IN THE SUPREME COURT OF FLORIDA

CASE NO.: 78,386

JOSEPH JEROME RAMIREZ,

Appellant,

-vs-

THE STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT

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

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INTRODUCTION

This is a direct appeal by the Appellant, JOSEPH JEROME RAMIREZ, from an adjudication of guilt and sentence of death entered following a jury trial before the Honorable Alfonso Sepe, Circuit Judge, Eleventh Judicial Circuit, Dade County, Florida.

Citations to the record are abbreviated as follows:

R. - Record on Appeal

SR - Supplemental Record on Appeal

SSR - Second Supplemental Record[1]

The Appellant will be refered to in the body of this brief as Joseph Ramirez or as Appellant. The State of Florida will be refered to as the State.

STATEMENT OF THE CASE AND FACTS

A. STATEMENT OF THE CASE

An indictment was returned on January 13, 1994, charging Joseph Ramirez with First-Degree Murder, Armed Robbery and Armed Burglary. R. 2578-80. This case was originally tried in November, 1984 resulting in the conviction of the Appellant and a sentence of death.

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[1] Contemporaneous with this Brief a motion for supplementation of the record with Appellant's motion to suppress, transcript of proceedings addressing the motion to suppress, and the first trial court's findings in regard to sentence are submitted.

Further, a review of volume IX of the record, R.1372-1560, as it exists in the Office of the Clerk, Florida Supreme Court, reveals the absence of five (5) pages from the transcript. (Pages 51-55 as numbered in the upper right hand corner of the page.) Appellant will refer to the transcript as provided in the Amended Index and submits the missing five pages in the second supplemental record.

This court reversed Appellant's conviction and sentence due to the improper admission of evidence identifying a knife found in Appellant's car as the specific knife that caused the wound to the victim. ***Ramirez v. State***, 542 So.2d 352 (Fla. 1989).

Upon remand, the State filed a motion to admit knife mark evidence. R. 2628-30. A hearing was held on that motion on January 31, 1991, R. 1-145, and the trial court determined this evidence to be admissible. Appellant sought a writ of mandamus directing the trial court to allow Appellant to present evidence bearing upon the admissibility of the knife mark evidence. R. 2728-30. A ruling on the petition[2] was not received prior to commencement of trial. R. 150.

Jury selection commenced on February 4, 1991, R. 154, and trial on the guilt phase concluded with the finding of guilty on all counts on March 5, 1991. R. 2895-97. Penalty proceedings commenced on March 21, 1991, R. 2290, and the jury returned a unanimous recommendation of death the following day. R. 2489. Additional hearings on sentencing were held on May 16, 1991, R. 2503-32, and the trial court subsequently sentenced the Appellant to death on the First-Degree Murder charge on May 29, 1991. R. 2937-40. Appellant received consecutive life sentences on the Armed Robbery and the Armed Burglary charges. R. 2944-46. The instant appeal followed.

FACTS[3]

Some time after 10:00 p.m. on December 24, 1983, Mary Jane Quinn drove to work at the Federal Express Office. R. 779. The facility, located off of 78th Avenue in the warehouse

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[2] This application was entitled "writ of mandamus" rather than as a petition seeking such a writ, R. 2728, and appears to have been filed in the Third District Court of Appeal, R. 150.

[3] Facts pertinent to the individual issues are more fully explored within the body of this Brief.

area near Miami International Airport, R. 820; 835, was just a 15 or 20 minute drive from her home. R. 779. Quinn, a 27 year old, 208 pound white female, R. 2604, had been a courier for Federal Express for a little over a year assigned to drive, on weekends, a tractor-trailer truck from Miami to Ft. Lauderdale. R. 779; R. 789-90. The tractor-trailer contained packages that had accumulated during the day and were to be dispatched to Memphis. ***Id.***

Early Christmas morning Quinn did not arrive home as expected. R. 780. Her husband called the office, sought information from other couriers and queried the authorities. R. 781. The discovery of Quinn's body was made Christmas morning by Mary Maguire, another courier. R. 802. Arriving at the building at 8:30 a.m. or 8:40 a.m. Maguire observed Quinn's car behind the locked gate inside the facility. R. 791; R. 2747 (photograph). Maguire unlocked the gate, R. 792, and entered through the garage/warehouse area into the office area until she observed the body. R. 795-802. She left the building and called the police. R. 802. She noticed that the lights were off in most of the offices, R. 816, and she did not touch anything before she left. R. 816.

The first officer on the scene was Sgt. George Johnson who arrived at 8:30 a.m. to 8:45 a.m. R. 821. He observed the south gate open and a private car parked on the south side of the building. R. 821. He entered the building through the unlocked front doors and upon going around the counter into the hallway observed the body. R. 823. There was a lot of blood and the body appeared to have been there for awhile. ***Id.*** He left the building touching only the front door going in. R. 824.

Dorothy Ballard was the crime scene officer who reported to the Federal Express Building. She described the scene as a one story building facing east. The south side has seven

roll type doors and a regular metal door. R. 838; R. 2747. The first roll type door was open about 9 1/2 inches. R. 839.[4] Ballard observed no forced entry and she noted a public phone located outside the front door to the south. R. 854-5. She also noted and collected a drink can and styrofoam cup from the area around the phone as well as a napkin which appeared to be from the Federal Express bathrooms and also appeared to have blood on it. R. 855-7.

There appeared to be blood on the inside of the front door. R. 858. Inside the front area runs a counter, chest high, running in a north to south direction interrupted only by weighing scales similar to the check-in counters at the airport. R. 861. To the south of the counter is a three foot wide passage way. ***Id.*** On the inside of the counter was some blood and on top of the counter a plastic letter B with blood on it. ***Id.***

Significantly, she observed a shoe print in apparent blood on the tile floor in a hallway that runs in a north, south axis. R. 863-4. The shoe print was not well photographed, R. 1234-5, but observed by other officers, R. 1082; 1234;1695. The shoe print, was never compared to those worn by Appellant, Joseph Ramirez. R. 1735-6. Through cross-examination it was suggested that the size of the print (size 8), R. 1080-1, was inconsistent with Ramirez's size (250-60 pounds). R. 1096. Ramirez's Converse sneakers were seized by police officers, R. 1728, and analyzed for the presence of blood with negative results. R. 1790. It has remained an open question as to who caused this bloody shoe print to be placed on the tile floor, R. 2062-3.

In the main office area Ballard observed a small amount of blood on the carpet, R. 866, and a desk that appeared to have dent or pry marks on it. R. 868-9. She observed one chair

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[4] Exhibits 2 and 5, diagrams of the building, are not included within the record but are referred to extensively by Ballard. Some detail is available from photographs, copies of which appear in the record at R. 2748-67.

overturned and a large amount of blood in that area, R. 875, a telephone off the hook, R. 876, a computer with a screen and keyboard that had been handled with bloody fingers. R. 876-7.

The victim was found in a prone position near the doorway to the hall, R. 877, the surrounding carpet revealing a large amount of blood and on the east wall above the victim, cast-off blood splatters. R. 878. She observed a partial patent bloody fingerprint 3 foot 9 inches above the floor on the door jam above the victim. This fingerprint was photographed and the wall section eventually cut out and forwarded to ID and Serology. R. 879.

Collected from the scene were ninety-two (92) latent fingerprints, R. 1461, but only seven (7) were of value. R. 1464. These seven came from the inside surface of the front door, the lobby area, two from the outside phone booth area, one from the ladies bathroom door and the dispatch offices. R. 1465. Although, 126 people were working at the Federal Express building during that time, comparison technician, William Miller, received only sixty-three (63) sets of standard prints to compare. R. 1476. None of the ***latent*** prints submitted from the scene matched those of Joseph Ramirez. Miller received standard prints of some of the cleaning crew, but not all of them. R. 1478.

The ***patent*** print from the doorjamb revealed only about 10% of a fingerprint. R. 1480. Although this makes it difficult to match and although there are some 500 potential points of comparison, Miller was able to find 10 points of comparison with the standards of Joseph Ramirez, sufficient for him to render the opinion that this print matched those of Joseph Ramirez'. R. 1481-2.

Dorothy Ballard observed the victim to be lying face down in the hallway dressed in navy pants, shirt, jacket, shoes and socks. R. 889. She observed multiple stab wounds and a large

amount of trauma to the head. The victim still wore her watch and ring. R. 894. Her left hand was closed and held several hairs. R. 894. Her right arm was bent beneath her, palm down and another hair was discovered on top of that hand. R. 895. All of these hairs were submitted to serology, R. 895, and all were found to be inconsistent with Negroid hair, the Appellant's hair type. R. 1804.[5]

Ballard described pieces of broken plastic found around the scene that were consistent with a large fax machine missing from the office. R. 942; R. 944-5; R. 949; R. 954; R. 957-8; R. 1087; R. 1088. This machine weighed 67 pounds, R. 1104, the inference being draw that Quinn's assailant used the fax machine as a blunt instrument. Officer Gerald Zito was tendered as an expert in blood splatter crime scene reconstruction over the objection of the defense. R.1185-91. He believed that the impact to Quin's head took place near the doorway to the dispatch office. R. 1224-5.

Inside the office area Ballard also examined the rest room, discovering two steak knives in the ladies room, R. 982-3, and cold water running from the hot water tap in that area. R. 1017. A check for fingerprints in that area was negative. R. 884-5. By the exit door to the warehouse Ballard found the keys to the closest truck missing. R. 885-6. Plywood areas within that vehicle appeared to have been pried open. R. 886-8.

Associate Medical Examiner, Gwen Hardeman, testified that she was able to match an identical fax machine to the wounds on Quinn's head. R. 1596-1601. She testified to a

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[5] Although Serologist Theresa Merritt, stated that random hair is common in carpet, R. 1804, she found none in the carpet samples presented to her from the scene. R. 1822. Ballard saw no other hair in the carpet in the area of the victim. R. 1005.

minimum number of three blows to the head causing skull fractures to the front and back of the head as well as internal injuries to the organs of the chest. R. 1591;1616. She further found a total of twelve (12) puncture wounds to the body, one on the hand, one on the right chest and 10 on the back. R. 1612. She believed that the victim was alive at the time of these stab wounds, but cannot tell if they occurred before or after the blunt trauma. R. 1627. She referred to one wound on the hand as a defensive wound. R. 1600. She believes that the knife used was single edged, R. 1618, consistent with the one seized from Ramirez's car, R. 1623, and she rendered the opinion that the cause of death was multiple stab wounds, blunt injury to the head and resultant internal injuries. R. 1616.

Frank Dolan, the station manager for this Federal Express office on Christmas, 1983, was called as a witness by the State. R. 1090. He was responsible for all operations, customer service, pick-up, delivery and transport to Ft. Lauderdale. R. 1091. He was also in charge of hiring personnel. R. 1091. On Christmas Day 1983 he received a call about the break-in and murder and went down to the station. He learned that a mail bag and a fax machine was missing. R. 1094-5. He testified that the typical departure for a courier like Quinn would be 8:15 p.m. However, during the weekend it became 11:00 p.m. or 11:30 p.m. R. 1098. He identified the desk that had been damaged as belonging to Daisy Rodriguez. R. 1108. Daisy Rodriguez was identified as an individual who sold jewelry from her desk and kept jewelry in her desk drawer. R. 1268-9. The mail bag was believed to contain $430.00, which was not an unusual amount of money for them to take in during the day. R. 1273; 1282. Further, it was not unusual for the mail bag to be left unlocked and not in the safe. R. 1273.

Dolan testified that Appellant, Joseph Ramirez, worked for a janitorial service that cleaned the area. He knew him as a black man, 6 foot, 250 to 260 pounds. R. 1096. He also knew that there were other janitors who work there but did not know their names or their size. R. 1118. He further stated that it was policy to exclude the janitors from the building unless Federal Express personnel were there. R. 1099. Dolan indicated that Quinn would have had a key to the building that would have opened the outer doors north and south and the double doors on the east of the building. R. 1107. He remembered that Quinn had lost her keys at one point but he doesn't know when or if they were found. The locks were not changed after she lost her keys. R. 1120-1.

The State called Marcellis Gaines, who was operations manager on Christmas 1983 for Federal Express. R. 1284. He identified the Appellant, Joseph Ramirez, in court. R. 1287. Gaines testified that when he left the Federal Express building at 8:05 p.m. on Christmas Eve no one was left in the building. R. 1289. He also recalled that Mary Jane Quinn had lost her keys but placed this loss on December 17, 1983. He believed that on that date Ramirez and other janitors stayed in the building after him to do stripping and waxing of the floors. He believed that they stayed with their supervisor. R. 1289-90. He did verify that Lynn Hall was the supervisor and was supposed to be there, R. 1308, and testified that he had run into at least one other gentleman who worked as a janitor. R. 1310. He verified that Mary Jane Quinn had been given another set of keys and had them copied, but he doesn't know if anyone else knew that she had lost her keys.

Gaines further testified that Ramirez was talkative on the afternoon of December 24, 1983 asking about the amount of packages coming through the facility. R. 1300. He also recalled

Ramirez mention that the keys used the prior week during the waxing of the floors did not fit the warehouse area. R. 1301. These doors, according to Gaines, were never locked. ***Id.*** Gaines let Ramirez out of the building at 7:00 p.m. and locked the doors when he left. R. 1294.

On the 27th of December, 1983, Gaines received a call from the Appellant at the Federal Express Office. R. 1303-4. Ramirez had told him that he had heard that someone had been hurt at Federal Express. Gaines reported to him that someone had been killed at the building. R. 1305. Prior to this telephone conversation Gaines did not know the police were talking to Ramirez.[6]

On December 27, 1983 arrangements were made for Joseph Ramirez to come to the homicide office ostensibly to provide elimination finger prints and to inform the officers of the areas that he had cleaned on December 24, 1983. R. 1332. Detective Stephan Parr spent 2 1/2 hours with him and took a taped statement. R. 1332-33. At that time Joseph Ramirez informed him that he worked for LRH Janitorial Service, cleaning Federal Express, West Garden Village, Los Berise and Carmel. R. 1337-38. He had worked for them for two months and his immediate supervisor was Lynn Hall. R. 1338. His normal hours at the Federal Express Office were from 8:30 p.m. to 10:00 p.m., Mondays through Fridays, and on Saturdays, 1:00 p.m. to 3:00 p.m. His helpers name was Johnny Britten, who had assisted him in stripping and waxing the floors at the building. R. 1339-40. He provided Britten's telephone number and address.

Ramirez indicated that he had been present on December 24, 1993 in the Federal Express building and that other people were present when he cleaned. R. 1340-41. It was still business

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[6] Oddly, one of Quinn's co-workers, Mary Maguire, reported that on that Tuesday, it was the Appellant Joseph Ramirez who first remarked that the fax machine was missing. R. 809. However, this statement is inconsistent with Gaine's report of Ramirez calling the office.

hours when he started cleaning first the front part of the building and then the rest. He cleaned the glass doors, the counter tops and swept the floors. R. 1343. He emptied all the trash cans and wiped off the tops of the desks and the faces of the drawers. R. 1344. He also reported vacuuming the carpets. R. 1344. He explained to the officers the procedure he used in cleaning the bathrooms and soap dispensers and he reported that he did not see a Miami Herald newspaper that was found intact in the womens bathroom. R. 1346-48.

Ramirez reported that he did not have any keys to the Federal Express building and that his supervisor has never given him the keys to the Federal Express building. He completed his job between 5:25 p.m. and 5:30 p.m. R. 1348. He arrived home at 6:00 p.m., where he lives with his girlfriend, Delores Douglas. R. 1350-51. He remained there until 9:00 p.m. when he went to get something for her to eat. He returned 15 minutes after that. R. 1351. He later left and went to Johnny Britten's house to have a few beers at about 9:30 p.m. R. 1351-52. He stayed at the Britten's house until approximately 11:00 p.m. to 11:30 p.m. and then left there, got a beer on the way home and arrived home between 11:55 p.m. and midnight. R. 1352. He remained home for the rest of the night. R. 1352.

He denied knowing Mary Jane Quinn or recalling a "heavy set white female with red hair, approximately 27 years old". R. 1353. At that time hair samples and elimination fingerprints were provided by Joseph Ramirez. Parr also learned that the Appellant drove a 1983 Renault. After taking this statement Parr responded to the residence of the Britten's family to inquire about Mr. Ramirez. R. 1355-56.

Dolly Britten testified at trial and was called by the State. R. 1487. She recalled that Joseph Ramirez came to her house on Christmas Eve between 8:30 p.m. and 9:30 p.m., everyone

was playing cards in the dining room. R. 1490. That evening Joseph Ramirez was wearing a blue sweater with a fox emblem and she believes he left between 10:30 p.m. and 11:00 p.m. that evening. R. 1493-4. She recalls that Jerome Longstreet, her grandson, had worked at Federal Express with Joseph Ramirez as had Johnny Britten. That evening everyone was drinking beer and whiskey and smoked some reefer. R. 1491; R. 1507.

Delores Douglas was called as a witness by the State, R. 1838, and testified that she had lived with Joseph Ramirez for approximately a year and a half at the time of Christmas, 1983. R. 1839. On Christmas Eve she saw him with her two children when she returned in the late afternoon. R. 1840. She reported Joseph Ramirez left to go to the Burger King about 8:15 p.m. or 8:30 p.m. and was gone about 20 minutes. R. 1841. He left at approximately 9:30 p.m. wearing a white t-shirt and long sleeved blue pullover. She recalled either an alligator or a fox on the shirt. R. 1842-3. She further recalled that he wore high-top tennis shoes and blue sweatpants. She does not recall when he returned that night because she did not have on her glasses and was unable to read her clock. R. 1843-4.

The following day she drove the Renault to South Dade to visit her father and noticed nothing unusual about the interior or the trunk. R. 1845-6. She recalls that she has kept a knife inside the car for as long as she can remember but between Christmas Eve and Joseph Ramirez' arrest she saw the knife in the sink. R. 1846. She testified that Ramirez washed the car between Christmas Day and the day he was arrested. Id. Upon examining exhibit 96, the knife, it was remarked that the knife appeared to be bent but she indicated that it had been bent for a long time before it was placed in the car. R. 1847. She further reported that her blood type is O and

her daughters are A and O respectively, R. 1851. She did not recall anyone having bled on the piece of lining taken from the trunk of her car. R. 1852.

She had never seen Joseph Ramirez in possession of the keys to the Federal Express building, R. 1855, and on Christmas when he returned, he left his clothes at the foot of the bed and she doesn't remember them to be soggy or bloody. R. 1860. Further, she didn't observe any cuts on his hands or face or any bruises or scratches or signs of a struggle. R. 1860-61. He didn't see the clothes he was wearing go into the wash the next day. R. 1861. Further, she washed and used the knife from the vehicle on Christmas Day or the day after and didn't see any blood on it. The knife was in the house but only during the time that Ramirez was cleaning the car and when he asked for something to cut string with, her daughter brought him that particular knife. R. 1863-4.

After meeting with the Brittens on December 27, 1983, Detective Parr proceeded to Joseph Ramirez' house, ostensibly to speak with Delores Douglas. R. 1358. Joseph Ramirez was irritated by their presence there and asked them to leave. ***Id.*** Ramirez further asked "what it would take to show [to Detective Parr] that he was not involved in this ladies death". At that time Parr asked him for the sweater he was wearing on December 24, 1983. ***Id.*** Ramirez attempted to find the sweater in the house and came back and said that it was at the cleaners. R. 1359. The Detective followed this up by searching for the Alvarez Cleaners located at 183rd Street and 27th Avenue the following day, but found none. He did go to a cleaning establishment there and was informed that there was no sweater under the name of Ramirez. R. 1359.

On December 28, 1983 he received a call from Joseph Ramirez at the homicide office at about 6:00 p.m. R. 1361. Ramirez informed him that he had found the sweater and they arranged to meet at the Federal Express building at 9:30 p.m. R. 1361-62. At that time Parr knew that the fingerprint on the doorjamb had been identified as Ramirez's fingerprint. R. 1362. Consequently, an arrest warrant had been issued and the police went to the Federal Express building at 9:30 p.m. that evening in order to conduct an arrest. R. 1363-64. Parr testified that when they arrived at the Federal Express building Ramirez drove up in his brown Renault wearing a blue sweater. This sweater did not have any markings on it at all. R. 1365. Parr observed no cuts or scratches on Ramirez'z hands. R. 1366.

Testimony was later presented at trial that the sweater had been purchased earlier that day. The State established through witnesses that J.C. Penneys produces a sweater that has a fox on it, R. 1538-9, but that Burdines does not. Further, they presented the manager of the men's department at Burdines at Westland Mall, Angie Pearson, R. 1511, who examined the receipt found in the Appellant's pocket at the time of arrest. The salesman at the Burdines, Jorge Pena, was called as a witness and he recalled the actual sale on the 28th of December to Joseph Ramirez. R. 1526. He recalled talking with Ramirez about the Piaget watch that he was wearing, R. 1527-8, and identifies the watch sized from Ramirez as an imitation Piaget. R. 1534-5.[7] Pena as well, did not recall seeing any cuts or marks on Ramirez's hands. R. 1536.

At the time of arrest no officers drew guns nor was the Appellant ever violent or resistant. R. 1400. His only response was to say "you are crazy" twice. R. 1402. Ramirez had previously

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[7] It is only in this second trial that it is established that the watch that he purchased was not an expensive watch but an imitation copy.

provided the pants that he had been wearing on December 24th and his sneakers from that evening as well. R. 1414. Following his arrest on the evening of December 28, 1983 additional hair samples, blood and photographs were taken of and from the Appellant. R. 1542. By that time, 2:00 a.m., December 29, 1983, the Appellant was vocally and profanely protesting the investigation by the officers. R. 1544. The officer assigned to collect these materials further did not observe any marks or cuts on the hands of the Appellant, nor any scabbing or swelling of any fingers. R. 1551; 1557.[8]

Subsequent to his arrest a search of Ramirez' house disclosed no keys for the Federal Express building and the only thing taken from his house was a sneaker that had blood on it and a Timex watch which appeared to have blood on it. R. 1747.

Theresa Merritt, a serologist for Metro-Dade Police Dept., testified for the State. She established that the victim, Mary Jane Quinn, had O blood which would result in the finding of the H antigen. R. 1779. She further determined that Ramirez has type B blood but is also a "secretor", and consequently, she would expect to find antigens B and H in his blood or in any of his bodily fluids. R. 1780. She identified the blood on the paper towels which were exhibit 46, 47 and 48 as a particular blood group O, the blood of Mary Jane Quinn. Further, she found blood consistent with blood group O on the counter in the front office. R. 1783. She examined blood which had been taken from a piece of rubber from the Renault automobile. R. 1788-89. However, because of the small amount of blood found in the auto, she was only able to render

[8] The absence of cuts on Ramirez's hands was presented by the Appellant as evidence that in fact that he had not committed a stabbing because often cuts are found on an assailants hands when there is slippage. R. 1753

the opinion that the blood was consistent with both the victim's and the Appellant's blood type. R. 1789.

Further, she examined a pair of sneakers (provided by Joseph Ramirez) and did not find any blood on them and looked at several other items of clothing (which were seized Ramirez) and found no blood on those as well. R. 1790. She examined a Piaget watch and found no blood and she examined a Timex watch and found the presence of B and H antigens, consistent with Ramirez blood and his sweat. R. 1793-94.

This mixture of B and H on the Timex watch would also have been consistent with the blood of both the victim and Ramirez mixed together or the blood of the victim and the sweat or secretions of Ramirez. R. 1796. DNA testing would have been able to establish the origin of the fluids, between one person and another, but no testing was done at that time. R. 1797-99. She could not tell when the blood was put on the Timex watch. R. 1834-5. Further, she analyzed a pair of running pants for blood to see if they were stained and found that there was none. R. 1827.

Finally, she tested the fingerprint that was present on the door jam at the Federal Express building which had matched Ramirez's fingerprint. There was insufficient amount of blood for DNA testing. R. 1805-6. Again, she found the presence of the B and H antigens. Thus, the fingerprint stain could was consistent with Ramirez blood alone, R. 1808, or type O blood (the H antigen) and either type B blood, (Ramirez's) or any B secretor (H antigen). R. 1796; 1807.

The State also called several tool mark identification "experts" to the witness stand.[9]

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[9] The validity of knife comparison evidence is addressed in issue number 1 within.

William Conrad is a firearms and tool mark examiner for the commonwealth of Virginia. R. 1872. He examines bullets and trace evidence in firearms cases and tool mark examination. Tool mark evidence is present where any instrument which is used may leave impressions in soft surfaces, including knives. R. 1873. He had been doing this for 9 years at the western regional laboratory in Virginia. ***Id.*** His training began with the United States Army Crime Lab at Fort Gordon for 6 years and he did firearm and tool mark examination for the U.S. Marshall during that period of time. He also taught at Fort Gordon for two years. R. 1874. Although he had been given training in the manufacturing process of tools he had never visited any factories in that field. He holds an Associates degree in General Studies and had taught at several institutes and colleges in firearms. R. 1875-6. He is a member of the Association of Firearms and Tool Marks Examiners. By virtue of having been screened by judges and attorneys and other familiar with his work and 3 years of 100% of firearm and tool mark identification work. He has been a member since 1977. R. 1876-77. He has been accepted as an expert 200 times in Virginia in the field of firearms and tool mark identification. R. 1878.

He has received a knife to be examined along with body parts for comparison purposes 10 times. R. 1879. He has been able to make a comparison only 1 time. R. 1882. Although it is his belief that knife mark comparison is an accepted science in the scientific community, R. 1884, only qualified tool mark examiners can see the differences through the microscope. R. 1885. He testified that there is no specific number of lines or tests that is used when a comparison is made but is exclusively on the ability of the examiner to see what he is looking for. R. 1890. He does not check other knives to make sure that he is right. Although photographs may be taken of what appears in the comparison microscope, it would be difficult

to explain in court what he is looking at. R. 1892. He further indicated that there is no set number of striations to line up for a comparison and that not every tool mark examiner has the ability to make a comparison between the knife and the medium. R. 1907.

The next witness was Robert Hart, who has a Bachelors Degree in Science plus 2 years of undergraduate work in Physical Science at the University of Miami. His job is to examine firearms and firearm related evidence for the Metro-Dade Police Dept. He is a member of the Association of Firearms and Tool Mark Examiners and a distinguished member of the Society of American Academy of Forensic Sciences. R. 1913. He has taught at the Metropolitan Police Institute in Dade County and the South Florida Institute of Law Enforcement in St. Petersburg. He has presented an article on knife in human cartilage along with Dr. Valerie Rao of the Medical Examiners Office from Dade County, Florida. R. 1914-5. He has testified on firearms and tool mark identification 300 times, R. 1915, but other than the instant case has never testified about knife mark identification in court. R. 1917.

He tested the knife that was found in the vehicle of the Appellants, Joseph Ramirez. He made standards of a stab mark by the knife in Dip Pak using a straight angle and a slight angle. R. 1994. Then he took a secondary cast of that mark. During his testimony the article that he authored with Dr. Rao was introduced as evidence over the Appellant's objection. R. 1943. After making comparison cast from the cartilage taken from Mary Quinn's body, R. 1948, he rendered the opinion, over objection, that the wounds made to Mary Jane Quinn's chest was made by Exhibit 96, that night to the exclusion of all other knives in the world. R. 1948-9. He did not test any other knives. R. 1949. He did not test the whole knife, nor does he know how far the knife traveled into the cartilage. R. 1959. He does not know whether Dr. Harleman, the

Medical Examiner probed the wound during the autopsy. R. 1961-62. He could have taken photos of what he observed in the comparison microscope but did not. He made this identification and we have only his word to trust on that. R. 1965.

Robert Hart does not quantify the points of similarity when he is looking at them. And it doesn't matter how many of the lines match up. R. 1967-8. He cannot quantify the number of lines which match up but only that he determines "in his mind" that there is sufficient similarity. ***Id.***

The State also called Lonnie Harden from the Department of Forensic Sciences for the State of Alabama. R. 1975. He is one of 26 graduates from the United States Army Fort Gordon School of Tool Mark Identification. He has never testified in Florida. R. 1982. He testified that if he had photographed the comparisons he observed under the microscope he does not think that a jury would be able to understand the photographs. R. 1988. Further, it is possible by changing the light to make something look like a positive comparison when it is not. ***Id.*** He rendered the conclusion as well that Exhibit 96, the knife, caused the stab wound in Mary Jane Quinns body. R. 1994. He did not do the casting himself, nor did he observe the casting process. R. 1996-97.

Following the testimony of the knife comparison experts, the State rested. Ramirez presented no testimony. R. 2005. Ramirez rested without presenting any testimony or evidence. R. 2017. On March 5, the jury returned a verdict of guilty as charged on First-Degree Murder on Count I, guilty of Armed Robbery in Count II, and guilty of Armed Burglary in Count II, all as charged. R. 2275-76.

The penalty phase of the trial commenced on March 21, 1991. The State presented the testimony of Dr. Charles Wetli, the Deputy Chief Medical Examiner for Dade County, Florida. R. 2323. Wetli was called to testify about the pain and suffering suffered by Mary Jane Quinn. R. 2328.[10] Wetli believes that the victim was alive when all the wounds were inflicted but he cannot tell whether the stab wounds occurred prior to the blows to the head or after. R. 2332.

The State also called Luis White, who had been the victim of a crime committed by Joseph Ramirez in May of 1976. R. 2364-65. In May of 1976 Ramirez stole $140.00 at knife point from White. Since Ramirez went to school with White's son, it was easy for the police to catch him the next day. R. 2366-67. He was no longer able to identify Ramirez. R. 2367. He got his money back and he does not recall there having been a trial. R. 2369.

The State called Sgt. John Kelly from the Tampa Police Dept., R. 2370, who on May 3, 1976 arrested a 16 year old named Joseph Ramirez. R. 2372. Ramirez received 10 years in the State Penitentiary.

The State called Detective Saladrigas, the homicide investigator in the instant case. R. 2375. He testified that the instant case there did not appear to be a robbery of the victim and did not appear to be a sexual assault. R. 2376-77.

The defense called, in the penalty phase, Marie Davis, the grandmother of Joseph Ramirez. R. 2381. She lives in Tampa at 4625 N. 38th Street. She reported that Ramirez had lived with his mother and father, until age seven, when he went to live with his aunt due to

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[10] Wetli's testimony is discussed extensively in issue number 5 and is believed by the Appellant, Joseph Ramirez to have been highly improper.

physical abuse by his father. R. 2383. She professed her continued love and concern for Joseph Ramirez. R. 2384.

The defense also called Elsie Johnson, Joseph Ramirez' aunt. She took Joseph from the house when he was six or seven years old due to beatings by his father. R. 2388. Ramirez lived with her for three or four years. R. 2390. She continued to visit Ramirez after he was incarcerated in 1984 in both Dade County and at Starke, Florida. R. 2391.

Estelle Collins, Ramirez's aunt, was called as well. She reports having observed Ramirez being beaten with an "iron cart" by his father when he was seven or eight years old. R. 2394-95. She also reports having observed the sexual abuse of Joseph Ramirez by a neighbor at a very young age. R. 2396-97. Both Collins and Johnson reported their continued concern and love for Joseph Ramirez.

The State followed these witnesses with the probation officers who conducted the PSI reports of Ramirez after his 1976 and 1984 convictions. R. 2427; R. 2438. Neither of these PSI investigators learned of any sexual abuse. R. 2435; R. 2445. One presentence investigator stated that he had never learned of any abuse by Appellant's father. R. 2445. However, that presentence investigator failed to ask Joseph Ramirez if he had been beaten or abused or his aunt. Further, he had not looked at any hospital records nor did he even have an independent recollection of having ever spoken with the aunt who raised Ramirez for four years, Elsie Johnson. R. 2446-47.

The jury was instructed on March 22, 1991 and returned a recommendation of death on that date. R. 2489. The instant appeal followed.

SUMMARY OF ARGUMENT

1. The trial court failed to understand this court's opinion in ***Ramirez v. State***, 542 So.2d 352 (1989), requiring a ***Frye*** hearing on the admission of new scientific evidence regarding knife mark comparisons. The trial court failed to allow the Appellant an opportunity to present any evidence on the issue of scientific reliability. The State failed to make an adequate showing of scientific reliability. The introduction of the knife mark evidence was held to be harmful error in ***Ramirez***, ***supra***, and the evidence presented against the Appellant was less than in the first trial. Reversal is required.

2. Over the Appellant's ***Neil*** objection, the trial court allowed the peremptory challenge of a black female juror. Appellant is a black male. The court failed to allow the Appellant an opportunity to argue the ***Neil*** challenge. The reason asserted by the State as race neutral was nonexistent and based upon unconstitutional questions.

3. The search of Appellant's vehicle on December 28, 1983 revealed a knife in the passenger compartment and a small amount of blood on the rubber portion of the trunk. Both of these items were admitted into evidence. The search warrant which authorized the search of this vehicle was based upon an affidavit which failed to allege a crime. The items seized during the search were not authorized for seizure under the warrant. The affidavit contained information from an anonymous informant without any showing of reliability. This warrant was therefore invalid and the evidence seized as a result thereof should have been suppressed.

4. Several other rulings during the course of the trial reveal error. First, the court erred in allowing the testimony of Officer Gerald Zito as an expert in crime scene reconstruction based

upon blood splatter. He had never testified as an expert on any previous occasion nor had he been a police officer for over 6 years. His initial qualifications were minimal and his expertise in the area was suspect. Second, the trial court allowed the introduction of a "learned treatise" as substantive evidence. Finally, the prosecutor commented extensively on the Appellant's exercise of his right to remain silent during closing argument.

5. In the penalty phase the trial court allowed the jury to consider and ultimately found as an aggravating factor that the homicide was committed for the purpose of avoiding or preventing a lawful arrest. The evidence presented, however, was clearly insufficient to allow consideration of this factor by the jury or the sentencing court. The jury should not have been instructed on this matter and the sentencing court should not have found this aggravating factor.

6. The trial court allowed the presentation of evidence through a medical examiner as to the aggravating factor of heinous, atrocious or cruel. Specifically, the trial court allowed Assistant Medical Examiner Charles Wetli, to testify as an "expert" on "pain and suffering." This characterization was a thin disguise of Wetli as an expert on the factor of heinous, atrocious or cruel. The record fails to reveal sufficient qualifications for him to be an expert in either area, the trial court failed to allow proper cross-examination of the medical examiner and Wetli injected highly prejudicial and irrelevant materials into the sentencing proceeding. Specifically, Wetli injected the spectre of sexual battery and torture, neither of which were present from the facts in the instant case. His testimony infected the entire proceeding.

7. The aggravating factor of heinous, atrocious or cruel was not proven beyond a reasonable doubt and should not have been considered by the jury or the trial court. There was absolutely no evidence that the Appellant intended to torture, or desired to cause pain beyond that

which was necessary to effect the murder in this case. Recent pronouncements of this court require that there be such an intent or desire before a finding of heinous, atrocious or cruel is proper. The facts present in this case are consistent with the assailant attempting to effect the death of the victim as quickly as possible and the victim being strong and resistant. There is absent from the record any evidence of torture, or the infliction of pain simply for the purpose of causing pain. As such, the aggravating factor of heinous, atrocious or cruel was not proven beyond a reasonable doubt and should not have sent to the jury or considered by the sentencing court. That the trial court relied on this factor is error.

8. The jury on the aggravating factor of heinous, atrocious or cruel was unconstitutionally vague in that it failed to give sufficient guidance to the finder of fact in this cause.

9. The trial court failed to consider and weigh all mitigating circumstances by rejecting facts which were proven by the Appellant. The Appellant presented evidence of his physical abuse by his father and sexual abuse by a neighbor. He presented evidence of continued family ties and support and that he had consumed marijuana and alcohol within two hours of the murder. All of these have been recognized as mitigating factors. The trial court recognized their existence but failed to give them any weight in his sentencing determination. This was error and a new sentencing is required.

10. Other errors which occurred in the sentencing proceeding are as follows: (A) The trial court's instructions led them to believe that they bore nor responsibility for the Appellant's death. ***Caldwell v. Mississippi***, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). (B) Reference was made during the sentencing proceeding to other offenses committed by the Appellant. (C) The evidence indicated the presence of fingerprints and a bloody shoe print at

the scene of the crime that did not match the Appellant's and was indicative of a second perpetrator of the offense. The Appellant sought to argue his minor participation pursuant to Fla. St. 921.141(6)(d). and was precluded by the trial court. This was error.

ARGUMENT

I.

THE TRIAL COURT ERRED IN ADMITTING KNIFE MARK COMPARISON EVIDENCE

In ***Ramirez v. State***, 542 So.2d 352 (Fla. 1989), this Court reversed the instant Appellant's conviction because the trial court had allowed a technician to identify the knife seized from the Appellant's vehicle as the one that had made marks on the cartilage of the victim. This Court found that the issue requiring reversal was not the qualification of the witness, but the "reliability of testing methods which formed the basis of the witness's conclusion." ***Id.*** at 355. This Court pointed out that it:

> will accept new scientific methods of establishing evidentiary facts only after proper predicate has first established the reliability of the new scientific method. Clearly, in the instant case, insufficient evidence exists to establish the requisite predicate for the technician's positive identification of the knife as the murder weapon.

Id. at 355. On retrial, the State sought a pre-trial determination as to the admissibility of the comparison evidence and presented additional witnesses on the subject. *See generally* R. 1-145; 2528-30. However, the trial court failed to comprehend the nature of the inquiry to be made and acted under an incorrect standard of law. Further, the trial court failed to allow the presentation of evidence by the Appellant which would have shown a lack of scientific reliability in the methods used by the State's witness. Finally, the State failed to satisfy the requirements of scientific reliability.

A. THE TRIAL COURT FAILED TO CONDUCT A FULL HEARING

This Court has recognized that the admission of testimony from an expert is uniquely within the discretion of the trial court. ***Ramirez v. State***, 542 So.2d 352, 355 (Fla. 1989); ***Johnson v. State***, 393 So.2d 1069, 1072 (Fla. 1980) *cert. denied.* 454 U.S. 882, 102 S.Ct. 364, 70 L.Ed.2d 191 (1981); ***Endress v. State***, 462 So.2d 872, 873 (Fla. 2d DCA 1985). This discretion will be disregarded if it has been abused. ***Town of Palm Beach v. Palm Beach County***, 460 So.2d 879, 882 (Fla. 1984); ***Johnson v. State***, *Supra*; ***Buchman v. Seaboard Coastline Railroad***, 381 So.2d 229 (Fla. 1980). In this case, this Court gave specific guidance as to the deficiencies in the State's presentation in the first case. The trial court failed to completely understand this Court's directions and refused to allow the Appellant the opportunity to present testimony as to the predicate issue of scientific reliability.

The State sought to present testimony that the knife found in the Appellant's vehicle was the exact knife - to the exclusion of all other knives in the world - to have caused a cut in the cartilage of Mary Jane Quinn.[11] This type of knife mark comparison evidence has been addressed in only one other reported decision in the country. ***State v. Churchill***, 231 Kansas 408, 646 P.2d 1049 (1982)[12]. However, this Court rejected ***Churchill*** finding that no predicate of

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[11] This Court had no problem with the admissibility of the knife itself, as it could have caused the wound, based upon the testimony of the medical examiner and that there was other evidence linking the knife to the Appellant. 542 So.2d 355.

[12] It appears that this Court's opinion in ***Ramirez*** and the ***Churchill*** opinion continue to be the only cases where evidence that a particular knife has made a specific wound has been addressed at the appellate level. *See* Thomas M. Fleming, Annotation, *Admissibility of Expert Opinion Stating Whether a Particular Knife Was, or Could Have Been, the Weapon Used in a Crime*, 83 A.L.R. 4th 660 (1991).

scientific reliability was presented there. This Court stated:

> The qualification of the witness is not, however, the primary issue in this case. Rather, the real issue is the reliability of testing methods which form the basis of the witness's conclusion.

Ramirez, 542 So.2d at 355. To that end, the State presented, pretrial, the same technician who testified in the first trial, Robert Hart, and two other technicians, Lonnie Harden and William Conrad. The testimony of the additional witnesses was similar to Hart and virtually the same as that presented in 1984 and which this Court found inadequate.

Significantly, the Appellant sought to introduce testimony from their own witness which would have disputed any showing of scientific reliability. Specifically, Appellant's counsel proffered his evidence and was rebuffed:

Mr. Chavies: What we are doing, Judge, is we are challenging Mr. Hart's testing methods. We are saying he didn't do it correctly.
We have a witness who is going to say he didn't test it correctly, that he should have tested other knives in order to make his comparison accurate. Then, he ought to have taken that same knife and tested it into the cartilage to see if he got the same markings in the cartilage.
So, if it is not scientifically proper, then the predicate can't be laid.

The Court: Not so.

Mr. Chavies: And your results cannot be laid.

The Court: I don't agree with that you can bring that out in your trial, that is your show.

R. 138. Further examination of the record shows the trial courts misunderstanding of the procedure to be followed:

The Court: Let's suppose that we are at a trial.

Mr. Chavies: We are not, that makes a big difference.

The Court: We are doing this and you are doing it at the time of the trial. Now let's suppose we are in a trial. State goes to offer the knife. Okay, no predicate. All right. State says: Judge, let's excuse the jury and put on the predicate. They put on a predicate. They put what they want to put on for the predicate. Whatever they put on it's either the predicate, or it's not the predicate. ***It has nothing to do with any opposing evidence by the defense attorney.***

We do not have a mini-trial. We have a unilateral hearing outside the presence of the jury for the admission of the evidence, because all I rule on is its admissibility, not its weight. That will be left for the triers of fact, the jury, in this case. ***Now, I cannot comprehend what evidence the defense would have to offer that would be relevant to this issue.***

R. 129-30. Clearly, all that the trial court believed was necessary for the State to cross the threshold into admissibility was an additional witness or two. Consequently, in the proceedings below, the trial court simply took the Appellant and his evidence out of the equation. All the court deemed necessary were additional witnesses who testified to essentially the same thing.

That the trial court refused to conduct a full hearing is an abuse of discretion. Ordinarily, when scientific evidence is sought to be introduced, a court can take judicial notice that the scientific procedure has already been accepted by other courts. Consequently, a review of judicial notice procedures is instructive in this case. Fla. Stat. §90.204(1) provides, in pertinent part, that "the court shall afford each party reasonable opportunity to present information relevant to the propriety of taking judicial notice and to the nature of the matter noticed". Therefore, in ***Milton v. State***, 429 So.2d 804 (Fla. 4th DCA 1983), the State asked the trial court to take judicial notice of court records. The Fourth District noted that the trial court could take notice

of this type of record, however, the lower court was reversed because the Appellant was not afforded the opportunity provided by 90.204(1). *See also* ***United States Sugar Corporation v. Hayes***, 407 So.2d 1079 (Fla. 1st DCA 1982); ***Leffler v. Grand Union Company***, 409 So.2d 1145 (Fla. 1st DCA 1982); ***Rodriguez v. Phillip***, 413 So.2d 441 (Fla. 3d DCA 1982).

While a ***Frye***[13] analysis is not purely a statutory matter of judicial notice, it is clearly analogous to judicial notice. That the Appellant should be allowed an opportunity to present evidence contesting the scientific reliability of the techniques used by the State's expert is equally applicable in both situations. The trial court's refusal to allow the Appellant to introduce evidence in the pretrial hearing, evidence that was specifically relevant to the scientific reliability of the methods in question, was reversible error.

B. THE STATE FAILED TO MAKE AN ADEQUATE SHOWING OF SCIENTIFIC RELIABILITY

As noted earlier, knife mark comparison has been accepted in only one other reported decision, ***State v. Churchill***, 231 Kan. 408, 646 P.2d 1049 (Kan. 1982), and that court's reasoning has been rejected by this Court.[14] The methods used by the technician in this case

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[13] 293 F. 1013 (D.C. Cir. 1923).

[14] The State asserted in their written application below, R. 2628-30, that this type of evidence has been accepted in two additional courts, citing ***Stout v. Commonwealth***, 376 S.E.2d 288 (Va. 1989) and ***Potter v. State***, 416 So.2d 773 (Ala. Cr. App. 1982). R.2628-30. However, an examination of these cases finds that ***Stout*** did not address the validity of knife mark comparison, but rather, rose to the appellate court on a plea of guilty. No evidentiary issues were presented. 376 S.E.2d 291.

In ***Potter,*** the examination was of an ax blows, one to the neck of the victim and one to a piece of wood. The resultant chopping marks are consistent with the usual vertical instrument marks found in tool marks and firearm ballistics identification. They are not consistent with sawing or stabbing movements inherent in a knife mark comparison. Consequently, a knife mark comparison was not evaluated and ruled on in ***Potter.***

contained no standards by which to evaluate his comparison nor any verification procedure, and there exists a glaring lack of ability to reproduce or demonstrate the purported comparison. The findings of the technician below are completely subjective and totally unverifiable. Further, the alleged "acceptance" in the scientific community which was purported to exist by the State below resides exclusively with the technicians within the same limited community of knife mark examiners. The State did not satisfy the ***Frye*** standard.

Generally, a tool mark may be described as the impression or mark resulting from contact by an instrument or hard substance with a relatively softer medium. 1 AM. JUR. TRIAL §69 (1964); R. 30-1; R. 69-70. The contact of the two will leave an impression or striations in a softer medium. Ordinarily, a straight cutting motion such as a knife through cheese, a wire cutter through wire, the mark of a lug wrench on a lug nut or a bullet passing through the barrel of a gun provide proper medium for comparison. 1 AM. JUR TRIAL §69-75 (This article presents clear and vivid photographs of striation comparisons easily apparent to the lay eye. No such photographs were presented in the instant case.)

Knife mark comparisons differ from tool mark evidence in several ways. First, a bolt cutter cutting a piece of metal or a bullet passing through a barrel of a gun travel in only one direction and touch the harder medium at identifiable locations. See examples in 1 AM. JUR. TRIAL §70. However, a stab mark is necessarily different as it is inherently a sawing motion as the blade passes in and out of the medium rather than through the medium;

> A pocket knife leaves identifiable striations only if the knife passes straight through the object. This mark would be of no value if a sawing effect were used.

1 AM. JUR. TRIAL §75, p. 628. In the instant case, Technician Robert Hart testified that he was not able to tell which portion on the blade made the mark in the cartilage, R. 1939; 1959, nor did he know the angle of the knife when it entered the cartilage. R. 1956. The instant case does not involve a comparison of a specific portion of the knife to a specific wound, but rather, it involves an attempted recreation of a stab would of unknown depth and angle.

Second, knife mark comparisons are not comparisons of the instrument to the wound, but are comparisons of castings made by the technician. In this case, Hart stabbed a material called "Dip Pak" with the knife seized from the Defendant's vehicle and then made a "CoeFlex" cast from the area left vacant in the Dip Pak. R. 104. That casting was, consequently, two mediums removed from the knife. Hart then made CoeFlex castings of the cartilage. R. 104. Each casting causes a loss of detail R. 121; 1951; 1958. This procedure is not used in ballistics or other tool mark comparisons. R. 60-1; 125-6.

The most striking aspect of the comparison is the complete inability of the technician to objectively demonstrate his findings and the complete lack of objective verification present in his procedures. It is possible to photograph the images which are observed by the technician in the comparison microscope. R. 124; 1892; 1951; 1999. But each technician testified below that even were these photographs to be presented to the jury, the jury would be unable to see the similarities which only they as trained technicians could observe. R. 50-1; 87-8; 125; 1988; 1892; 1902-3; 1951; 1988; 2001. The jury simply has to "take the technician's word for it". R. 1999. Thus, although the jury could be presented with a comparison microscope photograph of the striations, ***the alleged similarities in striations would be invisible except to the technician.***

If the technician were comparing fingerprints, his photos would show the swirls, loops, and ridges that he compared and he could easily identify for a jury the points of comparison. *See generally*, 36 AM. JUR. Proof of Facts 2d. 285-334 (1983). A chemist analyzing an unknown solution with gas chromatography will compare known graphs and peaks with the those revealed by the instrument and the tested material. These graphs are often provided to defense counsel in discovery in drug prosecutions. Even polygraph technicians have several objective scoring methods by which they evaluate the charted physiological responses of their subject. The instant knife mark comparison methods produce nothing of a verifiable nature. ***We are told simply to take the technician's word for it.*** R. 1999.

The technician does not even record purported matching points of comparison. Traditionally, a fingerprint technician will identify and record 8 to 12 points of similarity before rendering an opinion that the comparison standard matches the latent print. 36 AM. JUR. Proof of Facts 2d, 297-8 (1983). Here, the knife mark technician does not utilize a comparison point system. R. 87-8; R. 123; R. 1890; R. 1936; R. 1967. Nor does the technician count the number of striations that he believes match. R. 87-8; R. 124; R. 1907; R. 1967; R. 2000. Even though a change in the lighting of the comparison microscope can produce a false positive comparison, R. 1988, the technician below refers us to only their subjective opinions that they have observed a match unverifiable by either photographs or a point system. R. 1964-6.

Finally, the same technician steadfastly refused to test any other knives in the world to see if another knife could produce similar striations marks. R. 1891; 1949; R. 1983. The State asserted that no two knives are identical, a proposition that even the trial court found difficult

to believe.[15] However, no witness testified and no evidence was produced which discounted different knives making the same or similar striation marks when used in a stabbing or sawing motion. Nor was any test below performed with the instant knife on cartilage material.

Consequently, the lack of objective verification and inability of the technician to demonstrate the reliability of his methods to the Court or jury causes this novel experimental evidence to be suspect. It appears clear that this Court continues to endorse the scientific reliability standards enunciated in ***Frye v. United States***, 293 F. 1013 (D.C. Cir. 1923) and its progeny. ***Stokes v. State***, 548 So.2d 188 (Fla. 1989); ***Ramos v. State***, 496 So.2d 121 (Fla. 1986); ***Delap v. State***, 440 So.2d 1242 (Fla. 1983). This Court has expressed its adherence to the ***Frye*** standard even after ***Daubert v. Merrill Dow Pharmaceutical, Inc.*** __ U.S. ___, 113 S.Ct. 2786, 125 L.E.2d 469 (1993). ***Flanagan v. State***, 18 Fla. L. Weekly S475, n.2 (Fla. Sept. 9, 1993); ***State v. Hickson***, 18 Fla. L. Weekly S549, n.4 (Fla. October 21, 1993).

This Court has addressed the ***Frye*** test as follows:

> Under ***Frye***, the results of mechanical or scientific testing are not admissible unless the testing has developed or improved to the point where experts in the field widely share the view that the results are scientifically reliable as accurate.

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[15] The Court: Where did you get the premise that no two things [are] alike anywhere in the world.
Mr. Harden: This is basic scientific premise. Nothing is totally identical to anything else, even when viewed under magnified power.
The Court: Who says that is a scientific premise and who says it is - -
Mr. Harden: Well, this is in all your scientific books, as well as what I was taught through all the college courses, firearms and tool mark courses I have taken.
R. 23-4.

Bundy v. State, 471 So.2d 9, 13 (Fla. 1985)(***Bundy II***). In the instant case, the State failed to show that the proffered method of knife method comparison had gained acceptance in the scientific community. Particularly unsettling is the fact that only knife mark examiners were presented to prove their methods. This evidence of acceptance exists only in their small and limited community.

In ***Bundy II***, this Court addressed the admissibility of hypnotically refreshed testimony. In finding that this evidence had not garnered sufficient acceptance in the relevant scientific community, this Court approvingly quoted the Arizona Supreme Court:

> [U]ntil hypnosis gains general acceptance in the fields of medicine and psychiatry as a method by which memories are accurately improved without undue danger of distortion, delusion or fantasy, we feel that testimony of witnesses which has been tainted by hypnosis should be excluded in criminal cases.

Bundy v. State, 471 So.2d 9, 14 (Fla. 1985) (quoting ***State v. Mena***, 128 Ariz. 226, 231, 624 P.2d 1274, 1279 (1981)). It is probably safe to assume that within the narrow field of hypnosis the technicians of that "discipline" believe their methods to be reliable. However, this Court appears to require a showing of reliability from more than just the practitioners.

Such was also the courts belief in ***Contreras v. State***, 718 P.2d 129 (Alaska 1986), another hypnosis case:

> [A]pplying ***Frye*** is a two step process: First, the relevant scientific community must be defined, and second, the testimony and publications of the relevant experts in the field must be evaluated to determine if there is a general consensus that [the evidence to be produced] is reliable.

718 P.2d 135. The same result was reached in ***Haakenson v. State***, 760 P.2d 1030 (Alaska App. 1988) where the court addressed admissibility of polygraph results. In rejecting the polygraph

evidence, the court found that the polygraph operators were not a member of the relevant scientific community, but that a psychology professor "had a better grasp of the acceptance level of polygraphs within the scientific community..." 760 P.2d 1034. *See also* ***Reed v. State***, 391 A.2d 364 (Ct. App. Md. 1978).

In this Court's earlier opinion in this case, this Court expressed its concern with "the experts self-serving statement supporting the procedure [identifying a knife from marks made in cartilage]. ***Ramirez***, 542 So.2d 355. Upon remand, all the State has done is to find other technicians of the same narrow area, repeated the same description of their methods and merely change their self-serving description to that of "scientist".[16] This evidence still has not been accepted by any court in Florida, R. 1953, or addressed by any other appellate court.

The additional witnesses all spring from the same United States Army Crime Lab at Ft. Gordon, R. 1874 (Conrad), R. 1977 (Harden), from which the number of graduates is only 26, R. 1982-3. As such, they are within the very narrow field of persons seeking to justify and legitimize their purported discipline.

There is absent from the record below any review of knife mark findings or methods by dentists,[17] metallurgists, physicist or pathologists (except for the one article prepared by Dr. Rao

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[16] Robert Hart has still not testified on knife mark evidence except in the first trial in this cause, R. 1953, and is still working in the same job. On retrial, however, he refered to himself as a "scientist" R. 1911. Throughout the hearing on remand, the State exercised every opportunity to disengenuosly refer to all procedures and individuals within technician Hart's field as "scientists" or "scientific".

[17] Dentists are included in this list because the witnesses called by the State used techniques far into tool examination, and borrowed from dentistry to make the cast which they used for comparison. It is important to note that, unlike normal tool mark comparison, these witnesses were not comparing a tool to a mark, but a cast of a mark to a cast of a sampled tool mark made with a target tool, and that these casts were made using casting techniques and materials

and Robert Hart). There was shown absolutely no acceptance outside the narrow community of these knife mark "experts". As has been noted earlier, the contrary view and evidence that their methods are not reliable was excluded for consideration by the trial court. What was shown below cannot serve to satisfy the ***Frye*** standard.

This Court has previously recognized the prejudicial nature of the knife mark evidence in this case. The evidence of guilt presented in the instant case was less than that presented at the time of the first trial. The admission of the testimony of Robert Hart was error, clearly harmful, and should result in the reversal of this cause for a new trial. Admission of this evidence violated the Appellant's Due Process rights guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution.

II.

THE SELECTION AND COMPOSITION OF THE JURY DEPRIVED THE APPELLANT OF HIS RIGHT TO A FAIR AND IMPARTIAL JURY UNDER THE FEDERAL AND FLORIDA CONSTITUTIONS

During the jury selection portion of this case, the prosecutor sought to strike Juror Michele Pullin, a black female. This issue is largely based on a colloquy between the prosecutor and Ms. Pullin as follows:

Prosecutor: I don't know if you are going to be on this 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 in the person who signs all the documents for the jury. If there is a finding of

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borrowed from another discipline, dentistry.

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 Pullin. Can you see yourself doing that? (emphasis supplied)

Juror Pullin: Would I have to be assigned to that position?

Prosecutor: No. Let's say you are. Can you see yourself signing a document that says, " I recommend the death of another person"?

Juror Pullin: I can't answer that.

Prosecutor: Why?

Juror Pullin: I just can't answer that.

Prosecutor: There is some possibility that you won't be able to do that?

Juror Pullin: Yes.

R. 590-1. A sidebar was then conducted where the trial court informed the prosecutor that this line of questioning was improper and would not be allowed. R. 592-3. At the end of jury selection the following colloquy occurred amongst the trial court, the defense attorneys and the two prosecutors, Mr. Gilbert and Ms. Seff:

The Court: Michelle Pullin, 841, defense?

Mr. Chavies: Accept.

The Court: State?

Mr. Gilbert: Excuse. First, before we do that, I would move to challenge for cause--during the course of the examination of her, I asked her whether or not she ever anticipated actually being involved in the process, and she said no. And, before the Court

stopped me from asking the question, I did ask her whether or not she felt she was capable of signing the form if she was the foreperson, recommending the death penalty, and she said she didn't know if she could do it. I believe that she was hesitant about the death penalty.

The Court: Challenge for cause is denied.

Mr. Gilbert: For that same reason, I would exercise the peremptory challenge.

Mr. Chavies: We will renew our ***Neil*** motion and state that the State is exercising strikes based upon race and race alone. She is a black female, for the record.

Mr. Gilbert: Agreed.

Ms. Seff: Agreed that she is a black female.

The Court: Make it clear on the record, please, Mr. Gilbert. The Court doesn't find they are racially motivated strikes. . .

R. 707-8. These colloquies reveal three distinct issues, each of which constitutes reversible error. First, the trial court failed to hold a proper ***Neil*** inquiry when the issue was raised, including the foreclosure of the Appellant from rebutting the State's proffered reasons for the contested strikes. Second, the peremptory challenge was not exercised in a race-neutral fashion. And finally, the questions on which the strike was based were unconstitutional.

A. THE TRIAL COURT ERRED IN FAILING TO HOLD A PROPER *NEIL* INQUIRY

It is now certainly clear that the exclusion of even a single person from service on a jury solely on the basis of race violates a defendant's rights to a fair trial under Article I, sections 2 and 16, of the Florida Constitution, and a defendant's right to equal protection under the

Fourteenth Amendment to the United States Constitution. ***Tillman v. State,*** 522 So.2d 14, 17 (Fla. 1988); ***State v. Neil,*** 457 So.2d 481 (Fla. 1984); ***Batson v. Kentucky,*** 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The procedures outlined by this Court and other Florida courts for determining whether a challenge is proper are clear. Once a party establishes, and the trial court finds, that the peremptory challenge is being exercised in a racially discriminatory manner, the burden shifts to the party making the challenge to provide clear and specific racially neutral reasons for their use of the peremptory challenge. ***State v. Slappy,*** 522 So.2d 18, 22 (Fla. 1988), *cert. denied,* 487 U.S. 1219, 108 S.Ct. 2873 (1988): ***State v. Neil, supra*** at 486; ***Foster v. State,*** 557 So.2d 634 (Fla. 3d DCA 1990). The trial court must then evaluate the proffered reasons and "cannot merely accept the reasons proffered at face value, but must evaluate those reasons as he or she would weigh any disputed fact." ***Slappy,*** 522 So.2d at 22. In the instant case, it is apparent that the trial court neither understood nor conducted the appropriate ***Neil*** inquiry.

When presented with the Appellant's ***Neil*** challenge to the State's Pullin strike, without further inquiry, the trial court simply stated "the Court doesn't find they are racially motivated strikes." R. 708. However, to fully appreciate the trial court's statement and to understand why this statement underscores the failure to hold a proper ***Neil*** inquiry, it is necessary to look earlier in the transcript to find how the previous ***Neil*** challenges were addressed.

The State moved to strike three women (Jurors Romero, Octave and Pullin), two of whom were indisputedly black, and one of whom the defense believed to be a Puerto Rican woman of African descent. R. 461-68;707-8: When the State sought to strike Jurors Romero and Octave, the Appellant objected. R. 461-63. The trial court refused to make an initial finding that the

strikes were racially motivated. ***Id.***[18] When the State challenged Pullin, it was the first exercise of a peremptory challenge on a black juror during *that day* of jury selection. Under the Court's

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[18] Upon the Appellant raising his first ***Neil*** inquiry the following occurred:

Defense counsel:	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...
The Court:	Who are you talking about?
Defense counsel:	The first lady.
The Court:	Why are we talking about her?
Defense counsel:	I am explaining the reasons why I'm making that motion.
The Court:	Your motion for what?
Defense counsel:	It is a Neal [sic] motion.

* * *

The Court:	Are you telling me that I have to make a finding versus [sic] there is a suggestion of racial bias strikes?
Prosecutor:	Yes.
The Court:	Well, I don't know that I have to do that. I won't make that finding. I think that if the defense or the moving party, if the moving party demonstrates that there are a series, or there are several strikes in which race is involved, without it meaning necessarily that the strikes were because they were racially motivated, but that is a showing sufficient to warrant a good faith motion under Neal [sic]....

R. 461-63. This statement by the Court is clearly incorrect.

understanding of the law, the Appellant could not successfully demand a ***Neil*** inquiry until there had been a series of, or several, strikes in which race was involved.

There is no requirement that there be a series of, or several, racially motivated strikes before a court must hold a ***Neil*** inquiry. In ***State v. Slappy***, 522 So.2d 18 (Fla. 1988), *cert. denied*, 487 U.S. 1219, 108 S.Ct. 2873 , this Court refused to establish a bright line test based on numbers of strikes, citing federal case law that "the issue is not whether several jurors have been excused because of their race, but whether *any* juror has been so excused, independent of any other." ***Slappy,*** 522 So.2d at 21. This statement was clarified by this Court in ***Valentine v. State***, 616 So.2d 971 (Fla. 1993): "[I]n other words, unless a court can cite specific circumstances in the record that eliminate all question of discrimination, it must conduct an inquiry." ***Id.*** at 974. The Court in ***Valentine*** found that failure to cite record evidence eliminating all question of discrimination constituted reversible error. ***Id.; Gooch v. State***, 605 So.2d 570 (Fla. 1st DCA 1992)(only black on panel struck - inadequate inquiry).

In regard to the Appellant's challenge to the striking of Juror Pullin, the trial court failed to hold any hearing at all in response to the Appellant's renewal of the previous ***Neil*** motion. ***Critically, the trial court foreclosed the defense from rebutting the state's proffered reasons.*** At the time of the first ***Neil*** challenge to the striking of Jurors Octave and Romero, the trial court informed the Appellant's counsel that a response to the State's proffered reasons was not appropriate.

Defense counsel: May I respond, Judge?

The Court: Yes.

Defense counsel: First of all, in terms of key questions, whether or not she would be prejudiced against the state on her

brother's involvement with the criminal justice system--

The Court: I denied the challenge for cause already. You do not even have to argue that.

Defense counsel: I was responding to their reasons as to--

The Court: I don't know if that is something for you to respond to.

Defense counsel: I just asked if I could. I will just sit down and shut up.

The Court: I'm going to find that this strike is not a racially motivated strike. Let's go on.

R. 468. Thus, the trial court established his procedure for dealing with ***Neil*** motions - that the Appellant would not be allowed to make argument on the State's reasons given to show race-neutrality. In the instant case no hearing was conducted at all in response to the Appellant's request for a ***Neil*** inquiry, other than to, presumably, adopt the reasons given by the State in its attempt to strike Juror Pullin for cause. This is not an adequate substitution for a ***Neil*** inquiry. When the State then exercised a peremptory challenge and the Appellant requested a ***Neil*** inquiry, the trial court simply ruled. The Appellant was not allowed an opportunity to respond to the State's explanation.

Thus, the procedure adopted and utilized by the trial court below was based upon a misunderstanding of the law. This misunderstanding infected the procedure and denied the Appellant of the opportunity to contest the "race-neutral" reasons forwarded by the State. As will be discussed below, this procedure had a major impact, for the proffered race-neutral reason for Juror Pullin ***was factually incorrect.*** Unfortunately, the trial court believed the Appellant was not permitted to comment on the reasons forwarded by the State. Because of the procedure

utilized and the additional prejudice to be demonstrated below, the Appellant was denied his rights to a fair and impartial jury and due process of law under Article I, sections 9 and 16 of the Florida Constitution, and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. ***United States v. Gordon***, 817 F.2d 1538, 1541 (11th Cir. 1987); ***United States v. David***, 803 F.2d 1567, 1571 (11th Cir. 1986); and ***Fleming v. Kemp***, 794 F.2d 1478 (11th Cir. 1986).

B. THE TRIAL COURT ERRED IN ALLOWING A RACIALLY DISCRIMINATORY PEREMPTORY CHALLENGE

The reasons given by the state for its attempted **cause challenge** of Juror Pullins was that she was hesitant about signing a death recommendation as a foreperson. R. 707-8. If this could be construed as "hesitancy" regarding the death penalty, then it **might** have been a valid race neutral reason for the exercise of the State's peremptory challenge. ***Atwater v. State,*** 18 Fla. L. Weekly S496 (Fla. September 16, 1993); ***Williams v. State,*** 621 So.2d 413 (Fla. 1993). However, had the trial court conducted the proper inquiry and allowed any input by the Appellant in ruling on the validity of this reason, he would have learned that, in fact, Juror Pullin was not hesitant about the death penalty. Rather, the supposed hesitance was based upon improper inquiry about service as foreperson--a question not asked of any other juror. Further, another non-black juror who had expressed hesitancy about the death penalty was not challenged by the state. The State's proffered reasons for the striking of Juror Pullin were, when examined under the scrutiny required by ***State v.Slappy,*** 522 So.2d 18 (Fla. 1988), pretextual and factually inaccurate.

Initially, the trial court addressed the venire as to whether any of them were opposed to capital punishment and at no time did Juror Pullin give any indication that she was opposed to the death penalty. R. 527; 530-31. The Appellant also asked the venire whether anybody would not be able to follow the law and impose a death sentence if warranted and once again Juror Pullin gave no such indication. R. 548. When asked how she felt about the death penalty, Juror Pullin was one of eleven panel members that responded that they were "in the middle." R. 558. In fact, when the State asked Juror Pullin a direct question on the subject she responded as follows:

MR. GILBERT: If we are able to satisfy you that the aggravated circumstances outweigh the mitigating -- and given the judge hasn't gone all over these -- would you be able to seriously consider recommending the imposition of the death penalty?

JUROR PULLINS: Yes.

R. 647. In the light of the entire transcript it becomes clear that Juror Pullin was able to follow the law and was able to appropriately consider the death penalty. She was one of eleven panel members who responded they were in the middle, and the state did not strike all who so responded. She also affirmatively stated that she could seriously consider recommending the death penalty. Consequently, the assertion by the State that she was hesitant about the death penalty was factually inaccurate. It is unfortunate that the trial court foreclosed the Appellant from presenting argument on this matter below.

Any attempt by the State to bolster its assertion below that Juror Pullin was hesitant about the death penalty runs afoul by virtue of the pretextual nature of the questioning. In ***State v. Slappy***, 522 So. 2d 18 (Fla.1988), *cert. denied*, 487 U.S. 1219, 108 S.Ct. 2873 (1988), this Court

established a nonexclusive list of factors for the trial court to consider when evaluating whether a party has given non-racially related reasons for the exercise of peremptory challenges or whether the reasons constitute a mere pretext;

> We agree that the presence of one or more of these factors will tend to show that the state's reasons are not actually supported by the record or are an impermissible pretext: (1) alleged group bias not shown to be shared by the juror in question, (2) failure to examine or perfunctory examination, assuming neither the trial court nor opposing counsel had questioned the juror, (3) **singling the juror out for special questioning designed to evoke a certain response**, (4) the prosecutor's reason is unrelated to the facts of the case, and (5) **a challenge based on reasons equally applicable to jurors who were not challenged**. (emphasis supplied).

522 So.2d at 22. It is clear from the record below that the State singled out Juror Pullins for special questioning designed to evoke a certain response. In fact, Juror Pullins was singled out for special questioning which is specifically not permitted under applicable case law. In addition, the challenge was based on reasons equally applicable to jurors who were not challenged.

The first of the two questions the State appears to have based its strike on is whether Juror Pullins had ever anticipated actually being involved in the death penalty process. R. 589-90. The only person this question was directed to was Juror Pullins. Certainly very few people have anticipated actually being seated on a death penalty jury. Had the State asked the question of the other panel members, the record would be clear as to their responses. Instead, the record shows the question was asked to a single panel member, a black female. The State then relied on her negative response as a basis for a challenge. In ***Clark v. State***, 601 So.2d 284 (Fla. 3d DCA 1992), the state asked a provocative question "likely to evoke the peeved reaction that followed, and which the State relie[d] on as justification for the peremptory challenge (footnote

omitted)." ***Id.*** at 286. The Court, citing ***Slappy***, ruled that such questioning weighed against the legitimacy of a race-neutral explanation. ***Id.*** It took a specifically targeted question, asked only of Miss Pullin, to give the State a pretext to request that she be stricken from the jury.

It becomes even clearer that this excuse is merely a pretext when the entire record is reviewed. The Record reveals that while Juror Pullin was the only person to whom the State directed the above question, another juror volunteered a similar answer. Juror Franklin Garcia was another of the eleven panel members who placed himself "in the middle" on the death penalty. However, he volunteered, when being questioned by the defendant, that:

> I have never been placed in this position --like he just said--where I might have something to do with putting a man to death. **I feel very uncomfortable about it.** (emphasis supplied)

R. 551. Clearly, had other jurors been asked the same questions by the prosecutor, their responses would have been similar to that of Juror Pullin and Juror Garcia. That Juror Garcia in fact did express hesitancy about the death penalty but was not stricken by the State emphasizes the pretextual nature of the asserted reason below as this Court pointed out in ***Slappy***. *See also* ***Roundtree v. State***, 546 So.2d 1042, 1045 (Fla. 1989); ***Valentine v. State***, 616 So.2d 971, 974 (Fla. 1993); ***Aldret v. State***, 610 So.2d 1386 (Fla. 1st DCA 1992).

The second of two colloquies on which the state based its strike of Juror Pullins was the series of questions and answers about being foreperson. This series of questions and answers was interrupted by the trial court, which refused to allow further questioning. The State initially stated that it intended to ask this series of questions to the entire panel. But later in the same discussion, the prosecutor asked "(c)an I first explore it with this juror, and I won't go into it

with another juror?" As such, the State itself confirms that this question was directed to Pullin alone. This is clearly a violation of the "special questioning" prohibition of ***Slappy***.

It is clear that the trial court's interruption of this line of questioning was appropriate. In a case exactly on point, ***Alderman v. Austin***, 663 F.2d 558 (5th Cir. Unit B 1981), the prosecutor asked an identical question of a juror, and then struck that juror, and two others with similar responses, for cause. Alderman's sentence of death was reversed as a result of this line of questioning and the cause strikes. (See discussion of ***Alderman*** in section C. ***infra***.)

It is clearly improper to single out a black female for questions designed to evoke a specific response. It is certainly even more improper to single out a black female for ***unconstitutional*** questions designed to evoke a specific response. Furthermore, using the response to such questions as the basis for an attempted cause challenge, or as the basis for a peremptory challenge in the face of a ***Neil*** inquiry, clearly violates ***Slappy***'s restriction against aiming questions at minority jurors to elicit specific responses. If the only basis for the State's challenge of Juror Pullins are her responses to the two questions described above, the challenge is clearly in violation of the Appellant's right to a fair and impartial jury guaranteed by the United States and Florida Constitutions.

The Record shows that Juror Pullin was, in fact, not hesitant about imposing the death penalty, but rather, indicated that she could. Another juror, however was hesitant about the death penalty and he was not stricken by the State. The only suggestion of hesitancy by Juror Pullin comes about as the result of a specifically targeted question designed to evoke a response that would be used to support a challenge. That question had been held to be improper by the controlling Federal court and was found to be improper by the trial court below. The reasons

given by the State for the peremptory challenge of Juror Pullin were factually inaccurate, pretextual and based on an unconstitutional question. The ***Neil*** challenge of the Appellant below should have been sustained and Juror Pullin seated. The striking of that juror deprived the Appellant of the rights guaranteed by Article I, sections 9 and 16 of the Florida Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

C. THE QUESTIONS ON WHICH THE STRIKE OF JUROR PULLINS WAS BASED WERE UNCONSTITUTIONAL

In ***Witherspoon v. Illinois***, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), the Supreme Court considered a case in which veniremen were excluded for cause because they voiced general, conscientious or religious objections to the death penalty. The Court ruled that "the State crossed the line of neutrality" and "produced a jury uncommonly willing to condemn a man to die." 391 U.S. at 520-21. In the instant case, the questioning of Juror Pullin about sitting as the foreman and signing the verdict of death violated the principles of ***Witherspoon.***

The "jury foreman" question below is identical to that which appears in ***Alderman v. Austin***, 663 F.2d 558 (5th Cir. Unit B 1981). In ***Alderman***, the prosecutor asked a series of questions which are so similar to the instant case they could well be the model for this prosecutor's inquiry. The venireman first stated that he was not conscientiously opposed to capital punishment. The prosecutor next asked if the venireman could vote yes to inflict the death penalty, and he responded that he could. The prosecutor continued:

> All right, now, going a step further with this . . . if you were selected to serve as foreman on this jury and the other eleven jurors believed that the evidence and the law required that the death penalty was proper and should be voted for in this case, could you, as foreman of the jury, following instructions given you

> by Judge Cheatham, write out the verdict on the indictment and sign your name to it as foreman?

Id. at 562. This venireperson expressed hesitancy as to his ability to write out the verdict and sign it as the foreman. This venireperson, and two others who responded similarly, were stricken for cause. The sentence of death was reversed as a result of this line of questioning and the cause strikes.

The Fifth Circuit's reasoning began with the Sixth Amendment of the United States Constitution, applied to the states through the Fourteenth Amendment by ***Duncan v. Louisiana***, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). The Court then cited the ruling of ***Witherspoon***, *supra*, finding that juror selection methods that "produce[] a jury uncommonly willing to condemn a man to die are unconstitutional." ***Alderman*** at 563, citing ***Witherspoon***, 391 U.S. at 521, 88 S.Ct. at 1776 (footnote omitted). The Court then analyzed the record of the voir dire. It found that the veniremen at issue were not opposed to capital punishment, and that they would each be able to vote for execution. The Court next noted that they knew of no Georgia law requiring a juror to serve, against his will, as foreman of a jury. The Court found that

> (w)hether a venireman could sign, in good conscience, a verdict that would result in a defendant's execution is immaterial to jury service under ***Witherspoon.*** The action by the state court leaves us . . . with a death sentence [that] cannot be carried out.

Alderman at 563-64.

The line of cases beginning in Florida with ***Neil*** clearly state that peremptory challenges may not be used in a way that would infringe on a defendant's Sixth Amendment right to an impartial jury. The Court, in ***Witherspoon***, clearly stated that the state may not violate its duty

as guardian of a defendant's constitutional rights by selecting a "jury uncommonly willing to condemn a man to die." 391 U.S. at 521. Finally, the Court in ***Alderman*** ruled that striking a venireman who could follow the law and recommend the death penalty, but who could not be foreperson and sign a death recommendation, was a violation of the rule in ***Witherspoon***, and a violation of a defendant's Sixth Amendment right to an impartial jury.

The appropriate remedy for an unconstitutional exercise of peremptory challenges is for a Court to force-seat the challenged venireperson. The only remedy when that is not done, and a defendant is convicted by an unconstitutionally selected jury, is reversal. Finally, the only remedy for a defendant sentenced to death by a jury uncommonly willing to condemn a man to die is reversal of that sentence.

If Appellant were forced to rely on ***Witherspoon*** and ***Alderman*** alone, the State might be in a position to argue that there was no violation, as the venireperson in question was not stricken for cause. However, the State may not ignore the existence of an entire line of cases which rule that challenges may not be used to encroach upon the constitutional guarantee of an impartial jury. The State also may not ignore its duty to protect a Appellant's constitutional rights. The State may not exercise peremptory challenges in a way designed to deprive Appellant of his constitutional right to a fair an impartial jury. The use of the "jury foreman" question in any fashion violated the Appellant's rights as guaranteed by Article I, section 9 and 16 of the Florida Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

III.

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE DISCOVERED PURSUANT TO AN INVALID SEARCH WARRANT

On December 29, 1983, Metro Dade Police detectives sought a search warrant for the Appellant's automobile. The search warrant named as items to be seized

> evidence relevant to proving a felony to wit First Degree Murder, Armed Robbery and Burglary is contained therein to wit blood samples, property or pieces of property taken including, but not limited to computer parts, interoffice mail of Federal Express Corp. and Burglary tools.

SSR. 3.[19] Attached to the search warrant was an affidavit by Detective Venturi. SSR. 4-5. This affidavit served as the factual basis for the issuance of the warrant. The warrant was signed by Circuit Court Judge Ellen Morphonios on December 29, 1983 and executed on that same date. SSR. 6. During a search of that automobile a knife was found in the passenger compartment which was later used against the Appellant at trial. Further, a search of the trunk revealed a small amount of blood on the rubber molding of the trunk.

The warrant is legally insufficient for three distinct reasons. First, the affidavit fails to allege a crime, and further fails to allege the specific offenses to which the search is directed. Second, the item seized was not listed in the arrest warrant, and therefore was not subject to

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[19] Supplementation of the record is being sought contemporaneous with the filing of this Brief. However, the Appellant's motion does appear in the Record at R. 2585-96, and objections to the introduction of the knife were preserved in the instant trial below. R. 1657. Appellant seeks supplementation of the testimony and argument presented at the first trial as the trial judge in the second trial merely relied on the first ruling.

seizure pursuant to that warrant. Third, the affidavit was based, in part, on an unattributed statement of a person whose reliability was not established.

A. THE AFFIDAVIT FAILS TO ALLEGE A CRIME

The affidavit states that the victim went to work, and that her body was later discovered there. The affidavit next states that the scene was processed for evidence relating to the victim's homicide. SSR. 4. This conclusory statement does not provide an unbiased magistrate with the information necessary to determine whether there is probable cause to determine whether there was, in fact, a homicide. Further, this affidavit does not provide an unbiased magistrate with any information to determine whether, if there was a homicide, there was an unlawful and criminal homicide committed by another against the victim.[20] In addition, while the affidavit conclusorily alleges an armed robbery and burglary, there is nothing in the affidavit to support such allegations.

Search warrants are reviewed by an impartial magistrate to determine whether probable cause exists and such warrants must be supported by affidavits which provide facts upon which a magistrate can make such a determination. The Third District Court of Appeals stated the rule in ***Churney v. State***, 348 So.2d 395 (Fla. 3d DCA 1977):

> [b]oth federal and state constitutions require that search warrants be supported by affidavits which state facts sufficient to permit an impartial magistrate to determine whether probable cause exists; and to be sufficient, the affidavit must state facts, not conclusions.

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[20] The definition of homicide includes justifiable homicide, excusable homicide, and suicide. *See* Fla. Stat. § 782.02 and § 782.03.

at 397. In the instant case there are no facts stated upon which a magistrate could determine the existence of probable cause. The affidavit merely concludes the existence of a "homicide," with no further evidence. The affidavit additionally states that the victim was "murdered," giving an approximate time of death, but again provides no facts to support that conclusion.

The warrant in ***Williams v. State***, 249 So.2d 743 (Fla. 2d DCA 1971) provides an example of a sufficient affidavit. In ***Williams***, the affidavit alleged the "[h]omicide of George Glasco, *found dead from a gunshot wound.*" ***Id.*** at 744. It further alleged that Williams had been arrested for Murder in the First Degree, the discovery in his room of the same clothes worn during the commission of the offense, ten live cartridge rounds in the clothing, and shoes which matched the footprints in the immediate vicinity of the offense. ***Id.*** The affidavit in ***Williams*** alleged the victim's cause of death and further connected Williams to the offense *at the time of its commission* and the live cartridges. Finally, that Williams had already been arrested indicated a previous determination of probable cause.

In the instant case none of these factors can be found in the affidavit in question. The cause of death in not stated nor is any information provided which places the Appellant at the scene of the offense at the time it was committed, and it does not allege possession of any weapons used in the homicide. Finally, it does not allege any prior determination of probable cause. *See* ***State v. Malone***, 288 So.2d 549 (Fla. 1st DCA 1974)(defendant arrested, property missing, fingerprint of defendant found at scene of murder). In the instant case the affidavit states merely that the Appellant was arrested while driving his vehicle, but does not state the basis for the arrest, nor the charges for which he was arrested.

The affidavit not only fails to state probable cause that the Appellant committed the crime of murder, it further fails to state any probable cause which would link the objects being searched for to any offenses or to the premises being searched. There are no facts provided in the affidavit which would give a neutral magistrate probable cause to determine that computer parts or interoffice mail of Federal Express Corporation were taken. There are also no facts providing probable cause for a determination that burglary tools were used. Finally, other than a statement that there was a fingerprint in blood, there is no indication that there was sufficient blood on the scene to believe that there would be blood samples anywhere else.

In ***State v. Tamer***, 475 So.2d 918 (Fla. 3d DCA 1985), a search warrant was procured based on a warrant which did provide probable cause to believe that he was linked to an arson. However, the court found,

> there are no facts stated therein which indicate that the subject clothing constituted some evidence relevant to proving the aforesaid arson. Indeed, the affidavit makes no mention whatever of the subject clothing. This being so, no probable cause was stated in the affidavit for the seizure of this clothing, the search and seizure of the clothing was unreasonable, and the clothing was properly suppressed as being inadmissible in evidence.

475 So.2d at 919. In the instant case there are no facts stated in the affidavit indicating that the evidence sought is relevant to proving any offense therein described. In fact, the affidavit makes no mention whatever of the items sought. Further, the affidavit makes no mention of a knife, or a weapon of any kind. It does not describe the cause of death, and it does not authorize the police, based on the warrant, to search for a knife. This being so, no probable cause was stated in the affidavit for the seizure of the knife, and it should have been suppressed.

B. ITEMS SEIZED DURING THE SEARCH WERE NOT AUTHORIZED BY THE SEARCH WARRANT

During the search pursuant to the aforementioned warrant the police seized a knife which was later introduced into evidence against the Appellant at trial. The search warrant did not authorize the seizure of a knife, or of any other weapon. Therefore, the seizure of the weapon was in violation of the Fourth Amendment to the United States Constitution and Article I, section 12 of the Florida Constitution.

In ***Carlton v. State***, 449 So.2d 250 (Fla. 1984), this Court stated:

> We believe that the particularity requirement and its constitutionality must be judged by looking only at the information contained within the four corners of the warrant. We do not believe that the drafters of our constitution and this state's legislators intended that the language of a warrant be scrutinized and compared to the knowledge of the officer seeking the warrant and/or the information contained in the supporting affidavit.

449 So.2d at 251. This Court further stated in ***Carlton***, "the particularity requirement stands as a bar to exploratory searches by officers armed with a general warrant." ***Id.*** at 252. Following ***Carlton,*** the First District Court of Appeals in ***Sims v. State***, 483 So.2d 81 (Fla. 1st DCA 1986) stated:

> It is a fundamental requirement that a search warrant to be valid must set forth with particularity the items to be seized. U.S. Constitution, Amendment 4; Florida Constitution, Article I, Section 12; Section 933.04, 933.05 Florida Statutes (1983). Further, in determining the sufficiency of a search warrant on this issue, the inquiry is limited solely to an examination of the warrant itself and the supporting affidavit.

Id. at 82. The Fifth District Court of Appeals best summarized the rule derived from the above authorities in ***Polakoff v. State***, 586 So.2d 385 (Fla. 5th DCA 1991), stating "[n]othing should be left to the discretion of the officers executing the warrant as to what should be seized and taken." 586 So.2d at 392.

In ***Perez v. State***, 521 So.2d 262 (Fla. 2d DCA 1988), the police officers went to the defendant's home armed with a search warrant specifically listing cocaine, and the specific make, model, and caliber of each gun to be seized. ***Id.*** at 264. When the officers arrived at the defendant's home they saw and seized a videocassette recorder (VCR) from on top of his television set. The defendant moved to suppress the VCR, arguing that it was not specifically listed on the search warrant, and therefore could not be seized. The state argued that since the warrant used the language "stolen property" the seizure of the VCR was lawful. The court reversed, citing the United States and Florida Constitutions and section 933.05 Florida Statutes (1985), as well as ***Carlton*** and ***Sims***, *supra*, and ruled that "this argument runs afoul of the constitutional and statutory requirements that items seized pursuant to a warrant must be described with particularity." ***Id.*** at 264.

In the instant case, none of the language within the four corners of the warrant provide any probable cause for the seizure of a knife. The affidavit does not provide probable cause for the seizure of a knife, and the warrant does not, with the particularity required, authorize the seizure of a knife. Therefore, any seizure of the knife pursuant to the search warrant in question was in violation of the Appellant's rights under the United States and Florida Constitutions, and was in violation of sections 933.04 and 933.05, Florida Statutes. Therefore, these items should have been suppressed pursuant to the Appellant's pretrial Motion to Suppress, and failure to suppress this evidence constitutes reversible error.

C. CRITICAL INFORMATION IN THE WARRANT WAS SUPPLIED BY AN ANONYMOUS INFORMANT, WITH NO SHOWING OF RELIABILITY

The premises which was searched pursuant to the warrant in questions was the Appellant's automobile. The only information in the affidavit which indicated any relevance to the automobile was the unattributed statement "[t]he subject Ramirez was observed in the aforementioned premises at 11:00 p.m., 24 December, 1983, and then again observed in the vehicle at 7:00 a.m., 25 December, 1983." SSR. 5. The affidavit does not indicate who made those observations, but it seems clear from the language that it was not the affiant. The affidavit also does not provide any information on which a neutral magistrate could base a finding that the person providing that information was reliable.

It is clear that an affidavit does not demonstrate probable cause if it does not establish an informant's credibility and the basis of his knowledge. ***St. Angelo v. State***, 532 So.2d 1346 (Fla. 1st DCA 1988). In ***St. Angelo***, the court discussed an affidavit which did not name an informant, and did not provide information about his credibility or the basis of his knowledge. The court found:

> The affidavit is deficient in failing to demonstrate probable cause. It fails to establish the informant's credibility and basis of knowledge. . . Moreover, not even the "good faith exception" of ***United States v. Leon*** [468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1084)] can salvage the affidavit in the instant case. Officer Franklin could not have manifested "objective good faith in relying on a warrant based on an affidavit 'so lacking in indicia or probable cause as to render official belief in its existence entirely unreasonable.'" 468 U.S. at 923, 104 S.Ct. at 3421.

532 So.2d at 1347. The Fifth District Court of Appeals has also found that a finding of probable cause could not rest on the statement of an anonymous informant, absent additional indicia of reliability. ***Mims v. State***, 581 So.2d 638 (Fla. 5th DCA 1991). In ***Mims***, also an anonymous

tip informant case, the court ruled that [t]his hearsay information from an unidentified source did not provide probable cause for a search warrant.... Probable cause could not have been determined from the totality of the circumstances as is required from ***Illinois v. Gates***, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527, *reh'g denied*, 463 U.S. 1237, 104 S.Ct. 33, 77 L.Ed.2d 1453 (1983). In the instant case the informant, within the four corners of the warrant, remains confidential, and does not provide an independent affidavit in support of the warrant.

In ***Vasquez v. State***, 491 So.2d 297 (Fla. 3d DCA 1986), the Court considered a case in which an affidavit for a search warrant did not name the informant or give any information about his credibility. The Court ruled that:

> [t]here were insufficient facts before the judge upon which she could exercise her 'neutral and detached' function of determining the existence of probable cause. For these reasons, the officers' reliance on the warrant may not be categorized as within the 'good faith' exception to the warrant requirement.

Id. at 300. *See also* ***Gillette v. State***, 561 So.2d 4 (Fla. 5th DCA 1990); ***Blue v. State***, 441 So.2d 165 (Fla. 3d DCA 1983); ***Wallace v. State***, 442 So.2d 1066 (Fla. 1st DCA 1983).

The only statement in the affidavit which provides probable cause for the premises to be searched is the statement of an anonymous informant, with no indicia of reliability. Therefore, probable cause could not be determined from the totality of the circumstances. Further, as such an affidavit is so lacking in indicia of probable cause as to render official belief in its existence unreasonable, no good faith exception case resuscitate the otherwise fatally flawed warrant. The trial court erred by not granting the Appellant's Motion to Suppress Evidence acquired as a result of the execution of this warrant.

The search warrant in question did not provide probable cause for a search. It did not provide sufficient facts to allege the commission of a crime. It also did not provide any facts

to support a finding that there was probable cause to believe that a robbery and/or a burglary had occurred. Further, the warrant listed as items to be seized items which were not mentioned in the affidavit, and which were not supported by the affidavit. During the execution of the search warrant a knife was seized which was not named with particularity in the warrant. And finally, the information providing relevance to the premises was provided by an anonymous informant, with no additional indicia of reliability of that informant. For all of these reasons, the trial court erred in failing to grant the Appellant's Motion to Suppress Evidence, and the admission of this evidence seized under this warrant violated the Appellant's rights guaranteed by Article I, Section 12 of the Florida Constitution and the Fourth and Fourteenth Amendments to the United States Constitution.

IV.

THE TRIAL COURT ERRED IN VARIOUS OTHER RULINGS MADE DURING THE COURSE OF THE TRIAL

A. THE TRIAL COURT ERRED IN ALLOWING OPINION TESTIMONY ON BLOOD SPLATTER RECONSTRUCTION FROM AN UNQUALIFIED WITNESS

An expert is defined by Fla. Stat. §90.702 as an individual who's qualified in the subject matter "by knowledge, skill, experience, training or education." When the trial court allows an individual to testify and to offer an opinion as an expert witness, it is within the court's broad discretion. ***Johnson v. State***, 393 So.2d 1069, 1072 (Fla. 1980), *cert. denied*, 454 U.S. 882, 102 S.Ct. 364, 70 L.Ed.2d 191 (1981); ***Ramirez v. State***, 542 So.2d 352, 355 (Fla. 1989); ***Quinn v.***

Millard, 358 So.2d 1378, 1382 (Fla. 3d DCA 1978). However, it was clear that Officer Zito did not have sufficient background and training to offer an opinion on blood splatter reconstruction in this case.

During the course of the trial the State presented Officer Zito as an expert in crime scene reconstruction based upon blood splatter. R. 1181; R. 1211-25. Among his opinions were the positioning of chairs and persons throughout the crime scene.

Several errors arose during the course of his testimony. First, during his initial questioning, Zito informed the jury that he had previously testified as an expert in this case at the prior trial. R. 1181. The Appellant immediately moved for a mistrial, R. 1182, alleging that mention of a previous trial in this cause is evidence that a finding of guilt had previously been returned by an earlier jury. As such his statement that he had testified as an expert in an earlier trial is error.

Second, Zito was not qualified to give an expert opinion. His qualifications were as follows: he attended forty (40) hours of classroom and experimentation sessions and had numerous training sessions in the field, R. 1181, he taught a course "not as extensive as McDonald's" (the 40 hour course) to a group of crime scene technicians who came to his lab. ***Id.*** He had testified as a blood splatter expert only once and that was earlier in this case. ***Id.***

His experience in the crime lab was only for 2 years and that was in 1981-3, R. 1183. There are no licensing procedures in the field, nor any written examinations, nor any periodic proficiency tests. R. 1184. He had not conducted any analysis nor kept familiar with any literature in the six (6) years prior to being tendered as an expert in this cause. R. 1183. The trial court inquired and found that none of his work product had ever been endorsed by any other

expert or confirmed by any other blood splattering expert. Prior to his work in this case he had conducted examinations at only three or four actual scenes, R. 1188-9. The State's strongest argument for qualification was that the court in the prior trial of Appellant had accepted Zito as an expert and that the issue had not been raised on appeal before this Court from the 1984 trial. Based upon Zito's lack of recent experience, the lack of verification by other experts of his three or four previous crime scene opinions, and his failure to maintain current knowledge in the field, Zito should not have been accepted as an expert and allowed to render an opinion.

Third, within the course of his testimony the State sought to introduce standard blood splatter cards. The Appellant objected on grounds of discovery violations as well as relevancy. R. 1131-49. These cards were not evidence garnered at the scene, but rather were standard cards actually created by the assistant state attorney in this case. While they may have been useful as a demonstrative aid, they should not have been admitted as evidence. The testimony of Zito as an expert was error as was his mention of the previous trial and the use of the blood splatter cards.

B. THE TRIAL COURT ERRED IN ADMITTING AN ARTICLE AND PHOTOGRAPHS ON TOOL MARK COMPARISON

During the course of Technician Robert Hart's testimony on knife mark comparison the State sought to introduce an article written by Medical Examiner Rao and Robert Hart on knife mark comparisons. The Appellant objected on grounds of hearsay and relevancy, R. 1942. This article appears in the instant record at R. 2839-43. Appellant objected on the grounds that this article discussed knife mark comparisons not from this case, but from another case.

Fla. Stat. §90.706 permits introduction of a learned treatise only in cross-examination of an expert witness. ***Chorzelewski v. Drucker***, 546 So.2d 1118 (Fla. 4th DCA 1989); ***Medina v. Variety Children's Hospital***, 438 So.2d 138 (Fla. 3d DCA 1983). In the instant case the prejudice is even greater. The circumstances under which these particular knife marks were made was not fully explained. Further, no photographs of knife mark comparisons were provided to the jury from the alleged comparison made in the instant case. However, the article submitted to the jury contains Robert Hart's name and shows clear knife mark comparison photographs. It is certainly possible that the jury may have confused these knife mark comparison photos as proof of the comparison in this case. Photos were never made of the alleged comparison in this case. The introduction of this article clearly violated hearsay and relevancy prohibitions and was prejudicial error.

C. THE PROSECUTOR COMMENTED ON THE APPELLANT'S RIGHT TO SILENCE DURING HIS CLOSING ARGUMENT

During the closing argument of the prosecutor in the Guilt Phase, the prosecutor referred to 2 tables full of evidence in this courtroom. "There is one on my right with 100 exhibits (referring to the table of evidence introduced by the State of Florida) [and] the one on my left. You do not see the one on my left. That is the imaginary table" of the Defendant. R. 2141-2. The Appellant objected to this statement. The prosecutor continued to refer to the "magical and mythical table in the custody of the defense" through his closing. R. 2148; 2157. Further, the prosecutor stated "if it is that important they have the right to put it into evidence." R. 2149. Finally, the prosecutor informed the jury that there was "nobody to backup the Defendant's

statement to the police that he was in a given location at a given time." R. 2130. A motion for mistrial was made based upon all of these statements. R. 2222.

It is clear that a comment on the Appellant's right to remain silent or failure to present evidence is reversible error. ***State v. DiGuilio***, 491 So.2d 1129 (Fla. 1986); ***State v. Smith***, 573 So.2d 306 (Fla. 1990); ***Sharp v. State***, 605 So.2d 146 (Fla. 1st DCA 1992). In the instant case, the arguments of the prosecutor are fairly susceptible as being interpreted by the jury as a comment on his right to remain silent. First, the "mythical table" when compared to the prosecutors table containing 100 physical exhibits was an example of a prosecutor drawing direct attention to a defendant failing to present evidence in his behalf. Further, the statement that the Appellant failed to produce anyone who would back up his statement to the police is an even more direct comment on his failure to produce evidence in this cause.

In the instant case, the Appellant did not present evidence on his behalf. The comments of the prosecutor drew further attention to this election of his right to remain silent. This was prejudicial error and a violation of the Appellant's rights guaranteed by the Fifth and Fourteenth Amendment to the United States Constitution.

V.

THE TRIAL COURT ERRED IN ALLOWING THE JURY TO CONSIDER AND IN ULTIMATELY FINDING THE AGGRAVATING CIRCUMSTANCE THAT THE OFFENSE WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST

Following the jury's verdict of guilt in this cause, the issue of the appropriate sentence was argued to the jury. *See generally* R. 2290-495. Over objection, the State was allowed to argue to the jury that the instant homicide was committed for the purposes of avoiding or preventing a lawful arrest. R. 2418, 2459. Subsequently, the trial court found as an aggravating circumstance that the homicide "was committed for the sole purpose of avoiding or preventing a lawful arrest." R. 2938. This Court has consistently held that evidence in support of this factor must be "very strong." ***Rembert v. State***, 445 So.2d 337, 340 (Fla. 1984). Furthermore, the "evidence [must] prove that the only or dominant motive for the killing was to eliminate a witness". ***Geralds v. State***, 601 So.2d 1157, 1164 (Fla. 1992). The evidence in this case did not rise to the level necessary to sustain this aggravating factor and as a result the trial court improperly and illegally allowed the jury to consider this aggravating factor and committed error when he found "witness elimination" as an aggravating factor.

A. THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THIS AGGRAVATING FACTOR

Fla. Stat. §921.141(5) provides in pertinent part:

Aggravating circumstances shall be limited to the following:

* * *

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

This factor was argued to the jury by the State, R. 2459, and the jury was instructed that this was an aggravating circumstance for their consideration. R. 2481. Such instruction was over the timely objection of the Appellant. R. 2406; 2416-7. The trial court in sentencing the Appellant to death made the following factual finding with regard to this aggravating factor:

> (c) 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 tele-communications equipment which could have been utilized to summon assistance. An investigation of the homicide scene revealed a telephone in the dispatch office that had the victim's smeared blood on it and the receiver was off the hook, while teletype machine (sic) also in the dispatch office, 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. However, even accepting the courts finding's as correct, these findings are insufficient to support this aggravating factor.

In ***Riley v. State***, 366 So.2d 19 (Fla. 1979) this Court first addressed the evidence necessary to prove the instant aggravator. Riley argued that this factor must be limited to the killing of police officers or other officials engaged in apprehending a felon, lest the factor become an automatic aggravator common to every felony murder. ***Id.*** at 22. This Court rejected Riley's position but did hold:

> [T]he mere fact of a death is not enough to invoke this factor when the victim is not a law enforcement official. Proof of the requisite intent to avoid arrest and detection must be very strong in these cases.

Id. at 22[21]. This Court has since held that to prove this aggravating factor the evidence must clearly show that the "dominant or only motive for the killing was the elimination of the witness". ***Bates v. State***, 465 So.2d 490 (Fla. 1985); ***Oats v. State***, 446 So.2d 90 (Fla. 1984); accord ***Jackson v. State***, 599 So.2d 103 (Fla. 1992); ***Jackson v. State***, 502 So.2d 409 (Fla. 1986).

The trial court below relied upon purported familiarity between the Appellant and the victim. Specifically, the Court stated:

> Mary Jane Quinn worked at the Federal Express Office, the homicide scene, with the defendant and thus could have recognized him.

R. 2938. To the extent that this finding suggests a close relationship as co-workers, it is unsupported by the record. Ramirez was a janitor usually in the office between the hours of 4:00 p.m. and 7:00 p.m. R. 1294. Quinn came to the office to drive the mail truck to the Fort

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[21] This Court went on to find that the victim in Riley was well acquainted with the defendant and that one of perpetrators had expressed a concern for subsequent identification. This Court thus found the facts susceptible of only one interpretation and upheld Riley's death sentence. 366 So.2d 22.

Lauderdale office in the late evenings. R. 1289. Thus, while it is possible Quinn could have recognized the Appellant theirs was not a familiar relationship.

Nonetheless, this Court has found a mere knowledge of the perpetrator to be insufficient to prove this factor. In ***Rembert v. State***, 445 So.2d 337 (Fla. 1984) the trial court found that Rembert and the victim had known each other "for a number of years" and Rembert therefore "eliminated the only witness who could testify against him". ***Id.*** at 340. This Court disagreed, finding this to be insufficient to sustain the aggravating factor of witness elimination. *See also* ***Caruthers v. State***, 465 So.2d 496 (Fla. 1985) (Recognition of the defendant as a customer for a number of years insufficient to prove witness elimination factor.)

In ***Geralds v. State***, 601 So.2d 1157 (Fla. 1992) this Court addressed probably the strongest showing of familiarity in regard to the witness elimination factor. In ***Geralds***, the trial court found:

> The evidence establishes that the (d)efendant had worked around the victim's home and was known by the victim, the victim's spouse and her children. The evidence established that the defendant had spoken with the victim and her two children the week prior to the murder and at that time sought out information concerning the family's time schedule and the fact that the victim's husband would be out of town on the date the crime was committed. This evidence is clear to establish that the victim could have identified the defendant if she had survived the beating she was subjected to in the stabbing that occurred during the course of the robbery and burglary.

Id. at 1164. This Court found these facts insufficient to sustain the factor of witness elimination. ***Id.*** The evidence in the instant case does not nearly rise to that found in ***Rembert*** and ***Geralds***.

Finally, the trial court makes much in his order of the presence of telephone communication equipment, that one telephone receiver was found off the hook, that the teletype

machine had the victim's blood on the keys and that a telephone was pulled out of the wall. While one might speculate as to the significance of these facts, they are not sufficient to sustain this factor.

In ***Garron v. State,*** 528 So.2d 353 (Fla. 1988), the trial court based a finding of witness elimination on evidence that Garron shot his step-daughter (ostensibly an individual who could identify him) as she was "talking on the telephone with the operator asking for the police." ***Id.*** at 360. This call to the police followed in time the step-daughter having witnessed Garron kill her mother. This Court stated:

> Here, there is no proof as to the true motive for the shooting of Tina. Indeed, the motive appears unclear. The fact that Tina was on the telephone at the time of the shooting hardly infers any motive on the Appellant's part.

Id. at 360. This Court reversed the finding of the witness elimination aggravator.

In the instant case, the evidence in support of this factor is, under ***Garron, Rembert, Johnson*** and the consistent holdings of this Court, insufficient to sustain such a finding by the trial court. The Appellant objected to the jury receiving instruction on this aggravator. Allowing the jury to be so instructed and argument by the State deprive the Appellant of a fair sentencing hearing. The presentation to the jury infected their deliberations. The consideration and finding of this factor by the sentencing court violated Appellant's rights as provided by the Florida Constitution and the Fifth, Eight and Fourteenth Amendments to the United States Constitution.

VI.

THE TRIAL COURT ERRED IN PRECLUDING CROSS-EXAMINATION OF THE MEDICAL EXAMINER AND ALLOWING TESTIMONY ON IRRELEVANT MATTERS AND AN EXPERT OPINION THAT THE OFFENSE WAS HEINOUS, ATROCIOUS OR CRUEL

Following the Appellant's conviction in the guilt phase, the jury was convened for the purpose of reaching an advisory verdict as to punishment. One of the aggravating factors advanced by the State was that the homicide was heinous, atrocious or cruel. Fla. Stat. §921.141(5)(h). In addition to relying on the evidence of crime scene photographs and the testimony of the Associate Medical Examiner who conducted the autopsy, R. 1569-1654, the State presented an "expert" in matters "heinous, atrocious or cruel." R. 2319-20. The trial court erroneously limited the Appellant in examining Wetli as to the means by which he reached his opinion. Further, by allowing Wetli to testify the trial court allowed the State to introduce prejudicially irrelevant material and an improper opinion by an Associate Medical Examiner that the homicide was heinous, atrocious or cruel. This witness infected the entire sentencing proceeding.

Over objection of the Appellant, Associate Medical Examiner Charles Wetli was called as a witness by the State at the penalty phase.[22] By his own admission his main function was

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[22] The Appellant's initial objection was as follows:

Mr. Houlihan: [W]e object for purposes of this phase the facts are already in evidence. Most of the state's witnesses, as I understand with one exception, are new

to investigate the death of anyone "who has died suddenly and offer an opinion as to the time of death and the cause." R. 2323. His familiarity with the instant case was not from participation in the autopsy or investigation in 1983, R. 2350, but only after a review of the photographs and evidence in the case file. This review was conducted only after having been

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witnesses. They are going to give testimony. One of the witnesses they have is the medical examiner. He's gonna be called and say exactly the same things, and that's improper, and it's not necessary.

The Court: We'll see.

Mr. Rosenblatt (the state): The purpose for calling the medical examiner is to establish aggravating heinous, atrocious, and cruel, the pain and suffering with which we are allowed to go with in the case.

The Court: I think the state has a right. They want to meet the aggravating circumstance of heinous and cruelty.

Mr. Houlihan: Mr. Chavies and I did not object. We met with the medical examiner concerning all these things, and are figuring if we got to this point, it would be improper for them to relate that.

The Court: Oh, no.

Mr. Houlihan: There is nothing that this doctor is going to say that it was not already testified to.

The Court: I don't think that's the test here, I don't think that's the test. If they want to show heinous and cruelty, that's one of the ways they can do it. They have a right. Objection overruled.

Mr. Houlihan: That's an objection if this particular witness testifies.

(emphasis supplied) R. 2319-20.

contacted by the prosecutor **two or three days before his testimony**. R. 2350-1. Although he had been a medical examiner thirteen (13) years, R. 2324, it was the first time he had been called to testify at a sentencing hearing.

The reason for his presence became clear early in the questioning by the State:

Question: Do you understand why you were called as a witness.

Answer: Yes.

Question: Do you understand that the purpose for this is to determine an approach as to what is called the aggravating circumstance of the unusual death which is heinous, atrocious or cruel?

Answer: Yes.

Question: Do you have any specific training or experience which would help you to answer questions that I am going to pose to you about a heinous, atrocious or cruel death?

Answer: I attended seminars which were entitled "Counteraction and Care of the Dying Patient."

Question: What does the care of a dying patient have to do with heinous, atrocious or cruel?

Answer: That particular conference; that conference specifically dealth [sic] with the concept of youth in Asia [sic] and specifically the care of terminally ill patients in which pain and suffering is a part of the person.

R. 2327-8. Subsequently, the Appellant objected to the relevance of euthanasia and the pain and suffering of the terminally ill to the issues at hand. R. 2329. This objection was overruled and the medical examiner then proceeded into a discussion of different types of pain and suffering including fear of death while one's head is held under water, R. 2330, fear of impending death, R. 2330, and torture in Brazil R. 2331. The doctor also injected,

hypothetically, the fear of rape twice in his discussion R. 2328; R. 2335, despite the absence of even a suggestion of any sexual assault or intended sexual assault in this case. In fact, at no time did the prosecutor directly relate these irrelevant and inflammatory matters to the instant case but rather carefully tied them to the doctor's attendance at the seminar and his feelings about pain and suffering. These matters were inflammatory and prejudicial.[23]

However, the prosecutor then sought an opinion from the doctor as to whether this victim had experienced pain and suffering. R. 2337-9. The hypothetical question posed to the doctor took over two pages in the transcript to relate and was objected to by the Appellant as not being based upon the evidence and invading the province of the jury. R. 2340. The doctor was then asked and offered his opinion, over objection, that the instant homicide involved not only pain and suffering but to an extreme degree. A review of the testimony is instructive in illustrating how the State presented the doctor as an expert in "heinous, atrocious, or cruel".

Question: Instructions that the jurors are going to receive and that they are going to be instructed on is that, if the crime is aggravated if the heinous, atrocious or cruel [sic]. For that reason I ask you the following? How many autopsies have you performed?

Answer: Five thousand.

Question: Based upon experience on those five thousand plus autopsies, does the amount of pain and/or suffering experience [sic] by Mary Jane Quinn stand apart from the other cases that you have handled? Is it above and beyond what the average person would experience in pain and suffering?

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[23] Wetli's testimony also included a discussion of the wounds suffered by the victim and her state of consciousness during the offense as well as the presence of defensive wounds. R. 2333-4. This testimony drew no objection from the Defendant and properly so as it was ostensibly within the associate medical examiners expertise, ***Capehart v. State***, 583 So.2d 1009, 1012-13 (Fla. 1991) and relevant to the issue of heinous, atrocious, or cruel.

R. 2342. Over objections the doctor was allowed to opine that it was. Immediately following that question the doctor testified that most of the homicides he reviewed are gunshot cases. The "other cases" he viewed are cases where death is drawn out, "were [sic] a person is murdered where the head is wrapped in duct tape and so forth." R. 2343. At this point the Appellant objected and requested an opportunity to question Wetli as to the basis of his opinion and review with him other cases in which similarly gruesome offenses had not been found to be heinous, atrocious and cruel. R. 2344-46. The trial court denied the Appellant an opportunity to investigate other autopsies performed by this doctor and to present testimony concerning other cases.

Ultimately Wetli testified that medical science is unable to objectively gauge pain and that he can only give an opinion that the person suffered pain. R. 2349-50. His opinion in this case was based only on photographs as he was not present during the autopsy. R. 2350. In essence, Wetli was presented as an expert on heinous, atrocious, cruel and rendered an opinion in that regard. This was error.

Prior to the commencement of the sentencing phase the state moved to preclude the Appellant from examining the facts and circumstances of other death penalty cases, citing ***Herring v. State***, 446 So.2d 1049 (Fla. 1987). R. 2318. In ***Herring***, the Defendant unsuccessfully sought to introduce testimony from three defense lawyers that their clients had received life sentences as opposed to death sentences for crimes similar to that committed by Herring. This Court upheld the exclusion of that evidence. ***Id.*** at 1056.[24]

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[24] This Court found that ***Lockett v. Ohio***, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) did not require admission of this evidence in that the weighing of the proportionality of the sentence was a factor to be weighed by the trial court and ultimately by the Florida Supreme

The trial court below granted the State's Motion in Limine without discussion. R. 2318. Within minutes, the state had violated the exact order they sought. Although they disingenuously disguised Dr. Wetli as a "pain and suffering" expert (his qualifications as such to be discussed below) it was their obvious intent to present his opinion on the ultimate issue of whether the homicide was heinous, atrocious or cruel.

A. THE APPELLANT WAS NOT ALLOWED TO CROSS EXAMINE DR. WETLI ABOUT THE BASIS FOR HIS OPINION

The failure of the trial court to allow cross examination in regard to Wetli's opinion constituted a clear violation of the Appellant's rights. It is blatantly unfair to allow the State to limit the evidence presented by the Appellant in regard to the circumstances of other death penalty cases but then allow the State to offer an opinion of a medical examiner that the instant offense was far more painful (and inherently far more heinous, atrocious or cruel) than another homicide. The Appellant pointed out this lack of parity in his objection. R. 2343-46. Specifically he sought permission to investigate all previous cases from the medical examiners office and the opportunity to confront Dr. Wetli on his statements. R. 2345. The trial court denied him this opportunity.

In an oft-quoted passage, this Court has discussed the parameters of cross examination:

> "[W]hen the direct examination opens a general subject, the cross examination may go into any phase, and may not be restricted to mere parts . . . or to the specific facts developed by the direct examination. Cross examination should always be allowed relative to the details of an event or transaction a portion only of which has been testified to under direct examination. As has been stated,

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Court, but not "a matter for the jury." ***Herring,*** 446 So.2d at 1056.

> cross examination is not confined to the identical details testified to in chief, but extends to its entire subject matter, and to all matters that may modify, supplement, contradict, rebut or make clearer the facts testified to in chief . . ."

Coxwell v. State, 361 So.2d 148, 151 (Fla. 1978) (quoting ***Coco v. State***, 62 So.2d 892, 895 (Fla. 1953) (quoting 58 Am. Jur. *Witnesses* §632 at 352 (1948))) (footnote omitted.) *See also* ***Zerquera v. State***, 549 So.2d 189 (Fla. 1989). The importance of cross examining experts can not be understated:

> Cross-examination of experts on relevant and material issues is especially important in view of the rules of evidence that permit experts to testify and express opinions without setting out in detail all of the predicates upon which the opinion or testimony may be based. Those matters are now left largely to be explored on cross-examination. Hence, if cross-examination is limited . . . an expert's views and the soundness thereof may go largely untested.

Dempsey v. Shell Oil Co., 589 So.2d 373, 379 (Fla. 4th DCA 1991). *See also* ***Marks v. Marks***, 576 So.2d 859 (Fla. 3d DCA 1991). Since Wetli's opinion was designed to assist the jury in determining whether the instant facts presented a homicide which was heinous, atrocious or cruel, an examination should have been allowed into Wetli's case file to present to the jury instances where similar or like offenses involving pain and suffering had resulted in findings by juries in court that the homicides were not heinous, atrocious or cruel.

The unfairness of this proceeding is patent. The State first sought to preclude the Appellant from examining other cases. R. 2852. Upon receiving the court's order that the Appellant could not examine other cases, the State then presented an "expert" witness who rendered an opinion on an ultimate issue of an aggravating factor **based upon his examination of other cases, including death penalty cases**. The Appellant was then precluded from examining the medical examiner on the basis of his opinion and presenting him with, perhaps,

his own cases in which the aggravating factor sought by the State was not found. This procedure deprived the Appellant of his opportunity to present evidence during the sentencing phase of this trial, and to effectively cross examine a witness against him in violation of his Due Process and confrontation rights afforded by the Florida and Federal Constitutions.

B. DR. WETLI WAS NOT QUALIFIED TO TESTIFY ABOUT PAIN AND SUFFERING IN THIS CASE

The associate medical examiner's expertise in regard to pain and suffering came from attendance at one seminar in Holland on the counteraction and care of terminally ill patients. It is a broad leap from attendance at one conference on euthanasia to rendering an opinion that a murder victim suffered pain and suffering beyond what "the average person would experience in pain in suffering [sic]." R. 2342.

It is recognized that a trial court has broad discretion in determining the range of subjects upon which an expert witness may offer an opinion. ***Johnson v. State***, 393 So.2d 1069, 1072 (Fla. 1980). However, this discretion:

> [I]s not boundless and expert testimony should be excluded where the facts testified to are of such a nature as not to require any special knowledge or experience in order for the jury to form conclusions from the facts.

Johnson v. State, 393 So.2d at 1072; ***Lowder v. State***, 589 So.2d 933 (Fla. 3d DCA 1991) (Police officer not permitted to testify as an expert as to relationship between defendants possession of currency at time of arrest in dealing in narcotics.) ***Ruffin v. State***, 549 So.2d 250 (Fla. 5th DCA 1989) (Testimony of police officers in opinion form that defendant was person in video tape selling cocaine error.)

Finally, it is questionable whether Dr. Wetli was even qualified to render an opinion on these matters. He indicated in his testimony that his main function was "the investigation of anybody who has died suddenly and offer an opinion as to the time of death and cause." R. 2323. He admitted in cross examination that there is no way to objectively gauge the pain that someone feels. R. 2348. Further, he did not know the legal definition of heinous, atrocious, or cruel. ***Id.*** Yet, over objection, the trial court allowed the doctor to render an opinion that this particular homicide victim suffered pain and suffering "above and beyond what the average person would experience." R. 2342. No showing was made that this witness had any special knowledge about pain and suffering:

> It is not enough . . . that a witness is qualified in some general way -doctors cannot give expert opinions in all fields of medicine - but the witness must be possessed of special knowledge about the discrete subject upon which he is called to testify.

United Technologies v. Industrial Risk Insurers, 501 So.2d 46, 49 (Fla. 3d DCA 1987). Thus in ***Shaw v. State***, 557 So.2d 77 (Fla. 1st DCA 1990), a Second Degree Murder conviction was reversed where the trial judge improperly permitted a pathologist to render expert opinion that the victim was not engaged in a struggle immediately prior to her death.

In ***Gilliam v. State***, 514 So.2d 1098 (Fla. 1987), this Court addressed the admission into evidence of a medical examiner's opinion that a sneaker found at the scene of a homicide caused certain marks on the victim. The medical examiner had even conducted experimentation wherein she had slapped a co-worker's back with the sneaker leaving marks similar to those found on the decedent. This Court found her not to be qualified as an expert in shoe patterns and reversed Gilliam's conviction and sentence of death. ***Id.*** at 1100. *See also* ***Sun Supermarkets, Inc. v.***

Fields, 568 So.2d 480 (Fla. 3d DCA 1990) (Optometrist not competent to give medical type opinions as to post operative conditions.)

In ***Tarin v. City National Bank of Miami***, 557 So.2d 632 (Fla. 3d DCA 1990), a Florida Highway Patrolman who had handled "trooper and homicide investigation", attended 40 hours in "traffic homicide" training and a seminar during which "Dr. Fogerty" from the University of Miami instructed in accident reconstruction, was found to be not qualified to offer an opinion as an expert in accident investigation or reconstruction. The Court in ***Tarin*** pointed out that the Highway Patrolman had failed to specify how many or over what length of time he had handled accidents and they found that the showing was "entirely too sketchy to qualify the officer as an expert in accident investigation or reconstruction." ***Id.*** at 633.

In the instant case, there is no showing that Dr. Wetli has any expertise in neurology. Nor, save his attendance at one seminar involving the care of terminally ill patients, that he had any training or expertise in distinguishing between wounds which might be painful and wounds which are not painful. Further, the State presented no showing to the trial court that he had conducted any studies involving pain, or that he had any familiarity with the subject in the instant case. Consequently, he was not qualified to testify in this regard.

Finally, as noted earlier, the State presented Dr. Wetli to provide the jury with an expert opinion on a legal conclusion. Although cloaking him in the guise of a "pain and suffering" expert, it is clear that he was presented to provide an opinion to the jury that the instant offense was "heinous, atrocious or cruel." In ***Gurganus v. State***, 451 So.2d 817 (Fla. 1984) this Court addressed the exclusion of psychologists who were presented by the defendant in a murder trial to offer the opinion that the defendants actions were closer to a "depraved mind" than to a

premeditated plan. 451 So.2d 817. In upholding the trial court's refusal to allow the psychologists to render such opinions, this Court stated:

> The defense was attempting to elicit a bottom line opinion as to whether the actions of Gurganus were those of a "depraved mind" or a "premeditated plan." Both of these terms are legal terms with specific legal definitions. Essentially, the defense was attempting to elicit the psychologists' opinions as to whether Gurganus committed Second-Degree or First-Degree Murder. Such a conclusion was a legal conclusion no better suited to expert opinion than to lay opinion and as such, was an issue to determined solely within the providence of the jury. (citations omitted)

451 So.2d 821. In the instant case, Wetli's opinion was one of a legal conclusion best left for to determination by the jury.

C. THROUGH DR. WETLI, THE STATE INJECTED PREJUDICIAL AND IRRELEVANT MATERIAL INTO THE TRIAL

Inherent in this error is that Wetli was presented to the jury as an expert in heinous, atrocious, or cruel matters. As counsel for the state clearly framed this testimony;

> Do you understand why you were called as a witness?
>
> Do you understand that the purpose for this is to determine an approach as to what is called the aggravating circumstances of the unusual death which is heinous, atrocious or cruel?
>
> Do you have any specific training or expertise which would help you to answer the questions that I am going to pose to you about a heinous, atrocious or cruel death?

R. 2328. Whether the instant homicide was heinous, atrocious or cruel is a legal conclusion, not an area which was susceptible to opinion by the associate medical examiner, Charles Wetli. In that regard, this case is no different than that of ***Gurganus v. State***, 451 So.2d 817 (Fla. 1984) discussed above. In ***Gurganus***, the Defendant attempted to illicit a psychologists' opinion

essentially "as to whether Gurganus committed Second or First Degree Murder." ***Id.*** at 821. This Court found that this was a legal opinion best suited to determination by the jury and not by an expert. In the instant case, the State attempted successfully to provide the jury with exactly that, an expert opinion on an issue that was to be determined solely by the jury. As such, it constitutes error.

The prejudice here may be even greater than envisioned in ***Gurganus***. There is little question that the opinion of an associate medical examiner who has been involved in over 5,000 autopsies carries tremendous weight with a jury. The danger of a jury attaching too much significance to his opinion is patent. Nonetheless, Wetli was permitted to offer an opinion on a matter which was a legal conclusion and one which was required to be determined solely by the jury. As noted above, Dr. Wetli showed no special expertise in the determination of pain and suffering, except his attendance at a seminar at which pain and suffering of the terminally ill was discussed. Nonetheless, he was allowed to present to the jury discussions regarding individuals who had been tortured in Brazil, R. 2331, and other human rights violations, fear related to drowning by way of someone holding ones head under water, R. 2330, and fear of rape R. 2335.

There is no objective manner in which to measure the prejudice inherent in Wetli's injection of rape into this trial. There is no question that the evidence presented in the guilt phase contained not even a hint of a sexual battery. No rape was suggested by any evidence, argument of counsel, instruction of the trial court or even inquired into during voir dire. Yet Dr. Wetli presents the absolutely speculative, unsupported and highly prejudicial musing that the victim may have feared that she was to be raped during the time that she was being physically assaulted. Further, we are to presume that this associate medical examiner reached this

conclusion based upon what he had learned at the seminar "Counteraction and Care of the Dying Patient", the seminar about euthanasia. The "Parade of Horribles" presented by Wetli had no place in this trial and was introduced only to unfairly prejudice the Appellant.

The discussion of these matters took place under the guise of discussing what pain and suffering is. As noted above, this an area that is not excluded from a lay persons general knowledge. Nor is an expert necessary to inform an individual what pain is. After successfully seeking to preclude the Appellant from discussing the facts and circumstances of other death penalty cases, the State successfully introduced before the jury a discussion of heinous offenses in Brazil and offenses never contemplated nor presented in the instant case. As such this evidence was prejudicial and inflammatory. It had no place in this trial, and its presentation through an expert exacerbates its harm to the Appellant.

In sum, the presentation of "pain and suffering" evidence was in fact a thinly disguised attempt to put an "expert's" gloss on his opinion that the offense was heinous, atrocious and cruel, terms that Wetli did not fully comprehend. The prejudice is apparent where the State was able to examine and discuss irrelevant and inflammatory offenses foreign to the evidence presented while successfully precluding the Appellant from inquiring as to the basis of Wetli's opinion. Wetli's testimony invaded the province of the jury, was not based upon any special expertise and should not have been allowed. The procedure utilized deprived the Appellant of a fair sentencing proceeding, not only as to this specific aggravating factor, but as to the entire sentencing phase. The Appellant's Eighth Amendment rights were violated and his sentence must be reversed.

VII.

THE TRIAL COURT ERRED IN ALLOWING THE JURY TO CONSIDER AND IN ULTIMATELY FINDING APPLICABILITY OF THE AGGRAVATING FACTOR OF HEINOUS, ATROCIOUS OR CRUEL

The evidence below proved multiple stab wounds and blows to the head and chest of the victim. It further showed that Mary Jane Quinn was assaulted in the office of the Federal Express building and was not transported to any other locations. What the evidence did not show is that her attacker **intended** to cause unnecessary or prolonged suffering or that there was present the **desire** to inflict a heightened degree of pain or suffering. Rather, the evidence is consistent with the intent to complete the death of the victim, avoid prolonged suffering and that the assailant had encountered a strong, resistant victim. Absent the intent to torture or to inflict a high degree of pain, the aggravating factor of heinous, atrocious or cruel was not proven beyond a reasonable doubt and should not have been considered.

In ***Cheshire v. State***, 568 So.2d 908 (Fla. 1990), this Court addressed the evidence necessary to sustain the finding of heinous, atrocious or cruel:

> The factor of heinous, atrocious or cruel is proper only in torturous murders - those that evince extreme and outrageous depravity as exemplified by the ***desire*** to inflict a high degree of pain or ***utter indifference to or enjoyment of*** the suffering of another. ***State v. Dixon***, 283 So.2d 1 (Fla. 1973)(emphasis supplied).

Cheshire, 568 So.2d 912; ***Santos v. State***, 591 So.2d 160, 163 (Fla. 1991). Since ***Cheshire***, this Court has consistently required evidence that a defendant intends to cause unnecessary pain or to torture the victim.

In ***Bonifay v. State***, 18 Fla. L. Weekly S464 (September 2, 1993), this Court stated:

> "The record fails to demonstrate any intent by Bonifay to inflict a high degree of pain or to otherwise torture the victim. The fact that the deceased begged for his life and that there were multiple gun shots is an inadequate basis to find this aggravating factor absent evidence that Bonifay **intended** to cause the victim unnecessary or prolonged suffering." (emphasis supplied)

Id. at S465. In ***McKinney v. State***, 579 So.2d 80 (Fla. 1991) evidence was presented that the defendant jumped into the victim's car, hit him on the head and ordered him to drive to another location. There the victim was shot twice. Then the vehicle was driven (by the defendant or the victim) to an alley where the victim was shot twice more causing his death. ***Id.*** at 84. This Court found the heinous, atrocious or cruel factor to be improperly applied stating: "The evidence in the record does not show that the defendant ***intended to torture*** the victim." ***Id.*** (emphasis supplied).

In ***Richardson v. State***, 604 So.2d 1107 (Fla. 1992) the Court held that a shotgun shooting would not sustain the heinous, atrocious or cruel aggravator:

> [T]he factor of heinous, atrocious or cruel is not permissible based on the present facts, because there was no pitiless or conscienceless ***infliction of torture***. (emphasis supplied)

Id. at 1109. Such was also the result in ***Porter v. State***, 564 So.2d 1060 (Fla. 1990) where the defendant shot his former lover and her male companion. In finding that the State had not met their burden this Court stated:

> [T]his record is consistent with the hypothesis that Porter's was a crime of passion, not a crime that was ***meant*** to be deliberately and extraordinarily painful (emphasis original).

Id. at 1063.

It is not enough that the victim suffered pain as a result of a defendants acts or that the victim was aware of their impending death:

> The criminal act that ultimately caused death was a single sudden shot from a shotgun. The fact that the victim lived for a couple of hours in undoubted pain and knew that he was facing imminent death, horrible as this prospect may have been, it does not set this senseless murder apart from the norm of capital felonies.

Teffeteller v. State, 439 So.2d 840, 846 (Fla. 1993); *Accord* ***Mills v. State***, 476 So. 2d 172 (Fla. 1985)(whether death is imminent or whether the victim lingers and suffers is pure fortuity).

Thus, there must be more than merely facts which show suffering of the victim. There need be a clear showing that a defendant intended to torture or evidence of the desire to inflict a high degree of pain.[25] In the instant case, the victim suffered twelve penetrating knife wounds. R. 1615. One is referred to as a defensive wound to the hand, R. 1602, one on the

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[25] Appellant is not unmindful of ***Hitchcock v. State***, 578 So.2d 685, 692 (Fla. 1990) ("That Hitchcock might not have meant the killing to be unnecessarily torturous does not mean that it actually was ... not heinous, atrocious or cruel. This aggravator pertains more to the victim's perception of the circumstances than to the perpetrator's.") However, ***Hitchcock*** is clearly inconsistent with the pronouncement of this Court requiring intent in ***Cheshire, Bonifay, McKinney, Richardson*** and the cases that have come after ***Hitchcock.***

Further, this Court stated in ***Richardson v. State***, 604 So.2d 1107, 1109 (Fla. 1992) that the legal landscape regarding this factor has changed since the pronouncements in ***Sochor v. Florida***, ____ U.S. ___, ___, 112 S.Ct. 2114, 2121, 119 L.Ed.2d 326, 339 (1992) where the Court ruled that this aggravator requires that the crime be <u>both</u> conscienceless or pitiless <u>and</u> unnecessarily torturous to the victim. (emphasis by this Court).

Finally, the facts of ***Hitchcock*** involving sexual battery, beating and strangulation, including the transportation of the victim to a second location (facts found at ***Hitchcock v. State,*** 413 So.2d 741, 743 (Fla. 1982)) are more in line with ***Sochor***. (Facts found at ***Sochor v. State***, 619 So.2d 285, 287-8 (Fla. 1993)). In ***Sochor*** there was an abduction, sexual battery, beating and strangulation. Significantly, the underlying crimes in ***Sochor*** and ***Hitchcock*** were intended from the start as a painful assault upon the person and the infliction of torture upon that person. In those cases, the initial intent of the perpetrators contemplated the infliction of excruciating, unnecessarily torturous and prolonged pain which led to the ultimate death of the victims. This is not so in the case at bar.

right chest, and ten on the back. R. 1612. The associate medical examiner also determined a minimum of three blows to the head, back and chest were delivered by a blunt instrument and that defensive blunt wounds to the hands were present. R. 1591;1600;1616. The medical examiner was able to opine that the fax machine stolen from the Federal Express Office was the instrument used to cause the blunt trauma. R. 1596-1601. Although she believed that the victim was alive at the time of the knife wounds, she could not tell whether they were inflicted before or after the blunt trauma. R. 1627. Although associate medical examiner, Wetli, opined that the victim was alive up to fifteen minutes after the assault commenced, R. 2341, he was not able to offer an opinion as to which blows or stab wounds occurred while the victim was conscious.

No evidence was presented that the victim was tortured, transported to a second location while aware of her impending death or of escalating and deliberate infliction of less severe to more severe wounds. Rather, the evidence is most susceptible to the interpretation that Quinn's assailant killed her during a robbery in a manner designed to effect her death as quickly as possible. Ms. Quinns age (27 years of age) and size (5'5", 208 pounds), R. 2604, suggests that she was capable of significant resistance. However, there is no evidence that once incapacitated, Quinn was tortured. There was no evidence of infliction of pain merely for the sake of causing pain. Finally, it is clear that Quinn was not the object of the underlying robbery or that her death was other than incidental to the robbery. As such this case does not fall under the cases recently decided where this Court has found the heinous, atrocious or cruel aggravator to be proper.

This case is not like ***Thompson v. State***, 619 So.2d 261 (Fla. 1993) where the sexual battery and torture endured by the victim was not only repulsive even to read but was unquestionably intended by Thompson. ***Id.*** at 263. Thompson's victim was beaten with a chain,

a chair leg and night stick as well as burned with lit cigarettes and lighters. *See also* ***Foster v. State***, 614 So.2d 455 (Fla. 1992). (Victim first beaten, verbally informed of his impending death, then stabbed in throat. Victim later stabbed a second time and then, probably while still alive, had spine severed with knife.)

Nor is his case like ***Sochor v. State***, 619 So.2d 285 (Fla. 1993). In ***Sochor***, the victim was abducted, beaten, sexually assaulted and strangled all while screaming for help. ***Id.*** at 292. As noted earlier, harm to the victim was intended from the first acts of ***Sochor*** and intentionally increased until the victims torturous death eventually occurred. ***Sochor*** intended from the start to effect cruel and unnecessarily painful results upon his victim. His acts were not incidental to another underlying crime, but were his main objective.

This case is closest to, but distinguishable from, ***Atwater v. State***, 18 Fla. L. Weekly S496 (Fla. September 16, 1993). In ***Atwater***, the defendant not only robbed his 64 year old victim but beat him and inflicted nearly 40 stab wounds. ***Id.*** at 497. This Court observed that the stab wounds were "inflicted ***in the order of increasing severity*** and that the fatal wounds . . . were probably inflicted last." (emphasis supplied) ***Id.*** These facts clearly show the intent of ***Atwater*** to cause pain beyond that necessary to effect the death of his victim.

The evidence in the instant case does not allow for this inference to be drawn. Such an interpretation was not argued by the State nor was such intent by Ramirez found by the Court. As such, the evidence is not sufficient to allow a finding that the heinous, atrocious or cruel factor was proven beyond a reasonable doubt. It should not have been sent to the jury and should not have been weighed by the sentencing judge. ***Hamilton v. State***, 547 So.2d 630, 633 (Fla. 1989).

A final note is necessary. It is facially compelling to merely divide the heinous, atrocious and cruel cases into those where the victim suffered a death by use of a firearm, and consequently died quickly, and those where death was effected less swiftly, invariably by means of a knife, blunt instrument, beating or strangulation. These latter homicides are generally effected in a manner which produces more pain and suffering. However, such a division raises two problems. First, it ignores this Court's latest pronouncement that the intent to torture or the desire to inflict pain be present in order to find the aggravating factor of heinous, atrocious and cruel.

Second, such a division rewards murderers for using instruments of greater destruction. The obvious reason why death occurs faster by use of a firearm is that the instrumentality is more dangerous and capable of producing greater harm in a shorter period of time. The possession of these instruments of destruction should not be encouraged. It seems anomalous for this Court to "reward" a murderer who uses a robbery in a firearm yet punish more severely another who ultimately effects a bloodier, slower death as a result of carrying only a knife or blunt instrument. If, as in ***Atwater v. State***, *supra*, a defendant takes pleasure in inflicting pain in the course of a robbery by use of a knife, then the aggravating factor of heinous, atrocious or cruel is proper. However, where a defendant encounters a resistant victim, and effects the death in the only means available to him, without the intent to inflict or prolong pain, then the factor of heinous, atrocious or cruel is inappropriate. It is for this reason that the requirement of intent to cause pain becomes the logical element necessary to constitutionally apply the heinous, atrocious or cruel factor.

In the instant case the evidence is inconsistent with the intent of causing pain. Rather, it is consistent with an intent to effect the victim's death in a manner as quickly as possible. Absent the evidence of the intent to torture or to cause pain for pain sake, the aggravating factor of heinous, atrocious or cruel should not have been presented to the jury and should not have been considered by the sentencing Court. A finding of this factor violates the Appellant's rights guaranteed by the Florida Constitution and the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

VIII.

THE INSTRUCTION TO THE JURY ON THE AGGRAVATING FACTOR OF HEINOUS, ATROCIOUS AND CRUEL WAS UNCONSTITUTIONALLY VAGUE.

The trial court instructed the jury on the aggravating circumstance of heinous, atrocious and cruel as follows:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence.
>
> * * *
>
> 5. The crime for which the Defendant is to be sentenced was especially wicked, evil, atrocious or cruel.
>
> Atrocious means outrageously wicked and vile. And cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of another. The crime must be conscienceless or pitiless and be unnecessarily torturous to the victim.

R. 2481-2. This instruction fails to give sufficient guidance to the finder of fact and is therefore unconstitutionally vague. ***Maynard v. Cartwright***, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988).

In ***Maynard***, the United States Supreme Court found a virtually identical instruction to be violative of the Eight Amendment to the United States Constitution.[26] Similarly, the same instruction as that found in ***Maynard*** and almost identical to that utilized here was found unconstitutionally vague in ***Shell v. Mississippi***, 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990). The danger of this vagueness was recognized in ***Stringer v. Black***, 503 U.S. ____, 112 S.Ct. 1130, 1139, 117 L.Ed.2d 367 (1992):

> [O]ur precedents . . . have not permitted a State in which aggravating factors are decisive to use factors of vague or imprecise content. A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance. Because the use of a vague aggravating factor in the weighing process creates the possibility not only of randomness but also of bias in favor of the death penalty, we cautioned in ***Zant*** [***Zant v. Stephens***, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983)], that there might be a requirement that when the weighing process has been infected with a vague factor the death sentence must be invalidated.

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[26] The instant instruction added the sentence "the crime must be conscienceless or pitiless and be unnecessarily torturous to the victim." R. 2481-2. This language gives no more guidance than that found in ***Maynard, supra; Shell v. Mississippi***, 498 U.S. 1, 111 S.Ct. 313,112 L.Ed.2d 1 (1990) or ***Godfrey v. Georgia***, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).

In the instant case, the jury was given insufficient guidance by the instruction of the trial court. This was a violation of the Eighth Amendment to the United States Constitution and reversible error, on its own, or in conjunction with the other sentencing errors presented.

IX.

THE TRIAL COURT FAILED TO CONSIDER AND WEIGH ALL MITIGATING CIRCUMSTANCES

The Appellant presented evidence that as a youth he suffered physical abuse at the hands of his father and a complete lack of guidance from his mother and father. R. 2383; 2387. The abuse was so severe that at age seven he was taken to live with his Aunt for three or four years. R. 2387. Further, evidence was presented which showed that the Appellant consumed marijuana and alcohol within two hours of the murder. R. 1495; R. 1511. Finally, evidence of family ties and continued support by his aunts and grandmother was presented. R. 2381-99. Although these are all recognized mitigating factors and were proven below, the trial court refused to consider them in mitigation.

It has clearly been this Court's pronouncement that evidence presented in mitigation must be considered by the sentencing court. Initially, the sentencing court must consider whether the facts are supported by the record and then whether the facts are of a kind capable of mitigating the Appellant's punishment. ***Santos v. State***, 591 So.2d 160, 164 (Fla. 1992); ***Campbell v. State***, 571 So.2d 415, 419 (Fla. 1990); ***Rogers v. State***, 511 So.2d 524, 536 (Fla. 1987) *cert. denied.* 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). Mitigating circumstances have been

defined by this Court as those "that in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability of the crime committed. ***Rogers v. State*** 511 So.2d 526, 534 (Fla. 1987) *cert. denied*, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988).

The sentencing Court must find mitigating circumstances if they are necessarily established by the greater weight of the evidence. ***Campbell v. State***, *supra.* Where a reasonable quantum of uncontroverted evidence has been produced, the trial court must find that the mitigating circumstance has been proved, ***Nibert v. State***, 574 So.2d 1059, 1062 (Fla. 1990). The trial court may reject a defendant's claim that a mitigating circumstance has been proven only if the record contains competent, substantial evidence to support the court's rejection of the factor. ***Cook v. State***, 542 So.2d 964 (Fla. 1989).

This Court has acknowledged that federal caselaw requires the sentencing court to consider all mitigation:

> Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence . . . the sentencer, and the [appellate court], may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

Campbell v. State, 571 So.2d 415, 419 (Fla. 1990), quoting ***Eddings v. Oklahoma***, 455 U.S. 104, 114-5, 102 S.Ct. 869, 876-7, 71 L.Ed.2d 1 (1982). In the instant case the trial court improperly refused to consider the mitigating evidence presented by the Appellant.

First, the Appellant presented evidence of abuse at the hands of his father and of sexual abuse by a neighbor. Appellant's grandmother, Marie Davis, testified that Appellant was beaten

by his father and that his mother was not a caring mother. R. 2383. Appellant's aunt, Elsie Johnson, removed him from the abusive household when he was seven and kept Appellant for three or four years. R. 2388. She reported seeing him being beaten by his father with "switches like ring cords". R. 2388. Appellant's other aunt, Estelle Collins, reported observing beatings with an "iron cart" resulting in the Appellant being hurt. R. 2395.

Estelle Collins also reported having observed first hand that Appellant had been sexually abused by a neighbor. R. 2396. Although the exact sexual acts visited upon Appellant were not reported, his age is described in the record as very young. ***Id.***

What arises from the testimony from these family members is clear evidence of a dysfunctional family, splintered at an early stage of Appellant's life and a household in which he had no parental guidance from his mother and father and physical abuse from his father. This picture of a disadvantaged childhood is only completed by the sexual abuse that he suffered in the household. Parental neglect, a disadvantaged youth and physical abuse, while not specifically delineated in Fla. Stat. §921.141, have previously been accepted by this Court as proper mitigating factors. ***Maxwell v. State***, 603 So.2d 490 (1992); ***Hegwood v. State***, 575 So.2d 170 (Fla. 1991); ***Nibert v. State***, 574 So.2d 1059 (Fla. 1991); ***Brown v. State***, 526 So.2d 903 (Fla. 1988) *cert. denied.* 488 U.S. 944, 109 S.Ct. 371, 102 L.Ed.2d 361 (1988).

The trial court addressed this evidence as follows:

> The Defendant did present some evidence of his having been abused as a child. While the evidence was not particularly credible or convincing, this Court finds that what ever abuse did befall the Defendant ***it did not rise to a level that this Court would consider to be a mitigating factor***. (emphasis supplied)

R. 2939. That the Appellant left a splintered, abusive home to live with his Aunt at age seven was clearly shown by the evidence.[27] The trial court refers to this showing as a "mere possible mitigating circumstance. R. 2940. This was error. There was no competent substantial evidence to support the trial court's refusal to consider this mitigating circumstance. ***Nibert v. State***, 574 So.2d 1059, 1062 (Fla. 1991)(Trial court found evidence of physical and psychological abuse to be "possible mitigation" - error to refuse to consider it.)

Second, the Appellant urged that he had previously been found to be a loving and attentive father of two children and had close ties to other members of his family. In fact, the sentencing court in the Appellant's first sentencing had found his family ties to be a mitigating circumstance. SSR. 138. The instant trial court recognized the finding of the earlier sentencing court, even referring to it as the finding of "this court". R. 2939. However, the instant trial court discounted this non-statutory mitigating evidence by stating:

> 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.

R. 2939. The trial court's rejection of this evidence as mitigation was not supported by the record. Rather, both Appellant's aunts and grandmother all professed their continued love and concern for Appellant. R. 2385; 2390. Despite the court's statement, Elsie Johnson did visit Appellant in prison while he was in Starke, Florida and while he was awaiting trial in Dade County, Florida. R. 2391. She expressed her inability to visit him in other facilities was due to

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[27] It is not a quantum leap of logic to accept the Appellant's background as the primary reason he ended up serving an adult prison sentence at age 16. R. 2939. The trial court gave that fact no mitigating weight at all.

a lack of transportation. ***Id.*** In one of the rare direct conversations between the Appellant and the Court, the Appellant specifically requested visits with his family members to be allowed in the Dade County Jail and personally expressed his concern for his family members. R. 2529-31. The trial court ignored this evidence and improperly rejected these family ties as mitigating evidence.

Finally, evidence was received during trial that between the hours of 9:00 p.m. and 11:00 p.m. on December 24, 1983, the Appellant consumed alcohol and smoked marijuana. R. 1495, 1511. The State alleged the murder to have occurred at 11:30 p.m. Consequently, there is evidence to suggest impairment under Fla. Stat. §921.141(6)(f). The trial court felt that there was sufficient evidence of alcohol and marijuana consumption to support this factor being instructed to the jury. R. 2413-4; 2482. Notwithstanding that he found sufficient evidence to support a jury instruction, the trial court, in his sentencing order stated "no evidence to support this circumstance exists." The testimony of alcohol and marijuana consumption was unrebutted. The court should not have rejected this factor outright but should have weighed it with the other factors he erroneously refused to find. ***Fead v. State***, 512 So.2d 177, 178 (Fla. 1987); ***Cannady v. State***, 427 So.2d 723, 731 (Fla. 1983).[28]

The trial court concluded by stating that "sufficient aggravating circumstances exist which out weight the mere possible mitigating circumstances". R. 2940. Thus, the trial court failed to weigh the mitigating circumstances and acknowledged them as only a "mere possibility." This

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[28] Unlike ***Hardwick v. State***, 521 So.2d 1071 (Fla. 1988) there is no testimony of non-impairment. Rather in the instant case one might normally expect impairment from the consumption of alcohol and marijuana within hours of the offense. ***Lamb v. State***, 532 So.2d 1051, 1054 (Fla. 1988).

exact language was that used by the trial court in ***Nibert v. State***, *supra.* In ***Dailey v. State***, 594 So.2d 254 (Fla. 1992) the trial court found five aggravating circumstances and then, after considering a number of non-statutory mitigating factors concluded: "this court does not consider any of the factors presented by the Defendant to mitigate the crime." ***Id.*** at 259. This Court reversed the trial court because, once the presence of mitigating circumstances is recognized, it cannot be accorded no weight at all. ***Id.*** In the instant case the trial court recognized the existence of these mitigating circumstances but refused to afford them any weight at all.

In ***Lamb v. State***, 532 So.2d 1051 (Fla. 1988), the trial court found four aggravating circumstances but rejected evidence of drug and emotional problems, relationships with family and friends, and that Lamb had consumed marijuana and alcohol in the hours immediately before his offense. ***Id.*** at 1053-4. After determining that one of the aggravating factors was improperly found, this Court reversed the death sentence for reconsideration and resubmission of a new sentencing order. ***Id.*** at 1054. The instant case is most like ***Lamb*** in that both trial courts failed to give adequate consideration to the mitigating factors.

The Appellant has argued in this brief, *infra*, that two of the four aggravating factors found below were not supported by the evidence. These improper aggravating circumstances, coupled with the failure of the trial court to give any weight at all to the proven mitigating circumstances, deprived the Appellant of a fair sentencing proceeding as required by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution. ***Lockett v. Ohio***, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); ***Eddings v. Oklahoma***, 455 U.S. 104, 114-5, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); ***Parker v. Dugger***, __ U.S. ___, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991). Reversal for resentencing for sentencing is required in the instant case.

X.

THE TRIAL COURT COMMITTED OTHER ERRORS IN THE SENTENCING PHASE

A. THE TRIAL COURT'S INSTRUCTIONS LED THE JURY TO BELIEVE THAT THE RESPONSIBILITY FOR DETERMINING THE APPROPRIATENESS OF THE APPELLANT'S DEATH RESTED ELSEWHERE

Through the course of this case the trial court instructed the jury that they were not responsible for the penalty in any way because of their verdict. Specifically, the court told them that "the possible result of this case was to be disregarded as you discuss your verdict on the issue of guilt or innocence." R. 2247. During the preliminary instructions of the sentencing phase, the court stated "the final decision to whatever punishment has to be imposed, rests solely on the judge of this court." R. 2322. The final instructions to the jury in the sentencing phase the court stated "as you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge. R. 2480.

This is a violation of the Appellant's rights under the Fifth Amendment, Eighth Amendment and Fourteenth Amendment to the United States Constitution, to suggest to the jury that the responsibility for the ultimate determination of death will rest with someone else. ***Caldwell v. Mississippi***, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). Since this jury was informed throughout this case that they were not responsible for the decision as to the Appellant's punishment, and Florida law requires the sentencing judge to give their determination great weight, the sentencing procedure here was fatally flawed. Consequently, a new sentencing proceeding is required.

B. REFERENCE TO OTHER OFFENSES COMMITTED BY THE APPELLANT WAS ERROR

During the course of the testimony in the sentencing phase, the State presented the testimony of Irma Botana, a probation officer, who prepared a Pre-Sentence Investigation in 1984. R. 2427-8. The State also presented the testimony of Joseph Papy, a probation officer, from Hillsboro County. R. 2438-9.

The Appellant objected to the testimony of Irma Botana and the reference to a PSI being prepared in 1984 because it left the impression that he was convicted of something in 1984 about which the jury was not informed. R. 2428. If the jury speculated that the Appellant was convicted for this offense, then they received the imprimatur of a previous jury finding on this case. If not, then they received evidence that the Appellant had been convicted of something about which they had not been informed. The Appellant was essentially being labeled a career felon and this was error. ***Geralds v. State***, 601 So.2d 1157, 1162 (Fla. 1992); ***Maggard v. State***, 399 So.2d 973 (Fla. 1981); ***Robinson v. State***, 487 So.2d 1040 (Fla. 1986).

Further, Joseph Papy, the Appellant's probation officer who prepared his 1976 PSI referred to conversations with Appellant's "Juvenile Probation Officer". R. 2440. The Appellant objected, arguing that "there wouldn't be a Juvenile Probation Officer unless he was involved with the juvenile system" and that this was not one of the aggravating circumstances which could be properly presented to the jury. Reference to a juvenile probation officer was also error under ***Maggard, Robinson and Geralds***. Reference to these previous offenses or connection to the criminal justice system by Appellant before the sentencing jury was prejudicial and should require a new sentencing proceeding.

C. THE TRIAL COURT ERRED IN FAILING TO ALLOW ARGUMENT ON THE MITIGATING FACTOR OF LESSER CULPABILITY PURSUANT TO FLA. STAT. §921.141(6)(d)

There was evidence presented in this case of the presence of fingerprints at the scene of the crime that did not match the Appellant's nor any of the standards taken by the officers of employees. Further, there was evidence of a bloody shoe print of a size that would clearly not fit the Appellant. Photographs were taken of this shoe print and the person who wore the shoe was never identified. Argument was presented by defense counsel about this shoe print, R. 2064, and the involvement of a second person, R. 2099, clearly evidence existed of a second individual present at the crime scene in addition to the Appellant.

That the offense was committed with another perpetrator and that the Appellant was an accomplice and his participation was relatively minor is a statutorily recognized mitigating circumstance under Fla. Stat. §921.141(6)(d). The Appellant requested that the jury be instructed on this mitigating factor in the penalty phase. R. 2415. The trial court refused to give this instruction. R. 2415.

Where there is evidence of a mitigating factor it is error for the trial court to refuse to instruct the jury on this factor. In the instant case sufficient evidence was provided in the court's refusal to give this instruction was error and a violation of the Appellant's rights as guaranteed by the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

CONCLUSION

For the reasons argued in issues I, II, III and IV, the Appellant urges that this Court reverse his conviction and return this cause for a new trial.

The Appellant has argued that two of the four aggravating factors found by the trial court should not have sent to the jury or considered by the sentencing judge and that certain mitigating circumstances should have been to the jury and were not. Further, Appellant argues that the trial court failed to properly weigh the mitigating factors, evidence of which were provided by the Appellant. Finally, the entire sentencing proceeding was infected by the testimony of Dr. Wetli, who injected prejudicial and inflammatory matters into the sentencing proceeding. As a result the entire sentencing proceeding is invalid and a new sentencing proceeding is required if this court fails to reverse the conviction.

Respectfully submitted,

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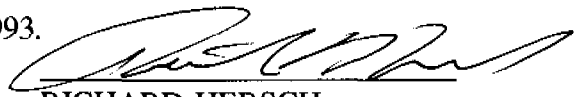
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to: The Office of the Attorney General, 401 N.W. 2nd Avenue, Suite N-921, Miami, Florida 33128 on this 21st day of December, 1993.



RICHARD HERSCH