IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
January 27, 2009 Session

STATE OF TENNESSEE v. JOHN P. HENRETTA

Appeal from the Criminal Court for Bradley County
No. 97-334 R. Steven Bebb, Judge

No. E2007-01750-CCA-R3-DD - Filed April 14, 2009

A Bradley County Criminal Court jury convicted the defendant, John P. Henretta, of premeditated murder, *see* T.C.A. § 39-2-202(a)(1) (1982), felony murder, *see id.*, two counts of robbery with a deadly weapon, *see id.* § 39-2-501(a), two counts of aggravated rape, *see id.* § 39-2-603(a), and two counts of aggravated kidnapping, *see id.* § 39-2-301. The trial court merged the felony murder and premeditated murder convictions into a single conviction, and the jury imposed a sentence of death after determining that the State had proven four aggravating circumstances and that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt. *See id.* § 39-2-203. The trial court also merged the non-capital convictions into a single conviction of each offense and imposed concurrent, Range II sentences of 45 years for robbery with a deadly weapon, 50 years for aggravated kidnapping, and 50 years for aggravated rape. The court ordered the effective 50-year sentence to be served consecutively to the sentence of death. In this appeal, the defendant challenges his conviction of first degree murder and the accompanying death sentence as well as his conviction of aggravated kidnapping. He contends (1) that the trial court erred by refusing to dismiss the indictment for a lack of jurisdiction; (2) that the trial court erred by refusing to suppress evidence obtained pursuant to a search of his person; (3) that the trial court erred by refusing to dismiss the death penalty notice on the basis of the delay between his confession and indictment; (4) that the evidence is insufficient to support his conviction of aggravated kidnapping; (5) that the trial court's refusal to instruct the jury on the effect of a non-unanimous verdict at the capital sentencing hearing deprived him of due process; and (6) that Tennessee's death penalty scheme violates the constitutional ban on cruel and unusual punishment. Discerning no error, we affirm the judgments of the trial court. Following our mandatory review, *see* T.C.A. § 39-13-206(c)(1) (2006), we also affirm the sentence of death.[1]

Tenn. R. App. P. 3; Judgments of the Criminal Court Affirmed

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[1] At the time of the offenses in this case, the Code provided for "the right of direct appeal from the trial court to the Tennessee Supreme Court, which shall have exclusive appellate jurisdiction, provided that the sentence of death shall be automatically reviewed by the Tennessee Supreme Court." T.C.A. § 39-2-205(a) (1982). The General Assembly later amended the Code to provide for direct review of death penalty cases by this court. *See* T.C.A. § 39-13-206(c)(1) (2006).

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which NORMA MCGEE OGLE and D. KELLY THOMAS, JR., JJ., joined.

Charles G. Currier, Madisonville, Tennessee (on appeal and at trial); Steven B. Ward, Madisonville, Tennessee (on appeal); and Charles Corn, District Public Defender (at trial), for the appellant, John P. Henretta.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Mark E. Davidson, Senior Counsel; Jerry Estes, District Attorney General; and Sandra Donaghy, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The proof at trial established that in November 1988, the defendant robbed, kidnapped, raped, and murdered Rose Crabtree, a thirty-two-year-old mother of two. At the time of the offenses, the defendant and an accomplice, Michael Goodhart, were on parole and fleeing authorities in a stolen car when they stopped in Cleveland, Tennessee. Ms. Crabtree's murder remained unsolved for several years until continuing investigation into the case led state and federal authorities to the pair. Upon meeting with investigators at Leavenworth Penitentiary in Kansas, where he was incarcerated for unrelated crimes, the defendant gave a full confession to the victim's murder.[2]

Guilt Phase

In November 1988, the victim and her sister, Helen Williams, both worked at the Salvation Army Thrift Store in Cleveland, Tennessee. Ms. Williams described the victim as a very friendly, very likeable person who was never rude to anyone. Although Ms. Williams worked only part-time, the victim worked full-time to support her two children, ages 11 and 13, and the family lived from paycheck to paycheck. On November 30, 1988, the victim worked the closing shift at the thrift store. Ms. Williams telephoned the victim between 4:30 and 5:00 p.m. to discuss their plans to meet at church later that evening around 7:00 p.m. and go together to visit a local nursing home. The store's closing procedure required the remaining employee first to lock the front door, then empty the cash register, count the money, and place it into a bag in preparation for a bank deposit. Fifty dollars was always left in the cash drawer to provide change for the following day's transactions, while the daily proceeds were deposited at the bank. The final cash register receipt on November 30, 1988, reflected a print time of 5:12 p.m. and daily proceeds of $139.69.

When the victim did not arrive at church at 7:00 p.m. as planned, a church member and his son went to the thrift store to check on the victim. They found the victim's car in the parking lot and the store's front door locked. Ms. Williams then went to the store with her boyfriend, Ray.

[2]The record indicates that Mr. Goodhart died in prison of natural causes before being brought to trial for the victim's murder.

She unlocked the door with her own key, and they began looking for the victim. When Ray turned on the lights at the back of the store, Ms. Williams saw the victim's lunch box and coat lying on the sales counter at the front of the store, but they did not find the victim. The store appeared to be in normal condition; the sales floor was "orderly." Two rooms at the back were cluttered with items taken in for sale. A door at the very back of the store opened to the street, and the Cleveland Police Station was located directly across from the thrift store.

According to Ms. Williams, the victim paid for all of her expenses on a cash basis and had just received $420 from an inheritance. Ms. Williams believed that the victim had the $420 in her possession on the day of the offenses. Ms. Williams never found either the victim's purse or the bank deposit in the store.

Officers who were called to the store found the cash drawer insert, a number of receipts, and one of the victim's shoes on the floor in the middle section of the store. Officers found an empty money bag just inside the back room. They found the victim's partially covered body at the back of the store near a large pool of blood, her right leg and right arm exposed and her other shoe nearby. The victim was clothed in a blue jean skirt, a pink pull-over top, and a bra, but her underwear had been removed. Officers never found the victim's purse or any cash.

An autopsy of the victim's body, performed by Doctor Fenton Scruggs, revealed three stab wounds to the victim's neck, two on the left side and one on the right side. A three-inch wound to the top left side of the neck severed her jugular vein. A one-inch wound to the bottom left side of the neck did not cut any major veins or arteries. A wound immediately below the right ear, which Doctor Scruggs described as "particularly damaging," severed the carotid artery and the jugular vein and extended so deep that it severed the ligaments holding the backbone vertebra together, exposing the spinal cord. Doctor Scruggs testified that this most severe wound, which was the first such wound that he had seen, resulted from "great force" and would have rendered the victim unconscious within approximately 30 seconds. The autopsy report reflected that the victim ultimately died of the loss of blood resulting from the stab wounds to her neck.

Early into their investigation of the murder, detectives developed several suspects, but deoxyribonucleic ("DNA") analysis failed to connect any of the suspects to the evidence collected at the crime scene. As a result, no arrests were made for several years.

In January 1994, Bradley County detectives and agents from the Federal Bureau of Investigation ("FBI") received information that led them to speak first with Michael Goodhart and then the defendant, who was then a federal inmate in Leavenworth, Kansas. Before meeting with the defendant, authorities obtained a search warrant to procure blood, hair, and saliva samples from the defendant. After securing the specimens, authorities took the defendant's sworn statement. The defendant confessed to killing the victim and committing the related offenses. In addition, he drew a diagram of the store, and in the process, he described various features of the store and designated the locations where he had killed the victim, "rolled her over," and "covered her up."

According to the defendant, he was on parole and "on the run" from authorities in Pennsylvania when he and Mr. Goodhart left Pennsylvania in a stolen car. The two men traveled

across Florida, Georgia, and Alabama before stopping in Cleveland, Tennessee. They began "drinking and stuff" at a bar near the Salvation Army Thrift Store, and, after waiting approximately two hours, the defendant and Mr. Goodhart "went back by the store," where they remained until closing time. The defendant explained that Mr. Goodhart hid inside the store and after the store closed, let the defendant in the back door. The men, both armed with knives, grabbed the victim at the "store room entrance." Mr. Goodhart raped the victim while the defendant searched through her purse and found several hundred dollars. The defendant also admitted taking the cash from a money bag he found.

After gathering the cash, the defendant raped the victim. He stated that the victim did not struggle or scream during the assault and, as the men were preparing to leave, even advised them against using the back door to exit because the police station was located there. At that point, the defendant asked Mr. Goodhart whether he should kill the victim. Mr. Goodhart said yes, and the defendant stabbed the victim "one time in the neck." After Mr. Goodhart "poked her with his knife to make sure" she was dead, the defendant placed a blanket over the victim's body. The men took the victim's purse, panties, and pantyhose and left. They later disposed of these items in Alabama and Memphis, Tennessee. The pair later traveled to Arkansas, where they were eventually arrested by the FBI for unrelated offenses. In concluding his statement, the defendant told investigators that he had covered the victim's body because he knew what he had done was "wrong." He stated that he and Mr. Goodhart had originally planned to rob but not kill the victim. The defendant described the victim as a "nice looking lady" wearing a blue jean skirt and pink top.

Tennessee Bureau of Investigation ("TBI") Agent Brooks Wilkins described the defendant as being "very cooperative" during the interview. The defendant made no attempt to deny his role in the victim's murder and told Agent Wilkins that he would be willing to return to Tennessee and plead guilty in exchange for a life sentence. Agent Wilkins testified that he believed the defendant's confession and had "no doubt" that the defendant was present and a perpetrator in the crime. He stated, however, that he always had reservations about people who made confessions while holding back some details. Agent Wilkins noted, for example, that the defendant only admitted stabbing the victim one time. Agent Wilkins said he advised the defendant before interviewing him that he had already spoken with Michael Goodhart.

Constance Howard, a TBI forensic scientist who testified as an expert in the areas of serology and DNA analysis, stated that testing indicated the presence of semen on the slide taken from the victim's "rape kit," on a mattress pad found at the scene, and on two areas of the victim's skirt. Her initial testing failed to link the defendant to any of the evidence she examined. Agent Howard recalled that various items of evidence were sent to the FBI Crime Laboratory more than once after the initial FBI testing failed to link the evidence to any suspect. She also noted that at the time of the victim's 1988 murder, the FBI had just begun to perform DNA analysis and that the TBI had not begun to do so. Agent Howard testified that dried blood samples can last "years and years" for purposes of DNA analysis and at least five years for blood type analysis.

FBI forensic examiner Alan Giusti testified that of the evidence initially submitted to the FBI laboratory in April 1996, he performed DNA testing on a cutting from the victim's skirt and vaginal swabs taken from the victim, which he compared with a known blood sample of the

defendant and a known blood sample of the victim. His initial testing was inconclusive, but after the evidence was resubmitted in January 1997, he performed a second test using a process known as polymer chain reaction ("PCR"), which, he explained, required a much smaller amount of DNA for analysis. PCR testing yielded a DNA profile that Agent Giusti then compared to the known DNA profiles of the defendant and victim. Analysis of the skirt cutting showed a mixture of DNA with the defendant as the "major DNA donor." Analysis of the vaginal swabs also showed a mixture of DNA with the defendant again providing the dominant DNA profile in the specimens. In summary, Agent Giusti testified that the probability that a person other than the defendant had contributed the DNA profile on the victim's skirt and vaginal swabs was approximately one in 88,000 from the Caucasian population. He also testified that testing excluded Mr. Goodhart as the contributor of a third DNA profile found on the victim's vaginal swabs.

Following Agent Giusti's testimony, the State rested its case. The defense entered various exhibits and rested without calling any witnesses. After deliberating for two hours, the jury returned with a verdict convicting the defendant on all counts.

Sentencing Phase

The State introduced into evidence judgments for the defendant's prior violent felony convictions, which included an October 1974 conviction of rape in Crawford County, Pennsylvania; a June 1991 conviction of second degree murder in Lawrence County, Pennsylvania; a June 1991 conviction of first degree rape in Lawrence County, Pennsylvania; and a July 1989 conviction of kidnapping filed in the United States District Court for the Eastern District of Pennsylvania.

In addition, the State introduced the victim impact statement of the victim's son, David Crabtree, who stated that his mother's murder had left him depressed, unable to trust people, and unable to work alone. In her victim impact statement, the victim's daughter, Amanda Crabtree Forest, stated that she was living a "nightmare" as a result of her mother's death. She said that she was forced to grow up without her mother's love and guidance when she most needed it and would never be "fully and truly happy" because her heart was filled with pain, sorrow, and hatred and would always be broken.

Through its criminal investigator, Judy Randolph, the defense presented proof of the defendant's background. According to Ms. Randolph, the defendant was born in Meadville, Pennsylvania, in February 1943 and lived there with his parents and two brothers until his mother deserted the family when the defendant was about two years old. In 1948, the defendant's father took the three boys to be cared for by an aunt, who, that same year, took the boys to an orphanage. Each nun at the orphanage supervised approximately 50 children. Medical records from the orphanage showed that the defendant once received five stitches to his left ear after suffering a blow to his head, and a psychological exam showed the defendant to be "dull normal."

In 1953, the defendant's father regained custody of the defendant and one brother, Terrance, and they lived together with the defendant's stepmother in Detroit, Michigan. The defendant's other brother, Robert, had been adopted. The defendant's stepmother died in 1961, and the defendant spent the remainder of his life "mostly incarcerated in different institutions." Ms.

Randolph testified that from her discussions with the defendant and her review of the presentence and psychological reports, she learned that the defendant's father was an alcoholic and "very abusive," but she was unable to find any evidence that he directed his abuse at the defendant. The defendant's brother, Terrance, had died of cancer in a nursing home in October 1998, and his other brother, Robert, had been killed in New York City at the age of 34. Ms. Randolph discovered that the defendant's only lasting relationship was his friendship with a Robin McKeehan and her family. Ms. McKeehan and her husband worked with church ministries and had befriended the defendant while he was incarcerated in Pennsylvania and had continued to communicate with him through letters and telephone calls.

Neuropsychologist James S. Walker testified that his evaluation of the defendant revealed evidence of brain dysfunction, including poor muscle functioning, difficulty inhibiting impulsive behaviors, mild frontal brain damage, poor memory skills, and poor "executive function," which, he explained, helps a person organize and figure out solutions to problems. Other personality tests showed the defendant to be a person "who has a lot of difficulties with his thinking, his feeling and behavior." Doctor Walker described the defendant as a "very confused, agitated, angry, hostile, . . . person who feels like he's not in control of his own impulses, who doesn't understand why he does the things that he does." Doctor Walker explained that many people with these personality traits become involved in serious criminal behavior. Doctor Walker testified that he concluded that the defendant did not fake his symptoms because the defendant had evidenced the same deficiencies throughout his life. He explained that the defendant did not learn from his mistakes and had tended throughout his life to act in a very disorganized way often based on impulse rather than rationality or reason.

Standard intelligence testing showed that the defendant, at the age of nine, had an intelligence quotient ("IQ") of 84, which is slightly below average. At the age of 45, he had an overall IQ of 75, which Doctor Walker described as "quite poor," and at the age of 58, he had an IQ of 79. Doctor Walker explained that a normal IQ ranged from 85 to 115 and that an IQ in the 70s evidenced low or borderline intelligence. Doctor Walker testified that the defendant was "somewhere in that land between normal and mentally retarded."

Regarding the victim's murder, Doctor Walker testified that the defendant had been unable to refrain from acting on a "strong feeling" on the day of the murder, as was consistent with his overall personality. According to the doctor, the defendant reported drinking approximately "a fifth" of whiskey and eight to 10 beers on the day of the murder, and as a result, the defendant was "probably quite intoxicated." Doctor Walker could not identify the source of the defendant's dysfunction, but he explained that a combination of brain dysfunction and a history of physical abuse would often result in "difficulty coping and managing life." Doctor Walker concluded that all of these factors influenced the defendant's actions, choices, and reactions and insisted that "it's not the same as the average person committing the same acts or making the same choices." Doctor Walker agreed that a computerized axial tomography ("CAT") scan of the defendant's brain showed no evidence of "gross abnormality," that an electroencephalogram ("EEG") was normal, and that the defendant's brain chemical levels were normal.

Doctor William Bernet, a psychiatrist, testified that he performed an evaluation of the defendant that consisted of four separate visits for a total of five hours and included a neurological evaluation, brain scans, and a review of the defendant's historical information and medical records. According to Doctor Bernet, the evaluation established that the defendant suffered maltreatment, neglect, and abuse as a child; that he had brain damage; that he had a condition called "intermittent explosive disorder," and that, at the time of the offenses, the defendant was intoxicated. Doctor Bernet testified that on the day of the victim's murder, the defendant's various brain conditions impaired his ability to control his angry and violent impulses as well as his sexual impulses. Doctor Bernet explained that the type of wounds the victim sustained indicated that the defendant was in a violent state, which the doctor partly attributed to the child abuse, the explosive disorder, the brain damage, and the intoxication.

Following its deliberations, the jury concluded that the State had proven all four of the aggravating circumstances alleged: (2), that the defendant had been previously convicted of one or more violent felonies; (5), that the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind; (6), that the defendant committed the murder for the purpose of avoiding, interfering with, or preventing his lawful arrest or prosecution; and (7), that the defendant committed the murder while he was engaged in the commission of or attempting to commit rape, robbery, or kidnapping. *See* T.C.A. § 39-2-203(i)(2), (5) - (7) (1982). After also concluding that the established statutory aggravating circumstances outweighed any mitigating circumstances beyond a reasonable doubt, the jury sentenced the defendant to death for the murder of Ms. Crabtree.

I. Interstate Agreement on Detainers

The defendant argues that the trial court erred by refusing to dismiss the indictment on grounds that the State violated the "anti-shuttling" provision of the Interstate Agreement on Detainers Act ("Agreement"). *See* 18 U.S.C. App., Interstate Agreement on Detainers, art. IV(e) (1976); *see also* T.C.A § 40-31-101 (1997). Also, the defendant argues that a variety of jurisdictional and procedural deficiencies rendered ineffective the writ of *habeas corpus ad prosequendum* issued by the trial court ineffective to retrieve the defendant from federal custody in Kansas. Thus, he argues, because the writ issued by the trial court could not have operated as a writ of *habeas corpus ad prosequendum*, the writ, an order directed at the trial court clerk for issuance of the writ, and a letter from the prosecutor to federal prison authorities collectively constituted a detainer governed by the Agreement. He then argues that the State's failure to follow the procedures of the Agreement deprived the trial court of jurisdiction over him. The defendant seeks a return to the custody of the Pennsylvania Department of Corrections to serve the remainder of his sentence of life imprisonment without the possibility of parole. The State submits that the defendant's transfer to Tennessee from Kansas resulted from a valid writ of *habeas corpus ad prosequendum*, rendering the Agreement inapplicable. In denying the defendant's motion to dismiss the indictment, the trial court essentially adopted the State's position.

Initially, we note that the defendant has failed to support his argument with appropriate references to the record of this case, *see* Tenn. R. App. P. 27(a)(7), thereby waiving our

consideration of this issue, *see* Tenn. R. Ct. Crim. R. 10(b). Despite the apparent waiver, we choose to address the issue on its merits.

The record reflects that Bradley County Assistant District Attorney General Sandra Donaghy wrote to federal prison officials at Leavenworth Penitentiary on August 26, 1997, requesting that the defendant be temporarily transferred to Tennessee state custody, via a writ of *habeas corpus ad prosequendum*, for the purpose of service of process and disposition of the instant case. In her letter, Ms. Donaghy expressly requested that her office be advised of "any reason we cannot assume custody of JOHN P. HENRETTA . . . by Writ of Habeas Corpus Ad Prosequendum." Two days later, the trial court entered a writ of *habeas corpus ad prosequendum* against the defendant, observing that the relevant state and federal offices "have agreed to honor this Writ of Habeas Corpus Ad Prosequendum." The court also issued an order directing the trial court clerk to issue the writ to the Bradley County Sheriff to receive custody of the defendant from the federal prison.

"The [Agreement] is a compact between the states, the District of Columbia, Puerto Rico, the Virgin Islands, and the United States," *see State v. Brown*, 53 S.W.3d 264, 284 (Tenn. Crim. App. 2000), which has been adopted by Tennessee and codified at Tennessee Code Annotated section 40-31-101, *see id.* The provisions of the Agreement are triggered only upon the filing of a detainer, which has been defined as "'a request filed by a criminal justice agency with the institution in which a prisoner is incarcerated, asking the institution either to hold the prisoner for the agency or to notify the agency when release of the prisoner is imminent.'" *Brown*, 53 S.W.3d at 285 (quoting *Carchman v. Nash*, 473 U.S. 716, 719, 105 S. Ct. 3401, 3403 (1985)). The "anti-shuttling" provision of the Agreement provides:

> If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

T.C.A. § 40-31-101, art. IV(e).

The purpose of the writ of *habeas corpus ad prosequendum*, which originated in the English common law, is "to remove a prisoner in order to prosecute him in the proper jurisdiction wherein the offense was committed." *Carbo v. United States*, 364 U.S. 611, 615, 81 S. Ct. 338, 341 (1961). Although no statutory authority exists conferring upon the courts of this state the power to issue a writ of *habeas corpus ad prosequendum*, the practice of using the writ to secure the presence of an out-of-jurisdiction defendant has continued as an extension of the common law. *Id.* at 620-21, 81 S. Ct. at 344. The writ depends primarily upon "comity . . . between sovereignties" for effective operation. *Id.*

Although a writ of *habeas corpus ad prosequendum* can be loosely defined as a request for the presence of an accused to stand trial in a jurisdiction other than the one where he is

currently incarcerated, it does not constitute a detainer within the meaning of the Agreement. *See generally United States v. Mauro*, 436 U.S. 340, 98 S. Ct. 1834 (1978). As the Supreme Court explained, "The role and functioning of the *ad prosequendum* writ are rooted in history, and they bear little resemblance to the typical detainer which activates the provisions of the Agreement." *Id.* at 358, 98 S. Ct. at 1846. The Court described the differences between a writ of *habeas corpus ad prosequendum* and a detainer:

> Unlike a writ of *habeas corpus ad prosequendum* . . . , a detainer may be lodged against a prisoner on the initiative of a prosecutor or law enforcement officer. Rather than requiring the immediate presence of the prisoner, a detainer merely puts the officials of the institution in which the prisoner is incarcerated on notice that the prisoner is wanted in another jurisdiction for trial upon his release from prison. Further action must be taken by the receiving State in order to obtain the prisoner. Before it was made clear that a prosecuting authority is not relieved of its obligation to provide a defendant a speedy trial just because he is in custody elsewhere . . . detainers were allowed to remain lodged against prisoners for lengthy periods of time, quite often for the duration of a prisoner's sentence.

Id. at 358-59, 98 S. Ct. at 1846 (citation omitted). Given these differences, the Court ruled, "a writ of *habeas corpus ad prosequendum* is not a detainer for purposes of the Agreement." *Id.* at 361, 98 S. Ct. at 1848. Similarly, this court has held that when a writ of *habeas corpus ad prosequendum* is used to gain custody of a federal prisoner, neither the agreement nor its anti-shuttling provision is implicated. *See Brown*, 53 S.W.3d at 285; *Metheny v. State*, 589 S.W.2d 943, 945 (Tenn. Crim. App. 1979).

As indicated, the defendant concedes that the trial court issued a writ of *habeas corpus ad prosequendum* to effect his transfer from federal to state custody in August 1997. He argues, however, that the writ issued by the trial court was ineffective for a variety of jurisdictional and procedural deficiencies.

First, he claims that the trial court lacked "constitutional or statutory jurisdiction to issue a writ against an individual in Kansas." The very purpose of the common law writ of *habeas corpus ad prosequendum* requires that it be issued against the prisoner by a court located in a different jurisdiction. The defendant did not challenge either the issuance of the writ or his transfer from federal to state custody while he was still incarcerated in Kansas. Upon the federal government's agreement to honor the writ issued in this case and the defendant's subsequent transfer to this state, the trial court obtained personal jurisdiction over the defendant.

Next, the defendant argues that "under T.C.A. 29-21-102, Tennessee Courts do not have habeas corpus jurisdiction over federal prisoners." Tennessee Code Annotated section 29-21-102 provides:

> Persons committed or detained by virtue of process issued by a court of the United States, or a judge thereof, in cases where such judges or courts have exclusive jurisdiction under the laws of the United States, or have acquired exclusive jurisdiction by the commencement of suits in such courts, are not entitled to the benefits of this writ.

T.C.A. §29-21-102 (2006). Code section 29-21-101, provides for such writs as follows: "Any person imprisoned or restrained of liberty, under any pretense whatsoever, except in cases specified in § 29-21-102, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment and restraint." *Id.* § 29-21-101. The writ of habeas corpus, when it is used to inquire into the validity of detention, is more accurately referred to as a writ of *habeas corpus ad subjiciendum*. As explained by Chief Justice John Marshall, the generic term habeas corpus actually encompasses the writ of *habeas corpus ad subjiciendum*, the writ of *habeas corpus ad prosequendum*, the writ of *habeas corpus ad testificandum*, the writ of *habeas corpus ad respondendum*, the writ of *habeas corpus ad satisfaciendum*, the writ of *habeas corpus ad deliberandum*, and the writ of *habeas corpus cum causa* or *ad faciendum et recipiendum*. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 97-99 (1807). Of the several writs of habeas corpus, the writ of *habeas corpus ad satisfaciendum* has no application to American jurisprudence. *Id.* at 98. The Court explained "that when used singly – when we say the writ of habeas corpus, without addition, we most generally mean that great writ," used to test the reasons for restraint or detention. *Id.* at 95; *see also Carbo*, 364 U.S. at 615, 81 S. Ct. at 341.

Thus, although Code section 29-21-101 uses the general term habeas corpus, the language of the statute makes clear that it is specifically addressed to the writ of *habeas corpus ad subjiciendum*, the "Great Writ." *See Faulkner v. State*, 226 S.W.3d 358, 361 (Tenn. 2007). Because section 29-21-101 is applicable only to the writ of *habeas corpus ad subjiciendum*, the procedural and jurisdictional restrictions provided for in subsequent sections are likewise applicable only to the *ad subjiciendum* writ. In consequence, the writ of *habeas corpus ad prosequendum* issued in this case does not fail for failure to comply with the habeas corpus provisions in the Code.

The defendant also contends that the trial court lacked the authority to issue the writ to command the federal prison to release him into state custody. Although the doctrine of federal supremacy would generally prevent a state court from commanding the action of a federal officiary, in this instance the federal government has agreed to "consider a request made on behalf of a state or local court that an inmate be transferred to the physical custody of state or local agents pursuant to state writ of habeas corpus ad prosequendum." 28 C.F.R § 527.30. Indeed, prisoners confined in federal institutions are routinely transferred "other than through the Interstate Agreement on Detainers" pursuant to the procedure established in section 527.31 of chapter 28 of the Code of Federal Regulations. *See id.* § 527.31(a); Given this express statutory consent, no issues of supremacy affected the validity of the writ of *habeas corpus ad prosequendum* in this case.

Because the defendant was transferred from federal to state custody via a valid writ of *habeas corpus ad prosequendum* and because a writ of *habeas corpus ad prosequendum* is not a detainer, the "anti-shuttling" provisions of the Agreement do not apply. The defendant is not entitled to relief on this issue.

II. Motion to Suppress

The defendant contends that the trial court erred by failing to suppress the search warrant executed against him at the federal prison in Leavenworth, Kansas, on grounds that the State failed to attach to the warrant a letter referenced in the warrant and that officers failed to serve him with a copy of the warrant or leave a copy of the warrant with him following its execution. The defendant argues that his confession, as "fruit of the poisonous" search, should have been suppressed. The State responds that neither the failure to attach the cited documents nor the method of service of the warrant invalidated the warrant.

The record reflects that officers obtained a search warrant for the defendant's blood, saliva, and hair samples on February 10, 1994, in Leavenworth County, Kansas. The sworn joint affidavit of Cleveland Police Department Officer Danny Chastain and TBI Special Agent Brooks Wilkins, attached in support of the warrant, provided that a lead in a police bulletin ultimately "revealed the attached copy of a letter sent by Michael S. Goodhart" to a federal judge in Pennsylvania in December 1993. The referenced letter is not attached to the affidavit and does not otherwise appear in the record.

At an October 23, 2000 hearing on his motion to suppress, the defendant first argued that the absence of the letter from Mr. Goodhart warranted suppression of the evidence against him. After discussing the potential that the letter was indeed attached to the original warrant located in Kansas, the trial court and the parties agreed that they should obtain a certified copy of the warrant and any attachments. In subsequent argument, the prosecutor advised that her certified copy of the warrant did not include the Goodhart letter. In later testimony, Agent Wilkins testified that in preparation for the hearing, he had discovered a copy of the letter in the TBI file of the defendant's case.

The defendant also advocated suppression based on the failure of the serving officers to provide to him a copy of the warrant at the time of or immediately after the search and seizure. The defendant testified that he was not handed a copy of the warrant at the time of the search, but he acknowledged that he received one via the prison's in-house mail system approximately one week later. The defendant stated that prison rules would not have prohibited the officers from giving him a copy of the warrant or his taking it with him to his cell. The return reflects that a copy of the warrant was left with "Bill Thomas, SIS."

Agent Wilkins testified that before traveling to Kansas, he and Lieutenant Chastain contacted FBI Agent Thomas Moriana, who was assigned to the federal penitentiary at Leavenworth, to arrange their visit with the defendant and help them obtain a search warrant. Upon arriving in Kansas, Agent Wilkins and Lieutenant Chastain presented their evidence, including the Goodhart letter, to a county prosecutor who assisted them by drawing up the search warrant and presenting it to a judge. Agent Wilkins stated that "to the best of [his] recollection," the Goodhart letter was attached to the affidavit he prepared with Lieutenant Chastain.

Regarding the warrant itself, Agent Wilkins testified that upon first meeting the defendant, he introduced himself and explained why they were there. He continued: "I had a copy of the search warrant, explained what the search warrant was for." Neither Agent Wilkins nor any other State's witness proffered any reason that the warrant was not personally served on the defendant at the time of its execution.

More than a year after the hearing, the trial court entered an order denying the motion to suppress on both claimed grounds. First, the trial court found that even without the Goodhart letter, the warrant and affidavit established probable cause for the search and that the affidavit alone was legally sufficient. Second, the trial court concluded, based on testimony from the suppression hearing, that officers executing the search, following the instructions of the prison personnel, gave a copy of the warrant to prison officials for delivery to the defendant. The trial court observed: "Although no copy of any express policy was provided, this court finds that the officers did as instructed by prison officials and left a copy for the defendant because they believed that they could not personally hand it to him." In the alterative, the court found that the officers' failure directly to provide a copy of the warrant to the defendant would not require suppression of evidence.

A trial court's factual findings on a motion to suppress are conclusive on appeal unless the evidence preponderates against them. *State v. Binette*, 33 S.W.3d 215, 217 (Tenn. 2000); *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996). Thus, questions of credibility, the weight and value of the evidence, and the resolution of conflicting evidence are matters entrusted to the trial judge, and this court must uphold a trial court's findings of fact unless the evidence in the record preponderates against them. *Odom*, 928 S.W.2d at 23; *see also* Tenn. R. App. P. 13(d). The application of the law to the facts, however, is reviewed de novo on appeal. *State v. Keith*, 978 S.W.2d 861, 864 (Tenn. 1998). We review the issue in the present appeal with these standards in mind.

The defendant first argues that because "the search warrant referred to documents that were not attached and an incomplete affidavit was presented to the Kansas Court . . . the search warrant was defective under Tennessee law." As he explains in his reply brief, "Without the letter that was claimed to be attached, the affidavit of Lt. Chastain is totally devoid of probable cause."

When the defendant seeks suppression of evidence on the basis of a defective search warrant, he bears the burden of establishing, by a preponderance of the evidence, "the existence of a constitutional or statutory defect in the search warrant or the search conducted pursuant to the warrant." *State v. Henning*, 975 S.W.2d 290, 298 (Tenn. 1998) (citing *State v. Evans*, 815 S.W.2d 503, 505 (Tenn. 1991); *State v. Harmon*, 775 S.W.2d 583, 585-86 (Tenn. 1989)).

Both the state and federal constitutions require probable cause as a prerequisite for the issuance of a search warrant. *See* U.S. Const. Amend. IV; Tenn. Const. art. 1, § 7. Probable cause for the issuance of a search warrant exists when, "given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place," which in this instance was the defendant's own body. *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332 (1983). "The sufficiency of a search warrant affidavit is to be determined from the allegations contained in the affidavit alone," *see Henning*, 975 S.W.2d at 297,

when read "in a commonsense and practical manner," *see State v. Melson*, 638 S.W.2d 342, 357 (Tenn. 1982), and given their natural meaning and interpretation, *see State v. Smith*, 477 S.W.2d 6, 8 (Tenn. 1972). "[T]he traditional standard for review of an issuing magistrate's probable-cause determination has been that so long as the magistrate had a 'substantial basis for . . . [concluding]' that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more." *Gates*, 462 U.S. at 236, 103 S. Ct. at 2331 (quoting *Jones v. United States*, 362 U.S. 257, 271, 80 S. Ct. 725, 736 (1960)) (alteration in *Gates*).

In this case, the sworn joint affidavit of Agent Wilkins and Lieutenant Chastain provided in pertinent part as follows:

> On January 11, 1994, Lieutenant Danny Chastain of the Cleveland Tennessee Police Department observed an NCIC teletype from Detective Ballentine of the Philadelphia, Pennsylvania Police Department, directed to any Tennessee Police Agency having an unsolved homicide involving a female employee of a store that was murdered by a cut to the throat sometime in November, 1988, and requesting they respond in reference to a possible lead. Subsequent investigation by Lieutenant Chastain revealed the attached copy of a letter sent by Michael S. Goodhart to Federal Judge Joseph L. McGlynn Jr., in Philadelphia, Pennsylvania, December 20, 1993.
>
> On January 20, 1994, Lieutenant Chastain contacted the aforesaid inmate Michael S. Goodhart by telephone at the Federal Correctional Institute in Bastrop, Texas. Goodhart advised Lieutenant Chastain that the murder he witnessed and referred to in the aforesaid letter occurred in a Thrift Store where used clothing is sold, and that the murder occurred approximately between 5:00 p.m. and 6:00 p.m. in the evening after the store had closed. Goodhart also stated that the Thrift Store was located just a couple of blocks from the Courthouse in the downtown section of the city. Goodhart further stated that he was present when the murder occurred and that he knew who had committed the murder and the location of this man. Goodhart advised that the man is in the penitentiary. He did not state the [n]a[m]e of this individual nor his location to Lieutenant Chastain. The Salvation Army Thrift Store at the time of the Crabtree murder was located approximately two blocks from the Courthouse Square in Cleveland, Tennessee.
>
> Further investigation by Lieutenant Chastain and Special Agent Wilkins has revealed that Michael Goodhart was arrested along with John Henretta, white male, DOB: 2-12-43, FBI#767995D, on December 3, 1988, outside of Little Rock, Arkansas. Goodhart and Henretta were wanted by the FBI for a Kidnapping that occurred on or about the day after Thanksgiving, in 1988, in Pennsylvania. The

> weapon used in the kidnapping was a knife. John Henretta has committed and been convicted of rapes and one homicide similar to the Francis Rose Crabtree case in the past. He is a suspect in another homicide similar to the Rose Crabtree murder.
>
> . . . . The Crabtree murder occurred at a time when Henretta and Goodhart were fleeing from crimes committed in Pennsylvania and Virginia and according to Goodhart's letter traveling through Tennessee. Cleveland, Tennessee is located in routes between Virginia and Arkansas.
>
> Blood, head hair, pubic hair and saliva samples are needed from John Henretta for comparison with evidence recovered from the crime scene.

Although the defendant asserts that there is no proof that the Goodhart letter was actually attached to the affidavit when it was presented to the magistrate, he has likewise failed to present any proof that it was not. As indicated, the defendant bears the burden in this instance of establishing a constitutional defect in the warrant. Moreover, even assuming that the letter was not attached to the affidavit, we agree with the trial court that the affidavit alone provided probable cause for the issuance of the warrant. The affidavit provided a basis of the officers' knowledge, key facts establishing the veracity of Mr. Goodhart's claims, information linking Mr. Goodhart and the defendant at the time of the crimes, and a basis for concluding that the forensic samples requested would uncover evidence of the defendant's participation in the offenses. In consequence, the trial court did not err by denying the motion to suppress on this basis.

To the extent that his argument can be construed to state that the absence of the letter runs afoul of the procedural requirements of Rule 41 of the Tennessee Rules of Criminal Procedure, the defendant is not entitled to relief. At the time of the issuance of the warrant in this case, Rule 41 provided, in relevant part, as follows:

> A warrant shall issue only on an affidavit or affidavits sworn to before the magistrate and establishing the grounds of issuing the warrant. If the magistrate is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, the magistrate shall issue a warrant identifying the property and naming or describing the person or place to be searched. . . . The magistrate shall prepare an original and two exact copies of the search warrant, one of which shall be kept by the magistrate as a part of his or her official records, one of which shall be left with [the] person or persons on whom the search warrant is served. . . . Failure of the magistrate to make said original and two copies of the search warrant or . . . the failure of the serving officer where possible to leave a copy with the person or persons on whom the search warrant is being

> served, shall make any search conducted under said search warrant an illegal search and any seizure thereunder an illegal seizure.

Tenn. R. Crim. P. 41(c) (1994). "These provisions derive from a predecessor statute," *State v. Steele*, 894 S.W.2d 318, 319 (Tenn. Crim. App. 1994), and have been interpreted as "plain and mandatory," *see id.* The provisions of Rule 41(c) apply only to search warrants and do not extend to the underlying affidavit. *See State v. Davis*, 185 S.W.3d 338, 345 (Tenn. 2006); *see also Henning*, 975 S.W.2d at 296. In *Henning*, the defendant argued that the failure to attach the underlying affidavit to the warrant or file the documents together rendered the search warrant invalid. In rejecting the defendant's assertion, our supreme court held the failure to attach the affidavit was "inconsequential." *Henning*, 975 S.W.2d at 296. The court said, "While an affidavit must be retained in order to ensure subsequent judicial review of the probable cause determination, there is no statute or rule in Tennessee which requires an affidavit upon which a search warrant is issued to be attached or otherwise kept with the warrant." *Id.*

Here, the defendant urges application of these provisions not only to the underlying affidavit but also to the Goodhart letter, which was referenced in the affidavit. Given that the failure to attach or file an underlying affidavit does not affect the validity of the warrant, we cannot say that the failure to attach a letter included in support of the affidavit would render the warrant in this case invalid.

The defendant also urges suppression of the evidence on the basis of the officers' failure to personally serve him with the warrant or leave a copy of the warrant with him at the time of its execution. As noted, Rule 41(c) provides that "the failure of the serving officer where possible to leave a copy with the person or persons on whom the search warrant is being served[] shall make any search under said search warrant an illegal search and any seizure thereunder an illegal seizure." Although the defendant acknowledges that he received a copy of the warrant by mail several days after its execution, he asserts that this method of service runs afoul of the requirements of Rule 41 and, as a result, requires suppression of the evidence obtained pursuant to the warrant and of his confession. We disagree.

In this case, the defendant concedes that he received an exact copy of the warrant through institutional mail approximately one week after the search. Given the defendant's status as an inmate, the delivery of the warrant to prison officials immediately upon its execution satisfies the requirements of Rule 41. *See State v. Johnny Ray Roach*, No. 4 (Tenn. Crim. App., at Nashville, Mar. 15, 1989) (holding that delivery of search warrant and inventory into the "property bag" of an inmate incarcerated in a county jail satisfied service requirement of Rule 41).

III. Pre-Indictment Delay

The defendant argues that the more than three-year delay between his confession to the crimes in 1994 and his indictment in 1997, which he deems "inherently unfair," violated his due process rights and resulted in the loss of mitigation evidence. As a result, he contends that the trial court should not have allowed the State to pursue the death penalty and asks this court to reverse the sentence of death. The State submits that the defendant has failed to establish either that it

orchestrated the delay to gain tactical advantage over the defendant or prejudice as a result of the delay. We agree with the State.

Due process principles provide protection from an unreasonable delay between the commission of the crime and the commencement of adversarial proceedings. *State v. Gray*, 917 S.W.2d 668, 673 (Tenn. 1996) (holding that "an untimely prosecution may be subject to dismissal upon . . . due process grounds . . . even though in the interim the defendant was neither formally accused, restrained, nor incarcerated for the offense"). This due process guarantee is found in the Fifth Amendment of the United States Constitution and Article I, sections 8 and 9 of the Tennessee Constitution. *See* U.S. Const. amends. V, XIV; Tenn. Const. art. 1, §§ 8, 9; *Gray*, 917 S.W.2d at 673.

In *State v. Dykes*, 803 S.W.2d 250 (Tenn. Crim. App. 1990), this court, relying upon *United States v. Marion*, 404 U.S. 307, 92 S. Ct. 455 (1971), stated:

> [B]efore an accused is entitled to relief based upon the delay between the offense and the initiation of adversarial proceedings, the accused must prove that (a) there was a delay, (b) the accused sustained actual prejudice as a direct and proximate result of the delay, and (c) the State caused the delay in order to gain tactical advantage over or to harass the accused.

Dykes, 803 S.W.2d at 256. In *Gray*, however, our supreme court observed "that the *Marion-Dykes* approach to pre-accusatorial delay is, in application, extremely one-sided. It places a daunting, almost insurmountable, burden on the accused by requiring a demonstration not only that the delay has caused prejudice but also that the State orchestrated the delay in order to obtain a tactical advantage." *Gray*, 917 S.W.2d at 673. The *Gray* court held that "[i]n determining whether pre-accusatorial delay violates due process, the trial court must consider the length of the delay, the reason for the delay, and the degree of prejudice, if any, to the accused." *Id.*

Later, however, in *State v. Utley*, 956 S.W.2d 489 (Tenn. 1997), our supreme court limited the holding in *Gray* to the unique facts of that case and reiterated that "in other cases involving a pre-arrest delay, the due process inquiry continues to be guided by *Marion*." *Id.* at 495. The supreme court ruled that prejudice "cannot be presumed and instead must be substantiated by the defendant with evidence in the record" and that the due process inquiry under *Marion* also requires proof regarding "the State's use of the delay to gain tactical advantage." *Id.* We note, though, that in *United States v. Lovasco*, 431 U.S. 783, 97 S. Ct. 2044 (1977), both the majority and dissenting opinions placed upon the prosecution the burden of justifying the delay. As a result, the issue of the burden of proof is somewhat muddled. *See, e.g.*, *United States v. Sowa*, 34 F.3d 447, 451 (7th Cir. 1994), *cert. denied*, 513 U.S. 1117, 115 S. Ct. 915 (1995) (holding that once the defendant has proved actual and substantial prejudice, the prosecution must provide its reasons for delay, to be balanced against prejudice to determine whether due process has been denied); *Howell v. Barker*, 904 F.2d 889, 895 (4th Cir.), *cert. denied*, 498 U.S. 1016, 111 S. Ct. 590 (1990). *But see, e.g.*, *United States v. Gouveia*, 467 U.S. 180, 192, 104 S. Ct. 2292, 2300 (1984) (observing, in a case involving the right to counsel prior to indictment, that the defendant must prove that the prosecution's delay in bringing the indictment was deliberate and designed to gain an advantage over

the defendant); *United States v. Crouch*, 84 F.3d 1497, 1510-14 (5th Cir. 1996), *cert. denied*, 519 U.S. 1076, 117 S. Ct. 736 (1997) (rejecting the balancing approach and holding that defendant must show that the prosecution acted intentionally to gain a tactical advantage).

There is no question, here, that there was a substantial delay between the offense, which was committed on November 30, 1988, and the indictment, which was filed on August 20, 1997. In addition, there was a not inconsequential delay of three years between the time that the defendant confessed to the crimes and the time of his indictment. The record, however, reveals no indication of actual prejudice to the defendant or that the State caused the delay to gain a tactical advantage or to harass the defendant.

In determining whether a delay has violated due process principles, "the most critical [factor] is the prejudice to the accused." *Jones v. Greene*, 946 S.W.2d 817, 826 (Tenn. Ct. App. 1996) (citing *State v. Hallock*, 875 S.W.2d 285, 289 (Tenn. Crim. App. 1993); *Tillery v. State*, 565 S.W.2d 509, 510 (Tenn. Crim. App. 1978)); *see State v. Carico*, 968 S.W.2d 280, 285 (Tenn. 1998) ("The third factor, and the most important though not determinative in every case, is prejudice to the accused."); *see also State v. James Webb*, No. 02C01-9512-CC-00383, slip op. at 14 (Tenn. Crim. App., Jackson, Feb. 27, 1997), *perm. app. denied* (Tenn. 1997).

In its written response to the defendant's motion to dismiss the death notice, the State averred that it continued to investigate the defendant's involvement in the crimes following his February 1994 confession. The State also asserted that during this time, repeated forensic comparison of the evidence from the crime scene and the samples obtained from the defendant took place. The record reflects that the State received the FBI report matching the defendant's DNA profile to evidence obtained at the crime scene some time after April 15, 1997, and the defendant was indicted some four months later.

First, although the defendant argues that he lost valuable mitigation evidence in the form of the testimony of his brother, Terrance, as a result of the three-year delay, the record establishes that the defendant's brother did not actually die until October 1998, more than a year after the indictment in this case. Moreover, the defendant failed to establish that his brother could have offered mitigation testimony that was otherwise unavailable from any other source. Indeed, as the trial court observed, the defendant was himself in a position to offer mitigation testimony about his turbulent childhood and the abuse he suffered at the hand of his father. Although testimony by the defendant's brother would certainly have corroborated this information, his testimony was not the sole source of the information. Furthermore, there is simply no proof that the State orchestrated the delay to gain a tactical advantage over the defendant. To the contrary, the record establishes that the primary reason for the delay was the State's desire to assure that it did not charge the defendant without sufficient evidence. Upon our review of the record, we conclude that the trial court correctly denied the defendant's motion to dismiss the death notice.

IV. Challenges to Conviction of Kidnapping

The defendant argues that his conviction for aggravated kidnapping violated due process principles because the State failed to present sufficient evidence that the confinement of the

victim was anything other than incidental to the crimes of rape, robbery, and murder. He further asserts that the State failed to establish that he "asported" the victim while she was alive, as opposed to her body having been moved after her death. The State responds that the evidence demonstrated that the victim was both removed and confined to an extent beyond that necessary to effectuate the offenses of robbery and rape, thereby supporting a conviction for the separate offense of kidnapping.

"The issue of whether a separate kidnapping conviction violates due process is purely a question of law" subject to purely de novo review. *State v. Fuller*, 172 S.W.3d 533, 536 (Tenn. 2005).

In *State v. Anthony*, 817 S.W.2d 299, 305 (Tenn. 1991), our supreme court for the first time considered "the propriety of a kidnapping conviction where detention of the victim is merely incidental to the commission of another felony, such as robbery or rape." *Id.* at 300. As in the present case, the kidnapping statute at the time of the court's decision provided for a conviction of aggravated kidnapping for "[a]ny person who unlawfully seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away another with the felonious intent to: (1) [c]ause the other to be confined secretly against his will; (2) [d]etain the other against his will; or (3) [s]end the other out of the state against his will." *See* T.C.A. § 39-2-301. The high court acknowledged that a period of confinement technically meeting the definition of kidnapping frequently accompanies such crimes as robbery and rape and concluded that a separate kidnapping conviction cannot be supported when "the confinement, movement, or detention [was] essentially incidental to the accompanying felony." *Anthony*, 817 S.W.2d at 305. Specifically, a reviewing court must determine "whether the confinement, movement, or detention is essentially incidental to the accompanying felony and is not, therefore, sufficient to support a separate conviction for kidnapping, or whether it is significant enough, in and of itself, to warrant independent prosecution and is, therefore, sufficient to support such a conviction." *Id.* at 306.

Since its decision in *Anthony*, the supreme court has issued a series of cases addressing the ruling. First, in *State v. Dixon*, 957 S.W.2d 532 (Tenn. 1997), the court observed:

> *Anthony* and its progeny, however, are not meant to provide the rapist a free kidnapping merely because he also committed rape. The *Anthony* decision should only prevent the injustice which would occur if a defendant could be convicted of kidnapping where the only restraint utilized was that necessary to complete the act of rape or robbery. Accordingly, any restraint in addition to that which is necessary to consummate rape or robbery may support a separate conviction for kidnapping.

Id. at 534-35. The *Dixon* court also added a second level of inquiry to the *Anthony* analysis, concluding that where the confinement is beyond that necessary for the accompanying felony, a court must next determine "whether the additional movement or confinement: (1) prevented the victim from summoning help; (2) lessened the defendant's risk of detection; or (3) created a significant danger or increased the victim's risk of harm." *Id.* at 535. Finally, the *Dixon* court emphasized that

the focus of any *Anthony* inquiry should be on "the purpose of the removal or confinement and not the distance or duration." *Id.*

The supreme court again revisited *Anthony* in the context of a kidnapping conviction in *Fuller*, wherein the court emphasized that "'the determination of whether a detention or movement is incidental to another offense is highly dependent on the facts in each case.'" *Fuller*, 172 S.W.3d at 538 (quoting *Anthony*, 817 S.W.2d at 306). The court also ruled that the *Anthony* test is not "outcome determinative," noting that the victim in *Fuller* had been able to summon help despite being bound with duct tape. Most recently, in *State v. Richardson*, 251 S.W.3d 438 (Tenn. 2008), the supreme court completely abandoned the "essentially incidental" analysis of *Anthony* and replaced it with the two-part test established in *Dixon*:

> The *Dixon* two-part test fully replaces the *Anthony* "essentially incidental" analysis. As we previously have observed, the *Dixon* test "provides the structure necessary for applying the principles announced in *Anthony*." Although we adhere to the due process principles adopted in *Anthony*, we now make clear that the *Anthony* analysis should not be used in conjunction with the *Dixon* two-part test. The *Dixon* test should be used exclusively in all future inquiries.

Id. at 443 (citation omitted). The court emphasized,

> [N]o bright line exists for making the threshold determination in the first prong of the *Dixon* test. The inquiry is fact-driven. Distance of the victim's movement and duration or place of the victim's confinement are factors to be considered in determining if the movement or confinement was beyond that necessary to consummate the accompanying felony . . . .

Id.

Accordingly, our first inquiry is "whether the movement or confinement was necessary to consummate the accompanying crime." *Id.* at 442 (citing *Dixon*, 957 S.W.2d at 535). To this end, the proof adduced at trial established that the defendant and Mr. Goodhart "grabbed" the victim at the "store room entrance" and immediately instructed her to lie on the floor. Mr. Goodhart raped the victim while the defendant took the victim's personal cash as well as the day's proceeds from the Thrift Store. The defendant then raped the victim as she lay on the floor following the sexual assault by Mr. Goodhart. Officers discovered one of the victim's shoes, the empty bank deposit bag, scattered receipts, and a cash register drawer insert on the floor in this location. Officers found the other shoe close to victim's body at the rear of the store where she was taken and killed after the sexual assault and robbery. The defendant's movement of the victim to this "second" location was beyond that necessary to accomplish the rape and robbery.

Because we have concluded that the additional movement and confinement of the victim was beyond that necessary to commit the associated felonies, we must next determine

"'whether the additional movement or confinement: (1) prevented the victim from summoning help; (2) lessened the defendant's risk of detection; or (3) created a significant danger or increased the victim's risk of harm.'" *Id.* at 443 (citing *Dixon*, 957 S.W.2d at 535). In our view, the movement of the victim so that an additional door separated her from the store's front entrance further lessened her chances of summoning help and the defendant's risk of detection. Upon the facts presented, we conclude that the record supports the defendant's conviction for aggravated kidnapping as an offense sufficiently separate from the accompanying felonies of robbery and rape.

Finally, the record simply does not support the defendant's assertion that the victim was moved only after her death. Evidence adduced at trial, including the defendant's own confession, established that the victim was raped in the middle section of the store. She was then forced into a separate location near the rear of the store where she was murdered. No evidence supports the defendant's contention that the victim's body was moved after the murder.

V. Instruction Requiring Unanimous Sentencing Verdict

The defendant argues that the trial court did not afford him the heightened due process to which a capital defendant is entitled when it instructed the jury that their sentencing verdict, whether it be for death or a life sentence, must be unanimous. The State responds that the trial court correctly instructed the jury pursuant to applicable law. We agree with the State.

At the time of the offenses, applicable law provided as follows:

> (f) If the jury unanimously determines that no statutory aggravating circumstances have been proved by the state beyond a reasonable doubt, or if the jury unanimously determines that a statutory aggravating circumstance or circumstances have been proved by the state beyond a reasonable doubt but that said circumstance or circumstances are outweighed by one or more mitigating circumstances, the sentence shall be life imprisonment. . . .
>
> (g) If the jury unanimously determines that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved by the state beyond a reasonable doubt, and said circumstance or circumstances are not outweighed by any mitigating circumstances, the sentence shall be death. . . .
>
> (h) If the jury cannot ultimately agree as to punishment, the judge shall dismiss the jury and the judge shall impose a sentence of life imprisonment. The judge shall not instruct the jury, nor shall the attorneys be permitted to comment at any time to the jury, on the effect of the jury's failure to agree on a punishment.

T.C.A. § 39-13-203(f)-(h) (1982).

At trial, the defendant acknowledged that counsel were prohibited from advising the jury of the effect of its failure to reach a unanimous verdict but nevertheless asked the trial court to refrain from instructing the jury that its decision to impose a life sentence must be unanimous so as to "reflect the accurate law." In support of his position, the defendant pointed out that a life sentence would automatically be imposed should the jury fail to agree on a punishment. He reasoned that the trial court should not instruct the jury that its decision to impose a life sentence must be unanimous considering the statute's provision that if the jury ultimately failed to reach a verdict regarding the appropriate punishment, it would lead the trial court to dismiss the jury and impose a life sentence.

Despite the defendant's protestation that the pattern jury instruction did not state "the accurate law," Code section 39-2-203(f) clearly provided that the jury must unanimously agree to impose a life sentence. The trial court's instruction accurately reflected the law.

To the extent that the defendant's claim can be interpreted as a challenge to the constitutionality of the statute and corresponding instruction, he is not entitled to relief. Our supreme court has repeatedly rejected variations of this argument. *See State v. Smith*, 893 S.W.2d 908, 926 (Tenn. 1994); *see also generally State v. Cazes*, 875 S.W.2d 253 (Tenn. 1994); *State v. Smith*, 857 S.W.2d 1 (Tenn. 1993); *State v. Black*, 815 S.W.2d 166 (Tenn. 1991); *State v. Boyd*, 797 S.W.2d 589 (Tenn. 1990); *State v. Teel*, 793 S.W.2d 236 (Tenn. 1990); *State v. Thompson*, 768 S.W.2d 239 (Tenn. 1989). Indeed, as recently as last year in *State v. Banks*, 271 S.W.3d 90 (Tenn. 2008), our supreme court reaffirmed its position by rejecting Bank's claim that requiring a jury to agree unanimously upon a life verdict violates the United States Supreme Court's rulings in *McKoy v. North Carolina*, 494 U.S. 433, 110 S. Ct. 1227 (1990), and *Mills v. Maryland*, 486 U.S. 367, 108 S. Ct. 1860 (1988). *Id.* at 158-59. Noting that it had "fully addressed and rejected this argument in *State v. Brimmer*, 876 S.W.2d [75,] 87 [(1994)]," the court ruled that the defendant had failed to offer any evidence that *Brimmer* should be overruled. *Id.* at 159.

VI. Cruel and Unusual Punishment

Tracing the principles underlying the constitutional prohibition against cruel and unusual punishment back to the Magna Carta, and citing a decision generally espousing Canadian capital punishment jurisprudence and United States Supreme Court Justice John Paul Stevens' call for a reevaluation of the costs versus the benefits of the death penalty to society,[3] the defendant condemns capital punishment as unconstitutional, unacceptable, and unfair. The defendant submits that it is "time for the State of Tennessee to recognize that we have progressed to the point that the death penalty is cruel and unusual punishment." In response, the State aptly cites *State v. Black*, 815 S.W.2d 166, 190-91 (Tenn. 1991), in which our supreme court reexamined the constitutionality of the death penalty in this state and set forth in detail its basis for continuing to hold that the death penalty does not per se violate the state and federal constitutional bans against cruel and unusual punishment.

[3] *See Baze v. Rees,* ___ U.S.___, ___, 128 S. Ct. 1520, 1548-49 (2008) (Stevens, J., concurring).

Since its elaborative analysis in *Black*, our supreme court has repeatedly upheld capital punishment in the face of challenges that it constitutes cruel and unusual punishment. *See, e.g.*, *State v. Thacker*, 164 S.W.3d 208, 254-55 (Tenn. 2005), *cert. denied*, 546 U.S. 940, 126 S. Ct. 432 (2005) (citing *State v. Keen*, 31 S.W.3d 196, 233 (Tenn. 2000), *cert. denied*, 532 U.S. 907, 121 S. Ct. 1233 (2001); *State v. Pike*, 978 S.W.2d 904, 925 (Tenn. 1998) *cert. denied*, 526 U.S. 1147, 119 S. Ct. 2025 (1999); *State v. Nesbit*, 978 S.W.2d 872, 902-03 (Tenn. 1998), *cert. denied*, 526 U.S. 1052, 119 S. Ct. 1359 (1999); *State v. Vann*, 976 S.W.2d 93, 118 (Tenn. 1998), *cert. denied*, 526 U.S. 1071, 119 S. Ct. 1467 (1999); *State v. Blanton*, 975 S.W.2d 269, 286 (Tenn. 1998), *cert. denied*, 525 U.S. 1180, 119 S. Ct. 1118 (1999); *State v. Cribbs*, 967 S.W.2d 773, 796 (Tenn.), *cert. denied*, 525 U.S. 932, 119 S. Ct. 343 (1998); *State v. Cauthern*, 967 S.W.2d 726, 751 (Tenn.), *cert. denied*, 525 U.S. 967, 119 S. Ct. 414 (1998)).

As an intermediate appellate court, we are bound to follow the precedent set by our supreme court. We decline the defendant's invitation to hold, contrary to our established case law, that the death penalty constitutes cruel and unusual punishment.

VII. Mandatory Review

Pursuant to Tennessee Code Annotated section 39-13-206(c)(1), this court must determine whether the evidence supported the jury's finding that the aggravating circumstances were established beyond a reasonable doubt and that the aggravating circumstances outweighed evidence of mitigating circumstances beyond a reasonable doubt. T.C.A. § 39-13-206(c)(1)(B)-(C) (2006). The record establishes that the jury found that four aggravating circumstances had been proven beyond a reasonable doubt: (2), that the defendant had been previously convicted of one or more violent felonies; (5), that the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind; (6), that the defendant committed the murder for the purpose of avoiding, interfering with, or preventing his lawful arrest or prosecution; and (7), that the defendant committed the murder while he was engaged in the commission of or attempting to commit rape, robbery, or kidnapping. *See* T.C.A. § 39-2-203(i)(2), (5) - (7) (1982).

The proof adduced at the sentencing hearing established that the defendant had been previously convicted of rape in Pennsylvania in 1974 and 1991, of second degree murder in Pennsylvania in 1991, and of kidnapping in the United States District Court for the Eastern District of Pennsylvania in 1989. These convictions satisfy aggravating factor (i)(2). *See id.* § 39-2-203(i)(2) (1982).

Proof at trial showed that the victim, who had already been raped by both men, suffered three stab wounds, one of which was so violent that it severed her spinal cord. The defendant's violent stabbing of the victim took place after the victim had essentially told the men how to escape undetected by police. In our view, this evidence supports the jury's conclusion that the murder was especially heinous, atrocious, and cruel. *See* T.C.A. § 39-2-203(i)(5).

In addition, evidence adduced at trial and at the sentencing hearing established that the defendant and Mr. Goodhart, already on the lam from Pennsylvania, murdered the victim to avoid arrest or prosecution. *See id.* § 39-2-203(i)(6). Finally, there was ample evidence that the

defendant committed the murder immediately following his rape, robbery, and kidnapping of the victim. *See id.* § 39-2-203(i)(7).

In mitigation, the defendant presented evidence of his turbulent childhood, previous brain injuries, and mental problems, including a low IQ and personality disorder. Despite the compelling nature of this evidence, we cannot say that the jury erred in its conclusion that the aggravating circumstances outweighed any mitigating circumstances beyond a reasonable doubt. Proof of the aggravating circumstances in this case was simply overwhelming.

Finally, when a defendant has been sentenced to death, this court is required to engage in a comparative proportionality analysis. T.C.A. § 39-13-206(c)(1)(D) (2006). "[C]omparative proportionality review 'presumes that the death penalty is not disproportionate to the crime in the traditional sense. It purports to inquire instead whether the penalty is nonetheless unacceptable in a particular case because disproportionate to the punishment imposed on others convicted of the same crime.'" *State v. Bland*, 958 S.W.2d 651, 662 (Tenn. 1997) (quoting *Pulley v. Harris*, 465 U.S. 37, 42-43 (1984)). This court must "employ[] the precedent-seeking method of comparative proportionality review, in which we compare a case with cases involving similar defendants and similar crimes. . . . [A] death sentence is disproportionate if a case is 'plainly lacking in circumstances consistent with those in cases where the death penalty has been imposed.'" *State v. Davis*, 141 S.W.3d 600, 619-20 (Tenn. 2004) (quoting *Bland*, 958 S.W.2d at 668). "[T]he pool of cases considered . . . includes those first degree murder cases in which the State seeks the death penalty, a capital sentencing hearing is held, and the sentencing jury determines whether the sentence should be life imprisonment, life imprisonment without the possibility of parole, or death." *Id.* at 620.

Although there is no specific formula for comparing similar cases, this court must generally consider the following factors regarding the offense:

> (1) the means of death; (2) the manner of death (e.g., violent, torturous, etc.); (3) the motivation for the killing; (4) the place of death; (5) the similarity of the victims' circumstances including age, physical and mental conditions, and the victims' treatment during the killing; (6) the absence or presence of premeditation; (7) the absence or presence of provocation; (8) the absence or presence of justification; and (9) the injury to and effects on nondecedent victims.

Bland, 958 S.W.2d at 667. In addition, we must also consider the following factors about the defendant: "(1) prior criminal record, if any; (2) age, race, and gender; (3) mental, emotional, and physical condition; (4) role in the murder; (5) cooperation with authorities; (6) level of remorse; (7) knowledge of the victim's helplessness; and (8) potential for rehabilitation." *Id.* (citing *Bland*, 958 S.W.2d at 667; *State v. Bane*, 57 S.W.3d 411, 428-29 (Tenn. 2001)). In completing our review, we are aware that "no two cases involve identical circumstances." *State v. Terry*, 46 S.W.3d 147, 164 (Tenn. 2001).

Applying these factors to the present case, the proof showed the defendant and his accomplice gained entrance to the store where the victim worked just before closing time after planning to rob her. Both men carried large knives. They hid in a back room until the victim had locked the door at the store's front entrance, then grabbed her, forcing her into a different area. The victim was then robbed and raped but did not struggle or attempt to summon help. The two men then forced the victim to the back of the store near the rear exit door. At that point, the victim advised the defendant not to exit by the back door because the police station was located directly across the street. After the two men discussed what should be done with her, the defendant stabbed the victim in the neck with such force that vertebrae were severed and her spinal cord exposed. Although the defendant admitted to stabbing the victim only once, she suffered three serious wounds and would have survived for at least 30 seconds before losing consciousness as a result of her injuries. After confirming that she was dead, the defendant turned the body over and covered it with a blanket, later explaining that he did this because he knew what he did was wrong. The defendant and his accomplice, already on the run from authorities in another state, fled in their stolen car, disposing of the victim's personal items along their way. After investigators were led to interview him, the defendant made no effort to hide his responsibility for the murder. The victim was a 32-year-old mother who left behind two children, ages 11 and 13.

At the time of the murder, the defendant, a white male, was 45 years old. Between 1974 and 1991, he was convicted of two rapes, a kidnapping and a second degree murder. The defendant presented evidence that his mother abandoned the family when he was a toddler, and that he spent his early childhood years in an orphanage along with his two brothers. For much of the remainder of his life, he was incarcerated. The defendant, who reported that his father was an abusive alcoholic, had a ninth-grade education, and his mental evaluations showed him to have brain dysfunction, brain damage, and low-level intelligence bordering on retardation. The defendant reported that he was intoxicated at the time of the murder. He confessed to the murder and acknowledged that his action was wrong. At trial, after deliberations but before his sentence was announced, he apologized to the victim's family and asked their forgiveness.

We have reviewed the circumstances of the present case with similar cases and conclude that the death penalty imposed in the present case is not excessive or disproportionate to the penalty imposed in similar cases. *See, e.g.*, *State v. Reid*, 164 S.W.3d 286, 317 (Tenn. 2005) (defendant kidnapped and stabbed two young employees to death following robbery of an ice cream store; jury imposed death penalty upon finding of (i)(2), (i)(5), and (i)(6) aggravating circumstances); *State v. Bush*, 942 S.W. 2d 489 (Tenn.), *reh'g denied* (Tenn. 1997), *cert. denied*, 522 U.S. 953, 118 S.Ct. 376 (1997) (79-year-old widow repeatedly stabbed to death in her home by defendant during a first degree burglary; jury found (i)(5) and (i)(6) aggravating circumstances in imposing death sentence); *State v. Harris*, 839 S.W.2d 54 (Tenn. 1992) (32-year-old defendant murdered two employees of hotel during robbery; jury imposed sentences of death based upon (i)(2), (i)(5), and (i)(7) aggravating circumstances despite evidence of defendant's lack of education and troubled childhood); *State v. King*, 694 S.W.2d 941 (Tenn. 1985) (33-year-old defendant murdered the proprietor of a tavern during the course of a robbery; sentence of death upheld based upon (i)(2) and (i)(7) aggravating circumstances); *State v. Campbell*, 664 S.W. 2d 281 (Tenn. 1984) (defendant beat 72-year-old man to death during course of a robbery and was sentenced to death upon finding of

(i)(2), (i)(5), and (i)(7) aggravators); *State v. Dicks*, 615 S.W.2d 126 (Tenn. 1981) (defendant slit throat of elderly store clerk in the course of a robbery and was sentenced to death based on (i)(5) and (i)(7) aggravating factors).

The death sentence has also been upheld in similar cases based on the sole aggravating circumstance of prior violent felony convictions. *See, e.g.*, *State v. Faulkner*, 154 S.W.3d 48, 63 (Tenn. 2005) (prior convictions for second degree murder, assault with intent to commit robbery, assault with intent to commit voluntary manslaughter, and robbery); *State v. McKinney*, 74 S.W.3d 291 (Tenn. 2002) (prior conviction for aggravated robbery as adult and aggravated assault as juvenile); *State v. Chalmers*, 28 S.W.3d 913 (Tenn. 2000) (prior convictions for attempted especially aggravated robbery and attempted first degree murder); *State v. Keough*, 18 S.W.3d 175, 183 (Tenn. 2000) (prior convictions for assault to commit voluntary manslaughter and manslaughter); *State v. Smith,* 993 S.W.2d 6, 18-21 (Tenn. 1999) (prior convictions for robbery and first degree murder). The prior violent felony factor is an aggravating circumstance that our supreme court has described as "more qualitatively persuasive and objectively reliable than others." *McKinney*, 74 S.W.3d at 313; *State v. Howell,* 868 S.W.2d 238, 261 (Tenn. 1993).

Our review of these cases reveals that the sentence of death imposed upon the defendant is proportionate to the penalty imposed in similar cases. In undertaking the required analysis, we have considered the entire record and conclude that the sentence of death was not imposed arbitrarily, that the evidence supports the jury's finding of the aggravating circumstances, that the evidence supports the jury's finding that the aggravating circumstances outweighed any mitigating circumstances beyond a reasonable doubt, and that the sentence is not excessive or disproportionate.

VIII. Conclusion

In consideration of the foregoing and the record as a whole, the judgments of conviction are affirmed. In addition, following our required statutory review of the sentence imposed in this case, we affirm the imposition of the death penalty.

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JAMES CURWOOD WITT, JR., JUDGE