IN THE SUPREME COURT OF FLORIDA

CARL DAUSCH,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC12-1161

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT,
IN AND FOR SUMTER COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE

On May 10, 2006, Carl Dausch was indicted[1] by the grand jury of Sumter County, Florida, for the July 15, 1987, murder of Adrian Mobley. (V1, R1).[2] Following various pre-trial proceedings, Dausch's trial began on December 5, 2011. The jury returned verdicts of guilty of murder in the first degree and aggravated battery on December 13, 2011, and, on December 16, 2011, recommended that Dausch be sentenced to death by a vote of eight to four. The trial court imposed that sentence on April 26, 2012. Notice of appeal was filed on May 25, 2012, and an amended notice was filed on June 5, 2012. Dausch filed his *Initial Brief* on or about December 19, 2012.

STATEMENT OF THE FACTS

The Statement of the Facts set out in Dausch's Initial Brief is argumentative and is denied. The State relies on the following facts.

Lacy Catle was Adrian Mobley's brother-in-law. (V12, R367). Catle said Mobley drove a maroon colored, four-door Honda sedan

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[1] The indictment charged: Count I - Murder in the First Degree; and Count II - Sexual Battery-Force Likely to Cause Injury. (V1, R1).

[2] Cites to the record are by volume number, "V_" followed by "R_" for the page number.

in 1987. (V12, R376). On July 15, 1987, at the request of the Sumter County Sheriff's Office, Catle identified Mobley's body at the coroner's office in Leesburg, Florida. (V12, R376-77).

Patricia Mobley, Mobley's older sister, said she and her siblings lived with their parents in Lake Panasoffkee, Florida, in 1987. Adrian drove a 1981 four-door, red Honda Civic. (V12, R380, 381). Patricia last saw Adrian at about 9:00 p.m., on July 14, 1987, when Adrian left their home. (V12, R382, 383, 384).

Deputy Tim Lunday, Sumter County Sheriff's Office, was assigned to road patrol in the Lake Panasoffkee area in 1987. (V12, R385, 386, 387). On July 15, 1987, Lunday responded to a call where Bobby Lee Brown and Eddie Sizemore[3] had reported seeing a body on the side of the road in Bushnell, Florida. (V12, R387-88). Upon arriving at the scene, Lunday found Mobley's clothed body.[4] Mobley's pants were slightly pulled down. His hands were tied behind his back. A blue sheet was also tied to his hands which was connected to his feet. (V12, R390; V13, R400, 408).

The Sumter County Sheriff's Office did not have a crime scene

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[3] Brown and Sizemore are deceased. (V12, R391, 392).

[4] Mobley was wearing an orange sleeveless tee shirt and blue jeans. (V13, R408).

unit in 1987 but the crime scene was videotaped. (V12, R393-94).[5] (V12, R394). Sheriff personnel conducted a grid search and collected various pieces of evidence[6] which were then given to Lunday. (V12, R399; V13, R404). Photographs were taken of Mobley's body. (V12, R396, 397).

Dr. Cheryl LaMay, medical examiner, performed the autopsy on Mobley.[7] (V13, R422, 426). In addition to conducting an internal and external examination, she took samples from Mobley's hair, fingernail scrapings, body tissue and blood, and collected anal swabs. (V13, R427-28, 456, 458). The blood tested negative for the presence of drugs or alcohol. (V13, R459, 466). Smears from the anal swabs revealed the presence of sperm. (V13, R430, 454). As a result, police were concerned whether or not Mobley had been forcibly raped or had consensual sex. (V13, R448-49). There were no scratches or bruises on Mobley's buttocks and no

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[5] The videotape was published to the jury. (V12, R396-97).

[6] The evidence included a jar of vaseline, a piece of styrofoam, a piece of blood-stained grass, a pack of gum, beer bottles, Wonder bread wrapper, a Heineken carton, and a paper container. (V13, R404-06).

[7] LaMay was an associate medical examiner when she performed the autopsy on Mobley. She did not complete a forensic pathology fellowship and did not receive a specialty in forensics. She is not a forensic pathologist. Subsequent to leaving the Fifth Circuit medical examiner's office, LaMay did not practice forensic pathology. (V13, R445-47). Her qualifications are not contested.

evidence of a lubricant. However, LaMay did not examine Mobley's rectum area for evidence of trauma. (V13, R454). LaMay could not determine whether or not Mobley had been a victim of forcible sexual assault. Based upon her observations, Mobley could have engaged in consensual sex. (V13, R455).

LeMay also noted skin slippage on Mobley's arms which she attributed to the early stages of decomposition. (V13, R464, 465).

LaMay examined Mobley's clothing for trace evidence. She collected a single hair from Mobley's face. (V13, R450, 451). Any obvious traces of evidence on Mobley's clothing was noted in her report. Mobley's clothing would have been examined by the crime lab. (V13, R458). She did not see any defensive wounds on Mobley's body. As a result, in LaMay's opinion, Mobley was not struggling at the time he died. (V13, R453-54).

LaMay said Mobley sustained "a lot" of blunt force trauma to his face, neck, and upper chest area. There was a large area of bruising as well as laceration on his right forehead. There were lacerations and bruising on his nose. There was a V-shaped tear through the tissue over Mobley's left eyebrow. Smaller lacerations and areas of bruising were on Mobley's right cheek and chin. (V13, R435, 436). An internal examination of Mobley's head revealed a lot of bleeding in his eye sockets as well as a fractured nose. There were several skull fractures. (V13, R437).

Although there was no direct damage to Mobley's brain, "the head trauma was severe enough that it could have affected consciousness." (V13, R437-38).

Mobley also suffered blunt force injuries to his throat, shoulder, and chest. (V13, R439, 440). As a result, "there was a lot of hemorrhage and bruising in the muscles between the ribs. And, it was severe enough blunt force trauma that there was actually bruising on the surface of the underlying lung tissue." (V13, R440, 443). In LaMay's opinion, the pattern of external contusions to Mobley's chest area and internal damage to his lungs were consistent with stomping. (V13, R443). Further, in LaMay's opinion, Mobley was barely conscious when he was stomped. (V13, R460). In addition to the chest injuries, there was a lot of hemorrhage in Mobley's trachea and around the thyroid area. (V13, R440). Although LaMay did not see any trauma directly to Mobley's brain, the autopsy revealed his brain was "full and swollen." The cerebral edema was caused by blunt force trauma to Mobley's neck which would have obstructed the blood flow to his head "to a degree." (V13, R441, 460). In LaMay's opinion, Mobley's death was caused by blunt force trauma to his head and upper chest, which resulted in asphyxia, loss of consciousness, "and death within minutes." In Lamay's opinion, the head injuries occurred first. (V13, R459-60). The manner of death was homicide. (V13, R442). All of the medical mechanisms

occurring to Mobley at the time of his death could have caused a very quick death. (V13, R460).

Walter Lee was an auxiliary officer with the Whitehouse Police Department in Whitehouse, Tennessee, in 1982. (V13, R469). During the afternoon of July 15, 1987, Lee was driving on Tennessee highway 76 (in his personal vehicle) in Whitehouse when he noticed a maroon, compact vehicle parked underneath an overpass of Interstate 65. (V13, R470, 473, 474, 476, 482). Lee saw an adult male exit that car, who was "carefully looking around," and who then picked up a suitcase and scampered up the highway bank to the interstate above. (V13, R474-75, 492). The man was "wearing a red t-shirt and red shorts ... carrying a small gray suitcase ... wearing sandals. He looked about five nine, five ten ... dirty blond hair, and facial hair." (V13, R475, 484, 486, 488). Lee did not recall seeing any scars or tattoos. (V13, R496). Lee made an attempt, but was unable, to find the man on Interstate 65. He called dispatch and alerted police of suspicious activity and an abandoned vehicle. (V13, R475-76, 492, 493). The vehicle was eventually towed to an impound lot. (V13, R477).

Lee went to Bowling Green, Kentucky, a few days later to meet with local police who had requested he attempt to identify a person in a composite sketch. However, the person in the sketch was not the person he saw exit the maroon vehicle. (V13, R478,

480-81, 490).[8]

Norman Sheldon was a police officer in Whitehouse, Tennessee, in 1987. (V13, R499-500). During the afternoon of July 15, 1987, Sheldon responded to a call for an abandoned vehicle on interstate 76 underneath the overpass at highway 65. (V13, R502-04, 507-08). Sheldon observed an abandoned maroon-colored, four door car with a Florida license tag. (V13, R504, 505). He ran the tag through NCIC which did not indicate any problems. He then had the car towed to an impound lot. (V13, R505, 508). Sheldon ran the tag again the following day which resulted in a "hit" from Sumter County, Florida. The car was taken to the Tennessee Bureau of Investigations ("TBI") Crime lab. (V13, R507, 508).

Julia Merry, special agent in the forensics lab for the TBI in 1987, processed the maroon Honda. She did not find any blood in the car. (V13, R510-11, 512, 518). Merry collected a lot of trash that included soda cans, food wrappers, and cigarette butts. (V13, R515). The cigarette butts were sent to the Florida Department of Law Enforcement's ("FDLE") Tampa crime lab for

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[8] That individual was later identified as Calvin David Webb and eliminated as a suspect in Mobley's murder. See V13, R581-82, 589; V14, R603, 630-31, 634).

processing. (V13, R516). Merry's co-worker[9] collected hair samples and vacuumed the car for trace evidence. (V13, R520).

Danielle Daniels formerly worked as a DNA analyst at Fairfax Identity Laboratories in Virginia. (V13, R522-23). In June 2003, Daniels received an envelope containing two anal swabs and an envelope containing four cigarettes butts that pertained to Dausch's case. Under Daniels' supervision, a technician examined these pieces of evidence which resulted in the following findings: two of the cigarette butts yielded the same DNA profile; a third butt contained a DNA mixture; the fourth butt contained a different profile altogether; and the anal swabs contained DNA from more than one person, but only a partial profile could be obtained. (V13, R527, 528, 529, 530, 531, 532). In addition, Daniels said the lab was not provided with any reference samples, and therefore, Dausch's DNA profile was not compared with the DNA profiles obtained from these pieces of evidence. (V13, R531, 533).

Hoyt Phillips was employed as a latent print examiner at TBI for over thirty years. (V13, R534-35). In 1987, Phillips processed the inside and outside of the Honda Civic for latent fingerprints. (V13, R537-38, 540). Phillips was able to recover

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[9] Merry could only recall her co-worker's first name, Kyle. (V13, R512).

latent prints from the exterior and interior of the car, a Bic lighter wrapper, and a plastic lid from a drink cup. (V13, R543, 546). Phillips did not have any known standard fingerprint cards to compare with the lifted latent prints. (V13, R544, 545). The lift cards that Phillips processed were sent to the FLDE Tampa office. (V13, R544).

Sergeant Jack Bedan is employed by the Indiana State police as a crime scene investigator. (V13, R548-49). In October 2004, Bedan and Sumter County detectives obtained buccal swabs, hair samples, and fingerprints from Dausch. (V13, R549, 552).

Darryl Jones, maintenance worker for the Georgia Department of Transportation, was working on I-75 about a mile north of the Florida border in July 1987. (V13, R556-57, 558). Jones and his partner were performing routine maintenance at exit number one where Jones located Mobley's wallet. Jones contacted law enforcement and eventually gave the wallet to Florida law enforcement personnel. (V13, R559, 560, 562).

Sheriff James Reid, Hamilton County, Florida, was a patrol deputy in July 1987. (V13, R564). On July 22, 1987, Reid was contacted by Darryl Jones, who then gave Reid Mobley's wallet. (V13, R565, 566-67). The wallet contained Mobley's driver's license as well as the vehicle registration to Mobley's Honda civic. (V13, R567). The wallet, along with exemplars of Reid's and Jones' fingerprints, were sent to the Sumter County

Sheriff's office. (V13, R568-69).

Lesley Bryant, senior crime lab analyst, FDLE, has examined "millions" of pieces of evidence for the presence of latent prints and compared them to known prints, during his 34-year career. (V13, R571, 572). Bryant compared latent lift print cards taken from Mobley's car and the Bic lighter wrapper with the known prints obtained from Dausch. Bryant determined that the latent lift cards containing two left palm prints obtained from above the driver's side passenger door of the Honda matched Dausch's palm prints. A latent lift card containing a right thumb print obtained from the Bic lighter wrapper matched the known right thumb print of Dausch. (V13, R579, 581-82, 585-86).[10]

Major Gary Brannen supervises operations for the Sumter County Sheriff's Office. (V13, R587). Brannen has conducted latent fingerprint identification and examination since 1999 in approximately "a thousand" cases. (V13, R588-89). In November 2010, Brannen compared a known set of fingerprints of Calvin David Webb to the latent lift cards obtained from the exterior of Mobley's car. (V13, R581-82, 589; V14, R603). Brannen

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[10] Bryant examined several other pieces of evidence including a jar of vaseline, beer bottles, bread wrappers, condom wrappers, and Mobley's wallet. There either were no prints of value or the prints of value did not match Dausch's prints. (V13, R583-84).

determined there was no match. (V13, R590).

Brannen said that after receiving additional information in 2004 regarding Mobley's death, he assigned Detectives Havens and Baker to go to Indiana to arrest Dausch. (V13, R592; V14, R605). After Dausch was returned to Florida, about 50 hand writing samples were obtained from him. (V13, R593, 595, 600). The samples were compared to a postcard that Dausch sent to his daughter. (V13, R600-01).

Sheriff William Farmer, Sumter County, was a detective in the homicide division in 1987. (V14, R610, 611). On July 15, 1987, Farmer reported to the location where Mobley's body was found. (V14, R613-14). Farmer observed that Mobley was lying on his back, slightly on his right side, face up, with his hands and feet tied behind him. Mobley was tied "kind of like you're tying a calf when you're roping a calf." (V14, R628). Mobley's hand and feet were tied behind him, feet drawn up, "hog tied." (V14, R629). Mobley's pants were slightly pulled down which "could have" been consistent with being dragged. (V14, R628). Condoms were found in his pants' front pocket. (V14, R626).

Farmer later attended Mobley's autopsy and collected several pieces of evidence that included Mobley's clothes, the sheet, Mobley's drawn blood, and a black hair found on Mobley's face. (V14, R616, 624-25, 629). Farmer requested that Lacey Catle, Mobley's brother-in-law, come to the medical examiner's office

and identify Mobley's body. (V14, R618). Later that evening, Farmer told Mobley's mother that Mobley was deceased. She told Farmer that Mobley's car was missing. (V14, R619). Farmer initiated a BOLO notification through the National Crime Information Center and Florida Crime Information Center for Mobley's missing car and that it was connected to a homicide. (V14, R619, 629).

Farmer was notified on July 16 that Mobley's car had been located in Whitehouse, Tennessee. Farmer requested that the vehicle be impounded and processed at the TBI. Farmer further requested that the items recovered in the car be sent to FDLE's Tampa office for examination. (V14, R620, 621).

Farmer said that Mobley's car was found at about 1:00 p.m., on July 15 in Tennessee, which was about a 12-hour drive from where Mobley's body was found in Citrus County. Since Mobley was last seen alive at approximately 8:30 p.m. on July 14, Farmer estimated that Mobley was killed at about midnight or thereafter on July 14. (V14, R622).

Farmer said the Bowling Green, Kentucky, police contacted his office when they had a person in custody fitting the description of the person who had abandoned Mobley's car in Tennessee. However, that person, Calvin David Webb, was wearing different clothes than what Mr. Lee had observed in Tennessee and Webb also had a different bag than what Lee had observed.

Consequently, Webb was eliminated as a suspect in Mobley's murder. (V14, R630-31, 634).[11]

Thomas Wahl was a forensic lab analyst at the FDLE's Tampa office in 1987. (V14, R635). In 1987, the technology the lab used for forensic serology was ABO typing, which is commonly referred to as a person's blood type. In addition, the lab also conducted enzyme typings which revealed different enzymes present in ones body due to genetic inheritance. (V14, R648).

Wahl conducted ABO typing and enzyme typing on a portion of the anal swabs taken from Mobley. The ABO test result indicated blood type A, which was Mobley's blood type. The enzyme testing PGM and PGM sub typing yielded a 2-1 and a 2+1+, respectively, which was also the same as Mobley's. (V14, R650, 651).

Wahl conducted the amylase test on the cigarette butts recovered from Mobley's vehicle. Amylase is an enzyme found in very high concentrations in saliva. Wahl subsequently conducted ABO testing on the cigarette butts that had yielded a positive amylase result. (V14, R653).

Wahl visually inspected several other pieces of evidence[12] for

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[11] No physical evidence connects Webb to this case, either.

[12] Wahl inspected a jar of Vaseline, a piece of styrofoam, a partial package of gum, beer bottles, a plastic bag, two packages of Trojan condoms, Mobley's clothing and shoes, and the

biological stains. (V14, R654). He identified human blood on a piece of styrofoam, Mobley's shirt, the bed sheet that was tying Mobley's hands and feet, and Mobley's underwear. (V14, R655). The bed sheet revealed semen stains in which Wahl conducted ABO blood typing and PGM enzyme typing. However, Wahl did not detect any ABO blood group substances on the sheet, and, the PGM testing was inconclusive. (V14, R656-57, 660).

Corporal Elmer Havens, Sumter County Sheriff's Office, travelled to Indiana in October 2004 and retrieved a Florida postcard from Rebecca Kelly which was postmarked July 8, 1987, from Jacksonville, Florida. (V14, R663, 664). In addition, pursuant to a court order, Havens collected hair and buccal swabs taken from Dausch by Sergeant Bedan with the Indiana State Police. (V14, R665, 666).

Karen Nobles, forensic document examiner, FDLE, compared the July 8, 1987, postcard to known samples of Dausch's writing. (V14, R668-69, 674-75, 676). In Nobles' opinion, Dausch "probably wrote" the postcard which was addressed to Dausch's daughter, Lindsey. (V14, R676, 677).

Detective Alan Jones, an officer with the Indianapolis Police Department, recalled that Dausch had facial hair as well as

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bed sheet recovered from Mobley's body. (V14, R654-55).

long, blond hair in 1987. (V14, R678-79).[13]

Dawn Schlegel, latent print examiner and crime scene specialist, Sumter County Sheriff's Office, examined the latent prints recovered from Mobley's car by the TBI. (V14, R700-01, 703, 706, State Exh. 20). Schlegal compared the prints to those of Erik Patrick and determined there was no match. (V14, R704). However, in Schlegel's opinion, after comparing the prints from State Exhibit 20 with the known prints of Dausch, Schlegel determined they were a match. (V14, R705).

Corporal James Reid works at the Sumter County jail. On April 3, 2011, Reid reported to Dausch's cell as a call was issued by the jail nurse that something was wrong with Dausch. (V14, R708, 711). Reid saw that Dausch had a homemade rope made of jail linens wrapped around his neck several times. (V14, R714, State Exh. 25). After he removed the "rope," Reid did not see

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[13] Dausch objected to State's Exhibit C (marked for identification) of a photograph that depicted his looks from 1987. In addition, he moved for a mistrial based on the argument that a law enforcement officer had identified Dausch's looks from the 1987 photograph, and not based on his person knowledge. Dausch argued the identification "creates the inference that ... (Dausch) has been involved in criminal activity since the time he says he came to know" Dausch. The State argued that Dausch's record was "totally void" of prior criminal activity and that it had questioned the detective with regard to Dausch "getting older." Further, the State argued that Dausch failed to show "any manifest necessity or any totally undue prejudice to warrant the granting of a mistrial." The court sustained the objection but denied the motion for mistrial. (V14, R683-696).

any bruising or redness around Dausch's neck. (V14, R716, 722). There were no scratches or signs of strangulation on Dausch. (V14, R723). Dausch was unresponsive, and was transported to the hospital. (V14, R717).

Reid conducted a subsequent search of Dausch's cell and found a plastic garbage bag at the head of the bed in the back of the cell. (V14, R719, State Exh. 26).

Robin Ragsdale is a senior crime lab analyst with FDLE. (V14, R724, 725). She explained the DNA can degrade when subjected to the environment such as sunlight, moisture or mold. (V14, R737). However, even if DNA degrades, analysis can still be performed, but with the limited results. (V14, R738). With DNA STR analysis, only thirteen different areas are looked at on the DNA molecule. Ragsdale said, "With degraded DNA, we may only see results at two or three of those areas." (V14, R738).

Ragsdale compared the DNA profile obtained from Dausch's buccal swabs (State Exh. 27) to the DNA profile in the anal swabs removed from Mobley (V14, R757, State Exh. 28). Ragsdale concluded that Dausch "was included as a possible contributor to the mixture and that was four different areas of the DNA molecule out of thirteen." (V14, R754-55). Ragsdale performed additional DNA analysis on the anal swabs and determined Dausch's profile matched at two areas, that had previously been designated as a "foreign profile." (V14, R756).

Ragsdale reviewed the DNA analysis previously conducted on the cigarette butts found in Mobley's car (V14, R760, State Exh. 29) and determined Dausch's DNA profile matched at all thirteen areas. (V14, R759-60). Ragsdale excluded Calvin David Webb as a contributor to the cigarette butts and the anal swabs. (V14, R761). Ragsdale said that, in order for a sample to be entered into the CODIS database, FDLE requires a standard of five areas that need to have results. Further, the State requires a standard of seven areas, and, nationally, an attempt has to be made at all thirteen areas, but has to have a result of ten. (V14, R762-63).

Ragsdale tested two semen stains located on the sheet that had been tied to Mobley's hands and feet. The stains yielded one DNA profile that excluded Dausch. (V14, R765). Ragsdale also tested Mobley's fingernail scrapings. One of the scrapings resulted in a male profile but Dausch was excluded as the contributor. Dausch was also excluded as a contributor to the other scraping, as well. (V14, R766).

Ragsdale said that additional YSTR testing conducted by ReliaGene did not yield a DNA match that was foreign to the victim. However, because ReliaGene could not sample Mobley's

DNA,[14] Mobley's brother Columbus submitted a DNA sample for additional YSTR testing by ReliaGene. That result indicated the profile from the anal swabs could not exclude Columbus Mobley or any of his paternal relatives. (V14, R768, 770-71, 772).

Dausch's motion for a judgment of acquittal on both Counts was denied. (V14, R775-79). Dausch's renewed motion for mistrial was also denied. (V14, R779).

Gary Thompson is Dausch's former brother-in-law. (V14, R788). Thompson met Dausch in 1972. (V14, R791; V15, R814). Thompson recalled that Dausch was about six-foot one-inch and weighed about 225 pounds. Dausch was very muscular and had blond hair. He also had very noticeable tattoos on his arm. (V14, R791-92; V15, R821). However, Thompson said Dausch has more tattoos now than he did in 1987. (V15, R822).

Thompson's relationship with Dausch was "pretty good" while Thompson was married to Dausch's sister. (V14, R788). Thompson and Dausch's families vacationed together. In July 1987, the two families went on vacation, along with friends Jim and Pam Michaels, for a week-long visit in Flagler Beach, Florida. (V14, R788-89). Thompson's wife and his 12-year-old daughter, Angela,

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[14] According to Huma Nasir, ReliaGene's lab analyst, a DNA profile could not be obtained from the hair pulls from the victim because the DNA was too degraded. (V15, R892).

were with them. (V14, R791; V15, R813). Sometime during the week, the families went to Tampa for a day and a half. They returned to Flagler after their Tampa visit. (V14, R792). They stayed in the Michaels' motor home while in Flagler Beach and in Tampa. (V14, R789, 792). Thompson said Dausch was with him the whole time. (V14, R789). However, Thompson said "sometimes" he and his wife were not with Dausch during their vacation. (V15, R820).

After the two families left Flagler Beach, they drove north on I-95, west on I-10, toward I-75. They decided to spend the night at a rest area on I-10 near the intersection of I-75.[15] (V14, R793; V15, R820). However, Thompson said Dausch did not want to spend the night, that Dausch wanted to be home in the next day or two because it was Dausch's birthday. Sometime during the night, Dausch left the rest area with his light brown, square suitcase. (V14, R794). The next morning, Thompson looked for Dausch. Thompson and his family went north on Interstate 75 and "looked at every exit a couple of hundred miles" but did not find Dausch. (V14, R794-95). Thompson continued driving to Indianapolis and arrived about 16 hours

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[15] Thompson spoke to police on July 16, 2005, and said "it wasn't very long" after leaving Flagler Beach that the families stopped at a rest area for the night. (V15, R818-19, 822).

later. (V14, R795; V15, R812). Thompson did not see Dausch until the following day. (V14, R795; V16, R812).

Thompson and Dausch lived about 5 houses away from each other in Indiana. Thompson continued to see Dausch, including through 1988. (V15, R815).

Rebecca Kelly is the mother of Dausch's daughter. (V15, R824-25). Kelly said Dausch sent their daughter[16] a postcard from Flagler Beach during his 1987 vacation. (V15, R825). After his vacation ended, Dausch placed a collect call to Kelly and asked her to pick him up on I-65, about 45 miles south of Indianapolis. When Kelly arrived in that area, at about 8:30 p.m., Dausch was walking north on the highway. (V15, R826). Kelly recalled that day was Dausch's birthday because she baked him a cake.[17]

Kelly said that, when Florida detectives contacted her in 2005 regarding this case, she did not want to give them a recorded statement. After speaking with detectives, Dausch "may have" called her. (V15, R829-30, 845). Kelly did not recall talking to Indiana State Police Detective Bundy. (V15, R831-32,

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[16] Dausch's daughter, Lindsey Spurgeon, was 16 months old at that time. (V15, R827, 829).

[17] Dausch was born on July 14, 1958. http://www.dc.state.fl.us/activeinmates/detail.asp?Bookmark=1&From=list&SessionID=767197425

834). Although she did not recall talking to Bundy, Kelly did not deny telling Bundy that she did not want to have a tape-recorded statement sent to Florida regarding Dausch's case. (V15, R834).

Randall Prescott is a district maintenance engineer for the Florida Department of Transportation in the Tampa area. (V15, R847). Prescott calculated that the rest stop on I-10 where Thompson testified he and Dausch spent the night in July 1987 was about 54 miles from intersecting with I-75. The Lake Panasoffkee exit on I-75 is about 115 south of I-10.

Justin Little is a corrections officer at the Sumter County Detention Center. (V15, R861). On April 3, 2011, Little responded to Dausch's cell and saw that Dausch was unresponsive. (V15, R862-63, 867). Dausch had a portion of a sheet tied loosely around his neck and draped on his shoulders, as well. (V15, R863-64, 867). Little said it not unusual for inmates at the jail to tie a sheet around their eyes to keep the light out. (V15, R864). Corporal Reid cut the sheet off Dausch's neck. (V15, R867).

Ralph Beach is retired from the Bowling Green, Kentucky, police department. (V15, R868). In 1987, Beach received a BOLO for a person in the I-65 area that was possibly involved in an incident that had occurred in Whitehouse, Tennessee, which was about 23 miles from Bowling Green. (V15, R870). A female co-

officer contacted Beach about a possible suspect that she had encountered passing through the county, and had been transported to a homeless-type facility. (V15, R870, 871). Beach picked up David Calvin Webb and transported him to the detective division. (V15, R872-73).

Beach was not present when Walter Lee came to see Webb and did not identify him as the person he had seen getting out of Mobley's vehicle in Whitehouse, Tennessee. (V15, R873).

Scott Bowerman was an evidence technician with the Bowling Green Police department in 1987. (V15, R876). In July 1987, Bowerman photographed Webb, and collected hair samples and fingerprints which were sent to the Sumter County Sheriff's department. (V15, R877). Bowerman was aware that detective Bobby Allan (deceased) drew a composite sketch of Webb. (V15, R879-80).

Huma Nasir, currently a forensic analyst with Orchid CellMark DNA laboratory, formerly worked for ReliaGene Technologies. (V15, R886). In December 2006, Nasir conducted DNA testing on the DNA extracted from the anal swabs and head hairs taken from Mobley, and compared them with DNA extracts and pubic and head hairs from Dausch. (V15, R889, 893). Nasir conducted YSTR testing on the DNA extracted from the anal swabs and compared those profiles to Mobley's head hairs. She also performed YSTR testing on the DNA extract from Dausch provided to her by FDLE.

(V15, R889-90). Nasir was only able to identify one single male profile from the testing of the DNA from the anal swabs which did not match Dausch. Therefore, she excluded Dausch and all his biological male relatives as a contributor to DNA extracted from the anal swabs. (V15, R891, 893). Nasir said that DNA mixtures can have major profiles and minor profiles. (V15, R901). However, testing conducted on the cuttings from the envelope containing the anal swabs also excluded Dausch. The only profile obtained was consistent with Columbus Mobley and with Adrian Mobley's paternal lineage. (V15, R905-06).

Nasir could not obtain a DNA profile from the pulled hairs from Mobley because the DNA was too degraded or broken down. Therefore, since all of Mobley's paternal relatives would have the same DNA profile, she received a buccal swab from Mobley's brother, Columbus. In October 2007, Nasir conducted additional YSTR testing. (V15, R893). The YSTR profile obtained from Columbus Mobley's sample was compared to the anal swab results and were found to be consistent with Adrian Mobley, Columbus Mobley, and all their male paternal relatives. (V15, R892, 894, 904).

Nasir explained that bacteria as well as environmental factors cause DNA degradation. (V15, R899-900). In addition, the anal swab evidence sample in this case had been analyzed on three prior occasions before Nasir conducted her testing. She

said "it's possible" that the DNA material would have been destructed through the examination process, "depending on what storage conditions the samples were stored in, and how many times it was tested, and how long of a period it was between the old testing and then when it's sent to our lab." (V15, R903). In this case, the only sample Nasir had to use for testing was the "already extracted DNA by FDLE." (V15, R903).

Nancy Peterson is a forensic DNA consultant. (V15, R914-15). Peterson reviews cases for a defense team to determine how DNA evidence should be evaluated, in addition to auditing and reviewing case files from a laboratory to ensure the lab follows its own standards. (V15, R920-21). Peterson was employed by FDLE for 20 years and conducted DNA analysis. (V15, R917). Although she conducted RFLP DNA analysis for approximately six years during her tenure with FDLE, she has never been trained or proficiency tested by an accredited laboratory in the field of STR analysis. (V15, R916, 926, 927, 930, 932, 961).

Peterson reviewed the DNA case file in Dausch's case which included bench notes from FDLE, Fairfax Laboratory, as well as reports from those lab and ReliaGene's reports. (V15, R938-39, 942). In Peterson's opinion, the STR DNA testing conducted by Fairfax Laboratories on the cigarette butts that found the DNA was consistent with Dausch's was correct. (V15, R944-45, 960). Peterson did not disagree with the DNA testing and findings

conducted on the sheet that was tied to Mobley's hands and feet, either. The semen stains did not match either Mobley or Dausch. (V15, R945-46). Peterson also examined the DNA findings regarding the anal swab testing. (V15, R947). In her opinion, the major profile from the DNA in the anal swabs belonged to Mobley. But, three of six STR types did not match Dausch and the other three "had STR types that were similar to his." (V15, R948). Peterson said, "anytime you have even one STR type, DNA type that's different from an individual, then that individual did not leave that sample. So there were three places where it was different from his STR type, and therefore I concluded it was not from him. It would be from someone else." (V15, R948).

Peterson said she worked with DNA Labs International in 2004-2005 collecting paternity samples. (V15, R966, 968, 969).

Gina Paneda, DNA expert, formerly worked for ReliaGene/Orchid CellMark and currently owns her own consulting company. (V15, R977-78). During her employment at ReliaGene in October 2006, Paneda received several items of evidence for the purpose of conducting YSTR DNA analysis. The items included hairs, anal swabs, buccal swabs and tubes containing DNA extracts. The lab received a second submittal in September 2007 which included a sample of Mobley's blood and a buccal swab taken from Mobley's brother, Columbus. (V15, R980-81, 982).

The lab tested the DNA extracts obtained from FDLE and an

envelope that contained the anal swabs. Only one YSTR profile was obtained and it was not consistent with Dausch. (V15, R982-83; V16, R1005-06). The lab conducted additional testing in September 2007 but was unable to obtain a profile from Mobley's blood as it was too degraded. (V15, R982-83). The DNA profile obtained from Columbus' buccal swab sample matched the profile obtained from the anal swab. (V15, R984). Paneda concluded that the victim as well as all of his paternal relatives could not be excluded as a donor from the obtained anal swab DNA profile. (V15, R984; V16, R1005).

Paneda said RFLP DNA analysis is different than STR and YSTR analysis. (V15, R993). RFLP is the first type of DNA testing used in the forensic field and requires a lot of material to obtain a result. (V15, R994). In addition, RFLP testing may not yield a mixture in a forensic sample. (V15, R996). YSTR uses a method called PCR "Polymerase Chain Reaction," in which the procedure produces a billion-fold times the DNA. It only requires a small amount of DNA in order to perform an analysis. (V15, R995). STR testing will detect a mixture because PCR will detect more DNA than RFLP would. (V15, R996). In Paneda's opinion, this method is a more suitable technology to use in forensics. (V15, R996).

Paneda said a DNA mixture contains major and minor profiles. Anal swabs often contain mixture profiles. (V15, R1000).

However, Paneda did not obtain a mixture by utilizing the YSTR testing. (V16, R1006).

Lieutenant Clint Bundy, Indiana State Police, testified in rebuttal. (V16, R1023). In May 2005, the Sumter County Sheriff's Office contacted Bundy and requested he obtain a formal statement from Rebecca Kelly, the mother of Dausch's daughter. Kelly refused to give Bundy a recorded statement. (V16, R1024). In July 2005, Kelly contacted Bundy. Bundy again requested a formal statement but Kelly refused. (V16, R1024-25).

Kevin Noptinger, DNA analyst, retired from government crime laboratories and founded a private lab in 2004, DNA Labs International. (V16, R1041-42). Noptinger said Nancy Peterson collected paternity samples for the lab. (V16, R1042-43). She was never employed by the lab to conduct DNA analysis. (V16, R1044).

The jury returned verdicts of guilty of murder in the first degree and aggravated battery on December 13, 2011. (V16, R1130).

The penalty phase began on December 15, 2011. (V17, R1255).

Detective Allen Jones, Indianapolis Police Department, investigated the 1990 rape, criminal confinement, and battery

case of victim, P.D.,[18] in which Dausch was convicted and sentenced to prison. (V17, R1265, 1267, State Exh. 1).

Assistant State Attorney Angelina Rodeo read a victim impact statement from Mobley's family. (V17, R1270-72).

Mark Combs has been friends with Dausch since the two men were ten years old. They were neighbors. (V17, R1276-77). Combs recalled that Dausch was raised in a cluttered, one-bedroom home. Dausch's sisters slept in the dining room area while Dausch slept on the family's enclosed front porch when the weather was warm. When it was too cold, Dausch slept on the living room couch. (V17, R1282-83). The kitchen and bathroom sinks had running water but no tub or shower. The home "was a lot like it had been gutted and just halfway put back together." (V17, R1283). Combs and Dausch spent a lot of time at each other's homes. (V17, R1285). Together, they skipped classes in grade school and began to drink alcohol. (V17, R1285). Dausch's father, "Toty," was a welder who "would work all day and then go to the bars." (V17, R1286). It was easy for Combs and Dausch to get into the bar because Toty spent a lot of time there, as well. Toty drank a lot and drank "most of his money away." (V17, R1286-87, 1293). Dausch's mother was "a very nice person" and

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[18] Only the victim's initials are used in this brief.

treated "all the kids in the neighborhood just like her own." She was sickly and had heart trouble. (V17, R1292). Combs said he also spent time at Dausch's grandparents' home where they fished. (V17, R1293). The family did not have much money but they had groceries and fuel for heat. (V17, R1293).

Combs and Dausch eventually started smoking marijuana and, at about age 14, got into "heavier drugs." (V17, R1287). At 16 years old, Combs and Dausch dropped out of school. (V17, R1289). Combs said, "We were average teenagers." (V17, R1289).

Combs said he and Dausch experimented with other drugs including "all the acids that were around." They were also "interested" in cocaine. (V17, R1290). However, they stayed away from the bad neighborhood near the high school. (V17, R1291).

Combs said Dausch was good at sports. He played football, baseball, and guitar. Dausch's mother watched him play sports when her health allowed her to go see him. Dausch was so good at sports "that everybody knew who he was." In addition, Combs said Dausch made "better grades than I did." (V17, R1291-92, 1293, 1295).

Combs said Dausch's father "would come home drunk and he would get loud and obnoxious" with Dausch's mother, Mary, and accuse her of cheating on him. However, "she was too sick to do anything." Combs and his neighbors could hear Toty Dausch's yelling from inside their own houses. (V17, R1294). Other boys

picked on Dausch but "he would stand his ground." (V17, R1295). After Dausch started working out, "nobody had anything bad to say about Carl." (V17, R1295). Dausch was protective of Combs' two younger sisters - - he treated them as if they were his own. (V17, R1295).

Combs and Dausch went their separate ways when they were 19 years old. Dausch was still abusing drugs but Combs "had to stay pretty straight" because he worked at the same place as his mother. (V17, R1296). However, Combs said that he and Dausch "have always been friends." (V17, R1298).

Kenneth Dausch is Dausch's uncle. They played together while growing up because they are both the same age. (V17, R1300, 1301). Dausch was athletic, well-liked, and enjoyed helping others. He was a "really good kid." They always had a good time together. (V17, R1302). Kenneth's brother Toty never spent much time with Dausch. "He would get off work and go to the bars." (V17, R1302). Kenneth recalled the Dausch home had a bathtub but he did not know if it worked. (V17, R1304). Dausch's mother was "a real good lady." She took the children fishing, to ball games, and spent a lot of time with them. (V17, R1304). However, she died in her early forties. (V17, R1306). Dausch was a good athlete, and could "have a scholarship in any sport he wanted" if he had pursued going to school. (V17, R1304-05).

Kenneth said Dausch attended "a rough school." There were a

lot of riots and the police were called. "It was dangerous." (V17, R1305). In addition, there were dangerous motorcycle gangs in the area. (V17, R1310).

Kenneth and Dausch drank alcohol together but only Dausch smoked marijuana. The two also worked together in the auto and construction field. (V17, R1307, 1308). Dausch was a good worker and "everybody (at work) just loved him half to death." (V17, R1308). When Kenneth became a single father, he stopped hanging out with Dausch. (V17, R1307). Kenneth and Dausch love each other like brothers. "There is good in him." (V17, R1311).

Doctor Chowallur Chacko, M.D., specializes in forensic psychiatry and addiction medicine. (V17, R1313).

Chacko evaluated Dausch for any substance abuse issues and possible head injuries that may have impacted his brain and behaviors. (V17, R1317). Chacko reviewed Dausch's medical records, jail and prison records,[19] and the charging affidavit. He obtained a history from Dausch, conducted a mental health evaluation, and obtained collateral information from third parties. (V17, R1317, 1337). Chacko also reviewed a 1990 Indiana

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[19] The prison records included the following: a 1978 conviction for battery; a 1979 conviction for robbery and burglary; a 1983 conviction for battery on a police officer; a 1983 conviction for battery; and a 1989 conviction for rape, criminal confinement and battery. (V17, R1337-38).

prison evaluation that said Dausch had "hostility toward women, substance abuse, antisocial personality, and a general inability to function appropriately in society." (V17, R1339). Chacko agreed that Dausch "has some traits" of antisocial personality disorder but does not actually suffer from antisocial personality disorder. (V17, R1339, 1344).

Chacko said Dausch had a "very deprived childhood" and grew up in a dysfunctional home. There was no shower or bathtub, the family washed themselves with an outside hose, and did not often have heat during the winters. (V17, R1318). Dausch's father was an alcoholic and away most of the time. When he was home, he was physically violent with Dausch and Dausch's mother. (V17, R1318). Dausch's mother was absent to some degree to a heart condition. Dausch said he was sexually abused as a child by male and female babysitters. (V17, R1319, 1337). Chacko could not verify the sexual abuse from anyone else. (V17, R1320, 1337). However, in Chacko's opinion, the physical, emotional, and sexual abuse that Dausch suffered all played a part in the lack of values in Dausch's his personality. (V17, R1319).

Chacko interviewed Dausch's sister, Diana, who verified that the children were very fearful of the domestic violence within the home. She and Dausch hid together in bed and could not sleep at night. As a result, they both failed in school -- she in kindergarten, and Dausch in the first grade. (V17, R1320).

Chacko said that, in his opinion, an abused person becomes an abuser. (V17, R1321). Because an abused person is psychologically traumatized, their minds do not develop like that "of a normal person's. And they have what we call holes in their minds." (V17, R1322). In Chacko's opinion, based upon the materials he reviewed, interviews he conducted, and the mental health assessment he conducted, Chacko said Dausch suffers from polysubstance dependence[20] and personality disorder NOS. (V17, R1322, 1327, 1340).[21] Chacko said that someone with a personality disorder is more likely to become addicted. (V17, R1324-25). In Chacko's opinion, Dausch suffered "chronic brain damage" due to abusing "powerful drugs for extended periods of time." (V17, R1323). Chacko corroborated Dausch's drug use through self-reports and information obtained from two of Dausch's close childhood friends as well as family members. (V17, R1323, 1337). Dausch abused PCP, LSD, injected cocaine, crystal meth, and abused alcohol. (V17, R1323, 1336). Chacko said that prolonged abuse of drugs and alcohol "caused a certain degree of brain damage in him." (v17, R1324). Dausch was addicted to cocaine and

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[20] Chacko said Dausch was also diagnosed with polysubstance dependence in Indiana State prison in the 1990's. (V17, R1322).

[21] Chacko utilized the DSM-IV-TR to diagnose Dausch. (V17, R1340).

alcohol -- one is a stimulant and the other is a depressant. Chacko said that abusing these substances causes the brain to be "in a constant tug of war. It's pulled in two directions." (V17, R1328). As a result, in Chacko's opinion, Dausch would not have had a normal social or personal life. (V17, R1329). However, people with personality disorders "usually mellow with age." (V17, R1333).

Chacko said Dausch's friends and his sister Diana confirmed that Dausch was subjected to beatings on his head from his father, beatings on his head in bar fights, and beatings on his head on several occasions by police. (V17, R1329). On one occasion, Dausch was unconscious for a short period of time. Multiple head traumas can accumulate and cause chronic brain damage, which, in turn, impacts behavior. Chacko said, "Patients with brain damage are known for impulse control. "They tend to explode with little or no provocation." (V17, R1330).

Chacko said Dausch "has made tremendous progress since he's been in prison." He is close to receiving a Bachelor's Degree and makes use of sources available to him in prison. (V17, R1331, 1332). In addition, Dausch has a loving relationship with one of his daughters. (V17, R1333-34, 1336). In Chacko's opinion, Dausch benefits from a structured environment. (V17, R1334). Dausch was apparently diagnosed as antisocial personality disordered according to Indiana prison records (V17,

R1339), but Chacko insisted that he only had "elements of antisocial personality". (V17, R1344).

Lindsey Spurgeon, Dausch's daughter, said her father has always been an inspiration to her, particularly when she was injured during her stint in the Marine Corps. (V17, R1372, 1374). Spurgeon's mother did not allow her to see Dausch when she was a child. She "officially" met him when she was 16 years old. (V17, R1375). As Dausch was in prison when they met, Spurgeon visited him every two weeks. (V17, R1377). Dausch "always" encouraged Spurgeon to better herself and to do what was best for her. (V17, R1378, 1385, 1395). Spurgeon has maintained contact with her father through letters and contact visits. (v17, R1391). Spurgeon said Dausch did not want her to know he had a rough childhood as "he didn't want me to have to worry about him." (V17, R1394). Dausch is her "driving force" to do better and to be better. (V17, R1395).

On December 16, 2011, by a vote of eight to four, the jury returned an advisory vote that recommended that Dausch be sentenced to death.

This appeal follows.

SUMMARY OF THE ARGUMENTS

The verdict of guilt is supported by competent substantial evidence, and the motion for judgment of acquittal was properly denied. Dausch's complaints are merely about the credibility

choices made by the trier of fact.

The claim that a mistrial should have been granted because a law enforcement officer testified about Dausch's appearance in 1987 (at the time of the offense) is not preserved for review by timely objection. In any event, evidence about Dausch's appearance at the time of the offense was relevant and probative of the issues in this case. The bare fact that a law enforcement officer testified that he knew Dausch 25 years ago implies nothing improper.

Evidence that Dausch attempted suicide in his cell the night before his first trial was to begin was properly admitted as consciousness of guilt evidence. The sub-claim that the "suicide letter" should have been admitted to "explain" the suicide attempt has no legal basis. the letter is hearsay not subject to any exception, and is a self-serving statement that was properly excluded.

The "juror misconduct" claim has no impact on the guilt phase -- the incident at issue took place after the guilt stage had concluded. There is no basis for reversal of the penalty phase.

The "double jeopardy" claim is directed toward the conviction of aggravated battery as a lesser included offense of sexual battery. Under §775.021 of the *Florida Statutes*, there is no error.

The sentencing court properly found, as an aggravating

circumstance, that the murder of Adrian Mobley was heinous, atrocious or cruel. The victim was beaten and stomped to the point that he died of asphyxiation. That mechanism of death is no different than suffocation, which is virtually *per se* heinous, atrocious or cruel.

Dausch's claim that the jury should not have been instructed on two aggravators that ultimately were not found has no legal basis. There was credible and competent evidence to support those aggravators, and the jury was properly instructed on them. In any event, the claim contained in Dausch's brief is not preserved for review.

The sentencing court properly assigned weight to the non-statutory mental mitigation. The court did not abuse its discretion in assigning weight to that mitigation evidence, and, from the record, it appears that more weight was given than the evidence truly deserved. At worst, Dausch received a windfall.

Death is the proper sentence in this case. The prior violent felony and heinousness aggravators are among the weightiest in Florida, and both of them were given great weight by the sentencing court. The mitigation, in contrast, is sparse and non-specific. The aggravation far outweighs the mitigation, and death is the proper sentence.

The "special requested jury instructions" were properly denied. This Court has ruled on that claim repeatedly, and it

has no legal basis.

This Court has repeatedly rejected claims based on *ring v. Arizona* when the prior violent felony aggravator is present. That is the case here, and there is no reason to deviate from this Court's settled precedent.

ARGUMENT

I. THE JUDGMENT OF ACQUITTAL WAS PROPERLY DENIED

On pages 32-40 of his brief, Dausch says that the trial court should have granted his motion for judgment of acquittal. The standard of review for the denial of a motion for judgment of acquittal is whether the verdict is supported by competent substantial evidence. *See Crump v. State* 622 So. 2d 963, 971 (Fla. 1993) (question of whether evidence fails to exclude any reasonable hypothesis of innocence is for jury to determine, and if there is competent substantial evidence to support the jury's verdict, that verdict will not be reversed on appeal); *Tibbs v. State*, 397 So. 2d 1120 (Fla. 1981), *aff'd*, 457 U.S. 31 (1982) (concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment). This Court has said:

We have held that premeditation can be shown by circumstantial evidence. *Sireci v. State*, 399 So. 2d 964 (Fla.

1981), *cert. denied*, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982), *overruled on other grounds, Pope v. State*, 441 So. 2d 1073 (Fla. 1983). In order to prove a fact by circumstantial evidence, the evidence must be inconsistent with any reasonable hypothesis of innocence. *Cochran v. State*, 547 So. 2d 928, 930 (Fla. 1989). **The question of whether the evidence fails to exclude any reasonable hypothesis of innocence is for the jury to determine**, and where there is substantial, competent evidence to support the jury verdict, the verdict will not be reversed on appeal. *State v. Law*, 559 So. 2d 187, 188 (Fla. 1989). Thus, the State must exclude every other reasonable inference that may be drawn from the circumstantial evidence to show that premeditation exists. *Id.* As this Court has stated:

Evidence from which premeditation may be inferred includes such matters 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. It must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result to flow from it in so far as the life of the victim is concerned.

Holton v. State, 573 So. 2d 284, 289 (Fla. 1990) (*quoting Larry v. State*, 104 So. 2d 352, 354 (Fla. 1958)), *cert. denied*,

--- U.S. ----, 111 S.Ct. 2275, 114 L.Ed.2d 726 (1991).

Crump v. State, 622 So. 2d 963, 971 (Fla. 1993). (emphasis added). The "circumstantial evidence" rule set out in *Lynch* is not as defense-friendly as Dausch suggests:

It is the trial judge's proper task to review the evidence to determine the presence or absence of competent evidence from which the jury could infer guilt to the exclusion of all other inferences. That view of the evidence must be taken in the light most favorable to the state. *Spinkellink v. State*, 313 So. 2d 666, 670 (Fla. 1975), *cert. denied*, 428 U.S. 911, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976). **The state is not required to "rebut conclusively every possible variation"** [FN3] **of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events**. *See Toole v. State*, 472 So. 2d 1174, 1176 (Fla. 1985). **Once that threshold burden is met, it becomes the jury's duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt.**

[FN3] *State v. Allen*, 335 So. 2d 823, 826 (Fla. 1976).

State v. Law, 559 So. 2d 187, 189 (Fla. 1989). (emphasis added). Under the correct analytical framework, Dausch loses.

Dausch devotes a substantial part of his brief to discussion of the "felony murder" theory of guilt. That argument is

extraneous because Dausch was not convicted of felony murder. However, contrary to his claims, the verdict is well-supported on a premeditation theory.

There is no dispute that Adrian Mobley was found dead, with his hands tied behind his back and "hog-tied" with a sheet, on a road in rural Sumter County, Florida. The medical examiner testified that the victim sustained "a lot" of blunt force trauma to his face, neck and upper chest. He had several skull fractures, and the beating was so forceful that the surfaces of his lungs were bruised. These injuries were consistent with the victim having been stomped, and the medical examiner testified that the Mobley died as the result of blunt force trauma to his head and upper chest, which led to asphyxia and, ultimately, death.[22] In other words, Adrian Mobley was beaten to death, and there is no question that his death was due to the criminal acts of another. The full extent of Mobley's injuries are cataloged at pages 4-5, above, and are fairly depicted in State Exhibits 2, 8, 9, 12, 13, and 14. (V10, Disk 1). Those injuries are extensive, to say the least, and obviously took some time to inflict. Moreover, **there were no defensive wounds** -- the

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[22] On page 40 of his brief, Dausch says that the State "did not establish what led to the victim's death" and did not establish premeditation. Those claims fly in the face of the evidence, where they find no support.

reasonable inference is that the victim was tied up before he was beaten to death, since there would be no reason at all to restrain an unconscious victim. *Russ v. State*, 73 So. 3d 178, 193-194 (Fla. 2011); *See Finney v. State*, 660 So. 2d 674, 680 (Fla. 1995). The only interpretation of these facts that is reasonable is that Mobley was tied up, and then stomped to death -- the length of time those acts would take, coupled with the extent of his injuries, establish premeditation beyond a reasonable doubt. The standard in *Holton, supra*, is satisfied.

Dausch argues that the proof at trial was "legally insufficient" to show that he is the person who killed Adrian Mobley. Dausch attempted suicide (by hanging) while housed in the Sumter County jail awaiting trial.[23] A suicide **threat**, which obviously falls far short of an actual **attempt**, has been interpreted to show consciousness of guilt analogous to flight to avoid prosecution. *See Penalver v. State*, 926 So. 2d 1118, 1133-1134 (Fla. 2006). Under the facts of this case (attempted suicide on the eve of trial resulting in hospitalization), the evidence of consciousness of guilt is very strong.

Dausch's fingerprints were found on the victim's car, as well as on various items found inside the vehicle. Those fingerprints

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[23] This suicide attempt came immediately before his first scheduled trial date, and resulted in trial being postponed.

can only be there because Dausch was inside the car. Likewise, Dausch left DNA on cigarette butts found inside the vehicle -- that evidence, separately and cumulatively, places Dausch in possession of the victim's car (which was in the possession of the victim the last time he was seen alive). Dausch has suggested Webb and Patrick as potential suspects -- both of those individuals were absolutely excluded from having any connection at all to this case. To the extent that those "real killers" constituted Dausch's theory of the case, the State completely rebutted it.

The victim's car was recovered near Whitehouse, Tennessee, at the intersection of U.S. Highway 76 and Interstate 65. An off-duty Whitehouse reserve officer observed an individual in the process of abandoning that vehicle, and described the person he saw scrambling up the highway embankment[24] to the Interstate as being five-nine to five-ten with dirty blond hair and facial hair. That is consistent with Dausch's appearance at that time, as Exhibits 16, 31, and 32, show. (V10, Disk 1). The time and location where the vehicle was recovered is consistent with the time it would take to drive from the location where the victim's

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[24] Interstate 65 passes over Highway 76 -- the vehicle was left underneath the overpass where Dausch pulled off of Highway 76. He climbed the bank up to the Interstate.

body was found to Whitehouse, Tennessee. Adrian Mobley's wallet was recovered on Interstate 75 just inside Georgia -- this is a location consistent with travel from Sumter County, Florida to Whitehouse, Tennessee.

Finally, DNA consistent with Dausch was found present in the victim's rectum. While not as conclusive as some DNA matches (probably because of the age of the sample), the DNA evidence, coupled with the other evidence and the clear consciousness of guilt, is sufficient to rebut Dausch's theory of events. Of even greater significance is the fact that DNA from the scene matched Dausch in six (6) loci,[25] and the likelihood of finding a mixed DNA sample containing DNA from both Mobley and Dausch was very remote. The State met its threshold burden, and it was for the jury to determine whether the evidence established guilt beyond a reasonable doubt. Any conflict in the testimony of the DNA expert witnesses presented a credibility choice for the finder of fact. That credibility determination is not simply a matter of counting the experts and crediting the position consistent with the majority of the testimony. Experts disagree frequently, and the credibility of competing opinions is a matter for the

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[25] In his brief, Dausch claims that the DNA matched Dausch at "two loci." That is incorrect, and is not what the transcript reflects.

jury. The motion for judgment of acquittal was properly denied.

II. THE "POLICE OFFICER'S TESTIMONY AS A BASIS FOR MISTRIAL" CLAIM

On pages 41-45 of his brief, Dausch says that the trial court should have granted his motion for mistrial because a law enforcement officer from Dausch's home area in 1987 testified about the defendant's appearance at that time. Because this claim is raised as a denial of a motion for mistrial, the trial court's ruling is reviewed for an abuse of discretion. *Goodwin v. State*, 751 So. 2d 537, 546 (Fla. 1999); *Thomas v. State*, 748 So. 2d 970, 980 (Fla. 1999) (explaining that a ruling on a motion for mistrial is within the trial court's discretion and should not be reversed absent an abuse of that discretion); *Hamilton v. State*, 703 So. 2d 1038, 1041 (Fla. 1997) (same).

The testimony at issue begins at V14, R678, and consists of the testimony of Indiana sheriff's deputy Alan Jones that he knows the defendant, and that, in the 1980s, Dausch had long blonde hair. (V14, R681). Not until the witness was shown a **photograph** did Dausch raise any objection at all, and that objection was to the introduction of the photograph (V14, R689-90), which was sustained. (V14, R697). **Dausch never objected to any part of the officer's testimony, and did not preserve that issue for review.** *See Hazen v. State*, 700 So. 2d 1207, 1211 (Fla. 1997) (stating that the court "need not reach the merits

of this claim" because it was "procedurally barred for lack of a contemporaneous objection.")(*citing Lindsey v. State*, 636 So. 2d 1327, 1328 (Fla. 1994); *Correll v. State*, 523 So. 2d 562, 566 (Fla. 1988)); *Teffeteller v. State*, 495 So. 2d 744, 747 (Fla. 1986) (stating that "[a]ppellant cannot bootstrap this concern over" [revealing the defendant's prior death sentence] in *voir dire* "to alleviate the requirement of a contemporaneous objection.") (*citing Steinhorst v. State*, 412 So. 2d 332 (Fla. 1982)).[26] The claim by Dausch that the Court "sustained his objection to his testimony" is not supported by the record. That

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[26] Dausch has not established error and has not argued that fundamental error exits. Fundamental error is error that "reach[es] down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *Archer v. State*, 934 So. 2d 1187, 1205 (Fla. 2006) (*citing Kilgore v. State*, 688 So. 2d 895, 898 (Fla. 1997)); *D'Oleo-Valdez v. State*, 531 So. 2d 1347, 1348 (Fla. 1988) ("for error to be so fundamental that it may be urged on appeal, though not properly presented below, the error must amount to a denial of due process.") (*citing Ray v. State*, 403 So. 2d 956, 960 (Fla. 1981)).

was not the objection that he made at trial.

Even putting aside the failure to preserve this claim, evidence about the defendant's appearance in 1987 was certainly relevant and probative of the issues in this case. It stands reason on its head to suggest that evidence of the defendant's appearance at the time of the murder has "weak probative value" when 25 years separate the murder from the trial. That sort of evidence is critical to the truth-seeking function of the court.

Moreover, the fact that a law enforcement officer testified that he knew Dausch 25 years ago does not imply that that knowledge came from official contact with Dausch. For all the jury knew, Dausch lived next door to the officer. *Randolph v. State*, 556 So. 2d 808, 809 (Fla. 5th DCA 1990) ("It cannot be accepted as a foregone conclusion that a jury will infer that, when a police officer knows a person, that person has been suspected as a criminal or has a criminal record."). And, in addition to not objecting to the officer's testimony, Dausch specifically did not ask for a cautionary instruction of any sort. (V14, R699). Under these facts, the trial court did not abuse its discretion in denying the motion for mistrial.

The cases cited in Dausch's brief do not require a different result. The objection at trial was not framed in federal due process terms, and the objection that was raised (which was to the photograph) was sustained. There is no adverse ruling from

which to appeal. And, Dausch's reliance on *Thigpen v. Thigpen*, 926 F.2d 1003, 1012 (11th Cir. 1991) is misplaced. *Thigpen* was a federal habeas corpus case that was decided under the habeas statute that was replaced by the Anti-terrorism and Effective Death Penalty Act of 1994, and the continuing precedential value of that decision is questionable. At best, *Thigpen* has nothing at all to do with this case because it was decided on federal procedural grounds. This claim is not a basis for relief.

III. THE ATTEMPTED SUICIDE

On pages 46-50 of his brief, Dausch says that the trial court should not have admitted evidence that he attempted suicide on the eve of his first trial date. The admission of evidence generally is reviewed only for an abuse of discretion, *Ray v. State*, 755 So. 2d 604, 610 (Fla. 2000), and consciousness of guilt evidence (which a suicide attempt is) is no exception to that rule. "We review a trial court's ruling on the admission of evidence advanced to demonstrate consciousness of guilt for abuse of discretion. *See Jackson v. State*, 18 So. 3d 1016, 1031 (Fla. 2009)." *Partin v. State*, 82 So. 3d 31, 38-39 (Fla. 2011). Dausch cannot make that showing.

The testimony about Dausch's attempted suicide is found at V14, R708-23 in the record. That testimony establishes that the suicide attempt took place the night before Dausch was originally scheduled for trial, and, given that he was described

as unresponsive when he was admitted to the hospital, there can be no colorable claim that the suicide attempt was a serious one. The timing of that attempt places it within the chronology of suicide attempts that demonstrate consciousness of guilt and show a desire to avoid prosecution. *Walker v. State*, 483 So. 2d 791 (Fla. 1st DCA 1986). The suicide attempt was properly admitted.

The second part of this claim is that what Dausch calls a "suicide letter" should have been admissible to "explain" the suicide attempt. That document is found at V6, R1067. Whether that letter is actually a statement of "then existing state of mind" for §90.803(3) purposes is debatable. The closest it comes to "state of mind" is the statement that Dausch believes he is being "led to a slaughter" -- the most that statement shows is a desire to avoid prosecution, and that is exactly the premise of "consciousness of guilt" evidence. The letter does not explain, justify or rationalize the suicide attempt and is ultimately simply a self-serving document that has nothing to do with the writer's state of mind. There was no abuse of discretion, and therefore no error, in refusing to admit the self-serving letter.

Further, had the letter been admitted, the outcome would have been no more than to allow Dausch to testify in the guilt phase without being subject to cross examination. That result would

have been contrary to any notion of a fair trial. Moreover, it would have allowed the State to impeach the hearsay declarant (Dausch) with his criminal record. *Huggins v. State*, 889 So. 2d 743, 755-757 (Fla. 2004). That bare-bones impeachment would have amounted to a poor second choice. The letter did nothing to "explain" the attempted suicide, and it was properly refused admission. There is no basis for relief.

Alternatively, while not mentioned at trial or in Dausch's brief, the sentence in the letter that says "I'm being led to a slaughter and you know it" can arguably be considered an expression of then-existing state of mind. However, the remainder of the letter, which consists of complaints about the prosecution and assertions about what the "independent DNA" reports show, has nothing at all to do with state of mind, or anything else that falls under 90.803(3). Dausch never suggested that the letter be redacted in any fashion, and chose to insist on admission of the entire letter. Had Dausch attempted to redact the letter to exclude the self-serving parts that had nothing at all to do with state-of-mind evidence, he might have a basis for complaint. As it is, however, the letter, as offered, was not admissible, and the trial court did not abuse its discretion in refusing to allow it in evidence.

IV. THE JUROR MISCONDUCT CLAIM

On pages 51-58 of his brief, Dausch says that he is entitled

to a new trial based upon "juror misconduct." Because the claimed misconduct took place after the guilty verdict had been announced, the only issue is whether Dausch should have a new penalty phase. In general terms,

Under Florida law, a trial court has wide discretion in deciding whether or not to grant a new trial. *First National Bank v. Bliss*, 56 So. 2d 922, 924 (Fla. 1952). However, this discretion is not without limit:

The granting of a mistrial should be only for a specified fundamental or prejudicial error which has been committed in the trial of such a nature as will vitiate the result.... However, when an alleged error is committed which does no substantial harm and the defendant is not materially prejudiced by the occurrence, the court should deny the motion for a mistrial.

Perry v. State, 146 Fla. 187, 200 So. 525, 527 (1941) (citations omitted). *Accord Fla. R. Crim. P.* 3.600. An abuse of the discretion to grant a new trial thus is subject to reversal on appeal.

State v. Hamilton, 574 So. 2d 124, 126 (Fla. 1991). It is an abuse of discretion to grant relief when any error was harmless beyond a reasonable doubt. *Id.* Any error in this case was harmless.

Dausch says, as the factual basis for this claim, that the jurors "conducted their own internet research." *Initial Brief*,

at 52. That statement exaggerates the events, which were shown, through the testimony of the jurors, to be that a **single** juror ran what was apparently a single search from an iPhone and commented on the result of that search to a small number of the other jurors. (V16, R1145-89).[27] **All of the evidence is consistent that no incident of any sort whatsoever took place until after the jury had found Dausch guilty.** (V16, R1130, 1145, 1147, 1150, 1158-59, 1162, 1164, 1171, 1172, 1179-80, 1181-82, 1187). This claim does not implicate the conviction in any way. And, of the few jurors who even knew about the search results,

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[27] Jury Foreman Eck said the jury was told they could use their phones. (V16, R1182). Eck "googled" Dausch's name on his iphone and saw a headline from the local paper, The Daily Commercial. (V16, R1179, 1181). Eck said the headline mentioned Dausch, and the year "two thousand four, thousand five, something like that." (V16, R82). Eck did not open/click the newspaper article. (V16, R1182). Jurors Burnat, Long, Cavanaugh, Orienti, and Reedy said they did not hear anything about Dausch from Eck or any other juror. (V16, R1152-53, 1165, 1166-67, 1168-69, 1184). Juror Tyler said Eck looked up Dausch's name on his iphone, "But he didn't see anything." (V1157-1158). Juror McKinney said "I heard a name (Carl Dausch) but that was it." (V16, R1149). Jurors Adkison and Thompson said Eck "had looked up something on (his) iphone ... and it said something about Carl had gone to DisneyWorld in two thousand and four with his family. And something about they had an argument." (V16, R1161–62; 1165). Juror Cassidy said Eck and Juror Weatherford told him that Dausch had been in Orlando at some point, that "there was some sort of altercation," and that Dausch "may have been in prison for a different charge." (V16, R1170-71). Weatherford told Cassidy that Dausch "most likely" had been in prison for rape. (V16, R1171). Juror Weatherford said he heard "a general conversation" that Dausch had been in Orlando and "that he was in jail before here." (V16, R1186, 1188).

each said that it would not affect their penalty phase verdict. The trial court, after observing the demeanor of the jurors, found any error harmless beyond a reasonable doubt through his citation to *Hamilton, supra*, as the basis for his denial of relief.

The testimony is undisputed that the internet search at issue took place in the jury room **after** the guilty verdict had been announced and before instructions were given to the jury about reporting for the penalty phase. It is also undisputed that that the information resulting from that search was that Dausch had a prior felony conviction, and that Dausch had made a trip to DisneyWorld when he was in Florida. The jury learned of Dausch's criminal past very soon, (V17, R1266-67) and there is absolutely no evidence anywhere to suggest that DisneyWorld was on his travel itinerary. Dausch's criminal record cannot be part of the harmless error analysis because that evidence was properly before the jury at the penalty phase. Because that is so, the **only** "improper" information at issue is the incorrect news report that had Dausch travelling to DisneyWorld. The only prejudice suggested from that incorrect information is the speculative suggestion that the jury might have "lost faith in the defense team" based on that incorrect report. That requires stacking inferences to an unreasonable degree. Since the jury had just sat through the trial and was privy to all of the

evidence, it is more likely (if one wishes to speculate) that the few jurors who were aware of the purported "DisneyWorld trip" would readily conclude that the media got their facts wrong. Under the circumstances of this case, which were heavily aggravated (and minimally mitigated) for sentencing purposes, this indiscretion by some members of the jury was harmless beyond a reasonable doubt. A speculative suggestion that the jury would have distrusted the defense team does not establish prejudice, especially when the jury is not exactly predisposed in the defendant's favor at the start of the penalty phase, having already convicted him of first degree murder. *Green v. Zant,* 738 F.2d 1529, 1542 (11th Cir. 1984) ("A defendant does not arrive at the penalty phase of a capital proceeding with a clean slate, and there is no point in pretending otherwise."). Dausch's claim of prejudice fails. In any event, as the trial court properly found after lengthy inquiry, the jurors were able to base their penalty phase recommendation solely on the evidence presented in court, and that there was no information about the defendant that did not come before the jury during the penalty phase. (V8, R1405-6).

In his brief, Dausch attempts to apply the standard for juror "misconduct and concealment" of information during *voir dire* to the distinct facts of this case. The *voir dire* standard is as follows:

The question of whether a juror has concealed material information during *voir dire* so as to warrant the juror's removal or the grant of a new trial is subject to the three-part *De La Rosa* test:

First, the complaining party must establish that the information is relevant and material to jury service in the case. Second, that the juror concealed the information during questioning. Lastly, that the failure to disclose the information was not attributable to the complaining party's lack of diligence.

De La Rosa v. Zequeira, 659 So. 2d 239, 241 (Fla. 1995). Although *De La Rosa* is a civil case, the three-part test also applies in criminal cases. *See Murray v. State*, 3 So. 3d 1108, 1121-22 (Fla. 2009); *Marshall v. State*, 664 So. 2d 302, 304 n. 2 (Fla. 3rd DCA 1995).

Nicholas v. State, 47 So. 3d 297, 313 (Fla. 2nd DCA 2010). The standard applicable to this case is the settled *Hamilton* standard set out above. In any event, the *De La Rosa* standard was never suggested to the trial court, was not argued or preserved by objection at trial, and cannot be raised for the first time on appeal. Therefore, the instant challenge is unpreserved and procedurally barred from appellate consideration. *Smith v. State*, 28 So. 3d 838, 863 (Fla. 2009) (*citing Perez v. State*, 919 So. 2d 347, 359 (Fla. 2005) (holding

that for an issue to be preserved for appeal, the *specific legal argument* or ground to be argued on appeal must have been presented to the lower court), *cert. denied*, 547 U.S. 1182, 126 S.Ct. 2359, 165 L.Ed.2d 285 (2006)) (italics in original); *Anderson v. State*, 863 So. 2d 169, 181 (Fla. 2003); *Evans v. State*, 808 So. 2d 92, 106 (Fla. 2001). Dausch's motion for new trial said that the trial court "erred in denying the Defendant's motion for mistrial." (V6, R1184). The record indicates that the only relief previously sought was the impaneling of a new penalty phase jury. (V16, R1190). Dausch never asked for a mistrial as to guilt, and cannot raise that claim for the first time here.[28] *Smith, supra; Anderson, supra; Evans, supra.*

V. THE DOUBLE JEOPARDY CLAIM

On pages 59-60 of his brief, Dausch says that he cannot stand convicted of first degree premeditated murder and aggravated battery. The aggravated battery conviction came as a result of the jury's finding him guilty of that lesser included offense of the charged offense of sexual battery with the use of a deadly weapon or great force. (V16, R1107, 1115-16). Florida law

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[28] Dausch's argument to the trial court was for a new penalty phase jury only. He did not ask for a mistrial as to guilt. (V16, R1195; V17, R1208).

provides that:

(4)(a) Whoever, in the course of one criminal transaction or episode, commits an act or acts which constitute one or more separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.

(b) The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent. Exceptions to this rule of construction are:

1. Offenses which require identical elements of proof.

2. Offenses which are degrees of the same offense as provided by statute.

3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.

§ 775.021, *Florida Statues*. Dausch does not claim that the statute does not govern his case, which turns on the applicability (or, more accurately, the non-applicability) of the statutory exceptions. No objection to the sentences imposed

was raised below, and, because that is so, the claim is not preserved for review. And, the issue is not one of "fundamental error" since none of the statutory *Blockburger* exceptions are applicable.

In *Valdes*, which involved convictions for two firearms-related offenses, this Court said:

Under the approach we adopt today, dual convictions for the two offenses at issue in this case, discharging a firearm from a vehicle within 1000 feet of a person in violation of section 790.15(2), *Florida Statutes*, and shooting into an occupied vehicle in violation of section 790.19, *Florida Statutes*, do not satisfy the second statutory exception because the two offenses are found in separate statutory provisions; neither offense is an aggravated form of the other; and they are clearly not degree variants of the same offense. This is in contrast to sections 790.15(1), 790.15(2), and 790.15(3), which are explicitly degree variants of the same offense. We thus approve the result reached by the Third District in *Valdes* in concluding that dual convictions for these two offenses do not violate the prohibition against double jeopardy.

Valdes v. State, 3 So. 3d 1067, 1077-1078 (Fla. 2009). (footnotes omitted). First degree murder and aggravated battery, like the firearms offenses in *Valdes*, fall into none of the three exceptions. They do not require identical elements of

proof -- first degree premeditated murder requires the death of the victim caused by the premeditated criminal act of the defendant, §782.04(1)(a), and aggravated battery requires an intentional touching against the will of the victim that causes great bodily harm or permanent disability or disfigurement. §784.045, *Fla. Stat. But see, Mills v. State,* 476 So. 2d 172 (Fla. 1985); *State v. Sturdivant,* 94 So. 3d 434, 441 (Fla. 2012).[29]

VI. THE HEINOUSNESS AGGRAVATOR

On pages 61-65 of his brief, Dausch says that the State did not prove the "heinous, atrocious and [sic] cruel"[30] aggravating factor beyond a reasonable doubt. Whether an aggravating circumstance exists is a factual finding reviewed under the competent, substantial evidence standard. When reviewing aggravating factors on appeal, this Court, in *Alston v. State,* 723 So. 2d 148, 160 (Fla. 1998), reiterated the standard of

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[29] *Sturdivant, supra,* says that the underlying felony in *Mills* was aggravated battery. While Mills was convicted of that offense, the felony supporting his felony-murder conviction was burglary, the correctness of which is unchallenged and unaffected by anything at issue here. *Mills* is not a square "felony-murder/merger" case.

[30] The heinousness aggravator is defined in the disjunctive: heinous, atrocious **or** cruel. To describe it in the conjunctive, as Dausch does, can, deliberately or unintentionally, re-write the statute to change the meaning of the aggravator and alter the elements of proof.

review, noting that it "is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt -- that is the trial court's job. Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding," *quoting Willacy v. State*, 696 So. 2d 693, 695 (Fla.), *cert. denied*, 522 U.S. 970 (1997). Dausch cannot make the showing he is required to make.

Dausch says that the proof of the heinousness aggravator is circumstantial, but does not explain why that is so. This Court has said, repeatedly, that:

[This Court has] upheld the HAC aggravator in numerous cases involving beatings. *Lawrence v. State*, 698 So. 2d 1219, 1221-22 (Fla. 1997) ("We have consistently upheld HAC in beating deaths."); *see also, e.g., Colina v. State*, 634 So. 2d 1077, 1081 (Fla. 1994) (holding that the HAC aggravator applied where one of the defendants hit the victim, who fell to the ground, and when that victim attempted to get to his feet, the other defendant hit him several times in the back of the head with a tire iron); *Owen v. State*, 596 So. 2d 985, 990 (Fla. 1992) (**upholding the HAC aggravator where the sleeping victim was struck on the head and face with five hammer blows**); *Lamb v.*

State, 532 So. 2d 1051, 1053 (Fla. 1988) (upholding the HAC aggravator where the defendant struck the victim six times in the head with a claw hammer, pulled his feet out from under him, and kicked him in the face); *Heiney v. State*, 447 So. 2d 210, 216 (Fla. 1984) (**upholding the HAC aggravator where seven severe hammer blows were inflicted on the victim's head**).

Buzia v. State, 926 So. 2d 1203, 1212 (Fla. 2006). The Court has held:

It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies-the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

Hernandez v. State, 4 So. 3d 642, 668-69 (Fla. 2009) (*quoting State v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973)), *cert. denied*, --- U.S. ----, 130 S.Ct. 160, 175 L.Ed.2d 101 (2010). Further, "[t]he HAC aggravator focuses on the means and manner in which death is inflicted and the immediate circumstances surrounding the death." *Id.* at 669 (*quoting Brown v. State*, 721 So. 2d 274, 277 (Fla. 1998)).

Williams v. State, 37 So. 3d 187, 198 (Fla. 2010).

In its sentencing order, the trial court said:

The evidence at trial proved beyond a reasonable doubt that Adrian Mobley was bound, beaten, and stomped in the chest and head and left to die by the side of C.R. 475 during the middle of the night. The medical examiner testified as to the multiple blunt force injuries to Adrian Mobley's chest and head. Among the injuries found at the autopsy were nose fractures, hemorrhages to the eye sockets, scalp, brain swelling and a "stomping pattern" injury to the clavicle and neck area. Adrian Mobley's hands were bound by a sheet which was looped down to his legs and feet, thus restricting his movement. The medical examiner testified that the cause of death was cerebral edema and it would have taken several minutes for the victim to die. Clearly, the death of Adrian Mobley was deliberate and extraordinarily painful and, this, especially heinous, atrocious and [sic] cruel.

This Court finds that the evidence supports the conclusion that the Defendant's actions demonstrated a marked indifference to the suffering of Mr. Mobley.

(V8, R1408-9). Those findings are correct, and are supported by the evidence, which was that the victim died as a result of blunt force trauma to his head and chest, which resulted in asphyxia, **followed** by loss of consciousness, followed by death.

(V13, R442).[31] That evidence is unchallenged. Asphyxiation is the technical term for deprivation of oxygen to the brain, which can result from various means. In this case it resulted from compression of the airways, followed by unconsciousness. For analysis purposes, this is, as this Court is well aware, no different than death by strangulation, which is virtually by definition heinous, atrocious or cruel. *Orme v. State*, 25 So. 3d 536, 551 (Fla. 2009), *cert. denied*, --- U.S. ----, 130 S.Ct. 3391, 177 L.Ed.2d 309 (2010); *Stephens v. State*, 975 So. 2d 405, 423 (Fla. 2007); *Hitchcock v. State*, 578 So. 2d 685, 693 (Fla. 1990) ("[s]trangulations are nearly *per se* heinous.").

The victim in this case was subjected to a brutal beating, which led to his death by asphyxiation, as the evidence showed. Because that is so, the beating, coupled with the loss of consciousness from oxygen deprivation, doubly establishes the heinousness aggravator. Beating a victim to death, like strangulation, is virtually *per se* heinous, atrocious, or cruel.

In an effort to avoid the heinousness aggravator, Dausch focuses on the lack of defensive wounds on Adrian Mobley's body. That argument ignores that the victim was tied up ("trussed up"

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[31] The cerebral edema discussed by the trial court was the result of the obstruction to the flow of blood to the brain caused by the injuries to the neck. (V13, R441).

is perhaps more descriptive) in such a fashion that he could not have defended himself. And, there would have been no reason at all to restrain an unconscious person in that fashion. Moreover, due to early-stage decomposition, it was not possible to determine whether there were marks from the restraints on the victim's arms. (V13, R464-5). The conclusion that follows from these facts is that the victim was tied up, and thereby rendered completely defenseless, before Dausch inflicted the various injuries.[32] Coupled with the fact that asphyxia led to loss of consciousness, this case is, analytically, the same as strangulation of a conscious victim. It is heinous, atrocious or cruel, and there is no basis for disturbing this aggravating circumstance.

VII. THE "UNFOUND AGGRAVATION" JURY INSTRUCTION CLAIM

On pages 66-69 of his brief, Dausch says that the trial court should not have instructed the jury on the "committed for pecuniary gain" and "in the course of a robbery" aggravating circumstances. Florida law is settled that:

a trial court is required to instruct a jury on an aggravating circumstance if the evidence adduced during trial is

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[32] The various injuries are consistent with the victim lying on the ground when the injuries were inflicted. This, in turn, is consistent with the victim having been tied up before he was beaten.

legally sufficient to support a finding of that circumstance. *See Welch v. State*, 992 So. 2d 206, 215-16 (Fla. 2008) ("[T]he trial court properly instructed the jury on CCP because the State introduced credible and competent evidence in support of the aggravator."); *Hunter v. State*, 660 So. 2d 244, 252 (Fla. 1995) ("**A judge should instruct a jury only on those aggravating circumstances for which credible and competent evidence has been presented.**"); *Bowden v. State*, 588 So. 2d 225, 231 (Fla. 1991) ("Where, as here, evidence of a mitigating or aggravating factor has been presented to the jury, an instruction on the factor is required.") (emphasis supplied); *Stewart v. State*, 558 So. 2d 416, 420 (Fla. 1990) (**stating that trial court is required to instruct on all aggravating circumstances "for which evidence has been presented"**). Therefore, a trial court's ultimate determination that an aggravating circumstance was not proven beyond a reasonable doubt does not necessitate a conclusion that there was insufficient evidence to allow the jury to consider the factor for purposes of the advisory sentence. *See Davis v. State*, 928 So. 2d 1089, 1132 (Fla. 2005) (*citing Pace v. State*, 854 So. 2d 167, 181 (Fla. 2003) (*quoting Bowden*, 588 So. 2d at 231)).

Miller v. State, 42 So. 3d 204, 226-227 (Fla. 2010). (emphasis added). In this case, as the trial court recognized, the evidence was that the victim's wallet was missing when he

was found, and his vehicle was missing. (V8, R1410). The vehicle was found in Tennessee, and the wallet was found empty of money on Interstate 75, just north of the Georgia line. *Id.* The evidence also showed that Dausch resided in Indiana, was vacationing in Florida without his own means of transportation, and that he parted company with the people who had brought him to Florida. *Id.* That evidence is sufficient to support instructing the jury on both the "pecuniary gain" and the "during a robbery" aggravating factors.[33]

In any event, the issue contained in Dausch's brief was not raised at trial. (V17, R1350-65). No issue is preserved for review. *Smith, supra; Anderson, supra; Evans, supra.*

VIII. THE WEIGHT GIVEN MITIGATION CLAIM

On pages 70-73 of his brief, Dausch says that the sentencing court did not give enough weight to his purported, non-statutory, "brain damage" mitigation. With respect to mitigating factors, this Court, in *Campbell v. State*, 571 So. 2d 415 (Fla. 1990), established the following standards: 1) whether a particular circumstance is truly mitigating in nature is a

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[33] In his brief, Dausch relies on *United States v. Friend*, 92 F. Supp. 534, 541-42 (E.D. Va. 2000). That case from a federal trial court has no precedential value. And, it is an invalid comparison, since the issue in that federal death penalty prosecution concerned **non-statutory aggravation**, something that is wholly foreign to Florida law.

question of law that is subject to *de novo* review; 2) whether a mitigating circumstance has been established **by the evidence in a given case** is a question of fact subject to the competent substantial evidence standard; and finally 3) the weight assigned to a mitigating circumstance is within the trial court's discretion and subject to the abuse of discretion standard. *See also Kearse v. State*, 770 So. 2d 1119, 1134 (Fla. 2000) (whether a particular mitigating circumstance exists and the weight to be given to it are matters within the discretion of the sentencing court); *Trease v. State*, 768 So. 2d 1050, 1055 (Fla. 2000) (receding in part from *Campbell* and holding that, though a court must consider all the mitigating circumstances, it **may assign "little or no" weight** to a particular mitigator); *Mansfield v. State*, 758 So. 2d 636 (Fla. 2000) (the trial court may reject a claim that a mitigating circumstance has been proven so long as the record contains competent substantial evidence to support rejecting the mitigator). The sentencing court is not **required** to accept a proposed mitigating factor:

A trial court may properly reject a proposed mitigating circumstance where there is competent, substantial evidence in the record to support its rejection. *See Lebron*, 982 So. 2d at 660. As we noted in *Coday*, "[e]ven expert opinion evidence may be rejected if that evidence cannot be reconciled with other evidence in the case." 946 So. 2d at 1003. In the present case,

there was sufficient evidence in the record to support the rejection of both [statutory] mitigating factors. We therefore affirm the trial court's decision to reject this mitigation.

Ault v. State, 53 So. 3d 175, 189 (Fla. 2010).

This is not a case in which the claim is that the trial court erroneously did not find a statutory mitigator, nor is it a case in which the claim is that the sentencing court erroneously gave "no weight" to a proposed non-statutory mitigator. Instead, the sentencing court discussed the mental state mitigation offered, and concluded that there was not any testimony or evidence to indicate or opine the Defendant suffered from mental illness or organic brain damage at the time of the commission of the murder in this case. **nonetheless, our law does establish that *all* evidence of mental disturbance or impairment is relevant if it may have some bearing on the crime or the defendant's character.** *Walls v. State*, 641 So. 2d 381 (Fla. 1994).

Consequently, this mitigator is given minimal weight.

(V8, R1412). (italics in original; emphasis added). There is no abuse of discretion in the weight given the proposed mitigator, and, in this case, as in *Ault*,

The trial court set out the evidence, determined that the circumstance was both proved by the evidence and mitigating, and assigned weight. This approach complies with the requirements set out by this Court.

Ault v. State, 53 So. 3d at 195. There is no showing, and no citation to the record, to support the idea that Dausch was "suffering" from "brain damage" at the time he killed Adrian Mobley in 1987. Further, and more importantly, there is not, and has never been, any suggestion that the murder committed by Dausch was "impulsive" -- the restraining of the victim, followed by beating him to death, followed by disposal of the body, followed by flight from the scene to Indiana demonstrates anything but an "impulsive" crime. And, if Dausch was as impulsive and "explosive" as he now claims (*Initial Brief* at 24), he would not be the "perfect example of a person" bettering himself in prison. *Id.* There is no evidence anywhere in the record to support the claim that Dausch is "explosive," and, moreover, there is no evidence that whatever Dausch's mental status was at the time of trial accurately mirrors his mental status in 1987. The evidence does not exist to support that stacking of inferences, and it appears that Dausch got the benefit of the doubt when the trial court gave any weight at all to this proposed non-statutory mitigation. Given the inconsistencies in the testimony, the inability to connect Dausch's "current mental status" with his mental status at the

time of the crime,[34] and the fact that the behavioral correlate (impulsiveness) of the claimed brain damage has apparently never been reported, there is no abuse of discretion in assigning minimal weight to this evidence. In the end, all that remains is general testimony that Dausch has a personality disorder not-otherwise-specified, and has used drugs that may cause brain damage. He received a windfall when the trial court considered this as mitigation. There is no basis for relief.

IX. THE DEATH SENTENCE IS PROPORTIONATE

On pages 74-78 of his brief, Dausch says that his death sentence is not "proportionate" to other death sentences. Whether an aggravating circumstance exists is a factual finding reviewed under the competent substantial evidence standard. When reviewing aggravating factors on appeal, this Court in *Alston v. State*, 723 So. 2d 148, 160 (Fla. 1998), reiterated the standard of review, noting that it "is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt -- that is the trial court's job. Rather, our task on appeal is to review the record to determine whether the trial court applied the

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[34] Apparently Dausch did not admit involvement in the murder to his mental state expert. If he denies the offense, as it appears he has, that fact hampers assessment of his mental state at the time of the offense.

right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding," *quoting Willacy v. State*, 696 So. 2d 693, 695 (Fla.), *cert. denied*, 522 U.S. 970 (1997). With respect to mitigating factors, this Court, in *Campbell v. State*, 571 So. 2d 415 (Fla. 1990), established the following standards: 1) whether a particular circumstance is truly mitigating in nature is a question of law that is subject to *de novo* review; 2) whether a mitigating circumstance has been established **by the evidence in a given case** is a question of fact subject to the competent substantial evidence standard; and finally 3) the weight assigned to a mitigating circumstance is within the trial court's discretion and subject to the abuse of discretion standard. *See also Kearse v. State*, 770 So. 2d 1119, 1134 (Fla. 2000) (whether a particular mitigating circumstance exists and the weight to be given to it are matters within the discretion of the sentencing court); *Trease v. State*, 768 So. 2d 1050, 1055 (Fla. 2000) (receding in part from *Campbell* and holding that, though a court must consider all the mitigating circumstances, it **may assign "little or no" weight** to a particular mitigator); *Mansfield v. State*, 758 So. 2d 636 (Fla. 2000) (the trial court may reject a claim that a mitigating circumstance has been proven so long as the record contains competent substantial evidence to support rejecting the mitigator).

In this case, there are two weighty aggravators, both of which were given great weight by the sentencing court. Other than dissatisfaction with the result, Dausch has offered no reason to dispute the weight given the aggravating factors.[35] Likewise, no statutory mitigation was found, and no issue related to those findings is raised. Instead, the sentencing court found various non-statutory mitigation -- the most arguably significant of this mitigation was Dausch's "history of mental illness," but there was no compelling testimony to establish that this "mental state" evidence, to the extent that it was established at all, existed at the time of the offense. The court gave that mitigation "minimal weight," which is what it was due. Likewise, the remaining proposed mitigation was given weight -- it simply was not substantial enough to outweigh two of the weightiest aggravators in Florida's sentencing structure. *Heyne v. State*, 88 So. 3d 113, 126 (Fla. 2012). This case is similar to, but more aggravated than, *Bright v. State*, 90 So. 3d 249, 262 (Fla. 2012) (HAC and prior violent felony given great weight against one statutory mitigating circumstance, extreme emotional or mental disturbance, and

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[35] In his brief, Dausch suggests that this case is like another case which was a "spontaneous fight." That description is inapplicable here, where the victim was restrained before being beaten to death.

nineteen nonstatutory mitigating circumstances), *Blackwood v. State,* 777 So. 2d 399, 412-13 (Fla. 2000) (death sentence proportionate for strangulation murder where trial court found HAC aggravator, one statutory mitigator, and eight nonstatutory mitigators), and *Spencer v. State,* 691 So. 2d 1062, 1065-1066 (Fla. 1996).

Qualitatively, Dausch killed Adrian Mobley by inflicting extensive blunt force trauma on him -- in the end, that blunt force trauma led to death by asphyxiation. There can be no argument that the beating inflicted on the victim, regardless of its precise mechanism, was anything but brutal in the extreme. The photographs of the victim speak for themselves, and establish that this murder was especially heinous, atrocious or cruel. Likewise, there is no argument against the prior violent felony aggravator and its applicability here.

In contrast, there was no statutory mitigation found, and the non-statutory mitigation is not compelling. Even coupled with the jury's sentencing recommendation, which the sentencing court did, there is not enough to offset the aggravation present, which, in the words of the trial court, "far outweigh[s] the mitigation presented." (V8, R1416). Dausch's death sentence is proportionate, and should not be disturbed.

X. THE "SPECIAL REQUESTED JURY INSTRUCTIONS" CLAIM

On pages 79-84 of his *Initial Brief,* Dausch argues that the

trial court committed error when it denied his various "special requested jury instructions." The standard of review applied to the decision not to give a jury instruction is whether the trial court abused its discretion. *James v. State*, 695 So. 2d 1229, 1236 (Fla. 1997) (noting that a trial court has wide discretion in instructing the jury). For the reasons set out below, there is no error.

Dausch requested modified jury instructions on the following matters:

1. the death penalty is reserved for only the most aggravated cases;

2. the jury is allowed to exercise mercy;

3. the heinous, atrocious or cruel aggravator in vague.

These issues are foreclosed as a matter of settled Florida law, and have been rejected by this Court numerous times -- the standard jury instructions are correct, and were properly given in this case. *Floyd v. State*, 850 So. 2d 383, 400-401 (Fla. 2002); *Darling v. State*, 808 So. 2d 145, 162-63 (Fla. 2002); *Card v. State*, 803 So. 2d 613, 624 (Fla. 2001); *James v. State*, 695 So. 2d 1229, 1236 (Fla. 1997); *Ferrell v. State*, 653 So. 2d 367, 370 (Fla. 1995). The jury instruction claim has no legal basis, and all relief should be denied.

XI. THE *RING V. ARIZONA* CLAIM

On pages 85-86 of his brief, Dausch argues the validity of

Florida's capital sentencing procedures. Regardless of the nuances to the claim, the fact remains that Dausch had a prior violent felony conviction and that conviction takes his case outside any possible reach of *Ring*:

Kocaker asserts that Florida's capital sentencing scheme is unconstitutional because the judge, rather than the jury, determines the sentence, and that the jury's verdict as to the aggravating circumstances need not be unanimous. Kocaker argues that the 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). We deny relief on this claim as this Court has consistently rejected similar challenges to Florida's capital sentencing scheme. *See, e.g., Rigterink v. State*, 66 So. 3d 866, 896 (Fla. 2011); *Frances v. State*, 970 So. 2d 806, 822 (Fla. 2007); *Hodges v. State*, 885 So. 2d 338, 359 nn. 9-10 (Fla. 2004). Furthermore, Ring does not apply to cases where the prior violent felony aggravator exists. *See Hodges*, 55 So. 3d at 540.

Kocaker v. State, 38 Fla. L. Weekly S8 (Fla. Jan. 3, 2013).

This Court has repeatedly rejected this claim where, as here, the prior violent felony conviction has been applied. *Martin v. State*, 37 Fla. L. Weekly S563 (Fla. Sept. 20, 2012); *Altersberger v. State*, 103 So. 3d 122, 126, n.4 (Fla. 2012); *McGirth v State*, 48 So. 3d 777, 796 (Fla. 2010); *Miller v.*

State, 42 So. 3d 204, 216-219 (Fla. 2010); *State v. Steele*, 921 So 2d 538 (Fla. 2005). Dausch has not provided any new law or argument to compel a different result. His *Ring* claim is foreclosed by binding precedent, and there is no legal basis for relief of any sort.

CONCLUSION

Based upon the foregoing, the State submits that Dausch's conviction and sentence of death should be affirmed in all respects.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by E-MAIL on February 25th, 2013: Nancy Ryan Ryan.Nancy@pd7.org, and Christopher S. Quarles at Quarles.chris@pd7.org, young.kathypd7.org.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,

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