IN THE SUPREME COURT OF FLORIDA

STEPHEN SMITH,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC06-1903
Lower Tribunal No. 03-1526F

ON APPEAL FROM THE CIRCUIT COURT
OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR CHARLOTTE COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF THE APPELLEE

BILL McCOLLUM
ATTORNEY GENERAL

STEPHEN D. AKE
Assistant Attorney General
Florida Bar No. 0014087
Concourse Center 4
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501

COUNSEL FOR APPELLEE

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PRELIMINARY STATEMENT

Citations to the record on appeal will be referred to by the appropriate volume number followed by the page number.

STATEMENT OF THE CASE

Appellant, Stephen Smith, and two other inmates housed at Charlotte Correctional Institution (CCI), Dwight Eaglin and Michael Jones,[1] were indicted and charged with two counts of first degree murder for the deaths of CCI Correctional Officer Darla K. Lathrem and fellow inmate Charles Fuston during an attempted escape.[2] (V1:1-2). Appellant's trial counsel filed numerous pre-trial motions and challenges to Florida's death penalty scheme. The motions relevant to the issues raised in this direct appeal will be addressed by Appellee in the

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[1]Appellant notes in his initial brief the "similar cases" of Dwight Eaglin v. State, SC06-760, and Michael Jones v. State, lower court case number 03-1527. Appellant attempts to "incorporate by reference" the Jones case (Jones never appealed his life sentence) and the entire record on appeal in Eaglin's capital case. Initial Brief at xiii and 39. As this Court stated in Johnson v. State, 660 So. 2d 648, 652 (Fla. 1995), "[t]he attempt to cross-reference a brief from a separate case is impermissible under any circumstances because it may confuse factually inapposite cases, it leaves appellate courts the task of determining which issues are relevant (which is counsel's role), and it circumvents the page limit requirements. As a general rule, cross-referencing of records is contrary to the holdings" in Wuornos v. State, 644 So. 2d 1012 (Fla. 1994) and Jackson v. State, 575 So. 2d 181 (Fla. 1991). Accordingly, this Court should reject Appellant's attempt to incorporate by reference the record on appeal in Eaglin.

[2]The State subsequently filed a notice of *nolle prosequi* as to count II of the indictment charging Appellant with the murder of Charles Fuston. (V20:3758, 3798).

argument section of this brief. The Honorable William L. Blackwell presided over the jury trial conducted in this case on June 19-23, 2006. The jury returned a verdict finding Appellant guilty of the first degree murder of Darla Lathrem under both theories of prosecution; premeditation and felony murder.[3]

At the penalty phase proceeding the following week, the State introduced evidence regarding Appellant's prior convictions for murder committed in the course of a burglary and robbery in Broward County, home invasion and sexual assault of a teen-aged child in Broward County, and a conviction for sexual assault of his younger sister with a knife while living in Rhode Island. At the time of the instant murder, Appellant was serving multiple consecutive life sentences at Charlotte Correctional Institution. (V38:204-06). As will be discussed in more detail, infra, Appellant presented numerous witnesses at the penalty phase

[3]The verdict form indicated that the jury found Appellant guilty of first degree premeditated murder; first degree murder while engaged in the perpetration of, or in the attempt to perpetrate a felony, to wit: escape; and first degree murder while engaged in the perpetration of, or in the attempt to perpetrate a felony, to wit: resisting an officer with violence. (V20:3852).

proceeding to establish mitigating circumstances.[4] After hearing all of the evidence, the jury recommended that Appellant be sentenced to death by a vote of 9-3. (V20:3909).

At the Spencer hearing on July 27, 2007, Appellant testified that the killing of Darla Lathrem should not have happened and he expressed his condolences to the victim's family. (V42:999-1000). Appellant also voiced his opinion that the State had argued in codefendant Eaglin's trial that Eaglin was the ringleader and mastermind, and in his trial, the State argued that he was the mastermind and ringleader. (V42:1000). The State did not present any additional information at the Spencer hearing.

On August 18, 2006, the trial judge followed the jury's recommendation and sentenced Appellant to death for the murder of CCI Correction Officer Darla Lathrem. The court found the following five aggravating circumstances: (1) the capital felony was committed by a person previously convicted of a felony and under a sentence of imprisonment; (2) Appellant was

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[4]Appellant presented evidence from his family members (mother, uncle, brother, and two sisters), an attorney and a social worker from Rhode Island, and a psychiatrist. In addition, Appellant presented evidence from numerous correctional officers/consultants in an attempt to demonstrate how the victim's position at CCI placed her in a vulnerable position.

previously convicted of another capital offense or of a felony involving the use or threat of violence to the person; (3) the capital felony was committed for the purpose of effecting an escape from custody; (4) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification; and (5) the victim of the crime was a law enforcement officer engaged in the performance of her official duties.[5] (V21:3961-63). In mitigation, the court found that defense counsel presented an abundant amount of evidence regarding Appellant's dysfunctional family background and gave this factor great weight. The court also found mental and emotional health issues were established. Specifically, the court found that Appellant had a history of depression, Attention Deficit Disorder, and chronic substance abuse, and gave these factors some weight. (V21:3963-64). The court gave Appellant's expression of remorse little weight. The court rejected the argument that the failure of officials at CCI to properly administer the prison and to properly supervise the inmates was in some way a mitigating factor in this case. The court ultimately concluded that the

[5]The court did not find aggravating factor (5) to be an additional aggravating factor because it merged with aggravating factor (3). (V21:3963).

aggravating circumstances in this case greatly outweighed the mitigating circumstances and sentenced Appellant to death.

STATEMENT OF THE FACTS

While serving multiple life sentences at Charlotte Correctional Institution (CCI), Appellant began planning an escape attempt. Fellow CCI inmates Kenneth Lykins and Jessie Baker each testified to hearing Appellant discuss his escape plans on a number of occasions.[6] (V31:585-606, 663-86). Lykins testified that he arrived at CCI in October, 2002, and after being released from closed management (CM) status, he was placed in F dorm and shared a cell with Appellant. (V31:569-71, 590). Sometime around January or February, 2003, Lykins observed Appellant looking out a window and Appellant stated that he wanted to "try these crackers again." Lykins testified that this meant Appellant wanted to escape again. (V31:590-92). The last time Appellant had attempted to escape, another inmate, John Beaston, had snitched on him. (V31:590-92).

After the inmates had moved to another dorm due to the construction renovations, Lykins again heard Appellant

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[6] Appellant, codefendant Michael Jones, Lykins, and Baker were all inmates that were working as inmate plumbers on a construction crew performing renovations to CCI in 2003. (V31:582). In mid-2003, the plumbing crew worked almost daily with members of the inmate fence/welders crew made up of codefendant Dwight Eaglin, murder victim Charlie Fuston, and John Beaston. (V31:582).

discussing his escape plans. Appellant and Michael Jones were both going to attempt to go over the fence, but they had not figured out how they were going to do it at that time. (V31:593). About a month before the murder, while housed in yet another dorm, Lykins heard the majority of the discussions about the escape plans. Appellant and Jones planned to build ladders to go over the fences, but their initial attempt to build a homemade ladder failed to support Jones' weight. (V31:594-95). Because their homemade ladder did not work, they planned on using the prison ladders from the tool room. Appellant planned to drill holes into the ladders and use metal braces to make the ladders sixteen feet high by twenty-three feet across. (V31:595). By this time, Dwight Eaglin had also joined in with the planned escape because Smith and Jones were not healthy enough to pull off the physical aspects of it. (V31:597-98, 606). As part of this plan, Eaglin would go between CCI's two perimeter fences and wait for the gun truck to drive by.[7] Because it was summer, they anticipated

[7]The two perimeter fences at CCI were approximately twelve feet high and twenty feet separated the inner and outer fences. The fences also contained razor wire at the top and bottom. (V33:907-08). The photographs and exhibits introduced at trial, including those of the fences and ladders, are currently not part of the appellate record and are the subject of Appellee's motion to supplement the record

that the driver of the gun truck would have his window down and Eaglin would be able to strike him with a hammer. (V31:596-97). The three inmates (Appellant, Jones and Eaglin) planned to go before the construction project was completed because, otherwise, they would not have access to the ladders.[8] (V31:600-01).

The inmates attempted to go before the construction process moved to A dorm, but they were unable to. Their last chance to implement the ladder plan was during the construction of A dorm. In order to facilitate their plans, Appellant, an inmate plumber, volunteered for the welding crew so that he could work at night in A dorm. (V31:601-02). Appellant told Lykins that they wanted to go when they were supervised at night by a female guard. (V31:603). Appellant indicated that before he escaped, he was going to kill two people. Appellant wanted to kill inmate John Beaston by hitting him in the head with a small sledgehammer because Beaston had previously snitched on him.[9] (V31:603-05).

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filed contemporaneous to this brief.

[8]Appellant was aware that the construction process was going to conclude on June 12, 2003. (V31:681). The murders occurred on the evening of June 11, 2003.

[9]Appellant also was angry with Beaston because either John

Appellant also indicated that the officer supervising them would have to be killed so the inmates would not have to worry about the officer alerting others. (V31:604). If the officer was a female, Appellant was going to rape her. According to Appellant, he "was gonna get me a piece of pussy before I leave because if I get out there and die, at least I know I got a shotta ass before I left." (V31:604-05, 637-38). Appellant also told Lykins to watch the news because he was going to be famous. On June 10, 2003, the day before the murder, Appellant told Lykins to stay away from A dorm on June 11, 2003. (V31:606).

Another inmate, Jessie Baker, also testified to statements Appellant made regarding his plans to escape. Baker was a member of the plumbing crew with Appellant, codefendant Michael Jones, and Kenneth Lykins. (V31:663-65). Codefendant Dwight Eaglin was a member of the fence/welding

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Beaston or Charlie Fuston had cut some long pieces of metal that Appellant had planned to use in one of his escape plans. (V31:675-76). This incident also caused Dwight Eaglin to become angry with Charlie Fuston, whom he threatened to kill. (V31:676-77). Shortly before the murder of CCI Correctional Officer Darla Lathrem, Eaglin killed Fuston by striking him in the head with a small sledgehammer. (V31:656-59; V34:1017-19).

crew,[10] but he sometimes worked with the plumbing crew. (V31:667). In June, 2003, all of the inmates worked in A dorm on the renovations, but Baker and Lykins did not work on the night crew with Appellant, Jones, Eaglin, Fuston and Beaston. (V31:671). Prior to the June 11, 2003, murders, Baker heard Appellant state on an almost daily basis that he planned to escape and he told Baker to "watch the news," and "if anyone gets in our way, we're gonna kill the bitch."[11] (V31:673, 677).

Shortly after 4 p.m. on June 11, 2003, CCI Correctional Officer Mary Polisco transported five inmates (Appellant, Jones, Eaglin, Fuston, and Beaston) to A dorm to work on the construction project. (V30:493-502). Officer Polisco left the five inmates in A dorm under the supervision of CCI Correctional Officer Darla Lathrem. (V30:502-07). At 8:30 p.m., CCI conducted its master roster count of inmates and Officer Lathrem accounted for the five inmates in A dorm. (V30:507-08). CCI Correctional Officer Kenneth George received the count slip from Officer Lathrem at approximately

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[10]The other members of the welding crew were Charlie Fuston and John Beaston.

[11]Codefendants Eaglin and Jones were sitting with the group when Appellant made these statements.(V31:673-74).

8:50 or 8:55 p.m. (V30:532-39).

Approximately an hour later, an alarm was triggered on the inner perimeter fence behind A dorm. Officers responding to the scene observed Appellant, Jones, and Eaglin attempting to escape over the fences with ladders. (V30:412-21, 450-61; V32:726-31). When the first officers arrived, Eaglin was located in between the two perimeter fences, Appellant was climbing on a ladder, and Jones was standing next to the ladder inside the prison yard. (V30:417-20). Appellant and Jones saw the officers and ran into A dorm where they were quickly apprehended. (V30:417; V32:726-31).

The responding officers were unsuccessful in reaching the inmates' supervising correctional officer, Officer Lathrem, on her radio, and once inside A dorm, they discovered a locked mop closet with a large pool of blood coming from under the door.[12] (V30:423-25, 547-48). Once they were able to obtain a key from the control room, they opened the closet door and found Officer Lathrem.[13] (V32:749-64). Officer Lathrem had no pulse, was not breathing, and had obvious injuries to her

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[12]Officer Lathrem's radio and keys were subsequently located in the toilet of one of the cells. (V32:789).

[13]A sledgehammer was found in a pool of blood in the closet. (V30:426; V33:934-35).

head.[14] (V30:549). The medical examiner testified that Officer Lathrem died as a result of at least three blunt trauma injuries to her skull and head which caused extensive damage to her brain. (V34:997-1016). The pattern injuries to her head indicated that the sledgehammer found in the mop closet most likely caused her injuries.[15] (V34:1014-15).

In addition to finding Officer Lathrem locked in the mop closet, officers responding to A dorm after the escape attempt also found inmates Charles Fuston and John Beaston locked in separate cells. Inmate Beaston was sitting in a locked cell downstairs and holding a rag to a head injury, while inmate Fuston was unconscious and lying in a massive pool of blood in an upstairs cell. (V30:463-64; V31: 655-62). Inmate Beaston survived his head injury, but inmate Fuston died as a result of his head injuries.[16]

After he was apprehended, Appellant gave four separate,

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[14]CCI nurse Robert Colgan testified that although he was not allowed to legally pronounce her dead, it was his opinion that Officer Lathrem was dead when they unlocked the closet. (V30:548-52).

[15]The blood on the sledgehammer matched the victim's DNA. (V34:1073-74).

[16]The medical examiner testified that the head injuries to Fuston were similar to those of Officer Lathrem and were most likely caused by the same sledgehammer. (V34:1018-19).

post-Miranda statements to lead Florida Department of Law Enforcement (FDLE) Agent Steve Uebelacker. The fourth statement was a video-taped walk-through at CCI that was played for the jury.[17] (V35:1116-1253). Appellant described in great detail on the video his actions on the night of the murder. After Eaglin beat up Fuston with his fists and locked Fuston in a cell, Eaglin walked by and told Appellant that "we're leaving tonight, it's on." (V35:1120-27). Appellant saw Eaglin go back into Fuston's cell with a sledgehammer and Appellant went upstairs in time to see Eaglin exiting the cell covered in blood. Eaglin then went into a shower and cleaned up. (V35:1127-36).

While Eaglin was in the shower, Appellant and Jones led Officer Lathrem to another quad under the pretense that they needed something from the mop closet. (V35:1139-43). While Officer Lathrem was unlocking the mop closet, Appellant saw Eaglin sneak into a nearby cell with the sledgehammer he had used in the attack on Fuston. (V35:1143-47). Eaglin then came around and struck Lathrem in the head with the sledgehammer, knocking her to the ground. Eaglin then struck

[17]The other three statements were not introduced into evidence.

Officer Lathrem in the face with the hammer a second time. According to Appellant, he asked Eaglin why he hit her a second time.[18] (V35:1147-53). The inmates grabbed Officer's Lathrem's radio and keys and placed her body in the mop closet.[19]

As Eaglin was finishing placing Officer Lathrem in the closet, Appellant and Jones went to get the ladders which were outside A dorm. When they returned with the ladders, Appellant saw Eaglin and Beaston heading into a cell, with Eaglin carrying a different hammer. Because Beaston only had four years left on his sentence, he did not plan to escape, and the plan was to strike him in the head to make it look like he was not part of the plan. (V35:1155-60). Appellant began taking apart ladders and drilling holes to brace them together, while Eaglin and Jones retrieved more ladders. Eventually, the three inmates took the ladders outside and put them together in an L-shape. (V35:1160-1217). The ladders

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[18]Appellant did not follow through on his plans to rape Officer Lathrem because, in his mind, Eaglin killed her with the second strike. (V35:1172-73).

[19]During the attack, codefendant Jones was standing at the other end of the quad by an electrical outlet. (V35:1147). The relative positions of the inmates, as well as their actions, are best determined by viewing State's Exhibit 36, Appellant's videotaped statement.

did not work and the fence alarm sounded. Appellant and Jones went back inside while Eaglin attempted to scale the fences. (V35:1218-20).

After Agent Uebelacker testified regarding Appellant's video-taped statement, the State rested. (V36:1285). Appellant moved for a judgment of acquittal which the trial judge denied. (V26:1286-96). Thereafter, the defense also rested. Following closing arguments, the jury returned a verdict finding Appellant guilty of first degree murder. (V36:1392). As previously noted, the verdict form indicated that the jury found Appellant guilty of first degree murder under each theory of prosecution; premeditated murder and first degree murder while engaged in the perpetration of, or in the attempt to perpetrate a felony, to wit: escape and resisting an officer with violence. (V20:3852).

At the penalty phase, the State presented evidence regarding Appellant's prior violent felony convictions. The State called the prosecuting attorney who prosecuted Appellant in 1990 for murder, armed robbery, and armed burglary with assault. Because defense counsel raised a confrontation clause objection based on Crawford v. Washington, 541 U.S. 36 (2004), the trial judge ruled that the State could only

introduce trial testimony from the 1990 jury trial, rather than having the prosecutor summarize the evidence. (V37:45-65). The evidence established that Appellant murdered an 80 pound elderly woman after breaking into her house. (V37:65-88).

The State also introduced evidence surrounding Appellant's 1990 convictions for armed sexual battery, armed burglary, armed robbery, and kidnapping.[20] (V38:152-180). The State introduced Appellant's confession wherein he admitted to breaking into a house and stealing a VCR and tapes, and removing a young girl from the house and forcing her to perform oral sex on him outside. (V38:156-71). The State also briefly introduced evidence surrounding Appellant's 1981 conviction for sexual assault on his sister in Rhode Island.[21] (V38:181-90).

In mitigation, Appellant presented numerous witnesses to testify regarding his background and character, as well as witnesses to testify regarding the policies and procedures at

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[20]As a result of these 1990 convictions, Appellant was serving multiple consecutive life sentences at CCI. (V38:204-05).

[21]Additionally, the State presented three victim impact witnesses at the penalty phase who read from prepared statements. (V38:210-17).

CCI at the time of the murders. Appellant presented testimony from family members and his social worker regarding his life growing up in Rhode Island. Appellant's brother, Charles Smith, who was serving a life sentence in Rhode Island for murdering his step-daughter, testified that their father was a violent, alcoholic man who was often physically and sexually abusive to the kids and his wife. (V38:262-319). Appellant's uncle, sisters, and social worker reiterated the testimony from Charles Smith regarding Appellant's upbringing in an abusive environment. In giving this mitigation great weight, the trial court stated:

> Defense counsel presented an abundant and often cumulative quantity of evidence about the Defendant's family of origin, including the family's history of sexual abuse and incest extending from his immediate family through the Defendant's mother and maternal grandfather. The Defendant's father was a dysfunctional, alcoholic figure who frequently brutalized the Defendant and his brother, Charles, as well as their mother; he also sexually abused the Defendant's sisters. These sisters essentially overcame their abusive history to become good and functional members of society although they described in heart-rendering fashion the pain and difficulty they had experienced in recovering from their dysfunctional family background. Brother, Charles, also testified about the early life of these siblings by video deposition from the Rhode Island State Prison where he is serving a life sentence for murdering his step-daughter. The Defendant and his brother, Charles, were removed from the home at early ages and were involved with juvenile authorities in Rhode Island for years. Both these siblings essentially proved to be

> incorrigible and not susceptible of any significant rehabilitation. The existence of such a dysfunctional family background was proven beyond question and the Court gives it great weight.

(V21:3963-64). Additionally, Appellant presented evidence from a forensic psychiatrist, Dr. Frederick Schaerf, that indicated Appellant suffered with a history of depression, attention deficit disorder, and chronic substance abuse. (V41:771-83)

At the Spencer hearing, Appellant testified that the killing of Officer Lathrem was not supposed to happen, and as the trial court found, Appellant "expressed an apology of sorts." (V21:3964; V42:999-1000). Appellant also stated:

> As far as being the mastermind, the ringleader, the recruiter, they said that was Dwight Eaglin, now they said it was me. What was it?
>
> That's all I wanted to bring up. The things that they said in Dwight Eaglin's trial they said in my trial, and it was wrong.

(V42:1000). As previously noted, supra at 3-4, the trial court followed the jury's recommendation and sentenced Appellant to death. This appeal follows.

SUMMARY OF THE ARGUMENT

I. Appellant's claim that the trial court failed to make requisite factual findings when denying his motion to suppress is procedurally barred, as defense counsel never requested additional findings by the court below or asserted that such findings were constitutionally necessary. In addition, the claim is without merit as due process does not require a trial court to make factual findings when denying a motion to suppress. Furthermore, in this case, the trial court recited factual findings into the record prior to admitting Smith's statements into evidence.

II. Appellant's claim of ineffective assistance of counsel is not cognizable on direct appeal. Trial counsel filed a pre-trial motion to suppress and was not required to make a contemporaneous objection in order to preserve the issue for review.

III. Similarly, Appellant's claim that counsel was ineffective for failing to object to the State's introduction of evidence that Appellant indicated a desire to rape a female prison guard during the escape is not cognizable on direct appeal. Appellant has not shown deficient performance or prejudice.

IV. Appellant's claim of ineffective assistance of trial counsel is not cognizable on direct appeal. Even if this Court were to consider this claim, Appellant has failed to establish either deficient performance or prejudice. Trial counsel moved for a judgment of acquittal and made numerous arguments in support of said motion. The fact that trial counsel did not raise the meritless claim that Appellant now asserts does not establish deficient performance. Furthermore, Appellant was not prejudiced because, even had Appellant raised the issue, the motion would have been denied.

V. The evidence is sufficient to support Appellant's conviction for first degree premeditated murder under the principal theory. Appellant planned the escape from Charlotte Correctional Institution for a lengthy period of time and told other inmates that he planned to kill the supervising correctional officer so that the officer could not alert anyone to the escape attempt. Once the escape plans had been set in place and codefendant Eaglin had killed another inmate with a sledgehammer, Appellant led the correctional officer to a mop closet so that Eaglin could sneak up on her with the sledgehammer and inflict the fatal blows.

VI. Even if this Court were to find that the evidence

was insufficient to support premeditation, there is no question that the evidence was sufficient to support Appellant's conviction for first degree felony murder based on the underlying felonies of escape and resisting an officer with violence. Contrary to Appellant's assertion, the evidence was sufficient to support the felony murder conviction based on escape because Appellant was lawfully confined at Charlotte Correctional Institution. Additionally, Appellant resisted the correctional officer's lawful duty to prevent escapes by participating in her murder and stealing her keys and radio.

VII. This claim is procedurally barred, as the defense below never asserted that the State was taking an inconsistent position in violation of due process. Moreover, Smith has not presented a sufficient record for consideration of this issue, since the Eaglin trial record is not before the Court. Even if considered, the claim must be denied because the record refutes Smith's allegation of a due process violation.

VIII. The trial court acted within its discretion in denying Appellant's motion for mistrial after a witness inadvertently mentioned a prior penalty phase proceeding which Appellant had been subjected to as a result of his prior

murder conviction. The testimony was inadvertent and minimal. Even if the court erred, the error was harmless.

IX. The trial court properly weighed the aggravating and mitigating factors in this case and Appellant's argument that the court improperly balanced the aggravating factors against the mitigation evidence is without merit. Contrary to Appellant's assertion, his mitigation evidence is not so overwhelming so as to be dispositive; thereby preventing him from being eligible for the death penalty.

X. Appellant's death sentence is proportionate to other death cases. Appellant was serving multiple life sentences in prison when he planned an escape, including killing any guard that interfered with his plans. The court found five weighty aggravators and properly concluded that the aggravation outweighed Appellant's nonstatutory mitigation.

XI. The trial court did not abuse its discretion in denying Appellant's special jury instruction on mitigating factors. The court properly instructed the jury with the "catch-all" instruction.

XII. Trial counsel was not ineffective for failing to reassert his pre-trial motion challenging the State's lethal injection procedure. Counsel was not deficient and Appellant

cannot establish prejudice for failing to renew a motion that lacks merit.

XIII. Appellant's claim that Florida's lethal injection procedure violates the separation of powers doctrine has not been preserved for appellate review. Even if Appellant had preserved the issue, this Court rejected the instant claim in Diaz v. State, 945 So. 2d 1136 (Fla. 2006).

XIV. Appellant's argument that Florida's capital sentencing scheme violates due process and Ring v. Arizona, 536 U.S. 584 (2002), is without merit and has repeatedly been rejected by this Court.

XV. Appellant's claim that the trial court erred in instructing the jury on their advisory role is procedurally barred as the claim was not preserved below. During defense counsel's penalty phase closing argument, counsel made improper arguments concerning the jury's role as sentencer and the trial court properly sustained the prosecuting attorney's objection. Thereafter, the court gave a curative instruction that mirrored Florida's standard jury instruction which fully advised the jury of the importance of its role. The court's instruction did not unconstitutionally denigrate the jury's role.

XVI. Appellant's ineffective assistance of trial counsel claim is not cognizable on direct appeal. Furthermore, the claim lacks merit as this Court has found that Florida's clemency process does not violate the Due Process and Equal Protection Clauses of the United States and Florida Constitutions.

XVII. Because Appellant has failed to demonstrate any individual errors, his cumulative error argument must fail.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING SMITH'S MOTION TO SUPPRESS?

Smith's first issue asserts that the trial court violated his constitutional right to due process by failing to provide factual findings and legal conclusions in denying Smith's motion to suppress. However, this issue was never presented to the court below, and is therefore procedurally barred and beyond the scope of this Court's appellate consideration. Castor v. State, 365 So. 2d 701 (Fla. 1978) (contemporaneous objection required to preserve appellate argument for review).

The record reflects that Smith filed numerous motions to suppress statements he made while in state custody (V10:1896-1955; V13:2428-29; V19:1383-86; V20:3795-96). The particular motion discussed in Smith's brief alleged that Smith's formal, recorded statements to FDLE Agent Uebelacker on June 12, June 23, June 27, and July 31, 2003, should be suppressed as involuntary due to the conditions present when Smith was transferred to the Q-wing at Florida State Prison on June 12, 2003. (V10:1896-1955; V19:1383-86; V24:4556). Evidence and argument regarding that motion were entertained by the trial

court prior to trial, at a hearing on Friday, June 16, 2006. (V24-25:4553-4761). Some of the evidence was offered in the form of DVD tapes, typed transcripts, and depositions, which the parties agreed could be reviewed by the court over the weekend prior to the start of the trial on Monday, June 19, 2006. (V24:4553-58). On Monday morning, Judge Blackwell announced that he had reviewed the additional evidence and was denying the motion to suppress. (V27:3). On June 26, 2006, a written Order was rendered, denying the motion to suppress Smith's statements to Uebelacker. (V20:3866). Prior to the admission of the statements, the trial court recited its findings and reasons for denying the motion on the record (V34:1078-80).

Another motion to suppress was filed on June 20, 2005, challenging the admission of statements which Smith made to co-defendants Eaglin and Jones on June 23, 2003, which were surreptitiously recorded by law enforcement. (V20:3795-96). This motion was heard and denied at the June 16, 2006 pretrial hearing. (V24:4530-37). The State did not introduce any evidence regarding these statements at trial. Additionally, Smith filed another motion to suppress on August 11, 2005, requesting suppression of statements Smith made to Detective

Drouse. (V13:2428-29). There is no indication in the record that this motion was ever litigated; Detective Drouse did not testify and the statements were not offered at trial.

At no time, in any written motion or any legal argument thereon, did Smith suggest to Judge Blackwell that the lower court had a constitutional duty to enter specific factual findings and legal conclusions in ruling on any of the motions to suppress. Thus, that argument, now asserted on appeal for the first time, must be rejected as procedurally barred.

Even if the claim is considered, Smith cannot establish any error. There is no authority for his assertion that specific factual findings are constitutionally mandated in this instance. Furthermore, the court below did recite specific findings into the record. (V34:1079-80). Therefore, no new trial is warranted on this issue.[22]

Smith asserts that both state and federal due process clauses require trial courts to make specific factual findings

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[22]In discussing the appropriate standard of review to a trial court's ruling on a motion to suppress, this Court has stated that "appellate courts should continue to accord a presumption of correctness to the trial court's rulings on motions to suppress with regard to the trial court's determination of historical facts, but appellate courts must independently review mixed questions of law and fact." Globe v. State, 877 So. 2d 663, 668-69 (Fla. 2004) (citations omitted).

and legal conclusions, citing Gardner v. Florida, 430 U.S. 349, 357 (1977), Monge v. California, 524 U.S. 721 (1998), and Beck v. Alabama, 447 U.S. 625 (1980). None of these cases support his argument. In Gardner, the Court found that due process was violated by the trial court's consideration of information contained in a presentence report which had not been disclosed to the defense. The Gardner Court noted in passing that due process also required that the full document be available in the record on appeal in order to ensure meaningful appellate review. In Monge, the Court held that the double jeopardy clause did not preclude a retrial of a prior conviction used to enhance a non-capital sentence. The Monge Court recognized that double jeopardy would preclude such a retrial for purposes of capital sentencing, and explained why capital cases warrant heightened due process and additional scrutiny than other criminal cases. In Beck, the Court determined that Alabama's death penalty scheme violated due process by prohibiting a jury instruction on lesser offenses. Again, the Beck Court acknowledged a higher standard for review of death penalty cases.

Thus, it appears that these cases are noted only for the recognition that "death is different," and not for the

proposition for which they are cited, the assertion that "[t]he federal right to due process of law requires specific findings of facts and conclusions of law by the trial court" (Appellant's Initial Brief, p. 22). In fact, Smith does not cite any cases which support this broad assertion or are factually comparable to the case at hand. Moreover, the cases which recognize that due process may be heightened because death is different refer to the sentencing process, and do not implicate the pretrial consideration of a motion to suppress. Since the elevated due process is a component of the prohibition against cruel or unusual punishment, these cases should not be read as establishing a higher standard for trial court rulings on guilt phase issues. See Caldwell v. Mississippi, 472 U.S. 320, 329 (1985) ("under the Eighth Amendment the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny *of the capital sentencing determination*," quoting California v. Ramos, 463 U.S. 992, 998-99 (1983) [emphasis added]). The United States Supreme Court has expressly acknowledged that a state court is not required to explain its reasons for denying relief. Michigan v. Long, 463 U.S. 1032, 1041 (1983) ("As this Court has recognized, 'requiring state

courts to clarify their decisions to the satisfaction of this Court' is both 'unsatisfactory and intrusive'").

Smith next argues that the Florida Constitution provides more due process protection than the United States Constitution. While that has been noted in particular circumstances, it does not provide authority for his contention in this case that his trial court erred by failing to make factual findings which were not requested below and which no court has ever deemed to be constitutionally necessary. Clearly, none of the cases cited for this proposition suggest that specific factual findings must be articulated by the trial court when ruling on a motion to suppress. See Traylor v. State, 596 So. 2d 957, 961-66 (Fla. 1992); Hlad v. State, 585 So. 2d 928, 932 (Fla. 1991); Brown v. State, 484 So. 2d 1324, 1328 (Fla. 3d DCA 1986); M.E.K. v. R.L.K., 921 So. 2d 787, 790 (Fla. 5th DCA 2006). Smith has offered no reason to hold that the Florida Constitution provides any due process protection beyond that granted in its federal counterpart in this regard. See Troy v. State, 948 So. 2d 635, 645 (Fla. 2006) (finding no basis to conclude that Florida Constitution provides more due process protection than U.S. Constitution with regard to voluntary intoxication

defense).

According to Smith, specific findings are necessary in order to insure meaningful appellate review. He submits that a remand is necessary any time the trial court fails to provide factual and credibility findings when ruling on a motion to suppress, citing State v. Moore, 791 So. 2d 1246, 1250 (Fla. 1st DCA 2001). Neither Moore nor State v. Shaw, 784 So. 2d 529, 533 (Fla. 1st DCA 2001), a similar state appeal from an order granting suppression which was remanded for specific findings, suggest an absolute rule requiring findings in all cases. Certainly appellate courts have authority to remand for findings when necessary to resolve an issue on appeal; courts need not invoke such authority if findings were already constitutionally mandated.

Finally, Smith's reliance on Mendoza v. State, 964 So. 2d 121 (Fla. 2007), and Collucci v. Department of HRS, 664 So. 2d 1142, 1144 (Fla. 4th DCA 1995) (requiring findings for termination of parental rights), is misplaced. In Mendoza, where this Court remanded for specific findings in an order denying postconviction relief sought pursuant to Florida Rule of Criminal Procedure 3.851, this Court noted that Rule 3.851 required such findings, and did not hold that such findings

were constitutionally necessary. In Collucci, a trial court had terminated the appellant's parental rights upon finding that appellant had failed to comply with the requirements of a performance agreement. Noting that this failure could not, in and of itself, provide a basis for the termination, the district court of appeal remanded for additional findings. The due process concern involved the State's failure to prove an essential element required for termination of parental rights, not the trial court's failure to recite findings to support a discretionary evidentiary ruling. Although these cases, like others, required trial judges to make particular findings, there is no case which raises that requirement to constitutional dimensions.

Moreover, the trial judge in this case provided the necessary findings for this Court's consideration of the suppression issue. Prior to admitting Smith's statements through Agent Uebelacker, the trial court recited his relevant findings for the record:

> THE COURT: All right. Be seated everyone. At the beginning of the trial Monday I announced that I had reviewed all of the materials that were admitted into evidence for -- on last Friday's hearing for various motions, including the defendant's motion to suppress certain statements the defendant made in the presence of Mr. Uebelacker and Mr. Rhodes. I did review all of those. I looked at the DVD over the weekend. I read all the transcripts of

> depositions and other items that were admitted into evidence for the purpose of that hearing. And as I announced, I denied the motion to suppress. **I did not make findings of fact at the time, but I will now.**
>
> I denied the motion based on my finding, as a matter of fact, that the defendant freely, voluntarily and knowingly waived his rights, that he was presented the Miranda warning in advance of his making those statements. He appeared not to have any confusion about what he was doing, and, therefore, I find that he was adequately warned that his Fifth Amendment right against self-incrimination was at stake and that he knowingly and freely waived that right.
>
> Anything else?
>
> MR. RUSSELL: No, Your Honor. I believe that covers it other than, in general, there was a preliminary indication that it was otherwise voluntary aside from waiving the rights.
>
> THE COURT: Yeah. Obviously, what I've said is it appeared voluntary. I -- I could find no evidence that it wasn't voluntary.

(V34:1078-80) (emphasis added).[23]

Even if this Court were to adopt a new rule requiring trial courts to articulate specific factual findings and legal conclusions and determine that the findings announced below were constitutionally insufficient, Smith would need to show prejudice in order to obtain any relief. Smith claims that he

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[23]The only statement introduced by the State at trial was the DVD of Appellant's walk-through at CCI with Agent Uebelacker. As a review of State's Exhibit 36 establishes, Appellant freely and voluntarily made this statement after receiving his Miranda warnings.

is being denied an adequate appellate review in this case because, in denying the motion to suppress, the trial judge did not offer any credibility findings as to unrebutted testimony describing Smith's treatment by prison officials while in his cell on Q-wing.[24] According to Smith, this Court cannot review either the facts or the law applied below under the appropriate standards because no specific findings on credibility have been made.

Smith's suggestion of prejudice is refuted on this record. In fact, there was no need for a credibility determination as to treatment by the prison officials because the testimony offered on this point, even if believed, did not compel suppression of Smith's statements. The evidence before the court, even if taken in a light favorable *to the defendant*, showed only that Smith and his codefendants were deprived of such things as toilet paper and eating utensils for a time following their initial transfer to Florida State Prison. This testimony did not require the granting of Smith's motion to suppress the statements made on video at

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[24]Smith's brief claims that the court may have believed Smith's testimony, yet made a legal error in denying the motion. See Appellant's Initial Brief, p. 24. However, Smith did not testify at the suppression hearing (V24-25:4553-4771).

CCI. The mistreatment alleged was unrelated to securing Smith's statements, coming at the hands of prison authorities and not the FDLE investigators, and occurring in a different time and place than the taking of Smith's statements. Smith did not testify that these conditions had any impact on his ability or desire to understand or waive his Miranda rights. On these facts, the provision of complete Miranda warnings prior to the statements taken ensured the voluntariness of Smith's statements, and the motion to suppress was subject to denial even if the testimony provided about mistreatment is credited as true. See Oregon v. Elstad, 470 U.S. 298 (1985) (recognizing subsequent Miranda warnings may cure any taint of prior police misconduct); Lyons v. Oklahoma, 322 U.S. 596 (1944) (finding subsequent statement voluntary after initial confession induced by physical abuse).

Given this result, any failure to provide factual findings in this case does not affect this Court's review of the denial of his motion to suppress. Although Smith asserts that this Court should not be required to speculate on the facts found below, no such speculation is necessary. It can be presumed that, because the testimony was not rebutted or impeached, the trial court accepted Smith's claim of

deprivation. See State v. Jones, 849 So. 2d 438, 443 (Fla. 3rd DCA 2003); Brannen v. State, 94 Fla. 656, 114 So. 429 (1927) (court must accept accuracy of testimony which has not been impeached, discredited, or controverted, and is not contradictory within itself or physically impossible). As explained above, however, acceptance of this testimony did not require the court below to grant the motion to suppress.

Thus, Smith's concern that his due process rights may be violated by this Court's application of the accepted rule that presumes the facts on appeal to be favorable to the prevailing party is unwarranted. Given the lack of any factual foundation to support Smith's claim of involuntariness, Smith could not show any error in the denial of his motion to suppress regardless of the standards or presumptions applied on appeal. His due process claim must be denied.

ISSUE II

WHETHER THE DEFENDANT'S TRIAL ATTORNEY RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE FAILED TO PRESERVE FOR APPELLATE REVIEW THE TRIAL COURT'S DENIAL OF HIS MOTION TO SUPPRESS BY FAILING TO OBJECT TO THE EVIDENCE WHEN IT WAS INTRODUCED AT TRIAL?

A. The Instant Claim is Not Cognizable on Direct Appeal.

A claim of ineffective assistance of counsel is generally not cognizable on direct appeal. An exception to this general rule is recognized where the claimed ineffectiveness is apparent on the face of the record. Such an instance is not presented here. See Mansfield v. State, 758 So. 2d 636, 642 (Fla. 2000); Bruno v. State, 807 So. 2d 55, 63 & n.14 (Fla. 2001); Wuornos v. State, 676 So. 2d 972, 974 (Fla. 1996) ("We find that this argument constitutes a claim of ineffective assistance of counsel not cognizable on direct appeal, but only by collateral challenge."); Martinez v. State, 761 So. 2d 1074, 1078 n.2 (Fla. 2000); Lawrence v. State, 691 So. 2d 1068, 1074 (Fla. 1997); McKinney v. State, 579 So. 2d 80, 82 (Fla. 1991) ("The trial court is the more appropriate forum to present such claims where evidence might be necessary to explain why certain actions were taken or omitted by counsel."); Gore v. State, 784 So. 2d 418, 437 (Fla. 2001)

("Even assuming that an ineffective assistance of counsel claim could be properly asserted under these circumstances, with rare exception ineffective assistance of counsel claims are not cognizable on direct appeal."); Consalvo v. State, 697 So. 2d 805, 811-812 n4 (Fla. 1996).

Appellant argues that counsel rendered deficient performance by failing to object to the admissibility of inculpatory statements after unsuccessfully seeking to exclude them at a suppression hearing. At pages 28 and 29 of his brief, Smith requests that this Court abandon its decades-long jurisprudence relating to the contemporaneous objection rule and procedural bars. The Court should decline Appellant's invitation throughout this brief to ignore or reverse its longstanding jurisprudence.

B. The Instant Claim of Ineffective Assistance of Counsel is Meritless.

Cases are legion that claims pursuant to Strickland v. Washington, 466 U.S. 668 (1984) must establish two prongs: (1) deficient performance by counsel and (2) prejudice. Both elements must be satisfied. Appellant cannot satisfy the first or deficient performance prong. Florida Statute 90.104 provides in pertinent parts:

> (1) A court may predicate error, set aside or reverse a judgment, or grant a new trial on the

> basis of admitted or excluded evidence when a substantial right of the party is adversely affected and:
>
> (b) When the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer of proof or was apparent from the context within which the questions were asked.
>
> **If the court has made a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.**

(emphasis added).

As Appellant noted, trial counsel filed pre-trial motions to suppress his statements. (V10:1896-97; V19:3683-86; V24:4553). The trial court denied the motion to suppress after conducting a suppression hearing and hearing from numerous witnesses. (V20:3886; V34:1078-80). Thus, Appellant cannot satisfy the requirement of showing a deficiency by counsel. No further inquiry is needed.

Nor can Appellant satisfy the prejudice prong of Strickland. Witnesses Haszinger, Wood, Mimms, DeKeyser, and Windin testified that no one threatened Appellant, abused him or made any promises to him in order to get him to confess. (V24:4561, 4566, 4570, 4573, 4576). FDLE Agent Uebelacker testified that while at Charlotte Correctional Institution he read Appellant Miranda rights and the latter agreed to speak; he waived his rights and there were no threats, coercion or

promises. (VR24:4580-83). Subsequently, at Florida State Prison and at Charlotte Correctional Institution the witness again provided Miranda warnings and Appellant waived his rights (V24:4584-86). Appellant did not testify at the suppression hearing but his codefendant, Eaglin, testified and acknowledged he had no personal knowledge of what happened to Smith on Q-wing. (V25:4755). Furthermore, as discussed in Issue I, infra, even assuming Appellant established that he suffered mistreatment at the prison, such treatment did not affect his subsequent voluntary discussion with Agent Uebelacker at CCI.

Since there is neither deficient performance nor resulting prejudice in trial counsel's failure to object at trial, this meritless claim must be rejected.

ISSUE III

WHETHER THE DEFENDANT'S TRIAL ATTORNEY RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE FAILED TO OBJECT TO THE TESTIMONY THAT THE DEFENDANT WANTED TO RAPE A FEMALE PRISON GUARD DURING HIS ESCAPE ATTEMPT?

A. The Instant Claim is Not Cognizable on Direct Appeal.

As stated in Issue II, supra, ineffective assistance of counsel claims are ordinarily not cognizable on direct appeal. Mansfield, supra, and cases cited therein. There is no reason to address such a claim here.

B. The Claim is Meritless.

During the examination of FDLE Agent Uebelacker a videotaped interview of Appellant, State's Exhibit 36, was introduced into evidence. (V35:1116). In the transcript of that videotaped interview Appellant acknowledged an intention that if Officer Lathrem had not been killed, all three of the inmates would have raped her:

> MR. SMITH: Well, if it was earlier, if we had -- if we had time, all three would a -- probably would a got some.
> AGENT UEBELACKER: Yea? When you say that what do you mean?
> MR. SMITH: Probably would a got some pussy.

(V35:1173). Appellant also acknowledged that his plan included eliminating, that is killing, inmate Beaston (Beast).

(V35:1194).

Additionally, witness inmate Kenneth Lykins testified that he heard Appellant talking about plans to escape quite a few times. (V31:585-86). Appellant wanted to try the escape when there was a female officer in the dorm. Appellant indicated that he wanted to kill Beaston because he felt he had snitched on him and whoever else was in the building was going to die to prevent alarms to others. (V31:603-04). Appellant noted that if a female officer happened to be present in the dorm the night of the escape that he was going to rape her; his words were "I'm gonna get me a piece of pussy before I leave because if I get out there and I die, at least I know I got a shotta ass before I left." (V31:605). Appellant also told Lykins, "watch TV, I'm gonna be famous." (V31:605). On cross-examination the witness reiterated that Appellant told him he wanted to make sure nobody was able to tell on them or alert other officers. Appellant stated that he wished to rape and, if he had to, kill the female officer because "he wishes to have a shot of pussy before he escapes; therefore, if he dies, he knows he got a shot of ass before he left." (V31:637-38).

Witness inmate Jessie Baker also testified that Appellant

told him to watch the news and "if anyone gets in our way, we're gonna kill the bitch." (V31:673). He bragged about it as an everyday statement. (V31:677).

Appellant's admissions including those regarding the desire to rape the female guard before leaving the prison were part and parcel of his intent to escape and to kill so that no warning or alarms could be made. Trial counsel's failure to object is neither deficient performance - since such objection would have been denied - nor did it result in prejudice that would likely have changed the result. Evidence of Appellant's planned sexual activity with the victim, even if it constituted an uncharged crime, was inseparable and inextricably intertwined with the crimes charged, and was therefore admissible. Griffin v. State, 639 So. 2d 966 (Fla. 1994). In proving its case, the State is entitled to paint an accurate picture of events surrounding the crimes charged. Smith v. State, 699 So. 2d 629 (Fla. 1997). Inextricably intertwined evidence or inseparable crime evidence may be admitted at trial to establish the entire context out of which a criminal act arose. Hunter v. State, 660 So. 2d 244, 251 (Fla. 1995); see also Remeta v. State, 522 So. 2d 825, 827 (Fla. 1988) (stating that evidence of a collateral murder was

admissible because the same gun was used in both crimes and the evidence established the defendant's possession of the murder weapon and counteracted the defendant's statements blaming the crimes on a companion).

In the instant case, defense counsel was aware that Appellant told other inmates and Agent Uebelacker that he planned to rape a female guard prior to his escape. Defense counsel had no legal argument which would have precluded the admission of this evidence. Thus, trial counsel cannot be found ineffective on the face of the record for failing to object to admissible evidence that did not unfairly prejudice Appellant.[25] Accordingly, this Court should reject Appellant's claim of ineffective assistance of counsel in this direct appeal.

[25]Trial counsel may very well have had a strategic reason for not objecting to this evidence; namely, that it supported one of his client's statements that he did not want Eaglin to kill the victim because he wanted to rape her.

ISSUE IV

WHETHER THE DEFENDANT'S TRIAL ATTORNEY RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE FAILED TO MOVE FOR A JUDGMENT OF ACQUITTAL BASED ON THE STATE'S FAILURE TO PROVE THAT THE MURDER WAS NOT THE INDEPENDENT ACT OF CO-DEFENDANT EAGLIN?

As stated in Issues II and III, supra, ineffective assistance of counsel claims are ordinarily not cognizable on direct appeal and there is no reason to address Appellant's claim here.

The instant record reflects that trial counsel below moved for a judgment of acquittal asserting that the State had failed to prove premeditated murder and had failed to prove the felony-murder based on the escape or resisting an officer with violence. (V36:1286-88). The prosecutor responded that there was evidence of both that Appellant had the intent that the crime be committed and knew that the person who committed it intended the crime to be committed. As the prosecutor summarized, two inmates testified regarding Appellant's announced plans to escape. Appellant stated that he intended to kill anyone that got in his way; whoever else was in the building had to die so no alarm was given. Appellant's statements to Lykins and Baker were in dorm rooms at CCI with both codefendants Jones and Eaglin present. The defendants

could not take the chance since the female correctional officer had a radio and could alert other officers. Both Appellant and Eaglin had the intent to kill. On the evening of June 11th, Smith saw and knew that Eaglin was going up with a sledgehammer to hit Fuston. He knew "the plan" was on and lured the corrections officer-victim to the mop closet; Smith saw Eaglin stealthily go by holding the sledgehammer. The felony-murder was foreseeable - there was no evidence of an independent act, that the officer was killed for any other reason than pursuant to the escape effort. (V36:1289-93). The court denied the motion, noting:

> ...based on the testimony of Lykins and Baker and the weight of their evidence, and a job for the jury and not for the Court. Clearly, under their testimony, an intent to kill could be found.

(V36:1296).

Contrary to Appellant's suggestion that ineffectiveness is apparent from the face of the record, the record demonstrates that trial counsel ably argued the judgment of acquittal predicated on his view of the evidence as an advocate. The contention that the murder was only the independent act of co-defendant Eaglin is belied by the record showing Smith and Eaglin working together and Appellant's admissions to Lykins and Baker that he did not plan to leave

anyone alive who could alert others. Trial counsel was not deficient - nor did prejudice ensue - in failing to assert the meritless argument appellate counsel now champions. See Darling v. State, 32 Fla. L. Weekly S486 (Fla. July 12, 2007); Jones v. State, 845 So. 2d 55, 73-74 (Fla. 2003) (no ineffectiveness in failing to raise meritless claim).

ISSUE V

WHETHER THE STATE FAILED TO PROVE THAT THE DEFENDANT COMMITTED FIRST DEGREE MURDER?

Smith's next claim challenges the sufficiency of the evidence to support his conviction for first degree murder. Specifically, Smith asserts in a half-page argument that the State failed to prove premeditation because there was no direct evidence of a plan to kill Officer Lathrem, and that Smith only intended for Officer Lathrem to be locked up in a closet. Contending that no evidence was presented to the contrary, Smith posits that his conviction for premeditated murder must be reversed.

Contrary to Appellant's assertion, the evidence is sufficient to support his conviction for first degree murder as a principal based on the theory of premeditation. As this Court noted in Crain v. State, 894 So. 2d 59 (Fla. 2004) (citations omitted):

> A judgment of conviction comes to this Court with a presumption of correctness and a defendant's claim of insufficiency of the evidence cannot prevail where there is substantial competent evidence to support the verdict and judgment. The fact that the evidence is contradictory does not warrant a judgment of acquittal since the weight of the evidence and the witnesses' credibility are questions solely for the jury. It is not this Court's function to retry a case or reweigh conflicting evidence submitted to the trier of fact.

This Court further stated in Tibbs v. State, 397 So. 2d 1120, 1123 (Fla. 1981):

> An appellate court should not retry a case or reweigh conflicting evidence submitted to a jury or other trier of fact. Rather, the concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment. Legal sufficiency alone, as opposed to evidentiary weight, is the appropriate concern of an appellate tribunal.

In the instant case, the State presented evidence that Appellant planned his escape for a long period of time and often discussed with other inmates his intent to kill any correctional officer that got in his way. Appellant specifically told inmate Lykins that he wanted to escape when a female correctional officer was supervising him and that he planned to kill the guard so she could not alert anyone while they tried to go over the fence. (V31:603-04). On the night of the murder, Appellant watched Eaglin kill a fellow inmate with a sledgehammer, and after Appellant and Jones led Officer Lathrem to a mop closet under the ruse of needing something, Appellant saw Eaglin stealthily approach with the sledgehammer and inflict the fatal blows. Although Appellant confessed to

a number of the details regarding the murders of Officer Lathrem and John Beaston, he told Agent Uebelacker in the videotaped walk-through that he did not intend for the officer to die. Clearly, Appellant's self-serving statements were refuted by the evidence introduced by the State at trial.

As the trial court noted when sentencing Appellant to death:

> This argument ignores the evidence that Smith led Ms. Lathrem to the place near the broom/mop closet where Dwight Eaglin was waiting with the hammer to administer the first of several blows to the head before the Defendant stripped her of the keys and the radio. This argument further ignores the testimony of inmates Lykins and Baker, discussed earlier, in which they described the planning by this Defendant with the others and the intent to kill anybody who got in the way.
>
> **Counsel may characterize this as "no credible evidence" because it came from inmates with multiple felony convictions but it was never significantly impeached nor controverted by other evidence.**

(V21:3965-66) (emphasis added). Appellee submits that the State introduced substantial, competent evidence to support the jury's finding that Appellant was guilty of first degree murder as a principal based on the theory of prosecution of premeditation. See Ferrell v. State, 686 So. 2d 1324, 1329 (Fla. 1996) (stating that while the defendant may not have

actually pulled the trigger, the evidence established that he played an integral part in the crimes and in actually luring the victim to his death, thus, at a minimum, he was guilty as a principal). Of course, even if this Court were to find that the evidence was insufficient to support premeditation, the evidence clearly supports his conviction for first degree felony murder. See, Issue VI, infra.

ISSUE VI

WHETHER THE EVIDENCE WAS SUFFICIENT TO SUPPORT APPELLANT'S CONVICTION BASED ON FELONY MURDER?

Smith next asserts that his first degree murder conviction must be reversed because the State failed to prove that he committed felony murder. As the jury verdict indicates, the jury found Appellant guilty of first degree premeditated murder and felony murder based on the underlying felonies of escape and resisting an officer with violence. (V36:1392). The State submits that competent, substantial evidence supports the jury's verdicts.

As to the escape, Appellant argues that the State failed to prove that Appellant was "lawfully confined" in a correctional facility. Relying on Pons v. State, 278 So. 2d 336 (Fla. 1st DCA 1973) and Fouts v. State, 374 So. 2d 22

(Fla. 2d DCA 1979), Appellant asserts that the State is required to prove that Appellant was lawfully confined. However, Appellant reluctantly acknowledges that this Court held in State v. Williams, 444 So. 2d 13, 15 (Fla. 1984), that the "unlawfulness of the confinement is an affirmative defense to be raised by the defendant. . . . and the presumption of lawful custody exists when the state proves that the person is confined in any 'prison, jail, road camp, or other penal institution . . . working upon the public roads, or being transported to or from a place of confinement.'" Appellant argues that this represents an unconstitutional burden-shifting, an argument that was rejected by this Court in Williams. Because the State clearly established that Appellant was a prisoner in custody at Charlotte Correctional Institution, the trial court properly denied the motion for judgment of acquittal and allowed the issue to go to the jury.

Likewise, the evidence is sufficient to support Appellant's conviction for felony murder based on the underlying felony of resisting an officer with violence. The State established that Appellant and Eaglin "resisted, obstructed, or opposed" CCI Correctional Officer Darla Lathrem by doing violence to her while she was engaged in the lawful

execution of a legal duty. See § 941.03, Fla. Stat. (2005). Obviously, her act of supervising the inmate night crew at the prison constituted the lawful execution of a legal duty. See generally (V36:1373-74); Std. Jury Instr. (Crim) § 21.1 ("The Court further instructs you that the supervision of inmates in the custody of the Florida Department of Corrections constitutes the lawful execution of a legal duty); Hierro v. State, 608 So. 2d 912 (Fla. 3d DCA 1992). Because the evidence clearly supported the jury's verdict for both premeditated and felony murder, this Court should deny the instant issue.

ISSUE VII

WHETHER APPELLANT WAS DENIED DUE PROCESS DUE TO THE STATE ALLEGEDLY TAKING INCONSISTENT POSITIONS?

Appellant next claims that he was denied due process when the State asserted at trial that Smith was the ringleader and mastermind of the escape. According to Smith, the State had taken a contrary position in the Dwight Eaglin trial, thereby violating Smith's right to due process in his later trial. This argument is not properly before the Court. In addition, even if the claim is considered, Smith's argument is without merit.

First of all, this issue was not preserved for appellate review by a contemporaneous objection. Smith submits that this issue was presented *pro se* at the Spencer hearing (Appellant's Initial Brief, pp. 38-39). A review of the transcript from the Spencer hearing clearly refutes the suggestion that Smith preserved this legal issue for review. In fact, Smith did not address the court at the hearing, but was testifying and offering his apology to the families of the victims (V42:999-1000). He noted that Darla Lathrem and Charles Fuston were not supposed to die (V42:1000). When asked if there was anything else, Smith responded:

Just that, going through this trial here, as far as

> evidence, I feel as though this was the Dwight Eaglin's trial all over again.
>
> For one, they brung in Dwight Eaglin's clothes. I didn't wear Dwight Eaglin's clothes.
>
> Darla Lathrem's DNA, or Charles Fuston, or John Beaston's DNA wasn't on my clothes.
>
> As far as being the mastermind, the ringleader, the recruiter, they said that was Dwight Eaglin, now they said it was me. What was it?
>
> That's all I wanted to bring up. The things that they said in Dwight Eaglin's trial they said in my trial, and it was wrong.
>
> And that is what I wanted to bring to the Courts, and to apologize to the victim's family.

(V42:1000).[26] These comments do not alert the court to a possible due process violation. They do not suggest any impropriety of constitutional proportions and no specific action or relief from the court is requested. The complaint expressed is not timely, coming weeks after the purported misconduct occurred. As there was no contemporaneous objection lodged below, this issue must be denied as procedurally barred.

Smith's attempt to circumvent the contemporaneous objection rule by the alternative argument that his counsel was ineffective for failing to object is also unavailing. As explained previously, any claim of ineffective assistance is

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[26]Smith does not identify the basis of his knowledge about the Eaglin trial, which presumably was held while Smith was in custody.

premature. Moreover, there is no showing of any reasonable basis for counsel to have objected on this record. It cannot be demonstrated that counsel could reasonably have known what the State may have argued at Dwight Eaglin's trial, let alone that such knowledge would have compelled a due process objection during Smith's trial. As the issue is not developed below, no finding of deficient performance or prejudice is possible.

Review is also precluded because Smith has not offered a sufficient record for consideration of this issue. Although Smith attempts to incorporate "the entire record on appeal in Dwight T. Eaglin v. State, SC06-760," with regard to this issue, an appellate brief cannot merely incorporate a separate record on appeal by reference. Smith's reference to the entire Eaglin record must be stricken pursuant to Johnson v. State, 660 So. 2d 648, 653 (Fla. 1995) (noting such references are subject to being stricken upon request or *sua sponte* by the Court).

Furthermore, even with the conclusory reference to Eaglin's record, Smith has failed to identify any specific comment, evidence, or argument as improper. He offers several record citations from the Smith record, asserting that the

prosecutor repeatedly argued "that all of this was the defendant's plan," while arguing "in Eaglin's case" that Eaglin was the mastermind and ringleader (Appellant's Initial Brief, p. 39). In the absence of a specific citation to the Eaglin record, Smith's argument is vague and insufficient to place any cognizable issue before this Court. See Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990) (noting mere reference to arguments without elucidation is insufficient).

Finally, even if Smith's argument is considered, no relief is due. Although Smith has not provided a sufficient record for this Court to grant relief, an adequate basis for denial clearly exists once the legal parameters of this issue are defined.

Smith primarily relies on Bradshaw v. Stumpf, 545 U.S. 175 (2005). Justice Thomas's concurring opinion in that case expressly recognized that the United States Supreme Court "has never hinted, much less held, that the Due Process Clause prevents a State from prosecuting defendants based on inconsistent theories." Id. at 190. Defendant Stumpf had pled guilty to aggravated murder and one of three capital murder specifications, charges arising from an armed robbery in which two people were shot, and one of the victims died.

At a penalty hearing, Stumpf asserted in mitigation that his accomplice, a man named Wesley, had fired the shot that killed the victim, and that Stumpf's role in the crime was minor. The State had countered that Stumpf had fired the fatal shot and was the principal offender in the murder. The State also urged, alternatively, that the death penalty was appropriate because the facts demonstrated that Stumpf acted with the intent to cause death, even if he did not fire the fatal shot. The sentencers concluded Stumpf was the principal offender and imposed a death sentence.

At Wesley's later trial, the State presented evidence that Wesley had admitted firing the fatal shot. Wesley countered that the State had taken a contrary position with Stumpf, and received a life sentence. Stumpf then sought relief, asserting that the State's endorsement of Wesley's confession cast doubt on his conviction and sentence. The Sixth Circuit agreed, finding Stumpf's conviction could not stand because the State had secured convictions for Stumpf and Wesley for the same crime, using inconsistent theories. However, the United States Supreme Court reversed as to this holding, finding that the identity of the triggerman was immaterial to the conviction and therefore the prosecutorial

inconsistency on that point did not require voiding Stumpf's plea. Id. at 187-88.

In United States v. Dickerson, 248 F.3d 1036, 1043-44 (11th Cir. 2001), the Eleventh Circuit considered a due process claim premised on inconsistent prosecutorial theories and discussed the issue at length. The court determined that due process was only implicated by inconsistent theories when the State was required to change theories in order to pursue the later prosecution. For example, relief on this basis has been granted in cases such as Thompson v. Calderone, 120 F.3d 1045 (9th Cir. 1997), and Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1998), where the inconsistency in the subsequent prosecution was essential because the government could not have prosecuted the second defendant at all under the prosecutorial theory espoused at the first defendant's trial. Because Dickerson could have been prosecuted as a conspirator under the theory even as asserted in his codefendant's earlier trial, the change of argument was not undertaken in order to allow the later prosecution and therefore due process was not implicated. Dickerson, 248 F.3d at 1044. See also United States v. Paul, 217 F.3d 989 (8th Cir. 2000) (denying relief under same analysis); Jacobs v. Scott, 513 U.S. 1067 (1995)

(denying certiorari review of similar issue).

Applying the law to the instant case, no due process violation can be demonstrated. Both Smith and Eaglin were prosecuted under the principal theory (V36:1347-51); regardless of which defendant is actually characterized as the ringleader, each was responsible and criminal culpability is established for both defendants under either theory. Therefore, due process is not offended by any alleged shift of prosecutorial theory relating to which defendant actually masterminded the plan. See also Loi Van Nguyen v. Lindsey, 232 F.3d 1236, 1237 (9th Cir. 2000) (State's change of position as to who fired the initial shot did not violate due process, where theory of prosecution was voluntary mutual combat, rendering issue of who shot first irrelevant; prosecutor's arguments were consistent with the evidence presented in both trials, and there was no showing that prosecutor had falsified information or acted in bad faith). For all of these reasons, Smith's claim of a due process violation due to changing prosecutorial theories must be denied.

ISSUE VIII

WHETHER THE TRIAL COURT PROPERLY DENIED THE MOTION FOR MISTRIAL AFTER A WITNESS REFERRED TO APPELLANT'S PENALTY PHASE FOR ONE OF HIS PRIOR VIOLENT FELONY CONVICTIONS?

Appellant's next claim is that the trial court erred in denying his motion for mistrial after a state witness, in violation of a pre-trial motion in limine, mentioned that evidence had been presented in the defendant's penalty phase in a prior conviction. Smith argues that it was "grossly prejudicial" and "unfairly jaded the jury" by informing them that Smith had already survived a possible death sentence. Appellee submits that the trial court properly denied the motion for mistrial as the reference was inadvertent and minimal.

A trial court's ruling on a motion for mistrial is subject to an abuse of discretion standard of review. Goodwin v. State, 751 So. 2d 537, 546 (Fla. 1999); Thomas v. State, 748 So. 2d 970, 980 (Fla. 1999) (explaining that a ruling on a motion for mistrial is within the trial court's discretion and should not be reversed absent an abuse of that discretion); Hamilton v. State, 703 So. 2d 1038, 1041 (Fla. 1997) (noting that a ruling on a motion for mistrial is within the trial

court's discretion).

During the penalty phase in the instant case, the State introduced evidence of Smith's 1993 Broward conviction for first-degree murder, armed robbery, and armed burglary with assault. (V37:46). Assistant State Attorney Peter LaPorte, from the Seventeenth Judicial Circuit, identified Smith as the defendant in that case and read portions of the trial transcript to the jury, including Smith's confession to burglarizing the seventy-five-year-old victim's home where he gave details as to how he stabbed her to death after beating her. (V37:45, 76-80). Smith said that after he used a shovel to break open the door, he saw Mrs. Costello standing there with green sweat pants in her hand, yelling, telling him to get out. He admitted hitting her repeatedly with his fist, then a shovel, and ultimately stabbing her with a screwdriver as she lay on the floor screaming for help. (V37:76-83).

ASA LaPorte then read testimony from the first trial where Smith admitted that after robbing and killing Mrs. Costello, he went to find a rock cocaine dealer named Gene. He got two "dimes" off him and put 70 cents in the gas tank in the scooter. He then went back to the park and smoked the crack cocaine with John and his wife. (V37:85).

State Attorney Steve Russell then asked ASA LaPorte if, during that trial, he had presented evidence regarding another Broward County case involving the defendant, Stephen Smith. LaPorte responded, "Yes, sir. During the penalty phase, I did present -—." Smith objected and moved for a mistrial. (V37:88). Upon inquiry Mr. Russell explained that, "I didn't intend, obviously, to get into any reference to that. My —- my purpose was to try to tie up that we have the same defendant" and "Your Honor, I would indicate to the Court as an officer of the court it was not my intent nor my anticipation that we would reference penalty phase," and further, "I apologize to the Court and counsel as it was not my intent to go into that area or —— or violate the Court's ruling." (V37:91-92). Mr. Russell also pointed out with regard to any possible prejudice that the judgment and sentence, which would be entered into evidence, shows that Smith got a life sentence. The court denied the motion for mistrial saying that if there was no further mention of the penalty phase it was likely it would go over the jury's head and in one ear and out the other. (V37:96). Defense counsel rejected the offer of a curative instruction. (V37:97).

Smith's argument rests solely on this Court's decision in

Hitchcock v. State, 673 So. 2d 859, 863 (Fla. 1996). In Hitchcock, this Court directed that:

> When resentencing a defendant who has previously been sentenced to death, caution should be used in mentioning the defendant's prior sentence. Making the present jury aware that a prior jury recommended death and reemphasizing this fact as the trial judge did here could have the effect of preconditioning the present jury to a death recommendation.

While Hitchcock is readily distinguishable from the instant case, it should also be noted that this Court did not find reversible error based upon the mention of a prior death sentence. Similarly, this Court has repeatedly declined to find reversible error where the jury has been told that the defendant had previously been sentenced to death. Sireci v. State, 587 So. 2d 450, 453 (Fla. 1991) (holding that there no abuse of discretion in the trial court's refusal to grant a mistrial where the prosecutor's reference to the prior death sentence did not prejudice the defendant or play a significant role in the resentencing proceeding so as to warrant a mistrial); Teffeteller v. State, 495 So. 2d 744 (Fla. 1986) (declining to find error where the record reflected that the impact of merely mentioning a prior death sentence was negligible).

In the instant case, the statement made by the witness

was inadvertent and minimal. Further, unlike in the foregoing cases, the reference to the penalty phase in the instant case was concerning Smith's penalty phase for a separate offense that the jury was being asked to consider as an aggravating factor. In Hitchcock, Sireci and Teffeteller, this Court was considering the impact of giving the jury knowledge that on the same facts and in the same case, a prior jury had recommended death. Here, even without the off-handed mention of the penalty phase for the Broward County conviction, the Charlotte County jury would necessarily know that Smith had received a life sentence for the murder of Mrs. Costello and had escaped the ultimate sanction of death. Compare Sireci v. State, 587 So. 2d 450, 452-53 (Fla. 1991) (finding no prejudice where "trial judge noted that any 'halfway intelligent' juror would determine that Sireci had been sentenced to death previously for this crime.") Thus, the passing reference to a penalty phase under the circumstances did not give the jury any truly prejudicial information and the trial court did not abuse its discretion in denying the motion for mistrial as the error was not so prejudicial that it vitiated the entire trial. Cox v. State, 819 So. 2d 705, 714 (Fla. 2002) (finding that while defense may have been

chagrined that jury was informed that the appellant was serving two life sentences, this information did not vitiate the entire trial); Merck v. State, 664 So. 2d 939, 941 (Fla. 1995) (finding no abuse of discretion in denying Merck's motion for mistrial based upon inadvertent reference by deputy to the first trial of this case).

Further, error if any was harmless. As this Court has found in other cases where the jury received otherwise inadmissible information, given the nature and extent of other evidence in aggravation presented to the jury in the instant case, it is beyond a reasonable doubt that its recommendation would have been unchanged. Rogers v. State, 783 So. 2d 980, 1000-02 (Fla. 2001); Owen v. State, 596 So. 2d 985, 989 (Fla. 1992).

ISSUE IX

WHETHER TRIAL COURT COMMITTED REVERSIBLE ERROR IN ITS CONCLUSION THAT THE AGGRAVATING FACTORS OUTWEIGHED THE MITIGATING FACTORS?

Appellant next claims that the trial court improperly weighed the aggravating factors against the mitigating factors. He contends that although the trial court found the mitigating factors, the court erred in failing to give enough weight to his proposed mitigation of dysfunctional family, mental and emotional health, remorse and his "nontriggerman" status. The State contends that no abuse of discretion has been shown.

In reviewing challenges to the sentencing order, this Court has set forth the following standard:

> In reviewing the weight given to mitigating factors, this Court has stated that "[t]he relative weight given each mitigating factor is within the discretion of the sentencing court." Trease v. State, 768 So. 2d 1050, 1055 (Fla. 2000) (citing Campbell v. State, 571 So. 2d 415, 420 (Fla. 1990)). "We therefore recognize that while a proffered mitigating factor may be technically relevant and must be considered by the sentencer because it is generally recognized as a mitigating circumstance, the sentencer may determine in the particular case at hand that it is entitled to no weight for additional reasons or circumstances unique to that case." Id. "When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether,

> in the case of nonstatutory factors, it is truly of a mitigating nature." Campbell, 571 So. 2d at 419 (footnote omitted), receded from on other grounds by Trease, 768 So. 2d at 1055. "A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established." Id. at 419-20 (quoting Fla. Std. Jury Instr. (Crim.) Homicide). "The court next must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance." Id. at 420. "To be sustained, the trial court's final decision in the weighing process must be supported by 'sufficient competent evidence in the record.'" Id. (quoting Brown v. Wainwright, 392 So. 2d 1327, 1331 (Fla. 1981)).

Walker v. State, 957 So. 2d 560, 584 (Fla. 2007).

In the instant case, the trial court found the following aggravating circumstances: (1) under a sentence of imprisonment; (2) prior violent felony; (3) committed for the purpose of effecting an escape from custody; (4) cold, calculated and premeditated and; (5) victim was a law enforcement officer. (V21:3962-63). Balanced against these weighty aggravators, the court found in mitigation:

> 1. **The existence of any other factors in the Defendant's background that would mitigate against imposition of the death penalty.** Defense Counsel presented an abundant and often cumulative quantity of evidence about the Defendant's family of origin, including the family's history of sexual abuse and incest extending from his immediate family through the Defendant's mother and maternal grandfather. The

Defendant's father was a dysfunctional, alcoholic figure who frequently brutalized the Defendant and his brother, Charles, as well as their mother; he also sexually abused the Defendant's sisters. These sisters essentially overcame their abusive history to become good and functional members of society although they described in heart-rending fashion the pain and difficulty they had experienced in recovering from their dysfunctional family background. Brother, Charles, also testified about the early life of these siblings by video deposition from the Rhode Island State Prison where he is serving a life sentence for murdering his step-daughter. The Defendant and brother, Charles, were removed from the home at early ages and were involved with juvenile authorities in Rhode Island for years. Both these siblings essentially proved to be incorrigible and not susceptible of any significant rehabilitation. The existence of such a dysfunctional family background was proven beyond question and the **Court gives it great weight**.

2. **Mental/emotional health issues.** A forensic psychiatrist, Dr. Frederick Schaerf testified that his examination of the Defendant revealed an individual with a history of depression, Attention Deficit Disorder, and chronic substance abuse. That these conditions may be a product of his dysfunctional family background is worthy of consideration, but the Court finds that this mitigator was proven to the Court's satisfaction and it is **given some weight**. Dr. Schaerf further testified that the Defendant also had Antisocial Personality Disorder. This factor is not a mitigator and is rejected. Elledge v. State, 706 So.2d 1340 (Fla.1997).

3. **The Defendant's expression of remorse and apology to the families of the victim.** At the Spencer hearing, the Defendant took the witness stand to testify that he regretted the killing of Ms. Lathrem and that it "wasn't supposed to happen." He expressed an apology of sorts. Based on the evidence in the guilt phase of the trial, it appears that someone was destined to die from the inception of

the plan to escape. This expression of the Defendant at the Spencer hearing is accepted and found as a mitigator but is **given little weight**.

4. **The failures of officials at CCI to properly administer the prison and to properly supervise inmates.** James Aiken, a retired prison warden and prison official with experience in South Carolina and North Carolina, testified that the administration of CCI failed in four material respects to properly run this prison and that these failures contributed to the killings involved in this escape attempt. These four failures were: a) inmates were improperly classified in terms of their potential danger; b) inmate accountability was poor—i.e. the who, what, where of inmate assignment was deficient; c) key and tool control measures were inadequate; and d) there was a failure in the chain of command. The essence of this testimony was that the negligent failures of the prison administration contributed to the murder of Ms. Lathrem. Defense Counsel contends that this is a mitigating factor under the holding of Lockhart v. Ohio. 438 U.S. 586 (1976), that any circumstances of the offense may be offered by the defendant as the basis for a sentence less than death.

This Court considered and rejected similar evidence and arguments in the Sentencing Order of the co-defendant, *Dwight T. Faglin. State v. Dwight T. Eaglin, Case No. 03-1525-CF, March 31, 2006,* wherein this Court said:

> One can hypothesize many situations where the negligence of someone with a duty to care makes it easier for a perpetrator to commit a crime. For example, what if a parent of a young child neglects to keep that child from playing in the street? Along comes an intoxicated driver who kills or maims the child playing in the street. Is moral culpability somehow lessened through the negligence of the parent? Or, even worse, what if that child is kidnaped and murdered? Is there any less moral culpability because of the parent's

> negligence?
> This Court concludes that even if negligence -----—--------—--is conceded for discussion purposes, it cannot and should not reduce the moral culpability for murder. These----proposed mitigators, individually and collectively, are, therefore, rejected as repugnant to order in a society which strives to live by the law.
>
> This Court reaches the same conclusions today in regard to consideration of the method of operation of CCI as a mitigator and rejects the four items testified to by Mr. Aiken as mitigators.

(V21:3964-65)(emphasis added).

First, with regard to his challenge to the weight assigned to the mental health claim, Smith challenges the trial court's consideration of this second factor in light of his findings with regard to the first "catch-all" factor where he considered much of the same evidence. This is a matter within the trial court's discretion and Smith has failed to show an abuse of that discretion. Those findings were supported by competent substantial evidence and Smith has failed to establish that no reasonable person would have assigned the weight the trial court did. Therefore, the trial court's determination has not been shown to be unreasonable or arbitrary. Rodgers v. State, 948 So. 2d 655, 669 (Fla. 2006); Perez v. State, 919 So. 2d 347, 372, 376 (Fla. 2005); Elledge

v. State, 706 So. 2d 1340, 1347 (Fla. 1997).

Next, even though the trial court gave great weight to his dysfunctional family mitigator, Smith contends that the mitigation was so substantial it is "essentially a dispositive mitigator" when considered in conjunction with his claim that he was only an accomplice who confessed. Of course, Smith has no support for the contention that a defendant's upbringing can essentially act as a bar to the death penalty, giving him a free "pass" on any murders he may commit. To the contrary, this Court has upheld the death sentence for defendants who have a history of extremely abusive childhoods. Compare Hall v. State, 614 So. 2d 473, 480 (Fla. 1993) ("[S]ixteenth of seventeen children, Hall was tortured by his mother and abused by neighbors. Various relatives testified that Hall's mother tied him in a "croaker" sack, swung it over a fire, and beat him; buried him in the sand up to his neck to "strengthen his legs"; tied his hands to a rope that was attached to a ceiling beam and beat him while he was naked; locked him in a smokehouse for long intervals; and held a gun on Hall and his siblings while she poked them with sticks. Hall's mother withheld food from her children because she believed a famine was imminent, and she allowed neighbors to punish Hall by

forcing him to stay underneath a bed for an entire day); Kearse v. State, 770 So. 2d 1119, 1136 (Fla. 2000) (mitigators included severe emotional disturbance as a child; difficult childhood due to social and economical disadvantages; impoverished background; improper upbringing; malnourishment; lack of opportunity to bond with natural father; loss of his father when young boy which forced him to grow up without a male role model; upbringing in a broken home and poverty; dysfunctional family; alcoholic mother; neglect by mother; childhood trauma; physical and sexual abuse; and life in the streets after his mother gave up on him at an early age.) Moreover, this argument was not presented to the trial court and is barred.

Smith further argues that the trial court overlooked his alleged mitigation that he was only an accomplice to the murder. However, the sentencing order explains:

> Finally, the Court considers the argument of Defense Counsel in the Defendant's Sentencing Memorandum that:
>
> > Pursuant to ----Enmund v. Florida, 458 U.S. 782 (1982) and Tison v. Arizona, 481 U.S. 137 (1987), Mr. Smith is not eligible for a death sentence, because he was an accomplice and there is no credible evidence in the record to support a finding of reckless indifference to human life.
>
> This argument ignores the evidence that Smith led Ms. Lathrem to the place near the broom/mop closet

where Dwight Eaglin was waiting with the hammer to administer the first of several blows to the head before the Defendant stripped her of the keys and the radio. This argument further ignores the testimony of inmates Lykins and Baker, discussed earlier, in which they described the planning by this Defendant with the others and the intent to kill anybody who got in the way.

Counsel may characterize this as "no credible evidence" because it came from inmates with multiple felony convictions but it was never significantly impeached nor controverted by other evidence. In hindsight, one wonders if the escape attempt required the killing of Ms. Lathrem. Seemingly, she could have simply been overpowered and locked in the closet where her body was ultimately found while the ladder for crossing the two perimeter fences was fabricated. While Eaglin administered the death blows, this Defendant's involvement went beyond the passive. The planning described in this Order in Paragraphs A.3. and A.4 clearly provides a basis for the jury's verdict of guilty of three species of First Degree Murder, including Premeditated First Degree Murder.

(V21:3965-66).

In Paragraphs A.3 and A.4, the trial court made the following factual findings:

3. **The capital felony was committed for the purpose of effecting an escape from custody.** The purpose of the killing was borne out by the testimony of two contemporary inmates, Jesse Baker and Kenneth Lykins. Lykins described the methodology employed by this Defendant in getting certain inmates with welding and plumbing experience to work with him in the alterations that were being done in the prison dormitory where Ms. Lathrem was killed. His two co-defendants, Dwight T. Eaglin and Michael Jones, were involved in the escape planning. Eaglin was a welder and Jones was a plumber. Lykins testified that this Defendant, Smith, told him that he was going to

“kill everything in there” in order to effectuate the escape plan. He also said that his weapon would be a two pound hammer being used for metal work in the dormitory. Inmate Baker testified that Smith said, “Watch the news—anyone gets in our way, we’ll kill them.” Baker also testified that Smith bragged about the escape plans every day. There is no doubt that the killing of Ms. Lathrem was an integral part of the escape plan. This aggravator was proven beyond any reasonable doubt.

4. **The capital felony was a homicide and was committed in a cold. calculated, and premeditated manner without any pretense of moral or legal justification.** There is ample evidence to prove this aggravating circumstance. Inmates Lykins and Baker testified they overheard this Defendant’s statements, as discussed in the preceding paragraph, of the intent to kill anyone who got in the way of the escape plan. Killing was contemplated from the very inception of the escape plan. This plan consisted of fabricating a large ladder with the upper part at a right angle to the vertical lower part This ladder would allow those planning the escape to climb vertically over the inside fence of the prison perimeter and then to walk or crawl over horizontally in order to get past the outside perimeter fence. Both fences were topped with coils of razor wire. The escape ladder consisted of joining multiple smaller ladders together by a combination of welding them together, using bolts, screws and flat metal pieces to join ladders, and in limited application, to use duct tape to join some of the ladder pieces. This work had to be done without the observation of the supervising Correctional Officer, who, on the night of June 11, 2003, was alone supervising the inmates working on the Dormitory A alterations. Obviously, some disposition of her was essential in order to allow time for the ladder construction. By this Defendant’s own admissions he led Ms. Lathrem to the point where Dwight Eaglin was waiting with the hammer, unobserved by Lathrem, to administer the fatal blows. This Defendant admitted in a pre-trial statement that he distracted her by asking for the

> keys to the mop closet while Eaglin stealthily approached and struck her with the hammer. The Medical Examiner testified that his autopsy of Ms. Lathrem revealed no defensive wounds of any sort, explaining that when people perceive an attack their hands and arms are raised instinctively to fend off the attack. This aggravator was proven beyond any reasonable doubt.

(V21:3962-63). While Smith now contends that he is not asserting that being an accomplice made him ineligible for the death penalty and that the court overlooked his claim that it should be viewed as a mitigator, a review of his sentencing memorandum does not support his argument. (V21:3951-53). His claimed status as a mere accomplice was given one line in his list of nonstatutory mitigation. (V21:3951). The only argument he made with regard to the facts in support of his "accomplice" claim though focused on his ineligibility for the crime under Enmund/Tison,[27] which the trial court thoroughly considered and rejected. Assuming, *arguendo*, the trial court failed to consider his "accomplice" claim as nonstatutory mitigation, it would be harmless beyond a reasonable doubt as the trial court's factual findings establish Smith to be equally culpable for the murder of Officer Lathrem. See

[27] Enmund v. Florida, 458 U.S. 782 (1982) and Tison v. Arizona, 481 U.S. 137 (1987).

Douglas v. State, 878 So. 2d 1246 (Fla. 2004) (noting that even if the trial court erred in rejecting mitigation, error would be harmless in light of other mitigating evidence considered and weighed by the trial court and the minimal amount of additional mitigation these factors would have provided); Taylor v. State, 855 So. 2d 1, 30 (Fla. 2003) (stating that "even if the trial judge erred in rejecting this factor as nonmitigating or in failing to assign it any weight, any error would be harmless, given the minimal amount of mitigation this factor would have provided").

As the foregoing shows, the trial court thoroughly considered each and every factor in light of the evidence, the law and the facts of this case. Smith has failed to establish that no reasonable person would have assigned the weight the trial court did. Therefore, the trial court's determination has not been shown to be unreasonable or arbitrary. Rodgers v. State, 948 So. 2d 655, 669 (Fla. 2006), Perez v. State, 919 So. 2d 347, 372, 376 (Fla. 2005); Elledge v. State, 706 So. 2d 1340, 1347 (Fla. 1997). As no abuse of discretion has been shown, this claim should be denied. Walker v. State, 957 So. 2d 560, 584 (Fla. 2007) (where trial court thoroughly considered each mitigator and the unique circumstances of

case, court did not abuse its discretion in assigning weight to each mitigator); Foster v. State, 679 So. 2d 747, 755 (Fla. 1996) ("As long as the court considered all of the evidence, the trial judge's determination of lack of mitigation will stand absent a palpable abuse of discretion.").

ISSUE X

WHETHER SMITH'S SENTENCE IS PROPORTIONATE?

After acknowledging this Court's standard for proportionality review,[28] Appellant adds that this review is insufficient because it does not include cases where the death penalty was sought and not imposed and cases where the death penalty could have been sought but was not. To support this position, Appellant relies on the September 2006 ABA report. He argues that the failure to engage in this multifaceted analysis deprives every capital defendant of a meaningful proportionality review, denies due process, results in "unusual" punishments in derogation of article I, Section 17 of the Florida Constitution and creates the risk that the imposition of the sentence will be arbitrary. Again, Appellant presents no support for this contention. The only case he cites to is Simmons v. State, 934 So. 2d 1100, 1122

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[28] This Court in Simmons v. State, 934 So. 2d 1100, 1122 (Fla. 2006) set forth the standard for determining whether death is a proportionate penalty as requiring a consideration of the totality of the circumstances of the case and a comparison of the case with other capital cases. "However, this proportionality review is not a comparison between the number of aggravating and mitigating circumstances." Id. at 1122 (quotations omitted).

(Fla. 2006), wherein this Court held that:

> The Court performs a proportionality review to prevent the imposition of "unusual" punishments contrary to article I, section 17 of the Florida Constitution. See Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991). "The death penalty is reserved for 'the most aggravated and unmitigated of most serious crimes.'" Clark v. State, 609 So. 2d 513, 516 (Fla. 1992) (quoting State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973)). In deciding whether death is a proportionate penalty, we consider the totality of the circumstances of the case and compare the case with other capital cases.

Clearly, Simmons does not conclude that proportionality review requires this Court to consider all cases where the death sentence was not imposed. Nor does Smith suggest why performing such a review would aid in ensuring that the sentence is not unusually imposed. To the contrary, the limitation of this Court's review to the most aggravated murders necessarily inures to the benefit of the defendant in that it raises the bar for what can be considered the most aggravated of the most serious of all offenses.

As for the ABA report, this Court has consistently held that there is nothing in the report that would cause this Court to recede from its past decisions upholding the facial constitutionality of the death penalty. Rutherford v. State, 940 So. 2d 1112 (Fla. 2006); Rolling v. State, 944 So. 2d 176,

181 (Fla. 2006); Diaz v. State, 945 So. 2d 1136, 1146 (Fla. 2006).

Smith also argues that his sentence is disproportionate because his equally culpable codefendant Jones received a life sentence. Jones' sentence in January 2007 was a result of a plea agreement with the State and, therefore, is of no help to the defendant. See England v. State, 940 So. 2d 389, 406 (Fla. 2006) (holding that where equally culpable codefendant enters plea for lesser sentence, there is no disparate treatment); Kight v. State, 784 So. 2d 396, 401 (Fla. 2001) (recognizing in instances where the codefendant's lesser sentence was the result of a plea agreement or prosecutorial discretion, this Court has rejected claims of disparate sentencing); San Martin v. State, 705 So. 2d 1337, 1350-51 (Fla. 1997) (upholding court's rejection of codefendant's life sentence as a mitigating circumstance where codefendant's plea, sentence, and agreement to testify for the State were the products of prosecutorial discretion and negotiation); Steinhorst v. Singletary, 638 So. 2d 33, 35 (Fla. 1994) (concluding that codefendant's sentence for second-degree murder was not relevant to claim of disparate sentencing); Brown v. State, 473 So. 2d 1260, 1268 (Fla. 1985) (finding

that death sentence was proper even though accomplice received disparate prosecutorial and judicial treatment after pleading to second-degree murder in return for life sentence).

Moreover, outside of Smith's own self-serving statements, there is no evidence in the record that Jones was equally culpable. Although, Smith continues to argue that he is merely an accomplice, the trial court rejected this claim and found that he had preplanned the escape with the recognition that officers might have to be killed. The court's order notes that "Smith, told inmate Lykins that he was going to 'kill everything in there' in order to effectuate the escape plan. He also said that his weapon would be a two pound hammer being used for metal work in the dormitory. Inmate Baker testified that Smith said, 'Watch the news—anyone gets in our way, we'll kill them.' Baker also testified that Smith bragged about the escape plans every day." The court also found that "there is no doubt that the killing of Ms. Lathrem was an integral part of the escape plan. By this Defendant's own admissions he led Ms. Lathrem to the point where Dwight Eaglin was waiting with the hammer, unobserved by Lathrem, to administer the fatal blows." (V21:3962-63).

Smith's claim that his sentence is disproportionate when

compared to other similarly situated cases because he is only an accomplice is likewise without merit. This Court in Van Poyck v. State, 564 So. 2d 1066, 1070-71 (Fla. 1990), reviewed a similar case where the defendant admitted helping plan an escape but denied being the triggerman. After rejecting Van Poyck's claims that he was a minor actor and did not have the culpable mental state to kill, this Court found the death sentence proportional, explaining:

> Although the record does not establish that Van Poyck was the triggerman, it does establish that he was the instigator and the primary participant in this crime. He and Valdez arrived at the scene "armed to the teeth." Since there is no question that Van Poyck played the major role in this felony murder and that he knew lethal force could be used, we find that the death sentence is proportional.

Id. at 1070-1071. Similarly, this Court in Lugo v. State, 845 So. 2d 74, 118 (Fla. 2003), also addressed the appropriateness of the death sentence for the "nontriggerman," stating:

> We agree with the trial judge's analysis of this aspect of the proportionality review. Lugo's reliance on Larzelere v. State, 676 So. 2d 394 (Fla. 1996), is unavailing. Moreover, Larzelere actually supports the conclusion that sentences of death are appropriate for Lugo. In Larzelere, we noted that disparate treatment of a codefendant, including the imposition of the death penalty, is warranted when that codefendant is a more culpable participant in the criminal activity. See id. at 407. The appellant in Larzelere presented an argument similar to Lugo's argument that he was not the "hands-on" killer. We nevertheless affirmed the death penalty, stating:

> [The appellant's] participation was not relatively minor. Rather she instigated and was the mastermind of and was the dominant force behind the planning and execution of this murder and behind the involvement and actions of the co-participants before and after the murder. Her primary motive for the murder was financial gain, which motive was in her full control. Id. In Lugo's case, record evidence reflects that he was a dominant force in the murders of Griga and Furton, and was motivated to a significant degree by pecuniary gain. The decision in Larzelere therefore counsels that sentences of death for Lugo are appropriate.

In the instant case, like Van Pock, Lugo and Larzelere, Smith was the driving force behind the plan to escape, including the plan to kill anyone who got in his way. Accordingly, the sentence is proportionate.

Moreover, when compared to similar cases, this sentence is proportional. The trial court found five very weighty aggravating circumstances: (1) under a sentence of imprisonment; (2) multiple prior violent felonies including murder, kidnapping and sexual battery; (3) committed for the purpose of effecting an escape from custody; (4) cold, calculated and premeditated and; (5) victim was a law enforcement officer. (V21:3962-63). In mitigation, the court found the nonstatutory factors of dysfunctional family background, a history of depression, Attention Deficit Disorder, and chronic substance abuse and remorse. The record

shows that Smith was imprisoned in CCI when he developed the plan to escape and kill anyone who got in the way, resulting in the death of Officer Dana Lathrem. As the trial court found, "he was serving multiple life sentences for convictions from Broward County. These convictions included one for First Degree Murder committed in the course of a burglary and robbery. Another of the life sentences he was serving sprang from the burglary of a home in Broward County during which he committed a sexual battery on a teen-aged child in the home." (V21:3962). When compared to similar cases where multiple aggravating factors are balanced against the evidence in mitigation, the sentence in the instant case is proportionate. Compare Caballero v. State, 851 So. 2d 655, 663 (Fla. 2003) (affirming death sentence where trial court found that four aggravating factors were established and several nonstatutory mitigators applied); Shellito v. State, 701 So. 2d 837 (Fla. 1997) (affirming the death penalty of a twenty-year-old defendant where the trial court found two aggravators and various nonstatutory mitigation consisting of alcohol abuse, a mildly abusive childhood, difficulty reading, and a learning disability); Spencer v. State, 691 So. 2d 1062 (Fla. 1996) (affirming the death sentence where the trial court found HAC

and prior violent felony aggravators outweighed two statutory mental mitigators and numerous nonstatutory mitigators.) This claim should be denied.

ISSUE XI

WHETHER THE LOWER COURT ERRED REVERSIBLY IN DENYING THE DEFENSE REQUEST TO INSTRUCT THE JURY ON ITS LIST OF MITIGATING EVIDENCE?

Trial defense counsel requested that the court provide the jury with a list of proposed mitigation in its instructions. After hearing the argument of counsel (V41:679-687), the court ruled that it was rejecting the defense request and would give the standard jury instructions which deal with any other aspects of the defendant's character, record or background. The trial court allowed defense counsel to argue all the particulars listed if supported by the evidence (V20:3919; V41:687; V42:973).

The decision whether to give a particular jury instruction is within the trial court's discretion. Alston v. State, 723 So. 2d 148, 159 (Fla. 1998). Discretion is abused only when the judicial action is arbitrary, fanciful or unreasonable, which is another way of saying discretion is abused only where no reasonable person would take the view adopted by the trial court. Trease v. State, 768 So. 2d 1050, 1053 n2 (Fla. 2000); Overton v. State, 801 So. 2d 877, 896 (Fla. 2001). There can be no abuse of discretion when the trial court follows this Court's precedents. See Miller v.

State, 926 So. 2d 1243, 1257 (Fla. 2006); Brown v. State, 721 So. 2d 274, 283 (Fla. 1998) (holding that the standard jury instructions fully advise the jury of the importance of its role, correctly state the law, do not denigrate the role of the jury, and do not violate Caldwell v. Mississippi, 472 U.S. 320 (1985)); Belcher v. State, 851 So. 2d 678, 684-85 (Fla. 2003) ("We find that the trial court did not abuse its discretion by giving a "catch-all" jury instruction about mitigation instead of giving Belcher's list of nonstatutory mitigators."); James v. State, 695 So. 2d 1229, 1236 (Fla. 1997) ("The trial court is required to give only the "catch-all" instruction on mitigating evidence and nothing more."); Morris v. State, 811 So. 2d 661 (Fla. 2002); Davis v. State, 859 So. 2d 465 (Fla. 2003); Downs v. Moore, 801 So. 2d 906 (Fla. 2001).

Moreover, the United States Supreme Court has held that catch-all jury instructions are adequate to apprise the jury of available mitigation. See Blystone v. Pennsylvania, 494 U.S. 299, 307-308 (1990) ("The requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence. In petitioner's case the jury was specifically instructed to consider, as

mitigating evidence, any 'matter concerning the character or record of the defendant, or the circumstances of his offense.' ... This was sufficient to satisfy the dictates of the Eighth Amendment.") (footnote and citations omitted); Boyde v. California, 494 U.S. 370 (1990) ("Petitioner had an opportunity through factor (k) to argue that his background and character 'extenuated' or 'excused' the seriousness of the crime, and we see no reason to believe that reasonable jurors would resist the view, 'long held by society,' that in an appropriate case such evidence would counsel imposition of a sentence less than death. ... The jury was directed to consider any other circumstance that might excuse the crime, which certainly includes a defendant's background and character."); Ayers v. Belmontes, 127 S. Ct. 469, 166 L. Ed. 2d 334 (2006) ("The factor (k) instruction is consistent with the constitutional right to present mitigating evidence in capital sentencing proceedings.").

Appellant's reliance on Brewer v. Quarterman, 127 S. Ct. 1706, 167 L. Ed. 2d 622 (2007), Abdul-Kabir v. Quarterman, 127 S. Ct. 1654, 167 L. Ed. 2d 585 (2007) and Smith v. Texas, 127 S. Ct. 1686, 167 L. Ed. 2d 632 (2007) is unavailing. Those cases dealt with correcting Texas' special issues that did not

provide for adequate jury consideration of mitigating evidence. Nothing is presented in the instant case similar to Texas where the special issue instruction and the subsequent nullification charge failed to cure the error. In the instant case, the jury was instructed and allowed to consider all relevant mitigating evidence and there was no constitutional error as had been the case in Texas.

ISSUE XII

WHETHER TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO CHALLENGE THE CONSTITUTIONALITY OF FLORIDA'S LETHAL INJECTION PROCEDURES?

A. The Instant Claim is Not Cognizable on Direct Appeal.

As stated in Issues II-IV, supra, ineffective assistance of counsel claims are ordinarily not cognizable on direct appeal. There is no reason to address the claim on direct appeal; Appellant should await post-conviction proceedings.

B. The Claim is Meritless.

Trial defense counsel filed a Motion to Declare the Existing Procedures Utilized in Florida for Lethal Injection Unconstitutional, relying on The Lancet article. (V19:3644-57). On June 16, 2006, trial counsel called the court's attention to the motion (V24:4528-29):

> Judge, I filed a motion asking the Court to declare the Florida procedure for lethal injection unconstitutional. I attached to that, a copy of a medical journal from -- a copy of an article from the medical journal, The Lancet, which sets forth the real inadequacies of the lethal injection process that's set forth in the protocols in the State of Florida.
>
> The -- I know the Court had previously ruled in another case that this was not -- that such a motion would not be right prior to the penalty phase. I think it's appropriate to bring it now, and I would ask the Court to grant my motion and find that the Florida lethal injection procedures violate the United States Constitution and the Florida

> Constitution.
>
> THE COURT: Well, I don't think that even merits discussion. Even if there were a sentence of death at this point, you know, the appeal is automatic, and we're not to the point of execution; if we ever get there.
>
> So, I don't know why you're bringing this motion in advance of trial. The ruling is the same as it was in the Eaglin case. It's not timely and we'll move on.

The court's order noted that the motion was "viewed as untimely and is therefore not considered." (V20:3857).

In this appeal, Smith contends that trial counsel rendered ineffective assistance for failing to renew the motion at the penalty phase. Appellant's claim is meritless. If we are invited to speculate on the matter without the usual protocol of presentation of the claim in a post-conviction motion, a proceeding whereby trial counsel is given the opportunity to explain his actions under oath subject to cross-examination, Appellee speculates that since trial counsel presented the claim at guilt phase, he may well have concluded that no further action was necessary since the trial court declared there was no merit to discussion "[e]ven if there were a sentence of death at this point." (V24:4529). There is no deficiency since trial counsel presented the claim. In any event, ineffectiveness is not apparent on the face of the record.

Even if there were deficiency, the prejudice prong cannot be satisfied since this Court has rejected lethal injection claims and thus counsel need not pursue unmeritorious claims. See Sims v. State, 754 So. 2d 657 (Fla. 2000); Bryan v. State, 753 So. 2d 1244, 1253 (Fla. 2000); Hill v. State, 921 So. 2d 579, 582-583 (Fla. 2006) (approving trial court's summary denial of claim that lethal injection as administered in Florida constitutes cruel and unusual punishment) Suggs v. State, 923 So. 2d 419 (Fla. 2005), Rutherford v. State, 926 So. 2d 1100, 1113-14 (Fla. 2006) (approving summary denial of claim). Accordingly, this Court should deny the instant claim.

ISSUE XIII

WHETHER THE LETHAL INJECTION PROCEDURE VIOLATES THE SEPARATION OF POWERS DOCTRINE?

The instant claim now raised - that the lethal injection procedure violates the separation of powers doctrine - is procedurally barred and may not be reviewed on appeal since it was not presented to the lower court for a ruling as a predicate to appellate review. Instead, Smith filed quite a different motion below challenging lethal injection based on The Lancet article. (V19:344-57). This Court's jurisprudence is clear that a party must present the same specific question to both the trial court and appellate court for review. Changing the argument is impermissible. See Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982) ("Furthermore, in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below."); Woods v. State, 733 So. 2d 980, 984 (Fla. 1999); Archer v. State, 613 So. 2d 446, 448 (Fla. 1993).

Additionally, the claim is meritless. Smith's argument was considered and rejected in Diaz v. State, 945 So. 2d 1136, 1142-44 (Fla. 2006):

> Lethal Injection
>
> Diaz challenges Florida's lethal injection

statute, section 922.105, Florida Statutes (2006), on several grounds. He argues that the statute violates the separation of powers doctrine in article II, section 3 of the Florida Constitution because it improperly delegates legislative authority to the Department of Corrections (DOC) to create the lethal injection protocol and exempts these procedures from the procedural safeguards of Florida's Administrative Procedure Act in chapter 120 Florida Statutes (2006). He further argues that the statute violates the constitutional prohibition on cruel and unusual punishment in article I, section 17 of the Florida Constitution and amendment 8 of the United States Constitution. Additionally, Diaz contends that the current lethal injection protocol inflicts cruel and unusual punishment.

Article II, section 3 of the Florida Constitution, which codifies the constitutional doctrine of the separation of powers, prohibits the members of one branch of government from exercising "any powers appertaining to either of the other branches unless expressly provided herein." This Court has traditionally applied a "strict separation of powers doctrine," State v. Cotton, 769 So. 2d 345, 353 (Fla. 2000), which "encompasses two fundamental prohibitions." Chiles v. Children A, B, C, D, E, & F, 589 So. 2d 260, 264 (Fla. 1991). "The first is that no branch may encroach upon the powers of another. The second is that no branch may delegate to another branch its constitutionally assigned power." Id. (citation omitted).

This second prohibition generally precludes the Legislature from delegating "the power to enact a law or the right to exercise unrestricted discretion in applying the law." Sims v. State, 754 So. 2d 657, 668 (Fla. 2000). Diaz claims that the lethal injection statute gives DOC "unrestricted discretion in applying the law," presumably because the statute simply states that the means of execution shall be by lethal injection without providing a definition of the procedure or the drugs to be used. However, as we stated in Sims,

> [T]he Legislature may "enact a law, complete in itself, designed to accomplish a general public purpose, and may expressly authorize designated

> officials within definite valid limitations to provide rules and regulations for the complete operation and enforcement of the law within its expressed general purpose."

Id. at 668 (quoting State v. Atlantic Coast Line R.R. Co., 56 Fla. 617, 47 So. 969, 976 (Fla. 1908)).

We rejected the same separation of powers challenge in Sims, finding that Florida's lethal injection statute "is not so indefinite as to constitute an improper delegation of legislative power." Id. at 670. We cited four reasons for our conclusion:

> First, the statute clearly defines the punishment to be imposed (i.e., death). Thus, the DOC is not given any discretion to define the elements of the crime or the penalty to be imposed. Second, the statute makes clear that the legislative purpose is to impose death. [The Secretary of the Department of Corrections] testified that the purpose of the DOC's execution day procedures were to achieve the legislative purpose "with humane dignity." Third, determining the methodology and the chemicals to be used are matters best left to the Department of Corrections to determine because it has personnel better qualified to make such determinations. Finally, we note that the law in effect prior to the recent amendments stated simply that the death penalty shall be executed by electrocution without stating the precise means, manner or amount of voltage to be applied.

Id. Thus, the trial court properly denied relief on this aspect of Diaz's challenge to the statute.

Diaz also argues that the Legislature gave DOC "unfettered discretion to legislate" when it exempted the DOC's policies and procedures for execution from the administrative safeguards of chapter 120, Florida's Administrative Procedure Act. See § 922.105(7), Fla. Stat. (2006). We find no merit to this claim. Even though the execution procedures may not be challenged through a chapter 120 proceeding, they can and have been challenged through postconviction proceedings under rule 3.851. See, e.g., Hill v. State, 921 So. 2d 579, 582-83

> (Fla.), cert. denied, 546 U.S. 1219, 126 S. Ct. 1441, 164 L. Ed. 2d 141 (2006). In light of the exigencies inherent in the execution process, judicial review and oversight of the DOC procedures is preferable to chapter 120 administrative proceedings. We conclude that the statutory exemption does not give DOC "unfettered discretion" as to lethal injection procedures.

Thus, the instant claim must be rejected as both procedurally barred and meritless.

ISSUE XIV

WHETHER FLORIDA'S DEATH PENALTY SCHEME VIOLATES DUE PROCESS, THE SIXTH AMENDMENT AND RING V. ARIZONA, 536 U.S. 584 (2002)?

Appellant filed a motion to declare Florida Statutes 921.141 unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002), and Apprendi v. New Jersey, 530 U.S. 466 (2000). (V1:123-134). The trial court denied the motion. (V2:350). Apparently relying on the ABA Report of 2006, Smith asks this Court to find the death penalty statute unconstitutional. This Court has recently and repeatedly declined to do so and should continue to adhere to its precedents. In Rutherford v. State, 940 So. 2d 1112, 1117-18 (Fla. 2006) the Court opined:

> THE ABA REPORT
>
> We first address the impact of the ABA Report because it serves as the basis for Rutherford's claims in his rule 3.800(a) and 3.851 motions, as well as in his habeas petition, that his death sentence is unconstitutional. On September 17, 2006, the American Bar Association published a report on Florida's death penalty system. The report, titled Evaluating Fairness and Accuracy in the State Death Penalty System: The Florida Death Penalty Assessment Report, analyzes Florida's death penalty laws, procedures and practices, and highlights areas in which, in the view of the assessment team, Florida "fall[s] short in the effort to afford every capital defendant fair and accurate procedures." ABA Report at iii.
>
> We agree with the circuit court's conclusion that the ABA Report is not "newly discovered evidence." The ABA Report is a compilation of previously available information related to

> Florida's death penalty system and consists of legal analysis and recommendations for reform, many of which are directed to the executive and legislative branches. See ABA Report at ii ("The state assessment teams are responsible for collecting and analyzing various laws, rules, procedures, standards, and guidelines relating to the administration of the death penalty" and the assessment team's findings "are intended to serve as the bases from which [the state] can launch [a] comprehensive self-examination[]."). However, even if we were to consider the information contained in the ABA Report, nothing therein would cause this Court to recede from its decisions upholding the facial constitutionality of the death penalty. See, e.g., Hodges v. State, 885 So. 2d 338, 359 & n.9 (Fla. 2004) (noting that the defendant's claim that "the death penalty statute is unconstitutional because it fails to prevent the arbitrary and capricious imposition of the death penalty, violates due process, and constitutes cruel and unusual punishment," has "consistently been determined to lack merit"); Lugo v. State, 845 So. 2d 74, 119 (Fla. 2003) ("We have previously rejected the claim that the death penalty system is unconstitutional as being arbitrary and capricious because it fails to limit the class of persons eligible for the death penalty."). Further, Rutherford does not allege how any of the conclusions reached in the ABA Report would render his individual death sentence unconstitutional.
>
> For all these reasons, we affirm the circuit court's denial of the motion for postconviction relief regarding these points related to the ABA Report, we affirm the circuit court's dismissal of the motion for 3.800(a) relief, and we deny Rutherford's petition for a writ of habeas corpus.

See also Rolling v. State, 944 So. 2d 176, 181 (Fla. 2006); Diaz v. State, 945 So. 2d 1136, 1145-1146 (Fla. 2006).

Smith's claim is meritless and relief must be denied.

Likewise, Appellant's claim that Florida's death penalty scheme violates Ring v. Arizona, 536 U.S. 584 (2002), is also meritless. The trial court in its sentencing order concluded that the aggravators present in this case were (1) capital felony committed by a person previously convicted of a felony and under a sentence of imprisonment (serving multiple life sentences for convictions from Broward County including one for first degree murder committed in the course of a burglary and robbery and another arising from a burglary of a home during which he committed a sexual battery on a teenaged child); (2) the defendant was previously convicted of a felony involving the use or threat of violence to the person, i.e., in December of 1981 Smith pled guilty and was convicted of sexual assault of his sister in Rhode Island; additionally, there were the multiple violent crimes in Broward County listed above; (3) the capital felony was committed for the purpose of effecting an escape from custody; (4) the homicide was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification; (5) the victim was a law enforcement officer engaged in the performance of her official duties which merged with aggravator in paragraph 3. (V21:3962-63).

This Court has repeatedly rejected Ring arguments, especially where, as here, the prior violent felony aggravator has been found. Floyd v. State, 913 So. 2d 564, 577 (Fla. 2005); Duest v. State, 855 So. 2d 33, 49 (Fla. 2003); Lugo v. State, 845 So. 2d 74, 119 n79 (Fla. 2003); Blackwelder v. State, 851 So. 2d 650, 653 (Fla. 2003); Doorbal v. State, 837 So. 2d 940, 963 (Fla. 2003). In addition, this case involved the aggravator of murder committed while under sentence of imprisonment which this Court has held may be found by the judge alone. Allen v. State, 854 So. 2d 1255, 1262 (Fla. 2003); Floyd, supra, at 577. Accordingly, the instant claim must be denied.

ISSUE XV

WHETHER THE TRIAL COURT IMPROPERLY PREVENTED DEFENSE COUNSEL FROM TELLING THE JURY TO TAKE ITS RESPONSIBILITY SERIOUSLY?

During defense counsel's closing penalty phase argument, counsel belittled the prosecutor's reliance on Appellant's aggravating factors of prior convictions and being under sentence of imprisonment. (V42:951-52). Defense counsel complained the prosecutor was saying "you gotta kill this poor man because he's got this prior record" when the defense urged that it was not an aggravator. (V42:952-53). The prosecutor objected that the defense was again attempting to transfer ultimate sentencing to the jury and the court agreed that it was an improper argument. (V42:953). When the court inquired if a curative instruction was desired, this exchange occurred:

> MR. RUSSELL: Just -- just that it's the -- well, just to the effect of the -- well, it's the Court's job to sentence; however, you know, your recommendation must be given great weight but it's the Court's job to sentence. Something to that effect.
>
> MR. SULLIVAN: Well, Judge, I don't think that's an accurate statement at all. Under Raymond and Prindy it's this jury's job to sentence and I object.
>
> THE COURT: It's their job to make a recommendation to the Court. It's not their job to pull the plug on him and give him the lethal injections and pull the electric switch or any of those things.
>
> MR. SULLIVAN: I'll -- I'll try to quit using

> that term, Your Honor.
>
> THE COURT: All right.
>
> (Whereupon, the conference was concluded and the following proceedings were conducted within the hearing and presence of the jury.)
>
> THE COURT: Members of the jury, I will instruct you that none of these arguments are intended to make you feel like you're the instrument of death in the event that is the ultimate sentence in this case. Your job is to listen to, weigh the evidence, listen to these arguments, apply the law to the facts as you find them, and make a verdict, a recommendation to this Court, which is the ultimate sentencer. And I will give your recommendation great weight. All right.

(V42:953-54).

A. The Instant Claim is Procedurally Barred.

Appellee would initially submit this claim is procedurally barred and not subject to appellate review based on trial counsel's failure to interpose an objection below or cite relevant case law in support of the defense position. See Lucas v. State, 376 So. 2d 1149, 1152 (Fla. 1979) ("This court will not indulge in the presumption that the trial judge would have made an erroneous ruling had an objection been made and authorities cited contrary to his understanding of the law.").

B. The Instant Claim is Meritless.

This Court has repeatedly held that the standard jury instruction fully advises the jury of the importance of its

role and does not unconstitutionally denigrate that role. Taylor v. State, 937 So. 2d 590, 600 (Fla. 2006); Brown v. State, 721 So. 2d 274, 283 (Fla. 1998); Johnson v. State, 660 So. 2d 637, 647 (Fla. 1995). The court's action of sustaining the prosecutor's objection and giving a curative instruction was entirely proper given defense counsel's improper argument. The court's curative instruction mirrored Florida's standard jury instruction and, contrary to Appellant's argument, did not "affirmatively misadvise[] the jury that it's [sic] recommendation did not really matter." (V42:954, 969-78). Because Appellant has failed to demonstrate any error, this Court should deny the instant issue.

ISSUE XVI

WHETHER TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO CHALLENGE THE CONSTITUTIONALITY OF FLORIDA'S CLEMENCY PROCEDURES?

A. The Instant Claim is Not Cognizable on Direct Appeal.

As previously noted throughout this brief, ineffective assistance of counsel claims are ordinarily not cognizable on direct appeal. There is no need to address such a claim here. Moreover, even if counsel had challenged the constitutionality of Florida's clemency procedures, it would avail Smith naught since invalidation of clemency would not bar the imposition of a judgment and sentence of death.

B. Alternatively, the Instant Claim is Meritless.

This Court has held that Florida's clemency process does not violate the Due Process and Equal Protection Clauses of the United States and Florida Constitutions. See Rutherford v. State, 940 So. 2d 1112, 1121-23 (Fla. 2006) (reaffirming prior decisions King, Glock and Provenzano, and stating that "we reject Rutherford's argument that the ABA Report requires us to reconsider our prior decisions rejecting constitutional challenges to Florida's clemency process."); King v. State, 808 So. 2d 1237, 1246 (Fla. 2002); Glock v. State, 776 So. 2d 243, 252-53 (Fla. 2001); Provenzano v. State, 739 So. 2d 1150,

1155 (Fla. 1999).

Since the underlying claim is without merit, neither prong of the Strickland v. Washington standard can be satisfied and Smith's claim must fail. Trial counsel is not required to file non-meritorious motions. Gordon v. State, 863 So. 2d 1215 (Fla. 2003); Fennie v. State, 855 So. 2d 597, 607 (Fla. 2003); Valle v. Moore, 837 So. 2d 905, 908 (Fla. 2002).

ISSUE XVII

CUMULATIVE ERROR

Appellant's final argument is that the cumulative effect of attorney deficient performance and other errors denied him a fair trial. Appellee submits that for the reasons stated, supra, the challenge to attorney ineffectiveness need not be addressed here and is alternatively meritless. Since there are no individual errors, any cumulative error argument must fail. Bryan v. State, 748 So. 2d 1003, 1008 (Fla. 1999); Downs v. State, 740 So. 2d 506, 518 (Fla. 1999).

CONCLUSION

Based on the foregoing facts, arguments and citations of authority, the appellant's convictions and death sentence should be AFFIRMED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Ryan Thomas Truskoski, Esq., P.O. Box 568005, Orlando, Florida 32856-8005 and Stephen B. Russell, State Attorney, Twentieth Judicial Circuit, P.O. Box 399, Ft. Myers, Florida 33902-0399, this 7th day of November, 2007.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL

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STEPHEN D. AKE
Assistant Attorney General
Fla. Bar No. 14087
Concourse Center 4
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910

Facsimile: (813) 281-5501
COUNSEL FOR APPELLEE