IN THE SUPREME COURT OF FLORIDA

CASE NO.: 78,386

JOSEPH JEROME RAMIREZ,

Appellant,

-vs-

THE STATE OF FLORIDA,

Appellee.

REPLY BRIEF OF APPELLANT

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

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I.

THE TRIAL COURT ERRED IN ADMITTING KNIFE MARK COMPARISON EVIDENCE

RAMIREZ has argued that the trial court erred in admitting knife mark comparison evidence and in permitting an expert opinion that the knife in question was the knife that created the wounds on the victim. There are two components to this error. First, the trial court erred in refusing to permit the defense to present evidence that the methods used were scientifically unreliable. Second, the trial court erred by introducing evidence absent a showing of scientific reliability.

A. THE TRIAL COURT FAILED TO CONDUCT A FULL HEARING

The trial court held a hearing on the State's Motion to Admit Knife Mark Identification to determine whether the evidence would be admissible at trial. R. 8. The State presented evidence and witnesses during this Motion. The trial court ruled that the defense could not offer any evidence that would be relevant to the issue. R. 28.

The State, in its Answer Brief, argues extensively that the hearing was one to set a "predicate," and that RAMIREZ did not file his own Motion in Limine.[1] Answer Brief at 11. The State's argument hinges on its interpretation of the word "predicate" as a term of art, ignoring this Court's pronouncement in ***Ramirez v. State,*** 542 So.2d 352 (Fla. 1989) (***Ramirez I***), of the predicate necessary for admission of the evidence in question. This Court noted that the qualifications of a person to testify as an expert were within discretion of trial judge, but "(t)he real issue is the reliability of the testing methods which form the basis of the witness's

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[1] The State does not provide any authority for the proposition that a defendant must file his own motion to litigate an issue already before a court.

conclusion." ***Id.*** at 355. This Court then stated "this Court ... will accept new scientific methods of establishing evidentiary facts only after a proper predicate **has first established the reliability of the new scientific method.**" ***Id.***

The predicate to establish the reliability of a new scientific method is found in ***Frye v. United States***, 293 F. 1013 (D.C.Cir. 1923), and remains the law in Florida. ***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); ***Flanagan v. State***, 625 So.2d 827, n.2 (Fla. 1993); and ***State v. Hickson***, 630 So.2d 172, n.4 (Fla. 1993). As even the State concedes, the standard is the general acceptance of knife mark evidence in the scientific community.[2] Answer Brief at 11.

The State argues that RAMIREZ had no right to introduce evidence during the hearing on the acceptance in the scientific community. The State has provided no authority for the position that the standard in this state is general acceptance *in the portion of the scientific community the State chooses to call as its own witnesses*,[3] nor is any such authority to be found.

The trial court's error was in confusing the predicate necessary for an expert to testify with the predicate necessary for a new scientific method to be introduced. In the former, an expert's qualification must be established, and those qualifications can be challenged on cross-examination. However, in the latter, where the consideration is general acceptance in the

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[2] The State adds to this concession "as a subset of toolmark identification," (Answer Brief at 11) but this self-serving insertion is nowhere to be found in this Court's ruling in ***Ramirez I.***

[3] The State additionally argues that RAMIREZ showed no prejudice, as he failed to file his own Motion in Limine and he did not call a witness at trial. The error complained of by RAMIREZ, however, is the trial court's failure to hold a full and fair hearing. Further, RAMIREZ should not be forced to choose between having a fair pretrial hearing and waiving his right to silence, including his right to present no evidence in his own defense at trial.

scientific community, a defendant may not be restrained from introducing evidence from that community. *See* ***Haakenson v. State***, 760 P.2d 1030 (Alaska App. 1988), in which the party challenging the introduction of polygraph evidence was permitted to call a psychology professor to rebut the contention that polygraphy was an accepted science. *See also* ***Bundy v. State***, 471 So.2d 9 (Fla. 1985), *cert. denied*, 479 U.S. 894, 107 S.Ct. 295, 93 L.Ed.2d 269 (1986). This was clearly error, and by virtue of the State's own argument, this was clearly prejudicial.

B. THE STATE FAILED TO SHOW SCIENTIFIC RELIABILITY

RAMIREZ argues that the trial court erred in admitting evidence for which there was not a sufficient showing of scientific reliability. The State's reply is an apparent attempt to relitigate this Court's ruling in ***Ramirez I***. The State argues "the Court should not be misled into equating the tool mark comparison at bar with some exotic new test..." Answer Brief at 14. The State also argues "that the case at bar does not involve some 'new' science."[4] Answer Brief at 20. This Court, in ***Ramirez I***, reversed the case upon its finding that this was a new scientific method of establishing evidentiary facts, for which a proper predicate had not been established.

The State reargues ***State v. Churchill***, 646 P.2d 1049 (Kans. 1982), quoting it extensively and arguing that this Court did not reject it in ***Ramirez I***. In ***Ramirez I***, this Court stated "(w)e

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[4] The State also cites numerous cases in which Florida courts have accepted tool mark comparisons into evidence. RAMIREZ does not contest the admissibility of comparisons of projectiles, tire marks, shoe prints or bite marks. RAMIREZ does contest the scientific validity of knife mark comparisons.

One of the cases cited by the State, ***Bundy v. State***, 455 So.2d 330 (Fla. 1984), notes that with bite marks evidence, "the jury is able to see the comparison for itself by looking directly at the physical evidence in the form of photographs and models." ***Id.*** at 349. In the instant case, the State refused to introduce photographs of the actual evidence, stating that the jury would not be able to see anything, yet at the same time the State introduced photographs from another knife mark case to show the validity of the comparisons. *See* Section IV.B. of this Reply Brief.

reject the state's argument that, since the Supreme Court of Kansas in ***Churchill*** admitted testimony that a particular knife caused the wound, without a predicate of scientific reliability, we should do likewise." In an apparent refusal to accept this Court's previous ruling, the State again presents the same argument. In the absence of additional authority beyond ***Churchill*** this Court should rule as it did in ***Ramirez I***.

Finally, all the State's witnesses were from within a narrow community of self-serving "experts," and are not representative of the relevant scientific community for this inquiry. The State called to the stand several knife-mark analysts, and that these witnesses were no different from polygraphers (rather than psychologists) called to buttress the reliability of polygraphs, or hypnotists (rather than psychologists) called to buttress the reliability of hypnotically refreshed testimony. ***Bundy v. State***, 471 So.2d 9 (Fla. 1985); ***Contreras v. State***, 718 P.2d 129 (Alaska 1986); ***Haakenson v. State***, 760 P.2d 1030 (Alaska App. 1988); ***Reed v. State***, 391 A.2d 364 (Ct. App. Md. 1978). The State responds that the witnesses were not from a small and limited community, but were rather "from such diverse jurisdictions as Kansas and Canada, from the Metro-Dade police to the Royal Canadian Mounted Police to experts trained by the United States Army." Answer Brief at 20. The State additionally alleges that treatises were introduced in the hearing. Answer Brief at 20. However, these treatises are also from the same self-serving and self-proclaimed community of "experts" in knife-mark examination, and are of no additional assistance in determining the acceptance of this method in the general scientific community. By utterly failing to grasp the issue at hand, the State has failed to enunciate any meaningful answer to the error alleged. As argued by RAMIREZ in his Initial Brief, there was no showing of reliability in the methods by experts in disciplines controlling over the *scientific principles*

involved.

The State has not provided any reason for this Court to reconsider its ruling in ***Ramirez I***, though it has clearly attempted to relitigate that case. The State has been relegated to doing so because the trial court in the instant case made the same error as the trial court in the original case, albeit making the same error with several, rather than one, self-serving witnesses. Once again, the trial court admitted scientific evidence without first requiring the state to establish the reliability of the new scientific method. This prejudicial error must result in the reversal of this cause for a new trial.

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 the prosecutor asked a black female panel member (Pullins) a series of questions about her willingness to sign a recommendation of death as the foreperson of a jury. R. 590-1. The State then used her answers as the basis for a cause challenge. When that challenge was denied, the State exercised a peremptory challenge to excuse her. RAMIREZ alleged that the State was basing that peremptory strike upon her race. The trial court, without argument and without requiring an explanation from the State, found that the strike was not racially motivated. R. 707-8.

RAMIREZ alleges that the trial court erred when the court, without inquiry, ruled that the challenge was not racially motivated. The State has responded by arguing that RAMIREZ failed to properly preserve the issue. The State also responds with a lengthy argument about the facts of this case. The State finally responds by analyzing the State's challenge in light of the five

factors set forth by this Court in ***State v. Slappy***, 522 So.2d 18 (Fla. 1988).

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

The State first argues that RAMIREZ failed to preserve the issue for appellate review by accepting the petit jury. As support for this position the State cites ***Joiner v. State***, 618 So.2d 174 (Fla. 1993); ***Suggs v. State***, 620 So.2d 1231 (Fla. 1993); ***Brown v. State***, 620 So.2d 1240 (Fla. 1993); and ***Mitchell v. State***, 620 So.2d 1008 (Fla. 1993). In ***Joiner*** the defendant accepted the jury without renewing his previous ***Neil*** motion. This Court noted "counsel's action in accepting the jury led to a reasonable assumption that he had abandoned, for whatever reason, his earlier objection. It is reasonable to conclude that events occurring subsequent to his objection caused him to be satisfied with the jury about to be sworn." 618 So.2d at 176.

The ***Joiner*** decision is not a ruling based on law, but on fact. This Court determined that a reasonable interpretation of the facts presented by the record was that Joiner had become satisfied with the jury. ***Id.*** There is no such reasonable interpretation in the instant case. A careful review of the record shows that RAMIREZ objected to the State's peremptory challenge of Ms. Pullins shortly before 3:22 p.m.[5] RAMIREZ accepted the jury before 3:37 p.m.[6] RAMIREZ's objection to the strike of Ms. Pullins occurred less than fifteen minutes before the jury was accepted. Only two more panel members were discussed in the ensuing time, and only one was accepted. All of that time, with the exception of a few seconds, was taken in the State's

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[5] RAMIREZ completed his objection to the challenge on p. 708 of the record. The next notation of time is found only three pages later, at p. 711, as 3:22 p.m.

[6] RAMIREZ accepted the jury on p. 718 of the record. The next notation of time on the record is after the entire panel was brought back into the courtroom, and is 3:37 p.m., found on page 721.

attempt to strike a juror for cause, on whom they eventually exercised a peremptory challenge. One other juror was then accepted with just a few words. Nothing occurred during that time which could cause RAMIREZ to become satisfied with the jury. It is therefore not reasonable in this case, to believe that "something" had occurred that caused Appellant's counsel to suddenly be satisfied with the panel and abandon his very recently made objection.

Further, where the objection occurs so close to the conclusion of the jury selection, it is not reasonable to require a defendant to renew an objection the echo of which is still ringing about the courtroom. The trial court had, just moments before, ruled on the objection. To require a defendant to renew so recent an objection would be to require him to invite the wrath of the trial court as being unnecessarily argumentative, bordering upon obstreperous.

The State cites ***Suggs***, *supra,* and ***Mitchell***, *supra,* to stand for the proposition that accepting the petit jury waives any objection. These cases follow ***Joiner***. Consequently, Appellant urges that he acted reasonably in objecting and that due to the short time span and lack of significant change in the composition of the panel it was not reasonable for him to futilely raise the same objection. Under the instant facts, such a requirement would be placing form before substance as there exists no reasonable possibility that it was the intent of Appellant to waive his objection.

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

The State's recitation of the facts is filled with error, irrelevant information, and specious circuitous arguments. The State first argues that, as the trial court ruled that there would be a minimum of two African-Americans on the jury, "any effort to exclude such jurors would have

been futile." Answer Brief at 24. This argument was specifically rejected by this Court in ***Slappy***, *supra*, finding that

> the striking of a single black juror for a racial reason violates the Equal Protection Clause, even where other black jurors are seated, and even when there are valid reasons for the striking of some black jurors.

Id. at 21, quoting ***United States v. Gordon***, 817 F.2d 1538, 1541 (11th Cir.1987). The State can not now argue that a trial court's ruling that a minimum number of minority members be seated as petit jurors grants the government *carte blanche* to strike other minority members in violation of the Equal Protection Clause of the Constitution.[7]

The State next argues that RAMIREZ would have concurred with the State's peremptory challenge (later withdrawn) or another female African-American had he known she would ultimately recommend death. Answer Brief at 26. Therefore, the State concludes, the State's challenge of this woman, **and of Ms. Pullins**, must not have been racially motivated. Answer Brief at 25, 26. The absurdity of this argument is patent. Neither RAMIREZ nor the State knew how Ms. Octave would vote when challenging her. The legitimacy of a pretrial peremptory challenge can not be argued by "bootstrapping" it to the juror's final decision. And, most critically, the argument assumes that Ms. Octave would have acted in the same manner had Ms. Pullins also been on the jury. This is an insupportable conclusion. This entire "argument" is invalid.

The remainder of the State's argument on this ***Neil*** error incorporates the ***Slappy*** (522

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[7] The State argues that ***Batson v. Kentucky***, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); ***State v. Neil***, 457 So.2d 481 (Fla. 1984); and ***Slappy***, *supra*, are based upon the Sixth Amendment's guarantee of an impartial jury. While this is the basis of ***Neil***, the courts have based their rulings, since ***Batson***, on the Equal Protection Clause.

So.2d 18) five factors. Three, they assert are applicable. First, the State argues generally and with questionable support that Juror Pullins was not challenged for racial reasons but because she was reluctant to "vote for either a conviction or for a death sentence." Answer Brief at 30-1. In fact, the prosecutor speculated that she was hesitant regarding the death penalty, and based that speculation upon her hesitancy to sign a recommendation of death as the foreperson. R. 70-7.[8] [9] The State therefore bases this strike upon improper and illegal questioning.

The State additionally quotes part of a statement by Ms. Pullins, leaving out the rest, and her eventual answer. The State quotes Ms. Pullins as answering "I don't know" to the question whether she could bring back a verdict of guilty if he could satisfy her of guilt beyond a reasonable doubt. Answer Brief at 30. The State does not include the entire quote, which is "I don't know. You mean if you give me enough evidence - -" (R. 646.) at which time there was an objection. Ms. Pullins was clearly asking the prosecutor to clarify his question, not to answer that question. The State also excludes the next answer by Ms. Pullin, which is "yes" in response to the question whether she could vote to recommend the death penalty. R. 647.

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[8] The State later argues that RAMIREZ did not object to this series of questions. However, before RAMIREZ could object, the trial court stopped the questioning on its own. The record was preserved by the court's own action and by the discussion at side bar, in which RAMIREZ participated. One of his attorneys, Mr. Houlihan, noted sidebar that the question was inappropriate, as there was no legal requirement for a person to be foreperson or for anybody but the foreperson to sign the recommendation. R. 592-3.

[9] The State argues that ***Witherspoon v. Illinois***, 391 U.S. 510 (1968) and ***Alderman v. Austin***, 63 F.2d 558 (5th Cir. 1981), were repudiated by ***Wainwright v. Witt***, 469 U.S. 412 (1985). Actually, in ***Wainwright*** the Court reiterated its confidence in its finding in ***Witherspoon***, but condoned inappropriate reliance upon a footnote in that case. Nothing in ***Wainwright*** permits the government to exercise peremptory strikes for racial motivations, and to base that action upon a juror's reluctance to do that which they are not required to do. It was error for the trial court to permit the State to do so.

Ms. Pullins, as is clear from the discussion above, never indicated a reluctance to vote for conviction or for the death penalty. The only things indicated by the record quotations cited by the State, once considered in their entirety, are that Ms. Pullins asked the prosecutor to clarify a question, and that she was hesitant when improperly asked if she could assume personal responsibility for a death sentence by putting her name on the death verdict as the foreperson.

The next factor enumerated in ***Slappy*** is whether the juror was singled out for special questioning. The record is clear that Ms. Pullins was the only person asked the questions at issue. The record is additionally clear that, while the State first indicated its intent to ask these questions to everybody, the State actually asked the court's permission to single out Ms. Pullins. The State quoted the portion of the conversation at bar in which the State announced its intent to ask the questions to the other jurors, but excluded the prosecutor's request "(c)an I first explore it with this juror, and I won't go into it with another juror?" R. 593. Based upon this additional information, it is clear that the State did intend to ask these questions of Ms. Pullins, and further wished to single her out for these questions when barred from asking them of others. Further, the impact of asking Pullins these questions before the others shows that she was targeted. RAMIREZ's contention that the State singled out this African-American juror is not supported by the record.

The final factor enumerated in ***Slappy*** is whether the challenge was based on reasons equally applicable to jurors who were not challenged. The only basis for the challenge was Ms. Pullins' hesitancy about actually being the person signing the death recommendation. As even the State agrees, another juror, Mr. Garcia, stated he was uncomfortable with the prospect of sentencing someone himself. Answer Brief at 32. This is the same answer, albeit in different

words, as Ms. Pullins'. The State glosses over this in its Answer Brief, and argues that this statement by Mr. Garcia did not give the State any basis for a challenge of Mr. Garcia. Clearly, the State did base its challenge of Ms. Pullins on a reason equally applicable to a juror who was not also challenged.

Once relieved of the State's sophistry and selected quotation, it is abundantly clear that Ms. Pullins was stricken from the jury based on her race. Three of the five factors to be considered from ***Slappy*** are applicable, and the State's explanation for the challenge is refuted by the record. The trial court erred in permitting this challenge. The trial court further erred by refusing to hold a hearing to require the State to explain the challenge, and by refusing to permit RAMIREZ to respond to any such explanation. These violations of RAMIREZ's and Ms. Pullins' constitutional rights require reversal of the instant case.

III.

THE TRIAL COURT ADMITTED EVIDENCE DISCOVERED PURSUANT TO AN INVALID SEARCH WARRANT

RAMIREZ argues that the trial court erred in denying his Motion to Suppress Evidence and allowing the state to introduce a knife and other evidence seized from a vehicle pursuant to an invalid search warrant. RAMIREZ alleges that the warrant did not state facts sufficient to permit an impartial magistrate to determine whether probable cause exists by failing to allege a crime and by failing to name or describe the reliability of the source of information. Further the knife seized should have been suppressed, as its seizure was not authorized by the warrant issued. The State responds by agreeing that the warrant was inadequate, but arguing that the police acted in good faith or that the property in question would inevitably have been discovered.

The State first argues that the police acted in good faith under ***United States v. Leon***, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). The State first describes the facts of the homicide in infinitely greater detail than that in the affidavit, then argues that "there is no question that a better affidavit could easily have been drawn up if the magistrate had requested it." Answer Brief at 38. The State's argument is that the affidavit could have been written better, therefore this court should take into consideration the evidence adduced at trial and apply that as if it were included in the original warrant. There is no authority for this position.

The ***Leon*** good faith exception is not available where the affidavit for the warrant is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." 468 U.S. at 923, 104 S.Ct. at 3421. First, the affidavit does not allege a murder, and it does not provide any information at all indicating the relevance of the items sought. No police officer could reasonably believe such an affidavit to be reliable. ***State v. Tamer***, 475 So.2d 918 (Fla. 3d DCA 1985); ***Carlton v. State***, 449 So.2d 250 (Fla. 1984); ***Churney v. State***, 348 So.2d 395 (Fla. 3d DCA 1977).

Second, the only information in the affidavit connecting RAMIREZ to the premises to be searched is the 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." R. SSR 5. The affidavit does not name the person providing this information, nor does it describe any information about the person's reliability. This renders the warrant fatally defective, and so lacking in indicia of reliability that a police officer could not in good faith rely upon it. ***St. Angelo v. State***, 532 So.2d 1346 (Fla. 1st DCA 1988); ***Mims v. State***, 581 So.2d 638 (Fla. 5th DCA 1991); ***Vasquez v. State*** 491 So.2d 297 (Fla. 3d DCA 1986); ***Gillette***

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

The State attempts to distinguish these cases in two ways. First, the State notes that many of these cases are drug cases and, as noted in ***Blue***, "virtually anyone can walk up to an officer, hand him a pill, point to a house and provoke a warrant under the standards urged therein." Answer Brief at 39. The State does not point out how this differs from an unknown person of unknown reliability walking up to an officer, pointing to a man in a car, and stating that he was observed at the scene of a crime. Clearly, the mere fact that many of these are drug cases is a distinction without a difference.

The State's second method of distinction is to describe in detail evidence the police did not include in their affidavit to argue that it could have been better if the magistrate had requested it. Again, RAMIREZ must point out the absence of authority for this position.

The State further argues that the evidence would have inevitably been discovered during an inventory search, that the owner of the vehicle could have provided consent to search,[10] or that the police could have prepared a better warrant (this third allegation is addressed *supra*). In four of the five cases cited by the State to support the argument of inevitable discovery, ***Nix v. Williams***, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984); ***Craig v. State***, 510 So.2d 857 (Fla. 1987), ***Maulden v. State***, 617 So.2d 298 (Fla. 1993); and ***Jennings v. State***, 512 So.2d 169 (Fla. 1987), there was testimony elicited in the record on the issue of inevitable discovery allowing for the reviewing court to make a finding on inevitable discovery. More instructive is

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[10] The State attaches undue reliance on the fact that Ms. Yates "testified for the state" (Answer Brief at 38), when this indicates only that she responded to a lawful subpoena.

the fifth district cases cited by the State, ***State v. McLaughlin***, 454 So.2d 617 (Fla. 5th DCA 1984), where the case was remanded to the trial court to determine whether the evidence would have inevitably been discovered. In the case at bar there was no testimony that the car would have been impounded and subjected to an inventory search,[11] or that the owner of the automobile would have voluntarily consented to a search.

The search warrant in question was so legally inadequate that no police officer could have reasonably relied upon it, and there is no evidence that the evidence seized would have inevitably been discovered. Therefore, the trial court erred in denying RAMIREZ's Motion to Suppress this evidence. The evidence in question is the knife which became the central issue in this trial, therefore, this cannot be found to have been harmless error.

IV.

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

A. THE TRIAL COURT ALLOWED OPINION TESTIMONY ON BLOOD SPLATTER FROM AN UNQUALIFIED WITNESS

RAMIREZ alleges that the trial court erred in refusing to grant a mistrial when Officer Zito testified he had previously been qualified as an expert in the case at bar in a prior trial. The trial court also erred by permitting Officer Zito to testify as an expert in blood splatter reconstruction, and in permitting the introduction of a demonstrative aid as substantive

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[11] In fact, the car was stopped at the Federal Express Office, R. 1713, and was owned by another individual, (SSR. 3-4, Affidavit for Search Warrant, p. 1), therefore it is equally likely that it would have been picked up by that person and never subjected to such a search.

evidence.[12] The State responds by citing several cases asserting that the trial court has broad discretion in determining expertise,[13] and such decisions will not be disturbed on appeal absent an abuse of discretion. The State also cites several cases noting that an advanced degree is not essential to qualification as an expert. ***Allen v. State***, 365 So.2d 456 (Fla. 1st DCA 1978); ***Brown v. State***, 477 So.2d 609 (Fla. 1st DCA 1985); and ***Cheshire v. State***, 568 So.2d 908 (Fla. 1990). Although RAMIREZ agrees with these basic propositions, the cases cited by the State are distinguishable from the case at bar.

In ***Allen***, the witness at issue had a bachelor's degree and 180 hours toward a doctorate degree in physics. He had also co-authored a published work in the field. In ***Brown***, the witness in question had spent 27 years in the highway patrol, and was still acting as a Junior College instructor in the field on which he was testifying. In ***Cheshire***, the witness had significant recent field experience and had been qualified as an expert on three prior occasions. All of these cases involved a witness with far more experience than Zito in the instant case. Zito had never testified as an expert in any other case, had no postgraduate experience, and had not practiced in the field in which he testified in many years. Finally, he had done nothing to remain up to date in the field, and was testifying from the memory of nominal and ancient experience. R. 1183. Mr. Zito[14] was not an expert, and the trial court erred in qualifying him to offer an

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[12] The facts upon which these claims are based are discussed in the Initial Brief of the Appellant.

[13] ***Johnson v. State***, 393 So.2d 1069 (Fla. 1980); ***Quinn v. Millard***, 358 So.2d 1378 (Fla. 3d DCA 1978); ***Endress v. State***, 462 So.2d 872 (Fla. 2d DCA 1985); and ***Brown v. State***, 477 So.2d 609 (Fla. 1st DCA 1985).

[14] He had not been "Officer Zito" for six years, and had not practiced in the particular field for eight years.

opinion.

RAMIREZ alleges that the trial court erred in permitting the state to introduce blood spatter cards created by the Assistant State Attorney. The cards were not identical to those used in the case, and there was no testimony that the cards introduced into evidence were reasonably exact reproductions or replicas of the cards originally used. ***Alston v. Shiver***, 105 So.2d 785 (Fla. 1958); ***Robinson v. State***, 145 So.2d 561 (Fla. 3d DCA 1962); ***Wade v. State***, 204 So.2d 235 (Fla. 2d DCA 1967); and ***Brown v. State***, 550 So.2d 527 (Fla. 1st DCA 1989). Use of these cards was error.

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

The trial court additionally erred in permitting the state to introduce photographs from a treatise into evidence. The photographs at issue were of a different knife analysis unrelated to the instant case. No photographs were ever taken, and the jury was required to rely upon the "expert's" testimony that a match was made. There was no evidence that the photographs introduced were reasonably exact reproductions or replicas of any photographs originally taken. Introduction of these photographs was error for the reasons stated above. *See* ***Alston***, *supra;* ***Robinson***, *supra;* ***Wade***, *supra;* and ***Brown***, *supra.* Introduction of these photographs was prejudicial as they permitted, even encouraged, the jury to substitute the observations they could make of the photographs in evidence for the unsupported testimony[15] they heard from the

[15] It should be noted that one of the primary defense objections, and subjects of cross examination, about the knife comparison was the lack of photographs, and the requirement that the jury "just take their word for it." R. 1999. The introduction of photographs, on the one hand, demonstrates that it is possible to photograph the analysis and show evidence to the

witness who did the analysis in the instant case.

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

RAMIREZ alleges that during the closing argument of the prosecutor in the Guilt Phase, the prosecutor commented on his right to silence by referring to the Appellant's "imaginary table of evidence" and "mythical table". R. 2130, 2148, 2157. The State responds by arguing that these comments were not such a violation, and that they were invited by RAMIREZ.

The State cites three cases to suggest that RAMIREZ invited these comments.[16] The cases are easily distinguished from the case at bar. In ***Dufour v. State***, 495 So.2d 154 (Fla. 1986), *cert. denied*, 479 U.S. 1101, 107 S.Ct. 1332, 94 L.Ed.2d 183 (1987), the defense suggested that a witness could have reviewed Dufour's legal papers while with him in his cell. ***Id.*** at 160. The prosecutor responded specifically to that allegation, noting that there was no evidence that Dufour had any such papers in his cell. This was held to be an invited response.

In ***State v. Mathis***, 278 So.2d 280 (Fla. 1973), Mathis asked the jury to consider the voluntariness of the statement made by the defendant. The State responded specifically to the issue of voluntariness by asking the jury if they had heard any evidence about Mathis being beaten into confessing. ***Id.*** at 281. This invited comment was specifically targeted at a single factual issue upon which there had been testimony. Both of these cases involve specific and

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jury, and on the other hand, demonstrates the prejudice in inviting the jury to substitute those for the photographs that were absent in the State's case.

[16] ***Ferron v. State***, 619 So.2d 507 (Fla. 3d DCA 1993), the third case cited by the State in its Answer Brief, is devoid of any factual discussion. Therefore, it is impossible to determine whether it is applicable to the instant case.

factual response to particular allegations. Neither case holds that if a defendant argued that the State failed to prove its case, the prosecution would be invited to respond that the defendant also did not prove anything.

The trial court permitted an unqualified witness to proffer an opinion as an expert, it permitted the State to introduce irrelevant and prejudicial evidence, and it allowed the prosecutor to repeatedly comment on RAMIREZ's right to silence. All of these errors were prejudicial, and all of these errors warrant reversal of this case by this Court.

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

RAMIREZ attacks the sentence in the case at bar, arguing that the trial court erred both in permitting the jury to consider, and in finding, the aggravating circumstance that the offense was committed for the purpose of avoiding or preventing a lawful arrest. In ***Scull v. State***, 533 So.2d 1137 (Fla. 1988), this Court stated "when the victim is not a law enforcement officer, proof of intent to avoid arrest or effectuate escape must be very strong in order to support a finding of this aggravating factor." ***Id.*** at 1141. This Court refused to accept the finding of witness elimination based on "mere speculation...that witness elimination was the dominant motive behind the murder." ***Id.*** at 1142. The instant trial court's finding that the victim was killed to eliminate her as a witness was based on mere speculation, and is not supported by sufficient evidence.

In a case reported since RAMIREZ filed his initial brief, ***Elam v. State***, 19 Fla. L. Weekly 175 (Fla. April 15, 1994), this Court reversed a finding that a murder was committed to avoid

arrest. In ***Elam,*** the defendant's employer confronted Elam about misappropriated funds and Elam beat him to death with a brick. This Court reversed the trial court's finding of the witness elimination factor, finding that "(t)he record contains virtually no competent evidence showing the presence of this aggravating circumstance, but rather indicates that the murder took place as the result of a spontaneous fight that erupted when Beard confronted Elam concerning misappropriated funds." ***Id.*** at S176. The instant case similarly lacks competent evidence to show the presence of this factor and the same inferences this Court drew in ***Elam*** can be drawn here. This factor was clearly not proven beyond a reasonable doubt here.

The State argues that "(t)he only possible motive for killing someone, during a robbery - and not robbing them - is witness elimination," supporting this conclusion with the argument that "(t)he key is motive, and witness elimination without any other explanation for the killing is clearly sufficient to prove this factor beyond any reasonable doubt." Answer Brief at 49-50. However, of the four cases cited for this proposition, three actually refute the State's claim as they involve defendants who **expressly admitted** that the murder was committed to avoid arrest and to eliminate a witness. *See* ***Remata v. State*** 522 So.2d 825, 827 (Fla. 1988) ("[L]ike Florida, they ain't got not witnesses. Anytime I seen a witness, I took him out, or at least shot him."); ***Kokal v. State*** 492 So.2d 1317, 1319 (Fla. 1986) ("Kokal's own statement to his friend to the effect that dead men can't talk confirms that the murder was committed to avoid or prevent arrest."); and ***Wright v. State*** 473 So.2d 1277 (Fla. 1985) (defendant told witness victim killed because she recognized him and he did not want to go back to prison). These cases are supportive of RAMIREZ's argument, as they are clear examples of cases in which there was sufficient evidence for a trial court to find this aggravating factor.

The fourth case, ***Lightbourne v. State***, 438 So.2d 380 (Fla. 1983), did not involve a robbery, and therefore cannot support the State's conclusion. In ***Lightbourne*** the defendant admitted knowing the victim, sexually battering her, and that she begged him not to kill her. This Court ruled that these factors provided strong proof of the requisite intent to kill to avoid detection. ***Id.*** at 391. ***Lightbourne*** is distinguishable from the instant case as here there was no testimony that the victim actually knew the defendant, nor is there evidence that the instant robbery was completed at the time of the murder. In ***Lightbourne*** the sexual battery was complete, and the murder did nothing to assist the perpetrator in the commission of the underlying felony.

The State cites two additional cases, ***Correll v. State,*** 523 So.2d 562 (Fla. 1988) and ***Henry v. State***, 613 So.2d 429 (Fla. 1992), to support the trial court's finding. In ***Correll***, the defendant murdered his girlfriend, her mother, her sister, and his five year old daughter. The court found that there was sufficient evidence to find that **the last two murders** were committed for the purpose of avoiding arrest, finding that there was no other reason to kill his daughter (with whom he had a good relationship) and that his girlfriend's sister entered the apartment after the murders began. Both of them knew Correll well and could easily have identified him. In the case at bar there was only evidence that the defendant and the victim worked at the same place doing different jobs, and that it was therefore **possible** that the victim might have seen him before.

In ***Henry,*** *supra,* the defendant robbed the store where he was employed. He disabled both employees in the store and then committed the robbery. Once the robbery was complete, and after Henry left the store, he returned to the store and murdered them. The court noted that

the defendant could have effected the robbery without killing the victims, as they were already disabled. Both victims knew and could identify him. Therefore, the court found, the evidence supported the finding that the defendant intended to eliminate the witnesses to avoid arrest.

Unlike ***Henry***, the instant case presents no evidence that the victim was disabled or that Ramirez completed the robbery, left the scene, and then returned to kill the victim. In fact, it is a reasonable hypothesis that the victim interrupted the robber during the course of the robbery, struggled with him in an attempt to stop him, and was killed during that struggle.

The State urges ***Stein v. State***, 19 Fla. L. Weekly S32 (Fla. January 21, 1994), as requiring close examination of a defendant's motive in reviewing this factor. Answer Brief at 49. However, the State fails to acknowledge two controlling facts in ***Stein***. First, prior to the murder Stein expressly stated that there could be no witness to the robbery, ***supra*** at S32, and second, both victims were found in the restroom where they could not interfere with the commission of the robbery. ***Id.*** at S32-3. Thus, ***Stein*** is similar to ***Remata***, ***Kokal***, and ***Wright*** in the defendant's statement of intent, and like ***Henry*** in that the victims were disabled and unable to interfere with the commission of the robbery. ***Stein*** is not, however, sufficiently similar to the instant case to be of value to the State's position.

The State correctly cites ***Swafford v. State***, 533 So.2d 270 (Fla. 1988), for the proposition that arrest need not be imminent for this factor to be applicable. However, the State does not point out that this is yet another case in which the factor was found to be applicable where there was testimony that the defendant stated "I'll shoot her in the head twice and I'll make damn good and sure that she's, you know, she's dead.... there won't be no witnesses." ***Id.*** at 273. Therefore, this case is also distinguishable from the case at bar and actually supports the defendant's

position by providing another example of a case in which there is sufficient evidence to find this factor applicable.

The State, rather than refuting RAMIREZ's argument that the trial court erred in instructing the jury in, and in finding, the aggravating factor that the murder was committed for the purpose of avoiding lawful arrest has actually supported RAMIREZ's argument by arguing additional cases which provide clear examples of the evidence necessary for this factor to be proved beyond a reasonable doubt. Therefore, the aggravating factor of the murder being committed for the purpose of avoiding lawful arrest should not have been presented to the jury and should not have been considered by the sentencing Court.

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

RAMIREZ argues that the trial court erred in permitting testimony comparing this death to all other sudden deaths in Dade County and then refusing to allow cross examination on those same deaths. RAMIREZ also argues that the trial court erred by permitting Dr. Wetli to reach an expert opinion that the murder was heinous, atrocious or cruel, an opinion he was not qualified to render and which invaded the province of the jury. Finally, RAMIREZ argues that the trial court erred in allowing Dr. Wetli to inject irrelevant and prejudicial testimony into the sentencing hearing.[17]

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[17] RAMIREZ does not contest that Dr. Wetli was properly permitted to describe the wounds and to testify to the victim's consciousness during the attack.

A. THE APPELLANT WAS NOT ALLOWED TO CROSS EXAMINE DR. WETLI ON THE BASIS OF HIS OPINION

The State claims that RAMIREZ "wanted a recess to research every homicide in the history of Dade County" and describes this as an "untimely, mid-trial request to do research that could have been done for weeks or months." Answer Brief at 52. They argue that the right to cross examination is not unlimited and that a trial court has discretion to limit cross examination to relevant issues, citing ***Rose v. State***, 472 So.2d 1155 (Fla. 1985); ***United States v. Owens***, 484 U.S. 554, 108 S.Ct. 838, 98 L.Ed.2d 951 (1988); and ***Delaware v. Van Arsdall***, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). These cases stand for the proposition that a trial court may impose **reasonable** limits on cross-examination. However, these cases stand for the proposition that the trial court has the discretion to impose **reasonable** limits on cross-examination. The State's reliance upon them is misplaced.

The State misleadingly portrays RAMIREZ's request as if the defense was dilatory in failing to prepare the case, and was needlessly seeking a mid-trial continuance. RAMIREZ had no reason to believe that this request would ever become necessary, or that other deaths in Dade County would be relevant, until the State "opened the door" by asking "(b)ased upon your experience on those five thousand plus autopsies, does the amount of pain and/or suffering experience by Mary Jane Quinn stand out from the other cases that you have handled?" R. 2342. RAMIREZ then sought an opportunity to rebut Dr. Wetli's opinion that the pain and suffering was "beyond and above" that suffered by other people who died sudden deaths. This cross examination was specifically intended to rebut the very conclusion that Dr. Wetli reached- that this death was more painful than the others.

This Court clearly stated the standard in ***Steinhorst v. State***, 412 So.22 332, 337 (Fla.

1982), finding "the rule permits inquiry into all the facts and circumstances connected with the matters of the direct examination.'" While the trial court has discretion to limit cross examination to relevant issues, it abuses that discretion if it exercises it in a manner which deprives a defendant of his right to confrontation. ***Coxwell v. State***, 361 So.2d 148 (Fla. 1978). *See also* ***Coco v. State***, 62 So.2d 892 (Fla. 1953); and ***Zerquera v. State***, 549 So.2d 189 (Fla. 1989).

Finally, Dr. Wetli was permitted to compare this victim's "pain and suffering" to, on the one hand, many cases in which the decedent died a natural death or committed suicide and suffered little or not pain, and on the other hand, a single case where the decedent was murdered by duct tape-strangulation. This Court has consistently held that heinousness is properly found if a conscious victim is strangled to death. ***Sochor v. Florida***, 504 U.S. ___, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992). *See also* Section VII of this Reply Brief. Therefore, Dr. Wetli's opinion was only that this victim experienced greater pain and suffering than that of people who experienced little or none, yet the testimony was presented in a way that compared this homicide to a type which this Court has practically found to be the only example of heinousness *per se*. Failure to allow complete cross-examination in this area was error.

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

Dr. Wetli was erroneously permitted to testify by the trial court as an expert in pain and suffering despite his lack of qualifications. The State asserted two bases for this qualification. The first was that Dr. Wetli attended a seminar about euthanasia. "Euthanasia" is defined in Black's Law Dictionary as "the act or practice of painlessly putting to death persons suffering from incurable and distressing disease as an act of mercy." (Black's Law Dictionary, Abridged

5th Edition, p. 286). This study is, at best, tenuously applicable to the factor of heinous, atrocious or cruel. The other basis elicited from Dr. Wetli was "(r)eading a newspaper of an individual who might have been tortured in Brazil or reading a document or (sic) activities of individuals, for example, in Mexico, who was tortured and killed a year or a year or two ago." R. 2330-1. He was not bringing to the court any "special knowledge or experience in order for the jury to form conclusions from the facts." ***Johnson v. State***, 393 So.2d 1069, 1072 (Fla. 1980).[18] He was simply providing a layman's opinion bolstered by the imprimatur of expertise as a medical examiner.[19]

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

The State alleges that Dr. Wetli did not "either allege or imply any sexual battery in this case." Answer Brief at 52. The record shows that Dr. Wetli volunteered the fear of being raped two times in his direct testimony. The first time, in describing the difference between the words "pain" and "suffering," Dr. Wetli defined "suffering" to include "the fears of dying, **fear of being raped** and the fear of other things that can come with pain and suffering that comes with the individual (sic)." R. 2328. This statement, taken alone, may be seen as a general comment, not specifically applied to the instant case. However, the second comment was specifically addressed

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[18] *See also* ***Lowder v. State***, 589 So.2d 933 (Fla. 3d DCA 1991); ***Ruffin v. State***, 549 So.2d 250 (Fla. 5th DCA 1989); ***United Technologies v. Industrial Risk Insurers***, 501 So.2d 46 (Fla. 3d DCA 1987); and ***Shaw v. State***, 557 So.2d 77 (Fla. 1st DCA 1990), discussed in RAMIREZ's Initial Brief.

[19] It must be noted that Dr. Wetli's experience, as a forensic pathologist, is in examining people who have already died, and who never have an opportunity to speak to him about the pain they suffered.

to the victim in this case.

Mr. Gilbert: Can you render an opinion as to whether or not Mary Jane Quinn suffered either pain or suffering as a result of receiving any of those three wounds in State's Exhibit 79, 80 and 81?

Dr. Wetli: Yes, in this particular picture, there is swelling of the hands. The bruising which took place here (indicating) is going to be painful. Again, it is a stab wound to the palm of the hand itself...

Mr. Gilbert: Is this defense would (sic), is that consistent with with (sic) this person being conscious?

Dr. Wetli: Yes, it would have to be.

Mr. Gilbert: Why is that?

Dr. Wetli: A person that is not conscious cannot defend himself. The person has to be conscious and alive.

Mr. Gilbert: If it is consciousness which results as pain, is it also consistant (sic) with suffering?

Dr. Wetli: Yes.

Mr. Gilbert: In what way?

Dr. Wetli: Basically, because the person is obviously under attack and the person (sic) life is being threatened **possibly by rape** or whatever bad thing, again, that is contact, and the suffering, the fear, the hysteria, and so forth.

R. 2334-5. Taken in context, it is clear that Dr. Wetli was discussing particular defense wounds on Mary Jane Quinn's hand, and the fear she suffered while incurring those wounds.

Dr. Wetli's speculation that the victim died fearing she would be raped[20] was without basis in the evidence. It was mere speculation and, as such, inadmissible. The prejudice inherent

[20] RAMIREZ is a black man. The victim in this case is white. The prejudice inherent in raising the specter of this fear is immeasurable, and this is a tactic that harkens back to the worst days of prejudice and segregation.

in such comments is also clear.

VII.

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

In his Initial Brief, RAMIREZ has argued that the finding of heinous, atrocious and cruel was in error due to the absence of any evidence that he intended to cause unnecessary pain or of the intent to torture. The State has responded by detailing the injuries to the victim and evidence of a struggle, and states that "(n)o realistic argument can be advanced for the proposition that this brutal crime - which had the additional outrage of being committed on Christmas Eve[21] - did not reflect an utter indifference to the suffering and anguish of the victim." Answer Brief at 56. The State then proceeds to buttress that conclusion with cases that pre-date those cited by RAMIREZ in his initial brief,[22] or with cases that easily be distinguished.

The State cites five cases in which the cause of death was strangulation as similar cases to the case at bar--***Dudley v. State*** 545 So.2d 857 (Fla. 1989) (the victim was strangled and had her throat cut, and was killed in her own home); ***Gilliam v. State*** 582 So.2d 610 (Fla. 1991) (the

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[21] That the murder occurred on Christmas Eve is hardly relevant to the issue of heinous, atrocious and cruel, and is inappropriate in the appellate context.

[22] ***Cheshire v. State*** 568 So.2d 908 (Fla. 1990); ***Santos v. State*** 591 So.2d 160 (Fla. 1991); ***Bonifay v. State*** 18 Fla.L.Weekly S464 (Fla. 1993); ***McKinney v. State*** 579 So.2d 80 (Fla. 1991); ***Richardson v. State*** 604 So.2d 1107 (Fla. 1992); ***Porter v. State*** 564 So.2d 1060 (Fla. 1990); ***Teffeteller v. State*** 439 So.2d 840 (Fla. 1983), cert. denied, 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 754 (1984); ***Thompson v. State*** 619 So.2d 261 (Fla. 1993); ***Foster v. State*** 614 So.2d 455 (Fla. 1992); ***Sochor v. State*** 619 So2d. 285 (Fla. 1993); and ***Atwater v. State*** 626 So.2d 1325 (Fla. 1993).

victim, in addition to being strangled, suffered injuries to her face, neck, breast, shins, arms, rectum, and vagina. One nipple was almost bitten off, she had tears from anal rape, and she hemorrhaged from her vagina. In addition, she screamed throughout the course of the murder, indicating she was conscious during this intentional torture.); ***Johnston v. State*** 497 So.2d 863 (Fla. 1986) (the strangulation and stabbing of an 84 year old woman); ***Quince v. State*** 414 So.2d 185 (Fla. 1982) (beating, wounding, raping, and manual strangulation of an 82 year old woman); and ***Tompkins v. State*** 502 So.2d 415 (Fla. 1986) (strangulation of victim who struggled and fought to get away as she was strangled). These cases are not analogous to the case at bar for, as the United States Supreme Court noted in ***Sochor v. Florida***, 504 U.S.___, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992): "our review of Florida law indicates that the State Supreme Court has consistently held that heinousness is properly found if the defendant strangled a conscious victim." 112 S.Ct. at 2121. Further, four of the five strangulation cases cited by the State include at least one additional indicia of heinousness.

The State cited four other cases as examples similar to the case at bar. However, three of those cases, ***Medina v. State*** 466 So.2d 1046 (Fla. 1985), ***Perry v. State*** 522 So.2d 817 (Fla. 1988), and ***Scott v. State*** 494 So.2d 1134 (Fla. 1986), were decided before those cited by RAMIREZ in his Initial Brief, and are not applicable in the light of this Court's more recent decisions. The last case cited by the State, ***Thompson v. State*** 619 So.2d 261 (Fla. 1993), was a case of such horrible and intentional torture that it cannot be legitimately analogized to the instant case in any way (the facts of ***Thompson*** were discussed in RAMIREZ's initial brief).

The State has failed to squarely address Ramirez's primary claim. Since 1990, this Court has consistently ruled that the factor of heinous atrocious and cruel can only be found if the

defendant intended to inflict a high degree of pain or torture the victim. ***McKinney v. State***, 579 So.2d 80 (Fla. 1991). Since RAMIREZ submitted his Initial Brief, this Court has ruled six times in a similar manner. *See* ***Stein v. State***, 19 Fla. L. Weekly S32 (January 21, 1994); ***Christmas v. State***, 19 Fla. L. Weekly S35 (January 21, 1994) ("Because we find no evidence in this record that Stein intended to cause the victims unnecessary and prolonged suffering, we find that the trial judge erroneously found that the murders were heinous, atrocious, or cruel."); ***Schwab v. State***, 19 Fla. L. Weekly S113 (Fla. March 11, 1994) (eleven year old boy anally raped then strangled or smothered to death); ***Street v. State***, 19 Fla. L. Weekly S159 (Fla. April 8, 1994) (police officer watched partner murdered, then was murdered himself, found not heinous atrocious and cruel); ***Reaves v. State***, 19 Fla. L. Weekly S173 (Fla. April 15, 1994) (police officer shot, found not heinous atrocious and cruel); ***Carroll v. State***, 19 Fla. L. Weekly S187 (Fla. April 22, 1994) (vaginal and anal rape of ten year old girl followed by strangulation found to be heinous atrocious and cruel).

The State did not present evidence that the defendant intended to inflict a high degree of pain or torture the victim in the instant case. Therefore, 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.

VIII.

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

The trial court erred by giving an unconstitutionally vague instruction on the aggravating factor of heinous, atrocious and cruel. The State responds that RAMIREZ did not object to this

instruction, thereby it is not preserved for appeal. While the trial record is not clear, it appears that such an objection was made. The trial court stated "I thought you would all agree on this hacket (sic)." R. 2416. RAMIREZ objected that the circumstance had not been given beyond a reasonable doubt. "Hacket" may have been the court reporter's interpretation of "HAC." During a later discussion of wicked, evil, atrocious or cruel, after RAMIREZ asked that all aggravating factors be discussed, his attorney stated "this doesn't apply to go to the jury as an aggravating circumstance (sic)." R. 2420. Finally, RAMIREZ preserved his objection by stating "I renew all the objections made earlier, and no further instructions (sic)." R. 2486. *See* ***Suggs v. State***, 620 So.2d 1231 (Fla. 1993). Even if the court reporter did not clearly record an objection by RAMIREZ to the instruction at issue, reading of the instruction was fundamental error, and therefore may still be reviewed. ***Ray v. State***, 403 So.2d 956 (Fla. 1981).

The instruction given was unconstitutionally vague, as discussed in RAMIREZ's initial brief. The State has not responded to that argument. The State argues that the body of case law on vagueness of jury instructions does not apply in Florida, as the jury is not the final sentencer. This argument was soundly rejected in ***Espinosa v. Florida***, 505 U.S. ____, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992). The Court noted that the jury's "indirect weighing of an invalid aggravating factor creates the same potential for arbitrariness as the direct weighing of an invalid aggravating factor." 112 S.Ct. at 2928. The Court ruled "if a weighing State decides to place capital-sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances." ***Id.*** at 2929. The lack of guidance given to the jury by this instruction constituted error.

IX.

THE TRIAL COURT FAILED TO CONSIDER AND WEIGH ALL MITIGATING CIRCUMSTANCES

RAMIREZ alleges that the trial court did not properly weigh mitigating circumstances presented during the penalty phase. These mitigating circumstances included abuse as a child, evidence that more than one person was involved in the homicide, youth, and evidence that he was under the influence of alcohol and drugs at the time of the offense.

The State responds to these allegations first by a factual recitation, then by quoting the trial court's findings. The State then begins its argument with the statement "(i)f Mr. Ramirez received some spankings prior to the age of seven..." Answer Brief at 62. This cavalier attitude towards child abuse and its terrifying ramifications misrepresents the evidence presented to the jury. The State then cites several cases to support the proposition that "(a) mere tough youth is not a controlling factor." Answer Brief at 62. In ***Zeigler v. State,*** 580 So.2d 127 (Fla. 1991), this issue was not discussed. In ***King v. Dugger,*** 555 So.2d 355 (Fla. 1990), this Court did not discuss the issue, it merely ruled that the issue of age should have been raised on direct appeal, and was procedurally barred in post-conviction proceedings. In ***Sochor v. State***, 580 So.2d 595 (Fla. 1991), and ***Valle v. State***, 581 So.2d 40 (Fla. 1991), this Court upheld rulings in which trial courts did consider such evidence, but properly determined that it was not a mitigating factor or, if it was, that it was outweighed by aggravating factors.

The State miscites ***Rogers v. State,*** 511 So.2d 526 (Fla. 1987), for the proposition that there is no nexus between childhood trauma and crime. Answer Brief at 62. In ***Rogers***, this Court ruled that "(t)he effect produced by childhood traumas, on the other hand, indeed would have mitigating weight if relevant to the defendant's character, record, or the circumstances of

the offense." ***Id.*** at 535. This Court then ruled that the evidence of childhood trauma did not meet the standard of relevance, as "(n)o testimony on this question was presented during the penalty phase, and Rogers raised the issue for the first time on appeal." ***Id.*** at 535.

The State next argues that the function of a trial judge "is to consider all mitigating evidence, not to mindlessly "believe" it." Answer Brief at 62. In support the State cites ***Eddings v. Oklahoma,*** 455 U.S. 104, 102 S.Ct 869, 71 L.Ed.2d 1 (1982), and ***Lockett v. Ohio***, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). In ***Eddings*** the Court did say that, but found that a court "may not give it (mitigating evidence) no weight by excluding such evidence from their consideration." ***Id.*** at 877. In ***Lockett*** no such statement was found. The Court reversed a death sentence were the trial court could only consider three statutory mitigating circumstances, and where the trial court was without discretion in sentencing if aggravating factors were found and none of the three statutory mitigating circumstances were present.

The State next cites ***Pettit v. State***, 591 So.2d 618 (Fla. 1992); ***Sireci v. State***, 587 So.2d 450 (Fla. 1991); ***Campbell v. State***, 571 So.2d 415 (Fla. 1990); and ***Kight v. State***, 512 So.2d 922 (Fla. 1987) for the proposition that a trial judge has the discretion to rule whether evidence, "**'rebutted' or not**," (Answer Brief at 62, emphasis added) supports rejection of mitigation. The State's reliance on these cases is misplaced.

In ***Pettit***, *supra*, Pettit introduced evidence of neglect and physical ailment. The State introduced evidence from mental health experts, as well as neurologists who testified as to his physical condition. Based on the evidence presented by the State, the trial court found that the mitigating factors had not been proven. This Court ruled that "(c)ompetent, substantial evidence support(ed) the rejection of mitigating circumstances." ***Id.*** at 621.

In ***Sireci***, *supra*, the trial court rejected evidence that Sireci suffered from brain damage which led to the inability to appreciate the consequences of his acts. The trial court based this finding upon the State's presentation of a radiologist who rebutted Sireci's claims. Once again, this finding supports RAMIREZ's position, and shows the error in the State's argument.

In ***Kight***, *supra*, there was no discussion of the facts or evidence presented. However, this Court ruled that "(t)here was competent substantial evidence to support the trial court's rejection of these mitigating circumstances." ***Id.*** at 933. This supports RAMIREZ's argument and refutes the State's.

In ***Campbell***, *supra*, this Court ruled that the trial court erred in failing to recognize two mitigating circumstances for which there was unrefuted evidence. ***Id.*** at 419. This finding is consistent with this Court's ruling in ***Cook v. State***, 542 So.2d 964 (Fla. 1989), that a mitigating circumstance may be rejected only if the record contains competent, substantial evidence to support that rejection. The State additionally cites ***Campbell*** for the proposition that "whether the mitigating evidence rises to that level is a finding of fact that will not be reweighed on appeal." Answer Brief at 62. This Court's actual finding was the opposite- "(t)o be sustained, the trial court's final decision in the weighing process must be supported by 'sufficient competent evidence in the record'," ***Id.*** at 420, and this Court vacated the death penalty, ordering the trial judge to "reweigh the aggravating and mitigating circumstances in light of this opinion." ***Id.*** at 420. The State has clearly misrepresented this Court's findings in ***Campbell***, which supports RAMIREZ's argument of error by the trial court.

The trial court in this case erred by rejecting unrebutted evidence of mitigation. Contrary to the State's position, this Court has not ruled that a trial court has the discretion to reject

evidence of mitigation where that evidence is unrebutted. Therefore, this sentence of death must be reversed for the trial court to reweigh the aggravating and mitigating factors consistent with the law cited above.

X.

THE TRIAL COURT COMMITTED OTHER ERRORS IN THE SENTENCING PHASE

B. Reference to Other Offenses. The trial court erred in permitting testimony of other prior offenses committed by RAMIREZ. One witness testified to being a probation officer in 1984, with relevant information about RAMIREZ from that time. The other testified that he was RAMIREZ's "Juvenile Probation Officer." R. 2440. This testimony could lead the jury to believe that RAMIREZ had a conviction in 1984, about which they knew nothing, or that he had previously been convicted on the instant offense. This testimony could also lead the jury to believe that RAMIREZ had additional juvenile convictions, as no convictions with a sentence of juvenile probation were presented in evidence.

C. Failure of the Trial Court to Allow Argument of Other Perpetrator. The Appellant wished to argue to the sentencing jury the presence, participation and perhaps greater culpability of another individual at the crime scene. Such argument was presented in closing on the guilt stage. R. 2064, 2099.

The trial court rejected instruction on this in the penalty phase, R. 2415, and contrary to the State's assertions in their brief (p. 66), the Appellant did not waive this issue but rather, was precluded from arguing it by the trial court. R. 2415 **and** 2475. In the first instance, counsel

for RAMIREZ specifically presented to the trial court that there was evidence of others being present. This was erroneously rejected by the trial court. R. 2415. When Appellant's counsel sought to argue this to the jury, the trial court sustained the objection of the State. R. 2475. This is not a waiver. These errors and the others urged above require resentencing in this case.

CONCLUSION

For the reasons argued in issue I, II, III and IV, RAMIREZ again urges that this Court reverse his conviction and return this cause for a new trial. For all the other reasons argued, RAMIREZ urges that a new sentencing proceeding is required if this Court fails to reverse the conviction.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion was sent by U.S. Mail to: Department of Legal Affairs, the Capitol, Tallahassee, FL 32399 and the Office of the Attorney General, 401 N.W. 2d Ave., Suite N-291, Miami, FL 33128 this ~~30th~~ 27th day of May, 1994.

RICHARD HERSCH