IN THE SUPREME COURT OF FLORIDA

THOMAS OVERTON,

Appellant,

v. **CASE NO. SC95404**

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE SIXTEENTH JUDICIAL CIRCUIT IN AND FOR MONROE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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MISCELLANEOUS

STATEMENT OF THE CASE AND FACTS

Rebecca Hobby-Neely met Michael and Susan MacIvor, "teaching childbirth classes." (R 3030-31, 3032). The first class was on August 21, 1991 and ended at "9:00 p.m." (R 3032, 3034). The MacIvors had named the boy baby "Kyle Patrick," and he was due "the beginning of October." (R 3038).

Janet Kerns, Susan's close friend, testified that the MacIvors lived in "a gated community along an airstrip . . . maybe 20 homes" and had been married "[a] little over a year." (R 3035-38). Michael "made and sold airplane parts." (R 3037). On August 22, 1991, she received a call inquring about Susan who had not shown up for work. (R 3039, 3040). She and another teacher went to the MacIvors' home. (R 3041). Receiving no answer to their knock, they "tried the door and it was locked." (R 3041). Ms. Kerns looked in a window and saw "somebody laying on the floor." (R 3041).

Ms. Kerns went to a neighbor's house to see if she had a key to the MacIvor home, while the other teacher, Ms. Regan, "ran next door" to find someone "to call 911." (R 3042-43). As Ms. Kerns returned, Ms. Regan "was running downstairs screaming that Mike was dead." (R 3043). Ms. Kerns did not go inside. (R 3046).

Ms. Kerns had been with Susan when she had stopped for gas at the Amoco Station on Plantation Key. (R 3044). It was "a couple of minutes up on the highway from their house . . .." (R 3047).

Joiy Rae Holder was a commercial airline pilot, working for Pan American World Airways. (R 3048, 3049). He lived next door to the MacIvors and was familiar with the Amoco Station "only a half

a mile" away. (R 3050, 3055-56). Mr. Holder was at home on August 21st and 22nd, 1991. (R 3056). "[A]round 11:30 at night . . . it started to rain and thunder and lightning . . .." (R 3057). He was working outside the next day when a woman "came out running across the runway and said, call 911." (R 3058). He and the woman returned to the MacIvor home and getting no answer to his banging and seeing someone on the floor, Mr. Holder entered by breaking the door with "my shoulder." (R 3059, 3061-62).

He "saw Michael laying in the living room face up." (R 3062). He "was in his underwear" and "a white and red . . . striped shirt." (R 3062). "[H]e appeared to be dead;" his "head was taped," and he was bound, except for "his feet." (R 3062, 3077). He touched the victim "with the back of my hand, . . . and said, Mike, thinking he might still be alive." (R 3064). He did not disturb anything and did not move Michael's body at all. (R 3076).

As Mr. Holder "walked down the hallway I saw her." (R 3064). Mrs. MacIvor "had no clothes on. She was on her . . . stomach . . . at the end of the bed. It . . . was a bad scene." (R 3064). He did not touch her body, or even enter the room; neither did he touch anything in the MacIvor residence.[1] (R 3064-65, 3067). To Mr. Holder it appeared that Mrs. MacIvor "had been raped." (R 3065). This was evident "[f]rom the position she was in and the way her buttocks was up a little bit higher. And from looking at the back of her . . . it didn't look normal. It looked like she

[1] Ms. Regan "stopped at Mike's body" and did not see Susan's. (R 3067). She and Mr. Holder left the home together. (R 3067).

had been violated just by, . . . feces in the buttocks area." (R 3065-66, 3075). Mrs. MacIvor was also bound. (R 3066).

Mr. Holder went back to his home and called 911, reporting a murder. (R 3065). He asked them to hurry because "[t]he baby may still be alive if you get her (sic) fast." (R 3065). The neighbors "made sure nobody went in that house at all." (R 3083).

Later, Mr. Holder noticed a ladder "up on that balcony." (R 3070). It had not been there the day before. (R 3071). The MacIvors usually kept it "alongside of the house." (R 3071).

Deputy Lawrence Benedict was the first officer on the scene and was closely followed by paramedic Donald Bock. (R 3086-89). There "was about six other people . . . neighbors and friends of the MacIvors." (R 3089). Deputy Benedict, Mr. Bock, Mr. Holder, and Ms. Regan entered the home and saw a person "on his back on the floor, obviously deceased." (R 3090, 3091). Neither he, nor Mr. Bock, touched the man. (R 3091).

"From where Mr. MacIvor was at we were able to see into the bedroom and I saw a second body in that room." (R 3091). The deputy saw Susan "on the floor next to the bed" laying "on her side" with something around her feet. (R 3091-92, 3094, 3095). "She was obviously deceased, also." (R 3092). Neither he, nor Mr. Bock, entered the room, and neither touched anything. (R 3092, 3095). "[W]e cleared everybody out of the house immediately." (R 3092). No one was inside when the deputy left, and no one was allowed in until two detectives arrived shortly. (R 3092-93).

Paramedic Donald Bock saw Michael "laying on the floor. His

legs and hands were bound, with tape around his head." (R 3105). He "had lividity," indicating that he had been dead for "a while." (R 3106). The female victim "also had lividity and . . . tape around her head," and she was laying on her left side. (R 3106, 3108). He touched nothing. (R 3105, 3107-08).

Crime Scene Investigator Robert Petrick a/k/a "Pops" described the MacIvors' home as a "two-story . . . being used as a single-family . . .." (R 3109-10, 3213, 3118). A perimeter had been set up, and the area was secure when he arrived. (R 3113).

Sliding glass doors in the master bedroom were open, and a fan was "blowing air into the residence." (R 3121). Sliding glass doors were also open in the nursery. (R 3121). There was a "jog" in the balcony outside of the nursery, and a ladder leaned against the second floor balcony near it. (R 3121).

In the kitchen, "a piece of pipe wrapped in a towel . . . was laying on the floor." (R 3122). The pipe was "about 25 inches long, about a half inch in diameter," and "it was heavy enough that you could use it as a weapon . . .." (R 3186). "A partial palm print" was found on it. (R 3256). There was a "message board" in the kitchen which the MacIvors used for "messages back and forth to each other." (R 3124). A photo of that board was introduced into evidence over a relevancy objection. (R 3124-25).

Michael's body was "[a]t the foot of the desk" where "a bunch of personal papers" were "thrown on the floor." (R 3129). A coffee table and a heavy sofa had been moved about 18 inches. (R 3129, 3134-35). Michael's "foot [was] almost touching the TV stand. His

head was by the table. His legs were together. His right arm was alongside of him. His left arm was out. He was laying on a rug . . .," and a cup lay next to his shoulder. (R 3129, 3131).

Michael's "face was covered with inch-and-a-half wide masking tape. The only part that was exposed was his nose." (R 3131-32). He had blood "[o]n his left shoulder," and "in his nostril area." (R 3131). "[A] sock [was] across his eyes" under the tape, and his neck was bruised. (R 3134). The detective concluded there had been a struggle, although "[n]ot much." (R 3134-35, 3258).

Susan's body was "between this bed and the dresser . . . on a white comforter . . . and underneath the comforter was a bunch of other items" which appeared to have been "dumped out of a purse" or were "clothing." (R 3136, 3139, 3168). Near the "foot of the bed" was "an address book with the first couple of pages partially torn out," and just above it lay "inch-and-a-half masking tape." (R 3138). Susan's nightgown had been ripped off of her with great force. (R 3164). Her panties "had been cut up each side on . . . the hip area with a sharp object" and were under her. (R 3169).

Her back was to the doorway, and she "was hunched over . . . because she was hog tied[2] with belts from around her wrist to around her ankles and then two belts were tied together in the center and she . . . had some soft feces in her buttocks area." (R 3140). There were "several layers" of masking tape around her

[2] "Hogtied" means the hands are tied together, the ankles are tied together, and the ankles are tied to the hands. (R 3141).

ankles, as well as clothesline rope.[3] (R 3147). The rope was so tight that it "left indentations in the skin itself." (R 3148).

Susan's "hands were together. Both . . . were clenched and the belt went around her wrist and . . . was pulled over the top to help keep it snug." (R 3149). "It was very tight. She could not move her hands out of the bondage." (R 3149).

The air conditioning was off, and a box fan was "blowing air into the residence." (R 3134, 3139). It was warm inside, "about 85 degrees." (R 3145). There had been "a tremendous rainstorm" the night before, and as the "humidity went up, the temperature went back up to 90 degrees." (R 3145). There "were very small, tan, tan-colored ants" and insects on her body. (R 3145).

There was "a garotte (sic) around her neck."[4] (R 3150). "The first garotte that was around her neck was a necktie . . . tied with a square knot." (R 3151). The second "was a black sash." (R 3151). Her hair was "entangled in the knot itself." (R 3153). She had struggled with her attacker as shown by the clenched hands and the hair in the garotte; "she was not cooperating . . .." (R 3163).

"[T]wo pieces of inch-and-a-half masking tape" were around Michael's eyes, and it "was put on all the way around his head" and was "very smooth" and looked "put on with care." (R 3158, 3161).

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[3] "[A] piece of clothesline-type rope that appeared to have been cut" was in the hallway, more was found "in the doorway to the master bedroom" where Susan's body lay, and some was "outside the sliding glass doors" in the nursery. (R 3135-36).

[4] A "garrote" is "something you put around . . . someone's neck and pull it tight so then you can . . . twist it to make it tighter either to control or to kill that person." (R 3150).

With Susan, “the tape appeared to be put on in a frantic type of a hurry, just slapped over her eyes,” and there was “a contusion” on “the bridge of her nose.” (R 3161). Susan’s “eyelids . . . had . . . petechia . . . a bursting of the real small blood vessels in the eyelid usually caused by strangulation.” (R 3163).

“A high-intensity alternate light source . . . very helpful in detecting evidence” of things that “cannot be seen with the naked eye” was used.[5] (R 3126, 3127). Called a “luma light,” it assists the investigator “in seeing seminal fluid.” (R 3127). When it was passed over her body, it showed semen “in the crotch area on either side of the public area.” (R 3164, 3165, 3193-94). A long “dried feces” stain was found “on the fitted bottom sheet” at “the foot of the bed,” and the light indicated semen was present. (R 3191-94).

Detective Petrick collected the bed sheet, the mattress pad, and the comforter and placed each into a bag. (R 3195, 3223, 3224). He rolled them up, starting “at the foot of the bed, because that’s where the stains were . . ..” (R 3235). He put the items in his locked van to which no one else had access. (R 3195). He took the evidence out of his van and put it the Marathon facility and locked the room when he left. (R 3196, 3197). On August 24, 1991, he retrieved those items from there and gave them to Dr. Pope, who signed for them, noting they needed “to be air dried.” (R 3197-98, 3268). The evidence identified by the detective at trial was in

[5] This is similar to the hand stamps used at shows or amusement parks which do not show on the skin but are revealed under a special light. (R 3127).

paper bags which did not appear to be the same bags he had originally placed it into. (R 3221, 3222).

"[A] little basket . . . that had some condoms and some K-Y jelly in it" was found. (R 3262). Since it was obvious to the detective after using the luma light "that the perpetrator did not use a condom," the condoms were not collected. (R 3264-65).

A shell casing was found on the nursery floor near the sliding glass door. (R 3189, 3261). The ladder leaned against the balcony. (R 3204). It was processed for fingerprints, but it began to rain heavily, and no prints of value were obtained. (R 3208).

The telephone "wires had been cut," explaining the failure to get a dial tone since arrival at the residence the day before. (R 3212). It "was a fresh cut" made with "pliers." (R 3215).

Mark Andrews, a Sheriff's office detective at the time of the MacIvor murders, entered the home and left quickly after seeing the bodies of both victims. (R 3288, 3289, 3290-92). Susan was "on the floor, kind of facing the floor but into the room also, kind of halfway on her side almost." (R 3292). The detective "ordered everybody out and ordered Deputy Benedict to establish a perimeter . . .." (R 3292). Neither officer touched, or left, anything inside the residence. (R 3293). He later reentered to "video the crime scene" before anything was touched or moved. (R 3293, 3295). The tape was admitted into evidence. (R 3299).

Detective Andrews assisted in developing partial prints in the MacIvors' residence. (R 3306). He lifted some "[o]ff of the tape wrapper" and asked that they be compared to Overton's, but no

"connection" was made. (R 3306, 3309). Other than making that recommendation, he recalled having nothing to do with any investigation of Overton in regard to the MacIvor case. (R 3306).

Defense counsel asked the detective if he was "involved in an operation to sell a gun to Mr. Overton." (R 3311). The State objected on relevancy grounds. (R 3311). Defense Counsel argued that it went to "the bias and setting up of Mr. Overton . . .." (R 3315). The State argued that if that door is opened, "the jury will then hear about suspected other murders, other burglaries, why this officer thought that Thomas Overton was a likely suspect." (R 3316). The objection was sustained. (R 3317, 3318).

Dr. Donald Pope then "a forensic serologist" with the Monroe County Sheriff, held a degree as a Doctor of Veterinary Medicine." (R 3326-28). Defense Counsel's objection to Dr. Pope's admission as an expert in forensic serology was overruled. (R 3335, 3337).

Dr. Pope brought the luma light to the scene. (R 3338). It "throws a very powerful, intense light that causes certain stains or certain substances on other materials to what is called luminesce." (R 3338, 3339). The examiner must "wear special filters" to see "the substances that it's capable of detecting." (R 3339). The luma light detects blood and seminal fluid. (R 3339, 3340). Blood appears as "a nondescript, very black, tarry looking stain," while seminal fluid "luminesces or . . . produces a very bright orange-ish yellow white-ish color. It's very intense. Once you see it, it's hard to ever forget." (R 3340).

Dr. Pope used the luma light at the scene. (R 3340-41). A

bathroom "closet . . . illuminated or luminesced possibly with blood." (R 3345). In the master bedroom, he saw "a female . . . tied up with what appeared to be belts and ties and all kinds of things." (R 3345). She was in "a semi-fetal position," naked with "[h]er buttocks . . . to me and she was facing away." (R 3346).

Susan's body had ants "all over the place . . . on probably every part." (R 3346-47). The light luminesced at "three or four places on her body," including "the cheek of one of her buttocks, her pubic hair, and then down one thigh." (R 3347-48). These areas "luminesced very brightly, very distinctly. No doubt about it." (R 3348). Dr. Pope placed the swabs from those areas into a refrigerator "to stop the degradation" or decay. (R 3349-50).

Dr. Pope processed the bedding. (R 3350). Three areas on the fitted sheet "luminesced just real bright." (R 3351). He "took a little tiny cutting from one of them," . . . which "was basically for my own purposes . . . to get going real quick."[6] (R 3351). The biggest and "best areas" were "marked" for later testing. (R 3351).

"There was some brown, brownish-colored stains located in various places" on the sheet. (R 3355). The sheet, mattress pad and comforter were folded and placed in "[b]rown grocery bags." (R 3356). Dr. Pope identified them at trial. (R 3357-3367).

He also identified his writing on the brown paper bag

[6] This quick exam was done without going "through the laborious process of case notes and other things . . .." (R 3351). Dr. Pope explained: "It's just to help me organize what I'm going to or how I'm going to approach that evidence." (R 3517). These very small cuttings were positive for P-30 protein "that's only found in human semen" and "certain monkeys." (R 3432-33).

(containing the bottom sheet) previously shown to Detective Petrick. (R 3357, 3358). He had written on the sheet while it lay on the mattress in the MacIvor home. (R 3358, 3359). The State moved for admission of the sheet into evidence. (R 3365). Defense Counsel objected, claiming that the chain of custody had not been established because "Petrick, he's the one that impounded this" said "that's not the bag." (R 3364, 3369). The State argued that Petrick only thought it was not the bag because it contained handwriting which he did not recognize. (R 3370-72). Dr. Pope did not put his name on the bag because at the time he placed the sheet into the bag, he "was assisting him [Detective Petrick]." (R 3367). The State added: "[T]his is a plain paper bag. The only thing that would distinguish it from another paper bag is writing on it." (R 3371). Dr. Pope said he placed the writing on it when he was assisting at the crime scene and that the markings on the sheet inside were his, having been put on while it was still on the bed in the home. (R 3372). Thus, the chain of custody had been well established. (R 3372). The trial court overruled the objection and admitted the sheet into evidence. (R 3375).

Dr. Pope identified the mattress pad and the comforter, as well as his writing on the brown paper bags holding them. (R 3376-78, 3381-85). He swept the sheet, pad, and comforter for fibers and hair on "9/9/91." (R 3520). The potential trace evidence was sent to Orlando for analysis on "9/20/91." (R 3543).

Cuttings were taken from the sheet, mattress pad, and quilted comforter on "9/11 of '91." (R 3379, 3519). These cuttings were

not tested for sperm until "10/92" "[b]ecause we had no suspect" from whom to obtain a sample. (R 3521, 3592-93, 3594).

The doctor wrote "bottom" on that portion of the mattress pad at the crime scene and then placed it in the paper bag. (R 3380). He identified the pad at trial as the one taken from the MacIvor home on August 22, 1991. (R 3381). The defense made the same chain of custody objection as made to the sheet, but the judge overruled it and admitted the pad into evidence. (R 3383-84).

Dr. Pope also identified the quilted comforter. (R 3384). It was "stapled . . . up to try to stop the feather avalanche in my lab." (R 3386). The comforter was taken from the MacIvor home on August 22, 1991, after the luma light indicated blood when passed over the stains. (R 3390). At the scene, he wrote on the bag into which the comforter was placed and identified his handwriting at trial. (R 3385, 3386). Defense objections were overruled, and the comforter was admitted into evidence. (R 3388-89).

Dr. Pope took possession of the bedding on August 24th "at Pops' office in Marathon and took it with me to my home" where he lived alone. (R 3390, 3392, 3393). He had "a separate room" in which to "pin these things up" where "they wouldn't be disturbed." (R 3393). He took them there "for storage" and to dry them, or "to see if all the stains were dry . . .."[7] (R 3393). The Sheriff's Office lacked a "large room to do this in." (R 3393).

[7]"[T]he biggest thing we find in the Keys with any type of serological or biological evidence is the heat, humidity, mold, fungus and bacterial growth. . . .." (R 3539-40).

The doctor hung the bottom sheet, the mattress pad, and the quilted comforter in the room, “checking to be sure that they had been dried.” (R 3394). He hung each item “with a dip . . . to minimize . . . loss of trace [evidence].” (R 3535). Thereafter, he “refolded it and put it back into the bags . . .” in a manner “to minimize loss of trace [evidence].” (R 3394, 3536). He “took them to the property room in Key West” on August 26th. (R 3395).

Immediately thereafter, Dr. Pope “rechecked them out and took them to my lab” to begin work on them. (R 3395, 3396). He returned them “on 11/21/91.” (R 3396, 3408, 3543). The mattress pad was taken to a psychic consultant in Orlando on December 17, 1992. (R 3508). The police had no suspect at that time. (R 3546). The pad was returned to property on January 13, 1993. (R 3513-14, 3546).

Dr. Pope had the cutouts until April, 1993 when he left the Sheriff’s Office. (R 3417). He kept them in the “locked refrigerator-freezer in my Marathon laboratory,” and the sheet, pad, and comforter in ”locked cabinets.” (R 3416 3549). Upon his departure, he took “everything . . . to the laboratory in Key West and put it in their refrigerator.” (R 3549).

Dr. Pope described “a cylindrical smear . . . light brownish in color” on the mattress pad and a similar stain on the bottom sheet. (R 3399). Photographs of the stains were admitted into evidence. (R 3399-3400). The luma light presumptively indicated the presence of seminal fluid. (R 3405). Dr. Pope described four additional tests from which he determined that sperm or semen was present and would permit DNA testing. (R 3410, 3413, 3554).

Dr. Pope did an "alkaline phosphatase test and a sperm search test" on the cutting from one of the stains on the bottom sheet. (R 3419-20). The test was "positive" for sperm and would permit DNA testing. (R 3420). The cuttings from the pad and the sheet were refrigerated in the locked lab. (R 3420).

Regarding the swabs containing fluid taken from Susan's body, Dr. Pope took them from the crime scene to his home. (R 3421). There, he "air dried them and refrigerated them." (R 3421). He took them to the autopsy the next day. (R 3422).

At the autopsy, Dr. Pope "took photographs and helped with the collection of the sexual assault kit." (R 3422). The medical examiner "would take the samples and hand them to me and then I would place them in the appropriate envelopes." (R 3422). Dr. Pope kept the swabs he took from the crime scene separate from those taken at the autopsy, although he misdated the envelopes containing the crime scene swabs. (R 3423-24).

Dr. Pope found no evidence of sperm on the swabs. (R 3424-25). He was not surprised as it was very hot and humid and the body "already was exuding a liquid" when the swabs were made. (R 3426-27). He explained "the seminal stain will stay, but you could lose all the sperm cells" due to degradation. (R 3564).

Dr. Pope was asked about a telephone conversation several years after the autopsy. (R 3452-54). Detective Powell

> called me up laughing . . . and he said, Doc, you hid those swabs from us. And I said, what are you talking about? And he said, in the MacIvor case, you hid the swabs from us. And I said, no, I didn't. They were in the sexual assault kit. . . . [T]hey had already been

'found' if, in fact, they were lost.

(R 3454).

Dr. Pope testified that it was proper procedure to add specialized items to a property receipt after it had been initially signed. (R 3488). An "A" or a "B" would be added to identify the item being added subsequently. (R 3491).

Dr. Pope recalled seeing a condom package at the crime scene. (R 3526). There was a "circular object within the foil, so evidently it wasn't opened." (R 3527). He did not regard that to be a significant piece of potential evidence in the crime, but considered it "a normal sexual aid . . . with a married couple." (R 3528, 3529). Even though Susan was eight months pregnant, the condom could have been necessary or desirable as a result of either spouse's "medical history . . . or . . . medical problems." (R 3529). Moreover, "one would think that . . .if a condom was used, there would have been no depositing of seminal fluid," and the luma light revealed the presence of such fluid. (R 3566).

Dr. Pope did not send the evidence to FDLE for DNA testing in 1991 because:

> . . . I called FDLE up and at that particular time, . . . it was eight years ago and DNA was just becoming a field usable and at that time . . . only Tallahassee was even starting to do DNA analysis.
>
> Their protocol at the time was that you had to have a suspect to turn any evidence in to ask for any DNA analysis, period.

(R 3556). At that time, there was no suspect. (R 3556-57).

Medical Examiner, Robert Nelms, was recognized as an expert.

(R 3605, 3610). He performed autopsies on the MacIvors' bodies on August 23, 1991 at Fishermen's Hospital. (R 3614).

Michael had a bloody laceration on the back, right of his head and "a slight scrape of the nose." (R 3617, 3619). "There were horizontal ligature marks on the neck . . . four on the front . . . and at least two on the back of the neck." (R 3619). There were "two abrasions . . . on the left shoulder . . . discoloration across the back of the neck" and "some greenish discoloration on the right lower quadrant of the abdomen." (R 3621, 3622).

The head injury was "trauma" of "considerable force" which could cause unconsciousness or "daze someone in a semiconscious state." (R 3624-26). Although the blow would likely render one unconscious, it could vary and "be minutes up to hours." (R 3637).

Michael's neck also sustained a blow of "great force." (R 3683). It was such that "it would have paralyzed him just from the . . . spinal cord shock." (R 3683). In addition, the neck had "bruises" and "[t]he larynx itself was fractured along the base . . .," as was the epiglottis." (R 3626, 3628). The doctor had seen such injuries before in "[s]trangulation cases," and all of the markings were consistent with "ligature strangulation." (R 3628, 3629). The injuries to the shoulder and cecum (lower abdomen) were consistent with "[a] heavy blow" and could be inflicted by a man "with a baseball bat . . . swinging about as hard as I can swing." (R 3629-30). The abdominal injury could also be inflicted by a stomp or kick to the area or "someone kneeing the victim with great force." (R 3631). All of these injuries were "recent injuries and

. . . occurred prior to his death." (R 3631).

The cause of death was "[a]sphyxiation via ligature strangulation" and was consistent with having occurred "late evening or early morning hours of August 21st, August 22nd." (R 3632). It would take "10 to 15 seconds . . . longer if the ligature is not completely as tight as it could be" to render one unconscious. (R 3633). It would "take about five minutes at the very least" to cause death. (R 3633).

The ligature on Michael was "applied with several wraps around the neck, but tension applied from the rear." (R 3633-34). The victim was not under the influence of alcohol or any type of medication or drug at the time of his death and was "taking nothing that would diminish his ability to be aware of or sense pain or what was going on around him." (R 3635). Michael's height was "6'1" and he was all muscle;" he weighed 200 lbs. (R 3636). There were no defensive wounds found on the male victim. (R 3636). These factors indicated that Michael "was taken by surprise." (R 3669). He could not say whether the blow to the head, or the strangulation occurred first or was the most severe -- both were very severe. (R 3670). He felt that most likely the blow to the head came first because "it would render him unable to defend himself." (R 3671). The tape was put on Michael before he died. (R 3674). The injuries could have occurred "several hours" before his death. (R 3672).

Defense counsel suggested that the wound to the abdomen did not "fit" with the "scenario that he was surprised by a blow to the back of the head." (R 3672). Dr. Nelms had considered the

possibility that there was more than one attacker based on the victims having been in separate locations and the "size and strength of Mr. MacIvor."[8] (R 3672-73). However, the crime may have been committed by one "very strong and very fast" person who knew "exactly what he was doing." (R 3684).

Dr. Nelms also did the autopsy on Susan. (R 3639). The external facial examination revealed "an abrasion across the bridge of the nose . . . abrasion between the mouth and the nose . . . contusions of the lower lip, . . . contusion of the right tongue, . . . [and] petechial hemorrhages . . .." (R 3640). At the crime scene, the doctor saw a blue-gray discoloration of the face caused by blood entering the head faster than its leaving. (R 3642). This indicates "[i]ncomplete application of the ligature so that it doesn't totally block the arterial blood flow, but it does block the venous flow." (R 3642-43). This was also indicated by the presence of "conjunctiva." (R 3643).

On Susan's neck, Dr. Nelms found "ligature marks" and "abrasions," approximately four on the right and one on the left. (R 3643). These injuries were consistent with application of the scarf-like ligature found on Susan's body. (R 3647). "She was moving against the ligature . . .." (R 3648).

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[8] The evidence is entirely consistent with the surprise blow to the back of the head and/or neck rendering Michael unconscious and/or paralyzed, he was bound and regained consciousness at some point while his wife was being raped and/or killed. The killer returned to Michael, stomped him in the lower stomach as he lay on his back on the floor, and then placed the ligature around the neck of the man. Thereafter, he was strangled to death.

Susan “was lying on the left side” at the crime scene, and her body had consequent “postmortem blistering” on that side. (R 3648). There was “a ligature mark” on her “right wrist,” and “three little circular marks” on the left wrist which were also consistent with a ligature mark. (R 3648-49).

Dr. Nelms found “some marks on the left upper thigh right where it joins the body,” and “a mark on each side” of “the inner thighs.” (R 3649). There was “an abrasion inside the vulva” and “[a] bruise on the lower leg just below the knee.” (R 3649). These injuries were recent and “inflicted before death.” (R 3650).

There were “abrasions on the right ankle” caused by “the ligatures on the ankle.” (R 3651). This injury “strongly suggest[ed] the possibility of a struggle . . ..” (R 3652).

There were “at least three” distinct injuries to Susan’s head. (R 3656). These blows were forceful, although less than used on Michael. (R 3656). They would cause momentary unconsciousness, but consciousness would return rapidly. (R 3656-57).

Susan’s neck had “scattered bruises or contusions, bleeding points around the upper larynx. There was also petechia at the base of the epiglottis.” (R 3657). This was secondary to the pressure from the ligature. (R 3657). He also found “petechia on the surface of the heart,” and edema in her lungs which indicated “she was trying to breath in and couldn’t . . ..” (R 3658).

The injury to the internal parts of the vulva was consistent with sexual assault. (R 3658-59). Dr. Nelms opined that Mrs. MacIvor was sexually battered based on:

> [T]he totality of the evidence. The fact she was undressed, she was bound, she was -- the ligature on the ankles, the rope part had been cut which would allow the legs to be spread, and then the area of the abrasion.

(R 3659). He also knew that possible seminal fluid had been detected. (R 3659).

Susan died from "[a]sphyxiation due to ligature strangulation." (R 3660). Head congestion indicated that she took longer to lose consciousness, with the shortest time being 15 seconds and there being "no upper limit" - it could have been "hours." (R 3660). "[S]he was conscious in order to clench the hands." (R 3663).

Susan was not under the influence of alcohol, drugs, or other toxological substances when she died. (R 3661). Nothing impaired her ability to feel pain or be aware of what was happening. (R 3661). The injuries, except the blistering on her left side and the insect bites, were "pre-death" and inflicted "around the time of death." (R 3662). Dr. Nelms found "feces in her rectal area" which "can occur at the time of death . . . with fear." (R 3662).

Susan was seven to eight months pregnant. (R 3663). The baby had no external injury and was normal for its age. (R 3663). Had the baby been delivered, it would have been able to survive on its own; there was "no reason" that the baby would not have survived but for the death of its mother. (R 3663-64). The baby died from "[a]sphyxiation due to the mother's strangulation," although the baby would have lived "30 minutes" longer than its mother. (R 3664-65). Kyle Patrick made "efforts to breathe and perhaps kick

and jerk its hands like babies usually do." (R 3665).

> Petechial hemorrhages in the lungs and the heart and the thymus gland, all in the chest, indicating a negative pressure in the chest, meaning the baby is trying to breath in, but had no air to breath in.

(R 3665).

Thomas Zimmer was Dr. Pope's supervisor to whom he brought all of the evidence and equipment he had at the Marathon office he left the Department. (R 3693-94). That evidence "was placed in a refrigerator-freezer in the back of the crime laboratory." (R 3694). Mr. Zimmer eventually removed it "and took to (sic) over to the property evidence section;" he gave a container with the envelopes inside to Diane O'Dell . . .." (R 3695, 3700).

The State's next witness was Avon Park Correctional inmate Guy Green, a nine time felon, then serving time for a burglary. (R 3701-02). Green met Overton "[a]round January or February, 1992." (R 3702). He became friendly with Overton, who was his roommate, and had many conversations with him. Overton told Green that:

> [H]e did a burglary at a real exclusive, wealthy, wealthy area down in the Keys. The guy had his own airplane and a private airway and he could land his plane in his front yard. . . . [H]e went into the house and started fighting with the lady. The lady jumped on his back and he had to waste . . . somebody down in the Keys.

(R 3703, 3704). He described the lady as "[a] fat bitch." (R 3704). Overton said that he was doing a burglary, and "[a] woman started fighting him and he had to waste a lady in the Keys." (R 3704, 3705). "Waste" meant "kill" to both men. (R 3705). Overton also said he struggled with "another person." (R 3783).

Overton described other burglaries he had committed to Green.

(R 3705). It was his practice to "[c]ut the phone line before he went into the house" to "[s]top people from calling out, or automatic alarm system." (R 3776). He always wears "latex gloves" and "bring[s] a little kit" in which he kept a "[g]un, knife, gloves, disguises." (R 3777). Overton said that the "[b]est time to do it would be a power outage or bad weather, storm." (R 3777). Green had seen no reports or witness statements in the MacIvor case and had not spoken to Overton since January or February of 1992. (R 3777-78). He did not report this information until he was contacted by law enforcement in December, 1996. (R 3778).

The officers who contacted Green they learned of him from letters he had written to Overton in early 1992 and which they had found. (R 3778-79). Green asked for, and was promised, nothing for the information. (R 3779, 3804). However, about a year later, Green asked for "[s]ome back gain time" in exchange for testifying at trial and also asked that they "[l]ook out for my security." (R 3780). He had not received the back gain time by the time of his testimony, but still hoped for it. (R 3780). If he did receive it, Green would be eligible for release soon. (R 3805). No one in law enforcement ever told him what to say. (R 3808).

Diane O'Dell, "[p]roperty director" for the Monroe County Sheriff's Office, had been a property supervisor for "[e]ight, nine years," including 1991. (R 3808, 3809, 3810). The headquarters is in Key West with "substations . . . in Marathon and Plantation Key." (R 3810). Ms. O'Dell testified to the chain of custody of the items on "property receipt number 15528." (R 3812-3823). She

accounted for the whereabouts of the items at all times from the point they were taken into evidence at the crime scene by Detective Petrick until trial. (R 3812-2823). She confirmed that it "was a common procedure" to check items in and immediately take then back out and to add items "that pertained to that item" to an existing property receipt. (R 3813, 3814, 3824, 3829). There was nothing unusual about the documentation on the receipt. (R 3823).

Head Nurse Timothy Schramm drew Overton's blood on November 19, 1996 pursuant to a search warrant. (R 3847-48). He used an empty, tamper-proof vial from "a sterile sealed kit." (R 3849, 3851). He put Overton's blood into "presealed DNA packages," labeled, sealed it and "handed it to a detective." (R 3848, 3849).

Special Agent Scott Daniels of FDLE served the search warrant for Overton's blood and hair samples. (R 3852, 3853). He observed the taking of the blood sample and turned it "over to the lab technician." (R 3854-55). He identified it at trial. (R 3853).

FDLE serologist James Pollock, "an expert in forensic serology and DNA identification," testified that DNA is different in all persons except identical twins,[9] and the "number of times [DNA information is] repeated accounts for the differences in individuals." (R 3863, 3866, 3867). Whether it comes from blood, semen, skin, or hair, "DNA is going to be the same within . . . a given individual." (R 3867). A profile is made with "DNA patterns from a number of different locations, from the same sample, which

[9]"Overton, does not have an identical twin." (R 4050-51).

we then compare back to the known samples." (R 3870).

Three methods of DNA analysis are currently used in forensics: "RFLP, which stands for restriction fragment length polymorphism," PCR, which stands for "plenary chain reaction," and two subclasses of PCR, one "called the DQ-alpha and polymarker test, and then the last . . . STR, which are short tandem repeats." (R 3871). RFLP has "been used most widely" and "been around in Courts for the longest time." (R 3870).

FDLE completed "the RFLP analysis" in this case on May 9, 1994.[10] (R 3871, 3937). Dr. Pollock tested "very small" cuttings from the three articles of bedding and blood samples from the MacIvors. (R 3873, 3940). One cutting "was used in its entirety just to get a result" and the other was mostly used up. (R 3940). He got results from the bottom sheet and the comforter. (R 3876).

The results showed a match "at all five probes or locations" between the DNA extracted from the mattress pad and that from the bottom sheet, and there was only "one profile." (R 3951, 4013). Throughout 1994 and 1995, he received seminal fluid samples from John Golightly, Larry Hurlth, James McIvor, Michael Codekas, Donald Codekas, and Patrick Trombley, but none matched the samples from the sheet and pad. (R 3952-54). The last of these was Mr. Trombley's, received on August 25, 1995; the doctor completed the work on it on November 6, 1995. (R 3953). At that point, he had

[10] The delay was due to "a backlog" for which priority was given to cases where "there's a suspect in custody, on court plans, trial proceedings . . .." (R 3937). There was no suspect in this case when the evidence was received in June, 1993. (R 3938).

not been given any sample, blood or seminal fluid, from Overton and did not know who Overton was. (R 3953-54). He received a vial of blood from Overton in November, 1996. (R 3954).

Dr. Pollock extracted DNA from Overton's blood sample using the RFLP DNA test, and Overton's "profile matched at five locations, five loci, the semen sample found on the mattress pad and also on the bottom sheet and also matched a sample submitted on a towel."[11] (R 3955). The DNA profile extracted from the MacIvors' bedding in 1994 matched that extracted from Overton's blood in 1996. (R 3956). The FDLE protocol procedures were followed, and had anything gone wrong during the testing, it would have been revealed by the quality control measures taken. (R 3956, 3957). Not only is each sample tested with specified controls, the analyst is also "tested throughout that period too." (R 3957). "[A]ll of those tests [controls] were okay." (R 3957).

The matched profile is imported into a computer program which takes it "through mathematical calculations" to determine "how common that profile is."[12] (R 3960). In Overton's case,

> the probability of finding an unrelated individual . . . having the same profile as found in the semen samples

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[11] He only found five matches because he "only had five loci on the original profiles from the mattress pad and the sheet," as the sixth loci was not developed until just before Overton's sample was tested in 1996. (R 3955-56). "[O]ne more probe matching would not change the statistical probability . . .." (R 4012).

[12] The database used to calculate the percentage of probability is "used nationally, somewhat internationally . . .." (R 3961). "[M]ost if not all of the state labs," as well as "the forensic or law enforcement laboratories" in the federal system, the FBI, and "a number of the private laboratories" use it. (R 3961).

> found on the mattress pad and on the bottom sheet is conservatively . . . in excess of one in six billion caucasians, one in six billion blacks, one in six billion southeastern hispanics and one in six billion southwestern hispanics.

(R 3960). The approximate population of the earth is "less than six billion." (R 3960). When questioned on cross about the conservative nature of his statistic, Dr. Pollock responded:

> I have chose (sic) to make a cutoff of not reporting a value or a number in excess of the population of the earth or much over the population . . . because that statistical number can be so large that it becomes meaningless and not well understood. So in each of these population databases, the actual number . . . was in the tens or hundreds of billions, but we chose . . . to make a cutoff at one in six billion, which is **one on the face of the earth** anyway.

(emphasis added) (R 4020).

Dr. Pollock did a sperm search on the bottom sheet in March, 1997 to "confirm that the stain that I . . . did RFLP testing on actually contained spermatozoa." (R 3967). He "found spermatozoa"[13] and "had no problems in getting a DNA profile;" therefore, the evidence "was properly handled." (R 3967, 3973).

RFLP DNA measures "the length of the fragment, the size of the fragment, rather than the number of times that information is repeated . . .." (R 3984). STR DNA testing "is another PCR-based type of testing" which "came later than the DQ-alpha polymarker." (R 4010). The DQ-alpha method has been used "since the early 1990s

[13] His findings were also consistent with Dr. Pope's findings regarding the swabs from Susan's body. (R 3970). Dr. Pollock explained "there's any number of explanations why a semen stain that might be on the body might not be testable." (R 3972).

in forensic testing." (R 4010). "[T]he basis for both of these tests is . . . PCR, so most of the methodology has been around the same time." (R 4010).

Detective Jerry Powell testified to the chain of custody of cuttings from the bedding, blood from Overton, and "a towel with blood on it." (R 4051, 4052). He sent this evidence to Bode Tech because it had been five years since FDLE examined the evidence and "advanced technology" might provide an even "more in depth analysis" and "yet another reading." (R 4053).

Dr. Robert A. Bever of the Bode Technology Group, an independent laboratory, was the State's next witness. (R 4055, 4056). Overton renewed his previous objection "regarding the discovery issues," but did not otherwise object. (R 4060). The trial court recognized Dr. Bever as an expert in the areas of biochemistry, DNA typing, and population genetics. (R 4060).

Dr. Bever did not do the hands-on testing in this case, however, as the lab director, he "reviewed and . . . supervised Elizabeth Curry who did" the work. (R 4094). Each time Ms. Curry obtained "a result she showed it to me, we discussed what was to go in the next . . . step . . .." (R 4094). The two "were in constant communication" regarding the matter. (R 4094).

Dr. Bever explained DNA technology to the jury. (R 4061-66, 4067-68, 1070-73, 4077-79, 4083-85, 4087-89, 4114). STR DNA is concerned with "counting the number of times that that one repeat unit, CTTA, repeats itself. These repeat units are in tandem to each other like a railroad car. So that's why we call them short

tandem repeats." (R 4069). STR testing is

> a more informative test because it has the ability to exclude . . . more people that are falsely accused. It's a much more powerful test in terms of looking at difference between humans. DQ-alpha test looks at one locus. DQ-alpha marker, polymarker looks at six loci. This looks at 12 loci.

(R 4089).

Dr. Bever emphasized that "RFLP work is still very good technology," but opined that STR is "an improvement." (R 4071). The FBI makes a positive identification based on DNA where "the 13 core STR loci" are identified because that is "an absolute match;" moreover, if it exceeds twice the earth's population, "12 billion people," it is a "unique identification." (R 4074).

The Bode Technology Group received cuttings from the comforter, the bed sheet, and the mattress pad, Overton's blood sample, and three separate cuttings from bloody towels. (R 4075). Dr. Bever "was in the room" when Bode employee Lisa Barnes opened the sealed evidence on June 17, 1998. (R 4076, 4077).

Dr. Bever testified to a match between the DNA from the MacIvors' bedding and that from Overton's blood at all 12 locations tested. (R 4087). The 12 loci examined in STR DNA testing is different than that examined in RFLP testing. (R 4088). STR is a "much more powerful test in terms of looking at difference between humans" because it "looks at 12 loci" whereas the other tests look at fewer loci. (R 4089).

The match of all 12 loci results in the probability of finding another person with the same DNA as found on the MacIvors' bedding

to be “one in four trillion in the caucasian population,” in the African American population - “one in 26 quadrillion,” and in the hispanic population - “one in 15 trillion.” (R 4088). The total population of the Earth was approximately “five billion individuals” when Dr. Bever last checked. (R 4089).

The defense renewed the discovery objection to Dr. Bever’s testimony, claiming that counsel could not “vigorously” cross-examine Dr. Bever. (R 4090-91). The defense had been given “the materials that have been provided,” and told that if they needed “anything further that they could contact Bode Tech and go through every file they ever had.” (R 4092). The judge agreed: “That’s what I basically recall. So . . . the Court’s not going to change its previous rulings . . ..” He added: “[T]he State’s complied with their discovery demands and . . . the defense made certain choices as to how to proceed . . ..” (R 4092-93).

Defense Counsel explained that “Mr. Overton, has advised me not to go beyond a certain types (sic) of questions regarding Dr. Bever’s testimony.” (R 4091). The judge responded: “[A]s far as what counsel decides to cross-examine, that’s strictly a matter between counsel and the defendant.” (R 4093).

Dr. Bever received two defense discovery demands. (R 4105). He prepared a written response, signed, and forwarded it to Dr. Kevin McElfresh for editing. (R 4106, 4107). On December 21st, the editing was completed, and the document mailed to Defense Counsel. (R 4107-08). At the end of the *Frye* hearing, Dr. Bever “had been advised . . . [that Defense Counsel] would come visit our

laboratory to review all the documentation." (R 4095).

Twenty-four items were requested on the November 2nd demand, and Dr. Bever provided the requested information for all of them, referencing an earlier response in his answer to question 21. (R 4109, 4114). Dr. Bever testified that in his previous employers used "basically the same procedure" as Bode; "you answer the questions, if there's a lot of information that they request you invite them to your laboratory." (R 4110).

Dr. Bever said that his company tested the cuttings from the MacIvors' bed sheet, mattress pad, and one other. (R 4111, 4112). He said the theory underlying the RFLP testing and the STR testing "involves a different methodology a different technique," but "the underpinnings" are the same. (R 4111). He described the quality control tests performed in Overton's case. (R 4115-18).

Research biologist Elizabeth Curry had been working with DNA analysis since her graduation from college in June, 1989. (R 4119-20). She followed the Bode Tech protocols in extracting the DNA from the samples supplied to her in this case. (R 4121).

Monroe County Jail inmate, James Zientek, a three-time felon, developed a friendship with Overton in May, 1997 while they were in jail together - for approximately six months, they had daily conversations. (R 4139-41, 4142, 4203). He and Overton met an inmate named "Ace." (R 4142-43). Overton "wanted to know if there was a DNA analysis made on the particular sexual assaults that this individual Ace was involved with." (R 4147). A couple of weeks later, Overton divulged that "he had a strategy to hold the blame

on the MacIvor murders on . . . Ace." (R 4148). He proposed to give Mr. Zientek "precise details of the homicides" and have him "go to law enforcement with that information" claiming it came from Ace. (R 4148). Overton thought this would "throw a reasonable doubt in the jury's mind" as to his guilt, and told Mr. Zientek that his charges would probably be dismissed. (R 4148).

A few days later, Overton, having recently received "[t]wo batches of crime scene photos of the MacIvor homicides," called Mr. Zientek "to his cell to show me the pictures." (R 4150). Looking at them, Mr. Zeintek "vomited."[14](R 4150). Overton "started laughing" and "told me not to get the pictures wet." (R 4151).

Overton said:

> [H]e met the female victim at a gas station where he was employed . . . it was a hot and cold type relationship. I mean, in conversing with her, she was -- some days she would be very polite. The next day she could be very, to quote him, very bitchy and cold. And, there came a point when she stopped coming to the gas station. Mr. Overton told me that there came a time when he started to surveille (sic) the house.

(R 4152). Overton went to "a back room located by the residence" to watch the house. (R 4153). He did not enter the home on those occasions because the MacIvors had company. (R 4153).

On the day he "made entry of the home," Overton brought "a bag with him . . . had a police scanner . . . that he keeps in a bag on the . . . law enforcement frequencies, and . . . there was a ladder on the scene." (R 4153-54). He "cut the phone lines at the house"

[14] The "first one I seen that made me vomit was a picture of one of the victims with . . . the face ripped off." (R 4151).

and moved the ladder against the home. (R 4154). The ladder made a noise, and a light inside came on. (R 4154).

As Overton "was going up the ladder, he cut clothesline . . . popped the patio door . . . and . . . entered the room." (R 4154). He walked around the MacIvors' home "in his Ninja suit,"[15] watched them sleeping in their bed and went into another area. (R 4155). He heard a noise, and saw Michael take something from the refrigerator. (R 4155). As he walked by the room where Overton had entered, he "appeared to be sensing that something was wrong" and began "looking in the area." (R 4155). Overton grabbed a pipe "and slammed him in the back of the head." (R 4155).

"The blow . . . didn't immediately knock him out. There was a struggle and Mr. Overton knocked him out with his fist." (R 4156). Susan "came running out of the bedroom screaming and hollering." (R 4156). "Overton chased her into the bedroom and temporarily restrained her, tried to calm her down, told her as long as everybody cooperated, nobody would get hurt." (R 4156). Susan began "pleading for her baby's and her husband's life." (R 4157). She told Overton: "I know who you are." (R 4157).

Overton "was concerned about the male just being just temporarily knocked out. He knew that he wasn't dead. He . . . proceeded to tape his face and his eyes with a pair of socks with tape over them, the socks." (R 4157). Then, he returned to Mrs. MacIvor and "fucked her" while she did "[a] lot of pleading . . .."

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[15] "[A] mask, . . . type of military black fatigue-type. . . where you can just slip up the booties, gloves." (R 4156).

(R 4158). Despite knowing that Michael was home, he fully intended "[t]o rape the female" when he entered. (R 4169).

When he was finished with the rape, Overton "restrained her again and . . . strangled her . . . [w]ith a tie." (R 4158). As he told Mr. Zientek what he had done, he referred to various of the crime scene pictures. (R 4158). Overton said he strangled Susan because "[h]e doesn't leave any witnesses." (R 4159).

Thereafter, Overton "went into the living room area where the male was . . . back to conscious, consciousness. He ran up to him and drop kicked him with a severe blow to the solar plexus . . . to disable him and strangled the male," using "some kind of cord." (R 4159, 4167). He made it "very clear" to Mr. Zientek that "he doesn't leave witnesses." (R 4159). He said that he taped the victims' faces before strangling them because "[h]e believed that their eyes would pop out, that their noses would bleed." (R 4166).

Overton showed Mr. Zientek a picture, and Mr. Zientek "asked him, what was that? . . . Why would they take a picture of that? All I seen was a piece of steel . . . also a sliding glass door." (R 4167). He said that "it had nothing to do with the . . . crime" or with him; he pointed to a hole in the wall. (R 4168). Overton took some items from the home which "nobody would realize were gone," but he did not say what they were. (R 4168, 4169).

Mr. Zientek was so disturbed by this conversation that he "called the FBI." (R 4170). He also went to the jail chaplain "the very next morning" - October 7th. (R 4170). Law enforcement personnel spoke with him on October 17th. (R 4171). Subsequently,

he gave a taped statement. (R 4172).

Thereafter, Overton gave more details of the murders, including that he "beat the female" and tied her "three times" in "additional ways." (R 4172-73). "[A]fter he killed them," he confused the scene. (R 4173). He moved Michael's body to look "like he was just laying there watching TV . . .." (R 4173). He "took an address telephone book and he ripped the pages out of it and threw it down on top of the bed" because "he read somewhere in a novel . . . it would lead the investigators to believe that whoever committed the homicides wanted their name deleted or destroyed out of the particular . . . book." (R 4173-74).

Overton said "he had ripped a nightgown off the female." (R 4174). He showed Mr. Zientek a picture of a chalkboard, but Mr. Zientek "wasn't getting what . . . was so funny," and he asked Overton, "what?" (R 4177). Overton told him to "look at the chalkboard." (R 4177). Written on the chalkboard was "renew life insurance," and Overton "started laughing and said, you don't think they knew what time it was?" (R 4177).

Overton changed part of his story in regard to what he had done to Michael. (R 4177). The first time, he said that he tied him up, but later, "he said . . . he didn't have to." (R 4177). He said that after he strangled Susan "he noticed some motions in her stomach and he felt the baby . . . kicking." (R 4179).

Prior to these conversations with Overton, Mr. Zientek overheard one between inmate, Jeffrey Wallace, and Overton. (R 4179). Wallace was also in jail on a murder charge, and he and

Overton got into a "loud argument." (R 4184). Overton said: "[M]other fucker, you've got six witnesses testifying against you . . . all my witnesses are dead. I'm going to trial." (R 4185).

Mr. Zientek asked for nothing when he first reported the conversations, and he did not report for the purpose of obtaining a benefit for himself. (R 4185, 4203-04). On October 17th, he asked for, and received, a promise of "[m]y personal protection." (R 4185). When his attorney learned that he was talking to law enforcement, he "was highly upset at me for not coming to him and compromising (sic) a possible deal . . .." (R 4186). Ultimately, a plea agreement was worked out where Mr. Zientek would receive "a maximum sentence of seven years in prison" on the charges that were then pending against him.[16] (R 4186). Mr. Zientek had never been an informant or testified against anyone before. (R 4187).

Mr. Zientek had read "[s]ome" about the MacIvor case in the newspapers. (R 4201). Once, he gave Overton a newspaper article about it, and Overton asked him to call the paper on his behalf; he did not. (R 4201-02). Mr. Zientek later learned about "the major publicity in the case." (R 4202).

Mr. Zientek had no access to Overton's cell and was never shown any law enforcement reports on Overton's case. (R 4239). Neither did he see the statements of any other witness in this

[16] Mr. Zientek had been offered a plea to his charges with a 10 year sentence prior to his having reported his conversation with Overton. The "deal" worked out was for a sentence of at least 5 years and no more than 7 years in exchange for his truthful testimony at Overton's trial. The deal was in no manner contingent upon the outcome of Overton's trial. (R 4237-38).

case. (R 4239). The only photographs he saw in connection with the MacIvors' murders were those shown him by Overton. (R 4239).

Jail Chaplain Judith Remley knew Mr. Zientek (a/k/a James Pesci) in 1997. (R 4252). He came to her on approximately October 7, 1997 and discussed a conversation with Overton. (R 4253). Mr. Zientek "was very upset . . . crying . . . devastated." (R 4253).

Marcia Timm, the younger sister of Susan, spoke to her sister on a daily basis, and they visited with each other "once or twice a week." (R 4256, 4257). She identified a "nightshirt" Susan "would sleep in." (R 4258). She called Susan "about 4:00 o'clock" on August 21, 1991 and "left a message." (R 4258). Susan returned the call at "approximately 9:00" when Ms. Timm was out and left a message that they had just gotten back from their childbirth class" and were "getting ready to go to sleep." (R 4258, 4259).

After learning of Susan's death, the family requested certain things from the home, including "photographs that she had shown me that weekend of her being pregnant and her pregnant stomach and they weren't there." (R 4260). When Ms. Timm had seen them that weekend, the negatives had been "inside the photo sleeve, but they never found those, either." (R 4260). Detective Powell diligently searched for those pictures, but they were not found. (R 4261-62).

The State rested its case. (R 4262). The defense's motions for judgment of acquittal were denied. (R 4263, 4279, 4278).

The Defense presented its case. (R 4306-4560). Bob Roberts said that Mr. Green wrote him stating that "he had met a man in jail and that the incidents . . . sounded very similar" to those in

this case. (R 4306, 4308). He never wrote back, or talked, to Mr. Green about it. (R 4308). Bob's wife, June Roberts, spoke with Mr. Green on the phone several times - "[j]ust chit chat." (R 4310, 4311). He did not tell her about any murders. (R 4311).

Former Detective F.K. Jones, initially the lead investigator in the MacIvor homicides, secured the scene. (R 4312-14). The Sheriff's Department at first wanted FDLE to investigate, but then decided that it "had all of the equipment" needed and "was much closer," and so the it was handled by the Sheriff's Office. (R 4315). This officer "did the area canvass of the community . . . and talked to everyone that lived there at least twice." (R 4338).

Detective Jones saw a condom package "in a basket in the master bedroom" on the date the bodies were discovered. (R 4316, 4340). The condom was collected two days later "in an abundance of caution." (R 4317, 4340). On April 7, 1992, he called the manufacturer to determine what the numbers on a "Trojan brand, lubricated" package of condoms meant. (R 4320, 4325). It had **not** contained spermicidal condoms. (R 4342).

Detective Charles Visco was at the crime scene "as security to make sure no one entered the area . . .." (R 4347, 4351). He helped canvass the neighborhood and search and process Michael's plane parked at the residential airport. (R 4352, 4353). He accompanied Agent Ruby to Belize where they "met with a minister in the police government." (R 4354). A plane had been seized by the government "because it was being used in drug" trade, and it was

auctioned. (R 4358). Michael bought it; and the officers wanted to know "who the unsuccessful bidders were." (R 4354).

Detective Visco had spoken to Overton's former girlfriend, Lorna Swaybe, "[a]pproximately half a dozen" times. (R 4364). These contacts occurred in the "1990, 1991, time period." (R 4365). This detective never entered the MacIvors' residence, and Ms. Swaybe never gave him any of Overton's semen. (R 4365).

Detective Jerry Powell became concerned that the swabs taken from Susan's body may have been lost. (R 4369, 4371-72). He called Dr. Pope to inquire. (R 4372). The detective found the swabs in the sexual assault kit, having looked there because it seemed "a reasonable place" for them to be. (R 4372, 4373).

Detective Powell discussed the claim regarding "spermicide and a condom involved in the DNA evidence" with the prosecutor in 1998. (R 4375). Documents, showing that condoms were found were "verified in writing" on April 7, 1992, but given to the defense in the summer of 1998; they referenced the condoms in the wicker basket. (R 4377, 4383). The detective examined those condoms at trial and determined that they were **not** spermicidal. (R 4383). Since they were not spermicidal, they could not have been involved in depositing spermicide at the scene of the crime. (R 4383).

Detective Powell took a cutting from the MacIvors' bed sheet and sent it for spermicidal nonoxynol testing. (R 4394). He made two other cuttings, "as far away on the bed sheet as possible from the original cut," and sent them for testing as well. (R 4395,

4396). "[O]ne of the cuttings was made outside of the elasticized area of the fitted sheet and the other one was made where it actually should have been under the mattress with part of the elastic in the cut itself." (R 4296). From the crime scene photos, the sheet was "tucked in" at the time of the crime. (R 4397-98).

Overton next called Special Agent Scott Daniels of FDLE. (R 4399). He did not participate in the MacIvor case until December, 1991, when he "took a prominent role in the investigation." (R 4401). FDLE did not to run DNA samples unless there was a suspect. (R 4416-17). From the time that FDLE had the DNA profile in this case, it looked for someone to match it, checking many persons, and in 1996, it was matched to Overton. (R 4427).

Agent Daniels determined that Lorna Swaybe died on April 3, 1994 in Lee County of AIDS. (R 4419). He was able to confirm that in August, 1991, Overton worked (usually at night) at the Amoco a short distance from the MacIvor home. (R 4428, 4431).

The agent sought out Mr. Green and offered to try to get his past gain time restored in exchange for his cooperation in this case. (R 4421-22, 4425). He was concerned for Mr. Green's safety because when an inmate testifies against another "he brings the wrath of the other inmates on him . . .." (R 4422).

Agent Daniels also talked with Mr. Zientek. (R 4422). He received a plea bargain for his cooperation. (R 4423). It included a plea cap, and a promise to try to place him in an out-of-state

prison "for his protection."[17] (R 4423). Mr. Zientek gave three taped statements: The first related his first conversation with Overton; the second, a subsequent conversation with Overton, and the third time, he gave additional information that he did not recall when gave his other statements. (R 4424, 4425).

Phillip Trager, "director of the laboratory at the Consumer Products Testing Company in Fairfield, New Jersey" was Overton's next witness. (R 4433). His company "perform[ed] chemical testing on pharmaceutical and personal care products mainly." (R 4433). He was admitted, without objection, "as an expert in the field of analytical testing of pharmaceutical and other chemical materials." (R 4434, 4435). He conducted testing on samples sent to him in connection with the instant case "to determine if there was any Nonoxynol-9 on the fabrics . . .." (R 4436, 4447).

Nonoxynol-9, a "[v]ery stable" and water soluble compound, is found "in packaging with condoms" and "vaginal contraceptive foams . . ." which is its "main pharmaceutical use." (R 4437, 4444). He had no "direct knowledge of its use in any other products." (R 4437). He found "more likely than not" that "53 micrograms of Nonoxynol-9 [were] present on the sample" from "the bottom sheet." (R 4438-39). This was a "minuscule" amount.[18] (R 4462).

About two months later, Mr. Trager was asked to test two more

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[17] "It's an exchange program. We have to take a prisoner from another state who wants to come here ...." (R 4423-24).

[18] 50 micrograms on a six square inch sample is "nine micrograms per square inch. That's a very small amount." (R 4467).

samples from the sheet. (R 4439). “[O]ne . . . showed 50 micrograms of the Nonoxynol-9 and the other sample . . . showed a very, very small amount . . ..” (R 4440-41). He could not say with certainty whether Nonoxynol-9 was on the second: “It could have, it might or it might not be.” (R 4455, 4456). His testing of a sample from the quilt showed “11 micrograms of Nonoxynol-9 . . ..” (R 4443).

On cross, Dr. Trager conceded that the tests he performed could not distinguish between various types of nonoxynol. For example, they would not distinguish between Nonoxynol-6 and Nonoxynol-12 or any of the nonoxynol compounds within the “range of Nonoxynol-6 . . . through 12.” (R 4452, 4455). Neither could the test tell the source of the Nonoxynol-9. (R 4452).

One of the two later submitted samples had “an elasticized edge,” and it was that sample on which 50 micrograms of nonoxynol-9 was found. (R 4454-55, 4464). If Nonoxynol-9 was present in detergents, his testing would not distinguish between the compound’s presence in detergents or in spermicidal products. (R 4461). However, he opined that if deposited by detergent, “[o]ne would expect to find a fair amount of uniformity.” (R 4468).

Dr. Trager also conceded that “the manufacturer of these products would have an expertise in what the compounds are and their uses and how to identify them.” (R 4460). In fact, he had never before tested fabrics. (R 4462). The Defense had tried to stop him from testing the two subsequent samples. (R 4472).

Overton next called Dr. Ronald Wright, an expert “in forensic pathology including determining the cause of death and interpreting

and processing crime scenes." (R 4484, 4487, 4490). Regarding whether the perpetrator used a condom, he said: "[I]t's highly unusual in . . . sexual assault . . . particularly if you find semen at the scene . . .." (R 4494). The Nonoxynol-9 found on the sheets may have come from "detergents which are used in the household." (R 4495). If it was deposited by detergents in the wash, "it ought to be the same all over," however, a "number of variables," such as folding, could affect the concentration of deposits of detergent Nonoxynol-9 on the sheets. (R 4496, 4542).

Dr. Wright opined that "the semen was planted using a condom." (R 4496). However, he agreed that the condom package from the scene did not indicate that it was spermicidal, and "that means it isn't." (R 4498).

Dr. Wright opined that Susan was struck on the nose with an object that may have been a gun. (R 4505). He claimed there was "[v]ery, very little" evidence of a struggle at the scene and disagreed with Dr. Nelms' conclusion that a blow to the upper back was sufficient to have paralyzed Michael, but later admitted that "it's possible." (R 4508). He suggested "assuming that there's two guns involved," there may have been two perpetrators.[19] (R 4510). He admitted, however, that his assumption of two guns was based on the bullet hole in the curtains and a shell casing found in the home, and that he was also making "an assumption that they were

[19] Earlier he had indicated that there might be two because "somebody to take care of him, somebody to take care of her." (R 4536). However, there was nothing definitive to indicate that the crimes could not have been done by one person. (R 4536).

related in time and you can't really tell that." (R 4535).

He agreed with Dr. Nelms' conclusion of sexual assault on Susan. (R 4525-26). Moreover, her injuries would not have rendered her unconscious. (R 4526). She had been battered, and the abrasion on the nose may have resulted from her struggling and striking her nose on "[a]n edge of a table or . . . something . . .." (R 4526).

In fact, Dr. Wright said that the evidence was consistent with both MacIvors having struggled with Overton, and that the baby would have lived if he had been born. (R 4527). The child lived about twenty minutes after his mother died. (R 4527-28). After she died, the boy would have been "active," moving "around quite a little bit," and would have "defecate[d]" and kicked. (R 4528).

Dr. Wright opined that the crime scene was "complicated," but "overall, . . . was done quite, quite well." (R 4529). The bullet hole in the curtains may have occurred after the crime scene had been cleared. (R 4530). Neither could he say if the shell casing was related to the crime. (R 4530).

Dr. Wright would not be surprised to learn that Nonoxynol-9 is present in detergents "because it is a detergent, after all." (R 4537). The testing done would not distinguish between a commercial grade or a pharmaceutical grade of Nonoxynol-9. (R 4541-42). The doctor agreed that "[i]f a spermicidal condom was used . . . in this crime, it wouldn't have been a condom from that package," i.e., the one found in the waste basket. (R 4538).

Moreover, the doctor said that condoms break, and especially in a forcible sexual assault one could break, or in removing it,

some fluid could be spilled out of it. (R 4543). The perpetrator could have taken the condom with him when he left the scene, accounting for the failure to find the used condom. (R 4543).

Dr. Wright was "not saying" that someone brought a condom containing Overton's semen to the scene and planted it. (R 4544). "Assuming that the laboratory is correct in their DNA analysis," Overton's DNA was there, whether it was deposited by him or another. (R 4544-45). Moreover, it was a "[g]ood question" why the would-be planter of evidence against Overton would plant it and then "mess around for years not making an arrest." (R 4550).

The Defense rested. (R 4584).

The State called chemist Richard Oliver of the Home Personal Care Industrial Ingredients Division of Rowdier, in rebuttal. (R 4585-86). He was recognized "as an expert in analytical chemistry and the particular product line we're talking in this case of surfactants." (R 4589, 4590-91). His company makes Nonoxynol-9, a chemical surfactant "used as a spermicide." (R 4591). It also makes "other types of nonoxynol besides Nonoxynol-9. (R 4592). The company makes nonoxynol 6, 7, 8, 9, and 12, and is the only one that manufactures it in the United States. (R 4592-93).

Although the spermicidal and commercial or detergent uses of Nonoxynol-9 can be distinguished between by the manufacturer "with a sufficient quantity of material," it requires a "large sample." (R 4594). All of the information Mr. Oliver provided at trial is a matter of public record with his company. (R 4597).

On cross examination, Mr. Oliver said that "[m]ost likely" if

a fabric was washed in a detergent containing Nonoxynol-9 some of that substance would remain on the fabric. (R 4599). Upon being further pressed by Defense Counsel, he clarified: "I can be sure that . . . there will be residue of the product on the cloth" after washing in "a standard washing machine" with "a standard rinse cycle." (R 4600). He added that "[i]f semen mixed with . . . Nonoxynol-9, is dropped on a sheet containing residue of the detergent that contains Nonoxynol-9," there is no test he knows of that "could distinguish between the two." (R 4604).

Moreover, a sheet in a washing machine would be folded in such a manner as to make it likely that some areas would have a greater deposit of Nonoxynol-9 than others. (R 4606). "[S]tatistically" speaking, "those numbers are uniform." (R 4606).

Overton was convicted of the first degree murder of Michael MacIvor, the first degree murder of Susan MacIvor, the killing of an unborn child, the sexual battery of Mrs. MacIvor, and burglary of a dwelling. (R 4882-83). The jury recommended the death penalty by a vote of 8 to 4 for Michael's murder and 9 to 3 for Susan's murder. (R 5018). Overton refused to permit his attorneys to present mitigating evidence, even in the form of a written proffer. (R 4896-4911, 5035-39). The judge found five aggravators for each victim, to-wit: (1) convicted of another capital murder; (2) committed during commission of burglary and/or sexual battery; (3) heinous, atrocious, and cruel (HAC); (4) cold, calculated, and premeditated (CCP), and (5) avoid arrest. (R 4991-99). The judge sentenced Overton to death for each murder. (R 5065).

SUMMARY OF THE ARGUMENTS

POINT I: The trial court did not reversibly err in denying the for cause challenges to two prospective jurors. The defense was given an extra peremptory for one of the jurors, and the other clearly met the standards for jurors. Any error was harmless.

POINT II: The trial court did not reversibly err in admitting the STR DNA testing results. Overton failed to prove that not having the laboratory's validation studies, protocol manual, and proficiency tests prevented him from establishing that STR DNA evidence does not meet the *Frye* test. Moreover, the evidence does meet the *Frye* test and was properly admitted. In any event, any error was harmless as the RFLP test conclusively established the same fact as the STR test.

POINT III: The trial court did not abuse its discretion in denying the defense another continuance of the trial which had already been continued on defense motions for some 15 months. The defense had access to all of the information needed to proceed with the *Frye* hearing and with trial. In any event, any informational deficiency was the choice of the defense.

POINT IV: The trial court did not reversibly err in denying the defense a second chemical expert. The theory of defense did not depend on a showing that the chemical was spermicidal, as opposed to commercial, nonoxynol-9. In any event, any error was harmless.

POINT V: The trial court did not err in denying the mistrial motion made when the prosecutor mentioned in closing that the

defense had asked that one sample be tested while the State had an additional two samples tested. The prosecutor's statement was a permissible comment on the evidence at trial.

POINT VI: The trial court did not reversibly err in permitting the jail chaplain to testify to her observation of the demeanor of a State witness. The defense opened the door to the evidence by charging that the emotional response the witness exhibited when testifying was feigned. Moreover, even if characterized as hearsay, it was relevant to rebut a claim of recent fabrication.

POINT VII: The trial court did not reversibly err in ruling that if the defense chose to put on evidence of an internal affairs complaint filed by Overton against an officer, the officer could testify to the circumstances underlying it. Besides being without merit, the claim is procedurally barred.

POINT VIII: Competent, substantial evidence supports each of the challenged aggravators. Moreover, Zientek's testimony was not the only evidence of same, especially HAC as to Mr. MacIvor. Neither did the trial court err in failing to give an unrequested instruction on consideration of jailhouse snitch testimony.

POINT IX: The trial court did not reversibly err in failing to compel Overton's attorneys to present mitigation evidence which Overton forbade the presentation of. Neither did it err in failing to find substance abuse and unspecified mental factors as mitigation. In any event, any error was harmless.

POINT I

THE TRIAL COURT DID NOT ERR IN DENYING DEFENSE CAUSE CHALLENGES AGAINST JURORS HEUSLEIN AND RUSSELL.

Overton complains that his for cause challenges to prospective jurors Heuslein and Russell should have been granted. (IB 39). He charges that Heuslein was biased because he knew that law enforcement had used "extraordinary restraint measures" on Overton, was "strongly predisposed toward the death penalty," and did not unequivocally express that he could follow the law. (IB 39). He says that Russell's "responses raised a reasonable doubt as to whether he could follow the law regarding the right to remain silent," and he also knew of the security restraints, and "of other prejudicial facts not introduced at trial." (IB 50).

This issue is not preserved for appellate review. "'To show reversible error, a defendant must show that all peremptories had been exhausted and that an objectionable juror had to be accepted.'" *Hall v. State*, 614 So. 2d 473, 476 (Fla. 1993), *cert. denied*, 510 U.S. 834 (1993) (*quoting Pentecost v. State*, 545 So. 2d 861, 863 n.1 (Fla. 1989)); *Trotter v. State*, 576 So. 2d 691, 693 (Fla. 1990). The defendant must specify which juror he "otherwise would have struck peremptorily," and that person must have been challenged or objected to "after his peremptory challenges had been exhausted." *Trotter*, 576 So. 2d at 693. *See Mendoza v. State*, 700 So. 2d 670, 674-75 (Fla. 1997), *cert. denied*, 525 U.S. 839 (1998).

Overton has failed to specify any juror who was objectionable, but had to be accepted and ultimately sat on the jury. The only

prospective jurors mentioned in the initial brief are Heuslein and Russell; (IB 38-56); neither sat on the jury.

Moreover, the prosecutor complained that Defense Counsel had to specify which jurors he had excused peremptorily that he believed should have been excused for cause, justifying additional peremptories. (R 2449). He responded: "All of the ones that we moved for cause on . . .." (R 2449). When the State noted "[t]hey've moved for cause on almost every juror," Defense Counsel identified Heuslein and Archer. (R 2449). The trial judge had granted the for cause challenge to Archer. (R 2449). Defense Counsel then cited only Heuslein. (R 2449-50). The judge granted the defense one additional peremptory challenge. (R 2450, 2453).

Defense counsel immediately used the peremptory and requested another. (R 2453-54). He did the same with prospective jurors, Stoddard, Reid, Dale, Guevara, Baum, Skifano. (R 2454, 2902, 2903, 2906, 2907-08, 2909-10, 2911-12). Eventually, he mentioned the for cause challenge to Russell as a basis for an additional peremptory, but never identified which juror he was not able to peremptorily challenge that he would have had he not used a peremptory to remove Russell. (R 2904). Thus, the issue is procedurally barred.

It is also without merit. Where the jurors the defendant complained of were acceptable, "it does not matter that he was forced to exercise peremptory challenges" to remove those jurors. *Farina v. State*, 679 So. 2d 1151, 1154 (Fla. 1996) (receded from on other grounds, *Franqui v. State,* 699 So. 2d 1312 (Fla. 1997). "[I]t is within the trial court's province to determine whether a

challenge for cause is proper, and the trial court's determination of juror competence will not be overturned absent manifest error." *Mendoza*, 700 So. 2d at 675. The lower court "has latitude in ruling upon a challenge for cause because the court has a better vantage point from which to evaluate prospective jurors' answers than does this Court in our review of the cold record." *Id.* "The trial court is able to see the jurors' *voir dire* responses and make observations which simply cannot be discerned from an appellate record." *Smith v. State*, 699 So. 2d 629, 635 (Fla. 1997), *cert. denied*, 523 U.S. 1008 (1998). Therefore, a trial court's determination will be disturbed only if the failure to grant the for cause challenge is "manifest error." *Id*.

"The test for determining juror competence is whether the juror can lay aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law given by the court."[20] *Farina*, 679 So. 2d at 1153. Even where jurors give "conflicting answers during *voir dire*," they are not subject to for cause challenges if they ultimately indicate they can base their decision on the *Lusk* factors. *Id.* Where the juror indicates that he or she would follow the judge's instructions and do not indicate that they "would apply the death penalty automatically," they are not subject to for cause objection. *See Mendoza*, 700 So. 2d at 675. Moreover, "[t]o be qualified, jurors

20 This is known as the *Lusk* standard. *See Lusk v. State*, 446 So. 2d 1038, 1041 (Fla. 1984), *cert. denied*, 469 U.S. 873 (1984).

need not be totally ignorant of the facts of the case nor do they need to be free from any preconceived notion . . ..." *Rolling v. State*, 695 So. 2d 278, 285 (Fla. 1997) *cert. denied*, 522 U.S. 984 (1997). Where prospective jurors satisfy the trial court "during *voir dire* that they are impartial despite their extrinsic knowledge, they are qualified . . .." *Id.* The standard for review of this mixed question of law and fact is abuse of judicial discretion. *Hall*, 614 So. 2d at 476.

Overton complains only about the failure to grant a for cause challenge as to Heuslein and Russell.

Heuslein: Defense counsel was ultimately given another peremptory to take the place of that used on Heuslein. Thus, in effect, the for cause challenge was granted, and consideration of this issue as to Heuslein need go no further.

In any event, Heuslein was closely and extensively questioned by both attorneys and the trial judge. (R 2318-2340). Regarding the security measures, he could put aside the information from the newspapers, including reports that "they've got him chained up," and decide the case solely on its merits. (R 2327, 2328). He refused the attempt to obtain an admission that there was "a possibility" that he could not do that.[21] (R 2328-29).

[21] Moreover, that jurors have *seen* a capital defendant brought to trial in handcuffs and shackles is not so prejudicial as to require a mistrial. *See Heiney v. State*, 447 So. 2d 210 (Fla. 1984)[chains]; *Neary v. State*, 384 So. 2d 881 (Fla. 1980)[handcuffs]. Surely reading about, security measures in a newspaper (especially by one who acknowledges the inaccuracy of such reports) would not disqualify a potential juror who said that he could put that information out of his mind and not consider it

Regarding the death penalty, Heuslein said that although he held a personal opinion that leaned toward the death penalty in a planned murder, he could put his personal thoughts out of his mind, "start from a clean slate," and follow and apply the law as instructed by the court. (R 2337). He had no doubt that he **w**ould entertain the possibility of a life recommendation.[22] (R 2337).

Although Heuslein gave what may have seemed, at times, to be conflicting answers during *voir dire*, he unequivocally indicated that he could base his decision on the evidence and the law as instructed by the court. Certainly, he made it clear that he would **not** automatically apply the death penalty. Thus, the for cause challenge was properly denied. *Farina*, 679 So. 2d at 1153. *See Mendoza*, 700 So.2d at 675; *Rolling*, 695 So. 2d at 285.

Russell: In the lower court, Defense Counsel moved to strike Russell for cause on two grounds: He felt that an innocent person would take the stand, and Overton was guilty "based upon the newspaper articles that he read." (R 1899, 1900). Since these were the only grounds given to the trial court, only these may be considered on appeal.

Russell, also, was carefully and extensively questioned during individual *voir dire*. (R 1672-1690). Regarding the first ground,

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in rendering his verdict and/or recommendation.

[22] Further, his personal beliefs regarding early release of prisoners and the costs of prisoner housing would not be considered in making his recommendation in Overton's case. (R 2340).

Russell explained that he had believed that if a defendant did not testify it was because "he's got something to hide," but emphatically told the court that he "can shut that out." (R 1681-82). He **w**ould shut it out, if the judge told him to. (R 1682). Defense Counsel pressed further, and Russell explained that if he were charged with a crime "I'd want to get up there knowing that I'm innocent and tell it to the jury myself;" however, he would not hold it against "other people" if they did not do the same. (R 1683, 1684). He could completely close that out of his mind: "[I]t will be like . . . everything's fresh." (R 1684). He said that "right now," he presumed Overton "[i]nnocent." (R 1684).

Regarding the claim that Russell believed that Overton was guilty based on the newspaper stories, Russell refused to agree and maintained he would have "to hear the whole case." (R 1676). He admitted that when he was reading a given story, he thought it sounded like Overton was guilty, but that was a briefly held notion, and he had **not** "arrived at a conclusion about Mr. Overton's guilt." (R 1676, 1677). Repeatedly, he patiently insisted that he could "sit here as a juror with an open mind and listen to all the evidence." (R 1677, 1679, 1680). He said he could completely put the information in the newspaper out of his mind and not let it "seep" into the decision making process. (R 1677). Unprompted, Russell said that Overton is "innocent until proven guilty," and added that "the State has to prove to me that he's committed the crime." (R 1678). He agreed that since "there hasn't been any

evidence . . . he's got to be not guilty." (R 1678). Russell denied that the security measures would make him think that Overton's probably guilty, and said they would not be considered in his deliberations. (R 1680, 1682).

Thus, Russell was clearly an acceptable juror, and so, it matters not (for the purposes of this issue) that Overton used a peremptory challenges to remove him.[23] *Farina*, 679 So. 2d at, 1154. Moreover, the State submits that Heuslein was also an acceptable juror under the above-cited case law. Having utterly failed to carry his burden to demonstrate that the judge abused his discretion and committed manifest error in regard to these for cause challenges, Overton is entitled to no relief.

Overton claims that this Court should substitute its judgment for that of the trial court based on *Hamilton v. State*, 547 So. 2d 630 (Fla. 1989). (IB 53). *Hamilton* is distinguishable. In *Hamilton*, the prospective juror "stated she had a preconceived opinion of Hamilton's guilt and that it would take evidence put forth by Hamilton to convince her he was not guilty." 547 So. 2d at 632. In this case, Russell presumed Overton "[i]nnocent," and would not hold any decision Overton might make not to take the stand against him. (R 1684). He would hold the State to its burden "to prove to me that he's committed the crime," and agreed that

[23] The appellate complaints that Russell was aware of the security measures and knew that Overton attempted suicide after his arrest (IB 55) were not asserted as grounds underlying the for cause challenge below. (R 1899-1900). Thus, those claims are not properly before this Court. In any event, they are without merit.

since “there hasn’t been any evidence . . . he’s got to be not guilty.” (R 1678). Thus, **unlike** the juror in *Hamilton*, Russell did not have a preconceived opinion of guilt and would require the State, **not Overton**, to shoulder the burden of proof. Clearly, this comports with the law.

In *Hamilton*, “after the juror responded affirmatively . . . regarding whether she could hear the case with an open mind, she again asserted that she had a fixed opinion as to guilt or innocence.” *Id.* If Russell were “selected to the jury it will be like . . . everything’s fresh.” (R 1684). Repeatedly, he patiently insisted that he could “sit here as a juror with an open mind and listen to all the evidence.” (R 1677, 1679, 1680). The only fixed opinion as to Overton’s guilt or innocence was since “there hasn’t been any evidence . . . he’s got to be not guilty.” (R 1678).

Finally, in *Hamilton*, the defense “requested an additional challenge” after having used all peremptories, “so he could backstrike **this juror**.” (emphasis added) *Id.* Overton never identified any juror which he would have backstricken had he been given an another peremptory to take the place of that used on Russell. Moreover, he declined to peremptorily challenge Russell when the for cause challenge was denied, although he eventually used a peremptory challenge him. (R 1901, 1915).

Overton is entitled to no relief.

POINT II

THE TRIAL COURT DID NOT ERR IN ADMITTING THE EVIDENCE OF SHORT TANDEM REPEAT DNA TESTING; THE DEFENSE WAS NOT PREVENTED FROM CHALLENGING THE STATE'S PROOF AT THE *FRYE* HEARING BASED ON AN ALLEGED FAILURE TO PROVIDE VALIDATION STUDIES, PROTOCOL MANUAL, AND PROFICIENCY TESTS.

Overton complains that the trial court should not have admitted the short tandem repeat ["STR"] DNA testing results. (IB 56). In the lower court, he based this claim solely on not having the laboratory's validation studies, protocol manual, and proficiency tests, claiming this prevented him from establishing that STR DNA evidence does not meet the *Frye* test. (R 1026-28, 1163-64). Thus, that is the only issue preserved for appellate review. *See Steinhorst v. State*, 412 So. 2d 332 (Fla. 1982).

It is well established that the admission of evidence is within the discretion of the trial judge. *Ray v. State*, 25 Fla. L. Weekly S96 (Fla. Feb. 3, 2000); *Thomas v. State*, 748 So. 2d 970, 982 (Fla. 1999); *Alston v. State*, 723 So. 2d 148, 156 (Fla. 1998); *San Martin v. State*, 717 So. 2d 462, 470-71 (Fla. 1998), *cert. denied*, 525 U.S. 841 (1998). The judge's ruling "will not be reversed unless there has been a clear abuse of that discretion." *Ray*, 25 Fla. L. Weekly at S98. No such abuse has been demonstrated, and none occurred. In *Wainwright v. State*, 704 So. 2d 511 (Fla. 1997), cert. denied, 523 U.S. 1127 (1998),

> [a]t the end of the day following opening argument, the State told defense counsel that new test results revealed three additional genetic loci, making a total of six, and the odds now against the donor being anyone but Wainwright were astronomical.

704 So. 2d at 514. The defense asked that the additional evidence be excluded, but the court refused, even though the new test negated representations made in the defense statement. *Id.* Denying the request, the judge noted that "everyone was on notice that the State was proceeding in the DNA testings." *Id.* at 514. This Court upheld the admission of the evidence, noting that the defense had 24 hours to "evaluate the additional evidence." *Id.* at 515.

Overton claims that the STR DNA test "involved a new method of testing." (IB 57). He says he needed the laboratory protocol manual so his expert, Dr. Litman, could "understand *how* the test was performed, and to assess whether the laboratory adhered to the protocol;" he needed validation studies "to assess the reliability of the testing procedures;" and, he needed proficiency test results "to examine the laboratory's capability to carry out this testing, and the qualifications of the laboratory personnel." (IB 57). It is clear that the defense was given complete access to this information it claims was so desperately needed and repeatedly chose not to avail itself of the opportunity to acquire it.

Defense Counsel were invited to visit Bode Tech and were told that all of the requested information would be available for their examination there. (R 1020, 1164). The defense did not go because it would not be "efficient for an expert and attorneys to go up there." (R 1032). Moreover, Dr. Bever was "available for phone calls and . . . depositions," but the defense did not do either. (R 1164-65). Defense Counsel acknowledged that they got Dr. Bever's name as a witness "in October;" Thus, he was named at least three

months before trial and was available for deposition. (R 517, 1165). Further, he testified at the *Frye* hearing and was available to, and did, answer questions about protocols, validation, and proficiency. (R 1110-13, 1115-16, 1120-25, 1130). At that time, Defense Counsel did not even attempt to question him. (R 1127, 1132).

Clearly, Overton had much more than 24 hours in which to meet the evidence that would be offered at the *Frye* hearing and at trial. That he failed to take advantage of the opportunity, or elected for strategy reasons not to do so, does not render the judge's admission of the evidence an abuse of discretion.

Moreover, the trial judge ruled that the defense had been provided all of the discovery it was entitled to and that its supplemental discovery demand in regard to these three items was overreaching. (*See* R 1168). Overton has not shown that the trial judge abused his discretion in so concluding, and therefore, even if the failure to obtain the manual, studies, and tests was not the fault of the defense, he is entitled to no relief because he was not entitled to the information.

Finally, the evidence was admissible because the State established that STR DNA satisfies the *Frye* test. In *Hayes v. State*, 660 So. 2d 257, 264 (Fla. 1995), this Court judicially noticed the general acceptance in the scientific community of DNA test results. The State need only show that the laboratory used accepted testing procedures that would preclude contamination and/or false results. 660 So. 2d at 264. Thus, DNA methodology

conducted properly satisfies the *Frye* test. *Id.*

Dr. Bever explained that STR DNA is "one method for PCR" DNA testing and is somewhat newer than the "dot method of detection."[24] (R 1049). "PCR is a technique to amplify small quantities of DNA to give . . . more copies for the subsequent analysis." (R 1049). The PCR technique was "developed in the 80s"in "the scientific community." (R 1050). Its primary advantage is "it requires a smaller sample," and it is also "quite a bit faster." (R 1050).

STR is a "method of detection," which is "much, much shorter than RFLP." (R 1050-51). It identifies "discreet alleals . . . [or] individual types."[25] (R 1051). Both RFLP and STR are "VNTRs," or "variable number of tandem repeats." (R 1051). In a layman's terms, STRs are "basically baby RFLPs." (R 1051). The process is similar, although "with STRs you have an additional process of the amplification of small fragments of DNA." (R 1051-52).

STR DNA is "comparing . . . the length differences within the human population. So it is still looking at DNA bands that differ in length or differ in size." (R 1084). However, "[t]he size differences are due to the number of tandem repeats of your genetic area of interest . . .." (R 1084). For both "STR . . . and RFLP

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[24] Dr. Bever had done RFPL, PCR DQ-Alpha Polymarker, and STR DNA testing; he had done STR testing since 1994. (R 1074, 1078). He began PCR testing in 1991, although the process had been "around longer than 1991." (R 1079) He was accepted as an expert "in biochemistry DNA analysis and population genetics." (R 1082-83).

[25] "An alleal is . . . an individual marker found on the human chromosome. . . . [A] site. . . . [T]he alleal corresponds to that VNTR that we're measuring." (R 1071).

analysis, . . . these genetic locations we look at do not code for any known function . . ..” (R 1084). “STRs are used a lot in the field of human genetics to help map genes of interest . . ..” (R 1089). STRs and PCR are “considered to be extremely reliable.” (R 1090). STRs are “a discreet measurement as opposed to a measurement in base pairs.” (R 1094). The STR locations on the chromosomes are different than those looked at with RFLP. (R 1095). Thus, FDLE looked at four or so locations to determine whether Overton’s DNA matched that left at the crime scene, but Bode looked at twelve other locations to so determine.[26] (R 1095). PCR “is the technology that allows you to look at different pieces of information quickly and rapidly;” Dr. Bever likened it to the computer on which different programs are run. (R 1101).

Some of the STR procedure is the same as that used in RFLP testing, and some is not, however, the scientific principles between RFLP and STR testing are the same. (R 1103, 1105). Moreover, the twelve genetic marker locations tested are generally accepted by the scientific community as being reliable. (R 1114). Dr. Bever explained several compelling reasons why the twelve locations looked at in STR DNA testing were selected, with the primary one being that they “differentiate between humans.” (R 1115). These locations “have been thoroughly validated through many laboratories, including the FBI . . ..” (R 1115).

In the instant case, the tests were done at “different times

[26] It’s like “looking on the . . . same street, but . . . at different houses.” (R 1095).

to where the isolation of Thomas Overton was done at a separate time than the extraction of the evidence from the bed sheet and the mattress pad." (R 1110). It was done this way "to prevent contamination." (R 1110). This is a procedure which is strictly complied with at Bode Tech. (R 1111).

Dr. Bever described several controls run to insure that the tests are done properly and no contamination results. (R 1111-12). These controls are recognized in the scientific community as reliable and are recommended by "the TWGDNAAM, Technical Working Group on DNA Analysis Methods" which "sets standards or guidelines for DNA typing labs. (R 1113). All of these controls were done in Overton's case. (R 1112). In fact, the results were run "two times," and they got "the same answer both times." (R 1112).

The test kits used by Bode Tech for STR DNA testing are purchased commercially, but are internally tested to insure quality. (R 1116). That procedure is always followed and was followed in this case. (R 1116).

The product rule was used to calculate the statistics for both the RFLP test done by FDLE and the STR test done by Bode Tech. (R 1061, 1119). Bode used two different databases in its calculations; Dr. Bever explained each in considerable detail. (R 1120-1123). He was personally involved in the compilation and establishment of one of those databases. (R 1123). He described how the databases are published and tested by persons outside Bode Tech. (R 1124-26).

Defense counsel declined to question Dr. Bever.[27] (R 1127). The judge, however, asked a number of questions, and verified that Bode Tech does not "just work for prosecutors;" its services were equally available to defense attorneys and others. (R 1129).

Dr. Martin Tracey, a professor of Biological Sciences at the University of Miami, was accepted as an "expert in DNA analysis and population genetics." (R 1133, 1139-40). He testified that "[p]olymerase chain reaction or the technique . . . described as DNA amplification has been around since the early 80s," although it "came into forensic use in the late 80s . . .." (R 1142). STR testing has been around "since the early 90s." (R 1144). "The logical and scientific principles in short tandem repeat and RFLP analysis are essentially identical."[28] (R 1144).

Dr. Tracey reviewed the "procedures, quality assurance, quality control" which Bode Tech uses in STR testing of DNA.[29] (R 1144-45). He found no errors "in either the database or procedures or quality controls . . .." (R 1145). The "procedures and the quality control . . . for both the database and the actual testing" are generally accepted within the scientific community. (R 1145). He described the databases in detail. (R 1146-49). Having reviewed a lot of "laboratories, both public and private," he concluded:

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[27] Neither did he question Dr. Pollack and Dr. Tracey. (R 1064, 1151, 1158).

[28] "[T]he idea of DNA amplification has been around since the early 60s" and is "really a very simple procedure." (R 1142-43).

[29] He made four trips to the laboratory. (R 1144-45).

> The BODE Lab, particularly in the area that they've specialized in, in the STRs, is certainly one of the best designed in the world in terms of preventing contamination and things of that nature.

(R 1152, 1153).

Dr. Tracey calculated the odds of someone other than Overton matching the crime scene DNA sample and concluded it was one in four trillion, and higher in the African American database. (R 1150). He said that if the 17 genetic DNA markers (5 RFLP and 12 STR) were considered together, "we don't have enough people on the planet earth at . . . 5.6 billion . . . to give what I would call a good statistical analysis for 17 DNA tests." (R 1150-51). What that means is "the DNA on the evidentiary stains originated from Mr. Overton." (R 1151).

In *Ramirez v. State*, 651 So. 2d 1164, 1168 (Fla. 1995), this Court said that the State must establish "by a preponderance of the evidence" that "the underlying scientific principle and the testing procedures used" are generally accepted in the scientific community. Both the techniques and methods used to determine if two DNA samples match and the "statistics or population genetics used to calculate population frequency" must be commonly accepted in the scientific community. *Brim v. State*, 695 So. 2d 268, 271-72 (Fla. 1997). In *Brim*, the case was remanded for an evidentiary hearing because the record did not show the details of the calculation methods. *Id.* at 274. That is not the case here.

The evidence from Doctors Pollack, Bever, and Tracey establish, by more than the required preponderance of the evidence,

that both the STR DNA testing procedure and the statistics used to calculate population frequency in Overton's case are scientifically accepted. In fact, STR DNA is widely used both inside and outside the United States, and most private laboratories, as well as the United Kingdom, are **only** doing STR typing. (R 1155-57). The law enforcement laboratories are now moving towards doing only STR DNA testing, although some "are continuing to do both types of analysis" [STR and RFLP]. (R 1157). This testimony is supported by the NRC II report which states that STR testing is "coming into wide use," and "STR loci appear to be particularly appropriate for forensic use." (NRC II at 35, 71). Indeed, it has been used as early as 1991 to identify the remains of soldiers killed in war. *Commonwealth v. Rosier*, 685 N.E.2d 739 (Mass. 1997). *See State v. Russell*, 882 P.2d 747, 765 (Wash. 1994)[PCR analysis used to identify those killed in the Persian Gulf].

Moreover, the composition of the databases used as well as the actual calculation method for the statistics was detailed and established to be generally accepted in the scientific community. Thus, the STR DNA test results in Overton's case met the *Frye* test.

Admission of STR DNA testing in murder cases has been upheld by at least two appellate courts nationwide. In *Allen v. California*, 85 Cal. Rptr. 2d 655 (Cal. Ct. App. 1999), the Court rejected the claim that since the "only evidence regarding general scientific acceptance consisted of the testimony from a Cellmark employee," the threshold had not been reached. The employee was "a

microbiologist and deputy director of Cellmark Labs." 85 Cal. Rptr. 2d at 657. The Court found the employee's testimony to be "competent evidence of general acceptance" and upheld the admission of the STR DNA testing. *Id.* at 658, 660.

In *State v. Jackson*, 582 N.W.2d 317, 325 (Neb. 1998), the director of a university laboratory testified that PCR STR testing is generally accepted in the scientific community and that it had "been around several years now . . .." This director also testified that the product rule, (used in the instant case), is a scientifically accepted and valid method of statistical analysis. *Id.* The Court upheld the lower court's finding of general acceptance in the scientific community based on this testimony. *Id.*

Dr. Bever testified that the STR testing is generally accepted in the scientific community. That opinion was supported by both Dr. Pollack and Dr. Tracey. All three also testified to the general acceptance of the databases used. Thus, the trial court did not err in admitting the STR DNA test results.

Assuming *arguendo* that the STR DNA evidence did not meet the *Frye* test, any error in its admission was harmless. Dr. Powell testified that he performed RFLP DNA analysis in this case. (R 1054). He followed all of FDLE's procedures which are modeled after "the FBI protocol" and were judicial declared scientifically accepted in *Hayes*. (R 1055). When he extracted the DNA profile from the evidence, he had no sample from Overton, although he had samples from others. (R 1062). Thus, there was no chance of "cross contamination," or contamination and/or false results of any kind.

Dr. Pollock concluded that Overton's DNA matched that from the MacIvor crime samples. (R 1062). Since semen was the source of the DNA, the probability of anyone else matching the DNA from the crime scene was one in six billion males. (R 1063-64). Dr. Tracey also calculated the statistics, but used a "pocket calculator," and got the same answer Dr. Pollock did. (R 1149). "[T]he odds of selecting, in addition to Thomas Overton, another . . . who matches the DNA pattern on the two stains is less than one person out of six billion." (R 1149). Thus, any error was harmless as the RFLP test conclusively established the same fact as the STR test, i.e., one person on the face of the earth donated the DNA left at the crime scene - Thomas Overton.

POINT III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE CONTINUANCE BASED ON AN ALLEGED DISCOVERY VIOLATION REGARDING STR DNA EVIDENCE.

In the heading to this point of his brief, Overton complains that the trial court abused its discretion in denying a continuance of the trial based on an alleged denial of access to the protocol manual, proficiency tests, and validation studies of the Bode Technology Group. (IB 73). However, his argument on that point is simply a reassertion of the arguments made in his point II. (IB 73-76). No where in the body of the argument does he even mention a continuance, much less identify when or where such was requested, or dealt with, in the lower court, or give the bases for denial of same. The State submits that such barebones pleading is wholly insufficient on which to base a claim for relief and procedurally

bars consideration of the issue on appeal.

Assuming *arguendo* that the claim is not barred, it is without merit. Whether to grant, or deny, a request for a continuance is addressed to the sound discretion of the trial judge. Fla. R. Crim. P. *3.190(g)(2). See Gorby v. State, 630 So. 2d 544, 546 (Fla. 1993), cert. denied.* 513 U.S. 828 (1994). Good cause must be shown, and where the motion is made after a trial date has been set, the basis for good cause must have arisen after the case was set for trial. Fla. R. Crim. P. 3.190(g)(3). Overton has failed to show that the trial judge abused his discretion in denying the motion for a continuance. Neither has he demonstrated any good cause for the request, nor shown that he was prejudiced by the denial of same.

On the morning jury selection began, January 11, 1999, the defense requested a continuance "to fully investigate and prepare for that [DNA] evidence . . .." (R 1237). The prosecutor pointed out that at the *Frye* hearing on January 7, 1999, the representative "from BODE Tech" invited the defense to "come and look at the voluminous stuff at their facility." (R 1237-38). The trial did not begin until January 20, 1999. (R 2991). Moreover, Bode Tech had "been listed for a long time. They were here to be talked to. They could have, for the last two months, sent anybody to the facility if these particular things that they're requesting were really an issue."[30] (R 1238).

[30] The defense was "asking for a listing by case number and case name of all cases in which this [STR DNA] has been done and

Defense Counsel acknowledged receiving Bode's response on December 29th, but claimed that "[i]t was virtually impossible with a trial date of today to go up there . . .." (R 1238-39). The prosecutor pointed out that the Bode Tech response "was almost identical" to that of FDLE, and although FDLE's response was given to the defense "a year or so ago," they had not "followed up on that." (R 1239). The court reissued the same decision as earlier made, i.e., the State needed to provide no other answers to discovery requests, and the timing did not necessitate a continuance. (R 1240). The motion was denied. (R 1240).

At the *Frye* hearing, the judge noted that he had given the defense "multiple continuances" and had "indulged you to the maximum extent;" the case had been "continued . . . 15 months" beyond the original trial date. (R 1029). Some six months earlier, he judge told the defense that was their last continuance, and to "[d]o whatever it takes to be ready." (R 1029-30). He ruled: "[T]he time has come to deal with the issues;" the defense had "made your choices" and "had ample opportunity." (R 1030).

The defense received "the initial discovery" on October 14th, and the specific witnesses names were also provided in October. (R 1021, 1165). The defense filed its request for supplemental discovery from Bode Tech on November 2nd, requested a *Frye* hearing on December 21st, and received the supplemental response on December 29th. (R 665-66, 895, 1021). The *Frye* hearing occurred on

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this would take . . . years [to] accumulate." (R 1238).

January 7th, and the jury selection began on January 11th. Not once did the defense attempt to schedule depositions or make arrangements to travel to Bode Tech and examine the information it now claims was so desperately needed.

Moreover, the trial court was "entirely convinced that the discovery request . . . is overreaching." (R 1168). It is clear from the transcripts that the judge was fed up with the defense's continual requests for continuances, and had given them ample and more than fair warning that the grant of continuances had come to an end and Overton would proceed to trial. Overton has utterly failed to carry his burden to establish that the trial judge abused his discretion in ruling that he had demonstrated no good cause for a further continuance of the already 15 month continued trial date. He is entitled to no relief.

POINT IV

THE TRIAL COURT DID NOT ERR IN DENYING THE APPOINTMENT OF AN ADDITIONAL DEFENSE CHEMIST.

Overton complains that he should have been given a second chemist to assist him in developing his defense that a law enforcement officer planted his DNA from a condom containing his semen obtained from his AIDS-infected girlfriend, Ms. Swaybe. (IB 77). He claims that this additional expert was necessary "to show that the semen on the bed sheets originated from a condom." (IB 78). However, the evidence at trial showed that even if the semen came from a condom, Overton was not excluded as the perpetrator. Whether his semen spilled from a condom was not a crucial element

of the defense; the crucial elements were whether Ms. Swaybe gave Overton's semen to Detective Visco who then planted it on the MacIvors' sheet. Overton failed to present even a scintilla of evidence to establish either of those elements.

The evidence at trial showed that Ms. Swaybe never gave Detective Visco any of Overton's semen. (R 4365). Ms. Swaybe died of AIDS on April 3, 1994. (R 4419). A "minuscule" amount of Nonoxynol-9 was found on the three samples from "the bottom sheet." (R 4462, 4440-41, 4467).

Defense Expert, Dr. Wright, testified that condoms break, especially when being used in a forcible sexual assault, and the evidence showed that Susan was struggling while being raped. (R 4526, 4527, 4543). He also opined that seminal fluid could have been spilled from a condom worn by the perpetrator when he removed it. (R 4543). Moreover, the perpetrator could have taken the condom with him when he left the scene - no spermicidal condoms were found there. (R 4543). Indeed, Overton bragged to Mr. Zientek that he does "various things . . . after he killed them" such as "confuses the crime scene." (R 4173).

Overton regarded himself as a smart criminal who well planned this rape/murder and came prepared. In accord with his plan, he confused the crime scene. Certainly, Overton, who may have been used to using condoms when he had sex with his AIDS-infected girlfriend, may have used one when he sexually assaulted a woman he hardly knew and who might have also had some loathsome disease. Moreover, this "smart" criminal likely hoped this would eliminate

any DNA evidence that might be used to identify him. It is clear from his statements to others that he was most concerned that he not leave anyone, or anything, that could identify him.[31]

Despite his careful planning, however, his DNA was left at the scene when the condom broke during the struggle with Susan and/or its contents spilled out when he removed it. Whether he was aware of the semen leakage at the time is not apparent, but he took the condom he used when he assaulted Susan with him. This theory was argued to the factfinder. (R 4722). Overton acknowledges that there are "sexual assault cases" in which "the police suspect that a condom was used by the perpetrator." (IB 81 n.45). Moreover, that semen was smeared on the bed sheet and trace amounts on Susan's body does not make "it apparent that a condom was not used" as argued by Overton; it merely shows that Overton's careful plan to avoid detection by using a condom backfired on him when the device broke during the struggle with his victim or when he removed it.

Thus, whether the spermicidal form of Nonoxynol-9 was present, indicating that a condom was used by the perpetrator, matters not to the issue of Overton's guilt, or his defense. He utterly failed to prove that Detective Visco obtained a condom, much less one with Overton's semen in it, or that he planted any evidence against Overton. In fact, the evidence was that Detective Visco never entered the MacIvors' home. (R 4365). The evidence containing the

[31] Overton entered the home "in his Ninja suit," consisting of "a mask" and "botties, gloves." (R 4155, 4156). Susan told Overton that she knew who he was, and Overton explained that he strangled her because "[h]e doesn't leave any witnesses." (R 4159).

semen (which was luma-lighted at the scene) was taken directly from that residence into the custody of the serologist who confirmed the presumptive indication of semen. Thus, the evidence conclusively established that Detective Visco never had the opportunity to plant any semen had he had any.

This alleged defense was no more than the wholly unsupported assertion of counsel. The crux of the defense was not that spermicidal Nonoxynol-9 was present, but was that Detective Visco obtained Overton's semen from an innocent source and planted it on the evidence at the crime scene. There were no facts to support this claim. Since it mattered not whether the Nonoxynol-9 on the sheet was spermicidal or detergent based, there clearly was no error in denying the defense a second expert chemist for the purpose of determining same. Moreover, Overton has not shown that such a determination could be made. Mr. Oliver, the representative of the only United States manufacturer of Nonoxynol-9 testified that if semen from a Nonoxynol-9 coated condom was dropped on a sheet laundered in a detergent containing Nonoxynol-9, there was no test he knew of that could distinguish whether the Nonoxynol-9 came from the detergent or the condom. (R 4604). Overton has utterly failed to establish a reasonable probability that a second expert chemist would have aided this defense, and it was not an abuse of discretion to deny the request for same.

Moreover, Overton's claim that he had "only one month left before trial" when "confronted with new state expert evidence" is false. (B 78). The State first listed Mr. Oliver as a witness on

November 12, 1998, shortly after the discovery that "nonoxynol was there." (R 573, 4573). The defense took Mr. Oliver's deposition on December 1st. (IB 78). Mr. Oliver testified at trial on January 29th. (R 4476,4585). Thus, Overton had at least two months notice of this witness and seven weeks notice after taking his deposition. He was not an "eleventh hour" witness as Overton wrongly characterizes him, and Overton clearly has not shown that the trial court abused his discretion in ruling that "due process has certainly more than been satisfied here . . .."[32] (R 4573).

Overton can show no prejudice in being denied a second chemist because the first one, Dr. Trager, established that Nonoxynol-9 was present. That was all that was needed to permit the defense to argue its theory that the semen came from a condom. Had a subsequent test been done and it been determined that the Nonoxynol-9 was spermicidal, same would have supported the State's theory that Overton wore a condom that broke and spilled semen or that he spilled his semen out of it when removing it at least as well as it would have supported the wholly unsubstantiated claim that the semen was obtained from Overton's girlfriend and planted by a law enforcement officer. Of course, other trial evidence would have utterly discredited the defense theory (i.e., the detective did not even enter the crime scene, etc.) and would have supported the State's alternative theory (i.e., Overton's great

[32] The trial court granted a motion in limine to prevent Mr. Oliver from identifying any brand name detergents nonoxynol-9 since he did not provide that information at the deposition. (R 4584).

concern with preventing his identification).

"A trial court's refusal to provide funds for the appointment of experts for an indigent defendant will not be disturbed unless there has been an abuse of discretion." *San Martin*, 705 So. 2d at 1347. The two-part test for evaluating the discretionary act is: "(1) whether the defendant made a particularized showing of need; and (2) whether the defendant was prejudiced by the court's denial of the motion requesting the expert assistance." *Id.* Overton has failed to meet the burden to show either a particularized need or prejudice, and therefore, he has not established an abuse of judicial discretion. *Id.*

Finally, just prior to the presentation of the testimony of the rebuttal expert, Mr. Oliver, defense counsel said that he wanted a second expert because "there may be a better test" than that done by Defense Expert Trager. (R 4570). However, Mr. Oliver testified that "[i]f semen mixed with . . . Nonoxynol-9, is dropped on a sheet containing residue of the detergent that contains Nonoxynol-9," there is no test he knows of that "could distinguish between the two." (R 4604). Thus, based on the evidence before the trial court, Overton could not possibly establish his need for a second expert to do an additional test to distinguish between spermicidal and commercial Nonoxynol-9. Since this was the basis for the claim below, Overton was, and is, entitled to no relief.

POINT V

THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENSE MISTRIAL MOTION MADE WHEN THE PROSECUTOR REFERENCED

THE DEFENSE REQUEST FOR A SINGLE NONOXYNOL TEST.

Overton complains that the trial court should have granted his motion for a mistrial made when the prosecutor argued that the defense had sought a single nonoxynol test of the MacIvors' bed sheet. (IB 82). He claims that this, together with the State's request for further testing, suggested "to the jury that the defense was concealing harmful evidence." (IB 82, 83). Citing *Sun Charm Ranch, Inv. v. Orlando*, 407 So. 2d 938, 941 (Fla. 5th DCA 1981), which does not appear to be relevant to the instant issue, he apparently claims that the prosecutor's argument was improper because it tipped "the scales of justice too heavily." (IB 83).

A judge's ruling on a mistrial motion is reviewed under the abuse of discretion standard. *See Cole v. State*, 701 So. 2d 845, 853 (Fla. 1997), *cert. denied*, 523 U.S. 1051 (1998). Such a motion "should be granted only when it is necessary to ensure that the defendant receives a fair trial." 701 So. 2d at 853. Only a comment "so prejudicial as to require reversal" justifies a mistrial. *Id.*

There is no abuse of discretion in denying a mistrial motion made on a prosecutor's argument which is a fair comment on the evidence. *Monlyn v. State*, 705 So. 2d 1, 4 (Fla. 1997), *cert. denied*, 524 U.S. 957 (1998). *See Hamilton v. State*, 703 So. 2d 1038, 1043-44 (Fla. 1997), *cert. denied*, 524 U.S. 956 (1998). In *Monlyn*, the defense argued that the prosecutorial comment during argument "was merely inflammatory and not a proper comment on the evidence." 705 So. 2d at 4. The prosecutor said that Monlyn would

have done the victim "a big favor if he had shot him. It would certainly have been a less painful death." *Id.* The trial judge said: "I think it's a fair comment on the evidence . . .." *Id.* This Court found "no abuse of discretion in denying the motion. Monlyn introduced evidence that there were shotguns available, so it was not improper for the state to comment on Monlyn's choice of method in committing the murder." *Id.*

The defense asked whether the tests done on the samples supported a theory that the Nonoxynol-9 was deposited onto the sheet by detergent. (R 4468-69). The witness said that if one assumed that it could remain on the sheet after washing, he expected that the distribution of Nonoxynol-9 would be "fairly uniform" over the fabric. (R4468). He said that the subsequent testing of the two samples submitted by the State "don't support or . . . don't not support" uniformity. (R 4469). Dr. Trager added: "[I]f anybody asked me the question that you just asked me now, it would lead me to probably recommend more testing . . ." over a larger sampling. (R 4469). That questioning was followed with the query whether the Defense had only asked him to test one spot on the sheet. (R 4470). Dr. Trager said yes.[33] (R 4470).

Defense Counsel moved for a mistrial. (R 4806). The prosecutor pointed out that he was merely commenting upon the evidence which had been introduced at trial; Defense Counsel charged that it was

[33] Defense Counsel asked: "What was my reaction when you told me" that the State had asked for subsequent testing. (R 4471). Dr. Trager answered that he had tried to stop him. (R 4472).

"a mischaracterization of the evidence." (R 4806). The trial judge disagreed with the defense, overruled the objection, and denied the motion for a mistrial. (R 4806-07).

In going over various evidence talked about by the Defense in its closing argument, the prosecutor said: "We talked about the condoms and that more testing and more testing is needed. The State didn't do enough testing. Who asked for only one test? The State did more testing --." (R 4804-05). The defense objected and complained "we asked for more testing," and said the State had been cautioned not to go into this. (R 4805). The Court disagreed, pointing out that the "one test" mentioned was that done by the Defense Expert Trager and reminded Defense Counsel that he was the one who "corrected a witness to say that they did one test." (R 4805). The judge felt that it was clear that the prosecutor was "not talking about more testing," and the prosecutor affirmed that. (R 4805). The judge added that it was the defense that "raised the argument" that the evidence "was sent up there to Trager's place and one test was done . . .." (R 4806).

The defense introduced evidence through Dr. Trager which indicated that testing of a larger sampling might have been helpful to determine whether there was a uniform distribution of Nonoxynol-9 on the sheet.[34] (R 4468-69). The defense made it clear that the State had sent only two additional samples, implying that

[34] However, both Dr. Trager and Mr. Oliver admitted that due to folding of the fabric in the washing machine, the deposits of detergent-based Nonoxynol-9 would not be completely uniform over the entire sheet. (R 4542, 4606).

it could, and should, have sent more if it wanted the jury to believe that the Nonoxynol-9 found on the sheet was detergent-based. Thus, the State was well within permissible argument to point out that the defense had ordered only *one* test on the bed sheet, while the State had ordered an additional two. As Mr. Oliver testified, the measurements of Nonoxynol-9 found on the three samples tested by Dr. Trager were sufficiently uniform to be consistent with having been deposited by detergent. (R 4606). Thus, this argument was in response to the matters raised in the defense closing argument and properly commented upon trial evidence. Overton has established no improper tipping of the scales of justice, much less an abuse of discretion in the denial of the mistrial motion. He is entitled to no relief.

POINT VI

THE TRIAL COURT DID NOT REVERSIBLY ERR IN PERMITTING THE TESTIMONY OF A STATE WITNESS'S PRIOR CONSISTENT STATEMENT TO A PRISON CHAPLAIN.

Overton claims that he "heavily impeached" the testimony of James Zientek "with evidence of motive to fabricate, past lies, and numerous prior convictions." (IB 84). He charges that "to overcome the obvious problems with this witness's credibility," the State called "the jailhouse chaplain, Judy Remley, to testify that Zientek appeared upset, cried, and was 'devastated' as he spoke to her about Overton's" confession. (IB 84).

Upon the conclusion of Mr. Zientek's testimony, the State announced its intention to call Ms. Remley. Overton objected "on the basis of vouching" and added relevance. (R 4247). The

prosecutor contended that Ms. Remley's observations of Mr. Zientek as he related Overton's confession were relevant and appropriate because "[i]t got raised on cross-examination" of Mr. Zientek that his "emotional response to this case is basically being faked . . .." (R 4248). The court clarified that the State offered the testimony "to rebut some contention about fabrication or motivation," and that the witness would not opine that Mr. Zientek was "believable or sincere or honest." (R 4249). The trial judge overruled the objection, finding "relevance in terms of motivation and . . . emotional response . . .." (R 4250).

It is clear from the record that at some point in Mr. Zientek's testimony, he became emotional. On cross-examination, Defense Counsel accused: "And in fact, you, before when you were looking disturbed and shedding tears, that was an act, wasn't it?" (R 4194-95). Moreover, he attacked Mr. Zientek's testimony that he vomited when he looked at the pictures given him by Overton, charging that instead he "thanked" Overton for showing him "his materials, the pictures and the reports." (R 4150, 4151, 4195). Mr. Zientek also said he "was upset enough where I called the FBI" and "was pretty freaked out about the whole thing. . . . It was bothering me. I wanted to get a hold of the chaplain . . .." (R 4170). Defense Counsel accused him of wanting to get in good with the chaplain because her husband "runs the jail." (R 4205).

The issues of feigned distress, demeanor, and improper motive to disclose were brought out by the defense questioning. Under these circumstances, the State was properly permitted to put on Ms.

Remley's limited testimony of her observations of Mr. Zientek's demeanor as he disclosed Overton's conversation.

Contrary to Overton's appellate claim, this testimony was not "inadmissible hearsay." (IB 84). "'Hearsay' is a statement . . .." Sec. 90.801(1)(c), Fla. Stat. (1999). Ms. Remley's testimony did not relate any statements, but reported only her observations when Mr. Zientek was speaking with her. That was not hearsay.

Moreover, even assuming that the demeanor testimony was hearsay, it was admissible to rebut a charge of recent fabrication. "[P]rior consistent statements are considered non-hearsay if . . . the person who made the prior consistent statement testifies at trial and is subject to cross-examination concerning that statement; and the statement is offered to 'rebut an express or implied charge . . . of improper influence, motive, or recent fabrication." *Chandler v. State*, 702 So. 2d 186, 197-98 (Fla. 1997), *cert. denied*, 523 U.S. 1083 (1998). In the instant case, the alleged recent fabrication occurred at trial when Mr. Zientek "put on" tears when testifying before the jury allegedly in an attempt to be more convincing. That he also demonstrated this demeanor months earlier when he related the same subject matter to Chaplain Remley directly rebutted the charge of recent fabrication. Thus, even if construed as a statement, Ms. Remley's limited testimony regarding that prior statement was relevant and admissible under the hearsay exception. *Chandler.* Finally, the hearsay/recent fabrication issue is not preserved for appellate review. The objection in the trial court was improper vouching and

relevancy. (R 4247). A specific objection in the trial court is necessary to preserve a hearsay issue for appellate review. *See Hamilton v. State*, 678 So. 2d 1228, 1230-31 (Fla. 1996)[where "defense did not object to this particular statement on hearsay grounds, that issue now is procedurally barred."].

Overton is entitled to no relief.

POINT VII

THE TRIAL COURT DID NOT REVERSIBLY ERR IN PRECLUDING EVIDENCE OF OVERTON'S FILING OF AN INTERNAL AFFAIRS COMPLAINT AGAINST DETECTIVE VISCO.

Overton complains that he was precluded from introducing evidence that he "filed an internal affairs complaint against Officer Charles Visco, asserting that he illegally took possession of Overton's car." (IB 86). He admits that Detective "Visco was ultimately cleared of the charges." (IB 86). He claims that "[t]he purpose of the proposed testimony was to show Visco's bias and motive to plant evidence to incriminate Mr. Overton." (IB 86).

This issue is not preserved for appellate review. Overton raised the issue in the trial court as a Motion in Limine. (R 4296). He wanted to establish that he filed an internal affairs complaint against Detective Visco for stealing his car. (R 4300). Although he was willing to tell the jury that the complaint was "unfounded or that he was cleared of that," he did not want the detective to be permitted to explain the circumstances out of which the incident arose. (R 4300-04). Specifically, he did not want Detective Visco to explain that he continued to detain Overton's vehicle because of suspicious items found therein which were

believed relevant to the murder of Rachael Surette.

"A trial court has wide discretion in areas concerning the admission of evidence, and, unless an abuse of discretion can be shown, its rulings will not be disturbed." *San Martin*, 717 So. 2d at 470-71. "Even when a prior motion in limine has been denied, the failure to object at the time collateral evidence is introduced waives the issue for appellate review." *Correll v. State*, 523 So. 2d 562, 566 (Fla. 1988), *cert. denied*, 488 U.S. 871 (1988) .

In *San Martin*, the defendant made a motion in limine to exclude statements made by the victim police officer before he died. 717 So. 2d at 470. The trial court denied the motion, finding the evidence relevant to issues of the victim's identity as a law enforcement officer. *Id.* When the witnesses testified to the statements at trial, the defense objected to one, but failed to object to the other. *Id.* This Court held that the issue was procedurally barred on appeal because of the failure to object when the second witness testified. *Id.*

Overton's motion in limine to prevent Detective Visco from explaining why he continued to hold Overton's vehicle was made well before the detective's trial testimony. Three other witnesses testified after the motion was made and before Detective Visco testified. At no point immediately before, during, or after the detective's testimony did Overton renew his motion or make any objection on this ground, although other objections were made. Thus, the State submits that the issue is procedurally barred for want of a timely objection. *San Martin*.

Assuming *arguendo* that the issue is properly before this Court, it is without merit. The record well supports the discretionary decision of the trial judge, and certainly Overton has not shown an abuse of judicial discretion.

Overton maintained that his "car was initially towed because of a traffic violation." (R 4304). It was impounded, and Detective Visco, who was the lead investigator in the Rachael Surette murder case, obtained a search warrant for it. (R 4202-03). The search revealed items which the detective believed were linked to the Surette homicide, as well as to the crime of possession of burglary tools. (R 4302-03). The detective continued to hold Overton's vehicle because of the Surette murder investigation.

To permit the Defense to introduce that Overton filed an internal affairs complaint against Detective Visco **for stealing** his automobile, (R 4300), but not permit the detective to explain why he continued to detain the vehicle would have been most unjust. An admission that the theft claim was "unfounded" would not have remedied the situation because absent an explanation for the continued detention of Overton's vehicle the fact that the detective had detained Overton's car for some unspecified period of time for some unspecified reason after it had been impounded for a mere traffic violation would create an appearance of bias that had no basis in fact. The detective detained the car beyond the normal time for a traffic violation because it contained suspicious items relevant to a murder investigation. Thus, he had a legitimate,

nonbiased reason for detaining the vehicle. Merely explaining that the internal affairs complaint filed for theft was "unfounded," would not have dispelled the implication that the detective detained the vehicle due to a bias against, or improper motive toward, Overton. Only explaining the legitimate reason for detaining the vehicle could dispel that false implication. Certainly, a reasonable trial judge could have so concluded. Overton has not carried his burden to show an abuse of discretion.

Moreover, in the lower court, Overton did **not** ask the court to preclude Detective Visco from disclosing that the very burglary kit Mr. Zientek said Overton described to him when confessing to the MacIvors' murders was found in the vehicle. (R 4303-05). Thus, had the court granted the motion to keep out the mention of the Surette murder investigation, the evidence corroborating Mr. Zientek's testimony would have been disclosed when the defense inquired into the subject of the theft complaint. This would have severely undercut the defense's argument that Mr. Zientek's testimony came directly from the information reported about the MacIvor crimes in the newspapers. It is unlikely that this burglary kit was described in the newspapers since it was not discovered in connection with the MacIvor murders. This corroboration would have underscored the fact that Mr. Zientek got his information directly from the mouth of Overton as he testified at trial. Thus, admission of this evidence would have been most harmful to Overton's case.

The trial judge's denial of the motion in limine regarding

mention of the Surette investigation resulted in the defense electing not to inquire into the internal affairs complaint. This, in turn, kept out the evidence about the burglary kit. Thus, any error in denying the motion was harmless, and therefore, Overton is entitled to no relief. *See Nelson v. State*, 704 So. 2d 752, 754 n.1 (Fla. 5th DCA 1998).

The trial judge did not preclude the examination of Detective Visco regarding the filing of the internal affairs complaint. Rather, he ruled that he would not stop the defense from raising it, but also would not stop the State "from asking the officer . . . Why did you do what you did?" (R 4304). The district court of appeal cases cited by Overton are not relevant because they concern restriction of cross-examination. (See IB 88).

The issue below was not whether evidence of the internal affairs complaint, or that Detective Visco had detained Overton's vehicle, indicated bias against Overton by Detective Visco. Rather, it was whether the defense could raise the specter of such bias and not permit the detective to put it in context and explain the circumstances surrounding it. No right to show bias or motive was abridged below. Overton is entitled to no relief.

POINT VIII

ALL FIVE AGGRAVATORS FOUND BY THE TRIAL COURT WERE ESTABLISHED BY THE EVIDENCE, AND THE TRIAL JUDGE WOULD HAVE IMPOSED A DEATH SENTENCE EVEN IN THE ABSENCE OF THE THREE AGGRAVATORS CONTESTED HEREIN.

A. HAC (MR. MACIVOR): Overton complains that the evidence did not support the finding of the HAC aggravator as to Michael. (IB

89). He says that the evidence of sufficient suffering is too speculative and was based on the determination that he "was 'strangled to death in his own home after his pregnant wife had been sexually battered and murdered.'" (IB 90). He complains that "[t]here was no evidence presented that Mr. MacIvor had any knowledge of what happened to his wife. Further, strangulation does *not* establish HAC where the evidence fails to show that the victim was conscious at the time." (IB 90). Neither is correct.

"In reviewing a trial court's determination of heinous, atrocious, or cruel, this Court examines the record to ensure that the finding is supported by substantial competent evidence. *Mansfield v. State*, 25 Fla. L. Weekly S245, S247 (Fla. 2000). The evidence in this case well meets that standard. Regarding his finding of HAC as to Mr. MacIvor, the trial judge wrote:

> [T]he evidence shows that he, too, was ultimately strangled to death. However, before he was murdered, he was first hit in the head with a blunt object and then later kicked in the area of his midsection. In addition, before strangling Michael MacIvor, the Defendant wrapped Mr. MacIvor's head and eyes with tape, leaving only a small area uncovered for him to breathe. According to the testimony of Mr. Zientek, the Defendant told him that he taped Mr. MacIvor's head so that the victim's eyes would not bulge or pop out of his head while he was being strangled.
>
> The Court finds that the murder of Michael MacIvor was heinous, atrocious and cruel beyond a reasonable doubt in that he was strangled to death in his own home after his pregnant wife had been sexually battered and murdered.

(R 1193).

Overton told Green and Zientek separately that when he was burglarizing the home of "[t]he guy . . . [with] his own airplane

and a private airway" in the "down in the Keys," the "lady," came screaming out of the bedroom and jumped on his back **while he was attacking the male**. (R 3703-04, 3783, 4156). Overton chased her into the bedroom, but "was concerned about the male just being just temporarily knocked out." (R 4157). He went back and taped his face so that only his mouth was uncovered to permit him to breathe. (R 1193, 4157). He returned to the female, raped and strangled her, and then went to "the male [who] was . . . back to . . . consciousness." (R 4159, 4167). Overton "ran up to him and drop kicked him with a severe blow to the solar plexus . . . to disable him and strangled the male . . .." (R 4159, 4167).

Dr. Nelms' examination of Michael's body corroborated the injuries as described by Overton to Mr. Zientek. (R 3617-22). The doctor said that the head injury might have caused some period of unconsciousness "minutes up to hours," but also may have merely dazed the man into "a semiconscious state" for a brief time. (R 3625-26, 3637). Overton made it clear that the man was conscious when he returned from raping and murdering Susan and at the time he savagely kicked Michael in the abdomen to disable him and then strangled him to death with a ligature. There was no alcohol or any type of medication in Michael's body, and there was "nothing that would diminish his ability to be aware of or sense pain or

what was going on around him."[35] (R 3635).

This evidence well meets the substantial competent evidence standard and establishes HAC under this Court's caselaw. This Court has long held: "[I]t is permissible to infer that strangulation, when perpetrated upon a conscious victim, involves foreknowledge of death, extreme anxiety and fear, and that this method of killing is one to which the factor of heinousness is applicable." *Tompkins v. State*, 502 So. 2d 415, 421 (Fla. 1986). Substantial competent evidence in this case established that Michael was conscious while he was being strangled to death by a ligature. Thus, the trial court's finding of this factor should be upheld. *See Hildwin v. State*, 727 So. 2d 193, 195 (Fla. 1998), cert. denied, 120 S.Ct. 139 (1999). [rejected claim strangulation not HAC where no evidence of a struggle].

Indeed, "[a]lthough . . . the HAC aggravator does not apply to most instantaneous deaths or to deaths that occur fairly quickly, fear, emotional strain, and terror of the victim during the events leading up to the murder may make an otherwise quick death especially heinous, atrocious, or cruel." *James v. State*, 695 So. 2d 1229, 1235 (Fla. 1997), *cert. denied*, 522 U.S. 1000 (1997). In *James*, the State conceded that the strangulation victim "died quickly," however, the defendant's said that when he picked her "up from the couch by her neck," she opened her eyes and looked at him

[35] The evidence showed that Susan's body could be seen from where Michael lay, creating the reasonable inference that the man was aware, of what was happening to his wife, via sight (when she jumped on Overton's back) and/or hearing.

"as he squeezed her neck until her eyes and tongue bulged out . . .." 695 So. 2d at 1235. Overton taped Michael's face so he would not have to see his eyes bulge out when he strangled his victim. Nonetheless, Michael knew what was happening. His wife came screaming out of the bedroom while Overton was first attacking him; Overton chased, caught, and bound her. He returned to Michael, bound him and taped his face. Then, he returned to Susan and raped and murdered her - all the while concerned because he knew Michael had been, at best, very temporarily knocked out. After killing Susan, he returned to the living room to find Michael conscious. He savagely kicked him in the stomach, disabling him, and then wrapped a ligature around his neck three times and strangled him to death. Thus, even if he was conscious during the strangulation for the very minimum time that Dr. Nelms indicated it could have been - 10 to 15 seconds with "a completely perfectly tight ligature" (R 3633)[36] - he was clearly "conscious of both [his] attacker and [his] impending death in the moments preceding [his] actual death." *Id*. Moreover, the events leading up to his death, as set out above, were themselves heinous, atrocious, or cruel. Clearly, the evidence well supports the trial judge's finding of HAC!

Moreover, HAC has been found, and upheld, where the victims were first incapacitated and then set on fire. *Henry v. State*, 613 So. 2d 429, 433-34 (Fla. 1992), *cert. denied*, 510 U.S. 1048 (1994). Likewise, where the victim was first bludgeoned and then shot.

[36] It would take at least 5 minutes to cause death even with a completely tight ligature. (R 3633).

Wilson v. State, 493 So. 2d 1019, 1023 (Fla. 1986). Substantial competent evidence in this case supports that Michael was first incapacitated and bludgeoned before being strangled to death with a ligature. The finding of the HAC is well supported by competent substantial evidence, as well as this Court's case law. Overton is entitled to no relief.

B. INSTRUCTION RE SNITCH'S TESTIMONY: Overton complains that regarding HAC as to **Mr**. MacIvor and CCP and avoiding arrest as to both victims, "it was fundamental error to not instruct the jury that it should use great caution in relying on the snitch's testimony" because these aggravators "were proven only through the testimony of a jailhouse snitch."[37] (IB 91).

Overton claims that "[t]he need for such an instruction can be traced back nearly half a century." (IB 94). If that is true, he clearly had notice of the issue, and an objection as well as a proposed instruction was necessary for appellate review.

Moreover, this issue is procedurally barred for lack of an

[37] The State takes issue with the claim that Mr. Zientek was "the sole provider of the evidence that supported three of the aggravators" and asserts that it was Overton who provided that information through Mr. Zientek. Further, some of that evidence, especially regarding the HAC aggravator as to Mr. MacIvor, was also provided through other witnesses. *See* A. above. Moreover, in regard to the avoid arrest aggravator, there was corroborating evidence that indicated that Overton and Mrs. MacIvor knew each other: Ms. Kerns had been with Susan when she stopped for gas at the Amoco Station where Overton worked and which was only "a couple of minutes" from the MacIvor home. (R 3044). Mr. Holder, was also familiar with that Amoco Station which was "only a half a mile down the roadway." (R 3056). Agent Daniels confirmed that Overton worked at that Amoco station in August of 1991 and also learned that Overton "worked at night primarily." (R 4428, 4431).

objection and submission of a proposed instruction because Overton has not carried his burden to show that the failure to give such an instruction is fundamental error. It is not.

> Fundamental error is error which goes to the foundation of the case. *Sanford v. Rubin*, 237 So. 2d 134 (Fla. 1970). Failure to give an instruction unnecessary to prove an essential element of the crime charged is not fundamental error. . . . Because the complained-of instruction went to Sochor's defense and not to an essential element of the crime charged, an objection was necessary to preserve this issue on appeal.

Sochor v. State, 619 So. 2d 285, 290 (Fla. 1993), *cert. denied*, 510 U.S. 1025 (1993).

In *Archer v. State*, 673 So. 2d 17, 20 (Fla. 1996), *cert. denied*, 117 S.Ct. 197 (1996), this Court reiterated the well-established rule "that jury instructions are subject to the contemporaneous objection rule, . . . and absent an objection at trial, can be raised on appeal only if fundamental error occurred." Such error is present only if "'a verdict of guilty could not have been obtained without the assistance of the alleged error.'" 673 So. 2d at 20 (*quoting State v. Delva*, 575 So. 2d 643, 644-45 (Fla. 1991)). This Court concluded that the "failure to define reasonable doubt to the jury in the sentencing phase of a capital trial is not fundamental error." *Id.* at 20.

This Court also concluded that Archer's claim that the trial court should have instructed the jury on principals was not preserved for appeal because no objection was made at trial. *Id.* 20-21. Moreover, this Court said that the failure to give even a general or miscellaneous jury instruction on principals did "not

constitute fundamental error." *Id.* at 21.

In *Pope v. State*, 679 So. 2d 710 (Fla. 1996), *cert. denied*, 117 S.Ct. 975 (1997), fundamental error in the failure to give a limiting instruction regarding the consideration of collateral crime evidence was alleged. Pope contended that the court should have told the jury that "the battery was relevant solely to prove motive." 679 So. 2d at 714. This Court rejected the claim that the failure to give that "limiting instruction" was fundamental error, and found it procedurally barred for failure to request an instruction. *Id.*

The State submits that the instruction that Overton claims the trial court should have given despite his failure to request it, or object to the instructions as given, is also a type of limiting instruction. He now complains that the jury should have been told to use "great caution in relying on the snitch's testimony," (IB 91), although he has not even now presented a proposed instruction. The instruction would limit the consideration of the evidence from the informant by placing it in a special category requiring much greater scrutiny. Thus, a request for the instruction at trial was required to preserve the issue for appellate review.

Overton appears to confine the fundamental error component of his claim to the situation where "an informant's testimony is uncorroborated." (IB 95). In that instance, he claims, "the need for a special instruction is so great that the failure to give it is plain error requiring reversal, even absent a request . . .." (IB 95). Overton cannot meet the prerequisite of his own standard.

In the instant case, Mr. Zientek's testimony that Overton told him that he killed the MacIvors and raped Mrs. MacIvor was corroborated by the fact that Overton's DNA was found at the crime scene. Two separate DNA tests were run on this evidence by two separate organizations and two different doctors, and both showed that unquestionably, Overton was the donor of the DNA found at the scene. Indeed, the RFLP DNA test showed that "one on the face of the earth" could have matched the DNA on the MacIvors' bed sheet, and that one is Thomas Overton! The medical examiner's description of the nature and effect of the injuries inflicted upon the MacIvors, including the baby, further corroborated the informer's description of the acts Overton took against the victims. Susan's friend corroborated the part of the informant's testimony which indicated that, and how, Susan and Overton were acquainted. Mr. Holder's testimony, as well as that of some of the officers, corroborated the informant's testimony regarding the burglary tools used, including the placement of the ladder, as well as the weather conditions and time of the crime. It likewise corrborated the informant's testimony regarding the positioning of Michael's body and the confusing of the crime scene. Susan's sister's testimony regarding missing photos of Susan corroborated the informant's testimony that Overton claimed to have taken things from the crime scene which "nobody would realize were gone." (R 4168). Clearly, there was a great deal of evidence which corroborated the testimony of the informer, and therefore, the error in not giving the

instruction, if any, was not fundamental **under the standard Overton advanced** in his brief.

More importantly, it is not fundamental under the standards this Court has articulated in its caselaw for many, many years. Neither Overton's citations to three out-of-state decisions,[38] nor his references to jury instructions given by some federal courts provide any basis to unsettle the law of this state. Overton is entitled to no relief.

POINT IX

THE TRIAL COURT DID NOT ERR IN ITS CONSIDERATION OF AVAILABLE MITIGATION.

Overton complains that the trial court "failed to consider and weigh the mitigating evidence found by defense counsel, in violation of *Farr v. State*." (IB 98). He concedes that "[t]he trial court complied with *Koon*." (IB 98). However, he claims that the court should have required counsel "to proffer the existing

[38] *Dodd v. State*, 993 P.2d 778, 783 (Okla. Crim. App. 2000) was reversed because cross-examination as to prior inconsistent statements of the inmate made in recantation letters was precluded; it did **not** concern any jury instruction of the nature Overton urges. In *State v. Allison*, 910 P.2d 817, 820 (Kan. 1996), the appellate court upheld the trial court's **denial** of a defense requested special instruction that testimony of a witness who gives it in exchange for benefits from the state should be considered with caution. In *McNeal v. State*, 551 So. 2d 151, 158 (Miss. 1989), the jailhouse snitch's testimony was "strongly question[ed]" by the Court "[d]ue to the uncertainty of [his] source for his facts (newspaper or McNeal))." The evidence was that Mr. Zientek's information came from Overton, not from newspapers or law enforcement; moreover, the exact burglary kit Overton described to Zientek was found in Overton's vehicle in connection with investigation of the Surette homicide and much of what Zientek reported Overton told him was corroborated by others.

mitigating evidence" for the court's consideration even though Overton confirmed that he did not want any mitigation presented and had instructed his attorneys not to file the memorandum they had written proffering the available mitigation. (IB 99).

In *Farr v. State*, 621 So. 2d 1368 (Fla. 1993), this Court said that the trial court must consider mitigation even if the defendant asks for the death penalty, as well as where he asks the court not to consider such evidence. In *Robinson v. State*, 684 So. 2d 175 (Fla. 1996), this Court remanded for resentencing where the sentencing order stated that it did not consider mitigation apparent on the record. This Court held that the sentencing judge has the responsibility "to affirmatively show that all possible mitigation has been considered and weighed." 684 So. 2d at 179. Overton's appellate claim that the lower court declined to consider mitigating evidence as in *Robinson* (IB 99) is incorrect.

In *Hauser v. State*, 701 So. 2d 329 (Fla. 1997), this Court reiterated the standard for review of a sentencing order addressing mitigation: "[T]he sentencing court must give good faith consideration to the mitigation contained in the record." Hauser made "an oral proffer of potential mitigation that could have been investigated," and the court considered the "proffered mitigation as proven." 701 So. 2d at 330. Hauser complained that the court did not "acknowledge each possible mitigating circumstance contained in the PSI." *Id.* This Court said:

> [T]he trial court bent over backwards to give full consideration to the proffered mitigation . . .. Although the order does not specifically mention the PSI,

> it does show a thoughtful and deliberate weighing of aggravating and mitigating circumstances, and much of the data contained in the PSI was cumulative to information addressed in the order. We conclude that the court gave good faith consideration to the mitigation contained in the record.

Id. at 330-31.

In the instant case, at commencement of the penalty phase proceeding on February 4, 1999, Defense Counsel advised the trial judge that "over the past two years" Overton had maintained the position that upon conviction, "he does not want any mitigation being presented . . .." (R 4897-98). He said he would present a memo "to the Court" outlining what had been done in the investigation the defense had made (however, Overton later directed his attorneys not to do so). (R 4989, 5035). The judge inquired what had been "ferreted out or pursued," and Defense Counsel replied: "Well, the family background, any type of mental defense or mental mitigation, we attempted to pursue that. Mr. Overton didn't want any of that on. There were some allegations of drug abuse that may have been able to be presented if that was pursued." (R 4900). He said there was a possibility of some mental and/or substance abuse mitigation, and might be something in his family background and upbringing that would be potential mitigation. (R 4900-01). However, Overton "from the very beginning . . . had advised family and friends not to cooperate with any investigations . . . for the penalty phase." (R 4901). An affidavit of one of the two defense investigators was introduced which dealt with the attempts to contact Overton's mother, who utterly refused to

cooperate based on Overton's wishes. (R 4901).

Thereafter, Overton personally expressed his desire not to have any mitigation presented. (R 4902-12). He and the judge had a lengthy discourse during which the judge pointed out what he regarded as possible flaws in Overton's reasoning, trying to convince the man to relent and permit the presentation of mitigation. (R 4902-12). Overton said that the reasons for his decision included that he "didn't commit the crime," felt that he would have a chance to have the jury verdict reversed on appeal, and was "not going to put my family and friends through this stuff." (R 4905, 4906, 4907). The court pointed out that mitigation did not have "to come from family and friends," and explained several other sources of mitigation. (R 4908). Overton remained steadfast in his decision, stating that had it been his family who had been so brutally murdered, nothing would mitigate it; "there's no excuse for what happened." (R 4908-09).

Overton affirmed that his attorneys had tried to talk him into presenting mitigation, and that he had instructed his family and friends not to answer any questions, but refer anyone asking them to him. (R 4909). He laughed at the thought that someone had induced him "to give up this important right," (R 4909), and repeated his desire to "just take it to the appellate court." (R 4910). The judge continued to try to talk him out of his position, further explaining the law. (R 4910-12). Overton said that he was "fully aware of what's going on" and knows "a lot about the process in the courts," and that what he did not know, his attorneys had

already fully explained to him. (R 4911).

Some time later, the judge revisited the issue asking Overton if he had changed his mind about presenting mitigation. (R 4926). Overton remained steadfast in his position. (R 4926). The court found that he had "made a knowing, voluntary decision even in the face of advice from competent counsel to the contrary. So, so be it then." (R 4926). After the jury returned its death recommendation, the court ordered a presentence investigation to be prepared by the Department of Corrections. (R 5027).

At the *Spencer* hearing, held on February 22, 1999, the trial judge revisited the mitigation issue with Overton. (R 5036). Overton stood firm in his desire not to have his attorneys present any evidence of mitigation. (R 5036). Defense Counsel said that an attempt had been made "to go into his background and also his friends, his prior military school, history and . . . inquiry regarding his past military background, school background, . . . past health, medical record . . .." (R 5037). Thereafter, the court again engaged in a lengthy discourse with Overton. (R 5038-5040). Once again, the court found he had "made a knowing and voluntary decision" to waive presentation of mitigation. (R 5040).

On March 18, 1999, the court sentenced Overton. (R 5057). The judge characterized Overton's decision to waive mitigation and prevent his attorneys from even objecting at the penalty phase "as a strategic decision" and noted that he had frustrated any attempts to obtain mitigating information, including refusing to cooperate with the Department of Corrections in preparation of the PSI. (R

5062). Nonetheless, "this Court has endeavored to uncover whatever mitigation may exist." (R 5063). Further, the court found "no evidence . . . to support any statutory mitigating factors" and concluded that "none exist." (R 5063).

The Court

> considered . . . specifically family background, military record, employment record, history of substance abuse, mental health. And the Court, after thoroughly analyzing the possibility that some mitigation may exist in these areas, has found none to exist.

(R 5063-64). In his written order, the trial judge addressed each of these factors and explained what it had found in support of same and why he did not regard it to be mitigating in nature. (R 1195-1196). He then proceeded to find two nonstatutory mitigating factors, to-wit: (1) Overton "will be incarcerated for the rest of his life," and (2) during all court proceedings observed by the judge, Overton "has conducted himself in an appropriate manner and has not been a behavioral problem." (R 1196-97). He assigned the former "little weight," and the later, "some weight." (R 1197).

The record in this case shows that the trial court, as did the one in *Hauser*, "bent over backwards" to give full consideration to all mitigation on the record, including that in the PSI. The order shows a careful and deliberate weighing of aggravating and mitigating circumstances. Certainly, it can be said that this trial judge gave good faith consideration to the mitigation contained in the record. Thus, he fully discharged his responsibility to show that all possible mitigation has been considered and weighed, and thereby, complied with the dictates of *Farr* and *Robinson*.

Finally, even if the trial court erred in regard to the proffered mitigation of "possible substance abuse" and "existence of mental mitigation," any error was harmless. In *Lawrence v. State*, 691 So. 2d 1068, 1076 (Fla. 1997), *cert. denied*, 522 U.S. 880 (1997), this Court found a *Farr* error regarding a "history-of-substance-abuse mitigator" harmless "because the mitigator would not have offset the three aggravators that were properly found." In this case, there are five valid aggravators to be weighed against mitigation minuscule in comparison. Thus, any error in regard to the two proposed mitigators is harmless. Overton is entitled to no relief.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: Maria E. Lauredo, Assistant Public Defender, 1320 N.W. 14th Street, Miami, FL 33125, on this _____ day of October, 2000.

_____
Of Counsel