IN THE SUPREME COURT OF FLORIDA

MICHAEL RENARD JACKSON

Appellant,

v. CASE NO. SC10-1646

STATE OF FLORIDA,

Appellee.

_____/

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

ANSWER BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

Appellant, MICHAEL RENARD JACKSON, raises five issues in this direct appeal from his convictions (murder and sexual battery) and sentence to death. References to the appellant will be to "Jackson" or "Appellant". References to the appellee will be to the "State" or "Appellee". References to the murdered victim will be to A.B.

There are seventeen volumes that comprise this record on appeal. The first eight are the record volumes and will be referred to as "R" followed by the appropriate volume and page number. The nine volumes containing the trial transcripts will be referred to as "TR" followed by the appropriate volume number and page number. In the rear of record volume 6 there are discs containing photographs admitted into evidence, Jackson's full and redacted interview with the police, and a disc containing a video from the convenience store where A.B. stopped for a soda and cigarettes shortly before the murder. The photo file is password protected. To view these photos, open the file, and click on the "read only" button (the file opens slowly). These exhibits will be referred to as "State Ex" followed by the exhibit number. References to Jackson's initial brief will be referred to as "IB" followed by the appropriate page number.[1]

[1] In the state's copy of the record, the cover pages to Volumes 16 and 17 were inadvertently switched. The undersigned counsel

STATEMENT OF THE CASE

Born on Christmas Eve in 1969, Michael Renard Jackson was thirty-seven (37) years old when he raped and murdered A.B. on January 23, 2007. (R Vol. I 2). Jackson was arrested on February 16, 2007. (R Vol. I 4).

On March 9, 2007, a Clay county grand jury indicted Jackson for first degree murder and sexual battery. (R Vol. I 14). On March 14, 2007, the State provided notice that it intended to seek the death penalty for the murder of A.B. (R Vol. I 21).[2]

Jackson pled not guilty and proceeded to trial. At trial, Jackson was represented by three lawyers; Refik Eler, Sean Espenship and Kate Bedell.

The State called sixteen (16) witnesses, and then rested its case. Jackson made a motion for a judgment of acquittal targeting both the murder and sexual battery counts of the indictment. (TR Vol. XIV 1174-1179).

As to the charge of sexual battery, Jackson argued the State had presented no evidence of penetration or union with A.B.'s vagina. Jackson also argued the evidence was

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switched the cover pages to correspond with pagination. This Court's record may or may not suffer the same problem, which fortunately is easily remedied.

[2] The trial judge ordered Jackson to transported to be examined by a psychologist, Dr. Harry Krop, on November 5, 2008, January 21, 2009, February 4, 2009. (R Vol. I 36-37, 42).

insufficient to support the sexual battery charge because there was no evidence of physical trauma to the vaginal area inside and out. (TR Vol. XIV 1174). Jackson claimed the State failed to overcome his reasonable hypothesis that he had consensual sexual relations with A.B. prior to the murder. (TR Vol. XIV 1174). The trial judge denied the motions. (TR Vol. XIV 1179-1180).

Jackson called six witnesses to testify for the defense. (TR Vol. XIV 1183-1195, TR Vol. XV 1287-1317). Jackson also testified on his own behalf. (TR Vol. XIV 1197-1200, TR Vol. XV 1206-1285). Jackson's theory at trial was that someone else committed the murder, perhaps A.B.'s husband or a homeless man who frequented the area around Wells Road and to whom A.B. had been kind.

After Jackson rested his case, Jackson renewed his motion for a judgment of acquittal. (TR Vol. XV 1317-1318). The trial judge denied the motion. (TR Vol. XV 1318). The State offered two photographs into evidence in rebuttal. The photos depicted injuries to A.B.'s thighs and were introduced to rebut Jackson's claim he had consensual sex with A.B. (TR Vol. XV 1318-1320).

On February 22, 2010, contrary to his pleas, a Clay county jury found Jackson guilty as charged in the indictment. The jury found that during the commission of the murder, Jackson carried, displayed, or used a weapon. (R Vol. IV 754-756).

On March 2, 2010, Jackson filed a motion for a new trial. Among the grounds asserted was an allegation the trial court erred in denying Jackson's motion for a judgment of acquittal because the State had failed to demonstrate A.B. had any trauma to her vagina or anus. Jackson argued the State had failed to overcome his reasonable hypothesis of innocence; that he and A.B. had engaged in consensual sexual intercourse. (R Vol. IV 785-787). The trial judge denied the motion. (R Vol. V 833).

On April 28, 2010, the State provided notice of its intent to rely on four aggravators during the penalty phase of Jackson's capital trial. (R Vol. V 815-816). The State notified Jackson it intended to present evidence to support the following aggravators: (1) under a sentence of imprisonment; (2) prior violent felony; (3) murder in the course of a sexual battery; and (4) the murder was especially heinous, atrocious, or cruel (HAC). (R Vol. V 815).

On April 30, 2010, more than two months after Jackson was found guilty, the penalty phase commenced. It lasted one day. When the parties went on the record at the penalty phase, trial counsel announced that Jackson wished to waive the presentation of mitigation evidence. (TR Vol. XVI 1498).

Pursuant to this Court's decision in Koon v. Dugger, 619 So.2d 246 (Fla. 1993), the trial court conducted an inquiry into

the defendant's decision to waive mitigation. The trial judge placed Jackson under oath. (TR Vol. XVI 1500). When the trial judge asked Jackson whether he insisted that no mitigation be presented on his behalf, Jackson told the court "That is correct, sir." (TR Vol. XVI 1500).

Trial counsel advised the court that he had 15 witnesses present to testify on Jackson's behalf at the penalty phase. (TR Vol. XVI 1502). Trial counsel also explained that they consulted with various mental health professionals including Dr. Meadows, Dr. Krop, and a Dr. Rue in California. Trial counsel told the court that after investigation of Jackson's mental health, the defense team felt that there would not be any mental health evidence to present either in statutory or non-statutory mitigation. (TR Vol. XVI 1502). Trial counsel advised the court there were no "neuro psych" issues. (TR Vol. XVI 1503).

Trial counsel advised the court that the defense team did do a socioeconomic and early childhood family background investigation. Counsel advised the court that the defense was prepared to put on evidence relating to Jackson's childhood as well as his good deeds. In addition, trial counsel told the court that they were prepared to call witnesses from Texas and Florida whom Jackson had helped and contributed to as a human being. Counsel advised the trial court that the defense team felt the available mitigation was significant mitigation that

could be presented. (TR Vol. XVI 1503).

Trial counsel presented an affidavit from Jackson waiving the presentation of mitigation evidence. (TR Vol. XVI 1504). Jackson affirmed he had signed the affidavit and that he wished to waive presentation of mitigation evidence. (TR Vol. XVI 1504). Jackson told the trial court that he fully understood what was contained in the affidavit and what efforts had been made on his behalf to investigate and present mitigation. (TR Vol. XVI 1504). The trial court found that Jackson freely, voluntarily, and knowingly waived the right to present any mitigation evidence. (TR Vol. XVI 1504).

The State presented two witnesses in aggravation; one witness to testify about the facts of Jackson's prior violent felony conviction for burglary and sexual battery on a 14 year old girl and one witness to testify that at the time of the murder Jackson was under his supervision on felony sex offender probation. (TR Vol. XVI 1536-1549; 1569-1575). The State also introduced a copy of the judgment and sentence reflecting Jackson's previous convictions for burglary and two counts of sexual battery.

Finally, the State offered the testimony of two witnesses (A.B.'s husband and father) who read victim impact statements. (TR Vol. XVI 1549-1550, 1550-1569).

Although Jackson had previously waived his right to present

mitigation evidence, Jackson did call one witness to testify on his behalf. Tom Waugh from the Clay County Sheriff's Office offered Skipper-type evidence to the jury.[3] Mr. Waugh testified that Jackson knew what the rules were of the jail and followed them and could be considered a model inmate. (TR Vol. XVI 1580-1581).

Jackson also testified in his own behalf. Jackson read a prepared statement for the jury. (TR Vol. XVI 1583-1593). In it, among other things, Jackson told the jury that he had been a victim of sexual abuse and had been a runaway, a drug abuser, and a prostitute. (TR Vol. XVI 1588). On April 30, 2010, the jury recommended Jackson be sentenced to death by a vote of 9-3. (TR Vol. XVII 1673-1674).

On May 7, 2010, Jackson filed a motion for a new penalty phase. Jackson made no claim the trial court erred in instructing the jury on the "under a sentence of imprisonment" aggravator because the State failed to prove a nexus between Jackson's sentence of imprisonment and the murder. (R Vol. V 831). The trial judge denied the motion. (R Vol. V 833).

[3] Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986)(evidence that a defendant has exhibited good prison behavior or has the potential to do well in prison is evidence a defendant may present in mitigation).

On May 19, 2010, the trial court held a Spencer hearing. (TR Vol. XVII 1680-1723).[4] The State presented five additional victim impact statements. (TR Vol. XVII 1690-1705).

Jackson called one witness to testify on his behalf at the Spencer hearing. David Douglas testified that he was a criminal defense investigator. He was the lead mitigation investigator in the Jackson case. (TR Vol. XVII 1706). Through Mr. Douglas, trial counsel introduced a timeline/lifeline of Mr. Jackson's life. (TR Vol. XVI 1707). Mr. Douglas also explained some of Jackson's family and social history, including that Jackson lived in the projects as a child which were located in the vicinity of a CITCO refinery, Jackson was sexually abused by a caregiver and her granddaughter when he was five or six years old and that he was exposed to drug and alcohol abuse at a young age. (TR Vol. XVII 1710-1713). Mr. Douglas described Jackson's young life as one characterized by abuse, neglect and family violence. (TR Vol. XVII 1714).

Through Mr. Douglas, trial counsel also presented some medical records that showed Jackson was admitted to the hospital on four separate occasions before he was three years old. The records also showed that Jackson was five or six months of age when he was admitted to the hospital with compulsive disorder

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

and suffering with convulsions. Mr. Douglas told the trial court that Jackson's EEG showed questionable brain activity possibly linked to epilepsy. (TR Vol. XVII 1716). Mr. Douglas also explained that Jackson suffered a skull fracture when he was pushed or fell from a second floor window. (TR Vol. XVII 1716).

Mr. Douglas was unable to find any positive role models that may have had a positive influence on Jackson as a teenager. He did play sports and one or two of his coaches remembered him. (TR Vol. XVII 1717). Douglas found a man who credited Jackson with turning his life around and leading him to religion. (TR Vol. XVII 1717). The man and his wife traveled from Tennessee and were prepared to testify at the penalty phase. (TR Vol. XVII 1717-1718). Mr. Douglas came to the conclusion that Jackson believes in God. (TR Vol. XVII 1718).

Mr. Douglas also told the court about Jackson's relationships with other people with whom Jackson had been associated. Mr. Douglas testified that several people considered Jackson a good friend and to be loyal, trustworthy, a hard worker and a good provider. Mr. Douglas told the trial judge about one incident when Jackson volunteered at a local church and assisted in replacing a roof that had caved in. The homeowner was a church member's neighbor. (TR Vol. XVII 1721). Jackson did so to "pay the church back" for providing food

assistance to him and to a friend while they were out of work and hungry. (TR Vol. XVII 1721).

Douglas was present and ready to testify at the penalty phase on Jackson's behalf. He was not authorized [by Jackson apparently] to testify, however. (TR Vol. XVII 1722). After the Spencer hearing, the State and the defendant submitted sentencing memoranda. (TR Vol. V 843-848, 849-856).

On July 16, 2010, the trial judge followed the jury's recommendation and sentenced Jackson to death. (R Vol. V 857-867). The court found the State had proven four aggravating factors beyond a reasonable doubt: (1) under a sentence of imprisonment (great weight); (2) prior violent felony (great weight); (3) the murder was committed in the course of a sexual battery (great weight); and (4) the murder was HAC (great weight). (R Vol. V 858-859).

The trial judge did not find any statutory mitigating factors. (R Vol. V 861). The trial judge noted that although Jackson had not suggested any statutory mitigators existed or offered any evidence to support a statutory mitigator, he had nonetheless reviewed each statutory mitigating factor and found no evidence to support any of them. (R Vol. V 861).

The Court did, however, consider and weigh twenty-four (24) non-statutory mitigating factors. These were: (1) the defendant was a model probationer as well as a model prisoner (slight

weight); (2) the defendant has a deprived early childhood without role models (slight weight); (3) the defendant's father was absent from the home (slight weight); (4) the defendant's mother abandoned him when she moved from Florida to Texas (slight weight); (5) the defendant suffered a severe physical injury (skull fracture) at a young age, along with other injuries (slight weight); (6) the defendant and his family were poor (slight weight); (7) the defendant was abused by an older woman when his mother was not around (slight weight); (8) the defendant and his siblings were subject to child sexual abuse and neglect (slight weight); (9) the defendant's Clay County jail incarceration revealed he is capable of adapting well to long term incarceration (sleight weight); (10) the defendant is loved by his family and friends (slight weight); (11) the defendant has a severely dysfunctional family (slight weight); (12) the defendant has friends, cares about others, and had brought others to believe in God (slight weight); (13) the defendant believes in God (slight weight); (14) the defendant was subjected to involuntary drug use and alcohol abuse prior to reaching his 5th birthday (slight weight); (15) the defendant was hospitalized and/or required major surgery on three occasions prior to attaining the age of three years old (slight weight); (16) at the age of six months, a medical specialist detected abnormal brain activity on an electroencephalogram performed on

the defendant which was consistent with a seizure disorder, however there was no follow-up care or treatment (slight weight); (17) the defendant was raised in a low-income housing project situated in an unhealthy and polluted industrial neighborhood (slight weight); (18) as a child, the defendant witnessed violence perpetrated upon his mother when she was shot by her husband in the defendant's presence (slight weight); (19) after being abandoned in Texas by his mother at an early age, the defendant was unilaterally removed from the care and custody of a caring relative and sent to Florida, thus preventing him from receiving necessary counseling and treatment (slight weight); (20) the defendant was sexually abused during his teenage years by a juvenile detention counselor who was later arrested from abusing the defendant (slight weight); (21) the defendant's roommates and co-workers describe him as a hard worker, financially responsible, and a good provider as an adult (slight weight); (22) the defendant was kind to children and homeless individuals, providing them with money and food (slight weight); (23) the defendant was polite, cooperative and respectful to his attorneys and legal staff during the pendency of his criminal case (slight weight); and (24) after being released from long term custody, the defendant resided with, and assisted with the physical care of an older couple with medical issues. They described him as a gentleman and a productive

member of their household (slight weight). (R Vol. V 861-865).

The trial court also sentenced Jackson to life in prison as a result of his conviction for sexual battery. (R Vol. V 873). The court ordered Jackson's life sentence to run concurrently with his sentence to death. (R Vol. V 875).

Jackson did not file a motion for rehearing. Specifically, Jackson made no claim, after the sentencing order was entered, that it was improper to find the "under a sentence of imprisonment" aggravator because the State had failed to prove a nexus between the aggravator and the murder. Instead, on August 18, 2010, Jackson filed a notice of appeal. (R Vol. V 883).

On March 31, 2011, Jackson filed his initial brief. This is the State's answer brief.

STATEMENT OF THE FACTS

The last day of A.B.'s life was a Tuesday. It was January 23, 2007. A.B.'s day started like every other Tuesday. She got up early, between 4:00-4:15 a.m., and got ready for work. A.B.'s husband of six years, S.B., got up with her to keep her company. (TR Vol. XI 480-482).

A.B. was the lead veterinary technician for the Wells Road Veterinary Clinic in Clay County, Florida. Tuesdays were surgery days in the veterinary clinic. (TR Vol. XI 483). A.B. went in early on Tuesdays to ready the clinic for the day's surgery cases. (TR Vol. XI 483, 570-571).

On the morning of January 23, 2007, A.B. drove the family's only working truck, a black 2005 Chevy Silverado. Although A.B. and her husband had another truck which S.B. drove for work, it was broken down. (TR Vol. XI 484). When the couple was down to one working truck, S.B. would sometimes take his wife to work so he could use the Chevy Silverado during the day. (TR Vol. XI 484). S.B. did not take his wife to work on Tuesday, January 23, 2007.

A.B. left her home somewhere between 4:30 and 4:45 in the morning to make the 20-35 minute drive into work (depending on traffic). (TR Vol. XI 493, 510). As usual, A.B. stopped at a Kangaroo convenience store near her workplace to get some

cigarettes and a soft drink. (TR Vol. XI 485, 534). A.B. could not know she had only minutes to live.

The store's security camera caught A.B. on video. A.B. walked in the door at the Kangaroo at 5:10 in the morning. She bought a soda and some cigarettes. She left at 5:12 a.m. (State's Exhibit 122RRRRR). A.B. was only customer in the store. There was no one else on the sidewalk or in the parking lot when A.B. arrived and left the Kangaroo. (TR Vol. XI 544-546). Michael Jackson was not with A.B. (TR Vol. XI 546).

Twelve minutes later, at 5:24 a.m., A.B. turned off the alarm in the main building of the clinic. (TR Vol. XI 556). Before entering the building and turning off the alarm, A.B. had to drive up to the gate, open the combination padlock, drive through, park her truck, and walk back to put the chain around the gate (she did not relock it). (TR Vol. XI 574). Then in order to get into the building, A.B. would have to walk through a latched but not locked walk-through gate, unlock the door to the main building and enter the security code to disarm the alarm system. (TR Vol. XI 574).

When A.B. got to the clinic, her routine was to check the main building then go to the kennels to walk the dogs that were housed overnight in the clinic. Thereafter, A.B. would prepare the clinic for surgery. A.B. got to the clinic on Tuesday mornings about an hour to an hour and half before anyone else.

(TR Vol. XI 570, TR Vol. XII 616-617).

On a normal Tuesday, by the time everyone else got to the clinic shortly before the clinic's 7:00 a.m. opening time, everything was ready to go. Typically, A.B. prepared and laid out the surgery packs and surgery tools and lined up the numbered surgical meds baskets. She would also prepare all the paperwork needed for the day. (TR Vol. XI 570, TR Vol. XII 616-617).

On Tuesday, January 23, 2007, A.B. never got a chance to set up the clinic for surgery. (TR Vol. XI 588). After turning the alarm off, per her routine, A.B. went out to the kennel, folded her coat, and put down her coat and keys in the normal place. (TR Vol. XI 486, TR Vol. XII 632). She never made it any further.

Joy Ortiz and Holly Butler arrived at the clinic between 6:45 and 6:50 a.m. Both women noticed A.B.'s truck in the parking lot. Both women also noticed the clinic was not set up as usual. (TR Vol. XI 581, TR Vol. XII 612). Something else was amiss. One hundred dollars ($100) was missing from the cash drawer. The money had been there the night before. (TR Vol. XI 587).

Holly Butler found A.B. dead on the kennel floor when she went to investigate the unusual state of the clinic that morning. A.B. had massive head injuries. (TR Vol. XII 657).

The Medical Examiner would later find that A.B. had been stabbed, strangled both manually and with a ligature, and bashed over the head several times with a fire extinguisher. (TR Vol. XIII 989, TR Vol. XIV 1007-1015, 1015-1022, 1026-1031, 1040-1047, 1050-1051).

A.B.'s body showed signs of sexual battery. (TR Vol. XIII 974). A.B. was lying on her back. Her legs were splayed open and she was naked from the waist down. (State's Exs. 52-54, 58, 60-62, 65). A.B.'s scrub pants and underwear were tangled around one ankle. (TR Vol. XIII 974). There was blood on one thigh. A.B.'s bra was in place but her shirt was open and pulled up over her bra. (TR Vol. XIII 974). A.B.'s bra and shirt were bloody. A.B.'s face was unrecognizable under the blood. Blood was pooled around A.B.'s face and head. (State's Exs. 52-54, 58, 60-62, 65).

Secretions from A.B.'s vagina were pooling near the opening of her vagina. The medical examiner told the jury that if A.B. would have been raped within a couple hours of her death, the secretions would have settled along the dependent portion of her vagina including the area just inside the opening. (TR Vol. XIII 976). These secretions were visible when the medical examiner examined A.B.'s body. (TR Vol. XIII 976).

The medical examiner used a rape kit to obtain vaginal and anal swabs from A.B.'s body. The swabs were sent for DNA

testing. DNA testing revealed that Michael Renard Jackson was the only source of the semen found in A.B.'s vagina and anus. No third party DNA was found.[5] (TR Vol. XIV 1127-1136).

A.B.'s body was bruised and battered. A.B. had bruises on the back of both of her shoulders consistent with her bra strap being jammed down into the concrete of the kennel. (TR Vol. XIII 991). A.B. had two bruises on the inner aspect of each thigh. (TR Vol. XIII 994). These particular bruises could be consistent with someone forcing her legs apart. (TR Vol. XIV 1005). A.B. also had bruises on her armpit and another on her right arm. A.B. had a series of bruises and one small abrasion to the back of her left arm. A.B. had three linear abrasions that were located on her right forearm. A.B. had a bruise over her right hip. Some of these bruises could be consistent with A.B. being grabbed and shoved to the concrete during a sexual attack. (TR Vol. XIV 1004). Others were consistent with her fighting off her attacker and impacting the kennel's metal animal crates during the attack. (TR Vol. XIV 1004).

A.B.'s murder went unsolved for almost a month. However, when the DNA results from the semen found in A.B.'s body was put

[5] S.B. testified that he and A.B. had not engaged in sexual relations in the six days before the murder. A.B.'s father was visiting them and sleeping in their bedroom. Although A.B.'s father left the night before the murder, the couple watched TV and went to sleep without having sexual intercourse because A.B. had to get up early the next morning for work. (TR Vol. XI 491).

into the FBI's Combined DNA Index System (CODIS), investigators got a hit - Michael Renard Jackson.[6] After the hit, investigators from the Clay County Sheriff's Office asked Jackson to accompany them to the Clay County Sheriff's Office for an interview. Jackson agreed. (TR Vol. XIII 886).

The State's theory of the case was that Jackson had never met A.B., but while walking to work, Jackson saw A.B. arrive at the Wells Road Clinic alone. It was still dark outside. A person walking between the Rodeway Inn where Jackson was living on January 23, 2007 and Grimes Construction, where Jackson worked on January 23, 2007, would walk right past the Wells Road Vet Clinic. (TR Vol. XIII 883).

The likely scenario was that once A.B. unlocked the fence, Jackson followed her surreptitiously onto the clinic grounds, and attacked A.B. after she got to the kennel to walk the dogs. Once he killed her and partially cleaned up the scene, Jackson went to work. Enroute, Jackson jumped a wire fence leading away from the clinic, and into a woody area, and left some of A.B.'s

[6] CODIS along with the National DNA Index System (NDIS) fosters the exchange and comparison of forensic DNA evidence from violent crime investigations to law enforcement agencies throughout the United States. http://www.fbi.gov/about-us/lab/codis. Jackson's DNA was in the system as a result of a previous conviction for sexual battery. The State carefully refrained from allowing testimony that would inform the jury that Jackson was identified as a suspect as a result of a "hit" from CODIS.

blood on the fence.[7] As such, during the interview, investigators questioned Jackson closely about whether he had ever seen A.B. before and whether he had walked to work on January 23, 2007. Jackson denied knowing A.B. and he denied walking to work.

During the interview, investigators showed Jackson a picture of A.B. (State's Exhibit 83, TR Vol. XIII 893, 909). Jackson denied ever seeing her. (TR Vol. XIII 909). Detective Calhoun asked Jackson whether he had ever asked A.B. for directions or anything like that. Jackson shook his head no. (TR Vol. XIII 909). When asked whether he ever saw A.B.'s picture on the news or anything, Jackson said "no, never seen her." (TR Vol. XIII 910).

During the interview, Detective Cotchaleovich had the following exchange with Jackson:

> *Detective Cotchaleovich: And this girl I showed you a picture of her name is [A.B}. You've never seen her?*[8]
>
> *Jackson: Never saw her.*
>
> *Detective Cotchaleovich: In your whole life never run into her? Don't recognize her from anywhere?*

[7] It is a 16 minute walk between the vet clinic and Grimes Construction. (TR Vol. XIII 883).

[8] The detective told Jackson her full name when he showed him A.B's picture. The undersigned has used the victim's initials in substitution of her name for the purposes of this brief.

Jackson: No.

(TR Vol. XIII 913).

Jackson told the police that he did not even know this person. Jackson claimed he "never had nothing with this person." (TR Vol. XIII 933).

Jackson also told investigators that at the time of the murder, he worked for Grimes Construction. He was living at the Rodeway Inn. (TR Vol. XIII 878). His boss would always pick him up for work. (TR Vol. XIII 903). He would pick Jackson up every morning. (TR Vol. XIII 905). When Jackson was staying at the Rodeway Inn and working at Grimes, he never had to walk to work. (TR Vol. XIII 906). Jackson told investigators that he doesn't leave the house, he is always picked up and he "don't walk." (TR Vol. XIII 916). Jackson told Detective Cotchaleovich that he is always picked up, every single morning and that he doesn't go anywhere. (TR Vol. XIII 919). Jackson told the police that on the day of the murder, his boss picked him up at 6:30 a.m. His boss honked the horn out front and "we get in the truck." (TR Vol. XIII 922). Jackson stated that on the day of the murder, he got picked up at his house and went directly to work. (TR Vol. XIII 935). He knows he did not walk to work that day. (TR Vol. XIII 939)

Jackson consistently denied ever being at the vet clinic and sexually battering and killing A.B. (TR Vol. XIII 914-915,

918-920, 924). He told the police his semen was not there. (TR Vol. XIII 921). He had no explanation how his semen got into A.B.'s vagina. (TR Vol. XIII 925).

At trial, Jackson told an entirely different story about knowing A.B. Contrary to what he told the police many times during the interview, Jackson actually did know A.B. Indeed, Jackson told the jury that he had not only seen A.B. many times, he and A.B. had engaged in regular sexual intercourse.

Jackson testified at trial that he and A.B., a woman he knew as "Haley", had been having sex on a regular basis. According to Jackson's testimony at trial, some months before the murder, he had a chance encounter with A.B. at the Kangaroo gas station. Jackson spoke with her because he thought he recognized her from a club where she used to dance. Jackson told the jury that after their chance encounter, he saw "Haley" often. They began smoking marijuana together and then having sex on a regular basis. Jackson told the jury that before the murder he had met with A.B. maybe 50 or 60 times. (TR Vol. XV 1225). Jackson testified that A.B. even told him that she was the mother of his baby. (TR Vol. XV 1225).

Jackson also told the jury a different story about what he did on the way to work and how he got to work. Jackson testified that on the morning of January 23, 2007, he got up about 4:30 in the morning. (TR Vol. XV 1255). He met A.B. at

the Chevron. The Chevron, where Jackson claimed they met on the morning he murdered her, is very close to the clinic where A.B. worked. (TR Vol. XI 485).

Jackson would have walked to the Chevron because he does not have a car. (TR Vol. XIII 903). Jackson told the jury, after meeting A.B. at the Chevron, they went to the Suburban hotel, smoked marijuana, and had sex (in her truck). (TR Vol. XV 1222). After that Jackson went to work and she went her own way. (TR Vol. XV 1223).

Jackson told the jury that he got to work at 6:02 a.m. (TR Vol. XV 1255). Jackson also told the jury he and A.B. only had vaginal sex and that they were together about 20-30 minutes. (TR Vol. XV 1260).

Jackson's decision to testify left him with a dilemma. How can he explain the fact that he told the police repeatedly that he had never seen A.B. before, even though detectives showed him her picture?

Jackson testified before the jury that, despite the 50 or 60 encounters with her in the months leading up to the murder, he did not recognize A.B. from her picture. Jackson told the jury the girl in the photo was dressed up real nice and the picture was "fuzzy." (TR Vol. XV 1221). He had never seen A.B. dressed up like that and her hair was different. (TR Vol. XV 1222). It did not occur to Jackson to tell the police that

the woman in the picture looked like another woman he knew as Haley, a woman with whom he had met the very morning of the murder for a consensual sexual romp and pot smoke in her truck.

The jury did not believe Jackson. The jury found that Jackson guilty of first degree murder and sexually battery with great physical force. (R Vol. IV 754-756).

SUMMARY OF THE ARGUMENT

ISSUE I: In this claim, Jackson avers that the trial judge erred in allowing the State to play portions of Jackson's recorded statement to the police. Jackson relies on Rule 403 of the Florida Rules of Evidence, which excludes relevant evidence on the grounds that its probative value is substantially outweighed by the danger of unfair prejudice.

The trial judge did not abuse his discretion. The tape was admissible as a statement made by the defendant. The parties meticulously went through the tape recorded interview and redacted matters that were unduly prejudicial to Jackson (e.g. that he was under supervision). Contrary to Jackson's suggestions, the police did not invent an imaginary script of the murder nor concoct various theories of how the murder/rape must have occurred. Instead, the jury heard the police officers confront Jackson with evidence found on the victim's body. The jury also heard Jackson's emphatic denial.

Any rational juror would understand the confronting statements by the investigating officers were part of the officers' interrogation technique, rather than "opinion evidence" upon which they could rely to find Jackson guilty. Certainly, the State never argued the police officer's statements to Jackson during the interview were evidence of Jackson's guilt. Rather the State argued, among many other things, that it was Jackson's statements to the police, statements completely at odds with his version of events at trial, that the jury could, and should, consider. Under the circumstances, the trial judge did not abuse his discretion in allowing the State to play the redacted version of Jackson's statement to the police.

ISSUE II: In this claim, Jackson avers there was insufficient evidence to support his conviction for sexual battery. Jackson claims that despite the presence of his, and only his, DNA in A.B.'s vagina and anus, this case is a wholly circumstantial case. Jackson avers he was entitled to a judgment of acquittal because the State failed to overcome his reasonable hypothesis of innocence; he had consensual sexual intercourse with A.B. before she reported to work, and that some other dude (SODDI defense) must have killed her shortly after she got to work.

This case is not a wholly circumstantial evidence case because the State presented direct evidence (DNA) showing

penetration. However, even if this Court were to find this case was wholly circumstantial because evidence of A.B.'s lack of consent was circumstantial, the State presented evidence inconsistent with Jackson's claim of consensual sex.

The medical examiner testified that when he saw A.B.'s body, there were signs of sexual battery. A.B. was naked from the waist down and her legs were splayed open. Her scrubs and panties were pulled down and tangled around one ankle. Her body was bruised in a manner consistent with a sexual attack. Seminal secretions were pooling around the outside of vaginal walls. More semen was found in her anus. That semen belonged to Michael Jackson.

Even in a wholly circumstantial evidence case, the State need only present evidence inconsistent with the defendant's hypothesis of innocence. The State did so in this case. As such, the trial judge properly sent this case to the jury. Moreover, there is competent substantial evidence to support the verdict.

ISSUE III: In his third claim, Jackson alleges the trial judge erred in finding, as an aggravating factor, that Jackson committed the murder while under a sentence of imprisonment. Jackson 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. Instead, Jackson 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 two reasons. First, it was not preserved for appeal. Next, Florida's capital sentencing statute makes clear that no nexus need be shown.

ISSUE IV: In this claim, Jackson alleges the trial court abused its discretion when it refused Jackson's request to instruct the jury that Jackson could be sentenced to life as a result of his contemporaneous conviction for sexual battery. This Court has on many occasions rejected the same claim.

Even if that were not the case, the trial judge did not abuse his discretion. The sole purpose of asking for an instruction regarding the potential sentence a defendant faces as a result of his conviction for contemporaneous non-capital crimes is to reassure the jury that if it recommends life, the defendant will never be released. However, the standard instruction on the only two possible penalties for first degree murder already does that.

In this case, the trial judge instructed the jury that the only two possible sentences were death and life in prison without (emphasis mine) the possibility of parole. As such, based on the jury instructions alone, the jury was instructed that a recommendation of life would mean that Jackson would never be released. Likewise, trial counsel told the jury,

during closing argument, that if it recommended life, Jackson would never be released, a factual assertion made without objection from the State. Because the standard jury instructions adequately advise the jury that, if sentenced to life, Jackson would never be released, the trial judge does not abuse his discretion in refusing to instruct the jury on possible sentences that could be imposed for non-capital convictions.

ISSUE V: In this claim, Jackson alleges that Jackson's sentence to death is unconstitutional pursuant to the United States Supreme Court's decision in Ring v. Arizona. This Court has rejected similar claims on many occasions. Moreover, Ring has no impact on Jackson's death sentence, in any event, because Jackson was under a sentence of imprisonment at the time of the murder. Jackson has also been convicted of a prior violent felony (burglary and sexual battery). Finally, Jackson committed the murder in the course of a sexual battery. This Court has rejected, on many occasions, claims that a sentence to death violates the dictates of Ring when the defendant is under a sentence of imprisonment, has been previously convicted of a violent felony, and committed the murder in the course of an enumerated felony for which he was also found guilty, beyond a reasonable doubt, by a unanimous jury.

ADDITIONAL ISSUE: Jackson's sentence to death is proportionate. The trial judge found four aggravators, including HAC, to which he gave great weight. The trial court found no statutory mitigators had been proven. The trial court also found twenty-four non-statutory mitigators had been proven but gave all twenty-four of them only slight weight. Case law from this Court establishes that Jackson's sentence to death is proportionate.

ARGUMENT

ISSUE I

WHETHER THE TRIAL JUDGE ERRED IN ALLOWING THE STATE TO PLAY JACKSON'S RECORDED STATEMENT TO THE POLICE.

Standard of Review: This Court reviews a trial court's decision to admit evidence under an abuse of discretion standard. Williams v. State, 967 So.2d 735, 747-48 (Fla. 2007); Johnston v. State, 863 So.2d 271, 278 (Fla. 2003). A trial judge's discretion is, of course, guided and limited by the rules of evidence. Johnston v. State, 863 So.2d at 278.

Preservation: This issue is preserved for appeal. Trial counsel filed a motion *in limine* to exclude Jackson's taped recorded statements, *inter alia*, on the grounds the tape contained expressions of the detectives' belief that Jackson was lying as well as statements outlining the detectives' theories

of what they believed happened in the case. (R Vol. I 47, 98-99).

Prior to trial, the trial judge heard argument on the defendant's motion which trial counsel referred to as the "redaction motion." (R Vol. VIII 1245). By the time of the hearing, the parties had agreed to 80% or maybe even 90% of what should come in and what should be redacted. (R Vol. VIII 1253, 1255).

The parties went through each page of the transcript, at times line by line, to resolve any remaining issues. (R Vol. VIII 1261-1322). Trial counsel objected to those portions of the recorded statement in which Detective Cotchaleovich confronted Jackson with evidence that Jackson sexually battered and killed A.B. (R Vol. VIII 1277-1281). Trial counsel argued that admission of that portion of Jackson's record statement was improper because the officer's statements in the interview were unadopted admissions. Counsel also argued it was improper because the officers were expressing their views on Jackson's guilt. (R Vol. VIII 1277, 1282). The court queried the parties whether the dectives' statements were part of the interrogation to which the prosecutor answered in the affirmative. (R Vol. VIII 1277). The trial court ruled that it was staying in. (R Vol. VIII 1279).

Subsequently, the State introduced the redacted video tape of Jackson's interview with Detectives Calhoun and Cotchleovich. The jury was given a transcript to follow along. (TR Vol. XIII 895-940). Trial counsel did not request any sort of limiting instruction regarding the police officer's statements during his interview.

MERITS:

The trial judge did not abuse his discretion in allowing the State to play a redacted version of the defendant's statement to the police. The trial court meticulously went over Jackson's statement, page by page and sometimes line by line, with both counsel to ensure only relevant portions of the statement were played for the jury and that unduly prejudicial matters were removed (e.g. that the defendant was on probation at the time of the murder and that the police identified him as suspect as a result of a CODIS hit). (R Vol. VIII 1261-1322).

This Court has ruled that a jury may hear an interrogating detective's statements about a crime when the statements provoke a relevant response from the defendant being questioned. This Court has also ruled a jury may hear an interrogating detective's statements about a crime to give context to an interview. *See* McWatters v. State, 36 So.3d 613 (Fla. 2010); Jackson v. State, 18 So.3d 1016, 1031–32 (Fla. 2009). Moreover, this Court has observed that when placed in proper context, an

interrogating detective's statements to a suspect could be understood by a "rational jury" to be "techniques" used by law enforcement officers to secure confessions. McWatters v. State, 36 So.3d at 637.

Jackson relies primarily on two cases, one from the Second District Court of Appeal and one from the Fourth District Court of Appeal. The first is Mohr v. State, 927 So.2d 1031 (Fla. 2d DCA 2006). In Mohr, the defendant was charged with sexual battery. Mohr did not deny that sexual intercourse had occurred. Mohr claimed the sex was consensual.

During a taped interview with the police, the detective told the defendant he was not a nice guy when he was drunk and was the kind of guy that took advantage of the victim and had sex with her when she could not even think about consenting to you. Additionally, the detective told the defendant that he lost control when he was drunk and there was no way in the world the victim would want to have sex with him. The detective also opined that the victim did not want to have sex with him and was in no condition to consent so things got out of hand. The officer also told the defendant that the victim would not be willing to go all through what she was going through (rape exam) if she had not been raped. Finally, the officer told Mohr he was covering it up and that there's no doubt in his mind that

Mohr had sex with the victim while she was passed out. Mohr v. State, 927 So.2d at 1033-1034.

The Second District Court of Appeal found the trial judge should not have admitted the detective's statements. The court found that the detective, in effect, advised the jury of his personal belief in Mohr's guilt, set forth his theories as to why Mohr committed the offense, and offered his opinion that the victim was telling the truth. The Court found that the detective presented his opinion as to the ultimate fact to be decided by the jury. The Court also found the jury could not reasonably have been expected to disregard the aspersions of guilt created by the detective's words. Mohr v. State, 927 So.2d 1031, 1034 (Fla. 2d DCA 2006).

The second case upon which Jackson relies is Sparkman v. State, 902 So.2d 253 (Fla. 4th DCA 2005). In Sparkman, the defendant was charged with manslaughter in connection with the suspicious death of Sparkman's boyfriend's daughter. There were no direct witnesses to the events leading up to the child's death. The state's case was based largely upon after-the-fact testimony from the child's father, an emergency medical technician, and two medical examiners, one of whom testified that traumatic, and not accidental injury was the cause of the child's death.

In a tape recorded statement with a detective, the defendant maintained that she did not do anything that would have hurt the baby and that she just shook her a little to get her to wake up from a seizure. During the statement, the detective launched into an extensive recitation of his theory of the case, outlining his version of the facts of the crime. The defendant responded to the detective's accusations with "Uh huh" and with silence. Sparkman v. State, 902 So.2d at 257-258.

The Fourth DCA reversed based on the trial court's failure to exclude, from the tape recording, the detective's hypotheses of how the crime occurred. The basis of the holding was that the probative value of the detective's words were "substantially outweighed by the danger of unfair prejudice" and created a risk of misleading the jury pursuant to section 90.403, Florida Statutes (2005). According to the Fourth District, the danger of unfair prejudice in Sparkman was that, in light of the detective's detailed and speculative narrative, the defendant's silence or "Uh huh" answers could be seen as admissions of guilt. Eugene v. State, 53 So.3d 1104, 1112 (Fla. 4th DCA 2011).

Neither Mohr nor Sparkman should persuade this Court to rule that the trial judge abused his discretion in this case. Indeed, in Eugene v. State, 53 So.3d 1104 (Fla. 4th DCA 2011), the Fourth DCA explained that its holding in Sparkman was relatively narrow. The Court explained that its main concern in

Sparkman was that the defendant's silence or "uh huh" answers might be construed as admissions of guilt. The Court went on to find n Eugene, that the danger found in Sparkman was not present. Eugene v. State, 53 So.3d at 1112.

In Eugene, the defendant was charged with murdering his cousin's daughter with whom he had, prior to the murder, a close personal relationship. Prior to trial, Eugene asked the court to exclude portions of his taped interview which, he alleged, contained the detectives' theory of what happened and their belief in the defendant's guilt. In particular, the defendant objected to four statements by the detectives during a lengthy interview: (1) Let me talk to a jury, a grand jury, a judge, and a state attorney and say, "Listen, I spoke with [Appellant]. It took a while. [Appellant] obviously knows he made a mistake." (2) I'm a little fearful you're gonna do something to yourself. You're gonna hurt yourself. And I'm being serious. I'm being sincere; (3) If you were a jury member and that's the way it was told to you, you would say, "That guy's lying." Right? and (4) You know why? Because you know it's true, Jimmy. You drove down here—and I am not yelling. You drove down here to the City of Miramar because you didn't have control. Where the hell is she? She's going to be rude to me like that on the phone, in front of Stephane? I don't think so. I am going to humiliate her

at the house. She ain't there. Now what, Jimmy? Are you going to humiliate her? Did you?

The trial judge denied Eugene's motion to redact the four statements. On appeal, Eugene claimed these statements, in light of other statements in the interview, constituted reversible error. Eugene pointed to the Fourth District's decision in Sparkman in support of his claim.

The Fourth District rejected Eugene's claim. The Court found that the danger of unfair prejudice present in Sparkman was not present in Eugene's case. The court explained that the detective's statements to Eugene did not spark an answer like "uh huh" nor did it spark silence, both of which might cause a jury to believe the defendant was agreeing with the detective's accusations. Instead, the Fourth District noted that throughout the eight hours of interrogation, an alert, articulate Eugene maintained that he did not commit murder, no matter what interrogation technique the detectives threw at him. The court observed that the jury had ample time to consider the defendant's credibility over the course of the extensive questioning. Eugene v. State, 53 So.3d at 1112.[9] *See also*

[9] The Court in Eugene suggested that a trial court might specifically instruct the jury about the police officer's statements in an interrogation. However, the Court in Eugene did not rule the statements should not be admitted absent such an instruction. Instead, the Court suggested that a trial judge might give an instruction on the limited purpose for which the

Derival v. State, 58 So.3d 357 (Fla. 2011)(no error in admitting the defendant's recorded interview with the police, even though the detective confronted Derival with allegations that she poisoned her child by putting alcohol in her formula or food, because all the facts alleged by the detective came in through other witnesses and none of Derival's responses were equivocal and susceptible of being misconstrued).

This case is more like Eugene and Derival than Sparkman or Mohr. In this case, the detectives confronted Jackson with the evidence of his guilt (the DNA) as well as evidence established by crime scene investigators or the medical examiner. Additionally, evidence mentioned by the detective (e.g. DNA, fire extinguisher as the murder weapon) came into evidence through other witnesses subject to cross examination.

Nowhere in the statement did the detectives create an imaginary script based on speculation. Instead, Detectives Cotchaleovich and Calhoun simply confronted Jackson with the evidence of his guilt, and applying police interrogation techniques, requested Jackson to explain why and how he raped and murdered A.B. In response, no matter what interrogation technique Detectives Cotchaleovich and Calhoun threw at Jackson, Jackson emphatically denied raping and murdering A.B.

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jury has been allowed to hear the interrogator's statements. Eugene v. State, 53 So.3d at 1112, n 4. In this case, trial counsel did not ask for any such instruction.

No juror, let alone any reasonable juror, could have believed that Jackson's answers were an admission of guilt or that somehow Jackson was agreeing with the detectives' view of the case. Likewise, the jury had ample opportunity to judge Jackson's credibility, not only as a result of his demeanor and statements to the police during his interview, but in light of his testimony at trial and the other evidence introduced by the State. This Court should deny Jackson's first claim on appeal.

ISSUE II

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

In this claim, Jackson alleges that the State presented insufficient evidence to sustain Jackson's conviction for sexual battery involving great physical force. In particular, Jackson points to the fact that the medical examiner found no trauma to A.B.'s vagina or anus and that A.B's panties were not torn. (IB 31-32). Jackson also avers the State presented no evidence that contradicted his claim, at trial, that he had consensual sex with A.B. sometimes shortly before her death. (IB 36). Jackson is wrong about that! He is also wrong that the trial judge erred in denying his motion for a judgment of acquittal.

Preservation: Jackson preserved this issue by making a motion for a judgment on acquittal. Jackson made essentially

the same arguments below that he makes now to this Court. (TR Vol. XIV 1174).

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)). If, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, sufficient evidence exists to sustain a conviction. Pagan v. State, 830 So.2d 792, 803 (Fla. 2002) (citation omitted). A motion for a judgment of acquittal, in case where there is direct evidence of guilt, should not be granted unless "there is no view of the evidence which the jury might take favorable to the opposite party that can be sustained under the law." Gudinas v. State, 693 So.2d 953, 962 (Fla. 1997) (quoting Taylor v. State, 583 So.2d 323, 328 (Fla. 1991)).[10]

[10] The fact that the evidence is contradictory does not warrant a judgment of acquittal because the weight of the evidence and the witnesses' credibility are questions solely for the jury. Fitzpatrick v. State, 900 So.2d 495, 508 (Fla. 2005).

In a circumstantial evidence case, a trial judge conducts a slightly different analysis when the defendant moves for a judgment of acquittal. The trial court must determine whether there is a prima facie inconsistency between the evidence, viewed in light most favorable to the State, and the defense theory or theories. See Reynolds v. State, 934 So.2d 1128, 1145–46 (Fla. 2006). Under the circumstantial evidence standard, when there is an inconsistency between the defendant's theory of innocence and the evidence, when viewed in a light most favorable to the State, the question is one for the finder of fact to resolve and the motion for judgment of acquittal must be denied. *See* Floyd v. State, 850 So.2d 383 (Fla. 2002).

This Court has held that in a circumstantial evidence case, the State is not required to rebut conclusively every possible variation of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the Defendant's theory of events. Darling v. State, 808 So.2d 145, 156 (Fla. 2002) (quoting State v. Law, 559 So.2d 187, 189 (Fla. 1989)). Once that threshold burden is met, it becomes the jury's duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt." Law, 559 So.2d at 189. On appeal, where

there is substantial, competent evidence to support the jury verdict, this Court will not disturb the jury's verdict. Durousseau v. State, 55 So.3d 543, 557 (Fla. 2010).

The State contends this case is not wholly circumstantial because DNA testing revealed that Jackson's sperm was deposited in A.B.'s vagina and anus. As such, the State presented direct evidence to support at least one necessary element (penetration) of the crime of sexual battery. 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 Jackson raped A.B. and then murdered her. Troy v. State, 948 So.2d 635 (Fla. 2006); Darling v. State, 808 So.2d at 156.

Merits: Jackson testified at trial that he and A.B., a woman he knew as "Haley", had been having sex on a regular basis. According to Jackson's testimony at trial, some months before the murder, he had a chance encounter with A.B. at the Kangaroo gas station. Jackson told the jury that, after their chance encounter, he saw "Haley" often. They began smoking marijuana together and then having sex on a regular basis. Jackson told the jury that before the murder he had met with

A.B. maybe 50 or 60 times. (TR Vol. XV 1225). Jackson testified that A.B. even told him that she was the mother of his baby. (TR Vol. XV 1225).

Jackson also told the jury that on the morning of January 23, 2007, he got up about 4:30 in the morning. (TR Vol. XV 1255). He met A.B. at the Chevron. The Chevron, where Jackson claimed they met on the morning he murdered her, is within a mile of the clinic where A.B. worked. (TR Vol. XI 485).

Jackson would have had to walk to the Chevron to meet A.B. because he has no car. (TR Vol. XIII 903). Jackson told the jury that, after meeting at the Chevron, he and A.B. went to the Suburban hotel, smoked marijuana, and had sex (in her truck). (TR Vol. XV 1222). After that Jackson went to work and she went her own way. (TR Vol. XV 1223). Jackson told the jury that he got to work at 6:02 a.m. (TR Vol. XV 1255). Jackson also told the jury they only had vaginal sex and he and A.B. were together about 20-30 minutes. (TR Vol. XV 1260).

The State introduced ample evidence that was inconsistent with Jackson's claim that he had consensual sex before he and A.B. went to work and that some other dude must have murdered her. First, the timeline.

A.B.'s husband, S.B. testified that on the morning of January 23, 2007, his wife left the house between 4:30 and 4:45 a.m. It is somewhere between a 20 and 35 minute drive from

their home to the clinic, depending on traffic. (TR Vol. XI 485, 493, 510).

At 5:10 a.m., A.B. entered a Kangaroo convenience store to buy a soda and cigarettes. The Kangaroo store where A.B. stopped for a soda and some cigarettes is about ¾ mile from the vet clinic. (TR Vol. XI 535). As such, A.B. would have arrived at the Kangaroo some 20-35 minutes after she left her house.

A.B. is captured on a time stamped surveillance camera at 5:10:56. (TR Vol. XI 544-546). No one else was in the store. The store manager did not see Michael Jackson at the store at the same time A.B. was there. (TR Vol. XI 546). The time stamp on the video shows A.B. leaving the store at 5:12 a.m. (State's Exhibit 122).[11]

Twelve minutes after A.B. is seen leaving the Kangaroo, after buying a soda and some cigarettes, A.B. entered the security code for the alarm system in the main building at the Well's Road Vet Clinic. The time is 5:24 a.m. (TR Vol. XI 556).

Getting into the area where employees parked takes some time. When A.B. arrived at the clinic, she would have to get out her truck and unlock the gate. The gate was secured by a combination padlock. In order to open the lock, A.B. would have to dial in the combination. Once the lock and the gate are

[11] This exhibit is on a disc marked Ext. 122RRRRR and is attached to Volume 6 of the record.

opened, A.B. would drive in, park the truck, and walk back and shut the gate. (TR Vol. XI 574).[12] A.B. would then have to go through a walk through gate, unlock the building, walk in and put in the alarm code. (TR Vol. XI 574).

If Jackson's version of events were to be believed, the only available time for he and A.B. to meet, drive to the Suburban hotel, have sex, and smoke marijuana, would be between the time A.B. left the house and the time she arrived at the Kangaroo. The tight time line between the time A.B. left the house and the time she arrived at the Kangaroo to buy cigarettes and soda is evidence, when viewed in the light most favorable to the State, inconsistent with Jackson's version of events.

Next, Jackson's version of events at trial was inconsistent with the statement he gave to the police. In particular, Jackson told the jury that he had known A.B. for months and had been engaging regularly in consensual sex with her. However, when the police interviewed Jackson and showed Jackson a picture of A.B., Jackson repeatedly and emphatically told the police he had never seen A.B. before. (State's Exhibit 83) (TR Vol. XIII 913).

At trial, Jackson explained that, despite the 50 or 60 encounters with her in the months leading up to the murder, he

[12] It is not far from where employees park their cars and the locked gate entrance.

did not recognize A.B. from her picture because the girl in the photo was dressed up real nice and the picture was "fuzzy." (TR Vol. XV 1221). The jury was able to see the picture to determine whether it was "fuzzy" (it isn't). Jackson explained that he did not recognize A.B. because he had never seen her dressed up like that and her hair was different. (TR Vol. XV 1222). Jackson also testified that he and A.B. only had vaginal sex while Jackson's sperm was found on both A.B.'s vaginal swabs and anal swabs.

When viewed in a light most favorable to the State, the defendant's inconsistent versions of events, coupled with other evidence that refutes a claim of consensual sex, was sufficient to send the case to the jury. Carpenter v. State, 785 So.2d 1182, 1196 (Fla. 2001). *See also* Fitzpatrick v. State, 900 So.2d 495, 509 (Fla. 2005)(defendant's statements that were inconsistent with his claim of consensual sex coupled with the condition in which the victim was found sufficient to support the charge of sexual battery as underlying felony to felony murder).

Finally, and in the State's view, the most compelling, is the graphic evidence that A.B. was sexually battered immediately before she was strangled and beaten to death.[13] This Court

[13] Given that money was missing from the cash drawer, Jackson's claim that some other dude did it assumes the most likely

should look in particular at State's Exhibits 52-54 and 58-62, 64-65 (on a disc in Volume 6 of the record on appeal). These photos show A.B.'s body after Jackson murdered her on the kennel floor of the Wells Road Veterinary Clinic. The pictures amply demonstrated that the person who murdered her also sexually battered her.

When co-workers found A.B. dead on the floor of the kennel shortly before 7:00 a.m., A.B. was naked from the waist down, her panties and scrub pants were pulled down, turned inside out, and wound around one ankle. A.B.'s bra was blood soaked in places and her shirt was pulled up and open. Her legs were splayed apart. A.B.'s body was beaten and bruised. A.B.'s face was unrecognizable under the massive amounts of blood around her face and head. *State's Exhibits 52-54 and 58-62, 64-65.*

Secretions from A.B.'s vagina were pooling near the opening of her vagina. The medical examiner told the jury that if A.B. would have been raped within a couple hours of her death, the

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scenario is that someone went in to the unlocked main building and went to the cash drawer looking for money, and because A.B. caught him, the UNSUB decided to kill her. If this were the case, the killer would have had no reason to strip A.B. naked from the waist down and open and pull up her shirt. Nor would the killer have any reason to take her from the main building to the kennel. The fact A.B. was found in the kennel, rather than the main building where the cash drawer was, by itself belies any notion this was a burglary gone bad. All of the evidence points to a conclusion that the same person who murdered her also raped her.

secretions would have settled along the dependent portion of her vagina including the area just inside the opening. (TR Vol. XIII 976). These secretions were visible when the medical examiner examined A.B.'s body. (TR Vol. XIII 976).

A.B.'s body was bruised. A.B. had bruises on the back of her shoulders consistent with her bra strap being jammed down into the concrete of the kennel. (TR Vol. XIII991). She had a bruise over her right hip. (TR Vol. XIII 1004). This could be consistent with A.B. being shoved to the concrete during a sexual attack. (TR Vol. XIII 1004). Two bruises are on the inner aspect of A.B.'s thighs. These bruises could be consistent with someone forcing her legs apart. (TR Vol. XIII 1005). A.B. had a series of bruises and one small abrasion to the back of her left arm consistent with being forced by her attacker to the concrete floor. (TR Vol. XIII 994). A.B. had bruises on her armpit and another on her right arm. These injuries were consistent with being grabbed on that portion of her body. (TR Vol. XIII 994).

The condition of A.B.'s near naked, bruised, and battered body is inconsistent with Jackson's claim that after having consensual sex and parting ways, some other dude must have murdered her. Instead, the evidence is consistent with a conclusion that the same person who murdered A.B. also sexually battered her. The evidence was also consistent with a

conclusion that the person who sexually battered and murdered A.B. was Michael Renard Jackson. Jackson's, and only Jackson's, sperm was found in swabbings from A.B.'s vagina and anus. No third party DNA was present. (TR Vol. XIV 1154).

This Court has previously looked to the victim's injuries and condition of her body to find the evidence was sufficient to support the defendant's conviction for sexual battery. For instance, in Fitzpatrick v. State, 900 So.2d 495 (Fla. 2005), the victim was found alive. Passersby found the victim walking on the side of the road. She was bloody and her throat was cut. Her bloody undergarments were wrapped around her waist near her breasts. Other injuries included a penetrating wound in the breast area that was either another stab wound or a bite mark, puffiness around her head, bruising on her arms, scratches covering her legs, and a cigarette burn on her leg. The victim's breasts were deep purple and several areas of her vagina and anus were either a very deep pink or red, indicating there was pressure from something penetrating the areas. A registered nurse who examined the victim testified her findings were consistent with forced sexual activity; however, she could not determine conclusively if the sexual activity was forced.

The victim eventually succumbed to her injuries and Fitzpatrick was charged with first degree murder. Fitzpatrick alleged he had consensual intercourse with the victim some hours

before she was found and that someone else actually killed her. Fitzpatrick argued that, as such, the trial judge erred in denying his motion for a judgment of acquittal for felony murder with sexual battery as an underlying felony.

This Court rejected his claim. This Court found the condition of the victim's body contravened Fitzpatrick's claim of consensual sex. Fitzpatrick v. State, 900 So.2d at 509. Although Fitzpatrick's victim's injuries were not exactly the same as A.B.'s injuries, in both cases, the victim showed signs of great trauma consistent with forced sex followed by a vicious murder. Pursuant to this Court's decision in Fitzpatrick, this Court should find there is sufficient evidence to support Jackson's conviction for sexual battery.

This Court may also look to this Court's decision in Orme v. State, 25 So.3d 536 (Fla. 2009). After a second penalty phase that this Court ordered after counsel was deemed ineffective for failing to pursue evidence of Orme's bipolar disorder, Orme claimed, on direct appeal, that the trial judge erred in finding the "in the course of a sexual battery aggravator." Orme v. State, 25 So.3d at 552. Orme alleged that the State had failed to overcome his reasonable hypothesis that the sex was consensual.

This Court rejected his claim pointing to evidence that: (1) Redd's shirt was unsnapped and pulled up just below her

breast; (2) her pants were not fully up; (3) her bra was twisted and above the breast; (4) her panties were only on one leg; (5) Redd had injuries to her rectum consistent with unlubricated anal intercourse; (6) there was a significant amount of blood was found in the backside of Redd's panties which the medical examiner testified would not be normal in everyday consensual anal intercourse; and (7) there was a significant amount of bruising to Redd's body, specifically her legs, arms, abdomen, and upper chest area. Orme v. State, 25 So.3d at 552.

While the medical examiner found no injuries to A.B.'s vagina and rectum, A.B. was naked from the waist down and her panties and pants were pulled down and wrapped around one ankle. Moreover, A.B.'s legs were splayed and two bruises on the interior aspect of her thighs were consistent with her legs being forced apart. (TR Vol. XIV 1004-1005). Similar to Orme's victim, A.B's body was bruised on both arms, the back of her shoulders and right hip. Likewise, similar to Orme's victim, the evidence in this case supported a conclusion that A.B. was sexually battered and then, albeit it not without a fight, murdered almost immediately thereafter. Pursuant to this Court's decision in Orme, this Court should find there is sufficient evidence to support Jackson's conviction for sexual battery.

The record supports a finding from this Court that the State presented competent substantial evidence inconsistent with Jackson's hypothesis of innocence. As such, the trial judge properly denied Jackson's motion for a judgment of acquittal and sent this case to the jury and this Court should affirm. Durousseau v. State, 55 So.3d 543, 557 (Fla. 2010).

ISSUE III

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

In this claim, Jackson alleges the trial judge erred in finding, as an aggravating factor, that Jackson committed the murder while under a sentence of imprisonment. Jackson 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.

Instead, Jackson 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. (AB 40). Jackson argues that, without such a link, the "under a sentence of imprisonment" aggravator does nothing to limit or narrow the class of persons eligible for a death sentence. (39-40).

This claim can be denied for two reasons. First, it is not preserved for appeal.

Contrary to Jackson's claim the issue was preserved, Jackson 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. (R Vol. IV 633-637). 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 there is no requirement that the State demonstrate a nexus between the "under a sentence of imprisonment" aggravator and the murder. 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. Moreover, 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.

Jackson cites to no case law that actually supports the notion the State must prove a nexus between this particular aggravator and the murder. Indeed, Jackson points to no case law that supports the notion that "status" aggravators render a sentence to death unconstitutional. Jackson is mistaken, however, when he claims the "under a sentence of imprisonment" aggravator fails to adequately narrow the class of persons eligible for the death penalty in Florida.

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." Florida's under a sentence of imprisonment does not apply to every defendant convicted of murder because 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. Jackson does not even allege the aggravator is vague. Pursuant to the United States Supreme Court's ruling in Tuilaepa, Jackson is simply mistaken when he alleges the "under a sentence of imprisonment" aggravator fails to adequately narrow the class of persons eligible for the death penalty.

Finally, this Court has repeatedly rejected the notion that Florida's capital sentencing scheme is unconstitutional "as being arbitrary and capricious because it fails to limit the class of persons eligible for the death penalty." Williams v. State, 967 So.2d 735, 767 (Fla. 2007). See also Miller v. State, 926 So.2d 1243, 1260 (Fla. 2006) (quoting Lugo v. State, 845 So.2d 74, 119 (Fla.2003)). This Court should reject Jackson's third issue on appeal.

ISSUE IV

WHETHER THE TRIAL JUDGE ERRED IN DENYING JACKSON'S REQUEST TO INSTRUCT THE JURY THAT JACKSON FACED A LIFE SENTENCE AS A RESULT OF HIS CONVICTION FOR SEXUAL BATTERY UPON A.B.

Standard of Review

A trial court's decision regarding jury instructions is reviewed under the abuse of discretion standard. See Carpenter v. State, 785 So.2d 1182, 1199-1200 (Fla. 2001) ("This Court has explained that a trial court has wide discretion in instructing the jury, and the court's decision regarding the charge to the jury is reviewed with a presumption of correctness on appeal."). *See also* Franqui v. State, 669 So.2d 1312, 1326 (Fla. 1997) (noting that the trial judge did not abuse its discretion in refusing to allow trial counsel to argue that the jury could consider Franqui's other sentences in mitigation).

Preservation

This issue is preserved. Jackson requested the trial court to instruct the jury that he faced a life sentence as a result of his conviction for sexual battery. (R Vol. 5 805). The trial judge denied Jackson's request. (TR Vol. XVII 1658).[14]

[14] The State believes that preservation in this case is a very close call. This is so because Jackson's request for this particular instruction was one of 20 requests for special jury instructions. Trial counsel told the court, at the penalty phase charge conference, that these 20 requests were requests he always files (AKA boilerplate)(TR Vol. XVII 1675). Trial counsel did not make any of the same arguments that Jackson makes here on appeal. Indeed, he did not even advise the trial

Merits

In this claim, Jackson avers the trial judge abused its discretion in refusing to instruct the jury that Jackson faced life in prison as a result of his conviction for the sexual battery of A.B. This Court has repeatedly rejected this same claim. Booker v. State, 773 So.2d 1079 (Fla. 2000) (rejecting claim that the trial court erred by refusing to inform the jury regarding the consecutive sentences Booker received for his prior burglary, sexual battery, and aggravated assault convictions); Nixon v. State, 572 So.2d 1336, 1345 (Fla. 1990). *See also* Franqui v. State, 699 So.2d 1312, 1326 (Fla.1997) (same); Marquard v. State, 641 So.2d 54, 57-58 (Fla. 1994) (same); Gorby v. State, 630 So.2d 544, 548 (Fla. 1993) (stating that, according to Nixon, "during the penalty phase, there is no need to instruct the jury on the penalties for noncapital crimes a defendant has been convicted of"). Jackson has offered no compelling reason for this Court to overturn two decades of precedent.

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judge that out of the 20 "boilerplate" special jury instructions, he really wanted this one. The purpose of requesting a special jury instruction is to put the judge on notice of the request and put before him the relevant and controlling case law so that he/she can make an informed decision on the request. By burying this particular requested instruction in the 20 boilerplate requests and by failing to ask the judge during the charge conference for this particular one, the purpose of preserving a request for special jury instructions was not met.

Even if this Court had not already decided this same issue several times adversely to Jackson's claim on appeal, the trial court did not abuse its discretion. The sole purpose for instructing the jury on other non-capital sentences a defendant may face is so the defendant may argue that, even apart from the murder sentence, he will spend the rest of his life in prison removed from society. Indeed, in his request for this special instruction, Jackson alleged the instruction should be given because "evidence of other sentences may well cause the jury to decline to impose the death sentence." (R Vol. V 805).[15] In other words, a defendant wants this "other sentences" instruction so that he may argue that a life sentence is warranted because there is no possibility he will paroled and get out of prison.

However, in this case, the only two available punishments upon conviction for first degree murder is death or life without the possibility of parole. Jackson's jury was instructed that if sentenced to life for murder, there would be no possibility of parole. (TR Vol. XVII 1670-1673). As such, the jury knew, from the jury instructions alone, that if it recommended life, Jackson would never get out of prison.

[15] Jackson did not cite to any of this Court's controlling precedent on this issue. (R Vol. V 805).

Trial counsel ensured this particular instruction was reinforced during his closing argument. Indeed, trial counsel argued at length that Jackson would never get out of prison and would live in an extremely structured environment for the rest of his life. (TR Vol. XVII 1634, 1642, 1643, 1647). Among other things, trial counsel told the jury that "life without parole is life without parole…. He'll never feel the warmth of sun on his face… He'll never feel the sand under his feet… He'll never be with his mom or aunt or anybody else when she dies, hold someone in his arms. He'll never go to those rodeos or movies that he was writing about or shopping, whatever he was talking about [wanting to do], the things he wants." (TR Vol. XVII 1647).

The standard jury instructions in this case adequately apprised the jury that Jackson would never get out of prison if it recommended life in prison. Nevertheless, the jury recommended by a vote of nine to three (9-3), that Jackson be sentenced to death. This Court, in accord with its now well-established precedent, should deny this claim.

ISSUE V

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

In this claim, Jackson argues his sentence to death is unconstitutional pursuant to Ring v. Arizona, 536 U.S. 584 (2002). Jackson avers this Court wrongly decided Bottoson v. Moore, 833 So.2d 693 (Fla. 2002) and King v. Moore, 831 So.2d 143 (Fla. 2002). (IB 59). Jackson does, however, acknowledge the precedent weighing against this claim. Jackson requests this Court to recede from those decisions.

This Court should reject any notion that Jackson's sentence to death is unconstitutional under Ring. Among the aggravators found to exist in this case was that Jackson committed this murder in the course of a sexual battery. Jackson was convicted by a unanimous jury beyond a reasonable doubt of sexual battery. Additionally, Jackson was under a sentence of imprisonment at the time of the murder and had previously been convicted of a prior violent felony (burglary and sexual battery).

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, committed the murder in the course of an enumerated felony, or had previously been convicted of a violent felony.

See Deparvine v. State, 995 So.2d 351 (Fla. 2008)(finding of a prior violent felony conviction moots any claim under Ring); 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, Jackson's final claim should be denied.

ADDITIONAL ISSUE

WHETHER JACKSON'S SENTENCE TO DEATH IS PROPORTIONATE.

Jackson does not raise a proportionality claim in his initial brief. However, 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.

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. Jackson's jury found, unanimously beyond a reasonable doubt that, in addition to murdering A.B., Jackson sexually battered her using great physical force. Jackson cut her with a knife, strangled A.B., both manually and with a ligature, and then bashed her head in with a fire extinguisher.

The trial judge found four aggravators to exist beyond a reasonable doubt including a prior violent felony and the murder

was heinous, atrocious or cruel (HAC). This Court on more than one occasion ruled that HAC and prior violent felony are two of Florida's most weighty aggravators. Hodges v. State, 55 So.3d 515, 542 (Fla. 2010); Zommer v. State, 31 So.3d 733, 751 (Fla. 2010), *cert. denied*, ––– U.S. ––––, 131 S.Ct. 192, 178 L.Ed.2d 115 (2010). Moreover, Jackson's prior violent felony was for the forcible sexual battery on a 14 year old girl, the crime for which he was still on probation at the time of the murder. The trial judge gave great weight to each of the aggravators in this case.

Weighed against this aggravation qualitatively was no statutory mitigation and twenty-four non-statutory mitigators. Several mitigators centered on essentially the same facts and the trial court gave slight weight to all twenty-four. When comparing this case to other similar cases, Jackson's sentence to death is proportionate.

For instance, in Hodges v. State, 55 So.3d 515 (Fla. 2010), this Court found Hodges' sentence to death proportionate. Hodges broke into the home of Patricia Belanger, sexually battered her and then murdered Ms. Belanger by beating and stabbing her to death. The trial court found five statutory aggravating factors, including four of the same ones found in this case (under a sentence of imprisonment, prior violent felony, murder in the course of sexual battery, and HAC). As

statutory mitigation, the trial court found and assigned moderate weight to the extreme mental or emotional disturbance mitigator and minimal weight to the mitigating factors of age and substantially impaired ability to conform conduct to the requirements of law. The trial court also found and weighed numerous nonstatutory mitigating factors. Id. This Court found Hodges' sentence to death proportionate. Hodges is a good comparator case because even though the Hodges' case was more mitigated than Jackson's case is, this Court still found Hodges death sentence proportionate. Hodges v. State, 55 So.3d at 542-543.

Another appropriate comparator case is this Court's decision in Murray v. State, 3 So.3d 1108 (Fla. 2009). Murray broke into the home of Alice Vest, vaginally and anally raped her and then murdered her by beating, strangling and stabbing her to death.

The trial court found four aggravating factors: (1) Murray was previously convicted of three felonies involving violence (great weight); (2) he was engaged in a burglary and/or sexual battery at the time of the commission of the murder (immense weight); (3) the crime was committed for financial gain (some weight); and (4) the crime was especially heinous, atrocious and cruel (great weight). The trial court found no statutory mitigators but considered and weighed several non-statutory

aggravators although Murray refused to put on any mitigation at all. Murray v. State, 3 So.3d at 1114.

This Court found Murray's sentence to death proportionate. Murray is a good comparator case. Not only is it similar factually, it is similar in terms of aggravation and mitigation. Based on this Court's decision in Murray, this Court should find Jackson's sentence to death proportionate.

Another case to which this Court may look to determine whether Jackson's sentence to death is proportionate is this Court's decision in Johnston v. State, 841 So.2d 349 (Fla. 2002). In Johnston, the defendant raped and murdered orthodontist technician Leanne Coryell sometime after she left work. An autopsy revealed that Ms. Coryell died from manual strangulation. She had also been beaten with a belt and raped.

The trial judge found four statutory aggravators: (1) the defendant was previously convicted of violent felonies; (2) the crime was committed while Johnston was engaged in the commission of sexual battery and a kidnapping; (3) it was committed for pecuniary gain; and (4) it was especially heinous, atrocious, or cruel (HAC). The trial court also found Johnston's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired and gave it moderate weight. Finally, the trial court

considered and weighed twenty-six non-statutory mitigators including Johnston's long history of mental illness.

This Court found Johnston's sentence to death proportionate. Johnston v. State, 841 So.2d at 361. Not only is the Johnston case factually similar, it is similar in terms of aggravation and mitigation. Based on this Court's decision in Johnston, this Court should find Jackson's sentence to death proportionate. *See also* Orme v. State, 25 So.3d 536 (Fla. 2009) (death sentence for rape and murder proportionate when the court found three aggravating factors [HAC, pecuniary gain, murder in the course of an enumerated felony] and three statutory mitigators including both mental mitigators); Douglas v. State, 878 So.2d 1246 (Fla. 2004); Mansfield v. State, 758 So.2d 636 (Fla. 2000)(upholding death sentence where two aggravators, HAC and murder committed during the commission of a sexual battery, outweighed five nonstatutory mitigators); Bates v. State, 750 So.2d 6 (Fla. 1999) (upholding death sentence where the Court found three aggravators, including that the murder was committed during a kidnapping and sexual battery, was committed for pecuniary gain, and was HAC, and weighed them against two statutory mitigators and several nonstatutory mitigators); Branch v. State, 685 So.2d 1250 (Fla. 1996)(death sentence proportionate when the evidence showed that Branch sexually assaulted, then murdered the victim by beating, stomping, and

strangling her to death, the trial court found three aggravators [murder committed in the course of a sexual battery, prior violent felony conviction, and HAC] and several nonstatutory mitigators).

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing 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 30th day of June 2011.

_____
MEREDITH CHARBULA
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
Assistant Attorney General