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**IN THE SUPREME COURT OF FLORIDA**

**KIM JACKSON,**

**Appellant,**

**v.**

**STATE OF FLORIDA,**

**Appellee.**

**Case No. SC13-2090**

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

# ANSWER BRIEF OF APPELLEE

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## PRELIMINARY STATEMENT

This brief will refer to Appellant Kim Jackson as Appellant, Defendant, or by proper name, Jackson. Appellee, the State of Florida, was the prosecution below. This brief will refer to Appellee as Appellee, the prosecution, or the State.

The record on direct appeal will be cited throughout this brief by the appropriate volume and page number (V#/page#).

The supplemental record on appeal will be cited as "Supp." followed by the appropriate volume and page number (Supp. V#/page#).

Appellant's initial brief in this proceeding will be cited as "IB" followed by the appropriate volume and page number (IB page#).

## STATEMENT OF THE CASE AND FACTS

Debra Pearce was murdered in October 2004 in her home in Jacksonville, Florida. (10/640). She was last seen by her mother in the early morning hours of October 16, 2004. (8/388-89). Her body was discovered 3 days later by a neighbor, Chester Norvell[1]. (8/370-72). Mr. Norvell became

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[1] Although Jackson spells this witness's name "Norville"

concerned about Ms. Pearce when he her van missing from her driveway for a few days and he was unable to reach her by phone. (8/371, 8/380-81). As he was walking by Ms. Pearce's house during the late evening/early morning hours of October 18-19,[2] Mr. Norvell noticed that the side gate and sliding glass door of Ms. Pearce house were open. (8/371). When he went to check on Ms. Pearce he found her body in a pool of dark blood on her kitchen floor. (3/460, 8/370-71, 8/377). A butcher knife was still protruding from her chest. (3/492, 3/511). It was clear that she had been deceased for some time. (8/400, 9/405). Mr. Novell did not have a cell phone with him so returned home and called 911. (8/372).

Law enforcement arrived to process the crime scene. (8/295). A bloody fingerprint[3] was found in the victim's

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in his initial brief, the correct spelling is Norvell. (8/370).

[2] Jackson's brief indicated that Mr. Norvell discovered the body "[a]round midnight on October 18, 2004." This is not correct. Norvell was not sure about the time he discovered the body, but he said it was "somewhere around midnight, 1:00 o'clock," meaning the early morning hours on October 19. (8/371-72). It was definitely before 2:00 a.m. on October 19 (8/380). Law enforcement arrived to process the scene on October 19. (8/395). The record is clear that Norvell discovered the body late at night on October 18 or before 2:00 a.m. on October 19.

[3] The bloody print actually showed impressions from 3

blood on the kitchen sink. (3/481-82, 9/417, 9/419, 9/471, 9/567). A hair was collected from the victim's calf that clearly did not come from the victim or belong on her calf. (3/461-62, 9/405-07).

An autopsy revealed that the victim sustained numerous injuries including lacerations, incisions, stab wounds, scrapes, abrasions, a black eye, bruises, contusions, and a bone fracture. (3/499-511, 10/630-40). There were a total of 16 stab and incised wounds. (3/499-510, 4/716, 10/630-38). At least 2 of the injuries appeared to be defensive wounds. (10/635). The murder weapon was still buried in her chest when she arrived at the medical examiner's office. (3/492, 3/511).

One of the stab wounds to the neck and one of the stab wounds to the chest would have been independently fatal. (10/640). The fatal wound to her neck cut her jugular vein in half. (10/632). The fatal wound to her chest cut her subclavian vein in half and almost cut her subclavian artery

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fingers and one main impression of the ring finger on top of three or four other "taps" of the same finger. (3/524-27, 9/504-5, 9/545-47). Only the main impression was of value for comparison. For simplicity's sake, reference in this brief will refer only the main print of the ring finger that was of value for comparison to Jackson's known print.

in half. (10/634). The chest wound penetrated 8 inches deep and was so forceful that it pierced the scapula (shoulder blade) in the back of her body and broke off a ¾ inch area of bone. (10/638-39). Another stab wound to the neck penetrated the cartilage of the larynx. (10/638).

The medical examiner estimated the time of death during the early morning hours of October 17. (10/642). Ms. Pearce bled to death so it would have taken some time for her to lose consciousness. (10/639). The 2 defensive wounds also indicated she was conscious during the attack. (10/635).

The bloody fingerprint from Ms. Pearce's sink was sent to the Jacksonville Sheriff's Office lab, the Pinellas County Sheriff's Office lab, and the FBI lab in Quantico, Virginia. (9/569-71). A latent print examiner with the Jacksonville Sheriff's Office, Michelle Royal, was of the opinion that the print was not of value for comparison. (9/586). The print was then sent to the Pinellas County Sheriff's Office lab and the FBI lab in Quantico, Virginia. (9/570-71). Both Pinellas County and the FBI determined that the print was of value for comparison. (9/491, 9/525). But no known print was initially submitted for comparison and no match was found in the FBI database. (9/491).

Five names came up during investigation. (9/598). Four of

those people were identified, located, interviewed, and ruled out as suspects. (9/598). One was never located. (9/598). Law enforcement also received information during a canvas of the neighborhood that 3 individuals besides Mr. Norvell may have entered the victim's house and stolen items between the time of the murder and law enforcement's arrival at the scene. (10/608). Two of those individuals were located and interviewed. One or both admitted to taking a TV that had been inside the house. (10/608-09). The other was not located. (10/609). No arrests were made because there was conflicting information about whether they actually inside the or not. (10/611). No murder suspects were developed in October 2004. (9/597).

The first big break in the case came in 2007 when FDLE identified the DNA from the hair left on Ms. Pearce's calf. (9/571). A complete DNA profile was developed from the hair and it was a complete match to Kim Jackson. (9/463-64).

In 2008, detectives from the Jacksonville Sheriff's Office travelled to Georgia[4] to interview Jackson. (9/575-76,

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[4] Jackson was in Georgia serving a prison sentence for robbing a Days Inn clerk at gunpoint in 2005. The video of the robbery and the clerk's testimony were introduced during

9/595). The detective provided *Miranda* warnings to Jackson and explained that they were conducting an investigation into the homicide of Debra Pearce (9/579-80). Jackson denied knowing Ms. Pearce or ever having been inside her home. (9/576-78, 9/580). He was shown a large picture of the victim, taken not long before her death, pictures of her home, and a picture of the street signs at the corner on which the home is located. (3/517-19, 9/576-78, 5/596). Jackson did admit to living in Jacksonville from 2001-2005 and being familiar with the neighborhood depicted in the photos, but said he had no idea who Debra Pearce was, that the name Debra Pearce was not familiar to him, that he had never seen her before in his life, and that he had never been inside her home. (9/580-82).

After the FDLE matched the DNA in the hair found on the victim's calf to Jackson, the lead detective sent Jackson's known fingerprints of Jackson to the FBI and Pinellas labs for comparison to the bloody fingerprint. (9/571). Both labs conclusively matched the bloody fingerprint to Jackson. (3/552, 9/496, 9/535). Jackson was indicted for the first-

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the penalty phase.

degree murder of Debra Pearce on July 24, 2008. (1/1-3).

The trial began on April 16, 2013. The State's case focused on the physical evidence found at the crime scene. Detective Knox was the lead crime scene investigator at the scene of Ms. Pearce's murder. (8/394-96). He has a specialized expertise in blood patterns and bloodstains. (8/394). Based on blood evidence, it was determined that the killing took place in the kitchen where the body was found. (9/409, 9/417-18).

Blood spatter evidence also showed that blood was coming from below the kitchen counter and moving upward when it struck the front edge of the counter near the sink. (3/481, 9/417-18). The victim's body was found right below the sink. (9/418). Most of the blood spatter was near the head of the body. (9/409). There was also "cast-off" blood on the other side of the kitchen that was flung off the knife as it was brought up in preparation to strike again. (9/410).

The victim's earrings, a pill bottle, and a hair barrette were also found on the floor in the blood. (9/411-13). A small folding pocketknife was found under the body. (9/412). The knife in the victim's chest "corresponded" to another knife in the knife block on the kitchen counter. (9/411).

The bloody fingerprint located on the kitchen sink was

made when blood was transferred from a hand to the sink. (9/418, 9/442, 9/450). The bloody fingerprint was left after the victim was attacked and blood was shed, not prior to the attack. (9/449). The blood had been there at least long enough to dry. (9/441). The sink was removed and collected as evidence. (9/418-19). DNA testing on the bloody fingerprint established that it was the victim's blood. (9/471).

Bloody shoe impressions and sock prints were also found. (9/424). The footwear impressions led from the kitchen to the master bathroom. (9/431). The number of perpetrators could not be determined from the tread and sock impressions. (9/424-25). The shoe and sock prints could have been made by the same person. (9/425).

The dark hair found on the back of victim's right calf clearly did not belong to the victim and did not belong on her calf. (9/406-07). It was lying in such a way that it may have fallen off her leg if she had stood up. (9/449). The hair was collected and sent to the FDLE for examination. (9/407-08).

The victim's van, which had been missing from her driveway in the days leading up to the discovery of her body, was found at an apartment complex on Lane Avenue,

about a mile to a mile and a half from where Jackson was living at the Diamond Inn. (10/745, 10/765). Blood was found on the upholstery, armrest, and steering wheel and swabbings were taken. (9/468).

Leigh Clark, a DNA expert from the FDLE, was asked to attempt to produce DNA profiles from evidence collected from the crime scene and the victim's car and compare those profiles to the known DNA profiles of Ms. Pearce and Jackson. (9/455-57).

DNA testing of the evidence collected and comparisons to the known profiles of the victim and Jackson was done by the FDLE. (9/455-57). The foreign hair found on the victim's calf had a root attached and was suitable for DNA testing. (9/460). A complete DNA profile was developed and it matched the known DNA profile obtained from Jackson's cheek swabs. (3/516, 9/461-62). The frequency Jackson's DNA profile in the general population is 1 in 44 quintillion Caucasians, 1 in 490 quadrillion African-American blacks, and 1 in 29 quintillion southeastern Hispanics. (9/470). Because of the amount of DNA on the hair and its growth stage, the hair was not shed naturally but likely pulled from Jackson's body with some degree of force. (9/462-66, 9/472). Of the four other hairs submitted for testing, three were not suitable

for DNA testing, and one was matched to the victim. (9/466).[56]

Swabbings from a knife[7] were tested. (9/467). The handle gave a DNA profile consistent with the victim. (9/467). The blade contained a mixture of DNA from 2 or 3 individuals. (9/467). The victim was the major contributor to the DNA on

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[5] Jackson asserts that "[f]ive other hairs that looked out of place were collected." (IB 4). This is incorrect. There were 5 hairs *total*. (9/439). And one of those belonged to the victim. (9/466). The other 3 hairs "did not appear to all be the same," according to the investigator who collected them, but there was no evidence that they "looked out of place" or that they did not belong to the victim. (9/439).

[6] Jackson also seems to incorrectly imply that another male hair was found at the crime scene. His initial brief state, "[t]hree of the other hair fibers were not suitable for DNA testing, the fourth gave a male profile, and the fifth matched the victim. (IB 5). The "male profile" was the same profile matched to Jackson.

[7] The Assistant State Attorney referred to the knife tested as a "small knife," which suggests it was the smaller pocketknife recovered from the scene. (9/412). But the Assistant State Attorney also stated that the knife to which he was referring was "State's 55, for record proposes." (9/467). Defendant's attorney also referred to the knife on which DNA testing was done as State's Exhibit 55. (9/4730). According to the clerk's exhibit memorandum, State's 55 was the "big knife, which was the knife recovered from the victim's chest (3/588), but that appears to be an error that was corrected during trial. (8/434-35). Court's Exhibit A (3/554-56), which is a list of State's exhibits 1-85 that were admitted by stipulation prior to opening statements (8/344-46), shows the correction and lists State's 55 as "big knife," and State's 56 as "little knife." (3/555).

the blade. (9/467). Jackson was excluded as being one of the minor contributors. (9/467).

DNA testing on the blood found on the upholstery and armrest in the victim's van matched the victim. (9/468). Three swabbings from the steering wheel cover were determined to contain a mixture of DNA profiles to which the victim was the major contributor. (9/468). The results of testing to determine the minor contributor were inconclusive, but indicated that the minor contributor was male. (9/468). Jackson could not be excluded as a possible contributor to the blood mixed with the victim's on the steering wheel. (9/468).

Jacqueline Slebrch, a latent print examiner from the FBI lab in Quantico, Virginia, testified regarding her analysis of the bloody fingerprint. When the FBI initially received the bloody latent print, no known print was submitted for comparison and no match was found in the FBI database. (9/491-91). When Jackson's fingerprints were submitted for comparison Ms. Slebrch determined confidently that the bloody latent matched the known print of Jackson's right ring finger. (9/496, 9/510).

Ms. Slebrch testified that she has never seen blood deposited on an existing latent print capture and preserve

the latent. (9/497). She has also never seen a latent print left by going through blood that was already on a surface, but she said it is possible that could happen. (9/506).[8]

William Schade, from the Pinellas County Sheriff's Office lab, testified that he has been a fingerprint expert for over 40 years. (9/516). Upon seeing the bloody fingerprint for the first time in 2004, he immediately determined that it was of value for comparison. (9/525). When later asked to compare the bloody print with Jackson's known print, he determined there was a match. (3/522, 9/527, 9/535). He could tell that the print was left by a hand with wet blood on it. (9/532-33). There is no plausible conclusion except that the bloody print was made by Jackson's right ring finger. (9/535).

The other fingerprints found in Ms. Pearce's house were identified. A latent print from a cologne bottle matched the victim. (9/573-74). A latent print found on a video in one

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[8] Jackson incorrectly states that Slebrch testified that she "had not seen a situation where a latent left on an object was preserved by blood going on top of it but testified that this could occur." (IB 10). Ms. Slebrch did not testify that blood could preserve a print by going on top of it. This is a misinterpretation of her testimony. *See infra* pp. 31-32.

of the bedrooms was identified as belonging to Richard Thomas, a friend of the victim's who was interviewed and ruled out as being involved in the murder. (9/574, 9/583). The only print that remained unidentified was a palmprint, which was taken off a doorjamb in the house that was not close to the victim's body. (9/564, 9/572-73). It was compared to the victim's palmprint, but the results were inconclusive. (9/509). There was not enough information in agreement or disagreement to identify or exclude the victim as the source of the print. (9/509). The unidentified palmprint was not left in blood.[9] (10/612).

Jackson testified at trial in support of his alibi defense. (10/722-760). Jackson admitted he knew Debra Pearce. He met her through her boyfriend in 2003. (10/722, 10/736). He had met her somewhere between 5 and 10 times and had been to her house about 5 times. (10/723). He had been buying crack cocaine from the victim and her boyfriend.[10]

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[9] Although defense counsel got a positive response to a leading question about the palmprint being bloody (9/585), the detective corrected himself on redirect and stated that the palmprint was not bloody. (10/612).

[10] The victim's boyfriend was incarcerated at the time of the murder. (9/584). He was interviewed during the investigation and had no information about the murder or any

(10/724). Sometimes he went there to buy crack because his ex-son-in-law lived right across the street. (10/725).

Jackson said that he and Ms. Pearce were friends at the time of her murder. (10/754). He had even helped her around the house a couple of times. He helped move a couch and fixed her garbage disposal. (10/727-27, 10/750, 10/753-54, 10/758). He claimed that his fingerprint would have been on the kitchen sink because he retrieved a rag from the garbage disposal a few months before the murder. (10/742-43). He also claimed to have vacuumed out Ms. Pearce's van one time at a BP gas station when he met her there to purchase crack. (10/727, 10/750). He was friendly enough with Ms. Pearce that she would have let him in her house at any time. (10/751). At one point, he referred to "staying over" at the victim's house. (10/753).[11]

In October 2004, Jackson was living an extended-stay motel call the Diamond Inn. The Diamond Inn was located in Jacksonville at the corner of Ramona and Lane about a mile

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potential suspects. (9/584-85).

[11] "I mean it's not like having spans when I just happened to be, you know what I'm saying, like staying over there, when I was staying over there, but other than just coming through, I mean it's not – it's not like random, like all the time that I go over there, no sir." (10/753-54).

to a mile and a half from where the victim's van was found on Lane Avenue. (10/745, 10/765).

Jackson claimed that he was in his hometown of Adel, Georgia to celebrate his birthday when Ms. Pearce was murdered. (10/726). His birthday is on October 13, which fell on a Wednesday in 2004. (10/728). He said that he travelled to Adel on Friday, October 15, 2004 with his cousin, Lucy Baker.[12] (10/728). He planned to return to Jacksonville with Baker on Sunday, October 17, but he decided to stay a few extra days instead. (10/730).

Jackson testified that he returned to Jacksonville on Thursday, October 21. (10/730). He left from Valdosta, Georgia on a Greyhound bus around 9:00 or 9:30 p.m. on Thursday, October 21, and arrived in Jacksonville around 11:30 or midnight. (10/730-31). He said he got off the bus before it reached the Jacksonville terminal and walked the rest of the way to Baker's house. (10/731). He called his wife to pick him up from Baker's house at 12:30 or 12:45 a.m. on Friday, October 22. (10/731-32). Jackson learned of the murder when he got back to Jacksonville. (10/737).

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[12] Ms. Baker did not testify at trial.

Jackson admitted during his testimony that he lied to detectives about knowing Ms. Pearce when they came to interview him in Georgia in 2008. (10/739-40). He maintained, however, that he did not immediately recognize the picture of Ms. Pearce shown to him by the detectives because it was in black and white and Ms. Pearce had a red tint to her hair. (10/738). He said Ms. Pearce looked like an "older lady" in the picture. He said she "looked like she was dead to me." (10/738).

Jackson acknowledged that Ms. Pearce was the only person he knew that was murdered in Jacksonville between his birthday trip in 2004 and the interview with detectives. (10/753). But even though he recognized the photos of Ms. Pearce's neighborhood, and detectives told him there were there to talk about her murder, Jackson maintained at trial that he did not recognize Ms. Pearce when the detectives showed him her picture. (10/755).

> ASA MIZRAHI: You fixed Debra's [garbage disposal] because she was your friend, right?
>
> DEFENDANT: Yes.
>
> Q: All right. That's my question. Now, so you sit down in a room with homicide detectives from Jacksonville, correct?

A: Yes, sir.

Q: And you know Debra Pearce, a person that you were moderately close with has been murdered, correct?

A: Yes.

Q: Okay. And they – and they show you this picture, correct, and it never occurred to you that that's Debra Pearce? That's your testimony?

A: Yes, it is.

Q: Never even dawned on you that may be her?

A: I ain't – I have never seen Ms. Pearce like that.

Q: Okay. But certainly when you saw that street sign, you knew right then that this was Debra Pierce, right?

A: I knew that was the area, sir.

Q: Okay. But when you combine it with the photograph, you knew, right?

A: No, sir.

(10/754-55).

Jackson also admitted he is familiar with drug culture from his experience using and selling crack cocaine. (10/746). He is aware that drug dealers often keep drugs and money in their homes. (10/747-48). He denied being in a

difficult financial situation when the murder occurred. (10/748). He stated that he could always hustle, sell drugs, or work to get money, but he admitted having to borrow money from a friend for his bus fare back to Jacksonville in October 2004. (10/748-49). At the time of his testimony, Jackson was a 4-time convicted felon. (12/898-99).

Jackson's wife, Debra Jackson, testified in support of the alibi defense. (10/659-71). She testified that she is still married to Defendant Jackson, still cares for and loves him, still maintains a family with him, does not want him to be in trouble, and has an interest in how this case is decided. (10/671).

Although the Jacksons were living in the same part of town as Debra Pearce, Ms. Jackson said that Defendant Jackson was in Georgia from October 15-22, 2004 because he always goes home to Adel on the weekend closest to his birthday. (10/661-62, 10/665, 10/666). She claimed to remember that he went to Georgia in 2004 with his cousin, Lucy Baker, and that Baker returned to Jacksonville on Sunday, October 17, even though she was not asked to recall these specific dates in 2004 until 3 ½ or 4 years later. (10/662, 10/666-67). She claimed to have such specific recall because she was mad that Jackson took a trip when he should have been working to

help her pay the bills. (10/667, 10/670). She did not see Jackson get in the car with Baker to leave town. (10/669). She claimed to remember that Jackson called her from his father's house in Adel in the morning on Monday, October 18, 2004. (10/670). Based on "other calls throughout the week," she does not believe Jackson was in Jacksonville October 15-19, 2004. (10/670-71).

Defendant Jackson's sister, Penny Williams, testified that she thinks that Jackson moved from Georgia to Jacksonville sometime in the early 2000s, but she is not sure about the timeframe. (10/673-74, 679). She claimed to remember Jackson being in Georgia in October 2004, the weekend after his birthday. (10/674, 10/676). Even though she was not asked to recall this weekend until at least four years later, she said she remembers it because Jackson brought his daughter by to see her "like during that period of time." (10/679). Jackson asked Ms. Williams to take him to the bus station when he missed his ride. (10/674-75). She remembered taking Jackson to the bus station on a Wednesday. (10/676, 10/678). On the way to the bus station, she took Jackson to see his friend, Ms. Franklin, so he could borrow money for the bus fare. (10/675).

Lillie Rose Franklin has known Jackson for 18 years and is

"good friends" with him. (10/682). She remembers seeing Jackson "around October" of 2004, but not the specific day. (10/683, 10/685). She claimed to be sure that it was October because it was "around his birthday" and she "heard he was in town." (10/685). She did not see Jackson until he came to her job to borrow money for a bus ticket. (10/684-85). Despite not being asked to recall anything about seeing Jackson in October 2004 until 4 or 5 years later, she claimed to remember that Jackson told her that his sister was waiting in the car when he came to her job in 2004. (10/684-86).

Walter Jackson, Defendant Jackson's father, testified that he thinks Defendant Jackson moved to Jacksonville in 2000 or 2001. (10/687). Walter claimed to remember Defendant Jackson coming home after his birthday in 2004. (10/688). After being told by defense counsel that Defendant Jackson's birthday was on a Wednesday in 2004, Walter said that Defendant Jackson may have arrived a couple of days after his birthday. (10/688). Walter said Defendant Jackson stayed in Adel for more than a day or two, but could not be sure he was still there on Sunday. (10/689-90). He then testified that he took Defendant Jackson to the bus station on a Wednesday or Thursday, after he missed his first bus.

(10/689, 10/690). He claimed to see Jackson get on the bus, but could not remember if the sun was up or down. (10/690-91).

The jury rejected Jackson's alibi theory and returned a verdict of guilty of murder in the first degree. (11/881). The penalty phase took place on April 26, 2003. Prior to the start of the penalty phase, Jackson stipulated that he had prior convictions for robbery, aggravated assault, armed robbery, and that he was on felony probation at the time of the murder. (4/608). The defense presented 15 witnesses in mitigation. (12/944-1053). The jury recommended that the judge impose the death penalty by a vote of 8-4. (4/605). A *Spencer*[13] hearing was held on June 11, 2013. (6/1058-1108).

On October 1, 2013, the court sentenced Jackson to death. (6/1143). The court found 3 aggravating circumstances: 1) the Defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person (great weight), 2) the capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community

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

control or on felony probation (great weight), and 3) the capital felony was especially heinous, atrocious, or cruel (great weight). (4/720-30).

The court found 66 nonstatutory mitigating circumstances.[14] (4/730-54).

The court found that the aggravating circumstances far outweighed the mitigating circumstances in this case. (4/760-61). The court followed the jury's recommendation and imposed the death penalty. (4/762).

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[14] For purposes of clarity, the court grouped these mitigating circumstances into the following 12 general categories in the sentencing order: 1) the Defendant is a good father and husband, and shares the love of his family, 2)the Defendant is a good sibling and son, and shares the love of his relatives in Georgia, 3) the Defendant experienced a difficult childhood and upbringing, 4) the Defendant is a nice, generous, helpful person, 5) the Defendant is athletic, dependable, and helped children learn sports, 6) the Defendant was a polite, respectful person, 7) the Defendant is a religious person, 8) the Defendant is a hard-working person, 9) the Defendant always had a positive outlook on life, 10)the Defendant's friends and associates will continue to foster a position relationship and visit him while he is incarcerated, 11) the Defendant has low-average intelligence, 12) the Defendant respects the process, has been polite and cooperative throughout these proceedings. (4/730-54).

## SUMMARY OF THE ARGUMENT

**Issue I:** The evidence is sufficient to sustain a conviction of first-degree murder. Although Jackson testified at trial that he was in Georgia for days before and after Debra Pearce was murder in Jacksonville his fingerprint, which was left in the victim's blood above her body, puts him at the victim's home near the time of death and proves that his alibi was false. The physical evidence is sufficient to exclude Jackson's hypothesis of innocence and to support the verdict and judgment.

Jackson asserts an alternative hypothesis of innocence not argued at trial. The new hypothesis is entirely inconsistent with the evidence presented at trial. The relevant inquiry regarding whether the circumstantial evidence of guilt is inconsistent with the defense's theory of innocence is based on the evidence presented and the theory argued to the jury *at trial*.

At trial, Jackson claimed to have an alibi for the time of the murder. Now, he presents alternative theory that he was present during the murder but some unknown assailant was the murderer. Because this argument was not presented to the trial court or the jury it is not preserved. Even if the argument was preserved it is meritless as it is

irreconcilable with the evidence presented by the State and Jackson himself at trial.

Jackson's claim that there was insufficient evidence to prove premeditation is likewise not preserved for review as Jackson failed to argue this ground during his motions for judgment of acquittal. Notwithstanding this bar, the evidence is sufficient to sustain the jury's finding of premeditation. The victim was stabbed 16 times and suffered 2 fatal injuries: a slash to her neck that cut her jugular vein in half and the wound to her right chest that cut her subclavian vein in half and almost cut in half her subclavian artery. The attack continued even after the victim was on the ground where Jackson plunged the knife 8 inches into the already mortally wounded victim's chest where it remained until the body was found.

The injuries inflicted on the victim are inconsistent with any scenario other than Jackson having a fully formed conscious purpose to kill. The nature of the murder weapon, a large butcher knife, and the manner in which it was used to stab the victim multiple times in vital organs is sufficient to support the jury's finding of premeditation, and the jury's verdict should not be disturbed.

**Issue II:** Jackson asserts that the prosecutor made some

improper comments during his closing argument. Jackson did not object to the comments at trial and therefore he must show that the comments constitute fundamental error. It is clear from the record that the comments were reasonable inferences drawn from the evidence and not improper comments, let alone fundamental error.

**Issue III:** Jackson argues that the HAC aggravator was improperly vicariously applied to him. Jackson is mistaken and this argument fails because HAC was not vicariously applied to him. The trial court made a finding that Jackson "directly caused the victim's death." Because he was directly responsible there was no vicarious application of the aggravator.

Even if Jackson was not the actual killer, HAC was properly applied because Jackson "was 'particularly physically involved' in the murder of Debra Pearce." (4/727). The trial court considered Jackson's new theory that an unknown assailant was the killer and rejected it. The trial court founds that "[e]ven if there was an 'unknown assailant' that did the actual killing, the forensic evidence linking the Defendant to the crime scene supports the determination that the Defendant was 'particularly physically involved' in killing Debra Pearce."

**Issue IV:** The sentence of death is proportionate as compared to similar cases. The HAC aggravator was properly applied and Jackson stipulated to prior violent felony convictions and being on felony probation at the time of the murder. Two of the three aggravators found in this case, HAC and prior violent felony, are among the weightiest aggravators in Florida's statutory scheme.

The trial court noted that the 3 aggravating factors found in this case "far outweighed" the nonstatutory mitigating circumstances. The death sentence is proportionate even if the court had improperly applied the HAC aggravator. Although the court found 66 nonstaturory mitigating circumstances, the trial court organized them into 12 general categories because many were repetitive and cumulative. None of the mitigation was substantial.

The mitigation was not substantial. Jackson had a good home and family life. He had a stable and loving marriage. He does not have any mental or emotional issues and was not abused, traumatized, or abandoned. Despite his seemingly normal life, Jackson "has consistently led an entirely separate life from the one known to his family and friends that involved a repeated willingness to resort to violent criminal acts to further his intentions." This Court has

found the death sentence proportionate in similar cases, even cases with more significant mitigation.

**Issue V:** Jackson claims that Florida's capital sentencing procedures violate the Sixth Amendment to the United States Constitution as interpreted in *Ring v. Arizona*, 536 U.S. 584 (2002). This claim is insufficiently briefed and meritless. This Court has repeatedly held that Florida's capital sentencing scheme does not violate the United States Constitution under *Ring.* Jackson urges the court to revisit this issue but does not elaborate. This Court has previously declined such a request. Additionally, *Ring* does not apply to Jackson's sentence because he has previously been convicted of a violent felony.

## ARGUMENT

### ISSUE I: THE EVIDENCE IS SUFFICIENT TO SUPPORT A CONVICTION OF FIRST-DEGREE MURDER

Jackson first argues that the evidence presented at trial was insufficient to sustain a conviction of premeditated murder. (IB 33). Jackson claims that his fingerprint, which was left in the victim's blood on the sink near the body, and the hair containing his DNA found on the body, are insufficient to prove that he was present when Pearce was murdered. (IB 34). He alternatively argues that even if he was present at the time of the murder, someone else may have

been the actual killer. (IB 41).

**Standard of review**

Two standards of review apply to the determination of whether the evidence of guilt is sufficient. Where the evidence of guilt is direct, either in whole or in part, this Court reviews whether "a rational trier of fact, upon reviewing the evidence in the light most favorable to the State, could find that the elements of the crime have been established beyond a reasonable doubt." *Smith v. State*, SC11-1076, 2014 WL 172534 at *3 (Fla. Jan. 16, 2014) (*quoting Twilegar v. State,* 42 So. 3d 177, 188 (Fla. 2010)). However, where the evidence of guilt is wholly circumstantial, "not only must the evidence be sufficient to establish each element of the offense, but the evidence also must be inconsistent with any reasonable hypothesis of innocence proposed by the defendant." *Id.* "The issue of inconsistency is a jury question and the verdict will be sustained if supported by competent, substantial evidence." *Id.*

Although the evidence is sufficient to sustain the conviction under either standard, this Court should apply the direct evidence standard of review in this case because it is not a wholly circumstantial case. Jackson left a blood

transfer fingerprint, in the victim's blood, near the body at the time of the murder, or so shortly thereafter that the blood was still wet. This established that Jackson was at the murder scene with the victim's blood on his hand. It is direct evidence that he stabbed Ms. Pearce and the case is not *wholly* circumstantial. *See Fitzpatrick v. State*, 900 So. 2d 495, 506 (Fla. 2005) ("[T]his Court need not apply the special standard of review applicable to circumstantial evidence cases because the State presented direct evidence in the form of DNA evidence and eyewitness testimony."). *Cf. Floyd v. State*, 902 So. 2d 775, 784 (Fla. 2005) (nothing that there was no direct evidence of Floyd's guilt, such as eyewitness testimony or DNA blood evidence or fingerprint evidence at the victim's home).

**Sufficient evidence existed to prove Defendant killed Debra Pearce**

Debra Pearce's body was discovered stabbed to death on her kitchen floor. A large knife was lodged in her chest. The stab wound to her chest was so forceful and deep that it broke off a piece of her shoulder blade. Her jugular vein and subclavian artery were severed and her subclavian vein was nearly severed. On the kitchen sink next to the body was Jackson's fingerprint in the victim's blood. On the back of

the victim's calf was a hair containing Jackson's DNA that had been forcibly removed from his body. When Jackson was first questioned by detectives, he denied knowing the victim or ever having been to her house. After learning about the fingerprint and DNA evidence, Jackson changed his story. His theory of defense was an alibi.[15] He testified at trial that he *did* know the victim and had been to her house, but claimed that he was in Georgia at the time of the murder.

The evidence presented at trial clearly established that the print was left when Jackson touched the sink with his hand while it was wet with the victim's blood. Latent print examiner William Schade testified that the print was left while the blood was wet. (9/532). Lead crime scene investigator Detective Knox also testified that the print was a blood transfer impression that was left when a hand with the victim's blood on it touched the sink. (9/450). The blood could not have been deposited over the latent print. (9/450).

Jackson incorrectly states in his initial brief that "the State's fingerprint expert, Jacqueline Slebrch, testified

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[15] Jackson did not file his alibi notice until nearly 20 months after his arrest in this case. (1/6-14, 2/369-70)

that it was possible blood was deposited on top of a print that had been placed there earlier." (IB 38).[16] This is a misstatement of the testimony. Jackson does not provide a record citation to this alleged testimony of Ms. Slebrch, and a thorough review of her testimony does not reveal such a statement. (9/479-511). Jackson may be misinterpreting a question posed to Ms. Slebrch by the State and later followed-up by the defense.

The question posed by the State and Ms. Slebrch's answer were:

> Q [Mr. Mizrahi] There's been some discussion in this trial about the possibility that a latent print was left behind on this object, on a sink, and that later blood kind of preserved that print or captured it by going on top of it, similar to the way black powder would be applied to a latent print to preserve and capture that. Have you even seen anything like that in your training and experience?
>
> A [Ms. Slebrch] No, I have not.

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[16] Jackson also claimed in the "statement of the facts" section of his initial brief that "Slebrch had not seen a situation where a latent left on an object was preserved by blood going on top on it but testified that this could occur." (IB 10). Jackson again did not provide a record citation and is mistaken about Ms. Slebrch having given such testimony.

(9/497).

The defense followed-up on cross-examination:

> Q [Mr. Bateh] Now, Ms. Slebrch, you – when Mr. Mizrahi was asking you a moment ago if you had ever seen where blood had been dropped and then a print had gone through it, you stated that you have never seen that before, is that right.
>
> A [Ms. Slebrch] No, I have not.
>
> Q Does that mean that that could never happen?
>
> A No, it's possible that that could occur.

(9/506).

Ms. Slebrch only said that it was possible for a print to be left after the blood, but neither Ms. Slebrch nor any other witness testified that the print could have been left before the murder and then preserved when the victim's blood was deposited on top of it. No witness testified that was even possible.

In denying Jackson's motion for judgment of acquittal, the trial court agreed that the evidence presented was clear that the bloody fingerprint was a transfer print, left by someone with the victim's wet blood on his hand. (10/655). The record precludes the possibility that the print was placed on the sink when Jackson worked on the garbage disposal several months before the murder.

The bloody fingerprint forecloses any possibility that Jackson was in Georgia at the time Debra Pearce was murdered. Jackson testified that he left the state 2 days before the murder and did not return to Florida until 4 days after the murder. (10/642, 10/730-31). When his wife and sister were first asked to remember in 2008, they claim that they were able to remember 4 years back that Jackson was in Georgia from October 15-20, 2004. Jackson's wife was in Florida during that time so she did not have personal knowledge that he was in Georgia, but said she remembered a Georgia number showing up on her caller ID when Jackson called her during that time. Jackson's father and Jackson's friend also claim to remember that Jackson was in Georgia in October 2004, although neither could remember the exact dates. They also could not even remember the year that Jackson moved from Georgia to Jacksonville.

Despite Jackson's asserted alibi, the forensic evidence proves that he was in Jacksonville with the victim's wet blood on his hand when she was murdered. The bloody fingerprint is not just inconsistent with Jackson's alibi theory of defense, it disproves it completely.

The forcibly removed hair found lying on the back of Ms. Pearce's leg when her body was discovered was a complete DNA

match to Jackson. It is consistent with Jackson being at the murder scene and being in a struggle with the victim. It is inconsistent with his alibi. When taken together with the bloody fingerprint it proves that Jackson committed the murder.

Even if the Court applies the circumstantial standard of review, the evidence is sufficient. This Court has held that in a circumstantial evidence case, "[t]he state is not required to rebut conclusively every possible variation of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the Defendant's theory of events." *Kocaker v. State*, 119 So. 3d 1214, 1225 (Fla. 2013) (citation omitted) (internal quotation marks omitted). Once that threshold burden is met, it becomes the jury's duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt. *State v. Law,* 559 So. 2d 187, 189 (Fla. 1989).

The jury is not required to believe the defendant's version of the facts when the State has produced evidence inconsistent with the defendant's reasonable hypothesis of innocence. *Perry v. State,* 801 So. 2d 78, 84 (Fla. 2001). As long as the jury's resolution of the inconsistency in favor

of the State is supported by competent, substantial evidence, this Court will affirm. *Twilegar v. State,* 42 So. 3d 177 (Fla. 2010). As Appellee, the State is entitled to a view of any conflicting evidence in the light most favorable to the jury's verdict. *Cochran v. State,* 547 So. 2d 928, 930 (Fla. 1989).

Jackson concedes that circumstantial evidence could sustain the conviction if the circumstances were such that the print could have been placed on the sink only at the time the crime was committed. (IB 39). As explained above, the circumstances *are* such that the print had to have been left at the time of the murder. Although Jackson's hypothesis of innocence was that he was in Georgia when the murder occurred, the State presented evidence that excluded that possibility. The forensic evidence is inconsistent with Jackson's version of the facts and proof that his alibi was false.

Jackson also lied to detectives about knowing Ms. Pearce and having been to her home. That in and of itself is grounds for the jury to reject the Jackson's hypothesis of innocence. *See Carpenter v. State,* 785 So. 2d 1182, 1195 (Fla. 2001) ("In similar situations [where defendant has made inconsistent statements], we have routinely held that

the jury was free to reject the defendant's version of the events.").

The bloody fingerprint constitutes competent, substantial evidence inconsistent with Jackson's alibi. Jackson's inconsistent statements also provided a basis for the jury to reject Jackson's alibi. The jury's resolution of the inconsistency of his alibi and the forensic evidence in favor of the State is therefore supported by competent, substantial evidence.

In addition to the alibi defense presented at trial, Jackson now alternatively argues that even if he was present at the time of the murder, the evidence is insufficient to prove that he participated in the crime. (IB 40). He suggests that even if he was there, someone else may have killed Ms. Pearce. (IB 41). The conviction must stand in light of this new hypothesis of innocence for two reasons.

First, the relevant inquiry regarding whether the circumstantial evidence of guilt is inconsistent with the defense theory of innocence is based on the evidence presented and *the theory argued to the jury at trial*. *Smith v. State*, SC11-1076, 2014 WL 172534 (Fla. Jan. 16, 2014) (emphasis added); *Twilegar v. State*, 42 So. 3d 177, 188 (Fla. 2010); *State v. Law,* 559 So. 2d 187, 188 (Fla. 1989).

The question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and where there is substantial, competent evidence to support the jury verdict, this Court will not reverse. *McWatters v. State*, 36 So. 3d 613, 631 (Fla. 2010); *Darling v. State,* 808 So. 2d 145, 155 (Fla. 2002); *State v. Law,* 559 So. 2d 187, 188 (Fla. 1989).

This new alternative hypothesis of innocence, that Jackson was present but not involved in the murder, is not based on the evidence presented at trial. It was not presented to the trial court when Jackson moved for judgment of acquittal at the close of the State's case or the close of all the evidence. (10/648-56, 10/789). And it was not argued to the jury. (11/804-26).

A defendant cannot "try out" one theory of defense at trial, testify under oath why he is not guilty under that theory, and then once he is convicted see if he can get this Court to buy a different theory that is completely inconsistent with the theory and sworn testimony he presented at trial. Because Jackson failed to present this argument at the trial level, it is not preserved for appellate review. *See Victorino v. State*, 23 So. 3d 87, 103 (Fla. 2009) (claim that evidence of another person's DNA

that was found inside defendant's boots supports defense theory that someone else wore defendant's boots at the time of the murders was not preserved in capital murder case where specific argument was not made in motion for judgment of acquittal); *Archer v. State,* 613 So. 2d 446, 447-48 (Fla. 1993) (holding argument in capital murder case that the victim's murder was independent of the agreed-upon plan to kill a different clerk was not preserved where specific grounds argued on appeal were not raised in the trial court on motion for judgment of acquittal). *See also Steinhorst v. State,* 412 So. 2d 332, 338 (Fla. 1982).

Second, the evidence presented at trial is inconsistent with the new hypothesis of innocence that Jackson was present but did not commit the murder. Jackson's own testimony was contrary to this new theory. Jackson said he was not even in the state in the days before and after the murder. But his own testimony, his bloody fingerprint, his forcibly removed hair, his lies to detectives, and his phony alibi are all inconsistent with the new claim.

Jackson also claimed he was "friends" with Ms. Pearce, but if he was there, he did not call for help after she was stabbed or he did not cooperate with investigators. Even if the unknown assailant theory was presented to the jury, and

even if the jury believed that another person was present, the forensic evidence and Jackson's inconsistent statements provided a basis for the jury to reject this version of events and to support the guilty verdict.

The cases cited by Jackson in his initial brief are distinguishable from this case. In *Cox v. State*, 555 So. 2d 352 (Fla. 1989), the evidence created only a suspicion that Cox murdered the victim. Cox was staying at a motel in close proximity to where the victim's body was found. *Id.* In the victim's car investigators found a hair, some O-type blood, and a boot print, none of which belonged to the victim. *Id.* at 353. Cox had also had part of his tongue bitten off the night the victim went missing. *Id.* at 352. The hair was merely consistent with Cox's hair. *Id.* at 353. The type O blood was not unique to Cox, but a characteristic of 45% of the world's population. *Id.* The boot print was not compared to Cox's boots and no tongue tissue was found in the victim's car. *Id.* Although witnesses cast doubt on his alibi, Cox did not know the victim and no one testified that they had even been seen together. *Id.*

In Jackson's case, the DNA from the hair was determined to occur in the population with a frequency of 1 in 490 quadrillion African-American blacks and matched Jackson's

DNA profile. Jackson left his fingerprint at the murder scene in the victim's blood placing him there with the victim at the time of the murder. Jackson admitted he knew the victim and had been to her home. His lied to law enforcement and his alibi was conclusively disproven.

In *Ballard v. State,* 923 So. 2d 475, 476 (Fla. 2006), the defendant was charged with the double murder and robbery of his neighbors and long-time friends, which occurred at home of the victims. There were bloody fingerprints left on a barbell and a curl bar, but none of them were identified as Ballard's. *Id.* at 478. Of the 118 latent fingerprints lifted from the murder scene, one [which was not bloody], lifted from a bed frame in the room where one of the victims was found, was identified as Ballard's. *Id.* at 479. Of the 6 hairs found in the hand of one of the victims, 3 were consistent with the victim's, 2 were too short to make any conclusion, and one was consistent with Ballard's arm hair. *Id.* DNA on the hair matched Ballard, but it could not be determined whether the hair was forcibly removed or naturally shed. *Id.* at 480.

The Court summarized the entire circumstantial case presented against Ballard as: (1) Ballard's fingerprint located on the frame of the near on victim's body, with no

evidence presented as to when or how the fingerprint was left; and (2) one hair found on the same victim's hand was consistent with Ballard's arm hair in the telogen phase, with no evidence to ascertain if the hair was pulled out prematurely or naturally shed, and with that hair being only one out of six total arm hairs found in the victim's hand and among hundreds of hairs found at the crime scene. *Id.* at 483.

There were bloody fingerprints left on a barbell and a curl bar, but none of them were identified as Ballard's. *Id.* at 478. The fingerprint on the bed frame was not left in blood. The week prior to murders, a known gang member shot through the victims' windows with two other men. *Id.* at 477. Ballard cooperated with the investigation. *Id.* at 484. The Court found the evidence insufficient to establish the defendant's guilt, given the fact that Ballard was a long-time friend of the couple and had frequent and personal access to the premises.

The instant case is distinguishable from *Ballard* because Jackson had his victim's wet blood on his hand. The hair evidence in this case is also more compelling than the hair evidence in *Ballard.* The hair in *Ballard* was in the telogen phase. *Ballard*, 923 So. 2d at 480. A hair in the telogen

phase is loosely held and can be forcibly removed with normal daily activity. *Id.* In the late telogen phase, very little force is required to remove the hair. *Id.* The expert in *Ballard* could not determine whether the hair was forcibly removed or naturally shed. *Id.*

The expert in the instant case determined that the hair found on Ms. Pearce's leg was in the anagen stage. (9/464). It was not naturally shed and some degree of force was required to pull it from Jackson's body. (9/466, 9/472).

The facts of this case are more akin to the facts in *Burkell v. State*, 992 So. 2d 848 (Fla. 4th DCA 2008). In *Burkell,* the defendant's footprints were left in the victim's blood at the murder scene and could only have been left there during or after the murder. *Id.* at 851. The footprint evidence therefore placed Burkell at the murder scene at or near the time of the murder, which directly contradicted Burkell's version of events. *Id.* at 852.

*Lindsey v. State*, 14 So. 3d 211 (Fla. 2009) is distinguishable because in that case the State failed to produce any evidence that placed Lindsey at the scene of the crime at the time of the murder. Here, like the footprint in *Burkell,* the bloody fingerprint placed Jackson at the murder scene at the time of the murder, which directly contradicted

Jackson's version of events.

**There was sufficient evidence to show premeditation**

The jury found Jackson guilty of first-degree premeditated murder. Jackson contends that the evidence is insufficient to prove premeditation. This claim fails because the evidence is sufficient to support the finding of premeditation, and, when viewed in the light most favorable to the State, is inconsistent with any other reasonable inference.

Premeditation is a factual issue to be determined by the jury and, like other factual matters, may be established by circumstantial evidence. *Twilegar v. State*, 42 So. 3d 177, 190 (Fla. 2010).

> Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted. It must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result to flow from it in so far as the life of his victim is concerned. No definite length of time for it to exist has been set and indeed could not be.
>
> Where premeditation is sought to be proved by circumstantial evidence, the

> evidence must be inconsistent with every other reasonable inference. This question of inconsistency is for the jury to determine.

*Id. (internal citations omitted).*

The deliberate use of a knife to stab a victim multiple times in vital organs is evidence that can support a finding of premeditation. *Hampton v. State*, 103 So. 3d 98, 119-20 (Fla. 2012) (concluding that evidence of the nature and number of the wounds inflicted in the confrontation—including multiple blunt traumas causing brain injuries, a complete severing of the victim's jugular vein, and defensive wounds on the victim—was sufficient to provide a basis for a reasonable jury to conclude that the defendant killed the victim in a premeditated manner); *Boyd v. State*, 910 So. 2d 167, 182 (Fla. 2005) (sufficient evidence supported conclusion that defendant had acted with premeditation where victim had been stabbed in the chest and head numerous times, one of the stab wounds to her head penetrated her brain, and victim had wounds consistent with defensive wounds); *Perry v. State*, 801 So. 2d 78, 86 (Fla. 2001) (evidence was sufficient to support a finding of premeditation where victim was stabbed 7 times in chest and neck, 4 of the wounds would have been fatal, and extensive

force was required for one of the wounds where the knife when through the victim's chest bone, further demonstrating that the victim was stabbed in order to effect death).

Debra Pearce was stabbed 16 times and suffered numerous other injuries.[17] All but 2 of the stab wounds were to the head/face/neck, and chest. The two fatal injuries were a slash to her neck that cut her jugular vein in half and the wound to her right chest that cut her subclavian vein in half and almost cut in half her subclavian artery. (10/632-34). The right chest wound penetrated 8 inches deep and was so forceful that it pierced the shoulder blade and broke off

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[17] Two knife wounds to right forehead. (3/500, 3/506-07, 10/630-31, 10/633). Black eye. (3/500, 10/630). Bruising around the eye. (3/500, 10/630). Stab wound to the lip that came out of her chin. (3/502, 10/631). Laceration or incision to left cheek. (3/503, 10/631). Stab wound under chin that cut jugular vein in half. (3/503, 3/505, 10/632). Two cuts across the ear (3/504, 10/632). An area of scraping or abrasion where victim was hit or drug. (3/504, 10/632). 5 shallow incisions to left neck. (3/504, 10/632). Bruise on right face. (3/506, 10/633). Slice to upper part of left breast (went through left bra cup) (3/508, 10/634). 7-8" stab would to right chest, cutting in half subclavian vein and almost cutting in half subclavian artery, and punching the inside of the back of the scapula (went through right bra cup). (3/499, 3/508, 3/511, 10/634). Deep cut to right little finger into some of the tendons. (3/509, 10/635). Incision on left forearm with shallow component and deep component. (3/510, 10/635).

a ¾ inch area of bone. (10/638-39). The shoulder blade is a dense bone and a considerable amount of force was required to pierce it. (10/638). Another stab wound to the neck penetrated the cartilage of the larynx. (10/638). She was also stabbed in her left chest. (10/634). Ms. Pearce suffered defensive wounds and her shirt was pulled up over her bra and off her. (10/637). She sustained multiple stab wounds to the head, neck, and chest.

The type of injuries Ms. Pearce received are only inflicted where there is a fully formed conscious purpose to kill. A large butcher knife is only left protruding from deep within a woman's chest where there is a fully formed conscious purpose to kill. These injuries are inconsistent with any other scenario and sufficient to sustain a finding of premeditation. *See Hampton v. State*, 103 So. 3d 98, 119-20 (Fla. 2012) (concluding that evidence of the nature and number of the wounds inflicted in the confrontation, including a complete severing of the victim's jugular vein, blunt injuries, and defensive wounds, was sufficient to provide a basis for a reasonable jury to conclude that the defendant killed the victim in a premeditated manner); *Hodges v. State*, 55 So. 3d 515, 541 (Fla. 2010) (holding evidence sufficient to sustain finding of premeditated

murder where victim had multiple injuries to head and neck, including severing of jugular vein); *Morrison v. State*, 818 So. 2d 432, 452 (Fla. 2002) (where there were 2 major knife wounds to victim's neck, one which cut the esophagus and nicked the vertebrae, the nature of the weapon used (a knife) and the manner in which the homicide was committed as well as the nature and manner in which the wounds were inflicted were sufficient to support premeditation).

The stabbing continued even after Ms. Pearce was on the ground. Blood spatter evidence showed that blood was coming from below the kitchen counter and moving upward when it struck the front edge of the counter near the sink. The victim's body was found right below the sink. The 10" knife was plunged 7-8" deep and left in her chest before the attack ceased. Jackson did not stop after the first or fifth or tenth or fifteenth stab. He did not stop after Ms. Pearce was on the ground or even after cutting her jugular vein in half. The continuing nature of the attack is indicative of premeditation. *Cf. Mungin v. State*, 689 So. 2d 1026, 1029 (Fla. 1997) (evidence of continuing attack would have suggested premeditation).

The final blow to the chest and the fact that the knife was left in the chest cavity also indicate premeditation.

Ms. Pearce was already dying from her severed jugular vein and plunging the knife in her chest was just a finishing blow, which demonstrates there was fully formed conscious purpose to kill. Not only is the evidence sufficient to support the finding of premeditation, but when viewed in the light most favorable to the State, it is inconsistent with any other reasonable inference.

Jackson testified at trial that he is not guilty of premeditated murder because he was in Georgia when the murder occurred. Jackson also admitted lying to detectives about knowing Ms. Pearce and having been to her home. The physical evidence introduced at trial cannot be reconciled with his trial testimony or his new hypothesis of innocence that he was present when Pearce was murdered, but did not stab her. The evidence at trial showed that Jackson had the victim's blood on his hand and the victim had Jackson's hair on her leg. If Jackson had presented his new theory to the jury, they would have been free to reject it. *See Henry v. State,* 574 So. 2d 73, 74 (Fla. 1991) (holding that the physical evidence inconsistent with Henry's hypothesis of innocence and 13 stab wounds provided sufficient evidence of premeditation).

Not only is the evidence sufficient to support the

finding of premeditation, but when viewed in the light most favorable to the State, it is inconsistent with any other reasonable inference. *Darling v. State*, 808 So. 2d 145, 156 (Fla. 2002) (*quoting State v. Law*, 559 So. 2d 187, 189 (Fla. 1989)).

Jackson relies primarily on *Coolen v. State,* 696 So. 2d 738 (Fla. 1997), a 4-3 decision in which this Court concluded that there was insufficient evidence to support a finding of premeditation where the defendant stabbed the victim. Coolen and his girlfriend met the victim and his wife at a bar several hours before the murder. *Id.* at 740. The two couples drank at the bar for 3-4 hours and then went back to the victim's house and continued to drink. *Id.*

When the victim took Coolen's girlfriend in the house to use the bathroom, Coolen stuck his hand down the victim's wife's shirt. *Id.* She pushed him away and did not know where he went. *Id.* When the victim came back outside, Coolen backed him up to the house and began to stab him. *Id.* Coolen also stabbed the victim's wife several times when she tried to protect her husband. *Id.* Coolen was arrested shortly after the stabbing. *Id.* He was intoxicated but told law enforcement that the victim had "copped an attitude" with him. *Id.* Coolen said he saw "something silver" in the

victim's hand, which he thought was a small handgun the victim said he owned. *Id.* Coolen said he attacked the victim to protect himself. *Id.*

At trial, the victim's wife testified that the two men had not been arguing and Coolen simply "came out of nowhere" and started stabbing her husband. *Id.* at 741. The victim's 9-year-old stepson described an "ongoing pattern of hostility between two intoxicated men that culminated in a fight over a beer can." *Id.* at 741-42.

The Court found that the testimony of the victim's wife and his stepson was contradictory and neither provided sufficient evidence of premeditation. *Id.* at 742. The Court noted that although the nature of manner of the wounds inflicted may be circumstantial evidence of premeditation, the stab wounds in this case were also consistent with an escalating fight over a beer can (the stepson's account) or a "preemptive" attack in the paranoid belief that the victim was going to attack first (Coolen's version). *Id.*

The testimony in *Coolen* gave rise to a reasonable inference other than premeditation: a drunken fight that turned lethal or a pre-emptive/self-defensive stabbing. Here, there is no evidence that the attack was a result of tensions between Jackson and the victim or done for self-

preservation, and he does not suggest that it was. The evidence here, including the severing of the jugular and the coup de grâce to the chest, is inconsistent with any reasonable inference other than premeditation.

In *Green v. State,* 715 So. 2d 940, 944 (Fla. 1998), also relied on by Jackson, the victim was intoxicated the night of her murder. She had a heated argument with her former boyfriend and employer and had been arrested for disorderly conduct and resisting arrest. *Id.* There was evidence that Green confessed that he and his friend, Franklin, picked up the (still intoxicated) victim from the jail a few hours after her arrest and "did things to her." *Id.* at 942. When "the bitch got crazy," Green and Franklin killed her. *Id.* Although she was stabbed 3 times, the cause of death was manual strangulation. *Id.* at 941.

Franklin testified that he was home at the time of the murder and Green alone was responsible. *Id.* at 942. Franklin's wife provided evidence that Franklin was not home at the time of the murder, did not act shocked and was not bothered when he found out about the murder. *Id.* She also saw scratches on Franklin's back after the murder. *Id.* The State's theory was that the victim was killed by 2 people. *Id.* It was undisputed that Green's intelligence was

exceedingly low. *Id.* at 944. His IQ was 73. *Id.* at 943 n.4.

The facts in *Green* are distinguishable from this case. The victim here was stabbed to death unlike the victim in *Green* who was stabbed 3 times but died of strangulation. The victim here was stabbed 16 times and 2 of the blows were fatal. She was murdered at home with a large knife. There was no evidence that she was agitated, intoxicated, or "got crazy." Jackson's intelligence was found to be low-average, not exceedingly low like Green's.

In *Kirkland v. State*, 684 So. 2d 732, 733 (Fla. 1996), the defendant was living in the same home as the victim. The cause of death was "a very deep, complex, irregular wound of the neck," *id.*, caused by "many slashes," *id.* at 735. There was also evidence that a walking cane was used in the attack. *Id.* at 735. Kirkland was found incompetent to proceed following his indictment, but was later restored to competency. *Id.* at 734. He pursued an insanity defense at trial. *Id.* There was evidence that Kirkland was mildly mentally retarded with an IQ that measured in the 60s. *Id.* at 734-35. This Court reversed the first-degree murder conviction finding the insufficient evidence of premeditation "in light of the strong evidence militating against a finding of premeditation." *Id.* at 735.

*Kirkland* is inapplicable to the case at bar. There is no strong evidence militating against a finding of premeditation in this case. Jackson is not mentally retarded and he does not have an IQ in the 60s. He was not living in the victim's home. The attack on Debra Pearce did not begin with a walking cane and proceed to become a stabbing. Ms. Pearce was attacked with a knife, and it did not take "many slashes" to sever her jugular vein or subclavian artery. There is no strong evidence militating against a finding of premeditation as there was in *Kirkland.*

This Court distinguished its decision in *Kirkland* in *Morrison v. State*, 818 So. 2d 432 (Fla. 2002). In *Morrison,* the defendant went to the victim's apartment after he ran out of crack. *Id.* at 438. Morrison asked the victim for a cigar and a light and followed him inside to his bedroom. *Id.* The defendant said that the victim saw him steal some money from a shirt pocket, so the victim got a knife from somewhere and began swinging it at the defendant and a struggle ensued. *Id.* The defendant claimed that the victim accidentally cut his throat twice during the struggle. *Id.* There were no witnesses to the attack.

The medical examiner testified that there were two major knife wounds to the victim's neck. *Id.* at 452. One was an

incised wound from left to right across the victim's neck. *Id.* The other was a stab wound that was 4 ¾ inches long. *Id.* The second wound not on cut the victim's esophagus and nicked the vertebrae in his neck. *Id.*

Morrison relied on this Court's decision in *Kirkland* in arguing that there was insufficient evidence of premeditation. This Court distinguished *Kirkland* because Kirkland was "mildly retarded" and "there was no suggestion that Kirkland exhibited, mentioned, or even possessed an intent to kill the victim at any time prior to the homicide." *Id.* at 452, n.11. The Court noted that Morrison was not mildly retarded and, given the nature of the weapon used and the nature and manner in which the wounds were inflicted, the jury was amply justified in concluding that it demonstrated Morrison's intent to kill. *Id.* The evidence was sufficient to sustain the conviction of premeditated murder because reasonable jurors could reject Morrison's theory of non-premeditation and conclude that he committed premeditated murder. *Id.* at 453.

The nature of the weapon and the manner in which Jackson used it here is also similar to the weapon and the way it was used in *Hartman v. State*, 728 So. 2d 782 (Fla. 4th DCA 1999), where the Fourth District Court of Appeal

distinguished the facts of that case from both *Green* and *Kirkland.* In *Hartman*, the defendant murdered his wife. *Id.* at 783. The victim was stabbed to death by a butcher knife that came from a knife holder on the kitchen counter about twenty feet from where her body was found body. *Id.* at 784. She was stabbed 36 times and the 13 ½ inch butcher knife was still in her chest when the body was discovered. *Id.*

Blood spatter evidence showed that the victim was on her back during the stabbing and the defendant was on his knees. *Id.* The blood patterns also showed that the victim was not chased around the house. *Id.* She had defensive injuries and wounds to her face. *Id.*

In deciding *Hartman,* the Fourth District found that "while some similarities exist between this case, *Kirkland,* and *Green,* [in Hartman's case], the State presented evidence of the type that would be sufficient to find premeditation under *Jackson." Id.* at 785 (*citing Jackson v. State,* 575 So. 2d 181 (Fla. 1991) ("Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed and the nature and manner of the wounds inflicted.").

Like the defendants in *Hampton*, *Boyd*, *Perry*, *Morrison*, and *Hartman*, Jackson used the knife to stab Debra Pearce multiple times in vital organs and she suffered multiple fatal wounds. The evidence is sufficient to support the jury's finding of premeditation and the verdict should not be disturbed.

## ISSUE II: THE PROSECUTOR'S COMMENTS WERE REASONABLE INFERENCES DRAWN FROM THE EVIDENCE

Jackson complains about several comments made by the prosecutor about Michelle Royal in his closing argument of the guilt phase. This claim is without merit because the prosecutor's comments were not improper, and even if they were improper, would not constitute fundamental error.

**Standard of Review**

Jackson did not object to any of the alleged improper comments at trial, therefore he must show that the comments constitute fundamental error. *Patrick v. State*, 104 So. 3d 1046, 1062 (Fla. 2012) (defendant's failure to object to State's closing argument statements rendered his challenge to them on appeal subject to review for fundamental error).

**The trial testimony**

William Schade testified that he has been a latent print examiner for over 40 years. (9/516). He started training in 1971. (9/516). He was employed with the Nassau County Police Department in New York for 22 years and had been employed with the Pinellas County Sheriff's Office for 20 years at the time of trial. (9/516). He is in charge of a staff of 23 employees and he trains other print examiners. (9/516-17). He testified about how his job has changed over the years, in terms of how laboratories work:

> [W]e've always talked about the science of fingerprints, however, we did not always adhere to some of the other principles of science that are now coming to the forefront. Science is never absolute, one hundred percent certain. Science always leaves the door open for additional information, additional examination, and even changing conclusions. Early on, and as recently as 15 years ago, fingerprint people were trained you examine the evidence carefully, you come to a conclusion and you stand by it, come hell or high water. It was weakness to say, well, I'm reconsidering my opinion. And that's a big change for us. It's still very difficult sometimes to think that, you know, we can no longer say we're one hundred percent certain, this is a one hundred percent certain match.
>
> Those terms are no longer allowed in court and that's really holding to the tenants of science. It's just the way it

> is. It's a preponderance of evidence, it's a conclusion that, you know, it can be possible or plausible conclusions but science never says one hundred percent. That's a big change for us to go from the days of it's my opinion, I'm a hundred percent and I will not be swayed to reconsidering.
>
> . . .
>
> [T]he culture of laboratories changed. It has become much more scientific. As I said, we have certain things that we have habitually testified to that we can't anymore. Like I say, we do not say one hundred percent certainty. We will say that the preponderance of the evidence, the examination holds up to the scrutiny of other examiners and that is a big change. It may not sound like it, but going back from the days when it was very simple, keep it simple, we examined it and the prints match, one hundred percent certainty that person right over there and you just don't do that anymore.

(9/518-19).

Schade determined that bloody fingerprint from Ms. Pearce's sink was of value for comparison. (9/525). When he compared it to Jackson's known prints, Schade concluded that the bloody print was made by Jackson's right ring finger.[18] (9/535).

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[18] Although Appellant's brief says that Slebrch and Schade

Jacqueline Slebrch was the other latent print examiner called by the State. Ms. Slebrch testified that she received her bachelor's in chemistry, then completed an 18-month training program with the FBI's latent print unit, and has been employed for the last 5 years as a latent print examiner with the FBI in Quantico, Virginia. (9/480). When Jackson's fingerprints were submitted to the FBI for comparison to the bloody latent, Ms. Slebrch determined confidently that the latent print matched the known print of Jackson's right ring finger. (9/496, 9/510).

Michelle Royal was called by the defense. She has been a latent print examiner with the Jacksonville Sheriff's Office for 22 years. (10/703). Ms. Royal has testified as a latent print examiner in the 4th Judicial Circuit "in excess of 175 times." (10/706).

Ms. Royal was asked to review the bloody print from Ms. Pearce's sink in 2004. (10/705). At the time, Jackson was not a known suspect in the murder so she was not asked to make a comparison to his known prints. Initially, she was

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matched the bloody latent to Jackson's right little finger (IB 45), the latent was actually matched to Jackson's right ring finger (9/510, 9/535).

not sure whether the print was of value or not. (10/717). After photographing the print herself she "felt like there were just a lot of things going on that would not allow [her] to plot a sufficient number of individual ridge characteristics that could be used to identify the latent print to a set of known prints." (10/717). Although the photo of the print could have been digitally enhanced to make it a print of value, Ms. Royal did not attempt any such enhancement. (10/716). Instead, she concluded that the bloody print was not a print of value. (10/705).

Although Ms. Royal testified that the print was of no value so she "could not have compared it to a defendant," when viewing the bloody print and Jackson's known print together during trial, she acknowledged that the bloody latent had similarities to Jackson's known print. (10/710-12). She said they are the same as far as the pattern type and flow of ridges. (10/712). She would not exclude the print as coming from Jackson. (10/715).

Ms. Royal also discussed her practice when she gives testimony in cases where she has made an identification on a print.

> Q [Mr. Mizrahi] Okay. Now, would you agree with the concept that if an identification is made, for example, when you come into court

and you say that it matches that person, that that's a hundred percent accurate?

A [Ms. Royal] That is correct.

Q Okay. Is there any doubt in your mind whatsoever when you make those decisions?

A No, the identification is made then I'm a hundred percent certain that the unknown print was identified to a set of known prints.

Q And that's the way you've been taught to operate?

A That is how I operate.

(10/715).

**The prosecutor's comments were proper inferences**

Jackson takes issue with the fact that the prosecutor said in closing: 1) that he has put Royal on the stand in other cases, 2) that she is "old school" and "was taught" to be 100% sure when she makes a decision about a print and to be final in that decision, and 3) that Ms. Slebrch is the "new school." (IB 45-46).[19] This claim should be denied because the prosecutor's comments were reasonable inferences drawn from the evidence. Closing argument is an opportunity

[19] Jackson agrees that the prosecutor's comment that Michelle Royal was "just wrong on this one" is a conclusion that could be drawn from the evidence. (IB 49).

for counsel to review the evidence and to explicate those inferences that may reasonably be drawn from the evidence. *Wade v. State*, 41 So. 3d 857, 868 (Fla. 2010); *Merck v. State*, 975 So. 2d 1054, 1061 (Fla. 2007).

In response to questioning by the defense, Ms. Royal stated that she has testified as a latent print examiner over 175 times in the 4th Judicial Circuit. It can be inferred from the evidence that Mr. Mizrahi, as an assistant state attorney in that circuit, has called Ms. Royal to the stand before.

William Schade testified that up until about 15 years ago, fingerprint examiners were trained to come to a conclusion and stand by it "come hell or high water." Ms. Royal has been a latent print examiner for 22 years. She testified that once she makes an identification, she is 100% certain about her conclusion. She will come to court and say that there is a match that is 100% accurate. When asked if that is how she was taught to operate, she responded, "[t]hat is how I operate." The prosecutor's comments about Ms. Royal's methods were clearly reasonable inferences drawn from the evidence.

Jacqueline Slebrch completed her latent print examination training only 5 years prior to the trial. It is certainly

reasonable to infer that she was trained under the "new school" of thought described by Mr. Schade. This comment was a reasonable inference drawn from the evidence.

**The comments do not constitute fundamental error**

Contrary to Jackson's claims in his initial brief, the identity of the bloody fingerprint was not "highly contested," this case was not a "battle of fingerprint experts," nor did "Jackson's guilt rest[] on which expert the jury believed." (IB 44-45). The defense did not even contest the identity of the print. Jackson's counsel told the jury that the defense did not deny that the print [and the hair] belonged to Jackson. (11/805).

Even Ms. Royal testified that she could not exclude Jackson as the source of the print. (10/712-15). She acknowledged that the bloody print and Jackson's known print had similar characteristics and were the same as far as pattern type and flow of ridges. (10/712). Jackson also admitted that his prints would have been on Ms. Pearce's sink when he fixed her garbage disposal. (10/742-43).

In order for a prosecutor's comments to constitute fundamental error, the comments must reach 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. *Miller v. State,* 926 So. 2d 1243, 1261 (Fla. 2006); *Anderson v. State*, 841 So. 2d 390, 403 (Fla. 2003). Here, the prosecutor's comments were reasonable inferences from the evidence, if not simply recitations of the evidence. But even if they were improper, they do not rise to the level of fundamental error.

Prosecutorial improprieties must be viewed in the context of the record as a whole to determine if a new trial is warranted. *Robards v. State*, 112 So. 3d 1256, 1269 (Fla. 2013). The State proved the bloody print was Jackson's and the defense did not contest that or even deny it. Jackson would have been convicted regardless of the prosecutor's comments. The comments, which were made without objection from the defense, do not require a new trial.

**ISSUE III: HAC AGGRAVATOR WAS PROPER**

Jackson argues that the HAC aggravator was improperly vicariously applied to him. He claims that even assuming he was a principal to the murder and was present during the murder, "there is a possibility that he did not directly cause or have knowledge or control over the manner of death." (IB 53). Jackson's argument fails because the HAC aggravator was not applied vicariously to him and vicarious application would have been proper because Jackson was

particularly physically involved in the victim's death.

**Standard of review**

The standard of review applicable to whether a trial court properly found an aggravating factor is whether competent, substantial evidence supports the trial court's finding. *Conde v. State,* 860 So. 2d 930, 953 (Fla. 2003). The standard of review applicable to whether the trial court properly instructed the jury to consider an aggravating factor is whether the "evidence adduced at trial is legally sufficient to support a finding of that aggravating circumstance." *Davis v. State,* 2 So. 3d 952, 962 n. 4 (Fla. 2008) (*quoting Ford v. State,* 802 So. 2d 1121, 1133 (Fla. 2001)).

Under this Court's precedent, HAC applies to Jackson directly because he was the actual killer. Even if Jackson's argument that "there is a possibility that he did not directly cause or have knowledge or control over the manner of death" had merit, HAC is vicariously applicable to Jackson because he directed or knew how the victim would be killed or he was particularly physically involved in the events leading up to the murder.

**Jackson was the actual killer**

Vicarious application of the HAC aggravator is not relevant in this case because the evidence established and the trial court found that Jackson "directly caused the victim's death." (4/727). He was present at the murder scene and he wielded the knife that killed the victim. There is no reason that Jackson, who claimed to be in Jacksonville at the time, would have had the victim's wet blood on his hands at the time of the murder unless he killed her. Jackson's forcibly removed hair was lying on the victim's calf and his bloody fingerprint was located right above where the victim's body lay in her small kitchen. There were no other bloody fingerprints at the murder scene. Jackson lied to detectives about knowing Ms. Pearce and having been to her house and he presented a false alibi to the jury. The evidence eliminates any reasonable possibility that Jackson did not directly cause the victim's death.

The bloody shoe and sock prints did not establish that there was more than one killer. (9/424-25). There was no evidence that it was the killer who left the shoe and sock impressions. There were at least three individuals in Ms. Pearce's house after the murder that may have left the shoe or sock prints. (10/608). There was no evidence that the

small knife found under the victim's body was used in the murder. The fact that the blade contained a mixture of DNA from 2 or 3 individuals is not evidence that 2 or 3 other individuals were present during the murder. The trial court did not err in instructing the jury on and in finding HAC because there is competent, substantial evidence to support a finding Jackson was the actual killer.

**HAC could have been vicariously applied to Jackson**

This Court has upheld the application of HAC to defendants who did not directly cause the victim's death where the defendant was particularly physically involved in the events leading up to the victim's murder. *See Cole v. State*, 36 So. 3d 597, 608-09 (Fla. 2010) (*citing Cave v. State*, 727 So. 2d 227, 229 (Fla. 1998) (holding that application of HAC to nontriggerman defendant was proper where defendant removed victim from convenience store at gunpoint, placed victim in car's backseat with codefendant, heard victim plead for her life during the fifteen- to eighteen-minute ride to isolated area, removed victim from car, and turned victim over to codefendant who killed victim) and *Copeland v. State*, 457 So. 2d 1012, 1015, 1019 (Fla. 1984) (holding that application of HAC to nontriggerman defendant was proper where defendant

confronted victim at gunpoint, kidnapped victim, and raped victim before the codefendant murdered the victim)). *Cf. Farina v. State*, 801 So. 2d 44, 48 (Fla. 2001) (upholding the HAC aggravator where defendant and codefendant planned and participated in the robbery, but codefendant "actually fired the fatal shot, shot two other restaurant employees, and stabbed the assistant manager in the back after his gun misfired.").

In other cases, this Court has rejected vicarious application of HAC absent a showing by the State that the defendant directed or knew how the victim would be killed. *See e.g., Perez v. State,* 919 So. 2d 347, 378 (Fla. 2005) (trial court erred in applying HAC without evidence establishing that Perez directed or otherwise knew that the victim would be killed or the manner of death); *Williams v. State*, 622 So. 2d 456, 463 (Fla. 1993) (holding that HAC "cannot be applied vicariously, absent a showing by the State that the defendant directed or knew how the victim would be killed"); *Archer v. State,* 613 So. 2d 446, 448 (Fla. 1993) ("[A] defendant who arranges for a killing but who is not present and who does not know how the murder will be accomplished cannot be subjected vicariously to the heinous, atrocious, or cruel aggravator."); *Omelus v. State,*

584 So. 2d 563, 566 (Fla. 1991) (holding that where defendant was not the actual killer, application of HAC was improper because there was no evidence that the defendant knew how the killer would carry out the murder).

Although the aggravator was not applied vicariously, the State showed that Jackson directed or knew how the victim would be killed by showing that he was the actual killer.

Even if Jackson was not the actual killer, HAC was properly applied because Jackson "was 'particularly physically involved' in the murder of Debra Pearce." (4/727). The trial court considered the "unknown assailant" theory and rejected it. The trial court found that "[e]ven if there was an 'unknown assailant' that did the actual killing, the forensic evidence linking the Defendant to the crime scene supports the determination that the Defendant was 'particularly physically involved' in killing Debra Pearce." (4/727). The HAC aggravator is therefore proper even under Jackson's "unknown assailant" theory.

**Harmless error analysis**

Even if was improperly applied to Jackson, the death penalty still is supported by strong aggravating circumstances that outweigh the mitigating circumstances. When an aggravating factor is stricken on appeal, the

harmless error test is applied to determine whether there is a reasonable possibility that the error affected the sentence. *Williams v. State,* 967 So. 2d 735, 765 (Fla. 2007).

Jackson stipulated to 2 other aggravating circumstances: having prior violent felony convictions and being on felony probation at the time of the murder. Both were given great weight. Prior violent felony is one of the weightiest aggravators. *Brown v. State*, 126 So. 3d 211, 220 (Fla. 2013); *Anderson v. State,* 18 So. 3d 501, 510 (Fla. 2009). This Court has previously upheld a death sentence where HAC was stricken and only two valid aggravators remained. *Diaz v. State*, 860 So. 2d 960, 971 (Fla. 2003) (upholding death sentence where HAC was rejected but CCP and prior violent felony remained).

The trial court noted that the 3 aggravating factors found in this case "far outweighed" the nonstatutory mitigating circumstances. (4/759-60). Therefore, even without HAC, the 2 remaining aggravators would still outweigh the qualitatively unsubstantial mitigation and any error in applying HAC would be harmless beyond a reasonable doubt.

## ISSUE IV: THE DEATH SENTENCE IS PROPORTIONATE

This Court comprehensively reviews each death sentence to determine whether the crime falls within the category of both the most aggravated and the least mitigated of murders, thereby assuring uniformity in the application of the death penalty. *Brown v. State*, SC12-2159, 2014 WL 1923644 at *11 (Fla. May 15, 2014) (*citing Anderson v. State*, 841 So. 2d 390, 407-08 (Fla. 2003)). The proportionality analysis does not involve a quantitative comparison between the number of aggravating and mitigating circumstances, but rather entails a *qualitative* review of the totality of the circumstances and the underlying basis supporting the application of each aggravating and mitigating circumstance. *Id.* (*citing Simpson v. State*, 3 So. 3d 1135, 1148 (Fla. 2009)) (emphasis supplied).

**Standard of Review**

This Court's responsibility on appeal is to review the record to determine whether the trial court applied the correct rule of law for each aggravating circumstance and, if so, whether competent, substantial evidence supports its finding. *Brown v. State*, SC12-2159, 2014 WL 1923644 at *7 (Fla. May 15, 2014).

**Analysis**

In this case, the court found 3 aggravating circumstances: 1) Jackson was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person (great weight)[20], 2) the capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation (great weight), and 3) the capital felony was especially heinous, atrocious, or cruel (great weight).[21] (4/720-30).

Jackson stipulated that he was convicted of aggravated assault in 1992. (4/720-21). The offense involved Jackson brandishing a gun to an undercover agent with the Georgia Bureau of Investigation during a narcotics transaction. (4/721-24). Only months after the murder of Debra Pierce, Jackson committed an armed robbery of a Days Inn clerk.

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[20] The court found that Jackson had twice been convicted of a prior violent felony: aggravated assault and armed robbery. Jackson stipulated to these convictions and also stipulated to having previously been convicted on another robbery in 1998, although the 1998 robbery was not form and part of the court's basis for finding that this aggravating circumstance was proven.

[21] Although Jackson challenges the vicarious application of HAC to him in Issue III, he does not challenge the fact that the murder was especially heinous, atrocious, or cruel.

(4/721, 723-24). An audio and video recording of the armed robbery was entered into evidence. (4/721). The surveillance footage clearly shows Jackson entering the lobby of the Days Inn, pointing a gun at Ms. Moore, the clerk, and deliberately and calmly demanding money. (4/721). Jackson also stipulated that he was on felony probation for the 1992 aggravated assault at the time of the murder. (4/724).

The court found the murder HAC based upon the testimony of the medical examiner, Dr. Giles. (4/729). The victim suffered 16 stab wounds, a severed jugular vein, a severed subclavian artery, a nearly severed subclavian vein, and 2 defensive wounds indicating that the victim was involved in a struggle with Jackson, and therefore, alive, conscious, and aware of her impending death during the attack. (4/729). Dr. Giles also testified that Ms. Pearce was found with 2/3 of a 5-inch knife still lodged in her chest. (4/729). The knife entered her chest with such extensive force that it pierced her soft tissue and shoulder blade and broke off a ¾ inch section of bone. (10/638-39).

This Court has consistently affirmed the HAC aggravator where the victim was repeatedly stabbed and remained conscious during part of the attack. *E.g., Gosciminski v. State*, 132 So. 3d 678, 715 (Fla. 2013); *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. *Gosciminski*, 132 So. 3d at 715. There was competent, substantial evidence to support the trial court's finding of HAC because there was evidence that the victim was alive and conscious for at least part of the attack and struggled with her attacker while trying to defend her life.

Two of the three aggravators found in this case, HAC and prior violent felony, are among the weightiest aggravators in Florida's statutory scheme. (Fla. Apr. 10, 2014)*Gonzalez v. State*, SC11-475, 2014 WL 1408552 at *34 (Fla. Apr. 10, 2014) ("HAC and prior violent felony are among the weightiest"); *Brown v. State*, 126 So. 3d 211, 219-20 (Fla. 2013) (prior violent felony "among the weightiest"); *Hodges v. State,* 55 So. 3d 515, 542 (Fla. 2010) ("HAC and prior violent felony are among the weightiest"); *Anderson v. State,* 18 So. 3d 501, 510 (Fla. 2009) (prior violent felony "among the weightiest"); *Deparvine v. State,* 995 So. 2d 351, 381 (Fla. 2008) (prior violent felony "among the weightiest").

Although the trial court found 66 mitigating

circumstances, the proportionality review is not a mere numbers game. *Rigterink v. State*, 66 So. 3d 866, 899 (Fla. 2011). Many of the mitigating circumstances in this case were repetitive and cumulative. For example, the first 21 mitigating circumstance all referred to Jackson's parenting skills[22] and there were 6 different mitigating circumstances indicating that Jackson's family would maintain

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[22] #1)Defendant is a good father to his daughter, #2) Defendant encouraged his daughter to study hard, #3) Defendant encouraged his daughter to go to college, #4) Defendant encouraged his daughter to make something of herself and to grow beyond Nashville, Georgia, #5) Defendant is involved in his daughter's life and taught her right from wrong, #6) Defendant's daughter intends to continue to maintain a relationship with her father, #7) Defendant loves his daughter and his daughter loves him, #8) Defendant assumed the role of step-father and went beyond legal responsibilities, #9) Defendant is a good stepfather to his son, #10) Defendant is a good role model to his stepson, #11) Defendant was involved in raising his stepson, #12) Defendant was a good provider to his stepson, #13)Defendant taught his stepson the value of hard work, #14) Defendant taught his stepson to have a good work ethic, #15) Defendant and his stepson worked side by side for more than a year, #16) Defendant encouraged his stepson to study hard, #17) Defendant was a good athlete and instruct his stepson, #18) Defendant provided emotional encouragement to his stepson, #19)Defendant loves his stepson and his stepson loves the Defendant, #20) the stepson has a relationship with the Defendant and communicates through his mother, #21) the stepson intends to continue a relationship with the Defendant.

relationships with him while he is incarcerated.[23]

The court organized the 66[24] mitigating circumstances into 12 general categories in the sentencing order: 1) the Defendant is a good father and husband, and shares the love of his family, 2)the Defendant is a good sibling and son, and shares the love of his relatives in Georgia, 3) the Defendant experienced a difficult childhood and upbringing, 4) the Defendant is a nice, generous, helpful person, 5) the Defendant is athletic, dependable, and helped children learn sports, 6) the Defendant was a polite, respectful person, 7) the Defendant is a religious person, 8) the Defendant is a hard-working person, 9) the Defendant always had a positive outlook on life, 10) the Defendant's friends and associates

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[23] #62) Defendant's family will continue to foster a positive relationship and visit him while he is incarcerated (some weight); #65) Defendant's wife will continue to foster a relationship and visit him while he is incarcerated, #7) Defendant's daughter intends to continue to maintain a relationship with her father, #22) Defendant's stepson intends to continue a relationship with the Defendant, #27) Defendant's sister will maintain a relationship while he is incarcerated, #37) Defendant's father will continue to foster their relationship while the Defendant is incarcerated.

[24] Although Jackson refers to 67 proposed mitigating circumstances in his initial brief (IB 2), the court rejected proposed circumstance #6, thus only 66 mitigating circumstance were found by the court.

will continue to foster a positive relationship and visit him while he is incarcerated, 11) the Defendant has low-average intelligence, 12) the Defendant respects the process, has been polite and cooperative throughout these proceedings. (4/730-54).

The mitigation was not substantial. Jackson did not present evidence of any mental or emotional issues, he had not been abused, suffered trauma, or abandoned by his family. To the contrary, Jackson had what most people would consider to be a good home and family life. (4/760). He had a stable and loving marriage, a daughter in college a stepson in the military, a large circle of friends and family. (4/760). Despite his seemingly normal life, the trial court found that Jackson "has consistently led an entirely separate life from the one known to his family and friends that involved a repeated willingness to resort to violent criminal acts to further his intentions." (4/761).

This Court has found the death sentence proportionate in similar cases, even cases with more significant mitigation. *See e.g., Duest v. State*, 855 So. 2d 33, 47-48 (Fla. 2003) (holding death penalty proportionate in stabbing death where the court found 3 aggravators of prior violent felony, murder committed during the course of a robbery merged with

pecuniary gain, and HAC versus 12 nonstatutory mitigators); *Hildwin v. State*, 727 So. 2d 193 (Fla. 1998) (finding death penalty appropriate and proportional where the court found 4 aggravators including HAC, prior violent felony conviction, under sentence of imprisonment (parole), and mitigation including a "horrible childhood," a history of drug and substance abuse, and "organic brain damage" that resulted in a mental illness); (*Spencer v. State*, 691 So. 2d 1062, 1063-65 (Fla. 1996) (holding death penalty proportionate where victim beaten and stabbed and court found 2 aggravators of prior violent felony and HAC versus 2 statutory mental mitigators plus drug and alcohol abuse and paranoid personality); *Pope v. State*, 679 So. 2d 710, 716 (Fla. 1996) (holding the death sentence proportional for beating and stabbing homicide where 2 aggravating factors found—murder committed for pecuniary gain and prior violent felony—outweighed the 2 statutory mitigating factors—commission while under the influence of extreme mental or emotional disturbance and impaired capacity to appreciate criminality of conduct—and three nonstatutory mitigating circumstances); *Johnson v. State*, 660 So. 2d 637, 641 (Fla. 1995) (holding death penalty proportionate where victim fatally stabbed inside her home and court found 3 aggravators prior violent

felony, financial gain, and HAC versus 15 mitigating circumstances).

This Court has also found the death sentence proportionate where a large number of mitigating circumstances were found. *See Abdool v. State*, 53 So. 3d 208, 215 (Fla. 2010) (death penalty proportionate where there were 2 aggravating circumstances, 4 statutory mitigating circumstances, and 48 nonstatutory mitigating circumstances). In light of the weighty aggravating circumstances and insignificant and repetitive mitigating circumstances as compared to other cases, the death penalty is proportionate in the case of this brutal murder.

Jackson also claims that the death penalty is disproportionate because the *Enmund/Tison* requirement has not been met. Jackson is mistaken. The *Enmund/Tison* requirement does not apply here because Jackson was convicted of premeditated murder, not felony murder.

In *Enmund v. Florida,* 458 U.S. 782, 797(1982) the United States Supreme Court held that the Eighth Amendment of the United States Constitution does not permit imposition of the death penalty on a defendant "who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a

killing take place or that lethal force will be employed." In *Tison v. Arizona*, 481 U.S. 137, 158 (1987) the United States Supreme Court expanded the *Enmund* culpability requirement for imposing a death sentence under a felony murder theory to include "major participation in the felony committed, combined with reckless indifference to human life." *See also DuBoise v. State*, 520 So. 2d 260, 265 (Fla. 1988) (explaining that "[i]n *Tison* the Court stated that *Enmund* covered two types of cases that occur at opposite ends of the felony-murder spectrum, i.e., "the minor actor in an armed robbery, not on the scene, who neither intended to kill nor was found to have had any culpable mental state" and "the felony murderer who actually killed, attempted to kill, or intended to kill.").

Jackson was convicted of premeditated first-degree murder so the requirements of *Enmund/Tison* are inapplicable. The trial court correctly stated:

> The jury was never instructed that the Defendant could be found guilty on the alternate theory of felony murder, and the State never argued such a theory to the jury either. *Enmund/Tison* does not apply in the instant case because the State relied exclusively upon a theory of premeditated intent to kill on the part of the Defendant . . . .

(4/757).

## ISSUE V: FLORIDA'S CAPITAL SENTENCING PROCEDURES ARE CONSTITUTIONAL UNDER *RING*

Jackson's final claim disputes the validity of Florida's capital sentencing procedures. Specifically, Jackson claims that Florida's process violates the Sixth Amendment to the United States Constitution as interpreted in *Ring v. Arizona*, 536 U.S. 584 (2002). This claim should be denied for 3 reasons.

First, the claim is insufficiently briefed. Jackson merely asks this Court to revisit its decisions in *Bottoson v. Moore,* 833 So. 2d 693 (Fla. 2002) and *King v. Moore,* 831 So. 2d 143 (Fla. 2002) "because *Ring* represents a major change in constitutional jurisprudence which would allow this Court to rule on the constitutionality of Florida's statute." (IB 62). He does not elucidate further. Jackson's failure to fully brief and argue this claim constitutes a waiver of the claim. *See Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990) ("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived.").

Second, this claim is without merit. This Court has

repeatedly held that Florida's capital sentencing scheme does not violate the United States Constitution under *Ring*. *E.g.*, *Brown v. State*, SC12-2159, 2014 WL 1923644 at *13 (Fla. May 15, 2014); *Abdool v. State*, 53 So. 3d 208, 228 (Fla. 2010). This Court has also declined to revisit its opinions in *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002), and *King v. Moore*, 831 So. 2d 143 (Fla. 2002). *Abdool v. State*, 53 So. 3d 208, 228 (Fla. 2010).

Finally, one of the aggravating circumstances found by the trial court, and stipulated to by Jackson, was that Jackson was [twice] previously convicted of a violent felony, "a factor which under *Apprendi* and *Ring* need not be found by the jury." *Jones v. State,* 855 So. 2d 611, 619 (Fla. 2003). *Ring* does not apply to Jackson's sentence because he has previously been convicted of a violent felony. This Court has previously rejected *Ring* claims in cases in which one of the aggravating factors found is a prior violent felony conviction.

Moreover, this Court has also previously rejected *Ring* claims in cases in which one of the aggravating factors found is a prior violent felony conviction. *See Larkin v. State,* SC12-702, 2014 WL 2118192 (Fla. May 22, 2014); *Frances v. State*, 970 So. 2d 806, 822 (Fla. 2007).

## CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm the conviction and sentence.

## CERTIFICATE OF SERVICE

I CERTIFY that copy of the foregoing document has been furnished by email to Nada Carey, Counsel for Appellant, nada.carey@flpd2.com, Leon County Courthouse, 301 S. Monroe Street, Tallahassee, Florida 32301, this 30th day of May, 2014.

## CERTIFICATE OF COMPLIANCE

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

Respectfully submitted,

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