IN THE SUPREME COURT OF FLORIDA

JOSEPH JEROME RAMIREZ,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 78,386

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

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

MARK C. MENSER
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0239161

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES — PAGES

CONSTITUTIONS AND STATUTES PAGES

OTHER AUTHORITIES PAGES

STATEMENT OF THE CASE AND FACTS

(A) Procedural History

The Appellee accepts the chronology of this case as set forth by the Appellant except for the date of the Indictment, which was January 13, 1984. (R 2578-80).

(B) Facts

The Appellee will rely upon the following statement as being in closer compliance with the requirement that all facts and inferences therefrom must be taken in favor of the judgment and sentence under attack. Shapiro v. State, 390 So.2d 344 (Fla. 1980); Gilvin v. State, 418 So.2d 996 (Fla. 1982).

On Christmas Eve, 1983, Mary Jane Quinn and her husband went to church (R 778). This was the last time they were to see each other. Mary Jane Quinn went to work at Federal Express after church (R 779). She left home just after 11:00 P.M. and was due home by 3:00 A.M. Christmas morning (R 780).

When Mary failed to come home, her husband began calling various co-workers and the Florida Highway Patrol (R 781).

One of Mary Jane Quinn's co-workers was Mary Maguire (R 789). After Mr. Quinn telephoned, Mary went to the Federal Express office (R 791).

Ms. Maguire found the front gate locked, but the victim's car was still parked inside (R 791). The garage door was partly raised, and the victim's AM-FM radio was standing on the floor (R 795). Upon entering the garage, Ms. Maguire noticed that someone had been inside the first van (R 801). As Maguire began searching for Mary Jane, she noticed blood on the walls, and then saw Mary's body (R 801-2).

Maguire left the building and went to a nearby location, where the police were contacted (R 803).

The Appellant, Ramirez, was the janitor (R 804-805). On the first workday after Christmas, Ramirez (who worked for a contract service and not Federal Express) asked what had happened to the office "Fax Machine" (R 809). The inquiry was odd enough to prompt Maguire to report it to her boss (R 809).

Officer George Johnson was the first officer to arrive and enter the building (R 819). The double glass doors were unlocked and had blood on them (R 822-823).

Crime scene technician Dorothy Ballard testified to her findings at the scene. Ballard found no evidence of any forced entry (R 854). She uncovered a paper towel with blood on it, a Peach Nectar can and a piece of a styrofoam cup (the lid) at an outside pay phone (R 856). There was blood on the inner set of glass doors at the front of the building (R 858).

Ballard found blood spatters and shards of plastic at various locations in the building (R 861 et. seq.). Also, Ballard found a very faint shoeprint that was "non-conclusive" (R 863).[1] Shoe impressions in the carpet were not collected (R 864). A bloody hair pin (R 866) and Mary Jane's unopened pay envelope were recovered (R 867-868).

In another part of the office, a desk drawer had been tampered with (R 868).

---

[1] Contrary to Ramerez's claims here and below, the only person to "testify" that the shoe size was "wrong" or "Size 8" was Ramirez's lawyer, while phrasing questions for cross-examination.

Mary Jane Quinn was found lying on her stomach in a hallway (R 877). The carpet was saturated with blood and blood spatters covered the walls (R 878). A bloody fingerprint was found on a metal doorframe (R 879).

As Ballard photographed the scene, she heard water running (R 881). The officer discovered that someone had gone into the ladies' bathroom, which was adjacent to the janitor's storage area, and used the hot water (R 880). The spigot was running at full speed and the water was running cold (R 881). The "middle sink" had a paper towel dispenser with towels similar to the bloody towel found earlier (R 882). The sink appeared to have been cleaned (R 884).

In the garage itself, the first truck had an open driver's side door but no keys. The plywood barrier between the driver's seat and the cargo bay had pry marks on it (R 888).

The victim's body contained multiple stab wounds and head trauma (R 889-890). A telephone cord was tangled around her legs (R 892). The victim still wore her watch and rings (R 893). In her left hand some of her own hairs were found (R 894). On the back (not the palm and not clasped) of her right hand were some hairs, stuck in blood (R 895).

Later that day, a fax machine and a mailbag containing the day's cash and receipts were found to be missing (R 1094).

Federal Express employee William Tucker testified that the mailbag had been placed in Quinn's van and that her van did not carry pry marks on its plywood barrier (R 1162-67).

The blood spatters and stains indicated a prolonged and brutal attack that went from the dispatch room to the hallway (R 1208 et. seq.).

Marcellas Gaines, the Operations Manager, identified Ramirez as a contract worker (R 1287). On December 17, 1983, a week before the murder, Gaines was surprised to discover that Ramirez and his supervisor had obtained a key to the building (R 1289). Also on December 17, Mary Jane Quinn report the loss of her keys (R 1291).

Gaines worked Christmas Eve, as did Ramirez (R 1294). Gaines saw Ramirez leave at 4:00 P.M., and Gaines himself made sure that all doors were locked (R 1295). Gaines actually placed the mailbag in Quinn's van (R 1298).

On Christmas Eve, the defendant, a contract-janitor, surprised Gaines by asking about the day's volume of business (R 1300-01).

On December 27, 1983, Ramirez called Gaines to get information regarding the police and their investigation of him (Ramirez) (R 1304-06).

Detective Parr testified that all of the Federal Express workers were questioned (R 1332). Ramirez being the janitor, the police were interested in his testimony regarding any cleaning in an effort to "time" any bloodstains or fingerprints (R 1342). When the police asked Ramirez for a specimen of his hair, he asked if Quinn had hair in her hands (R 1355).

The police had a problem with the alibi Ramirez had given them and asked permission to see a blue sweater (described by the Brittens, Ramirez' alibi witnesses) worn by Ramirez on Christmas Eve (R 1356-58).

Ramirez claimed the sweater was at the cleaners (R 1359-60), but the police never located the sweater after visiting area cleaning establishments (R 1361).

On December 28, 1983, Ramirez called the police and arranged to deliver "the sweater", but the one he delivered did not fit the description the police had been given (R 1362).

A warrant-based search of Ramirez' home turned up a Timex watch with bloodstains (R 1368 et. seq.).

Later, the police also discovered receipts from Burdines which documented the purchase, on December 28, 1983, of the blue sweater that Ramirez gave to the police instead of the sweater he actually wore on Christmas Eve (R 1511-1527).

The sweater sought by the police carried a Fox logo and would have come from J. C. Penneys, not Burdine's (R 1517-18). When Ramirez "delivered" the Burdine's sweater, he was wearing it (R 1712).

The police arrested Ramirez and gave Miranda warnings (R 1716) which Ramirez said he had heard before (Id.).

When Officer Saladrigas asked Ramirez "Where's the Fox"?, referring to the J.C. Penney logo, Ramirez lied and said that the Fox had "come off in the wash." (R 1718).

At the station, the Appellant resisted all attempts to get physical specimens despite the fact that the police had a warrant (R 1725).

The medical examiner, Dr. Gwen Harleman, testified to the victim's injuries and cause of death (R 1565 et. seq.). The injuries included blunt force trauma (consistent with blows from a fax machine being slammed repeatedly on the victim's head) and twelve stab wounds, including defensive wounds (R 1587-1602). One piece of cartilage from the victim contained good enough knife impressions to prompt Dr. Harleman to preserve the cartilage for analysis (R 1627-30).

Serologist Theresa Merritt testified that Ramirez was a type B "secretor", and that the victim was a type "O" secretor (R 1777-79). Type "O" blood was found on plastic shards (R 1782), on the various blood spatters in the office (R 1783-86) and on the paper towels recovered within and outside the building (R 1786). Ramirez' Timex watch had a mixture of blood antigens consistent with several possibilities, including the victim's blood mixed with Ramirez' blood, or Ramirez' perspiration mixed with the victim's blood, or Ramirez' blood alone (R 1793 et. seq.).

The same three possibilities attached to the defendant's bloody fingerprint that was recovered just six feet from the victim, on the door frame (R 1807).

Dolores Douglas, the Appellant's live-in girlfriend, testified that Ramirez went out twice on Christmas Eve. First he purchased food at Burger King and brought it home (R 1840-42). Then he left again (around 9:30) and did not come home until late (R 1844).

Ms. Douglas testified that a knife was always kept in the family car, yet over Christmas, it suddenly appeared in the kitchen sink (R 1847). She also testified that the (Burdines) sweater was not the one Ramirez wore on Christmas Eve (R 1851).

That knife was later positively identified, by tool mark expert Bob Hart, as the weapon that put certain impressions in the cartilage removed from the victim's body (R 1950).

No witnesses were called by the defense.

Ramirez was found guilty on all counts (R 2275-76).

During the penalty phase, the state introduced testimony from a second medical examiner, Dr. Wetli, who had specialized training in the area of pain and suffering, including studies in Euthanasia (R 2323-2328). Dr. Wetli analyzed the various wounds, including defensive wounds, and determined that the victim suffered great physical and emotional pain beyond that suffered in most cases (R 2333-42).

The state also established Ramirez' prior conviction for armed robbery, with a knife, in Tampa (R 2370-74).

Ramirez called various family members in mitigation. His grandmother and two aunts testified that he was beaten and possibly sexually molested as a young child (R 2381 et.seq.). However, the grandmother never actually saw Ramirez get hit, (R 2384) and she noted that there were no problems with Ramirez' four siblings (R 2384). In fact, Ramirez' mother (who did not testify) gave up on Ramirez as a troublemaker (R 2384).

Ramirez' Aunt Elsie (Johnson) testified that she took Ramirez out of the family home when he was only seven (7) to stop the beatings (R 2388). Ms. Johnson had not ever testified to this before, and when questioned on that point, just said, "Nobody asked" (R 2390). Another aunt, Estell Collins, provided the sexual abuse story that had also never surfaced before (R 2392-2401).

In rebuttal, the state called Irma Botana and Joseph Papy, investigators who prepared separate presentence investigation reports on Ramirez in 1976 and 1984. No one reported physical or sexual abuse to either investigator (R 2435, 2445).

The jury, as in the first trial, recommended death by a 12-0 vote (R 2489-90).

The trial judge, as actual sentencer, sentenced Ramirez to death (R 2937-40). The court found the following factors in aggravation:

(1) The defendant was previously convicted of a violent felony (R 2937).
(2) The defendant committed this murder in the course of a felony (R 2938).
(3) The murder was committed to avoid arrest (R 2938).
(4) The murder was especially heinous, atrocious and cruel (R 2938-39).

The court considered all statutory and non-statutory mitigating factors proposed by the defense and addressed them in its order (R 2939). These proposed factors were either found not to have been established or, if they existed, to have no nexus with the crime (R 2939). This order will be addressed in more detail in the argument portion of the brief.

Ten arguments are presented in this appeal. The facts relevant to each will be discussed in the argument for the Court's convenience.

SUMMARY OF ARGUMENT

The Appellant raises ten general claims which fail to offer any basis for relief.

The Appellant's brief questions a number of discretionary rulings entered by the trial court regarding the expert witnesses and their testimony. Nowhere, however, does the Appellant establish any abuse of discretion by the trial court or any basis for reversal.

The Appellant's brief raises other, technical, disputes which are either refuted by the record or simply not preserved for appellate review.

No reversible error is present in this case.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN ADMITTING EXPERT OPINION TESTIMONY ON TOOL MARK COMPARISONS

The Appellant's first point on appeal raises two distinct issues. First, Mr. Ramirez challenges the trial court's procedures in conducting a pre-trial "predicate" hearing. Second, Mr. Ramirez challenges the admission of knife mark evidence on the basis of unfounded "scientific" theories propounded by defense counsel without record support. Neither claim warrants relief.

(A) The Trial Court Did Not Err During The Predicate Hearing

The Appellant's brief suffers from confusion over the nature and scope of the pretrial hearing conducted by the trial judge.

In response to this Court's decision in Ramirez v. State, 542 So.2d 352 (Fla. 1989), the state requested a special pretrial hearing to test the sufficiency of its predicate for the presentation of expert opinion testimony under §90.704, Fla. Stat.[2] The trial court noted that there was, in fact, no particular rule of criminal procedure authorizing a so-called "predicate hearing", but ultimately decided to allow the state to proceed (R 18).

The hearing was not a hearing on a motion in limine, it was not a hearing on the ultimate issue of "admissibility", and it was not concerned with questions of impeachment or evidentiary

---

[2] The predicate went to the admission of knife mark evidence, not the qualifications of the particular examiner.

weight. If the defense had wanted a hearing in limine on the use of (knife mark) opinion testimony, it could have had one. No motion was ever filed.

The "issue" was simply the sufficiency of the state's predicate for the introduction of expert opinion testimony. To that end the state proved the education, training, skill and experience of its witnesses (§90.704, Fla. Stat.) and, in keeping with Ramirez, supra, evidence of the general acceptance of knife mark evidence in the scientific community as a subset of tool-mark identification. This evidence included the depositions of two noted national and international experts, (Cayton and Lutz) and treatises from the Royal Canadian Mounted Police (R 3642-2691) as well as live witnesses (R 21-127).

To establish a predicate for expert opinion testimony it is not necessary to prove (and no case so holds) that absolute unanimity exists in the scientific community or that no experts exist who would question the proffered expert's methodology or conclusions. Those issues go to the weight of the evidence, not its admissibility. Rimmer v. Tesla, 201 So.2d 573 (Fla. 1st DCA 1967); Harrison Association v. Byrd, 256 So.2d 50 (Fla. 1971). Indeed, if such were the case virtually no expert opinion testimony would ever be admissible on any topic.

Here, the basic principles of tool mark identification were testified to and documented (R 21-127, 2642-2691). Thus, a predicate was established.

Mr. Ramirez, in addition to failing to understand the nature and scope of the hearing, also fails to understand the difference between the "predicate" and the expert opinion itself. A

predicate establishes the basis for an opinion, it is not the opinion itself. Thus, the fact that Mr. Ramirez may have his own experts is irrelevant to the underlying issue of "predicate". The real issue, and the one that should have been raised by a motion in limine or by the presentation of witnesses at trial, is the reliability, under Frye v. United States, 293 F.2d 1013 (D.C. Cir. 1923), of the opinion evidence itself. That issue will be addressed below. The issue of whether Mr. Ramirez should have been allowed to call rebuttal witnesses at a "predicate" hearing (again, not a motion in limine) clearly cannot provide a basis for relief.

Finally, the State would submit that even if the trial court erred in conducting its special "predicate" hearing, Mr. Ramirez suffered no prejudice. First, Ramirez had the absolute right to file a motion in limine challenging knife mark evidence. Second, Ramirez had the absolute right to call his mysterious "expert" rebuttal witness at trial, to wit:

> THE COURT: Answer my question. Suppose you put your witness on and the judge still rules that the predicate has been met?
>
> I don't understand; What do you think you have got?
>
> You still have to put that same witness before the jury and show the jury this predicate has not been met.
>
> MR. CHAVIES: What you are saying is after you rule against us today, or for the state because it is their motion, that we will still be able to present a witness at trial as it goes to the predicate issue?
>
> THE COURT: Absolutely. You just don't call it a predicate. You produce your witness as going to say the state is wrong..." (R 143-144).

The pretrial "predicate" hearing was not a final determination that the state's evidence would be admitted at trial. Indeed, the trial court's final ruling on the pretrial predicate found that it was slightly deficient in that it failed to address "reasonable scientific certainty." (R 151). Given the non-final nature of the hearing, its limited scope, and Ramirez' continuing ability to file a motion in limine and rebut any opinion at trial, any "error" was harmless beyond any reasonable doubt. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

Finally, it should be noted that Mr. Ramirez' comparison of "predicates" to "judicial notice" completely misapprehends both concepts. "Judicial notice" under §90.204 involves judicial acceptance of a fact: (i.e., the validity of a sealed document, the contents of a court file, a generally recognized scientific, historic or other "fact"). A "predicate", on the other hand, is evidence relating to the threshhold admissibility of other evidence without any finding that the other evidence is true or dispositive of any issue. If Judge Sepe had taken judicial notice of "knife mark evidence", then §90.204 might apply. He did not do that. Judge Sepe merely reviewed a predicate to an expert opinion that still had to be contested, or even rebutted, at trial. No "judicial notice" was taken of anything.

This brings us to the main point.

(B) The Expert Opinion Was Properly Received

In this Court's first Ramirez decision, the Court recognized that the decision to admit expert opinion testimony was a matter of judicial discretion that would not be reversed on appeal in the absence of abuse. Johnson v. State, 393 So.2d 1069 (Fla.

1980); Endress v. State, 462 So.2d 872 (Fla. 2nd DCA 1983). This portion of the opinion was clearly correct.

The opinion went on, however, into a discussion of Frye v. United States, 293 F.2d 1013 (D.C. Cir. 1923) and untested or unproven scientific tests such as dog-lineups, Ramos v. State, 496 So.2d 121 (Fla. 1986) and polygraphs, Delap v. State, 440 So.2d 1242 (Fla. 1983). The court thus remanded the case for establishment of a "scientific predicate."

While the Court's reliance upon Frye is correct,[3] the Court should not be misled into equating the tool mark comparison at bar with some exotic new test, particularly on the basis of questions raised by the Appellant (who is not qualified as an expert) and no one else. Indeed, it must be remembered that the Appellant claimed to have expert support for his position but, again, never filed a motion in limine and never called (the promised) witnesses at trial. All of the so-called "questions" raised by Mr. Ramirez are those of the Appellant, period.

"Toolmark" comparisons, whether made by the direct comparison of objects (as in ballistics) or the comparison of casts of impressions (such as tire marks) have long been accepted in Florida. The technology is not new. Roberts v. State, 164 So.2d 817 (Fla. 1964) (shoe tracks); Irvin v. State, 66 So.2d 288 (Fla. 1953) (tires and shoes); Smith v. State, 76 So.2d 493 (Fla. 1954) (tires); Ayers v. State, 169 So.2d 349 (Fla. 4th DCA

---

[3] The State does not necessarily agree that the ancient Frye test should control, given its rejection in the federal system in favor of a "relevancy" test. Dobbert v. Merrill-Dow, ___ U.S. ___, 125 L.Ed.2d 469 (1993), but see Flanagan v. State, ___ So.2d (Fla. 1993) 18 Fla. L. Weekly S.475.

1964) (plaster casts of tire track compared to photograph of tire track); Jones v. State, 440 So.2d 570 (Fla. 1983) (rifle stock dent in windowsill); Floyd v. State, 569 So.2d 1225 (Fla. 1990) (tracks); Wilkes v. State, 596 So.2d 1020 (Fla. 1992); Crump v. State, 622 So.2d 963 (Fla. 1993) (tires); Johnson v. State, 442 So.2d 193 (Fla. 1983) (powder burns on skin to powder burns on paper); Amazon v. State, 487 So.2d 8 (Fla. 1986) (knife marks on screen); Bundy v. State, 455 So.2d 330 (Fla. 1984) (bite marks on flesh).

Mr. Ramirez' questions regarding knife mark comparisons ignore established precedent and, frankly, betray a fundamental inability or unwillingness to grasp the process involved in the test.

Knife mark comparisons are tests of exclusion, not inclusion. Like a fingerprint comparison, a knife print comparison will either match or it will not - period. As with tire marks, ballistics tests or fingerprints, it is not necessary to test "other objects" (prints, tires, bullets, knives) once a match has been achieved because no two knives - (no matter how they leave the factory, see below) are ever going to be exactly alike after being used.

Turning to Frye, therefore, we can see the flaws in the Appellant's position.

First, Ramirez makes the frankly absurd argument that all knives - or even two knives - may be exactly alike to the most minute microscopic detail. Thus, to Ramirez, every knife is exactly the same even though tolerances exist in any manufacturing process. To Ramirez, every knife hits every

sanding belt at the same spot, at the same place on the knife, at the same angle, and the condition of the belt never varies no matter how long the belt is used. To Ramirez, every knife leaves the factory exactly the same, and remains exactly the same no matter who owns the knife, who sharpens or fails to sharpen the knife, who uses the knife correctly or who abuses the knife.

It is this argument, and this argument alone, that supports the Appellant's persistent complaining about the alleged "need to test other knives." Even if it was worthy of some marginal credence, the contention that all knives are alike[4] is contrary to the unrebutted evidence; to wit:

> (1) Two consecutively made knives from the same factory will not be exactly alike (R 73, 2687-88).
>
> (2) Test cuts by two knives, made consecutively in the same factory, contained distinctly different marks (R 2687-2689).
>
> (3) The exact knife that produced a cut (in a tire, for example) can be positively identified (R 2691-943), 2677, 2688).
>
> (4) The scientific community accepts the proposition that no two objects (like knives) are ever perfectly alike (R 28, 69-72).

---

[4] At (R 2078) Defense Counsel argued:

"Where do they come up with, no two knives are alike? Well, they explained it to you by saying, I've gone to the manufacturer where they make knives here in the United States. I've seen movies, I guess, is how they do it. And they went to where knives are made.

Well, this particularly knife was made in Japan. It is a common knife. You go up to your local store and there is that same one. Are these experts? You know how the Japanese manufacture knives? You now how the Japanese even started kicking the big American manufacturers around because there is a difference. The only thing that is more better is the efficiency. How did they make it in Japan?"

Again, no evidence exists in the record to question the concept that no two items are ever exactly alike.[5]

The next "challenge" offered by Mr. Ramirez, again without evidentiary support, deals with the use of cast-impressions of the knife marks in the cartilage specimen and in the plastic test material.

First, a question is raised regarding the material used in making these test-casts for comparison with the cartilage. All of the experts (and literature) were unanimous in stating that cartilage, a plastic-like material, could be suitably simulated with "Dip-Pak."[6] (R 52-54, 77-78, 104, 2654, 2674). It should be remembered, however, that the former legal requirement of "essential similarity" between the test material and (human) material was receded from in Johnson v. State, 442 So.2d 193 (Fla. 1983) (comparing powder burns in skin and paper despite dissimilarities). See, Rindfleisch v. Carnival Cruise Lines, 498 So.2d 488 (Fla. 3rd DCA 1986).

The Appellant's second assertion is that the comparison of knife marks involves the use of casts, and that (a) casts are not used in other tests, and (b) minute details may be lost in the cast making process.

---

5 To his credit, at least the Appellant does not question the second presumption governing the expert's opinion; that harder objects can leave impressions on softer objects. (Brief at 30), 1 A.M. Jur. Trial §64.

6 Dip Pak is described as "a hard, gelatinous material which [the witness found to be] an excellent medium for making standard impressions of knife blades." (R 104).

His first complaint is simply wrong. Casts are used all of the time, particularly in tire mark cases. See, Ayers, supra. His second complaint fails to account for the fact that (1) minute details are lost in tire cases too (accepting Appellant's contention that details are lost); (2) the loss of detail is irrelevant since mark comparison tests exclude knives that do not match, thus making the loss of a material detail a basis for exclusion, not inclusion or identification (R 60).

The Appellant's third assertion is that knife mark evidence differs from ballistics evidence because a shell contains markings generated by motion in a single direction while knives leave markings generated by motion in "two directions", (Appellant's Brief at 30) i.e., penetration and removal. Again, the criticism is a red herring. The knife marks removed from the cartilage of the victim are striations (essentially, drag marks created by the surface texture of the blade as it moves). (See R 26). Striations are not "static marks" like a footprint (R 26) it is true, but striations are compared to other striations, not to an impression of a stationary blade. It is wholly illogical to intimate, as Appellant does, that two dissimilar objects will leave dissimilar striations "on the way in" to cartilage, but suddenly create perfectly duplicated striations by virtue of being pulled out!

In point of fact, the unrebutted expert testimony makes it clear, once again, that knife striations can be matched. If the examiner cannot duplicate the angle of incision with reasonable scientific certainty, the knife prints will not match, and no "comparison evidence" will exist (R 114). This is no different

in principle than an expert's inability to compare a smeared fingerprint with a "static" print and thus should not be confused.

Mr. Ramirez' final complaint does not go to the validity of tool mark comparisons as much as to trial procedure. Mr. Ramirez states that the raw materials compared by the state's expert should have been given to the jury to enhance the expert's testimony, confirm its reliability, and negate any nonsensical objections. Frankly, this complaint has nothing to do with Frye or the issue at bar. Indeed, allowing the state to put this evidence before the jury is not objectionable to the Appellee at all[7] - but it has nothing to do with admissibility. At most, the absence of corroborative material would go to weight rather than admissibility, and it is not necessary for an expert, prior to testifying to a professional opinion, to first have all underlying data admitted into evidence. §90.705, Fla. Stat.; Roberts v. State, supra. In fact, the burden of challenging the expert's data rested upon Ramirez, not the state (in anticipation of such a defense), Hialeah v. Weatherford, 466 So.2d 1127 (Fla. 3rd DCA 1985).

Mr. Ramirez had full discovery under Fla.R.Cr.P. 3.220, he fully deposed all the experts and he told the trial court that he had his own experts. If the photographs of the exhibits would have revealed something, Ramirez could and should have used them

---

[7] When Mr. Hart testified, the victim's cartilage was put into evidence, (R 1928) as was the knife (R 1929-30), and the casts made with the knife (R 1937, 1938) and casts made of the knife marks in the cartilage (R 1938). Mr. Hart was fully cross-examined, particularly on the absence of photographs of the materials already in evidence (R 1966).

himself at trial, even though he was not "required" to put on any evidence. Thus, even if the state erred, there is nothing in this record reflecting any prejudice to the Appellant. DiGuilio, supra.

Once again, it must be emphasized that the case at bar does not involve some "new" science. It is nothing more than a rational use of existing technology based upon undisputed facts, a factor recognized by this Court in Bundy, supra, at 349:

> "As the trial court found, the basis for the comparison testimony - that the science of odontology makes such comparison possible due to the significant uniqueness of individual dental characteristics - has been adequately established. Appellant does not contest this supposition. Forensic odontological identification techniques are merely an application of this established science to a particular problem."

While Mr. Ramirez (R 34) may adhere to the belief that tool mark comparisons are recognized only in the Appellee's "small and limited community", clearly the opposite is true. The experts and treatises relied upon below came from such diverse jurisdictions as Kansas and Canada, from the Metro-Dade police to the Royal Canadian Mounted Police to experts trained by the United States Army.

The ability of experts to identify a specific knife as a murder weapon was noted (and not contested) in Stout v. Virginia, 376 S.E.2d 288, 290 (Va. 1989). The expert who performed the analysis in Stout was William Conrad, who testified in this case (R 65 et. seq.).

In State v. Churchill, 646 P.2d 1049 (Kan. 1982),[8] the state relied upon the expert knife-mark analysis of one Mr. Kelty in specifically identifying a knife taken from the defendant as the exact murder weapon. In declaring this expert opinion admissible, the Court held:

> Mr. Kelty had been employed for many years as a toolmark and firearms examiner; he had made hundreds of toolmark comparisons and had testified frequently as an expert during that period of time. He testified that he had not previously performed tests to determine whether marks upon the human body were made by a given tool, but he testified that toolmark examinations in human tissue were conducted by the same procedures and governed by the same principles applicable generally in toolmark examinations, and that the procedure used was acceptable in his profession. It would appear from the record that he has the requisite skill and training to perform the tests, and that the methods used were reliable. The defendant presented expert testimony to the jury in order to call into question Kelty's methods and conclusions. The witness's experience or lack of experience in previously performing similar examination goes to the weight of the testimony, not to its admissibility. See, State v. Peoples, 227 Kan. 127, 133, 605 P.2d 135 (1980). We hold that the trial court did not abuse its discretion in admitting the testimony.

Other states have recognized that the science of toolmark comparison extends to wounds to the human body. Potter v. State, 416 So.2d 773 (Al. Cr. App. 1982) (Axe); Pennsylvania v. Graves, 456 A.2d 561 (Pa. Super. 1983). (Fingernails, knives, screwdrivers).

---

8 This Court did not reject Churchill in its prior opinion in this case. Rather, this Court said that the Churchill decision could not be substituted for an evidentiary predicate on the admissibility of knife-mark evidence. Ramirez v. State, supra, at 355.

Given the fact that the expert opinion testimony at bar was nothing more than an expression of toolmark identification, using existing and accepted technology, and given the fact that no coherent or logical objection was raised to this evidence and no rebuttal evidence was ever placed in the record, the trial court did not err in admitting, in its discretion, the expert opinion at bar.

Finally, it must be noted that in this case, as opposed to "Ramirez I", virtually no evidence was put on by the defense to rebut the State's case or establish any affirmative defense. Under the circumstances of an unchallenged prosecution, any "error" in the presentation of this essentially cumulative evidence was harmless beyond any reasonable doubt. DiGuilio, supra.

POINT II

THE APPELLANT IS NOT ENTITLED TO RELIEF ON THE JURY SELECTION ISSUE

The Appellant's second point on appeal alleges the existence of reversible error under State v. Neil, 457 So.2d 481 (Fla. 1984) and State v. Slappy, 522 So.2d 18 (Fla. 1988). His claim is not properly before this Court because it was not preserved below. In addition, Mr. Ramirez' Neil-Slappy issue is both meritless and a purely tactical complaint.

Although Mr. Ramirez did raise some specific Neil-Slappy objections to the peremptory excusal of some potential jurors, the record at (R 718) shows us that Mr. Chavies, Ramirez' counsel, accepted the final petit jury without renewing the Neil-Slappy objection or reserving the claim for appellate review; to wit:

> Mr. Chavies: "Judge, we will accept this jury." (R 718).

Florida caselaw has been consistent in requiring would-be appellants to reserve the Neil-Slappy issue specifically when "accepting" a petit jury in order to preserve the issue for appellate review. Joiner v. State, 618 So.2d 174 (Fla. 1993); Suggs v. State, 620 So.2d 1231 (Fla. 1993); Brown v. State, 620 So.2d 1240 (Fla. 1993); see also Mitchell v. State, ___ So.2d ___, (Fla. 1993) 18 Fla. L. Weekly S. 343 (Fla. 1993).

The rationale behind this procedural bar is quite simple. Since Batson v. Kentucky, 476 U.S. 79 (1986); Neil, supra and Slappy supra, are based upon the Sixth Amendment's guarantee of an impartial jury, it is quite proper to require an allegedly aggrieved party to object to the final (petit) jury (as unfair or biased) or to accept said jury (as fair) and thus waive any claim. As noted in Batson v. Kentucky, supra, (at n.5), the key issue is one of fairness, not pigmentation; to wit:

> "Similarly, though the Sixth Amendment guarantees that the petit jury will be selected from a pool of names representing a cross section of the community, Taylor v. Louisiana, 419 U.S. 522. . . we have never held that the Sixth Amendment requires "that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population; Id. at 538 . . ."
>
> (476 U.S. at 85, n.6)

If Mr. Ramirez, after extensive voir dire, selected a petit jury that was fair and acceptable, and in turn accepted the final jury without renewing his Neil objection, then the Sixth Amendment was satisfied and the issue was waived. The mere absence of African-American jurors, without more, does not

constitute a per se Sixth Amendment violation just as the mere presence of an African-American juror would not cure a Sixth Amendment violation. See, Joiner v. State, supra, at 176 (holding that African-American jurors are not "fungible").

Without waiving this procedural defense, the Appellee would note that Mr. Ramirez' argument cannot withstand careful scrutiny.

To put this case in context, we must begin by discussing certain key factors that Mr. Ramirez has failed to address.

If we are to assume, as Ramirez suggests, that the prosecutor wanted to remove all African-American from the jury, then logic dictates that the prosecutor must have had a reason. The clear implication, of course, is that the prosecutor wanted to remove people of the defendant's race in order to remove potentially sympathetic jurors and create the fabled "hanging jury" mentioned in such cases as Witherspoon v. Illinois, 391 U.S. 510 (1968).

In this case, the racial-motive theory cannot stand. As noted by the prosecutor (R 469-470), this was Mr. Ramirez' second trial. At his first trial, a racially mixed jury convicted Ramirez and unanimously recommended a sentence of death. Thus, the State argued, there was no reason to exclude African-American jurors because such jurors had voted "for the state" unanimously, in this case, in the past. (R 469-70).

Even if some sinister, unspoken, motive could be assumed notwithstanding the record, Mr. Ramirez still cannot overcome Judge Sepe's ruling that no jury would be seated unless the petit jury held a minimum of two African-Americans. Thus, any effort

to exclude such jurors would have been futile. Given the inevitability of a significant minority presence on the final jury, the State simply had no motive.

Once the smokescreen of an alleged "plot" to create an all-white jury is removed, we can begin a reasoned analysis of the rest of the record.

The venire submitted to Judge Sepe's court consisted largely of persons of Hispanic origin. Mr. Ramirez, in addition to being "African-American", has an Hispanic surname and could just as easily identify with that ethnic group. State v. Alen, 616 So.2d 452 (Fla. 1993), see Powers v. Ohio, ___ U.S. ___, 113 L.Ed.2d 411 (1991); Hernandez v. New York, 500 U.S. ___, 114 L.Ed.2d 395 (1991); United States v. Rodriguez, 935 F.2d 194 (11th Cir. 1991). Only six of the venirepersons were African-Americans (R 469).

Since the state has only been attacked for offering challenges to three minority persons, (Octave, Redding and Pullin), the fate of the other three qualified minority venirepersons cannot be discerned.

The first African-American peremptorily challenged by the state was Ms. Octave (R 459). This particular juror is extremely interesting since she was later seated on the jury, voted to convict Mr. Ramirez and voted to give him the death penalty.[9]

In his brief, Mr. Ramirez correctly notes that, on the surface, Ms. Octave looked like an excellent prosecution juror. She was, after all, an employee of the police department and a

---

[9] This makes Mr. Ramirez' arguments highly ironic, to say the least.

crime victim herself. In this somewhat circumstantial case, Ms. Octave would assess the credibility of her co-workers, and presumably would favor the state.

It is this very fact, however, that also destroys Mr. Ramirez' position on appeal. Given Ms. Octave's status, why didn't the defense challenge her? Was it strictly her pigmentation, or was it some other factor - found by the defense as well as the state - that led all of the lawyers, at the time, to suspect that she would be an acceptable juror to the defense despite her employment? Clearly the answer to that question is apparent from the record.

The prosecutor stated, on the record, that the state found Ms. Octave objectionable because of her voir dire answers (R 468). In particular, Ms. Octave testified that her response to a crime of violence would be to pray for the criminal and hope that he could get a nice job and thus, return to an honorable life (R 468). Apparently, the defense saw and heard the same Ms. Octave the state did, since we must assume that the defense would have peremptorily challenged her itself had counsel known that Ms. Octave - once reinstated on the jury - was going to vote for "death".

At the time Ms. Octave was peremptorily challenged her race was noted but no specific Neil objection was raised.

When the state announced its second challenge (Ms. Romero), the challenged venirewoman was not African-American, but the defense immediately "noted" that Ms. Romero had "brown skin" (R 459), launching an absurd dispute over the depth of her tan:

MR. CHAVIES: Let the record reflect that she is a brown-skinned Latin female. I think her parentage is Puerto Rican.
I think it is relevant, Judge.

THE COURT: Michael, that is all right. How do you know it is Puerto Rican?

MR. CHAVIES: I asked her. She said she is of Puerto Rican and Cuban heritage.

THE COURT: Puerto Rican, brown-skinned.

MRS. SEFF: We wouldn't agree that she is brown-skinned.

THE COURT: Not brown skinned.

MR. GILBERT: She has a Latin complexion. I wouldn't consider it to be of the - - -

THE COURT: We agree that she is female.

Betty Redding? (R 459-460).

The very next potential juror, Ms. Redding, really was an African-American. The state challenged her for cause due to her frank inability to grasp the concept of circumstantial evidence (R 405-411) and her express unwillingness to vote to convict any defendant for any crime for which the state failed to produce an eyewitness (R 405-411). These factors were aggravated by the fact that Ms. Redding had one brother in prison and a second brother awaiting prosecution for murder (R 467). Finally, Ms. Redding was displeased with the state because she herself was a crime victim, yet, in her case, no one was arrested (R 467).

Nonetheless, the state's challenge for cause was denied, so the state had to expend a peremptory challenge (R 461). On cue, the defense objected:

MR. CHAVIES: The state is excusing jurors based on race. Ms. Redding is black, Ms. Octave is black. There are only two blacks on the jury as far as I can tell. There are

several reasons why they have been stricken. Ms. Romero, although she is Puerto Rican and Cuban, I still believe it is of African heritage. Even if you exclude her and say that there are only two blacks on the jury, that is all we have.

There is nothing dishonorable to Ms. Octave's background, certainly which would incline the state to strike her. She works for the police department.

THE COURT: Who are you talking about?

MR. CHAVIES: The first lady.

THE COURT: Why are we talking about her?

MR. CHAVIES: I am explaining the reasons why I'm making that motion,

THE COURT: Your motion for what?

MR. CHAVIES: It is a Neal [sic] motion.

THE COURT: Well, go ahead.

(R 461-62).

After the defense stated its objection the state was required to give race neutral reasons for its peremptory challenges (as noted above), thus satisfying the "hearing requirement." Atwater v. State, ___ So.2d ___ (Fla. 1993), 18 Fla. L. Weekly S. 496; Taylor v. State, 583 So.2d 323 (Fla. 1991).

Given the shortage of African-American venirepersons, a new panel was summoned. This new array included Ms. Pullin, the prospective juror whose exclusion rests at the center of the appeal.

During voir dire, the following colloquy transpired between the prosecutor, Ms. Pullin and the Court:

MR GILBERT: I don't know if you are going to be on the jury or not, and I don't know that

if you are on the jury you are going to be the foreman or not, but the foreperson is the person who signs all the documents for the jury. If there is a finding of guilt, you would sign the name. If there is a recommendation for the death penalty, you would sign the name, your name.

Can you envision yourself signing a document that says, 'On behalf of the jury, as the foreman, we recommend the death of another person, signed, Michelle Pullins'? Can you see yourself doing that?

JUROR PULLINS: Would I have to be assigned to that position?

MR. GILBERT: No.

Let's say you are. Can you see yourself signing a document that says "I recommend the death of another person?"

JUROR PULLINS: I can't answer that.

MR. GILBERT: Why?

JUROR PULLINS: I just can't answer that.

MR. GILBERT: Is there some possibility that you won't be able to do that?

MS. PULLINS: Yes.

(R 590-591)

Contrary to the representation in Mr. Ramirez' brief that "Juror Pullin" was singled out for this question, the record shows that the trial judge, at that point, held the following sidebar:

THE COURT: I don't want to put you on the spot on that question in front of the jury panel.

I don't think that is a proper question to make, to personalize that death penalty question with a juror.

MR. GILBERT: That is what she may have to do. I am going to ask each of the jurors the same question. I am not singling them out, if you are concerned with that.

THE COURT: No, I don't think you should be asking any juror personally -----

(R 591-92) (emphasis added).

After some further argument, the Court declared that it would not allow the state to continue asking that question (R 593). This effectively refutes Mr. Ramirez contention of misconduct regarding that question.

Ms. Pullins' ambivalence about the death penalty was not the only problem. On the issue of simple "guilt" itself she vacillated as well:

MR. GILBERT: Ms. Pullin, would you be able to bring back a verdict of guilty if I can satisfy you personally of his guilt beyond a reasonable doubt?

JUROR PULLINS: You mean if you can give me enough evidence?

MR. GILBERT: To satisfy you personally.

JUROR PULLINS: I don't know.

(R 646).

At (R 702), the State withdrew its challenge to Ms. Octave, then the State and the defense agreed upon a panel of twelve fair and impartial jurors (R 706). Unfortunately, this panel failed to satisfy Judge Sepe's "two African-American quota", so the court directed the parties to backstrike white and Hispanic jurors (R 706).

By this process Ms. Pullin became eligible to sit on the petit jury. The State challenged her for cause, noting specifically her hesitancy regarding the death penalty (R 707). When this challenge was denied the State had to excuse Ms. Pullins peremptorily (R 707). Again on cue, the defense

parrotted its "Neil" objection (R 707), but the court found no racial motivation (R 708). Again, given the prosecutor's arguments regarding his challenge for cause, there was an adequate, race-neutral explanation in the record which satisfied any "hearing" requirement. Atwater, supra; Taylor, supra.

In State v. Slappy, 522 So.2d 18 (Fla. 1988), this Court set forth five factors to be considered in assessing a Neil claim.

(1) **Whether The Challenge To The Juror Demonstrated "Group Bias"**

The "challenged juror", Ms. Pullin, was not challenged on the basis of her race but, rather, her reluctance to vote for either a conviction or for a death sentence.

(2) **Whether The State Failed To Examine The Juror**

The State, obviously, questioned Ms. Pullin extensively (see above).

(3) **Whether The Juror Was Singled Out For Special Questioning**

Mr. Ramirez levels this accusation on appeal in complete defiance of the record. As noted above, the State's intent was to use its questions with other jurors but the trial court ordered the State not to do so. It is grossly disingenuous to even imply that the State singled Ms. Pullin out.

(4) **Whether The Prosecutor's Reason Was Unrelated To The Case**

This factor does not apply since, again, the prosecutor's "reason" went to the guilt death penalty issues and not Ms. Pullin's life-style or clothing. Compare Roundtree v. State, 546 So.2d 1042 (Fla. 1989) ("pointy-New York shoes" an inadequate ground); Atwater, supra (hesitancy regarding death sufficient and race-neutral).

(5) Whether Other Equally Objectionable Jurors Were Not Challenged

In an effort to meet this factor, the Appellant refers us to a Mr. Garcia. Mr. Garcia was a crime victim (R 505), but, even more to the point, was, the attitude conveyed by Mr. Garcia. The record shows that Mr. Garcia struck defense counsel as being strongly "pro-death". For example, when defense counsel questioned Mr. Garcia on the fact that the death penalty is not "automatic" (R 552), Mr. Garcia said he understood, but counsel noted "some hesitation" (R 552). Garcia, in turn, said he was "uncomfortable with it". (R 553).

At (R 561), defense counsel challenged Mr. Garcia for cause, alleging that he was too strongly in favor of death. The defense objection was so strong that Garcia was recalled (R 565), at which time he said that he was uncomfortable with the prospect of sentencing someone himself, but that he would follow the law (R 565-566).

Given the mixed signals conveyed by Mr. Garcia and the futility of any challenge for cause, the State had no reason to challenge a potentially strong, pro-death juror.

None of the five Slappy criteria have been satisfied by Mr. Ramirez. Indeed, given the fact that Judge Sepe's conclusions regarding "race-neutrality" must be judged by an "abuse of discretion" standard rather than some de novo review of a cold record, Files v. State, 613 So.2d 1301 (Fla. 1992), Mr. Ramirez cannot prevail given the existence of record support for the lower court's rulings.

Finally, Ramirez contends that Mr. Pullin was asked "unconstitutional questions" during voir dire. The question (quoted above) was a hypothetical question regarding Ms. Pullin's ability to sign a verdict form that recommended a sentence of death (R 588-590).

The defense never objected to this question, never moved for a mistrial and never demanded curative instructions. (The court stopped the questions on its own (R 591)). Therefore, the issue was not preserved for appellate review. Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Gunsby v. State, 574 So.2d 1085 (Fla. 1991); Bundy v. State, 471 So.2d 9 (Fla. 1985).

Without waiving this bar the State would note that Mr. Ramirez' brief cites to Witherspoon v. Illinois, 391 U.S. 510 (1968), and to Alderman v. Austin, 663 F.2d 558 (5th Cir. 1981). Alderman interpreted Witherspoon as permitting the government to challenge only those jurors who would automatically vote against death. That view was repudiated in Wainwright v. Witt, 469 U.S. 412 (1985), and its progeny - none of which are cited by Ramirez.[10]

Again, however, the State must emphasize the fact that the issues raised in Point II were not preserved in the lower court and cannot be considered on appeal.

---

10 The basic premise of Witherspoon, that the exclusion of anti-death biased jurors would create "hanging juries," was immediately repudiated in Bumper v. North Carolina, 391 U.S. 543 (1968), a point noted in particular in the dissent by Justice Black (Id. at 553-554).

POINT III

THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION TO SUPPRESS EVEN IF IT REACHED "THE CORRECT RESULT FOR THE WRONG REASON"

The Appellant contends that the trial court erred in failing to suppress certain items of physical evidence seized, pursuant to a search warrant, from his girlfriend's car shortly after his arrest. The Appellant contends that the affidavit supporting the warrant was deficient for:

(1) Failing to set forth sufficient facts to show the commission of a murder, robbery or burglary.
(2) Relying upon conclusory allegations that those crimes were committed.
(3) Failing to establish the source, or reliability of any source, of certain bits of information.

The Appellant's brief goes to painstaking detail to explain the defects in the perfunctory affidavit at bar - all for no reason. The state has never alleged that the affidavit was sufficient. Indeed, the prosecutor below referred to them as "the most awfully written warrants." (SSR 119). That depiction is not abandoned here.

The trial court ruled that the evidence seized from the car would not be suppressed because the police acted in good faith under United States v. Leon, 468 U.S. 897 (1984)(SSR 127).

In this brief, the State will submit two arguments in support of the trial court's decision:

(A) The police acted in good faith.
(B) The discovery of the evidence seized was inevitable, thus rendering any error harmless.

(A) The Good Faith Exception

In United States v. Leon, supra, the Supreme Court recognized, yet again, the inherent conflict between the need to prohibit unreasonable and intrusive government conduct and the need to preserve the trial process as a process for discovering the truth, including the admission of any relevant evidence, citing Alderman v. United States, 394 U.S. 165 (1969).

The affidavit in Leon was based upon stale information and the reports of an informant whose credibility had not been established. In reviewing whether the police acted in good faith, the Supreme Court said that it could, if it wanted, review the issue of "probable cause" using the "totality of the circumstances test" of Illinois v. Gates, 462 U.S. 213 (1983). It did not do so, however, because the parties did not argue the test.

Turning instead to the Fourth Amendment, the Leon Court noted:

> Language in opinion of this Court and of individual Justices has sometimes implied that the exclusionary rule is a necessary corollary of the Fourth Amendment. . .[citations]. . or that the rule is required by the conjunction of the Fourth and Fifth Amendments. . . . [citations]. These implications need not detain us long, the Fifth Amendment theory has not withstood critical analysis or the test of time, see Anderson v. Maryland, 427 U.S. 463. . . and the Fourth Amendment 'has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons. Stone v. Powell, 428 U.S. 465. . .'
>
> Id. at 905, 906).
>
> The Fourth Amendment contains no provision expressly precluding the use of evidence

> obtained in violation of its commands, and an examination of its origin and purpose makes clear that the use of fruits of a past unlawful search or seizure "work[s] no new Fourth Amendment wrong". . . . The wrong condemned by the Amendment is "fully accomplished" by the unlawful search or seizure itself . . . a the exclusionary rule is neither intended nor able to 'cure the invasion of the defendant's rights which he has already suffered" Stone v. Powell. . .'
>
> (Id.)

The decision of whether "exclusion" of evidence is an appropriate response is separate and apart from the question of whether the Fourth Amendment was violated. Leon,; Illinois v. Gates, 462 U.S. 213 (1983). The suppression issue is resolved "by weighing the costs and benefits of preventing the use in the prosecution's case-in-chief of inherently trustworthy tangible evidence", Leon, suppressible simply because of a defective warrant.

The Leon Court went on to note the general standards governing review of search warrants; to wit:

> (1) No deference should be given to a reckless or false affidavit.
> (2) The magistrate should not be a mere "rubber stamp" for the police, and
> (3) The magistrate must receive sufficient information to determine the existence of probable cause.

As to these three standards, however, the Court held that the sanction of "suppression" should only apply to the first standard ("false affidavits") since that standard addresses police misconduct. The other two standards refer to errors by "neutral" magistrates who have "nothing to gain" and "no stake in the outcome" of any investigation. In those situations, "suppression" would do nothing to protect Fourth Amendment interests:

> "It is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment. In the ordinary case, the Officer cannot be expected to question the magistrate's probable cause determination or his judgment that the form of the warrant is technically sufficient. 'Once the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law' [citations]"
>
> Leon, supra, at 921.

Finally, Leon recognizes that the suppression sanction still applies when:

> (1) The officers lie to the magistrate.
> (2) The affidavit is so completely devoid of information as to make reliance upon it unreasonable.
> (3) The resulting warrant is so vague that the police cannot reasonably rely upon it.

Since Florida amended its Constitution to adopt United States Supreme Court decisional law on all search and seizure issues, see Art. I §12 Fla. Const. (1982), we must review this case in light of Leon and the post - 1982 decisional law of this state.

We will begin with the totality of the circumstances, an issue available under Illinois v. Gates, supra, but not considered in Leon only because, as noted above, it was not argued.

The murder at bar took place on the night of December 24-25, 1983. Mr. Ramirez, a contract janitor, originally cooperated with the police and signed a consent form for an inspection of his car (SSR 56). Ramirez opened the car for the police (SSR 57). When the officer put his head into the trunk, Ramirez said, "That's enough", and slammed the trunk lid (SSR 57). When the

police started to look inside the passenger compartment, Ramirez told them to stop (SSR 57). Ramirez then asked the police if they were looking for blood (SSR 57).

The police were interested in a sweater worn by Ramirez, on December 28, 1983. Ramirez telephoned the police and said he had found the sweater and wanted to give it to them (SSR 59). Ramirez told the police to meet him at 9:30 P.M. at the Federal Express parking lot (SSR 559). When Ramirez met the police he tried to pass off a different sweater (that he had just purchased) as his old sweater.

Mr. Ramirez was arrested in the parking lot that night (SSR 60). His vehicle was sitting in the parking lot, where the police could impound and inventory it,[11] search it with Ramirez' girlfriend's consent (she owned the car and testified for the state) or obtain a search warrant. The third option was chosen.

Under the totality of the circumstances, it appears that the police acted in good faith in seeking a search warrant on the vehicle despite the presence of other options. While the paperwork was defective in alleging a murder, burglary and robbery without detailing more facts, there is no question that a better affidavit could easily have been drawn up if the magistrate had requested it. There was no exigency that required a search of the vehicle at once. The error at bar, rather than resting upon police deceit, rests upon the shoulders of the magistrate for not reviewing the paperwork, an error clearly

---

11 South Dakota v. Opperman, 428 U.S. 364 (1976).

within the class of errors, under Leon, for which suppression is not automatic.

To counter this, Mr. Ramirez would logically argue that this affidavit was "so bad" the police could not rely upon it. In support of this proposition, he cites a host of distinguishable cases.

Many of Mr. Ramirez' cases involve drugs, not murder. The continuing pattern of those cases involved a building or house where there was no indication of illegal activity, a hearsay report that drugs were in the location, from on unverified source, and/or the delivery of a sample of the drug that allegedly came from the location to be searched. See, Blue v. State, 441 So.2d 165 (Fla. 3rd DCA 1983); Vasquez v. State, 491 So.2d 297 (Fla. 3rd DCA 1986); St. Angelo v. State, 532 So.2d 1346 (Fla. 1st DCA 1988). In these cases it was clear that the police were speculating that a crime might be "in progress" but they did not know for certain. As Blue noted, virtually anyone could walk up to an officer, hand him a pill, point to a house and provoke a warrant under the standards urged therein.

Our case is different. The police had a dead body. The victim was stabbed in the back, chest and head, and her skull was cracked by repeated blows from a seventy-pound fax machine (that was missing). Logically, these wounds were not self-inflicted, so speculation that this case could have involved a suicide is utter nonsense. The only common problem with the cited cases was a defective affidavit that could easily have been remedied at the time, if the police had been told.

The police erred in assuming references to the homicide, bloody fingerprint, and specific felonies were enough. They were wrong, but they acted in good faith under the totality of the situation. See, State v. Diamond, 598 So.2d 175 (Fla. 1st DCA 1992); McClellan v. State, 359 So.2d 869 (Fla. 1st DCA 1978).

Given the fact that nothing in this record gives rise to any suspicion that any evidence seized was "false" or "unreliable", the absence of any deceit in the application for the warrant, the fact that a warrant was sought for a car that could have (arguably) been impounded and "inventoried", or searched with the consent of its actual owner (Ms. Yates-Douglas, a state witness at trial), no misconduct can be attributed to the police. As such, under Leon, the error belonged to the magistrate for not demanding a better affidavit, and suppression is not the appropriate remedy.

((B) Inevitable Discovery/Harmless Error

The state did not argue "inevitable discovery" below because it won the suppression hearing on the strength of its Leon argument. As common sense dictates, when a party wins, it does not have to reargue and reargue alternate theories, thus "winning again and again" ad infinitum, to preserve arguments for appellate review.

The requirement of "preservation" attaches to arguments supporting the reversal of a lower court, not the affirmance of a lower court. Affirmance of a lower court order can be based upon any ground discernible from the record whether relied upon sub judice or not. Savage v. State, 156 So.2d 566 (Fla. 1st DCA 1963); Caso v. State, 524 So.2d 422 (Fla. 1988); Amrep Corp. v.

Nicholson, 249 So.2d 84 (Fla. 1st DCA 1970); Owens v. State, 354 So.2d 119 (Fla. 3rd DCA 1990); Stuart v. State, 360 So.2d 406 (Fla. 1978); Combs v. State, 436 So.2d 93 (Fla. 1983); Martin v. State, 411 So.2d 987 (Fla. 4th DCA 1982); Robinson v. State, 393 So.2d 33 (Fla. 1st DCA 1981).

Here, the trial court can be said to have reached the correct result even if for "the wrong reason" Savage, supra. While the police acted in good faith, any finding that they did not reasonably rely upon the search warrant still cannot overcome the fact that discovery of the contents of Ms. Yates' car was inevitable. Again, the police had the car. There were no exigent circumstances. The car could have been impounded and inventoried, Opperman, supra, or, if not, then Ms. Yates' consent could have been obtained or a better affidavit could have been prepared. Thus, at least three other independent avenues for searching the Appellant's car could have been used, and discovery of the knife and bloodstains was inevitable. Nix v. Williams, 467 U.S. 4341 (1984). Florida's constitution requires observance of the inevitability standard applied to the Fourth Amendment and, indeed, our caselaw has consistently recognized this standard. Craig v. State, 510 So.2d 857 (Fla. 1987); Maulden v. State, 617 So.2d 298 (Fla. 1993) (evidence from automobile); Jennings v. State, 512 So.2d 169 (Fla. 1987); State v. McLaughlin, 454 So.2d 617 (Fla. 5th DCA 1984).

Closely akin to the principle of inevitable discovery is the concept of harmless error. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Indeed, in Mauldin v. State, 617 So.2d 298 (Fla. 1993), this Court compared and essentially equated Nix, supra,

and DiGuilio in noting that fact that no purpose is served by the exclusion of evidence that inevitably would have been discovered.

The evidence at bar, without being redundant, would have been discovered if the police had amended the affidavit, performed an inventory or simply gotten permission from its owner (who also testified, for the state, at trial). The trial court did not err in denying the motion to suppress.

POINT IV

THE APPELLANT IS NOT ENTITLED TO RELIEF ON HIS CLAIM OF MISCELLANEOUS ERROR

The Appellant's fourth point on appeal raises three distinct sub-issues which are readily disposed of as follows:

(A) The Testimony Of Officer Zito

Two basic claims arise out of the testimony of Officer Zito. First, the Appellant questions Zito's qualifications as an expert, and second, Ramirez claims Zito violated his right to a fair trial by mentioning "the first trial" in this case. Neither claim has merit.

Mr. Ramirez properly concedes that the trial court's decision to admit expert testimony under §90.702, Fla. Stat. is a matter of judicial discretion that will not be disturbed, on appeal, absent an abuse of discretion. Johnson v. State, 393 So.2d 1069 (Fla. 1980); Quinn v. Millard, 358 So.2d 1378 (Fla. 3rd DCA 1972). An "abuse of discretion" does not exist simply on the basis of some disagreement regarding evidentiary weight, Johnson, supra. Given the existence of record support for the trial court's decision no abuse of discretion exists.

(Former) Office Zito worked the crime scene at bar. In setting out his training and field experience, Zito mentioned completion of the reknowned, 40 hour, "McDonald" course (R 1181) plus follow-up training, field experience and experience as an instructor (R 1181).

Mr. Ramirez' only objection (that went to the facts) was the fact that Mr. Zito was testifying as an expert for the first time.[12] This argument was specious, since every expert, somewhere, had a "first case". For that same reason, Ramirez' effort to distinguish Cheshire v. State, 568 So.2d 908 (Fla. 1990) (admitting a similarly qualified expert) simply because that expert had testified three times was for naught.

Officer Zito's training and experience qualified him as an expert even without an advanced degree. Allen v. State, 365 So.2d 456 (Fla. 1st DCA 1978); Salas v. State, 246 So.2d 621 (Fla. 3rd DCA 1971); Johnston v. State, 497 So.2d 863 (Fla. 1986). Indeed, the fact that Officer Zito had left the department did not lessen his ability to testify. Brown v. State, 477 So.2d 609 (Fla. 1st DCA 1985).

The Appellant also argues that a mistrial should have been granted on defense motion (R 1180) when Zito testified that he had previously qualified as an expert in this case at the prior trial (R 1181). The actual testimony was as follows:

> Q. And have you had occasion to testify in courtrooms or in depositions as an expert in -- as a person capable of interpreting blood spatter evidence?

---

[12] Mr. Zito was accepted as an expert in the first trial as well, and the issue was not raised on appeal (R 1191).

A. Last time I testified was at _____ in this the time before (R 1181).

This answer, in reply to a question that encompassed trials and depositions, was not a specific reference to a prior trial, nor in any way did it indicate the outcome of any prior trial. The court denied the request for a mistrial and the Appellant decided not to request any curative instruction (R 1182). Given the indefinite nature of Mr. Zito's answer and the purely speculative nature of the defendant's arguments, clearly the trial court did not abuse its discretion in denying a mistrial and any "error" in Zito's testimony was harmless. DiGuilio, supra.

(B) Introduction Of Demonstrative Evidence

The state's toolmark expert illustrated his general testimony on striations, etc., with photographs from a treatise (R 1942). The defense objected, alleging both "hearsay" (misuse of a treatise on direct examination) and the danger of "confusion" since the photographs were not related to this particular case.

The trial court admitted the treatise in evidence, but ruled that only the photographs were to go to the jury (R 1975). The defense fully cross-examined the expert witness and, in fact, exploited the state's failure to produce pictures of the knife marks from this case.

While a treatise cannot be introduced "on direct", Churzelewski v. Drucker, 546 So.2d 1118 (Fla. 4th DCA 1989), the actual "evidence" in this case was demonstrative photographs, not the treatise per se. Under the totality of this record, it

cannot be said that the Court abused its discretion or that any error was not harmless. DiGuilio, supra.

(C) The Prosecutor Did Not Comment On The Defendant's Silence

The third so-called "error" simply never happened.

The defense, by virtue of not calling witnesses, had first and last final argument.

During his first argument, defense counsel vilified the state's case as "garbage" (R 2056, 2062), engaged in ad hominem commentary and, most of all, commented at length regarding the evidence which the state failed to produce (R 2049-2064). Indeed, the state was flatly accused of manipulating the evidence (R 2064). At one point defense counsel, referring to a conversation with co-counsel, said:

> "I went to Michael and I asked, did we miss something. What questions didn't we ask that we should have to show more evidence?" (R 2062)

The prosecutor's closing argument began at (R 2080). In a painstaking point by point refutation of the defense's closing argument, the prosecutor addressed those issues raised by Ramirez. Finally, at (R 2141), the prosecutor made a comment that is edited in Ramirez' brief to change its context. The actual quotation is:

> What the defense says is the following:
>
> Essentially, there are two tables full of evidence in this courtroom. There is one on my right, with 100 exhibits, including what is in the back there, the one on my left.
>
> You do not see the one on my left. That is the imaginary table. That is the imaginary table that contains all the things the defense would have liked to see, things that

> are not necessary for us to bring in order to prove the defendant is guilty. (R 2142-42).

That argument was a direct reply to the question of evidence the state failed to produce - not the defense. Indeed, the prosecutor made it even clearer:

> MR. GILBERT: These are the things the State has to bring in, according to the defense argument. Where is the gun? Who are the other seven people, where are their fingerprints? (R 2142)

In point of fact, the closest the state came to commenting on the defense came during the state's reply to defense counsel's argument that the prosecutor withheld evidence (hair) that exonerated Ramirez. The defense accusation was rebutted as follows:

> MR. GILBERT: ..."Which brings me to the argument made by the defense during their closing.
>
> Where is the hair?
>
> I don't know, where is the hair? Do you see it? No, you do not. It is not there.
>
> They have the right to put it into evidence if they wish it to be there. If it is that important, they have the right to put it into evidence.
>
> MR. CHAVIES: Objection. We do not have to prove anything. I will preserve the earlier objection.
>
> THE COURT: All right, Sir. Sustained.
>
> MR. CHAVIES: I ask that be stricken, Judge. The jury has to disregard the last comment.
>
> THE COURT: Well, I'm sustaining your objection only to the implication that the defense has to prove anything. I don't find anything wrong with the argument.
>
> MR. GILBERT: I am not implying that they have to prove anything. I do not mean that,

> but if they want you to believe we are hiding something from you they have the right to show us for all we are [sic] wroth . . . "
>
> (emphasis added) (R 2149-50).

The defense objected anew and the Court told the jury that the defense was not required to prove anything (R 2150).

The defense then gave its final closing argument (R 2169) which consisted of a personal attack upon the prosecutor as a "witness." The tirade reached a fever pitch with this outburst:

> Where is the real thing in this case?
> Where is the real evidence?
> Why are they hiding it from you? (R 2176)

After the argument ended (R 2214), the jury was excused for the day and the defense aired its objection to the "two tables" comment (R 2222). The objection misrepresented the comment (as referring to the defendant's silence rather than defense arguments on evidence the state failed to produce) and the prosecutor replied by correcting the misrepresentation (R 2223). The defense motion was denied without comment (Id.).

The state's arguments were clearly invited by the defense, Dufour v. State, 495 So.2d 154 (Fla. 1986); State v. Mathis, 278 So.2d 280 (Fla. 1973); Ferron v. State, 619 So.2d 507 (Fla. 3rd DCA 1993). As such, they did not operate to deny the defendant a fair trial or otherwise compel reversal. See, State v. Murray, 443 So.2d 955 (Fla. 1984). To the extent a "comment" on silence could even be implied, any "error" was certainly harmless. DiGuilio, supra.

From the entire record, however, it is obvious that the alleged prosecutorial misconduct simply never happened.

POINT V

THE TRIAL COURT DID NOT ERR IN FINDING THAT THE MURDER WAS COMMITTED TO AVOID ARREST

Mr. Ramirez killed Mary Jane Quinn for the express purpose of avoiding arrest. The trial court's findings summarize the supporting facts succinctly:

> The capital felony was committed for the purpose of avoiding or preventing a lawful arrest. The evidence adduced at trial conclusively demonstrated the sole purpose for the defendant's killing of Mary Jane Quinn was to eliminate the only witness to the burglary committed by the defendant. Mary Jane Quinn worked at the Federal Express Office, the homicide scene, with the defendant and thus could have recognized him. A substantial portion of the injuries incurred by the victim were inflicted in the dispatch office, an office full of telephone and telecommunications equipment which could have been utilized to summon assistance. An investigation of the homicide scene revealed a telephone in the dispatch officer that had the victim's smeared blood on it and the receiver was off the hook, while teletype machine, also in the dispatch officer, had the victim's blood on the keys. Another telephone was pulled out of the wall at the door to the dispatch office. Additionally, and most significantly, Mary Jane Quinn was neither sexually assaulted nor robbed of her personal possessions. (R 2938).

Mr. Ramirez' brief does not address all of the court's findings, nor does it offer any other reason why Ramirez murdered Mrs. Quinn. Instead, the brief questions how well the parties knew each other and the significance of the attack beginning in the dispatch office.

Mr. Ramirez concedes the fact that Mrs. Quinn could have identified him no matter how well they knew each other. He also concedes that the telephone had blood on it and was off the hook (R 2938).

Even more to the point, however, was the condition of Mrs. Quinn herself. She was not sexually assaulted, thus eliminating any motive relating to primal instincts or passions. Furthermore, and perhaps most important, she was not robbed even though the murder took place during a robbery.[13] The only possible motive for killing someone, during a robbery - and not robbing them - is witness elimination (or, a desire to avoid arrest).

The defendant's motive is central to any assessment of the "avoid arrest" factor. Stein v. State, ___ So.2d ___, (Fla. 1994), 19 Fla. L. Weekly S. 32. In Stein, a Pizza Hut robbery culminated in the execution of two employees in the men's room. The apparent and obvious motive was witness elimination.

In Henry v. State, 613 So.2d 429 (Fla. 1993), a janitor at a Cloth World store, working the night shift with two clerical workers, robbed the store and brutally murdered his co-workers by incapacitating them and setting them on fire. There, as here, the stolen money was not recovered and there, as here, no other explanation for the murders could be found.

We would also compare this case to Correll v. State, 523 So.2d 562 (Fla. 1988). In that case the defendant "clearly intended to leave no survivors in the house" (Id., at 568) when, after Correll murdered his ex-wife and her mother, he also murdered his sister-in-law (who happened to be at home) and his five year old daughter. This Court said that there was no

---

13 This evidence, at least, justified instructing the jury on this factor whether or not the factor was later applied. Mordenti v. State, ___ So.2d ___, (Fla. 1994), 19 Fla. L. Weekly S. 61.

explanation for the latter two killings except witness elimination no matter what motives attended the first two slayings.

It is not necessary for the state to prove that Ramirez' arrest was imminent, Swafford v. State, 533 So.2d 270 (Fla. 1988). The key is motive, and witness elimination without any other explanation for the killing is clearly sufficient to prove this factor beyond any reasonable doubt. See, Remeta v. State, 522 So.2d 825 (Fla. 1988); Lightbourne v. State, 438 So.2d 380 (Fla. 1983); Kokal v. State, 492 So.2d 1317 (Fla. 1986); Wright v. State, 473 So.2d 1277 (Fla. 1985).

Given the overwhelming evidence supporting this aggravating factor and the total absence of any other motive for the killing, the trial court did not err in finding the "avoid arrest" factor.

Even if the "avoid arrest" factor could be challenged, it is beyond debate that this crime was committed by a convicted felon, in the course of a felony, and was heinous, atrocious and cruel. If those three factors alone are weighed against Ramirez' proffered "mitigation" (which was either unsupported by competent evidence or devoid of any nexus to this crime) (R 2939), it is patently obvious that any error was harmless beyond any reasonable doubt. Rogers v. State, 511 So.2d 526 (Fla. 1987); DiGuilio, supra.

POINT VI

THE TRIAL COURT DID NOT ERR IN ITS HANDLING OF THE DIRECT AND CROSS EXAMINATIONS OF DR. WETLI

The sixth point on appeal questions the trial court's decisions regarding the testimony of Dr. Charles Wetli. The State will rely upon the following facts in placing this issue in proper perspective.

There was a two-week recess (March 5-18, 1991) between the guilt and penalty phases of Ramirez' trial. The State's medical examiner, Dr. Harleman, was unavailable for the penalty phase so the State, two weeks prior to March 18, gave the defense notice that Dr. Charles Wetli would be its witness in the penalty phase (R 2346). The defense did not depose Dr. Wetli (id).

The defense took the position that the State should not be allowed to call Dr. Wetli because his testimony would be redundant (R 2319). Since the State was still required to prove the existence of aggravating factors beyond a reasonable doubt, the defense request was denied (R 2320).

Dr. Wetli testified as a substitute for Dr. Harleman. His credentials were unimpeachable. Dr. Wetli was the Chief Deputy Medical Examiner for Dade County (R 2324). He was a board certified forensic pathologist (id). He had been qualified as an expert witness on issues relating to cause of death two hundred and fifty (250) times (R 2325).

After Dr. Wetli gave his qualifications the defense stipulated to his medical expertise (R 2325).

Dr. Wetli then testified that he reviewed this autopsy with the forensic team in 1983 (R 2325), and had thoroughly

familiarized himself with the file in preparing his opinion (R 2325-2327). Dr. Wetli also testified that it is accepted, if not common, practice for a substitute doctor to testify from the first doctor's notes (R 2327).

As a qualified medical expert, Dr. Wetli discussed the medical concepts of "pain" and "suffering" (distinguishing the two) and drew upon his experience and special training with crime victims and euthanasia (R 2328-2332). (Dr. Wetli did not, as misstated by Ramirez, either allege or imply any sexual battery in this case). Dr. Wetli then discussed and described the wounds inflicted upon the victim and the prospect that she suffered great pain or mental anguish (R 2333, et seq). The only defense objection went to the "redundant" nature of the testimony (R 2337).

In fact, on appeal Ramirez properly confesses that Dr. Wetli's testimony was proper. See Capehart v. State, 583 So.2d 1009 (Fla. 1991).

With these facts in mind, we can address the sub-issues presented by the Appellant.

(A) **Limitation of Cross**

At trial, the defense wanted a recess to research every single homicide in the history of Dade County[14] in order to cross examine Dr. Wetli on his theory that Mrs. Owens suffered (R 2345). This untimely, mid-trial request to do research that

---

[14] Defense counsel: ". . . I want the opportunity before cross examination to investigate all previous cases from the medical examiner's office so I can confront Dr. Wetli . . ." (R 2345).

could have been done for weeks (as to Dr. Wetli) or months (as to Dr. Harleman, had she testified) was denied.

On appeal, Mr. Ramirez complains that he was not allowed to cross examine Dr. Wetli regarding "other cases", but it is clear from the record that the defense was not prepared to engage in such questioning at the time of the trial. The denial of the continuance has not been appealed and is waived.

Nevertheless, we would note that the right to cross examine any witness is not unlimited. Delaware v. Van Arsdall, 475 U.S. 673 (1986); Bundy v. Dugger, 850 F.2d 1402 (11th Cir. 1988); United States v. Owens, 484 U.S. 554 (1987).

The penalty phase of a capital case focuses upon the details of the crime at bar and the defendant himself, not other crimes or other victims. Cruse v. State, 588 So.2d 983 (Fla. 1988); Herring v. State, 446 So.2d 1049 (Fla. 1984). Thus, the trial judge had absolute discretion to "limit" the defense to relevant issues on cross and to exclude any comparisons of other cases. Cruse, supra; Herring, supra; Rose v. State, 472 So.2d 1155 (Fla. 1985); Smith v. Illinois, 390 U.S. 129 (1968).[15]

(B) **Dr. Wetli's Qualification**

Once again, Mr. Ramirez has confused the concepts of evidentiary weight and admissibility. Dr. Wetli was a highly qualified medical expert and the decision to allow him to testify to the pain probably created by various wounds was not an abuse

---

15 See also Jackson v. State, 498 So.2d 406 (Fla. 1986) (exclusion of testimony from victim's brother regarding disapproval of the death penalty); Jackson v. State, 530 So.2d 269 (Fla. 1988) (exclusion of evidence from Parole Commission regarding other cases).

of discretion. Burns v. State, 609 So.2d 600 (Fla. 1992); Johnson v. State, 393 So.2d 1069 (Fla. 1980); §90.702, Fla.Stat.

If Mr. Ramirez truly embraced a belief system that denied the pain and anguish caused by repeated, non-lethal, stab wounds or bludgeoning with a fax machine, his beliefs could have been tested in court either by cross examination or some presentation by his own expert. The issue of whether there was sufficient evidence to support the expert's opinion, however, was one of weight, not admissibility, Rimmer v. Tesla, 201 So.2d 573 (Fla. 1st DCA 1967), and thus cannot compel appellate relief even if the expert opinion is one with which Mr. Ramirez disagrees.

(C) **The State had the Right to Prove its Case**

As noted above, the theory of the defense was that the State should not be allowed to offer any penalty phase evidence on the HAC issue. Now the Appellant complains that Dr. Wetli, a medical doctor and board certified forensic pathologist, should not have been permitted to render an expert opinion on the subject of "pain", apparently because he was not also a neurologist[16], and, since, (by extension) only neurologists know whether it hurts to get stabbed. The facial weakness of Mr. Ramirez' position is exacerbated by its failure to recognize controlling law.

Section 90.703, Fla.Stat. declares that an expert opinion is not "inadmissible" simply because it touches upon an ultimate issue. Thus, while Dr. Wetli could not declare Ramirez "guilty", he could clearly assess the damage done to the victim and give an opinion on the issue of pain. For example, in Bloodworth v.

---

16 Of course, a special degree is not always required. Allen v. State, 365 So.2d 456 (Fla. 1st DCA 1978).

State, 504 So.2d 495 (Fla. 1st DCA 1987), a medical expert was allowed to give an opinion on the non-consensual nature of sexual activity even though the opinion overlapped the issue of "rape". Even Gurganus v. State, 451 So.2d 817 (Fla. 1984), while cited by Ramirez for the proposition that a doctor could not declare the degree of a homicide, held that that same doctor could address issues of mental capacity, intent or mens rea.

The State had to produce additional evidence that the victim felt pain and actually suffered in order to establish the HAC factor. The victim received blows to the head as well as stab wounds, and the failure to prove she was conscious might preclude a finding of HAC no matter the brutality of the attack. Scott v. State, 494 So.2d 1134 (Fla. 1986), citing Jackson v. State, 451 So.2d 458 (Fla. 1984).

Dr. Wetli was qualified to render such an opinion and was properly allowed to do so. Even so, if the jury could easily have concluded that this crime was one for which the HAC factor applied (simply on the basis of common sense and the guilt phase evidence, as Ramirez argued below,) then any error was harmless. DiGuilio, supra.

POINT VII

THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL

The trial court found that this murder was heinous, atrocious and cruel, stating:

> d) This crime was especially heinous, atrocious and cruel. The victim, Mary Jane Quinn, was stabbed in both the hand and the chest with a knife. The stab wound to her hand and other trauma to her hands indicate a desperate attempt to ward off her attacker.

> The location of the victim's blood spatters and drippings throughout the small dispatch room support this conclusion. The victim's head was also bludgeoned with a 70 pound facsimile transceiver causing massive trauma. Yet Mary Jane Quinn continued to struggle to survive, crawling out of the dispatch room down a hallway, as evidenced by her bloody handprints on the hallway wall. There in the hallway she met her demise, receiving 10 stab wounds in the back, most of which exceeded five inches in depth. Mary Jane Quinn lived through the agony of the infliction of all these wounds. (R 2938-2939).

No realistic argument can be advanced for the proposition that this brutal crime - which had the additional outrage of being committed on Christmas Eve - did not reflect an utter indifference to the suffering and anguish of the victim. Cheshire v. State, 568 So.2d 908 (Fla. 1990).

The HAC factor applies when a slow and painful method of killing is utilized and the victim has time to suffer the anguish of impending death. Tompkins v. State, 502 So.2d 415 (Fla. 1986) (victim strangled, fought for her life). The case at bar is similar to many in which the HAC factor applied:

In Johnston v. State, 497 So.2d 863 (Fla. 1986), the victim, an 83-year-old widow, was stabbed three times and strangled. Her death took several minutes, she struggled, and she was conscious and by extension suffered great pain. Johnston cites to similar killings in Wright v. State, 473 So.2d 1277 (Fla. 1985), and Quince v. State, 414 So.2d 185 (Fla. 1982).

In Medina v. State, 466 So.2d 1046 (Fla. 1985), the defendant stabbed the victim ten times, inflicting severe pain in a ten to thirty minute assault.

In Perry v. State, 522 So.2d 817 (Fla. 1988), the victim was repeatedly stabbed, beaten (about the head, particularly), and attempted to ward off the attack, thus incurring defensive wounds. The presence of defensive wounds was found to be important proof of the HAC factor, while the location of the attack (the "safety" of her home) added to the outrageous nature of the offense. (Here, the victim died at work, but on Christmas Eve). A similar result was obtained in Dudley v. State, 545 So.2d 857 (Fla. 1989). See also Atwater v. State, ___ So.2d ___ (Fla. 1993), 18 Fla.L.Weekly S496; Gilliam v. State, 582 So.2d 610 (Fla. 1991).

Mr. Ramirez contends that the HAC factor can only apply if the defendant had the express intent to torture the victim. He even implies that the victim added to her own suffering by trying to ward off the attack rather than laying down and dying. Clearly, however, the HAC factor was created by the Legislature to punish the suffering of the victim, not to protect the murderer from all but "intentional torture". Hitchcock v. State, 578 So.2d 685 (Fla. 1990). Thus, the utter indifference of Mr. Ramirez to the suffering of Mrs. Quinn and the presence of defensive wounds support the logical conclusion that the HAC factor applies. Cheshire, supra; Dudley, supra; Perry, supra,[17] Gilliam v. State, 582 So.2d 610 (Fla. 1991).

---

17 We must point out some interesting observations by Mr. Ramirez that relate to the other issues on appeal. At pp. 84-86, Ramirez opines that the victim might not have been conscious throughout the attack - thus enhancing the relevance of Dr. Wetli's testimony. See Johnston, supra. Ramirez also notes that Mrs. Quinn was not robbed, sexually assaulted or the "target of the robbery" - all factors that support the "avoid arrest" factor.

The murder of Mary Jane Quinn was clearly heinous, atrocious and cruel under any rational review of the record.

POINT VIII

THE JURY INSTRUCTION ON THE HAC FACTOR WAS PROPER AND THE ISSUE WAS NOT PRESERVED FOR APPELLATE REVIEW

During the charge conference on the penalty phase instructions the trial court stated it would give the standard "HAC" instruction and the defense did not object (R 2420). After the charges were given to the jury no additional objection was aired (R 2486). Thus, the Appellant's claims of error under Maynard v. Cartwright, 186 U.S. 536 (1988), and Stringer v. Black, 503 U.S. ___, 117 L.Ed.2d 367 (1992),[18] are not preserved and are not available to him on appeal. Sochor v. Florida, 504 U.S. ___, 119 L.Ed.2d 326 (1992); Atkins v. Singletary, 622 So.2d 951 (Fla. 1993); Rose v. State, 617 So.2d 291 (Fla. 1993); Sims v. Singletary, 622 So.2d 980 (Fla. 1993); Ferguson v. Singletary, ___ So.2d ___ (Fla. 1993), 19 Fla.L.Weekly S101. Kennedy v. Singletary, 602 So.2d 1285 (Fla. 1992)

Without abandoning this procedural defense, three factors are worth mentioning.

First, the instruction at bar is not the instruction condemned in Espinosa.

Second, the murder at bar was so clearly heinous, atrocious and cruel that this factor would have been properly applied regardless of the form of the jury instruction, rendering any

---

[18] No claim is raised under Espinosa v. Florida, 505 U.S. ___, 120 L.Ed.2d 854 (1992), or Sochor v. Florida, 504 U.S. ___, 119 L.Ed.2d 326 (1992).

"error" harmless. Gorby v. State, ___ So.2d ___ (Fla. 1993), 18 Fla.L.Weekly S263; cf. Thompson v. State, 619 So.2d 261 (Fla. 1993), see also Clemons v. Mississippi, 494 U.S. 738 (1990).

Third, neither Stringer, supra, nor Maynard, supra, apply to Florida[19] because in Florida, by statute, the jury is neither the sentencer nor the co-sentencer and the jury does not report any specific findings of fact. Bertolotti v. Dugger, 883 F.2d 1503 (11th Cir. 1989); Johnson v. Singletary, 991 F.2d 663 (11th Cir. 1993); Clark v. Dugger, 559 So.2d 192 (Fla. 1989); Porter v. Dugger, 559 So.2d 201 (Fla. 1989); Ventura v. State, 560 So.2d 217 (Fla. 1990).

Thus, Mr. Ramirez' unpreserved jury instruction claim is not a basis for appellate relief.

POINT IX

THE TRIAL COURT DID NOT ERR IN WEIGHING MITIGATING EVIDENCE

The defendant presented very minimal evidence in mitigation, summarized as follows:

1. Marie Davis: Ramirez' grandmother testified that Ramirez' parents did not like him very much and did not treat him well (R 2381-2383). On cross, Mr. Davis explained that this "dislike" came about because Ramirez was a "troublemaker" and his mother simply gave up on him (R 2384). She never saw Ramirez beaten but only heard stories from the defendant (R 2384). Out of five siblings, only the defendant was a killer (R 2384).

---

19 Maynard itself explicitly distinguishes Florida cases from its ambit due to the fact that Florida juries do not pass sentence.

2. Elsie Johnson: Ramirez' aunt testified that the defendant was abused when very young, but she took Ramirez into her home at the age of 7 and kept him "3 or 4 years" (R 2390), and never beat him (R 2390). Johnson was unaware of the prison Ramirez went to at age 16 (R 2391), but noted that Ramirez went to live with his so-called "abusive" mother upon his release (R 2392). She had had no contact with Ramirez since his release (R 2392).

3. Estell Collins: Ramirez' aunt verified that Ramirez was removed from his home when very young and not abused thereafter (R 2393). She also suspected sexual abuse but had no proof (R 2396). Ms. Collins "thought" Ramirez might have fathered some children over the years (R 2397), and then obligingly said that he loves his children (R 2397).

Neither Collins nor Johnson had ever testified before about the alleged early childhood abuse, because "no one asked" (R 2390, 2401).

No expert testimony was provided to link the hearsay reports of possible early childhood abuse to the crime at bar.

In rebuttal, the State called Irma Botana, the investigator who did a presentence investigation (PSI) on Ramirez in 1984. She reported that there was no evidence of any sexual abuse (R 2435). Next, the State called Joseph Papy, the preparer of the PSI completed in 1976. Papy spoke to Ms. Collins and Ramirez' mother, and was never told about "beatings" or sexual abuse (R 2445).

The trial court carefully considered the conflicting evidence in mitigation, and held:

The Court considers each statutory mitigating circumstance and other mitigating factors.

The Court finds no statutory mitigating circumstances exist. The defendant has asserted that the statutory mitigating circumstance of being merely an accomplice with relatively minor participation (§921.141(7)(c)) exists. However, this Court finds no evidence to support this circumstance. The defendant also claims that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired (§921.141(7)(e)). Specifically, that the ingestion of alcohol or drugs caused this impairment. Again, this Court finds no evidence to support this circumstance. Finally, the defendant proposes that his age (23) at the time of the offense is a mitigating circumstance (§921.141(7)(f)). This Court rejects that as a factor in mitigation in this case.

As to any other factor that would mitigate against imposition of the death penalty, this Court previously found that the defendant was a loving and attentive father of two children and had close ties to other members of his family. In the instant proceeding, the defendant presented no evidence to suggest this factor might still exist. And, in fact, the record of lack of contact between the defendant and his family during his incarceration belies this claim. The Court therefore rejects this as a possible mitigating factor.

The defendant did present some evidence of his having been abused as a child. While this evidence was not particularly credible or convincing, this Court finds that whatever abuse did befall the defendant it does not rise to a level that this Court would consider to be a mitigating factor. Additionally, the defendant argues that somehow his having been incarcerated as an adult at the age of 16 mitigates his conduct here. The Court is unable to comprehend this argument or to attach any significance to it. Therefore, it is rejected.

Upon consideration, it is the conclusion of the Court that sufficient aggravating circumstances exist which outweigh the mere

> possible mitigating circumstance. Accordingly, the crime involved in this case warrants the imposition of the death penalty. (R 2939-2940).

If Mr. Ramirez received some spankings prior to the age of seven - a claim based only upon hearsay - this "mitigating evidence" was never linked to the crimes at bar and certainly did not suffice to overcome the aggravating factors - contested and uncontested - at bar. A mere tough youth is not a controlling factor. Sochor v. State, 580 So.2d 595 (Fla. 1991); King v. State, 555 So.2d 355 (Fla. 1990); Scull v. State, 533 So.2d 1137 (Fla. 1988); Valle v. State, 581 So.2d 40 (Fla. 1990); Zeigler v. State, 580 So.2d 127 (Fla. 1991); Rogers v. State, 511 So.2d 526 (Fla. 1987) (no nexus between childhood trauma and crime).

The function of a trial judge, as actual sentencer, is to consider all mitigating evidence, not to mindlessly "believe" it. Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). Thus, the judge still has discretion to rule whether the evidence, "rebutted" or not, rises to the level of a "mitigating factor." Petit v. State, 591 So.2d 618 (Fla. 1992); Sireci v. State, 587 So.2d 450 (Fla. 1991); Campbell v. State, 571 So.2d 415 (Fla. 1990); Kight v. State, 512 So.2d 922 (Fla. 1987).

Mr. Ramirez' cited case of Campbell v. State, 571 So.2d 415 (Fla. 1990) states that trial judges must "find" mitigating factors that are established by the evidence, but it also states that the issue of whether the mitigating evidence rises to that level is a finding of fact that will not be reweighed on appeal, citing Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981).

The trial judge at bar acknowledged the minimal mitigation proffered by Ramirez, including some wholly unsubstantiated speculation about "substance use" or being "merely an accomplice." The judge simply found that this evidence did not mitigate the crime at bar and did not outweigh the HAC factor, the fact that Ramirez had a prior conviction for a violent felony (R 2937), the commission of this murder during a felony (R 2938), or the "avoid arrest" factor. (R 2938). These strong aggravating factors clearly render any "failure" to consider proposed mitigating factors harmless. Wickham v. State, 593 So.2d 191 (Fla. 1991); Cook v. State, 581 So.2d 141 (Fla. 1991).

The court was absolutely correct.

POINT X

THE APPELLANT IS NOT ENTITLED TO RELIEF ON HIS REMAINING CLAIMS

The Appellant's remaining three claims are disposed of as follows:

(A) The Caldwell Claim

Ramirez alleges that Caldwell v. Mississippi, 472 U.S. 320 (1985) was "violated" when the jury was correctly advised that it was not the final sentencer. Pursuant to §921.141, Fla. Stat., the jury is not the sentencer in Florida nor is it a "co-sentencer". It is merely advisory - a status only the Florida legislature can constitutionally change. There is no constitutional requirement of jury sentencing. Spaziano v. Florida, 468 U.S. 447 (1984). Indeed, the jury need not even report its findings in aggravation or mitigation. Hildwin v. Florida, 490 U.S. 638 (1989).

Since the jury is not the sentencer in Florida, Caldwell does not apply here. Provenzano v. State, 561 So.2d 541 (Fla. 1990); Foster v. Dugger, 518 So.2d 901 (Fla. 1987); Banda v. State, 536 So.2d 221 (Fla. 1988); Cave v. State, 529 So.2d 293 (Fla. 1988).

Here, no defense objections to the "Caldwell" comments appear of record, thus precluding review in any event. Mitchell v. State, 527 So.2d 179 (Fla. 1988); Dugger v. Adams, 489 U.S. 401 (1989).

(B) References To "Other Offenses"

The Appellant alleges that the state elicited testimony from two rebuttal, penalty phase, witnesses about "other crimes" that somehow tainted the entire proceeding.

First, Ramirez accuses the state of eliciting testimony from Irma Botana that she prepared a "PSI" on Ramirez in 1984. That is incorrect. The truth is that the state asked Ms. Botana what she did for a living and she replied that she was a "pretrial services officer." (R 2427). Then the state asked:

> Q. Back in 1984 what were you doing for a living?
>
> A. I was a probation officer for the State of Florida, Department of Corrections. (R 2427).

Defense counsel objected, stating that the witness was testifying to a 1984 "PSI'. (Id.) The trial court disagreed that she had gone that far and overruled the defense (R 2429-31) but offered a curative instruction (R 2431-32) and told the jury not to infer or assume the existence of any prior convictions (Id.).

All the jury ever learned was that Ms. Botana investigated Ramirez.

When Mr. Papy testified to speaking to a juvenile officer in 1976, the defense objected anew (R 2440). The court overruled the objection since the jury knew that Ramirez' "adult" robbery conviction in 1976 began as a "juvenile" case and, Judge Sepe noted, Ramirez would have had some juvenile officer involvement in the felony case (R 2441). Thus, the jury was not led to believe there were "other convictions."

It is submitted that the trial judge was in the best position to assess the statements and their impact and, thus, his discretionary decision not to grant a mistrial should be upheld as long as it enjoys record support. See, Johnson, supra; Endress v. State, supra (abuse of discretion).

The cited case of Geralds v. State, 601 So.2d 1157 (Fla. 1992) is distinguishable because there the state, in violation of a court ruling, specifically asked, a witness about "prior felony convictions." That was not the situation in this case. Geralds, however, also says that "harmless error" can be considered. In the case at bar, the aggravating factors surrounding the death of Mrs. Owens were so overwhelming, and the so-called mitigating evidence was so trivial, that the implication of some "juvenile problems" cannot possibly have influenced the advisory jury and definitely did not play a part in the Court's actual findings in support of the death penalty. DiGuilio, supra; Rogers, supra.

(C) The Trial Court Did Not Improperly "Limit Argument" or Mis-Instruct The Advisory Jury

The Appellant contends that the trial court refused to allow him to argue that someone else was the "actual" killer or that he was merely an accomplice. He also contends that the Court erred in not instructing the jury on this as a mitigating factor.

First, Ramirez did argue the theory about a phantom accomplice to the advisory jury (R 2475). The State properly objected when Ramirez, in the penalty phase, began to expand this argument into a reargument of "guilt" (R 2475), and Ramirez' attorney acquiesced to the objection by the State and altered his argument (id). Thus, the issue was waived, if it ever existed.

Second, the "phantom partner" instruction was rejected without objection (R 2415), because there was no supporting evidence. The issue was, again, waived. In addition, however, we must not forget:

(1) The "other fingerprints" were the general latent prints found around the Federal Express Building that were never linked to this offense in even the most remote fashion.

(2) Only Ramirez' print was in blood, by the victim's body.

(3) The shoe print was not suitable for testing and there was no evidence at all that it was "too small" for Ramirez. The only person to ever say that was defense counsel, who was not a witness.

(4) Ramirez' defense had been alibi, not "I was there but someone else killed Mrs. Owens." Indeed, Ramirez called no witnesses and never testified to such a theory.

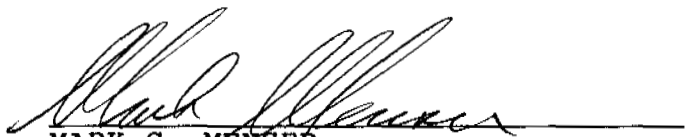
Ramirez' failure to preserve the record precludes review of this sub-issue. Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Clark v. State, 363 So.2d 331 (Fla. 1978). Nevertheless, Ramirez was not entitled to jury instructions on a claim for which there was virtually no record evidence. Maggard v. State, 399 So.2d 973 (Fla. 1981); Jones v. State, 612 So.2d 1370 (Fla. 1992) and his arguments regarding novel theories, phantom accomplices or other putative "mitigation" were adequately covered by the "catchall" instruction that the jury could consider any other fact, relating to the crime or the defendant, that mitigated the offense. Stewart v. State, 558 So.2d 416 (Fla. 1990).

CONCLUSION

Based on the foregoing arguments and authorities, the State respectfully requests that this Honorable Court affirm Appellant's .

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



MARK C. MENSER
Assistant Attorney General
Florida Bar No. 0239161

DEPARTMENT OF LEGAL AFFAIRS
The Capitol
Tallahassee, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. Richard L. Hersch, Esq., 2937 S.W. 27th Avenue, Suite 301, Coconut Grove, Florida, on this 25th day of March, 1994.

MARK C. MENSER
Assistant Attorney General