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

REPLY BRIEF OF APPELLANT AND ANSWER BRIEF OF CROSS-APPELLEE

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SUMMARY OF THE ARGUMENT

As Cross-Appellee on the issue of the prior violent felony aggravator, this issue could be moot. If this Court should reach the merits, then the issue still fails. This Court's case law has not been overruled and remains good law.

ARGUMENT

ISSUE IV,V,VII,VIII,IX,X,XI,XIII

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?

When the State argued this issue, this Court had not yet decided State v. Johnson, Case No. SC06-86 (Fla. May 1, 2008). Now this Court has decided Johnson and held lab reports revealing the illegal nature of a substance is testimonial, this Court's reasoning should also apply to DNA results.

This Court found in Johnson:

> lab reports and similar material, when prepared for criminal trials, to be testimonial and that their admission without the preparer's testimony runs afoul of Crawford [v. Washington, 541 U.S. 36 (2004),] and the Confrontation Clause. ...[T]he report, while admittedly a business record, was clearly prepared in anticipation of trial and meant to establish an element of the crime. Such an 'accusatory' document should only be admissible where the preparer is unavailable and the defendant had a prior opportunity to cross-examine.

This Court rejected the business records hearsay exception under § 90.803(6), Fla. Stat. (2005). It noted the lab report was from

FDLE and not from a hospital where testing is done almost exclusively for medical treatment. The FDLE lab report "is only intended to bear witness against an accussed," unlike a hospital lab report. Johnson, Case No. SC06-86, citing the lower opinion of Johnson v. State, 929 So. 2d 4, 7 (Fla. 2d DCA 2005).

In Mr. Smith's case the State had submitted Carlie Brucia's shirt to the FBI lab along with blood samples from Carlie and samples from Mr. Smith for the sole purpose of trying to locate evidence against Mr. Smith in the Brucia case of rape via DNA evidence. (V43/T4514,4519-4521) The FBI lab's majority of tests are conducted on behalf of the prosecution. (V43/T4575) The DNA results were crucial in establishing proof of a sexual battery.

The State at trial argued the business records exception, which the trial court did reject; however, the trial court did not say what reasoning it was using to allow the supervisor to testify. (V43/T4526,4527) The State is now arguing that DNA results fit under the hearsay exception allowing an expert to offer an opinion even when the underlying facts and data may not be independently admissible. § 90.704, Fla. Stat. (2005). The cases on DNA reports from other courts around the country are relying on either exception. Because there is always the "tipsy coachman" doctrine (which allows an appellate court to affirm a trial court that obtained the right result but for the wrong reason--see Robertson v. State, 829 So.2d 901, 906 (Fla. 2002)), both exceptions need to be addressed.

The other jurisdictions that have found DNA or blood work to

be non-testimonial under Crawford base their reasoning on the inherent reliability of the technicians who are following procedures and conducting tests with no discretion. These courts consider the entire process is neutral with no value in the cross-examination of these lab technicians.

In People v. Rawlins, 884 N.E.2d 1019 (N.Y. App. 2008), the Court found DNA results were not testimonial—the lab technicians merely contemporaneously recorded the results of well-recognized scientific tests. Even though the lab technicians knew they were working on a rape kit and their findings could later be used at trial, the Court found that neither the prosecution or law enforcement could influence the outcome of the report generated by an independent private lab. The Court found instructive cases including State v. Crager, 879 N.E.2d 745 (Ohio 2007); and People v. Geier, 161 P.3d 104 (Cal. 2007). These cases emphasized the objectivity of the scientific procedures.

Although Rawlins warned "against the convenient danger of relying on a hearsay exception—particularly business records...," the business records hearsay exception was used in Crager to find DNA reports not testimonial under Crawford. Crager agreed with the analysis in Geier which focused on the contemporaneous recordation of observable events rather than the documentation of past events. Crager and Greier rejected the reasoning of those courts that hold lab reports are testimonial because their primary purpose is to establish an incriminating fact at the defendant's trial. Instead, these Courts found the DNA reports by the lab

tech were done as part of a standardized scientific protocol with results that can either be incriminatory or exculpatory; thus, the lab results are non-accusatory but neutral raw data.

The dissent in Crager points out the many flaws in the majority's opinion. The Bureau of Criminal Identification and Investigation conducted the DNA testing at the request of the prosecutor in the case against Crager. In conducting the tests, lab personnel had to believe their findings would be used at trial against Crager. The key question as to whether or not evidence is testimonial is whether an objective witness would reasonably believe the statement would be used at a criminal trial. The majority assumed reliability—thus admissibility—of reports produced by respected labs; but a focus on presumed reliability is a remnant of Ohio v. Roberts, 448 U.S. 56 (1980), which was overruled by Crawford. The dissent notes that "courts must take care not to assume reliability, based upon the source of the report: 'Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.' Crawford, 541 U.S. at 62...." Crager, 879 N.E.2d at 764. The dissent also points out the extreme importance of DNA evidence:

> DNA evidence has become the "smoking gun" in criminal trials. It can be a powerful tool for conviction or exoneration. DNA evidence is too central to prosecution to allow the routine introduction of such evidence as a business record. To do so would permit a records clerk to present the most important piece of evidence against a defendant without allowing that defendant to cross-examine the person responsible for preparing the report.

Id. at 760.

Not noted by the dissent in Crager, but very important, is that after all discussion in Grier as to DNA reports not being testimonial, the Court still hedged its bets. Geier found that even if the introduction of the DNA results did violate Geier's Sixth Amendment rights to confrontation under Crawford, the error was harmless. Thus, reliance on Geier's reasoning on the DNA report being non-testimonial is shaky when not even the Geier Court relied on this conclusion.

U.S. v. Washington, 498 F.3d 225 (4th Cir. 2007), also found blood work for illegal substances from blood taken at the request of law enforcement was not testimonial. It held that the raw data obtained by lab techs via machines would have no value in cross-examination; i.e., cross-examination would be useless. Id. at 230. The dissent, however, points out that it is not for the courts to say there is no value in cross-examining a lab tech. It is up to the defendant to decide whether or not to cross-examine lab techs, and forensic testing is not above reproach:

> The strategic decision of whether to cross-examine a laboratory technician is one for the defendant to make. Although in many cases a defendant may choose not to exercise this right, cross-examination of laboratory technicians may be useful in some instances. Forensic test reports are not always accurate. Testing errors are sometimes caused by technician inexperience, sample contamination, failure to follow laboratory protocols, or breaks in the chain of custody. Furthermore, on rare occasions laboratory technicians have "engage[d] in long-term systematic, and deliberate falsification of evidence in criminal cases." Pamela R. Metzger, Cheating the Constitution, 59 Vand. L.Rev. 475, 499 (2006). In one notorious case, a forensic serologist at the West Virginia Department of Public Safety falsified

> hundreds of forensic tests between 1979 and 1989. Id. the best way to expose errors or falsification in testing is through cross-examination of the laboratory technician. See Crawford, 541 U.S. at 61, 124 S.Ct. 1354 (stating that the reliability of testimony is best determined "in the crucible of cross-examination").

Washington, 498 F.3d at 235.

Johnson rejected the business records hearsay exception for lab reports identifying the nature of a drug. If the testing and reports were done in anticipation of trial and meant to establish an element of the crime, then the reports are testimonial under Crawford. This same reasoning, which was rejected in Rawlins, Crager, and Geier, applies to DNA testing and results. Using the expert opinion hearsay exception to introduce DNA results is not a valid alternative. Although a few more steps may be involved in DNA as opposed to the nature of a substance, the bottom line is that DNA testing is still lab testing. If reliability is not presumed for illegal substance testing (or breath tests in DUI cases, State v. Blevin, Case No. SC06-593 (Fla. May 1, 2008)), then it should not be presumed for DNA testing. As this Court noted in State v. Lopez, 974 So. 2d 340, 345 (Fla. 2008), the reliability analysis has been dispensed with under Crawford.

In the proffer and cross-examination of Jennifer Luttman, Ms. Luttman stated she was the case manager who decides what tests are to be done on which items by the assigned biologist. She does not go into the lab when the testing is done, and she may not even be in the building. She then interprets the results and draws conclusions. She compared her methods to those of a doctor

ordering medical tests, technicians doing the tests, and the doctor interpreting the results. (V43/T4488-4491,4612) Yet, as noted in Blevin there is a difference between the indicia of reliability of hospital tests done for the benefit of a patient's medical treatment and testing done to incriminate and convict an accused. Citing approvingly to Rivera v. State, 917 So. 2d 210, 212 (Fla. 5th DCA 2005), a supervisor "under cross-examination, could not have answered questions concerning chain of custody, methods of scientific testing, analytical procedures...." Blevin.

And as noted in the dissent in Washington, it's not like what the lab techs do is above reproach. As Ms. Luttman admitted, there was a biologist in 2002 in her FBI lab who was not properly conducting her DNA testing for over 2 years in at least 100 cases. This biologist was only caught when another biologist walked by her area and saw something wrong—an accidental discovery. Prior to that this biologist had been getting fully satisfactory performance reviews, and her supervisors never realized anything was wrong. Yet, this biologist had been falsifying her reports saying she had done work she had not done. Evidence had to be retested, and the Office of the Inspector General was called in. (V43/T4512,4513,4586,4587) This particular problem has not gone unnoticed and is specifically discussed in Thomas v. U.S., 941 A.2d 1,15 (D.C. 2006), in ftnot. 16. Perhaps if this biologist had been forced to testify in court under oath and subject to cross-examination, she would have been caught in her lies sooner without regard to happenstance.

In addition to lab techs falsifying reports and not following procedures, Ms. Luttman admitted how sensitive DNA testing is: there can be human errors in handling and analyzing DNA, there could be an error in recording data, the sample could be mislabeled or mixed up, the chain of custody is important when handling this evidence in the lab, equipment can be faulty, contamination can occur during the handling of the evidence, one area of testing (PCR) is so sensitive additional controls are needed, and there can be error as a result of analyst bias. (V43/T4595-4598) Unlike the pictures painted in Rawlins, Crager, and Geier of a neutral, robotic contemporaneous recordation of observable events with standardized scientific protocol that produce neutral raw date with no need for cross-examination, Ms. Luttman's picture is one of unsupervised biologists free to falsify their reports without getting caught by their supervisors in a sensitive area of testing where human error could occur in many steps along the way. In light of how important DNA evidence is, and was in Mr. Smith's case, the testimonial nature of this evidence is clear; and lab techs should not be allowed to hide in their labs without having to justify their results while a supervisor who had nothing to do with the testing testified under oath to the conclusion. There is great value in cross-examination in such DNA testing, and it is up to the defendant to decide whether or not to cross-examine these lab techs. The State should not be allowed to use the "expert" hearsay exception when the underlying hearsay reports are so crucial to the State's case.

Florida would not be alone in finding DNA reports are testimonial.

In Minnesota the Supreme Court found, as this Court did in Johnson, that lab reports identifying the substance found on the defendant as cocaine were testimonial. The Court's reasoning was the same as Johnson. State v. Caulfield, 722 N.W.2d 304 (Minn. 2006). When a Minnesota appeals court was faced with blood testing lab reports and Crawford, the Court found the lab reports were testimonial based on the reasoning in Caulfield. State v. Weaver, 733 N.W.2d 793 (Minn. App. 2007). Then in an unpublished appeals court decision, Minnesota applied Caulfield to DNA tests and found such testing testimonial; however, the improper admission of this testimonial evidence was harmless error. State v. Mejia, Not Reported in N.W.2d, 2008 WL 2020388 (Minn. App.).

In Michigan the appeals court found that notes and lab report prepared by nontestifying crime lab serologist who tested a stain on the defendant's clothing constituted testimonial hearsay. This evidence, which included the testing of a rape kit, was prepared by a police crime lab for use in a particular prosecution; and the lab tech would reasonably expect this evidence would be used in a prosecutorial manner at trial. The error was not considered harmless in light of the importance of this evidence to the State's case. A new trial was required. People v. Lonsby, 707 N.W.2d 610 (Mich. App. 2005).

In State v. Renshaw, 915 A.2d 1081 (N.J. Super. 2007), certification of blood tests instead of "live" testimony in a DWI

case was testimonial and violated the defendant's confrontation rights. The document was specifically prepared for the purpose of litigation, so the business record exception could not be used.

In our case Ms. Luttman, who did none of the testing, not only testified to the DNA results but also to miscellaneous items in the biologist's report such as the visual examination of the item, how much was cut from the item, markings on the item made by the biologist, what stains tested for what, and which items were transferred from the serologist to the biologist. (V43/T4521-4536) As in Johnson, the DNA lab reports were prepared for a criminal trial in Mr. Smith's case, meant to establish proof of the capital sexual battery, and the people conducting the tests knew it was for prosecution in a criminal trial. The DNA tests were testimonial, and Mr. Smith's confrontation rights were violated under Crawford when the tests were introduced via a supervisor who did not perform the tests instead of the lab techs who did. The State did not show these lab techs were unavailable, and there was no prior opportunity for Mr. Smith to cross-examine these lab techs (a discovery deposition, which was not shown to have been taken here, is not a prior opportunity—Blanton v. State, Case No. SC04-1823 (Fla. Mar. 13, 2008)). The DNA results were crucial to the State's case of capital sexual battery, so it cannot be said the error was harmless. A new trial is required.

Mr. Smith relies on his Amended Initial Brief for further argument on this issue.

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?

The State argues the issues that the testimony was beyond the competence of the Medical Examiner and invaded the province of the jury were never presented below and are procedurally bared. Mr. Smith argues trial counsel's objection to the Medical Examiner's opinion coming in as to a Carlie Brucia being sexually battered was broad enough to include these arguments; however, if this Court finds these particular arguments unpreserved, the error was so pervasive in this trial as to constitute fundamental error.

The objections to the Medical Examiner's ultimate opinion/conclusion that a sexual battery occurred in this case are at V42/T4325-4330,4407-4410:

> MR. TEBRUGGE: Your Honor, in her opening statement, the State Attorney testified that the Medical Examiner was going to offer the opinion that the victim had experienced a sexual assault. I'm requesting that the Court consider excluding that particular opinion. As I understand it, he's basing his opinion on three factors:
>
> One, the position of the body and the fact that it was unclothed; two, because he saw the videotape and it appeared to show an older male and the younger female; and three, because she died of ligature strangulation and ligature strangulations are frequently associated with an accompanying sexual battery.
>
> Now, in his examination of the sexual organs, he's going to testify that he found no conclusive evidence of a sexual battery and, again, I can go into detail on that if you need to hear it, but it's my position that there's an insufficient foundation to offer the opinion that the victim experienced a sexual assault and it would not be a reliable opinion and, therefore, should not be offered to the jury. It would be nothing more than pure speculation as to the ultimate issue in the case, and while testimony is not excludable merely

because it goes to the ultimate issue, I think that the Court has to be very careful to make sure that if an opinion is offered on the ultimate issue, that it is based upon reliable evidence, and it's my position that that is not the case here.

* * *

MS. RIVA: Judge, his opinion with regard to the sexual battery is that all of the evidence is consistent with her having been sexually battered. That is the question asked of him.

THE COURT: Okay. So he's really not going to give an opinion. He's just going to say that it's all consistent with a sexual battery having occurred. He's not going to state that, it's my opinion a sexual battery occurred.

MS. RIVA: Right.

THE COURT: He's just going to say that his findings are consistent with a sexual battery?

MS. RIVA: That's correct, Judge.

MR. TEBRUGGE: Judge, in my opinion, that's mere semantics and would have the same effect upon the jury.

* * *

MR. TEBRUGGE: It seems to me that Florida has not specifically required the standard that the Court just stated, that the trends in evidence rulings these days, Your Honor, seems to me to be going more to the issue of reliability when opinions are offered and that's what I'm saying to the Court. I think that this is a very dangerous opinion to offer when he's basically saying, Well, it could have been a sexual battery based upon a lot of extraneous factors, not based upon my examination.

Now, if he had seen specific injuries to the genitals that he associated with sexual battery, I don't think I would have a good basis to make my opinion. But that is what he cannot say in this case.

* * *

[MS. RIVA] Q: Doctor, based on your observation of the body of Carlie there at the scene at the church, all of the evidence available to you at autopsy, subsequent DNA testing regarding the presence of semen on the victim's shirt –

MR. TEBRUGGE: Judge, I'm going to object to that aspect of the question.

THE COURT: All right. It will be overruled at this time.

BY MS. RIVA:

Q: - - as well as statements of the Defendant regarding having oral sex or rough sex with the victim - -
MR. TEBRUGGE: Judge, could we approach?

THE COURT: You may.

(BENCH CONFERENCE HELD:)

MR. TEBRUGGE: Your Honor, I know you suggested this hypothetical, but I object to it.

THE COURT: Well, what is - - if I did, I wasn't suggesting it and I apologize. I mentioned it.

MR. TEBRUGGE: I'm not trying to cast aspersions here.

THE COURT: I know you're not.

MR. TEBRUGGE: What I'm saying is, this is an awful lot of information that the jury is going to have to determine whether it's reliable or not. So to ask this witness just to assume that those are the true facts and that they represent the true state of events, and then ask him to base an opinion upon that, again, I want to renew as to that.

And, Judge, if you heard him just now when Ms. Riva asked, What would you base your opinion of the sexual assault on? He said, Well, first the body, and then second, the testing, and then third, the circumstances. Well, the body didn't give him anything, as you just heard, and neither did the testing. So he's just basically evaluating a circumstantial evidence case here and saying all that proves to me is that the crime occurred. And I have an objection to that.

(Emphasis added.)

Defense counsel's objections are that the Medical Examiner has nothing to contribute based on his own physical evaluation and is relying on circumstantial evidence via what the Medical Examiner heard about. There was "insufficient foundation" for the Medical Examiner to give such an opinion, and this argument includes the Medical Examiner giving an opinion beyond his competence and invading the province of the jury. In order to provide an opinion as an expert, the Medical Examiner had to give testimony that was beyond the common understanding of the average layman so as to aid the trier of fact. Florida Power Corp. v. Baron, 481 So. 2d 1309 (Fla. 2d DCA 1986). When the State failed to show this standard was being met, it failed to present a sufficient foundation to offer the opinion. Although the magic words of "invading the province of the jury" are not used here, the concept is the same--the Medical Examiner had nothing to offer personally on the issue of the sexual battery but relied on evidence, not all of which was reliable, before the jury with which to give his "expert" opinion. Such an opinion had to be given great weight by the jury and cannot be considered harmless.

Should this Court not find the issue preserved, then it should still require reversal based on fundamental error. As this Court stated in Jones v. State, 949 So. 2d 1021,1037 (Fla. 2006):

> Fundamental error is error that reaches "down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Kilgore v. State, So.2d 895, 898 (Fla. 1996) (quoting State v. Delva, 575 So.2d 643, 644-45 (Fla. 1991)). Error during the penalty phase is fundamental if it is "so prejudicial as to taint the jury's recommended sentence." Fennie v.

State, 855 So.2d 597, 609 (Fla. 2003) (quoting Thomas v. State, 748 So.2d 970, 985 n.10 (Fla. 1999)).

The Medical Examiner's "expert" opinion on the issue of a sexual battery having occurred had to have had extreme weight with the jury; yet, this opinion should never have been given. In light of the lack of credible evidence on the sexual battery, the Medical Examiner giving his opinion on this matter was an error that reached into the validity of the trial to the extent that a guilty verdict could not have been obtained without it and was so prejudicial as to taint the jury's recommended sentence.

As for the doctor's opinion that strangulation of women by ligature is associated with sexual assaults in numerous cases, undersigned counsel tried to locate cases where a medical examiner found a sexual battery occurred based only on the fact that strangulation was with a ligature and no other physical evidence, but was unable to do so. In Commonwealth v. Perin, 398 A.2d 1007 (Pa. 1979), there is evidence of a sexual battery: spermatozoa in the vagina within 24 hours of death, the wall of the rectum torn within 6 hours of death in a manner consistent with forceful penetration. Strangulation by ligature is listed as the cause of death—not a factor in the opinion on the sexual assault. In State v. Hunt, 306 S.E.2d 846 (N.C. App. 1983), the medical examiner had physical evidence of a sexual assault via the tears and bruises in the vaginal canal and area. In the medical examiner's opinion the victim died from a heart attack during strangulation and sexual assault. There is no connection made between the strangulation and

sexual assault. In State v. Knese, 985 S.W.2d 759 (Mo. banc 1999), the medical examiner was allowed to give her opinion that the victim was probably sexually assaulted based on several factors: strangled at close range, condition of clothes (partially nude), position of her body (legs spread apart). The Court found this opinion within the expertise of the medical examiner with an expertise in forensic pathology. However, the Court hedged its bets. In the alternative, "[e]ven if this testimony had been erroneously admitted, no prejudice would have occurred, since the testimony only suggested in conditional and probabilistic terms what Mr. Knese himself directly confirmed: That he was attempting to sexually assault Ms. Knese at the time of the killing." Id. at 769.

In light of the lack of physical evidence and serious problems with the evidence that does exist, a new trial and penalty phase is required. Mr. Smith relies on his argument for this issue in his Amended Initial Brief.

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?

Appellee argues Mr. Smith's claims of his brother being told by the FBI agents to get information from Mr. Smith is not supported by the record. There is record support as to how the FBI used John Smith to get to his brother.

At V9/R1724-1795 FBI agents Street and Martinez are interviewing John Smith on February 4, 2004. The discussion

starts out about the video and how John believes it is Joseph. The agents ask John about his relationship with his brother, and John describes how poor it is. John talks about Joseph's visit to his (John's) home on Monday night at about 11 p.m., February 2, 2004. At one point Agent Street asks John, "Uhm, have you, I mean, this is an off the wall question but have you literally thought about, I mean, to rest your mind, I mean have you thought about going to see him and asking him if he did this?" (V9/R1773) John says his brother wouldn't tell him, but Agent Street continues to press him on this. Agent Street asks John if his brother "could live with it"; if "his conscious can deal with it." (V9/R1774) John tells the agents they might be able to trick his brother into confessing, "I do know that probably if you guys make him think that he was getting out and he was to call me from like the lobby, where he might try to confess if it was him...." (V9/R1774) Discussions continue on how to get Joseph to talk. The agents gave John their names and phone numbers. (V9/R1785)

On February 5, 2004, at about 11:30 p.m. the same 2 FBI agents do another interview with John. (V9/R1796-1800; V10/R1801-1853) When John asks whey they were doing this interview now, now that they had their leads, Agent Street said they wanted to establish the exact time line, find out exactly what Joseph told him (John), and find every little piece. (V9/R1796) Agent Martinez also stressed wanting to know the sequence of events. (V9/R1797) They asked about his meeting that morning with Joseph. (V10/R1801) The agents keep mentioning the need to get their

facts accurate and a time line. (V10/R1807, 1816, 1817) They question John in detail as to his conversation with his brother and subsequent phone calls. When John starts messing up on details, he blames it on his lack of sleep from the night before, but the agents encourage him to go on. (V10/R1817, 1823) The agents asked for details John didn't know because he didn't ask. (V10/R1837, 1838) After over an hour the agents ask John to contact them with any further details he may remember. John could "reach out" to them. (V10/R1850-1853)

During trial Agent Martinez denied on direct that he was trying to encourage John to meet with Joseph to elicit information (V21/T875), but on cross-examination he admitted Agent Street asked John if he thought about asking his brother if he (Joseph) did this to "rest" his mind. John did not mention wanting to see his brother until after the interview was over. (V21/T898,899)

As pointed out in Appellant's Amended Initial Brief, pp42-43, John had several recorded conversations with his brother after that late night meeting with the agents on February 5, 2004; and these conversations all focused on John getting more details from Joseph—details that he could not initially provide because he never thought to ask such details. The agents had put it into John's head that he should talk to his brother so that John could rest his mind. John and Joseph were not on friendly terms, and John's first reaction to this suggestion was a negative one. Several hours after this suggestion that John speak to Joseph, John calls the one of agents back to see about arranging a meeting

with his brother. Without prodding from the agents, John may not have made initial contact with his brother; and without the agents asking for specific details that John had no interest in initially, John may not have repeatedly gone back to his brother for more details (such questions as did Joseph know the girl, V10/R1815; where Joseph and the girl had sex and if it happened at the church, V10/R1823-1824; where Joseph got his clothing, V10/R1827; did Joseph give her drugs, V10/R1832; what Joseph did with his clothing and shoes, V10/R1837; what about the whereabouts of her clothes, V10/R1837-1838; whether or not Joseph knew her mother, V10/R1839. Some of these questions then became questions John asked Joseph in the days following. The FBI agents put the idea of John going to Joseph and asking if Joseph did it in John's head, and then these same agents spoonfed John the questions they wanted Joseph to answer. This constitutes record support as to how the FBI used John Smith as their agent to get to Joseph Smith after Joseph had invoked his Fifth Amendment, U.S. Constitution, right to counsel, and later his Sixth Amendment, U.S. Constitution Right to Counsel. (Undersigned Counsel did say at the top of p.42, Amended Initial Brief, that the agents had told John to go back to his brother and get more information. Undersigned counsel misread the bottom of pg.12 of John Smith's second interview with the FBI agents on February 5, 2004, (V10/R1807) wherein Agent Martinez tells John to stay on the time (i.e., timeline) and he's still in the jail in the room and not mix things up. When the agent told John to go back to the room wherein he's talking to

Joseph, he means for John to talk about the earlier discussion he had with Joseph—not as undersigned counsel mistakenly initially believed to future discussions with Joseph. Undersigned counsel apologizes for this unintentional error and would delete the first complete sentence of the Amended Initial Brief on p.42.)

Counsel for the State is correct in that this is not a Fourth Amendment claim, but really a Fifth Amendment—as well as a Sixth Amendment claim. As per the uncontroverted line of events set forth in Mr. Smith's Motion to Suppress Statements (V6/R1084-1089):

- Mr. Smith arrested on violation of probation on February 3, 2004.
- At 12:30 a.m. on February 4, 2004, while in custody at the Sarasota County Sheriff's Office, Detective Davis interrogated Mr. Smith about the disappearance of Carlie Brucia. Mr. Smith was given his constitutional rights, and at that time Mr. Smith clearly and unequivocally invoked his right to counsel before questioning.
- In the morning hours of February 4, 2004, Detective Davis called PD Metcalfe; and Mr. Smith was allowed to speak with Mr. Metcalfe on the phone. Mr. Smith maintained his right to speak to counsel before questioning.
- Later that day (February 4, 2004), Mr. Smith met with counsel from the Public Defender's Office; and Mr. Smith's right to remain silent concerning the Brucia case remained in effect pursuant to the right to counsel.
- Also on February 4, 2004, FBI agents meet with John Smith and raise the idea of John visiting his brother in regards to Brucia's disappearance.
- Later February 4, 2004, John Smith is denied a meeting with his brother and calls one of the FBI agents. He is told that Joseph has counsel, and any contact must be arranged through counsel.

- In the morning of February 5, 2004, John and his mother have an unrecorded, private meeting with Joseph Smith.

Further facts showed John Smith took the agents to Carlie's whereabouts at 10:15 p.m. (V38/T3743); John had a second interview with the FBI agents from 11:30 p.m.-12:45 a.m. on February 5 and 6, 2004 (V9/R1796-1800;V10/R1801-1853); and arraignment with the official appointment of counsel on the murder and kidnapping of Carlie Brucia occurred on February 6, 2004 (V1/R1-6).

Although Mr. Smith was not officially appointed counsel until February 6, 2004, he clearly personally invoked his right to counsel on the Brucia case on February 4, 2004, and had the benefit of counsel from February 4, 2004, forward. His Fifth Amendment Miranda[1] rights kicked in until his appointment of counsel was official, and at that point his Sixth Amendment rights to counsel kicked in. Under Fla. R. Crim. P. 3.111(c), the right to counsel would be as soon as feasible after custodial restraint, making it early a.m. on February 4, 2004. See Traylor v. State, 596 So. 2d 957,969-70 (Fla. 1992). (These rights are applied to Florida via the Fourteenth Amendment, U.S. Constitution; and as further protected in Florida in §9, Art. I, Fla. Const.; and §16, Art. I, Fla. Const..) Once this right to counsel was invoked, state interrogation on the Brucia matter had to cease throughout the period of prosecution unless Mr. Smith chose to initiate contact with the police (which he did not). Traylor, 596 So. 2d

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

at 968. Therefore, all statements John obtained from Joseph while acting as an agent of the government were in violation of Joseph's Fifth and Sixth Amendment right to counsel. Since John did not initially speak to Joseph about the Brucia until February 5, 2004, and then several dates from February 9, 2004, through March 14, 2004, all of the statements John obtained from Joseph were covered by Joseph's Constitutional rights to counsel.

Mr. Smith cited cases wherein the state used private individuals as government/state agents to conduct illegal search and seizures in violation of the Fourth Amendment, U.S. Constitution. These cases are easily analogized to this case and just as applicable in Fifth and Sixth Amendment violations. Undersigned Counsel did not address Rolling v. State, 695 So. 2d 278 (Fla. 1997); because a case involving a jailhouse snitch who wished benefit from cultivating a relationship with Rolling so that the snitch could obtain a deal on his own charges would be comparing apples to oranges. Whereas the state did not seek out the snitch's help in Rolling, the FBI agents did seek John's help by interviewing him, putting the idea of John going to Joseph to ask if Joseph did this to ease John's mind, and setting forth detailed questions they wanted answers to but not initially asked by John during John's February 5, 2004, contacts with Joseph.

As for John withholding information from the FBI agents, this was only during the early part of February 5, 2004; but John explained his decision not to tell the agents about his February 5, 2004, morning conversation with Joseph. John told the agents

later that night on February 5, 2004, he withheld information; because he didn't believe Joseph at that time. As the day went on and John had further conversations with Joseph on the phone, John began to believe Joseph. John then called the agents at about 9 p.m. on February 5, 2004. (V10/R1808-1818) So the withhold of information was short and for a reason—John needed more information to believe Joseph was not lying to him. He didn't want to go to the agents with false information.

Appellant relies on his Amended Initial Brief for the remainder of his argument.

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?

The State is correct when it argues this issue was not preserved as to the doubling of Capital Sexual Battery on a Child under 12 and Victim under 12 as aggravators. Undersigned counsel re-examined the record. At V17/T375 the trial court was concerned about this issue:

> ...I'm a little concerned and I'm sure we will address the possibility of being involved with a doubling factor on the aggravators. But that is something we'll have to address separately because the same age applies to the capital sex battery and also to this aggravator [referring to the victim being under 12].

Later at V46/T5150-5155, the trial court again brings up the issue of doubling the Capital Sex Battery on a Child under 12 and the Victim being under 12 as aggravators. The State said it was not an issue, and defense counsel said nothing. Apparently, defense

counsel focused on aggravated child abuse for its doubling argument with Victim under 12; but he abandoned that argument when the State said it would not be using aggravated child abuse as an aggravator now that it had convictions for capital sexual battery and kidnapping. (V51/T5822,5823,5841-5846).

This issue, however, should still be considered by this Court as fundamental error. Including both of these aggravators which required the victim be under 12 in both had to taint the jury's recommendation. Jones, 949 So. 2d at 1037. Since the trial court emphasized Carlie being an innocent 11-year-old child and was sexually battered (V14/R2617-2653), it cannot be said the erroneous doubling of these aggravators had no major impact on the sentence imposed.

Mr. Smith relies on his Amended Initial Brief for further argument on this issue.

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?

Although this issue was rejected by the Court in Troy v. State, 948 So.2d 635,643-645 (Fla. 2007), this issue is being raised to preserve it for further review. In Appellant's Initial Brief it was stated that sec. 775.051, Fla. Stat. (2003), is fundamentally different from the Montana provision upheld in Egelhoff; however, explaining that difference was not possible due to page limitations. That explanation is set forth here.

The Montana statute Mont.Code.Ann. §45-2-203--which was before the U.S. Supreme Court in Montana v. Egelhoff, 518 U.S. 37 (1996), provides:

> A person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense unless the defendant proves that he did not know that it was an intoxicating substance when he consumed, smoked, injected or otherwise ingested the substance causing the condition.

Note that the Montana statute does not use the term "voluntary" intoxication; rather it refers to "a person who is in an intoxicated condition", and the sole exception goes to the defendant's state of mind (mens re); i.e., if he was unaware when he used the substance that it was an intoxicating substance. In other words, the Montana statute amounts to an across-the-board removal of voluntary intoxication from the mens re inquiry, but it retains the exception for involuntary intoxication.

In Egelhoff a sharply divided Court upheld the Montana statute against a constitutional challenge. The four-Justice plurality

found no due process problem, concluding that the voluntary intoxication defense is of "too recent vintage, and has not received sufficiently uniform and permanent allegiance, to qualify as fundamental, especially since it displaces a lengthy common-law tradition which remains supported by valid justifications today." Egelhoff, 518 U.S. at 51. The four-Justice dissent concluded that the statute's blanket exclusion of a category of evidence which would allow the accused to negate the mental-state element of a charged offense does violate the due process clause, and that in determining whether a fundamental principle of justice had been violated, consideration should be given not only to historical development but also to the constitutional guarantee "that a defendant has a right to a fair opportunity to put forward his defense, in adversarial testing where the State must prove the elements of the offense beyond a reasonable doubt." Id. at 62, 71. In addition to joining Justice O'Connor's opinion, Justice Breyer (joined by Justice Stevens) and Justice Souter also wrote separate dissenting opinions. All four of the dissenters agreed with the plurality that states have the power to redefine the elements of criminal offenses, including mens re. See State v. Birdsall, 960 P. 2d 729, 835-35 (Hawaii 1998). However, the dissenters concluded that the Montana statute, as interpreted by the state's Supreme Court, had not accomplished a redefinition of mens re, but rather amounted to "an evidentiary provision that not only excluded a category of evidence from consideration, namely, voluntary intoxi-cation, but relieved the prosecution from having to prove mental

state beyond a reasonable doubt." See Birdsall, at 960 P. 2d at 734. It is this combination of effects which, in the dissenters' view, violates due process. Egelhoff, 518 U.S. at 62 (O'Connor, J., dissenting); see Birdsall, 960 P. 2d at 734.

The crucial "swing vote" in Egelhoff was that of Justice Ginsburg. Justice Ginsburg reasoned that if the effect of the Montana statute §45-2-203 was to keep out relevant, exculpatory evidence pertaining to a required mental state element of the offense, then it indeed violated due process. If, on the other hand, §45-2-203 "is, instead, a redefinition of the mental-state element of the offense", then due process would not be abridged, since a state legislature has the authority to identify the elements of the offenses it wishes to punish "and to exclude evidence irrelevant to the crime it has defined." Id. at 57 (Ginsburg, J., concurring). So the outcome of Egelhoff turned on whether the Montana statute operated as an evidentiary proscription blocking the accused from negating the required mens re, or whether it was instead a full scale redefinition of mens re. Justice Ginsburg agreed with Montana and its amici that §45-2-203 "extract[s] the entire subject of voluntary intoxication from the mens re inquiry . . . thereby rendering evidence of voluntary intoxication logically irrelevant to proof of the requisite mental state". Id. at 58 (Ginsburg, J., concurring). Based on that analysis, Justice Ginsburg cast the deciding vote to uphold the Montana statute.

However, the Florida statute, whose constitutionality is at issue in the instant case, is significantly different from the

Montana provision. Montana's statute is straightforward and applies across-the-board. It does not refer to admissibility or inadmissibility of evidence, nor is it dependent on the particular intoxicating substances used to produce a state of intoxication. It simply states that "[a] person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense. . . ." § Mont. Code Ann. §45-2-203. The sole exception is when the defendant proves he was unaware that the substance he consumed was an intoxicating substance, i.e., involuntary intoxication. Thus, as Justice Ginsburg emphasized, the Montana statute removed the entire subject of voluntary intoxication from the mens re inquiry, and effectively redefined the required mental state.

Florida's statute fails to do that. § 775.051, Fla. Stat. 2003), reads:

> Voluntary intoxication; not a defense; evidence not admissible for certain purposes; exception.
>
> Voluntary intoxication resulting from the consumption, injection, or other use of alcohol or other controlled substances as described in chapter 893 is not a defense to any offense proscribed by law. Evidence of a defendant's voluntary intoxication is not admissible to show that the defendant lacked the specific intent to commit an offense and is not admissible to show that the defendant was insane at the time of the offense, except when the consumption, injection, or use of a controlled substance under chapter 893 was pursuant to a lawful prescription issued to the defendant by a practitioner as defined in s. 893.02.

Unlike the Montana statute, Florida's does not uniformly pro-

vide that a defendant's voluntary intoxication is legally irrelevant to his mental state; it depends on the substance used and (in the case of controlled substances under chapter 893) it may even depend on the legal status of a prescription. Under the plain and unambiguous language for the Florida statute, it applies only when the voluntary intoxication resulted from the consumption, injection, or other use of alcohol or (with the "lawful prescription issued by a practitioner" exception) a controlled substance as described in chapter 893. The statute, by it very terms, does not apply to a defendant who voluntarily becomes intoxicated by "huffing" or otherwise ingesting chemical solvents (such as paint, glue, kerosene, nitrous oxide, and a wide variety of common and esoteric substances which fall into this category of frequently abused chemical products). Florida's DUI statute, for example, applies to persons driving a vehicle when "under the influence of alcoholic beverages, any chemical substance set forth in s. 877.111, or any substance controlled under chapter 893, when affected to the extent that the person's normal faculties are impaired." §316.193(1)(a), Fla. Stat. [Emphasis added.]

A voluntary intoxication defense is available in Florida when a defendant's intoxication was produced by chemical agents [see Mullin v. State, 425 So. 2d 219 (Fla. 2d DCA 1983)], and nothing in Section 775.051 purports to change that. By its unambiguous language, § 775.051 only prohibits a defense of voluntary intoxication when the defendant's state of intoxication was caused by the use of alcohol or a controlled substance as enumerated in

chapter 893. This stands in contrast to the Montana statute which removes voluntary intoxication from the mens re inquiry for any person in an intoxicated condition who became intoxicated voluntarily. A glue sniffer such as Mullin, or any other Florida defendant who became intoxicated by huffing or otherwise ingesting chemical substances not controlled under chapter 893, still has the defense of voluntary intoxication available to him after 10-1-99; and he can introduce evidence to negate the specific intent element of a criminal charge. However, a defendant whose intoxication was caused by alcohol (also a substance whose possession and use is ordinarily lawful) or controlled drugs cannot use voluntary intoxication as a defense. This demonstrates that § 775.051 does not amount to a redefinition of the mental state element of specific intent criminal offenses, nor does it extract the entire subject of voluntary intoxication from the mens re inquiry as the Montana statute did. It does not render evidence of voluntary intoxication "logically irrelevant to proof of the requisite mental state" [see Montana v. Egelhoff, 518 U.S. at 58 (Ginsburg, J., concurring)]; it simply has the unconstitutional effect of arbitrarily prohibiting most but not all voluntarily intoxicated defendants from introducing evidence to negate the requisite mental state.

CROSS APPEAL

ISSUE I

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

The State was allowed to present evidence for 6 aggravators, but it was denied an additional aggravator of prior violent felony conviction. In 1993 Mr. smith pled no contest to an aggravated battery, adjudication was with held, and he successfully completed 2 years of probation. Thus, there was no conviction on this aggravated battery; and the trial court would not let the State present evidence on the aggravator. The trial court relied on Garron v. State, 528 So. 2d 353 (Fla. 1988).

The first aspect of this issue is whether this issue is moot. If Mr. Smith obtains a new penalty phase, then the issue is not moot. If there is no new penalty phase, the issue is moot. As this court stated in State v. Matthews, 891 So. 2d 479,483-484 (Fla. 2004), "[t]he mootness doctrine does not destroy our jurisdiction because the question before this Court is of great public importance and is likely to recur.... Moreover, this Court elects to proceed because the problem that the instant action presents is capable of repetition yet evading review." This issue is not one of great public importance nor is it capable of repetition yet evading review.

Garron was decided in 1988, and the State claims the legislature overruled it in 1993. It is now 2008, and not being able to use the aggravator of prior violent felony conviction in a death penalty case when the defendant has pled no contest, received a withhold of adjudication, and was never found guilty of the offense does not come up very often. Thus, it is hardly a question of great public importance. Should the issue arise in a

case in the future, the State could take interlocutory review or a cross-appeal. Although the issue may be capable of repetition some day, it does not evade review. Should this Court uphold Mr. Smith's sentence, it need not decide this issue at this time.

The second aspect of this issue is the merits should Mr. Smith obtain a new penalty phase. The State's argument must fail on the merits, as well.

As the State acknowledged in its brief, Garron, 528 So. 2d at 360, held the aggravating factor of "prior violent felony conviction" could not be established with a prior violent felony to which a defendant pled nolo contendere and adjudication was withheld. In order for there to be a "conviction" for purposes of this aggravator, the defendant had to be guilty. In 1993, Ch. 93-406, Sec. 9, Laws of Fla., the legislature created a definition for "conviction" which "means a determination of guilt that is the result of a plea or trial, regardless of whether adjudication is withheld." Sec. 921.0011, Fla. Stat. (1993), effective January 1, 1994, and applicable to sentences after that date. The reasoning for Ch. 93-406 includes changes to the habitual offender sentencing, sentencing guidelines revision, youthful offender disposition, gain time, and control release; but nothing is said about capital sentences or aggravators (see attached App. A). When the newly created Sec. 921.0011 is read as a whole, it is obvious that it applies to sentencing guidelines. The legislative intent for this new statute, if not totally clear in 1993, was made very clear in 1997 when the

legislature created the Florida Criminal Punishment Code for sentencing that does not include capital/death cases. Sec. 921.0011 was renumbered to Sec. 921.0021; and although there are some charges and additions, it is clear that Sec. 921.0021 applies to scoring sentences under the newly created Criminal Punishment Code (the definition for "conviction" remains the same). The purpose for Ch. 97-194 only mentions changes required to create statewide sentencing guidelines under the Criminal Punishment Code (see attached App. B).

In 2000 this Court dealt with two different definitions of "conviction" for two different statutes resulting in two different conclusions. In State v. McFadden, 772 So. 2d 1209, 1213 (Fla. 2000), this Court held that if a trial court withholds adjudication, there is no "prior conviction" for impeachment purposes under sec. 90.610(1). Since there was no definition of "conviction" in sec. 90.610(1), it was appropriate to consider prior case law. Id. at 1214. While in Raulerson v. State, 763 So. 2d 285,294-295 (Fla. 2000), this Court found "conviction" to mean both adjudicated and adjudication withheld cases based on both legislative intent and history in Ch. 322, Fla. Stat.

Then in 2005 this Court held a defendant's no contest plea and a withhold of adjudication constitutes a prior "conviction" for sentencing purposes. In order to come to this conclusion, this Court had to combine and consider as a whole two provisions of sec. 921.0021, Fla. Stat. (2002)—subsections (2) defining "conviction" and (5) defining "prior record." Montgomery v.

State, 897 So. 2d 1282, 1285 (Fla. 2005). Since "prior record" relates to the "primary offense" for sentencing under the Criminal Punishment Code, the reasoning in Montgomery only applies to sentencing under the Criminal Punishment Code and cannot be inferred to apply to aggravators in death sentence cases.

Most recently in Buzia v. State, 926 So. 2d 1203 (Fla. 2006), this Court held a contemporaneous guilty verdict for attempted murder could be used as a prior violent felony aggravating circumstance for the murder in the same trial. In so holding, the focus was on "conviction" meaning a valid guilty plea or jury verdict of guilty:

> Section 921.0011(2), Florida Statutes (2001), defines "conviction" as a "determination of guilt that is the result of a plea or a trial, regardless of whether adjudication is withheld." (Emphasis added). "The word 'convicted' as used in section 921.141(5)(b) means a valid guilty plea or jury verdict of guilty for a violent felony; an adjudication of guilt is not necessary...." McCrae v. State, 395 So.2d 1145,1154 (Fla. 1980)(emphasis added).

Buzia, 926 So. 2d at 1209. Not only did this Court define "convicted" as requiring either a guilty plea or jury verdict of guilty, but it continued to rely on McCrae. McCrae was the case this Court based its decision of Garron upon. When it comes to imposing death and using the prior violent felony conviction aggravator, Garron is still controlling.

If the legislature intended to use nolo pleas for the prior violent felony conviction aggravator in a death sentence case, then it must do so unequivocally and not in the midst of

sentencing guideline statutes. Death is different. See F.B. v. State, 852 So. 2d 226 (Fla. 2003). Any legislative intent to overrule Garron in its definition of "convicted" for the prior violent felony conviction aggravator must be clear. Since no such legislative intent exists to overrule Garron and this Court is still relying on the caselaw used to decide Garron on this issue, the trial court did not err in prohibiting the State from using the prior violent felony conviction in Mr. Smith's case.

CONCLUSION

This Court should reject the State's cross appeal as being moot or without merit. Mr. Smith is entitled to a new trial and penalty phase.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Bill McCollum, Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of June, 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).

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APPENDIX