IN THE SUPREME COURT OF FLORIDA

JOSEPH SMITH,	:	
Appellant,	:	
vs.	:	Case No. SC06-0747
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR SARASOTA COUNTY
STATE OF FLORIDA

AMENDED
INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

Joseph Smith, Appellant, was charged by Indictment on 2-20-04, with the first-degree murder of Carlie Brucia on 2-1 or 2-04, in violation of § 782.04(1)(a), Fla. Stat. 2003). (V1/R137,138) The State also filed an information on 2-20-04, which it subsequently amended charging Mr. Smith with 2 counts: (1) Capital Sexual Battery by a person over 18 on someone younger than 12, Carlie Brucia, by penetration or union with Ms. Brucia's vagina and Mr. Smith's penis and/or Ms. Brucia's vagina with Mr. Smith's finger and/or union with Ms. Brucia's mouth and Mr. Smith's penis on 2-1 or 2-04, in violation of § 794.011(2), Fla.Stat. (2003); and (2) Kidnapping with Commission of a Felony on a Child on 2-1 or 2-04, by abducting Carlie Brucia and committing a sexual battery on Carlie Brucia who was under 12 years old and/or by inflicting bodily harm on Carlie Brucia and/or committing a felony on a child in violation of §§§ 787.01(1)(a)2, 787.01(3)(a), 787.01(1)(a)3, Fla. Stat. (2003). (V1/R133-136;V4/R788-791) All charges were consolidated for the trial. (V6/R1033-1037)

Mr. Smith had a jury trial in Oct. and Nov. 2005. (Vols.22-46) Mr. Smith was found guilty as charged on all counts on 11-17-05. (V46/T5073-5075;V9/R1708,1709) The penalty phase was held, and on 12-1-05 the jury recommended death 10-2. (Vols. 47-52;V52/T5970-5974;V11/R2084) A Spencer hearing was held (Vols. 52-53), and the sentencing hearing took place on 3-15-06. (V53/T6227-6280) The sentencing order was filed on 3-17-06. The trial court sentenced Mr. Smith to death on the murder conviction and life on

the kidnapping and capital sexual battery charges. (V14/R2663-2671) The notice of appeal was filed on 4-12-06. (V14/R2691)

STATEMENT OF THE FACTS

Carlie Brucia, 11 years old, spent the night at a friend's house on 1-31-04; and at about 6:15 p.m. on 2-1-04, Carlie said she was going to walk home. Carlie was wearing a short-sleeve red shirt, blue jeans, and a pink backpack. Although Carlie said it was okay for her to walk home alone, her friend's mother called Carlie's home to let them know she was on her way. (V35/T3305,3367-3388;V44/T4764) Carlie's stepfather drove out to meet Carlie, but cold not locate her. They called 911 at 7:30 p.m. (V35/T3312-3319)

A bloodhound was used to track Carlie's scent, and she lost the scent at Evie's Car Wash. (V35/T3393-3412) The owner of Evie's Car Wash spoke to the police and told them he would check his motion cameras. When he did, he saw on Camera 3 at 6:27 p.m. for 2-1-04 a young lady being led out to the back side with a man taking her hand. Later he was asked to check his cameras for a yellow station wagon for that same time period. He saw a yellow station wagon on 2-1-04 on Camera 2 at 6:18 p.m., on Camera 8 at 6:19 p.m., and on Camera 5 at 6:15 p.m. The car wash was closed at noon on 2-1-04. (V35/T3423-3426,3440-3463)

A tape of the girl being led away at the car wash was shown to Carlie's mother and stepfather, and they identified Carlie as the girl. They did not know who the man was. Because there were no other leads, the tape was released to the media the night of 2-2-04. (V37/T3580-3587;V35/T3324-3327) There were 771 tips based on

the tape, and 60 referenced Joseph Smith. (V45/T4833-4840) One of these calls was from Ed and Lynn Dinyes. Ed was a friend of Mr. Smith's and a business associate. (V36/T3524-3548) Others also identified Mr. Smith as the man on the tape: someone who used to work with Mr. Smith (V36/T3551-3356), Mr. Smith's brother and his girlfriend (V38-T3793;V39/T3913-3917), and one of the persons Mr. Smith was living with at the time (V37/3653). The tape was played for the jury. (V36/T3490-3492)

As a result of these leads, the Sarasota Sheriff's Office sent detectives on 2-3-04, to check into Mr. Smith along with a list of other possible leads. Mr. Smith spoke to one detective while other detectives searched his living quarters and car with his consent for any evidence of Carlie. Mr. Smith denied being the man on the tape when he was shown a photo from it, and no evidence of Carlie was found. Mr. Smith said he had left his residence at about 6 p.m. in his car and went to see his brother John til about 6:30 p.m. on 2-1-04. He then returned to where he was staying with the Pincuses til 7:30 p.m. This covered the time of 6:22 p.m. that concerned the detective. The man on the tape had tattoos, so the detective asked Mr. Smith to roll up his sleeves—Mr. Smith did have tattoos on his arms. Since Mr. Smith had an alibi that could be checked, there was no evidence of Carlie, and there were others to check, the detectives moved on. (V37/T3570-3577,3590-3608)

Mr. Smith was staying with Jeffrey and Naomi Pincus on 2-1-04. Mr. Smith was having marital problems and was renting a room from his friends to be near his family. The Pincuses owned a yellow station wagon which Mr. Smith borrowed on 2-1-04 at about

3:05 p.m.. Although Mr. Smith said he would be back in 15 minutes, Mr. Pincus did not see Mr. Smith again that night. Mr. Smith was wearing his mechanics' uniform when he left. When he saw Mr. Smith the next morning, Mr. Smith asked to borrow the station wagon again to visit his wife, children, brother, and mother. Mr. Smith said he had to sort things out with them. Mr. Pincus let Mr. Smith borrow the station wagon 2-2-04 and it was returned that night. Mr. Pincus saw the tape on 2-3-04 and recognized Mr. Smith. Mr. Pincus took his yellow station wagon to the Sheriff's Department and gave it to them. He noted the second-row seat was down when Mr. Smith returned it, but it was up when he gave it to Mr. Smith. Also, there were ties and cords in the station wagon when he loaned it to Mr. Smith. Mr. Pincus identified the yellow station wagon at the car wash on 2-1-04 as his. (V37/T3637-3657)

Mr. Smith had worked on Alibizu Moctezuma's car. Mr. Moctezuma saw Mr. Smith on 2-1-04, at 3:15 p.m.. Mr. Smith was picking grapefruit from their yard and was going to fix their fence. Mr. Moctezuma left; and when he returned at 8:15 p.m., Mr. Smith was at his house again. They talked about his car for 35-45 minutes, and Mr. Smith acted normal. A light-colored station wagon was in front of his home that night. (V37/T3682-3687)

When the station wagon was examined, no prints matched Carlie's, 2 head hairs consistent with Carlie's were found inside the station wagon from the rear of the wagon and on the floor mat, and 7 fibers from the vehicle were consistent with Carlie's shirt. No pubic hairs consistent with Carlie were found in the vehicle, and no unknown hairs were found in the combings from Carlie's

pubic region. (V41/T4135-4209;V44/T4680-4692)

After Mr. Smith talked to the detectives on 2-3-04, he was arrested and put in the Sarasota County Jail later that day on unrelated charges. (V37/T3608) On 2-5-04, arrangements were made so Mr. Smith could talk to his mother and brother alone and without taping. (V37/T3699-3702)

John Smith, Mr. Smith's brother, called the Sarasota County Sheriff's Office on 2-4-04 at night and said he wanted to visit with Mr. Smith that night. Because Mr. Smith had counsel, John was told a visit could not take place that night; and John was referred to the Public Defender's Office. (V37/T3698,3699) John also spoke to two FBI agents at the Sarasota County Sheriff's Office at 7:30 p.m.. During that conversation, one of the agents asked if John had thought about going to see his brother in order to rest his mind—going to see his brother and asking if Joseph had done it. (V38/T3737,3755,3756) Later that evening John called the FBI agent and said he wanted to see his brother. This was not allowed, and the agent told John to call his brother's attorney. John, who had 3 felony convictions and had pending charges with this State Attorney's Office, admitted he was upset with his brother Joseph back in Feb. 2004. His brother had stolen things from him resulting in many fights. John had not spoken to his brother for some time; so when his brother showed up at his house at 11 p.m. on 2-2-04, he told his brother he did not want to speak to him. After John saw the tape on 2-3-04, he went to see his brother. John did not get to talk to his brother til 2-5-04. (V38/T3738,3739,3791-3798,3840,3841,3860;V39/T3878,3879)

According to John, he asked his brother about the girl; and his brother cried, mumbled a lot, and said he was sorry. His brother said he couldn't remember a lot because of the cocaine he'd taken that had affected him like no other cocaine had. His brother was foggy about what had happened and said it was a blur. His brother would not talk about the girl til their mother left. According to John, his brother gave him yes or no responses to questions John asked. John said his brother said they had oral sex, rough sex, and sex where he ejaculated inside her. His brother did not know if she was dead, but she could be. John asked about the girl's location, and his brother said something about a church on Proctor Road and a concrete building. (V38/T3798-3815,3857-3859)

During a phone call between John Smith and a detective the afternoon of 2-5-04 and later that same night, John asked the detective about a reward. John appeared to be concerned that someone else might be getting that reward. In a subsequent conversation, the detective was concerned when John continued to ask about the reward. (V38/T3758,3770-3773) John said he was interested in the reward for his brother's children. John claimed his brother wanted him (John) to get the reward for Joseph's children; however, in a taped statement between John and the FBI agents on 2-5-04, John is discussing the reward, those trying to claim it, and the amount. John never mentions his brother wanting John to get it for his brother's children. John did not get any reward money in this case. (V38/T3851,3852,3864;V45/T4870,4871)

After John left the jail, he drove by some churches on

Proctor Road, stopped at one, got out of his vehicle, looked around, and left when he didn't find anything. (V38/T3816-3818) Two men working for a tree service who parked their equipment at the Central Church of Christ on Proctor Road saw a white man coming out of the tree area on the property and get into an SUV that was parked behind the church. The guy ran to his vehicle and drove away as soon as he saw the two men. This was on 2-5-04 in the afternoon. (V45/T4912-4929) John received calls from his brother on 2-5-04. According to John, his brother called him during the day; and they discussed the girl's location. (V38/T3820) However, the Sarasota County Sheriff's Office logged Mr. Smith's calls made from his cell as to date, time and the number to which the call was placed; and the only calls they have listed to John's number on 2-5-04 were from 7:44 p.m. to 10:29 p.m.. Sarasota's County Jail could not record these calls, but one deputy assigned to Mr. Smith's cell overheard part of a conversation to John as to where "she" was—'she's between 2 trees and not too far back maybe along the tree line.' "John, tell mom I'm sorry. I was not thinking right. Please tell mom I'm sorry."' The deputy never heard anything about sex acts or anything of a sexual nature. (V39/T3913,3987-3399,3924-3949)

John called one of the FBI agents at 8:55 p.m. on 2-5-04 and asked the agent to come to his (John's) home. Two FBI agents and a Sarasota County detective went to John's home; and then the officers, John, and John's mother got into an SUV. John directed them to Central Church of Christ on Proctor Road at 10:15 p.m. John received calls from his brother while at the church.

(V38/T3741-3749,3824-3827;V39/T3881-3885) Because it was believed Carlie Brucia's body was nearby, everyone remained on the parking lot. (V39/T3890) A deputy from the forensics department with the Sarasota County Sheriff's Office was sent in to the wooded area early in the morning on 2-6-04, and she did find Carlie Brucia's body with her flashlight. (There was a stipulation as to the identity of the body.) (V39/T3958-3969:V42/T4354)

The medical examiner went to the scene and observed Carlie's body. There was no rigor mortis. It was apparent she had been dragged to that location. Carlie was wearing a red shirt, bra, and one sock. Because the left leg was in the unusual position of being under the left buttock, the medical examiner believed the body was dragged there before rigor mortis set in. Rigor mortis develops a few hours after death and builds to a peak at about 12 hours. It is gone within 24 hours. (V42/T4354-4357,4361-4366) The medical examiner could not pinpoint the time of death (V42/T4357); but a forensic entomology consultant, i.e., insects, put the time of death within a reasonable degree of scientific certainty before sunrise on 2-2-04. This opinion was based upon the growth or development of the insect population on the body. (V43/T4468-4486)

The medical examiner determined cause of death to be strangulation. There were no other obvious signs of injuries, and there was a ligature-type mark around the neck. (V42/T4359) Unconsciousness occurs in 8-10 seconds, and it takes 2-4 minutes for the person to die. The manner of death was homicide.

The medical examiner had no physical evidence of a sexual battery from the body. Swabs taken from the body, including the

mouth and vagina, did not reveal any semen/sperm. Decomposition and insect activity obscured the genital area. Damage to the hymen could have been caused by insects, and the tear to the vagina was probably caused by his speculum. No other injuries to the vagina were found. There were dragging abrasions on the body that could have occurred right before or after death. There was some bruising on the right leg, but this was not necessarily connected to the assault—it could have occurred several hours before death. Some of the damage to the body was caused by animal activity. Both wrists had linear marks similar, but more subtle, to the one on the neck. Marks were consistent with her hands being bound. Since the body had been dragged more than just a few feet, that could be why the shirt was up, bra unclasped, and lower clothing was missing. There were no injuries to the head or torso. (V43/T4422-4452)

Mr. Smith had some injuries to his hands and legs, but the medical examiner could not say how they occurred. He could not link the injuries to Carlie, and they were consistent with Mr. Smith's work as a mechanic. (V42/T4411-4414;V43/T4455-4458)

Carlie's red shirt was sent to the FBI lab in Quantico, Virgina; and the case manager—who doesn't perform any of the testing—testified to the results. This case manager admitted that in 2002 there was a biologist in this FBI lab who was running tests correctly, but was not running the controls used to check for contamination. This biologist then falsified her reports saying she had done the controls. This biologist had been with the FBI for 14 years, and her improper DNA testing lasted for over 2 years in over 100 cases. This biologist only got caught when

another biologist walked by and saw something wrong. The supervisors for this biologist never realized she was falsifying her reports, and they always gave her satisfactory performance reviews. As a result of this discovery, all of this biologist's work had to be redone; and the Office of the Inspector General was called in to investigate the lab's areas of vulnerability. Their report on the DNA unit was not issued until May 2004, while the evidence in this case was received in Feb. 2004.

One semen stain was found on Carlie's shirt, and the male DNA matched Mr. Smith's to a reasonable degree of scientific certainty. This was the only DNA found. Carlie's fingernail clippings did not reveal any foreign DNA, nor did swabbings from her mouth, vagina, or anus. The case manager admitted the majority of their tests are conducted for the prosecution. The case manager also admitted there is a risk of error in every human activity including in the handling and analyzing of DNA. Inadvertent contamination could occur, and some testing is very sensitive. A forensic DNA examiner is trying to examine less than .1% of human DNA that is different from other human DNA. In addition, there can be analyst bias. The case manager does no testing and does not observe the testing. The work continues whether the supervisor is there or not. (V43/T4498-4615)

Mr. Smith was moved to the Manatee County Jail in Feb. 2004 so that all of his calls and visits could be, and were, recorded. (V44/T4706-4730) Portions of some of these recordings were played to the jury:

1. Telephone Call on 2-9-04 between John Smith and his brother, Joseph. Joseph says he did not know the mother

and did not sell her drugs in a bar. He does not sell drugs, and he does not know the people where the kid was sleeping over. John says he's going to ask questions, but he'll use code words. Joseph tells him to bring paper and a pen. (V44/T4741,4742)

2. Telephone Call on 2-9-04 between Patricia Davis and her son, Joseph. Patricia says the best thing Joseph can do is explain it as an accident, and Joseph says it was an accident. He did not do it on purpose. Patricia wants him to talk to a priest, and she knew drugs were going to get him in trouble. Joseph says he didn't mean to do and asks if his wife knows he's not an animal. Patricia tells him that his wife Lucy called to tell her that Joseph never hurt her. Joseph asks his mom to tell Lucy he's sorry. (V44/T4742-4746)

3. Telephone Call on 2-10-04 between John and Joseph. John asks Joseph why Joseph came to his (John's) house on Monday night—did Joseph see himself on TV. Joseph says no, he needed to talk 'about that.' John asks if Joseph knew the family, and Joseph said no. John said it makes a difference and it's a shame Joseph did not know them. Joseph asks why, and John just repeats it makes a difference. Joseph says he never met her. John says Joseph had to have met the girl before, but Joseph says no. John says the girl didn't look 11 years old—16 or 17, and Joseph agrees. (V44/T4747-4748)

4. Jail Visit on 2-12-04 between Sharon Johnson and Joseph. Joseph says he's embarrassed and a 'piece of shit.' He blames the drugs—heroin and cocaine. (V44/T4749)

5. Telephone Call on 2-18-04 between John and Joseph. Joseph says he's going to make the best of the worst situation, and he admits he screwed up. Joseph wants Alexis to know he did not do this to hurt her, and he wants John to tell Alexis that he (Joseph) loves her. (V44/T4749-4751)

6. Jail Visit on 2-19-04 between John and Joseph. John is asking a lot of questions, but the answers are inaudible. Joseph says he finished it because he was scared—the adrenaline. Joseph initially wants to know who called the tip on him, but then says it doesn't matter. Eventually, he was going to get caught. Joseph saw her running, and then he parked the car. John tells Joseph something about Joseph selling "it" so the kids could go to college. Joseph says that was a bad idea. It would have done something to John to see that, "they" would have followed him, and John would have been implicated. John says once he saw "that" he would have had to go straight to "them." Joseph told John he would have been putting himself in jeopardy, and it was a bad idea. John says it didn't

> happen, but Joseph is going to be away for a long time. John wants to make sure the kids go to college. John then says something, about Joseph knowing the mother because they used to go to a bar. Joseph says he never met her and never went to a bar. Joseph says he saw the priest and confessed to everything—"murder, all types of stuff." The priest gave him penance and told him not to worry about the people he hurt—he now has a clean slate. Joseph said he had to do the right thing from now on; it made him feel a little bit better. (V44/T4751-4756)
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> 7. Telephone Call on 2-29-04 between John and Joseph. John talks about encryptions and taking a lot of time to decipher what he's going to send to Joseph. Joseph says he has nothing but time. John says the trial is to be long and drawn out, and he will be testifying as to what he knows. When Joseph says John knows nothing, John says he knows stuff. (V44/T4756-4759)
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> 8. Telephone Call on 2-29-04 between Patricia Davis and Joseph. Patricia says somebody knows that Joseph knew the mother, and Joseph said he never knew these people before in his life. (V44/T4759)
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> 9. Telephone Call on 3-7-04 between John and Joseph. Joseph tells John he never knew this girl before in his life, and John says he wishes it wasn't that way. Joseph repeats he never knew her. (V44/T4760)
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> 10. Jail Visit on 3-11-04 with Patricia, John, and Joseph. Joseph is asked what he was on that night, and he says he thought it was cocaine. However, he did not react to this cocaine as he usually did—it was totally different. Joseph says there are so many rumors that he knew these people, but he never knew them. (V44/T4760,4761)
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> 11. Jail Visit on 3-14-04 between John and Joseph. Joseph tells John that John has nothing to feel bad about. He did it, he screwed up, he used the drugs. (V44/T4761,4762)

A letter Joseph Smith tried to send his brother in code was intercepted at the jail. (V38/T3832-3835;V44/T4724,4725) A cryptanalyst forensic examiner in the FBI lab in Quantico broke the code. The letter dated 4-9-05 was translated to:

> I wish I had something juicy to say. Oh, okay. The backpack and clothes went in four different dumpsters. That Monday I came to your house for advice. I went it. I left it out in the open. I dragged the body to where it sit, was found. Destroy this after deciphering it and shut up.

(V44/T4765-4789)

It was stipulated Joseph Smith was born on 3-17-66 and was on probation. (V44/T4764,4793,4794)

Penalty Phase

The State presented additional testimony from the Medical Examiner. As there was no evidence of injury that would have resulted in unconsciousness and the ligature marks on the wrists suggest restraint prior to the strangulation, Carlie was probably conscious when strangled. In the 8-10 seconds it takes to lose consciousness, it is only the last seconds there would be some loss of reflexes and visual activity. (V47/T5208-5211)

Several witnesses spoke on behalf of Mr. Smith, and they fell into 3 categories: (1) friends and family, (2) people involved in the prison/jail system, (3) doctors who spoke about Mr. Smith's medical condition and addiction/dependency on drugs.

Mr. Smith's aunt and cousin came from New York to talk about their closeness to Mr. Smith when he was growing up and how they loved him—the aunt as a son and the cousin as a brother. Joseph was always helping them—he fixed things that broke at his aunt's house and he maintained their cars. The aunt visited Joseph when he was in a coma in Florida in 1993. If Joseph receives life, they would both continue to write him and support him. (V47/5262-5299)

The woman Joseph dated from 1984-1989 while she was in high school also came down from New York to say Joseph was very helpful and generous. He would fix their cars and work on their home. He was always working different jobs—plumber and mechanic. Joseph loved animals. If Joseph receives life, she will continue to

support him. (V47/T5300-5318)

The mother of a lady Joseph dated for a few months several years ago came to give her support. Joseph helped them around the house, and he treated her grandchildren well. (V48/T5410-5415)

A hairdresser in Sarasota first met Joseph and his brother in 1993 when they came into her shop for haircuts. Joseph has been to her shop 15-20 times. He's a terrific mechanic and fixed her van 4-6 times for only $20 per visit. She was having financial problems, so this price was important. She recommended Joseph as a mechanic to all her clients. Joseph would bring two of his little girls to the shop and was a good, loving dad. When she and her husband walked their dogs past Joseph's home, they would sometimes see Joseph out in his yard playing with his kids. Since Joseph has been incarcerated, she has been writing to him; and he has written back. (V48/T5416-5423)

The neighbor who lived next to Joseph Smith, his wife Lucy and three children for 5-6 years saw Joseph many times with his children. When her grandchildren visited, they would play with the Smith children; and Joseph was fine with them. She raises show rabbits; and when Joseph asked her for a rabbit, she gave him one. It was a pet for the children and lived a long time in the back yard. Joseph did a lot of work around his home; and when she wanted a stockade fence around her home, she asked Joseph. He was more than happy to do it. She never heard any violence or arguments at the Smith house. Once she did hear raised voices, but it was nothing of concern. (V49/T5486-5496).

Another hairdresser who worked with Joseph's wife Lucy for 6

years became friends with Lucy. When she first met Joseph, he offered to fix her car. She cut Joseph's hair, and her husband became friends with Joseph. They would see each once or twice a week and visit each other's homes. Joseph and Lucy looked happy. She never saw anything bad. Joseph loved his children and never yelled at them. (V49/T5540-5547)

A young girl who used to babysit for the Smiths said Joseph and Lucy got along good. Joseph was a good father—he loved his children. Joseph would drive her home, always thanked her, and treated her good. (V49/T5548-5550)

When Joseph got out of prison in 2003, a friend he had known since 1998 offered Joseph a job as a mechanic. His friend would sell used cars, and Joseph would fix them up. His friend considered Joseph an above-average mechanic—Joseph could do everything on a vehicle and do the repairs in less time than set forth in the labor book. Joseph did deal with customers and was very polite. His friend/business partner met Gino Longobardi through Joseph. Gino was a recovering drug addict, and he came by the shop 2-4 times a week to check on Joseph. In June 2003 Joseph found Gino dead from a drug overdose and was real broken up. Gino was Joseph's best friend. In Aug. 2003 Joseph called his friend/business partner at 4:30 a.m. saying he had been using drugs all night and didn't know what to do. He took Joseph to the hospital, and on the way he told Joseph their business relationship was over. He heard Joseph tell the ER nurse he had been doing cocaine all night. Joseph said he had lost his family, his job, and was suicidal. His friend/business partner did not see

Joseph much after that night. (V47/T5320-5338)

Joseph's brother-in-law got to know Joseph in Jan. 2003. They saw each other at family gatherings, holidays, barbeques, dinners, lunches. They were frequently at each other's homes. Joseph was very caring and affectionate about his children and a caring uncle. (V48/T5437-5446)

Joseph's stepfather married Joseph's mother in 1977 and considered her three children his own. As Joseph got older he was very mechanical and worked a variety of jobs. He and Joseph's mother moved to Florida in 2002 to be with the children. They visited regularly at Joseph's home, and Joseph treated his wife and children with lots of love. He calls Joseph in jail, and his wife is always in contact with Joseph. (V48/T5447-5457)

A seminarian was doing jail ministry at the Manatee County Jail, and he met Mr. Smith in July 2004. He was nervous meeting a man charged with murder, but Mr. Smith put him at ease and was very gentle and kind. They usually met once a week til he had to go back to school in Aug. 2005. Mr. Smith was sincere about his spiritual growth—he had been to confession and believed he was forgiven. (V48/T5377-5383)

Mr. Smith's probation officer in 2000 visited Mr. Smith's home and work place. Mr. Smith was always working, polite, and respectful. He knew Mr. Smith had a severe substance abuse problem as well as severe back pain issues from a car wreck. That combination is a real problem as the back pain medications can build up and cause a relapse into illegal drug use. When Mr. Smith did violate his probation by attempting to obtain a controlled

substance by fraud; i.e., altering a prescription, his probation officer recommended Mr. Smith be put on drug offender probation where he would get a lot more supervision. (V48/T5357-5376) Mr. Smith's probation officer in 2003 was for drug offender probation. She had a smaller caseload, and Mr. Smith had more requirements. Mr. Smith never gave her a hard time or had a bad attitude. Mr. Smith would test positive because of his prescription drugs, so she did not violate him. Mr. Smith did test positive for cocaine in Aug. 2003 when he was depressed and suicidal. Mr. Smith was put on medication for the depression. (V49/T5552-5572) Mr. Smith did get into the TASC program in early 2003. While waiting for a residential opening, Mr. Smith did some outpatient treatment wherein he did not use drugs. When Mr. Smith did get into the residential program, he called to cancel his next appointment. This type of consideration is rare. (V48/T5424-5435)

One of the Manatee County Sheriff's deputies who was responsible for taking care of Mr. Smith pretrial, testified he had a lot of contact with Mr. Smith—mail, meals, laundry. The deputy never had any problems with Mr. Smith on his shift. Mr. Smith followed the rules and regulations. (V49/T5475-5485)

The president of a prison consulting firm has classified thousands of inmates and worked with Florida through the U.S. Depart. of Justice to assist in the further development of a classification system to better manage and protect inmate populations. He has personally visited Florida prisons. Someone convicted of first-degree murder in Florida who gets life will never go back into the community—life means life. He received Mr.

Smith's 2002 prison records and 2004-2005 jail records. Mr. Smith only received one DR while in prison for smoking in an unauthorized area. While in prison a person is constantly evaluated, and everything is documented. Doing anything out of the ordinary or that does not meet staff expectations will get a DR. While Mr. Smith was in jail in 2004-2005, he got some DRs for having too much table salt in his cell, trying to grab something outside his cell, and talking back to an officer. Although Mr. Smith wrote a letter to a fellow inmate telling that inmate how to incapacitate another inmate before beating him, the consultant was not impressed. The predator/inmate population does not usually write letters—they use action. This kind of communication is a continual thing in a prison environment, because it contains dysfunctional people. (V50/T5679-5719)

Dr. Ford, a physician, had Mr. Smith as a patient from Jan. to Nov. 2003. Mr. Smith had taken medication for depression and suicide attempts, high blood pressure, addiction, hepatitis C, and chronic back pain not resolved by several unsuccessful back surgeries. To be clinically depressed is a medically recognized disease where a person is not able to function in life—carry on a marriage, relationships, occupation. Dr. Ford observed depression symptoms in Mr. Smith: he was tearful, withdrawn, hard to get information from, slow in speaking and movement. She gave him prescriptions for Ibuprofen for his back and medications for his blood pressure and depression. When she next saw Mr. Smith in March 2003, he was more upbeat; because he had established a business. In Sept. 2003 Mr. Smith was despondent and like when she

first saw him. His business had dissolved, he could not work as a mechanic because of his chronic back pain, he had just separated from his wife, and he had admitted himself to Manatee Glens for substance abuse. Mr. Smith had not taken the pain management doctor's recommendations for medications, because Mrs. Smith was very concerned about any pain medication. Mr. Smith was in a lot pain and frustrated, because he could not provide for his family. After that Sept. 2003 visit, Mr. Smith brought his 2-year-old to the next visit; and even though he was depressed and not feeling good, he had a lot of patience for his little girl. Their interaction impressed Dr. Ford. (V49/T5497-5531)

Dr. McQueen is a physician certified in addiction medicine. She evaluated Mr. Smith and his medical records, and she interviewed him once in 2004 and in 2005. Mr. Smith told her of his substance abuse starting with alcohol at a very early age, to marijuana and cocaine in his adolescence, to heroin in his late teens. Mr. Smith's father drank and was very sick which Mr. Smith related to alcohol. In his late teens or early 20's he worked at labor-intensive jobs, and he began having back problems. Mr. Smith's drug use continued; and in the early 1990's he was seen in the ER for drugs, withdrawing from drugs, and feeling depressed and hopeless because of the drugs. Mr. Smith moved to Florida in 1993 and hoped to get off the drugs, but in 1993 he was hospitalized and comatose due to drug use. In 1999 Mr. Smith sought pain treatment and spent several years on prescription opiates, including Oxycontin and Dilaudid. Mr. Smith had a number of back surgeries, and he began using heroin and cocaine in

addition to the prescription drugs. In 2003 Mr. Smith had several ER admissions due to withdrawal, depression, being suicidal. Mr. Smith was in and out of treatment; and each time he was released from the treatment, he would relapse to drugs shortly thereafter.

Being dependent/addicted is a severe disorder where you have to take a lot to get the same effect, or you get sick if the substance is taken away. There is a loss of control when you try to stop but can't. The use is compulsive despite the fact that it makes medical problems, family problems, and legal problems worse. Cocaine speeds things up—heart rate, blood pressure, and the brain. When the brain goes too fast, the person becomes very paranoid and psychotic and impaired. It can also significantly impact on a person's ability to make a decision. Normally, the brain assesses a situation and weighs the consequences, risks, and options. Cocaine narrows things down to two choices and then to one—fight or flight becomes fight or die. Cocaine increases impulsivity, and choices are made without weighing the risks. Dependence is more severe than substance abuse; dependence has compulsion. Addiction is a recognized medical illness; there are criteria and it responds to treatment just like high blood pressure or diabetes. It's caused by genetic and environmental factors. People who have a dependence have a decreased ability to tolerate pain—"hyperaglesia" which is the increase in the sensation of pain and decrease in the ability to tolerate pain. There are problems with getting treatment for people with substance abuse dependence: lack of available treatment, inadequate training of doctors, treatment that is episodic instead

of constant. Mr. Smith's history of medical treatment shows there was no real understanding of how to treat his combination of pain, depression, bipolar disorder and dependence. No doctor was treating all of Mr. Smith's problems on a coordinated plan. Mr. Smith has opiate and cocaine dependence with physical symptoms as well as compulsion and loss of control. (V50/T5609-5677)

Mr. Smith introduced letters he wrote to his children and niece and his hospital records from 1992-2003. (V51/T5787-5791)

On rebuttal the State introduced a letter Mr. Smith wrote to a fellow inmate about his brother John. Joseph is upset that John gave three statements to the FBI and with the contents of those statements. Joseph threatens to break his brother's jaw if John ever visits him. He then tells his fellow inmate how to incapacitate another inmate before beating him. (V51/T5793-5798)

Spencer Hearing

Mr. Smith presented additional medical records. (V52/T6034-6079) The Medical Examiner did observe various injuries consistent with injection sites on Mr. Smith. These sites were consistent with an intravenous drug user. (V52/T6082-6090) Other documents showed Mr. Smith paid restitution while on probation, had phone calls with his children while incarcerated to show he can still have a positive impact on his children even though incarcerated, Mr. Smith's employment records to show he's been gainfully employed throughout his life, various treatment programs Mr. Smith participated in, and four different statements Mr. Smith gave as a witness to four different crimes to show he has cooperated with law enforcement. (V52/T6091-6122)

Mr. Smith's 16-year-old niece testified that since she came to Florida 3 years ago, she has spent time with her Uncle Joe—family outings, movies, the beach, walking the dogs, birthdays, holidays. She saw her uncle with his children, and he was really good to them. Since her uncle has been in jail, she has visited him, written him, and called him. (V52/T6126-6130)

Letters from Lucy Smith reaffirmed Mr. Smith was at all times a loving father to their three children. She did not participate in the trial because of the extensive publicity. She needed to protect her children. There were also letters from Mr. Smith to his niece and daughter. (V53/T6159-6165)

In rebuttal the State introduced Mr. Smith's prior convictions. (V53/T6170-6182)

Mr. Smith made a Statement to the Court. He described his addictions, back pain, depression, loss of his business and family. On 2-1-04 he found out his wife did not want him, and he wanted to die by overdose. He believes something was in the cocaine, but he takes full responsibility. He never believed he would commit these horrible crimes. He's very sorry, and he will live with the pain he has caused for the rest of his life. He asks for life for his family's sake. He does not want to see his children or his mother hurt any further. (V53/T6186-6190)

SUMMARY OF THE ARGUMENT

Mr. Smith's confrontation rights were violated when DNA results were admitted without the person who conducted the tests testifying.

The Medical Examiner should not have been allowed to give his

opinion Carlie Brucia had been sexually assaulted. That opinion was beyond his competence and invaded the jury's province.

The brother's statements concerning what Mr. Smith told him should have been suppressed. The brother was acting as an agent of the State when he obtained Mr. Smith's statements.

The trial court erred in denying Mr. Smith's challenges for cause. This issue was preserved and shown to be prejudicial.

Gruesome and shocking photos with little or no relevance should not have been introduced into evidence.

The trial court erred in doubling the aggravators of felony committed during commission of capital sexual battery and victim under 12 when both aggravators were based on the same factor—victim under 12.

The aggravator of the victim being under 12 years old is unconstitutional; because it's overbroad, overinclusive, a strict liability factor, and fails to genuinely narrow the class of persons eligible for the death penalty.

The aggravator of avoiding arrest is not applicable here. The evidence did not establish that the dominant motive for the killing was to avoid arrest.

CCP was not established where the evidence did not solely show a planned killing. The circumstantial evidence was consistent with the killing being the result of emotional frenzy or panic.

Mr. Smith was prevented from presenting essential mitigating witnesses during the penalty phase when the trial court ruled the State could cross-examine them about collateral acts Mr. Smith committed over 2 decades ago. The relevancy of those acts was far

outweighed by its prejudice.

When the jury asked for a statement of allocution and Mr. Smith was willing and prepared to make that statement, the trial court deprived Mr. Smith of a fair penalty hearing and due process when it prohibited giving that statement.

Florida's statute which prohibits voluntary intoxication under some circumstances, but not all, as a defense is unconstitutional.

Florida's capital sentencing scheme which does not require a unanimous jury for aggravators or to recommend death is unconstitutional.

ARGUMENT

ISSUE I

WAS APPELLANT'S FEDERAL CONSTITUTIONAL RIGHT TO CONFRONTATION VIOLATED WHEN THE STATE WAS ALLOWED TO INTRODUCE DNA LAB RESULTS WITHOUT THE PERSON WHO ACTUALLY CONDUCTED THOSE TESTS AND OBTAINED THE RESULTS TESTIFYING?

The only physical evidence of Mr. Smith having sex with Carlie were the DNA lab results showing Mr. Smith's semen on Carlie's shirt. (V43/T4532-4536) The medical examiner could not provide any such physical evidence even though he was looking carefully for it. (V42/T4432-4452) The DNA results were critical to the State proving the charge of sexual battery on a child under 12 and then using that conviction as an important aggravator to obtain a death sentence for Mr. Smith. Without that DNA, the State only had the weak, unsupported, and inadmissible (see Issue II) speculation/opinion of the medical examiner that he believed Carlie was sexually assaulted from the "circumstances" (V42/T4325-

4330,4407-4410) and Mr. Smith's brother's unsubstantiated (not recorded), inadmissible and highly suspect testimony (see Issue III) that Joseph told John he (Joseph) had sex with Carlie (V38/T3788-3870). Although the State taped all of Mr. Smith's calls and visits once he was moved to the Manatee County Jail, none of those taped statements had Mr. Smith admitting to having sex with Carlie. John said his brother Joseph admitted to having sex with Carlie during the calls he had with Joseph while Joseph was still in the Sarasota County Jail before Carlie's body was found. These calls were not taped and no one overheard Joseph say anything about sex. So with no real help from the Medical Examiner and no one to back up John's testimony with John's credibility severely attacked, the State needed the DNA results.

Instead of calling the biologist lab technicians who actually performed the tests, the State called the supervisor Jennifer Luttman, a forensic DNA examiner at the FBI lab at Quantico, Virginia. Ms. Luttman did not perform any of the testing in Mr. Smith's case and admitted she may not have even been in the building when the testing was done. (V43/T4600,4612) Prior to Ms. Luttmans' testifying, her testimony was proffered clearly showing Ms. Luttman was a supervisor who did not actually perform the DNA testing. (V43/T4488-4493) Mr. Smith objected to this testimony coming in in violation of his federal constitutional right to confrontation and cited to Crawford v. Washington, 541 U.S. 36 (2004), and the Second District's case of Johnson v. State, 929 So. 2d 4 (Fla. 2d DCA 2005), rev. granted, 928 So. 2d 810 (Fla. 2006), pending before this Court in State v. Johnson, Case No.

SC06-86. Mr. Smith's counsel pointed out that this highly significant piece of forensic evidence required an effective cross-examination of the person(s) performing the testing, but no such cross-examination could be conducted of Ms. Luttman as she did not do the work. Mr. Smith was being denied his right to confrontation under the Unites States Constitution Confrontation Clause. The State argued the business records exception, and the trial court agreed finding Crawford not applicable. Mr. Smith's objections were overruled, and Ms. Luttman testified as to the DNA results. (V43/T4487-4497,4519-4536,4540,4650)

During her cross-examination, Ms. Luttman did admit there had been problems at the FBI lab in Quantico in the DNA section when it was discovered in 2002 that a woman who had been with the FBI for 14 years had been falsifying her DNA reports for over 2 years in over 100 cases. She was only caught when another biologist walked by her area and saw something wrong. Prior to that the woman had been receiving fully satisfactory performance reviews. As a result, the Inspector General was called in to review the DNA unit; and that report with its recommendations was issued in 5-04. (V43/4512,4513,4579-4588) The State had submitted the shirt and blood samples in Mr. Smith's case to the FBI lab in 2-04. (V43/T4514) Although the biologist was gone in 2-04, the report with its recommendations were not issued when Ms. Luttman received the evidence in Carlie's case from the Sarasota Sheriff's Office. (V43/T4513-4514) Ms. Luttman also admitted the majority of their tests are conducted on behalf of the prosecution. (V43/T4575) The DNA testing in this case was clearly done for the State to obtain

evidence against Mr. Smith. (V41/T4148,4113-4134)

The confrontation right to cross-examine the actual lab technician when lab reports are prepared as evidence in a criminal case and not with a supervisor reading lab results as a business record exception is the issue presently pending before this Court in Johnson. As in Mr. Smith's case, Johnson dealt with the admission of a lab report; but the person who performed the test did not testify—the supervisor, who did not conduct the test, testified. The Second District held that in the case of a "lab report prepared pursuant to police investigation and admitted to establish an element of a crime is testimonial hearsay even if it is admitted as a business record." Johnson, 929 So. 2d at 7. The Court noted that even though the lab report was technically a record kept in the regular course of business, by its nature it's intended to bear witness against an accused. The lab report's purpose in Johnson, as in this case, is to establish an element of the crime at trial. The Court found the lab report was testimonial. It then moved on to consider whether it was still admissible under Crawford's two-prong test of unavailability and prior meaningful opportunity to cross-examine the witness.

The Court determined that "before a witness can be deemed unavailable, the State must make a good-faith showing of attempting to secure the witness. Although the State is not required to perform a futile act, if there is any 'remote' chance the witness may be procured, it must go to reasonable lengths to procure the witness. [Ohio v.] Roberts, 448 U.S. [56] at 74...." Johnson, 929 So. 2d at 8. The State in Johnson failed this prong,

because the actual lab technician was able and willing to come to testify. The State simply elected not to produce her. Because the State had not established the witness was unavailable, the Court decided it need not address the "prior meaningful opportunity to cross-examine" prong.

Just as in Johnson, the State failed to establish the prong of unavailability in Mr. Smith's case. The State gave no reason as to why it chose to go with a supervisor/case manager from the FBI lab instead of producing the actual lab technician(s) who performed the blood examinations and the DNA analysis. There was never any claim that the actual technician(s) was/were unavailable. The State simply argued the business records exception. (V43/T4487-4496) The trial court held Crawford was not applicable. However, Crawford is applicable here, the DNA results were testimonial, and the State failed to establish the unavailability prong.

Because the State failed the unavailability prong of the Crawford test, there is no need to proceed to the prior-meaningful-opportunity-to-cross prong. Johnson refers to a lack of opportunity to depose the actual lab analysts and refers to Lopez v. State, 888 So. 2d 693 (Fla. 1st DCA 2004). Lopez found discovery depositions are for gathering information and not for adversarial testing; thus, discovery depositions do not satisfy the prior-meaningful-opportunity-to-cross prong of Crawford. In Mr. Smith's case there is no mention of discovery depositions, and the names of the actual lab technicians are never mentioned by Ms. Luttman. There is, however, a problem the defense counsel points out at a

hearing on 6-22-05 in dealing with the FBI and discovery concerning the DNA. (V16/T254-290) Therefore, there is no showing Mr. Smith had a prior meaningful opportunity to cross-examine the lab technician(s) from the FBI who was/were actually performing the DNA testing. This prong of Crawford was also not met.

The decision in Johnson is well-reasoned and should be upheld by this Court. Respondent's brief does an excellent job of showing why lab reports are testimonial and fall under Crawford. It also addresses cases from other jurisdictions, many of which agree the result reached in Johnson. Mr. Smith will not reargue all the cases raised in the Respondent's Johnson brief and supplemental authority filed with this Court in SC06-86, but all of those arguments are adopted by Mr. Smith.

As the DNA results presented in Mr. Smith's case were clearly testimonial, their presentation by someone who did not conduct the tests was a violation of Mr. Smith's right to confrontation. This violation could not be deemed harmless when it allowed the only physical evidence of a sexual battery having occurred. As even Ms. Luttman admitted, DNA analysis is subject to human error—especially when doing the PCR testing which is very sensitive. (V43/T4595-4598) It was impossible to cross-examine Ms. Luttman on the testing of the DNA in this case; and as prior history within the FBI Lab at Quantico has shown, the people who do the testing are not above reproach. Due to the DNA's impact on the sexual battery charge and on the aggravators, the error cannot be considered harmless in Mr. Smith's case. It cannot be said beyond a reasonable doubt that this error did not contribute to the

verdict and sentence. State v. DiGuilio, 491 So. 2d 1129,1138 (Fla. 1986). A new trial is required.

ISSUE II

DID THE TRIAL COURT ERR IN ALLOWING THE MEDICAL EXAMINER TO GIVE AN OPINION THAT WAS BEYOND HIS COMPETENCE TO GIVE AND INVADED THE PROVINCE OF THE JURY AS TO WHETHER THE VICTIM HAD BEEN SEXUALLY ASSAULTED?

Prior to Dr. Vega, the Medical Examiner, testifying, Mr. Smith objected to Dr. Vega giving his opinion that Carlie had been sexually assaulted. The doctor's opinion was not based on fact and is not reliable. It was pure speculation. The trial court found this opinion was part of the Medical Examiner's job and allowed the testimony. (V42/T4325-4330)

During his testimony Dr. Vega gave his opinion that under the totality of the circumstances, a sexual battery "could have occurred": (1) the absence of clothing below the victim's waist when the body was found which is highly suggestive, (2) in numerous cases when a woman is strangled by ligature they are associated with sexual assault and battery, (3) subsequent DNA showing semen on the victim's shirt, and (4) Mr. Smith's statements about having oral sex or rough sex with victim. At this point defense counsel objected to so many assumptions as being true in "hypothetical." Defense counsel also argued Dr. Vega cannot give his opinion on this since he had no physical evidence from the body. The doctor was basing his opinion on circumstantial evidence. The objection was overruled. Dr. Vega gave his opinion Carlie was sexually battered. (V42/T4407-4410)

On cross-examination Dr. Vega admitted Carlie's body as found

was likely not in the same position as when death occurred. The body had been moved after death in his opinion, and it had been dragged more than just a few feet. Because of the dragging, Dr. Vega admitted it was possible this could have affected the shirt being pulled up and the bra being unfastened. It was also possible the dragging could have caused the lower clothing to come off. Dr. Vega initially said this was less likely as the dragging marks on the body were uniform suggesting the clothing was already off; but the doctor had to alter this opinion. Since the doctor did not know how far the body was dragged, the lower clothing could have come off when the dragging started and then the dragging continued. Dr. Vega also admitted he was suspicious of a sexual assault prior to the body being removed from the scene, so he examined the body very carefully for any evidence of sexual assault. There was no finding of sperm from swabs taken from the victim's mouth, vagina, or anus; nor did he find any semen stains on the body. There were no broken bones or skull fracture, and no signs of head injury. No signs of injury to the mouth, lips, or tongue; and no evidence of injury to the torso. The bruises on the right thigh and knee could have come from a variety of reasons—not just the attack. There were no signs of injury to external area of the vagina and no signs of injury to the vagina—no sign of hemorrhage or bleeding. Although the victim's hymen was torn, the Medical Examiner admitted this did not necessarily indicate a sexual assault. The damage could have been caused from the insects. The doctor stated the most important sign of sexual battery comes from the body, but there was none in this case. The

second thing the doctor looks for is the presence of sperm, but he could not find any evidence of this. Thus, the doctor had to rely on the overall circumstances to form his opinion; however, this opinion did not rise to the level of reasonable degree of medical certainty that a sexual assault had occurred. Dr. Vega did note the injuries Mr. Smith had on his hands were consistent with his work as a mechanic. The doctor didn't see any wounds or marks on Mr. Smith that showed a confrontation with the victim. (V42/T4405,4406;V43/T4422-4458)

In giving his opinion that a sexual battery took place in this case, Dr. Vega gave a personal opinion not based on a reasonable degree of medical certainty or on any medical basis. He saw a victim who was nude below the waist which was "highly suggestive," saw numerous cases where a woman is strangled by a ligature was associated with a sexual assault, found out about the subsequent DNA results, and heard that Mr. Smith had made statements about having oral or rough sex with the victim. Out of these 4 items, only the connection between ligature-strangled women and sexual assaults is something that would be beyond a juror's common understanding or knowledge. Clearly, a female nude below the waist, DNA results, and Mr. Smith's statements would all be within the common understanding of the jury as to whether or not a sexual battery took place. As for the "strangulation/sexual battery connection," the doctor does not say how he knows there is such a connection in "numerous" cases. He does not cite to any medical journals or treatises; he appears to have come to this conclusion based on his own experience. The bottom line is Dr.

Vega gave an opinion on an issue that was beyond his competence and invaded the province of the jury. His opinion on the sexual battery should not have been admitted.

In Florida Power Corp. v. Baron, 481 So. 2d 1309 (Fla. 2d DCA 1986), an expert testified to a fact within the common understanding of the jury; and because that expert testimony invaded the province of the jury, it should not have been admitted. “In order to admissible, expert testimony must concern a subject which is beyond the common understanding of the average layman and is such as will probably aid the triers of fact in their search for the truth.” Id. at 1310. The fact that a person loses their powers of concentration the longer they are on the job and become more fatigued was not complicated and beyond the understanding of the jurors. However, having an “expert” testify to such a common fact “creates the possibility that the jury will forego independent analysis of the facts when it does not need assistance in making that analysis. This is particularly true when there are no unusual or complicated circumstances surrounding the incident about which the expert testifies.” Id. at 1311. The court did note the “expert’s” testimony didn’t consist of the application of expert knowledge to the circumstances of the case to explain the human response. “[I]t merely consisted of a statement of a fact which we believe is within the common understanding of the jury.” Id. at 1310. The Court did not find the inadmissible “expert” testimony harmless, and a new trial was ordered.

In Key, D.O., v. Angrand, 630 So. 2d 646 at 649-651 (Fla. 3d

DCA 1994), the expert in the case had a doctorate in sociology with extensive additional education in bereavement and grief. He had also written extensively on the subject of grief and provided training to counselors, therapists, nurses, social workers, and physicians. However, being an expert in a subject does not end the inquiry. The expert's knowledge must assist the trier of fact in understanding the evidence or determining a fact in issue. In this case the Court found the testimony of the grief expert inadmissible, because the expert did not testify to anything outside the common experience, or common sense, of the jury. But because this testimony come from an "expert," it was unfairly prejudicial due to the possibility the jury would give the "expert" testimony undue weight. Although a trial court has broad discretion in determining what an expert may testify to and such discretion can only be disregarded if abused, the trial court had no discretion when presented a Fourth District case and no interdistrict conflict. The Third District disagreed with the Fourth. It then held such testimony was highly prejudicial and given heavy emphasis at trial. A new trial was ordered.

This Court took review of the case in Angrand v. Key, 657 So. 2d 1146 (Fla. 1995), based on conflict; and this Court agreed with the Third District on its legal findings (it did not agree that a new trial was required on liability, but just as to damages). This Court emphasized the decision to admit expert testimony is within the trial court's discretion, but that discretion is not boundless. "The trial court should exercise its discretion so that only expert testimony which will assist the trier of fact is

admitted. An expert's testimony should not be admitted merely to relay matters which are within the common experience of the jurors or to summarize what the expert has been told by lay witnesses." Id. at 1149. The problem that arises when an expert is allowed to testify to facts or opinions that are within the ordinary experience or knowledge of the jury, is that the jury gives up its decision-making powers by bowing too readily to the opinion of the expert and foregoing their independent analysis of the facts. This Court quoted from Mills v. Redwing Carrieres, Inc., 127 So. 2d 453 at 465 (Fla. 2d DCA 1961)(citations omitted):

> When facts are within the ordinary experience of the jury, the conclusion from those facts will be left to them, and even experts will not be permitted to give conclusions in such cases. Expert testimony is admissible only when the facts to be determined are obscure, and can be made clear only by and through the opinions of persons skilled in relation to the subject matter of the inquiry. Consequently the opinion of an expert should be excluded where the facts testified to are of a kind that do not require any special knowledge or experience in order to form a conclusion, or are of such character that they may be presumed to be within the common experience of all men moving in ordinary walks of life. The reasons for this rule are that where the facts are such that the jury is competent, from common knowledge and experience, to form conclusions thereon, it is their province to do so, and to permit expert testimony in such an instance presents the potential danger that the jury may forego independent analysis of the facts and bow too readily to the opinion of an expert or otherwise influential witness.

Clearly what these cases warned about with expert testimony happened here—the Medical Examiner testified as an expert as to his opinion that a sexual battery occurred in this case. In doing so the doctor used factors that were within the common knowledge of the jury—nude below the waist when the body was found, summarized what he had heard from lay witnesses—DNA semen found on

the shirt and statements supposedly made by Mr. Smith stating he had oral sex or rough sex, and an opinion that strangulation of a woman by ligature is associated with sexual assaults and batteries. Whether or not a sexual battery occurred in this case was a very important issue for the jury to decide, and they had to make this decision with very little evidence—DNA on the shirt showing Mr. Smith's semen as testified to by a supervisor in a lab with a history of problems as to DNA lab reports (see Issue I) and unsupported statements by Mr. Smith's brother John who had serious credibility problems (see Issue III). The decision on this issue not only determined Mr. Smith's guilt or innocence on the sexual battery charge, but it also seriously impacted on the penalty phase where it was used as an important aggravator. When the Medical Examiner invaded the jury's province on this issue by giving his "expert" opinion, it is more than possible that the jury dispensed with their independent analysis and readily bowed to the Medical Examiner on this issue.

As for the doctor's opinion that strangulation of women by ligature is associated with sexual assaults in numerous cases, as was pointed out above, he gives no support for that finding—no medical treatises or journals. At best, it must be assumed that these "numerous cases" were from his own personal experience; but personal experience is not enough to give an "expert" opinion. In Jones v. State, 748 So. 2d 1012 (Fla. 1999), this Court agreed with the trial court in finding the testimony of a doctor regarding the negative effects of crack cocaine addiction was not admissible. Even though the psychiatrist had specialized training

in drug addiction and drug treatment programs, the vast majority of his testimony related only to his experiences as a drug addict. The Court found the personal experiences of the psychiatrist had no relevance to the defendant's penalty phase; there was no attempt to generalize characteristics of cocaine addiction.

In Mr. Smith's case, the Medical Examiner makes a connection between ligature-strangled women and sexual assaults, but he doesn't say where his information comes from. He doesn't support it with medical treatises or journals. This leaves us with the conclusion that his finding in "numerous cases" could be from his personal experience; however, personal experience is not scientifically sound on the broader scale (which may be why the doctor could not state his opinion on the sexual battery occurring rose to the level of reasonable degree of medical certainty). The Medical Examiner's testimony was not competent here.

In Behn v. State, 621 So. 2d 534 (Fla. 1st DCA 1993), a reconstruction expert gave his opinion that if the defendant had proper brakes, the injuries would not have been fatal to the two passengers. There was no testimony the expert had expertise in medicine, physiology, or biomechanics. The Court held the expert's opinion was beyond his competence and should not have been allowed in as evidence. In reaching its decision the Court relied on its prior case of Wright v. State, 348 So. 2d 26 (Fla. 1st DCA 1977), cert. denied, 353 So. 2d 679 (Fla. 1977), where the only testimony that tended to establish premeditation came from the medical examiner, an expert in the field of forensic pathology. In Wright the forensic pathologist/medical examiner testified many of the

victim's serious injuries had been inflicted prior to burial and suffocation and were inconsistent with the defendant's version of events. The Court found the doctor's testimony was beyond the competence of the medical examiner; and it found the error in introducing it so obvious and extensive that it amounted to fundamental, reversible error.

In Mr. Smith's case the medical examiner had no physical evidence of sexual assault, so he had to rely on facts that "suggested" a sexual assault to give his opinion. Facts that were either in the province of the jury or based on his personal unsupported, experience of "numerous" cases involving a strangulation by ligature was associated with a sexual assault making his opinion beyond his competence.

This "expert" opinion had to have a devastating affect on the jury on the issue of sexual battery having occurred at all in light of very little physical (especially when taken in light of Issues I and III) at the trial and also at the penalty phase where it was relied on heavily as an aggravator. To further demonstrate how it was utilized at the trial, one need only look at the closing arguments at trial where the prosecutor relied heavily on the Medical Examiner's opinion:

> When a child is sexually battered, when a child is strangled, that—those are the results. [V45/T4963] ...You also have to consider the medical evidence in this case. You heard from the Medical Examiner. [V45/T4964] ...We also learned from Dr. Vega that strangulation is very common, very commonly associated with sexual battery in women, that method of homicide. Another fact, not by itself, but taken in conjunction with everything else proves sexual battery. [V45/T4985] When you look at the medical evidence and when you look at all the circumstances surrounding her death and her abduction and you look at the binding, when you look at her being naked,

> when you look at the semen he left on the back of her shirt, and then his statements, he raped Carlie Brucia. He should be found guilty of sexual battery. [V45/T4987,4988]

As can be seen from the State's closing arguments, the State had to build a case of sexual battery; because their physical evidence was weak. The State had to use the Medical Examiner's opinion strangulation was associated with sexual battery to build its case. It played an important part in obtaining a sexual battery conviction and felony murder conviction and death penalty. It cannot be said beyond a reasonable doubt that the Medical Examiner's opinion on sexual battery had no impact on the jury's verdict and recommendation. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). A new trial and penalty phase is required.

ISSUE III

> DID THE TRIAL COURT ERR IN NOT SUPPRESSING APPELLANT'S BROTHER'S STATEMENTS CONCERNING APPELLANT'S STATEMENTS, BECAUSE THE BROTHER WAS ACTING AS AN AGENT OF THE STATE?

As has been argued, the State had very little evidence of a sexual battery—the DNA (with its admissibility problems), the erroneous admission of the Medical Examiner's opinion, and the statements Mr. Smith supposedly made to his brother John about having sex with Carlie. John Smith was the only one who testified as to these alleged statements, because they were not recorded by the Sarasota County Jail nor were they overheard by the guard on duty. (V37/T3699-3702;V39/T3913,3924-3999) John's testimony was very important to the State, but John had credibility issues as to why he would testify against a brother he had not spoken to or seen for some time after Joseph had stolen some items from him. Even John's statements supposedly made by Joseph as to the rough

sex, the oral sex, and sex where he ejaculated inside, were not supported by the evidence. There was no evidence of sperm in Carlie's mouth or vagina or anus—just the DNA found on the back of her shirt. Thus, while these statements were very important to the State's case, they were very questionable.

The issues here are why and how did John obtain these supposed statements about a sexual attack by and from Joseph. The answer is that the Sarasota Sheriff's Office and the FBI agents acting with them on the Carlie Brucia case used John as their agent to get information from Joseph when they could not obtain that information themselves. Joseph had invoked his right to counsel, so the State could no longer question him. At the point they spoke with John, Carlie was missing but could still be alive. The officers and agents wanted answers, so they used John to try and get them. Because John was acting as an agent for the State when he spoke to and questioned his brother, the trial court erred when it denied Mr. Smith's motion to suppress the statements John said Joseph made. This motion was renewed pre-trial and during trial.(V6/R1084-1089;V8/T1515-1529,1559-1560;V9/R1724-1800;V10/R1801-1853,1867-1889,1905-1910,1934-1963;V21/T874-936;V22/T1088-1108;V38/T3785-3786;V41/T4221-4294;V44/T4668-4675;Supp.V3)

Carlie disappeared on 2-1-04 Joseph Smith was taken into custody for a violation of probation on 2-3-04 John Smith called the Sarasota County Sheriff's Office and spoke to two FBI agents assigned to the case on 2-4-04 John Smith saw his brother on 2-5-04 and had subsequent phone calls with his brother that same day, and Carlie's body was found in the early morning hours on 2-6-04.

John gave a statement to the FBI agents on 2-4-04 where he talked about his brother's drug addiction and how Joseph had stolen things from him. He was angry with Joseph and refused to speak to him when Joseph showed up at his (John's) home on 2-2-04. When John saw the tape, he thought it looked like Joseph. FBI Agent Street asked John if he had thought of going to see Joseph and asking if Joseph did it—just to ease his mind. John said Joseph wouldn't tell him. The Agent then asks if John has the number to contact Joseph at the jail in order to get Joseph to talk. (V9/R1724-1795;V38/T3755,3756) Later that evening John called Agent Street and wanted to see his brother. John was told to call Joseph's attorney, and a meeting was set up for the morning of 2-5-04 that would not be recorded. (V38/T3738,3739;V39/T3878-3881) It was during this meeting after their mother left, John said Joseph spoke of the sex acts. He asked Joseph about the girl—he asked questions and Joseph would answer yes or no. John asked about the girl's location; and Joseph mentioned a church, concrete building, and Proctor Road. Joseph told him they had oral sex and rough sex, and he said he ejaculated inside her. (V38/T3799-3814)

When John left the jail, he tried to locate the girl; he spoke with Joseph on the phone while he was out looking. Later that day on 2-5-04 the FBI Agents brought John back to the jail for a second statement. They wanted to know what Joseph had told John. John said Joseph said the girl was dead and the location of the body; however, John had been unable to locate her with the information he had gotten from Joseph. The agents told John to go back to his brother and get more information. Joseph had told John

during the visit that Joseph wanted to speak to his attorney, but John kept pressing for more information. Joseph told John not to talk to the police, but John knew he would. John talked about the reward money—he was afraid someone else would get it. John had asked Joseph yes-or-no questions about the sex. (V9/R1796-1800;V10/R1801-1853) That evening John contacted Agent Street and asked him to come to his (John's) house. John then took the FBI Agents and Det. Davis to the location of the victim, calling his brother at the jail enroute to get landmarks. During those calls, John said Joseph said he had rough sex and oral sex with the girl. (V38/T3824-3830) Although there was no way to record those phone calls on 2-5-04, there was a deputy near Joseph Smith when he used the phone. That deputy even had to get special permission to get the phones turned back on after 10 p.m. for Mr. Smith. That deputy could not hear everything Joseph Smith said, but he did take notes on what he did hear. That deputy did not hear Joseph say anything about sex acts. (V39/T3939-3949)

John had several recorded conversations with Joseph after 2-5-04: 2-9-04, 2-10-04, 2-11-04, 2-18-04, 2-19-04, 2-29-04, 3-7-04, 3-11-04, 3-14-04. During these calls, John repeatedly questions Joseph about Carlie in order to obtain more details. On 2-9-04 John asks Joseph about a pink backpack—everyone's looking for it and it's a big deal. John asks about Joseph knowing the mother. John tells his brother he's going to ask a lot of questions when he visits Joseph tomorrow, but they can use code words. John knows the police are listening. (V10/R1876-1889) On 2-10-04, John spoke to Joseph twice. In the second call John asks Joseph if he knew

the family and the girl, and John keeps insisting Joseph had to know the girl or else she would have pulled away. (V10/R1934-1956) On 2-19-04 John says he has put some money into Joseph's account, but he gets upset with Joseph since Joseph isn't saying much when he (John) calls. John wants some answers, and he wants Joseph to answer 1 for yes and 0 for no. John tells Joseph he (John) spoke to the lawyer and feels there's a real good chance for maybe a lesser. John asks if she had good drugs, how much time Joseph spent with her, if it happened right there, if it took 1 hour or 2, whether Joseph went back afterwards, what made Joseph pick this place, if she started something in the car, where did Joseph finish, what made Joseph finish it, whether he was driving around when Joseph saw her walking, and if Joseph parked somewhere. John also tells Joseph to start writing a book about himself and be very specific, because this is very big and could be made into a movie. This could mean money for Joseph's children. (Supp.V3/R3-42)

These conversations between John and Joseph were not casual conversations between brothers. John was clearly seeking specific information about that night with Carlie, and he kept at his brother until he obtained answers. John was a source of money for Joseph and contact with the outside world. John would threaten to stop his visits unless Joseph gave him some answers, and John would speak of book and movie deals for money for Joseph's children to get Joseph to remember specifics. The FBI had asked John to speak to Joseph about the case, and that is exactly what John did—he acted as an agent of the State to get information from

his brother when the police and FBI could not ask Joseph any questions. Joseph's statements to John, especially those concerning the sexual battery, should have been suppressed.

"The test for determining whether private individuals are agents of the government is whether, in consideration of the circumstances, the individuals acted as instruments of the state. See Coolidge v. New Hampshire, 403 U.S. 443 ... (1971). To determine whether a private individual acts as an instrument of the state, courts look to (1) whether the government was aware of and acquiesced in the conduct; and (2) whether the individual intended to assist the police or further his own ends." State v. Iaccarino, 767 So. 2d 470 at 475 (Fla. 2d DCA 2000). In Iaccarino, those putting on a music festival enlisted the sheriff's office in setting up security and used deputies and corrections officers to conduct searches. The Court found those off-duty officers conducting the searches were acting as agents of the state. The government acquiesced in the officers' conduct by co-ordinating the extra duty assignments, and the officers' first priority was to the sheriff's office and not to furthering their own needs. Thus, even though the officers were off-duty, they acted as instruments of the state for Fourth Amendment purposes.

In State v. Moninger, 957 So. 2d 2 (Fla. 2d DCA 2007), rev. granted State v. Moninger, Case No. SC07-510, officers were called to Moniger's home to investigate an alleged child molestation of Moniger's 15-year-old daughter. The daughter was going to be removed from the home, but she was allowed to go back inside to pack some things. Before she went back in, a detective asked if

there was any evidence to substantiate her claim; and she said there were some condoms in the house. When the detective told her to get her things, he told her that if she wanted, she could grab the condoms. The detective then gave her a bag to put them it. The daughter retrieved 2 condoms from the trash can in Moninger's room inside the house and gave them to the detective. Consent was never requested from Moninger. Instead of obtaining consent from Moninger or a search warrant, officers used the daughter by "encouraging" her to obtain the evidence. The daughter had no private interest in obtaining these condoms; the only interest being fulfilled was that of law enforcement. Quoting from Treadway v. State, 534 So. 2d 825 at 827 (Fla. 4th DCA 1988), the Court noted that "while a wrongful search and seizure by a private party does not violate the fourth amendment, when a private party acts as an 'instrument or agent' of the state in effecting a search and seizure, fourth amendment interests are implicated. ... 'The government must be involved either directly as a participant or indirectly as an encourager of the private citizen's actions before we deem the citizen to be an instrument of the state.'" (quoting from U.S. v. Walther, 652 F.2d 788,791 (9th Cir. 1981). Treadway also notes that if the only purpose of a private search is to further a government interest, it is subject to the Fourth Amendment; however, if there is a dual purpose to the search, both private and government, then the search generally retains its private character. The Court in Moninger found the daughter acted as an agent of the State, as her intent was to help the police by obtaining evidence for them.

In Mr. Smith's case FBI Agent Street "suggested" to John that he speak to Joseph to "ease his mind." The agent makes sure John can contact Joseph at the jail, and special rules are broken to make sure John can talk to Joseph after the phones are turned off. The State set up a meeting for John, Joseph, and their mother on 2-5-04 that would not be recorded to encourage communication. Clearly, the government was aware of and acquiesced in John's conduct. As for whether or not John had a private interest in obtaining information from his brother, none was demonstrated. Although John had asked about a reward, John testified his brother Joseph wanted the money for his children. John never received any reward money in this case. (R38/T3852, 3864) And although John said the police did not ask him to get information from his brother (V38/T3831), the facts belie this. The officers encourage the communication and wanted John to ask Joseph if he had done it, and the officers facilitated the communications. John was manipulated in obtaining the information the government could not directly obtain once Joseph invoked his right to counsel. John was acting as a state agent, so all statements he obtained from Joseph, especially those about the sexual battery, must be suppressed under the Fourth Amendment. This also includes any other incriminating statements John obtained from Joseph on the recorded conversations. (V44/T4739-4762)

As for whether or not the use of John's statements at trial were harmless error, it has already been pointed out above how important they were in proving Joseph Smith sexually battered Carlie. The State relied on Joseph's statements to his brother as

a confession as is shown in the closing arguments:

> You have direct evidence from the defendant's mouth....You have statements he's made to his family. [V45/T4964] But let's say we didn't have all that [DNA]. We have more evidence of sexual battery. His own words. He confessed to sexual battery. His own words, again, told us he committed sexual battery. He told John Smith, his brother, that he had oral sex from her and that he had rough sex with her. "I didn't use a condom. I'm not sure where I ejaculated." "Did you F her?" "Yes." That's sexual battery. That's a complete act. ...He talks on tape about her starting something in the car. What is that about? That is consistent with what John Smith said about him receiving oral sex in the car. This is his words on tape. "She started something in the car." How about this, when John says, "I thought she was 16 or 17." He says, "So did I." What is the context or connotation of that? What else are they talking about if not about a sexual connotation? Is it okay if she was 16 to have sex with her? Clearly a sexual discussion. So between what he told John Smith and [V45/T4986] what he told John Smith on tape, he confessed to sexual battery. ...He told us he had rough sex. He said he had oral sex from her. He didn't use a condom. He told us it was a completed act. ... It's a completed sexual battery. When you look at the medical evidence and when you look at all the circumstances surrounding her death and her abduction and you look at the binding, when you look at her being naked, when you look at the semen he left on [V45/T4987] the back of her shirt, and then his statements, he raped Carlie Brucia. He should be found guilty of sexual battery. [45/T4988]

The State needed all the inadmissible evidence to prove sexual battery (see also I and II). Without actual evidence, all the State had was "logical, reasonable, common-sensical explanation" for Mr. Smith taking Carlie—to sexually abuse her, which it also argued to the jury. (V45/T4969) But a "logical, reasonable, common-sensical explanation" is no substitute for evidence in this case. Without John's testimony as to what Joseph said about the sexual acts, the State's case of sexual battery was extremely weak. The error had to have impacted on the jury's verdict of guilt and recommendation of death. DiGuilio. Mr. Smith

is entitled to a new trial on first-degree murder and sexual battery and a new penalty phase.

ISSUE IV

DID THE TRIAL COURT ERR IN DENYING APPELLANT'S COUNSEL'S CHALLENGES FOR CAUSE?

Mr. Smith's counsel made challenges for cause on jurors 9,10,27,29,59,62,89,24, and 116. The trial court denied these challenges for cause, so defense counsel used 6 of his peremptories to make sure 9,10,27,29,59, and 62 were not on the jury. After defense counsel used all 10 of his peremptories, he asked the trial court for more. The trial court gave defense counsel 3 additional peremptories (jurors 89,24,116); but when defense counsel asked for additional peremptories on jurors 17,31,83, and 117, the trial court denied these additional requests. These 4 jurors sat on Mr. Smith's trial. Defense counsel did not accept the jury (V34/T3218-3248). This error has been preserved under Trotter v. State, 576 So. 2d 691 (Fla. 1991); and if it can be shown that at last 4 of the 9 jurors should have been excused for cause as requested by defense counsel, then prejudice has been established. Busby v. State, 894 So. 2d 88 (Fla. 2004); Conde v. State, 860 So. 2d 930 (Fla. 2003).

In this Court's recent case of Kopsho v. State, 959 So. 2d 168,170 (Fla. 2007), the test for jury competency and the standard of review was set forth as follows:

> The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law given by the court. See Lusk v. State, 446 So. 2d 1038,1041 (Fla. 1984). "In evaluating a juror's qualifications, the trial judge should evaluate all of the questions and answers posed to or received from

the juror." Parker v. State, 641 So. 2d 369,373 (Fla. 1994). A juror must be excused for cause if any reasonable doubt exists as to whether the juror possesses an impartial state of mind. See Bryant v. State, 656 So. 2d 426,428 (Fla. 1995). The trial court has broad discretion in determining whether to grant a challenge for cause, and the decision will not be overturned on appeal absent manifest error. Overton v. State, 801 So. 2d 877,890 (Fla. 2001).

The question before this Court is whether the trial court should have granted a cause challenge based on Mullinax's equivocal responses when he was asked if he could be impartial if Kopsho exercised his right not to testify. As noted in Busby v. State, 894 So. 2d 88,96 (Fla. 2004), the mere fact that a juror gives equivocal responses does not disqualify that juror for service. The question is whether the juror's responses were sufficiently equivocal to generate a reasonable doubt about his fitness as a juror. Id.

During voir dire, the following took place involving the 9 "for cause" challenged prospective jurors:

#9

THE COURT: Good afternoon, juror number nine.

PROSPECTIVE JUROR NINE: Good afternoon.

THE COURT: I see from your questionnaire that you had some information or knowledge about the case. Could you please relate that to us?

PROSPECTIVE JUROR NINE: I subscribe to the local newspaper and recall there being some articles in the paper, and, you know. I think I indicated on the sheet some specifics that I recalled. That's about the essence of what I knew about the case.

THE COURT: Okay.

Now, you've indicated that Mr. Smith was an auto mechanic and may have known the victim. Do you have any other information about Mr. Smith that you've heard or read as it relates to Mr. Smith?

PROSPECTIVE JUROR NINE: No.

THE COURT: Based upon the information or the knowledge that you have of this case, do you feel that you have formed any impressions or opinions concerning the case?
PROSPECTIVE JUROR NINE: No.

THE COURT: Would you be able to state to everyone involved here that any decision, if selected as a juror in this case, any decision that you would make as to the guilt or innocence of Mr. Smith would be based solely on the evidence presented here in this courtroom and my instructions to you on the law?

PROSPECTIVE JUROR NINE: Yes, I would be able to do that.

(V23/T1199,1200) Defense counsel asked for a cause challenge based on #9's knowledge of the case, and it was denied. (V33/T3054,3055) Defense counsel used a peremptory on #9. (V34/T3218-3222)

#10

Juror number ten, can you tell me what you think about the death penalty?

PROSPECTIVE JUROR TEN: Well, if the evidence points in that direction, then I believe it should be given.

MR. NALES: Okay. Do you understand and agree that it's not an automatic sentence in first-degree murder?

PROSPECTIVE JUROR TEN: Yes.

MR. NALES: That we have under our system in Florida two choices, it's either life or death?

PROSPECTIVE JUROR TEN: Yes, sir.

MR. NALES: And are you willing to consider all of the aggravating factors and all of the mitigating factors presented during the penalty phase of the trial and listen to all that evidence with an open mind?

PROSPECTIVE JUROR TEN: Yes, sir.

MR. NALES: And then render you verdict and your opinion to the Court?

PROSPECTIVE JUROR TEN: Yes, sir.

MR. NALES: Sir, do you have any moral, religious or personal beliefs that would make it difficult for you to sit on a jury where death is a potential sentence?

PROSPECTIVE JUROR TEN: No, sir.

MR. NALES: Okay. Do you have any beliefs that would make it difficult for you to sit in judgment of another person?

PROSPECTIVE JUROR TEN: No. No, sir.

* * *

Juror number ten, what do you think about sort of that same subject I was just discussing with juror number nine?

PROSPECTIVE JUROR TEN: I believe you have to listen to all the evidence for or against, and you have to just do the best you can and you have to go from there.

MR. TEBRUGGE: All right. For you personally, juror number ten, would you think it would be relevant to hear evidence about a man's background or his character in terms of deciding the punishment that should be imposed?

PROSPECTIVE JUROR TEN: That should be part of the evidence - -

MR. TEBRUGGE: All right.

PROSPECTIVE JUROR TEN: - - that I would say your side would, should tell us about and, yes, sometimes that is a big factor.

MR. TEBRUGGE: Okay. Now, I want to throw out one category of mitigation and I'll start with you, but if you would each think about this and, again, it's sort of the question is, would it make any real difference to you or you have a strong reaction to this subject matter, and that is the issue of drug addiction. Again, we can't really go into the facts of the case at this point, but that would be a possible mitigating circumstance that the jury might be asked to consider. And I hope I threw enough qualifiers in there for that. But the reason I like to talk about it is because I know some people have very strong feelings in this particular area.

Juror number ten, what would your reaction be to that type of mitigating evidence?

PROSPECTIVE JUROR TEN: From what I understand, a lot of people are addicted to drugs. I don't even like taking aspirins myself. So I have a hard time with the drug addiction and stuff because you allowed that to happen to yourself.

(V29/T2368,2369,2384,2385) Even though #10 responded "yes" to the prosecutor's general leading questions on aggravators and mitigators, #10 revealed his true feelings on the specific area of

drug addiction—Mr. Smith's major mitigation. For a person who didn't even like to take aspirins, drug addiction was an area for which #10 clearly had no sympathy since a drug addict allowed it to happen to himself. Defense counsel asked for a cause challenge based on #10's inability to consider drug addiction as a mitigator, and it was denied. (V33/T3055) Defense counsel then used a peremptory on #10. (V34/T3218-3222)

#27

Juror 27, what are your beliefs about the death penalty?

PROSPECTIVE JUROR 27: Yeah, I believe in the death penalty. I'm not against it.

MR. NALES: Okay. Do you understand by our system that it's not an automatic sentence, that the jury needs to listen to the facts of the case and aggravating factors and mitigating factors and then render an opinion to the Court?

PROSPECTIVE JUROR 27: Yes.

MR. NALES: And do you believe that you could do that?

PROSPECTIVE JUROR 27: Yes.

MR. NALES: What would you think about a life sentence?

PROSPECTIVE JUROR 27: My feeling toward a life sentence is the fact we're having to spend all that money to keep somebody.

* * *

Juror number 27, I heard you to say that you were not against the death penalty, and could you just share a little bit of your thinking on the subject with me, please?

PROSPECTIVE JUROR 27: I feel there are circumstances that the death penalty is necessary and if the person is never going to be out in the world again and, you know, they would harm other people, then, you know, to me the death penalty is - - because of our jail system being so crowded and everything.

MR. TEBRUGGE: What's your concern in that area about you

> just mentioned that the jail system is so crowded, and I was trying to understand how that fit in here. Are you saying basically, well, I don't know if that's why - - I don't want to put words in your mouth.
>
> PROSPECTIVE JUROR 27: Yeah.

(V29/T2432,2466). Defense counsel asked for a cause challenge on #27 because of her fiscal concerns for life imprisonment. She didn't want to pay to keep someone in prison for the rest of their life and was concerned about the "jail system being so crowded and everything." Clearly #27 was biased toward the death penalty based on reasons that had nothing to do with the facts of the case. The request was denied. (V33/T3057) Defense counsel the used a peremptory on 327. (V34/T3218-3222)

> #29
>
> THE COURT: Good afternoon, juror 29.
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> PROSPECTIVE JUROR 29: Good afternoon, Your Honor.
>
> THE COURT: I see from your questionnaire that you did have some information or knowledge about the case. Could you relate to us what you recall or know about the case?
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> PROSPECTIVE JUROR 29: Well, I remember it being Super Bowl Sunday and after the Super Bowl, the Amber Alert coming out, and it happened right around the corner from my house, so I was familiar with the neighborhood and was very concerned about Carlie.
>
> At work, I was responsible for updating our staff because we have an intranet. So I posted an article about the search.
>
> Then the news broke that her body was found and that a suspect had been apprehended and I broke that news as well on our intranet.
>
> After that, as far as the case goes, I guess I listen to a.m. radio. I don't watch the news or watch TV or anything. So I heard bits and pieces based on what's been reported in the news. Nothing really extensive other than that.

THE COURT: Other than what you've just related to me, do you know anything about Mr. Smith you've heard or read?

PROSPECTIVE JUROR 29: I do know that he is the accused. I do know that he was a mechanic, that he - - I had heard that he had confessed in prison to a family member and that later that was being - - that the lawyers had made an attempt to get that confession thrown out of court. I knew that he had lived in Bradenton, was married, two kids, estranged from his wife at the time of the incident.

THE COURT: Based upon the knowledge that you have about the case and Mr. Smith, do you feel that you have formed any impressions or opinion as it relates to the case?

PROSPECTIVE JUROR 29: Yeah, I probably formed some impressions.

THE COURT: Okay. Can you tell us what those are?

PROSPECTIVE JUROR 29: I have a daughter who is the same age that Carlie was and, you know, up until that time, we had allowed her to ride her bike in our neighborhood. Now, with things being what they are, we decided that all of that is now supervised even though now she's 13.

My impression being that, you know, having seen the videotape and everything that came out and that he made the confession, my thought is, okay, well, he's accused, he probably did it. Those are the thoughts that are in my mind.

THE COURT: Do you feel that that impression or opinion that you have, that is so strong that it would always color your decision, would affect your decision in this case? Or do you feel that you can completely set that aside and any decision that you would make in this case as to the guilt or innocence of Mr. Smith as it relates to these charges would be based solely on the evidence that you received here in this courtroom and my instructions to you on the law? Or do you feel that those impressions that you have are going to bleed over and might fill in gaps for you here at the trial?

PROSPECTIVE JUROR 29: Well, having a great respect for the judicial system, I think I would do my very best to be impartial and understanding that it would have to be based on the evidence. I would have to look at it in a very black and white manner, which is what I would like to consider myself being, a person of integrity who would be able to say that, you know, if this is what the law says, then we have to go by what the law says. So, for me, it would be a matter of integrity.

THE COURT: And I know that being a human being, that we -- every time we read or see something, we get an impression.

PROSPECTIVE JUROR 29: Right.

THE COURT: There's no question about it. But it's very important to both the State and to the Defense in this case that every prospective juror and anyone that's actually seated as a juror in this case can state emphatically without any hesitation that any decision they make in this case is only going to be based on the evidence presented in court and the Court's instructions on the law. Do you feel you could do that?

PROSPECTIVE JUROR 29: Yeah.

* * *

Juror number 29, what are your feelings about the death penalty?

PROSPECTIVE JUROR 29: I support the death penalty when the aggravating and mitigating circumstances would warrant that.

MR. NALES: All right.

PROSPECTIVE JUROR 29: As far as a life sentence goes, I think that there would be circumstances when that would be appropriate and humane.

MR. NALES: So are you in essence agreeing with the system we have where there's no automatic sentence?

PROSPECTIVE JUROR 29: Absolutely.

MR. NALES: You as a juror would be willing to listen to the aggravating and mitigating circumstances, weigh them out with an open mind and then render an opinion to the Court as to what the sentence should be?

PROSPECTIVE JUROR 29: Correct.

MR. NALES: Do you have any personal beliefs or moral, religious beliefs that would hinder your sentence on a death penalty jury?

PROSPECTIVE JUROR 29: Absolutely not.

MR. NALES: You feel you can be open-minded and listen to all the facts here?

PROSPECTIVE JUROR 29: I would have to be, yes.

* * *

> PROSPECTIVE JUROR 29: So I think as far as my opinion of capital punishment goes, I support it for cases that would - - where that would be appropriate.
>
> MR. TEBRUGGE: And I guess my next question is either why do you support it or what would you make - - what would make you think that it would be appropriate in a particular case?
>
> PROSPECTIVE JUROR 29: Well, from a moral standpoint, when someone takes a life, a fair punishment is to take their life, and so I see that from a very, you know, ground level moral perspective. Likewise, there could be mitigating circumstances or arguments to be made to spare that person's life in a merciful way in the penalty phase. So I see it, you know, a very balanced approach I guess.

(V23/T1235-1238;V29-T2433,2434,2448,2449) Defense counsel asked for a cause challenge on #29 because of his extensive knowledge and concern when the incident occurred, his home being near where the incident occurred, how it impacted on his dealings and fears for his own daughter who was the same age as Carlie, and his conclusion that "he's accused, he probably did it." He admitted to having formed "impressions" about the case. Upon extensive leading questioning from the trial court, #29 said "yeah" to the question of basing his decision only on the evidence. Clearly, #29 believed in the death penalty and spoke of morally it being fair—a life for a life. The trial court denied the cause challenge, and a peremptory was used by defense counsel. (V33/T3057,3058;V34/T3218-3222)

> #59
>
> THE COURT: Good afternoon, Mr. 59.
>
> PROSPECTIVE JUROR 59: Yes, sir.
>
> THE COURT: Have a seat.

I see from your questionnaire that you had indicated knowledge or information about the case from early reports on the news. Can you tell us anything that you recall about that?

PROSPECTIVE JUROR 59: Just that there was a girl abducted and killed, a man was arrested, but there was a video from the car wash where she was abducted. That's all I remember.

THE COURT: Have you read or heard anything about Mr. Smith at all that you can recall?

PROSPECTIVE JUROR 59: Nothing more than those original reports.

THE COURT: Do you feel that you've formed any opinions or impressions about the case?

PROSPECTIVE JUROR 59: No.

THE COURT: Do you feel that you could assure all of us if you were selected as a juror in this case, that any decision you would make in this case as to Mr. Smith's guilt or innocence would be based solely on the evidence and my instructions to you on the law?

PROSPECTIVE JUROR 59: Yes, I do.

* * *

Juror number 59, do you have personal beliefs and feelings about the death penalty?

PROSPECTIVE JUROR 59: I've always been a believer that it is a deterrent to serious crime. Been somewhat of a believer in it.

MR. NALES: So you would favor the death penalty in appropriate cases?

PROSPECTIVE JUROR 59: Hypothetically speaking, I suppose I would, if the evidence was such, yes.

MR. NALES: And obviously we're speaking hypothetically in terms of the facts of the case, but you would be able to listen to the facts of the case and listen to the aggravating and mitigating circumstances as the Court just explained to you and weigh everything out and give it the weight that you believe is appropriate and make a determination as to what would be the appropriate sentence?

PROSPECTIVE JUROR 59: I believe I would.

MR. NALES: There would be - - excuse me - - no automatic sentence in your mind?

PROSPECTIVE JUROR 59: No.

MR. NALES: It wouldn't, because it's first-degree murder, as the judge explained, we have two sentencing options in the state of Florida, but neither life nor death would be automatic for you?

PROSPECTIVE JUROR 59: No.

MR NALES: What would you think of a life sentence for a conviction of first-degree murder?

PROSPECTIVE JUROR 59: I don't know. I would have to see the specifics. Again, I don't have a - - I would not have a moral problem either way.

MR. NALES: Okay. Do you have any personal beliefs, either religious, moral or otherwise, that would make it difficult for you to sit as a juror in a death penalty case?

PROSPECTIVE JUROR 59: I don't believe I do. It's a very serious thing, but I don't think - - I think I could accomplish the job.

MR. NALES: You think you could sit in judgment of another person?

PROSPECTIVE JUROR 59: Yes.

* * *

MR. TEBRUGGE: Okay. I heard you to talk earlier when Mr. Nales was questioning about the death penalty and I just wanted you to perhaps elaborate on your thinking a little bit. I think you might have been the one that mentioned the word "deterrence;" is that right?

PROSPECTIVE JUROR 59: Yes.

MR. TEBRUGGE: Any other thoughts on that subject that I can ask you about?

PROSPECTIVE JUROR 59: No, not really. It is just obviously this is my only association ever and I've always considered it from a detached viewpoint, something that was probably necessary for society, and that's just about my total thinking.

> MR. TEBRUGGE: That's fine. What if a case involves the death or the murder of a child? For some people that might be all that they needed to hear. What do you think about that?
>
> PROSPECTIVE JUROR 59: Well, I don't think it's all I need to hear. I think it's an aggravating factor. I think it does in my mind raise the seriousness of the issue, but it's not all there is, I guess.
>
> MR. TEBRUGGE: Okay. And this topic of addiction or drug abuse, what's your reaction when I put that out there?
>
> PROSPECTIVE JUROR 59: I've always believed we're responsible for the choices we make in life, and I don't see that as a huge factor of mitigation. There would probably have to be more to it than that, so I'm willing to listen.

(V23/T1288;V30;T2513,2514,2532,2533). Defense counsel asked for a cause challenge, because #59 believed having a child victim raised the seriousness of the case and believed drug addiction/abuse was not a huge factor of mitigation - - people are responsible for the choices they make. The trial court denied the request, and defense counsel used a peremptory. (V34/T3223-3226)

> #62
>
> MR. C. SCHAEFFER: Your Honor, the next one is a delicate subject.
>
> THE COURT: 62?
>
> MR. SCHAEFFER: Yes.
>
> THE BAILIFF: 62, Your Honor?
>
> THE COURT: Okay, the 23. Is that what you had answered to number 23?
>
> MR. C. SCHAEFFER: Yes, sexual assault.
>
> MR. S. SCHAFFER: What were you referring to, Judge?
>
> THE COURT: On the backside, he had been the victim. I'll try to be as delicate as I can about that. Number 62.
>
> Thank you for pointing that out. I missed that.

(PROSPECTIVE JUROR 62 ENTERED THE COURTROOM.)

THE COURT: Welcome, Mr. 62. Thank you for being here.

On the portion of your questionnaire as it relates to information about the case, I was a little unclear. I believe it's that you saw the initial newscast about it.

PROSPECTIVE JUROR 62: I moved actually in the area where it happened and, of course, everyone searching for her and whatnot. I don't watch the news and that's about all I heard.

THE COURT: Okay.

PROSPECTIVE JUROR 62: And then heard where they found her, at least in a church.

THE COURT: All right. Have you read or heard anything about Mr. Smith himself?

PROSPECTIVE JUROR 62: Negative.

THE COURT: Okay. Do you feel based upon living in the neighborhood and anything that you might have heard, that you've formed any opinions about this case?

PROSPECTIVE JUROR 62: Negative.

THE COURT: Okay. If you were selected as a juror, do you feel that you could assure all of us that any decision that you would make in this particular case would be based solely on the evidence presented in this courtroom and my instructions to you on the law?

PROSPECTIVE JUROR 62: Absolutely.

THE COURT: I was uncertain on your questionnaire about if a family member had been the victim of a crime.

PROSPECTIVE JUROR 62: It was myself, actually.

THE COURT: Do you feel that that incident would in any way affect your decision in this case?

PROSPECTIVE JUROR 62: No.

* * *

MR. NALES: Thank you, sir.

Juror number 62, what are your personal beliefs about the death penalty?

PROSPECTIVE JUROR 62: If the evidence proves it, I do support the death penalty, but at the same rate, if mitigating circumstances, that it shows to me the possibility that through correctional resources or whatever that someone could avoid the death penalty, I would also support that decision, too.

MR. NALES: So you understand that it’s not an automatic--

PROSPECTIVE JUROR 62: Oh, absolutely.

MR. NALES: - - in any situation here in Florida, and that the jury would be weighing the aggravating and the mitigating circumstances?

PROSPECTIVE JUROR 62 : I do.

MR. NALES: You would listen to that evidence and you would weigh it?

PROSPECTIVE JUROR 62: I think, I think that’s the only fair way to do this job.

MR. NALES: And you would be open to that?

PROSPECTIVE JUROR 62: Oh, absolutely.

MR. NALES: You have no moral, religious beliefs that would hinder you from serving on a jury with the death penalty?

PROSPECTIVE JUROR 62: If you were to ask the question, do I believe in the death penalty, yes, I do, and if the crime supports that particular punishment, I’m supporting it in that sense, too. Of course, with mitigating circumstances, again, if it proves to me there’s another way to correct this person or being, then, yes, let’s maybe try to correct them.

* * *

MR. TEBRUGGE: Good. In fact, I even heard you using terms like mitigating circumstances. Did that make sense to you? And I don’t mean make sense, did that seem to you to be something that would be relevant for your punishment consideration?

PROSPECTIVE JUROR 62: In considering, yes.

MR. TEBRUGGE: Right.

PROSPECTIVE JUROR 62: But I wouldn’t make it an excuse for the crime committed - -

MR. TEBRUGGE: Right.

PROSPECTIVE JUROR 62: - - by any means.

MR. TEBRUGGE: I think if you listen carefully to the jury instructions, you'll see the word "excuse" never appears, and also any mitigating circumstances would not be a defense to a crime.

Let me ask you this: I had posed this question earlier about some people would be primarily interested in the facts of the crime; other people would want to hear additional evidence. What do you think about that?

PROSPECTIVE JUROR 62: I think first and foremost the facts of the crime, because in essence that's what we're here to talk about, the crime, not the general person's life and what happened to him 20 years ago. So definitely the crime is more important and the facts of that crime.

MR. TEBRUGGE: Okay. Now, for some people evidence of somebody's background or mental health, well, it really wouldn't matter to them in terms of the punishment decision. What do you think about that?

PROSPECTIVE JUROR 62: In a generalization of mental health, character, so to speak?

MR. TEBRUGGE: Yes, sir.

PROSPECTIVE JUROR 62: I think we could look into one's character. I think nowadays people are pretty good at pretending to be other characters. So at the same rate, there will - - I'm going to fall on the evidence of the crime is going to tell me this is what happened, not why it happened, but this is what happened.

MR. TEBRUGGE: Okay. And one final topic I wanted to talk about with you. And again, it's because some people have strong feelings about it, is addiction or drug abuse. What's your reaction when I throw out those concepts?

PROSPECTIVE JUROR 62: The first word that comes to mind is kind of an excuse. I don't find those being relevant in committing any type of crime really, to be honest with you, it's a personal issue that one certainly deals with.

* * *

PROSPECTIVE JUROR 62: My only thought in listening to the first row, and I have respect for everyone and agree with a lot of what they're saying. Initial reaction when I opened up the paper and read what I'm dealing with and whatnot, I've got two young children and I'm a big man. I

> used to be a bouncer. I know what it takes to overpower certain people, that to hear about a child being injured or, God forbid, killed, that I do hold a little bit more resentment towards because how could you, you know, a child, so innocent, so small, it doesn't take much to do whatever you need to accomplish. Not that it would sway my opinion, but it still does irk me a little bit more than a 20-year old killing a 20-year old. You kind of write that off as a battle.
>
> DEFENSE ATTORNEY: Thank you very much.
>
> PROSPECTIVE JUROR 62: It was no struggle as far as a child can't struggle against whoever, unless it was another child.

(V23/T1292-1294;V30/T2514,2515,2529-2531;V33/T2977,2978) Defense counsel asked for a cause challenge for several reasons: #62 had been a victim of a sexual assault - - a crime at issue in this case, he would consider mitigation if it would correct the person, he wouldn't use mitigation as an excuse for the crime, didn't think a person's life history was important to the punishment decision, considered drug addiction/abuse is an excuse and not relevant to committing any type of crime, he's got 2 small children, and he had resentment towards someone who could kill an innocent, small child - - it irked him since there would be no struggle in this case of a child versus an adult (being a bouncer, he would know - - he knows what it takes to overpower people). The request for a cause challenge was denied, so defense counsel used a peremptory. (V33/T3061,3062;V34/T3225,3226)

> #89
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> THE COURT: Thank you. Please have a seat.
>
> I noted in your questionnaire concerning your daughter.
>
> PROSPECTIVE JUROR 89: Correct.
>
> THE COURT: And this case also involves the death of a

child. Do you feel that you would be able to serve in this particular type case?

PROSPECTIVE JUROR 89: Yes, I do.

THE COURT: Okay. All right.

I noted from your questionnaire that you had some information about the case. Could you relate to us what you recall about the case?

PROSPECTIVE JUROR 89: That the little girl was abducted from a car wash.

THE COURT: Okay.

PROSPECTIVE JUROR 89: Kidnapped and laid to murder.

THE COURT: Okay. Have you read or heard anything about Mr. Smith that you recall?

PROSPECTIVE JUROR 89: Not really, other than the name.

THE COURT: Okay. Do you feel that you have formed as a result of what you've heard or read, seen, concerning this case, any opinions concerning this case?

PROSPECTIVE JUROR 89: No, other than, you know, what I heard on the news, but, I mean, I have no particular opinion one way or the other.

THE COURT: Okay. So you've heard this, but you didn't form any fixed or strong opinions?

PROSPECTIVE JUROR 89: No.

THE COURT: If you were selected as a juror in this case, could you assure all of us that any decision you would make concerning the guilt or innocence of Mr. Smith of these charges would be based solely on the evidence presented in this courtroom and my instructions to you on the law?

PROSPECTIVE JUROR 89: Most definitely.

* * *

PROSPECTIVE JUROR 89: I was a witness in a capital case.

MS. RIVA: Okay. In Florida or in another state?

PROSPECTIVE JUROR 89: Another state.

MS. RIVA: And how was that experience for you?

PROSPECTIVE JUROR 89: Very, very painful.

MS. RIVA: Yes.

PROSPECTIVER JUROR 89: Because it involved my daughter.

MS. RIVA: Okay. Right. That's right. And the fact that you had to be a witness in that case, do you feel that that's - - and I know it's hard to answer, I don't' know if it's hard to answer, I'll let you answer it.

PROSPECTIVE JUROR 89: Well, you know, I'm a believer that time is a great healer, and it's been 28 years and things change.

MS. RIVA: Obviously this is a whole different case, you don't know anybody involved in the case. But the one thing we do have to make sure of is that, and I think you covered it and talked about it a little bit in earlier sessions, that you can assure us that throughout the case you can follow the instructions and remain fair to both sides?

PROSPECTIVE JUROR 89: Absolutely.

(V23/T1328,1329;V33/T3101,3102). Defense counsel asked for a cause challenge, because #89's child daughter was murdered. He was also a witness in his daughter's murder trial. Although #89 said the murder of his daughter was 28 years ago and time was a great healer, the fact remained that Mr. Smith's case was for the murder of a female child. The trial court denied the request for cause, but it did give an additional peremptory to defense counsel which was used on #89. Defense counsel had already used all 10 of his peremptories, so this was peremptory 11. (V34/T3227)

#24

Juror Number 24, good morning. Can you tell us what your thoughts are on the death penalty?

PROSPECTIVE JUROR 24: I believe in the death penalty, but I think the more heinous crime is when it should be applied.

MR. NALES: Yesterday when the Judge talked about the fact that in Florida not every first degree murder qualifies for the death penalty, he said that under our system there are two options, death or life, but that not every first degree murder qualifies, that it is not an automatic sentence and that's why we have this process for jurors to decide in the appropriate cases what sentence should be imposed. Do you agree with that?

PROSPECTIVE JUROR 24: Yes.

MR. NALES: So you would be willing to listen to all of the facts in the case and make a determination as to whether or not, based on the law, the case would be appropriate for the death penalty?

PROSPECTIVE JUROR 24: Yes.

MR. NALES: The Judge explained to you the aggravating and mitigating factors that are involved in a case and how jurors will listen to evidence of those and then weigh that evidence out in their deliberations. Did you understand that procedure?

PROSPECTIVE JUROR 24: Yes, I did.

MR. NALES: Do you have any questions about any of that?

PROSPECTIVE JUROR 24: No.

MR. NALES: Do you feel, sir, that after listening to all of the evidence in the case and all the aggravating and mitigating circumstances and the law and then applying the law as the Judge instructs you during your deliberations, if you come to the conclusion that death is the appropriate sentence that you would be able to return the recommendation of the death to the court?

PROSPECTIVE JUROR 24: Yes, I could.

MR. NALES: Do you have any personal, moral, religious beliefs that would hinder you in being able to return--

PROSPECTIVE JUROR 24: No, I don't.

* * *

MR. TEBRUGGE: Juror 24?

PROSPECTIVE JUROR 24: From what I've seen, it looks like he is somewhat guilty, but I have an open mind and I am willing to listen to all evidence and make my determinations.

(V32/T2807,2808,2821) Defense counsel asked for a cause challenge, because #24 said Mr. Smith looked like he was somewhat guilty from what he's seen. The trial court denied the request for cause; but when defense counsel asked for an additional peremptory, peremptory 12 was granted. (V34/T3228-3236)

#116

> Juror Number 116, what are you personal thoughts and feelings on the death penalty?
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> PROSPECTIVE JUROR 116: I believe in the death penalty.
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> MR. NALES: Had you thought about I much before you came to court last week and were placed in this situation?
>
> PROSPECTIVE JUROR 116: Not deep thought about it, no. I just believe in the death penalty. It should be there. And, you know, it depends on the circumstances of the cases. If it's extreme, you know, murder case, premeditated, and stuff, I believe in death penalty. Maybe some cases should be life sentences and the life of the individuals.
>
> * * *
>
> Juror Number 116, what do you think about some of these line of questions?
>
> PROSPECTIVE JUROR 111 [SIC 116]: Very similar. And it's some of it weighs in, but you know, just because you had a drug addiction doesn't give you the right to kill somebody. So if you have to have a, you know, completely good life and then you don't see him kill somebody, but there's - - I don't take for a lot of excuses either. You just have to kind of weigh what the past was and so forth.
>
> MR. TEBRUGGE: All right. Same hypothetical I was discussing with Juror 114. This idea of worse crime you could think of, no question of guilt in your mind, not a case of self-defense or anything, see where I'm getting at?
>
> PROSPECTIVE JUROR 116: Guilty.
>
> MR. TEBRUGGE: Right. Just guilty. Under those circumstances are you going to be thinking, Hey, I already know what the punishment should be? Or do you think you would be interested?

> PROSPECTIVE JUROR 116: I would listen, but if in fact it's clearcut brutal, then I probably would be weighing to the extreme, but I would listen, because this is always - - everything is open.
>
> MR. TREBUGGE: Right. Good. And let's see, you had said that you did believe that the death penalty was an appropriate punishment in some cases.
>
> PROSPECTIVE JUROR 116: Yes.
>
> MR. TEBRUGGE: What's your thinking along those lines?
>
> PROSPECTIVE JUROR 116: As in for one case?
>
> MR. TEBRUGGE: Well, if that's how you thought it out, or what was your rationale?
>
> PROSPECTIVE JUROR 116: I just believe in the death penalty should be for a deterrent in some cases. I don't think it is enforced enough. But we need the death penalty. It just depends on circumstances, like I don't believe there should be the death penalty if an elderly man tries to assist suicide for a terminal patient. I don't think that he would be sentenced to death because of that, because of the weighing circumstances. But brutal crime, that's a whole other ball game.

(V30/T2588,2606-2608). Defense counsel asked for a cause challenge, because #116 did not believe in drug addiction as a mitigator but as an excuse. In addition, #116 believed the death penalty wasn't being enforced enough; it should be used for brutal cases. The trial court denied the cause challenge; but it did give defense counsel an additional peremptory (13), which defense counsel used on #116. (V34/T3228-3236)

Defense counsel then asked for additional peremptories on #17 (she was aware of suppression hearing and has 2 children ages 7 & 4), #31 (father is a retired State Trooper and she saw the video), #83 (son-in-law is with law enforcement in Venice, she had "impressions" about the case, and she was impressed that Mr. Smith was being given a fair trial), and #117 (husband was an assistant

district attorney in Massachusetts and she knew Mr. Smith had a parole violation). No additional peremptories were given for these 4 jurors, and they did sit on Mr. Smith's jury. (V34/T3228-3248) Mr. Smith's counsel did not accept the jury. (V34/T3240)

At least 4 of the "for cause" prospective jurors gave sufficiently equivocal responses to generate a reasonable doubt as to their fitness as a jurors. Busby, 894 So. 2d at 96. The problems for each juror has been identified, but a few deserve special attention: #10 had very strong feelings against drugs - - even disliking aspirin. He admitted he would have a hard time with drug addiction as a mitigator since it was self-inflicted. Drug addiction played heavily in Mr. Smith's penalty phase as a mitigator. #27 wanted to save the State money and solve the jail overcrowding situation by imposing the death penalty. #29 had an extreme interest in the case when it happened and was responsible for keeping his fellow employees up-to-date on their intranet. He had a daughter who was Carlie's age, and he took additional precautions with her after Carlie's death. He had "impressions" about the case and believes in a life-for-a-life morality. #59 did not see drug addiction as a mitigator. #62 had been a victim of a sexual assault, had a problem with mitigation based on a person's life history, and was very upset the victim was a child. #89 had his child daughter murdered, which begs the question if any amount of time--even 28 years--is enough to face and judge another accused of a female child's murder. #24 had already decided Mr. Smith looked guilty. #116 strongly believed in death for extreme cases/ premeditated cases/brutal cases. No matter that each juror

said they could be fair and open in response to the State's standard leading questions, each of these jurors demonstrated a bias when asked open-ended questions that gave reasonable doubt as to their fitness to serve as a juror.

In Busby, the prospective juror in question was a correctional officer with experience on death row. Responses that prior convictions would cause him to vote for death and life wasn't good enough for someone who committed premeditated murder, showed a bias and inability to serve as an impartial juror. A new trial was ordered. In Vega v. State, 781 So. 2d 1165 (Fla. 3d DCA 2001), two prospective jurors had problems with charges that involved drugs. They expressed disdain for people involved with drugs. These comments created a reasonable doubt as to their ability to serve as impartial jurors, and they should have been stricken for cause. A new trial was ordered. In Bryant v. State, 656 So. 2d 426 (Fla. 1995), one prospective juror was such a strong supporter of the death penalty this Court found he did not have the requisite impartial state of mind. The error in not granting the cause challenge was not reversible as no prejudice was shown--one additional peremptory had been given.

In Mr. Smith's case at least 4 of the 9 prospective jurors defense counsel sought a cause challenge on should have been granted. They demonstrated biases or prejudices which showed a reasonable doubt as to whether they possessed an impartial state of mind. Error has been established, the issue properly preserved, and prejudice shown. A new trial is required.

ISSUE V

DID THE TRIAL COURT ERR IN ALLOWING THE STATE TO INTRODUCE GRUESOME AND SHOCKING PHOTOS THAT HAD NO OR LITTLE RELEVANCE, BUT WHICH INFLAMED THE JURY?

Mr. Smith objected to several photos taken at the scene and at the morgue of Carlie Brucia. The trial court overruled objections to photos 34,35A,42, and 48; and they were introduced into evidence over renewed objections. Medical Examiner Dr. Vega was then allowed to discuss these photos. (V40/T4014-4018,4048;V42/T4298-4338,4361-4403,4416) Defense counsel objected to each photo on the following bases:

> 34 – closeup of the lower half of unclothed torso which did not show any injuries. In addition, 32 showed the same thing. The trial court allowed it as relevant to the sexual battery charge.
>
> 35A – closeup of the genital region which was shocking and offensive and did not show any injury caused by the killing. The Medical Examiner did not need this photo to describe what happened. The Medical Examiner said 35 A assisted him in discussing how the insect larvae and decomposition impeded his ability to get optimal results for body fluids and semen; however, he also admitted other photos showed the same thing and could have used these other photos. He liked 35A because it was in better focus. Defense counsel argued it was only being used to shock and offend. The trial court initially reserved ruling, but it did allow the photo in.
>
> 42 – the lower right leg showed a lot of animal activity. From the ankle to the shin it has been partially consumed. Defense noted this animal activity had nothing to do with the way the death occurred.
>
> 48 – there was some bruising on the upper thigh area not very evident, so the Medical Examiner dissected the area to better show the bruising. Defense counsel argued the photo adds nothing to the Medical Examiner's description and is highly prejudicial.

In Douglas v. State, 878 So. 2d 1246,1255 (Fla. 2004), this Court set forth the standard of review and test for admitting photographs:

> This Court reviews the admission of photographic evidence for an abuse of discretion. See Philmore v. State, 820 So. 2d 919,931 (Fla.), cert.denied, 537 U.S. 895, 123 S.Ct. 179, 154 L.Ed.2d 162 (2002). "The test for admissibility of photographic evidence is relevancy rather than necessity." Pope v. State, 679 So. 2d 710,713 (Fla. 1996). Crime scene photographs are considered relevant when they establish the manner in which the murder was committed, show the position and location of the victim when he or she is found by police, or assist crime scene technicians in explaining the condition of the crime scene when police arrived. See Looney v. State, 803 So. 2d 656, 669-70 (Fla. 2001). This Court has upheld the admission of autopsy photographs when they are necessary to explain a medical examiner's testimony, the manner of death, or the location of the wounds.
>
> * * *
>
> However, even where photographs are relevant, the trial court must still determine whether the "gruesomeness of the portrayal is so inflammatory as to create an undue prejudice in the minds of the jur[ors] and [distract] them from a fair and unimpassioned consideration of the evidence." Czubak v. State, 570 So. 2d 925,928 (Fla. 1990) (quoting Leach v. State, 132 So. 2d 329,331-34 (Fla. 1961)) (second alteration in original). In making this determination, the trial court should "scrutinize such evidence carefully for prejudicial effect, particularly when less graphic photos are available to illustrate the same point." Marshall v. State, 604 So. 2d 799,804 (Fla. 1992). As we explained in Almeida v. State, 748 So. 2d 922,929 (Fla. 1999), the relevancy standard "by no means constitutes a carte blanche for the admission of gruesome photos."

In Czubak v. State, 570 So. 2d 925 (Fla. 1990), this Court found gruesome photographs of the victim's body should never have been admitted. They had little or no relevance: they did not establish identity as the decomposed body was unrecognizable, they did not reveal any wounds, and they did not show the cause of death. However, the photos were particularly gruesome; because the victim was severely decomposed and partially eaten by 2 small dogs in the house. "Thus, the gruesome nature of the photographs were caused by factors apart from the crime itself. Under these

circumstances, where the probative value of the photographs was at best extremely limited and where the gruesome nature of the photographs was due to circumstances above and beyond the killing, the relevance of the photographs is outweighed by their shocking and inflammatory nature." Id. at 929.

In Hertz v. State, 803 So. 2d 629 (Fla. 2001), this Court found error when 2 gruesome photos of the charred victim's bodies were put into evidence to show the effects of the fire; but the fire occurred after the victims' deaths. These gruesome close-ups did not show the cause of death, and the medical examiner did not use these photographs for that purpose. Showing what the fire did to the bodies after their death was not an issue in dispute. The photographs were not relevant/probative of any fact in issue; however, this Court found the error of being used at trial harmless in light of the minor role they played.

The same finding of harmless error in light of the gruesome photos' minor role was made in Almeida v. State, 748 So. 2d 922 (Fla. 1999), and Duncan v. State, 619 So. 2d 279 (Fla. 1993). In both cases, however, the introduction of the gruesome photos was error. In Almeida the inflammatory autopsy photo of the victim's gutted body cavity to supposedly show the trajectory of the bullet and nature of the injuries was gratuitous as neither of these points was in dispute. In Duncan the gruesome photo showed extensive injuries suffered by the victim from a totally unrelated crime not related to her murder. The prejudicial effect of the gruesome photo clearly outweighed its probative value. Because there was no further reference to the photo once it was admitted,

this Court found the error harmless in a 5-2 decision with 2 judges finding the photo so inflammatory it was prejudicial.

In Mr. Smith's case the 4 gruesome photos at issue were not relevant; or if there was some relevancy, it was far outweighed by its prejudicial effect. Photo 34 did not show any injuries caused by the murder. It did show a highly inflammatory depiction of the genitalia with decomposition and insect activity after death. This concept was then enforced with photo 35A. The Medical Examiner's only reason for using this highly inflammatory closeup photo was to supposedly show why he couldn't obtain semen or fluids due to decomposition and insect activity. The reason for 34 is not really clear. The trial court believed showing a nude lower torso had something to do with the sexual battery, but 32 showed the same thing in a less offensive way. Again, neither photo had anything to do with the victim's cause of death and it did not show evidence of a sexual attack. It also did not depict the scene of the killing as the victim was dragged to the location after death. Photos 34 and 35A did not demonstrate anything that wasn't depicted in 32—even the Medical Examiner admitted other photos (less inflammatory) showed the same thing, but he liked 35A because it was in better focus.

What these photos did do was put into sharp focus the exposed genitalia of a girl who was outside and decomposing for several days with insect activity taking place—all of which had nothing to do with the killing. These highly inflammatory photos were very prejudicial, and that prejudice far outweighed any probative value. It is interesting to note the forensic entomology

consultant did not use any of these photos to show the jury how the insect activity determined the time of death. Instead, only the Medical Examiner used these photos to show why he couldn't find evidence. However, the jury could have been shown the less-offensive photo 32 and simply told the decomposition and insect activity effectively destroyed any possible evidence that might have existed. Using photos 34 and 35A had little to no relevance but were so inflammatory so as to create an undue prejudice in the minds of the jury and distract them from considering the evidence in a fair and unimpassioned manner. They had nothing to do with the killing, but they show the aftermath of what happens when a body is left outside to decompose. These photos were not relevant but were highly prejudicial.

Photo 42 showed the victim's right leg substantially eaten away at the ankle and above by animals. The Medical Examiner used this photo, along with another photo, to show the victim had abrasions on the right side showing the body had been dragged to where it was found. Since other, less offensive, photos showed this and since there was no issue in dispute that she had been killed elsewhere and dragged to the location where the body was found, the highly inflammatory effect of this picture far outweighed any relevancy. In fact, when the prosecutor referred to this photo in closing arguments in the penalty phase, he only did so to argue Mr. Smith should die because he left Carlie "in the woods exposed to animals, predators in the woods. . . . You have been left a very different memory of Carlie, a very different memory Carlie, by the Defendant. The pictures of Carlie as she was

found by law enforcement speak volumes, speak volumes about the Defendant's acts." (V51/T5918,5919) Clearly, the prosecutor wasn't using these photos to show cause of death or wounds caused by the killing. The prosecutor was using the photos for their inflammatory nature of what happened after the death. The error of their use is not harmless. There was also a general reference to the photos in the prosecutor's closing argument in the guilt phase. This comment referred to the "results" of when a child is murdered and the work of the person who commits the murder. (V45/T4963) Again, these photos are being used for the wrong purpose—to inflame the jury, not for showing how she died.

The final photo 48 is of the upper thigh. The Medical Examiner found bruising not evident from the skin, so he dissected the area to show the bruising under the skin. The State tried to argue this was evidence of the sexual assault, but the Medical Examiner could not make that leap. Dr. Vega said the bruising was not necessarily connected to the assault, and he did not use the bruising when he listed his unscientific reasons for believing Carlie was sexually assaulted. He admitted there could be a variety of reasons for such a bruise. (V42/T4397,4398,4407-4410;V43/T4443-4445) Thus, photo 48 consisted of dissections to Carlie's leg made by the Medical Examiner to try and show bruising that could not be connected to the killing. Again, the relevancy was little to none while the prejudice was great. The use of such a gruesome photo was reversible error.

Combined, the introduction of these 4 photos was highly prejudicial and used to inflame the jurors' minds so as to impact

on their finding of guilt and recommendation of death. There was little to no relevancy for these photos, and the trial court abused its discretion when it allowed them to be introduced into evidence. They were so gruesome and inflammatory they had to have contributed to the jury's verdict and recommendation. DiGuilio, 491 So. 2d at 1138. A new trial is required.

ISSUE VI

DID THE TRIAL COURT ERR IN WHEN IT IMPERMISSIBLY DOUBLED SENTENCING AGGRAVATORS THAT THE MURDER WAS COMMITTED DURING THE COURSE OF THE FELONY OF SEXUAL BATTERY ON A CHILD UNDER 12 AND THE MURDER WAS COMMITTED ON A VICTIM UNDER 12?

In its sentencing order the trial court found 6 aggravating circumstances: (1) murder committed by a person previously convicted of a felony and placed on felony probation (moderate weight), (2) murder was committed while defendant engaged in capital sexual battery or kidnapping—both felonies found and merged (significant weight), (3) murder committed to avoid arrest (great weight), (4) HAC (great weighed), (5) CCP (great weight), and (6) Victim was under 12 (great weight). When it came to finding the aggravators outweighed the mitigators and imposing a death sentence, 2 factors were emphasized—Carlie was an innocent 11-year old child and she was sexually battered. (V14/T2617-2653)

Prior to sentencing, defense counsel argued both the capital sexual battery and victim under 12 aggravators could not be considered because of improper doubling; but the trial court rejected this argument. (V10/R1989-1995;V46/T5140-5156;V47/T5157-5164;V51/T5800-5859;V52/T5968) The jury also considered both aggravators. (V52/T5953-5965) It was error to consider both aggravators as the age of the victim is an essential feature to

both. Improper doubling took place.

In Banks v. State, 700 So. 2d 363,367 (Fla. 1997), this Court set forth the proper analysis concerning the duplication of aggravating factors: "Improper doubling occurs when both aggravators rely on the same essential feature or aspect of the crime." As noted in Sireci v. Moore, 825 So. 2d 882 at 885,886 (Fla. 2002), "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."

In Lukehart v. State, 776 So. 2d 906,925 (Fla. 2000), this Court held that finding the two aggravators of murder committed while person engaged in aggravated child abuse and the victim under 12 was an improper doubling. Both aggravators were based on the victim's status as a child, and "allowing the two to operate as separate aggravators does constitute the sentencing error of improper doubling." Id. The same error occurred in Mr. Smith's case. The only difference is that his felony during the murder was sexual battery on a child under 12 instead of aggravated child abuse, but the common factor remains—both aggravators rely on the age of the victim being under 12. Thus, the felony of capital sexual battery improperly doubled with victim being under 12.

The next question is whether the error is harmless. Lukehart found it to be harmless as the fact the infant was helpless increases the weight; however, the trial court gave each of these questions significant and great weight. They only aggravator to get moderate weight was that Mr. Smith was on felony probation at

the time. The remaining 5 aggravators all received great weight, so it was harmful error to repeatedly give great weight to the age of the victim. This Court should merge the 2 aggravators as in Chamberlain v. State, 881 So. 2d 1087,1106 (Fla. 2004). Considering the emphasis on the age of the victim and the capital sexual battery, it cannot be said this improper doubling had no impact on the jury's recommendation on the penalty and its impact on the trial court's decision to impose death. DiGuilio. An entire new penalty phase is required.

ISSUE VII

IS THE AGGRAVATOR OF THE VICTIM BEING UNDER 12 YEARS OLD UNCONSTITUTIONAL?

In some of this Court's more recent cases, the issue of the constitutionality of the aggravator that the victim is under 12 years old has not been addressed due to a lack of preservation. See Stephens v. State, Case Nos. SC05-1301, SC06-1729 (Fla. Nov. 15, 2007); Hutchinson v. State, 882 So. 2d 943,957 (Fla. 2004); Lukehart v. State, 776 So. 2d 906,925 (Fla. 2001). That failure is not a problem in this case as the issue was raised and properly preserved at the trial level. Defense counsel argued this aggravator was unconstitutional—no showing Carlie had an age-based vulnerability, age is not the motivational factor here, and there is no need to show Mr. Smith even knew Carlie's age. Defense counsel also asked for his own instruction which was denied. (V4/R710-712,756,757;V10/R1989-1995;V17/T372-375;V46/T5140-5156; V47/T5157-5164;V51/T5800-5859;V52/T5968) The jury was given this aggravator in the penalty phase, and the trial court found this aggravator to have great weight. (V14/T2617-2653;V52/T5953-5965)

A few aggravators are based on the victim's status: sec. 921.141(5)(j), Fla. Stat. (2003), applies to law enforcement officers killed while engaged in their official duties; sec. 921.141(5)(k), Fla. Stat. (2003), applies to elected or appointed officials killed while engaged in their official duties and killed because of their official capacity; sec. 921.141(5)(m), Fla. Stat. (2003), applies if the victim was particularly vulnerable due to advanced age or disability. Contrary to those narrow provisions, sec. 921.141(5)(1), Fla. Stat. (2003), making the killing of a person under the age of 12 an automatic aggravating circumstances, is vast, overinclusive, and undiscriminating.

The statute and its instruction do not require the defendant to know the victim's age or youth or to intend to kill because of the victim's age. They do not require a showing the victim had and age-based vulnerability that played a role in the homicide. The aggravator arbitrarily cuts off at age 12. The jury is given no discretion in finding this aggravator. This is a strict liability determinant of life or death, contrary to the common law tradition requiring some knowledge or intent and disfavoring strict liability in imposing severe punishments.

This overbroad, overinclusive, automatically applicable factor, on its face, fails to genuinely narrow the class of persons eligible for the death penalty, or reasonably justify the imposition of a more sever sentence compared to others found guilty of murder, Zant v. Stephens, 462 U.S. 862,877 (1983), thereby violating due process, equal protection, and appellant's protection against cruel and/or unusual punishment. See U.S.

Const. Amends. VIII, XIV; Art. I, secs. 9,16,17, Fla. Const.,; Shriners Hospitals for Crippled Children v. Zrillic, 563 So. 2d 64,70 (Fla. 1990)(overinclusive legislative classification violates Florida's equal protection clause).

The facial unconstitutionality of this factor and the instruction render the giving of this aggravator reversible error.

ISSUE VIII

DID THE TRIAL COURT ERR IN FINDING THE MURDER WAS COMMITTED TO AVOID ARREST?

The trial court found the murder was committed to avoid arrest based on the following: Mr. Smith did not conceal his face or his nametag "Joe," Carlie saw Mr. Smith's face and name and could identify him, Carlie's belongings were disposed of after the fact, the ligatures used around the neck and wrists were removed from the scene, Mr. Smith denied being the perpetrator, Carlie was taken from the car wash and transported elsewhere, Carlie was defenseless but was killed after the sexual battery. The trial court also noted Mr. Smith had no idea his actions at the car wash were being taped. Defense counsel argued this aggravator was not supported by the evidence; but the trial court rejected this argument. This aggravator was considered by the jury and given great weight by the trial court. (V10/1989-1995;V46/T5140-5156;V47/T5157-5164;V51/T5800-5859;V52/T5968;V14/T2617-2653)

This Court recently discussed the strict standard of proof required when the victim is not a police officer in Jones v. State, Case No. SC04-2231 (Fla. July 12, 2007).

> This standard must be especially honored in cases where the defendant is not fleeing from the police and the victim is not a police officer. The stringent standard and

> degree or proof required to establish the avoid arrest aggravator in such instances was explained in Urbin v. State, 714 So. 2d 411 (Fla. 1998), where this Court held that the intent to avoid arrest is not present unless it is demonstrated beyond a reasonable doubt that the dominant or only motive for the murder was the elimination of witnesses. Urbin, 714 So. 2d at 415 (citing Menendez v. State, 368 So. 2d 1278,1282 (Fla. 1979)). This Court also explained the avoid arrest aggravator in Riley v. State, 366 So. 2d 19 (Fla. 1978), where we cautioned that "the mere fact of a death is not enough to invoke this factor when the victim is not a law enforcement official. Proof of the requisite intent to avoid arrest and detection must be very strong in these cases." Id. at 22. Further, in Hurst v. State, 819 So. 2d 689 (Fla. 2002), this Court held that the mere fact that the victim knew the defendant and could identify the defendant, without more, is insufficient to prove this aggravator. Id. at 696 (quoting Consalvo v. State, 697 So.2d 805, 819 (Fla. 1996)(stating that mere speculation on the part of the State that witness elimination was the dominant motive behind a murder cannot support the avoid arrest aggravator)); see also Davis v. State, 604 So. 2d 794,798 (Fla. 1992); Geralds v. State, 601 So. 2d 1157,1164 (Fla. 1992).

This Court found the evidence insufficient to support this aggravator as there was no evidence witness elimination/avoiding arrest was the dominant motive for the shooting.

In Hoskins v. State, 965 So.2d 1 at 19,20 (Fla. 2007), this Court combined the victim's being able to identify the perpetrator (a factor which is insufficient alone) with the victim being transported somewhere else and killed. In Hoskins, however, the sexual battery took place in the victim's home; and then she was taken to a remote location and killed. In Jennings v. State, 718 So. 2d 144,151 (Fla. 1998), this Court found that in addition to the victims knowing the defendant, the defendant had said on a prior occasion he would not leave any witnesses if he robbed someone. In addition, the manner of killing (consecutive throat slashings of multiple victims) was not a reactionary or

instinctive form of killing. In both Hoskins and Jennings this Court found sufficient evidence of the dominate motive for the killing being to avoid arrest.

Finally, in Hurst v. State, 819 So. 2d 689 at 695-697 (Fla. 2002), this Court found the evidence insufficient to prove the main motive for killing the victim was to avoid arrest—there were several possible motives, but not avoiding arrest as the dominant motive. Hurst worked with the victim at a restaurant; and while the 2 were alone at the restaurant, Hurst killed his co-worker while her hands were bound and her mouth taped. Then Hurst took the money from the safe. Hurst had stated he and the victim had an argument, she retaliated, and he didn't want the victim to see his face. This Court found insufficient evidence to support avoiding arrest as the dominant motive, but it found the error harmless for 2 reasons: the remaining aggravators outweighed the mitigators, and the jury was never given this aggravator to consider. Thus, "Hurst was not disadvantaged in the jury's recommendation by this aggravator." Id. at 696.

In Mr. Smith's case Carlie saw his face and first name, but that does not mean she could have identified him. Without the tape, a tape Mr. Smith knew nothing about, Carlie's abductor may never have been found even if she had lived to describe him; and as pointed out in all the case law, the mere fact the victim could identify the perpetrator is insufficient to prove this aggravator. The fact that Mr. Smith picked Carlie up at the car wash and took her elsewhere is not the same as attacking the victim in her own home and transporting her. Cases like Hoskins involving the

transporting of the victim had the needless transporting of the victim. Since the victims were in their homes where the assaults took place, transporting the victims were only necessary for one thing—to kill the victims to avoid arrest. In Mr. Smith's case, the car wash parking lot cannot be compared with the privacy of a victim's home. Going somewhere else was a necessity with the car wash location. In Hurst the victim knew the defendant and was found bound and gagged. This was not sufficient to find the avoid arrest aggravator as it was not shown to be the dominant motive. In Mr. Smith's case, the only evidence of motivation was Mr. Smith's statements to his brother: he blames the drugs—heroin and cocaine (V44/T4749), 'he finished it because he was scared—the adrenaline' (V44/T4751-4756), it was an accident, he didn't do it on purpose (V44/T4742-4746), he wasn't thinking right (V39/T3913-3999). There may have been several motives for the killing—the drugs, the fear at what he had done; but the State did not establish the dominant motive was to avoid arrest.

The jury was given this aggravator when it was error for them to consider it. Being allowed to consider such a prejudicial aggravator had to have impacted on their recommendation, so this error cannot be considered harmless unlike the situation in Hurst. DiGuilio. In turn, the trial court gave this aggravator great weight and spent several pages of its order justifying the finding of this aggravator. Combine the impact of the jury's recommendation, the great weight given to this aggravator by the trial court (not to mention other aggravators erroneously considered), an entirely new penalty phase is required.

ISSUE IX

DID THE TRIAL COURT ERR IN FINDING CCP AS AN AGGRAVATOR?

When Carlie decided to walk home alone, it was a spontaneous decision; and when Mr. Smith saw her, it was a spontaneous decision to stop for her. If there was a sexual battery (highly disputed in prior issues), that was not planned. Mr. Smith repeatedly said he didn't know the girl or her family, and the mother and stepfather did not recognize the man on the tape. Mr. Smith had said he had taken a lot of cocaine, and what happened was a blur. Mr. Smith also said it was an accident—he didn't do it on purpose; 'he finished it because he was scared—the adrenaline.' The car he borrowed that night had ties and cords already in it. (V37/T3637-3657;V38/T3798-3815,3857-3859;V39/T3913,3987-3399,3924-3949;V44/T4741-4762;V35/T3327-3328) The facts show the killing was not from a prearranged plan. The weapon used was not brought by Mr. Smith but was already in the car. Defense counsel argued the evidence was insufficient to show the heightened premeditation necessary to support CCP, but the trial court rejected that argument. The jury was instructed on CCP, and the trial court gave it great weight. (V10/T1989-1995;V46/T5140-5156;V47/T5157-5164; V51/T5800-5859;V52/T5923-5966;V12/R2345-2346;V14/T2628-2631)

This Court defined the CCP aggravator as follows:

> Thus, in order to find the CCP aggravating factor under our case law, the jury must determine that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold), Richardson, 604 So. 2d at 1109; and that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated), Rogers, 511 So. 2d at 533; and that the defendant exhibited heightened premeditation (premeditated), Id.; and that the defendant had no pretense of moral or legal

> justification. Banda v. State, 536 So. 2d 221, 224-25 (Fla. 1988), cert. denied, 489 U.S. 1087, 109 S.Ct. 1548, 103 L.Ed.2d 852 (1989).

Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994). Each of these 4 requirements must be met to find CCP. And as noted in Geralds, 601 So. 2d 1157 at 1163 (Fla. 1992), if the State is relying on circumstantial evidence, it "must be inconsistent with any reasonable hypothesis which might negate the aggravating factor." As this Court has held, a careful plan to commit murder must exist prior to the killing; and emotional frenzy or panic is not a cool and calm reflection. All of the above 4 elements must exist to establish CCP as an aggravator, and these elements must establish CCP beyond a reasonable doubt. The circumstantial evidence used to establish this aggravator must be inconsistent with any other reasonable hypothesis which might negate CCP.

In Holton v. State, 573 So. 2d 284, 292 (Fla. 1990), this Court found CCP was not established beyond a reasonable doubt. It noted that "[a] heightened form of premeditation is required which can be demonstrated by the manner of the killing. Id. [Hamblen v. State, 527 So. 2d 800, 805 (Fla. 1988).] To achieve this heightened level of premeditation, the evidence must indicate that a defendant's actions were accomplished in a calculated manner; i.e., by a careful plan or a prearranged design to kill." Holton, 573 So. 2d at 292. Simple premeditation used to establish first-degree premeditated murder is not sufficient to prove CCP. In Holton the strangulation murder was committed during the commission of a sexual battery and could have been a spontaneous act in response to the victim's refusal. Ligatures were found

around the victim's neck and one wrist. Holton had admitted to killing the girl, but he said he did not mean to kill her. Striking one of 4 aggravators was not enough to overturn the death sentence; the error of finding CCP was found to be harmless.

In Brown v. State, 721 So. 2d 274 (Fla. 1998), this Court examined several cases involving murder committed during a robbery and CCP. Those cases that had CCP had evidence of intent to kill before the robbery was carried out via statements made by the defendants. In other words, the killing was planned as a part of the robbery which showed heightened premeditation. The cases where this Court found no CCP were cases of a robbery gone awry. One such example was Castro v. State, 644 So. 2d 987 (Fla. 1987), wherein the defendant had been drinking heavily for several days prior to his meeting the victim. Castro had decided he needed to steal a car to leave town. When he met the victim, they drank together in the victim's apartment; and Castro obtained a knife from a neighboring apartment. Castro then stabbed the victim 5-15 times. This Court found evidence of a plan to rob the victim, but no evidence of a careful design and heightened premeditation necessary to find CCP.

In Geralds, 601 So. 2d at 1163,1164, the victim was tied up, beaten, then stabbed during a robbery at her home. The circumstantial evidence was not inconsistent with a planned robbery but an unplanned killing: he gained information about the family's whereabouts to avoid contact, he bond the victim rather than immediately kill her, evidence of a struggle prior to the killing, and the knife from the home was a weapon of opportunity.

Thus, there were other reasonable hypotheses other than CCP—that the defendant was trying to interrogate the victim and killed her in sudden anger when she refused or the victim could have been struggling to escape and was killed during the struggle. The State failed to meet its burden of establishing CCP beyond a reasonable doubt, so this aggravator was struck along with avoiding arrest. These errors along with prejudicial evidence used during the penalty phase required a new penalty phase.

And in Harmon v. State, 527 So. 2d 182, 188 (Fla. 1998), this Court found no sufficient evidence of CCP where the defendant shot the victim during a robbery. The defendant never mentioned killing anyone on the trip from South Carolina to the victim's home in Florida, and defendant's cellmate said the defendant told him the victim spoke his (defendant's) name during the robbery and he (defendant) became frightened. Because there were other reasonable hypotheses as to how the killing occurred, this Court held the evidence did not establish CCP beyond a reasonable doubt. Based on one less aggravator, the mitigators, and the jury's life recommendation, this Court reduced the sentence to life.

Mr. Smith has many of these factors as set forth above that show the State failed to meet its burden and prove CCP beyond a reasonable doubt to the exclusion of other reasonable hypotheses. Mr. Smith was under the influence of cocaine, so his thinking was impaired. He told his brother it was an accident, he didn't do it on purpose, he finished it because he was scared. The weapon was a weapon of opportunity—cords and ties left in the car by its owner. The evidence and circumstances showed the killing occurred during

the commission of a crime (kidnapping and/or sexual battery) as a result of emotional frenzy or panic. The State's claim of heightened premeditation was not inconsistent with emotional frenzy or panic. The entire episode was unplanned and full of random acts. CCP was not established beyond a reasonable doubt, so this aggravator must be struck. In light of all the errors as to 4 of the 5 aggravators given great weight and the mitigation, it cannot be said these errors had no impact on the jury's recommendation and the trial court's decision to impose death. DiGuilio. A new penalty phase is required.

ISSUE X

DID THE TRIAL COURT ERR IN RULING THE STATE COULD CROSS-EXAMINE APPELLANT'S MOTHER AND SISTER ON HIGHLY PREJUDICIAL BUT IRRELEVANT ACTS THAT OCCURRED BETWEEN APPELLANT AND HIS SISTER IF THE MOTHER AND/OR SISTER TETIFIED ON BEHALF OF APPELLANT AT THE PENALTY PHASE?

During the penalty phase, Mr. Smith's mother and sister wanted to testify. The proffer of Mr. Smith's mother Patricia Davis' statement, which the State agreed to, was set forth:

> MR. TREBUGGE: So I will just tell the Court that we probably had 15 to 20 points in mitigation that we would feel like Patricia Davis could address and establish. Based upon the Court's ruling, we would be unable to call Ms. Davis to establish the fact that she had numerous miscarriages before Mr. Smith was born; the fact that Mr. Smith was a difficult labor and childbirth; the fact that Mr. Smith's father was an abusive alcoholic who used to treat her in a violent manner; the fact that when Mr. Smith's father left the residence, it was due to the fact that he was molesting teenage boys; the fact that other than the – after he left the residence he had limited contact with the defendant and disappointed the defendant on many occasions.
>
> THE COURT: This is Howard Smith, the natural father, not Mr. Davis.
>
> MR. TEBRUGGE: Yes, not Mr. Davis.

> THE COURT: Thank you.
>
> MR. TEBRUGGE: And then basically circumstances of the last several years, the contact she had with the defendant, his wife, his children, the relationship that she observed on those occasions, her knowledge of the defendant's addictions, those would be some of the matters that the witness would have been called to testify for.
>
> THE COURT: Can the state – is the State willing to accept that as a proffer, or do you want, for appellate purposes, to call Ms. Davis and have her testify to those?
>
> MR. NALES: We can agree to those.
>
> THE COURT: I'm not asking you to agree, but if she were called, that would be the line of questioning and those would be her responses. I'm not saying – you may have objections to it and some of it may not be admissible.
>
> * * *
>
> MR. TEBRUGGE: I will also indicate that a deposition of Ms. Davis was taken where many of these matters were addressed.
>
> MR. RIVA: They were, Judge, and I would agree that these are matters that I had definitely heard of in the past and certainly I would have had certain objection to some of those pieces of evidence coming in, but I don't mind agreeing that the proffer is correct, that is what would be represented.

(V50/T5722-5724) Mr. Smith's sister Rena Grudzina wanted to read a letter that was "more of an appeal to the Court as opposed to factual testimony or evidence." (V52/T6131) The State argued that if she said anything more than 'give my brother life instead of death,' it would cross-examine her about the prior sexual contacts she had with her brother when she was 13 and he was 17. The same was argued by the State concerning their mother's testimony as she was the one to send Mr. Smith to an aunt's home when Rena came to her. Neither Mr. Smith's mother or sister testified on behalf of Mr. Smith at the penalty phase.

Defense counsel argued the use of prior sexual contact between Mr. Smith and his sister was not relevant except to bring forth highly prejudicial evidence that would turn a mitigator into an aggravator. The State argued it had the right to cross-examine them if they chose to speak on Mr. Smith's behalf to show the entire picture, and the trial court agreed. When defense counsel stated he would not be calling Mr. Smith's mother and sister, he said it was because of the trial court's ruling that the State could ask them about the sexual activities between Mr. Smith and his sister. (V46/T5088-5091;V48/T5385-5408;V50/T5721-5724;V51/T5732-5735;V52/6130-6142)

It is to be noted that these activities occurred over 22 years ago (it was stipulated Mr. Smith was born on 3-17-66, and these acts happened when he was 17), the particular acts were never described except to say they involved sexual contact, and no criminal charges were filed. (V48/T5385-5408;V44/T4764) More importantly when it came to deciding whether Mr. Smith lived or died, the trial court gave only moderate weight to Mr. Smith's good character. The reason for such little weight was because the individuals who did speak on Mr. Smith's behalf spoke of events which occurred years ago and had no recent daily contact with Mr. Smith. "The Court notes, however, that family members closest to the defendant, <u>such as his mother</u>, did not testify." (V14/R2646,2647-emphasis added)

Mr. Smith was deprived of essential mitigating evidence, because the State wanted to turn it into aggravating evidence. This cross-examination was extremely old and occurred when Mr.

Smith and his sister were teenagers. Testimony concerning Mr. Smith's difficult birth, serious problems with his father, how he lived the last several years with his wife and kids and addictions, to appeal for his life and to say what a nice man he was were very important to show his character; and that evidence of mitigation far outweighed the relevance of what happened 22 years ago when Mr. Smith and his sister were young.

Sec. 90.403, Fla. Stat. (2003), states that "[r]elevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury...." This section requires a balancing test. "This statute compels the trial court to weigh the danger of unfair prejudice against the probative value. In applying the balancing test, the trial court necessarily exercises its discretion." State v. McClain, 525 So. 2d 420,422 (Fla. 1988). As this Court stated in Steverson v. State, 695 So. 2d 687 at 688-689 (Fla. 1997), sec. 90.403 is not just about prejudicial evidence as most evidence against a defendant is prejudicial; it's about evidence that inflames the jury or appeals improperly to the jury's emotions. "Only when that unfair prejudice substantially outweighs the probative value of the evidence is the evidence excluded." Id. at 689. In Steverson the State brought out extensive collateral crime evidence that occurred after the murder when the defendant shot a police officer. Mr. Steverson's death penalty was reversed and a new trial ordered, because the extensive and unfairly prejudicial evidence was not harmless.

In Sexton v. State, 697 So. 2d 833 (Fla. 1997), the defendant

was given a death sentence for the murder of his son-in-law. That sentence was reversed and a new trial ordered; because the State presented highly prejudicial evidence concerning his having sex with his children, Satanism, how to kill FBI agents, and more. The State claimed this highly prejudicial evidence was relevant to show a motive for the killing and why the defendant's son would kill at the defendant's discretion. Although the evidence may have been relevant, its prejudicial impact far outweighed its relevance. As reprehensible as his behavior was, Sexton was not on trial for the maltreatment of his children. "Yet the jury could only have been inflamed by this damaging testimony and might have moved to punish Sexton for those collateral acts by finding him guilty of the murder in this case." Id. at 837.

In Geralds v. State, 601 So. 2d 1157 (Fla. 1992), this Court held the State was not allowed to present otherwise inadmissible information regarding a defendant's criminal history under the guise of witness impeachment in the penalty phase. "This rule is of particular force and effect during the penalty phase of a capital murder trial where the jury is determining whether to recommend the death penalty for the criminal accused." Id. at 1163. In Geralds the defense presented a penalty phase witness who was the defendant's neighbor for a year and never had any problems with the defendant. The State then cross-examined the neighbor as to whether he knew of the defendant's prior criminal history—8 prior convictions. The State claimed the defendant opened the door, but this Court disagreed. As for the harm of the error, the State had the burden to prove beyond a reasonable doubt the error

did not contribute to the jury's death recommendation. DiGuilio. The State could not meet this burden, so a new penalty phase was ordered.

In Mr. Smith's case the trial court had a balancing test to do, and it abused its discretion when it found the State could cross-examine Mr. Smith's mother and sister about highly prejudicial acts that occurred over 22 years ago if the mother and sister testified as to Mr. Smith's problems and character during the penalty phase. Such cross-examination would have inflamed the jury and the trial court. What little, if any, relevance that cross-examination would have had was far outweighed by the unfair prejudice. The jury and trial court would have used this damaging testimony to punish Mr. Smith by recommending/imposing death. Instead of exposing the jury and trial court to this inflammatory cross-examination, neither the mother nor sister testified at the penalty phase; and that void did not go unnoticed. The trial court specifically pointed out how those closest to Mr. Smith, especially the mother, did not testify. If the trial court made his life and death decision partially on this void when weighing the mitigators, it can be properly assumed the jury noticed this same void when making its death recommendation. The State cannot show this void had no impact on the jury's death recommendation—especially in light of the State's closing penalty arguments that the defense witnesses didn't really know Mr. Smith and had no recent experience with him, especially not as a brother or son. (V51/T5899-5900) It is also obvious from the trial court's order that the void did impact on his decision. DiGuilio. A new penalty

phase is required.

ISSUE XI

DID THE TRIAL COURT ERR IN REFUSING TO ALLOW APPELLANT THE RIGHT OF ALLOCUTION BEFORE THE JURY AFTER THE JURY ASKED ABOUT THE APPELLANT MAKING A STATEMENT OF ALLOCUTION?

After the evidence was presented in the penalty phase and before the State made its arguments, the jury submitted four questions. One of them asked if it was within the realm of possibility to consider a sentence based on allocution to the crime? The State argued Mr. Smith could not make a statement of allocution to the jury. If Mr. Smith wanted to speak to the jury, he would have to do it under oath and subject to cross-examination. Mr. Smith argued the jury gives an advisory opinion that must be given great weight; so they should be able to hear him make a brief, unsworn statement that does not deal with the facts but allows him to express remorse. Mr. Smith prepared a written statement he could make to the jury (it was sealed and put in evidence), and he asked to be able to make a statement of allocution to the jury in response to their specific request. The trial court denied this request and limited allocution to before the trial court at the Spencer hearing. (V51/T5860-5885; V53/T6184;V11/R2062)

Since this argument was made, this Court has decided the issue against the Appellant in Troy v. State, 948 So. 2d 635,647-649 (Fla. 2007). Mr. Smith seeks to preserve this issue for further review, but he also notes a fact in his case not present in Troy--the jury in Mr. Smith's case was sophisticated enough to know about a statement of allocution, they asked for it, and they

demonstrated (via their question) that they expected it. By not getting a statement of allocution, the jury may have believed Mr. Smith had no remorse for what he had done; and this failure more than likely played a factor in the jury's recommendation 10-2 for death. As noted below, a jury's recommendation is far more than just a suggestion. They are co-sentencers whose verdict for life or death is entitled to great weight.

Under Florida's capital sentencing law, the penalty-phase jury actively participates in the life-or-death decision as co-sentencer. Johnson v. Singletary, 612 So. 2d 575, 576 (Fla. 1983). The requirements of the Eighth Amendment and the due process clause of the Fourteenth Amendment apply to the jury's weighing of aggravating and mitigating factors at least as much as they apply to the judge's weighing process. See Johnson. The critical importance of the jury is accentuated by the U.S. Supreme Court's recognition in Ring v. Arizona, 536 U.S. 584 (2002), that capital sentencing by the judge alone violates the Sixth Amendment. The law requires the trial judge to give great weight to the jury's penalty verdict. It is part of the jury's role to reflect the conscience of the community at the time of the trial. Weaver v. State, 894 So. 2d 178 at 197 (Fla. 2004). As the judge in the instant case accurately instructed the jury, "it is only under rare circumstances that I would impose a sentence other than the sentence you recommend" (V52/T5953).

If the jury represents the conscience of the community, who better to assess the sincerity of a capital defendant's expression of remorse or to decide whether it warrants sparing his life?

Remorse is defined as "a gnawing distress arising from a sense of guilt for past wrongs (as injuries done to others)" [Beasley v. State, 774 So. 2d 649, 672 (Fla. 2000), quoting Webster's Third New International Dictionary 1921 (1993)], and it is a recognized mitigating circumstance under Florida law. See Parker v. State, 643 So. 2d 1032, 1035 (Fla. 1994) ("Jurors also may consider remorse or repentance"); Stevensv. State, 613 So. 2d 402,403 (Fla. 1992); Pope v. State, 441 So. 2d 1073, 1078 (Fla. 1983); Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990). The initial question is not whether Florida recognizes a defendant's right to allocution (it does), or whether the right to allocution applies to capital sentencing in Florida (again, it does), but rather the question is when – and, more importantly, before whom – does the defendant get the opportunity to allocute? Since, under Florida law, (1) the jury is the co-sentencer and respresents the conscience of the community; (2) the jury's penalty verdict is based on weighing the mitigating factors (including remorse) against the aggravating factors; and (3) the jury's verdict for life or death is entitled to great weight and–-except in the rarest cases-–when it recommends life, the judge must follow the jury's recommendation. When a Florida capital defendant requests allocution before the jury, he must be afforded that opportunity. This should be especially true in this day and age of savy juries who not only know what a statement of allocution is, but request it and expect it.

Because the jury in Mr. Smith's case knew about and asked for a statement of allocution, because the jury plays an

extremely important part in the sentencing process in the penalty phase when it comes to a life and death decision, and because Mr. Smith wanted to give the jury a statement of allocution, Mr. Smith was deprived of a fair penalty hearing and due process of the law under the Eighth and Fourteenth Amendments, U.S. Const., when the trial court refused to allow Mr. Smith to make a statement of allocution to the jury. This refusal had to have had an impact on the jury's 10-2 death recommendation. They wanted to hear Mr. Smith say he was sorry, and Mr. Smith was prohibited from doing so even though he was more than willing. Mr. Smith is entitled to a new penalty phase.

ISSUE XII

DOES SECTION 775.051, FLA. STAT. (2003), WHICH ABOLISHES THAT THE DEFENSE OF VOLUNTARY INTOXICATION AND EXCLUDES EVIDENCE OF A DEFENDANT'S VOLUNTARY INTOXICATION UNDER SOME BUT NOT ALL CIRCUMSTANCES, VIOLATE DUE PROCESS UNDER THE FOURTEENTH AMENDMENT BECAUSE, UNLIKE THE MONTANA STATUTE UPHELD BY A 5-4 VOTE IN MONTANA V. EGELHOFF, 518 U.S. 37 (1996), THE FLORIDA STATUTE NEITHER REDEFINES THE REQUIRED MENTAL STATE FOR CRIMINAL RESPONSIBILITY NOR REMOVES THE ENTIRE SUBJECT OF VOLUNTARY INTOXICATION FROM THE MENS RE INQUIRY?

This issue was rejected by this Court in Troy v. State, 948 So.2d 635,643-645 (Fla. 2007). It was preserved at the trial level (V4/R741-745,798-800;V5/R801-809;V6/R1040-1044,1073-1074; V18/T388-524;V45/T5017) and is being raised to preserve the issue for further review.

§ 775.051, Fla. Stat. (2003), is fundamentally different from the Montana provision upheld in Egelhoff. Florida's provision violates the Fourteenth Amendment's guarantee of due process because, instead of redefining the required men re for criminal

responsibility, it merely precludes some, but not all, voluntarily intoxicated offenders from negating it.

ISSUE XIII

IS FLORIDA'S CAPITAL SENTENCING SCHEME, WHICH EMPHASIZES THE ROLE OF THE CIRCUIT JUDGE OVER THE TRIAL JURY IN THE DECISION TO IMPOSE A SENTENCE OF DEATH, CONSTITUTIONALLY INVALID UNDER RING V. ARIZONA, 536 U.S. 584 (2002)?

Ring v. Arizona, 536 U.S. 584 (2002), declared unconstitutional the capital sentencing schemes then used in Arizona, Colorado, Idaho, Montana, and Nebraska, in which the judge, rather than jury, was responsible for (1) the factfinding of an aggravating circumstance necessary for imposition of the death penalty, as well as (2) the ultimate decision whether to impose a death sentence. Four states--Alabama, Delaware, Florida, and Indiana--were considered to have "hybrid" capital sentencing schemes, the constitutionality of which were called into question, but not necessarily resolved, by Ring. Id. at 621 (O'Connor, J., Dissenting).

Unlike Alabama, Delaware, and Indiana, Florida is a "judge sentencing" state within the meaning and constitutional analysis of Ring; and, therefore, its entire capital sentencing scheme violates the Sixth Amendment. As this Court recognized in State v. Steele, 921 So. 2d 538,548 (Fla. 2006), Florida is now the only state in the country that does not require a unanimous jury verdict in order to decide that aggravators exist and to recommend a sentence of death. This Court recently reaffirmed in Troy v. State, 948 So. 2d 635,648 (Fla. 2006), that Florida's procedure "emphasizes the role of the circuit judge over the trial jury in

the decision to impose a sentence of death." The Court also quoted and highlighted the following statement from Spencer v. State, 615 So. 2d 688,690-91 (Fla. 1993): "It is the circuit judge who has the principal responsibility for determining whether a death sentence should be imposed." Troy, 635 So. 2d at 684.

The jury's advisory role, coupled with the lack of a unanimity requirement for either the finding of aggravating factors or for a death recommendation, is insufficient to comply with the minimum Sixth Amendment requirements of Ring. It is to be emphasized that although 2 of the aggravators were either found by the jury or by a Court (on felony probation and murder committed during commission of a felony--kidnapping and/or sexual battery, 4 were not (to prevent arrest, HAC, CCP, victim under 12). The issue was thoroughly preserved below. (V4/R703-709;V17/T337-340,363-364) Florida's capital sentencing scheme and appellant's death sentence are constitutionally invalid.

CONCLUSION

Mr. Smith is entitled to a new trial and/or penalty phase.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Carol Dittmar, Office of the Attorney General, Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of December, 2008.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

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