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IN THE SUPREME COURT OF FLORIDA

KIM JACKSON,

Appellant,

v. **CASE NO. SC13-2090**

STATE OF FLORIDA,

Appellee.
_____/

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

INITIAL BRIEF OF APPELLANT

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CONSTITUTIONS AND STATUTES

IN THE SUPREME COURT OF FLORIDA

KIM JACKSON,

Appellant,

v. **CASE NO. SC13-2090**
L.T. CASE NO. 16-2008-CF

STATE OF FLORIDA,

Appellee,
_____/

STATEMENT OF THE CASE[1]

On July 24, 2008, the Duval County Grand Jury indicted Kim Jackson on a charge of premeditated murder with a weapon in the October 2004 death of Debra Pearce. R1:1-3.

On April 15-17, 2013, Jackson was tried by jury before Duval County Circuit Judge James H. Daniel.[2] The defense motions for judgment of acquittal were denied, R10:648-654, 765, and at the state's request, a principal instruction was given. R10:779, R11:851. The jury found Jackson guilty as charged. R3:585, R11:881.

The penalty phase was held April 26, 2013. The jury recommended death by a vote of 8 to 4. R4:605, 13:1148.

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[1] The thirteen-volume record on appeal is designated as "R," followed by the volume number and page number. The three-volume supplemental record is designated as SR, followed by the volume number and page number.

[2] Duval County Circuit Judge Elizabeth A. Senterfitt presided over the proceedings through September 13, 2011.

A Spencer hearing was held on June 11, 2013. The state presented victim impact testimony and the defense presented the testimony of David Douglas, an investigator. R6:1061-1086.

On October 1, 2013, the trial judge adjudicated Jackson guilty as charged and sentenced him to death, finding three aggravating circumstances: 1) previous conviction of another violent felony; 2) Jackson was on parole for his 1992 conviction for aggravated assault in Cook County, Georgia, at the time of the murder; 3) the murder was especially heinous, atrocious, or cruel. In mitigation, the court bundled the 67 proposed mitigating circumstances into 12, finding: 1) Jackson is a good father and husband, and shares the love of his family, 2) Jackson is a good sibling and son, and shares the love of his relatives in Georgia, 3) Jackson experienced a difficult childhood and upbringing, 4) Jackson is a nice, generous, helpful person and friend, 5) Jackson is athletic, dependable, and helped children learn sports, 6) Jackson was a gentleman and respectful of women, 7) Jackson is a religious person, 8) Jackson is a hard-working person, 9) Jackson always had a positive outlook on life, 10) Jackson's friends and associates will continue to foster a positive relationship and visit him while he is incarcerated, 11) Jackson has low-average intelligence, 12) Jackson respects the process, has been polite and cooperative throughout the proceedings. R4:714-761; 6:1143.

Notice of appeal was timely filed October 22, 2013. R4:766.

STATEMENT OF FACTS

Guilt Phase

State's Case

Around midnight on October 18, 2004, Chester Norville, III, a neighbor of Debra Pearce, 49, walked by Pearce's house and noticed the side gate was open. Pearce's van was not in the driveway. Norville hadn't seen the van in several days. Norville entered the house through the open back sliding glass door and found Pearce face down in the kitchen in a pool of blood. Norville then went home to call 911. Norville said Pearce was a drug dealer. He had bought and smoked crack at her home several times a week with her boyfriend, Mike Brown. Other people also came by to buy and smoke crack. R8:369-83.

Pearce's mother, Bobbi Jenkins, last spoke to her daughter on October 16, around 1 a.m. R8:388-89.

The medical examiner (ME) who conducted the autopsy testified that Pearce bled to death from stab wounds. She had been dead for several days and was in the early stages of decomposition. A knife with a 5-inch blade, which was still in her chest, delivered one of two fatal blows. The knife went through her left bra cup, staying outside the chest, and then cut into the subclavian vein and artery, which feed the right arm, and into the back of the scapula. The second fatal wound

was a stab wound under the chin that cut the jugular vein, causing profuse bleeding. There were two other stab wounds to the neck, one into cartilage, and one superficial. The ME described a superficial laceration to the forehead, a shallow stab to the chin, and a shallow laceration to the left cheek. There also was a deep cut across the little finger, which could be a defensive wound, and an incision on the forearm, which could be from warding off a blow. There were other minor blunt force injuries to the head and face, evidencing a struggle. The ME didn't know for sure but thought it possible Pearce had been conscious throughout the attack. R10:628-40. The estimated time of death was early a.m. October 17th or late on the 16th. Pearce was 5'6", 172 pounds. R10:642-46.

Michael Knox, the crime scene investigator, retrieved a dark hair from Pearce's back right lower leg. R9:405. Five other hairs that looked out of place were collected. R9:439.

Leigh Clark, a DNA analyst, testified that DNA extracted from the root of the hair found on Pearce's calf matched Jackson. Clark testified the first stage of hair growth, the anagen stage, is when the hair is firmly attached to the head and has a fleshy root with cells with DNA. The anagen stage can last from months to years. In the second stage, the root starts to die, the cells start to die, and the hair is no longer actively growing. Sometimes partial DNA profiles can be

obtained from hairs in the second stage, or no DNA at all. The final stage is telogen hair, which is still attached to the scalp but no longer attached to the root and is not suitable for DNA testing. Because of the amount of DNA present on the hair recovered from Pearce's leg, Clark believed the hair was actively growing and not naturally shed. An actively growing hair would require some degree of force to dislodge. Once pulled, the hair could be transferred from one item to another. R9:462-66, 472. Clark could not say how long the hair had been present or from what area of the body it originated. R9:473. Three of the other hair fibers were not suitable for DNA testing, the fourth gave a male profile, and the fifth matched the victim. R9:466.

Spatter radiating out from the blood on the floor indicated the killing took place in the kitchen. R9:409. The knife in Pearce's chest came from the knife block on the kitchen counter. R9:411. On the edge of the kitchen sink, just above the body, was a fingerprint in blood. The sink was removed, and the print processed and photographed. R9:417-18, 21-23. The blood on the sink matched Pearce. R9:441. Blood spatter on the counter was moving upward and therefore coming from below. R9:417. In Knox's opinion, the print on the kitchen sink was left after the bloodshed. The presence of a print or a hair does not mean the

person that left the print or hair killed the victim. The hair could have been transferred from another room. R9:442, 450.

On the carpet beneath the body was an open folding knife. R9:417. The knife handle had DNA consistent with Pearce. The blade had a mixture of 2-3 individuals, which included Pearce but excluded Jackson as a contributor. R9:467.

Nothing of value was found on the knife in Pearce's chest. R10:608.

Red staining on the carpet and tile floors, enhanced with luminal, revealed footprints going from the kitchen to the back (master) bedroom, where drawers were open and poured out. R9:414-15, 431. The bloody footprints included a distinctive shoe impression as well as a sock-clad impression, which Knox said could mean there were two people, or that a person had removed a shoe. R9:424-25. Fingerprints from the master bedroom and a palm print from the doorjamb of the master bedroom closet were collected. R9:426. A television from the living room entertainment center had been removed, R9:432, and a DVD player and VCR had been removed from the second bedroom. R9:443. There was no blood transfer around the living room entertainment set. Knox testified that if people came into the house after the murder and stole things, they may have contaminated the crime scene. Animals also could have

contaminated the scene. Knox could not recall if a cat had been collected and taken to a shelter. R9:447-48.

Pearce's vehicle was located at London Town Apartments at 1591 Lane Avenue South, which is 1-1/2 miles from Ramona and Lane. R10:765. Blood on the armrest and steering wheel cover contained a mixture of DNA that matched Pearce. DNA from a second donor was male. R10:765-66.

Detective Waldrup learned during the investigation that people had been in and out of Pearce's house, carrying TVs and other items, shortly before police arrived. R9:568. Police identified some of those people, including Leron and Lydon Faust and Jacobi Huff. TV's, VCR's, and DVD's were taken. The Fausts admitted being there but Huff was never questioned. R10:608-09, 613-14.

The latent prints initially were submitted to Michelle Royal at the Jacksonville Sheriff's Office lab. Royal indicated the print from the kitchen sink was of no value. R9:586. When Detective Waldrup heard Pinellas County had some special equipment that could enhance the print, he took the sink to Pinellas, but the enhancement was not helpful. Carol Beachum of Pinellas informed Waldrup the print was of value but the computer could not identify it. R9:586. The print was then submitted to the FBI. The FBI determined there was a print of value but the computer could not identify it. R9:587.

Subsequently, the Florida Department of Law Enforcement (FDLE) identified DNA from the hair found on Pearce's body as belonging to Jackson. Jackson's fingerprints were then sent to the FBI. R9:569-71. The palm print found on the doorjamb also was sent to the FBI. R9:570-73. Police never identified the palm print. R9:585, R10:612. A print found on a video was identified as belonging to Richard Thomas, a friend of Pearce's, who is now dead. R9:574. Thomas was ruled out as a suspect after Waldrup spoke to Pearce's boyfriend, Mike Brown, who was in jail when the murder was committed. R9:583-84.

Four years later, on January 22, 2008, after receiving the fingerprint and DNA results, police interviewed Jackson in Georgia and showed him photos of Pearce, Pearce's house, and the neighborhood. The 3-4 minute audio recorded interview was played for the jury. After reading Jackson his rights, the officers said they were investigating a homicide in Jacksonville and asked Jackson if he recognized the woman in the photograph. Jackson said, no, and the detectives then asked, "Did you murder this woman?" Jackson responded, no. When police identified the woman as Debra Pearce, Jackson said he didn't know her. Shown photos of her house and neighborhood, Jackson said he'd been in the area but not in her house. The photo of Pearce was a blurry black and white photo. Pearce had red hair. R9:576-83, 588-90, 593-95.

During the investigation, many names came up, including Catab Robinson, Billy Carol, Jamie Shiver, "Red," and Amber Martinez. Some people were ruled out as suspects, while others were never located, such as Catab Robinson. R9:597-99.

Two fingerprint analysts testified for the state. Jacqueline Slebrch has worked at the FBI at Quantico for five years. R9:480. A print is "of value" for identification when Slebrch believes "there is sufficient quantity and quality of information that if at any point we were given the corresponding known print we would be able to make an identification." R9:486. The FBI lab uses a blind verification process in which an additional examiner who does not know the original examiner's conclusion conducts an independent analysis and evaluation. R9:487. The first examiner in this case was Laura Hutchins, who is no longer with the FBI. She received a series of photos, decided there was a fingerprint "of value," and searched the database, but no match was returned. R9:492. Slebrch took over after Hutchins left and conducted her own independent analysis after Jackson's prints were sent to compare to the latent print. R9:491-92. When making a comparison, the analyst marks on the photo of the latent print all the characteristics she sees, places the print next to the 10-point card of known prints, and then goes through each one, using a magnifying glass. Szebrch identified State's Exhibit 39 as the photo she examined and

State's Exhibit 83 as the side-by-side comparison of the latent print and Jackson's print. R9:493-94. In this case, the photo has splotches on it, which could potentially cause distortion. Also, if excess liquid such as blood is on the hand, and the hand touches with a certain amount of pressure, the substance coating the ridges will get pushed into the spaces between the ridges, the furrows, and that will end up being behind the impression of the furrows. R9:495-96. Slebrch concluded the print from the sink was Jackson's because she "did not notice any significant dissimilarities to exclude that finger," and "I found a sufficient amount of finding quality of info to be in agreement." R9:496. The palm print was excluded from Jackson. R9:497. On cross-examination, Slebrch testified the sink print was of "average" quality. There is an absence of information in the areas of the splotches. The print identified as Jackson's was one of multiple prints on top of each other. Slebrch compared the print towards the bottom. The other two were of no value. R9:503-04. Slebrch 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. A certain number of points are not required to make a comparison. R9:506-07. The latent print was identified as Jackson's right ring finger. R9:510.

William Schade has been the records manager at the Pinellas County Sheriff's Office for 20 years. Schade began fingerprint training in 1971. R9:516. As recently as 15 years ago, fingerprint examiners did not always adhere to the principles of science. Science leaves the door open for additional information and changing conclusions. Fingerprint people were trained to examine the evidence carefully, come to a conclusion, and stand by it, "come hell or high water." Now, "we can no longer say we're 100% certain." It's a preponderance of evidence, it can be possible or plausible conclusions but science never says 100%. R9:518. Some labs do blind verification though Pinellas does not. R9:522. The Pinellas lab received the photo in 2004. Pinellas had a vacuum metal deposition chamber, which processes fingerprints using vaporized gold and zinc. The extra processing didn't help, and the lab ended up working with the Polaroid photos it received. The lab determined the print was of value, ran it through the database, and then packaged it up and filed it away. R9:524-526. When asked to look at the photo again in May 2012 and compare it to a known print, the lab identified the print as Jackson's. The lab did not know what the FBI had done. R9:526-27. Asked how the comparison is made, Schade said, "I've looked at a lot of fingerprints and so you get a feel for it, you know, what is normally commonly found." R9:530. The analyst marks off where

ridges split in two, where they end, where they divide, and where they come back together. Schade marked 8-9 points on this latent, which matched the known print. In doing this, he had to take into account that when a wet substance is squeezed into the ridges, it makes the ridges white, not black. R9:531-33. The latent print was made by Jackson's right ring finger, "there's no other possible conclusion." Ten years ago, Schade would have said, "I'm 100% certain," but that's not scientific. Now, he says, "I'm 100% confident." R9:535.

On cross-examination, Schade explained that in the past 10-15 years, some testimony was discovered to have been wrong, mistakes were made, and there was criticism. Analysts haven't changed how they examine or analyze, what's changed is "the way we present our testimony." He can have 100% confidence but not scientific certainty. Asked if it were possible he could be wrong, Schade said, "No." If he followed protocols, "it's not possible I made a mistake." R9:538-39. In 2004, the lab wasn't asked to render an opinion, only to help with the processing. R9:557. They ran a couple of searches but no one requested they do so. R9:558. In 2008, they were asked to document what they had done in 2004. Then, in 2012, they were asked to do a comparison. R9:542. The print involved a double tap, about 4 impressions. R9:544-45. Three of the prints are not identifiable, there's not enough detail present, not enough

information. R9:549. The splotches on the print of value hide what's under them but don't change what's present. R9:550-51. Schade's comparison was based on 5 dots at the top and 3-4 dots at the bottom. R9:551. No minimum number of points is required to make a comparison. It's not just the number that is relevant but also the spacing. R9:553. Here, one portion of the print matched Jackson's print. R9:554. Based on that, Schade determined with "100% certainty" the latent print and known print were the same. R9:551.

Defense Case

The defense presented four alibi witnesses, an expert latent print examiner, Michelle Royal, and Mr. Jackson.

Debra Jackson is Kim Jackson's wife. They got married in June 2000. Mrs. Jackson is an accountant. In October 2004, she and her husband were living at Diamond Inn on the west side of Jacksonville, off Lane. They previously had lived at the Mission Springs Apartments, off Timuquana and Roosevelt, in the neighborhood of Bennington Drive and Seaboard. Every year, her husband goes home to Adele, Georgia, around the time of his birthday, October 13. Adele is just north of Valdosta, 2-1/2 hours from Jacksonville. In 2004, October 13 was a Wednesday, and he left for Adele that Friday, October 15, with his cousin, Lucy Baker. Lucy came back on Sunday night, the 17th. Jackson got back the following Friday, October 22, by bus, and Debra saw

him as soon as he got back. She was first asked to recall that weekend in 2008. She remembered that particular birthday because her husband hadn't gotten a full paycheck that week, there was no money for the trip, and she was furious with him for going. R10:659-65. She did not see her husband leave with his cousin. She knew his whereabouts from the 15th until the 22nd from his phone calls. He called her from his father's house, which is a 229 number, meaning he was in Georgia. He called on Monday morning, the 18th, and said he missed his ride and needed bus fare to get home. She received calls from him throughout the week as he tried to make arrangements to get back, as she wasn't sending him any money. R10:669-70.

Penny Williams is Kim Jackson's brother. Penny has been a nurse aid for 17 years and works at Behavioral Health in Valdosta, Georgia. In 2004, Penny lived in Cook County, Georgia, with her grandfather. Birthdays were a big thing for her brother to be home and celebrate with his friends and family. That year, on the Wednesday after his birthday, he came by to visit and asked Penny to take him to the bus station because he had missed his ride. She first took him to see his friend, Rose Franklin, at her workplace to get money for the bus ticket. He met Franklin on the porch because visitors weren't allowed to go in the facility. Penny then took him to the bus station, but the bus had already left, so she brought him back

to Adele. Penny had to work the next day, so his father took him to the bus station. R10:672-76. Kim was close to his grandfather, and during that week, he came in and out, visiting his grandfather and Penny's boys. She was sure about the weekend because he brought his daughter to see her. She was first asked to remember that weekend in 2008. R10:677-79.

Lillie Rose Franklin has known Jackson for 18 years and is a good friend. Franklin is a social worker at Parkwood, a center for the mentally retarded. She works Monday through Friday. In October 2004, Jackson came by to borrow money for a bus ticket. His sister was out in the car. Franklin doesn't remember the specific day he came by but she remembers it was around his birthday because she had heard he was in town but didn't see him until he came by asking for money. She was first asked about this 4-5 years later. R10:681-86.

Walter Jackson is Kim Jackson's father. Walter saw his son in October 2004. He always came home for his birthday. As best Walter could recall, Kim came home a few days after his birthday that year. Most of the time, he stayed with Walter. If not, he would be with other relatives. Walter didn't recall the date Kim left but remembered taking him to the bus station in Valdosta, which is 30 minutes away, on a Wednesday or Thursday evening. Walter saw him get on the bus. He had missed the first bus. R10:687-91.

Michelle Royal works for the Jacksonville Sheriff's Office, in the latent print unit. In her 29 years at the JSO and 22 years as latent print examiner, she has examined hundreds of thousands of latent prints. She examines prints on a daily basis. She attends conferences and classes to stay up to date. She has testified in court as a latent print examiner more than 175 times. In October 2004, Royal was asked to review 12 latent lift cards in this case. She evaluated the prints to determine if there were any prints of value, searched the latent prints in the AFIS system, and compared the prints to those of the victim. At a later time, she was asked to evaluate a latent print that came off a sink. She determined that the print did not have sufficient information present to identify it and classified it as of no value. R10:702-06. The image appeared to have a double tap, i.e., the finger touched the surface and may have touched again right next to it. There were two prints that covered more area, with several other impressions surrounding those two. R10:707.

On cross-examination, Royal said she identified a latent print on a bottle of cologne to the victim and a latent print to Mr. Thomas on a VHS cassette. She did not compare the print on the sink to Jackson because there was not enough information to take that step. If enough information is present, such as pattern type, a person may be excluded even if there are not

enough characteristics present to actually compare a print. R10:709-10. When shown State's Exhibit 84 and asked what the red markings on the pictures meant to her, Royal responded they were points that had been plotted to illustrate individual ridge characteristics, as well as their relationship to one another, which is something she does in her cases. Asked to look at the two prints quickly, Royal agreed the latent print and the known print had similarities. Based on the flow of the ridges, she could not immediately say the two prints did not come from the same person. She did not agree that the plotting on the latent print corresponded to similar characteristics on the known print. They were the same as far as the pattern type and the flow of ridges but some of the individual ridge characteristics that were plotted on the unknown print appeared to be white ridges and some appeared to be black ridges, and when dealing with a print that is color-reversal, some of the points may be off. R10:711-13. The Jacksonville lab, like the Pinellas County lab, does not do blind verifications. Royal alone made the call initially. If giving her opinion specifically in reference to exclusion, she would not exclude the print as coming from Jackson. Royal agreed that when she testifies that a print matches a person, she is one hundred percent certain. R10:713-15. Royal identified the photo in State's Exhibit 87 as the Polaroid she took in 2004, which is the photograph she

examined. She agreed it was possible for digital enhancement to make a print of no value a print of value and that this is scientifically accepted in the fingerprint community. R10:16.

On redirect, Royal testified that when she did the print analysis in 2004, she was not initially one hundred percent certain it was a print of no value. She initially received a photograph taken by the evidence technician. She requested a better photo and was given the opportunity to photograph the latent print herself. She reviewed that photo and felt there were 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 to a set of known prints. Asked to look at the two sets of prints in Exhibit 87, magnified from the Polaroid, Royal said there appeared to be four different prints and pointed out each one. As to the large one, she could not plot anything in the bottom half of it. The circles or bubbles in the photograph appeared to be water marks or some liquid that may have dried and was present when the photo was taken. The circles block off information regarding the ridge definition, which also created difficulty in determining whether the print was of value. R10:717-20.

Kim Jackson testified he met Debra Pearce through her boyfriend, Michael Brown. He bought crack cocaine from both Pearce and Brown. He knew Pearce as "Peppermint Pattie," had

seen her between 5 and 10 times, and had been to her house about 5 times. He was living in Mission Springs Apartments at the time, off Timuquana and Catoma. He bought drugs from Brown 7-8 times and from Pearce 4-5 times. He met them at the BP gas station at Timuquana or walked into the neighborhood to buy from Pearce because his ex-son-in-law, Benjamin Watson, lived across the street from her. While at her home, he had moved a couch and gotten a rag out of her disposal. A friend of Pearce's named "Red" was usually there. When he helped with the disposal, he looked up under the sink to see if there was some kind of mechanism to make it unwind. This was months before the homicide. R10:743-44. He also vacuumed her car once at the BP station so they wouldn't look suspicious. When Detective Waldrup interviewed him in Georgia four years later, he distanced himself because he felt Waldrup was trying "to put me into something that I wasn't involved in." He had been to Pearce's home about a week before his trip to Georgia that year. In 2004, his birthday, October 13, was on Wednesday. He went to Adele, Georgia, the Friday after his birthday with his cousin, Lucy Baker. He went straight to his dad's house. His sister, his granddaddy, his cousin, and other relatives were also in Adele. His wife did not go with him because she had been complaining about money being short and was against his going. He was supposed to come back on Sunday but he wanted to stay

longer and enjoy his friends. He came back late Thursday by Greyhound. His father took him to the bus station. He left Valdosta around 9, 9:30, stopped in Waycross, Georgia, where he waited for another bus, and got back to Jacksonville around midnight. He got off at Martin Luther King and Myrtle Street, walked to Lucy's house, and called his wife to come get him around 12:45. R10:722-32.

Jackson had never had a fight with Pearce or Brown. As far as he knew, Pearce did not do drugs, she just sold them. He would call her, and she would meet him at the BP with the drugs or tell him to come to the house. When he got back from Georgia that year, his son-in-law told him Pearce had been murdered. He didn't hear anything about her again until the detectives came to talk to him. At first, he did not recognize the picture of Pearce they showed him. Her hair was usually red, and she never looked "raggedy." The photo they showed him looked like an older lady, and the face and eyes made her look dead. When they showed him the photos of her house, he recognized her house, but Waldrup had said he was a homicide detective, and Jackson felt they were trying to "implement" him in something he had nothing to do with, so he lied. R10:734-39.

Penalty Phase

The state presented the victim impact testimony of Bobbi Jenkins, Debra's Pearce's mother, and Lindsey Pearce, Pearce's

daughter. Lindsay testified that at the time her mother was killed, she was living with her mother and grandmother. She stayed at her grandmother's because her mother lived in a bad neighborhood with prostitutes walking around. R12:924-32.

A stipulation was read to the jury that Jackson was convicted of robbery in Cook County, Georgia, on April 20th, 1988; was convicted of aggravated assault in Cook County, Georgia, on February 17, 1992; was convicted of armed robbery in Cook County, Georgia, on August 16, 2005; and was on felony probation for the above-mentioned aggravated assault at the time the present murder was committed. R12:942-43.

Melissa Moore testified Jackson robbed the Days Inn, in Adele, Georgia, on May 23, 2005, during the 11-3 shift. A surveillance video, which was played for the jury, showed Moore letting Jackson inside after he requested a room. As Moore stood behind the desk preparing the paperwork, they conversed, and then Jackson walked around the counter with a gun in his hand. She told him to "get out of here, buddy. Here. Here's the money." He told her not to follow him, and she said, "Get out of here so I can lock the door back." After Jackson left, Moore called 911 and reported the robbery. R12:932-36.

Bobby Stanley, a Georgia Bureau of Investigation agent, testified he was the victim of an aggravated assault committed by Jackson on September 21, 1991. Stanley and two others were

working undercover, trying to buy crack from their vehicle. They earlier had talked to Jackson about buying crack, but that didn't pan out. When they tried to buy crack from an older man, Jackson ran up, pushed the older man out of the way, pulled up his shirt, and pulled out a gun. Stanley took off and didn't see whether Jackson pointed the gun at him. R12:940-41.

The defense presented 15 lay witnesses and 1 expert witness.

Lequitta Weldon has known Kim Jackson for 20 years. Jackson coached her softball team, was a good coach, and worked well with the players. He was encouraging, a caring person, and a good role model. Jackson and his wife had attended church with Lequitta. R12:944-49.

Walter Jackson, Kim's father, testified he was in the Army for 14 years, stationed at Ft. Polk, Ft. McClellan, and Ft. Benning, Germany, and Korea, when Kim was young. When Kim was a teenager, Walter kept him on post with him during the summers. Walter's first wife, now deceased, was Viola Jackson. He had 4 children with her. Kim's mother was Merle Jean Tucker. Kim played a lot of sports and was good in sports. Kim has been in prison in Georgia since 2005. R12:950-61.

Laquinta Jackson, 23, is Kim's younger half-sister. Walter is their father. Laquinta grew up with Walter and her mother, Joann Posey. Her brother worked, took her to baseball games,

and was a positive influence on her. He encouraged her to stay in school, not get involved with the wrong people, make good choices. She loves him very much and respects him. R12:963-66.

Kenyetta Jackson is Kim's daughter. Kenyetta grew up in Nashville, Georgia, which is near Adele, Georgia. She finished high school in 2010. She now lives in Savannah, Georgia, where she is attending Savannah State, majoring in biology. Since her father has been incarcerated, she has stayed in contact with him by writing and visiting. He has been a positive influence, encouraging her to stay in school, graduate from college, get a good job, do the right things. R12:968-73.

Penny Williams is Kim's sister. They had the same mother and Penny is the youngest of five. Penny is 13 years younger than Kim. Kim was a positive person. He was very protective of Penny. He taught her sports because he was good at everything, baseball, softball, football. Since he's been in prison, she and her family have visited, written, and talked to Kim on the phone. She loves him a lot. R12:974-77.

Ridmone Durr grew up with Kim in Adele. They played midget league baseball and football together as kids and adult softball when they got older. Kim was a great athlete and ball player, a hard worker, and a good teammate. He always gave 110% effort. He was always very encouraging to the rest of the team. He was

a leader. He also was a humble person. Durr drives semi-trucks, and Jackson sometimes rode with him and helped him make deliveries and unload the truck. He did most of the work because Durr would be tired from the driving. Kim was always a mild person and would give people the shirt off his back if he could. Durr never saw him be disrespectful to anyone. Durr still considers Kim one of his best friends. R12:978-84.

Dr. Jerry Valente is a forensic psychologist, licensed to practice in Georgia and Florida for 15 to 18 years. He has testified in court about 300 times. Dr. Valente met with Jackson on April 4 and 15 regarding his competency to proceed to trial. Dr. Valente found Jackson competent. He also did an IQ test. Jackson's full-scale IQ is 84, which is in the low-average range. He saw no evidence of psychosis. Jackson was cooperative, well-mannered, and respectful to authority. Some defendants are very resistant in such situations, Jackson wasn't. Based on his mental functioning, he would be considered a slow learner. There appeared to be a processing disorder, a learning disability. He may have been in special education in school, but there is no brain impairment. R12:987-96.

Stephen Stafford, 40, has lived in Adele, Georgia all his life. He grew up in the same neighborhood with Jackson, played sports with him, and umpired softball games. Jackson was very motivated, a good athlete, hard worker, had a good work ethic.

He played on the Soldiers travel softball team. He motivated everybody and treated his teammates with respect. He was very kind. He taught people how to do something if they didn't know how. He was hands-on. R12:997-1000.

Jerome Durr, 40, lives in Adele and knew Kim growing up primarily through sports. Jerome saw in Kim a determination to go all-out. He was dedicated to the team and dependable. He was a good teammate and wanted you to give your all. It was all positive. Adele was a typical small town. Everybody knows everybody. It was working class mostly and poverty, no affluence. Kim had an older brother, and they grew up with their grandfather. R12:1001-05.

Annie Scott lives in Jacksonville. She has known Kim Jackson and his wife since early 2000, when she met them in church. Jackson was a very respectable and mannered person. He had prayer meetings and Bible study at his home for church members. Mr. and Mrs. Jackson were always care-giving to other people and helpful. Kim always offered to help when something needed doing at church functions. He was giving of his time and dependable. He probably mentioned his prior run-ins with the law and he expressed regret for some of the things he had done and he wanted to do better. R12:1005-10.

Nathan Bernard lives in Jacksonville, works as a waiter, and volunteers at the 12-step program at the Duval County Jail.

Bernard first met Jackson about ten years ago, when they worked together in construction. They were residential framers. Jackson was a hard worker. Everyone loved him. He kept morale really high. He was very reliable, someone you could depend on. He was a jokester and kept people laughing. He encouraged people, too. Jackson spent time with Bernard's family, too. He came over and would throw ball with Bernard's then-four-year-old son. When Bernard ran into Jackson again at the jail a few months ago, Jackson's first words were to ask about Nathan, Jr. Jackson has been to every meeting, which are weekly, and has shared his struggles about sobriety. When Jackson shares his stories, it's quiet as a button. When he speaks, the class quiets down and listens to what he has to say. R12:1011-15.

Tracy Dyal lives in Jacksonville and is the manager at Bryant Displays, which does displays and graphics for trade shows. Her father and brother also work there. She met Jackson in the early 2000's when her father hired him to work for the company. He worked for several years and was a fantastic worker. He was an extremely hard worker and did a good job. He was prompt. He was wonderful. He mainly worked in the shop with the construction part of the job but would do anything they asked him to. If she needed him to clean the bathroom, he would do it. He worked whenever they needed him, sometimes late into the evening. Tracy often worked late into the night with him.

He was protective because the business is in a rough area. He always walked her out to her car and watched out for any other men or women that were working. Tracy sometimes brought her son, Justin, to work, and Jackson interacted wonderfully with Justin and made sure he was safe. Jackson was a trustworthy employee. Tracy and other people in the store felt better when he was there. R12:1016-22.

Don Meaders owns Bryant Displays. Meaders met Kim through his wife, Debra, who did the company's accounting and bookkeeping. Jackson was a very good worker. He was good at building and construction. Sometimes they worked long hours on evenings and weekends to get the work done. Jackson was always willing to work when they needed him and never complained. He last worked for them in 2004, when things slowed down. Meaders was aware of Jackson's prior record when he hired him. Jackson was very upfront and honest about it, and they would sit and talk and sometimes pray together, and the character he saw in Jackson did not give him any reason to be concerned about his past. R12:1023-27.

Timothy Bryant, 26, is Kim Jackson's step-son. His mother is Debra Jackson. Timothy is in the Air Force and lives in Washington, D.C. Jackson came into Timothy's life when Tim was 12 or 13 and still living in Hahira, Georgia. They moved to Jacksonville in 2000. Tim finished school in 2006 and enlisted

in the military in 2009. He is now a senior airman. Jackson was genuinely compassionate with Timothy and viewed him like a biological child. They had a close relationship. Jackson always encouraged Tim to do the right thing and supported him when he made decisions others may have looked down on. He's had a very positive influence in his life, more so than Tim's biological father. Tim has stayed in contact with his father since he's been incarcerated, by visiting or telephone. He loves his father and will continue to visit him. R12:1028-33.

Eileen Yvonne Gibbs met Kim Jackson five years ago through his wife, Debra. Since then, she has talked to him many times, visited him in jail, and exchanged written correspondence with him. He has always been upbeat, encouraging, and motivated. He always has a good word to say about someone and displays genuine concern for people and helping them make positive choices in their lives. He talks with the other inmates, encourages them to redirect their thoughts and actions while they are still young and have a chance. The guys have a lot of respect for him, and he was able to deescalate situations that otherwise would have gotten out of hand. In prison, Jackson would be a positive influence in the lives of those who cross his path. R12:1036-37.

Debra Jackson testified she and Kim got married on June 9, 2000. Kim has been a good husband and provider and an excellent

father and grandfather. She has visited him continuously since he was incarcerated in May 2005, written him letters, and accepted phone calls from him. If in prison, he will change lives. It's his character to encourage others. He has learned from the things he's been through and tries to help others not make the same mistakes. October 2004 is the last remembrance anyone has of him in Adele. R12:1039-53.

In rebuttal, over defense objection, the state presented the testimony of Carol Adeyeye, court liaison at the Georgia Department of Corrections, that Jackson had nine disciplinary reports (DRs) during 2007. Adeyeye testified DRs are internal complaints and do not involve major infractions that a person would be prosecuted for. R12:1084-85.

SUMMARY OF ARGUMENT

Issue 1. The state's evidence was insufficient to establish that Jackson committed the murder. The only evidence linking Jackson to Pearce's murder was a hair on Pearce's leg and a bloody fingerprint on the kitchen sink above her body. The state did not establish that this evidence was left at the scene at the time of the murder, as Jackson admittedly had been in Pearce's kitchen before, and the state's fingerprint expert testified the fingerprint could have been preserved by blood being deposited on top of it after it was left on the sink. In addition, four witnesses testified that Jackson was in Adele, Georgia, for his birthday when the murder occurred. Even a deep suspicion or probability of guilt is not enough for a conviction. In order to satisfy the standard of beyond a reasonable doubt, the evidence must conclusively establish the defendant's guilt to the exclusion of all other inferences. The evidence in this case does not meet that standard.

However, even if the hair and/or fingerprint evidence were sufficient to establish Jackson's presence when the murder was committed, this evidence does not prove Jackson killed Pearce or was a principal to the killing, in light of the evidence--two sets of bloody footprints and unknown DNA on one of the knives used--that more than one person was present at the time of the murder.

The evidence also failed to establish the murder was premeditated. The evidence showed a struggle involving two knives, one of which came from the knife block in Pearce's kitchen. There were no eyewitnesses and no evidence of what immediately preceded the murder. The evidence is entirely consistent with a spontaneous fight and the absence of premeditation.

Issue 2. The prosecutor's comments during the guilt phase closing argument require a new trial. In closing argument, the prosecutor impugned the testimony of the defense fingerprint expert, Michelle Royal, based on matters outside the evidence, including the prosecutor's asserted personal knowledge of how Royal operates based on his past experience with her. These highly improper comments directly concerned the principle evidence of guilt and rendered Jackson's conviction fundamentally unfair.

Issue 3. The trial court erred in finding the aggravating circumstance of especially heinous, atrocious, or cruel where no evidence established that Jackson killed Pearce or was substantially involved in her killing to the extent that he knew in advance how she was going to die.

Issue 4. Absent the especially heinous, atrocious, or cruel aggravator, the death sentence is disproportionate, as this Court has found death unwarranted in cases involving a

similar balance of aggravation and mitigation. The death penalty also violates the requirement of individualized punishment set forth in Enmund v. Florida, 458 U.S. 782, 801 (1982), because the evidence was insufficient to show Jackson "took life, attempted to take life, or intended to take life."

Issue 5. This Court should re-examine its prior cases and declare Florida's capital sentencing proceedings unconstitutional pursuant to Ring v. Arizona.

ARGUMENT

Issue 1

THE STATE'S EVIDENCE WAS INSUFFICIENT TO PROVE JACKSON'S GUILT OF PREMEDITATED MURDER.

The only evidence linking Jackson to Pearce's murder is a hair found on Pearce's leg and a fingerprint in blood on the kitchen sink above her body. Because the state's fingerprint expert testified the blood could have been deposited on top of a print placed on the sink at an earlier time, and Jackson admitted having been in Pearce's house and kitchen before, the hair and fingerprint do not prove Jackson was at Pearce's house at the time of the murder. The state therefore failed to present competent evidence from which the jury could infer guilt to the exclusion of all other inferences. Jackson's conviction cannot stand.

"[W]here a conviction is based wholly upon circumstantial evidence, a special standard of review applies." Lindsey v. State, 14 So. 3d 211, 215 (Fla. 2009)(quoting Reynolds v. State, 934 So. 2d 1128, 1145 (Fla. 2006)); see also Ballard v. State, 923 So. 2d 475 (Fla. 2006). The special standard of review requires that the circumstances lead "to a reasonable and moral certainty that the accused and no one else committed the offense charged. It is not sufficient that the facts create a strong probability of guilt. They must be inconsistent with

innocence." Frank v. State, 121 Fla. 53, 163 So. 223,, 223 (1935), quoted in Lindsey, 14 So. 3d at 215.

As this Court explained in Ballard:

> Evidence which furnishes nothing stronger than a suspicion, even though it would tend to justify the suspicion that the defendant committed the crime, is not sufficient to sustain conviction. It is the actual exclusion of the hypothesis of innocence which clothes circumstantial evidence with the force of proof sufficient to convict. Circumstantial evidence which leaves uncertain several hypotheses, any one of which may be sound and some of which may be entirely consistent with innocence, is not adequate to sustain a verdict of guilt. Even though the circumstantial evidence is sufficient to suggest a probability of guilt, it is not thereby adequate to support a conviction if it is likewise consistent with a reasonable hypothesis of innocence.

923 So. 2d at 482 (quoting Davis v. State, 90 So. 2d 629 (Fla. 1956)).

Here, a hair on Pearce's leg and a fingerprint on the kitchen sink above her body were identified as belonging to Jackson. This evidence proved only that Jackson had been in Pearce's house at some point in time, which he admitted, but is insufficient to prove he was there the night Pearce was murdered. In cases analytically similar to the present case, this Court held the circumstantial evidence was insufficient to prove the defendant's guilt beyond a reasonable doubt.

In Cox v. State, 555 So. 2d 352 (Fla. 1989), police found a hair, some O-type blood, and a boot print, none of which was definitely the defendant's, in the victim's car. A hair

comparison expert testified the hair was consistent with Cox's hair but the Court stated that "hair analysis and comparison are not absolutely certain and reliable." 555 So. 2d at 353. Cox did have O-type blood, and the boot print appeared to have been made by a military-type boot similar to boots Cox owned, but the print was not compared to Cox's boot. Cox also had part of his tongue bitten off, and a surgical assistant testified it was consistent with someone other than Cox biting it. The Court concluded this evidence established "only a suspicion, rather than proving beyond a reasonable doubt, that Cox, and only Cox, murdered the victim." Id.

In Ballard, investigators determined that one of four fingerprints found on the bed frame near the victim's upper torso belonged to Ballard. 923 So. 2d at 478. A forensic expert determined that one of several hairs found in the hand of the victim were consistent with the arm hair of Ballard but could not say whether the hair had fallen out naturally or been forcibly removed. The Court concluded that because Ballard was a frequent guest in the victim's apartment, the presence of his hair and fingerprint in her apartment failed to prove he was the person who robbed and killed her. Id. at 482.

In Lindsey, the defendant was convicted of felony murder in the shooting death of Joanne Mazollo, a pawn shop clerk. The circumstantial case against Lindsey consisted of 1) a Royal

Crown bag containing jewelry was taken during the robbery, 2) Lindsey's ex-wife, Nikki, found a Crown Royal bag containing jewelry in a closet of an apartment where she sometimes stayed with Lindsey and several other individuals, including LoRay (LoRay already had been convicted of robbery and second-degree murder in Mazollo's death), 3) Lindsey told Simms, whom Lindsey had met in jail, that Simms should always kill witnesses and that Lindsey had to do that once. The evidence did not show the bag of jewelry found in the closet was the bag of jewelry missing from the pawn shop or that Lindsey placed the bag in the closet or ever had possession of it before he sold the items at a flea market. The Court vacated Lindsey's conviction, reasoning:

> The State failed to produce any evidence in this case placing Lindsey at the scene of the crime at the time of the murder. . . .
>
> Consequently, we find that the evidence presented to support an inference of guilt does not exclude all other inferences. While we agree that the evidence here does seem suspicious, even a "deep suspicion the appellant committed the crime charged is not sufficient to sustain conviction." Williams v. State, 143 So.2d 484, 488 (Fla. 1962); see also Ballard, 923 So.2d at 482 ("Suspicions alone cannot satisfy the State's burden of proving guilt beyond a reasonable doubt....").

14 So. 3d at 216.

Similarly, the circumstantial evidence in the present case, while suspicious, is insufficient to support a conviction, as

the state presented no conclusive evidence that the hair and fingerprint were left at Pearce's house at the time of the murder.

Leigh Clark testified that because of the amount of DNA present on the hair found on Pearce's leg, she believed it was in the actively growing stage and not naturally shed. Clark testified an actively growing hair requires some degree of force to dislodge but did not say how much force. Once removed, a hair can be transferred from one item to another. R9:462-66, 472. Clark could not say how long the hair had been present or from what area of the body it originated. R9:473. Jackson testified he had been to Pearce's house many times, including one week before the murder, and that he had engaged in physical tasks while there, including moving a sofa and fixing the disposal. The evidence therefore leaves open the reasonable possibility that the hair was pulled out during one of these activities and later transferred to Pearce's leg. If the hair was deposited on the sofa, it could have been transferred to Pearce when she sat on the sofa. Or, as the defense argued below, a cat could have transferred the hair from one place to another such that it ended up on Pearce before or after the murder. No evidence shows the hair fell or was removed from Jackson's body at the time of the murder. Jackson's hair on

Pearce's leg is no more suspicious than the defendant's hair found in the victim's hand in Ballard.

The fingerprint concededly is more problematic, given that it had blood on it. Apart from the conflicting evidence as to whether the print was of value for comparative purposes, the state's fingerprint expert, Jacqueline Slebrch, testified it was possible blood was deposited on top of a print that had been placed there earlier. Jackson testified that when he fixed Pearce's disposal, he looked up under the sink. No evidence showed Pearce was a tidy person who necessarily would have cleaned the edge of the sink during the intervening weeks. The state's evidence therefore did not conclusively establish when the print was placed on the sink, and Jackson's testimony established an innocent explanation for the print on the sink.

Jackson also had a solid alibi for the time of the murder. Four witnesses testified he was in Adele, Georgia, celebrating his birthday, which he did every year, when Pearce was killed. The state attempted to cast doubt on the witnesses' memories by pointing out that they were not asked about Jackson's 2004 birthday until 2008, four years later. Although the jury was not informed of this until the penalty phase, October 2004 was the last time Jackson spent his birthday in Adele, as he has been in prison since his May 2005 arrest for armed robbery. In addition to the evidence of more than one person in the house at

the time of the murder, there were other hairs and prints that were either not identified to anyone or were excluded as belonging to Jackson (e.g., the palm print found on the door jamb).

The circumstantial evidence in this case raises a suspicion of guilt, but that is not enough. As this Court said in Lindsey, "even a deep suspicion the appellant committed the crime charged is not sufficient to sustain conviction." 14 So. 3d at 216 (internal quotation and citation omitted). Rather, circumstantial evidence "must be of a conclusive nature and tendency, leading on the whole to a reasonable and moral certainty that the accused, and no one else, committed the offense." Parish v. State, 98 Fla. 877, , 880, 124 So. 444, 445 (Fla. 1929); see also Cox v. State, 555 So. 2d 352, 353 (Fla. 1989)("circumstantial evidence must lead to a reasonable and moral certainty that the accused and no one else committed the offense charged"). The evidence would rise to this level only if the circumstances were such that the print could have been placed on the sink only at the time the crime was committed. This requirement was not met here because the record does not preclude the reasonable possibility that the print was placed on the sink at some time before the murder. The evidence therefore was insufficient to sustain Jackson's conviction.

Assuming for the sake of argument that the fingerprint was placed on the sink at the time of the murder, the evidence nonetheless is insufficient to prove Jackson killed Pearce, or was a principal to her murder. At the state's request, the trial judge gave a principal instruction based on evidence that more than one person was involved. As the prosecutor stated:

> I think it's appropriate based on the evidence that's presented in this case. Specifically that there is evidence that there may be more than one person involved. Specifically that there are - there are two sets of footwear impressions and although that may be evidence of one person taking off their shoes, there is evidence before this jury that more than one person participated in the crime.
>
> In addition, there was a knife found in[3] the victim's body which may indicate a second person involved. The DNA on that knife is primarily the victim's, although there was some unknown DNA that was excluded as coming from the defendant. Under that factual scenario the jury could find that the defendant was present and an active participant in this murder but that someone else was involved and they together committed this crime.

R10:777-78.

The state argued below that the foot impressions and knife-DNA is evidence that two people may have been involved in Pearce's murder. This evidence, however, shows only that two people may have been present when Pearce was killed, not that two people were involved in the killing. There is no evidence that Jackson, if present, participated in the crime. Pearce was

[3] The prosecutor apparently was referring to the knife found under Pearce's body, not the knife in her chest. Nothing of value was recovered from the knife in Pearce's chest. R10:608.

a drug dealer, and there was testimony that lots of people bought and used drugs at her house. One of the knives used was from the knife block in the kitchen. Even if Jackson was present at the time of the murder, someone else may have killed Pearce during a drug-fueled argument.

The evidence also does not prove the murder was premeditated. Premeditation is the essential element that distinguishes first-degree murder from second-degree murder. Wilson v. State, 493 So. 2d 1019 (Fla. 1986). Premeditation is "more than a mere intent to kill; it is a fully formed conscious purpose to kill." Roberts v. State, 510 So. 2d 885, 888 (Fla. 1987), cert. denied, 485 U.S. 943 (1988). The purpose to kill "'may be formed a moment before the act but must exist for a sufficient length of time to permit reflection as to the nature of the act to be committed and the probable result of that act.'" Coolen v. State, 696 So. 2d 738, 741 (Fla. 1997)(quoting Wilson, 493 So. 2d at 1021).

Premeditation sought to be proved by circumstantial evidence must be inconsistent with every other reasonable inference. Coolen, 696 So. 2d at 741; see also Hoefert v. State, 617 So. 2d 1046 (Fla. 1993). If the state's proof fails to exclude a reasonable hypothesis that the homicide occurred other than by premeditated design, a verdict of premeditated murder cannot be sustained. Coolen.

In Coolen, the defendant stabbed the victim to death during a backyard party. The victim, Kellar, had six stab wounds, including two defensive wounds to his forearm and hand, and deep stab wounds to the chest and back. The state argued premeditation was proved by the following circumstantial evidence: 1) Barbara Kellar's testimony that Coolen suddenly attacked the victim, Kellar, without warning or provocation, 2) Caughman's testimony that Coolen had threatened him with the knife earlier that evening, that Kellar and Coolen had fought over a beer, and that Kellar had tried to fend off Coolen during the attack, 3) the deep stab wounds to the chest and back and defensive wounds, which were inconsistent with Coolen's claim of self-defense.

The Court reversed Coolen's conviction for first-degree murder, concluding:

> Although this evidence is consistent with an unlawful killing, we do not find sufficient evidence to prove premeditation. Barbara Kellar testified that the two men had not been arguing and that Coolen simply "came out of nowhere" and starting stabbing her husband. Jamie Caughman described an ongoing pattern of hostility between two intoxicated men that culminated in a fight over a beer can. The testimony of these eyewitnesses is contradictory and neither provides sufficient evidence of premeditation. While the nature and manner of the wounds inflicted may be circumstantial evidence of premeditation, Holton v. State, 573 So.2d 284, 289 (Fla. 1990), the stab wounds inflicted here are also consistent with an escalating fight over a beer (Jamie Caughman's account) or a "preemptive" attack in the paranoid belief that the victim was going to attack first (Coolen's version).

696 So. 2d at 741-42; see also Green v. State, 715 So. 2d 940 (Fla. 1998)(finding insufficient evidence of premeditation where victim stabbed three times and manually strangled, Green had threatened to "kill [the victim] before the night was out," but there were no witnesses to the events immediately preceding the homicide); Kirkland v. State, 684 So. 2d 732 (Fla. 1996) (premeditation not established where victim died of severe knife wounds to neck, where no indication Kirkland possessed intent to kill prior to actual homicide and there were no witnesses to events immediately preceding the homicide).

In the present case, similar to Coolen, there were a number of stab wounds, including two fatal wounds, one to the chest and one under the chin, as well as two defensive wounds, indicating a struggle. Here, however, as in Green and Kirkland, there were no eyewitnesses to the crime and no evidence of what preceded the homicide. One of the knives involved came from the knife block in the kitchen, which is consistent with a spur-of-the-moment or escalating fight. As in Coolen, Green, and Kirkland, the state's evidence fell short of establishing premeditated murder. The evidence showed, at most, the state of mind required for second-degree murder.[4]

[4] Second-degree murder is "an unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although

Issue 2

THE PROSECUTOR'S COMMENTS DURING THE GUILT-PHASE CLOSING ARGUMENT, IMPUGNING THE TESTIMONY OF THE DEFENSE EXPERT WITH PERSONAL OPINION, FACTS UNSUPPORTED BY EVIDENCE, AND THE AUTHORITY OF HIS OFFICE DESTROYED JACKSON'S RIGHT TO A FAIR TRIAL, REQUIRING A NEW ONE.

During closing argument, the prosecutor told the jury he had put the defense fingerprint expert, Michelle Royal, on the stand many times; that Royal was "old school;" and that she "was taught" to testify "it's a hundred percent, no doubt;" and that she "was taught" to stand by a decision, once made. "She made the call [] and she's going to stand by that conclusion because that's what she does in court." These comments improperly implied that Royal *was taught* to testify she is "100% certain" even if she isn't certain, and to stand by an initial conclusion, even if she later is presented with countervailing evidence. Because there was no evidence Royal *was taught* to testify in this way, and because the prosecutor asserted personal knowledge of how Royal operates based on his experience with her in other cases, the prosecutor's comments were highly improper. This case presented a battle of fingerprint experts. Indeed, Jackson's guilt rested on which expert the jury believed. The prosecutor's improper denigration of Royal thus

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without any premeditated design to effect the death of any particular individual." s. 782.04(2), Fla. Stat. (1995).

went to the heart of the conviction, rendering his trial fundamentally unfair. A new trial is required.

Although Jackson's counsel made no objection to the improper argument, it is well-settled that unobjected-to comments are grounds for reversal if the error is fundamental. Merck v. State, 975 So. 2d 1054, 1061 (Fla. 2007). Fundamental error is error that "goes to the foundation of the case or goes to the merits of the cause of action." Ray v. State, 403 So. 2d 956, 960 (Fla. 1981)(quoting Sanford v. Rubin, 237 So. 2d 134, 137 (Fla. 1970)), quoted in Jackson v. State, 127 So. 3d 447 (Fla. 2013). That has occurred here.

The state's case for guilt largely depended on whether the latent print on the deceased's kitchen sink could be identified as belonging to Jackson. This issue was highly contested, the evidence consisting of conflicting expert testimony on both sides. Jacqueline Slebrch and William Schade testified for the state that the print matched Jackson's right little finger. Michelle Royal, testifying for the defense, testified the print was not of sufficient quality to make a comparison, i.e., the print was of "no value." During closing argument, the prosecutor argued, as follows:

> Now, Michelle is a good woman. I've put her on the stand before in many cases to convict defendants of crimes. She's just wrong on this one. It happens. It was interesting, the reason I asked her this question about the hundred percent and the reason why

> Bill Schade spent all that time talking about the change is Michelle Royal is old school. She was taught you walk into court, it's a hundred percent, no doubt, this is the way I am. She's also taught that once a lab makes a decision, that decision is final. She runs that lab, she made the call that wasn't a print of value and she's going to stand by that conclusion because that's what she does in court. A hundred percent.
>
> Bill Schade told you that's really not where the business - not where the expertise is going. You saw a lot of that from the FBI. Jacqueline Slebrch. She's the new school. She's been taught new. That's why they're doing the whole blind verifications. That's why they're doing those things.

R11:836-37 (emphasis added).

It is impermissible for a prosecutor to comment in closing argument on matters outside the evidence produced at trial, Bigham v. State, 995 So. 2d 207, 214 (Fla. 2008); Ryan v. State, 457 So. 2d 1084 (Fla. 4th DCA 1984); Tuff v. State, 509 So. 2d 953 (Fla. 4th DCA 1987); to express a personal belief as to any matter in issue, Toler v. State, 95 So. 3d 913 (Fla. 1st DCA 2012); Pacifico v. State, 642 So. 2d 1178 (Fla. 1st DCA 1994); to assert personal knowledge of the facts in issue, except when testifying as a witness, Pierre v. State, 88 So. 3d 354 (Fla. 4th DCA 2012); Cantero v. State, 612 So. 2d 634 (Fla. 1993); or to bolster a witness's testimony by vouching for his or her credibility. Simpson v. State, 3 So. 3d 1135 (Fla. 2009); Gorby v. State, 630 So. 2d 544, 547 (Fla. 1993); Ramos v. State, 579 So. 2d 360 (Fla. 4th DCA 1991).

The prosecutor's statements about Michelle Royal and Jacqueline Slebrch violated all of the above proscriptions. There is no *evidence* in the record that Royal is "old school;" there is no *evidence* in the record that Royal "was taught" to testify her conclusion is 100% accurate; and there is no *evidence* in the record that Royal "was taught" she must stand by a decision once a decision has been made. The only evidence about how Royal testifies was her own testimony that she makes an identification in court only when she believes the match is 100% accurate. The prosecutor's comments about how Royal was taught therefore were impermissible comments on facts not in evidence. Moreover, by telling the jurors he had put Royal on the stand many times, the prosecutor placed before the jury his personal knowledge and opinion of her. In so doing, his comments went far beyond the evidence and were tantamount to the prosecutor becoming a witness in the case. After casting doubt on Royal's credibility, "she's old school," the prosecutor improperly bolstered the testimony of the state's expert by comparing her to his version of Royal: "Jacqueline Slebrch. She's the new school. She's been taught new." Once again, there is no *evidence* in the record that Slebrch was taught differently than Royal.

"Improper bolstering occurs when the State places the prestige of the government behind the witness or indicates that

information not presented to the jury supports the witness's testimony." Hutchinson v. State, 882 So. 2d 943, 954 (Fla. 2004); see also Spann v. State, 985 So. 2d 1059, 1067 (Fla. 2008). Here, the prosecutor took on the role of an impeaching witness, and, in the guise of arguing, impugned the professional opinion and credibility/veracity of the key defense witness on the basis of asserted personal knowledge.

The role of counsel in closing argument is to assist the jury in analyzing the evidence, not to obscure the jury's view with personal opinion, emotion, and non-record evidence. Ruiz v. State, 743 So. 2d 1 (Fla. 1999); see also Williamson v. State, 994 So. 2d 1000, 1012 (Fla. 2008); Robinson v. State, 610 So. 2d 1288, 1290 (Fla. 1992); Bertolotti v. State, 476 So. 2d 130, 134 (Fla. 1985). As the Court said in Ruiz:

> The role of the attorney in closing argument is "to assist the jury in analyzing, evaluating and applying *the evidence*. It is not for the purpose of permitting counsel to 'testify' as an 'expert witness.' The assistance permitted includes counsel's right to state his contention as to the conclusions that the jury should draw from the evidence." United States v. Morris, 568 F.2d 396, 401 (5th Cir. 1978)(emphasis in original). To the extent an attorney's closing argument ranges beyond these boundaries, it is improper. Except to the extent he bases any opinion on the evidence in the case, he may not express his personal opinion on the merits of the cause of the case or the credibility of witnesses. Furthermore, he may not suggest that evidence which was not presented at trial provides additional grounds for finding defendant guilty.

743 So. 2d at 4 (quoting United States v. Garza, 608 F.2d 659, 662 (5th Cir. 1979)).

Here, the prosecutor's comment, "she's just wrong on this one," is a conclusion that could be drawn from the evidence. That comment did not stand alone, however, but was impermissibly buttressed by assertions of personal knowledge regarding Royal's training and testimony in other cases, matters that could not reasonably be inferred from the evidence. The prosecutor did not merely *imply* that the state had "unique knowledge" that was not presented to the jury, see Tindal v. State, 803 So. 2d 806, 810 (Fla. 4th DCA 2001), the prosecutor asserted that it absolutely had such knowledge.

The impact of these errors was fundamental. In determining fundamental error, the court reviews the totality of the circumstances. Power v. State, 886 So. 2d 952, 963 (Fla. 2004); Scoggins v. State, 726 So. 2d 762 (Fla. 1999). A reading of the cases shows that fundamental error has been found where the nature or extent of the defendant's guilt presented a close question and the prosecutorial misconduct tainted an issue critical to the resolution of that question. See Stephenson v. State, 31 So. 3d 847 (Fla. 3d DCA 2010)(in trial for aggravated manslaughter of 13-month-old, prosecutor's comment that mother contemplated aborting decedent was fundamental error); DeFreitas v. State, 701 So. 2d 593, 599 (Fla. 4th DCA 1997)(prosecutorial

misconduct "deprived the defendant of a fair trial in this otherwise close case" and "may very well have tipped the scales in favor of the State"); Fullmer v. State, 790 So. 2d 480 (Fla. 5th DCA 2001)(prosecutor's disparaging comments about Fullmer and misstatement of law was fundamental error, where credibility of Fullmer was key); Ryan v. State, 457 So. 2d 1084 (Fla. 4th DCA 1984)(improper closing argument was fundamental error; "in a close case, such as the one at hand, where the jury is walking a thin line between a verdict of guilt and innocence, the prosecutor cannot be allowed to push the jury to the side of guilt with improper comments"); Pierre, 88 So. 3d at 356 (fundamental error where prosecutor improperly argued victim recanted prior identification out of fear, and victim was only eye-witness in case with scant physical evidence); Evans v. State, 62 So. 3d 1203, 1205 (Fla. 4th DCA 2011)(fundamental error where case was "highly contested, the evidence consisting, in large part, of conflicting testimony between eyewitnesses on both sides"); Miller v. State, 782 So. 2d 426 (Fla. 2d DCA 2001) (fundamental error where prosecutor improperly implied deputy's testimony amounted to expert testimony and mischaracterized another witness's testimony on issue critical to defendant's guilt).

Here, the identification of the fingerprint found on the sink was the crux of the state's case. To find Jackson guilty

of Pearce's murder, the jury had to find the fingerprint was of value and was Jackson's. To find that the fingerprint was of value, the jury had to reject Royal's testimony. Impeachment of Royal thus was essential to the state's case. Because the prosecutor's improper argument concerned the principal evidence of guilt, the prosecutorial misconduct goes to the core of the conviction and "the foundation of the case." See Sanford v. Rubin, 237 So. 2d at 137. Such error is "basic to the judicial decision under review and equivalent to a denial of due process." See State v. Johnson, 616 So. 2d 1, 3 (Fla. 1999) (citations omitted).

Furthermore, even if a contemporaneous objection had been made, the damage could not have been undone because it would have been impossible to erase the prejudicial information from the jurors' minds. See Peterson v. State, 376 So. 2d 1230, 1234 (Fla. 4th DCA 1979)(When prosecutorial comments are "of such a character that neither rebuke nor retraction may entirely destroy their sinister influence ... a new trial should be granted, regardless of the lack of objection")(citation omitted); see also Pait v. State, 112 So. 380, 385 (Fla. 1959) (same). Courts have long recognized a jury's susceptibility to credit the prosecutor's viewpoint. See United States v. Young, 470 U.S. 1, 18 (1985)("prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust

the Government's judgment rather than its own view of the evidence"); Brooks v. Kemp, 762 F.2d 1383, 1399 (11th Cir. 1985) ("[T]he prosecutorial mantle of authority can intensify the effect on the jury of any misconduct"); Ruiz, 743 So. 2d at 4 ("The power and force of the government tend to impart an implicit stamp of believability to what the prosecutor says"); Pacifico, 642 So. 2d at 1184 ("jury can be expected to attach considerable significance to a prosecutor's expressions of personal beliefs"). Here, the prosecutor not only told the jury his personal belief, he revealed to the jury the purported extra-record information that informed that belief. That the prosecutor's opinion and knowledge of Royal was based on having tried many cases with her is not information the jury would have been able to forget. There is no curative instruction that could have rehabilitated Royal in the eyes of the jury.

Jackson is entitled to have the jury weigh the conflicting expert testimony without the taint of the prosecutor's impermissible argument. A new trial is required.

Issue 3

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING CIRCUMSTANCE WHERE, ASSUMING JACKSON'S COMPLICITY IN THE MURDER, THERE WAS NO EVIDENCE JACKSON HAD KNOWLEDGE OR CONTROL OVER THE MANNER OF DEATH.

The especially heinous, atrocious, or cruel aggravating circumstance (EHAC) cannot be applied vicariously to a principal to the murder if there is a possibility that the defendant did not directly cause or have knowledge or control over the manner of death. See Perez v. State, 919 So. 2d 347, 380 (Fla. 2005) (reversing application of EHAC aggravator where evidence showed defendant did not know victim would be killed during course of felony or manner in which she would be killed); Williams v. State, 622 So. 2d 456 (Fla. 1992)(error in finding EHAC where defendant who ordered killings did not order a particular manner to be used); Archer v. State, 613 So. 2d 446 (Fla. 1993)(error to instruct jury on EHAC where defendant contracted murder knowing gun would be used but not knowing victim would die begging for his life); Omelus v. State, 584 So. 2d 563 (Fla. 1991)(error to instruct jury on EHAC where defendant contracted with another to kill the victim but did not know how the murder would be committed and thought gun would be used rather than knife).

Here, as discussed in Issue 1, supra, if this Court determines the fingerprint is sufficient to establish Jackson's

complicity in Pearce's murder, the print does not establish that Jackson directly killed her or knew how the murder would be committed. Two sets of bloody foot impressions were found at the scene, and the knife under Pearce's body had DNA on it that was excluded as being Jackson's. This evidence indicates that more than one person may have been involved in the murder. Jackson's fingerprint and hair may have been deposited in the aftermath of a murder in which he was not directly involved.

In Perez, this Court disapproved the EHAC aggravator even though the evidence showed Perez was involved in the preparation for the robbery, covering up the murder, and pawning the victim's belongings. 919 So. 2d at 381. There was evidence that Perez left a bloody shoe print next to the body, his own testimony placed him at the crime scene, and he admitted disposing of his shoes because they had blood on them. Id. at 370. Perez also cut the victim's phone lines and helped dispose of the murder weapon. The only eyewitness testimony, however, was Perez's recorded statement in which he denied striking the victim and stated that the co-defendant committed the murder of his own accord. On this record, this Court found there was no evidence establishing that Perez knew the victim would be killed or that he would be killed in the manner in which it was carried out. Id. at 381.

Here, there were no eyewitnesses to Pearce's murder, what precipitated it, or what came after. The only thing linking Jackson to the murder is the bloody fingerprint on the sink and the hair on Pearce's leg. Neither of these pieces of evidence prove Jackson knew Pearce would be killed, or the manner in which she would be killed.

Accordingly, the trial court erred in instructing the jury on and in finding the EHAC aggravating circumstance. This error cannot be deemed harmless, and a new penalty phase is required.

Issue 4

THE DEATH SENTENCE IS DISPROPORTIONATE.

Because death as a punishment is unique in its finality and its total rejection of the possibility of rehabilitation, it has been reserved for the worst of first-degree murders. State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973), cert. denied, 416 U.S. 943 (1974).

As explained in Issue 3, supra, the EHAC aggravator was improperly found. This leaves two valid aggravators, the prior violent felony aggravator and the under sentence of imprisonment aggravator.

The prior violent felony aggravator, though serious, is not "especially weighty." See, e.g., Ferrell v. State, 680 So. 2d 390, 391 (Fla. 1996)(prior violent felony aggravator is "especially weighty" where based on prior murder or similar prior violent assault). Here, the prior felony aggravator was based on Jackson's prior convictions in Cook County, Georgia, for aggravated assault in 1992 and armed robbery in 2006. R4:721-23.[5] The victim of the aggravated assault, an undercover agent, testified that Jackson brandished a weapon during a narcotics transaction (between the agent and another individual)

[5] The trial judge did not consider the 1988 robbery as there were no details of that robbery, and the court could not determine whether, under Georgia law, a robbery would automatically involve the use or threat of violence. R4:722.

and then fled. The videotape of the armed robbery shows that Jackson pulled a gun on the clerk, calmly asked for cash, which she gave him, and left when the clerk told him to get out. No shots were fired, and no one was injured in either incident.

The second aggravating factor, under sentence of imprisonment, applies because at the time of the murder, Jackson was on felony probation for the 1992 aggravated assault conviction. This aggravator thus is based in part on the same facts that comprise part of the prior violent felony aggravator. Furthermore, the aggravated assault was 12 years old at the time of the current offense and 20 years old at the time of sentencing.

Although the trial court found no statutory mitigating circumstances, the trial court found numerous nonstatutory mitigating circumstances, 67 proposed factors which the court bundled into 12 mitigating circumstances. Thirteen family members and friends from Georgia, Florida, and Washington, D.C. testified on Jackson's behalf, including his father, wife, sister, son, daughter, and former employers at Bryant Displays. This testimony collectively established that Jackson has been a good husband, sibling, and father; is a trustworthy friend and has a good heart; has a good reputation in his hometown; was raised in poverty without consistent adult guidance; has low-average intelligence (I.Q. of 84); is humble, generous, and

helped others; was a nurturing and caring person with children; was an excellent athlete and good teammate; was polite and respectful of women; is religious and gave himself to God; and is a productive and hard worker.

This Court has found death unwarranted in other cases involving a similar balance of aggravation and mitigation. In Larkins v. State, 739 So. 2d 90 (Fla. 1999), there were two aggravators and no statutory mitigation but some nonstatutory mitigation. The aggravators were prior violent felony, based upon a prior manslaughter and assault with intent to kill, which occurred twenty years prior to the murder, and robbery. As here, neither EHAC nor cold, calculated, and premeditated (CCP) were found as aggravators.[6] Similarly, in Johnson v. State, 720 So. 2d 232 (Fla. 1998), two aggravators, prior violent felony and burglary/pecuniary gain, were balanced against the defendant's age of 22 and nonstatutory mitigation that included a troubled childhood, previous employment, and that Johnson was respectful to his parents and neighbors. The prior violent felony aggravator in Johnson, was based on 4 prior violent felony convictions, a 1989 aggravated assault for shooting at his brother, a 1989 aggravated battery for shooting a man, and

[6] This Court has deemed EHAC and CCP the "most serious aggravators set out in the statutory scheme," whose absence, while not controlling, is not without relevance to proportionality analysis. Larkins, 739 So. 2d at 95.

contemporaneous convictions as a principal for robbery and attempted murder of a second victim. Other comparable cases include Robertson v. State, 699 So. 2d 1343 (Fla. 1997)(felony murder and EHAC balanced against age (19), drug and alcohol use, abusive childhood, low intelligence, and mental illness); Terry v. State, 668 So. 2d 954 (Fla. 1996)(two aggravators, prior violent felony and felony murder, balanced against emotional deprivation in adolescence, poverty, good family man); and Wilson v. State, 493 So. 2d 1019 (Fla. 1986)(two aggravators, prior violent felony and pecuniary gain, balanced against nonstatutory mitigation).

When the facts of the present case are compared with other cases, it is clear that equally culpable defendants have received sentences of life imprisonment. As discussed above, the felony probation aggravator, based on a 1992 conviction, is relatively weak, and the prior violent felony aggravator is not compelling, as in neither incident was a shot fired or a person injured. In the pantheon of capital crimes, this case is neither the most aggravated nor the least mitigated for which the law has reserved the ultimate penalty of death. This court should reverse the death penalty and remand for imposition of a life sentence with no possibility of parole.

The death penalty also violates the requirement of individualized punishment set forth in Enmund v. Florida, 458

U.S. 782, 801 (1982). In Enmund, the defendant drove the getaway car, and his two colleagues killed the intended robbery victims. The Supreme Court held death is a disproportionate penalty "for one who neither took life, attempted to take life, nor intended to take life." 458 U.S. at 801. Subsequently, in Tison v. Arizona, 481 U.S. 137, 158 (1987), the Court held "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the Enmund culpability requirement."

The Enmund/Tison requirement has not been met here. As argued in Issue 1, supra, there is no evidence Jackson's participation went beyond his presence in the house when the murder occurred. Even if Jackson was a participant in a felony or attempted felony[7] that resulted in Pearce's death, there is no evidence Jackson directly killed Pearce, participated in the killing, or intended that she be killed. Under such circumstances, the death penalty is unwarranted. See Jackson v. State, 575 So. 2d 181 (Fla. 1991)(Enmund not satisfied in robbery-murder involving two defendants where triggerman not identified and single gunshot may have been reflexive action to victim's resistance).

[7] Contamination of the crime scene by individuals entering the house and removing items prior to the arrival of the police made it impossible to determine if the murder was committed during a robbery or attempted robbery.

Issue 5

THE TRIAL COURT ERRED IN SENTENCING KIM JACKSON TO DEATH BECAUSE FLORIDA'S CAPITAL SENTENCING PROCEEDINGS ARE UNCONSTITUTIONAL UNDER THE SIXTH AMENDMENT PURSUANT TO RING V. ARIZONA.

This issue was preserved by Jackson's Motion to Declare Florida's Capital Sentencing Procedure Unconstitutional under Ring v. Arizona. SR1:70-84. The standard of review is de novo.

The death penalty was improperly imposed in this case because Florida's death penalty statute is unconstitutional in violation of the Sixth Amendment under the principles announced in Ring v. Arizona, 536 U.S. 584 (2002). Ring extended to the capital sentencing context the requirement announced in Apprendi v. New Jersey, 530 U.S. 446 (2000), for a jury determination of facts relied upon to increase maximum sentences. Section 921.141, Florida Statutes (2009), does not provide for such jury determinations.

Jackson acknowledges that this Court has adhered to the position that it is without authority to declare section 921.141 unconstitutional under the Sixth Amendment, even though Ring presents some constitutional questions about the statute's continued validity, because the United States Supreme Court previously upheld Florida's statute on a sixth amendment challenge. See, e.g., Bottoson v. Moore, 833 So. 2d 693 (Fla.),

cert. denied, 537 U.S. 1070 (2002); King v. Moore, 831 So. 2d 143 (Fla.), cert. denied, 537 U.S. 1067 (2002).

Additionally, Jackson is aware that this Court has held that it is without authority to correct constitutional flaws in the statute via judicial interpretation and that legislative action is required. See, e.g., State v. Steele, 921 So. 2d 538 (Fla. 2005). However, this Court continues to grapple with the problems of attempting to reconcile Florida's death penalty statute with the constitutional requirements of Ring. See e.g., Marshall v. Crosby, 911 So. 2d 1129, 1133-35 (Fla. 2005) (including footnotes 4 & 5, and cases cited therein); Steele. At this time, Jackson asks this Court to reconsider its position in Bottoson and King because Ring represents a major change in constitutional jurisprudence which would allow this Court to rule on the constitutionality of Florida's statute.

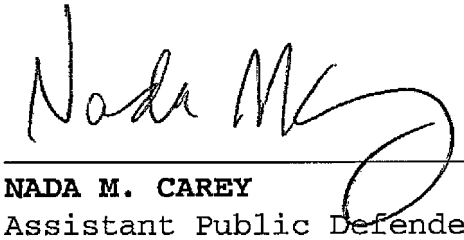
This Court should re-examine its holding in Bottoson and King, consider the impact Ring has on Florida's death penalty scheme, and declare section 921.141 unconstitutional. Jackson's death sentence should then be reversed and remanded for imposition of a life sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy was furnished by electronic transmission, per parties' agreement, to **RENE RANCOUR**, Assistant Attorney General, capapp@myfloridalegal.com, and by U.S. Mail to **KIM JACKSON**, #135963, Florida State Prison, 7819 NW 228th Street, Raiford, FL 32026, on this date, May 12, 2014.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that, pursuant to FRAP 9.210(a)(2), this brief was typed in Courier New, 12 point.



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IN THE SUPREME COURT OF FLORIDA

KIM JACKSON,

Appellant,

v. **CASE NO. SC13-2090**

STATE OF FLORIDA,

Appellee.
_____/

APPENDIX TO INITIAL BRIEF OF APPELLANT

Appendix	Document
A	Sentencing Order

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16-2008-CF-010726-AXXX-MA

DIVISION: CR-G

STATE OF FLORIDA

v.

KIM JACKSON,
Defendant.
_____/

SENTENCING ORDER

The Defendant, Kim Jackson, was tried for the murder of Debra Pearce. The murder occurred on or between October 15, 2004, and October 18, 2004. The guilt phase portion of the trial commenced on April 16, 2013, wherein the jury returned a verdict on April 18, 2013, finding the Defendant guilty of First Degree Murder.

The penalty phase commenced on April 26, 2013, at which time both the State and the Defense presented evidence. During the penalty phase, the State presented the testimony of Bobbie J. Jennings, Lindsey N. Pearce, Melissa Moore, Agent Bobby Stanley (via telephonic testimony), and Carol Adeyeye. The State also presented a surveillance videotape of the Defendant committing an armed robbery in 2005. The Defense presented the testimony of Lequitta Weldon, Walter Jackson, LaQuinta Jackson, Kenyetta Jackson, Penny Williams, Ridmone Durr, Dr. Jerry Valente, Stephen Stafford, Jerome Durr, Annie Scott, Nathan Bernard, Tracy Dyal, Don Meaders, Timothy Bryant, Aileen Y. Gibbs (via video testimony), and Debra Jackson. Through a special interrogatory, the jury first determined, unanimously and beyond a reasonable doubt, that the Defendant played a significant role in the homicide of Debra Pearce. Thereafter, the jury returned a recommendation, by a vote of eight-to-four, that the Defendant be sentenced to death for the murder of Debra Pearce.

A separate *Spencer*[1] hearing was held on June 11, 2013, at which time the Defense was given an opportunity to present additional evidence in support of mitigation of sentence. During the *Spencer* hearing, the Defense presented the testimony of David Douglas, the Defense mitigation specialist. The State introduced the victim impact statements and testimony of Linda Waddel, the victim's sister, as well as that of Bobbie Jennings, the victim's mother. Following the *Spencer* hearing, each party submitted their memoranda in support of, and in opposition to, imposing the death penalty as the sentence in this case. The sentencing memoranda specifically addressed each of the aggravating and mitigating circumstances presented to the Court for consideration.

Because the State asked for an instruction during the guilt phase that explained culpability under a principal theory, the Court delayed sentencing in this case to further explore two additional legal issues. First, the Court requested that both sides address a potential *Enmund/Tison* issue and gave each side the opportunity to provide any supplemental argument and memoranda on that issue. Additionally, the Court afforded each side the chance to provide their respective positions on whether, and under what circumstances, the Court can consider applying the aggravating circumstance that the murder was committed in a heinous, atrocious, and cruel manner, if the Defendant did not directly cause the victim's death.

In imposing this sentence, the Court has taken into account all of the evidence presented during the trial, including the guilt and penalty phases, the *Spencer* hearing, and all sentencing memoranda submitted by the parties.[2] Based on the evidence presented and the argument of counsel, the Court now finds as follows:

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

[2] The Court did not order a Presentence Investigation Report. Fla. R. Crim. P. 3.170(a) (court has discretion, but is not required, to order report except when sentencing first time felony offenders or defendants under the age of 18); *Rose v. State*, 461 So. 2d 84, 87 (Fla. 1984) ("[T]he ordering of a presentence report is discretionary in capital cases....").

FACTS

At some point during the three-day period of October 16, 17, and 18, 2004, Debra Pearce was murdered in the kitchen of her own home. No eyewitnesses to the crime have ever been identified. Her body was discovered on Monday, October 18, 2004, by Mr. Chester Narvell, a concerned neighbor who had not seen her in a few days. During the three-day period, Mr. Narvell noticed the victim's automobile was missing from the driveway of her home and he had not seen the victim. On October 18, 2004, Mr. Narvell went to check on the victim and found the side gate and the sliding glass door of her home were left ajar. Mr. Narvell entered the victim's home and saw her body face down in the kitchen surrounded by a large pool of dried blood. He left and went to his home to alert the Jacksonville Sheriff's Office ("JSO") about the discovery of the victim's body. Law enforcement authorities arrived shortly after Mr. Narvell's telephone call.

The forensic evidence indicates Debra Pearce was brutally stabbed to death with a five-inch butcher knife. When her body was discovered, two-thirds of the blade was still lodged in her chest, with the remaining portion of the blade and handle outside of her body. The knife transected the victim's subclavian vein, incised her subclavian artery, and entered her body with such force that it pierced her right scapula and broke off an area of that bone roughly the size of three-fourth's of an inch. The attacker also inflicted another fatal knife wound to her neck where the knife transected her left jugular vein. In addition to these two injuries, the victim suffered sixteen separate stab wounds and numerous bruises and contusions to the rest of her body. The medical examiner characterized several of these wounds as defensive in nature, including those found on her elbows and finger. From the number and nature of the wounds discovered during the autopsy of the victim's body, it was apparent that a struggle had ensued between the victim and her attacker.

JSO detectives processed the victim's home for evidence on October 19, 2004. The

detectives noticed what appeared to be a bloody fingerprint on the kitchen sink near the final resting place of the victim's body. The Florida Department of Law Enforcement ("FDLE") tested the kitchen sink with a blood swab and concluded that the blood matched the victim's DNA profile. Initial examination of the fingerprint by latent print examiners, however, proved inconclusive as to the identity of the individual who left the print. The detectives also collected from the victim's calf a hair that "looked out of place" and preserved the hair for testing. As with the fingerprint, FDLE experts were at first unable to determine a match to the DNA profile of the hair, except that it did not belong to the victim. Finally, the detectives recovered a small pocketknife which was found beneath the victim's body.

In addition to the evidence at the crime scene, JSO detectives were able to recover the victim's automobile and process it for possible evidence. DNA swabs were taken from the steering wheel and provided to experts with the FDLE. Additional testing of the steering wheel from the victim's car revealed two DNA donors: the victim and an unknown male. However, similar to the fingerprint and hair found in the victim's home, the evidence from the vehicle produced few leads at the outset.

Over the next two years, FDLE experts continued to analyze the evidence found at the crime scene without much success. In the interim, the Defendant was convicted of Armed Robbery in Cook County, Georgia on August 16, 2006, and sentenced to prison in that state. As a result of his conviction, the Defendant's DNA profile was placed into a database that produced a "match" to the DNA profile of the hair found on the victim's calf. From there, FDLE analysts conducted further testing and analysis and determined that the complete DNA profile from that hair matched Defendant's known standard DNA profile. Further testing of the DNA from the unknown male found on the steering wheel proved inconclusive, but the FDLE analysts indicated that the Defendant

could not be excluded as the second contributor. Subsequent DNA testing of the blood on the small knife found under the victim also proved inconclusive.

With the DNA match from the hair, experts from both the Federal Bureau of Investigation Latent Print Unit and the Pinellas County Latent Fingerprint Lab examined the fingerprint on the kitchen sink and compared it to the Defendant's fingerprints. Both experts determined that the Defendant's known fingerprint matched the latent print left on the kitchen sink and that the print was made by the Defendant's right ring finger. Furthermore, they testified at trial that this was a blood transfer fingerprint that was created when the Defendant's finger touched the area of the sink that already contained the victim's blood, rather than a fingerprint that existed prior to the victim's death that became visible when the victim's blood landed on the existing print. In short, the Defendant could not have left the print, according to the experts, at some indeterminate date prior to the attack.[3]

While the Defendant was incarcerated for the Armed Robbery, JSO detectives traveled to Georgia to interview him. After providing *Miranda* warnings to the Defendant and explaining that they were conducting an investigation into a homicide involving Debra Pearce, the interviewing detective asked the Defendant if he knew her and whether he had ever been inside her home. During the interview, the Defendant denied knowing the victim and denied ever being in her house. Shortly thereafter, the Defendant was arrested on the charge of First Degree Murder for the death of Debra Pearce.

With no eyewitnesses to the murder, the State based its case during the guilt phase of the trial entirely on the forensic evidence recovered from the scene linking the Defendant to the murder and his initial denial that he did not know Debra Pearce and had never been in her house. The State

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[3] At trial, the Defendant testified that he had gotten a ring out of the victim's kitchen sink garbage disposal one week prior to her murder. The State offered this testimony to rebut the Defense's assertion that the Defendant left the fingerprint on the kitchen sink at a time unrelated to the victim's death and that the victim's blood merely exposed an already existing print.

sought to convict the Defendant of First Degree Murder solely on a theory of premeditation. At the close of the guilt phase, the jury was instructed only on Premeditated First Degree Murder and was not given an instruction on Felony Murder.

At trial, the Defense claimed alibi and presented testimony, including from the Defendant, that he was not present when Debra Pearce was murdered and was, instead, visiting family in Adel, Georgia. The Defense suggested that the murder was committed by someone else, relying upon the forensic evidence at the crime scene that consisted of bloody footprints that did not belong to the Defendant, other fingerprints in the house that were not matched to the Defendant, and the smaller knife found under the victim's body with the inconclusive DNA test results. There was also testimony at trial that other neighborhood people frequently congregated at Debra Pearce's home to purchase and/or use illegal drugs. When Debra Pearce's body was found, her home had been ransacked and there was additional testimony that other individuals had been in her house after she was murdered, but before her body was discovered by Mr. Narvell.

Because the Defense argued that someone else committed the crime and focused on the forensic evidence that did not implicate the Defendant, the State asked for an instruction at trial that the Defendant could also be guilty if he was a principal to the crime. The Court gave the standard jury instruction on principals that explained that the Defendant could still be found guilty if he helped another person or persons commit the crime if the Defendant 1) had a conscious intent that the criminal act be done; and 2) did some act or said some word that was intended to, and did, encourage, incite, cause, advise, or assist, another to commit the crime. The jury found the Defendant guilty of First Degree Premeditated Murder as charged by the Indictment.

During the penalty phase, the Court further instructed the jury that before considering any aggravating or mitigating factors for imposition of the death penalty, they must first find

"unanimously and beyond a reasonable doubt that the Defendant played a significant role in the homicide of Debra Pearce" and required the jury to make this finding in a special interrogatory verdict form. The jury in this case returned a verdict wherein they specifically made this finding and, thereafter, recommended by a vote of eight to four that the Defendant should receive the death penalty for the murder of Debra Pearce.

AGGRAVATING CIRCUMSTANCES

The State proposed three aggravating circumstances: (1) the Defendant was previously convicted of another capital felony or felony involving the use or threat of violence to the person (Robbery, Armed Robbery, Aggravated Assault); (2) the Defendant was under a sentence of imprisonment at the time he committed the capital felony (felony probation for Aggravated Assault); and (3) the capital felony was especially heinous, atrocious, and cruel. During the guilt and penalty phases, the State proved beyond a reasonable doubt the existence of all three aggravating circumstances.

1. The Defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person. § 921.141(5)(b), Fla. Stat.

A prior violent felony is defined as a "felony involving the use or threat of violence." *Pham v. State*, 70 So. 3d 485, 495 (Fla. 2011). "Whether a crime constitutes a prior violent felony is determined by the surrounding facts and circumstances of the prior crime." *Id.* "[T]he finding of a prior violent felony conviction aggravator attaches to life-threatening crimes in which the perpetrator comes in direct contact with a human victim." *Williams v. State*, 967 So. 2d 735, 762 (Fla. 2007). Furthermore, a violent felony that is committed after the murder, but before the penalty phase, may be used as an aggravating circumstance if the defendant has been convicted prior to sentencing. *Elledge v. State*, 346 So. 2d 998, 1001 (Fla. 1977).

By stipulation, the State presented evidence at the penalty phase that the Defendant has three

prior felony convictions: Robbery in Cook County, Georgia, on April 20, 1988; Aggravated Assault in Cook County, Georgia, on February 17, 1992; and Armed Robbery in Cook County, Georgia, on August 16, 2006. Although the 2006 conviction was based upon a crime that occurred after the murder of Debra Pearce, and the conviction was entered against the Defendant thereafter, as well, the conviction occurred prior to the penalty phase and sentencing in this case and thus qualifies as a prior felony conviction for purposes of this aggravating circumstance. *See id.*

In further support of this aggravating circumstance, the State presented the testimony of Ms. Melissa Moore, the victim of the Armed Robbery in Cook County, Georgia, that resulted in the Defendant's 2006 conviction. Ms. Moore testified that she worked as the front-desk clerk at the Days Inn Hotel in Adel, Georgia on May 23, 2005. She testified that on that date, the Defendant brandished a firearm and threatened to use it against her if she did not give him the money located at the front desk. The State also entered into evidence the videotaped surveillance footage obtained from the Days Inn Hotel that captured the Defendant robbing Ms. Moore at gunpoint. The videotape clearly depicted the Defendant entering the lobby, pointing a gun at Ms. Moore, and deliberately and calmly demanding money.

The State also presented the telephonic testimony of former Agent Bobby Stanley, the victim of the Aggravated Assault in Cook County, Georgia, that was the basis of the Defendant's 1992 conviction. Mr. Stanley testified that at the time of the Aggravated Assault, he worked undercover for the Georgia Bureau of Investigations. He also testified that on September 21, 1991, the Defendant brandished a gun to Mr. Stanley during a narcotics transaction and then fled the scene.

Convictions under Florida law for Aggravated Assault and Armed Robbery typically qualify as a prior violent felony sufficient to support the finding of this aggravating circumstance. *Gunsby v. State*, 574 So. 2d 1085, 1090 (Fla. 1991) (a previous conviction of aggravated assault constitutes

a prior violent felony to satisfy said aggravating circumstance); *Daugherty v. State*, 533 So. 2d 287, 289 (Fla. 1988) (holding that the aggravating circumstance of prior violent felony is met where a defendant has previous convictions for armed robbery and aggravated assault). Although the Defendant's prior felony convictions for Aggravated Assault in 1992 and Armed Robbery in 2006 are all from the state of Georgia, the stipulation, the testimony of Ms. Moore and Mr. Stanley, and the videotape surveillance from the Days Inn robbery prove beyond all reasonable doubt the existence of this aggravating circumstance without the need to compare the elements for these two crimes under Georgia and Florida law. Clearly, the Defendant's 2006 conviction for Armed Robbery and 1992 conviction for Aggravated Assault involved the use or threat of serious violence to another human being. In each case, the State provided independent corroborating evidence that the Defendant used a handgun to threaten the life of the victim. The videotape from Armed Robbery at the Days Inn was particularly compelling as there is no question that the Defendant perpetrated the crime.

For whatever reason, most likely the age of the crime, the State was unable to provide any specific details about the Defendant's 1988 Robbery conviction. In Florida, Robbery is also typically a "felony involving the *use or threat* of violence." *Simmons v. State*, 419 So. 2d 316, 319 (Fla. 1982). However, because the 1988 conviction is also under Georgia law, the Court will not speculate whether such a conviction under that state's laws would automatically include the use or threat of violence. Accordingly, the 1988 conviction does not form any part of the basis of the Court's finding that the State has proven this aggravating circumstance beyond a reasonable doubt, nor the weight to assign that aggravating factor.

As to the weight given to this aggravating circumstance in this case, the Court recognizes that the Florida Supreme Court has traditionally viewed it as among the weightiest aggravating factors

set forth under Chapter 948. *Hodges v. State*, 55 So. 3d 515, 542 (Fla. 2010) ("Qualitatively, prior violent felony and HAC are among the weightiest aggravators set out in the statutory sentencing scheme."). The Florida Supreme Court has found that this aggravating circumstance, standing alone, carries sufficient weight to support the death penalty. *Rodgers v. State*, 948 So. 2d 655 (Fla. 2006); *LaMarca v. State*, 785 So. 2d 1209 (Fla. 2001); *Ferrell v. State*, 680 So. 2d 390 (Fla. 1996); *Duncan v. State*, 619 So. 2d 279 (Fla. 1993). Although multiple prior violent felony convictions can support a finding of only *one* "prior violent felony" aggravating circumstance, the existence of more than one prior violent felony conviction will justify giving this aggravating circumstance greater weight. *Bright v. State*, 90 So. 3d 249, 260-61 (Fla. 2012) (citing *Tanzi v. State*, 964 So. 2d 106, 117 (Fla. 2007)). The age of a prior violent felony conviction may also have an effect on the weight that may be assigned. *See Larkins v. State*, 739 So. 2d 90, 93-95 (Fla. 1999), *and cases cited therein.*

The Court finds it appropriate to assign great weight to this aggravating circumstance given that the Defendant committed two prior violent felonies, the timing of both prior convictions in relation to the murder of Debra Pearce, and the level of violence threatened by the Defendant in each act. Although the 1992 conviction for Aggravated Assault is now over twenty years old, Debra Pearce was murdered in 2004, only twelve years after this previous felony conviction. The 2006 conviction for Armed Robbery is based on a 2005 criminal act that occurred only months after the Defendant murdered Debra Pearce. Allowing for the time the Defendant spent in jail after the 1992 conviction, and the fact that the Defendant has been incarcerated since his 2005 arrest, the Court cannot conclude that the Defendant led a "comparatively crime-free life" between 1992 and his arrest in this case. *See id.* at 95.

Moreover, both prior violent acts and resulting felony convictions illustrate the Defendant's penchant for violence as a means to further his criminal ends. The videotape of the 2005 Days Inn

robbery shows an individual who, with all deliberate intent and absolutely no hesitation, walked into the lobby of a hotel, immediately pointed a handgun at an innocent victim, and demanded money. Former Agent Stanley, likewise, provided the description of an individual involved in a narcotics transaction that was willing to brandish a handgun despite the risks presented by such an act. The manner in which the Defendant committed each prior violent felony, and the timing of both convictions in relation to the Defendant's decision to murder Debra Pearce, more than justifies giving this aggravating circumstance 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 control, or on felony probation. § 921.141(5)(a), Fla. Stat.**

This aggravating circumstance includes persons incarcerated under a felony order of probation and persons who are under sentence for a specific or indeterminate term of years, as well as persons who have been placed on parole. *Merck v. State*, 763 So. 2d 295, 299 (Fla. 2000) (noting that, in 1996, the Florida Legislature amended section 921.141(5)(a) to include persons under a sentence of felony probation). *See Martin v. State*, 107 So. 3d 281, 322 (Fla. 2012), *reh'g denied*, (Feb. 1, 2013). It is not required that there be a "nexus" between the fact that the defendant is on probation and the murder. *Caylor v. State*, 78 So. 3d 482, 496-97 (Fla. 2011). Similarly, the statute does not require that the underlying probationary sentence relate to a violent act for this aggravator to apply. *Blake v. State*, 972 So. 2d 839, 847 (Fla. 2007). Although the probation may be based on a sentence for a violent felony, this aggravating circumstance does not merge with the prior violent felony conviction aggravating circumstance, nor does use of both aggravating circumstances constitute "doubling." *See Waterhouse v. State*, 429 So. 2d 301, 306-07 (Fla. 1983) (citations omitted), *overruled on other grounds, State v. Owen*, 696 So. 2d 715, 719 (Fla. 1997).

In the instant case, as discussed above, the State and the Defense stipulated that at the time

of the commission of the capital felony, the Defendant was on felony probation for his 1992 conviction for Aggravated Assault in Cook County, Georgia. This stipulation proves beyond all reasonable doubt the existence of this aggravating circumstance.

The Court also finds that it is appropriate to give great weight to this aggravating circumstance. Although violence is not required for the aggravator to apply, the fact that the Defendant was on probation for a violent act certainly enhances the weight it should be given. *See Blake*, 972 So. 2d at 847 (competent and substantial evidence supported giving this aggravator only "some weight" where the felony probation was for a non-violent driving offense). The fact that the Defendant committed this murder while under court supervision for a prior violent felony indicates a determined unwillingness on his part to abide by the law, even when subject to court oversight and supervision.

3. The capital felony was especially heinous, atrocious, or cruel. § 921.141(5)(h), Fla. Stat.

The heinous, atrocious, or cruel aggravator (HAC) has also been held to be one of the most weighty aggravators. *Offord v. State*, 959 So. 2d 187, 191 (Fla. 2007) ("HAC is a weighty aggravator that has been described by this Court as one of the most serious in the statutory sentencing scheme.") (citing *Larkin v. State*, 739 So. 2d 90, 95 (Fla. 1999)); *Sireci v. Moore*, 825 So. 2d 882, 887 (Fla. 2002) (noting that prior violent felony conviction and HAC are two of the most weighty aggravators in Florida's sentencing scheme). To qualify for the heinous, atrocious, or cruel aggravator, "the crime must be both conscienceless or pitiless and unnecessarily torturous to the victim." *Hertz v. State*, 803 So. 2d 629, 651 (Fla. 2001) (citation omitted). This aggravating circumstance "focuses on the means and manner in which the death is inflicted and the immediate circumstances surrounding the death, ... where a victim experiences the torturous anxiety and fear of impending death." *Allred v. State*, 55 So. 3d 1267, 1279-80 (Fla. 2010) (citations omitted).

HAC is proven in cases involving multiple stab wounds if the victim was alive and conscious when the wounds were inflicted. *Aguirre-Jarquin v. State*, 9 So. 3d 593, 608 (Fla. 2009). The slitting of a victim's neck and further infliction of trauma upon the victim has been held to be HAC. *Card v. State*, 803 So. 2d 613, 624-25 (Fla. 2001). *See Zommer v. State*, 31 So. 3d 733, 747-48 (Fla. 2010) (finding that the act of killing a victim by slicing her throat with a knife is in itself heinous, atrocious, and cruel, provided the victim is conscious at the time). If defensive wounds exist on the victim's body, it may be assumed that the victim was alive during the attack, unless the evidence demonstrates otherwise. However, "the lack of defensive wounds on the body of the victim has not precluded [the Florida Supreme] Court from holding the HAC aggravator applicable." *Id.* at 747.

As a threshold matter, the Court must first determine whether the HAC aggravator can be applied in this case if there is a possibility that the Defendant did not directly cause the victim's death, even if the manner in which Debra Pearce was murdered may otherwise qualify as HAC. This issue must be addressed at the outset because the State requested, and received, an instruction on the Defendant's culpability if he acted as a principal. In general, the HAC aggravator may not be applied vicariously to a defendant for the acts of his or her co-defendant. *See Perez v. State*, 919 So. 2d 347, 380 (Fla. 2005) (reversing the application of the HAC aggravator where the evidence demonstrated a "significantly higher level of culpability" on the part of co-defendants, as compared to the defendant, particularly because the evidence revealed the defendant did not know the victim would be killed during the course of the felony murder or the manner in which she would be killed); *Williams v. State*, 622 So. 2d 456, 463 (Fla. 1993) (citing *Omelus v. State*, 584 So. 2d 563 (Fla. 1991)) (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"); *Copeland v. State*, 457 So. 2d 1012, 1019 (Fla. 1984). However, the HAC aggravator may be applied "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." *Cole v. State*, 36 So. 3d 597, 608 (Fla. 2010).

In this case, the Court has no trouble finding that the Defendant was "particularly physically involved" in the murder of Debra Pearce. The Defendant testified that he wasn't present when the crime occurred. Clearly the jury rejected the Defendant's claim of alibi when it found him guilty of Premeditated First Degree Murder. With the jury's rejection of the Defendant's alibi claims, and no testimony from the Defendant, or anyone else, that specifically identified anyone other than the Defendant who could have done the actual killing, the overwhelming conclusion to reach is that the Defendant directly caused the victim's death.

However, even 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. The Defendant's fingerprint left in the victim's blood next to the kitchen sink not only identified the Defendant as a suspect, but also indicated that he was present while the victim's blood was still fresh and had not dried up. The imprint was, therefore, made close to the time that the victim struggled with her attacker. Also, a hair expert testified during the guilt phase that the hair found on the victim's calf matching the Defendant's DNA profile was a pulled hair containing the root, not one that was cut or clipped with a sharp instrument. As such, this evidence was consistent with a finding that the Defendant engaged in some type of struggle with the victim, again, at or near the time of her death.

The Court has considered the decision in *Perez v. State*, *supra*, but finds the facts distinguishable to those in the instant case. In *Perez,* the Florida Supreme Court disapproved the application of the HAC aggravator despite overwhelming evidence showing that the defendant was involved in the preparation for the robbery, in covering up the murder, and in pawning the victim's

belongings. *Perez*, 919 So. 2d at 381. There was evidence in *Perez* that the defendant left a bloody shoe print next to the victim's body, his own testimony placed him at the crime scene, and he admitted disposing of his shoes because they had blood on them. *Id.* at 370. Additionally, there was evidence that the defendant cut the victim's phone lines and helped dispose of the murder weapon after the crime. *Id.* However, the only eyewitness testimony presented at trial was the defendant's recorded statement where he denied striking the victim and consistently stated that his co-defendant committed the murder of his own accord. *Id.* at 381. On this record, the Florida Supreme Court found that there was no evidence to establish that the defendant directed or otherwise knew that the victim would be killed or that he would be killed in the manner in which it was carried out. *Id.*

As in the *Perez* case, the only eyewitness testimony in the instant case was from the Defendant himself, but the similarities end there. Unlike the defendant in *Perez,* the Defendant testified simply that he was not present at the victim's home at the time she was murdered and was not involved. His trial testimony was consistent with his recorded statement, at least to the extent that he denied being present when Debra Pearce was killed. As such, the jury was presented with two stark choices: either the Defendant was not present at the crime scene and not involved, or he was the only discernible, identifiable individual present at the crime scene. The jury flatly rejected the Defendant's version of events and the Court finds that the Defendant was particularly physically involved in Debra Pearce's murder and can lawfully apply the HAC aggravator, provided the manner of death qualifies. *See Cole*, 36 So. 3d at 608.

The testimony in both the guilt and penalty phases of this case proves beyond all reasonable doubt that the manner in which Debra Pearce was murdered qualifies as HAC. During the guilt phase, Dr. J. Giles, the Chief Medical Examiner for Duval County in 2004, testified that he conducted the autopsy of the victim on October 19 and 20, 2004, and prepared a report detailing his

findings. Dr. Giles testified that both the victim's jugular vein in her neck, as well as her subclavian vein and artery in her chest, were slit in half. Dr. Giles could not render an opinion as to which wound occurred first, but either injury could have caused the victim's death. Additionally, Dr. Giles testified that two-thirds of the five-inch blade of the knife was still lodged inside the victim's chest when her body was discovered. Furthermore, the knife entered the front chest of the victim's body with such force that it pierced her right scapula and soft tissue and broke three-fourth's of an inch of that bone which is located on the back side of her upper body. Dr. Giles opined that the victim's cause of death was hypoglycemia shock; in other words, she died because she bled to death. The manner of death was homicide.

In addition to the two injuries described above, Dr. Giles described the extreme nature of the sixteen stab wounds suffered by the victim, in addition to the bruises and contusions found over the rest of her body. Dr. Giles testified that the victim sustained stab wounds, incisions, and lacerations to her face, specifically to her forehead, chin, left cheek, and ears. Dr. Giles explained that one particular wound on the victim's elbow and another deep cut across the victim's ring finger were defensive wounds indicating that the victim was likely alive, conscious, and aware of her impending demise while the Defendant attacked her with a knife. *See Aguirre-Jarquin*, 9 So. 3d at 608; *Zommer*, 31 So. 3d at 747-48. Finally, Dr. Giles testified that a struggle ensued between the victim and the Defendant, as indicated by the following two injuries: the victim sustained blunt force trauma to her head, one blow to her skull which reached down to the bone; and an abrasion near her neck. These two injuries most certainly indicate the victim was alive and conscious during the attack.

The Court has also given great weight to this aggravating circumstance in determining the appropriate sentence to be imposed. The evidence presented at trial established that Debra Pearce's assailant repeatedly and brutally stabbed her with a butcher knife containing a five-inch

long blade. Stab by stab, blow by blow, the Defendant mercilessly attacked the head and body of Debra Pearce and inflicted not one, but two fatal blows to her neck and chest. Undoubtedly, Debra Pearce was aware of her impending death during the Defendant's ruthless attack, given the defensive wounds on her arms and hands. Finally, the Defendant left the knife with approximately two-thirds of the blade still lodged in Debra Pearce's chest while she bled to death, to further illustrate the "conscienceless or pitiless" nature of his crime.

MITIGATING CIRCUMSTANCES

The Defense proposed one statutory mitigating circumstance: "The existence of any other factors in the Defendant's background that would mitigate against the imposition of the death penalty." § 921.141(6)(h), Fla. Stat. The Court allowed the Defense to present any and all evidence pertaining to the Defendant's background, life, and character that might provide mitigation on his behalf and instructed the jury that a mitigating circumstance can include anything in the Defendant's character, background, or life, or any circumstance of the offense that reasonably may indicate that the death penalty is not an appropriate sentence in this case. Following the *Spencer* hearing, the Defendant submitted a memorandum itemizing each and every aspect of his background, character, or life that he contended should mitigate against the imposition of the death penalty.

The Court has analyzed each item submitted by the Defendant to support a life sentence and the Court has not assigned any less weight to an item simply because it was submitted as a mitigating factor under §921.141(6)(h), Fla. Stat. In analyzing each enumerated item, the Court found it appropriate to group together similar mitigating circumstances for purposes of clarity, but has also identified the number assigned to a given item in the Defendant's memorandum for ease of reference.

I. The Defendant is a good father and husband, and shares the love of his family.

1. The Defendant is a good father to his daughter.

Debra Jackson, the Defendant's wife, testified that the Defendant is a good father. The photographs presented during the penalty phase through Debra Jackson's testimony demonstrate that the Defendant shared many loving memories with his daughter, Kenyetta Jackson. The Defendant's daughter also testified that her father has had a positive effect on her life. Ms. Jackson stated that when her father was in town, he would always visit her, and he would take her to Adel, Georgia, to visit family. **The Court finds that this mitigating circumstance was proven and has been given moderate weight in determining the appropriate sentence to be imposed in this case.**

2, 3, 4. The Defendant encouraged his daughter to study hard, to go to college in order to make something of herself, and to grow beyond Nashville, GA.

Kenyetta Jackson testified that in 2004, she showed her father her middle school report card. She stated her father used to give her incentives to do well in school by rewarding her for receiving good grades in school. She further testified that her father always encouraged her to stay in school, to graduate from college, and to get a good job. At the time of her testimony, Ms. Jackson was a junior at Savannah State University pursuing a degree in Biology. **The Court finds that these mitigating circumstances were proven and has given some weight to each in determining the appropriate sentence to be imposed in this case.**

5. Defendant is involved in his daughter's life and taught her right from wrong.

Kenyetta Jackson testified that her father has always encouraged her to do the right thing, even after he became incarcerated. He has remained involved in her life despite being incarcerated, as he writes her letters and consistently keeps in contact with her. **The Court finds that this mitigating circumstance was proven and has been given some weight in determining the appropriate sentence to be imposed in this case.**

6. **The Defendant is religious/faith based and guided his daughter spiritually.**

No testimony was presented in support of this mitigating circumstance as far as the Defendant guiding his daughter spiritually. **The Court finds that this mitigating circumstance was not proven and has been given no weight in determining the appropriate sentence to be imposed in this case.**

7. **The Defendant's daughter intends to continue to maintain a relationship with her father.**

Kenyetta Jackson testified that she will continue to stay in contact with her father while he is in prison. She stated she has stayed in contact with her father since he became incarcerated and since she began college. She writes to him and also visits him in prison when she has the chance. The Defendant writes her letters back in response. **The Court finds that this mitigating circumstance was proven and has been given some weight in determining the appropriate sentence to be imposed in this case.**

8. **The Defendant loves his daughter and his daughter loves him.**

Kenyetta Jackson testified that she has a good relationship with her father and she loves him. The photographs presented during the penalty phase through the Defendant's wife, Debra Jackson, demonstrate a loving family relationship between the Defendant and his daughter. The evidence presented during the penalty phase through Kenyetta Jackson demonstrates that the Defendant and his daughter maintain contact with one another. **The Court finds that this mitigating circumstance was proven and has been given moderate weight in determining the appropriate sentence to be imposed in this case.**

9, 10, 12. **The Defendant assumed the role of stepfather and went beyond legal responsibilities, was involved in raising his stepson, and is a good father to his stepson.**

Timothy Bryant, the Defendant's stepson, grew up with the Defendant in his life since he was

twelve or thirteen years old. He referred to the Defendant as his father throughout his penalty phase testimony, even though the Defendant is his stepfather. Mr. Bryant testified that the Defendant views him as his own biological son and that the Defendant was genuinely compassionate about him growing up. He stated that he and the Defendant have a "pretty close relationship." Mr. Bryant testified that the Defendant supported him while he was growing up, and supported his decisions even if others did not agree with his decisions. Mr. Bryant additionally testified the Defendant has been a good father to him. Debra Jackson testified that the Defendant and her son are very close and that the Defendant has been an excellent father to her son. Mr. Bryant is currently serving in the military and stationed in Washington D.C. Certainly Mr. Bryant's maturity and bright future are the result, at least in part, of the Defendant's involvement in this life during Mr. Bryant's formative years. **The Court finds that these three mitigating circumstances were proven and have been given moderate weight in determining the appropriate sentence to be imposed in this case.**

11. The Defendant is a good role model to his stepson.

Mr. Bryant testified that the Defendant had a positive effect on his life, more so than his biological father. Mr. Bryant stated that the Defendant always encouraged him to make the right decisions. Mr. Bryant further stated his stepfather always meant the best for him and he meant well in all he did for him growing up. **The Court finds this mitigating circumstance was proven and has been given some weight in determining the appropriate sentence to be imposed in this case.**

14, 15, 16, 17. The Defendant taught his stepson the value of hard work; the Defendant taught his stepson to have a good work ethic; the Defendant and his stepson worked side by side for more than a year; the Defendant encouraged his stepson to study hard.

Although Mr. Bryant may not have specifically testified about each of these mitigating circumstances, the Court was able to determine collectively from his testimony that the Defendant had a positive effect on Mr. Bryant's values and work ethic. Mr. Bryant grew to understand the

Defendant and stated that the Defendant meant well in everything he did and always encouraged him. **The Court finds that these mitigating circumstances were proven and has given each some weight in determining the appropriate sentence to be imposed in this case.**

18. The Defendant was a good athlete and instructed his stepson athletically.

Mr. Bryant testified he was not interested in sports like the Defendant was, but that his stepfather always encouraged him to play some type of sport. Mr. Bryant eventually played basketball in high school. He stated the Defendant attended some of his games and "he was supportive as he could be" in cheering him on at his games. **The Court finds that this mitigating circumstance was proven and has been given slight weight in determining the appropriate sentence to be imposed in this case.**

19. The Defendant encouraged his stepson to join the military and provided emotional encouragement.

As to the Defendant directly encouraging his stepson to join the military, no testimony was presented in support of this mitigating circumstance. As such, as to first portion of this mitigating circumstance, the Court finds it **was not proven and has been given no weight in determining the appropriate sentence to be imposed in this case.**

However, Mr. Bryant testified that the Defendant encouraged him to always do the right thing and that the Defendant always supported him when he wanted to make decisions even if others "looked down on" his decisions. Again, the Court has no trouble concluding that the Defendant's military service is a result, in part, to the Defendant's involvement in his life. As such, as to the latter portion of this mitigating circumstance, the Court finds it **was proven and has been given some weight in determining the appropriate sentence to be imposed in this case.**

20. The Defendant loves his stepson and his stepson loves the Defendant.

Mr. Bryant testified that he still loves his stepfather, even though he is incarcerated and has

been since 2005. The photographs presented during the penalty phase through the Defendant's wife demonstrate a loving family relationship between the Defendant and his stepson. **The Court finds that this mitigating circumstance was proven and has been given moderate weight in determining the appropriate sentence to be imposed in this case.**

21. The Defendant's stepson has a relationship with the Defendant and communicates through his mother.

Mr. Bryant testified that he is in contact with his stepfather since he became incarcerated in 2005. Mr. Bryant stated he has not written the Defendant letters because he prefers verbal communication as opposed to written communication. As such, when he visits Florida from Washington, D.C., he either speaks with the Defendant on the telephone through his mother, or goes to visit the Defendant in jail. **The Court finds that this mitigating circumstance was proven and has been given slight weight in determining the appropriate sentence to be imposed in this case.**

22. The Defendant's stepson intends to continue a relationship with the Defendant.

Mr. Bryant testified he intends to continue to communicate with his stepfather by visiting him in prison and through the telephone. Mr. Bryant stated that when he has the opportunity to travel to Florida, he will visit the Defendant in prison. **The Court finds that this mitigating circumstance was proven and has been given slight weight in determining the appropriate sentence to be imposed in this case.**

63. The Defendant is a good husband, friend, and companion.

Debra Jackson is the Defendant's wife; they married in 2000. She testified that, throughout the years, they have experienced only minor, small disagreements in their relationship. She stated the Defendant has been a good husband to her, as well as a good father and grandfather to their family. Timothy Bryant, the Defendant's stepson, testified that the Defendant was a good husband

to his mother. **The Court finds that this mitigating circumstance was proven and has been given moderate weight in determining the appropriate sentence to be imposed in this case.**

65. The Defendant's wife will continue to foster a relationship and visit him while he is incarcerated.

Debra Jackson testified that she will stand by the Defendant regardless of the jury's recommendation of punishment. Since the Defendant became incarcerated in May of 2005 in Georgia, as well as in the Duval County Jail for the instant capital crime, she has continuously visited him, written him letters, and accepted his telephone calls. She will continue to stay in contact with him while he is incarcerated, whether it be for life or to eventually receive the death penalty. **The Court finds that this mitigating circumstance was proven and has been given some weight in determining the appropriate sentence to be imposed in this case.**

13, 64. The Defendant was a good provider to his stepson and a good provider to the family.

Defendant's wife, Debra Jackson, testified that the Defendant provided for their family, as well as his family in Adel, Georgia. Timothy Bryant testified that the Defendant provided for him as if he was the Defendant's biological child. Kenyetta Jackson testified that her father was a good father to her while she grew up. **The Court finds that these two mitigating circumstances were proven and each has been given some weight in determining the appropriate sentence to be imposed in this case.**

II. The Defendant is a good sibling and son, and shares the love of his relatives in Georgia.

23. The Defendant assumed the role of protector and role model of his younger sister.

LaQuinta Jackson, one of the Defendant's half-sisters, testified that the Defendant was a good influence on her growing up. Penny Williams, the Defendant's other half-sister, testified that the Defendant was always very protective of her growing up. She stated that when she used to watch

the Defendant play sports, he always told her to "stay right in that area [of the recreational park] for him to see me," indicating the Defendant was concerned for Ms. Williams' safety. **The Court finds that this mitigating circumstance was proven and has been given slight weight in determining the appropriate sentence to be imposed in this case.**

24. **The Defendant was a good influence on his sister.**

Ms. Jackson testified that the Defendant was a good influence on her growing up; he never led her down the wrong path and he was never a bad influence on her. Ms. Williams testified that the Defendant was a positive influence on her growing up. **The Court finds that this mitigating circumstance was proven and has been given slight weight in determining the appropriate sentence to be imposed in this case.**

25. **The Defendant encouraged his sister through life's difficulties as she grew up.**

Ms. Jackson testified that the Defendant encouraged her to do positive things such as stay in school, not get involved with the wrong people, and make good life choices. Ms. Williams spent a lot of time with the Defendant growing up and he taught her how to play sports. **The Court finds that this mitigating circumstance was proven and has been given slight weight in determining the appropriate sentence to be imposed in this case.**

26. **There is mutual love and respect between the Defendant and his sister.**

Ms. Jackson testified that although the Defendant has been incarcerated, she has been in contact with him and she loves and respects him. Ms. Williams testified that even though the Defendant is incarcerated, she still loves him a lot and he is still an important person in her life. **The Court finds that this mitigating circumstance was proven and has been given slight weight in determining the appropriate sentence to be imposed in this case.**

27. **Defendant's sister will maintain a relationship with him while he is incarcerated.**

Ms. Jackson testified that she has written to the Defendant since he has been incarcerated. She stated she will make a better effort to contact the Defendant and maintain a relationship with him while he is in prison. Ms. Williams has maintained contact with the Defendant since 2005 when he became incarcerated; she has visited him in jail and he has written her letters and called her on the telephone. Ms. Williams testified that she will continue to stay in contact with the Defendant. She stated that when she has the chance, she will visit the Defendant in prison and she will continue to write him letters while he is incarcerated. **The Court finds that this mitigating circumstance was proven and has been given slight weight in determining the appropriate sentence to be imposed in this case.**

34. **The Defendant is a good son and good to his father as an adult.**

Although Mr. Jackson did not specifically state such during his testimony, the Court discerned that the Defendant has been a good son to his father while the Defendant has not been incarcerated, as evidenced by testimony that the Defendant often visited his family in Adel, Georgia, even when he lived in Florida. **The Court finds that this mitigating circumstance was proven and has been given slight weight in determining the appropriate sentence to be imposed in this case.**

35. **The Defendant is respectful and polite to his father.**

Again, Mr. Jackson may not have directly stated this about his son, but the Court has no trouble concluding from his testimony that the Defendant loves and respects his father and has acted towards him in a polite manner. **The Court finds that this mitigating circumstance was proven and has been given slight weight in determining the appropriate sentence to be imposed in this case.**

36. The Defendant has a good relationship with his father.

Mr. Jackson testified that he and the Defendant have a good relationship. **The Court finds that this mitigating circumstance was proven and has been given slight weight in determining the appropriate sentence to be imposed in this case.**

37. The Defendant's father will continue to foster their relationship while the Defendant is incarcerated.

Walter Jackson testified that he wants to be in the Defendant's life. He has written the Defendant letters and visited him in Georgia while the Defendant was incarcerated in that state. Mr. Jackson stated he will continue to write the Defendant letters every chance he can, and continue to visit him in prison whenever he possibly can. **The Court finds that this mitigating circumstance was proven and has been given slight weight in determining the appropriate sentence to be imposed in this case.**

38. The Defendant visited Adel, GA often to see his father, family, and friends.

Kenyetta Jackson, the Defendant's daughter, testified that her father used to pick her up from Nashville, Georgia, and take her to Adel, Georgia, to visit family members. Debra Jackson testified that the Defendant always had a good relationship with his family, but particularly his sisters, father, and his grandchildren. Ms. Jackson stated that the Defendant attended family functions in Adel, Georgia very often. She further testified about five family photographs depicting the Defendant with his family in Adel, Georgia, on numerous occasions throughout the years. During the guilt phase of the trial, several of the Defendant's family members, as well as Debra Jackson, testified that the Defendant always made an effort to "come home" to Adel on his birthday or the weekend following his birthday, to visit with family members and relatives.

Ridmone Durr testified that when he drove semi-trucks and drove through Jacksonville, he used to give the Defendant a ride to Adel, Georgia, so the Defendant could see his friends and

family. Mr. Durr stated that the Defendant also played softball with his friends in Adel on the weekends. During this time, the Defendant stayed and visited with his father when he visited home. **The Court finds that this mitigating circumstance was proven and has been given slight weight in determining the appropriate sentence to be imposed in this case.**

45. **The Defendant did his best to support his family in a very poor town and was active in his church.**

Laquitta Weldon testified that, from the way the Defendant appeared to her while coaching her in softball, it seemed like the Defendant grew up attending church. She testified that the Defendant and his wife attended church service with her in the same church in Georgia. However, the Defendant presented no testimony demonstrating that he supported his family (outside of his spouse, daughter, and stepson). Therefore, **the Court finds that this mitigating circumstance as to the Defendant's church attendance was proven, but was not proven as to providing support to his family, and has been given slight weight in determining the appropriate sentence to be imposed in this case.**

III. **The Defendant experienced a difficult childhood and upbringing.**

28, 29, 30. **The Defendant's mother worked long hours to support the family and therefore was not home as he grew; The Defendant's mother passed away; The passing of the Defendant's mother was hard on him.**

Although no specific testimony was presented in support of these three mitigating circumstances, the Court has no trouble finding, in light of the testimony that the Defendant's grandfather raised the Defendant and his siblings for much of the Defendant's childhood, that the Defendant grew up without the consistent presence of his mother. Furthermore, there was no evidence that the Defendant's mother didn't love him or was abusive towards the Defendant. Thus, the court also finds that it is not a stretch to conclude that her passing would have been hard on the Defendant. **The Court finds that these mitigating circumstances were proven and has given**

slight weight to each in determining the appropriate sentence to be imposed in this case.

31, 32. The Defendant's father was in the U.S. Army and was overseas in some underdeveloped dangerous areas; The Defendant's father was not home for very long periods of time and could not be with his son.

Walter Jackson, the Defendant's father, testified during the penalty phase that he served in the United States Army for fourteen years. During that time, he was stationed in the following locations away from home: Fort Benning, Georgia; Fort Polk, Louisiana; Fort McClellan, Alabama; Germany; and Korea. Mr. Jackson further testified that he lived away from the Defendant and his family except for when he went on leave from the service for brief periods during the summer when the Defendant was a teenager. Mr. Jackson was away from his family for two years while he toured Germany and for one year while he toured Korea. Even when Mr. Jackson was stationed at Fort Benning in Georgia, he could not visit his family at home every weekend due to his work obligations. **The Court finds that these mitigating circumstances were proven and have been given slight weight in determining the appropriate sentence to be imposed in this case.**

33, 55, 56. The Defendant did not have a strong male role model growing up; The Defendant did not have good adult guidance; The Defendant was raised by various relatives and lived in a dysfunctional family.

Jerome Durr grew up in Adel, Georgia with the Defendant, and he stated the Defendant did not have a "singular" stable influence there who was involved in his upbringing. Mr. Durr further testified that the Defendant was raised by various family members, including the Defendant's older brother, the Defendant's father, the Defendant's grandfather, and different cousins. As discussed in mitigating circumstance 32, Walter Jackson testified that while he was away in the service, his father (the Defendant's grandfather) took care of the Defendant and the Defendant's brothers and sisters during the Defendant's teenage years. Mr. Jackson further testified the Defendant's mother also raised the Defendant while he was away. LaQuinta Jackson, the Defendant's half-sister,

testified that, growing up, her mother and father did not regularly attend the Defendant's recreational sports games, indicating that the Defendant did not have a continued parental presence in his life growing up. **The Court finds that this mitigating circumstance was proven and has been given slight weight in determining the appropriate sentence to be imposed in this case.**

57. **The Defendant was raised in poverty.**

Jerome Durr testified that Adel, Georgia, is a very small town of working class/poverty level citizens, which is where the Defendant grew up. Mr. Durr could not say how the "hard times" affected the Defendant (i.e., when the lumber mill and factories closed in Adel); Mr. Durr testified only that a lot of people lost their jobs. However, the totality of the evidence concerning the Defendant's upbringing in Adel leads the Court to conclude that the Defendant was most likely raised in a situation where there was little money available for anything except for basic requirements. **The Court finds that this mitigating circumstance was proven and has been given slight weight in determining the appropriate sentence to be imposed in this case.**

IV. **The Defendant is a nice, generous, helpful person and friend.**

39. **The Defendant has a good reputation as a nice individual and good person in Adel, GA., by his friends.**

Lequitta Weldon testified that the Defendant coached her in softball in Adel, Georgia, and he was always friendly and nice. Ridmone Durr testified that the Defendant was a kind person and always nice in his interactions while they played softball together. Stephen Stafford testified that, by officiating recreational games, as well as playing such recreational sports, the Defendant used his time to help, and make better, the community of Adel, Georgia, as well as the people of their community. **The Court finds that this mitigating circumstance was proven and has been given slight weight in determining the appropriate sentence to be imposed in this case.**

40. The Defendant was not known, by his friends, to be violent.

Ridmone Durr testified that the Defendant used to tell their younger teammates during softball games that there was no need to get angry or competitive. Jerome Durr testified that, growing up with the Defendant, he never knew him to be violent or try to start a fight with another teammate. The Defendant also presented the testimony of Ms. Tracy Dyal in support of this mitigating circumstance. Ms. Dyal testified that during all the long hours she worked alone with the Defendant at Bryant Displays, she felt safe. She stated that she even felt safer with the Defendant's presence at the workplace. Ms. Dyal's father, Mr. Don Meaders, testified that although he knew of the Defendant's criminal past, he did not fear for the safety of his daughter while she worked with the Defendant. Mr. Meaders stated that if he did have such concern, he would not have allowed Ms. Dyal to work alone with the Defendant. Aileen Gibbs stated that since the Defendant has been incarcerated in the Duval County Jail, he has been able to "de-escalate" situations which occur in the jail that would have gotten out of hand, indicating that he is not a violent person. **The Court finds that this mitigating circumstance was proven and has been given slight weight in determining the appropriate sentence to be imposed in this case.**

41. The Defendant was not a trouble-maker as a child or teenager.

Walter Jackson testified that growing up, the Defendant "wasn't a bad kid, he was pretty good." The testimony of Ridmone Durr, Jerome Durr, and Stephen Stafford indicated that while growing up, they all played sports with the Defendant. None of these three witnesses testified that the Defendant was a trouble-maker as a child or teenager. **The Court finds that this mitigating circumstance was proven and has been given slight weight in determining the appropriate sentence to be imposed in this case.**

47. **The Defendant was humble, generous, and helped others.**

Lequitta Weldon testified that the Defendant helped her learn how to play softball and he was very supportive. Stephen Stafford believes the Defendant is a very helpful person and saw the Defendant teach others how to play sports. Ridmone Durr testified that the Defendant was a very humble person but acted as a leader of their softball team by encouraging and helping his teammates. The Defendant also used to help Mr. Durr load and unload his semi-trucks. Annie Scott testified that the Defendant was always care-giving to other people, very helpful, and generous. The Defendant always offered to help out at the church, for example, with moving things or getting things together; Ms. Scott could always rely on the Defendant. Aileen Gibbs stated that the Defendant always helps others in making positive choices in their lives. Specifically, she further stated that since the Defendant has been incarcerated, he has especially attempted to help younger inmates make positive changes in their lives. Nathan Bernard volunteers at the Duval County Jail and helps facilitate a twelve-step program at the jail for inmates. Mr. Bernard stated that when the Defendant speaks at his meetings, all the other inmates listen to what he has to say. Debra Jackson testified that helping others is part of the Defendant's character and who he is as a person. **The Court finds that this mitigating circumstance was proven and has been given some weight in determining the appropriate sentence to be imposed in this case.**

49. **The Defendant was a good and trusted friend.**

Ridmone Durr testified that he has known the Defendant since he was eight years old. The Defendant is one of Mr. Durr's best friends. Annie Scott testified that she was friends with Defendant and his wife in around 2001 and she spent a lot of time with them at church, although she knew of the Defendant's criminal past. Don Meaders testified that, although he knew about the Defendant's criminal past, the Defendant was "very upfront and honest and we became friends."

The Court finds that this mitigating circumstance was proven and has been given slight weight in determining the appropriate sentence to be imposed in this case.

60. The Defendant is trustworthy and has a good heart.

Nathan Bernard testified that while he worked with the Defendant in the construction business, the Defendant often had interaction with his family often and this did not concern Mr. Bernard. Specifically, the Defendant visited Mr. Bernard's home and played sports with Mr. Bernard's young son. Tracy Dyal testified that the Defendant was a trustworthy employee and she never had any concerns working with him. Ms. Dyal stated that she brought her child to work and the Defendant interacted well with her son. Ms. Dyal further testified that the Defendant was cautious with her son and always wanted her son to stay in the safe areas of the workplace. Finally, Ms. Dyal testified that she felt safer working late at night with the Defendant there with her. Don Meaders knew of the Defendant's criminal past, but hired him to work at Bryant Displays anyway. Mr. Meaders had no concerns about the safety of his daughter, Ms. Dyal, while she worked with the Defendant. Aileen Gibbs stated that the Defendant always has something good to say about others and that he displays genuine concern about others. **The Court finds that this mitigating circumstance was proven and has been given some weight in determining the appropriate sentence to be imposed in this case.**

V. The Defendant is athletic, dependable, and helped children learn sports.

42, 43. The Defendant was a good athlete and coached softball for the area children; The Defendant gave his time to children, their families, was a great mentor for youngsters, and taught them good lessons about patience.

Lequitta Weldon testified she has known the Defendant for almost twenty years and he coached her in softball while she was growing up. The Defendant was a good coach and worked well with the other coaches. Ms. Weldon stated that the Defendant was a good person, as well as

a good role/mentor to the kids on the softball team. Ms. Weldon further testified that the Defendant always encouraged her and the other players to do better next time; he was a good role model for all the kids on the team.

LaQuinta Jackson testified that the Defendant liked to play sports while she grew up, and she watched him play in his games, particularly baseball games. Penny Williams testified that the Defendant taught her how to play sports. Specifically, Ms. Williams stated that the Defendant spent his time growing up teaching her and her little cousins how to play sports. **The Court finds that these two mitigating circumstances were proven and have been given slight weight in determining the appropriate sentence to be imposed in this case.**

44. The Defendant was a nurturing and caring person with children, very dependable, and one you could rely upon and trust.

Lequitta Weldon stated that the Defendant was a supportive, caring, and dependable person, especially when he acted as her head softball coach when the head coach could not attend. Penny Williams testified that the Defendant taught her and her little cousins how to play sports, indicating he was a nurturing and caring person toward children. Stephen Stafford testified that the Defendant was very kind. Mr. Stafford further testified that he believes that the Defendant used his time to better their community of Adel, Georgia, as well as the people of their community. Ridmone Durr testified that the Defendant was a very dependable person. Annie Scott, who attended church with the Defendant and his wife, testified that she could always rely upon the Defendant, as he was a very dependable person. Nathan Bernard worked with the Defendant in the construction business; he testified that the Defendant was very reliable and was somebody he could depend on. **The Court finds that this mitigating circumstance was proven but has been given slight weight in determining the appropriate sentence to be imposed in this case.**

46. The Defendant was an excellent athlete, dependable, and a good teammate.

Walter Jackson testified that the Defendant played sports, and he was talented in all sports but "really good" at baseball and football. Penny Williams testified that the Defendant was a great athlete in playing baseball, softball, and football.

Ridmone Durr testified that he has known the Defendant since he was eight years old, and he played numerous sports with the Defendant, including recreational football and adult recreational softball. Mr. Durr stated the Defendant was a great ballplayer, one of the best on the team, and he was a very dependable person. Mr. Durr further testified that the Defendant was a great teammate and always encouraged his teammates. Additionally, Mr. Durr stated that the Defendant functioned as the leader of their team and encouraged his teammates to never give up on the game. Stephen Stafford testified that he knew the Defendant growing up and he played various sports with him. Mr. Stafford officiated several of the Defendant's games and observed that the Defendant was motivated, had a good work ethic, and motivated his teammates. Mr. Stafford stated that the Defendant was the "all around teammate." Jerome Durr testified that he played sports with the Defendant and he observed him as being determined, dedicated to succeed, and dependable. The Defendant was a good teammate, always encouraged his teammates, and acted as a very positive influence on his teammates. The Court notes that none of the testimony presented is relevant to the time surrounding the capital murder. **The Court finds that this mitigating circumstance was proven but has been given slight weight in determining the appropriate sentence to be imposed in this case.**

51. The Defendant was proud of and a good representative of the team South Georgia Soldiers.

Stephen Stafford testified that the Defendant played on this adult traveling softball team; he officiated games in which the Defendant played for this team. Mr. Stafford observed that the Defendant was a good motivator to the other players on the team. The Defendant also treated the

team and his teammates with respect. Although Jerome Durr did not specify the name of the traveling softball team on which he played with the Defendant, this Court discerned that Mr. Durr referred to the South Georgia Soldiers. Mr. Durr stated that the Defendant was very dedicated to the team and he was "determined." **The Court finds this mitigating circumstance was proven and has given it slight weight in determining the appropriate sentence to be imposed in this case.**

VI. The Defendant was a polite, respectful person.

48. The Defendant was a gentleman and respectful of women.

Tracy Dyal testified that the Defendant always walked her out to her car after they worked together late at night at Bryant Displays. She also testified that the Defendant used to do the same for anyone else working late at night. **The Court finds that this mitigating circumstance was proven and has been given slight weight in determining the appropriate sentence to be imposed in this case.**

50, 53. The Defendant was not rude to friends or strangers; The Defendant was polite, respectful, and had good manners.

Lequitta Weldon testified that she never heard "any bad language come out of [the Defendant's] mouth." Ridmone Durr testified that, in all the years he has known the Defendant, he never saw the Defendant act in a disrespectful manner around others. Mr. Durr further testified that the Defendant was "an admirable young man," always respectful toward others during the time they grew up together. Mr. Durr stated that the Defendant "would always give people the shirt off his back if he could" and he characterized Defendant as a "mild young man." Stephen Stafford testified that he observed the Defendant's interactions with his teammates, and he noticed that the Defendant was a very kind person who was never rude. Mr. Stafford also testified that the Defendant treated his teammates with great respect. Annie Scott testified that the Defendant was a "very respectable and mannered person."

Tracy Dyal testified that while the Defendant worked with her at Bryant Displays, he used to walk her, and any other employees working late at night, out to their cars. Ms. Dyal further testified that the Defendant was always friendly with her young son when he visited the workplace after school. Aileen Gibbs stated that the Defendant always has something good to say about others, he displays genuine concern about others, and he always helps others in making positive choices in their lives. Ms. Gibbs further stated that the Defendant tries to guide the other inmates at the jail, especially younger inmates, and help them make positive changes in their lives. Ms. Gibbs testified the Defendant has told her that since he has been incarcerated, the other inmates respect him. Debra Jackson testified that the Defendant is always willing to help others, even strangers, learn from their mistakes. **The Court finds that these mitigating circumstances were proven and have been given slight weight in determining the appropriate sentence to be imposed in this case.**

VII. The Defendant is a religious person.

52, 54. The Defendant is religious, believes in and gave himself to God; The Defendant and his wife hosted church functions at their home.

Lequitta Weldon testified that the Defendant and his wife attended church service with her at the same church in Georgia, over ten years ago from the date of her testimony. Annie Scott testified that she met the Defendant and his wife through her church in the early 2000s and the Defendant was active in the church. Ms. Scott testified that the Defendant and his wife held prayer meetings at their home and they studied the Bible together. Ms. Scott further stated that she spoke with the Defendant in the early 2000s and he expressed regret and remorse for things in his past and wanted to move forward with his faith in God. The Defendant's wife, Debra Jackson, also testified that she and the Defendant held prayer meetings and Bible studies at their home. Don Meaders, the owner of Bryant Displays, the Defendant's former employer, testified that although he knew of the Defendant's criminal past, he often prayed with the Defendant during his employ. **The Court finds**

that this mitigating circumstance was proven and has been given some weight in determining the appropriate sentence to be imposed in this case.

VIII. The Defendant is a hard-working person.

58. The Defendant is a productive and hard worker.

LaQuinta Jackson testified that the Defendant was always a hard worker. Stephen Stafford testified that the Defendant was a very motivated person, he was a hard worker, and he had very good work ethic. Nathan Bernard has known the Defendant for nine to ten years, and they worked in the residential construction business together. Mr. Bernard stated that the Defendant was a hard worker, he kept morale high on the job, and the Defendant encouraged him at work.

Ridmone Durr described the Defendant as being very hard-working and having a great work ethic, as the Defendant helped him unload his semi-trucks and make deliveries. Mr. Durr testified that the Defendant "did most of the work" and always volunteered to lift and stack the boxes in the truck. In the context of sports, Mr. Durr stated that the Defendant always "gave it a hundred and ten percent effort" and that the Defendant was always a hard worker on the field.

Tracy Dyal was the Defendant's manager at Bryant Displays for a few years. Ms. Dyal testified that while the Defendant worked there, he was a "fantastic, wonderful worker." She had no issues with the Defendant not coming to work, indicating he is a dependable worker. The Defendant was protective of the workers and wanted to keep them safe, due to the dangerous area of town in which the business is located. Ms. Dyal testified that the Defendant was a very nice worker and that she felt safer with the Defendant there with her at work, rather than if she worked alone. Don Meaders owned Bryant Displays during the time the Defendant worked there in the early 2000's. Mr. Meaders testified that the Defendant was a very good worker and that his abilities were "very good." The Defendant always worked the hours requested of him, which usually included

having to work long hours or into the evenings or weekends, in order to meet deadlines. **The Court finds that this mitigating circumstance was proven and has been given some weight in determining the appropriate sentence to be imposed in this case.**

59. **The Defendant grasps artistic concepts easily, perseveres through hard work, and is a good project worker.**

Tracy Dyal testified that, during his employ at her company, the Defendant was a quick learner, never objected to the type of work she asked him to complete, and worked "whenever we needed him." Additionally, Ms. Dyal stated that the Defendant was able to catch on to the work she asked of him and even had suggestions about how to make projects better. Ms. Dyal testified that the Defendant mainly worked within the shop, doing construction and putting things together. The Defendant used to work very late into the evening and sometimes really late at night. The Defendant helped her company greatly through his work. Mr. Meaders, the owner of Bryant Displays, the Defendant's previous employer, testified that the Defendant's abilities at work were "very good." Specifically, Mr. Meaders stated that the Defendant was able to build graphic design exhibits for national trade shows by using power tools and design construction. The Defendant always worked the hours requested of him, which usually included having to work long hours or into the evenings or weekends, in order to meet deadlines. Mr. Meaders testified that the Defendant was always there when he was needed at work and never complained about the work hours. **The Court finds that this mitigating circumstance was proven and has been given some weight in determining the appropriate sentence to be imposed in this case.**

IX. The Defendant always had a positive outlook on life.

61. LaQuinta Jackson testified that she grew up with the Defendant and he always stayed positive in life. Penny Williams testified that the Defendant was always a positive person growing up as a kid. Aileen Gibbs testified that she and the Defendant have exchanged written

correspondence since he has been incarcerated, and she visits him at the jail. In his letters and during visits, Ms. Gibbs stated that the Defendant always appears upbeat, encouraging, and motivated. The Defendant always tries to encourage others to also be positive and better themselves by making positive decisions. Debra Jackson testified that the Defendant always encourages others to make positive decisions in their lives. **The Court finds that this mitigating circumstance was proven and has been given slight weight in determining the appropriate sentence to be imposed in this case.**

X. The Defendant's friends and associates will continue to foster a positive relationship and visit him while he is incarcerated.

62. Walter Jackson testified that he wants to be in the Defendant's life. He has written the Defendant letters and visited him in Georgia while the Defendant was incarcerated there. Mr. Jackson stated he will continue to write the Defendant letters every chance he can, and continue to visit him in prison whenever he possibly can. LaQuinta Jackson testified that she will make a better effort to contact the Defendant and maintain a relationship with him while he is in prison. Penny Williams has maintained contact with the Defendant since 2005 when he became incarcerated; she has visited him in jail and he has written her letters and called her on the telephone. Ms. Williams testified she will continue to stay in contact with the Defendant. She stated that when she has the chance, she will visit the Defendant in prison and continue to write him letters while he is incarcerated.

Kenyetta Jackson testified that she will continue to stay in contact with her father while he is in prison. Timothy Bryant testified that he intends to continue to communicate with his stepfather through the telephone and visit the Defendant in prison. Mr. Bryant stated that when he has the opportunity to travel to Florida, he will visit the Defendant. Debra Jackson testified that she will stand by the Defendant regardless of the jury's recommendation of punishment. Since the Defendant

became incarcerated in May of 2005 in Georgia, as well as in the Duval County Jail, she has continuously visited him, wrote him letters, and accepted his phone calls. She will continue to stay in contact with him while he is incarcerated, whether it be for life or to eventually receive the death penalty. **As to the Defendant's family members only, the Court finds that this mitigating circumstance was proven and has been given some weight in determining the appropriate sentence to be imposed in this case.**

As to the Defendant's friends and associates, however, Lequitta Weldon, Ridmone Durr, Jerome Durr, Stephen Stafford, Tracy Dyal, Don Meaders, and Aileen Gibbs did not testify during the penalty phase that they would remain in contact with the Defendant while he is incarcerated. **Therefore, as to the Defendant's friends, the Court finds that this mitigating circumstance was not proven and has been given no weight in determining the appropriate sentence to be imposed in this case.**

XI. The Defendant has low-average intelligence.

66. Dr. Jerry Valente testified that he is a Forensic Psychologist and has been practicing in this capacity for approximately fifteen to eighteen years. Dr. Valente was deemed an expert in forensic psychology during the penalty phase. He met with the Defendant and his attorneys on April 4, 2013, and on April 15, 2013, and evaluated the Defendant. He opined that the Defendant was competent to proceed to trial. Dr. Valente stated that the Defendant did not have "any specific deficits," and the Defendant did not suffer from psychosis or neurosis, nor is the Defendant delusional. However, Dr. Valente opined that the Defendant has a low-average range of intelligence and a low-average range of verbal comprehension. Essentially, the Defendant was considered a slow learner based on his low-average range of intelligence. Ultimately, though, Dr. Valente testified that the Defendant did not suffer from any brain impairment. **The Court finds that this mitigating**

circumstance was proven and has been given slight weight in determining the appropriate sentence to be imposed in this case.

XII. The Defendant respects the process, has been polite and cooperative throughout these proceedings.

67. Dr. Valente testified that during his examination of the Defendant, the Defendant was cooperative, well-mannered, and respectful of him and to authority. Dr. Valente stated the Defendant wanted to assist him and the Defendant was very engaging, polite, and helpful. The Court observed that the Defendant has exhibited excellent courtroom behavior throughout all of the court proceedings in this case. The Defendant has participated in group sessions with other prisoners and has become a leader in those sessions. **The Court finds that this mitigating circumstance was proven and has been given some weight in determining the appropriate sentence to be imposed in this case.**

REMAINING STATUTORY MITIGATING CIRCUMSTANCES

As discussed, the Defendant presented only one statutory mitigating circumstance to the jury. However, the Court has reviewed each remaining statutory mitigating circumstance and now finds that no evidence has been presented to support any of the other enumerated statutory mitigating circumstances under §921.141(6), Fla. Stat.

ENMUND/TISON

As detailed above, the Defense suggested in the guilt phase that the murder was committed by someone else based on certain items of forensic evidence at the crime scene and the Defendant's trial testimony denying any involvement in the victim's murder. As a result, the State asked for, and received, the standard jury instruction on culpability as a principal to a crime. However, the jury was not asked to make a specific finding in the verdict form as to whether their verdict was based on direct responsibility or a principal theory.

During the guilt phase, the parties discussed the need to instruct the jury on the requirements of *Enmund/Tison*[4] because of the possibility that the jury could have based its decision on the theory of the Defendant acting as a principal. Accordingly, the parties agreed to instruct the jury that they must first unanimously and beyond a reasonable doubt determine if the Defendant "played a significant role in the murder of Debra Pearce," before deciding if the State proved the existence of any aggravating factors and weighing those against any mitigating circumstances. The jury was also required to expressly make this finding in a special interrogatory verdict form before providing their recommended sentence. The jury found that the Defendant did, in fact, play "a significant role" in Debra Pearce's murder, before voting eight to four to recommend a death sentence.

The Florida Supreme Court summarized the *Enmund/Tison* exclusion in *Jackson v. State*, 575 So. 2d 181, 190-191 (Fla. 1991):

> In *Enmund* and *Tison*, the Court said that the death penalty is disproportional punishment for the crime of felony murder where the defendant was merely a minor participant in the crime and the state's evidence of mental state did not prove beyond a reasonable doubt that the defendant actually killed, intended to kill, or attempted to kill. Mere participation in a robbery that resulted in murder is not enough culpability to warrant the death penalty, even if the defendant anticipated that lethal force might be used, because "the possibility of bloodshed is inherent in the commission of any violent felony and this possibility is generally foreseeable and foreseen." *Tison*, 481 U.S. at 151, 107 S.Ct. at 1684. However, the death penalty may be proportional punishment if the evidence shows both that the defendant was a major participant in the crime, and that the defendant's state of mind amounted to reckless indifference to human life. As the Court said, "we simply hold that major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement." *Tison*, 481 U.S. at 158, 107 S.Ct. at 1688. Courts may consider a defendant's "major participation" in a crime as a factor in determining whether the culpable state of mind existed. However, such participation alone may not be enough to establish the requisite culpable state of mind. *Id.*, 481 U.S. at 158 n. 12, 107 S.Ct. at 1688 n. 12.

Although the U.S. Supreme Court has held that an *Enmund/Tison* decision can be made by a jury,

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[4] *Enmund v. Florida*, 458 U.S. 782; 102 S.Ct. 3368 (1982); *Tison v. Arizona*, 481 U.S. 137; 107 S.Ct. 2969 (1989).

the trial judge, or an appellate court, *Cabana v. Bullock*, 474 U.S. 376; 106 S.Ct. 689 (1986), the Florida Supreme Court mandates that juries be instructed on the requirements of *Enmund/Tison* before penalty phase deliberations, and that trial courts must make findings that satisfy those requirements before imposing a sentence of death. *See Perez*, 919 So. 2d at 365-366.

The Florida Supreme Court in *Perez* approved the giving of the following instruction on the *Enmund/Tison* requirements:

> In order for you to recommend a sentence of death in this case you must find [Perez] was a major participant in the crime of robbery or burglary and that [Perez's] state of mind at the time amounted to wreckless [sic] indifference to human life.

Id. at 366. In this case, however, the parties agreed upon an instruction that advised the jury that they must determine if the Defendant "played a significant role in the death of Debra Pearce" and did not provide any instructions concerning the Defendant's state of mind (i.e., reckless indifference to human life). Thus, the jury instruction and special interrogatory verdict form did not accurately reflect the criteria for satisfying *Enmund/Tison*.

Although the jury was not properly instructed as to the requirements of *Enmund/Tison*, the Court finds upon further research and reflection that such an instruction was not necessary under the facts and circumstances of this case. The *Enmund/Tison* exclusion concerns the proportionality of the death penalty for the crime of felony murder where the defendant is only a minor participant in the offense and does not have the requisite mental state that amounts to a reckless indifference to human life. *See Jackson*, 575 So. 2d at 190; *see also Van Poyck v. State*, 116 So. 3d 347, 359 (Fla. 2013) *cert. denied*, 133 S. Ct. 2823 (2013) (holding that "[b]ecause Van Poyck played a "major role" in this felony-murder and acted with "reckless indifference to human life," Van Poyck's sentence of death meets the *Enmund/Tison* standard"); *Stephens v. State*, 787 So. 2d 747, 759 (Fla. 2001) (discussing *Enmund* and *Tison* in terms of proportionality of a death sentence in the felony-murder

context); *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 . . . 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"). In other words, the *Enmund/Tison* criteria must be satisfied for purposes of the Eighth Amendment in those cases where a defendant aids or 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. *See Enmund*, 458 U.S. at 797, 102 S.Ct.at 3376. These requirements are not necessary in cases where the State seeks a conviction based only upon a theory that the defendant had the premeditated intent to kill a victim and did some act in furtherance of that intent.

In the instant case, the State sought a conviction against the Defendant based solely on a theory that he had the premeditated intent to kill Debra Pearce. The jury was instructed in the guilt phase of the trial that in order to convict, they must find that 1) Debra Pearce is dead; 2) the death was caused by the criminal act of Kim Jackson; and 3) there was a premeditated killing of Debra Pearce. The jury was never instructed that the Defendant could be found guilty of first degree murder 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 and the instruction that was given was superfluous, at least in terms of the requirements for satisfying the Eighth Amendment of the United States Constitution.

The fact that the jury could have found the Defendant guilty of First Degree Murder vicariously through the acts of another unknown assailant under a principal theory did not require

an *Enmund/Tison* instruction in the penalty phase, either. With respect to culpability as a principal, the jury was given the standard instruction in the guilt phase that the Defendant was responsible for the acts of another if he helped another person or persons commit the crime and 1) the Defendant had a conscious intent that the criminal act be done; and 2) the Defendant did some act or said some word that was intended to, and did, incite, cause, encourage, assist or advise the other persons to actually commit the crime. Assuming for the sake of argument that the jury based its determination of guilt on a principal theory, the jury would have necessarily concluded that a) the Defendant had helped the unknown assailant when the Defendant had a conscious intent to kill Debra Pearce and b) that he did some act to cause, encourage, or assist the other person in actually carrying out the killing. *Enmund/Tison* was satisfied the moment the jury came to that conclusion in the guilt phase, provided that the principal theory was in fact the basis of their decision. *See Perez*, 919 So. 2d at 366-367 (Where trial court gave standard instruction regarding principal responsibility, "[s]atisfaction of these criteria alone would indicate major participation in the commission of a crime.").

Moreover, the evidence in this case overwhelmingly satisfied the *Enmund/Tison* requirements of major participation and reckless indifference to human life. The forensic evidence in this case has been set forth, in detail, above. The bloody fingerprint on the sink next to the victim's body and the pulled hair lying on her calf indicate the Defendant's participation in the struggle that led to her death, and would more than qualify for major participation. Furthermore, the Defendant's presence and participation in a struggle where a knife was used to inflict two fatal wounds, along with defensive wounds and numerous other injuries, would clearly rise and exceed the level of reckless indifference to human life.

CONCLUSION

"[T]he death penalty must be limited to the most aggravated and least mitigated of first-degree murders." *Larkins v. State*, 739 So. 2d 90, 92-93 (Fla. 1999). The Court has carefully considered and weighed the aggravating and mitigating circumstances found to exist in this case. Understanding that this is not a quantitative comparison, but one which requires qualitative analysis, the Court has assigned an appropriate weight to each aggravating circumstance and each mitigating circumstance as set forth in this Order. As noted above, the Court gave great weight to the heinous, atrocious, or cruel aggravating circumstance, the prior violent felony aggravating circumstance, and the capital felony committed while under a sentence of imprisonment aggravating circumstance. On balance, these aggravating circumstances far outweigh the mitigating circumstances present in this case.

In reviewing the mitigation evidence, the Court is struck by the fact that it appears by all accounts that the Defendant had what most people would consider to be a good home and family life. He had a stable and loving marriage with a stepson in the military and a daughter in college. While not wealthy, the Defendant and his family did not lack for the necessities in life, including comfortable housing, food, and transportation. Although the Defendant did spend time in prison for the 1992 assault charge, the evidence shows that he was able to resume his life with fewer difficulties than most convicted felons experience upon their release. The Defendant had a large circle of childhood friends and family in the town of Adel, Georgia, where he grew up and regularly visited. His childhood was not particularly difficult, at least to the extent that there was no evidence that he suffered any abuse or trauma. Throughout his life, he was able to enjoy the things most people enjoy such as participating in sports and spending time with friends and family. The Defendant suffered from no discernible mental health condition and the Court was not presented with any mental

mitigation evidence of any significance.

This portrait of the Defendant as a husband, father, and friend stands in stark contrast with the reality that the Defendant committed a brutal and savage murder for reasons that, at least for now, remain unknown. The dual nature of the Defendant's life is further exemplified by the fact that he committed an Armed Robbery in Adel, Georgia, while undoubtedly on a visit to his family in the area. From the evidence, the Defendant 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. Even giving moderate weight to the fact that the Defendant appears to have been a good husband and father to his daughter and stepson, the mitigation evidence presented to the Court is far outweighed by the aggravating factors present in this case.

This case has marked similarities to the case of *Hildwin v. State,* 727 So. 2d 193 (Fla. 1998), where the Florida Supreme Court affirmed the imposition of the death penalty where the defendant strangled the victim.[5] In *Hildwin*, the Florida Supreme Court held that the death penalty was appropriate and proportional where the trial court found the existence of the following four (4) aggravating factors: HAC; prior violent felony conviction (2 prior convictions); previously convicted of a felony and under a sentence of imprisonment (parole); and pecuniary gain. *Id.* at 198. The Court in the *Hildwin* opinion quoted extensively from the trial court's evaluation of the aggravating and mitigating factors:

> At the time of the murder, it would appear that the defendant was decently situated materially. He had gotten out of prison and had relocated to Florida. While true that he was on parole, he lived a fairly normal life. He had a girlfriend, and he lived with his father in a mobile home in the woods. He was living like a normal citizen. The

[5]After the first trial, the Court initially vacated the sentence of death on grounds of ineffective assistance of counsel during the penalty phase and remanded for a new sentencing hearing. *Hildwin v. State,* 654 So. 2d 107 (Fla. 1995). After the trial court resentenced the defendant, the Court affirmed it on direct appeal.

> evidence of this case indicated that the defendant enjoyed the things that most of us enjoy, the company of friends, movies, and so forth. Yet the defendant was apparently not satisfied by this peaceful coexistence. For some strange reason, not nearly understandable, even given the intense psychological scrutiny to which the defendant has been subjected, the defendant decided to commit a senseless, wasteful, and unnecessary murder, apparently motivated primarily for economic gain. He brutally killed a young woman merely to acquire some money with which to put gas in his car, and for a few personal possessions with which to stock his bedroom. This ruthless, savage, cruel and unnecessary murder cannot be lawfully justified under any circumstances present in this case, even considering the mitigating factors present, and giving them some weight.

Id.

Moreover, the defendant in *Hildwin* had the additional mitigating factors of a "horrible childhood," a history of drug and substance abuse, and "organic brain damage" that resulted in a mental illness that was "appropriate and treatable in prison." *See, Hildwin v. State*, 84 So. 3d 180, 191 (Fla. 2011)(quoting additional findings made by the trial court in second post-conviction appeal). None of that additional mitigation, however, is present in the instant case.

The jury was fully justified in its eight-to-four recommendation that the death penalty be imposed upon the Defendant for his murder of Debra Pearce. The Court is required to give great weight to the jury's recommendation[6] and fully agrees with the jury's assessment of the aggravating and mitigating circumstances in this case. After also considering the additional mitigating circumstances presented during the *Spencer* hearing, the Court finds that the ultimate penalty which the Court can impose should be imposed.

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[6] *Blackwood v. State*, 946 So. 2d 960 (Fla. 2006); *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975) (stating that under Florida's death penalty statute, the jury recommendation should be given great weight).