**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. 92,975**

**JOSEPH RAMIREZ,**

**Appellant,**

**vs.**

**THE STATE OF FLORIDA,**

**Appellee.**

**ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, CRIMINAL DIVISION**

# BRIEF OF APPELLEE

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## STATEMENT OF TYPE SIZE AND STYLE

This brief is typed in 12 point Courier New font.

## INTRODUCTION

Appellant, JOSEPH JEROME RAMIREZ, was the defendant below. Appellee, THE STATE OF FLORIDA, was the prosecution below. The parties will be referred to as they stood in the trial court. The symbols "R." and "T." will refer to the record on appeal and transcript of proceedings, respectively. The symbol "S.R." will refer to the supplemental record.

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## STATEMENT OF THE CASE AND FACTS

On Christmas eve of 1983, Mary Jane Quinn left her home to go to work as a courier at Federal Express shortly after 11:00 p.m. (T. 1520) She was supposed to take the packages that had accumulated at the office that day and drive them to Fort Lauderdale for shipment. (T. 1520, 1530-31) The drive from Ms. Quinn's home to the Federal Express building usual took her 15 to 20 minutes, and she usual returned home from work around 3:00 a.m. (T. 1520-21) No one else was supposed to be at the office at that time. (T. 1526-27, 1545) The Federal Express office had no security personnel but a security patrol passed the building every 15 to 20 minutes. (T. 1527, 1545, 1566-67)

Around 7:00 a.m. Christmas morning, Mr. Quinn awoke, realized his wife was not home and locate her, to no avail. (T. 1520, 1521-22) Mr. Quinn then called Mary Maguire, one of his wife's coworkers, to contact Dolan, who was unaware of Ms. Quinn's location. (T. 1521-22, 1529-30, 1534-36, 1854-55) Maguire, however, agreed to go to the Federal Express office to check for Ms. Quinn. (T. 1523, 1536) When Maguire arrived at the Federal Express office, the gate to the parking lot was locked, and Ms. Quinn was parked next to the building. (T. 1536) Maguire unlock the gate and approached Ms. Quinn's car. (T. 1536-37) As she did so, Maguire noticed that the overhead door to the truck parking was ajar, and Ms. Quinn's radio was lying next to it. (T. 1537) Maguire entered the building through the warehouse and noticed an open door on one

of the truck. (T. 1537-38) Maguire started calling for Ms. Quinn and walking through the building. (T. 1537-40)

When she reached the hallway between the warehouse area and the front offices, Maguire noticed blood on the wall. (T. 1540) Maguire panicked and ran to call the police at a nearby from a more populated area. (T. 1540-41) The police told Maguire to return to the Federal Express office, which she did. (T. 1541) Sgt. George Johnson, the security patrol officer, responded to the Federal Express office. (T. 1565-68) Maguire met Sgt. Johnson and another officer in front of the office and gave the other officer her keys. (T. 1541-42 However, before that officer give Sgt. Johnson the key, he entered the building through the unlocked front door. (T. 1542, 1569-70) Maguire was shocked, as the front door is kept locked excepted during business hours. (T. 1542-43)

Sgt. Johnson walked passed the front counter and saw Ms. Quinn's body in the hallway. (T. 1569-70) He then left the building and waited for fire rescue to arrive. (T. 1570) When fire rescue did so, he accompanied the paramedic back to the body. (T. 1570) The paramedic walked up to the body and realized Ms. Quinn was dead. (T. 1570) They then left the building without touching the body, and Sgt. Johnson then secured the crime scene. (T. 1570) Subsequently, a bloody fingerprint, which was later identified as Defendant's, was found on a doorjamb near the body. (T. 1621, 2410) As a result, Defendant was chargedby indictment, with committing, first degree premeditated or felony murder, armed robbery, and

armed burglary. (R. 1-4)

Prior to the instant trial, the State moved the trial court to determine the admissibility of a knife mark identification. (R. 82-85) The trial court held an evidentiary hearing on this motion.

At the hearing, Robert Hart testified that he has been a criminalist, specializing in firearm and tool mark identification since 1971. (R. 104) He has extensive training and education in firearm and tool mark identification and is a distinguished member of the Association of Firearm and Tool Mark Examiners. (R. 105-06) To become a distinguished member, a person has to be a full time examiner and have made contributions to the field. (R. 108) He had previously testified as an expert in the field of tool mark identification between 25 and 50 times, as an expert in both fields over 500 times. (R. 106) He has also published papers, given lectures and taught firearm and tool mark identification. (R. 108-10)

In 1983, Hart co-authored an article on tool mark identification of knives that had made stab wounds in cartilage. (R. 111-12) This article concerned Hart's work in identifying knife marks in a prior murder case. (R. 112-14) In addition to being published, the paper was presented to the American Academy of Forensic Science and the Association of Firearm and Tool Mark Examiners. (R. 113) Hart was unaware of any literature disputing the methods he used in knife mark identification in cartilage or the reliability of his identification. (R. 118-19)

Prior to the case reported in the article, Hart had examined tool marks made by knives in substances other than human cartilage. (R. 117) He had also aware of cases and papers from other tool mark examiners who had studied knife marks in human tissue. (R. 117-18) Since the article, Hart has examined tool marks made in human cartilage in 12 to 15 cases. (R. 120) However, none of the other cases have ever gone to trial. (R. 120-21) Because Hart had never testified about knife mark identification during the trial of another case, Defendant objected to qualifying him as an expert in the field, and the trial court overruled the objection. (R. 123-24)

Hart explained that there are three types of tool mark identification: fracture patterns, static impressions and striated tool marks. (R. 106-07) Striated tool marks are microscopic lines created when a tool that has a pinpoint defect in passed through a softer material. (R. 115-17) The patterns created on a bullet from traveling through a gun barrel are a form of striated tool mark. (R. 107, 117) As such, there is considerable overlap between firearms identification and tool mark identification. (R. 107)

Neither the type of tool that makes the mark or the media in which the mark is made affects the analysis. (R. 124-25) Hart stated that human cartilage is closest to dipak, a gelatinous material he used in his tests, and rubber and plastic. (R. 115, 124-26)

He explained that using human cartilage to make test marks is not desirable because surface details are more easily seen in

opaque materials. (R. 129) Because of the difficulty in looking at cartilage, which is translucent, through a microscope, casts are made of the cartilage. (R. 135) To compare these castings to a suspect knife, the knife is stabbed into dipak. (R. 137) The dipak standards are then casted with the same material used to make casts of the cartilage. (R. 137) The two castings are then compared under a microscope. (R. 137) This process may cause the loss of some detail in the mark but will not cause a false identification. (R. 135)

Further, in making the dipak standards for comparison, the examiner attempts to duplicate the angle of the knife wound, based on information from the medical examiner. (R. 137-38) A difference of up to 20 to 30 degrees in the angle would not prevent identification because the relationship between the striations would remain the same. (R. 138) The standard making process and the casting process is similar to the process of test firing bullets for ballistic examination. (R. 138-39)

Additional knives are not tested to see if they would match the striations because the striations made by a particular knife are unique. (R. 140-41) Again, this is similar to ballistics analysis, where each gun is unique. (R. 141) Hart based his testimony that each knife is unique on studies done on consecutively manufactured knives. (R. 141-46) Hart recognized a number of articles on tool mark identification as authoritative in the field. (R. 146-56)

On cross examination, Hart explained that the process of tool mark identification was qualitative, not quantitative. (R. 157) If particular striations had multiple contours, fewer striations would be required to make an identification. (R. 157) In making an identification, the depth, length and shape of the striations and their relationship to one another are considered. (R. 165) The reliability of the identification is check by have multiple examiners analyze the pattern. (R. 162-65)

Hart explained that lighting can affect the identification process, so both samples are light the same way. (R. 161, 166) However, difference in light would prevent an identification and not create a false identification. (R. 166-67)

Hart explained that cartilage can deteriorate if not properly preserved and shrink if dried. (R. 176-80) However, if the shrinkage is uniform, it would still be possible to conduct an identification because the striations would merely be compressed. (R. 176-79) Further, the cartilage can be rehydrated. (R. 176-79) However, Hart saw no evidence of deterioration in the cartilage in this case. (R. 171) Deterioration would prevent an identification but not lead to a false identification. (R. 189-90)

Hart stated that he did not know how many similar knives had been manufacture or the exact process used to manufacture the knife in question. (R. 181-84) However, Hart explained that these facts were irrelevant because no two knives would produce exactly the same tool marks. (R. 184-85)

Monty Lutz testified that he attended a two year course in firearms and tool mark identification given by the United States Army. (R. 209-11) He then became section chief for the Army's Criminal Investigations Laboratory. (R. 211) For more than twenty years, he has been a firearm and tool mark examiner in Wisconsin. (R. 209) He has been a member of the Association of Firearm and Tool Mark Examiners since 1970. (R. 213)

Lutz agreed with Hart that the fields of firearm and tool mark identification overlap. (R. 214-15) He also concurred that the type of tool used and the type of media in which the mark is made do not affect the scientific principles used in tool mark identification. (R. 215-16)

On voir dire, Lutz admitted that he had never personally examined knife marks made in human cartilage. (R. 216-17) However, he stated that the process of making and examining tool marks are the same as the process of making and examining ballistic evidence. (R. 217-19) He also testified that he had examined knife marks in other substances. (R. 222-23)

Lutz testified that the application of knife mark analysis to knife marks in human cartilage was general accepted in the scientific community. (R. 225-26) He keeps current with the state of tool mark science and is unaware of any dispute regarding the application of the principles to this media. (R. 226)

Lutz also stated that casting of marks is accepted in the community. (R. 227) He stated that casting are used when examining

the cut surface would require damaging the evidence or the cut surface is translucent. (R. 227-28) Lutz also agreed with Hart that the casting process might cause some lose of detail that would prevent an identification but would not cause a misidentification. (R. 228-29) Lutz again agreed with Hart that the illumination and angle of viewing might prevent an identification but would not cause a false positive result. (R. 242-47)

Lutz also agreed with Hart that no minimum number of points of similarity are required for an identification. (R. 234-36) Lutz pointed out that this was true of ballistic testing also. (R. 238, 249-50)

Lutz did not know how many knives had been manufactured. (R. 219-20, 241-42) However, he agreed with Hart that this was irrelevant because each knife creates a unique mark. (R. 220-21)

Lonny Ray Harden testified that he had been a firearm and tool mark examiner for 30 years. (R. 263-64) He also graduated from the Army firearm and tool mark identification school. (R. 263) He had four college degrees and had taken courses at the FBI academy. (R. 263) He had been the chief of firearm and tool mark identification for the Army. (R. 263) He had testified as an expert in firearms and tool mark identification over a thousand times in the courts of this country and Great Britain. (R. 263, 267) He had also testified just about tool marks about 300 times. (R. 267) He had testified in 5 cases involving tool marks in human cartilage. (R. 267-68)

Harden testified that each individual knife is unique

regardless of the process used to manufacture the knife. (R. 269-74) Harden agreed with the other experts that the type of tool that made the mark and the type of media receiving the mark does not affect the process of tool mark identification. (R. 275-76) He agreed that casting of tool marks is general accepted in the field, as was the method of casing used here. (R. 276-79)

In the approximately 40 cases in which Harden had examined tool marks in human tissue, the tissue had always been preserved in formalin, the material used here. (R. 280-84) In some of the cases, Harden had been present at the autopsy when the samples were collected, and he had never seen any degradation in the samples preserved in this manner. (R. 283-84)

Harden agreed with the other experts that quantification of striations was not required to determine a match. (R. 287) He also agreed that such identification were general accepted in the field. (R. 287) In 1989, he examined the evidence in this case and concurred in Hart's opinion that the knife was the murder weapon. (R. 288-90)

Harden agreed with the other experts that a large error in the angle of the test marks would prevent an identification but would not create a misidentification. (R. 292) Any error in lighting the sample would prevent an identification but not create a misidentification. (R. 293) He also concurred that once a mark is matched to a tool, there is no need to test other tools. (R. 293)

Harden keeps current with the state of the science. (R. 293)

There is no authority that suggests that other knives should be tested or that other protocols should be used in making an identification. (R. 293-94)

Harden stated that examiners are subject to proficiency testing. (R. 317-19) During this testing, blind samples are sent to the examiner, and the results are verified by independent laboratories. (R. 317-19)

William Conrad testified that he has been a firearms and tool mark examiner since at least 1982. (R. 335) He too attended the Army's firearm and tool mark identification school. (R. 336) He is a distinguished member of the Association of Firearms and Tool Mark Examiners. (R. 337) He has previously testified as an expert in firearms and tool mark identification approximately 350 times and in tool mark identification 3 to 4 times. (R. 338) He had previously testified to the identification of a knife mark made in human tissue in a capital murder trial. (R. 339)

He has found tool marks in human tissue before but was unable to conduct comparisons because the tool was not located. (R. 339-40) In his experience, human tissue was capable of retaining sufficient striations to permit an identification. (R. 340-41) In some cases, Conrad examined the tissue directly for tool marks and in others he cast the marks. (R. 341) He testified that casting is general accepted for this type of analysis. (R. 341)

Conrad agreed with the other experts that the media receiving the mark and the type of tool used to make the mark do not affect

the tool mark analysis. (R. 344-45) He also concurred that the manufacturing process under which a tool is made does not affect the analysis. (R. 346-47) He also agreed that any error in the angle of the test marks would prevent an identification but would not create a false positive. (R. 355) The same was true of any errors in lighting. (R. 356)

Conrad had personally tested consecutively manufactured knives. (R. 347) He determined that each knife made a unique tool mark. (R. 347) In the case in which Conrad testified regarding the knife mark in human tissue, he was given two knives to compare to the tool mark. (R. 350-51) He was able to exclude one knife and identify the other. (R. 351)

No specific number of matching striations is required to determine a match, as is generally accepted in the field. (R. 353-54) Instead, the identification is reviewed by a second examiner. (R. 352) This same practice is followed in ballistic testing, as ballistics is merely an application of tool mark identification. (R. 354)

John Cayton testified that he had been a firearm and tool mark examiner for 28 years. (R. 378) Cayton handled 3 or 4 cases involving knife marks in human tissue a year. (R. 383) He had testified in one case involving a tool mark in human tissue. (R. 385-86) He had testified 500 times as an expert in firearms and tool mark identification. (R. 386) He had written an article, which was published in a professional journal, regarding a case in which

he had identified a tool mark in human tissue. (R. 387-88) He had given numerous lectures regarding knife mark analysis. (R. 403) He is also a distinguished life member of the Association of Firearm and Tool Mark Examiners. (R. 396)

Cayton confirmed that the type of tool making a mark and the type of media receiving the mark do not affect the analysis. (R. 383-85, 400) He also agreed that ballistics was merely an application of tool mark analysis. (R. 386-87) He had examined several thousand tool marks and had found each one to be unique. (R. 385) He was familiar with the literature in the field, and it did not dispute the fact that each tool creates a unique mark. (R. 403) He also confirmed that the use of casts is general accepted in the field. (R. 400-02) He explained that casts are used with human tissue to prevent deterioration. (R. 401-02)

He also confirmed that the number of striations is not what controls the determination that a tool mark matches. (R. 411-19) Instead, the identification is depended on the pattern of the striations. (R. 411-19) To insure that the identification is properly made, the results are confirmed by a second examiner. (R. 417) Additionally, the examiners are subjected to proficiency testing, during which blind samples are sent from an independent laboratory and tested. (R. 419-20)

Richard Suberon, a forensic odontologist, testified that he preserves and examines bite marks. (R. 903-08) In his work, he uses the casting material used in this case, as he does in his private

dental practice. (R. 908-09) He uses this material because it is extremely stable and makes accurate casts. (R. 909)

Suberon was also trained in the characteristics and preservation of cartilage. (R. 916) He has assisted in autopsies in which cartilage was removed. (R. 915-16) The method used to preserve the cartilage in this case results in very little change in the cartilage. (R. 917)

Defendant presented the testimony of Dale Nute. (R. 944) Nute had received his doctorate in criminology two weeks prior to the hearing. (R. 945) Between 1966 and 1980, Nute had been a microanalyst with FDLE. (R. 945) As a microanalyst, Nute had examined trace evidence and had worked with static tool marks and testified over 200 times as a crime scene technician and a microanalyst. (R. 946-48) When he was with FDLE, he was supervisor of the microlab, working in trace evidence and serology, but not tool marks. (R. 950-51) He had never been qualified as an expert in firearm and tool mark identification. (R. 969-70)

Since leaving FDLE, Nute has specialized in examining forensic procedures for compliance with standard laboratory practices, the subject of his dissertation. (R. 953-54) The dissertation is based on his experience, his discussions with others and his applications of his principals. (R. 954-58)

On voir dire, Nute admitted that he formulated the theory in his dissertation to teach and for use as a private consultant. (R. 961-62) Nute denied that his departure from FDLE was prompted by

his demotion. (R. 962) However, he admitted that he was transferred from being supervisor of the microanalysis laboratory at the main FDLE lab to a lab that did not have a section for anyone with his specialty. (R. 962-63) As a result, he resigned from FDLE. (R. 963)

Nute admitted that he had never written to a scientific journal to criticize the reliability or methodology of a reported technique. (R. 963-64) He claimed that this was because of "inertia," lack of time and lack of requests or compensation. (R. 964-65) However, Nute admitted that such criticism is submitted and results in active discussion. (R. 966)

Nute was aware of Hart's article about the prior case in which his analysis of knife marks in cartilage was discussed. (R. 965) He did not recall ever seeing any criticism of this analysis in a scientific journal. (R. 966) Hart's article was the only article he had ever seen on analysis of knife marks in human cartilage. (R. 968) Nute had never looked for reported cases in which this type of analysis was accepted. (R. 968) He never spoke to any tool mark analysts about it. (R. 968-69)

Nute felt that he was qualified to testify that any type of forensic science was unreliable if the person he spoke to about that science was not able to answer certain questions in a manner he found acceptable. (R. 970-72) However, he admitted that his ability to analyze the appropriateness of the responses would be affected by his knowledge of the field. (R. 970-72) He based his opinions on the philosophy of science. (R. 976-78) Based on his

definition of the scientific method, he defined what must be done to render an analysis acceptable. (R. 977)

In reaching his conclusion in this case, Nute read Hart's testimony and deposition. (R. 980) He also spoke to Hart, who explained his procedures. (R. 980-81) He opined that the identification protocols used in this case had not been properly developed. (R. 973-74) However, he was unaware of whether any other firearm and tool mark examiners had done any work on the protocols and whether the results had been verified. (R. 974) If someone else had validated Hart's results and protocol, they would be acceptable. (R. 974)

Nute felt that Hart's identification was based on standard tool mark identification principles and applied standard tool mark methodology. (R. 983-84) However, Nute felt that Hart had not done sufficient tests to determine that this principles and methods applied to human cartilage. (R. 984-85) In Nute's opinion, several knives of different type would have to be stabbed into cartilage to verify that all knives can leave a mark in cartilage. (R. 985-86) Further, Nute felt that it would be necessary to stab consecutively manufactured knives into cartilage to confirm that each knife made a unique mark in cartilage, as Nute acknowledged was true of other materials. (R. 986-87) He was unable to say that this caused the identification to be incorrect. (R. 990)

Nute also felt that different areas of the knife's surface should have been test stabbed into cartilage. (R. 990) He believed

this was necessary to verify that each surface of the knife was capable of producing an identifiable tool mark. (R. 990-92) He did not believe the fact that he had found this to be true in another case was significant unless he had conducted additional tests in the other case. (R. 1017) However, he acknowledged that he could rely on scientific literature written by people who had conducted tests. (R. 1017)

Nute also felt that articulable evaluation criteria were necessary. (R. 993-94) He believed that subjective criteria were not acceptable. (R. 993-94) He opined that a number should be used to define a match. (R. 1000-02) However, a distinct number of points was not necessary if the criteria could be described by a sequence, percentage or distribution. (R. 1002) He opined that without such criteria as match could not be verified. (R. 1002-03) Nute opined that Hart's match was not appropriate because he could not define the criteria for a match to him. (R. 1000)

On cross examination, Nute acknowledged that the criteria he alleged were required are not used in ballistics testing. (R. 1003) He was unaware of any expert in firearm and tool mark examination who stated their opinions in terms of the type of criteria be felt were necessary. (R. 1004-06) However, he had read one article from 1959 that had proposed such criteria, which had been rejected by the scientific community. (R. 1004-06) As such, Nute accepted the principles of ballistics testing but found the conclusions unscientific. (R. 1003) Nute felt that it was improper for forensic

experts to testify to their opinions. (R. 1008) He believed that they should only testify to objective criteria. (R. 1008) When asked if the scientific community agreed with his definition of the scientific method, Nute replied that it depended on the science. (R. 1009-10)

Nute acknowledged that for his conclusions to be valid, he would have to have the proper set of facts. (R. 1012) However, Nute believed that this case was the case on which Hart had written his article, which is was not. (R. 1013) Further, he believed that Hart compared the test marks directly to the cartilage. (R. 1013-14) He also believed that Hart had never examined a knife mark from a stab wound as opposed to a cut. (R. 1016)

Nute acknowledged that there was nothing unique about cartilage that made him feel that additional testing needed to be done. (R. 1018) Instead, he believed that testing was necessary any time a new media or new tool is analyzed. (R. 1018-19) Nute acknowledged that this requirement for testing came from his doctoral dissertation, is his original theory and is not generally accepted in the scientific community. (R. 1018-19)

Nute admitted that tool mark identification is general accepted in the scientific community. (R. 1020) He conceded that tools that are subjected to individual processing are unique but claimed that if tools were "stamped out from the same form," they might be identical. (R. 1020)

After the hearing, the trial court determined that evidence

that Defendant's knife had been the murder weapon was admissible. (R. 1194-1230) In making this determination, the trial court utilized the four part test enunciated in *Ramirez v. State*, 651 So. 2d 1164 (Fla. 1995), and found that the evidence satisfied every part of the test. (R. 1194-1230) In analyzing the second part of the test, the trial court first determined that knife mark identification was generally accepted in the relevant scientific community. (R. 1198-1220) The trial court noted that Defendant had not offered any evidence that knife mark identification was not general accepted or any alternative definitions of the scientific community. (R. 1211, 1214) Because Defendant had challenged the reliability of the evidence under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, the trial court also determined that knife mark identification was reliable under this standard. (R. 1220-29)

Defendant also filed a pretrial motion to suppress all statements he gave the police and items of tangible evidence seized during searched of his car, residence and person. (R. 1414-19) With regard to the tangible items, Defendant asserted that they were either seized in warrantless, nonconsensual searches or that the warrants were obtained by illegally obtained evidence. (R. 1414-19)

At the hearing on the motion to suppress, Det. Steven Parr testified that he assisted in the investigation of this case. (R. 2815-16) Det. Parr was assigned to interview all of the employees at the Federal Express building. (R. 2816-17) During the interview

process, the police had fingerprint technicians available to obtain fingerprints of all the employees to use as elimination prints. (R. 2818-19) As part of this process, an interview with Defendant was arranged for December 27, 1983, at the police station. (R. 2820)

At that time, Defendant came to the station on his own. (R. 2821) He was not a suspect and was not in custody. (R. 2822) As such, he was not read his *Miranda* rights. (R. 2822) He was not threatened or coerced into giving a statement, and no promises were made. (R. 2822-23) Defendant gave Det. Parr a sworn statement concerning his duties as janitor and his whereabouts on the night of the crime. (R. 2823-24)

After giving the statement, Det. Parr asked Defendant if he would voluntarily provide a hair sample and allow his fingerprints to be taken. (R. 2825-28) Defendant agreed and executed a consent to search form authorizing the taking of his fingerprints and hair sample. (R. 2925-28) Defendant's fingerprints and a sample of the hair from his head were then taken. (R. 2826-28) However, Defendant refused to provide samples of his facial and chest hairs. (R. 2827)

Thereafter, Defendant started to leave the police station. (R. 2827-28) On the way out of the building, Defendant inquired if the hair samples were being sought because the victim had hair in her hands. (R. 2829) Det. Parr did not respond. (R. 2829)

When they reached the front door, Det. Parr saw Defendant's car and asked if he could look inside it. (R. 2929) Defendant agreed, executed a consent to search, opened the trunk and

permitted Det. Parr to glance briefly into the trunk. (R. 2829-32) Defendant then told Det. Parr that was enough and slammed the trunk closed. (R. 2930) Det. Parr then asked if he could look into the passenger compartment. (R. 2830) Again, Defendant agreed, opened the door, permitted a brief glance and slammed the door. (R. 2830) While Det. Parr was glancing into the passenger compartment, Defendant inquired if he was looking for blood. (R. 2833)

Later that night, Det. Parr and Det. Saladrigas when to Defendant's home. (R. 2834) Initially, they spoke to Defendant's girlfriend until Defendant arrived a few minutes later. (R. 2834) Defendant inquire what he could do to convince the officers that he was not involved in the crime. (R. 2835) They informed Defendant he could provide them with the sweater that Ms. Britton had seen him wearing the night of the crime. (R. 2835) Defendant briefly searched his house of the sweater and then claimed that the sweater was at Alvarez Cleaners. (R. 2834-36)

The following evening, Defendant called Det. Parr and stated that he had found the sweater. (R. 2836-37) Det. Parr arranged to meet Defendant later that evening at the Federal Express building so that Defendant could turn over the sweater. (R. 2836-37) When Defendant arrived at the Federal Express building, he was wearing the sweater. (R. 2837) When Det. Saladrigas inquired where the fox emblem that had been described as being on the sweater was, Defendant responded that it had fallen off. (R. 2837-38) By this time, Defendant's fingerprint had been matched to a bloody print

found at the crime scene, and a warrant for his arrest had been issued. (R. 2836, 2845) As such, Defendant was arrested. (R. 2841)

Later that night, Det. Parr when to Defendant's home and asked his girlfriend for permission to search the house, which she refused. (R. 2840) However, two days later, Det. Parr returned to the house, and Defendant's girlfriend consented to the search and executed a consent to search form. (R. 2840-43) During the search, Det. Parr found Defendant's watch on top of his dresser and seized it. (R. 2843)

Det. William Saladrigas testified that he was the lead detective in this case. (R. 2855) He confirmed that he accompanied Det. Parr to Defendant's home on December 27, 1983. (R. 2856)

Det. Saladrigas stated that he arrested Defendant when he arrived at the Federal Express building. (R. 2858) At that time, he advised Defendant of his *Miranda* rights. (R. 2859-60) Defendant responded by stating that he knew his rights and cussing at the officers. (R. 2861-62) When asked if he understood his rights, Defendant again cussed at the officers and stated that he had provided the sweater. (R. 2862) At this point, Det. Saladrigas inquired about the fox emblem, and Defendant responded that it had fallen off in the wash. (R. 2862) During this time, Defendant was not threatened nor were any promises made. (R. 2863) After Defendant arrest and transport to the police station, his clothes, watch and wallet were seized. (R. 2868) In his wallet, the police found a receipt for a sweater from Burdine's dated December 28,

1983. (R. 2868)

On December 28, 1983, the police executed a search warrant for Defendant's car. (R. 2966) In the car, the police found the knife, a clipboard that had sticker and writing indicating that it was from Federal Express, a pair of sneakers, an electrical plug, rubber trim from the trunk, a lug wrench and a Burdine's bag. (R. 2867)

On cross, Det. Saladrigas admitted that he had not listed the Burdine's bag on the inventory of the items found in the car. (R. 2879) He did not recall why it was not listed. (R. 2879)

Det. Saladrigas did not recall how the police obtained the keys to Defendant's car. (R. 2877) He believed that they might have been left in the car. (R. 2877) He knew the car was left in the parking lot at the Federal Express building but did not specifically recall where and did not know if the car had been moved. (R. 2877)

In the memorandum Defendant submitted in lieu of argument, he asserted that it was tainted by the allegedly illegal arrest and that the alleged movement of the car after his arrest resulted from a warrantless, nonconsensual entry. (R. 1474-79) Further, he asserted that there was no reason to believe that the car was connected to the criminal activity. (R. 1474-79)

In its memorandum, the State responded that the warrant was sufficient to establish probable cause to believe that Defendant committed the crime and that evidence thereof would be found in the

car. (R. 1483-95) Further, the State contended that the police had acted in good faith in relying on the warrant and that the evidence would have been inevitably discovered. (R. 1483-95)

The trial court denied the motion to suppress in a written order. (R. 1496-1507) The trial court found that the search warrant was based on probable cause, that the officers acted in good faith in relying on it and that the evidence would have been inevitable discovered. (R. 1505-07)

The State filed a pretrial motion to admit the former testimony of Dorothy Ballard, a former crime scene technician. (R. 1480-82) In the motion, the State asserted that Ballard was affected by numerous personal problems that affected her mental state. (R. 1480-82) As a result, Ballard was unable to remember any details about her actions in this case even after the opportunity to review her reports and former testimony. (R. 1480)

At the hearing on the motion, Ballard testified via telephone that she retired from Metro Dade Police Department on October 28, 1988, and now resides in Madison, Florida. (R. 1313) She recalled having been the crime scene technician in this case and having testified at Defendant's two prior trials. (R. 1314) However, she only remembered the details of her actions as a crime scene technician to some extent even though she had reviewed her report. (R. 1315) She also stated that she would be unable to testify without continually referring to her report and prior testimony because of emotional problems. (R. 1315-16) She believed that her

memory lapse would affect her ability to testify effectively. (R. 1316) She testified that her problems caused her to be unable to hold a conversation because she lost her train of thought. (R. 1318) She explained that her emotional problems were due to caring for a daughter with cancer and dealing with two other daughters going through difficult divorces. (R. 1317) The State proffered that Ballard was willing to testify. (R. 1324)

Based on this testimony, the State argued that Ballard's memory lapses destroyed her effectiveness as a witness and that she should be considered unavailable. (R. 1319-24) Defendant responded that she could testify from her reports even if she could not remember the details of her actions. (R. 1319-24) The trial court found that Ballard was unavailable because she would have to continually refer to her report and because she blacked out in the middle of conversations. (R. 1323-24) The trial court believed that this destroyed her effectiveness as a witness. (R. 1323-24)

Shortly prior to trial, the State sought to supplement the record regarding Ballard's unavailability. (T. 97-98) The State proffered an affidavit she had executed and the testimony of an Assistant State Attorney, who had been present with Ballard when she testified telephonically at the hearing. (T. 97-98) The State asserted that the affidavit was necessary because Ballard's testimony was contrary to statements she had made to the prosecutor. (R. 109-10) Defendant objected to the introduction of the affidavit because he did not have an opportunity to cross

examine. (T. 110-11) The trial court refused to consider the affidavit. (T. 114)

The trial court also suggested that Ballard could be examined by a doctor. (T. 116) The State responded that it was unaware of what doctors would be available where Ballard lived and that it could not compel her to see a doctor. (T. 116, 118) The State also suggested that it could attempt to compel her testimony by subpoena. (T. 117) However, the State had learned that Ballard would refuse to comply with a subpoena. (T. 117) As such, the State and trial court were concerned with the delay of the proceeding and the damage to Ballard in pursuing contempt sanction. (T. 117-19)

With regard to the testimony of the prosecutor, the trial court felt that it might be helpful, and Defendant did not objection. (T. 116-20) As such, Darin Gayles testified that he was employed as an Assistant State Attorney and was assigned to be present with Ballard during her telephonic testimony. (T. 120-21) Prior to the testifying, Ballard showed Gayles as statement she had prepared to read to the trial court at the hearing, which she forgot in going to the hearing. (T. 121-24)

During her telephonic testimony, Ballard began crying. (T. 127-28) Immediately after hanging up the phone, Ballard sobbed for 10 to 15 minutes. (T. 125, 127) During this time, it was necessary for Gayles to calm down Ballard. (T. 127) Gayles then accompanied Ballard to her home, she was still upset, and Gayles remained with her for an additional 20 minutes because she was alone. (T. 125-26)

After hearing this additional testimony, the trial court adhered to its prior ruling. (T. 130)

Three working days before the trial was to commence, Defendant filed an exparte motion to compel the State's experts to assist unnamed defense experts in examine the evidence in this case. (R. 1598-99) The trial court granted the motion in an unrecorded, exparte hearing in reliance on defense counsel's proffer that these orders were entered as a matter of course. (R. 1606, T. 7, 21) The State learned of the entry of the order when the State's experts left a phone message on the Thursday before the Monday trial was to start, complaining of the presence of the defense experts. (T. 3-4) When the State asked the name of the defense expert, some of they refused to identify themselves. (T. 4)

On the day trial was supposed to start, the State appeared before the trial court and requested that the trial court order a halt to further testing because of the discovery violation. (T. 6) The State also sought exclusion of any new experts or opinions if Defendant choose to offer them. (T. 6) Defendant responded that he planned to make the decision regarding whether these new witnesses would be called the following day. (T. 11) Defendant assert that his investigator had begun looking for the physical evidence about a month and a half before trial. (T. 14) He contended that the clerk had initially been unable to find the evidence, which had been located a month before trial. (T. 15) Defendant then sought experts and arranged from them to come to Miami, which took until

the eve of trial. (T. 15) The State responded that the evidence had always been available from the clerk's office and that if Defendant had difficulty locating it, the State would have been of assistance had it known. (T. 15-18)

The State then suggested that a discovery violation had occurred. (T. 17-19) However, the State noted that until Defendant decided if he was going to present the experts, a *Richardson* hearing was premature. (T. 19-20) The trial court decided to continue the case for two days until Defendant had a opportunity to complete his testing and decide if any new witnesses would be called. (T. 25-27)

The following day, Defendant faxed the State a new witness list, adding three experts: Charles Neu, Robert Kopec and Nute. (T. 185) The State immediately took the depositions of Kopec and Nute. (T. 185) Nute's proposed testimony was in accordance with his *Frye* hearing testimony. (T. 19) Kopec claimed to be an expert in numerous areas, including blood splatter. (T. 194-95) While Kopec was planning to offer testimony regarding blood splatter, he had yet to complete his analysis in this area because he had yet to view all of the crime scene photos. (T. 195) He also planned to testify that knife mark identification was not scientific because it had allegedly not been sufficiently tested. (T. 195-96) The following morning, the State requested a *Richardson* hearing. (T. 185) The State proffered the testimony of the evidence vault clerk, which was that Defendant had not requested to view the evidence

until the week before trial. (T. 185)

With regard to Kopec's incomplete testing, the State requested that he be precluded for performing additional analysis during trial. (T. 198) Defendant responded that Kopec had been unable to complete his analysis because Defendant had not received all of the crime scene photographs. (T. 198-99) The State replied that the crime scene photographs had been available at all times but had never been requested. (T. 199) Defendant asserted that he had only recently learned that other crime scene photographs existed because his file was incomplete when transferred from the prior attorneys. (T. 201-02)

The trial court found that Defendant had committed a discovery violation that appeared to be willful. (T. 199-200) However, the trial court did not believe that the State had demonstrated prejudice with regard to the completed testing because it had been permitted to depose the new experts. (T. 199) Further, it felt constrained to permitted Defendant to continue to develop more evidence for fear of reversal. (T. 202-03) As such, the trial court felt that the only remedy available was to grant a continuance. (T. 203) The State then suggested that Kopec should immediately complete his work while the parties began jury selection and that the situation be readdressed before the jury was sworn. (T. 204-05) However, Kopec had left the county, and the additional photographs were in the custody of the clerk because they had been exhibits at the prior trials. (T. 205-06) As such, the trial court found that

Kopec should look at the evidence during jury selection. (T. 206)

During jury selection, Defendant contended that Kopec could not find all of the photographs that he wanted to view. (T. 969-70) The State responded that all of the photographs were available in the clerk's evidence vault. (T. 970) Defendant asserted that there were 30 to 40 photographs were in the vault and around 200 photographs had been taken. (T. 970) The State explained that the estimate of 200 photographs was based on the number of rolls of film used and that not all the exposures had resulted in photographs because of problems with the camera. (T. 971) The State asserted that all of the photographs showing blood splatter were in evidence but that the negatives could be made available to confirm that the exposures has not all resulted in pictures. (T. 970-71) Defendant agreed that Kopec had seen all of the pictures, and a new deposition was arranged. (T. 972)

After the jury was sworn, the subject of Ballard's testimony was again readdressed. (T. 1491-1510) The State asserted that Ballard's daughter was dying, she was away from home and it could not contact her. (T. 1495) Defendant renewed his objection to the presentation of this evidence and contended that the State had not provided a doctor's report as requested by the court. (T. 1508) The trial court responded that it had only requested the note in an abundance of caution and that it was not required. (T. 1508-09)

At trial, Maguire testified that Defendant had been the janitor at the Federal Express office. (T. 1543) She stated that

the janitorial supplies were kept in the women's bathroom. (T. 1544) Maguire testified that the week before the murder, Ms. Quinn had been given a new set of keys because she had lost her keys. (T. 1544) Maguire stated that the janitorial staff was not supposed to have keys to the building. (T. 1552-53) However, Federal Express did not carefully track who had keys prior to the murder. (T. 1546, 1548, 1552)

Ballard's prior testimony was then read to the jury. (T. 1578) she stated that she was one of the crime scene technicians assigned to this case. (T. 1581) Upon arrival at the scene, she saw 7 garage type bay doors on the south side of the Federal Express building. (T. 1584) Next to them was a regular entry door. (T. 1584) A car was parked in front of the second bay door and the first bay door was opened 9½ inches. (T. 1584-85) The front doors to the building were glass and on the east side of the building. (T. 1585-86) Next to them was a public telephone. (T. 1585) As part of her work, Ballard prepared a diagram of the crime scene and marked the location of the evidence she found on it. (T. 1587-88, 1594-95) In making the observation to draw the diagram, Ballard noted that there were no signs of a forced entry. (T. 1595)

On the telephone outside the front doors, Ballard found a can of peach nectar and a top to a styrofoam cup, which had a phone number written on it. (T. 1596) She also found a paper towel that appeared to have blood on it in this area. (T. 1596-97) Blood was also found on the inside of the front doors. (T. 1599) Inside the

front door was a lobby that had a counter along the wall. (T. 1601) On top of the counter, Ballard observed a broken piece of plastic that had blood on it. (T. 1601) There was also blood on the side of the counter. (T. 1602) In the hallway behind the counter, she observed what appeared to be a faint, bloody footprint on the tile floor. (T. 1603) The tile was not collected because of the difficult in removing the tile and matching the prints. (T. 1603-04)

In the main office just off of this hallway, Ballard saw blood on the carpet, a woman's hair clip with blood on it, and a square piece of plastic consistent with the piece found on the counter. (T. 1606-07) On a table in this area, Ballard found a computer printout of Ms. Quinn's time card and her pay check. (T. 1606-07) On the other side of this room, Ballard also found a desk drawer that appeared to have been pried open and processed it for prints. (T. 1604-05, 1607-08) Near there, a file cabinet drawer had been pulled out and a telephone cord was caught in it. (T. 1607) On the floor between the desk and the location of the body was a roll of computer paper on a blue plastic dowel. (T. 1613) Next to the wall between the dispatch room and this office were two tables: one of the tables held a typewriter and the other was empty. (T. 1613) A telephone that appeared to have been on the empty table had been pulled with its jack from the wall and was tangled in Ms. Quinn's legs. (T. 1632-33)

Around the body, Ballard found a piece of pink paper with

writing on it and a piece of yellow paper. (T. 1614) In the doorway to the dispatch room were more pieces of broken plastic. (T. 1614) One of the pieces of plastic had marking on it indicating that it was from a fax machine. (T. 1667-70) Ms. Quinn's wallet was found under her body. (T. 1614-15) A feedout tray from a fax machine was found under Ms. Quinn's right arm. (T. 1615) The carpet around the body was saturated with blood. (T. 1620) The jewelry was still on the body. (T. 1633) The body was lying in a prone position with her feet near the doorway to the dispatch room and her head extending into the hall. (T. 1659-60) The left arm was bent, left hand was next to the head, and it was clasped and contained several light color hairs. (T. 1633-34) The right arm was also bend, and the right hand was next to her stomach, and it was cupped and had a hair on top of it. (T. 1635)

Ballard, with the assistance of several other crime scene technicians, processed the scene for fingerprints. (T. 1647-51) They lifted 94 latent prints from the scene in addition to the one bloody fingerprint near the body. (T. 1651-53)

The door to the dispatch room, which was next to the body, was found open and splatter with blood from 2' to 6'5" above the ground. (T. 1615-16) The light in the dispatch room was off. (T. 1615) Just inside the door to the dispatch room, another piece of paper with blood on it was on the floor, as was a computer. (T. 1616) Inside the dispatch room was a T shaped counter that had several phones and another computer on it. (T. 1616-17) There were

two chairs in the room: one was pushed under the counter and the other was overturned, covered in blood and had a missing roller. (T. 1617) The counter above the bloody chair was also bloody and held a telephone that was off the hook and displayed the number 594-0007. (T. 1618) There was another piece of broken plastic, a piece of metal with blood on it and a blood paper towel on the ground in this area. (T. 1618, 1655) The keyboard of the computer on the counter had several bloody fingerprints on it. (T. 1618)

The wall across from the dispatch room had vertical lines of cast off blood splatter. (T. 1620) Ballard also observed smeared blood in the shape of a small right hand about 4" off the floor on this wall. (T. 1620-21) The 2' of wall between the dispatch room and the break room was also covered in blood. (T. 1621) Ballard also discovered a bloody fingerprint on the doorjamb of the break room. (T. 1621) This portion of the doorjamb was removed. (T. 1622)

When she walked into the break room, Ballard heard the sound of running water. (T. 1623) She walked into the women's room, saw the janitor's closet and noticed that the water was running full force in one of the sinks. (T. 1623) Over the sink was a paper towel dispenser filled with towels like the ones found outside the building and in the dispatch room. (T. 1623-24) She also found a pile of dirty dishes, including two steak knives, on the floor of the bathroom. (T. 1623) In the janitorial closet, a full trash can with a newspaper on top was found. (T. 1625)

In the warehouse area, Ballard noticed that the keys for the

truck that Ms. Quinn was supposed to take to Fort Lauderdale were missing from the board. (T. 1626) The driver's door was unlocked and opened while all the remain doors were shut and locked. (T. 1627-28) A small locked plywood enclosure behind the seats had been pried open. (T. 1628) No mail bag was found in the truck. (T. 1629)

Ballard explained the procedure for taking samples from blood stains. (T. 1788-92) In this case, she took samples from the stains on the front doors, the front counter, and the piece of plastic found on the counter. (T. 1794-95) She also took samples from the smeared bloody handprint and the blood stains on the opposite wall, the door to the dispatch room and the counter in the dispatch room. (T. 1795-96)

Marcellas Gaines testified that at the time of the murder, he was the weekend supervisor at the Federal Express building. (T. 1737-39) On Christmas Eve 1983, he opened the office at 7 a.m. and closed it at 8:00 p.m. (T. 1739-40) No one was left in the office when it was closed. (T. 1741)

Gaines knew Defendant because he was the janitor. (T. 1743) Defendant usually arrived at the office between 3:30 and 4:00 p.m. and spent about 4 hours cleaning. (T. 1744) Gaines usually stayed at the office until Defendant finished and would lock up after he left. (T. 1744) A week before the murder, Defendant told Gaines that he had to stay late and strip and wax the floors. (T. 1744) Since no arrangements had been made for Defendant to stay late, Gaines spoke to Defendant's supervisor and left Defendant, Johnny

Britton, another janitor, and Defendant's supervisor at the office with keys. (T. 1745, 1760-61) That same day, Ms. Quinn found that her keys were missing, and she arranged with Gaines to get replacements. (T. 1746-47)

The day of the murder, Defendant asked Gaines more questions that usual. (T. 1748) One of the things Defendant asked about was whether the office had made a lot of money. (T. 1748) Defendant also commented that the keys he had been given the previous week did not fit the doors between the office and warehouse areas. (T. 1749) Gaines thought this was unusual as these doors were never locked and Defendant did not clean the warehouse area. (T. 1749-50) Defendant also commented that he was having problems at home because his wife made a lot more money than he did. (T. 1751)

Gaines stated that the money collected by the office during the day was recorded in a report and placed in a locked money bag. (T. 1742) That bag was then placed in a mailbag, along with correspondence, and put in the truck that Ms. Quinn was supposed to take to Fort Lauderdale. (T. 1742) On the day of the murder, Gaines put the mailbag in the truck. (T. 1752) At that time, the back of the truck was open. (T. 1765) He let Defendant out the front door to the office and locked them. (T. 1752) Gaines checked that all of the doors to the building were closed and locked before he left the office. (T. 1753) At that time, the water was not running in the women's room. (T. 1753)

On December 27, 1983, Gaines received a phone call from

Defendant at the office. (T. 1754-55) Defendant told Gaines that he had heard that someone was hurt at the office and wanted to know why the police had asked him to give a statement. (T. 1755) Gaines informed Defendant that someone had been killed in the office and that everyone that worked there was being questioned. (T. 1755)

Frank Dolan, the manager of the Federal Express office, testified that he had not made arrangements for Defendant to stay late the week before the murder. (T. 1852) He stated that the cleaning crew was not supposed to ever stay after the office was closed and should not have had keys to the building. (T. 1852-53) However, he was aware that the cleaning crew had obtained keys. (T. 1853)

Dolan knew the work schedules of both Defendant and Ms. Quinn. (T. 1866) They would have been in the Federal Express office at the same time. (T. 1867) He also testified that the empty table near the body had held a 67 pound fax machine that was missing and a telephone that was on the floor. (T. 1858-59, 1964) The broken pieces of plastic found through the office, the roll of computer paper found in the office and the feeder tray found under the body were all consistent with parts of the fax machine. (T. 1861-64)

Dolan stated that he discovered that the mailbag that should have been in the truck that was supposed to go to Fort Lauderdale was missing. (T. 1865-66) The desk that had been pried open had contained jewelry, which the employee who used that desk sold. (T. 1867, 1947-48)

Mary Jane Schreidell testified that she worked at the Federal Express office at the time of the murder. (T. 1941) It was her job to get the payments made to the office, total up the day's receipts and prepare the recap report. (T. 1943-45) After the report was prepared, she faxed it to Federal Express Headquarters. (T. 1946) On the day of the murder, she worked, prepare the report but forgot to fax it. (T. 1946, 1948) The cash receipts for that day totaled $430. (T. 1949) She placed this cash, checks and the report into the locking money bag and placed that bag in the mailbag. (T. 1950)

Det. Jerry Zito was supervising the crime scene technicians on the day of the crime. (T. 1962-64) He observed the patent, bloody fingerprint on the door jamb at the Federal Express office and assisted in its collection, which entailed photographing the print and sawing off the portion of the door jamb. (T. 1966-68) He also removed a piece of fabric from the back of the overturned, bloody chair. (T. 1974) Det. Zito also assisted in executing the search warrant for Defendant's car. (T. 1976-77) Under the front passenger's seat, he found a knife and impounded it. (T. 1977-81) He also found a blood stain on the rubber molding in the trunk of the car and impounded the molding. (T. 1982-84)

On cross, Det. Zito stated that he saw several faint bloody shoeprints on the carpet near the body and one on the tile floor in the lobby. (T. 1987-89) Photographs were taken of the shoeprints but did not turn out. (T. 1989) The carpet and tile were not removed because of the faintness and lack of detail of the prints.

(T. 1989, 1997-99)

Det. Steven Parr testified that he had been part of the homicide team assigned to this case. (T. 2007-10) As part of his duties, he took Defendant's statement. (T. 2010-11) In the statement, Defendant said that he had cleaned the Federal Express office and taken out the trash on the day of the murder. (T. 2011-13) He indicated that he had gotten home round 6:00 p.m., purchased take out food and eaten it with his girlfriend. (T. 2014) Around 9:30, Defendant stated that he had gone to the home of his friend Johnny Britton and remained there until 10:30 or 11:00 p.m. (T. 2014) Defendant claimed that he had then returned home and remained there the rest of the night. (T. 2014)

Det. Parr also explained about the taking of Defendant's fingerprint and hair samples as he had at the suppression hearing. (T. 2014) He also testified consistent with his suppression hearing testimony about the statements Defendant had made and looking in Defendant's car. (T. 2015)

Det. Parr stated that after Defendant left, he when to the Britton residence and spoke to Johnny Britton's mother, Dolly. (T. 2016) He then detailed his first visit to Defendant's home as he had at the suppression hearing. (T. 2016-18) Det. Parr attempted to locate the dry cleaners that Defendant had described. (T. 2018) However, no such dry cleaner existed, and the sweater were not at any of the dry cleaners in the area. (T. 2018-19)

Det. Parr then detailed the phone call he received from

Defendant, the meeting with Defendant and his arrest as he had at the suppression hearing. (T. 2022-26) He also testified, consistent with his suppression hearing testimony, about the search of Defendant's house. (T. 2027-29)

Det. Danny Borrego testified that he was a member of the homicide team. (T. 2052) His job was to obtain fingerprints from all of the Federal Express employees, which he did on December 27 and 28, 1983. (T. 2054-56) He did not complete this task. (T. 2058) He also check the packages at the Federal Express building to see if any had been taken. (T. 2053-54)

William Tucker testified that he was employed at the Federal Express office at the time of the murder. (T. 2089) On Christmas Eve 1983, he moved the truck the victim was supposed to drive into the warehouse, loaded it and placed the keys on the key board. (T. 2090-93) At that time there was no damage to the truck. (T. 2093)

Gwen Harleman, the medical examiner, testified that she went to the crime scene and observed the body. (T. 2098-2105) The body was in rigor mortis, which led Harleman to believe that Ms. Quinn died between 3:00 p.m. on Christmas eve and 3:00 a.m. on Christmas day. (T. 2106-07) The victim was fully clothed, and the clothes did not appear disheveled. (T. 2108) The victim's hands were bagged at the scene. (T. 2109)

Harleman also performed an autopsy on the victim. (T. 2111-13) On the body, she observed a 2½" abrasion with 2 lacerations in it on the forehead, a laceration on the nose, abrasions on the cheeks

and bruising around the left eye and inside the lower lip. (T. 2116-18) These injuries were consistent with a blow to the face or striking an object while falling to the floor. (T. 2117-18)

There were 2 lacerations in the back left scalp and a complex pattern of lacerations, abrasions and contusions to the back right scalp. (T. 2120-21) Harleman put the edges of the wounds back together, taped them and traced the pattern. (T. 2122-24) She took this tracing to the Federal Express office to see in anything there matched the pattern and discovered that the fax machine did. (T. 2163-67) The wounds to the head were consistent with at least 6 blows. (T. 2173) The injuries to the left side and back of the head resulted in a skull fracture. (T. 2203-04) This injury was consistent with having been caused by a blow from the fax machine. (T. 2205)

Harlman observed several defensive wounds to the victim's hands. (T. 2168) These consisted of a stab wound at the base of one thumb, and abrasions and lacerations covering both hands. (T. 2168-71) These wounds were inconsistent with a fall and consistent with attempts to ward off blows. (T. 2171)

On the chest, Harlman observed a stab wound above the right breast that penetrated 6 inches and resulted in a broken rib and injury to the lung. (T. 2175-76) On the back, there were 10 stab wounds, all of which were inflicted with the same single edged knife. (T. 2177-78, 2193-95) They were inconsistent with having been caused by the 2 steak knives recovered from the bathroom. (T.

2196) However, they were consistent with the knife recovered from Defendant's car. (T. 2197) All of the wounds were inflicted while the victim was still alive. (T. 2201)

The first entered the left upper back, was 1 1/4 inch wide, penetrated 6 inches, nicked a rib and injured the lung. (T. 2189-90) The next was next to the first wound, and was similar to it. (T. 2190-91) The next entered the right upper back, penetrated 6 inches and exited at the side of the neck. (T. 2190-91) The next entered the center of the back, went between two ribs, punctured the right lung, penetrated 6½ inches and nicked the chest. (T. 2091) The next entered the back, went between the ribs punctured the right lung, penetrated 7½ inches, and injured the cartilage at the front of the rib. (T. 2191) The next entered the left back, injured the lungs and penetrated 7 inches. (T. 2191) The last 4 all hit the spine: one fractured the fifth thoracic vertebra, the next was just below that one, the next hit the spine in the middle of the back and the last injured the tenth thoracic vertebra. (T. 2192) The wounds to the spine were consistent with having been inflicted while the victim was lying on her stomach on the floor. (T. 2202-03)

Harlman removed the section of rib cartilage that had been stabbed, placed in formaldehyde and sealed it. (T. 2205-09) Ms. Quinn died as a result of the injuries to her head and the stab wounds. (T. 2212) She was alive when each and every injury occurred. (T. 2212)

Dolly Britton testified that Defendant was a friend of her son Johnny and came to her house to visit, arriving between 8:30 and 9:00 p.m. on Christmas Eve 1983. (T. 2281-86) He and the Brittons played card, drank beer and whiskey and smoked marijuana until 10:30 p.m. (T. 2286-87, 2297, 2299-2300) Johnny Britton went to bed because he was drunk, and Defendant asked to borrow a crowbar, which was not given to him. (T. 2287-88) Defendant left the house alone between 10:30 and 11:00 p.m. (T. 2288) While Defendant was at the Britton house, he was wearing a blue sweater with a fox emblem on it. (T. 2289) Early the following morning, Defendant again came to the Britton home and remained about 30 minutes. (T. 2289)

Brian Reynolds, a police photograph, testified that he took a photograph of the bloody fingerprint in the crime lab on December 28, 1983. (T. 2322-23) This photograph was taken using high contrast black and white film so that the fingerprint could be compared. (T. 2323) Michael Collier, a fingerprint technician, testified that he took Defendant's fingerprints on December 27, 1983. (T. 2329-33)

Jorge Pena testified that he was a Burdine's salesman in December 1983. (T. 2340) He sold a sweater on December 28, 1983 to Defendant, who was wearing an expensive, Piaget watch. (T. 2341-63) Angela Pearson, a Burdine's manager, testified that the sweater purchased was a v-neck velour sweater. (T. 2491-2502)

William Miller, a fingerprint examiner, examined the latent and patent prints recovered from the crime scene. (T. 2368-2400)

There were 8 identifiable prints, which included the bloody print. (T. 2399-2400) He also had 65 sets of elimination prints from employees at the Federal Express office. (T. 2408) He positively identified the bloody fingerprint as Defendant's print. (T. 2410) He matched one of the remaining prints to Sue Munoz but was unable to match any of the remaining prints to anyone. (T. 2412) He stated that the blood had to be on the finger before it touched the door jamb to make the print. (T. 2432-33)

Det. William Saladrigas, the lead detective, testified that the victim's car keys and some change were found in the victims's pocket. (T. 2516-17) He also stated that the partial shoeprint was not collected because attempting to remove it would have destroyed it. (T. 2527) Det. Saladrigas confirmed that they looked for the dry cleaner where Defendant alleged he had taken his sweater and found none. (T. 2533-34) A cleaner in the area did have clothes in Defendant's name but not a sweater. (T. 2534) At the time of his arrest, Defendant's clothing and his Piaget watch were seized. (T. 2544-46, 2548) Defendant's hand had scars on them. (T. 2556)

Technician Daniel Eydt testified that he took blood and hair samples from Defendant pursuant to a search warrant after his arrest. (T. 2616-21) Defendant initially was belligerent and refused to allow the sample to be drawn. (T. 2627-28)

Dolores Douglas Sheppard testified that she lived with Defendant at the time of the crime. (T. 2628-30) Defendant routinely drove her car in which she kept a knife. (T. 2630-31)

After Christmas, Sheppard found the knife in the kitchen sink and did not return it to the car. (T. 2632, 2640) On Christmas Eve 1983, Defendant took Sheppard's car to go to work around 2:00 p.m. and returned home around 5:00 p.m. (T. 2633) Defendant left again around 9:00 p.m., and Sheppard went to sleep. (T. 2634-35) When Sheppard awoke around 5:00 a.m. the next morning Defendant was there, and his clothes were on the floor. (T. 2636) Sheppard did not look at the condition of the clothes. (T. 2636) Sheppard never saw the sweater Defendant had been wearing Christmas Eve again. (T. 2640-41)

Sheppard stated that the day after Christmas, Defendant replaced his Timex watch with what Sheppard thought was an imitation Piaget Watch. (T. 2639-40) She assumed the watch was an imitation because of the cost of a real Piaget. (T. 2652)

Theresa Merritt, a serologist and hair analyst, testified that she received and tested the blood samples and standards in this case. (T. 2658-76) The samples were all consistent with the victim's blood type except the blood from the fingerprint. (T. 2674-78, 2680-81, 2682-83) The blood from the fingerprint was consistent with a mixture of Defendant's sweat and the victim's blood. (T. 2679-80) The nail scraping from the victim revealed only the presence of blood consistent with her own. (T. 2681-82) The steak knives from the bathroom and the clothes Defendant was wearing when arrested did not have any blood on them. (T. 2682-83)

Merritt tested the knife recovered from Defendant's car, and

it was positive for presumptively blood at the connection between the blade and the handle. (T. 2684-85) However, this testing consumed the sample. (T. 2685) The molding from the trunk of Defendant's car had blood consistent with the victim's type, and the Timex watch had blood consistent with the same mixture as the fingerprint. (T. 2686-87) The hair found in Ms. Quinn's right hand was consistent with her own hair. (T. 2694-95) The hairs found in Ms. Quinn's left hand were inconsistent with her own hair or Defendant's hair. (T. 2695) All three of the hairs appeared to have come from separate people, and were consistent with having been picked up from being in contact with a carpet. (T. 2695-98)

William Conrad testified regarding the science of tool mark and firearm identification and the procedures used in this science consistent with his testimony at the *Frye* hearing. (T. 2746-74) When Conrad was called to testify, Defendant objected because he had not done the testing in this case, and the objection was overruled. (T. 2746-47, 2752-57) Robert Hart testified that he examined the knife mark in the victim's rib cartilage and determined that it was made by the knife found in Defendant's car. (T. 2789-2807, 2852-80) He also testified regarding the science of tool mark and firearms examination consistent with his testimony at the *Frye* hearing. (T. 2789-2807, 2852-80) Hart added that counting the number of points of similarity to determine an identification had been proposed but was not generally accepted. (T. 2873-74)Lonnie Harden testified to the science of tool mark and firearms

examination consistent with his testimony at the *Frye* hearing. (T. 2933-48) He also stated that he independently examined the evidence in this case and confirmed Hart's identification. (T. 2933-48)

As the State was about to rest its case, Defendant produced Kopec for the continuation of his deposition, and he arrived with exhibits he had created the day before which he claimed demonstrated that a existing fingerprint could have been coated in blood. (T. 2970-71) The State requested a recess to examine the exhibits. (T. 2970-74) The trial court decided to permit the State to rest and then recess the proceeding to allow the State to do its examination. (T. 2974-75)

After the recess, the State moved for a *Richardson* hearing regarding Kopec's exhibits, and also objected on *Frye* grounds and relevance (T. 2978-3010) Apparently, the night before he was supposed to testify, Kopec had taken a number of surfaces, none of which were painted metal like the door jamb, place fingerprints on them in grease and floor polish, and then poured, splashed and brushed blood over them. (T. 3006-10) Kopec admitted that he made no attempt to simulate the actual condition of the bloody fingerprint in the case and its surroundings in making his exhibits. (T. 3047-58)

Kopec stated that he was planning to write an article on ability of prior fingerprints to be visualized by being coated in blood. (T. 3030) He claimed that he decided to write the article because there were not articles on the subject and he had just

learned that his theory was not general accepted. (T. 3043-44)

The trial court indicated that it felt constrained to grant a continuance as the remedy for the discovery violation. (T. 3020-21) The State responded that a continuance would be necessary to even conduct a *Frye* hearing. (T. 3021-22) Defendant responded that a *Frye* hearing was not necessary because the tests were based on a combination of fingerprint expertise and serology and was not novel. (T. 3022-23) After hearing Kopec explain the exhibits and viewing them, the trial court decided to exclude them as more confusing than relevant. (T. 3058-59) The trial court noted that the exhibits were not remotely similar to the condition of the door frame. (T. 3058-59)

Before the jury, Kopec testified that he had seen many occasions were a fingerprint had been on a surface and was made visible when bloody hit it. (T. 3070-90) He stated that this results in a negative fingerprint. (T. 3090) However, he claimed if the fingerprint was press hard into the surface, the blood would make a positive print. (T. 3091-92) Kopec stated that the print would have to have been made in grease, paint or floor wax when it was originally placed on the object for this process to occurred. (T. 3092-93) He stated that he had verified this theory through testing. (T. 3103-05)

On cross, Kopec admitted that he was an a supervisor at FDLE for all of the time be listed on his resume. (T. 3106) Kopec stated that he was qualified as a fingerprint analyst but was unable to

state what percentage of his time in any job had been spent analyzing fingerprints or how many times he had qualified as an expert in the field. (T. 3114-15) He asserted that he was qualified as an expert in crime scene processing and analysis, hair and fiber analysis, gunshot residue, serology, and tool and firearm examination. (T. 3116-17) He claimed that he had never gotten an advanced degree despite years of formal education because he did not want to take course he considered irrelevant. (T. 3118)

Dale Nute testified to his theory of why tool mark analysis of knife marks in cartilage was not scientific in accordance with his *Frye* hearing testimony. (T. 3138-93)

Defendant testified that Johnny Britton was his helper at work because he had had an operation. (T. 3205) He claimed that he used grease, oil and wax in his job. (T. 3209-14) He admitted that he had been given keys to the building at one point but claimed to have immediately returned them. (T. 3214-15) Defendant testified to his activities on Christmas Eve and early Christmas morning consistent with his statement to the police. (T. 3220-28) He stated that the watch was not a real Piaget and that he had stated it was expensive because he did not like being asked out it. (T. 3229-31)

Defendant claimed that the police had threatened him to get his sweater. (T. 3242-44) As such, he asked Sheppard's children to search the house for the sweater was he was at work. (T. 3241) When he called home, the children said they had found the sweater so Defendant arranged to meet the police. (T. 3244) However, the

children did not have the sweater when Defendant came home for it, and he could not find it so he bought a new sweater to give to the police. (T. 3245-49) In describing where he last had the sweater, Defendant stated that he had been drinking on the night of the murders. (T. 3247)

In rebuttal, Toby Wolson testified that the bloody fingerprint was not created by blood splashing on it. (T. 3363-71) He could tell this because of the smearing of the blood. (T. 3370-71)

After deliberating, the jury found Defendant guilt of first degree murder, armed robbery and armed burglary of an occupied structure with an assault. (R. 1938-39, T. 3659) The trial court adjudicated him guilty in accordance with the verdicts. (R. 2119-20, T. 3680) After the verdict was rendered and Defendant adjudicated, the State noted that Defendant was refusing to be fingerprinted. (T. 3681) Defendant claimed that he was not refusing but was merely seeking to speak to his counsel about court costs. (T. 3681-82)

Prior to the penalty phase, Defendant filed a motion to declare §921.141, Fla. Stat. unconstitutional because it does not define the requirement for finding the existence of mitigating and aggravating factors or require that the jury make specific findings to support its recommendation. (R. 2008-11) As alterative relief, Defendant requested that a special verdict form be used, which Defendant stated that he was prepared to proffered but which was not attached to the motion. (R. 2008-11) The State responded that

the statute has been repeatedly upheld against this challenge and that special verdict forms are not required. (R. 1977-78) The trial court denied the motion. (T. 3779)

During the penalty phase, the State presented a certified copy of Defendant's 1976 conviction for armed robbery with a knife in 13th Judicial Circuit case no. 97-63457. (T. 3868-70) The testimony of Louis White, the victim of this crime was read to the jury. (T. 3870-73) White stated that he had taken a lady to the store when Defendant came up to them and demanded money. (T. 3870-72) When the lady refused to comply, Defendant put a knife to White's throat. (T. 3872) White and the lady then gave Defendant $140, and he fled. (T. 3872) Defendant was arrested that day, and the stolen money was recovered from him. (T. 3872-73)

Doreen Minnick, the victim's mother, testified that the victim was her best friend. (T. 3876-77) She stated that Ms. Quinn was a unique person with many friends and that life was not fun anymore without her. (T. 3879-80) Nancy Van Der Plate stated that she considered the victim to be like a sister to her. (T. 3880-82) She stated that Ms. Quinn was a kind, generous, considerate person who did volunteer work in the community. (T. 3882-83) The loss of Ms. Quinn has changed her life. (T. 3884)

Lt. Francine D'Erminio, a corrections officer at the Dade County Jail, testified that Defendant was better than most of the inmates. (T. 3887-89) However, she noted that Defendant had been reported for assaulting Officer Moss. (T. 3889) She stated that

generally Defendant acts appropriately with the guards and other inmates. (T. 3889-90)

On cross, she admitted that of the two years Defendant had been in the custody of Dade County Corrections, he had spend 14 months at facilities other than Dade County Jail. (T. 3891-92) As such, Lt. D'Erminio knowledge of his behavior during that period was from records that are only kept for a year. (T. 3892-93) She also admitted that Defendant had been found with contraband in his cell on numerous occasions. (T. 3894) Further, she admitted that Defendant was only in contact with other inmates when he was taken out of his cell at which point he is in handcuffs and in the presence of several guards. (T. 3896-3900)

Sgt. Arthur Clemons, a corrections officer at Dade County Corrections Metro-West facility, testified that Defendant had behaved as a typical, average inmate. (T. 3904-06) He stated that Defendant had not been involved in any fights and was respectful. (T. 3906) Sgt. Clemons also admitted that Defendant only have contact with other inmates when out of his cell. (T. 3907-10)

Sgt. Ernest Parrish, a corrections officer with Dade County Jail, stated that during the period of his 13 year incarceration when he had been in that facility, he had not been violent and behaved respectfully. (T. 3912-13) He also knew Defendant had a disciplinary hearing, and contraband had been found in Defendant's cell. (T. 3916-20)

Renee Rico, Defendant's sister, testified that Defendant was

always very nurturing toward her. (T. 3937-40) Rico admitted that Defendant had been incarcerated for most of her life. (T. 3939) When Defendant asked Rico about her experiences with her mother, the State objected. (T. 3940) The State pointed out that she had not lived in the same house with Defendant since she was 2½ or 3 years old and asserted that his upbringing was not relevant to Defendant's upbringing. (T. 3940-41) Defendant conceded that he had not been raised with Rico but contended that her upbringing was relevant because they had the same mother. (T. 3941, 3946) The trial court ruled that Defendant could elicit testimony that was related to his character and upbringing but could not elicit testimony related to the witness' character. (T. 3946)

Defendant then asked Rico to speak about her mother to which Rico responded by describing her relationship with her mother and alleged childhood abuse of her mother. (T. 3847) The State's objection to this testimony was sustained, as was the State's objection to how Rico was raised. (T. 3947-48) However, the trial court permitted Rico to testify that her mother worked hard to provide her children with a private school education but did not have a lot of time to spend with her children. (T. 388-49)

Daisy Longworth, Defendant's mother, testified that Defendant's father had a nervous breakdown when Defendant was two and was in a mental hospital for two years. (T. 3950-51) After the breakdown, Defendant's father never returned to live with the family. (T. 3960) However, his father visited him regularly. (T.

3961-62)

She stated that she left the children in the care of Mary Williams when she was working. (T. 3952) At that time Defendant was around 8 years old. (T. 3959) Eventually, she stopped taking Defendant's brother Leonard to Williams because he complained that Williams' son Ernest was "fooling with his back." (T. 3952-53) However, the other children continued to stay with her. (T. 3953) Eventually, Defendant's sister Liz stated that Ernest was raping the children and that Williams knew about it. (T. 3954-55)

When Defendant was around 9 years old, he was bitten by a dog. (T. 3958) The bit injured his ear. (T. 3958) When Defendant was eleven or twelve, Defendant and Leonard were sent to live with his father and stepmother for six months. (T. 3958, 3962) Defendant's father disciplined the boy by hitting them with an electrical cord when they misbehaved. (T. 3957-58) The father told the mother of this incident. (T. 3972) The boys did not like this and returned to live with their mother. (T. 3958) When Defendant returned, his mother could not control him. (T. 3959-60) The problem was that Defendant wanted to do only what he desired. (T. 3960) Defendant would stay out all night and would disobey his mother about staying home. (T. 3964)

On cross, Longworth admitted that she had never reported the alleged sexual abuse and had never confronted Williams or her son about it. (T. 3966-67) She admitted that she first learned of the abuse when Defendant was 14. (T. 3967-68) Further, she claimed that

she did not learn of any abuse to her daughter Liz until Liz was an adult. (T. 3969) She stated that when Defendant was 19, he told her that Ernest had pulled down his pants and tried to have sex with him. (T. 3969-70)

Longworth acknowledged that the boys enjoyed going to spend the summers with there father. (T. 3972) They also went to their father's for some Christmases. (T. 3972)

Joseph Lopez, Defendant's son, testified that his father encourages him to stay out of trouble and stay in school. (T. 3975-76)

Estella Collins, Defendant's maternal aunt, testified that when Defendant was 8 years old, she saw Ernest Moody in the bathroom with Defendant bend over through a crack in the wall. (T. 3979-83) However, Collins admitted that she did not report having seen this to anyone, including her sister. (T. 3983) She was unsure if Defendant continued to be care for by Williams after this incident. (T. 3984)

Collins stated that Defendant's father had beaten him with the electrical cord when Defendant was 6. (T. 3987) According to Collins, this occurred when Defendant's father returned to live with the family after his release from the mental hospital. (T. 3988) Additionally, Defendant was beaten when he went to live with his father later. (T. 3987)

Collins stated that when Defendant's mother could no longer control him, Defendant came to live with her. (T. 3989) However,

Defendant stopped living with her when a man came to the house and informed her that Defendant had drawn a knife on him. (T. 3990) She also stated that Defendant started dating 3 older women when he was 15. (T. 3998-99) She denied having petitioned the juvenile court for help in controlling Defendant. (T. 4001-02)

Leonard Ramirez, Defendant's brother, verified Longworth's testimony that his father left the house after the nervous breakdown and never returned. (T. 4014-15) After that time, the children lived with their mother, who had to work most of the time. (T. 4015-16)

Defendant next asked Leonard to explain the bad thing that happened to him as a boy. (T. 4016) The State objected that this testimony was not relevant and was unduly prejudicial. (T. 4016) The trial court ruled that the specifics of any sexual abuse of Leonard was inadmissible but permitted Defendant to introduce the fact that Leonard had been sexually assaulted and to discuss abuse of Defendant. (T. 4016-20)

Leonard then testified that Defendant, Liz and he were sexually abused by Ernest Moody as children. (T. 4020-21) Thereafter, the State withdrew its objection to the effect the sexual abuse had on Leonard. (T. 4027) Leonard then explained that he was sexually abused 7 to 10 times and knew Defendant had been sexually abused because Defendant and Ernest would go off to different places. (T. 4028) Leonard stated that the sexual abuse caused him to have trouble keeping jobs, commit nonviolent crimes

and abuse drugs. (T. 4028-30, 4047) Leonard would discuss his problems with Defendant, who would try to help him. (T. 4030-31)

Leonard stated that he had a difficult time living with his father because he yelled at the children and hit them. (T. 4031-32) Also, the children missed their mother. (T. 4032) On cross, Leonard stated that Defendant was 9 when they lived with there father for a school year and that they were hit because they had not done their chores. (T. 4037-40) He admitted that he had kept jobs for significant periods of time and had a good work record. (T. 4048)

He stated that the sexual abuse occurred when he was 5, Defendant was 6 and Liz was 2. (T. 4041-42) He admitted that he saw Ernest frequently as an adult. (T. 4043-44) He also claimed that Defendant told him about being sexually abused when Defendant was 21 and had been released from prison. (T. 4044-45)

As Leonard was being excused, Defendant requested a recess. (T. 4049) As he was leaving the courtroom, Defendant yelled, "you bitch," at the prosecutor. (T. 4053-54) When he returned Defendant apologized for having done so. (T. 4054)

Sgt. Kenneth O'Neill, a corrections officer at Metro-West, testified Defendant had never been violent in his presence and had always behaved respectfully. (T. 4056-58) Sgt. O'Neill admitted, however, that he is a shift commander and does not regularly guard inmates. (T. 4059-61) Further, Sgt. O'Neill stated that he had not reviewed Defendant's file and had forgotten that he had personally authored a disciplinary report about Defendant. (T. 4062-66) Cpl.

Kay Robinson, a corrections officer at the Dade County Jail, confirmed that Defendant behaved himself. (T. 4070-72)

Sgt. Eugene Kelly testified that he arrested Defendant for the armed robbery of Louis White. (T. 4076-77) He did not specifically recall the arrest and did not remember Defendant being uncooperative. (T. 4077-79) Defendant did provide a handwriting confession to the robbery. (T. 4079, 4083-84) However, Sgt. Kelly admitted that Defendant escaped from pretrial detention in that case. (T. 4087)

Brezetta Ramirez, Defendant's wife, testified that she met him in 1983 and that he helped her resolve an argument with her boyfriend at that time. (T. 4087-89) After Defendant was arrested, he would call her and provide emotional support. (T. 4090-91) Defendant also encourage his wife to get her real estate license and was interested in investing in real estate. (T. 4095-97) After Defendant was returned to Dade County, he arranged to speak to, and visit with, his children, who he loved and encouraged. (T. 4091-95)

On cross, Ramirez admitted that she began a sexual relationship with Defendant while he was still living with another woman. (T. 4099-4100) Further, she admitted that Defendant had fathered 2 children with 2 different women, neither of whom were Ramirez or Douglas, shortly before his arrest. (T. 4100-01)

Liz Jackson, Defendant's half-sister, testified that Defendant was attacked by his aunt's dogs when he was 10. (T. 4104-07) Defendant also defended her once from a neighborhood bully. (T.

4107-08)

She stated that she was sexually molested by Ernest Moody. (T. 4109) When she started to describe the specifics of her sexual abuse, the State objected, and the trial court sustained the objection. (T. 4109)

Jackson stated that he mother worked hard to support the family. (T. 4110) She stated that her mother could be very kind and very angry, particularly after her second husband left her. (T. 4110-11) Her mother displayed her anger by playing gospel music early in the morning and yelling. (T. 4110-11) Her mother was not affectionate and did not pay much attention to the children but would buy the children nice presents. (T. 4111-12) During this testimony, the trial court sustained objections to Jackson testifying that her mother identified her with her father and her reaction to getting nice presents. (T. 4111-12)

She learned that her brothers had been sexually abused as well. (T. 4112) This caused her to be non-responsive, anger and prone to cry. (T. 4112) When she started to describe her pregnancy, the State objected that it was not responsive, and Defendant agreed to cut off the narrative testimony. (T. 4113)

As a child, Jackson's mother was often not at home and there were no adult males in the house. (T. 4114-15) She would turn to Defendant for help because Leonard's behavior was always abnormal. (T. 4115) When Defendant asked how the sexual abuse had affected her life and Leonard's life, the trial court sustained the State's

objection. (T. 4116-21) The trial court permitted Jackson to testify regarding her knowledge of its affect on Defendant's life. (T. 4117-20) Jackson stated that Defendant emotionally supported her because of the strained relationship between herself and her mother. (T. 4122) When she started to add a description of her mother, the State objected that the answer was nonresponsive, and the trial court sustained the objection. (T. 4122-23)

On cross, she stated that she was only molested once when she was 5 or 6. (T. 4123-24) She did not know if she was present when Defendant was molested. (T. 4125) Further, she admitted that Defendant stopped living with the family when he was 12 or 13. (T. 4125) She also acknowledged that she was sexually molested by two other individuals. (T. 4126-27) Jackson stated that she attended college on an academic scholarship and did well in school. (T. 4126) She also worked regularly. (T. 4128)

Jonathan Sorensen, a professor of criminal justice, testified that he specialized in corrections and capital punishment. (T. 4130-31, 4155-57) He had written several articles on the subject of predicting future dangerousness. (T. 4157-60) In support of these articles, he conducted studies on the behavior of inmates whose death sentences were commuted as a result of *Furman v. Georgia*, 408 U.S. 238 (1972), and on the behavior of inmates whose had committed murder and received sentences less than death. (T. 4159-60) The studies looked at the rate of misbehavior while incarcerated and the rate of recividism once released, and found that 1% of murders

were likely to murder again and 10% were likely to commit further violent crime. (T. 4161, 4165, 4167) They then looked at the characteristics of the inmates and created an actuarial table for predicting future dangerousness. (T. 4161) The factors that where found to be significant were the age of the offender, his prior record, his institutional behavior, the length of time served, his family relationships and his maintenance of his innocence. (T. 4162, 4164) The studies revealed that murderers tend to be the best behaved prisoners and the least likely to reoffend, as compared to other class of prisoners. (T. 4162-63)

In this case, Sorensen reviewed Defendant's prison records and found 9 disciplinary reports (DR's) in the 9 years worth of records. (T. 4170-72) The average rate of DR's for his prison was 1 every 13 months. (T. 4226) Further, he did not consider these reports to be for violent behavior. (T. 4172-73) From his earlier incarceration, Defendant amassed 18 DR's in 4½ years. (T. 4173-74) Sorensen also believed that Defendant was claiming he was innocent and had good family relationships. (T. 4174)

When Sorensen was asked to render an opinion on Defendant's adjustment to prison, the State voir dired the witness, who stated that there was no recognized field of predicting future dangerousness. (T. 4176-77) Based on this response, the State objected to Sorensen offering an opinion. (T. 4177) The trial court recognized that the testimony would violate *Frye*. (T. 4177-81) Defendant argued that criminology and statistics were recognized

fields and that other trial courts had permitted similar testimony. (T. 4177-81) Defendant did not request an opportunity to further qualify the testimony. (T. 4177-81) The trial court acknowledged the testimony was improper but permitted it anyway over the State's objection for fear that this Court would reverse. (T. 4180-81)

Sorensen then opined that Defendant was well adjusted to prison and would continue to be so. (T. 4182) Further, he felt that Defendant would not be violent in the future. (T. 4182-84) Sorensen stated that his opinion would be the same if Defendant had been released the date after trial. (T. 4187) He admitted that Defendant had frequent contact with the criminal justice system since childhood and had been incarcerated for a large part of his life. (T. 4190) Further, he admitted that he had misread a DR that indicated that Defendant had committed an assault. (T. 4193) Another DR indicated that Defendant had threatened a guard but Sorensen did not think this was serious. (T. 4194)

Sorensen admitted that Defendant was reported as making a poor adjustment to prison during his initial incarceration. (T. 4199-4207) He considered that Defendant had successfully completed his parole even though he had seen a report indicating Defendant had committed a battery during that period. (T. 4207-14) He also admitted that Defendant had gotten into trouble every time he had been released from custody since the time he was 13. (T. 4214) However, Sorensen felt that the records of his present incarceration were more important. (T. 4214)

He stated that the lowest recidivism rate he had seen for individuals release from prison was between 6 and 10% for murderers and that the rate was higher for robbers and burglars. (T. 4215-16) Further, he had not considered the motive for the murder in arriving at these figures. (T. 4216-17) He acknowledged that Defendant had frequently been found with contraband, which could have been used as weapons, in 1996 and 1997. (T. 4228-32)

In rebuttal, Joseph Papy, a parole officer, testified that he prepared a presentence investigation of Defendant in 1976. (T. 4326-29) He stated that Defendant was incarcerated in a juvenile facility between the ages of 14 and 15. (T. 4331) He stated that he also reviewed Defendant's parole records, which indicated that his release was due to overcrowding, was not in contact with his parole officer for the last year of his parole and was involved in a battery. (T. 4332-36)

Ted Key, a corrections probation officer, testified that Defendant had been under maximum security while in state prison. (T. 4339-40) Under these conditions, Defendant can only interact with other prisoners twice a week for 2 hours. (T. 4340-42) Defendant had 8 DR's, which he considered to be serious. (T. 4345-51) Irma Botana, a probation officer, testified that she spoke to Defendant in 1985, and he admitted to being violent with his son's mother and Douglas. (T. 4362-64) Sgt. Rene Villa, a corrections officer with Dade County, testified that she reviewed Defendant's jail records and found he had contraband in his cell 12 times

within a year. (T. 4368-71)

During his closing argument, Defendant asked the jury to cry because he was sexually abused as a child. (T. 4416) Defendant appealed to the parents and grandparents on the jury to consider the effect of child abuse. (T. 4416-17) He asserted that jail was a "hell hole" and that he is being punished by not being able to live with his family. (T. 4418-20) He suggested that the anguish that Defendant's family felt over their own abuse and the pain they felt because Defendant was incarcerated should be considered. (T. 4420-22) Defendant asserted that he might be able to prove that he was not guilty. (T. 4424) He begged the jury to recommend live for the sake of his family and as a show of compassion. (T. 4429-30)

After deliberating, the jury recommended a life sentence. (T. 4444) At the *Spencer* hearing, the State argued that the trial court should overrule the jury's recommendation. (T. 4455-71, 4477-85) The State asserted that jury was improperly influence by sympathy for Defendant's brother and sister and the demeanor of Defendant's family on the stand. (T. 4466, 4469) Further, the State suggested that the evidence of abuse was fabricated because it was not mentioned in the original PSI in the matter or at the first penalty phase. (T. 4465) The State contended that Sorensen's testimony should never have been admitted and that Defendant's closing argument was an improper appeal for sympathy for Defendant's family. (T. 4477-85)

Thereafter, the trial court overrode the jury's recommendation

and sentenced Defendant to death. (T. 4537, R. 2462-88) The trial court found 4 aggravating factors: prior violent felony, during the course of a robbery and burglary merged with for pecuniary gain, witness elimination, and heinous, atrocious and cruel (HAC.) (T. 4511-17, R. 2463-66) The trial court found no statutory mitigating factors and 4 nonstatutory mitigators: physical and sexual abuse and positive influence on his family. (T. 4517-33, R. 2466-88) The trial court also sentenced Defendant to consecutively terms of life imprisonment for the armed burglary and the armed robbery. (T. 4537, R. 2490-91) This appeal follows.

**SUMMARY OF THE ARGUMENT**

The trial court properly concluded that the knife mark identification was admissible because it is generally accepted in the scientific community. It is also reliable. Because of defense discovery violations and failure to compliy with *Frye*, the trial court properly excluded demonstrative aids to illustrate it. Moreover, the trial court properly determined that they were more prejudicial than probative.

The trial court properly denied Defendant's motion to suppress as the search warrant was vaild. Even if they did not, the officers relied on the warrants in good faith and the evidence would have been inevitably discovered. The trial court also properly found the crime scene technician unavailable due to memory loss. Moreover, any error in doing so was harmless because her testimony was corroborated by physical evidence and other testimony.

The trial court properly overrode the jury's recommendation. The alleged mitigation was poorly supported by the evidence and did not outweigh the aggravation, and the jury was swayed by sympathy for Defendant's family and an improper closing argument. The trial court properly found both witness elimination and HAC. The trial court applied the correct law and its findings are supported by competent, substantial evidence. The trial court properly limited the evidence regarding Defendant's siblings' problems, as irrelecant. The trial court properly determined that special penalty phase verdict forms were not required.

## ARGUMENT

### I. THE TRIAL COURT PROPERLY FOUND THAT THE KNIFE IDENTIFICATION SATISFIED *FRYE*.

In *Ramirez v. State*, 651 So. 2d 1164 (Fla. 1995), this Court laid out the test for admissibility of the knife mark identification evidence in this matter. In doing so, this Court stated that the *Frye* test for the admissibility of such evidence should apply. *Id.* at 1167. In fact, this Court has steadfastly refused to adopt the federal standard as enunciated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *Hadden v. State*, 690 So. 2d 573, 577-78 (Fla. 1997); *Brim v. State*, 695 So. 2d 268, 271-72 (Fla. 1997); *Hayes v. State*, 660 So. 2d 257 (Fla. 1995); *State v. Hickson*, 630 So. 2d 172 (Fla. 1993); *Flanagan v. State*, 625 So. 2d 827, 829 n.2 (Fla. 1993); *Stokes v. State*, 548 So. 2d 188 (Fla. 1989). The *Frye* test requires that the proponent of evidence must show that the scientific principal has been

"sufficiently established to have gained general acceptable in the particular field in which it belongs." *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

Here, the State presented the testimony of five experts in firearms and tool mark identification. All of these experts stated that the identification of knife marks in human cartilage was generally accepted in the scientific community. Further, they all agreed that the manner in which the identification was made in this case was generally accepted in the scientific community. Despite having twice had this matter remanded for a *Frye* hearing, Defendant presented no evidence to dispute the State's definition of the relevant scientific community or the fact that the evidence here was generally accepted in that community, as the trial court noted in its order. (R. 1198, 1211) Instead, Defendant mounted a *Daubert* challenge to a *Frye* issue, as he has done again in this Court. As such, the trial court properly determined that the knife identification satisfied *Frye*.

Defendant now asserts that the trial court should have defined the scientific community more broadly to include Nute as a tool mark expert. He then appears to contend that had Nute been included, he would have shown that the knife identification was not generally accepted. However, Nute was never offered as a tool mark expert below. (R. 959) Instead, he was offered as an expert in the "evaluation of forensic science examinations with respect to testing their scientific nature and validity." (R. 959) Further,

while Nute stated that he had examined shoe tracks, which he considered a static tool mark, he admitted that he did not work in tool mark identification and did not consider himself an expert in tool mark identification or testify as one. (R. 950-51, 969-70) As such, the trial court properly determined that Nute was not an expert in this field.

Moreover, even if Nute had been considered an expert in this area, he admitted that this type of analysis was generally accepted in the scientific community. (R. 983-84, 1020) He stated that he had never seen any criticism of the analysis in any peer journals. (R. 966) Further, he acknowledged that his criticism of the method were not generally accepted. He stated that his requirement for additional testing was his own and not generally accepted in the scientific community. (R. 1018-19) He also stated that his requirement for evaluation criteria had been proposed in 1959 and rejected by the scientific community.[1] (R. 1004-06) As such, Nute's testimony does not support a claim that the identification was not generally accepted in the scientific community, and the trial court properly concluded that the evidence satisfied *Frye*.

Instead of addressing the *Frye* issue, Defendant, both here and in the trial court, mounted a *Daubert* challenge. Defendant contends here that he is doing so because the trial court found *Daubert* relevant to the *Frye* test. In fact, the trial court did not. The

[1] At trial, Hart acknowledged that the issue was again being raised but was not generally accepted. (R. 2892)

trial court conducted a *Daubert* analysis in an "abundance of caution" because Defendant had raised a *Daubert* challenge and this Court had used the word "reliable" in its last opinion. (R. 1222) As previously noted, this Court has repeatedly rejected *Daubert* and should do so again here.

If this Court were to adopt a *Daubert* analysis, the trial court would still not have abused its discretion in finding the evidence admissible. Despite the fact that Defendant now challenges the testing, error rate, peer review and general acceptance, he only challenged the lack of testing and the method of determining a match below. As such, the trial court cannot be said to have abused its discretion with regard to the area not presented.

Defendant first contends that the State should have conducted testing to show that each knife creates a unique mark. However, at the hearing it was undisputed that individually processed knives create unique tool marks. (R. 140-41, 220-21, 269-74, 347, 385, 1020) It was undisputed that the knife in question had been subjected to individual processing through resharpening and use. (T. 2632) The literature also supported this conclusion. (R. 141-56) As such, the trial court did not abuse its discretion in accepting the undisputed evidence.

Moreover, Defendant's reliance on *Brim* is misplaced. There, this Court relied on the scientific community's own assessment that additional testing was necessary. Here, the scientific community has not determined that additional testing was not necessary. As

such, *Brim*'s endorsement of further testing is not applicable here.

Defendant next contends that further testing to show that unique identifiable knife marks could be made in human cartilage. At the hearing, Nute testified that he did not believe any such testing had ever been perform. (R. 1016-17) However, if such testing had been performed, it would satisfy this criteria. (R. 1017) The trial court found three articles outlining a lengthy history of testing. (R. 1215-17) Defendant now contends that these tests were insufficient but did not do so in the trial court. Moreover, this contention is not supported by any citation to any scientific sources. As such, the trial court did not abuse its discretion in finding that the testing was sufficient.

Defendant next asserts that the trial court should have found the error rate unacceptable. However, the undisputed testimony at the hearing was that any inaccuracies in the testing would not result in a false identification. Instead, the inaccuracies would result in an identification not being made. (R. 135, 166-67, 189-90, 242-47, 292-93, 355-56) While Defendant asserts that this cannot be accepted because there is no proficiency testing, the record reflects that Lonnie Harden and John Cayton both testified that blind, proficiency testing is conducted. (R. 317-19, 419-20) As such, the trial court did not abuse its discretion in finding that a false positive identification was not possible.

Defendant next attacks the peer review of the knife mark identification. However, the State presented 7 articles on knife

mark identification. (S.R. 1-8, 10-12, 14-16, 18-21, 23-24, 25-27, 55-57) Additionally, the trial court found 3 additional articles in its research on the issue. (R. 1231-97) Both Hart and Nute testified that these articles had not generated any disagreement in the community. (R. 118-19, 966) Even now, Defendant has presented no peer review data to conflict with these authorities. Further, while Defendant characterizes the German articles as not claiming identification of the particular knife was possible, this is not true. (R. 1266, "the described method would prove that a specific knife was not only plausible in terms of its type but that the individual traces must have been caused by the same.") As such, the trial court did not abuse its discretion in finding that "reliability has been established through peer review for substantive content in a manner subject to critical analysis and in full compliance with the scientific method." (R. 1218)

As asserted earlier, the trial court properly determined that the identification was generally accepted in the scientific community. Further, it should be noted that at least three reported decisions in which knife mark identifications in human tissue have been admitted. *See Potter v. State*, 416 So. 2d 773 (Ala. Crim. App. 1982); *State v. Churchill*, 646 P.2d 1049 (Kan. 1982); *Stout v. Commonwealth*, 376 S.E.2d 288 (Va. 1989). As such, the trial court did not abuse its discretion in so finding.

The *Daubert* standard is not a rigid test, and the decision on what criteria to use in doing this analysis is committed to the

trial court's discretion, as is the evaluation of these criteria. *Kumho Tire Co v. Carmichael*, 526 U.S. 137 (1999). Given the evidence before it, the trial court did not abuse its discretion in finding the knife mark identification satisfied the *Daubert* test. As such, the trial court properly admitted the evidence under either standard.

## II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING THE DEMONSTRATIVE AIDS.

Defendant next asserts that the trial court abused its discretion in excluding certain demonstrative aids that Defendant's expert had prepared during trial. However, the trial court acted entirely properly given that the entire testimony of this expert was excludable as a sanction for a discovery violation and because it did not met the *Frye* test. Further, the aids were cumulative to the expert's testimony and were unduly prejudicial.

Despite the fact that this matter had been pending for more than almost 14 years at the time of trial, Defendant waited until the eve of trial to seek to have his experts examine the evidence. (T. 1598-99) As such, the defense experts had still not completed their testing on the day of trial and were not listed as witnesses until the following day, which required the trial court to grant a two day continuance. (T. 17-27) Even then, Kopec had not completed his testing, and the trial court found that Defendant had committed a willful discovery violation. (T. 194-96, 199-203) However, the trial court feared that this Court would reverse if he sanctioned Defendant for the violation, so he allowed Kopec to complete his

testing during jury selection. (T. 203-06) On the day Kopec was supposed to testify and as the State was resting its case, he arrived with the demonstrative aids at issue here, which he admitted he had not prepared until the night before. (T. 2970-75) Again, the trial court found a discovery violation. (T. 3021-22)

Given these circumstances, the trial court properly concluded that Defendant had committed a willful discovery violation in the late disclosure of the demonstrative aids. *Richardson v. State*, 246 So.2d 771 (Fla.1971). Further, this violation was prejudicial to the State because it was unable to fully explore the scientific validity of the theory underlying these exhibits and have its experts fully examine them. (T. 3019-20) As Defendant repeatedly violated the discovery rules regarding this witness, it cannot be said that the trial court abused its discretion in excluding only the demonstrative aids. *State v. Tascarella*, 580 So. 2d 154 (Fla. 1991) As such, the claim should be rejected.

Moreover, in order for scientific evidence to be admissible, it must pass the *Frye* test, which requires general acceptance in the relevant scientific community. *Ramirez v. State*, 651 So. 2d 1164 (Fla. 1995). Here, Kopec himself admitted that the theory underlying his testimony about the fingerprint and the production of the demonstrative aids was not generally accepted in the scientific community. (T. 3043-44) While Defendant argued below that *Frye* was not applicable because the theory was merely a combination of fingerprint evidence and serology and both were

generally accepted, this Court has rejected a this argument. *See Brim v. State*, 695 So. 2d 268 (Fla. 1997)(calculation portion of DNA evidence satisfy *Frye* despite claim that it was merely a combination of population genetics and statistics.) As such, Kopec's testimony would properly have been excluded for not satisfying *Frye*, and the trial court did not abuse its discretion in simply excluding the demonstrative aids.

Further, the trial court permitted Kopec to testify extensively about his theory that latent fingerprints would become visible when blood was placed on them. (T. 3087-99) He claimed to have seen bloody prints produced in this manner at crime scenes. (T. 3089) He also was permitted to describe experiments in which he stated that bloody prints had been produced in this manner. (T. 3103-05) Thus, Defendant's reliance on *Johnson v. State*, 442 So. 2d 193 (Fla. 1983), is misplaced. There, the issue was whether the expert should have been permitted to testify regarding the results of his experiments. As Kopec was permitted to do so here, *Johnson* is inapplicable. Instead, this matter is controlled by *Jackson v. State*, 648 So. 2d 85, 90-91 (Fla. 1994). There, the expert relied on a hypnotic regression session in reaching his conclusion. The expert was permitted to describe the procedure but was not permitted to admit a videotape of the session. This Court found that the trial court did not abuse its discretion because the facts and data underlying an opinion need not be admitted and the tape was cumulative to the testimony. As such, the trial court properly

excluded the demonstrative aids under *Jackson*.

Finally, the trial court properly concluded that the demonstrative aids were more prejudicial than probative. Kopec admitted that the manner in which the demonstrative aids were produced was not similar to the manner in which the bloody fingerprint was made. Further, the bases on which the State's experts refuted these tests was whether the resultant print would be a positive or a negative and whether any of the print was smeared. (T. 2431-32, 3370-71) The untrained jurors without proper examining equipment would not have been able to evaluate these problems. Further, Kopec has already testified regarding his experiments and results. As such, the trial court properly determined that the demonstrative aids were more likely to confuse the jury than help it, and properly excluded them on this basis. *See Taylor v. State*, 640 So. 2d 1127, 1134 (Fla. 1st DCA 1994), *rev. denied*, 649 So. 2d 235 (Fla. 1994)(demonstrative aids that were not similar to actual evidence properly excluded); *State v. Wright*, 473 So. 2d 268 (Fla. 1985), *rev. denied*, 484 So. 2d 10 (1986)(demonstrative aid that was cumulative to testimony properly excluded).

**III. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS THE KNIFE.**

Defendant next contends that the trial court erred in denying his motion to suppress the knife. He alleges that the search warrant was defective because the information was stale and the source was not revealed. He also asserts that the warrant was so

defective that the officers could not have relied upon it in good faith and that the evidence would not have been inevitably discovered. However, Defendant's challenges to the warrant are unpreserved, and the issues are meritless.

With regard to the contention that the information regarding the car was stale and the source not revealed, Defendant did not raise these issue in his motion to suppress. (R. 1414-19) Instead, Defendant asserted that the warrants were defective because the were based on allegedly illegally obtain information. In his memorandum in support of the motion, Defendant again only asserted that the affidavits did not contain sufficient facts. (R. 1478) As Defendant did not assert below that the warrant was defective because the information was stale or the source unrevealed, these issues are not preserved. *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982).

Even if the issues raised here had been preserved, they are meritless. The affidavit for the warrant to search Defendant's car for "[e]vidence relevant to proving a felony to wit First Degree Murder, Armed Robbery and Burglary . . . to wit blood samples, property or pieces of property taken," which was issued on December 29, 1983, outline the fact that Ms. Quinn had been murdered, that Defendant's bloody fingerprint was found near the body, that Defendant had been driving the car around the time of the murder, that he had been arrested and that he had given a statement to the police.(R. 1452-55) It showed that four days elapsed between the

discovery of the crime and the issuance of the warrant. "The courts of this state have generally refuse to invalidate warrants because of "staleness," in the absence of extraordinary circumstances, if the issuance of the warrant occurs within thirty days of the observation of the evidence establishing probable cause." *State v. Lewis*, 605 So. 2d 590, 591 (Fla. 2d DCA 1992); *see also Montgomery v. State*, 584 So. 2d 65 (Fla. 1st DCA 1991). As such, the information was not stale, and the trial court properly denied the motion to suppress.

Moreover, the affidavit when viewed under the totality of the circumstances, provided probable cause. The affidavit showed that Defendant had been arrested in the vehicle the previous day and that evidence of a murder, robbery and burglary were sought. The fact that Defendant was seen in the car was clearly based on an actual observation. Further, there was nothing incriminating in the observation that would have given anyone reason to fabricate it. *Swartz v. State*, 316 So. 2d 618 (Fla. 1st DCA 1975).

Even if the warrant as defective, the trial court would still have properly denied the motion under the "good faith" exception. *United States v. Leon*, 468 U.S. 897 (1984). While the affidavit neglects to mention the source of the observation of Defendant in the car, Defendant himself had informed the police the day before his arrest that he drove the car and had been to the Britton house the evening of the murder until 11 p.m. (R. 1439-40) Dolly Britton verified that Defendant left her house around 11 p.m. and returned

the following morning. As such, it is clear that Defendant and Ms. Britton were the source of the information regarding his presence in the car. The mere lack of their names did not render the warrant so lacking in indicia of probable cause as to render reliance on it unreasonable. *Leon; State v. Diamond*, 598 So. 2d 175 (Fla. 1st DCA 1992).

Even if the officers could not have relied on the warrant in good faith, the trial court would still have properly denied the motion to suppress. The evidence would have been admissible under the inevitable discovery doctrine. *See Nix v. Williams*, 467 U.S. 431 (1984). The knife was found during the search of a car. Defendant had been seen driving the car shortly before the crime and had admitted to doing so. His fingerprint was found in the area of the stabbed, battered body of Ms. Quinn. The fax machine and other property from the office had been taken. Defendant himself recognized the connection between the car and the crime when he inquired if the police were looking for blood in the car when he initially consented to a brief search. Under these circumstances, the police had probable cause to believe the car contained evidence of a crime and could have searched it without a warrant. *Chambers v. Maroney*, 399 U.S. 42 (1970)(no warrant required to search car even after occupants arrested and car impounded).

Moreover, Dolores Douglas Sheppard, the owner of the car, eventually cooperated with the police. Two days after Defendant's arrest she consent to a search of her home. (R. 2840) She also

testified against Defendant at trial. (T. 2628-52) As such, the police would inevitably been able to obtain her consent to search her car as well. *See Jorgenson v. State*, 714 So. 2d 423 (Fla. 1998)(warrantless search proper with consent). As such, the trial court properly denied Defendant's motion to suppress.

## IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING CRIME SCENE TECHNICIAN BALLARD UNAVAILABLE TO TESTIFY.

Defendant next asserts that the trial court abused its discretion in finding crime scene technician Dorothy Ballard unavailable to testify. However, given the circumstances, the trial court did not abuse its discretion in finding her unavailable.

Section 90.804(1)(c) & (d), Fla. Stat (1997), provides:

> Definition of unavailability.--"Unavailability as a witness" means that the declarant:
> * * *
> (c) Has suffered a lack of memory of the subject matter of his or her statement so as to destroy the declarant's effectiveness as a witness during the trial; [or]
> (d) Is unable to be present or to testify at the hearing because of death or because of then-existing physical or mental illness or infirmity.

This decision regarding whether a witness meets these requirements is committed to the discretion of the trial court. *Stano v. State*, 473 So. 2d 1282, 1286 (Fla. 1985); *Outlaw v. State*, 269 So. 2d 403 (Fla. 4th DCA 1972), *cert. denied*, 273 So. 2d 80 (Fla. 1973).

At the hearing on Ballard's unavailability, she stated that she recalled going to the scene but would be unable to testify without continually referring to her report and prior testimony.

(R. 1315-16) She averred that she was unable to hold a normal conversation because she forgot what she was saying. (R. 1318) She stated that she was under the care of a doctor for her problems. (R. 1318) However, contrary to Defendant's suggestion, Ballard did not testify that this was due to side effects from medication. (R. 1318) While Defendant now contends that Ballard's inability to remember anything long enough to hold a conversation might not have been a persistent problem now, no such contention was raised below. Instead, Defendant merely asserted that Ballard should be force to testify by continually referring to her report and prior testimony. (R. 1319-24) As such, Ballard's lack of memory destroyed her effectiveness as a witness, and the trial court did not abuse its discretion in finding her unavailable. §90.804(1)(c), Fla. Stat.; *United States v. Davis*, 551 F.2d 233 (8th Cir. 1977)(witness unavailable where he remembered part of testimony but not all); *McDonnell v. United States*, 472 F.2d 1153 (8th Cir. 1973)(witness unavailable when he could not remember details of prior testimony); *Commonwealth v. Graves*, 398 A.2d 644 (Pa. 1979)(same).

Further, Gayles testified that as a result of her brief (7 page) testimony at the pretrial hearing, Ballard sobbed for 10 to 15 minutes. (T. 125, 127) Even after she had stopped crying and was taken home, Ballard remained visible upset for 20 more minutes such that Gayles did not feel safe leaving her alone. (T. 125-26) In *Happ v. State*, this Court upheld a finding of unavailability, where the witness was suffering a nervous breakdown. Given that Ballard

broke down after her brief testimony at the pretrial hearing and the fact that she was under a doctor's care for her emotional problems, she should be considered unavailable under *Happ*.

Defendant's reliance on *North Mississippi Communications, Inc. v. Jones*, 792 F.2d 1330, 1336-37 (5th Cir. 1986), is misplaced. There, the hearsay statement was not former testimony. The witness was merely being called to recount what one party to a conservation had told her was said to him. Here, there was former testimony. As such, *Jones* does not apply.

Further, even if the admission of Ballard's former testimony was error, it was harmless. *State v. Diguilio*, 491 So. 2d 1129 (Fla. 1986). Defendant had subjected Ballard to extensive cross examination at the prior trial, which was read to the jury. Ballard's testimony regarding the evidence collection was corroborated by photographs, physical evidence and diagrams of the crime scene. Her demeanor while testifying would not have changed these items. Another officer verified her testimony regarding the disputed pieces of evidence, the fingerprint and the faint, partial shoeprint. (T. 1966-68, 1987-89, 1997-98) The jury was able to observe this officer's demeanor. Moreover, the evidence of Defendant's guilt was overwhelming. His bloody fingerprint was found near the body, he had the murder knife in his possession and he had blood consistent with the victim's in his car. Property and money was taken for the closed Federal Express office, and Defendant purchased an expensive watch the day after the crime. As

such, any error in not having Ballard present to read her reports and prior testimony did not affect the jury's verdict.

## V. THE TRIAL COURT PROPERLY OVERRODE THE JURY'S RECOMMENDATION.

Defendant next asserts the trial court erred in overriding the jury's life recommendation. However, the trial court properly found 4 weighty aggravators. Defendant presented no evidence in support of, and the trial court found, no statutory mitigation. Further, while Defendant presented ample evidence regarding his siblings, he presented almost no evidence regarding his upbringing, life and character. Considering this facts, the presentation of sobbing family members and the blatantly improper defense closing argument, the trial court properly overrode the jury's recommendation.

The standard for reviewing a jury override is whether "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975). While an override may not be warranted where the record reveals some mitigation, "[t]hat the mere presentation of mitigating evidence precludes imposition of the death penalty is not and never has been a correct statement of this state's law." *State v. Bolender*, 503 So. 2d 1247 (Fla. 1987); *see also Robinson v. State*, 610 So. 2d 1288 (Fla. 1992). Moreover, "[w]here a sentence of death is otherwise appropriate and it appears that some matter not reasonably related to a valid ground of mitigation has swayed the jury to recommend life, such as through emotional appeal, prejudice, or some similar impact, it is

proper for the judge to overrule the jury's recommendation." *Thomas v. State*, 456 So. 2d 454, 460 (Fla. 1984); *see also Francis v. State*, 473 So. 2d 672 (Fla. 1985).

First, Defendant asserts that the trial court should have given greater weight to his allegedly repeated sexual abuse. However, Defendant presented no evidence that he was repeatedly sexually abused. Instead, Defendant relied upon the sexual abuse of his brother and sister. In fact, Defendant presented a great deal of emotional testimony regarding the details of his siblings' abuse and its effect on them. The only evidence that Defendant was sexually abused at all was the testimony of his aunt, who allegedly saw, through a little crack between board in the wall of a frame house, Moody with Defendant "bend over and []going with him from the back." (T. 3979-83) Additionally, Defendant presented the testimony of his sister and brother that Defendant had told them that he had been abused without any details of this abuse. (T. 4044-45, 4112) However, Defendant told his mother only that Moody had attempted to abuse him. (T. 3969-70) Moreover, there was no testimony regarding how this alleged abuse affected Defendant.

Additionally, Defendant's siblings, whose abuse and its effects were amply detailed for the jury, never hurt anyone. Liz testified that she had done well in school and held a responsible job. (T. 4126-28) Leonard had no history of violence.[2] (T. 4028-30,

[2] Defendant emphasizes that Leonard had a conviction for battery on a law enforcement officer. However, Leonard explained that he was attacked by an officer during a riot and simply fought

4047) In contrast, Defendant had a length history of incarceration for violent crimes and murdered Ms. Quinn. Given the lack of evidence to show that this crime had anything to do with any alleged abuse of Defendant and the improper influence of the detailed testimony regarding his siblings, the trial court properly determined that mitigating factor was entitled to little weight despite the jury's recommendation. *See Lara v. State*, 464 So. 2d 1173 (Fla. 1985).

Next, Defendant next alleges that the trial court gave too little weight to the alleged physical abuse. In making this argument, Defendant grossly distorts the nature of the evidence presented below. First, Defendant describes his father as mentally ill at the time that he lived with him. In fact, the evidence showed that Defendant's father had a nervous breakdown about 10 years before that. (T. 3950-51, 3958-62) There was no evidence that his father suffered any ongoing mental illness. Next, Ms. Collins did not state that alleged beating when Defendant was 6 occurred during a visit. Instead, she testified that this occurred when Defendant's father moved back into the house after leaving the mental hospital, which never occurred according to all members of the household. (T. 3987-88, 4014-15, 3960) While Defendant allegedly claimed to have scars, no one stated that they ever saw them. (T. 3963) Moreover, both Defendant's mother and brother admitted that the alleged beatings occurred because of misbehavior.

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back. (T. 4047)

(T. 3957-58, 4039) In fact, Defendant's mother stated that he was uncontrollable. (T. 3959-60) Moreover, there was again no testimony regarding how the alleged beatings affected Defendant. Given the weak nature of this testimony, the trial court reasonable found that no reasonable person could give it more than little weight. *See Lara*.

Defendant next contends that the trial court should have considered the alleged emotional neglect by his mother. Here, there was no evidence. Instead, Defendant's sisters Renee and Liz testified that their mother worked hard to support the children and provide them with a private school education and nice gifts. (T. 3348-49, 4110-12) They agreed that this left their mother with little time with the children. (T. 3848-49, 4111-12) Liz also described her mother as kind. (T. 4110) Liz also stated that her mother was angry over the abandonment by Liz's father and not affectionate but asserted that she displayed this anger by playing music and yelling. (T. 4110-12) Moreover, there was no testimony regarding the nature of Defendant's relationship with his mother or how it actually affected him. As such, the trial court properly found that this evidence fell short of showing emotional neglect as mitigation. *See Lara*.

Defendant asserts that the trial court should have found his "good" behavior in prison mitigating. However, Defendant's own expert agreed that Defendant was only an average inmate. (T. 4170-72, 4226) Further, Sorensen denigrated the severity of these DR's

based on his opinion of what they were for. (T. 4172-73) However, Ted Key testified regarding the actual severity of the DR's. (T. 4345) Moreover, while a number of Dade County Corrections Officers testified that Defendant was well behaved, these officers only saw him during brief stays at the individual facility at which they worked during his various pretrial detentions. Further, Defendant was frequently found with contraband, including weapons. (T. 4370-73) Thus, the trial court properly concluded that on this record Defendant was not a good prisoner.

Defendant also contends that the trial court improperly rejected Sorensen's testimony because it did not satisfy *Frye*. Defendant alleges that the State did not raise a *Frye* objection until after the jury returned its recommendation, which is simply untrue. The State asked to void dire Sorensen before he offered his opinion. (T. 4176) When the State voir dired him, the State immediately objected that the evidence was inadmissible. (T. 4176-77) As such, the State did move to exclude the testimony on *Frye* grounds on a timely fashion. *Jones v. State*, 701 So. 2d 76, 78 (Fla. 1997).

While Defendant alleges that he had no opportunity to rehabilitate Sorensen, Defendant was on notice that the trial court considered this testimony violative of *Frye*, and never tried to clarify the testimony. (T. 4180-81) While Defendant asserts that field should have been considered statistics or criminology, this Court has held that merely defining a new principal as a

combination of old ones does not obviate the need for a *Frye* hearing. *Brim*. As such, the trial court properly excluded Sorensen opinion. *Frye*.

Further, the trial court specifically considered the remainder of Sorensen's testimony about his studies and Defendant's record. (R. 2475) However, the trial court found the studies and details of Defendant's record useless in predicting Defendant's future dangerousness without the opinion because the studies were not specific enough and Defendant, a robber, burglar and murderer, feel in several different categories. As such, the trial court did not find that evidence of future dangerousness was irrelevant, and the trial court properly determined that this mitigator did not apply. *Willacy v. State*, 696 So. 2d 693, 695 (Fla. 1997).

Next, Defendant assails the trial court's reliance on two instances of his misconduct during trial, asserting that this was part of the reason the trial court rejected the good prisoner evidence. However, the trial court, in fact, relied on these incidents in rejecting any claim of good behavior during trial. (R. 2477) While Defendant appears to contend that they never happened, the record reflects that they did. When the State put on the record that Defendant had yelled "you bitch" at the prosecutor, defense counsel did not disagree that this happened, and Defendant acknowledged the comment immediately after he returned. (R. 4053-54) Further, Defendant did refuse to be fingerprinted after he was adjudicated. In fact, this incident provoked a response from

corrections that resulted in the compromise regarding the stun belt. (T. 3734-35, 3807-09) As such, the trial court properly rejected good behavior in the courtroom based on these events.

Next, Defendant argued that the fact that he was a loving and supportive family member should have been considered by the trial court. However, the trial court did consider this evidence and found it mitigating. (R. 2482-83) However, this factor itself is not sufficient to justify reversal of a jury override. *See Robinson v. State*, 610 So. 2d 1288 (Fla. 1992); *Bolender*. Here, the evidence was particularly weak in that Defendant next lived with his wife or children. Thus, the trial court properly accorded it little weight. *Willacy*.

Defendant also asserts that the trial court should have found his alleged intoxication mitigating. However, "[w]hile voluntary intoxication or drug use might be a mitigator, whether it actually is depends upon the particular facts of a case." *Banks v. State*, 700 So. 2d 363, 368 (Fla. 1997). Lack of evidence of signs of intoxication and evidence of purposeful conduct negate intoxication as mitigation. *Banks; Johnson v. State*, 608 So. 2d 4, 13 (Fla. 1992); *Preston v. State*, 607 So. 2d 404 (Fla. 1992). Here, Defendant and Ms. Britton stated that Defendant had been drinking and using marijuana. However, he denied being intoxicated. (T. 3247) Ms. Britton did not describe Defendant as intoxicated and stated that he was able to play cards. Moreover, there was amply evidence of purposeful behavior. Defendant got to the Federal

Express office and was able to pry open the enclosure containing the money bag and take it. (T. 1628-29) He located and pried open the one desk drawer that contained valuables. (T. 1604-08, 1867, 1947-48) After killing Ms. Quinn, he was able to realize he was bloody and clean himself before leaving the scene. (T. 1623-24) He thought enough to take both of the murder weapons with him when he left. Given this evidence, the trial court properly determined that the alleged intoxication was not mitigating.

The cases relied upon by Defendant are inapplicable. None of these cases show the level of purposeful behavior exhibited here. Further, in *Barrett*, 649 So. 2d at 223, *Cheshire v. State*, 568 So. 2d 908 (Fla. 1990), *Amazon v. State*, 487 So. 2d 8 (Fla. 1986), *Norris v. State*, 429 So. 2d 688 (Fla. 1983), there was evidence of other mental or emotional problems and amply evidence of purposeful behavior. As such, the case upon which Defendant relies are inapplicable.

Defendant next argued that the jury could have found that HAC and witness elimination were not proven or given them little weight. However, as argued in issues VI and VII, *infra*, the evidence supported these aggravators. Moreover, there was no legitimate reason for giving these factors little weight. Defendant repeatedly and brutally stabbed and battered the victim for no other reason then she found him committing a burglary and could identify him. Unlike *Jenkins v. State*, 692 So. 2d 893 (Fla. 1997), and *Hallman v. State*, 560 So. 2d 223 (Fla. 1990), Defendant

presented nothing that ameliorated the weight of these aggravators. As such, there was no reason for the jury to have given little weight to these factors.

Defendant finally assails the trial court's determination that the jury was improperly influence by sympathy for Defendant's family and his closing argument. However, the trial court properly considered this factors. *Francis v. State*, 473 So. 2d 672 (Fla. 1985). With regard to sympathy for Defendant's family, Defendant presented extensive testimony regarding the sexual abuse of his siblings and its effect on them. Defendant also presented evidence regarding his siblings' relationship with their mother but none of his. Defendant's brother and sister broke down on the stand while describing their own abuse. (T. 4022, 4113) Thus, the trial court properly considered the effects of sympathy for Defendant's family on the jury.

While Defendant attempts to minimize the impropriety of his argument by claiming that it was closing argument by stating that he made one brief improper comment during otherwise proper argument, this is not true. In addition to arguing lingering doubt after agreeing not to do so, Defendant also repeatedly sought the sympathy of the jury. Defendant asked the jury to "have some tears for" him because he had allegedly been sexually abused. (T. 4416) He asked that "[a]ny of you folks that have children or grandchildren" feel for him. (R. 4416) He implied that Defendant had been mistreated while incarcerated. (R. 4418) He emphasized the

pain and anguish that his siblings felt because of their abuse. (R. 4422) He begged the jury not to take Defendant from his family. (R. 4429) Defendant continued this barrage despite repeated sustained objections by the State. (T. 4416, 4424, 4427, 4428) Thus, the impropriety of Defendant's closing argument cannot be excused as one isolated comment. *See Garron v. State*, 528 So. 2d 353 (Fla. 1988).

Under the totality of these circumstances, the trial court properly found that there was no reasonable basis for a life sentence. The trial court properly found 4 weighty aggravating factors: prior violent felony, during the course of a robbery merged with pecuniary gain, witness elimination and HAC. Defendant did not even serious argue, and the trial court found, no statutory mitigators. The nonstatutory mitigation (childhood and loving family) was weakly supported and never related to Defendant's conduct. The trial court candidly admitted that it had erroneous permitted inadmissible testimony to go before the jury. Moreover, the jury was presented with weeping members of Defendant's family and a wholly inappropriate defense closing argument. Taken together, these factor show that the trial court properly overrode the jury's recommendation. *See Garcia v. State*, 644 So. 2d 59 (Fla. 1994)(override proper for brutal murder of victim during course of a felony by defendant with prior violent felony convictions where trial court rejected both mental mitigators, intoxication, good prisoner evidence, lack of premeditation, good employment history

and nonviolent character); *Torres-Arboledo v. State*, 524 So. 2d 403 (Fla. 1988)(override proper where murder committed during the course of a robbery by a defendant with a prior violent felony conviction where court rejected intelligence and potential for rehabilitation); *Washington v. State*, 653 So. 2d 362 (Fla. 1994)(override proper where victim brutal murdered during the course of a felony by an inmate with a prior violent felony where nonstatutory mitigation of loving family, high school diploma and participation in sports were found).

## VI. THE TRIAL COURT PROPERLY FOUND THAT THE MURDER WAS COMMITTED FOR THE PURPOSE OF ELIMINATING MS. QUINN AS A WITNESS.

Defendant next argues that the trial court improperly found that the murder was committed for the purpose of eliminating Ms. Quinn as a witness. However, the trial court's finding regarding this aggravator applies the correct law and is supported by competent, substantial evidence. As such, it should be affirmed. *Willacy v. State*, 696 So. 2d 693, 695 (Fla. 1997); *see also Cave v. State*, 727 So. 2d 227, 230 (Fla. 1998), *cert. denied*, 1999 WL 73704 (U.S. 1999).

In support of this aggravator, the trial court found:

> In order for this aggravating circumstance to apply when the victim is not a police officer there must be clear proof that the defendant's dominant or only motive was the elimination of a witness. This can be shown when no other reason exists for killing the victim, but to eliminate the victim as a witness.
>
> Frank Dolan testified that the defendant and Mary Jane Quinn worked the same shift at

> Federal Express and that they would have come into contact with each other prior to the night the defendant killed Mary Jane Quinn. The evidence established that Mary Jane Quinn was attacked in the portion of the Federal Express office known as the dispatch office. The telephone in the office was found with the receiver off the hook, a button pressed for an outside line, and Mary Jane Quinn's blood smeared on the receiver. The computer machine which was used to communicate with other Federal Express Offices, was found with Mary Jane Quinn's blood on it. The crime scene showed that Mary Jane Quinn had been attacked in the doorway of the dispatch office and that she had been able to crawl out of the doorway and into the hallway, despite the fact that she had been hit on the head and face at least six times with the fax machine. She had also been stabbed once in the front, and ten times in the back. The hallway, where her body was found, was in the opposite direction from the front door or the warehouse. Her body was found with the telephone wire from outside of the dispatch office pulled out of the wall and wrapped between her legs.
>
> The evidence showed that Mary Jane Quinn had not been sexually assaulted. Her clothing was intact. No personal items were taken from her. Her rings and watch were still on her. There was money in her pockets. Her paycheck was left there. It is clear that the dominant motive, if not the sole motive for killing Mary Jane Quinn was to eliminate her as a witness to the defendant's burglary and theft from Federal Express. At the time the defendant stabbed her, she was no longer a threat to him, she had already been substantially incapacitated by the blows to her head, and she was not trying to leave the building.
>
> Although this aggravator has been proven circumstantially, the court finds that it has been proven beyond a reasonable doubt.

(R. 2465-66)(footnotes omitted). These findings are supported the testimony of Ballard regarding the state of the crime scene and the evidence found there. (T. 1606-22, 1629-36) Further, Harleman's

testimony about the condition of the victim's body supports the trial court findings. (T. 2108, 2110-11) Moreover, Frank Dolan stated that Defendant and Ms. Quinn worked at the same time. (T. 1866-67) As such, these findings are supported by competent, substantial evidence and should be affirmed.

In *Willacy v. State*, 696 So.2d 693, 696 (Fla. 1997), this Court upheld the finding of the witness elimination aggravator in similar circumstances. There, the victim interrupted the defendant, her neighbor, while he was burglarizing her home, the defendant incapacitated the victim and then killed her. This Court upheld the aggravator, finding:

> She was incapable of thwarting his purpose or of escaping and could not summon help. There was little reason to kill her except to eliminate her as a witness since she was his next door neighbor and could identify him easily and credibly both to the police and in court.

*Id.*

Here, the victim and Defendant were coworkers on the same shift. She interrupted him during a burglary of the office, she was incapacitated by the first blows. She was crawling away from the exits as he continued to stab and beat her. She had been driven away from one phone that was off the hook and another had been pulled from the wall. Nothing was taken from her, and no attempt was made to sexually assault her. As such, the only reason for Defendant to have continued the attack until Ms. Quinn was dead was to keep her from identifying Defendant. Thus, the aggravator was

properly found under *Willacy*. *See also Consalvo v. State*, 697 So. 2d 805 (Fla. 1996)(aggravator proper where victim was attempting to call the police); *Correll v. State*, 523 So. 2d 562 (Fla. 1988)(aggravator proper where means of communications were cut off and no other motive present).

Defendant appears to contend that the trial court erred in finding this factor because there was no direct evidence of his intent. However, the witness elimination aggravator can be found based on circumstantial evidence. *Preston v. State*, 607 So. 2d 404 (Fla. 1992); *Swafford v. State*, 533 So. 2d 270 (Fla. 1998); *Routly v. State*, 440 So. 2d 1257 (Fla. 1983). As such, the trial court's conclusion is not flawed simply because it relied on circumstantial evidence.

Further, unlike the cases involving an "instinctive" or panicked response on which Defendant relies, there was no evidence that the attack started in response to Ms. Quinn screaming or attacking Defendant. *Compare Urbin v. State*, 714 So. 2d 411 (Fla. 1998)(victim killed while resisting robbery); *Robertson v. State*, 611 So. 2d 1228 (Fla. 1993)(victim resisted robbery and screamed); *Cook v. State*, 542 So. 2d 964 (Fla. 1989)(victim resisted robbery and screamed) There was also no evidence that Defendant suffered a psychotic break, blacked out or became enraged. *Compare Geralds v. State*, 601 So. 2d 1157 (Fla. 1992)(victim killed because she enraged defendant); *Perry v. State*, 522 So. 2d 817 (Fla. 1988)(evidence that defendant blacked out during murder);

*Hansbrough v. State*, 509 So. 2d 1081, 1086 (Fla. 1987)(killing during frenzy and claimed psychotic attack). Instead, the evidence reflects that victim was attacked when she went to the phone to summon help and that having killed her, Defendant calmly cleaned himself and left. Thus, the trial court properly found that this was not an instinctive or panicked killing.

## VII. THE TRIAL COURT PROPERLY FOUND THAT THE MURDER WAS HEINOUS, ATROCIOUS AND CRUEL.

Defendant next asserts that the trial court erred in finding the murder was heinous, atrocious and cruel (HAC). However, the trial court's finding regarding HAC applies the correct law and is supported by competent, substantial evidence. As such, it should be affirmed. *Willacy; Cave*.

In support of HAC, the trial court found:

> Dr. Gwen Harleman, the assistant medical examiner, testified that Mary Jane Quinn had at least six impacts on her head and face which were caused when a sixty-five pound piece of office equipment, a fax machine was used to strike her. Mary Jane Quinn also had a stab wound over her right breast, and ten stab wounds to her back. Two of those wounds went through her back and into her spine, another went through her lungs. She also had defensive wounds on both of her hands. Dr. Harleman testified that Mary Jane Quinn was alive for every stab wound. The evidence showed that Mary Jane Quinn fought her attacker and was crawling on her hand when the last stab wounds were administered, The court does not find beyond a reasonable doubt that the defendant killed Mary Jane Quinn with the desire to inflict a high degree of pain with utter indifference to, and even enjoyment of her suffering. The court does however find beyond a reasonable doubt that prior to her death, Mary Jane Quinn knew she was going to die; was

> terrified and suffered tremendous emotional strain for a significant period of time as the defendant hit her over the head multiple times with the fax machine and then continually stabbed her as she tried to defend herself and tried to crawl away from the defendant. The beating and stabbing inflicted on the [sic] Mary Jane Quinn by the defendant was undoubtedly painful. Accordingly, the conclusion is inescapable that Mary Jane Quinn suffered greatly before she died.
>
> The court finds that the State had established beyond and to the exclusion of every reasonable doubt the existence of this aggravating factor and gives it great weight.

(R. 2467-68)(footnotes excluded). These findings are supported by the testimony of Harleman regarding the nature and extent of Ms. Quinn's injuries and her level of consciousness. (T. 2111-2203) Further, Ballard testified about the blood trail from the site of the initial attack to the final resting place of the body, as well as the hand print on the wall which showed that Ms. Quinn was crawling. (T. 1614-22) As such, the findings are supported by competent, substantial evidence and should be sustained.

Defendant contends that these findings should be disregarded because the trial court found that he did not intend to inflict great pain on Ms. Quinn. However, this Court had repeatedly held that intent to inflict pain is not an element of this aggravator. *Guzman v. State*, 721 So. 2d 1155, 1160 (Fla. 1998); *Brown v. State*, 721 So. 2d 274, 277 (Fla. 1998); *see also Bates v. State*, 24 Fla. L. Weekly S471, S475 (Fla. Oct. 7, 1999); *Mahn v. State*, 714 So. 2d 391, 399 (Fla. 1998). Instead, this Court has stated that "the HAC aggravator focuses on the means and manner in which death is

inflicted and the immediate circumstances surrounding the death." *Brown*, 721 So. 2d at 277; *see also Banks v. State*, 700 So. 2d 363 (Fla. 1997).

As this Court has noted, "[t]he HAC aggravating circumstance has been consistently upheld where the victim was repeatedly stabbed." *Guzman v. State*, 721 So. 2d 1155, 1159 (Fla. 1998); *see also Bates*; *Brown*; *Mahn*. Here, the victim was stabbed 11 times and smashed over the head at least 6 times with a 67 pound fax machine. She was alive for each of these injuries and sustained defensive wounds. As such, HAC was properly found.

The cases on which Defendant relies are inapplicable. All of the cases in which HAC was rejected involve death by shooting. *See Donaldson v. State*, 722 So. 2d 177 (Fla. 1998); *Buckner v. State*, 714 So. 2d 384 (Fla. 1998); *Kearse v. State*, 662 So. 2d 677 (Fla. 1995); *Bonifay v. State*, 626 So. 2d 1310 (Fla. 1993); *Robertson v. State*, 611 So. 2d 1228 (Fla. 1993); *Santos v. State*, 591 So. 2d 160 (Fla. 1991).

## VIII. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING EVIDENCE THAT WAS NOT RELEVANT TO DEFENDANT'S CHARACTER OR THE CIRCUMSTANCES OF THE CRIME.

Defendant next contends that the trial court abused its discretion in excluding evidence during the penalty phase regarding the lives of his sisters and brother. However, this claim is without merit and partially procedurally barred.

In *Lockett v. Ohio*, 438 U.S. 586, 605 (1978), a plurality of the Court held that a defendant in a capital sentencing hearing

must be permitted to introduce any evidence relevant to his character and record and the circumstances of the crime in support of claimed mitigation. However, the trial court may exclude evidence that is relevant to the witness' character, not the defendant's. *Hill v. State*, 515 So. 2d 176, 177-78 (1987), *cert. denied*, 485 U.S. 993 (1988). Here, the evidence Defendant sought to elicit was probative of the witnesses' character but his.

First, Defendant contends that the trial court abused its discretion in refusing to allow his sister Renee to describe her upbringing. However, the trial court did permit Renee to describe her mother's problems and how she raised her children. (T. 3946) It merely prohibited Defendant from having Renee describe how her upbringing affected her and testifying that her mother was allegedly sexually abused. (T. 3946-47)Further, it is undisputed that Defendant did not live with the family after Renee was a toddler. (T. 3940-41) Given these circumstances, the excluded testimony clearly concerned the witnesses' character and was properly excluded. *Hill*.

With regard to Leonard's testimony, the only thing excluded was a description of the alleged sexual abuse he suffered. (T. 4016-31) Leonard was permitted to testify that he was sexually abused. (T. 4020-21) While the State initially objected to testimony regarding the alleged effect of the abuse, the State subsequently withdrew its objection, and the testimony was admitted. (T. 4016, 4027-31) As such, refusing to admit the

intimate details of Leonard's sexual abuse was proper. *Hill*.

With regard to the alleged exclusion of Liz's testimony, several of the objections about which Defendant complains were to the narrative and non-responsive nature of the testimony. (T. 4113, 4123) After these objections were sustained, Defendant made no attempt to elicit the testimony through appropriate questioning. (T. 4113-14, 4123) As such, any issue regarding the relevancy of this testimony was not preserved. *Steinhorst*.

Further, the objections that were sustained regarded, Liz's reactions to her mother's behavior, her reaction to her sexual abuse and her description of the sexual acts performed on her. (T. 4109, 4111-13, 4116, 4123) She was permitted to describe her mother's actions and to describe her reaction to the abuse. (T. 4110-15) She was permitted to describe Defendant's reactions to his sexual abuse and his upbringing. (T. 4115, 4117-23) As the excluded testimony went to Liz's character and not Defendant's, the trial court did not abuse its discretion in excluding it. *Hill*.

Even if the trial court had abused its discretion in the exclusion of any of this testimony, any error was harmless. Both Liz and Leonard described their emotional problems as adults. Testimony regarding the manner in which Defendant was raised as admitted. As such, the excluded evidence was merely cumulative to the admitted evidence, and any error was harmless. *State v. Diguilio*, 491 So. 2d 1129 (Fla. 1986).

## IX. THE TRIAL COURT PROPERLY REJECTED DEFENDANT'S REQUEST FOR A SPECIAL VERDICT FORM.

Defendant finally contends that the trial court erred in rejecting his request for a special verdict form during the penalty phase. However, this claim is without merit. In *Patten v. State*, 598 So. 2d 60 (Fla. 1992), the defendant raised exactly the same claim that is raised here. This Court rejected the claim. *Id.* at 62; *see also Hoskins v. State*, 702 So. 2d 202, 208 & n.4 (Fla. 1997); *Jones v. State*, 569 So. 2d 1234, 1238 (Fla. 1990). The United States Supreme Court has also rejected the claim. *Clemons v. Mississippi*, 494 U.S. 738, 745 (1990)("Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence had been soundly rejected by prior decisions of this Court.") As this Court has previously rejected this claim, the trial court's actions were proper and should be affirmed.

**CONCLUSION**

For the foregoing reasons, the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by U.S. mail to Christina Spaulding, Assistant Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125, this day of 18th day of November, 1999.

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