

IN THE SUPREME COURT OF FLORIDA

CASE NO. 92,975

JOSEPH RAMIREZ,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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CERTIFICATE OF FONT

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

INTRODUCTION

This is a direct appeal from judgments of conviction and a sentence of death, entered following a jury trial before the Honorable Jennifer Bailey and Ronald Dresnick of the Eleventh Judicial Circuit in and for Dade County, Florida. In this brief, the clerk's record on appeal is cited as "R.," the transcript of the proceedings as "T.," and the supplemental record as "S.R."

STATEMENT OF THE CASE AND FACTS

This appeal follows Joseph Ramirez' third trial for the 1983 murder of Mary Jane Quinn. His first conviction was reversed in *Ramirez v. State*, 542 So. 2d 352 (Fla. 1989) (*Ramirez I*), because the state had failed to establish the scientific reliability of knife mark identification evidence presented at the trial; his second conviction was reversed in *Ramirez v. State*, 651 So. 2d 1164 (Fla. 1995) (*Ramirez II*), because the trial judge had not allowed the defense to present witnesses at the *Frye*¹ hearing.

Ramirez was convicted again after the third trial of first degree murder, burglary with an assault, and armed robbery. (R. 1938-39) At the conclusion of the penalty phase, the jury recommended life by a vote of 9 to 3, but the trial judge overrode the jury's recommendation and sentenced Ramirez to death. (R. 2117, 2488)

Mary Jane Quinn's body was found in the Miami Federal Express building

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

where she worked as a night courier on December 25, 1983. (T. 1530, 1570) She died as a result of blunt force injuries to her head and multiple stab wounds. (T. 2114, 2212) Blood and pieces of plastic that were consistent with a missing facsimile machine were found in the dispatch office and hallway. (T. 1606, 1614-21, 1664-72, 1773-74, 1777-79, 1858; S.R. 59) In the dispatch office, a chair was overturned, there was blood on a computer keyboard, and a telephone had been pulled loose and its cord wrapped around Quinn's legs. (T. 1619, 1632, 1655, 1779; S.R. 59) There was a bloody fingerprint on the door jamb leading into the break room and a bloody shoe print on the tile in the hallway between the lobby and main office. (T. 1603, 1621, 1989) The portion of the door jamb containing the print was removed for analysis. (T. 1989) The police did not take up the tile containing the shoe print and, due to a camera malfunction, there were no photographs of the shoe print. (T. 1600, 1936, 1988-89, 2522)

A locked drawer in the desk of an employee who sold jewelry appeared to have been tampered with, and a mail bag containing approximately \$430 in receipts was missing. (T. 1607, 1612, 1742, 1867, 1948-49) A locked interior door in one of the trucks appeared to have been forced, and the loading bay door where it was parked was open about 9 inches. (T. 1594, 1628)

Appellant worked for a janitorial service, LRH, that contracted to clean the Federal Express building. (T. 1743) Ramirez had cleaned the Federal Express building the afternoon of December 24th and returned home about 6 p.m. (T. 2014) After

watching television with his girlfriend, Dolores Douglas, and her children, Ramirez went to Burger King to pick up dinner for the family. (T. 2014, 2633-34) At about 9:00 or 9:30 p.m., he went to visit his friend Johnny Britten. (T. 2014, 2634-35) Ramirez was wearing blue sweat pants, a white T-shirt, a blue velour shirt with a fox insignia, and white Converse sneakers. (T. 2289, 2634) The Brittens were playing cards, and Ramirez joined them in drinking beer and whiskey and smoking marijuana. (T. 2297, 2299-3000) Ramirez left before midnight, stopped at the convenience store to buy some groceries, then went home. (T. 2014, 2288, 3225) Douglas went to bed shortly after Ramirez left; when she woke up at about 5 a.m., he was in bed. (T. 2635-36, 2646) She remembered him coming to bed during the night but did not know what time it was. (T. 2642) His clothes were on the floor, and she did not notice anything unusual about him or his clothing. (T. 2636, 2642-43)

Marcella Gaines, a Federal Express Supervisor, reported that a week before the homicide, on December 17, Ramirez, his employer Lynn Hall, and Johnny Britten, who also worked for IRI Janitorial Services, stayed late to strip and wax the floors at the Federal Express building. (T. 1745, 176) Someone had given Hall keys to the building. (T. 1745, 170) Gaines testified that, on the 24th, Ramirez asked whether a lot of packages and revenue went through the station and mentioned that he and his wife were having money problems (T. 1748, 175) Gaines said he put the mail bag in the truck that evening and locked Ramirez out at 8 pm (T. 175) The service agent who tallied the cash receipts at the end of the day

testified that she usually did so in the general office where couriers and other evening service agents were present. (T. 1956-57)

On December 26, the day after the homicide, the police requested and Ramirez agreed to come to police headquarters the following day for an interview. (R. 2820) On December 27, Ramirez told Detective Parr he had gone to the Brittens' the night of December 24th and had then returned home. (T. 2014) Ramirez agreed to be fingerprinted and to give hair samples. (T. 2014) Parr said that Ramirez asked whether hair had been found in the victim's hand. (T. 2014-15) Parr walked Ramirez to his car and asked whether he could look inside; Parr said Ramirez inquired whether he was looking for blood. (T. 2015)

Parr next spoke to Johnny Britten's mother, Dolly, then went to Ramirez' home. (T. 2016) In response to Ramirez' question what it would take to convince the police he had nothing to do with the murder, they asked him to produce the clothing he had been wearing on December 24th. (T. 2017-18, 2533) Ramirez searched for the sweater he had been wearing, then told police it must be at the cleaner's and gave them the name Alvarez cleaners on 183rd street. (T. 2018, 2533) The police were not able to locate an Alvarez cleaners and did not find the sweater at three other cleaners in the area. (T. 2019, 2533-34)

On December 28, 1983, a police fingerprint technician positively identified the bloody partial fingerprint found on the doorjamb as Ramirez'. (T. 2410-11) Based on this information, police sought a warrant for Ramirez' arrest. (R. 1471-72) The same

day, Ramirez called police and told them he had found the sweater he wore on December 24th, and suggested they meet him at work at 9:30 p.m. (T. 2023, 2535-36) There, Ramirez told them he was wearing the sweater they wanted; it did not have the fox emblem that Mrs. Britten had described. (R. 2858; T. 1468, 2025) Ramirez was placed under arrest and advised of his *Miranda*² rights. (T. 2537) Saladrigas asked him “where is the fox?” (T. 2540) Ramirez responded that it had fallen off in the wash. (T. 2548-49) When the police arrested Ramirez, they found a Burdine’s receipt in his wallet dated December 28. (T. 2344, 2548) A Burdine’s employee, Jorge Pena, identified the receipt and said he sold Ramirez a blue velour sweater that day. (T. 2344, 2354)

In a search of Douglas’ house, the police seized Ramirez’ watch, which appeared to have traces of blood on the back. (T. 2028, 2030) In a search of the Douglas’ car, police found a wood-handled kitchen knife that she kept there for protection. (T. 2553-54, 2631) Douglas testified that sometime after Christmas, she found the knife in her kitchen sink. (T. 2632) The knife tested positive for blood, but it could not be determined whether the blood was human. (T. 2684-85) Blood matching the victim’s type was found on the rubber molding on the trunk of the car. (T. 2644, 2686, 2688) Both the fingerprint and Ramirez’ watch tested positive for H and B antigens, consistent with a mixture of Ramirez’ perspiration and the victim’s blood, or with just Ramirez’ blood. (T. 2680, 2687) No other blood was found on

²*Miranda v. Arizona*, 384 U.S. 436 (1966).

Ramirez' clothing or sneakers. Samples of Ramirez' hair were not consistent with any of the hairs found on the victim's hands. (T. 2695-96) None of the money or other items missing from the Federal Express building were found. Ramirez testified that he did not kill Quinn. (T. 3208-09)

* * *

Frye Hearing

On remand, the trial court held a *Frye* hearing to determine whether the state would be allowed to present testimony that the knife found in Douglas' car — to the exclusion of any other knife in the world — was the murder weapon.

The State's lead witness was Robert Hart, who testified at Ramirez' first trial. Hart is a criminalist specializing in firearm and tool mark identification with the Metro-Dade Police Department. (R. 104) In 1983, Hart published an article that described a case in which he matched a knife to a wound in the victim's rib cartilage. (R. 110, 113) An identification is made by comparing striae, or lines, left by "pinpoint defects[s]" in a knife blade when it moves through the receiving material. (R. 115) Because cartilage is a slightly flexible, fairly uniform density material, it is capable of taking fine microscopic detail. (R. 125) Hart used "dip-pak" -- a very dense gelatin-like material -- to make test marks for comparison to the cartilage. (R. 115) In this case, he received a piece of Quinn's rib cartilage, and a suspect kitchen knife. (R. 136, T. 2803, 2883) Hart found a 1/2 inch long cross-section suitable for comparison. (R. 178, T. 2894) Hart made a test mark with the suspect knife in dip-pak, made casts of

both the cartilage and the test cut with Coe-flex, a dental impression material, and compared the two casts under a comparison microscope. (R. 129, 137) Hart did not test any other knife once he determined that the wound was made by the suspect knife, based on a comparison of the microscopic striae. (R. 141) Hart said it is irrelevant how many of a particular tool are produced, because identification is based on finding sufficient similarity to conclude that a mark was made by one tool to the exclusion of all others. (R. 160) Hart testified to a scientific certainty that if there were 2 million identical knives manufactured, he could conclude that the 1/2-inch long mark in this case was made by Ramirez' knife to the exclusion of all others. (R. 185)

Hart presumed that all knives are unique based on his knowledge of the manufacturing process and on published articles concluding that consecutively manufactured tools, including knife blades, show microscopic differentiation. (R. 144; 145) Hart testified that examiners do not require a minimum number of matching striations to make an identification and that it is possible for two striae to have enough detail to make an identification. (R. 157, 188, 159) The ability to identify similarities is developed by training, mostly by examining details under a microscope and "passing on this criteria" to new examiners. (R. 163-64) Hart testified that errors in lighting the microscope could never cause a false positive identification; it could only prevent an identification from being made. (R. 166-67)

The state also presented the testimony of four other toolmark examiners: (1) Monty Lutz of the Milwaukee crime lab (R. 209); (2) Lonny Harden, a private

consultant who had worked as a forensic scientist for the State of Alabama for 13 years (R. 263; S.R.); (3) William Conrad, a consultant under contract with the Washington, D.C., Police Department and former Senior Forensic Scientist in Roanoke, Virginia (R. 335); and (4) John Cayton, the Chief Forensic Firearm and Toolmark Examiner for the Regional Criminalistics Laboratory in Kansas City, Missouri, and past president of the Association of Firearm and Toolmark Examiners (“AFTE”) (R. 378, 396)

Three of these witnesses -- Harden, Cayton, and Conrad -- had conducted similar examinations on behalf of crime laboratories in other jurisdictions. (R. 209, 263, 280, 335, 339, 378, 387-88) In 1989, after conferring with Hart and examining his casts, Harden also positively identified Ramirez’ knife as the murder weapon. (R. 288, 290) These witnesses agreed that every knife is unique, and the same striae -- even on a 1/2 inch section of blade -- could never be made with two different knives, whether there were 100 or 10 million copies of that knife produced. (R. 220, 270, 272, 316, 363) A lay person would not be able to see the differences, except for obvious damage, even under the microscope. (R. 270)

These witnesses also agreed that there are no objective criteria or minimum number of matching striations required to make an identification. (R. 240, 250, 287, 353-54, 413) Rather, an examiner makes a subjective judgment, based on his experience and training. (R. 235, 297, 299, 363, 418a-19) They also testified that errors in the angle of the test mark or in lighting the comparison microscope could never result in false positives, only in the inability to make an identification, (R. 244,

291-92, 301-02, 355-56); once a match had been made, no further comparisons are attempted, because an identification necessarily excludes all other knives. (R. 255, 351, 370)

The defense presented Dr. Dale Nute, whose testimony had been excluded from the *Frye* hearing in *Ramirez II*. Nute had recently been awarded a doctorate in criminology from Florida State University. (R. 1089) Before that, he worked as a microanalyst and compression toolmark examiner for the Florida Department of Law Enforcement for 15 years. (R. 1089-90) Nute was familiar with the general principles of toolmark examination and the techniques used to make examinations, although he was not an expert in toolmarks and had testified only as to static toolmarks. (R. 1114-15) Nute's dissertation was on applying the scientific method to the forensic sciences. (T. 1101-02) He testified that knife mark identification had not been properly validated. (R. 1119) Because knife mark identification uses an unusual receiving material -- cartilage -- and involved a stabbing rather than a cutting motion, it could not be assumed that it would be as reliable as other toolmark comparisons. (R. 1129, 1132, 1145) Nute also maintained that it is not scientific to say "it was a match because I say so," rather than using objective criteria or at least articulating the bases for making an identification. (R. 1147)

Judge Bailey ruled that Hart's technique of matching wounds in cartilage to a specific knife is accepted within the scientific community of toolmark examiners. (R. 1211, 1214) She further found that the evidence was scientifically reliable because

there had been “a full scientific examination” of the principle that all knives are microscopically unique and of the suitability of human cartilage as a receiving material for knife marks. (R. 1214, 1217-18) The judge acknowledged that “this science relies to some degree on subjective interpretation,” but found that “[i]t is impossible . . . to create a false positive identification,” because “the items compared either match or not.” (R. 1225-27) The trial judge rejected Nute’s testimony because she found he had failed adequately to review the literature in the field, he was not an expert in comparing striated toolmarks, and “[n]o . . . authority or documentation was adduced” to support his definition of the scientific method. (R. 1220, 1229-30)

Hart and Harden both testified at trial to the scientific reliability of knife mark identification and, over defense objection, testified that Ramirez’ knife -- to the exclusion of all others in the world -- was the murder weapon. (T. 2788-2807, 2852-80, 2932-48) Conrad testified that Hart’s identification technique is accepted in the scientific community of toolmark examiners. (T. 2746-74)

Suppression Hearing

After the police arrested Ramirez, they got a warrant to search his girlfriend Douglas’ Renault, from which they recovered a wooden-handled knife and found apparent blood stains on the rubber molding of the trunk, both of which were introduced into evidence against Ramirez at trial, over defense objection. (R. 1455, 1458, 2867; T. 1976, 1981-84) The defense filed a motion to suppress before trial, asserting among other things that the warrant to search Douglas’ car was invalid. (R.

1414-19) The motion was denied. (R. 1496-1507)

Dolly Ballard's Testimony

The state moved before trial to admit the former testimony of Dolly Ballard, the crime scene technician, under section 90.804(1)(c), Florida Statutes, which provides that a declarant's former testimony may be admitted when he or she "has suffered a lack of memory of his or her subject statement so as to destroy the declarant's effectiveness as a witness at the trial." (R. 1480-82) In a telephonic hearing on the state's motion, Ballard said she remembered some of the details of collecting evidence at the Federal Express Office in 1983-84 and believed her recollection could be refreshed by reviewing her reports. (R. 2924-26) However, Ballard said, she had been under a great deal of stress due to family problems and often "blanks out" in the middle of conversations. (R. 2925, R. 2927-28) She later submitted an affidavit, stating she had taken medication in the past that had affected her memory. (R. 1722) The judge granted the state's motion, and Ballard's prior testimony was admitted at trial over defense objection. (R. 2934; T. 1508)

Kopec's Exhibits

During the trial, the defense called an expert, Robert Kopec, who testified that it was possible that Ramirez' bloody fingerprint, found on the door jamb to the break room, could have been created when blood spattered on a latent print left there at an earlier time. (T. 3090-97) He had conducted experiments, by putting grease or wax on his fingers, touching a surface to leave a print, then splashing blood on the print. (T.

3034-43, 3103-04) The state objected to the results of these experiments being admitted as demonstrative exhibits, and the trial judge excluded them as irrelevant and misleading. (T. 3006-07, 3058-59, 3060, 3064, 3100-02)

The Penalty Phase

During the penalty phase of the trial, the state presented evidence of Ramirez' 1976 conviction for armed robbery. (T. 3868-72) The state also presented victim impact testimony from Doreen Minnick, Mary Jane Quinn's mother, and Nancy Van Der Plate, a close friend. Minnick testified that she had an exceptionally close relationship with her daughter, who had been her best friend, that life "just isn't fun anymore" since Quinn was killed. (T. 3878-80) Van Der Plate, who lived with the Quinns from 1978 until shortly before Mary Jane Quinn was killed, testified that she misses Quinn, who was a very kind, generous, considerate person, who took in stray people, loved to cook and entertain, and was an active volunteer in her church and community. (T. 3881-84)

The defense presented testimony from five corrections officers, who had known Ramirez for many years, all of whom testified that he was a good inmate -- respectful and cooperative; none of them had known Ramirez to be violent or assaultive. (T. 3887, 3889, 3906, 3912-13, 4056-58, 4070-72)

Dr. Jonathan Sorensen, a criminologist at the University of Texas, Pan American in Edinburg, Texas, whose courses include correctional administration and research methods, testified that he had conducted and published actuarial studies of the future

dangerousness of prison inmates. (T. 4131, 4156) In one study, Sorensen tracked individuals who were released from death row after *Furman*; he also published two other studies based on empirical data collected from institutional files, parole records, and other records. (T. 4159-60) Sorensen looked at inmates' rates of misbehavior, their prison adjustment, and their rate of violence or recidivism on parole to determine whether a person is more or less likely to commit an offense in the future based on other groups of offenders with similar characteristics. (T. 4161)

The most salient factors include prior record or lack thereof; how the person behaved in prison; the strength of the inmate's relationship with his family, and the inmate's age, which is the single most significant factor, because the older the inmate, the less likely he is to be dangerous. (T. 4162, 4164, 4174) Defendants who are unwavering in their claims of innocence also tend to behave well in order to convince others of their innocence. (T. 4168)

Sorensen reviewed Ramirez' prison records, which were available for 9 or 10 of the 14 years he had been in prison for this offense. Ramirez had nine disciplinary reports (DRs) during that period, but none were for violent or assaultive behavior. (T. 4172-73) Sorensen noted that Ramirez' average of one DR per year was consistent with the average for inmates. (T. 4225, 4227) Sorensen contrasted this with Ramirez' record when he was incarcerated in 1976, at the age of 16, when he had a much higher rate of disciplinary infractions. (T. 4174) Sorensen was aware of shakedown reports finding Ramirez in possession of contraband items such as pens, an altered razor blade,

matches, a lighter, bleach, half a marijuana joint, and excessive sheets. (T. 4228-32)

During the prosecutor's voir dire, Sorensen testified that the criminal justice field makes predictions of future dangerousness all the time, and his empirical research had given him expertise in doing so. (T. 4176-77) However, when the prosecutor asked whether there was a "recognized field" of "a predictor of future dangerousness," Sorensen answered negatively and began to explain that clinical predictions of future dangerousness are disapproved. (T. 4176-77) Based on this response, the prosecutor objected to Sorensen offering an opinion. (T. 4177) The defense argued that Sorensen could be qualified as an expert in criminology, with expertise in statistics and empirical studies of prisoners. (T.4177-78, 4180-81) The trial judge ruled that he would allow Sorensen to state an opinion. (T. 4181)

Sorensen testified that, in his opinion, Ramirez had adjusted well to the prison environment, and there was no reason to believe he wouldn't do well over next few decades. (T. 4182) Based on Ramirez' age of 38, his behavior while incarcerated, his relationship with his family, and his claim of innocence, Sorensen believed Ramirez would not pose a danger to fellow inmates or officers. (T. 4182-83)

The defense also presented testimony from Ramirez' brother Leonard and his half-sisters Liz and Renee, his mother, Daisy Longworth, and aunt, Estella Collins. These witnesses testified that Joseph was the victim of repeated sexual abuse by his babysitter's teenage son, physical abuse by his mentally ill father, and emotional neglect by his mother. While Ramirez' mother, Daisy Longworth, worked long hours

as a maid to provide materially for her children, Liz described her mother as emotionally remote and angry. (T. 4110-12)

Every day, Mrs. Longworth sent Joseph, Leonard and Liz to “Mrs. Mary” Williams, a babysitter. (T. 3952, 4109) Mrs. Williams’ son, Ernest Moody, sexually abused Joseph and his brother and sister from the time Joseph was about eight. (T. 3981, 3984, 4028, 4046, 4109) Joseph’s Aunt, Estella, lived next door to Mrs. Mary, and Ernest would come over to her house. (T. 3984) She once caught Ernest in the bathroom with Joseph bent over and Ernest “going with him from the back.” (T. 3982-83) Leonard testified that he had been sodomized repeatedly by Ernest, in different locations. (T. 4028) Ernest also took Joseph off to different locations and when Ernest brought him back, Joseph would cry and refuse to talk or play with the other children. (T. 4028, 4046) Moody had also molested Liz. (T. 4109) The judge sustained objections to both Liz and Leonard providing any details of the abuse. (T. 4027-28, 4109)

Leonard said the repeated sexual assaults had “deteriorated” his mind. (T. 4028) He became a male prostitute, abused drugs, and shoplifted; he had trouble keeping legitimate jobs. (T. 4029) He was treated for mental illness and had a nervous breakdown. (T. 4034) Leonard believed the sexual abuse had also ruined Joseph’s mind and caused him a great deal of emotional distress. (T. 4046) Liz, whose life has had more financial and domestic stability than her brothers’, testified that the childhood sexual abuse and her mother’s emotional unavailability had caused her continuing

emotional problems and she still required counseling. (T. 4112-13, 4121, 4123, 4126, 4128) The court sustained the state's objection to Liz testifying further about the effect of the sexual abuse on her or Leonard. (T. 4116-21)

The sexual abuse continued until, when Joseph was 11 or 12 years old, he and Leonard were sent to live with their father in Gainesville. (T. 3958-59, 3982) Their father had not lived with the family from the time of his 2-year involuntary hospitalization, when Joseph was a toddler; until the boys moved in with him, they had only visited him during summers and on holidays. (T. 3961-62) During one such visit, when Joseph was about six, his father had beaten him badly. (T. 3987) Leonard testified that living in Gainesville was difficult because their father and stepmother yelled and screamed at them and the boys' father beat them with an iron or extension cord. (T. 3957, 4032, 4039) The boys called their Aunt Estella from Gainesville about the beatings, which left scars and marks on Joseph's body. (T. 3963, 3987) After six to nine months, Joseph and Leonard returned home to Tampa because of the beatings. (T. 3962, 4037) Joseph began getting into trouble frequently when he returned from Gainesville. (T. 3959-60, 3982) He cut school about half the time and became involved with older women. (T. 3964, 3998-99)

Both Liz and Leonard testified that Joseph had been their protector when they were young. When Joseph was 8, he had protected Liz from his Aunt Estella's dogs, who attacked Joseph and bit off most of his ear and almost struck his jugular vein. (T. 3958-59, 4108) Joseph was hospitalized, and the doctors told his mother he could have

been killed. (T. 3958) Joseph also intervened to protect Liz from neighborhood bullies who attacked her after school, taking a blow across the chest with a 2x4. (T. 4108) Liz still relies on Joseph to help her with her difficult relationship with their mother. (T. 4122-23)

Ramirez' wife, Brezetta, and his son Joseph Lopez, also testified. Brezetta met Ramirez in 1983 before he was incarcerated. (T. 4088) They continued their friendship after Ramirez was arrested, and throughout his incarceration and were married in 1992. (T. 4090, 4097) Brezetta testified that Ramirez has been a source of emotional support for her, including when her mother and brother passed away and through her own health problems. (T. 4090-91) Ramirez had encouraged Brezetta to get her real estate license, and watched real estate shows on television so he could talk to her about her work. (T. 4096-97)

When Ramirez was in Miami awaiting his second trial, he arranged for his children, Joseph and Chantelle, to come visit him together. (T. 4092) The children continued to visit Ramirez and spoke to him almost daily by phone. (T. 4093) Ramirez encouraged the children to work hard in school and to be obedient at home. (T. 4094) Brezetta described Ramirez' tearful response the first time his daughter called him "dad." (T. 4095) Joseph Lopez testified that he spoke to his father every day or every other day, and that his father is a positive influence in his life. (T. 3975-76) Ramirez counsels his son to stay out of trouble, not to be a follower, and to stay in school. (T. 3976) Joseph wanted to testify because of what his father means to him. (T. 3976)

The state presented a rebuttal witness who verified that, before this crime, Ramirez had acknowledged committing domestic batteries against Dolores Douglas and Sharon Lopez, (T. 4363-68); they also called a Corrections official, Rene Villa, who testified about the possible uses of the contraband found in Ramirez' cell, (T. 4370-73); and Ramirez' former classification officer, Ted Key, who testified that Ramirez' 8 DRs while in Florida State Prison and Union Correctional Institution were all in the least serious category. (T. 4356-57)

During defense counsel's closing argument, after referring to Ramirez' claim of innocence as incentive for good behavior, he stated, "And if the gods of science are proven wrong, if they come up with DNA that's different, the finality of the death sentence doesn't help him at all. And I don't think there will be fourteen happier people on this world if it was proven down the road you were wrong. (T. 4423-24) The prosecutor's lingering doubt objection was sustained, and the jury was instructed immediately to disregard the remark. (T. 4424) Defense counsel's motion for a special verdict form was denied. (T. 3778-79; R. 1977)

The jury returned a recommendation of life imprisonment. (R. 2117) At the *Spencer* hearing, defense counsel filed an affidavit from a juror, who had contacted him after the trial, which stated that the jury recommended life by a vote of 9 to 3 and had based its recommendation on Ramirez' nonviolent prison record, the evidence of childhood physical and sexual abuse and neglect, and Ramirez' positive influence in his family. (R. 2404-05) The state objected to the affidavit, and the Court refused to

consider it. (R. 4471-75)

The state argued at the *Spencer*³ hearing, and in its sentencing memorandum, that the jury's recommendation should be disregarded because it was tainted by Sorensen's testimony, which should not have been admitted under *Frye* and *Flanagan*, by sympathy for the defendant's family, and by defense counsel's improper closing argument. (T. 4477-78, 4480; R. 2168, 2174-79)

Sentencing Order

In his sentencing order, the trial judge found five aggravating circumstances, two of which were merged: (1) prior violent felony conviction⁴ (T. 2463); (2) felony-murder⁵ (T. 2464); (3) avoiding arrest⁶ (T. 2466); (4) pecuniary gain⁷ (T. 2466-67); and (5) heinous atrocious or cruel⁸ ("HAC"). (T. 2467) With respect to HAC, the trial court stated that it "does not find beyond a reasonable doubt that the defendant killed Mary Jane Quinn with the desire to inflict a high degree of pain with utter indifference to, and even the enjoyment of her suffering." (R. 2467) The pecuniary gain and felony murder aggravators were merged. (R. 2466-67)

³*Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

⁴§ 921.141(5)(b), Fla. Stat. (1997).

⁵§ 921.141(5)d), Fla. Stat. (1997).

⁶§ 921.141(5)(e), Fla. Stat. (1997).

⁷§ 921.141(5)(f), Fla. Stat. (1997).

⁸§ 921.141(5)(h), Fla. Stat. (1997).

The trial judge found no statutory mitigating circumstances and, with respect to nonstatutory mitigation, found that the defense had failed to establish a mitigating circumstance of adjustment to prison and lack of future dangerousness. He found that Dr. Sorensen's opinion testimony should never have been admitted under *Frye* and *Flanagan v. State*, 625 So. 2d 827 (Fla. 1993), and therefore disregarded it. (R. 2475-76) The judge rejected Ramirez' prison record as a mitigating circumstance based on the contraband found in his cell. (R. 2476) He also cited two episodes of "aggressive" and "passive-aggressive" courtroom behavior. (R. 2477)

The judge was not reasonably convinced of the mitigating circumstance that the defendant was under the influence of alcohol and marijuana at the time of the crime. (R. 2478) The judge found that the mitigating circumstances of physical and sexual abuse had been reasonably established but gave these factors "very little weight." (R. 2481) The court rejected as a mitigating circumstance that the defendant's mother had been unable to show affection. (R. 2481-82) Finally, the judge found that the defendant reasonably established that he is a positive influence on his children and supportive of his wife but gave that mitigating circumstance "minimal weight." (R. 2483)

Weighing the jury's "recommendation with the other mitigating circumstances," the judge found "the aggravating circumstances to outweigh the mitigating circumstances." (R. 2484) Because he found the mitigating circumstances to be "minor and nonstatutory," the judge concluded that "the jury's recommendation could

only have been based on an improper argument or on sympathy or both.” (R. 2487)
This appeal followed.

SUMMARY OF ARGUMENT

The trial court erred in allowing the state’s experts to testify that the knife found in Ramirez’ car -- to the exclusion of any other knife in the world -- was the murder weapon, when the state failed to present any evidence that the reliability of knife mark identification had ever been tested and relied instead on the examiners’ own unsubstantiated claims that, although their identification technique is entirely subjective, it is impossible to make a false positive identification.

The trial court also erred in excluding demonstrative exhibits that would have illustrated the defense expert’s testimony that Ramirez’ bloody fingerprint on the door jamb could have been created when blood splashed on a pre-existing latent print. The knife itself was improperly admitted into evidence because the police lacked probable cause to search Ramirez’ car. Appellant’s confrontation rights were violated when the trial court allowed the state to introduce the former testimony of the crime scene technician without insufficient evidence that she was “unavailable” due to a lack of memory.

With respect to the penalty phase, the trial court improperly overrode the jury’s 9 to 3 recommendation of life imprisonment when the defense presented abundant mitigating evidence through 14 witnesses whose testimony established that Ramirez had been repeatedly sexually abused by his babysitter’s teenage son from the time he

was 8 years old; had been physically abused by his mentally ill father; and had been emotionally neglected by his mother; that during his 14-year incarceration for this offense he had adapted well to prison; that he did not represent a danger in the future; that he was a source of great emotional support and encouragement to his siblings, wife, and children; and that he was under the influence of alcohol and marijuana at the time of the offense. The trial judge improperly attributed the jury's recommendation to sympathy for appellant's family and to defense counsel's fleeting reference to lingering doubt in closing argument -- which the jury was immediately instructed to disregard -- because he disagreed with the jury's weighing of aggravating and mitigating circumstances.

The trial judge improperly found the HAC and avoid arrest aggravators when he concluded specifically that the state had *not* established an essential element of HAC, and the evidence was insufficient to establish that the sole or dominant motive for the homicide was to eliminate a witness. At a minimum, the jury could have properly given these aggravators little weight. The trial court also improperly restricted defense counsel's efforts to elicit mitigating evidence from appellant's family members, frustrating both appellant's rights and this Court's goal of obtaining more complete sentencing information for its own proportionality review. Finally, the trial judge improperly denied defense counsel's request for a penalty phase special verdict form, which would have memorialized the bases for the jury's recommendation, and then overrode the jury's life recommendation based on speculation that it must have been

influenced by improper factors.

ARGUMENT

I.

THE TRIAL COURT ERRED IN ADMITTING TESTIMONY THAT IDENTIFIED THE KNIFE FOUND IN APPELLANT'S CAR TO THE EXCLUSION OF ANY OTHER KNIFE IN THE WORLD AS THE MURDER WEAPON WHEN THE STATE FAILED TO PROVE THAT SUCH TESTIMONY WAS SCIENTIFICALLY RELIABLE.

For the third time in this case, the prosecution presented expert testimony asserting that the 1/2 inch stab wound to the victim's rib cartilage could have been made *only* by the knife found in Ramirez' car, to the exclusion of any other knife in the world. This Court has twice suggested that the prosecution was free to "introduc[e] Ramirez's knife into evidence and present[] testimony that the wounds on the victim were consistent with that knife" but made clear it could not introduce testimony that Ramirez' knife -- and no other -- was the murder weapon without first establishing the scientific reliability of that opinion. *Ramirez II*, 651 So. 2d at 1167; *Ramirez I*, 542 So. 2d at 355.

In the 10 years since *Ramirez I* was decided, the State of Florida has still failed utterly to establish the scientific reliability of knife mark identification.⁹ While it would

⁹In that time, a growing body of scholarly literature has called for greater scrutiny of the type of evidence presented in this case, precisely because it lacks empirical validation or any other indicia of scientific reliability. *See, e.g.*, Erica Beecher-Monas, *Blinded by Science: How Judges Avoid the Science in Scientific Evidence*, 71 TEMP. L. REV. 55, 97-100 (1998); Michael J. Saks, *Merlin and Solomon: Lessons from the Law's Formative Encounters with Forensic Identification Science*, 49 HASTINGS L. J. 1069 (1998); Paul C. Giannelli, *The Abuse of Scientific Evidence in Criminal Cases:*

be remarkably simple, as discussed below, to test in a controlled, blind study whether examiners can indeed accurately determine which of a number identical knives made a ½ inch stab wound in human cartilage, *no such tests have ever been conducted*. Instead, the state has continued to rely on the completely unsubstantiated claims of certainty and infallibility put forth by a handful of examiners who have promoted the technique of forensic knife mark identification.

The Testimony Below

Whereas in the first trial the state presented only the “self-serving” testimony of Robert Hart, a tool mark examiner with the Metro-Dade crime lab, *Ramirez I*, 542 So. 2d at 355, it has now supplemented Mr. Hart’s testimony with the equally self-serving testimony of four other tool mark examiners -- Monty Lutz, Lonny Harden, William Conrad and John Cayton -- three of whom have conducted similar examinations on behalf of crime laboratories in other jurisdictions. (R. 209, 263, 280, 335, 339, 378,

The Need for Independent Crime Labs, 4 VA. J. SOC. POL’Y & L. 439 (1997); Clive A. Stafford Smith et al., *Forensic Hair Comparison Analysis: Nineteenth Century Science or Twentieth Century Snake Oil*, 27 COLUM. HUM. RTS. L. REV. 227 (1996); D. Michael Risinger et al., *Science and Nonscience in the Courts: Daubert Meets Handwriting Identification Expertise*, 82 IOWA L. REV. 21 (1996); Randolph N. Jonakait, *Real Science & Forensic Science*, 1 SHEPARD’S EXPERT & SCIENTIFIC EVIDENCE Q. 435 (1994); David L. Faigman et al., *Check Your Crystal Ball at the Courthouse Door, Please: Exploring the Past, Understanding the Present, and Worrying About the Future of Scientific Evidence*, 15 CARDOZO L. REV. 1799 (1994); Margaret A. Berger, *Procedural Paradigms for Applying the Daubert Test*, 78 MINN. L. REV. 1345, 1352-63 (1994); Paul C. Giannelli, *Scientific Evidence in Criminal Prosecutions*, 137 MIL. L. REV. 167 (1992); Michael J. Saks et al., *What DNA “Fingerprinting” Can Teach the Law About the Rest of Forensic Science*, 13 CARDOZO L. REV. 361 (1991); Randolph N. Jonakait, *Forensic Science the Need for Regulation*, 4 HARVARD H. L. & TECH. 109 (1991).

387-88) Harden also positively identified Ramirez' knife as the only knife that could have made the stab wound. (R. 290) Lutz, Conrad and Cayton testified that Hart's technique of knife mark identification is generally accepted among toolmark examiners. (R. 227-28, 341-44, 402)

To make the identification, the medical examiner first removed a piece of the victim's rib cartilage and preserved it in a formaldehyde solution. (R. 129, T. 2209) Hart was later given the suspect knife — a kitchen knife that Ramirez' girlfriend kept in her car — to compare to the cartilage. (R. 180) Hart found that a 1/2 inch-long section of the cartilage had retained sufficient detail for comparison, cleaned the tissue from the cartilage, dissected it, and made a cast using Coe-flex, a dental impression material. (R. 178, 1801; T. 2809, 2853) Hart then made test marks with the suspect knife, by stabbing the knife into “dip-pak” -- a very dense gelatin-like material -- attempting to replicate the angle of the wound. (R. 115, 137-38) He then made casts of those marks with Coe-flex and compared them with the casts of the cartilage under a comparison microscope. (R. 137-38)

An identification is made by comparing striated marks, or lines, left by microscopic defects in the knife blade when it moves through the receiving material. (R. 115) A match is declared if there is “sufficient similarity” in the striated marks for the examiner to conclude that, “in our opinion this similarity cannot be due to

coincidence, the similarity can only be due to a common origin.”¹⁰ (R. 163) Each of these witnesses acknowledged that this determination is entirely subjective, that there are no minimum number of matching striae or other objective criteria that they apply to make an identification.¹¹ (R. 157, 164, 235, 240, 250, 287, 300, 353-54, 413, 418a-19) Nor do they require any particular percentage of agreement between compared striae. (R. 297-98, 363) Rather, they base their subjective judgments solely on their experience and training. (R. 163-64, 297, 299, 363, 418a-19) They do not use photographs to illustrate their comparison for a jury, because lay persons would not be able to interpret the marks. (R. 353, T. 2897, 2941) Hart and Harden do not even take any notes describing the bases for their identification. (T. 2907, 2957-58) Each of the state’s witnesses also testified that errors in their comparison technique would never result in a false positive identification, only in the inability to make an identification. (R. 166-67, 244, 292, 301-02, 355-56) The witnesses testified that it was unnecessary

¹⁰Identification can be made with respect to “class characteristics” -- features that would be shared by a particular type or design of tool, or “individual characteristics” -- which are “random imperfections or irregularities of tool surfaces,” considered “unique to that tool.” DAVID L. FAIGMAN ET. AL., MODERN SCIENTIFIC EVIDENCE 132 n.3 & 152.

¹¹At trial, Hart conceded that some examiners are attempting to develop objective criteria for toolmark identification but asserted that such standards were not generally accepted in the field. (T. 2892) The research to which Hart was referring is set out in detail in Alfred Biasotti & John Murdock, *The Scientific Basis of Firearms and Toolmark Identification* in 2 DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE 131 (1997). The defense expert, Dr. Nute, had relied in part on Biasotti’s research in contending that it would be possible to develop more objective identification criteria. (R. 1150)

to engage in any further testing once they made a “match” because an identification necessarily excluded all other tools in the world. (R. 141, 255, 293, 351, 370)

Despite this extraordinary claim of certainty and infallibility, the state presented no evidence that the reliability of knife mark identification had ever been subject to controlled blind testing. Moreover, while the witnesses testified that tool mark examiners are subject to periodic proficiency tests, the state did not present any evidence that such testing included the identification of knife marks. (R. 109, 317-19, 419-20)

The defense expert, Dr. Nute, was a forensic science consultant who had worked as a microanalyst and compression toolmark examiner for the Florida Department of Law Enforcement for 15 years. (R. 1089-90) He had a doctorate in criminology from Florida State University, with a dissertation on the application of the scientific method to forensic science. (R. 1089, 1100-02) He contended that the identification technique at issue was not “scientific” because it was highly subjective and had not been adequately tested. (R. 1134-35, 1139, 1148, 1156-57, 1162)

The Trial Court’s Order

The trial court concluded in pertinent part that the technique of matching wounds in cartilage to a specific knife in the manner employed by Hart is accepted within the scientific community of toolmark examiners. (R. 1211, 1214) The trial judge further found that the evidence was scientifically reliable because there had been “a full scientific examination” of the principle that all knives are microscopically unique and

of the suitability of human cartilage as a receiving material for knife marks. (R. 1214, 1217-18) While acknowledging that “this science relies to some degree on subjective interpretation,” the court nevertheless found that “[i]t is impossible . . . to create a false positive identification,” because “the items compared either match or not.” (R. 1225-27)

The trial judge rejected Nute’s testimony because she found he had failed adequately to review the literature in the field, he was not an expert in comparing striated toolmarks, and “[n]o . . . authority or documentation was adduced” to support his definition of the scientific method. (R. 1220, 1229-30)

Standard of Review

A trial court’s *Frye* determination is reviewed de novo. *Hadden v. State*, 690 So. 2d 573, 579 (Fla. 1997); *Brim v. State*, 695 So. 2d 268, 274 (Fla.1997). The appellate court’s determination is made as of the time of the appeal. *Hadden*, 690 So. 2d at 579.

ANALYSIS

The Applicable Legal Standard

The trial judge applied the *Frye* test but, because the defense had specifically challenged the *reliability* of the underlying comparison methodology, she also drew on elements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Appellant agrees that *Daubert* provides useful guidance in assessing “the soundness of the science” at issue, (R. 1222), but disagrees with the trial court’s application of *Daubert*’s principles.

This Court has stressed that “[t]he principal inquiry under the *Frye* test is whether the scientific theory or discovery from which an expert derives an opinion is reliable.” *Ramirez II*, 651 So. 2d at 1167; accord *Hadden*, 690 So.2d at 578. Indeed, the Court has retained the *Frye* standard because it arguably imposes a “higher standard of reliability” than *Daubert*.¹² *Brim*, 695 So.2d at 271-72 (citing *Ramirez II*).

Frye is more stringent than *Daubert* insofar as it assumes that a particular method must pass through the crucible of rigorous scientific examination and debate before it is generally accepted. See Jay P. Kesan, Note, *An Autopsy of Scientific Evidence in a Post-Daubert World*, 84 GEO. L.J. 1985, 1990 (1996); Paul C. Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half Century Later*, 80 COLUM. L.REV. 1197, 1225 (1980). As the U.S. Supreme Court has noted, however, general acceptance is not a proxy for reliability if “the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy.” *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1175 (1999).

In this case, the critical issue was whether the “discipline” of knife mark

¹²This Court has taken that standard of reliability seriously. See, e.g., *Murray v. State*, 692 So. 2d 157, 164 (Fla. 1997) (finding that state failed to carry its burden as the proponent of PCR DNA testing); *Hadden*, 690 So. 2d at 579-80 (testimony regarding child sexual abuse accommodation syndrome not admissible under *Frye*); *Hayes v. State*, 660 So. 2d 257, 264 (Fla. 1995) (DNA “band-shifting” technique had not attained general acceptance); *Flanagan*, 625 So. 2d at 828 (pedophile profile evidence did not satisfy *Frye*); *Stokes v. State*, 548 So. 2d 188, 195-96 (Fla. 1989) (hypnotically refreshed testimony did not satisfy *Frye*).

identification is itself scientifically reliable. *Daubert*'s discussion of the scientific method is useful and relevant to answering that question. *Daubert* suggested four relevant criteria for determining the scientific reliability of the theory or technique underlying the proffered expert testimony: (1) whether it can be (and has been) tested; (2) the known or potential error rate; (3) whether it has been subjected to publication and peer review; and (4) general acceptance by the relevant scientific community. *Daubert*, 509 U.S. at 593-94. Applying *Daubert*'s guidelines correctly, it is apparent that the state has failed to establish the scientific reliability of the knife mark identification evidence presented at trial.

4. Testing and Falsifiability

The most glaring weakness in establishing the reliability of knife mark identification is that it has never been adequately tested. Testing is particularly important in a field such as knife mark examination because its practitioners have a strong institutional bias; the identification technique itself is extremely subjective; and it makes extraordinarily strong claims about the significance and reliability of an identification.

In *Daubert*, the Court emphasized that “[s]cientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry.” *Daubert*, 509 U.S. at 593. Because rigorous testing is the *sine qua non* of the scientific method, it is perhaps the most important single criterion in determining the reliability

of scientific or technical evidence.¹³ 1 DAVID L. FAIGMAN ET. AL., *supra*, at 20 & n.47 (noting that courts generally treat testability as a prerequisite to reliability rather than just another factor under *Daubert*). This Court has similarly recognized that “adequate studies on the accuracy and reliability” of a forensic technique may be a prerequisite to establishing its scientific reliability under *Frye/Ramirez*. *Hayes*, 660 So. 2d at 264 (quoting National Research Council’s (“NRC”) 1992 report, DNA TECHNOLOGY IN FORENSIC SCIENCE and concluding that the reliability of band shifting in DNA identification had not yet been sufficiently established). As *Kumho Tire* makes clear, it is not the reliability of the general theory (in this case, toolmark examination) that must be established, but the reliability of its specific application to the disputed issue in the case (identification of knife wounds in cartilage). 119 S.Ct. at 1177 (issue was not reasonableness of visual and tactile inspection of tire but of using such approach to conclude that tire defect caused tread to separate in this case).

The “field” of knife mark identification rests on the hypotheses that all knives

¹³Some techniques that have been admitted without adequate testing by disinterested parties have proven to be highly unreliable when subject to greater scrutiny. *See, e.g.*, Giannelli, *Scientific Evidence in Criminal Prosecutions*, *supra*, at 174-76 (discussing demise of the paraffin test, voiceprints, and hypnotically-refreshed testimony). Recent cases have also called into question the reliability of forensic document examination and hair comparison. *United States v. Starzeczyzel*, 880 F.Supp. 1027, 1037 (S.D.N.Y. 1995) (handwriting); *Williamson v. Reynolds*, 904 F.Supp. 1529, 1557 (E.D.Okla. 1995) (hair comparison), *rev’d in part & aff’d on other grounds*, 110 F.3d 1508 (10th Cir. 1997). While the court of appeals reversed the district court’s holding in *Williamson* on the ground that *Daubert* did not apply on federal habeas review of a state court evidentiary ruling, 110 F.3d at 1523, the district court’s *Daubert* analysis is instructive.

are microscopically unique and can be identified by the marks they leave in an appropriate receiving medium.

The Principle of Uniqueness

The trial judge found that the state had established “the principle of the uniqueness of knives, consistent with tool mark theory, by introducing a study of two consecutive knives straight off the factory assembly line which still had microscopically unique characteristics subject to differentiation in tool mark analysis.”¹⁴ (R. 1214)

In *Brim*, this Court remanded for a *Frye* hearing on the population frequency statistics used to explain the significance of a “match” between two DNA samples, noting that the NRC’s 1992 report had stated:

Unlike many of the technical aspects of DNA typing that are validated by daily use in hundreds of laboratories, the extraordinary population-frequency estimates sometimes reported for DNA typing do not arise in research or medical applications that would provide useful validation of the frequency of any particular person's DNA profile. Because it is impossible or impractical to draw a large enough population to test calculated frequencies for any particular DNA profile much below 1 in 1,000, *there is not a sufficient body of empirical data on which to base a claim that such frequency calculations are reliable or valid per se.*

695 So. 2d at 271 (quoting DNA TECHNOLOGY IN FORENSIC SCIENCE at 77) (emphasis added). The same report cautioned that “an expert should — given the relatively small

¹⁴The Court was referring to two articles introduced by the state at the *Frye* hearing: Donald J. Watson, *The Identification of Tool Marks Produced from Consecutively Manufactured Knife Blades in Soft Plastics*, 10 ASSOC. FIREARM & TOOLMARK EXAM. J. 43 (1978) (S.R. 10); Y.J. Tuira, *Tire Stabbing with Consecutively Manufactured Knives* 14 ASSOC. FIREARM & TOOLMARK EXAM. J. 50 (1982) (S.R. 14).

number of loci used and the available population data — avoid assertions in court that a particular genotype is unique in the population.” DNA TECHNOLOGY IN FORENSIC SCIENCE at 92. The experts in this case made precisely such a claim of absolute uniqueness, based on two “studies,” each consisting of a sample size of exactly two knives — a much slimmer empirical basis than the DNA databases deemed insufficient by the NRC in 1992.¹⁵

¹⁵“Uniqueness” is really a question of the probability that a particular combination of characteristics will recur by chance:

The essential idea of this concept is that if objects vary on a number of independent (i.e. uncorrelated) dimensions, the probability of occurrence of any one combination of characteristics is found by multiplying together the probabilities associated with each dimension. . . . [T]he next step in the argument -- and it is offered by the progenitors of each forensic identification subfield -- is to . . . leap into concluding that no two . . . toolmarks . . . or whatever could be alike.

Saks, *supra*, at 1086. The problem, as Saks notes, is that in fields other than DNA, forensic scientists have not collected the data to produce valid statistical probabilities. *Id.* at 1087-88. Moreover, by claiming absolute uniqueness, they can avoid acknowledging “that there is a measurable probability of coincidental matches.” *Id.* at 1083 n. 65. For example, in this case, the experts asserted that it was irrelevant to their opinion how many knives of the same model had been manufactured. (R. 185, 220, 316, 363) As an elementary principle of probability, however, the more knives that were manufactured, the greater the chance that a particular combination of microscopic features *could* recur by chance -- particularly given the very small portion of the blade that was at issue -- approximately 1/2 inch.

The Reliability of the Identification Technique

Even if the hypothesis of uniqueness is taken as a given, however, the identification technique itself must still be proven reliable. The state's witnesses acknowledged that the bases for declaring a "match" are entirely subjective.¹⁶ "The greater the subjectivity" of an identification technique, "the greater the chance for error." See Paul C. Giannelli, *Scientific Evidence in Criminal Prosecutions*, 137 MIL. L. REV. 167, 183 (1992); cf. *Kumho*, 119 S.Ct. at 1177 (trial judge was properly concerned by expert's "repeated reliance on the 'subjective[ness]' of his mode of analysis in response to questions seeking specific information" about how he reached his conclusions). Moreover, identifications are typically made in suggestive circumstances -- more akin to a "show-up" than a "line-up" -- that maximize the possible effects of bias and further increase the likelihood of error.¹⁷ Consequently, it

¹⁶ At one point during Hart's testimony at the *Frye* hearing, the trial judge observed, "you keep using the word criteria, but from what you are telling me, there isn't a criteria. There is a sense that you have enough training, you look at it and you say this is a match, this is not a match." (R. 164) Hart agreed that this was "basically . . . correct." (R. 164)

¹⁷A study of hair comparison -- which is similarly subjective -- found a 30.8% error rate, when the examiner used a "show-up" technique -- comparing a questioned hair from a crime scene with known hair samples from a suspect. Jonakait, *Forensic Science: The Need for Regulation*, *supra*, at 161-62. The error rate was only 3.8% when a "lineup" method of comparison was used, in which examiners were presented with hair from a crime scene and samples from five possible suspects. *Id.* The researcher concluded that the show-up method of comparison, which is most commonly used by practicing examiners, "may encourage unintentional bias on the part of the examiner." *Id.* The possible influence of bias is exacerbated if the examiner is also given background information about the case.

In this case, while he did not recall the conversation specifically, Hart presumed

is even more important to determine whether toolmark examiners employing these subjective criteria are able to make identifications as accurately as they claim. No such testing has ever been conducted in the field of knife mark identification.

In addressing the issues of falsifiability and testing, the trial judge acknowledged that “this science relies to some degree on subjective interpretation,” but nevertheless concluded that “[i]t is impossible . . . to create a false positive identification,” because “the items compared either match or not.” (R. 1225-27) This reasoning, however, stands the concept of falsifiability -- testing hypotheses by trying to disprove them -- on its head because it simply accepts as true the examiners’ claim of infallibility, which is precisely what must be tested in order to establish the reliability of the identification technique.¹⁸

While the trial judge noted correctly that German pathologists had conducted experiments using stab wounds to human cartilage, these studies concluded merely that knife mark identification may be possible; they did not purport to test whether such identifications could be accurately and reliably made. (R. 1215-18) The strongest

that he spoke to the homicide detective before making the comparison and would have been told a suspect was arrested. (T. 2883) Harden, who confirmed Hart’s identification had the additional information that he was to review a match already made by a fellow examiner.

¹⁸The trial judge bolstered her conclusion by relying on *Bundy v. State*, 455 So. 2d 330, 349 (Fla. 1984), for the proposition that identification evidence may be admissible “even though it does not result in identifications of absolute certainty as fingerprints do.” (R. 1226) Of course, as this Court held in its two prior opinions, the problem with the state’s evidence in this case is precisely that it *does* claim the same “absolute certainty” as fingerprints, without any empirical support.

claim in any of these articles merely proposes the hypothesis that: “Since even brand-new knives *may* show micronotches due to the grinding process, one can *almost always* count on finding individual marking patterns.” Wolfgang Bonte, *Tool Marks in Bones and Cartilage* 20 J. FORENSIC SCI. 315 (1975) (R. 1291) He concludes that “stab wounds in cartilage . . . frequently permit estimation of the type of implement and, moreover, *sometimes* enable the individual identification of the tool used.”¹⁹ *Id.* (R. 1296) Bonte did not purport to test the ability of examiners to reliably and accurately make such individual identifications.

Indeed, in each of the German experiments, the examiners were specifically looking for differences in marks made by knives known to be different. *See Tool Marks in Bones and Cartilage, supra*; Bosch, *supra*; *Considerations on the Identification of Notch Traces, supra*. The same is true of the comparisons of marks made by consecutively manufactured knives. Watson, *supra*; Tuira, *supra*. While such

¹⁹The other two articles are even more limited in their conclusions. Kyrill Bosch examined stab wounds made in human cartilage and organs with different types of serrated knives. Kyrill Bosch, *On Stabbing and Cutting Wounds from Knives with Serrated Blades*, 54 GERMAN JOURNAL FOR THE ENTIRE FORENSIC MEDICINE 273-85 (1963) He concluded that “[s]pecific statements could be made concerning the finish of the blade surfaces, the tip area, and the base of the wound.” (R. 1238) That is, it was possible to identify the class characteristics of the knives that made the wounds. In his 1972 article, Wolfgang Bonte concluded that it was possible to identify a specific knife based not only on its class characteristics, but on notches -- defects caused by prior use -- which left traces in the wound. Significantly, Bonte noted that the two knives he tested “with a straight blade without any special bevel left very smooth cut surfaces without notch traces.” Wolfgang Bonte, *Considerations on the Identification of Notch Traces from Stabbing Injuries*, 149 ARCH-KRIMINOL 77 (1972) (R. 1262) The knife at issue in this case was precisely the same type of smooth kitchen blade that left no identifiable traces in Bonte’s experiments.

experiments are critical to establish the possibility of knife mark identification, they tell us nothing about its reliability.

The reliability of a technique can be established only by controlled, blind testing, considered essential in the scientific community to eliminate the possibility of bias. In this context, an examiner could be given a substantial sample of identical knives (“controls”) and asked to determine which of them made a particular mark in cartilage, without being given any background information that could influence his conclusion (thus making the examiner “blind”).

It is well understood in scientific research that “[s]cientists are subject to self-deception or forms of experimental bias that they cannot reasonably be expected to control” and “science that relies heavily on human observation skills is especially prone to the self-deception phenomena.” Robert M. Anderson, *The Federal Government’s Role in Regulating Misconduct in Scientific and Technological Research*, 3 J.L. & TECH. 121, 128-29 (1988). Blind studies have “become standard practice” in human and animal experimentation to prevent such bias from affecting the results of the research. *Id.*; see also Stafford-Smith, *supra*, at 242 & n. 62.

The “discipline” of knife mark identification has thus far refused to subject itself to controlled, blind studies that could validate — or disprove — its extraordinary claims of certainty and reliability. Indeed, notwithstanding the highly subjective nature of the identification technique and the extremely suggestive circumstances in which it is carried out, the state’s experts explained that the field is so confident of its own

infallibility that it has defined its accepted practices to *exclude* the use of controls to test the validity of an identification.²⁰ This, quite simply, is not real science, let alone reliable science. As the *Starzecpyzel* court observed, “an unknown error rate does not necessarily imply a large error rate. However if testing is possible, it must be conducted if” the discipline “is to carry the imprimatur of ‘science.’” 880 F.Supp. at 1037.

5. **Error Rates**

Just as there has been no testing of the validity of the technique of knife mark identification, there has also been no proficiency testing of the examiners who make such comparisons. *See Berger, supra*, at 1358-59 (explaining difference between validity testing of methodology and proficiency testing of its application). As one commentator has noted:

[L]ack of data . . . does not mean that the tests are performed perfectly. No scientific test is perfect. The potential for error exists in any measurement. Meaningful scrutiny of a technique should normally result in information about its error rate. *A technique with an unknown error rate is a technique that has not been adequately tested.*

Jonakait, *Real Science and Forensic Science, supra*, at 446 (emphasis added).

6. **Peer Review & Publication**

The *Daubert* court included peer review and publication as a factor “relevant,

²⁰The state’s experts explained that, because an identification necessarily excludes all other knives, it is the accepted practice in the field to cease investigation once a “match” has been declared. (R. 141, 255, 293, 351, 370) That is, because the examiners know they cannot be wrong, they consider it unnecessary to test their conclusions by using a control. This, again, is the antithesis of falsifiability.

though not dispositive” in determining scientific reliability because “submission to the scrutiny of the scientific community is a component of ‘good science,’ in part because it increases the likelihood that substantive flaws in methodology will be detected.” 113 S.Ct. at 2797.

In *Starzecpyzel*, 880 F.Supp. at 1038, the court noted that, while several articles were proffered, they were notable “in their lack of critical scholarship.” The Court concluded:

the literature of forensic document examination . . . fails to meet the expectations of the *Daubert* court--that a competitive, unbiased community of practitioners and academics would generate increasingly valid science. Given the uncritical nature of the literature, its scrutiny during peer review, on which there was no testimony, is of little significance.

Id. Exactly the same is true in this case. The articles submitted by the state at the *Frye* hearing in this case are uncritical, even self-congratulatory, anecdotal accounts of examiners’ purported success in matching a wound or other mark to a suspect tool. See Valerie J. Rao & Robert Hart, *Tool Mark Determination in Cartilage of Stabbing Victim*, 28 J. FORENSIC SCI. 794 (1984); J.I. Galan, *Identification of a Knife Wound in Bone* 18 A.F.T.E. J. (Oct. 1986); John C. Cayton, *Catching a Cutthroat*, LAW ENFORCEMENT COMMUNICATIONS 14 (Nov.-Dec. 1980); Michael J. Kelty, *Court Presentation of Toolmarks Identified in Stab Wounds* 16 A.F.T.E. J. 66 (1985) (“by keeping the testimony simple, void of the mystique, saying a toolmark is a toolmark, the evidence and testimony was accepted readily by the court and jury. A conviction

was obtained on this examination and other evidence and later upheld by the Kansas Supreme Court”). In none of these cases was the identification subject to controlled, blind testing or otherwise validated or critically examined.

While the German literature cited by the trial judge appears to be considerably more scholarly, it is correspondingly far more modest in its claims. As noted above, the strongest claim in this literature is Bonte’s untested hypothesis that “stab wounds in cartilage . . . *sometimes* enable the individual identification of the tool used.” (R. 1217; R. 1296) (emphasis added) Bonte did not purport to address the reliability of the identification technique at issue in this case.

7. General Acceptance

The state presented the testimony of a total of five tool mark examiners that Hart’s methodology was generally accepted in their field. Hart characterized himself as one of “multiple national authorities” on knife mark identification, along with Cayton, Conrad, and Harden. (R. 154) The trial judge discounted the testimony of the defense expert, Dr. Nute, because he “is not a member of the relevant scientific community and has no competent knowledge as to the reliability of knife mark/cartilage comparisons.” (R. 1218, 1229) Dr. Nute had, in fact worked as an *impression* tool mark examiner but conceded that he was not an expert in the comparison of striated tool marks. (R. 1090, 1114-15) Having thus defined the relevant scientific community to include only examiners of striated toolmarks, the judge found the identification technique at issue in this case had achieved general acceptance.

As numerous courts and commentators have recognized, however, under both *Frye* and *Daubert*, “[t]o allow general scientific acceptance to be established on the testimony alone of witnesses whose livelihood is intimately connected with a new technique would eliminate the safeguard of scientific community approval implicit in the general acceptance test.” *People v. Tobey*, 257 N.W.2d 537, 539 (Mich. 1977); accord *Starzeczyzel*, 880 F.Supp. at 1038 (finding general acceptance among forensic document examiners to be meaningless since “this community is devoid of financially disinterested parties, such as academics.”); *State v. Gortarez*, 686 P.2d 1224, 1233 (Ariz. 1984); *People v. Kelly*, 549 P.2d 1240, 1248 (Cal. 1976); A. MOENSSENS, ET AL. SCIENTIFIC EVIDENCE, *supra* at 15. A co-author of one of the leading evidence treatises,²¹ Margaret A. Berger, has similarly suggested that “an expert who knows how to set up validating tests might be far more helpful” to a court attempting to determine the reliability of a technique “than an expert who has a stake in the technique in question.” Berger, *supra*, at 1361.

All of the state’s witnesses in this case are or were at the time of their first involvement in this case affiliated with law enforcement and police-run crime laboratories; none are or were employed by independent research institutions. See Andre A. Moenssens, *Novel Scientific Evidence in Criminal Cases: Some Words of Caution*, 84 J. CRIM. L. & CRIMINOLOGY 1, 6 (1993) (noting that most crime lab

²¹JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE (McLaughlin, ed., 1997).

personnel are “technicians,” not trained scientists, and are particularly prone to pro-police bias and unwilling to submit to rigorous scientific investigation); Giannelli, *The Abuse of Scientific Evidence in Criminal Cases*, *supra*, (arguing for independent crime labs to reduce effect of bias); Saks, *Merlin and Solomon*, *supra*, at 1092-93 (“No other fields are as closely affiliated with a single side of litigation as forensic science is to criminal prosecution.”)

The testimony of the state’s experts establishes that this “discipline,” while it has some of the “trappings of science,” has thus far eschewed the testing and critical analysis that defines the scientific method. *Starzecpyzel*, 880 F. Supp. at 1038.

Conclusion

The knife mark identification evidence presented in this case thus fails to satisfy a single one of *Daubert*’s criteria for determining scientific reliability. The trial court’s conclusion to the contrary was based on a complete misapprehension of the *Daubert* criteria it purported to apply and of the literature on which the court principally relied. To find *Frye* satisfied on this record would reduce it to a caricature of itself and defeat this Court’s purpose in retaining *Frye*, because the only “scientific community” in which knife mark identification has attained general acceptance has assiduously avoided the critical inquiry that *Frye* assumes takes place in scientific communities.

On the other hand, to hold that there is not yet sufficient proof of the scientific reliability of knife mark evidence does not mean that such evidence would forever be barred from the court room. It simply requires knife mark examiners to back up their

claims of certainty and infallibility with empirical evidence from validation and proficiency testing. In the interim, as this Court has twice noted, the state may still present testimony that the knife was consistent with the wound.

This Court has previously found that Hart’s testimony declaring Ramirez’ knife — to the exclusion of any other in the world — to be the murder weapon was harmful. *Ramirez I*, 542 So. 2d at 356; *see also Ramirez II*, 651 So. 2d at 1167. This time, that testimony was buttressed at trial by two other toolmark examiners, one of whom also identified Ramirez’ knife as the murder weapon and both of whom expounded further on the scientific nature of the identification. (T. 2746-74, 2932-48) Their testimony, moreover, did not merely “impl[y] an infallibility not found in pure opinion testimony,” *Flanagan*, 625 So. 2d at 828, it affirmatively claimed it. (T. 2772, 2785-86, 2870-71) Thus, if anything, the effect of this evidence on the jury’s verdict was even greater than in the first trial.

II.

THE TRIAL COURT IMPROPERLY PREVENTED A DEFENSE EXPERT FROM USING DEMONSTRATIVE EXHIBITS THAT WERE CRITICAL TO EXPLAIN HIS TESTIMONY TO THE JURY, IN VIOLATION OF AMENDMENT VI AND XIV TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION.

The defense called an expert, Robert Kopec, who testified that it was possible that Ramirez’ bloody fingerprint, found on the door jamb to the break room, could have been created when blood spattered on a latent print left there at an earlier time. (T.

3090-97) To test this proposition, he had conducted experiments, putting grease or wax on his fingers, touching a surface to leave a print, then splashing blood on the print. (T. 3034-43, 3103-04) The state did not object to Kopec describing his experiments, but moved to exclude the physical results of the experiments -- the pieces of wood and cardboard with the bloody fingerprints.²² (T. 3006-07, 3100-02) The trial judge ruled that the exhibits were irrelevant and misleading because they did not sufficiently resemble the actual fingerprint in this case -- because there was more blood on the exhibits than in the photo of the print on the door jamb. (T. 3058-59, 3060, 3064)

Evidence is relevant if it has “a logical tendency to prove or disprove a fact which is of consequence to the outcome of the action.” CHARLES W. EHRHARDT, FLORIDA EVIDENCE § 401.1 (1999 ed.) Kopec’s exhibits were relevant because they addressed a critical disputed issue in the trial -- whether the bloody fingerprint could have been created by blood splashing on a pre-existing latent print. As the judge conceded, the exhibits showed clearly visible fingerprints. (T. 3058-59) There was, moreover, an evidentiary foundation for Kopec’s experiments. The state’s own witnesses had testified that -- just one week before the homicide -- Ramirez and his supervisor had stripped and waxed the floors at the Federal Express office. (T. 1745) He therefore could have touched surfaces in the office with wax on his fingers. Ramirez testified to the same effect. (T. 3210-11, 3213-14)

²²The exhibits are defense exhibit A-1 for identification and located with the other physical evidence from the trial.

Contrary to the trial court's ruling, the exhibits would not have been confusing or misleading within the meaning of section 90.403, Florida Statutes, simply because of their dissimilarity to the fingerprint on the door jamb. As defense counsel specifically pointed out, (T. 3063), this Court long ago abandoned the rule of "essential similarity" between test conditions and actual conditions, holding that "the issue is one of the weight to be given the evidence rather than its relevance or materiality." *Johnson v. State*, 442 So. 2d 193, 196 (Fla.1983).

Moreover, the exhibits would not have diverted the jury from the issues in the case, wasted time on collateral issues, or unduly swayed the jury. *See* MICHAEL H. GRAHAM, HANDBOOK OF FLORIDA EVIDENCE § 403.1 (1996 ed. & Supp. 1999). The differences between the exhibits and the actual print on the door jamb would have been readily visible to the jury, which could have reached its own conclusion whether the print on the door jamb could have been created in the manner Kopec described. By excluding the exhibits on the ground that they were too different from the print on the door jamb to be of any probative value, the judge effectively resolved a disputed factual issue that should have been within the jury's province. *Cf. Brown v. State*, 678 So.2d 910, 912 (Fla. 4th DCA 1996) (judge's comment on credibility of witnesses usurped jury's role); *Foster v. State*, 464 So.2d 1214, 1216 (Fla. 3d DCA 1984) (trial court improperly restricted defense counsel's closing argument, usurping jury's role to determine strength or weakness of proffered defense.)

While rulings on evidentiary matters are generally within the sound discretion of

the trial judge, the judge here abused his discretion and violated the defendant's right to present a defense. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (due process entitles a defendant to "a meaningful opportunity to present a complete defense"); accord *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); *Webb v. Texas*, 409 U.S. 95 (1972); *Washington v. Texas*, 388 U.S. 14, 18 (1967). The improper exclusion of exculpatory evidence "deprives a defendant of the basic right to have the prosecutor's case encounter and survive the crucible of meaningful adversarial testing." *Crane*, 476 U.S. at 690-91; see also *Rivera v. State*, 561 So.2d 536, 539 (Fla. 1990) (subject to principles of relevancy, "where evidence tends in any way, even indirectly, to establish a reasonable doubt of defendant's guilt, it is error to deny its admission."); accord *Story v. State*, 589 So. 2d 939, 942 (Fla. 2d DCA 1991).

The purpose of Kopec's testimony was to establish a reasonable doubt regarding Ramirez' guilt by explaining that the bloody fingerprint could have been created by innocent means. The effectiveness of that testimony was greatly diminished by the inability to show the jury an illustration. That prejudice was exacerbated when the state's rebuttal witness, a serologist and blood spatter expert, testified he had never seen an instance in which blood was dripped over a fingerprint and the fingerprint remained. (T. 3373) Thus, by excluding Kopec's exhibits, the state was also able to attack the plausibility of his testimony -- and potentially mislead the jury -- in a manner it would not otherwise have been able to do. The jury would have been able to more fairly and accurately resolve the competing testimony if the exhibits had been properly

admitted.

III.

THE TRIAL COURT ERRED IN ADMITTING THE KNIFE INTO EVIDENCE WHERE THE POLICE DID NOT HAVE PROBABLE CAUSE TO SEARCH THE CAR IN WHICH IT WAS FOUND IN VIOLATION OF AMENDMENTS IV AND XIV TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 12 OF THE FLORIDA CONSTITUTION.

On December 28, Ramirez called the police to tell them he had found the shirt he was wearing on December 24. (R. 2836-37) Ramirez agreed to meet the police at the Federal Express office at 9:30 p.m.; the police arrived around 9 or 9:15, and Ramirez arrived about 9:40. (R. 2837, 2845) Ramirez drove up in Dolores Douglas' car, got out, and told the officers he had the clothes they wanted. (R. 2858) Saladrigas advised Ramirez they had a warrant for his arrest and told him to put his hands on the police car. (R. 2858) After the police arrested Ramirez at the Federal Express office and transported him to the jail, they applied for a warrant to search the Renault. The affidavit was signed, and the warrant issued, on December 29. (R. 1455, 1458) It contained the same allegations as the arrest affidavit, with the single additional allegation that Ramirez had been observed in the car at approximately 11 p.m. the night of the homicide and again at 7 a.m. the next morning. (R. 1453-54; 1472-73) In the search, the police recovered a wooden-handled knife from under the front passenger seat of the car and found apparent blood stains on the rubber molding of the trunk, both of which were introduced into evidence at trial, over defense objection. (R. 2867; T. 1976,

1981-84)

The trial judge erroneously concluded that, if the police had probable cause to arrest Ramirez they necessarily had probable cause to search the Renault.²³ (R. 1505) Probable cause for a search warrant is not, however, identical to probable cause to make an arrest:

For probable cause to arrest, it is simply necessary that there exist a probability that a crime has been committed and that the person to be arrested committed it. Probable cause to search, on the other hand, ordinarily may be said to exist only if it is established that certain identifiable objects are probably connected with certain criminal activity and *are probably to be found at the present time in a certain identifiable place.*

2 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 3.7(a) (3d ed. 1996 & Supp. 1998).

Depending whether the crime is a single event or a continuing enterprise, the nature of the items sought and how incriminating they are, and the nature of the place to be searched, probable cause may diminish sharply with the passage of time. *Id.*

The affidavit in this case alleged that the police were seeking “blood samples, property or pieces of property taken including, but not limited to computer parts, interoffice mail of Federal Express Corp. and Burglary Tools.” (R. 1452) It does not, however, allege any facts that would support a belief that the described items would be in Ramirez’ car four days after the crime was committed. The items enumerated would have been highly incriminating and not particularly valuable; Ramirez did not own the

²³The validity of the search was raised in the last *Ramirez* appeal but was not addressed by this Court.

car or have exclusive use of it; he plainly knew he was under suspicion and had agreed to meet the police on the night of his arrest for the express purpose of dispelling those suspicions. All of these factors militate against the reasonableness of expecting to find any of the listed items in the car.

Moreover, the affidavit does not identify the source of the only information in that even arguably links the car to the homicide -- the allegation that Ramirez was seen in the car at 11 p.m. the night of the homicide and again at 7 a.m. the next morning. (R. 1454) The affidavit “fails to establish the informant's credibility and basis of knowledge” *St. Angelo v. State*, 532 So.2d 1346, 1347 (Fla.App. 1 Dist. 1988). Consequently, the affidavit does not establish probable cause under the totality of the circumstances. *Id.* (citing *Illinois v. Gates*, 462 U.S. 213 (1983)).

Contrary to the trial court’s conclusion, the police in this case “could not have manifested ‘objective good faith in relying on a warrant based on an affidavit ‘so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.’” *Id.* at 1347 (quoting *United States v. Leon*, 468 U.S. 897, 923 (1984)). (R. 1505) Nor could the vehicle properly be searched incident to arrest.²⁴ (R. 1506) To be valid under this exception to the warrant requirement, the search “must have been contemporaneous with the arrest” — not removed in time or place. *State v. Williams*, 516 So.2d 1081, 1083 (Fla. 2d DCA 1987). To hold otherwise defeats the rationale for

²⁴Indeed, the trial court’s conclusion that the evidence seized would have been inevitably discovered in a search incident to arrest is factually impossible, since the arrest occurred well before the search. (R. 1506)

the exception — to allow a warrantless search of an arrestee's person and the area within his immediate control “because of the need to remove any weapons that the arrestee might seek to use and the need to prevent the concealment or destruction of evidence.” *Union v. State*, 660 So.2d 803, 804 (2d DCA 1995); *see also Bennett v. State*, 516 So. 2d 964, 965 (Fla. 5th DCA), *review denied*, 528 So. 2d 1183 (Fla. 1988). Here the search did not occur until the day after the arrest and therefore was not incident to it. *See State v. Marini*, 488 So. 2d 551, 552 (Fla. 5th DCA 1986) (search no longer incident to arrest after car impounded); *State v. Licourt*, 417 So. 2d 1051, 1053 (Fla. 4th DCA 1982) (same).

Finally, the trial court erroneously concluded that the evidence would have been inevitably discovered pursuant to an inventory search. (R. 1506-07) Impoundment and an inventory search are “reasonable” under the Fourth Amendment only if the police follow standardized procedures, and are not acting in bad faith or “for the sole purpose of investigation.” *Colorado v. Bertine*, 479 U.S. 367, 372 (1987); *see also Rodriguez v. State*, 702 So. 2d 259, 262 (Fla. 3d DCA 1997); *State v. Williams*, 516 So.2d 1081, 1084 (Fla. 2d DCA 1987). Because the state presented no evidence that regarding Metro-Dade’s departmental policy in 1983 concerning either impoundment of the vehicles or inventory searches, it did not establish below that the knife would have been inevitably discovered in an inventory search. *Florida v. Wells*, 495 U.S. 1, 4 (1990) (where state presented no evidence that highway patrol had standard policy regarding inventory searches, evidence seized during such a search was properly suppressed);

accord Roberson v. State, 566 So.2d 561, 563-64 (Fla. 1st DCA 1990), *review denied*, 576 So. 2d 291 (1991); *Diaz v. State*, 555 So.2d 1306, 1307 (Fla. 4th DCA 1990).

IV.

THE TRIAL COURT ERRED IN ADMITTING THE FORMER TESTIMONY OF THE CRIME SCENE TECHNICIAN DOROTHY BALLARD WHEN THE STATE FAILED TO ESTABLISH SHE WAS UNAVAILABLE IN VIOLATION OF AMENDMENT VI AND XIV TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION.

The prosecution was improperly allowed, over defense objection, to present the former testimony of Dolly Ballard, the crime scene technician, on the ground that she was “unavailable” under section 90.804(1)(c), Florida Statutes, having “suffered a lack of memory” since the last trial. While Ballard was plainly under great personal stress and did not want to testify again, the state failed to establish a sufficient “lack of memory” to render Ballard unavailable and did not provide the medical corroboration that would have been necessary to establish her inability to attend the trial. The admission of her testimony without an adequate showing of unavailability was in violation of the Florida Rules of Evidence, section 90.804, and of the defendant’s state and federal constitutional rights to confront the witnesses against him.

At the telephonic hearing on the state’s motion to admit Ballard’s former testimony, Ballard testified that she remembered responding to the Federal Express Office and collecting evidence in 1983-84, and some of the details of her crime scene duties. (R. 2924-25) She acknowledged that her recollection could be refreshed by reviewing her reports. (R. 2926) However, she testified she had “been under a lot of

mental stress and emotional stress” and it would be “too overwhelming” to testify again.

(R. 2925) After the Judge reminded Ballard that the issue is lack of memory, she said that she “blanks out a lot of times,” and forgets what she is saying in the middle of a conversation. (R. 2927-28) Ballard said she was not presently taking medication. (R. 2928)

Ballard subsequently filed an affidavit of unavailability which averred that she had *in the past* taken anti-depressant medication which had “affected my long and short-term memory.” (R. 1722) The prosecution never obtained an affidavit from Ballard’s doctor, as it had originally promised to do. (R. 2888) Nevertheless, the trial judge concluded that Ballard “has suffered a lack of memory so as to destroy her effectiveness as a witness” and granted the state’s motion. (R. 2934)

Ballard’s testimony at the pre-trial hearing did not establish such a complete lack of memory as to destroy her effectiveness as a witness. To the contrary, she remembered at least some of the details and conceded that her memory could be refreshed. *See North Mississippi Communications, Inc. v. Jones*, 792 F.2d 1330, 1336 (5th Cir. 1986) (witness not unavailable under Federal Rule of Evidence 804(a)(3) where he remembered general subject matter but not details of matter at issue). Her testimony that she sometimes forgets what she is saying in the middle of a conversation is likewise insufficient; the state did not present enough evidence to conclude that this was such a persistent problem -- beyond the relatively common experience of losing one’s train of thought -- that it would actually destroy her effectiveness as a witness. Further, to the

extent that such forgetfulness was purportedly due to side-effects from medication Ballard was no longer taking, the state should have been required to produce an affidavit from a medical doctor documenting the nature and extent of those side-effects.

The state must meet very high standards to establish unavailability under other provisions of section 90.804(1). *See, e.g.*, § 90.804(1)(e), Fla. Stat. (1997); *Barber v. Page*, 390 U.S. 719, 725 (1968), regarding a witness' absence from a hearing; § 90.804(1)(b); *Stano v. State*, 473 So. 2d 1282, 1286 (Fla. 1986), *cert. denied*, 474 U.S. 1093 (1986), regarding witness' refusal to testify. The standards for establishing unavailability are high because a defendant's "right of confrontation may not be dispensed with . . . lightly." *Barber*, 390 U.S. at 725. "The right to confrontation . . . includes both the opportunity to cross-examine *and the occasion for the jury to weigh the demeanor of the witness.*" *Id.* at 725-26 (emphasis added). Consequently, while former testimony is generally highly reliable, the confrontation clause does not permit the state to substitute it for live testimony whenever a state's witness is reluctant -- however understandably -- to testify again.

The bare assertion of lack of memory in this case did not satisfy the requirements of the confrontation clause. Because Ballard's extensive testimony recounted the crime scene evidence collection -- the inadequacies of which were a central theme in the defense -- the failure to properly establish her unavailability as required by the confrontation clause was not harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967).

V.

THE TRIAL COURT IMPROPERLY OVERRODE THE JURY'S LIFE RECOMMENDATION IN VIOLATION OF SECTION 921.141, FLORIDA STATUTES, *TEDDER v. STATE*, ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION AND AMENDMENTS VIII AND XIV TO THE U.S. CONSTITUTION.

The jury recommended by a vote of 9 to 3 that Ramirez be sentenced to life imprisonment, but the judge rejected the jury's recommendation and sentenced Ramirez to death. The override was improper because the trial judge substituted his judgment for that of the jury in evaluating the sentencing factors, then concluded that since the jury had reached a different conclusion, its life recommendation must have been based on sympathy for the defendant's family and on defense counsel's brief reference in closing argument to lingering doubt, which the jury had been instructed to disregard.

Legal Standard

The framers of the constitution regarded the right to jury trial in criminal cases as “an inestimable safeguard” against abuses of authority by “overzealous prosecutor[s]” and “judges too responsive to the voice of higher authority.” *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). They also had great faith in the “common-sense judgment of a jury.” *Id.* As the Supreme Court has observed, “when juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed.” *Id.* at 157.

Florida's capital sentencing statute accordingly gives the jury the power “in the

first instance, to determine the validity and weight of the evidence presented in aggravation and mitigation” and to render an opinion regarding the appropriate punishment. *Holsworth v. State*, 522 So.2d 348, 354 (Fla. 1988). This Court has made clear that the jury’s “opinion is entitled to great weight, reflecting as it does the conscience of the community, and should not be overruled unless no reasonable basis exists for the opinion.” *Dolinsky v. State*, 576 So.2d 271, 274 (Fla. 1991); *Richardson v. State*, 437 So.2d 1091, 1095 (Fla.1983). A judge may not override “a jury recommendation of life [unless] the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ.” *Tedder v. State*, 322 So.2d 908, 910 (Fla.1975). This Court has “consistently interpreted” *Tedder* “to mean that when there is a reasonable basis in the record to support a jury’s recommendation of life, an override is improper. When there are valid mitigating factors discernible from the record upon which the jury could have based its recommendation an override may not be warranted.” *Boyett v. State*, 688 So.2d 308, 310 (Fla. 1996) (quoting *Ferry v. State*, 507 So.2d 1373, 1376 (Fla.1987)); accord *Pomeranz v. State*, 703 So. 2d 465, 472 (Fla. 1997); *Rodriguez v. State*, 699 So. 2d 1010, 1012-13 (Fla. 1997); *Barrett v. State*, 649 So. 2d 219, 223 (Fla. 1994); *Parker v. State*, 643 So. 2d 1032, 1034 (Fla. 1994); *Esty v. State*, 642 So. 2d 1074, 1080 (Fla. 1994); *Heiney v. State*, 620 So. 2d 171, 173 (Fla. 1993); *Downs v. State*, 574 So. 2d 1095, 1099 (Fla. 1991); *Freeman v. State*, 547 So. 2d 125,129 (Fla. 1989).

Consequently, it is not sufficient that the trial judge disagrees with the jury’s

assessment of the credibility of witnesses, or that he believes they assigned too little or too much weight to a particular sentencing factor. *Holsworth*, 522 So.2d at 354; *accord Mahn v. State*, 714 So. 2d 391, 401 (Fla. 1998); *Parker*, 643 So. 2d at 1035; *Scott v. State*, 603 So. 2d 1275, 1277 (Fla. 1992). Under *Tedder*, the role of the trial judge is solely to determine whether there is record evidence sufficient to form a basis upon which reasonable jurors may rely in recommending a sentence of life. *Cheshire v. State*, 568 So. 2d 908, 911 (Fla. 1990).

Analysis

A. There Was Abundant Mitigating Evidence on Which the Jury Could Have Reasonably Relied to Recommend a Life Sentence

The defense presented 14 witnesses during the penalty phase whose testimony established substantial mitigating circumstances, including that Ramirez had been repeatedly sexually abused by his babysitter's teenage son from the time he was 8 years old; had been physically abused by his mentally ill father; and had been emotionally neglected by his mother; that during his 14-year incarceration for this offense he had adapted well to prison; that he did not represent a danger in the future; that he was a source of great emotional support and encouragement to his siblings, wife, and children; and that he was under the influence of alcohol and marijuana at the time of the offense.

1. Childhood Abuse and Neglect

Under the Eighth Amendment and Article I, Section 17, evidence of childhood abuse is relevant mitigating evidence that bears on the defendant's moral

culpability and the ultimate question whether he deserves the death penalty. *See, e.g., Penry v. Lynaugh*, 492 U.S. 302, 319, 327-28 (1989). *Hitchcock v. Dugger*, 481 U.S. 393, 398-99 (1987); *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982). This Court has emphasized repeatedly that evidence of childhood abuse can be “a significant mitigating factor” which a sentencer may not refuse to consider or lightly dismiss. *Walker v. State*, 707 So. 2d 300, 318-19 (Fla.1997); *Elledge v. State*, 613 So. 2d 434, 436 (Fla. 1993); *Nibert v. State*, 574 So. 2d 1059, 1062 (Fla. 1990); *Campbell v. State*, 571 So. 2d 425, 419 (Fla. 1990); *Waterhouse v. State*, 522 So.2d 341, 344 (Fla.), *cert. denied*, 488 U.S. 846, and 488 U.S. 869 (1988). Accordingly, this Court has also held repeatedly that record evidence of childhood abuse provides a reasonable basis for a jury’s life recommendation. *See, e.g., Mahn*, 714 So. 2d at 401; *Strausser v. State*, 682 So. 2d 539, 542 (Fla. 1996); *Carter v. State*, 560 So. 2d 1166, 1168 (Fla. 1990); *Freeman*, 547 So. 2d at 129; *Brown v. State*, 526 So. 2d 903, 908 (Fla.), *cert. denied*, 488 U.S. 944 (1988); *Holsworth*, 522 So. 2d at 354.²⁵

²⁵The significance of childhood abuse as a mitigating circumstance is confirmed by the growing body of research that has documented the damaging, long-term effects of childhood abuse. *See, e.g.,* Robert S. Pynoos, Alan M. Steinberg & Armen Goenjin, *Traumatic Stress in Childhood and Adolescence* in TRAUMATIC STRESS (Bessel A. van der Kolk et al. eds. 1996); Bruce Perry, *Incubated in Terror: Neurodevelopmental Factors in the ‘Cycle of Violence’* in CHILDREN, YOUTH AND VIOLENCE: SEARCHING FOR SOLUTIONS (Joy Osofsky ed. 1995); David Finkelhor, *The Victimization of Children: A Developmental Perspective*, 1995 J. AM.ORTHOPSYCHIATRIC ASSOC. 177; Kendall-Tackett et al, *Impact of Sexual Abuse on Children: A Review and Synthesis of Recent Empirical Studies* 113 PSYCH. BULL. 164-80 (1993); JUDITH HERMAN, TRAUMA AND RECOVERY (1992); THE SEXUALLY ABUSED MALE (Mic Hunter ed. 1990); PSYCHOLOGICAL TRAUMA (Bessel A. van der Kolk ed., 1987); JAMES GARBARINO ET AL., THE PSYCHOLOGICALLY BATTERED CHILD

The trial judge found that the mitigating circumstances of physical and sexual abuse were reasonably established, but gave them “very little weight” because there was no expert testimony describing how the abuse affected Joseph and, while both Liz and Leonard had problems, neither had harmed anyone.²⁶ (R. 2480-81) The jury could have relied on its common sense, however, to conclude that the combination of repeated sexual abuse in childhood, an emotionally unavailable mother, and a mentally ill and physically abusive father would have a serious adverse effect on almost any child.

Joseph’s mother, Daisy Longworth, his aunt, Estella Collins, his brother Leonard, and his half-sister Liz testified about Joseph’s troubled childhood:

a. Repeated Sexual Abuse from the Age of Eight

While Joseph’s mother worked long hours as a maid, Joseph and his younger brother and sister, Leonard and Liz, were left with “Mrs. Mary” Williams. (T. 3952, 4109-10) Mrs. Longworth left the children with Mrs. Mary because “somebody told me that she kept children” and she charged only “a dollar a head, or fifty cents a head.” (T. 3952) Mrs. Mary’s son, Ernest Moody, sexually abused all three of the children. Joseph was abused repeatedly from approximately the age of 8. (T. 3981, 4028, 4046)

(1986); Browne & Finkelhor, *The Impact of Child Sex Abuse*, 99 PSYCH. BULL. 66-77 (1986).

²⁶ Leonard did have a conviction for assault on a law enforcement officer. (T. 4029)

Ernest was about 16 or 18 years old.²⁷ (T. 3985, 4028) The sexual abuse finally stopped when Leonard and Joseph were sent to live with their father in Gainesville when Joseph was 11 or 12 years old.²⁸ (T. 3962, 4042)

Joseph's aunt, Estella, lived next door to Mrs. Mary, and Ernest would often come to her house. (T. 3984) She once caught Ernest anally raping Joseph (Joseph was "bent over" and Ernest was "going with him from the back"). (T. 3982-83) She chased Ernest from the house but failed to report the abuse to Joseph's mother. (T. 3983) Leonard testified that Ernest had repeatedly sodomized him, in different locations; he remembered being forced to stand up against the wall.²⁹ (T. 4028) Ernest also took Joseph off to different locations and Joseph was very upset when Ernest brought him back; he would cry and refuse to talk or play with the other children. (T. 4028, 4046) Ernest had also molested Liz; she remembered "like it was yesterday" that he took her

²⁷There was some confusion over the children's ages. Liz was not certain how old she was when Ernest abused her but knew she was old enough to go to the store by herself — at least five or six; Leonard would have been about eight or nine, and Joseph ten or eleven at that point. (T. 3968, 3970, 4124) There was also some confusion about Ernest's age -- Mrs. Longworth thought he might have been about five years older than Joseph -- but it was agreed that Ernest was big, whatever his age. (T. 3968, 3985) The confusion about exact ages is understandable given that the relevant events were 25-30 years earlier. The trial judge, relying on the State's state's sentencing memo, gave Ernest's age as 13. (R. 2170, 2480)

²⁸Again, the length of time is somewhat unclear. Leonard thought Joseph was only 9 years old when they moved to Gainesville, though Mrs. Longworth said he was 11 or 12. (T. 4038, 3962) In any event, it appears that the abuse continued for at least one year, and more likely for as long as three years.

²⁹The prosecution objected successfully to any more detailed description of the abuse. (T. 4027-28)

into a shed, pulled off her panties and was “pumping me up and down.”³⁰ (T. 4109) Although she did not find out the reason until later, Mrs. Longworth had a vivid memory of Leonard standing on the corner, “and he hollered, and hollered, and hollered” and refused to go to Mrs. Mary’s. (T. 3953-54) Mrs. Longworth took Leonard to Estella’s instead, but forced Joseph and Liz to remain at Mrs. Mary’s. (T. 3954) Ernest threatened the children not to tell. (T. 4030) Joseph did not tell his mother about the abuse until he was 19. (T. 3927, 3970)

Both Leonard and Liz described the long term effects of the abuse they experienced: Leonard said the repeated sexual assaults had “deteriorated” his mind. (T. 4028) He prostituted himself with other men and became addicted to cocaine. (T. 4029, 4034-35) Leonard was also treated for mental illness and had a breakdown. (T. 4034) Joseph and Leonard discussed the sexual abuse with each other when they were older, and Leonard believed it had also ruined Joseph’s mind and caused him a great deal of emotional distress. (T. 4045-46)

While Liz was outwardly more successful — she received a college scholarship, had a white-collar job, and married a minister — she testified that she is still very angry with their mother for failing to protect them from Ernest Moody; she cries “all the time,” and has required ongoing psychological counseling.³¹ (T. 4112-13, 4121, 4123, 4126,

³⁰The judge again sustained an objection to any specific description of the nature of the abuse. (T. 4109)

³¹Renee, the fourth child, who was not sexually abused, had a far more positive perception of her childhood. (T. 3947-48)

4128)

The jury was entitled to give this evidence far more weight than the trial judge did. In fact, the effect of childhood sexual abuse on boys can be particularly devastating. Childhood sexual abuse correlates highly with the later development of behavior, personality and thinking disorders in adult males. Peter E. Olson, *The Sexual Abuse of Boys: A Study of the Long-Term Psychological Effects* in THE SEXUALLY ABUSED MALE, *supra*, at 146. While girls tend to internalize the effects of sexual abuse in a diminished sense of self-worth and self-destructive behaviors, boys are more likely to externalize their response, becoming rebellious to authority, hyperactive, and acting out aggressively toward others. *Id.* at 148; HERMAN, *supra*, at 113. Sexually abused boys are more likely than non-abused boys “to have had problems with truancy in school and later to [become] involved in criminal behavior.” Olson, *supra*, at 148; *see also* van der Kolk, *The Complexity of Adaptation to Trauma*, in TRAUMATIC STRESS (hereinafter *Adaptation to Trauma*), *supra* at 199-200. Sexually abused males are also more likely to struggle, like Leonard, with substance abuse and to become male prostitutes or hustlers. Olson, *supra*, at 148; *Adaptation to Trauma*, *supra* at 200.

Thus, Joseph’s subsequent delinquent behavior -- skipping school, rebelling against authority, engaging in criminal activity and having relationships with older women -- which the state attempted to characterize as simply “bad,” was in fact symptomatic of the sexual abuse he experienced. (T. 3992-98)

For children who have suffered a trauma like sexual abuse “the quality of the

parental bond is probably the single most important determinant of long-term damage.” *Adaptation to Trauma, supra*, at 185; accord Diane H. Schetky, *Sexual Victimization of Children* in *SEXUAL AGGRESSION* 119-20 (John A. Shaw ed. 1999). A healthy, supportive, intact family is a “critical ingredient” to successful recovery and, for boys and young men, the presence of “[l]oving, balanced male role models” is particularly helpful. Paul N. Gerber, *Victims Becoming Offenders: A Study of Ambiguities*, in *THE SEXUALLY ABUSED MALE, supra* at 157; accord Schetky, *supra* at 120. As discussed further below, Joseph had none of these things.

b. Physical Abuse by Mentally Ill Father

Instead of finding a safe haven or positive male role model, Joseph and Leonard were sent to live with their mentally ill father in Gainesville, who physically abused them. Their father had been committed to a mental hospital when Joseph was about two; he had remained hospitalized for two years and had not lived with the family since then. (T. 3950-51; 3961-62) The boys had only visited with him -- during the summer and on holidays. (T. 3973) Estella reported that during one such visit, when Joseph was just six, his father had beaten him badly. (T. 3987) Leonard testified that living with their father in Gainseville was very difficult, because he beat his sons with an iron or extension cord for not doing household chores, for not doing favors for strangers, or for no cause at all. (T. 3957, 4032, 4039) The boys had called their Aunt Estella from Gainesville about the beatings, which left scars and marks on Joseph’s body. (T. 3963, 3987) Joseph and Leonard returned home to Tampa after six to nine months because

Leonard “raised so much alarm” about the beatings. (T. 3962, 4037)

Quoting large passages verbatim from the State’s sentencing memorandum, the trial judge minimized the physical abuse, suggesting it was a legitimate form of discipline and that Leonard and Joseph returned from Gainesville because they simply “did not like it at their father’s.” *Compare* R. 2479-80 *with* 2169-70. While the trial court found this mitigating circumstance to be established, he gave it “very little weight.” (R. 2481) The jury was entitled to attach significantly more weight to the father’s physical abuse, particularly given that it followed immediately on the heels of the lengthy period of sexual abuse by Ernest Moody.

c. Emotional Neglect

Liz testified that the children likewise found little comfort in their mother’s household. Mrs. Longworth was an overwhelmed single mother of four (and later six) children, who struggled under tremendously adverse circumstances to provide for her children. (R. 3951-52) It was apparent at the sentencing hearing that she deeply regrets that she did not realize and intervene earlier to stop their abuse by Ernest Moody. (T. 3954-55)

Liz testified that, while Mrs. Longworth worked hard to provide materially for her children, and gave them generous gifts at Christmas, she was emotionally remote and angry. (T. 4110-12) Liz’ father, who was also the father of their younger sister Renee, had abandoned their mother while she was pregnant with Renee and returned to South America to marry another woman. (T. 4110) During that time, Liz testified, their

mother “became very, very angry” -- she would often get up at 5 a.m., “and turn on Gospel music and walk up and down the house, and rant and rave.” (T. 4110-11) Liz remembered lying in bed and “thinking when I get older, God when am I getting out of this?” (T. 4111) Liz testified that her mother did not hug her once when she was growing up and showed no attention to Joseph either.³² (T. 4111)

The judge rejected this evidence entirely as a mitigating circumstance, stating that “[t]he defendant also argued that the court should find as a mitigating circumstance that the defendant’s mother was unable to express love towards the defendant and that this somehow affected the defendant’s development.” (R. 2481-82) It is, however, an elementary principal of childhood development that a secure emotional attachment with the mother or other primary caretaker is *essential* to a child’s healthy development. *E.g.*, STANLEY I. GREENSPAN, *THE GROWTH OF THE MIND* 50-53, 252-80 (1997); PAUL H. MUSSEN ET AL., *CHILD DEVELOPMENT & PERSONALITY* 158-75 (7th ed. 1990); HOWARD GARDNER, *DEVELOPMENTAL PSYCHOLOGY: AN INTRODUCTION* 21-56 (1978); JOHN BOWLBY, *ATTACHMENT* (1969). Even if a child is materially well-provided for, a mother’s inability to respond to the child’s emotional needs or to show affection to the child can have lasting adverse effects. *See* GREENSPAN, *supra*, at 51-53, 252-67; GARBARINO, *supra* at 14-15. Moreover, because the quality of the parental bond is critical to a child’s recovery from sexual abuse, the combination of the sexual abuse,

³²Liz testified that their mother is now able to be much more affectionate with her grandchildren than she was with her own children. (T. 4111)

with physical abuse by the father, *and* the mother's emotional unavailability, is far more damaging than any one of these factors alone.

As defense counsel attempted to emphasize in closing argument, this does not mean that Mrs. Longworth was morally blameworthy. (T. 4419) It is extremely traumatic for a child to be sexually abused while in the care of someone to whom the parent has entrusted him, and “[t]he reasons for this protective failure are in some sense immaterial to the child victim who experiences it at best as a sign of indifference and at worst as complicit betrayal . . . The child feels that she has been abandoned to her fate, and this abandonment is often resented more keenly than the abuse itself.” HERMAN, *supra* at 101. For Joseph, the protective failure occurred first with the sexual abuse and was then compounded by being sent to live with his mentally ill and physically abusive father. The jury may have properly appreciated that the issue relevant to mitigation is how the *child* experiencing this would have felt, not whether the parent was to blame.

* * *

The trial judge quoted with approval the state's assertion in its sentencing memorandum that neither Liz nor Leonard “hurt anyone as a result of what happened to them,” suggesting that the childhood abuse and neglect therefore had no relationship to Joseph's later behavior. (R. 2173, 2481). In fact, Joseph, Liz, and Leonard could be a case study in three well-documented trajectories for victims of child sexual abuse: Liz is outwardly successful but has difficulties in relationships and still feels anger at the parent who failed to protect her, *see* HERMAN, *supra* at 101, 105, 113; Leonard became

a male prostitute and drug addict, *see* Olson, *supra* at 146, 148; and Joseph became delinquent and ended up on Death Row, *see id.*; *Adaptations to Trauma, supra* at 199-200. The fact that Joseph's siblings were damaged in different ways does not diminish the mitigating effect of the abuse on him.

In rejecting or giving little weight to these mitigating circumstances, the trial judge improperly “substituted his view of the evidence and the weight to be given it for that of the jury.” *Holsworth*, 522 So. 2d at 353. The jury, in its common sense, could understand that the *combined* effect of childhood sexual abuse, an emotionally distant mother, and a mentally ill and physically abusive father did not merely affect Joseph but profoundly shaped his future.

2. Adaptation to Prison and Lack of Future Dangerousness

The defense also presented substantial evidence that Ramirez had adapted well to prison and was unlikely to pose a danger in the future to guards or other inmates if sentenced to life. It is well-established that a defendant is entitled under the Eighth Amendment to endeavor to “convinc[e] the jury that he should be spared the death penalty because he would pose no undue danger to his jailers or fellow prisoners and could lead a useful life behind bars if sentenced to life imprisonment.” *Skipper v. South Carolina*, 476 U.S. 1, 7 (1986); *Maxwell v. State*, 603 So. 2d 490, 492 (Fla. 1992); *Valle v. State*, 502 So. 2d 1225, 1226 (Fla. 1987) (holding defendant should have been permitted under *Skipper* to present evidence regarding his “ability to adjust, in the future, to prison life”). This Court has accordingly recognized that such evidence is

“unquestionably a significant factor in mitigation,” and, particularly when combined with other mitigating evidence, provides a reasonable basis for a jury’s life recommendation. *Cooper v. Dugger*, 526 So. 2d 900, 902 (Fla.1988), *and appeal after remand*, 581 So. 2d 49, 52 (Fla. 1991) (Barkett, J., concurring) (citing lack of future dangerousness and good conduct in prison as basis for jury’s life recommendation); *see also Craig v. State*, 685 So. 2d 1224, 1225 n.2 (Fla. 1996), *appeal after remanded by* 510 So. 2d 857, 871 (Fla. 1987) (for consideration of *Skipper* evidence); *Barrett*, 649 So. 2d at 223; *Esty*, 642 So. 2d at 1080; *McCrae v. State*, 582 So. 2d 613, 616 (Fla. 1991); *Douglas v. State*, 575 So. 2d 165, 167 (Fla. 1991); *Carter*, 560 So. 2d at 1169; *Harmon v. State*, 527 So. 2d 182, 188 (Fla. 1988); *Holsworth*, 522 So. 2d at 354; *Fead v. State*, 512 So. 2d 176, 179 (Fla. 1987); *McCampbell v. State*, 421 So. 2d 1072, 1075-76 (Fla. 1982).

a. Adaptation to Prison

In this case, five corrections officers, with an average of over 18 years experience each, testified that Ramirez was a good prisoner, respectful and cooperative, and was not violent or assaultive toward others. (T. 3887, 3889, 3906, 3912-13, 4056-58, 4070-72) Two officers, Lieutenant D’Erminio and Corporal Robinson, currently saw Ramirez on a daily basis. (T. 3888, 4071) D’Erminio testified he was better than most other inmates, and Robinson testified she had not had any problems with Ramirez; that he is quiet and does what he is asked. (T. 3889-90) Sergeant Parrish had known Ramirez for 13 years and likewise testified that he had never known Ramirez to be violent to

another inmate or officer, and that he has always been respectful. (T. 3913)

The prosecutor cross-examined these witnesses extensively about contraband found in Ramirez' cell over the years, including pens, an altered razor blade, matches, a lighter, some bleach, half a marijuana joint, and excessive sheets (T. 3894-96, 3917-20, 4065-66) While agreeing that some of the items *could* be used in a hostile manner or to attempt an escape, the officers testified that Ramirez had never done so. (T. 3894-96, 3902-03, 3917-20, 3920-21) The State also presented a rebuttal witness, Rene Villa, who had reviewed the shakedown reports and testified about the possible uses of the contraband found in Ramirez' cell. (T. 4370-73) Villa, who did not know Ramirez, testified that he would not regard Ramirez as a better-than-average inmate, based on these reports. (T. 4373) Villa acknowledged, however, that there was no indication Ramirez had ever used such items in a violent manner or attempted to escape. (T. 4375)

The defense expert, Dr. Jonathan Sorensen testified that, during the 10 years for which records were available, Ramirez had accumulated 9 disciplinary reports ("DRs"). (T. 4173) According to Sorensen's data, the average prisoner had 1 DR every 13 months. (T. 4227) Sorensen thus categorized Ramirez' disciplinary record as about average. (T. 4225) Ramirez had had the highest number of DRs -- 3 -- in 1985, at the beginning of his incarceration, but his record improved and averaged out to 1 per year. (T. 4227) The state's expert, Ted Key, testified that Ramirez had 8 DRs while at Florida State Prison and Union Correctional Institution. (T. 4345) While it is unclear

whether Key considered the number of DRs to be above or below average, it was undisputed that all of Ramirez' DRs were in the *least* serious category; none involved violence or threats of violence.³³ (R. 2167; T. 4345, 4356-57) The jury could reasonably have found the nature of Ramirez' DRs more important than the number.

The trial judge, however, completely rejected Ramirez' prison behavior as a mitigating circumstance. In doing so, he relied solely on the prosecutor's characterization of the contraband found in Ramirez' cell, quoting verbatim from the state's sentencing memorandum: "This leads to the conclusion that the defendant, although liked by numerous corrections officers has not always displayed good conduct while in custody, and that items were seized before the defendant had the opportunity to use those contraband articles in a violent manner." *Compare* R. 2476 (sentencing order) *with* R. 2167-68 (State's Sentencing Memorandum).

The jury, however, could have properly credited the five very experienced corrections officers who had interacted regularly with Ramirez for years, rather than the prosecutor, in evaluating the gravity of his disciplinary infractions. Indeed, as the Supreme Court noted in *Skipper*, "[t]he testimony of more disinterested witnesses--and,

³³The transcript reflects that Key testified that this number of DRs was *below* average for a maximum security inmate, but the prosecution subsequently represented that the transcript was erroneous and that Ramirez' number of DRs was above average. (T. 4345; R. 2167) The sentencing order states that Key's testimony was corrected by affidavit at the *Spencer* hearing. (R. 2475) However, while the prosecutor announced her intention to obtain an affidavit from Key (T. 4456), counsel has been unable to locate one in the record. In any event, the trial judge subsequently stated that both the prosecution and defense witnesses had found Ramirez to be a "more or less average inmate." (R. 2476)

in particular, of jailers who would have had no particular reason to be favorably predisposed toward one of their charges--would quite naturally be given much greater weight by the jury.” *Skipper*, 476 U.S. at 8. In rejecting this mitigating circumstance, the trial judge again improperly “substituted his view of the evidence and the weight to be given it for that of the jury.” *Holsworth*, 522 So. 2d at 353.

b. Lack of Future Dangerousness

Dr. Sorensen, a criminologist who has studied the behavior of prison inmates, also testified about Ramirez’ lack of *future* dangerousness. (T. 4156, 4158) Sorensen explained that studies have found that persons convicted of murder, as a class, have a recidivism rate of 1 percent with regard to an additional homicide, and 10 percent with regard to other assaultive conduct; they also have a better rate of institutional adjustment than other types of offenders. (T. 4163, 4164-65, 4167; R. 2476) Sorensen used this study as the actuarial baseline for determining an inmate’s future conduct. (T. 4163)

He testified that the factors that make an inmate less likely to be violent in the future include his age, time already served, strong family ties, record while in prison, prior criminal record, and unwavering claims of innocence. (T. 4164, 4168) Sorensen explained that the effect of the latter derives not from the veracity of the inmate’s belief, but from his efforts to behave well in order to convince others of his innocence. (T. 4168) Age is the most significant factor in predicting future dangerousness; fatherhood and family relationships are also one of the best predictors of institutional adjustment. (T. 4162, 4174)

In Sorensen's opinion, Ramirez' age of 38, his behavior while incarcerated, his relationship with his family, and his claim of innocence, all indicated he would continue to function well in prison and would not pose a danger to fellow inmates or officers. (T. 4182-83) Sorensen also noted that people become less likely to commit violent acts as they age, and since Ramirez would not be eligible for parole -- if ever -- before the age of 50, he was also unlikely to pose a danger to the community at large.³⁴ (T. 4167, 4184)

The trial judge first concluded that Sorensen's opinion was "invalid" because it did not satisfy the *Frye* test. (R. 2475) The prosecution, however, did not raise a *Frye* objection until *after* the jury had returned its life recommendation.³⁵ (T. 4477; R. 2168) This Court has held that a *Frye* objection must be specific and timely. *Hadden*, 690 So. 2d at 580. The objecting party cannot wait until the witness has testified and then move to strike the testimony. *Jones v. State*, 701 So. 2d 76, 78 (Fla. 1997). Thus, by failing to raise a timely objection, the state waived any *Frye* objection to Dr. Sorensen's testimony, and this was not a proper basis on which to disregard it.

The trial court also noted that, during the sentencing hearing, the state objected

³⁴This is entirely academic. If the judge had followed the jury's recommendation, Ramirez would be serving three consecutive life sentences. (R. 2488)

³⁵While the state had moved in limine before the sentencing hearing to preclude certain aspects of Sorensen's testimony, such as the reasons for his opposition to the death penalty and any descriptions of his research that referred to "allegedly innocent people either being sentenced to death or executed," it did not assert that Sorensen's testimony should be excluded as scientifically unreliable. (T. 3798-99; R. 1957)

to Sorensen's testimony on the ground that he had said there was not a recognized field of predicting future dangerousness. (T. 4177; R. 2474) In context, it is clear that Sorensen -- whom the state emphasized had never testified before -- simply did not understand the voir dire procedure. (T. 3801, 4176-77) In response to the prosecutor's question whether there was a recognized field of predicting future dangerousness, Sorensen answered negatively and tried to explain that clinical predictions of future dangerousness are disfavored.³⁶ (T. 4176-77) At this point, the prosecutor terminated the voir dire and objected to Sorensen offering an opinion. (T. 4177) As defense counsel pointed out, however, Sorensen could have been qualified readily as an expert in criminology, with an expertise in studying future dangerousness based on empirical, actuarial data. (T. 4176, 4179) Since the trial court ruled that Sorensen *could* provide his opinion, defense counsel did not rehabilitate Sorensen by asking him to clarify his voir dire responses. (T. 4181)

Even if Sorensen's opinion is excluded from consideration, however, it constituted only a small part of his testimony. The jury could still have properly considered Sorensen's testimony about Ramirez' record and about the factors that affect an inmate's successful adaptation to prison and drawn its own conclusions. *Cf. State v. Hickson*, 630 So. 2d 172 (Fla. 1993); CHARLES W. EHRHARDT, *FLORIDA EVIDENCE* 559-60, 562 (1999 ed.).

³⁶In fact, Sorensen distinguished his own actuarial approach from clinical efforts. (T. 4161-62, 4166) *See also* Robyn Dawes et al., *Clinical Versus Actuarial Judgment* 243 *SCIENCE* 1688 (1989).

The judge, however, rejected the remainder of Sorensen's testimony as "irrelevant" and rejected "altogether" the mitigating circumstance of Ramirez' lack of future dangerousness. (R. 2475-7) The judge took particular issue with the study showing that murderers have a lower recidivism rate than other offenders and noted that Ramirez was also a robber and burglar, and they have a higher recidivism rate than murderers. (R. 2476) The judge ignored the most significant non-opinion portions of Sorensen's testimony -- his discussion of Ramirez' record and of the specific factors relevant to prisoners' positive outcomes -- to which the jury could give significant weight. Moreover, since the Supreme Court held specifically in *Skipper*, 476 U.S. at 7, that a defendant's *future* behavior in prison, not only his *prior* conduct, is relevant mitigating evidence, the trial judge could not properly reject such evidence as "irrelevant." Consequently, his rejection of this mitigating circumstance not only improperly supplanted the jury's judgment, it violated the Eighth Amendment and Article I, Section 17.

The trial judge finally bolstered his rejection of the *Skipper* evidence with inaccurate characterizations of the defendant's courtroom behavior. While noting that the defense had not submitted Ramirez' courtroom behavior as a mitigating circumstance, the trial judge nevertheless expressed concern in the sentencing order about two incidents of "aggressive" and "passive-aggressive" behavior.³⁷ (R. 2477)

³⁷The defense mentioned Ramirez' courtroom behavior only in response to what it perceived as the prosecutor's efforts to poison the record by expressing fear for her personal safety and demanding additional security. For example, the prosecutor

The trial judge's account of these "incidents," however is contradicted by his own contemporaneous remarks. With regard to the first incident, the judge stated in the sentencing order:

During the penalty phase of the trial the Defendant had to be physically restrained after the prosecutor finished cross examining the Defendant's brother. The Defendant stood up and called the prosecutor a bitch. The court quickly excused the jury and the Defendant was taken from the courtroom to compose himself. The court believes that if the Defendant had not been wearing an electronic restraining belt and had not been lead (*sic*) from the courtroom by corrections guards that he would have physically attacked the prosecutor.

(R. 2477) The record reflects, however that until the prosecutor put Ramirez' remark on the record, the judge was not even aware of it; he said specifically that he had not heard it. (T. 4054) Moreover, the judge apparently did not detect anything amiss in Ramirez' behavior because, after granting the *defense* request for a recess, he inquired whether Ramirez had gone to the bathroom. (T. 4049) It was defense counsel who advised the court that Ramirez had wanted a recess because he was upset. (T. 4049)

While the prosecutor argued at the *Spencer* hearing that "the Correction Officers

complained, "Judge I've been concerned throughout the trial about the security or lack of security in the courtroom. And the detectives who worked on the case have now complained as well . . . this man has been sentenced twice and I have been the prosecutor." (T. 2003) Defense counsel objected that Ramirez had done nothing improper in court, and the trial judge expressly agreed, "**I've been watching him. he has been behaving himself perfectly well with no problem at all . . .**" (T. 2004) Nevertheless, in response to the prosecutor's request for more security, Corrections stationed four uniformed corrections officers directly behind Ramirez, prompting another objection by defense counsel. (T. 2181-83) Characterizing this display as "overkill," the judge again remarked to the prosecutor, "**I haven't seen anything to let me feel concern for you or me or anybody else in this courtroom.**" (T. 2184)

were ready to push the button to zap him,”³⁸ (T. 4462), no corrections officers ever testified that they believed Ramirez was on the verge of attacking the prosecutor. Moreover, as defense counsel noted at the time, “[t]he record also should reflect after the Defendant left the room upset, [the prosecutor] was very, very pleased with herself and was laughing, which I saw, which I thought was totally inappropriate.” (T. 4053) Thus, Ms. Seff’s own conduct at the time was not consistent with an authentic fear for her own safety.

With respect to the “passive-aggressive” episode cited in the sentencing order, the judge stated that

[t]he Defendant refused to be fingerprinted after the court adjudicated the Defendant guilty. The court had to persuade the Defendant that his behavior was not in his best interest. The Defendant eventually agreed to cooperate.

(R. 2477) Shortly after the incident, however, the judge expressly stated,

I have not seen him be a problem at all. The only thing I noticed at the end of the case last time he was before me there was a recalcitrance on his part to be fingerprinted and sign some documents. The only thing I have seen I would consider the slightest bit disruptive. **And, frankly, don’t consider anything he’s done so far to be disruptive.**³⁹

³⁸At the penalty phase, Ramirez was forced to wear a stun belt as a “compromise” to avoid a more conspicuous show of force. (T. 3733-35, 3804) Defense counsel expressed concern at the time that the prosecutor would try to use the stun belt to rebut mitigation. (T. 3807)

³⁹After Ramirez was adjudicated guilty, defense counsel asked to confer privately with their client. (T. 3681) The prosecutor interjected that Ramirez “is refusing to be fingerprinted.” (T. 3681) Defense counsel explained that Ramirez simply wanted to discuss with his attorneys some of the forms he was being asked to sign. (T. 3681) The judge complained that no one had ever “had a problem with this” before but

(T. 3688-89) The judge's contemporaneous remarks thus make clear that he did not regard either incident to be threatening or particularly disruptive at the time. The revisionist version of events in the sentencing order therefore does not provide a reasonable basis on which to either reject the *Skipper* evidence or to override the jury's recommendation.

3. Positive Family Relationships

Ramirez' wife, Brezetta, testified that she met Ramirez in 1983, before he was arrested; they continued their friendship throughout his incarceration and were married in 1992. (T. 4088, 4090, 4097) Brezetta said that Ramirez had been a source of emotional support for her, including when her mother and brother passed away and through her own serious health problems. (T. 4090-91) He also encouraged her professionally and even began watching real estate programs on television and reading about real estate so he could discuss it with her when she was studying for her real estate license. (T. 4096-97)

Brezetta helped him establish a relationship with his children, Joseph and Chantelle, who were both less than a year old when he was arrested. (T. 4092, 4101) Brezetta described how Ramirez had come to realize how much he had lost by not being able to see his children grow up and how family had become very important to him. (T. 4092) He contacted his children and arranged for them to visit him. (T. 4092) They grew increasingly close, and he called his children almost daily when he was in Miami.

agreed to let defense counsel talk to their client. (T. 3682)

(T. 4093) Brezetta described Ramirez' tearful response the first time Chantelle called him "dad." (T. 4095) Ramirez encourages his children to work hard in school and to be obedient at home. (T. 4094)

Joseph Lopez testified that his father called him every day or every other day, when he had access to a phone, and that his father is a positive influence in his life. (T. 3975-76) Ramirez counsels his son to stay out of trouble, not to be a follower, and to stay in school. (T. 3976) Joseph wanted to testify because of his father's importance to him. (T. 3976)

Both Ramirez' sister Liz and his brother Leonard testified that Ramirez had been a protective older brother. (T. 4031, 4108) Leonard went to Joseph with his problems and Joseph would help him. (T. 4031) When Joseph was 8, he had protected Liz from his Aunt Estella's dogs, who attacked Joseph and bit off most of his ear and almost struck his jugular vein. (T. 3958-59, 4108) Joseph also intervened to protect Liz from neighborhood bullies who attacked her after school, taking a blow across the chest with a 2 x 4. (T. 4108) Liz testified that, despite Ramirez' being in prison, she continues to rely on him emotionally, particularly in trying to work through her difficult relationship with their mother. (T. 4122-23) She explained that she could not confide in others in her life the same way she could talk to her older brother and that he is able to provide her with a sense of calm. (T. 4122-23) She testified that he would continue to be a positive influence in her life if he lived. (T. 4122)

The trial judge found that this mitigating circumstance was reasonably established

but gave it “minimal weight.” (R. 2483) Again, the jury was entitled to disagree. *Skipper* speaks about a defendant’s ability to “lead a useful life behind bars if sentenced to life imprisonment.” 476 U.S. at 7. And this Court has recognized that a defendant’s “capacity to form loving relationships with his family and friends” and thus to make some positive contribution from prison, together with other mitigation, provides a reasonable basis for a life recommendation. *Barrett*, 649 So. 2d at 223; *accord Craig v. State*, 685 So. 2d at 1225 n.2; *Strausser*, 682 So. 2d at 540 n.3; *Parker*, 643 So. 2d at 1035; *Scott*, 603 So. 2d at 1277; *Bedford v. State*, 589 So. 2d 245, 253 (Fla. 1991), *cert. denied*, 503 U.S. 1009 (1992); *Perry v. State*, 522 So. 2d 817, 821 (Fla. 1998); *Fead*, 512 So. 2d at 179.

Brezetta’s, Joseph’s and Liz’ testimony, in particular, showed that Ramirez can do something “productive” in prison by the role he plays in the lives of his family. Brezetta’s and Joseph’s testimony also shows that Ramirez has matured during his incarceration, that he has gained enough insight into his own mistakes to be able to counsel his children to avoid them by obeying authority and staying in school. This evidence, particularly when combined with the other mitigating factors presented, provided a reasonable basis for the jury’s life recommendation.

4. **Alcohol and Marijuana Use**

In support of this mitigating circumstance, the defense relied on the first phase evidence regarding Ramirez’ consumption of alcohol and marijuana before the crime. Dolly Britten testified that, on the night of the murder, Ramirez joined her children in

drinking beer and whiskey and smoking marijuana. (T. 2297, 2299-3000) Ramirez testified that when he arrived at the Brittens' house, many of them were intoxicated and high on drugs, and he got that way, too. (T. 3290) In the approximately 1 1/2 to 2 1/2 hours he was at the Brittens, he had three or four beers, a couple of shots of liquor, and smoked marijuana. (T. 2014, 2288, 2634-35, 3225) The state asserted, and the trial judge accepted, that Ramirez had denied being intoxicated on the night of the murder. (R. 2169) This is not, however, an accurate characterization of Ramirez' testimony. Ramirez testified that, when he left the Brittens' house, "I was drunk. Well, correction, I wasn't drunk, I was feeling good." (T. 3247) He also said that, when he arrived home, he was trying not to appear "too drunk." (T. 3247) While Ramirez' definition of "drunk" is unclear, his testimony certainly establishes that he was under the influence of alcohol -- enough to be concerned that he appeared impaired.⁴⁰

The trial judge further asserted that there was no evidence that Ramirez' reasoning was impaired, noting that the crime itself exhibited purposeful behavior and that Dolores Douglas had noticed nothing odd about Ramirez the next morning. (R. 2478) Ironically, the trial judge relied on a case, *Patterson v. State*, 513 So. 2d 1257,

⁴⁰The trial court also cited as grounds for rejecting this mitigating circumstance that Ramirez had "never admitted responsibility for this crime." (R. 2477) A defendant's failure to acknowledge his guilt is not, however, a proper consideration in sentencing. *Mitchell v. United States*, 119 S.Ct. 1307, 1315 (1999); *McCampbell v. State*, 421 So. 2d 1072, 1075 (Fla. 1982).

1261 (Fla. 1987)⁴¹, in which this Court held that a trial court had properly refused to reduce a *conviction* from first degree to second degree murder, based on evidence of intoxication. In so holding, this Court stated:

There was conflicting evidence on the extent of Patterson's intoxication. Patterson presented evidence that he had been drinking substantially on the night of the murder. On the other hand, testimony by the prosecution indicated that despite his drinking Patterson had the capacity to plan, to make decisions, and to act accordingly. *The effect of Patterson's use of intoxicants on the night of this incident was a fact question for the jury.*

513 So.2d at 1261 (emphasis added). The trial court also cited *Banks v. State*, 700 So.2d 363, 368 (Fla. 1997), *cert. denied*, 118 S.Ct. 1314 (1998), *Johnson v. State*, 608 So.2d 4, 11 (Fla.1992), *cert. denied*, 508 U.S. 919 (1993), and *Preston v. State*, 607 So.2d 404, 412 (Fla.1992), *cert. denied*, 507 U.S. 999 (1993), each of which held that the trial court did not abuse its discretion in rejecting intoxication as a mitigating circumstance when there was contrary evidence of purposeful behavior. (R. 2478) In none of these cases, however, was the judge overriding a jury's recommendation of life imprisonment.

The standard here is not whether the trial judge abused his discretion, but whether the jury could have reasonably reached a different conclusion. *Mahn*, 714 So. 2d at 401 (even though "some reasonable persons might disbelieve portions of this testimony, we have no doubt that other reasonable persons would be convinced by it). The jury was "entitled to consider the conflicting testimony and weigh it in [the defendant's] favor for

⁴¹In the sentencing order, as in the State's sentencing memorandum, the name of this case is erroneously given as *Koons v. State*. (R. 2169; 2478)

purposes of imposing punishment.” *Parker*, 643 So. 2d at 1034.

In this case, the jury could have reasonably found that, notwithstanding the arguable evidence of purposeful activity, the amount of alcohol Ramirez consumed in a short period of time, in addition to smoking marijuana, was sufficient to have impaired his judgment. The trial court’s different view of the evidence does not justify overriding the jury’s life recommendation. *See Barrett*, 649 So. 2d at 223 (trial court’s rejection of voluntary intoxication as mitigation on ground that defendant may have intended to “fortify his resolve” or “bathe his conscience” did not justify override where jury could have given more credence to evidence of intoxication); *Cheshire*, 568 So.2d at 911 (override improper “where there was some evidence that Cheshire had been drinking at the time of the murder” and “[a]lthough the judge concluded that Cheshire was not sufficiently intoxicated, . . . a reasonable jury could have relied upon this evidence”); *Amazon v. State*, 487 So. 2d 8, 13 (Fla.) (override improper where mitigating factors included “some inconclusive evidence” that defendant took drugs on the night of the murder), *cert. denied*, 479 U.S. 914 (1986); *Norris v. State*, 429 So.2d 688, 690 (Fla. 1983) (override improper where, among other factors, defendant “claimed to have been intoxicated at the time of the crime.”)

B. The Jury Could Have Reasonably Rejected or Given Little Weight to the HAC and Avoiding Arrest Aggravating Factors

This Court has also recognized that another consideration in assessing the propriety of an override is whether the jury may have rejected some of the aggravating

circumstances or given them little weight. *Jenkins v. State*, 692 So.2d 893, 895(Fla.) (jury could have concluded prior violent felony conviction aggravator was entitled to little weight), *cert. denied*, 118 S.Ct. 311 (1997); *Bedford*, 589 So.2d at 254 n.5 (jury properly could have rejected CCP aggravator because there was insufficient evidence of the heightened premeditation); *Hallman v. State*, 560 So.2d 223, 227 (Fla. 1990) (“the jury may well have decided that, although four aggravating factors were proved, some were entitled to little weight”); *Amazon*, 487 So. 2d at 13 (jury could properly have found insufficient evidence of witness elimination).

In this case, as discussed further below, there is arguably insufficient evidence to support either the avoid arrest or HAC aggravating circumstances. At a minimum, the jury could have properly given these factors little weight.

C. The Trial Court Erroneously Attributed the Jury’s Life Recommendation to Defense Counsel’s Closing Argument and Sympathy for the Defendant’s Family.

Having either rejected outright or dismissed as insignificant all of the mitigating evidence presented by the defense, and finding the aggravating circumstances to be “overwhelming,” the judge concluded that “the jury’s recommendation could only have been based on improper argument or on sympathy [for the defendant’s family] or both.” (R. 2486-87) During his closing argument, defense counsel asserted that Ramirez was less likely to pose a danger in the future because of his “unwavering claim of innocence” and concluded:

And if the gods of science are proven wrong, if they come up with DNA

that's different, the finality of the death sentence doesn't help him at all. And I don't think there will be fourteen happier people on this world if it was proven down the road you were wrong.

(T. 4423-24) The prosecutor immediately objected, the objection was sustained, and the jury was instructed to disregard defense counsel's remarks. (T. 4424) The prosecution did not request any further curative instructions.

After the jury returned its life recommendation, at the *Spencer* hearing, the prosecution argued that "many" death sentences are reversed because of improper closing arguments by prosecutors, and the same rule should apply to the defense. (T. 4478) In response to the trial court's inquiry, the prosecutor specifically declined to request a mistrial, arguing that the judge should simply override the jury's recommendation and sentence Ramirez to death to spare the victim's family from another hearing.⁴² (T. 4478-79) The trial judge ultimately did so, concluding that "[t]his court can not state that the jury's recommendation was not based on counsel's improper argument." (R. 2486)

Appellant does not dispute that defense counsel, who acceded to the state's motion in limine to preclude mention of lingering doubt, should not have made the remark. Nevertheless, the remark was extremely brief, was not repeated, and the jury

⁴²This Court has remarked, with respect to prosecutorial misconduct, that "it is appropriate that individual professional misconduct not be punished at the citizens' expense, by reversal and mistrial, but at the attorney's expense, by professional sanction." *Bertolotti v. State*, 476 So.2d 130, 134 (Fla. 1985). Here, while claiming to request parity in the treatment of prosecutors and defense counsel, the state asserted that the appropriate remedy for similar misconduct by defense counsel should be not discipline or reversal but the client's execution.

was immediately instructed to disregard it. The theme of defense counsel's closing argument was the devastating effect that sexual abuse would have on an 8-year-old boy, how the lack of maternal love would have exacerbated it, how well Joseph had adjusted to prison, and how he could continue to be a positive influence in the lives of his family if sentenced to life imprisonment.⁴³ (T. 4416-29) The two-sentence reference to lingering doubt was hardly a feature of the 13 pages of argument. It is simply not plausible that this single anemic reference to the possibility of Ramirez being vindicated in the future could have had any effect on the jury's recommendation. *See, e.g., Shellito v. State*, 701 So.2d 837, 842 (Fla.1997) (prosecutor's "brief reference to [defendant's] lack of remorse was of minor consequence and constituted harmless error"), *cert. denied*, 118 S.Ct. 1537 (1998); *Walker*, 707 So. 2d at 314 (single improper reference to future dangerousness harmless); *Spencer v. State*, 645 So.2d 377, 383 (Fla. 1994) (prosecutor's single improper reference to matters not in evidence harmless); *Davis v.*

⁴³The state in its sentencing memorandum complained about two other remarks in defense counsel's argument. (R. 2175) At the beginning of his argument, defense counsel referred to seeing the jurors' tears -- from the prosecutor's closing -- and asked whether they could listen to the mitigation and "have some tears for this little guy," referring to a photo of the defendant at age 8. The prosecutor objected, and the objections was sustained. (T. 4416) This, however, was in response to the prosecutor's own emotional closing during which she displayed blown-up pictures of the victim before her death and graphic photos of her body in the bloody crime scene. The defense objection to the use of these photos was overruled. (T. 4393) The prosecutor also asserted at one point that defense counsel made a "Golden Rule" argument when he was attempting to emphasize the damaging effects of childhood sexual abuse and why society takes it seriously and referred to "Any of you folks who have children or grandchildren" The state's objection was again immediately sustained. (T. 4417)

State, 604 So. 2d 794, 797 (Fla. 1992) (any error resulting from single, isolated “golden rule” remark was harmless beyond a reasonable doubt); *State v. Benton*, 662 So.2d 1364, 1365 (Fla. 3d DCA 1995) (trial court abused its discretion in ordering new trial based on single improper attack on defense counsel in closing argument); *Williams v. State*, 544 So.2d 1114, 1115 (Fla. 3d DCA 1989) (prosecutor’s single reference to tears of victim’s parents was improper appeal to sympathy but not reversible error).

The judge also concluded that the jury may have been motivated by sympathy for Ramirez’ family, particularly “toward the defendant’s wife who was present almost every day during the trial and toward the defendant’s son who testified on the defendant’s behalf.” (R. 2483, 2487) The prosecution did not suggest once during the trial or sentencing hearing, however, that Mrs. Ramirez behaved inappropriately during the trial; nor did it ever dispute that her testimony and that of Ramirez’ son was relevant mitigating evidence as established by numerous decisions of this Court. Indeed, the *prosecutor* elicited on cross-examination both that Brezetta is very ill and how much she loves her husband.⁴⁴ (T. 4099-4100, 4103)

In closing, the prosecutor argued at length that sympathy for Ramirez’ family was not mitigation and that, in fact, any harm to his family compounded his culpability. (T. 4405-07) The jury was also instructed specifically that it could *not* base its

⁴⁴The state presented victim impact evidence, but complained at the *Spencer* hearing that the victim’s mother and best friend “have had to move on” with their lives and that their testimony had been “dry and unemotional.” (T. 4468-69) The record reflects, however, that the prosecutor gave a powerful closing argument that reduced the jury to tears. (T. 4393- 96, 4409-13, 4416)

recommendation on sympathy. (T. 4438) The “jury is presumed to follow the judge's instructions as to the evidence it may consider.” *Valle v. State*, 474 So.2d 796, 805 (Fla. 1985) (rejecting argument that jury may have considered nonstatutory aggravating circumstances), *vacated and remanded on other grounds*, 476 U.S. 1102 (1986). Examining the record as a whole, there is no basis to conclude that the jury was moved by any improper sympathy for Ramirez’ family as opposed to the substantial mitigating evidence presented by the defense.

The trial judge attributed the jury’s verdict to improper factors simply because he disagreed with their evaluation of the mitigating evidence. Rather than examining the evidence to determine whether there was a reasonable basis for the jury’s recommendation, the trial judge, relying heavily on the state’s sentencing memorandum -- from which he frequently borrowed verbatim, errors and all -- evaluated the sentencing factors as if writing on a blank slate and concluded that “death would be the appropriate sentence.” (R. 2463-84) He then reasoned, in effect, that since the jury had reached a different conclusion, they *must* have been influenced by some improper factor. (R. 2484-85) This defeats the purpose of the *Tedder* standard.

As this Court has emphasized: “Although a trial judge may not believe the evidence presented in mitigation or find it persuasive, others may. It takes more than a difference of opinion for a trial judge to override a jury's life recommendation.” *Stevens v. State*, 552 So. 2d 1082, 1086 (Fla. 1989) (citing *Robinson v. State*, 487 So.2d 1040, 1043 (Fla.1986) and *Holsworth*, 522 So.2d at 354). Consequently, if there

is sufficient evidence of mitigation in the record on which a jury could reasonably rely to recommend life, then the fact that trial judge can point to some arguably improper factor is not sufficient to justify an override of the jury's recommendation. *See, e.g., Esty*, 642 So. 2d at 1080 (trial judge improperly concluded jury's recommendation could only have resulted from sympathy when there was reasonable basis in record to support life recommendation); *Morris v. State*, 557 So. 2d 27, 30 (Fla. 1990) (trial judge improperly overrode jury recommendation based on belief that jury was unduly swayed by the closing argument of defense counsel); *Masterson v. State*, 516 So. 2d 256, 258 (Fla. 1987) (trial judge improperly rejected jury's recommendation as based on "some matter not reasonably related to a valid ground of mitigation" when there was sufficient evidence to establish a reasonable basis for a life recommendation). There was substantial mitigating evidence on which the jury could have reasonably relied to return a recommendation of life in this case. The trial court therefore erred in overriding the jury's recommendation.

VI.

THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS COMMITTED TO ELIMINATE A WITNESS IN VIOLATION OF SECTION 921.141, FLORIDA STATUTES, ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION AND AMENDMENTS VIII AND XIV TO THE U.S. CONSTITUTION.

When the avoid arrest aggravator is sought in a case not involving a law enforcement officer, "[p]roof of the requisite intent to avoid arrest and detection must be very strong." *Consalvo v. State*, 697 So.2d 805, 819 (Fla. 1996) (*quoting Riley v.*

State, 366 So.2d 19, 22 (Fla.1978)), *cert. denied*, 118 S.Ct. 1681 (1998). The state must prove that the sole or dominant motive for the killing was to eliminate a witness. *Id.*; *Geralds v. State*, 601 So.2d 1157, 1164 (Fla.1992); *Oats v. State*, 446 So.2d 90, 95 (Fla.1984). Mere speculation that witness elimination was the dominant motive behind a murder is not sufficient. *Consalvo*, 697 So. 2d at 819; *Scull v. State*, 533 So.2d 1137, 1142 (Fla.1988), *cert. denied*, 490 U.S. 1037 (1989). Nor is the mere fact that the victim knew and could identify defendant sufficient, without more, to prove this aggravator. *Consalvo*, 697 So. 2d at 819; *Geralds*, 601 So.2d at 1164; *Davis*, 604 So.2d at 798.

In this case, the avoid arrest aggravator was based entirely on circumstantial evidence. One witness testified that Ramirez *could* have known Quinn from working the same hours, but he had no personal knowledge that they had ever met. (T. 1867, 1871) While the judge inferred, as the state urged, that evidence of a struggle in the dispatch room indicated that Quinn had been trying to call for help, this is entirely speculative. (R. 2465-66) *Scull*, 533 So. 2d at 1142; *Rivers v. State*, 458 So.2d 762 (Fla. 1984) (trial court's theory that victim was shot as she turned to run down a hallway to prevent her from alerting authorities was too speculative to support avoiding arrest aggravator). There was evidence of a struggle in the main office as well as in the dispatch room. (S.R. 59) The dispatch room was in disarray: a chair was overturned with some of its casters off, and there was broken plastic from the fax machine in the room and blood in several locations. (T. 1617-18; S.R. 59) The prosecution

emphasized that one phone was off the hook with a button lit up, there were bloody fingerprints on a computer keyboard, and the cord from the phone in the hallway had been pulled out of the wall and wrapped around Quinn's legs. (T. 1618-19, 1632, 4409-10)

There is no evidence, however, that Quinn was actually attempting to call anyone as opposed to the phone button being pushed accidentally in the course of a struggle.⁴⁵ Further, the phone cord that was pulled from the wall and wrapped around Quinn's legs had been hooked up to the fax machine in the hallway. (T. 1632, 1858-59; S.R. 59) This is consistent with the cord having been pulled from the wall when the fax machine was picked up, rather than in a deliberate attempt to eliminate a line of communication. The evidence does not exclude the reasonable hypotheses, as defense counsel argued, that the defendant was surprised by the victim and panicked, or that he had attempted to restrain her and she resisted or tried to escape. (T. 4424)

This Court has found far more compelling circumstantial evidence to be insufficient to establish this aggravator. In *Amazon*, the defendant not only knew the victims, but one of them was stabbed while on the telephone, pleading for a neighbor's help. 487 So. 2d at 9. A detective also testified that Amazon had admitted he killed the second victim because she was a witness to the first killing. *Id.* at 13. This Court concluded that "the jury could well have discounted" the officer's uncorroborated

⁴⁵Dolly Ballard testified that the phone indicated the number "594-007" but there was no further testimony about this. (T. 1618) It is therefore unclear whether this was an extension within the office, the last number called, or something else.

testimony and concluded that Amazon killed both victims in a “frenzied attack” rather than in a conscious effort to eliminate a witness. *Id.*; *see also Garron v. State*, 528 So. 2d 353, 360 (Fla. 1988) (evidence insufficient when the defendant shot second victim as she attempted to reach police on the phone).

This Court has consistently found circumstantial evidence of this aggravator insufficient where the facts are consistent with an “instinctive” or panicked response, rather than “a calculated plan to eliminate [the victim] as a witness.” *Urbin v. State*, 714 So. 2d 411, 415 (Fla. 1998) (quoting *Livingston v. State*, 565 So. 2d 1288, 1292 (Fla. 1988)); *accord Robertson v. State*, 611 So. 2d 1228, 1232 (Fla. 1993); *Geralds* 601 So. 2d at 1164; *Cook v. State*, 542 So.2d 964, 970 (Fla. 1989); *Perry v. State*, 522 So.2d 817, 820 (Fla. 1988); *Hansbrough v. State*, 509 So.2d 1081, 1086 (Fla. 1987). In such a circumstance, the “fact that witness elimination may have been *one of the* defendant's motives is not sufficient to find this aggravating circumstance.” *Davis*, 604 So. 2d at 798.

Thus, in *Geralds*, 601 So. 2d at 1164, this Court found the evidence insufficient to establish the avoid arrest aggravator where the defendant stabbed and beat to death his former employer during a burglary of her home. The Court reasoned that the evidence did not exclude the hypotheses that Geralds became enraged when the victim would not disclose the location of hidden money, or that she had struggled to escape and had been killed during the struggle. *Id.*; *see also Rogers v. State*, 511 So. 2d 526, 533 (Fla. 1987) (evidence insufficient where defendant remarked he shot victim, who was

attempting to slip out back door “for trying to be a hero”).

At a minimum, these cases underscore that the jury here, as in *Amazon*, could have reasonably concluded that this aggravator was not established beyond a reasonable doubt.

VII.

THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS HEINOUS, ATROCIOUS OR CRUEL IN VIOLATION OF SECTION 921.141, FLORIDA STATUTES, ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION AND AMENDMENTS VIII AND XIV TO THE U.S. CONSTITUTION.

With respect to the heinous, atrocious, or cruel aggravating circumstance, the trial court stated specifically that it “does not find beyond a reasonable doubt that the defendant killed Mary Jane Quinn with the desire to inflict a high degree of pain with utter indifference to, and even the enjoyment of her suffering.” (R. 2467) The Court nevertheless found the HAC aggravator had been established beyond a reasonable doubt because of the evidence that the victim had suffered pain and “tremendous emotional strain” prior to her death. (R. 2476)

This Court has held repeatedly, however, that “[t]he factor of heinous, atrocious or cruel is proper *only* in torturous murders -- those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another.” *Brown v. State*, 721 So. 2d 274, 277 (Fla. 1998) (emphasis added), *cert. denied*, 119 S.Ct. 1582 (1999); *accord Donaldson v. State*, 722 So. 2d 177, 185 (Fla. 1998); *Guzman v. State*, 721 So.2d

1155, 1159 (Fla. 1998), *cert. denied*, 119 S.Ct. 1583 (1999); *Buckner v. State*, 714 So. 2d 384, 389 (Fla. 1998); *Kearse v. State*, 662 So. 2d 677, 686 (Fla. 1995); *Robertson*, 611 So. 2d at 1233; *Cheshire*, 568 So.2d at 912.⁴⁶ Because the trial court found specifically that an essential element of the HAC aggravator was not established beyond a reasonable doubt, it was error to find this aggravating circumstance. Moreover, the trial court's own conclusion that this necessary element of HAC was not established underscores that the jury could have properly concluded that the state failed to establish its existence beyond a reasonable doubt.

VIII.

THE TRIAL JUDGE IMPROPERLY RESTRICTED THE DEFENDANT'S PRESENTATION OF MITIGATING EVIDENCE REGARDING HIS FAMILY BACKGROUND IN VIOLATION OF THE EIGHTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 17 OF THE FLORIDA CONSTITUTION.

This Court has properly rejected restrictive interpretations of relevance in the

⁴⁶The defense did not dispute that the victim would have suffered prior to her death but argued that there was no evidence that the defendant had intended to cause the victim pain or suffering, rather than striking out in panic with the weapons at hand. (T. 4425) This Court's decisions on the necessity of intent as an element of HAC have been conflicting. In *Guzman, supra*, the Court held that "[t]he intention to inflict pain on the victim is not a necessary element of the aggravator." 721 So. 2d at 1160. But in numerous other cases, the Court has held that the HAC aggravator may not properly be found where there is no evidence that the defendant "intended to subject the victim to any prolonged or torturous suffering." *Buckner*, 714 So. 2d at 389; *Kearse*, 662 So. 2d at 686; *Bonifay v. State*, 626 So.2d 1310, 1313 (Fla. 1993); *Robertson*, 611 So. 2d at 1233; *Santos v. State*, 591 So.2d 160 (Fla.1991). The trial judge in this case, however, did not find that the state had proved the utter indifference which is still required under *Guzman*.

capital sentencing context, emphasizing that “[m]itigating evidence is not limited to the facts surrounding the crime but can be anything in the life of a defendant which might militate against the appropriateness of the death penalty for that defendant.” *Brown v. State*, 526 So. 2d 903, 908 (Fla. 1988) (citing *Hitchcock, supra*; *Eddings v. Oklahoma*, 455 U.S. 104 (1982); and *Lockett v. Ohio*, 438 U.S. 586 (1978)), *cert. denied*, 488 U.S. 944 (1988). “[I]t is well-established” that evidence about the defendant’s “family background and personal history” is constitutionally relevant and “must be considered.” *Brown*, 526 So. 2d at 908. Moreover, complete information about a defendant’s background is essential for this Court to be able to conduct an informed and meaningful proportionality review. *Nelson v. State*, 24 Fla. L. Weekly S250 (Fla. May 27, 1999) (Pariente, J., concurring); *accord Farr v. State*, 656 So. 2d 448, 451 (Fla. 1995) (Anstead, J., concurring). To that end, the Court has expressly “encourage[d] trial courts to err on the side of caution” and allow capital juries to receive mitigating evidence “rather than being too restrictive.” *Robinson v. State*, 487 So.2d 1040, 1043 (Fla. 1986).

In this case, the state attempted repeatedly to restrict the presentation of mitigating evidence on grounds that it did not relate sufficiently to the defendant. Defense counsel argued vigorously that it was important for the jury to understand the dysfunctional nature of Ramirez’ family and to see the pattern of abuse and its destructive effect on Ramirez’ siblings, to corroborate its effect on him -- particularly since the state claimed that the abuse never happened or, if it did, it was insignificant.

(T. 4117-20) Nevertheless, the trial court sustained objections to questions about how Mrs. Longworth had raised her children (T. 3947-48); to both Liz' and Leonard's attempts to describe their abuse by Ernest Moody and its effects, (T. 4027-28, 4109, 4116); and to Liz' attempts to describe their mother's behavior. (T. 4111-13; 4123-24)

The prosecution persuaded the trial court that this Court's decision in *Hill v. State*, 515 So. 2d 176 (Fla. 1987), *cert. denied*, 485 U.S. 993 (1988), precluded the defense from presenting testimony that did not concern the defendant directly. (T. 3944-45, 4018, 4111-13, 4116; R. 1955) In fact, *Hill* held only that the trial judge had not abused his discretion in preventing the defendant's family members from testifying to matters which "focused substantially more on the witnesses' character than on appellant's." *Id.* at 178. It is far from clear that this Court intended *Hill* to be an affirmative limitation on a defendant's ability to elicit a complete social history as part of the case in mitigation. That interpretation is manifestly inconsistent with the goal of obtaining *more* complete information to "enhance the decision-making of both the trial court that imposes the sentence and this Court in reviewing that decision and in performing our independent proportionality review." *Nelson*, 24 Fla. L. Weekly at S254 (Pariente, J., concurring).

IX.

THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S REQUEST FOR A PENALTY PHASE SPECIAL VERDICT FORM IN VIOLATION OF AMENDMENTS VIII AND XIV TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 17 OF THE FLORIDA CONSTITUTION.

The defense moved before the sentencing for a penalty phase special verdict form on the ground that actual findings by the jury are necessary to ensure the reliability of a death sentence where the trial court is required to give great weight to the jury's recommendation. (R. 2008-10) The state opposed the motion, citing *Patten v. State*, 598 So. 2d 60, 62 (Fla. 1992), *cert. denied*, 507 U.S. 1019 (1993), and the trial court denied it. (T. 3778-79; R. 1977) The state subsequently argued that the trial court should override the jury's recommendation because it could not have a reasonable basis. (R. 2174) To demonstrate that there was a reasonable basis for the jury's verdict, defense counsel submitted an affidavit from a juror who had contacted him after the sentencing which enumerated the mitigating circumstances on which the jury had relied.⁴⁷ (T. 4472; R. 2404-05) The state objected that the court could not consider the affidavit under section 90.607(2)(b), Florida Statutes, which precludes jurors from "testify[ing] as to any matter which essentially inheres in the verdict or indictment." (T. 4471-73) The judge ruled he would not consider the affidavit. (T. 4475) The trial court then overrode the jury's recommendation, speculating that it must have been influenced by sympathy or improper argument.

Patten held, without discussion, that there is "no constitutional or statutory requirement that mandates the use of a special verdict form in death penalty cases." 598

⁴⁷Juror Butler's affidavit explained that the jury's life recommendation was based on (1) the fact that Ramirez' prison record from 1983-97 was nonviolent and therefore evidence of a lack of future dangerousness; (2) evidence of sexual and physical abuse in childhood and insufficient guidance; and (3) although in jail, Ramirez is a positive influence on his children and the rest of his family. (R. 2404-05)

So. 2d at 62. In *Hildwin v. Florida*, 490 U.S. 638, 640 (1989), the U.S. Supreme Court held there was no *Sixth Amendment* requirement that the jury, as opposed to the trial judge, make specific findings regarding the existence of aggravating circumstances. *Hildwin* did not, however, address the Eighth Amendment argument raised below.

It is axiomatic that “[b]ecause of the uniqueness of the death penalty...it [may] not be imposed under sentencing procedures that create a substantial risk that it [will] be inflicted in an arbitrary and capricious manner.” *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (citing *Furman v. Georgia*, 408 U.S. 238 (1972)). As Justice Shaw has emphasized, the absence of any mechanism for determining which aggravating and mitigating circumstances the jury relied upon in returning its recommendation “presents a serious *Furman* problem because, if *Tedder* deference is paid, both this Court and the sentencing judge can only speculate as to what factors the jury found in making its recommendation and, thus, cannot rationally distinguish between those cases where death is imposed and those where it is not.” *Combs v. State*, 525 So. 2d 853, 859 (Fla. 1988) (Shaw, J., specially concurring); *cf. Pangburn v. State*, 661 So.2d 1182, 1188 (Fla. 1995) (separate jury recommendations required for each count of first-degree murder to protect against “arbitrary and irrational results,” especially since “jury's recommendation is given great weight in the final sentence imposed on a defendant”).

Just as it is inherently unreliable for a trial judge to defer to a jury recommendation of death without knowing the basis for that recommendation, it is

inherently unreliable for the trial court to disregard a jury recommendation of life based on speculation regarding its basis. Appellant further submits that it is inconsistent with basic principles of due process for the state to *prevent* the jury from making specific findings in support of its recommendation, and then exploit the resulting uncertainty to attack the reasonableness of the jury's recommendation. *Cf. Simmons v. South Carolina*, 512 U.S. 154, 164-65 (1994) (prosecution could not rely on aggravating circumstance of future dangerousness while preventing defendant from informing jury he was ineligible for parole); *Gardner v. Florida*, 430 U.S. 349, 362 (1977) (defendant could not be sentenced to death on basis of information he had no opportunity to deny or explain).

CONCLUSION

For the foregoing reasons, appellant's
the case is remanded for a new trial, and the jury's recommendation of life
imprisonment must be given effect.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I ~~HEREBY CERTIFY~~ that a true and correct copy of the foregoing was forwarded by mail to Assistant Attorney General SANDRA JAGGARD at the Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 950, Miami, Florida 33131, this ___ day of July 1999.

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