

IN THE SUPREME COURT OF FLORIDA

ROLANDO GARCIA,

Appellant,

vs.

CASE NO. SC95136

STATE OF FLORIDA,

Appellee.

_____ /

ON APPEAL FROM THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR DADE COUNTY, FLORIDA

ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF FACTS

The following is offered to supplement and/or clarify the Statement of Case and Facts recited by the Appellant:

Carlo Ribera's 1998 trial testimony.

Ribera began spending time with Appellant in December 1985. (T2170). At that time, Appellant was dealing drugs. (T2171).

Ribera first went into Pardo's apartment in March, 1986. (T2171). Appellant told Ribera that Pardo was his uncle and that he was a federal agent. (T2172). On the occasion of Ribera's first visit to Pardo's apartment in March, 1986, Appellant showed Ribera some newspaper articles concerning a guy named Mario. Appellant told Ribera that Pardo and he set up a drug deal with Mario, then they ripped him off and killed him. (T2173). Pardo also admitted to participating in the murder of Mario. (T2177).

Concerning the murder of Amador and Alfonso, Appellant explained that they intended to buy two kilos of cocaine from Mario. Then, Pardo and Appellant went to Mario's apartment. (T2179). When they arrived Mario and another guy were in the apartment. They sat down at a kitchen table. Mario went to get the drugs and brought them back in a tray. Appellant then opened a briefcase and pulled out a .22. The other guy started running, but Appellant brought him back into the room. Pardo also had a .22 Rugar. (T2180-2181).

While Appellant was relating this story to Ribera, Appellant

showed the Rugar and a silencer to him. (T2181). Appellant explained that they assembled the silencer, put it in a shoulder holster and then went into Mario's apartment. (T2181-2182).

When they pulled out their weapons in Mario's apartment, Pardo and Appellant made Mario and the other guy lie face down on the floor. (T2182). Mario and the other guy were then executed. Pardo and Appellant emptied their clips inside the victims' heads. (T2182).

After relating the story of the murders, Appellant showed Ribera a .25 caliber Baretta. (T2173). Appellant also told Ribera that he was a hit man and a drug dealer. (T2174).

Ribera initially was brought to Pardo's because Appellant had spoken with Pardo about involving Ribera in a drug deal. Ribera was interested in dealing drugs because of the money and the life style. (T2174). Ribera was 23 years old at the time. Ribera had not previously been involved in any drug deals. However, he did use drugs. (T2175).

Appellant also showed Ribera Pardo's diary. (T2182). Pardo explained that they wrote down the time they killed their victims and the date. (T2182-2183). Appellant remarked about the diary that "this has a lot of information and could get us into a lot of trouble." (T2183).

On his second visit to Pardo's apartment, Pardo was writing in the diary. Then, Appellant showed Ribera the details in the diary

such as how much they made from each deal, how much they made from the Mario rip off, the date and time that Mario was killed, and how much they took from Mario. (T2184-2185). The newspaper articles were also shown to Ribera, as well as the briefcase and Mario's driver's license. (T2185). Appellant admitted that he used Mario's license to buy some guns. (T2186).

In late April, Appellant told Ribera that his drug supplier found out that Appellant had killed Mario. Because of this information, the supplier no longer wanted to do business with Appellant. Appellant's name had come up in the investigation. (T2188).

At that point, Appellant became more aggressive with Ribera. Appellant threatened to kill Ribera and his family. (T2188). These threats led Ribera to contact the police. (T2189). Ribera then gave the first of many statements to the police on May 5, 1986. (T2189-2190).

On cross-examination, Ribera told of a time that he rode in his car with Pardo and Appellant in early 1986. Ribera was in the back seat and Appellant drove. Pardo and Appellant mentioned that they wanted to collect from Sergio. They drove by Sergio's house and Pardo shot at the windows with a .22 Rugar. After that episode, Ribera learned that Sergio was a drug dealer. (T2210).

Later, when Ribera went to the police, he turned over a .25 Baretta clip and a .22 caliber casing that had been in his car.

Ribera owned neither of these items. What he gave to police belonged to Appellant. (T2213-2214).

Defense counsel impeached Ribera's statement concerning turning the .22 casing over to police with a statement he gave on April 17, 1987. In 1987, Ribera said that the police found the casing in his car. (T2251). However, at trial, Ribera firmly stated that he turned the casing over to police himself and that they never searched his car. (T2252-2253).

Defense counsel also attempted to impeach Ribera concerning the weapons he observed in Pardo's apartment. Referring to Ribera's May 5, 1986 statement, defense counsel tried to distinguish between what Ribera actually observed and what Appellant and Pardo had simply told him about. However, Ribera maintained that he had personally observed a number of weapons in the apartment. (T2255-2258). Defense counsel impeached Ribera regarding the number of times he had done cocaine with his April 15, 1987 statement. (T2265-2267). Defense counsel impeached Ribera regarding the amount of time he had known Appellant and how much time he spent with him with statements he gave on May 5 and 15, 1986 to police. (T2273-2275, 2278-2280).

Finally, defense counsel asked Ribera if he killed Mario Amador. Defense counsel accused Ribera of killing Amador and Alfonso with Pardo. (T2283, 2291).

SUMMARY OF THE ARGUMENT

Issue I: Appellant has failed to demonstrate that the lower court abused its discretion in refusing to allow the defense to impeach Ribera's testimony with his pre-polygraph interview. The interview was not conducted under oath or in the formal setting which would justify its admission as substantive evidence. More importantly, the subject of the interview had no bearing on the two homicides relevant to this appeal, and was, therefore, not sufficiently related to the material issues involved in the underlying trial so as to merit its use as an impeachment tool. Finally, any possible error resulting from this issue would be harmless in view of the voluminous other material which was available for impeachment purposes.

Issue II: Where Appellant initiated questioning of Detective Merritt regarding the police efforts to verify Ribera's testimony, Appellant cannot now claim that Merritt improperly vouched for Ribera's credibility. Similarly, Appellant cannot challenge the prosecutor's closing comments on the topic where the defense opened the door to this line of questioning rendering the State's comments proper rebuttal. Additionally, Appellant failed to preserve these issues for appellate review.

Issue III: The trial court acted properly within its discretion in denying the admission of Pardo's former trial testimony. Although Pardo was unavailable for Appellant's trial,

the State did not have the requisite similar motive for cross-examining Pardo in his trial as compared to the motive relevant to Appellant's trial. Other than the former testimony hearsay exception, Appellant offered no other justification for admitting Pardo's hearsay testimony to the lower court. As such, no other argument on this issue was preserved for appeal.

Issue IV: Despite Appellant's hearsay objection, Pardo's diary entries were properly admitted below pursuant to the trial court's wide discretion concerning the admissibility of evidence. The entries do not even constitute hearsay. Moreover, even if the hearsay objection was well founded, no error resulted where all of the information contained in the diary entries was cumulative to other evidence admitted at trial.

Issue V: Appellant cannot demonstrate an abuse of discretion resulting from the admission of several alleged hearsay remarks. Allen Lopez's testimony regarding the victim's distrust of Appellant was relevant to provide a motive for the murder and was admissible as a statement against interest. Alternatively, any error resulting from Lopez's testimony would be harmless in view of the other evidence of Appellant's guilt.

Appellant failed to preserve the current challenge to the testimony of John Hegarty, Sr. Further, where defense counsel insinuated that Hegarty's statements were intended to exonerate himself from the murder, Hegarty's testimony concerning his

distrust of Appellant and his belief that Appellant killed the victims was proper rebuttal. Finally, any error would also be harmless when compared to the evidence of Appellant's guilt.

Lastly, the prosecutor did not improperly refer to matters outside the record in closing argument. The information regarding Hegarty's warning to the victim came in through Hegarty's testimony. As such, any proposed error could not be of the prejudicial magnitude required to vitiate the entire trial.

Issue VI: Appellant has not demonstrated the presence of cumulative error requiring reversal. Each of the claims challenged under the guise of cumulative error was raised individually and refuted on the merits in Issues I through V.

Issue VII: Pardo's former trial testimony was also properly precluded from the penalty phase. The lack of similar motive for the State to cross-examine Pardo in his own trial versus Appellant's applies equally to the decision of the trial court to refuse admission of this evidence in the penalty phase as it did in the guilt phase. Even if this constituted error, the aggravators far outweighed any possible mitigation, rendering any error harmless.

Issue VIII: Any error related to the sentencing order's treatment of the proposed mitigators must be deemed harmless in view of the lack of evidence supporting any mitigation, as well as the strength of the aggravating factors. Alternatively, if the

order is flawed, this Court should remand simply to allow the trial court to provide a new sentencing order, as opposed to requiring an entirely new penalty phase.

Issue IX: No need to revisit the 1988 jury override for the murder of Amador has been presented to this Court. The appellate decision of this Court remanding the case for a new trial in 1990 did not constitute an acquittal of the death penalty for the Amador murder. Thus, the "clean slate" rule rendered Appellant subject to any lawful punishment following the 1998 retrial. Alternatively, the 1988 jury override was entirely proper, as demonstrated by the analysis set forth in the 1988 sentencing order.

Issue X: Appellant failed to present any of the constitutional challenges raised on appeal to the lower court. Thus, these issues were not properly preserved.

As to the merits, this Court has previously denied each of the constitutional claims raised by Appellant. To the extent that Appellant raises new concerns relevant to the Apprendi decision, such arguments are inapplicable where the Apprendi decision explicitly notes that it does not apply to capital sentencing schemes.

ARGUMENT

ISSUE I

THE TRIAL COURT ACTED PROPERLY WITHIN ITS DISCRETION BY REFUSING TO ALLOW APPELLANT TO IMPEACH CARLO RIBERA'S TRIAL TESTIMONY WITH HIS PRE-POLYGRAPH INTERVIEW DISCUSSING TOPICS WHOLLY UNRELATED TO THE INSTANT OFFENSES.

Appellant contends the trial court reversibly erred by preventing the use of a pre-polygraph interview as impeachment evidence against State witness Carlo Ribera. Mr. Ribera gave numerous statements to law enforcement which led to the arrest and prosecution of Appellant for a total of nine murders, including the two murders that are the subject of the instant appeal. Of the many statements made by Ribera,¹ the trial court ruled only that the pre-polygraph interview discussing two murders unrelated to the instant offenses could not be used for impeachment purposes. (T2225-2237). The other prior statements, as well as prior trial testimony of Ribera, remained available tools for impeaching the witness. Under these circumstances, the trial court properly acted within its broad discretion to reasonably limit cross-examination, and Appellant cannot make the requisite showing that the lower court's ruling was clearly erroneous. Thus, no reversible error

¹ The prior statements actually used to impeach Ribera's 1998 trial testimony include his deposition, (T2251-2252), a statement given to police on May 5-6, 1986, (T2257), and two other statements taken from Ribera on May 15, 1986, and April 15, 1987. (T2266-2267, 2273, 2279). It appears that only the May 5-6, 1986 statement was included in the record.

occurred. See Sanders v. State, 707 So. 2d 664, 667 (Fla. 1998), citing Geralds v. State, 674 So. 2d 96 (Fla.), cert. denied, 519 U.S. 891, 117 S.Ct. 230, 136 L.Ed.2d 161 (1996); Jones v. State, 580 So. 2d 143 (Fla. 1991), cert. denied, 502 U.S. 878, 112 S.Ct. 221, 116 L.Ed.2d 179 (1991); and Smith v. State, 404 So. 2d 167 (Fla. 1st DCA 1981).

Initially, Appellant claims that the pre-polygraph interview was offered only for use as impeachment evidence. However, Appellant's arguments in the Initial Brief belie that claim. For example, Appellant notes that the videotaped statement contained internal inconsistencies and was inconsistent with Ribera's testimony in the 1988 trial. The mere existence of any such inconsistencies would not be admissible to impeach Ribera's testimony in the 1998 trial unless and until Ribera made a statement in contradiction to his earlier statements.

Appellant also points to testimony given by Ribera in the trial for the murder of Millot. Again, this irrelevant testimony would not be admissible in the instant trial where the inconsistencies in Ribera's testimony in the Millot trial went solely to the details of the Millot homicide which was wholly unrelated to the instant offenses. (Initial Brief, p. 35). Therefore, it seems that Appellant would also seek to introduce portions of the videotaped pre-polygraph interview for purposes other than impeachment. Thus, to the extent that the videotaped

statement was offered as substantive evidence, the trial court properly refused to admit such evidence. See Ellis v. State, 622 So. 2d 991, 997 (Fla. 1993).

In order to exclude the pre-polygraph statement from the hearsay rule, the statement must fall under the purview of Section 90.801(2), Florida Statutes. The statute provides:

A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is:

(a) Inconsistent with his testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition....

Where the pre-polygraph statement was not made at a trial, hearing or deposition, the statement would be admissible only if it was made in some "other proceeding." See Ellis, 622 So. 2d 991, 997. Such "other proceedings" do not include types of less formal information-gathering activities such as police interrogations, even if sworn, interviews under oath by Internal Revenue officers or sworn statements made to obtain a warrant. See Ellis, 622 So. 2d at 997 (citations omitted). Consequently, the trial court properly noted that the pre-polygraph statement was not made under oath and was taken in an informal setting in preparation for a polygraph in determining not to admit said statement as substantive evidence. (T2225-2238).

Turning to the question of impeachment, Appellant maintains that the pre-polygraph statement was offered primarily as an

impeachment tool against Ribera. In that vein, the trial court ruled that the statement failed to refer to the murders of Amador and Alfonso which are the subject of this litigation. (T2226). In the 341 pages of transcript resulting from the pre-polygraph interview, Ribera never directly refers to the murders of Mario Amador and Roberto Alfonso, the victims in the instant case. In fact, the name Mario is mentioned twice, and Fountainbleu, the location of several murders other than the two at issue, is noted twice. (SR603, and SR694, 707, 715). However, by Appellant's own admission, it is not clear that Ribera was actually referring to Mario *Amador* or the relevant murders. (Initial Brief, p. 31, footnotes 27 and 28).² The trial judge also noted that "no specific reference to the Mario Amador and Alfonso killing" occurred in the pre-polygraph statement. (T2229).

The transcript of the pre-polygraph interview, when read in its entirety, reveals that Detective Rodriguez was concerned with murders wholly unrelated to the two offenses which form the basis

² Appellant attempts to argue, in the alternative, that if the pre-polygraph statement did not refer to the Amador and Alfonso murders then he should have been able to impeach Ribera with the omission of this information. However, a witness should only be impeached by a "...previous failure to state a fact in circumstances in which that fact naturally would have been asserted." See Sanjuro v. State, 736 So. 2d 1263, 1264 (Fla. 4th DCA 1999) (citations omitted). The Amador and Alfonso murders were not naturally a part of the pre-polygraph interview which was primarily concerned with two to three of the nine murders with which Appellant was ultimately charged. Accordingly, the pre-polygraph interview did not constitute valid "negative impeachment" evidence.

of this appeal. (SR400-741). As such, the trial court properly determined that the proffered inconsistent statement was not sufficiently related to a material matter or issue involved in the trial. See Gamble v. State, 492 So. 2d 1132, 1133 (Fla. 5th DCA 1986), citing Myers v. State, 43 Fla. 500, 31 So. 275 (1901); and Gelabert v. State, 407 So. 2d 1007 (Fla. 5th DCA 1981). Moreover, the subjects which Appellant raises as areas of impeachment, such as Ribera's finances or the Millot murder, have no material bearing on the issue of ultimate guilt. Under such circumstances, the trial court cannot be said to have abused its discretion in disallowing this impeachment evidence. See Sanders, 707 So. 2d 664, 667.

Moreover, even if the pre-polygraph interview was erroneously excluded as impeachment evidence, the error had no effect on the outcome of the trial. First, Ribera's testimony in the 1998 trial did not exactly mirror his testimony in the 1988 trial. Thus, many of the inconsistencies to which Appellant alludes were not available in the 1998 trial testimony.

For example, Appellant attempts to point out inconsistencies in Ribera's trial testimony regarding his financial situation as compared to his statements in the pre-polygraph interview. (Initial Brief, pp. 28-29). However, in 1998, Appellant did not elaborate on his finances as he had in his 1988 trial testimony. In 1998, Appellant never mentioned buying a trailer for his mother

with drug money, (T2222), never said he was "drowning" in debt because of his wife's illness, (T2171), and never said that he saw drug dealing as "the only way out" of his financial distress. (T2174). Thus, the impeachment evidence on the topic of Ribera's finances allegedly contained in the pre-polygraph interview has no relevance to the 1998 trial testimony.

Also, Ribera gave several other statements and testified on more than one occasion regarding the specific facts of the two murders at issue here. Each of the other statements was available to impeach Ribera, and defense counsel utilized those statements for that very purpose. Therefore, the pre-polygraph interview would have added little, if any, substance to Appellant's otherwise successful attempts to impeach Ribera's testimony. See Sanders, 707 So. 2d at 667.

Even without the use of the pre-polygraph interview, defense counsel impeached Ribera numerous times during cross-examination. Using his deposition testimony, defense counsel challenged Ribera's inconsistent statements concerning whether he voluntarily gave the police a bullet casing from his car or whether the police actually obtained the casing after a search of Ribera's vehicle. (T2251-2252). Ribera's testimony concerning the weapons he observed at Pardo's house was impeached with the statement he gave police on May 5, 1986. (T2257). With respect to Ribera's true relationship with Garcia, defense counsel challenged Ribera's testimony

regarding the number of times he did cocaine with Garcia, how many months he had known Garcia and how much time he had actually spent with Garcia, using two other statements taken from Ribera on May 15, 1986 and April 15, 1987. (T2266-2267, 2273, 2279).

In view of defense counsel's successful impeachment of Ribera, the jury was well aware of Ribera's inconsistent statements to law enforcement without need of the pre-polygraph interview. See Sanders, at 667. Consequently, any error resulting from the exclusion of the interview must be deemed harmless. See Pomeranz v. State, 703 So. 2d 465, 468 (Fla. 1997) (denial of use of prior inconsistent statement as impeachment evidence harmless, especially in light of other extensive impeachment testimony regarding witness), citing State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986).

The harmless nature of the trial court's decision to preclude use of the pre-polygraph interview is further demonstrated by a review of the statements which were available for impeachment purposes. For instance, Ribera told investigators in his May 5, 1986 statement that he had seen Pardo's daughter shoot an Uzi. (SR1663). Thus, Ribera could have been impeached with that information without resort to the pre-polygraph interview.

Finally, the trial court's decision to disallow the use of the pre-polygraph interview for impeachment was not the type of limitation on cross-examination meriting reversal. While it is

well settled that "limiting the scope of cross-examination in a manner which keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony constitutes error," Clark v. State, 567 So. 2d 1070, 1071 (Fla. 3d DCA 1990) (citations omitted), such error did not occur where, as discussed above, Ribera's testimony was more than adequately subjected to impeachment.

The impeachment of Ribera's testimony stands in stark contrast to improper restrictions on cross-examination such as occurred in Washington v. State, 737 So. 2d 1208, 1211 (Fla. 1st DCA 1999), cited by Appellant. In Washington, the defendant and Nafeesa Howard were the only two people with the child murder victim when the injuries leading to the child's death were inflicted. Howard later became a key witness against the defendant in the State's case. 737 So. 2d 1208, 1217.

On cross-examination, defense counsel was prohibited from asking Howard generally about "matters affecting the credibility of the witness," and specifically about the defense theory that Howard herself had committed the crime and, thus, had a powerful motive to testify falsely against Washington. See Washington, 737 So. 2d at 1219. Ultimately, the appellate court determined the trial court violated Washington's right to confrontation. See Washington, at 1219.

In contrast to the Washington case, Appellant's counsel

thoroughly attacked Ribera's credibility throughout cross-examination. More importantly, defense counsel specifically accused Ribera of murdering Amador and Alfonso and expounded on this theory of defense without any limitation from the trial court. (T 2283-2291). Thus, the constitutional concerns at issue in the Washington case were not present here.

Here, defense counsel was permitted to fully develop the defense theory that Ribera committed the crimes charged. As such, Appellant's right to confrontation was not impinged where defense counsel had a full and fair opportunity to challenge any bias or improper motive behind Ribera's testimony. See id. Thus, Appellant's assertions to the contrary, the trial court was not required to admit any and all evidence marginally related to Ribera's credibility.

ISSUE II

NEITHER THE LEAD DETECTIVE NOR THE PROSECUTOR IMPROPERLY VOUCHER FOR THE CREDIBILITY OF STATE WITNESS CARLO RIBERA WHERE DEFENSE COUNSEL SOLICITED THE TESTIMONY FROM THE DETECTIVE AND THE STATE FAIRLY COMMENTED UPON SAID TESTIMONY.

According to Appellant, Detective Merritt and the prosecutor improperly vouched for the credibility of State witness Carlo Ribera. A closer inspection of the record reveals that this assertion is false. The challenged testimony of Detective Merritt was actually solicited from defense counsel on cross-examination. Additionally, the prosecutor's comments in closing argument simply addressed the credibility of Ribera as it was called into question by defense counsel. Under these circumstances, Appellant cannot complain that reversible error occurred.

First, as quoted by Appellant in the Initial Brief, it was defense counsel, not the State, that asked Detective Merritt what the police had done to verify Ribera's testimony.³ (T2379-2384). Thus, this situation is markedly different than that wherein a witness affirmatively testifies that another witness was telling the truth. Compare Tingle v. State, 536 So. 2d 202, 205 (Fla.

³ Appellant's attempts to discredit the substance of Merritt's testimony regarding what was done to verify Ribera's statement are irrelevant to the question of improper vouching. More importantly, Appellant's arguments on this point also fail because the results of the polygraph are inadmissible, Lane v. State, 762 So. 2d 560, 561 (Fla. 5th DCA 2000), and because the pre-polygraph was not admissible as substantive evidence. See Ellis, 622 So. 2d 991, 997.

1988) (error for state's expert witnesses to directly testify as to truthfulness of victim of sexual assault); and Norris v. State, 525 So. 2d 998 (Fla. 5th DCA 1988) (testimony of child protection worker in sexual battery case that she had scientifically "validated" the testimony of the child witness was inadmissible).

Instead, Detective Merritt was asked what investigation took place to verify Ribera's story, not whether Ribera testified truthfully. At no time did Detective Merritt actually testify that he personally believed in Ribera's veracity. As such, the trial court could not have abused its discretion by admitting this testimony. See Taylor v. State, 640 So. 2d 1127, 1133 (Fla. 1st DCA 1994) (citations omitted).

Alternatively, even if Detective Merritt's comments can be construed as improperly vouching for Ribera's credibility, Appellant failed to preserve this issue for appeal. Defense counsel never raised any objection to Detective Merritt's testimony on the specific ground that he had impermissibly vouched for Ribera's credibility. (T2380). See Correia v. State, 695 So. 2d 461, 463 (Fla. 4th DCA 1997) (error not preserved where objections did not adequately apprise trial judge that appellant believed that witness was impermissibly vouching for the credibility of the child victim), citing Glendening v. State, 536 So. 2d 212, 221 (Fla. 1988), cert. denied, 492 U.S. 907, 109 S.Ct. 3219, 106 L.Ed.2d 569 (1989); Assiaq v. State, 565 So. 2d 387 (Fla. 5th DCA 1990).

Therefore, reversal is not required.

As for the prosecutor's comments in closing argument, said comments were highly relevant given the theory of defense presented at trial. Defense counsel directly accused Ribera of committing the murders which are the subject of this appeal. (T2283, 2287-2291). Toward that end, defense counsel repeatedly challenged Ribera's credibility. Moreover, as stated above, it was the defense that solicited testimony from Detective Merritt as to police efforts to verify Ribera's story. Neither can the prosecutor's comments be fairly construed as referring to matters outside the record in view of defense counsel's direct questions on this topic. Under these circumstances, it was entirely proper for the State to emphasize that the police did their work in investigating this case where the defense opened the door to this line of questioning. See e.g., Rogowski v. State, 643 So. 2d 1144 (Fla. 3d DCA 1994) (prosecution's solicitation from state's witnesses that they entered into plea agreements requiring truthful testimony upon pain of prosecution for perjury did not vouch for witnesses' credibility where defense counsel had repeatedly attacked credibility of witnesses based in part on their agreements).

Appellant also failed to preserve any error with regard to the State's closing argument. Although defense counsel objected to the State's comments relating to defense counsel's questions of

Detective Merritt, no specific objection was raised concerning whether the State improperly vouched for Ribera's credibility. (T2621). Thus, once again, this alleged error cannot justify reversal. See Correia, 695 So. 2d 461, 463. See also Jones v. State, 760 So. 2d 1057 (Fla. 4th DCA 2000) (prosecutor's remark during closing arguments not reversible error, as defense counsel's objection failed to apprise court of objection's basis, and defense counsel opened door to prosecutor's remark).

Finally, even if the alleged error constitutes fundamental error which can be considered on appeal without objection, Crump v. State, 622 So. 2d 963, 972 (Fla. 1993) (citations omitted), reversal is not required. Where wide latitude is permitted in arguing to a jury, control of comments made to the jury is within the trial court's discretion, and an appellate court will not interfere unless an abuse of discretion is shown. See Crump, 622 So. 2d 963, 972 (citations omitted). Here, the prosecutor's comments, when taken in context, were not so outrageous as to taint the outcome of the proceedings. Thus, fundamental error did not occur. See Crump, 622 So. 2d at 972 (citations omitted).

ISSUE III

THE FORMER TRIAL TESTIMONY OF MANUEL PARDO WAS NOT ADMISSIBLE AS A HEARSAY EXCEPTION WHERE THE STATE DID NOT HAVE THE SAME MOTIVE FOR CROSS-EXAMINING PARDO IN HIS TRIAL AS IT WOULD IN APPELLANT'S TRIAL.

Appellant suggests reversible error resulted from the trial court's ruling prohibiting the introduction of Manuel Pardo's former trial testimony into evidence. Pardo and the Appellant were accused of committing a total of nine murders, including the two which are the subject of the instant appeal. While they were originally tried together in a proceeding which ended in mistrial, Pardo eventually went to trial separately for all nine murders in a single trial. It is Pardo's testimony from his individual trial in 1988 that Appellant attempted to introduce below. (SR166-253). However, the trial court determined the State did not have the requisite similar motive for cross-examining Pardo in his own trial compared to the motive relevant to Appellant's trial, and refused to allow Pardo's testimony into evidence. (T866, 1878). See Section 90.804(2)(a), Florida Statutes (1997). See also U.S. v. DiNapoli, 8 F.3d 909 (2d Cir. 1993). Under these circumstances, Appellant cannot demonstrate that the trial court abused its discretion in determining whether to exclude evidence. See Rivera v. State, 561 So. 2d 536, 540 (Fla. 1990).

A. Former testimony hearsay exception.

Appellant sought to admit Pardo's former testimony as an

exception to the hearsay rule pursuant to Section 90.804(2)(a), which provides, in pertinent part:

(2) Hearsay exceptions.--The following are not excluded under s. 90.802, provided that the declarant is unavailable as a witness:

(a) Former testimony.--Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

The use of prior testimony is allowed where (1) the testimony was taken in the course of a judicial proceeding; (2) the party against whom the evidence is being offered was a party in the former proceeding; (3) the issues in the prior case are similar to those in the case at hand; and (4) a substantial reason is shown why the original witness is not available. See Thompson v. State, 619 So. 2d 261, 265 (Fla. 1993), citing Hitchcock v. State, 578 So. 2d 685 (Fla. 1990), Johns-Manville Sales Corp. v. Janssens, 463 So. 2d 242 (Fla. 1st DCA 1984), rev. denied, 467 So. 2d 999 (Fla. 1985) and Layton v. State, 348 So. 2d 1242 (Fla. 1st DCA 1977). Here, the State objected to the introduction of Pardo's former testimony because the issues in Pardo's trial were not sufficiently similar to those presented in Garcia's trial. (T856-857, 1876-1877). As such, the State did not have a "similar motive" to develop Pardo's testimony in his own trial as compared to the motive for cross-

examination in Garcia's trial. On this basis, the trial court properly precluded the admission of Pardo's former testimony. (T866, 1878). See DiNapoli, 8 F.3d 909, 912.

In contrast to the Thompson decision which involved former testimony from a previous sentencing hearing for the same defendant for the same offense, the issues in Pardo's trial were too dissimilar from Garcia's trial to allow the admission of Pardo's testimony. By way of comparison, Pardo was tried for all nine murders in one proceeding, and Pardo confessed to the crimes. In fact, Pardo actually took the stand in order to explain to the jury why he had killed the nine victims. (SR166-253). Pardo claimed to have murdered all of the nine victims because they were drug dealers and it was his mission to punish them. See Pardo v. State, 563 So. 2d 77, 78 (Fla. 1990), cert. denied, 500 U.S. 928, 111 S.Ct. 2043, 114 L.Ed.2d 127 (1991). Given Pardo's confession, the State's focus during cross-examination was to demonstrate that Pardo was not insane despite his bizarre attempt to justify the killings which included, among other things, his praise of Hitler. (SR177). Appellant's involvement in the murders, while briefly discussed, was certainly not relevant to the question of Pardo's guilt or his sanity.

On the other hand, Appellant's underlying trial dealt only with the murders of Amador and Alfonso, not the other seven homicides. Appellant did not confess to the murders and did not

take the stand to testify on his own behalf. Instead, Appellant presented his theory of defense that State witness Carlo Ribera, not Appellant, acted in conjunction with Pardo to kill Amador and Alfonso. Thus, the State's focus in this case involved proving that Appellant was involved in the murders and, to a lesser extent, disproving the theory Ribera committed the crimes charged.

Under such circumstances, U.S. v. Foster, 128 F.3d 949 (6th Cir. 1998), is not sufficiently analogous to provide guidance in this case. In Foster, the facts of the underlying crime involving Foster and the non-testifying co-defendant were far less complicated than the nine homicides involved here. Thus, a determination as to the similarity of motives in cross-examination in Foster did not involve the same factors discussed below.

Additionally, in Foster, 128 F.3d 949, 954-955, the trial court erroneously ruled that the co-defendant was available. No such error occurred here.

In view of the disparate issues presented in Pardo's trial, as compared to Appellant's, the trial court properly precluded the admission of Pardo's former testimony. In DiNapoli, the Second Circuit dealt with the task of determining how similarity of motive at two proceedings should be analyzed for the purposes of admitting former testimony. 8 F.3d 909, 912. In resolving this issue, the court specifically rejected Appellant's argument that the test of similar motive is simply whether the questioner takes the same side

of the same issue. See DiNapoli, 8 F.3d at 912. Thus, Pardo's former testimony would not be admissible simply because the State was a party to his trial and had an interest in challenging Pardo's version of events.

Instead, the test must also turn on whether the questioner had a similar interest in asserting the same side of the issue. See DiNapoli, at 912.

If a fact is critical to a cause of action at a second proceeding but the same fact was only peripherally related to a different cause of action at a first proceeding, no one would claim that the questioner had a similar motive at both proceedings to show that the fact had been established (or disproved).

This suggests that the questioner must not only be on the same side of the same issue at both proceedings but must also have a substantially similar degree of interest in prevailing on that issue.

See id. Here, the State's interest in cross-examining Pardo regarding Appellant's involvement in the murders of Amador and Alfonso would be substantially different at Pardo's trial versus Appellant's. The State would have no interest or need to convince the jury of Appellant's guilt in Pardo's trial. As such, Pardo's former testimony cannot be excepted from the rule against hearsay in these circumstances.

Appellant's arguments to the contrary, the DiNapoli court's interpretation of the former testimony hearsay exception did not rest solely upon the distinction between the two types of

proceedings involved, *i.e.*, grand jury versus trial. The DiNapoli decision specifically recognizes that whether the degree of interest in prevailing on an issue is substantially similar at two proceedings will *sometimes* be affected by the nature of the proceedings. See id. (emphasis added). In fact, the Second Circuit noted that the nature of the two proceedings, while relevant, will not be conclusive on the ultimate issue of similarity of motive. See id. Therefore, the fact that Pardo's former testimony was given at trial is not solely dispositive of the issue of admissibility.

B. Statement against interest hearsay exception.

Appellant also contends that Pardo's former testimony should have been admitted pursuant to the statement against interest hearsay exception. See Section 90.804(2)(c), Florida Statutes (1997). Notably, Appellant never argued the statement against interest hearsay exception below. Consequently, this argument has not been preserved for appeal. See Carabella v. State, 727 So. 2d 270, 271 (Fla. 4th DCA 1999) (argument that statements excluded by trial court were nonhearsay or fell within exception to hearsay rule was not preserved for appeal where appellant failed to raise admissibility arguments below), citing Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985).

Even assuming that this hearsay exception had been presented below, no error resulted from the trial court's refusal to admit

Pardo's former testimony as a statement against interest. As Appellant correctly notes,

In order for a hearsay statement to be admissible as a statement against penal interest, it must be shown that:

(1) the declarant is unavailable as a witness, (2) the statement must so far tend to subject the declarant to criminal liability that a reasonable person in the declarant's position would not have made the statement unless he or she believed it to be true, and (3) corroborating circumstances clearly indicate the trustworthiness of the statement.

See Perry v. State, 675 So. 2d 976, 980 (Fla. 4th DCA 1996), rev. denied, 684 So. 2d 1352 (Fla. 1996) (citations omitted). See also Jones v. State, 709 So. 2d 512, 524 (Fla. 1998); Voorhees v. State, 699 So. 2d 602 (Fla. 1997). Pardo's statement attempting to exculpate Appellant fails to comply with the above-stated requirements.

First, while Pardo was unavailable to testify, a reasonable person in Pardo's position might easily have made the statement regardless of whether it subjected him to criminal liability. In this circumstance, Pardo's relationship with Appellant provided an independent motivation to try to save Appellant from conviction and the death penalty. Pardo's testimony demonstrated the protective, paternalistic role he felt towards Appellant:

Rolando Garcia is related to my wife. I've known him since I've been married, [sic] 12 years. Rolando Garcia lived at my brother-in-law's house, my house. He had nowhere to go. We took him in. He was a run around boy, always been a run around boy for everybody else because he might have an IQ of two, but he's a good person, he's a good person.

(SR 186). Thus, the circumstances surrounding Pardo's statement do not carry the same indicia of reliability as would other such statements.

More importantly, no "corroborating circumstances clearly indicate[d] the trustworthiness of the statement." See Perry, 675 So. 2d 976, 980 (emphasis added). In fact, Appellant cannot point to any corroborating evidence to support Pardo's statement. Appellant relies solely on the fact that Pardo testified at trial and that no ballistic evidence proved that two shooters committed the murders. However, Appellant cannot rely on the substance of Pardo's statement to establish the requisite corroboration. See Woodard v. State, 579 So. 2d 875, 877 (Fla. 1st DCA 1991). Further, lack of ballistic evidence is not sufficiently corroborative given the other evidence presented at Appellant's trial.

While no definitive test exists to gauge the reliability of a declaration, several factors have been identified which should be considered, including

whether the guilt of the declarant is inconsistent with the guilt of the accused, whether the declarant was so situated that he might have committed the crime, the timing of the declaration and its spontaneity, the relationship between the declarant and the party to whom the declaration was made, and the existence of independent corroborating facts.

See Lacy v. State, 700 So. 2d 602, 607 (Miss. 1997), citing Davis v. State, 872 S.W.2d 743 (Tex. Crim. App. 1994). Overall, the

circumstances of Pardo's statements attempting to exculpate Appellant cannot be considered reliable when the relevant factors are considered.

The State's theory was that Pardo and Appellant acted in concert in murdering Amador and Alfonso. As such, while Pardo was so situated to have committed the murders, Pardo's guilt is not inconsistent with the idea that Appellant might also be guilty. Further, Pardo's trial testimony is the only statement against interest offered for consideration. Such a statement certainly lacks any spontaneity, especially given Pardo's decision to confess to the murders. Pardo's motivation for helping Appellant must also be considered in view of their close familial relationship.

Finally, no independent corroborating facts exist which support Pardo's claim that Appellant was not involved in the murders. In fact, the evidence demonstrates exactly the opposite. Carlo Ribera testified in detail to Appellant's criminal acts, including the murders of Amador and Alfonso. (T2169-2240). Hegarty and Lopez also testified that Amador was involved in drug deals with Appellant. (T2029-2031; 2072-2074). Additionally, Appellant's fingerprints were found on the paperwork related to the gun purchases made with Amador's identification after his death. (T2156-2158, 2132, 2185-2186).

By way of comparison, the statement against interest proffered in the Lacy case was sufficiently corroborated. In Lacy, the

question was whether one of two brothers, John, the declarant, or Calvin, the defendant, fired the shots that killed the victim. See Lacy, 700 So. 2d 602, 604. John reportedly told his mother that he had done the shooting. John also confessed to police the next day. However, at Calvin's trial, the court would not allow John's confession into evidence based upon the alleged lack of corroborative evidence. See Lacy, 700 So. 2d at 604. In actuality, the evidence showed that John's gun was used, that John fired it at the scene, that at least one witness contradicted the testimony that Calvin took the gun from John, and John confessed to law enforcement authorities the day following the shooting. See Lacy, at 608. Therefore, the appellate court found the lower court erred in denying admission of John's statement where sufficient corroborating circumstances did exist. See id.

The circumstances of Pardo's statement fails to provide the requisite level of corroboration such as that present in Lacy. Thus, where a trial court has broad discretion in determining whether to admit or exclude evidence, the lower court's ruling excluding Pardo's testimony was not an abuse of discretion meriting reversal. See Mosley v. State, 739 So. 2d 672, 675 (Fla. 4th DCA 1999). See also Rivera, 561 So. 2d 536, 540.

C. Due process concerns.

Appellant also maintains that the exclusion of Pardo's testimony resulted in a denial of due process denying Appellant a

fair trial. Relying upon Chambers v. Mississippi, 410 U.S. 284, 302 (1973), Appellant argues that the hearsay rule was applied "mechanistically to defeat the ends of justice" in this case. In view of the lack of corroboration of Pardo's statement, this argument is without merit.

This Court previously discussed this issue in Jones v. State, 709 So. 2d 512, 524-526 (Fla. 1998).

In Chambers, the Supreme Court relied on the following factors to justify the admission of the hearsay confessions of a third party, despite state evidentiary rules to the contrary: (1) each confession was made spontaneously to a close acquaintance after the murder occurred; (2) each confession was corroborated by some other evidence in the case; (3) each confession was self-incriminatory and unquestionably against interest; and (4) if there was any question as to the truthfulness of the statements, the declarant was available for cross-examination.⁴ See id. at 300, 93 S.Ct. at 1048. As the Supreme Court observed about the statements:

The hearsay statements involved in this case were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability.

Id.

...[T]he facts and circumstances of Chambers [were

4

Notably, the factors used in Chambers to justify admission of the hearsay statements at issue are virtually identical to the factors relevant to the admission of a statement against penal interest. See Lacy, 700 So. 2d 602, 607. Thus, to the extent that Appellant asserts this due process argument as a means of circumventing his failure to preserve the hearsay exception of a statement against penal interest, this argument should also be considered procedurally barred.

as follows]:

Another individual made three verbal confessions to this crime and one written confession which he later repudiated. The prosecution did not call this declarant as a witness so the defense did. At that time, under the "voucher" rule in Mississippi, one could not impeach one's own witness. Therefore, the defense was not allowed to have the verbal confessions admitted into evidence for that purpose. In addition, the hearsay rule prevented the testimony from being heard and Mississippi had no exception to the rule based on declarations against penal interest.

Card v. State, 453 So. 2d 17, 21 (Fla. 1984). In Gudinas v. State, 693 So. 2d 953, 965 (Fla. 1997), cert. denied, 522 U.S. 936, 118 S.Ct. 345, 139 L.Ed.2d 267 (1997), we recently characterized Chambers as "limited to its facts due to the peculiarities of Mississippi evidence law which did not recognize a hearsay exception for declarations against penal interest."

The Supreme Court stated in Chambers that it was establishing no new standards of constitutional law, nor was it diminishing the authority of the states over their own trial rules. Chambers, 410 U.S. at 302, 93 S.Ct. at 1049. Rather, "under the specific facts of [Chambers], where the rejected evidence bore persuasive assurances of trustworthiness, its rejection denied the defendant a trial in accordance with due process standards." Card, 453 So. 2d at 21 (citing Chambers, 410 U.S. at 302, 93 S.Ct. at 1049).

We considered and rejected these same arguments in Jones' prior 3.850 appeal, finding that unlike the statements made in Chambers, Schofield's alleged confessions did not bear "persuasive assurances of trustworthiness." Jones, 678 So. 2d at 315. Jones asserts, however, that the circumstances have changed since the 1992 3.850 hearing and ensuing appeal because of additional evidence discovered since his last evidentiary hearing. He claims that because of this additional evidence Schofield's confessions now bear sufficient indicia of reliability.

We disagree. None of the additional evidence

requires that we disregard the plain language of section 90.804(2).

Moreover, unlike the confessions in Chambers, the alleged confessions in this case lack indicia of trustworthiness. . . .The confessions were not made prior to the original trial in circumstances indicating trustworthiness, such as spontaneously to a close acquaintance as in Chambers, or to his own counsel or the police shortly after the crime, see, e.g., Wilkerson v. Turner, 693 F.2d 121 (11th Cir.1982); United States ex rel. Gooch v. McVicar, 953 F. Supp. 1001 (N.D.Ill.1997), but were made to a variety of inmates with whom Schofield served prison time.

Therefore, whether we consider the alleged confessions as impeachment or substantive evidence, we do not find that this evidence requires a new trial based on newly discovered evidence.

See Jones, 709 So. 2d 512, 524-526.

As in Jones, for the reasons discussed above, Pardo's trial testimony fails to provide sufficient indicia of trustworthiness justifying its admission into evidence. While Appellant attempts to discredit the State's evidence against Appellant, nothing in either the State's case or the defense corroborated Pardo's version of events. Under these circumstances, the trial court properly excluded Pardo's former trial testimony.

ISSUE IV

PARDO'S DIARY ENTRIES WERE PROPERLY ADMITTED BELOW.

Appellant next challenges the admission of a few cryptic entries in Pardo's diary, claiming the entries constituted inadmissible hearsay. The State initially disagrees with Appellant's assertion that the diary entries meet the definition of hearsay. Moreover, the trial court has wide discretion concerning the admissibility of evidence, and in the absence of an abuse of discretion, its ruling regarding admissibility will not be disturbed. See Alfano v. State, 696 So. 2d 442, 443 (Fla. 4th DCA 1997). Therefore, even if the diary entries are hearsay, the cumulative nature of the information contained in the diary precludes a finding of the requisite abuse of discretion resulting from the admission of any diary entries.

As stated by Appellant, the diary entries admitted into evidence revealed the following information:

An entry on the date January 21 reads "11:45 p.m.-Mario-\$23,000." (T. 2355, 1108) A January 22 entry reads "\$10,000 to Roly" (T.2356) Newspaper clippings - one in Spanish and one in English - reporting the Amador/Alfonso homicides were also in the diary. (T.2356, S.R. 1107) Earlier pages contained the abbreviation "R.U.G." followed by "Mario" and a list of numbers, which corresponded to the serial numbers of the weapons purchased at Firearms International on January 24, 1986. (T. 2301; S.R.1109)

(Initial Brief, pp. 55-56). The State asserts that the information contained in these entries cannot constitute hearsay.

Hearsay is an out of court statement offered to prove the truth of the matter asserted. See Section 90.801(1)(c), Florida Statutes. A "statement" is defined, in relevant part, as "an oral or written assertion." See Section 90.801(1)(a)1, Florida Statutes. Here, where nothing is actually asserted by the cryptic entries in Pardo's diary, these random words cannot constitute a "statement," much less a hearsay statement offered to prove the truth of the matter asserted. No "truth" exists in the words contained in the diary. Standing alone, the information contained in the diary has no meaning whatsoever. As such, Appellant's hearsay objection was duly overruled.

Additionally, all of the information contained in these diary entries was cumulative to other testimony or was otherwise admissible. Carlo Ribera testified, in detail, to the meaning of the diary entries as Appellant had explained them to him. (T2182-2185). Even if the entries were improperly admitted, the diary could have been used to refresh Ribera's testimony concerning Appellant's explanation of the meaning of the entries. Thus, the information would have, and did, come in through Ribera's testimony regardless of the admissibility of the actual diary.

Next, the newspaper articles found inside the diary were admissible on their own. Where newspapers are presumed to be authentic, Section 90.902(6), Florida Statutes, no other evidence is necessary to support their admission. See Ehrhardt, Florida

Evidence, Section 902.7. Therefore, the information contained in the articles was independently admissible.

Lastly, the testimony at trial revealed that Appellant's fingerprints were found on the federal forms required for the purchase of the weapons listed in the diary. (T2156-2158). Testimony also proved that Appellant used Amador's identification to purchase these weapons after Amador had been killed. (T2132, 2185-2186). Under these circumstances, the information in the diary regarding the gun purchase was entirely cumulative.

Consequently, any error resulting from the admission of the diary entries must be deemed harmless. The cumulative nature of the information contained in the diary entries means that the admission of the diary could not have affected the outcome of the proceedings. See Felder v. State, 25 Fla. L. Weekly D2309 (Fla. 3d DCA September 27, 2000), citing State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Compare Butler v. State, 376 So. 2d 937, 939 (Fla. 4th DCA 1979) (admission of address book of non-testifying co-defendant could have been subject to harmless error analysis).

ISSUE V

NO REVERSIBLE ERROR OCCURRED WITH RESPECT TO THE ADMISSION OF ANY ALLEGED HEARSAY STATEMENTS ADMITTED AT TRIAL.

Appellant challenges the admission of alleged hearsay statements through the testimony of Allen Lopez and John Hegarty, Sr. As discussed below, where Appellant cannot demonstrate an abuse of the trial court's discretion in the admission of the challenged testimony, Alfano, 696 So. 2d 442, 443, no reversible error occurred. Neither did the prosecutor's closing argument related to Hegarty's testimony merit reversal.

A. Allen Lopez

Over defense objection, Lopez testified that the murder victim, Amador, asked Lopez to be present during a drug deal with Appellant because Amador did not trust Appellant. (T2029-2031). Lopez never testified that Amador directly claimed to be afraid of Appellant or that Amador specifically asked for protection from Lopez. Appellant now claims that the admission of this hearsay testimony requires reversal. However, the trial court properly relied upon Maugeri v. State, 460 So. 2d 975 (Fla. 3d DCA 1984), to overrule Appellant's objection.

In Maugeri, 460 So. 2d 975, the testimony of the murder victim's girlfriend that the victim told her the day before his murder that he had stolen two kilograms of cocaine from the defendant's airplane, although uncontestably hearsay, was properly

admitted as a statement against penal interest. Consequently, the victim's admission to the crime of stealing cocaine provided the motive for the murder. Similarly, Amador's statement to Lopez regarding the upcoming drug deal with Appellant provided the motive for Appellant's murder of Amador. Thus, the hearsay was properly admitted as a statement against penal interest.

Nevertheless, Appellant maintains that the portion of Lopez's statement indicating that Amador did not trust Appellant was improperly admitted. In support of this contention, Appellant provides the example of Stoll v. State, 762 So. 2d 870 (Fla. 3d DCA 1984). However, the facts of Stoll are readily distinguishable from the instant case. In Stoll, the challenged hearsay concerned statements made by the victim concerning her fear of the defendant. Such hearsay was not admissible under the state-of-mind exception to the hearsay rule. See Stoll, 762 So. 2d 870, 874. Error was ascribed to the admission of the victim's hearsay statements in Stoll because the victim's state of mind is not a material issue in a murder case. 762 So. 2d at 874 (citations omitted).

In comparison, Lopez never stated that Amador was afraid of Appellant. Rather, Amador expressed that he did not trust Appellant. This statement could just as easily be limited to Amador's trust in Appellant with regard to completing the cocaine transaction as opposed to a physical fear of Appellant. Therefore, the concern raised in Stoll is not applicable to this case.

Ultimately, even if Lopez should not have been permitted to mention Amador's distrust of Appellant, any resulting error would be harmless in view of the other evidence of Appellant's guilt, including Ribera's testimony, (T2169-2240), Pardo's diary, (T2301, 2355-2356), and Appellant's fingerprints on the federal gun forms. (T2156-2158). See Correll v. State, 523 So. 2d 562, 565-566 (Fla. 1988) (Erroneous admission of testimony regarding murder victim's statements concerning her fear of defendant was harmless error, in view of other evidence against defendant.)

B. John Hegarty, Sr.

Appellant failed to preserve the current challenge to the testimony of John Hegarty, Sr. While Appellant maintains that Hegarty testified over objection to his distrust of Appellant, the record demonstrates that no objection was made to this specific testimony. The record reveals the following direct examination by the State:

State: Now, at about that time and after you took Mr. Girling to Mario Amador's apartment, did Mr. Amador speak to you about a drug deal with the defendant?

Hegarty, Sr.: Yes, he had.

State: What did he say?

Hegarty, Sr.: He said that Rolando had called him -

Defense: Objection.

Court: Overruled.

Hegarty, Sr.: And wanted to make a deal with him as far as a kilo. And I told him to be careful because I did

not trust Rolly and that he might get ripped off by him.
(T2072-2073).

Hegarty went on to make two other statements regarding his distrust of Appellant, (T2073, 2074), without objection. In fact, the record shows that Appellant never objected to any of Hegarty's testimony on the grounds of improper character evidence as asserted on appeal. Therefore, this issue was not preserved for appellate review. See Burnett v. State, 605 So. 2d 971, 972 (Fla. 3d DCA 1992) (general objection failed to preserve claim that improper evidence of bad character was admitted), citing Tillman v. State, 471 So. 2d 32 (Fla. 1985).

Moreover, Hegarty's testimony regarding his statement to Lopez that Appellant killed Amador was made on redirect in response to defense counsel's questions about Hegarty's statement to Lopez that Amador was involved in a deal with Appellant on the night of the murder. (T2080-2081). Defense counsel insinuated that Hegarty made the statement to Lopez to exonerate himself and implicate Appellant in the murder. Thus, the question on redirect was proper rebuttal, and, in any event, harmless in view of the other evidence of guilt. See Burnett, 605 So. 2d 971, 972.

C. Prosecutor's comments in closing.

Appellant also maintains that the prosecutor improperly referred to matters outside the record in closing argument. Specifically, the prosecutor referenced a message left by Hegarty on Amador's answering machine. While this information did not come

in through Detective Merritt's testimony, Hegarty did testify to the same information. Hegarty stated, "I called him [Amador] up and I told him to beware of Rolly [Appellant] and the deal with the white horse and that - because he told me he was making a deal with Rolly that week. And I told him that night, and I said make sure you get help or backup or whatever." (T2074). Thus, where the information was cumulative in nature, any error in the prosecutor's closing must be deemed harmless.⁵

Automatic reversal of a conviction on the basis of prosecutorial error is not warranted, unless the errors are so basic to a fair trial that they can never be considered harmless. The standard of review is whether "the error committed was so prejudicial as to vitiate the entire trial." See Pacifico v. State, 642 So. 2d 1178, 1184 (Fla. 1st DCA 1994), quoting State v. Murray, 443 So. 2d 955, 956 (Fla. 1984). Where the information of Hegarty's phone call to Amador came in through Hegarty's testimony, any comment by the prosecutor on this topic cannot have been improperly prejudicial.

⁵ As a side note, Appellee would point out that Hegarty also testified in the 1988 trial regarding this information, adding only that he left a message on Amador's answering machine. (1988 T2486-2488). Thus, the prosecutor's reference to the answering machine in the 1998 trial cannot fairly be considered an *intentional* argument based upon facts outside the record.

ISSUE VI

NO CUMULATIVE ERROR REQUIRING REVERSAL HAS BEEN DEMONSTRATED.

This cumulative error claim is not an independent claim, but is contingent upon Appellant demonstrating error in the first five issues discussed above. Where each of the claims urged in support of Appellant's cumulative error claim has also been asserted as an individual claim for relief, the State will rely on the arguments presented supra in opposition to those claims. As the State's arguments demonstrate, each of the claims contained within this cumulative error issue are either without merit or are procedurally barred. Thus, this claim must be denied. See Rose v. State, 2000 WL 1508576, n. 10 (Fla. October 12, 2000), citing Downs v. State, 740 So. 2d 506, 509, n. 5 (Fla. 1999) (finding that where allegations of individual error are found without merit, a cumulative error argument based thereon must also fail).

ISSUE VII

THE TRIAL COURT PROPERLY PRECLUDED THE ADMISSION OF PARDO'S FORMER TESTIMONY AT THE PENALTY PHASE.

Appellant contends that the trial court reversibly erred in precluding the admission of Pardo's former testimony during the penalty phase. While Appellant specifically waived his right to put on mitigating evidence and to challenge the aggravating evidence, Appellant did take the stand. (T2716-2717, 2719). Appellant testified simply that he was seeking the death penalty so that the proper court would hear his appeal. (T2746). Appellant reiterated his request for the death penalty when he spoke to the trial judge at his sentencing hearing. (T2775-2791). Appellant's request was granted.

Now, Appellant seeks reversal of his sentence, arguing that the rules of evidence are more lax in the penalty phase, and, therefore, the trial court should have admitted Pardo's former testimony. However, a defendant's right to introduce hearsay testimony at the sentencing phase is not unlimited. See Griffin v. State, 639 So. 2d 966, 970 (Fla. 1994), citing Hitchcock v. State, 578 So. 2d 685, 690 (Fla. 1990), vacated on other grounds, 505 U.S. 1215, 112 S.Ct. 3020, 120 L.Ed.2d 892 (1992). "While the rules of evidence have been relaxed somewhat for penalty proceedings, they have not been rescinded...." See Griffin, 639 So. 2d 966, 970, quoting Hitchcock, 578 So. 2d 685, 690.

As in Hitchcock, 578 So. 2d 685, 690, where the trial court refused to admit the trial transcript of a police officer's testimony during the penalty phase, the trial court properly precluded the admission of Pardo's testimony. As discussed above in Issue III, the State did not have the requisite similar motive for cross-examining Pardo in his own trial compared to the motive relevant to Appellant's trial, thus Pardo's testimony constituted inadmissible hearsay. See Section 90.804(2)(a). See also DiNapoli, 8 F.3d 909. The same reasoning for excluding Pardo's testimony in the guilt phase applies equally to the penalty phase in this case.

According to Appellant's own case law, hearsay may be admitted in a penalty phase proceeding only if there is an opportunity to rebut it. See Lawrence v. State, 691 So. 2d 1068, 1073 (Fla. 1997), cert. denied, 522 U.S. 880, 118 S.Ct. 205, 139 L.Ed.2d 141 (1997); and Mendoza v. State, 700 So. 2d 670, 675 (Fla. 1997), cert. denied, 525 U.S. 839, 119 S.Ct. 101, 142 L.Ed.2d 81 (1998). Here, the trial judge specifically ruled that Pardo's former testimony was inadmissible because the State did not have a similar motive for cross-examining Pardo in his trial as compared to Appellant's. Thus, no valid opportunity existed for the State to rebut this testimony. Consequently, the trial court properly determined that Pardo's testimony was inadmissible in the penalty phase.

Additionally, Appellant waived his right to put on any mitigating evidence. Therefore, while Pardo's former testimony was not available to him, he chose not to present any other evidence in mitigation of the death penalty. Under these circumstances, where the judge acted within his discretion in precluding the admission of Pardo's testimony, Appellant cannot claim reversible error. See Griffin, 639 So. 2d at 970 (no error in failure to admit self-serving hearsay as mitigation where defendant not otherwise precluded from presenting evidence of remorse).

Moreover, even if Appellant had been permitted to present Pardo's testimony in mitigation, the aggravators established by the evidence far outweighed any possible mitigation.⁶ The trial court found the following aggravating circumstances: Appellant's previous convictions for another capital felony or violent crimes, the fact that the two murders were committed during the commission of an armed robbery and for pecuniary gain and the cold, calculated and premeditated manner in which the murders were committed. (SR 1439). As such, any error related to the lack of evidence in support of such weak mitigation must be deemed harmless in the face of the strong aggravating circumstances. See e.g., Armstrong v.

⁶Notably, Pardo had testified that Appellant did not commit the murders. As such, Pardo's testimony would not have properly been admitted where residual doubt is not an appropriate nonstatutory mitigating circumstance. See Preston v. State, 607 So. 2d 404, 411 (Fla. 1992), citing King v. State, 514 So. 2d 354 (Fla. 1987), cert. denied, 487 U.S. 1241, 108 S.Ct. 2916, 101 L.Ed.2d 947 (1988).

State, 642 So. 2d 730 (1994), cert. denied, 115 S.Ct. 1799, 514 U.S. 1085, 131 L.Ed.2d 726, citing Parker v. Dugger, 498 U.S. 308, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991) (court may conduct a harmless error analysis or reweigh the remaining aggravating and mitigating circumstances even though the court has struck one or more of the aggravating factors).

ISSUE VIII

NO ERROR RESULTED FROM THE SENTENCING ORDER'S DISCUSSION OF MITIGATION WHERE THE EVIDENCE PROFFERED PURSUANT TO KOON V. DUGGER, 619 SO. 2D 246 (FLA. 1993), FAILED TO CONSTITUTE ACTUAL EVIDENCE OF MITIGATION.

Appellant asserts error resulted from the sentencing order's failure to adequately discuss the proposed mitigating evidence set forth by defense counsel pursuant to Koon v. Dugger, 619 So. 2d 246 (Fla. 1993). Where Appellant waived both mitigation and any objection to the aggravators and specifically requested the death penalty, the sentencing order noted that the record was devoid of any evidence establishing any statutory mitigators. "Accordingly, the court reject[ed] the existence of ... statutory and nonstatutory circumstances which the jury was instructed on in the penalty phase of th[e] trial." (SR1439). Thus, while mitigation evidence must be considered and weighed when contained anywhere in the record, to the extent it is believable and uncontroverted, Farr v. State, 621 So. 2d 1368, 1369 (Fla. 1993), no mitigation evidence exists in this case. See also Lamarca v. State, (No. SC92610, Fla. March 8, 2001) (proffered mitigation evidence is not actual evidence).

The question of whether a mitigator has been established by the evidence is a question of fact and subject to the competent substantial evidence standard. See Blanco v. State, 706 So. 2d 7, 10 (Fla. 1997), citing Campbell v. State, 571 So. 2d 415 (Fla.

1990). Where no competent substantial evidence supported any of the proposed mitigators, no error resulted from the trial court's order.

Moreover, in view of the lack of evidence supporting mitigation and the strength of the aggravating evidence, any error related to the sentencing order's assessment of the mitigating evidence must be deemed harmless. See Peterka v. State, 640 So. 2d 59, 71 (Fla. 1994), cert. denied, 115 S.Ct. 940, 513 U.S. 1129, 130 L.Ed.2d 884 (1995). But see Muhammad v. State, 2001 WL 40365 (Fla. January 18, 2001), citing Robinson v. State, 684 So. 2d 175, 176, 179 (Fla. 1996); and Farr, 621 So. 2d 1368, 1369. Reversal of a death sentence is permitted only if this Court finds that the errors in weighing the aggravating and mitigating circumstances, if corrected, reasonably could have resulted in a lesser sentence. See Peterka, 640 So. 2d 59, 71, citing Robertson v. State, 611 So. 2d 1228, 1234 (Fla. 1993); see also Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). If there is no likelihood of a different sentence, the error is harmless. See Peterka, 640 So. 2d at 71, citing State v. DiGuilio, 491 So. 2d 1129 (Fla.1986). Here, the evidence demonstrated no likelihood of a different sentence.

As mitigation, defense counsel proffered the following evidence: Appellant's age, Appellant's minor participation in the murders, Appellant's substantial domination by Pardo, the

possibility of a harsh sentence, lack of intent to kill, good trial conduct, and positive family relationships. (T2712-2714). The evidence at trial demonstrated that these potential mitigators could not have outweighed the statutory aggravators established by the State.

First, Carlo Ribera's testimony established that Appellant was an equal participant in the murders along with Pardo. According to Ribera's testimony, Appellant admitted to setting up the drug deal with Amador. (T2179). Appellant also told Ribera, in great detail, how the murders took place, including Appellant taking out a gun, putting Amador and Alfonso on the floor, and that Pardo and Appellant emptied their clips into the victims' heads. (T2179-2182). This testimony belies the claim that Appellant was a minor participant, that he was under the substantial domination of Pardo or that he lacked the intent to kill. No other evidence contradicted Ribera's testimony on this point. In fact, Allen Lopez, John Hegarty, Sr., John Hegarty, Jr., and George Girling all testified that Appellant was a known drug dealer involved in drug transactions with Amador. (T2031, 2052-2056, 2069-2071, 2099-2103).

This leaves only the possibility of a harsh sentence, Appellant's age, good trial conduct and family relationships as possible mitigating evidence. As to age, age is simply a fact, every murderer has one. If it is to be accorded any significant

weight, it must be linked with some other characteristic of the defendant or the crime such as immaturity or senility. See Echols v. State, 484 So. 2d 568, 575 (Fla. 1985). In this case, as in Echols, nothing in the record warrants a finding of any truly mitigating significance in Appellant's age. Additionally, no mention of Appellant's familial relationships exists in the record.

Thus, Appellant's good trial conduct, along with the possibility of a harsh sentence, cannot outweigh the aggravating circumstances of Appellant's previous convictions for another capital felony or violent crimes, that the murders were committed during the course of an armed robbery and for pecuniary gain and the cold, calculated and premeditated manner in which the murders were committed. See e.g., Johnson v. State, 696 So. 2d 317 (Fla. 1997) (four strong statutory aggravators outweighed statutory and nonstatutory mitigation). Consequently, even if the sentencing order is flawed for failing to adequately discuss the possible mitigation of Appellant's good trial conduct, reversal of the death sentence would be inappropriate because a lesser sentence could not have reasonably resulted. See Peterka, at 71.

Finally, if this Court determines that the sentencing order is fatally flawed for failing to adequately discuss possible mitigation evidence, a new penalty phase is unwarranted. Instead, the State would urge this Court to simply remand for a new sentencing order. See Ferrell v. State, 653 So. 2d 367, 371 (Fla.

1995) (failure of sentencing order to document requisite findings of fact for mitigating and aggravating circumstances did not entitle defendant to life sentence, but, rather, warranted remand for new sentencing order).

ISSUE IX

THIS COURT NEED NOT REVIEW THE JURY OVERRIDE ISSUE EMANATING FROM THE 1988 TRIAL OF APPELLANT WHERE THE DECISION REVERSING THE 1988 PROCEEDING DID NOT CONSTITUTE AN ACQUITTAL OF THE DEATH PENALTY FROM AMADOR'S MURDER.

Appellant erroneously suggests that principles of double jeopardy bar the imposition of the death penalty against him for the murder of Amador. Appellant bases this argument on the fact that he challenged the lower court's 1988 ruling overriding the jury's life recommendation for Amador's murder in the previous direct appeal. However, the override issue was not addressed in the resulting opinion of this Court. See Garcia v. State, 568 So. 2d 896 (Fla. 1990). Thus, where Appellant was never acquitted of the death penalty for Amador's murder, the "clean slate" rule applies, and Appellant was subject to any lawful punishment following the 1998 retrial. See Preston v. State, 607 So. 2d 404, 407 (Fla. 1992), cert. denied, 113 S.Ct. 1619, 507 U.S. 999, 123 L.Ed.2d 178 (1993).

When this Court previously reviewed Appellant's 1988 conviction for the murders of Amador and Alfonso, among others, the conviction was overturned based upon improper consolidation of numerous double homicides. At that time, this Court specifically held,

Because the discussion above [regarding the improper joinder and consolidation of the multiple murders] disposes of this case, we do not address any of Garcia's

other arguments presented on appeal. We reverse the convictions, vacate the sentences of death, and remand to the circuit court. Upon remand, the court is instructed to sever the episodes of offenses and conduct further proceedings in a manner consistent with this opinion.

See Garcia, 568 So. 2d 896, 901. Because the 1990 decision of this Court failed to address the issue of the jury override, Appellant was never acquitted of the death penalty as to the murder of Amador. Thus, double jeopardy principles are not applicable.

As explained in the Preston decision, when a defendant obtains a reversal of his conviction on appeal, the general rule is that the slate has been wiped clean, and, upon a subsequent conviction, he may be subjected to any lawful punishment. 607 So. 2d 404, 407, citing Bullington v. Missouri, 451 U.S. 430 (1981). While in Bullington double jeopardy precluded imposition of a death sentence reversed on grounds of insufficient evidence, no such "acquittal" occurred in the instant proceedings. See Preston, 607 So. 2d at 407-408.

Here, as in Preston, neither the trial court nor this Court on review found the State failed to prove its case that Appellant deserved the death penalty. Id., at 408. Thus, the State was not barred from seeking the death penalty for the Amador murder upon retrial. See e.g., id., citing Zant v. Redd, 249 Ga. 211, 290 S.E.2d 36 (1982) (if death-sentenced defendant overturns sentence on technical grounds, the sentence is nullified and the State and defense start anew; on resentencing the State may offer any

evidence on aggravating circumstances, including those submitted to the first jury but not listed by the jury in support of the death sentence), cert. denied, 463 U.S. 1213, 103 S.Ct. 3552, 77 L.Ed.2d 1398 (1983); State v. Koedatich, 118 N.J. 513, 572 A.2d 622 (1990) (double jeopardy did not prevent State upon resentencing from relying on aggravating factors not unanimously found by the jury in the initial sentencing proceeding); Hopkinson v. State, 664 P.2d 43 (Wyo.) (allowing resentencing jury to consider evidence concerning aggravating circumstances deemed inapplicable in first penalty hearing did not violate double jeopardy), cert. denied, 464 U.S. 908, 104 S.Ct. 262, 78 L.Ed.2d 246 (1983).

Alternatively, should this Court determine a need to revisit the 1988 jury override, the trial court's sentencing order demonstrates that the appropriate Tedder⁷ analysis was undertaken. The sentencing order discussed the decision to override the jury recommendation of life for Amador's murder as follows:

PART A. The recommended sentence for the murder of MARIO AMADOR was life.

As recently stated in Torres-Arboledo v State, 524 So.2d 403 (Fla 1988):

Under Florida's capital sentencing scheme, a jury's recommendation of life is entitled to great weight. Therefore, an override sentence of death will not be upheld unless the

⁷See Tedder v. State, 322 So. 2d 908 (Fla. 1975).

facts justifying a death sentence are so clear and convincing that no reasonable person could differ as to its appropriateness. Tedder v. State, 322 So.2d 908 (Fla. 1975); Brookings v. State, 495 So.2d 135 (Fla. 1986). As recently noted in Ferry v. State, 507 So.2d 1373 (Fla. 1987), the Tedder standard has been "consistently interpreted by this Court to mean that when there is a reasonable basis in the record to support a jury's recommendation of life, an override is improper." 507 So.2d at 1376. In other words, when there are valid mitigating factors discernible from the record which reasonable people could conclude outweigh the aggravating factors proven in a given case, an override will not be upheld. See Echols v State, 484 So.2d 568 (Fla. 1985), cert. denied, 107 S.Ct. 241 (1986).

This Court overrides the jury's recommendation of life based on the following aggravating circumstances.

1. The defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person. Section 921.141 (5) (b), Florida Statutes.

The Court finds that the defendant, ROLANDO GARCIA, was previously convicted of the First Degree Murders of Roberto Alfonso, Ramon Alvero, and Daisy Ricard by jury verdicts and adjudications of guilt. Although these convictions were contemporaneous with the defendant's for the First Degree Murder of Mario Amador, the Court finds these convictions satisfy the proof required for this aggravating circumstance. See King v. State, 390 So.2d 315, 320 (Fla. 1980); LeCroy v. State, _____ So.2d _____ (Fla. 1988) (October 20, 1988); Correll v. State, 523 So.2d 562 (Fla. 1988). This circumstance should be given more weight since the murders occurred during two criminal episodes separated by three months.

2. The capital felony was committed for pecuniary gain.

There is clear and convincing evidence beyond a reasonable doubt that the murder of Mario Amador was committed for pecuniary gain, including but not limited to the armed robbery of Mario Amador as convicted in Count III. The diary entry of \$10,000 and the execution style of the killing of Mario Amador further support this finding. In addition, witness John Heggerty [sic] testified that he stated to "watch out for Rolly because he is going to rip you off." Mr. Heggery [sic] told witness Carlos Ribero that instead of money in the suitcase the defendant had shredded paper in order to purchase cocaine.

3. The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

The testimony of witnesses Heggerty [sic] and Ribera referred to above support his finding. See Hardwick v. State, 521 So.2d 1071 (Fla. 1988).

4. The commission of this capital felony was while the defendant was engaged in the commission of the robbery of Mario Amador.

The Court made the following determination as to any mitigating circumstances:

1. Whether the defendant has no significant history of prior criminal activity.

The defendant argued that the first mitigating circumstance of no significant history of prior criminal activity is applicable. This argument is undermined by the testimony of John Heggerty [sic] and George Girling that the defendant had done cocaine kilo deals. While the defendant testified that this testimony was not true, it is clear that the jury disbelieved him, and this Court does likewise. At any rate, even if the defendant's testimony on his prior criminal activity is believed, his admission that he sold and used relatively small amounts of cocaine and marijuana would negate a finding of no

significant history of prior criminal activity.

2. Whether the crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance.

There is no evidence of this mitigating circumstance. The defendant denied any involvement in this or any other murder.

3. Whether the victim was a participant in the defendant's conduct or consented to the act.

The court finds that this mitigating circumstance is inapplicable despite the fact that victim Mario Amador was a drug dealer. See Bolender v. State, 422 So.2d 833 (Fla. 1982). Although the jury apparently recommended life as to the Amador killing because Amador was a drug trafficker, such factor is not a legally reasonable mitigating circumstance.

4. Whether the defendant was an accomplice in the offense for which he is to be sentenced but the offense was committed by another person and the defendant's participation was relatively minor.

There is no evidence as to this mitigating circumstance. The defendant was a major participant in this murder. There is evidence of two guns being used against AMADOR and ALFONSO. Furthermore witnesses Heggerty [sic] and Ribera testified as to this defendant's plan to rob Mr Amador.

5. Whether the defendant acted under extreme duress or under the substantial domination of another person.

Although the defendant testified as to his friendship for Manuel Pardo there is no evidence of duress or substantial domination of Manuel Pardo or anyone else.

6. Whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the

requirements of the law was substantially impaired.

There is no evidence as to that circumstance based on the defendant's own testimony.

7. The age of the defendant at the time of the crime.

The defendant was 23 years old and supporting himself. The defendant's age in this case is not a mitigating circumstance. Cooper v. State, 492 So.2d 1059 (Fla. 1986).

8. Any other aspect of the defendant's character, including lack of prior arrest record, and any other circumstance of at the offense, including admissions to crimes charged in the indictment for which he stands convicted.

The defendant admitted his involvement in the credit card offenses and was found guilty of them in Counts XVII, XVIII, XIX, XX, XXI, XXIII and XXIV. The defendant's testimony as it relates to these offenses was presented along with his denial of the other offenses. The court considers this factor but does not find this a legally sufficient mitigating circumstance and even if it were it does not outweigh the aggravating circumstances found in this case.

WHEREFORE, the Court overrides the jury's recommendation of life finding that the sole mitigating circumstance, the role as a drug dealer by victim AMADOR, if valid at all, is outweighed by the aggravating circumstances listed. (R59-62).

Under these circumstances, the trial court properly overrode the jury's recommendation of a life sentence. Simply no valid mitigating evidence existed in the record. Thus, reasonable people could not conclude that a complete dearth of mitigating evidence outweighed the strong aggravating circumstances discussed in the

sentencing order. See Echols, 484 So. 2d 568, 576-577. Therefore, where the initial decision to override the jury's life recommendation was proper, no error resulted from the reimposition of the death sentence for Amador's murder following the 1998 trial.

ISSUE X

**FLORIDA'S DEATH PENALTY STATUTE IS
CONSTITUTIONAL.**

Appellant raises several constitutional challenges to Florida's death penalty statute which should be reviewed pursuant to the *de novo* standard of review. See e.g., City of Jacksonville v. Cook, 765 So. 2d 289, 291 (Fla. 2000). As discussed below, each of these challenges has been previously denied by this Court.

However, Appellant also challenges the death penalty statute, for the first time on appeal, on the basis of the United States Supreme Court's decision in Apprendi v. New Jersey, 120 S.Ct. 2348 (2000). Relying on Apprendi, Appellant claims that each of his four constitutional challenges to the death penalty, involving notice of aggravating factors, specific written jury findings regarding the existence of particular aggravators, jury unanimity, and the burden and standard of proof argument, must be revisited by this Court. This argument fails for several reasons.

First, this issue was not preserved below where Appellant's trial took place long before the Apprendi decision was rendered on June 26, 2000. Thus, the lower court had no opportunity to address the argument asserted by Appellant. Similarly, the undersigned has reviewed both the 1988 and the 1998 records, as well as the transcripts of the many pretrial hearings, (T1-805), and has been unable to identify any constitutional challenges raised by

Appellant below. Thus, it does not appear that Appellant has preserved any of the constitutional challenges now asserted on appeal.

Even assuming that this claim is legitimately before this Court, the decision in Apprendi is inapplicable to the constitutional challenges raised by Appellant. Apprendi requires only that any fact, other than a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury and proved beyond reasonable doubt. Nothing in the Apprendi decision altered the *jurisprudence* of any capital sentencing scheme.

In fact, the majority of the Supreme Court specifically noted the following:

Finally, this Court has previously considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death. Walton v. Arizona, 497 U.S. 639, 647-649, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990); *id.*, at 709-714, 110 S.Ct. 3047 (STEVENS, J., dissenting). For reasons we have explained, the capital cases are not controlling:

"Neither the cases cited, nor any other case, permits a judge to determine the existence of a factor which makes a crime a capital offense. What the cited cases hold is that, once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed.... The person who is charged with actions that expose him to the

death penalty has an absolute entitlement to jury trial on all the elements of the charge." Almendarez-Torres, 523 U.S., at 257, n. 2, 118 S.Ct. 1219 (SCALIA, J., dissenting) (emphasis deleted).

See also Jones, 526 U.S., at 250-251, 119 S.Ct. 1215; post, at 2379-2380 (THOMAS, J., concurring).

Additionally, in State v. Weeks, 2000 WL 1694002 (Del. Nov. 9, 2000), the Delaware Supreme Court rejected a due process challenge to Delaware's bifurcated capital punishment procedure. The Delaware court was "not persuaded that Apprendi's reach extends to state capital sentencing schemes in which judges are required to find specific aggravating factors before imposing a sentence of death." Where the aggravating factors set forth in Section 4209 of the Delaware statute did not constitute additional elements of capital murder separate from the elements required to be established by the State in the guilt phase, the finding of such aggravating factors does not "expose the defendant to a greater punishment than that authorized by the jury's guilty verdict." See Apprendi, 120 S.Ct. at 2365-2366, and Walton v. Arizona, 497 U.S. 639, 647-49 (1990).

Under these circumstances, Appellant's attempts to apply the Apprendi decision to his constitutional challenges to Florida's capital sentencing scheme must fail. As discussed further below, each of these unpreserved challenges has been previously denied by this Court, independent of the ruling in Apprendi.

A. Notice.

Appellant argues that the death penalty statute should require notice of the aggravating factors the State intends to prove at the penalty phase. Vining v. State, 637 So. 2d 921, 927 (Fla.), cert. denied, 513 U.S. 1022, 115 S.Ct. 589, 130 L.Ed.2d 502 (1994), held that the aggravating factors to be considered in determining the propriety of a death sentence are limited to those set forth in death penalty statute. Therefore, there is no reason to require the State to notify a defendant of aggravating factors that it intends to prove. See Vining, 637 So. 2d 921, 927.

B. Specific jury findings.

Again, Appellant's assertion that the death penalty statute is defective for failing to require the jury to make specific written findings regarding the existence of particular aggravators has previously been decided. The Sixth Amendment does not require juries to make specific findings authorizing the imposition of the death penalty. See Randolph v. State, 562 So. 2d 331, 339 (Fla. 1990), citing Hildwin v. Florida, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989).

C. Jury unanimity.

The United States Supreme Court has never held that jury unanimity is a requisite of due process⁸, and in Alvord v. State,

⁸See Johnson v. Louisiana, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972).

322 So. 2d 533 (Fla. 1975), cert. denied, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976), this Court held that the jury in a capital case could recommend an advisory sentence by a simple majority vote. See James v. State, 453 So. 2d 786, 792 (Fla. 1984). Thus, unanimity is unnecessary when the jury considers this issue.

D. Burden and Standard of Proof.

Again, this Court has repeatedly held there is no merit to the burden shifting claim. See Freeman v. State, 761 So. 2d 1055, 1067 (Fla. 2000), citing Demps v. Dugger, 714 So. 2d 365 (Fla. 1998); and Shellito v. State, 701 So. 2d 837 (Fla. 1997), cert. denied, 523 U.S. 1084, 118 S.Ct. 1537, 140 L.Ed.2d. 686 (1998).

CONCLUSION

Based on the foregoing arguments and authorities, the judgment and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Christina A. Spaulding, Assistant Public Defender, 1320 Northwest 14th Street, Miami, Florida 33125, this _____ day of March, 2001.

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CERTIFICATE OF TYPE SIZE AND STYLE

This brief is presented in 12 point Courier New, a font that is not proportionately spaced.

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