IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,992

JOSEPH JEROME RAMIREZ,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

INITIAL BRIEF OF APPELLANT

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(no Summary of Argument)

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INTRODUCTION

The Appellant, JOSEPH JEROME RAMIREZ, was the Defendant in the trial court, the Circuit Court of the Eleventh Judicial Circuit of Florida In and For Dade County, and the Appellee, THE STATE OF FLORIDA, was the Prosecution. In this brief, the Appellant will be referred to as the Defendant and the Appellee will be referred to as the State.

The following symbols will be utilized: The symbol "R" will designate the Record on Appeal; the symbol "SR" will designate the Supplemental Record on Appeal; the symbol "Tr." will designate the Transcript of trial proceedings; the symbol "Ex." will designate the Supplemental Record of Duplicate Trial Exhibits; and the symbol "A" will designate the Appendix to this brief. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE

Mary Jane Quinn was discovered stabbed to death during the early morning hours of December 25, 1983, by a co-worker named Mary McGuire. She had last been seen by her husband the previous night when she left him at home and departed for her job as a nighttime courier with the Federal Express Company.

On December 28, 1983, Joseph Ramirez, who worked during the day as a janitor at Federal Express was arrested by Detective William Saladrigas of the Miami Metro-Dade Police Department and charged him with First Degree Murder of Mary Jane Quinn.

POINTS ON APPEAL

I.

WHETHER THE TRIAL COURT ERRED IN ALLOWING OVER OBJECTION OF DEFENDANT, A BALLISTICS EXPERT TO TESTIFY TO MATTERS BEYOND HIS EXPERTISE AND PERSONAL KNOWLEDGE, WHERE THE TESTIMONY WAS HIGHGLY PREJUDICIAL TO DEFENDANT, THEREBY DENYING DEFENDANT A FAIR TRIAL, AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

II.

WHETHER THE TRIAL COURT ERRED IN NOT DECLARING A MISTRIAL AFTER THE ASSISTANT STATE ATTORNEY COMMITTED A DISCOVERY VIOLATION BY NOT SUPPLYING THE DEFENSE WITH THE NAME OF THE WITNESS TO WHOM THE DEFENDANT ALLEGEDLY CONFESSED.

III.

WHETHER THE TRIAL COURT ERRED IN ALLOWING, OVER OBJECTION OF DEFENSE, THE STATE TO INTRODUCE SEGMENTS OF THE DEFENSE MOTION TO SUPPRESS EVIDENCE IN REBUTTAL. THE EFFECT OF THIS WAS TO FORCE THE DEFENDANT TO GIVE UP A FIFTH AMENDMENT RIGHT IN ASSERTING A FOURTH AMENDMENT GUARANTEE.

IV.

WHETHER THE TRIAL COURT ERRED IN DENYING A MOTION TO SUPPRESS PHYSICAL EVIDENCE SEIZED WITH A WARRANT THAT DID NOT MEET CONSTITUTIONAL REQUIREMENTS.

V.

WHETHER THE CIRCUMSTANTIAL EVIDENCE PRESENTED IN THIS CASE WAS SUFFICIENT TO SUPPORT A FINDING OF GUILT.

VI.

WHETHER THE TRIAL COURT ERRED IN READING PORTIONS OF THE DEFENDANT'S OLD PRE-SENTENCE INVESTIGATION, WITHOUT KNOWLEDGE OF THE DEFENSE, AFTER THE COURT HAD REJECTED THE DEFENSE REQUEST FOR A NEW PRE-SENTENCE INVESTIGATION.

VII.

WHETHER THE STATUTORY AGGRAVATING CIRCUMSTANCES RELIED UPON BY THE TRIAL COURT ARE NOT SUPPORTED BY THE EVIDENCE AND/OR WERE IMPROPERLY FOUND.

VIII.

WHETHER THE DEATH SENTENCE IS UNRELIABLE SINCE THE TRIAL COURT PRECLUDED INDIVIDUALIZED ASSESSMENT OF PENALTY, AND EXCLUDED MITIGATING CIRCUMSTANCES APPLICABLE TO THE DEFENDANT.

STATEMENT OF THE FACTS

Mary Jane Quinn, a night courier with the Federal Express Office at 1410 N.W. 78th Avenue, Miami, Florida (Tr. 815) was stabbed to death at the above stated address on December 24, 1985.

Counsel, the Office of the Public Defender for the Eleventh Judicial Circuit of Florida, was appointed for the Defendant at his "first appearance hearing on December 29, 1984. An indictment, charging the Defendant with murder in the first degree, armed robbery and armed burglary was returned by the Dade County Grand Jury and was filed on January 13, 1984. (R. 1)

Defendant was arraigned on January 13, 1984. (SR. 1) Trial in this cause was set for March 19, 1984 (SR. 1), after several continuances the trial in this matter commenced on November 29, 1984. (Tr. 751)

The testimony adduced at trial by the prosecution established that after the body of Mary Jane Quinn was discovered, crime scene technicians along with Detectives began their investigation at the Federal Express complex. Sometime during that investigation Homicide Detectives and the crime scene Technicians discovered a fingerprint on a doorjamb some six feet away from the head of the victim.[1] After this print was processed, it was positively compared to Joseph Ramirez (Tr. 1261), who was a janitor employed by Lynn Hall Janitorial Services; the company that contracted to clean the Federal Express Offices. Based upon the fingerprint identification

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[1] "Q: Now, Officer Ballard, could you please explain what you do have marked on this diagram as T.

A: This is an area that is a doorway, leading into the break room. This is a metal frame and while working with the deceased we observed a - what appeared to be a bloody fingerprint in the metal doorjamb .

Just adjacent to the body, approximately three feet, nine and a half inches from the floor."

Homicide Detectives sought and obtained a warrant for the arrest of Joseph Ramirez. Joseph Ramirez was arrested and charged by police with First Degree Murder on December 28, 1983. (Tr. 1340)

Subsequent to his arrest and incarceration, a Serologist by the name of Theresa Washam, from the Metro-Dade Police Department, tested the blood scraping from the print on the doorjamb in an attempt to type it. (Tr. 1465) According to the Serologist, due to the small amount of blood involved, she was unable to determine type, but did conclude that the blood specimen contained the H antigen. She later testified at trial that the Defendant possessed B type blood, the victim "O" type blood and that the "H" antigen could be consistent with either one or a combination of the above-named blood types. (Tr. 1478) The Technician went on to say that the blood type containing the "H" antigen was, therefore, consistent with the Defendant's blood type, the victims blood type, or a combination of the two. Ms. Washam also testified that hair strands found clutched in the hand of the deceased were consistent with the hair of Mary Jane Quinn and were inconsistent with the hair samples taken from the defendant. (Tr. 1491-1492)

Another Metro-Dade Technician by the name of Robert Hart later testified at trial that the knife found by Detectives in the car belonging to the girlfriend of the defendant was in fact, the murder weapon. (Tr. 1626)

Prior to the commencement of trial in this cause, the defense invoked reciprocal discovery and filed several motions including a Motion to Suppress Physical Evidence. (SR. 2) The State responded to the discovery demands by informing the defense that no inculpatory statements had been made by the defendant. (SR. 21) At trial, the defense attorney in his opening statement, said that the defendant at each opportunity had denied involvement in the homicide. (Tr. 776)

The jury returned a verdict of guilty as charged as to all counts (Tr. 2005) and a sentencing hearing took place on December 11, 1984. (Tr. 2035)

The jury returned an advisory verdict recommending the imposition of the death penalty. (Tr. 2106-2107) The trial court set off sentencing until January 9, 1985.

On January 9, 1985, the defense moved for a continuance of the proceedings, alleging that the court had improperly read and considered a ten (10) year old pre-sentence investigation report of the defendant without defense knowledge or approval. The court re-set sentencing for February 20, 1985 and at that time imposed the death sentence. (Tr. 2213)

The court found that there were applicable aggravating circumstances and only one applicable mitigating circumstance. (Tr. 2210)

I.

THE TRIAL COURT ERRED IN ALLOWING OVER OBJECTION OF DEFENDANT, A BALLISTICS EXPERT TO TESTIFY TO MATTERS BEYOND HIS EXPERTISE AND PERSONAL KNOWLEDGE, WHERE THE TESTIMONY WAS HIGHLY PREJUDICIAL TO DEFENDANT, THEREBY DENYING DEFENDANT A FAIR TRIAL, AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Mr. Robert Hart, a ballistics expert with the Metro-Dade Police Department, was qualified by the trial court as an expert in the field of tool mark identification. (Tr. 1596) Specifically, Mr. Hart was qualified as a person able to compare a knife found in the automobile belonging to the girlfriend of the Defendant, to a stab wound to the chest rib cage of the victim. However, Mr. Hart should not have been qualified as an expert, and the scope of his testimony far exceeded proper bounds. The qualification of Technician Hart and the admission of this testimony over objection of Defendant was reversible error.

Prior to the qualification of Technician Hart, the defense filed a Motion In Limine (R. 188-190), contesting his ability to testify as an expert in the field of "knife mark identification." In said motion the defense requested that the trial court enter an order prohibiting Technician Hart from testifying as an expert in the area of knife mark identification. (R. 188-190a) Furthermore, the defense objected to him being so qualified (Tr. 1605) and made an evidentiary showing as to Mr. Hart's limitations in open court. (Tr. 1535-1598) Despite these vigorous objections, the court saw fit to qualify Technician Hart in this area, even though he had never been so qualified before (Tr. 1542), and Mr. Hart proceeded to testify that "the result of my examination made from the microscopic similarity, which I observed from both the cut cartilage and the standard mark, was that the stab wound in the victim was caused by this particular knife to the exclusion of all others." (Tr. 1626)

In reaching such a conclusion, the Technician compared a piece of cut cartilage from the body of the victim to knife impressions, using the knife in question but failed to test any other knife. (Tr. 1633)

The testimony of Technician Hart exceeded the scope of his expertise and the proper bounds of expert testimony. He was qualified by the trial court as an expert in the field of tool mark identification, he was never qualified in the area of knife mark identification. It is well established that "to qualify as a skilled witness, one must have such skill, knowledge or expertise with respect to the subject matter about which he is called to testify", that opinion rendered will be of assistance to the jury. Seaboard Airline Railroad Company v. Lake Region Packing Association, 211 So.2d 25, 30 (Fla. 4th DCA 1968).

Proof of such qualifications is an indispensible element of the predicate for expert testimony, United State v. Amaral, 488 F.2d 1148, 1153 (9th Cir., 1973); Lyles v. United States, 254 F.2d 725, 730 (D.C.Cir., 1957) cert.denied 356 U.S. 901 (1958). This predicate is not satisfied by the mere fact that a witness is an expert in some subject areas it must be established that the witness is an expert in the area in which testimony is sought. Salinetro v. Nystrom, 341 So.2d 1059, 1061 (Fla. 3d DCA 1977).

Technician Robert Hart was an expert in the area of balistics or firearm comparison and had been qualified as an expert in this area on numerous occasions. (Tr. 1599) However, he had never been qualified in the area of knife mark identification. (Tr. 1607) Although he indicated to the court that he had testified as a witness in the area of tool mark identification 20-30 times (Tr. 1599), he could not even remember the last time nor the case name, when he last did so. (Tr. 1606-1607) Most important, Mr. Hart readily admitted that this was the first time for him to be qualified in the area of knife mark identification. (Tr. 1608) Additionally, it was established that no one in the State of Florida

qualified in the area of tool mark identification ever testified in the knife mark area. (Tr. 1609-1615)

The law is well established in this State that, "when a witness is offered as an expert or skilled witness, it is the duty of the trial court to determine whether or not the witness has been shown to possess required qualifications and specific knowledge so as to authorize his opinion testimony." Upchurch v. Barnes, 197 So.2d 26 (Fla. 4th DCA 1967) and Central Hardware v. Stampler, 180 So.2d 205 (Fla. 3d DCA 1965). In this case Techniician Robert Hart did not possess the required expertise in the area of "knife mark identification" to be qualified as an expert in this field.

Moreover, his testimony would have been inadmissable even if he had been properly qualified.

Technician Hart testified that no other knife could have caused the incision in question. (Tr. 1626) Mr. Hart rendered that opinion without ever testing any other knife. (Tr. 1633) Therefore, his opinion was based on general conclusions regarding some similarity between a cast of the cartilage and an impression made into a synthetic medium called "dip pak". (Tr. 1617) Not only did he not test any other knife, but he did not even compare an impression of the knife to an impression of the cartilage. [2] Even the medical examiner could not testify to that extent. Medical Examiner Harleman could say at most, that the knife was consistent with the stab wound. [3]

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[2] "I compared the cartilage stab precisely, I compared a cast of the coeflex of the cartilage stab to a cast of the dip pak stab." (Tr. 1536; 1620; 1631)

[3] "Q: Now Doctor, getting back to the stab wounds, let me show you what's been marked as State's Exhibit 50 composite and ask you if those knives could have accounted for the injuries that you observed on the victim in this case?

A: The wounds I saw are not consistent with this type of weapon.

Certainly, even she could not eliminate the possibility of another knife being consistent with the stab wound.

There was no factual or experimental basis for the testimony of Technician Hart regarding his conclusion that no other knife could have been responsible for this stab wound to the victim. There was no way to draw such a conclusion without testing other knives. The testimony of an expert is admissible only if it is "based on facts in evidence, or within his knowledge." Cirack v. State, 201 So.2d 706, 709 (Fla. 1967) Technician Hart did not examine any other knife, and the facts upon which his testimony was based were not within his personal knowledge. Nor is there any basis in the record for his testimony since there was no other testimony which established evidence to exclude another knife or other knives being responsible for the wounds to the victim.

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3 cont.

Q. What type of weapon? Can you describe the type of weapon that the wound would be consistent with?

A. It would be a —

Mr. Chavies: Judge, I am going to object as being beyond this —

The Court: (Are you able to describe such a weapon, Doctor, based upon your expertise as a doctor?)

The Witness: On — In general size.

Q. (By Mr. Purow) Doctor, as to size, width of the weapon —

The Court: If you can, as to dimensions of a weapon?

The Witness: This was a — The wounds I saw were caused by a single-edged sharp knife type instrument. The length is difficult to estimate but I check what the minimum, at least of five, five inches in length and that is —

Q. (By Mr. Purow) That's a minimum?

A. I would say a minimum, yes.

On Cross Examination:

Q. Doctor, you talked about the type of size of stab wounds,

It is noteworthy to point out, furthermore, that the trial judge also expressed extreme reservation about having allowed Mr. Hart's testimony.[4] For the above-stated reasons, Technician Hart's testimony was inadmissable, and the convictions in this case should be reversed. Johnson v. State, 314 So.2d 248 (Fla. 1st DCA 1975) See also, People v. Perry, 311 N.E.2d 341 (Ill. 1st DCA 1974).

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3 cont.

the depth of those stab wounds and type of instrumentality which may have caused the stab wounds and all that.

You state for certain, things are consistent with an instrumentality or could be consistent; is that correct?

A. Correct.

Q. And this means that more than one instrument could be consistent, is that not correct?

A. Correct.

Q. You don't know the exact size, configuration, shape of the instrument which did cause the stab wound?

A. Correct." (Tr. 1024-1025)

4 "Now, I have, over the past two weeks, been carefully considering this case and I realize that for the first time in the history of the Florida courts, as I am told, I have permitted into evidence knife prints, which the jury considered in the course of arriving at their verdict.

I have sat over, presided over, I would say a score of murder trials during the past three years. Most all of them were based upon eyewitness testimony. Basically, particular evidence on guns, fingerprints on guns, fingerprints on knives found at the scene, or confessions or all of these.

This has been a circumstantial case and because of the knife evidence I am not at all unmindful of the course of the jury. I am going to take these matters under consideration. I am leaving on vacation today and I am going to be gone for two weeks and I want to consider this matter, because it is, I think in my mind, particularly the knife that I permitted into evidence, and when I return that will be a week from tomorrow, a week from tomorrow, in fact, a day after I return. I want a day to get my affairs organized. That will be on the 27th, do we have court on the 27th Ms. Clerk?" (Tr. 2059)

II.

THE TRIAL COURT ERRED IN NOT DECLARING A MISTRIAL AFTER THE ASSISTANT STATE ATTORNEY COMMITTED A DISCOVERY VIOLATION BY NOT SUPPLYING THE DEFENSE WITH THE NAME OF THE WITNESS TO WHOM THE DEFENDANT ALLEGEDLY CONFESSED.

In his opening statement, defense counsel for Joseph Ramirez stated, "the defendant never confessed to anyone", furthermore, counsel said "each and every time Joseph Ramirez had an opportunity to say anything, he stated, I am not guilty." (Tr. 775) These representations in opening argument were based in part on the state's discovery response stating that no statements had been made by the defendant. [5] Subsequently, at trial, the lead Detective in the case stated from the witness stand that the defendant had confessed to a cellmate.

Whenever a violation of the prosecutor's obligation to furnish discovery under Rule 3.220, Fla.R.Crim.P. is brought to the trial court's attention, the court must conduct full inquiry into the surrounding circumstances of the breach. Cooper v. State, 377 So.2d 1153 (Fla. 1980); Kilpatrick v. State, 376 So.2d 386 (Fla. 1979); Wilcox v. State, 367 So.2d 1020 (Fla. 1979); Cumbie v. State, 345 So.2d 1061 (1977); Richardson v. State, 246 So.2d 771 (Fla. 1971).

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[5] Although the state did in its discovery response indicate that statements had been made by the defendant, at no time did they disclose an alleged statement made to a cellmate.

> "All statements or summaries of statements made by the defendant are available for copying by contacting the undersigned Assistant State Attorney."
> (SR. 21)

Upon review of these statements, there were no statements made to a cellmate, nor were there any inculpatory statements whatsoever.

The scope of this inquiry must include a determination as to (1) whether the prosecutorial violation was inadvertent or willful; (2) whether the violation was trivial or substantial and (3) what effect the violation had upon the ability of the defendant to properly prepare for trial. Richardson, supra at 775. If the court finds that no prejudice has accrued to the defendant, the circumstances establishing non-prejudice must affirmatively appear on the face of the record. Richardson, supra at 775. The burden rests upon the prosecution to demonstrate before the trial court the absence of prejudice. Cumbie, supra at 1062.

In the case at bar, although the trial court conducted what is commonly referred to as a "Richardson Hearing", it abused its discretion by not finding prejudice and declaring a mistrial, Richardson, supra.

The court attempted to remedy the state's violation by giving a curative instruction to the jury. Specifically, the court said:

> "The Court: 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 the defendant had confessed to anything." (Tr. 1431)

Clearly, however, the attempted curative did not properly erase the prejudice to the defendant and as a result the defendant was not afforded a fair trial.

In the case at bar, the prosecution breached its duty under Florida Rules of Criminal Procedure 3.220(a)(1)(iii), by failing to furnish defense counsel with defendant's alleged unrecorded, in custody statement to a cellmate, or the name of the person to whom it was made. After being alerted to this violation the trial court conducted a hearing, but never found that no prejudice existed. (Tr. 1428-1429) Under established

decisonal law, this non-feasance by the court constituted reversible error. Cumbie v. State, supra. The error is established by the record as follows:

> At arraignment defense counsel properly filed his demand for discovery. Pursuant to Rule 3.220(a)(1)(iii), Florida Rules of Criminal Procedure, this demand specifically requested that the prosecutor disclose:
>
> "Any written or recorded statements and the substances and substance of any oral statements made by the defendant and known to the prosecutor together with the name and address of each witness to the statement." (SR. 1)

Notwithstanding this request, the prosecutor failed to timely divulge to defense counsel the defendant's oral, in custody statement to a cellmate. In fact, the very first time the defense heard of any such statement was in trial when it came out of the mouth of Detective William Saladrigas of the Metro-Dade Police Department. [6] Prior to that occasion, defense counsel had been misinformed by the prosecution since they had previously informed the defense that no statements were made by the defendant.

Defense counsel lodged an objection to the Detective's testimony on the basis that he had "received no notice of this statement, nor the name of the person who had received it." (Tr. 1389) At the ensuing

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"Q: Did you talk to anybody else to try to get any 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 Joseh Ramirez confessed this murder to him?
A: Yes. (Tr. 1386-1387)

sidebar held at defense counsel's request, the trial court was further advised that there had been a discovery violation. [7]

Although the trial court proceeded to hold a "Richardson Hearing", it never determined whether there had been any prejudice to the defense, [8] after the state admitted the discovery violation. [9]

Specifically, the court never made a ruling as to (1) the willfulness or inadvertency of the breach; (2) the materiality of breach, or (3) the effect it had upon the defendant's trial preparation ability.

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[7] "Mr. Chavies: Judge, I believe I asked him whether or not he talked to anybody else in the Dade County Jail and he said he had and I asked him whether or not Joseph Ramirez said he committed the crime to him, he said, yes.

I never knew about this person. I don't know who he is.

If he did make that admission to him I think that's discoverable and Brady material. We should be aware of — be made aware of it — the fact that we weren't is certainly prejudice to us.

The only people he told me about in the deposition was Robertson — I am sorry, Sharon Lopez and George Crawford." (Tr. 1389)

[8] "THE COURT: Two things, instructions and secondly a question to the jury either individually or as a group, depending on what you think will be the least damaging, that I will ask the jury in terms of whether they were affected by the initial statement. And, I really believe that if they can't tell me, based upon a question which I am sure you all can properly phrase and if they can tell me, I'll accept the direction of the Court, I am satisfied that no harm will be done in this.

I really believe that if they can't I would grant a mistrial.

Now, I really don't think that this is such a circumstance that we cannot correct it. And if the jury tells me that it is correct, I am satisfied that it will be if they tell me they can't disregard it, more than two, then of course I'll have to be bound by what they say." (Tr. 1428-1429)

[9] "Mr. Purow: Judge, I am interested to know how this is Brady material. I know besides exculpatory material — First of all, Judge, I spoke to this individual." (Tr. 1389) (Note: Here, when Mr. Purow speaks about an individual he is talking about the person to whom the defendant allegedly confessed.)

As to the first facet of inquiry required by Richardson, the prosecutor flat out told the court that although he knew the information was discoverable, he determined it would be of no use to the defense so he simply decided not to supply it. [10] (Tr. 1401) Although the court ordered the state to provide the defense with the name of the person to whom this alleged confession was made, (Tr. 1427-1428) the prosecutor never complied and did not even make a good faith effort to do so. The record clearly establishes the fact that the prosecutor acted recklessly, at the least, in failing to discharge his obligation under Rule 3.220(a)(1)(iii) and (2), and, the police had misrepresented to defense counsel the non-existence of any statements during deposition. [11] Certainly, the prosecutor, and not

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[10] "Mr. Purow: Judge, if I can make argument. Clearly, this isn't a Brady violation, Judge. As the Court well knows there are people in the jail that routinely attempted to get deals for themselves in order to get a more lenient sentence by coming forward with information.

This man called me up and said, I have information with a possible escape.

The Court: When was that?

Mr. Purow: I don't recall, Judge. It was, it was in the winter or spring.

I went over and I asked him, did he ever tell you he did the crime. He said yes. And then I said, can you give me any details? Can you tell me how he did it? And he gave me details which were so vague or so inconsistent with what actually happened that it had no bearing on the case that we have here.

The Court: In that direction, I'll address the state and the Detective to exercise every effort that you can to attempt to determine who that person was and advise Mr. Chavies not later than tomorrow at 9:00 o'clock." (Tr. 1401)

[11] At deposition, defense counsel asked Detective Saladrigas whether or not there were any other statements made by the defendant :

"Q: Any other information, physical evidence, statements of witnesses, statements of Joseph Ramirez, that you know of in this case that we have not talked about?

A: That I haven't referred to in the report?

Detective Saladrigas, was charged with the responsibility of furnishing discovery to defense counsel. (See Rule 3.220(a), Florida Rules of Criminal Procedure). As to why the prosecutor disregarded his discovery obligation, the record is egregiously silent. Richardson, supra; Cumbie, supra.

The record is crystal clear, however, that Detective Saladrigas stated during deposition that there were no other statements. Thus, although the trial court conducted an inquiry as to the deliberateness of the violation it never ruled as to the issue. In the case at bar, the record demonstrates both the misrepresentation by the police as to the oral statement's existence and the reckless abandonment by the prosecution of its duty to disclose under Rule 3.220(a).

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11 cont.

Q: That you have not referred to in the report, that I have not read in the report.

A: Well, you've read it all.

Q: That I do not have or that we have not talked about?

A: No, not that I know of, not to me. You've read the final report, right, last supp?

Q: I have seen everything, I think, except for the Grand Jury information report that you referred to.

A: It just says I attended the Grand Jury.

Q: So we have got one, two, three, and you will give me a copy of the other reports that I do not have?

A: You have four supps from me and one offense incident report under a different case number for the stolen computer.

Mr. Chavies: I do not have anything further." (SR. 143-144)

As to the second facet of inquiry mandated by Richardson, the lower court made no determination as to the seriousness of the violation. To be sure, the lower court did recognize that there was a big problem and attempted to give a curative instruction to the jury (Tr. 1431), but by that time, the damage had already been done, the jury had already heard from the mouth of the lead Detective in the case, that the defendant had confessed. Furthermore, that the violation was highly material is clearly borne out by the fact that defense counsel stated in opening argument that the defendant only said he did not commit the crime at each opportunity he had to speak to the police. Thus, even though the trial court attempted to correct the problem by giving a curative instruction, the seed had already been planted in the minds of the jurors, and they certainly may well have believed that the defendant did confess. Thus, it is undeniable that before the jury, the subject matter of the discovery violation might well have been treated as evidence of a "substantial" matter. Richardson, supra at 775.

As to the third facet of inquiry required under Richardson, the effect of the violation upon defense counsel's trial preparation, no inquiry was conducted by the court. Defense counsel certainly complained with vigor, but such protest was neither rebutted by the prosecution nor properly assessed by the court.

Since the discovery violation concerned the defendant's alleged statement to a cellmate, effective trial preparation would necessarily include the taking of this person's deposition, at the very least, to determine if the statement was actually made. Had counsel been properly advised of the statement's existence, he might have suppressed the statement or totally eliminated the possibility of it coming out by way of Motion in Limine. Additionally, defense counsel would have found out the circumstances

under which the statement was made, the promises, if any, made to the recipient, the crime for which he was in jail and any possible bias he might have against the defendant. In short, advance knowledge would have given defense counsel time to gather witnesses or evidence to rebut the officer's belated pronouncement of the unrecorded statement's existence. Although the trial court did attempt to conduct a "Richardson Hearing", it failed to resolve the necessary issues as required by Richardson, supra.

The noncompliance with Richardson by both the judge and prosecution at trial is the issue to be resolved by this Court. Resolution of this issue is governed by Richardson and Cumbie. The noncompliance constituted reversible error as a matter of law.

III.

THE TRIAL COURT ERRED IN ALLOWING, OVER OBJECTION OF DEFENSE, THE STATE TO INTRODUCE SEGMENTS OF THE DEFENSE MOTION TO SUPPRESS EVIDENCE IN REBUTTAL. THE EFFECT OF THIS WAS TO FORCE THE DEFENDANT TO GIVE UP A FIFTH AMENDMENT RIGHT IN ASSERTING A FOURTH AMENDMENT GUARANTEE.

No Person Shall Be Held To Answer For A Capital, Or Otherwise Infamous Crime, Unless On A Presentment Or Indictment Of A Grand Jury, Except In Cases Existing In The Land Or Naval Forces, Or The Military, When In Actual Service In Time Of War Or Public Danger, Nor Shall Any Person Be Subject For The Same Offense To Be Twice Put In Jeopardy Of Life Or Limb, Nor Shall Be Compelled In Any Criminal Case To Be A Witness Against Himself, Nor Be Deprived Of Life, Liberty Or Property, Without Due Process Of Law, Nor Shall Private Property Be Taken For Public Use, Without Just Compensation.

In the case at bar, the Defendant, Joseh Ramirez, was made

to testify when he, in fact, chose not to. This situation occurred when the trial court erroneously allowed into evidence portions of the defendant's motion to suppress evidence. (Tr. 1842) In the case of Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968). The Supreme Court held that "when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection".

At trial, when the state sought to introduce a part of the defendant's motion to suppress as substantive evidence during its rebuttal case, the defense objected immediately. [12]

The argument in objection was two-fold; first, that it was improper rebuttal and secondly, that it constituted a Simmons violation. The prosecutor argued that this testimony was being offered to rebut a hearsay statement made to a doctor concerning an injury the defendant had sustained. [13] (Tr. 1819) The defense countered said argument by

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[12] "Mr. Chavies: Objection, Judge, as part of the Fourth Amendment Right, I would ask for a side bar. (sic) What we intend to do through the United States Supreme Court (sic) clearly states that the defendant does not have to give up one right in assertion of another." (Tr. 1816-1817)

[13] "They have introduced a hearsay statement of the defendant's and I am going to impeach that and there is no constitutional right to not have this come into evidence. This is not being introduced as substantive evidence. It's being introduced to a hearsay statement that was introduced over the state.

The courts have laid out that motion to suppress. You cannot use that as substantive evidence. But if someone testifies in a motion to suppress and differently at trial, then the motion to suppress can be used as impeachment." (Tr. 1819)

raising a Simmons violation.[14] Essentially, what the state and court did was make the defendant give up his Fifth Amendment right in assertion of his Fourth Amendment guarantee.

The prosecutor argued that the defendant's "Statement of Facts" section of his motion to suppress could be used to rebut the information he gave to a physician, Dr. Dove, when he treated the defendant for an injury to his wrist.

Specifically, the Doctor testified as follows:

> "He indicated to me that it was occasioned, in the course of employment as a janitor in which it was occasioned by a sharp object in his employment in the realm of his employment." (Tr. 1790-1791)

That which was admitted into evidence under the theory of rebuttal were two paragraphs contained in the statement of facts section of the defense's motion to suppress evidence.

> "The defendant sustained a cut to his left index finger on December 24, 1983, while picking up broken glass at another property, i.e. The Fountainbleu Apartment complexes which he carried on to the Federal Office that afternoon.
>
> The blood which contained defendant's fingerprint could have been left far in advance to the homicide." (Tr. 1849)

Clearly, there is no inconsistency between the two statements. Rebuttal

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[14] What the State is seeking to do is make him give up his Fourth Amendment Right in assertion of another. When he files a motion to suppress he has a right to do so. We argued that as a part of our motion. That's all it is, its a Fourth Amendment. He cannot be put into a position where he is giving up (sic) in order to assert that right. Furthermore, Mr. Ramirez has not testified in this court. (Tr. 1817-1818)

evidence is defined as follows:

> "Evidence given to explain, repel, counteract, disprove facts given in evidence by the adverse party. That which tends to explain or contradict or disprove evidence offered by the adverse party. Evidence which is offered by a party."
> (Black's Law Dictionary, 5th Ed., St. Paul, Minn., 1959)

Furthermore, in the case of Layton v. State, 301 N.E.2d 633, 636, the court said:

> "Rebuttal evidence is as its name indicates, that which tends to explain or contradict or disprove evidence offered by the adverse party."

The portion of the defense motion to suppress containing the defendant's Statement of Facts, was improper rebuttal and should not have been admitted. Those statements attributed to the defendant could have given the jury the impression that the defendant was attempting to cover-up or lie, and thus he was prejudiced thereby.

The effect of the admission into evidence of this part of the Motion to Suppress Evidence was to force the defendant to give up his right to remain silent by asserting his Fourth Amendment Right in a motion to suppress evidence. Simmons v. United States, supra.

Once again, Simmons specifically forbade this from happening.

> "In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another."
> Simmons at p. 1259

This is exactly what happened in the case at bar. Even though the defendant did not technically testify at a motion to suppress hearing, his rendition of facts in his motion to suppress evidence was based upon personal thoughts and observations and, moreover, the prosecution and

court treated that part of the motion to suppress as a statement of the defendant. In fact, the court in instructing the jury referred to paragraphs two and three which were admitted into evidence and said:

> "All right, ladies and gentlemen of the jury this is a statement that has been testified to, paragraphs 2 and 3 have been read to you, of the defendant's statement." (Tr. 1849)

Therefore, there can be no doubt but that portions of defendant's motion to suppress evidence were allowed as improper rebuttal evidence in direct violation of Simmons. For the above-stated reasons, the defendant's conviction should be reversed.

IV.

THE TRIAL COURT ERRED IN DENYING A MOTION TO SUPPRESS PHYSICAL EVIDENCE SEIZED WITH A WARRANT THAT DID NOT MEET CONSTITUTIONAL REQUIREMENTS.

The defense argued both a Motion to Suppress Physical Evidence and Motion to Suppress all alleged statements made by the Defendant, Joseph Ramirez. At the hearing held prior to trial, it was the position of the defense that the warrants relied upon in this case were deficient as a matter of law.[15] In Illinois v. Gates, 102 S.Ct. 2317, 76 L.Ed.2d 527 (1983), the United States Supreme Court reaffirmed the

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[15] "At this point, defense maintains that all of the warrants in front of you are insufficient as a matter of law." (Tr. 395)

Mr. Houlihan went on to say at p. 405: ". . . If we strip the warrant of all unimportant things, all it says is a bloody fingerprint and dead body. That is not probable cause for an arrest. Even if the fingerprint came to be Joseph Ramirez's, who is a janitor there. For example, in the car warrant if we have a bloody fingerprint, a body, once again no connection between the two but we have no basis for a source of knowledge. No source of reliability. Judge, they are insufficient facially and we are asking that you grant the motion." (Tr. 405)

States Supreme Court reaffirmed the "totality of the circumstances test", which traditionally has formed the basis of probable cause determinations. See State v. Jacobs, 437 So.2d 166 Fla.App. 5th Dist. (1983). In Gates the court said:

> "The task of the issuing Magistrate is simply to make a practical common sense decision whether, given all of the circumstances before him, there is a fair probability that contraband, or evidence of a crime will be found in a particular place. The duty of the reviewing court is simply to ensure that the Magistrate had a substantial basis for concluding that probable cause existed."

In making application for the issuance of a warrant a homicide Detective from the Miami Metro Dade Police Department did not comply with the requirements of law. In fact, some of the facts contained within the supporting factual affidavit are so false that even if they were not "knowingly and intentionally made", they were certainly represented with reckless disregard for the truth. Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

In applying for the issuance of warrants to search the defendant's residence and the defendant's vehicle, Homicide Detective William Venturi said in pertinent part:

> "The subject Ramirez was observed in the aforementioned premises at 11:00p.m., December 24, 1983." (SR. 10)

Certainly, Detective Venturi did not see the defendant in his car at the Federal Express Office at 11:00p.m., nor did anyone else. The above statement was a total misrepresentation. Furthermore, the same affidavit is untrue in other respects. Specifically, it refers to a bloody fingerprint at a time

when no blood testing had been done.[16] However, the former untrue misstatement of facts is by far the most egregious, and it is that violation which this argument addresses itself to Gates and Franks, supra. The Franks court said that inaccuracies in the affidavit would not be enough to invalidate a warrant, but that a "false statement knowingly and intentionally made or made with reckless disregard for the truth, would be Franks, supra at pp. 171-172.

In the case at bar, the affidavit of facts clearly states that the defendant was seen in his car at the Federal Express Office at 11:00p.m. at night. That statement is simply untrue and totally unsupported by the facts. There was simply no testimony or evidence before, during or after trial that anyone saw the defendant at the Federal Express Office at 11:00p.m. Conversely, the testimony at trial ws that the defendant was last seen at the Federal Express Office when he left at 5:30p.m. (Tr. 409-410) Clearly then, there is a huge discrepancy in the time period between when the defendant was last seen at the Federal Express Office and the time alleged in the supporting affidavit. Since the testimony at the trial indicated that the victim would have arrived at the Federal Express Office at about 11:30 p.m., this affidavit then suggests that both the defendant and the victim would have been there at about the same time on the evening of the homicide. Clearly, the Police Officers charged with investigating this case knew that the defendant had not been seen at 11:00 p.m. that night at Federal Express, and by stating this untrue fact the affidavit becomes insufficient and the warrant invalid.

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16 "Mr. Houlihan: Judge, at the time the warrant is presented, the police do not know that first of all it's a bloody fingerprint.

Secondly, where is the basis of the reliability? Where is the knowledge for him being in the car at a certain time, like 11:00 p.m. at night, and being seen at 6:00 o'clock the next day. Where is the basis of knowledge that has not been shown?" (Tr. 411-412)

In Wilson v. Quigg, 17 So.2d 697 (Fla. 1944) the court said:

> "The application for, issuance of and seizure of search warrants is serious business which has been jealously controlled by statutes and constitution. It is almost automatic that statutes and rules authorizing searches and seizures are strictly construed and affidavits and warrants issued pursuant to such authority must meticulously conform to statutory and constitutional provisions."
>
> See also Hesselrode v. State, 369 So.2d 348 (Fla. 2d DCA 1979)

The knowing and fraudulant disregard of the truth by the Metro Homicide Detective in the instant matter should have invalidated the warrants in this case. The failure of the trial court to grant the motion to suppress physical evidence and suppress the arrest warrant constituted reversible error.

V.

THE CIRCUMSTANTIAL EVIDENCE PRESENTED IN THIS CASE WAS INSUFFICIENT TO SUPPORT A FINDING OF GUILT.

At the trial level, the State of Florida relied totally upon circumstantial evidence to convict the defendant. Specifically, the state argued that a bloody fingerprint, a blood type consistent with the defendant's and a knife found in the automobile belonging to the defendant's girlfriend, which was consistent with stab wounds to the body of the deceased, were sufficient to meet their burden of showing that the evidence was inconsistent with a reasonable hypothesis of innocence. McArthur v. State, 351 So.2d 972 (Fla. 1977). In McArthur, a special standard of review was reiterated:

> "Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence."
>
> See also McArthur v. Hourse, 369 So.2d 578 (Fla. 1979)

There can be no question but that the defendant, Joseph Ramirez, worked at the Federal Express building where the homicide occurred and that he had been an employee there for sometime. (Tr. 757) At trial, the state relied heavily upon the fact that a bloody print was discovered on a doorjamb some six (6) feet away from the body of the victim. In a circumstantial evidence case involving fingerprints, the standard was extended in the case of Tirko v. State, 138 So.2d 388 (Fla. 3d DCA 1968). The Tirko court said: "That where it, fingerprint evidence, is relied upon to establish identity, the circumstances must be such that the print could have been made only at the time the crime was committed." Also see, Jaramillo v. State, 417 So.2d 257 (Fla. 1982); Wharton's Criminal Evidence, Sec. 982 (12th Ed. 1955).

In the case at bar, the state called to the witness stand fingerprint technician, William Sloane Miller, who testified that Mr. Ramirez' prints were consistent with the print left on the doorjamb at the Federal Express Office. Mr. Miller, however, could not say when that print was left there.[17] Therefore, the state failed to establish that Mr. Ramirez'

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17 "Q: Now Mr. Miller there is no way for you to know the age of the print; is there?

A: No, sir. I can't detect age.

Q: There is no test for that is there?

A: Well, in a patent print I can determine the age.

print could not have been left there at another time. An earlier case, Sorey v. State, 419 So.2d 810 (Fla. 3d DCA 1982), sheds further light as to what the appropriate standard is. In Sorey the court said in pertinent part:

> ". . . However, if the defendant shows through testimony that he, unlike a member of the general public, had access to the place or the object at a time other than the time of the crime so as to reasonably explain the existence of his prints, the version of events related by defense must be accepted as true unless contradicted by other proof showing defendant's version to be wrong."
>
> Sorey v. State, 419 So.2d 810 (Fla. 3d DCA 1982); see also Williams v. State, 308 So.2d 595 (Fla. 1st DCA 1975).

Clearly then, since the defendant had worked at the Federal Express Office for a period of time prior to the homicide and had access to the area where the print was, the print could have been left prior to the homicide. Therefore, the print evidence failed on sufficiency grounds.

The state attempted to meet this argument by contending that it was not merely a print but a print in blood and, therefore, represented

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17 cont.

Q: In this case, with respect to this print, you cannot determine the age?

A: Correct.

Q: You know that Joseph Ramirez was the janitor at the Federal Express Building do you not, sir?

A: Yes.

Q: Now, just as you can't determine the age of a print, sir, just as there is no test by which you can make that determination, similarly there is no test by which you determined whether or not a substance and print arrived at the same time or a print arrives after a substance is there?

A. That's true." (Tr. 1265-1266)

greater circumstantial evidence that the print was left at the time of the homicide. This argument, however, failed since the testimony of the serologist was that the blood tested from the doorjamb area would be consistent with Mr. Ramirez' blood group "B", or would be consistent with a combination of "B" and "O". The decedent possessed blood from the general blood grouping "O". [18] Furthermore, even if we were to assume that this was the defendant's print in his blood, there was additional evidence in the case to suggest that the print could have been left at an earlier time when the defendant cut himself. (Tr. 1790; 1849)

The third area of circumstantial evidence the state relied upon in this matter was that which was discussed in Argument I; the knife found in the automobile of the defendant's girlfriend. Because the balistics technician overstepped the bounds of his expertise in deciding that this knife was the only knife in the universe which could have caused the stab wounds to the victim, and because it was never put in the hands of the defendant this evidence failed to meet the McArthur test also.

Moreover, the evidence in this case is consistent with a reasonable hypothesis of innocence. At trial, Teresa Washam, a Serologist with the Metro Dade Police Department was also qualified as an expert in the area of hair comparison. (Tr. 1468) Ms. Washam testified, in pertinent

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[18] "Okay. Again there are several possibilities that could exist here because I have found more than one antigen. Because I have found the B and H antigen. The possibilities would be first of all that it would be entirely B blood because, in some cases B will have the H antigen. So this could be one possibility. It could be only B blood on there.

The second possibility, it could be type O blood. Which would account for H antigen Type B blood. Which would account for the B antigen, and another possibility would be the fact that it would be Type O blood mixed perhaps with some type of another body fluid from a B secreter. Which would account for the B as well as H being there." (Tr. 1478)

part, that she compared hair found in the hands of the victim to a sample of hair taken from the head, face and chest of the defendant, Joseph Ramirez. The result of this testing was that the hair found in the hands of the victim in this case did not belong to Joseph Ramirez. Ms. Washam also testified that hair strands of a different variety did in fact belong to the victim herself. (Tr. 1491) One reasonable hypothesis consistent with innocence, then, would be that the hair found in the hand of the victim belonged to she and her assailant; someone other than Joseph Ramirez.

In conclusion, since this was a circumstantial evidence case and evidence was presented consistent with a reasonable hypothesis of innocence the conviction of the defendant cannot be upheld.

VI.

THE TRIAL COURT ERRED IN READING PORTIONS OF THE DEFENDANT'S OLD PRE-SENTENCE INVESTIGATION, WITHOUT KNOWLEDGE OF THE DEFENSE, AFTER THE COURT HAD REJECTED THE DEFENSE REQUEST FOR A NEW PRE-SENTENCE INVESTIGATION.

Prior to imposition of sentence by the trial judge in the case at bar, the court, without notifying the defense, requested the prosecution to furnish him with the defendant's prior record. However, instead of supplying the court with the information requested, the prosecutor gave the trial judge a copy of an old pre-sentence investigation report.

Because said pre-sentence investigation contained certain information which could not be denied or explained, the defense moved for a continuance of the sentencing hearing to allow sufficient time to investigate. (Tr. 2116) The trial court after acknowledging that he had read

the report and considered a number of matters contained therein, agreed to a continuance of the sentencing proceedings.[19]

Ironically, at the time that the verdict was returned, defense counsel requested that the court order a pre-sentence investigation and it refused to do so.[20] However, after denying defense counsel's request, the court received from the prosecutor an old pre-sentence investigation, read it and considered it prior to imposing sentence in the defendant's case.

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19 "The Court: Well, I have read the psychological screening report, as it was called. And without getting into the assertions set forth there is little question there are assertions set forth which will to some extent bear upon the Court's consideration of the Defendant's background.

Without generally becoming detailed at all, there is a conclusion made during the report, which indicates that he had an extensive juvenile record from the time he was 11 years old and then it goes on to amplify some, which are assertions and not report information other than he ran into certain proceedings when he first came to the attention of the juvenile court.

It would appear to me, Number One, that I do not want this matter — which took over two weeks to come to trial and disposition — to be sent back as it was in this case for sentencing.

I could — my completion of sentencing, based upon the fact that the Defendant was not given a short period of time to investigate assertions made which could bear upon sentencing. The Defendant is faced with the death penalty being imposed here and I think as of course you are aware, the Court has the right to weigh aggravating and mitigating and it would seem to me that under the circumstances a brief delay would be appropriate to avoid any possible question of whether or not the Defendant was afforded due process which he's entitled to." (Tr. 2126-2127)

20 "Mr. Chavies: Judge, the other — well, thank you for your consideration. The other thing is that I would ask the Court to consider pre-sentence investigation as you did before.

The Court: No.

Mr. Chavies: I am making a request for the record.

The Court: All right. I deny that." (Tr. 2110)

Although defense counsel used the allotted time between sentencing hearings in order to research the material contained in the old pre-sentence investigation, much of the information could not be confirmed nor denied. Based upon the foregoing, the defense argued two motions prior to the new sentencing hearing held on February 20, 1985. [21]

In the case of Proffit v. Florida, 96 S.Ct. 2966, 428 U.S. 242, 49 L.Ed.2d 913 (1976), the Supreme Court in reinstating the death penalty in this State, said that it was only doing so because Florida had delineated guidelines for sentencing in a capital case. In the case at bar, the court deviated from those guidelines when it read the ten year old pre-sentence investigation report. Defense counsel recognized this point when it argued; "There is no provision in the Florida Statutes for a court to read a pre-sentence investigation report ten years old after denying a defense request to order a pre-sentence investigation." (Tr. 2139) In the case of Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197 (1977), the Supreme Court held that the petitioner in that case was denied due process of law when the death sentence was imposed, at least in part, on the basis of information, which he had no opportunity to deny or explain. Similarly, in the case at bar, although the trial judge did grant a continuance in order to allow counsel time to look into the contents of the pre-sentence investigation, due to the age of the reoprt the task was impossible. [22] The prejudice to Mr. Ramirez, then, was tremendous, since many of the allegations in the old pre-sentence

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21 "Mr. Chavies: The first motion so filed is the Motion to Recuse. We are asking that this court recuse itself from this matter, inasmuch as the Court well knows, you,, Judge Perry, read a pre-sentence investigation report of Joseph Ramirez from 1976, which had no relevance to this case whatsoever." (Tr. 2140)

22 Mr. Joseph Papy, the person who wrote the old pre-sentence investigation, told me that much of what was included in that pre-sentence investigation report was never confirmed. There was never any disposition as to the series of alleged armed robberies having to do with Mr. Ramirez, never any disposition with respect to an allegation that he stole $150.00, I

investigation were totally unsupported. The defendant may not have been involved in any of these crimes at all, and in reading this report the sentencing judge may well have thought that he was. Based upon the foregoing, the defendant was denied his right to a fair sentencing hearing.

The issue in this case, like the issue in Gardner v. Florida, supra and Woodson v. North Carolina, 428 U.S. 280 (1976), involves the procedure employed by this State in selecting persons who will receive the death penalty. Clearly, when the trial judge read a ten year old pre-sentence investigation of the defendant and relied upon certain information which could not be confirmed, he deviated from appropriate sentencing procedures. As the Court said in Woodson, supra:

> "The conclusion rests squarely on the predicate that the penalty of death is qualitatively more difficult than a sentence of imprisonment however long. Death, in its finality, differs more from life imprisonment than a 100 year prison term differs from one of only a year or two. Because of that qualitative difference, there is a greater need for reliability in the determination that death is the appropriate punishment in a specific case. Id. at 304-305, 96 S.Ct. at 2991-2992."

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22 cont.

believe it was, from Law Incorporated, and furthermore, that the charges of an alleged rape by Mr. Ramirez were dropped. He said what he did was to mirror and reflect that which was indicated in the juvenile records and in a police file that I saw at Hillsborough County Police Department. He also indicated that in talking to Mr. Kelly, a Police Officer, he gave him no reason whatsoever than the fact that there had been allegations that certain crimes had been committed in the community with a person using a knife, having committed a robbery. He felt as I now feel, that the only reason that he submitted Joseph Ramirez (sic) was to clear the records in Hillsborough County as to those alleged crimes. (Tr. 2141)

Here, the sentencing judge indicated that he had considered portions of the pre-sentence investigation prior to selecting the defendant for the death penalty. As previously had been pointed out, much of the information contained therein did not meet the test for trustworthiness, which was outlined in Proffit v. Florida, supra.[23] A procedure for selecting people for the death penalty which permits consideration of such information prejudicial and not applicable to the defendant fails to meet the need for reliability in the determination that death is the appropriate punishment which the Supreme Court indicated was required in Woodson, supra at 305, 96 S.Ct. at 2992.

Because of the gross deviation from the requirements of this State's death penalty statute, the death penalty should be vacated.

VII.

THE STATUTORY AGGRAVATING CIRCUMSTANCES RELIED UPON BY THE TRIAL COURT ARE NOT SUPPORTED BY THE EVIDENCE AND/OR WERE IMPROPERLY FOUND.

With non-statutory aggravating circumstances stricken from the order of the court, see Riley v. State, 366 So.2d 19 (Fla. 1978). There are five statutory aggravating circumstances which must be considered. The court found that the homicide was committed while the defendant

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23 Defense counsel argued that "all of this pre-sentence investigation is to inflict the court with prejudice, the court against Mr. Ramirez, and in no way, shape or form has anything to do with this sentencing hearing. I don't think this court can rid it from its mind. It puts us in a position where we must ask you to step down in this case, because we feel that you are prejudiced against Mr. Ramirez after having read that report and demonstrated (sic) by the decision in Proffit v. Florida." (Tr. 2141-2142)

was engaged in committing a robbery (Subsection 5(D)); that the homicide was committed for the purpose of avoiding arrest (Subsection 5(e)); that the homicide was especially heinous, atrocious and cruel (Subsection 5(h)); and that the defendant has previously been convicted of a crime involving violence. The finding of aggravating circumstance (Subsection 5(e)); to avoid lawful arrest or detention by the trial court was erroneous. (Tr. 2203-2207)

In the case of Rivers v. Florida, 458 So.2d 762 (Fla. 1984), the Supreme Court determined that it was error to give this aggravating circumstance where it could only be shown through speculation. In the case at bar, the court assumed that since the victim was killed when and where she was, she was murdered so that she would not tell the police who had committed a robbery at the Federal Express Office.[24] (Tr. 2205) This conclusion is based upon mere speculation at best. No one can say what was happening with the victim, nor what was going through the victim's mind at the time of the death. Aggravating circumstances must be proven beyond and to the exclusion of a reasonable doubt. State v. Dixon, 283 So.2d 1 (Fla. 1973). Yet, the court's conclusion that this aggravating circumstance applied based on the fact that the victim was stabbed multiple times was clearly not proven beyond a reasonable doubt.

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[24] "Then, the one that Mr. Chavies argued and Ms. Seff responded to, the crime for which the Defendant was to be sentenced was for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

It would appear to me, as a presiding judge, beyond a reasonable doubt — that although the Defendant did not speak until today, and I have heard many speak today, and bearing in mind as well as that, I have heard him speak today — that the Defendant killed the victim for the purpose of avoiding or preventing a lawful arrest.

The Defendant and the victim were employed by Federal Express, the Defendant is a janitor and the victim is a part-time driver person.

In Rivers, supra, this Court determined that this circumstance was inappropriately found. Specifically, the court said:

> "However, we agree with appellant's assertion that the trial judge improperly imposed a sentence of death in this case. . .
>
> First we hold that the judge erred in finding that the murder was committed for the purpose of avoiding a lawful arrest. The judge based her finding on the testimony that appellant shot the waitress as she turned to run down a hallway." Rivers, supra at p. 765.

In that case, a witness was shot in the back as she turned and ran down a hallway during the commission of a robbery at a Chinese Restaurant. The prosecution argued that the defendant shot the waitress as she turned to run down a hallway to prevent her from leaving the restaurant and alerting the authorities. The Rivers court felt that those set of circumstances were far too speculative to support such a conclusion. Specifically, the Rivers court said at page 765:

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24 cont.

The Defendant had no reason to kill the victim but for the fact that she entered upon the Federal Express Office while the Defendant was present and was about to, or was, in fact, burglarizing the Federal Express on the midnight of December 24th.

Now, the Defendant had no reason to be at the premises and she apparently surprised him by appearing to arrange for a midnight drive to Fort Lauderdale. No one else was on the premises except the victim and the Defendant.

The Defendant took nothing from the victim, she was wearing a wristwatch and a couple of personal effects. She carried no weapon, which might suggest that this woman, who was some six inches shorter than the Defendant and weighed 100 pounds less. The only reason for his killing her, in my view, was to eliminate a witness who observed him on the premises where he did not belong at that hour.

I am going to note this as aggravating circumstances." (Tr. 2204-2205)

> "The trial judge concluded from this fact appellant shot the waitress to prevent her from leaving the restaurant and allerting the authorities. We find this conclusion to be speculative and the evidence to be insufficient to prove beyond a reasonable doubt that this was the reason appellant shot the waitress. Past cases show that a finding of this circumstance should be based on direct evidence as to motive or at least a very strong inference from the circumstances." p. 765

For example, in Riley v. State, supra, the Supreme Court said:

> "That the mere fact of a death is not enough to invoke this section when the victim is not a law enforcement official. Proof of the requisite intent to avoid arrest and detection must be very strong in these cases."
> 366 So.2d at 22.

Furthermore, in Menendez v. State, 368 So.2d 1278 (Fla. 1979), it was stated that it must be clearly shown that the dominant or only motive for the murder was the elimination of a witnesses. Here, this was not shown since the state repeatedly contended that the murder was occasioned during a robbery at the Federal Express office complex. [25]

Certainly, there is even more reasonable doubt as to this circumstance here, since there is just no way to know what the victim

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25 "You are going to hear that after attempting to break into the truck, he realizes she must have the keys and you'll hear that eventually the truck is opened from the back and that the mail bag is taken from the truck. The mail bag is stolen." (Tr. 763-764)

was thinking of doing at the time of her death, and there is simply no other evidence to support this court's conclusions. Based upon a finding of this circumstance, the trial court erred and the death sentence should be vacated.

VIII.

THE DEATH SENTENCE IS UNRELIABLE SINCE THE TRIAL COURT PRECLUDED INDIVIDUALIZED ASSESSMENT OF PENALTY AND EXCLUDED MITIGATING CIRCUMSTANCES APPLICABLE TO THE DEFENDANT.

A sentencing procedure which forecloses individualized consideration of the offender and the offense poses the risk of inacurate penalty assessment. In capital matters that risk is neither acceptable or compatible with the heightened measure of reliability commanded by the Eighth Amendment. Woodson v. North Carolina, supra. Accordingly, in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed 973 (1978), the court held that the sentencer must fully consider all mitigating factors relevant to the individual and his offense which are proffered as bases for a sentence less than death. The principles outlined in Lockett, supra, were extended even further in Songer v. State, 365 So.2d 696 (Fla. 1978). The Songer court confirmed that the mitigating factors delineated in Section 921.141(6), Florida Statutes have never been treated as an exclusive list and that, therefore, all relevant mitigating circumstances, whether or not statutorily provided for, have always required the sentencers consideration.

In the case at bar, although the trial court did in fact find that one non-statutory mitigating factor existed, [26] he excluded other applicable mitigating circumstances. These circumstances not considered, were both of a statutory and non-statutory nature.

At the advisory sentencing hearing in this case held on December 11, 1984, defense counsel argued that seven mitigating circumstances

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[26] The trial court, however, stated:

"Now there are seven mitigating circumstances that I shall consider. One, that the defendant has no significant history of prior criminal activity. The court finds that he was sentenced to two other serious crimes in addition to this charge and in addition to a previous crime and therefore, this is not applicable.

The crime for which the Defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance. There has been no psychological testimony and I am not satisfied —

x x x x

Next, the victim was a participant in the Defendant's conduct or consented to the act. This does not appear to be applicable, the victim was not a participant in the Defendant's conduct.

Next, the Defendant was an accomplice in the offense for which he is to be sentenced but the offense was committed by another person and the Defendant's participation was relatively minor. The evidence gives no indication as to this and this not applicable.

The Defendant acted under extreme duress or under the substantial domination of another person. There is no evidence to show that the Defendant acted under extreme duress or under the domination of another person.

The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. There is no evidence to suggest the foregoing.

The age of the Defendant at the time of the crime. The Defendant was 24 years old and I don't think that his age was a factor.

Any other aspect of the Defendant's character or record, which might suggest mitigations. I have learned through the testimony — and otherwise that the Defendant visited his 18 month old child with a degree of regularity and the Defendant was moved to be at the point of tears when he learned from the witness stand that his mother was affected with a serious illness." (Tr. 2207-2210)

were applicable to the Defendant, Joseph Ramirez.[27]

At the sentencing hearing held on February 20, 1984, defense counsel argued that there were at least six mitigating circumstances that applied to the defendant.[28]

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"As far as mitigating is concerned in this case, I believe there is mitigation. I believe there is no significant prior history with respect to Mr. Ramirez. This is one mitigating factor.

Furthermore, ladies and gentlemen, the other mitigating factors that you can consider are the following: You can consider whether or not the Defendant was under significant mental or emotional disturbance.

Whether or not the Defendant was under the extreme duress or extreme domination of another is another mitigating circumstance, and we ask you to consider it.

Whether or not Joe Ramirez possessed an impaired capacity during this case is up to you. I think you again heard testimony that he did suffer from his father's nervous breakdown when he was a boy and I think this is another circumstance that you can consider as mitigating in this case.

Joseph Ramirez' age is 25 years old. He will be 26 years old on December 25, of this year. Certainly, age is a consideration. Age is a factor and I believe that is mitigating in this case and I ask you to consider that.

We, in the State of Florida, probably have some of the toughest laws in the country. We have a death penalty law. The alternative to the death penalty law is life imprisonment, the term of 25 years without the possibility of parole. I ask you to consider the fact that if this man were sentenced to life imprisonment he would not even be eligible for parole until he is 51 years old. If punishment is one of the considerations in this case for this jury, I ask you to consider that fact.

They told you that he had a child. He was a caring father, and that he was certainly a loving, caring nephew to those people who testified before you today. Still those are our (sic) mitigating circumstances that you can consider as well." (Tr. 2090-2094)

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"MR. CHAVIES: Our position, Judge, is certainly based upon this presentence psychological report done by a doctor of Mr. Ramirez's, indicating that he has an I.Q. of 85, dull normal, mild retardation. This is qualified (sic) as mitigating circumstance in this case.

Furthermore, Judge, if you recall the testimony of the witnesses in this case, there were indications that prior to the crime in this case Mr. Ramirez was at the house of the Britten family, wherein the Brittens testified that Mr. Ramirez drank alcohol and smoked marijuana.

Among the six mitigating circumstances urged upon the court by the defense, it was argued that the defendant was under significant mental and emotional disturbance and that Joseph Ramirez possessed an impaired capacity. This argument was based on the fact that the defendant had been shown to have an I.Q. of 85, dull normal, mild retardation. (Tr. 2161-2162) Furthermore, there was testimony at trial that Joseph Ramirez had been drinking and perhaps doing some drugs the night of the crime. Certainly then, the defendant should have qualified under either or both of these areas. Additionally, the defense argued that the defendant's age at the time, qualified.

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If the Court is to believe the testimony of the witnesses, accepting the rendition of the verdict by the jury, then clearly if he was doing this and engaged in this type of activity he certainly could have been under the influence of something, alcohol and drugs. And we offer this as another mitigating circumstance in this case.

The Supreme Court said in a number of cases that intoxication does qualify as an impaired capacity in mitigating circumstances.

We would ask the Court to consider the age of Mr. Ramirez, 24 at the time of the offense, 26 now, as a mitigating circumstance.

Certainly, persons of that age and older have qualified for this mitigating circumstance in the past. Those, Judge, are three statutory mitigating circumstances which can be presented on behalf of Mr. Ramirez.

As the Court well knows, the law states that we are not limited to statutory limit. (sic) I ask that the Court consider furthermore Mr. Ramirez is a human being. Mr. Ramirez doesn't really have a significant past. This is a person who was convicted of a strong armed robbery back in 1976. That was the only crime for which he was convicted before. (A crime for which he was convicted in the instant case (sic)). He is a father to two children. Mr. Ramirez, when I believe in part presentence investigation report this Court read that his father suffered from a mental illness when he was a young boy and left the household and was in an institution in Gainesville. (sic)

Judge, clearly there are at least six mitigating circumstances in this case that the Court can consider with respect to Joseph Ramirez." (Tr. 2161-2162)

The trial judge rejected all of these mitigating circumstances and others. In fact, the only mitigating circumstance the judge found had to do with the fact that the defendant's family came to Miami from Tampa to look into the circumstances of the homicide.[29]

As to the statutory mitigating factors of mental disturbance and impaired mental capacity, the trial judge clearly erred when he rejected these circumstances. As defense counsel accurately argued, the psychological report which was a part of the defendant's old pre-sentence investigation, clearly showed that the defendant qualified under either one or both of these areas. (Tr. 2161) Similarly, through testimony adduced at trial, it was shown that the defendant drank alcohol and smoked marijuana during the night of the homicide. (Tr. 2161)

In State v. Dixon, supra, this court defined the circumstance of extreme mental or emotional disturbance "as less than insanity but more than the emotions of an average man, however inflamed." Furthermore, in Dixon, this court provided the following definition of this mitigating circumstance:

> "Mental disturbance which interferes with but does not obviate the defendant's knowledge of right and wrong may also be considered as a mitigating circumstance. Like Subsection(b), this circumstance is provided to protect that person who, while legally answerable for his actions, may be deserving of some mitigation of sentence because of his mental state." Dixon at p. 10.

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29 "Members of the defendant's family came to Miami from Tampa to look into the circumstance of murder and I heard them, too, speak today and I believe this to be a mitigating circumstance." (Tr. 2210)

There can be no doubt then, that this mitigating circumstance applied to one with an I.Q. of 85 and an intelligence level in the dull normal, mildly retarded range.

The death sentence imposed in this case cannot meet the heightened standard of reliability and accuracy commanded by the Eighth Amendment. The judge's constricted consideration of evidence in mitigation, in not finding that the mitigating circumstances of significant mental or emotional disturbance, impaired capacity, and age applied to the defendant, precluded a penalty assessment tailored to the individual defendant and his offense. Lockett v. Ohio, supra. The unreliability of the sentence imposed was increased further by the invocation of factors in aggravation which were without record support.

For the above-stated reasons the death penalty imposed in this case should be vacated.

CONCLUSION

The defendant below, Joseph Jerome Ramirez, was tried in the Eleventh Judicial Circuit, Dade County, Miami, Florida in November and December of 1984. The State of Florida in seeking the death penalty presented a case based totally upon circumstancial evidence. Among the circumstances presented, which allegedly linked Mr. Ramirez to the homicide, was a knife found in the car belonging to the defendant's girlfriend, a finger-print found at the scene of the homicide, and a blood type consistent with the defendant's. None of these items either together or alone satisfied the legal requirements sufficient to convict the defendant of these crimes.

Additonally, the sentence of death imposed in this case should not have been. Mr. Ramirez was 26 years old at the time of sentencing

and had only one previous conviction, which occurred when he was 16 years old. The sentencing procedure utilized by the trial court grossly deviated from those guidelines outlined by our State of Florida, and therefore was in violation of the law.

Therefore, for all the reasons stated above, including the arguments asserted in this brief, the conviction and sentence imposed by the trial court below should be reversed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing, Initial Brief of Appellant, was delivered by mail to: The Offfice of the Attorney General, 401 N.W. 2nd Avenue, Room 820, Miami, Florida 33130 this 18th day of April, 1986.

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