IN THE SUPREME COURT OF FLORIDA

WALTER RUIZ,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. 89,201

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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ATTORNEYS FOR APPELLANT

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STATEMENT OF THE CASE

Walter Ruiz, along with Micky Hammonds, Lotia Romanes, and Delio Romanes, was charged by indictment in Hillsborough County on April 26, 1995 with first degree murder of Rolando Landrian,[1] armed kidnapping with a firearm, and robbery with a firearm (R1/62-65).[2] Appellant's case was severed for trial (R14/1291-92,1301). On June 12, 1996, appellant's counsel filed a pre-trial motion in limine asking that the state be prohibited from introducing any evidence that appellant "was charged with robbery in other counties, that he solicited others to help in robberies in other counties, or inferring in any way that he participated in robberies"" (R3/423-24). In this motion, the defense conceded that the facts that appellant was in jail in Seminole County, that he bonded out, and that he failed to appear in court on April 4, 1995 were relevant and were "integrally linked to both the State and defense cases" (R3/423). However, the defense asserted, "the nature of the charges for which he was incarcerated (robbery) has no relevance whatever", and "[w]hile the Defendant concedes no legal relevance at all, any relevance is overwhelmed by the prejudicial impact", especially in view of the fact that the charged murder of Rolando Landrian was also, in part, a robbery (R3/423-24).

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[1] The deceased's name is variously spelled Landrian or Landrain in the record. The correct spelling is Landrian.

[2] The trial transcript will be cited by the transcript volume number, followed by a page number. Pleadings, documents, and exhibits will be cited "R", followed by the record volume number and a page number.

At a hearing on August 1, 1996, the prosecutor acknowledged that she could not think of a reason why the fact that the underlying charge for which appellant had been in jail was for armed robbery "would be something that would be admissible in Mr. Ruiz' case." The prosecutor continued "So I think it was in everybody's understanding that unless I came up with something I wasn't going to go into it, but the fact that he was in jail I think is absolutely relevant" (R14/1391). Defense counsel agreed, "in my motion I said I didn't have a problem with the fact that he was in jail or the fact that he skipped bond on April 4, it was just the fact that the charge itself was robbery" (R14/1391). The judge[3] asked if she had reserved ruling on that, and defense counsel replied "You in effect granted all subject to reargument" (R14/1392, see Supplemental Record p. 26-27).

The case proceeded to trial before Circuit Judge J. Rogers Padgett and a jury on August 26 - September 5, 1996. During the trial, over defense objection, the prosecution introduced rebuttal evidence elicited from appellant's mother Julia Ramirez -- on the asserted basis of impeachment by a prior inconsistent statement -- which informed the jury that the earlier charges in Seminole County were for robbing stores (8/837,873-81,890-93).

Appellant was found guilty as charged on all counts (9/1023; R3/493-94). After the penalty phase of the trial, the jury recommended a death sentence by a vote of 10-2 (12/1240; R3/532).

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[3] A predecessor judge, Claudia Isom, heard this and other pre-trial motions.

On October 7, 1996, the trial court imposed the death penalty for the murder of Landrian, and concurrent sentences of life imprisonment on the other counts (14/1274; R3/546-62). The trial court found as aggravating factors (1) that appellant was previously convicted of felonies involving the use or threat of violence;[4] (2) that the capital felony was committed during the course of a kidnapping; (3) that it was committed for financial gain; and (4) that it was committed in a cold, calculated, and premeditated manner (R3/556-58), The first two aggravators were given substantial weight, and the last two were given great weight (R3/559-60). The court found no statutory mitigating factors, but he found that the evidence established numerous nonstatutory mitigating circumstances beyond a reasonable doubt (R3/558-59). These were:

> Defendant is a fair and considerate father to his four children including two stepchildren; he played games with them, he participated in their activities, helped with homework and treated them equally both before and after the separation between himself and his ex-wife, the children's mother. Defendant has always supported his children financially. Before the separation defendant was always steadily employed in Orange County and when the family lived in New York City. Defendant helped willingly with the housework and cooking. Before the separation defendant attended church regularly and was active in church affairs by singing and testifying and "gave his heart to God in the church". Defendant participated willingly and actively in family gatherings. From jail the defendant talks to his children and stepchildren on the telephone and writes them inspirational and loving letters and this contact is important to the children and they would continue this contact with defendant were he to be sentenced to life

[4] These included a conviction of resisting an officer with violence and three convictions of armed robbery (R3/556).

> in prison. Defendant's mother loves him and communicates with him and would visit him in prison were he to be sentenced to life in prison. Defendant's conduct and lifestyle changed abruptly for the worse about two years ago.

(R3/558-59)

The trial court found that these nonstatutory mitigating factors should be given considerable weight (R3/559).[5]

STATEMENT OF THE FACTS

A. Trial - Overview

The prosecution's theory of the case was that appellant and Micky Hammonds were solicited and paid by a Tampa couple, Delio and Lotia Romanes, to kill Rolando Landrian. [Landrian was Lotia Romanes' former common law husband, and they had a daughter together, Zuhay. Lotia had two other daughters -- Myra and Llorca -- from a relationship with Ernesto Acosta (see 11/1154-56). Lotia and her present husband, Delio, were now working for (and apparently residing at least part of the time with) Rolando Landrian in Tampa]. Lotia told appellant and Hammonds that Landrian had been having sex with her daughters (Myra and Llorca) over a long period of time, and she was going to get the girls out of the relationship (see 3/344). According to the prosecution, Hammonds drove the car, while appellant abducted Landrian from a convenience store parking lot and soon thereafter shot him to death.

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[5] Due to the length of this brief, the penalty phase evidence will not be set forth in the Statement of Facts, but will be discussed in the argument sections as necessary.

The state's key witness was Hammonds,[6] who had made a plea bargain immediately prior to his own trial. The state also presented three witnesses -- all strangers to appellant -- who had made pre-trial or in-court identifications. Each of these were challenged on cross-examination.[7]

For the defense, appellant testified that he was not in Tampa on the day of the murder and he did not kill Landrian. The Romanes, who were drug customers of his, had approached him about roughing up the man who had been molesting and abusing Lotia's daughters, but appellant had declined. He had suggested to them that Micky Hammonds might be interested. The defense's theory was that Micky Hammonds was indeed the driver, but that the shooter was either a third party or, more likely, Delio Romanes himself (See 3/294,320-23;9/945,948,951,958,960-64,972). The defense presented four alibi witnesses -- appellant's ex-wife, his mother, and two acquaintances -- who placed him in the Orlando area at the time of the murder (and throughout the entire day of the murder, during

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[6] During voir dire, in ascertaining whether the prospective jurors could consider the testimony of a co-defendant who plea bargained with the state, the prosecutor commented "If anybody here has a predisposition not to hear [Micky Hammonds], we better pack up our bags and go home" (2/107).

[7] These witnesses included Charles Via, a convenience store stocker whom the prosecutor acknowledged was obviously mentally slow (9/926); he picked appellant's picture out of a photopak, but when he saw appellant in court he said he was not the guy he had seen abducting the victim. Store manager Michael Witty was not shown any photopaks, but he identified appellant in court; his opportunity to observe was called into question on cross. Mary Jo Hahn did not make an in-court identification, but she said she had recognized appellant's photograph in a newspaper article about the crime, as being the passenger in a car similar to Hammonds' car which was parked in the vicinity of Rolando Landrian's house. Her opportunity to observe was also impeached.

which Micky Hammonds said appellant was in Tampa stalking Landrian). The defense also presented a jail inmate who testified that Micky Hammonds admitted to him that they were framing appellant; the person who actually did the shooting was the stepfather (i.e., Delio Romanes) of the girls who were raped by the murder victim. Hammonds said the stepfather was paying him to implicate appellant.

All of the key witnesses for both sides -- Hammonds, the ID witnesses, appellant, the alibi witnesses, and the inmate -- were the subject of intense cross-examination and impeachment. The case turned on the jury's assessment of credibility.

B. State's Case (Micky Hammonds)

Micky Hammonds testified that he was indicted for kidnapping, robbery, and first degree murder of Rolando Landrian. The murder charge carried a maximum penalty of death and a minimum penalty of life imprisonment, and the state had announced it was seeking the death penalty for Hammonds. Immediately before his own trial was to begin, Hammonds decided it was time to cut a deal, and he ultimately received a twenty year prison sentence (3/324;4/409-12).

Hammonds testified that he met appellant in late 1994 at Bonita [Griffin's] house (3/325-26;4/389). He only met him that one time prior to appellant's incarceration in Seminole County (4/389). While appellant was in jail, Hammonds met Maria Vasquez through a mutual friend (3/326;4/389). Hammonds and Maria became good friends, and he later learned that she was appellant's girl-

friend (3/326-27;4/389). A couple of times Hammonds drove her to the jail to visit appellant (3/327).

At Maria's apartment, while appellant was still in the county jail, Hammonds made the acquaintance of a couple named Delio and Lotia Romanes (3/327-28;4/389). The Romanes were people who bought drugs from appellant (4/389). Hammonds saw them at Maria's twice (3/328-29; 4/389-90). Hammonds was also introduced by Maria to an individual named Abraham Machado (whom Hammonds knew as "Gordo") (4/390). On the one or two times he saw Gordo prior to April 6, 1995, appellant was not present (4/390). April 6, the day they bought the gun, was the first time Hammonds saw Gordo and appellant together (4/390-91).

Maria told Hammonds that appellant was getting out of jail, and she invited Hammonds to come over and party with them (3/329). The prosecutor then asked Hammonds if, when they first met, he and appellant had ever had "any conversations about your possibly assisting him or working with him" (3/329). Hammonds replied that they did (3/329). Over defense objection, the prosecutor asked whether they talked about a specific robbery, and Hammonds answered, "No, we never talked about a specific robbery. He just asked me do I want to drive for him and he had to take care of something for Delio and them in Tampa" (3/332, see 3/329-32). Hammonds agreed to drive (3/333).

On April 6, 1995, Hammonds was at a friend's shop when he got a phone call from his roommate Dianne, telling him that appellant and another guy were at the house (3/333-34). Hammonds returned home at around 2 p.m. Appellant and Delio Romanes were there,

along with Hammonds' two roommates (3/334-35). Appellant asked Hammonds if he was ready to go. He told him to pack some clothes; they were going to Tampa and staying overnight (3/335). Appellant said they would take Hammonds' car, which was a 1984 Chrysler Fifth Avenue (3/335-36). They went to a pawn shop around the corner to buy some bullets. Delio gave Hammonds the money to purchase the bullets, because Delio had no Florida ID or driver's license (3/336). Then appellant said they were going near where Maria lives, where a friend of his (the man Hammonds knew as "Gordo") was going to buy him a pistol (3/337). They picked up Gordo and drove to a second pawn shop (3/338-39). The others were all speaking Spanish, which Hammonds does not speak or understand (3/338-39). At the pawn shop, Delio and Gordo got out of the car, while appellant and Hammonds drove to a store, waited 15-20 minutes, and returned to pick them up (3/339-40,4/391). Delio pulled a pistol out of his pocket in a bag and handed it to appellant (3/340). Then they drove to Gordo's house, for Gordo to grind the serial number off the pistol (R3/340;4/392).

They drove to Tampa, with Delio and appellant in Delio's car and Hammonds following in his own car with the gun in his trunk (3/341). Hammonds testified that he did not know exactly where he was going or what he was going to do there (3/341-42). They arrived at a trailer somewhere past the airport (3/342). Lotia Romanes was there. She gave Delio some money, and the three men went out to get some beer and cocaine, which they brought back to the trailer and consumed (3/342-43). While they were sitting around talking, Lotia (who was the one talking English most of the

time) said her ex-husband had been having sex with her daughters, and the girls were tired, and she was going to try to get them out of the relationship with the guy (3/344; 4/396-97,414-16). She said the guy keeps them locked up; they were effectively prisoners of his (4/397). This had been going on for twenty years (4/397). By this time, Hammonds knew that a specific person was going to be killed the next day (3/345).

Lotia wanted to see the gun, so Hammonds brought it inside. She asked "Are you sure this gun will do the job", and appellant said it would (3/343). Lotia explained that the guy would be hard to kill, and appellant told her not to worry, he could do it (3/344).

They were up all night, and very early the next morning -- April 7 -- they left the trailer (3/345-46; 4/398). Hammonds and appellant were in one car, and Delio was in another car; Hammonds' car was not used at this time (3/345-46). They went to a convenience store operated by Landrian, and sat in the cars for over two hours waiting for him to come and open up (3/345-48). Delio had given appellant a set of Landrian's car keys; appellant was going to abduct him and take him back to the Romanes' trailer in his own car (3/347-48; 4/394,397). While appellant and Hammonds were waiting, Delio (who was parked around the corner another block away) twice came over to them, saying there were guys with cameras taking pictures and "The guy knows we"re waiting on him, trying to put this hit on him" (3/348-39). Appellant told him no, "[Y]ou're tripping, man", we're going to wait a little longer (3/349)

Neither Landrian nor anyone else showed up to open the store, and eventually they went back to the trailer (3/349-50). After a while, Lotia called her daughter to find out why Landrian hadn't opened the store, and found out that he was planning to go to Miami (3/350; 4/356,358). Also, he was driving a different car than the one they had the keys to; a maroon Nissan rental car (4/358-59). They decided they had to try to catch him before he left for Miami (4/358).

This time Hammonds and appellant were in Hammonds' car (the white over maroon Chrysler), and Delio and Lotia were in a yellow or beige rental car (4/357,361-62). On the way, Hammonds followed Lotia through a neighborhood, where she pointed out the house where Landrian lived (4/359). They did not stop, but proceeded to the convenience store where they had been earlier in the morning (4/357-360). Landrian's maroon rental car was there (4/359). The Romanes pulled up beside Hammonds' car, and Delio gave appellant some money and a beeper number (4/360). Hammonds and appellant waited in the parking lot for an hour and a half until Landrian finally came out of the store; by this time the Romanes had already left (4/361). Landrian drove away in his rental car, and Hammonds began following him (4/361-62). Landrian was driving fast and zig-zagging through traffic; Hammonds was unable to keep up and they lost him after a couple of red lights (4/362).

They tried to beep the Romanes but got no response, so they rode around for a while until they found themselves back near the subdivision where Lotia had showed them Landrian's house (4/363). They parked on a side street and watched the house (4/363-64).

After about twenty minutes, they saw the rental car shoot out of the driveway and down the street, still driving like a maniac, and they took off behind the guy again (4/354-65,400). Hammonds had to run some red lights to keep up with him (4/364-65). They followed him onto an expressway, and Hammonds told appellant the guy was probably on his way to Miami; they wouldn't be able to keep up with him as fast as he was driving and they didn't have enough gas to keep following him (4/365). At one point appellant said he was going to shoot him through a window (R/400-01). Landrian "shoots down a ramp again", down a main highway, and pulled into a convenience store parking lot (4/365-66).

It was now about 7:00 or 7:30 p.m. (4/367). Appellant told Hammonds to pull in, he was going to get him here (4/366). Landrian was on the phone or heading toward the phone (4/366). Appellant jumped out of the car and walked up real fast with a pistol in his hand (4/366). Landrian turned, and appellant said something to him in Spanish, grabbed him, and hit him in the face with the pistol (4/366). Hammonds figured the guy must have seen the gun; "[h]e starts following Walter, and Walter starts leading him towards my car" (4/366). Appellant put him in the front seat, and appellant got in the back seat (4/366). [Hammonds reiterated on cross that appellant hit Landrian in the face with a pistol, not a wrench. There was a crescent wrench in the car at the time of the abduction, and it was still there when Hammonds was arrested, but according to Hammonds the crescent wrench did not play any role in this crime (4/401)].

As Hammonds was backing out of the parking lot, a guy with a bag over his head started walking toward the car (4/366,401-02). Appellant stuck the pistol out the window and told him to back up (4/366). As Hammonds drove away, he saw the man writing something; he assumed it was his tag number (4/367,401-02). Appellant was in the back holding the pistol, hollering at Landrian in Spanish (4/368). Landrian, also talking Spanish, was pulling off his jewelry and chains, taking money and keys out of his pocket, and giving them to appellant (4/368-69,402). Hammonds turned down a street and appellant told him to stop the car. Appellant opened Landrian's door and Landrian got out. As he started walking away from the car, appellant approached him, drew the pistol, and shot him repeatedly (4/370). Appellant then jumped back in the car and Hammonds took off (4/370).

Hammonds figured he needed to get rid of the car, because the cops were going to be looking for it (4/371). They pulled over across the street from another convenience store, intending to leave the car and call Lotia and Delio to come get them (4/371-72, 403). When they were unable to get in touch with the Romanes, they decided to call a cab. The cab arrived and they told the driver their car had broken down and they were waiting for a friend to pick them up (4/371-72). They paid the driver to let them wait in the car, and after ten more minutes had passed, Delio and Lotia showed up in yet another of their rental cars, a grey one (4/372, 403). Hammonds and appellant got in the car with the Romanes, leaving Hammonds' car where it was parked (4/372,403).

They returned to the convenience store where the abduction had taken place to get Landrian's rental car. [Appellant had taken the keys away from him before the shooting] (4/373,403-04). The reason for doing this was that Landrian was supposed to have ten thousand or twenty thousand dollars in a bag he carried with him (4/373-74). Appellant and Delio walked across the street to retrieve Landrian's car, while Hammonds stayed in the Romanes' rental car with Lotia (4/373). They then traveled in the two cars to a bowling alley, where Delio and appellant searched Landrian's vehicle (4/374-75). Hammonds did not see them find anything (4/375).

They left Landrian's car in the bowling alley parking lot, and the four of them left in the Romanes' car (4/375). They drove back by Landrian's house, and Delio and Lotia went inside (4/375,404). Appellant decided that, while they were gone, he would search the Romanes car. He drove it around the block to a Winn-Dixie, searched it, found nothing, and returned the car to in front of Landrian's house (4/375-76,404). Appellant told Hammonds he was going to get something to eat, and he left Hammonds by himself. Hammonds didn't want to be sitting there alone in front of the guy's house so he went around the corner where there was a Burger King. He didn't see appellant, so he headed back to tell the Romanes. Delio and Lotia were coming the other way, and Hammonds jumped in the car with them (4/376-77,404). Then they saw appellant, picked him up, and headed back to the Romanes' trailer (4/377-404).

At the trailer, appellant dumped the money and jewelry out of a bag (4/377,404). He was saying this is all the guy had, a thou-

sand dollars, and where's the rest of his money? (4/377-78). The bag contained about ten rings, a large watch, a bracelet, and half a dozen chains and medallions (4/378). Appellant gave Hammonds a couple of pieces of jewelry, and kept the rest, except for one piece Delio said he wanted (4/378). Of the one thousand dollars appellant said there was, he gave Hammonds about $350, and said he'd give him some more later (4/378-79).

They went and got some more beer and cocaine, and picked up Hammonds' Chrysler (4/379,404-05). [Hammonds was still worried about the tag, but he felt he couldn't leave it sitting there (4/405)]. Then the four of them went to a motel in north Tampa (4/379-80,405). The Romanes rented two rooms; they stayed in one and Hammonds and appellant stayed in the other (4/380,382). The Romanes came to Hammonds' and appellant's room for a while. Appellant was angry at Delio and Lotia; he had been expecting that Landrian would have ten to twenty thousand dollars on him, and he wanted the rest of his money (4/380-81). The Romanes said they'd get him the rest of the money tomorrow, and he said "All right" (4/380). Then they went back to their room (4/380).

Hammonds and appellant stayed up all night again using their share of the cocaine (4/381,405). According to Hammonds, appellant made some phone calls, one of which was to Maria Vasquez; "[s]omething about tell somebody to get me two hundred thousand dollars or I'll kill them" (4/405). The next morning -- Saturday -- Delio and Lotia came to their room and told appellant they were going to get the rest of his money and they'd be back later (4/381-82). While they were waiting, appellant told Hammonds he had only charged the

Romanes ten thousand dollars, and if they didn't come up with the rest of his money he was going to have to kill them too (4/382). The Romanes returned that afternoon and gave appellant some money. Hammonds saw the stack of money on a table and asked Lotia how much it was; she said it was $2500 (4/382).

Saturday evening they all drove back to Orlando in two cars (4/383,406). Hammonds was going to leave his car at a friend's house, but the friend wasn't home, so Hammonds decided to keep driving it. He took the tag off and replaced it with a paper tag (4/384,406). He then drove to a motel where the others were waiting (4/384).

Sunday morning Hammonds went back to his house and parked the car in the front yard (4/384). On Monday he went to the tag office and bought a new tag. He told them the old tag got stolen or lost (4/385,406). Hammonds wore some of the jewelry he had gotten; the rest he put in a drawer and a suitcase in his bedroom (4/385). On Tuesday afternoon, April 11, while driving the Chrysler with the new tag, Hammonds was stopped by the police and arrested (4/385-86,407,421). He was brought to the police station for questioning (4/386). Hammonds told the police he had been in Daytona Beach that weekend, and someone stole his tag; he didn't know anything about Tampa (4/386,407). He stuck with this story for awhile (4/407). He knew that the police had a search warrant for his house, and he was sure they would find the jewelry (4/387,407-08). Hammonds was told that there were witnesses who put him at several of the locations in Tampa. The police told him he was in trouble up to his neck, but maybe he could get it down to his waist if he

gave up his shooter (4/387,408). At that point Hammonds told the police that Walter Ruiz was the shooter (4/387,408). He also told them about Delio and Lotia (4/388).

On cross-examination, Hammonds stated that while he was in jail awaiting trial he had some contact with Delio Romanes. Delio offered Hammonds money to keep him and Lotia out of it (4/412). Hammonds mentioned this to another inmate. Hammonds testified in both of their [the Romanes'] trials (4/412).

On the way to Florida state prison, Hammonds rode in the same van with Delio Romanes. Delio gave Hammonds his lawyer's phone number, and asked him to call the lawyer about changing his statement. Hammonds said he'd think about it (4/412-13).

Hammonds acknowledged that he "probably did" talk to James Alderman, a jailhouse "paralegal", about his case while they were on the rec field (4/413). However, Hammonds denied telling Alderman that the stepfather of the girls Rolando Landrian was raping was the real shooter (4/413-14). Hammonds also denied telling Alderman that Walter Ruiz was approached about the murder but wouldn't do it; that he [Hammonds] and Delio had agreed to put it off on Ruiz if they were caught; or that he was thinking of telling the authorities that Delio was the real shooter and asked [Alderman] if that was a good idea (4/414).

C. State's Case (Other Witnesses)

Mary Jo Hahn was a neighbor of Rolando Landrian, but did not know him well (4/424-25). In the early evening of April 7, 1995, as she and her family were going out to eat, she saw a car parked

on her street in front of another neighbor's yard (4/426). You couldn't see the front of the Landrian house from where the car was parked, but you might have been able to see the back of the house from there (4/428). The car was maroon or burgundy with a white top (4/427).[8] There were two men, who appeared to be Cuban or Hispanic (4/427). To the Hahns, who had never seen them or their car before, they looked "rough" and very out of place (4/426-27).

The Hahns decided to go to the nearby police substation to report the suspicious looking car. When they followed the cruiser back over, the car was gone (4/428-29).

The next day or sometime later, the Hahns learned that their neighbor had been murdered (4/429). Her husband brought home a newspaper which had an article about the crime and photographs of the suspects (4/429-30). Mrs. Hahn testified that at the time she recognized one of the photographs as being the passenger in the car she saw (4/429-30). Asked to compare the photo in the newspaper clipping with a photograph of appellant, she testified that it was the same person (4/429-30; see R16/61-62). She acknowledged on direct that at her deposition she had said she believed she saw one person, and she may have stated that it was the driver she saw (4/430-31). She testified that she had seen a picture of the driver on television or somewhere right after his arrest, and this might have gotten her confused (4/431).

On cross, Mrs. Hahn testified that the newspaper article said the people in the photos were wanted for the Landrian murder, and

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[8] Shown a photograph of Micky Hammonds' car, Mrs. Hahn said it could be the car she saw (4/427).

one of them -- the driver -- had been arrested (4/434). After they saw the newspaper photos, her husband called the police and left a message, but Mrs. Hahn never talked to the police and never gave any statement until she was deposed on August 7 (4/429-30,438-39).

Mrs. Hahn stated on cross that of the two men in the car, whom she saw only for a period of seconds, it was the driver she could see more clearly (4/433-34,436-38). She felt that the driver was heavier and older than the passenger, but she could not further describe them (4/434). She was distracted by her baby, who was in a car seat in the back; she recalled handing something back to the baby (4/434-36). Her memory of the incident was "definitely" better at the time of her August 1995 deposition than it was at trial (4/438). In that depo, she had said "From where [I] sat, I really at the time I was messing with the baby and I remember looking at them, but I cannot tell you any identifying marks on their faces" (4/435). At trial, Mrs. Hahn said she could see the passenger "pretty well", but in her depo, when her recall was better, she said "Now, the driver was closer to us so . . . I didn't get a very good line of sight on [the passenger], but he did appear to be thinner" (4/436-37, see 4/438). Mrs. Hahn agreed at trial that her statements that she "didn't get a good line of sight of him" and that she"couldn't see a lot of him" were correct (4/437).

At trial Mrs. Hahn remembered that the passenger had facial hair, while in her depo she stated that she did not remember anything about facial hair (4/437).

In both the deposition (which took place four months after the incident) and at trial, Mrs. Hahn stated that because of the time which had passed she did not believe she would be able to recognize the passenger if she saw him again (4/437).[9]

Joe Hahn, husband of Mary Jo, had also noticed the suspicious looking car[10]; he told his wife they were "rough looking characters" who "were up to no good" (4/445-47). Both men appeared to be Hispanic, darker-skinned individuals (4/448). Mr. Hahn had eye contact with the driver, who reminded him of somebody he'd seen in a movie, "and I really picked up on him" (4/448). The passenger, on the other hand, was a slender guy, "and I really couldn't identify him" (4/448).

Mr. Hahn drove to the sheriff's substation, but when he followed the deputies back over there, the car was gone (4/449-50).

The following Monday or Tuesday, there was an article in the newspaper about their neighbor's murder (4/450). This article (which did not contain photographs of any suspects) described a maroon car with a white top, "and it rang a bell" (4/450). Mr. Hahn thought these were the same guys he had seen parked on the street, so he called a detective (4/450-51). A day or two later, another article came out with photos of two suspects (4/451). Mr. Hahn recognized the driver, the heavier-set guy (4/451). He showed

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[9] Defense counsel's motion to strike, on the ground that Mrs. Hahn's testimony regarding the newspaper photograph was "a memory that she once had a memory", and that the prejudice outweighed its probative value (if any), was denied (4/442-43).

[10] Like his wife, Mr. Hahn said the photo of Micky Hammonds' car looked like the one he saw (4/448).

the article to his wife, told her he recognized the driver, and she replied that she recognized the guy in the other photo as the passenger (4/451). Mr. Hahn called the detective and left a message on his voice mail (4/452).

Susie Bates Jacobs, the owner of a pawn shop in suburban Orlando, has a customer named Abraham Machado (4/453-55). She identified a firearms transaction form in connection with a gun she sold to Machado on April 6, 1995 (4/455-56; R15/35-36). The gun was a semi-automatic 380 (4/456). Machado paid a hundred dollars down on April 3, and he returned on April 6 to pick it up (4/455-57; R16/63-64). Ms. Jacobs testified that there is a three-day waiting period to buy a gun in Florida, but in Mr. Machado's situation "he put it on lay-away because he couldn't pay for it in three days" (4/455). Ms. Jacobs was testifying based on the ATF form and the lay-away ticket; she had no independent recollection of the transaction (4/455,458). She does not know appellant (4/458).

Abraham Machado, a/k/a "Gordo", is an auto mechanic who works out of his home (4/459-60,467; 5/496). He met appellant when he came over to get some repair work done on his car (4/460,467). A week or two after they met, appellant asked Machado to purchase a gun for him, as a favor (4/460-61,467-68). He said he needed it for protection (4/467-68). When they went the first time to pick out the gun, there was a black guy and a bald guy with them (4/461, 464,469). The black guy was Micky Hammonds, whom Machado thought he had met at Maria Vasquez' house (4/468). [He did not remember if he had met Hammonds before he knew appellant (4/468)]. Machado

identified a photograph of Delio Romanes as being the bald guy (4/461-62; R15/37-38).

They went to a pawn shop near Machado's house, where appellant and the bald guy picked out the gun and Machado filled out the paperwork and made a down payment (4/462-63). Three days later, the same four guys went back to pick up the gun; the black guy (Hammonds) again stayed in the car while the other three went inside (4/463-65,469). Machado paid for it and gave it to appellant or the bald guy (4/465). They took the gun back to Machado's house, where Machado ground off the serial number (4/469; 5/496-97).

Edith Priest, a bail bondsman, testified that in March 1995, when appellant was in jail in Seminole County, two bonds were set; one for $25,000 and one for $10,000 (4/472-74). To meet the ten percent premium, appellant's stepfather gave Ms. Priest a thousand dollars cash and a check for $2500 (4/474). Appellant's stepfather told her the check was not good, but appellant would provide the cash for the check within a few days (4/474). Ms. Priest held the check and went ahead and underwrote the bond, and appellant was released (4/474,476-77).

About five days later, on March 28, a woman came in and made the check good. The name on her driver's license was Lotia Romanes; she had a heavy Spanish accent and she said she was appellant's aunt from Tampa (4/475-76). Mrs. Priest identified a photograph of Lotia (4/476; R15/39-40).

When appellant bonded out, he had an imminent court date on April 4, 1995, but he failed to appear (4/478).

Dianna Guty shared a rented house with two friends, one of whom was Micky Hammonds (4/479-80). She was introduced to appellant by Hammonds (4/480-81). On April 6, 1995, appellant came to see Hammonds, who wasn't home (4/481). Appellant was with another person she hadn't seen before; she identified a photo of Delio Romanes (4/481-82; R15/37-38). Ms. Guty called Hammonds at Elgee Broussard's shop, and he came back to the house (4/482; see 4/479-81,485). Hammonds and appellant went back to Hammonds' bedroom for a few minutes (while the other guy stayed in the living room with Guty); then they emerged with a suitcase and all three men left (4/483).

On cross, Ms. Guty stated that this occurred between 4:00 and 5:00 p.m. on a Thursday (4/484). She acknowledged that she had told Sergeant McNamara that Micky Hammonds had left on Thursday and she didn't see him come back that night; that it was Saturday when appellant and Delio Romanes showed up and that was when she called Elgee Broussard (4/484-85). She had since been made aware that this would put those events on the day after the death of Rolando Landrian (4/485).

On redirect, Ms. Guty stated that in a January 30, 1996 depo she had indicated that she was mistaken about the date she had given Sergeant McNamara; upon reflection she had figured out it was Thursday (4/485-86).

Charles Via was working at the Stop & Shop convenience store at Lois and Kennedy in Tampa (5/497-98). Between 7:00 and 8:00 p.m. on April 7, 1995, he was outside taking a break; the assistant manager Michael Witty was also outside holding a Lotto sign and

wearing a bag over his head (5/498-99). A man who had come in a tan or blue Toyota came in the store, bought some water, and went back outside to the pay phone (5/499-01,508-09). This man was short, a little chubby, with black curly hair and glasses (5/501). A red car with a white roof pulled off to the side of the building, and a guy got out of the passenger side (5/499,501-02). This man looked Hispanic and appeared to be in his thirties; he was about Via's height (5'9"), had black hair, and was wearing a light or bright shirt (5/504-05). He walked up to the guy on the phone, started talking to him in Spanish, and then hit him in the left temple with a wrench (5/502-04,513-14,517). [Via at first thought it might be a gun he was being hit with, but then he got a better look at it and he could see that it was a wrench (5/514)]. The man who was hit went down, and caught himself as he was going down, and the assailant dragged him back to the red and white car (5/503,505-06). While being dragged, the man who was hit said something to Via in Spanish (5/506). The assailant stuck the man in the front seat and he got in the back seat (5/508,514). Via told Mike Witty "Fight!", and that was when Mike ran out and -- as the car backed out on Kennedy -- got the tag number (5/506,508). They called 911 but they never showed up (5/506). Later that night they noticed that the blue Toyota was no longer in the parking lot (5/509).

A few days later, the police showed Via two photopaks (5/510, 513) Out of the first photopak (State Exh. 34), he picked out the photograph in the upper left, which was appellant's photo, as the assailant (5/511-12,517,519-20; R15/41-44). Via testified that he also picked somebody out of the other photopak he was shown (5/511-

12,517-18). [The second photopak was not introduced into evidence]. He did not get a good enough look at the driver of the car to identify him; he just saw that he was a big guy, and he was kind of a suntanned brown (5/507,518,520).

On cross, Via stated that after the incident was over he told Mike Witty all about it (5/516). Via remembered stating in his depo that he told Mike everything because Mike didn't know what happened (5/516).

Via testified that the perpetrator -- the guy with the wrench -- was wearing a dangling earring on his right ear (5/517).

Via was unable to make an in-court identification. The day before he testified -- in the courtroom with the jury absent -- Via was shown appellant and was asked whether appellant was the guy he saw. Via answered ""No" (5/518).

On redirect, the prosecutor pointed out that appellant, at the time of trial, had a shaved head. Via agreed that in the photopak picture he had a little bit of hair on his head (5/519). On recross, Via stated that when Detective Rockhill showed him the photopak he told him to ignore things like hair and facial hair because they change from day to day, and Via agreed that that was good advice (5/517,520).

Store manager Michael Witty was standing out front with a grocery sack over his head, drumming up business for the lottery (5/521-22,530). When he heard the stockboy, Bubba (Charles Via), yelling "Mike, fight!", he turned around and pulled the bag off his head (5/522,530). He saw two men fighting by the pay phone, and started over there to break it up (5/522-23). One person had "a

pair of water pump pliers or otherwise known as channel locks in his hands" (5/523). Asked to describe them, Witty said:

> They're two pieces of plier that are -- it's kind of hard to describe, channel locks, they're grooved together with a rivet in the middle, and they're adjustable for grabbing pipe.
>
> Q. Could you see that clearly?
>
> A. When he hit him upside the head with it I could.

(5/523).

Witty got a good look at the tool, with which he was quite familiar from previous employment (5/530).

The two men who were fighting were about the same height (5/523). The person who was hit was a well-dressed older gentleman between 35 and 40 (5/523). He was kind of stunned by the blow, and he got pushed toward the car and into the front seat (5/523-24). He was yelling for help in English (5/533). The driver of the car reached across with his arm to hold the victim down, while the assailant climbed into the back seat (5/524). Then the car -- a maroon Fifth Avenue with a white vinyl top -- backed out onto Kennedy (5/524).

Witty gave chase. It was now "going towards dusk" and the sun was going down, but Witty testified that he didn't have any problems seeing what was going on (5/524-25). As he chased the car down Kennedy trying to memorize the tag number, "[a] gentleman looked out the back window. I made a gesture out of frustration, and then as they drove down the road, I went to the pay phone and called 911" (5/525,527).

Although he told them a person was kidnapped, there was no response to the first 911 call. Witty's adrenalin was still pumped up from the incident; after he calmed down a little bit, he realized the victim's car was still in the parking lot. He called the police department's non-emergency line and advised them of this fact, and that there were witnesses. Again there was no response. The store was extremely busy, but there was a lull just before closing, and Witty noticed that the victim's car was now gone. The next day, after a third phone call, the police arrived (5/528-29).

Witty testified that he was never shown any photographs, or asked if he could pick out any suspects from a photopak (5/525-26). He identified appellant in court as the person who hit the victim (5/526-27). Asked if there was anything different about him from the time of the incident, Witty said he was missing a lot of hair on top of his head (5/527).

On cross, Witty said he got right up to the window of the car as it was pulling out (5/531). In his deposition, when asked if the assailant had any distinguishing features, Witty had said:

> [I] wasn't really that close to him. The only time I really got a good look at him was when he was in the back of the vehicle and giving me a hand signal and driving away.

(5/531-32).

Witty also remembered saying in his depo that, as he was running parallel to the car, the only person he could see directly was the victim because "the victim was between me and the suspect"; Witty didn't see the suspect until he looked out the back window on Kennedy (5/532-33). Witty also acknowledged that once he realized

he couldn't get to the victim, he wasn't concerned about making identifications but rather about getting the tag (5/533). Between the incident and the trial, eighteen months had passed (5/539-31).

A cabdriver named Victor Ojunku got a call to a Rainbow Mart on Westshore on the evening of April 7. Two men in their early to mid-thirties got in the cab and said they were waiting on a ride, but if their ride didn't show up he could take them where they wanted to go. They waited in the cab with the meter running. After about 35 minutes, a light colored car arrived. The men paid Ojunku and walked toward their ride. Ojunku didn't see who was in the car, and he remembered nothing about the two men other than their approximate ages (5/536-40).

Tampa police detective Paul Rockhill responded to a crime scene in the residential neighborhood of Beachway Drive at 8:40 p.m. on April 7, 1995 (5/540-43). He observed the body of an unidentified white male in his mid-to-late forties; the deceased had sustained multiple gunshot wounds (5/544-46). No wallet or identification was found, and no jewelry except a small, broken neck chain (5/546-47). Six 380 caliber shell casings and two projectiles were recovered (5/548-49). A single shoe print was observed in the sugar-type residual sand on the sidewalk to the right of where the body was found (5/550-52). The shoe print was photographed (with a ruler in it to measure its size) and a plaster cast was made (5/551,570-71;see R16/81-82). Rockhill testified that there was no way to determine when the shoe print was put there, or whether it was put there at the time of the crime (5/551-52). Detective Rockhill did not seize appellant's shoes at the

time of his arrest, and no attempt was ever made to compare appellant's shoes or shoe size to the shoe print at the scene (5/575-76).

The day after the body was found, Rockhill received information which led him to interview Michael Witty at his convenience store, which was located about a mile from Beachway Drive (5/553-54). Witty gave him more details about the abduction, and a description of the car and tag number (5/553-54). The tag (LUB99W) came back registered to Micky Hammonds of Orlando (5/554-55).

On the evening of April 9, Rockhill learned that a person named Rolando Landrian had been reported missing; after comparing his driver's license photo, Rockhill concluded that he was the previously unidentified murder victim (5/555-56). Landrian's car was recovered in the parking lot of Crown Bowling Lanes (5/557-58).

On April 11, Rockhill was notified that Micky Hammonds had been located (5/559). Rockhill traveled to Orlando, where Hammonds was arrested, and search warrants were executed on his residence and automobile (5/559-62). Jewelry which belonged to Rolando Landrian was found in two locations in the house (5/562,573). No gun or firearm was found in the house, but a wrench was found in the car (5/562,573).

After searching Hammonds' residence, Rockhill went back to the Orange County Sheriff's Office, where Hammonds was being interrogated (5/562-63,573). There Rockhill was made aware of a man named Walter Ruiz, and obtained his photograph (5/563-64). A photopak was constructed, and Rockhill brought it to the convenience store and showed it to Charles Via, who identified appellant's photo

(5/564-66). Rockhill testified that he never showed this or any photopak to Michael Witty; Witty was not working on that particular evening and Rockhill was unable to get ahold of him (5/574,577). After that, no further efforts were made; as Rockhill explained, "We already had an identification by Mr. Via in the photopak and the investigation continued. It didn't seem necessary at the time to attempt to show Mr. Witty a photopak" (5/577).

On April 12, Delio and Lotia Romanes were arrested, and an arrest warrant was issued for appellant (5/566-67). A search warrant was obtained for the residence of Maria Vasquez, who was believed to be appellant's girlfriend (5/567). On June 22, 1995, Detective Rockhill learned that appellant had been arrested in Orlando, at the home of a girl named Bonita Griffin (5/568-69).

Ann Cahill lives on Beachway Drive in the Beach Park section of Tampa (5/578-79). Between 7:00 and 8:00 p.m. on April 7, 1995, she and her husband heard what sounded like five quick gunshots, and they ran outside (5/579-80,585). She saw a man across the street lying on the grass between the street and the sidewalk (5/580). He appeared to have sustained gunshot wounds to the face and body; he was still moving a little but Mrs. Cahill did not think he was cognizant (5/580-81,584). Her husband ran back in the house to call 911 (5/581). When Mrs. Cahill first came out of the house she didn't notice anyone around, but after she crossed the street to where the man was, she saw a maroon or dark red car with a lighter colored top heading down the road toward Westshore (5/581-82).

Detective Julia Massucci participated in the April 12 arrest of Delio and Lotia Romanes; she identified a photograph of Delio (5/586-87, see R15/37-38). That same day, she went to the Interchange Motel and obtained a registration receipt showing Delio Romanes registered with two persons in his party in room 201 (5/587; see R16/66). She looked through the phone toll records and found numerous phone calls made from room 201 (5/587-89, see R16/65-67). The next day, acting on new information, she went back to the motel and found that another room (either 125 or 159, it was hard to determine which) was also registered to Delio Romanes (5/588). They found no phone calls associated with that room (5/589). Both registrations were for check-in on the early morning of April 8 (5/588-89).

A stipulation was introduced into evidence that an FDLE latent print expert had examined Landrian's rental car, Micky Hammonds' car, and the wrench obtained in the search of the latter vehicle. No fingerprints were found on Landrian's car or the wrench, and no prints of value for comparison purposes were found on Hammonds' car (6/596-97).

Associate medical examiner Lee Miller performed an autopsy on Rolando Landrian the day after his death (6/598-99). Landrian had sustained seven or eight gunshot wounds to the head and body; the fatal shot entered the right side of the neck and severed an artery (6/604,607-08, see 6/604-13). After that wound was inflicted, death would have occurred rapidly (6/608,615). There were also some non-gunshot injuries, including some scratches and scrapes, as well as a "patterned abrasion" on the right cheek which, according

to Dr. Miller, "looked like two half moons just separated a bit from one another" (6/601-02). Asked on direct if he could tell the instrument that would have caused such a injury, Dr. Miller answered "I can't tell what instrument it is, but they are patterned, and if I had an instrument to look at, a possibility to match up against them, I might be able to answer that question" (6/602-03).

> Q. [prosecutor]: Is that consistent with being struck with blunt force, such as the butt of a gun?
>
> A. Yes.
>
> Q. Is it consistent with other -- being struck with other hard objects.
>
> A. Yes, it is.

(6/603).

On cross, Dr. Miller agreed that the pattern injury with the half moons would be consistent with pliers or a crescent wrench (6/616). Dr. Miller was never given a crescent wrench to compare to the injury (6/617). As to whether the butt of a gun could have produced it, Dr. Miller stated that no particular weapon came to mind, "but the configurations of butts of several guns are so variable. So that it's possible that some gun with which I'm not familiar could have produced it" (6/617).

D. Defense Case

James Alderman, an inmate in the Hillsborough County Jail, is a "jailhouse lawyer" who holds himself out to other inmates as a paralegal, in order to obtain money or goods (6/619,621,625-26).

Alderman met Micky Hammonds in the break yard and discussed his case with him on two occasions (6/620-21). Hammonds told Alderman he had been arrested for murder, and at that point he was blaming it on Walter Ruiz, but it was another guy who actually did the murder with Hammonds (6/621). They had tried to get Ruiz to rough the man up, but he wasn't into it and he didn't do it (6/622). The other guy did it and he [Hammonds] got paid for driving the car (6/622). Hammonds told Alderman that the guy who did the shooting was the stepfather of the girls who were raped by the murder victim (6/622). The stepfather was paying Hammonds to implicate Ruiz (6/623).

Hammonds wanted to know what Alderman thought would happen to him, since he didn't do the actual crime but just drove the car (6/623). Alderman, who was familiar with the law of principals, told Hammonds that since he drove the car he might as well have shot the man (6/623).

A month or two later, Alderman found himself sharing a cell with Walter Ruiz, and he told him what Hammonds had said (6/624).

On cross, Alderman acknowledged that he has been convicted of approximately fifteen to twenty crimes, about ten of which involved thefts (6/626-27). On redirect, he testified that nobody from the defense had promised him anything, and he was not aware of any way appellant or the defense attorneys could do anything to help him (6/628-29). He is already doing a prison sentence and, because of being brought down to testify, he is losing the opportunity to earn gain time (6/629).

Detective Randy Bell of the Tampa Police Department testified that the footprint at the crime scene where Rolando Landrian was found was "within the proximity of the body and all the other evidence that was recovered" (6/658). Bell couldn't tell when or by whom the footprint was put there (6/662-63). He identified a photograph of the shoe print and the ruler which was used to measure it (6/659, see R16/81-82). To Bell's knowledge, the footprint was never compared to appellant's shoe or anyone else's shoe (6/665). By stipulation, the shoes which appellant was wearing at the time of his June 1995 arrest were introduced into evidence (7/681-82). [Defense counsel argued, and the prosecutor did not dispute, that the shoe print at the scene measured an inch and a half shorter than appellant's shoe size; they disagreed, however, on whether the shoe print was significant to the case. (Compare 9/952-53 with 9/936-38)].

Maria Vasquez had been dating appellant for almost two years, and they broke up in late 1994 (6/667,671). Later, when appellant was in the Seminole County Jail, Maria met Micky Hammonds through mutual friends (not through appellant) (6/667). Hammonds, Delio and Lotia Romanes, and a person whose nickname was "Gordo" or "Gago" or something like that (Abraham Machado), all visited Maria from time to time during that period; sometimes they were all there at the same time (6/668-70). Hammonds and Machado met before appellant got out of jail (6/669). Appellant met Machado afterwards (6/669).

Maria testified that she never received any phone call from appellant to the effect that somebody needed to pay him $200,000

(or a large amount of money) or else he would kill him (6/669-70). If she had received such a phone call, or anything remotely like it, she definitely would have remembered it (6/669-70).

When the police came to her house with a search warrant on April 12, 1995 looking for appellant, Maria told them she had seen him the night before, and that he had left in a cab at 3:40 that morning (6/671-73,676). He had come over to say goodbye; she never said anything about him spending the night (6/676).

Jorge Rodriguez dated appellant's ex-wife Nancy for a while during the spring of 1995, although it never developed into a "boy-friend/girlfriend" type of relationship (6/632,640,654). At the time of this trial, Jorge was in a federal prison in Georgia on charges unrelated to this case (6/630-31,639). Had he not transferred to the Hillsborough County Jail so he could testify here, he would instead have been transferred to a halfway house in Orlando (6/630-31).

During the time they were dating, in the early part of April, Nancy told Jorge that the police were looking for her ex-husband (appellant) because he had missed a court date (6/633). The court date was for April 4, and Nancy mentioned this to Jorge a day or two after appellant failed to appear (6/633,648). On the following Friday -- April 7 -- Jorge (who had plans to meet Nancy later that night at a night club called Four Fighters) went to Nancy's residence to pick up some food she had made (6/633-34,647). Their routine on Friday nights was that Nancy would go to Four Fighters with her friend Coralyes Rodriguez (no relation to Jorge), and Jorge would go with a friend of his, and they would meet there

(6/631,634,641-42). On April 7, Jorge was at Nancy's house for less than a couple of minutes, between 7:30 and 8:00 p.m. (6/635). Appellant, whom Jorge had not met before, was in front of the house with Nancy and his kids (6/632,635-36,644). Nancy told Jorge who it was. Jorge asked what he was doing there, because he knew her ex-husband was wanted for not being in court; Nancy replied that he was only going to be there for a few minutes (6/635). Jorge waved to appellant to show his respect, and then left; he has not seen him since (6/635-36).

On the Saturday night a week and a day after this (April 15), Jorge and Nancy were on their way home from another nightclub called Maskies (6/636,642-46). Nancy had received a page from her daughter, who told her a helicopter was over the house with a spotlight (6/636-37). Jorge waited until Nancy got in the house, and then found himself surrounded by police cars. He was ordered out of the car, and the police officers approached him with guns drawn, until they noticed he wasn't appellant (6/637).

On cross, Jorge acknowledged that in his depo he had said that they were going to Maskies on the night he went to Nancy's to pick up the food (6/642-46). However, he corrected himself immediately during the depo and stated that "the club we went to was Four Fighter", "[t]he next weekend is when we went to Maskies" (6/645, 653-54).

Nancy Ruiz is appellant's ex-wife. They were married in 1984 and divorced in 1993. They have two children together, ages 11 and 10, and Nancy has two other children from her first marriage (6/683

-84). After their divorce, Nancy and appellant were in fairly regular contact because he would see the children (7/684-85).

When appellant was in the Seminole County Jail, Nancy and the children visited him there (7/685). Appellant bonded out and had a court date scheduled for Tuesday, April 4 (7/685). When that day came, somebody called her and told her he did not go to court (7/686). Nancy talked with appellant on the phone on Tuesday, Wednesday, and Thursday, and on April 7 -- Friday -- he called and said he wanted to come by and see the children (7/686,692). Nancy told him he would have problems with the policemen because they were looking for him, but he came anyway, arriving between 7:00 and 7:30 p.m. (7/686-87). Nancy would not let him go inside because of his "wanted problem" with the police, so he stayed in the front yard visiting with the children (7/687-88,717).

At about 8:00 p.m., Jorge Rodriguez, whom Nancy was dating as a friend, stopped by to pick up some food (7/788-89,705,721-23). Appellant, who had not met Jorge before, was still in front of the house (7/689,721-22). Around 9:30, Nancy's friend Coralyes Rodriguez arrived to pick up Nancy's daughter Wanda, who was going to spend the night with Coralyes' children (7/690-91). Later that night, Nancy and Coralyes were planning to go to Four Fighters night club, as was their regular routine on Friday nights (6/689-90,692). Coralyes and Jorge are not related, but they are friends through Nancy (7/704-05). Nancy's plans that night were to go to Four Fighters with Cori; Jorge used to go there too, but she had no particular plans to meet him there (7/705-06). When Coralyes arrived, appellant was still there (7/681). She asked Nancy who he

was, Nancy told her, and Coralyes said "Hi" (7/681). Soon afterward, Nancy told appellant she had to leave. He asked for a ride and she dropped him off at the corner of Semoran and Dahlia; she then proceeded to Coralyes' house, and from there to Four Fighters (7/691-92).

Nancy testified that she knew that this occurred on April 7, because it was the Friday immediately after appellant's missed court date (7/692). Eight days later, on Saturday of the following week, Nancy had been to a place called "Marquis" with Jorge (7/692-93,734). When he brought her home there was a police helicopter overhead; then they came to the house looking for appellant (7/693-94). Nancy had become aware a few days earlier, from the TV, that appellant was now wanted on a murder charge; from that point on she did not allow him to come by to visit the children anymore (7/694-95,720).

Nancy (whose first language is not English) testified that she made a mistake in her May 1996 depo regarding the weekend the police came to her house (7/684,695-96,739-50). She had gotten confused and said it was the Saturday of the same weekend that appellant had been to her house, but she now clarified that it was the weekend after (7/694-95,740,743-45,747,749). "I see Walter the 7th. We talk then. I found out because he don't come to see the children right away. Then I found out they was looking for him on TV Wednesday. So that's when I say the next weekend, don't come" (7/747). Her concern for her children was on a different level because now the police were looking for appellant on a murder charge, not just a failure to appear; she was afraid the police

might try to kill him and therefore she didn't want him around the children (7/695,720).

After appellant was arrested on the murder charge, Nancy would regularly take the children to see him. He is a good father and the children love him (7/729-30).

Nancy testified that she has never known appellant to wear an earring (7/696).

It was brought out on cross that Nancy saw appellant very briefly on Wednesday, April 5, the day after he failed to appear in court (7/711-15). It was also brought out on cross that Coralyes Rodriguez had seen appellant a couple of times before April 7, 1995. This was a lot of years before -- before their divorce -- when Nancy would baby-sit Coralyes' children at her [Nancy's] home. Occasionally he would be there when Coralyes came by to pick up her kids, but they didn't talk (7/700-04).

Coralyes Rodriguez testified that on Friday nights she and her friend Nancy Ruiz would go to Four Fighters (7/757-58,761-62). On Friday, April 7, 1995 -- the first week in April -- Coralyes went to Nancy's house to pick up Nancy's daughter Wanda (7/758-59,774). Nancy and appellant were out front talking (7/758-59). Coralyes knew that Nancy and her husband were separated. She asked Nancy if that was who she thought it was, and Nancy said yes (7/759). Coralyes got Wanda and left; later that night she and Nancy went to Four Fighters (7/760-61). She has not seen appellant since (7/760).

Julia Ramirez is appellant's mother (7/778). In March of 1995, appellant was in the Seminole County Jail (7/779). To help

him bond out, Mrs. Ramirez testified, "we wrote a check for the amount of $2500 and we let the bondwoman, Edith, know at that moment we didn't have that amount in the bank"; she was supposed to hold the check until Maria [Vasquez] or some friends of his were going to bring the money (7/779). Appellant bonded out around the 24th or 25th of March (7/779). When he missed his court date on April 4, Mrs. Ramirez got phone calls from his lawyer and from the bondwoman, both of whom were looking for him (7/780-81). Mrs. Ramirez was worried and she talked to appellant (7/781).

On the morning of Friday, April 7, around 10:30, the doorbell rang at her home in Kissimmee (7/778-79,781-82). It was appellant. Mrs. Ramirez told him she was going to Orlando to run some errands, and asked him if he wanted to come with her (7/782). First she went to State Farm to pay her car insurance (7/783). She went inside, while appellant sat on the hood of her car smoking, since she did not allow him to smoke in her car (7/784). Her check made out to State Farm and a receipt, both dated April 7, 1995, were introduced into evidence (7/783-84; R16/83-84,87-88). They next went to a nearby K-Mart, where Mrs. Ramirez wanted to get some clothing and shoes (7/785). They looked around, and then decided to have lunch (7/785). They went to the Little Caesar's Pizza which is located inside the K-Mart and sat for quite awhile talking (7/786). Mrs. Ramirez was trying to talk her son into giving himself up (7/786-87). She offered to call her pastor, and they would take him over to the police department and would make sure that nothing went wrong (7/787). Appellant didn't say no and he

didn't say yes; she was taking this time trying to convince him (7/787).

They resumed shopping. Appellant picked out some items for her -- shoes, a skirt, and a T-shirt -- and she paid for them with a check (7/787-88). [The check, dated April 7, 1995, was introduced into evidence (7/787; R16/85-86)]. They sat down and talked some more; then looked around but didn't buy anything else (7/778). When they left K-Mart, appellant declined a ride, saying he was going to walk over and see his kids (7/789).

Mrs. Ramirez testified that, from the time they left State Farm, she was with appellant for five to five-and-a-half hours (7/790). She did not remember what time it was when she wrote the check in K-Mart; it could have been 12:30 or twenty to 1:00, or it could have been later than that, but she did not think it was toward the end of the visit (7/790). Defense counsel asked:

> In any event, if the State is able to show some particular time that the check was written, which may or may not -- which may be inconsistent with your memory, would that shake your belief in the idea that Walter, your son, was with you on that Friday?
>
> MRS. RAMIREZ: Not at all.

(7/791)

On cross-examination, the prosecutor showed Mrs. Ramirez the check, and asked her if it came as a surprise to her that the time of sale (which was automatically annotated on the back of the check by the register) was 12:22 p.m. (7/792-94; see 8/906-08). She answered, "Why should it be a surprise to me? I don't know the mechanics of what they do with the checks there" (7/794). In her

August 1995 written statement and her May 1996 deposition, when she recounted the sequence of events, she had indicated that the items were purchased after the lunch at Little Caesar's (7/806-817). At trial, on cross and redirect, she said that to the best of her recollection the purchases were made before they went to Little Caesar's (7/801-03,824).

Mrs. Ramirez testified that, except for one time in 1976 or 1977 when he was home on leave from the Army, she has never known appellant to wear an earring (7/791). That earring was a tiny diamond stud (8/791).

Walter Ruiz (appellant) testified that he did not kill Rolando Landrian, and he was not in Tampa at any time on April 7, 1995. (8/833,845-46). On the morning of April 7, he left his hotel room in Orlando and got a ride to his mom's house in Kissimmee (8/833-34). He went with her to State Farm, and smoked a cigarette on the car while she paid the bill (8/834-35). Then they went across the street to K-Mart (8/833). His mother wanted to get an outfit. Appellant picked some items out for her at the skirt, blouse, and shoe departments, and they went to the register and paid for them (8/835-36). Then he suggested that they take a break and talk for awhile (8/836). He didn't want to be walking around too much, because he knew they were looking for him for missing his April 4th court date (8/836). They went to the Little Caesar's pizza shop in the back of the store and talked for a couple of hours (8/836-37). His mom was trying to talk him into turning himself in, but he told her they trying to charge him with some charges he wasn't guilty of, and he wasn't going to turn himself in at that time (8/837).

After leaving Little Caesar's, they walked around the store a little more, looking possibly to buy another outfit (8/837-38). Then they sat and talked some more on the benches at the front of the store (8/838). They left K-Mart around 5:30 or 5:45 (8/838-39). From there, appellant walked to the house where his ex-wife and his children were staying, stopping on the way for some food (8/839-40). When he got there, he played with the kids in front of the house (8/840-41). During the evening he briefly saw Jorge Rodriguez, who went inside the house with Nancy, and Coralyes Rodriguez, who had come to pick up Wanda (8/834-44). Appellant had not previously met Jorge; they acknowledged each other with eye contact. He and Coralyes (whom he'd seen in passing a few times in previous years, but had never really spoken to) exchanged hellos (8/843-44,862-64). After Coralyes left, appellant asked Nancy to drop him off at the food and lotto store at Dahlia and Semoran, and from there he returned to his motel (8/844-45).

Appellant testified that he knows Micky Hammonds; he met him in November 1994 at Bonita Griffin's house and saw him one other time "on the outside part" when he brought Maria Vasquez to visit him in the Seminole County Jail (8/846-47). He didn't see Hammonds again until the night he bonded out of jail on March 23, 1995 (8/847). That same night -- March 23 -- was the first time he met Abraham Machado, who also came over to Maria's house (8/847). Appellant did not take a car to Machado for repair (8/847). However, after they met on March 23, Machado bought cocaine from appellant a couple of times (8/848).

Two other individuals who purchased cocaine from appellant on a regular basis were Delio and Lotia Romanes (8/848-49). One day Lotia approached appellant about a problem she had in Tampa; that a man named Rolando Landrian had been physically and sexually abusing her daughters for years (8/849-50). He kept them like prisoners and would force them at gunpoint to have sexual relations (8/850). Lotia was looking for someone to rough Landrian up -- break an arm or a leg or something -- and persuade him to slack off her daughters (8/850,871-73). Appellant did not understand how Lotia could be staying in the same house with a man who was harming her daughters, and he was not sure if what she and Delio were saying was true (8/872). Over the next few months, Lotia kept asking appellant if he would do it, and appellant kept telling her he wasn't interested, that he wasn't into that kind of stuff (8/850-51). After he bonded out of jail, they asked him again and he got mad (8/851). [Lotia Romanes paid a large chunk of his bond, but it had nothing to do with killing anybody; the money was a prepayment for a quarter of a kilo of cocaine (8/855)]. Appellant told them, "Look, I'm just getting out on bond right now and you want me to get into something that I told you from the beginning that I don't want nothing to be a part of" (8/851). When Lotia persisted in asking if he knew anyone who might do it, he suggested Micky Hammonds (8/851-52).

Appellant asked Abraham Machado to buy a gun, but he was not with Machado on April 3 (the day before appellant's scheduled court

date) when Machado picked out the gun (8/853,887).[11] Appellant did go to the pawn shop on April 6. Machado and Delio went in, while appellant and Hammonds went down the road to get a couple of beers (8/853-54). Then they went over to Machado's house, where Machado was supposed to grind the numbers off the gun (8/857). They next went to the other side of town to pick up a quantity of cocaine which Delio was buying through appellant (8/858). Then Delio and Hammonds dropped off Machado, and dropped off appellant at a Winn-Dixie where he had a car (8/858). Appellant did not see them again that day or the following day (8/859).

Appellant testified that his head was shaved during the trial because he had gone bald on one side, as a result of an injury he sustained when he was attacked in jail (8/859). He acknowledged having seven prior criminal convictions (8/859).

E. Defense Case (State's Cross-Examination of Appellant)

On cross-examination, appellant testified that he does not know Jorge Rodriguez, and has only seen him that one time at Nancy's house and in court (8/863-65). "He was [Nancy's] boyfriend as far as I'm concerned" (8/865). Jorge never visited appellant in jail, but Nancy did visit, mainly for the purpose of bringing the children (8/865).

Appellant was arrested on the Tampa homicide charge on June 22, 1995 at the Orlando home of his girlfriend, Bonita Griffin

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[11] The gun was for Delio Romanes, but appellant told Machado it was for appellant. Delio had told appellant he needed a pistol because he was going to be running the store in a rough neighborhood in Tampa (8/854-55).

(8/865,882-83). During interrogation, when asked his whereabouts on April 7, he told Detective Rockhill that he was possibly with another girlfriend, Maria Vasquez (8/884-85). His reason for saying that was he didn't want to jeopardize his mother, or the mother of his children; he was concerned that they might be arrested for helping him (8/885-86).

Regarding the Romanes' effort to persuade him to "rough up" Rolando Landrian, the prosecutor asked appellant:

> Didn't Delio tell you that Rolando Landrian wore a lot of jewelry and kept lots of money in his car, so it was going to be a robbery?
>
> A. I don't know nothing about no robbery, ma'am. You're putting words into my mouth now.
>
> Q. Well, Delio tells you in the context of what he wants done to Rolando Landrian, that Rolando Landrian wears lots of jewelry and keeps lots of money in his car?
>
> A. What he says is that the person that goes down there to rough him up could take it because he does have a lot of jewelry and he does carry a large sum of money, yes.
>
> Q. And that's a robbery?
>
> A. As far as -- yeah.
>
> Q. You know what a robbery is?
>
> A. How do you know what I know what a robbery is?
>
> Q. Well, are you trying to suggest to this jury -- let me look for a moment. You told . . . Mr. Donerly that you sell drugs, but you don't do things like hurting people, right?
>
> A. Why should I?
>
> Q. Well, you're more than willing to use a gun in order to get what you want, aren't you?

A. If you have a gun, that doesn't mean you're going to hurt somebody.

Q. Pointing a gun at someone doesn't mean you're willing to hurt someone?

A. If you point a gun at somebody doesn't mean you're going to shoot the gun. If you point a gun at somebody, it doesn't mean that it's loaded.

(8/873-74)

At this point, the prosecutor asked to approach the bench, and argued that appellant had opened the door "big time" to evidence of the prior robbery charge in Seminole County which was the subject of the pretrial motion in limine:

. . . when he said in response to one of his questions about Lotia, when he got out of jail, "Oh, I sell drugs; I don't do things like that."

Well, I know, number one, that he was in jail for robbery with a weapon and that when he gets out, he commits two robberies that he's been convicted of, and I think the door has been opened, and we've been dancing around this robbery issue forever, but at this point, it's like they drove a Mack truck through their motion in limine, and his answer, "How do you know what I know about a robbery."

(8/874-75)

The prosecutor argued that she "should be able to establish that . . . he's been convicted of robberies before and that's how he knows exactly what a robbery is" (8/875). She also argued that, since appellant had testified that he'd told his mother he did not show up for court because they were trying to put charges on him that he didn't do, the state should be able to introduce the portion of a letter written by the mother in which she stated that appellant told her he didn't show up because he didn't do those

robberies alone (8/875). The trial court pointed out "You have two separate things there" (8/875). Defense counsel objected to any references to robberies (8/876) and said:

> What they've characterized as a statement I believe to be accurate is "I don't hurt people; I sell drugs." If they had a robbery in which someone was injured, I think that might be a fair rebuttal to that. I don't believe they do have a robbery in which anyone was injured.

(8/876).

As to the state's second argument, defense counsel asserted that it was not proper impeachment, and the prejudicial impact would greatly outweigh any probative value; "it would be a tremendous 403 problem in making that tiny point with that particular sledge hammer" (8/877).

The prosecutor argued that the mother's letter was an inconsistent statement (8/878), and then returned to her "opening the door" theory:

> But the problem that I have is that this guy is sitting on the stand perpetrating a major fraud on this jury, that this guy has the nerve to sit here and try to portray himself as a free-wheeling drug dealer, but there is a line to which I won't cross and he's leading them with a totally false representation because this is a guy who will arm himself to rob people. And this whole thing is a robbery felony murder.
>
> THE COURT: Well, I see the distinction Mr. Donerly [defense counsel] is talking about. He could commit an armed robbery without breaking people's arms or legs.

(8/878-79).

The trial court stated, "Well, robbery is stealing things from people with the use of a deadly weapon, and Mr. Romanes asked that

Mr. Ruiz talk to the man and rough him up. And I don't see -- you know, better safe than sorry. I don't see the connection" (8/879). Therefore, the judge did not allow the state to bring in other robberies on its "opening the door" theory, but he did tell the prosecutor he would permit her to recall appellant's mother, Mrs. Ramirez (8/879-80). The prosecutor asked wither she needed to confront appellant with the purported prior inconsistent statement, and the judge answered:

> No, it's not his statement. But that -- there is a conflict there between what he is saying that he told her and what she says that he told her.

(8/879-80).

Defense counsel maintained his §90.403 objection, and his objection to any mention of robberies (8/880). He further contended that, if the proposed impeachment were allowed over his objection, that the question should be framed "did he tell you . . . that he didn't want to go to jail for crimes that he didn't do alone, or for crimes that he didn't do as opposed to robberies, which I think is the real thrust of this, that they want to get the word 'robberies' into this" (8/880). The judge said:

> Well, he testified about what he told her.
>
> MR. DONERLY [defense counsel]: He testified that he told her that he didn't -- that they were trying to put crimes on him that he didn't do.
>
> THE COURT: Right.
>
> MR. DONERLY: And I think the State wants to use that to tell you, did he tell you about robberies he didn't do alone.

> THE COURT: Theoretically, she's going to tell us what he told her, what she says that he told her.

(8/880-81).

F. State's Case in Rebuttal

The state's rebuttal case consisted of appellant's mother Julia Ramirez and three other witnesses.[12] The prosecutor asked Mrs. Ramirez whether, during their conversation at K-Mart on April 7, appellant had expressed the concern that they would lock him up for a long time and he didn't rob these stores alone (8/891). Defense counsel interjected:

> Objection. I would like to state the same objection and would like to state one more: Lack of a proper predicate for failure to have given Mr. Ruiz a time, date, and place and opportunity to explain and then launching into a purported rebuttal.
>
> THE COURT: Give Mr. Ruiz a time, date, and place? You mean Ms. Ramirez?
>
> MR. DONERLY [defense counsel]: I mean Mr. Ruiz. This was not properly set up by not asking Mr. Ruiz the right questions to impeach him.

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[12] The other rebuttal witnesses were K-Mart employee Jeffrey Crook, who testified about the procedure for annotating the time and date of sale on a check (8/906-08); Detective Rockhill, who testified that appellant told him he was with Maria Vasquez on April 7 (8/909-11); and William Bibb, an Orange County corrections officer (9/895). Through Bibb, the state introduced jail records indicating that a Jorge Rodriguez once visited appellant in jail and twice deposited money (ten dollars and twenty dollars) in his jail account (8/897). On the visit, he was accompanied by two children (8/898). The record is computer generated and Bibb did not have the complete record with him in court; therefore he could not exclude the possibility that there were other visitors on that date (8/904-05). Defense counsel argued in his closing statement that it was a reasonable inference that Jorge brought Nancy and the children to visit appellant. (9/970).

THE COURT. Okay. Overruled.

MR. DONERLY: And I would renew all the previous objections on the previous grounds we discussed at the bench.

THE COURT: Okay. Same ruling.

(8/891-92).

The prosecutor then repeated the question, and showed Mrs. Ramirez a statement she had written out on August 17, 1995:

Didn't he mention to you that one of the reasons that he -- he mentioned that they would lock him up for a long time and he didn't rob those stores alone -- or those store alone? Tell me what this word is right here?

. . .

A. "This."

Q. That's a "this"?

A. Uh-huh.

Q. So that's what he mentioned to you in that store?

A. That's what he mentioned.

(8/892-93).

Mrs. Ramirez' out-of-court statement (which states "He mentioned 'they would locked me in for a long time-and I didn't rob these store alone'", or possibly "thise store alone", R16/72) was received in evidence as State's Exhibit 53 (8/892; R16/70-74).

SUMMARY OF THE ARGUMENT

In a trial involving substantial factual disputes, and where the outcome depends on the jury's determination of the credibility of witnesses, prosecutorial misconduct results in harmful error requiring reversal of the conviction and death sentence so obtained [Issues I, II, and IV].

"The State is not permitted to present otherwise inadmissible information regarding a defendant's criminal history under the guise of witness impeachment". Geralds v. State, 601 So. 2d 1157, 1162-63 (Fla. 1992). Here it was harmful error to allow the prosecution, over defense objection on multiple grounds, to inform the jury that appellant's previous charge in Seminole County involved robbery of a store (or stores), and that he was facing a long period of incarceration. This evidence was irrelevant to the charged crime; it showed only bad character and criminal propensity; and its prejudicial effect outweighed its negligible probative value. Moreover, the purported impeachment went to a collateral matter, and the foundation required by statute -- that the witness be afforded an opportunity to explain or deny the prior statement -- was not met. Finally, assuming arguendo that the challenged evidence had some minor impeachment value, the purposes of the impeachment would have been fully achieved by allowing the state to elicit that appellant told his mother he didn't do those crimes alone; there was no need or legitimate reason to inject store robberies into this trial [Issue III].

ARGUMENT

ISSUE I

APPELLANT SHOULD RECEIVE A NEW TRIAL AS A CONSEQUENCE OF FLAGRANT PROSECUTORIAL MISCONDUCT WHICH COULD WELL HAVE CONTRIBUTED TO HIS CONVICTION IN THIS CLOSELY CONTESTED CREDIBILITY CASE.

A. Introduction

In Hill v. State, 477 So. 2d 553, 556 (Fla. 1985), this Court found that the prosecutor acted improperly by asking the jury to consider him a "thirteenth juror" when it returned to deliberate its guilt phase verdict, but found the error harmless under the particular circumstances of that case. However, the Court noted that "[h]ad the case involved substantial factual disputes, this 'inexcusable prosecutorial overkill' would have resulted in harmful error requiring reversal of each of [Hill's] convictions." 477 So. 2d at 556-57.

The instant case is the case this Court envisioned in Hill. The trial was a fiercely litigated credibility contest, and appellant's guilt or innocence was very much in question. Depending on which witnesses were believed, either appellant kidnapped and shot Rolando Landrian, or else he was framed by the people who did. The state's key witness was co-defendant Micky Hammonds, who had struck a plea bargain; the prosecutor acknowledged his importance to the state's case when he told the jurors in voir dire that if anyone had a predisposition not to hear Hammonds "we better pack up our bags and go home" (2/107). The state also had the relatively weak

identifications made by Mary Jo Hahn, Charles Via, and Mike Witty, and some corroborative testimony from Abraham Machado and Dianne Guty. The defense had appellant (who denied committing the crime) and four alibi witnesses, all of whom said appellant was in Orlando during the time Micky Hammonds had him in Tampa stalking and eventually killing Rolando Landrian. The defense also called a jail inmate who testified that Micky Hammonds admitted to him that Landrian was actually killed by the stepfather (Delio Romanes) of the girls whom Landrian had been raping, and that Hammonds was being paid by the stepfather to implicate appellant as the shooter.

All of the key witnesses for both sides were the subject of intense cross-examination and impeachment. There was substantial evidence supporting the two competing theories, and the outcome turned on the jury's assessment of credibility. It is with this backdrop that the prosecutor curried an undeserved and wholly improper advantage with the jury, by her flagrant misconduct in closing argument.

B. The Misconduct was Egregious

In her rebuttal closing argument in the guilt phase, while arguing witness credibility, the prosecutor improperly injected her own personal opinion and the prestige of the State Attorney's office into the jury's resolution of the critical issue:

> What interest, ask yourselves what interest does Charles Via, Michael Witty, the Hahns, Dianne Guty and Abraham Machado have in seeing that somebody other than the person responsible for this horrible crime be convicted? What interest do we as representatives of the

> citizens of this county have in convicting somebody other than the person --

(9/975).

The defense promptly objected and moved for a mistrial (9/975-76). The judge sustained the objection but denied the motion for mistrial, whereupon the prosecutor continued in the same vein:

> Delio Romanes was charged in this case. What interest is there to bamboozle anybody about Delio's real role in this case. Ask yourselves that. No one is saying Delio Romanes has clean hands, but what interest does anybody have in saying that Delio Romanes isn't the person responsible for this if he was?

(9/976)

This argument technique -- where the prosecutor invokes her status as representative of "the people" and assures the jury "I don't prosecute innocent people" or "If he wasn't guilty he wouldn't be here" or words to that effect -- has been repeatedly condemned by Florida and federal courts as egregious misconduct and reversible error. See Riley v. State, 560 So. 2d 279 (Fla. 3d DCA 1990); Duque v. State, 460 So. 2d 416 (Fla. 2d DCA 1984); McGuire v. State, 411 So. 2d 939 (Fla. 4th DCA 1992); Buckhann v. State, 356 So. 2d 1327 (Fla. 4th DCA 1978); Reed v. State, 333 So. 2d 524 (Fla. 1st DCA 1976); Price v. State, 267 So. 2d 39 (Fla. 4th DCA 1972); United States v. Garza, 608 F. 2d 659, 664-66 (5th Cir. 1979); United States v. Bess, 593 F. 2d 749, 753-57 (6th Cir. 1979); United States v. Chrisco, 493 F. 2d 232, 237-38 (8th Cir. 1974); United States v. Lamerson, 457 F. 2d 371 (5th Cir. 1972); Hall v. United States, 419 F. 2d 582, 587 (5th Cir. 1969).

The prosecutor's argument in the instant case, at the beginning, bordered on an improper vouching for the state's witnesses. Then she crossed the border when -- juxtaposing with her previous comment -- she suggested to the jury that she and her co-prosecutor, as representatives of the citizens of Hillsborough County, had no interest in convicting somebody other than the person responsible for this horrible crime. (In other words, we wouldn't be prosecuting Walter Ruiz if we didn't believe he is guilty; indeed, if we didn't know that he is guilty). This is precisely the argument technique which has been roundly condemned in all of the above-cited cases, and which is especially insidious in trials where the outcome depends on the jury's assessment of credibility.

The A.B.A. Standards for Criminal Justice 3-5.8(b) cautions that in closing argument to the jury "[t]he prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant." See Bass v. State, 547 So. 2d 680, 682 (Fla. 1st DCA 1989). The Commentary to this Standard explains:

> The prosecutor's argument is likely to have significant persuasive force with the jury. Accordingly, the scope of argument must be consistent with the evidence and marked by the fairness that should characterize all of the prosecutor's conduct. Prosecutorial conduct in argument is a matter of special concern because of the possibility that the jury will give special weight to the prosecutor's arguments, not only because of the prestige associated with the prosecutor's office, but also because of the fact-finding facilities presumably available to the office.

See Singletary v. State, 483 So. 2d 8,10 (Fla. 2d DCA 1985); State v. Ramos, 579 So. 2d 360, 362 (Fla. 4th DCA 1991).

In United States v. Lamerson, supra, 457 F. 2d at 372, the appellate court reversed the defendant's conviction and said:

> In effect, [the prosecutor] stated that the Government prosecutes only the guilty. Even the lesser suggestion that the Government tries to prosecute only the guilty has been held reversible error by this court. In Hall v. United States, 5 Cir. 1969, 419 F.2d 582, 587, this Court held:
>
> > "The statement 'we try to prosecute only the guilty' is not defensible. Expressions of individual opinion of guilt are dubious at best. * * * This statement takes guilt as a pre-determined fact. The remark is, at the least, an effort to lead the jury to believe that the whole government establishment had already determined appellant to be guilty on evidence not before them. * * * Or, arguably, it may be construed to mean that as a pretrial administrative matter the defendant has been found guilty as charged else he would not have been prosecuted, and that the administrative level determination is either binding upon the jury or else highly persuasive to it. Appellant's trial was held and the jury impaneled to pass on his guilt or innocence, and he was clothed in the presumption of innocence. The prosecutor may neither dispense with the presumption of innocence nor denigrate the function of the trial nor sit as a thirteenth juror." [Emphasis in opinion].

See also United States v. Garza, supra, 608 F. 2d at 665 ("this particularly egregious form of argument has . . . been considered and condemned by this Court"); United States v. Chrisco, supra, 493 F. 2d at 237 ("Such a statement is, of course, error, for it amounts to an appeal to the jury to substitute the power, prestige, and integrity of the Government for a neutral determination of the facts"); United States v. Bess, supra, 593 F. 2d at 753

("We can only express our astonishment that a prosecutor could make the statements quoted above"). In Bess, the appellate court said:

> Here, the transgressions of the prosecutor were egregious. First, it is always improper for a prosecutor to suggest that a defendant is guilty merely because he is being prosecuted or has been indicted. [Citations omitted]. The prosecutor's first statement was in patent violation of this rule; we do not believe that his interjection of the words "based on the evidence presented to you" in any way diminished the error.

C. The Misconduct was Harmful

When defense counsel unsuccessfully moved for a mistrial after the trial court sustained his objection to the improper prosecutorial comments, he preserved the issue for appellate review. Holton v. State, 573 So. 2d 284, 288 n.3 (Fla. 1990); Nixon v. State, 572 So. 2d 1336, 1340 (Fla. 1990); Simpson v. State, 418 So. 2d 984, 986 (Fla. 1982); State v. Fritz, 652 So. 2d 1243, 1244 (Fla. 5th DCA 1995). The remaining question is whether the prosecutor's misconduct requires reversal for a new trial, or whether it can be found "harmless." The doctrine of harmless error cannot be invoked unless this Court can determine beyond a reasonable doubt that the error could not have contributed to the jury's verdict. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). In the instant case, for many reasons, such a conclusion cannot be reached.

First and most importantly, the evidence of guilt was neither overwhelming nor conclusive. This trial was essentially a six-on-six credibility contest, and the only possible outcomes supported by the evidence were (1) acquittal or (2) conviction of first

degree murder as charged.[13] Which outcome it would be depended entirely on which witnesses were believed by the jury. The prosecutor's comments, especially in the context in which they were made, were a calculated effort to influence the jury's crucial credibility determinations by assuring it that the prosecutors, as representatives of the citizens of the county, had no interest in convicting anybody other than the person who committed "this horrible crime" (and, further, that they had no interest in "bamboozling" anyone about Delio Romanes' "real role" in the case). In a trial where the evidence of guilt is not overwhelming, and where the jury's verdict depends entirely upon its determination of the credibility of conflicting witnesses, improper prosecutorial argument cannot be deemed harmless, especially where -- as here -- the particular argument technique had been repeatedly condemned as egregious misconduct precisely because it enables the prosecutor to use the prestige of her public office to unfairly influence the jury's credibility determination. See United States v. Garza, supra, 608 F. 2d at 664-66, where the prosecutor argued, inter alia, that the government agents and the government had "no interest whatsoever in convicting the wrong person." The appellate court, concluding that this and other unobjected-to comments, taken as a whole, affected the substantial rights of the defendant and amounted to fundamental error, wrote:

> [P]erhaps the most important problem facing the jury was its decision to credit the testimony of Gonzales and Juarez, the government witnesses, or that of defendant's alibi wit-

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[13] See the prosecutor's closing argument at 9/973-74.

> nesses. The prosecutor's comments that we have considered were expressly intended to influence this critical credibility choice; he introduced for the jury's consideration his own personal opinion as to this choice, suggested the existence of information beyond that presented at trial to support his witnesses' credibility, and sought to use the status and influence of the entire government investigatory apparatus to bolster the believability of his case. It is impossible to imagine this strategy did not have substantial influence on the jury.

See also United States v. Bess, supra, 593 F. 2d 755 (devastating impact of such statements should be apparent, "especially where a jury faces difficult credibility issues"); Hill v. State, supra, 477 So. 2d at 556-57 (prosecutor's "thirteenth juror" comment would have necessitated reversal if the case had involved substantial factual disputes); Pacifico v. State, 642 So. 2d 1178, 1184 (Fla. 1st DCA 1994) ("Obviously, in situations of this nature, where witness credibility is the pivotal issue, inappropriate prosecutorial comment which might be considered harmless in another context, can become prejudicially harmful"); Singletary v. State, 483 So. 2d 8 (Fla. 2d DCA 1985) (misconduct held harmful where "whatever chance defendant had to be acquitted depended upon the jury believing his testimony. It was as to this critical aspect that the prosecutor improperly inserted into the trial his personal beliefs"); McLellan v. State, __So. 2d__ (Fla. 2d DCA 1997) [22 FLW D1705]; State v. Ramos, 579 So. 2d 360, 362 (Fla. 4th DCA 1991); Bass v. State, 547 So. 2d 680, 681-82 (Fla. 1st DCA 1989); Williamson v. State, 459 So. 2d 1125, 1128 (Fla. 3d DCA 1984); Thompson v. State, 318 So. 2d 549, 552 (Fla. 4th DCA 1975).

Appellant had a right to fair consideration of his own testimony and that of the defense witnesses, unimpeded by unfair prosecutorial tactics. Cf. Washington v. Texas, 388 U.S. 14, 19 (1967) (a basic element of due process is "the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies). Moreover, even viewing the prosecution's case in isolation, it was hardly overwhelming. As previously mentioned, the prosecutor herself informed the prospective jurors how dependent her case was upon the testimony of the plea-bargaining co-defendant Micky Hammonds (2/107). The jury was instructed, in accordance with the Florida standard instructions, that it should use great caution in relying on the testimony of a witness who claims to have helped the defendant commit a crime (9/1012). With regard to the identification witnesses (and it is important to re-emphasize here that appellant is not arguing sufficiency of the evidence; only that the state's evidence was not so compelling as to render the prosecutor's overreaching harmless), probably the most important factor in assessing the reliability of an identification is the witness' opportunity to observe. See e.g., Neil v. Biggers, 409 U.S. 188 (1972); Manson v. Brathwaite, 432 U.S. 98 (1977); Edwards v. State, 538 So. 2d 440 (Fla. 1989). The danger for the accused of misidentification is "particularly grave when the witness' opportunity for observation was insubstantial." Edwards, 538 So. 2d at 444, quoting United States v. Wade, 388 U.S. 218, 228-29 (1967). In the instant case, of the three identification witnesses, the only one who had any significant opportunity to observe was Charles Via, the

convenience store clerk whom the prosecutor described as obviously mentally slow (9/926); he picked appellant's picture out of a photopak but was unable to make an in-court identification. Mike Witty and Mary Jo Hahn each had very little time and very little opportunity to observe (4/433-38; 5/531-33), and both were distracted -- Hahn by her baby and Witty by trying to memorize the car's tag number as he chased it. Of the three identification witnesses, only Witty claimed to recognize appellant in court. In addition, the circumstances of Mrs. Hahn's purported recognition of appellant's photograph in the newspaper (where he was shown as a suspect in the homicide of her neighbor Landrian) were extremely suggestive, which further diminishes the reliability of the ID.

Both Via and Witty testified that the perpetrator hit the victim with a tool such as a wrench or channel locks (5/514,523, 530). A wrench was found in Micky Hammond's car when it was searched incident to his arrest (4/401; 5/573; 6/597). Hammonds, on the other hand, testified that appellant hit Rolando Landrian in the face with a pistol (4/366,401). Hammonds acknowledged that there was a crescent wrench in his car at the time of the abduction, but he insisted that it played no role in the crime (4/401). The medical examiner testified that there was a patterned abrasion on Landrian's right cheek which "looked like two half moons just separated a bit from one another" (6/601-02). This pattern injury would be consistent with pliers or a crescent wrench, but Dr. Miller was never given any tool to compare it with (6/616-17). It could also be consistent with the butt of a gun or some other hard object, but no particular weapon came to mind; "the configurations

of butts of several guns are so variable. So that its possible that some gun with which I'm not familiar could have produced it" (6/617).

The prosecutor, not surprisingly, argued that it didn't matter whether it was a wrench or a gun (9/929). But -- for purposes of the state trying to show on appeal that its case was so "overwhelming" as to render the prosecutor's misconduct harmless -- it does matter. Why? Because the discrepancy necessarily calls further into question either the ability of the convenience store witnesses to observe, or the ability of Micky Hammonds to tell the truth.

There were many other weaknesses and inconsistencies in the state's case. (Compare, for example, Hammonds' testimony with Abraham Machado's regarding the purchase of the gun).[14] Another aspect of the evidence which, according to the prosecutor, didn't matter (see 9/952-53, compare 9/936-38), was the shoe print at the scene of the shooting, which was too small to belong to appellant.

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[14] Hammonds testified that he met "Gordo" (Machado) at Maria Vasquez' apartment while appellant was in jail (4/390). On the one or two times Hammonds saw Machado prior to April 6, 1995, appellant was not present (4/390). April 6, the day they bought the gun, was the first time Hammonds saw Machado and appellant together (4/390-91). April 6 was the day Hammonds said he received a phone call from his roommate Dianne Guty (3/333-34). Hammonds returned home, met appellant and Delio there, and then (after picking up Machado) they went to a pawn shop. Machado and Delio went inside and returned with a gun (3/334-40;4/391-92).

According to the ATF form and layaway ticket introduced through the pawnshop owner Ms. Jacobs, Abraham Machado paid $100 down for the gun on April 3, and he returned on April 6 to pick it up (4/455-57; R15/35-36; R16/63-64). According to Machado's testimony, appellant and Hammonds and Delio Romanes were with him on April 3 as well as on April 6 (4/461-65,468-69), while according to Hammonds April 6 -- after receiving the call from Dianne Guty -- was the only time he went to the pawnshop and the only time he ever saw appellant and Machado together.

The prosecutor made the point that the print could possibly have been made by someone else, and maybe it could have, but you can bet that if it had been appellant's size the prosecutor would have been much more impressed with its significance, and would have dismissed the possibility that someone else could have made the print as speculation. There was no physical or scientific evidence to connect appellant to the abduction or the murder, or to place him in Tampa, or to refute his testimony and that of his witnesses that he was in Orlando. This was a credibility case, pure and simple, accompanied by some ambiguous circumstantial evidence tending to corroborate or contradict the various witnesses. The state cannot show that the prosecutor's unfair and improper argument did not have its intended effect of influencing the jury to resolve the credibility issues in the prosecution's favor. Therefore, the error cannot be written off as harmless. Appellant's conviction must be reversed for a new trial.

D. The Misconduct was Pervasive

This was far from the only example of the prosecutorial overreaching which denied appellant a fair trial. The prosecutors introduced -- in the guise of impeachment -- irrelevant and prejudicial evidence that the charges for which appellant had been jailed in Seminole County involved robbing stores [Issue III]. After misusing the crime scene photographs in their guilt phase closing argument ["[Y]ou saw those pictures, and how, frankly, how gross they were" (9/940)], they took a smaller photograph from the guilt phase and reintroduced a blown-up (three feet by two feet)

close-up version of the photo (State Exhibit 2) showing the bloody head and upper torso only; even though the prosecutor herself pointed out that guilt was no longer at issue, and even though she expressly did not even request that the jury be instructed on the HAC aggravator [Issue IV]. These errors were the subject of strenuous objections.

In addition, the closing arguments made by both Ms. Goudie (guilt phase) and Ms. Cox (guilt phase rebuttal and penalty phase) were replete with improper, unprofessional, unsupported, and misleading comments which were not preserved for review by objection below. One of these -- which was used by Ms. Cox as the climax to her penalty phase summation -- was so outrageous as to descend to the level of fundamental error, and it will be discussed separately in Issue II. As for the other comments, they cannot be asserted as independent grounds for reversal due to lack of preservation, but their cumulative impact can still be considered in assessing the harmfulness of the comments which were objected to. Pope v. Wainwright, 496 So. 2d 798, 801 n.1 (Fla. 1986); Pollard v. State, 444 So. 2d 561, 563 (Fla. 2d DCA 1984). Therefore, if the state is going to argue harmless error as to the comment that the prosecutors, as representatives of the citizens, have no interest in convicting anyone but the person responsible for this horrible crime, then the totality of the prosecutor's argument becomes relevant to that analysis.

Three of the most basic tenets of professional conduct are that a prosecutor (1) may not express his or her personal beliefs

regarding the guilt of the accused or the veracity of witnesses;[15] (2) may not comment on facts not in evidence on matters outside the record;[16] and (3) may not engage in rudeness or name-calling.[17] The prosecutor in this case[18] violated all three of these rules of conduct. She expressed to the jury her personal belief that defense witnesses Nancy Ruiz and Julia Ramirez were lying,[19] and

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[15] See ABA Standards for Criminal Justice 3-5.8(b) and the Commentary thereto; Florida Bar Rules of Professional Conduct 4-3.4(e); Pacifico v. State, 642 So. 2d 1178, 1183-84 (Fla. 1st DCA 1994); State v. Ramos, 579 So. 2d 360, 362 (Fla. 4th DCA 1991); Riley v. State, 560 So. 2d 279, 280-81 (Fla. 3d DCA 1990); Bass v. State, 547 So. 2d 680, 682 (Fla. 1st DCA 1989); Singletary v. State, 483 So. 2d 8, 10 (Fla. 2d DCA 1985); United States v. Bess, 593 F. 2d 749, 754-55 (6th Cir. 1979).

[16] See ABA Standards for Criminal Justice 3-5.8(a) and 3-5.9 and the Commentary to the latter standard; Florida Bar Rules of Professional Conduct 4-3.4(e); Huff v. State, 437 So. 2d 1087, 1090-91 (Fla. 1983); McLellan v. State, __ So. 2d __ (Fla. 2d DCA 1997) [22 FLW D1705]; Aja v. State, 658 So. 2d 1168 (Fla. 5th DCA 1995); Tillman v. State, 647 So. 2d 1015 (Fla. 4th DCA 1994); Pacifico v. State, 642 So. 2d 1178, 1184 (Fla. 1st DCA 1994); Shorter v. State, 532 So. 2d 1110 (Fla. 3d DCA 1988); Duque v. State, 460 So. 2d 416 (Fla. 2d DCA 1984); Jones v. State, 449 So. 2d 313 (Fla. 5th DCA 1984); Wheeler v. State, 425 So. 2d 109, 110-11 (Fla. 1st DCA 1982), approved State v. Wheeler, 468 So. 2d 978 (Fla. 1985); Thompson v. State, 318 So. 2d 549, 551 (Fla. 4th DCA 1975).

[17] See Riley v. State, 560 So. 2d 279 (Fla. 3d DCA 1990); Glassman v. State, 377 So. 2d 108, 211 (Fla. 3d DCA 1979).

[18] Actually two prosecutors, but -- except in Issue II where the misconduct was solely that of Ms. Cox -- they will be referred to interchangeably

[19] Re Nancy Ruiz:

> And in May she came in, May of this year, and gave a sworn statement to me where she promised that she was going to tell the truth and said that the day that Walter was in the driveway it was so vivid to her because it was the next day that this SWAT team invasion of her privacy rights with the police dogs oc-
>
> (continued...)

her personal belief that state witness Micky Hammonds was telling the truth.[20] See Bass v. State, 547 So. 2d 680, 682 (Fla. 1st DCA 1989) (citing the ABA standards for the proposition that it is unprofessional conduct for a prosecutor to express her personal belief or opinion as to the truth or falsity of any testimony or as to the guilt of the accused). She asked the jurors to look at the evidence and ask themselves if it was enough to give them an abiding conviction of guilt (9/940). This, of course, is perfectly

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[19](...continued)

> curred. And she's wrong about that, and the reason that all these people are wrong about it is because it's just not the truth, and when you're lying, it's hard to keep things straight, and it's hard to keep them in a row . . .

(9/987).

Re Julia Ramirez:

> But the problem was when she wrote that statement, no one thought to get this check. No one thought to look at the back of this check and that check shows this whole transaction happened at 12:22. So it's pretty conclusive to anybody that looks at it it's all a lie. I mean it's completely a lie, and the house of cards folds.

(R9/990).

[20] Re Micky Hammonds:

> And he's able to keep his story straight six times. I mean he's been questioned and grilled by attorneys, and it's not fun. And the reason he can keep his story straight is because that's what happened; and when it's the truth, it doesn't change.

(9/977).

proper argument. Unfortunately, the prosecutor then answered her own question in the following grossly improper way:

> I can't even think of a way that it isn't enough to give you an abiding conviction of guilt, an overwhelming conviction of guilt. There's no way, no stretch of the imagination because let me tell you one thing, if that guy were Pinocchio, his nose would be so big none of us would be able to fit in this courtroom on what he said on there.

(9/940)

She then concluded her argument:

> You all had an opportunity to watch him. Give me a break, okay? Look to the evidence, think about it. Use your common sense, and don't let anybody get you side-tracked, and all of you are going to come back with the only just verdict you can in this case, and remember what you're here to do is render justice. Truth equals justice, and the truth is he was the hit man. He violently kidnapped, robbed and murdered another human being and after he did that, and you saw those pictures, and how, frankly, how gross they were. After he did that, he had a burger and fries at a Burger King. That's the kind of person we're looking at over there. That's what he thought about another human being. The truth is he did that and justice is that you convict him of it.

(9/940-41).

As recognized in State v. Ramos, 579 So. 2d 360, 362 (Fla. 4th DCA 1991) and Singletary v. State, 483 So. 2d 8, 10 (Fla. 2d DCA 1985), the law is well settled that expressions of personal belief by a prosecutor are improper, because:

> A prosecutor's role in our system of justice, when correctly perceived by a jury, has at least the potential for particular significance being attached by the jury to any expressions of the prosecutor's personal beliefs. That expression in this case involved critical issues in the trial, to wit, defen-

> dant's credibility and intent. Thus, as we have indicated, the question in this regard boils down to whether the evidence of guilt was so overwhelming as to justify a conclusion that defendant was not improperly prejudiced and that the error was harmless.

In both Ramos and Singletary, as here, the state could not meet its burden of showing harmless error.

See also the Commentary to ABA Standards for Criminal Justice 3-5.8 (Expressions of personal opinion by the prosecutor are a form of unsworn, unchecked testimony and tend to exploit the influence of the prosecutor's office and undermine the objective detachment that should separate a lawyer from the cause being argued. Such argument is expressly forbidden by the ABA model ethics codes, and many courts have recognized the impropriety of such statements").

In the instant case, the prosecutor -- by repeatedly telling the jury that this testimony is the truth and that testimony is a lie, and then capping it off with "the truth is he was the hit man" and "the truth is he did that" -- could only have compounded the already harmful effect of her previous objected-to comment assuring the jury that, as a prosecutor and representative of the citizens, she had no interest in convicting the wrong man.

The comment about the pictures and "how gross they were" was a blatant effort to use properly admitted evidence for an improper purpose. [See also Issue IV, where an even more prejudicial tactic was used, over objection, in the penalty phase]. Under the law established by this Court, "photographs are admissible if they are relevant and not so shocking in nature as to defeat the value of their relevance." Czubak v. State, 570 So. 2d 925, 928 (Fla.

1990). If the photos are relevant, then the trial court and the appellate court must determine "whether the gruesomeness of the portrayal is so inflammatory as to create an undue prejudice in the minds of the jury and [distract] them from a fair and unimpassioned consideration of the evidence." Czubak, at 928; Leach v. State, 132 So. 2d 329, 331-32 (Fla. 1961). In the instant case there was no dispute that Rolando Landrian was shot repeatedly; no dispute about the nature of the wounds, or the distance or the direction from which the shots were fired, or the cause of death; no claim of accident or self-defense. The only contested issue was the identity of the person who shot him. The crime scene photographs were arguably properly introduced to illustrate the police officer's testimony, but when the prosecutor intentionally called the jury's attention to "how gross [the photographs] were" in order to inflame their emotions against appellant she committed gross misconduct.

Then there is the Pinocchio comment. In Pacifico v. State, 642 So. 2d 1178, 1183-84 (Fla. 1st DCA 1994), the appellate court distinguished Craig v. State, 510 So. 2d 857, 865 (Fla. 1987), and explained:

> The fourth area of improper prosecutorial comment concerns the many references to appellant as a "liar". Exhorting the jury to convict the accused because he lied constitutes--
>
> > an open invitation to the jury to convict the defendant for a reason other than his guilt of the crimes charged. Such comments have been held to constitute reversible error in a long line of cases.
>
> Bass v. State, 547 So.2d 680, 682 (Fla. 1st DCA), review denied, 553 So.2d 1166 (Fla. 1989) (citation omitted). In Bass, this court reversed, concluding the prosecutor's remarks

> could have been and likely were construed as asking jurors to send a message about lying in the courtroom, rather than focusing their attention on whether the state proved Bass's guilt.
>
> Likewise, it is improper for a prosecutor to express a personal belief in the guilt of the accused, or in the veracity of the state's witnesses. Jones v. State, 449 So.2d 313, 314 (Fla. 5th DCA), review denied, 456 So.2d 1182 (Fla. 1984). Where the case against a defendant is weak or tenuous, a prosecutor's contentions that the defendant is a liar could rarely, if ever, be construed as harmless error. Jones, 449 So.2d at 314-315. It is permissible for a prosecutor to refer to a witness as a liar only if the context of the statement indicates that "the charge is made with reference to testimony given by the person thus characterized, [and] the prosecutor is merely submitting to the jury a conclusion that he is arguing can be drawn from the evidence. Craig, 510 So.2d at 865.

See also Washington v. State, 687 So. 2d 279 (Fla. 2d DCA 1997) ("It is 'unquestionably improper' for a prosecutor to state that a defendant has lied"); Riley v. State, 560 So. 2d 279 (Fla. 3d DCA 1990).

The question, then, is whether the prosecutor was properly arguing a conclusion which could be drawn from the evidence [Craig], or improperly giving the jury her personal opinion of appellant's credibility [Pacifico] in a rude manner designed to ridicule him [Riley; Glassman]:

> I can't even think of a way that it isn't enough to give you an abiding conviction of guilt, an overwhelming conviction of guilt. There's no way, no stretch of the imagination because let me tell you one thing, if that guy were Pinocchio, his nose would be so big none of us would be able to fit in this courtroom on what he said on there.

It there is a line which can be crossed, the prosecutor crossed it.

And if there is a standard of professional conduct more basic than refraining from arguing one's personal beliefs, it is that counsel -- whether a prosecutor, defender, or civil litigator -- must confine his or her argument to the evidence. ABA Standard 3-5.9 states:

> The prosecutor should not intentionally refer to or argue on the basis of facts outside the record whether at trial or on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice.

The Commentary to this standard explains:

> At the trial level, it is highly improper for a prosecutor to refer in colloquy, argument, or any other setting to factual matter beyond the scope of the evidence or the range of judicial notice, other than in response to defense counsel's nonprovoked statements outside of the record. This is true whether the case is being tried to a court or to a jury, but it is particularly offensive in a jury trial.

The Florida Bar's Rules of Professional Conduct 4-3.4(e) provides that a lawyer shall not:

> in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused.

See Huff, 437 So. 2d at 1090-91; McLellan, 22 FLW D 1705; Aja, 658 So. 2d at 1168; Tillman, 647 So. 2d at 1015; Pacifico, 642 So.

2d at 1184; Shorter, 532 So. 2d at 1111; Duque, 460 So. 2d at 417; Jones, 449 So. 2d at 314; Wheeler, 425 So. 2d at 110-11; Thompson, 318 So. 2d at 551.

In the instant case, the prosecutor three times accused appellant of changing his appearance for court in an effort to "fool" the witnesses and the jury (9/928,931), even though there was no evidence that he did so, and no evidence contrary to appellant's testimony that his head was now shaved because he had gone bald on one side as a result of an injury he sustained when he was attacked in jail (8/859). See Jones v. State, 449 So. 2d 313, 314 (Fla. 5th DCA 1984) ("It is clear that the prosecutor felt Jones had procured, through threats or otherwise, the absence of the victims at trial, and the silence of the shop clerk. No evidence of this was presented at trial, however, and it was therefore improper for the state to make such an argument"). The prosecutor also argued:

> In addition to that, did anybody pick Delio Romanes out of any line-up? No, they picked him, Walter Ruiz, and he don't look nothing like Delio Romanes except for maybe now that he shaved his head trying to look that way for all of you.
>
> * * *
>
> Why in the world, if Delio Romanes is the guy that's out hitting Landrian at that pay phone and dragging him by the suspenders into the car and beating him in the car and forcing him to give up his jewelry, why isn't Delio Romanes getting picked out out of line-ups? Why is it him? [Ruiz]

(9/931-32)

This was improper and misleading argument because there was no evidence that Delio Romanes' picture was in any photopak which was

shown to any witness. Mike Witty, we know, was never shown any photographs at all, because Detective Rockhill felt it wasn't necessary once they had Charles Via's ID (5/525-26,574,577). Charles Via was shown two photopaks (5/510,513). The first photo-pak (State Exhibit 34), out of which Via selected appellant's picture, did not contain Delio Romanes' photograph (compare the six photos at R15/44 with the photo of Delio Romanes at R15/38; see 5/511-12,517,519-20). Via testified that he also picked somebody out of the other photopak he was shown (5/511-12,517-18). The person he picked out of the other photopak was not the driver of the car; he did not get a good look at the driver (5/518; see 5/507,520). The second photopak was not introduced into evidence and is not in the record on appeal. There is no evidence of who was in it, or who Via picked out, or whether Delio Romanes was in it, or -- if he was -- whether Via picked him out. Therefore, the prosecutor's argument to the effect of "If Delio Romanes did it, why isn't he getting picked out of line-ups" is both misleading and outside the evidence. See the Commentary to ABA Standards for Criminal Justice 3-5.8 ("The intentional misstatement of evidence is particularly reprehensible. It has long been established that a lawyer may not knowingly misquote testimony of a witness or in argument assert as a fact that which has not been proved").

Next, the prosecutor told the jury:

> Stop and think about something else. They [the defense] would have you believe that Micky Hammonds was this great friend of Abraham Machado. Remember Abraham Machado, the guy who stutters, he's the one who came in here who went with them to the pawn shop to get the gun, that guy, okay?

> Well, Micky Hammonds doesn't know Abraham Machado by his name, doesn't know Abraham Machado by his nickname. He thought the guy's nickname is "Gordo." Well "Gordo" as Americans say it, is Spanish for fat. And we know from the other witnesses that Abraham Machado-'s nickname is "Gago." "Gago" means stutter. That's obviously the guy's nickname.
>
> There's no question Micky Hammonds may have met Abraham Machado at one of these parties at Maria Vasquez's house, no kidding, but the guy that really knew Abraham Machado was him [Ruiz].

(9/933-34).

Now the prosecutor is acting as an unpaid, unsworn translator, on a matter very relevant to the credibility of the witnesses. [Whether Machado was a closer associate of appellant or Hammonds is obviously relevant to the likelihood of him being part of the group trying to set up appellant].

> The most elementary rule governing the limits of argument is that it must be confined to the record evidence and the inferences that can reasonably and fairly be drawn from it. Assertions of fact not proven amount to unsworn testimony of the advocate and are not subject to cross-examination. Prosecutors have aptly been condemned by courts for the clearly improper use before the jury of evidence that had not been or could not have been introduced in evidence at the trial.

Commentary to ABA Standards for Criminal Justice 3-5.8.

Was the prosecutor here "testifying" as a self-styled expert in the Spanish language, or could it be argued that her defining the words "Gordo" and "Gago" for the jury -- and expressing her opinion that Machado's nickname is obviously "Gago" because he stutters -- was a fair and reasonable inference from the evidence? Well, she certainly could have asked Machado what his nickname was; he was her own witness. When the trial court read the stipulation

regarding Machado grinding the serial number off the gun, he referred to him as Abraham Machado "also known as 'Gordo'" (5/596). The prosecutor told the jury "[W]e know from the other witnesses that Abraham Machado's nickname is 'Gago'. 'Gago' means stutter. That's obviously the guy's nickname" (9/934). But, once again, the prosecutor is misstating the evidence. The only witness who even mentioned the name "Gago" was Maria Vasquez, who testified:

> Q. [by defense counsel]: Do you know a gentleman by the name of Abraham Machado?
>
> A. Yes, I know who he is. Now, I didn't know his last name was Machado.
>
> Q. How did you know him?
>
> A. He's got a nickname, "Gordo" or "Gago" or something like that.

(6/668).

If Maria Vasquez, who knew the man, wasn't sure if his nickname was Gordo or Gago, then it cannot be said that "we know from the other witnesses" that it was Gago. The jury knew it only because the prosecutor told them so, and defined the Spanish words for them. And the prosecutor not only took advantage of this improper tactic in her initial closing argument, but also in her rebuttal closing argument when she said:

> . . . they want you to believe that Micky Hammonds was the bud of Abraham Machado, right? Micky Hammonds is the one involved in this plot with Delio. Why not use Micky Hammonds? Micky Hammonds is closer to Abraham, right, isn't that what they're telling you?
>
> Let me ask you this: If that's so, then why do we use Walter? Because Walter is the hit man. Because that's not true. That's not so. Micky Hammonds does not know Abraham

Machado. He doesn't even know the guy's nickname.

(9/979).

E. Conclusion

The misconduct of the two prosecutors in their guilt phase closing argument was egregious, harmful, and pervasive. The comment to which defense counsel objected and moved for a mistrial -- that the prosecutors as representatives of the citizens of the county have no interest in convicting anyone other than the person responsible for this horrible crime -- has been repeatedly condemned by Florida and federal courts, especially in trials where the outcome depends on the jury's resolution of conflicting testimony and the credibility of the witnesses. Riley; Duque; McGuire; Buckhann; Reed; Price; Garza; Bass; Chrisco; Lamerson; Hall. The many other improper comments would also independently require reversal for a new trial, had they been objected to. Unlike the extraordinary comment which is the subject of Issue II, undersigned counsel does not seek to invoke the "fundamental error" exception as to the latter comments, but if the state argues that the objected-to comment was "harmless error", then the cumulative effect of the prosecutors' argument as a whole may be considered by this Court. Pope v. Wainwright, supra, 496 So. 2d at 801 n.1; Pollard v. State, supra, 444 So. 2d at 563.

The prosecutors' conduct in this case denied appellant a fair trial and a reliable determination of his guilt or innocence. Reversal for a new trial is the only meaningful remedy.

ISSUE II

THE PROSECUTOR DESTROYED THE FAIRNESS AND RELIABILITY OF THE JURY'S PENALTY RECOMMENDATION WHEN SHE ARGUED IRRELEVANT FACTS FAR BEYOND THE EVIDENCE AND PLAYED UPON THE JURY'S SYMPATHIES FOR HERSELF AND HER FAMILY, BY UNFAVORABLY CONTRASTING APPELLANT WITH HER OWN FATHER WHO WENT TO FIGHT IN THE PERSIAN GULF WAR DESPITE THE FACT THAT HE WAS DYING OF CANCER, AND BY EQUATING HER FATHER'S SACRIFICE WITH THE JURY'S MORAL DUTY TO SENTENCE APPELLANT TO DEATH.

Prosecutorial misconduct occasionally -- but rarely -- descends to the level of fundamental error; so outrageous and unfairly prejudicial as to require reversal even in the absence of an objection below.[21] The various and sundry additional improper comments made by the two prosecutors in the guilt phase probably do not reach this level, and are catalogued only to rebut the state's anticipated "harmless error" argument as to the one egregious comment which was preserved by objection and motion for mistrial. However, the tactic used by Ms. Cox as the climax of her penalty phase summation was so over the top -- so completely and irredeemably irrelevant and outside the evidence (or anything which conceivably could have been in evidence), yet at the same time so prejudicial to appellant and emotionally distracting to the jury --

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[21] See Pait v. State, 112 So. 2d 380, 385 (Fla. 1959); Pacifico v. State, 642 So. 2d 1178, 1182-83 (Fla. 1st DCA 1994); Duque v. State, 460 So. 2d 416 (Fla. 2d DCA 1984); Jones v. State, 449 So. 2d 313 (Fla. 5th DCA 1984); Peterson v. State, 376 So. 2d 1230 (Fla. 4th DCA 1979); Thompson v. State, 318 So. 2d 549 (Fla. 4th DCA 1975).

that if there is any such thing as fundamental error this must be it.

Appellant has consistently stated that he did not commit the murder of Rolando Landrian; he was solicited to "rough [him] up" and he declined, then he was set up by the people who actually committed the crime. Upon his being convicted, the focus of the mitigating evidence in the penalty phase was to show that appellant had been a caring son, husband, father, and stepfather whose life went downhill around the time of a separation and divorce that neither he nor his wife really wanted. This mitigation is not inconsistent with his claim of innocence. The defense called as witnesses appellant's ex-wife Nancy, his daughter Wanda, his son Walter Jr., and his stepdaughter Aracelis, and introduced letters written by appellant to his children and a videotape of family events (R17/116-39). The trial judge, in his sentencing order, found that these nonstatutory mitigating factors were worthy of considerable weight (R3/558-59).[22]

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[22] The judge found:

> Defendant is a fair and considerate father to his four children including two stepchildren; he played games with them, he participated in their activities, helped with homework and treated them equally both before and after the separation between himself and his ex-wife, the children's mother. Defendant has always supported his children financially. Before the separation defendant was always steadily employed in Orange County and when the family lived in New York City. Defendant helped willingly with the housework and cooking. Before the separation defendant attended church regularly and was active in church affairs by singing and testifying and "gave
>
> (continued...)

Under Florida's capital sentencing law the jury is co-sentencer, and any error which taints the jury's penalty recommendation also taints the ultimate sentencing decision. Espinosa v. Florida, 505 U.S. 1079 (1992); Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993). And here the jury's ability to fairly weigh the mitigating circumstances and to reach a reliable penalty verdict was destroyed by the improper tactics of Ms. Cox. She began with a legitimate argument, that appellant has family members who love him, but despite their love he made conscious decisions which led to his being convicted and their having to be in court (12/1207-08):

> Ask Mr. Ruiz why should their love be a reflection upon him when it had no effect on him or his behavior, none. Doesn't his reckless indifference to their love, to their well-being, to their concern make his actions even more despicable?

(12/1208-09)

At this point, she concluded her summation:

> And it's not easy for any of us to be here. My father was a physician and a commander in the United States Military, US Navy Reserve,

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[22](...continued)
his heart to God in the church". Defendant participated willingly and actively in family gatherings. From jail the defendant talks to his children and stepchildren on the telephone and writes them inspirational and loving letters and this contact is important to the children and they would continue this contact with defendant were he to be sentenced to life in prison. Defendant's mother loves him and communicates with him and would visit him in prison were he to be sentenced to life in prison. Defendant's conduct and lifestyle changed abruptly for the worse about two years ago.

and about six years ago, he got orders to go to Operation Desert Storm to command a Naval ship in the Gulf. And as he prepared to close his practice down and leave, they found a shadow on his brain, and the doctors would not commit to anything, but we all knew, the family all knew that was going to be the cancer that ultimately killed him.

And so I begged him, don't go, your days are numbered. Stay here with your family. Go talk to the people who issued your orders, go talk to the Navy and tell them that you can't go. You've got an excuse now. You've got an excuse that no one can deny. And he said, "I can't do that. This is my duty." And the thing about duty is that it's often difficult and it's usually unpleasant, but it's a moral and in this case a legal obligation.

When you got your jury summons in this case, it was a call to duty, and no one of us is underestimating the difficulty of your task in this case, but it's your duty to make sure that justice is meted out in this case.

It's without any pleasure that the State asks for the ultimate sentence because for there to be justice in our society, the punishment must fit the crime, the crime that was inflicted upon Rolando Landrian, the ultimate act of moral depravity and unmitigated evil. And justice can be harsh and demanding, but there's no room in these facts for compassion. There's no room in these facts for mercy.

We ask you to consider this not because it's easy, because we all know it's very difficult, but it's the right thing and we ask that you have the courage and the moral strength to bring justice to this case.

Thank you.

(12/1209-10)

For sheer rhetorical effectiveness, this argument is a thing of beauty. In one fell swoop, it personalizes Ms. Cox and gains the jury's sympathy for herself and her family; it contrasts appellant unfavorably with Ms. Cox' heroic and dutiful father; it demeans the mitigating evidence (which was presented by actual witnesses under oath) that appellant was a caring parent; it avoids

the complication of being subject to cross-examination or rebuttal; and -- finally -- it equates Ms. Cox' father's noble sacrifice for his country with the jury's moral duty to sentence Walter Ruiz to death.

This Court has repeatedly expressed its displeasure with prosecutorial misconduct in death penalty cases, and has stated that "violations of the prosecutor's duty to seek justice and not merely 'win' a death recommendation cannot be condoned by this Court." Garron v. State, 528 So. 2d 353, 359 (Fla. 1988) (citing ABA Standards for Criminal Justice 3-5.8)); Hill v. State, 477 So. 2d 553, 556-57 (Fla. 1985); Bertolotti v. State, 476 So. 2d 130, 134 (Fla. 1985); Teffeteller v. State, 439 So. 2d 840, 845 (Fla. 1983); see also Nowitzke v. State, 572 So. 2d 1346, 1350 and 1356 (Fla. 1990); Florida Bar v. Schaub, 618 So. 2d 202 (Fla. 1993). The ABA Standards provide that the prosecutor "should refrain from argument which would divert the jury from its duty to decide the case on the evidence" (Standard 3-5.8(d)) and "should not intentionally refer to or argue on the basis of facts outside the record . . . unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice" (Standard 3-5.9). The Commentary to 3-5.8 states:

> The most elementary rule governing the limits of argument is that it must be confined to the record evidence and the inferences that can reasonably and fairly be drawn from it. Assertions of fact not proven amount to unsworn testimony of the advocate and are not subject to cross-examination. Prosecutors have aptly been condemned by courts for the clearly improper use before the jury of evidence that had not been or could not have been introduced in evidence at the trial.

The Commentary to 3-5.9 states that it is "highly improper" for a prosecutor to refer "in colloquy, argument, or any other setting" to a matter beyond the scope of the evidence or the range of judicial notice; "This is true whether the case is being tried to a court or to a jury, but it is particularly offensive in a jury trial." Florida courts have repeatedly reminded prosecutors of this basic rule of conduct, and have not hesitated to reverse convictions when it has been violated. See e.g. Huff, 437 So. 2d at 1090-91; McLellan, 22 FLW at D1705; Aja, 658 So. 2d at 1168; Pacifico, 642 So. 2d at 1184; Shorter, 532 So. 2d at 1111; Duque, 460 So. 2d at 416; Jones, 449 So. 2d at 314-15; Wheeler, 425 So. 2d at 110-111. [In at least three of these cases -- Pacifico; Duque; and Jones -- the reversals were expressly based on fundamental error, notwithstanding the lack of an objection, or an inadequate objection, below]. As the Second DCA has recently observed, "If attorneys do not recognize improper argument, they should not be in a courtroom." Washington v. State, 687 So. 2d 279, 280 (Fla. 2d DCA 1997), quoting Judge Blue's concurring opinion in Luce v. State, 642 So. 2d 4 (Fla. 2d DCA 1994).

The Eighth Amendment requires a heightened degree of reliability in capital sentencing. Lockett v. Ohio, 438 U.S. 586 (1978); Caldwell v. Mississippi, 472 U.S. 320 (1985); see Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988). A jury's penalty verdict should "reflect a logical analysis of the evidence in light of the applicable law." Bertolotti, 476 So. 2d at 134. Here, the character of the defendant [Lockett v. Ohio], and to a certain extent the character of the victim [Payne v. Tennessee, 501 U.S. 808

(1991)] were relevant to the penalty decision. The character of the prosecutor's father certainly was not relevant. Nor was the prosecutor's family relationships and her personal loss relevant. Nor was it appropriate for her to convey to the jury, through the emotional experience of how she lost her father, that it was their patriotic or moral duty to recommend that appellant be sentenced to die.

As this Court wrote in Teffeteller, 439 So. 2d at 845:

> "We think that in a case of this kind the only safe rule appears to be that unless this court can determine from the record that the conduct or improper remarks of the prosecutor did not prejudice the accused the . . . [sentence] must be reversed." Pait v. State, 112 So. 2d 380, 385-86 (Fla. 1959). We cannot determine that the needless and inflammatory comments by the prosecutor did not substantially contribute to the jury's advisory recommendation of death during the sentencing phase.

Both appellant's conviction [Issue I] and his death sentence were obtained by impermissible and unfair tactics. Florida and federal law require that the conviction be reversed for a new trial, but -- in addition -- the Eighth Amendment's guarantee of reliability in capital sentencing leads to the conclusion that the death sentence in this case cannot constitutionally be carried out. Appellant is entitled to a new trial and, in the event that he is found guilty, a new penalty proceeding.

ISSUE III

THE TRIAL COURT ERRED IN ALLOWING THE STATE OVER OBJECTION TO INTRODUCE, IN THE GUISE OF IMPEACHMENT, IRRELEVANT AND PREJUDICIAL EVIDENCE THAT APPELLANT'S PRIOR INCARCERATION

WAS FOR ROBBING A STORE (OR STORES); AND FURTHER ERRED IN OVERRULING THE DEFENSE'S OBJECTION TO THE PURPORTED IMPEACHMENT BASED ON LACK OF A PROPER PREDICATE.

"The State is not permitted to present otherwise inadmissible information regarding a defendant's criminal history under the guise of witness impeachment." Geralds v. State, 601 So. 2d 1157, 1162-63 (Fla. 1992).

In this case, defense counsel moved in limine prior to trial to prohibit the state from introducing any evidence that appellant "was charged with robbery in other counties, that he solicited others to help in robberies in other counties, or inferring in any way that he participated in robberies" (R3/423-24). In this motion, the defense conceded that the facts that appellant was in jail in Seminole County, that he bonded out, and that he failed to appear in court on April 4, 1995 were relevant and were "integrally linked to both the State and defense cases" (R3/423). However, the defense asserted, "the nature of the charges for which he was incarcerated (robbery) has no relevance whatever", and "[w]hile the Defendant concedes no legal relevance at all, any relevance is overwhelmed by the prejudicial impact", especially in view of the fact that the charged murder of Rolando Landrian was also, in part, a robbery (R3/423-24).

At a hearing on August 1, 1996, the prosecutor acknowledged that she could not think of a reason why the fact that the underlying charge for which appellant had been in jail was for armed robbery "would be something that would be admissible in Mr. Ruiz'

case." The prosecutor continued "So I think it was in everybody's understanding that unless I came up with something I wasn't going to go into it, but the fact that he was in jail I think is absolutely relevant" (R14/1391). Defense counsel agreed, "in my motion I said I didn't have a problem with the fact that he was in jail or the fact that he skipped bond on April 4, it was just the fact that the charge itself was robbery" (R14/1391).

At trial, the defense presented four witnesses who testified that appellant was in Orlando throughout the day of the murder (during the period of time the abduction and shooting occurred; and also earlier in the day, during the time period when Micky Hammonds claimed he and appellant were driving around Tampa in pursuit of Landrian). One of these witnesses -- appellant's mother, Julia Ramirez -- testified that she and appellant were together for five hours or a little more on the morning and afternoon of April 7. They went to the State Farm office and did some shopping at K-Mart, and they had a long lunch at the Little Caesar's in the back of the store. Appellant had bonded out of jail and had failed to appear in court, and Mrs. Ramirez was trying to talk him into giving himself up. A check made out to State Farm signed by Luis A. Ramirez, a receipt from State Farm, and a check made out to K-Mart for shoes, a skirt, and a T-shirt signed by Julia F. Ramirez -- all dated April 7, 1995 -- were introduced into evidence (7/783-84,787; R16/83-88). The back of the K-Mart check was automatically annotated by the register; the date and time of sale indicated 12:22 p.m. on April 7, 1995 (8/906-07; see 7/792-94). Therefore the state did not dispute that Mrs. Ramirez was in K-Mart on April 7,

but it contended that appellant was not there with her; hence the conversation in Little Caesar's, according to the state's theory of the case, could not have occurred.

Appellant testified that he did not kill Rolando Landrian, and he was not in Tampa at any time on April 7. He went with his mother to the State Farm office in Orlando, and smoked a cigarette on the car while she paid the bill (8/834-35). Then they went across the street to K-Mart (8/833). His mother wanted to get an outfit. Appellant picked some items out for her at the skirt, blouse, and shoe departments, and they went to the register and paid for them (8/835-36). Then he suggested that they take a break and talk for awhile (8/836). He didn't want to be walking around too much, because he knew they were looking for him for missing his April 4th court date (8/836). They went to the Little Caesar's pizza shop in the back of the store and talked for a couple of hours (8/836-37). His mom was trying to talk him into turning himself in, but he told her they were trying to charge him with some charges he wasn't guilty of, and he wasn't going to turn himself in at that time (8/837).

After leaving Little Caesar's, they walked around the store a little more, looking possibly to buy another outfit (8/837-38). Then they sat and talked some more on the benches at the front of the store (8/838). They left K-Mart around 5:30 or 5:45 (8/838-39). From there, appellant walked to the house where his ex-wife Nancy and his children were staying. Three other witnesses -- Nancy, Coralyes Rodriguez, and Jorge Rodriguez -- corroborated

appellant's testimony that he was at Nancy's house, in the front yard, from around 7:00 or 7:30 until around 9:30 that evening.

On cross-examination, regarding the Romanes' effort to persuade him to "rough up" Landrian -- which appellant testified he declined to do -- the prosecutor asked:

> Didn't Delio tell you that Rolando Landrian wore a lot of jewelry and kept lots of money in his car, so it was going to be a robbery?
>
> A. I don't know nothing about no robbery, ma'am. You're putting words into my mouth now.
>
> Q. Well, Delio tells you in the context of what he wants done to Rolando Landrian, that Rolando Landrian wears lots of jewelry and keeps lots of money in his car?
>
> A. What he says is that the person that goes down there to rough him up could take it because he does have a lot of jewelry and he does carry a large sum of money, yes.
>
> Q. And that's a robbery?
>
> A. As far as -- yeah.

(8/873-74).

Although he had answered her question, the prosecutor continued to bait appellant:

> Q. You know what a robbery is?
>
> A. How do you know what I know what a robbery is?
>
> Q. Well, are you trying to suggest to this jury -- let me look for a moment. You told . . . Mr. Donerly that you sell drugs, but you don't do things like hurting people, right?
>
> A. Why should I.
>
> Q. Well, you're more than willing to use a gun in order to get what you want, aren't you?

A. If you have a gun, that doesn't mean you're going to hurt somebody.

Q. Pointing a gun at someone doesn't mean you're willing to hurt someone?

A. If you point a gun at somebody doesn't mean you're going to shoot the gun. If you point a gun at somebody, it doesn't mean that it's loaded.

(8/873-74)

At this point, the prosecutor asked to approach the bench, and argued that appellant had opened the door "big time" to evidence of the prior robbery charge in Seminole County which was the subject of the pretrial motion in limine:

. . . when he said in response to one of his questions about Lotia, when he got out of jail, "Oh, I sell drugs; I don't do things like that."

Well, I know, number one, that he was in jail for robbery with a weapon and that when he gets out, he commits two robberies that he's been convicted of, and I think the door has been opened, and we've been dancing around this robbery issue forever, but at this point, it's like they drove a Mack truck through their motion in limine, and his answer, "How do you know what I know about a robbery."

(8/875)

The prosecutor argued that she "should be able to establish that . . . he's been convicted of robberies before and that's how he knows exactly what a robbery is" (8/875). She also argued that, since appellant had testified that he'd told his mother he did not show up for court because they were trying to put charges on him that he didn't do, the state should be able to introduce the portion of a letter written by the mother in which she stated that appellant told her he didn't show up because he didn't do those

robberies alone (8/875). The trial court pointed out "You have two separate things there" (8/875). Defense counsel objected to any references to robberies (8/876) and said:

> What they've characterized as a statement I believe to be accurate is "I don't hurt people; I sell drugs." If they had a robbery in which someone was injured, I think that might be a fair rebuttal to that. I don't believe they do have a robbery in which anyone was injured.

(8/876).

As to the state's second argument, defense counsel asserted that it was not proper impeachment, and the prejudicial impact would greatly outweigh any probative value; "it would be a tremendous 403 problem in making that tiny point with that particular sledge hammer" (8/877).

The prosecutor argued that the mother's letter was an inconsistent statement (8/878), and then returned to her "opening the door" theory:

> But the problem that I have is that this guy is sitting on the stand perpetrating a major fraud on this jury, that this guy has the nerve to sit here and try to portray himself as a free-wheeling drug dealer, but there is a line to which I won't cross and he's leading them with a totally false representation because this is a guy who will arm himself to rob people. And this whole thing is a robbery felony murder.
>
> THE COURT: Well, I see the distinction Mr. Donerly [defense counsel] is talking about. He could commit an armed robbery without breaking people's arms or legs.

(8/878-79).

The trial court stated, "Well, robbery is stealing things from people with the use of a deadly weapon, and Mr. Romanes asked that

Mr. Ruiz talk to the man and rough him up. And I don't see -- you know, better safe than sorry. I don't see the connection" (8/879). Therefore, the judge did not allow the state to bring in other robberies on its "opening the door" theory, but he did tell the prosecutor he would permit her to recall appellant's mother, Mrs. Ramirez (8/879-80). The prosecutor asked wither she needed to confront appellant with the purported prior inconsistent statement, and the judge answered:

> No, it's not his statement. But that -- there is a conflict there between what he is saying that he told her and what she says that he told her.

(8/879-80).

Defense counsel maintained his §90.403 objection, and his objection to any mention of robberies (8/880). He further contended that, if the proposed impeachment were allowed over his objection, that the question should be framed "did he tell you . . . that he didn't want to go to jail for crimes that he didn't do alone, or for crimes that he didn't do as opposed to robberies, which I think is the real thrust of this, that they want to get the word 'robberies' into this" (8/880). The judge said:

> Well, he testified about what he told her.
>
> MR. DONERLY [defense counsel]: He testified that he told her that he didn't -- that they were trying to put crimes on him that he didn't do.
>
> THE COURT: Right.
>
> MR. DONERLY: And I think the State wants to use that to tell you, did he tell you about robberies he didn't do alone.

> THE COURT: Theoretically, she's going to tell us what he told her, what she says that he told her.

(8/880-81).

Accordingly, during the state's case in rebuttal, the prosecutor called Mrs. Ramirez and asked her whether, during their conversation at K-Mart on April 7 (a conversation which, according to the state's theory of the case, could not have taken place at all), appellant had expressed the concern that they would lock him up for a long time and he didn't rob those stores alone (8/891). Defense counsel interjected:

> Objection. I would like to state the same objection and would like to state one more: Lack of proper predicate for failure to have given Mr. Ruiz a time, date, and place and opportunity to explain and then launching into a purported rebuttal.
>
> THE COURT: Give Mr. Ruiz a time, date, and place? You mean Ms. Ramirez?
>
> MR. DONERLY [defense counsel]: I mean Mr. Ruiz. This was not properly set up by not asking Mr. Ruiz the right questions to impeach him.
>
> THE COURT. Okay. Overruled.
>
> MR. DONERLY: And I would renew all the previous objections on the previous grounds we discussed at the bench.
>
> THE COURT: Okay. Same ruling.

(8/891-92).

The prosecutor then repeated the question, and showed Mrs. Ramirez a statement she had written out on August 17, 1995:

> Didn't he mention to you that one of the reasons that he -- he mentioned that they would lock him up for a long time and he didn't rob those stores alone -- or those

store alone? Tell me what this word is right here?

. . .

A. "This."

Q. That's a "this"?

A. Uh-huh.

Q. That what he mentioned to you in that store?

A. That's what he mentioned.

(8/892-93).

Mrs. Ramirez' out-of-court statement (which states "He mentioned 'they would locked me in for a long time-and I didn't rob these store alone'", or possibly "thise store alone", (R16/72) was received in evidence as State's Exhibit 53 (8/892; R16/70-74).

The trial court's ruling which allowed the state to inform the jury that appellant's prior charge in Seminole County was for robbing a store (or stores) was prejudicial error for many reasons. First, the nature of the prior charge was irrelevant to the crime for which appellant was on trial, and it showed only propensity to commit crimes and bad character. Thus it was not admissible as "similar fact evidence" under Fla. Stat. §90.404(2)(a) because it was not similar, and it was not admissible as "dissimilar fact evidence" under Fla. Stat. §90.402 because it was not relevant, and because the prejudicial effect of informing the jury that appellant was charged with one or more prior robberies greatly outweighed its non-existent probative value. Fla. Stat. §90.403; Farrell v. State, 682 So. 2d 204 (Fla. 5th DCA 1996). See this Court's recent discussion of the interplay amount those three

provisions of the Evidence Code in Sexton v. State, __So. 2d __ (Fla. 1997) [22 FLW S469].

Second, the purported impeachment went to a collateral issue. See e.g., Caruso v. State, 645 So. 2d 389, 394-95 (Fla. 1994); Gelabert v. State, 407 So. 2d 1007 (Fla. 1st DCA 1981). While there may be more leeway to impeach a witness with collateral extrinsic evidence when it concerns matters testified to on direct examination as opposed to cross-examination,[23] the rule that the prejudicial effect of the evidence must not outweigh the probative value still applies,[24] as does the requirement that the impeaching party lay the proper foundation. Mills v. State, 681 So. 2d 878, 880 (Fla. 3d DCA 1996).

This leads to the third reason the state should not have been allowed to introduce evidence of a prior robbery or robberies as impeachment; the required foundation was not laid. Florida's Evidence Code (§90.614(2)) provides that "[e]xtrinsic evidence of a prior inconsistent statement by a witness is inadmissible unless the witness is first afforded an opportunity to explain or deny the prior statement and the opposing party is afforded an opportunity to interrogate the witness on it . . . ." See Ehrhardt, Florida Evidence, §614.1 (1997 Ed.); Mills v. State, supra, 681 So. 2d at

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[23] See Mills v. State, 681 So. 2d 878, 880 (Fla. 3d DCA 1996); Ehrhardt, Florida Evidence, §608.1 (1997 Ed.).

[24] See Ehrhardt, Florida Evidence, §608.1 (1997 Ed.) ("Impeachment evidence is . . . subject to the requirements of section 90.403 which will exclude the evidence, even though it is relevant to the credibility of the witness, if the probative value of the evidence is substantially outweighed by undue prejudice or the other enumerated criteria"); Caruso v. State, supra, 645 So. 2d at 394-95; Colbert v. State, 320 So. 2d 853 (Fla. 1st DCA 1975).

880-81; Dietrich v. State, 673 So. 2d 93 (Fla. 4th DCA 1996); Kimble v. State, 537 So. 2d 1094 (Fla. 2d DCA 1989); Irons v. State, 498 So. 2d 958, 960 (Fla. 2d DCA 1986); McGuire v. State, 411 So. 2d 939 (Fla. 4th DCA 1982); Garcia v. State, 351 So. 2d 1098 (Fla. 3d DCA 1977); Hancock v. McDonald, 148 So. 2d 56, 59 (Fla. 1st DCA 1963). Unless the statement is introduced as substantive evidence, as an admission of a party-opponent under §90.803(18), the requirement of laying the proper foundation for impeachment applies just as strongly -- or more so -- when the witness is the defendant in a criminal trial. McGuire v. State, 411 So. 2d 939, 940 (Fla. 4th DCA 1982). See also the concurring opinion of Justice Overton, joined by Justices England, Sundberg, and Hatchett, in Nowlin v. State, 346 So. 2d 1020, 1024-25 (Fla. 1977). As stated in Booker v. State, 397 So. 2d 910, 914 (Fla. 1981), "[a] defendant who takes the stand as a witness in his own behalf occupies the same status as any other witness, and all the rules applicable to other witnesses are likewise applicable to him." See Ehrhardt, Florida Evidence, §608.1 ("The credibility of a criminal defendant who takes the stand and testifies may be attacked in the same manner as any other witness").

In the instant case, the comment in Mrs. Ramirez' written statement of August 17, 1995, that appellant said to her in Little Caesar's that he had mixed feelings about turning himself in because they would lock him up for a long time and he didn't rob this store (or these stores) alone was admitted into evidence solely as impeachment, on the theory that it was inconsistent with his trial testimony that he had told her they were trying to charge

him with some charges he wasn't guilty of. Neither the prosecutor nor the trial court ever suggested that the statement might be admissible as substantive evidence, or as an admission of a party-opponent under §90.803(18). As explained in Professor Ehrhardt's treatise on Florida's Evidence Code:

> The predicate, of giving a witness an opportunity to explain or deny a prior statement before it may be offered, is necessary only when the statement is offered to impeach the witness. However, if the statement is not offered for impeachment, but is offered as substantive evidence, it is not necessary that the witness be first given an opportunity to admit or deny the statement. The last sentence in section 90.614(2) provides that when an admission by a party-opponent is offered as substantive evidence, it is admissible without regard to whether the person making the statement is first questioned about it in open court. [Footnotes omitted].

Ehrhardt, Florida Evidence, §614.1 (1997 Ed.).

> If a statement is offered as substantive evidence under this exception [90.803(18)] it is not necessary to lay a foundation by asking the individual who made the statement whether or not he or she did so. The foundation must be laid only when the statement is being offered for purposes of impeachment, e.g., prior inconsistent statements. If the statement is an admission of a party-opponent and is being offered as substantive evidence, it is admissible when counsel proves the statement was made. [Footnote omitted].

Ehrhardt, Florida Evidence, §803.18 (1997 Ed.).

Moreover, even if the state had sought to introduce the statement contained in Mrs. Ramirez' letter as substantive evidence, it would not have been admissible as an "admission of a party-opponent", since evidence cannot be admitted under §90.803(18) unless it is relevant to prove a material fact in issue. Hoefert

v. State, 617 So. 2d 1046, 1050 (Fla. 1993); Swafford v. State, 533 So. 2d 270, 274 (Fla. 1988). Where, as here, the evidence of a prior inconsistent statement having no independent relevance to the charged offense is introduced solely as purported impeachment, the foundational requirements apply with full force to a defendant who has taken the stand, just as with any other witness. McGuire v. State, supra, 411 So. 2d at 940; Nowlin v. State, supra 346 So. 2d at 1024-25 (Overton, J., concurring); Wright v. State, 427 So. 2d 326 (Fla. 3d DCA 1983); see generally, Booker v. State, supra, 397 So. 2d at 914.

In the instant case, the trial court compounded his error in allowing the state to use collateral impeachment as a vehicle to inform the jury of an irrelevant prior robbery or robberies by also excusing the state from satisfying the statutory predicate for such impeachment. When defense counsel (who had already objected on numerous grounds, and now renewed these) raised the additional objection of "[l]ack of a proper predicate for failure to have given Mr. Ruiz a time, date, and place and opportunity to explain" (8/891), the judge replied "Give Mr. Ruiz a time, date, and place? You mean Ms. Ramirez?" (8/892). Defense counsel reiterated,"I mean Mr. Ruiz. This was not properly set up by not asking Mr. Ruiz the right questions to impeach him" (8/892). The judge thereupon overruled the objection on this ground, and on all of the other grounds (8/892).

Since §90.614(2) provides that, absent the required foundation, extrinsic evidence of a prior inconsistent statement is

inadmissible [Mills; Dietrich; Kimble; Irons; McGuire; Garcia], the trial court's ruling was prejudicial error.

Fourth and finally, even assuming arguendo that there was any conceivable justification for the state to go into this area of collateral impeachment, and even if the foundational requirements had been met, the purpose of the impeachment could easily have been achieved without mentioning store robberies. This aspect of the issue -- like all the others -- was fully preserved by defense counsel below, when he maintained his §90.403 objection, and further contended that, if the proposed impeachment were allowed over his objection, that the question should be framed "did he tell you . . . that he didn't want to go to jail for crimes that he didn't do alone, or for crimes that he didn't do as opposed to robberies, which I think is the real thrust of this, that they want to get the word 'robberies' into this" (8/880). The judge said:

> Well, he testified about what he told her.
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> MR. DONERLY [defense counsel]: He testified that he told her that he didn't -- that they were trying to put crimes on him that he didn't do.
>
> THE COURT: Right.
>
> MR. DONERLY: And I think the State wants to use that to tell you, did he tell you about robberies he didn't do alone.
>
> THE COURT: Theoretically, she's going to tell us what he told her, what she says that he told her.

(8/880-81).

By unnecessarily calling the jury's attention to the fact that the prior charges involved store robberies, the state went too far,

and guaranteed that the prejudicial effect of the irrelevant collateral crime evidence would greatly outweigh whatever legitimate impeachment value the statement might have. Appellant's testimony which was supposedly being impeached was:

> Yeah, my mom was telling me about turning myself in; that's the best thing that I could do. And then I told her that they were trying to charge me with some charges that I wasn't--you know, that I wasn't guilty of, and that I wasn't going to turn myself in at that time.

(8/837)

The state, if impeachment were its true goal, could simply have asked Mrs. Ramirez on rebuttal if her son had told her in Little Caesar's that he didn't do the crime or crimes alone. Unless Mrs. Ramirez denied this, there was no need to introduce her written out-of-court statement. There was no need to mention stores or robberies or "that they would lock him up for a long time" unless the state wanted the jury to hear these things for the truth of the matters asserted. See Kyle v. State, 650 So. 2d 127 (Fla. 4th DCA 1995), in which the state, in a trial for robbery and resisting arrest, brought out that the defendant had a prior conviction for battery on a law enforcement officer; the appellate court reversed for a new trial, saying:

> [T]he trial court permitted the prosecutor's inquiry because he concluded that appellant had opened the door to it. We cannot agree. While appellant's statement that he had been "jumped on by police before" may have opened the door slightly, it could not possibly have opened it wide enough to allow in the state's naming the crime and pointing out that appellant had been incarcerated for it, nor does the state cite any authority for such a proposition.

See also Farrell v. State, 682 So. 2d 204, 206 (Fla. 5th DCA 1996) (although relevant to explain why the child feared Farrell and why he delayed reporting fondling incident, statement indicating that Farrell had previously been imprisoned for fondling another child should not have been admitted because its probative value was outweighed by its prejudicial effect; "[i]nstead of admitting the similar crime evidence, the court should have allowed D.C. to testify only that Farrell stated he had been in prison -- which would have explained D.C.'s fear of Farrell and reluctance to report him").

Similarly, assuming arguendo that the impeachment on a collateral issue in the instant case had any legitimate probative value -- and since appellant's testimony which the state sought to impeach was that he told his mother they were trying to charge him with some charges he wasn't guilty of -- the purpose of the impeachment could have been achieved by allowing Mrs. Ramirez to testify that he had told her he didn't do that crime or those crimes alone. As in Kyle and Farrell, there was absolutely no need and no proper purpose for the state to inform the jury that the prior charges involved store robberies, or that appellant was facing being locked up for a long time. This information was both irrelevant to the charged offense and unduly prejudicial, and, as defense counsel argued below, should have been excluded under §90.403. Farrell; see generally Sexton v. State, __So. 2d__ (Fla. 1997) [22 FLW S469]; Steverson v. State, __So. 2d__ (Fla. 1997) [22 FLW S345].

As in Farrell, "[t]his case was one of whom do you believe", and thus the evidence that appellant had been charged with one or

more prior robberies could easily have influenced the jury to believe the prosecution's version over the defense's. See Straight v. State, 397 So. 2d 903, 909 (Fla. 1981); Colbert v. State, 320 So. 2d 853, 854 (Fla. 1st DCA 1975) (underlying rationale for excluding irrelevant evidence of other crimes is the tendency of such evidence "to promote a more ready belief by the jury that he might have committed the [crime] for which he is charged" thereby predisposing the minds of the jurors to believe the accused guilty). For this reason, the erroneous admission of irrelevant criminal activity is presumptively harmful error. Straight v. State, supra, 397 So. 2d at 908 (Fla. 1981); Keen v. State, 504 So. 2d 396, 401-02 (Fla. 1987); Castro v. State, 547 So. 2d 111, 115 (Fla. 1989); Weitz v. State, 510 So. 2d 1060 (Fla. 4th DCA 1987); Carr v. State, 578 So. 2d 398 (Fla. 1st DCA 1991); Stephens v. State, 662 So. 2d 394 (Fla. 5th DCA 1995). Moreover, in the instant case, as in Keen (504 So. 2d at 401), "it would be leger-demain to characterize the evidence as overwhelming." Keen was a one-on-one credibility contest pitting the credibility of the witness Shapiro versus that of the accused, Keen. The instant case, as discussed in Issue I, was essentially a six-on-six credibility contest. Depending on which witnesses the jury chose to believe, appellant either accepted Delio and Lotia Romanes' proposed "contract" and abducted, robbed, and killed Rolando Landrian; or else he declined the proposed contract and was thereupon framed for the murder by the people who committed it. Appellant denied that he killed Landrian and testified that he was in Orlando -- not Tampa -- on the day of the murder. His testimony was corroborated

by four other witnesses who stated that they were with him or saw him in Orlando that afternoon and evening, as well as a jail inmate who testified that Micky Hammonds admitted to him that he and the Romanes were framing appellant. The prosecution's case was largely dependent on the jury's believing the testimony of Micky Hammonds (See 2/107). The state's three identification witnesses (one of whom recognized a newspaper photograph portraying appellant as a suspect, but could not make an in-court ID; another who selected appellant from a photopak, but when he saw appellant in court said he was not the person he saw abducting the victim; and a third who was never shown any photographs, but identified appellant in court) all had very little opportunity to observe. This is the hallmark of an unreliable identification, particularly where it is an identification of a stranger. Moreover, at least two of the three IDs were extremely suggestive; appellant was the only defendant in the courtroom, and he was labeled a suspect in the newspaper photo.[25] The prosecution's evidence contained several significant inconsistencies (see the discussion in Issue I regarding the question of whether the victim was struck with a gun or a crescent wrench, and the importance of this discrepancy to either the witnesses' ability to observe or Hammonds' ability to tell the truth), and it was neither conclusive nor "overwhelming". There were certainly no confessions -- appellant has maintained his innocence throughout --

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[25] Undersigned counsel is not arguing that the identifications were inadmissible, since their suggestiveness was not the result of improper procedures. He is simply showing that they do not remotely approach the level of "overwhelming evidence" for the purposes of harmless error analysis.

and there was no physical evidence tying him to the murder or even placing him in Tampa. The shoeprint at the scene did not match appellant's size. Moreover, due process and the Sixth Amendment right to a fair trial guarantees appellant the opportunity to have the jury fairly consider his own testimony and that of the other defense witnesses, untainted by prosecutorial misconduct [see Issues I and II], and untainted by irrelevant evidence of prior crimes. Keen. This Court should reverse his conviction and death sentence and grant him a new trial.

ISSUE IV

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE IN THE PENALTY PHASE A BLOWN-UP CLOSE-UP CRIME SCENE PHOTOGRAPH OF THE VICTIM'S BLOODY HEAD AND UPPER TORSO, AS THE PHOTOGRAPH WAS IRRELEVANT TO ANY ISSUE AND SERVED NO PURPOSE BUT TO INFLAME THE JURY.

The test for admissibility of photographic evidence is relevancy. Gudinas v. State, 693 So. 2d 953, 963 (Fla. 1997); Pangburn v. State, 661 So. 2d 1182, 1187 (Fla. 1995); Czubak v. State, 570 So. 2d 925, 928-29 (Fla. 1990). Even when relevant, however, a photograph should not be introduced before the jury if its probative value is substantially outweighed by its prejudicial impact. Fla. Stat. §90.403; Gudinas, 693 So. 2d at 963; Pangburn, 661 So. 2d at 1187; Czubak, 570 So. 2d at 928-29; State v. Smith, 573 So. 2d 306, 313 (Fla. 1990). In Marshall v. State, 604 So. 2d 799, 804 (Fla. 1992), where the challenged photograph was held to have been properly admitted to illustrate the medical examiner's

testimony explaining the nature of the wounds and the manner in which they were inflicted, this Court said:

> While we do not find the small polaroid photo unduly prejudicial in this case . . . , we caution trial judges to scrutinize such evidence carefully for prejudicial effect, particularly when less graphic photos are available to illustrate the same point.

In the instant case, the prosecutors took a smaller crime scene photograph which was properly admitted without objection in the guilt phase[26] (although misused when the prosecutor told the jury "[Y]ou saw those pictures, and how, frankly, how gross they were" (9/940)), focused in on the bloody head and upper torso, and blew it up to three feet high by two feet wide (10/1044-45,1049-50; R15/1-2). Then -- over strenuous defense objection that the enlarged photograph was unduly prejudicial and irrelevant to any issue in the penalty phase (10/1044-45,1049-50) -- they published it to the jury as Penalty Phase State Exhibit 1 (10/1050,1080).

The probative value of the blown-up photograph to the penalty phase of this trial was zero. See Czubak, 570 So. 2d at 929. There was no valid reason to show it -- indeed, to emphasize it -- to the jury at this sensitive stage of the proceedings; it was both cumulative (since the much smaller version had already been admitted in the guilt phase) and unfairly prejudicial (since by its sheer size it demanded "LOOK AT THIS!"). See State v. Smith, 573 So. 2d at 313. It was not relevant to the HAC aggravating circumstance, since as the prosecutor acknowledged, she didn't even ask that the jury be instructed on HAC (10/1049; see 12/1233-34). Cf.

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[26] State Exhibit 2 (5/545-46; R15/1-2).

Jordan v. State, 694 So. 2d 708, 714 (Fla. 1997) (reversing death sentence where irrelevant and prejudicial testimony was introduced; this Court noted that the testimony was presumably offered to support the HAC aggravator but no such instruction was eventually given to the jury). Contrast Lott v. State, 695 So. 2d 1239, 1243 (Fla. 1997); Gudinas v. State, supra, 603 So. 2d at 963 (photographs held admissible in penalty phase because relevant to prove HAC aggravator).

As the prosecutor correctly argued to the jury, guilt or innocence was no longer in issue in the penalty phase; "[t]his is not a proceeding where those issues are going to be revisited" (12/1192). Therefore, questions relating to guilt or innocence could not have provided a reason for the prosecutor to reintroduce a much larger version of the crime scene photo. And finally, since this was a blown-up, close-up photograph of a dead body at the scene -- not a "basic portrayal of the victim [in life], presented to the jury in a routine manner" -- it was not "victim impact evidence" under Fla. Stat. §921.141(7). Contrast Branch v. State, 685 So. 2d 1250, 1253 (Fla. 1996). In the instant case, victim impact evidence was something the state wanted to stay a million miles away from, lest it open the door for the defense to introduce rebuttal evidence of Rolando Landrian's bad character and his unique viciousness as a human being, beyond that which came out in

the guilt phase and in the penalty phase testimony of Lotia Romanes' daughter, Myra Acosta (see 10/1030-44; 11/1154-77).[27]

Quite simply, there was no reason for the prosecution to blow up the crime scene photograph and introduce it in the penalty phase other than to prejudice the jury, and distract it from its task of dispassionately deciding whether life imprisonment or death was the appropriate sentence in this case. See Bertolotti v. State, 476 So. 2d 130, 134 (Fla. 1985) (jurors' penalty verdict should reflect a logical analysis of the evidence in light of the applicable law; not an emotional response to the crime or the defendant). Moreover, this was far from the only example of prosecutorial excess in the guilt [Issues I and III] and penalty [Issues II and V] phases of this trial. Appellant's death sentence, like his conviction, was irreparably tainted and must be reversed.

ISSUE V

THE TRIAL COURT ERRED IN ALLOWING THE STATE, IN PROVING A PRIOR CONVICTION FOR RESISTING AN OFFICER WITH VIOLENCE, TO INTRODUCE IRRELEVANT EVIDENCE AS TO THE DETAILS OF A DOMESTIC INCIDENT AND THE RECOVERY OF A GUN WITH BLOOD ON THE HANDLE.

In proving that appellant has a prior conviction for resisting an officer with violence (10/1059-60; R16/89-91), the state called

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[27] The trial court allowed Ms. Acosta to testify insofar as it tended to rebut the CCP aggravator by establishing a pretense of justification, but disallowed further testimony showing Landrian's brutality which the defense sought to introduce as negative victim impact evidence. See Conover v. State, 933 P. 2d 904, 922-23 (Okl. Cr. 1997). A Point on Appeal arising from this ruling has been eliminated due to page limitations.

Jeff Wilhelm, a City of Casselberry police officer, who testified that on January 18, 1994, he was called to the apartment of Maria Rivera (also known as Maria Vasquez) "in reference to a domestic disturbance of some sort" (10/1055-58). Officer Wilhelm testified, over relevancy objection, that "[t]he front door had been kicked and was damaged." (10/1056-57). Two side bedroom windows had been busted out, and there was some blood on the windows (10/1057). Maria Rivera "was very upset and very afraid" (10/1057). The suspect -- appellant -- was located in another apartment building within the same complex (10/1057). He had several cuts to his hands and he was bleeding (10/1058). This bleeding did not occur in the course of any confrontation with the police officers (10/1060). The officers took appellant into custody, and as they were escorting him down the stairs to be treated by the paramedics, "he began to jerk and pull away from us" (10/1058). The officers "had to restrain him, take him back down and put him on the ground again" (10/1058). While they were scuffling, Officer Wilhelm smashed his finger a little bit, when it was caught between appellant and a guardrail (10/1058,1061). Wilhelm testified that he received no extensive medical treatment over that injury (10/1061).

Over defense relevancy objection, the prosecutor asked Officer Wilhelm if, during the course of the investigation, a weapon was recovered (10/1058-59). The officer answered yes, a gun was recovered in the apartment where appellant was found (10/1058-59). The prosecutor asked whether any substance that appeared to be

blood was found on the handle, and Wilhelm replied yes, there appeared to be some blood on the butt of the gun (10/1059).

It is clear from Officer Wilhelm's own testimony that the gun had absolutely nothing to do with the charge of resisting an officer with violence, which was the aggravating factor the state was ostensibly seeking to prove.[28] Nor was there even any evidence that the gun had anything to do with the underlying domestic disturbance. It was not found in Maria Rivera's apartment, but rather in an apartment in another building where appellant was later taken into custody. Although the jury would likely speculate that appellant brandished the gun during whatever events may have occurred in Maria's apartment, there is no evidence that that was true. Moreover, while the details of the prior violent felony (i.e., the resisting incident where appellant pulled away and Officer Wilhelm hurt his finger) were admissible, the details of the domestic disturbance -- which did not result in a felony conviction, and which was separated in time and location from the resisting incident -- were not. Undersigned counsel will concede the relevancy of the bare fact that the officers were called "in reference to a domestic disturbance of some sort", in order to show a basis for their taking appellant into custody, but the prejudicial impact of the details of the domestic incident, Maria's fear and anxiety, and especially the recovery of the gun with blood on the handle

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[28] Cf. Scott v. State, 559 So. 2d 269, 273 (Fla. 4th DCA 1990) (trial court erred in permitting state to present evidence concerning marijuana found in a dresser and the presence of a weapon; this evidence was irrelevant to the charges for which defendant was on trial, and should have been excluded as impermissible Williams Rule evidence).

which was only speculatively connected to the domestic incident, far outweighed the negligible probative value of such evidence. See Rhodes v. State, 547 So. 2d 1201, 1204-05 (Fla. 1989) (although this Court has approved testimony concerning details of prior violent felony convictions, "the line must be drawn when that testimony is not relevant, gives rise to a violation of defendant's confrontation rights, or the prejudicial value outweighs the probative value"); see Finney v. State, 660 So. 2d 674, 683 (Fla. 1995). The error in admitting this testimony, alone and in combination with the other errors and excesses which occurred in this trial and penalty phase, requires reversal.

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, appellant respectfully requests that this Court reverse his conviction [Issues I and III] and death sentence [Issues II, IV, and V], for a new trial and (in the event of a conviction) a new penalty phase.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this 8th day of October, 1997.

Respectfully submitted,

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