IN THE SUPREME COURT OF FLORIDA

JOSEPH SMITH,

Appellant,

v. CASE NO. SC06-0747

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE TWELFTH JUDICIAL CIRCUIT,
IN AND FOR SARASOTA COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF APPELLEE

BILL McCOLLUM
ATTORNEY GENERAL

CAROL M. DITTMAR
Senior Assistant Attorney General
Florida Bar I.D. No. 0503843
Concourse Center #4
3507 Frontage Road, Suite 200
Tampa, Florida 33607
Phone: (813) 287-7910
Fax: (813) 281-5501

COUNSEL FOR APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellant Joseph Smith was convicted of the kidnapping, sexual battery, and first degree murder of eleven-year-old Carlie Brucia and sentenced to death. Carlie disappeared while walking home from a friend's house on Sunday, February 1, 2004 (35/3307-16,3369-71). The police were notified and a search bloodhound tracked Carlie's scent to Evie's Car Wash on Bee Ridge Road in Sarasota, along the route between the two houses (35/3319,3349,3354-56,3405-10). Surveillance cameras at the car wash captured an image of Carlie being led away by a man in a mechanic's uniform (35/3324-28,3424, 3440,3444,3457; 37/3581-82,3586-90). A yellow station wagon could also be seen in the video (35/3455-57; 36/3499,3503).

The car wash videotape was displayed extensively by the media (36/3525; 37/3586-90,3624). Several members of the community contacted law enforcement after recognizing Smith as the person depicted in the video abducting Carlie (36/3525-29,3539-43,3551-55; 37/3591,3653-54). Smith was interviewed on Feb. 3 and described his activities from Feb. 1; he was shown a photograph taken from the video, and denied that it was him (37/3572-76,3592-99). He was arrested later that day on unrelated charges (37/3607,3697).

The owner of the yellow station wagon, Jeffrey Pincus, delivered the car to the police after seeing the video (37/3609,3639,3654). Pincus had permitted Smith to borrow his car the afternoon of Feb. 1 (37/3639,3644-45). Although Smith was only

supposed to use the car for about fifteen minutes, he did not return the car to Pincus until the following morning (37/3645-48). The car odometer showed that it had been driven over 300 miles in two days, mostly during the time Smith had the car (37/3644,3651).

After Smith was arrested and counsel had been appointed, Smith's brother, John Smith, went to the jail to try to meet with Smith (37/3697-99; 38/3795-97). After speaking with FBI Special Agents David Street and Leo Martinez, John asked if he could see Smith (38/3738-39). John was referred to Smith's attorney, and the following morning, arrangements were made for a meeting between Smith, John, and their mother, Patricia Davis (37/3697-3700; 38/3739,3798). Sheriff's officials agreed to defense counsel's request not to monitor or record any conversation; they did not ask John or Mrs. Davis to elicit any information from Smith (37/3700; 38/3831). The meeting took place the morning of Feb. 5; Smith met with his attorney in an interview room at the sheriff's substation, then the attorney came out, and John and Mrs. Davis went in the room (37/3701; 39/3878-79). Mrs. Davis was very emotional when she came out, about forty-five minutes later (37/3701; 39/3879). John came out approximately half an hour after that, and the two of them left together (37/3702; 39/3880).

John testified that during this meeting, he asked Smith if he had taken the little girl; Smith was crying and mumbling and did not answer their questions directly (38/3799-3800). However, Smith

told them he was sorry and told them where the girl was (38/3808). Smith described having sex with the girl, calling it oral sex or rough sex and admitting that he ejaculated inside her (38/3809-11, 3814). At one point, Mrs. Davis left the room, and John and Smith sat close, hugging, and talking about Carlie's location (38/3811). John was hoping Carlie was still alive (38/3812). Smith was giving bits of information and describing landmarks, noting a church near Proctor and Cattleman Roads, with a concrete structure and a tree line (38/3812). Smith told John he didn't know if Carlie was dead, but she could be, saying something about getting carried away (38/3814).

Leaving the meeting, John told the police that Smith had not told them anything; it wasn't true, but at that time, things seemed very unclear to John (38/3815). John and Mrs. Davis left, and then ran some errands, including driving by a few churches near Proctor Road, trying to find out if the information Smith had given them was accurate (38/3816). They got out and looked around at a few churches, but didn't find anybody (38/3818-19). They did not tell the police that they were looking for Carlie, even when Agent Street called to get information about Smith's credit card (38/3739-40,3820). At one point, Smith called John, still talking about Carlie's location; they spoke in code, such as using "Avenue P" for Proctor Road because they believed the police were monitoring their call (38/3820-21).

John decided he had to tell the police what Smith had related about finding Carlie (38/3822). Around 9:00 p.m. on Feb. 5, John called Agent Street, and Street, Martinez, and Det. Davis responded to John's house (38/3741,3824; 39/3881). They waited for Mrs. Davis to arrive and then Agent Martinez drove them all out to Central Church of Christ on Proctor Road (38/3742-43,3825; 39/3882-83). John spoke with Smith by telephone from the church, and verified the concrete structure, tree line, and other landmarks Smith recalled (38/3826-27; 39/3883-85). While on the phone, Smith admitted that he had rough sex and oral sex with Carlie and then strangled her (38/3830).

John directed the police to an open field behind the church, but they all stayed on the paved parking area in order to preserve any evidence in the field (39/3883,3890). Sarasota Sheriff's Sgt. Sheila Sullivan responded to the church about 12:40 a.m. on Feb. 6 (39/3958). Carlie's body was believed to be in a wooded area along the open field behind the church, based on the information John was getting from Smith over the phone (39/3959). Sullivan walked the wooded area by herself with a flashlight (39/3960-61). As she neared a fence, she could smell a decomposing body, and caught Carlie's red shirt in her flashlight beam (39/3963-64). Sullivan took notes of her observations: Carlie was wearing a red shirt and one white sock, but had no pants or panties (39/3964-67). Her left leg was bent under her, and her right leg was extended (39/3967).

Sullivan did not approach the body, as she was not wearing protective gear and did not want to contaminate the scene (39/3967). As she returned to the paved parking area, it started raining (39/3968). There was no exterior lighting, and due to the dark and wet conditions, there was a determination to preserve the scene and process it later, in the light of day (39/3958,3968-69).

Medical Examiner Dr. Russell Vega examined Carlie at the scene and noted ligature marks and other injuries to the body (42/4359, 4364). Abrasion marks along the right side of her body and limbs suggested that she had been dragged to the scene (42/4366). Her position indicated that she had been there for at least a day (42/4355,4365).

Dr. Vega took cavity swabbings at the autopsy, but the decomposition of the body and the presence of insect larvae impeded his ability to get optimal results from any testing (42/4369, 4372). Carlie's shirt and bra were pulled down over her right shoulder and arm (42/4373-74). The bra was unclasped in back and pulled over her right breast (42/4374). The drag marks indicated that she had been dragged along her right side by her left arm, with a uniform distribution suggesting she was either unconscious or dead at the time (42/4379-80).

Dr. Vega testified that Carlie was killed by ligature strangulation (42/4385). The ligature was something like a narrow shoe string, and the mark crisscrossed in the back; the killer

would have been behind Carlie, and slightly higher, using continuous manual pressure for several minutes before she died (42/4389-95). Carlie's wrists also bore ligature marks, sustained when she was alive (42/4399-4403). Dr. Vega observed a bruise on her right shin and a more subtle contusion inside her right thigh; blunt impact injuries consistent with having occurred at or near the time of her death, which may have been sustained in a struggle with the perpetrator (42/4395-97).

Dr. Vega noted a defect to the hymen, consistent with a sexual battery, but which may have been caused by insect activity (42/4405). He also observed a deep circular tear in the vaginal mucosa, but concluded that was probably caused by his insertion of the speculum into soft, decomposed tissue (42/4406). Some of the factors he considered in determining whether or not a sexual battery occurred were the absence of clothing below the waist, and the ligature strangulation, which is most common with women and highly associated with sexual assaults (42/4407). In his opinion, based on the totality of circumstances in this case, Carlie had been sexually battered (42/4410).

Dr. Vega observed pictures that had been taken of Smith at the time of his arrest; Smith had an injury to the outside of his hand that occurred around Feb. 1 and was consistent with friction from a cord or ligature, and had a large bruise in an unusual location on the inside of his knee, more difficult to date but possibly

occurring around the same time (42/4411-15).

Forensic entomologist Dr. Neal Haskell testified that, based on the colonization evidence, Carlie's body had probably been placed at the scene sometime before sunrise on Feb. 2 (43/4468, 4484-85).

FBI forensic examiner Jennifer Luttman testified that a semen stain on Carlie's shirt contained DNA matching Smith (43/4514, 4535-36,4540). Smith's fingerprints were discovered on the Pincus station wagon and on a receipt inside the wagon, and hairs and fibers in the wagon were consistent with Carlie's hair and her red shirt (41/4189-92,4194-99; 44/4687-90).

Despite posted and electronic warnings that all telephone calls and visitations could be recorded and/or monitored, Smith made several calls from the jail discussing Carlie's abduction, and also discussed her kidnapping during family visitations (44/4710, 4718,4736-63). For example, Smith tells his brother that he did not know Carlie or her family; they discuss having pen and paper at a visit and using code words to communicate; he agrees with John that Carlie looked older than eleven and describes how he saw her running along the road and pulled into the car wash; tells his mother that this was an accident, he was on drugs and didn't mean to do it; that he's confessed to a priest; and tells a friend it was the drugs (44/4736-63). In all, eleven excerpts of recorded conversations were admitted (44/4763).

Also while in jail, Smith wrote a coded letter to John, dated April 9, 2005; they had discussed the code and used it so that the authorities could not read the letter (38/3832-37; 44/4723-24, 4775-77). An FBI cryptanalyst, Daniel Olson, cracked the code and translated the letter, in which Smith admitted that Carlie's backpack and clothes had been put in four different dumpsters and that Smith had dragged her body to where it was found (44/4775-77, 4788). The letter concluded with instructions to "destroy this after deciphering it and shut up" (44/4788).

The defense presented six witnesses that discussed other suspects and other leads that had been developed over the course of the police investigation, and noted John Smith's interest in the advertised reward (45/4833-4929). Smith did not testify.

The jury convicted Smith as charged on all counts (46/5073-75). At the penalty phase, Dr. Vega testified that Carlie was conscious when she was strangled, and a probation officer with the Department of Corrections testified that Smith was on felony probation for possession of cocaine in February, 2004 (47/5208-14). Carlie's mother, father, step-father, and teacher offered redacted victim impact testimony (47/5221-47).

The defense presented nineteen mitigation witnesses (47/5262-50/5719). Family and friends testified to memories of family events, and to Smith's childhood, positive character traits, mechanical skills, relationships with loved ones, and his struggles

with illegal drugs and medical problems (47/5262-5338,5377-83; 48/5410-5420,5437-5457; 49/5486-96,5540-5551). Several corrections officials that knew Smith from supervising him in custody or on probation testified to Smith's substance abuse struggles and his good character (48/5356-76; 49/5475-85), as did his case manager in a drug treatment program (48/5424-35). Dr. Anit Ford, a family physician, testified about Smith's medical and prescription drug history, and treating him for back problems, depression and pain management (49/5497-5531). Dr. Katherine McQueen, a physician certified in addiction medicine, related Smith's drug history, starting with alcohol at a very early age, and progressing to more serious substances, including cocaine and heroin (50/5609-77). Ford and McQueen outlined Smith's addiction to prescription painkillers following repeated back surgeries, and the physical difficulties Smith had endured in his repeated attempts to overcome his drug addictions (49/5497-5531; 50/5609-77). A prison consulting president testified that a first-degree murder conviction will keep someone in prison for life, he would not be exposed to the community again, even if he behaved well in prison; that Smith's records showed only very minor disciplinary reports; that Smith would be at a high level risk for victimization; and that he would always be kept at the highest level of security (50/5679-5719).

The jury recommended a sentence of death by a vote of ten to

two (11/2084; 52/5970-74). A *Spencer* hearing was held on Feb. 13-14, 2006 (52/6013-53/6126). Smith submitted medical records and other documentary evidence, and presented testimony from a niece and letters from Smith's ex-wife (52/6034-53/6165). The State introduced Smith's prior convictions in rebuttal, and Smith made a statement to the court, taking responsibility for these crimes and describing his drug addictions, back pain, and business and marital problems (53/6170-90).

The court imposed a sentence of death on March 15, 2006 (14/2617-53; 53/6227-70). The court found six aggravating factors: 1) murder committed while defendant was on felony probation (moderate weight); 2) murder committed while defendant was engaged in sexual battery and kidnapping (significant weight); 3) murder committed to avoid arrest (great weight); 4) murder was heinous, atrocious or cruel (great weight); 5) murder was committed in cold, calculated and premeditated manner, without any pretense of justification (great weight); 6) victim was under twelve years of age (great weight) (14/2620-31).

The court expressly rejected the statutory mitigating factors of extreme disturbance and substantial impairment (14/2632-39). The court weighed the following nonstatutory mitigation: 1) Smith's history of mental illness, including Bipolar Affective Disorder, Major Depressive Disorder, and Personality Disorder NOS (Antisocial features), as documented through hospital and treatment center

records from 1992 to 2003 (moderate weight); 2) Smith's history of drug abuse (moderate weight); 3) Smith's longstanding pain from back injuries contributed to Smith's addictions (little weight); 4) Smith repeatedly sought help for his problems (little weight); 5) Smith was denied or received inadequate treatment (little weight); 6) Smith has positive qualities (moderate weight); 7) Smith provided information leading to resolution of the case (very little weight); 8) Smith's family cooperated with the police (slight weight); 9) Smith's spiritual growth (moderate weight); 10) Smith's gainful employment (slight weight); 11) Smith is a good father (moderate weight); 12) Smith is remorseful (little weight); and 13) Smith is amenable to rehabilitation and a productive life in prison (little weight) (14/2639-52).

The court concluded that the aggravating factors "far outweigh" the mitigation offered, and noted that any one of the aggravating factors, standing alone (except felony probation), would outweigh the totality of mitigation (14/2652).

SUMMARY OF THE ARGUMENT

1. The trial court did not abuse its discretion in admitting expert testimony over Smith's hearsay objection. Florida law has long permitted expert opinions which rely on facts that are not independently admissible. The testimonial conclusion that the DNA on Carlie's shirt matched Smith's profile was the conclusion of the expert and was not hearsay. Caselaw supports the trial court's ruling to admit this testimony.

2. The trial court did not abuse its discretion in permitting the medical examiner to offer his opinion that Carlie had been sexually battered. Dr. Vega's opinion was supported by competent evidence in the record, and was within the scope of his qualifications and expertise. This Court has approved similar testimony under similar circumstances.

3. The trial court properly denied Smith's motion to suppress statements he made to his brother, John Smith. Following an evidentiary hearing below, the trial court specifically found that John was not acting as an agent of the State in conversations with Smith while Smith was in custody. This finding is supported by the record and defeats any claim for suppression. Smith cites only Fourth Amendment cases in support of this Fifth Amendment claim.

4. The trial court properly denied the cause challenges lodged by the defense and contested by Smith on appeal. Each of the prospective jurors clearly demonstrated a willingness and ability

to follow the law impartially.

5. The trial court did not abuse its discretion in admitting crime scene and autopsy photographs of Carlie. The court below carefully considered the relevance of each picture, and excluded a number of exhibits as too inflammatory. The disputed photos assisted the medical examiner in his discussion of Carlie's injuries.

6. The trial court did not improperly double the aggravating factors of "murder committed during a sexual battery" and "victim was under twelve years of age." Each of these factors involve different aspects of Carlie's murder. In addition, the factor of during commission of a felony was also supported by the kidnapping in this case.

7. The aggravating factor of "victim under twelve years of age" is not unconstitutionally overbroad and does not violate due process. The factor does not apply to every first degree murder, and therefore serves to narrow the class of eligible defendants. There is no constitutional requirement that the factor can only apply where a victim was targeted due to young age.

8. The trial court properly found and weighed the "avoid arrest" aggravating factor. The court's factual findings are supported by the evidence, and the legal principles were correctly applied.

9. The trial court properly found and weighed the "cold, calculated and premeditated" aggravating factor. The court's

factual findings are supported by the evidence, and the legal principles were correctly applied.

10. The trial court did not abuse its discretion in ruling that the State could question Smith's sister or mother about Smith's sexual abuse of his sister when they were teenagers, based on the mitigation presented. Smith was not deprived of available mitigation by abandoning calling his sister or his mother, since the same information was available from other sources.

11. The trial court did not err in denying Smith the opportunity to make an unsworn allocution statement to the jury. This Court has rejected any such right of allocution.

12. This Court has previously upheld the Florida legislature's abolition of the voluntary intoxication defense.

13. This Court has previously rejected the claim that Florida's capital sentencing statute violates the Sixth Amendment right to a jury trial.

Cross Appeal: The court below erred in ruling that the State could not seek the "prior violent felony conviction" aggravating factor based on Smith's 1993 attack on Michelle Warner. The court's conclusion that Smith's plea of no contest to the aggravated battery precluded use of this conviction failed to recognize the change in law permitting reliance on this factor under these circumstances.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN ADMITTING EXPERT TESTIMONY BY FBI LAB SUPERVISOR JENNIFER LUTTMAN.

Smith's first issue challenges the admission of expert testimony by Jennifer Luttman, a supervisor and forensic DNA examiner at the FBI laboratory in Quantico, Virginia. Smith objected to some of Luttman's testimony as hearsay, which he alleged violated his right to confront the witnesses against him, citing Crawford v. Washington, 541 U.S. 36 (2004)(43/4493-96). This claim presents an evidentiary ruling, reviewed on appeal for an abuse of discretion. Schoenwetter v. State, 931 So. 2d 857, 871 (Fla. 2006)(determination of a witness's qualifications to express an expert opinion is peculiarly within the discretion of the trial judge, and such decision will not be reversed absent a clear showing of error). Smith has failed to demonstrate any abuse of discretion in this admission of this expert testimony.

The record reflects that when the State called Luttman as a witness, the jury was excused to allow defense counsel to inquire as to the underlying facts to support Luttman's expert opinion (43/4487-89). Luttman had been qualified as a forensic examiner for five and a half years, and had examined relevant materials submitted to the FBI in this case (43/4488-89). Luttman was to testify to the results of serological and DNA examinations

conducted on the shirt worn by Carlie at the time of her murder (43/4489-90). Luttman was asked to explain her involvement in the examinations at issue, and she stated that the FBI works as a team; she serves as "basically the case manager," determining what exams will be conducted on what items, then the biologists actually perform "the bench work," under her supervision, then Luttman draws the conclusions, interprets the results, writes the report, and testifies as needed (43/4490,4516). Judge Owens asked if the situation was similar to a psychologist that might use an intern to administer a test which the psychologist then interprets in rendering an opinion on mental health, and Luttman agreed that it was comparable; she offered another example of a medical doctor that might request blood work be drawn by a medical technician or request an X-ray by an X-ray technician, but then the doctor interprets the results and informs the patient of the results (43/4491).

Luttman confirmed that she is familiar with the testing done by the biologists and that she performed the same exams herself prior to being promoted to an examiner (43/4492). The team procedure she described is used in every case the FBI serology DNA lab handles (43/4492). The court ruled that testimony regarding the examinations conducted would not violate Crawford, noting that Luttman's conclusions were subject to cross examination (43/4495).

Smith now asserts that the trial court erred in overruling his

Crawford objection to Luttman's testimony. Smith's brief suggests that this issue presents the same question as that pending before this Court in State v. Johnson, Case No. SC06-86 (see Johnson v. State, 929 So. 2d 4 (Fla. 2d DCA 2005), rev. granted, 928 So. 2d 810 (Fla. 2006), and expressly adopts the arguments in Johnson's brief before this Court. However, as defense counsel below acknowledged, the facts in Johnson are significantly different (43/4509-10). Johnson truly presented a direct question of hearsay evidence, as the actual FDLE report was admitted under the business records exception. The judge below in fact declined to admit this evidence under the business records exception (43/4526). In the instant case, the relevant results and conclusions were the opinion of the witness, not the biologists that performed the preliminary "bench work" examinations (43/4490,4536). This is a critical distinction. Florida's evidence code permits an expert to offer an opinion, even when the underlying facts and data may not be independently admissible. Schoenwetter, 931 So. 2d at 871; Esty v. State, 642 So. 2d 1074, 1078-1079 (Fla. 1994); Section 90.704, Florida Statutes. Thus, the issue in this case, whether Luttman could rely on the bench work performed by the non-testifying biologists, may not be resolved in Johnson.

Many courts have upheld the admission of testimony in similar circumstances against Crawford challenges. In United States v. Moon, 512 F.3d 359, 361-62 (7th Cir. 2008), the Court found that

the admission of testimony by a Drug Enforcement Agency chemist did not amount to plain error under Crawford. The chemist in Moon testified in his expert opinion that the substance at issue was cocaine, relying on laboratory work and a report generated by a prior chemist that no longer worked for DEA. Noting that the chemist testified as an expert rather than a fact witness, and that the federal code permits an expert to rely on facts or data which may not be independently admissible, the Court held that even if the confrontation clause precluded admission of the first chemist's report, it did not taint the second chemist's testimony based on the report. "Thus we agree with *Washington [United States v. Washington,* 498 F.3d 225 (4th Cir. 2007)] that the Sixth Amendment does not demand that a chemist or other testifying expert have done the lab work himself." Moon, 512 F.3d at 362.

Similarly, the court in People v. Ramirez, 153 Cal. App. 4th 1422, 64 Cal. Rptr. 3d 96 (Cal. Ct. App. 2007), held that Crawford is not violated when an expert offers opinion testimony based on hearsay. That court noted that any hearsay encompassed within an expert's testimony is not offered for the truth of the matter asserted, but is considered to assess the weight of the expert's opinion.

As in Ramirez, the defense here has not identified a particular hearsay statement testified to by Luttman. He objected to her conclusion as hearsay, but it was Luttman's own conclusion,

and she was subject to cross examination on that conclusion. To the extent that Smith challenges the test "results" rather than Luttman's conclusion that the DNA on Carlie's shirt matched Smith, his claim is without merit as such results are not hearsay statements, and are not testimonial in nature as contemplated in Crawford. See New Hampshire v. O'Maley, 156 N.H. 125, 932 A.2d 1 (N.H. 2007)(blood test results were nonaccusatory because the test could have lead to either inculpatory or exculpatory results and laboratory supervisor was properly permitted to testify as to results even absent the testimony of the analyst who performed the test); North Carolina v. Heinricy, 645 S.E. 2d 147 (N.C. App. 2007)(chemists' affidavit regarding defendant's blood alcohol level nontestimonial and, even if error, error was harmless); United States v. Washington, 498 F.3d 225, 227 (4th Cir. 2007)(Crawford objection properly denied as to lab director's testimony, and data upon which director relied were not testimonial hearsay statements).

This Court has repeatedly explained that discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court. Green v. State, 907 So. 2d 489, 496 (Fla. 2005); White v. State, 817 So. 2d 799, 806 (Fla. 2002); Trease v. State, 768 So. 2d 1050, 1053 n.2 (Fla. 2000). Smith cannot satisfy

this standard in this issue, and no abuse of discretion can be found in the trial court's overruling the Crawford objection below.

Furthermore, any impropriety in the admission of Luttman's testimony was clearly harmless. To the extent that Luttman should not have testified specifically to the lab results upon which her ultimate conclusion was based, it was not those lab results, but her conclusion, which implicated Smith. Moreover, there was other significant evidence that Carlie had been sexually battered prior to her death: Smith admitted it to his brother, and the medical examiner concluded it from the totality of the circumstances presented. Although Smith challenges this other evidence on appeal, no error has been demonstrated (see Issues II and III, *infra*). Therefore, there is no reasonable possibility that any Crawford error could have affected Smith's conviction for sexual battery. State v. DiGuilio, 429 So. 2d 1129, 1138 (Fla. 1986).

ISSUE II

WHETHER THE TRIAL COURT ERRED IN ADMITTING OPINION TESTIMONY FROM THE MEDICAL EXAMINER, DR. VEGA.

Smith next asserts that the trial court improperly allowed testimony from Dr. Russell Vega, Twelfth Circuit Medical Examiner, that, in Vega's opinion, Carlie had been sexually battered prior to her death (42/4407-10). This issue presents an evidentiary ruling, reviewed on appeal for an abuse of discretion. Brooks v. State, 918 So. 2d 181 (Fla. 2005); Globe v. State, 877 So. 2d 663, 672 (Fla. 2004). As no abuse of discretion has been shown, no error can be discerned on this issue.

The record reflects that at trial, defense counsel sought to exclude Dr. Vega's opinion as being unreliable, speculative, and without sufficient foundation (42/4325-26). On appeal, Smith repeats these claims, but his primary arguments--that the testimony was beyond the competence of the medical examiner and invaded the province of the jury--were never presented below and are procedurally barred. Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982)(to be cognizable on appeal, argument must be same specific contention made below).

As to the preserved claim that Dr. Vega's opinion was speculative and unreliable, Smith merely offers that conclusory complaint, without any factual or legal analysis. A review of the record demonstrates that Vega's opinion was based on facts well

established in the record and was properly admitted.

Dr. Vega testified that, in rendering an opinion about an injury, he considers the totality of circumstances (42/4406-07). In this case, he was asked to consider whether a sexual battery had occurred, and in making that decision, the factors he looks at are: physical findings on the body; injuries that might be associated with a sexual battery; subsequent testing that demonstrates the presence of semen or sperm; and the overall nature of the circumstances, including the scenario of finding the body and the circumstances surrounding the individual's disappearance and death (42/4407). He specifically observed that Carlie had been found nude from the waist down, finding this "highly suggestive" of sexual activity, and that her death occurred by ligature strangulation, which is "highly associated" with sexual assaults in numerous cases (42/4408).

Smith has repeatedly asserted that there were no physical findings from Carlie's body to be considered. However, Dr. Vega noted: Carlie had been strangled with a ligature, and her hands had been bound with ligatures (42/4359,4399-4400); she had bruises on her legs that were sustained about the same time of her abduction and death, including a contusion on her inner thigh (42/4363,4395-97); she was nude from the waist down, and her shirt was pulled up and bra unfastened, (42/4362,4373-74); her hymen was torn (42/4404-05); and the decomposition and insect activity

obscured her genital area and impeded his ability to get reliable swabbings (42/4369,4372). All of these findings were properly considered and supported Dr. Vega's opinion that a sexual assault had occurred. In addition, of course, Dr. Vega was aware that later testing had confirmed the presence of semen on Carlie's shirt, and that Smith had made statements to his brother admitting a sexual attack.

The fact that Smith can theorize about other possible explanations for some of the findings Dr. Vega noted in supporting his conclusion that Carlie was sexually battered is not a persuasive argument for exclusion of this testimony. Vega's acknowledgments (that it was possible that Carlie's shirt was pulled up and bra unclasped due to her body being dragged to the scene,[1] that it was possible the tearing of her hymen could be attributed to insect activity, and that the recent bruises on Carlie's inner thigh and shin were "not necessarily" related to her attack) merely go to the weight to be given Vega's opinion, and provide no basis for exclusion. Troedel v. State, 462 So. 2d 392, 396 (Fla. 1984)(perceived weaknesses in expert testimony can be

[1] Although Dr. Vega testified that the dragging of Carlie's body could possibly account for the way her shirt and bra had been disarrayed, he noted it was much less likely that the dragging could explain Carlie being nude from the waist down (43/4428-29); the uniformity of the drag marks suggested the same amount of exposure to the lower areas of her body, and while Vega could not definitively rule out that her clothes may have hung up on something with the marks consistent after that point, her jeans, underwear, and one missing sock were never found.

brought out on cross examination, and pertain to the weight and credibility of testimony rather than its admissibility).

Smith is highly critical of Vega's testimony that "In numerous case reports and studies, ligature strangulations are most common in women and are highly associated with sexual assaults and sexual battery" (42/4408). Since, as Smith admits, this testimony would not be within the common knowledge of the jury (Appellant's Initial Brief, p. 32), he must find another way to dispute the statement and therefore repeatedly claims that, because Vega did not voluntarily identify the "numerous case reports and studies" by referencing specific medical treatises or journals, this comment must be based solely on personal experience (Appellant's Initial Brief, pp. 32-33,36-37). However, defense counsel below made no attempt to voir dire or cross examine Dr. Vega with regard to these reports and studies; it is inappropriate and unfair to castigate a witness on appeal for failing to volunteer information which was never requested at trial. Smith's complaint that this statement was beyond the competence of the medical examiner and his presumption that it was based solely on personal knowledge are not supported by the record below, since counsel failed to explore the foundation for the statement with Dr. Vega.

Moreover, there is no legal basis to exclude testimony as to a correlation between ligature strangulation and sexual battery even if Dr. Vega's knowledge of the correlation was based solely on his

own experience and observations as a medical examiner. Smith cites Jones v. State, 748 So. 2d 1012 (Fla. 1999), to suggest error, but in Jones this Court agreed that the psychiatrist in that case could not testify as to the effects of crack cocaine, where the testimony was based solely on the doctor's personal experience as an addict, not as an expert. Unless Smith is suggesting that Vega is a strangler and rapist, and basing his knowledge on that experience, Jones is inapposite and Smith's reliance on that decision is misplaced.

To the extent that Smith adopts the objection below as to the use of a hypothetical in securing Vega's opinion, his claim is without merit. The evidence code does not prohibit the use of hypothetical questions; rather, such questions are common, particularly when directed at medical examiners and other expert witnesses. State v. Hickson, 630 So. 2d 172, 173 (Fla. 1993) (discussing proper scope of expert testimony); Chavez v. State, 832 So. 2d 730, 744, n.20 (Fla. 2002)(noting use of hypothetical question to expert); Jennings v. State, 583 So. 2d 316, 321 (Fla. 1991)(same). The judge below correctly noted that the facts relied upon in the hypothetical had been admitted into evidence, and Smith does not identify any fact noted which was not proven; he merely disputes the inferences properly drawn by the evidence.

Notably, Smith's unpreserved claims that Vega's opinion was beyond his competence as a medical examiner and invaded the

province of the jury are inherently contradictory; he fails to explain how the jury would have common knowledge and understanding of any opinion which the medical examiner lacked the necessary qualifications and expertise to offer. In addition to being procedurally barred, these claims are independently without merit.

The unpreserved claim that this testimony invaded the province of the jury as in Angrand v. Key, 657 So. 2d 1146 (Fla. 1995), and Florida Power Corp. v. Baron, 481 So. 2d 1309 (Fla. 2d DCA 1986), must be rejected. The admissibility of expert opinion testimony is governed by Section 90.702, Florida Statutes, which provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.

Moreover, such testimony is "not objectionable because it includes an ultimate issue to be decided by the trier of fact," see Section 90.703, Florida Statutes, a point which defense counsel expressly acknowledged below (42/4326).

In Dailey v. State, 594 So. 2d 254, 258 (Fla. 1991), this Court approved similar testimony. In Dailey, an investigating detective was qualified as an expert and permitted to offer his opinion that it was highly likely that a sexual battery or attempt had occurred based on the fact that the victim was found nude and her clothing was found scattered at the scene. In rejecting the

claim that the testimony was only common sense and within the common knowledge of the jury, this Court noted that the detective had extensive training and experience in homicides and sexual batteries, and concluded that his testimony was helpful in consolidating the various pieces of evidence found at the scene. See also Bloodworth v. State, 504 So. 2d 495, 498 (Fla. 1st DCA 1987)(no error in allowing physician to opine that victim had recently engaged in nonconsensual intercourse).

In Schneer v. Allstate Indem. Co., 767 So. 2d 485, 489 (Fla. 3rd DCA 2000), the court noted that testimony invades the province of the jury when it has the effect of advising the jury how to decide the case, rather than assisting the jury in determining what had occurred. See also Martinez v. State, 761 So. 2d 1074, 1080 (Fla. 2000)(holding detective's testimony that he had "no doubt" that Martinez committed the murders was improperly admitted). Dr. Vega's testimony was clearly offered to assist the jury in determining whether a sexual assault had occurred, rather than advising them to convict Smith of sexual battery. Thus, Smith's current argument that Vega's testimony invaded the province of the jury is procedurally barred and without merit.

Smith's unpreserved claim that this testimony was beyond the competence of the medical examiner is similarly meritless. Such a claim relies on a finding that Dr. Vega did not have the requisite expertise to conclude that Carlie had been sexually battered. See

Behn v. State, 621 So. 2d 534 (Fla. 1st DCA 1993); Wright v. State, 348 So. 2d 26 (Fla. 1st DCA 1977), cert. denied, 353 So. 2d 679 (Fla. 1977). In addition to being procedurally barred, this claim is refuted by the record. Vega testified that he had been Chief Medical Examiner for the Twelfth District for over two years, and had previously served as an associate medical examiner in the Thirteenth District (Hillsborough County) for four and a half years, as well as being staff pathologist and chief of autopsy services at the VA Hospital in Tampa for two years (42/4345-47). He had previously testified as an expert and had performed approximately 2000 autopsies (42/4347). Smith does not identify any particular deficiency in Vega's qualifications to preclude the opinion offered.

In addition, it was not necessary for Dr. Vega to have been convinced "to a reasonable degree of medical certainty" in order to offer his opinion. Delap v. State, 440 So. 2d 1242, 1253-1254 (Fla. 1983)("To be admissible, a medical expert's opinion as to the cause of an injury or death does not have to be expressed in terms of a reasonable medical certainty. Such evidence is admissible, but the weight to be given it is a matter to be determined by the jury"). Although Smith offers a number of complaints relating to the admission of Vega's opinion that a sexual battery occurred, it is clear that Vega had specialized training as a medical examiner to assist the jury in determining a fact at issue as to whether the

victim had been sexually battered, and therefore his opinion testimony was properly admitted below.

Furthermore, any impropriety in the admission of Dr. Vega's opinion was clearly harmless. Smith's recognition that the jury could have reached a conclusion as to whether a sexual battery occurred through the other evidence admitted weighs against any finding of harmful error. The evidence noted by Dr. Vega, including Carlie being found nude from the waist down and sustaining a bruise on her inner thigh, would lead the jury to the same conclusion. Moreover, there was other significant evidence that Carlie had been sexually battered prior to her death: Smith's DNA was found in a semen stain on Carlie's shirt, and he admitted the sexual abuse to his brother. Although Smith challenges this other evidence on appeal, no error has been demonstrated (see Issues I and III, *infra*). Therefore, there is no reasonable possibility that any potential error could have affected Smith's conviction for sexual battery. DiGuilio, 429 So. 2d at 1138.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN DENYING SMITH'S MOTION TO SUPPRESS STATEMENTS MADE TO HIS BROTHER, JOHN SMITH.

Smith also contends that the trial court erred in allowing testimony by John Smith, Appellant's brother, as to statements Smith made to John following Smith's arrest. In reviewing the denial of a motion to suppress statements, this Court must accord a presumption of correctness to the trial court's determination of historical facts, but independently review mixed questions of law and fact to determine the constitutional issues presented. Fitzpatrick v. State, 900 So. 2d 495, 510 (Fla. 2005); Nelson v. State, 850 So. 2d 514, 521 (Fla. 2003). The presumption of correctness requires this Court to interpret all reasonable inferences and deductions from the evidence in a manner most favorable to sustaining the trial court's ruling. Rolling v. State, 695 So. 2d 278, 292 (Fla. 1997).

Smith's motion to suppress his statements was filed on Sept. 21, 2005, and alleged, among other things, that Smith's statements to John on Feb. 5 and 6 were unconstitutionally obtained because John was acting as an agent of law enforcement (6/1084-89). Evidence relating to the motion to suppress was presented at a hearing on Oct. 11 and Oct. 13, 2005 (20/700-831; 21/873-908). Det. Toby Davis, Capt. Jeffrey Bell, and Lt. Ronald Albritton from the Sarasota Sheriff's Office and Special Agents David Street and

Leo Martinez from the FBI testified at the hearing. In addition, transcripts of the interviews with John Smith by Agents Street and Martinez were admitted as exhibits at the hearing (9/1724-94; 9/1976-1853; 20/769-70; 21/909).

Det. Davis testified that following Smith's arrest for violation of probation on Feb. 3, Davis wanted to interview Smith as a suspect in Carlie's disappearance (20/722). Shortly after midnight, Davis provided Miranda warnings and Smith requested an attorney (20/723).[2] Sheriff's officials contacted the public defender's office, and were advised that Public Defender Elliott Melcalfe and Metcalfe's assistant, Adam Tebrugge, would meet with Smith the next day (20/724). Smith also asked Davis if Smith could see his family, and Davis advised Smith that all Davis could do was try to secure an attorney, since Smith had invoked his right to counsel (20/737-38). Davis did not attempt any further questioning of Smith (20/725).

Capt. Bell was monitoring Davis's attempt to interview Smith (20/740). Bell intended to secure counsel for Smith as soon as possible, with the hope of continuing the investigation in case Smith wanted to cooperate after consulting with counsel (20/740-41). Bell personally called Metcalfe, and determined that nothing further would happen that night (20/742). Bell noted that his attempt to accommodate the request for counsel was unusual, but at

that point they were still hopeful that Carlie might be alive, and wanted to take every opportunity to try to locate her (20/741). The following morning, Bell and Lt. Albritton went to Metcalfe's office and met with Metcalfe and Tebrugge to try to facilitate the attorneys' meeting with Smith (20/743,756-57). Bell wanted to remind the attorneys of their obligation to reveal any information they might receive indicating where Carlie could be found if she was still alive (20/744).

Smith was thereafter transported to Metcalfe's office so that he could consult with his attorneys privately (20/746-47,756-57). Again, the sheriff's officials were taking "extremely unusual" measures to facilitate a private consultation with counsel, believing that this was their best chance to locate the missing child (20/757).

Later that evening, Smith's brother, John Smith, came down to the sheriff's office to see Smith (20/768; 38/3795-97). FBI Special Agents Street and Martinez testified that they met with John Smith in an interview room at the Sarasota Sheriff's Office around 7:30 p.m. on Feb. 4, 2004 (20/767-68; 21/874-75).[3] Street and Martinez both denied asking John to meet with Smith in order to elicit additional information, and the transcript confirms that no

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[2] A transcript of this meeting (10/1854-61) was admitted as State Ex. 3 at the suppression hearing (20/735-36).

[3] This interview was videotaped and recorded; the 71-page transcript (9/1724-94) was admitted as State Ex. 1 at the hearing (20/769-70; 21/909).

such solicitation occurred (9/1724-94; 20/771,778,790; 21/875). After the interview, John requested the opportunity to visit with Smith that evening, and asked if Street and Martinez could assist in making that happen (21/875-76). The agents advised John that they could not help him, as Smith was represented by counsel and John would need to speak to Smith's attorney to make any arrangements to visit his brother (21/876). John left but later contacted the sheriff's office with a second request to visit Smith that evening (9/1799; 20/775-77,814-15; 21/876). Again, John was told that "it could not happen" (20/776; 21/876).

Capt. Bell made arrangements for the family meeting at the sheriff's office on Feb. 5 at the request of Smith's defense attorneys (20/747-49). Bell agreed that law enforcement would not monitor or record the meeting (20/748). Smith's attorneys met with him initially, then Metcalfe and Tebrugge came out and John Smith and his mother, Patricia Davis, went in the room and closed the door (20/748,751-52; 21/877). Mrs. Davis later came out, very upset and crying; the officers offered to get her some water, and she accepted (20/752; 21/878). She was not asked any questions about what had happened in the room, and she did not volunteer any information (20/753; 21/879). Mrs. Davis went back into the room for a very short period of time, then she and John came out together (21/879). John advised that "he came close, but he didn't say anything," and John and his mother then walked out of the

building by themselves; law enforcement did not ask them any questions, and did not follow or surveil them when they left (20/753; 21/880).

Later that evening, John contacted Agt. Street and indicated that he may have information about the location of Carlie's body (20/780; 21/881). John, Mrs. Davis, Det. Davis, and Agents Martinez and Street drove out to the church on Proctor Road where Carlie's body was ultimately found (20/782-84; 21/882). While in the parking lot by the church, John received a phone call (20/785; 21/883-84). He indicated that it was Smith; John advised Smith that their mother and the FBI were present (20/785; 21/884). John handed his phone to Mrs. Davis, and she cried during a brief conversation, then returned the phone to John (21/884). John had further conversation regarding the location of Carlie's body, and other officers were notified (21/885-86). Martinez and Street drove John back to the sheriff's office and took a second statement from John, which was videotaped and recorded; the transcript was admitted as an exhibit at the hearing (9/1796-10/1853; 20/788; 21/887). In the transcript, John revealed what Smith had told him about the crimes (10/1802-06, 1815-16). He acknowledged, as he did at trial, that he concealed information from the police, and that he and his mother conducted their own investigation (10/1808-09).

Following the hearing, the trial court expressly found that John was not acting as an agent of the State when he met with Smith

(8/1528). Citing Rolling v. State, 695 So. 2d 278, 290 (Fla. 1997), the court held that Smith failed to prove that John Smith acted on behalf of law enforcement, and that none of John Smith's actions could be attributed to State action (8/1528). The court continued:

> The Court recognizes that evidence was presented that John Smith may have had an ulterior motive in speaking with his brother, such as obtaining information to receive the reward money or even notoriety; however, this evidence failed to demonstrate that an agency relationship existed. No evidence was presented to support a finding that law enforcement took any steps to encourage or use John Smith to obtain information from the Defendant. If anything, the opposite is true. Despite law enforcement's directives that John Smith only speak with the Defendant through arrangements made by his attorney, John Smith was not hindered or discouraged. He continued to obtain additional information *on his own*, by asking questions and even going so far as conducting an independent and unsuccessful search of the church property to look for the victim's body.

(8/1528) (emphasis in original).

Smith's claim of error based on this ruling fails factually and legally. Factually, Smith acknowledges that the testimony presented at the suppression hearing supports the trial court's findings, but he asserts that the "facts belie" the testimony presented, because the police allegedly "encouraged" and "facilitated" the meeting between Smith and John. This assertion overlooks the undisputed testimony that, when John requested the opportunity to meet with Smith through law enforcement, he was told "no" (20/776; 21/876). He called back later that evening and was

told “no” again (20/776; 21/876). The sheriff’s office scrupulously honored Smith’s constitutional rights; John was told any such arrangements would need to be made through the public defender’s office (20/777). The only request which law enforcement accommodated was from defense counsel, which surely does not amount to a violation of Smith’s right to counsel.

Smith’s argument relies on facts which are not supported by the record. For example, Smith’s brief claims that “The agents told John to go back to his brother and get more information” (Appellant’s Initial Brief, p. 42), and “The FBI had asked John to speak to Joseph about the case” (Appellant’s Initial Brief, p. 44), without providing any record citations. In fact, all of the testimony presented at the suppression hearing and at trial directly refuted these statements.

Smith fails to identify any actual evidence which supports his theory that his brother was acting on behalf of law enforcement. Capt. Bell testified that the family meeting was arranged solely at the request of Smith’s defense attorney, Adam Tebrugge (20/747-48). Agents Street and Martinez both testified unequivocally that they did not seek to have John elicit any information from Smith (20/771,790,828; 21/875). John Smith testified at trial that the police did not ask him to get information from Smith, but that he did this on his own (38/3831).

Moreover, John’s actions belie any suggestion that he was

acting in the State's interest when questioning Smith. After the meeting, John did not disclose anything Smith had said (10/1808; 20/753; 21/879-880; 38/3815). He withheld information Smith had provided about Carlie's location, and instead decided to go out on his own looking for Carlie (10/1808; 38/3816-20). He communicated with Smith in "code," believing that their conversations were being monitored (10/1812-13; 20/803; 38/3821).

Furthermore, Smith has failed to identify any possible benefit to John for his cooperation with the police. Typically, an agreement to assist law enforcement is entered so that the agent/informant can secure some specific benefit in exchange for the information to be provided. Clearly, no such "deal" was involved in this case, and Smith has not even suggested that John received any personal benefit for his actions.

Legally, Smith cites only to Fourth Amendment cases to support his Fifth Amendment claim. Although the court below cited to this Court's opinion in Rolling, Smith does not address that case or make any attempt to distinguish it. In Rolling, this Court considered the claim that Rolling's post-arrest statements to another inmate, Bobby Lewis, should not have been admitted because Lewis was acting as a government agent when he intentionally solicited inculpatory statements from Rolling. This Court reviewed the applicable case law and determined that "the culpability of law enforcement is dependent upon the extent of their role in securing

the confession indirectly," and summarized the question as "whether the confession was obtained through the active efforts of law enforcement or whether it came to them passively." Id., at 292. The focus on the role of law enforcement as discussed in Rolling supports the court's finding below that no State action could be attributed to John's efforts to obtain information from Smith, since the police here did not actively seek out this information, but came by it passively. See also Muehleman v. State, 503 So. 2d 310, 314 (Fla. 1987)(affirming trial court's finding that inmate was not acting as State agent in eliciting statements, noting that defendant was willing to talk, that the informant approached authorities on his own initiative, and the informant's efforts were not induced by promises of any form of compensation).

In Lightbourne v. State, 438 So. 2d 380, 386 (Fla. 1983), this Court held that a fellow inmate was not a State agent when officers advised the inmate to "keep his ear open," holding that this claim requires proof of an overt scheme in which the State takes part to obtain incriminating statements, or a promise of compensation, or some other evidence of a prearrangement to discover incriminating statements. Moreover, the fact that the informant was paid a reward was not sufficient to prove the claim, since the money was provided from the general reward fund and not given as an inducement to elicit information.

Smith relies on cases finding that individual parties were

acting as "instruments of the State" for purposes of the Fourth Amendment when (1) the government was aware and acquiesced in the individual's conduct and (2) the individual intended to assist the police rather than "further his own ends." State v. Iaccarino, 767 So. 2d 470, 475 (Fla. 2d DCA 2000); see also State v. Moninger, 957 So. 2d 2 (Fla. 2d DCA 2007), rev. granted, Case No. SC07-510. However, Smith's claim is not a Fourth Amendment claim, and therefore reliance on those cases is misplaced. Moreover, Smith failed to prove that his brother was an instrument of the State even if the test applied in those cases was the proper consideration.

The State did not acquiesce in John's desire to meet with his brother, but told John that he had to pursue any visit through Smith's attorney. The sheriff's office only acquiesced in the request *from defense counsel* to allow an unrecorded family visit. There was no evidence below to support any suggestion that John Smith was attempting to assist law enforcement by questioning his brother. To the contrary, as outlined above, John's actions in withholding information and conducting his own investigation belie any suggestion that he was acting in the State's interest when questioning Smith. John thought the police were listening to his conversations with Smith, and did not want them to hear about what Smith had done (38/3821)--curious behavior for someone allegedly assisting the police.

The record in this case reveals that John received incriminating statements from his brother, and once he was completely convinced of Smith's guilt, John ignored the advice of the public defender's office and voluntarily called the police (10/1808-09,1818-20). In John's statement to the FBI after he disclosed what Smith had revealed about Carlie's location, John admits that he had spoken to Smith's defense attorney, and was advised not to reveal any of the information Smith had provided (10/1819-20; 20/797). According to John, the attorney asked John to wait and use any information "as a bargaining chip," which John thought was "pretty shitty," so John decided to call law enforcement and share his knowledge (10/1819-20; 20/797). No misconduct on the part of law enforcement can be discerned, and no constitutional principles are implicated. See Coolidge v. New Hampshire, 403 U.S. 443, 488 (1971)(noting "it is no part of the policy underlying the Fourth and Fourteenth Amendments to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals"); Odom v. State, 403 So. 2d 936, 939 (Fla. 1981)(recognizing that the Constitution "does not protect a person from the possibility that one in whom he confides will violate the confidence").

Once again, any possible error in the admission of John Smith's testimony would be harmless. Smith complains that there was insufficient evidence of the commission of a sexual battery

without his statements to his brother acknowledging the sexual abuse. However, as noted in Issues I and II, there was strong evidence to support the jury verdict on this charge. Smith has not identified any non-sexual motive for Carlie's abduction and murder, or offered any reasonable hypothesis of innocence on these facts. Under the circumstances of this case, any possible error would clearly be harmless. DiGuilio, 491 So. 2d at 1138.

Smith's disagreement with the trial court's factual finding that John was not a State agent offers no basis for a reversal on appeal. Since the trial court's finding is supported by competent, substantial evidence, this Court must affirm that finding and consequently affirm the denial of the motion to suppress.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN DENYING DEFENSE CHALLENGES FOR CAUSE.

Smith's next issue disputes the trial court rulings during voir dire denying cause challenges lodged by the defense. According to Smith, the court below improperly refused to excuse nine prospective jurors for cause. Smith preserved the issue by using all of his peremptory challenges, identifying four jurors that he would have excused if given additional peremptories, and renewing his objections prior to the jury being sworn. Kopsho v. State, 959 So. 2d 168, 170 (Fla. 2007); Trotter v. State, 576 So. 2d 691 (Fla. 1991).

Appellate review of rulings on motions to strike prospective jurors for cause must be highly deferential. In reviewing a judge's denial of a challenge for cause, this Court must give deference to the judge's determination of a prospective juror's qualifications. Hertz v. State, 803 So. 2d 629 (Fla. 2001); Castro v. State, 644 So. 2d 987, 989 (Fla. 1994). "It is within a trial court's province to determine whether a challenge for cause is proper, and the trial court's determination of juror competency will not be overturned absent manifest error." Fernandez v. State, 730 So. 2d 277, 281 (Fla. 1999)(citing Mendoza v. State, 700 So. 2d 670, 675 (Fla. 1997)). This Court has acknowledged that a trial court has wide latitude in ruling upon a challenge for cause

because the court has a better vantage point from which to evaluate prospective jurors' answers than does a review of the cold record. Mendoza, 700 So. 2d at 675.

Smith specifically disputes the denial of cause challenges on nine different prospective jurors. The test for juror competency is whether a juror can lay aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions from the court. Kearse v. State, 770 So. 2d 1119, 1128 (Fla. 2000). The law does not require a juror to be free from bias, it only requires any personal views to be set aside as necessary to follow the law. Gore v. State, 706 So. 2d 1328, 1332 (Fla. 1997)(although some challenged members of venire expressed certain biases, court not required to excuse them for cause). As each of the prospective jurors now challenged demonstrated a clear ability to follow the law, the record supports the rulings entered below. No manifest error has been shown, and Smith is not entitled to a new trial on this issue.

Jury selection in this case commenced on Oct. 25, 2005 and the jury was sworn on Nov. 4 (22/1109-34/3248). Each prospective juror was assigned a number, and names were not used in an attempt to protect the identity of the prospective jurors (22/1117-18). Judge Owens initially divided the large group of prospective jurors into smaller groups; prospective jurors were addressed in panels of about five to discuss potential hardships with jury service, then

prospective jurors were interviewed individually about their knowledge of the case, and finally the remaining prospective jurors were divided into groups of 28 for general questioning by the parties (22/1120-27,1140; 23/1173-80; 24/1366-67,1430-33; 25/1618, 1716; 27/2009-18; 32/2865; 33/3068; 34/3191-93).

Smith now claims that Prospective Jurors #9 and #29 knew too much about the case to be able to serve on the jury. He cites the responses provided by #9 and #29 during the preliminary questioning, although defense counsel below was not so offended by the responses at that time to challenge either #9 or #29 for cause; the cause challenges only came at the conclusion of the general questioning (23/1200,1238; 29/2391; 33/3054-58).

The defense requested that Prospective Juror #9 be excused for cause due to #9's knowledge of the case (33/3054-55). Prospective Juror #9 subscribed to the local newspaper and recalled several articles, including "some specifics" of the case, such as that Smith was an auto mechanic and may have known the victim (23/1199, 1200). However, Prospective Juror #9 had not formed any impressions or opinions concerning the case, unequivocally affirmed his ability to decide the case based solely on the evidence and the instructions, felt he could be impartial, and agreed to follow the court's instructions as to any penalty phase (23/1199-1200; 29/2355-57; 32/2884-85,2898-99). Absolutely no basis for disqualification of Prospective Juror #9 has been shown.

The defense requested that Prospective Juror #29 be excused for cause due to #29's knowledge of the case (33/3057-58). Prospective Juror #29 recalled the case, lived near where the incident occurred, had a daughter about the same age as Carlie, admitted to having formed impressions about the case, and concluded Smith had been accused, so he "probably did it" (23/1235-38, 29/2433,2434,2448,2449). However, #29 stated that he had great respect for the judicial system, that he knew he had to judge impartially and follow the law, and he believed he had the integrity to do so (23/1237-38).

Both Prospective Jurors #9 and #29 repeatedly affirmed their ability to put aside their knowledge of the case and render a verdict based solely on the evidence presented in the courtroom (23/1200,1238; 32/2884-85,2899-2900). In light of these responses, Smith cannot show any error in the denial of the cause challenges to Prospective Jurors #9 or #29.

Smith's challenges to the rulings on Prospective Jurors #10, #59, #62, and #116 can be considered collectively. Smith claims that each of these prospective jurors should have been disqualified from service due to their reluctance to give significant weight to drug abuse or drug addiction as mitigation. It should be noted that at the time the noted responses were offered, the prospective jurors had not been given much direction as to mitigating evidence and/or the weighing of factors; counsel was simply asking for

personal opinions regarding drug addiction (29/2384-85,2445; 30/2531,2616-17). More importantly, however, the law does not require jurors to provide a particular level of weight to such evidence. Harris v. Alabama, 513 U.S. 504, 512 (1995). Each prospective juror indicated that he or she would be willing to consider the mitigating evidence presented and to follow the court's instructions on weighing aggravating and mitigating circumstances in recommending a sentence ([#10] 29/2355-57,2368-69; 32/2899; [#59] 30/2513-14,2532-33; 32/2899-2900; [#62] 30/2514-16; 32/2899-2900; [#116] 30/2588-90). None of these prospective jurors indicated that they could not consider this evidence in mitigation; the fact that they may not allocate the same weight desired by the defense to such mitigation is not a basis for juror disqualification, as each of these prospective jurors evinced a clear ability to follow the instructions of the court with regard to mitigation.

Smith's additional complaints regarding Prospective Jurors #59 and #62 are also without merit. Smith asserts that Prospective Juror #59 "believed having a child victim raised the seriousness of the case" (Appellant's Initial Brief, p. 59). When defense counsel asked leadingly "What if a case involves the death or murder of a child? For some people that might be all that they needed to hear," Prospective Juror #59 responded that she would still need to hear more; she acknowledged that it was an aggravating factor, "but

it's not all there is" (30/2513-14,2532-33). This response was favorable to the defense, since #59 was acknowledging that even with a child victim, the appropriateness of the death sentence had to be weighed through consideration of mitigation. The recognition that a child victim makes the crime more serious is no more than a statement agreeing with the legislature's decision to codify an aggravating factor reflecting this judgment. Such a statement does not reflect any inability to follow the law. Prospective Juror #59 unequivocally affirmed an ability to follow the law (23/1288).

As to Prospective Juror #62, Smith claims excusal was necessary because #62 had been a victim of child abuse, had two small children, and resented anyone that could kill an innocent child. Prospective Juror #62 stated that the child abuse incident would not affect his decision in this case in any way (23/1294). None of the responses noted by Smith suggest an inability to follow the law, or casts any doubt on Prospective Juror #62's express agreement to follow the law in this case (23/1293-94).

The defense requested that Prospective Juror #27 be excused for cause due to #27's alleged bias toward the death penalty based on #27's noted concern with the fiscal requirements of life imprisonment (33/3057). While #27 described feeling a life sentence meant spending "all that money," #27 acknowledged that he would be willing to listen to all of the facts and weigh the aggravating and mitigating factors and follow the law as instructed

by the court (29/2432-33,2446-48).

As to Prospective Juror #89, Smith takes the position that an individual that has suffered the loss of a murdered child could not serve on his jury. The defense requested that Prospective Juror #89 be excused for cause because #89's daughter was murdered as a child, and #89 was a witness at the trial (23/1328-29; 33/3101-02). The incident happened 28 years earlier, and #89 noted that time had been "a great healer" (33/3101-02). Prospective Juror #89 indicated no hesitation in the ability to serve in this case, unequivocally stated that his/her tragedy would not interfere with his/her ability to try the case fairly, and repeatedly affirmed that any decision would "absolutely" be premised solely on the evidence and instructions received in court (23/1328-29; 33/3073, 3084,3101-02; 34/3179). Smith does not identify any comments from this prospective juror suggesting any inability to follow the law and be fair, but relies entirely on the fact that a child was murdered as requiring automatic disqualification. Since this is not an automatic basis for disqualification, there is no error in declining to excuse this prospective juror.

The defense requested that Prospective Juror #24 be excused for cause due to #24's comment that Smith "looks like he is somewhat guilty," although #24 continued, "but I have an open mind and I am willing to listen to all evidence and make my determinations" (32/2821). Prospective Juror #24 recalled seeing

the video of Carlie's abduction, but had no other information about the case; #24 had not formed any opinions about the case, and agreed to reach a verdict based solely on the evidence and instructions received in court (23/1221-22). No basis for disqualification has been offered, and no error is shown in the court's denial of the cause challenge on Prospective Juror #24.

On the record presented, each of the prospective jurors now disputed demonstrated the ability and intent to render a verdict solely on the evidence presented and the instructions from the court. Smith has fallen fall short of establishing that any one, let alone at least four, of the cause challenges he requested below were improperly denied. No new trial is warranted on this issue.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN ADMITTING CRIME SCENE AND AUTOPSY PHOTOGRAPHS.

Smith next challenges the admission of crime scene and autopsy photographs into evidence. Smith identifies four pictures of Carlie, three as she was discovered at the scene and a fourth from her autopsy, and asserts they were improperly admitted because they were irrelevant or any relevancy was outweighed by the danger of unfair prejudice. A trial court's ruling on the admissibility of photographic evidence is reviewed under an abuse of discretion standard. Dennis v. State, 817 So. 2d 741 (Fla. 2002); Mansfield v. State, 758 So. 2d 636, 648 (Fla. 2000). No abuse of discretion can be found on the facts of the instant case.

This Court has long recognized that the test of admissibility of photographs in a situation such as this is relevancy, and not necessity. Meeks v. State, 339 So. 2d 186 (Fla. 1976). In Henderson v. State, 463 So. 2d 196 (Fla. 1985), the defendant argued that the trial court erred by allowing into evidence gruesome photographs which he claimed were irrelevant and repetitive. This Court found that the photographs, which were of the victim's partially decomposed body, were relevant:

> Persons accused of crimes can generally expect that any relevant evidence against them will be presented in court. The test of admissibility is relevancy. Those whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments.

463 So. 2d at 200. This Court further held that it is not to be presumed that gruesome photographs so inflamed the jury that they will find the accused guilty in the absence of evidence of guilt, but it is presumed that jurors are guided by logic and thus, that pictures of the murder victims do not alone prove the guilt of the accused. Id.

A review of the record reflects that the disputed photos admitted into evidence below were relevant to demonstrate the nature and extent of the injuries to Carlie, as well as to provide an explanation for the lack of physical evidence of Smith's sexual assault. Smith's assertion that the photos were irrelevant because they did not relate to the cause of death and "did not show evidence of a sexual assault" demonstrates a lack of understanding as to the meaning of relevance. The jury in this case had to determine whether a sexual assault occurred, clearly a disputed fact. The State was entitled to establish that the circumstances and conditions of Carlie's death contributed to the lack of physical evidence of the sexual attack.

Exhibits 34 and 35A were clearly relevant for this purpose. Smith suggests that the State should have been limited to Exhibit 32, but he admits the medical examiner noted that Exhibit 35A was a better quality and more in focus (42/4336-38,4370). Exhibits 32 and 34 were used by the crime scene technician to demonstrate Carlie's appearance as she was discovered (40/4048). Exhibit 32

does not show the position of her legs, and would not be suitable for explaining the lack of physical evidence of a sexual battery. While Smith suggests that the medical examiner could have "simply told" the jurors why he couldn't find evidence of a sexual assault, the defense intimated at trial that the medical examiner had a law enforcement bias (43/4429-30), and the State was well justified in offering photographic evidence to support and explain the medical examiner's testimony on the issue (42/4369-72).

Exhibit 42 shows the abrasions to Carlie's leg, demonstrating that she had been dragged to the location where her body was found (42/4376-81). While Smith now asserts that there was no dispute that Carlie had been killed elsewhere and dragged to where she was found, the record reflects that the question of how and when Carlie got into the woods behind the church was subject to dispute, with the defense suggesting other suspects and other possible scenarios for Carlie's death. Moreover, the uniformity of the abrasions was used to rebut Smith's suggestion that Carlie's clothes may have pulled off as she was being dragged, rather than having been removed for the commission of a sexual battery (43/4428-29).

The final photo, Exhibit 48, supports the medical examiner's testimony about a bruise to Carlie's inner thigh (42/4396-99). The medical examiner testified that this bruise was subtle and less visible on the surface, so he excised the area to confirm that there was a bruise (42/4397-98). This is an injury which may have

occurred during a struggle with the perpetrator (42/4399); the fact that Dr. Vega acknowledged on cross examination that it was "not necessarily" related to the attack does not vitiate the relevance of any injury that clearly could have been sustained during the attack.

The issue of the admissibility of these photos was discussed several times during the trial, and Judge Owens spent considerable time and effort performing the necessary balancing required by Section 90.403, Florida Statutes (40/4014-17; 42/4298-4325,4336-38). The court sought input from the medical examiner as to which pictures he felt best assisted his testimony (42/4336-38,4370-71). A number of photographs were excluded at the request of the defense (40/4014-17; 42/4298-4325). These measures weigh against Smith's claim that the court abused its discretion in admitting the photos now challenged. Douglas v. State, 878 So. 2d 1246 (Fla. 2004)(trial court's preliminary screening for prejudice is factor weighing in favor of admissibility); Philmore v. State, 820 So. 2d 919, 932 (Fla. 2002).

Although the photographs in this case may show the affects of some deterioration and insect presence, they are not unduly gruesome in that Carlie's body was not horribly scarred or disfigured. This Court has approved the admission of autopsy and other relevant photos under similar circumstances. Davis v. State, 859 So. 2d 465, 477 (Fla. 2003); Burns v. State, 609 So. 2d 600

(Fla. 1992); Marshall v. State, 604 So. 2d 799 (Fla. 1992); Nixon v. State, 572 So. 2d 1336 (Fla. 1990). In Gore v. State, 475 So. 2d 1205 (Fla.), cert. denied, 475 U.S. 1031 (1985), this Court disagreed with Gore's contention that the trial court reversibly erred in allowing into evidence two prejudicial photographs, one depicting the victim in the trunk of Gore's mother's car and the other showing the hands of the victim behind her back. This Court held that the photographs placed the victim in the car, showed the condition of the body when first discovered by police, showed the considerable pain inflicted by Gore binding the victim, met the test of relevancy, and were not so shocking in nature as to defeat their relevancy. Id. at 1208.

This Court has previously upheld the admission of pictures when relevant to explain a medical examiner's testimony, or to show the manner of death and/or the location of the wounds. See Dennis; Floyd v. State, 808 So. 2d 175, 184 (Fla. 2002); Mansfield, 758 So. 2d at 648; Pope v. State, 679 So. 2d 710, 714 (Fla. 1996); Larkins v. State, 655 So. 2d 95, 98 (Fla. 1995). The photos admitted against Smith meet this test, and no abuse of discretion has been demonstrated in the rulings to admit these exhibits.

Furthermore, any possible error in the admission of this evidence would clearly be harmless beyond any reasonable doubt. Given the strong evidence establishing Smith's guilt, including the video of Carlie's abduction, the testimony placing Smith in the car

used in her kidnapping and murder, the directions to his brother establishing the location of Carlie's body, and Smith's own statements and admissions to his family, the minor role played by these pictures in the State's case renders any possible error harmless. Hertz v. State, 803 So. 2d 629, 643 (Fla. 2001); Almeida v. State, 748 So. 2d 922, 930 (Fla. 1999).

The crime scene and autopsy photos were relevant and not unduly prejudicial. The trial court did not err in admitting these exhibits, and no new trial is warranted on this issue.

ISSUE VI

WHETHER THE TRIAL COURT IMPROPERLY DOUBLED AGGRAVATING FACTORS.

Smith's first sentencing issue alleges that Judge Owens improperly doubled the aggravating factors of "murder committed during a sexual battery" and "murder committed on a victim under 12 years of age." According to Smith, because both factors share a common element of the victim being a child, the trial court should not have found and weighed the factors separately.

It must be noted initially that this issue is procedurally barred. Smith's brief asserts that defense counsel argued below that the capital sexual battery aggravator and the victim under twelve aggravator could not both be considered without improperly doubling the same aspect of the crime. Smith cites to a pretrial motion where the defense requested the court to strike proposed aggravating factors as the source of this argument. However, a review of the motion reveals that this argument was directed at the proposed aggravating factor that the murder was committed during the commission of an aggravated child abuse (10/1989-90). In fact, the argument now asserted on appeal, that improper doubling precluded consideration of both the victim under twelve and during the course of a sexual battery aggravators, was never offered at trial, and therefore this issue is not preserved for appellate review. Spann v. State, 857 So. 2d 845, 857 (Fla. 2003)(the

specific ground upon which a claim is based must be raised at trial and a claim different than that will not be heard on appeal).

In Spann, this Court addressed the issue, even after finding that it had not been preserved, noting that "the trial court may not double the aggravators." Spann, 857 So. 2d at 857. This Court does not explain why the fact that the trial court committed an error relieved the defendant of a contemporaneous objection. In addition, in Chamberlain v. State, 881 So. 2d 1087, 1106 (Fla. 2004), this Court found doubling error "Although not raised by Chamberlain." Thus, it appears this Court's practice is to address this claim notwithstanding a lack of preservation. However, it does not appear to be an issue of fundamental error, since no error was found in Spann, and the error was deemed harmless in Chamberlain. Perhaps this Court is only considering the issue to the extent it may be encompassed within this Court's obligation to conduct an independent review of proportionality. At any rate, there is no basis for review of this issue on the merits, and any refusal to recognize the procedural bar on this issue should be explained.

This Court has described the proper analysis for a claim of improper doubling of aggravating factors:

> Improper doubling occurs when both aggravators rely on the same essential feature or aspect of the crime. However, there is no reason why the facts in a given case may not support multiple aggravating factors so long as they are separate and distinct aggravators and not merely

> restatements of each other, as in murder committed during a burglary or robbery and murder for pecuniary gain, or murder committed to avoid arrest and murder committed to hinder law enforcement.

Banks v. State, 700 So. 2d 363, 367 (Fla. 1997). Therefore, "the focus in an examination of a claim of unconstitutional doubling is on the particular aggravators themselves, as opposed to whether different and independent underlying facts support each separate aggravating factor." Sireci v. Moore, 825 So. 2d 882, 886 (Fla. 2002).

The principle against improper doubling of aggravating factors was not violated in this case.[4] In Lukehart v. State, 776 So. 2d 906, 925 (Fla. 2000), this Court found such error based on the sentencing court granting weight to the factor of victim under twelve years of age as well as the factor of murder committed during the course of aggravating child abuse. The reasoning in Lukehart, however, does not apply when the relevant factors are

[4] Smith's brief claims that the two relevant factors "were emphasized" by the court below when it concluded that the aggravating factors outweighed the mitigating factors established (Appellant's Initial Brief, p. 77). Smith's statement is supported by a record citation to the entire sentencing order, 14/2617-2653. However, the sentencing order never indicates that these two factors were given any special priority. In summarizing the weighing process, the court below noted that each and every aggravating factor, except for Smith being on felony probation, would individually outweigh the totality of mitigation presented (14/2652). If anything, the sentencing order suggests that the factor of murder committed during a felony was not as significant as other factors, since the court only allocated "significant" weight to that factor while ascribing "great" weight to avoid arrest; heinous, atrocious or cruel; cold, calculated, and premeditated; and victim being under twelve years of age (14/2620-31).

victim under twelve years of age and murder during the commission of a sexual battery. Obviously, the aggravating factor of a murder committed during the commission of, or attempt to commit, a specified felony (Section 921.141(5)(d), Florida Statutes), applies whether or not the victim is a minor. The aggravating factor of a victim younger than twelve applies whether or not a separate and distinct felony was being committed with the murder.

Notably, taking the age element out of an aggravated child abuse would result in an offense of aggravated assault, which is not a predicate felony to be used for the application of the during-a-felony aggravating factor. See Sections 827.03, 921.141(5)(d) Florida Statutes. However, removing the age element from Smith's conviction for capital sexual battery would still leave the commission of a sexual battery, which is a predicate felony and therefore would support the finding of this factor. See Section 794.011, Florida Statutes. Therefore, Lukehart's prohibition against doubling the aggravated child abuse and victim under twelve aggravating factors is not violated when the felony aggravator is based on sexual battery rather than aggravated child abuse. Because the sexual battery and victim under twelve factors involve different aspects of the crime and are not mere restatements of each other, there was no error in finding and weighing the factors separately.

Furthermore, no error can be discerned in this case, since the

aggravating factor of during the commission of a felony was supported by the kidnapping as well as the sexual battery (14/2621). This Court has recognized that, when two or more enumerated felonies are committed during the course of the homicide, the pecuniary gain aggravator can be considered separately as long as one of the felonies did not involve obtaining money. Barnhill v. State, 834 So. 2d 836, 852 (Fla. 2002); Willacy v. State, 696 So. 2d 693 (Fla. 1997). Even if Smith's argument that during the course of a sexual battery in this case was improper because Smith sexually battered a child under twelve, no improper doubling occurred where this aggravating factor was also premised on the commission of a kidnapping.

Finally, any possible error in this regard would clearly be harmless beyond any reasonable doubt. Not only is there a separate felony to support the during commission of a felony aggravator, but there are four strong aggravating factors in addition to the two at issue here. Merging these into one factor would still provide five weighty factors, in contrast to minimal, nonstatutory mitigation. The death sentence is still clearly compelled on these facts, and therefore no relief is warranted on this issue.

ISSUE VII

WHETHER SECTION 921.141(5)(l), FLORIDA STATUTES, IS CONSTITUTIONAL.

Smith next disputes the constitutionality of the aggravating factor, murder committed on a victim under 12 years of age, codified in Section 921.141(5)(l), Florida Statutes. Smith preserved this argument through the filing of a motion below, which was denied (4/710-12, 756-57). The constitutionality of a statute is a legal issue reviewed *de novo* on appeal. Troy v. State, 948 So. 2d 635, 643 (Fla. 2006).

Smith claims that this aggravating factor is unconstitutionally overbroad and fails to narrow the class of defendants eligible for the death penalty. He also asserts a lack of due process because there is no requirement that the victim's age be linked to the murder; rather, the factor is automatically applicable for any victim under twelve.

As to overbreadth, Smith's argument is without merit because this factor does not apply to all first degree murders. Clearly, many murder victims are over twelve years of age when they are killed. Therefore, this factor meets the requirement of narrowing the eligible class. See Francis v. State, 808 So. 2d 110, 139 (Fla. 2001)(noting aggravating factor satisfies constitutional requirement of narrowing the class of eligible defendants as long as there is no risk that reasonable jurors will find the aggravator

in every case); Tuilaepa v. California, 512 U.S. 967, 972 (1994)(aggravating factor is not constitutionally overbroad unless it applies to every defendant convicted of murder).

As to the claim that the factor must require the defendant to target the victim due to young age, or at least know the victim to be under twelve, there is no constitutional requirement for this construction. Notably, this Court has upheld aggravating factor (5)(m), "The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim," despite a construction that does not require the age or disability to have such a link to the murder. See Francis, 808 So. 2d at 139 (upholding constitutionality of §921.141(5)(m), Fla. Stat.); Woodel v. State, 804 So. 2d 316, 325-326 (Fla. 2001)(the finding of this aggravator is not dependent on the defendant targeting his or her victim on account of the victim's age or disability).

To the extent Smith claims this aggravator fails to require "particular vulnerability" as in the advanced age aggravator, surely the legislature has the prerogative to determine that anyone under twelve is particularly vulnerable. The court below noted that the victim in this case was raped and strangled by a man nearly four times her age and double her size (14/2627). Clearly Carlie's young age left her vulnerable to this senseless murder and

the brutal acts that led to it.

Smith has failed to overcome the presumption of constitutionality which attaches to this statute. Moreover, any concern as to the propriety of this factor would not affect the sentence in this case given the other strong aggravating factors applicable. Since the death penalty would be imposed even if this aggravating factor was not available, any possible error is harmless beyond any reasonable doubt. Smith is not entitled to a new sentencing proceeding.

ISSUE VIII

WHETHER THE TRIAL COURT ERRED IN APPLYING THE AGGRAVATING FACTOR OF MURDER COMMITTED TO AVOID ARREST.

Smith next challenges the applicability of the avoid arrest aggravating factor. Such a claim requires this Court to review the record to determine whether the trial court applied the right rule of law for the aggravating circumstance and, if so, whether competent substantial evidence supports its finding. Willacy v. State, 696 So. 2d 693, 695-96 (Fla. 1997). Such a review in this case confirms the propriety of the court's finding and weighing the avoid arrest aggravating factor.

The court offered the following facts to support this factor:

> ***3. The capital felony was committed for the purpose of avoiding or preventing a lawful arrest.***[fn12]
>
> To prove this aggravating circumstance when the victim is not a law enforcement officer, the State must show beyond a reasonable doubt that the sole or dominant motive for the murder was the elimination of a witness.[fn13] This factor focuses on the motive for the murder, and it may be proved "by circumstantial evidence from which the motive for the murder may be inferred, without direct evidence of the offender's thought processes.[fn14] The evidence presented in this case leaves no doubt that the sole or predominant reason that the Defendant killed Carlie Brucia was to avoid arrest.
>
> a. *The Defendant failed to conceal his identity.*
>
> When the Defendant kidnapped Carlie from Evie's Car Wash, he did not wear a mask or cover his name badge, which was prominently displayed on his uniform, revealing the name "Joe." At that time, the Defendant had no idea his actions were being filmed by surveillance cameras—he only learned about the videotape later. Carlie had seen the Defendant's face, knew his name, and could identify him.[fn15]
>
> *b. The Defendant took most of Carlie's belongings*

and disposed of them.

When law enforcement and the medical examiner's office recovered Carlie's body at the crime scene, certain items belonging to Carlie were not found with her body, including her backpack and much of her clothing. While the cause of death was ligature strangulation, and the medical examiner testified that Carlie had ligatures on her wrist at some point, no ligatures were ever recovered at the crime scene.

During trial, the State introduced a letter written in "code" by the Defendant on April 9, 2005, to his brother.[fn16] A cryptanalysis expert for the FBI deciphered the letter, and testified that in the coded letter, the Defendant admitted taking the backpack and clothes and disposing of them in four different dumpsters.[fn17] The Defendant further admitted that he dragged Carlie's body to the location where she was later discovered.[fn18]

c. The Defendant lied to Detective Toby Davis when initially interviewed on February 3, 2004.

When Detective Davis asked the Defendant questions about his whereabouts on February 1, 2004, the Defendant told a series of lies. He told Detective Davis he had visited his brother's house that evening and denied having been involved in the abduction. When he was shown a still picture from the videotape of the abduction, he said, "That looks like me, but that's not me."

d. *The Defendant abducted Carlie from one location and transported her to another location to commit the sexual battery.*

The evidence presented reveals that the Defendant was driving his friend's vehicle on February 1, 2004. Just before the abduction, the surveillance cameras at Evie's Car Wash picked up the vehicle driving west on Bee Ridge Road, and then entering the car wash parking lot. The Defendant spotted Carlie taking a shortcut through the car wash to reach her home. At that point he made the ill-fated decision to park the car, cut her off as she walked through the parking lot, snatch her, and transport her to another location.[fn19]

While the Court may never know the exact sequence of events, the Court has no doubt that this crime was initially sexually motivated. Once the Defendant finished committing the sexual battery against Carlie, he was faced with deciding whether to let Carlie live or die. At this point, Carlie was completely confined by the ligatures and could offer no resistance to him. She was no threat. As she remained defenseless, subdued, and

stripped of most of her clothing, the Defendant could have walked away and left her.[fn20] He even had the option of transporting her to yet another location and dropping her off. Instead, he made the life altering decision to kill Carlie.

Court's Finding: Absolutely no other reason existed for the Defendant to kill Carlie Brucia than to avoid arrest. Based upon the facts in this case, the Court specifically finds that the Defendant's decision was not based on reaction or instinct, but was motivated solely by his decision to eliminate Carlie as a witness.[fn21] No doubt, the Defendant realized that if he were caught and convicted of kidnapping and capital sexual battery, he would spend the rest of his life in prison.

In his allocution, the Defendant told this Court that on the day he murdered Carlie, "[he] just wanted to die." The evidence presented in this case, however, reveals a far different story. His actions reveal that he valued the chance of living the rest of his life outside of prison walls far above the life of an innocent eleven-year-old child.

After killing Carlie, the Defendant took additional steps to avoid detection such as dragging her body into the wooded area,[fn22] removing her personal items and the ligatures from her body and the crime scene, and disposing of them in four different dumpsters.[fn23] In furtherance of his plan to avoid detection, the Defendant lied to law enforcement when questioned about his whereabouts on February 1, 2004.

After considering the totality of factors set forth above, the Court finds that the State has proved this aggravating factor beyond and to the exclusion of each and every reasonable doubt. The Court assigns this aggravating factor great weight.

* * *

[fn12] §921.141(5)(e), Fla. Stat.

[fn13] *See Connor v. State*, 803 So. 2d 598, 610 (Fla. 2001). *See also Wike v. State*, 698 So. 2d 817 (Fla. 1997).

[fn14] *Farina v. State*, 801 So. 2d 44, 54 (Fla. 2001). *See also Jones v. State*, 748 So. 2d 1012, 1027 (Fla. 2000).

[fn15] *See Hertz v. State*, 803 So. 2d 629, 649 (Fla. 2001)(defendants did not cover their faces and believed that the victim had seen them, feared being identified, and expressed apprehension concerning arrest); *Lugo v. State*, 845 So. 2d 74, 113 (Fla. 2003)(because Defendant did not hide his

> identity from victims, this showed he planned from the beginning to kill both victims to eliminate having any witnesses available to testify against him).
> [fn16] *See* State's Trial Exhibit No. 128.
> [fn17] *See* State's Trial Exhibit No. 157.
> [fn18] The Defendant's coded message to his brother was deciphered to read: "I WLSH L HAD SOMTHLN JULCY TO SAY OH OK THE BACKPACK AND CLOTHES WENT IN FOUR DIFFERENT DUMPSTERS THAT MONDAY I CAME TO YOUR HOUSE FOR ADVISE I WENT IT I LEFT IT OUT IN THE OPEN I DRAGED THE BODY TO WHERE ST WAS FOUND DESTROY THIS AFTER DECIFERING IT AND SHUT UP." (Note: The Court did not correct punctuation or spelling).
> [fn19] *See Jones v. State*, 748 So. 2d 1012, 1027 (Fla. 2000).
> [fn20] *See Nelson v. State*, 850 So. 2d 514, 525 (Fla. 2003); *Jennings v. State*, 718 So. 2d 144, 151 (Fla. 1998).
> [fn21] *See White v. State*, 817 So. 2d 799, 807 (Fla. 2002); *Farina v. State*, 801 So. 2d 44, 54-55 (Fla. 2001); *Jones v. State*, 748 So. 2d 1012, 1027 (Fla. 2000).

(14/2622-25).

The sentencing order clearly establishes the application of this factor on the facts of this case. The court below applied the correct rule of law, citing to numerous cases where this Court has upheld the avoid arrest aggravator in similar situations. In addition, the court's factual findings are supported by competent, substantive evidence. Smith offers no specific criticism with regard to the court's legal or factual analysis, he simply discusses other cases where this Court has addressed the application of the factor.

In considering the applicability of this factor, this Court has previously considered it significant that the victim could

identify the killer. Hoskins v. State, 965 So. 2d 1, 20 (Fla. 2007); Nelson v. State, 850 So. 2d 514, 526 (Fla. 2003). With regard to the relevant considerations for application of this factor, Hoskins is similar to the instant case. Hoskins broke into the home of an elderly woman, raped her, put her in the trunk of a car, and left her body in a remote location. This Court agreed the circumstantial evidence was sufficient to prove Hoskins' motive in killing his victim was to eliminate her as a witness to the rape.

As the court below noted, Smith took no steps to conceal his identity when he kidnapped Carlie. He was wearing a mechanic's uniform with the name "Joe" on it. Even though there is no evidence that Carlie knew Smith, she clearly would have been able to identify him as the perpetrator of her kidnapping and rape, unless she was killed.

Other facts noted below also support the application of this factor. The videotape demonstrates that Carlie was not resisting her attacker. The fact that her hands had been bound confirms that her death was not a matter of Smith merely overreacting to Carlie struggling or resisting. This Court has also repeatedly upheld this factor when, as in this case, a victim is transported to another location to be killed. Smith attempts to downplay the transport in this case since she was kidnapped off the street rather than from her own home is not persuasive; the point is, the defendant took efforts to delay discovery of his crimes. He could

have accomplished the rape and left Carlie, dead or alive, back at the car wash; but his actions in driving her body to another location and dragging her into the woods shows that he was trying to cover up his crimes, supporting the avoid arrest factor.

Clearly, the support for this factor below went beyond the fact that Carlie could identify her attacker, but that fact alone is significant. The additional supporting facts, including Smith's ongoing efforts to conceal evidence and in lying to the police and his transporting Carlie to remote locations to commit further crimes, provide ample reason to find and weigh this factor in this case. This Court has upheld this factor under similar circumstances. Buzia v. State, 926 So. 2d 1203, 1210 (Fla. 2006) (noting victim's ability to identify perpetrator was significant, defendant did not use mask or gloves, and victim was not in a position to resist); Chavez v. State, 832 So. 2d 730, 765 (Fla. 2002)(witness elimination only motive for murder of child kidnapped and sexually abused by Chavez); Davis v. State, 698 So. 2d 1182, 1193 (Fla. 1997)(defendant kidnapped young girl, took her back to his trailer, sexually abused her, and left her body in dumpster); Wike v. State, 698 So. 2d 817, 822 (Fla. 1997)(defendant kidnapped young sisters, drove them to remote area to sexually abuse them, walked them into forest and left them for dead).

The court below concluded that "[a]bsolutely no other reason existed" for Smith to have killed Carlie, beyond the need to

eliminate her as a witness. This conclusion is compelled by the evidence presented below. The court did not err in finding and weighing this aggravating factor. Furthermore, any possible error would be harmless in this case, given the other strong aggravating factors present and the lack of any significant mitigation. Reynolds v. State, 934 So. 2d 1128, 1158-59 (Fla. 2006). Smith grabbed an eleven-year-old girl walking home from a friend's house, raped her, strangled her, and dragged her body to a remote, hidden location. His being depressed and on drugs at the time does not ameliorate the atrocity of his crimes. The death penalty is clearly the proper sentence on the facts of this case, and no new sentencing is warranted on this issue.

ISSUE IX

WHETHER THE TRIAL COURT ERRED IN APPLYING THE AGGRAVATING FACTOR OF MURDER COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER.

Smith also challenges the applicability of the cold, calculated and premeditated aggravating factor. Again, this Court must review the record to determine whether the trial court applied the right rule of law for the aggravating circumstance and, if so, whether competent substantial evidence supports its finding. Willacy v. State, 696 So. 2d 693, 695-96 (Fla. 1997). Such a review in this case confirms the propriety of the court's finding and weighing the CCP aggravating factor.

The court offered the following facts to support this factor:

> ***5. The capital felony was a homicide and was committed in a cold and calculated and premeditated manner without any pretense of moral or legal justification.***[fn34]
>
> The aggravating circumstance of cold and calculated and premeditated ("CCP") focuses on the manner in which the homicide was committed.[fn35] CCP may be established by the totality of circumstances.[fn36]
>
> *a. Planning of the Contemporaneous Felonies:*
>
> On February 1,2004, the Defendant borrowed his friend's station wagon and while driving on Bee Ridge Road spotted Carlie Brucia. He quickly turned the vehicle into Evie's Car Wash, parked, and intercepted Carlie as she was making a shortcut to her house. Her kidnapping was a deliberate, premeditated act; it was not an accident, caused by panic or distress, or even an afterthought. The Defendant preyed upon a young, vulnerable victim, and took the necessary steps to abduct her and use her for his own sexual gratification.
>
> While the Court may not be privy to each and every detail concerning the timing of the events on the night of Carlie's abduction, rape, and murder, the pertinent details are all too clear. For the Defendant to achieve his goal of preying on this young child, he drove Carlie

to a remote location and tied her wrists with ligatures, which he had with him.[fn37] Like the kidnapping, the rape was not an accident or motivated by the need to obtain more drugs. It was a deliberate act, motivated by the selfish and violent desires of the Defendant.

b. Manner of Death-Ligature Strangulation:

During the trial, Dr. Vega testified that death by ligature strangulation generally occurs as a result of the obstruction or occlusion of the arteries, which take blood to the brain, and of the veins, which take blood from the head. Further, strangulation may potentially obstruct or occlude the airways.

Dr. Vega testified that his autopsy examination of Carlie revealed the presence of “crisscross marks” on back of her neck.[fn38] These marks indicate that when the Defendant strangled Carlie, he likely stood behind her, kept hold of the ligature, and “crisscrossed” it over behind her neck, without ever tying it. Further, to actually cause Carlie’s death, Dr. Vega testified the Defendant would have needed to apply continuous, manual pressure to hold the ligature in place.

Throughout these proceedings, the defense has stressed that with ligature strangulation, loss of consciousness generally occurs rapidly within about 8 to 10 seconds. No one has disputed this fact. What is crucial is the length of time it takes to exact death through ligature strangulation. Dr. Vega’s testimony clarified that ***death from ligature strangulation is not instant*** and generally takes two to four minutes. He further stressed that once a victim is rendered unconscious, the pressure placed around the victim’s neck must be maintained to cause death; otherwise, recovery may occur. In other words, ***pressure must be maintained for minutes to cause death.***

The Defendant’s actions were cold and calculated and premeditated and without any moral or legal justification. He held Carlie’s life in his hands, not for 8 to 10 seconds, but for minutes, and as each moment passed, he made a conscious choice to slowly and methodically deprive her body of the blood and air necessary to sustain life.[fn39]

Throughout this entire time, Carlie was no threat to him. First, he subdued her with the wrist ligatures he brought with him to the crime scene. Next, he committed the unthinkable act of strangling Carlie until she was rendered unconscious. If ever a victim could be described as defenseless and subdued, it was Carlie Brucia.[fn40]

During these crucial moments, the Defendant had adequate time to reflect on whether to spare Carlie's life. He had other options available to him, but for reasons we may never know, he simply chose to ignore them. In fact, he not only chose to ignore those options, the forensic evidence reveals that he held the ligature so tight around Carlie's neck that it dug into her flesh. He did not let go and ultimately carried out his senseless plan to end her life.[fn41]

The Court finds that the State satisfied each and every element of the cold and calculated and premeditated aggravating circumstance beyond a reasonable doubt.[fn42]

The Court assigns it great weight.

[fn34] §921.141(5)(i), Fla. Stat.

[fn35] *See Stein v. State*, 632 So. 2d 1361 (Fla. 1994).

[fn36] *See Wike v. State*, 698 So. 2d 817, 823 (1997).

[fn37] *See Stein v. State*, 632 So. 2d 1361 (Fla. 1994)(One factor supporting CCP is the advance procurement of the murder weapon).

[fn38] After examining these marks, Dr. Vega opined there is a great likelihood that Smith applied a ligature to Carlie's neck, while standing behind her, in a position somewhat above her..

[fn39] *See Conde v. State*, 860 So. 2d 930, 953-954 (Fla. 2003); *Connor v. State*, 803 So. 2d 598, 611-612 (Fla.2001).

[fn40] *See Hertz v. State*, 803 So. 2d 629, 650 (Fla. 2001)(trial court properly found CCP where victims were bound and gagged for two hours and unable to offer any resistance or provocation; the defendants had ample time to reflect on their actions and still chose to execute their victims).

[fn41] *See Hertz v. State*, 803 So. 2d at 651. (Heightened premeditation demonstrated when a defendant has an opportunity to let his victim go after committing a crime but after substantial reflection chooses to carry out the plan to murder). *See also Willacy v. State*, 696 So. 2d 693 (Fla. 1997).

[fn42] The "cold" element was satisfied because the Defendant committed the murder against Carlie, even though she was defenseless, subdued, and unable to defend herself. The Defendant had ample time to reflect about his actions. The

> "calculated" prong was satisfied because the Defendant "armed" himself with the ligatures in advance of the abduction and drove Carlie to a remote area to commit the crimes. The "heightened premeditation" element was satisfied because the Defendant had more than sufficient time to release Carlie after committing the kidnapping and sexual battery. Even after he began to apply pressure to Carlie's neck with the ligature, the Defendant could have changed his mind, and Carlie could have possibly recovered. Instead, the Defendant chose to carry out his plan to murder Carlie. The final element of "no legal or moral justification" has clearly been proved because Carlie was an eleven-year-old child, who was bound and defenseless when slain. *See Barnhill v. State*, 834 So. 2d 836, 850 (Fla. 2002); *Jackson v. State*, 648 So. 2d 85 (Fla. 1994).

(14/2628-31).

Once again, the court below applied the correct rule of law, citing appropriate cases discussing the legal principles at issue in the application of this factor. In addition, the court's findings are supported by competent, substantive evidence. Smith again offers no specific dispute with the trial court's legal or factual analysis, he merely disagrees with the court's conclusion that this murder involved the requisite heightened premeditation.

Specifically, the court below noted the planning involved for Carlie's kidnapping and rape; the deliberation required to kill someone by ligature strangulation; the fact that Carlie presented no threat to Smith, being bound and subdued; and the ample time for reflection over the course of the crimes. The court also observed that witnesses described seeing Smith hours before and after Carlie's abduction, and Smith appeared normal at those times. This

Court has upheld the application of this factor repeatedly under similar circumstances. Ibar v. State, 938 So. 2d 451, 474 (Fla. 2006)(noting defendant had ample time to reflect on actions, victim was killed execution-style, and defendant had opportunity to leave the scene without committing the murder); Hertz v. State, 803 So. 2d 629, 650-51 (Fla. 2001)(noting victims were bound and gagged, unable to resist, and defendant had ample time to reflect and leave scene); Wike, 698 So. 2d at 823 (noting defendant could have left minor children alone after kidnap and sexual battery, but instead he took them into the woods and killed them).

To the extent that Smith relies on his self-serving statements--that Carlie's death was "an accident," that he didn't mean to do it, and that he was on drugs at the time--to defeat application of this factor, he presents a factual issue that was resolved against him by the trial court. The court below considered the totality of Smith's actions, which clearly demonstrated his awareness of the crimes he was committing and the deliberation of his conduct. Murder by ligature strangulation is hardly an accident. There was no evidence presented below which revealed with any specificity the drugs which Smith claims to have taken that day or the impact any drug consumption may have had on the commission of this crime. No mental mitigation suggesting an inability to plan or appreciate his actions was offered below. This Court has recognized that this factor may be applied to a

chronic drug user, where no evidence is presented that the drug use destroyed the defendant's ability to plan. Guardado v. State, 965 So. 2d 108, 117 (Fla. 2007); see also Robinson v. State, 761 So. 2d 269, 278 (Fla. 1999). Smith's actions in concealing Carlie's body, removing the ligatures and her personal items, and taking her clothes and backpack to four different dumpsters plainly demonstrate his ability to plan. The testimony of the witnesses that observed Smith acting calm and normal only hours before and after the crime defeats any suggestion that Smith's drug use or state of mind somehow preclude application of this factor.

Most of the cases cited by Smith present situations where this Court struck the CCP factor as applied in robbery/murder cases, where the victims were stabbed or shot. Clearly a strangulation murder provides additional time for reflection and deliberation. Smith also relies on Holton v. State, 573 So. 2d 284, 292 (Fla. 1990), but in Holton, the victim had not been kidnapped, but was raped in a vacant house which was then set on fire. There was no suggestion that the victim was transported to another location, with the accompanying opportunity for reflection. Also, in Holton the ligature was tied behind the neck, rather than held manually for the minutes necessary to effect death as in this case.

The court below did not err in finding and weighing this aggravating factor. Furthermore, any possible error would be harmless in this case, given the other strong aggravating factors

present and the lack of any significant mitigation. Holton, 573 So. 2d at 293 (finding application of CCP to be harmless error in light of three other aggravating factors, concluding there was no reasonable likelihood of a lesser sentence without CCP). Smith grabbed an eleven-year-old girl walking home from a friend's house, raped her, strangled her, and dragged her body to a remote, hidden location. His being depressed and on drugs at the time does not ameliorate the atrocity of his crimes. The death penalty is clearly the proper sentence on the facts of this case, and no new sentencing is warranted on this issue.

ISSUE X

WHETHER THE TRIAL COURT ERRED IN RULING THAT PROFFERED DEFENSE TESTIMONY WOULD OPEN THE DOOR TO QUESTIONING BY THE STATE.

In his next issue, Smith asserts that he was deprived of mitigating evidence when defense counsel decided against presenting Smith's mother (Patricia Davis) and sister (Rena Grudzina) as penalty phase witnesses, due to the trial court's ruling that the State would be permitted to question them with regard to ongoing sexual contact between Smith and his sister when Smith was 17 and his sister was 13. The record reflects that once the trial court ruled that the State could elicit information about the contact, Smith abandoned the defense effort to call the mother or the sister. For a number of reasons, no basis for relief is offered in this issue.

This issue first arose prior to the beginning of the penalty phase. Defense counsel advised the court that when Rena Grudzina, Smith's younger sister by four years, was a teenager, "there was some type of sexual contact" between Smith and Rena (46/5088). The defense acknowledged that the State was aware of the situation, having asked the mother about it during deposition (46/5088). According to counsel, Rena wanted to testify at the penalty phase, but counsel believed that "whatever happened in the past between the defendant and his sister is not relevant to any of the issues involved in the penalty phase" (46/5088).

The State responded that it was difficult to resolve the issue without a full understanding of the evidence to be presented and relevant case authority to apply (46/5089). For example, if the sister were to testify that Smith was a good brother, this information would present relevant rebuttal for such testimony (46/5089). Obviously, the State was not going to present any evidence of the sexual contact in its case, and could not agree to stipulate to avoid the issue without knowing what mitigation testimony was going to be presented (46/5089). Defense counsel indicated that no written motion in limine was filed, because counsel did not want the media aware of the sexual contact (46/5089). When the court asked defense counsel what testimony would be presented from the sister, counsel acknowledged that he had not yet decided whether he would use the sister as a witness at all (46/5091). Counsel expressed that he was concerned about the State cross examining other family members about the incident, but did not request the court to take any action or make any ruling on the issue (46/5091).

In the defense's opening statement for the penalty phase, counsel told the jury that Smith's positive character traits should persuade them to recommend a life sentence. Counsel promised, "You will hear about Joe as a son, a brother, a husband, a father, a nephew, a cousin, and a friend" (47/5191). The defense advised they would be presenting family and friends that knew Smith when he

was “a child and a young man,” to help the jury understand “Joe’s good qualities” (47/5191).

The first defense penalty witness was Smith’s aunt, Jean Dwyer (47/5262-81). Ms. Dwyer testified that Smith was more like a son than a nephew; Smith and Dwyer’s son, Peter, were close in age, and grew up together, and for a time, both families lived in the same house (47/5162-63). Dwyer described Smith’s childbirth, with his mother experiencing a very difficult delivery resulting in Smith being born with black eyes and a pointy head (47/5163-65). She also discussed numerous family functions, noting the family got together frequently for Sunday dinners, barbecues, and special occasions such as weddings and communion parties (47/5165-66). A video of Smith making a toast at Peter’s wedding was shown to the jury and admitted (47/5274-77). On cross examination, Dwyer opined that Smith had a normal childhood, and admitted that she had not had much involvement with Smith in the last ten years (47/5178-81).

Ms. Dwyer’s daughter, Theresa Dillon, next testified about growing up with Smith; all six of the cousins were “always together” and “very close” (47/5286). A number of family pictures, including a picture of Smith and the cousins at sister Rena’s communion and Smith and Rena together at a park, were admitted into evidence (47/5286-90).

A few more witnesses testified, then defense counsel approached the bench once more about this issue (48/5384-85). The

judge asked if criminal charges had been brought, and the State noted no charges had been filed; from Grudzina's deposition, she would say that she was about 13, Smith was 17, when they engaged in a sexual relationship over a period of time (48/5385-86). The mother had Smith move out of the home and he went to live with an aunt (48/5385). Defense counsel advised his intention would be to call the sister as a witness, but confine his questioning to the year 2003; primarily, the defense wanted the sister to testify to letters which Smith had written to his children from jail, which Rena delivered, in order to establish Smith's positive relationship with his children (48/5386). Defense counsel preferred to use the sister and to avoid having to call one of Smith's children to testify (48/5387).

The defense also wanted to present Rena's husband, Paul Grudzina, as a witness (48/5387). Mr. Grudzina was aware of the situation but he did not know Smith prior to 2003, and his testimony would be limited to his friendship with Smith since that time (48/5387). The State advised it did not intend to question Mr. Grudzina about the situation (48/5391); Mr. Grudzina did in fact testify to this mitigation and was not cross examined about Smith's sexual abuse of Rena (48/5437-46).

Another proposed witness was an aunt, Doris Smith, with whom Smith went to live after his mother learned of the sexual relationship with the sister (48/5387). Doris Smith knew Smith was

coming to live with her due to conflicts with his step-father and a problem with his sister, but defense counsel noted she only knew the reason through hearsay, and therefore she should not be questioned about why Smith was living with her (48/5387,5391-92). The defense sought a ruling that testimony from Doris Smith would not open the door for the State to question her about Smith's abuse of his sister or why he was living in her home (48/5387,5391-92).

Because the defense wanted to use Rena as a witness primarily to introduce the letters Smith wrote to his children from jail, the discussion shifted to the admissibility of the letters (48/5394-5404). Although the State objected to putting the letters into evidence without any witness to testify about them, the court ultimately ruled that the defense could admit the letters without having to put Rena on the stand for a predicate or to be cross examined about the letters or Smith's relationship with his children (48/5407; 49/5580-82; 51/5787-88). However, if Rena testified, she would be subject to cross examination as to her relationship with Smith (48/5407). The court also ruled that if the aunt testified that Smith came to live with her, the State would be permitted to ask the reason for the living arrangement (48/5407-08).

The defense presented several other witnesses, including Paul Grudzina and Smith's step-father, Paul Davis (48/5437-46, 5447-57). Paul Davis had married Smith's mother in 1977 and considered all

three of her children to be his own (48/5448-49,5452). Mr. Davis had known Smith since Smith was born, and testified that they had a good relationship and Smith had good mechanical skills (48/5449, 5453). He also testified that Smith had a good relationship with Smith's biological father (48/5455).

After the remainder of the mitigation witnesses had been presented, defense counsel advised the court that he was considering calling Smith's mother, Patricia Davis, as a witness, and wanted to know whether the State would be permitted to question her about Smith's sexual abuse of his sister (50/5721-22). (50/5721). The court ruled that, due to the evidence presented by the defense as to Smith's character in being a loving brother and good son, this would be an appropriate line of inquiry for the State (50/5722). Defense counsel then outlined some of the mitigation the defense would seek to present if they could call Mrs. Davis as a witness without being subject to cross examination on this issue (50/5722-23). Counsel noted that he had not yet made a final decision as to whether to use Mrs. Davis as a witness at that time (50/5724-25).

Following a break, the defense advised the court they would not be calling any more witnesses (51/5732). The court conducted a colloquy with Smith regarding the decision against putting his mother on the stand (51/5734). Smith stated that he and his attorney had discussed the issue, and he agreed that he did not

want his mother to testify (51/5734-35). Smith also volunteered that he did not want his mother to testify even if there was no issue with regard to asking her about the activities with his sister (51/5734).

At the *Spencer* hearing, defense counsel advised the court that Smith's sister Rena was present and had written a letter which she would like to read to the court (52/6130). Counsel first requested that Grudzina be permitted to simply read the letter[5] without being sworn as a witness, "more of an appeal to the Court as opposed to factual testimony or evidence" (52/6130-31). When that request was denied, counsel asked if Rena could be sworn as a witness, read the letter, and then be subject to cross examination only at the bench and not in open court (52/6133). The State expressed concern at the suggestion of closing the testimony to the public and the press, and the court determined any questioning needed to be with the witness on the witness stand (52/6133). Defense counsel suggested that he was being forced to provide ineffective assistance of counsel by failing to present this mitigation; he denied that he was making a strategic decision, because "I'm not willing to expose that young lady and her mother to public ridicule," and he didn't understand "why they want to do this on national television" (52/6134-35). He again asserted that the

[5] The letter does not appear in the record, but among other things, Rena characterizes Smith as a "good guy" in the letter (52/6131-32).

evidence of Smith's sexual relationship with his sister was completely irrelevant (52/6135).

This issue seeks review of an evidentiary ruling, considered on appeal for an abuse of discretion. Kormondy v. State, 845 So. 2d 41 (Fla. 2003)(scope of cross examination is within discretion of trial court). No abuse can be discerned on the facts of this case, and no relief is warranted on this issue.

Initially, this Court must determine the scope of review available on this issue. Smith's assertion that evidence of his sexual relationship with his sister should have been excluded under Section 90.403, Florida Statutes, is procedurally barred; defense counsel below never requested the court to conduct the balancing test required by that section, but maintained that any testimony about Smith's sexual relationship with his sister was totally irrelevant and inadmissible.

In addition, the record reflects that counsel abandoned any attempt to present Smith's sister, aunt, and mother as mitigation witnesses. The exact nature of testimony that could have been presented in mitigation or rebutted through the State's cross examination is not developed on this record. Although the State agreed generally to the sufficiency of defense counsel's proffer of possible mitigation from Mrs. Davis, the details of the information which the defense wanted to keep from the jury's consideration are not identified beyond the fact that Smith and the sister had some

sexual contact on an ongoing basis. A similar situation occurred in Caballero v. State, 851 So. 2d 655 (Fla. 2003). In Caballero, the defense sought to challenge a trial court's ruling that defense introduction of a codefendant's conviction would open the door to admission of the codefendant's confession, in order for the jury to understand the factual evidence upon which the conviction was based. However, this Court noted that, once this ruling was made, the defendant abandoned his attempt to introduce the conviction. This Court found that Caballero was not entitled to any relief, noting, "This Court cannot rule on assertions of errors which did not in fact occur." Caballero, 851 So. 2d at 662. As in Caballero, the record in this case does not reveal "what the trial court's evidentiary rulings on the substance of" Smith's acts with his sister would have actually been, and therefore this Court must reject this claim.

Moreover, the court below properly found that the testimony about the sexual activity between Smith and sister Rena was relevant and subject to admission. As this Court has acknowledged, the State is entitled to rebut the mitigation offered by the defense. Kormondy, 845 So. 2d at 52. This Court quoted Ellis v. State, 622 So. 2d 991, 1001 (Fla. 1993), that the State "shall be provided a full opportunity to rebut the existence of mitigating factors urged by [the defendant] Ellis and to introduce evidence tending to diminish their weight if they cannot be rebutted." This

principle fully supports the court's ruling below that the State would be entitled to rebut the mitigation presented, that Smith was a good brother and maintained positive family relationships, by questioning witnesses about Smith's sexual abuse of his sister.

Section 90.404(a), Florida Statutes, clearly authorizes the admission of such testimony. That section provides when evidence of a pertinent trait of character is offered by an accused, the prosecutor may offer evidence to rebut the trait.

Smith now claims that Section 90.403, Florida Statutes, precluded admission of this testimony, because the prejudice to Smith allegedly outweighs any relevance of Smith's sexual relationship with his sister when they were teenagers. As noted earlier, this argument has not been preserved for appellate review and is now procedurally barred. Counsel below took the position that this evidence was irrelevant, and never requested the court to undertake the balancing required by Section 90.403 once the court below found the necessary relevance for admission.

Smith cites Steverson v. State, 695 So. 2d 687, 688-89 (Fla. 1997); Sexton v. State, 697 So. 2d 833 (Fla. 1997); and Geralds v. State, 601 So. 2d 1157 (Fla. 1992), in support of his claim. However, Steverson and Sexton considered straightforward applications of Section 90.403, which is not an issue in this case since the balancing required was not requested or considered below. Moreover, those cases are factually distinguishable; both cases

found error in the guilt-phase admission of collateral crime evidence of (in Steverson) an unrelated murder committed by Steverson, and (in Sexton) bizarre behavior, including fake marriages and incest with his own children, by Sexton. The question presented in this case, the proper scope of rebuttal character evidence for penalty purposes, is not implicated in those cases.

Geralds is also distinguishable. The State's questioning of the neighbor in that case, under the guise of impeachment, revealed Geralds' prior convictions, in violation of an agreement against presenting such evidence. Geralds' prior criminal history was not proper impeachment of the witness, since the witness only testified that he had not personally experienced any confrontation with Geralds; no predicate for impeaching the witness on the basis of Geralds' eight prior, nonviolent convictions had been laid.

To the contrary, in the instant case, the State's intent to rebut the defense mitigation that Smith was a good son and a good brother was entirely justified. Moreover, any possible error with regard to this issue would clearly be harmless beyond any reasonable doubt. Smith has never identified any mitigating evidence which was foreclosed by the decision against calling his sister Rena or his aunt Doris to the stand. Although he recited a list of purported mitigation he could have presented through his mother, some of this evidence was presented through other

witnesses, such as Jean Dwyer's testimony about the circumstances of Smith's difficult birth (47/5263-65). In addition, Smith advised Judge Owens that he did not want his mother to testify in the penalty phase, even if there had been no issue with his sister (51/5734). To the extent other evidence was not presented, Smith does not explain why other witnesses could not have been used. The information itself was not uniquely known to Mrs. Davis. But even if provided for the jury's consideration, the minimal mitigation value would not have affected the jury recommendation or sentence imposed when balanced against the strong aggravating factors applicable to Carlie's murder. On these facts, no new sentencing proceeding is warranted on this issue.

ISSUE XI

WHETHER THE TRIAL COURT ERRED IN DENYING SMITH'S REQUEST TO MAKE AN ALLOCUTION STATEMENT BEFORE THE JURY.

Smith also challenges the trial court's ruling denying Smith the opportunity to offer an unsworn statement to the jury without being subject to cross-examination. According to Smith, capital defendants possess a right to allocution before the sentencing jury. Smith acknowledges that this Court rejected this argument in Troy v. State, 948 So. 2d 635, 647-49 (Fla. 2006), but asserts that the issue should be resolved differently in his case because his jury specifically "asked for" and "expected" an allocution statement. However, the rules of criminal procedure do not yield to the jury's desires. Smith was given the opportunity to testify before the jury in penalty phase, and he declined to do so (51/5782-83). In denying Smith's request to speak informally to the jury, the court below properly noted Smith's opportunity for allocution was at the Spencer hearing, and like Troy, Smith did provide a statement at that time (53/6186-90). As no legal error is presented in the trial court's refusal to permit an allocution to the jury, Smith's death sentence must be affirmed.

ISSUE XII

WHETHER FLORIDA'S ABOLITION OF THE DEFENSE OF VOLUNTARY INTOXICATION IS CONSTITUTIONAL.

Smith next claims that Section 775.051, Florida Statutes (2003), which abolished the defense of voluntary intoxication, is unconstitutional. According to Smith, Montana v. Egelhoff, 518 U.S. 37 (1996), demonstrates that the Florida legislature violated due process in eliminating this affirmative defense because Section 775.051, Florida Statutes, does not redefine the required mental state or remove the entire subject of voluntary intoxication from the mens rea inquiry. This issue is reviewed *de novo*. Troy, 948 So. 2d at 643. As Smith concedes, this Court has already determined that this statute is constitutional under Montana v. Egelhoff in Troy, 948 So. 2d at 643-45. Therefore, this claim offers no basis for relief and Smith's conviction must be affirmed.

ISSUE XIII

WHETHER FLORIDA'S CAPITAL SENTENCING SCHEME IS UNCONSTITUTIONAL UNDER RING V. ARIZONA, 536 U.S. 584 (2002).

Smith's final issue disputes the constitutionality of Florida's capital sentencing scheme, asserting that the right to jury recognized by Ring v. Arizona, 536 U.S. 584 (2002), is violated due to judicial participation in the sentencing decision. Of course, Smith's jury convicted him of sexual battery and kidnapping as well as murder, and he was on felony probation at the time. This Court has repeatedly rejected this claim. Troy, 948 So. 2d at 653-54 (defendant with contemporaneous felonies); Davis, 859 So. 2d at 479-480 (defendant on felony probation). Smith has offered no basis to overturn these cases.

STATEMENT REGARDING PROPORTIONALITY

Although Smith presents no legal claim of a disproportionate sentence, the following is offered to assist the Court in its mandated proportionality review. See Rimmer v. State, 825 So. 2d 304, 331 (Fla. 2002).

The trial court's sentencing order outlines the findings to support the death sentences imposed. The court found six aggravating factors: Smith was on felony probation; murder was committed during the course of a sexual battery and kidnapping; murder committed to avoid arrest; murder was heinous, atrocious,

and cruel; murder committed in a cold, calculated and premeditated manner; and Carlie was under twelve years of age (14/2620-31). The felony probation was allotted "moderate" weight, the felony murder aggravator was allotted "significant" weight, and the other factors were each given "great" weight (14/2621-31). In mitigation, the court found routine nonstatutory mitigating circumstances, which received "very little" to "moderate" weight (14/2632-52). The court found that any one of the aggravating factors (except felony probation) would be independently sufficient to outweigh all of the existing mitigation (14/2652).

This Court has repeatedly upheld the proportionality of death sentences imposed after a child had been kidnapped, raped, and murdered. Chavez, 832 So. 2d at 767; Davis, 698 So. 2d at 1194; Wike, 698 So. 2d at 823; Schwab v. State, 636 So. 2d 3, 7 (Fla. 1994); Carroll v. State, 636 So. 2d 1316 (Fla. 1994).

CROSS APPEAL

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING APPLICATION OF THE AGGRAVATING FACTOR OF PRIOR VIOLENT FELONY CONVICTION.

On Oct. 12, 2005, the State filed a motion requesting a pretrial ruling as to the admissibility of Smith's 1993 aggravated battery offense to establish an aggravating factor under Section 921.141(5)(b), Florida Statutes, along with a legal memorandum (7/1326-36). The motion described an aggravated battery which Smith committed on April 26, 1993, upon 21-year-old Michelle Warner. Ms. Warner was walking when Smith, a total stranger, drove by her on his motorcycle. Smith stopped, approached Ms. Warner, and forcefully struck her in the face with his motorcycle helmet. Ms. Warner suffered lacerations to her nose, lip, and mouth area, as well as a fractured nose, and was transported to Sarasota Memorial Hospital. On Dec. 29, 1993, Smith pled no contest to charges of aggravated battery and loitering and prowling based on the incident. Adjudication was withheld, and Smith was placed on probation for two years.

Following a hearing, Judge Owens ruled that the aggravating factor of "prior violent felony conviction" could not be applied premised on Smith's 1993 conviction for aggravated battery (22/1031-37). The court held that, because Smith entered a nolo plea and was not adjudicated guilty, the crime could not be

considered a "conviction" in light of Garron v. State, 528 So. 2d 353 (Fla. 1988). In Garron, this Court ruled that the capital aggravating factor of "prior violent felony conviction" could not be proven by a prior violent offense to which the defendant pled nolo contendere with a withheld adjudication. Id., at 360. However, Garron was legislatively overridden by the definition of "conviction" adopted for Chapter 921 in 1993, and therefore the court below erred in denying the State's request to use Smith's 1993 aggravated battery as a prior violent felony conviction.

Resolution of this issue should be guided by legislative intent. Following Garron, in State v. McFadden, 772 So. 2d 1209, 1214-16 (Fla. 2000), this Court recognized that the term "conviction" has been given different meanings when used in different contexts for different purposes. After analyzing inconsistent interpretations of the term "conviction," McFadden concluded that the appropriate definition required a determination of legislative intent through statutory analysis. See also Raulerson v. State, 763 So. 2d 285, 291 (Fla. 2000)(noting "conviction" to be "a 'chameleon-like' term that has drawn its meaning from the particular statutory context in which the term is used").

It is now clearly established that offenses to which a defendant pled no contest may be used as prior "convictions" even when adjudication has been withheld. Montgomery v. State, 897 So.

2d 1282 (Fla. 2005). In Montgomery, this Court reviewed the statutory definition of "conviction" set forth in Section 921.0021, Florida Statutes, and determined that the legislature clearly intended to include crimes subject to a nolo contendere plea, regardless of whether adjudication was withheld. Although Montgomery considered the issue in the context of Florida's sentencing guidelines, and Section 921.0021 facially "does not apply to capital cases," these distinctions, as will be seen, do not justify the lower court's refusal to apply the Montgomery holding to the facts of this case. Because McFadden requires legislative intent to be controlling, the question demands a more thorough assessment of the genesis of the statutory definition at issue.

As support for its holding, the Garron Court considered only its previous holding in McCrae v. State, 395 So. 2d 1145 (Fla. 1980), which upheld the prior conviction aggravating factor was applied to an offense to which McCrae had pled guilty with adjudication withheld. Garron cited McCrae as establishing that a guilty plea was "an absolute condition precedent" for considering a conviction without an adjudication. Accord Jackson v. State, 502 So. 2d 409, 411 (Fla. 1986)(affirming application of aggravating factor based on a nolo contendere plea, where change of plea form reflected adjudication of guilt).

Notably, in 1993, the legislature created Section 921.0011,

Florida Statutes, providing a definition of "conviction" identical to that construed in Montgomery. Ch. 93-406, §9, Laws of Fla. The Montgomery Court distinguished Garron because, according to Montgomery, "[d]espite this language in Garron, the Legislature, eleven years after Garron, enacted section 921.0021, defining convictions and specifically including convictions whether or not adjudication is withheld" (footnote omitted). Actually, the legislative change took place in 1993, but the definitional section of Chapter 921 was renumbered in 1997 as part of the comprehensive changes to the sentencing guidelines by the enactment of the Criminal Punishment Code, which does not apply to capital cases. Ch. 97-194, §4, Laws of Fla. As originally enacted in 1993, the definition of "conviction" was applicable to capital cases, and therefore clearly demonstrates the legislative intent to include offenses with or without an adjudication in applying the aggravating factor of prior violent felony conviction in section 921.141(5)(b).

Montgomery has firmly established that offenses to which a defendant pled no contest may now be used as prior "convictions," even when adjudication has been withheld. This construction must be applied in the context of capital sentencing, since Garron was statutorily overridden by the express definition of "conviction" enacted in 1993. The fact that §921.0021 currently does not apply to capital cases is not significant, since codification of that

section was part of the comprehensive changes to the sentencing guidelines and not based on any legislative intent to alter the law relating to aggravating factors in capital cases.

The rule of McFadden, requiring deference to legislative intent, demonstrates that Garron has lost all precedential value on this issue. Therefore, the court below erred in prohibiting consideration of Smith's prior offense as a prior violent felony conviction under §921.141(5)(b). Moreover, this issue is not moot, even if this Court affirms the death sentence already imposed on Smith. The error is clearly capable of repetition, as long as Garron is presumed to be good law. This Court should take this opportunity to clarify that Garron has been overruled on this point.

CONCLUSION

Based on the foregoing facts, arguments and citations of authority, this Court must affirm the convictions and sentences imposed by the lower court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Deborah K. Brueckheimer, Assistant Public Defender, P. O. Box 9000--Drawer PD, Bartow, Florida, 33831, this 10th day of March, 2008.

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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CAROL M. DITTMAR
Senior Assistant Attorney General
Florida Bar No. 0503843
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
(813) 287-7910
(813) 281-5501 Facsimile

COUNSEL FOR APPELLEE