**IN THE SUPREME COURT OF FLORIDA**

**JOHN HAMPTON,**

**Appellant,**

**v.**

**STATE OF FLORIDA,**

**Appellee.**
**_____/**

**CASE NO. SC10-812**
**L.T. No. CRC07-12699 CFANO**
**Death Penalty Case**

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

# ANSWER BRIEF OF APPELLEE

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## PRELIMINARY STATEMENT

References to the record on appeal [volumes 1-10], which include the court reporter's transcripts, will be designated by the volume number and appropriate page number (Vol. #/page #).

## STATEMENT OF THE CASE AND FACTS

On June 21, 2007, a grand jury in and for Pinellas County, Florida returned an indictment charging the Appellant/Defendant, John Hampton, with the first degree murder of Lashonda Renee McKinnnes, which occurred on June 10, 2007. (V1/5-6).

Hampton's jury trial was held on June 22 – 25, 2009. On June 25, 2009, the jury returned a verdict finding Hampton guilty of murder in the first degree, as charged. (V2/213). The penalty phase took place on June 25, 2009. The jury recommended to the trial court, by a vote of 9 to 3, that it impose the death penalty upon Hampton for the murder of Renee McKinnes. (V2/214).

A hearing conducted pursuant to *Spencer v. State,* 615 So. 2d 688 (1993), was held on December 4, 2009. (V4/587 -643). The sentencing hearing was held on February 19, 2010, and the trial court imposed a sentence of death. (V2/282-299; V4/633-643). On February 25, 2010, Hampton filed a Motion for New Trial which alleged that one of the jurors, Juror Doetsch, was a disqualified juror. The trial court denied the motion for new trial on March 26, 2010. Hampton's notice of appeal was filed on April 16, 2010. (V2/304-307; 312-318).

The trial court's sentencing order summarized the pertinent facts presented at trial as follows:

> Although the precise order of some events cannot be unequivocally determined, the facts of this case are apparent and compelling. The facts indicate that the victim spent June 9, 2007, at a baby shower with her friend Chimere Streeter and the victim's three children ages three years, four years, and five years. After the shower, both women returned to the victim's residence and the victim's children went to a neighbor's home. Throughout the evening, there were sporadic visits by the neighbor from across the hall and the evidence demonstrates that it was apparent the victim did not lock her apartment door and was sharing a phone with the neighbor. The women began drinking and "hanging out." Later that evening, the Defendant and his brother-in-law, Reginald Span (Red), arrived at the victim's home and began playing card games and drinking. It appears that Red and the victim went out twice to buy more alcohol and later in the evening Chimere left.
>
> Eventually, Red and the victim moved into the victim's bedroom and had sexual intercourse. Red testified at trial that he did not ejaculate inside of the victim because during intercourse he looked up and saw the Defendant watching them through the bedroom door. Around 3:00 a.m., Red and the Defendant left the victim's home. When they arrived at Red's house, where the Defendant was temporarily residing, the Defendant told Red that he was going to go out and meet a girl. The Defendant returned to the victim's home knowing the victim's door had been left unlocked because he had been a guest in her home that evening. Although the sequence of events is not clear, the encounter ended in the victim's death.
>
> The victim was beaten on her face. She had black eyes, with swelling and bleeding under the skin around the eyes. She had a bruised forehead, abrasions to her left cheek and chin, her right eyelid was torn, and she had incised wounds to her face and forearms. The victim suffered abrasions on her back, shoulders, and

knees. Through the testimony presented at trial it was apparent that these injuries occurred prior to the victim's death because swelling and bleeding only occur when one is alive. The victim received multiple blows to her head. The muscles in the temporal region of the head were hemorrhaged and she was suffering from a brain hemorrhage demonstrated in the autopsy by a showing of blood on her brain at the time of death. Moreover, cuts to her hand were defensive wounds, indicating that the victim was conscious and attempting to block and protect herself during the beating and stabbing. The victim's throat was sliced by a sharp instrument and her jugular vein was slashed.

It is undisputed that the Defendant and the victim had sex. In addition, there were physical indicators consistent with sexual battery. There was the battery about the victim's face and around her upper torso and forearms. There were also handprints in the blood surrounding the victim's body consistent with a person being in the missionary position over the victim's body while engaged in sexual intercourse. The Defendant's DNA was found inside of the victim's vagina. Finally, after beating and raping the victim, the Defendant sliced and stabbed the victim in the neck and in so doing cut her jugular vein.

The Defendant then took lighter fluid and 409 cleaning fluid, poured it over the victim's body, and began wiping her lower body. The Defendant testified that he got a soapy rag to clean the victim's "vagina out" in an attempt to remove his DNA. The associate medical examiner, Wayne D. Kurz, M.D., testified that the body had a "generalized petroleum product-like odor." The victim suffered chemical burns as well as skin slippage, which occur when chemicals burn through the skin. Dr. Kurz testified that the damage to the victim's skin could reasonably be considered evidence she was alive when the chemicals were applied to her body. Chemical substances also were found in the victim's vagina.

The Defendant testified that while he was cleaning the victim and while the victim lay on the

> ground bleeding to death, she was pleading with the Defendant for help. According to testimony presented by the Defendant at the guilt phase of trial, the victim had difficulty breathing as she bled from the neck and was begging the Defendant, "help me, help me." The Defendant did not get help, did not call 911, but left the victim for dead on her bedroom floor. The Defendant put the lighter fluid, the 409, and the rag in a trash can, as well as his socks that had blood on them. He then took the bag of garbage out and put it in the dumpster at the apartment complex. The Defendant left the victim's home and bought some alcohol to drink and other items with the money he stole. Red's wife, Dorothy Span, testified that at approximately 8:00 a.m., she heard the alarm beep signaling the entrance of someone into the home and the Defendant entered and gave her a bag of pork skins. The same morning the victim was found by her friend in the unlocked apartment.
>
> (V2/289-291)

The State's witnesses at trial included lay witnesses Chimere Streeter, who was partying at victim Renee McKinnes' apartment with Hampton and others on June 9, 2007 (V6/225-240); Bettina Robinson, a neighbor who watched the victim's children that night (V6/241-261); Tierra Jones, who discovered the victim's body and called 911 (V6/263-270); Reginald Span [Red], Hampton's brother-in-law, who was at the victim's apartment with Hampton earlier that evening; Red admitted he'd previously had consensual sex with the victim (V6/271-301); and Dorothy Span, Red's wife, who saw Hampton come back home at 8:00 a.m. on June 10, 2007, and insisted that Hampton talk to the police (V6/302-319).

The law enforcement personnel who testified at trial included: Clearwater Police Officer Dustin Kennedy, who responded to the scene and saw Hampton at the apartment complex on the morning of the murder (V6/322-329); Corporal Paul Bosco, who also responded to the scene and saw officers Kennedy and Cameron (V6/330-332); Sergeant Laura Spellman, who assisted with the investigation (V6/333-350); Pinellas County Sheriff's Deputy Kelson Doherty, a forensic science specialist who took photographs at the scene, collected items from the dumpster, including the bloody socks and the cleaning solution bottle, processed evidence for fingerprints, and processed the crime scene (V6/350-366); Rhonda Hilliard, forensic science specialist with the Pinellas County Sheriff's Office, who collected evidence from the defendant at the Clearwater Police Department, took photographs of Hampton, his clothing, necklace, shorts, feet, and obtained oral swabs, toenail clippings and swabs from defendant's feet and the defendant's shoes (V6/367-385); Detective Joe Ruhlin with the Clearwater Police Department, who was the lead detective and interviewed the witnesses, including the defendant, John Hampton, and also attended the victim's autopsy (V8/535-710; V9/695); Carol Beauchamp, latent print examiner with the Pinellas County Sheriff's Office, who was provided with the known prints from the victim, the defendant

and Reginald Span and analyzed the fingerprint lifts, including the white shoe box with Hampton's print (V7/465-483); and Anna Cox, forensic science specialist with the Pinellas County Sheriff's Office, who testified as to the blood pattern and blood spatter evidence (V7/484-515).

Dr. Wayne Kurz, M.D., the Associate Medical Examiner, District 6, who performed the autopsy on the victim, testified regarding the injuries to the victim, the cause of death and opined that the victim was killed between 4:00 a.m. and 8:00 a.m. (V7/434-464; V8/527-531).

Furthermore, the State presented the testimony of Sarah Shields, DNA analyst with Bode Technology (V7/395-425) tested the following items submitted for DNA testing and obtained the following results:

-Swab from the defendant's foot: mixture of defendant and the victim

-Socks: mixture of defendant and the victim

-Victim's nipple swab: sperm fraction inconclusive

-Victim's vaginal swabs: matched the defendant, excluded Reginald Span

-Victim's rectal swabs: victim

*Items from Hampton*:

-Shorts: 13 locations netted partial profile; inconclusive

-Shorts/right leg: consistent with victim

-Shorts/back left leg: mixture of victim and other male

-Shorts/pocket seam: mixture of victim and other male

-Necklace/Pendant: victim

In addition, Hampton's videotaped statement was played for the jury during the State's case and transcribed in the record. (V8/566-684).

During the defense case, Hampton testified and his trial testimony differed from the other nine versions he'd previously told detectives on videotape. (V9/713). Hampton admitted, among other things, that he'd told the police many different stories,[1] he had four felony convictions, as well as a prior conviction of a crime involving truth or dishonesty, he was on felony probation in June of 2007, and there was an outstanding warrant for his violation. (V9/740-749).

*Penalty Phase*:

The State presented two witnesses at the penalty phase: Howard Maddox, a Georgia DOC probation officer, who testified that Hampton was sentenced to probation on 2/23/07 for violation of the sex offender registry law; and Detective Kerri Spaulding Spoke, who spoke with the victim's three young children and the

[1]Hampton's differing versions and various stories are fairly summarized in the Appellant's Initial Brief, at pages 13 – 17.

oldest child, who was 5 years old, said that she knew her mother was gone and she needed a new momma. (V10/887-893).

The defense presented seven witnesses at the penalty phase: Isabella Jones, the defendant's mother, who testified that she had seven children, Hampton was her oldest son, she took him to live with his grandmother in Georgia, two of her children (Angie and Jimmy) were taken away from her, and Hampton's father was not part of his son's life (V10/898-901); Patricia Ship (perpetuated testimony), the defendant's 4th grade teacher, who recalled that Hampton had a speech problem, was not a happy child, other kids picked on him, he cried and would act out and he came to school like nobody was taking care of him (V10/901-905; Marshall Hampton, the defendant's father, who had nine felony convictions, and had not seen the defendant over much of his life -- welfare took care of him (V10/906-907); Jimmy Hampton, the defendant's younger brother by three years, who testified that when the defendant was about five, he went to live with his daddy's family in Georgia and Jimmy stayed with their mother in Florida, but one time when they were living together, their mother's boyfriend took the racks out of the oven, beat them, and tried to put them into the oven, the oven was so hot that it burned the defendant's arm, their father's people didn't really care about the defendant, but Jimmy was

adopted by their aunt and was taught right from wrong (V7/907-914); Angela (Angie) White, the defendant's younger sister who grew up in the same house as the defendant until her father (not Hampton's father) came from Georgia and got her, Angie's father gave her love and taught her right from wrong, but Angie didn't get that from her mother, Angie would see the defendant from time to time and he came back into her life in 2003, the defendant didn't have anywhere to go and Angie took him in, Angie has three sons who love Hampton (V10/914-920); Anthony White, Hampton's brother-in-law who met the defendant in 2003, cared about Hampton and Hampton was good to their sons (V10/920-922); and Tammy Russo, Classifications Supervisor, Pinellas County Sheriff's Office who testified that Hampton had not had any DRs since being incarcerated in the Pinellas County Jail. (V10/922-925).

At a bench conference, the defense announced that they would not be calling any psychological witnesses or experts before the jury's penalty phase and Hampton agreed. (V10/925).

*Spencer Hearing*:

The *Spencer* Hearing was held on December 4, 2009. (V4/587-643). The defense presented the testimony of two witnesses, Greg Wolinski, the attorney who represented Hampton in Georgia

in 2006-2007, and Robert Berland, Ph.D., a forensic psychologist who evaluated Hampton for this case.

According to Mr. Wolinski, Hampton went to prison at age 18 and that was why he was required to register as a sex offender. Hampton took the State's offer of probation - for failing to register as a sex offender – against Mr. Wolinski's advice. (V4/595-601). In light of his plea in Georgia, Hampton was on probation on June 10, 2007. (V4/601).

Dr. Berland first saw Hampton some 6 – 10 days after the offense. Dr. Berland interviewed Hampton and Hampton's sister, Angie Jones, and he also reviewed various documents, including prison records, school records and prison medical records. Hampton was about 28 when his sister last saw him and Hampton was 32 or 33 at the time of this crime. One of the tests Dr. Berland administered was the MMPI-2. Dr. Berland concluded that Hampton suffered from a psychotic disturbance. Dr. Berland believed Hampton would qualify for the statutory mitigating factor of extreme mental or emotional disturbance. Dr. Berland was not saying that Hampton was substantially impaired in his capacity to recognize the wrongfulness of his act, but that Hampton was substantially impaired by his psychotic disturbance from conforming his conduct to the requirements of the law. Dr. Berland identified seven non-statutory mitigating circumstances,

while noting that the evidence for each was not real strong, but it was consistent: 1) Blunt trauma to the back of the defendant's head in 1993; 2) Mood disturbance and on anti-seizure medication in the mid 1990's; 3) History of suicide attempts; 4) Physical abuse as a child; 5) History of drug abuse; 6) Intoxication at the time of the crime; and 7) extremely poor parents behaviorally and genetically. Dr. Berland last saw Hampton in October of 2008. (V4/602-628).

The sentencing hearing was held on February 19, 2010. (V4/633-643). The trial court found the following aggravating factors:

1) Committed by person previously convicted of felony and under sentence of imprisonment/community control/felony probation (great weight)

2) Committed during course of robbery, sexual battery or burglary (great weight)

3) HAC (great weight)

The trial court did not find the statutory mental mitigators, but did consider the following as non-statutory mitigation: 1) the defendant was under mental/emotional disturbance (little weight); and (2) the defendant's capacity to appreciate criminality of conduct/conform to the law (little weight). In addition, the trial court found the following

additional non-statutory mitigating factors: 1) Childhood neglect (little weight); 2) Childhood abuse (little weight); 3) Abandonment and extremely poor parents (little weight); 4) Exemplary disciplinary jail/prison records; (little weight); and 5) Non-unanimous jury recommendation (little weight). (V2/286-299).

## SUMMARY OF THE ARGUMENT

Issue 1: *The Juror Disqualification Claim*

No abuse of discretion resulted from the trial court's denial of Hampton's motion for new trial relating to Juror Doetsch's service. First, Juror Doetsch was not under prosecution by the State Attorney's Office during Hampton's trial and, thus, Juror Doetsch was not disqualified to sit on the jury. Second, no error can be ascribed to Juror Doetsch's failure to disclose the misdemeanor arrest where defense counsel neglected to make any inquiry of Juror Doetsch on this topic, despite notice from his questionnaire. Moreover, this sub-claim was not preserved where the motion to interview Juror Doetsch was untimely filed.

Issue 2: *The Sufficiency of the Evidence Claim*

The evidence was sufficient to find Hampton guilty of first-degree murder on both the theory of premeditated murder and on the theory of felony murder, with sexual battery or robbery or burglary (or attempted sexual battery, attempted burglary or attempted robbery) as the underlying felony.

Issue 3: *The Cumulative Photographs Claim*

The trial court did not abuse its discretion in admitting the crime scene and autopsy photos which were relevant to explain the medical examiner's testimony, the manner of death,

the location of the wounds, and the HAC aggravating factor.

Issue 4: *The Ring v. Arizona Claim*

The trial court correctly denied Hampton's claim based on *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428 (2002). This Court has repeatedly rejected challenges to Florida's capital sentencing scheme brought under *Ring*.

Issue 5: *The Statutory Mental Mitigators Claim*

The trial court did not abuse its discretion in rejecting the *statutory* mental mitigators and considering the defendant's mental health issues as *non-statutory* mitigation.

Issue 6: *The Proportionality Claim (Supplemental)*

Lastly, Hampton's death sentence is proportional in relation to other death sentences that this Court has upheld. HAC is among the weightiest aggravator in the statutory sentencing scheme. Given the strong aggravation compared to the weak mitigation, Hampton's death sentence is proportionate.

## ARGUMENT

### ISSUE I

### THE JUROR DISQUALIFICATION CLAIM

Hampton's jury trial was held on June 22-25, 2009. Hampton argues that he is entitled to either a new trial or juror interview because one of the jurors, Steven Doetsch, was arrested on June 6, 2009, for the misdemeanor offenses of loitering and prowling and possession of drug paraphernalia.

Applying *Tucker v. State*, 987 So. 2d 717 (Fla. 5th DCA 2008) and § 775.15(4)(a), Florida Statutes, the trial court denied the motion for new trial, finding that (1) Mr. Doetsch was not "under prosecution" at the time of Hampton's trial and (2) Hampton failed to assert any prejudice or actual bias by Juror Doetsch serving on the jury. The trial court also ruled that Hampton's motion for juror interview was time-barred and Hampton failed to show good cause to excuse the untimely filing. For the following reasons, the trial court's denial of Hampton's motion for new trial and motion for juror interview should be affirmed.

Standards of Review:

The standard of review for the denial of a motion for new trial is abuse of discretion. *See Smith v. State,* 7 So. 3d 473, 507 (Fla. 2009), citing *Woods v. State*, 733 So. 2d 980, 988

(Fla. 1999). Likewise, in *Johnston v. State*, 63 So. 3d 730, 739-740 (Fla. 2011), this Court reiterated that "[a] trial court's decision on a motion to interview jurors is reviewed pursuant to an abuse of discretion standard." *Id*., quoting *Anderson v. State*, 18 So. 3d 501, 519 (Fla. 2009). The trial court does not abuse its discretion in denying a motion to interview jurors where there is no indication of bias or misconduct in the record. *Id*.

The Trial Court's Orders:

*Motion for Juror Interview*: The trial court denied Hampton's [Second Amended] Motion to Interview Juror 10 [Steven Doetsch] as time-barred and found that the defense failed to show good cause to excuse the untimely filing. The trial court's order, filed January 7, 2010 states, in pertinent part:

> The trial in this case was held on June 22-25, 2009. **The Defendant was found by a jury to be guilty of first-degree murder on June 25, 2009**. The Defendant filed the amended motion seeking to have Juror 10, Steven Doetsch interviewed pursuant to rule 3.575. In the attached affidavit, counsel for Defendant states that he saw Mr. Doetsch at the Criminal Justice Center sometime in August and again in October. On November 17, 2009, counsel discovered that Mr. Doetsch was allegedly under prosecution by the State Attorney's Office and was an unqualified juror pursuant to section 40.013, Florida Statutes (2009).
>
> **Mr. Doetsch was arrested on June 6, 2009, and a complaint was filed on June 7, 2009, according to this Court's online docket. Defense counsel has failed to state a reason for his failure to investigate the jury**

> **panelist during jury selection, prior to the jury being sworn, during the trial, or immediately after trial. Furthermore, defense counsel stated in his affidavit that he saw Mr. Doetsch in the court house in August and in October, but he has failed to assert why he did not investigate or discover that Mr. Doetsch was facing prosecution prior to November 17, 2009. As such, defense counsel could have discovered this information earlier with due diligence. See Belcher v. State, 9 So.3d 665 (Fla. 1st DCA 2009). Therefore, defense counsel has not stated good cause why this motion was not filed within 10 days of the verdict.**
>
> (V2/269-70) (e.s.)

*Motion for New Trial:* On March 26, 2010, the trial court denied Hampton's motion for new trial and found that Juror Doetsch was not "under prosecution" at the time of Hampton's jury trial. In addition, the trial court found that Hampton failed to assert any prejudice or actual bias by Mr. Doetsch serving on the jury or that there was any casting of doubt on the fairness of the proceedings by Mr. Doetsch's service. The trial court found that Juror Doetsch was not "unqualified" to serve on the jury and there was no inherent prejudice. The trial court's order states, in pertinent part:

> The Defendant alleges in his motion for new trial that he did not receive a fair trial because a disqualified juror, Steven P. Doetsch, served on the jury. Mr. Doetsch was arrested on June 6, 2009, for loitering and prowling and released on his own recognizance that same day. See Exhibit A: Complaint/Arrest Affidavit. On July 23, 2009, an information was filed charging Mr. Doetsch with possession of drug paraphernalia, which was found in a

search incident to arrest. See Exhibit B: Information. Mr. Doetsch pleaded no contest on October 9, 2009, and adjudication was withheld. Pursuant to section 40.013(1), Florida Statutes, no person who is under prosecution for any crime . . . shall be qualified to serve as a juror. The Defendant asserts that his trial was held from June 22, 2009, through June 25, 2009, and during that time Mr. Doestch was under prosecution.

In its response, the State raised several arguments. First, the State argues that Mr. Doetsch was not "under prosecution" during the Defendant's trial between June 22, 2009 and June 24, 2009. Pursuant to section 775.15, Florida Statutes, prosecution is commenced "by the filing of an Indictment, Information, or other charging documents." The State asserts that Mr. Doetsch was not charged by information until July 23, 2009, and therefore, prosecution did not begin until that date. Relying on Tucker v. State, 987 So.2d 717 (Fla. 5th DCA 2008), the State asserts that this reasoning is supported by the Fifth District Court of Appeal (DCA) opinion. In Tucker, the juror received a traffic citation, which she did not report and neither the State nor defense counsel questioned her regarding the citation. The Fifth DCA held that a person is not placed "under prosecution" until the State Attorney's Office has exercised its discretion to pursue the charges through formal judicial process.

Secondly, the State argues that the Defendant has the burden of establishing that he was prejudiced by Mr. Doetsch sitting on the jury. Mr. Doetsch noted on his questionnaire that he or someone he knows was accused of a crime. See Exhibit C: Juror Questionnaire. Both the State and defense counsel failed to ask Mr. Doetsch any questions regarding that matter and therefore, the Defendant cannot be prejudiced by a tactical decision made by his attorneys. Further, there is no evidence that Mr. Doetsch acted with a bias towards any one party in this case, which is evidenced by the unanimous finding of guilt by the 12-member jury.

> **This Court finds that Mr. Doetsch was not "under prosecution" during voir dire, during the guilt phase, or during the penalty phase. This Court in applying Tucker finds that Mr. Doetsch had not been formally charged by the State until after the trial was complete and after the penalty phase occurred. Pursuant to section 775.15(4)(a), prosecution of Mr. Doetsch did not commence until the State filed the Information on July 23, 2009. The Defendant has failed to assert any prejudice or actual bias by Mr. Doetsch serving on the jury or that there was any casting of doubt on the fairness of the proceedings by Mr. Doetsch's service. Therefore, Mr. Doetsch was not "unqualified" to serve on the jury and there is no inherent prejudice.** Consequently, this motion must be denied.
>
> (V2/312-14) (e.s.)

Analysis:

For the following reasons, the trial court did not abuse its discretion in (1) denying Hampton's motion for new trial based on Juror Doetsch's misdemeanor arrest, and (2) denying Hampton's motion for juror interview as untimely filed.

***A. Juror Doetsch was not "under prosecution" at the time of Hampton's trial and was not disqualified from jury service.***

Pursuant to section 40.013(1), Florida Statutes,

> **No person who is *under prosecution* for any crime**, or who has been convicted in this state, any federal court, or any other state, territory, or country of bribery, forgery, perjury, larceny, or any other offense that is a felony in this state or which if it had been committed in this state would be a felony, unless restored to civil rights, **shall be qualified to serve as a juror**.
> (e.s.)

Hampton argues that Juror Doetsch was not qualified to

serve as a juror under section 40.013(1) because he was arrested on June 6, 2009 for the misdemeanors of loitering and prowling and possession of drug paraphernalia. Juror Doetsch was not "under prosecution" during the time period of the defendant's jury trial, as defined by § 775.15, Florida Statutes and Florida caselaw. Section 775.15, Florida Statutes defines time limitations, exceptions and commencement of prosecution. Section 775.15(4)(a), specifically states that "**Prosecution** on a charge for which the Defendant has previously been arrested **is commenced** by the filing of an Indictment, Information, or other charging documents." (e.s.). Hampton's jury trial was held on June 22 – 25, 2009; and, pursuant to § 775.15(4)(a), the State Attorney's Office did not commence prosecution of Mr. Doetsch until July 23, 2009. Therefore, Juror Doetsch, was not "under prosecution" during the time period of Hampton's jury trial.

In addition, Florida caselaw defines "under prosecution" in a similar manner as § 775.15, Florida Statutes. In *Tucker v. State*, 987 So. 2d 717 (Fla. 5th DCA 2008), the Fifth District Court held that a person is not placed "under prosecution" until the State Attorney's Office has exercised its discretion to pursue the charges through formal judicial process (*i.e.,* an Information). In *Tucker*, a juror received a Driving While License Suspended or Revoked citation on the last day of *voir*

*dire* in a murder and sexual battery case. Neither the State nor the defense questioned the juror after the juror received the citation. The juror never reported the citation to either party. Like the instant case, the juror in *Tucker* sat through the trial, deliberated, and returned a verdict of guilty. Unlike the juror in *Tucker*, however, Juror Doetsch checked the box "yes" on the juror questionnaire marked "Have you or anyone you know been accused of a crime?" Thus, in this case, the defense had more information than in *Tucker*. In other words, Juror Doetsch put the State and defense on notice *via* his questionnaire. However, neither the State nor the defense questioned Juror Doetsch regarding the crime(s), despite notice from Juror Doetsch's questionnaire.

The *Tucker* court also defined when "prosecution" begins for purposes of interpreting § 40.013, the jury qualifications statute, by citing from § 775.15(4)(a). Furthermore, in *Tucker*, the Court explained:

> Ordinarily, "arrest" and "prosecution" refer to different stages in the criminal justice process. "Prosecution" generally refers to the formal pressing of criminal charges by a prosecuting authority In Florida, the prosecuting authority is the state attorney, who has the complete discretion to initiate, continue or terminate a "prosecution." *State v. Bloom*, 497 So.2d 2 (Fla. 1986); *Henry v. State*, 825 So.2d 431, 433 (Fla. 1st DCA 2002); State v. J.M., 718 So.2d 316, 317 (Fla. 2d DCA 1998). **Thus, in *Willacy v. State*, 640 So.2d 1079 (Fla. 1994), even though the**

> **juror had been arrested and his charges remained pending, the court held that he was not "under prosecution" at the time of his jury service because the state attorney had agreed to pretrial diversion in the juror's criminal case. Accordingly, we do not think that a person is placed "under prosecution," as used in the jury qualification statute, until the state attorney has exercised his or her discretion to pursue the charges through formal judicial proceedings. This interpretation is consistent with a central policy underlying the qualification statute – to prevent the seating of a prospective juror who might vote to convict in hopes of receiving favorable treatment from the state attorney in the juror's own case. *Companioni v. City of Tampa*, 958 So.2d 404, 415 n. 9 (Fla. 2d DCA 2007). Under this definition, we conclude that the trial court was correct in its determination that W. was not "under prosecution" because the state attorney had not received or acted on the citation.**
>
> *Tucker*, 987 So. 2d at 721 (e.s.)

Here, although Juror Doetsch was arrested on a non—traffic misdemeanor offense, under both § 775.15(4)(a) and the reasoning in *Tucker*, Juror Doetsch was not "under prosecution" until the State Attorney's Office filed the misdemeanor Information against Doetsch on July 23, 2009.

Hampton relies on *Lowery v. State*, 705 So. 2d 1367 (Fla. 1998), in support of his claim of inherent prejudice. According to *Lowery*, 705 So. 2d 1367, 1368, "where it is not revealed to a defendant that a juror is *under prosecution* by the same office that is prosecuting the defendant's case, inherent prejudice to the defendant is presumed and the defendant is entitled to a new

trial." In *Lowery,* the juror had been aware of an investigation being conducted regarding battery charges and had actually initiated a discussion with the prosecutor regarding the charges. Since a prosecution does not commence until a charging document is filed, Juror Doetsch was not "under prosecution" at the time of Hampton's trial. *See Brown v. State*, 674 So. 2d 738, 740 (Fla. 2d DCA 1995) ("A prosecution is commenced when 'either an indictment or information is filed, provided the capias, summons, or other process issued on such indictment or information is executed without unreasonable delay.' § 775.15(5), Fla. Stat. (1993).") Here, the trial court specifically found that Doetsch was not "under prosecution" at any time during Hampton's trial, Doetsch was not disqualified from jury service and no "inherent" prejudice existed.

In *Johnston v. State,* 841 So. 2d 349, 357 (Fla. 2002), a juror who had an outstanding capias for her failure to pay a court fine (resulting from her nolo contendere plea to a misdemeanor) was not "under prosecution" during the course of the defendant's trial and was not disqualified from jury service under section 40.013(1), Florida Statutes (1999). *Johnston*, 841 So. 2d at 356–57. In *Johnston*, this Court further determined that even if the juror was aware of the capias and disclosed it upon questionning, such disclosure would not have provided a

reason for her to be removed for cause. Here, as in *Johnston*, even if the juror arguably had been *convicted* of the *misdemeanors* at the time of the defendant's trial, he likewise would not have been disqualified from jury service nor subject to removal for cause.

***B. Hampton is not entitled to a new trial based on Juror Doetsch's "failure to disclose" his misdemeanor arrest.***

Hampton also argues that a new trial should be granted because Juror Doetsch failed to disclose his misdemeanor arrest during *voir dire*. This sub-claim is procedurally barred. The defense Motion for New Trial, while timely filed, alleged only that Doetsch was a disqualified juror, but it was silent as to any claim of an alleged "failure to disclose" by Juror Doetsch. (V2/304). Thus, the "failure to disclose" sub-claim is procedurally barred on Hampton's motion for new trial.[2] *See Johnston,* 841 So. 2d at 357 (Claim that juror deliberately failed to disclose her plea of nolo contendere to a misdemeanor charge was not included as specific ground for a new trial and therefore, would not be considered on appeal.)

Furthermore, even if this non-disclosure sub-claim is subject to review in connection with Hampton's motion for new trial, which the State emphatically disputes, Hampton cannot

[2]Hampton's "failure to disclose" theory was raised only in his untimely motion for juror interview.

satisfy the three-part test of *De La Rosa v. Zequeira*, 659 So. 2d 239 (Fla. 1995). The three-part test relevant to a juror's non-disclosure of information during *voir dire* requires that

> 1) the information must be relevant and material to jury service in the case;
>
> 2) the information must be concealed by the juror during voir dire examination; and
>
> 3) the failure to discover the concealed information must not be due to the want of diligence of the complaining party.

*See De La Rosa*, 659 So. 2d at 241; *See also Lugo v. State*, 2 So. 3d 1, 13 (2008).

In this case, when the trial court initially announced to all prospective jurors collectively "have you or a family member been accused of a crime?" (V5/44), no juror volunteered any information on the topic. When the trial court began the individual inquiry of the members of row one, the trial court first observed, "Mr. Layman, you've already told us about your son, correct?" (V5/45). The trial court then inquired of each: (1) Did the case get processed through the court system; (2) Any dissatisfaction with the way it was processed; and (3) Can you set it aside? (V5/45-46). The responses in row number one included McGee/brother; Layman/son; Pepper/son; and Wheatley/self and granddaughter. (V5/45-46). When the trial court reached Mr. Doetsch, he said:

THE COURT: Thank You. Mr. Doetsch?

PROSPECTIVE JUROR DOETSCH: Yeah, my sister, and no, I won't.

THE COURT: No problems with the way it was processed?

PROSPECTIVE JUROR DOETSCH: No.

THE COURT: Can you set it aside?

PROSPECTIVE JUROR DOETSCH: Yes, sir.

(V5/46)

In light of the abbreviated manner in which the individual inquiry was conducted and the focus on prior criminal cases having been processed "through the court system," Doetsch's failure to discuss his misdemeanor arrest and ROR does not fairly equate with concealment within the meaning of *De La Rosa*.

Defense counsel did not ask Juror Doetsch anything about his questionnaire.[3] Furthermore, defense counsel did not ask a

[3]Although the prosecutor did ask Doetsch about his questionnaire, that inquiry related to employment:

[PROSECUTOR] MR. DAVIDSON: . . . On your questionnaire I didn't see that you are currently employed. Are you currently employed or not?
PROSPECTIVE JUROR DOETSCH: No, I'm unemployed.
MR. DAVIDSON: What did you do previously?
PROSPECTIVE JUROR DOETSCH: I was a professional baseball player for seven years.
MR. DAVIDSON: Locally or all over?
PROSPECTIVE JUROR DOETSCH: I was with the Atlanta Braves for five, then nationals for a year and then I played independent ball.
(V5/129-130).

single question of any juror regarding the topic of prior criminal charges.[4] Here, like *Johnston*, 63 So. 3d at 739, Hampton cannot demonstrate that the claimed error regarding the non-disclosure violates *De La Rosa*. As this Court explained in *Johnston*:

> **Under the first prong of *De La Rosa*, Johnston must establish that the nondisclosed information is relevant and material to jury service in this case**. *De La Rosa*, 659 So.2d at 241; see also *Murray v. State*, 3 So.3d 1108, 1121–22 (Fla. 2009). "There is no *per se* rule that involvement in any particular prior legal matter is or is not material." *Roberts v. Tejada*, 814 So.2d 334, 345 (Fla. 2002); see also *State Farm Fire & Cas. Co. v. Levine*, 837 So.2d 363, 366 n. 2 (Fla. 2002). Factors that may be considered in evaluating materiality include the remoteness in time of a juror's prior exposure, the character and extensiveness of the experience, and the juror's posture in the litigation. *Roberts*, 814 So.2d at 342.
>
> But "materiality is only shown 'where the omission of the information prevented counsel from making an informed judgment — which would in all likelihood have resulted in a peremptory challenge.'" *Levine*, 837 So.2d at 365 (internal quotation marks omitted) (quoting *Roberts*, 814 So.2d at 340). In other words, "[a] juror's nondisclosure . . . is considered material if it is so substantial that, if the facts were known, the defense likely would peremptorily exclude the juror from the jury." *Murray*, 3 So.3d at 1121–22 (quoting *McCauslin v. O'Conner*, 985 So.2d 558, 561 (Fla. 5th DCA 2008)).

[4]Defense counsel did ask each prospective juror to name any person in history that they would like to spend thirty minutes with (V5/164-165) and Juror Doetsch named Babe Ruth. (V5/166). Defense counsel also asked each juror to give two words to describe themselves (V5/169) and Juror Doetsch responded, "loyal and loving." (V5/172).

> In *Lugo*, we held that a juror's nondisclosure was not sufficiently material where the juror, sitting on a death penalty case, had been a victim of theft. *Lugo*, 2 So.3d at 14. In evaluating materiality, this Court observed that the juror's "one-time isolated incident" did not resemble the murder victim's "extended torture and captivity." *Id.* Thus, we concluded that the sheer disparity between the experiences made the juror's experience insufficiently material or relevant to service on that jury. Id.
>
> **Similarly, here, Johnston has failed to satisfy materiality under *De La Rosa's* first prong. We find nothing about the character and extensiveness of Robinson's own experience — she committed a nonviolent offense and then pled nolo contendere — that suggests she would be biased against a defendant pleading not guilty in a death penalty case or against legal proceedings in general.** See *Lugo*, 2 So.3d at 14; cf. *De La Rosa*, 659 So.2d at 241. The capias, furthermore, was not issued for a criminal offense. *Johnston*, 841 So.2d at 357. **In fact, juror Robinson's positioning as a prior defendant makes bias against Johnston especially unlikely. See *Garnett v. McClellan*, 767 So.2d 1229, 1231 (Fla. 5th DCA 2000) (finding that prior litigation experience was immaterial, in part, because the juror had been similarly situated to and was therefore more likely to be sympathetic to the complaining party). . .**

*Johnston*, 63 So. 3d at 739 (e.s.)

Under the first prong of *De La Rosa*, Hampton must establish that the non-disclosed information is relevant and material to jury service in this case. As in *Johnston*, nothing about the character and extensiveness of Juror Doetsch's misdemeanor experience suggests he would be biased against a defendant pleading not guilty in a death penalty case or against legal proceedings in general. Furthermore, Hampton never even alleged

that if he had known of Juror Doetsch's misdemeanor arrest, he would have exercised a peremptory challenge to strike Juror Doetsch.

Second, a juror's answer cannot constitute concealment where counsel does not inquire further to clarify any ambiguity relating to the information sought. *See Birch v. Albert*, 761 So. 2d 355, 358 (Fla. 3d DCA 2000) (citations omitted). Where defense counsel failed to follow up or clarify any ambiguity, no improper concealment can be attributed to Juror Doetsch's response. *See Birch*, 761 So. 2d at 358.

Finally, defense counsel failed to diligently discover this information. As noted above, defense counsel failed to ask a single question during *voir dire* regarding any juror's prior criminal history. Where defense counsel failed to follow up with any of the jurors on their prior criminal history or even to follow up with Juror Doetsch on his questionnaire, ". . . any failure to disclose additional prior legal proceedings was due to the defendant's lack of due diligence and thus cannot constitute active concealment on the part of the juror." *See Birch*, 761 So. 2d 355, 358 (citations omitted). Here, as in *Lugo v. State,* 2 So. 3d 1, 16 (Fla. 2008), the defendant is not entitled to a new trial under a *De La Rosa* analysis based upon the juror's non-disclosure. The asserted nondisclosure was

immaterial and the failure to disclose was attributable, in part, to the lack of diligence of trial counsel.

There is no suggestion or evidence that Juror Doetsch acted with a bias towards any one party in this case. In any event, such a claim is subject to the actual prejudice standard set forth in *Carratelli v. State*, 961 So. 2d 312, 324 (Fla. 2007). To be entitled to relief, the defendant must establish that a juror was actually biased. *Carratelli*, 961 So.2d at 324. As this Court reiterated in *Lugo*, 2 So. 3d at 16:

> Under the "actual bias" standard articulated by this Court in *Carratelli*, Lugo has similarly failed to demonstrate that he is entitled to relief. In *Carratelli*, we explained:
>
> > A juror is competent if he or she "can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court." *Lusk*, 446 So.2d at 1041. Therefore, actual bias means bias-in-fact that would prevent service as an impartial juror. *See United States v. Wood*, 299 U.S. 123, 133–34[, 57 S.Ct. 177, 81 L.Ed. 78] (1936) (stating, in a case involving a statute permitting government employees to serve as jurors in the District of Columbia, that the defendant in a criminal case still has the ability during voir dire to "ascertain whether a prospective juror ... has any bias in fact which would prevent his serving as an impartial juror"). Under the actual bias standard, the defendant must demonstrate that the juror in question was not impartial—i.e., that the juror was biased against the defendant, and the evidence of bias must be plain on the face

of the record.

> 961 So.2d at 324 (emphasis supplied). Our analysis with regard to the *De La Rosa* standard defeats any assertion by Lugo that a biased juror actually served on the jury. As we have noted, the trial court engaged in an extended venire discussion to assure that the status of a juror as a crime victim would not impact his or her ability to fairly and impartially adjudicate the guilt or innocence of Lugo with regard to the charged crimes. Juror Schlehuber did not indicate that he would be unable to set aside any of his past experiences if he were selected to serve on Lugo's jury. In *Carratelli*, we held that the defendant failed to demonstrate actual prejudice where the challenged juror explained during voir dire that he could be fair, listen to the evidence, and follow the law. *See id*. at 327. *Lugo* similarly has failed to demonstrate that juror Schlehuber was actually biased against him. *See id*. at 324. Accordingly, he is not entitled to relief under *Carratelli*.
>
> *Lugo*, 2 So. 3d at 16

No claim of bias has been shown. Given that the 12-member jury unanimously determined Hampton's guilt after hearing all the facts and evidence, the evidence supports the contrary. Under these circumstances, Hampton has failed to demonstrate error warranting a new trial.

***C. The trial court did not abuse its discretion in denying Hampton's motion to interview Juror Doetsch as untimely filed.***

Lastly, Hampton argues that the trial court abused its discretion in denying his motion to interview Juror Doetsch as untimely filed. Rule 3.575, Florida Rules of Criminal Procedure requires that a motion to interview juror shall be filed within ten days after the rendition of the verdict, unless good cause

is shown for the failure to make the motion within that time.

Hampton's initial Motion to Interview Juror was filed on November 19, 2009 (V2/250), 148 days after the jury's verdict was rendered on June 25, 2009. The trial court ruled that defense counsel failed to state a reason for his failure to investigate the jury panelist during jury selection, prior to the jury being sworn, during the trial, or immediately after trial. In addition, although defense counsel saw Mr. Doetsch in the courthouse in August and in October, he still failed to assert why he did not investigate or discover that Mr. Doetsch was facing prosecution prior to November 17, 2009. Thus, the trial court found that defense counsel could have discovered this information earlier with due diligence. *See Belcher v. State*, 9 So. 3d 665 (Fla. 1st DCA 2009). In this case, although defense counsel was aware of the potential juror issue, he still did not investigate the issue until long after the trial. The motion for jury interview was time-barred. Fla. R. Crim. P. 3.575.

Hampton apparently urges this Court to reject any notion of requiring the defense to show "due diligence." However, in *Lugo v. State*, 2 So. 3d 1, 15 (Fla. 2008), this Court reiterated,

> We have held that
>
> > [t]he "due diligence" test requires that counsel provide a sufficient explanation of the type of information which potential jurors are being asked to

> disclose, particularly if it pertains to an area about which an average lay juror might not otherwise have a working understanding. Thus, resolution of this "diligence" issue requires a factual determination regarding whether the explanations provided by the judge and counsel regarding the kinds of responses which were sought would reasonably have been understood by the subject jurors to encompass the undisclosed information.

> *Roberts v. Tejada*, 814 So.2d 334, 343 (Fla. 2002). When trial counsel for Lugo conducted group voir dire, he did not inquire if any of the other jurors had also inadvertently failed to include on their questionnaire altercations, whether reported to the police or whether charges were actually filed. Here, it appears that charges were never pursued against the deliveryman involved with juror Schlehuber, and therefore, at best, an ambiguity may exist which was not explored.

> *Lugo,* 2 So. 3d at 15

Furthermore, the requirement of due diligence is well-established in other criminal contexts. For example, "[A]ny claim of newly discovered evidence in a death penalty case must be brought within one year of the date such evidence was discovered or could have been discovered through the exercise of due diligence." *See Glock v. Moore*, 776 So. 2d 243, 251 (Fla. 2001). In addition, this Court has held that two requirements must be met in order for a conviction to be set aside on the basis of newly discovered evidence: (1) to be considered newly discovered, the asserted evidence must have been unknown to the trial court, to the party, or to counsel at the time of trial,

and *it must appear that the defendant or defense counsel could not have known of it by the use of due diligence*; and (2) the newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial. *Jones v. State*, 709 So. 2d 512, 521 (Fla.1998). The trial court did not abuse its discretion in denying the motion to interview juror as time-barred where defense counsel could have discovered this information earlier with due diligence.

Alternatively, Hampton's Motion to Interview Juror was also without merit. Here, as in *Johnston*, 63 So. 3d at 740, the trial court did not abuse its discretion in denying Hampton's rule 3.575 motion because a juror interview was unnecessary given that the substance of the juror's nondisclosure – his misdemeanor arrest -- was already known. Based upon nothing other than pure speculation, Hampton posits that Juror Doetsch might have failed to disclose his misdemeanor arrest because of some future theory to "curry favor" with the State. However, *Johnston* rejected such speculation and Hampton did not provide adequate justification to support the need for a juror interview. *See* Ehrhardt, Florida Evidence, Section 607.2 (ed. 2001) (counsel has to have knowledge of juror misconduct prior

to interview)[5].

Hampton has not demonstrated any error with respect to Juror Doetsch's service. None of the foregoing sub-claims, individually or collectively, merit a new trial. The trial court did not abuse its discretion in denying Hampton's motion for new trial and finding that the defense failed to show good cause to excuse his untimely motion for juror interview.

[5]If Hampton is suggesting, based upon Doetsch's prior misdemeanor drug paraphernalia arrest, a claim of juror misconduct or influence upon the juror's deliberations arising from external sources, any such claim is procedurally barred and also would not entitle him to a juror interview. *See Devoney v. State*, 717 So. 2d 501, 503-504 (Fla. 1998) (citations omitted), citing *Tanner v. United States*, 483 U.S. 107, 107 S. Ct. 2739 (1987) (even allegations of juror misconduct such as consuming alcohol and ingesting and selling narcotics during court recess did not constitute external influences on the jury which would violate a defendant's Sixth Amendment right to a fair trial. *Devoney*, 717 So. 2d at 504.

## ISSUE II

## THE SUFFICIENCY OF THE EVIDENCE CLAIM

The jury found Hampton guilty of murder in the first degree, as charged. (V2/213). "A general guilty verdict rendered by a jury instructed on both first-degree murder and felony murder alternatives may be upheld on appeal where the evidence is sufficient to establish either felony murder or premeditation." *Blake v. State*, 972 So. 2d 839, 850 (Fla. 2010) (quoting *Crain v. State*, 894 So. 2d 59, 73 (Fla. 2004)).

Hampton concedes, correctly, that his current challenge to felony murder, based on sexual battery or attempted sexual battery as an underlying felony, was not raised during his motion for judgment of acquittal. (V9/713; 776). As a result, his current arguments are procedurally barred. Nevertheless, Hampton argues that his challenge to the sufficiency of the evidence of felony murder, with sexual battery as the underlying felony, should be reviewed as fundamental error under *F.B. v. State*, 852 So. 2d 226 (Fla. 2003) because this Court has a duty to address the sufficiency of evidence in each capital case. *See Overton v. State*, 801 So. 2d 877, 905 (Fla. 2001); Fla. R. App. P. 9.142(a)(6).

In light of this Court's duty to review the sufficiency of

the evidence under 9.142(a)(6), the State will address the sufficiency of the evidence on both premeditated murder and felony murder. "If, after viewing the evidence in a 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." *Deparvine v. State*, 995 So. 2d 351, 376 (Fla. 2008) (quoting *Reynolds v. State*, 934 So. 2d 1128, 1145 (Fla. 2006)).

"The question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and where there is substantial, competent evidence to support the jury verdict," reversal is not required. *Darling v. State*, 808 So. 2d 145, 155 (Fla. 2002) (quoting *State v. Law*, 559 So. 187, 188 (Fla. 1989)). The State is not required to "rebut conclusively, every possible variation of events," it only has to present evidence that is inconsistent with defendant's reasonable hypothesis. *Darling*, 808 So. 2d at 156. Moreover, the State is entitled to a view of any conflicting evidence in the light most favorable to the jury's verdict. *Cochran v. State*, 547 So. 2d 928, 930 (Fla. 1989).

Premeditation may be shown by evidence such as "the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the

manner in which the homicide was committed, and the nature and manner of the wounds inflicted." *Green v. State*, 715 So. 2d 940, 943 (Fla. 1998); *Johnston v. State*, 863 So. 2d 271, 285-86 (Fla. 2003) (evidence of premeditation sufficient where victim was strangled and injuries indicated victim struggled).

In this case, the victim had a brain hemorrhage consistent with multiple blows to her face and head. She was beaten with such force that her eyes were swollen shut, she had multiple abrasions on her face and body, and the lacerations across her neck were consistent with her throat being sliced and then stabbed by a knife. The blood spatter evidence, bloody handprints, and multiple injuries established that she struggled extensively, and did not die immediately after her jugular vein was cut. Despite her gasping pleas for help, Hampton poured lighter fluid on her and tried to destroy his own DNA in her vagina with a rag and cleaning solution.

In *Hodges v. State*, 55 So. 3d 515, 541 (Fla. 2010), this Court reiterated that "the deliberate use of a knife to stab a victim multiple times in vital organs is evidence that can support a finding of premeditation." *Id.*, citing *Williams v. State*, 967 So. 2d 735, 758 (Fla. 2007) (quoting *Perry v. State*, 801 So. 2d 78, 85–86 (Fla. 2001)). Here, as in *Hodges*, 55 So. 3d at 541, the stab wound cut the victim's jugular vein and,

given the evidence of multiple injuries to the victim's head, neck and body, a reasonable jury could have concluded that the perpetrator formed a premeditated intent to kill. The nature and location of the victim's wounds support the finding of premeditation. *See also Perry v. State*, 801 So. 2d 78, 85-86 (Fla. 2001), citing *Rogers v. State*, 783 So. 2d 980, 989 (Fla. 2001).

*Felony Murder:*

The evidence also was sufficient to support a conviction on the alternate theory of felony murder, with sexual battery or robbery or burglary as the underlying felony. Hampton does not challenge the sufficiency of the evidence of felony murder based on either robbery or burglary. Nor could he credibly do so. The direct evidence included Hampton's post-*Miranda* statements in which Hampton told the police, among other things, that he entered the victim's apartment while she slept and was "digging around" in the drawers of her dresser looking for money and cocaine. According to Hampton, the victim woke up while he was looking for money and drugs, a struggle ensued, and he stabbed her in the neck. Hampton stated that he took $50.00 belonging to the victim. When Hampton was taken into custody on the day of the murder, he had approximately $10.00 in his pocket. Hampton admitted taking $50.00 from the victim's home and

explained how he spent the money. Thus, the trial court found that it was proven beyond a reasonable doubt that Hampton was committing both robbery and burglary at the time he killed the victim.

As to the sexual battery, Hampton told Reginald that he was going to meet a girl at 3:45 a.m., Hampton admitted having sexual intercourse with the victim, which was cumulative since DNA testing proved that he had, but claimed it was consensual sex. However, the State's evidence sufficiently rebutted Hampton's claim of consensual sex. In this case, there were multiple injuries to the victim, blood and blood spatter evidence in the victim's bedroom, and Hampton's semen and DNA found inside the victim's vagina. Although Hampton claimed that the sex was consensual, there was evidence of a struggle and the victim was discovered laying on the floor of her bedroom with both eyes swollen shut, abrasions on her face and body, and a laceration across her neck consistent with her throat being sliced and then stabbed by a knife. She also had a brain hemorrhage consistent with multiple blows to her face and head. As the trial court further noted, blood spatter on the walls and around her body reflect that she received a minimum of four blows while she was on the floor. In addition, there were handprints in the blood around her body indicative of sexual

intercourse with the victim in the missionary position. Hampton testified at trial that he used a soapy rag to attempt to clean away DNA evidence from the victim's vagina as she lay bleeding and pleading for help. Ultimately, as the trial court found:

> **The evidence is clear that the sexual intercourse between the Defendant and the victim was not consensual. The evidence provided at trial supports a finding that the victim was beaten into submission for sex by the Defendant.** [fn4] The sexual battery at the time of the capital offense has been proven beyond a reasonable doubt.
>
> (V2/288-289) (e.s.) (footnote omitted)

*See Fitzpatrick v. State*, 900 So. 2d 495, 509 (Fla. 2005) (relying, in part, on trauma to murder victim's breasts, puffiness around her head, and bruising on her arms to reject defendant's assertion that sex was consensual); *Dessaure v. State*, 55 So. 3d 478, 486 (Fla. 2010) (finding, despite Dessaure's assertion to the contrary, there was ample evidence to support that a sexual battery occurred – the victim was found naked and face down on the floor; Dessaure's semen was on a towel near the victim's body and on her bed linens; and a witness testified that Dessaure told him he struck the victim and began having sex with her). Even assuming, *arguendo*, that the sexual intercourse began as consensual, which the State does not concede and specifically disputes, any consent would have been revoked when Hampton started to beat and stab her to death.

*See McWatters v. State,* 36 So. 3d 613, 633-634 (Fla. 2010) (finding that jury could have reasonably inferred that any consent to sex was terminated when the defendant began to choke her to death); *Zack v. State*, 753 So. 2d 9, 17–18 (Fla. 2000) (although there was evidence implying victim originally intended to engage in consensual intercourse, it did not negate expert's opinion, based on blood evidence and other physical evidence, that the attack began as soon as she and Zack entered the house).

The evidence previously described also supports the trial court's finding that Hampton was engaged in all three of the aforementioned felonies at the time of the murder. §921.141(5)(d), Fla. Stat. (2007). As the trial court found:

> The aggravating factors in this case are horrendous. The Defendant was on probation for failing to register as a sex offender in Georgia when he murdered Renee McKinness. The Defendant committed the murder during the course of burglary, robbery, and sexual battery. The method employed by the Defendant to kill Renee McKinness was especially heinous, atrocious, and cruel. These factors greatly outweigh the comparatively insignificant mitigating factors.

In light of the unchallenged alternate theories supporting Hampton's first-degree murder conviction, both premeditated and felony murder, and the multiple weighty aggravating factors, error, if any, is harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986).

## ISSUE III

## THE CUMULATIVE PHOTOGRAPHS CLAIM

A trial court's decision to admit photographic evidence will not be disturbed absent an abuse of discretion. *Ault v. State,* 53 So. 3d 175, 198-200 (Fla. 2010). In *Ault*, this Court, quoting *Brooks v. State*, 787 So. 2d 765, 781 (Fla. 2001), reiterated that the initial test for determining the admissibility of photographic evidence is relevance, not necessity. *Id*., citing *Mansfield v. State*, 758 So. 2d 636 (Fla. 2000). Photographs are admissible if "they assist the medical examiner in explaining to the jury the nature and manner in which the wounds were inflicted." *Bush v. State*, 461 So. 2d 936, 939 (Fla. 1985). Furthermore, photographs are admissible "to show the manner of death, location of wounds, and the identity of the victim." *Larkins v. State*, 655 So. 2d 95, 98 (Fla. 1995).

Under section 921.141(1), Florida Statutes, in capital sentencing proceedings, "evidence may be presented as to any matter that the court deems relevant to the nature of the crime." As provided in *Rose v. State*, 787 So. 2d 786, 794 (Fla. 2001), "relevant evidence is ordinarily admissible unless it is barred by a rule of exclusion or its admission fails a balancing test to determine whether the probative value is outweighed by

its prejudicial effect. This standard is equally applicable to photographs." *See Zack v. State*, 753 So. 2d 9, 16 (Fla. 2000). In *Ault,* this Court also emphasized:

> . . . "[t]he mere fact that photographs may be gruesome does not necessarily mean they are inadmissible. The admission of such photographs is within the trial court's discretion and will only be reversed when an abuse of discretion has been demonstrated." *Harris*, 843 So.2d at 864 (citing *Rose v. State*, 787 So.2d 786 (Fla.2001)); see also *Gorby v. State*, 630 So.2d 544, 547 (Fla. 1993) (finding that trial court did not abuse its discretion in admitting numerous photographs and a videotape of the crime scene where "[t]he court conscientiously considered all of the photos the state sought to introduce and rejected those it found to be too prejudicial or cumulative"). To be relevant, however, "a photo of a deceased victim must be probative of an issue that is in dispute." *Almeida*, 748 So.2d at 929.
>
> * * *
>
> In *McWatters v. State*, 36 So.3d 613, 637 (Fla.), petition for cert. filed, No. 10–6029 (U.S. Aug. 20, 2010), we found that the trial court did not abuse its discretion in admitting four autopsy photographs into evidence, explaining, **"This Court has upheld the admission of photographs when they are offered to explain a medical examiner's testimony, the manner of death, the location of the wounds, or to demonstrate the heinous, atrocious, or cruel (HAC) factor."** Although the photographs in *McWatters* depicted the decomposed heads, necks, and upper torsos of the victims, they were relevant where used by the medical examiner to explain the condition of the bodies and the manner and cause of death. Additionally, we found that "[t]he photographs were also relevant to establishing HAC because [the medical examiner] used these photographs to demonstrate how the victims were strangled." Id.; see also *England v. State*, 940 So.2d 389, 399 (Fla. 2006) (finding that the trial court did not abuse its discretion in admitting autopsy photos

> of the victim's head, torso, and hands in a moderately decomposed state where relevant to establish the manner and cause of death and HAC).

*Ault*, 53 So. 3d at 198-200 (e.s.)

Hampton admits that the defense did not object to the photographs on the State's exhibit boards containing exhibits 4A – 4I and exhibits 9A – 9F. (V7/427; 431). Hampton argues that the trial court abused its discretion in admitting seven photographs of the victim – exhibits 24A; 24B; 24C; 24F; 24H; and 25 A & B. Hampton argues that these seven photos were cumulative to some of the photographs in group 4 and group 9, and that the prejudicial impact outweighed their probative value.

The photographs to which Hampton objects were offered into evidence during the testimony of Dr. Kurz, the Medical Examiner who conducted the victim's autopsy. In addressing the defense objection to the photographs contained in exhibit 24 and 25, the prosecutor explained, outside the presence of the jury:

> [PROSECUTOR] MR. DAVIDSON: The next board would be Exhibit 24.
> THE COURT: All right. Do you have objections to that board?
> [DEFENSE COUNSEL] MR. LASTINGER: Yes. I think they're cumulative. The eyes, the swelling of the eyes. We also have--there's another board and even another board from the scene showing the extent of the swelling and her injuries. THE COURT: Why don't you explain to me C, D and E.
> **MR. DAVIDSON: Yes, Judge. C would be showing the**

**extensive bruising to the lower portion of the victim's right eye, as well as you can see up at the top of the right eye there's a contusion area that we expect to have the doctor testify to.**

**D is the eyes spread wider to show the damage and hemorrhaging to the eye and the overall--I will call it global hemorrhaging, my terms. I think the doctor may be a little more specific as to that.**

**E is then a photograph to demonstrate the hemorrhaging to the--it would be the left eye of the victim.**

**THE COURT: Okay. And then up further, F, G, H.**

**MR. DAVIDSON: Photograph F demonstrates an injury towards the upper back of the victim, her upper right shoulder.**

**Photograph G, an abrasion and injury to the other side of the right shoulder, the top area.**

And H is some injuries noted on the medial area of the victim.

THE COURT: Now let's go to the last board.

**MR. DAVIDSON: This is State's Exhibit 25, Your Honor, this is to show A and B the extent of chemical staining the victim received as a result of the lighter fluid and/or cleaning solutions poured on her, as the evidence has indicated.**

**Photograph C is a portion of the victim's skin that's demonstrating a term called slippage, where the skin is sloughing off, likely as a result of the chemical application, as well as an injury or blood-type injury below that.**

THE COURT: All right.

* * *

**MR. DAVIDSON: I think you indicated you didn't have an objection to 9?**

**MR. LASTINGER: Those pictures I don't think are overly graphic, but I think it's the total number of pictures that we're dealing with here that also creates an issue for me. Number 4 is already in evidence, and then there's that one as well.**

**MR. DAVIDSON: Judge, I would point out as to State's 9 and 24, any--what might be somewhat duplication with 4 is important for the State to establish to the jury that by the time 9 and 24, with the exception of, I**

**think, 24A, all the rest are after the victim has been cleaned up and she's still exhibiting these injuries.**

**So it's not something that's masked in blood. These are actual traumatic injuries to the tissues in the body.**

MR. LASTINGER: I don't think there's any way that I can argue it was masked in blood or anything like that. These are clearly bruises. And certainly I won't be making such arguments. I think the injuries speak for themselves.

THE COURT: Your objection to 4, 9--you didn't have an objection to 9, correct?

MR. LASTINGER: Nothing in 9.

THE COURT: So your objection goes to 24?

MR. LASTINGER: Yes, sir.

THE COURT: It's overruled. And 25 is overruled. So 4 is already in.

THE CLERK: Right.

MR. LASTINGER: Right.

THE COURT: **So I recognize that it's some duplicative; however, A, for instance, in 24A and 4C are somewhat duplicative, but yet A is a wider view and C, D and E, of course, go to display the type of hemorrhaging in the eyes.**

(V7/427-431) (e.s.)

When Dr. Kurz testified, he explained the injuries he noted at the autopsy *via* the photographs in State's exhibit 9 (V7/439-442), and composite exhibits 24 and 25 A and B. (V7/442-446):

Q Before you move on, looking at both [24] A and B in conjunction with each other, I see multiple areas of discoloration. Would that indicate multiple strikes to the victim?

A Yes, there's multiple different areas that are involved and that indicates different areas that wouldn't likely be caused by one strike.

Q Now, the fact that we have what I would commonly refer to as bruising or hemorrhaging showing visible on the victim, would that indicate that she was alive at the time of each of those injuries being inflicted?

A Yes. Typically when you have an injury, the blood

pressure is what forces the blood out of the vessel and gets the bruising. There is some overlap between what gravity can do and what the actual injury and the blood pressure can do, but these appear to be inflicted prior to death.
Q And so by looking at particularly those two and then as we go through the others, that would reveal a significant beating to the victim while she was alive?
A Yes, multiple injuries.
Q Now, moving on to photograph C, what are we looking at in photograph C?
A Photograph C, the eyelids are reflected. You can see the eye in this photo. We can also see the inside of the lower eyelid. There's bleeding in this area under the surface there. You can also see that in the upper eyelid and we can also see the laceration or tear of the upper eyelid in that photo as well.
Q Now, would that be a result of blunt force as opposed to a sharp force?
A Correct, a blunt force.
Q And could blunt force be from any blunt object, such as a fist?
A Sure.
Q What are we looking at in D?
A Photograph D is a photograph of the right eye in the center of the photograph with the eyelid retractors on. We can visualize the white of the eye also has hemorrhages, and then what we call the anterior chamber.

The eye is a sphere or round object filled with liquid. And what we can see under the cornea, which is in the center of the eye, and in front of the iris, which is called the anterior chamber, there is blood within there, so that's also blunt injury.
Q And does it take significant force to obtain these types of injuries?
A It takes a significant force.
Q Photograph E?
A Photograph E is of the left eye. Using the eyelid retractor we can see the bleeding of the white part of the eye, the sclera, and we can also see in this photo that the cornea is cloudy, which just happens progressively after death.
Q Now photograph F, what are we looking at there?
A Photograph F is a photograph of the back of the

decedent and we see an abrasion on the top right side of the back and abrasions on the top of the left side of the back.
Q And G?
A G was a photograph of the right shoulder and we have a couple abrasions here as well, an abrasion, an abrasion.
Q And H?
A H is a photograph of the knees of the decedent. It's a little bit harder to see in this photograph, but you have an abrasion there. You have an abrasion--an abrasion on the left and then a couple abrasions on the right, knee scrapes.
Q Now, before moving on from this, in photographs A and B, we've talked about the forehead and then I believe the side, which would be the left side of the victim's face. Did you also discover injuries to her lips and chin area?
A Well, there are abrasions of the chin area. I will have to refer to my report for the lips. I just described the lips have dry artifact, which is just after death things dry out. They're no longer getting blood to that area and no longer being hydrated that way.
Q What is the submental region?
A Sorry. The submental region is just the area under the chin.
Q Okay. If I can show you Exhibit 25 and ask you if you can tell us what your findings are here?
A Photograph A is a photo of the left leg and the right leg and the thigh regions. And photograph A shows a dripping staining pattern on the skin of the right thigh.

Photograph B is just a little bit further away from the same photo as A, and that just shows, once again, dry dripping liquid.
Q And was this--are these photographs taken after liquids have been cleaned from the exterior of the victim's body?
A Yes, they are.
Q So those were remnants left on by whatever had been placed on her?
A Correct.
Q Now, what is photograph C?
A Photograph C is a photograph of one of the forearms,

> and you can see the skin sloughing at the edges, and you can see these areas of erythema. These are chemical burns.
> Q And skin slippage, what can cause that?
> A Skin slippage can occur when certain thing are applied to the skin where it sort to breaks down the skin. Also after death, after a period of time, the skin can slip off as a part of decomposition.
> Q But if the body wasn't in a decomposing situation, the slippage could also be attributable to a chemical being applied?
> A Correct.
>
> (V7/442-447)

In this case, the testimony of the State's guilt phase witnesses began in this record at V6/225 and the State rested its case at V9/710. In addition, Hampton testified during the defense case and his testimony began at V9/713 and concluded at V9/775. The Medical Examiner's testimony which addressed the seven photographs in exhibits 24 and 25 A & B amounts to only 5 pages, out of approximately 550 pages of trial transcript.

Here, the photographs showed the nature and extent of the victim's injuries, the manner of death, and were also relevant to establish the aggravation that the State was required to prove, all relevant issues for the jury. *See Mansfield v. State*, 758 So. 2d 636 (Fla. 2000) (noting felony murder aggravator found where aggravator of murder committed during the commission of a sexual battery); *England v. State*, 940 So. 2d 389, 399-400 (Fla. 2006) (finding photographs admissible to

address felony murder and HAC aggravators); *Rose v. State*, 787 So. 2d 786, 794 (Fla. 2001) (holding "autopsy photographs, even when difficult to view, are admissible to the extent that they fairly and accurately establish a material fact and are not unduly prejudicial."). Moreover, "[t]hose whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments." *Chavez v. State*, 832 So. 2d 730, 763 (Fla. 2002) (quoting *Henderson v. State*, 463 So.2d 196, 200 (Fla. 1985)). The evidence, as the trial court found in detailing the HAC aggravating factor, included that:

> The victim was beaten on her face. She had black eyes, with swelling and bleeding under the skin around the eyes. She had a bruised forehead, abrasions to her left cheek and chin, her right eyelid was torn, and she had incised wounds to her face and forearms. The victim suffered abrasions on her back, shoulders, and knees. Through the testimony presented at trial it was apparent that these injuries occurred prior to the victim's death because swelling and bleeding only occur when one is alive. The victim received multiple blows to her head. The muscles in the temporal region of the head were hemorrhaged and she was suffering from a brain hemorrhage demonstrated in the autopsy by a showing of blood on her brain at the time of death. Moreover, cuts to her hand were defensive wounds, indicating that the victim was conscious and attempting to block and protect herself during the beating and stabbing. The victim's throat was sliced by a sharp instrument and her jugular vein was slashed.
>
> It is undisputed that the Defendant and the victim had sex. In addition, there were physical indicators consistent with sexual battery. There was the battery about the victim's face and around her

> upper torso and forearms. There were also handprints in the blood surrounding the victim's body consistent with a person being in the missionary position over the victim's body while engaged in sexual intercourse. The Defendant's DNA was found inside of the victim's vagina. Finally, after beating and raping the victim, the Defendant sliced and stabbed the victim in the neck and in so doing cut her jugular vein.
>
> The Defendant then took lighter fluid and 409 cleaning fluid, poured it over the victim's body, and began wiping her lower body. The Defendant testified that he got a soapy rag to clean the victim's "vagina out" in an attempt to remove his DNA. The associate medical examiner, Wayne D. Kurz, M.D., testified that the body had a "generalized petroleum product-like odor." The victim suffered chemical burns as well as skin slippage, which occur when chemicals burn through the skin. Dr. Kurz testified that the damage to the victim's skin could reasonably be considered evidence she was alive when the chemicals were applied to her body. Chemical substances also were found in the victim's vagina.
> (V2/290-291)

The trial court did not abuse its discretion in admitting the photographs to explain the medical examiner's testimony, the manner of death, the location of the wounds, and to demonstrate the heinous, atrocious, or cruel (HAC) factor. Furthermore, any alleged duplication in the photos to the unobjected-to evidence previously admitted is harmless. Error, if any, is harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986).

## ISSUE IV

## THE *RING v. ARIZONA* CLAIM

Hampton filed a motion to declare Florida's death penalty unconstitutional based upon *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428 (2002) and the trial court denied this motion. (V1/92-107; 131).

This Court has repeatedly rejected challenges to Florida's capital sentencing scheme based on *Ring*. *See Ault v. State*, 53 So. 3d 175, 206 (Fla. 2010) (noting continued rejection of Ring challenges); *Abdool v. State*, 53 So. 3d 208, 228 (Fla. 2010) (recognizing this Court has rejected argument to revisit its opinions in *Bottoson* v. Moore, 833 So. 2d 693 (Fla. 2002), and *King v. Moore*, 831 So. 2d 143 (Fla. 2002) and find Florida's sentencing scheme unconstitutional); *Frances v. State*, 970 So. 2d 806, 822 (Fla. 2007). This Court also has consistently rejected Hampton's argument that the jury must reach a unanimous decision on the aggravating circumstances. *See Zommer v. State*, 31 So. 3d 733, 752-753 (Fla. 2010); *McWatters v. State*, 36 So. 3d 613, 644 (Fla. 2010); *Abdool v. State*, 53 So. 3d 208, 228 (Fla. 2010); *Hodges v. State*, 55 So. 3d 515, 540-541 (Fla. 2010); *Rigterink v. State*, 2011 WL 2374188 (Fla. June 16, 2011); *Deparvine v. State*, 995 So. 2d 351, 379 (Fla. 2008); *Frances v.*

*State*, 970 So. 2d 806, 822 (Fla. 2007).

In addition, this Court has repeatedly held that *Ring* does not apply to cases where either the prior violent felony, during the course of a felony, or the under-sentence-of-imprisonment aggravating factor is applicable. *See Turner v. State*, 37 So. 3d 212 (Fla. 2010); *Victorino v. State*, 23 So. 3d 87, 107–08 (Fla. 2009) The trial court found the aggravator that the capital felony was committed during the course of a felony and while Hampton was on felony probation. As such, *Ring* is not implicated. *See Baker v. State*, 2011 WL 2627418 (Fla. July 7, 2011), ("[w]e have previously explained that *Ring* is not implicated when the trial court has found as an aggravating circumstance that the crime was committed in the course of a felony. *See McGirth v. State*, 48 So. 3d 777, 795 (Fla. 2010) (citing *Robinson v. State*, 865 So. 2d 1259 (Fla. 2004). In *Rigterink*, this Court reiterated:

> Rigterink alleges that Florida's capital sentencing scheme fails to satisfy the constitutional requirements articulated in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and that Florida's capital sentencing scheme is unconstitutional because the judge, rather than the jury, determines the sentence and the jury's recommendation need not be unanimous. **This Court has consistently rejected similar challenges to Florida's capital sentencing scheme**, and Rigterink has merely presented his general objections to this Court's prior precedent.

For example, in *Frances v. State*, 970 So.2d 806, 822 (Fla. 2007), this Court addressed the challenges that Rigterink raised in this case concerning Florida's capital sentencing scheme:

> **[I]n over fifty cases since Ring's release, this Court has rejected similar Ring claims**. *See Marshall v. Crosby*, 911 So.2d 1129, 1134 n. 5 (Fla. 2005), *cert. denied*, 547 U.S. 1143, 126 S.Ct. 2059, 164 L.Ed.2d 807 (2006). As the Court's plurality opinion in *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002), noted, "the United States Supreme Court repeatedly has reviewed and upheld Florida's capital sentencing statute over the past quarter of a century." *Id*. at 695 & n. 4 (listing as examples *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989), *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), *Barclay v. Florida*, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983), and *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976)); *see also King v. Moore*, 831 So.2d 143 (Fla. 2002) (denying relief under *Ring*).
>
> . . .
>
> Additionally, this Court has rejected claims that *Ring* requires the aggravating circumstances to be individually found by a unanimous jury verdict. *See Hodges v. State*, 885 So.2d 338, 359 nn. 9–10 (Fla. 2004); *Blackwelder v. State*, 851 So.2d 650, 654 (Fla. 2003); *Porter v. Crosby*, 840 So.2d 981, 986 (Fla. 2003). . . .

*Rigterink*, 2011 WL 2374188, 27-28 (Fla. June 16, 2011) (e.s)

Hampton's *Ring* claim is without merit. In *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000), the Court found

that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond reasonable doubt." *Apprendi*, 530 U.S. at 490. Nothing in the *Apprendi* decision altered the jurisprudence of any capital sentencing scheme. Even the United States Supreme Court's subsequent extension of the *Apprendi* rationale to capital cases in *Ring v. Arizona*, 536 U.S 584, 122 S. Ct. 2428 (2002), has not affected Florida's capital sentencing scheme because Florida's capital sentencing procedures do not create the Sixth Amendment error identified in *Ring*.

This Court has repeatedly held, both before and after *Ring* that, unlike Arizona, in Florida a defendant is eligible for the death penalty upon conviction for first degree murder. *See Mills v. Moore*, 786 So. 2d 532, 536-538 (Fla. 2001) (statutory maximum for first degree murder is death); *Shere v. Moore*, 830 So. 2d 56, 61 (Fla. 2002) ("This Court has defined a capital felony to be one where the maximum possible punishment is death"); *Porter v. Crosby*, 840 So. 2d 981, 986 (Fla. 2003). Because *Ring* holds that any fact which increases the penalty beyond the statutory maximum must be found by the jury, and because death is the statutory maximum for first degree murder in Florida, *Ring* does not establish Sixth Amendment error under Florida's statutory scheme.

Because death is the statutory maximum for first degree murder in Florida, *Apprendi* and *Ring* do not apply. In Florida, the determination of death-eligibility is made upon conviction for first degree murder at the guilt phase, and not at the penalty phase as in Arizona. *See Bottoson v. Moore*, 833 So. 2d 693, 699-701 (Fla.), *cert. denied*, 537 U.S. 1070 (2002) (Quince, J., concurring) (noting that *Ring* does not affect Florida's capital sentencing scheme because a defendant is exposed to the maximum sentence of death upon conviction for first degree murder). The trial court correctly denied Hampton's motion to bar imposition of the death penalty based on *Ring*.

## ISSUE V

## THE REJECTION OF THE STATUTORY MENTAL MITIGATORS CLAIM

Next, Hampton argues that the trial court erred in rejecting the two statutory mental health mitigating factors, that: (1) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, § 921.141(6)(b), Fla. Stat. (2007); and (2) the capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired, § 921.141(6)(f), Fla. Stat. (2007).

The trial court found that the evidence did not reasonably establish the statutory mitigating factor that Hampton was under the influence of extreme mental or emotional disturbance at the time of the murder. However, the trial court explained that it did consider Hampton's mental health to be a non-statutory mitigating factor and gave it little weight. In addition, the trial court concluded that the evidence did not reasonably establish the statutory mitigating factor that Hampton's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; however, the trial court explicitly did consider Hampton's mental health to be a non-statutory mitigating factor and gave

it little weight. (V2/293-94).

The analysis offered by the trial court in rejecting the statutory mental mitigation is supported by substantial, competent evidence. In *Ault v. State*, 53 So. 3d 175, 186 (Fla. 2010), this Court reiterated that the following standards are applied to evaluating mitigating circumstances in death penalty cases:

> Trial courts must observe the following standards when evaluating mitigating circumstances during capital sentencing:
>
> > A trial court must find as a mitigating circumstance each proposed factor that has been established by the greater weight of the evidence and that is truly mitigating in nature. However, a trial court may reject a proposed mitigator if the mitigator is not proven or if there is competent, substantial evidence to support its rejection. Even expert opinion evidence may be rejected if that evidence cannot be reconciled with other evidence in the case. Finally, even where a mitigating circumstance is found a trial court may give it no weight when that circumstance is not mitigating based on the unique facts of the case.
> >
> > *Coday v. State*, 946 So.2d 988, 1003 (Fla. 2006).
>
> In its written sentencing order, the trial court must expressly evaluate each statutory and nonstatutory mitigating circumstance proposed by the defendant. See *Ferrell v. State*, 653 So.2d 367, 371 (Fla.1995). **Where it is clear that the trial court has considered all evidence presented in support of a mitigating factor, the court's decision as to whether that circumstance is established will be reviewed only**

> **for abuse of discretion.** See *Harris v. State*, 843 So.2d 856, 868 (Fla. 2003); *Foster v. State*, 679 So.2d 747, 755 (Fla. 1996). **The trial court's findings will be upheld where there is competent, substantial evidence in the record to support each finding**. See *Lebron v. State*, 982 So. 2d 649, 660 (Fla. 2008). **The weight assigned to an established mitigating circumstance is also reviewed for abuse of discretion.** Id.
>
> *Ault,* 53 So. 3d at 186-187 (e.s.)

In this case, the trial court's sentencing order addressed the proposed mitigating factors and found:

> **II. Mitigating Circumstances**
>
> **A. Statutory Mitigators**
>
> **1. The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. 921.141(6)(b), Fla. Stat. (2007)**
>
> Dr. Robert Berland, a forensic psychologist, testified that he gave the Defendant the MMPI-2 test shortly after the offense occurred. In the doctor's opinion, the results of the testing demonstrated that the Defendant was suffering from a psychotic disturbance at the time of the offense. Dr. Berland testified that a psychotic disturbance is a brain dysfunction caused by brain injury, inheritance, or a combination of both that never goes away and symptoms include auditory and visual hallucinations. Dr. Berland relied on the Defendant's Georgia prison medical records and testimony from the Defendant's half-sister to support these conclusions.
>
> According to the Georgia prison medical records, the Defendant reported that sometimes he heard his name being called. Additionally, the Georgia prison medical records stated that there was blunt trauma to the back of the Defendant's head in November of 1993. Moreover, from 1995 through 1997, the Defendant was

taking mild antidepressants for mood disturbance while in prison. The Defendant also was taking Depakene, antiseizure medication in 1997. Dr. Berland stated that the Defendant self-reported his attempts to commit suicide at least five times including drinking Drano when he was eighteen years of age. This report is vaguely consistent with the Georgia prison medical records that the Defendant was hospitalized for three weeks for a "suicidal gesture."

The Defendant's half-sister told Dr. Berland that the Defendant lived with her for about two years, from 2003 until about 2005. She reported that the Defendant had a hard time trusting people and would stare off into space for long periods of time. Sometimes she would enter the room to find him talking aloud to himself. The Defendant reportedly told her that he heard people outside of the house or heard people talking when no one was there. The doctor stated these were auditory hallucinations. The half-sister also indicated that the Defendant told her he saw a light, which is considered a visual hallucination.

**Although he admitted that taken separately the Defendant's symptoms described above might just be normal human behavior, Dr. Berland testified that he believed that the Defendant's psychotic disturbance was permanent.**

**On cross-examination, Dr. Berland testified that although a psychotic disturbance is a brain dysfunction that shows up on a PET scan, he did not administer such a confirmatory PET scan. Dr. Berland acknowledged that he only gave the Defendant an abbreviated version of the MMPI-2 test and administered it by reading the questions aloud to the Defendant. Dr. Berland conceded that this has been determined to be a questionable manner of administration according to others in the field. The doctor admitted that the Defendant's score of twenty and twenty-five on the "F scale" could invalidate the profile. However, he asserted, "there is plenty of other research which says that it's okay." Further, the Court notes that Dr. Berland relied on dated material from the Defendant's half-sister and did not**

**seek updated information from any of the people with whom the Defendant was living before the murder occurred to determine his state of mind at the time of the murder.**

**This Court finds that the evidence does not reasonably establish that the Defendant was under the influence of extreme mental or emotional disturbance at the time of the murder. However, the Court does consider the Defendant's mental health issues to be a non-statutory mitigating factor and the Court will give it little weight.**

**2. The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired. 921.141(6)(f), Fla. Stat. (2007)**

On the day of the murder, the Defendant was drinking alcohol heavily. Dorothy Span, Red's wife, testified at trial that during the day, prior to the murder, the Defendant attended a family barbeque where everyone was drinking. Red and Chimere, two witnesses at trial, testified that while they were at the victim's home they all were drinking heavily. Red testified that both he and the victim left twice to go buy more alcohol. The Court finds the testimony of these witnesses credible that they were drinking all day and night prior to the murder. The Defendant admitted post-Miranda that he used cocaine on the night of the murder but he never stated he believed he was intoxicated or he could not remember the events of the evening.

However, it is clear through other established evidence that the Defendant was not substantially impaired by alcohol or cocaine. At trial, the Defendant admitted that he cleaned the victim's vagina in an attempt to hide his DNA. The Defendant clearly recalled that while he was doing this, the victim was pleading with him for help. He testified that he then dumped the cleaning supplies and his socks in the trash and took the garbage out to the dumpster in a further attempt to hide evidence. Furthermore, in his

post-Miranda statements the Defendant stated that he took money from the victim and went to buy more alcohol and treats for the family where he was residing. The Defendant testified at trial that the next morning he participated in assisting the family clean the home where he was residing, with no admitted aftereffects from the evening's consumption of alcohol or cocaine.

Further, Dr. Berland testified that, in his opinion the Defendant's psychotic disturbance did not impair his capacity to recognize the wrongfulness of his act; however, he opined it would impair the Defendant's ability to conform his conduct to the requirements of law. The Defendant does not argue and no testimony was presented that the Defendant suffered from mental retardation as defined in Florida Rule of Criminal Procedure 3.203(b) and section 921.137(1), Florida Statutes (2007).

**The Court concludes that the evidence does not reasonably establish that the Defendant's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. However, the Court does consider the Defendant's mental health issues to be a non-statutory mitigating factor and the Court will give it little weight.**

* * *

The Court finds that the State has established three statutory aggravating factors beyond a reasonable doubt and that two statutory mitigators have not been established but does consider the Defendant's mental health to be a non-statutory mitigating factor. Further, the Court finds that the six enumerated non-statutory mitigating factors have been established. The Court recognizes, in considering the aggravating and mitigating factors, there is no mathematical formula. It is not enough to weigh the number of aggravators against the number of mitigators. The Court carefully considered the nature and quality of each of the aggravators and mitigators.

> The aggravating factors in this case are horrendous. The Defendant was on probation for failing to register as a sex offender in Georgia when he murdered Renee McKinness. The Defendant committed the murder during the course of burglary, robbery, and sexual battery. The method employed by the Defendant to kill Renee McKinness was especially heinous, atrocious, and cruel. These factors greatly outweigh the comparatively insignificant mitigating factors. The Court has considered and given great weight to the advisory verdict of the jury, who by a vote of nine to three recommended that the death penalty be imposed. Further, the Court's review of other capital cases has led the Court to conclude that the death penalty would be a proportionate sentence in this case.
>
> Therefore, the Court concludes that the Defendant, under the laws of the State of Florida, has forfeited his right to live.
>
> (V2/293-94, 298-99 (e.s.)

Hampton argues that the trial court erred in rejecting his mental health claims as statutory mitigation "because Dr. Berland's opinion was supported by facts." Initial Brief of Appellant at 65. However, the trial court's order specifically detailed the facts supporting the trial court's rejection of the mental health claims as statutory mitigation. Moreover, in *Hoskins v. State*, 965 So. 2d 1, 16 (Fla. 2007), this Court underscored that expert testimony does not require a finding of statutory mitigation. As this Court explained in *Hoskins*:

> **With respect to expert psychological evaluations, we have explained that "expert testimony alone does not require a finding of extreme mental or emotional disturbance. Even uncontroverted opinion testimony can be rejected, especially when it is hard to reconcile**

> **with the other evidence presented in the case."** *Philmore v. State*, 820 So.2d 919, 936 (Fla. 2002) (quoting *Knight v. State*, 746 So.2d 423, 436 (Fla. 1998)). "A trial court has broad discretion in determining the applicability of a particular mitigating circumstance, and this Court will uphold the trial court's determination of the applicability of a mitigator when supported by competent substantial evidence." Id.; see also *Foster v. State*, 679 So.2d 747, 755 (Fla. 1996) ("As long as the court considered all of the evidence, the trial judge's determination of lack of mitigation will stand absent a palpable abuse of discretion.").

Hampton argues that the trial court believed that the defendant must establish that he is mentally retarded in order to qualify for the statutory mitigating factor of substantial impairment. This is incorrect. Instead, after finding "it is clear through other established evidence that the Defendant was not substantially impaired by alcohol or cocaine," and detailing the defendant's actions on the day of the crime, the trial court noted:

> Further, Dr. Berland testified that, in his opinion the Defendant's psychotic disturbance did not impair his capacity to recognize the wrongfulness of his act; however, he opined it would impair the Defendant's ability to conform his conduct to the requirements of law. The Defendant does not argue and no testimony was presented that the Defendant suffered from mental retardation as defined in Florida Rule of Criminal Procedure 3.203(b) and section 921.137(1), Florida Statutes (2007).

In sum, the trial court rejected the expert's testimony, in part, because it was inconsistent with the other evidence

presented. As noted in *Hoskins*, "[e]ven uncontroverted opinion testimony can be rejected, especially when it is hard to reconcile with the other evidence presented in the case." The trial court did not abuse its discretion in rejecting the mental health testimony as establishing statutory mitigation and, instead, evaluating it as non-statutory mitigation. Any alleged error is harmless.

**ISSUE VI**
(Supplemental)

**THE PROPORTIONALITY CLAIM**

Lastly, while Hampton does not challenge the proportionality of his sentence, this Court is required to address the proportionality of each death sentence on direct appeal. *Green v. State*, 907 So. 2d 489, 503 (Fla. 2005); *See* Art. I, § 17, Fla. Const. In conducting the proportionality review, this Court compares the case under review to others to determine if the crime falls within the category of both (1) the most aggravated, and (2) the least mitigated of murders. *Almeida v. State*, 748 So. 2d 922, 933 (Fla. 1999). This Court's function is not to reweigh the aggravators and mitigators, but to accept the jury's recommendation and the judge's weighing of the evidence. *Bates v. State*, 750 So. 2d 6, 12 (Fla. 1999).

In *McCray v. State,* this Court recently reiterated:

> In deciding whether death is a proportionate penalty, the Court conducts a comprehensive analysis to determine "whether the crime falls within the category of both the most aggravated and the least mitigated of murders, thereby assuring uniformity in the application of the sentence." *Anderson v. State*, 841 So.2d 390, 407–08 (Fla. 2003)(citations omitted). Accordingly, this Court considers the totality of the circumstances and compares the present case with other similar capital cases. See *Duest v. State*, 855 So.2d 33, 47 (Fla. 2003) (quoting *Terry v. State,* 668 So.2d 954, 965 (Fla.1996)). This consideration entails "a qualitative review by this Court of the underlying basis for each aggravator and mitigator rather than a

> quantitative analysis." *Urbin v. State*, 714 So.2d 411, 416 (Fla.1998). "In reviewing the sentence for proportionality, this Court accepts the jury's recommendation and the trial court's weighing of the aggravating and mitigating evidence." *Miller v. State*, 42 So.3d 204, 229 (Fla. 2010), cert. denied, ––– U.S. ––––, 131 S.Ct. 935, 178 L.Ed.2d 776 (2011).
>
> *McCray v. State,* 2011 WL 2637377, 26 (Fla. July 7, 2011)

In comparison with factually analogous cases in which this Court ruled that death was a proportionate penalty, the sentence here is constitutionally proportionate. In *Murray v. State*, 3 So. 3d 1108 (Fla.), *cert. denied*, 130 S. Ct. 396 (2009), Murray was convicted of burglary, sexual battery, and first-degree murder. The victim had been fatally beaten, stabbed, sexually battered, and strangled in her home. The trial court found four aggravators — prior violent felony, commission of the murder during a burglary or sexual battery or both, committed for pecuniary gain, and HAC. The trial court found no statutory mitigation but found five nonstatutory mitigating factors. On appeal, this Court concluded that Murray's death sentence was proportionate. *Id*. at 1112–14, 1125; *See also Hodges v. State* 55 So. 3d 515, 542-543 (Fla. 2010).

In *Johnston v. State*, 841 So. 2d 349, 360–61 (Fla. 2002), this Court upheld Johnston's death sentence as proportionate where the trial court found four aggravators — prior violent felony, commission of the murder while engaged in commission of

sexual battery and kidnapping, committed for pecuniary gain, and HAC – assigned moderate weight to the statutory mitigating factor of substantially impaired capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law, and found 26 non-statutory mitigating factors. *See also Pope v. State*, 679 So. 2d 710, 713, 716 (Fla. 1996) (upholding death penalty as proportionate in stabbing death where trial court found two aggravating factors (committed for pecuniary gain and prior violent felony) and two statutory mitigating factors (extreme mental or emotional disturbance and substantially impaired capacity), as well as nonstatutory mitigating circumstances such as intoxication at the time of the offense).

In this case, the trial court found and weighed the following aggravating circumstances:

> **I. AGGRAVATING FACTORS**
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> **A. The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation. 921.141(5)(a), Fla. Stat. (2007)**
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> At the *Spencer* hearing, Attorney Greg Wolinski testified that he represented the Defendant in February 2007 on a charge of violating the State of Georgia sex offender registry law for not residing in the place where he informed the Tift County, Georgia Sheriff's Office he was living. Attorney Wolinski testified that the Defendant pleaded guilty to the charge and was placed on probation for ten years.

During the penalty phase, the State presented the testimony of Howard Maddox, a probation officer with the Georgia Department of Corrections. Mr. Maddox testified that he was the Defendant's probation officer while he was on probation in Georgia for violation of the Georgia sex offender registry law. Mr. Maddox testified that he learned the Defendant left Georgia on March 7, 2007, while the Defendant was still on probation and a warrant was issued for absconding supervision. Therefore, it has been proven beyond a reasonable doubt that the Defendant was on probation at the time the murder was committed on June 10, 2007.

The Court concludes that this aggravating factor has been proven beyond all reasonable doubt, and the Court gives great weight to this aggravating factor.

**B. The capital felony was committed while the defendant was engaged... in the commission of or an attempt to commit, any: robbery, sexual battery, or burglary.... 921.141(5)(d), Fla. Stat. (2007)**

The evidence supports a finding that the Defendant was engaged in all three of the aforementioned felonies at the time of the murder. During the guilt phase, there was substantial testimony that the Defendant entered the victim's home with the intent to commit an offense (robbery or sexual battery) therein. In his post-*Miranda* [fn 2] statements, the Defendant told the police that he entered the victim's apartment while she slept and was 'digging around" in the drawers of the victim's dresser looking for money and cocaine. The Defendant told the police that the victim awakened while he was looking for money and drugs, a struggle ensued, and he stabbed the victim in the neck resulting in her death. He stated that he took $50.00 belonging to the victim.

When the Defendant was taken into custody, the day of the murder, he had approximately $10.00 in his pocket. The Defendant admitted to taking $50.00 from the victim's home and explained how he spent the money. It has been proven beyond a reasonable doubt

that the Defendant was committing both robbery and burglary at the time he killed the victim. [fn 3]

In addition, during the guilt phase there was testimony presented proving beyond a reasonable doubt that the Defendant committed sexual battery against the victim at the time of the murder. The offense was evidenced by the injuries to the victim, the blood evidence found in the victim's bedroom, and the Defendant's semen and DNA found inside the victim's vagina. The victim was discovered lying on the floor of her bedroom with both eyes swollen shut, abrasions on her face and body, and a laceration across her neck consistent with her throat being sliced and then stabbed by a knife. She also had a temporal and brain hemorrhage consistent with multiple blows to her face and head inflicted prior to her death. Blood splatter found on the walls and around the victim's body reflect that the victim received a minimum of four blows while she was on the floor. Also, there were handprints in the blood around the victim's body indicative of someone having sexual intercourse with the victim in the missionary position.

The Defendant testified at trial that he used a soapy rag to attempt to clean away DNA evidence from the victim's vagina as she lay bleeding and pleading for help. The evidence is clear that the sexual intercourse between the Defendant and the victim was not consensual. The evidence provided at trial supports a finding that the victim was beaten into submission for sex by the Defendant. [fn 4] The sexual battery at the time of the capital offense has been proven beyond a reasonable doubt.

The Court concludes that the aggravating factor, that the Defendant was engaged in the enumerated acts, has been proven beyond a reasonable doubt and gives great weight to this aggravating factor.

[fn 2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[fn 3] Although the Court finds that it was proven beyond a reasonable doubt that the murder was committed for pecuniary gain pursuant to

section 921.141(5)(f), Florida Statutes (2007), the Court is precluded from considering this factor as it would constitute impermissible doubling of the aggravating factors. *See Penalver v. State*, 926 So.2d 1118, 1123-24 (Fla. 2006).

[fn 4] The Court's consideration of the sexual battery pursuant to section 921.141(5)(d), Florida Statutes (2007), and section 921.141(5)(h), below does not constitute impermissible doubling. The first aggravating factor focuses on the fact that the Defendant was engaged in the commission of an enumerated felony, while the second aggravating factor focuses on a different aspect of the capital felony—its impact on the victim. *See Banks v. State*, 700 So.2d 363, 367 (Fla. 1997).

**C. The capital felony was especially heinous, atrocious, or cruel. 921.141(5)(h), Fla. Stat. (2007)**

The heinous, atrocious, or cruel aggravator focuses on the means and manner in which death is inflicted and the immediate circumstances surrounding the death. *Brown v. State*, 721 So.2d 274, 277 (Fla. 1998). In order for a murder to be especially heinous, atrocious, or cruel, it must be both conscienceless or pitiless and unnecessarily torturous to the victim. *Nelson v. State*, 748 So.2d 237, 245 (Fla. 1999). Furthermore, the aggravating factor may be applied to torturous murders where the killer was utterly indifferent to the suffering of another. *Francis v. State*, 808 So.2d 110 (Fla. 2001). Because the heinous, atrocious, or cruel aggravator is focused on the victim's perceptions of the circumstances as opposed to those of the perpetrator, the courts generally require evidence demonstrating that the victim was conscious and aware of impending death.

Although the precise order of some events cannot be unequivocally determined, the facts of this case are apparent and compelling. The facts indicate that the victim spent June 9, 2007, at a baby shower with her friend Chimere Streeter and the victim's three

children ages three years, four years, and five years. After the shower, both women returned to the victim's residence and the victim's children went to a neighbor's home. Throughout the evening, there were sporadic visits by the neighbor from across the hall and the evidence demonstrates that it was apparent the victim did not lock her apartment door and was sharing a phone with the neighbor. The women began drinking and "hanging out." Later that evening, the Defendant and his brother-in-law, Reginald Scan (Red), arrived at the victim's home and began playing card games and drinking. It appears that Red and the victim went out twice to buy more alcohol and later in the evening Chimere left.

Eventually, Red and the victim moved into the victim's bedroom and had sexual intercourse. Red testified at trial that he did not ejaculate inside of the victim because during intercourse he looked up and saw the Defendant watching them through the bedroom door. Around 3:00 a.m., Red and the Defendant left the victim's home. When they arrived at Red's house, where the Defendant was temporarily residing, the Defendant told Red that he was going to go out and meet a girl. The Defendant returned to the victim's home knowing the victim's door had been left unlocked because he had been a guest in her home that evening. Although the sequence of events is not clear, the encounter ended in the victim's death.

The victim was beaten on her face. She had black eyes, with swelling and bleeding under the skin around the eyes. She had a bruised forehead, abrasions to her left cheek and chin, her right eyelid was torn, and she had incised wounds to her face and forearms. The victim suffered abrasions on her back, shoulders, and knees. Through the testimony presented at trial it was apparent that these injuries occurred prior to the victim's death because swelling and bleeding only occur when one is alive. The victim received multiple blows to her head. The muscles in the temporal region of the head were hemorrhaged and she was suffering from a brain hemorrhage demonstrated in the autopsy by a showing of blood on her brain at the time of death. Moreover, cuts to her hand were defensive wounds,

indicating that the victim was conscious and attempting to block and protect herself during the beating and stabbing. The victim's throat was sliced by a sharp instrument and her jugular vein was slashed.

It is undisputed that the Defendant and the victim had sex. In addition, there were physical indicators consistent with sexual battery. There was the battery about the victim's face and around her upper torso and forearms. There were also handprints in the blood surrounding the victim's body consistent with a person being in the missionary position over the victim's body while engaged in sexual intercourse. The Defendant's DNA was found inside of the victim's vagina. Finally, after beating and raping the victim, the Defendant sliced and stabbed the victim in the neck and in so doing cut her jugular vein.

The Defendant then took lighter fluid and 409 cleaning fluid, poured it over the victim's body, and began wiping her lower body. The Defendant testified that he got a soapy rag to clean the victim's "vagina out" in an attempt to remove his DNA. The associate medical examiner, Wayne D. Kurz, M.D., testified that the body had a "generalized petroleum product-like odor." The victim suffered chemical burns as well as skin slippage, which occur when chemicals burn through the skin. Dr. Kurz testified that the damage to the victim's skin could reasonably be considered evidence she was alive when the chemicals were applied to her body. Chemical substances also were found in the victim's vagina.

The Defendant testified that while he was cleaning the victim and while the victim lay on the ground bleeding to death, she was pleading with the Defendant for help. According to testimony presented by the Defendant at the guilt phase of trial, the victim had difficulty breathing as she bled from the neck and was begging the Defendant, "help me, help me." The Defendant did not get help, did not call 911, but left the victim for dead on her bedroom floor. The Defendant put the lighter fluid, the 409, and the rag in a trash can, as well as his socks that had blood on

them. He then took the bag of garbage out and put it in the dumpster at the apartment complex. The Defendant left the victim's home and bought some alcohol to drink and other items with the money he stole. Red's wife, Dorothy Span, testified that at approximately 8:00 a.m., she heard the alarm beep signaling the entrance of someone into the home and the Defendant entered and gave her a bag of pork skins. The same morning the victim was found by her friend in the unlocked apartment.

In *Cole v. State*, 701 So.2d 845, 851 (Fla. 1997), the Florida Supreme Court upheld a trial court's determination that a murder was especially heinous, atrocious, or cruel in a factually similar case. In that case, the victim was alive when he was severely beaten in the head and his throat was cut. The victim's sister testified that while Cole was with the victim she heard a gagging sound, which Cole led her to believe, was the victim vomiting. The victim lived for several minutes after his throat was cut while struggling proved beyond a reasonable doubt the victim suffered a slow and tortuous death and the manner in which Cole killed him was evidence of total indifference to the victim's suffering of which Cole was aware. In the case at hand, through the Defendant's own admissions and Dr. Kurz's testimony it was proven beyond a reasonable doubt that the victim was conscious throughout the ordeal and up until her death. Furthermore, the Defendant was aware of the victim's suffering and pleas for help as he testified to these facts at trial.

In *Hernandez v. State*, 4 So.3d 642 (Fla. 2009), the Florida Supreme Court upheld the trial court's determination that the murder was especially heinous, atrocious, or cruel due to the fear, emotional strain, and terror from the victim's awareness of impending death. *Preston v. State*, 607 So.2d 404, 410 (Fla. 1992) (stating that fear and emotional strain may be considered as contributing to the heinous nature of the murder). **In the case at hand, the Defendant beat the victim into submission and the victim perceived and felt the entire ordeal. The Defendant raped the victim and then attempted to clean the DNA evidence**

> **from her vagina. The Defendant testified that while he was cleaning the victim's body, she was pleading for help and he did not call for help. The Defendant used lighter fluid, 409, and a soapy rag in an attempt to remove his DNA evidence from the victim's lower body, specifically her vagina. In addition to the pain from the beating and the stabbing, the victim also would have been in pain from the lighter fluid and 409 being used as evidenced by the chemical burns she suffered.**
>
> **The testimony shows that the victim was severely beaten, was suffering from a temporal and brain hemorrhage and chemical burns, and was cut through her jugular vein, all of which factored into her death. It is not unreasonable for this Court to conclude the victim might have been in fear that the Defendant was going to set her on fire because of his use of lighter fluid. Furthermore, this Court can conclude the victim would have been in fear that her young children could come home at any time through the unlocked door and could have discovered her in this condition. The victim was aware of her impending death and she pleaded with her murderer for help.**
>
> Therefore, this Court finds that the Defendant committed this crime in a heinous, atrocious, or cruel manner. The Court concludes that this aggravating factor has been proven beyond all reasonable doubt, and the Court gives <u>great</u> weight to this aggravating factor.

(V2/287-292) (e.s.)

This Court has recognized that HAC is one of the most serious aggravators in the statutory sentencing scheme. *Larkins v. State*, 739 So. 2d 90, 95 (Fla. 1999).

In contrast, Appellant's mitigation case was relatively weak. As the trial court explained:

> The Court concludes that the evidence does not reasonably establish that the Defendant's ability to

appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. However, the Court does consider the Defendant's mental health issues to be a non-statutory mitigating factor and the Court will give it little weight.

**B. Non-Statutory Mitigators**

**1. Childhood Neglect**

The deposition of the Defendant's fourth grade teacher was read into evidence at the penalty phase of the trial. She stated that nobody ever came to the school to support the Defendant. She asserted that his parents never met with the teachers and from his appearance, it seemed like nobody was taking care of the Defendant. She stated that it looked like the Defendant wore the same clothes repeatedly, even though they were not clean and were tattered. Evidence was presented, through the testimony of the Defendant's siblings, that as a child the Defendant was not loved, was not taught right from wrong, and was not taught how to interact within the rules and constraints of society. The Court concludes that this mitigating factor has been established and gives this mitigating factor little weight.

**2. Childhood Abuse**

There was testimony provided that when he was a small child, the Defendant's inebriated stepfather, while disciplining the Defendant and his siblings, attempted to place the Defendant in a hot oven where he received non-life-threatening burns. The Defendant's siblings testified that the Defendant was taken to live with his grandparents in Georgia because of continued abuse by his stepfather. The Court concludes that this mitigating factor has been established and gives this mitigating factor little weight.

**3. Abandonment and Extremely Poor Parents Behaviorally and "Genetically"**

The Defendant's mother stated that she sent the Defendant to live with his grandparents in Georgia because he would not listen to her and she "could not handle him." The Defendant's mother stated that she had not seen the Defendant for over twenty years. The Defendant's biological father had fifteen other children and the Defendant is his oldest son. Attorney Greg Kolinski testified that he represented the Defendant's father in the Georgia Court system as well as the Defendant. Attorney Kolinski stated that Tift County was one of the poorest counties in Georgia and the Defendant's father was known as "the town drunk."

In support of this non-statutory mitigating factor, Dr. Berland testified at the *Spencer* hearing that the Defendant's mother allowed the stepfather to "abuse [the Defendant] physically, and then gave him up and kept the stepfather." Furthermore, the Defendant's biological father had nine felony convictions and spent the majority of the Defendant's childhood in prison. Despite the testimony presented at the *Spencer* hearing, the Court does not find that the Defendant has established that he was predisposed to committing this crime because of his genetics. However, the Court does conclude that the Defendant has established that he was abandoned and his parents did behave poorly. The Court concludes that this mitigating factor has been established and gives this factor little weight.

**4. Current Relationship with Family**

After his release from prison in 2003, the Defendant reconnected with his siblings and their families. At the penalty phase of trial, the Defendant's half-sister, Angie White, testified that her brother lived with her for about two years. She stated that the Defendant got along with his three nephews, especially the youngest one nicknamed Butterball. Ms. White stated that she loved her brother and her children loved their uncle. Ms. White still corresponds with her brother. Mr. White, the

Defendant's brother-in-law, also testified and stated that he wanted his wife to be happy and knew her brother made her happy. Mr. White stated that after the Defendant was released from prison in 2003, he was trying to get his life together by getting a job and getting married.

The Defendant's brother testified that he knew of his brother and saw him around town growing up, but they did not form a relationship until the Defendant was released from prison in 2003. He stated that he loved his brother. The Defendant's biological father also stated that he loved his son. The Court concludes that the Defendant has family that care about him and want to have a relationship with him. The Court concludes that this mitigating factor has been established and gives this mitigating factor little weight.

**5. Exemplary Disciplinary Records in Jail/Prison**

In nearly two years of incarceration at the Pinellas County jail, the Defendant has had no disciplinary reports. At the *Spencer* hearing, Pinellas County Sheriff Deputy Tammy Russo testified that the Defendant had an excellent disciplinary record, was a model prisoner, and displayed model behavior. The Defendant also displayed model behavior during his weeklong trial and in all pretrial proceedings. The Defendant has the capacity to live an ordinary life with his fellow inmates, the prison guards, and prison administration. The Court concludes that this mitigating factor has been established and gives this mitigating factor little weight.

**6. Non-Unanimous Jury Recommendation**

The jury recommended death by a non-unanimous vote of nine to three. The Defendant's counsel argues that Florida is currently the only jurisdiction that allows a death sentence to be imposed in the absence of either a unanimous sentencing recommendation or a unanimous finding of an aggravating factor. Defense counsel asserts that the Florida Supreme Court has recognized this and called upon the legislature to

revise the death penalty statute. *State v. Steele*, 921 So.2d 538, 548-50 (Fla. 2005). However, the legislature has failed to do this. Defense counsel also asserts that if this had been any other state, the Defendant surely would not have been eligible for the Court to impose the death penalty. Nevertheless, the law as it stands in Florida today and at the time the Defendant committed the offense, allows for the imposition of the death penalty even with a non-unanimous jury recommendation. The Court has considered this fact and gives this factor little weight.

**III. CONCLUSION**

**The Court finds that the State has established three statutory aggravating factors beyond a reasonable doubt and that two statutory mitigators have not been established but does consider the Defendant's mental health to be a non-statutory mitigating factor. Further, the Court finds that the six enumerated non-statutory mitigating factors have been established. The Court recognizes, in considering the aggravating and mitigating factors, there is no mathematical formula. It is not enough to weigh the number of aggravators against the number of mitigators. The Court carefully considered the nature and quality of each of the aggravators and mitigators. The aggravating factors in this case are horrendous. The Defendant was on probation for failing to register as a sex offender in Georgia when he murdered Renee McKinness. The Defendant committed the murder during the course of burglary, robbery, and sexual battery. The method employed by the Defendant to kill Renee McKinness was especially heinous, atrocious, and cruel. These factors greatly outweigh the comparatively insignificant mitigating factors.** The Court has considered and given great weight to the advisory verdict of the jury, who by a vote of nine to three recommended that the death penalty be imposed. Further, the Court's review of other capital cases has led the Court to conclude that the death penalty would be a proportionate sentence in this case.

(V2/295-299) (e.s.)

Hampton's case is proportionate to other capital cases where the death sentence has been upheld. *See Davis v. State*, 2 So. 3d 952 (Fla. 2008) (four aggravating circumstances, including HAC and CCP, outweighed three statutory mitigators and numerous nonstatutory mitigators); *Merck v. State*, 975 So. 2d 1054 (Fla. 2007) (finding death sentence proportionate where two aggravating factors of HAC and prior violent felony outweighed one statutory mitigator, the defendant's age, and numerous non-statutory mitigators including defendant's difficult family background, his alcoholism and alcohol use on the night of the murder, and his capacity to form and maintain positive relationships); *Rose v. State*, 787 So. 2d 786 (Fla. 2001) (death sentence proportionate where four aggravators, including HAC and prior violent felony, outweighed substantial mental mitigation and depraved childhood); *Spencer v. State*, 691 So. 2d 1062 (Fla. 1996) (death sentence proportionate where two aggravating circumstances, prior conviction for a violent felony and HAC, outweighed two mental health mitigators, and a number of non-statutory mitigators including drug and alcohol abuse, paranoid personality disorder, sexual abuse by father, honorable military record, good employment record, and the ability to function in a structured environment). *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 non-statutory mitigators); *Taylor v. State*, 630 So. 2d 1038 (Fla. 1993) (finding death sentence proportionate for sexual battery and murder in the course of a felony, where crime was HAC and committed for financial gain). Given the strong aggravation and relatively weak mitigation present in this case, this Court should find Hampton's death sentence is proportionate.

## CONCLUSION

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

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. regular mail to Deborah K. Brueckheimer, Assistant Public Defender, Post Office Box 9000 - Drawer PD, Bartow, Florida 33831-9000, this 12th day of August, 2011.

## CERTIFICATE OF FONT COMPLIANCE

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

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