder, to assault two Russian women he thought stole some of his cocaine. (TR Vol. XXIII 925).

[6] Caylor checked out of the hotel shortly after he killed M.H. although he was paid through the upcoming Saturday. A housekeeper cleaned the room on July 9, 2008, but did not find M.H.'s body under the bed. She was supposed to look under the bed during cleaning, however, she had a sore back and did not do so. Another guest, trucker Vince Wallace, checked into Room 140 in the wee morning hours of July 10. (TR Vol. XIX 412-413). He did not notice anything unusual about the room except that it was very cold. The AC was turned down very low. (TR Vol. XIX

427, 437). Crime scene investigators discovered M.H.'s clothes underneath her body. (TR Vol. XIX 440).

Dr. Michael Hunter, Bay County's medical examiner, told the jury how M.H. died. Dr. Hunter described M.H.'s injuries. M.H. had bruises along the right side of the clavicle and a small bruise on her left arm. (TR Vol. XX 586, 593). Injuries to her clavicle could be caused by M.H. striking an object at that area of her body. They could also be caused by someone applying force to the clavicle region with a knee or hand. (TR Vol. XX 595).

Dr. Hunter found a small injury to M.H.'s pubic region. (TR Vol. XX 596). The medical examiner told the jury that the injury could be consistent with consensual sexual activity but he could not really make a lot of the injury. (TR Vol. XX 596). There were no other injuries to her pubic region. (TR Vol. XX 596). Dr. Hunter cannot tell whether M.H. was a virgin or sexually active. (TR Vol. XX 604).

M.H. was strangled to death. She was strangled both manually and with a ligature. In this case, the ligature was a phone cord that Caylor removed (and then replaced) from the phone in his room.

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413). Mr. Wallace and his girlfriend went straight to bed and got up early the next day and checked out. (TR Vol. XIX 412-413). A second housekeeper found M.H.'s body on July 10, 2008, when she cleaned Room 140 after Wallace checked out. (TR Vol. XIX 419-422).

M.H. had a considerable amount of injury to her neck. M.H. had bruising in different parts of her neck. Dr. Hunter found linear patterns that repeat themselves in different locations. (TR Vol. XX 587).

Some of M.H.' injuries were consistent with manual strangulation. (TR Vol. XX 588). This is especially true with the bruising in the front of the neck surface. (TR Vol. XX 589). The linear patterns are consistent with someone taking a ligature, like a telephone cord, and wrapping it around her neck then pressing it down on the front and strangling her. (TR Vol. XX 589).

Dr. Hunter found a plethora of petechial hemorrhaging in M.H.'s eyes. Petechial hemorrhaging is consistent with strangulation and the application of several pounds of force to the neck. (TR Vol. XX 591-592).

During cross-examination, Dr. Hunter agreed that it is possible that M.H. died from the manual strangulation and the ligature was applied after death. (TR Vol. XX 606). Dr. Hunter believes, however, that this scenario is unlikely given the parallel pattern of ligature marks around her neck. The marks show that blood was still within the blood vessels when the ligature was applied. (TR Vol. XX 607).

Dr. Hunter told the jury that it would probably take about 20-30 seconds to render M.H. unconscious. (TR Vol. XX 599).

Dr. Hunter found no signs that M.H. was unconscious at the time her killer started to strangle her. (TR Vol. XX 602). Death would follow unconsciousness if her killer applied continuous pressure for two to five minutes. (TR Vol. XX 601).

Once M.H. lost consciousness, she would not struggle or be aware of what was happening to her. (TR Vol. XX 608). She would have been defenseless. (TR Vol. XX 608). It would then be easy to apply pressure for another two minutes to cause death. (TR Vol. XX 608).

Dr. Hunter found evidence of repeated strangulation. He cannot tell if there were repeated acts of manual strangulation but the multiple ligature marks present on the neck tell him there was application and reapplication of the ligature. M.H.'s injuries are not consistent with the cord being wrapped around her neck multiple times and then force applied. Instead, it was consistent with application and reapplication at different angles. (TR Vol. XX 612).

M.H. was menstruating at the time of her death. (TR Vol. XX 603). Sperm was found in M.H.'s vagina. The sperm could have come from pre-ejaculation seminal fluid. (TR Vol. XX 605). DNA testing showed that it was Matthew Caylor's sperm. (TR Vol.

XX 569).[7]

A toxicology screen showed that M.H. had no alcohol or illegal drugs in her bloodstream. Specifically, no THC or cocaine was found. Nicotine was detected. (TR Vol. XX 596-597).

Caylor admitted that he killed M.H. Matthew Caylor told the police that "I killed that girl y'all found." (TR Vol. XX 478). Caylor also admitted he had sex with M.H. Caylor claimed it was consensual.

The prosecutor played Caylor's video recorded interview with the police for the jury. (TR Vol. XX 474-530). Detective Mark Smith took the lead in questioning Caylor. (TR Vol. XX 474).

Caylor told Detective Smith that M.H. came by his room after she walked Scott Heinze's dog. (TR Vol. XX 479). M.H. knocked on his closed door. (TR Vol. XX 479). Caylor told Detective Smith that he opened the door and M.H. came in. She asked him for a cigarette. Caylor gave her one and M.H. smoked it. (TR Vol. XX 479).

Caylor reported that, while M.H. smoked the cigarette, he asked her what she had been doing. M.H. told Caylor that she had been walking the dog. According to Caylor, he asked M.H.

[7] The chance that an unrelated individual other than Caylor deposited the sperm in M.H.'s vagina is 1 in 6.5 trillion. (TR Vol. XX 569).

what she was doing hanging out with those guys next door (Heinze and Nichols). Caylor commented that M.H. was pretty young. Caylor told Detective Smith that M.H. told him then that she was 13 years old. (TR Vol. XX 481). According to Caylor, M.H. told him that Heinze and Nichols thought they were hot stuff and she really did not like them. (TR Vol. XX 481).

Caylor told Detective Smith that M.H. started "hitting on me." (TR Vol. XX 481). According to Caylor, M.H. told him "I think you're hot." (TR Vol. XX 481, 486). M.H. then sat close to him and put her right arm around him. (TR Vol. XX 481). The next thing Caylor knew, "I'm kissing her and she's kissing me" and "I'm taking her clothes off and all this and this." (TR Vol. XX 482).

Caylor told Detective Smith that he and M.H. started having sex on the bed. (TR Vol. XX 482, 488). He did not use a condom. Then he started choking her. When he did, M.H. "started flipping out." (TR Vol. XX 482).

Eventually M.H. passed out. Caylor did not think she was dead yet. He flipped out. Caylor grabbed the phone cord off of the phone and put it around M.H.'s neck. By then M.H. was on the floor. (TR Vol. XX 482-483). Both of them were nude. (TR Vol. XX 483).

When Detective Smith asked Caylor why he started choking M.H., Caylor told them "I don't know. I don't know." (TR Vol.

XX 486). Caylor told Detective Smith that the sex part did not last long. Caylor did not wear a condom and he did not ejaculate. (TR Vol. XX 488).

Detective Smith asked Caylor how he and M.H. ended up on the floor when Caylor told him that he and M.H. had sex on the bed. Caylor told Detective Smith "when she was fighting me, when I started choking her we ended up on the floor." (TR Vol. XX 488).

According to Caylor, M.H. kept saying "Let me ask you a question, let me ask you a question." Caylor didn't want to hear it. (TR Vol. XX 489).[8]

Detective Smith asked Caylor about getting the phone cord to finish M.H. off. Detective Smith asked Caylor whether M.H. said or did anything when Caylor put the cord around her neck. Caylor told Detective Smith that "well yeah, it was like no, no." (TR Vol. XX 490).

Caylor put the phone line back after he finished choking her. (TR Vol. XX 490). He pushed M.H. under the bed. (TR Vol. XX 491). He had to pick up the bed, a little bit, to get her body under the bed. (TR Vol. XX 491). He put her clothes under her body. (TR Vol. XX 493). Caylor took his stuff and left the

[8] The record is not clear when M.H. said to Caylor, "let me ask you a question, let me ask you a question." It is logical, however, to conclude that it was before Caylor started to strangle her.

hotel room. (TR Vol. XX 493). He did not intend to come back. (TR Vol. XX 493).

Detective Smith asked Caylor when he decided to take M.H.'s life. Caylor told Detective Smith that it was "cloudy". (TR Vol. XX 496). Caylor told Detective Smith that he thought that it was that she made him angry. According to Caylor, M.H. was the "fucking reason why I'm in this situation I'm in now." (TR Vol. XX 497).[9] Caylor told Detective Smith that he felt hate and anger toward M.H. Caylor explained that he hated M.H. because she was a 13 year old coming on to him. (TR Vol. XX 497). Caylor told Detective Smith that M.H. had done nothing to him. It wasn't her. (TR Vol. XX 498). He just lost it. Caylor told Detective Smith that he was not a bad guy. (TR Vol. XX 498).

Detective Smith asked Caylor whether his attack on M.H. was "blitzed" on her, that is one second you're having sex and the next second you're choking her out. Caylor said, "Yeah." (TR Vol. XX 499). M.H. did not know it was coming "cause to her, I guess, it was whatever enjoyable or that's what she was, you know." (TR Vol. XX 499).

[9] Caylor was referring to his Georgia conviction for child molestation. He was put on first offender probation but did not successfully complete first offender probation. As such, Caylor was required to register as a sex offender. (TR Vol. XXII 902-903).

Caylor told Detective Smith that he really did not want to have sex with M.H. He wasn't into it. (TR Vol. XX 499). According to Caylor, M.H. simply walked up at the wrong time. (TR Vol. XX 499).

SUMMARY OF THE ARGUMENT

ISSUE I: In his first claim, Caylor alleges that this Court's decision in Brooks v. State, 918 So.2d 181 (Fla. 2005) precludes his conviction for aggravated child abuse under the "merger" doctrine. Caylor also alleges Brooks precludes his conviction for first degree felony murder with aggravated child abuse as the underlying felony. Caylor admits that this Court's decision in Brooks is distinguishable from the case at bar because the State proved more than one single act that constituted aggravated child abuse. Caylor claims this Court should not limit Brooks to cases where only one act underlies convictions for both aggravated child abuse and first degree felony murder.

It is undisputed that aggravated child abuse is an enumerated felony that would support a felony murder charge. It is also undisputed that the State proved Caylor committed more than one act constituting aggravated child abuse. As such, Brooks does not act to bar Caylor's conviction for aggravated child abuse or felony murder with aggravated child abuse as an underling felony.

ISSUE II: The trial judge properly denied Caylor's motion for a judgment of acquittal. The State presented competent, substantial evidence to support the jury's finding that Caylor was guilty of sexual battery. Even if this Court were to apply the special standard of review applied to wholly circumstantial

evidence cases, the trial judge properly denied the motion for a judgment of acquittal.

Caylor admitted having sexual intercourse with M.H. He claimed the sex was consensual. In a statement to the police, Caylor averred that M.H. walked up to his closed motel room door, knocked, came into his room when Caylor opened the door, sat down on the bed, told Caylor he was "hot", began hitting on him and kissing him, and then willingly let Caylor undress her and have unprotected sex with her. Caylor claims M.H. was enjoying herself, right up to the point that he started choking her.

Caylor points to his own statement to the police, evidence from the medical examiner that there were no injuries consistent with forced sex, and evidence establishing that M.H.'s clothes were found with no rips or tears. Caylor argues the State failed to present any evidence to overcome his hypothesis of innocence. Caylor is mistaken.

The State presented evidence that M.H. was only 13 years old when her path fatefully crossed Matthew Caylor's. There was evidence that Caylor and M.H. had never met or even spoken before the day Caylor murdered her. There was no "relationship" between Caylor and M.H. M.H. was reserved around strangers and she was seldom alone on the hotel property. Most of the time, she was with her older brother. When meeting a stranger, M.H.

would, for the most part, only talk with the people to whom her brother talked. Only when she became more comfortable with someone might she talk with someone when by herself. Such evidence alone refutes any notion that this 13 year old stranger wary child would suddenly turn into a sexual aggressor.

Apart from presenting evidence that Caylor's version of M.H.'s behavior was completely contrary to her true nature, the evidence showed that Caylor started strangling M.H. while he was engaged in sexual activity with M.H.. Caylor's attack was "blitzed on her" meaning that one second he was having sex with her and the next second he was choking her out. This Court has found that when the evidence supports a finding that the defendant began to strangle the victim during "consensual" sex, a jury could properly find that any previous consent was withdrawn.

The State presented competent substantial evidence to support the jury's rejection of Caylor's claim that his sexual intercourse with M.H. was consensual. This Court should deny this claim on appeal.

ISSUE III: In his third claim, Caylor alleges the trial judge erred in finding, as an aggravating factor, that Caylor committed the murder while under a sentence of imprisonment. Caylor does not dispute that, at the time of the murder, he had been previously convicted of a felony and was under a sentence

of imprisonment (Georgia felony probation for felony child molestation). (TR Vol. XXII 793-796). Instead, Caylor alleges that a trial judge may find this aggravator only if the State proves a nexus between the felony probation and the murder.

This claim may be denied for at least four reasons. First, it was not preserved for appeal. Second, any error was invited. Third, Florida's capital sentencing statute makes clear that no nexus need be shown. Fourth, to the extent any nexus need be shown, Caylor told the police that he killed M.H. because he had been "through all this because of something I didn't do." "I think that, I think that's what really pushed me into doing whatever it was I did."

Even in his sentencing memorandum in support of a life sentence, Caylor admitted that his anger and frustration over his prior conviction and punishment for child molestation, a crime he claimed that he did not commit, was the driving factor behind the murder of M.H. This claim is properly denied.

ISSUE IV: Caylor can show no abuse of discretion in the weight the trial judge assigned to Caylor's dysfunctional childhood and expressions of remorse. There is competent substantial evidence in the record to support the trial judge's decision to assign little weight to this mitigation evidence.

ISSUE V: Caylor's sentence to death is proportionate. The trial judge found three aggravators, including HAC, to which she gave

great weight. The trial judge found one statutory mitigator (extreme emotional disturbance) to which she gave some weight and four non-statutory mitigators to which she gave little or very little weight. Case law from this Court establishes that this rape and murder of a 13 year old child is proportionate.

ISSUE VI: The United States Supreme Court's decision in Ring v. Arizona does not render Caylor's sentence to death unconstitutional. At the time of the murder, Caylor was under a felony sentence of imprisonment (Georgia probation). The trial court also found the murder was committed in the course of a sexual battery or aggravated child abuse. In accord with this Court's well-established precedent, Ring has no impact on Caylor's conviction and sentence to death.

ARGUMENT

ISSUE I

WHETHER THE MERGER DOCTRINE PRECLUDES CAYLOR'S CONVICTION FOR FELONY MURDER WITH AGGRAVATED CHILD ABUSE AS UNDERLYING FELONY.

In addition to indicting Caylor on charges of sexual battery and first degree murder, a Bay County grand jury indicted Caylor for aggravated child abuse. (TR Vol. I 3). The charge alleged that Caylor committed aggravated child abuse by penetrating or attempting to penetrate M.H.'s vagina or anus and repeatedly strangling M.H. by using manual and ligature strangulation methods until she was dead. (TR Vol. I 3-4). "Aggravated child abuse" occurs when a person: (a) Commits aggravated battery on a child; (b) Willfully tortures, maliciously punishes, or willfully and unlawfully cages a child; or (c) Knowingly or willfully abuses a child and in so doing causes great bodily harm, permanent disability, or permanent disfigurement to the child. *Section 827.03, Florida Statutes*.

In Florida, a defendant may be convicted of first-degree murder under a premeditation theory or under a felony murder theory. *See § 782.04, Fla. Stat. (2007*). In this case, the State proceeded against Caylor on both theories.

The State's theory as to felony murder was that Caylor was guilty of felony murder with both sexual battery and/or aggravated child abuse as underlying felonies. Both aggravated

child abuse and sexual battery are enumerated felonies to felony murder. *Section 782.04(3), Florida Statutes (2007*).

The jury used a general verdict form to render its verdict. (TR Vol. I 75). The jury convicted Caylor of first degree murder, sexual battery with great physical force, and aggravated child abuse. (TR Vol. I 75).

In his first claim, Caylor alleges that the "merger" doctrine explained by this Court in Brooks v. State, 918 So.2d 181 (Fla. 2005) precludes his conviction for both aggravated child abuse and felony murder with aggravated child abuse as a underlying felony. (IB 12). In Brooks, the defendant murdered three month old Alexis Stuart by stabbing her, one time in the chest, as she sat in her car seat. The State pursued its felony murder theory with aggravated child abuse as the predicate offense where a child died of a single stab wound. Id. at 197-98.

Because there was no separate act of abuse, apart from the stab wound that caused Alexis' death, this Court opined the child abuse merged with the homicide and thus could not serve as the predicate felony for a felony murder conviction. Brooks v. State, 918 So.2d at 198-99. This Court also noted that if Brooks had been charged with aggravated child abuse, which he wasn't, he could not have been convicted of aggravated child abuse either because it "merged" with the homicide.

Caylor admits that his case is distinguishable from Brooks because the State alleged and proved more than a "single act." Caylor invites this Court, however, to extend Brooks to preclude Caylor's convictions anyway. This Court should decline the invitation and limit Brooks to cases involving only a single act of child abuse that causes the child's death.[10]

The record reflects that M.H. suffered multiple acts of torture as well as multiple injuries. In addition to the extensive neck injuries caused by manual and ligature strangulation applied separately, the evidence showed that M.H. was subjected to non-consensual sexual intercourse. Additionally, M.H.'s clavicle was bruised, as was her left arm. Dr. Hunter testified that the injury to M.H.'s clavicle extended the length of her clavicle. (TR Vol. XX 594). There was considerable bleeding underneath the bruised area. It was a fresh injury. (TR Vol. XX 594-595). M.H. either struck an object or sufficient force was applied to her clavicle to cause the bleeding that Dr. Hunter found. The injury was consistent

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The Second District in Rosa v. State, ---- So.3d ----, 2010 WL 2430985, 35 Fla. L. Weekly D1361 (Fla. 2d DCA 2010) observed that this Court's decision in Brooks seems directly contrary to the plain, unambiguous language of the [felony murder] statute that demonstrates that the legislature intended that a defendant who kills a child during the perpetration of the crime of aggravated child abuse may be charged and convicted of both aggravated child abuse and felony murder, regardless of the number of acts of abuse which caused the child's death. The First District Court of Appeal agreed in Lewis v. State, 34 So.3d 183, 187 (Fla. 1st DCA 2010).

with force being applied with a knee or hand or both. (TR Vol. XX 595).

The evidence demonstrated that there was much more than one act of child abuse and more than one single act that led up to and caused M.H.'s death. This Court should decline to extend Brooks to the facts of this case.[11] *See* Lewis v. State, 34 So.3d 183 (Fla. 1st DCA 2010)(evidence showing there were multiple acts of child abuse made Brooks inapplicable to Lewis' case); Rosa v. State, ---- So.3d ----, 2010 WL 2430985 (Fla. 2d DCA 2010)(multiple acts of child abuse leading to child's death takes the case out from the Brooks decision); Dorsey v. State, 942 So.2d 983 (Fla. 5th DCA 2006)(refusing to apply Brooks to a case where the evidence showed multiple acts of child abuse).

[11] Even if there was a Brooks error, it was harmless in this case. The jury found Caylor separately guilty of sexual battery, also an underlying felony to first degree felony murder. As such, even if the child abuse conviction cannot be sustained, Caylor is still guilty of felony murder with sexual battery as the underlying conviction.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN DENYING CAYLOR'S MOTION FOR A JUDGMENT OF ACQUITTAL ON THE CHARGE OF SEXUAL BATTERY.

In this claim, Caylor alleges that the State presented insufficient evidence to sustain Caylor's conviction for sexual battery involving great physical force. Caylor points to his own tale of M.H.'s seduction, the fact M.H.'s clothes were not torn or ripped, and the medical examiner's testimony that he found no injuries to M.H.'s genitals save for a small injury to M.H.'s pubic region, which could be consistent with consensual sexual activity but from which he really could not tell much. (TR Vol. XX 596). Caylor avers the trial court erred in failing to grant his motion for a judgment of acquittal. (IB 21). The State disagrees.

A. Preservation

Caylor preserved this issue for appeal. Caylor filed a motion for a judgment of acquittal. Caylor claimed that while he did commit a lewd and lascivious battery on M.H., the evidence did not support a sexual battery conviction because the State failed to prove the sex was without M.H.'s consent. (TR Vol. I 63). The trial court denied the motion. (TR Vol. XXI 641-642).

B. *Sexual Battery Statute*

Section 794.011 Florida Statutes (2007), defines sexual battery, in pertinent part, as the vaginal penetration by, or union with, the sexual organ of another. When an alleged victim is over the age of 12, the State must prove beyond a reasonable doubt that the sexual battery occurred without that person's consent. Consent means intelligent, knowing, and voluntary consent and does not include coerced submission. Consent shall not be deemed or construed to mean a failure by the alleged victim to offer physical resistance to the offender. *Section 794.011, Florida Statutes (2007)*.

Ordinarily, sexual battery is a first degree felony. Sexual battery plus actual physical force is a life felony. *Section 794.011(3), Florida Statutes (2007)("A* person who commits sexual battery upon a person 12 years of age or older, without that person's consent, and in the process thereof uses or threatens to use a deadly weapon or uses actual physical force likely to cause serious personal injury commits a life felony.").

C. *Standard of Review*

The standard of review depends on whether the State presents direct evidence of the defendant's guilt or whether the State's case is entirely circumstantial. "On appeal of a denial of a motion for judgment of acquittal where the State submitted

direct evidence, the trial court's determination will be affirmed if the record contains competent and substantial evidence in support of the ruling." Walker v. State, 957 So.2d 560, 577 (Fla. 2007) (quoting Conde v. State, 860 So.2d 930, 943 (Fla. 2003)); Pagan v. State, 830 So.2d 792, 803 (Fla. 2002). There is sufficient evidence to sustain a conviction if, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt. See Banks v. State, 732 So.2d 1065 (Fla. 1999).

Where the evidence of guilt is wholly circumstantial, however, a "special" standard of review applies. "A motion for judgment of acquittal should be granted in a circumstantial evidence case if the state fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt." Orme v. State, 677 So.2d 258, 262 (Fla. 1996).

In meeting its burden in a circumstantial evidence case, the State is not required to rebut, conclusively, every possible variation of events that could be inferred from evidence that ostensibly supports the defendant's hypothesis of innocence. Instead, the State need only introduce competent evidence, which is inconsistent with the defendant's theory of events. Darling v. State, 808 So.2d 145, 156 (Fla. 2002) (quoting State v. Law, 559 So.2d 187, 189 (Fla. 1989)). If the State's evidence

creates an inconsistency with the defendant's theory of innocence, the trial judge should deny the motion for judgment of acquittal and allow the jury to resolve the inconsistency. Woods v. State, 733 So.2d 980, 985 (Fla. 1999). *See also* Boyd v. State, 910 So.2d 167, 181 (Fla. 2005).

The State contends this case is not wholly circumstantial because Caylor admitted penetrating M.H.'s vagina with his penis. Additionally, DNA testing revealed that Caylor's sperm was deposited in M.H.'s vagina. As such, the State presented direct evidence to support at least one necessary element (penetration) of the crime of sexual battery. Miller v. State, 42 So.3d 204 (Fla. 2010) (statements from Miller's confession constituted direct evidence of his guilt under either theory of first-degree murder); Fitzpatrick v. State, 900 So. 2d 495, 506 (Fla. 2005) (finding the case was not wholly circumstantial because the State presented direct evidence in the form of DNA evidence and eyewitness testimony).

The State disputes the notion that a case is "wholly circumstantial" when the State offers direct evidence to prove one or more elements of a particular crime and circumstantial evidence to prove another element of the same crime. However, this Court has applied the circumstantial evidence standard of review when the evidence as to only one element of the conviction (consent) is circumstantial. Thomas v. State, 894

So.2d 126 (Fla. 2004) (applying circumstantial evidence standard of review when there was no eyewitness testimony to the sexual act and the defendant admitted the sexual act took place but claimed it was consensual). *But see* State v. Law, 559 So.2d 187 (Fla. 1989)(A special standard of review of the sufficiency of the evidence applies where a conviction is "wholly" based on circumstantial evidence).

This Court need not resolve the question of whether this particular conviction is subject to the circumstantial evidence standard of review. This is so because the State presented competent evidence inconsistent with the defendant's claim the sex was consensual. As such, the trial court properly sent this case to the jury. State v. Clyatt, 976 So.2d 1182 (Fla. 5th DCA 2008)(citing to State v. Hudson, 397 So.2d 426, 428 (Fla. 2d DCA 1981) for the notion that "[q]uestions of consent, force, resistance and fear are particularly within the province of the jury to determine."). Likewise, there is competent substantial evidence to support the jury's determination that Caylor raped M.H. Troy v. State, 948 So.2d 635 (Fla. 2006); Darling v. State, 808 So.2d at 156.

D. Merits

Caylor admits having sexual intercourse with M.H. but argues the sexual activity was consensual. (IB 21-27). Caylor points to his own statement to the police, testimony from the

medical examiner that there were no injuries to M.H.'s pubic region consistent with forced sex, and evidence establishing that M.H.'s clothes were found with no rips or tears. Caylor argues the trial judge erred in denying his motion for a judgment of acquittal because the State failed to present any evidence that refutes evidence M.H. consented to sexual intercourse. (IB 10). Caylor is mistaken.

Recently, this Court addressed a similar argument. In McWatters v. State, 36 So.3d 613 (Fla. 2010), the evidence at trial demonstrated that McWatters raped and murdered three women.

Jackie Bradley was the first victim. Her body was also the first to be found. Ms. Bradley's body was found in a canal. Ms. Bradley was wearing a T-shirt and bra which was bunched up into her armpits. Other clothing was found nearby. Evidence pointed to a conclusion that her killer threw Ms. Bradley's body in the canal and attempted to weight it down with rocks. The medical examiner, Dr. Diggs, testified that he did not find any external lacerations, contusions, or hemorrhages on Ms. Bradley's body. Dr. Diggs could not rule out a consensual sex act followed by a murder. However, based on factors that in his experience are common to rape-homicides, Dr. Diggs opined that within a reasonable degree of medical probability, Ms. Bradley was a victim of a rape-homicide. Two witnesses saw McWatters

and Bradley together three days before the murder.

Carrie Ann Caughey's body was found next. Her body was found in a secluded wooded area. Ms. Caughey was found nude from the waist down. Her shirt and bathing suit were pushed up into her armpits. Other clothing was found nearby. The medical examiner testified Ms. Caughey's hyoid bone was broken. Otherwise, Ms. Caughey had no injuries. Based on the presence of factors that in his experience and training were associated with sexual battery, Dr. Diggs opined that the crime was consistent with a rape-homicide or an attempted rape-homicide. A witness saw McWatters and Ms. Caughey together prior to the murder.

Crystal Wiggins' body was the last to be found. Her body was found some four days after Ms. Caughey's body was found. Ms. Wiggins's body was partially skeletonized due to decomposition. Her shirt and bra were pulled up toward her neck. A pair of women's panties was found nearby in a tree. An investigating officer found signs of struggle at the crime scene. Although Ms. Wiggin's vaginal injuries were inconclusive, the medical examiner opined that Ms. Wiggins was the victim of a sexual battery or attempted sexual battery. McWatters v. State, 36 So.3d 613, 619-622 (Fla. 2010). Witnesses had seen Ms. Wiggins with McWatters before the murder. Indeed, a witness testified that Ms. Wiggins declined an

invitation from friends in order to stay with McWatters. A witness saw Ms. Wiggins and McWatters walking together in the direction of a Li'l Saints convenience store.

McWatters admitted he killed all three women but denied raping them. McWatters told police that sex with all three women was consensual. When asked to explain what led to their deaths, McWatters told the police that he began raging because the sex (with Caughey and Wiggins) reminded him of the hatred he had for his ex-girlfriend.

On appeal, McWatters claimed the trial judge erred in denying his motion for a judgment of acquittal as to the sexual battery because the State failed to present sufficient evidence that the sex was non-consensual. This Court disagreed. This Court found that, even if it applied the special standard of review, the evidence supported the jury's verdict. Although this Court pointed to evidence in McWatters that was not presented in Caylor's, this Court discussed the issue of the victim's lack of consent. This Court noted that "[t]he fact that each woman was killed during sexual intercourse-which is based on McWatters' admission-is evidence supporting the finding that at some point, the sexual activity became nonconsensual." McWatters v. State, 36 So.3d at 634.

In this case, Caylor told Detective Smith that he and M.H. started having sex. Caylor reported that at some point he "just

started choking her." Although Caylor claimed that he had pulled out of her before he started choking her, Caylor told Detective Smith that he started choking M.H. on the bed. (TR Vol. XX 488). Caylor was straddling M.H. in the missionary position and M.H.'s legs were still spread. (TR Vol. XX 519, 522). Caylor told Detective Smith that M.H. was surprised when he started choking her because she was enjoying it [the sex presumably]. (TR Vol. XX 499). Caylor agreed that the sex/murder was a blitz sort of thing; one second he was having sex with her and the next second he was choking her. (TR Vol. XX 498).

As was the case in McWatters, Caylor's admissions demonstrate Caylor was still engaged in sexual activity at the time he started to strangle M.H. As was the case in McWatters, the jury could infer that any consent previously given was withdrawn when Caylor started to strangle M.H. and that at some point the sex became non-consensual.

Even if this were not the case, the State presented evidence inconsistent with Caylor's claim the sex was consensual. The State presented evidence that M.H. was only 13 years old. Caylor and M.H. had, apparently, never met or even spoken before the day Caylor murdered her. There was no "relationship" between Caylor and M.H. M.H. was reserved around strangers and she was seldom alone on the hotel property. It

would take a while before M.H. would go up and meet new people. When meeting a stranger, M.H. would, for the most part, only talk with the people to whom her older brother talked. Only when she became more comfortable with someone might M.H. talk with someone when by herself. Such evidence is inconsistent with Caylor's claim that this 13 year old child would suddenly turn into a sexual aggressor. The trial judge properly denied the motion for a judgment of acquittal. Hitchcock v. State, 413 So.2d 741, 745 (Fla. 1982) (finding that the totality of the circumstances, including the age of the victim and her previous chaste character, refuted defendant's claim that his sexual contact with the victim was consensual, and the jury thus "could easily have considered Hitchcock's contention that the girl consented to be unreasonable.").

ISSUE III

WHETHER THE TRIAL COURT ERRED IN FINDING THAT CAYLOR COMMITTED THE MURDER WHILE UNDER A SENTENCE OF IMPRISONMENT.

In this claim, Caylor alleges the trial judge erred in finding, as an aggravating factor, that Caylor committed the murder while under a sentence of imprisonment. Caylor does not dispute that, at the time of the murder, he had been previously convicted of a felony and was under a sentence of imprisonment (Georgia felony probation for felony child molestation). (TR Vol. XXII 793-796).

Instead, Caylor avers that, in order for the trial judge to find the aggravator, the State must show some sort of nexus between his status as a person under a sentence of imprisonment and the murder. (IB 28). Caylor argues that, without such a link, the aggravator does nothing to limit or narrow the class of persons eligible for a death sentence. (IB 30).[12]

[12] The United States Supreme Court in Tuilaepa v. California, 512 U.S. 967, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994), outlined the criteria by which an aggravator can pass constitutional muster in the face of an allegation that it fails to narrow the class of persons eligible for the death penalty. First, the aggravating circumstance must "not apply to every defendant convicted of murder; it must apply only to a subclass of defendants convicted of murder." Not every defendant convicted of murder will be under a sentence of imprisonment at the time of the murder. Accordingly, there is no danger that reasonable jurors will find this aggravator in every case. The second requirement is that the aggravator not be unconstitutionally vague. Caylor does not even allege the aggravator is vague. See also Francis v. State, 808 So.2d 110 (Fla. 2001).

This claim can be denied for four reasons. First, it is not preserved for appeal. Caylor never objected, below, to the "under a sentence of imprisonment" aggravator on the grounds the State failed to prove a nexus between the defendant's status and the murder. Indeed, in his sentencing memorandum, Caylor agreed that the State had proven the aggravator beyond a reasonable doubt. (TR Vol. I 133). Failure to preserve this issue below also fails to preserve it for appeal. Hutchinson v. State, 882 So.2d 943 (Fla. 2004) (ruling that this Court would not address Hutchinson's claim, that in order to prove the victim under 12 aggravator the State must prove a nexus between the victim's status and the murder, because Hutchinson did not object below and preserve this claim for appeal). *See also* Everett v. State, 893 So.2d 1278 (Fla. 2004) (rejecting Everett's claim that use of the "under sentence of imprisonment" aggravator is unconstitutional because there is no evidentiary nexus between the factor and the homicide because it was not preserved for review and does not constitute fundamental error).

This claim may also be denied because any error in finding the "under a sentence of imprisonment" aggravator was invited error. In his sentencing memorandum, Caylor agreed the State had proven the aggravator beyond a reasonable doubt. Moreover, directly contrary to Caylor's position now, Caylor argued, in his sentencing memorandum, that "it is the anger and frustration

over Defendant's probation that led directly to this homicide." (R Vol. I 133). In the memo, Caylor used this aggravating circumstance in an attempt to mitigate this murder. Having invited the alleged error, Caylor cannot complain about it now on appeal. Norton v. State, 709 So.2d 87, 94 (Fla. 1997) (the invited error doctrine prevents a party from making or inviting error in a case and then taking advantage of that error on appeal).

Third, this claim may be denied because there is no requirement that the State demonstrate a nexus between the "under a sentence of imprisonment" aggravator and the murder. Caylor cites to no case law that actually supports the notion that the State must prove a nexus between this particular aggravator and the murder. Instead, Caylor points to another aggravator, the "avoid arrest" aggravator and avers this aggravator is a proper comparator. (IB 31).

Caylor alleges that like the "avoid arrest" aggravator, which requires the State to show a nexus between the aggravator and the crime, the State should have to show the murder was motivated by the Caylor's status as a felony probationer. (IB 31). A simple side by side comparison of the two aggravators, as well as an examination of Florida's capital sentencing statute, shows the illogic of Caylor's argument.

Section 921. 141(5), Florida Statutes (2007) establishes a limited number of aggravating factors that can be considered in deciding whether to sentence a convicted capital defendant to death. Some of the aggravators are "status" aggravators; victim under 12, particularly vulnerable victim, defendant has been previously convicted of a violent felony, and the victim was a law enforcement officer in the line of duty. Others are aggravators that have a specific nexus to the crime; the murder was committed for pecuniary gain, the murder was CCP, the murder was committed to avoid arrest, and the murder was HAC.

The "under sentence of imprisonment" aggravator is clearly an aggravator based on the defendant's status as a recidivist, while the avoid aggravator requires a specific link to the crime. On the face of the statute, a statute which has been held to adequately narrow the class of persons eligible for the death penalty, avoid arrest is not a proper comparator. Proffitt v. Florida, 428 U.S. 242, 259-260, 96 S.Ct. 2960 (1976). Likewise, on the face of Florida's capital sentencing statute, it is clear the State does not have to prove the defendant's status as a felony probationer/parolee had a nexus to the murder.

Finally, this claim may be denied because, even if a nexus need be shown, Caylor admitted there was nexus in his sentencing memorandum. Indeed, Caylor argued that his felony probation in

Georgia, and the underlying conviction (child molestation) that caused him to be on probation, was the actual cause of the murder. (TR Vol. I 133). Caylor told the trial judge, in his sentencing memorandum, "that it is the anger and frustration over the defendant's probation that led directly to the homicide". (TR 1 Vol. I 133).

Caylor also alluded to his probation during his confession and told the police he killed M.H. because he had been in trouble before. Indeed, Caylor actually admitted that he killed M.H. because he had been "through all this because of something I didn't do." (TR Vol. XX 479-480). Caylor told the police that "I think that, I think that's what really pushed me into doing whatever it was I did." Caylor decided to "make it worth it and that's basically where that came from." (TR Vol. XX 480).

Assuming, *arguendo*, the State is required to show a nexus between the murder and the defendant's status as a person under a sentence of imprisonment, the State did so in this case. This Court should deny this claim.

ISSUE IV

WHETHER THE TRIAL JUDGE ERRED IN HER CONSIDERATION OF THE MITIGATION CAYLOR PRESENTED DURING THE PENALTY PHASE OF HIS CAPITAL TRIAL.

In this claim, Caylor alleges the trial court failed to adequately consider the mitigation evidence that Caylor presented during the penalty phase of his capital trial. Caylor acknowledges that he cannot challenge the weight assigned by the trial court to the mitigation evidence. (IB 33). Caylor claims that, as such, he seeks only to "attack the reasons why the court gave the mitigators so little consideration." (IB 33).

A. Standard of Review

Determining whether a mitigating circumstance exists and the weight to be given to existing mitigating circumstances are matters within the discretion of the sentencing court." Hurst v. State, 819 So.2d 689, 697 (Fla. 2002) (citing to Campbell v. State, 571 So.2d 415, 420 (Fla. 1990)). "[T]he trial court's conclusions as to the weight of mitigating circumstances will be sustained by this Court if the conclusions are supported by sufficient evidence in the record." Id. (citing Mansfield v. State, 758 So.2d 636, 646 (Fla. 2000)). A trial judge may even give no weight to a mitigating circumstance when, under the unique fact of the case before him, the circumstance is not mitigating. Coday v. State, 946 So.2d 988, 1003 (Fla. 2006).

Even if this Court were to determine that the trial judge committed an error in evaluating and weighing the mitigating evidence that Caylor offered, any error is subject to a harmless error analysis. Reversal is permitted only if the excluded mitigating factors reasonably could have resulted in a lesser sentence. If there is no likelihood of a different sentence, then the error must be deemed harmless. Ault v. State, --- So.3d ----, 2010 WL 3781991 (Fla. 2010); Rogers v. State, 511 So.2d 526, 535 (Fla. 1987). *See also* Lebron v. State, 982 So.2d 649, 661 (Fla. 2008)(This Court will not overturn a capital defendant's sentence to death if it determines that an error was harmless beyond a reasonable doubt).

B. Merits

(1) ***Caylor's dysfunctional family life***

The trial judge considered Caylor's dysfunctional family and gave it little weight. The trial court noted that Caylor was the product of a dysfunctional family. The Defendant's parents abused drugs and the Defendant began experimenting with drugs by the age of 13. The Defendant's father would physically discipline and beat him as well as psychologically abuse him. The trial court determined this factor would be given little weight especially since the Defendant's brother was raised in the same environment and became a law abiding citizen. (TR Vol. I 156).

Caylor takes issue with the fact the trial court gave little weight to Caylor's dysfunctional family life. (IB 34). In particular, Caylor takes issue with the fact the trial judge considered that Caylor's younger brother, Christopher, grew up in the same environment as Caylor, yet turned out to be a law abiding citizen.

Caylor points out that Christopher did not have the same learning difficulties, bipolar disorder, PTSD, or drug addictions that he had. (IB 33). Caylor also points out that while he was a teen, a police officer developed a homosexual relationship with him, something his brother did not have to endure. (IB 33). Finally, Caylor cites to evidence that Christopher did not, like he did, have to endure parents who were drunk and who beat him, yelled at him, and abused him over days, weeks, months and years. (IB 33-34).

Caylor is correct that there was no evidence that Christopher Caylor endured sexual abuse at the hands of a young police officer that the Caylor family befriended. While Caylor alleges that Christopher did not have the same drug, mental, and emotional problems that he did, the record is largely silent as to what, if any, similar difficulties plagued Christopher while he was growing up. As such, there is really no record support for Caylor's allegation that Christopher did not have to endure the same things that he did.

What is clear from the record, however, is that Christopher was subject, at the very least, to the same neglect that Caylor was. Kimberly Caylor testified that Caylor was a good kid until his brother was born. Caylor was about 7 years old when Christopher was born. (TR Vol. XXII 799).

Both she and Caylor's father had substance abuse problems. They used "crank." (TR Vol. XXII 802). It was bad when Caylor was about 12 (which would have made Christopher 5 years old). (TR Vol. XXII 802).

When they were using drugs, Ms. Caylor and her husband were barely able to provide for the kids. There was not always food in the house. (TR Vol. XXII 802). At times, there was no power. (TR Vol. XXII 802). It got so bad that she and her husband asked her mother-in-law to take the kids for a while. The boys stayed with their grandmother for about six months. (TR Vol. XXII 803).

During the time that they were heavy into drugs and partying, Caylor's parents would leave him with Christopher. She has no idea what they did. (TR Vol. XXII 804). She does not know what the kids would eat. (TR Vol. XXII 804). Once she woke up from a seven day binge and found them eating toothpaste. (TR Vol. XXII 805).

Caylor has had a problem throughout his life controlling his anger. It's like he just snaps. His Dad was the same way.

(TR Vol. XXII 807). Christopher Caylor grew up in the same household that Caylor did. Chris and Matthew are like "night and day." Christopher is a law abiding citizen. (TR Vol. XXII 809).

Kerry Caylor testified that he and his wife had a drug problem. Mr. Caylor testified that he and his wife got clean and sober about 20 years ago. They quit using drugs altogether. He and his wife have been clean for years. (TR Vol. XXII 811).[13]

While the evidence supports the notion that Caylor grew up in a dysfunctional household, the trial judge considered this evidence and found it in mitigation. She committed no error in giving this circumstance little weight. Likewise, given evidence of Christopher's exposure to the same kind of neglect that Caylor suffered, the trial court committed no error in considering that Christopher grew up in the same household that Caylor did. Abdool v. State, --- So.3d ----, 2010 WL 3909803 (Fla. 2010).

Even if the trial judge should not have considered the contrast between Caylor and his law abiding brother, any error was harmless. Caylor was 33 years old when he committed the murder.

[13] Doing the math, Caylor would have been about 14 or 15 years old at the time his parents got clean and sober. Christopher would have been about seven or eight years old.

The trial judge considered Caylor's learning disabilities as a separate mitigator. (TR Vol. I 157). Additionally, the trial judge separately considered evidence of Caylor's PTSD, bipolar disorder, drug dependence, suicide attempts, and binge use of drugs. The trial judge found that, at the time of the murder, Caylor was under the influence of an extreme mental or emotional distress. The trial judge gave this statutory mitigator some weight. (TR Vol. I 156-157).[14]

Given that Caylor committed this terrible crime some 15 years after he reached adulthood, the trial judge considered Caylor's learning difficulties and his mental health problems separately, and the State established three strong aggravators, including HAC, beyond a reasonable doubt, there is simply no reasonable possibility that, had the trial judge given more weight to Caylor's dysfunctional family or disregarded Christopher as a comparator to his brother, that Caylor would have received a life sentence. Ault v. State, --- So.3d ---- 2010 WL 3781991 (Fla. 2010). *See also* State v. DiGuilio, 491 So.2d 1129, 1138 (Fla. 1986).

[14] The trial judge observed, in her sentencing order, that the nature and quality of Caylor's mitigation evidence pales in comparison to the enormity of the circumstances in this case. (TR Vol. I 157).

(2) ***Caylor's alleged remorse***

Caylor avers the trial court failed to give sufficient weight to the evidence of his remorse. Caylor also alleges the trial judge erred in concluding that Caylor tried to blame M.H. in part for her death. Caylor points to evidence that he readily confessed to the police and at no point in his subsequent confession made even the remotest suggestion that M.H. bore any responsibility for her own death. (IB 35). Caylor points out that at the Spencer hearing, he expressed remorse and sorrow for the pain he inflicted on M.H.'s parents. According to Caylor, he made no excuse for what he had done. (IB 34-35).

Caylor argues that clearly he has "accepted responsibility for what he has done, and is sincerely, deeply sorry for killing M.H." (IB 35). Caylor avers that the trial court should have accepted his testimony, rather than dismissing it under an unsupported conclusion that his statements were somehow self-serving or limited to rebut aggravation. (IB 35).

In her order, the trial court noted that Caylor discussed his remorse at the Spencer hearing. The court found that Caylor tried to shift some of the blame onto the victim for being in his room. The Court found that Caylor tried to minimize his responsibility in the instigation of the events. (TR Vol. I 157). Although not a model of clarity, the trial court's order

made clear that the trial judge did not consider Caylor's blame shifting as an aggravator but instead considered it only in terms of the weight Caylor's remorse would be given in mitigation. The trial court assigned Caylor's remorse little weight. (TR Vol. I 157).

Evidence of a defendant's remorse for the killing can be a mitigating factor. Many cases decided by this Court have recognized that remorse is frequently offered, and considered, in mitigation of the murder for which a capital defendant has been convicted. *See e.g.* Ault v. State, --- So.3d ----, 2010 WL 3781991 (Fla. 2010); Hernandez v. State, 4 So.3d 642, 655 n.9 (Fla. 2009).

Evidence pertinent to Caylor's remorse and blame is present at two places in this record. First, Detective Smith asked Caylor about how he felt about murdering M.H. Caylor said, "I just, I kind of feel like, I don't know, I really don't know. (TR Vol. XX 497). When Detective Smith asked him whether he was remorseful, Caylor answered, "Oh yeah, I feel bad, yeah, I mean, I know this is going to lock me in for the rest of my life, I know that." (TR Vol. XX 497). When Detective Smith asked Caylor what led him to decide that M.H. had to die and whether he was afraid she would tell someone what happened, Caylor said that was not the reason. Instead, Caylor told Detective Smith that it was "like, more or less, you're (M.H.) the fucking

reason why I'm in this situation I'm in now… (TR Vol. XX 497). Caylor told Detective Smith that M.H. was in the wrong place at the wrong time. (TR Vol. XX 501).

At the Spencer hearing, Caylor told the court that he took all his anger and frustration out on M.H. Everything that went on in his life came out. (TR Vol. XXIII 908).

Caylor told the court that he was so sorry. He could not put it into words how sorry he was. (TR Vol. XXIII 908). He was very remorseful. Caylor told the Court that he was willing to take whatever it is they feel needs to happen to him. (TR Vol. XXIII 909). Caylor testified that "It wasn't her fault." (TR Vol. XXIII 910).

During cross-examination at the Spencer hearing, and despite the jury's verdict, Caylor insisted the sex was consensual. Caylor told the court that the evidence was pretty strong that he did not rape her. He did, however, take every bit of rage that has been in his life out on her. (TR Vol. XXIII 918). Caylor took umbrage with the prosecutor's reference to M.H. as a little girl. Caylor told the court that M.H. was not little. She was 5'3" and 133 pounds. (TR Vol. XXIII 932). "She was not little." (TR Vol. XXIII 932).

The trial court did not abuse her discretion at giving little weight to Caylor's alleged remorse. Long before Caylor discovered that remorse was a mitigating factor, Caylor

expressed how he really felt. At first, he did not know how he felt about murdering M.H. Next, he felt bad about it because it was going to lock him in for the rest of his life. (TR Vol. XX 497). Caylor also told Detectives that, in his view, it really was M.H.'s fault. Caylor told Detective Smith that what he thought, right before he killed M.H., was that she was "the fucking reason why I'm in this situation I'm in now… " (TR Vol. XX 497). Caylor hated M.H. because she was a 13 year old coming on to him. (TR Vol. XX 497).

The trial court was entitled to consider Caylor's statements to the police as evidence that Caylor had little real remorse, made excuses for his actions, and did indeed blame, M.H. for his plight. This Court should find no abuse of discretion.

Even if the trial court erred in not giving more credence to Caylor's remorse, any error is harmless. The trial court found three aggravators: (1) the murder was especially heinous, atrocious, or cruel (HAC); (2) commission during a sexual battery; and (3) under a sentence of imprisonment. The mitigation in the case was relatively weak. Therefore, even if the trial judge would have given more weight to remorse as a nonstatutory mitigator, the mitigating evidence would not have outweighed the aggravators and Caylor would not have been given a life sentence. Ault v. State, --- So.3d ----, 2010 WL 3781991

(Fla. 2010). *See also* State v. DiGuilio, 491 So.2d 1129, 1138 (Fla. 1986).

ISSUE V

WHETHER CAYLOR'S SENTENCE TO DEATH IS PROPORTIONATE.

In his fifth claim, Caylor avers his sentence to death is disproportionate. This Court reviews every capital case for proportionality. Fennie v. State, 855 So.2d 597, 608 (Fla. 2003). In deciding whether death is a proportionate penalty, this Court considers the totality of the circumstances of the case and compares it with other capital cases. *See* Urbin v. State, 714 So. 2d 411, 416-17 (Fla. 1998); Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991). Guiding this Court's proportionality review, in every case, is the notion that the death penalty is reserved for the most aggravated and least mitigated of first-degree murders. State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973).

In the instant case, death is a proportionate sentence. The evidence clearly supports a finding that this case is one of the most aggravated and least mitigated. Caylor's jury found, unanimously beyond a reasonable doubt that, in addition to murdering M.H., Caylor sexually battered this thirteen year old child using great physical force. The jury also found Caylor guilty of aggravated child abuse.

The trial judge found one statutory mitigator to which she gave some weight and four non-statutory mitigators to which she assigned little weight or very little weight. (TR Vol. I 156-157). In comparison, the trial court found in aggravation that: (1) the capital felony was committed by a person previously convicted of a felony and on felony probation; (2) the capital felony was committed while the defendant was engaged in the commission of a sexual battery or aggravated child abuse; and (3) the capital felony was especially heinous, atrocious, or cruel. (TR Vol. I 155-156).[15] The trial court gave great weight to each of the aggravators she found to exist. (TR Vol. I 155-156).

In performing her sentencing responsibilities, the trial court found that the mitigation presented "pales" in comparison to the enormity of the circumstances of this case. The trial court found that the aggravating factors clearly and convincingly outweighed the mitigating factors. (TR Vol. I 157).

In claiming his sentence to death was not proportionate, Caylor points to not a single case, which supports his claim that his sentence to death is not proportionate. Instead, Caylor seems to attack the sufficiency of the evidence to

[15] HAC is one of Florida's most weighty aggravators. Offord v. State, 959 So.2d 187, 191 (Fla. 2007).

support the HAC aggravator. (IB 36). Caylor cites to this Court's decision in Zakrzewski v. State, 717 So.2d 488, 493 (Fla. 1988) in support of this assertion. Caylor notes that a murder is not HAC if the victim is unconscious or semi-conscious at the time of the murder.

Even though Caylor is generally correct as to the general principle of law articulated in Zakrzewski, Zakrzewski has no application to this case. This Court has repeatedly held that a strangulation death involving a conscious victim supports the HAC aggravator. Orme v. State, 25 So.3d 536, 551-552 (Fla. 2009). *See also* Bowles v. State, 804 So.2d 1173, 1178 (Fla. 2001) ("Strangulation of a conscious murder victim evinces that the victim suffered through the extreme anxiety of impending death as well as the perpetrator's utter indifference to such torture. Accordingly, this Court has consistently upheld the HAC aggravator in cases where a conscious victim was strangled.").

Dr. Hunter told the jury that it would probably take about 20-30 seconds to render M.H. unconscious. (TR Vol. XX 599). Dr. Hunter found no signs that M.H. was unconscious at the time her killer started to strangle her. (TR Vol. XX 602). Caylor even admitted that M.H. was conscious when he started strangling her.

Caylor told the police that M.H. started fighting him when he started choking her and they ended up on the floor. (TR Vol. XX 488). Caylor also told the police that, first he manually strangled M.H. with his right hand, and then strangled her with the phone cord that he took from the motel room phone. According to Caylor, M.H. kept asking "Let me ask you a question, let me ask you a question." (TR Vol. XX 489).

Although Caylor argues that M.H. was "certainly unconscious, and unaware of what Caylor was doing," at the time he began strangling M.H. with a telephone cord, the evidence is to the contrary. (IB 36). Detective Smith asked Caylor whether M.H. was doing anything at the time he cinched the telephone cord around her neck, such as flailing, moving, or gurgling. Caylor said, "[w]ell yeah, it was like no, no." (TR Vol. XX 490). Evidence that M.H. she was pleading with Caylor to stop belies any notion that M.H. was already unconscious at the time Caylor applied the ligature, several times, in order to ensure she died at his hands.

There was substantial competent evidence that M.H. was conscious when Caylor began manually strangling her and still conscious when Caylor applied the ligature. As such, the evidence clearly supported a finding the murder was HAC. Orme v. State, 25 So.3d 536, 551-552 (Fla. 2009).

Even though Caylor points to no cases in support of his claim his sentence to death is disproportionate, many valid comparator cases from this Court demonstrate that Caylor's death sentence is proportionate. For instance, in Toney Deron Davis v. State, 703 So.2d 1055 (Fla. 1997), the defendant was charged with and convicted of first-degree felony murder, aggravated child abuse, and sexual battery for the murder of two year old C.C.

The Court found in aggravation that the murder was HAC and committed in the course of a sexual battery. The trial court found no statutory mitigators had been established. The trial court considered and gave some weight to evidence of Davis' family background, which included evidence that Davis was a good child, had musical talent, wrote poetry and attended church. Davis v. State, 703 So.2d at 1057. This Court found Davis' sentence to death proportionate. Id. at 1061-1062.

In Stephens v. State, 787 So.2d 747 (Fla. 2001), this Court found Stephens' sentence to death was proportionate. Stephens was sentenced to death after he kidnapped and murdered three year old Robert Sparrow by leaving him helpless in a hot car. The trial court found three aggravating circumstances: prior violent felonies; murder during the commission of a felony; and the age of the victim, all of which were given great weight.

In mitigation, the trial court discussed and gave some weight to a number of nonstatutory factors including: volunteer church work; the defendant's fondness for children; employment; Stephens' religious and supportive family; Stephens' educational background; adjustment to incarceration; lack of intent to kill; a codefendant's life sentence; and Stephens' pleas of guilty to other offenses.

This Court found Stephens' sentence to death proportionate. While the trial court gave great weight to Stephens' prior violent felony convictions, an aggravator not present here, the trial court in Stephens did not find the murder was especially heinous, atrocious or cruel (HAC), an aggravator this Court has deemed especially weighty. Douglas v. State, 878 So.2d 1246, 1262 (Fla. 2004)("We have recognized that HAC is one of the most serious aggravators in the statutory sentencing scheme"). This Court's decision in Stephens supports a finding Caylor's sentence to death is proportionate.

In Lukehart v. State, 776 So.2d 906, 925 (Fla. 2000), this Court affirmed a death sentence for a murder committed during the perpetration of aggravated child abuse. Lukehart beat five month old Gabrielle Hanshaw to death.

The trial court found three aggravating circumstances: (1) the murder was committed during the commission of a felony; (2) the defendant had a conviction of a prior violent felony and

was on felony probation (merged); and (3) the victim was under the age of twelve. In addition, a number of mitigating factors were found; including the two statutory mitigating factors of age (the defendant was twenty-two) and the defendant's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired. Some weight was given to the four nonstatutory mitigating factors that Lukehart abused drugs and alcohol; his father was an alcoholic and abusive; he was sexually abused as a child; and he was employed.

Once again, while Lukehart had a prior violent felony conviction, and Caylor did not, the trial court in Lukehart did not find the murder HAC as did the trial court in this case. Moreover, while Lukehart and Caylor's non-statutory mitigation evidence is similar, Lukehart was 22 when he committed the murder while Caylor was 11 years older (33 years old). Lukehart v. State, 776 So.2d at 911. This Court's decision in Lukehart supports a finding Caylor's sentence to death is proportionate.

In Douglas v. State, 878 So.2d 1246 (Fla. 2004), the 26 year old defendant raped and murdered 18 year old Mary Ann Hobgood. Douglas murdered Ms. Hobgood, after he sexually battered her, by beating her to death. The trial court found two aggravating circumstances, HAC and the murder was committed in the course of a sexual battery. The trial court also found

one statutory mitigator, that Douglas has no prior criminal history, which was given little weight and several non-statutory mitigators which were given little or very little weight. This Court found Douglas' sentence to death proportionate. This Court's decision in Douglas supports a finding that Caylor's sentence to death is proportionate.

In Eddie Wayne Davis v. State, 698 So.2d 1182 (Fla. 1997), this Court affirmed the imposition of a death sentence where the defendant entered the home of his ex-girlfriend, removed the ex-girlfriend's eleven year old daughter, transported her to his trailer, digitally penetrated her, and then strangled her. In aggravation, the trial court found that Davis was under a sentence of imprisonment; the murder was committed in the course of a kidnapping and sexual battery; the murder was committed for the purpose of avoiding arrest; and HAC. Davis v. State, 698 So.2d at 1187.

The trial court found one statutory mitigating circumstance-that the murder was committed while Davis was under the influence of extreme mental or emotional disturbance-and accorded this factor great weight. The trial court also found a number of non-statutory mitigating circumstances; Davis was capable of accepting responsibility for his actions and had shown remorse for his conduct and offered to plead guilty; he had exhibited good behavior while in jail and prison; he had

demonstrated positive courtroom behavior; he was capable of forming positive relationships with family members and others; he had no history of violence in any of his past criminal activity; he did not plan to kill or sexually assault the victim when he began his criminal conduct; he cooperated with police, confessed his involvement in the crime, did not resist arrest, and did not try to flee or escape; he had always confessed to crimes for which he had been arrested in the past, accepted responsibility, and pled guilty; he had suffered from the effects of being placed in institutional settings at an early age and spending a significant portion of his life in such settings; and Davis obtained his GED while in prison and participated in other self-improvement programs. Davis v. State, 698 So.2d at 1187.

While Caylor was not convicted of kidnapping as was Davis, the trial court in Davis gave great weight to the fact that at the time of the murder, Davis was under the influence of extreme mental or emotional disturbance. In this case, the trial court only gave that factor some weight. (TR Vol. I 157).

Moreover, the trial court in Davis found much more non-statutory mitigation than the trial judge did in this case, including a history of institutionalization, a factor not present here. (TR Vol. I 156-157). This Court's decision in Davis supports a finding that Caylor's sentence to death is

proportionate. *See also* Smith v. State, 28 So.3d 838 (Fla. 2009); Johnson v. State, 969 So.2d 938 (Fla. 2007); Johnston v. State, 841 So.2d 349 (Fla. 2003); Chavez v. State, 832 So.2d 730, 767 n. 44 (Fla. 2002); Blackwood v. State, 777 So.2d 399 (Fla. 2000); Carroll v. State, 636 So.2d 1316, 1319 (Fla. 1994); Schwab v. State, 636 So.2d 3 (Fla. 1994).

ISSUE VI

WHETHER CAYLOR's SENTENCE TO DEATH IS UNCONSTITUTIONAL PURSUANT TO THE UNITED STATES SUPREME COURT DECISION IN RING V. ARIZONA.

In this claim, Caylor argues his sentence to death is unconstitutional pursuant to Ring v. Arizona, 536 U.S. 584 (2002). Caylor avers this Court wrongly decided Bottoson v. Moore, 833 So.2d 693 (Fla. 2002) and King v. Moore, 831 So.2d 143 (Fla. 2002). Caylor also acknowledges the precedent weighing against this claim. Caylor requests this Court to recede from those decisions. (IB 39).

This Court should reject any notion that Caylor's sentence to death is unconstitutional under Ring. Among the aggravators found to exist in this case was that Caylor committed this murder in the course of a sexual battery and in the course of committing aggravated child abuse. Caylor was convicted by a unanimous jury beyond a reasonable doubt of both sexual battery and aggravated child abuse. Additionally, Caylor was under a sentence of imprisonment at the time of the murder.

Well after Bottoson and King were decided, this Court has consistently ruled that Ring will not disturb a capital defendant's sentence to death when a defendant was under a sentence of imprisonment as a result of a prior felony conviction or committed the murder in the course of an enumerated felony. *See* Troy v. State, 948 So.2d 635, 653 (Fla. 2006) (denying Ring relief because the trial court found the "during the course of a felony" aggravator based on the jury's verdict finding defendant guilty of two counts of armed burglary, two counts of armed robbery, and attempted sexual battery in addition to first-degree murder; Allen v. State, 854 So.2d 1255 (Fla. 2003) (Ring will not act to disturb death sentence when one of the aggravating factors in this case was that the murder was committed while Allen was under a sentence of imprisonment. Such an aggravator need not be found by the jury). In accord with this Court's well-established precedent, Caylor's sixth claim should be denied.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF OF THE APPELLEE has been furnished by U.S. Mail to David A. Davis, Office of the Public Defender, Leon County Courthouse, 301 S. Monroe Street, Suite 401, Tallahassee, Florida 32301, this 12th day of October, 2010.

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Assistant Attorney General

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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MEREDITH CHARBULA
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