IN THE SUPREME COURT OF FLORIDA

KENNETH RAY JACKSON,

Appellant,

v. **Case No. SC13-1232**
Lower Tribunal No. 07-CF-019884A
STATE OF FLORIDA, **Death Penalty Case**

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF CITATIONS iii

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF ARGUMENT 18

ARGUMENT 22

ISSUE I 22

WHETHER FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL UNDER RING V. ARIZONA? (IB ISSUES I AND IX: RESTATED) 22

ISSUE II 24

WHETHER § 913.08(1)(A), FLORIDA STATUTES, IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED TO APPELLANT AND WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT ADDITIONAL PEREMPTORY AND CAUSE CHALLENGES DURING JURY SELECTION? (RESTATED) 24

ISSUE III 49

WHETHER THE TRIAL COURT ERRED IN EXCLUDING TESTIMONY REGARDING QEEG TESTING DURING THE SPENCER HEARING? (RESTATED) 49

ISSUE IV 61

WHETHER THE TRIAL COURT WAS WITHIN ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR MISTRIAL WHEN A STATE WITNESS REFERENCED APPELLANT HAVING BEEN "RELEASED" BUT DID NOT STATE WHAT APPELLANT HAD BEEN RELEASED FROM? (RESTATED) 61

ISSUE V 67

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING THE INTRODUCTION OF PHOTOGRAPHS OF THE VICTIM'S BODY WHICH SHOWED POST-MORTEM BURN DAMAGE WHERE THE MEDICAL EXAMINER TESTIFIED THAT EACH OF THE PHOTOGRAPHS WAS NECESSARY TO ASSIST THE JURY IN UNDERSTANDING HER TESTIMONY AND WHERE THE

STATE ALLEGED APPELLANT ATTEMPTED TO BURN THE VICTIM'S BODY TO CONCEAL EVIDENCE OF HIS CRIMES? (RESTATED) 67

ISSUE VI 76

WHETHER THE TRIAL COURT ERRED IN GIVING THE COLD, CALCULATED AND PREMEDITATED INSTRUCTION TO THE JURY WHERE THE STATE PRESENTED EVIDENCE SUPPORTING THE INSTRUCTION? (RESTATED) 76

ISSUE VII 81

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE TO PRESENT EXPERT TESTIMONY DURING THE PENALTY PHASE TO REBUT APPELLANT'S CLAIM THAT HIS MALADAPTATION WAS THE RESULT OF CHILDHOOD ABUSE? (RESTATED) 81

ISSUE VIII 86

WHETHER THE "DURING THE COURSE OF A FELONY" AND THE "HEINOUS, ATTROCIOUS, AND CRUEL" AGGRAVATORS ARE UNCONSTITUTIONAL? (RESTATED) 86

STATEMENT REGARDING SUFFICIENCY OF THE EVIDENCE 92

STATEMENT REGARDING PROPORTIONALITY 93

CONCLUSION 98

CERTIFICATE OF SERVICE 98

CERTIFICATE OF FONT COMPLIANCE 98

TABLE OF CITATIONS

Cases

Abdool v. State,
53 So. 3d 208 (Fla. 2010) 95

Almeida v. State,
748 So. 2d 922 (Fla. 1999) 73

Alston v. State,
723 So. 2d 148 (Fla. 1998) 79

Amoros v. State,
531 So. 2d 1256 (Fla. 1988) 71

Atwater v. State,
626 So. 2d 1325 (Fla. 1993) 90

Banks v. State,
46 So. 3d 989 (Fla. 2010) 49

Bearden v. State,
161 So. 3d 1257 (Fla. 2015) 86

Blanco v. State,
452 So. 2d 520 (Fla. 1984) 82

Blanco v. State,
706 So. 2d 7 (Fla. 1997) 87

Boyd v. State,
910 So. 2d 167 (Fla. 2005) 67, 68, 96

Brant v. State,
21 So. 3d 1276 (Fla. 2009) 97

Brim v. State,
695 So. 2d 268 (Fla. 1997) 49

Brown v. State,
721 So. 2d 274 (Fla. 1998) 90

Bullis v. State,
734 So. 2d 463 (Fla. 5th DCA 1999) 36

Busby v. State,
894 So. 2d 88 (Fla. 2004) 27, 34, 36, 44

Buzia v. State,
926 So. 2d 1203 (Fla. 2006) 77, 78, 79, 92

Card v. State,
803 So. 2d 613 (Fla. 2001) 23

Carpenter v. State,
785 So. 2d 1182 (Fla. 2001) 77

Carter v. State,
115 So. 3d 1031 (Fla. 4th DCA 2013) 84, 85

Chicago Title Ins. Co. v. Butler,
770 So. 2d 1210 (Fla. 2000) 26

Conde v. State,
860 So. 2d 930 (Fla. 2003) 34, 45, 46

Crist v. Ervin,
56 So. 3d 745 (Fla. 2010) 26

Czubak v. State,
570 So. 2d 925 (Fla. 2007) 71

Daubert v. Merrill Dow Pharmaceuticals, Inc.,
509 U.S. 579 (1993) 15, 56, 57, 58

Davis v. State,
703 So. 2d 1055 (Fla. 1997) 97

Doorbal v. State,
893 So. 2d 464 (Fla. 2008) 33, 87

Douglas v. State,
878 So. 2d 1246 (Fla. 2004) 67, 70

England v. State,
940 So. 2d 389 (Fla. 2006) 62

Evans v. State,
808 So. 2d 92 (Fla. 2001) 96

Fla. Emergency Physicians-Kang and Assn., M.D., P.A. v. Parker,
800 So. 2d 631 (Fla. 5th DCA 2001) 89

Fletcher v. State,
__ So. 3d __, 2015 WL 3887475 (Fla. June 25, 2015) 63, 64

Florida Dept. of Revenue v. City of Gainesville,
918 So. 2d 250 (Fla. 2005) 26

Floyd v. State,
808 So. 2d 175 (Fla. 2002) 70

Frances v. State,
970 So. 2d 806 (Fla. 2007) 22, 31, 62

Francis v. State,
808 So. 2d 110 (Fla. 2001) 89, 90, 91

Frye v. United States,
293 F. 1013 (D.C. Cir. 1923) ..... passim

General Elec. Co. v. Joiner,
522 U.S. 136 (1997) 57

Geralds v. State,
674 So. 2d 96 (Fla. 1996) 97

Glynn v. State,
787 So. 2d 203 (Fla. 4th DCA 2001) 82

Gonzalez v. State,
136 So. 3d 1125 (Fla. 2014) 22

Goodwin v. State,
751 So. 2d 537 (Fla. 1999) 74

Gosciminski v. State,
132 So. 3d 678 (Fla. 2013) 52, 90, 93

Govt. of the Virgin Islands v. Hodge,
359 F.3d 312 (3d Cir. 2004) 28

Gudinas v. State,
879 So. 3d 616 (Fla. 2004) 22

Guzman v. State,
721 So. 2d 1155 (Fla. 1998) 89

Hamilton v. State,
703 So. 2d 1038 (Fla. 1997) 62

Harris v. State,
843 So. 2d 175 (Fla. 2002) 69

Heath v. State,
3 So. 3d 1017 (Fla. 2009) 29

Henderson v. State,
463 So. 2d 196 (Fla. 1985) 70

Hertz v. State,
803 So. 2d 629 (Fla. 2001) 72, 73

Hurst v. Florida,
__ U.S. __, 135 S. Ct. 1531 (2015) 18, 22, 23, 24

Hurst v. State,
147 So. 3d 435 (Fla. 2014),
cert. granted, 135 S. Ct. 1531 (2015) 23

In re Breast Implant Litigation,
11 F. Supp. 1217 (D. Colo. 1998) 56

Israel v. State,
837 So. 2d 381 (Fla. 2002) 23

Jackson v. State,
545 So. 2d 260 (Fla. 1989) 70, 71

Jackson v. State,
648 So. 2d 85 (Fla. 1994) 78

Jackson v. State,
983 So. 2d 562 (Fla. 2008) 74

James v. State,
453 So. 2d 786 (Fla. 1984) 23

Johnson v. Louisiana,
406 U.S. 356 (1972) 23

Johnson v. State,
660 So. 2d 637 (Fla. 1995) 87

Johnson v. State,
795 So. 2d 82 (Fla. 5th DCA 2000) 89

Johnson v. State,
969 So. 2d 938 (Fla. 2007) 96

Johnston v. State,
863 So. 2d 271 (Fla. 2003) 97

Kopsho v. State,
959 So. 2d 168 (Fla. 2007) 42, 48

Kumho Tire Co., Ltd. v. Carmichael,
526 U.S. 137 (1999) 57, 58

Larkins v. State,
655 So. 2d 95 (Fla. 1995) 70

Level 3 Comunications, LLC v. Jacobs,
841 So. 2d 447 (Fla. 2003) 27

Lite v. State,
617 So. 2d 1058 (Fla. 1993) 28, 29

Mansfield v. State,
758 So. 2d 636 (Fla. 2000) 96

Mendoza v. State,
700 So. 2d 670 (Fla. 1997) 36

Mendoza v. State,
87 So. 3d 644 (Fla. 2011) 56

Miller v. State,
42 So. 3d 204 (Fla. 2010) 93

Miller v. State,
980 So. 2d 1092 (Fla. 2d DCA 2008) 56

Montgomery v. State,
69 So. 3d 1023 (Fla. 5th DCA 2011) 87

Orme v. State,
25 So. 3d 536 (Fla. 2009) 61

Overton v. State,
801 So. 2d 877 (Fla. 2001) 40, 43

Oyola v. State,
99 So. 3d 431 (Fla. 2012) 82, 86

Parker v. State,
904 So. 2d 370 (Fla. 2005) 23

Patrick v. State,
104 So. 3d 1046 (Fla. 2012) 77

Peavy v. State,
442 So. 2d 200 (Fla. 1983) 90

Phillips v. State,
807 So. 2d 713 (Fla. 2d DCA 2002) 30

Philmore v. State,
820 So. 2d 919 (Fla. 2002) 73

Ponticelli v. Sec'y, Fla. Dept. of Corr.,
690 F.3d 1271 (11th Cir. 2012) 59

Porter v. McCollum,
558 U.S. 30 (2009) 59

Ramirez v. State,
810 So. 2d 836 (Fla. 2001) 52, 59

Rigterink v. State,
66 So. 3d 866 (Fla. 2011) 95

Ring v. Arizona,
536 U.S. 584 (2002) 18, 22, 23, 24

Robards v. State,
112 So. 3d 1256 (Fla. 2013) 23

Roper v. Simmons,
543 U.S. 551 (2005) 29, 30

Ross v. Schrantz,
1995 WL 254409 (Minn. App. 1995) 56

Russ v. State,
73 So. 3d 178 (Fla. 2011) 94, 95

Sanchez v. State,
445 So. 2d 1 (Fla. 3d DCA 1984) 84

Scott v. Williams,
107 So. 3d 379 (Fla. 2013) 22

Serrano v. State,
64 So. 3d 115 (Fla. 2011) 95

Shere v. State,
742 So. 2d 215 (Fla. 1999) 33

Silvia v. State,
60 So. 3d 959 (Fla. 2011) 96

Sliney v. State,
699 So. 2d 662 (Fla. 1997) 95

Smith v. State,
__ So. 3d __, 2015 WL 4112423 (Fla. July 9, 2015) 62, 63

Southeastern Fisheries Assoc. v. Dept. of Natural Resources,
453 So. 2d 1351 (Fla. 1984) 88

Spencer v. State,
615 So. 2d 688 (Fla. 1993) ..... passim

State v. Burch,
545 So. 2d 279 (Fla. 4th DCA 1989) 88

State v. Catalano,
104 So. 3d 1069 (Fla. 2012) 86

State v. Delva,
575 So. 2d 643 (Fla. 1991) 74

State v. DiGuilio,
491 So. 2d 1129 (Fla. 1986) ..... passim

State v. Gad,
27 So. 2d 768 (Fla. 2d DCA 2010) 71

Steinhorst v. State,
412 So. 2d 332 (Fla. 1982) 85

Steverson v. State,
695 So. 2d 687 (Fla. 1997) 71, 72

Stokes v. State,
548 So. 2d 188 (Fla. 1989) 52

Tillman v. State,
471 So. 2d 32 (Fla. 1985) 59

Tran v. Hilburn,
948 P.2d 52 (Colo. App. 1997) 56

United States v. Martinez-Salazar,
528 U.S. 304 (2000) 27, 28, 30

Victorino v. State,
23 So. 3d 87 (Fla. 2009) 88

Welch v. State,
992 So. 2d 206 (Fla. 2008) 77, 78

Westerheide v. State,
831 So. 2d 93 (Fla. 2002) 28

Zack v. State,
911 So. 2d 1190 (Fla. 2005) 23

Other Authorities

§ 90.401, Fla. Stat. (2007) 82

§ 90.402, Fla. Stat. (2007) 82

§ 90.403, Fla. Stat. (2007) 71

§ 90.405(1), Fla. Stat. (2007) 84

§ 90.702, Fla. Stat. (2013)..... 15, 57, 58
§ 913.08(1)(a), Fla. Stat. (2007)..... passim
§ 913.10, Fla. Stat. (2007)..... 25
§ 924.051(7), Fla. Stat. (2007)..... 81
28 U.S.C. § 2244..... 59
Ch. 13-107, § 1, Laws of Fla. (2013)..... 57
Fla. Const. art. I, § 17..... 29
Fla. R. App. P. 9.210(b)(5)..... 89
Fla. R. Crim. P. 3.280(a)..... 75
Fla. R. Crim. P. 3.280(b)..... 76
Fla. R. Crim. P. 3.340(e)..... 28
Fla. R. Crim. P. 3.350..... 25
Fla. R. Crim. P. 3.350(c)..... 19, 31
Fla. R. Crim. P. 3.350(e)..... 30
Antiterrorism and Effective Death Penalty Act of 1996..... 60

STATEMENT OF THE CASE AND FACTS

Cuc Thu Tran lived with her two youngest sons in a trailer in the Grandview Mobile Home Park in Seffner. She worked at a nail salon Monday through Saturday 9:00 a.m. to 9:00 p.m., and Sunday noon to 6:00 p.m. Her limited spare time was spent with her sons; however, every morning before sunrise, Tran would jog down County Road 579 to the St. Francis of Assisi Catholic Church, a distance of about .3 of a mile, and back (V58/2892-93; V61/3508, 3510; V68/4266-68).

On September 13, 2007, Cuc Tran left her trailer at around 5:30 a.m. for her morning jog. She never returned. (V61/3215-19).

Luis Carrero worked at the Advance Auto Parts in Seffner located about a block from County Road 579. Carrero parked his blue van in front of the store in an attempt to sell it. He last saw the van around 9:30 p.m. on September 12 when he closed the store. When the assistant manager opened the store at 6:30 a.m. on September 13, the van was gone (V60/3124-31, 3138).

At approximately 5:45 a.m. on September 13, Bonnie Cramer was driving northbound on County Road 579. She got behind a blue van and was annoyed when it slowed to about five miles per hour. The van eventually pulled to the side of the road (V60/3166-70).

Robert Paugh's morning commute took him along Martin Luther King Boulevard [MLK] and County Road 579. Around 6:30 a.m., a

Chrysler van came "screaming" around a corner, ran a traffic light, cut Paugh off, and traveled westbound on MLK. The van proceeded down MLK and made an "erratic" right turn, crossing in front of another car and onto County Road 579. It then sped north onto the ramp for westbound Interstate 4 (V60/3192-3201).

At 7:03 a.m. on September 13, fire rescue responded to a vehicle fire on a vacant lot on Bullfrog Court in Gibsonton, approximately 12 miles away from the St. Francis Church. When the fire was extinguished, Cuc Tran's partially-burned body was found inside (V58/2824, 2840, 2845; V59/3008-09; V61/3270). The van belonged to Carrero and he did not give anyone his permission to take it (V60/3130-31).

At the St. Francis Church near the victim's home, there was a dry retention pond about six to seven feet lower than the elevation of the road. Cuc Tran's pants, socks, and shoes were found on the side of the berm leading into the retention area. There was a bloody, matted-down area in the grass a little larger than the size of a human head where investigators found one of Tran's hair rollers (V59/3017-19; V60/3093-94, 3107-08, 3121).

Although partially burned, Tran's body was well-enough protected because of its position in the van that her wounds remained intact. On Tran's right hand was an incision that appeared to be a defensive wound (V62/3320-26). There were two

incised (slicing) wounds on her neck: a 4.5 inch incised wound was closest to her face, and another incised wound was lower on her neck. In addition to the two incised wounds, there were four stab wounds which the medical examiner determined were inflicted after the incised wounds. One stab wound went through Tran's carotid artery and could have been fatal. Another stab wound went through Tran's internal jugular vein and could also have been a fatal wound. Another potentially fatal stab wound damaged Tran's cricoid cartilage and would have impacted her ability to speak or scream and could have caused asphyxiation (V62/3327-38, 3361). The stab wounds to Tran's jugular vein and carotid artery caused her to bleed out. She would have lost consciousness within seconds to several minutes of the infliction of the fatal wounds. The medical examiner opined that Tran was alive when she sustained the wounds and that all the wounds were inflicted around the same time. They were caused by a sharp instrument consistent with a knife. Lack of soot in her airway indicated Tran was already dead when the van was set on fire. A sexual assault kit was performed on Tran's body (V62/3341-51, 3353-57).

Over Appellant's objection and following a proffer, the trial court permitted the State to introduce photographs of Tran's autopsy which, along with the intact wounds, incidentally showed postmortem burn damage to her body (V20/3634-65; V61/3275-79, 3306-10).

Christina Winchester worked the 3:00 to 11:00 p.m. shift at the BP gas station at the corner of MLK and County Road 579 in Seffner. Appellant was a regular customer and often spent time talking with Winchester. On September 14, 2007, Appellant asked Winchester and another customer, William Driskell, whether they had heard "what happened." Winchester and Driskell did not know what Appellant was talking about. Appellant told them that a Vietnamese lady had been killed at County Road 579 and Clay Pit Road and that she had been burned in a van next to his grandmother's property in Gibsonton. Appellant said the van had been stolen from the auto parts store down the street. He told them the lady was someone who lived in the Grandview Mobile Home Park where Appellant also lived. Appellant said he had seen the lady out jogging before and that she was killed in the area where she would normally jog. He said her bloody clothes were found on Clay Pit Road and County Road 579 (V62/3404-09, 3465-71). Winchester told Corporal Morgan about the conversation when Morgan stopped by the gas station and mentioned he was investigating the incident (V62/3411-13, 3439-40). Law enforcement had not released such detailed information to the public in the days immediately following the murder (V70/4432).

Investigators soon learned that Appellant lived in the Grandview Mobile Home Park with Wally and Linda O'Neal in a trailer located 387 feet from the victim's trailer (V62/3441-

47). Linda O'Neal testified that Appellant was not home on the morning of September 13. He arrived at the trailer on foot between 1:00 and 1:30 p.m. that day (V65/3823-24, 3826; V66/3973-75).

Iris Williams lived near the intersection of U.S. 41 and Symmes Road in Gibsonton, approximately 2.5 miles from the location of the burning van. Williams knew Appellant through the O'Neals (V64/3784-85, 3789-90; V86/4268-69). On the morning of September 13, she was riding her bike on U.S. 41 when she encountered Appellant walking northbound. He told Williams that Linda O'Neal had locked him out and he needed a place to stay. She told him she did not have room for him at her place (V64/3797-99, 3801; V65/3823-24). When she arrived home that morning sometime between 7:30 and 9:00, she called Linda O'Neal about having seen Appellant because it was unusual to see him in the Gibsonton area and because he told her O'Neal had locked him out [1] (V64/3798-00; V65/3800-02).

Appellant was interviewed in Carabelle, Florida, on September 20, 2007. During the interview, officers obtained a DNA sample from Appellant (V64/3504-95). He initially denied being in Gibsonton on the day of the murder, but then admitted he might have been there. He also initially denied seeing Iris Williams

[1] According to O'Neal, Williams called her a few times starting at 7:30 a.m. (V65/3823-24).

(V67/4089, 4092-93, 4096-97). When he ultimately acknowledged being in Gibsonton, Appellant told the officers he rode there from Seffner on a bicycle and that it took him twelve hours to ride the bicycle back home (V67/4092-93, 4103). About two and a half hours into the interview, Appellant admitted that he saw Iris Williams at U.S. 41 and Symmes Road in Gibsonton. His explanation for being in the area was that he had gone to Williams's house to look for her (V67/4189-91; V68/4252-55). Appellant denied knowing anything about Cuc Tran. He was shown photographs of Tran and denied ever having seen her (V67/4121-22, 4169).

DNA extracted from the sperm cells present in Tran's sexual assault kit matched Appellant's DNA at all 13 loci. The odds of finding another person with Appellant's DNA profile were approximately one in 34 quadrillion Caucasians. In 2007, the earth's human population was about seven billion (V64/3643-45; V70/4527-4531).

Law enforcement interviewed Appellant for a second time on September 27, 2007, confronting him with the fact that his DNA was found on the victim. Appellant stated, "I ain't never met her." Appellant said, "I didn't do shit," and continued to maintain he did not know Tran (V68/4323-25, 4332). Appellant was arrested at the end of the September 27 interview (V68/4334). He was ultimately indicted for first-degree murder, sexual battery

with a deadly weapon or force likely to cause serious personal injury, second-degree arson of a conveyance, and grand theft of a motor vehicle (V6/868).

In 2008, Appellant was housed in the same jail pod with Antonio Gonzalez for a few months, and they talked frequently. According to Gonzalez, "Kenneth was a very talkative guy." Appellant told Gonzalez that prior to the crime, after talking to a friend at a convenience store, he went home but found himself locked out. Angry, he wandered around and then stole a van from Discount Auto Parts on MLK (V71/4561-67). Appellant said he rode around for a while, and then spotted the victim out on her morning jog. Appellant parked the van in the church parking lot, got out, held the victim at knifepoint, and raped her. Gonzalez testified, "He said after he raped her, she started going crazy and wild; screaming. So he stabbed her in the throat" (V71/4568-69). After that, Appellant put the victim in the van. He did not want to leave her near where he was living. "He took her to an area he was familiar with like Gibsonton or Riverview. And he was looking to dump the body, but he ended up eventually getting [the van] stuck." After unsuccessfully trying to free the van, Appellant set it on fire with a lighter (V71/4570-71).

Appellant was housed in the same "mod" with Michael Kennedy for a few months in 2010. They saw each other almost every day,

and Appellant told Kennedy about his case (V72/4675, 4677, 4680, 4683, 4686). Appellant said he stole a van from Discount Auto Parts on MLK and then drove to where Tran would be and waited. Appellant had been watching Tran and knew she would be exercising at that time (V72/4686-88). Appellant got Tran on the side of the road, and she begged him "not to do it, not to hurt her." Appellant told her to shut up or he would kill her. Appellant raped Tran on the side of the road. He told Kennedy, "I fucked her good" (V72/4688-89). Appellant told Kennedy he cut Tran's throat and stabbed her in the neck, demonstrating with a pencil how he did it. After he raped and stabbed Tran, Appellant put her in the back of the van and drove to a different location. When the van got stuck, he set it on fire to get rid of the evidence. "He said his dumb ass thought DNA would burn" (V72/4690-91). Appellant suggested he got caught because he had talked to a woman and told her "too many details about what happened" (V72/4693).

The jury convicted Appellant as charged on all counts, finding as to count one that Appellant was guilty of premeditated and felony murder (V11/1852-53).

At the penalty phase, the State presented brief victim impact evidence in the form of a statement from Tran's eldest son (V76/5164-70). The defense presented testimony from teachers and a school psychologist that Appellant had struggled academically

as a child and had such serious behavioral problems that he was placed in special programs for children with learning and emotional disabilities (V76/5175-76, 5191, 5178-83, 5193-95, 5220-21, 5232-35, 5251-56). When Appellant was twelve years old, his teacher had him evaluated pursuant to the Baker Act because of concerns that he wanted to commit suicide (V76/5177). Appellant's school attendance was good; however, he did not get along with other students, make friends, or form attachments (V76/5255-56).

The defense also presented expert testimony from psychologist Dr. Yolanda Leon. Dr. Leon reviewed Appellant's educational and medical records and interviewed various family members. She reviewed Appellant's psychosocial and developmental history and interviewed him twice (V77/5288-92). Appellant's mother Patricia Helms conceived Appellant when she was fourteen years old. When Appellant was six months old, his mother left him with his maternal grandmother and his grandmother’s boyfriend, Wally O'Neal. Appellant's biological father was not involved in his upbringing (V77/5294-95). According to Dr. Leon, Appellant experienced a "chaotic and dysfunctional family system that [was] likely to cause his inability to form attachments." He came from an impoverished background, was encouraged to steal from an early age, and had no role model for learning values or morals. She opined that there was also evidence that Appellant

was exposed to sexual abuse and that he was "tortured" as a child (V77/5304, 5321). School records suggested neglect in that Appellant had head lice and that he came to school dirty and wearing unwashed clothes (V77/5309-10). Family members related to Dr. Leon that Appellant reported being sexually abused by various family members including his mother's former husband and his grandmother's boyfriend, although Dr. Leon admitted there was no source of corroboration for Appellant's reports of sexual abuse (V77/5312-14).

Appellant told Dr. Leon that he once took an overdose of Ritalin that required hospitalization and that when he was in elementary school, he was Baker "Acted" for saying he wanted to die (V77/5315-16). There was evidence of alcohol and drug abuse in Appellant's environment during his childhood, and Appellant told Dr. Leon that he smoked marijuana at age five, started taking pills at age sixteen, and got crack cocaine from an aunt while still a minor (V77/5323-25). Appellant described engaging in self-injuring behaviors to relieve stress, including cutting himself. He also reportedly engaged in self-injuring behaviors or threats of such behaviors in jail, including inserting an object into his urethra, swallowing a razor blade, and threatening to break light bulbs in order to hurt himself. According to Dr. Leon, someone with Appellant's background would have "extremely poor" ability to regulate their emotions, and

Appellant exhibited characteristics of a personality disorder (V77/5316-19). Dr. Leon opined that due to his background, it was not surprising that Appellant had developed antisocial personality disorder (V77/5327, 5340).

Psychologist Dr. Steven Gold evaluated Appellant for the defense using the Adverse Childhood Experiences (ACE) protocol, which involves the assessment of ten negative experiences[2] that might impact a child. According to Dr. Gold, research shows that people who experience the types of trauma set forth in the ACE protocol have a greater likelihood of negative long-term psychological effects (V77/5381-84, 5386-87). After conducting interviews and reviewing Appellant's background, Dr. Gold determined that all the adverse factors listed in the ACE protocol were present in Appellant's childhood. Dr. Gold opined that it would not be "surprising for someone from this kind of background to develop a personality disorder" (V77/5404-05, 5420-22).

In rebuttal, and over Appellant's objection, the State

[2] These included childhood physical neglect; childhood emotional neglect; childhood physical abuse; childhood sexual abuse; childhood verbal abuse; growing up in a household where at least one member had a substance abuse problem; growing up in a household where a member was incarcerated during the subject's childhood; growing up in a household with domestic violence; growing up in a household where at least one member had serious mental illness, serious depression, or attempted suicide; and growing up in a home without one or both biological parents (V77/5390).

presented the testimony of Dr. Wade C. Myers, M.D., a board certified psychiatrist in general, childhood, adolescent, and forensic psychiatry[3] (V77/5438). Dr. Myers reviewed the sheriff's office investigation reports, depositions of Appellant's penalty phase witnesses and family members, Appellant's school records, and the recordings of Appellant's police interviews (V77/5540-41). Dr. Myers concluded that Appellant has antisocial personality disorder. According to Dr. Myers, "nobody knows" what causes antisocial personality disorder (V77/5544-45). Appellant's school records revealed a "pattern of behavior of him having trouble with following the rules, of being oppositional, of defying teachers, of being disrespectful, of saying demeaning things to other kids, sometimes bullying" (V77/5446).

Dr. Myers did not believe that any type of abuse or lack of nurturing caused Appellant to act violently in his adult life (V77/5452-53). To the contrary, there was evidence that, although Appellant's childhood was not perfect, he had family members who loved and cared for him. For example, Appellant's grandmother and her boyfriend Wally O'Neal never abandoned

[3] Appellant objected that Dr. Myers's testimony would only serve to emphasize that Appellant had antisocial personality disorder. The State argued that Dr. Myers would present testimony to rebut Dr. Leon's opinion that a person exposed to Appellant's background would necessarily be maladapted (V77/5370-73, 5435-37).

Appellant (V77/5453-54). During childhood, Appellant was in special education programs where he had teams of professionals "looking at him intensively," and there was no indication of reports of neglect or abuse to any child services agency. Dr. Myers testified: "That many professionals looking at him over a course of years, I think somebody somewhere if [abuse] was happening and was significant would have picked it up and called the state" (V77/5455-56). There were indications in Appellant's school records that he could behave and cooperate when he was doing something he liked to do, and there was no reliable documentation of sexual abuse (V77/5459-60). There were, however, indications that Appellant had symptoms of conduct disorder as a child (V77/5467-68).

At the conclusion of the penalty phase, the jury recommended by a vote of eleven to one that Appellant receive the death penalty (V78/5602-05).

For the Spencer[4] hearing, the defense sought to introduce results of a quantitative electroencephalogram [qEEG] conducted on Appellant by Dr. William Lambos on July 27, 2011. Through the use of qEEG, Dr. Lambos concluded Appellant had suffered severe blunt force or penetrating trauma to the head with severe impairment of the brain resulting in broad impairments in

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

cognitive functioning (V8/1386-V9/1416). The State objected, arguing that qEEG does not meet the threshold requirements for admissibility set forth in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) (V7/1056-V8/1197-1299 V9/1419). A three-day pretrial hearing was conducted addressing Appellant's motion to admit qEEG evidence. Prior to the Spencer hearing, the trial court issued its order excluding qEEG evidence from the hearing, finding that "[i]t is clear to this Court that qEEG testing is not generally accepted in the relevant scientific community as a diagnostic tool for the assessment of brain disorder and traumatic brain injury." The trial court found that qEEG did not meet the Frye standard and rejected Appellant's argument that qEEG is admissible regardless (V11/1962-63). At the Spencer hearing, the defense proffered the documents related to Appellant's qEEG analysis and the pre-trial hearing transcripts (V79/5613, 5622-26).

The State presented no additional evidence at the Spencer hearing. Appellant offered the testimony of his mother Patricia Helms. She testified that Appellant was born when she was only fifteen years of age. Appellant lived with his maternal grandmother from birth until he was fourteen, and lived with Helms from the ages of fourteen to sixteen (V79/5615-16). Appellant was a loving child who was close to his grandmother. He had a good relationship with Helms as well. He helped Helms

with the animals and with cleaning and cooking, and once made her a plaque that said "Love You Mom." Appellant took care of his mother when she injured her back. He was protective of his younger sister, and they played together (V79/5617-21).

Prior to the sentencing hearing, the defense filed a motion for new trial. Appellant contested the verdict based, *inter alia*, on the trial court's: (1) denial of various challenges for cause during jury selection; (2) denial of defendant's motion in limine to exclude victim photographs; (3) refusal to declare mistrial based on Linda O'Neal's statement that the defendant had been "released;" and (4) exclusion of testimony related to qEEG analysis during the Spencer hearing (V17/3006-18). The trial court denied the motion for new trial by written order filed May 17, 2013 (V17/3023-25).

The sentencing hearing was held on June 5, 2013. At that time, Appellant filed a motion asking the trial court to reconsider the qEEG evidence because, effective July 1, 2013, §90.702, Florida Statutes (2013), would be revised to adopt the analysis announced in Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579, 597 (1993). Defense counsel asserted that no new evidence would be offered to support the qEEG evidence under the Daubert standard, and again noted that the defense had sought to have the qEEG results considered only as part of the Spencer hearing. The State objected, arguing that the Daubert

standard was not in effect yet (V81/5636-38). Recalling that a full hearing had been held on the matter prior to trial, the court declined to reconsider its prior ruling on the qEEG evidence in light of the prospective change in the statute (V17/3027-31, 3106-07; V81/5638-39).

The trial court followed the jury's eleven-to-one recommendation and sentenced Appellant to death for Tran's murder (V17/3034-56; V81/5639-43). The court found two aggravating factors: (1) the murder was committed while Appellant was engaged in commission of sexual battery; and (2) the murder was especially heinous, atrocious, or cruel. The court accorded great weight to both circumstances and found they were not duplicative (V17/3037-40). The court opined that the cold, calculated, and premeditated aggravating factor advanced by the State was insufficiently proven (V17/3041-42).

The court made the following findings as to the mitigating factors asserted by the defense: (1) dysfunctional family background that resulted in an environment of instability, given moderate weight; (2) psychological trauma due to deprivation in parental nurturing in his infancy and toddler years that affected Appellant's social and psychological development, given minimal weight; (3) abandonment by mother and father, given minimal weight; (4) lack of a healthy role model from which to learn appropriate behavior and coping skills, given minimal

weight; (5) sexually abused by his grandmother's boyfriend during his early teenage years and his life was "pre-determined during the years of his early development," given moderate weight; (6) developed pathological behaviors as a result of his dysfunctional family background and has exhibited cutting and other self-mutilating behavior, given minimal weight; (7) dysfunctional family life when young resulted in his inability to create secure attachments and to articulate and self-regulate his emotions, causing him to be an individual who is mentally and emotionally incomplete, given moderate weight; (8) personality disorder which developed due to childhood experiences and genetic traits passed down from his parents, given moderate weight; (9) raised in extreme poverty and was taught and encouraged by his family to steal food and clothes, given minimal weight; (10) raised by neglectful guardians who encouraged his criminality when he was young, given moderate weight; (11) history of prescription and alcohol abuse by care givers, given minimal weight; (12) impacted by the suicide of a loved one as a young boy, given minimal weight; and (13) exhibited positive signs of normalcy during childhood, given minimal weight (V17/3051-52).

The court further *sua sponte* found that the mitigating circumstances "cumulatively diminished [Appellant's] capacity or ability to conform his conduct to the requirements of the law,

but [did] not determine that such circumstances diminished his capacity or ability to appreciate the criminality of his conduct." The court accorded this statutory mitigating circumstance moderate weight (V17/3053).

Appellant filed a timely notice of appeal on June 14, 2013 (V17/3109).

SUMMARY OF ARGUMENT

Issue I: Florida's capital sentencing statute is not unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002). This Court has repeatedly rejected a claim that Ring invalidated Florida's capital sentencing statute, and Appellant has presented no reason for this Court to overrule its precedent. Furthermore, the jury unanimously found Appellant guilty of the contemporaneous felony of sexual battery, making him independently eligible for a death sentence under Florida law. Because of Appellant's conviction on the contemporaneous felony, there is no reason for this Court to hold this matter in abeyance pending the outcome of Hurst v. Florida, __ U.S. __, 135 S. Ct. 1531 (2015), as the ruling in Hurst will have no impact on Appellant's case.

Issue II: Appellant has not met his burden of establishing that § 913.08(1)(a), Florida Statutes (2007), is unconstitutional. His argument that the statute creates a "numerical disparity" as to peremptory challenges that violates

his rights to equal protection and to freedom from cruel and unusual punishment under the federal and Florida constitutions is meritless. Additionally, under the circumstances of this case, Appellant was not entitled to an accumulated maximum number of peremptory challenges pursuant to Florida Rule of Criminal Procedure 3.350(c). Finally, Appellant cannot demonstrate that the trial court abused its discretion with respect to the denial of any cause challenges during jury selection.

Issue III: The trial court properly excluded evidence during the Spencer hearing that qEEG testing had revealed Appellant had brain damage resulting in cognitive impairment. Contrary to Appellant's argument, the trial court properly excluded this evidence after concluding that it did not meet the standard set forth in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

Issue IV: The trial court did not abuse its discretion in denying Appellant's motion for mistrial following State witness O'Neal's nonresponsive comment that Appellant had been "released." The isolated remark, which did not state or imply that Appellant had been released *from prison* was not so prejudicial as to vitiate the entire trial. Appellant's attempts to tie other events that occurred during jury selection and trial to O'Neal's remark are equally meritless.

Issue V: The trial court was within its discretion in

permitting the State to introduce various photographs of the victim which incidentally depicted burn damage Appellant caused to the victim's corpse when he tried to destroy the evidence. During a proffer, the medical examiner reviewed each challenged photograph and explained how it would assist the jury in understanding the evidence. The photographs depicted the various wounds the victim sustained, and the medical examiner testified that each of the challenged photographs would assist her in testifying about the victim's wounds and cause of death.

Issue VI: The trial court did not abuse its discretion in giving the cold, calculated, and premeditated jury instruction to the jury, even though the court ultimately concluded that the aggravator was not proven beyond a reasonable doubt. The State presented credible and competent evidence to support the aggravator. A trial court is required to give all instructions to the jury regarding aggravating or mitigating circumstances when credible and competent evidence has been presented.

Issue VII: The trial court correctly permitted the State to present Dr. Myers as a rebuttal witness during the penalty phase. The evidence was admissible because it was relevant to rebut the defense experts' testimony that Appellant developed antisocial personality disorder as a result of negative childhood experiences. Furthermore, even if Appellant is correct and Dr. Myers' testimony merely agreed with that of Appellant's

own mitigation expert, any error in allowing such testimony would be harmless beyond a reasonable doubt. Testimony that merely reiterated Appellant's own mitigation evidence could not possibly have contributed to the jury's death recommendation.

Issue VIII: The trial court did not err in rejecting Appellant's constitutional challenges to Florida's death penalty statute, in particular the "during the course of a felony" and the HAC aggravators. This Court has on numerous occasions rejected the contention that murder in the course of a felony is an unconstitutional automatic aggravator and that it fails to narrow the class of persons eligible for the death penalty. This Court has also rejected the argument that the HAC aggravator is unconstitutionally vague.

Although not raised as issues, the State submits that the evidence was sufficient to support Appellant's conviction for first degree murder. Additionally, qualitative review of the totality of the circumstances in this case and a comparison between this case and other capital cases demonstrates that the death penalty is proportionate in this case.

ARGUMENT

ISSUE I

WHETHER FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL UNDER RING V. ARIZONA? (IB ISSUES I AND IX: RESTATED)

Appellant's first claim asserts that Florida's capital sentencing statute is unconstitutional under Ring v. Arizona, 536 U.S. 584 (Fla. 2002), and his final claim urges that, on the basis of Ring, this Court should hold this matter in abeyance pending the outcome of Hurst v. Florida, 135 S. Ct. 1531 (2015). Appellant is entitled to no relief on these matters, consolidated as Issue I herein.

The constitutionality of a statute is reviewed *de novo*. Scott v. Williams, 107 So. 3d 379 (Fla. 2013). This Court has repeatedly rejected a claim that Ring invalidated Florida's capital sentencing statute. Gonzalez v. State, 136 So. 3d 1125, 1168 (Fla. 2014); Frances v. State, 970 So. 2d 806, 822 (Fla. 2007) (noting this Court had rejected Ring claims in over fifty cases); Gudinas v. State, 879 So. 3d 616, 617 (Fla. 2004). Moreover, the jury unanimously found Appellant guilty of the contemporaneous felony of sexual battery, making him independently eligible for a death sentence under Florida law. Gonzalez, 136 So. 3d at 1168; Frances, 970 So. 2d at 822; Gudinas, 879 So. 2d at 617-18. This satisfies any right to jury sentencing that Appellant reads into Ring.

This claim is therefore without merit and does not implicate

the issues raised in Hurst v. State, 147 So. 3d 435 (Fla. 2014), cert. granted, Hurst v. Florida, 135 S. Ct. 1531 (2015). Unlike the instant case, Hurst did not involve the contemporaneous felony aggravator, which this Court's precedent clearly establishes does not implicate Ring. See, e.g., Zack v. State, 911 So. 2d 1190, 1202 (Fla. 2005)(holding that a "defendant is not entitled to relief under Ring where the aggravating circumstance that the murder was committed during the course of a felony was found and the jury unanimously found the defendant guilty of that contemporaneous felony").

Furthermore, it is well established that jury unanimity is not a constitutional requirement. In James v. State, 453 So. 2d 786, 792 (Fla. 1984), this Court noted that "the United States Supreme Court has never held that jury unanimity is a requisite of due process," Johnson v. Louisiana, 406 U.S. 356 (1972), when rejecting a defendant's claim that jury unanimity is required for a death recommendation. See also Robards v. State, 112 So. 3d 1256, 1267 (Fla. 2013) (rejecting defendant's claim that simple majority jury recommendations are inherently unconstitutional); Parker v. State, 904 So. 2d 370, 383 (Fla. 2005) ("This Court has repeatedly held that it is not unconstitutional for a jury to recommend death on a simple majority vote."); Israel v. State, 837 So. 2d 381, 392 (Fla. 2002); Card v. State, 803 So. 2d 613, 629 n.13 (Fla. 2001).

Accordingly, the State submits that Appellant's claim based on Ring is without merit and there is no reason to hold this matter in abeyance pending the outcome of Hurst.

ISSUE II

WHETHER § 913.08(1)(A), FLORIDA STATUTES, IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED TO APPELLANT AND WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT ADDITIONAL PEREMPTORY AND CAUSE CHALLENGES DURING JURY SELECTION? (RESTATED)

Appellant argues that the trial court erred in rejecting his claim that § 913.08(1)(a), Florida Statutes, is unconstitutional on its face and as applied. He further claims that the trial court erred in failing to grant additional peremptory and cause challenges during jury selection. As will be shown, neither the law nor the record supports Appellant's claims.

Constitutionality of § 913.08(1)(a), Florida Statutes

Appellant filed a pretrial motion seeking either additional peremptory challenges or to have § 913.08(1)(a), Florida Statutes (2007), declared unconstitutional. The nature of his complaint was that his charges on multiple counts left him at a numerical disadvantage with respect to peremptory challenges compared to the number of challenges he would receive if all the counts were tried separately. Consequently, Appellant requested "such additional challenges equal to [the] accumulated amount" he would receive were the counts against him tried separately.

He also complained that because the statute[5] and corresponding rule of procedure[6] allow for only ten peremptory challenges for death penalty cases, this constitutes a "numerical disparity" in light of the fact that § 913.10, Florida Statutes (2007), provides for twelve-person juries in capital cases (V4/535-40; V47/1189-90). The trial court denied his motion and denied his request for an accumulated amount of peremptory challenges, citing Florida Rule of Criminal Procedure 3.350. The denial of extra peremptory challenges was without prejudice (V5/715; V47/1191).

Appellant argues herein that § 913.08(1)(a), Florida Statutes (2007), is unconstitutional on its face and as applied to him. His theory is based on the fact that, while § 913.08(1)(a) provides for ten peremptory challenges for offenses punishable by death or life imprisonment, § 913.10, Florida Statutes (2007), provides for twelve jurors only in capital cases. Thus, persons facing trial for a charge punishable by life imprisonment get the benefit of ten peremptory challenges, but are entitled to only six jurors. This, Appellant postulates, results in a "numerical disparity" that violates his rights to equal protection and to freedom from cruel and unusual punishment under the federal and Florida constitutions,

[5] § 913.08(1)(a), Fla. Stat. (2007).
[6] Fla. R. Crim. P. 3.350.

rendering § 913.08(1)(a) unconstitutional.

The constitutionality of a statute is a question of law subject to *de novo* review. Crist v. Ervin, 56 So. 3d 745, 747 (Fla. 2010). Statutes are presumed to be constitutional, and the party challenging the constitutionality of a statute bears the burden of demonstrating that it is invalid. Chicago Title Ins. Co. v. Butler, 770 So. 2d 1210, 1214 (Fla. 2000). "Further, a determination that a statute is facially unconstitutional means that no set of circumstances exists under which the statute would be valid." Florida Dept. of Revenue v. City of Gainesville, 918 So. 2d 250, 256 (Fla. 2005).

The essence of Appellant's complaint is that individuals facing charges for crimes punishable by life (PBL) are tried by six-person juries while he, as a death penalty defendant, was tried by a twelve-person jury, yet Appellant received the same number of peremptory challenges under the statute that a PBL defendant would receive. In other words, Appellant was entitled to twice the number of jurors as the PBL defendant but the statute provided for the same number of peremptory challenges. He claims that this "makes it more difficult for a capital defendant to obtain an acceptable jury than for a defendant charged with non-capital crimes" (IB: 45). Appellant's claim is baseless and his constitutional challenges must fail.

It is important at the outset to recall that there is no

constitutional right to peremptory challenges in jury selection. In United States v. Martinez-Salazar, 528 U.S. 304, 311 (2000), the United States Supreme Court stated that, although the Court had "long recognized the role of the peremptory challenge in reinforcing a defendant's right to trial by an impartial jury," peremptory challenges "are auxiliary." The Court found that "unlike the right to an impartial jury guaranteed by the Sixth Amendment, peremptory challenges are not of federal constitutional dimension." Id. Similarly, this Court has not recognized a right to peremptory challenges under the Florida Constitution. Busby v. State, 894 So. 2d 88, 104 (Fla. 2004)(noting that peremptory challenges are "not expressly provided for in Florida's Constitution").

Appellant's Equal Protection Sub-Claim

"The constitutional right to equal protection mandates that similarly situated persons be treated alike." Level 3 Comunications, LLC v. Jacobs, 841 So. 2d 447, 454 (Fla. 2003). "Equal protection is not violated simply because persons are treated differently." Id. "When considering a statute that abridges a fundamental right, courts are required to apply the strict scrutiny standard to determine whether the statute denies equal protection." Id. Where a fundamental right is not at stake, courts apply the rational basis test. Id. "Under the rational basis standard, the party challenging the statute bears

the burden of showing that the statutory classification does not bear a rational relationship to a legitimate state purpose." Lite v. State, 617 So. 2d 1058, 1061 n.2 (Fla. 1993).

Appellant objects that the statute affords those facing sentences less than death a greater number of peremptory challenges in relation to the total number of jurors to which they are entitled than it affords defendants facing the death penalty. "The Supreme Court has not announced that the status of 'criminal defendant' is a suspect class." Govt. of the Virgin Islands v. Hodge, 359 F.3d 312, 326 (3d Cir. 2004). Therefore, the equal protection clause requires only that there be a rational and reasonable basis for the classification and that it bear a fair relationship to the purpose of the statute. Westerheide v. State, 831 So. 2d 93, 111-12 (Fla. 2002).

Providing for peremptory challenges is rationally related to the State's legitimate interest in ensuring that the accused receive a trial by an impartial jury. Martinez-Salazar, 528 U.S. at 311. The challenged statute merely provides for a minimum number of peremptory challenges. Florida Rule of Criminal Procedure 3.340(e) provides that "[t]he trial judge may exercise discretion to allow additional peremptory challenges when appropriate." This is an open-ended provision that does not limit the trial judge's discretion concerning the number of additional peremptory challenges that may be granted. Appellant

claims that there "is no compelling interest" or "rational basis" for the "severe limitation of peremptory challenges in capital cases" provided for in § 913.08(1)(a); however, the open-ended discretion of the trial judge to grant additional peremptory challenges disproves the notion that the statute is a "limitation" on peremptory challenges. Again, the statute sets forth the *minimum* number of peremptory challenges to which a defendant is entitled under the statute. Appellant cannot meet his "burden of showing that the statutory classification does not bear a rational relationship to a legitimate state purpose." Lite, 617 So. 2d at 1061 n.2.

Appellant's Eighth Amendment Sub-Claim

Appellant does not explain (or even hint) how the statute violates the prohibition against cruel and unusual punishment. His entire argument on this point consists of a conclusory reference to the Eighth Amendment and Article I, Section 17 of the Florida Constitution (IB: 45). Accordingly, the issue is waived. See Heath v. State, 3 So. 3d 1017, 1029 n.8 (Fla. 2009)("Vague and conclusory allegations on appeal are insufficient to warrant relief.").

Even if Appellant's claim is reviewed, its posture does not improve. The "Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions." Roper v. Simmons, 543 U.S. 551, 561 (2005). "The right flows from the basic

precept of justice that punishment for crime should be graduated and proportioned to the offense." Id. (citations and internal punctuation omitted). See also Phillips v. State, 807 So. 2d 713, 715-16 (Fla. 2d DCA 2002)(noting that the Eighth Amendment's guarantee against cruel and unusual punishment has been interpreted as providing two guarantees: (1) a bar against unnecessarily painful or barbarous methods of punishment (citing Trop v. Dulles, 356 U.S. 86 (1958)); and (2) a prohibition against penalties that are grossly disproportionate to the crime being punished (citing Harmelin v. Michigan, 501 U.S. 957, 996-98 (1991)(Kennedy, J., concurring))).

As stated previously, there is no constitutional right to peremptory challenges in jury selection. Martinez-Salazar, 528 U.S. at 311. Moreover, the challenged statute merely provides for a *minimum* number of peremptory challenges. The corresponding procedural rule allows a trial judge to expand the number of peremptory challenges infinitely at its discretion and "when appropriate." Fla. R. Crim. P. 3.350(e). The statute offends neither guarantee flowing from the Eighth Amendment. Phillips, 807 So. 2d at 715-16.

Appellant's "Accumulated Maximum" Sub-Claim

Appellant also contends that he was entitled to an "accumulated" number of peremptory challenges (i.e., the number he would have received had he been tried separately on each

charge) due to "pre-trial and trial publicity, the complexity of the allegations and the divergent locations of the multiple crime scenes" (IB: 45). This claim is meritless. Florida Rule of Criminal Procedure 3.350(c) provides: "If an indictment or information contains 2 or more counts ..., the defendant shall be allowed the number of peremptory challenges that would be permissible in a single case, but in the interest of justice the judge may use judicial discretion in extenuating circumstances to grant additional challenges to the accumulated maximum based on the number of charges or cases included when it appears that there is a possibility that the state or the defendant may be prejudiced."

As the rule makes clear, the decision of whether or not to grant an "accumulated maximum" number of peremptory challenges is a matter of discretion for the trial court. Fla. R. Crim. P. 3.350(c). Therefore, to be entitled to relief on review, Appellant would have to show that no reasonable jurist would have refused to grant such a request under the circumstances of this case. See, e.g., Frances v. State, 970 So. 2d 806, 813 (Fla. 2007)(reiterating that under the abuse of discretion standard, discretion is abused only where no reasonable person would take the view adopted by the trial court). Appellant cannot meet this burden. Contrary to Appellant's allegation, there were no "extenuating circumstances" in this case to

justify an accumulated maximum number of peremptory challenges. Appellant can point to nothing in the record to indicate that a large number of the panel of prospective jurors was exposed to publicity about the case. The allegations against Appellant were not "complex." Appellant was charged with four counts: (1) first-degree murder; (2) sexual battery; (3) second-degree arson; and (4) grand theft of a motor vehicle. The identity of the perpetrator was the main—if not the only—issue in dispute. There were not "multiple crime scenes" involved; there were only two: the location around which Appellant stole the van and raped and murdered Tran, and the location approximately twelve miles away where Appellant tried to burn Tran's body inside the van. Appellant can point to no authority which holds that, under similar circumstances, a refusal to grant an accumulated maximum of peremptory challenges was reversible error. The trial court did not abuse its discretion in this case and Appellant is entitled to no relief on this matter.

Denial of Additional Peremptory and Cause Challenges

Appellant appears to suggest that he is entitled to relief because the trial court improperly denied various cause challenges of prospective jurors and then refused to grant additional peremptory challenges during jury selection. Although he raised this issue below and frames his issue to include this matter, he presents no argument to support this claim.

This Court has made clear that the "purpose of an appellate brief is to present arguments in support of points on appeal." Doorbal v. State, 893 So. 2d 464, 482 (Fla. 2008). Thus, this Court has required defendants to present arguments that explain why the lower court erred in its rulings. See Shere v. State, 742 So. 2d 215, 217 n.6 (Fla. 1999). Merely referring to the arguments presented below is insufficient to meet the burden of presenting an argument on appeal. Doorbal, 983 So. 2d at 482. Given the fact that Appellant's presentation of the issue regarding the propriety of the denial of cause challenges is entirely conclusory, the issue should be deemed waived. Nevertheless, even if this claim is reviewed, the record supports the trial court's rulings on the cause challenges.

Appellant suggests that the trial court erred in denying cause challenges to seven prospective jurors, forcing him to use peremptory challenges to strike five of them. Appellant further claims that the trial court erred in denying additional peremptory challenges because it resulted in three jurors remaining on his case that he would have stricken.[7]

This Court has held:

> A trial court has great discretion when deciding

[7] At trial, after the court denied Appellant's request for additional peremptory challenges, he stated he would have challenged Jurors Bowden, Guerra, Bradley, and Fraser (V57/2720-23).

> whether to grant or deny a challenge for cause based on juror competency. Barnhill v. State, 834 So. 2d 836, 844 (Fla. 2002), cert. denied, 539 U.S. 917, 123 S. Ct. 2281, 156 L.Ed.2d 134 (2003). This is because trial courts have a unique vantage point in their observation of jurors' voir dire responses. Therefore, this Court gives deference to a trial court's determination of a prospective juror's qualifications and will not overturn that determination absent manifest error. Hurst v. State, 803 So. 2d 629, 638 (Fla. 2001), cert. denied, 536 U.S. 963, 122 S. Ct. 2673, 153 L.Ed.2d 846 (2002).

Conde v. State, 860 So. 2d 930, 939 (Fla. 2003).

"Where an appellant claims he was wrongfully forced to exhaust his peremptory challenges because the trial court erroneously denied a cause challenge, both error and prejudice must be established." Id., at 941. "In the State of Florida, expenditure of a peremptory challenge to cure the trial court's improper denial of a cause challenge constitutes reversible error if a defendant exhausts all remaining peremptory challenges and can show that an objectionable juror has served on the jury." Busby v. State, 894 So. 2d 88, 96-97 (Fla. 2004)(citing Trotter v. State, 576 So. 2d 691 (Fla. 1991)). "'This juror must be an individual who actually sat on the jury and whom the defendant either challenged for cause or attempted to challenge peremptorily or otherwise objected to after his peremptory challenges had been exhausted.'" Busby, 894 So. 2d at 97 (quoting Trotter, 576 So. 2d at 693).

Jurors Garcia and St. Hilaire (The "Sleeping" Jurors)

Appellant argues that the trial court should have excused

Jurors Garcia and St. Hilaire for cause because they were sleeping during portions of the voir dire. The record shows that both defense counsel and the prosecutor expressed concern that Garcia and St. Hilaire were falling asleep during jury selection (V50/1589; V51/1654-55; V52/1819). The record also shows that both Garcia and St. Hilaire responded to questions when called upon without indicating they needed to be awakened (V51/1678-79, 1681-82; V53/2023-26, 2028-32). After the death qualification portion of jury selection was completed, both the State and the defense moved to excuse Garcia and St. Hilaire for cause. The trial court denied the request (V54/2167-69).

During the next phase of voir dire, Garcia and St. Hilaire again responded to questions (V54/2214-16, 2221-25; V56/2457-58, 2532, 2561). At one point, Garcia explained that he suffered from sleep apnea and needed to move around during the day. Garcia stated that when he appeared to be nodding off, he could still hear what was going on (V56/2485-86).

The State again moved to excuse St. Hilaire for cause in part because he had been observed sleeping, and the defense agreed. The trial court declined to excuse St. Hilaire (V57/2679-82). As to Garcia, the State moved for cause but the defense objected, arguing that Garcia had explained that he could still hear what was happening when he closed his eyes and that he had responded appropriately to questions. The trial court denied the State's

cause challenge as to Garcia (V57/2676-78). Thereafter, the State exercised peremptory challenges to remove both Garcia and St. Hilaire (V57/2698, 2714).

Generally, the decision of "whether to replace or to retain a sleeping juror rests in the sound discretion of the trial court." Bullis v. State, 734 So. 2d 463, 464 (Fla. 5th DCA 1999). See also Mendoza v. State, 700 So. 2d 670, 675 (Fla. 1997)("A trial court has latitude in ruling upon a challenge for cause because the court has a better vantage point from which to evaluate prospective jurors' answers than does this Court in our review of the cold record."). Nevertheless, Appellant cannot complain that the trial court denied cause challenges as to Garcia and St. Hilaire where it was the State and not the defense that expended peremptory challenges on these two prospective jurors. See Busby, 894 So. 2d at 102 (reiterating that "reversible error occurs to the extent a party is forced to expend a peremptory challenge to cure a wrongly denied cause challenge" where the party can show that he exhausted his remaining peremptory challenges and an objectionable juror was ultimately seated on his panel). The record shows that Appellant did not expend a peremptory challenge on either Garcia or St. Hilaire. Furthermore, when the State sought a second time to remove Garcia for cause, the defense *objected*. Appellant cannot be heard to complain about either of these prospective jurors,

but this is particularly true when it comes to Garcia. He is entitled to no relief with respect to prospective jurors Garcia and St. Hilaire.

Prospective Juror Fiore

Appellant alleges that the trial court should have granted a cause challenge on prospective juror Fiore because she had more than one friend who was a murder victim, and because one of the defendants in one of those cases was represented by one of Appellant's attorneys. Appellant avers that Fiore had a "bias against the defense" and should have been removed for cause (IB: 46). He does not point to anything in the record to support his claim of "bias against the defense." Indeed, the record refutes his claim.

During voir dire, Fiore related that when she was in high school, her friend was murdered in a road rage incident in Oregon and that she had been disappointed that the perpetrator received a light sentence. Asked if that would affect her or cause her to be biased in any way in this case, Fiore answered: "Absolutely not at all." Asked whether she was certain she could keep her feelings about the outcome of that case separate from this case, Fiore indicated that she could because "every situation is different" (V54/2246-47). Fiore also revealed that she had a friend who was stabbed to death about five years earlier. She stated that her feelings about both crimes "just

further reinstates my belief that every situation is different." Asked whether her experience would affect her ability to serve on Appellant's jury, Fiore said: "Not at all. I think it would actually help me be more unbiased because I've seen it, I've been through it. I've seen both sides of it and I feel like I have a lot of experience in that area" (V54/2248-49).

Under questioning by defense counsel, Fiore stated:

> [Defense Counsel]: With respect to the second circumstance, if this case involves something that is similar like a stabbing or violent-type encounter with that and you're asked to look at photographs or listen to some graphic testimony from the medical examiner or law enforcement, are you able to separate that from this past experience and assure us that that's not going to kind of bleed over into your thought process?
>
> [Fiore]: Absolutely. And like I said, I think that going through that process has already taken the shock value out of it. You know what I mean? So it's like having that experience helped me lock that kind of thing out actually. You know what I mean.
>
> [Defense Counsel]: So if you were to see photographs of an individual that's heats [sic] not going to carry over into this case?
>
> [Fiore]: Absolutely not. I mean, I'm going to have emotions obviously it wouldn't carry over from that.

(V54/2252)

Fiore had also stated she could follow the law applicable to the death penalty and give fair consideration to any mitigation offered by the defense (V51/1693). With regard to her opinion about the death penalty, Fiore stated that in most cases, she would "rather give somebody life," but in "extreme cases," a

death sentence could be appropriate (V53/2037).

The defense moved to strike Fiore for cause because (1) she had a friend who was a murder victim where the defendant received a light sentence; and (2) she had asked to approach the bench to discuss the acquaintance who had been stabbed. Defense counsel placed on the record that Mr. Hill, one of Appellant's attorneys, was representing the defendant in that pending case. The State opposed striking Fiore for cause, noting that the stabbing case occurred five years previously and that there was no indication Fiore had ever attended court in that case or knew Mr. Hill was representing that other defendant. Fiore had also indicated she could keep those cases separate and that those other matters would not affect her. The trial court denied Appellant's cause challenge. Thereafter, Appellant exercised a peremptory challenge on Fiore (V57/2685-89, 2700).

It is true that Fiore had two friends who had been murder victims. Fiore stated that those incidents did not make her biased against either party in this case and that, if anything, they helped her to be more impartial. Nothing in the record suggests Fiore knew that one case was still pending against the other defendant or that one of Appellant's attorneys represented that other defendant. Contrary to Appellant's argument, Fiore's responses to questions about the other two cases do not indicate any sort of "bias against the defense." Accordingly, the trial

court did not abuse its discretion with regard to Fiore. Overton v. State, 801 So. 2d 877, 890 (Fla. 2001)("The trial court has broad discretion in determining whether to grant a challenge for cause, and the decision will not be overturned on appeal absent manifest error.").

Prospective Juror Suarez

Appellant next argues that the trial court wrongfully denied a cause challenge to prospective juror Suarez where Suarez's aunt was the victim in a death penalty case involving a different defendant (Freddy Clemons). The record shows that on the second day of jury selection, defense counsel notified the trial court that Suarez was related to the victim in the murder case of defendant Clemons and that her family was angry because Clemons did not receive the death penalty. Defense counsel did not want Suarez sitting with "the other 87 people there running her mouth" about being angry. Defense counsel stated that the victim's family was suing the school district alleging that a gate was left open allowing Clemons to get in and kill Suarez's family member. The trial court agreed to discuss the matter with Suarez (V50/1482-84, 1497).

Suarez explained that the victim in the Clemons case was her aunt, and the case was resolved by a plea. She stated that her aunt's husband might have brought a lawsuit, but Suarez did not know anything about it and was not involved. Suarez stated she

did not have any doubts about her ability be fair and impartial in this case. She said: “It’s a different case. What happened to my aunt happened. This is – I have no feeling towards this person. I don’t know him. I want to see the evidence." Defense counsel moved to strike Suarez and the trial court denied the motion at that time (V50/1499-1503).

During questioning, Suarez assured the court that she “could be objective and just concentrate on the evidence.” Asked if she could “give a fair shake to any mitigation” and “consider it fairly,” Suarez stated: “Definitely. I would have to[,] that’s the only way to be fair.” She further stated that she would be fair to both sides and that her aunt’s case was a different situation. Defense counsel asked Suarez whether she could be fair in spite of the fact that her aunt’s case was factually similar to this case. Suarez stated that she would be fair and concentrate on the evidence in Appellant’s case and not on her family’s situation. Suarez stated she was not angry that the person who murdered her aunt avoided the death penalty by entering a plea. She reiterated that she could be fair and objective to both sides in this case (V51/1688-92).

Suarez acknowledged that there was no trial in her aunt's case because the defendant entered a plea to avoid a death sentence; however, she reiterated that she would not let her personal feelings about her family's situation stand in the way

of giving someone else a fair trial. Although she had been saddened about her aunt's murder, Suarez emphasized that she was not angry to the point of seeking vengeance. She stated she was not angry Clemons avoided the death penalty because he was adequately punished by life in prison (V54/2256-57).

The defense sought to strike Suarez for cause. Defense counsel admitted that Suarez's responses indicated she could be fair and impartial, but defense counsel suggested she was merely trying to "sell herself to be on the jury." The trial court denied the request, finding: "I recall all the responses and all the times this lady came to the bench and I found that she made no comment which would suggest that she could not be an impartial juror." Appellant exercised a peremptory challenge on Suarez (V57/2689-92, 2697).

"The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law given by the court." Kopsho v. State, 959 So. 2d 168, 170 (Fla. 2007). "'In evaluating a juror's qualifications, the trial judge should evaluate all of the questions and answers posed to or received from the juror.'" Id. (quoting Parker v. State, 641 So. 2d 369, 373 (Fla. 1994)). "A juror must be excused for cause if any reasonable doubt exists as to whether the juror possesses an impartial state of mind." Id.

Suarez's answers indicated that her aunt's murder would not impair her ability to perform her duties as a juror. The trial court did not abuse its discretion in denying Appellant's challenge for cause as to Suarez. Overton, 801 So. 2d at 890.

Prospective Juror Russo

Appellant argues that prospective juror Russo should have been stricken for cause because she stated she might vote for death automatically if the murder was premeditated. The record refutes Appellant's contention. During questioning, Russo stated that in certain instances the death penalty is "okay." She stated that she would go through the weighing process and give fair consideration to any mitigation the defense presented because "[t]hat would be the only fair way to do it" (V51/1685-86).

Russo responded as follows to defense counsel's questions:

> [Defense counsel] I guess -- I don't want to keep asking the same question, but I feel in some way that I need to. **Does the mere fact that there was premeditation involved in the first phase that was shown to you because you voted 12 to nothing to convict Mr. Jackson of murder, does that automatically mean you're voting for the death penalty in the second phase?**
>
> [Russo] **No.**

(V52/1811-14)(emphasis added).

Defense counsel challenged Russo for cause arguing that she equivocated about whether the death penalty would be automatically required if she felt the murder was premeditated.

Defense counsel also asserted that Russo "believed if you murdered someone then you should get the death penalty." The trial court noted that Russo described herself as being "right in the middle" with regard to favoring the death penalty. The court recalled that under questioning from both sides "there was nothing unacceptable or that made this Court think there was any doubt that she could be objective and fair and impartial." Thus, the trial court denied the cause challenge as to Russo. Appellant exercised a peremptory challenge on Russo (V57/2703).

The trial court was correct. Contrary to Appellant's argument, Russo clearly and unequivocally answered *no* when asked whether proof of premeditation would automatically mean she would vote in favor of the death penalty in the second phase. The denial of Appellant's cause challenge as to Russo was justified. See Busby, 894 So. 2d at 95 ("The decision to deny a challenge for cause will be upheld on appeal if there is support in the record for the decision.").

Prospective Juror Spengler

Appellant claims prospective juror Spengler should have been removed for cause because he said he would "lean" toward the death penalty "if he found the defendant guilty and without hearing the evidence on the case" (IB: 47). The record shows that Spengler stated that he was in favor of the death penalty, but that he would follow the law and give fair consideration to

any mitigation the defense might present (V51/1684-85). Under questioning by defense counsel, Spengler admitted that he "leaned" toward the death penalty because he believed there should be consequences for people who commit first degree murder. Spengler acknowledged, however, that a viable consequence was also life in prison (V52/1814-21).

The defense moved to strike Spengler for cause, arguing that "he indicated he would lean towards the death penalty if Mr. Jackson was found guilty." Defense counsel argued that this gave rise to "reasonable doubt" as to whether Spengler could be fair and impartial. The trial court denied the challenge, finding that there was no indication Spengler could not be fair. Although the prospective juror said he would lean toward the death penalty, he also indicated he would go through the weighing process. Appellant peremptorily struck Spengler (V57/2695-97).

"Where a prospective juror is challenged for cause on the basis of his or her views on capital punishment, the standard that a trial court must apply in determining juror competency is whether those views would prevent or substantially impair the performance of a juror's duties in accordance with the court's instructions and the juror's oath." Conde v. State, 860 So. 2d 930, 939 (Fla. 2003)(citations omitted). "In a death penalty case, a juror is only unqualified based on his or her views on

capital punishment, if he or she expresses an unyielding conviction and rigidity toward the death penalty." Id. (citation and quotation marks omitted).

Although Spengler stated that he would "lean" toward the death penalty, he also indicated that that he would give fair consideration to any mitigation the defense presented and would follow the law. Where "a prospective juror initially states that one who murders should be executed but later states that he can follow the law upon court instruction, the trial court does not abuse its discretion in denying a cause challenge." Id. Under the circumstances, Appellant cannot demonstrate that the trial court erred in denying a cause challenge as to Spengler.

Prospective Juror Hearne

Appellant claims that prospective juror Hearne should have been excused for cause because she "said it was common to have the person who is guilty of the crime prove their innocence" (IB: 47). The record refutes this claim. At one point during voir dire, Hearne posed the following question:

> [Hearne] This is a question that maybe you can tell me. It's not my business, but I just wanted to know it is very common to have the person sitting right here in court when we discuss? It's very common to have that person that supposedly is guilty of a crime for us to face him all the time? It's common to have a person -- that person here and not have anything from the opposite? Is it common? I don't know if you can answer that.
>
> [Defense Counsel] Well, I can answer it in a general way. Anybody that's accused of a crime, any

> crime, not just this case, not any case -- any case the person that's accused of a crime is not guilty until he would be proven guilty so he stands there as an innocent person and he's entitled to be present for all the events that go on in the case involving him.
>
> [Hearne] Okay. That was my question. Thank you.

(V54/2155).

Later, defense counsel followed up with Hearne as follows:

> [Defense Counsel] Now what caught me as curious about that and when I was little bit concerned with is that you said is the person who's supposedly guilty. And what I ask you to do can you help us understand a little bit are you -- by the words you chose and lawyers like to pick those words apart, are you kind of leaning to the fact that Mr. Jackson's already guilty to some degree by the way you phrased that?
>
> [Hearne] No, sir. I said supposedly, you know. I don't know if he's guilty. We haven't gone through the process and, you know nobody's guilty until they prove it.
>
> [Defense Counsel] Okay.
>
> [Hearne] So no there was nothing in my mind of that.

(V56/2517-19).

Hearne explained that she had served in a different trial where both parties were in the courtroom. Of Appellant, she said: "And my question inside was just you know we see him every day. He is a person that is looking at us. He's got feelings. He had God's blood running you know normal human and that's the way I look at him and I'm not thinking and I was not even looking at him as a person who is guilty he's here [sic], no. It hasn't crossed my mind because in this time I'm a neutral person. I got

to see some evidence and you know to have a fair trial for this person." Hearne indicated she understood that the State had the burden of proof. Later, Hearne again affirmed that she understood the defense did not have any burden of proof and that, according to the law, the State must prove beyond a reasonable doubt the defendant committed the crimes (V56/2519, 2520-21; V57/2650-51).

The defense moved to excuse Hearne for cause because she "asked the question if it was common to have the person that was guilty of a crime or supposedly guilty of a crime facing them." The trial court denied the challenge, stating: "I don't find that she said anything or answered any question which created any doubt in this Court's mind that she could not be objective, fair and impartial and follow the law." Appellant exercised a peremptory challenge on Hearne (V57/2703-07).

It is true that "[a] prospective juror who cannot presume the defendant to be innocent until proven guilty is not qualified to sit as a juror." Kopsho v. State, 959 So. 2d 168, 172 (Fla. 2007). This was not the situation with Hearne, who affirmed that she understood the burden of proof belonged to the State to prove Appellant's guilt beyond a reasonable doubt. Her unequivocal statements to that effect leave no doubt that the trial court did not abuse its discretion in denying Appellant's cause challenge. See, e.g., Banks v. State, 46 So. 3d 989, 995

(Fla. 2010)(finding that prospective juror's "unequivocal assurances of impartiality do not provide this Court with a basis to conclude that the trial court abused its discretion in denying Banks' cause challenge").

In sum, Appellant has failed to establish that §913.08(1)(a), Florida Statutes (2007), is unconstitutional or that the trial court erred in any of its decisions with respect to Appellant's cause challenges during jury selection.[8] He is entitled to no relief from this Court.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN EXCLUDING TESTIMONY REGARDING QEEG TESTING DURING THE SPENCER HEARING? (RESTATED)

Appellant argues that the trial court committed reversible error by excluding evidence during the Spencer hearing to the effect that qEEG testing had revealed Appellant had brain damage resulting in cognitive impairment. Contrary to Appellant's argument, the trial court properly excluded this evidence after concluding that it did not meet the standard set forth in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

Appellate review of a Frye determination is treated as a matter of law subject to *de novo* review. Brim v. State, 695 So. 2d 268, 274 (Fla. 1997).

[8] Appellant's complaints about Jurors Clark, Eades, and Gomez are addressed more fully below, under Issues IV and V.

Appellant sought to introduce at the Spencer hearing the results of a qEEG test conducted on Appellant by Dr. William Lambos. Through the use of qEEG, Dr. Lambos concluded Appellant had suffered severe blunt force or penetrating trauma to the head with severe impairment of the brain resulting in broad impairments in cognitive functioning (V8/1386-V9/1416). Appellant asserted that this evidence would go toward proving that he lacked the capacity to appreciate the criminality of his conduct or that his ability to conform his conduct to the requirements of the law was substantially impaired.

Following a three-day Frye hearing at which the defense and the State presented expert witnesses, the trial court found that qEEG did not meet the Frye standard:

> The Court finds the relevant scientific community is that which diagnoses and treats brain disorders and traumatic brain injury, specifically, neurologists, neuropsychologists, neurophysiologists, psychiatrists and neuropsychiatrists. See, e.g., Tran [v. Hilburn], 948 P.2d 52, 56 (Colo. App. 1997)("In our view, for the purposes of this case [involving a mild closed head injury], the relevant scientific community is the community of clinicians who diagnose and, based on that diagnosis, treat brain injured patients."). It is clear to this Court that qEEG testing is not generally accepted in the relevant scientific community as a diagnostic tool for the assessment of brain disorders and traumatic brain injury.
>
> The Court finds noteworthy the AAN/ACNS position report, which recommends that qEEG not be used in legal proceedings. See Marc Nuwer, Assessment of Digital EEG; Quantitative EEG and EEG Brain Mapping: Report of the American Academy of Neurology and the American Clinical Neurophysiology Society, 49 Neurology 277-92 (1997)("On the basis of clinical and

> scientific evidence, opinions of most experts, and the technical and methodological shortcomings, qEEG is not recommended for use in civil or judicial proceedings."). The AAN/ACNS report states, "Because of the very substantial risk of erroneous interpretations, it is unacceptable for any EEG brain mapping or other qEEG techniques to be used clinically by those who are not physicians highly skilled in clinical EEG interpretation." Id. at 284. The report further notes that "On the basis of current clinical literature, opinions of most experts, and proposed rationales for their use, qEEG remains investigational for clinical use in post-concussion syndrome, mild or moderate head injury …" Id. at 285. This remains the position of the AAN and ACNS today. Although the defense has presented numerous scientific articles, the Court notes that as it related to qEEG as a diagnostic tool or the validity of the Neuroguide database, many of the articles, including the rebuttals to the AAN/ACNS report, were written by Dr. Thatcher and a small group of qEEG advocates.
>
> Although qEEG testing and analysis has been generally accepted in research, therapeutic and specific medical settings, i.e., anesthesia suites and intensive care units, the Court finds that it is not generally accepted as a diagnostic tool for the diagnosis of brain disorder or injury in the relevant scientific community.
>
> The Court finds that qEEG does not meet the Frye standard.
>
> ***
>
> The proposed qEEG evidence is inadmissible in any aspect of the penalty phase.

(V11/1962-64).

The trial court correctly rejected the proffered qEEG evidence. "Evidence based on a novel scientific theory is inherently unreliable and inadmissible in a legal proceeding in Florida unless the theory has been adequately tested and

accepted by the relevant scientific community." Ramirez v. State, 810 So. 2d 836, 843 (Fla. 2001)(footnote omitted). "The underlying theory for this rule is that a courtroom is not a laboratory, and as such it is not the place to conduct scientific experiments." Stokes v. State, 548 So. 2d 188, 193-94 (Fla. 1989). "If the scientific community considers a procedure or process unreliable for its own purposes, then the procedure must be considered less reliable for courtroom use." Id.

"In utilizing the Frye test, the burden is on the proponent of the evidence to prove the general acceptance of both the underlying scientific principle and the testing procedures used to apply that principle to the facts at hand." Gosciminski v. State, 132 So. 3d 678, 702 (Fla. 2013). "The trial judge has the sole responsibility to determine this question." Id. "The general acceptance under the Frye test must be established by a preponderance of the evidence." Id.

Here, the trial court held a Frye hearing and concluded that Appellant did not carry his burden of proof and did not show by a preponderance of the evidence that qEEG test results are generally accepted in the relevant scientific community. At the Frye hearing, Appellant presented the testimony of Dr. Lambos, a psychologist, who testified that he uses the Neuroguide software and database created by Dr. Robert Thatcher to conduct qEEG testing in his practice. He explained that qEEG involves taking

three to five minutes of raw EEG data on the patient. The practitioner then selects a sixty- to ninety-second subset of the EEG data that is deemed to be "artifact free," or free of "non-cerebral sources of electrical activity measured on the EEG." The computer software then processes that raw, "artifact free" subset of data into quantitative data that is compared against a "normative" database to determine whether the patient's reading is within the range of normality. The "normative" database utilized by Neuroguide consisted of 625 participants determined to be "neuro-typical healthy individuals" whose "typicality" was based on self-reporting and on neuropsychological and cognitive tests (V14/2441-46, 2501-02; V15/2612, 2638-40, 2649-56).

Appellant also presented the testimony of Dr. David McCraney, M.D., a board certified neurologist. Dr. McCraney testified that he previously used qEEG in his practice, but ceased using it after 1997 when the AAN/ACNS released a position report declining to recognize qEEG brain mapping as a useful technique for assessing neurobehavioral or psychological issues and that recommended against its use in the courtroom setting. Dr. McCraney did not disagree with the AAN/ACNS report and testified that quantitative EEGs are sometimes abused in the forensic setting. A majority of neurologists do not believe qEEG is appropriate for use as a forensic tool; however, it is generally

accepted in the medical community for use in biofeedback (V16/2871, 2873, 2886-91).

The State presented the testimony of Dr. Barbara Stein, M.D., a clinical and forensic psychiatrist, who testified as an expert in psychiatry, forensic psychiatry, and neuropsychiatry. Dr. Stein testified that qEEG is "not considered a valid reliable diagnostic tool for the diagnosis of traumatic brain injury and psychiatric disorders" according to the AAN, and should not be used in the courtroom setting. According to Dr. Stein, qEEG has a number of shortcomings as a diagnostic tool, including: (1) the likelihood of "false positives;" (2) the tendency of qEEG to confuse psychiatric problems or the effects of medication with traumatic brain injury; (3) the difficulty of eliminating artifacts; (4) a lack of sharing of databases, which results in insufficient studies necessary for the technology to meet "scientific muster;" and (5) the absence of replication of studies, meaning there is no indication of consistency, reliability, or validity for the analysis (V15/2693-2701, 2709, 2712-14, 2717-21).

Dr. Stein testified that the science does not support a premise of an identifiable and measurable correlation between the readings of the brain's electrical impulses and psychiatric disorders or traumatic brain injury. Dr. Stein testified that qEEG is not generally accepted in the scientific community

comprised of psychiatrists, neuropsychiatrists, forensic psychiatrists, or the neurological organizations. She characterized qEEG as a "fringe of mainstream medicine" (V15/2724-28, 2730, 2745).

Dr. Peter Kaplan, M.D., a professor of neurology at Johns Hopkins School of Medicine and director of electrophysiology at Johns Hopkins Bayview Medical Center, testified for the State as an expert in neurology, neurophysiology, and electrophysiology. Dr. Kaplan testified that qEEG is not generally accepted as a diagnostic method in the fields of neurology, neurophysiology, or electrophysiology. Although qEEG is a valid technique for "trend analysis, for research, [and] for anesthesia," it is not accepted by neurologists, neurophysiologists, or electrophysiologists in the context of diagnosing brain damage using "little two-second bits and a 60-second aggregate and compared with a normative database assembled by people not trained in EEG" (V15/2764-67; V16/2800-06, 2846-47).

The trial court properly concluded that "qEEG testing is not generally accepted in the relevant scientific community as a diagnostic tool for the assessment of brain disorder and traumatic brain injury." The State presented evidence that qEEG is not generally accepted as a tool for the diagnosis of brain disorder or injury in the scientific community that includes neurologists, neuropsychologists, neurophysiologists,

psychiatrists, and neuropsychiatrists. Dr. Stein explained numerous shortcomings of qEEG as a diagnostic tool, and characterized it as a "fringe of mainstream medicine." Dr. Kaplan confirmed that qEEG is not commonly accepted as a method for diagnosing brain injury, mental disorder, or psychosis.

Appellant cites to only one case in which a court ruled that qEEG was admissible—a Dade County circuit court case (IB: 53). That circuit court decision was not binding on the trial court and is not binding on this Court. See, e.g., Miller v. State, 980 So. 2d 1092, 1094 (Fla. 2d DCA 2008)("Only the written, majority opinion of an appellate court has precedential value."). Indeed, research reveals no reported cases in which a court has found qEEG testing as a diagnostic tool admissible under either a Frye or a Daubert[9] analysis.[10] In Mendoza v. State, 87 So. 3d 644, 666 (Fla. 2011), this Court held that the trial court did not abuse its discretion in excluding evidence

[9] Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

[10] A number of courts around the country, however, have found it inadmissible. See, e.g., Tran v. Hilburn, 948 P.2d 52, 57 (Colo. App. 1997)("QEEG is not generally accepted in the relevant scientific and clinical community" for the purpose of diagnosing closed-head injury); In re Breast Implant Litigation, 11 F. Supp. 1217, 1238 (D. Colo. 1998)(qEEG is not well recognized in the clinical setting as a tool for diagnosing neurocognitive and neuropsychological disorders); Ross v. Schrantz, 1995 WL 254409 (Minn. App. 1995)(trial court was correct in concluding that qEEG is not generally accepted in the scientific community as a tool for the diagnosis of head injury, and would also be inadmissible under a Daubert analysis)(not selected for publication).

of the defendant's qEEG test results at the evidentiary hearing because "such a test had not passed the Frye test."

In positing that the trial court should have considered the evidence under the Daubert standard, Appellant suggests that under the Daubert standard, "[g]eneral acceptance in the scientific community is not an issue" (IB: 55). First, Appellant's trial and sentencing took place prior to the July 1, 2013, effective date of the revised § 90.702, Florida Statutes (2013), which replaced the Frye standard with the Daubert standard. Second, contrary to Appellant's assertion, general acceptance in the scientific community is, in fact, an "issue" under the Daubert test. Effective July 1, 2013, the Florida legislature modified § 90.702 to adopt the standards for expert testimony in Florida's courts as provided in Daubert; General Elec. Co. v. Joiner, 522 U.S. 136 (1997); and Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999). See Ch. 13-107, § 1, Laws of Fla. (2013)(Preamble to § 90.702). The Daubert standard relies on a "scientific knowledge" approach to determining whether expert testimony is relevant and reliable, and, therefore, admissible as evidence. Daubert, 509 U.S. at 590. The focus of the Daubert standard is solely on the "principles and methodology" used by testifying experts, and "not on the conclusions they generate." Id., at 595. In considering the

three enumerated statutory requirements[11] of § 90.702, Florida Statutes (2013), courts, in fulfilling their gatekeeping function as established in Daubert, may consider factors bearing on reliability, including (1) whether the theory or technique can be or has been tested; (2) whether it has been subjected to peer review and publication; (3) whether it has a high known or potential rate of error; (4) whether its operation is subject to controlling standards; and (5) whether it enjoys *general acceptance within a relevant scientific or expert community*. Kumho Tire Co., 526 U.S. at 149-50.

Appellant contends that the trial court should not have discounted the findings of Dr. Lambos and Dr. McCraney "in their entirety because the court found the qEEG component lacking." He states that qEEG is "only one part of the diagnostic process," and that both experts testified that it was used to identify broad areas of Appellant's "brain dysfunction" (IB: 56-57). To the extent Appellant is complaining that the trial court should have taken other evidence into consideration beyond the qEEG test results, such an argument is unpreserved as Appellant did not proffer anything besides the qEEG test results and

[11] The revised statute provides that an expert witness may testify in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has applied the principles and methods reliably to the facts of the case. § 90.702, Fla. Stat. 2013).

documentation supporting his claim that qEEG satisfies the Frye analysis. See Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985)(to be preserved for appellate review, "an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved"). If Appellant is arguing that the trial court should have credited the findings of brain damage allegedly revealed by the qEEG testing, this argument fails because the trial court found that qEEG does not meet the Frye standard. "Evidence based on a novel scientific theory is inherently unreliable *and inadmissible* in a legal proceeding in Florida unless adequately tested *and accepted by the relevant scientific community*." Ramirez, 810 So. 2d at 843 (emphasis added).

Appellant's reliance on Porter v. McCollum, 558 U.S. 30 (2009), is misplaced. "Porter decided that it was unreasonable for a state court to conclude that counsel's failure to present powerful mitigation evidence about his client's heroic military service and mental health evidence of brain damage was not prejudicial." Ponticelli v. Sec'y, Fla. Dept. of Corr., 690 F.3d 1271, 1297 (11th Cir. 2012). Porter was not about the admissibility of a new or novel scientific method, or even the admissibility of mitigating evidence. It was a case interpreting 28 U.S.C. § 2244, the Antiterrorism and Effective Death Penalty

Act of 1996.

Finally, Appellant contends that because qEEG is simply a "refinement of a long-accepted EEG test, it should no longer qualify as a 'new or novel' scientific method" (IB: 57). As the evidence at the Frye hearing demonstrated, EEG and qEEG are not the same. Appellant points out that even the State's experts agreed that qEEG is used in intensive care units and in administering anesthesia, "two very important functions" (IB: 57). The use of qEEG in these "very important functions" does not, however, render it a valid diagnostic tool for the diagnosis of brain damage. The trial court did not err in excluding qEEG evidence at the Spencer hearing.

Furthermore, even if the trial court erred in excluding the qEEG evidence from the Spencer hearing, such error was harmless. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). The trial court found two aggravators (HAC and commission during a sexual battery). Appellant sought to introduce his qEEG results to support a contention that he lacked the capacity to appreciate the criminality of his conduct or that his ability to conform his conduct to the requirements of the law was substantially impaired. Even without the qEEG evidence, the trial court found that Appellant's capacity to conform his conduct to the requirements of the law was substantially impaired. This mitigator was accorded moderate weight. The remaining mitigators

were accorded no more than moderate weight, with many of them assigned minimal weight. Thus, even if the qEEG evidence had been considered, the mitigating evidence would not have outweighed the aggravators. See, e.g., Orme v. State, 25 So. 3d 536, 543-44 (Fla. 2009)(trial court's failure to consider remorse as a mitigating circumstance was harmless because the mitigators would not outweigh the aggravators in the case).

ISSUE IV

WHETHER THE TRIAL COURT WAS WITHIN ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR MISTRIAL WHEN A STATE WITNESS REFERENCED APPELLANT HAVING BEEN "RELEASED" BUT DID NOT STATE WHAT APPELLANT HAD BEEN RELEASED FROM? (RESTATED)

Appellant argues that the trial court erred in refusing to declare a mistrial when the following occurred during the testimony of State witness Linda O'Neal:

> [PROSECUTOR]: And prior to September 13 of 2007, how long approximately did [Defendant] live with you at the Grand View Mobile Home Park with you and Wally?
>
> [O'NEAL]: I believe he was released --

(V65/3816).

Defense counsel interrupted O'Neal's statement and moved for mistrial. The trial court found that the comment was uninvited and nonresponsive and that it did not go further than saying Appellant was "released." Appellant is not entitled to relief from this Court.

A trial court's ruling on a motion for mistrial is subject to

an abuse of discretion standard of review. England v. State, 940 So. 2d 389, 402 (Fla. 2006). Discretion is abused only where no reasonable person would take the view adopted by the trial court. See, e.g., Frances v. State, 970 So. 2d 806, 813 (Fla. 2007). "A mistrial is appropriate only where the error is so prejudicial as to vitiate the entire trial." Hamilton v. State, 703 So. 2d 1038, 1041 (Fla. 1997).

As to the testimony given in this case, O'Neal did not say that Appellant was released *from prison*. She said he was "released," and nothing further. Contrary to Appellant's claim, without any context at all, the jury had nothing from which to infer that Appellant had been released from prison. There are other things besides prison from which one may be released, such as the hospital or the military.

In Smith v. State, __ So. 3d __, 2015 WL 4112423 (Fla. July 9, 2015), the defendant complained on appeal that the trial judge should have declared a mistrial when a police officer made reference during her testimony to an "investigation that [she] was doing for the City of Sarasota." Id., at *8. Appellant argued that the detective's remark "informed the jury that Smith was being investigated for other crimes." This Court disagreed that this "marginal reference" did any such thing. The witness referenced only "an investigation" she was performing for the City of Sarasota, and was immediately stopped by the prosecutor

from saying more. Id., at *8-9. This Court concluded that the trial court did not abuse its discretion in denying the motion for mistrial "on the basis of this isolated reference." Id., at *9.

Similarly, in this case, the witness made a marginal reference to Appellant being "released." An objection was lodged and the witness said nothing further about "release." As in Smith, in this case, the trial court did not abuse its discretion in denying the motion for mistrial "on the basis of this isolated reference." Id.

Even remarks that *actually do* "relate to a defendant's prior imprisonment are to be evaluated in the context of the surrounding circumstances and do not always require reversal." Fletcher v. State, __ So. 3d __, 2015 WL 3887475, *15 (Fla. June 25, 2015)(citations omitted). "A comment that is brief, isolated, and inadvertent may not warrant a mistrial." Id. In Fletcher, there were two references to the defendant's prior imprisonment. First, a police officer related that the defendant said he "had been sentenced." The testimony was interrupted by a defense objection and a motion for mistrial was denied. Id., at *14. Second, the defendant's statement to an investigator that he had been "sentenced to the ten years" was improperly played for the jury when it should have been redacted. The defense again moved for mistrial, which the trial court denied. Id.

In rejecting Fletcher's claim of error on appeal, this Court opined that although the comments "should not have been heard by the jury, the standard for a motion for mistrial is high, and we conclude that the remarks in this case were not so prejudicial as to vitiate the entire trial." Id. This Court reasoned that the statement by the officer that the defendant had been sentenced "was brief and did not reveal the nature of the conviction or the severity of the sentence." Id. As to the unredacted comment, this Court agreed with the trial court that the comment "was just a blip." Id. Accordingly, this Court concluded that "these brief and fleeting statements were not so prejudicial as to vitiate the entire trial." Id.

If an *actual* reference to a defendant's prior imprisonment can be insufficiently prejudicial to warrant a mistrial, an isolated reference to a defendant simply being "released," without a hint at what he was released from, is certainly not prejudicial. This is particularly so when, as in Fletcher, the comment was "brief and fleeting" in the context of the trial and no attention was thereafter drawn to the fact that Appellant was "released." Id.

Appellant's creative attempts to tie other evidence and events in the trial to O'Neal's non sequitur are unavailing. First, the fact that the trial judge was incensed with O'Neal for her comment is neither here nor there. All the jury heard

was "he was released." The fact that O'Neal admitted outside the presence of the jury that she thought Appellant had been released from jail or prison is irrelevant. The jury heard none of this.

Second, the fact that O'Neal either "burst into tears" or got a little red-eyed (depending upon whether one believes the defense attorney's or the prosecutor's account) when the prosecutor asked O'Neal if her husband had passed away has nothing whatsoever to do with O'Neal's comment. It was the prosecutor who asked O'Neal about her husband, and if he upset her, the jury would have blamed him for eliciting this so-called "emotional display" when he reminded her of the death of her husband. Any suggestion that O'Neal's reaction to the question was in any way prejudicial to Appellant or even tangentially related to her comment is completely unavailing.

Third, testimony that Iris Williams called O'Neal after she encountered Appellant in Gibsonton the morning of the crime was clearly offered to corroborate the time of day Appellant was in Gibsonton (i.e., at around the same time the firefighters were dousing the van fire and finding Tran's body). Contrary to Appellant's suggestion, there was nothing in either O'Neal's or Williams' testimony to indicate either woman was "suspicious" of Appellant and the jury would not have inferred "suspicion" based on testimony about the phone calls between the two women.

Finally, Appellant's attempts to connect various issues with jurors and prospective jurors to O'Neal's nonresponsive blurb are equally futile. Prospective Juror Singh was dismissed because, contrary to the judge's order, he conducted an internet search on the case. The court verified that Singh told no other prospective jurors the results of his research (V52/1984, 1903-14; V53/1919; V54/2108). Juror Clark was released during the guilt phase because his fear of enclosed spaces and of heights made him fear the onset of a severe panic attack (V64/3582-89). Juror Gomez could not be sequestered because of child care issues, so she was moved to alternate juror status for guilt phase deliberations and placed back on the jury for the penalty phase (V72/4763, 4796-4801; V74/5084; V76/5202-08). None of these matters are relevant to O'Neal's isolated remark that Appellant was "released" or to any other issue in the case.

O'Neal's remark that Appellant had been "released" was not so prejudicial as to vitiate the entire trial; therefore, the trial court properly denied Appellant's motion for mistrial. He is entitled to no relief on this claim.

ISSUE V

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING THE INTRODUCTION OF PHOTOGRAPHS OF THE VICTIM'S BODY WHICH SHOWED POST-MORTEM BURN DAMAGE WHERE THE MEDICAL EXAMINER TESTIFIED THAT EACH OF THE PHOTOGRAPHS WAS NECESSARY TO ASSIST THE JURY IN UNDERSTANDING HER TESTIMONY AND WHERE THE STATE ALLEGED APPELLANT ATTEMPTED TO BURN THE VICTIM'S BODY TO CONCEAL EVIDENCE OF HIS CRIMES? (RESTATED)

Appellant argues that he received an unfair trial because the State was permitted to introduce photographs that depicted post-mortem burn injuries to the victim's body. Specifically, Appellant contends that State's exhibits Q3, Q4, Q5, Q6, Q9, and Q10 were irrelevant and unduly prejudicial. The trial court properly ruled that the photographs were admissible. The photographs showed the victim's injuries and also revealed damage that Appellant caused to the victim's remains. They assisted the medical examiner in her testimony concerning the victim's wounds and the cause of her death, and were also relevant to show the extent to which Appellant tried to destroy evidence of his crimes.

A reviewing court will not disturb a trial court's ruling on the admissibility of photographic evidence absent a clear abuse of discretion. Boyd v. State, 910 So. 2d 167, 191 (Fla. 2005)(citation omitted). "Photographic evidence is admissible if it is relevant to a material fact in dispute." Id. See also Douglas v. State, 878 So. 2d 1246, 1255 (Fla. 2004)("The test for admissibility of photographic evidence is relevancy rather

than necessity."). "Thus, 'autopsy photographs, even when difficult to view, are admissible to the extent that they fairly and accurately establish a material fact and are not unduly prejudicial.'" Boyd, 910 So. 2d at 191-92 (quoting Rose v. State, 787 So. 2d 786, 794 (Fla. 2001)). "This Court has … repeatedly upheld the admission of photographs when they are necessary to explain a medical examiner's testimony, the manner of death, or the location of the wounds." Boyd, 910 So. 2d at 192 (citations omitted).

Appellant objected that the photographs were "extremely graphic" and that much of the damage to the body occurred post-mortem and was therefore of "very little probative value." At Appellant's request, the State proffered the testimony of the medical examiner as to whether the photographs would assist her in her testimony. The medical examiner described the various areas of the victim's body depicted in each photograph, and testified that each photograph was necessary to help her explain what happened to the victim. Exhibit Q3 showed a stab wound and an incised wound on the victim's neck. Exhibit Q4 displayed the injury to the victim's neck area in front and on the right side, but did not fully show two incised wounds on the neck. Exhibit Q5 was a close-up of the stab wounds which made it easier to see the relationship between the stab wounds and the incised wounds. Exhibit Q6 showed the victim's face and injuries to her throat

and neck on the left side. Exhibit Q7 depicted the anterior view of the injuries to the front of the victim's neck. Exhibit Q9 was a close-up of the victim's left hand and showed an injury to the hand that was likely a defensive wound. Exhibit Q10 showed the injury to the victim's left hand from a different angle (V61/3271-79, 3285-90).

As to the thermal injuries to the body, the medical examiner explained that the photographs of the burn damage would assist in explaining why the victim's injuries looked the way they do. She testified: "The thermal injuries cause artifact to pre-mortem or antemortem injuries so they don't necessarily look like they might in a non-burned body" (V61/3292, 3295).

The trial court ruled that all the photographs were relevant and were not unduly prejudicial (V61/3306-10).

Appellant complains that the trial court allowed into evidence photographs of the victim that showed post-mortem burn damage. This was not error. First, the burn damage, while disturbing, was not something that happened to the victim's body by mere happenstance or passage of time (e.g., animal damage or decomposition). But see Harris v. State, 843 So. 2d 175, 184 (Fla. 2002)(crime scene photographs of decomposed body of the victim were relevant, since they demonstrated the manner of death and assisted the officer in testimony about the crime scene). Appellant deliberately inflicted the burn damage to the

victim's body in an effort to conceal his crimes. "Those whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments." Henderson v. State, 463 So. 2d 196, 200 (Fla. 1985).

Second, the medical examiner testified that each of the challenged photographs would assist her in presenting her testimony concerning the victim's wounds and her cause of death. "This Court has upheld the admission of autopsy photographs when they are necessary to explain a medical examiner's testimony, the manner of death, or the location of the wounds." Douglas v. State, 878 So. 2d 1246, 1255 (Fla. 2004). See also Floyd v. State, 808 So. 2d 175, 184 (Fla. 2002)(autopsy photographs "were relevant to show the circumstances of the crime and the nature and extent of the victim's injuries"); Larkins v. State, 655 So. 2d 95, 98 (Fla. 1995)("We have upheld the admission of photographs to explain a medical examiner's testimony, to show the manner of death, the location of wounds, and the identity of the victim.").

In Jackson v. State, 545 So. 2d 260, 265 (Fla. 1989), the victims' bodies were also burned. The adult victims died of gunshot wounds while the child victims died of smoke inhalation. Id. This Court rejected the defendant's claim that the trial court erred in admitting photographs of the victims' charred remains because "these photos were relevant to prove identity

and the circumstances surrounding the murders and to corroborate the medical examiner's testimony." Id. Similarly, here the photographs were relevant to show the circumstances surrounding the murder, including depictions of incised, stab, and defensive wounds, and to corroborate the medical examiner's testimony.

Appellant asserts that the photographs were unduly prejudicial and therefore inadmissible. "Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." § 90.403, Fla. Stat. (2007). "In order for relevant, probative evidence to be deemed unfairly prejudicial, it must go beyond the inherent prejudice associated with any relevant evidence." State v. Gad, 27 So. 2d 768, 770 (Fla. 2d DCA 2010). Indeed, "[a]lmost all evidence introduced during a criminal prosecution is prejudicial to a defendant." Amoros v. State, 531 So. 2d 1256, 1258 (Fla. 1988). "This Court has long followed the rule that photographs are admissible if they are relevant and not so shocking in nature as to defeat the value of their relevance." Czubak v. State, 570 So. 2d 925, 928 (Fla. 2007). Section 90.403 "is directed at evidence which inflames the jury or appeals improperly" to the jurors' emotions. Steverson v. State, 695 So. 2d 687, 689-90 (Fla. 1997)(citation omitted). The six photographs Appellant challenges on appeal, although

difficult to view, do not rise to such a level that they would inflame the jury or appeal improperly to the jurors' emotions. Id.

Hertz v. State, 803 So. 2d 629 (Fla. 2001), upon which Appellant relies, is distinguishable. In that case, the victims were shot and the bodies were burned when the defendant and his co-defendants set the victims' house on fire. Id., at 636. The bodies were so "severely burned" the victims had to be identified using dental records. Id., at 637. The State introduced two autopsy photographs which were used by the medical examiner *only* "to describe the damage done to the victims' bodies by the ensuing fire," a matter that was not in dispute. Id., at 643. Thus, the photographs were not relevant in that case. Additionally, "the medical examiner's testimony about the cause of death did not rely at all on the photographs." Id. This Court noted that "[i]n fact, when describing the *actual* cause of death, i.e., the gunshot wounds, it appears from the record that the medical examiner pointed to his own head to demonstrate the entry and exit wounds of the male victim—not to any of the autopsy photos offered by the State." Id., at 643 n.11 (emphasis in original).

In this case, by contrast, the photographs were not used *solely* to depict the post-mortem damage to the victim's body. The medical examiner relied on the photographs to explain the

cause and manner of the victim's death. The photographs incidentally showed burn damage; however, they also featured the incised, stab, and defensive wounds to the victim's body. The trial court reviewed all of the photographs and found that they were relevant and not unduly prejudicial. "[T]his Court has considered the trial court's preliminary screening as a factor weighing in favor of admissibility." Philmore v. State, 820 So. 2d 919, 931 (Fla. 2002)(citing Gudinas v. State, 693 So. 2d 953, 963 (Fla. 1997)).

Even if the trial court erred in admitting the photographs, any such error was harmless beyond a reasonable doubt. DiGuilio, 491 So. 2d at 1129. The photographs were not a feature of the trial. They were only a small part of the evidence against Appellant, which included DNA evidence linking him to the victim's rape and murder as well as his own statements implicating him in the crimes. See Almeida v. State, 748 So. 2d 922, 930 (Fla. 1999)(erroneous admission of autopsy photograph held harmless "in light of the minor role the photo played in the State's case"); Hertz v. State, 803 So. 2d 629, 643 (Fla. 2001)(in light of the admissible evidence implicating defendant and the "minor role the autopsy photos played in the State's case," any error in admitting the photographs was harmless).

To the extent Appellant finds fault with the medical examiner's testimony concerning the photographs, he did not

object below. Thus, his complaints about the medical examiner's testimony are unpreserved for appellate review. See, e.g., Jackson v. State, 983 So. 2d 562, 568 (Fla. 2008)(to preserve error for appellate review, a contemporaneous, specific objection must be made during trial). If a claimed error is not properly preserved or is unpreserved, the conviction can be reversed only if the error is fundamental. Goodwin v. State, 751 So. 2d 537, 544 (Fla. 1999). Fundamental error is "error which reaches 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." State v. Delva, 575 So. 2d 643, 644-45 (Fla. 1991)(citation omitted). Appellant complains that during her testimony and while using the challenged photographs, the medical examiner described the burn damage to the victim's body. The medical examiner's descriptions of the burn damage were given in the context of describing the victim's cause and manner of death. Accordingly, there was no error, much less fundamental error, with respect to this testimony. Id.

Again, as in Issue IV above, Appellant's attempts to link other events in the trial to the photographs are unconvincing. As previously explained, Juror Clark was released during the guilt phase because he feared the onset of a severe panic attack due to his fear of enclosed spaces and of heights. During his discussion of this matter with the trial court, Juror Clark made

no mention whatsoever of the autopsy photographs. Juror Eades asked to be excused shortly after the penalty phase began and after Appellant presented the testimony of one of his elementary school teachers. Juror Eades stated that the testimony was "hitting [her] close to home" such that she could not be impartial. She explained that her emotional response at that point had to do with her feelings about her own son (V76/5199-5202). Contrary to Appellant's assertion, Juror Eades' release from the jury had nothing to do with autopsy photographs. She had already been through the entire trial and rendered a verdict. Her emotional response related to her own son and came after Appellant's first penalty phase witness had testified about Appellant's difficult childhood. It is more likely, given this context, that Juror Eades felt she could not be fair and impartial toward the State.

Furthermore, Appellant has not demonstrated that it was somehow improper for the trial court to place Juror Gomez back onto the jury after Juror Eades was excused. Florida Rule of Criminal Procedure 3.280(a) provides that "[a]lternate jurors, in the order in which they are impaneled, shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties." The rule further provides that, *except in capital cases*, "an alternate juror who does not replace a principal juror shall be discharged

at the same time the jury retires to consider its verdict." Rule 3.280(b) provides that, in capital cases, alternate jurors will be instructed at the end of the guilt phase that they may have to return for an additional hearing if there is a penalty phase. Appellant has cited to no authority to establish that the trial court's decisions with respect to alternate jurors was improper.

In sum, the trial court properly admitted the challenged photographs. Although the photographs incidentally depicted burn damage Appellant caused when he tried to destroy evidence of his crimes, the photographs were not shown solely for that purpose. Rather, they were admissible to assist the medical examiner in explaining to the jury the nature and manner of the victim's wounds and her cause of death. Appellant is entitled to no relief on this matter.

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN GIVING THE COLD, CALCULATED AND PREMEDITATED INSTRUCTION TO THE JURY WHERE THE STATE PRESENTED EVIDENCE SUPPORTING THE INSTRUCTION? (RESTATED)

Appellant contends the jury recommendation was tainted because the trial court instructed the jury on the cold, calculated, and premeditated [CCP] aggravator when the evidence was insufficient to support the instruction. To the contrary, a trial court is required to give all instructions to the jury regarding aggravating or mitigating circumstances when credible and competent evidence has been presented.

A challenge to a specific jury instruction is reviewed for abuse of discretion. Carpenter v. State, 785 So. 2d 1182, 1200 (Fla. 2001). "[D]iscretion is abused only where no reasonable [judge] would take the view adopted by the trial court." Buzia v. State, 926 So. 2d 1203, 1216 (Fla. 2006)(quoting Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990)). "A trial court has wide discretion in instructing the jury, and the court's discretion regarding the charge to the jury is reviewed with a presumption of correctness on appeal." Patrick v. State, 104 So. 3d 1046, 1058 (Fla. 2012)(citation omitted).

A trial judge is required to instruct the jury on all aggravating and mitigating factors when credible and competent evidence of such has been presented to the jury. Welch v. State, 992 So. 2d 206, 215 (Fla. 2008)(citation omitted). Although an aggravating factor must be proven beyond a reasonable doubt for purposes of sentencing, a jury instruction on an aggravator "need only be supported by credible and competent evidence." Welch, 992 So. 2d at 215 (citation omitted). "The fact that the State does not prove an aggravating factor to the court's satisfaction does not require a conclusion that there was insufficient evidence to allow the jury to consider that factor." Welch, 992 So. 2d at 215 (citation omitted).

To support the CCP aggravator, the State must prove that "the killing was the product of cool and calm reflection and not an

act promoted by emotional frenzy, panic, or a fit of rage (cold), and that the defendant had a careful or prearranged design to commit murder before the fatal incident (calculated), and that the defendant exhibited heightened premeditation (premeditated), and that the defendant had no pretense of moral or legal justification." Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994)(citations omitted). Appellant complains that because the trial court found there was insufficient evidence of heightened premeditation, the instruction should not have been given. "Heightened premeditation" has been described as "deliberate ruthlessness." See, e.g., Buzia v. State, 926 So. 2d 1203, 1214 (Fla. 2006).

Here, credible and competent evidence was presented that supported the instruction on the cold, calculated, and premeditated factor. Welch, 992 So. 2d at 215. Specifically, Appellant told fellow inmate Kennedy that he had been watching the victim and knew her exercise routine of jogging by the church. He procured a stolen van, drove to where he knew the victim always jogged, and waited for her. When she came around, he took her at knifepoint from the side of the road, into a dry retention pond six to seven feet below the level of the road. As the victim pleaded with Appellant not to hurt her, Appellant raped the victim. Kennedy testified, "He told her to shut up or he'd kill her." Ultimately, after he had "fucked her good,"

Appellant sliced the victim's throat twice, and then stabbed her four times in the throat. He did not want to leave the body close to where he lived, so he loaded it into the stolen van and drove about twelve miles to an area he was familiar with. His plan was to dump the body, but the van got stuck so he set it on fire to destroy the evidence.

Appellant procured the means to conceal evidence of his crime ahead of time (the stolen van), and he waited for the victim armed with a knife. See, e.g., Buzia v. State, 926 So. 2d 1203, 1215 (Fla. 2006)("We have found the CCP aggravator where the defendant procured a weapon beforehand."). In this case, it is reasonable to infer that Appellant procured the weapon ahead of time, as he had it when he accosted the victim. Appellant also procured the means by which he could dispose of evidence of his crime in advance by stealing the van shortly before driving it over to the church to wait for the victim to jog by. Additionally, after sexually battering the victim, Appellant had the opportunity to leave without killing her, but instead, he sliced and then stabbed her throat until she bled out and died. This Court has "previously found the heightened premeditation required to sustain this aggravator where a defendant has the opportunity to leave the crime scene and not commit the murder but, instead, commits the murder." Alston v. State, 723 So. 2d 148, 162 (Fla. 1998)(emphasizing the defendant's choice between

stopping at the level of kidnapping and robbery and murdering the victim).

Even though the trial court did not ultimately find the existence of CCP beyond a reasonable doubt, there was credible and competent evidence presented to give the jury an instruction on the aggravator. Aguirre-Jarquin v. State, 9 So. 3d 593, 607-08 (Fla. 2009). Accordingly, it was not error to instruct the jury on the CCP aggravator.

Should this Court determine that the trial court erred in giving the CCP jury instruction, such error is harmless beyond a reasonable doubt. State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986). Application of the harmless error test requires a complete review of the record, including examining both the permissible and impermissible evidence, to determine if the impermissible evidence affected the verdict. Id.

The jury was instructed on three aggravators: (1) the capital felony was committed while Appellant was engaged in the commission of sexual battery; (2) the capital felony was heinous, atrocious, or cruel; and (3) the capital felony was committed in a cold, calculated, and premeditated manner. The two aggravators which the trial court found—during the commission of a felony and HAC—are indisputable. The DNA extracted from the sperm fragments in the victim's vagina matched Appellant's DNA at all 13 loci. Although he insisted to

investigators that he did not know the victim and had never seen her, he told a fellow inmate he had watched the victim, knew her routine, waited for her, abducted her from the side of the road at knifepoint, raped her, then slit and stabbed her throat as she begged him not to hurt her. When viewed against the proven aggravators, no reasonable possibility exists that any error in instructing the jury on the CCP aggravator affected the jury recommendation. Id. Appellant's claim should be rejected.

ISSUE VII

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE TO PRESENT EXPERT TESTIMONY DURING THE PENALTY PHASE TO REBUT APPELLANT'S CLAIM THAT HIS MALADAPTATION WAS THE RESULT OF CHILDHOOD ABUSE? (RESTATED)

Appellant argues that the trial court erred in permitting the State to present Dr. Myers as a rebuttal witness during the penalty phase. Appellant's argument on appeal is that "[n]othing in Dr. Myers' testimony contradicted [the testimony of defense witness] Dr. Leon" (IB/83). Appellant has not met his burden of establishing that the trial court erred in allowing Dr. Myers' testimony. See § 924.051(7), Fla. Stat. (2007)("In a direct appeal or a collateral proceeding, the party challenging the judgment or order of the trial court has the burden of demonstrating that a prejudicial error occurred in the trial court.").

The trial court's ruling on the admissibility of evidence will not be disturbed on review absent an abuse of discretion.

Blanco v. State, 452 So. 2d 520, 523 (Fla. 1984). See also Glynn v. State, 787 So. 2d 203, 204 (Fla. 4th DCA 2001)("It is well-established that a trial court has broad discretion regarding the admissibility of rebuttal testimony")(citations omitted). Discretion is abused only where no reasonable person would take the view adopted by the trial court. Oyola v. State, 99 So. 3d 431, 443 (Fla. 2012).

The trial court did not abuse its discretion in refusing to exclude Dr. Myers' testimony. The evidence was admissible because it was relevant to rebut the defense experts' testimony that Appellant developed antisocial personality disorder as a result of negative childhood experiences. "All relevant evidence is admissible, except as provided by law." § 90.402, Fla. Stat. (2007). "Relevant evidence is evidence tending to prove or disprove a material fact." § 90.401, Fla. Stat. (2007).

Defense witness Dr. Leon testified that Appellant grew up in a "chaotic and dysfunctional family system" and was abused and neglected as a child. As a result of this background, she opined, Appellant suffered from abnormal psychological development. According to Dr. Leon, Appellant's antisocial personality disorder was the direct result of his abnormal childhood (V77/5304-05, 5327, 5331, 5340, 5367). Similarly, defense witness Dr. Gold testified that it would not be "surprising for someone from this kind of background to develop

a personality disorder" (V77/5387, 5420-22).

Dr. Myers reviewed the sheriff's office investigation reports, depositions of Appellant's penalty phase witnesses and family members, Appellant's school records, and the recordings of Appellant's police interviews, and concluded that Appellant has antisocial personality disorder. In contrast to the testimony of the defense witnesses, Dr. Myers opined that "nobody knows" what causes antisocial personality disorder. Dr. Myers did not believe, however, that abuse or lack of nurturing caused Appellant to act violently in his adult life.

Dr. Myers also disputed some of the factual underpinnings upon which the defense experts based their assessments of Appellant. For example, Dr. Myers countered Dr. Leon's conclusion that Appellant had been "abandoned" as a child, pointing out evidence that Appellant always had family members, such as his grandmother and Wally O'Neal, who loved and cared for him and who never abandoned him. Dr. Myers also noted that Appellant had teams of professionals in the school system "looking at him intensively" as a child and yet there were no apparent reports of neglect or abuse to any child services agency (V77/5452-56). Thus, contrary to Appellant's argument, Dr. Myers' did, in fact, offer testimony that contradicted that of Dr. Leon.

The authority upon which Appellant relies is distinguishable.

In Sanchez v. State, 445 So. 2d 1 (Fla. 3d DCA 1984), the defendant claimed self-defense in his prosecution for the shooting death of his wife's former husband. Id., at 2. In that case, the appellate court reversed in part because the prosecution was permitted to introduce improper rebuttal evidence regarding the deceased's lack of a prior criminal record. Id. Evidence of the deceased's good character was not admissible under the circumstances of that case. See § 90.405(1), Florida Statutes (2007) ("When evidence of the character of a person or a trait of that person's character is admissible, proof may be made by testimony about that person's reputation."). Here, by contrast, Dr. Myers' testimony was offered to counter the testimony of Appellant's experts regarding their conclusions that his personality disorder was the result of his unfortunate upbringing.

Carter v. State, 115 So. 3d 1031 (Fla. 4th DCA 2013), upon which Appellant also relies, does not support his claim. In that case, the State called a deputy who had taken statements from witnesses who were called by the State to testify. Id., at 1037. In his own testimony, the defendant had suggested that the witnesses' testimony was consistent only because they talked to each other after the incident. Id. The deputy testified in rebuttal that when he took statements from the witnesses, their versions of the incident were consistent with each other. Id. In

reversing for a new trial, the appellate court found that the rebuttal testimony amounted to "improper bolstering." Id., at 1038. In this case, the State introduced no evidence in the penalty phase which Dr. Myers' rebuttal testimony could "bolster."

Furthermore, even if Appellant is correct and Dr. Myers' testimony merely agreed with that of Appellant's own mitigation expert, any error in allowing such testimony would be harmless beyond a reasonable doubt. Testimony that merely reiterated Appellant's own mitigation evidence could not possibly have contributed to the jury's death recommendation. See State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986)(holding that an error is harmless where there is no reasonable possibility that it contributed to the conviction).

Finally, to the extent Appellant suggests that Dr. Myers' testimony was inadmissible because his review of Appellant's documentation was incomplete (IB: 82), this specific argument was not raised below and is therefore unpreserved for appellate review. See Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982)("[I]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as the legal ground for the objection, exception, or motion below."). Furthermore, Appellant's argument goes to the weight to be given to the testimony and not to its admissibility. "The judge, as

gatekeeper, decides only whether evidence exists and is admissible. Once the evidence is admitted, the jury decides whether it is credible." Bearden v. State, 161 So. 3d 1257, 1263 (Fla. 2015)(citation omitted).

Under the circumstances, Appellant cannot establish that the trial court abused its discretion by permitting the State to introduce Dr. Myers' rebuttal testimony during the penalty phase. Oyola, 99 So. 3d at 443. Therefore, Appellant is not entitled to a new penalty phase based on the admission of Dr. Myers' rebuttal testimony.

ISSUE VIII

WHETHER THE "DURING THE COURSE OF A FELONY" AND THE "HEINOUS, ATTROCIOUS, AND CRUEL" AGGRAVATORS ARE UNCONSTITUTIONAL? (RESTATED)

Appellant asserts that the trial court erred in rejecting his constitutional challenges to Florida's death penalty statute, in particular the "during the course of a felony" and the HAC aggravators. The trial court properly denied these claims.

"A court's decision regarding the constitutionality of a statute is reviewed *de novo* as it presents a pure question of law. There is a strong presumption that a statute is constitutionally valid, and all reasonable doubts about the statute's validity must be resolved in favor of constitutionality." State v. Catalano, 104 So. 3d 1069, 1075 (Fla. 2012)(citations omitted). "As a result, the party

challenging the constitutionality of a statute bears a heavy burden of establishing its invalidity." Montgomery v. State, 69 So. 3d 1023, 1026 (Fla. 5th DCA 2011)(citation omitted).

Appellant filed a motion asking the trial court to declare Florida's death penalty statute unconstitutional. He argued as to the "during the course of a felony" aggravator that it fails to serve a limiting function and instead creates an unlawful presumption that death is the appropriate sentence. The trial court denied his claim (V4/504-09; V5/714).

Appellant repeats his argument on appeal, claiming that the "during the course of a felony" aggravator unconstitutionally amounts to an automatic aggravating circumstance. As Appellant acknowledges (IB: 84), this Court has on numerous occasions rejected the contention that murder in the course of a felony is an unconstitutional automatic aggravator and that it fails to narrow the class of persons eligible for the death penalty. See Doorbal v. State, 983 So. 2d 464, 495 (Fla. 2008)(citing Jones v. State, 928 So. 2d 1178, 1183 n.6 (Fla. 2006); Griffin v. State, 866 So. 2d 1, 14 (Fla. 2003); Card v. State, 803 So. 2d 613, 628 (Fla. 2001); Kelly v. Dugger, 597 So. 2d 262, 265 (Fla. 1992)). See also Blanco v. State, 706 So. 2d 7, 11 (Fla. 1997); Johnson v. State, 660 So. 2d 637, 647 (Fla. 1995). Therefore, Appellant is entitled to no relief on this claim.

Appellant asserts that the HAC aggravator is

unconstitutionally vague and overbroad[12] and was applied in an arbitrary manner in his case. Appellant raised this argument below, and the trial court rejected his claim (V4/553-69; V5/716). In Victorino v. State, 23 So. 3d 87 (Fla. 2009), this Court rejected such a challenge to the HAC aggravator, reasoning:

> In Espinosa,[13] the Supreme Court held that our prior jury instruction on this aggravator was unconstitutionally vague. However, in Hall v. State, 614 So. 2d 473, 478 (Fla. 1993), this Court upheld the statute against this same challenge, and we have repeatedly affirmed that holding. See Francis v. State, 808 So. 2d 110, 134 (Fla. 2001)(explaining that in Hall, this Court "reasoned that the [new] instruction provided sufficient guidance so as to save both the instruction and the aggravator from a vagueness challenge"); Walker v. State, 707 So. 2d 300, 316 (Fla. 1997)("[T]he standard instruction given in this case is the same instruction this Court approved in Hall and found sufficient to overcome vagueness challenges to both the instruction and the aggravator." (citation omitted)); Power v. State, 605 So. 2d 856, 864 & n.10 (Fla. 1992).

Victorino, 23 So. 3d at 104.

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[12] Appellant makes reference to "overbreadth" in his initial brief (IB: 86); however, this argument is inapplicable here as there is no First Amendment issue. "The overbreadth doctrine applies only if the legislation is susceptible of application to conduct protected by the First Amendment." Southeastern Fisheries Assoc. v. Dept. of Natural Resources, 453 So. 2d 1351, 1353 (Fla. 1984)(citations and quotation marks omitted). Appellant cannot reasonably contend that his conduct in murdering the victim was protected by the First Amendment. See State v. Burch, 545 So. 2d 279, 281 (Fla. 4th DCA 1989)(agreeing that overbreadth doctrine did not apply because defendant could not reasonably contend his conduct of selling cocaine within one thousand feet of a school was protected by the First Amendment).

[13] Espinosa v. Florida, 505 U.S. 1079 (1992).

In light of this precedent, Appellant cannot establish that the HAC aggravator is unconstitutional.

Without raising it as a separate issue and without any supporting argument, Appellant also suggests that the trial court erred in finding that his actions of murdering the victim met the requirements for the heinous, atrocious, and cruel aggravator. He states that, "[t]here was no other evidence of shocking or vile behavior other than the burning of the body" (IB: 86).

This argument is waived.[14] Nevertheless, it bears noting that the HAC aggravator was properly applied in this case. "For HAC to apply, the crime must be conscienceless or pitiless and unnecessarily torturous to the victim." Francis v. State, 808 So. 2d 110, 134 (Fla. 2001)(citations omitted). This Court has consistently upheld the HAC aggravator where the victim was repeatedly stabbed. Francis, 808 So. 2d at 134; Guzman v. State, 721 So. 2d 1155, 1159 (Fla. 1998); Brown v. State, 721 So. 2d

[14] See Fla. R. App. P. 9.210(b)(5)(providing that the initial brief shall contain argument with regard to each issue); Fla. Emergency Physicians-Kang and Assn., M.D., P.A. v. Parker, 800 So. 2d 631 (Fla. 5th DCA 2001)("In order to obtain appellate review, alleged errors relied upon for reversal must be raised clearly, concisely, and separately as points on appeal." (citations an quotation marks omitted); Johnson v. State, 795 So. 2d 82, 89-90 (Fla. 5th DCA 2000)(defendant's privacy claim deemed abandoned where, even if his initial and reply briefs could be construed as raising the claim, the argument was not developed).

274, 277 (Fla. 1998); Atwater v. State, 626 So. 2d 1325, 1329 (Fla. 1993). "We have consistently affirmed the HAC aggravator where the victim was repeatedly stabbed and remained conscious during part of the attack." Gosciminski, 132 So. 3d at 715 (citing Boyd v. State, 910 So. 2d 167, 191 (Fla. 2005)). "When a victim sustains defensive wounds during an attack, it indicates that the victim did not die instantaneously, and in such a circumstance, the trial court can properly find the HAC aggravator." Id. (citing Rolling v. State, 695 So. 2d 278 (Fla. 1997)). In this case, there was evidence of a defensive wound on the victim's hand. During the attack, Appellant sliced the victim's neck open in two locations. One of the incised wounds was 4.5 inches long. After that, he stabbed the victim in the neck four times, which finally caused her to bleed out and die.

This Court has also "upheld a finding of HAC where the medical examiner has determined that the victim was conscious for merely seconds." Francis, 808 So. 2d at 135 (citing Rolling v. State, 695 So. 2d 278, 296 (Fla. 1997)(upholding HAC where medical examiner concluded that victim was conscious anywhere between 30 and 60 seconds after she was initially attacked); Peavy v. State, 442 So. 2d 200, 202-03 (Fla. 1983)(upholding finding of HAC where medical examiner testified that victim lost consciousness within seconds and bled to death in a minute or less and there were no defensive wounds)). Here, the medical

examiner testified that, due to the nature of the wounds, she could conclude that the incised (slicing) wounds were inflicted first. The fatal (stabbing) wounds were inflicted next. The victim was alive when all the wounds were inflicted, and she would have remained conscious from seconds to *several minutes* after the infliction of the fatal wounds.

Furthermore, as this Court has "previously noted, 'the fear and emotional strain preceding the death of the victim may be considered as contributing to the heinous nature of a capital felony.'" Francis, 808 So. 2d at 135 (quoting Walker v. State, 707 So. 2d 300, 315 (Fla. 1997)("[F]ear, emotional strain, and terror of the victim during the events leading up to the murder may make an otherwise quick death especially heinous, atrocious, or cruel.")). Cuc Tran was jogging before sunrise. Appellant took her from the side of the road at knifepoint. He either forced her to remove her clothing, or he removed it himself, as her clothing was found along the berm leading to the dry retention pond. He sexually battered her while she begged him not to hurt her. In his own words, he "fucked her good." There was evidence by way of a defensive wound on her hand that during the attack, she attempted to defend herself. She screamed, and he tried to shut her up by slicing her throat open—not once, but twice. After slicing her throat, he stabbed her four times in the neck, finally killing her.

Under the circumstances, had Appellant presented an appropriate argument concerning the propriety of the HAC aggravator, this Court would be justified in rejecting it.

STATEMENT REGARDING SUFFICIENCY OF THE EVIDENCE

Appellant does not challenge the sufficiency of the evidence to support the jury's verdict finding him guilty of first degree murder in the death of Cuc Thu Tran. Because this Court reviews this issue on direct appeal in every capital case, this statement is offered to assist the Court in that function. See Buzia v. State, 926 So. 2d 1203, 1217 (Fla. 2006)(noting that this Court has "the independent duty to review the record in each death penalty case to determine whether competent, substantial evidence supports the murder conviction").

The only disputed issue in this case with respect to Tran's murder was the identity of her killer. Tran was sexually battered and she died from stab wounds to her neck inflicted after her killer tried to murder her by slicing her throat. Appellant confessed to Gonzalez and Kennedy that he raped and murdered the victim and that he tried to destroy evidence of his crime by driving her body to another location and setting the van on fire. The State presented evidence that Tran lived in a trailer located only 387 feet from the trailer where Appellant was living. She jogged every morning at the same time down the road and around the St. Francis Church. Appellant insisted to

investigators that he had never met or seen Tran; however, DNA extracted from sperm fragments from Tran's vagina matched Appellant's DNA at all 13 loci. On the morning of the victim's disappearance, Appellant was seen on foot in the area near where the victim's remains were found in a burning van. This evidence, combined with Appellant's own admissions to the murder, provides sufficient proof to uphold the adjudication of guilty. Accordingly, competent, substantial evidence supports the murder verdict.

STATEMENT REGARDING PROPORTIONALITY

Although Appellant does not contest the proportionality of his death sentence, this Court considers the issue on direct appeal in every capital case. See Gosciminski v. State, 132 So. 3d 678, 716 (Fla. 2013); Miller v. State, 42 So. 3d 204, 229 (Fla. 2010). Accordingly, the following analysis is offered to assist the Court with its proportionality review.

The trial court found two aggravating factors: the capital felony was committed while engaged in the commission of sexual battery; and the murder was especially heinous, atrocious or cruel (V17/3037-40). The court weighed this aggravation against one statutory and thirteen nonstatutory mitigating factors. The nonstatutory mitigators were: (1) dysfunctional family background; (2) deprivation of parental nurturing during infancy and toddler years; (3) abandonment by mother and father; (3)

lack of healthy role models from which to learn appropriate behavior and coping skills; (5) sexual abuse by grandmother's boyfriend during early teen years (6) development of pathological behaviors including cutting and other self-mutilating behaviors due to dysfunctional family; (7) inability to create secure attachments and self-regulate his emotions resulting in an individual who is mentally and emotionally incomplete; (8) personality disorder due to childhood experiences and genetic traits passed to him from his parents; (9) raised in extreme poverty and taught and encouraged by family members to steal food and clothes; (10) raised by neglectful guardians who encouraged criminality at a young age; (11) history of prescription and alcohol abuse by caregivers; (12) impacted by the suicide of a loved one as a youngster; (13) was affectionate with his mother, protective and loving toward his younger sister, and close to his grandmother. The court *sua sponte* found the existence of the statutory mitigating circumstance that Appellant's capacity to conform his conduct to the requirements of the law was substantially impaired. The jury recommendation for death was eleven-to-one.

"This Court's 'review on proportionality is not a comparison between the number of aggravators and mitigators.'" Russ v. State, 73 So. 3d 178, 198 (Fla. 2011)(quoting McGirth v. State, 48 So. 3d 777, 796 (Fla. 2010)). "Proportionality review

requires this Court to engage in a qualitative review of the 'totality of the circumstances and compare the present case with other capital cases in which this Court has found that death was a proportionate punishment.'" Id. (quoting Wright v. State, 19 So. 3d 277, 303 (Fla. 2009)). Rather than counting the aggravating and mitigating circumstances, the Court will consider the nature of, and the weight given to, the relevant factors. Serrano v. State, 64 So. 3d 115 (Fla. 2011); Abdool v. State, 53 So. 3d 208, 224 (Fla. 2010)(noting the large quantity of mitigation presented, but confirming that the focus is on the quality, not the quantity, of the evidence). In addition, the Court will not reweigh the sentencing factors, but accepts the jury's recommendation and the judge's balancing of the evidence. Rigterink v. State, 66 So. 3d 866, 899 (Fla. 2011). Because the analysis is a comparison of the totality of the circumstances with factually similar crimes and criminals, the Court can take facts beyond the stated sentencing factors into account. See, e.g., Sliney v. State, 699 So. 2d 662, 672 (Fla. 1997)(noting the brutality of the attack in upholding proportionality of sentence, despite the trial court's failure to find HAC).

This Court has found that HAC is one of the strongest aggravators in the sentencing scheme. See Rigterink v. State, 66 So. 3d 866, 900 (Fla. 2011)(HAC is among the weightiest of aggravating factors and "applies in physically and mentally

torturous murders which can be exemplified by the infliction of a high degree of pain or utter indifference to or enjoyment of the suffering of another"); Johnson v. State, 969 So. 2d 938, 958 (Fla. 2007)(the HAC aggravator "is among the weightiest in the statutory scheme"). The prior violent felony conviction aggravator is also cited as providing significant weight. See, e.g., Silvia v. State, 60 So. 3d 959, 974 (Fla. 2011)("[T]he prior violent felony aggravator is considered one of the weightiest aggravators").

A qualitative review of the totality of the circumstances in this case and a comparison between this case and other capital cases demonstrates that the death penalty is proportionate in this case. See Boyd v. State, 910 So. 2d 167 (Fla. 2005)(finding death sentence proportionate where trial court found two aggravators, one statutory mitigator, and five nonstatutory mitigating factors); Evans v. State, 808 So. 2d 92 (Fla. 2001)(concluding that the death sentence was proportionate where trial court found two aggravating factors, one statutory mitigator, and the existence of eleven nonstatutory mitigators). See also Mansfield v. State, 758 So. 2d 636, 647 (Fla. 2000)(death sentence was proportionate where trial court found two aggravating factors, HAC and murder committed during sexual battery, measured against five nonstatutory factors that were given little weight); Davis v. State, 703 So. 2d 1055, 1061-62

(Fla. 1997)(death sentence was proportionate where trial court found two aggravating factors of HAC and committed during course of sexual battery outweighed slight nonstatutory mitigation); Geralds v. State, 674 So. 2d 96 (Fla. 1996)(death sentence was proportionate where the trial court found two aggravating circumstances, HAC and murder in course of felony, and some nonstatutory mitigation).

Moreover, this Court has found the death sentence proportionate in the face of similar aggravators and significantly more mitigators. See, e.g., Johnston v. State, 863 So. 2d 271, 286 (Fla. 2003)(death sentence was proportionate where trial court found the existence of two aggravating circumstances, one statutory mitigating factor, and 26 nonstatutory mitigating factors); Brant v. State, 21 So. 3d 1276, 1283 (Fla. 2009)(finding death sentence with HAC and murder committed during sexual battery aggravators, three statutory mitigators, and several nonstatutory mental health mitigators).

The death penalty is appropriate when this case is compared with similar cases. Accordingly, this Court must affirm the sentence imposed on Appellant.

CONCLUSION

WHEREFORE, the State respectfully requests that this Honorable Court AFFIRM the judgment and sentence imposed on Appellant Kenneth Ray Jackson.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 16th, 2015, I electronically filed the foregoing with the Clerk of the Court by using the e-portal filing system which will send a notice of electronic filing to the following: Terri L. Backhus, Special Assistant Public Defender, Office of the Public Defender, Tenth Judicial Circuit, Post Office Box 9000-Drawer PD, Bartow, Florida 33831-9000, **bakowitz1@verizon.net** [and] **mjudino@pd10.state.fl.us**.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted and certified,

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