

IN THE SUPREME COURT OF FLORIDA

CASE NO. 94,317

**JAMES FRANKLIN ROSE,**

Appellant,

vs.

**STATE OF FLORIDA,**

Appellee.

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ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL  
CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA, (Criminal  
Division)

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ANSWER BRIEF OF APPELLEE

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CASE NO. 94,317

JAMES FRANKLIN ROSE v. STATE OF FLORIDA

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for the State of Florida, Appellee herein, hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

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Florida Rule of Criminal Procedure 3.800(b) . . . . . 5, 6, 15

PRELIMINARY STATEMENT

Appellant, defendant below, will be referred to as "Appellant" or "Defendant". Appellee, State of Florida, will be referred to as "Appellee" or "State". Reference to the record will be by as "R", to the transcripts as "T", and to Appellant's brief as symbol "IB", followed by the appropriate page numbers.

STATEMENT OF THE CASE AND FACTS

Subject to the additions, corrections, and/or clarifications here and in the argument portion of the brief, Appellee accepts Appellant's statement of the case and facts for this appeal.

The instant matter is an appeal from the third sentencing of Appellant to death for the murder of Lisa Berry<sup>1</sup> ("Lisa"). During this resentencing, the jury was informed that eight year

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<sup>1</sup>Rose v. State, 425 So.2d 521 (Fla. 1982), cert. denied, 461 U.S. 909 (1983)(affirming conviction, reversing sentence, and remanding for resentencing); Rose v. State, 461 So.2d 84 (Fla. 1984), cert. denied, 471 U.S. 1143 (1985) (affirming death sentence); Rose v. State, 675 So.2d 567 (Fla. 1996) (finding penalty phase counsel ineffective, resentencing ordered).

old Lisa was taken from a bowling alley where her mother and grandparents were playing in a league. Last seen alive by her sister, Lisa was abducted by Appellant, whom she knew and who was her mother's ex-boy friend. When Appellant returned to the bowling alley to meet Lisa's mother, witnesses observed blood on his pants and one his van. When Lisa's nude body was found several day later floating in a canal, it was clear she had severe head injuries. The evidence collected established Appellant was responsible for the kidnapping and murder of Lisa. Rose v. State, 425 So. 2d 521, 522-23 (Fla. 1982), cert. denied, 461 U.S. 909 (1983).

Reporting to the scene to collect first-hand information, the medical examiner, Dr. Fattah observed Lisa's body floating in a canal in a state of moderately advanced decomposition. He explained he saw brain matter coming from her ears, indicating a severe head injury. Also, she had suffered an injury to her right temple plus two larger injuries to the back of her skull (T VIII 638). The defense objected to the crime scene photograph (State's Exhibit 3) even though it had been the subject of a stipulation between previous counsel. It also

objected to State's Exhibit 2 which the doctor identified as the best in the series of prints, and necessary to explain the injuries to the jury. Both objections were overruled (T VIII 632-38, 641, 648-52).

Death was caused by a large fracture at the base of Lisa's skull. It extended from the right to left side of the head and allowed brain matter to protrude with signs of fairly large hemorrhaging within the brain indicating she was alive when struck. Subsequent X-rays confirmed the visual observations made after removing the brain (T VIII 658-67, 681). The injuries were consistent with having been struck with a hammer or kicked with shoes like those in evidence (T VIII 679-80). Due to the severity of the injuries, Lisa probably died within four to eight minutes, but may have lingered an hour (T VIII 663, 668). In Dr. Fatteh's opinion, the blow to the right temple would not necessarily cause a fracture in a child of her age, however, there would have been bleeding. While it was possible for submersion in water to cause bone separation, these fractures were caused by blows to the head, not swelling from water (T VIII 669-71, 680).

Deputy King obtained Appellant's confession to a 1969 burglary in which the victim had been grabbed by her assailant and shoved to the floor causing her injury (T IX 922-31). Officer Dickun, testified he monitored Appellant's parole and recalled an arrest for a 1971 burglary involving attempted rape (T X 1067-75). Pleading guilty to a probation violation (1969 burglary) and being convicted of the 1971 burglary, Appellant was imprisoned (T X 1075-77). When paroled, supervision was to end May 27, 1977 (T X 1078).

Appellant's expert, Dr. Toomer, admitted he never testified for the State in a death penalty case, but had testified for the State in other cases (T XIII 1269-71). Twice, Dr. Toomer evaluated Appellant, in 1993 and 1997, during which he reviewed existing tests, administered new ones, interviewed Appellant and some friends, as well as reviewed witnesses' statements. He did not talk to Appellant's mother, step-father, or siblings, however, he had a letter from Rose Jernigan, Appellant's mother (T X 1101-11, 1117-21; XII 1220-22; XIII 1278-81). His study of the 1969 presentence investigation report revealed Appellant's relationship with his

step-father, Mr. Jernigan, had improved. (T XIII 1291-93).

Dr. Toomer admitted other psychiatrists disagreed with his diagnosis that Appellant had a borderline personality disorder. In 1971, Dr. Silver found Appellant of average intelligence with a sociopathic personality and Dr. Eikert's found Defendant legally sane. In 1973, Dr. Almedia found no evidence of psychosis or emotional distress. When these doctors retested him in 1976, each concluded he was an antisociopath (T XIII 1294-96, 1337-39).

In sentencing, victim impact testimony was not considered (R 342). Five aggravators were found, (1) defendant on parole, (2) prior violent felony convictions, (3) committed during kidnapping, (4) heinous, atrocious, or cruel ("HAC"), and (5) victim under the age of 12 (T XV 1591-99). No statutory mitigators were found, but eight non-statutory mitigators were found established. "Some weight" was given the three mitigators, (a) non-nurturing childhood, (b) employment history, (c) good characteristics; "little weight" was accorded the three non-statutory mitigators (d) below average intelligence, (e) good person adapted to prison life, (f) good

deeds, and finally, "very little weight" was assigned the last two mitigators (g) attempt at cooperation and (h) maintaining innocence. Outlining facts supporting his decision for the aggravators/mitigators and weighing these factors, the judge imposed the death penalty (R II 355-57; XV 1599-1611).

Invoking Florida Rule of Criminal Procedure 3.800(b), Appellant sought reconsideration of the sentence (R III 385-93). Finding the rule not applicable, the motion was denied (R III 429-30). A second motion was filed following the release of State v. Hootman, 709 So. 2d 1357 (Fla. 1998). While it was denied, the victim's age aggravator was stricken, remaining factors, including the addition of the non-statutory mitigators, "mental/emotional distress" and "alcoholism", reweighed, and the death penalty reimposed (R III 394-412, 422-28).

SUMMARY OF THE ARGUMENT

**POINT I** - Imposition of the death penalty is appropriate and proportional. The trial court considered the evidence, determined aggravating and mitigating circumstances, and made an appropriate weighing of these factors. A fair hearing was conducted, devoid of prosecutorial misconduct or evidentiary errors. Defendant's constitutional rights were not violated. This death sentence should be affirmed.

**POINT I A** - Even though instructed on the "victim under age of 12" aggravator, the sentence should be affirmed. Instructing on this aggravator is harmless beyond a reasonable doubt.

**POINT I B** - Rule 3.800(b) does not apply to capital cases; the motion was denied properly. Nonetheless, the conclusions regarding aggravating/mitigating factors have record support. There was no abuse of discretion weighing these factors.

**POINT 1 C i and iii** - Admission of two photographs depicting the location of and injuries to the victim's body was proper.

POINT I C ii and iv - There was no Brady<sup>2</sup> violation arising from the disclosure of the autopsy photographs. The prints were not exculpatory. The discovery issue was resolved properly.

POINT I D i, ii, and iii - No prosecutorial misconduct occurred in this trial. The prosecutors closing argument, cross-examination of Dr. Toomer, and use of physical and medical testimonial evidence was proper. However, if there was error, such was harmless beyond a reasonable doubt.

POINT I D iv and v - Victim impact testimony was admitted properly and Mrs. Berry's courtroom presence was proper.

POINT I D vi - The cumulative effect of the alleged errors does not constitute fundamental error nor require reversal.

POINT I D vii - The judge instructed the jury properly using "catch-all" non-statutory mitigating circumstance instruction.

POINT I E - Appellant's sentence is proportional.

POINT I F - The time between conviction and resentencing is not a violation of the Florida or United States

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<sup>2</sup>Brady v. Maryland, 373 U.S. 83 (1963).

Constitutions.

POINT I G - The challenge to execution by electrocution is moot because Florida has switched to lethal injection.

ARGUMENT

POINT I

DEATH SENTENCE WAS IMPOSED PROPERLY; IT IS PROPORTIONAL AND CONSTITUTIONAL. (restated).

Claiming numerous errors, Appellant seeks reversal of his death sentence and imposition of a life term or a new penalty hearing. The State disagrees. No reversible error occurred. The court weighed the aggravators and mitigators properly before imposing the death penalty. Defendant's constitutional rights were not violated. The sentence is proportional and should be affirmed.

POINT I A

INSTRUCTING JURORS THAT THE VICTIM'S AGE MAY CONSTITUTE AN AGGRAVATOR IS HARMLESS ERROR BECAUSE THE TRIAL COURT STRUCK THE AGGRAVATOR, REWEIGHED THE EVIDENCE AND REIMPOSED THE DEATH PENALTY. (restated)

Contending it was reversible error for jurors to consider Lisa's age an aggravator, Appellant asserts there is a likelihood a different recommendation would have been rendered (IB 32-34). The State disagrees. The judge admitted Lisa's age properly, but later determined the jury should not have

been instructed on this aggravator. Striking the aggravator, the remaining aggravators and mitigators were reweighed and a new sentence imposed as required by Sochor v. Florida, 504 U.S. 527 (1992); Rogers v. State, 511 So.2d 526, 536 (Fla. 1987)(reasoning "if there is no likelihood of a different sentence, the error must be deemed harmless"), cert. denied, 484 U.S. 1020 (1988). This Court should affirm.

The evidence revealed eight year-old Lisa was last seen in Defendant's company. (T VII 520, 565-66, 595-97). At no time did Appellant seek suppression of this information; the only assertion was that the age could not be used in aggravation (R I 142-65; T IV 73-76). Appellant may not complain that the age was disclosed Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982) (finding unless error is fundamental, matter must be preserved for review). Further, he should not be permitted to base his claim of error on a fact so entwined with the nature of the victim, especially where he did not object, and it was determined the death penalty would have been imposed absent reliance upon the victim's age.

It is well settled, a defendant "takes his victim as he

finds him and 'cannot be excused from guilt and punishment because the victim is weak and could not survive the torture he administered.'" Brate v. State, 469 So.2d 790, 795 (Fla. 2d DCA 1985) (quoting Swan v. State, 322 So.2d 485 (Fla. 1975)). The fact Lisa was eight years-old was a fact which could not be excised from the proceedings any more than her sex. In fact, her age and sex are so inherent in the case, no one considered excising them. Cf. Allen v. State, 662 So.2d 323, 328 (Fla. 1995)(finding reference to victim's family proper where defense characterized victim as 'lady who has a large family'); Muehleman v. State, 503 So.2d 310, 317 (Fla. 1987)(reasoning characterizing victim as "feeble, sickly, 97-year-old man" could excite jurors' passions, but court is not required to "rewrite on behalf of the defense the horrible facts of what occurred or make the slaying appear to be less reprehensible than it actually was"). Because Lisa was eight (T VII 520, 565-66, 595-97), there was no error in so characterizing her.

In the February 13, 1998 sentencing order, without benefit of State v. Hootman, 709 So.2d 1357 (Fla. 1998), abrogated on

other grounds, State v. Matute-Chirinos, 713 So.2d 1006, 1008 (Fla. 1998), the trial court found the age aggravator proven (R II 348). Contemporaneously, the court determined four other aggravators were proven beyond a reasonable doubt, and together, these outweighed the non-statutory mitigators (R II 342-59).

In response to Hootman, the judge revisited his ruling on the victim's age aggravator, struck the factor, and finding its use harmless, imposed the death penalty upon reweighing the aggravators and mitigators (R I 135-38, 142-65; III 394-412, 422-28). Recognizing application of section 921.141(5)(1), Florida Statutes was an ex post facto violation the judge announced:

... this Court has closely examined the record, including any evidence this Court and/or the jury could have legitimately relied on, and in addition conducted even a closer examination of the impermissible evidence which might have influenced both this Court's and/or the jury's decision.

(R II 424). Continuing, the judge reasoned:

... this Court originally weighed the five aggravating statutory factors found to exist against all the non-statutory

mitigating<sup>3</sup> factors found to exist, and concluded that death was the appropriate sentence for the Defendant. Even after this Court strikes the aggravating factor of "the victim of the capital felony was a person less than twelve (12) years of age", there are four valid aggravating factors which remain to be weighed against the non-statutory mitigating factors that this Court previously accorded either some, little, or very little weight. It should be noted, that striking one aggravating factor does not necessarily require resentencing because, if there is no likelihood of a different sentence, the error must be deemed harmless.... Furthermore, this Court did not give disproportionate weight to the aforementioned stricken aggravator when compared to the others. Additionally, this Court and the jury were made aware of the fact that the victim of the murder was a person less than twelve years of age by the evidence presented, notwithstanding the inclusion of the aggravating factor enumerated in F.S. Section 921.141(5)(1). Finally, this Court has carefully reweighed the remaining four valid aggravators against the non-statutory mitigators previously found to exist and finds beyond a reasonable doubt, that the elimination of

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<sup>3</sup>Apparently, the judge reconsidered the existence of the non-statutory mitigating factors (1) homicide committed under influence of extreme mental or emotional disturbance and (2) Defendant is an alcoholic (R II 354, 356; R III 425). In the Order on Defendant's Second Motion to Correct Sentencing, these were found and given "some" and "very little" weight respectively (R III 425).

said invalid aggravating factor does not disturb this Court's determination that death by electrocution is the appropriate sentence for the Defendant. This Court has also conducted a thorough review of all the evidence presented to the jury and finds that the inclusion of the aforementioned invalid aggravating factor would not have effected the jury's recommendation of death, which was by a vote of nine (9) to three (3). This Court further finds that no reasonable juror, when weighing the remaining four valid aggravators, against the non-statutory mitigators found to exist, would have made any recommendation other than the one that was reached. Therefore, this Court's previous finding that the ex post facto aggravating factor enumerated in Florida Statute 921.141(5)(1) existed, was harmless error. Finally, this Court finds that the Defendant's death sentence is not disproportionate to other cases where the Florida Supreme Court has upheld the death sentence. In conclusion, this Court finds, that the totality of the remaining aggravating factors and the lack of significant mitigating circumstances conclusively demonstrates that death is the appropriate sentence in this case.

(R III 426-28).

A review of the original sentencing order and the order on Defendant's Second Motion to Correct Sentencing reveals the judge merely did not count the aggravators and mitigators in determining a sentence as forbidden in State v. Dixon, 283

So.2d 1, 10 (Fla. 1973). Instead, a weighing process was employed as required by Sochor, 504 U.S. at 532. Hence, the judge's conclusion the death sentence is appropriate, even after striking one aggravator, should be affirmed on the basis the initial use of the aggravator was harmless beyond a reasonable doubt.

Recently, in Zack v. State, 25 Fla. L. Weekly S19 (Fla. Jan. 6, 2000), this Court addressed the retroactive application of an aggravator. Initially, when discussing an unsupported aggravator, the Court reasoned application of this aggravator was harmless because "there [was] no reasonable possibility that the error contributed to the sentence because without this aggravating factor there [were] at least four other valid aggravators...." Zack, 25 Fla. L. Weekly at S22 (footnote omitted). Under Peterka v. State, 640 So. 2d 59, 71 (Fla. 1994), reversal of a death sentence is proper only where a correct weighing of the aggravators and mitigators by the trial court, reasonably could have resulted in a reduced sentence. See also, Robertson v. State, 611 So.2d 1228, 1234 (Fla. 1993); Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484

U.S. 1020 (1988). Conversely, if "there is no likelihood of a different sentence, the error is harmless." Peterka, 640 So.2d at 71. When addressing an ex post facto application of an aggravator in Zack, this Court applied the harmless error analysis and determined the remaining aggravators<sup>4</sup> supported the death penalty. Zack, 25 Fla. L. Weekly at S24.

Likewise, this Court should conclude the remaining aggravators (1) defendant on parole, (2) prior violent felony convictions, (3) homicide committed during kidnapping, and (4) HAC (R II 342-48) support the death sentence especially because the non-statutory mitigators were of "some" to "very little" weight. The mitigation identified in the Order on Defendant's Second Motion to Correct Sentencing was (1) mental/emotional disturbance (2) non-nurturing childhood (3) employment history (4) good characteristics, (5) below average intelligence, (6) person adapted to prison life; (7) good deeds; (8) alcoholic/intoxicated; (9) attempt at cooperation; and (10) maintains innocence (R II 354-57; III 425; T XV 1607-11).

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<sup>4</sup>Aggravators remaining were murder committed (1) during robbery, sexual battery, or burglary; (2) pecuniary gain; (3) HAC; and (4) cold calculated and premeditated manner.

Clearly, when the remaining valid aggravators are weighed against the non-statutory mitigation, any error in considering the age of the victim is harmless beyond a reasonable doubt<sup>5</sup>. Pietri v. State, 644 So.2d 1347, 1353-54 (Fla. 1994)(concluding erroneous CCP finding harmless because three other aggravators and no mitigators, supported death penalty); Coney v. State, 653 So.2d 1009, 1015 (Fla.1995)(holding error in finding great risk aggravator was harmless in light of four aggravators); Castro v. State, 644 So.2d 987, 991 (Fla. 1994)(finding reliance on CCP harmless with three other aggravators proven). This Court should affirm the sentence.

Analogous to instructing the jury on the victim's age aggravator, only to strike it, is giving a flight instruction. Even though the flight instruction is no longer appropriate, the facts showing the defendant fled from the police are

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<sup>5</sup>Appellant asks the Court to speculate upon what sentence the initial trial jury may have rendered absent a charge under Allen v. United States, 164 U.S. 492 (1896) (IB 32). As done in Rose v. State, 461 So.2d 84, 86 (1984) and Rose v. State, 675 So.2d 567, 574 n. 10 (Fla 1996), this should be rejected. What is clear, Appellant's prior two juries, which had not been given the "victim's age" instruction, recommended the death penalty.

admissible and may be argued to the jury. Fenelon v. State, 594 So.2d 292, 295 (Fla. 1992)(abolishing flight instruction, but permitting parties to argue facts of flight); Power v. State, 605 So.2d 856, 861 (Fla. 1992)(giving flight instruction harmless because facts supported defendant was fleeing); Schafer v. State, 537 So.2d 988, 991 (Fla. 1989). Hence, while an instruction may be found erroneous, the mere admission of facts supporting it does not require reversal.

Here, because Lisa's age was admitted properly as a fact of her nature, the parties could utilize the fact when characterizing her. This Court should find that instructing the jury on the victim's age aggravator was harmless beyond a reasonable doubt and affirm the death penalty imposed.

#### POINT I B

TRIAL COURT DID NOT ERR IN REFUSING TO VACATE SENTENCING ORDER; PROPER WEIGHING OF AGGRAVATING AND MITIGATING CIRCUMSTANCES WAS CONDUCTED. (restated).

It is Appellant's contention sentencing errors based upon the age aggravator and "errors committed in determining and applying the aggravators and mitigators" required the trial court to correct its sentence under Rule 3.800(b) (IB 34). The

State submits the trial court did not err in denying the Rule 3.800(b) motion as capital cases are excluded from the application of rule. Recently this Court decided capital cases are excluded from rule 3.800(b). Amendment to Florida Rules of Criminal Procedure 3.11(e), 3.800 and Florida Rule of Appellate Procedure 9.020(h) and 9.600, 25 Fla. L. Weekly S37 (Fla. Jan. 13, 2000). As such, the trial court did not err in denying the motion and this Court should affirm. For the same reason, Appellant may not rely upon his Rule 3.800 motions to preserve sentencing issues for appeal. In his sentencing recommendation, Defendant admitted each aggravator was proven except for HAC (R II 254-59, 269). However, assuming arguendo the Court will review the merits of this challenge, it will find the judge's determination related to mitigators and aggravators, the weighing of these factors, and the decision to impose the death penalty has record support and met the dictates of Sochor, 504 U.S. 532; Campbell v. State, 571 So.2d 415, 419-20 (Fla. 1990).

Aggravators must be proven beyond a reasonable doubt. Geralds v. State, 601 So.2d 1157, 1163 (Fla. 1992); Dixon, 283

So.2d at 9. Conversely, mitigating factors are "reasonably established by the greater weight of the evidence." Campbell, 571 So.2d at 419; Nibert v. State, 574 So.2d 1059, 1061 (Fla. 1990). The trial court "must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factor, it is truly of a mitigating nature." Campbell, 571 So.2d at 419. Whether a mitigator is established lies with the judge and "[r]eversal is not warranted simply because an appellant draws a different conclusion." Sireci v. State, 587 So.2d 450, 453 (Fla. 1991), cert. denied, 503 U.S. 946 (1992); Stano v. State, 460 So.2d 890, 894 (Fla. 1984). Resolution of evidentiary conflicts is the trial court's duty; "that determination should be final if supported by competent, substantial evidence." Id. Similarly, the relevant weight assigned each mitigator "is within the province of the sentencing court." Campbell, 571 So.2d at 420. See also, Alston v. State, 723 So.2d 148, 162 (Fla. 1998)(finding where detailed sentencing order identified mitigators, weight assigned each is within court's discretion);

Bonifay v. State, 680 So.2d 413, 416 (Fla. 1996)(same); Ferrell v. State, 653 So.2d 367, 371 (Fla. 1995)(same). A weight assignment is reviewed under the abuse of discretion standard. Cole v. State, 701 So.2d 845, 852 (Fla. 1997)(deciding mitigator's weight is within judge's discretion, subject to abuse of discretion standard).

Given these standards, clearly the judge complied with the law, and fulfilled his sentencing duty. The reasoning for each mitigator and aggravator has record support and was outlined in the detailed sentencing order and Order on Defendant's Second Motion to Correct Sentencing. Also, the judge identified each asserted mitigator and delineated the weight assigned each one established (R II 348-58; R III 425-27). There was no error. However, for the Court's convenience, each challenge will be taken in turn.

a. "Prior Violent Felony"

Seeking reversal, Defendant claims the 1969 burglary with intent to commit grand larceny did not involve violence (IB 35). This issue is unpreserved; the objection below, was on the basis of improper doubling of aggravators (R II, 254-59;

T III 37-38). This Court should not entertain the claim. Steinhorst, 412 So.2d at 338 (finding "in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below"). Nonetheless, because the facts of the 1969 burglary showed it was committed with violence, this aggravator was proven beyond a reasonable doubt.

The elements of a crime are not the deciding factor; the facts surrounding the crime determine whether it is a violent felony. Gore v. State, 706 So.2d 1328 (Fla. 1998); Rhodes v. State, 547 So.2d 1201 (Fla. 1989). In Johnson v. State, 465 So.2d 499 (Fla. 1985), overruled on other grounds, In re Instructions in Criminal Cases, 652 So.2d 814, 815 (Fla. 1995), this Court stated:

... whether a previous conviction of a burglary constitutes a felony involving violence under section 921.141(5)(b), Florida Statutes (1981), depends on the facts on the previous crime.

Johnson, 465 So.2d at 505; Gore, 706 So.2d at 1333 (finding armed trespass supports prior violent felony aggravator).

The facts show the 1969 burglary was a violent felony.

According to Detective King, Etta Celia was awakened and walking into the hallway, was grabbed from behind and told, "Don't make a noise. I don't want to hurt you. I just want to get out of here"; "Don't scream or I'll kill ya" (T IX 924-26). Subsequently, she was shoved to the floor and suffered a bruise, laceration, and two loosened teeth (T IX 927-31). Appellant was convicted of this felony (T IX 929-30). Based upon this, it was a violent felony.

Also, Defendant does not challenge the finding his 1971 burglary conviction was a prior violent felony. This Court determined Appellant had a prior violent felony conviction. Rose, 461 So.2d at 88. As such, there is a valid basis for the aggravator, and should the Court strike the 1969 burglary, reliance upon it was harmless. Mahn v. State, 714 So.2d 391, 399 (Fla. 1998) (finding harmless error where court relied on robbery as prior violent felony improperly when other factors supported aggravator); Robinson v. State, 610 So.2d 1288 (Fla. 1992). With the prior violent felony aggravator proven, there was no sentencing error.

b. Concurrent use of "Prior Violent Felony" and "Defendant on Parole"

aggravators.

No error occurred in employing prior violent felony and defendant on parole aggravators. Appellant's reliance upon Castro v. State, 597 So.2d 259 (Fla. 1992) and Monlyn v. State, 705 So.2d 1 (Fla. 1997) is misplaced as in those cases the improper doubling was based upon murder committed during a robbery and for pecuniary gain while here the aggravators are defendant on parole and prior violent felony. While based upon the same burglaries, there is no doubling as one aggravators relates to parole status and the other addresses the felony's violent nature. Hildwin v. State, 727 So.2d 193, 196 (Fla. 1998)(finding no doubling when both aggravators of existing imprisonment and prior violent felony were relied upon for sentencing), cert. denied, 120 S.Ct. 139 (1999); Muhammad v. State, 494 So.2d 969, 976 (Fla. 1986). Appellant's challenge must fail.

c. "Homicide Committed During Kidnapping"

The claim, undue weight was given the fact the homicide was committed during the course of a kidnapping, is meritless (IB 35). The evidence revealed Mrs. Berry never authorized

Defendant to take Lisa from the premises, and she was last seen alive with Appellant (T VII 520-22, 557-58, 566-73, 580, 595-98). This Court found these circumstances sufficient to uphold the convictions for murder and kidnapping. Rose, 425 So.2d at 523. Hence, the aggravator was proven beyond a reasonable doubt and relied upon properly.

d. "Homicide Heinous, Atrocious, or Cruel"

Challenging the HAC finding, Appellant asserts the State did not show the crime was extraordinarily painful or that Lisa did not lose consciousness immediately (IB 36). Based upon the totality of the evidence, from kidnapping, to stripping Lisa of her clothes, and the final blows which ended her life, HAC was proven beyond a reasonable doubt.

For support, Appellant cites Rhodes, 547 So.2d at 1208, in which the evidence suggested the victim was semiconscious due to intoxication when attacked. Here, Lisa was alert when last seen (T VII 538-39, 570-71, 595-97). Thus, unlike the victim in Rhodes, she experienced the full terror of the kidnapping and murder.

HAC focuses on the manner and means by which the murder is

accomplished and the circumstances surrounding the killing. Stano, 460 So.2d at 893. In determining HAC, this Court found "fear and emotional strain" preceding the victim's death could contribute "to the heinous nature of a capital felony." Adams v. State, 412 So.2d 850, 857 (Fla. 1982).

Even where the victim's death may have been almost instantaneous (as by gunshot), we have upheld [the HAC] aggravator in cases where the defendant committed a sexual battery against the victim preceding the killing, causing fear and emotional strain in the victim.... For purposes of this aggravator, a common-sense inference as to the victim's mental state may be inferred from the circumstances.

Banks v. State, 700 So.2d 363, 366 (Fla. 1997), cert. denied, 118 S.Ct. 1314 (1998)(citations omitted); Rivera v. State, 561 So.2d 536, 540 (Fla. 1990)(finding fear/emotional strain supports HAC).

When the body was found, injuries to the right temple and to the back of the head were visible. A large fracture at the base of her skull extended from one side to the other, with cerebral hemorrhaging indicating Lisa was alive when struck. Most likely, death occurred within four to eight minutes, but she may have lingered for an hour. Within a reasonable degree

of medical certainty, Dr. Fatteh expected there would have been blood spatter from the temple injury (T VIII 636-38, 652-55, 658, 662-63, 668-69, 679-80). The lack of blood on the victim's clothes and her broken pants zipper indicated her clothes were removed forcibly before death (T VIII 636-38, 775-78, 1042-43). In contrast, her hair and blood were on Defendant's clothing (T X 1012, 1022, 1053-54, 1063).

Death was not immediate, thus, the mental anguish and physical abuse suffered were relevant to HAC. As the trial judge stated:

... the Defendant acted with utter indifference to the suffering of this victim. Clearly, striking an eight (8) year-old victim in the head several times with a blunt object, resulting in severe head injuries and then disposing of her nude body in a canal establishes this criteria. This murder was clearly accompanied by such additional acts so as to set it apart from the norm of capital felonies. It was indeed a conscienceless, pitiless crime which was unnecessarily torturous to Lisa Berry.... Clearly, the direct and circumstantial evidence of this aggravating factor establishes the HAC aggravating factor beyond any reasonable doubt.... This Court can not imagine greater torture than the mental anguish of an eight (8) year-old child kidnapped by her mother's ex-boyfriend and beaten to

death. This murder was extremely wicked and vile and inflicted a high degree of pain and suffering on the victim.

(R II 347-48)(citations omitted).

In Preston v. State, 607 So.2d 404, 409 (Fla. 1992), HAC was established where the victim was forced to drive to a remote location, walk at knife point, and disrobe before being fatally stabbed. It was reasoned, "... the victim suffered great fear and terror during the events leading up to her murder. Fear and emotional strain may be considered as contributing to the heinous nature of the murder, even where the victim's death was almost instantaneous." Id. at 409-419 (citations omitted). Likewise, in Schwab v. State, 636 So.2d 3, 6 (Fla. 1994), HAC was proven where an eleven-year old boy was asphyxiated and his nude body and clothes, which had been cut from him, were hidden in a footlocker in a remote area. The Court opined, "[a]lthough the victim may have gone willingly with Schwab initially, the conclusion that at some point he was held against his will is inescapable." Id.

Similarly, while Lisa knew Appellant and may have gone with him willingly, it is reasonable to assume as they drove

further away and when her clothes were removed, she was being restrained and felt terror contemplating what abuse might follow. Under these circumstances, HAC was proven beyond a reasonable doubt.

However, should HAC be stricken, the sentence may be upheld. Shere v. State, 579 So.2d 86, 96 (Fla. 1991)(striking HAC, but affirming death sentence based upon very little mitigation and remaining aggravators). Here, the remaining valid aggravators, (1) defendant on parole; (2) homicide committed during kidnapping; and (3) prior violent felony convictions out-weight the non-statutory mitigation. The sentence should be affirmed.

e. "Victim Less than 12 Years of Age"

The State re-adopts its argument made therein in Point I A.

f. "Extreme Mental/Emotional Distress"

It is Defendant's position the statutory mitigator, "extreme mental/emotional disturbance" should have been found. (IB 37). Alternately, he claims, at the minimum, it should be a non-statutory mitigator (IB 40). The State submits the

evidence does not support a finding Defendant's mental state qualifies as a statutory mitigator, but recognizes it was found to be a non-statutory mitigator deserving of some weight (R III 425). Because the mitigator was found and entered the sentencing analysis, the decision may not be overturned as it is supported by competent, substantial evidence. Ferrell, 653 So.2d at 371; Sireci, 587 So.2d at 453; Campbell, 571, So.2d at 420; Stano, 460 So.2d at 894.

Dr. Toomer's opinion that Appellant had a borderline personality disorder, was under extreme mental/emotional distress, and could not conform his behavior to the requirements of law (T XII 1227-28, 1240, 1244) was undermined by the evidence. While Dr. Toomer had worked<sup>6</sup> on many capital cases, none were for the State (T XII 1256-71). Also, he never spoke to Defendant's mother, step-father, or siblings regarding personal history, and although much was made of Appellant's illegitimacy and poor relationship with his step-father, the record revealed the relationship had improved greatly by 1969.

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<sup>6</sup>Initially, Dr. Toomer recalled working on three capital cases, but later, the number jumped to 14 (T XII 1256-71).

Moreover, Appellant always had a close relationship with his mother. The psychiatrists, Dr. Silver, Dr. Eikert, and Dr. Almedia, who had examined Appellant, concluded he was sane and a sociopath (T XIII 1294-96, 1336-39). In fact, Dr. Almedia found no psychosis or emotional distress during either his 1973 or 1976 examination (T XIII 1337-39).

Floyd and Ruth Templeton, Defendant's friends and employer, testified he was a good friend who had a nice relationship with their grandchildren; he was honest, hardworking, and trustworthy. (T X 1111-21). While the evidence indicated Defendant had been drinking that evening, several witnesses testified he exhibited no signs of intoxication (T VII 615, 697, 702, 737, 745). In fact, Appellant told Detective King he was not intoxicated that night (T IX 938). Additionally, Defendant's actions of covering his crime by discarding Lisa's clothes in different locations between the bowling alley and the canal where her body was found, shows he knew to hide his crime (T VIII 775; IX 839-43, 918; X 962, 972, 982). Moreover, he was clever enough to lure her outside and send her younger sister to get sodas so that

Lisa could be secreted away before anyone noticed her missing (T VII 595-98). Similarly, the fact he tried to cover the blood on his pants, and told various stories to friends and police to explain his absence, and dirty, blood spattered appearance proves he understood the criminal nature of his conduct, and was in control of his faculties to the point he could hide his crime (T VII 529-31, 541-46, 550-51, 559-63, 572, 574-79; VIII 686-87, 695-96, 707-11; IX 855-61, 866-69, 897-902, 934-36). This evidence contradicts any conclusion Appellant could not conform his behavior to the requirements of law and was operating under extreme mental/emotional distress.

With the conflicts in the above referenced evidence, it cannot be said the judge erred in finding the statutory mitigators unproven, but determining the "mental/emotion disturbance" could qualify as a non-statutory mitigator of some weight. The dictates of Sireci, 587 So.2d at 453; Campbell, 571, So.2d at 420 were met. The judge did not abuse his discretion regarding this evidence.

g. "Non-nurturing childhood"

Contrary to Appellant, there was no abuse of discretion in the weight assigned the "non-nurturing childhood" mitigator. The weight assigned a mitigator is within the trial court's discretion. Cole, 701 So.2d at 852. While there was a strained relationship between Appellant and his step-father at one time, it had improved by 1969, some seven years before the homicide. According to Officer Van Sant, Defendant never claimed mistreatment by his parents (T IX 889, 912-13; X 1083-84; 1291-93). As such, there was no abuse in assigning some weight to this non-statutory mitigator.

h. "Defendant of Below Average Intelligence"

Appellant's I.Q. tests showed he could be deemed of average intelligence. As testified by Dr. Toomer, the tests on which Appellant scored 84 and 89 did not have redundancy to guard against malingering, while the test administered in prison, on which he scored 99, had redundancy, and rebuts any suggestion the higher I.Q. score was due to rehabilitation (T XIII 1323-28). This is competent, substantial evidence supporting the judge's findings. On these facts, the claimed

mitigators was weighted properly. There was no abuse of discretion. Cole, 701 So.2d at 852.

i. "Alcoholic /Intoxicated During Murder"

In its sentencing order, the court did not find this non-statutory mitigator, however, in the Order on Defendant's Second Motion to Correct Sentencing, it was found and accorded "very little weight" in the analysis (R II 356; III 425). Even if Appellant had a drinking problem, the witnesses did not report Appellant drunk, and Defendant admitted he was not intoxicated (T VII 615, 697, 702, 737, 745; IX 938). Defendant has not shown an abuse of discretion. Cole, 701 So.2d at 852.

j. Other Non-statutory Mitigating Factors

Without explanation, Appellant maintains the judge erred in not assigning more weight to the remaining non-statutory mitigators (IB 42). Such claim is without merit. The court gave its findings and reasoning in writing; such were supported by the record. As such, the judge complied with Cole, 701 So.2d at 852 and Campbell, 571 So.2d at 419-20. The death sentence should be affirmed.

POINT I C

REVERSIBLE ERROR DID NOT PERMEATE PENALTY  
PHASE PROCEEDINGS (restated).

Appellant maintains the judge committed evidentiary errors which became the feature of the case and cast serious doubt upon the proceedings requiring reversal (IB 44). Disagreeing, the State submits the photographic evidence was relevant to familiarize the jury with the case facts and aggravators; they were not unduly prejudicial. Further, there was no Brady or prejudicial discovery violation related to autopsy photographs. Any failure to disclose the photographs was harmless under State v. Schopp, 653 So.2d 1016 (Fla. 1995).

POINT I C i and iii

TRIAL COURT DID NOT ERR IN ADMITTING TWO  
PHOTOGRAPHS OF LISA BERRY AS BOTH WERE  
RELEVANT AND NECESSARY FOR A COMPLETE  
UNDERSTANDING OF THE HOMICIDE (restated).

Under section 921.141(1), Florida Statutes, in capital sentencing, "evidence may be presented as to any matter that the court deems relevant to the nature of the crime."

Likewise:

... it is within the sound discretion of the  
trial court during resentencing proceedings

to allow the jury to hear or see probative evidence which will aid it in understanding the facts of the case in order that it may render an appropriate advisory sentence.

Teffeteller v. State, 495 So.2d 744, 745 (Fla. 1986). As reasoned in Henderson v. State, 463 So.2d 196, 200 (Fla.), cert. denied, 473 U.S. 916 (1985), "[t]hose whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments." The admission of photographic evidence is within the trial court's sound discretion, and will not be overturned absent a showing of a clear abuse. Pangburn v. State, 661 So.2d 1182, 1187 (Fla. 1995); Wilson v. State, 436 So.2d 908 (Fla. 1983).

Here, two photographs<sup>7</sup> of Lisa were admitted into evidence; one was of her body in the canal and the other was of her head showing an injury (T VIII 636-37, 648-52). Asserting the photographs were gruesome, Appellant contended they should be excluded, "not because of the nature of the killing, but

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<sup>7</sup>Appellant does not identify the photographs challenged, however, because only two were admitted, it is assumed he attacks both. But see, Lott v. State, 695 So.2d 1239, 1243 (Fla.) (finding photograph's gruesomeness procedurally barred where photographs not identified), cert. denied, 522 U.S. 986 (1997).

because of what [defense counsel] would consider to be after-death activity in terms of what happened to the body while it was in the water for three to four days" (T III 15). A ruling on this challenge was deferred until the medical examiner's testimony (T III 15-18).

Dr. Fatteh testified he visited the crime scene depicted in State's Exhibit 3 and the State noted this photograph had been admitted into evidence during the guilt phase (T VIII 635-36). Defense counsel stated "Judge, I'm going to raise the same objection I have previously raised as to that particular photo, although it's subject to a previous stipulation between previous counsel." The objection was overruled (T VIII 636-37, 654).

The predicate for admission of the second autopsy photograph (State's Exhibit 2) was proffered outside the jury's presence (T VIII 648-52). According to Dr. Fatteh, he had viewed Exhibit 2 and it was the best of the series of photographs taken of Lisa as it demonstrated the injury, and helped him explain to the jury the nature and extent of the wound he observed; it was necessary for his testimony (T VIII

648). In fact, Dr. Fatteh stated, "This photograph reveals the injury to the right temple very clearly, and it will certainly help me in getting it across to the jury much better in terms of picture than just words" 9T VIII 649). Based upon Dr. Fatteh's testimony the court ruled:

I'm going to deny that request. I have had an opportunity to review that photograph. I am aware that there are a multitude of photographs that were taken at the M.E.'s office.

The doctor has indicated that this particular photograph will help describe for the jury the injuries sustained to the victim in this case, that he did review others, and this is the one that would best help him.

I think in the overall scheme of things, the jury has seen one photograph, and it is my intention to give a limiting instruction  
....

(T VIII 651-52). Subsequently, the judge advised the jury:

... I just want to inform the jury that the utilization of this photograph is for purposes of helping the medical examiner, in assisting him in his testimony, describing this particular injury in question and for no other reason.

(T VIII 654). State's Exhibit 2 was accepted (T VIII 654-55).

The mere fact a photograph is gruesome does not preclude

its use. Thompson v. State, 565 So.2d 1311, 1314-15 (Fla. 1990) (reasoning fact "photographs are gruesome does not render their admission an abuse of discretion"). Where the court has viewed the evidence and determined it relevant and necessary for a complete understanding of the testimony, the ruling should not be overturned. Lott v. State, 695 So.2d 1239, 1243 (Fla.)(finding no error where judge viewed prints and found them necessary and relevant to demonstrate manner of death, nature of injuries, and how they were inflicted), cert. denied, 522 U.S. 986 (1997); Larkins v. State, 655 So.2d 95, 98 (Fla. 1995)(same).

Defendant's reliance upon Czubak v. State, 570 So.2d 925, 929 (Fla. 1990) is misplaced because in that case the photographs admitted did not assist in the victim's identification or manner of death. Here, State's Exhibits 2 and 3 were admissible as they helped the jury understand the underlying case facts as well as the method and manner of death which was relevant to aggravation. Teffeteller v. State, 495 So.2d 744 (Fla. 1986). The print helped explain the location and extent of Lisa's injury. Floyd v. State, 569 So.2d 1225

(Fla. 1990), cert. denied, 501 U.S. 1259 (1991). Both photographs were necessary to assist the medical expert in describing the injury suffered by Lisa, the manner in which she was discovered, and the injuries (T VIII 635-38, 654-55). Being relevant to the nature of the crime, they were admitted properly.

POINT I C ii and iv

THE RECENT DISCLOSURE OF AUTOPSY  
PHOTOGRAPHS DID NOT CONSTITUTE A BRADY  
VIOLATION NOR PREJUDICE UNDER SCHOPP  
(restated).

Appellant asserts Brady and Richardson<sup>8</sup> violations occurred when certain autopsy photographs were disclosed during the hearing (IB 45-47). He complains the photographs should have been disclosed so the defense could have had an expert review and utilize them as exculpatory evidence or to defeat an aggravator (IB 46). Also, he claims the trial court erred in not ruling after the Richardson hearing (IB 47). Both arguments are meritless.

Although the State made a record to show how the

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<sup>8</sup>Richardson v. State, 246 So.2d 771 (Fla. 1971).

photographs at issue were discovered, Appellant never claimed a Brady or discovery violation, nor was the trial court asked to rule on these matters after the State presented its witnesses. As such, the matter is unpreserved. Steinhorst, 412 So.2d at 338 (holding for an issue to be preserved the matter asserted on appeal must be the same objection raised below). Moreover, it is well settled, it is the moving party's burden to secure rulings on its motions, and failure to obtain a ruling, absent the court's refusal to rule, waives the motion. Armstrong v. State, 642 So.2d 730, 740 (Fla. 1994)(finding claim procedurally barred where judge heard motion, but never ruled); Richardson v. State, 437 So.2d 1091, 1094 (Fla. 1983). Furthermore, the record does not contain a defense "Notice of Discovery" as required by Florida Rule of Criminal Procedure 3.220, therefore, only Brady material must be disclosed. Raulerson v. State, 420 So.2d 567 (Fla. 1982), cert. denied, 463 U.S. 1229 (1983)(finding defendant's non-specific request for exculpatory evidence did not establish Brady violation when prosecutor failed to review his files for such evidence); Antone v. State, 382 So.2d 1205 (Fla.), cert. denied, 449 U.S.

913 (1980). This Court should decline to entertain these issues. Assuming the Court reaches the merits, it will find there is no Brady violation and the late disclosure is harmless beyond a reasonable doubt under Schopp.

At issue here, are two sets of photographs, one containing two prints of the back of Lisa's skull and the other containing 16 autopsy photographs (T VII 1179-82). These prints appear to have been missing from the medical examiner's file for a significant period of time (T XII 1179). However, from transcripts of prior sentencing and postconviction proceedings, it appears at least 50 crime scene and autopsy photographs had been viewed by prior defense counsel and experts, however, no one could represent the defense saw these 18 prints (T XII 1181-84). Upon discovery the autopsy file was devoid of photographs, an ensuing investigation resulted in the discovery of autopsy negatives. Immediately, prints were made and turned over to the court and defense. (T X 1125-29; XII 1178-1204; XV 1528-67).

With this disclosure, the judge suggested Dr. Perper, the present medical examiner, and/or others, testify about this

matter. The trial court offered Appellant the opportunity to view the photographs, take additional time to review them with the defense witnesses and Dr. Perper, and to proffer testimony (T XII 1184-85, 1193). Without putting on its medical expert, Dr. Wright, the defense sought an advisory evidentiary ruling on the admissibility of the prints, however, not having heard from either parties' medical expert, the judge declined to make a ruling in a vacuum, but again offered defense counsel time to discuss the matter with Appellant and experts (T XII 1185-86). The judge said, "I want Mr. Rose to be able to make an informed and intelligent decision with regard to how he wants to pursue the balance of his case. My understanding when we discussed this issue last week ... in relationship to Dr. Wright, you were awaiting a determination from the doctor after you had an opportunity to present him with the two photographs that represented the skull fracture" (T XII 1191).

During discussion of the matter, the following transpired:

MR. SINGHAL (defense counsel): I have talked it over with Mr. Rose, and just based on the chance that some of these additional photographs may come in, I am not calling Dr. Wright.

THE COURT: I am still giving you the chance to proffer Dr. Wright's testimony for the record, and thereafter have the Court make a determination whether or not the matters may be material, and because without his testimony, it is absolutely impossible for this Court to judge what would be appropriate and relevant in rebuttal, if anything, because I haven't heard Dr. Wright's testimony, and therefore, the possible introduction of any of these photographs.

MR. SINGHAL: Although Dr. Wright is not here to give the proffer at this time, he certainly would, if called, he would testify as to the wound on the temple being caused by maggots. And in terms of the opinion he would form, in terms of the fracture, based on the two new photographs, which I got on Friday, he would testify that they are consistent with either a fracture or a suture.

It's just my opinion that that's ultimately going to open the door. I just can't take the chance of those pictures coming in.

...

THE COURT: My suggestion was, as to whether or not we should break and give the defense the opportunity to consult with Dr. Wright, or any other doctors and experts they feel are necessary, to deal with these particular issues. Because again, while I understand that the defense is making a tactical and strategic decision based upon the potential and the possibility that one of these photos may become relevant and

germane to rebuttal, in the absence of any proffer, any testimony, there may be absolutely no relevance to that. It might be a moot point. I don't know. I am willing to offer the defense whatever time and experts they feel are necessary and appropriate.

MR. SINGHAL: Candidly I would like to move on with Dr. Toomer at this point.

(T XII 1196-98)(emphasis supplied). The judge inquired:

THE COURT: If I tell you that these 16 photographs, none of them are going to be introduced in rebuttal, are you going to call Dr. Wright?

MR. SINGHAL: Then I still have the issue as to the two fractures photographs.

THE COURT: The two fracture photographs the doctor has had an opportunity to see?

MR. SINGHAL: Correct. I have, in fact, told the State what Dr. Wright's position is on that. I am making the decision not to call Dr. Wright.

THE COURT: This is a matter that you have consulted Mr. Rose on?

MR. SINGHAL: Yes.

THE COURT: Mr. Rose, do you wish your attorney to call Dr. Wright as an expert on your behalf in this penalty phase?

THE DEFENDANT: No, sir.

THE COURT: My understanding is that he did testify on your behalf back in 1983, and part of his testimony consisted of an opinion that one of the fractures that the State alleges was part of the cause of death in this case was not, in fact, a fracture, and that the victim in this case did not have a skull fracture and you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Last week the State produced two photographs that, and I haven't seen them.... But I am led to believe based upon the proffer that's been made in open court, with all parties present last week, that those photographs would be testified to by the current medical examiner, Dr. Perper, that they do, in fact, reflect skull fractures.

These 16 photographs, while it may become an issue in terms of whether or not one of them may be relevant, the fact still remains that the State does have those other two photographs which they would be utilizing with Dr. Perper in rebuttal to clearly demonstrate from their perspective that those are, in fact, skull fractures.

So the issue as to whether or not that one photograph with the maggots covering the face of the victim is relevant or not, the Court certainly could exclude these 16 photographs and permit the State to utilize the two that everybody has had an opportunity to view for a period of, at this point almost five or six days.

(T XII 1200-02)(emphasis supplied). Concerned this could become an ineffective assistance of counsel claim, the court once more offered to allow the defense to take whatever time necessary to discuss the prints with its experts and proffer testimony (T XII 1206-06). Defense counsel acknowledged the offer, but opted to continue without Dr. Wright (T XII 1206-07).

After the advisory sentence was rendered, the judge heard from Dr. Perper and Mr. Hindman on their discovery of the missing prints (T XV 1528-67). On March 27, 1997, Dr. Perper found the Lisa file devoid of photographs. Because this was unusual, Mr. Hindman looked where batches of old slides were kept. Unsuccessful, he looked in the Photographer's Room where old negatives were stored. There, he found two negatives showing an extensive fracture to Lisa's skull (Court's Exhibit 2) and 16 other negatives developed on April 2, 1997 (Court's Exhibit 1 (T XV 1532-41, 1560-66)).

Defense counsel accepted the State's proffer that 22 photographs had been reproduced and delivered to the Capital Collateral Regional Counsel assisting Appellant in

postconviction relief. After the prints had been delivered, the negatives of those prints could not be found (T XV 1566-67). The hearing concluded without the defense seeking a ruling or making an argument on the issue (T XV 1528, 1583).

On appeal, Appellant makes the unsupported claim the newly discovered autopsy photographs were withheld in violation of Brady. “[S]uppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or punishment irrespective of the good faith or bad faith of the prosecution.” Brady, 373 U.S. at 87. In United States v. Agurs, 427 U.S. 97 (1976), the United States Supreme Court stated, “the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant’s right to a fair trial.” Id. at 108. “The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish ‘materiality’ in the constitutional sense.” Id. at 109-10. Not every piece of evidence which was not disclosed earlier constitutes a Brady

or due process violation. See also, Breedlove v. State, 413 So.2d 1 (Fla.), cert. denied, 459 U.S. 882 (1982).

There is no evidence these prints were exculpatory, and if disclosed sooner, would have changed the outcome. Hildwin v. Dugger, 654 So.2d 107, 109 (Fla. 1995)(holding to establish Brady violation, defendant must show State possessed and suppressed favorable evidence not available to defense through due diligence and that, if introduced, would have changed outcome). See, Agurs, 427 U.S. at 108-10 (finding no Brady violation where withheld evidence of little significance). Upon this record, and the fact defense counsel admitted his expert had viewed two prints of Lisa's skull and would testify the victim had suffered either a skull fracture or suture (T XII 1196-98), this evidence was not exculpatory, nor withheld from the defense to its detriment. Most important, is the fact the prints were disclosed before Appellant had presented his expert, and additional time was offered to discuss this evidence with the witness<sup>9</sup>, and to make a proffer (T XII 1191-

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<sup>9</sup>The assertion Appellant was precluded from having an expert review this material is specious (IB 46). On numerous occasions the judge gave the defense the

1202). Having received the evidence and refused to avail himself of the judge's offer, Appellant cannot complain the material was exculpatory or changed the outcome of the case. This Court should find no Brady violation.

Turning to the alleged discovery violation, the severest penalty that could have been applied to the State would have been to preclude the use of the new evidence. Here, the evidence was never offered against the Defendant<sup>10</sup>, therefore, there is no prejudice. Similarly, it was Appellant who precluded the judge from evaluating the harm Appellant may have suffered from the disclosure of the photographs by choosing not to present his expert, even for a proffer. Under Schopp, 653 So.2d at 1021-22, there is a sufficient record to establish

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opportunity to recess and have its experts review the prints. Each offer was declined. In fact, when the court addressed Appellant, he too, rejected the offer (T XII 1193-1202). These actions border upon invited error and a frivolous argument. San Martin v. State, 705 So.2d 1337, 1347 (Fla. 1997)(prohibiting party from inviting error and then complaining about it on appeal).

<sup>10</sup>Defendant was not denied use of the material; it was his choice not to give it to his expert or to call him to testify. As such, no harm arose from the late disclosure of the autopsy photographs which, in all likelihood, had been disclosed during the initial trial on Defendant's guilt and were not exculpatory.

Appellant was not prejudiced by this photographic evidence. This Court must affirm.

POINT I D

APPELLANT WAS AFFORDED A FAIR TRIAL WHICH COMPORTED WITH DUE PROCESS UNDER THE FLORIDA AND UNITED STATES CONSTITUTIONS (restated).

A fair hearing was afforded Appellant. Contrary to Defendant's position, no harm was generated by the prosecutor's closing argument, his cross-examination of Dr. Toomer, or the use of Lisa's clothing and autopsy results. There was no improper victim impact testimony utilized, nor was it error for the trial court to refuse to read to the jury a list of 14 non-statutory mitigators. Taken either singly or cumulatively, these alleged errors do not amount to fundamental error.

POINT I D i, ii, and iii

THERE WAS NO PROSECUTORIAL MISCONDUCT ASSOCIATED WITH THE STATE'S CLOSING, CROSS-EXAMINATION OF DR. TOOMER, OR INTRODUCTION OF CLOTHING AND AUTOPSY RESULTS (restated).

Defendant claims prosecutorial misconduct occurred when the State (1) commented upon what transpired between Appellant and Lisa while driving together, (2) cross-examined Dr. Toomer,

and (3) inquired about a broken pants zipper and autopsy results (IB 49-51). The State submits there was no prosecutorial misconduct.

During its closing argument, the State offered:

So you know who the last person to see Lisa alive was, as shown by the evidence? James Franklin Rose. And he takes this little girl in his van to somewhere. And don't you know, drawing on your own human experience and common sense, she probably wanted to know where are we going? My mother's at the bowling alley.

(T XIV 1410-11). Recognizing the objection to this argument was sustained, the State submits the comment is neither preserved nor harmful. Review of the argument reveals it was directed to what the victim was thinking and feeling as she was with Appellant. As argued by the State, Appellant was the last person with Lisa; it is reasonable to infer the victim felt terror or uncertainty as she was secreted away. (T XIV 1410-11). The fact such terror exists goes to the HAC aggravator. Adams, 412 So.2d at 857.

Appellant did not seek a curative instruction or mistrial after the objection was sustained (T XIV 1410-11). Hence, he has not preserved the issue. Duest v. State, 462 So.2d 446,

448 (Fla. 1985)(finding issue of prosecutorial comment unpreserved where neither objection nor request for curative instruction made); Ferguson v. State, 417 So.2d 639 (Fla. 1982). "The law is clear that in order to preserve a claim based on improper prosecutorial conduct, defense counsel must object, and if the objection is sustained he must then request a curative instruction or mistrial...." State v. Fritz, 652 So.2d 1243, 1244 (Fla. 5th DCA 1995). See also, Nixon v. State, 572 So.2d 1336, 1340 (Fla. 1990) (finding defendant's motion for a mistrial at the end of the prosecutor's closing argument insufficient to preserve for review propriety of prosecutor's remarks), cert. denied, 502 U.S. 854 (1991); Holton v. State, 573 So.2d 284, 288 n. 3 (Fla. 1990) (reasoning "if the court sustains an objection, the other party still must bear the responsibility of moving for a mistrial, if appropriate), cert. denied, 500 U.S. 960 (1991); Simpson v. State, 418 S.2d 984, 986 (Fla. 1982), cert. denied, 459 U.S. 1156 (1983). Because the issue is unpreserved, fundamental error must be proved.

Generally, wide latitude is permitted in addressing a jury

during closing argument. Breedlove, 413 So.2d at 8. Logical inferences may be drawn and legitimate arguments advanced by prosecutors within the limits of their forensic talents to effectuate law enforcement. Spencer v. State, 133 So.2d 729 (Fla. 1961). In order to require a new trial, the improper comment must:

either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise.

Spencer v. State, 645 So.2d 377, 383 (Fla. 1994). In State v. Murray, 443 So.2d 955 (1984), this Court opined:

... prosecutorial error alone does not warrant automatic reversal of a conviction unless the errors involved are so basic to a fair trial that they can never be treated as harmless. The correct standard of appellate review is whether "the error committed was so prejudicial as to vitiate the entire trial." Cobb, 376 So.2d at 232. The appropriate test for whether the error is prejudicial is the "harmless error" rule set forth in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), and its progeny. We agree with the recent analysis of the Court in United States v. Hasting, 461 U.S. 499, 103 S.Ct.

1974, 76 L.Ed.2d 96 (1983). The supervisory power of the appellate court to reverse a conviction is inappropriate as a remedy when the error is harmless ... it is the duty of appellate courts to consider the record as a whole and to ignore harmless error, including most constitutional violations.

Murray, 443 So.2d at 956.

In the Urbin v. State, 714 So.2d 411, 419-21 (Fla. 1998), the prosecutor invited the jury to disregard the law, told the jury any vote for a life sentence was irresponsible, "created an imaginary script" that the victim had pled for his life, referred to the defendant's mother as the "mistress of excuses", and asked the jury to show the defendant the same mercy he showed his victim. Id. at 420-21. Conversely here, the single challenged comment addressed what Lisa may have thought as she drove with Appellant. The argument did not ask the jurors to put themselves in the child's place, show no mercy to Appellant, disparage witnesses, or misapply the law as was admonished against in Urbin. The comment was not so inflammatory to invoke high emotions to the point where the jury could not follow the trial judge's instructions that:

Your advisory recommendation must be

decided only upon the evidence that you have heard from the testimony of the witnesses and have seen in the form of exhibits in evidence and these instructions.

Your advisory recommendation must not be decided for or against anyone because you feel sorry for anyone or angry at anyone.

...

Your advisory recommendation should not be influenced by feelings of prejudice, bias or sympathy.

(T XIV 1478-79).

It is presumed jurors followed the court's instructions absent some evidence to the contrary. Valle v. State, 474 So.2d 796, 805 (Fla. 1985), vacated on other grounds, 476 U.S. 1102 (1986) (announcing jury presumed to follow judge's instructions); Silvestri v. State, 332 So.2d 351, 354 (Fla. 4th DCA), approved, 340 So.2d 928 (Fla. 1976); Collier v. State, 259 So.2d 765, 766 (Fla. 1st DCA 1972). See also, Grizzell v. Wainwright, 692 F.2d 722, 726-27 (11th Cir.1982), cert. denied, 461 U.S. 948 (1983). Thus, even though a curative instruction was not given immediately, the objection was sustained and subsequently, the jury was instructed to rely

upon the evidence and not to be swayed by sympathy. Clearly, any taint from the comment was removed. Moreover, this was a single comment and the prosecutor moved away from that topic. The Court should find the comment did not vitiate the recommendation, but is harmless beyond a reasonable doubt.

Likewise, the cross-examination of Dr. Toomer was not improper. The State asked Dr. Toomer to recollect the number of capital resentencing proceedings in which he had participated. (T XII 1256). When he could recall no more than three, the State tried to refresh his recollection by naming capital defendants. (T XII 1256-59). This drew a multi-ground objection. Because the judge found merit in the cases offered were not identified as resentencings, the State rephrased the query (T XII 1258-59).

As reasoned by this Court, a witness' bias is relevant:

Section 90.612(2), Florida Statutes (1995), provides:

Cross-examination of a witness is limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in its discretion, permit inquiry into additional matters.

Under this provision, a trial judge has broad discretion in determining limitations to be placed on cross-examination.... A judge's determination to allow or disallow questioning in that regard is not subject to review unless the determination is clearly erroneous.

Sanders v. State, 707 So.2d 664, 667 (Fla. 1998) (citations omitted). Reviewing this issue in a capital case, this Court held:

... the State may point out the frequency with which a defense expert testifies for capital defendants, since this is "relevant to show bias, prejudice, or interest." Henry v. State, 574 So.2d 66, 71 (Fla. 1991). But the fact that an expert has testified for defendants in cases involving the murder of a police officer is prejudicial and irrelevant in a case, such as the present, where no officer was killed.

Campbell v. State, 679 So.2d 720, 724 (1996). Implicit in this opinion is the fact cross-examining of an expert for bias is proper; only where the questions delve into irrelevant, prejudicial matters is there error. Before a court considers reversal, the totality of the alleged improper questioning must be examined. Id.

Here, the State did not overstep its bounds in questioning

Dr. Toomer. The doctor could remember no further back than a year and guessed he testified in no more than three capital cases. Upon refreshing his recollection, it was shown he had testified in at least 14, but none for the State. (T XII 1256-58; XIII 1265-68). At no time did the State identify the type of case beyond that it was a capital murder. As such, the State did not commit the error found in Campbell, 679 So.2d at 724. The jury was not subjected to prejudicial fear or outrage based upon those cases. The impetus behind the inquiry was to show Dr. Toomer's bias; such was proper.

Turning to the final claim of prosecutorial misconduct, Defendant argues the questioning of Detective King (T IX 932-33) and display of the victim's pants with a broken zipper inferred there had been a rape (IB 51-52). Neither of these lines of inquiry were improper nor impermissibly inferred a sexual battery.

The State questioned Detective King about Appellant's prior convictions involving violence, in particular the 1971 burglary involving an attempted rape (T IX 924-33). This testimony established the prior violent felony conviction

aggravator. Defendant's reliance upon this testimony to support his claim is misleading and should be rejected.

Attack upon the fact the pants were found with a broken zipper is equally misguided. Appellant did not raise a timely objection to this evidence. Detective Tipton identified the pants and the state of disrepair. It was not until another witness had testified and court was recessing for the evening that an objection was broached (T VIII 778, 792). Defense counsel admitted "[I] made a tactical decision that I did not want to bring that point out and emphasize it in front of the jury." In response, the judge observed "if the pants in question were found to have a broken zipper, the pants in question were found with a broken zipper." (T VIII 792). This suggestion of error was untimely and has not preserved the issue. Castor v. State, 365 So.2d 701, 703 (Fla. 1978)(applying contemporaneous objection rule).

Should the Court reach the merits, it will note Appellant does not refute the pants had a broken zipper, only that they created an inference of sexual battery. However, he does not identify where the State drew this inference for the jury.

While the State elicited testimony that Dr. Fatteh tested for sexual contact, the results were negative (T VIII 655-56). Even though a reasonable inference<sup>11</sup> is that there could have been a sexual battery, the State did not make this argument. The argument was limited to where and how Lisa was murdered and relevant aggravators (T XIV 1411-12). There was no improper inference of sexual battery.

Also, Appellant alleges the judge refused to permit Dr. Fatteh to testify concerning "an implication of sexual abuse" (IB 52). The record reflects the court refused admission of Appellant's comment to Detective Van Sant that "[t]his is so bad. What will everybody think of me because she was raped and everything." However, the court authorized inquiry into the autopsy results and what went into the autopsy as "fair game" (T VIII 645-47, 655-56).

However, if it were error to admit testimony about the

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<sup>11</sup>An inference a sexual battery occurred may be drawn from the fact the victim was naked. Dailey v. State, 594 So.2d 254, 258 (Fla. 1991)(finding evidence victim was found nude with her clothing scattered about sufficient to indicate sexual battery); Smith v. State, 515 So.2d 182, 184 (Fla. 1987).

broken zipper and autopsy results, such was harmless. The record confirms how Lisa was discovered and where her clothes were found. The additional fact that force was used to break the pants zipper was not so inflammatory, in and of itself, to prejudice the jury. In the same vein, if the jurors thought there had been a sexual battery because of how the victim was found, they were informed there was no medical evidence to establish this conclusively (T VIII 655-56). Thus, the jury was informed fully of the evidence surrounding Lisa's murder; they were not left with incomplete or misleading information. This Court must affirm.

POINT I D iv

TRIAL COURT DID NOT RELY UPON VICTIM IMPACT TESTIMONY IN SENTENCING APPELLANT NOR DID MRS. BERRY'S PRESENCE IN THE COURTROOM EQUATE TO VICTIM IMPACT TESTIMONY (restated).

Appellant asserts the trial judge abused his discretion by admitting victim impact testimony and permitting Lisa's mother to remain in the courtroom. He equates Mrs. Berry's presence to victim impact testimony (IB 52). Based upon these claimed errors, Appellant seeks reversal of his sentence (IB 54). The

State submits no error occurred and requests affirmance.

Below, Appellant admitted Florida law permits the admission of victim impact testimony during the penalty phase of trial. (T III 8). Here, he admits such testimony was not presented to the jury (IB 52 n. 14), but complains it was accepted by the trial court<sup>12</sup>. On appeal, he confesses correctly that attacks upon victim impact testimony have been rejected (IB 53). Bonifay, 680 So.2d at 419 (finding victim impact testimony admissible); Burns v. State, 699 So.2d 646, 653 (Fla. 1997), cert. denied, 118 S.Ct. 1063 (1998); Archer v. State, 673 So.2d 17, 21 (Fla.), cert. denied, 519 U.S. 876 (1996); Windom v. State, 656 So.2d 432, 438 (Fla.), cert. denied, 516 U.S. 1012 (1995).

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<sup>12</sup>This Court has recognized, "judges are routinely exposed to inadmissible or irrelevant evidence but are disciplined by the demands of the office to block out information which is not relevant to the matter at hand." Grossman v. State, 525 So.2d 833, 846 n. 9 (Fla.1988), cert. denied, 489 U.S. 1071 (1989), receded from on other grounds by, Franqui v. State, 699 So.2d 1312 (Fla.1997) . Thus, if the trial court should not have accepted victim impact testimony, such was harmless. Mann v. State, 603 So.2d 1141, 1144 (Fla. 1992)(affirming death sentence against attack impermissible evidence was viewed by judge where he affirmed he did not rely on those materials), cert. denied, 506 U.S. 1085 (1993).

In the sentencing order, the trial court affirmed it did not rely upon the victim impact testimony presented (R II 341-42). Given the state of the law and the fact the evidence was not relied upon, this Court should find there was no error committed below and affirm the death sentence.

Additionally, there was no error in permitting Mrs. Berry to remain in the courtroom and her presence did not equate to victim impact testimony. Appellant's reliance upon Strausser v. State, 682 So.2d 539 (Fla. 1996) is misplaced as that case deals with the presence of expert witnesses while here the person whose presence is at issue is the mother of the murder victim. Given her status as next of kin, Mrs. Berry has a constitutional right to be present. Such a right is not afforded a party's expert witness.

As provided in the Florida Constitution:

Victims of crime or their lawful representatives, including the next of kin of homicide victims, are entitled to the right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused.

Article I, section 16(b) of the Florida Constitution. Similarly, section 90.616(2)(d), Florida Statutes provides in part:

(2) A witness may not be excluded if the witness is:

...

(d) In a criminal case, the victim of the crime, the victim's next of kin, the parent or guardian of a minor child victim, or a lawful representative of such person, unless, upon motion, the court determines such person's presence to be prejudicial.

In Sireci, this Court rejected the claim it was improper to permit the wife and son of the murder victim to remain in the courtroom after their testimony, instead determining relatives had the constitutional right to be present so long as their presence did not interfere with the accused's rights. Sireci, 587 So.2d at 454.

Here, the witness sequestration rule had been invoked and the trial judge required Mrs. Berry remain outside the courtroom until after she testified (T VI 421-22). Faced with competing rights, Mrs. Berry's right to be present and

Defendant's right to a fair trial, the judge stated:

I certainly think that the victim has a right to be present....

And what I'm also going to request is that when Ms. Berry is present in the courtroom, that she be seated over on what would be the right-hand side of the courtroom, the left-hand side facing the Court, so that she is not in the constant view of the jurors on a day-in, day-out basis, and that the jurors would actually have to make a concerted effort to turn to their left, a full 90 degrees in order to observe her.

...

But I think Ms. Berry has a right to be here. Again, the testimony that's going to be proffered to and testified to is all testimony that has been given multiple times. So there is nothing new.

I am going to ask Ms. Berry be reminded to try to not have any type of emotional outbursts in the courtroom. And if she does need to leave, that she do as quietly and without much noise, if that's possible.

(T VI 421-23). Obviously, the competing interests were understood and attempts were made to accommodate the rights of both parties.

Appellant has not alleged such procedure altered his defense nor has he pointed to any disruption Mrs. Berry's

presence caused. In fact, the record is devoid of any such evidence. This Court should find that Mrs. Berry, as next of kin to the murder victim, had the right to be present and this right did not interfere with Appellant's constitutional rights.

Further, Mrs. Berry was excluded from the courtroom until after she testified; she did not fall under the general sequestration of witnesses under section 90.616(1), Florida Statutes. Having testified, she could attend the open court proceedings and there was no abuse of discretion in permitting her to remain. However, should the Court find it was error, such was harmless beyond a reasonable doubt, as Mrs. Berry was away from the jury's gaze and never disrupted the proceedings. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). This Court should affirm.

POINT I D vi

THE ERRORS ALLEGED BY APPELLANT DO NOT AMOUNT TO FUNDAMENTAL ERROR, THEREFORE, THIS COURT SHOULD AFFIRM THE DEATH SENTENCE IMPOSED (restated).

Appellant suggests the cumulative effect of errors he alleged, rose to the level of fundamental error (IB 48, 56).

While, he does not identify these errors, he cites three cases which deal with the cumulative effect of prosecutorial misconduct claims.

Assuming Appellant limited his argument to the cumulative effect of the alleged prosecutorial misconduct he asserted, the State relies upon its argument in Points I D i - iii and reasserts there was no prosecutorial misconduct. Because only one of these alleged instances of misconduct arguably could be deemed error (argument upon what transpired between Appellant and victim), there can be no cumulative effect from the other claimed instances. The analysis presented in Points I D i-iii supports affirmance.

Similarly, should Appellant be referring to all of the errors he raised previously, the State would again direct this Court to the analysis presented for each point. The State asks this Court to recognize that many of the alleged errors were not errors at all, but were within the trial court's sound discretion. Here again, there can be no cumulative effect. The State submits confidence in the sentence was not undermined, thus, the Court should find there was no

fundamental error and affirm.

POINT I D vii

TRIAL COURT DID NOT ERR WHEN REFUSING TO READ TO THE JURY A LIST OF NON-STATUTORY MITIGATING FACTORS SOUGHT BY APPELLANT (restated).

Appellant asserts it was error for the judge to refuse to read to the jury a list of 14 non-statutory mitigating circumstances (IB 56). At the same time, he acknowledges Zakrzweski v. State, 717 So.2d 488, 495 (Fla. 1998), cert. denied, 119 S.Ct. 911 (1999) and James v. State, 695 So.2d 1229, 1238 (Fla.), cert. denied, 118 S.Ct. 569 (1997), hold that a judge need only give the "catch-all" instruction on non-statutory mitigating evidence. Zakrzweski, 717 So.2d at 495. Even in light of these cases, Appellant "asserts error occurred at bar" (IB 57). However, he gives no basis for this claim, fails to show any prejudice, and cites no case law tending to support his position. Here, the trial court gave the "catch-all" instruction (T XIV 1472). Faced with this Court's clear opinions in Zakrzweski and James nothing more was required. This Court must affirm the death sentence imposed.

POINT I E

APPELLANT'S DEATH SENTENCE IS PROPORTIONAL  
(restated).

Contending his death sentence is disproportional, he seeks resentencing (IB 57). The purpose of proportionality review is to consider the totality of the circumstances in a homicide case compared with other capital cases. Urbin, 714 So.2d at 416-17; Terry v. State, 668 So.2d 954 (Fla. 1996). The State submits the facts of this case, viewed in light of other first-degree murder cases where the death penalty was imposed, support the death sentence rendered here, as it is one of the most aggravated and least mitigated of homicides.

In the case at bar, the child victim was killed in a heinous, atrocious, or cruel manner, during the course of a kidnapping, by an adult on parole, who had prior violent felony convictions. No statutory mitigators exists and the non-statutory mitigation was of only some to very little weight. Under these circumstances, the death penalty is proportional and should be affirmed.

The non-statutory mitigation in this case was of insignificant weight. Such factors included "some weight" for (1) crime committed while under influence of extreme mental and

emotional disturbance,(2) non-nurturing childhood, (3) employment history, (4) specific good characteristics; "little weight" for (5) below average intelligence/slow learner, (6) good person who adapted to prison life, (7) specific good deeds, and "very little weight" for (8) cooperating with police, (9) maintained innocence, and (10) alcoholic/intoxicated during murder (R II 354-57; R III 425; T XV 1607-11). A review of this non-statutory mitigation shows it does not override the significant aggravation in this case. As such, the decision in Snipes v. State, 24 Fla. L. Weekly S191 (Fla. 1999) is dissimilar from the instant matter where the victim was an adult and the mitigation included the fact the defendant was 17, had been sexually abused as a child, had abused drugs and alcohol from an early age, had no prior violent history, was raised in a dysfunctional family, had rehabilitation potential, obtained a GED on his own, attended drug rehabilitation programs, and had a sweet and loving personality. In contrast, Appellant, a 31 year old man at the time of the crime, had prior violent felony convictions, and was on parole when he murdered Lisa, a young child. Thus,

Snipes is not similarly situated with Appellant, and should not form a basis for reversing the instant sentence.

Similarly, Urbin, does not make for a fair comparison. In Urbin, the defendant was a young man who shot his adult victim during a robbery. Urbin, 714 So.2d at 413. After striking one aggravator, merging two others, and affirming another, this Court recognized there were two statutory mitigating factors along with five non-statutory mitigators. Id. at 415 n. 2. In reversing the sentence on proportionality, this Court relied heavily upon the defendant's young age. Such a mitigating factor is not present here. Urbin should not be used in this proportionality review.

Likewise, Sinclair v. State, 657 So.2d 1138 (1995) is unavailing. In Sinclair there was only one aggravator, the homicide was committed during commission of a felony, and three non-statutory mitigators. Id. at 1142. Here, the trial court found four aggravators including prior violent felony convictions and HAC. As such, Sinclair is dissimilar from the instant matter.

Appellant's fall-back position that he has been on death

row for 23 years and his guilt-phase jury had at one point been deadlocked regarding his sentence are not factors which should enter into proportionality review. The comparison is made between homicides with similar scenarios as well as comparable aggravating and mitigating circumstances. Proportionality review "requires a discrete analysis of the facts," Terry, 668 So.2d at 965. This entails "a qualitative review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis." Reliance upon the time an inmate has spent on death row prosecuting his appeals does not speak to the facts of the homicide. Moreover, it does not rise to a constitutional violation. See, Hitchcock v. State, 578 So.2d 685 (Fla. 1990), (finding no constitutional impediment to reimposition of the death penalty in spite of length of time between 1978 conviction and 1996 resentencing), cert. denied, 502 U.S. 912 (1991), vacated and remanded on other grounds, 505 U.S. 1215 (1992)

Appellant's use of Scott v. Dugger, 604 So.2d 465 (Fla. 1992) to support a reduction of his sentence to life in prison is incorrect. He claims Scott's sentence was reduced to life

based upon a finding of new mitigators, including good prison behavior (IB 62). However, the sentence in Scott was reduced because an equally culpable co-defendant was given a life sentence. Id. at 467-68. Here, Appellant is the sole person responsible for Lisa's death, thus, this mitigating factor does not come into play.

The State disagrees with Appellant's contention that "[b]ased upon uncontroverted testimony, James Rose's actions are aligned with the two (2) statutory mental mitigators which the Florida Supreme Court has ruled are the two (2) most significant" (IB 62). A review of the judge's sentencing order reveals mental mitigation was not uncontroverted (R II 348-53). The psychiatric reports and Appellant's actions show he was not suffering under extreme mental/emotional distress, but was capable of conforming his behavior to the dictates of the law. (R II 348-53).

Contrary to Appellant's position, Nibert, 574 So.2d at 1059 does not further his claim. While he asserts he abused alcohol, the record indicates alcohol was not a factor in murder. Defendant's admission, as well as testimony of

witnesses who saw him that night, support the weight assignment regarding intoxication. Appellant admitted to Detective King he was not intoxicated that night, and although Officer Walker testified Appellant appeared moderately intoxicated, several others testified he was neither drunk nor exhibited signs of intoxication (T VIII 615, 697-99 702, 737, 745; IX 938). As such, it was within the judge's discretion to determine Appellant's problem with alcohol should be given "very little weight" (R II 355-56; III 425).

Also, Appellant misconstrues Nibert in claiming the alcoholism outweighs HAC (IB 62). In Nibert, the Court found there was a large quantum of uncontroverted mitigation as opposed to one aggravating factor, therefore, making the death penalty disproportional. Nibert, 574 So.2d at 1062-63. Such is not the case here. The trial court found four aggravators and ten non-statutory mitigating circumstances which were of only some to very little weight. Exercising its discretion properly, the trial court weighed these factors, and imposed the death penalty.

In opposition to Defendant's claim, the State submits this

Court has found death sentences proportional in cases where the defendants are situated similarly with Appellant. For example, in Schwab, the imposition of the death penalty was affirmed for the murder of an eleven-year old boy who was kidnapped and sexually abused by the defendant, who had become a family friend. The aggravators established included a prior violent felony conviction, the homicide was heinous, atrocious, or cruel, and was committed during a kidnapping and sexual battery. Schwab, 636 So.2d at 7. Offsetting these aggravators was little mitigating evidence. Id.

Likewise, in Rivera, the defendant sexually battered and murdered an eleven-year old girl. Rivera, 561 So.2d at 537. The aggravators, "homicide committed during felony", "violent felony conviction", and "HAC", out weighed the one statutory mitigator and supported the imposition of death.

The death sentence was not disproportionate in Zakrzewski, 717 So.2d at 493 where the defendant killed his two children. Upon the trial court's finding of two statutory mitigating factors, numerous non-statutory mitigators and the aggravators, cold, calculated, and premeditated, HAC, and contemporaneous

murders, the death sentence was imposed properly. Id. at 494. Likewise, in Davis v. State, 703 So.2d 1055, 1061-62 (Fla. 1997), cert. denied, 524 U.S. 930 (1998), the death sentence was upheld against a proportionality challenge upon the conclusion the two aggravating circumstances of HAC and murder committed during a sexual battery out weighed the finding of some non-statutory mitigation for the murder of a two year old child by her mother's live-in boyfriend.

Here, there was a relationship between eight-year old Lisa and Appellant, her mother's ex-boyfriend. Becoming jealous of Mrs. Berry, Appellant secreted Lisa away from her mother and after stripping her of her clothes bludgeoned her to death. Such crime was committed by a man who had prior violent felony convictions and was on parole when he kidnapped the child and murdered her in a heinous, atrocious, and cruel manner. While ten non-statutory mitigating factors were found by the trial judge, six were of little and very little weight. Additionally, no statutory mitigators were found. Under these circumstances, this Court should find this homicide is one of the most aggravated and least mitigated of murders and that the

death penalty is proportional when compared to similar crimes. Affirmance is required.

POINT I F

THERE HAS BEEN NEITHER A SENTENCING DELAY NOR CONSTITUTIONAL VIOLATION OF DEFENDANT'S RIGHTS (restated).

The thrust of Appellant's argument is that his 23 years on death row is "truly unusual" because he had a jury recommendation of life at his initial trial (IB 64). This claim is meritless.

This Court has rejected Appellant's claim that he received a life recommendation from his trial jurors when they informed the trial court by note of their sentencing deadlock. As this Court recognized, the jury's initial sentencing standoff was not an advisory opinion and had no legal effect.

Rose also argues that we cannot properly affirm a sentence of death because the jury in the first sentencing proceeding passed a note to the judge indicating they needed instruction because they were tied 6 to 6 and no one at the moment would change....We have already implicitly decided this issue against Rose in his first appeal when we remanded for a new sentencing hearing. The note of the jury did not rise to the level of an advisory recommendation of the sentence to be imposed. The advisory

recommendation of the jury following the prior sentencing hearing was death....

Rose, 461 So.2d at 86. During the postconviction relief appeal, by footnote, this Court explained the phrase "Rose had once received a recommendation of life imprisonment":

We note the jury's vote only as part of the factual background we must consider in determining the issue of prejudice. We have previously determined that this vote, which the trial court erroneously found to be unacceptable, did not have the legal effect of a jury recommendation for life, which recommendation in turn would have sharply limited the judge's sentencing discretion....

Rose, 675 So.2d at 574 n. 10 (citations omitted). The fact that at one point in its deliberations the jury was at a stalemate does not equate to a recommendation of life in prison and is no impediment to a subsequent imposition of the death penalty.

Similarly, there is no constitutional violation arising from the 23 years between Appellant's conviction and resentencing. During the interim, Appellant utilized the remedies available convicted persons. To date, he challenged his conviction, death sentences, and the effectiveness of

trial, penalty phase, and appellate counsel<sup>13</sup>. None of these 23 years of litigation may be attributed to the State. As such, he cannot complain of a delay.

This Court addressed the constitutional challenges to the passage of time between conviction and sentencing. Such attacks were rejected where the delay was not attributable to the State and was due to the defendant exercising his appellate rights. In Hitchcock, the Court opined:

Finally, Hitchcock claims that the delay between his arrest (1976) and resentencing (1988) violates his right to a speedy trial and his due process rights and constitutes cruel and unusual punishment. He has, however, demonstrated no undue prejudice caused by the delay, and we find no merit to this claim.

Hitchcock, 578 So.2d at 693. See also, Hitchcock v. State, 673 So.2d 859, 863 (Fla. 1996)(rejecting argument that length of time between conviction and resentencing was constitutional

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<sup>13</sup>Rose v. State, 425 So.2d 521 (Fla. 1983)(affirming convictions, remanding for new sentencing); Rose v. State, 461 So.2d 84 (Fla. 1985)(affirming death sentence); Rose v. State, 508 So.2d 321 (Fla. 1987) (finding appellate counsel rendered effective assistance), and Rose v. State, 675 So.2d 567 (Fla. 1996)(finding second penalty phase counsel rendered ineffective assistance requiring new sentencing).

violation); Gore, 706 So.2d at 1336 (rejecting speedy trial challenge to reimposed death sentence).

Although recognizing a denial of certiorari is not an adjudication on the merits, Justice Thomas' concurrence in Knight v. Florida, 120 S.Ct. 459, 460 (1999) is enlightening.

As opined:

I write only to point out that I am unaware of any support in the American constitutional tradition or in this Court's precedent for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed....

It is worth noting, in addition, that, in most cases raising this novel claim, the delay in carrying out the prisoner's execution stems from this Court's Byzantine death penalty jurisprudence.... In that sense, Justice BREYER is unmistakably correct when he notes that one cannot "justify lengthy delays [between conviction and sentence] by reference to [our] constitutional tradition." Post, at 463. Consistency would seem to demand that those who accept our death penalty jurisprudence as a given also accept the lengthy delay between sentencing and execution as a necessary consequence. See Coleman v. Balkcom, 451 U.S. 949, 952, 101 S.Ct. 2031, 68 L.Ed.2d 334 (1981) (STEVENS, J., concurring in denial of certiorari) ("However critical one may be of ...

protracted post-trial procedures, it seems inevitable that there must be a significant period of incarceration on death row during the interval between sentencing and execution"). It is incongruous to arm capital defendants with an arsenal of "constitutional" claims with which they may delay their executions, and simultaneously to complain when executions are inevitably delayed.

Knight, 120 S.Ct. at 460 (footnotes omitted). If this Court were to vacate a death sentence merely because of a delay caused by a defendant exercising his constitutional rights, it would be the convicted felon controlling the judicial process, not the courts. Through no fault of its own, the State could be deprived of a lawful sentence. This Court must find Appellant's constitutional rights have not been violated.

#### POINT I G

THE CHALLENGE TO DEATH BY ELECTROCUTION IS MOOT AS FLORIDA HAS OPTED TO EXECUTE THE CONDEMNED BY LETHAL INJECTION (restated).

Appellant claims death by electrocution is cruel and unusual punishment (IB 66). This issue is not briefed and is moot.

Without briefing his position, Appellant asserts electrocution is cruel and unusual punishment and tries to

adopt an argument made in Bryan v. Moore, 68 U.S. L. Weekly 3281 (Jan. 24, 2000). In Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990), the Court rejected a similar attempt to raise a claim without briefing the issue.

Duest also seeks to raise eleven other claims by simply referring to arguments presented in his motion for postconviction relief. The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived.

Id. at 851-52. The Court must reject Appellant's constitutional challenge where he attempts to adopt an argument from another case.

Further, the instant claim is moot as the State has elected to carry out electrocutions by lethal injection. See, Chapter 00-2, Laws of Florida. As the United States Supreme Court noted in Bryan when dismissing the defendant's constitutional challenge to death by electrocution:

In light of the representation by the State of Florida, through its Attorney General, that petitioner's "death sentence will be carried out by lethal injection, unless petitioner affirmatively elects death by

electrocution" pursuant to the recent amendments to Section 922.10 of the Florida Statutes, the writ of certiorari is dismissed as improvidently granted.

Bryan, 68 U.S. L. Weekly at 3281.

Appellant also asserts the time between his arrest and resentencing violates his speedy trial and due process rights. Reasserting the arguments it presented in Points I E and F, the State submits similar challenges to the death penalty have been rejected. Gore, 706 So.2d at 1336 (rejecting challenge to resentencing delays on speedy trial grounds); Hitchcock, 673 So.2d at 863. Based upon the foregoing, this Court should affirm the death sentence imposed upon Appellant for the murder of Lisa Berry.

CONCLUSION

Wherefore, based on the foregoing arguments and the authorities cited therein, Appellee requests respectfully this Court AFFIRM Appellant's sentence of death entered below.

Respectfully submitted,  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Answer Brief of Appellee" has been furnished by courier, to: RICHARD L. ROSENBAUM, ESQ., Law Offices of Richard L. Rosenbaum, One East Broward Boulevard, Suite 1500, Fort Lauderdale, Fl 33301 on March 31, 2000.

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