IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,992

JOSEPH JEROME RAMIREZ,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

* *

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA
CRIMINAL DIVISION

* *

BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

The appellant, JOSEPH JEROME RAMIREZ, was the defendant in the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida, and the appellee, THE STATE OF FLORIDA, was the prosecution. The appellant, in this brief, will be referred to as he stood in the trial court and the appellee will be identified as the State.

The symbol "R" will be used, in this brief, to refer to the Record-on-Appeal and the symbol "T" will identify the transcript of trial court proceedings. The Supplemental Record-on-Appeal submitted by the appellant will be designated by the symbol "DSR" and the Supplemental Record-on-Appeal submitted by appellee will be referred to by the symbol "SSR." All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE

Appellant's Statement of the Case contains material errors and omissions and fails to refer to the record at all. Therefore, it is rejected by the appellee and Appellee's Statement of the Case is as follows:

The defendant, on January 13, 1984, was indicted for

First Degree Murder, Armed Robbery and Armed Burglary. (R.1-2A). Following a jury trial (T.1-2004), verdicts of guilty were returned against the defendant for First Degree Murder (SSR.19, T.2004-2005), Armed Robbery with a Deadly Weapon (SSR.20, T.2005) and Burglary with a Dangerous Weapon and with an Assault. (SSR.21, T.2005).

Following the penalty phase of the trial (T.2015-2106), the jury returned an advisory verdict recommending the death penalty by a vote of twelve (12) to zero (0). (T.2106-2108).

Defendant was sentenced to life imprisonment for Armed Robbery (SSR.23, T.2210-2211) and to life imprisonement for Burlgary with a Dangerous Weapon (SSR.24, T.2211). The court found four (4) aggravating factors and one (1) mitigating factor and, therefore, sentenced the defendant to death in the electric chair for the murder (R.276, 292-295, T.2203-2213).

STATEMENT OF THE FACTS

Appellant's Statement of the Facts contains numerous errors and omissions and fails to contain record references for a number of material allegations. It is therefore rejected by appellee and appellee's Statement of the Facts is as follows; although it will be limited to those facts

presented at guilt phase of the trial, the relevant facts concerning pre-trial and sentencing proceedings being set forth in the argument portion of this brief:

Mary Jane Quinn left her home for work as a courier for Federal Express a little after 11:00 p.m. on Christmas Eve, 1983 (T.782-784). She was due home about 3:00 a.m., so, when she hadn't returned by 7:00 a.m. on December 25th, her husband called Mary McGuire, another Federal Express Courier (T.785-786).

Mary McGuire went to the Federal Express Offices, getting there between 8:30 and 8:50 a.m. on Christmas Day (T.795), discovered Mary Jane's body in the hallway (T.795-796) and called the police (T.796-797). Sergeant George Johnson was the first officer to discover the victim's body (T.805-806).

A week prior, on December 17th, the victim had been unable to find her keys to the building and had been loaned the Operation Supervisor's key to make a duplicate (T.1125-1126). These lost keys were never found (T.1377). Also on the 17th, the defendant had informed the supervisor that he had to stay late to do some special cleaning and arrangemets were made to give a key to the defendant's manager (Lynn Hall, the manager of the contract janitorial service

company) (T.1122-1125). This was relevant because, on December 24th, the defendant mentioned to the supervisor that the key they had been given did not fit the door between the office and the warehouse area (T.1138), a door that there was no reason for a janitor to use (T.1138-1139). Federal Express policy was not to give keys to janitors and the defendant had never been given such a key, to the knowledge of the people who worked there (T.1739). Also on the 24th, the defendant had asked the Operations Supervisor if Federal Express had a lot of revenues coming through the station and was told they had a good business (T.1137). He had been in the area in which, that same day, the service agent counted the money to do the cash recap and placed the approximately $430 in the mail bag (T.1111-1119, 1139).

The defendant got home from work about 6:30 or 7:00 p.m. on December 24th (T.1504), but went out again about 9:00 or 9:15 p.m. wearing a navy blue velour sweater with a fox on it (T.1504-1505). He drove Delores Douglas' 1983 Renault (T.1504). Delores, with whom he had lived for about 18 months, never saw that sweater again (T.1509).

The defendant got to the Brittons' residence, where he was a friend of Dolly Britton's son, about 8:30 or 9:00 p.m. that night, wearing a blue shirt with a fox on it (T.1281-1282). Dolly Britton particularly noticed the fox, since it

is an emblem of J.C. Penney's, where she does her shopping (T.1282-1283). The defendant asked her son about a crowbar, but, when her daughter asked him what it was for, he told her it was none of her business (T.1283-1285). Ramirez left her house close to 11:00 p.m. that night (T.1283, 1291). The defendant's whereabouts are unaccounted for until 5:30 a.m. on December 25th when his girlfriend, Delores Douglas, woke up (T.1506). He had actually gotten home sometime prior to that, but Delores had no idea when (T.1506).

The Federal Express Office, the morning of the 25th, was mess. The victim's hair and hands were bloody (T.858) and blood spatters and pools throughout the area of the Federal Express Dispatch Office and Break Room indicated a struggle throughout the area (T.1088-1102, 1460-1468). A bloody paper napkin and bloodstained fragments of a missing 67-pound telex machine were found throughout the area (T.861-880, 949-951, 1144, 1460-1468). The hot water faucet in the ladies' room was turned on full force (T.835-836). One (1) truck had an open door on the driver's side and the door between the seats had been damaged, as if pried (T.840). The key to the truck was missing (T.842). These keys were, also, never found (T.1337). One of the loading bay doors was unlocked, although the others were locked (T.890). Two steak knives were found on the premises (T.902), which were inconsistent with the victim's wounds

(T.1024). A bloody fingerprint was found on a door jamb approximately one (1) foot from the victim's right elbow and three (3) feet, nine (9) inches from the floor (T.860-861). This fingerprint was identified as the left thumbprint of the defendant (T.1071-1072, 1232-1235, 1256-1261, 1331). This fingerprint was in human blood (T.1475-1477). The victim had type "O" blood (T.1460-1468) and Ramirez has type "B." (T.1474). However, the defendant is a secretor (as are 80% of the population) whose blood-type antigens are contained in his body fluids (such as perspiration) (T.1471-1472). The fingerprint contained the antigens for both type "O" (H antigen) and type "B" (B and H antigens) blood (T.1477). Therefore, the fingerprint could have either been in type "B" blood or type "O" blood mixed with perspiration from a secretor with type "B" blood (T.1477-1478). It should be noted that the defendant is a type "B" secretor (T.1474) who perspires a great deal (T.1345).

The desk of a woman employee of Federal Express who sells jewelry had been tampered with (T.956). The telex machine and the mail bag, which contained about $450, were the only things missing (T.949, 970-972), although pieces of the missing telex, were scattered around (T.951).

The victim had numerous abrasions, contusions and cuts to the head area and a skull fracture (R.50-51, T.979, 1006-

1008) consistent with being hit over the head with the missing telex machine (T.1008-1009). She had contusions, abrasions and a stab wound to the hands, all consistent with defense wounds (R.51, 56, T.1010-1012). The victim also showed one (1) stab wound to the chest and ten (10) to the back (R.51-56, T.1013-1019), generally 5 to 6 inches deep. The back wounds appeared to have happened later than the other wounds, although the victim was still alive when they were inflicted (T.1018-1021). The medical examiner particularly noted and observed the chest stab wound because it injured cartilage, which can retain the shape of the instrument which made it, so she removed and preserved the breastbone area containing that injury (T.1029-1033). The victim died of multiple stab wounds and blunt trauma to the head (R.48).

Detective Steven Parr, on December 27th, spoke to the defendant to find out what areas he had cleaned on Christmas Eve (T.1170-1171). He also wanted the defendant's statement, fingerprints and hair samples (T.1172). The defendant gave his statement (R.134-152, T.1172-1173). Ramirez also gave his fingerprint samples at the time (T.1189, 1232-1235, R.153-161). The defendant also agreed to give hair samples, but samples were only obtained from his head, since that's all he would allow (T.1189-1190).

While the detective was at the defendant's girlfriend's house attempting to verify his alibi, the defendant came by, so Parr asked to see the sweater he had worn on the 24th (T.192). Ramirez said it was in the house, then, after checking the house, said it was probably at Alvarez' Cleaners (T.1194). The girlfriend said that the shirt was not customarily sent to the cleaners (T.1509) and the Detective determined that there was no Alvarez' Cleaners at the location given by Ramirez, although there was another cleaner, which had some things of Delores Douglas, but nothing of defendant's (T.1195).

The defendant called the following day, saying that he had found the sweater, and made arrangements to meet the defendant that night at Federal Express (T.1196). He showed up about 9:40 p.m. and said "I got the sweater you are looking for" and "I am wearing it." (T.1197). An arrest warrant having been obtained for the defendant (T.1339), the defendant was arrested by Detective Saladrigas (T.1339-1340). The defendant, after having had his rights read to him, said he didn't know why they were messing with him, since he brought the clothes he had been wearing (T.1340-1344). He said the fox from the sweater fell off in the wash (T.1344). A Burdines' receipt was found in his wallet. (T.1349).

The sweater that the defendant was wearing at the time of his arrest was purchased the day of his arrest from Burdines, Westland Mall. The employee of Burdines who sold it to the defendant specifically remembered because the defendant was wearing a Piaget Watch like the one the employee had gotten for his birthday and said it cost him an arm or a leg (T.1445-1453). The Piaget Watch defendant was wearing at the time of the arrest had been purchased by him the day after Christmas (T.1346, 1510).

Meanwhile, on the 27th, Ramirez had called Marc Gaines, the Federal Express Operations Manager, whom he had called before, saying that he heard someone had been hurt at the office and asking why the authorities wanted to talk to him. Gaines told him that someone had been killed and that everybody who worked that day was being questioned (T.1145-1146).

The following day, the defendant's old Timex was found in the bedroom of Delores Douglas' house (T.1197-1199). It was bloodstained with blood containing the antigens for both "O" and "B" blood (T.1200, 1479).

Defendant had thoroughly cleaned the car he drove, inside and out, after Christmas (T.1509). Nevertheless a search of the car turned up a pair of sneakers with a tread

mark similar to one on the crime scene (T.1303, 1438). It also revealed a reddish-brown stain on the rubber molding of the trunk, near the latch (T.1303) which turned out to be blood of a type consistent with the victim (T.1482). A knife was also found in the car, under the passenger seat (T.1307-1309). It turned out that Delores Douglas normally kept this knife in the side pocket of the car the defendant drove, for protection (T.1507-1508). However, just after Christmas, she found it in the kitchen sink to be washed, which was unusual, but she washed it (T.1508-1509). It got back into the car because Delores' daughter brought it to Ramirez to cut some string with, while he was cleaning the car (T.1509). The knife did have blood on it, but of an insufficient amount to determine whether it was human (T.1482-1483).

It should be noted that, during cross-examination of the lead detective by the defense, the following took place:

> Q Did you talk to anybody else to try to get an admission?
>
> A Yes. There was another person spoken to.
>
> Q Who?
>
> A Another cellmate.
>
> Q What was his name?
>
> A I don't recall.

Q Did he tell you that Joseph Ramirez confessed this murder to him?

A Yes.

(T.1386-1387).

The defense then objected and moved for mistrial based both upon an alleged Brady violation and alleged discovery violation (T.1389-1396). Although the answer to the question was true, the State had investigated the alleged confession and determined that the person who said he heard it was vague, inconsistent, completely incredible, and had no true information relevant to the crime (T.1401, 1406). The court held a Richardson hearing (T.1407) and determined that nothing in the facts of the case "jived" with the facts given by the former cellmate who said the defendant had confessed (T.1411) and that the detective had no information leading him to believe that Ramirez had confessed to anybody (T.1414).

The court, in an abundance of caution, instructed the jury that the defendant never confessed to anyone, did not confess to a cellmate, and that they were to disregard any testimony of Detective Saladrigas which could cause them to believe that the defendant ever confessed to anything (T.1431). Then, the judge asked if any of the jury would have any problem following this instruction and the jury

answered, "No, Sir." (T.1432). The defense took advantage of this instruction to argue to the jury, during closing, that Detective Saladrigas lied when he said that the defendant confessed (T.1944), testimony that Saladrigas never gave.

Technician Robert Hart, a criminalist specializing in firearms and tool mark identification since 1971 (T.1535) was extensively examined to see if he was an expert in the subject of his testimony. It was determined that he took initial training from two (2) qualified tool mark examiners (T.1535) and additional training through professional organizations and publications (T.1536). Excluding ballistics testimony, he had testified on between 20 and 30 occasions on tool mark identification cases, and over 2300 occasions if ballistics were included (T.1536-1537, 1540). He has testified in tool mark identification involving screwdrivers, bolt cutters, pliers, shoes, tires and hoses and the comparison techinques used are the same (T.1549, 1559). Mr. Hart had previously made a positive identification of a knife (T.1560), had examined approximately fifteen other cases involving cut cartilage (T.1571) and has made a knife, a screwdriver and a bolt cutter (T.1559). He has a Bachelor's Degree and two (2) years of graduate work in physical science (T.1598-1599) and, in one instance, the Adam Walsh case, he was able to conclusively say that a

particular knife did not make a particular wound (T.1604-1605).

The defense called its investigator during voir dire, who had gone to the crime lab to inspect Mr. Hart's work three (3) times, with various defense tool mark experts (T.1592-1595), who said that he didn't think the technique Mr. Hart used would work, because it didn't sufficiently account for the angle of the stab. (T.1583-1590).

Mr. Hart was also the co-author of an article on stab wound identification involving a knife with Dr. Valerie Rao of the Medical Examiner's office, examining a case which involved a stab wound to the chest (T.1558, SSR.1-7).

The court determined that Mr. Hart was qualified to testify (T.1564-1565, 1576-177, 1596, 1605). He then testified to making a cast of the knife blade and on the cartilage (necessary because cartilage is a translucent substance which is unsuitable for microscopic examination because its surface detail cannot be seen under the microscope) (T.1612-1613). The comparison showed that the stab wound in the cartilage was made by the knife examined (the one found in Delores Douglas car) (T.1626).

The defense, after the above facts were elicited in the

case-in-chief-, presented evidence that the victim's wallet, jewelry and watch were found on the scene (T.1671, 1710) and that hair from unidentified person or persons was struck to the back of one of the victim's hands (T.1676, 1690). That nothing was missing from the van except the mail bag (T.1698) and that Ramirez said "that's crazy" both when he was arrested and later, at the station (T.1708). They presented evidence that Mrs. Britten had, at one time, said the defendant left her house between 11:30 and 11:35 p.m on Christmas Eve (T.1722, 1728).

Dennis Dove, a medical doctor who had been summoned by the defense, testified that he examined Ramirez on January 10th and found an injury to his left wrist (T.1774). It had occurred, in his opinion, at least seven (7) days prior and probably 14 to 21 days prior (T.1775). The injury was caused by a sharp object and the defendant told the doctor that he got the wound from a sharp object in the course of his employment as a janitor (T.1776-1791). When the wound occurred, it would have been obvious and bloody (T.1794). The defendant had no cuts on his fingers (T.1795).

The defense also presented evidence that about 20,000 Rogers knives (as was the murder weapon) were sold in Florida in 1983 (T.1810).

The State brought out in cross-examination that Ramirez had asked Sharon Lopez to bring him a thumbtack, to the jail, saying that it would help him prove his innocence. She noticed no cuts on him when she saw him Christmas Day (T.1732-1733).

During rebuttal, the following two paragraphs of defendant's sworn "motion to Suppress Warrant for Arrest" were admitted to impeach defendant's self-serving statement to the doctor, testified to over objection, that the wrist wound was occasioned by a sharp object in the course of his employment as a janitor (T.1776-1791).

> Paragraph Number 2: The Defendant sustained a cut to his left index finger on 12-24-83 while picking up broken glass at another property, i.e. the Fontainbleu apartment complexes which he carried on to the Federal office that afternoon.
>
> 3. The blood which contained Defendant's fingerprint could have been left far in advance to the homicide.
>
> (R.176-177, T.1859).

Delores Douglas, who spent 2 to 2 1/2 hours with the defendant on December 25th noticed no cuts on his hands or wrists (T.1812-1813). Detective Parr, within about 2 feet of Ramirez on December 27th, noticed no cuts on his hands or wrists (T.1816). Detective Saladrigas specifically examined

defendant's hands and wrists on December 28th and noticed no cuts or injuries (T.1859-1860). Technician Daniel Eydt took photohgraphs of the defendant's hands and fingers on December 29, 1983 at 2:50 a.m., specifically observed his hands, and saw no cuts or injuries to his hands or wrists (R.183-187, T.1862-1864).

Appellee reserves the right to argue additional facts in the argument portion of this brief.

POINTS ON APPEAL

I

WHETHER THE TRIAL COURT DID NOT REVERSIBLY ERR IN PERMITTING A TOOL MARK IDENTIFICATION EXPERT TO TESTIFY TO THE IDENTIFICATION OF THE MURDER WEAPON? (Restated).

II

WHETHER THE TRIAL COURT DID NOT REVERSIBLE ERR IN NOT DECLARING A MISTRIAL, BUT GIVING A CURATIVE INSTRUCTION, AFTER THE DEFENSE ELICITED THAT A FORMER CELLMATE OF THE DEFENDANT'S HAD ONCE SAID THAT THE DEFENDANT CONFESSED TO HIM? (Restated).

III

WHETHER THE TRIAL COURT DID NOT REVERSIBLY ERR IN PERMITTING TWO (2) PARAGRAPHS OF DEFENDANT'S SWORN-TO "MOTION TO SUPPRESS WARRANT FOR ARREST" TO BE ADMITTED TO IMPEACH DEFENDANT'S SELF-SERVING, HEARSAY STATEMENT TO HIS DOCTOR? (Restated).

IV

WHETHER THE TRIAL COURT DID NOT REVERSIBLY ERR IN DENYING DEFENDANT'S MOTION TO SUPPRESS PHYSICAL EVIDENCE? (Restated).

V

WHETHER THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE VERDICTS OF GUILT? (Restated).

POINTS ON APPEAL
(continued)

VI

WHETHER THE TRIAL COURT DID NOT REVERSIBLY ERR IN READING PORTIONS OF AN OLD PRE-SENTENCE INVESTIGATION OF THE DEFENDANT'S, WHERE IT GRANTED THE DEFENSE A SIX-WEEK CONTINUANCE TO REBUT ITS ALLEGATIONS AND ORDERED A NEW PRE-SENTENCE INVESTIGATION? (Restated).

VII

WHETHER THE TRIAL COURT DID NOT REVERSIBLY ERR IN DETERMINING THAT AVOIDING LAWFUL ARREST WAS A PROVEN AGGRAVATING FACTOR? (Restated).

VIII

WHETHER THE TRIAL COURT DID NOT REVERSIBLY ERR IN DETERMINING THAT THE DEFENDANT HAD PROVEN ONLY ONE (1) MITIGATING FACTOR? (Restated).

SUMMARY OF THE ARGUMENT

I

The trial court did not err in permitting a tool mark identification expert to identify the murder weapon where he was extensivley qualified in tool mark identification, had written a scholarly article on the identification of a knife as having made a stab wound, and properly explained the factual bases for his findings.

II

The trial court did not err in giving a curative instruction to prevent prejudice to the defendant after defense counsel had elicited that a former cellmate of the defendant's had once said that he confessed.

III

The trial court did not err in admitting a part of defendant's sworn-to motion to suppress his arrest warrant to impeach the defendant's own hearsay statement, which he chose to introduce, thereby waiving any rights he may have had as to evidence which impeached it.

IV

The trial court did not err in denying defendant's motions to suppress where the defense failed to either

allege or prove the required showing under Franks v. Delaware, 438 U.S. 154 (1978).

V

Defendant's bloody fingerprint found one (1) foot from the victim's body, the murder weapon found in his car, and his lies to police and others, together with the other evidence, were sufficient to establish his guilt.

VI

The trial court did not err in reading an old Pre-Sentence Investigation of the defendant's where it granted the defense a six-week continuance to refute it and ordered a new PSI.

VII

Determining that avoiding lawful arrest was a proven aggravating factor was proper where victim and defendant were co-workers, a telephone, stained with the victim's blood was found off the hook, and there was no other apparent reason for the murder, together with other evidence.

VIII

The court was clearly written its discretion, based on prior authorities, to find only one (1) mitigating factor.

ARGUMENT

I

THE TRIAL COURT DID NOT REVERSIBLY ERR IN PERMITTING A TOOL MARK IDENTIFICATION EXPERT TO TESTIFY TO THE IDENTIFICATION OF THE MURDER WEAPON. (Restated).

The defense argues that an extensively qualified tool mark identification expert should not have been allowed to testify because he had never previously testified, in court, to a "knife-mark" identification (T.1535-1605). This is analogous to objecting that a ballistics expert was unqualified to identify a .22 caliber rifle because he had previously testified only to other calibers. The defense is incorrect.

Mr. Hart, the witness, has specialized in firearms and tool mark identification since 1971 (T.1535). He has a Bachelor's Degree and two (2) years of graduate work in physical science (T.1598-1599). He received his initial training from two (2) qualified tool mark examiners (T.1535) and has had additional training since that time (T.1586). He has testified 20 to 30 times concerning tool mark identification, and over 2300 times if ballistics cases are included (T.1536-1537, 1540). Further, he has testified concerning tool mark identification of screwdrivers, bolt-cutters, pliers, shoes, tires and hoses, and the comparison

techniques used are the same (T.1549, 1559). He has previously been able to positively identify a knife (T.1560), and has made a knife, a screwdriver and a boltcutter (T.1559). He has even examined fifteen (15) other cases involving cut cartilage (T.1571). Indeed, in the Adam Walsh case, he was able to conclusively eliminate a knife as making a particular wound (T.1604-1605).

Further, Mr. Hart was the co-author of a scholarly article concrning the identification of a knife as the tool that made a stab wound to a human chest, using precisely the same technique (T.1558, SRR.1-7). This technique, despite allegations to the contrary, has a factual basis and was thoroughly explained (SSR.1-7, T.1615-1626). Nevertheless, the defense maintains that he was unqualified simply because he had never testified, in court, in a knife mark identification case (Appellant's Brief, 7-11).

According, even to the cases cited by the defense, the determination of a witness' qualifications to express an expert opinion is peculiarly within the realm of the trial judge, who should not be reversed absent a clear of showing of error. Seaboard Air Line R. Co. v. Lake Region Packing Ass'n, 211 So.2d 25 (Fla. 4th DCA 1968). The trial court's decision regarding an expert witness' qualifications is conclusive unless it is shown that the trial court applied

erroneous legal principles in arriving at its decision and, on appeal, is entitled to great weight. Upchurch v. Barnes, 197 So.2d 26 (Fla. 4th DCA 1967). The trial court's determination of the qualifications of an expert witness will not be disturbed on appeal unless a clear abuse of discretion is made to appear. Johnson v. State, 314 So.2d 248 (Fla. 1st DCA 1975).

More recent cases indicate that trial judges have broad discretion in admitting or excluding expert testimony and their actions are to be upheld unless manifestly erroneous. United States v. Sans, 731 F.2d 1521 (11th Cir. 1984). This "broad discretion" clearly applies within the State of Florida. Stano v. State, 473 So.2d 1282 (Fla. 1985), Cert. denied, 106 S.Ct. 869 (1986); Endress v. State, 462 So.2d 872 (Fla. 2d DCA 1985).

Finally, turning to a strikingly similar case (one of the two other cases in the country in which a knife-mark to a human body was identified) (T.1542-1543), the Kansas Supreme Court held that it was not an abuse of discretion to admit the testimony of an experienced firearm and tool mark examiner that cuts in the homicide victim's breastbone were made by a knife obtained from the defendant's apartment, as he had the requisite skill and training to perform the tests and the methods used were reliable, notwithstanding that the

expert had not previously performed tests to determine whether marks on a human body were made by a given tool. State v. Churchill, 646 P.2d 1049 (Kan. 1982).

The court did not reversibly err in permitting Mr. Hart to testify as an expert.

II

THE TRIAL COURT DID NOT REVERSIBLY ERR IN NOT DECLARING A MISTRIAL, BUT GIVING A CURATIVE INSTRUCTION, AFTER THE DEFENSE ELICITED THAT A FORMER CELLMATE OF THE DEFENDANT'S HAD ONCE SAID THAT THE DEFENDANT CONFESSED TO HIM. (Restated).

The problems the defense has in asserting this issue are that there was no discovery violation by the State and, even if there had been, any prejudice to the defense was cured by the curative instruction given by the court.

The defense maintains that there was a discovery violative because the State's discovery response did not indicate that the defendant had confessed to a cellmate. This was an absolutely true response, where the former cellmate's allegation that the defendant confessed was immediately determined to have been false when the cellmate provided incredible and inaccurate details of the crime (T.1401-1417). Having determined that the defendant had not confessed, the State certainly had no obligation to furnish details of this "non-confession" to the defense.

However, the defense alleges in its brief (without any record citation), that, "....the lead Detective in the case stated from the witness stand that the defendant had

confessed to a cellmate." (Appellant's Brief, 12). Fortunately for the State, this never happened. The detective only stated, in response to defense questioning, that the former cellmate had told him that the defendant confessed (T.1386-1387). A perfectly true statement. Since it was also true that the State, as its duty required, immediately determined that the cellmate's allegations were untrue (T.1401-1417), no discovery violation was committed. See, Johnson v. State, 427 So.2d 1029 (Fla. 1st DCA 1983).

Nevertheless, in an abundance of caution, the Court held a Richardson hearing (T.1407-1431). Although the trial court did not specifically rule on whether there was a discovery violation or not (T.1407-1431), it did decide to give the following curative instruction to remove any possible prejudice to the defense:

> THE COURT: All right. The record will show that the jury is present, Defendant and counsels are present.
>
> Ladies and gentlemen of the jury, at this time I am going to instruct you as to certain facts: First, the Defendant never confessed to anyone; secondly, he did not confess to a cellmate; third, I am instructing you to disregard anything from the testimony of Detective Saladrigas that you may have heard which could cause you to believe that Defendant had confessed to anything.

Now, do any of you have any problems following this instruction in any respect?

THE JURORS: No, sir.

(T.1431-1432).

The defense took full advantage of this instruction to improperly argue, during closing argument, that the detective had lied (T.1944). Nevertheless, the defense maintains that the jury, also, lied and that the curative instruction did not erase the prejudice to the defense (Appellant's Brief, 13).

Even if, some sort of discovery violation had existed, sanctions to be invoked for discovery failures is a matter within the discretion of the trial judge, and is to be interfered with by appellate courts only with the utmost reluctance. State v. Lowe, 398 So.2d 962 (Fla. 4th DCA 1981). The trial judge is vested with broad discretion in such matters and will not be reversed on appeal unless there is a clear showing of palpable abuse of that discretion. Mobley v. State, 327 So.2d 900 (Fla. 3d DCA 1976); Cert. denied, 341 So.2d 292 (Fla. 1976).

Also, it should be noted, that a mistrial is appropriate only where absolutely necessary, where the error is so prejudicial as to vitiate the entire trial. Wilson v.

State, 436 So.2d 908 (Fla. 1983); Cobb v. State, 376 So.2d 230 (Fla. 1979); See, United States v. Granville, 716 F.2d 819 (11th Cir. 1983); Ferguson v. State, 417 So.2d 639 (Fla. 1982); Salvatore v. State, 366 So.2d 745 (Fla. 1978); Cert. denied, 444 U.S. 885 (1979); State v. Collins, 436 So.2d 147 (Fla. 2d DCA 1983); Boyd v. State, 319 So.2d 157 (Fla. 4th DCA 1975).

Therefore, where there was no discovery violation, where the jury was instructed to disregard the misleading testimony, and where they assured the trial court that they would do so, no reversible error was committed by refusing to declare a mistrial.

III

THE TRIAL COURT DID NOT REVERSIBLY ERR IN PERMITTING TWO (2) PARA-PARAGRAPHS OF DEFENDANT'S SWORN-TO "MOTION TO SUPPRESS WARRANT FOR ARREST" TO BE ADMITTED TO IMPEACH DEFENDANT'S SELF-SERVING HEARSAY STATEMENT TO HIS DOCTOR. (Restated).

The defense argues, essentially, that a defendant can introduce his own self-serving statement, made to his doctor (T.1776-1791) with total impunity, because his prior inconsistent statement, made in a sworn-to, pro se "Motion to Suppress Warrant for Arrest" (R.176-177, T.1859) is inadmissible. The defense is incorrect.

The defense presented Dr. Dove's testimony, including his self-serving hearsay statement (admitted as a hearsay exception under F.S. §90.803(4), a statement for purpose of medical diagnosis or treatment) (T.1789), to show that he had received a bloody injury in the time period just before the crime (T.1775). The defense, in closing, argued that this could account for the defendant's bloody fingerprint left at the scene of the murder (T.1953). Nevertheless, defense maintains that the Fifth Amendment precluded his prior explanation, that he cut his finger, from being presented to the jury, alleging that such a motion constitutes testimony in support of a Motion to Suppress on Fourth

Amendment grounds, inadmissible under Simmons v. United States, 390 U.S. 377 (1968). (Appellant's Brief, 19-23).

The first problem with this is that F.S. §90.806(1) specifically states:

> (1) When a hearsay statement has been admitted in evidence, credibility of the declarant may be attacked and, if attacked, may be supported by any evidence that would be admissible for those purposes if the declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time inconsistent with his hearsay statement is admissible, regardless of whether or not the declarant has been afforded an opportunity to deny or explain it.

The defendant was hardly "compelled" to either file the motion in question or to swear to it. His attorneys filed a separate motion to suppress all the physical evidence obtained by all searches, including the one incident to his arrest (SSR.15-16). The defendant specifically chose not to testify at the hearing on his motions to suppress (T.388-412). It is well-settled that, unless the testimony concerned is "compelled," any invasion of a defendant's privacy is outside the scope of the Fifth Amendment's protection. Anderson v. Maryland, 427 U.S. 463 (1976); Homer v. State, 311 So.2d 780 (Fla. 3d DCA 1975). A defendant moved to testify out of his own self-interest does not have his

self-incrimination right violated when that testimony is used. McGautha v. California, 402 U.S. 183 (1971). Thus statements, such as the ones concerned here, which were made to a state attorney are admissible. See, Blake v. State, 332 So.2d 676 (Fla. 4th DCA 1976); Wright v. State, 309 So.2d 215 (Fla. 3d DCA 1975). Similarly, even statements made to a polygraph examiner may be admissible if freely and voluntarily made. See, Stevens v. State, 419 So.2d 1058 (Fla. 1982); Roberts v. State, 195 So.2d 257 (Fla. 2d DCA 1967).

The defense position, that a defendant can lie to the jury with impunity, providing he does so through a third person, is unsupportable. We know that statements of a defendant which would be otherwise inadmissible are perfectly admissible to impeach credibility, in accordance with Harris v. New York, 401 U.S. 222 (1971). It is respectfully submitted that the Harris analysis requires that the defendant's hearsay statement must be as impeachable as his direct testimony would have been, in accordance with F.S. 90.806(1). The defendant was "compelled" neither to file a sworn-to motion or to introduce his own self-serving statement. Therefore, if he chooses to do so, the only reasonable anlaysis requires that the one be admissible to impeach the other, his fifth amendment right having been waived as the statement he chose to present to the jury and any impeachment evidence concerning it.

Further, where the defendant was conclusively shown to have had no cuts on either his wrists or fingers immediately subsequent to the crime (T.1795, 1812-1813, 1816, 1859-1860, 1862-1864), any error which might have been involved would have to be considered harmless.

Finally, if, as the defendant alleges there was no inconsistency between the two statements (Appellant's Brief, 21), any error involved would have to be harmless.

The trial court did not reversibly err in permitting the two (2) paragraphs of defendant's motion to be used to impeach his self-serving hearsay statement.

IV

THE TRIAL COURT DID NOT REVERSIBLY ERR IN DENYING DEFENDANT'S MOTION TO SUPPRESS PHYSICAL EVIDENCE. (Restated).

Defendant chooses to argue, for the first time, that the warrants contained a material allegation in the search warrants which was a "false statement knowingly made or with reckless disregard for the truth...." (Appellant's Brief, 25). He does this through the simple expedient of misquoting the affidavit in support.

The defense alleges, that the affidavits contain the following statement:

> The subject Ramirez was observed in the aforementioned premises at 11:00 p.m., December 24, 1983.
>
> (Appellant's Brief, 24).

What the statement actually says is:

> The subject Ramirez was observed in the aforementioned premises at 11:00 P.M., 24 December, 1983, and then again observed in the vehicle at 7:00 A.M., 25 December, 1983. Subject Ramirez was arrested while driving aforementioned vehicle on Wednesday, 28 December, 1983.
>
> (SR.10, 15).

Further, the "premises" is specifically defined in the warrants referred to as "A 1983 Renault four door sedan, Model 18 I, bronze in color, 1984, Fla. DLL-687, VIN# VF1BD34B9D1761148, Decal 1177804, registered to Delores Yates, 18710 N.W. 23rd Avenue, Carol City, Fla. 33055."

Thus, the defendant's argument that the defendant wasn't seen at the Federal Express Office at 11:00 p.m. is completely irrelevant, where the warrant clearly indicates only that he was seen in his car. There is no question that "the premises" is the car he drove on the day of the murder (T.1504), and left the Brittons about 11:00 p.m. that night (T.1283-1291). Although the police weren't asked, during the hearing on the motions to suppress, if the Brittons had seen him in the car that night (T.338-412), the defense clearly failed to either allege or to show deliberate falsehood or reckless disregard for the truth, as required by Franks v. Delaware, 438 U.S. 154, 171-172 (1978) and the motions were even insufficient to require a hearing on the issue. Dean v. State, 430 So.2d 491 (Fla. 3d DCA 1983); Herring v. State, 394 So.2d 433 (Fla. 3d DCA 1980); See, United States v. Dorfman, 542 F.Supp 345 (N.D. Ill. 1982).

Further, the defense has chosen to ignore that the determination of the magistate is conclusive in the absence of arbitrariness. State v. Birs, 394 So.2d 1054 (Fla. 2d

DCA 1981). Also, where the defendant's bloody fingerprint on the scene would have been sufficient, anyway, the statement which the defense attacks is immaterial under the standards of Franks v. Delaware, 438 U.S. 154 (1978), applied to Florida by Antone v. State, 382 So.2d 1205, 1211 (Fla. 1980); Cert. denied, 449 U.S. 913 (1980).

The defense attack on saying it was a "bloody fingerprint" is relevant where, not only was it made in good faith, but it was perfectly true. (T.1475-1478).

Also, the affidavits having been made in good faith, the police were entitled to rely on the magistrate's determination under United States v. Leon, 82 L.Ed.2d 677 (1984).

The trial court did not reversibly err in denying the defendant's motions to suppress.

V

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE VERDICTS OF GUILT.
(Restated).

The defendant's bloody fingerprint was found a foot from the victim's body (T.860-861, 1256-1261, 1475-1479). The defendant had been in the immediate area when $430 had been counted and placed in the mail bag (T.1111-1119, 1139), which was the only thing missing other than the telex machine (and the truck keys) (T.949, 970-972). The defendant lied to both the police and his girlfriend about giving them the blue sweater he was wearing the day of the murder (T.1194-1197, 1445-1457, 1510). He bought a new Piaget watch right after Christmas, which cost him an arm or a leg (T.1346, 1453, 1510). His old watch, a Timex, was bloodstained (T.1197-1200). Right after Christmas, he cleaned the car, inside and out (T.1509). The sneakers foudn in the trunk of the car were similar to footprints seen on the crime scene (T.1303, 1438) and the rubber molding on the trunk was stained with blood of the same type as the victim's (T.1303, 1482). The knife found hidden under the passenger seat in the defendant's car, despite having been washed right after Christmas (unusual, since it was kept in a pocket of the car for his girlfriend's personal protection) (T.1307-1309, 1507-1509), revealed the presence of blood (T.1482-1483). This knife was

specifically identified as the murder weapon (T.1626). The movements of defendant were unaccounted for between 11:00 p.m. on Christmas Eve, when he left the Brittons after asking for a crowbar and refusing to explain what he wanted it for (T.1283-1285, 1291) and 5:30 a.m., when his girlfriend woke up (T.1506).

The defendant's "hypotheses" that the bloody fingerprint was left when he cut his finger (R.170-177) or when he cut his wrist (T.1775-1789, 1953) were completely discredited by showing that he had no cuts on either his hands or fingers after the crime (T.1795, 1812-1813, 1816, 1859-1860, 1862-1864).

It is clear that the evidence was sufficient to convict the defendant in acordance with the standards of Huff v. State, 437 So.2d 1087 (Fla. 1983) and Codie v. State, 313 So.2d 754 (Fla. 1975).

VI

THE TRIAL COURT DID NOT REVERSIBLY ERR IN READING PORTIONS OF AN OLD PRE-SENTENCE INVESTIGATION OF THE DEFENDANT'S, WHERE IT GRANTED THE DEFENSE A SIX-WEEK CONTINUANCE TO REBUT ITS ALLEGATIONS AND ORDERED A NEW PRE-SENTENCE INVESTIGATION. (Restated).

Despite the fact that the defense requested a continuance of two weeks to a month to have an opportunity to refute the allegations of the old PSI (T.2113-2127), (which was specifically delivered to defense counsel prior to being delivered to the court, (T.2118-2119), and was granted six weeks (T.2136), it now alleges that the court should never have even seen it (Appellant's Brief, 30-34). It should be noted that, when the issue was discussed at the time, defense said, "Judge, I never said that you were not entitled to see it." (T.2119). The Court also ordered a new pre-sentence investigation at that time (R.274, SSR.43-63, T.2133-2136).

Then, after the defense had been given its six (6) weeks, it changed its tune and moved the Judge to disqualify himself (R.281-284, T.2139).

Where, as here, the defense has failed to show personal bias or prejudice on th part of the judge, motions to recuse have been properly denied, even where the judge was shown to

have access to non-record material or have opinions on issues concerned. Daytona Beach Racing, Etc. v. Volusia Cnty, 372 So.2d 417 (Fla. 1978); Jones v. State, 411 So.2d 165 (Fla. 1982); Tafero v. State, 403 So.2d 355 (Fla. 1981); State Ex Rel. Locke v. Sandler, 23 So.2d 276 (Fla. 1945). Indeed, access of the judge to non-admitted materials has been held to be a reason supporting override of the jury. Porter v. State, 429 So.2d 294 (Fla. 1983).

The defense has been unable to cite any case indicating that, where defendant is given an opportunity to refute an old Pre-Sentence Investigation Report, simply looking at it precludes the Judge from imposing the death penalty . It is respectfully submitted that now is not the time to make suich a radical change.

The defense wanted an opportunity to refute the old PSI and were granted it (T.2113-2137, 2136). They wanted a new PSI and were granted it. (R.274, T.2133-2136). The trial court did not reversibly err in simply reading the old PSI (See SSR.27-42).

VII

THE TRIAL COURT DID NOT REVERSIBLY ERR IN DETERMINING THAT AVOIDING LAWFUL ARREST WAS A PROVEN AGGRAVATING FACTOR. (Restated).

There is no question that the victim and the defendant were co-workers in a small, one-story building (R.86), in which 70 to 90 people worked on December 24th (T.1268-1269). Every Federal Express employee who was asked, indicated that they knew the defendant (T.1113, 1121). Although there was no direct testimony that the victim, a courier, knew the defendant, who was a janitor, it seems virtually impossible that they could not have known each other, at least by sight.

In every case in which there was evidence that the victim knew the murderer, the finding of this aggravating factor has been upheld. Clark v. State, 443 So.2d 973 (Fla. 1983); Cert. denied, 816 L.Ed.2d 356 (1984); Routly v. State, 440 So.2d 1257 (Fla. 1983); Cert. denied, 82 L.Ed.2d 888 (1984); Adams v. State, 412 So.2d 850 (Fla. 1982); Cert. denied, 459 U.S. 882 (1982); See also, White v. State, 403 So.2d 331 (Fla. 1981); Cert. denied, 463 U.S. 1229 (1983). Further, in this case, the victim's blood was found smeared on a telephone which was off the hook (R.103, 294, T.851-852), a telephone had been pulled from the wall

(T.855), and the keyboard of the telex machine also had the victim's blood on it (R.294, T.853). Also, as the trial court pointed out, the victim was neither robbed of her personal possessions or sexually assaulted (R.294). The only reason left was that the victim was killed because she could identify her murderer.

Certainly, there can be no real question that this crime was especially heinous, atrocious and cruel for the reasons clearly set forth in the trial court's findings (R.294) which are clearly supported by the record (T.858-880, 975-1068, 1088-1102, 2061-2065). See, Bottoson v. State, 443 So.2d 962 (Fla. 1983).

Further, even if one (1) of the aggravating factors were improperly found (which is not the case), the death penalty would still be appropriate, under the circumstances. Maxwell v. Wainwright, 11 F.L.W. 219 (Fla., May 15, 1986).

The trial court did not reversibly err in determining that four (4) aggravating factors were properly proven. (R.292-295).

VIII

THE TRIAL COURT DID NOT REVERSIBLY ERR IN DETERMINING THAT THE DEFENDANT HAD PROVEN ONLY ONE (1) MITIGATING FACTOR. (Restated).

The defense argument that the fact that defendant has an I.Q. of 85 and his age of 24 must be considered additional mitigating factors must be rejected by this court. Finding or not finding specific mitigating circumstances applicable is within the trial courts domain, and reversal is not warranted simply because the defendant draws a different conclusion. Stano v. State, 460 So.2d 890 (Fla. 1984); Cert. denied, 105 S.Ct. 234 (1985); Daugherty v. State, 419 So.2d 1067 (Fla. 1982); Cert. denied, 75 L.Ed.2d 469 (1983).

Certainly, if the court is not required to mitigate due to age for 18 and 20 year-old defendants, it should not be required when the murderer was 24. Deaton v. State, 480 So.2d 1279 (Fla. 1985); Fitzpatrick v. State, 437 So.2d 1072 (Fla. 1983); Cert. denied, 104 S.Ct. 1328 (1984); Peek v. State, 395 So.2d 492 (Fla. 1981); Cert. denied, 101 S.Ct. 2036 (1981).

Also, borderline retardation can be specifically rejected as a mitigating factor. Doyle v. State, 460 So.2d

353 (Fla. 1984). See, also, Stano v. State, 460 So.2d 890 (Fla. 1984); Cert. denied, 105 S.Ct. 234 (1985); Card v. State, 453 So.2d 17 (Fla. 1984); Cert. denied, 105 S.Ct. 396 (1984); Johnson v. State, 442 So.2d 185 (Fla. 1983); Cert. denied, 80 L.Ed.2d 563 (1984); Martin v. State, 420 So.2d 583 (Fla. 1982); Cert. denied, 104 S.Ct. 1017 (1983); Daugherty v. State, 419 So.2d 1067 (Fla. 1982); Cert. denied, 75 L.Ed.2d 469 (1983).

While there is no evidence at all in the record that the defendant was doing any drugs, and very limited evidence that he was drinking, even if these allegations had been proven, they would not require that the court find a mitigating circumstance. Simmons v. State, 419 So.2d 316 (Fla. 1982).

The trial court did not reversibly err in finding only one (1) mitigating factor.

CONCLUSION

Based upon the foregoing arguments and authorities, the Judgements and Sentences of the trial court should clearly be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF APPELLEE was furnished by mail to MICHAEL B. CHAVIES, ESQ., 1011 N.W. 10th Avenue, Miami, Florida 33136, on this 8th day of July, 1986.

Charles M. Fahlbusch

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/vbm