IN THE SUPREME COURT OF FLORIDA

ELMER LEON CARROLL,,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 79,829

ON APPEAL FROM THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee generally accepts Appellant's Statement of the Case and Facts, subject to the following clarifications and supplementation:

As to the procedural history of the case, the state respectfully disputes the assertion (Initial Brief at 1) that Carroll "was initially found incompetent and was hospitalized." At the competency hearing of November 15, 1991, Dr. Kirkland testified that, as the jail psychiatrist, he had come into contact with Carroll shortly after the latter's arrest, and that, based on Appellant's behavior, he had him admitted to the psychiatric unit at Florida Hospital for several days, where, among other things, psychological tests were performed (R 1358); at trial, Dr. Kirkland specifically testified that Carroll had not been "committed" to the hospital (R 788). The record contains no indication that Elmer Carroll has ever been found, by a judge, to be legally incompetent to proceed, and likewise contains no order formally committing Carroll for hospitalization. As Appellant notes (Initial Brief at 2), following the competency hearing in this case, the court found Carroll to be competent to stand trial (R 1081).

As to the testimony of Dr. Hegert, the medical examiner, at the penalty phase (Initial Brief at 3), the State respectfully disputes any suggestion that the victim's death was painless. The medical examiner testified that Christine McGowan had not been rendered unconscious by the blow to her head (R 897). Dr. Hegert stated that the victim has been strangled, additionally maintaining that she would have remained conscious until her

brain lacked sufficient oxygen (R 898). The expert had no way of telling how long this would take to occur, noting that if there had been a complete obstruction of the airways, unconsciousness would result in three to four minutes, whereas anything less than complete obstruction "prolongs that time frame" (R 898). He opined that the victim would have remained conscious for the first one to two minutes, would have been able to feel pain during that period, and also would have been fully aware of what was happening to her (R 898-899). Dr. Hegert also testified that the injuries to the victim's upper lip were consistent with the victim's struggling, as a hand was held over her mouth (R 902-903). The doctor stated that the victim had been alive during the sexual battery, and testified in detail as to the tears and lacerations to her vagina (R 903, 899-903). The doctor stated that the ten-year-old victim would have experienced pain comparable to that of childbirth during the sexual attack (R 899-901). He stated that even if the victim were semi-conscious at that time, she could still feel pain (R 902). During his prior testimony at the guilt phase, Dr. Hegert had stated that the victim's vagina had been "torn and considerably expanded," stating that the amount of blood found in this area was "consistent with this being acute injury" (R 417-418). The doctor also noted the presence of blood smears on the victim's hands, noting that there were no injuries in such locations; Dr. Hegert opined that this blood could have come from the vaginal injuries (R 418).

As to any "stipulation" by the State that Carroll was sexually molested when he was a child (Initial Brief at 3),

Appellee must likewise respectfully dispute such assertion. The record in this case indicates that, during the penalty phase, the prosecutor stated that he had no objection, on authentication or other grounds, to the defense admitting into evidence a police report in which Carroll claimed to have been molested (R 914). The following exchange took place:

> THE COURT: You want to stipulate to the fact that he was molested as a child?
>
> MR. ASHTON [prosecutor]: I have no problem stipulating the records into evidence, but I wouldn't go any further than that . . .

(R 915).

Defense Exhibit #1 is a two page investigatory report by a deputy sheriff in Lake County, Florida, dated November 15, 1969, in which the officer relates that Appellant had told him that an adult male had performed homosexual acts upon him several times (Defense Exhibit #1).

As to the facts of the case per se (Initial Brief at 6-13), the State, as noted, generally accepts the recitation set forth by Appellant, to the extent that such is not argumentative, but would supplement as follows:

As Appellant notes (Initial Brief at 9), Elmer Carroll was residing in a halfway house, called the Lighthouse Mission, directly behind the victim's home, at the time of the murder. At trial, the State presented the testimony of Oliver Shipley, another resident of the mission, who stated that Carroll had remarked to him that the little girl who lived next door was "cute, sweet and liked to watch him make boats" (R 295). A playmate of the victim, Amanda McCune, testified that on the

afternoon before the murder, she and Christine had been playing outside in the victim's yard. She stated that, at such time, she had seen a man lifting weights in the mission's yard, and that Christine had gone over to talk to him (R 290-291). She stated that she had frequently seen this man while playing outside, and also said that she had gone home that afternoon, because the man had "looked sort of mad" after the victim had spoken with him (R 291-292).

The victim's stepfather, Robert Rank, testified that the front door of the home did not lock very well, and could be opened without a key (R 302). He stated that he had checked on Christine at around midnight, and that she had been fine (R 303). When he awoke the next morning at around 6:00 a.m., he had gone to wake up Christine, and had found that she was dead; he noted at this time that the front door was slightly ajar (R 309). He immediately called the police and also reported that his truck was missing. Rank was also shown a knife which had been found in Christine's bed, and he stated that he had never seen it before (R 308).

The State also called James Piper and Peter Wasilewski, who testified that they had come into contact with Carroll at around 6:00 a.m. that morning at a 7-11 close to the Apopka area. Piper stated that he had seen Appellant get into a white truck with a construction logo, "ATC" on the outside (R 314-316). He stated that Carroll had not been behaving "weirdly" or inappropriately, and had simply gotten a cup of coffee (R 315, 317). Wasilewski testified that Carroll had not done anything at that time which called his sanity into question (R 330). The witnesses testified

that they had heard a radio bulletin about the truck being involved in a murder three to four hours later, and that they had immediately called the police to report what they had seen (R 319-320, 331).

Debbie Hiatt testified that she lived near Speed World on Highway 50 (R 356). When she left for work at around 6:50 a.m., she had seen a white pickup truck parked by the entrance to Speed World (R 357). As such drove east on Highway 50, she saw an individual walking in the same direction, along the road; she stated that he was the only person whom she saw walking along the road, and that he was "rough" or "scraggly looking", as if he had been up all night. She stated that this individual had shoulder length brown hair and had on a big brown heavy jacket (R 358-359). Miss Hiatt thought that this individual was about a mile from her home, and stated that she had thought that he might have been the driver of the truck, walking for help after it had broken down (R 358-359). Later that morning, she heard a radio bulletin concerning the truck, and went home to see if the logo on the truck matched that described over the airwaves (R 358-359); when she found that it did, she called 911 (R 359). When the police came to investigate the truck, she told them of the individual whom she had seen walking along the highway; according to Deputy McDaniel, Miss Hiatt had described the individual as being a white male, "very dirty looking", wearing blue jeans and a brown jacket, and having dirty blonde hair (R 338). At this point, one of the officers had remarked that he had just passed an individual matching that description, walking along 520, and the officers left (R 360). When the officers

later returned with Appellant, Miss Hiatt identified him as the man she had seen earlier in the vicinity of the truck (R 360).

Nancy Peterson, a serologist with FDLE, testified that she had examined a number of suspected saliva or semen stains. She testified that both Carroll and the victim's step-father were type A secretors, although certain other enzymes in their blood were different (R 471-473). Semen consistent with that of Carroll was found on the victim's thigh, and saliva consistent with that of Carroll was found on her breast (R 488-489). Additionally, bloodstains were found on Appellant's sweatshirt (R 495-496); a swab taken from his penis revealed human blood (R 490). John Quill, an expert in DNA profiling with the FBI, testified that he had examined a number of the same exhibits considered by Miss Peterson, and stated that he could eliminate Robert Rank as a source of any of the stains at issue (R 587-588). Quill testified that he had found a profile which matched that of Appellant on one of the vaginal swabs (R 586, 604). Quill also stated that in two other instances, the results were unintelligible, given the fact that the DNA bands of the defendant and the victim had overlapped; although he stated that he did not reach a conclusion in these instances, he also stated that he could not exclude Carroll as the source (R 603-605, 608). The State also called Deborah Steger, a microanalyst with FDLE. The witness stated that a number of pubic hairs had been found on the victim's body, as well as on her nightgown and on the blanket of the bed (R 555); all thirteen of the pubic hairs which were suitable for comparison were consistent with those of Appellant (R 558, 565). Additionally, one of the head hairs found was

consistent with that of Appellant, although others could not be matched (R 558).

The defense called Margaret Powell, the director of the mission where Carroll had been staying. Although she testified that Carroll had been acting "kind of different" two weeks prior to the incident, she stated that she had a conversation with him on the night of the murder, and that, at such time, he had not seemed irrational and had seemed to be "functioning like anyone else" (R 628-632). Judy Arnold testified that she worked at a bar close to the mission, and that Appellant had come in on the night before the murder. She said that Carroll had been laughing and mumbling and talking to his jacket, and had asked her and the other customers whether they thought he was crazy (R 641-642). Appellant had had several beers while he was there, which he paid for, and, at one point, told Miss Arnold that he was in love "with something that he could not have" (R 643). Appellant apparently then went to another nearby bar, where he similarly began talking to his jacket. The bartender in this establishment said that Carroll had had several beers, which he paid for, and had asked her whether she would give him a gun or knife (R 637).

As Appellant notes, the defense also called three mental health experts. The first, Dr. McMann, stated that she had gotten very little information from Carroll, and that he had denied stealing the truck; when she asked him whether he had seen a child at the time, Appellant had simply given her a very blank look (R 653-654). Dr. Danziger, a psychiatrist, testified that while he felt that Carroll had not been sane at the time of the incident, this was "a very difficult call to make", in that

Carroll claimed that he had no recall of the incident itself (R 675-676). The doctor stated that he was basing his opinion upon what he believed Carroll's behavior to have been prior and subsequent to the incident, and acknowledged that this opinion was reached "without much certainty" (R 676, 718). The final expert, Dr. Benson, likewise stated that Carroll could not recall anything about the time of the incident, but concluded that Appellant had most likely been psychotic (R 755, 759). The doctor stated, however, that he did not have enough information to state whether Carroll had known right from wrong at the time of the murder, and likewise conceded that he had no idea of what had been in Carroll's mind at that time (R 763-765).

The State called two experts of its own. Dr. Gutman, a forensic psychiatrist, testified that, in his opinion, Carroll was malingering, and that, at most, he suffered from a long-term character and behavior disorder (R 510). The doctor expressly testified that Carroll had malingered on a prior IQ test, which had resulted in a misleadingly low score; Dr. Gutman placed Appellant's IQ as being one of average intelligence, or between 90 and 110 (R 512). As with the other doctors, Carroll had claimed to have memory loss as to the events leading up to his arrest, but Dr. Gutman noted that Carroll was able to recall other events which had occurred at the same time (R 513). In the absence of any instance of head injury, the expert stated that it was not common for an individual to suffer amnesia as to only one specific period of time (R 518). The State's other expert, Dr. Kirkland, specifically testified that he felt that Carroll's claim of memory loss was false (R 793). The doctor also

testified that, although Carroll might have been intoxicated at the time of the murder, he had known what he was doing, known that it was wrong and had known the nature and consequences of his actions (R 794).

SUMMARY OF ARGUMENT

Carroll presents five (5) points on appeal, in regard to his conviction to first-degree murder and sentence of death. As his initial claim, Appellant contends that he was seized as the result of an illegal arrest, and all of the "fruits" of such illegal arrest should have been suppressed. Appellee would maintain that the court below was correct in finding that Carroll was initially lawfully stopped, based upon founded suspicion, and was only arrested after probable cause developed, at least in part through the discovery of contraband during a lawful frisk. Alternatively, this claim of error has not been preserved for review, due to counsel's failure to timely renew any objection on this ground at the time that the contested evidence was admitted at trial, and any error herein was harmless, in that the evidence actually derived from the arrest is minimal; such evidence was, in any event, otherwise admissible under the doctrines of independent source and/or inevitable discovery.

Appellant's next point, that alleged comments were made upon his right to remain silent, is not well taken, given the context in which such remarks were made. Likewise, his claim that the state impermissibly introduced "collateral crime" evidence, and/or smeared his character, represents a misreading of the cross-examination of a defense expert; to the extent any error

was demonstrated in regard to the three questions at issue, such error was not so prejudicial as to merit a mistrial. Further, Appellant's cursory challenge to the admission of DNA test result evidence was simply insufficient to trigger the need for further inquiry below, considering the fact that this type of evidence has consistently been admitted throughout courts of this state, as well as the rest of the country; Appellant's collateral arguments, in regard to an evidentiary ruling made during the voir dire of the state's expert witness, and the denial of a belated motion for continuance, are without merit.

As to his sentence of death, Appellant's challenge to the finding of the heinous, atrocious or cruel aggravating circumstance is without merit. This court has consistently upheld the finding of this aggravating factor under comparable circumstances, i.e., in regard to the murder by strangulation of a child rape victim; Appellant's challenge to the jury instruction on this aggravating factor is procedurally barred or, at most, indicates the existence of harmless error. Carroll's challenge to the sentencer's findings in mitigation is likewise without merit, in that the sentencer's rejection of proffered mitigation is supported by the record. The instant sentence of death is in all degrees proportional, and the conviction of first-degree murder and sentence of death should be affirmed in all respects.

ARGUMENT

POINT I

DENIAL OF APPELLANT'S MOTION TO SUPPRESS EVIDENCE WAS NOT ERROR, ASSUMING, IN FACT, THAT ANY CLAIM OF ERROR HAS BEEN PRESERVED FOR REVIEW

As his first point on appeal, Appellant contends that the circuit court erred in denying his motion to suppress evidence, in that allegedly he was arrested without probable cause. The State disagrees with Appellant's position on the merits, but, as will be argued more fully infra, Appellee also questions the preservation of any point on appeal, given defense counsel's failure to renew his objection at trial at the time that the evidence allegedly improperly seized was introduced. In any event, reversible error has not been demonstrated, and Appellant's conviction should be affirmed in all respects.

The relevant facts, both procedural and otherwise, will now be set forth. Prior to trial, defense counsel filed a motion to suppress all items of tangible evidence allegedly seized from Appellant, on the grounds that he had been illegally searched as a result of an unlawful arrest (R 1088-1092). A hearing was held on this motion on March 16, 1992, at which three witnesses - Officer Young, Detective Payne and Debbie Hiatt - testified (R 4-51). Debbie Hiatt testified that she lived near Speed World on Highway 50, and that at around 6:50 a.m. on the morning of October 30, 1990, she had seen a white pickup truck parked by the entrance to Speed World (R 42-43). Miss Hiatt proceeded east on Highway 50 and saw a man walking along the road, also eastbound, about a mile from the truck (R 44, 46); she stated that he was

the only person that she saw that morning walking along the road at that hour (R 48). Miss Hiatt continued on to work, and later heard an announcement over the radio pertaining to a white pickup truck being involved in a homicide (R 44-45); the witness then returned home to look at the truck again. She called 911 and reported the location of the truck (R 45). Miss Hiatt saw the police arrive, and then went out to talk with them (R 46).

Carl Young, a wildlife officer with the State of Florida for the last twenty-two years, testified that he had been traveling westbound on Highway 520 in the early morning hours of October 30, 1990 (R 4). He stated that this was a desolate area, and that he had seen an individual walking eastbound along the road; Young stated that this was not a normal area for pedestrians and that this was the only person whom he saw that morning on the road (R 4-6). Young described this individual as "transient looking", and noted that he was not carrying a backpack (R 5); he did note that he had on a brown jacket (R 10). Young stated that the individual was approximately a mile and a quarter from the intersection of 50 and 520, and two miles from the entrance to Speed World (R 7). Young turned onto 50 at the intersection, and at the time that he approached Speed World, noted a white pickup truck parked along the road, and a sheriff's deputy approaching the vehicle with his gun drawn (R 8). Thinking that the officer might need backup, Young pulled over to assist, and, as he did so, another deputy arrived (R 8-9). The officers ascertained that no one was in the vehicle, and advised Young that it was a possible stolen vehicle involved in a homicide (R 12, 23). At around this time, Miss Hiatt approached the officers, and advised

them that she had been the one to call in about the truck (R 10). Miss Hiatt stated that she had not seen anyone in the truck or driving the truck, but that she had seen "a scruffy looking guy in a brown jacket" "in the immediate vicinity of the truck" (R 10). Recognizing this as a "definite description" of the individual whom he had just passed, Young proceeded back to his vehicle and drove eastbound on Highway 50 (R 11).

As Young proceeded along the road, he spotted the individual whom he just seen, a couple of hundred of yards further along (R 11). The officer pulled his car up behind the individual quite loudly, but the person did not turn around and simply kept walking (R 12). Young stated that this "spooked" him, and that he was concerned that the individual might be armed. Staying behind the open door of his vehicle, he called out, "Hey!" (R 12). At this point, Young had not drawn his gun (R 13). The individual kept walking, and at this point Young came around the door, leveled the gun at the person and said, "Hey!", louder (R 13). At this point, the individual did turn around, and Young directed him to put his hands up on his head, which he did (R 13). At Young's direction, the individual, who was of course Appellant, dropped to his knees and then laid spread-eagle face-down on the ground (R 13). At this point, the other deputy had arrived, and Young began patting Carroll down for weapons (R 14, 26). The officer found a box cutter razor blade in Appellant's hip pocket (R 14). Feeling a hard object in Appellant's left hand front pocket, and believing that it might be a weapon, Young removed it, and found that it was, in fact, a set of keys (R 14). Noting that the keys had a tag on them with the number 2870 on

it, Young had the other deputy radio to his associate back at Speed World, who, in turn, verified that the white pick-up truck had the same number upon it (R 14-15). Appellant was handcuffed and driven back to Speed World, where Ms. Hiatt identified him as the person whom she had seen earlier (R 15-16, 48).

The state also presented the testimony of Diane Payne, in support of any inevitable discovery argument. Detective Payne testified that she had been the lead investigator on the case. She stated that two witnesses had identified Appellant as being in possession of the truck that morning, at a store; they called the police after a radio broadcast about the stolen truck (R 31-2). This sighting was independent of the seizure which occurred on Highway 50. Detective Payne testified that as part of the investigation, the authorities had checked the neighborhood in which the crime had occurred, and had learned that Carroll lived next door, that he had a criminal history involving sexual offenses involving children and that he was missing (R 32-3). The officer testified that a jigsaw had been found in the truck itself, an instrument which witnesses stated Carroll had used at the mission (R 33). Detective Payne testified that based upon all of this information, she would have sought an arrest warrant for Carroll; she noted that, due to his prior arrests, the authorities possessed photographs of Carroll for use in any lineup (R 34). The witness stated that, following Carroll's arrest, a court order had been obtained in order to retrieve hair and blood samples (R 37-9); the officer testified that these samples would have been obtained, even if Appellant had not been arrested when he was (R 40).

Following the presentation of this evidence, the parties presented argument (R 51-61). Judge Perry then announced that he was denying the motion, specifically finding that the officers had had a well-founded suspicion for the stop (R 61-2). The trial formally commenced on March 18, 1992, and, that day, the state called Deputy McDaniel, one of the officers dispatched to Speed World (R 335-355). McDaniel testified that he had been dispatched to such location at around 8:40 a.m. that morning, and that prior to such time he had heard a bulletin for a white pickup truck with "ATC Construction" on the side; the tag number had been given, and it had been announced that the vehicle had been taken from the scene of a homicide (R 336). McDaniel testified that he had arrived on the scene at around the same time as Deputy Horne, and that the two had approached the vehicle (R 336-7). While they were doing so, Carl Young had driven up, and, several minutes later, Debbie Hiatt had approached the officers. Ms. Hiatt advised the officers that, on her way to work that morning, she had observed a white male "in the area of the truck"; she described him as having light brown or dirty blonde hair, wearing blue jeans and a brown jacket, and being "very dirty looking" (R 338). McDaniel followed Young in his pursuit of the individual whom he had just seen, who matched such description, and was present during the stop and frisk. McDaniel specifically testified that Appellant matched Hiatt's description, in that he was wearing blue jeans and a brown jacket and had shoulder length dirty blonde hair and dirty clothing (R 340).

The officer testified that Appellant was detained based on the description which he had received from Debbie Hiatt, "and the information from the BOLO" (R 340). For the own security, the officers patted down Carroll, and during the course of such pat down discovered some keys (R 340). After it was determined that the keys were in fact from the stolen vehicle, Appellant was handcuffed and "detained for further questioning" (R 343). He was then transported back to Speed World, where Ms. Hiatt identified him (R 343); he was later arrested for theft of the truck (R 351). During the officer's testimony, the state formally moved the keys into evidence; defense counsel's only response was an observation he did not find them "relevant at this time" (R 342).

Ms. Hiatt and Officer Young testified at trial, in conformity with their prior testimony at the pretrial hearing (R 356-365, 365-376). At trial, Ms. Hiatt testified that she had seen Appellant walking along the road earlier that morning, wearing "a big brown heavy looking jacket", looking "like he had been up all night" and having shoulder length straggly brown hair (R 358-9). She confirmed that she identified Appellant when he was brought back to Speed World (R 361). When he testified, Officer Young stated that when he had first passed Appellant, he had noticed that Carroll had shoulder length dirty blonde hair and a brown jacket (R 367). Subsequently, the state called Deputy Tate, who testified that he had been present when Carroll's clothing was taken from him after his arrest, pursuant to a search warrant; at that time, the state moved into evidence Carroll's gray sweatshirt, and defense counsel's only objection

was on "relevancy" (R 449). The state also called Deputy Taylor, and through him, introduced samples of Carroll's blood, saliva and head and pubic hair, which had been taken following his arrest, pursuant to a court order (R 458-463); once again, defense counsel's only objections were on relevancy grounds (R 458-463). The FDLE serologist testified, without objection, to her conclusions based upon comparisons using Caroll's blood and saliva (R 461-499). Detective Gay testified, without objection, that he had shown a photo lineup to witnesses Piper and Wasilewski, and that each had picked out Carroll's photo; the photo lineup, which had included a booking photograph taken after Carroll's arrest (R 35), was likewise admitted without objection (R 537). Earlier, Piper had, without objection, identified Carroll in open court (R 317), and Wasilewski, likewise without objection, had testified that he had made a prior identification (R 332). It was only when the state called its second-to-last witness, the microanalyst, that defense counsel announced without elaboration, that he wanted to renew his motion to suppress "to all evidence"; the motion was denied (R 557).

As noted earlier, the state questions the preservation of this point on appeal. Although defense counsel filed a pretrial motion to suppress, which was denied, he did not renew any objection until the state had presented virtually all of its case. Defense counsel did not renew his objection at the time that the most obvious "fruits" of the arrest were introduced, i.e., the keys to the stolen truck and Appellant's sweatshirt (R 342, 449), as well as when the samples of his hair and blood were formally introduced (R 458-463), prior to the more detailed

expert testimony.[1] It is well recognized that in order to properly preserve a Fourth Amendment issue for appeal, a defendant must renew any prior objection, on constitutional grounds, at the time that the disputed evidence is admitted. See, e.g., Routly v. State, 440 So.2d 1257, 1260 (Fla. 1983); Parker v. State, 456 So.2d. 436, 441 (Fla. 1984); Buchanan v. State, 575 So.2d 704, 707 (Fla. 3rd DCA 1991); Travieso v. State, 480 So.2d 100, 102-3 (Fla. 4th DCA 1985), cert. denied, 491 So.2d 280 (Fla. 1986); Jones v. State, 360 So.2d. 1293, 1296 (Fla. 1978). The fact that defense counsel objected to some of the items on "relevancy" grounds cannot preserve a search and seizure issue for appeal. See, Rodriguez v. State, 609 So.2d 493, 499 (Fla. 1992) (objection to testimony on relevancy grounds did not preserve claim that such was "inherently inflammatory"); Glendening v. State, 436 So.2d 212, 221 (Fla. 1988) (objection to testimony on relevancy grounds did not preserve claim that testimony was improper bolstering); D.J.C, v. State, 400 So.2d 830 (Fla. 3rd DCA 1981) (objection to testimony on relevancy grounds did not preserve claim that fingerprints should have been suppressed).

Given the absence of specific contemporaneous objection at the time that the disputed evidence was actually admitted, Appellee respectfully submits that no claim of error in this regard has been properly preserved for appeal. See, Bertolotti v. State, 565 So.2d 1343 (Fla. 1990); Tillman v. State, 471 So.2d 32 (Fla. 1985). This argument is not mere formalism. The

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[1] The box cutter razor blade removed from Carroll's pocket during the pat down was not introduced at trial.

purpose of any contemporaneous objection is to afford the trial court an opportunity to correct or prevent error in a timely fashion. See, e.g., Castor v. State, 365 So.2d 701, 703 (Fla. 1978); Troedel v. State, 462 So.2d 392, 396, (Fla. 1984). Having waited until the state presented virtually all of its case, and well after the admission into evidence of the contested items, defense counsel effectively precluded the court from acting upon his objection in any meaningful way, and, thus, effectively waived any claim of error in regard to the merits of the suppression issue. This claim is procedurally barred.

To the extent that this court disagrees, Appellee would suggest that Appellant is nonetheless entitled to no relief, and that, alternatively, the admission of the evidence directly attributable to any illegal arrest, i.e., the keys to the truck and the sweatshirt was harmless error under State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Appellant's primary argument on appeal is to the effect that Officer Young in fact arrested Carroll, as opposed to simply "stopping" him, and that such arrest was illegal, as without probable cause (Initial Brief at 16-21). The circuit court, however, rejected this argument, and found that, in fact, Officer Young had only stopped Carroll, and that he had a founded suspicion for doing so (R 61-2). It is, of course, well established that a trial court's ruling on a motion to suppress comes to the reviewing court with the presumption of correctness, and that the reviewing court must interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustaining the trial court's ruling. See, McNamara v. State, 357 So.2d 410, 412 (Fla.

1978); Medina v. State, 466 So.2d 1046, 1049-1050 (Fla. 1985); Savage v. State, 588 So.2d 975, 978-9 (Fla. 1991); Johnson v. State, 608 So.2d 4, 9 (Fla. 1992); Jones v. State, 612 So.2d 1370, 1373 (Fla. 1992). Appellant has failed to overcome this presumption of correctness, and given the untimely nature of any renewal of the suppression motion below, Appellee suggests that it is appropriate to consider the evidence presented at trial, as well as that presented at the suppression hearing, in resolving this claim of error; the evidence presented at trial was undoubtedly before the court, prior to the time that it was called upon to rule upon any renewed suppression-based objection to the evidence actually admitted.

The record in this case indicates that at 6:50 a.m. on October 30, 1990, Debbie Hiatt observed a white pick-up truck parked along the road. As she drove to work, she noted a man walking along the highway, approximately a mile from the vehicle; he was the only person whom she saw at that hour in that vicinity. Sometime within the next two hours, she heard a radio bulletin that a white pickup truck, apparently with a specific logo on it (R 359), was associated with a homicide (R 44-5). Returning home, she found that the truck matched the description given over the radio, and called the police. When the officers arrived, she advised them that she had seen a man "in the vicinity" of the vehicle, earlier that morning, walking eastward; according to Deputy McDaniel, she described this man as white, wearing blue jeans and a brown jacket, having dirty blonde hair and being very dirty looking (R 338). One of the officers, wildlife officer Young, had approached the scene from the east,

and, minutes earlier, had seen an individual matching that description, walking eastward on the highway; Young stated that he had seen this individual about two miles from where the truck was located, that this individual had been the only person that he had seen walking along the highway, and that it was unusual for pedestrians to be in such a desolate location. Accordingly, Young, followed by the other officers, drove eastward on the highway and found Appellant about one hundred yards from where Young had last seen him.

Young stated that he pulled his vehicle off the road very loudly directly behind Appellant, but that Appellant had not turned around, and had simply kept walking. Young stated that he had gotten out of his vehicle and called out to Appellant; at this point, his gun was not drawn. Appellant kept walking. At this point, Young did draw his gun and once again yelled, "Hey", to Appellant. Appellant then turned around, and at the officer's direction, laid down on the ground, spread-eagled. Officer Young testified that he knew that a homicide was involved in this matter, and that he was concerned for his own safety. Accordingly, Young patted Appellant down for weapons and found a box cutter razor blade in his hip pocket. Feeling a hard object, which he believed could be a weapon, in Appellant's left hand pocket, the officer retrieved what turned out to be a set of keys. A call to the officers back at the truck verified that these keys were to the stolen vehicle. Appellant was then handcuffed and transported back to the truck, where Debbie Hiatt identified him as the person whom she had seen earlier. Apparently, at this point, Appellant was formally arrested for stealing the truck (R 351).

The parties begin this point with almost immediate disagreement, in that, as noted, Appellant contends that there was no stop in this case, merely an arrest, whereas the state, in conformity with the ruling below, contends that Officer Young initially stopped or detained Carroll, based upon founded suspicion, and that Carroll was not arrested until probable cause developed. Appellant initially contends that because Carroll was held at gunpoint on the ground during the stop, he was not "free to leave," and that, hence, was actually under arrest. Appellant next contends that Debbie Hiatt's description of Carroll was too "generalized" to provide probable cause to arrest Appellant. Carroll likewise argues that Office Young lacked probable cause to believe that Appellant was armed, so as to authorize the pat down, and that the keys were too "innocuous" for seizure. Finally, Appellant argues that all evidence seized from Appellant's person, "including the hair and blood samples and the DNA test," must be suppressed, as fruits of the poisonous tree under Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). The state disagrees with each of these contentions, and will discuss each in turn.

As to the first, Judge Perry was correct in finding that Officer Young initially stopped Carroll based upon founded or reasonable suspicion. The fact that, for his own safety, the officer drew his gun and directed Carroll to lie on the ground, and/or that Carroll was later handcuffed when he was transported back to the scene for identification by Debbie Hiatt, did not convert this stop or detention into a formal arrest. See, e.g., State v. Perera, 412 So.2d 867 (Fla. 2nd DCA), cert. denied, 419

So.2d 1199 (Fla. 1982) (the fact that officers had weapons drawn did not convert temporary detention into formal arrest); State v. Ruiz, 526 So.2d 170 (Fla. 3rd DCA), cert. denied, 534 So.2d 401 (Fla. 1988), cert. denied, 488 U.S. 1044, 109 S.Ct. 872, 102 L.Ed.2d 995 (Fla. 1989) (the fact that officers, with guns drawn, directed defendant to lie prone on ground did not convert investigatory stop into arrest); Harper v. State, 532 So.2d 1091 (Fla. 3rd DCA 1988), cert. denied, 541 So.2d 1172 (Fla. 1989) (the fact that defendant handcuffed did not convert in investigatory stop into arrest); Wilson v. State, 547 So.2d 215 (Fla. 4th DCA 1989) (same); State v. Barcenas, 559 So.2d 70 (Fla. 3rd DCA 1989), cert. denied, 569 So.2d 1278 (Fla. 1990) (fact that stop executed by officers with guns drawn did not convert stop into arrest); United States v. Franklin, 972 F.2d 1253 (11th Cir. 1992) (fact that defendant was spread-eagled and frisked did not make stop into formal arrest). Additionally, as the court observed in Perera, 412 So.2d at 870, "[E]ven a person temporarily detained is not free to leave." See also LaFave, Search and Seizure (2d Ed. 1987), §9.2(d) at 363 ("The typical stopping for investigation cannot be viewed as anything but a complete restriction on liberty of movement for a time . . ."). Thus, the fact that a certain amount of force was utilized during the stop and/or that Carroll was not "free to leave" at all times did not mean that this stop became an arrest. Because the primary cases relied upon by Appellant - London v. State, 540 So.2d 211 (Fla. 2nd DCA 1989), Smith v. State, 389 So.2d 654 (Fla. 2d DCA 1980), and D'Agostino v. State, 310 So.2d 12 (Fla.

1975) - all involve arrests, as opposed to investigatory stops, they are distinquishable on such basis.[2]

As this Court held in Reynolds v. State, 592 So.2d 1082, 1084 (Fla. 1992), there is no bright-line test for determining what police action is permissible in an investigatory stop; rather the inquiry, under Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), turns upon the specific facts of a given case, and such inquiry involves a determination whether the actions taken were reasonable under the circumstances. The state respectfully suggests that all of the police actions in this case, from the inception of the stop to Carroll's eventual arrest, were reasonable under the circumstances. This Court in State v. Webb, 398 So.2d 820, 822 (Fla. 1981), again citing to Terry, held that in order to justify a stop, "A police officer must be able to point to specific and articulable facts which, taken together with rational inferences from these facts, reasonably justify the stop." See also Jacobson v. State, 476 So.2d 1282, 1286 (Fla. 1985) ("A person may be subjected to a limited seizure under Terry v. Ohio when an officer has a reasonable and articulable suspicion that the person may be engaged in criminal activity."). See also United States v. Hensley, 469 U.S. 221, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985) (investigatory stop may be based upon reasonable belief that defendant has committed a crime). In Webb, this Court likewise

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[2] Despite any dicta to the contrary, the court in London expressly stated that it was not deciding the validity of the stop. London, 540 So.2d at 213. It should also be noted that the primary case relied upon the court in Smith, St. John v. State, 363 So.2d 862 (Fla. 4th DCA 1978), was disapproved in State v. Webb, 398 So.2d 820, 823 (Fla. 1981).

set forth the objective standard by which a reviewing court should judge the reasonableness of the intrusion, "[W]ould the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?"

In this case, the above standard was met. While it is apparently Appellant's view that Officer Young should have told Ms. Hiatt that her description of the man whom she had seen in the vicinity of the truck was too "generalized" for the police to do anything, the Constitution does not require such a laissez-faire attitude on the part of law enforcement officers. Cf. Adams v. Williams, 407 U.S. 143, 146, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972) ("The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape."). Ms. Hiatt provided the officers with a description of the man whom she had seen "in the vicinity" (her words) of the stolen truck. She gave the individual's race, sex, hair color and description, as well as a description of his clothing and general appearance ("dirty-looking"). While she did not expressly discuss his height and weight, she obviously focused upon those identifying characteristics which had made the most impression upon her, and she expressly stated that Appellant was the only person whom she had seen along the road that morning; she stated that at the time that she had seen him she had felt that he might have been the driver of the abandoned truck, walking to get help. Ms. Hiatt's description of Appellant was not broadcast over the radio, but

rather was delivered in person to three police officers, one of whom had seen an individual matching that description only moments before. Perhaps the most significant fact was that the officer had seen this individual in a location entirely consistent with Ms. Hiatt's prior sighting, and, at a location less than two miles from the stolen truck. Ms. Hiatt had stated that she had seen the individual walking eastward on the highway, and Officer Young had observed Appellant further along the same highway, proceeding in the same direction; Young stated that Appellant was the only person whom he had seen that morning in that area, and that pedestrians were not a common occurrence in such a desolate location.

Under all these circumstances, it was reasonable for the officer to at least briefly detain Appellant and to "determine his identity or maintain the status quo momentarily while obtaining more information." Cf. Williams, supra. The officers were investigating an abandoned truck which was linked to a homicide discovered earlier that morning. It was reasonable for them to want to talk to the only person other than Ms. Hiatt who could shed light on the truck, i.e., the individual whom she had seen walking along the road when she had first seen the truck. It should be noted that the description given sub judice would seem comparable to that in Webb itself, wherein, although the defendant's height and weight were given, his clothing was not described, and that a proper stop was found in such case, where the defendant was located two miles from the site of robberies which had occurred on the previous two days. This court found that the description in Webb had been specific enough, and that

the information had been corroborated by Webb's presence "in the same general vicinity where the robberies had occurred on the two previous days." Cf. State v. Wise, 603 So.2d 61 (Fla. 2d DCA 1992). Here, Appellant was the only person on the road, both at the time that the truck was first noticed, and when it was investigated, and his location at the latter point in time was consistent with his having been previously observed by Ms. Hiatt. Under these circumstances, the authorities would have been derelict in their duties had they simply allowed Carroll to walk off into the sunset, and sufficient reasonable suspicion existed to justify the investigatory stop.

Just as the decision to stop Appellant was reasonable, so was the manner in which the stop was conducted and the officer's pat-down of Carroll for weapons. In this case, the officers knew that a homicide was involved, a fact which would put any reasonable law enforcement officer on guard, and Appellant's behavior during his initial contact with the authorities was not encouraging. Thus, Officer Young testified that when he pulled his vehicle off the road to effect the stop, he had made a lot of noise and had, in fact, pulled in very close to Appellant himself. Despite this, Appellant simply kept walking, a fact which "spooked" the experienced officer. Young did not charge out of the vehicle with his gun drawn, cf. London, supra, but rather, opened the door and called out to Appellant; Appellant, however, ignored the officer and kept walking. It was only at this point that the officer drew his weapon and called out to Appellant again; when Appellant finally responded, Young had him lie prone on the ground, and conducted a pat-down frisk for his own protection.

Young specifically stated that he was concerned that Appellant might be armed (R 12). The pat-down initially revealed a concealed weapon, a box cutter razor blade; feeling a hard object which he believed could be a weapon, the officer then located the keys to the truck, which had been in another pocket (R 14). In Russell v. State, 415 So.2d 797 (Fla. 3rd DCA 1982), cert. denied, 427 So.2d 737 (Fla. 1983), the court, citing with favor the concurring opinion of Justice Harlan in Terry v. Ohio, in which he had observed that an officer conducting a stop of a person suspected of a serious crime should not have to take a risk that an answer to one of his questions will be a bullet, held that an officer conducting a reasonably-based stop of a defendant for a crime of violence has the right to frisk. The court stated that this holding, which "reflects the common sense notion that it would be foolhardy for an officer to encounter an individual suspected of a serious and violent felony without taking the most basic safeguard for his personal safety," "has won virtually unanimous acceptance." Russell, 415 So.2d at 798. See also Lynn v. State, 567 So.2d 1043 (Fla. 5th DCA 1990) (officer authorized to frisk defendant whom he suspected met description of armed robbery suspect). The fact that a homicide was involved, coupled with Carroll's unusual behavior upon his initial encounter with the police, cf. Graham v. State, 495 So.2d 852 (Fla. 4th DCA 1986), provided a reasonable basis for the pat-down and frisk sub judice. See Webb, supra.

To the extent that Appellant argues that the retrieval of the keys was somehow "pretextual", the record does not support any such assertion. As noted above, Officer Young expressly

testified that, while patting down Appellant, he detected a hard object which he believed could be a weapon; this object turned out to be the keys to the stolen truck. Of course, by this time, Young had already discovered a concealed box cutter razor blade in another of Appellant's pockets; Appellee respectfully submits that the presence of this item could have provided probable caused for arrest for a violation of §790.01, thus justifying seizure of the keys as part of a search incident to a lawful arrest. Cf. State v. Ortiz, 504 So.2d 39 (Fla. 2d DCA 1987). In any event, it was reasonable for the officers to discover the keys, and a quick radio call to the other officers verified that the keys were in fact to the stolen truck. At this point, Carroll was handcuffed and transported two miles to Speed World, where Debbie Hiatt positively identified him as the person whom she had seen earlier in the vicinity of the truck. At least at this point, probable cause existed to arrest Carroll for theft of the truck, which was done. There has been no showing that the investigatory detention lasted so long as to become an arrest. Cf. United States v. Sharpe, 470 U.S. 675, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985). Rather, what occurred here was a stop, designed to determine whether Appellant had anything to do with the stolen truck. A reasonable frisk of Appellant uncovered a concealed weapon, as well as evidence which, coupled with a witness's identification, provided probable cause to arrest. No Fourth Amendment violation occurred sub judice, and the denial of Appellant's motion to suppress was not error.

To the extent that this Court disagrees as to the merits of Appellant's claim, the State would nevertheless contend that

reversible error has not been demonstrated. In evaluating the prejudice to Appellant by virtue of any wrongful ruling on the suppression motion, the initial inquiry must be, of course, what evidence was introduced against Carroll, by exploitation of any illegal arrest; the defendant himself, of course, is not a suppressible "fruit" of an illegal arrest, see United States v. Crews, 445 U.S. 463, 100 S.Ct. 1244, 63 L.Ed.2d 537 (1980), State v. Tillman, 402 So.2d 19 (Fla. 3rd DCA 1981), and, as will be argued more fully infra, it is the State's position that the blood and hair samples taken from Carroll for testing are not subject to suppression under Wong Sun, supra. Thus, the sum total of the evidence against Carroll which could arguably be said to stem from any illegal arrest would seem to be the keys to the stolen truck, as well as the testimony regarding the fact that blood stains were found on Appellant's sweatshirt and upon his penis.

The State suggests, however, that this evidence, as well as the blood and hair samples, could properly be admitted, despite any illegality in Carroll's actual arrest, under the doctrines of independent source and inevitable discovery, as set forth in such precedents as Nix v. Williams, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984), Murray v. United States, 487 U.S. 533, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988), Craig v. State, 510 So.2d 857 (Fla. 1987), and Jennings v. State, 512 So.2d 169 (Fla. 1987). The prosecution demonstrated below that an independent source existed for Carroll's arrest, unrelated to the observations of Debbie Hiatt or Officer Young and/or to Appellant's seizure on Highway 520. Thus, Diane Payne testified that, as part of the

normal criminal investigation, the police had determined that Carroll lived next door to the victim's home, that he had previously been arrested for crimes involving sexual assaults on children, and that he was missing. Additionally, she stated that, following the radio broadcast about the vehicle, two witnesses, namely Piper and Wasilewski, called in and reported having seen Appellant with the stolen truck; the two identified Carroll, through a photo line-up, as the individual whom they had seen getting into the truck at a 7-11, close to the murder scene, at approximately 6:00 a.m. that morning, or approximately three hours prior to the stop and arrest.[3] Additionally, the officers had talked to Amanda McCune, who had advised them of the fact that Appellant used to watch the victim while she played outside, and Deputy Payne also stated that a jigsaw had been found in the truck, which was consistent with one utilized by Appellant at the mission (R 33-34).

The State respectfully suggests that all of this evidence, which was discovered independently of Carroll's stop and arrest, furnished probable cause to arrest Appellant, under the standards set forth in Blanco v. State, 452 So.2d 520 (Fla. 1984), and rendered an arrest and seizure of the disputed evidence "inevitable". Accordingly, it would not further any constitutional purpose to order suppression of any evidence in this cause. Cf. Jennings, supra (photographs of defendant's

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[3] Although the photo actually used during this line-up was taken after Carroll's arrest, the officer testified that, due to Carroll's prior record and incarceration, other pictures of him were available (R 34). See also State v. Maier, 378 So.2d 1288 (Fla. 3rd DCA 1979).

penis taken after arrest, which showed injuries occurring during murder, not subject to suppression, despite suppression of confession, where police had probable cause, independent of confession, to arrest defendant and photographs would "inevitably" have been obtained); State v. Stevens, 574 So.2d 197 (Fla. 1st DCA 1991) (defendant's confession not subject to suppression despite illegal detention, where police had independent probable cause to arrest defendant). To the extent that this Court disagrees, the State would contend that any error in admission of the keys and/or the testimony concerning the presence of blood on Appellant's clothing or person was harmless error beyond a reasonable doubt, under State v. DiGuilio. While admission of the keys certainly linked Appellant to the stolen truck, the testimony of Piper and Wasilewski, who actually placed Carroll in the truck, was certainly more probative on that subject. Likewise, while the testimony concerning the blood stains suggested that Appellant was linked to the crime, this rather inconclusive physical evidence paled into insignificance, in light of the DNA evidence which conclusively placed Appellant at the scene and as the perpetrator; the serologist could not specifically link the blood stains on Appellant to the victim. Given the fact that the primary defense in this case was insanity, which presupposes that the defendant actually committed the crime at issue, it cannot be said that admission of this evidence, if erroneous, irretrievably tainted the proceedings such that a new trial would be warranted at this time.

Finally, as to the blood and hair samples, it is the state's position that, regardless of any alleged illegality in Carroll's

arrest, suppression of these items would not further any constitutional or societal interest. Initially, the state questions whether these matters can be considered "fruits" of the arrest. As Detective Payne stated, these samples were taken from Appellant pursuant to a separate court order or search warrant while he was incarcerated (R 38-9); apparently, the samples were not taken until sometime after November 14, 1990 (R 1011). Accordingly, the state suggests that any taint had been attenuated by the time that these samples were taken; the fact that Carroll would not have been in custody "but for" his arrest presents an insufficient basis to suppress this probative evidence. Cf. Stevens, supra; Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975); State v. Maier, 378 So.2d. 1288 (Fla. 3rd DCA 1979) (fact that photograph taken following illegal arrest used in photo lineup did not taint witness' identification of defendant). In fact, the court in Maier expressly questioned whether identification evidence of this sort was subject to suppression, as fruit of an illegal arrest, given the fact that the purpose of the exclusionary rule is only to deny government officials use of improperly obtained evidence, and not to forever immunize a defendant from prosecution. Maier, 378 So.2d at 1290-3; Paulson v. State, 257 So.2d 303 (Fla. 3rd DCA 1972) (where defendant not illegally arrested solely for purpose of obtaining of fingerprints, fingerprints need not be suppressed as fruit of illegal arrest; court noted that fingerprints were physical characteristics "obtainable in many ways"); Commonwealth v. Beldotti, 567 N.E. 2nd 1219 (Mass 1991) (results of occult blood testing upon defendant need not be

suppressed as fruit of poisonous tree, even if obtained through invalid warrant, where suppression would not further deterrent purpose of exclusionary rule; additionally, test would, in any event, have been performed following a lawful arrest, and results would "inevitably" have been discovered).

Further, as in Beldotti, the state would suggest that the hair and blood samples, and the testimony concerning their results, are admissible under the independent source or inevitable discovery doctrines, in that, however Carroll came into custody, the authorities would have obtained samples and run the test, given the circumstances of this case; the obtaining of these samples and their testing is in all respects independent of the manner in which Appellant was arrested. Cf. Jennings, (photograph of defendant's penis would "inevitably" have been discovered); Delap v. State, 440 So.2d 1242, 1250 (Fla. 1983) (evidence which was not obtained through exploitation of primary illegality did not have to be suppressed). Suppression of these items would place the police in a worse position than they would otherwise have been, something which is not required by the Constitution. See, Nix, supra; Murray, supra. For all of the above reasons, Appellant's conviction should be affirmed in all respects.

POINT II

REVERSIBLE ERROR HAS NOT BEEN DEMONSTRATED, IN REGARD TO ANY ALLEGED COMMENTS UPON CARROLL'S RIGHT TO REMAIN SILENT

As his next point on appeal, Appellant contends that his conviction of first degree murder and sentence of death must be reversed, because state witness McDaniel allegedly twice gave

testimony which was fairly susceptible to being interpreted as a comment upon Carroll's right to remain silent. The record in this case indicates that, during the direct examination of Deputy McDaniel, the prosecutor asked the witness if, when he had come into contact with Appellant, Carroll had done anything which caused the officer to question Appellant's mental competence (R 344). Unresponsively, the witness testified that Appellant's only reaction upon being stopped was that he had almost no reaction, adding, "He had nothing to say. He didn't ask why we stopped him." (R 344). Defense counsel objected, and immediately moved for a mistrial; the prosecutor pointed out that the answer had not been responsive and suggested that a curative instruction could be given (R 344). The court denied the motion for mistrial, and asked defense counsel if he wanted a curative instruction to jury to disregard the last comment; defense counsel replied, "No, sir. I'd rather have a mistrial." (R 344). Subsequently, on cross-examination, defense counsel asked McDaniel if he had previously stated in his deposition that Appellant had "mostly had a blank stare", when asked to describe Carroll's demeanor (R 346-347). On redirect, the prosecutor asked the witness what he had meant by saying that Appellant had a blank stare (R 349). The witness responded, "He showed no emotion whatsoever and it was unusual that he didn't question at the time -- " (R 349). At this point, defense counsel announced that he renewed his motion (R 350). When the judge stated that he was denying the motion, and asked defense counsel if he wished a curative instruction, counsel stated that he did not (R 350).

As noted, Appellant contends on appeal that reversible error has occurred, under such precedents as Bennett v. State, 316 So.2d 41 (Fla. 1975), and State v. Kinchen, 490 So.2d 21 (Fla. 1985), in that the comments of Deputy McDaniel allegedly could have been interpreted by the jury as comments upon Appellant's "post-arrest silence." (Initial Brief at 22). The State disagrees, but would initially question whether defense counsel properly preserved this point. As this Court held in Ferguson v. State, 417 So.2d 639, 644 (Fla. 1982), the proper procedure when an objectionable comment is made is for the defense to "request an instruction from the court that the jury disregard the remarks." Here, far from requesting such instruction, defense counsel affirmatively prevented the court from delivering one. In Farinas v. State, 569 So.2d 425, 429, n.7 (Fla. 1990), this Court specifically held that any error was invited when defense counsel, given the opportunity, specifically rejected the judge's offer to strike the objectionable evidence. Farinas would certainly seem to indicate that defense counsel sub judice invited any error herein, and that, consequently, reversal should not obtain on appeal. Cf. Duest v. State, 462 So.2d 446, 448 (Fla. 1985) (proper procedure when objectionable comment made is to object and request curative instruction; court notes absence of request for curative instruction); Flanagan v. State, 586 So.2d 1085, 1092 (Fla. 1st DCA 1991) (en banc) (request for curative instruction "necessary prerequisite" for mistrial). To the extent that this Court disagrees, the State would note that both Ferguson and Duest provide that a motion for mistrial is addressed to the sound discretion of the court, and that such

motion should not be granted unless the error committed was so prejudicial as to vitiate the entire trial. See also Marek v. State, 492 So.2d 1055, 1057 (Fla. 1986). Appellant has failed to demonstrate such abuse of discretion or "manifest necessity" sub judice.

Initially, the State would contend that, under the circumstances of this case, it is more than a little unlikely that the comments at issue could be regarded as "reasonably susceptible" to referring to Carroll's invocation of any constitutional right. It is clear from Bennett and Kinchen that the type of comment intended to fall within the proscription is a comment which may be interpreted to relate to the defendant's invocation of his right to remain silent "in the face of accusation of guilt." In Bennett, the comment occurred when a witness referring to the defendant's refusal to sign a waiver of rights form, whereas in Kinchen the comment occurred when a direct reference was made to the defendant's failure to testify at trial. See also Breniser v. State, 267 So.2d 23 (Fla. 4th DCA 1972) (improper for police officer to testify that defendant stated that he had nothing to say, after having been advised of his rights under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1967)). In this case, the jury never heard any testimony to the effect that Carroll had been advised of his rights, and, at most, simply heard that "at some point", he had formally been arrested for theft of the truck, such testimony having been elicited after the comments at issue (R 351).[4] It

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[4] The only even arguable reference to any advisement of rights came later during the testimony of Officer Young, when he

should be indisputable, from the context, that the remarks at issue were relating to Appellant's demeanor, which this court has previously held is not comparable to the invocation of any constitutional right. See, Jackson v. State, 522 So.2d at 802, 807 (Fla. 1988) (testimony describing defendant's demeanor at time of arrest as "calm" could not reasonably have been interpreted as comment upon his right to remain silent). On the basis of Jackson, it is clear that reversible error has not occurred.

In evaluating this claim of error, it must be remembered that the primary defense asserted in this case was one of insanity. Defense counsel advised the jury in opening statement that testimony would be presented, inter alia, from witnesses who saw Carroll on the night of the murder, that he had seemed irrational at the time (R 281-2). Accordingly, the state asked all of its witnesses who had come into contact with Carroll either before or after the crime to testify as to his demeanor, specifically asking each whether Carroll had said or done anything to cause them to question his sanity (R 317, 330, 343, 354, 361, 374, 538). Indeed, the question which elicited the first comment at issue sub judice was specifically directed toward whether the witness had seen or heard anything which caused him to question Carroll's competence (R 343-4); prior to McDaniel, the jury had heard the prosecutor ask witnesses Piper and Wasilewski the same question (R 317, 330). The jury

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unresponsively stated, "Well, after the weapon and the stuff was taken from him, he was handcuffed. He was advised, I read him his -" (R 373).

understood Detective McDaniel's testimony for what it was - a description of Appellant's demeanor at the time of his arrest, such testimony relevant to the issue of Carroll's sanity.

A similar result obtains as to the second comment at issue, although the state would contend that defense counsel invited this testimony. As noted, defense counsel had begun his cross examination by asking the witness whether he had stated earlier in his deposition that Carroll had had a "blank stare" at the time of their encounter (R 346-7). On redirect the prosecutor asked the witness what he had meant by a "blank stare", and defense counsel objected to the witness' explanation (R 349). If there was error, it was invited. Cf. Copeland v. State, 457 So.2d 1012, 1018 (Fla. 1984) (mistrial not required where defense counsel "opened the door" to damaging testimony). Further, from the context of this remark, it was clear again the officer was simply describing Carroll's demeanor, a relevant factor for the jury's assessment of the defendant's sanity. Following the remark at issue, the prosecutor elicited further testimony that Carroll had obeyed the officer's direction, and that he had not done anything which caused McDaniel to question his competence or sanity (R 352-4). Error has not been demonstrated under Jackson, supra.

To the extent that any error is perceived, it is unquestionably harmless beyond a reasonable doubt under State v. DiGuilio. This case would seem comparable to Brannin v. State, 496 So.2d 124 (Fla. 1986), although in such case, the comment at issue was unquestionably one relating to the defendant's invocation of a constitutional right; the officer therein

testified that when he had advised the defendant of his rights, the defendant had refused to sign a waiver and "did not want" to give a statement. Brannin v. State, 476 So.2d 245, 246 (Fla. 1st DCA 1985). On certiorari, this court concluded that admission of this testimony had been harmless error, noting that Brannin had presented an insanity defense, and that his factual guilt was largely uncontested. In words highly appropriate to this case, this court observed:

> At the trial sub judice the state introduced during its case-in-chief evidence of Brannin's behavior during the commission of the crime, at the time of his arrest and the several hours subsequent to his arrest. Each witness was asked by both the state and defense whether Brannin appeared to understand what was happening around him, appeared to be hallucinating, mumbled or talked to himself, was intoxicated or under the influence of drugs, or exhibited any other bizarre behavior. Several police agents testified, one of whom improperly commented that Brannin refused to sign a waiver of rights form and did not want to answer any more questions. The testimony of each witness provided the jury with properly admitted, probative information about Brannin's behavior during this time period. Based on our review of the entire record, it is clear to us beyond a reasonable doubt that there is no reasonable possibility that this one improper comment affected the verdict.
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> Brannin, 496 So.2d at 125.

On the authority of Brannin, the instant conviction should be affirmed in all respects. See also Ferry v. State, 507 So.2d 1373, 1376 (Fla. 1987) (testimony concerning defendant's invocation of his rights harmless error in capital prosecution).

POINT III

REVERSIBLE ERROR HAS NOT BEEN DEMONSTRATED, IN REGARD TO THE STATE'S CROSS-EXAMINATION OF A DEFENSE PSYCHIATRIST, ASSUMING, IN FACT, THAT ANY CLAIM OF ERROR HAS BEEN PRESERVED FOR REVIEW

As his next point on appeal, Carroll contends that his conviction of first-degree murder and sentence of death must be vacated, because of three alleged errors which occured during the state's cross-examination of defense witness Danzinger. Specifically, Appellant maintains that the prosecutor made improper references to Carroll's prior incarceration, prior misconduct with young children and alleged pedophilia, and that a mistrial should have been granted. The state disagrees, and as in the prior points, would initially question the preservation of this claim; on the merits, it is clear that the trial court took great pains to assure that reversible error did not occur. Appellant's conviction should be affirmed in all respect.

The record indicates that, as part of his insanity defense, Carroll called Dr. Jeffrey Danzinger, a psychiatrist (R 665). On direct examination, Dr. Danzinger testified that he had examined Carroll and had additionally "obtained data from a number of sources," including "old medical records and the like." (R 668). The expert stated that he had taken a comprehensive history from Appellant himself, involving past psychiatric history and treatment, and medical problems (R 668-9). Defense counsel specifically asked Danzinger whether Appellant had told him about his history with alcohol, and the expert stated that Carroll had told him that he had begun drinking as a young child, had continued to drink on a daily basis as an adult, and had "a past

history of black-outs", including hospitalization for detoxification (R 670). Appellant told Danzinger that he had been drinking heavily at the time of his arrest, and that he remembered nothing of the day of the murders, remembering only drinking in a bar the night before (R 670, 674). Based on all of this, Dr. Danzinger diagnosed Appellant as suffering from schizophrenia, alcoholism and multiple drug abuse (R 675). The doctor stated that, in his opinion, Carroll had not been sane on the night of the murder (R 675). The witness testified that he based this opinion upon witness accounts of Carroll's behavior both prior to and subsequent to the incident (R 676-9).

A proffer was held prior to the state's cross-examination outside the presence of the jury (R 681). During this proffer, the prosecutor asked the witness whether, in reaching his opinion, he had considered background information from Carroll's medical and psychological records from the Department of Corrections; the doctor replied that he had (R 681). Dr. Danzinger stated that these records had included references to Carroll's previously having been charged with lewd and lascivious behavior, although the circumstances of the offense had not been set forth (R 681-2). Dr. Danzinger agreed that, in assessing Appellant's mental state at the time of this offense, it could be relevant to consider the fact that Carroll had previously performed sexual acts upon children (R 683). At this point, Dr. Danzinger was shown a 1982 psychological report, referring to Carroll's prior offense, in which the prior expert had opined that Carroll used alcohol as an excuse for his sexually aggressive behavior; the doctor stated that it was "quite

possible" that he had looked at this report earlier, and that this would be relevant data in determining whether Carroll was malingering in this instance (R 683-5). The prosecutor stated, for the record, that, in two specific instances, Carroll had been convicted of lewd acts involving children, in which he had removed the child's clothing and placed his penis against the vagina (R 686); the prosecutor also represented that in both cases, according to medical records, Carroll claimed to have been drunk at the time and to have no memory of doing the acts (R 686). At this point, the doctor was excused, and the parties presented their arguments (R 686).

Defense counsel stated that, in his view, the state was improperly seeking to admit character evidence relating to Carroll's "prior and past criminal conduct" (R 687). Counsel did seem to suggest, however, that he would not oppose the state cross-examining the psychiatrist on Carroll's medical records, but that he objected to any reference to the specifics of the prior offenses (R 687); counsel added that he would move for a mistrial, if the state "got into Carroll's past criminal record, as it could not present the record of convictions (R 688)." The prosecutor responded that the state had no intention of going into the facts of the prior offenses, stating that it was simply his intention to cross-examine the expert as to the relevance of the fact that Carroll had previously claimed alcoholic black-out in regard to offenses involving children; the prosecutor also stated that the fact that Carroll had been in prison for ten years was relevant, because, at such time, he had been under constant supervision and observation (R 689). Defense counsel

protested that, in order to establish the latter, the state was "going to call witnesses that he had black-outs in jail," and opined that the state was seeking to introduce substantive evidence through hearsay on cross-examination (R 689). The court ruled that the state would be allowed to cross-examine the witness, only to the extent that such was relevant to the issue of whether Carroll was "legally insane, malingering or not legally insane," and stated the intention of instructing the jury on the limited purpose for which they could consider the testimony (R 692-3). Defense counsel expressed no desire for this instruction, and the judge advised him that he could draft an instruction of his own, if he wished (R 694). The prosecutor stated for the record, that the state was not seeking to introduce "Williams Rule" evidence, and was not offering evidence of any prior convictions but was simply seeking to impeach the witness (R 694).

When proceedings reconvened after recess, defense counsel offered no proposed instruction to the court. Defense counsel did, however, ask the court's guidance as to how to "preserve" his mistrial objection (R 700). Judge Perry ruled that it would be sufficient for defense counsel to object at the time that the prosecutor asked "the first question dealing with the subject matter," and that defense counsel should move for a mistrial "at the conclusion of the subject matter" or at the conclusion of the testimony, "after he finishes his cross-examination." (R 700-1). The state then subjected the witness to a thorough cross-examination, the majority of which having nothing to do with the three matters now at issue (R 702-741). During the cross-

examination, the prosecutor asked the witness if he had examined Carroll's medical records; the witness stated that he had (R 723). The prosecutor then asked whether those records reflected that Mr. Carroll "had been under state custody for most of the last ten years"; defense counsel objected at this point (R 723). The prosecutor then asked the witness whether Carroll had been "subject to observation by state actors and frequently by mental health professionals," and the witness replied in the affirmative (R 723). The state continued questioning in this vein, eliciting testimony to the effect that the mental health records, for all this time period, only contained one reference to a psychotic system on Carroll's part; such had occurred in 1989, when Appellant was very briefly placed on Thorazin (R 723-5). The prosecutor then pointed out that the records indicated that, within a week, Carroll had been adjudged "fine", and the witness agreed that this tended to indicate that Appellant was not a "true" schizophrenic (R 725).

At this point, the prosecutor elicited the fact that Carroll had told the expert that he had previously suffered alcoholic blackouts, and, in response to the next question, Dr. Danzinger agreed that the mental health experts did not confirm this (R 726). The prosecutor then asked the witness, if, in fact, the record's only reference to any claim of memory loss on the part of Carroll had occurred when he had been "accused of commiting sexual acts with children"; defense counsel objected, and such objection was overruled (R 726). Dr. Danzinger was then allowed to study, silently, some of the medical records (R 726-730). The witness acknowledged that, while a psychologist had in fact

opined that Carroll used alcohol as an excuse "for unacceptable behavior" in the past, he himself could not offer no opinion on that score (R 730-732). When shown the report, Dr. Danzinger stated, that, in his opinion, Appellant's statement could have been construed as one of innocence (R 734).

The prosecutor then questioned the expert as to his diagnosis of schizophrenia, and asked whether, if Carroll were in remission, he would still desire to have sex with children (r 736). Before the witness could answer, defense counsel objected on relevancy grounds (R 736). During the bench conference, the prosecutor observed that the fact that Carroll was a pedophile was relevant, and that pedophiles were not necessarily insane (R 737). Defense counsel stated that this constituted prejudicial bad character evidence, stating, "I am moving for a mistrial." (R 738). The prosecutor then pointed out that he had not yet asked any questions concerning pedophilia (R 738). The judge then sustained defense counsel's objection (R 738). No motion for mistrial was interposed following this ruling, nor was any motion for mistrial made at the conclusion of the prosecutor's cross-exasmination of this witness. In fact, it was not until the defense called another witness, and formally rested, that counsel "renewed" his motion for mistrial, without any statement of any grounds (R 784).

Before turning to the merits of Appellant's argument, the state would initially question the preservation of this point on appeal. This court has consistently held that motions for mistrial must be made in a timely fashion, in order to preserve any claim of error for appellate review. See, e.g., Nixon v.

State, 572 So.2d 1336, 1340-1 (Fla. 1990); Farinas, supra. Here, while defense counsel did interpose two relatively perfunctory objections at the time of the first two objectionable questions, he did not move for a mistrial until after another witness had testified. This was entirely contrary to the judge's instructions as to the manner in which this claim of error should be preserved, and additionally is contrary to such precedents as Nixon. Accordingly, Appellant's objections to the first two questions are not preserved for review.

Additionally, on other grounds, Appellant has waived any claim of error in regard to the third and final question, i.e., that involving Appellant's desire to have sex with children while in remission. This matter had not previously been discussed during the proffer, and, thus, it was unquestionably defense counsel's obligation to make a timely objection and motion for mistrial. The record in this case indicates that, while counsel did interpose an objection, such objection such sustained, and no motion for mistrial was made until, as noted, another witness had testified. This court has held that, in instances in which an objection has been sustained (as opposed to overruled), it is incumbent upon the objecting party to also move for a mistrial, in order to preserve any claim of error for review. See, Riechmann v. State, 581 So.2d 133, 139 (Fla. 1991); Holton v. State, 573 So.2d 284, 188, n.3 (Fla. 1990). Additionally, the "renewal" of the motion for mistrial, when finally made, contained absolutely no statement of specific grounds or argument, and this court has specifically held that "bare-bones" motions for mistrial of this type are insufficient to apprise the

trial court of any claim of error or to preserve a specific claim for appellate review. See Craig v. State, supra; Johnston v. State, 497 So.2d 863, 869 (Fla. 1986); Ferguson, supra. Finally, as in the prior point, defense counsel's failure to act upon the judge's suggestion for a curative instruction should likewise militate against any finding of reversible error. See Farinas, supra.

To the extent that this court finds any claim of error properly presented, reversible error has nevertheless not been demonstrated, and the state would respectfully contend that this point on appeal represents much ado about very little. As the proffer below indicated, the state possessed a great deal of potential evidence which could have been extremely damaging to the defense, i.e., his prior medical records which set forth the details of his two prior convictions for crimes involving children. Had the state formally introduced these matters into evidence, Appellant might now have an arguable claim that improper "collateral crime" evidence had played an impermissible part in his conviction. As it is, however, this point on appeal, stripped of its rhetorical finery, essentially revolves around three questions asked during cross-examination, one of them never answered, and none of them as insidious as posited by the Initial Brief. As noted in Point II, infra, a motion for mistrial is addressed to the sound discretion of the trial court, and is not warranted unless any error committed has completely vitiated the defendant's chance for a fair trial. See Ferguson, supra; Duest, supra. In this case, Judge Perry did not abuse his discretion in denying Appellant's motion for mistrial, such as it was, and any

error sub judice was harmless beyond a reasonable doubt under State v. DiGuilio.

Proceeding chronologically, it must be noted that, contrary to the Initial Brief (Initial Brief at 24, 26), the State never specifically advised the jury that Carroll had been "imprisoned" "almost continuously for the past ten years." Rather, at most, the prosecutor asked the witness whether Carroll's medical records indicated that he had been in state "custody" for most of this time period (R 723). The doctor agreed, and it was then established that Carroll had been under the observation of "mental health professionals" during this time (R 723-724). From its context, the prosecutor was clearly asking the witness to explain the fact that, despite his diagnosis as schizophrenia, no other mental health expert who had had unimpeded access to Carroll for the last ten years had reached a similar conclusion. There are many forms of custody other than imprisonment per se, and there is no reason to conclude that the jury would draw the most negative inference possible from this one question; the jury had previously been advised that Carroll had been hospitalized for alcohol rehabilitation (R 670). Even assuming that this question could be interpreted as Appellant posits, this court has previously held that a mistrial is not required, when the jury is advised of a defendant's prior incarceration. See Ferguson, supra (no curative instruction given); Johnston, supra (curative instruction given). In evaluating any prejudice to Appellant, it is important to note that the primary defense asserted was that of insanity, which, of course, presupposes an admission that Carroll committed the instant offense, and the fact that he might

have been incarcerated previously would have been of little, if any, significance.

In evaluating the second matter at issue, the existence of the insanity defense is critical. Dr. Danziger had previously testified that, in his view, Carroll suffered from schizophrenia, as well as alcoholism, and had related that Appellant had told him that he suffered from alcoholic blackouts; likewise, during direct examination, the expert had advised the jury that he had obtained, and considered, data from a number of sources, including Carroll's medical records. This court has consistently held that a party may fully inquire into the history utilized by an expert to determine whether the expert's opinion has a proper basis. See Parker v. State, 476 So.2d 134, 139 (Fla. 1985) (not error to allow state to cross examine defense expert on contents of case history used in evaluation, even though, in doing so, State elicited testimony as to defendant's prior criminal history, which would otherwise not have been admissible); Valle v. State, 581 So.2d 40, 46 (Fla. 1991) (state may cross examine expert on contents of defendant's prison records, including specific instances of misconduct inconsistent with expert's opinion, where expert had considered such records in reaching his opinion); Johnson, supra. The state would contend that under §90.705, Fla.Stat. (1991), as well as the cases cited above, the prosecutor below was entitled to cross-examine this witness as to the portions of the records, which he admitted he had considered, which were inconsistent with his diagnosis, and to ask him about this inconsistency. Specifically, the state was entitled to ask the expert to explain why he chose to believe Carroll's account

of alcholic blackout, as opposed to the prior expert who had found such claim to simply be an excuse for "unacceptable behavior"; likewise, the State was entitled to ask Dr. Danziger to reconcile this conflict.

The real issue in this point on appeal, no doubt, relates to the fact that, in propounding this question, the prosecutor made reference to Carroll's prior accusation "of committing sexual acts with children" (R 726). Appellant has cited no precedent which provides that, in cross-examination or impeachment of a witness, a party may not make reference to evidence concerning "bad acts" committed by the defendant; it is significant that no "conviction" in this regard was brought out. See Trepal v. State, 18 Fla.L.Weekly S327 (Fla. June 10, 1993). The only barrier to the admission of "bad act" evidence, is that such cannot be admitted for the sole purpose of proving "bad character or propensity." §90.404(2)(a), Fla.Stat. (1991). As noted, however, no evidence of this type was formally "admitted", although caselaw certainly suggests that "Williams Rule" evidence of this nature could properly have been admitted to refute any claim of insanity or intoxication by Carroll. See, e.g., Rossi v. State, 416 So.2d 1166 (Fla. 4th DCA 1982) (in sexual battery prosecution, it was proper for a state to introduce evidence of defendant's sexual assault upon another victim in order to rebut appellant's claim of insanity or suggestion that sexual battery at issue had been result of "isolated breakdown"); Townsend v. State, 420 So.2d 615 (Fla. 4th DCA 1982), cert. denied, 430 So.2d 452 (Fla. 1983) (state could cross-examine defense expert as to admission that defendant had made to collateral crimes, in order

to rebut insanity defense); Gould v. State, 558 So.2d 481 (Fla. 2nd DCA 1990), reversed on other grounds, 577 So.2d 1302 (Fla. 1991) (fact that defendant had committed prior assault against victim properly admitted in sexual battery prosecution to rebut insanity defense). Further, it should also be noted that courts have held that, in cases involving sexual assaults upon children, especially where identity is not an issue (i.e., such as in instances in which the insanity defense has been presented), the strict rule regarding collateral crime evidence is somewhat relaxed, and that evidence of a defendant's prior sexual misconduct may be admitted to show such matters as intent, the pattern of criminality and lustful state of mind toward the victim. See, e.g., Cotita v. State, 381 So.2d 1146 (Fla. 1st DCA 1980), cert. denied, 392 So.2d 1373 (Fla. 1981); Gibbs v. State, 394 So.2d 231 (Fla. 1st DCA 1981); Flanagan, supra (admission of "pedophile profile"); State v. Paille, 601 So.2d 1321 (Fla. 2nd DCA 1992); Gay v. State, 607 So.2d 454 (Fla. 1st DCA 1992). In light of these precedents, and in light of the fact that there is no reason to believe that the jury misinterpreted the one oblique reference to the prior accusation against Carroll, Appellee respectfully suggests that error has not been demonstrated in this regard.

To the extent that this Court disagrees, any error was harmless beyond a reasonable doubt, under the standard set forth in State v. DiGuilio, in that these "few objectionable words" did not become a feature of the trial, and no reasonable possibility exists they contributed to the verdict. Cf. Lawrence v. State, 614 So.2d 1092, 1095 (Fla. 1993). Again, the fact that this

prosecution involved the assertion of an insanity defense is relevant, in that such defense presupposes an admission that the defendant committed the act in question. The fact that Carroll had been previously accused of an act of sexual misconduct made it no more or less likely that the jury would conclude that he had been insane in this case. Cf. Rossi, supra. Additionally, in Duckett v. State, 568 So.2d 891 (Fla. 1990), this court found the wrongful admission of collateral crime evidence to be harmless, even though in such case the state had made a much greater presentation in that regard; the collateral crime witness in Duckett had specifically testified that Duckett had committed a sexual act upon her. Finally, in evaluating any claim of prejudice, it should be noted that the question at issue led, essentially, to an anticlimatic response. Dr. Danziger studied the prior report, and simply indicated that he had no opinion as to whether the prior expert had been correct; indeed, Dr. Danziger specifically stated that he found that Carroll's assertion of alcoholic blackout, in regard to this prior incident, might have been an assertion of innocence. This hardly prejudiced the defense, and no relief is warranted on this ground. Cf. Lewis v. State, 377 So.2d 640, 644 (Fla. 1979) (even if State's attempt at impeachment improper, relief not warranted where witness's response made harmless any error); Jennings v. State, 453 So.2d 1109, 1144 (Fla. 1984) (harmless error, where state mental health expert improperly made reference to defendant's prior crimes committed in the military).

Finally, as to the last matter at issue, the State would simply note that the prosecutor never referred to Appellant as a

pedophile in the hearing of the jury, as implied by the Initial Brief (Initial Brief at 24-25). Rather, at most, the prosecutor simply asked the witness if, when Carroll's alleged schizophrenia were in remission, he would still desire to have sex with children (R 736). Due to the fact that the judge sustained defense counsel's objection, no answer was ever interposed, and this matter was never brought up again. Reversible error cannot be predicated upon this inquiry. As noted, when Carroll asserted a defense of insanity, he suggested that he had in fact committed the crime. The crime in this case involved the sexual battery of a young child. The prosecutor was entitled to ask the defense expert, who had opined that Carroll was schizophrenic, about the relationship between his mental state and the act committed. In any event, these "few objectionable words", even if erroneous, did not taint this proceeding, such that a mistrial was required. Cf. Monroe v. State, 396 So.2d 241 (Fla. 3rd DCA 1981) (although prosecutor's question was improper, relief was not required, where, due to defense objection, witness never answered); Mann v. State, 603 So.2d 1141 (Fla. 1992) (prosecutor's reference to defendant as pedophile not improper). Under the standards set forth in State v. DiGuilio, supra, any error was harmless, and the instant conviction should be affirmed in all respects.

POINT IV

REVERSIBLE ERROR HAS NOT BEEN DEMONSTRATED, IN REGARD TO APPELLANT'S MULTI-FACETED ATTACK UPON THE ADMISSION INTO EVIDENCE OF THE RESULTS OF DNA TESTING

As his final attack upon his conviction of first-degree murder, Appellant presents a multi-faceted point on appeal

relating to the trial court's admission into evidence of the results of DNA testing. Appellant specifically contends that: (1) it was error to admit the evidence because certain aspects of the FBI's methodology for calculating the probability of coincidental DNA matches are unreliable and/or not generally accepted within the scientific community; (2) it was error for the court to, allegedly, preclude the defense from fully cross-examining the state's expert and (3) it was error for the court to deny the defense a continuance to secure witnesses to rebut the state's evidence. It is the state's contention that none of these claims has merit, and that the instant conviction should be affirmed in all respects. Before proceeding to the merits of Appellant's arguments, it is necessary to review the relevant record facts below.

The record in this case indicates that, when Carroll was formally arrested on this charge, the office of the public defender was appointed to represent him, on November 30, 1990 (R 1002). The public defender, after conducting discovery, subsequently withdrew, and, and on March 26, 1991, attorney James Taylor was appointed (R 1024); Attorney Taylor likewise demanded discovery (R 1030). On August 23, 1991, the state provided to the defense the name of its DNA expert, Jack Quill, with the FBI in Washington, D.C. (R 1040). Defense counsel subsequently moved for, and apparently received, two continuances (R 1031-2, 1052-3). On January 31, 1992, the court granted a defense request for a special examiner to be appointed to take Quill's deposition, apparently in Washington; such order reflected that the deposition was set for February 4, 1992 (R 1083-4).

On February 21, 1992, defense counsel filed a motion in limine, seeking the exclusion of the FBI's test results obtained through DNA profiling; in such motion, counsel conceded that he had received the test results through discovery, and that Quill had, in fact, been deposed (R 1023-5). Counsel specifically asserted that the evidence should be excluded because: (1) the FBI's DNA methods have not been empirically validated and have not been reproduced; (2) reliability must be closely scrutinized since the testing was not developed within the scientific peer review system; (3) the FBI does not meet the minimum national standard for blind, external proficiency testing; (4) data from the FBI's own validation experiments prove the match criteria is not a reliable standard of measure; (5) the FBI lacks a reliable method for producing a numerical estimate of the probability that an observed DNA profile would match the profile from a randomly chosen individual; (6) the FBI's method for estimating the probability of a match is not generally accepted as reliable; (7) the evidence derived from DNA print profiles is not based on proven scientific principles and (8) the techniques used by the FBI fatally impairs the reliability of declared matches (R 1094-5). Additionally, counsel filed a motion for appointment of an expert witness to rebut the testimony of the FBI agent (R 1095-8).

The matter was not called for hearing until the day before trial, on March 16, 1992. As such time, following the court's denial of the suppression motion, defense counsel stated that he wanted the DNA test results excluded, and cited the court to a decision from the Superior Court of the District of Columbia,

United States v. Porter, 120 Daily Wash. L. Rptr. 477 (Super. Ct. D.C. 1991), vacated, 618 A.2d. 629 (D.C. App. 1992). When the state asked if the defense intended to put on any evidence in support of its motion, defense counsel responded, "All right, then I move for a continuance in order to provide the court with evidence" (R 63). Counsel then added, "I need at least two experts and we have a hearing. That should last several weeks. I am not prepared." (R 63). Counsel also stated, "I will state to the court that I have not had the time to develop the evidence to attack the DNA." (R 63). The judge then asked defense counsel the thrust of his request for suppression and for additional time (R 63-4). Attorney Taylor referred to the matters discussed in the Porter opinion, adding that he had talked to experts and would like to be able to offer evidence, but that he simply was not able to do so (R 64). Counsel stated that he wanted to see the FBI data base and suggested that there was a very real possibility that an error could have been made (R 65).

In response, the prosecutor drew the court's attention to a recent decision from a federal court of appeals, which conclusively rejected the Porter analysis. See, United States v. Jakobetz, 955 F.2d 786 (2nd Cir.), cert. denied, ___ U.S. ___, 113 S.Ct. 104, 121 L.Ed.2d 63 (1992). The prosecutor also pointed out that any alleged discrepancy in the size of the population subgroups dealing with minorities was irrelevant, given the fact that Carroll was white (R 66). In answer to the court's question, defense counsel confirmed that he had had the opportunity to depose the FBI expert, but stated that he would

have needed a subpoena to find out more information about the data base (R 67). In answer to the court's next question, defense counsel affirmed that he had been aware of the DNA results since September of 1991 (R 67). Judge Perry announced that he would read the two cases submitted, but noted that Florida courts had previously admitted DNA evidence, and test results therefrom, and observed that the concerns expressed by defense counsel seemed to be more matters of weight, than admissibility (R 68). After the judge declared that he would reserve ruling on the motion in limine until the next morning, he asked if there were any more motions; defense counsel then replied, "I suppose I'll move for a continuance in order to be able to explore this DNA question in more detail." (R 69).

The next day, Judge Perry indicated that he had read the case law, and specifically determined that Florida case law had previously approved the admission of DNA evidence of this type (R 74-6); the judge stated that, based upon the fact that the test results were widely accepted, he would allow them, again observing that the defendant's concerns went to weight, as opposed to admissibility (R 76). The court also noted that the defense had filed a notice of intent to rely on the insanity defense, and observed that it would seem somewhat illogical for the defense to argue that Carroll had been insane at the time of a crime which he did not in fact commit; the court did not base its ruling on this observation, however (R 77). Noting that the case had been continued several times, Judge Perry denied counsel's motion to continue (R 77).

The state did not call Agent Quill until the conclusion of its case (R 571); defense counsel indicated no desire to voir dire the witness prior to his testimony. On direct examination during voir dire, Quill testified that he had been employed at the FBI lab as an analyst for the last thirteen (13) years, presently in the DNA unit (R 571-2); he stated that he had a master's degree in forensic science and had taken graduate courses in DNA characterization (R 572). He testified that he has previously been qualified as an expert in DNA profiling twelve times, and had testified in Texas, New York, South Carolina, Wyoming and Nebraska (R 573).

When the state proffered Quill as an expert, defense counsel objected (573). Defense counsel stated that he renewed his prior motion in limine and observed that, "because of all the controversy surrounding DNA," he submitted that no one should be qualified as an expert in the field (R 573-4). The court denied Appellant's motions, and defense counsel then asked to voir dire the witness; the judge granted such request (R 574). Defense counsel established that Quill worked in the FBI building in Washington, D.C. and then asked him whether, "in the District of Columbia" the data base utilized by the FBI had been deemed to be inadmissible (R 575). The prosecutor objected to this question on the grounds of relevancy, and the objection was sustained and the testimony stricken (R 575). Defense counsel then asked Quill if he had testified in "any of those cases", and the witness replied that he had not (R 575). Counsel indicated that he had no further questions, and, without objection, Quill was accepted as an expert (R 575-6).

On direct examination, the State had the witness describe the DNA profiling process in some detail (R 576-80). Quill stated that the techniques utilized in the FBI protocol went back to 1970's, whereas initial work involving DNA had begun in 1950's (R 580); the agent stated that the very specific locations on the chromosomes which were now considered in the process had been discovered in 1980, and that the process employed was a combination of knowledge from a period back into the 60's (R 580). Quill stated that the first time DNA identification had been utilized had been in England in 1985, and stated that the FBI had been offering testimony since 1989, whereas certain commercial companies had begun somewhat earlier (R 581). He explained that the FBI had wanted to come up with a "working protocol" before doing actual testing, and stated that the forensic applications utilized by the FBI had been accepted in the United States (R 581). Quill also stated that he believed that Florida had been the first state to allow DNA testimony of this kind to be admitted in court (R 581-2).

The witness then explained the results which he had obtained in this case, stating he had found a profile which matched that of Appellant's DNA on one of the vaginal swabs (R 586). Quill stated that, in another instance, he had visually detected a match, but that it had been very light, and the computer had not been able to confirm it; accordingly, he stated that, to be on the conservative side, he had not interpreted that profile (R 588). The witness stated that it was the policy of the FBI to only report matches which were "strong" (R 589). Quill stated that after "making a match", the FBI then used a statistical

probability study to determine the odds of an individual, other than the tested individual, being the source of the DNA and/or having the same profile; he stated that there were data bases for caucasian, black and hispanic individuals and that the caucasian data base used in this case had contained seven hundred and fifty (750) individuals (R 589-90). Quill likewise stated that in this case, the population base which had contributed samples for comparison had consisted on two hundred and twenty five (225) FBI candidates, as well as caucasians from the Miami/Dade area, Texas and California; the black and hispanic population data bases had likewise been drawn from such locations (R 590). Quill stated that the FBI had compared their data base figures with figures from other laboratories in the United States and in Europe, and that no major variations were found (R 590-1). The agent testified that the population frequency was determined by ascertaining how often a specific band of DNA would appear in the same location or "bin", stating that this was the most conservative way of giving the statistical significance to this type of evidence; Quill testified that this system was "biased towards the defendant" and that it tended to "over estimate" (R 592). He specifically stated that the method utilized by the FBI acknowledged substructuring population samples (R 592). The witness stated that the probability of finding someone else in the random population who would match Appellant's genetic profile was one in fifty thousand (50,000) for the caucasion race (R 592-3).

On cross-examination, defense counsel questioned Quill as to the composition of the data base which he had used (R 590). At

the time that the projection had first been made in April of 1991, Quill had apparently used the caucasion data base-2, which included only the FBI agents; in August of 1991, he had utilized caucasion data base-3 which now included seven hundred individuals (R 596). Yet another data base had been formed, largely by excluding duplicates from the prior data bases, and Quill testified that, utilizing such data base, the probability of another individual "matching" was one in fifty two thousand (52,000) (R 618). From the interchanges which occurred during cross-examination, it was clear that the witness had previously been extensively examined by defense counsel, and, in fact that they had had a number of discussions (R 597). In answer to counsel's questions, Quill stated that he did not do DNA "fingerprinting" rather DNA profiling, and conceded that there was no scientific method, at that point, to "match up" every "rung" of the DNA ladder (R 599-600). Quill stated that DNA profiling was primarily a matter of exclusion, and was much more definitive than conventional serology; if a match did not occur, the individual was excluded forever, whereas if a match did occur, it was then necessary to determine the frequency of an occurrence of an unrelated individual in the random population (R 600). In answer to another of counsel's question, Quill conceded that the FBI permitted a "window of error" of 2.5%, which was higher than some private laboratories; he stated, however, that in 97% of the cases, the margin of error was less 1% (R 601-2). Defense counsel then examined the witness on such subjects as "band shifting", and the problems associated with Ethidium Bromide (R 605-7).

The state rested after this witness, and the defense presented its case the next day (R 623-784). Defense counsel never renewed any motion for continuance during this time period. During his closing argument to the jury, defense counsel reminded them that there was no such thing as a DNA "fingerprint", and likewise stated that there was no such thing as DNA identification, in that DNA profiling could not say, "That's the person." (R 836). Counsel stated, "All we can say is there's a probability based on some data base; that we have come up with a probability study." (R 836). Counsel reminded the jury of the expert's inability to make certain matches in this case and urged them to use their common sense (R 836-7).

A. The Trial Court Did Not Abuse Its Discretion In Admitting The State's DNA Evidence.

As his first attack, Carroll maintains that Judge Perry committed reversible error in admitting into evidence the testimony of Agent Quill. Appellant contends that the defense below made a timely request for a determination of the reliability and/or admissibility of this evidence, and was "rebuffed"; virtually in the same breath, however, opposing counsel also state that defense counsel below "admitted a basic lack of understanding regarding DNA evidence" and sought further information and time to "fortify" his attack (Initial Brief at 32). Appellant maintains that the trial court erred in relying upon Correll v. State, 523 So.2d 562 (Fla. 1988) and Andrews v. State, 533 So.2d 841 (Fla. 5th DCA 1988), cert. denied, 542 So.2d 1332 (Fla. 1989), and points to decisions from the District of Columbia, New Mexico and California. Appellant specifically

points out that the population data base utilized by the FBI in making its probability determinations is subject to attack in these jurisdictions, and maintains that further inquiry should have been held on this matter. The state disagrees, and would contend that reversible error has not been demonstrated.

The state would contend, the chiding of opposing counsel not withstanding, Judge Perry was indeed correct in relying upon Correll in resolving the claim below, in that this case is, in all material respects, indistinguishable from this court's earlier precedent. In Correll, the defendant objected, for the first time at trial, to the state's proposed used of blood test results derived through electropheresis. This court observed on appeal that such objection had been untimely, noting that not only had such evidence previously been admitted in that circuit court and throughout the state, but also that the defendant through discovery and deposition of the expert witness, had long been on notice as to the potential use of this evidence. This court held that when scientific evidence is to be offered that has already been received in a substantial number of other Florida cases, any inquiry into its reliability for purposes of admissibility is only necessary when the opposing party makes a timely request for such inquiry supported by authorities indicating that there may not be general scientific acceptance of the technique employed. This court further held in Correll that the evidence had been properly admitted, and noted that defense counsel's only "evidence" against the admissibility of electropheresis had been two out-of-state precedents, in which the courts therein had been dissatisfied with the records created for their review.

While defense counsel sub judice did file a pretrial motion to preclude admission of the DNA evidence, such motion, as well as counsel's arguments, was simply insufficient to "indicate that there may not be general scientific acceptance of the technique employed." Defense counsel's only "evidence" below was the opinion of the trial court in United States v. Porter. The state respectfully maintains that a defendant's citation or utilization of one out-of-state precedent, especially one from a lower court, does not satisfy a defendant's burden in this regard. It is clear that the Porter decision is all the defense counsel had.

When the judge asked him the "thrust" of his motion in limine, counsel pointed to such opinion, and also stated that he would like to be able to offer more evidence, but that he was not prepared and could not do it (R 63-4); counsel also stated, "I will state to the court that I have not had the time to develop the evidence to attack the DNA." (R 65).[5] Given this stance by defense counsel, the court below did not abuse its discretion in failing to conduct a formal hearing on counsel's motion, something, of course, which counsel himself never requested. Cf. Stano v. State, 497 So.2d 1185, 1187 (Fla. 1986) (not error for court to deny evidentiary hearing, where defense counsel

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[5] While counsel had filed a motion for appointment of experts to assist him in this regard (R 1096-8), the motion was never called up for a hearing, and was never ruled upon by the court below; accordingly, no claim of error in this regard can be asserted on appeal. See, e.g., Snead v. State, 415 So.2d 887, 890 (Fla. 5th DCA 1992) (defendant must obtain adverse ruling upon motion before asserting error on appeal); Blackmon v. State, 588 So.2d 662, 663 (Fla. 1st DCA 1991) (same). Additonally, the prosecutor observed at the hearing, without contradiction, that two experts had been listed on the defense witness list (R 65).

announced beforehand that he needed more time and could not prevail). Given the fact that DNA evidence had previously been admitted in the circuit in which this case was tried, see, Andrews, supra, as well as throughout the State of Florida, see, Martinez v. State, 549 So.2d 694 (Fla. 5th DCA 1989), Toranzo v. State, 608 So.2d 83 (Fla. 1992), Teemer v. State, 615 So.2d 234 (Fla. 3rd DCA 1993) (error to exclude defendant's proffer of DNA evidence), the trial court did not err in denying defense counsel's motion in limine. Indeed, in Robinson v. State, 610 So.2d 1288, 1290-1 (Fla. 1992), this court affirmed the trial court's admission into evidence of DNA evidence over the defense's objection, where the trial court had found such evidence admissible, a matter of law, given its prior acceptance in this state. Error has not been demonstrated in this regard.

Further, it must be noted that the Porter case is a very slim reed upon which to rest a constitutional argument. For one thing, it must be noted that the decision rejects some of the argument contained in Carroll's own motion in limine. Thus, the judge in Porter specifically found that the "relevant scientific community generally accepts that, as performed by the FBI, R.F.L.P. [Restriction Fragment Length Polymorphism or "profiling"] is appropriate for forensic use." (R 1184). The court likewise found no merit in Porter's claim to the effect that the FBI's decision to call a match was "subjective" or "unscientific", or in regard to Porter's claim that the FBI could not replicate its test results (R 1181). The court in Porter found no merit in the defendant's argument that there were no "industry-wide" standards governing DNA analysis, and

specifically found, in fact, that the FBI did have a "blind proficiency program." (R 1186-1190). Significantly, the trial judge in Porter found that it was highly unlikely that forensic DNA analysis as performed by the FBI "would produce a false positive." (R 1190-3). Accordingly, even the authority relied upon Carroll below supports a finding that DNA testing is reliable and accepted within the scientific community.

The Porter decision however, disapproved of the manner in which the FBI calculated the probability of a coincidental match, on the basis that the methodology utilized had not been generally accepted by the appropriate scientific groups. The judge in Porter, however, was candid enough to recognize that, in excluding the DNA evidence, he was joining "the very short list of courts that have ruled against its admission." (R 1178). Indeed, the judge in Porter, specifically, and correctly, observed, "The vast majority of trial courts and intermediate courts of appeal that have considered the issue have ruled in favor of the admissibility of DNA evidence." (R 1178). Elsewhere in the order, the judge noted that the state supreme courts in eight states - Georgia, Iowa, Kansas, Missouri, North Carolina, South Carolina, South Dakota, Virginia and West Virginia - had all approved the admission of DNA evidence and test results (R 1174-5). The state respectfully suggests that when the only legal authority presented to a trial court indicates, on its face, that it is in the "vast minority" in excluding evidence, such "showing" does not "indicate that there may not be general scientific acceptance of the technique employed." Cf. Correll, supra; Robinson, supra.

Further, the state would note that the data base utilized in Porter is different from that employed by the FBI sub judice. The judge in Porter noted that the data base blood samples had been obtained from blood banks in South Carolina, Miami and Texas (R 1136); apparently, the government had contended therein that the odds of a random match were one in thirty million (30,000,000) (R 1139). In his order, the judge had expressed some concern as to the reliability of the racial breakdown of the samples, in that he felt that in the South, self-identification by donors could be open to question (R 1180). These concerns are not applicable sub judice. Agent Quill testified that the samples utilized in the data bank for comparison in Carroll's case had been obtained from recent FBI recruits, as well as from the Miami/Dade Crime Laboratory, the College of Osteopathic Medicine in Texas, and the Department of Justice in California (R 590). Further, the expert in this case gave a much more conservative estimate of the probability of a random match, one in fifty thousand (50,000) (R 593). This is significant, because when the District of Columbia Court of Appeals reversed the opinion relied by Appellant, see, United States v. Porter, 618 A.2d 629 (D.C. App. 1992), the court specifically instructed the lower court to hold hearings on whether scientific consensus existed as to conservative estimates of probability for random matches. Id. at 642-4. Accordingly, the relevance of the Porter decision, subsequently vacated, to this case, is highly questionable. For all of the above reasons, the court below did not err in failing to hold a more complete inquiry into the admissibility of this evidence.

It is unclear to what extent, if any, Appellant contends that DNA evidence is per se inadmissible. To the extent that such claim is presented, it has been conclusively rejected. While there is not unanimity on this subject, (which, of course, is not required), it is indisputable that state and federal jurisdictions throughout the country have followed Florida's lead in allowing the admission of this type of evidence; this result has been reached through application of a variety of different legal standards for admissibility. See, Annot, Admissibility of DNA Identification, 84 ALR 4th 313 (1991); Andrews, supra; Martinez, supra; Robinson, supra; United States v. Jakobetz, 955 F.2d 786 (2nd Cir.), cert. denied, ___ U.S. ___, 113 S.Ct. 104, 121 L.Ed.2d 63 (1992) (specifically finding admissible, reliable and generally accepted, FBI testing methods and methods of calculating random matches); United States v. Yee, 134 F.R.D. 161 (N.D. Ohio 1991) (same), Prater v. State, 820 S.W.2d. 429 (Ark. 1991) (same, citing Andrews); Rivera v. State, 840 P.2d 933 (Wyo. 1992) (same, citing Martinez); State v. Montalbo, 828 P.2d 1274 (Hawaii 1992) (same, but without cite to Andrews or Martinez); State v. Woodhall, 385 S.E.2d 253 (W.Va. 1993) (approving admission of DNA evidence in general, citing to Andrews); State v. Ford, 392 S.E.2d 781 (S.C. 1990) (same); State v. Pennington, 393 S.E.2d 847 (N.C. 1990) (same); State v. Davis, 814 S.W.2d 593 (Mo. 1991) (same); State v. Brown, 470 N.W.2d 30 (Iowa 1991) (same); People v. Wesley, 589 N.Y.S.2d 197 (A.D. 3 Dept. 1992). In order to prevail on this point, Appellant must demonstrate an abuse of discretion. See, Jent v. State, 408 So.2d 1024, 1029 (Fla. 1981). He had not done so.

Appellant does specifically contend on appeal that the trial court erred in admitting into evidence testimony as to the statistical probability that an individual other than Carroll could have "matched" this DNA, and cites to three out-of-state precedents. These cases are not persuasive.[6] As noted, other courts have specifically found reliable, and accepted, the methodology employed by the FBI in calculating random probability. See, Jacobetz, 955 F.2d at 798-800 (rejecting, based upon expert testimony in district court, defendant's claim that FBI statistical analysis invalid); Yee, 134 FRD at 165-7, 204-7) (same); Prater, 820 S.W.2d at 437-9 (summarily rejecting Porter's finding of lack of acceptance or reliability, and finding FBI's "conservative" methodology reliable and properly admissible); Montalbo, 828 P.2d at 1281-3 (court specifically finds basic techniques underlying FBI's statistical analysis "widely accepted", and further finds that FBI's "conservative" process is biased in favor of the defendant and "over estimates" in his favor to compensate for any error in collecting data). The testimony presented by Agent Quill below certainly suggests that, in Carroll's case, the FBI employed the same "conservative"

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[6] As noted, the appellate decision in Porter suggests that more "conservative" probabilities, such as was provided here, are admissible. The status of the decision from New Mexico, State v. Anderson, 1993 WL 135835 (N.M. App. Jan. 28, 1993), is unclear, given the fact that the New Mexico Supreme Court has granted review. See, State v. Anderson, 848 P.2d 531 (N.M. 1993). The decision of an intermediate California court, People v. Barney, 10 Cal. Rptr. 2d 731 (Cal. App. 1 Dist 1992), is in conflict with a prior California opinion on the subject, People v. Axwell, 1 Cal. Rptr. 2d 411 (Cal. App. 2 Dist. 1991), and at most, found any error in regard to the admission of statistical probabilities derived from the FBI data base to be harmless. Barney, 10 Cal. Rptr. 2d at 747-8).

method of determining statistical probabilities approved by the above courts; this is especially true given the relatively low probability found (R 589-593). Given the insufficiency of any challenge below, the trial court did not abuse its discretion in admitting this testimony as to statistical probability.

The state would also further note that some jurisdictions have found that challenges to this type of statistical analysis, or "interpretation" of random probability in regard to a DNA match, go towards the weight of the evidence and not its admissibility, as the trial court observed in this case. See, Smith v. Deppish, 807 P.2d 144, 153-9 (Can. 1991) (statistics based on population studies are admissible and any challenge to the reliability of the testing goes to the weight, not its admissibility); People v. Lipscomb, 574 N.E.2d 1345, 1359 (Ill. App. 4 Dist. 1991) (same); Hopkins v. State, 579 N.E.2d 1297, 1303 (Ind. 1991) (same); State v. Pierce, 597 N.E.2d 107, 114-5 (Ohio 1992) (same); Commonwealth v. Rodgers, 608 A.2d 1228, 1235-7 (Pa. Super. 1992) (same). While the Porter court and others disagree, the state suggests that this approach is the correct one. As the expert below testified, DNA profiling is an exercise in exclusion; the fact that a match occurs is of great significance. In Jent, this court approved the admission of testimony regarding hair analysis, even though such analysis can never conclusively identify anyone. While the statistical probability of a random match is relevant, and definitely something which a jury should consider in order to assign weight to an expert's testimony, Appellee cannot agree that it is a sine qua non for admission of any DNA evidence. In this case, as

noted, Agent Quill's estimation of probability resulted in a rather low number,[7] and he stated, in answer to defense counsel's questioning, that the profile was not a "fingerprint", and acknowledged that a margin of error existed (R 598-603); in closing argument, defense counsel certainly pointed out that there was no such thing as DNA identification (R 836-7). The fact that some scientists, which defense counsel below never called, apparently disagree with the manner in which the FBI calculates these probabilities is an appropriate subject for cross-examination, but cannot be grounds for wholesale exclusion of this type of evidence. Accordingly, reversible error has not been demonstrated, and the instant conviction should be affirmed in all respects.

B. Reversible Error Did Not Occur During Voir Dire Of Agent Quill

Appellant next contends that the trial committed reversible error when it sustained the state's objection to a defense question during voir dire of Agent Quill; defense counsel asked Quill if the data base utilized by the FBI had been deemed

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[7] Should any error be perceived sub judice, the fact that the probability of a random match was a relatively low one is significant in that courts have previously expressed concern when the probability given is in the billions, such that a jury might believe that the defendant was the only person in the world who could have committed the crime. Cf. Martinez, supra. Here, this statistical testimony served as a link of Carroll to the crime, but was not an overpowering one. This case does not represent an instance in which the defendant had twenty-three alibi witnesses who all testified that he was somewhere else, only to suffer conviction on the basis of the state's DNA evidence, the only thing which would tend to place him at the scene; it must also be remembered that an insanity defense was presented, an assertion which presupposes the defendant's commission of the act. As in Barney, relied upon by Appellant, any error in admission in this evidence was harmless.

inadmissible in the District of Columbia, and the state's objection, on the grounds of relevance, was sustained (R 575). Carroll maintains on appeal that this ruling constituted an impermissible restriction of cross-examination, and deprived the jury of critical evidence. This argument is frivolous. The purpose of voir dire of an expert witness is to determine whether the witness is qualified to offer an opinion; such a determination is a primary question of fact to be determined by the trial court, not the jury. Cf. Rose v. State, 506 So.2d 467, 470 (Fla. 1st DCA 1987); Ehrhardt, Florida Evidence, §702.1 p.493-4 (1993 Edition). Whether or not one jurisdiction out of fifty-one (51) had declared this evidence inadmissible had no relevance to the question of fact before the judge; this is particularly true, given the fact that the Porter decision had previously been found to constitute an insufficient basis to preclude the admission of this expert testimony. The trial court did not abuse its discretion in sustaining the state's objection. Cf. Cruse v. State, 588 So.2d 983, 988 (Fla. 1991) (trial did not err in precluding defendant's attempt to cross-examine state expert on fact that expert had previously been found to have performed an incompetent mental examination in another case; such fact was neither relevant nor proper impeachment).

In this case, counsel's inquiry was not designed for the judge's ears, but rather for those of the jury. It was obviously counsel's intention to embarrass the witness by pointing out that he could not testify in his own backyard; however, given the subsequent holding of the District of Columbia Court of Appeals, such situation may simply turn out to be a temporary

inconvenience. On appeal, Appellant points out, that, during its direct examination of the witness, the state elicited testimony concerning the fact that DNA evidence had been admitted in Florida (Initial Brief at 37-8). This fact is indeed true, but does Carroll little good at this juncture. It is entirely possible that this testimony elicited by the state could, in fact, have authorized defense counsel, on cross-examination of this witness, to ask his question about the District of Columbia. However, the problem for Carroll is that this question was not asked following the state's direct examination, but rather was interposed, completely improperly, during the preceding voir dire; defense counsel clearly could have imposed this inquiry during his cross-examination, and there is no reason to blame the state or the judge for his failure to do so. It should be noted, however, that defense counsel did fully avail himself of the opportunity to cross-examine the expert, and argued in closing argument to the jury all perceived weaknesses in the DNA testimony (R 695-709, 835-7). There has been no demonstration of an abuse of discretion by the court, and the cases relied upon by Appellant, to-wit, Coco v. State, 62 So.2d 892 (Fla. 1953), are completely distinquishable. The instant conviction should be affirmed in all respects.

C. The Trial Court Did Not Err In Denying Appellant's Belated Request For A Continuance

Appellant finally argues that his conviction of first-degree murder and sentence of death must be reversed, due to the trial court's denial of his motion for continuance, interposed on the day before trial. Citing to Hill v. State, 535 So.2d 354 (Fla.

5th DCA 1988), Carroll contends that this constituted an abuse of discretion, in that it was "through no fault of his own" that defense counsel lacked the information to challenge the DNA results (Initial Brief at 41). The state would contend that the denial of Appellant's motion to continue was not, in fact, an abuse of discretion, and would further maintain that Carroll's reliance upon Hill is grossly misplaced.

In Hill, the district court of appeal noted in its opinion that the case had involved "many state-caused delays and questionable tactics." Id. at 355. The court stated that it was "teetering on the brink" of ordering outright discharge of the defendant due to the state's misconduct. While stopping short of that, the court held that the lower court had erred when it denied Hill's motion for a continuance. In that case, the defense had not been able to depose the state's expert witness until 5:00 p.m. on the Sunday before a Monday trial; the next morning, the defense requested a continuance to prepare a defense to the DNA evidence. This court found Hill to be distinguishable in Robinson, supra, another case involving the admission of DNA evidence. In Robinson, the defendant had not received a copy of the state expert's report until the day before trial was to begin, although counsel had telephonically deposed the witness several days earlier. Robinson like Hill, moved for a continuance, "so that the defense could talk to someone else about DNA testimony." Robinson, 610 So.2d 1290. This court held that the trial court had not abused his discretion in denying the continuance, in that Robinson had known for months that the state planned to introduce DNA evidence against him; this court

likewise noted that defense counsel had been able to depose the expert and obtain the test results several days prior to trial.

It should be indisputable that Robinson, and not Hill, controls sub judice. Defense counsel below had known for approximately seven months prior to trial, i.e. since August of 1991, that the state intended to introduce DNA evidence against his client; indeed, defense counsel stated below that he had received the test results from the expert in September of 1991 (R 67). Counsel was able to depose the FBI expert in Washington, D.C. on February 4, 1992, approximately one and a half months prior to trial; it is likely that the defense attorney in Robinson would have been more than eager to change places with defense counsel sub judice. Despite all this lead time, it is obvious that defense counsel sub judice did very little to prepare a response to the DNA evidence; as noted, when he filed the motion in limine, he announced, at the time of hearing, that he was not prepared and had no evidence to offer.

The "explanation" for this state of affairs offered at trial and on appeal (R 68; Initial Brief at 41), to the effect that the matter of Carroll's competence to stand trial somehow precluded counsel from attending to this matter, is patently unconvincing. The matter of Carroll's competence was litigated in November of 1991, four months prior to trial; although the judge did not formally rule until the next month, it is unclear what, if any, further investigation counsel was performing in regard to this matter after the hearing. Further, no showing has been made that counsel was unable to investigate two very unrelated matters at the same time, and the other excuse proffered, i.e., counsel's

alleged inability to secure the DNA data base from the FBI (R 67; Initial Brief at 41), similarly rings hollow. As the state pointed out at the hearing below, defense counsel never brought to the court's attention any discovery problem which he might have been encountering (R 69), and the state suggests that due diligence has not been demonstrated, in any respect. Further, the state would note that in State v. Dykes, 847 P.2d 1214, 1218 (Kan. 1993), the Kansas Supreme Court rejected a claim of error involving an alleged discovery violation involving the FBI DNA data base. As here, the defendant had contended that he needed access to that data base so that he could attack its reliability. The state supreme court noted that some of the matters contained therein, such as the identification of the donors, were privileged or unavailable, and also observed,

> The defendant has been unable to show how the requested materials were relevant to his case. In a nutshell, the defendant claims that he needed the information to attack the data base of (sic) a theory 'unanimously accepted amongst scientists and lawyers.' The defendant's request can be characterized as a mere entertaining of hope that something of aid may be discovered. The information was not relevant or material to the preparation of his defense. (Citation omitted). .

The logic of Dykes is compelling.

In Florida, it is well established that a trial court's ruling on a motion for continuance will not be disturbed on appeal, absent an abuse of discretion. See, e.g., Williams v. State, 438 So.2d 781, 785 (Fla. 1983); Lusk v. State, 446 So.2d 1038, 1040-1 (Fla. 1984). This court has applied this legal principle in other capital cases, including those where the

alleged basis for the continuance was the need to obtain evidence to counter expert testimony presented by the state. See, Echols v. State, 484 So.2d 568, 572 (Fla. 1985); Robinson, supra. The continuance sought sub judice was not for a limited period of time, nor was there any specific identification of the persons, if any, whom the defense wished to testify. Cf. Wike v. State, 596 So.2d 1020, 1025 (Fla. 1992). Rather the continuance sub judice was an open-ended request for indefinite postponement of the trial, so that investigation could be undertaken, an investigation whose purpose had been known for months. Given the lack of due diligence, the trial court did not abuse its discretion in denying this motion for continuance. See, e.g., Coney v. State, 258 So.2d 497 (Fla. 3rd DCA), cert. denied, 262 So.2d 448 (Fla. 1972), (trial court did not err in denying continuance, where trial had been set for a considerable period of time and defense had not taken any steps to secure presence of witness); Johns v. State, 24 So.2d 708 (Fla. 1946) (defendant who seeks continuance of trial must set forth what prospective witnesses would say). Alternatively, given the speculative nature of Appellant's request, any error in this regard was harmless, cf. Richardson v. State, 604 So.2d 1107 (Fla. 1992); likewise, given the sophisticated cross-examination actually performed at trial (R 595-609), it is clear that defense counsel sub judice was not a complete stranger to DNA. The instant conviction should be affirmed in all respects.

POINT V

APPELLANT'S SENTENCE OF DEATH IS SUPPORTED BY VALID AGGRAVATION, AND REVERSIBLE ERROR HAS NOT BEEN DEMONSTRATED IN REGARD TO THE SENTENCER'S FINDINGS IN AGGRAVATION AND MITIGATION

Following the jury's return of a unanimous recommendation of death, Judge Perry sentenced Carroll to death, finding that three aggravating circumstances applied - that the homicide had been committed by one with prior conviction for crimes of violence, §921.141(5)(b), Fla.Stat. (1989), that the homicide had been committed during the course of a sexual battery, §921.141(5)(d), Fla.Stat. (1989), and that the homicide had been especially heinous, atrocious or cruel, §921.141(5)(h), Fla.Stat. (1989) (R 1304-1309); the court found that no statutory mitigating circumstances applied, but expressly found as non-statutory mitigation the fact that Carroll suffered from "some possible mental abnormalities and has an anti-social personality." (R 1313). On appeal, Appellant contends that the finding of the last-mentioned aggravating circumstance was error, in that the evidence supporting such was allegedly lacking, and also attacks the instruction given the jury on this aggravating factor, in light of Espinosa v. Florida, ___ U.S.___, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992). Additionally, Appellant contends that the judge erred in failing to find the statutory mitigating circumstances relating to mental state, and, allegedly, in failing to consider all non-statutory mitigation proffered, under Campbell v. State, 571 So.2d 415 (Fla. 1990). The state would contend that reversible error has not been demonstrated, and that the instant sentence of death should be affirmed in all respects.

A. The Heinous, Atrocious And Cruel Aggravating Circumstances Was Properly Found; Any Claim Based Upon Espinosa v. Florida Is Procedurally Barred And/Or Harmless

Appellant contends that this aggravating circumstance was improperly found, because there is allegedly insufficient evidence to establish that Carroll "intended" the victim to suffer and/or to the effect that she actually did, either mentally or physically. Appellee respectfully contends that only the commendable need for zealous advocacy can explain the presentation of this point on appeal. This case involves the brutal sexual battery and strangulation of a ten-year-old child, which occurred, in all likelihood, at knifepoint, in her own bed in the dead of night. The medical examiner's testimony, to the effect that even if her airway had been completely obstructed, the victim would still have had several minutes of fear, panic, apprehension and awareness of impending death, is unrebutted (R 898-899). The doctor testified that the wounds to the victim's lip were consistent with the victim struggling as a hand was held over her mouth (R 902-903); the presence of bloodstains on her hands, in a location in which no wound existed, is consistent with her trying to fend off the sexual battery, which caused extensive bleeding and injury to her vagina (R 417-418). Considering the fact that the medical examiner testified that the pain which she endured as Carroll attempted to penetrate her, both vaginally and rectally, was "comparable to that experienced during childbirth" (R 899-901), it strains credulity to believe that the victim in this case experienced no physical pain. This

court has consistently upheld the finding of this aggravating factor under comparable circumstances. See, e.g., Capehart v. State, 583 So.2d 1009, 1015 (Fla. 1991) (aggravating circumstance properly where victim sexually assaulted and smothered; victim would have remained conscious for one to two minutes and would have experienced foreknowledge of death as well as anxiety and fear); Sanchez-Velasco v. State, 570 So.2d 908, 916 (Fla. 1990) (aggravating circumstance properly found where eleven-year-old child raped and strangled; medical expert testified that child was alive for at least three minutes after defendant began to choke and rape her, and that she suffered panic "of not being able to breathe.").

As noted, Appellant contends that this aggravating circumstance was wrongfully applied, in that there was no evidence to suggest that Carroll "intended" to torture the victim. As support for this proposition, Appellant cites to Santos v. State, 591 So.2d 160, 163 (Fla. 1991), and Cheshire v. State, 568 So.2d 908, 912 (Fla. 1990). While it is true that in each decision, this court, inter alia, observed that there had been no showing that the defendant intended to inflict a great deal of pain upon the victim, this observation was made in the course of the vacation of this aggravating circumstance, found in situations involving relatively "quick" shooting deaths, occurring during the "heat of passion." This court has consistently recognized that the mindset or the mental anguish of the victim is an important factor in determining whether this aggravating circumstances applies. See, e.g., Phillips v. State,

476 So.2d 194, 196-197 (Fla. 1985). In determining whether this aggravating circumstance applies, a sentencer is entitled to apply common sense inferences from the circumstances. See Gilliam v. State, 582 So.2d 610, 611-612 (Fla. 1991) (aggravating circumstance properly found, where victim attacked and strangled; defendant's contention that victim's consciousness insufficiently proven rejected). Even if it could be said that the record does not support any finding that the victim suffered physical pain during her torturous murder (a finding which the record would not support), under this court's caselaw, the testimony of the medical examiner to the effect that the victim would have been conscious during her strangulation, and would have suffered fear and anxiety at such time, validates the finding of this aggravating circumstance. See, e.g., Sochor v. State, 18 Fla.L.Weekly S273, S275 (Fla. May 6, 1993) ("It can be inferred 'that strangulation, when perpetrated upon a conscious victim, involves foreknowledge of death, extreme anxiety and fear, and that this method of killing is one to which the factor of heinousness is applicable.'"); Rivera v. State, 561 So.2d 536, 540 (Fla. 1990); Tompkins v. State, 502 So.2d 415, 421 (Fla. 1986); Doyle v. State, 460 So.2d 353, 357 (Fla. 1984); Adams v. State, 412 So.2d 850, 857 (Fla. 1982). The trial court did not err in finding that this truly was a homicide which was conscienceless, pitiless and unnecessarily torturous to the victim.

As noted, Appellant also argues that the jury instruction on this aggravating circumstance violated Espinosa v. Florida, ___

U.S.___, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992). Initially, the state would note that the instruction given in this case is not, in fact, the instruction condemned in Espinosa. Rather, the instruction used sub judice contains a full definition of each of the statutory terms, as well as an admonition to the jury to the effect that what is intended to be included is a crime accompanied by additional acts, such that the crime is conscienceless, pitiless or unnecessarily torturous to the victim (R 954). This court has previously held that this instruction passes constitutional muster. See, e.g., Preston v. State, 607 So.2d 404, 407 (Fla. 1992), cert. denied, ___ U.S. ___, 113 S.Ct. 1619, 123 L.Ed.2d 178 (1993); Hall v. State, 614 So.2d 473, 478 (Fla. 1993). Further, contrary to representation in the Initial Brief (Initial Brief at 46), this claim is not preserved for review.

The record indicates that defense counsel filed no proposed penalty phase jury instructions. During the charge conference, defense counsel objected to any instruction on the aggravating circumstance relating to "avoid arrest", on the grounds that the evidence did not support such (R 920). When the court proposed instructing the jury on the heinous, atrocious or cruel aggravating circumstance, defense counsel stated, "I object to that." (R 921); the objection was overruled (R 921). Following all of the instructions, defense counsel, after much prodding from the trial court, stated that he "renewed" his prior objections (R 957-958). Appellee respectfully suggests that this "objection" is too generalized to preserve any claim of error for

appellate review, in regard to the wording of the jury instruction. See, e.g., Bertolotti, supra (the specific legal ground upon which a claim is based must be presented to the trial court, in order to preserve an issue for appeal); Occhicone v. State, 570 So.2d 902, 906 (Fla. 1990) (same); Wenzel v. State, 459 So.2d 1086, 1087-1088 (Fla. 2nd DCA 1984) (claim of error in regard to trial court's failure to specifically instruct jury on underlying felony in third-degree murder not preserved for review, where defense counsel only stated, "I also object to the third-degree murder charge as it is given."); Kennedy v. Singletary, 602 So.2d 1285 (Fla.), cert. denied, ___ U.S. ___, 113 S.Ct. 2, 120 L.Ed.2d 931 (1992) (constitutional challenge to wording of jury instruction not preserved, where only objection at trial was to applicability of aggravating factor). Accordingly, this claim is procedurally barred.

Further, on the facts of this record, it is beyond dispute that counsel's only "objection", such as it was, had to do with the court's giving of an instruction on this aggravating circumstance. After the judge had initially advised the parties that he was going to instruct the jury on this aggravating factor, he called the parties back into chambers, and advised them that he had just discovered that the standard jury instruction had been modified (R 929). The following then took place:

> THE COURT: Mr. Taylor, Mr. Ashton, Ms. Wilkinson. There's one think I'd like to note dealing with number eight on the list of aggravating circumstances. Originally, we had indicated at charge conference I would give the following, the crime for which the

> defendant is to be sentences was especially wicked, evil, atrocious or cruel.
>
> After the three of you had left, I read sometime ago that the Florida Supreme Court changed that instruction. That was changed by the Florida Supreme Court. It will be found at 579 So.2d page 75, June 21st, 1990. I will read what has been changed. The crime for which the defendant was to be sentenced was especially heinous, atrocious and cruel and pursuant to Dickon versus State and explain to them what is meant by those particular terms. That was the only change that I had to make while you were gone.
>
> The one that we previously had was incorrect. Any objection on behalf of the state or the defense?
>
> MS. WILKINSON: None from the state, Your Honor.
>
> MR. TAYLOR [Defense counsel]: No, Your Honor.

(R 929) (emphasis supplied).

A clearer example of waiver would be difficult to imagine. See, e.g., Gunsby v. State, 574 So.2d 1085, 1089 (Fla. 1991) (defendant could not assert error on appeal in regard to jury instruction which he had expressly approved in trial court); Walton v. State, 547 So.2d 622, 625 (Fla. 1989) (defendant could not assert error in regard to penalty phase jury instruction to which he had stipulated in trial court); White v. State, 446 So.2d 1031, 1036 (Fla. 1984) (discussion of invited error doctrine); Lucas v. State, 376 So.2d 1149, 1152 (Fla. 1979) (where defense counsel defers to judge's statement of the law, it will not be presumed that judge would have made erroneous ruling, had objection been interposed). No claim of error has been preserved for review in regard to the constitutionality of the jury instruction sub judice.

Without waiving the above procedural argument, Appellee would simply observe that it would not be inappropriate for this court to make an alternative finding of harmless error, should it so desire, as it has done in other cases. See, e.g., Kennedy, supra. As the sentencing judge correctly observed, "If any case meets the definition of heinous, atrocious or cruel, it is this case." (R 1308). This court has found alleged Espinosa error to be harmless beyond a reasonable doubt when, under the facts of the case, the murder was clearly heinous, atrocious or cruel, "under any definition of those terms." See, e.g., Slawson v. State, 18 Fla.L.Weekly S209, S211 (Fla. April 1, 1993); Thompson v. State, 18 Fla.L.Weekly S212, S214 (Fla. April 1, 1993); Henderson v. Singletary, 18 Fla.L.Weekly S256 (Fla. April 19, 1993), cert. denied, ___ U.S. ___, 113 S.Ct. 1891, 123 L.Ed.2d 507 (1993); Happ v. State, 18 Fla.L.Weekly S305 (Fla. May 10, 1993) (error found harmless in case involving strangulation). Additionally, of course, in Sochor v. Florida, ___ U.S. ___, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992), the United States Supreme Court expressly recognized that this court has consistently found this aggravating circumstance applicable to homicides involving the strangulation of a conscious victim. Any jury instruction error sub judice was harmless beyond a reasonable doubt. The instant aggravating circumstance was properly found, and Carroll's sentence of death should be affirmed in all respects.

B. Reversible Error Has Not Been Demonstrated In Regard To The Sentencer's Findings In Mitigation

Appellant also contends that Judge Perry committed reversible error, in his handling of the statutory and nonstatutory mitigation allegedly proffered. Appellant specifically argues that reversible error has occurred under Campbell v. State, supra, and Nibert v. State, 574 So.2d 1059 (Fla. 1990), in that allegedly uncontraverted evidence was presented as to Carroll's alleged abuse as a child, chronic drug and alcohol abuse, and below average intelligence. Appellant further argues that the testimony of the mental health experts during the guilt phase established the existence of the two statutory mitigating circumstances relating to mental state, §§921.141(6)(b) & (f), Fla.Stat. (1989) (Initial Brief at 48-52). The state disagrees. The sentencing order in this case indicates beyond any reasonable doubt that Judge Perry fully considered all of the proffered mitigation (R 1309-1314). His conclusions are amply supported by the record, and the instant sentence of death should be affirmed in all respects.

In his sentencing order, Judge Perry recounted all of the psychiatric testimony presented at the trial, in detail (R 1309-1311); the fact that the judge discussed each expert's findings as to Carroll's sanity and competence does not mean that he applied the wrong legal standard, as implied in the Initial Brief (Initial Brief at 47), but, rather, simply indicates that he was thorough. Cf. Ponticelli v. State, 593 So.2d 483, 490 (Fla. 1991), reversed on other grounds, ___ U.S. ___, 113 S.Ct. 32

(1992), reinstated, Ponticelli v. State, 18 Fla.L.Weekly S309 (Fla. May 27, 1993) (not error for sentencer to discuss expert's conclusions as to defendant's sanity and competence in rejecting statutory mitigation). The judge noted that Carroll had allegedly been unable to recount to any expert his actions at the time of the murder, and further noted that one of the defense experts had not been at all sure as to his conclusions; he likewise noted that another defense expert had been unable to state whether Carroll had known right from wrong at the time of the incident (R 1309-1312). The judge similarly noted that one of the state's experts had testified that Carroll was malingering, and that another had expressly stated that Appellant's claim of amnesia was not accurate; this expert had likewise opined that Carroll had known the nature and consequences of his actions, and their wrongfulness, at the time of the murder (R 1309-1311). The judge specifically found that the following facts had been established: (1) that Carroll had stealthily entered the victim's home without detection; (2) that he had prevented the victim from screaming; (3) that he had stolen Robert Rank's truck to effectuate his escape; (4) that he had subsequently been seen by two individuals at a 7-11 at around 6:00 a.m., and neither had witnessed any bizarre behavior on his part, and (5) that the law enforcement officers who had come into contact with Carroll on the morning and afternoon following the murder likewise reported no bizarre or unusual behavior on his part (R 1311-1312). The judge noted that there had been no testimony from any witness to the effect that Carroll had been

exhibiting bizarre behavioral characteristics at the time of the murder (R 1312); as noted earlier, the judge did find, as non-statutory mitigation, the fact that Carroll apparently had some mental abnormalities.

This court has consistently held that the determination as to whether a mitigating circumstance has been established is within the trial court's discretion, see, e.g., Hall, supra, Preston, supra, whose responsibility it is to resolve any conflicts in evidence. See Sireci v. State, 587 So.2d 450, 453 (Fla. 1991). A trial court's ruling in this regard will not be disturbed on appeal, as long as there is competent, substantial evidence to support it. See Johnson, supra; Preston, supra. As the trial court below correctly noted, this court held in Bates v. State, 506 So.2d 1033, 1034 (Fla. 1987), that a sentencer need not accept even uncontradicted expert testimony, as to the applicability of the statutory mitigating circumstances. While the trial court was correct in recognizing this legal principle, it had no application to Carroll's case. This is because the defense presented no expert testimony, to the effect that any statutory mitigating circumstance existed; while the defense did present expert testimony during the trial, such evidence related solely to Carroll's alleged sanity, and absolutely no testimony was offered as to the applicability of the statutory mitigating circumstances. Given the fact that the defense offered no evidence as to the effect that §§921.141(6)(b) & (f) applied sub judice, it is difficult to see how the trial court could have abused his disrection in finding them inapplicable. Cf. Nibert,

supra (abuse of discretion to reject statutory mitigating circumstance, where defense expert had testified without equivocation or contradiction that such applied).

Further, the judge's reasons for rejecting the statutory mitigating circumstances are all in accordance with this court's caselaw. Thus, the judge's primary reason for finding that, at the time of the murder, Carroll had not been under the influence of extreme mental or emotional disturbance, and/or that he had not suffered any substantial impairment to his ability to conform his conduct to the requirements of the law, was based upon the fact that Carroll's actions at such time had been purposeful, intentional and well-executed. This court has upheld the rejection of these statutory mitigating circumstances based on comparable reasoning. See, e.g., Lucas v. State, 613 So.2d 408, 410 (Fla. 1992) (trial court did not err in rejecting mental mitigators, where defendant's actions were "purposeful" at time of murder); Johnson, 608 So.2d at 12, 13 (trial court did not err in rejecting defendant's contention that he was under the influence of extreme mental or emotional disturbance at time of murder, due to drug use, where there was "too much purposeful conduct" on defendant's part); Preston, 607 So.2d at 411-412 (statutory mitigating circumstances properly rejected where defendant's actions at time of murder indicated that he was "capable of planning and of deliberate thought"; such actions inconsistent with impairment due to "poly-substance abuse"); Davis v. State, 604 So.2d 794, 798 (Fla. 1992) (statutory mitigating circumstances properly rejected, despite testimony of

two defense experts, where defendant's methodical behavior at time of murder inconsistent with alleged drug use); Cook v. State, 581 So.2d 141, 143-144 (Fla. 1991) (statutory mitigating circumstances properly rejected, despite expert testimony concerning defendant's alleged substance abuse, where defendant's actions at time of murder indicated "logical (albeit criminal) progressions of thought"). Error has not been demonstrated in this regard.

Further, even had the mental health experts offered any express testimony as to the applicability of these statutory mitigating circumstances, such opinions would have been based on sheer speculation. Despite the experts' generalized testimony as to Carroll's alleged mental problems, Carroll was, allegedly, unable to recall anything about the murder and/or his mental state at such time; one expert, Dr. Danziger, stated that his conclusion as to sanity was "reached without much certainty" (R 676, 718), and simply represented an extrapolation based upon accounts of Carroll's behavior before and after the incident. Cf. Ponticelli, supra (not abuse of discretion for sentencer to rejected statutory mitigating circumstances, where defense experts' testimony "speculative", in that defendant never discussed his mental processes as the time of the murder with expert, and where defendant's actions at time refuted impairment). Judge Perry was correct in finding that all of the those who had come into contact with Carroll after the murder - Piper, Wasilewski, McDaniel and Young - had testified that Carroll had displayed absolutely no signs or irrationality or impairment.

While there was testimony presented as to Carroll's behavior on the night prior to the murder, such testimony hardly unequivocally supported either mitigating circumstance. Initially, it must be noted that Margaret Powell, the director of the mission, had testified that she had had a conversation with Carroll at this time, and that he had been "functioning like anyone else" (R 628-632). Although Carroll put on a performance for the benefit of various bar patrons, his true intent, and lack of impairment, showed through. The state respectfully suggests that is highly unlikely that one who truly suffers from a mental disease or impairment would interrupt his ostensible bizarre behavior and ask his audience if they thought that he was crazy (R 641-642). Likewise, Carroll's statements to the two bartenders revealed his true mindset; he asked one if she could give him a gun or knife and told the other that he was in love with "something that he could not have." (R 637, 643). Further, in rejecting the application of the statutory mitigating circumstances, the judge could properly take into account the lack of certainty expressed by the defense experts, i.e., Dr. Benson's concession that he had no idea what had been in Carroll's mind at the time of the crime (R 763-765). The sentencer could likewise credit any contrary testimony from the state experts, i.e., to the effect that Carroll was malingering, that his account of alcoholic blackout was fraudulent and that he had, in fact, known what he was doing at the time of the murder, known that it was wrong and had appreciated the nature and quality of his actions (R 510, 793, 794). Cf. Sireci, supra.

No reading of the record would support any conclusion that the mitigating circumstances at issue were reasonably established by the greater weight of the evidence, cf. Campbell, supra, Nibert, supra, and the sentencer did not abuse his discretion in finding that, at most, Carroll's alleged mental problems constituted only nonstatutory mitigation. Cf. Gunsby, supra (abuse of discretion not demonstrated in sentencer's rejection of expert testimony, and conclusion that defendant's alleged diminished capacity constituted only nonstatutory mitigation). Error has not been demonstrated in this regard.

A similar result obtains as to the nonstatutory mitigation. This court held in Lucas v. State, 568 So.2d 18, 23-24 (Fla. 1990), that it was the obligation of the defense to identify for the court the nonstatutory mitigating circumstances which it was seeking to establish. Appellee questions whether the defense sub judice satisfied that requirement. Defense counsel's position, both in closing argument to the jury and in argument to the judge at sentencing, was that the evidence presented established the two statutory mitigating circumstances relating to mental state (R 947-952, 969-970); while counsel did, at one point, refer to the documentary evidence relating to Carroll's alleged molestation as a child, he did so as part of his argument that the two statutory mitigating circumstances should apply (R 951). The state respectfully suggests that when the judge found Carroll's "possible mental abnormalities" as nonstatutory mitigation, he was, in fact, weighing the nonstatutory mitigating factors in the only context that defense counsel asked him to do

so. To the extent that there is any ambiguity, it is the fault of defense counsel, and not the judge. See Lucas, supra; Hodges v. State, 595 So.2d 929, 934-935 (Fla.), vacated on other grounds, ___ U.S. ___, 113 S.Ct. 33 (1992), reinstated, Hodges v. State, 18 Fla.L.Weekly S255 (Fla. April 15, 1993) (sentencer's failure to specifically discuss nonstatutory factors relating to defendant's childhood attributable to defense's failure to point out to court nonstatutory mitigation allegedly established).

Appellant contends on appeal that Judge Perry "glossed over" such nonstatutory factors as Carroll's alleged abuse and molestation as a child, his chronic alcohol and drug abuse and his allegedly below normal intelligence (Initial Brief at 50-51). Appellee respectfully questions whether these matters can be said to have been "reasonably established by the record." See Rogers v. State, 511 So.2d 526, 534-535 (Fla. 1987). Carroll's allegedly "below average intelligence" undisputably was not. The state expert testified that Carroll had malingered on his IQ test, and that his intelligence was, in fact, in the average range (R 512); the sentencer could have chosen to credit this testimony. See Sireci, supra. The only evidence adduced as to alleged abuse or molestation was the hearsay testimony of one defense expert, and the introduction of one 1969 two-page document; the state respectfully submits that these matters were not established. See Rogers, supra (defendant's claim of childhood trauma not supported by the record where only "evidence" was hearsay statement by defendant in PSI).

Further, in order to constitute mitigation, a matter must somehow extenuate or reduce the degree of moral culpability for the crime committed. Rogers, supra. Given the fact that there was no express testimony from any expert as to any relationship between Carroll's alleged substance abuse and the instant offense, the state respectfully suggests that the sentencer below did not err in failing to expressly find these matters as mitigation. Cf. Johnson, supra (defendant's self-imposed disability through drug use not mitigating, given purposeful actions at time of murder); Sochor v. State, supra (difficult to discern whether defendant's self-imposed intoxication "mitigating"). Alternatively, to the extent that any error can be said to have been demonstrated, such was unquestionably harmless beyond a reasonable doubt, given the convincing evidence in aggravation and lack of other substantial mitigation; the judge would unquestionably have otherwise imposed the death sentence. See, e.g., Cook, supra (sentencer's failure to expressly discuss nonstatutory mitigation harmless error); Wickham v. State, 593 So.2d 193, 194 (Fla. 1992) (sentencer's failure to weigh nonstatutory mitigation regarding defendant's abusive childhood, alcoholism and extensive history of hospitalization for schizophrenia harmless error, given "very strong case for aggravation"); Pace v. State, 596 So.2d 1034, 1036 (Fla. 1992) (even if one or more nonstatutory mitigating circumstances erroneously excluded from consideration or weighing, error harmless, where court convinced judge would still have imposed death); Stewart v. State, 18 Fla.L.Weekly S294 (Fla.

May 13, 1993) (sentencer's failure to consider mental health evidence as nonstatutory mitigation harmless error).

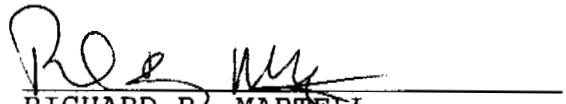
Finally, Appellee would contend that the death sentence in this case is, in fact, proportionate, and that this court has affirmed capital sentences in comparable cases. See, e.g., Power v. State, 605 So.2d 856 (Fla. 1992) (death sentence appropriate in instance in which defendant, with prior record, sexually battered and murdered child); Sanchez-Velasco, supra (death sentence appropriate in case in which defendant sexually battered and choked child to death; mitigating evidence as to mental state "not without equivocation"); Rivera, supra (death sentence appropriate in case involving rape and choking of young girl, where defendant had prior record, and where aggravation outweighed fact that defendant committed crime while under influence of extreme mental or emotional disturbance); Smith v. State, 515 So.2d 182 (Fla. 1987) (death sentence appropriate where no mitigation found, and where defendant, with prior record, sexually battered and beat child to death); Jennings, supra (death sentence appropriate, where child sexually battered and murdered, and where evidence in mitigation "in conflict"); Tompkins, supra (death sentence appropriate where defendant with prior record sexually battered and strangled child; aggravation outweighed nonstatutory mitigation); Adams, supra (death sentence appropriate, where defendant sexually battered and strangled child; aggravating circumstances outweighed statutory mitigating circumstances, including one in regard to defendant's mental state). The instant sentence of death should be affirmed in all respects.

CONCLUSION

WHEREFORE, for the aforementioned reasons, the instant conviction of first-degree murder and sentence of death should be affirmed in all respects.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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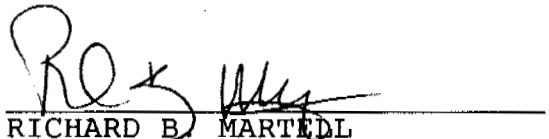
Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Mr. James R. Wulchak, Esq., and Christopher S. Quarles, Esq., Office of the Public Defender, Seventh Judicial Circuit, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114, this 14th day of June, 1993.



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