ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. 87,862

STATE OF FLORIDA,

Petitioner,

v.

KENNETH PIERCE,

Respondent.

****

ON PETITON FOR WRIT OF CERTIORARI REVIEW

****

PETITIONER'S REPLY/"ANSWER" BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The defendant is "Respondent." The State is "Petitioner." References to the record are preceded by "R," to the supplemental record by "SR."

STATEMENT OF THE CASE AND FACTS

Petitioner does not agree with Respondent's statement of the case and facts as they are argumentative, incomplete, not in light favorable to the prevailing party, and interject non-record allegations.

PRETRIAL HEARING ON ADMISSIBILITY OF COMPUTER ANIMATION

Detective Bjorndalen-Hull was stipulated to be an expert in accident reconstruction (SR 19). The information she collected from her measurements of the scene are reasonably relied on by experts in the field (SR 23-24). The "AutoCad" computer program she used is widely used in the field (SR 26). Her measurements were directly imported from her computer to Eyewitness Animations' computer (SR 27).

Detective Babcock, an accident reconstruction expert (SR 67), testified that the data he used is the type relied upon by reconstructionists in formulating opinions (SR 72). He supervised every aspect of the animation (SR 81). It accurately reflects his opinion of how the collision occurred (SR 82, 83). The animation is a visualization of his opinion (SR 82). The video shows the truck going the posted speed (30 m.p.h) (SR 87).

Jack Suchocki, computer animation expert (SR 149), was trained by the manufacturer in the use of "Autodisk" software (SR 152). He chose Autodisk because it is the most accurate program (SR 153). Computer animation is nothing more than many individual pictures shown in rapid sequence (SR 153). The company producing "AutoCAD" and "Autodisk" is the standard for

computer aided software design (SR 154). Those programs are used by most architectural and engineering facilities (SR 154). It is the standard for accuracy and the ability to create field images or designs (SR 154). "AutoCAD" files can be inputted directly into the other program to produce three dimensional images without the possibility of human error (SR 154). The animation is an accurate representation of the data provided to him (SR 163). The data, information, and evidence is the type relied on by experts in the field of forensic animation (SR 163). The animation is extremely accurate (SR 165). Its credibility is beyond reproach (SR 165). The brief cross-examination of Suchocki did not challenge the animation's accuracy (SR 165-66). The only questions concerned the animation's cost (SR 166).

Respondent's only witness at the hearing was Detective Babcock (SR 181). The first 911 call was received at 9:09 p.m. (SR 181). Respondent did not question Babcock regarding whether computer animations are accepted in his field.

The judge found the Frye test inapplicable because the video was merely a device used to express an opinion, similar to a chart (SR 275). He found that the original source data was trustworthy and that the accident reconstructionist verified the accuracy of the technical data or opinions supplied (SR 277). The judge found that the video could be marked in evidence by the State (SR 277).

TRIAL TESTIMONY

Sherry Mansey testified that she has a son, Joel and a

daughter, Brooke (R 474). On June 23, 1992, Joel was at the Walker's house, three houses from the Mansey's residence (R 475-76). Brooke was home with friends, Michelle, Gina and Nicole (R 476). A few minutes before 9 p.m., Brooke said that she was going to walk the girls home and then come home with Joel (R 478). Several minutes later Joel came inside screaming that Brooke had been hit by a vehicle. Nicole Walker was lying face up in a puddle with her eyes staring into space (R 479). Michelle was lying face up with her eyes closed (R 479). Brooke was sitting up in the puddle with her face full of blood (R 479). Mrs. Mansey moved Brooke from the puddle (R 479).

The puddle was in a parking lot of an apartment complex next to the Mansey residence (R 481). The whole lot was filled with water (R 481). The puddle extended from the car stops to the edge of the road (R 481). The puddle may have extended at most a foot into the street at the puddle's center (R 481, 491). The edges of both sides of the puddle were not in the road (R 491). It was not raining when Mrs. Mansey came outside (R 482, 483). It began raining while she waited for an ambulance (R 482). Many people walked through the puddle after the collision (R 482). A security light illuminates the parking lot (R 484). It provides enough light see the lot (R 485).

Mrs. Mansey indicated that State's Exhibit 2, a diagram, accurately depicted the puddle and the area at the time of the incident (R 488). Following the accident, many fliers describing the vehicle that hit the children were passed out (R 502). The

flier described the vehicle as a 1980 Chevrolet Silverado pick up truck, two wheel drive, medium to dark metallic blue, with a white camper top and broken front grill (R 502). The animation fairly and accurately depicted the scene on June 23, 1992 (R 504). Brooke wore a white jumper top at the time of the incident (R 505). There were no blue paint marks on her clothes when she got dressed that day (R 507). Mrs. Mansey was shown some aerial photos of the scene (R 521). She had no idea when they were taken or how much it had rained when they were taken (R 528).

Joel Mansey testified that the puddle was in the parking lot, not the street (R 540). The lot did not touch the street (R 539). As the children walked through the puddle, Michelle carried Nicole (R 540). Joel saw the truck's headlights at the end of the road (R 541). As it got closer, it swerved into the puddle and hit the girls (R 541). Joel was certain the truck swerved before it reached the puddle (R 542, 545). As it swerved, Joel yelled "watch out," and pushed Gina out of the way (R 542). They were in the middle of the puddle when the truck swerved (R 546). The truck looked like a missile coming at its target (R 550). It was going 50 to 60 miles per hour (R 570). Joel was positive none of them were in the street when the truck hit them (R 552). After the collision, he jumped over a pile of tree clippings, running inside to get his parents (R 542).

The State's map accurately depicted the puddle at the time of the collision (R 543). At the time of the incident, the sun was setting; "[y]ou could still see out." (R 547, 548). The

State's animation accurately depicts the puddle, the truck's path, how it hit the victims, and the victims' positions (R 549).

Joel thought the truck was green with a silver grill (R 551). He told Detective Babcock everything he remembered about the incident (R 551). The truck had normal size tires (R 563). The letters "F" and "O" were on the grill (R 563). The puddle was not in the road more than an inch or two (R 566, 573).

Eleven year old Michelle Vitello testified that she carried Nicole through the puddle (R 586). Nicole's legs were around Michelle's waist (R 587). Michelle suffered a broken leg, broken arm and a cut liver (R 587). The animation accurately depicted the way she held Nicole (R 589). A little bit of the puddle was in the street (R 596).

Gina Vitello testified that the puddle was in the parking lot (R 598). Gina was certain the truck swerved before it hit the puddle (R 599). Before the truck hit, she heard Joel yell "Brooke" and Gina said "watch out." (R 599). Joel pushed Gina out of the way. After hitting Michelle, the truck swerved out of the puddle and left (R 600). Gina was in the middle of the puddle when the truck hit (R 600). Joel stood next to her (R 604). Brooke and Michelle were in front of her (R 604). Michelle wore florescent pink, green, yellow and blue clothing (R 604). They were not in the street when the truck hit (R 604). The truck had a white camper top (R 605).

Ten year old Brooke Mansey testified that the puddle was in the parking lot (R 610). A little of the puddle went into the

street (R 611). Before the truck hit, Joel yelled "watch out." (R 611, 612). Michelle carried Nicole on her hip (R 611-12). The next thing she remembered was lying in the puddle with Michelle and Nicole (R 612, 613). Brooke's mother moved her from the puddle The animation accurately reflects the children's positions (R 614). The puddle was a little bigger than in the animation (R 614). Brooke received injuries to her left shoulder, scrapes on her knees and stitches in her forehead (R 612). She did not see the truck (R 616).

When Deputy Deguiceis arrived, many people were in the puddle (R 624). He secured the scene (R 630). State's exhibit two accurately depicts the puddle (R 626). It was raining when Deguiceis arrived (R 626). It continued raining off and on (R 640). Nicole was lying in the southernmost part of the puddle in the parking lot (R 626-27, 654). A second girl was a little north of the middle of the puddle (R 627). A third girl was on the hood of a car (R 627). The animation accurately reflects the street and size of the puddle (R 629). Deguiceis also secured a second crime scene half a block north of the puddle (R 630). A trash can had been hit there (R 630, State's Exs. 6-8).

Michael Jones testified that on the night of the incident at about 9 p.m., he was inside watching television (R 661, 662-63). Jones heard a loud thump and ran to the window (R 662). After seeing two "bumps" in the puddle, he ran outside while dialing 911 (R 662). The puddle stretched no more than a foot into the street (R 664). Nicole was at the south end of the puddle,

Michelle was about six feet north of Michelle and Brooke was by the parking lot car stops near Jones's apartment (R 665). Someone picked up and flipped over one child (R 671). Nicole was moved so that CPR could be performed (R 671, 675).

Jones found a grill piece in the puddle several feet from Nicole (R 666, 667). He gave the piece to a to a female deputy (R 668). The animation accurately reflected the puddle and the placement of the children (R 670). Before the puddle was cordoned, many people had been in it (R 671). Defense counsel showed Jones photos taken after the incident (R 678). The puddle was bigger in the photos than at the time of the incident because it continued raining (R 678-79). The police's chalk outlines did not accurately reflect the original positions of the children (R 684). The children were actually further into the water (R 685). No body parts were in the street (R 685).

Sharon Fischer saw the truck swerve into the puddle and hit the children (R 693-94). The puddle on the map (State's Ex. 2) accurately represents the puddle at 9 p.m. that night (R 694). The truck's lights were working (R 695). The entire truck swerved off the road before reaching the puddle (R 696, 697, 713). The driver appeared to purposely veer to splash the children (R 696, 713). The children were not in the road when the truck swerved (R 699). Fischer heard a bump and a "bunch" of screaming (R 697). She could only see one child get hit because of her vantage point (R 696). One child was hit by the passenger side of the truck (R 714). Fischer ran to the puddle to check

the children (R 697). Someone moved Nicole to the side of the road (R 698, 709). Fischer gave Nicole CPR (R 698). The animation accurately depicts the vehicle's path and where the one child she could see, was standing (R 702). Fischer thought the truck was dark in color, possibly green, with tinted windows (R 714, 716).

Wayne Payne was in his living room when he heard something get hit (R 720). The noise was "pretty loud." (R 720). As Payne ran outside he heard people yelling "truck, truck." (R 720). By the time he saw the truck, two or three cars were in front of it (R 720). The truck's driver tried to maneuver around cars in front of him, but could not (R 722). Payne got in his vehicle to chase the truck (R 722). As he approached it, the driver must have realized Payne was chasing him because the truck accelerated to a very fast pace and swerved in and out to go around cars (R 722, 723). The truck ran a red light, almost striking another vehicle (R 722, 726). Payne could not get a tag number (R 722).

Payne thought the truck was gray (R 724), but he "really couldn't tell" because it was dark (R 724, 727). He was certain it was a Silverado because he had worked in a body shop for ten years (R 724, 730-31, 734). It had a white camper top (R 725).

Howard Driller described the incident at the second crime scene (R 735). It was dusk and raining (R 737). At about 9 p.m., a truck traveling north hit a garbage can (R 736, 740, 746). The driver did not try to get back on the road, he just kept driving in the yard, dragging the can for about twenty feet

(R 736-37). The driver appeared to be asleep or drunk (R 737). The truck then swerved out of the yard onto the road (R 737, 738). It appeared to be a dark colored older Chevrolet truck with tinted windows and a camper top (R 737-38, 743).

Bonnie Florom testified that shortly before 9 p.m., she heard a loud noise (R 751-52). She noted the time because one television program had ended and she was waiting for another program to start (R 754). After running outside, she saw garbage all over and a truck heading west on 44th Street (R 751). That street is a dead end (R 752). Florom remained outside for about five minutes (R 758). During that period the truck did not come back down 44th Street (R 758). It appeared to be a full-sized pick up with a dark bottom and light camper top (R 752). She only saw the truck for a brief period (R 751). Lighting conditions were poor (R 764).

About 30 to 45 minutes after this incident, Florom spoke to a deputy (R 759). She learned about the hit and run down the street and felt she should tell a deputy about this incident (R 759). The next morning she met with Detective Babcock (R 760).

When Larry Florom ran out of the house after hearing the noise, he saw that the garbage cans across the street had been knocked over (R 765). Florom looked north, seeing a truck stopped in the intersection (R 765). After about a minute the truck went west down 44th Street, a dead end (R 765-66). The vehicle did not reappear during the five minutes Mrs. Florom, Edith Howe, and Mr. Florom remained outside (R 767). The truck

was dark with a light camper top (R 765).

Deputy Lahiff testified that the BOLO was for a 1980 blue Chevrolet Silverado, white camper top, front end grill damage, possibly a dent near where the hood meets the grill and center to right front end damage (R 776). When Lahiff first saw appellant's truck in Respondent's driveway on July 17, 1992, Lahiff thought it matched the BOLO (R 776, 783). Vehicles were parked behind and on each side of the truck (R 777). A dryer had been placed six inches from the front of the truck (R 780, 785). State Exhibits 10, 11 and 12 accurately depict the truck's location (R 777-78, 781). The truck had a dent where the hood meets the grill (R 779). The grill was not original equipment (R 780). The headlight lens cover had been cut to make it fit (R 780). The right turn signal lens did not fit properly (R 780).

Rena Berry received the fingerprint cards of Respondent, Trent Pierce (Respondent's son), Kimberly Knouff, and Terry Jones (R 789). One print on a can in the truck matched Respondent's prints (R 791, 1491). There were no other matches (R 792).

When Detective Philipson, an expert in accident reconstruction, arrived at the scene, the ambulances had gone (R 812, 814-15). Down the block was a second crime scene involving a trash can (R 817). The puddle did not extend into the road (R 817, 818). State's Exhibit 2 accurately depicts the puddle (R 818). Philipson, and Babcock spoke to witnesses at both scenes (R 820-21). Babcock removed part of the trash can to analyze a scuff (R 823). The amount of paint on the can was insufficient to compare

with the paint on Respondent's truck (R 941). However, the scuff appeared consistent with the white on Respondent's truck (R 999).

Deputy Lamey gave Philipson a piece of grill found in puddle (R 826). The next day he took the piece to John Zvirblis, the parts manager at Fronrath Chevrolet (R 827). Philipson may have gone to another dealership before going to Fronrath (R 828). Zvirblis said the grill was from a 1980 Chevrolet Silverado pick up or van (R 828-29). That grill was used only one model year (R 829). Zvirblis seemed very knowledgeable and sure of his identification (R 829). The part number for the grill was different in the years before and after 1980 (R 829).

Before the discovery of Respondent's truck, Philipson put the information he gathered in a BOLO (State's Ex. 3, R 833-34). The BOLO listed the truck's as blue because of paint fragments found in Brooke's clothing (R 835). There was also a blue paint smear on her clothing (R 1547, 1617-18). The lighting at the collision scene was sodium vapor lighting, which puts out a colored light, changing the appearance of colors (R 836).

The police were looking for a truck with damage to the right side, possibly damage to the grill area if it had not been repaired, and damage to the right turn signal lens (R 841). The medical examiner said a contusion on Nicole's body was consistent with the head snapping back and impacting the truck or simply impacting the truck (R 842, Ex. 17, 18). This led police to think there may be a dent on the lip of the hood (R 842).

On July 17, 1992, about three weeks after the collision,

Deputy Lahiff advised Philipson that he had located Respondent's truck (R 842, 845). Trucks were parked beside and behind Respondent's truck (R 844). A car was parked on the other side of the truck (R 844-45). The vehicles hindered Philipson's view of the truck (R 849). A dryer placed in front of the truck partially blocked Philipson's view of the damage (R 847).

The right headlight guard did not fit (R 847). The lip of the hood contained a dent (R 847). The dent was consistent with Nicole's injury (R 842, 848). The grill was not a Silverado grill (R 847). In one spot the grill was held in place by a blue wire tie (R 851, Ex. 25). A piece of wire tie was found on the ground in front of the truck (R 851, Ex. 27). The camper top was not on the truck, but rust marks on the camper top matched those on the truck (R 847-48, Exs. 46, 47).

After getting a search warrant, the police found blue wire ties in Respondent's house (R 857). Neighbors Nicholas Edwards and Phillip Lowe told police that the camper top had been removed from Respondent's truck (R 860). Police checked on tips received as to the identity of the truck's driver (R 860). Barbara Richardson indicated that Terry Jones had some information regarding the collision (R 861). Philipson learned that the camper top was at Jones's residence (R 864). Jones gave the officers permission to search his residence (R 865). Jones got the camper top from Respondent (R 866).

Witness descriptions of the vehicle at both scenes were consistent in that the vehicle was described as a pick up with a

camper top or a Blazer type vehicle (R 832). Based on the time, proximity, circumstances of the collision and the physical evidence, Philipson believed that this truck was involved in the incidents at both crime scenes (R 833, 870). In his opinion, the State's animation is accurate (R 872). An expert cannot formulate an opinion on a vehicle's path based on debris (R 882). That is because one cannot calculate variables such as wind, deflection off a vehicle or an object being carried by a vehicle before hitting the ground (R 882).

Jack Suchocki, president of the company that produced the State's animation, was declared an expert in computer animation (R 1027). Detective Babcock and Deputy Bjorndalen-Hull assisted in making the video (R 1034). The video was not an attempt to reconstruct lighting or weather conditions (R 1035). It would be impossible to depict accurate lighting unless a photographer were at the scene at the time of the collision (R 1059). The purpose of the video was to illustrate to the jury the dynamics of what happened that night (R 1035). It has nothing to do with trying to replicate the conditions or show the cause directly of a particular event (R 1051).

The animation illustrated the dynamics of an event for the jury's determination as to what might have caused the event (R 1051). Suchocki received information that the police had a color match on the truck (R 1036). The information relied on in producing the animation is the type reasonably relied on by experts in the particular field in forming opinions and

inferences in the producing this type of tape (R 1036). It is the normal type of information accepted within the field of computer animation (R 1037). If incorrect information is used for the animation, the animation will be incorrect (R 1037, 1039). There is a portion of the animation where the truck goes down a road, a pause with no truck and then the truck appears in the center of the road (R 1037). The was done to be consistent with the policy not to show things for which there is no evidence (R 1038). The animation accurately reflects the information given to Suchocki by Detective Babcock (R 1038). If the information about the puddle size and shape were wrong, the animation would be wrong (R 1040). Yellow street lighting hitting a blue truck would make the truck appear green (R 1058).

Detective Bjorndalen-Hull helped Babcock with the reconstruction diagram necessary for Babcock's report (R 1073). Bjorndalen-Hull took about 400 measurements in preparing the diagram (R 1079). She took autopsy photos of Nicole to determine how the child's injuries were related to the crash (R 1079). Babcock gave her information on where to place the puddle (R 1073). He got that information from witnesses (R 1077). When completed, her diagram was imported into Suchocki's three dimensional computer (R 1078).

The judge declared Detective Babcock an expert in accident reconstruction (R 1091). When he first arrived at the collision scene at 10:12 p.m., it was chaotic (R 1092). He took taped statements from Sharon Fischer, Joel Mansey, Gina Vitello, and

Wayne Payne within two hours of the collision (R 1094). The next day he interviewed Bonnie Florom, Larry Florom, Edith Howe, and Howard Driller (R 1095). The puddle grew as it rained following the collision (R 1097). Babcock spoke to Sherry Mansey, Pat Mansey, Nydia Jones, Michael Jones, David Lethco, Tammy Hewitt and Mellisa Hyer regarding the size of the puddle (R 1097). Those witnesses all indicated that the puddle went up to approximately the edge of the road (R 1097).

Based on witness interviews, Babcock developed a BOLO for the vehicle (R 1098). The truck was determined to be a 1980 Silverado based on a grill piece found at the scene (R 1099). It was described as blue because the chemist's paint analysis indicated it was blue (R 1100). The analyst determined this on July 2, 1992, from paint chips found in Brooke's clothing (R 1100, 1296). It was normal for witnesses to perceive colors differently, especially at night (R 1101).

Babcock's expert opinion was that the same vehicle was involved in both crime scenes (R 1101-02). Although the color description varied, witnesses at both locations described the vehicle as a dark colored pickup with a white or light colored top (R 1092, 1102). The incidents occurred on the same street within ten minutes and two blocks of each other (R 1102). In both instances the truck veered off the road, striking something (R 1102). The white stripe on Respondent's truck was consistent with the transfer on the trash can (R 1102). Under these circumstances, the odds of the incidents involving different

vehicles were astronomical (R 1102).

The children stood in the middle of the puddle well off the road when hit (R 1103). The vehicle's driving pattern was consistent with murder, though Babcock was not saying he felt it was murder (R 1104). It was consistent with someone who was impaired (R 1104). It certainly showed reckless driving (R 1104). Babcock used aerial photographs (State's Exs. 19-21) to describe the crime scenes and the truck's path (R 1107-09). Prior to finding the truck, Babcock told officers to look for a damaged, missing or replaced front grill (R 1112). He knew the right front turn signal had been broken based on lens pieces recovered at the collision scene (R 1112). He also told the officers to look for a dent on the lip of the hood (R 1112). In pedestrian collisions, head strikes almost always occur (R 1112). Babcock did not put the dent information on the BOLO because the dent could be easily fixed and that might discourage citizens from reporting a truck that otherwise fit the BOLO (R 1113).

On July 17, 1992, Babcock responded to Respondent's residence (R 1113). When Babcock first saw the vehicle, he said "This is our truck." (R 1114). Photos in evidence accurately represent Respondent's truck on July 17, 1992 (R 1119-20, Ex. 10-13). It was surrounded by three vehicles (R 1120). A large orange truck was parked behind the truck (R 1120). A dryer put in front of the truck partially obscured the right turn signal lens and headlight guard (R 1120). In Babcock's opinion, the placement of the vehicles and dryer were attempts to conceal the

truck (R 1448). The truck's grill was from a 1977 vehicle (R 1121). The right headlight guard did not match the left one (R 1122).

Before the animation was played, the judge instructed the jury that it was demonstrative evidence to illustrate Babcock's testimony (R 1124). Babcock described the animation as it was played for the jury (R 1127-28). The head impact was based on the dent in the truck (R 1128). The position of Nicole's body was consistent with the damage to the truck (R 1129). Brooke's injuries and the blue paint on her clothing were consistent with the depiction of the collision (R 1129). The video was consistent with every witness's statement that the children were off the road in the parking lot and that the truck veered off the road before the puddle and struck them (R 1130, 1261). Accordingly, the puddle's size had little or no relevance (R 1130, 1261).

Babcock described the truck's damage using the State's photos (R 1154). The dent and damage along the side appeared "fresh" as the paint was still peeling and there was no rust (R 1154, 1161). The headlight was bent inward toward the front of the truck, consistent with Nicole striking the front of the truck (R 1154). The grill did not belong to the truck (R 1155). The right turn signal lens was from a different model year and was held in place by scotch tape (R 1156-57, 1163). The repairs appear to have been made for cosmetic purposes, not for use of the truck in everyday driving (R 1157). Cuts were made in the

headlight lens cover to make it fit (R 1157). Part of the grill was held on with a blue metal tie (R 1158, Ex. 25). A metal tie piece was on the ground in front of the truck (R 1159, Ex. 27). Its location was consistent with having fallen off when the tie on the grill was cut (R 1159). It was also consistent with the repairs having been done at that location and indicated the repair was fairly recent (R 1159). Fresh marks were found on the screws holding the grill (R 1164). The dent was consistent with Nicole's head injury (R 1160). An L-shaped contusion on Nicole's back was consistent with a section of the original grill found at the scene (R 1160, 1210, State's Exs. 17, 18). Babcock had no doubt the grill caused Nicole's injury (R 1210). He described the area of the truck that hit Brooke (R 1161). It was consistent with her broken shoulder and the paint transfer on her shirt (R 1161).

Pieces of turn signal lens found at the scene matched the left lens on Respondent's truck (R 1163, 1207, 1209). Rust points on the truck bed corresponded with rust points on the camper top (R 1166, Exs. 46, 47).

Babcock found the truck's camper top in Terry Jones's backyard (R 1212-13). Jones agreed to a search of his residence (R 1213). Jones said he had a very small amount of marijuana (R 1214). That gave Babcock an opportunity to develop a rapport with Jones (R 1214). Babcock told Jones that he was not interested in the marijuana and that Jones should flush it down the toilet (R 1214). Babcock never used the marijuana to coerce

Jones (R 1216). They made no deals (R 1368). Jones and Babcock estimated the camper top to be worth $450 to $500 (R 1225). Respondent gave Jones $50 and the camper top for fixing the grill and doing three to four hours of other work (R 1224-25).

Babcock gave no incentive to David Brown for his testimony (R 1250). The fact that animal hair was found on the right front of the truck was not made public (R 1250, 1326).

Babcock testified that Barbara Richardson said that her husband told her that he heard that Terry Jones was a passenger and Trent Pierce was the driver of the truck. The police immediately spoke to Mr. Richardson. He said he had been talking to Larry Freeman (R 1445). Richardson knew Terry Jones and Trent Pierce. Richardson and Freeman discussed the possibilities (R 1445). However, Richardson said he never heard anything from anyone indicating Jones had been in the vehicle (R 1445). The police spoke with Freeman, who indicated the same (R 1445).

Detective Haarer, a crime scene expert, testified that marks on the camper top matched marks on the truck (R 1487, 1498, 1501). In his opinion, the camper top had been attached to Respondent's truck (R 1502). He had no way to tell if the truck's paint had been rubbed out in any area (R 1525).

Bruce Ayala, a forensic chemistry expert, testified that a paint chip is better for identification than an eye witness because people see color differently (R 1543, 1569). Before Ayala scraped Brooke's clothing for particles, he noticed a blue smear on her clothing (R 1547). Although impossible to analyze,

it appeared to be blue metallic paint (R 1547). Ayala examined six to twelve blue paint particles in the clothing (R 1547, 1617-18). When Ayala first examined the paint particles found in a victim's clothing, his primary concern was examining the top coat to determine the color of the vehicle (R 1548, 1642).

His examination was cursory; he had no other particles for comparison (R 1644). His first report indicated that the paint chips were four layers (R 1555). When he first examined the paint chips, all were blue on the first coat (R 1570). The chips had three layer structures (R 1570). When he turned one chip over he noticed black primer (R 1570). Without going back to look carefully at the other paint particles, he assumed, because the chips were so tiny, that he had missed a bottom layer of primer on the other paint particles (R 1570). That is why he reported a four layer structure (R 1570).

After receiving a sample for comparison from Respondent's truck, Ayala did a more thorough analysis (R 1555, 1569). The paint samples from the truck were six layers (R 1544). When he reexamined the particles from Brooke's clothing, he discovered that the particles were two different portions of the paint that when combined formed six layers (R 1544). They matched the six layer structure of the truck's paint (R 1545, 1557-60).

The six layers from Respondent's truck starting from the top layer, were blue metallic, blue non-metallic, gray body filler, blue metallic, white primer, and black primer (R 1556). It is remotely possible but unlikely that another vehicle would have

the same six layers of paint (R 1568). It is especially unlikely because the top three layers are not factory paint and one layer is body filler (R 1568, 1652). It was a very strong match (R 1652). Infrared and Pyrolyisis testing showed the paint samples to be consistent (R 1564, 1566). There was not sufficient paint on the trash can for analysis (R 1576). Paint smears are not typically suitable for analysis (R 1579, 1587-88).

Ayala found two red paint particles on one victim's clothing (R 1553). The blue particles stood out because of the paint smear and their greater number (R 1554). Ayala found no source for the red particles (R 1554). The red particle was a single layer (R 1554). It is uncommon for a single layer of paint particle to come off vehicles (R 1554). It would usually be a multiple layer transfer (R 1554).

Terry Jones, Respondent's friend, testified that a week or two after the collision, Respondent invited Jones to his residence (R 1674, 1667). When Jones arrived the camper top was not on Respondent's truck (R 1680). It had been placed on a different truck (R 1680). Respondent asked Jones to fix the grill on his truck (R 1677). Respondent said he had hit a garbage can (R 1679, 1684). The original grill was not on the truck (R 1678). A headlight guard was missing (R 1678).

Jones stole a grill for Respondent's truck and installed it a few days after Respondent first asked him to fix the truck (R 1680, 1681). A piece on the top passenger side of the grill was broken so Jones used a blue metal tie to secure it (R 1682). He

screwed in the remainder of the grill (R 1682).

Respondent supplied the replacement headlight guard (R 1683). He sawed it to try to make it fit (R 1683). Jones fixed the truck in 45 minutes (R 1685). Respondent gave Jones $40 and the camper top as payment (R 1685, 1686). Four or five days later, Jones and Respondent were watching the news (R 1686). A story about the collision was shown (R 1717). Jones asked Respondent if he had seen the BOLO "about it" (R 1686). He said "yeah, I've been watching the news pretty heavy." (R 1686). Jones confronted Respondent who said that he had been drinking (R 1687). He remembered hitting a trash can but did not think he hit the children (R 1687, 1688). Respondent admitted being in the area (R 1718). Respondent told Jones "You're the only one I can trust, buddy, to fix my truck and not say nothing." (R 1687).

Jones lied in his first statement to police (R 1689). He told them that a neighbor rather than Trent Pierce helped him take the camper top (R 1689). Jones did not want to get involved (R 1689). Babcock never used the marijuana to coerce Jones (R 1691). There was no evidence after Jones flushed the marijuana (R 1691). Jones told the truth in his second statement (R 1693).

David Brown, a jail inmate with ten felony convictions, talked to Respondent in jail (R 1735, 1738). Respondent said he had been drinking when he hit something and heard a scream (R 1735). He did not stop because he was on parole (R 1735). Respondent cleaned the blood off his truck and had the grill replaced (R 1736). He laughed and said the State did not have

enough evidence to show he was driving the truck (R 1736-37). Respondent laughed and said that the State had found dog hair, not human hair on the truck (R 1737). Brown and his attorney indicated said Brown got no promises or deals for his testimony (R 1738, 1777). He testified because the victims were children (R 1738-39).

Phillip Lowe lived down the street from Respondent (R 1888). On or about June 23, 1992, Lowe saw news reports regarding the collision (R 1888). After a report, Lowe saw Respondent the camper top from the Silverado and put it on a Dodge pick up (R 1889). That was odd because the top was too short to fit the Dodge (R 1889-90, 1892). The camper top stayed on the Dodge a few days, then disappeared (R 1892). The Silverado was surrounded by other vehicles and had a washer put in front of it (R 1891). Lowe had never previously seen the vehicles and washer placed around the Silverado in that manner (R 1894). Before the police arrived, he never saw the Silverado moved after it had been placed in that position (R 1894). About 10 to 14 days after the camper top disappeared, the police arrived at Respondent's residence (R 1892).

The medical examiner, Dr. Villa was declared an expert in forensic pathology (R 1903). The truck's dent is consistent with Nicole's head injury (R 1910-11). The animation contact is consistent with Nicole's head injury (R 1910-11). When a vehicle impacts a body, the body stretches from the impact (R 1914).

Respondent was found guilty of all Counts in the information

charged (R 2199-2201, 2330-31).

SUMMARY OF THE ARGUMENT

I & II

Taken alone, or properly considered with the complete, approved, standard instructions given at the end of trial, the unobjected to preliminary comments on reasonable doubt were an accurate statement of the law. The reasonable doubt standard does not require absolute or one hundred percent certainty. Absolute or one hundred percent certainty is an impossibility. The trial judge's comments were not error, fundamental or otherwise.

III

The video was merely used to illustrate the expert's opinion. It did not purport to represent each witness's testimony of what happened. Every relevant portion of the video was supported by testimony or physical evidence. Any error was harmless.

ARGUMENT

ISSUE I (RESTATED)

THE TRIAL COURT'S UNOBJECTED TO PRELIMINARY COMMENTS ON REASONABLE DOUBT, MADE BEFORE THE JURY WAS SELECTED OR SWORN, WERE NOT ERROR.

Respondent suggests that the trial court's giving of the standard, approved instruction at the end of trial was meaningless (Respondent's brief p. 13). Respondent's suggestion is simply without basis in logic or the law. In Higginbotham v. State, 19 So. 2d 829, 830 (Fla. 1944), this Court held:

> It is a recognized rule that a single instruction cannot be considered alone, but must be considered in light of ***all*** other instructions bearing upon the subject, and if, when so considered, the law appears to have been fairly presented to the jury, the assignment on the instruction must fail (emphasis supplied).

In his initial comments, the trial judge incorporated by reference the complete, approved instruction on reasonable doubt (R 54). The complete, approved instructions on reasonable doubt were given immediately before the jury began deliberations. It is difficult to comprehend a more appropriate time for the jury to hear such an instruction. Interestingly, Respondent concedes that the trial judge's supposedly improper comments were remediable by a proper curative instruction (answer brief p. 13). Petitioner does not agree that the trial judge's comments were improper. Still, it is difficult to imagine a better "curative" instruction than the complete, standard, approved instruction on reasonable doubt given at the end of this case and incorporated

by reference into the trial judge's comments.

Petitioner relies on its initial brief for further argument on this issue.

ISSUE II (RESTATED)

THE TRIAL JUDGE'S UNOBJECTED TO PRELIMINARY COMMENTS ON REASONABLE DOUBT, MADE BEFORE THE JURY WAS SELECTED OR SWORN, WERE NOT FUNDAMENTAL ERROR.

Respondent suggests that it improperly reduces the level of proof required, to state that a reasonable doubt is a doubt to which a reason can be attached (answer brief p. 19). Respondent's contention is incorrect. See Victor v. Nebraska, 511 U.S. ___, 114 S. Ct. 1329, 127 L. Ed. 2d 583, 597 (1994)(a reasonable doubt at a minimum, is one based upon reason). The standard jury instructions also make it clear that a reasonable doubt is not a possible, speculative, imaginary, or forced doubt (R 669).

Respondent's claim that the trial judge's comment violated judicial neutrality (answer brief p. 21), is ridiculous. The comment was a correct statement of the law. The fact that a correct instruction or statement benefits one party does not make it a violation of judicial neutrality. Does the instruction that a defendant has the right not to testify, violate judicial neutrality?

In Jones v. State, 656 So. 2d 489 (Fla. 4th DCA), rev. denied, 663 So. 2d 632 (Fla. Nov. 7, 1995), the Fourth District distinguished Freeman v. State, 576 So. 2d 415 (Fla. 3d DCA 1991) because in that case the Court also gave extensive and proper jury instructions on reasonable doubt and presumption of innocence. Petitioner argued in the Fourth District and in its initial brief in this Court that the Fourth District's

distinction was illusory. In this case and in Jones, the trial judge gave the complete, approved, standard instructions on reasonable doubt and presumption of innocence. See McInnis v. State, 671 So. 2d 803, 804 (Fla. 4th DCA 1996)(acknowledging that the standard instructions were given in Jones).

The Third District has recently confirmed the correctness of Petitioner's position. In Doctor v. State, 21 Fla. L. Weekly D1856 (August 14, 1996), prior to the commencement of voir dire, the trial court gave extemporaneous instructions on reasonable doubt to the venire. The Defendant claimed that the extemporaneous instruction minimized the reasonable doubt standard and constituted fundamental error. As in this case, the Defendant did not raise any error as to the formal jury instructions at the close of evidence. The Third District affirmed, holding:

> We adhere to our decision in Freeman v. State, 576 So. 2d 415 (Fla. 3d DCA 1991), and hold that 'the giving of the instruction does not rise to the level of fundamental error . . . ." Freeman, 576 So. 2d at 416.
>
> We decline Doctor's invitation to follow Jones v. State, 656 So. 2d 489 (Fla. 4th DCA), rev. denied, 663 So. 2d 632 (Fla. 1995), as we find it antithetical to our holding in Freeman.

Id.

Petitioner also notes the "special concurrence" in Doctor specifically and completely agreed with State's position that 1) the trial judge's comments not erroneous, 2) if erroneous, were not harmfully so in light of the complete instructions given at

the end of trial, and 3) if harmfully erroneous, were not fundamentally so since they could have easily been corrected upon objection and in no way affected the validity of the trial. Id. at 1857.

The "special concurrence" in Doctor was signed by a majority of the sitting members of the Court. Accordingly, it is law of the case. See Greene v. Massey, 384 So. 2d 24, 27 (Fla. 1980). This Court should approve the Third District's "special concurrence" and disapprove Jones.

POINT III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING THE STATE'S ANIMATED ILLUSTRATION.

This Court should decline considering this point. In Savoie v. State, 422 So. 2d 308, 310 (Fla. 1982), this Court stated that it may, in its discretion, consider other issues "*properly* raised and argued before this court." (emphasis supplied). Respondent's additional point was not properly raised as he did not file a cross-notice to invoke this Court's jurisdiction. Accordingly, he is only a respondent, and is only to respond to the argument raised by Petitioner, not raise new issues. See generally Lopez v. State, 638 So. 2d 931 (Fla. 1994).

Additionally, In 1980, Article V of the Florida Constitution was amended to limit this Court's mandatory review of district court of appeal decisions, and to provide for discretionary review jurisdiction. The amendment turned the district courts of appeal into courts of final appellate jurisdiction in most cases. Whipple v. State, 431 So. 2d 1011 (Fla. 2d DCA 1983). Appellant's notice of appeal was filed in the Fourth District in April of 1993 (R 2390). As there is no independent jurisdictional basis for this Court to review this issue, the District Court should be treated as the court of final appellate jurisdiction for this claim. This Court's consideration of this issue will only further delay final resolution of a case that has been languishing in the system for years. Petitioner disagrees that this issue is one of "fundamental significance." Petitioner notes that Respondent makes no claim that computer animations

should not be admitted in criminal trials. Respondent claims only that the video did not comport with the evidence.

Initially, Petitioner notes that the video was merely used to illustrate the expert's opinion. It did not purport to demonstrate each witnesses account. Respondent was allowed full cross-examination of the expert to challenge the accuracy of his opinion.

Respondent claims "Nor did the animation accurately show the shape and extent of the puddle as described by witnesses: the elliptical form shown on the tape was the product of limitations in the software program, not an accurate representation of what the witnesses described (record on appeal at 1084-85)" (answer brief p. 32). Reviewing Bjorndalen-Hull's testimony, Petitioner disagrees with this characterization. Although part of that testimony could have been clearer (R 1084-85), she stated that Babcock determined the shape of the puddle and that is the shape she used on the computer (R 1085). Joel Mansey, a child in the puddle at the time of the collision, testified that the tape accurately depicted the puddle (R 549). It was not in the road as depicted in photos taken after the collision (R 567, 569).

Gina Vitello testified that the puddle was in the parking lot, not the street (R 598). Deputy Deguiceis, the first policeman to arrive, testified that the animation accurately depicted the puddle (R 629). Michael Jones said the animation accurately depicted the placement of the puddle (R 670). The photos did not accurately represent puddle's size because they

were taken following the collision after a hard rain (R 679, 1270). When Deputy Philipson arrived, the puddle was in the parking lot, not the road (R 817). The puddle got larger as the night went on (R 905, 1096). Based on the above, there was ample evidence supporting the puddle as depicted in the animation.

A few people did state that the puddle extended inches into the street. However, the only one that indicated where the puddle encroached into the road said it was only the center of the puddle that extended a foot or less into the road (R 490). All witnesses agreed that Respondent veered off the road into the parking lot well before hitting the puddle (R 542, 545, 552, 599, 696, 697, 702, 713, 1261). Assuming a small portion of the puddle extended into the middle of the road, there was no testimony or evidence that it played any part in the collision. As noted by Detective Babcock, since all witnesses indicated the children were well off the road and the vehicle swerved off the road before the puddle, the size of the puddle had little relevance (R 1130, 1261-62).

Respondent also claims "[t]he cartoon puddle differed substantially from the sketch of the puddle prepared by police shortly after the accident occurred (R 1041-1043)" (answer brief p. 26). Those record references contain no evidence supporting Respondent's claim. Defense counsel's unsworn representation is not evidence. See Leon Shaffer Golnick Advertising v. Cedar, 423 So. 2d 1015, 1017 (Fla. 4th DCA 1982). It does not appear the police report, a defense exhibit (R 912), was put in evidence

at trial. Deguiceis, the first deputy on the scene, said the animation accurately depicted the puddle (R 629, 634).

Deputy Lamby, not first on the scene, apparently prepared the preliminary report (R 914). She was a road patrol officer, not an accident reconstructionist (R 913, 915). There is no indication she was a trained artist. The police relied on witnesses at the scene before Lamby (R 914). The puddle changed after the collision because of additional rain and the many people walking through it (R 573, 624, 671, 679, 905, 1096). Babcock never uses a deputy's field sketch in a homicide report (R 1421). Such diagrams are only rough sketches (R 1421).

Respondent also criticizes the video's use of his blue truck because witnesses said the truck was green or dark. Overwhelming evidence supported the State's theory that Respondent's truck was the truck involved in the collision. Artificial light has a dramatic effect on color (R 1063). The yellow lighting at the scene would make a blue vehicle appear green (R 836, 1058). Well before Respondent's vehicle was found, the BOLO indicated that the vehicle was blue (R 835). This was based on the paint fragments found in Brooke's clothing and the blue paint smear found on her dress (R 834, 1547, 1617-18). The six layer paint chips, which included body filler and non factory paint, matched Respondent's truck. The damage to Respondent's truck was "fresh." (R 1154, 1161). The dent in the truck's hood was consistent with Nicole's head injury (R 848, 1160, 1910-11). The right turn signal lens on Respondent's truck was from a different

truck and was held on by scotch tape (R 1156-57). The plastic turn signal fragments found at the scene matched the intact left factory lens found on Respondent's truck (R 1163, 1207, 1209). The grill piece at the scene was from the same model and year as Respondent's truck (R 666, 667, 826, 828-29). Respondent's grill had been replaced shortly after the accident (R 1680, 1682).

The transfer mark on the trash can was consistent with the white on Respondent's truck (R 999). Respondent admitted being in the area (R 1718). He admitted hitting a trash can (R 1679, 1684). Respondent told Jones, "You're the only one I can trust, buddy, to fix my truck and not say nothing." (R 1687). Respondent told Brown that he had been drinking when he hit something and heard a scream (R 1735). He did not stop because he was on parole (R 1735). Respondent cleaned the blood off his truck and had the grill replaced (R 1736). Respondent attempted to change the appearance of the damaged truck and conceal it shortly after the accident (R 1889, 1891, 1894).

There is no doubt Respondent's truck was the truck in question and that Respondent was the driver. Scanning his truck into the computer ensured its accurate depiction in the video (R 1060). Similarly, using his height ensured accuracy (R 1061).

The State made it clear to the jury that the video was not an attempt to reconstruct lighting conditions (R 1035, 1050). The purpose of the video was to illustrate the dynamics of what happened that night (R 1035). It would be impossible to get accurate lighting unless a photographer were there at the exact

time of the collision (R 1035, 1059). Cloud cover changes lighting dramatically (R 1059). Accepting Respondent's argument would mean that any photo of a crime scene of an incident that occurred in the dark would be inadmissible. Cf. United States v. Clayton, 643 F. 2d 1071, 1074 (5th Cir. 1981) (alleged deficiencies in measurements and lighting in model went to weight, not admissibility). Additionally, there was testimony it was not yet dark, that Respondent's headlights were working, and that the area was sufficiently lighted (R 484, 541, 547).

Regarding the rain, there was apparently conflicting information as to whether it was sprinkling (R 1035). However, Sherry Mansey testified it was not raining when she ran out of the house immediately after the collision (R 479, 482). Sharon Fischer stated it did not start raining until after the collision (R 699). Even the defense video indicated it was not raining at the time of the collision (R 1059).

Respondent claims that the video was misleading because it contained different perspectives. This claim was not preserved. See Steinhorst, 412 So.2d at 338. Additionally, Babcock used aerial photos to describe the crime scenes and the truck's path (R 1107-09). There was no objection to these photos. See Thomas v. State, 563 So. 2d 207 (Fla. 4th DCA 1990) (any error cumulative and harmless where information was previously brought up without objection). Respondent also repeatedly used aerial photographs during cross-examination (R 511, 529, 1085, 1086). Moreover, the video did not simply offer an overhead view, it

also gave the jury a view from the children's perspective and Respondent's perspective. There was nothing misleading about the perspectives used and no objection regarding the different perspectives.

Respondent claims his secondary defense was that the collision was "not caused by recklessness, but the unavoidable result of a sudden loss of control upon entering the puddle. There was no evidence presented to support this "secondary defense." All the testimony indicated that his truck left the road completely, then entered the puddle and hit the children.

The video was not misleading. The jury saw it once. It represented six minutes of an eleven day trial. The judge and prosecutor explained that the video was being used to illustrate the expert's opinion of how the incident occurred (R 1124, 1127). The defense was permitted to question all witnesses about any supposed discrepancies in the animation. Both sides made it clear that if the information put in the computer were inaccurate, the animation would be inaccurate (R 222, 270, 1037, 1039).

Although the scene was bloody (R 479, 1736), no blood was depicted. Although there was a great deal of screaming after the collision, there was no sound (R 697, 1735). Mannequins were used to avoid any sympathy from depictions of children. Although there was testimony Respondent was traveling at up to twice the speed limit (R 570), the video showed Respondent traveling at the posted speed (SR 87). There is a gap in the video after it traveled down the dead end street because there was no testimony

to support Respondent's activities at that time.

The trial court did not abuse its discretion. The depictions were supported by testimony and physical evidence. See Jent v. State, 408 So. 2d 1024, 1029 (Fla. 1981) (trial court has wide discretion concerning the admissibility of evidence will not be disturbed absent an abuse of discretion); Lopez v. State, 478 So. 2d 1110, 1111 (Fla. 3d DCA 1985) (sufficiency of facts necessary to form expert's opinion lies within province of expert opinion - weaknesses in expert's testimony go to weight not admissibility); State v. Lewis, 543 So. 2d 760, 767 (Fla. 2d DCA), rev. denied, 549 So. 2d 1014 (Fla. 1989) (technical deficiencies in video went to weight, not admissibility); Dempsey v. Shell Oil Co., 589 So. 2d 373, 380-81 (Fla. 4th DCA 1991) (difference in conditions of speed and visibility in experiment's conditions went to weight, not admissibility) and Nelson v. McMillan, 151 Fla. 847, 10 So. 2d 565, 568 (Fla. 1942) (no error in admission of photo of scene were it was explained that terrain had changed since accident). Cf. Protective Casualty v. Killane, 447 So. 2d 316, 317 (Fla. 4th DCA), approved, 459 So. 2d 1037 (Fla. 1984) (no abuse of discretion in admitting a "day in the life" video); Wilkins v. State, 155 So. 2d 129, 130-31 (Fla. 1963) (first decision allowing color photos of crime scene - accuracy actually enhanced by use of color); City of Miami v. McCorkle, 145 Fla. 109, 199 So. 575, 577 (Fla. 1940) (whether photos were sufficiently accurate representation was matter within trial court's discretion) and "State v. Pierce: Will Florida Courts Ride the

Wave of the Future and Allow Computer Animations in Criminal Trials? 19 Nova L. Rev. 374 (1994). Assuming there was error, it was harmless. Witness testimony provided overwhelming evidence of the crimes.

Although not necessary to decide this issue, Petitioner notes Respondent's suggestion that the trial court let the State's tape in, but refused to admit the defense's tape as a "court exhibit," is misleading. Although the trial court referred to the State's tape as a "court exhibit" (R 1123), it was fully authenticated by the State and introduced by the State during its case-in-chief. In calling it a "court exhibit," the judge apparently meant that it was being received as demonstrative, not substantive evidence and would not go back to the jury room (R 1123-24). The judge made it clear that if the defense wished to present its tape, it could do so during its case (R 1422-23, 1429-30, 1628-29). The State had no objection to the contents of Respondent's tape coming in if properly authenticated (R 1631). The State's tape was authenticated pretrial and at trial. The trial court correctly found that Respondent was improperly trying to get the contents of the tape before the jury without authentication or any explanation about what information was used to prepare the tape (R 1422-23, 1429-30). See Steinhorst, 412 So.2d at 337 (defendant may not use cross examination to present defensive evidence); Echols v. State, 484 So. 2d 568, 573 (Fla. 1985), cert. denied, 479 U.S. 871, 107 S. Ct. 241, 93 L. Ed. 2d 166 (1986) (defense may not use cross examination to present its

case in chief); Medina v. State, 466 So. 2d 1046, 1050 (Fla. 1985) (scope and control of cross-examination is within trial court's broad discretion) and Booker v. State, 514 So. 2d 1079, 1085 (Fla. 1987)(discretion is abused only where no reasonable man could take the view adopted by the trial court).

Additionally, it appears Respondent never requested to play his tape to the jury. He wanted to play the video to State witnesses and then get information about his tape before the jury by asking the witnesses questions about it (R 1054, 1422, 1915-16). However, Respondent never proffered the questions (or the tape) and responses he was supposedly prevented from offering. Accordingly, this issue was not preserved. See Mitchell v. State, 321 So. 2d 108, 110 (Fla. 1st DCA 1975), cert. dismissed, 345 So. 2d 425 (Fla. 1977) ("An appellate court is not justified in finding error on an evidentiary ruling by a trial judge when no proffer of the evidence is preserved for review.") and Peterson v. State, 505 So. 2d 16, 16-17 (Fla. 3d DCA 1987) (claim that cross examination was improperly limited not preserved for review absent proffer of intended testimony).

Moreover, had Respondent genuinely wished to present this matter, he could have introduced it during his case (R 1423-25). See Pace v. State, 596 So. 2d 1034, 1035 (Fla.), cert. denied, ___ U.S. ___, 113 S. Ct. 244, 121 L. Ed. 2d 178 (1992) (defendant prevented from presenting evidence during his cross-examination could have presented it during his case if he thought it important - any error harmless). See also Sullivan v. State, 303

So. 2d 632, 635 (Fla. 1974), cert. denied, 428 U.S. 911, 96 S. Ct. 3226, 49 L. Ed. 2d 1220 (1976) (where counsel fails to take advantage of opportunity to cure error, error, if any, was invited and will not warrant reversal). Any error was harmless.

CONCLUSION

This Court should reverse a soon as possible on the reasonable doubt issue and decline to review the issue raised in Respondent's brief.

Respectfully Submitted,

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Certificate of Service

I certify a true copy of this document was sent by courier to Tanja Ostapoff, Criminal Justice Building/6th Floor, 421 Third Street, West Palm Beach, FL 33401, this 4 day of September 1996.