IN THE SUPREME COURT OF FLORIDA

DOLAN C. DARLING,
a/k/a
SEAN SMITH

Appellant,
v. CASE NO. SC94691

STATE OF FLORIDA,

Appellee.
_______________________/

ON APPEAL FROM THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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CERTIFICATE OF FONT

This brief is typed in Courier New 12 point.

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STATEMENT OF THE CASE AND FACTS

Appellee, the State of Florida, disagrees with and/or supplements the Statement of the Case and Facts contained in the initial brief, as follows:

The first witness was Zdzislaw Raminski [hereinafter "Jesse"]. (T 323).[1] Jesse met the victim, Grazyna Mlynarczyk [hereinafter "Grace"] in Poland in '90, '91, where she lived with her husband and children.[2] (T 324-26). She became Jesse's "girlfriend." (T 326). Grace came to Orlando on September 28, 1992, and she and Jesse continued their "personal relationship." (T 325).

Jesse owned and operated Able Transportation which provided shuttle service to and from the "airport going out of town or Disney area." (T 326). Grace worked for his company. (T 326). She also supported herself by "cleaning houses and she was a baby sitter." (T 327).

Jesse last saw Grace alive "around 9:30 in the morning" on October 29, 1996. (T 327). "She was doing laundry" at the facility at her apartment complex. (T 327). Jesse "didn't get out of my car," but talked with her briefly. (T 328). She told Jesse that "she has appointment, doctor office." (T 328). Jesse gave her a "AM South Bank" envelope containing $300 "for the work for last

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[1]"T" refers to the transcripts of the guilt phase proceeding.

[2] Her children were "about 19 and 13." (T 339).

week.” (T 329, 330). She was dressed in shorts and “a little T-shirt.” (T 329).

Jesse left and went to work. About 10:15 he telephoned her, and “she said I’m still going back to bring laundry upstairs and clean apartments, and I will go later to the doctor, I will call you back.” (T 331).

Jesse telephoned her “shortly before noon.” (T 331-32). He was in Winter Haven and using a cell phone; he “couldn’t get through.” (T 332). He phoned again around 2:00 when he was “going to Vero Beach with passenger.” (T 332). The call went through, but “nobody answer. I left her message.” (T 332). He called again later and “left again message, I’m coming to Orlando.” (T 333). Around 4:10 PM, Jesse “called again and I left a message. I said, I’m at home already.” (T 333). A few minutes later, Jesse “went to her apartment.” (T 334).

Jesse used his key to enter the apartment. (T 334). He “didn’t pay attention” to whether the door was locked or not. (T 334). He “went inside.” (T 334). The “basket with laundry” was “in the living room, on the way to bedroom.” (T 334). Grace “never” left the laundry basket with clothes in it there, and Jesse “was surprised.” (T 335). He was again “surprised” to see that the “door from bedroom was closed.” (T 335).

Jesse entered the bedroom. (T 335). “I find Grace. She lay down on the floor in the carpet. Her half body in the closet and

half body outside close to the bed." (T 336). Her face was near the bed, and her legs were inside the closet. (T 336). She lay on her back, and Jesse saw no obvious signs of injury. (T 336). He called out to her a "few times," but "[s]he didn't answer. Then I took her body, and I put it on bed." (T 336). He "tried to help her," but "her body was not warm like usual." (T 337). "When I put her body on the bed my hand was in blood and I got some blood on my clothes, too." (T 337). He "immediately" called "9-1-1." (T 337).

The fire department responded first, and they "tried to help her." (T 337). "And after few minutes they say, she's dead." (T 338). Jesse recalled no broken, or disturbed, objects in the apartment. (T 365).

On cross, Jesse said that Grace told him that her husband "was drinking a lot of alcohol." (T 340). Her husband knew about the relationship between Grace and Jesse. (T 341). Jesse "told the police that Grace's husband had threatened to kill her." (T 361). Jesse was also married, and his wife did not know about his relationship with Grace. (T 340).

Grace, who was in the country on an expired Visa, did not have a bank account. (T 339, 342). Jesse paid her in cash "[m]ost of the time." (T 343). She had no "working papers," and so he "could not pay her by paycheck." (T 364).

Grace's doctor's appointment was with "a gynecologist." (T 342). She had complained to Jesse the morning of her murder, but

not before. (T 342).

Jesse said that at some unspecified time, Grace told him that "she was nervous about the maintenance people at the apartment complex." (T 345). Jesse put a chain on her door, and she asked to have the lock changed. (T 345). He told the police about this. (T 356).

Jesse went to the apartment which was "[a]bout one mile away" from his home because he was concerned that she had not returned his calls. (T 346). "It was after 4:00," and she should have been "back already from the doctor." (T 346).

"There was some people behind my vehicle . . . talking not too far" away when he spoke with Grace that morning. (T 348). He did not know whether anyone saw him give her the envelope containing the money. (T 348).

Another thing that surprised and "scared me a little bit" when he arrived at her apartment was that the blinds were closed, and "she never closed" them during the daytime. (T 349). It was not dark that night until around 6:00 or 6:30 PM. (T 349-50).

Jesse did not put a towel over Grace's body, and he did not recall anyone else doing so. (T 351). When he first saw her, Jesse "was thinking she sleeping," perhaps as a result of some medication she might have gotten from the doctor. (T 352-53). When he found her on the floor, she was naked from the waist down. (T 353).

Grace used an IUD for contraception. (T 354). He thought she

had it for "about a year." (T 368).

The police asked Jesse to verify his whereabouts on the day of the murder, and they took fingerprints and bodily fluid samples from him. (T 355). He had "no problem" verifying his whereabouts. (T 357). Jesse was not aware of ever being regarded as a suspect, although the police told him they were taking his blood sample "to eliminate my name." (T 361, 362).

The next witness was Richard LaLonde, a lieutenant for the Orange County Fire Rescue. (T 376). Two others were with him, Firefighter Sexton and Engineer Sharlarf, when he arrived at Grace's apartment. (T 377). Lt. LaLonde spoke with Jesse upon arrival. (T 377-78). Jesse was acting "the way you would act if some emergency is going on." (T 378). He did not go into the bedroom with them, although he had already told them "that he had moved her from the closet to the bed." (T 381, 382).

Grace "was nude except for a shirt, open shirt." (T 378). He "checked for a pulse and found none." (T 378). He moved Grace to the floor to do CPR, but ended up not doing the procedure when he "noticed that rigor mortis had set in." (T 379). At that point, he knew she was "dead and beyond hope," although he could see no obvious injuries. (T 379, 383). He did not recall getting any blood on him, although he did pull Grace up by the arms to look for injuries. (T 383). He "sat her up straight," and "then laid her back down." (T 384).

Firefighter Sexton, "[b]eing ever the gentleman, went to the living room and retrieved a towel from the laundry basket and recovered it" [her lower torso/private area]. (T 379-80). One of the firefighters washed his hands in the kitchen sink. (T 380). A picture showed Grace's "hands on top of the towel," but Lt. LaLonde could not say who put them there. (T 382).

The apartment was neat. (T 384).

William Pietrazrak, then a deputy with the Orange County Sheriff's Office, was the first law enforcement officer to respond to Grace's apartment. (T 385). He spoke with the fire department personnel and also to Jesse. (T 385-86). He was there to "[s]ecure the scene" - to "[l]et nobody else in, disturb nothing." (T 387, 388). He performed that function. (T 388).

Grace "was wearing a white tank top and she was covered from the waist to mid thigh with a towel." (T 387). Deputy Pietrazrak questioned Jesse, who was "out in the alcove" and who was "[v]ery upset." (T 388, 390). The deputy did not go into the bedroom, but stopped at the threshold. (T 390). He remained outside the room to avoid disturbing the area. (T 391).

Although he did not see it, the deputy was told by one of the firefighters that he had washed his hands in the kitchen sink. (T 392). The officer asked the fire department personnel to leave. (T 392). From that point on, no one except those from the Sheriff's Office entered the apartment. (T 392).

Michael Davis, also an Orange County Sheriff's Office deputy responded to the scene as "a crime scene investigator." (T 393). He described the layout of the apartment, indicating that access to the bathroom was through the bedroom. (T 395-96). Inside the bathroom, certain items were found and taken into evidence. (T 397). These included "a lotion bottle." (T 397-98). A pink throw pillow, found in the bathtub, was also recovered and admitted into evidence. (T 398-99). The pillow had a blackened area in it. (T 401).

Deputy Davis spent "nine days" at the crime scene. (T 405). He cut out pieces of carpet and linoleum and took the entire front door. (T 405). A red stain on the bathroom counter top did not test positive for blood, but was identified as nail polish. (T 407). However, "the lotion bottle, the pink pillow, piece of linoleum floor, wood trim, carpeting" were all collected. (T 407). In addition, "vacuum sweeps for trace evidence in the carpeting" were done. (T 407, 426). He found " seventy, eighty" fingerprints, and "took over a thousand photographs." (T 408-09).

The pink "pillow had a gunshot type hole through it. So I'm sure it was used" to kill Grace. (T 409). "A doctor, had observed a hole in the back of her head." (T 409). There was only "a little amount of blood present at the scene" and "fairly small" blood spatter. (T 410, 411). There was a bloody smear on the telephone in the hallway, and the phone was taken into evidence. (T 411-12,

413). There was blood spatter in the area from where Jesse had moved Grace's body. (T 427).

"Everything was searched."[3] (T 413). "No evidence was found in the clothing" in the laundry basket. (T 413). "[A] pair of panties on the toilet seat" lid (which was "closed") and a Gilby's gin bottle were also taken into evidence. (T 414, 430, 432).

Jewelry boxes containing jewelry and jewelry on a nightstand coaster appeared undisturbed. (T 431, 433). Two AMSouth Bank envelopes were found, containing cash totaling about $1,200. (T 432-33). A "shoe box" also "contained a thousand dollars," and a wallet had $58 in it. (T 433, 434). The phone book was open to "the O.B./G.Y.N section." (T 434).

"[T]he apartment was quite neat." (T 410). There were "[n]o signs of a struggle." (T 410, 412). The "only things in the apartment that were out of place were the lotion bottle in the sink and the pillow in the tub." (T 437).

The towel was already on Grace's body when the deputy arrived. (T 411). He did not know who placed her hands over it, but thought it was most likely "the fire department." (T 411). Although that would not contaminate the crime scene, "[i]t may contaminate

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[3] Apparently, this reference is to "everything" in the apartment; the "laundry room" at the apartment facility was not searched. (T 432). However, the apartment dumpsters and Jesse's motor vehicle were searched; nothing significant was found. (T 435).

evidence on the body." (T 411).

The air conditioning was on and working until about "day four or five." (T 411). "Maintenance had to be called out on that." (T 411).

The next witness was Dr. William Robert Anderson of the Orlando Medical Examiner's Office. (T 443). He was accepted as an expert without objection. (T 444). He arrived at the crime scene about 45 minutes after his investigator who "arrived about 7:00 P.M." (T 445). A diagram showing the "layout of the apartment" was admitted into evidence without objection. (T 449).

Dr. Anderson testified to the "defect" in the pillow, pointing out the "cloud of soot" from the "burning gun powder" left on the pillow as the "bullet, comes out." (T 450). The gun was fired at close range because "in the victim only a small amount of soot material. But . . . on the pillow there is a significant amount of that soot material." (T 450). "[T]he end of the weapon was up against that pillow . . . fairly tightly . . . .." (T 451). He testified that the "defect in the middle is consistent with a bullet passing through . . ., creating a tear." (T 451).

The victim's "upper body" was "covered with a T-shirt." (T 451). A towel covered her lower body. (T 451). When the doctor saw Grace at the scene, "[r]igor mortis was complete." (T 453). He estimated she "was probably dead at least six hours from the time we saw her, which was about seven." (T 453). He gave a range of

"greater than six hours, probably less than 18 or twenty." (T 454).

The bullet entered "the right back of the head." (T 454). Grace had an abrasion "consistent with something having been up against the cloth transferring energy across to the skin and creating that." (T 455). "That pillow there" was consistent with the abrasion. (T 455).

The doctor found that Grace had "some vaginal injuries, but nothing that would make her bleed significantly." (T 456). There was "[a] lot of bleeding . . . inside the brain," but "she's gonna die pretty quick." (T 456). In fact, "the rapidity in which she dies" is "one of the reasons she probably didn't bleed." (T 457).

There was "seminal purulent" in the vaginal area and bruising on the "back of the elbows . . . consistent with some moving around." (T 458). There was "a hemorrhage" which "means that took place when circulation was alive." (T 459). The vaginal area abrasions were "consistent with vaginal trauma from penetration of some object, penial, digital, some other object." (T 459). The doctor, having "done a lot of clinical rape exams," pointed out that the "tear of the labia majora, which is a very sensitive area" was "quite painful." (T 460). "This would not be consistent with consensual sex, in that the pain would interrupt the activity. It would be painful enough that consensual sex would not apply after that point." (T 460).

The "rectal area" had "some tears." (T 458). The tears were

"acute," and were caused by "[d]igital penetration, penial penetration, some trauma." (T 459). This tear was also painful. (T 460).

The doctor opined that "[c]onsciousness would probably not be more than a few seconds," however, "[s]he would have no motor activity." (T 463). Grace had "no ability to move anything at that point." (T 463). The "gunshot wound to the head with the injuries . . . described" was the cause of death. (T 463-64, 478).

On cross, Defense Counsel attempted to get the doctor to agree that the tears and trauma on Grace's body could "have been a rough sex type situation . . . something besides rape." (T 465). Dr. Anderson declined, responding that "[i]t could have been very violent sex." (T 465). The doctor agreed with Defense Counsel that if he scratched himself "vigorously" and "with enough force" over "a time," he could make an abrasion.[4] (T 468, 469). "[T]hat's going to create a painful situation. But it is possible to do it to yourself." (T 469). Dr. Anderson also explained that "itching and redness as a result of some . . . cervical inflammation" would not likely cause the abrasion. (T 469-70). He added: "Those were not scratch-type abrasions." (T 474). Any "cervical inflammation

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[4] The doctor explained that an abrasion is "more than a facial scrub." (T 469). It "is down to the area where the normal surface skin is removed . . . the vascular part of the skin that's got nerves . . . .. [W]hen you open that and scrape it, it's going to be painful." (T 469).

is . . . anatomically a long way away from the . . . vaginal area," and would not be treatable with "creams and lotions." (T 469-70, 471). Moreover, cervical inflammation would not affect the vaginal area.[5] (T 470). Indeed, the inflammation was not even visible until the cervix was removed during the autopsy. (T 472). The doctor concluded: "[T]here wasn't anything in the labia that would explain those abrasions other than trauma."[6] (T 474).

Dr. Anderson identified three areas of "disturbance" in Grace's apartment: A pillow with a bullet hole in the bathtub, "blood spatter on the door of the closet," and "blood present in the closet area." (T 472).

John Fisher was the next witness. (T 487). He was "a forensic analyst with the Sheriff's Office" at the time of the murder. (T 488). His expertise was primarily "in the chemical detection and enhancement and recording of fingerprints. (T 489). He was admitted "as an expert in the chemistry of fingerprints, the detection, enhancement and recording of fingerprints." (T 490).

Mr. Fisher identified State Exhibit 5, "a skin care lotion bottle." (T 495). He developed photographs and records of the

[5] The doctor concluded that Grace had "moderate cervical inflammation." (T 470).

[6] Dr. Anderson had "seen many, many sexual assault victims that don't have . . . defense wounds . . . .." (T 479). Indeed, in "[t]he majority of the cases of sexual battery . . . they don't put up a struggle . . . .." (T 480).

fingerprints for submission to a comparison expert. (T 495). He developed a photo of fingerprints from the lotion bottle, and it was admitted as Exhibit 14. (T 495, 499). He opined that the fingerprint on the lotion bottle had been there less than a year.[7] (T 505-06). Despite their careful examination of the scene, the expert was sure that not all fingerprints were recovered. (T 499).

The State recalled Dr. Anderson. (T 508). He identified medical-type smears, swabs, and slides he had prepared during the autopsy. (T 509-10). Those items were admitted into evidence without objection. (T 511-12).

Stewart DeRitter next testified. (T 514). He did a canvas of Grace's neighborhood to determine whether there were witnesses with information regarding the murder. (T 514-15). In that regard, he contacted Darling (also known as "Sean Smith) on October 30th, the day after the murder. (T 515, 516). Darling's apartment was "[j]ust North" of Grace's apartment. (T 517). Darling said "he was working and didn't know anything of the incident." (T 517).

The next witness was Richard Engram, a veteran detective with the Orange County Sheriff's Department. (T 521). He witnessed blood being taken from Darling and identified a "tube of blood" containing Darling's blood sample. (T 522-23). It was admitted, without objection, as exhibit 21. (T 523).

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[7] In comparison, fingerprints left on porous surfaces have been developed "[b]etween 20 and 25 years." (T 506).

Tony Moss testified that he is "a latent print examiner for the Orange County Sheriff's Office," and was admitted as an expert "in the area of fingerprint comparison" without objection. (T 524-25). He was shown Exhibit 14 (photo of lotion bottle fingerprint) and identified it as evidence on which he performed fingerprint comparison. (T 525-26, 529). He compared the fingerprints on Exhibit 14 with those obtained from Darling. (T 526). He found a fingerprint on the lotion bottle that belonged to Darling. (T 529). It was of Darling's "right thumb." (T 529).

Mr. Moss compared many prints from the scene, and in addition to Darling's print on the lotion bottle, he "identified several" as belonging to Grace, and one belonging to Jesse. (T 531). He found 97 prints "of value," and 74 which were not. (T 534-35). He could not identify to whom some prints "of value" belonged. (T 540). Of those, "a lot of them came off the walls inside the house and you never know who was . . . visitors . . . or whatever that left the fingerprint there." (T 541).

The next witness was Gary Daniels, a Florida Department of Law Enforcement forensic serologist. (T 543). He was accepted as an expert "in the area of forensic serology" without objection. (T 544). Mr. Daniels tested the vaginal swabs taken from the body of the victim and found semen on them. (T 545). Likewise, he found semen on the rectal smear. (T 546).

Mr. Daniels also identified "a vial of the victim's blood."

(T 547). He created "a stain card" for examination. (T 546). The stain card was admitted without objection. (T 550).

David Baer, a Senior Crime Laboratory Analyst in the DNA Section of the Florida Department of Law Enforcement Orlando Crime Laboratory, began doing DNA work in the Laboratory upon its inception in 1991. (T 559). He has worked with that unit continuously since that time through the date of the trial; he had been with FDLE for some 19 years. (T 559). He has been qualified as an expert in the performance and interpretation of DNA allowances in Florida courts "fifty to sixty times." (T 560).

Upon being tendered as an expert by the State, Defense Counsel objected on the basis that "this witness hasn't indicated any qualification in the area of statistical analysis." (T 561). Mr. Baer said that although he does not "claim to be a statistician," he is "familiar with how statistics are used in this instance." (T 561). Moreover, he has been qualified to render an expert opinion in the area of statistic interpretation of DNA tests in "just about any time I testify on DNA . . .." (T 562). He has never been denied expert qualification in that area. (T 562).

His formal education included "about sixteen hours in statistics" during one 160 hour course; in addition, he has been educated in statistics in several "other short courses," including the "Statistic Workshop in Ninety-five." (T 563, 565). Mr. Baer testified that he uses the "modified ceiling principal" formula

which is a variation of the Product Rule that which was recommended by the National Research Counsel Report in 1992. (T 564). The National Research Counsel [NRC] is "part of the National Academy of Sciences. It's sort of an independent part of the federal government." (T 674). It is not a law enforcement agency. (T 674).

Persons working in the rapidly developing DNA field became concerned about population substructuring and its effect on DNA databases and calculations based thereon. (T 670-72). The NRC created the modified ceiling method of calculation, a more "conservative way of doing the statistical calculations," (T 564-65), to "take away any problems that might even come from population substructuring." (T 671). "[T]his was overcompensating for, something that was not even really a problem." (T 671). In 1996, a second NRC committee determined that the more conservative approach was "not necessary;" it "went too far, it was too conservative." (T 565, 671). This committee recommended that the calculation method be "open[ed] up" to make the "match window twice what we normally had done before." (T 671). The normal match window was "one plus or minus 1.735 percent." Another approach was to "take your Product Rule calculation and put a range around it ten times more, or one-tenth less." (T 672).

Mr. Baer acknowledged that there are "issues about the genetic variation between different populations," and to compensate for that, he does "three calculations." (T 565). Each calculation is

based on a different data base; he uses "one based on Black data, one based an (sic) Caucasian data and one based on South Eastern Hispanics from Miami area where there are racial difference[s] in D N A types." (T 565). Use of the ceiling principal more than compensates for any differences "within the major ethnic groups" which are regarded as "very insignificant" in any event. (T 565-66).

Mr. Baer testified that "[t]here is no one formula for a sample size" for a DNA database. (T 566). This has been a matter of "quite a bit [of] debate over how big a sample size you need to do for D N A testing. It's said . . . two hundred samples are usually sufficient." (T 566). The formula used by FDLE "when we do the modified ceiling calculations . . . gives a ninety five percent upper confidence level." (T 567). Mr. Baer calculated the data in this case using "the Product Rule" and also the Modified Ceiling Principal." (T 568).

The Caucasian database used in the instant case is one which Mr. Baer and FDLE produced in the Orlando laboratory. (T 569). He used the Black and Hispanic databases produced by the FBI. (T 569). Mr. Baer relies on the expertise of "other statisticians" when reaching his expert opinion. (T 569).

After *voir dire*, Defense Counsel objected "to the witness being qualified to discuss analysis as an expert in that field. I don't have any objection to his being qualified as an expert in the

actual D N A process of laboratory process of D N A fingerprint." (T 569-70). The trial judge found him "qualified to testify as an expert," stating his "reasons out of the presence [of] . . . the jury," as follows:

> I find the witness is qualified to conduct laboratory analysis stipulated by both parties and qualified in the application of the statistical formulas developed by others. Although not a statistician himself he is sufficiently trained and qualified to use those formulas much as a person might make certain calculations using algebraic formulas might not be qualified to testify as to the fundamental mathematics underlying development of those formulas. He's not required to be a statistician himself in order to use those formulas.
>
> In listening to the witnesses testimony and the *voir dire* regarding his qualifications I believe that the court is qualified to listen and understand the testimony.
>
> I did graduate course work personally in statistics and without relying on the content of that course work but seeing that the court is an educated listener, I do find he is qualified in the areas in which the State has certified him.

(T 570).

The judge made it clear that he was not ruling on whether the "data basis" (sic) used meet the *Frye* test because "[t]hat's not been presented to the court . . .." (T 571).

The witness performed DNA examination on Darling's blood and vaginal swabs from the victim, containing sperm. (T 573). He explained: "Once I determined (sic) that a profile does match I'll

then do a statistical interpretation of the profile to determine how common would this profile be in the general population . . ..” (T 575). He concluded that the DNA from Darling’s blood sample had a strong band and a weak band which both matched the male faction found on the vaginal swabs containing sperm from Grace’s vagina. (T 582, 583, 586, 587).

In this case, Mr. Baer found ten independent genetic markers. (T 590). He set about determining the frequency of each of the ten markers. (T 591). That an individual has one genetic marker does not make it more likely that person has the others. (T 591). Thereafter, a “simple probability formula that’s been used for years way before it was applied to D N A testing” is used to determine how common the entire set of genetic markers are. (T 591). “It’s one of the methods they [NRC] recommended.” (T 592).

Defense Counsel objected, stating that “*Fry* (sic) is an issue and he’s not laid proper predicate that this is something accepted in the scientific community. Frankly, I don’t think he can because he isn’t a statistician.” (T 592). Thus, Darling’s *Frye* objection was that only a statistician can establish that the comparison portion of the DNA analysis is accepted in the scientific community. The prosecutor responded that under *Correll* the court may take notice that the procedure has been commonly accepted in the courts for more than five years, and the defense must then show “some variations” from what’s previously been accepted. (T 592).

The objection was overruled. (T 593).

Mr. Baer testified that he computed numbers which varied depending on the different major racial groups database used. (T 594). Mr. Baer explained that it takes about a week to run the DNA analysis. (T 654). There are eight commonly used probes in forensic DNA testing. (T 655). Mr. Baer and FDLE use six of "the ones that are most commonly used." (T 655).

The Caucasian database is "based on a population study" FDLE did in Orlando in 1990 or 1991. (T 594, 661). It "has been reviewed by a statistician." (T 661). It includes 166 samples. (T 594). Mr. Baer has compared his database numbers with others around the State, Country and World, and they are comparable; they do not vary significantly. (T 594). Based on the Orlando Caucasian database, using the product rule with "the plus or minus 1.735 BIN window, Darling's DNA profile "would have a frequency about one out of two hundred thirty-nine billion bytes." (T 595, 673). Using the modified ceiling, with "the larger match window," the frequency of match would be "one out of 99 billion Caucasians. (T 673).

For the Black calculation, Mr. Baer used the African American Population database "used by the F B I based on samples collected around the country." (T 595). The samples are "from seven hundred to a thousand." (T 595). Based on the FBI Black database, using the product rule with "the plus or minus 1.735 BIN window, Darling's DNA profile would have a frequency of "one out of one

hundred four billion Blacks." (T 595, 673). Using this method, it is "roughly twice as likely for a black person to have the same DNA profile as" Darling. (T 664). Using the modified ceiling, with "the larger match window," the frequency of match would be one out of 101 billion Blacks. (T 673).

For the Hispanic calculation, Mr. Baer used the Eastern Hispanic database which is "published by the F B I actually based on samples from the Miami Area." (T 596). He also had a Hispanic database from Arizona, California, Texas. (T 596). The Hispanic data base has "seven to 800" samples. (T 663). Using the California database, and the product rule with "the plus or minus 1.735 BIN window, Darling's DNA profile would have a frequency of "one out of one points (sic), seven billion eighty-one Hispanics." (T 596, 673). It is "17 times less likely" for a Hispanic person to have the same DNA profile as Darling. (T 664). Using the modified ceiling, with "the larger match window," the frequency of match would be one out of 1.3 trillion Hispanics. (T 674).

Mr. Baer and FDLE use "the product rule, which is what the FBI uses." (T 662). The FBI databases on Blacks and Hispanics was compiled "around the same time. Maybe a little earlier" than the Orlando database. (T 665). The statistics of match probability result from "calculations from the data bases." (T 662).

The test which Mr. Baer performed on the subject semen sample is one which has been used consistently for the past nine years. (T

667, 669). Mr. Baer is periodically tested to determine his proficiency in performing the DNA tests and in "keeping samples straight." (T 669). He has always performed well on them. (T 670).

Mr. Baer did not have any DNA database for Bahamian people. (T 664). When asked if there are any Bahamian databases, he replied: "I suppose there might be, I don't know." (T 667). He added that he "believed" that the Broward County Lab did "a Bahamian study," but he did not have "those figures." (T 667).

Mr. Baer said that "if you have a very inbred group," the occurrence of a match would be greater. (T 665). However, "generally found within the United States . . . there's a fairly good distribution of the major types within major ethnic groups." (T 665).

Darling declined to testify and offered no evidence. (T 680). The State had earlier dismissed the armed robbery count. (T 678-79). The jury found Darling guilty of capital murder and armed sexual battery. (T 788).

The penalty phase proceeding was held on December 14th and 15th, 1998. (R 1, 240).[8] The State presented the testimony of Gerald Paul Daigneault during the penalty phase proceeding. (R 30). Mr. Daigneault, a "self employed . . . taxicab" driver,

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[8]"R" refers to the nine volumes of the record on appeal which includes the pleadings, the transcript of the penalty phase proceeding, the transcript of the *Spencer* hearing, and the sentencing proceeding.

picked "up a black gentleman [Darling], . . . around Winter Park." (R 30-31). Darling instructed Mr. Daigneault to take him to an apartment complex and to go around to "the back part of the apartments . . .." (R 31). Thinking Darling to be a student that "lived back there," he "pulled around to the back." (R 31).

At that point, Darling "lay a gun to the back of my head and he said to pull over and put it in drive." (R 32). Mr. Daigneault could feel the gun against his head "right back here." (R 32). Mr. Daigneault complied with all of Darling's instructions, and when he "turned around and give the money, that's when he pulled the trigger." (R 32).

Mr. Daigneault was shot "in the back of my head here and went through my jaw shattered my jaw and plus my eardrum and my gum is still missing. I've been through three operations and it won't heal." (R 32-33). Mr. Daigneault survived by opening the car door and rolling out. (R 33). He "played dead." (R 33). When Darling took off in his car, the victim got up and went to a residence from which the police were called. (R 33). He still suffers from the gunshot wound he incurred at Darling's hands in November, 1996.[9] (R 30, 34).

Darling's conviction and sentence for the crimes against Mr.

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[9] In addition to the missing gum, "I got partial teeth. . . . [I]t's all numb, the nerves are all shot. They couldn't save that." (R 34). He has "applied for several jobs and I can't pass the physical." (R 35).

Daigneault were entered into evidence, without objection. (R 35).

The State's next witness was Joanne Reed. (R 35). Ms. Reed was a close friend of Grace, who works for Jesse's company as "a commercial driver." (R 36, 37). Grace had told her that she had been abused by her husband when she lived in Poland. "He's a drunk. She was scared to death of him. That's how she came here. She asked Jessie (sic) when he was in Poland to help her get here and he, and his sister did." (R 38).

Grace "loved her children very much. Everything was for her children." (R 38). It "bothered her very much" to leave the children in Poland, but "[s]he was very frightened of him in Poland, she could not have left him because he would never have left her alone. She had to go as far as she could get." (R 38-39). She kept in telephone contact with her children, and "brought them here and took them to Disney Land (sic)." (R 39). "[S]he did without to send [money] to the children." (R 39).

Grace

> was very, very happy here. It was like Disney World to here (sic) every day. She thought the United States was so amazing; and, and the wonderful people here. She was just so thrilled because it's nothing like it is in Poland.
>
> Poland is not a good place.

(R 39-40). Grace had a "[w]onderful relationship" with Jesse, whom she "loved . . . to death." (R 40). She had never "strayed from him in any way, or even thought about" it. (R 40). Grace and Jesse

had discussed marriage. (R 40). When the prosecutor asked: "[W]hy they weren't married?" Defense Counsel objected on relevancy grounds. (R 40). The judge sustained that objection. (R 40). During the State's subsequent argument, Defense Counsel first mentioned a desire "to argue lingering doubt she, she could have been having an affair" on Jesse. (R 41).

The prosecutor argued that "her hopes and what her plans that were destroyed by this act are exactly the kind of victim impact evidence the statute intended." (R 41-42). Defense Counsel said that "it could come out through testimony of the boyfriend," but "not through this witness." (R 42). The objection was again sustained. (R 42).

Ms. Reed described Grace as "warm and loving and caring and very, very gentle. She had a very, very, good heart." (R 42). A photo of Grace, taken on "12-31-94" was published to the jury without objection. (R 43).

The defense presented four penalty phase witnesses. Thirty-three year old Bahamian Deshane Claer testified that she "share[s] a three-year-old daughter" with Darling, whom she knew "as Dolan Sean." (R 62-63). She met Darling, an "all-around handyman on the job site" at a Paradise Island hotel in June or July of 1993. (R 63, 64). Darling has maintained contact with her, sending Christmas, birthday, and Valentine's cards and other communications to her and "our daughter," Divinka. (R 64). He

expresses "concern about his daughter." (R 64).

Ms. Claer never lived with Darling; each lived with their parents. (R 65). Darling had two sisters Ms. Claer knew of, Verneki Butler and Paula Haven. (R 65).

Darling, and his mother, paid support "for both the child and my preparation for the birth . . . and my going into the hospital." (R 66, 71). However, it was clarified on cross that Darling never paid any actual financial support, it came from his mother. (R 72). In fact, they had no contact from the time she learned she was pregnant, "approximately February of 1995 until June, July of 1995." (R 70, 71). Divinka was born "[t]he 26th of September 1995," and Darling left for the United States in "October of 1995." (R 71). Ms. Claer visited him at his apartment in Orlando "in October of '96." (R 66). She later brought Divinka to see him "after he was arrested and in jail." (R 73).

The prosecutor objected when Defense Counsel asked: "Did he ever indicate to you that he did not kill this woman?" (R 67-68). The prosecutor argued that it was impermissible hearsay, was irrelevant as "[i]t can only go to reasonable doubt," and "based on the stipulation" that defense witnesses could remain in the courtroom because "they would be not testifying about the crime in any way." (R 68). Defense Counsel claimed that "a mitigator is the defendant has an unwavering declaration of innocence." (R 68). The objection was sustained. (R 69).

Verneki Butler, Darling's thirty-two year old sister, testified next. (R 74, 75). Ms. Butler called him "Dolan." (R 75). Her mother's name was "Smith," and her father's name was "Darling." (R 75). Her parents were not married. (R 77). She was ten years older than Darling. (R 75).

Ms. Butler went to college in the United States and became "a computer teacher" in the Bahamas. (R 76). She lives about two miles from her mother, who still lives in Darling's childhood home. (R 82). Ms. Butler said that her father was "very verbally abusive" to her, and he was verbably, emotionally, and physically abusive to "my brother and mother." (R 76).

Although her mother does not, and did not, drink alcohol, her father did. (R 77). His excessive drinking caused a problem in the family. (R 77). One family problem was that the father carried "on with other women." (R 78). She has half brothers and sisters through her father, but has "no relationship with them." (R 78). Her father's affairs with other women was "[e]xtremely" embarrassing for her as she grew up. (R 78). One of her father's other women "lived right up the street from us." (R 78).

She left home at sixteen and went to school. (R 79). Ms. Butler would hear of continuing abuse from her mother, and when she returned from college, she "noticed that they weren't living in the same room." (R 79).

Darling has sent her cards from jail, and talked to her "once

or twice on a phone call when I was at my mother's house and answered the phone." (R 80). He has expressed concern for her well being and that of her son. (R 80). He was never violent to her. (R 80).

When asked to describe the violence in the home, she said:

> [I]t would always happen on a Sunday because that was my dad's day off and he would go drinking. We were all afraid to return home after visiting my grandmother. And it seemed like he would be just waiting for us to pick an argument with my mother. And then it, the fight would just take off from there. . . .

(R 81). One incident involved Darling being beaten with a pipe because he "had missed probation . . .." (R 84). Ms. Butler "rushed into the room but I was afraid to try to take if (sic) from him because I thought he would turn on me." (R 84). Darling was bruised "pretty bad," and she "nursed him . . .." (R 84). Darling "didn't cry." (R 84). This was the worst incident of her father's physical abuse of Darling which she ever saw. (R 91). Another incident occurred when their father had to wait on Darling and she had to go and look for him. (R 92). Her father beat him "with a metal coat hanger." (R 93). The only other instances of her father beating on Darling occurred "if he tried to separate a fight" between his parents. (R 92).

Both of her parents were employed outside the home. (R 83). She and Darling had plenty of food, good clothes, and other necessary provisions while growing up. (R 83).

Ms. Butler suffered "extremely" from emotional difficulties related to her father. (R 83). She and Darling and their Mom "attended church when we were younger. And after that time he went to church with a neighbor . . . or one of my family members." (R 84).

Ms. Butler learned of the murder charge against Darling from Deshawn. (R 85). Darling was "[n]ever" violent with her. (R 85). However, she "would just say that [Darling] started to hang out with bad company . . .." (R 85).

On cross, Ms. Butler reluctantly admitted that in all respects other than his homelife with her, Darling, and their mother, her father was considered "a good hard-working citizen and a success." (R 86). He works every day, is a responsible citizen, and well supported the family. (R 86). He worked his way up from a busboy to manager of the restaurant in one of the large hotels in Nassau. (R 87). Her father helped send her to college. (R 87).

Ms. Butler said that she "partly blame[s] my mother" for the problems in the relationship because "she should have taken a stand and . . . left that awful environment that we were in and maybe I could have been spared emotionally; so could he have." (R 88). However, she hates her father for "his treatment toward us" and "his drinking," and she has not spoken to him "in over seven years."(R 89, 97). Her father's verbal abuse of Darling included calling him "every name in the book." (R 89). However, she

reluctantly admitted that the abuse “started a little before I went off to college, and most of it took place when I was in college.” (R 90). Thus, most of what she knew about the abuse in the home while Darling was growing up came from her mother, or others, although “when I graduated from college I saw it again.” (R 90).

When Ms. Butler formed a relationship with someone she loved, she married him “because I didn’t want to be like my father.” (R 94). She understood the bad things her father had done and did not want to repeat them. (R 94). She does not think that Darling is like their father because “[t]o me he shows more love.” (R 95).

Ms. Butler has never committed a serious crime. (R 95). She battles alcoholism and “[a]t times,” she’s “plagued by depression.” (R 98). She takes “antidepressant drugs, xanax and yantax." (R 98). She also says she is “a bit rough with my own son,” but because she’s “more educated, . . . taken courses in psychology,” she “can stop myself from . . . abusing him . . ..” (R 98-99). She added that she has “a difficult time showing emotion to my husband.” (R 99).

Darling’s next witness was his mother, Eleanor Bessie Smith. (R 99). Darling was born on “May 28, 1976.” (R 100). He has also gone by the name “Devon Smith.” (R 100-01).

She lived with Darling’s father, Carlton Darling, from “December of ‘76 and until about . . . June or July of 1992.” (R 101). Verneki “was born September of ‘66.” (R 101).

Ms. Smith drinks "[m]oderately . . . a beer now and then." (R 101). Carlton is "[a]n alcoholic" which "was a problem . . . in the home . . .." (R 101). She was well aware of relationships he had with other women. (R 101). Carlton wanted her "to accept it." (R 101). However, at an earlier point in their relationship, he had "promised to marry me," but put it off "because he really don't believe in it." (R 110).

Carlton "provided for the children." (R 102). She and Carlton built the family's "middle class home" together. (R 102). She did so because "he was quite concerned with the children . . . [a]nd we just get together and decided to build a house together so we can move out of the neighborhood we were in." (R 109). Both parents had lived in "a low-class area" which Carlton referred to as "a ghetto area." (R 111, 112). After they built their new home, Carlton did not want her to take the children back into that area to visit her parents. (R 111-12). That's when problems between them started. (R 111).

Carlton "was abusive with me" and was verbally abusive toward Verneki "when he drinks." (R 102). The family feared him "on Sunday nights when he'd come home . . .." (R 102). "[T]he violence would come when" she got "in discussions about his philandering ways." (R 112).

Darling's mother described him as "like other boys," if Carlton "asked him to do something he probably wouldn't do it." (R

113). She felt that the trouble between Darling and Carlton arose out of Carlton's choosing to pick up his "second family" at the time he should have been picking up Darling from college. (R 114). Ms. Smith felt that Carlton "just completely like dropped him and never cared for him at all."(R 114). Darling complained to her that he wanted Carlton to "show some interest in him, not just to put food on the table." (R 114).

She attended church with Darling and brought him up to believe in God. (R 103). She's talked with him since he's been in jail and he has communicated with her via letters and cards. (R 103). He "always say, Mom, I hope you're fine because as long as you're fine then I'm fine." (R 103).

"[O]n many occasions," Darling would try to defend her from Carlton. (R 104). Once, "he got a blow," and "on . . . many occasions he got bruises from the trying to defend me because his dad is a very big, thick, heavy man." (R 104). She shared a room with Darling for several years, sleeping on the floor while he slept on his bed. (R 105). When asked why she let the abuse go on for years, she replied:

> [B]ecause it was already happening, we were building the house together and we where (sic) already there. And then have, I had the two children from him so I just, I, I guess it's my stupidness.

(R 106).

She believed that it was embarassing for Darling that his

father had relationships with other women. (R 105). His classmates made fun of him over it. (R 105). She was also embarrassed. (R 105).

She had worked for a bank for "[t]wenty-seven years and four months" at the time of the penalty phase proceeding. (R 107). The last contact she had with Carlton was when Darling "first got arrested." (R 104).

Darling's last witness was Dr. Michael Herkov, who was accepted without objection as an expert in forensic psychology. (R 115, 118). Dr. Herkov did a clinical interview with Darling, reviewed some of the discovery provided by the State, and evaluated Darling. (R 119). He also consulted with investigators, interviewed family members, including "his mother, his sister, his half sister and his girlfriend," and read the deposition of Carlton Darling, the statement of Harlan Deen, a headmaster at one of the Bahamain schools Darling attended, and spoke with Darling's probation officer, Debra Rolle. (R 120, 121, 122).

Dr. Herkov concluded that Darling began experiencing physical abuse "somewhere . . . between seven and nine." (R 122). He suffered beatings from his father "on a . . . monthly basis" from "about the age nine or ten . . .." (R 124). Before that, he had had "a fairly good relationship" with his father which included "a lot of love." (R 124). Carlton's indication that his relationship with Darling deteriorated "as he entered the teen years he got in

trouble and was difficult to discipline" was consistent with the time frame given by Ms. Smith. (R 158-59).

Darling's "father was involved in a number of extramarital (sic) affairs." (R 124). When "the relationship . . . between [Darling's] mother and Dad started to deteriorate," Carlton became verbally abusive and violent "solely at her." (R 124). However, "as the abuse continued the attention was directed to him" with Darling "being in the middle" in fights between his parents. (R 124). Darling received these beatings "trying to protect his mother." (R 125).

Carlton was "an alcoholic." (R 125). According to the half-sister, Ms. Haven, "about the time the family started falling apart the sister [Vernecki] developed an alcohol problem." (R 167).

Dr. Herkov said that children "physically abused are much more likely to get in trouble with the legal system, to have crimes that are violent, to engage in . . . antisocial" behaviors. (R 127). The doctor had learned of only one beating that was severe enough that Darling had to be treated by medical personnel. (R 127). That involved a beating with a P.V.C. pipe. (R 127). He said that such violence directed at a child affects how they "treat women and people you love, how you deal with things when things frustrate you." (R 130). A history of violence can desensitize a person to violence. (R 131). However, the doctor could not explain how the abuse Darling suffered desensitized him to the crime of rape, or

murder. (R 160, 161). Moreover, "70 percent of those children that have been physically abused . . . did not commit acts of violence." (R 164). However, violent abuse "increases the risk, . . . the likelihood." (R 164).

However, Dr. Herkov was clear that knowing all of the things that happened to Darling as a child, he could not "at all" say that it excused his behavior in the instant case. (R 132). Indeed, "no matter what kind of background," such a man can choose to do what's right. (R 132). This abuse could not lead him into doing something that he did not know he was doing. (R 134).

Without further comment, or explanation, Dr. Herkov alluded to "the history of sexual abuse." (R 136). He said Darling's I.Q. is "84 . . . which is . . . about a middle low average range." (R 137). "[T]here is some evidence to suggest a learning disability," but "no diagnosis . . .." (R 137). The State objected to this testimony because there had been nothing to suggest a learning disability in the discovery. (R 137, 140, 141). The trial court overruled the objection since the doctor was "not making a diagnosis of a learning disability." (R 142). Dr. Herkov did say, however, that "the problems in school" are "certainly consistent with somebody who's been abused." (R 144).

Darling's family members described him to Dr. Herkov as: "[A] very good person, very polite, very non-violent, loving to his children, and a good domestic partner, caring, et cetera, et

cetera.” (R 143-44). Darling was on probation “for some kind of shoplifting crime.” (R 151). Dr. Herkov testified that it is quite possible that Darling appeared one way to family members and was still well capable of committing the instant murder. (R 159). Indeed, Mr. Deen said that Darling could “appear to be very compliant and cooperative and friendly and then do a lot of things that were inconsistent with that.” (R 160). He “described him as a bully.” (R 160).

Dr. Herkov could not give an opinion as to why Darling raped and murdered Grace. (R 165).

After the jury left to deliberate its sentencing recommendation, Darling addressed the court. (R 301). He told the judge:

> I did not rape anyone. . . . Mr. Ashton [the prosecutor] stated . . . that I didn't know Grace Mlynarczk – I never said I didn't know Grace Mlynarczyk. I never denied having a sexual relationship with Grace Mlynarczyk. So he was straying, had the jury off into a different direction.

(R 307). The jury recommended a death sentence eleven to one. (R 309).

On December 18, 1998, the court held a *Spencer* hearing, and later that day, pronounced sentence. (R 318). The judge found two aggravating factors, the statutory age mitigator, and several nonstatutory mitigators. (R 330-38). He rejected Darling's proposed mitigator - that he is a human being, finding that that

status is not mitigating. (R 337). After assigning appropriate weight to the mitigation and considering all factors bearing on the sentencing decision, the court found "the aggravating circumstances outweigh the mitigating circumstances present." (R 339). He imposed the death sentence for the capital murder. (R 339). He sentenced Darling to 256.5 months for the armed sexual battery. (R 340).

SUMMARY OF THE ARGUMENTS

POINT I: The trial court did not err in denying Appellant's motion for judgment of acquittal. The State's evidence was inconsistent with the hypothesis of innocence Appellant advanced. The additional hypotheses of innocence raised for the first time on appeal are procedurally barred. Moreover, they are without merit. Premeditation was well proved. The evidence was sufficient to, and did, prove both offenses for which Appellant was convicted.

POINT II: The DNA evidence was properly admitted. Both the DNA process and the statistical analysis met the *Frye* test. The State's expert witness was competent to apply the DNA test results to the statistical information and calculate the frequency of occurrence ratio. Moreover, Appellant's challenge to the scientific acceptance of the DNA techniques was untimely and procedurally barred as is his appellate complaint that a different database should have been used. Finally, Appellant's ineffective assistance of counsel claim is not cognizable in this direct appeal.

POINT III: The trial court did not err in prohibiting Defense Counsel from commenting on the State's failure to present two witnesses who might have been considered suspects at some unspecified point in the investigation. These witnesses could have been produced by the defense, and the defendant failed to ask the State's expert witness about them when it had the opportunity to do

so at trial. Moreover, an ineffective assistance of counsel claim is not cognizable in this direct appeal.

POINT IV: Appellant failed to carry his burden to prove that the trial court abused its discretion when it limited Appellant's *voir dire* examination of prospective jurors. Moreover, the second of the two questions about which Appellant complains was withdrawn in the trial court, and thus, cannot be raised on appeal.

POINT V: The trial court properly denied Appellant's requested jury instruction on circumstantial evidence. Moreover, his failure to renew his objection when the instruction was given to the jury procedurally bars this claim on appeal. Appellant has failed to allege, much less prove, that the reasonable doubt and burden of proof jury instructions given in his case were inadequate. Thus, he is entitled to no relief.

POINT VI: The trial court committed no error when it denied a rebuttal, or concluding, closing argument to the defendant where the State waived its closing argument. Moreover, since the defense was well aware that the State might elect to waive its argument, any failure to make certain points in the initial closing argument was a strategic decision and should not be second-guessed. Much of the appellate argument on this issue was not presented below, and therefore, it is procedurally barred.

POINT VII: The trial court properly prevented Appellant from arguing residual doubt of guilt as a basis for a jury

recommendation of a life sentence. This issue is not preserved for appellate review insofar as it claims the argument should have been permitted because of the "weaknesses of the state's case." The argument was properly sustained because it was irrelevant and violated an evidentiary stipulation between the parties. The well-established precedent of this Court is that residual or lingering doubt is not mitigation, and therefore, this claim is without merit.

<u>POINT VIII</u>: Appellant has failed to carry his burden to establish that the appellate record is incomplete. Neither has he identified, much less proved, that he suffered any prejudice as a result of the alleged incomplete record. His instant claim is barred where he failed to move to relinquish the matter to the lower court for the purpose of completing the record.

<u>POINT IX</u>: The trial court did not err in denying Appellant's special requested jury instructions on burden-shifting and victim impact evidence. Moreover, the claims are procedurally barred because after instruction, Appellant stated that the instructions were acceptable as read. Finally, Appellant's proposed instructions were not accurate statements of the law, and therefore, the trial court was correct in not giving them.

<u>POINT X</u>: Appellant's death sentence is not disproportionate. The two strong aggravators overwhelmingly outweighed the age mitigator and the nonstatutory mitigation found by the trial court. A

comparison of the instant case to similar cases shows that Appellant's death sentence is proportionate.

<u>POINT XI</u>: Appellant has failed to show that his death sentence violates an international treaty. Although the Vienna Convention on Consular Relations may require authorities to notify a foreign national arrestee that he has the right to call his consulate, the failure to so notify does not result in exclusion of the death penalty. Moreover, both the appellate brief and the motion in the trial court are factually and legally insufficient due to conclusory, barebones pleading which cannot support relief. Finally, Appellant's claim must fail where he has utterly failed to explain, much less prove, how the consulate would have assisted him. Appellant is entitled to no relief.

POINT I

DARLING HAS FAILED TO ESTABLISH REVERSIBLE ERROR REGARDING THE TRIAL COURT'S DENIAL OF HIS MOTION FOR JUDGMENT OF ACQUITTAL BASED ON A CLAIM THAT THE COMPLETELY CIRCUMSTANTIAL EVIDENCE DID NOT EXCLUDE EVERY REASONABLE HYPOTHESIS OF INNOCENCE.

Darling complains that the trial judge improperly denied his motion for a judgment of acquittal because the evidence, which he characterizes as "entirely circumstantial," does not exclude every reasonable hypothesis of innocence. (IB 24). He identifies the relevant hypothesis as "that someone other than . . . Darling killed Grace Mlymarzk and/or that the killing was not premeditated." (IB 24).

In *Kimbrough v. State*, 700 So. 2d 634 (Fla. 1997), *cert. denied*, 523 U.S. 1028 (1998) the victim was found nude in her bathroom. Entry had apparently been made via a ladder onto the balcony and through the sliding glass door to her second floor apartment. 700 So. 2d at 635. Semen was taken from the bedsheets, blood from the victim, and pubic hairs from the bed and a towel. *Id.* A resident of the victim's apartment complex identified Kimbrough from a picture lineup as a man he had twice seen in the vicinity, and a worker at the complex identified him "as a man who had watched him putting away a ladder in the complex around the time of the murder." *Id.* "The DNA evidence showed that the semen . . . was compatible with Kimbrough's, and some of the pubic hairs

matched his." *Id.* at 635-36. Blood taken from the bed also matched Kimbrough's. *Id.* at 636. There was "evidence of vaginal injury, including tears and swelling consistent with penetration. There were bruises on her arms." *Id.*

Kimbrough's defense was that "the victim's ex-boyfriend . . . had committed the crime since he was with the victim shortly before, had used a ladder before at her apartment, had a key, and had beaten her previously." *Id.* Kimbrough was convicted of the murder, and the jury recommended the death penalty by a vote of eleven to one. *Id.* at 635. This Court soundly rejected Kimbrough's claim that the purely circumstantial evidence against him was inconsistent with this reasonable hypothesis of innocence, stating:

> We have established that circumstantial evidence is not a bar to conviction:
>
>> Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. The question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and where there is substantial, competent evidence to support the jury verdict, we will not reverse.
>
> *State v. Law*, 559 So. 2d 187, 188 (Fla. 1989) (citations omitted). There is substantial, competent evidence supporting the jury's guilty verdict.

Id. at 636-37.

In the instant case, the victim was found, nude from the waist

down, on the floor of her bedroom. She had fresh abrasion-type injuries to her elbows, vaginal, and rectal area. (T 458, 459). Semen was found in the victim's vagina and was compatible with Darling's semen. Darling lived in the same complex as, and near the apartment of, the victim.[10] A detective spoke with Darling at his apartment shortly after the victim's body was discovered. Darling's thumb print was found on a bottle of lotion in the bathroom adjoining the bedroom where the victim was killed and her killer had apparently washed blood from himself. Inside the bathtub, a pillow was found through which the gun that killed the victim had been fired. The medical examiner testified that the victim had suffered very painful penetration of her vagina and that her rectum also had a painful tear. Semen was found **on**, and inside, her. (T 458, 480-81) Based on his many years of experience, this expert opined that the victim had been sexually battered.

In the trial court, Darling contended that Jesse "was the killer." (T 707). He pointed out that the medical examiner testified that "the abrasions were recent," and that "[t]he evidence was just as strong that the abrasions could have happened earlier" when Jesse inflicted them. (T 707). He also pointed out that Grace had "an IUD" and "a gynecology appointment," and "there

[10] He lived "four apartments away." (T 707).

was something there that could reasonably indicate she had vaginal problems . . ..” (T 708). He surmised that Grace “simply had sex with [Darling] and at some later time her boyfriend found out and shot her.” (T 698). He said the abrasions found on Grace’s vaginal area could have been caused by her “scratching herself.” (T 696).

His argument that there was no proof that the sex occurred at the same time as the homicide is refuted by the evidence that semen was found **on** the partially nude body of the murdered victim,[11] and the vaginal and rectal injuries were “fresh.” (T 458, 459, 480-81). Jesse testified at trial and accounted for his whereabouts the day that Grace was murdered.[12] The medical examiner said that in his expert opinion Grace was sexually battered, and the mild cervical inflammation she had would not be relieved by scratching the vagina or applying creams or lotions to it.[13] Thus, there was substantial, competent evidence from which the jury could, and did, reject any reasonable hypothesis of innocence even remotely supported by the evidence.

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[11] In the lower court, Defense Counsel admitted this. (T 700).

[12] Indeed, on appeal, Darling concedes that Jesse was “out of town all day.” (IB 90).

[13] Moreover, although the doctor did not believe that Grace’s injuries occurred during “rough consensual sex,” a similar claim was recently rejected by this Court when it was offered to support an acquittal motion based on a hypothesis of innocence. *See Zack*, 753 So. 2d 17 (Fla. 2000).

"A motion for judgment of acquittal should only be granted if there is no view of the evidence from which a jury could make a finding contrary to that of the moving party." *Zack v. State*, 753 So. 2d 9, 17 (Fla. 2000). Darling has not demonstrated error in the denial of his acquittal motion made on the above mentioned grounds.

On appeal, Darling offers additional hypotheses regarding his lotion bottle fingerprint and other suspects, which he claims are reasonable and not refuted by the evidence. However, in the trial court, Darling offered no hypothesis as to how his fingerprint got on the lotion bottle. Certainly, he never suggested that it occurred while the bottle was still in the store, as he does on appeal. (IB 33). Since this issue was not presented to the trial court, it is not proper on appeal. In any event, it is without merit as such a broad based, speculative explanation for the fingerprint does not provide a **reasonable** hypothesis of innocence.

Likewise, at trial, when arguing his acquittal motion, Darling offered no hypothesis of innocence as to any other potential suspect except Jesse. (*See* T 698, 707). Thus, to the extent that appellate counsel alleges that a reasonable hypothesis of innocence which the State did not overcome was that maintenance men, Grace's estranged husband, or Jesse's wife might have killed Grace, (IB 36-37), same is not properly before this Court.[14]

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[14] Moreover, on appeal, Darling concedes that Grace's husband "was in Poland" at the time of her murder, and Jesse was "out of town all day." (IB 90).

Finally, on appeal Darling claims that the evidence was insufficient to prove premeditation. (IB 38). Although this potential issue was briefly mentioned in the trial court, no meaningful presentation of the claim occurred. (*See* T at 695-96). "[A] boilerplate motion" which does not fully set forth "the specific grounds upon which the motion was based" is insufficient to preserve an issue for appellate review. *Woods v. State*, 733 So. 2d 980, 984 (Fla. 1999). Thus, Darling's instant claim is not preserved for appellate review.

Assuming *arguendo* that the premeditation issue may be considered on appeal, it is without merit. First, Darling brought the death weapon - the gun - into the apartment. Then, after anally and vaginally sexually battering Grace, he took a throw pillow, placed the gun barrel against it, put the pillow to Grace's head, and pulled the trigger, killing her.

> Premeditation is a fully-formed conscious purpose to kill, which exists in the mind of the perpetrator for a sufficient length of time to permit of reflection, and in pursuance of which an act of killing ensues. Premeditation does not have to be contemplated for a particular period of time before the act, and may occur a moment before the act.

Sireci v. State, 399 So. 2d 964, 967 (Fla. 1981), *cert. denied*, 456 U.S. 984 (1982). *See Woods*, 733 So. 2d at 985.

> Premeditation may be established by circumstantial evidence. . . . Such evidence

> of premeditation includes 'the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted.' . . .

(citations omitted) *Woods*, 733 So. 2d at 985. *See Welty v. State*, 402 So. 2d 1159, 1163 (Fla. 1981)[manner of commission of murder, including the type of wounds inflicted, may show premeditated intent to kill]. Moreover, making the victim "get on his knees" for the murder indicates premeditation. *See Nibert v. State*, 508 So. 2d 1, 3 (Fla. 1987).

Premeditation is proved where there is "such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of that act." *Asay v. State*, 580 So. 2d 610, 612 (Fla. 1991), *cert. denied*, 502 U.S. 895 (1991). Deliberate use of a weapon to kill a victim supports premeditation. *See Holton v. State*, 573 So. 2d 284, 289 (Fla. 1990), *cert. denied*, 500 U.S. 960 (1991).

The evidence shows that Darling had more than the moment required to form premeditation. He took the gun in with him, then before using it, he took a throw pillow, placed the gun barrel against it, and placed the pillow against the back of the head of his sexually battered victim, who was most likely on her knees.[15]

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[15] Incidentally, Darling's appellate claim that "the shooting occurred in the victim's bed," is not supported by the evidence which showed that she was killed with her legs and feet inside her walk-in closet. (T 336).

See infra, n.16. Only after the several moments it took to accomplish this, did he fire the muffled fatal shot into the head of his fully compliant, nonresistant victim.[16] Clearly, the evidence was more than sufficient to support a verdict of premeditated murder.

Darling is entitled to no relief.

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[16] There was no sign of a struggle, or disturbance, and the trajectory of the gunshot indicated that Grace was on her knees when killed. (T 461-63).

POINT II

THE TRIAL COURT DID NOT ERR IN ADMITTING DNA EVIDENCE.

Darling complains that the DNA evidence admitted below should have been excluded. (IB 40). He claims that admission of that evidence denied him due process of law, effective assistance of counsel, and "the unique need for reliability . . .." (IB 40). Specifically, he complains that FDLE employee, David Baer, "was not qualified in the area of statistical analysis" and did not use the correct data base. (IB 44, 49). He further complains that the trial court should have conducted a *Frye* hearing. (IB 51).

In *Correll v. State*, 523 So. 2d 562 (Fla. 1988), *cert. denied*, 488 U.S. 871 (1988), this Court considered a challenge to the testimony of this very same witness, David Baer. Mr. Baer, "an expert in the field of forensic serology," testified "concerning the results of blood tests using the electrophoresis process . . . used to determine the presence of certain enzymes in the blood . . .." 523 So. 2d at 566. Using this test, Mr. Baer "was able to express the opinion that certain blood found at the murder scene could have been Correll's but could not have been from . . . others . . .." *Id.*

"[D]uring the course of Baer's testimony," the defense "raised for the first time an objection to the validity of the electrophoresis process." *Id.* at 567. At the time, "the defense

had previously taken Baer's deposition and admitted knowing the basis upon which the objection was to be made before the trial began." *Id.* This Court agreed with the sentiment expressed by an Arizona state court on similar facts, to-wit: "To wait to the day of trial to make this motion appears to be an instance of trial by ambush." *Id.* This Court held:

> [W]hen scientific evidence is to be offered which is of the same type that has already been received in a substantial number of other Florida cases, any inquiry into its reliability for purposes of admissibility is only necessary when the opposing party makes a timely request for such an inquiry supported by authorities indicating that there may not be general scientific acceptance of the technique employed.

Id.

In *Hayes v. State*, 660 So. 2d 257, 264 (Fla. 1995), this Court judicially noticed the general acceptance in the scientific community of DNA test results. The State needed only show that the laboratory had used accepted testing procedures that would preclude contamination and/or false results. 660 So. 2d at 264. Thus, DNA methodology conducted properly satisfies the *Frye* test, however, the second step -- the statistical report required to make a match significant in a given case -- must also satisfy that test. *Id.*

In *Murray v. State*, 692 So. 2d 157, 160 (Fla. 1997), a purported DNA expert testified that Murray's DNA matched one of the five hairs found at the scene of the crime. Murray filed a motion in limine to exclude DNA evidence. *Id.* He contended that the

testing method did not satisfy *Frye* because it was not generally accepted in the scientific community. *Id.* He also complained about the probability calculations used to report the frequency of a match. *Id.* At the pre-trial hearing, the purported expert testified that the frequency statistics were "based on the Hellmith Study Manual." *Id.* However, "he had absolutely no knowledge of how the database he used in drawing his probability conclusions was assembled." *Id.* This Court rejected the admissibility of the evidence where the expert's conclusion rested "on population frequency statistics from a database about which he had no knowledge and which was not generated by his own laboratory." *Id.* at 163. Indeed, he "had no knowledge about the database upon which his calculations were based." *Id.* at 164.

This Court made it clear that "it is not absolutely necessary for an expert witness to demonstrate practical experience in the field in which he will testify." *Id.* "We are not ruling that the expert . . . could only testify if he helped to assemble the database." *Id.* Rather, this Court said the expert must "demonstrate a sufficient knowledge of the database grounded in the study of authoritative sources." *Id.* An expert with "insight into the assembly of the relevant database" would be acceptable. *Id.* The expert in *Murray* did not meet that requirements, and so, "[t]he qualification of this expert witness was clearly erroneous." *Id.*

David Baer meets the *Murray* requirements. In regard to the

Caucasian database, he personally compiled it in 1990-1991. He used a sample size of 166 persons, and he verified his numbers with Caucasian databases from other States and Countries. The database and resulting calculations were reviewed by a statistician.

Regarding the Black and Hispanic databases, Mr. Baer knew when the database was compiled, how large was the sampling, who had compiled the database, what geographical area was included, and how long the information had been consistently used. Thus, the record well establishes that Mr. Baer is an expert with "insight into the assembly of the relevant databases."

The record also well supports the trial judge's qualification of Mr. Baer as an expert in both the DNA testing and the probability calculations. This evidence includes that he is a Senior Crime Laboratory Analyst in the DNA Section of the Florida Department of Law Enforcement Orlando Crime Laboratory who began doing DNA work in the Laboratory upon its inception in 1991. (T 559). He worked with that unit continuously since that time through the date of the trial, and had been with FDLE for some 19 years. (T 559). He has been qualified as an expert in the performance and interpretation of DNA allowances in Florida courts "fifty to sixty times." (T 560).

Although Mr. Baer does not "claim to be a statistician," he is "familiar with how statistics are used in this instance." (T 561). Moreover, he has been qualified to render an expert opinion in the

area of statistic interpretation of DNA tests in the cases in which he had testified on DNA testing. (T 562). He has never been denied expert qualification in that area. (T 562).

Mr. Baer's formal education includes "about sixteen hours in statistics" during one 160 hour course; in addition, he has been educated in statistics is several "other short courses," including the "Statistic Workshop in Ninety-five." (T 563, 565). He uses the "modified ceiling principal" formula, a more "conservative way of doing the statistical calculations," which is a variant of the product rule and was recommended by the National Research Counsel in its 1992 report. (T 564-65). In 1996, the NRC determined that the more conservative approach was "not necessary." (T 565). However, use of the ceiling principal more than compensates for any differences "within the major ethnic groups" which are regarded as "very insignificant" in any event. (T 565-66).

The Caucasian database used in the instant case is one which Mr. Baer and FDLE produced in the Orlando laboratory. (T 569). He used the Black and Hispanic databases produced and used by the FBI. (T 569). Mr. Baer relies on the expertise of "other statisticians" when reaching his expert opinion. (T 569).

The trial judge found Mr. Baer "qualified to testify as an expert," as follows:

> I find the witness is qualified to conduct laboratory analysis stipulated by both parties and qualified in the application of the statistical formulas developed by others.

> Although not a statistician himself he is sufficiently trained and qualified to use those formulas much as a person might make certain calculations using algebraic formulas might not be qualified to testify as to the fundamental mathematics underlying development of those formulas. He's not required to be a statistician himself in order to use those formulas.
>
> In listening to the witnesses testimony and the *voir dire* regarding his qualifications I believe that the court is qualified to listen and understand the testimony.
>
> I did graduate course work personally in statistics and without relying on the content of that course work but seeing that the court is an educated listener, I do find he is qualified in the areas in which the State has certified him.

(T 570). "Whether a witness is qualified to express an expert opinion is a matter within the discretion of the trial judge, and this ruling will not be reversed absent a clear showing of error." *Brennan v. State*, 24 Fla. L. Weekly S365, S366 (Fla. July 8, 1999). Darling has not, and cannot, show that the trial court abused his discretion in finding Mr. Baer was qualified to testify as an expert in this field. *See Alston v. State*, 723 So. 2d 148, 158 (Fla. 1998); *Monlyn v. State*, 705 So. 2d 1, 3 (Fla. 1997), *cert. denied*, 524 U.S. 957 (1998).

Mr. Baer performed DNA examination on Darling's blood and vaginal swabs from the victim, containing sperm. (T 573). He explained: "Once I determined (sic) that a profile does match I'll then do a statistical interpretation of the profile to determine

how common would this profile be in the general population . . ..” (T 575). He concluded that the DNA from Darling’s blood sample had a strong band and a weak band which both matched the male faction found on the vaginal swabs containing sperm from Grace’s vagina. (T 582, 583, 586, 587).

Mr. Baer found ten independent genetic markers. (T 590). He set about determining the frequency of each of the ten markers, and thereafter applied a “simple probability formula” to determine how common the entire set of genetic markers are. (T 591). He made the calculations under both formulas using the three major databases. Thereafter, a “simple probability formula that’s been used for years way before it was applied to D N A testing” is used to determine how common the entire set of genetic markers are. (T 591). “It’s one of the methods they [NRC] recommended.” (T 592).

Defense Counsel objected, stating that “*Fry* (sic) is an issue and he’s not laid proper predicate that this is something accepted in the scientific community. Frankly, I don’t think he can because he isn’t a statistician.” (T 592). Thus, Darling’s *Frye* objection was that only a statistician can establish that the comparison portion of the DNA analysis is accepted in the scientific community. The prosecutor responded that under *Correll* the court may take notice that the procedure has been commonly accepted in the courts for more than five years, and the defense must then show “some variations” from what’s previously been accepted. (T 592).

The objection was overruled. (T 593). The issue raised on appeal, whether the statistics used meet the *Frye* test (IB 46) was not raised below and is not preserved for appellate review. Assuming *arguendo* that the issue is properly before this Court, it is without merit.

In *Brim v. State*, 695 So. 2d 268, 274 (Fla. 1997), this Court said that "the underlying principles used to calculate . . . statistics must be generally accepted in the relevant scientific community." In *Brim*, the record did not show how the population frequency statistics were calculated. 695 So. 2d at 274. "As a result, we cannot properly evaluate whether the methods used to calculate the State's population frequency statistics would satisfy the *Frye* test in 1996. *Id.* at 274-75. The case was remanded "for a limited evidentiary hearing . . . to clarify the exact methods used . . . in calculating . . . .." *Id.* at 275.

Unlike *Brim*, the instant record contains ample evidence of the State's population frequency statistics calculation method. Mr. Baer uses the "modified ceiling principal" formula which is a variation of the Product Rule recommended by the National Research Counsel Report in 1992. (T 564). The National Research Counsel [NRC] is "part of the National Academy of Sciences. It's sort of an independent part of the federal government." (T 674). It is not a law enforcement agency. (T 674).

Persons working in the rapidly developing DNA field became

concerned about population substructuring and its effect on DNA databases and calculations based thereon. (T 670-72). The NRC created the modified ceiling method of calculation, a more "conservative way of doing the statistical calculations," (T 564-65), to "take away any problems that might even come from population substructuring." (T 671). "[T]his was overcompensating for, something that was not even really a problem." (T 671). In 1996, a second NRC committee determined that the more conservative approach was "not necessary;" it "went too far, it was too conservative." (T 565, 671). This committee recommended that the calculation method be "open[ed] up" to make the "match window twice what we normally had done before." (T 671). The normal match window was "one plus or minus 1.735 percent," and the NRC recommended making that "plus or minus three and a half percent." (T 672). Another approach was to "take your Product Rule calculation and put a range around it ten times more, or one-tenth less." (T 672).

To compensate for the genetic variation between different populations, Mr. Baer does "three calculations." (T 565). Each calculation is based on a different data base; he uses "one based on Black data, one based an (sic) Caucasian data and one based on South Eastern Hispanics from Miami area where there are racial difference[s] in D N A types." (T 565). Use of the ceiling principal more than compensates for any differences "within the

major ethnic groups” which are regarded as “very insignificant” in any event. (T 565-66).

“There is no one formula for a sample size” for a DNA database. (T 566). This has been a matter of “quite a bit [of] debate over how big a sample size you need to do for D N A testing. It’s said . . . two hundred samples are usually sufficient.” (T 566). The formula used by FDLE “when we do the modified ceiling calculations . . . gives a ninety five percent upper confidence level.” (T 567). Mr. Baer calculated the data in this case using “the Product Rule” and also the Modified Ceiling Principal.” (T 568).

Mr. Baer computed numbers which varied depending on the different major racial groups database used. (T 594). Mr. Baer explained that it takes about a week to run the DNA analysis. (T 654). There are eight commonly used probes used in forensic DNA testing. (T 655). Mr. Baer and FDLE use six of “the ones that are most commonly used.” (T 655).

Based on the Orlando Caucasian database, using the product rule with “the plus or minus 1.735 BIN window, Darling’s DNA profile “would have a frequency about one out of two hundred thirty-nine billion bytes.” (T 595, 673). Using the modified ceiling, with “the larger match window,” the frequency of match would be “one out of 99 billion Caucasians.” (T 673).

Based on the FBI Black database, using the product rule with

"the plus or minus 1.735 BIN window, Darling's DNA profile would have a frequency of "one out of one hundred four billion Blacks." (T 595, 673). Using this method it is "roughly twice as likely for a black person to have the same DNA profile as" Darling. (T 664). Using the modified ceiling, with "the larger match window," the frequency of match would be one out of 101 billion Blacks. (T 673).

Using the California database, and the product rule with "the plus or minus 1.735 BIN window, Darling's DNA profile would have a frequency of "one out of one points (sic), seven billion eighty-one Hispanics." (T 596, 673). It is "17 times less likely" for a Hispanic person to have the same DNA profile as Darling. (T 664). Using the modified ceiling, with "the larger match window," the frequency of match would be one out of 1.3 trillion Hispanics. (T 674).

In *Brim*, this Court said:

> At the time this case was tried, processes that did not utilize the 'ceiling principles' might not have satisfied the *Frye* test because those calculations did not take into account the possibility of population substructures. A sizeable portion of the scientific community speculated that failure to account for population substructures made 'produce rule' statistics unreliable. In 1996, that view changed and, therefore, the 'ceiling principles' are no longer necessary. We do not find, though, that they are unreliable. While the results obtained through the use of 'ceiling principles' might be unduly conservative, the scientific principles underlying the calculations are still

> generally accepted. By analogy, the fact that we now have calculators does not make long-hand arithmetic unreliable. If anything, calculators only make such long-hand work unnecessary.

695 So. 2d at 273. It is clear that in the instant case, Mr. Baer used both the original product rule and the "unnecessary" and more conservative "modified ceiling" method. The statistics using both methods as applied to three separate databases were put before the factfinders. Under *Brim*, both methods are "generally accepted," and therefore, the State's evidence passes the *Frye* test.

Moreover, in *Kimbrough v. State*, 700 So. 2d 634 (Fla. 1997), *cert. denied*, 523 U.S. 1028 (1998) this Court rejected Kimbrough's challenge to DNA evidence that "showed that the semen taken from the bedsheets was compatible with Kimbrough's" as "without merit." Quoting *Correll*, this Court reiterated than an "inquiry into its reliability . . . is only necessary when the opposing party makes a timely request for such an inquiry supported by authorities indicating that there may not be general scientific acceptance of the technique employed." 700 So. 2d at 637. Thus, Kimbrough's appellate claim failed.

Darling's instant claim likewise fails. Not only did he fail to timely request an inquiry into the general scientific acceptance of the DNA techniques employed in this case,[17] he utterly failed to

[17] The State listed David Baer on its witness list of September 10, 1997 (R 424-26).

produce any authority indicating support for a claim that the calculation methods used fail to meet the *Frye* standard. Thus, his instant claim is without merit. *Kimbrough*.

Moreover, Darling's complaint that the State should have used a Bahamian database in calculating DNA match frequency ratios is not properly before this Court. His failure to raise the claim in the trial court renders it procedurally barred. *See Cole v. State*, 701 So. 2d 845, 855-56 (Fla. 1997), *cert. denied*, 523 U.S. 1051 (1998). *See* generally, *Steinhorst v. State*, 412 So. 2d 332 (Fla. 1982)[specific contemporaneous objection required to preserve issue for appellant review]. Below, he asked a couple of questions about the possibility of the existence of a Bahamian database during cross examination of Mr. Baer. However, at no time did he object to the State's DNA evidence on the basis that only Bahamian data could be used, nor did he establish that there was, in fact, any Bahamian database available for use in this case. Thus, this issue is both waived and without merit on this record.

Finally, the entire issue is untimely and unpreserved. In *Correll*, this Court made it clear that "trial by ambush" is inappropriate and will not serve as a basis for relief. There, the challenge to the electrophoresis process was not made until "during the course of Baer's testimony." 523 So. 2d at 567. This despite having previously taken Mr. Baer's deposition and knowing the basis upon which the objection would be made before trial. *Id.*

In this case, David Baer's name, address, and FDLE number were disclosed on the State's first witness list which was served on Darling on September 10, 1997. (R 423-26). Moreover, Darling well knew that the State intended to present DNA evidence at trial. He filed a motion requesting his own DNA expert on August 11, 1998. (R 612-13). His failure to raise the *Frye* issue until the course of Mr. Baer's testimony at trial procedurally bars appellate review of the issue. *Kimbrough*.

Finally, to the extent that Darling claims that his trial counsel rendered him ineffective assistance in this regard, that issue is not properly before this Court. "A claim of ineffective assistance of counsel is generally not cognizable on direct appeal." *Mansfield v. State*, No. SC92412, slip op. 8 (Fla. March 30, 2000). Although "[a]n exception . . . is recognized where the claimed ineffectiveness is apparent on the face of the record," *id.,* those circumstances are not presented here. Thus, Darling is entitled to no relief on this claim. *Id.*

POINT III

DARLING HAS FAILED TO ESTABLISH REVERSIBLE ERROR REGARDING HIS CLAIM THAT THE TRIAL COURT RULED THAT DEFENSE COUNSEL COULD NOT COMMENT ON THE STATE'S FAILURE TO EXCLUDE OTHER SUSPECTS.

Darling claims that "defense counsel had a field day pointing the finger at other viable suspects."[18] (IB 55). He then complains that when he sought to argue "Who is Christopher Powell? Why was he a suspect? Where was his DNA?," the trial court sustained the State's objection. (IB 57). He claims that he was improperly precluded from arguing lack of evidence as to whether the fingerprints of Mr. Powell (and a Mr. Marcus also mentioned in the DNA expert's testimony) were checked against those found in Grace's apartment. (IB 57-58).

When Defense Counsel made the referenced argument, the prosecutor objected, stating that it is improper argument because the defense had had the same opportunity to inquire about Mr. Powell and Mr. Marcus and failed to do so. (T 740). Defense Counsel "could have asked Tony Moss" if he checked the prints; "he did check the prints and they were excluded . . .." (T 740).

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[18] Although it is of marginal note to this issue, the State points out that the only person the defense made any real attempt to portray as a viable suspect was Jesse. *See* T 359-60. Nonetheless, on appeal, Darling admits that Jesse was "out of town all day," and Grace's husband "was in Poland;" thus, by his own concession on appeal, neither man could have killed her. (IB 90).

Defense Counsel's response was that although he "cannot comment on his failure to call those witnesses," he could comment "on his failure to explain other possibilities or rule out other possibilities." (T 740). He later proffered that he would have added to his argument:

> [W]ho's Christopher Powell why was he a suspect. Where was he at the time the murder was committed. Who was Jean Marcus, and why was he a suspect. Where was he at the time the murder was committed. Are these the maintenance men that had been referred to, or are these suspects for other reasons. And have they been eliminated as suspects other then (sic) through the DNA evidence.

(T 772).

In *Haliburton v. State*, 561 So. 2d 248, 250 (Fla. 1990), *cert denied*, 501 U.S. 1259 (1991) this Court said that "[t]he purpose of closing argument is to help the jury understand the issues by applying the evidence to the law." That purpose "is disserved when comment upon irrelevant matters is permitted." *Id.* Thus, "no inference should be drawn or comments made on the failure of either party to call the witness." *State v. Michaels*, 454 So. 2d 560, 562 (Fla. 1984). Moreover, "an inference adverse to a party based on the party's failure to call a witness is permissible" only if "it is shown that the witness is peculiarly within the party's power to produce and the testimony of the witness would elucidate the transaction." *Haliburton*, 561 So. 2d at 250 (*quoting Martinez v. State*, 478 So. 2d 871, 871 (Fla. 3d DCA 1985), *rev. denied*, 488 So.

2d 830 (Fla. 1986)).

In *Haliburton*, during closing argument, Defense Counsel told the jury that the judge would instruct them that

> The Judge in his instructions will tell you you can find that there is reasonable doubt . . . because of a lack of evidence, something that somebody did not address in their testimony, or because of a (sic) absence of evidence. Danny Lee, I mean if you're going to evaluate this case, eliminate all reasonable doubt and all other possibilities, it seems you would have to have the testimony of Danny Lee.

561 So. 2d at 253 n.2. Haliburton complained when the trial court precluded him from "comment upon Lee" during his closing argument. Noting that counsel had, in fact, managed to make some comment on Lee, this Court held "that the trial judge did not err in limiting further comment," because "the witness was equally available to both parties." *Id.* at 250.

Later, in *Terry v. State*, 668 So. 2d 954, 963 (Fla. 1996), the defense attorney argued in closing: "We don't know about Audrin Butler. Even though he was the foundation of the state's case right from day one, we don't know about him. The state did not call Audrin Butler as a witness." This Court pointed out that there was "no indication that Butler was not equally accessible to both parties." *Id.* Further, "the defense called Butler to testify," and this Court said that same "undercuts any argument that Butler was 'peculiarly within the [State's] power to produce' and that his testimony would have 'elucidate[d] the transaction.'"

Id. This Court concluded that there was no abuse of discretion "in limiting appellant's closing argument." *Id.*

Haliburton is directly on point with the instant case. Here, Defense Counsel told the jury:

> As I said a couple of times already, you need to look at the lack of evidence. The judge will instruct you that is one of the things you should look at in determining whether the state has proven its case beyond a reasonable doubt.
>
> There are a lot of things that you don't know that are important. Who is Christopher Powell? Why was he a suspect? Where was his DNA?

(T 737). The record makes it clear that the relevant witness was Tony Moss and that he was equally available to both parties. Indeed, Mr. Moss testified at trial and was cross-examined by Defense Counsel who did not ask about Mr. Powell or Mr. Marcus. This failure to inquire certainly undercuts any argument that the testimony regarding any fingerprint evidence of Mr. Powell or Mr. Marcus was peculiarly within the State's power to produce at trial or that such evidence would have elucidated the issue of suspect fingerprints. Thus, the trial judge did not err in precluding further comment on Mr. Powell (or Mr. Marcus). *Haliburton*. *See Terry*.

Finally, to the extent that Darling claims that his trial counsel rendered him ineffective assistance in this regard, that issue is not properly before this Court. "A claim of ineffective assistance of counsel is generally not cognizable on direct

appeal." *Mansfield v. State*, No. SC92412, slip op. 8 (Fla. March 30, 2000). Although "[a]n exception . . . is recognized where the claimed ineffectiveness is apparent on the face of the record," *id.,* same is not the circumstances presented here. Thus, Darling is entitled to no relief on this claim. *Id.*

POINT IV

DARLING HAS FAILED TO ESTABLISH REVERSIBLE ERROR REGARDING HIS CLAIM THAT THE TRIAL COURT IMPROPERLY LIMITED HIS *VOIR DIRE* EXAMINATION OF PROSPECTIVE JURORS.

Darling claims that the trial judge limited his *voir dire* examination of potential jurors. (IB 61). He complains about two questions asked which drew objections from the prosecutor that were sustained by the trial judge. (IB 62, 63). They are:

1. "Did you or have you seen the stories in the news recently about the number of people that have been released after years on death row?" and,

2. ". . . Knowing that life without parole means life without parole, that once someone is sentenced to life, they never get out of prison, would that reduce the impression or the drive that you might have to impose the death--."

(IB 62, 63). *See* T 188-89, 193-94. Darling claims on appeal that these questions "were relevant and necessary," although he utterly fails to explain how or why.

The prosecutor's objection was based on a lack of relevance. (T 188). Defense Counsel responded: "My point was, he's saying in his questionnaire he thought the execution should happen sooner. I have -- guess my point was going to be, if they happened sooner, then these people who were wrongfully put on death row would have been --." (T 188-89). The prosecutor continued to question

relevance, asking how that related "to a juror's ability to follow the law or be fair and impartial in this case?" (T 189). The trial court properly sustained the relevancy objection.

"The scope of *voir dire* questioning rests in the sound discretion of the court and will not be interfered with unless that discretion is clearly abused." *Franqui v. State*, 699 So. 2d 1312, 1322 (Fla. 1997), *cert. denied*, 523 U.S. 1040 (1998). Neither at trial, nor on appeal, does Darling reveal what relevancy the question had. Thus, he has failed to carry his burden to show that the trial judge abused his judicial discretion in sustaining the relevancy based objection.

Regarding the second complained-of question, the trial court sustained the objection complaining "that goes to the ultimate weight of the jury . . . asking for a bottom line," but told Defense Counsel: "You may rephrase." (T 194). Counsel replied: "I'll withdraw that at this time . . .." (T 194). Trial counsel's withdrawal of the question below procedurally bars the issue on appeal. Moreover, he can not possibly show an abuse of judicial discretion since the trial judge gave him the opportunity to rephrase the question, and he did not do so. Finally, this question was also irrelevant to the issue of a juror's ability to follow the law or be fair and impartial to Darling in this case. Thus, the objection was properly sustained.

Darling has demonstrated no entitlement to relief.

POINT V

THE TRIAL COURT DID NOT ERR IN DENYING DARLING'S REQUESTED JURY INSTRUCTION ON CIRCUMSTANTIAL EVIDENCE.

Darling claims that his request for a special jury instruction on circumstantial evidence should have been granted. (IB 64). During the reconvened charge conference, Defense Counsel stated:

> Last night after we went back, [I] realized we had not discussed it, the instruction on circumstantial evidence. I have three requested instructions, and then I've written a fourth.

(T 709). Regarding the fourth requested instruction, he wanted the jury told: "[N]o matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence." (T 710). The prosecutor objected because the three previously submitted instructions and the one orally requested

> are all quotations from cases that talk about appellate review standards. They're not statements in the cases as to jury instructions. . . . There was a standard jury instruction on circumstantial evidence. . . . [T]he defense is not requesting that . . ..
>
> I oppose any circumstantial evidence instruction because . . . the courts have essentially found the standard instruction on reasonable doubt . . . sufficient, and . . . the circumstantial evidence instruction tends to mislead the jury into thinking that somehow circumstantial evidence is of a lesser degree.
>
> Certainly the ones submitted are inaccurate and incomplete, and should not be given.

(T 710-11). The trial judge ruled:

> I don't find that any extraordinary circumstances have been presented in this case that would compel me to override the general principle enunciated by the supreme court, which is no instructions on that subject be given.

(T 713). Defense Counsel offered only that the instant case is "a death penalty case," and opined that this gave the trial court "some leverage in fashioning jury instructions." (T 713). The trial court rejected that as insufficient, again stating: "I don't find any . . . set of circumstances that exist in this case that require me to override the general principle enunciated by the supreme court." (T 714).

Contrary to Darling's representation to this Court on appeal, he did **not** renew his objection to the denial of his circumstantial evidence jury instruction request. Rather, after the judge instructed the jury, he inquired whether the instructions are acceptable as read?" (T 767). Defense Counsel responded: "Yes, Your Honor." (T 767). As a result of his failure to renew his objection at the time the instructions were read to the jury, this issue is procedurally barred. *See generally, Knight v. State*, 746 So. 2d 423, 429 (Fla. 1998)[appellate challenge to denial of peremptory challenge procedurally barred by failure to renew objection to juror before jury sworn]; *Pomeranz v. Stat*, 703 So. 2d 465, 469 (Fla. 1997)[appellate challenge to denial of *motion in limine* seeking to preclude admission of collateral crimes evidence

procedurally barred by failure to renew objection during trial or at closing argument].

Assuming *arguendo* that the issue is properly before this Court, it is without merit. The requirement of a circumstantial evidence instruction was eliminated by this Court in 1981. *Pietri v. State*, 644 So. 2d 1347, 1355 n.9 (Fla. 1994), *cert. denied*, 515 U.S. 1147 (1995). Where the jury was "adequately instructed on reasonable doubt and burden of proof," the refusal to give a requested instruction on circumstantial evidence was not error. *Id.* Darling has not claimed that the reasonable doubt and burden of proof jury instructions in his case were inadequate, and the State contends that they were not. He is entitled to no relief on this meritless claim. *Branch v. State*, 685 So. 2d 1250, 1252 (Fla. 1996).

POINT VI

THE TRIAL COURT DID NOT ERR IN DENYING REBUTTAL CLOSING ARGUMENT TO THE DEFENSE WHERE THE STATE WAIVED ITS CLOSING ARGUMENT.

On appeal, Darling claims that he should have been permitted to make a rebuttal closing argument even though the State waived its closing argument, thereby leaving nothing to rebut. (IB 69). He says he was entitled to the "concluding argument," i.e., "the **last** argument," not just to argue "any facts in rebuttal." (IB 71). He is incorrect.

In *Dean v. State*, 478 So. 2d 38, 44 (Fla. 1985), this Court rejected just such a claim. After the defendants' attorneys completed their initial final argument, "the prosecutor stood up . . . and asserted, 'I think I can save the court some time. The evidence speaks for itself. We rest.'" 478 So. 2d at 44. The trial judge ruled that "this did not constitute final argument on the part of the state" and precluded any additional closing argument by the defendant. *Id.* This Court held that "the prosecution's waiver of final argument in the instant case provided no reason for defense counsel's further argument to the jury" and found "no error." *Id.*

In reaching its decision in *Dean*, this Court quoted extensively from the decision in *Menard v. State*, 427 So. 2d 399 (Fla. 4th DCA), 427 So. 2d 399 (Fla. 4th DCA). In *Menard*, "[a]t the end of the initial final argument presented by the defense,"

the prosecutor announced: "The State of Florida is going to rely on the evidence and testimony before the court and juror's common sense, and we will waive our argument." *Dean*, 478 So. 2d at 44 (*quoting Menard*, 427 So. 2d at 400). The defense complained, as does Darling, that the statement "'relying on the evidence and common sense' . . . was final argument." *Id.* The court disagreed, stating: "The remark did [not] address the evidence in particular nor any other testimony. Nor did they dwell unnecessarily on the level of intelligent consideration to be extended by the jury. Moreover, . . . the comments were but a very few words and . . . did not rise to the level of final argument." *Id.* Clearly approving of this reasoning, this Court said: "Similarly, the prosecution's waiver of final argument in the instant case provided no reason for defense counsel's further argument to the jury." *Id.*

The prosecutor in Darling said essentially the same thing as the prosecutors in *Dean* and *Menard*, and therefore, his statement did not constitute rebuttal, or concluding, argument and provided no reason for any further argument by the defense. Moreover, Darling's attorney made an **informed** strategic decision to present his initial closing argument as he did, as Darling concedes on appeal, "defense counsel was gambling by 'holding back' in his initial summation." (IB 72). However, appellate counsel well misses the mark when he adds: "Undoubtedly, he truly believed that he would have another chance to address the jury." (IB 72). The

record shows that trial counsel well knew that the State might waive its closing argument, as follows:

> The Court: The State is entitled to waive its closing.
>
> Mr. Iennaco: I have no problem with that either. **I knew that might be coming.** . . .

(emphasis added) (T 747). Knowing that the State might well waive its argument, the defense said all it really had to say during its initial closing argument. This is clear by counsel's "I have no problem with that" comment as well as the fact that he mentions not one area he did not already discuss with the jury. He says only that he wants to "again" argue "the lack of evidence" argument he had already made. (T 746). Certainly, Darling can show no prejudice in not being permitted to reargue the points he had **just made** to the jury in his initial closing argument.

Finally, on appeal, Darling claims that the prosecutor's statement in this case "constitutes an argument" because of "the entirely circumstantial nature of the evidence." (IB 72). This claim is procedurally barred because it was not raised in the lower court. *See Steinhorst v. State*, 412 So. 2d 332 (Fla. 1982).

In any event, it is without merit. Darling has offered no authority for the position that circumstantial evidence magically transforms a statement which has been previously held not to be a closing argument into one. The State contends that there is none, and Darling has failed to establish any logical reason why there

should be any such holding. Having utterly failed to carry his burden of proof, he is entitled to no relief on this claim.

POINT VII

THE TRIAL COURT DID NOT ERR IN PRECLUDING DARLING'S ATTEMPT TO ARGUE RESIDUAL DOUBT AS TO GUILT TO THE JURY AS A REASON FOR A LIFE RECOMMENDATION.

Darling claims that he should have been permitted to argue residual doubt of his guilt to the jury as a basis for making a recommendation of life in prison instead of a sentence of death. (IB 74). He acknowledges that this court has a long and consistent history of rejection of this claim. (IB 75). However, he asks this Court to reconsider this issue, yet again, "given the weaknesses of the state's case" against him. (IB 82).

This issue, as argued on appeal, is not preserved for review. Trial Counsel did not contend that he should be permitted to make the instant argument because the State's case against Darling was "weak." *See* T 67-69. Further, the matter was before the lower court as a three-grounded objection to a question asked of a witness, not an argument being made by Defense Counsel. Thus, the matter is not properly before this Court. *See Steinhorst*.

Moreover, the trial judge properly sustained the objection which was based on hearsay, relevance, and "the representation from [Defense] Counsel that they would be not testifying about the crime in any way." (T 68). The witnesses had been permitted to remain in the courtroom throughout the proceedings based on this representation. (*See* T 282). The question asked went directly to

guilt/innocence and was, therefore, improper based on the stipulation. The objection was properly sustained. It was also properly sustained because the matter was irrelevant. Darling's guilt had already been conclusively determined, and as he admits, the well-established precedent of this Court is that residual or lingering doubt is not mitigation. *Sims v. State*, 681 So. 2d 1112, 1117 (Fla. 1996), *cert. denied*, 117 S.Ct. 1558 (1997); *Rose v. State*, 675 So. 2d 567, 577 n.5 (Fla. 1996); *King v. State*, 514 So. 2d 354 (Fla. 1987), *cert. denied*, 487 U.S. 1240 (1988); *Burr v. State*, 466 So. 2d 1051 (Fla. 1985), *cert. denied*, 474 U.S. 879 (1985). *See Bates v. State*, 24 Fla. L. Weekly S471 (Fla. Oct. 7, 1999)["[N]o constitutional right to present 'lingering doubt' evidence exists."].

In *Preston v. State*, 607 So. 2d 404 (Fla. 1992), *cert. denied*, 507 U.S. 999 (1993), the defendant wanted to present statements that another person (his brother), had confessed to committing the crime during the penalty phase proceeding. Preston claimed the information was relevant to the mitigator domination of another or action under extreme duress. 607 So. 2d at 411. This Court rejected that contention, stating that "[t]he only relevance of the testimony was to suggest that someone else committed the murder, thereby creating residual doubt about the defendant's guilt . . .." *Id.* Holding that "[r]esidual doubt is not an appropriate nonstatutory mitigating circumstance," this Court said that the

evidence was "properly excluded." *Id.*

In the instant case, the evidence Darling sought to present went strictly to residual doubt. Thus, it was properly excluded. Darling has presented no reason for a change in this settled precedent. The evidence against him was not "weak" and well met the beyond a reasonable doubt standard. He is entitled to no relief.

POINT VIII

DARLING HAS FAILED TO DEMONSTRATE ANY ERROR IN REGARD TO HIS CLAIM THAT THE APPELLATE RECORD IS INCOMPLETE.

Darling claims that he is "unable to provide this Court with a complete record to conduct appellant (sic) review." (IB 83). He complains generally that there are "[s]everal times" that the record "contains court minutes . . . indicating that a hearing was held and that a court reporter was present," but upon his inquiry regarding production of a transcript, he was told "no stenographic notes for those hearing[s]" could be found. (IB 83). He claims that there was "at least one major hearing . . . on appellant's 'death penalty motions,'" and later characterizes this hearing as "critical." (IB 83, 85). Yet, despite claiming to have discussed it with "trial counsel" and "court personnel," (IB 84), he does not even hint at any basis for the "critical hearing" label. Surely, before appellate counsel would represent to this Court that the hearing was a "critical" one, he must have been told what happened thereat. Whether he obtained that information from Darling, trial counsel, or the unidentified "court personnel," it is his obligation to share it with this Court, and the State, if he hopes to obtain any relief on the claim. He carries the burden of proof in this regard, and the vague, barebones claim is wholly insufficient on which to base either form of relief he seeks.

Moreover, had Darling's well-experienced appellate counsel

believed that whatever happened at the referenced hearing was, in fact, "critical," he surely would have moved this Court to relinquish jurisdiction for reconstruction of the record. The issue, as raised in the initial brief, is untimely and improperly presented and should be denied.

Finally, the case on which Darling relies, *Delap v. State*, 350 So. 2d 462 (Fla. 1977), *cert. denied*, 496 U.S. 929 (1990), is distinguishable from the instant case. In *Delap*, a great deal of the record of the proceedings in the trial court were missing. These included "no transcripts . . . of 'the jury charge conferences; charge to the jury in both the trial and penalty phases; voir dire of the jury; and closing arguments of counsel in both the trial and penalty phases' of the proceedings . . .." *Craig v. State*, 510 So. 2d 857, 861 (Fla. 1987), *cert. denied*, 484 U.S. 1020 (1998). In *Delap*, "the trial court . . . found upon inquiry into the matter that it was 'impossible to reconstruct said portions of the record . . . and there appears to be no means of completing the requested record.'" *Id.*

In *Craig*, the defendant claimed to want "a verbatim transcript of the prosecutor's arguments on the sentencing issue." *Id.* He claimed, as Darling does, that without it "there can be no meaningful appellate review." *Id.* This Court rejected that claim, distinguishing *Delap* on the above bases, and noted that "the trial court found that it was possible to assemble a reasonably accurate

reconstruction of what was said." *Id.*

As mentioned above, Darling's well-experienced appellate counsel did not even attempt reconstruction of the record. The State contends that by presenting this claim to this Court without having first presented it to the trial court (or having moved this Court for relinquishment to make such a presentation) he has procedurally barred the claim on appeal. Furthermore, since it is Darling's burden to prove error, he must show that the failure to report the hearing, or to reconstruct the record, prejudiced him. *See Songer v. Wainwright*, 423 So. 2d 355, 356 (Fla. 1982)[defendant could show no prejudice where charge conference transcript not included in record where the instructions were in writing and included in record]. *See also Turner v. Dugger*, 614 So. 2d 1075, 1079-80 (Fla. 1992)[failure to record bench conferences harmless where no prejudice established]. Where, as here, appellate counsel has not disclosed any basis for his unsupported allegation that the hearing was a "critical" one, despite having talked to trial counsel, "court personnel," and presumably, his client, about what occurred thereat, he has not met the prejudice requirement. Darling is entitled to no relief.

POINT IX

DARLING HAS FAILED TO DEMONSTRATE ANY ERROR IN THE TRIAL COURT'S DENIAL OF HIS SPECIAL REQUESTED JURY INSTRUCTION PERTAINING TO BURDEN SHIFTING AND VICTIM IMPACT EVIDENCE.

Darling complains about the denial of two of his requested jury instructions. (IB 86). He says that one of the instructions improperly shifted the burden of proof to him, and also complains that another instruction regarding victim impact evidence, prejudiced him. (IB 86, 88). He is incorrect.

Burden-Shifting: Darling claims that the standard instruction on aggravating factors and mitigating circumstances misstates the law. (IB 86). He complains that the instruction "impermissibly shift[s] the burden of proof regarding mitigating circumstances." (IB 86).

This Court addressed this claim on the merits in *Shellito v. State*, 701 So. 2d 837 (Fla. 1997), *cert. denied*, 118 S.Ct. 1537 (1998). In *Shellito*, this Court said:

> . . . Shellito argues that the trial judge erred in refusing to give his requested clarifying instructions on mitigating evidence and on who bears the burden of proving that death is the appropriate penalty. We reject each of these claims. This Court has repeatedly determined that the requested clarifying instructions on mitigating evidence are not required. *. . .* Likewise, we do not find that the standard instructions improperly shift the burden of proof. . . .

(citations omitted) 701 So. 2d at 842. Since Darling's jury was instructed with the standard instruction approved in Shellito,

there is no merit to his claim.

Moreover, as mentioned above, after the trial judge instructed the jury, he specifically asked Defense Counsel whether the instructions were acceptable as read. Counsel responded that they were. (T 767). Trial counsel waived any objection to the jury instructions, and therefore, this issue is procedurally barred.

Victim Impact: Darling claims that his proposed jury instruction on victim impact evidence should have been given. He says the failure to give it "was error," and that it was an accurate statement of the law "not adequately covered in the standard jury instructions." (IB 86). His proposed instruction on victim impact evidence was:

> You have been presented with evidence concerning Grazyna (Grace) Mlynarzk by Joanne Reed. You are specifically advised and caution (sic) that this evidence is not an aggravating circumstance. You should not use this in determining what, if any, aggravating circumstances exist. Nor should you use this evidence in weighing the aggravating circumstances and mitigating circumstances.

(R 1051).

Contrary to Darling's claim, the proposed instruction is not an accurate statement of the law. In *Alston v. State*, 723 So. 2d 148, 160 (Fla. 1998), the defendant claimed that a jury instruction on victim impact evidence given by the trial court was error. The instruction provided: "[Y]ou shall not consider the victim impact evidence as an aggravating circumstance, but the **victim impact evidence may be considered** by you in making your decision in this

matter." (emphasis added) 723 So. 2d at 160. This Court agreed that the instruction comports with the law as set out in *Windom* and *Bonifay*.[19] *Id.*

Darling's requested instruction is an incorrect statement of the law in that it would instruct the jury not to use victim impact evidence in making its decision in the matter of the sentencing recommendation. *See Alston*. Since it was an incorrect statement of the law, it was properly denied.

Darling also complains that he asked the trial judge if he would give any instruction, and the judge "rebuffed appellant's request." (IB 89). The record shows the following:

> [Defense Counsel]: Judge, is there any type of instruction regarding the victim impact the court would allow? Possibly I could draft it so they would understand.
>
> The Court: One has not been presented to the court. I'm going to rule on what has been presented to the court.

(R 238). No jury instruction request was made to be rebuffed. The court informed defense counsel that he would rule on any proposed instructions presented. None were presented. The court has no obligation to fashion such a jury instruction for the defense. Darling has not, and can not, show any error in this regard. He is entitled to no relief.

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[19] *Windom v. State*, 656 So. 2d 432, 438 (Fla. 1995), *cert. denied*, 116 S.Ct. 571 (1995); *Bonifay v. State*, 680 So. 2d 413 (Fla. 1996).

POINT X

THE DEATH PENALTY WAS NOT DISPROPORTIONATELY IMPOSED; THE TWO AGGRAVATORS FAR OUTWEIGH THE NONSTATUTORY MITIGATION.

Darling complains that the death penalty should not have been imposed because the sequence of the events culminating in Grace's murder "are still unknown." (IB 90). He also quarrels with the trial court's determination that the two aggravators outweighed the mitigation. (IB 90-94). The aggravators were conviction of a prior, violent felony (carjacking with a firearm, robbery, and aggravated battery, each involving "the use or threat of violence to another person"[20]) and the murder was committed while Darling was engaged in the felony, armed sexual battery. (R 330-31).

Apparently, the trial judge found the statutory age mitigator (20 years old), but considered it of "modest" weight because the defense doctor testified that Darling was of average, normal intelligence and his mother said "he was an adequate student." (R 331, 332). Confusingly, it appears that the trial judge also considered Darling's age as a nonstatutory mitigator, assigning it "some weight" in this category. (R 332). He also found several other nonstatutory mitigators, to which slight to moderate weight was assigned. (IB 92). According to Darling, this nonstatutory

[20] Darling highjacked a car, made the male victim drive to a remote area, ordered him to hand over his money, and upon his compliance, shot him in the back of the head. (R 30, 32). Miraculously, he survived.

mitigation is:

> . . . Dolan was abused as a child by his alcoholic father who never married Dolan's mother. In spite of his background, he grew into a person who was loving and caring of his own family. In spite of his upbringing and his IQ of only 85, Appellant had a good employment history.

(IB 92).

Darling asks this Court to reweigh the mitigation and find that it outweighs the aggravators.

> Deciding the weight to be given a mitigating circumstance is within the trial court's discretion, and a trial court's decision is subject to the abuse-of-discretion standard. . . . In the sentencing order, the trial court detailed the evidence presented regarding each circumstance proposed, found each of these nonstatutory mitigators to exist, and afforded them the weight which the court found was appropriate.

(citations omitted) *Cole v. State*, 701 So. 2d 845, 852 (Fla. 1997), *cert. denied*, 523 U.S. 1051 (1998). In the instant case, the trial judge's sentencing order states the evidence of each circumstance, found all mitigators proposed, but one, and afforded them the weight which he felt was appropriate. Darling has utterly failed to establish that the trial judge abused his discretion in regard to the finding, and weighing, of the mitigating circumstances.

A comparison of the instant case to other similar cases compels the conclusion that the death sentence -- recommended by the jury by a vote of eleven to one -- is proportionate. In *Mansfield v. State*, 25 Fla. L. Weekly S245, S247 (Fla. 2000), a

death sentence based on two aggravators -- HAC and committed during a sexual battery -- weighed against five nonstatutory mitigators was proportionate. In *Davis v. State*, 703 So. 2d 1055 (Fla. 1997), *cert. denied*, 524 U.S. 930 (1997), HAC and committed during a sexual battery weighed against several nonstatutory mitigating factors supported an eleven to one jury recommendation, and trial court imposition, of death and was proportionate. In *Shellito v. State*, two aggravating circumstances, prior violent felony and committed during a robbery, and an eleven to one death recommendation weighed against age as mitigation and some background and character type nonstatutory mitigation supported a death sentence which this Court upheld as proportionate. In *Consalvo v. State*, 697 So. 2d 805 (Fla. 1996), *cert. denied*, 523 U.S. 1109 (1998), this Court found a death sentence proportionate where two aggravators -- avoid arrest and committed during a burglary -- were weighed against nonstatutory mitigation.

Moreover, in *Ferrell v. State*, 680 So. 2d 390 (Fla. 1996), *cert. denied*, 520 U.S. 1123 (1997), this Court rejected a proportionality challenge where there was a single aggravator -- one of the two found in the instant case -- prior violent felony and several nonstatutory mitigating circumstances with a ten to two jury recommendation of death. In *Ferrell*, this Court said:

> Although we have reversed the death penalty in single-aggravator cases where substantial mitigation was present, we have affirmed the penalty despite mitigation in other cases

> where the lone aggravator was especially weighty. . . .
>
> The prior violent felony Ferrell was convicted of committing was a second-degree murder bearing many of the earmarks of the present crime, as reported in the presentence investigation . . ..
>
> We find Ferrell's death sentence proportionate . . ..

680 So. 2d at 391.

The prior violent felony in the instant case bears many of the earmarks of the instant murder. In both cases, Darling confronted his victim alone, both victims were fully compliant with his demands, yet he shot both victims in the back of the head with a gun at extremely close range. *See* R 31-33. Thus, Darling's death sentence could well be upheld had there been only a single aggravator. *Ferrell*.

However, in this case, there are two valid and weighty aggravators which were almost the same as those in *Shellito*. The difference being that the committed during a felony was burglary in *Shellito* and sexual battery in the instant case. The State contends that the instant sexual battery was even more weighty than the burglary in *Shellito* though because Darling committed **two** sexual batteries on Grace, one vaginal and one anal.

Thus, the prior violent felony in Darling's case is especially weighty because it bears many of the earmarks of the instant murder, and the committed during a sexual battery is especially

weighty because it involves both vaginal and anal rape of a totally compliant victim.[21] If age and some background and character type nonstatutory mitigation was insufficient to render Shellito's death sentence disproportionate, it is certainly inadequate to do so in the case of Darling's. Darling's death sentence is proportionate and should be upheld by this Court.

[21] It is also worthy of note in this regard that the medical examiner testified that the vaginal rape especially was extremely painful; pain also accompanied the anal assault. (T 460).

POINT XI

DARLING HAS FAILED TO DEMONSTRATE THAT HIS DEATH SENTENCE VIOLATES AN INTERNATIONAL TREATY.

Darling claims that his death sentence was imposed upon him in violation of an international treaty, The Vienna Convention on Consular Relations. (IB 95). He says that as "a foreign citizen national from the Bahamas," he had the right to be informed that he could "seek contact with his consulate." (IB 95). He adds that his attorney "filed a motion below asking for such relief," (IB 95), however, he does not advise whether a hearing was held on that motion much less whether an order was entered on it, and, if so, what the ruling was.

Appellate counsel proceeds to claim that Darling was not informed of his right to seek consulate contact, but provides no record citation to support that claim. (IB 95). He claims that "the only remedy . . . is the elimination of death as a possible sentence" without any citation or grounds given in support of that claim. (IB 95-96). He alleges that The Hague "has previously called on other states to halt executions of foreign nationals based on possible Vienna Convention violations" without citation, analysis, or specifics. (IB 96).

The State contends that such conclusory, barebones pleading is "factually and legally insufficient to provide a basis for relief. *See Robinson v. State*, 707 So. 2d 688, 699 (Fla. 1988). It is

Darling's burden to demonstrate error, and where, as here, he has not even alleged what the disposition of his motion was, he has clearly failed to carry that burden. Thus, this claim should not be further considered.

Moreover, the motion filed in the lower court was legally and factually insufficient because it failed to state that Darling is a foreign national. (R 808-10). It also failed to State whether the Bahamas is a signatory to that treaty. *Id.* Either critical omission provides a sound basis for a denial of relief requested in the motion.[22]

Finally, even were this Court to reach the merits of this claim, Darling is entitled to no relief. "The Vienna Convention . . . has been in effect since 1969 . . .." *Murphy v. Netherland*, 116 F.3d 97, 100 (4th Cir. 1997), *cert. denied*, 521 U.S. 1144 (1997). To establish any entitlement to relief based on the notification requirement in the treaty, a defendant must "establish prejudice" by "explain[ing] how contacting the . . . consulate would have changed . . . his sentence." 116 F.3d at 100. Murphy's allegation that "the consulate could have helped him . . . obtain mitigating evidence for the sentencing hearing" was legally insufficient where he made "'no showing of what evidence the . . .

[22] Additionally, the State contends that the failure to obtain a ruling on his motion in the trial court constitutes abandonment of the claim and procedurally bars this issue on appeal.

consulate would have produced.'" *Id.* at 101.

In *Breard v. Pruett*, 134 F.3d 615 (4th Cir. 1998), *cert. denied*, 523 U.S. 371 (1998), the facts of the murder are very similar to those in the instant case. Apparently, the only evidence linking Breard to the murder of the victim was "[s]emen found on [the victim's] public hair [which] matched Breard's enzyme typing in all respects, and his DNA profile matched the DNA profile of the semen found on [the victim's] body. 134 F.3d at 617. The circuit court, reviewing denial of a federal habeas petition, soundly rejected Breard's claim "that his convictions and sentences should be vacated because, at the time of his arrest, the . . . authorities failed to notify him that, as a foreign national, he had the right to contact the Consulate . . .." *Id.* at 618-19.

In *United States v. Juarez-Yepez*, 202 F.3d 279 (9th Cir. Nov. 22, 1999), the Mexican defendant claimed that his post-arrest statements should not be used against him in his drug prosecution because he was not informed of his right to contact his consulate as required under the terms of The Vienna Convention. The court held that

> [i]n order to suppress evidence obtained in violation of the Vienna Convention, a defendant must show that 'he did not know of his right to consult with consular officials, that he would have availed himself of that right had he known of it, and that there was a likelihood that the contact would have resulted in assistance to him.

202 F.3d at 279. Since Juarez-Yepez failed to make that showing,

his statements were properly considered against him at trial. *Id.*

In *United States v. Lombera-Camorlinga*, 2000 WL 245374 (9th Cir. March 6, 2000), the court recognized that "Article 36 of the Vienna Convention on Consular Relations . . . provides that law enforcement officials 'shall inform' arrested foreign nationals of their right to notification of their consulates."[23] It then conducted an "*en banc* review . . . to consider whether the suppression of evidence is an appropriate remedy for violation of the Vienna Convention." The court concluded "that it is not, for there is nothing in the language or operation of the treaty provision to suggest [it] was intended to create an exclusionary rule . . .." *Id.* The court held that "a foreign national's post-arrest statements should not be excluded solely because he made them before being told of his right to consular notification." *Id.*

In the instant case, Darling asks this Court to exclude the death penalty as a possible sentence for his capital murder based on an alleged failure to inform him of his right to contact his consulate. Laying aside the critical fact that he did not

[23] The court noted that this provision of the treaty covers "a number of issues that require consular intervention or notification, including . . . the arrest or detention of a consular officer." *Id.* Since it is Article 36 on which he relies, it appears that he is entitled to no relief because he has not alleged that he was "a consular officer," and nothing in the record indicates that he was such.

introduce any evidence -- not even an affidavit or verified pleading -- establishing that he was not so informed (or any of several other critical facts), and assuming *arguendo* that his allegation of failure to inform is accurate, the federal cases on suppression of statements given by foreign nationals who were not informed of the right to contact their consulates indicate that he is entitled to no relief as no court has found that exclusion is an appropriate remedy. Moreover, his failure to show how being informed of his right to contact the consulate would have aided him in the defense of the charges against him and/or would have precluded the death sentence bars relief. Likewise, he has not even alleged, must less proved, that he did not know of his right to consult with his consulate, or that he would have availed himself of that right had he known of it. Clearly, his barebones, conclusory, unsworn pleadings are insufficient on which to base relief of any kind. Having utterly failed to demonstrate entitlement to relief, his instant appellate claim should be denied.

CONCLUSION

For the reasons set out above, Darling's conviction and sentence of death should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to Christopher S. Quarles, Assistant Public Defender, Chief, Capital Appeals, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114, on this ______ day of May, 2000.

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Of Counsel