IN THE SUPREME COURT OF FLORIDA

CASE NO. 92,975

JOSEPH RAMIREZ,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1320 N.W. 14th Street
Miami, Florida 33125
(305) 545-1958

CHRISTINA A. SPAULDING
Assistant Public Defender
Florida Bar No. 995320

Counsel for Appellant

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Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times Roman.

INTRODUCTION

In this reply brief, appellant's initial brief is cited as "Initial Br." and appellee's answer brief as "Answer Br." Appellant does not waive any points raised in the initial brief that are not specifically addressed raised in the reply brief.

ARGUMENT

I.

CONTRARY TO THE STATE'S CONTENTION, THE RELIABILITY OF SCIENTIFIC EVIDENCE UNDER *FRYE/RAMIREZ* CANNOT BE SATISFIED BY GENERAL ACCEPTANCE WITHIN A FIELD THAT IS COMPLETELY LACKING IN SCIENTIFIC RIGOR.

The state contends on appeal that this Court must uphold the admission of the state's knife mark identification evidence, even though there is no empirical evidence to support the experts' claim that the identification technique is reliable, because the experts testified that the technique is generally accepted in their "scientific community," and their scientific community has determined that no validating tests are necessary. This claim, by itself, should establish that knife mark identification evidence is *not* scientifically reliable because it is generally accepted in a community that does not follow accepted scientific practices.

Standard of Review

As an initial matter, the state asserts repeatedly that the trial court did not abuse its discretion in admitting the knife mark identification evidence. As noted in the initial brief, at 28, however, the standard of review for a trial court's *Frye*[1] determination is de novo -- not abuse of discretion. *Hadden v. State,* 690 So. 2d 573, 579 (Fla. 1997); *Brim v. State,* 695 So. 2d 268, 274 (Fla.1997); CHARLES W. EHRHARDT, FLORIDA EVIDENCE § 702.3, at 570 (1999 ed.). Thus, contrary to the state's assertions, this Court is not required to defer to the trial court's erroneous reasoning and may not only reevaluate the evidence presented below but may also consider other "scientific and legal writings" that were not part of the record in the trial court. *Hadden*, 690 So. 2d at 579; EHRHARDT, *supra*, at 570.

Discussion

The state is also mistaken in its characterization of appellant's argument, contending that the defense mounted a *Daubert*[2] challenge below and is on appeal urging this Court to abandon *Frye* in favor of *Daubert*. Answer Br. at 66-67. This is not so. The defense has always relied, at trial and on appeal, on this Court's decisions in *Ramirez I* and *Ramirez II*, which require the state to prove the *reliability* of the proffered evidence, and has simply asserted that reliability cannot be established by

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[1]*Frye v. United States*, 293 F. 1013 (D.C.Cir.1923).

[2]*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

"general acceptance" in a field that is utterly lacking in scientific rigor.[3]

The trial court, which properly recognized that "general acceptance" alone does not necessarily establish reliability and that "the soundness of the science involved must have some role in the analysis," turned to *Daubert* on its own initiative. (R. 1221-22) Appellant agrees with the trial court that *Daubert* provides a useful framework for evaluating the underlying "science" but disagrees with the trial court's conclusion. Initial Br. at 29.

The purpose of *Frye* is to "permit[] the experts who know most about a procedure to experiment and to study it. In effect, they form a kind of technical jury, which must first pass on the scientific status of a procedure before the lay jury utilizes it in making its findings of fact." *People v. Barbara,* 255 N.W.2d 171, 194 (Mich. 1977). If the experts abdicate their responsibility to study, experiment and critique the technique, the purpose of *Frye* is defeated. Thus, evidence scholars have observed that "general acceptance is only as good as the field that is surveyed." 1 DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE § 1-3.3.4, at 28 (1997). Professor Ehrhardt has similarly noted that, "[m]erely counting a majority of the members of the relevant scientific community is not controlling. The court must also consider the *quality* of the evidence supporting or opposing the principle." EHRHARDT, *supra,* at

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[3]*Ramirez v. State,* 651 So. 2d 1164, 1168 (Fla. 1995) (*Ramirez II*) ("The principal inquiry under the *Frye* test is whether the scientific theory or discovery from which an expert derives an opinion is reliable."); *Ramirez v. State,* 542 So. 2d 352, 355 (Fla. 1989) (*Ramirez I*) ("the real issue is the reliability of testing methods which form the basis of the witness's conclusion").

765 (emphasis added).

The state nevertheless takes the position that the quality of the "science" supporting knife mark identification is irrelevant to a *Frye* analysis. For example, to the contention that the reliability of knife mark identification has not been adequately tested, the state responds that its experts testified that their "scientific community" has determined that "testing was not necessary." Answer Br. at 68. Thus, according to the state, this Court cannot consider the failure of knife mark examiners to follow the most basic precepts of the scientific method because the examiners have testified that they don't consider it necessary to do so. Under this interpretation of *Frye*, "theories grounded in . . . generally accepted principles of astrology or necromancy" would indeed be readily admissible. *Kumho Tire Co., Ltd. v. Carmichael*, 119 S.Ct. 1167, 1175 (1999). This, however, is presumably the very absurdity this Court sought to avoid by requiring proof of reliability as well as "general acceptance." *Ramirez II*, 651 So.2d at 1167-68; *accord Hadden,* 690 So. 2d at 578; EHRHARDT, *supra*, at 563.

As the United State Supreme Court has emphasized, it is the methodology of rigorously testing hypotheses that "distinguishes science from other fields of human inquiry." *Daubert,* 509 U.S. at 593 (citations omitted). The Court relied on leading philosophers of science, including Karl Popper, who contended that the hallmark of true science was its willingness to risk being proven wrong by undertaking to falsify, or refute, rather than merely confirm, the scientists' hypotheses. *Id.*; K. Popper, *Science: Conjectures and Refutations*, in PHILOSPHY OF SCIENCE: THE CENTRAL

ISSUES at 6-7 (Martin Curd & J.A. Cover eds. 1998). Popper explained that pseudoscience is characterized by its avoidance of rigorous testing. *Id.* at 8-9; *see also Introduction to Science and the Scientific Method* in 1 FAIGMAN *et al*, *supra*, at 49 (noting that practitioners in fields "[m]asquerading as science" are likely to defend their claims as the product of "many years of experience" rather than empirical testing).

The state, like the trial court, stands Popper's concept of falsifiability on its head by arguing that further testing is unnecessary because "the undisputed testimony at the hearing was that any inaccuracies in the testing would not result in false identification. Instead, the inaccuracies would result in an identification not being made." Answer Br. at 69; R. 1225. That is, testing is not necessary because the experts already testified that they never make mistakes. There is, however, no empirical evidence whatsoever to support the state experts' extraordinary claims of infallibility even though it would be exceedingly easy to conduct controlled, blind tests in which the examiner would, for example, be given a number of consecutively manufactured knives and a test mark and be asked to determine which, if any, of the knives made the mark. Such tests would establish an actual error rate, including the rate of false positive identifications.

The state asserts that two of its witnesses testified that blind proficiency tests *are* conducted. Answer Br. at 69. In fact, however, the state's experts testified only that they had been subject to blind proficiency testing in the field of tool marks

generally; none of the state's witnesses testified that such testing included knife mark identification. Initial Br. at 27; (R. 109, 317-19, 419-20). Published descriptions of tool mark proficiency tests likewise include no reference to knife mark identification ever being included as a subtest. *See* Joseph L. Peterson & Penelope N. Markham, *Crime Laboratory Proficiency Testing Results, 1978-1991, II: Resolving Questions of Common Origin*, J. FORENSIC SCI. 1009 (1995).

Finally, the state, like the trial court, asserts mistakenly that the German articles cited in the trial court's order establish the reliability of knife mark identification. Answer Br. at 70; R. 1215-18. Contrary to the state's assertion, appellant does not dispute that these articles conclude that "individual identification" of a knife mark, based solely on its microscopic characteristics, is *possible*.[4] Initial Br. at 36; Wolfgang Bonte, *Tool Marks in Bones and Cartilage* 20 J. FORENSIC SCI. 315 (1975) (R. 1291, 1296) However, none of the experiments described in these articles even purported to test whether such identifications could be accurately and reliably made. Initial Br. at 36-37.[5] Moreover, in the 25 years since the most recent of these articles

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[4]Specifically, he said "stab injuries in cartilage . . . frequently permit the estimation of the type of implement and, moreover, *sometimes* enable the individual identification of the tool used." (R. 1296) (emphasis added).

[5]The state also quotes, out of context, from another of Bonte's articles which concluded that "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." Answer Br. at 70. The state omits the critical beginning of the sentence: "In the case described *which was characterized by additional, more specific notch traces, . . .* " Wolfgang Bonte, *Considerations on the Identification of Notch Traces*

was published, knife mark examiners have failed to conduct even the most elementary tests that could either confirm or refute the hypothesis that individual knife mark identifications can be accurately and reliably made based on microscopic characteristics alone. To the contrary, as the state itself emphasizes, present-day practitioners of knife mark identification have testified that they do not believe any such testing is necessary. Answer Br. at 68.

Thus, the very testimony on which the state relies in its answer brief -- which demonstrates that the practitioners of knife mark identification are unwilling to risk being proven wrong in objective tests -- is exactly what proves that knife mark identification is not scientifically reliable. The state's claim that this Court's decision in *Brim*, 695 So. 2d at 271, is inapposite because the scientific community in that case, unlike the knife mark examiners here, acknowledged the need for further testing therefore misses the mark entirely. Answer Br. at 68. The DNA experts in *Brim* deserved the label "scientific" community precisely because their field adheres to rigorous scientific standards, including the proposition that claims of accuracy and

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from Stabbing Injuries, 149 ARCH-KRIMINOL 77 (1972) (R. 1258, 1266). As Bonte explained, the knife in question had both wavy serrations and "real notches" -- "individual blade defects from prior use." (R. 1264, 1266, 1281) While the state's experts testified that a knife blade would become further individualized through use, they did not, as Bonte did, identify any "real notches" on the suspect knife that corresponded to striations in the test mark. (R. 144, 191-92, 270, 274, T. 2773-74, 2859) Moreover, the state ignores that, in the same article it quotes, Bonte found that knives that had "a straight blade without any special bevel," like the suspect knife in this case, "left very smooth cut surfaces without notch traces" that would permit individual identification. (R. 1262)

reliability must be supported by empirical evidence, gathered through rigorous testing. *See id.*

In this case, the state's experts claimed to make an identification with even greater certainty than DNA evidence -- based on the absolute exclusion of all other knives in the world, not mere probabilities -- and with even greater infallibility -- asserting the impossibility of false positives, not just a low error rate. Yet, the "research" cited to back up these claims is absurdly deficient when compared to the rigorous study that accompanied the introduction of DNA evidence.[6]

To find the state's evidence in this case sufficient to satisfy *Frye/Ramirez* would undermine completely this Court's central concern with reliability. It would, moreover, set a dangerous precedent. The academic literature is replete with examples of forensic evidence that was once widely admitted -- without its reliability ever being seriously tested -- only to be proven highly *un*reliable when it was finally tested. *See, e.g.,* Paul C. Giannelli, *Scientific Evidence in Criminal Prosecutions,* 137 MIL. L.

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[6]For example, the "literature" supporting the uniqueness of all knives, referred to in the state's answer, at 68, consists of exactly two studies each comparing two consecutively manufactured knives. (S.R. 10, 14) As Popper explained: "We cannot establish that all swans are white by parading ten, one hundred, or one thousand white swans, for the next swan might still be black, and the postulate disproved. The scientist, instead, should seek the only definitive proof; that which would prove the thesis wrong. He should attempt to find black swans." KARL R. POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY at 40-41 (1961)), *cited in* Randolph N. Jonakait, *The Assessment of Expertise: Transcending Construction,* 37 SANTA CLARA L. REV. 301, 324 & n.70 (1997). The "scientists" in this field have looked only for white swans (i.e., have sought only to confirm not to challenge their basic hypothesis), and have pronounced, after examining only four swans, that black swans do not exist.

REV. 167, 174-76 (1992) (discussing demise of the paraffin test, voiceprints, and hypnotically-refreshed testimony). As this Court has explained, the very purpose of *Frye* is to "ensure that the jury will not be misled by experimental scientific methods which may ultimately prove to be unsound." *Flanagan v. State,* 625 So. 2d 827, 828 (Fla. 1993).

Most recently, the reliability of hair comparison evidence has been called into question. Like knife mark identification evidence, it is a highly subjective identification technique -- though it does not claim the exactitude of knife mark identification.[7] Hair comparison evidence would satisfy *Frye* if the court looked only at whether the technique is generally accepted among its practitioners, without regard to whether the reliability of the technique has been properly tested. *See Williamson v. Reynolds,* 904 F. Supp. 1529, 1558 (E.D. Okla. 1995) (noting that hair comparison was generally accepted among "hair experts who are generally technicians testifying for the prosecution" but not necessarily among "scientists who can objectively evaluate such evidence"), *aff'd in part*, *rev'd in part,* 110 F.3d 1508, 1522 (10th Cir.

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[7]It is important to note that, contrary to the trial court's assertion, it is not the case that knife marks either match or they do not. In fact, there can be a very high percentage of agreement between the striated marks made by tools that are known *not* to match. *See* Alfred Biasotti & John Murdock, *The Scientific Basis of Firearms and Toolmark Identification* in 2 DAVID L. FAIGMAN ET AL., *supra*, at 147 (studies have found "up to 28% matching striae in known non-matches produced by the ground working surfaces of tools."). Consequently, there is a tremendous amount of subjective judgment involved in deciding whether the similarities are sufficient to declare that the marks were made by the same tool.

1997). In fact, however, when hair comparison was subject to the very type of testing that has *not* been done in knife mark identification, error rates were found to be "as high as 67% on individual samples, and the majority of the police laboratories were incorrect on 4 out of 5 hair samples analyzed." *Id.* at 1556.

Based on this data, at least one federal district court has concluded that hair comparison evidence was not sufficiently reliable to be admissible under *Daubert*. *Williamson,* 904 F. Supp. at 1558. Although the district court's holding in *Williamson* was reversed on appeal on the ground that *Daubert* was not the appropriate standard in a federal habeas corpus proceeding,[8] its assessment of the unreliability of hair comparison evidence was vindicated. DNA tests on the hairs in question subsequently *excluded* Williamson and his co-defendant as suspects. Williamson had been sentenced to death and came within five days of execution.[9] Bill Dedman, *DNA Tests Are Freeing Scores of Prison Inmates,* N.Y. Times, April 19, 1999; Charles T. Jones, *DNA Tests Clear Two Men in Prison -- Escapee Sought in Slaying of Waitress*, Oklahoman, April 16, 1999; Charles T. Jones, *DNA Tests Expected to Clear 2 Men in '82 Slaying*, Oklahoman, April 14, 1999; *see also* Steve Mills & Ken Armstrong, *Convicted by a Hair,* Chicago Tribune, Nov. 18, 1999 (documenting role of hair

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[8] *Williamson v. Ward*, 110 F.3d 1508, 1522 (10th Cir. 1997).

[9] DNA tests on semen found in the victim's body identified the actual perpetrator as a prosecution witness who had been excluded as a suspect by the state's hair comparison expert. Bill Dedman, *supra*; Charles T. Jones, *DNA Tests Clear Two Men in Prison -- Escapee Sought in Slaying of Waitress*, Oklahoman, April 16, 1999.

comparison evidence in several wrongful convictions, including those of two capital defendants in Illinois who were later exonerated by DNA evidence).

This experience underscores the wisdom of this Court's insistence that the proponent of the evidence demonstrate not just "general acceptance" but the reliability of the proffered evidence. Appellant submits simply that the unsupported assertions of the state's experts cannot be sufficient to establish the reliability of knife mark identification.[10] The state should not be permitted to wrap its experts in the mantle of "science," with all the mystique that term holds for a jury, if the experts are completely unwilling to undertake the risk of being proven wrong that distinguishes real science from pseudoscience. *See United States v. Starzecpyzel*, 880 F.Supp. 1027, 1037 (S.D.N.Y. 1995).

V.

THE SUBSTANTIAL MITIGATING EVIDENCE WHICH WAS SUFFICIENT TO SUPPORT A LIFE RECOMMENDATION WAS NOT NEGATED BY DEFENSE COUNSEL'S ISOLATED IMPROPER

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[10]The state also urges this Court to rely on three cases from other jurisdictions, *Potter v. State,* 416 So. 2d 773 (Ala. Crim. App. 1982), *State v. Churchill,* 646 P.2d 1049 (Kan. 1982), and *Stout v. Commonwealth,* 376 S.E.2d 288 (Va. 1989), in which knife or axe mark identifications were admitted. This Court specifically rejected *Churchill* as unpersuasive in *Ramirez I*, because the "testimony that a particular knife caused the wound" had been admitted "without a predicate of scientific reliability." 542 So. 2d at 355. The same is true of the other two cases the state cites. In *Potter,* the appellate court did not address the scientific reliability of the evidence; it merely commented that the "weight and credibility of this evidence were, of course, for the jury to determine." 416 So. 2d at 777. In *Stout*, the knife mark identification evidence is only mentioned in passing in the "Facts" section of the opinion; its admissibility was not even an issue on appeal. 376 S.E.2d at 290.

REMARK IN CLOSING ARGUMENT WHICH THE JURY WAS PROMPTLY INSTRUCTED TO DISREGARD.

The state's answer ultimately comes down to a contention that the testimony of 14 defense witnesses, which established a host of mitigating circumstances that have been recognized repeatedly by this Court as sufficient grounds for a life recommendation, was rendered meaningless by a brief improper remark in defense counsel's closing argument that the jury was immediately instructed to disregard. In the remainder of its answer, the state attacks the credibility of defense witnesses and defends the reasonableness of the trial court's sentencing order giving little or no weight to the numerous mitigating circumstances. This Court has made clear, however, that the reasonableness of the trial court's sentencing order is not the appropriate inquiry in an override case:

> Under the state's theory there would be little or no need for a jury's advisory recommendation since this Court would need to focus only on whether the sentence imposed by the trial court was reasonable. This is not the law.

Ferry v. State, 507 So. 2d 1373, 1377 (Fla. 1987). The state's position in this appeal is indistinguishable from the argument rejected in *Ferry*. The issue here is not whether the trial court abused its discretion in evaluating the mitigating circumstances but whether "the jury's recommendation of life was reasonably based on valid mitigating factors. The fact that reasonable people could differ on what penalty should be imposed in this case renders the override improper." *Id.*

A. The Jury's Recommendation of a Life Sentence Was

Based On Valid Mitigating Factors.

Each area of mitigation is addressed in turn below.

Childhood Sexual Abuse. The state asserts erroneously that there was no evidence Ramirez was repeatedly sexually abused and implies that "[t]he only evidence that Defendant was sexually abused at all" was not credible. Answer Br. at 82. The trial court, however, properly found that the mitigating circumstance of childhood sexual abuse had been reasonably established. (R. 2481) Not only did Joseph's Aunt Estella actually witness Ernest Moody anally raping Joseph on one occasion, but Joseph's brother Leonard, who was raped 7 to 10 times by Moody, testified that Moody also frequently took Joseph away (just as he took Leonard away) from the other children and that when Joseph was brought back, he would be crying and too upset to play. (T. 3982-83, 4028, 4046) Both Leonard and Liz testified that they knew Joseph had been sexually abused as well. (T. 4045-46, 4112, 4116) The evidence that Joseph's siblings were abused and that the abuse had long-term damaging effects on them is not, as the state contends, irrelevant. Rather, it corroborated their testimony about Joseph. *Cf. Beasley v. State,* 503 So. 2d 1347, 1348-49), *aff'd on other grounds,* 518 So. 2d 917 (1988) (upholding use of similar fact evidence in child sexual abuse case); *Sias v. State,* 416 So. 2d 1213 (Fla. 3d DCA), *rev. denied,* 424 So. 2d 763 (1982) (same).

Relying on a non-override case, *Lara v. State,* 464 So. 2d 1173 (Fla. 1985),[11] the state contends that the trial court reasonably gave very little weight to the evidence that Ramirez was repeatedly sexually abused from approximately the age of eight because there was no evidence "that the abuse affected the defendant in any way." Answer Br. at 82; R. 2481. Leonard, however, testified specifically that the abuse had caused Joseph great emotional distress and "ruined his mind." (T. 4046) Moreover, appellant submits that the jury could have reasonably concluded as a matter of common sense that repeated sexual abuse would have a profoundly damaging effect on a young boy. Certainly experts agree that childhood sexual abuse has devastating, long-term effects. *See* Initial Br. at 58 n. 25, 61-63 (collecting authorities). And this Court has repeatedly recognized that childhood sexual abuse is significant mitigating evidence that supports a life sentence. *See, e.g., Almeida v. State,* 24 Fla. L. Weekly S336, S339 & n.1 (Fla. July 8, 1999) (finding death penalty disproportionate based in part on defendant's abusive childhood, including repeated sexual abuse beginning at approximately age 7); *Boyett v. State*, 688 So.2d 308, 310 (Fla. 1996) (override

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[11]In *Lara,* this Court held that "the trial court could properly conclude that appellant's actions in committing this murder were not significantly influenced by his childhood experience so as to justify its use as a mitigating circumstance." 464 So. 2d at 1180. It is not clear whether this language in *Lara* survives this Court's subsequent decision in *Nibert v. State*, 574 So.2d 1059, 1062 (Fla. 1990), which suggests that a trial judge may not properly refuse to consider evidence of childhood abuse as mitigation when a defendant does not establish a direct causal relationship to his later behavior. *Accord Walker v. State,* , 707 So. 2d 300, 318-19 (Fla. 1997). Lara himself subsequently received a new sentencing because his attorney was found to be ineffective at the penalty phase. *State v. Lara*, 581 So.2d 1288 (Fla. 1991).

improper based on valid mitigation including childhood sexual abuse); *Strausser v. State*, 682 So. 2d 539, 542 (Fla. 1996) (same). It is therefore difficult to understand how it could possibly be unreasonable, as the state suggests, for the jury to find this evidence to be a significant mitigating factor.

The state also defends the trial court's conclusion that the evidence of repeated sexual abuse was meaningless as mitigation because Joseph's siblings never killed anyone. Answer Br. at 82. If this rationale prevailed, however, it would eviscerate an entire line of Eighth Amendment precedent, stretching from *Eddings*[12] to *Penry*,[13] for it is equally true that not all people who are mentally ill, mentally retarded, brain damaged, or addicted to drugs or alcohol commit murder. Nevertheless, the fact that a defendant *does* suffer such impairments has been held to lessen his moral culpability compared to others who are not so impaired. *Penry,* 492 U.S. at 319, 327-28.

Physical Abuse. Again applying the wrong legal standard, the state maintains that the trial judge reasonably gave the evidence of childhood physical abuse little weight because the testimony was "weak" and "the alleged beatings occurred because of misbehavior." Answer Br. at 83-84. The strength or weakness of the testimony was, however, for the jury to decide in the first instance. *Holsworth v. State*, 522 So. 2d 348, 354 (Fla. 1988). The jury was entitled to conclude as a matter of common sense that, regardless of whether it was prompted by misbehavior, beating a child with

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[12]*Eddings v. Oklahoma*, 455 U.S. 104 (1982).

[13]*Penry v. Lynaugh*, 492 U.S. 302 (1989).

an extension cord to the point that it leaves scars is not proper discipline. The jury could also have properly attached greater significance to Joseph's mistreatment by his father because it immediately followed the sexual abuse by Ernest Moody and thus occurred at precisely the time a loving and stable father figure was most critical. *See* Initial Br. at 62-64 (collecting authorities).

Emotional Neglect. The state next argues that the trial court "properly found" that the evidence "fell short of showing emotional neglect as mitigation." Answer Br. at 84. Contrary to the state's assertion that "there was no testimony" about Ramirez' relationship with his mother, Answer Br. at 84, Liz testified that their mother failed to show affection to Joseph when he was a child. (T. 4111) The trial judge, moreover, rejected this mitigating circumstance not because there was no evidence to support it but because he did not believe a child's development would be adversely affected by a mother's emotional unavailability when she otherwise worked hard to provide for her children. (R. 2481-82) The jury could have concluded, however, consistent with well-established principles of child development, (see Initial Br. at 65), that Mrs. Longworth's emotional unavailability, particularly when combined with the sexual abuse by Ernest Moody and the physical abuse by Joseph's father, was a significant mitigating factor. *See* Initial Br. at 65-66.

Adjustment to Prison. The state first attempts to diminish the significance of the testimony of the five corrections officers who testified on Ramirez' behalf, contending that they had only "brief" contact with them during his pretrial detention.

Answer Br. at 85. In fact, according to the Department of Corrections, Ramirez spent a total of 71 months -- nearly *six years* -- in pretrial detention in Dade County -- hardly a "brief" time.[14] *See* Florida Department of Corrections website (http://www.dc.state.fl.us/). The jury was entitled to give "great[ ] weight" to the testimony of these corrections officers, "who would have had no particular reason to be favorably predisposed toward one of their charges." *Skipper v. South Carolina,* 476 U.S. 1, 8 (1986).

Lack of Future Dangerousness. Again relying on a non-override case, the State asserts that the trial court "properly determined" that the mitigating circumstance of lack of future dangerousness did not apply .[15] Answer Br. at 86. As the state acknowledged at trial, however, the jury could consider Sorensen's nonopinion testimony about the factors associated with successful adaptation to prison and about Ramirez' record and draw its own conclusions about Ramirez' future behavior. (T. 4178-79) Thus, even if the trial court found Sorensen's testimony unpersuasive, the

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[14]The state also asserts that the defense expert, Dr. Sorensen, improperly "denigrated the severity" of Ramirez' disciplinary reports and that Sorensen was rebutted by the state's expert, Ted Key. Answer Br. at 84-85. In fact, however, Key testified that Ramirez' DRs were in the *least* serious category. (T. 4356-58)

[15]The state apparently cites *Willacy v. State,* 696 So. 2d 693, 695 (Fla. 1997), for the proposition that the trial court's findings regarding the existence of aggravating and mitigating circumstances are presumptively correct. If this were true in the context of a jury override, however, the *Tedder* standard would be a nullity. *Ferry,* 507 So. 2d at 1376-77.

jury was entitled to disagree.[16]

With respect to the much more limited aspect of Sorensen's testimony -- his opinion that Ramirez would likely continue to function well in prison and not pose a danger in the future -- the state insists that it made a timely *Frye* objection during the sentencing hearing, so that the judge could properly find the evidence inadmissible even after the jury returned its recommendation. Answer Br. at 85. A review of the relevant portion of the record discloses, however, that the state did not once mention *Frye* (though it had specifically made *Frye* objections to other defense witnesses during the trial) or ask for a *Frye* hearing. (T. 4177-82) The court never addressed the scientific reliability of Sorensen's methods because the state, seizing on Sorensen's misunderstanding of a voir dire question,[17] objected only on the ground that Sorensen was not qualified as an expert in a recognized field. (T. 4177, 4178, 4180-81) The state's contemporaneous objection was therefore not sufficiently specific. *See Hadden,* 690 So. 2d at 580. And its specific *Frye* objection, made only after the jury returned its life recommendation, was not timely. *Jones v. State,* 701 So.

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[16]As the state notes, the trial court rejected Sorensen's study comparing murderers with other types of offenders on the ground that Ramirez was not only a murderer but also a robber and burglar. Answer Br. 86; R. 2476. This is a false distinction, however, because fully 58 percent of the *Furman*-commuted inmates Sorensen studied were convicted, like Ramirez, of committing murder in the course of another felony. James W. Marquart & Jonathan R. Sorensen, *A National Study of the Furman-Commuted Inmates: Assessing the Threat to Society from Capital Offenders,* 23 LOY. L.A. L. REV. 5, 18 (1989).

[17]*See* Initial Br. at 73.

2d 76, 78 (Fla. 1997). The trial court therefore improperly relied on the state's *post hoc* objection to disregard Sorensen's testimony. At a minimum, the court should not have ruled the evidence (retroactively) inadmissible without conducting a proper *Frye* hearing.[18]

Family Relationships. The state asserts that the trial court "properly accorded" this mitigator "little weight." Answer Br. at 87. Again, the jury was entitled to disagree. Moreover, unlike *Robinson v. State,* 610 So. 2d 1288, 1292 (Fla. 1992), on which the state relies, this was far from the *only* mitigating circumstance present in this case.[19]

Alcohol and Marijuana Use . Appellant does not dispute that the mitigating effect of intoxication "depends upon the particular facts of the case." Answer Br. at 87. The state, however, misses the point that this was an issue for the jury in the first instance, and the jury reasonably could have viewed the evidence differently than the trial court. *See Holsworth,* 522 So. 2d at 354; Initial Br. at 82-83.

The state's attempt to distinguish the cases cited in the initial brief is unavailing.

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[18]While appellant believes that the scientific reliability of this evidence would be established in a *Frye* hearing, the record below is necessarily incomplete because the trial court did *not* conduct a *Frye* hearing. Moreover, a refusal to admit such evidence under *Frye* would raise potentially complex Eighth Amendment issues under *Skipper, supra*.

[19]The state also inexplicably relies on *Bolender v. State,* 422 So.2d 833, 838 (Fla. 1982), in which this Court specifically noted that the defendant "presented *no* testimony showing any mitigating circumstance, statutory or nonstatutory" -- which is plainly not the case here.

In particular, the state's contention that each of these cases involved *less* purposeful behavior than the instant case is, factually, wrong. The minimal discussion of the facts in *Barrett v. State*, 649 So. 2d 219, 220 (Fla. 1994), discloses that the four murders in that case were apparently planned months in advance by a group of men. Similarly, in *Cheshire v. State,* 568 So. 2d 908, 911 (Fla. 1990), the state had argued that the evidence was equally consistent with a planned revenge killing as an act of passion. Among other things, the defendant had slashed the tires of his intended victims, apparently to ensure they could not escape. *Id.* at 910. This Court, moreover, noted simply that there was "some evidence" that the defendant had been drinking at the time of the murder and concluded that, while the trial court may have reasonably found that "Cheshire was not sufficiently intoxicated . . . a reasonable jury could have relied upon this evidence to conclude Cheshire was not in full control of his faculties." *Id.* at 911. In *Amazon v. State,* 487 So. 2d 8, 9 (Fla. 1986), the defendant "concocted a burglary of his own home" and "went to police with an exculpatory story." The defendant also allegedly told a police officer he had killed the victims -- one of whom was on the telephone asking a neighbor for help -- because they could identify him. *Id.* at 13. This Court specifically noted, moreover, that the evidence Amazon had been taking drugs the night of the murders was "inconclusive." *Id.* Nevertheless, the jury was entitled to give the evidence more weight than the trial court did.

B. The Trial Court Erroneously Attributed the Jury's Life Recommendation to Sympathy and a Brief Improper Remark the Jury Was Immediately Instructed to Disregard.

The state's answer underscores the extent to which the trial court's assessment of the mitigating evidence turns on nothing more than a difference of opinion with the jury. *Stevens v. State*, 552 So. 2d 1082, 1086 (Fla. 1989). Unlike *Francis v. State,* 473 So. 2d 672, 676 (Fla. 1985), on which the state relies, there is a more than "reasonable basis discernible from the record to support the jury's life recommendation." This Court has made clear that, in these circumstances, the trial court may not justify an override simply by attributing the jury's recommendation to sympathy or improper argument. *See, e.g., Esty v. State,* 642 So. 2d 1074, 1080 (Fla. 1994); *Morris v. State,* 557 So. 2d 27, 30 (Fla. 1990); *Masterson v. State,* 516 So. 2d 256, 258 (Fla. 1987).

Such an assumption is particularly unwarranted in the circumstances of this case where the trial court attributed the jury's recommendation to a *single* improper reference to lingering doubt, which the jury was instructed immediately to disregard.[20]

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[20]The state now contends that the entire defense closing argument was a "barrage" of improper comments. Answer Br. at 90. As noted in the initial brief, the state complained in its sentencing memorandum about two other remarks made by defense counsel; the trial court, however, did not rely on them as grounds for the override and, in both instances, the state's objection was sustained, and there was no request for a curative instruction. *Initial Br.* at 85 n. 43. Taking some liberties with the record, the state now complains about three additional remarks, which it characterizes as improper, even though none of them was objected to below. Answer Br. at 89-90. Contrary to the state's assertion, defense counsel did not imply Ramirez was mistreated while incarcerated, he simply characterized the jail as a "hell hole."

(R. 2485-86; T. 4424) *See* Initial Br. at 85-86 (collecting cases). Nor is it reasonable, as the state suggests, to attribute the jury's recommendation to sympathy for the defendant's family when there was never any suggestion the family members behaved inappropriately, the prosecutor argued that any distress to the defendant's family was of his own creation, and the jury was specifically instructed not to consider sympathy in rendering its decision. *See* Initial Br. at 87.

Finally, the mitigation in this case is far more substantial than in the cases on which the state relies to support the trial court's override. In *Garcia v. State*, 644 So. 2d 59 (Fla. 1994), this Court upheld an override in a double homicide and rape of two elderly women, in which the jury had unanimously recommended death for one homicide but life for the other. The Court reasoned that there was no difference in the aggravating and mitigating circumstances for the two homicides and that most of the mitigating circumstances submitted by defense counsel had no record support whatsoever.[21] *Id.* at 63. In *Washington v. State,* 653 So.2d 362, 365 (Fla. 1994), this

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(T. 4418) Defense counsel referred to the "anguish of that childhood these kids" -- Ramirez *and* his siblings -- "must have gone through." (T. 4422) And he asked that Ramirez be allowed to continue to make a positive contribution to the lives of his family members. (T. 4429) The state, quite properly, did not consider any of these remarks to be objectionable at the time they were made.

It should be emphasized, moreover, that the prosecutor gave a graphic and powerful closing argument, augmented with enlarged photographs of the victim, before and after the murder, that reduced the jury to tears. (T. 4393-96, 4409-12, 4415-16)

[21]For example, defense counsel argued that the defendant had an exemplary prison record when he had a conviction for instigating mutiny while incarcerated in

Court upheld an override of a jury's life recommendation for the murder and rape of an elderly woman, agreeing with the trial court that the only mitigating circumstance submitted -- the defendant's potential for rehabilitation -- was "extinguished by the totality of [his] past criminal history, and his behavior in jail to date."

In *Torres-Arboledo v. State,* 524 So.2d 403, 413 (Fla. 1988), this Court upheld an override on the ground that no reasonable person could find that the testimony of one expert witness that the defendant was intelligent and had potential for rehabilitation could outweigh the aggravating circumstances, particularly given the defendant's second homicide conviction. Significantly, this Court later held that the jury's life recommendation might well have been sustained had Torres-Arboledo's counsel presented additional evidence regarding the defendant's adjustment to prison, his poverty-stricken childhood, his academic success and support of his family, and the disparate treatment of an alleged co-perpetrator. *Torres-Arboledo v. Dugger,* 636 So. 2d 1321, 1325 (Fla. 1994) (remanding for resentencing with benefit of prior life recommendation based on ineffective assistance of trial counsel).

In contrast to the cases cited by the state, the extensive mitigation presented in this case has been found by this Court in numerous cases, with comparable or greater aggravation, to provide ample grounds for a life recommendation. *See, e.g., Mahn v. State,* 714 So. 2d 391, 401-02 (Fla. 1998) (life recommendation supported by evidence

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Leavenworth federal penitentiary and submitted that the defendant had a "peaceful nature" and "no significant history of prior criminal behavior" despite four prior violent felony convictions. 644 So. 2d at 63.

of childhood abuse, lack of parenting, drug and alcohol abuse; double homicide, HAC aggravator); *Craig v. State,* 685 So. 2d 1224, 1125 n.2, 1230 (Fla. 1996) (life recommendation supported by evidence of good prison conduct, childhood background, family role, good work habits, possibility of rehabilitation; second murder conviction, avoiding arrest, pecuniary gain, and CCP aggravators); *Barrett,* 649 So. 2d at 223 (life recommendation supported by evidence of intoxication, potential for rehabilitation, family relationships, disparate treatment of co-defendants; quadruple homicide, avoiding arrest, pecuniary gain, CCP, and disrupting government function aggravators); *Parker v. State,* 643 So. 2d 1032, 1035 (Fla. 1994) (life recommendation supported by evidence of intoxication, history of substance abuse, capacity to form loving relationships, and difficult childhood; double homicide, pecuniary gain, CCP, and avoiding arrest aggravators); *Cooper v.State,* 581 So. 2d 49, 51 (Fla. 1991) & *id.* at 52 (Barkett, J., concurring) (life recommendation would have been supported by conflicting evidence regarding identity of triggerman, history of alcohol abuse, lack of future dangerousness, positive character traits; under sentence of imprisonment, prior violent felony, felony-murder, and avoiding arrest aggravators).

CONCLUSION

For the foregoing reasons, and those set forth in the initial brief, appellant's convictions must be reversed and the case remanded for a new trial, and the jury's recommendation of life imprisonment must be given effect.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1320 N.W. 14th Street
Miami, Florida 33125
(305) 545-1958

BY:_____
CHRISTINA A. SPAULDING
Assistant Public Defender
Florida Bar No. 995320

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded by mail to Assistant Attorney General SANDRA JAGGARD at the Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 950, Miami, Florida 33131, this _____ day of January 2000.

_____
CHRISTINA A. SPAULDING
Assistant Public Defender