IN THE SUPREME COURT OF FLORIDA

DOLAN C. DARLING,)
a/k/a)
SEAN SMITH)
)
Appellant,)
)
vs.) CASE NUMBER SC94-691
)
STATE OF FLORIDA,)
)
Appellee.)
_____)

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

The record on appeal comprises thirteen volumes. There are an additional three volumes comprising the supplemental record. The transcript of the guilt phase of the trial are volumes numbered one through four consecutively totaling 799 pages. This portion of the record will be referred to using a roman numeral to designate the volume coupled with the letter "T" and the appropriate pages therein. The remaining nine volumes of the record are numbered consecutively from volume one through volume nine totaling 1199 pages numbered consecutively commencing with page one. Counsel will refer to this portion of the record using a roman numeral to designate the volume coupled with the letter "R" followed by the

appropriate pages. Counsel will refer to the supplemental record using the appropriate roman numeral with the volume coupled with the letters "SR" and the appropriate pages.

STATEMENT OF THE CASE

On June 12, 1997, a grand jury in Orange County, Florida returned an indictment charging Sean Hector Smith, a/k/a Dolan Carlton Darling, the appellant, with the premeditated murder of Grazyna (Grace) Mlynarczyk by shooting her with a deadly weapon, to-wit: a firearm.[1] (R V, 405) The grand jury also charged appellant with one count of armed sexual battery[2] of Ms. Mlynarczyk and one count armed robbery[3] of Ms. Mlynarczyk. (R V, 405-407)

The originally appointed Office of the Public Defender was forced to withdraw after they certified a conflict of interest. (R V, 428-32) The trial court appointed Robert LeBlanc to represent appellant. (R V, 431-32) The trial court subsequently granted Mr. LeBlanc's motion for co-counsel and appointed Frank Iennaco. (R V, 441-44)

On July 23, 1998, appellant filed numerous motions attacking Florida's death sentencing scheme. (R V 468-610)

The case proceeded to trial before the Honorable John H. Adams, Sr. (R VI 668-74) During voir dire, the trial court restricted defense counsel's questioning of

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[1] In violation of Sections 782.04 and 775.087, Florida Statutes (1995).

[2] In violation of Section 794.011(3), Florida Statutes (1995).

[3] In violation of Sections 812.13(2)(a) and 775.087, Florida Statutes (1995).

potential jurors. (T II 187-89, 193-94)

Appellant objected to the testimony of the state's DNA expert. The trial court overruled the objection and qualified the witness as a expert. The trial court also overruled appellant's objection and rebuffed appellant's request for a Frye hearing[4]. The court allowed the DNA testimony in evidence over defense objection. (T III 560-72, 592-93)

The state rested and appellant presented no evidence. (T IV 678-80) Based upon the complete lack of evidence for armed robbery, the state stipulated to appellant's motion for judgment of acquittal as to that particular charge. (T IV 678-79, 711) The trial court denied appellant's motion for judgment of acquittal as to the charges of murder and sexual battery. (T IV 695-709)

During final summation by defense counsel, the trial court sustained the state's objection and precluded defense counsel from arguing the failure of the state to exclude other suspects. (T IV 737-41, 772)

After defense counsel completed his allowed argument to the jury, the prosecutor asked the jury to rely on their recollection of the evidence. When defense counsel attempted to argue that the state's evidence was lacking, the trial court sustained the state's objection and precluded appellant's argument in rebuttal.

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

(T IV 746-47)

The trial court denied appellant's request for a special jury instruction on circumstantial evidence. (T IV 709-15;R VII 762, 787) Following deliberations, the jury returned with verdicts finding appellant guilty of first-degree murder and armed sexual battery. (R VII 789-91) The trial court adjudicated appellant guilty of these two offenses. (R VII 793-95) Prior to the commencement of the penalty phase, appellant filed a motion to preclude death as a possible penalty based on the violation of international treaty law. (R VII 808-10)

During the penalty phase, the trial court sustained the state's objection and refused to allow appellant to argue in mitigation that he had steadfastly declared his innocence. (R II 67-69, 210-12, 249-51) At the charge conference, the trial court denied many of appellant's requested jury instructions. (R VIII 1052-76)

Following deliberations, the jury recommended that the trial court sentence Appellant to death. (R VIII 1086) Following a Spencer[5] hearing (R IX 1144, IV 318-42), the trial court sentenced appellant to death finding two aggravating factors and substantial mitigation. (R VIII 1121-27) The trial court sentenced appellant to a concurrent term of 256.5 months for the armed sexual battery. (R IX 1132) Appellant filed a notice of appeal on January 8, 1999. (R IX 1145) This

[5] Spencer v. State, 615 So.2d 688 (Fla. 1993).

brief follows.

STATEMENT OF THE FACTS

A. **Guilt /Innocence Phase**

The victim in this case, Grusonii Mlynarczyk, a Polish woman also known as "Grace", met Zdzislaw Raminski, also known as "Jesse", in Gdansk, Poland in 1990. (T II 323-25) Jesse was visiting from Orlando where he owned Able Transportation, which provided shuttle service to and from the airport and the surrounding attractions. (T II 326)

In September 1992, Grace left her husband and two small children in Poland. She arrived in Orlando and began working as a driver for Jesse. Grace's visa expired in 1993, but she continued to live illegally in Orlando. (T II 324-28, 338-40) At some point, Grace and Jesse became romantically/sexually involved. (T II 325-26) Grace's husband eventually became aware of the illicit relationship.[6] (T II 341) Jesse married another woman in 1996 with whom he had at least one child. Jesse's wife remained ignorant of his ongoing affair with Grace. (T II 340)

Jesse Raminski was the only witness at trial to provide any details of Grace's last day alive. Jesse stopped by Grace's apartment at 9:30 a.m. on October 29, 1996. Grace was doing laundry in the apartment complex laundry room. Jesse

[6] Grace and her husband had a turbulent relationship, and he had threatened to kill her in the past. (T II 361)

stayed in the car and Grace met him out front. Grace wore shorts and a small t-shirt. Jesse gave her $300.00 in cash for work she had performed.[7] (T II 327-30) Grace told Jesse that she had an appointment with her gynecologist that afternoon. She had been complaining of vaginal itching.[8] (T II 328-29, 342-43, 369)

As Jesse talked to Grace that morning, he noticed some people talking together behind his car. (T II 347-48) Jesse thought they could have been the maintenance crew. (T II 347-48) Grace feared the maintenance people who worked at the apartment complex. She had asked management to change her locks and had taken it upon herself to install a security chain on her door. (T II 345-46)

After driving away from Grace and her laundry duties, Jesse talked to her briefly by phone at approximately 10:15 a.m. while he was at the Orlando airport. He attempted to call her several more times that morning, but his cell phone failed to connect. He finally got through again before 2:00 p.m. that afternoon and left a message on Grace's answering machine. (T II 331-32) That afternoon he tried to reach Grace two more times without success. When he got home at 4:12 p.m., he called and left another message. He then changed his clothes and drove over to

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[7] Jesse paid Grace in cash because of her illegal status in this country. (T II 364)

[8] Grace had an IUD birth control device inserted about one year earlier. (T II 353-54, 368)

Grace's apartment. (T II 333-35)

Without noticing if Grace's door was locked, Jesse used his key to gain entry. He noticed a basket of laundry on the living room floor.[9] He noticed that Grace's bedroom door was closed which was also unusual. When he entered Grace's bedroom he found her lying face up on the floor. Her legs were inside the walk-in closet. She was nude from the waist down. Jesse noticed no apparent injuries. (T II 333-36) Jesse picked her up and put her on the bed. When he did so, he noticed that she was cold. He also found blood on his hand. He called 911 and waited for the paramedics and police to arrive. (T II 336-38)

Lt. Richard Lalonde and firefighter Sexton responded to the call. When they arrived at the apartment complex, Jesse was waiting outside. When they entered Grace's apartment, they noticed no signs of a struggle. In fact, the apartment appeared very neat. The EMTs removed Grace from her bed and placed her on the floor. They were about to perform CPR, when they noticed that rigor mortis had set in. Sexton got a towel from the laundry basket in the living room and covered Grace's nude lower half. (T III 376-84)

Orange County Deputy Sheriff William Pictrzrak arrived at the apartment as the EMTs were leaving. At that point, he secured the crime scene. (T III 385)

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[9] Jesse described such "mess" as very unusual. (T II 338-35)

Deputy Michael Davis processed the crime scene looking for evidence. (T III 393-94) He spent nine days throughly processing the apartment searching for blood, latent prints, and any other usable evidence. (T III 405-407) He lifted many latent fingerprints from the apartment. He took over 1,000 photographs. (T III 408-409) He found no gun, no casings, and very little blood. (T III 409-410) The apartment was quite neat and showed no signs of struggle. (T III 410) Davis found close to $2,000 in cash still in the apartment. (T III 433-32)

Dr. William Anderson, the medical examiner concluded that Grace died sometime before 1:00 that afternoon but sometime after 11:00 p.m. the day before. (T II 445,454) . Grace died from a single gunshot in the back of the head. (T III 446-55, 463-641) The bullet apparently passed through a pillow before entering her head. (T III 409, 446-55) Dr. Anderson found no evidence that Grace had been bound or that she fought or scratched her assailant. (T III 461)

A critical issue at trial was whether or not Grace had been sexually battered prior to her death. The medical examiner found one small tear in the rectal area which was consistent with penile or digital penetration.[10] (T III 458-59) There

[10] In his sworn deposition, Dr. Anderson testified that Grace's anal area suffered no injuries. At trial, the doctor's testimony changed. (T III 466-67)

were also recent abrasions[11] in the vaginal region. (T II 456, 468) The doctor never said how "recent" the abrasions were. The doctor found no lacerations. (T III 468) The abrasions were consistent with penetration by some object, for example a finger or a penis. (T III 459) The abrasions were also consistent with Grace scratching herself to relieve itching. (T III 468-69) Dr. Anderson believed that the injuries were an indication that recent sexual contact was non-consensual. He said that the rectal tear would cause "some pain". (T III 460) Dr. Anderson concluded that the injuries were not consistent with consensual sex based on his conclusion that the pain would interrupt the activity.

When pressed on the matter, Dr. Anderson admitted (as he did in his deposition) that the vaginal abrasions could have occurred during consensual "rough sex." (T III 464-65) The small rectal tear could have been the result of consensual anal intercourse . (T III 458-59, 467) Dr. Anderson would not agree that the absence of defensive wounds indicated that the encounter had likely been consensual. (T III 467)

Dr. Anderson noted during the autopsy, moderate cervical inflamation.[12] (T

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[11] The doctor explained that an abrasion is a hemorrhage without bleeding, similar to skin scrapes. (T II 457-468)

[12] The finding explained Grace's complaint that prompted her to make an appointment with her gynecologist.

III 470) This could have caused a vaginal discharge. (T III 473) Dr. Anderson noticed no generalized vulva infection, i.e., no inflamation in the vaginal area. Dr. Anderson explained that the cervix was a long way from the labia. (T III 469-70, 473-74) A vaginal cream would not have relieved Grace's medical problem, but douching would. (T III 471-72) Based on these factors, Dr. Anderson opined that the vaginal abrasions were not the result of Grace's cervical inflamation. (T III 473-74)

Of the many fingerprints lifted from Grace's apartment, one found on a bottle of skin care lotion in her bathroom matched Appellant's right thumb. (T III 487-95, 501-2, 524-29) There was no way to determine when the print was left on the bottle. (T III 504-5)[13] Tony Moss, the latent print examiner on the case, studied the **171** latent prints gathered from Grace's apartment. Moss only found one print matching the appellant. Two prints were identified as belonging to Jesse Raminski. Thirteen prints were identified as belonging to Grace. Ninety-seven prints were determined to be of value. Seventy-four prints were determined to be of no value. (T III 531-36)

The day after the murder, Corporal Stewart Deritter, a detective in the

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[13] Latent prints remain for quite sometime unless they are wiped away. (T III 541-42) The forensic analyst testified that he has found prints left on porous surfaces twenty three years earlier. (T III 506)

homicide unit of the Orange County Sheriff's office, participated in a canvass of Grace's apartment complex. (T III 514) Deritter and other officers knocked on doors and talked to neighbors. They briefly described what they were looking for and ascertained the neighbors' comings and goings. Police were trying to find witnesses. (T III 515)

During the canvass, Corporal Deritter came into contact with the appellant at unit #96 where the appellant lived. (T III 515) Appellant's apartment was located in the building just north of the building that contained Grace's apartment. (T III 516-17) Corporal Deritter made contact with Darling just as he was coming home. Deritter had a very brief conversation with the appellant which the detective described as follows:

> Identified who I was, my credentials. Said we're conducting a neighborhood canvass to find out if anybody in this time period has seen anybody referenced to a lady's death that occurred, do you know her. And that was basically it.

(T III 516) In response, appellant replied "That he was working and didn't know anything of the incident. Had no information." (T III 517)

Vaginal and rectal swabs from the victim tested positive for semen, more specifically, sperm. (T III 508-10, 543-47) There was no evidence as to how long the semen could remain in the vagina. DNA testing of the semen matched samples

obtained from the appellant. (T III 521-23, 592-96) Specifically, the state's expert computed the odds of a random Caucasian male exhibiting the same profile matching five autorads would be one out of 239 billion. The odds of a random African American matching that same profile would be one in 104 billion. For Hispanic males, the odds would be one out of 1.7 trillion. More conservative calculations that eliminated the problems caused by substructuring, raised the probabilities of random matching. Using the more conservative equations, Baer calculated the odds for Caucasians as one out of 99 billion; for African Americans--one out of 101 billion; and for Hispanics--one out of 1.3 trillion. (T 470-74)

In computing the odds for Caucasians, the state's expert used an Orlando data base that law enforcement had compiled in the early nineties. That data base consisted of information from between one hundred fifty and two hundred people. For the African Americans statistics, the expert used the FBI data base which consisted of approximately seven hundred subjects. The expert used the FBI data base for Hispanics as well. That data base had approximately eight hundred subjects. (T IV 662-63)

The state's DNA expert conceded that it is twice as likely for a black person to have the same DNA profile as the appellant. In contrast, it was seventeen times less likely that a Hispanic person would have the same DNA profile as the

appellant. (T IV 664)

The state's expert admitted that he had no data base at all for Bahamians or any other ethnic group. (T IV 664) Baer admitted that Broward County had compiled a data base for the Bahamian population, but he did not seek that out to use in his calculations in this case. (T IV 667) He conceded that certain ethnic groups that are isolated from other ethnicity and races reproduce certain DNA markers repeatedly. As a result these populations have wildly different DNA than the rest of earth's population. (T IV 664-65)

B. **Penalty Phase**

1. State's Case

The state offered proof of one prior criminal episode involving the appellant. In November, 1996, appellant robbed and shot a cab driver in the course of stealing his taxi. As a result of this one incident, the state convicted appellant of carjacking, robbery, and aggravated battery. (R I 30-35; State's #24)

The only other witness presented by the state at the penalty phase was Joanne Reed, a friend of the victim who knew Grace in the two years prior to her death. Reed, who also worked as a driver for Jesse Raminski, testified that Grace was like her little sister. (R I 36-38) Reed explained that Grace was a warm, loving, caring, very gentle person with a good heart. (R I 42)

Grace was sorely afraid of her Polish husband, whom Reed described as a mean drunk. Grace was so frightened of her husband that she left her small children and fled to the United States to escape his savage beatings. (R I 38-39) Once she arrived, Grace fell in love with the United States. She also fell in love with Jesse Raminski who had helped her escape Poland. (R I 38-40) Grace talked of Jesse all the time. She claimed that the two of them discussed getting married. (R I 40)[14]

2. Appellant's Case

Eleanor Bessie Smith gave birth to the appellant on May 28, 1976 in the Bahamas where she lived.[15] Eleanor never married Dolan's biological father, Carlton Darling. Carlton did not believe in marriage. (R II 65, 77-78)

Carlton Darling had already fathered a daughter with Eleanor Smith in 1966. He did not move in with Smith until ten years later, after Dolan was born. (R II 107) Life at the Darling household was less than idyllic. Sundays were especially bad. Carlton Darling did not work on Sundays. He stayed home and drank all

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[14] Reed did not discuss the unlikelihood of the marriage plans coming to fruition in light of Raminski's existing marriage and family.

[15] In the Bahamas, if the parents are not married, the child is registered with the mother's last name. If the father later files an affidavit, the child takes the father's last name. This explains Appellant's two very dissimilar names, Sean Smith and Dolan Darling. (R II 100)

day.[16] He was an angry drunk who was ready to fight about anything and everything, real or imagined.[17] (R II 81)

Dolan suffered much of the physical abuse meted out in the household. At the age of sixteen, Dolan missed an appointment with his probation officer.[18] Carlton Darling's sanction for this offense was a beating using a PVC pipe. The beating was loud enough to wake Dolan's older half sister who was too scared to intervene. (R II 84) The beating necessitated a hospital visit.[19] (R II 127) On another occasion, when Dolan was five minutes late meeting his father after school, Carlton used a metal coat hanger to inflict a beating. (R II 92-94) Many times, he drew the ire of his father when Dolan attempted to stop his father's physical abuse of Dolan's mother. Carlton would then turn his wrath on Dolan.[20]

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[16] Carlton Darling admitted that he consumed alcohol to excess. (R II 77, 125-26)

[17] Carlton Darling came by his violent nature honestly. His father had physically abused him as a child. (R II 128)

[18] Appellant was under some type of court supervision for a traffic ticket received after he drove his mother's car before he was of legal age. (R II 84, 90-92)

[19] Doctors at the hospital urged Dolan's mother to call the police, but she refused. (R II 128)

[20] Carlton Darling readily admitted beating Dolan on many occasions using a variety of weapons, including a club, a closet rod, and the infamous PVC pipe. (R II 166)

(R II 79, 96, 103-104)

Carlton Darling was emotionally abusive as well. He was a flagrant philanderer who embarrassed his family on a daily basis. He had numerous affairs with other women and fathered at least one child by another woman. (R II 101, 105, 108) His numerous affairs created even more discord at home. (R II 112) He was not discreet at all. His misconduct was open and notorious. One of his girlfriends lived just up the street from the Darling household.(R II 78)

Being raised by Carlton Darling also took its toll on Verneki, Dolan's sister. Carlton moved into the household when Verneki was ten years old. At age sixteen, she went away to school, but not before her father had made his own mark on her. (R II 74, 79, 107) Verneki blamed her father for her problems later in life. Verneki was plagued by depression and alcoholism. She also developed acid reflux disease. (R II 98-99) Verneki also admitted that she had difficulty showing emotion to her husband and tended to be too physical with her own son.

Michael Herkov, a forensic psychologist and associate professor of psychiatry at the University of Florida College of Medicine, evaluated Dolan Darling. Dr. Herkov conducted extensive interviews and reviewed voluminous material. (R II 115-22) Dr. Herkov's most significant finding was the extreme

physical abuse suffered by Dolan as a boy.[21] (R II 122) When Dolan was approximately seven years old, his father's numerous extramarital affairs led to a deterioration of his relationship with Dolan's mother. Carlton Darling initially focused his abuse on Ms. Smith before eventually shifting to Dolan. Dolan's parents separated in 1992, but not before Dolan suffered significant physical and emotional abuse. (R II 123-25)

Dr. Herkov explained the direct correlation between the violence a child experiences and subsequent violence committed by the child.[22] (R II 126-27) The cycle of violence begins when a caretaker abuses a child. The child cannot conceptualize the fact that someone he loves and trust is causing the abuse. The exposure desensitizes the child to violence. The child learns that violence is an acceptable way of dealing with conflict. The child also draws conclusions about the way one treats women and the people you love. (R II 129-31)

An examination of school records demonstrated that Dolan's deterioration began in the sixth grade. Initially, Dolan was a compliant, affectionate, and well-behaved child. Subsequently, his behavior and grades deteriorated. (R II 132-34)

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[21] Contrary to popular perceptions that child abuse is rampant, Dr. Herkov pointed out that less than five percent of children are abused. (R II 128)

[22] In addition to the physical abuse, there was brief mention that Dolan also suffered a history of sexual abuse. (R II 136) No details were developed.

Dolan's IQ measured 84. Eighty four percent of the population is higher. (R II 136-37) Dr. Herkov concluded that Dolan suffered from a learning disability. (R II 137)

Dr. Herkov explained that Dolan was clearly not insane. But as a result of his upbringing, Dolan's perception of the world had changed. The abuse affected his self-worth and his ability to cope. (R II 134-35) The abuse he suffered was not offered as an excuse. Rather Dolan was able to make choices in life, but the number and tools to make those choices were more limited than for a person who was not abused. (R II 132)

In spite of his environment as a child, many agreed that he had retained some redeeming qualities. He had fathered a child and made sure that the child was provided for financially. (R II 66, 72) Despite the fact that he had been in custody for quite sometime, Dolan maintained a relationship with his daughter.[23] (R II 64) Dolan's family described him as a good domestic partner who was polite, nonviolent, and affectionate toward children. (R II 143-44)

SUMMARY OF THE ARGUMENT

[23] Family was obviously important to Dolan. Even after his own father beat him unmercifully, Dolan would rush to his father's defense in the event of a fight with an outsider. (R II 135)

Appellant contends that the trial court should have granted his motion for judgment of acquittal as to both the murder and sexual battery. The sum of the state's evidence against the appellant was a fingerprint found on a bottle in the victim's bathroom and semen/DNA that matched his. The evidence is not inconsistent with every reasonable hypothesis of innocence. Initially, the DNA evidence is suspect. An unqualified witness testified as an expert, and the trial court allowed evidence without sufficient predicate.

Additionally, appellant and the victim could have been having a consensual affair that the victim hid from her boyfriend. The vaginal abrasions were consistent with rough sex. The rectal tear was consistent with consensual anal intercourse. Appellant's denial that he heard anything suspicious on the day of the murder is not incriminating in the least. The fingerprint could have been placed on the bottle at another time and at another location. Finally, even if this Court concludes that the evidence was sufficient to convict appellant of murder, the evidence is insufficient to support a conviction for first-degree murder. The circumstances surrounding Grace's killing are unclear at the very most. At most, the state proved second-degree murder. In this same vein, the trial court erred in denying appellant's requested special jury instruction on circumstantial evidence. Under the peculiar facts of this case, such an instruction was absolutely required.

Reversible error also occurred when the trial court sustained the state's objection and refused to allow defense counsel to argue that the evidence did not exclude other suspects whom the police investigated. Specifically, the state's DNA expert mentioned that he compared semen from the victim to at least two other named individuals. Defense counsel was arguing in final summation that the DNA results were unreliable. Defense counsel attempted to argue that police never excluded these two individuals as suspects using other methods such as fingerprints. The trial court prevented that line of argument. Appellant also contends that the trial court should not have precluded defense counsel from making the concluding argument, where the prosecutor ostensibly waived his own closing argument.

The trial court also committed reversible error by limiting voir dire examination. Appellant was prevented from asking jurors about their willingness to consider a sentence of life imprisonment without possibility of parole rather than the death penalty. Several jurors expressed concern about the lengthy appellate process in capital cases. Defense counsel was also precluded from inquiring of those jurors regarding their knowledge of innocent people freed from death row many years after the fact.

The trial court also committed reversible error at the penalty phase.

Specifically, the court refused to allow appellant to argue that he had steadfastly declared his innocence. Appellant urges this Court to reconsider its prior holdings that lingering doubt is not a relevant topic at the penalty phase. This is especially true under the facts of this case where the evidence of guilt was entirely circumstantial and the state continued their attempt to prove appellant's guilt at the penalty phase. The trial court also committed reversible error by failing to give the special jury instructions requested by the defense at the penalty phase.

The death penalty is not an appropriate sentence in this case. Only one valid aggravating factor exist. Balanced against the substantial mitigation, this Court has reduced similar cases to life imprisonment without the possibility of parole. Additionally, since appellant is a foreign national living in this country, his execution would violate international treaty law. Finally, appellant complains on appeal that the loss of critical pretrial hearing denies him adequate appellate review. The only remedy is a new trial.

ARGUMENT

Appellant discusses below the reasons which, he respectfully submits, compel the reversal of his convictions and sentences. Each issue is predicated on the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I, Sections 9, 16, 17, & 22 of the Florida Constitution, and such other authority as set forth.

POINT I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL WHERE THE EVIDENCE WAS COMPLETELY CIRCUMSTANTIAL AND DID NOT EXCLUDE EVERY REASONABLE HYPOTHESIS OF INNOCENCE.

The trial court erred in denying appellant's motion for judgment of acquittal where the evidence is legally insufficient to support the guilty verdicts. The evidence fails to exclude the reasonable hypothesis that someone other than Sean Smith/Dolan Darling killed Grace Mlymarzk and/or that the killing was not premeditated. The state's evidence is also legally insufficient to support a guilty verdict for sexual battery. The evidence of appellant's guilt is entirely circumstantial.

The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime

with which he is charged. In re Winship, 397 U.S. 358, 364 (1970). This Court has long held that one accused of a crime is presumed innocent until proved guilty beyond and to the exclusion of a reasonable doubt. It is the responsibility of the State to carry this burden. Cox v. State, 555 So.2d 352 (Fla. 1989). When the State relies upon purely circumstantial evidence to convict an accused, the courts have always required that such evidence must not only be consistent with the defendant's guilt but it must also be inconsistent with any reasonable hypothesis of innocence. Davis v. State, 90 So.2d 629, 631 (Fla.1956); McArthur v. State, 351 So.2d 972 (Fla.1977). Circumstantial evidence must lead "to a reasonable and moral certainty that the accused and no one else committed the offense charged." Hall v. State, 90 Fla. 719, 720, 107 So. 246, 247 (1925). Circumstances that create nothing more than a strong suspicion that the defendant committed the crime are not sufficient to support a conviction. Williams v. State, 143 So.2d 484 (Fla.1962); Davis; Mayo v. State, 71 So.2d 899 (Fla.1954).

Indeed, one of this Court's functions in reviewing capital cases is to see if there is competent substantial evidence to support the verdict. Cox v. State, supra at 353; Williams v. State, 437 So.2d 133 (Fla.1983). When evidence of guilt is circumstantial, a special standard of review of the sufficiency of the evidence applies:

> The law as it has been applied by this Court in reviewing circumstantial evidence cases is clear. A special standard of review of the sufficiency of the evidence applies where a conviction is wholly based on circumstantial evidence. Jaramillo v. State, 417 So.2d 257 (Fla.1982). 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. McArthur v. State, 351 So.2d 972 (Fla.1977); Mayo v. State, 71 So.2d 899 (Fla.1954). 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.
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> * * *
>
> [However, a] motion for judgment of acquittal should be granted in a circumstantial evidence case if the state fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt. See Wilson v. State, 493 So.2d 1019, 1022 (Fla.1986). Consistent with the standard set forth in Lynch [v. State, 293 So.2d 44 (Fla.1974)], if the state does not offer evidence which is inconsistent with the defendant's hypothesis, "the evidence [would be] such that no view which the jury may lawfully take of it favorable to the [state] can be sustained under the law." 293 So.2d at 45 (Fla.1974). The state's evidence would be as a matter of law "insufficient to warrant a conviction." Fla. R. Crim. P. 3.380.

State v. Law, 559 So.2d 187, 188-189 (Fla. 1989).

A. The Undisputed Facts

These facts are not in dispute. Jesse Raminski was the last known person to see Grace alive. Grace worked for Jesse as a driver. Grace and Jesse were having an affair. Grace's husband knew about the affair. Jesse's wife did not. (T II 325-26, 340-41) Grace's husband had threatened to kill her in the past. (T II 361) Grace was experiencing vaginal problems and had an appointment with her gynecologist on the day that she died.

Jesse found Grace dead in her apartment that afternoon. She was nude from the waist down and had been shot once in the back of the head. The police never located the weapon.

The appellant lived in the same apartment complex. On the day after the murder, police conducted a survey of the residence of the complex. When asked if he heard anything during the hours of the murder, appellant told the officer he had been working during the day and heard nothing out of the ordinary.

After scouring Grace's apartment for evidence, police examined 171 latent fingerprints found in the apartment. Ninety-seven of these prints were determined to be of value. (T III 531-36) Only one of the fingerprints matched appellant. A print from appellant's right thumb was found on a bottle of skin care lotion in Grace's bathroom. (T III 47-95, 501-2, 524-29) Of the 96 other prints determined

to be of value, two belonged to Jesse Raminski and thirteen belonged to Grace. (T III 531-36)

Vaginal and rectal swabs taken from Grace at the autopsy tested positive for semen. (T III 508-10, 540-47) DNA testing of the semen matched samples obtained from the appellant. The state offered no evidence as to how long DNA from semen can remain in the vagina.

B. The Semen/DNA

Initially, appellant points out that there is extreme doubt as to the reliability of the DNA results in this case. See Point II. Even if the semen found in the victim belonged to the appellant, there is no indication that it was the product of sexual battery. DNA evidence is like fingerprint evidence; it is merely a variety of circumstantial evidence. Jaramillo v. State., 417 So.2d 257 (Fla. 1982); Mucherson v. State, 696 So.2d 420, 422 (Fla. 2nd DCA 1997). Proof that the defendant's DNA was found in the semen inside the victim's body, just like fingerprint evidence, is insufficient to convict for first-degree murder (including the sexual battery felony-murder theory), unless the state has shown that the semen could only have been deposited by Grace's killer at the time of the murder. See D, Infra. The semen could have been the product of consensual sex. The semen could have been present for several days before the murder. Therefore, there is

insufficient evidence to prove that the sexual encounter occurred at the same time that Grace died.

It is certainly not beyond the realm of possibility that Grace had a consensual sexual encounter with Dolan Darling, a fellow resident of her large apartment complex. It is also reasonable to presume that she would have kept the taboo liaison a secret, especially from her boyfriend Jesse Raminski.[24] Jesse certainly never told his own wife about his affair with Grace. Jesse did not think that Grace socialized with others, but he could not rule out the possibility. (T II 348-49) He conceded that she did know some of her neighbors. (T II 348) He was not aware that she was having sex with anyone other then himself. (T II 354)

C. The Vaginal Abrasions and Rectal Tear

A critical issue at trial was whether or not Grace had been sexual battered prior to her death. During the autopsy, the medical examiner noticed recent abrasions, similar to skin scraps, in the vaginal region. (T II 456-68) He found no lacerations in the area. He also found one small tear in the rectal area. (T III 458-59) The abrasions were consistent with penetration by some object, for example a finger or a penis. (T III 459)

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[24] Grace may have had additional motivation to hide her affair with a black man in conservative Orlando.

Dr. Anderson, the medical examiner testified that he believed that the injuries were an indication that Grace had been sexually battered. He based his opinion on his belief that the injuries were not consistent with consensual sex, because the pain experienced would interrupt the sexual activity. (T III 460) When pressed on the matter Dr. Anderson admitted (as he did in his deposition) that the injuries could have occurred during "consensual rough sex." (T III 464-67) The small rectal tear did not even have to be the product of rough sex. That injury was consistent with consensual penetration by a penis or finger. (T III 458-59)

The evidence presented by the state does not prove sexual battery beyond a reasonable doubt. The evidence is just as consistent with the hypothesis that Grace engaged in rough sexual activity with someone other than her boyfriend. The medical examiner conceded that such a hypothesis was a reasonable one under the circumstances. Additionally, there was no evidence as to how long the "recent" abrasions could have been present prior to death.

There is yet another explanation for the vaginal abrasions that is consistent with a hypothesis of innocence. Grace was suffering from vaginal itching. It bothered her so much, that she had made an appointment with her gynecologist for that afternoon. (T II 342-43) The medical examiner found that Grace was

suffering from a cervical inflamation at the time of her death. Dr. Anderson opined that the inflamation would not affect the vagina directly. However, he conceded that Grace could have abraded herself by scratching with sufficient force. (T II 468-74)

D. Appellant's Fingerprint

Of the 171 latent fingerprints gathered from Grace's apartment, only one matched the appellant. Police found that print on the outside of a bottle of skin care lotion which was found in plain view in Grace's bathroom. (T III 487-95, 501-02, 524-29)

The presence of appellant's fingerprint on the bottle does not establish guilt. As argued in the previous section, Grace may have engaged in an illicit relationship with Darling, her neighbor. Even if that were not the case there is an additional hypothesis of innocence. Appellant's fingerprints may have been placed on the bottle at some time prior to its arrival to Grace's apartment. In order to use this evidence to identify the appellant as the perpetrator of a crime, the state must first establish that his fingerprints "could only have been placed on the items at the time the [crime] was committed." Jaramillo v. State, 417 So.2d 257 (Fla. 1982)

In this case, there was no evidence offered by the state concerning when Grace had purchased the bottle of skin lotion nor where she had purchased it. This

is a critical factor where the fingerprint was found on a commercially available, portable bottle of lotion. "[W]here fingerprint evidence found at the scene is relied upon to establish identity, the evidence must be such that the print could have been made only when the crime was committed. Tirko v. State, 138 So.2d 388, 389 (Fla. 4th DCA 1974).

Recently, the Fourth District Court of Appeal dealt with a very similar situation in Shores v. State, 25 Fla L. Weekly D91 (Fla. 4th DCA January 5, 2000). Shores' fingerprints were found on a box of ammunition in a drawer ransacked by the burglar. The ammunition had been purchased by the victim approximately two months earlier. There was no evidence as to the freshness of the fingerprint. The Fourth District concluded that the trial court should have granted a judgment of acquittal where this was the only evidence linking Shores to the burglary. The court pointed out that the result might have been different if the state had been able to establish the ammunition was purchased in a distant city, or was not assessable to be test by customers in the store where it was purchased, or that the prints were less than two months old. That type of evidence could have refuted Shores hypothesis of innocence that he could have touched the box while it was in the store.

Similar results were reached in factually similar cases. In Leonard v. State,

731 So.2d 712 (Fla. 2nd DCA 1999) the defendant's prints were found on a candy bar wrapper in the victim's bedroom. That evidence alone would have been insufficient for a conviction. In the matter of J.C.M., Jr. v. State, 502 A.2d 472 (D.C. 1985)[25] A burglar had entered through a bathroom window. A can of air freshener which had been on top of the toilet before the burglary was in the waste basket and contained the defendant's fingerprints. The court concluded that, given the fact that the air freshener was a product commonly available in retail stores, and thus accessible, the conviction could not stand based on that evidence alone.

At appellant's trial, the state's own fingerprint expert provided evidence that latent prints remain on surfaces for quite some time, unless they are wiped away. (T III 541-42) In fact, the witness admitted that he had found prints left on porous surfaces 23 years earlier. (T III 506) Additionally, appellant lived in the same apartment complex as the victim. Undoubtedly, both probably shopped at the same, nearby stores.

In Jaramillo v. State, 417 So.2d 257 (Fla. 1982) this Court found that the state had failed to make prima facie case of guilt of first-degree murder even though Jaramillo's fingerprints were found on the packaging for a knife, the knife itself, and a grocery bag, all of which were near the victims. His testimony

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[25] Relied upon in Shores v. State, 25 Fla. L. Weekly at D91.

explained that he had touched these items while in the house the day before the murder. This Court wrote:

> This proof is not inconsistent with the Jaramillo's reasonable explanation as to how his fingerprints came to be on these items in the victim's home. The State failed to establish that Jaramillo's fingerprints could only have been placed on the items at the time the murder was committed.

Jaramillo v. State, 417 So.2d at 257. While in Jaramillo the hypothesis of innocence came from the defendant's testimony. It is not necessary that the defendant testify in order to present a hypothesis of innocence or challenge the State's evidence. In State v. Law, 559 So.2d 187, 189-90 (Fla. 1989), this Court considered various hypotheses of innocence proposed by the defense which did not arise from the defendant's testimony. In fact, one hypothesis of innocence was actually refuted by the defendant's testimony. The presence of Appellant's fingerprint on the bottle is completely insufficient to prove guilt.

E. The "Denial"

A large part of the state's case was their assertion that the appellant denied knowing the victim and denied ever being at her apartment. The prosecutor told the jury in opening statement that on the day after the murder, the appellant told an investigating detective, "I don't know anything about it, don't know the woman, wasn't there, I was at work, or whatever." (T II 319) A close look at the testimony

refutes the prosecutor's assertion.

Candidly speaking, the state was very sloppy in its presentation of evidence on this issue. The day after the murder, Detective Deritter and other officers canvassed Grace's apartment complex. They knocked on doors and talked to neighbors. They briefly described what they were looking for and questioned the residents about their whereabouts during the estimated time of the murder. During this quest for witnesses, Corporal Deritter talked to the appellant who was returning to his nearby apartment from work. (T III 514-17) Deritter had a very brief conversation with the appellant which the detective described as follows:

> Identified who I was, my credentials. Said we're conducting a neighborhood canvass to find out if anybody in this time period has seen anybody referenced to a lady's death that occurred. Do you know her. And that was basically it.

(T III 516) In response, appellant told Deritter, "That he was working and didn't know anything of the incident. Had no information."

The above exchange proves nothing. There is no indication that the detective told Appellant the name of the woman or described her in any manner. He did not even tell Darling that she was a resident of the apartment complex. Contrary to the prosecutor's assertion, **Darling did not deny knowing Grace.** The trial court did not find Appellant's statement incriminating in the least. The

court pointed that the standard jury instruction regarding a defendant's out-of-court statements[26] was not necessary, since Appellant said nothing incriminating to the detective. The murder conviction and resulting death sentence should not be based on such sloppy testimony that really proves nothing.

F. The Other Suspects

Jesse Raminski was the last known person to see Grace alive. He was also the first person to discover her dead body. The police certainly considered him as a possible suspect. They questioned Raminski concerning his whereabouts that day. They took examples of his fingerprints, salvia and blood. (T II 355, 362) His fingerprints were found inside the apartment. (T III 531-36)

Jesse was having an illicit affair with Grace which he kept secret from his own wife. He claimed that Grace did not socialize much to his knowledge. (T II 348-49) Jesse also claimed that he never discovered that Grace was having an affair with anyone other than himself. (T II 354)

On the other hand, Grace's husband, with whom she had a violent relationship, was aware of Grace's affair with Jesse. (T II 340-41) Grace's husband had threatened to kill her in the past. Jesse obviously believed it to be a credible threat, as he relayed this information to the police the day of Grace's

[26] Fla. Std. Jury Instr. (Crim.) 2.04(e).

murder. (T II 361)

Other potential suspects were the maintenance men at the apartment complex. For whatever reason, Grace feared them. She had asked the management to change her locks. She had also taken it upon herself to install a security chain on her apartment door. (T II 345) Jesse also obviously believed that Grace's fear of the maintenance crew was credible. He told police about the situation on the day of the murder. (T II 356)

It is therefore clear that others were potential suspects. Perhaps Grace's combustible husband finally reached his limit, came to this country and killed her. Perhaps Jesse killed Grace when she threatened to expose their affair to Jesse's wife. Perhaps Jesse Raminski killed her in a fit of jealous rage after discovering that she was having an affair with Dolan Darling or some other identified man. Perhaps Jesse killed Grace somewhere else and later moved the body to her apartment. Perhaps Grace's fear of the maintenance crew was justified. All of these are reasonable hypotheses of innocence that exclude Dolan Darling as the killer.

G. Insufficient Evidence To Prove Premeditation

Even if this Court accepts the state's weak evidence that appellant killed Grace, the evidence clearly does not support a conviction for premeditated murder.

Premeditation is an essential element which distinguishes first degree from second degree murder. Coolen v. State, 696 So.2d 738, 741 (Fla. 1997). Under Florida law premeditation means "a fully formed and conscious purpose to take human life, formed upon reflection and deliberation, entertained in the mind for and at the time of the homicide." Spinkellink v. State, 313 So.2d 666, 670(Fla. 1975), quoting McCutcheon v. State, 96 So.2d 152, 153 (Fla. 1957). Reflection is an integral requirement for premeditation. Waters v. State, 486 So.2d 614, 615 (Fla. 5th DCA 1986).

Premeditation is "more than a mere intent to kill; it is a fully formed conscious purpose to kill"; this purpose must be formed a moment before the act, but it must also exist for a sufficient length of time to permit reflection. Green v. State, 715 So.2d 940 (Fla. 1998). Green's victim was stabbed and suffered blunt trauma, but the cause of death was strangulation. Even though Green had made prior threats to kill the victim, this Court found the evidence of premeditation to be insufficient.

Here, the evidence did not show any prior threats by the appellant. Additionally, the victim was not stabbed as was the victim in Green. Grace was killed by one shot to the back of the head. The fact that the bullet passed through a pillow is insufficient to support a theory of premeditation. This is especially true

in light of the fact that the shooting occurred in the victim's bed.

H. Conclusion

The state failed to present substantial, competent evidence to support convictions for murder and sexual battery. "[A] prima facie case of circumstantial evidence must lead to a 'reasonable and moral certainty that the accused and no one else committed the offense charged.'" Brown v. State, 672 So.2d 648, 650 (Fla. 4th DCA 1996). See also Davis v. State, 90 So.2d 629 (Fla. 1956) Evidence is insufficient if it shows only a strong suspicion of guilt, a bare probability of guilt, or mere presence at the scene. Brown v. State, 672 So.2d at 650. Circumstantial evidence is also insufficient when it requires a pyramiding of assumptions or inferences in order to arrive at a conclusion of guilt. Gustine v. State, 86 Fla. 24, 97 So.207 (Fla. 1923); and Chaudoin v. State, 362 So.2d 398 (Fla. 2nd DCA 1978). Mere presence at the scene of a crime is insufficient by itself to convict. Davis v. State, 436 So.2d 196 (Fla. 4th DCA 1983).

POINT II

THE TRIAL COURT ERRED IN ADMITTING THE DNA EVIDENCE WITHOUT CONDUCTING A FRYE[27] HEARING, THE EXPERT WITNESS WAS NOT QUALIFIED IN THE AREA OF STATISTICS, AND THE CORRECT DATA BASE WAS NOT USED, RENDERING THE RESULTS MEANINGLESS.

Introduction

The admission of the DNA evidence in this case denied Appellant Due Process of law and the effective assistance of counsel required by Article I, Sections 2, 9, and 16 of the Florida Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. It also denied appellant the unique need for reliability required by Article I, Section 17 of the Florida Constitution and the Eighth Amendment to the United States Constitution.

When DNA evidence first appeared on the scene it was accepted without scrutiny.[28] Testimony that is clothed with the trappings of science, but has not

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

[28] The Dark Side of DNA Profiling: Unreliable Scientific Evidence Meets the Criminal Defendant, 42 Stanford L. Rev. 465, 466 (1990)("Courts have lost all sense of balance and restraint in the face of this novel scientific evidence, embracing it with little scrutiny of its actual reliability and little concern for its impact on the rights of individuals").

been accepted by the scientific community, is more misleading than it is probative. State v. Woodall, 385 S.E. 2d 253, 259-60 (W.Va. 1989).

The test for determining the admissibility of scientific evidence is the Frye test. Flanagan v. State, 625 So.2d 827, 828 (Fla. 1993). In Ramirez v. State, 542 So.2d 352 (Fla. 1989), this Court held that a scientific predicate must be established prior to the introduction of the evidence:

> In reviewing the record, we find that no scientific predicate was established from independent evidence to show that a specific knife can be identified from the marks made on cartilage. The only scientific evidence received was the experts' self-serving statement supporting this procedure.

542 So.2d at 355 (Emphasis added) The predicate must established from independent evidence:

> ...The real issue is the reliability of testing methods which form the basis of the witness's conclusion.
>
> This court, as most other courts, will accept new scientific methods of establishing evidentiary facts only after a proper predicate has first established the reliability of the new scientific method. This point is illustrated by recent decisions of this Court. In Ramos v. State, 496 So.2d 121 (Fla. 1986), we reversed the appellant's conviction and remanded for a new trial because we found that no proper predicate was presented to establish the reliability of dog scent discrimination lineups. As in the instant case, the only evidence concerning the scent discrimination lineup's reliability was the

> testimony of the dog handler. We have previously rejected, because of an improper predicate of scientific reliability, hypnotically recalled testimony, Bundy v. State, 471 So.2d 9 (Fla. 1985), cert. denied, 479 U.S. 894, 107 S.Ct. 295, 93 L.Ed. 2d 269 (1986), and polygraph tests, Delap v. State, 440 So.2d 1242 (Fla. 1983), cert. denied, 467 U.S. 1264, 104 S.Ct. 3559, 82 L.Ed. 2d 860 (1984)...
>
> Clearly, in the instant case, insufficient evidence exists to establish the requisite predicate for the technician's positive identification of the knife as the murder weapon.

Many of the courts around the country have expressed the same basic analysis as Ramirez in terms of a showing of the reliability of procedures as a predicate to the admissibility of the DNA evidence in a given case. These courts have consistently held that even if the theory of DNA is acceptable, there must be a sufficient predicate as to the reliability of the scientific evidence. United States v. Two Bulls, 918 F.2d 56, 61-62; rehearing en banc granted at 925 F.2d 1127 (8th Cir. 1991); appeal dismissed on death of the defendant Id.; Ex Parte Perry, 586 So.2d 243, 249 (Ala. 1991); People v. Castro, 545 N.Y.S.2d 985, 999 (Supp. 1989); People v. Pizarro, 12 Cal.Rptr.2d 436, 449-450 (Cal.App. 5th Dist. 1992); State v. Houser, 490 N.W. 2d 168 (Neb. 1992). Pizarro is particularly instructive here. In Pizarro, the only expert who testified to the validity of the two procedures run by the F.B.I. was their own expert (Dr. Adams). 12 Cal.Rptr. at 451. The

Court rejected this type of self-serving expertise as qualifying as an independent predicate:

> Despite Dr. Adams' stellar qualifications, we do not believe his testimony standing alone establishes that the procedures employed by the FBI satisfy the requirements of Kelly/Frye. Prior to admitting testimony as potentially damaging as DNA forensic identification, the prosecutor should have been required to demonstrate through the testimony of at least one impartial expert witness that the protocols and/or procedures of the FBI were generally accepted within the scientific community as reliable.

Id. at 451.

In admitting the DNA evidence and testing results in Appellant's case, the trial court erred in several ways. First of all, David Baer, the state's expert and only witness to testify about the DNA results, was not qualified in the area of statistical analysis. His calculations and results are clearly suspect. Additionally, Baer used three data bases to calculate the odds of an identical match. Appellant was not a member of any of the three racial data bases that David Baer used to compute his findings. Dolan Darling is a foreign national from the Bahamas who was living temporarily in this country. Although a Bahamian data base was available, the state chose not to use it. Additionally, the trial court erred in refusing to conduct a Frye hearing prior to the admission of the DNA evidence.

A. The Witness Was Not Qualified as a Statistician

The state presented the testimony of David Baer, a senior crime lab analyst in the DNA section of the Florida Department of Law Enforcement Orlando Crime Laboratory. (T III 559) Appellant had no objection to Baer being qualified as a expert in the area of blood and DNA, but did object to Baer's qualifications for statistical analysis. (T III 560-61, 569-70) Baer's education was in chemistry and forensic science. (T III 560) He had no degrees in statistics. (T III 562) He was trained in the statistical interpretation of DNA results at the four week FBI class back in 1989. The statistics portion of the course comprised about 10% (16 hours) of the total course time. (T III 562-63) He also attended a short in-house course on statistical issues in 1990, and a workshop in 1993. Baer did not claim to be a statistician[29], but testified that he was familiar with how statistics are used in this instance. (T III 561) After hearing defense counsel voir dire the witness, the trial court overruled appellant's objection and qualified Baer as an expert witness entitled to give his opinion on DNA and related statistical calculations. (T III 560-72)

Beginning in Hayes v. State, 660 So. 2d 257 (Fla. 1995), and continuing in a series of cases, this court has recognized the general admissibility of DNA

[29] In fact, he specifically pointed out that he was **not** a statistician. (T III 569)

evidence provided the DNA testing and statistical results of this testing ensures reliability. In Hayes 660 So. 2d at 264, this court ruled "that DNA test results are generally accepted as reliable in the scientific community, provided that the laboratory has followed accepted testing procedures that meet the Frye test to protect against false readings and contamination." Under the Frye test, the proponent of the expert testimony has the burden to prove "the general acceptance of both the underlying scientific principle and the testing procedures used to apply that principle to the facts of the case at hand." Ramirez v. State, 651 So. 2d 1164, 1168 (Fla. 1995). Accordingly, the trial court must find an expert qualified before the opinion evidence can be admitted. Id.

In Brim v. State, 695 So. 2d 268, this court noted that the DNA testing process usually involved two distinct steps. The first step, which entails principles of molecular biology and chemistry, determines whether two DNA samples match. Id. at 270. The second step provides a probability significance to the match by using principles of statistics and population genetics. Id. This court has emphasized the importance of this second step by quoting from a 1992 report by the National Research Council (NRC): "[t]o say that two patterns match, without providing any scientifically valid estimate (or, at least, an upper bound) of the frequency with which such matches might occur by chance, is meaningless."

Murray v. State, 692 So. 2d (at 162). Given the importance of the probability calculations forming the basis of the second step of DNA testing, this court ruled in Brim that the second step, as well as the first step, must meet the Frye test of reliability. Brim v. State, 695 So. 2d at 270. This court concluded, "We heed the NRC's warning that we should be cautious when using standard statistical principles in the field of DNA testing." Id. at 271.

After noting that the appellate review of a Frye determination was one of a matter of law, this court in Brim found that the record failed to show the complete details of the calculation methods used to determine the probability frequencies. Id. at 275. This omission prevented the court from properly evaluating whether the methods used to calculate the statistics would satisfy the Frye test. Id. This court remanded the case for an evidentiary hearing on the method used to determine the statistics.

The expert in Murray v. State, 692 So. 2d 157, testified concerning the PCR testing of the defendant's DNA and the DNA from the crime scene. The expert concluded to the jury that the defendant's DNA matched the DNA sample and that over ninety percent of the population would have a different DNA type. Id. at 163. Defense counsel objected that neither the PCR testing nor the probability calculations met the Frye test. While stating the probability calculations were

based on a published study, the expert admitted he had no knowledge of the data base that formed the basis of the study. Id. at 159,164. He opined that PCR analysis of DNA is generally accepted in the scientific community. Id. The lower court admitted the evidence ruling that any deficiencies in the evidence concerned the weight of the evidence as opposed to its admissibility. Id at 160-61.

On appeal of the trial court's ruling, this court began by emphasizing the requirement in Brim that DNA probability calculations meet the Frye standard. Id. This court stated, "This standard requires a determination, by the judge, that the basic underlying principles of scientific evidence have been sufficiently tested and accepted by the relevant scientific community." Id. at 163. The trial court in Murray, this court held, had failed to apply the Frye standard to the expert testimony. Id. Even if the trial court had applied the Frye standard, the deficient information offered by the expert could not meet the standard. Id. This court ruled that the expert's testimony regarding the probability calculations was "unenlightening." Id. Specifically, this court stated, "[T]his expert was simply not qualified to report the population frequency statistics at issue here because the expert had no knowledge about the database upon which his calculations were based." Id. This court further found,

> this expert must, at the very least, demonstrate a sufficient knowledge of the database grounded in the study of authoritative sources. Such a

> knowledge was not demonstrated. In fact, this expert had no insight into the assembly of the relevant database. The qualification of this expert witness was clearly erroneous.

Id. at 164; accord, Miles v. State, 694 So. 2d 151 (Fla. 4th DCA 1997) (Court finds record insufficient to determine whether testifying witness was qualified as an expert to testify concerning population frequency statistics.).

The decisions in Brim and Murray are controlling in the present case. Although Baer was involved in the creation of the Caucasian data base used for one of the calculations in this case, he was not involved in the development of the Black and Hispanic data bases from the FBI. Baer claimed that the Caucasian data base had "been reviewed" by others. (T III 569) Nevertheless, Baer testified that only 166 samples were used to compile that data base. (T III 594-95) Baer had previously testified that a minimum of 200 samples was "usually" sufficient. (T III 566) Baer had no formal training in population genetics. (T III 566) Undersigned counsel's general experience is that the state uses a DNA blood expert and a second expert in population genetics to establish the statistical probabilities. Defense counsel was justifiably concerned with the state's ability to prove reliability of these results without the testimony of a statistician. As such, Baer hardly "demonstrate[d] a sufficient knowledge..." as required in Murray v. State, 692 So.2d at 694. See also Jordan v. State, 694 So.2d 708 (Fla 1997)[The record

did not show the qualifications of a proposed expert on offender profile evidence where the witness had not conducted an adequate study of the relevant scientific literature].

An expert can testify regarding matters that are not based on firsthand knowledge because of an assumption that "the expert's opinion will have a reliable basis in the knowledge and experience of his discipline." Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 590 (1993). Baer, untrained in statistics, has demonstrated neither the knowledge nor the experience necessary to be qualified as a witness on DNA population frequencies. The state failed to meet its burden of establishing Baer's qualifications as an expert on DNA population frequency statistics. Therefore, the trial court erred in permitting Baer to testify concerning this aspect of the DNA testing. In light of the critical nature of the DNA evidence at appellant's trial, the error cannot be deemed harmless.

B. Failure to Use the Bahamian Population Data Base

The state's expert used three separate data bases in calculating his findings in this case. Baer used the FBI data bases for Hispanics and African-Americans. He used a Caucasian data base that was developed by police in Orlando using 166 samples gathered in 1991. (T III 594-96) Baer admitted that certain ethnic groups such as isolated Indian tribes, have "wildly different" DNA than the rest of the

population found on this planet. (T III 664-65) This is based on the repetition of certain DNA markers that are repeatedly reproduced due to inbreeding. (T III 665) Baer testified that the population "generally found within the United States" reflected a good distribution of the major types of markers within major ethnic groups. (T III 665) Baer admitted that he had no data base for the Bahamian population. (T IV 664) Baer was aware that the Broward County authorities had compiled a Bahamian data base, but Baer took no affirmative action to obtain that data base for the testing in this case even though the suspect was Bahamian. (T IV 667) Appellant contends on appeal that the failure of the state to use an available data base that accurately reflected the ethnicity of the suspect renders Baer's calculations completely unreliable.

Baer conceded that the calculated results vary dramatically based upon the ethnic type of data base used for comparison purposes. (T III 565) For example, Baer concluded that it was twice as likely for a black person to have the same DNA profile as the appellant. In contrast, it was seventeen times less likely for a Hispanic person to have the same profile. (T IV 664) Appellant submits that these results illustrate the inherent unreliability of the state's failure to use a Bahamian data base which was clearly available to them, when the appellant is, in fact, Bahamian. The state's own expert conceded that isolated ethnic groups vary

considerably when their DNA profiles were compared with the rest of the world's population. Baer used an isolated Indian tribe as an example. An ethnic group on a small group of islands surrounded by ocean would certainly be analogous to an isolated Indian tribe.

C. Denial of Frye Hearing

Appellant initially raised a Frye objection regarding the data basis used in the state's calculations. (T III 571-72) Since that evidence had not yet been elicited from the witness, the trial court denied the motion as premature. (T III 571-72) Subsequently, appellant again raised the objection contending that the state had failed to lay the proper predicate by establishing that the procedures used were accepted in the scientific community. Defense counsel questioned the state's ability to do so, based on the fact that their witness was not a statistician. (T III 592) The state contended that the defense needed to show variations from the excepted general procedure used in the scientific community. The prosecutor also argued that Florida courts have routinely excepted these procedures in the last ten years. The trial court overruled appellant's objection and allowed the testimony in evidence to continue. (T III 592-93)

This Court addressed the admissibility of expert opinion testimony concerning a new or novel scientific principle in Ramirez v. State, 651 So.2d 1164

(Fla. 1995), holding that it requires a four-step process: First, the trial judge must determine whether such expert testimony will assist the jury in understanding the evidence or in determining a fact in issue. §90.702, Fla. Stat. (1993).... Second, the trial judge must decide whether the expert's testimony is based on a scientific principle or discovery that is "sufficiently established to have gained general acceptance in the particular field in which it belongs." Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923) .... The third step in the process is for the trial judge to determine whether a particular witness is qualified as an expert to present opinion testimony on the subject in issue. §90.702, Fla. Stat. (1993) All three of these initial steps are to be made by the trial judge alone.... Fourth, the judge may then allow the expert to render an opinion on the subject of his or her expertise, and it is then up to the jury to determine the credibility of the expert's opinion, which it may either accept or reject. Id., at 1167 This Court further held:

> [T]he burden is on the proponent of the evidence to prove the general acceptance of both the underlying scientific principle and the testing procedures used to apply that principle to the facts of the case at hand. The trial judge has the sole responsibility to determine this question.

Id., at 1168

This Court first addressed the admissibility of deoxyribonucleic acid (DNA) test results in Hayes v. State, 660 So.2d 257 (Fla. 1995), ruling that it must be

determined under the four-step inquiry provided by Ramirez. Id., at 262. This Court took judicial notice that DNA test results are generally accepted as reliable in the scientific community, provided that the laboratory has followed accepted testing procedures that meet the Frye test to protect against false readings and contamination.

In Brim v. State, 695 So.2d 268 (Fla. 1997), this Court determined that the DNA testing process consists of two steps. The first step relies on principles of molecular biology and chemistry to determine that two DNA samples match, while a second statistical step is needed to give significance to the match. Id., at 269. The second step relies on principles of statistics and population genetics, and the calculation techniques used in determining and reporting DNA population frequencies must also satisfy the Frye test. Id., at 270-271; Murray v. State, 692 So.2d 157, 161 (Fla. 1997). Also in Murray, at 164, this Court ruled that the expert must, at the very least, demonstrate sufficient knowledge of the database upon which his calculations were based to qualified to report population frequency statistics. The trial court's decision to admit DNA test results and DNA population frequency statistics is subject to de novo review on appeal. Brim, at 274; Murray, at 164.

Appellant submits that the trial court completely abdicated its responsibility

by failing to hold an adequate Frye hearing. The court erred as a matter of law in admitting Baer's testimony based on the state's inadequate proffer because the court failed to determine first, that the testimony would assist the jury in determining a fact in issue, and second, that the testimony was based on scientific principles that were sufficiently established to have gained general acceptance in the field. Hayes v. State, 660 So.2d at 262; Ramirez v. State, 651 So.2d at 1167. The court failed to determine whether the DNA testing conducted by Baer satisfied the Frye test. Brim v. State, 695 So.2d at 270-271; Murray v. State, 692 So.2d at 162.

POINT III

APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL, DUE PROCESS OF LAW, AND A FAIR TRIAL WHERE THE JUDGE RULED THAT DEFENSE COUNSEL COULD NOT COMMENT ON THE FAILURE OF THE STATE TO EXCLUDE OTHER SUSPECTS.

In light of the scant amount of evidence, all of which was circumstantial, linking appellant to these crimes, defense counsel had a field day pointing the finger at other viable suspects. These included the victim's husband, her boyfriend, and the apartment maintenance crew whom the victim feared. When the state called the victim's married boyfriend to testify, defense counsel wasted little time before he pointed an accusatory finger. Counsel elicited testimony from Jesse that police had asked about his whereabouts that day and later obtained fingerprints, salvia, and blood from him. (T II 355, 362) Defense counsel also used Jesse to prove that Grace was very frightened of the maintenance crew at the apartment complex. (T II 345) They could have been in close proximity to Grace that morning as she did laundry. (T II 347-48) Jesse later told police that Grace was afraid of these workers. (T II 356) Defense counsel also used Jesse to prove that Grace's husband was an abusive alcoholic who had previously threatened to kill her. (T II 340, 361)

David Baer, the state's expert in the area of DNA comparisons, testified that DNA samples taken from Dolan Darling matched the semen found in the victim's vagina. Darling's DNA was obviously not the only sample compared to the unknown semen. As mentioned earlier, the victim's boyfriend, Jesse, provided blood samples to police. Additionally, Mr. Baer mentioned in his testimony that he compared known samples from "a Mr. Powell" and from " a Mr. Marcus." (T III 581-82) When Baer used demonstrative evidence to demonstrate his opinion that the DNA matched appellant's, Baer also testified that it did not match samples from Powell and Marcus. (T III 581-85)

In his one and only summation to the jury, defense counsel addressed the DNA evidence which he argued was worthless. He acknowledged that the state's DNA expert was an important witness for the state. (T IV 736) He argued to the jury that the expert's methods were unreliable.[30]

> ...He used a sample of 166 people tested...and came up with billion to one odds, and didn't ever explain to you how he did that....you can't just take his opinion at face value....And I think you have to, really have to wonder about that.
>
> **As I said a couple of times already, you need to look at the lack of evidence.** The judge will instruct you that that is one of the things that

[30] The expert was allowed to testify over defense objection regarding statistical calculations for which he was not qualified to perform. See Point II.

> 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 IV 737) (Emphasis supplied.) At that point, the prosecutor objected and erroneously argued that it was improper for defense counsel to comment on the failure of the state to call a witness who is equally available to both sides. (T IV 737-38) Defense counsel correctly pointed out that he did not comment on the state's failure to call a witness. Rather defense counsel asserted that he was commenting on the lack of evidence.

> Mr. Iennacko (Defense counsel): ...I didn't say why didn't Christopher Powell come in, but who is Christopher Powell, why didn't they tell us why he was a suspect. I'm gonna (sic) go into it, if the court permits, that name came up through the state, they chose to put on their DNA expert who testified that he was somebody they tested, and I think that's something I should be allowed to comment on.
>
> Mr. Aston (Prosecutor): The investigating officer is equally available to Mr. Iennacko as he is to the state. That evidence could have been presented to Mr. Iennacko. He chose...
>
> The Court: Objection sustained.
>
> Mr. Iennacko: Your Honor, I am gonna (sic) have to proffer that...I want them to know or be reminded that they did not–there was no evidence

> that these witnesses, Powell, and Marcus was also mentioned, that their prints were not checked. That is not commenting on the state's failure to call them....that's very important evidence that they need to understand. And they need– I mean, you're gonna (sic) tell them lack of evidence is important. How can I not discuss it with them?
>
> Mr. Ashton (Prosecutor): As to that witness, number one, the witness that would answer that question was called which is Tony Moss. That was not asked the question by counsel. The point of the case is that when a piece of evidence is equally available to both sides...he can ask the questions as well as I can. The lack of evidence is if there's lack of evidence to an issue. The fact that a name has been thrown out before a jury, for him to play around with it when he could have asked Tony Moss as he testified that he did check the prints and they were excluded, which is in fact the truth...
>
> Mr. Iennacko: I don't believe that's even what the discovery shows. But the fact remains that's not what case law says. It simply says I cannot comment on his failure to call those witnesses. That's entirely different from my commenting on his failure to explain other possibilities or rule out other possibilities. ...

(T IV 738-40) The trial court sustained the state's objection and precluded defense counsel from arguing the lack of evidence on this particular point. (T IV 741) The trial court agreed that defense counsel could proffer the gist of the excluded argument but insisted that he do so subsequently. (T IV 741) Once the jury retired

to deliberate, defense counsel proffered the portion of his closing argument that the trial court excluded:

> Your Honor, if the objection had not been sustained, my argument would have been, who'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 through the DNA evidence.

(T IV 772)

This Court should not fall into the same trap where the prosecutor led the trial court. **This is not a situation involving a lawyer commenting on the failure to call a witness equally available to both sides. Rather, defense counsel was simply arguing the lack of evidence to convict his client.** Specifically, defense counsel was questioning the reliability of the DNA evidence and statistical calculations conducted in this case. More specifically, defense counsel was pointing out the possibility that other individuals who were initially suspects in this case could have committed this crime. Defense counsel elicited testimony from the state's fingerprint expert that a photograph of the crime scene revealed other latent fingerprints on the bottle of skin lotion. These did not match appellant nor "anyone else." (T III 539-40) In light of appellant's attack on the DNA evidence

it is not asking to much that the state compare fingerprints from Marcus and Powell to the latent prints on the lotion bottle, rather than simply excluding them based on unreliable DNA evidence.

The argument attempted by defense counsel is a basic fundamental right clearly allowed by law. The trial court's erroneous ruling precluding defense counsel's cogent and persuasive argument resulted in a denial of effective assistance of counsel, due process of law, and appellant's right to a fair trial. Amends. V, VI, XIV, U.S. Const.; Art. I , § 9 & 16, Fla. Const.

POINT IV

THE TRIAL COURT ERRED IN LIMITING APPELLANT'S VOIR DIRE EXAMINATION DURING JURY SELECTION, RESULTING IN A DENIAL OF DUE PROCESS AND THE RIGHT TO A FAIR TRIAL.

Voir dire examination of prospective jurors by counsel is assured by Florida Rule of Criminal Procedure 3.300(b). Jones v. State, 378 so.2d 797 (Fla. 1st DCA 1980). The purpose of voir dire, "Is to obtain a fair and impartial jury to try the issues in the cause." Keene v. State, 390 so.2d 315,319 (Fla. 1980). "Subject to the trial court's control of unreasonable repetitious and argumentative voir dire questioning, counsel must have an opportunity to ascertain latent or concealed pre-judgments by prospective jurors which will not yield to the law as charged by the court, or to the evidence." Jones, 378 So.2 at 798.

Wide latitude should be allowed during the examination of jurors during voir dire. Cross v. State, 103 So.2d 636, 89 Fla. 212 (1925). Voir dire examination should be as varied and elaborate as is necessary to obtain fair and impartial jurors whose minds are free of all interests, bias or prejudice. Gibbs v. State, 193 So.2d 460 (Fla. 2d DCA 1967).

Appellant's trial judge limited defense counsel's voir dire in any area of critical importance. As in many venires, many of the potential jurors had

misconceptions about certain facts. Several jurors expressed concern about the length of time between the imposition of a death sentence and the execution of the condemned. See, e.g.,(T I 129, 131-32) In response to those concerns, defense counsel questioned one particular juror about his answers in the questionnaire.

> Q. ...do you think the execution should occur sooner? In other words, you made a comment about appeals taking so long.
>
> A. I think the appeal should be limited.
>
> Q. Okay. To what degree or to what extent...?
>
> A. They can go on for 17, 20 years. The idea behind the death penalty is a deterrent to the crime. If you can live within the criminal system for twenty years, it's not much deterrent.
>
> Q. 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?

(T II 187) At that point, the prosecutor objected arguing that the question was irrelevant and inappropriate. The court sustained the state's objection and precluded that line of inquiry. (T II 188-89)

On another occasion, defense counsel was attempting to ascertain whether the availability of the only sentence, true life without parole, would reduce the jurors compulsion to vote for death.

> Q. Do you know...if convicted, there are only two

> choices? Life or death? ...If convicted of first degree murder. Do you understand that?
>
> A. [Juror answers affirmatively.]
>
> Q. Knowing that, knowing that the imposition of a life sentence without parole means life without parole, does that affect whether or not you might impose the death penalty?
>
> A. No.
>
> Q. In other words,...you had to voice an opinion as to whether death should be imposed or life. 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– –

(T II 193-94) At that point the prosecutor objected arguing that the question goes to "the ultimate weight of the jury...It seems to be asking for bottom line." (T II 194) The trial court sustained the objection.

Appellant submits that the trial court's restriction of appellant's voir dire resulted in a denial of his constitutional rights to a fair trial and to due process of law. The questions asked were relevant and necessary. The trial court's rulings constitute reversible error.

POINT V

THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUESTED INSTRUCTION REGARDING CIRCUMSTANTIAL EVIDENCE, A VIOLATION OF DARLING'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS.

During the charge conference, appellant requested a special jury instruction on circumstantial evidence. Although the trial court acknowledged that such an instruction was appropriate in extraordinary circumstances, one was not necessary in this case. Appellant renewed his objection to the denial of his request. (T IV 709-15; R VII 762) Under the special circumstances of this case, the trial court's ruling was error.

The law in this area begins with this Court's decision In re Standard Jury Instructions in Criminal Cases, 431 So.2d 594 (Fla. 1981). Until that case, the standard jury instructions in criminal cases included an instruction on circumstantial evidence. That is, if the evidence supported giving the jury that extensive guidance on this special form of evidence, the court had to give it as a matter of law.

In In re Standard Jury Instructions in Criminal Cases, this Court left to the trial court's discretion whether to instruct the jury on circumstantial evidence. It never disapproved the guidance given the jury, it merely said the court had the

choice of whether to give it to the fact finder or not.

> The elimination of the current standard instruction on circumstantial evidence does not totally prohibit such an instruction if a trial judge in his or her discretion, feels that such is necessary under the peculiar facts of a specific case. However, the giving of proposed instructions on reasonable doubt and burden of proof, in our opinion, renders an instructional circumstantial evidence unnecessary.

In re Standard Jury Instructions in Criminal Cases, 431 So.2d at 595.

Since then courts have consistently rejected, usually summarily, attacks on trial courts' refusal to specifically instruct the jury on circumstantial evidence. See Petri v. State, 644 So.2d 1346, 1355 (Fla. 1994); Trepal v. State, 621 So.2d 1361, 1366 (Fla 1993); Kelly v. State, 543 So.2d 286, 288 (Fla. 1st DCA 1989); and Rivers v. State, 526 So.2d 983, 984(Fla. 4th DCA 1988). As far as undersigned counsel can determine, no Florida court has reversed a trial court's decision refusing to give this instruction. Nevertheless, appellant contends that the trial judge abused its discretion in denying Darling's requested guidance on circumstantial evidence.

What makes this case so special that the circumstantial evidence instruction should have been given? Several factors combine to compel the conclusion that the trial court should have instructed the jury on circumstantial evidence.

First, the state's circumstantial case has a deceptively compelling quality. The state argued that Darling, a nearby neighbor, followed the victim to her apartment from the laundry room, forcibly raped her, and then shot her in the back in the head killing her. The state's DNA expert testified that, in all likelihood, Darling's semen was present in the victim's vagina. The medical examiner concluded that, in his expert opinion, the victim had been raped. Appellant's fingerprint was found on a lotion bottle in the victim's bathroom. Appellant chose not to testify or to put on any evidence.

The state had a compelling case, one that proved that Darling possibly committed felony or premeditated murder. It was not, however, one that excluded every reasonable hypothesis of innocence. Had the jury received an instruction on circumstantial evidence, it would have had explicit guidance that it could have so concluded. Instead, the jury was forced to deduce the concept from the burden of proof and reasonable doubt instructions. Although the state's evidence appeared deceptively strong, Dolan Darling had reasonable and uncontroverted explanations for the state's evidence. Under these peculiar circumstances, the jury should have received explicit guidance on how to consider circumstantial evidence.

Circumstantial evidence is a subtle legal concept. The jury here could be excused for not fully understanding that the presumption of innocence requires (not

permits) the jury to accept a reasonable hypothesis of innocence. Davis v. State, 90 So. 2d 629, 631 (Fla. 1956); McArthur v. State, 351 So. 2d 972 (Fla. 1977). Guidance, as provided in the old standard instruction that "The circumstances must be consistent with guilt and inconsistent with innocence" was essential. It articulated and emphasized that point with greater clarity than either the reasonable doubt or burden instructions do and with more authority than counsel's argument could have commanded. Such special, specific guidance was needed here considering the apparently strong circumstantial case the state presented.

In short, if this court has recognized that special rules of appellate review apply to issues involving circumstantial evidence, State v. Law, 559 So. 2d 187, 188 (Fla. 1989), the court in this case should have given the jury particular guidance on how to consider this evidence. This is particularly true here where the state's case was strongly, though exclusively circumstantial that Darling raped and murdered Grace. Because of the strong emotional undercurrent running through this trial, the jury needed particular guidance and a reminder that "If the circumstances are susceptible of two reasonable constructions, one indicating guilt and the other innocence, you must accept that construction indicating innocence." After all, if the defendant is entitled to an instruction on his theory of defense, Hooper v. State, 476 So. 2d 1253 (Fla. 1985), the jury in this particularly

treacherous case should have been given specific guidance so they could have avoided the emotional bogs the facts of this case produced.

With the defendant on trial for his life, the court should have given the guidance he requested on the rules for considering this special type of evidence. This court should reverse the trial court's judgment and sentence and remand for a new trial.

POINT VI

UNDER THE PARTICULAR FACTS OF THIS CASE, THE TRIAL COURT ERRED IN PRECLUDING DEFENSE COUNSEL'S REBUTTAL CLOSING ARGUMENT.

Since appellant presented no testimony or evidence during the guilt/innocence phase of his trial, he was entitled to first and final closing argument called, in the vernacular, "the hammer." Florida Rule of Criminal Procedure 3.250. Defense counsel's initial closing argument takes up approximately twenty-two pages in the transcript, excluding objections and legal argument. (T IV 719-45) When defense counsel concluded, the prosecutor stood before the jury, thanked them, and stated:

> I don't feel it's necessary to do a closing argument. We will ask the jury to rely upon the evidence they've heard, the court's instruction on the law. We'd ask the court to proceed to jury instruction.

(T IV 746) When defense counsel then attempted to argue in rebuttal, the prosecutor objected and claimed that there was nothing to rebut. Defense counsel pointed out that the prosecutor;

> made a statement in the jury's presence that he's gonna (sic) rely on the evidence presented. That is an argument to the jury. That's not much of argument, but that is his argument. I now want to rebut him by again arguing the lack of evidence.

(T IV 746) The prosecutor contended that according to case law, his statement was not argument and there was nothing to rebut. The trial court agreed with the state and proceeded to instruct the jury on the law. (T IV 746-47)

The prosecutor was obviously referring to this Court's holding in Dean v. State, 478 So.2d 38 (Fla. 1985). Dean's counsel opened final argument and was followed by counsel for the co-defendant. Upon the conclusion of the co-defendant's argument, the prosecutor stood up in open court and asserted, "I think I can save the court's time. The evidence speaks for itself. We rest.". Dean v. State, 478 So.2d at 44. This Court agreed with the trial court that the prosecutor's words did not constitute final argument on the part of the state. This Court cited with approval the holding on Menard v. State, 427 So.2d 399 (Fla. 4th DCA 1983) This Court even quoted the following portion of Menard:

> Every now and again, in the tragic world of criminal appeals, comes a case that brings an involuntary smile to otherwise grim lips. This is one of those, though it cannot be expected to afford any amusement to the defendant.
>
> At the end of the initial final argument presented by the defense, the state's entire response was:
>
> 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.
>
> The defense, discomforted by this tactic, pressed for the right to conclude on the basis that

> the comment "relying on the evidence and common sense" did not constitute a waiver and actually was final argument. (Cite omitted). We disagree. The remark did [not] address the evidence in particular nor any of the testimony. Nor did they dwell unnecessarily on the level of intellectual consideration to be extended by the jury. Moreover, unlike the discourse in Andrews [v. State, 99 Fla. 1350, 129 So.771 (Fla. 1930)], supra, the comments were but a very few words and in our opinion did not rise to the level of final argument.

Id. quoting Menard v. State, 427 So.2d at 400.

Florida Rule of Criminal Procedure 3.250 provides, in part:

> In all criminal prosecutions the accused may choose to be sworn as a witness in the accused's own behalf..., and a defendant offering no testimony in his or her behalf, except the defendant's own **shall be entitled to the concluding argument before the jury**.

(Emphasis added). Read literally, the rule provides that a defendant is entitled, under these circumstances, with **concluding argument**, **not just rebuttal argument.** "Concluding" argument means the **last** argument. Wright v. State, 87 So.2d 104 (Fla. 1956). It is therefore clear that a defendant is entitled to final argument to the jury even if the defendant is not arguing any facts in rebuttal.

A substantial body of case law recognizes that a statute or rule of procedure which confers upon the accused the right to conclude an argument is a substantial

procedural right. The denial of such a right constitutes reversible error, notwithstanding that the state's evidence may be more than adequate to support a verdict of guilty. See, e.g., Birge v. State, 92 So.2d 819 (Fla. 1957); Morales v. State, 609 So.2d 765 (Fla. 3rd DCA 1992); M.E.F. v. State, 595 So.2d 86 (Fla. 2d DCA 1992); and Terwilliger v. State, 535 So.2d 346 (Fla. 1st DCA 1988).

Dolan Darling was on trial for his life. The evidence against him was entirely circumstantial. The jury was not instructed on this peculiar and complex area of the law, i.e., circumstantial evidence. Under the circumstances, appellant did not receive the fair trial which is guaranteed him by both federal and state constitution. A capital trial should not be a child's game of "Gotcha!". Appellant concedes that perhaps defense counsel was gambling by "holding back" in his initial summation. Undoubtedly, he truly believed that he would have another chance to address the jury. He would have an opportunity to refute the state's entirely circumstantial case. Unfortunately for Dolan Darling, he never got that opportunity.

Under the peculiar facts of this case, specifically the entirely circumstantial nature of the evidence, appellant submits that the prosecutor's statement asking the jury to rely upon the evidence they heard constitutes an argument. It was a short argument, but nevertheless was an argument. See Dean v. State, 430 So.2d 491

(Fla. 3rd DCA 1983) ["the evidence speaks for itself" cannot legitimately construed as an indirect jury argument but, **even if it were**, the error, if any, in not allowing a reply to so fleeting a comment can hardly be considered reversible error.](Emphasis supplied) For the jury to fully and fairly consider the issues and the evidence in this case, they should have heard defense counsel's complete summation. To hold otherwise deprives appellant of a fair trial. See Andrews v. State, 129 Fla. So. 771, 99 Fla. 1350 (Fla. 1930) [In opening argument, prosecuting attorney should fairly state the case upon which he relies, thereby giving defendant's counsel fair opportunity to answer him; short perfunctory statement, not stating case, was held prejudicial error.]

POINT VII

THE TRIAL COURT ERRED IN REFUSING TO ALLOW APPELLANT TO ARGUE RESIDUAL DOUBT AS TO HIS GUILT IN THE PENALTY PHASE AS A LEGITIMATE REASON FOR THE JURY TO RECOMMEND LIFE.

At the penalty phase, appellant's first witness was Deshane Claer, the mother of his three-year-old daughter. Defense counsel asked Ms. Claer if Dolan had told her that he did not kill the victim in this case. (R II 67) The state immediately objected based on hearsay, relevance, and a violation of the sequestration of witnesses rule. (R II 68) Defense counsel announced that one mitigator he intended to prove was that the appellant "has an unwavering declaration of innocence."[31] (R II 68) Defense counsel pointed out that Darling had declared his innocence to every member of his family and to the examining psychiatrist. (R II 68-69) The trial court sustained the objection and precluded that line of inquiry. (R II 69) Subsequently, the trial court granted the state's motion in limine thus preventing defense counsel from arguing one of his proposed nonstatutory mitigating factors, i.e., that appellant has not wavered in his declaration of innocence. (R II 210-12; R III 249-51) The trial court relied on the

[31] Defense counsel had previously filed a list of proposed mitigation factors that he intended to prove.

well-settled law from this Court that residual doubt is not a relevant consideration in deciding whether a capital defendant lives or dies. This Court should reconsider its prior holdings and should allow a defendant facing a death sentence the opportunity to argue that any residual or lingering doubt a jury might have about a defendant's guilt can be used to mitigate the absolute finality of a death sentence.

This court has ruled that residual doubt as to a defendant's guilt does not mitigate a death sentence. Burr v. State, 466 So. 2d 1051 (Fla. 1985). This court has reiterated that holding several times since then. Sims v. State, 681 So. 2d 1112, 1117 (Fla. 1996); Bogle v. State, 655 So. 2d 1103, 1107 (Fla. 1995); Preston v. State, 607 So. 2d 404, 411 (Fla. 1992); White v. Dugger, 523 So. 2d 140 (Fla. 1988); Tafero v. Dugger, 520 So. 2d 287, 289 (Fla. 1988). The United States Supreme Court has decided that a state can prevent a defendant from so arguing. Franklin v. Lynaugh, 487 U.S. 164, 108 S.CT 2320, 101 L.Ed.2d 155 (1988). This case, however, shows why those rulings are wrong, and why this court should allow defendants facing a death sentence to argue that legitimate, residual doubt can mitigate a death sentence.

In Burr, this court said, in rejecting residual doubt as a mitigator

> [A] convicted defendant cannot be a 'little bit guilty.' It is unreasonable for a jury to say in one breath that a defendant's guilt has been proved beyond a reasonable doubt and, in the next breath,

> to say someone else may have done it, so we recommend mercy.

Id. at 1054.

Yet, others have not seen the problem that way. They have focused instead on the uncertainty inherent in any verdict in a criminal case and the conclusive finality of a death sentence.

Justice Marshall, in two dissents from denials of certiorari, considered that doubt as to guilt could validly mitigate a death sentence.

> [T]he 'reasonable doubt' foundation of the adversary method attains neither certainty on the part of the fact finders nor infallibility , and accommodations to that failing are well established in our society. . . . In the capital sentencing context, the consideration of possible innocence as a mitigation factor is just such an essential accommodation.

Burr v. Florida, 474 U.S. 879, 106 S.CT 201, 203, 88 L.Ed.2d 170 (1985).

> There is certainly nothing irrational-indeed, there is nothing novel-about the idea of mitigating a death sentence because of lingering doubts as to guilt. It has often been noted that one of the most fearful aspects of the death penalty is its finality. there is simply no possibility of correcting a mistake. the horror of sending an innocent defendant to death is thus qualitatively different from the horror of falsely imprisoning that defendant. The belief that such an ultimate and final penalty is inappropriate where there are doubts as to guilt, even if they do not rise to the level necessary for acquittal, is a feeling that stems from common sense and fundamental notions of justice.

Heiney v. Florida, 469 U.S. 920, 921-22, 105 S.CT 303, 83 L.Ed.2d 237 (1984).

Residual doubt is so strong a mitigator that the framers of the Model Penal

Code's death penalty statute absolutely precluded a death sentence where there was some lingering question that the defendant may not have committed the charged murder

> Death Sentence Precluded. When a defendant is found guilty of murder, the Court shall impose sentence for a felony of the first degree [i.e. a non capital felony offense] if it is satisfied that:
>
> * * *
>
> (f) although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt.[32]

ALI Model Penal Code Section 210.6(1) p. 107 (Official Draft, 1980).

Even members of this court have dissented from following the holding and reasoning of Burr and its progeny. King v. Dugger, 555 So. 2d 355, 360 (Fla. 1990); Melendez v. State, 498 So. 2d 1259, 1263 (Fla. 1986)(Barkett, dissenting.) ("[T]he 'reasonable doubt' foundation of the adversary method attains neither certainty on the part of the fact finders nor infallibility, and accommodations to that failing are well established in our society."

Federal Courts, including the United States Supreme Court, have also recognized the powerful persuasiveness of a lingering doubt defense in the penalty

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[32]Florida's death statute tracks, in many respects, the Model Penal Code's capital sentencing statute.

phase of a capital sentencing proceeding. In Andrews v. Collins, 21 F.3d 612, 623, fn. 21 (5th Cir. 1995), the court said,

> Moreover, the record reflects that counsel, during the punishment stage, relied solely upon what he believed to be the jury's residual doubts about the evidence presented at the guilt phase of Andrews' trial. Such a strategy has been recognized as an extremely effective argument for defendants in capital cases. Lockhart v. McCree, 476 U.S. 162, 181, 106 S.CT 1758, 1769, 90 L.Ed.2d 137 (1986) (internal quotation omitted); see also Stringer[v. Jackson, 862 F.2d 1108, 1116 (5th Cir. 1988)] (finding that counsel's decision to rely on residual doubt did not constitute ineffective assistance).

Accord, Kirkpatrick v. Whitley, 992 F. 2d 491, 498 (5th Cir 1993)("We have frequently recognized the strategic value of relying on 'residual doubt.'"); Kyles v. Whitley, 5 F. 3d 806, 863 (5th Cir 1993). Indeed, the United States Supreme Court in Lockhart at 476 U. S. At 181, noted "[A]s several courts have observed, jurors who decide both guilt and penalty are likely to form residual doubts or 'whimsical doubts' ... about the evidence so as to decide against the death penalty. Such residual doubt has been recognized as an extremely effective argument against the death penalty."

In addition, the California Supreme Court has explicitly allowed evidence of a residual doubt as to guilt during the penalty phase of a capital trial. Siripons v. Calderon, 35 F. 3d 1308 (9th Cir 1994); People v. Johnson, 842 P. 2d 1, 40-41 (Cal. 1992).

Finally, as a practical matter, jurors are going to consider the strength of their conviction of the defendant's guilt in the penalty phase, much as they probably realize in the guilt phase portion that if they return a verdict of guilt they will have to consider whether a death sentence should be imposed. Obviously, the jury in Burr, based its life recommendation on their persistent, residual doubt that he had committed the charged murder. It was the only thing that could have mitigated a death sentence in his case. Similarly, three jurors in Wike v. State, 596 So. 2d 1020 (Fla. 1992), had enough doubt that Wike had kidnaped two young girls, raped one of them, and had brutally slashed both of their throats, killing one to have voted for life. At a subsequent resentencing, where the evidence showing he did not commit the murders was excluded, none of the jurors recommended life. Wike v. State, 648 So. 2d 683 (Fla. 1994). Jurors will include their doubt as to the defendant's guilt in their sentencing deliberations, despite rulings in cases like Burr that said to do so was unreasonable. Human beings cannot compartmentalize their decisions with the logic expounded by this Court in Burr. Life is too uncertain, and the consequences of decisions too far reaching for anyone but those too blind to see that mistakes are made even under the best of circumstances. It is supremely reasonable to allow jurors the comfort of knowing that when they seriously consider a defendant's fate, any lingering doubt they may have about his guilt can

mitigate a death sentence. To wrap the guilt and sentencing phase issues into neat, separate, logical packages defies human experience and practical realities.

One aspect of this case makes it a particularly appropriate for defense counsel to argue residual doubt. At the penalty phase the state was still attempting to prove that appellant was guilty of the crimes of which the jury had already convicted him. Specifically, the prosecutor used the victim impact witness, Joanee Reed, the victim's friend, in an attempt to dispel any lingering doubt. The prosecutor asked Reed about Grace's relationship Jesse, Grace's married boyfriend.

> Q. Now, to your knowledge had she ever strayed from him in any way, or even thought about?
>
> A. Never, Never, nothing. It was just all Jessie.

(R I 40) Appellant submits that the state's presentation of the above testimony opened the door to an argument refuting the testimony. The trial court should have allowed the argument as to residual doubt.

Finally, in Windom v. State, 656 So. 2d 432 (Fla. 1995), this court approved admitting victim impact evidence, not because it had any relevance to the aggravating or mitigating factors, but simply so the jury could be aware of the victim's uniqueness and the resultant loss to the community. See, also Booth v.

Maryland, 482 U.S. 496, 107 S.Ct.. 2529, 96 L.Ed. 2d 440 (1987).[33] Rejecting the defendant's attack on the constitutionality of admitting such evidence, this court said, "We do not believe that the procedure for addressing victim impact evidence, as set forth in the statute, impermissibly affects the weighing of the aggravators and mitigators." Id. at S202.

If victim impact evidence has no constitutionally cognizable impact on jury deliberations then it is difficult to understand how doubt as to the defendant's guilt can, in anyway, unfairly tip the "playing field." If anything, such evidence and argument should be admitted under the rationale of Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), that any aspect of the case that could rationally support mitigation is relevant for the jury to consider. Such evidence has greater logical relevancy than victim impact evidence, which has no bearing on the defendant's character or the nature of the crime, the measure of relevancy in a capital sentencing. Lockett, at 601; Section 921.142(2), Fla. Stat. 1995.

Thus, given the weaknesses of the state's case against Darling, he respectfully asks this Honorable Court to reverse the trial court's sentence of death

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[33]In rejecting residual doubt as valid mitigation, Justice O'Connor in Franklin v. Lynaugh, 487 U.S. at 188, concluded that any "residual doubt" about a defendant's guilt did not mitigate a death sentence because it did not relate to the defendant's character or background, or the circumstances of the offense. The same could be said of victim impact evidence.

and remand for a new sentencing hearing so he can present evidence and argue that any lingering doubt the jury may have of his guilt can mitigate a death sentence.

POINT VIII

THE ABSENCE OF A COMPLETE RECORD ON APPEAL DEPRIVES DARLING ADEQUATE APPELLATE REVIEW RESULTING IN A DENIAL OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND TO EQUAL PROTECTION UNDER THE LAW.

After numerous conversations with the trial lawyers, the clerk of the lower court, and the court reporter's office, undersigned counsel has been unable to locate any stenographic notes or transcripts of any pretrial hearings of substance. Counsel was unsuccessful despite the fact that the record on appeal seems to reflect that at least one major hearing was held, that being the hearing on appellant's "death penalty motions." In spite of this, appellant still is unable to provide this Court with a complete record to conduct appellant review. Several times, the record on appeal contains court minutes from the clerk indicating that a hearing was held and that a court reporter was present. When undersigned counsel attempted to supplement the record with these hearings, the court reporter filed sworn affidavits claiming to have searched their records and could find no stenographic notes for those hearing. See, e.g., (R V 444; SR III 11)[November 3, 1997 hearing on motion for co-counsel].

The most puzzling of the missing hearings is the apparently quite substantial

hearing on appellant's death penalty motions. On July 23, 1998, defense counsel filed 15 motions attacking various aspects of Florida's death penalty sentencing scheme. (R V 468-531; R VI 532-610) These were heard by the trial court sometime after they were filed in late July and before trial started in late November. The record contains court minutes indicating that a hearing was held on September 16, 1998 where a court reporter was present. (R VI 661) Conversations with trial counsel and court personnel led undersigned counsel to believe that this was the sought-after hearing, but once again he was thwarted by an affidavit from the court reporter. (SR IV 13)[34]

Undersigned counsel has never experienced such difficulty in finding transcripts of missing hearings in a capital case. Counsel states this as an officer of the court who has perfected approximately thirty capital appeals before this Court. Counsel has even reviewed the trial lawyers' motions for attorney's fees with supporting affidavits which reflect attending hearings on specific dates. Some of these correspond with court minutes contained in the record, yet the clerk and the

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[34] Although the court minutes for the September 16, 1998 hearing indicate that the court reporter was Sue Hutson, the affidavit came from another official court reporter, Cathy L. Matta. In a telephone conversation, Ms. Matta assured undersigned counsel that the court minutes frequently are inaccurate in their representation of which particular court reporter was present. Ms. Matta assured me that she was the court reporter covering Judge Adams on that day.

court reporter are unable to locate any stenographic notes.

Appellant's submits that he is entitled to a complete record of the trial proceedings below in order to ensure adequate appellate review. The lack of a transcript of a critical hearing denigrates appellant's right to meaningful consideration of his cause by this Court as well as by other courts that may consider this case in the future. Amends. V & XIV, U.S. Const.; Estes v. Texas, 381 U.S. 532 (1965); Smith v. State, 407 So.2d 894 (Fla. 1982). In Delap v. State, 350 So.2d 462 (Fla. 1977), this Court ordered a new trial for a capital defendant when the voir dire and closing arguments were missing from the record on appeal.

> Since the full transcript of the proceedings requested by the defendant is unavailable for review by this Court, and since the omitted requested portions of the transcript are necessary for a complete review of this cause, this Court has no alternative but to remand for a new trial of the cause.

Delap v. State, 350 So.2d at 463).

The problem of procedural bar is also a consideration in the disposition of this issue. Appellant is entitled to the record of his entire trial not only on direct appeal but for all future litigation involving this case. Since this critical hearing is nowhere to be found, appellant is entitled to a complete retrial. See Delap. At the very least, this Court should remand for reconstruction of the record.

POINT IX

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO INSTRUCT THE JURY ON THE APPLICABLE LAW AT THE PENALTY PHASE BY DENYING APPELLANT'S REQUESTED SPECIAL JURY INSTRUCTIONS.

Florida Rule of Criminal Procedure 3.390(a) states:

> The presiding judge charge the jury only upon the law of the case at the conclusion of argument of counsel....

At the penalty phase, defense counsel requested, in writing, several special jury instructions. (R IX 1052-76) Although the trial court granted a few of appellant's request, the vast majority were denied. This was error. The requested special instructions were accurate statements of the law and were not adequately covered in the standard jury instructions.

One of the most glaring errors occurred when appellant attempted to correct the misstatement of law contained in the standard jury instructions that impermissibly shift the burden of proof regarding mitigating circumstances. Specifically, the court instructed the jury that:

> ...It is your duty to follow the law that will now be given to you by the court and render to the court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty

> and **whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.**

(R III 293)(Emphasis supplied) Appellant sought to correct the emphasized the statement of the law by striking that particular portion. (R VIII 1052) The trial court denied appellant's request at the very beginning of the penalty phase. (R I 4-17) Appellant renewed his objection prior to closing argument. (R III 242) The trial court error in denying appellant's request denied appellant Due Process and fair jury recommendation contrary to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16, 17, and 22 of the Florida Constitution.

Under the statute and case law, the existence of valid statutory aggravating circumstances does not necessarily justify imposition of the death penalty. There must be "sufficient" aggravation. However, once a jury finds sufficient aggravation to justify a death sentence, a defendant must then present mitigation "outweighing" that aggravation and persuade the jury that death is not appropriate. Under these instructions, given over objection, there is a "reasonable likelihood that the jury applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence," Boyde v. California, 494 U.S. 370, 380 (1990), because the mitigating evidence cannot be given weight to offset

the propriety of the death penalty until it is arbitrarily found to "outweigh" the totality of the aggravation that has been presented. This effectively presents relevant mitigating evidence from entering into the weighing process in violation of both the state and federal constitutions. See Penry v. Lynaugh, 492 U.S. 302, 317-318 (1989). Further, the burden of proof is unconstitutionally shifted to the defendant as to the ultimate question of which sentence is to be imposed. This violates due process and fundamental fairness. Mullaney v.Wilbur, 421 U.S. 684 (1975).

The trial court proceeded to deny many of appellant's other requested special jury instructions. Appellant submits on appeal that most of these covered areas of the law that were not adequately explained by the standard jury instructions. These were important for the jury to properly consider the issues involved period. One glaring example is the trial court's rejection of appellant's proposed instructions regarding victim impact evidence. The jury in this case heard testimony from the victim's friend which had no relevance other that establishing that the victim was a unique person who would be missed by her friend. Appellant requested a special instruction to the jury that they should not consider such evidence in aggravation. (R VIII 1051) When the trial court denied appellant's request, defense counsel asked if there was any instruction regarding

victim impact that the court would agree to give. (R II 236-38) Appellant correctly pointed out that the standard instructions did not tell the jury how to treat victim impact evidence. The trial court rebuffed appellant's request. The court indicated that it could not rule on a proposed instruction that was not before it. (R II 238)

POINT X

THE DEATH PENALTY IS NOT WARRANTED IN THIS CASE WHERE THE SEQUENCE OF EVENTS LEADING TO THE VICTIM'S DEATH ARE STILL UNKNOWN AND WHERE ONLY TWO "GARDEN VARIETY" AGGRAVATORS EXIST AND THE MITIGATION IS SUBSTANTIAL.

We will never know the circumstances of Grace Mlymarzk's death. The jury convicted Sean Smith based entirely on circumstantial evidence. Even if this Court decides that the evidence is sufficient to exclude every reasonable hypothesis of innocence, the evidence does not exclude the possibility that Darling acted without premeditation. See Point I. Nor does the evidence exclude the hypothesis that the killing was **not** committed during the course of a felony. See Point I. It is certainly reasonable to conclude from the evidence that Dolan Darling and Grace Mlymarzk engaged in a consensual sexual encounter which ultimately turned violent, for whatever reason. There was no sign of forced entry. Grace knew that her boyfriend would be out of town all day. She knew that her husband was in Poland. She may have been unfaithful to both men that day. This Court cannot rule out a hypothesis that supports only a conviction for second-degree murder.

With that in mind, this Court must consider that the trial court found **only**

two aggravating factors. One of these (during the commission of a sexual battery) is not supported by the evidence. See, Point I.

With only one valid aggravator (commission of a prior violent felony, Darling's death sentence is clearly disproportionate.) As a general rule, "death is not indicated in a single-aggravator case where there is substantial mitigation." Jones v. State, 705 So.2d 1364 (Fla. 1998) The prior violent felony convictions in this case were carjacking, robbery and aggravated battery, all stemming from one incident. (VIII R 1121-22) Thus, this case would not fall into the single-aggravator exception where a prior murder was involved. See, e.g., Ferrell v. State, 680 So.2d 390 (Fla. 1996) (affirming death sentence where sole aggravator was prior second-degree murder).[35]

Even if this Court concludes that the felony-murder aggravator is supported by the evidence, both it and the other aggravating factor (prior violent felony conviction) are "garden variety" aggravators that are found in the vast majority of first-degree murder cases, capital or not. Florida reserves the death penalty for the most aggravated and least mitigated of first-degree murderers. State v. Dixon, 283

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[35] This Court has even reversed single-aggravator cases involving prior murders (significant aggravation), where the mitigating evidence is as substantial as in the instant case. See, e.g., Almeida v. State, 24 Fla. L.Weekly S336 (1999) and Robertson v. State, 699 So.2d 1343 (Fla. 1997).

So.2d 1, 7 (Fla. 1973). The totality of the circumstances of this case, compared with other capital cases, render the death sentence a disproportionate penalty.

Weighing against the two "garden variety" aggravators, is the substantial mitigation accepted by the trial court. The trial court found one statutory mitigator, Darling's "chronological and mental age". (R VIII 1122) The trial court found that the evidence established eighteen non-statutory mitigating factors, but concluded that six of those merged with other established mitigating circumstances. (RVIII 1123-26) The trial court's weight given to each non-statutory mitigator varied from slight, little, some, moderate, and "most weighty." The court rejected only one of appellant's proposed non-statutory mitigators.[36]

The substantial non-statutory mitigating evidence established that 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. (VIII R 1123-26)

The aggravation in this case is not extensive and the mitigation is quite substantial. This Court has vacated the death sentence in cases with similar

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[36] The trial court agreed that Dolan Darling "is a human being" but did not recognize this as a separate factor. (R VIII 1125-26)

aggravation and mitigation. See, e.g., Snipes v. State, 733 So.2d 1000 (Fla. 1999)[two aggravators (CCP and pecuniary gain) weighed against age, personality disorder, dysfunctional, alcoholic family, etc.]; Urbin v. State, 714 So.2d 411 (Fla. 1998) [two aggravators (prior violent felony and pecuniary gain) weighed against age, substantial impairment, drug and alcohol abuse, dyslexia, employment history and lack of a father]; Livingston v. State, 565 So.2d 1288 (Fla. 1988)[two aggravators (prior violent felony and felony murder) versus defendant's youth and immaturity, limited intellectual functioning, and extensive use of drugs]; Cooper v. State, 739 So.2d 82 (Fla. 1999) [**three** valid aggravators (felony murder, pecuniary gain, CCP) were overcome by two statutory and several non-statutory mitigators including Cooper's low intelligence and abusive childhood]; Larkins v. State, 739 So.2d 90 (Fla. 1999) [sentence vacated with two aggravators (prior violent felony conviction and pecuniary gain) weighed against both statutory mental mitigators and eleven non-statutory mitigating factors]; Hawk v. State, 718 So.2d 159 (Fla. 1998)[death sentence disproportionate with two aggravators (prior violent felony and HAC) in light of two statutory mitigators (both mental) and two non-statutory mitigators (model prisoner, alcoholism and drug use)] ; Johnson v. State, 720 So.2d 232 (Fla. 1998) [death sentence disproportionate with two aggravators (prior violent felony and burglary/pecuniary gain) balanced against age of 22, voluntarily

surrender, troubled childhood, employment, respectful attitude, father of a young daughter, and GED]; Robertson v. State, 699 So.2d 1343 (Fla. 1997) [two aggravators (HAC and felony murder) were outweighed by age (19), abused childhood, mental illness, impaired capacity unplanned, senseless murder committed while under the influence of drugs and alcohol].

Darling's death sentence is disproportionate and must be reversed. Any other result would violate due process and subject Smith to cruel and unusual punishment in violation of the Eight and Fourteenth Amendments of the United States Constitution and Article I, sections 9 and 17 of the Florida Constitution.

POINT XI

DOLAN DARLING'S DEATH SENTENCE
VIOLATES AN INTERNATIONAL TREATY.

Appellant is a foreign citizen national from the Bahamas. Following his arrest, police never informed him of his right to seek contact with his consulate. While authorities never used any statements obtained from appellant following his arrest, appellant contends on appeal that death should be precluded as a possible penalty because of the treaty violation. Defense counsel filed a motion below asking for such relief. (R VIII 808-10)

The United States Constitution recognizes treaties as the supreme law of the land. Art. VI, cl. 2, U.S. Const. The President of the United States is empowered to enter into treaties with the advice and consent of the Senate. Art. II, § 2, U.S. Const. The supremacy clause indicates that federal law and treaties are supreme over state law. The Vienna Convention on Consular Relations, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261, entered into force in March 1967. Article 36 of the Vienna Convention provides that a foreign citizen national arrested in the United States has the right to be informed of his right to contact his consulate in order to arrange legal representation.

Police never informed appellant of his right to seek contact with his consulate in violation of the Vienna Convention. The only remedy at this point is

the elimination of death as a possible sentence. The International Court of Justice, based in The Hague has previously called on other states to halt executions of foreign nationals based on possible Vienna Convention violations. The World Court asked Texas to halt the execution of a Canadian national and asked Virginia to halt the execution of a Paraguayan national, based on the violation of international rights. This Court should recognize the supremacy of the international treaty and vacate appellant's death sentence.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, Appellant respectfully requests this Honorable Court to vacate his convictions and sentences and remand for discharge as to Points I and II. As for Points II, IV, V, VI and VIII, appellant asks this Court to reverse and remand for a new trial. As for Points VII and IX, appellant asks this Court to vacate his death sentence and remand for a new penalty phase trial. As to Points X and XI, appellant asks this Court to vacate his death sentence and remand for the imposition of a sentence of life in prison without possibility of parole.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand- delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to Mr. Dolan Darling a/k/a Sean Smith, #X06883, Union Correctional Institution, P.O. Box 221, Raiford, FL 32083, this 25th day of February, 2000.

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CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

_____
CHRISTOPHER S. QUARLES
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