ORIGINAL

IN THE SUPREME COURT OF FLORIDA

JOHN RICHARD MAREK,

Appellant,

v. CASE NO. SC09-765

STATE OF FLORIDA,

Appellee.
_____/

STATE'S CORRECTED NOTICE OF ADDITIONAL AUTHORITY

COMES NOW the Appellee, the State of Florida, by and through undersigned ccounsel, and provides this Court with the following additional authorities:

1. Smith v. State, 998 So. 2d 516, 525-526 (Fla. 2008)

2. Johnson v. State, 660 So. 2d 637, 641-642 (Fla. 1995)

Respectfully submitted,

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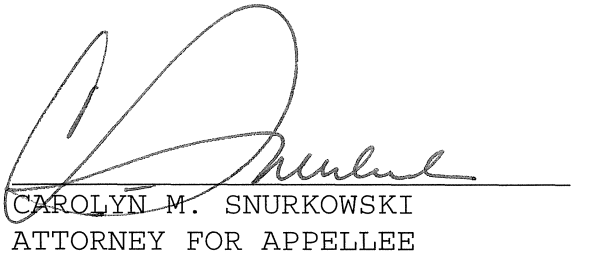
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing STATE'S NOTICE has been furnished to Martin J. McClain, McClain & McDermott, PA, 141 NE 30th Street, Wilton Manors, FL 33334 this 1st day of May, 2009.



CAROLYN M. SNURKOWSKI
ATTORNEY FOR APPELLEE

IN THE SUPREME COURT OF FLORIDA

JOHN RICHARD MARK,

Appellant,

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STATE OF FLORIDA,

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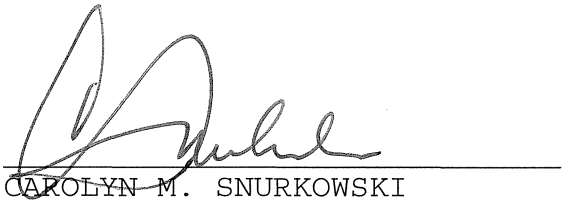

CAROLYN M. SNURKOWSKI
ATTORNEY FOR APPELLEE

LEXSEE 998 SO. 2D 516

STEPHEN SMITH, Appellant, vs. STATE OF FLORIDA, Appellee.

No. SC06-1903

SUPREME COURT OF FLORIDA

998 So. 2d 516; *2008 Fla. LEXIS 1639*; *33 Fla. L. Weekly S 727*

September 25, 2008, Decided

SUBSEQUENT HISTORY: Released for Publication December 18, 2008.
Rehearing denied by *Smith v. State, 2008 Fla. LEXIS 2387 (Fla., Dec. 18, 2008)*
US Supreme Court certiorari denied by *Smith v. Florida, 2009 U.S. LEXIS 2939 (U.S., Apr. 20, 2009)*

PRIOR HISTORY: [**1]
An Appeal from the Circuit Court in and for Charlotte County, William L. Blackwell, Senior Judge -- Case No. 03-1526F.

COUNSEL: Ryan Thomas Truskoski of Ryan Thomas Truskoski, P.A., Orlando, Florida, for Appellant.

Bill McCollum, Attorney General, Tallahassee, Florida, Candance M. Sabella, Assistant Attorney General, Bureau Chief, and Stephen D. Ake, Assistant Attorney General, Tampa, Florida, for Appellee.

JUDGES: QUINCE, C.J., WELLS, PARIENTE, LEWIS, and BELL, JJ., and CANTERO, Senior Justice, concur. ANSTEAD, J., dissents with an opinion.

OPINION

[*519] PER CURIAM.

Stephen Smith appeals from his judgment of conviction for the first-degree murder of a state correctional officer, Darla K. Lathrem, and his sentence of death. We have jurisdiction. *See art. V, § 3(b)(1), Fla. Const.* For the reasons explained below, we affirm.

I. THE FACTS AND PROCEDURAL HISTORY

Smith and his codefendants, Dwight Eaglin and Michael Jones, were indicted for the first-degree murder of Officer Lathram at Charlotte Correctional Institution (CCI) during an escape attempt. [1] The murder was charged under the alternative theories of premeditated murder and felony murder while engaged in escape or resisting an officer with violence. The defendants [**2] were tried separately.

1 The three prisoners also were indicted for the first-degree murder of another inmate, Charles Fuston. The State entered a *nolle prosequi* on that count as to Smith.

[*520] A. The Guilt Phase

During 2003, the defendants worked with a small group of other CCI prisoners on renovations to the inmate dormitories. This construction work included plumbing and welding and thus provided inmate work crews with access to a number of tools. Beginning in early 2003, Smith, who was serving multiple life sentences, and Jones began to formulate an escape plan. They planned to build a ladder and escape over the perimeter fence. When their first plan was thwarted, however, Smith and Jones developed a new plan with Eaglin.

Under the new plan, the inmates would join ladders from the tool room at CCI by drilling holes and adding bracing. The amalgamated ladder would rise sixteen feet above the ground and span across the tops of both perimeter fences, which were at least twenty feet apart. With the ladder-bridge in place, Eaglin would go over the first perimeter fence and, when the guard truck drove by, attack the driver with a hammer. Because they needed access to ladders and other necessary [**3] tools, the trio planned to escape during the ongoing dormitory renovation project.

Smith and the others decided to escape before construction was completed on the final dormitory. To fur-

ther facilitate the plan, Smith volunteered for the inmate crew that sometimes worked at night, which already included Jones and Eaglin. At such times, five or six prisoners worked in the empty dormitory under the supervision of a single corrections officer. In talking to other inmates about the plan, Smith said that he would kill any correctional officer guarding them and that he would be famous on the news. Smith preferred to escape when a female officer was on duty so that he could rape her--just in case he was killed during the escape.

On June 11, 2003, with renovations soon to be completed, the defendants put their plan into action. At 4:00 p.m., Officer Lathram took five inmates--the three defendants and two other inmates--to work in the dormitory for the evening. At 8:30 p.m., Lathram accounted for the five inmates, and about twenty minutes later, another officer personally picked up the count slip from Officer Lathram.

After the head count, Eaglin beat up one inmate and locked him in a cell; Eaglin [**4] then returned with a sledgehammer and beat him to death. Smith and Jones told Officer Lathrem they needed something from a locked mop closet. They all went to the closet, where the officer began to search for the correct key. Eaglin struck her twice in the head with the sledgehammer. They took the officer's radio and keys. While Eaglin struggled to put the officer's body into the closet and lock the door, Smith and Jones left to assemble the ladders for the escape. Before joining Smith and Jones, Eaglin found the other inmate and hit him in the head with another hammer. Injuring the inmate was part of the plan because that inmate did not want to escape and did not want to be disciplined for cooperating with the escape plan. The defendants carried two large ladder sections outside and put them together. When they attempted to lift the ladder, however, it collapsed and fell against the perimeter fence, setting off an alarm.

Correctional officers responding to the alarm saw the three defendants attempting to escape. Eaglin stood between the perimeter fences; Smith was climbing a ladder leaning against the inner fence, with Jones standing nearby. Upon seeing the guards, Smith and Jones [**5] ran into the dormitory, where they were quickly apprehended. The correctional officers also discovered a pool of blood outside a locked mop closet. Officer Lathrem lay dead in the closet, a sledgehammer on the floor [*521] beside her. The responding officers also found the two other inmates, one with a head injury in one cell and the other dead in another cell.

The jury returned a verdict finding Smith guilty of first-degree murder.

B. The Penalty Phase

In the penalty phase, the State presented evidence about Smith's 1990 convictions for murder, armed robbery, and armed burglary with assault, in which Smith broke into a home, stole money, and beat to death the elderly woman he encountered there. The State also presented evidence of Smith's other 1990 convictions for armed sexual battery, armed burglary, armed robbery, and kidnapping. In that break-in, Smith stole a VCR and tapes and took a young girl outside the house where he forced her to perform oral sex on him. As a result of these crimes, Smith was sentenced to multiple life sentences, some consecutive to others. Finally, the State also introduced evidence that in 1981, Smith was convicted in Rhode Island for the armed sexual assault of [**6] his sister. [2]

> 2 Also in the penalty phase, the medical examiner testified that Officer Lathram had no defensive wounds, consistent with having no awareness of the attack, and that she was unconscious upon the sledgehammer's impact. Three victim impact witnesses also read statements.

Smith presented numerous witnesses, including family members and a former Rhode Island social worker, regarding his background and character. [3] They testified that Smith's father was frequently intoxicated, violent, and physically abusive. He also sexually abused Smith's sisters. Smith's father was a poor provider, and the family essentially lived on welfare. Smith's parents did not display affection, provide religious or moral guidance, or require school attendance. The State of Rhode Island removed Smith from his home because he could not be controlled at home. From ages eleven to eighteen, he was in state placements ranging from group homes to juvenile prisons, and twice underwent psychiatric evaluation. Smith regularly escaped from many of the placements and returned home, and he frequently violated the law. As a young man, Smith and his younger brother went to Florida where they used drugs heavily, and [**7] where Smith had a sexual relationship with his aunt.

> 3 Smith's brother testified by video deposition from a Rhode Island prison where he is serving a life sentence for murdering and raping his stepdaughter. The evidence at the penalty phase showed, however, that all of Smith's sisters are married, employed, and living productive lives.

Dr. Frederick Schaerf, an expert in forensic psychiatry, testified that Smith has a history of depression, mood disorder, attention deficit disorder, hyperactivity (as a child), and substance abuse. However, Smith's depression and substance abuse were in remission. Smith has a

low normal IQ "in the 80 range," and the doctor concluded that he has an antisocial personality disorder.

Finally, Smith presented various witnesses to testify about the supervision and safety policies and procedures at CCI at the time of the murder.

C. The Trial Court's Order

By a vote of nine to three, the jury recommended a sentence of death. The trial court adopted the recommendation, finding the following aggravating factors: (1) the defendant was a convicted felon under a sentence of imprisonment; (2) he had prior violent felony convictions; (3) the murder was committed for the [**8] purpose of escape from custody, and the victim was a law enforcement officer engaged in official duties (merged); and (4) the murder [*522] was cold, calculated, and premeditated (CCP). In mitigation, the court found (1) Smith's background (great weight); (2) Smith's expression of remorse (little weight); and (3) mental and emotional health issues, including a history of depression, attention deficit disorder, and substance abuse (some weight). [4] The court rejected as mitigating the "failure of officials at CCI to properly administer the prison and to properly supervise inmates." The trial court concluded "that the aggravating circumstances in this case greatly outweigh the mitigating circumstances present."

> 4 The trial court rejected Smith's antisocial personality disorder as a mitigator.

II. THE ISSUES ON APPEAL

In this appeal, Smith raises seventeen issues. For purposes of our analysis, we have grouped several of them together and address them below.

A. The Ineffective Assistance of Counsel

We begin by discussing a category of claims that we will *not* address. Smith raises five claims of ineffective assistance of counsel. [5] Under the two-pronged standard of *Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*, [**9] a defendant must point to specific acts or omissions of counsel that are "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the *Sixth Amendment*," *id. at 687*, and establish prejudice by "show[ing] that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id. at 694*. A reasonable probability is a "probability sufficient to undermine confidence in the outcome." *Id.*

> 5 Smith alleges that trial counsel provided ineffective assistance by (1) failing to preserve for review the trial court's denial of his motion to suppress; (2) failing to object to testimony that Smith planned to rape any female guard supervising him during the escape; (3) failing to move for judgment of acquittal on the ground that the murder was the independent act of codefendant Eaglin; (4) failing to raise a second challenge to the constitutionality of Florida's lethal injection procedures; and (5) failing to challenge the constitutionality of Florida's clemency process.

Claims of ineffective assistance of trial counsel are usually presented in a postconviction motion under *Florida Rule of Criminal Procedure 3.850.* [**10] Under that rule, the circuit court can be specifically presented with the claim, and apply the *Strickland* standard with reference to the full record and any evidence it may receive in an evidentiary hearing, including trial counsel's testimony. Thus, ineffective assistance claims are not usually presented to the judge at trial, and we have repeatedly stated such claims are not cognizable on direct appeal. *E.g., Martinez v. State, 761 So. 2d 1074, 1078 n.2 (Fla. 2000)* ("With rare exception, ineffective assistance of counsel claims are not cognizable on direct appeal."); *McKinney v. State, 579 So. 2d 80, 82 (Fla. 1991)* ("Claims of ineffective assistance of counsel are generally not reviewable on direct appeal but are more properly raised in a motion for postconviction relief."); *Kelley v. State, 486 So. 2d 578, 585 (Fla. 1986)* (same); *State v. Barber, 301 So. 2d 7, 9 (Fla. 1974)* (holding that claims of ineffective assistance of counsel "cannot properly be raised for the first time on direct appeal" because the trial court has not previously ruled on the issue). We recognize that "[t]here are rare exceptions where appellate counsel may successfully raise the issue on direct appeal because [**11] the ineffectiveness is apparent on the face of the record and it would be a waste of judicial resources to [*523] require the trial court to address the issue." *Blanco v. State, 507 So. 2d 1377, 1384 (Fla. 1987)*; *see also Gore v. State, 784 So. 2d 418, 437-38 (Fla. 2001)* ("A claim of ineffective assistance of counsel may be raised on direct appeal only where the ineffectiveness is apparent on the face of the record."); *Mansfield v. State, 758 So. 2d 636, 642 (Fla. 2000)* (same). Thus, in the rare case, where both prongs of *Strickland*--the error and the prejudice--are manifest in the record, an appellate court may address an ineffective assistance claim. Not one of Smith's five claims meets these criteria, however. We therefore decline to address these claims now. Smith is free to raise them in an appropriate postconviction motion.

B. The Motion to Suppress

Smith first argues that the trial court erred in denying his motion to suppress his statement and that the

court's order lacked sufficient findings of fact and conclusions of law, making appellate review impossible. We disagree.

Over a month after the escape attempt and murder, Smith waived his *Miranda* [6] rights and was questioned by an agent [**12] of the Florida Department of Law Enforcement. In this his fourth statement, Smith was videotaped as he walked through the CCI dormitory with Agent Uebelacker, answering questions about the plan for and execution of the attempted escape. [7] Defense counsel filed a motion to suppress his statements, arguing they were involuntary because Smith lived in "inhumane circumstances" after his transfer to Florida State Prison. The motion alleged Smith was deprived of basic items, was threatened, was irregularly fed, and was deprived of sleep.

> 6 *Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).*
>
> 7 Smith gave statements to the agent on June 12, June 23, July 27, and July 31, 2003. Only his last statement was admitted at trial.

At the hearing, the trial court heard some live testimony and was presented with depositions and other evidence to review, such as the videotape of Smith's July 31 statement. Agent Uebelacker testified that in his several meetings with Smith over the course of almost three weeks, Smith never complained about his treatment and had no apparent injuries. On each occasion, he waived his rights and made a statement. During his June 23 trip to Florida State Prison, however, Uebelacker heard a [**13] surreptitious tape recording of Smith and his codefendants as they sat in holding cells before the interview and complained about their treatment there. Uebelacker requested that prison authorities look into the complaints, and they did. The testimony from corrections personnel was that Smith was not threatened or otherwise mistreated. Codefendant Eaglin testified about his own conditions in prison, but said they did not affect his understanding of his rights. He had no personal knowledge of how Smith was treated. Smith did not testify in support of his claim that his statement was not voluntary.

The trial court denied the motion to suppress. Before the July 31 videotaped statement was played at trial, the court orally announced its reasoning for denying the motion. The court explained that it had reviewed all of the evidence and found that Smith was adequately informed of his constitutional rights, that Smith did not appear confused, and that there was no evidence that the statement was involuntary.

Smith contends that the trial court failed to make specific findings of fact, [*524] including credibility determinations about each witness, and conclusions of law. Thus, he claims the order is [**14] insufficient for appellate review and violated his right of due process. We disagree. We find that the court's order adequately recites both its findings and conclusions. To the extent Smith claims the trial court made no findings or conclusions, he disregards the oral findings described above.

We now review the trial court's denial of Smith's motion. [8] On review, a trial court's ruling on motions to suppress is presumed correct. The evidence is considered in the light most favorable to the ruling, and mixed questions of fact and law are reviewed de novo. *Schoenwetter v. State, 931 So. 2d 857, 866 (Fla.), cert. denied, 549 U.S. 1035, 127 S. Ct. 587, 166 L. Ed. 2d 437 (2006).* In this case, the trial court found no evidence that Smith's statement was involuntary. Smith did not testify at the evidentiary hearing. He never complained to Agent Uebelacker on any of the four occasions on which he was questioned. The agent never threatened or coerced Smith or made him any promises. Regardless of Smith's treatment at the prison by corrections officers, there was no evidence demonstrating these conditions affected his statement. We hold that the trial court did not err in denying Smith's motion.

> 8 This issue was preserved for review [**15] with the denial of the motion; trial counsel was not required to object at the time the evidence was admitted at trial. *See § 90.104(1)(b), Fla. Stat.* (2003); *In re Amendments to The Florida Evidence Code--Section 90.104, 914 So. 2d 940, 941 (Fla. 2005).*

C. Competent, Substantial Evidence

The jury found Smith guilty of first-degree murder under both theories charged: premeditated murder and felony murder based on the underlying felonies of escape and resisting an officer with violence. Smith argues that competent, substantial evidence does not support the verdict under either basis. [9]

> 9 Even if Smith had not raised the issue, in death penalty appeals this Court must independently review the record to confirm that the verdict is supported by competent, substantial evidence. *See Fla. R. App. P. 9.142(a)(6); see also Floyd v. State, 913 So. 2d 564, 572 n.2 (Fla. 2005)* (recognizing the Court's independent duty).

We conclude that competent, substantial evidence supports Smith's conviction for first-degree premeditated murder. Ample evidence at trial demonstrated that from the inception of the escape plan, Smith stated that he planned to kill the guard supervising them. Smith even expressed [**16] a preference that a female officer be on duty and said he would "kill the bitch." Killing the

guard was necessary to the plan to give the escapees time to construct the ladders. Smith admitted that during the escape attempt he employed a ruse to lure Officer Lathram to the mop closet where Eaglin stood nearby. With the officer distracted looking for the closet key, Smith stood aside while Eaglin stealthily approached and delivered the fatal sledgehammer blows. Although Smith did not hit Officer Lathram, he had the intent to kill. *See Ferrell v. State, 686 So. 2d 1324, 1329 (Fla. 1996)* (finding that, while the defendant may not have actually pulled the trigger, he played an integral part in the crimes and in actually luring the victim to his death, and therefore was guilty as a principal). Thus, competent, substantial evidence supports the conviction for premeditated murder.

Where, as in this case, the jury delivers a general verdict and one of the theories of first-degree murder conviction is supported by competent, substantial evidence, [*525] we need not address the others. *See Crain v. State, 894 So. 2d 59, 73 (Fla. 2005)* ("A general guilty verdict rendered by a jury instructed on both [**17] first-degree murder alternatives may be upheld on appeal where the evidence is sufficient to establish either felony murder or premeditation."). Nevertheless, we address Smith's argument that the State failed to prove felony murder under either of the other theories alleged: (1) felony murder committed during an escape, and (2) felony murder committed while resisting an officer with violence.

First, Smith contends that the State did not prove that Smith was lawfully confined in a state correctional facility and thus did not establish the escape felony murder theory. In *State v. Williams, 444 So. 2d 13, 15 (Fla. 1984)*, however, we held that the "presumption of lawful custody exists" when the State proves that a person is confined in a prison and that the "unlawfulness of the confinement is an affirmative defense to be raised by the defendant." In this case, there was ample evidence that at the time of the murder and escape Smith was a prisoner at CCI. Thus, competent, substantial evidence supports the verdict under this felony murder theory as well.

Second, Smith claims that he did not defy a direct command from Officer Lathram and thus did not resist an officer with violence. The relevant [**18] statute provides in pertinent part: "Whoever knowingly and willfully resists, obstructs, or opposes any officer . . . in the lawful execution of any legal duty, by offering or doing violence to the person of such officer . . . is guilty of a felony of the third degree . . . ." *§ 843.01, Fla. Stat.* (2002). When Smith and his codefendants lured Officer Lathram to the mop closet and killed her, she was performing her duty of supervising the inmates. Such evidence clearly meets the requirements of the statute. Therefore, Smith's first-degree murder conviction is supported by competent, substantial evidence under each of the alternative theories.

D. Inconsistent Positions

Smith next claims that the State violated his right to due process by taking inconsistent positions at his and codefendant Eaglin's trials about who masterminded the escape. We decline to review this claim for two reasons.

First, this claim was not preserved. Although Eaglin's trial occurred before Smith's, Smith did not raise this issue during either phase of his trial. Instead, Smith himself asserted it at his *Spencer* [10] hearing. After making his statement to relatives of the victims, Smith alleged that at Eaglin's trial [**19] the State argued Eaglin was the ringleader, but at Smith's trial contended it was Smith. Because this alleged inconsistency was not raised contemporaneously with the State's argument at trial, the issue is not preserved.

> 10 *Spencer v. State, 615 So. 2d 688 (Fla. 1993).*

Second, Smith fails to demonstrate that the State actually pursued inconsistent theories. We have previously held that to bring relevant matters contained in separate records before the Court, the party must move to supplement the record and attach verified and complete copies of the material. *Johnson v. State, 660 So. 2d 648, 653 (Fla. 1995).* Because Eaglin's case is currently pending in this Court, appellate counsel attempted to incorporate by reference the entire record in Eaglin's case. Counsel has not identified any evidence in that record, however, that the State took inconsistent positions at the separate trials. [*526] [11] Therefore, we cannot review this claim.

> 11 *Eaglin v. State,* No. SC06-760 (Fla. notice of appeal filed April 21, 2006), is currently pending in the Court. At oral argument, Smith's counsel admitted that he has not reviewed the codefendant's record to ascertain whether any evidence supports this claim. We [**20] have denied a motion, filed a month after oral argument, formally requesting the Court take judicial notice of the other record and asking permission to provide the necessary record citations and argument.

Finally, at least one federal appellate court has rejected a claim that asserting inconsistent positions in codefendants' prosecutions violates due process. *Fotopoulos v. Secretary, Dep't of Corrections, 516 F.3d 1229, 1235 (11th Cir. 2008)* (reversing the district court's conclusion that the prosecutor's use of inconsistent theories at the separate trials about the defendant's domination of

his codefendant violated due process); *see also Bradshaw v. Stumpf, 545 U.S. 175, 190, 125 S. Ct. 2398, 162 L. Ed. 2d 143 (2005)* (Thomas, J., concurring) ("[The] Court has never hinted, much less held, that the *Due Process Clause* prevents a State from prosecuting defendants based on inconsistent theories.").

E. The Motion for Mistrial

Smith next argues that the trial court erred in denying his motion for mistrial when a witness violated an order forbidding mention to the jury that Smith previously faced a penalty phase in a different murder case. "A motion for a mistrial should only be granted when an error is so prejudicial as to [**21] vitiate the entire trial." *England v. State, 940 So. 2d 389, 401-02 (Fla. 2006), cert. denied, 549 U.S. 1325, 127 S. Ct. 1916, 167 L. Ed. 2d 571 (2007)*. We review a trial court's ruling on a mistrial motion for abuse of discretion. *Id. at 402*. We reverse such a ruling "only when the error is deemed so prejudicial that it vitiates the entire trial." *Floyd v. State, 913 So. 2d 564, 576 (Fla. 2005)*.

In this case, the trial court granted Smith's motion in limine to preclude testimony that Smith faced a penalty phase in his 1993 murder of an elderly woman during a burglary. During the penalty phase, the State presented evidence about that murder and sought to present, through the same witness, evidence of Smith's other 1993 convictions. As a segue, the following ensued.

> PROSECUTOR: Now, in that trial, did you present evidence to another Broward County case involving the defendant, Stephen Smith? In other words, in you--
>
> WITNESS: Yes, sir. During the penalty phase, I did present--

Defense counsel immediately moved for mistrial and, to avoid emphasizing the testimony, rejected the court's offer of a curative instruction. The circuit court denied the motion, finding the reference so fleeting that the jury was not likely even to [**22] remember it.

Smith relies on *Hitchcock v. State, 673 So. 2d 859 (Fla. 1996)*, in which we advised:

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

Id. at 863. Our concerns in *Hitchcock* are not present here. Smith was subject to a penalty phase in a different case, bare mention of that fact was made in this penalty phase, Smith was sentenced to life--not death--in that case, and the judgment [*527] and sentence evidencing that fact were entered into evidence. Thus, although the order on the motion in limine was violated by the mention of the prior penalty proceeding, such testimony did not vitiate the entire penalty phase.

F. Weighing Factors and Proportionality

Smith next argues that the trial court abused its discretion in weighing the aggravating and mitigating factors, and also claims that the sentence is not proportionate. We address each claim in turn.

We review the weight the trial court ascribes to mitigating factors [**23] under the abuse of discretion standard. *Walker v. State, 957 So. 2d 560, 584 (Fla. 2007)*. Further, competent, substantial evidence must support the trial court's final decision in weighing the aggravating circumstances and mitigation. *Id.* In this case, the trial court found the following mitigating factors and assigned the weight indicated: (1) Smith's background (great weight); (2) Smith's expression of remorse (little weight); and (3) mental and emotional health issues (some weight). Smith contends that the latter factor was entitled to more weight because these issues were intertwined with his background. However, with regard to the latter factor, the court found that Smith's history of depression, substance abuse, and attention deficit disorder was proven and may be related to his "dysfunctional family background." The court thus considered them in context with Smith's background to which it gave great weight. Smith has not demonstrated that the trial court abused its discretion in ascribing the mental health issues some weight.

Smith also contends that the court erred in its final weighing of the aggravators and mitigators. The court found the following aggravating circumstances: [**24] (1) Smith was under a sentence of imprisonment; (2) he had prior violent felony convictions, including first-degree murder, burglary, robbery, and sexual battery; (3) the murder in this case was committed for the purpose of escape from custody, and the victim was a law enforcement officer engaged in official duties (merged); and (4) the murder was cold, calculated, and premeditated (CCP). The trial court concluded "that the aggravating circumstances in this case greatly outweigh the mitigating circumstances present."

We reject Smith's contention that the mitigating evidence regarding his childhood alone outweighs all the aggravating factors, two of which are "among the more serious aggravating circumstances." *Chamberlain v. State, 881 So. 2d 1087, 1108-09 (Fla. 2004)* (noting that CCP and prior violent felony conviction are considered among the more serious aggravating circumstances). We also reject Smith's claim that he was merely a passive accomplice to the murder because he did not deliver the fatal blow. This minimization of Smith's role ignores the evidence that from the beginning murder was part of Smith's escape plan, and he played an active role by luring the officer to the mop [**25] closet where Eaglin waited with the sledgehammer. Therefore, we find that competent, substantial evidence supports the trial court's determination.

Smith raises three arguments regarding our proportionality review. First, he makes the conclusory claim that our review is legally insufficient and unconstitutional because it is does not include review of other factors, such as death cases from other states. We have previously rejected similar attacks on Florida's death penalty based on an American Bar Association report. *See Rutherford v. State, 940 So. 2d 1112, 1118 (Fla.), cert. denied, 549 U.S. 989, 127 S. Ct. 465, 166 L. Ed. 2d 331* [*528] *(2006); accord Rolling v. State, 944 So. 2d 176, 181 (Fla.), cert. denied, 549 U.S. 990, 127 S. Ct. 466, 166 L. Ed. 2d 332 (2006).*

Smith next claims that his sentence is not proportionate because codefendant Jones, who Smith alleges had an equal role in the escape, received a life sentence. However, Jones pled guilty and received a life sentence. We have previously rejected claims of disparate sentencing when the codefendant's sentence resulted from his entry of a plea or prosecutorial discretion. *England, 940 So. 2d at 406* (citing cases). Therefore, we reject this claim as well. [12]

12 We note that codefendant Eaglin [**26] was sentenced to death.

Finally, we address Smith's contention that his death sentence is not proportionate compared to death sentences in other Florida cases. In this case, the jury voted nine to three to recommend a sentence of death. As stated above, the trial court found four weighty aggravators and concluded that they greatly outweighed the mitigation. In conducting proportionality review, "we consider the totality of the circumstances of the case and compare the case with other capital cases." *Simmons v. State, 934 So. 2d 1100, 1122 (Fla. 2006), cert. denied, 549 U.S. 1209, 127 S. Ct. 1334, 167 L. Ed. 2d 80 (2007).* We hold that the sentence in this case is comparable to other cases in which this Court has affirmed the death penalty and is therefore proportionate. *See Caballero v. State, 851 So. 2d 655, 664 (Fla. 2003)* (affirming the death sentence where the defendant and the codefendant bound and robbed the victim in her home, then planned to and did murder her, and where the trial court found four aggravators--CCP, committed in course of robbery or kidnapping, committed to avoid arrest, and heinous, atrocious and cruel); *Franqui v. State, 804 So. 2d 1185, 1198 (Fla. 2001)* (finding a sentence proportional where [**27] a codefendant killed a police officer in the course of a bank robbery that defendant planned and during which he was armed and where the trial court found three aggravators--prior violent felony conviction, murder committed in the course of robbery, and murder was committed to avoid arrest and victim was a law enforcement officer--and minimal mitigation); *see also Van Poyck v. State, 564 So. 2d 1066, 1070-71 (Fla. 1990)* (finding the death sentence proportional even though the defendant was not the triggerman but was the instigator and the primary participant in the crime and knew that lethal force could be used).

G. The Mitigation Instruction

Smith next argues that the trial court abused its discretion in denying his request for a special jury instruction. Smith requested a jury instruction regarding his list of nonstatutory mitigating factors. The trial court denied the request, noting that counsel could argue all the particulars supported by the evidence but that the court would give the standard "catch-all" instruction. We have consistently found no abuse of discretion in denying a request for such a special instruction. *See Belcher v. State, 851 So. 2d 678, 685 (Fla. 2003); James v. State, 695 So. 2d 1229, 1236 (Fla. 1997).* [**28] Therefore, we affirm the trial court's denial of Smith's request.

H. Constitutional Issues

Smith raises several constitutional challenges to Florida's lethal injection procedures and death penalty scheme, each of which we have previously rejected. We briefly summarize our precedent here. First, we have upheld the constitutionality [*529] of lethal injection. *Provenzano v. State, 761 So. 2d 1097, 1099 (Fla. 2000)* (holding that execution by lethal injection does not amount to cruel or unusual punishment or both). We recently rejected the same constitutional challenges to Florida's lethal injection procedures that Smith now asserts. *Lightbourne v. McCollum, 969 So. 2d 326, 353 (Fla. 2007), cert. denied, 128 S. Ct. 2485, 171 L. Ed. 2d 777 (2008); Schwab v. State, 969 So. 2d 318, 325 (Fla. 2007), cert. denied, 128 S. Ct. 2486, 171 L. Ed. 2d 777 (2008).* [13] Smith correctly acknowledges that in *Diaz v. State, 945 So. 2d 1136, 1143 (Fla.), cert. denied, 549 U.S. 1103, 127 S. Ct. 850, 166 L. Ed. 2d 679 (2006)*, we rejected the contention that Florida's lethal injection sta-

tute violates the separation of powers doctrine. *See art. II, § 3, Fla. Const.*

> 13 The United States Supreme Court denied certiorari review in these cases following release of *Baze v. Rees, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (2008)*, [**29] in which a majority of the Court upheld the constitutionality of Kentucky's lethal injection protocol against an Eighth Amendment challenge.

Finally, Smith argues that Florida's death penalty scheme is unconstitutional under *Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002)*. In this case, two of the four aggravating circumstances were prior felony conviction and under sentence of imprisonment at the time of the murder. We have previously held that Florida's capital sentencing procedure does not violate *Ring* when the case includes the prior violent felony aggravator. *See Floyd, 913 So. 2d at 577*. We also have held that the aggravator of murder committed while under sentence of imprisonment may be found by the judge alone. *Id. at 577-78*; *see Allen v. State, 854 So. 2d 1255, 1262 (Fla. 2003)*. Therefore, we reject this claim as well.

I. Instruction on Sentencing

Smith contends that a curative instruction the trial court gave misadvised the jury about its role in sentencing, in violation of *Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985)*. During his closing argument in the penalty phase, defense counsel noted that the State knew about all of Smith's prior convictions and "[n]ow [the State] tells you today [**30] you gotta kill this poor man because he's got a prior record." The State objected that the argument was improper because defense counsel was "trying to transfer the ultimate sentencing to [the] jury." The court sustained the objection and, upon the State's request, gave a curative instruction:

> COURT: Members of the jury, I will instruct you that none of these arguments are intended to make you feel like you're the instrument of death in the event that is the ultimate sentence in this case. Your job is to listen to, weigh the evidence, listen to these arguments, apply the law to the facts as you find them, and make a verdict, a recommendation to this Court, which is the ultimate sentencer. And I will give your recommendation great weight. All right.

Smith argues that this instruction "affirmatively misadvised the jury that its recommendation did not matter." We disagree. The curative instruction is consistent with the standard jury instruction, which was given at the close of the evidence in the penalty phase. *See Fla. Std. Jury Instr. (Crim.) 7.11*. (Penalty Proceeding--Capital Cases). [14] As Smith acknowledges, [*530] we have consistently rejected challenges to the standard instruction, holding [**31] that it correctly advises the jury of its role and does not unconstitutionally denigrate it. *See Taylor v. State, 937 So. 2d 590, 600 (Fla. 2006)*. Therefore, we find no error in the trial court's curative instruction.

> 14 The standard instruction provides as follows in pertinent part:
>
> > Ladies and gentlemen of the jury, it is now your duty to advise the court as to what punishment should be imposed upon the defendant for [his] [her] crime of Murder in the First Degree. As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge; however, it is your duty to follow the law that will now be given you by the court and render to the court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.
> >
> > Your [**32] advisory sentence should be based upon the evidence [that you have heard while trying the guilt or innocence of the defendant and evidence that has been presented to you in these proceedings] [that has been presented to you in these proceedings].

J. Cumulative Error

Smith finally claims that as a result of cumulative error, he was denied a fair trial. Because we have found no individual error, no cumulative error can exist. *See*

Parker v. State, 904 So. 2d 370, 380 (Fla. 2005) (noting that where the individual claims of error alleged are either procedurally barred or without merit, the claim of cumulative error necessarily fails); *Johnson v. Singletary, 695 So. 2d 263, 267 (Fla. 1996)*.

III. CONCLUSION

Based on the analysis above, we affirm Smith's convictions and his sentence of death.

It is so ordered.

QUINCE, C.J., WELLS, PARIENTE, LEWIS, and BELL, JJ., and CANTERO, Senior Justice, concur.

ANSTEAD, J., dissents with an opinion.

DISSENT BY: ANSTEAD

DISSENT

ANSTEAD, J., dissenting.

Because I find both the written and oral presentations of counsel for the appellant fundamentally lacking, I would strike the appellate briefs, discharge counsel, and direct the trial court to appoint new appellate counsel for the appellant. [**33] Capital cases represent the most serious category of cases reviewed by this Court and such cases require diligent and competent advocacy by counsel. While this Court has inherent responsibility to assure such representation, the Florida Legislature has explicitly called upon the courts to take responsibility for assuring such representation in capital litigation. We should honor that call here. [15]

15 I acknowledge that the Court, to its credit, has notified both the Florida Bar and the Executive Director of the Legislature's Commission on Capital Cases of concerns about the performance of counsel in the *Smith* and *Hunter* cases as well as other filings by counsel in this Court.

By coincidence, the Clerk of this Court scheduled oral argument in this case and the case of *Hunter v. State, No. SC06-1963, 2008 Fla. LEXIS 1615 (Fla. Sept. 25, 2008)*, for the same date. In examining the briefs for appellants in those two cases, I was struck by both the similarity in approach and the facially flawed advocacy contained in the briefs in both cases. The oral advocacy was similarly lacking in both cases. Of course, the appellants are represented by the same counsel in both cases, and I have come to the same conclusion in [**34] *Hunter* as I have here.

LEXSEE 660 SO. 2D 637

EMANUEL JOHNSON, Appellant, v. STATE OF FLORIDA, Appellee.

No. 78,336

SUPREME COURT OF FLORIDA

660 So. 2d 637; *1995 Fla. LEXIS 1144*; *20 Fla. L. Weekly S 343*

July 13, 1995, Decided

SUBSEQUENT HISTORY: [**1] Rehearing Denied September 22, 1995. Released for Publication September 22, 1995.

PRIOR HISTORY: An Appeal from the Circuit Court in and for Sarasota County, Andrew Owens, Judge - Case Nos. 88-3198-CF-A-N1 88-3199-CF-A-N1.

COUNSEL: James Marion Moorman, Public Defender; and Stephen Krosschell and Robert F. Moeller, Assistant Public Defenders, Tenth Judicial Circuit, Bartow, Florida, for Appellant.

Robert A. Butterworth, Attorney General and Candance M. Sabella, Assistant Attorney General, Tampa, Florida, for Appellee.

JUDGES: KOGAN, J. GRIMES, C.J., and OVERTON, SHAW and HARDING, JJ., and McDONALD, Senior Justice, concur.

OPINION BY: KOGAN

OPINION

[*641] KOGAN, J.

We have on appeal the judgment and sentence of the trial court imposing the death penalty upon Emanuel Johnson. We have jurisdiction. *Art. V, § 3(b)(1), Fla. Const.*

On October 4, 1988, police found the body of 73-year-old Iris White. She was naked from the waist down and had suffered twenty-four stab wounds, one incised wound, and blunt trauma to the back of the head. A variety of fatal wounds penetrated the lungs and heart. The body also showed evidence of defensive wounds and abrasions near the vagina and anus most likely caused by a forceful opening [**2] by hand or fingernails.

Police found a screen in the living room had been cut and the lower window raised. The fingerprints of Emanuel Johnson were recovered from the window sill. Police also found two pubic hairs that showed the same microscopic characteristics as Johnson's, though an expert stated that an exact identification was not possible. Johnson had done yard work for White some years earlier.

After a lengthy interrogation on October 12, 1988, Johnson gave a taped confession to police. He stated that he knocked on White's door to talk about lawn maintenance. When she opened the door, he then grabbed her, choked her to unconsciousness, and then stabbed her several times. Johnson said he then left the house, locking the door behind himself, but forgot to take White's wallet. Twenty minutes later he cut open the window screen, climbed in, took the wallet, and left. Johnson said he later threw the wallet in an area where a road surveyor later found it.

Johnson was found guilty, and the jury recommended death by a vote of 8-to-4. The trial court found the following aggravating factors: (1) prior violent felony; (2) commission of a murder for financial gain; and (3) heinous, atrocious, [**3] or cruel murder. The trial court found the following mitigating factors: (1) Johnson was raised by the father in a single-parent household; (2) He had a deprived upbringing; (3) He had an excellent relationship with other family members; (4) He was a good son who provided for his mother; (5) He had an excellent employment history; (6) He had been a good husband and father; (7) He showed love and affection to his two children; (8) He cooperated with police and confessed; (9) He had demonstrated artistic and poetic talent; (10) "The age of the Defendant at the time of the

crime"; (11) Johnson "has potential for rehabilitation and productivity in the prison system"; (12) "The Court can punish the Defendant by imposing life sentences"; (13) Johnson had no significant history of criminal activity before 1988; (14) He exhibited good behavior at trial; and (15) He suffered mental pressure not reaching the level of statutory mitigation.

The trial court then found that each aggravating factor alone outweighed all the mitigating factors, and sentenced Johnson to death. The judge imposed an upward departure sentence for the burglary offense, based on the unscored capital felony and a pattern [**4] of escalating criminal activity.

As his first issue, Johnson argues that his confession was involuntary for a variety of reasons. Johnson contends that his low intelligence and mental disturbance at the time of questioning rendered his statements involuntary and thus inadmissible. As to both of these factors, the evidence in the record is conflicting. One defense expert's opinion was that Johnson was psychotic at the time he was questioned and that he had an intelligence in the retarded range. One State expert contended that Johnson was not emotionally disturbed when questioned by [*642] police, had a "working-type intelligence into the average range," and knowingly waived his rights. When evidence adequately supports two conflicting theories, this Court's duty is to review the record in the light most favorable to the prevailing theory. *Wuornos v. State, 644 So. 2d 1012, 1019 (Fla. 1994), cert. denied, 115 S. Ct. 1708, 131 L. Ed. 2d 568 (1995).* The fact that evidence is conflicting does not in itself show that the State failed to meet its burden of proof except where the evidence actually supporting the State's theory, viewed in its entirety, does not legally meet the burden. Such [**5] was not the case here. Accordingly, the trial court did not err in refusing to suppress the confession on grounds of involuntariness.

Johnson next argues that his confession should be suppressed because the waiver forms used in connection with his subsequent polygraph examinations failed to reiterate some of the warnings he already had received pursuant to *Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)*, and because he failed to receive additional warnings after the examinations were completed. The record is clear, however, that Johnson received proper *Miranda* warnings before the overall interrogation began. There is no requirement of additional warnings during the same period of interrogation where it is clear detainees are aware of their rights, as was the case here. Accordingly, we find no error.

On a related point, Johnson also contends that his confession should be suppressed because he confessed only after police told him he had failed the polygraph tests he had consented to receive. As a general rule, the fact that a polygraph examination or the prospect of receiving one has preceded or accompanied a confession does not of itself render the [**6] confession inadmissible. *Johnson v. State, 166 So. 2d 798 (Fla. 2d DCA 1964).* Rather, there must be a sufficient showing of physical or psychological coercion, intentional deception, or a violation of a constitutional right. *State v. Sawyer, 561 So. 2d 278 (Fla. 2d DCA 1990); Martinez v. State, 545 So. 2d 466 (Fla. 4th DCA 1989).*

Absent such egregious police misconduct, the confession may be admitted; but if it is, defendants are entitled to argue to the finder of fact why the confession should be deemed untrustworthy, if they wish to do so. *Johnson, 166 So. 2d at 803.* In sum, serious police misconduct poses a question of law for the judge, but less serious matters that may reflect on the reliability or fairness of the confession are questions of fact. Of course, putting polygraph misconduct into issue necessarily opens the door to all matters associated with the challenged examination. Thus, the decision to raise or not to raise the issue inherently is a strategic decision for the defense. The State obviously cannot broach details of a polygraph examination unless the defense has first put the matter into issue or otherwise consented.

Turning to the facts at hand, [**7] we find no violation of the principles outlined above. Police are not required to disclose every possible ramification of a waiver of rights to a detainee apart from those general statements now required by *Miranda* and its progeny. Nor are police required to tell detainees what may be in their personal best interests or what decision may be the most advantageous to them personally. Under our system, law enforcement officers are representatives of the state in its efforts to maintain order, and the courts may not impose upon them an obligation to effectively serve as private counselors to the accused. The latter is the obligation of private attorneys or public defenders and certainly must not be shouldered by those whose job it is to police our streets.

In the polygraph examination at issue here, police told Johnson the test results would not be admissible against him. Johnson's counsel makes much of this statement as being "misleading" because Johnson might have assumed that any statement he made in connection with the polygraph would be inadmissible. Counsel also notes that the post-test interview generally is considered to be one of several parts of a polygraph examination. [**8] While all of this may be true, these facts in and of themselves do not render Johnson's confession legally inadmissible. Police are not required to protect detainees [*643] from their own unwarranted assumptions, nor are police forbidden to talk about polygraph results with a detainee who has voluntarily taken a lie-detector ex-

amination and has validly waived all rights. In sum, Johnson's confession was not legally the result of coercion, deception, or the violation of constitutional rights.

This conclusion is not undermined, as counsel contends, by Johnson's statements to police that he was tired. While such statements were made, they did not indicate in themselves a desire to reassert waived rights. Indeed, Johnson showed every indication of wishing to complete the interrogation. As such, there was no violation of rights on this basis. Nor do we believe police improperly preyed on Johnson's conscience by telling him he suffered from a serious sexual disorder and needed help. The records establishes no basis for believing police coerced Johnson or made undue promises to him. We certainly cannot agree with Johnson's analogizing the challenged statements to the so-called "Christian burial [**9] technique." [1] Using sincerely held religious beliefs against a detainee is quite a distinct issue from a simple noncoercive plea for a defendant to be candid.

1 The Christian burial technique is the practice of inducing a detainee to tell the location of a homicide victim's body so it can receive a proper burial service. *Roman v. State, 475 So. 2d 1228 (Fla. 1985), cert. denied, 475 U.S. 1090, 106 S. Ct. 1480, 89 L. Ed. 2d 734 (1986).*

Except in those narrow areas already established in law, police are not forbidden to appeal to the consciences of individuals. Any other conclusion would come perilously close to saying that the very act of trying to obtain a confession violates the rights of those who otherwise have waived their rights. *Miranda* creates a sufficient protection for the accused by outlining the rights they may assert or waive. After waiver, those rights may be reasserted at any time. Because Johnson chose to waive his rights and because there is no basis to establish police misconduct, [**10] we find no error. By the same token, there is no violation of the right to counsel. *Traylor v. State, 596 So. 2d 957 (Fla. 1992).*

Johnson also challenges the admissibility of his confession on grounds that the written waiver of rights failed to meet the requirements of *Florida Rule of Criminal Procedure 3.111(d)(4).* The rule states that an out-of-court waiver of the right to counsel must be in writing and signed by at least two attesting witnesses. Here, the written waiver contained only a single attesting witness. In gauging violations of rules of procedure, the courts of Florida generally have held that noncompliance does not require reversal unless it has resulted in prejudice or harm to the defendant such that fundamental rights are implicated. *Richardson v. State, 246 So. 2d 771, 774 (Fla. 1971).* This rule only applies with greater force to purely technical rules like *rule 3.111(d)(4).* In a highly analogous case, then-Judge Grimes noted that the complete failure to obtain the signed waiver would not require reversal in the absence of harm or prejudice. *Hogan v. State, 330 So. 2d 557, 559 (Fla. 2d DCA 1976).* Because we find no harm or prejudice here and because any [**11] error is less serious than that in *Hogan*, no reversal is required on this point. [2]

2 We find no other basis for finding the confession inadmissible.

As his second issue, Johnson alleges that material seized from his apartment pursuant to a search warrant should have been suppressed on grounds the officer's sworn affidavit was defective and also because the warrant did not describe with particularity the items to be seized. The warrant authorized seizure of blood-stained clothing and "hair, fiber, tissue, or any other items of forensic comparison value." Among other things, officers seized unstained clothing found in the apartment.

While we may have doubts about the validity of the language describing "any other items," we need not determine today whether this language authorized an illegal general search. Even if it did, we find the remainder of the warrant would not thereby [*644] be rendered invalid, [3] and the warrant clearly authorized seizure of "fiber . . . of forensic comparison value." The latter language [**12] is sufficiently precise to include unstained clothing, viewed in light of the particular facts of this case and the type of items to be seized. [4] While the actual search conducted by officers may have resulted in the collection of other evidence not directly authorized by the warrant, the record reflects that the State did not use any such evidence at trial. In fact, the trial court expressly denied the motion to suppress only with respect to the items of clothing seized at Johnson's apartment, which were properly authorized for the reasons noted above.

3 American jurisdictions are in general agreement that partial invalidity of a warrant does not in itself render the remainder invalid. An extensive discussion of this point and leading case law is contained in 2 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 4.6 (2d ed. 1987).

4 LaFave, *supra*, notes that greater particularity is required for some types of evidence than for others, typically because the former may implicate other protected rights. Examples are records kept by news-gathering organizations and attorneys' records.

[**13] Johnson further argues that the relevant portions of the warrant were invalid because the accompanying affidavit made no mention that fibers had been gathered at the scene of the crime. We disagree. As a general rule, American courts have permitted a warrant

to include some items not specifically addressed in the affidavit if the overall circumstances of the crime are sufficiently established and the items added are reasonably likely to have evidentiary value with regard to the type of crime. 2 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 3.7(d), at 112 (2d ed. 1987). There is no doubt here that a murder had occurred and that there was probable cause to believe Johnson committed it. Gathering any fiber evidence is a common object of any murder investigation, and we therefore find that the warrant lawfully included it because of the high probability such evidence would be relevant to the type of crime in question.

As his third issue, Johnson contends that reversible error occurred because of the trial court's refusal to excuse for cause a juror who had expressed favor toward the death penalty. The record discloses that this juror made these statements [**14] when the defense asked her fairly technical questions about the mitigating circumstances applicable in a penalty phase. At this point, the trial court stepped in and asked whether the juror felt she was capable of following the jury instructions she would be given. The juror said that she thought and hoped she would. Johnson now contends that these remarks were not sufficiently definite to rehabilitate the juror.

Our case law holds that jurors who have expressed strong feelings about the death penalty nevertheless may serve if they indicate an ability to abide by the trial court's instructions. *Penn v. State, 574 So. 2d 1079 (Fla. 1991)*. On this question, the trial court is in the best position to observe the attitude and demeanor of the juror and to gauge the quality of the juror's responses. If there is competent record support for the trial court's conclusions regarding rehabilitation, then the appellate courts of this state will not reverse the determination on appeal based on a cold record.

The reasons for this conclusion are evident. As the trial court below suggested, jurors brought into court face a confusing array of procedures and terminology they may little understand [**15] at the point of voir dire. It may be quite easy for either the State or the defense to elicit strong responses that jurors would genuinely reconsider once they are instructed on their legal duties and the niceties of the law. The trial court is in the best position to decide such matters where, as here, the record strongly supports such a change of heart. Moreover, the courts should not become bogged down in semantic arguments about hidden meanings behind the juror's words. So long as the record competently supports the trial court's interpretation of those words, appellate courts may not revisit the question. We therefore may not do so here.

[*645] Fourth, Johnson asks this Court to consider arguments he has raised in a separate murder conviction appealed to this Court. *Johnson v. State, 660 So. 2d 648, 1995 Fla. LEXIS 1145, 20 Fla. Law W. S 347*. The State objects on grounds that this circumvents the page limits imposed on briefs and mixes questions posed in two separate cases involving different attorneys for the State. [5] At oral argument, Johnson's counsel countered that the page limits effectively foreclosed him from addressing any penalty-phase issues. In an abundance of caution we ordered supplemental briefing [**16] after oral argument, which renders this issue moot.

5 For the reasons expressed in *Johnson v. State, 660 So. 2d 648, 1995 Fla. LEXIS 1145, 20 Fla. Law W. S 347* and subject to the reservations stated there, we take judicial notice of the trial-court record in Case No. 78,337 to the extent it is relevant to the instant case.

In any event, it clearly is not proper for counsel to attempt to cross-reference issues from a *brief* in a distinct case pending in the same court. [6] The law is well settled that failure to raise an available issue constitutes an admission that no error occurred. Moreover, we do not believe it wise to put an appellate court or opposing counsel in the position of guessing which arguments counsel deems relevant to which of the separate cases, nor do we support a rule that might encourage counsel to brief the Court through a simple incorporation by reference. Accordingly, all available issues not raised in the present briefs are barred.

6 While *Rule of Appellate Procedure 9.200(f)(2)* protects counsel from a "surprise" ruling that the record is inadequate, the rule and its commentary clearly indicate that the protection exists only as to the record created in the proceeding below, not material added during a separate appeal pending in the same court.

[**17] In supplemental briefing, Johnson's fifth issue is that the trial court improperly limited the presentation of mitigating evidence. Johnson argues that the trial court erred in not permitting his counsel to inform the jury about the possible sentences he might receive in three other criminal cases pending in the courts. While this argument would have some merit if all such cases were consolidated for trial, *Jones v. State, 569 So. 2d 1234 (Fla. 1990)*, there is no merit where, as here, consolidation has not occurred. *Marquard v. State, 641 So. 2d 54 (Fla. 1994)*, *cert. denied, 115 S. Ct. 946, 130 L. Ed. 2d 890 (1995)*; *Nixon v. State, 572 So. 2d 1336 (Fla. 1990)*, *cert. denied, 502 U.S. 854, 112 S. Ct. 164, 116 L. Ed. 2d 128 (1991)*.

Likewise, Johnson argues that the trial court erred in refusing to let him show the jury a photograph of a daughter who had died by miscarriage. The judge did, however, permit the jury to hear information about the child and the fact that Johnson had written on the photograph the words, "My first kid. I thank God for her." We cannot fault any trial court for denying a defendant's request to present in mitigation potentially disturbing [**18] photographs that, in themselves, are of little relevance. The trial court correctly determined that the jury should be told of the photograph's existence, its importance to Johnson, and the impact the miscarriage had on him. In this light, the photograph was merely cumulative of other evidence to the degree it had actual relevance and otherwise was needlessly inflammatory or disturbing.

Johnson further contends that the trial court improperly refused to admit medical records about various psychological problems he had over many years, including suicide attempts and treatment by medication. The record, however, indicates that Johnson's counsel attempted to introduce these records without authenticating them, which is required under the evidence code. *§ 90.901-902, Fla. Stat.* (1987). The rules of evidence may be relaxed during the penalty phase of a capital trial, but they emphatically are not to be completely ignored. Moreover, the trial court found that the records were not complete in themselves and required interpretation to be understood by the jury. The judge even offered to admit them if defense counsel laid the proper predicate, which counsel did not do. Accordingly, there [**19] was no error in declining the request in light of counsel's actions.

[*646] Johnson next argues that mitigation was improperly restricted by the trial court's refusal to let counsel argue and present evidence (1) that the death penalty does not operate well as a deterrent and (2) is more expensive than life imprisonment. We find that these are not proper mitigating factors for two reasons. First, they do not meet the definition of a "mitigating factor"--matters relevant to the defendant's character or record, or to the circumstances of the offense proffered as a basis for a sentence less than death. *Rogers v. State, 511 So. 2d 526, 534 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S. Ct. 733, 98 L. Ed. 2d 681 (1988)* (quoting *Lockett v. Ohio, 438 U.S. 586, 604-05, 98 S. Ct. 2954, 2964-65, 57 L. Ed. 2d 973 (1978))*.

Second, they are not legal arguments but rather political debate that in essence attack the propriety of the death penalty itself. Once the legislature has resolved to create a death penalty that has survived constitutional challenge, it is not the place of this or any other court to permit counsel to question the political, sociological, or economic wisdom of the [**20] enactment. *Article II, section 3 of the Florida Constitution* specifies a strict separation of powers, *B.H. v. State, 645 So. 2d 987 (Fla. 1994), cert. denied, 63 U.S.L.W. 3873* (U.S. Feb. 21, 1995), which effectively forecloses the courts of this state from attempting to resolve questions that are essentially political in nature. Rather, political questions--as opposed to legal questions--fall within the exclusive domain of the legislative and executive branches under the guidelines established by the Florida Constitution. *Art. II, § 3, Fla. Const.* Accordingly, the trial court did not err in refusing Johnson's request here, which would have illegally interjected the judiciary into political questions.

Sixth, Johnson asks the Court to find prejudicial error in comments made by the State. The first of these occurred after the defense elicited testimony from Johnson's companion, Bridget Chapman, that he was loving and a good father figure to his son and to her daughter from a prior relationship. The State then elicited testimony that the two sometimes had violent arguments. Johnson now argues that the latter testimony was beyond the scope of direct examination and, in any event, [**21] constituted an illegal nonstatutory aggravating factor. We disagree. When the defense puts the defendant's character in issue in the penalty phase, the State is entitled to rebut with other character evidence, including collateral crimes tending to undermine the defense's theory. *Wuornos v. State, 644 So. 2d 1000, 1009 & n.5 (Fla. 1994), cert. denied, 115 S. Ct. 1705, 131 L. Ed. 2d 566 (1995)*. Such evidence in this context does not constitute an illegal nonstatutory aggravating factor provided the State uses it strictly for rebuttal purposes. Violent conduct in a relationship tends to rebut testimony that the relationship was loving and that a defendant was a good father figure. Accordingly, the trial court did not err on this point.

Johnson likewise argues that the State's closing argument improperly portrayed him as sexually attacking the victim when he was not convicted of any such offense. The error was not properly preserved for appeal because counsel did not object until after the jury had been given its instructions and retired to deliberate. *DuBoise v. State, 520 So. 2d 260, 264 (Fla. 1988)*.

As his seventh issue, Johnson argues that the trial court improperly [**22] declined to find the statutory "mental mitigator" of extreme mental disturbance. We acknowledge that the record establishes a history of emotional problems, but the central issue here is not that such evidence exists but the weight to be accorded it. On the question of weight, the trial court's ruling will be affirmed if supported by competent substantial evidence.

The record reflects that the evidence of Johnson's disturbance in the penalty phase came largely from anecdotal lay testimony poorly correlated to the actual offense at issue. Psychological experts had testified ex-

tensively as to Johnson's mental state in the earlier suppression hearing, though counsel chose not to bring these same experts before the jury in the penalty phase. Even then, Johnson's case for mental disturbance in the suppression hearing was partially controverted [*647] and is itself consistent with the trial court's conclusion that Johnson's psychological troubles did not rise to the level of a statutory mitigator. We therefore cannot fault the trial court's determination as to mental mitigation.

Johnson argues that *Walls v. State, 641 So. 2d 381 (Fla. 1994)*, *cert. denied, 115 S. Ct. 943, 130 L. Ed. 2d* [**23] *887 (1995)*, required the trial court to find the statutory mitigator of extreme mental disturbance, but we are unpersuaded. The trial court found and weighed *nonstatutory* mental mitigation and expressly concluded that the evidence actually presented did not rise to the level of *statutory* mental mitigation. The record as it was developed below contains competent substantial evidence supporting this determination.

Johnson also appears to suggest that, had he introduced expert testimony about his mental state in the penalty phase, the trial court could simply have rejected the testimony wholesale under *Walls*. Actually, *Walls* stands for the proposition that opinion testimony *unsupported by* factual evidence can be rejected, but that uncontroverted and believable factual evidence supported by opinion testimony cannot be ignored. *Walls, 641 So. 2d at 390-91*. Johnson did in fact introduce uncontroverted facts supporting a case for mental mitigation, but the record competently and substantially supports the trial court's determination of weight.

Eighth, Johnson argues various errors in the jury instructions. He contends that the trial court erred in declining to modify [**24] the standard jury instruction on the mental mitigators to eliminate adjectives such as "extreme" and "substantially." This argument rests on a fundamental misconception of Florida law. Statutory mental mitigators are distinct from those of a nonstatutory nature, and it is the latter category that Johnson's revised jury instruction attempted to recast in "statutory" terms. This in effect asked the trial court to rewrite the statutory description of mental mitigators, which is a violation of the separation of powers doctrine. *Art. II, § 3, Fla. Const.* Nonstatutory mental mitigators are addressed under the "catch-all" instruction, as happened here. *Walls, 641 So. 2d at 389*. Accordingly, there was no error.

Next, Johnson contends that the jury received no instruction on judging the relative weight of aggravating factors, which must be proved beyond a reasonable doubt, and mitigating factors, which can be established by a preponderance of the evidence. As noted by the Eleventh Circuit Court of Appeals, any argument of this type evinces a misunderstanding of the law of proof. While it is true that specific burdens of proof are necessary to establish the factors, their relative weight [**25] is not itself judged by any similar standard. Once the factors are established, assigning their weight relative to one another is a question entirely within the discretion of the finder of fact, *Ford v. Strickland, 696 F. 2d 804* (11th Cir.), *cert. denied, 464 U.S. 865, 104 S. Ct. 201, 78 L. Ed. 2d 176 (1983)*, subject to this Court's constitutionally required proportionality review.

Johnson also contends that the standard instructions impermissibly place the burden of proof on the defendant to prove a case for mitigation once aggravating circumstances have been established by the State. This argument is without merit. *Robinson v. State, 574 So. 2d 108* (Fla.), *cert. denied, 502 U.S. 841, 112 S. Ct. 131, 116 L. Ed. 2d 99 (1991)*. Likewise, there is no merit to Johnson's argument that Florida's jury instructions denigrate the role of the jury in violation of *Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985)*. We repeatedly have rejected similar claims. *E.g.*, *Combs v. State, 525 So. 2d 853 (Fla. 1988)*; *Grossman v. State, 525 So. 2d 833 (Fla. 1988)*, *cert. denied, 489 U.S. 1071, 109 S. Ct. 1354, 103 L. Ed. 2d 822 (1989)*. [**26]

As his ninth issue, Johnson urges the Court to find error in the use of the felony-murder aggravator, on grounds it creates an "automatic" aggravator and renders death a possible penalty even in the absence of premeditation. This contention has been repeatedly rejected by state and federal courts. *E.g.*, *Lowenfield v. Phelps, 484 U.S. 231, 108 S. Ct. 546, 98 L. Ed. 2d 568 (1988)*; *Stewart v. State, 588 So. 2d 972 (Fla. 1991)*, *cert. denied,* [*648] *503 U.S. 976, 112 S. Ct. 1599, 118 L. Ed. 2d 313 (1992)*.

Tenth, Johnson contends that the standard jury instruction on the aggravator of "heinous, atrocious, or cruel," which was given in his case, is constitutionally infirm. We find no error, *Fennie v. State, 648 So. 2d 95 (Fla. 1994)*, *cert. denied, 115 S. Ct. 1120, 130 L. Ed. 2d 1083 (1995)*, and we note in any event that the substitute instruction actually urged by Johnson at trial was not significantly different from the standard instruction. Accordingly, the issue is procedurally barred for failure to present a true alternative. *Castro v. State, 644 So. 2d 987, 991 n.3 (Fla. 1994)*. Moreover, the stabbing-strangulation murder here qualified as heinous, atrocious, or cruel under any [**27] definition, and any conceivable error thus would be harmless.

Finally, we have reviewed this case and the two records for proportionality of the death penalty, and we find that death is proportionately warranted here. Having reviewed for other errors and finding none, the convictions and sentences are affirmed.

It is so ordered.

GRIMES, C.J., and OVERTON, SHAW and HARDING, JJ., and McDONALD, Senior Justice, concur.