IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,136

ROLANDO GARCIA,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

AMENDED INITIAL BRIEF OF APPELLANT

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

INTRODUCTION

This is a direct appeal from judgments of conviction and sentences of death, entered following a jury trial before the Honorable Jerald Bagley of the Eleventh Judicial Circuit in and for Dade County, Florida. In this brief, the clerk's record on appeal is cited as "R.," the transcript of the proceedings as "T.," and the supplemental record as "S.R." References to appellant's 1988 hearing, of which this Court has taken judicial notice, are cited as "1988 T." and references to the co-defendant's trial, Florida Supreme Court case number 72,463 are cited as "Pardo T."

STATEMENT OF THE CASE AND FACTS

Introduction

Appellant, Rolando Garcia, and his co-defendant, Manuel Pardo, were charged in 1986 with a total of nine homicides. For fourteen years, Mr. Garcia has maintained his innocence of these crimes. His defense has been that his principal accuser, Carlo Ribera, has perjured himself, and was or may have been Pardo's accomplice in these crimes. To date, Mr. Garcia has been acquitted of five of the homicides, and convicted of two — the killings of Mario Amador and Roberto Alfonso — which are the subject of these appeal. In this case, the trial judge precluded the defense from impeaching Ribera with prior inconsistent statements and excluded testimony from Garcia's co-defendant that exonerated him. At the same time, the court allowed the

state to present evidence that bolstered Ribera's credibility and impugned Garcia's character.

Procedural History

This Court briefly described the offenses in *Garcia v. State*, 568 So.2d 896, 899-900 (Fla. 1990), and *Pardo v. State*, 563 So.2d 77, 80-81 (Fla.1990): "The first two murders [Amador and Alfonso] took place on January 22, 1986, and purportedly involved a drug 'rip-off.' The next episode occurred January 28; the victim [Michael Millot][1] was the man who had made Pardo's silencer and who supposedly was an informant. The third episode, on February 27, [Luis Robledo and Ulipano Ledo]was another probable drug rip-off. The fourth, on April 22, involved two women acquaintances [Sara Musa and Fara Quintero] who had angered Pardo and his accomplice. The final one was on April 23, the victims [Ramon Alvero and Daisy Ricard] being an alleged drug dealer (Pardo's alleged boss) and his woman companion."

Pardo's and Garcia's first trial ended in a mistrial when the court belatedly granted Garcia's motion for severance from Pardo. (S.R. 85) Pardo subsequently went to trial for all nine homicides, and admitted that he intentionally killed victims. (S.R. 171) Pardo testified that Mr. Garcia had no involvement in any of these homicides. (S.R. 226) Pardo was convicted and sentenced to death for each murder.

[1]The Millot case was assigned a separate circuit court case number, F86-14719, and Mr. Garcia was not tried for this murder until 1995-96.

Pardo, 563 So.2d at 78. This Court affirmed Pardo's convictions on direct appeal. *Id.* at 81.

Garcia's second trial, which included eight of the nine homicides, ended in another mistrial when the jury was unable to reach a verdict. *Garcia*, 568 So. 2d at 901. Before the third trial, Garcia moved for a severance of counts, which the court partially granted, severing two homicide counts (Musa/Quintera) and related offenses. *Id.* at 897. Garcia then proceeded to trial on six of the nine homicides — Amador/Alfonso, Robledo/Ledo, and Alvero/Ricard. Garcia was acquitted of the Robledo/Ledo homicides and convicted of the other four. *Id.* (R. 50, 52-55; S.R. 343) The jury recommended life imprisonment for the murder of Mario Amador and death for the three other homicides.[2] (R. 57; S.R. 351-55) The trial judge overrode the jury's life recommendation as to Mr. Amador and imposed four death sentences. (R. 58-67)

On direct appeal, this Court reversed all of the convictions, finding that the six homicides and related charges had been improperly joined for trial, and directed that Garcia be retried separately for the Alvero/Ricard episode and for the Amador/Alfonso episode. *Garcia*, 568 So. 2d at 901. The Court vacated the four death sentences, without addressing the propriety of the jury override. *Id.*

Since this Court's remand, Garcia has been acquitted of all charges in the Millot

[2]In its opinion, this Court mistakenly stated that the life recommendation was for Alfonso. *Garcia*, 568 So. 2d at 897.

case,[3] (S.R. 1616, 1619, 1621), and in the Alvero/Ricard case (R. 366-69). The Musa/Quintera case is still pending.

The Amador/Alfonso Case

On January 22, 1986, Amador and Alfonso were found face down in Amador's apartment, dead from multiple gunshot wounds to the head and neck; Amador had also been shot once in the hip. (T. 2416-17, 2423, 2427, 2431) There was a portable scale on the dining room table, and traces of unidentified white powder outside the front door. (T. 1907-08) There were no signs of forced entry or ransacking. (T. 1908-09, 1955, 1957, 1996) Two .22 caliber pistols, possibly Rugers, were used, one for each victim. (T. 2459-60, 2462, 2471) The murder weapons were never found. (T. 2454)

The homicide remained unsolved for several months, until Carlo Ribera, a friend of Pardo's and Garcia's, contacted the Hialeah Police Department. (T. 2350-5) Ribera gave a sworn, audiotaped statement to investigators on May 5**,** 1986, under the pseudonym "Number 13," in which he implicated Garcia and Pardo in a number of murders, including one "of this guy they called Mario." (S.R. 1648). Ribera did not, at that time, provide any other details of the Amador/Alfonso shooting.

On May 7, 1986 Pardo was arrested. (T. 2352) In the succeeding days, Ribera was questioned extensively by Metro-Dade Sergeant Theodore MacArthur, the lead

[3]There were two mistrials in the Millot case — one in October 1995 and another in February 1996. (S.R. 1553, 1585)

detective for all nine of the homicides. (1988 T. 2032) Garcia was arrested on May 23, 1986. (T. 2358)

Carlo Ribera's Testimony

According to the version of Ribera's story elicited by the State at Garcia's trials in 1988 and 1998:

Ribera first met Garcia in December 1985 at a video store where Ribera worked and Garcia was a customer. (1988 T. 2187) The store was owned by a relative of Ribera's, Nelson Estrada, who was a drug dealer, but Ribera maintained that he was never involved in any drug dealing with Estrada. (T. 2174-75)

According to Ribera, Garcia bragged about being a drug dealer and a hit man, spent money lavishly on others, including Ribera, and supplied Ribera with drugs. (1988 T. 2188; T. 2170, 2175, 2222) Ribera wanted to get into drug dealing himself because he was "drowning" in debt: his wife was in the hospital, he was being supported by his parents, his car was about to be repossessed, and he "thought this was the only way out." (1988 T. 2189-90, 2194-95) Ribera believed Garcia could come through with a big deal because Garcia bragged that he made a lot of money from drugs. (1988 T. 2197; T. 2174) In the mean time, Ribera acted as Garcia's chauffeur. (T. 2170)

Finally, Ribera said, in March 1986, Garcia invited him to Pardo's house to discuss a possible drug deal. (T. 2172) Ribera claimed that, when he picked Garcia up at his home, Garcia showed him articles about the Amador/Alfonso shooting. (T.

2173-74) When Ribera and Garcia arrived at Pardo's house, Garcia showed Ribera more newspaper articles about Amador, and allegedly told him the following story: that he had arranged to buy two kilos of cocaine from Amador; that he and Pardo had gone to Amador's apartment, where Alfonso was also present; that Pardo brought a briefcase containing guns instead of cash; that when Amador went to get the drugs, Pardo opened the briefcase and took out a gun; that Alfonso started running and Garcia, gun drawn, ran after and brought him back; then Garcia and Pardo, using .22 Rugers with silencers, put Amador and Alfonso on the floor and shot them. (T. 2176-77, 2179, 2180-82) According to Ribera, Pardo then picked up his appointment calendar (the "diary") and referred to an entry for the murders. He gave the diary to Garcia, who put it in the closet, noting that it could get them into trouble. (T. 2182-83)

Ribera said that sometime later, Garcia became very angry, because his associates in the drug business found out that he had killed Amador and didn't want to deal with him anymore. (T. 2188) Ribera claimed that Garcia threatened him and his family, and Ribera attempted unsuccessfully to contact the police; Ribera finally told his story to the police after Garcia threatened him again, because he wouldn't help Pardo leave Florida.[4] (T. 2188-89)

[4]In fact, Ribera did not actually speak to the Hialeah Police until May 5, twelve days *after* Pardo fled to New York. (1988 T. 3012; S.R. 1622)

Ribera's Undisclosed Statements to Police

Ribera's testimony was the only evidence that directly implicated Garcia in the murders. The remainder of the state's case was purely cicumstantial.[5] The state presented Ribera at trial as a broke, insignificant hanger-on, who was innocent of any wrongdoing, and naive about the drug world, but to whom Garcia and Pardo had nonetheless disclosed the most minute details of their criminal enterprise. The defense theory at trial was that Ribera was far more involved in Pardo's illicit activities than he acknowledged and had, very possibly, been Pardo's accomplice in the Amador/Alfonso killings.

After the Court's 1990 remand, defense counsel discovered that the state had failed to disclose several hours of videotaped statements that Ribera gave to the Hialeah Police Department on May 6, 1986, immediately after completing the audiotaped interview mentioned above. (R. 95-97) At the conclusion of the videotaped interview, Ribera took a polygraph examination regarding the Musa/Quintero murders. (S.R. 501-08, 452-53, 465-69) Although the videotaped statements were used to impeach Ribera in the Millot case, (S.R. 1239-1333), in which Garcia was acquitted, Judge Gerald Bagley, who took over Garcia's cases, reversed the predecessor judge's ruling and would not allow the statements to be used for

[5]For example, Garcia's fingerprints were found on paperwork for a firearms purchase in which Amador's driver's license was used, two days after the homicides. (T. 2132-4, T. 2156-57) The fictitious address on the forms, however, corresponded closely to Ribera's childhood address. (T. 2216-17).

impeachment in the Amador/Alfonso retrial. Judge Bagley reasoned that (1) the statements were made as part of a polygraph examination,[6] (2) they were not under oath, and (3) they did not directly concern Ribera's factual account of the Amador and Alfonso homicides.

The Excluded Impeachment Evidence

Ribera's videotaped statements differed from his trial testimony in several respects:

Whereas Ribera said in his testimony that *he* was broke and petitioned Garcia and Pardo for assistance, he said in his videotaped statement, that Pardo and Garcia needed money and came to Ribera and his boss for help. (S.R. 572, 669-70, 673-74) Ribera also said that Garcia wanted a job at the video store so that he wouldn't lose his trailer, and that Ribera, who had savings and commission checks from a former job, had loaned Garcia $1,000 to make improvements to his mother's trailer. (S.R. 572, 591-92, 655, 669-70, 673-74) While Ribera presented himself at trial as the devoted husband to a gravely ill wife, he acknowledged on the videotape that he was planning to leave his wife and had a girlfriend on the side. (S.R. 733-34, 594)

At trial, Ribera testified that Pardo and Garcia had described the Amador/Alfonso shootings in vivid detail. On the videotape, Ribera said only that

[6]Mr. Ribera was not hooked up to a polygraph machine, nor is the polygraph test or its results mentioned or alluded to in any of the excerpts the defense sought to use. *See* Court Exhibits 1-43. The unedited videotapes are Court Exhibits 44-48.

"they" told him to "read this article and that they killed two people in Fontainbleu."[7] (S.R. 694) Ribera apparently did not know that two .22 guns were used until a police officer provided the information. (S.R. 693-94)

At trial, Ribera said he had little contact with Pardo. (T. 2284-85) In his videotaped statement, Ribera claimed to have been horseback riding and "things like that" with the Pardo family, where he purportedly saw Pardo's seven-year-old daughter shoot an Uzi. (S.R. 597) Ribera also told police that Pardo's wife "murders people also," and had stolen AIDS-tainted blood from the hospital where she worked, which Pardo injected into his bullets. (S.R. 432)

At trial, Ribera testified that he went to the police because Garcia and/or Pardo had threatened his family. (1988 T. 2271-73, 2276; T. 2188-89)[8] In his videotaped interview, however, Ribera denied fearing Garcia and Pardo, explaining that he didn't know much about their activities, and boasted that no one threatens him anyway. (S.R 621, 709, 711)

Ribera also made inconsistent statements about Nelson Estrada's involvement in the drug trade; whether Garcia or Pardo threatened Ribera; and who was the "brains" of the pair. (S.R. 670, 583; 558-59, 703, 711, 621; 688, 566) The interviewer admonished Ribera several times about inconsistencies in his statement

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[7]This reference is ambiguous, because the Robledo/Ledo homicide also occurred in the Fontainbleu neighborhood. (S.R. 408-09)

[8]In 1988, Ribera said *Pardo* threatened to kill his children. (1988 T. 2271-73) In 1998, Ribera said *Garcia* threatened to kill him and his family. (T. 2188)

and instructed him to tell the truth. (S.R. 671, 674, 710, 567-71, 575-80, 616-19)

Ribera was assured the interview would be kept confidential. (S.R. 651-52) When Ribera apparently failed a polygraph question about his own involvement in the Musa and Quintera murders, he was sent home to sleep.[9] (S.R. 516, 519, 535-36) The officer interviewing Ribera reassured him, "I want you to pass the test." (S.R. 523) And, "I'm willing to give it as many tries as we need to just so you can pass the test." (S.R. 526) The interview recommenced that evening and, after the test was administered several more times, Ribera was apparently deemed to have passed. (S.R. 472)

Testimony and Argument Regarding Ribera's Credibility

After this case was remanded, Detective W.D. Merritt resumed primary responsibility for the Amador/Alfonso case, because the former lead detective, Sergeant MacArthur, was arrested and ultimately convicted of murdering his wife.[10]

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[9]Again, the defense did not seek to introduce the polygraph results at trial; they are, however, relevant to the question, presented in this appeal, whether the state misled the jury by implying that its out-of-court "checking" had confirmed Ribera's veracity.

[10]At MacArthur's trial in 1993, the same prosecutor's office that had relied on his testimony to convict Garcia attacked MacArthur "a proficient liar" and presented testimony from MacArthur's colleagues in the police department that his motto was "[a] lie is as good as the truth, if someone believes it." *See* John Lantigua, *Cop's Colleagues Cast Doubt on His Honesty,* MIAMI HERALD, December 3, 1993, at 4B. The jury rejected MacArthur's testimony that his wife had accidentally shot herself and convicted him of first degree murder on December 8, 1993. *See* John Lantigua, *Killer Cop's Colleagues Doubted His Innocence,* MIAMI HERALD, December 10, 1993, at 1B. The trial court in this case granted the state's motion in limine to exclude any reference to Detective MacArthur or his legal troubles. (T. 958; S.R. 911-12)

On cross examination of Detective Merritt, the defense established that a composite sketch based on descriptions by other residents of Amador's apartment complex depicted a Latin male with a beard and mustache — as Ribera had at the time.[11] (T. 2287, 2385) Detective Merritt could not recall, however, whether the police ever showed Ribera's photo to potential witnesses or compared his fingerprints to those at the crime scene (T. 2383-84) Nevertheless Detective Merritt testified that "the information that [Ribera] gave us was verified to the extent that we did not believe that he was involved." (T. 2380) In fact, Detective Merritt added, "we had even made a trip to Tampa to verify information" (T. 2380) Defense counsel objected at side-bar that Merritt's statement was a reference to a polygraph exam administered in Tampa. (T. 2380) The witness was admonished, outside the jury's presence, not to refer to any of the other homicides or to a polygraph exam. (T. 2381)

In fact, the report of the May 22, 1986 Tampa polygraph examination, to which Merritt adverted, shows that Ribera "passed" the polygraph when he denied that *he* had killed anyone or been present when any of the nine people in question were killed, but the results were "inconclusive" as to Ribera's answers to the remaining questions, including whether Ribera accompanied or "personally participated" with Pardo or Garcia in killing anyone, whether Pardo and Garcia told him about the killings, showed him news clippings about the murders or an arsenal of weapons, and whether

[11]Detective Merritt insisted that the suspect was described as medium build, but Ribera was obese. (T. 2385) On the videotapes, Ribera appears stocky, but not necessarily obese. If jurors had seen the tapes, they could have judged for themselves.

he had been truthful in his statements to Detective MacArthur. (S.R. 1447-48)

In closing argument, the parties agreed that the case turned on Ribera's credibility. (T. 2593-95, 2599, 2605-06, 2611-12, 2618, 2621, 2631) Notwithstanding the exclusion of Ribera's videotaped statements, the prosecutor argued that "[t]he defense in this case had every opportunity to develop anything that they thought would be of use to them in their case. . . . the defense attorney has the chance to ask whatever the Court says is appropriate area for cross examination. And nothing in this case developed that Carlos Ribera was lying . . ." (T. 2595) The prosecutor reiterated Ribera's testimony, then added, "all of the evidence that the police later uncovered say *(sic)* Ribera is believable, his testimony is to be believed." (T. 2611-12) Over defense objection, the prosecutor continued: "Merritt said over and over and over again, 'we checked [Ribera] out.' . . .We verified whatever he told us. We didn't know this guy. He came in and told us about these two murders. We checked and we checked and we checked." (T. 2621)

Evidence of Garcia's Bad Character and Amador's Alleged Fear of Him

John Hegarty worked with Amador, a civil engineer, on construction sites and purchased cocaine from him on a regular basis. (T. 2052, 2055, 2057, 2068, 2071-72) Garcia lived at Hegarty's ranch on and off for 1½ years, where he helped care for the horses. (T. 2064, 2068-69) Over defense objection, Hegarty testified that he spoke to Amador about selling a kilo of cocaine to Garcia, and Hegarty "told [Amador] to be careful because I did not trust Rolly and that he might get ripped off by him." (T.

2073) Hegarty could not explain why he distrusted Garcia, except to say that he felt Garcia did not help out enough with work around the ranch. (T. 2074)

Allen Lopez also worked with Amador and bought small quantities of cocaine from him on a regular basis. (T. 2023, 2026) Over defense objection, Lopez was permitted to testify that Amador told him someone named Roly had been at his house with cash to buy a kilo of cocaine and that Amador did not trust Roly and wanted Lopez to be present during the deal. (T. 2031; S.R. 1419) The trial judge apparently agreed with the state's contention that Amador's comments to Lopez were admissible as a statement against interest. (T. 2029-31)

Finally, George Girling, who knew Garcia through Hegarty, testified that he had done small drug deals with Garcia but aborted a one-kilo transaction with Garcia because the cocaine was of low quality. (T. 2101) Girling and Hegarty both acknowledged having conducted a one-kilo transaction with Amador in January 1986. (T. 2102, 2071-72, 2110)

During cross-examination, Detective Merritt volunteered that there had been a message on Amador's answering machine from "a Mr. Haggarty *(sic)* basically warning Mr. . . ." Defense counsel interrupted the witness before he provided hearsay testimony (T. 2375), but in closing argument — over defense objection — the prosecutor supplied the rest of Merritt's testimony, asserting that Hegarty "made a phone call to Mario Amador and he put it on the answering machine . . . and he said, 'this is Hegarty, watch out for Rolly and the white horse deal.'" (T. 2587-88)

Detective Merritt acknowledged that, though he took sworn statements from Hegarty, Lopez, and Girling regarding the Amador/Alfonso killings, the crime was unsolved, and the name Rolando Garcia was not part of the investigation until Ribera appeared at the Hialeah Police Department on May 5, 1986. (T. 2350-51)

Exclusion of Pardo's Former Testimony

Prior to trial, the defense sought leave to introduce Manuel Pardo's testimony from his own trial in which he confessed to the murders but exonerated Garcia. (T. 83, 856-68, 898, 907, 945-47, 1873-77; R. 166-253; S.R. 819-20) Before trial, Pardo was brought to Miami where he invoked the Fifth Amendment and said he would not testify; he reasserted his Fifth Amendment rights, through counsel, when the defense later renewed its motion. (T. 875-876, 1008) The trial judge refused to admit Pardo's testimony on the grounds that Garcia had not been a party to Pardo's 1988 trial, and the state had not had an opportunity and "similar motive" to prove Garcia's culpability. (T. 866, 1878)

The Admission of Pardo's Diary

In a search of Pardo's apartment, the police found a plastic folder containing Amador's identification, and a "Day at a Glance" appointment calendar. (T. 2312-14, 2353-54) Defense counsel objected before and during trial that the contents of the appointment calendar, or "diary", were inadmissible hearsay because the defense was not able to examine Pardo about the meaning of his diary entries. (T. 1876, 2315, 2318-19) At a minimum, the defense contended, they should be able to admit Pardo's

testimony if his diary was to be admitted (T. 1876, 2318-19) The objection was overruled and several pages of the "diary" were admitted in evidence. (T. 2313-15, 2319, 2354; S.R. 1106-08)

Detective Merritt testified that an entry on the date January 21 reads "11:45 p.m. dash Mario, to me" and a January 22nd entry reads "$10,000 to Rolly" (T. 2355-56, S.R. 1108) 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) Garcia's fingerprint was found on the outside of the plastic sleeve containing Amador's identification and newspaper articles, but not on any of the documents inside the sleeve. (T. 2243, 2249) Pardo's testimony, which the trial court excluded, explained that the notations in his diary referred to a drug deal that Garcia had brokered with Amador on behalf of Ribera. (S.R. 209-11)

Penalty Phase

Garcia has consistently maintained his innocence of all of the homicides and has taken the position since his 1988 trial that he will not agree to call witnesses "to beg for my life for a crime I didn't commit." (T. 2721) Accordingly, Garcia instructed his attorneys neither to offer mitigating evidence nor to contest the aggravating circumstances. (T. 2710)

In response to the trial court's inquiry, defense counsel proffered as possible statutory mitigating circumstances: (1) age,[12] (2) no significant history of prior criminal activity;[13] (3) that Garcia was an accomplice in an offense committed by another person, and his participation was relatively minor;[14] and (4) Garcia was under the substantial domination of another person.[15] (T. 2712) As nonstatutory mitigating circumstances, counsel proffered Garcia's family relationships, the length of the minimum mandatory sentences, lack of intent to kill, good trial conduct, and that, even if there was a drug deal, Garcia may not have been the trigger man (T. 2712-14, 2724)

The trial judge conducted a colloquy with Garcia pursuant to *Koon v. Dugger*. 619 So. 2d 246 (Fla. 1993), and Garcia confirmed that he had instructed his lawyers to offer no mitigating evidence; that he had reviewed the aggravating and mitigating circumstances with his lawyers and that he understood them; and that he was making the decision to waive mitigation of his own free will. (T. 2716-17, 2719) Garcia and his lawyers did ask, however, that Pardo's former testimony be read to the jury at the penalty phase, where hearsay is admissible, for the purpose of establishing Garcia's lesser culpability and substantial domination by Pardo. (T. 2714-15, 2717-18, 2734) The trial judge denied the request. (T. 2715, 2718)

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[12] § 921.141(6)(g), Fla. Stat. (1997).

[13] § 921.141(6)(a), Fla. Stat. (1997).

[14] § 921.141(6)(d), Fla. Stat. (1997).

[15] § 921.141(6)(e), Fla. Stat. (1997).

Ribera testified again at the penalty phase and claimed that Garcia had confided to him that one of the victims had begged for his life while Garcia laughed and told them not to worry. (T. 2744) Ribera also testified that Garcia had boasted that "it was his deal" and he had "planned to go in there and take the drugs and kill them." (T. 2745)

Garcia addressed the jury and asked them to sentence him to death "because it is the only way that a proper Court will hear what you weren't allowed to hear in this case." (T. 2746) In response to the judge's inquiry, Garcia reiterated his desire not to present mitigating evidence. (T. 2751-52)

The trial court instructed the jury on four aggravating circumstances: (1) prior conviction of another capital felony;[16] (2) robbery;[17] (3) pecuniary gain;[18] and (4) cold, calculated and premeditated ("CCP").[19] (T. 2753-54) The court also gave an anti-doubling instruction and read the entire list of 8 statutory mitigating circumstances. (T. 2755-56) The jury recommended death by votes of 10 to 2 for Amador and 7 to 5 for Alfonso. (T. 2760, S.R. 1-2)

At the *Spencer*[20] hearing, Garcia again confirmed his wish to present no

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[16] § 921.141(5)(b), Fla. Stat. (1997).

[17] § 921.141(5)(d), Fla. Stat. (1997).

[18] § 921.141(5)(f), Fla. Stat. (1997).

[19] § 921.141(5)(i), Fla. Stat. (1997).

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

mitigating evidence. (T. 2775-76) Prior to sentencing by the Judge, Garcia exercised his right to allocution and recounted receiving a call from Pardo in 1986, asking for Garcia to help him flee Miami. Garcia said he would never be the same after learning what Pardo had done but could not hurt him. (T. 2786) Garcia cooperated with police, but when confronted with the choice of putting Pardo in the electric chair or facing jail himself, he refused to testify against Pardo. (T. 2786-87) Referring to Ribera's videotaped statements, Garcia said it took 12 years for the truth to come out, but that, after two acquittals attributable to the videotaped statements, the court had prevented their use in this case. Garcia said the unfairness of the court's ruling had made him afraid to take the stand and testify in his own behalf. (T. 2789) Finally, Garcia explained that, although he asked the jury to recommend death, he did not want to die, but rather wanted to be sure his case would go to a court "that knows the history of this case" and that he "would trust [with] my life in their hands." (T. 2791) On February 5, 1999, the trial judge sentenced Garcia to death. (T. 2797-2802; S.R. 1434-40) The judge found three aggravating circumstances: (1) prior capital felony conviction for the contemporaneous homicides; (2) robbery and pecuniary gain (merged) and (3) CCP. (S.R. 1435-37) The judge found that, because Garcia had waived his right to present mitigating evidence, the record "is devoid of any evidence convincing the court of the existence of any" mitigating circumstances. (S.R. 1437-38) The judge listed the statutory mitigating circumstances but did not discuss the mitigators defense counsel had proffered pursuant to *Koon, supra*.

SUMMARY OF THE ARGUMENT

For 14 years, Mr. Garcia has maintained his innocence of the nine homicides in which he was implicated by Carlo Ribera. He has been acquitted of five of them. Mr. Garcia was convicted in this case because the trial court's erroneous evidentiary rulings precluded him from presenting his defense while simultaneously allowing the prosecution to bolster Ribera's credibility and improperly attack Garcia's character.

First, the trial court prevented the defense from impeaching Ribera with a 1986 pre-polygraph interview that was improperly withheld by the state until after the case was remanded for a new trial in 1990. The trial court ruled that the statements (1) were part of a polygraph exam (although the defense did not seek to introduce the results or anything that would suggest a polygraph was administered); (2) were not under oath (though the statements were not offered as substantive evidence); and (3) did not directly concern the facts of the Amador/Alfonso killings (although the statement contained Ribera's most detailed, untutored account of his relationships with Garcia and Pardo and what he knew about the homicides). These prior inconsistent statements would have contradicted the self-portrait Ribera presented to the jury; betrayed his attempts to distance himself from Pardo; and showed that his account of the Amador/Alfonso shooting had evolved considerably over time.

The trial court's error was compounded by allowing the lead detective to bolster Ribera's credibility by asserting that the police had investigated Ribera's story and found him to be believable, when, in fact, the additional investigation of Ribera's

credibility raised further doubts about his veracity. In closing argument, the prosecutor repeated the improper bolstering and misled the jury by asserting that the defense had been given wide latitude to impeach Ribera. Because, as the prosecution conceded, Ribera's testimony was essential to the state's case, these errors fundamentally undermined the reliability of the verdict.

Other prosecution witnesses were allowed to offer prejudicial hearsay and opinion testimony that Amador distrusted and was afraid of Garcia and that others also distrusted Garcia, had warned Amador to be careful of him, and suspected Garcia of murdering Amador. Finally, the court refused to admit Pardo's former testimony, which exonerated Garcia, while allowing the state to introduce hearsay statements in Pardo's appointment calendar that tended to incriminate Garcia.

Penalty Phase

Even though hearsay testimony is admissible at the penalty phase, the trial court would not allow the jury to consider Pardo's former testimony to establish statutory or nonstatutory mitigating circumstances of Garcia's lesser participation and domination by Pardo. Mr. Garcia waived the presentation of any other mitigating evidence. Although defense counsel proffered several mitigating circumstances the trial judge failed to consider *any* of them, erroneously finding that the record was devoid of mitigating evidence.

The death penalty for the murder of Mario Amador must be vacated because the 1988 jury returned a reasonable life recommendation that was improperly overridden

by the trial judge, contrary to the state's own advice. Although the override issue was raised on direct appeal, it was not addressed by this Court when it reversed the case for a new trial.

Finally, appellant submits that Florida's capital sentencing scheme is unconstitutional because it fails to require notice of aggravating circumstances; does not require jury findings regarding individual aggravators or death eligibility; does not require jury unanimity; and improperly shifts the burdens of proof and persuasion to the defense.

I.

THE TRIAL COURT ERRED BY REFUSING TO ALLOW APPELLANT TO IMPEACH THE STATE'S KEY WITNESS WITH HIS PRIOR INCONSISTENT STATEMENTS, IN VIOLATION OF AMENDMENTS VI AND XIV TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION.

The trial court violated Mr. Garcia's right under the state and federal constitutions to cross-examine the state's key witness, Carlo Ribera, by prohibiting the defense from impeaching Ribera with prior inconsistent statements he made in a videotaped, pre-polygraph interview with the Hialeah Police Department.[21] The videotaped statements which materially contradicted Ribera's testimony at Mr. Garcia's 1988 trial, were not disclosed by the state until after the case had been remanded for a new trial in 1990. The videotaped statements contradict the image of Ribera presented in his testimony as a dutiful family man who associated with Garcia and Pardo in the hope they would help him out of crushing financial distress by including him in a drug deal. The videotaped statements also belie Ribera's attempts to distance himself from Pardo and raise troubling questions about the evolution of his detailed description of the Amador/Alfonso shootings.

As the state acknowledged below, Ribera's testimony was central to their case.

[21]The approximately eight-hour interview precedes a series of polygraph examinations that occur at the end of the tape; otherwise, there is a brief discussion of polygraph procedures at the beginning of the interview and sporadic mentions during the interview. (S.R. 649-51, 635-63, 497, 501-36, 452-71) None of the excerpts offered by the defense showed Ribera hooked up to a machine or referred in any way to the test or its results. *See* Court Exhibits 1-43.

(T. 2593-95, 2599, 2605-06, 2608, 2611-12) When the predecessor judge, Amy Dean, allowed the defense to use the videotaped statements to impeach Ribera during Garcia's trial for the murder of Michael Millot, Mr. Garcia was acquitted. In the trial for the Alvero/Ricard murders, the state elected not to call Ribera rather than have him face impeachment, and Mr. Garcia was again acquitted.

During the instant trial for the Amador/Alfonso murders, however, Judge Bagley reversed Judge Dean's ruling and precluded any use of the videotaped statements for impeachment because they (1) "were taken in preparation and in the course of a polygraph examination"[22] (2) were not made under oath; and (3) did not specifically concern Ribera's factual account of the Amador/Alfonso homicides. (T. 2225, 2236-37, 2492) Each of these grounds is legally erroneous.

A. THE RIGHT TO CONFRONT WITNESSES IS VITAL TO THE TRUTH-SEEKING FUNCTION OF THE TRIAL

This Court has emphasized that "[t]he right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation and helps assure the 'accuracy of the truth-determining process.'" *Conner v. State*, 748 So. 2d 950, (Fla. 1999) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973)), *cert. denied*, 120 S.Ct. 2719 (2000); *accord Pointer v. Texas,* 380 U.S. 400, 404 (1965). Cross-examination is vital to the truth-seeking function of the trial because it is the "principal means by which the believability of a witness and

[22]Judge Bagley said that he reviewed the 338 pages of transcript in their entirety, and scanned tapes 3, 4 and 5 on fast forward during lunch break. (T. 2225)

the truth of his testimony are tested." *Davis v. Alaska,* 415 U.S. 308, 316 (1974). To this end, "the cross-examiner has traditionally been allowed" not only "to delve into the witness' story to test the witness' perceptions and memory," but also "to impeach, *i.e.*, discredit, the witness." *Id.* The "most common method of impeachment" is to "show[ ] that a witness has made a statement prior to the trial that is inconsistent with the testimony of the witness at the trial." C. W. EHRHARDT, FLORIDA EVIDENCE § 608.4, at 445 (2000 ed.). The trial court thus prevented the defense from using the most traditional means to test Ribera's believability and the truth of his testimony.

B. PRE-POLYGRAPH STATEMENTS ARE ADMISSIBLE FOR IMPEACHMENT.

The trial court's ruling that the videotaped statements could not be used for impeachment because they were made in connection with the administration of a polygraph exam is patently incorrect. (T. 2236) The law is clear that only the *results* of polygraph examinations are inadmissible; not all statements made in connection with the examination. As this Court has explained, "[t]he established rule that neither the result of a polygraph examination nor any allusion to such an examination to imply a certain result is admissible or proper, does not, in our view, label the polygraph a tree whose every fruit is forbidden." *Hostzclaw v. State*, 351 So. 2d 970, 971 (Fla. 1977)(internal citations omitted) (quoting *Johnson v. State*, 166 So.2d 798 (Fla. 2d DCA 1964)). Accordingly, statements made to police before, after, and sometimes during a polygraph exam are admissible. *See Johnson v. State*, 660 So. 2d 637, 642 (Fla. 1995); *Keen v. State*, 456 So. 2d 571 (Fla. 2d DCA 1984); *Hostzclaw*,

351 So. 2d at 972; *see also Wyrick v. Fields*, 459 U.S. 42, 48 n* (1982); *Stevens v. State.* 419 So. 2d 1058, 1062 (Fla. 1982).

Moreover, none of the policies served by excluding polygraph *results* are served by excluding *statements* made to an examiner from use as impeachment.[23] The reasons for excluding polygraph results are "ensuring that only reliable evidence is introduced at trial, preserving the jury's role in determining credibility, and avoiding litigation that is collateral to the primary purpose of the trial." *United States v. Scheffer,* 523 U.S. 303, 309 (1998). Immunizing a witness from impeachment with a prior inconsistent statement merely because the statement was made to a polygraph examiner does precisely the opposite. It encourages the introduction of *un*reliable evidence because the witness testifies free from the threat of impeachment with prior inconsistent statements; undermines the jury's role in determining credibility by withholding information critically relevant to that determination; and "calls into question the ultimate integrity of the fact-finding process." *See Conner,* 748 So. 2d at 955 (quoting *Chambers*, 410 U.S. at 295)); *cf. Harris v. New York,* 401 U.S. 222, 226 (1971) (criminal defendant may not "pervert[ ]" the "shield provided by Miranda . . . into a license to use perjury . . . free from the risk of confrontation with prior inconsistent utterances.")

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[23]The trial judge explained that "statements that were taken in preparation . . . of a polygraph examination . . . are inadmissible due to it is (*sic*) unreliable as determined by the Courts in the State of Florida and the Federal Courts and are not permitted." (T. 2236)

C. PRIOR INCONSISTENT STATEMENTS USED FOR IMPEACHMENT NEED NOT BE UNDER OATH.

Judge Bagley's second ground for prohibiting use of the videotaped statements is equally erroneous.[24] It is well-established that "[t]here is no requirement that impeaching prior statements be made under oath." C. EHRHARDT, FLORIDA EVIDENCE §608.4 (2000 ed.); *Williams v. State,* 472 So. 2d 1350, 1352 (Fla. 2d DCA 1985); *Mazzara v. State,* 437 So. 2d 716, 718 (Fla. 1st DCA 1983). An oath is required for a prior inconsistent statement to be admissible only if the statement is offered as substantive evidence under the hearsay exception of section 90.801(2)(a) of the Florida Evidence Code, but prior inconsistent statements used for impeachment are not hearsay and need not satisfy the requirements of section 90.801(2)(a). *See* EHRHARDT, *supra,* § 608.4, at 445-46 & n.2. Ribera's prior statements were being offered solely for impeachment, not as substantive evidence.

D. RIBERA'S PRIOR INCONSISTENT STATEMENTS WERE RELEVANT IMPEACHMENT, ESSENTIAL TO THE JURY'S ASSESSMENT OF HIS CREDIBILITY.

The trial court also erred in concluding that the statements could not be used because they did not concern Ribera's specific factual account of the Amador/Alfonso shootings. The trial court's ruling violates the elementary evidentiary principle that

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[24]The predecessor judge, Amy Dean, found that Ribera was under oath, because he was sworn when he gave his audiotaped statement from 10:40 p.m. on May 5th to 1:10 a.m. on May 6th, and Ribera regarded the videotaped interview that began shortly before 3:53 a.m. as a continuation of his earlier statements to the same police department. (S.R. 1231-34) Whether Ribera was under oath is, however, irrelevant, for the reasons set forth above.

"the credibility of the witness is always a proper subject of cross-examination." *Chandler v. State,* 702 So. 2d 186, 195-96 (Fla. 1997) (quoting CHARLES W. EHRHARDT, FLORIDA EVIDENCE § 608.1 at 385 (1997 ed.)). As the state acknowledged in closing argument, its case depended on Ribera's testimony and hence his credibility. (T. 2593, 2595, 2599, 2605-06, 2608, 2611-12) In such cases, "[i]t is well established that . . . great latitude is generally permitted in the cross-examination of a prosecution witness in order to test his credibility, *especially as to any prior inconsistent statement which could be used in an effort to impeach him*." *Jennings v. United States*, 364 F.2d 513, 515 (10th Cir. 1966) (emphasis added); *see also Powell v. Foxman,* 528 So.2d 91, 91-92 (Fla. 5th DCA 1988); *Mendez v. State,* 412 So. 2d 965, 966 (Fla. 2d DCA 1982). Accordingly, "limiting cross-examination in a manner that precludes relevant and important facts bearing on the trustworthiness of testimony constitutes error, especially when the cross-examination is directed at a witness for the prosecution." *Sanders v. State,* 707 So. 2d 664, 667 (Fla. 1998).

As defense counsel attempted to explain, there were significant areas of impeachment, in addition to the specific facts of the Amador/Alfonso homicides, to which the videotaped statements were critically relevant. (T. 2230, 2232) Specifically, the contrast between Ribera's trial testimony and the videotaped statements would have shown that Ribera was a highly unreliable and malleable witness, whose own involvement in the offenses was quite possibly far greater than

he let on.

Ribera's Presentation of Self

First, Ribera's self-portrait was altered dramatically to make him more sympathetic to a jury, by depicting his relationship with Pardo and Garcia as one of a fearful supplicant, and the motivation for his involvement with them as overwhelming family financial obligations.

In his trial testimony, Ribera claimed that Garcia was a successful drug dealer, who spent money lavishly and boasted of buying a trailer for his mother with drug money. (T. 2222; 1988 T. 2197) Ribera, on the other hand, was unemployed and "drowning" in debt, because his wife was ill and in the hospital. (1988 T. 2189-90; T. 2171) Because Ribera saw drug dealing as "the only way out" of his financial distress, he pleaded with Garcia to be included in a drug deal. (1988 T. 2191; T. 2174) Ribera denied that he was involved in the drug business with Nelson Estrada, the owner of Rainbow Video. (T. 2204)

In his videotaped statement, Ribera presents himself as a big shot, well-heeled, and in a position to aid Pardo and Garcia. Ribera said that another drug dealer, Sergio Godoy, asked Ribera and Nelson Estrada to help Pardo and Garcia because *they* needed money. (S.R. 572, 669-70, 673-74) Although Ribera initially denied that Estrada was involved in the drug business (S.R. 670), he subsequently admitted that Estrada was a drug dealer and he and Ribera *did* try to help Pardo and Garcia in the drug business. (S.R. 583-85) Ribera also said that Garcia's money problems were so

severe that he (Garcia) was about to lose his trailer and wanted Ribera and Estrada to hire him at the video store. (S.R. 572) Ribera further claimed that he had loaned Garcia $1,000 to make improvements to his mother's trailer. (S.R. 591-92) Ribera said he had savings from a lucrative job, from which he was still receiving commission checks. (S.R. 591-92, 655) Ribera also said that Garcia had asked him for backing to sell produce like Garcia's father. (S.R. 675-76, 573-74, 442) Finally, in the videotaped statements, Ribera explained that he and his wife were planning to separate and he had a girlfriend on the side. (S.R. 733-34, 594)

At trial, Ribera presented himself as a fearful victim of Pardo and Garcia. He testified specifically that he went to police because "Rolando Garcia came to my house and told me he would kill my family and kill me." (T. 2290) Ribera's vulnerable image was underscored by tearful outbreaks on the stand. (T. 2572, 1988 T. 2211) On the videotapes, when one would expect Ribera to be most shaken and fearful, he is matter-of-fact, evasive, and self-important. Far from being fearful, he boasts that no one threatens him, and denies that he came to police because he was afraid of Garcia and Pardo. (S.R 621, 711) He also denied that Pardo and Garcia made him nervous because of the things they were involved in, claiming that he didn't know much about them anyway. (S.R. 709)[25]

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[25]Ribera was not uniformly boastful. Elsewhere on the tape, he gave three different versions of a single episode during which he was purportedly threatened first by phone and then in person: (1) Garcia and Pardo called and threatened to send two men over to kill him, then Garcia called and both Pardo and Garcia came to his house where Ribera confronted them with loaded weapons (S.R. 702-04); (2) Pardo called

Ribera's Relationship with Pardo

Second, Ribera attempted in his trial testimony to distance himself from Pardo. He insisted that he was not "close" to Pardo and, indeed, had not even spoken to him before March 1986 — two months after the Amador/Alfonso homicides (T. 2172, 2219, 2253, 2284-85); had at most a passing acquaintance with Pardo's wife and daughter (T. 2222-23); and learned everything he knew about Pardo's idiosyncracies from Garcia (T. 2284-85). At the 1988 trial, Ribera denied saying that he saw Pardo's seven year old daughter shoot an Uzi, claiming that he was merely reporting what Garcia and Pardo told him and that the transcript of his audiotaped statement to the Hialeah police, which suggested otherwise, was mistaken.[26] (1988 T. 2315-16, 2339-40)

On the videotape, however, Ribera says he has "gone, you know, horseback riding, things like that" with Pardo's family and Pardo's daughter "knows how to use an Uzi . . . . I have seen what that little girl can do and she is only seven." (S.R. 597) Ribera also claimed to have learned that Mrs. Pardo "murders people also," and that she stole AIDS-tainted blood from her hospital job, which Pardo injected into his

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and Garcia came to Ribera's house with "an Italian girl" but Garcia backed off when Ribera threatened him with a shotgun (S.R. 558-59); and (3) Garcia called and then came over (S.R. 561).

[26]Ribera insisted that the transcript could not be accurate since it "came off a tape recording. Maybe possibly some of these answers and questions I didn't give because there was 12 people in that room." (1988 T. 2339) "[T]here's a lot of it in there, from what you are asking me and telling me, from the examples you are asking me, I did not say." (1988 T. 2340)

bullets. (S.R. 597, 432)

Ribera's observations, volunteered in his initial statement to police, thus suggest either a much more intimate familiarity with Pardo and his family than Ribera acknowledged at trial, or a penchant for exaggeration — either of which would have significantly undermined his credibility.

The Evolution of Ribera's Description of the Amador/Alfonso Murders

Third, the videotaped statements would have shown that Ribera's story evolved significantly over time, from apparently limited knowledge of the Amador/Alfonso shootings to details so vivid that one could conclude he must have been present. Ribera testified that he went to Hialeah police headquarters on May 5, 1986, where he told Hialeah and Metro Dade police officers the truth about "everything," including what Garcia and Pardo told him about the Amador/Alfonso shooting. (T. 2189, 2292) In his untutored videotaped statement, however Ribera said very little about the Amador/Alfonso shooting. He said only that "they" told him to "read this article and that they killed two people in Fontainbleu"[27] and said that he knew about the murder of "this guy named Mario."[28] (S.R. 603, 694) Ribera apparently did not know that two .22 guns had been used until a police officer told him that a second .22 was

[27]This reference is ambiguous, because the Robledo/Ledo homicide also occurred in the Fountainbleu neighborhood. (S.R. 408-09)

[28]In the audiotaped statement under the pseudonym "number 13," Ribera said only that he "saw the clip of a man named Mario. I don't remember his name . . . I think he is brother of Luis Robelco." (S.R. 1633)

registered to Pardo. (S.R. 693-94)

Ribera's original statements to police do not include *any* of the vivid detail added in his trial testimony — how Garcia purportedly bragged that he had set up the deal; how Amador looked pleased at what he thought was a briefcase full of money; how Amador went to get the drugs; how Alfonso ran when Pardo pulled his gun; how Garcia supposedly laughed when the two men begged for their lives; how Garcia and Pardo -- each using .22 caliber Rugers -- shot Amador and Alfonso as they lay on the floor; and how Pardo and Garcia showed Ribera the diary and Garcia remarked "this . . . could get us into a lot of trouble." (T. 2176-83, 2268-69, 2274)

The very *absence* of detail about the Amador/Alfonso murders in the videotaped statements is relevant impeachment evidence. *See Sanjurjo v. State,* 736 So. 2d 1263 (Fla. 4th DCA 1999) (defense should have been allowed to impeach victim with omissions from prior statements).

The videotaped statement is also rife with internal inconsistencies. For example, Ribera first told the interviewer that Pardo was the killer and Garcia the "brains" of the operation, then later said exactly the opposite, prompting the interviewer to admonish Ribera to tell the truth. (S.R. 688, 566) In fact, the interviewer, exasperated with Ribera's inconsistencies, admonished him repeatedly to tell the truth. (S.R. 671, 674, 710, 567-71, 575-80, 616-19) "If a police officer" had doubts about Ribera's credibility, "a juror would have, too."[29] *See Kyles v. Whitley,* 514 U.S. 419, 448

[29]The defense was not seeking to have the officer's comments admitted.

(1995).

The impeachment evidence would have substantially undermined Ribera's credibility and bolstered the defense theory that police made an unholy alliance with Ribera to secure his testimony against Pardo and Garcia, without adequately investigating the possibility that he was complicit in, or an actual perpetrator of, the murders. *See Kyles,* 514 U.S. at 446-47 (prior inconsistent statements of key state witnesses and informant were material under *Brady v. Maryland*, 373 U.S. 83 (1963) and *United States v. Bagley*, 473 U.S. 667 (1985) where statements would have undermined credibility of state witnesses and bolstered defense theory that informant was actual perpetrator). The jury would also "have been troubled by the adjustments to" Ribera's "original story" to more closely fit the state's theory of the case, raising an implication of coaching. *Id.* at 443 & n.14.

The defense theory was supported by several things, in addition to the impeachment evidence: While Detective Merritt insisted that Ribera's story had been "verified", he could not recall whether they had bothered to check Ribera's prints against those found at the crime scene or shown his photo to witnesses at the apartment complex who had seen a bearded Latin male there on the night of the murder. (T. 2287, 2383-85) The fictitious address on the gun purchase forms was very close to Ribera's own childhood address. (T. 2216-17; S.R. 1066, 1068, 1070-71, 1073-75, 1077, 1079-84) Even the polygraph examinations, to which Merritt adverted, were inconclusive at best as to the credibility of Ribera's story and his own

involvement. (S.R. 516, 519, 1447-48)

Ribera's videotaped statement is also his last untutored statement. When Ribera was cross-examined in 1988, about inconsistencies with his *audio*taped statement to Hialeah police, he claimed he was confused and the transcript inaccurate. In case of doubt, he said, "go to when I sat with Sgt. MacArthur, you will see that that's how I said it." (1988 T. 2337) Finally, police delayed arresting Garcia for over two weeks, while Ribera was interviewed by MacArthur. Garcia was arrested only after he refused to testify against Pardo. (1988 T. 2786-87) It is thus quite possible that the police did continue to have grave doubts about Ribera's credibility but had no choice but to embrace him when Garcia refused to testify against Pardo.

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When the trial court prevents the defense from using relevant impeachment evidence against the state's key witness, in a case that turns primarily on that witness' credibility, reversal is required. *See Washington v. State,* 737 So.2d 1208, 1218-19 (Fla. 1st DCA 1999) (restrictions on cross-examination about defense theory that witness may have committed the crime); *Howell v. State,* 667 So. 2d 869, 870 (Fla. 1st DCA 1996) (refusal to allow defense to impeach state's key witness with prior inconsistent statements); *Clark v.* State, 567 So. 2d 1070, 1071 (Fla. 3d DCA 1990)(refusal to allow impeachment of witness with evidence of prior fabrication); *Williams v. State*, 472 So. 2d 1350, 1352 (Fla. 2d DCA 1985) (same); *Kelly v. State,* 425 So. 2d 81, 83-84 (Fla. 2d DCA 1982) (refusal to allow cross-examination of

state's star witness regarding possible bias); *Mendez v. State,* 412 So. 2d 965, 966 (Fla. 2d DCA 1982) (refusal to allow defense cross-examination into possible motive for state's key witness to lie).

The evidence of harm is particularly compelling in this case, as Garcia was acquitted both when the defense was allowed to use the videotaped statements to impeach Ribera and when the state did not call Ribera to testify. (R. 366-69, S.R. 1619, 1621) *Cf. Kyles*, 514 U.S. at 455 (jury's inability to reach verdict at defendant's first trial "provides strong reason to believe the significant errors that occurred at the second trial were prejudicial.") (Stevens, J., concurring). In the Millot case, the defense used the videotaped statements for impeachment to devastating effect. The videotaped statements contradicted Ribera's claim to have minimal familiarity with Pardo and his family (S.R. 1255, 1257, 1330-32); showed that he changed his description of the car used to dispose of Millot's body to conform to a Mirimar police department report (S.R. 1281-84); showed that he had falsely claimed to have seen a photo of Millot's body (S.R. 1277-78, 1327); and contradicted his denial of a romantic relationship with the one other witness who corroborated his testimony (S.R. 1299-1305, 1312, 1322-26). The jury voted to acquit. (S.R. 1616, 1619)

In this case, having successfully prevented the defense from using the most damaging impeachment evidence against Ribera, the prosecutor argued in closing:

> *The defense in this case had every opportunity to develop anything that they thought would be of use to them in their case*. And that is part of our amazing system. That the defendant has a chance to sit in the courtroom with his accusers *and the defense attorney has the chance to ask*

> *whatever the Court says is appropriate area for cross examination. And nothing in this case developed that Carlos Ribera was lying*, that Carlos Ribera received any benefit for coming into court or that he sat there and made up things against this defendant, because for some reason he was protecting himself in the future.

(T. 2595) The jurors in this case asked to have Ribera's testimony read back, but unlike in the Millot case, it did not include the devastating impeachment with Ribera's own prior inconsistent statements. (T. 2664, 2674, 2689-90) This jury — having been led to believe that the defense had presented all evidence relevant to Ribera's credibility — voted to convict. Under these circumstances, this Court "cannot say beyond a reasonable doubt" that the trial court's improper restriction of the cross-examination of Carlo Ribera "did not affect the verdict." *State v. DiGuilio*, 491 So.2d 1129, 1138 (Fla.1986). Mr. Garcia is entitled to a new trial at which the jury will *actually* be allowed to hear all the evidence relevant to Ribera's credibility.

II.

> THE TRIAL COURT ERRED BY ALLOWING THE LEAD DETECTIVE AND THE PROSECUTOR TO IMPROPERLY VOUCH FOR THE CREDIBILITY OF THE STATE'S KEY WITNESS IN VIOLATION OF APPELLANT'S RIGHT TO A FAIR TRIAL UNDER AMENDMENTS VI AND XIV OF THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION.

The lead detective in the case was allowed to bolster Ribera's testimony by asserting that the police had thoroughly investigated his claims and determined he was telling the truth. The prosecutor, over defense objection, relied heavily and expanded on Merritt's testimony in closing argument to further bolster Ribera's credibility. The

state's conduct was improper, misleading, and harmful in a case that turned entirely on Ribera's credibility.

On cross-examination of the lead detective, W.D. Merritt,[30] defense counsel asked what the police had done to determine whether Ribera was at Amador's apartment complex on the night of the murders. (T. 2379-80) Merritt responded by volunteering,

> There was no indication talking to people about the information. Mr. Ribera was also interviewed at length by Hialeah and by us. That information that he gave us was verified to the extent that we did not believe that he was involved. He indicated he was not involved and we had even made a trip to Tampa to verify information.

(T. 2380) Defense counsel objected in a sidebar that the witness was "baiting" him by referring to a trip to Tampa where Ribera was polygraphed. (T. 2380) Merritt was admonished not to refer in front of the jury to any polygraph examination or to the other homicides. (T. 2381) Nevertheless, when defense counsel again questioned Merritt about whether the police had verified Ribera's story by "going to the physical evidence," Merritt responded, "I think there is different ways of verifying it." (T. 2384)

In closing argument, the prosecutor not only relied on Merritt's testimony, she embellished it:

> [A]ll of the evidence that the police later uncovered say Ribera is believable, his testimony is to be believed.

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[30]Merritt was originally in charge of the case, until MacArthur took over, and resumed that responsibility after MacArthur was arrested. (T. 958)

(T. 2611-12)

> I ask you to recall the Detective Merritt's testimony. Mr. Diaz asked him many times what it was that happened when Mr. Ribera went to the police and what the police did. ***And Merritt said over and over and over again, "we checked him out."***
> MR. DIAZ: Objection.
> THE COURT: Overruled.
> MRS. WEINTRAUB: ***"We verified whatever he told us. We didn't know this guy. He came in and told us about these two murders. We checked and we checked and we checked."***

(T. 2621)

Both Merritt's testimony and the prosecutor's closing argument were text-book examples of "improper vouching," which "occurs when the prosecution places the prestige of the government behind the witness or indicates that information not presented to the jury supports the witness' testimony." *May v. State,* 600 So. 2d 1266, 1269 (Fla. 5th DCA 1992) (citing *United States v. Roberts*, 618 F.2d 530 (9th Cir.1980), *cert. denied*, 452 U.S. 942 (1981)).[31] This Court has warned that this type of bolstering is particularly "pernicious," because:

> The power and force of the government tend to impart an implicit stamp of believability to what the prosecutor says. That same power and force allow him with a minimum of words, to impress on the jury that the government's vast investigatory network, apart from the orderly machinery of the trial, knows that the accused is guilty or has non-judicially reached conclusions on relevant facts which tend to show he is guilty.

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[31] *See also Tingle v. State*, 536 So.2d 202 (Fla.1988) (one witness cannot vouch for another's credibility); *accord Norris v. State*, 525 So.2d 998 (Fla. 5th DCA 1988); *Bowles v. State*, 381 So.2d 326 (Fla. 5th DCA 1980) ("it is an invasion of the jury's exclusive province for one witness to offer his personal view on the credibility of a fellow witness.")

Ruiz v. State, 743 So. 2d 1, 4 (Fla. 1999) (quoting *United States v. Garza*, 608 F.2d 659, 662-62 (5th Cir.1979) and *Hall v. United States*, 419 F.2d 582, 583-84 (5th Cir.1969)).[32]

The state here did precisely what was forbidden. Merritt suggested that the police had thoroughly investigated Ribera, verified his assertions, and determined that he was telling the truth. Courts have recognized that such bolstering of a witness' credibility "especially by a police officer, could well . . . result[ ] in a miscarriage of justice." *See Quiles v. State,* 523 So. 2d 1261, 1264 (Fla. 2d DCA 1988). In closing argument, the prosecutor even more explicitly invoked "[t]he power and force of the government" and "the government's vast investigatory network," *Ruiz,* 743 So. 2d at 4, by repeatedly insisting that the police had "checked and . . . checked and . . . checked" Ribera's story. This improperly bolstered Ribera's credibility by referring to matters outside the record. *See, e.g., McLellan v. State,* 696 So. 2d 928, 930 (Fla. 2d DCA 1997); *Baldez v. State,* 679 So. 2d 825, 826 (Fla. 4th DCA 1996). The clear implication of this argument was that the jury need not be troubled by questions about Ribera's credibility, since the state had access to additional information — to which the jury was not privy — that confirmed his veracity.

The bolstering of Ribera's testimony was particularly "pernicious," *Ruiz,* 734

[32]"It is improper to bolster a witness' testimony by vouching for his or her credibility." *Gorby v. State*, 630 So.2d 544, 547 (Fla.1993); *see also Szuba v. State,* 749 So. 2d 551, 553 (Fla. 2d DCA 2000); *May v. State*, 600 So.2d 1266 (Fla. 5th DCA 1992); *Boatwright v. State,* 452 So. 2d 666 (Fla. 4th DCA 1984).

So. 2d at 4, because it was grossly misleading. As far as checking Ribera's story, Detective Merritt could not recall whether the police had bothered to check Ribera's prints against those found at the crime scene or whether they had shown his photo to witnesses at Amador's apartment complex who saw a bearded Latin male on the night of the murder. (T. 2383-84) Moreover, as the prosecutor well knew, the defense had been precluded from using extensive impeachment evidence against Ribera — evidence which had been sufficient to convince an earlier jury to acquit Garcia of a related charge that also hinged on Ribera's testimony.

Finally, even the polygraph examination hinted at in Merritt's testimony did not confirm Ribera's credibility. To the contrary, the results of the Tampa polygraph examination were inconclusive as to Ribera's answers to these six questions:

- Have you personally participated with Manny Pardo or Rolando Garcia in killing anyone (Answer - No);
- . . . [H]ave you been with Manny Pardo or Rolando Garcia when they killed or attempted to kill anyone? (Answer - No);
- Did Manny Pardo and Rolando Garcia tell you they had killed numerous people? (Answer - Yes);
- Did Manny Pardo and Rolando Garcia show you pictures and newspaper clippings about people whom they claimed to have killed? (Answer - Yes);
- Did Manny Pardo and Rolando Garcia actually show you guns, silencers, an M16, a torpedo launcher and other weapons while at Pardo's home? (Answer - Yes); and
- Were you truthful to the best of your ability in your statements to Detective MacArthur (Answer - Yes).

(S.R. 1447-48) The examiner attributed Ribera's poor performance to the residual effects of "several prescribed medications" he had been taking until two or three days before the examination. (S.R. 1448)

Ribera had denied taking any such medication two weeks earlier when he underwent a polygraph examination at the Hialeah Police Department on May 6 and 7, 1986. (S.R. 658) That session similarly failed to confirm Ribera's credibility. The interviewer was openly incredulous of many of Ribera's claims, challenged him on his numerous inconsistencies and admonished him repeatedly to tell the truth. (S.R. 671, 674, 710, 567-71, 575-80, 616-19) Ribera apparently flunked the first test regarding his involvement in the Musa and Quintera shootings. The examiner informed Ribera that, "[t]hese questions are killing you." (516) Ribera had "a big response to" the question whether he was physically involved in the murders of Musa and Quintera. (519) Only after the examiner assured Ribera he "would give [the test] as many tries as we need to just so you can pass the test," sent him home to sleep, and tested Ribera several more times, was he deemed to have passed. (526, 472) Thus, far from confirming Ribera's credibility, the extra record "checking" should have given police *more* concern about Ribera's veracity.

When a witness' credibility is pivotal to the outcome of the case, as Ribera's was here, improper bolstering of the witness' testimony is reversible error. *See Ruiz*, 743 So. 2d at *5 (prosecutor's bolstering of state witnesses, in "hotly contested credibility battle"); *Szuba,* 749 So. 2d at 553 (Detective improperly bolstered critical

witnesses' credibility and masked inconsistencies in their testimony); *McLellan,* 696 So. 2d at 930 (prosecutor characterized doctor's testimony in child sexual abuse case as vouching for victim's veracity); *Quiles,* 523 So. 2d at 1264 (bolstering of critical witness' testimony by police officer).

In this case, the bolstering was all the more egregious because it was disingenuous and misleading, and fundamentally undermined the reliability of the verdict.

III.

THE TRIAL COURT'S REFUSALTO ADMIT THE EXCULPATORY TESTIMONY OF MANUEL PARDO DEPRIVED APPELLANT OF HIS RIGHT TO PRESENT A DEFENSE AND TO A FAIR TRIAL, IN VIOLATION OF AMENDMENTS VI AND XIV OF THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION.

The trial court improperly refused to allow Garcia to present the former testimony of his co-defendant, Manuel Pardo, in which Pardo asserted that Garcia was not involved "in any murder" with him and learned what Pardo had done only after the fact. (S.R. 226) The trial judge incorrectly ruled that Pardo's testimony from his 1988 trial was not admissible under the former testimony exception to the hearsay rule because the state did not have an opportunity and similar motive to cross-examine Pardo at Pardo's own trial. Pardo's testimony would also have been admissible as a statement against interest. The trial court's refusal to admit this critical exculpatory evidence violated Mr. Garcia's right to present a defense. *See Washington v. Texas,* 388 U.S. 14, 22-23 (1967) (rule disqualifying alleged accomplice from testifying on

defendant's behalf violated Sixth Amendment right to present a defense).

A. PARDO'S STATEMENTS EXONERATING GARCIA SHOULD HAVE BEEN ADMITTED UNDER THE FORMER TESTIMONY EXCEPTION TO THE HEARSAY RULE.

Section 90.804(2)(a), Florida Statutes (1997), provides an exception to the hearsay rule, when the declarant is unavailable, for:

> Testimony given as a witness at another hearing of the same or a different proceeding . . . if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

There was no dispute that Pardo, having invoked the Fifth Amendment (T. 755, 789, 875-76, 1008) was unavailable. *See Colina v. State*, 634 So. 2d 1077, 1081 (Fla. 1994). Nor was there any dispute that Pardo's 1988 trial constituted "another hearing" within the meaning of section 90.804(2)(a). The state did object, however, that it did not have an opportunity and similar motive to cross examine Pardo at his own trial because the state was interested only in rebutting Pardo's insanity defense and had "no basis for developing whether one or two people committed murder." (T. 856-57, 1876-77). The trial judge excluded Pardo's former testimony, finding that (1) Garcia was not a party to Pardo's trial and (2) that the state did not have "an opportunity to delve *(sic)* this testimony simply because that was not the focus to try somehow to find out about the involvement of Mr. Garcia." (T. 866, 1878)

As an initial matter, the trial judge was wrong to suggest that Pardo's former testimony was inadmissible because Mr. Garcia was not a party to Pardo's trial. As

defense counsel pointed out (T.859), the rule provides that it is "the party *against whom* the testimony is now offered" — in this case, the state — who must have been a party in the prior proceeding. § 90.804(2)(a), Fla. Stat. (1997) (emphasis added); *see also Thompson v. State*, 619 So. 2d 261, 265 (Fla. 1993). To the extent that the trial court conflated the "party" requirement with the "opportunity and similar motive" requirements, the ruling was still incorrect.

1. The State Had Ample Opportunity to Cross-examine Pardo about Garcia's Involvement in the Murders.

In *Thompson*, this Court explained that, in order to admit previous testimony, "all that is required is that the party have an *opportunity* at the prior proceeding to cross-examine the witness." 619 So. 2d at 265 (emphasis in original). There is no requirement that counsel actually take advantage of that opportunity, nor is there any requirement that the cross-examination be extensive. *See id.*

In this case, the prosecutor argued specifically that her co-counsel at Pardo's trial "chose not to pursue" further questions about Garcia's involvement, not that he was in any way restricted from doing so. (T. 859) The Eleventh Circuit has held that, "as a general rule, a party's decision to limit cross-examination . . . is a strategic choice and does not preclude his adversary's use of the [testimony] at a subsequent proceeding." *Hendrix v. Raybestos-Manhattan, Inc.*, 776 F.2d 1492, 1506 (11th Cir. 1985). Indeed, the "requirements of section 90.804(2)(a) have been satisfied" if "the opportunity [for cross examination] existed but was waived." Ehrhardt, *supra*, § 804.2, at 812. The opportunity requirement was satisfied in this case.

2. Contrary To The Trial Court's Ruling, The State Did Have A Similar Motive In Its Cross-Examination At Pardo's Trial.

The state's central argument below was that it did not have a similar motive[33] to explore Garcia's culpability during Pardo's trial because the prosecution was interested only in rebutting Pardo's insanity defense. The state's assertion, however, is belied factually by its own arguments at Pardo's trial and is inconsistent with the very case law on which it relied.

The state relied below on *United States v. DiNapoli*, 8 F.3d 909 (2d Cir. 1993) (en banc),[34] to persuade the trial judge that the similar motive requirement was not satisfied. (T. 857) *DiNapoli*, however, is readily distinguishable. In that case, the Second Circuit ruled that the trial court had properly denied the defendants' request to present the exculpatory grand jury testimony of two unavailable witnesses. The decision rests primarily on the distinction — not at issue here — between grand jury proceedings and trials. *See id.* at 912-14.

In a grand jury proceeding, where the prosecutor is seeking merely to establish

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[33]In *Thompson*, this Court did not refer to the "similar motive" standard but rather referred to a requirement that "the issues in the prior case [be] similar to those in the case at hand." 619 So. 2d at 265. This echoes the common-law requirement of "identity of issues." *See* EHRHARDT, *supra*, §804.2, at 815. Both requirements are intended to ensure the adequacy of cross-examination. *Id.* The issues in Pardo's trial were similar to those in Garcia's because — as demonstrated above — the state sought in Pardo's trial to prove that Pardo and Garcia murdered Amador and Alfonso.

[34]*United States v. Salerno*, 505 U.S. 317 (1992) — which the prosecution also cited below — is the same case as *DiNapoli*. Having held that the similar motive requirement applied, the Supreme Court remanded the case to the Second Circuit to determine whether the requirement had been satisfied.

probable cause, a denial of the defendant's culpability need not be disputed if it will not interfere with the grand jury's decision to indict. *DiNapoli*, 8 F.3d at 913, 915 (no similar motive to dispute exculpatory testimony where grand jury had already voted to indict defendant). In a trial, however, the similar motive requirement is far more likely to be satisfied: "the opponent at the first trial normally has a motive to dispute the [witness's] version so long as it can be said that disbelief of the witness's version is of some significance to the opponent's side of the case; the motive at the second trial is normally similar." *DiNapoli*, 8 F.3d at 912. Nothing in *DiNapoli* alters the established rule that "[t]he party against whom the prior testimony is offered must have had a *similar*, not necessarily an *identical*, motive to develop the adverse testimony in the prior proceeding." *See United States v. Lombard*, 72 F.3d 170, 188 (1st Cir. 1993)(emphasis in original).

In this case, contrary to the prosecutors' representations below, it had a motive to, and did, challenge Pardo's version of events. *See id.* It was the prosecution that first inquired into Garcia's role:

> Q: Rolando Garcia wasn't with you?
> A: *He wasn't in any murder.*
> Q: Rolando Garcia wasn't holding the second gun as you were holding the first gun?
> A: No.
> Q: And you each would shoot—
> A: You know that's not true.
> Q: And you each would shoot the second victim and cross fire on both of them?
> A: Rolando Garcia, the only time Rolando Garcia found out what I was doing [was after the] last murder . . . .

(S.R. 226-27). Pardo testified that Garcia had brokered a transaction with Amador for Ribera, who needed to dispose of three kilos of cocaine that Ribera and an associate named Ruben had stolen. (S.R. 209-11) Pardo insisted, however, that he alone "shot Mario Amador nine times and . . . Alfonso four times." (S.R. 216)

The prosecutor's claim that the state was interested only in disputing Pardo's insanity defense is also contradicted by her own closing argument at Pardo's trial:

> You may be saying to yourselves right at this moment, since the defendant testified and he sat in that chair and told you what he did, he sprouted *(sic)* his hatred out for you to see, why would the state have anything to say about the facts in this case and I say to you, members of the jury, that although you have heard lengthy facts, *it is important that we talk about the facts because you have to decide what is true*."

(Pardo T. 3953) Ms. Weintraub then devoted *more than twice as much* of her closing argument to disputing Pardo's version of the facts (Pardo T. 3950-3988) as to disputing the insanity defense (Pardo T. 3988-4002). She referred repeatedly to Garcia, emphasizing specifically his alleged involvement in the Amador/Alfonso shootings: "he killed two men that night *along with the defendant Garcia*, they shot and killed two men that night, and one of them, in fact, was Mario Amador." (Pardo T. 3957) And "you later learned from [Ribera] that *Rolly, defendant Garcia, was involved* and it wasn't one kilo, it was three kilos . . ." (Pardo T. 3958) Finally, Ms. Weintraub, who told the judge below that the state had "no basis" at Pardo's trial "for developing whether one or two people committed murder" (T. 1876-77), remarked incredulously in reference to the Alvero/Ricard homicide (of which Garcia has since been acquitted), "*[t]he defendant [Pardo] would like you to believe that he did this*

by himself." (Pardo T. 3982) Thus, contrary to the state's contention, "disbelief" of Pardo's version of events, including his exoneration of Garcia, was certainly "of some significance to" the state's side of the case. *See DiNapoli,* 8 F.3d at 912. The similar motive requirement, as articulated in *DiNapoli*, was therefore satisfied in this case.

In a closely analogous case, *United States v. Foster,* 128 F.3d 949 (6th Cir. 1998), the appellate court similarly distinguished *DiNapoli*. Like Garcia, Foster sought to introduce exculpatory former testimony from a co-defendant who was unavailable to testify at trial. During the co-defendant's grand jury testimony — as occurred at Pardo's trial — the government "repeatedly made it clear to [the co-defendant] that it believed he was lying." 128 F.3d at 954. Despite warnings that he could expose himself to a perjury charge, the co-defendant steadfastly denied that Foster was involved with him in distributing drugs. *Id.* The court held that, under these circumstances, even if the government had failed to fully cross-examine the co-defendant, it "had an opportunity and motive to develop and disprove [the co-defendant's] testimony before the grand jury." *Id.* at 956.

Similarly, in this case, the fact that the prosecutors did not question Pardo in more detail about Garcia's involvement in the Amador/Alfonso killing does not obviate the fact that they had the opportunity and a similar motive to do so. The prosecutor asked further questions about Garcia's alleged involvement in the murders of Ledo and Robledo, (S.R. 226-28), and the murders of Ricard and Alvero, (S.R. 240-41), but he chose not to ask similar questions regarding the murders of Amador and

Alfonso.

The prosecution's choice should not now be held against Garcia in order to deprive him of essential evidence proving his innocence. The trial court's ruling that he would have granted the defense request to introduce Pardo's testimony, "[i]f Mr. Waxman had gone into areas related to Mr. Garcia's involvement in this matter" (T. 867), is exactly wrong. The *DiNapoli* court specifically rejected "the Government's contention that the absence of similar motive is conclusively demonstrated by the availability . . . of some cross-examination opportunities that were foregone." 8 F.3d at 914. To the contrary, "[i]f the party against whom the previous statement is now offered is the party against whom that testimony is given, it is usually compatible with fair practice to make that party bear the consequences of any deficiencies in the cross-examination or of the decision not to cross-examine." 5 WEINSTEIN'S FEDERAL EVIDENCE § 804.04[3][a] (2d ed. 2000).

B. PARDO'S TESTIMONY WAS ALSO ADMISSIBLE UNDER THE STATEMENT AGAINST INTEREST EXCEPTION TO THE HEARSAY RULE.

Pardo's testimony was also admissible under section 90.804(2)(c), Florida Statutes, which provides an exception to the hearsay rule, when the declarant is unavailable for:

> Statements against interest.—A statement which, at the time of its making, was so far contrary to the declarant's pecuniary or proprietary interest or tended to subject him to liability or to render invalid a claim by him against another, so that a person in the declarant's position would not have made the statement unless he believed it to be true. A statement

> tending to expose the declarant to criminal liability and offered to exculpate the accused is inadmissible, unless corroborating circumstances show the trustworthiness of the statement.

To fall within the statement against interest exception (1) the declarant must be 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 must exist that "clearly indicate the trustworthiness of the statement." *Maugeri v. State*, 460 So.2d 975, 977 (Fla. 3d DCA 1984); *see also Perry v. State*, 675 So.2d 976, 980 (Fla. Dist. Ct. App. 1996) (applying the same test). Pardo's testimony met these three criteria.

1. Pardo's Confession So Far Tended To Subject Him To Criminal Liability That A Reasonable Person In His Position Would Not Have Made The Statement Unless He Believed It To Be True.

A statement against penal interest "has clear indications of trustworthiness because, human nature being what it is, a person is unlikely to implicate himself criminally unless he was in fact involved in the criminal undertaking." *United States v. Katsougrakis*, 715 F.2d 769, 775 (2d Cir. 1983). Pardo's confession — which he made, against the advice of his attorney, from the witness stand at his own murder trial — is a classically self-inculpatory statement.

Furthermore, Pardo's assertion that he was *solely responsible* for the murders is contrary to all of the ordinary incentives of co-defendants to falsely minimize their roles in comparison to others. *See Williamson v. United States*, 512 U.S. 594, 607-08

(1994) (Ginsburg, J., concurring). His statements not only ensured his conviction of multiple counts of first degree murder, they also greatly enhanced the likelihood that he would be sentenced to death. Pardo's admissions made it impossible for him later to claim statutory mitigating factors based on his minor role in the offense, *see* Fla. Stat. § 921.141(6)(d)(1997), or the substantial domination of another person, *see* Fla. Stat. § 921.141(6)(e)(1997), and left the judge and jury with little doubt about his extensive planning of the crimes or his criminal history. It is difficult to imagine any circumstances in which Pardo's admissions would have subjected him to *greater* liability than at his own capital murder trial.

2. The Circumstances In Which Pardo's Confession Was Made Corroborate Its Trustworthiness.

Pardo's confession was also accompanied by corroborating circumstances that indicated its trustworthiness. This requirement relates to the circumstances in which the statement is made, rather than the information contained in the statement. *United States v. Price*, 134 F.3d 340, 347 (6th Cir. 1998); *United States v. Garcia,* 986 F.2d 1135 (7th Cir. 1993)); *United States v. Brainard,* 690 F.2d 1117, 1124-25 & n.14 (4th Cir. 1982).

Applying the identical provision of the Missisippi evidence code, the Mississippi Supreme Court held that corroboration must also "be assessed *in the light of the importance of the evidence and the offeror's fundamental constitutional right to present evidence*." *Lacy v. State*, 700 So.2d 602, 606 (Miss. 1997) (emphasis added) (citing *Chambers v. Mississippi*, 410 U.S. 284 (1973)); *accord United States*

v. Slaughter, 891 F.2d 691, 698 (9th Cir. 1989). In *Lacy,* the court ruled that the trial judge should have admitted the co-defendant's sworn statement that he, and not his brother, fatally shot a man with whom they were arguing. *Id.* at 607. In so holding, the court emphasized that the statement inculpated the declarant and exculpated his co-defendant; was given under oath; was of "compelling importance to the defense;" and was consistent with the evidence. *Id.*

The same is true here. Pardo's statements simultaneously inculpated himself and exonerated Garcia;[35] the statement was given under oath and against the advice of counsel at Pardo's own murder trial (*see* S.R. 169); its admission was of compelling importance to the defense in a case that turned on the dubious credibility of a single informant and weak circumstantial evidence; and it was consistent with the evidence. Although a ballistics expert testified that two different guns were fired (T. 2642), there was no proof that the two guns were wielded by two different people.

C. THE EXCLUSION OF PARDO'S TESTIMONY VIOLATED APPELLANT'S RIGHT TO PRESENT A DEFENSE AND DEPRIVED HIM OF A FAIR TRIAL.

"Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." *Washington v. Texas,* 388 U.S. 14, 19 (1967); *accord Chambers v. Mississippi*, 410

[35] *See Franqui v. State,* 699 So. 2d 1312, 1320 (Fla. 1997) (specific statement sought to be admitted must be inculpatory to the declarant).

U.S. 284 (1973); *see also Crane v. Kentucky,* 476 U.S. 683, 690 (1986) (right to present a defense also grounded in Sixth Amendment Compulsory Process Clause).

In *Chambers*, the U.S. Supreme Court held that the defendant was denied a fair trial because the trial court strictly applied the hearsay rule to prevent the defendant from calling witnesses to testify that a third-party had admitted to killing the victim. The Court found both that the excluded hearsay statements were made "under circumstances that provided considerable assurance of their reliability," *id.* at 300, and that they were critical to Chambers' defense, *id.* at 302. "In these circumstances," the Court reasoned, "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Id.* at 302.[36]

Mr. Garcia, too, was precluded by a mechanistic application of the hearsay rule from introducing highly trustworthy statements that were critical to his defense. Whereas the Court in *Chambers* looked for circumstances that would compensate for the "lack [of] conventional indicia of reliability" — an oath and cross-examination — *id.* at 298, those conventional indicia of reliability *were* present here. Not only were Pardo's admissions that he acted alone manifestly against his interest, as demonstrated

[36] *Chambers* was decided in response to scholarly criticism which condemned the "barbarous doctrine, which would refuse to let an innocent accused vindicate himself even by producing to the tribunal a perfectly authenticated written confession, made on the very gallows, by the true culprit now beyond the reach of justice." 5 J. WIGMORE, EVIDENCE § 1477, pp. 289-290 (3d ed.1940), *quoted in Lilly v. Virginia,* 527 U.S. 116, 129-30 (1999).

above, they were also made under oath and subject to cross-examination by the state.

As in *Chambers,* the excluded statements were critical to Garcia's defense. As discussed above, the only evidence that implicated Garcia directly in the murder of Amador and Alfonso was the testimony of Carlo Ribera, an informant whose credibility was dubious at best. The state's other witnesses established at most that Garcia knew Amador and that Amador had been planning a drug transaction with Garcia for some time in January 1986. (T. 2073, 2031) There was no physical evidence or eye witness testimony that placed Garcia at the scene of the crime. Garcia's fingerprints were found on the *outside* of a plastic sleeve, recovered from Pardo's home, that contained Amador's identification and newspaper articles, and on documents from the gun purchase. (T. 2132-34, 2156-57, 2247-48) While this shows that Garcia handled these items at some point, it does not prove that he participated in the Amador and Alfonso murders.

The weakness of the state's case is underscored by the fact that Garcia has been acquitted of five of the nine homicides in which Ribera implicated him. (R. 366-69; S.R. 3-4, 343, 1621) Pardo's unequivocal statement that Garcia was not involved in the murders could well have tipped the balance toward acquittal in this case as well.

IV.

THE TRIAL COURT ERRED IN ADMITTING ENTRIES FROM PARDO'S DIARY TO PROVE APPELLANT'S COMPLICITY IN THE HOMICIDES, IN VIOLATION OF APPELLANT'S RIGHT TO CONFRONT WITNESSES AGAINST HIM UNDER

AMENDMENTS VI AND XIV TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION.

While the prosecution succeeded in excluding Pardo's self-incriminating statements that exonerated Garcia of murder, and which were made under oath and subject to cross-examination by the state, it was allowed to introduce Pardo's written hearsay statements, contained in his appointment calendar, which were incriminating to Garcia and not subject to cross-examination by the defense.

Over defense objection, several pages of a 1986 "Day at a Glance" calendar, found in Pardo's bedroom, was admitted in evidence. (T. 2313-15, 2319, 2354) 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)

Relying on *Butler v. State,* 376 So. 2d 937 (Fla. 4th DCA 1979), the defense argued that the appointment calendar (also referred to as a "diary") was inadmissible hearsay and that its introduction violated Garcia's confrontation rights and right to a fair trial because the defense could not cross-examine Pardo, the apparent author of the entries. (T. 1876, 2315, 2485) The trial judge, however, overruled the objection

and admitted the diary. (T. 1878, 2319, 2487-88)

Contrary to the trial court's ruling, *Butler* is indistinguishable from the instant case in all pertinent respects. The state in *Butler* introduced the address book of a severed co-defendant; the "purpose of its introduction was to prove by its contents that appellant knew [the co-defendant] in that appellant's name and address were contained within it." 376 So. 2d at 939. The address book should not have been admitted, the court concluded, because neither the book nor its author could be cross examined. *Id.* at 938-39 (citing *Pointer v. Texas*, 380 U.S. 400 (1965)). The error was, moreover, harmful: "Because appellant denied any prior knowledge of [the co-defendant], the result of admitting the address book was plainly to dissipate any credibility of appellant with the jury, thus effectively eliminating any reasonable doubt" in a close, circumstantial evidence case. *Id.*

The trial judge attempted to distinguish *Butler* on the ground that it was undisputed in this case that Garcia and Pardo knew each other. (T. 2316, 2318-19) It was not, however, the subject matter of the address book's entry that was dispositive in *Butler* but the fact that the book was offered for the truth of its contents, and the defendant was not able to cross-examine the book's author.

In this case, as in *Butler*, the state offered the diary for the truth of its contents. The prosecution relied specifically on the diary entries in closing argument as proof that Garcia succeeded in his desire to "break into the big time" with a kilo deal:

> How do you know that? Well, there is another entry and it includes that subject named Rubin paid $20,000 for rock *(sic - block)*. I guess that is

> the kilo. I don't know, I can't tell you, you can't assume. It is just what is written there. But what is written on that is, "ten thousand to Rolly." This was a very successful night's work.

(T. 2591) Garcia, like Butler, could not cross-examine his co-defendant who authored the diary entry. Garcia was therefore unable to effectively rebut the state's interpretation of the diary entry.

If the Diary Was Admitted, the Defense Should Have Been Allowed in the Interests of Fairness to Introduce Pardo's Former Testimony

The defense argued vigorously both before and after the diary was admitted that, if it did come in, basic fairness required that Pardo's testimony, which included his explanation of the diary entries, should also be admitted. (T. 1876, 2486-87) The judge rejected this argument as well.[37] (T. 1878, 2487-88)

The trial court's ruling, however, amounts to allowing hearsay statements by Pardo that *inculpated* Garcia to be admitted while disallowing those that *exculpated* him. In *United States v. Brainard, supra,* the court condemned a similar tactic by the prosecution as "imprudent and unfair." 690 F.2d at 1123, 1125 (where government elicited co-defendant's hearsay statements which inculpated defendant, ruling that defense could not elicit exculpatory hearsay statements "would pose serious

[37]The second time, the judge denied the request on the ground that Ribera claimed he had seen Garcia handle the diary and discussed with him the Amador/Alfonso shootings. (T. 2487-88) The court's reasoning again is flawed. Ribera's claim that he saw Garcia touch the diary does not transform it from hearsay to nonhearsay.

constitutional problems.")[38]

Pardo's excluded testimony is particularly significant, because he offered an exculpatory explanation of the diary entries. Pardo testified that he and Garcia had not stolen cocaine from Amador but rather Garcia had acted as a broker for Ribera, who needed to dispose of three kilos of cocaine he had stolen from associates at Rainbow Video where he worked. (S.R. 209-11) Pardo testified that he retained $10,000 to pay Garcia later. (S.R. 210) While the state used the diary to infer that Garcia was also guilty of committing the murders with Pardo, Pardo insisted that he committed the murders on his own. (S.R. 226)

V.

THE TRIAL COURT ERRED BY ADMITTING HEARSAY STATEMENTS BY THE VICTIM AND OTHERS THAT THEY DID NOT TRUST AND WERE AFRAID OF APPELLANT IN VIOLATION OF APPELLANT'S RIGHT TO CONFRONT WITNESSES AND TO A FAIR TRIAL UNDER AMENDMENTS VI AND XIV TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION.

The trial court improperly allowed the state, over defense objection, to elicit testimony from Amador's associate, Allen Lopez, that Amador did not trust Garcia and asked Lopez to provide protection during a potential drug transaction with Garcia and testimony from another associate, John Hegarty, that he did not trust Garcia and had warned Amador to be careful of him. The prejudicial impact of this testimony

[38]The fairness principles that underpin the "rule of completeness," section 90.108, Florida Statutes (1997), also support admitting Pardo's exculpatory statements if his incuplatory statements are admitted.

was compounded by the prosecutor's improper closing argument in which she, in effect, testified to the content of a message from Hegarty, found on the victim's answering machine, warning Amador to beware of Garcia.

A. HEARSAY TESTIMONY THAT THE VICTIM WAS AFRAID OF APPELLANT WAS INADMISSIBLE AND HIGHLY PREJUDICIAL.

First, the trial court erroneously allowed Allen Lopez to testify, over defense objection, that Amador said he was planning to sell one kilo of cocaine to someone named Roly; that he did not trust Roly; and he wanted Lopez to be present at the transaction for protection.[39] (T. 2031-32) Defense counsel renewed the objection and moved for a mistrial at the close of the state's evidence. (T. 2482-83) Contrary to the trial court's ruling, Amador's statement was not properly admitted as a statement against interest under section 90.804(2)(c), Florida Statutes (1997). Rather, it was a transparent effort to avoid the well-established rule that "[t]he victim's hearsay statements in a homicide case that the victim was afraid of the defendant generally are not admissible." *E.g., Stoll v. State,* 762 So.2d 870, 874 (Fla. 2000).

The state relied on *Maugeri v. State,* 460 So. 2d 975, 977 (Fla. 3d DCA 1984), in which the court held that a deceased drug dealer's admission to his girlfriend that he had stolen two kilos of cocaine from the defendant's airplane satisfied this

[39]Lopez worked with Amador as an engineer and purchased cocaine from him on a regular basis. (T. 2026) The week before the murder, Lopez had agreed to participate, for a share of the proceeds, in a one kilo transaction between Amador and John Hegarty, but Hegarty had not shown up. (T. 2037-39)

exception. (T. 2030-31) Significantly, the portions of the victim's statements that were inculpatory to the defendant in *Maugeri* were also "directly against the declarant's interest." *Id.* at 977 n.2 (quoting Comment, Federal Rule of Evidence 804(b)(3)).

The same is *not* true of the objectionable portion of Amador's statement. Even assuming *arguendo* that Amador's comments about the planned drug deal were admissible under this exception to the hearsay rule, his remark that he did not trust "Roly" and therefore wanted Lopez to be with him during the transaction, was not against Amador's penal interest and was therefore not admissible.

This Court recently clarified that only those portions of a statement that are "individually self-incriminatory . . . [bear] the requisite 'sufficient indicia of reliability' and 'particularized guarantees of trustworthiness' to render [them] admissible," consistent with the Confrontation Clause. *Franqui v. State,* 699 So. 2d 1312, 1320 (Fla. 1997). In so holding, the Court relied on *Williamson v. United States,* 512 U.S. 594, 602-03 (1994), in which the U.S. Supreme Court "narrowly construed [the statement against interest] exception to the hearsay rule and found only the self- inculpatory portions of the statement contained within the confession would be admissible." The *Williamson* Court emphasized that, "[i]n our view, the most faithful reading of [Federal Rule of Evidence] 804(b)(3) is that it does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory." 512 U.S. at 600-01. Thus, Amador's

statements that he did not trust and was afraid of Garcia were not rendered admissible merely because they were made in the context of a generally self-inculpatory narrative in which Amador told Lopez that he was planning to sell Garcia a kilo of cocaine.

This Court recently explained that such evidence is highly inflammatory, effectively providing the state "with an additional and powerful witness who could neither be impeached nor cross-examined." *Stoll,* 762 So. 2d at 878-79. As in *Stoll*, the prejudicial impact of this evidence was exacerbated by the prosecutor's improper closing argument. *Id.* at 878.

B. WITNESS' TESTIMONY THAT HE DID NOT TRUST APPELLANT AND WARNED VICTIM TO BEWARE OF HIM WAS IMPROPER BAD CHARACTER EVIDENCE, NOT RELEVANT TO ANY ISSUE IN THE CASE.

The trial court compounded its error in admitting Lopez' hearsay testimony by allowing John Hegarty to testify, also over defense objection, that he warned Amador not to deal with Garcia "[b]ecause personally I just didn't trust him and I figured he was going to get ripped off by him." (T. 2073) Hegarty could not explain why he distrusted Garcia except, he said, that Garcia did not help out enough with chores on Hegarty's ranch, where Garcia lived intermittently. (T. 2074) Hegarty testified that he "told [Amador] that night, and I said make sure you get help or backup or whatever." (T. 2074) Hegarty further testified that, after Amador was killed, "Allen Lopez came out to the yard and he talked to me and he says, 'Rolando killed Mario.'" . . . "I made a response and I said -- I cussed a little bit and everything and I said, 'well, I warned him, I warned him.'" (T. 2085)

Hegarty's testimony was classic bad character evidence that was not relevant to any issue in the case. This Court has held repeatedly that, "the well-established rule in Florida relating to character evidence is:

> 'The character of a person accused of crime is not a fact in issue, and the state cannot, for the purpose of inducing belief in his guilt, introduce evidence tending to show his bad character or reputation, unless the accused, conceiving that his case will be strengthened by proof of good character, opens the door to proof by the prosecution that his character in fact is bad.'"

Martinez v. State, 761 So. 2d 1074, 1082 (Fla. 2000) (quoting *Jordan v. State,* 107 Fla. 333, 334, 144 So. 669, 669 (1932)); *accord Mann v. State,* 22 Fla. 600, 606-07 (1886); § 90.404(1), Fla. Stat. (1998); EHRHARDT, *supra,* §404.5. The U.S. Supreme Court has likewise explained:

> The state may not show defendant's prior trouble with the law, specific criminal acts, *or ill name among his neighbors*, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. *The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury* and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.

Old Chief v. United States, 519 U.S. 172, 181 (1997) (quoting *Michelson v. United States*, 335 U.S. 469, 475-476, (1948)) (emphasis added).

Hegarty was permitted to testify, not to anything even arguably relevant and admissible, but to his unexplained *feeling* that Garcia was untrustworthy and would "rip off" Amador. Hegarty's testimony about Lopez' remark that Garcia had killed Amador was not only inadmissible hearsay, it was also nothing more than suspicion, which should not have been admitted, no matter who testified to it. The only possible

purpose of this testimony was to prove that Garcia acted in conformity with Hegarty's and Lopez' suspicions, by killing Amador in a drug ripoff.

This testimony is strikingly similar to — though worse than — the testimony at issue in the seminal Florida case on bad character evidence. In 1886 in *Mann v. State, supra*, this Court ruled that a trial judge had improperly allowed a murder victim's father to testify that he suspected the defendant of stealing from him and had taken precautions against him. 22 Fla. at 605. The Court reasoned that, if "[i]t is a fundamental principle of law that evidence that the defendant committed one offence, cannot be received to prove that he committed another and distinct offence," then "how much stronger would it be in a case where the prosecution attempted to introduce evidence of *suspicions* which could only have the effect to prejudice the jury against the defendant." *Id.* at 607-09 (emphasis added); *accord Reeves v. State,* 493 So. 2d 78, 78-79 (Fla. 4th DCA 1986) (error to allow victim to testify that defendant "had a reputation for 'ripping off and robbing people.'").

The trial court here allowed the state to introduce a raft of "irrelevant and highly inflammatory innuendos and implications concerning appellant's character." *See Albright v. State,* 378 So. 2d 1234, 1235 (Fla. 2d DCA 1980).

C. THE TRIAL COURT ERRONEOUSLY ALLOWED THE PROSECUTOR TO REFER TO MATTERS OUTSIDE THE RECORD TO FURTHER ATTACK APPELLANT'S CHARACTER.

The prejudicial effect of Lopez' and Hegarty's testimony was exacerbated further by the prosecutor's closing argument, which not only emphasized the bad

character evidence but reinforced it with facts outside the record. On cross-examination, Detective Merritt volunteered that he found a message from Mr. Hegarty on Amador's answering machine, "basically warning Mr. ---". (T. 2375) Defense counsel interrupted before Detective Merritt could testify to the contents of the tape, which would have been inadmissible hearsay. (T. 2375) Nevertheless, in closing argument, over defense objection, the prosecutor supplied the missing evidence, and tied it together with Lopez's and Hegarty's testimony:

> And you know that Mr. Lopez in that conversation with Mr. Amador just days before these killings was told that "I got a deal pending with Rolly and I want you here. He was here. He had the money, but I was by myself. I didn't want to do the deal alone. Will you be with me if we have another deal." And Lopez said, "if you call me, I will try and be there."
>
> And you know that Mr. Hegarty Senior told you the same thing. That he had a conversation with Mario Amador in which he said Mario Amador said to John Hegarty Senior, "I am setting up a deal with Rolly." And everybody knew who Rolly was. Rolly is the man that is sitting in front of you, Rolando Garcia. And Hegarty Senior said, *"be careful, watch out."* In fact he made a phone call. He made a phone call to Mario Amador and he put it on the answering machine.
>
> [DEFENSE COUNSEL]: Objection, there is no evidence of that.
>
> THE COURT: Overruled. The jury will rely on their best recollection of the testimony and evidence in the case. Go ahead.
>
> [PROSECUTOR]: He put it on the answering machine, *and he said, "this is Hegarty, watch out for Rolly and the white horse deal."* And Mr. Hegarty Senior sat there and told you that. And then you heard a little bit more about it when Detective Merritt testified. Because on cross examination he was asked by Mr. Diaz, what was on that tape, you didn't even listen to it. And Merritt said, "yeah, I did and what I heard was, 'this is Hegarty, watch out for Rolly.'" So those bits of information that the defendant had dealings with Mario Amador *and this is through the*

voice of the now dead Mario Amador that you learned this.

(T.2587-88) It was blatantly improper for the prosecutor to testify to facts that were not, and could not properly have been, admitted in evidence. *See Arroyo-Munoz v. State*, 744 So.2d 536, 537 (Fla. 2d DCA 1999); *Pacifico v. State*, 642 So.2d 1178, 1184 (Fla. 1st DCA 1994); ABA STANDARDS FOR CRIMINAL JUSTICE, THE PROSECUTION FUNCTION, Standard 3-5.9 (3d ed. 1993) (prosecutor "should not intentionally refer to or argue on the basis of facts outside the record").

The prosecutor's own improper argument combined with her references to the other inadmissible character evidence to create a theme of vindicated suspicions: Hegarty had a bad feeling about Garcia and warned Amador; Amador told Lopez he did not trust Garcia and asked for Lopez' protection; and Lopez "knew" that Garcia had killed Amador. The message to the jury was that they should reach the same conclusion as everyone else — that Garcia had killed Amador and Alfonso.

Curiously, however, though both Hegarty and Lopez gave sworn statements to the police in the investigation of Amador's death, Garcia was apparently not a suspect in the killing until Ribera fingered him in May 1986. (T. 2350) Again, there was no physical evidence whatsoever that Garcia killed Amador and Alfonso. The state's case turned entirely on the dubious credibility of Carlo Ribera. In this context, the inflammatory innuendo had a potentially dispositive effect on the jury.

VI.

THE CUMULATIVE ERRORS IN THE TRIAL DEPRIVED APPELLANT OF HIS RIGHT TO PRESENT A DEFENSE AND

DENIED HIM A FAIR TRIAL IN VIOLATION OF ARTICLE 1, SECTION 9 OF THE FLORIDA CONSTITUTION AND AMENDMENTS VI AND XIV TO THE U.S. CONSTITUTION.

Mr. Garcia has steadfastly maintained his innocence of all nine of the homicides in which he was implicated by Carlo Ribera. After *eight* trials, stretching over 14 years, Mr. Garcia has been acquitted of five of the nine homicides. (R. 366-69; S.R. 3-4, 343, 1621) Mr. Garcia's conviction in this case is the result of a series of erroneous evidentiary rulings that excluded critical exculpatory evidence while simultaneously allowing the prosecution to mislead the jury with improper bolstering of Ribera's credibility and baseless attacks on Garcia's character. The cumulative effect of these errors was to undermine the reliability of the jury's verdict. *See Stoll,* 762 So. 2d at 877-78 (considering cumulative effect of evidentiary errors in reversing case for new trial); *Martinez v. State,* 761 So. 2d 1074, 1082-83 (Fla. 2000) (combination of improper opinion of guilt evidence and improper closing argument required reversal); *Ruiz v. State,* 743 So. 2d 1, 7-9 (Fla. 1999) (finding that cumulative effect of prosecutorial misconduct "compromised the integrity of" the trial and required reversal).

Garcia was originally convicted of four homicides based on the testimony of Ribera, whose credibility was bolstered by the testimony of the then-lead detective, Theodore MacArthur. *See Garcia*, 568 So. 2d at 897; section IX.B.(4), *infra*. Only after the case was remanded for a new trial on other grounds did the defense discover that the state had improperly withheld hours of videotaped statements by Carlo Ribera

that materially contradicted his trial testimony. (R. 95-97) These videotapes, which were Ribera's last recorded statements before he fell under the now-discredited Detective MacArthur's tutelage, (*see* note 10, *supra*), also reveal that the officer interviewing Ribera had significant concerns about his credibility but neverthless assured Ribera that he could keep taking the polygraph examination until he passed and that the entire interview would be kept "confidential." (S.R. 523, 526, 567-71, 575-80, 616-19, 651-52, 671, 674, 710)

Not surprisingly, when Garcia was permitted to use the tapes for impeachment, the jury rejected Ribera's testimony and acquitted Garcia. (S.R. 1239-1333, 1621) When the state decided not to call Ribera rather than have him face impeachment, Garcia was again acquitted. (R. 366-69) It was not until the state persuaded the trial judge in this case to *exclude* the video taped statements -- thereby withholding from the jury information critical to any fair evaluation of Ribera's credibility -- that Garcia was again convicted.

The trial court's error in preventing Ribera from being impeached was compounded by allowing the state to present testimony, through Detective Merritt, improperly *bolstering* Ribera's credibility by asserting that the police had exhaustively investigated Ribera's story and found him to be believable. (T. 2380, 2384) In fact, as discussed above, Ribera's performance on the polygraph examinations to which Merritt was adverting should have given investigators more, rather than less, concern about Ribera's candor. (S.R. 516, 519, 1447-48) In closing argument, the prosecutor

both falsely told the jury that the defense had been allowed wide latitude to impeach Ribera with whatever relevant evidence it wanted and reiterated and embellished Detective Merritt's improper testimony, further vouching for Ribera's credibility. (T. 2595, 2611-12, 2621)

The net effect of these errors was to present the jury with a materially misleading picture of Ribera's credibility. Because -- as the prosecution effectively conceded below -- this case stands or falls on Ribera's testimony, these errors fundamentally undermined the reliability of the verdict. (T. 2593, 2595, 2599, 2605-06, 2611-12, 2621)

The scales were tipped further by the fact that other prosecution witnesses were allowed to offer prejudicial hearsay and opinion testimony that Amador distrusted and was afraid of Garcia and that others also distrusted Garcia, had warned Amador to be careful of him, and suspected Garcia of murdering Amador. (T. 2031-32, 2073-74, 2085) Finally, the court refused to admit Pardo's former testimony, which exonerated Garcia of guilt in these homicides, while allowing the state to introduce hearsay statements in Pardo's appointment calendar that tended to incriminate Garcia. (T. 866, 1878, 2319, 2487-88)

This Court has emphasized that, "especially [in] capital cases," prosecutors must abide by the standard set in *Berger v. United States*, 295 U.S. 78, 88 (1935):

> The [government] Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case,

but that justice shall be done. . . .

Craig v. State, 685 So. 2d 1224, 1229 (Fla. 1996) (quoting *Berger, supra*) (reversing for new sentencing where prosecutor withheld evidence that would have impeached state's key witness and misled jury in closing argument as to witness' credibility). Appellant respectfully submits that justice was not done in this case and that a new trial is required.

Penalty Phase Issues

VII.

THE TRIAL COURT ERRED IN NOT ALLOWING THE JURY TO CONSIDER PARDO'S FORMER TESTIMONY AT THE PENALTY PHASE WHERE IT WAS RELEVANT TO ESTABLISH SEVERAL MITIGATING CIRCUMSTANCES IN VIOLATION OF AMENDMENTS VIII AND XIV TO THE U.S. CONSTITUTION, ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, AND SECTION 921.141, FLORIDA STATUTES.

Although Garcia waived the presentation of most mitigating evidence, pursuant to *Koon v. Dugger,* 619 So. 2d 246 (Fla. 1993), he did ask that the jury be allowed to consider Pardo's former testimony in deciding his sentence. (T. 2714) Defense counsel correctly pointed out that hearsay is admissible at the penalty phase of a capital case and that Pardo's former testimony was relevant to establish mitigating circumstances, including Garcia's relatively minor role and his substantial domination by Pardo. (T. 2714, 2734) Nevertheless, the trial judge summarily denied the request. (T. 2715) In so holding, the trial judge violated the state and federal constitutional requirements that a sentencing jury be permitted to consider any mitigating evidence

offered by the defense.

It is one of the most basic principles of post-*Furman*[40] death penalty jurisprudence that a capital sentencer may not be precluded from considering "as a mitigating factor, any aspect of the defendant's character and record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 603-04 (1978); *accord Hitchcock v. Dugger*, 481 U.S. 393, 398 (1986); *Skipper v. South Carolina*, 476 U.S. 1, 8 (1986); *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982); *Cooper v. Dugger*, 526 So.2d 900, 901-903 (Fla. 1988).

A. PARDO'S FORMER TESTIMONY COULD NOT PROPERLY BE EXCLUDED AS HEARSAY

The trial judge apparently assumed that Pardo's testimony could be excluded for the same reason it was excluded at the guilt/innocence phase -- that it was inadmissible hearsay -- so that he did not have to reconsider his earlier ruling. Florida's capital sentencing statute provides expressly, however, that evidence may be offered at the sentencing phase of a capital trial "regardless of its admissibility under the exclusionary rules of evidence." Fla. Stat. Ann. § 921.141(1) (1997). This provision applies to make "hearsay evidence . . . admissible in a penalty-phase proceeding if there is an opportunity to rebut" it. *Mendoza v. State,* 700 So. 2d 670, 675 (Fla. 1997); *see also Cannady v. State,* 620 So. 2d 165, 169 (Fla. 1993); *cf.*

[40]*Furman v. Georgia*, 408 U.S. 238 (1972).

Lawrence v. State, 691 So.2d 1068, 1073 (Fla.1997) (no error in admitting former testimony of prosecution witness at penalty phase, even though witness was not unavailable).[41]

In (Enrique) *Garcia v. State,* 622 So. 2d 1325, 1329 (Fla. 1993), defense counsel failed to offer as mitigating evidence at the penalty phase a co-defendant's admission that the defendant "was not a shooter," in the mistaken belief that such evidence would be inadmissible. This Court held

> Counsel's failure to comprehend the most fundamental requirement governing the admissibility of evidence in capital sentencing proceedings was clearly unreasonable, particularly where the provision is set out plainly in Florida Statutes. The error also was sufficient to undermine confidence in the jury recommendation of death.

Id. at 1329. If defense counsel's mistake of law compromised the reliability of the sentencing proceeding in *Garcia*, then the trial judge's identical error in this case cannot be deemed any less harmful.

B. PARDO'S FORMER TESTIMONY WAS RELEVANT TO ESTABLISH MITIGATING CIRCUMSTANCES

Pardo's testimony was relevant to show that Garcia was merely "an accomplice in the capital felony committed by another person and his . . . participation was relatively minor."§ 921.141(6)(d), Fla. Stat. (1997). Even given the jury's finding that

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[41] A contrary rule would violate not only the Eighth Amendment right to present mitigating evidence but also the defendant's Fourteenth Amendment rights to due process and a fair trial. *See Green v. Georgia*, 442 U.S. 95, 95-97 (1979) (trial court improperly invoked hearsay rule to exclude co-defendant's admission that he killed the victim by himself).

Garcia was sufficiently implicated in the killings to be convicted of first degree murder, Pardo's testimony unequivocally reveals that Pardo played a substantially greater role in planning and carrying out the murders than Garcia. Pardo testified that he, and not Garcia, had been the mastermind of these murders. Additionally, he explained that he had been the actual triggerman and had shot the victims without Garcia's assistance. (S.R. 228); *see also, e.g., Marta-Rodriguez v. State*, 699 So. 2d 1010, 1013 (Fla. 1997) (jury could have been influenced by evidence that co-defendant "initiated and instigated the plan"); *Christmas v. State*, 632 So. 2d 1368, 1371 (Fla. 1994) (evidence proffered by defendant that co-defendant actually killed the victims was a persuasive mitigating factor); *Stevens v. State*, 613 So. 2d. 402, 402 (Fla. 1992) (testimony that co-defendant committed murder outside of defendant's presence was important mitigating evidence).

Pardo's testimony was also relevant to establish that Garcia was acting under the substantial domination of Pardo during the commission of the murders. *See* § 921.141(6)(e) Fla. Stat. (1997). On direct examination, Pardo explained that Garcia had long depended on him for support: "Rolando Garcia lived in my house. Rolando Garcia got kicked out of his house, problems with his parents. Rolando Garcia is a weak person. . . . He knows people that are drug dealers, but Rolando Garcia doesn't have $2 to fall down dead with." (S.R. 180). Later, he explained that "Rolando Garcia is related to my wife. I've known him since I've been married, 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 because he might have an IQ of two, but he's a good person." (S.R. 186). On cross-examination, Pardo elaborated on the extent of his influence on Garcia: "He respects me a lot, always admired me. He don't really question too many things." (S.R. 227) Indeed, Pardo suggested, Garcia was not emotionally equipped to handle too much information: "I don't go bragging too much to Rolando Garcia because he's not wrapped too tight." (S.R. 227) Pardo's testimony thus shows Garcia to be a follower -- an immature and impressionable young man, dependent on his older relative for support and guidance, who performed menial tasks and errands for drug dealers without asking too many questions.

In *Cooper v. Dugger*, 526 So. 2d 900 (Fla. 1988), this Court held that evidence proffered "to show [the co-defendant's] violent nature and dominant relationship to petitioner" was "relevant to petitioner's character as well as to the circumstances of the offense." *Id.* at 902. The defense should have been allowed to show that Cooper "was easily led by [his co-defendant] and likely played a follower's role in the commission of the crime" because, "this evidence, if accepted by the jury, along with the other evidence clearly would have been relevant to whether petitioner was deserving of the death penalty for this crime." *Id.* at 903.

In *Green v. Georgia, supra*, the U.S. Supreme Court similarly held that a co-defendant's admission that he alone had shot the victim, after sending Green on an errand, was "highly relevant to a critical issue in the punishment phase of the trial."

442 U.S. at 96-97. Relying on *Chambers v. Mississippi, supra,* the Court held that the exclusion of such evidence on hearsay grounds "denied petitioner a fair trial on the issue of punishment." *Id.* at 97.

The trial court's ruling in this case is thus in clear violation of *Lockett*, *Green,* and their progeny and cannot be found harmless. The evidence the trial court improperly withheld from the jury would have been sufficient to provide a reasonable basis for life recommendations for both homicides. *See, e.g., Barrett v. State*, 649 So.2d 219, 223 (Fla. 1994) (finding as a possible reason for the jury's recommendation of life, not death, evidence proffered by the defendant that the co-defendant could have been the actual killer); *Bedford v. State*, 589 So.2d 245, 253 (Fla. 1991) (holding that evidence that co-defendant instigated the crime was a likely reason the jury recommended life); *Dolinsky v. State*, 576 So.2d 271, 273-74 (Fla. 1991) (finding testimony that the co-defendant was the mastermind behind the murders to have been a mitigating factor that could have convinced the jury to recommend life).

Indeed, as discussed further below, Garcia in fact received a life recommendation for the Amador homicide at his 1988 trial, based on mitigating evidence that was substantially similar to this. See Section IX, *infra*; (S.R. 355) The jury in this case recommended death for Alfonso by a margin of only seven to five. (T. 2760; S.R. 1-2) Under these circumstances, it is impossible to say that the jury would not have been swayed by Pardo's testimony to recommend life. Accordingly,

a new sentencing proceeding is required.

VIII.

THE TRIAL COURT FAILED TO CONSIDER ANY OF THE MITIGATING CIRCUMSTANCES PROPOSED BY DEFENSE COUNSEL IN VIOLATION OF SECTION 921.141, FLORIDA STATUTES, ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION AND AMENDMENTS VIII AND XIV TO THE U.S. CONSTITUTION.

The trial judge in this case failed to consider *any* of the mitigating circumstances proffered by the defense, in clear violation of the constitutional and statutory obligations of a trial judge in a capital case. Although Garcia waived mitigation and asked for the death penalty, defense counsel properly identified pursuant to *Koon*, *supra*, several statutory and nonstatutory mitigating circumstances he believed to be supported by the record. (T. 2713-14) In his sentencing order, the trial judge stated:

> This court finds that the defendant has failed to establish any statutory or nonstatutory mitigating circumstances *because he voluntarily waived his right, against the advice of counsel and the court, to present such evidence.* Further, the court finds that the defendant, after a lengthy colloquy by the court, voluntarily and knowingly waived his right to challenge any of the aggravating circumstances presented by the State. Therefore, the trial record for both the guilt and penalty phase of this trial is devoid of any evidence convincing this court *(sic)* the existence of any [mitigating circumstances].

(S.R. 1437-38) The judge then listed the statutory mitigating circumstances and concluded "[a]ccordingly the court rejects the existence of these statutory and nonstatutory mitigating circumstances which the jury was instructed on in the penalty phase of this trial." (S.R. 1438) Nowhere in the order does the trial judge identify,

let alone evaluate, the mitigating circumstances proffered by defense counsel; nor does he anywhere mention Pardo's proffered testimony, even to explain why he diegarded it.

This Court has held repeatedly that,

> Since the ultimate penalty of death cannot be remedied if erroneously imposed, trial courts have the undelegable duty and solemn obligation to not only consider any and all mitigating evidence, *but also to "expressly evaluate in [their] written order[s] each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence*."

Walker v. State, 707 So.2d 300, 319 (Fla. 1997) (quoting *Campbell v. State*, 571 So.2d 415, 419 (Fla.1990))(emphasis added); *Ferrell v. State*, 653 So.2d 367, 371 (Fla.1995)). This "bedrock requirement," *id.*, "applies with no less force when a defendant argues in favor of the death penalty, and even if the defendant asks the court not to consider mitigating evidence." *Farr v. State*, 621 So.2d 1368, 1369 (Fla. 1993).

In this case, defense counsel proffered several mitigating circumstances, including: (1) age; (2) minor participation in the crime; (3) substantial domination; (4) the possibility of receiving consecutive minimum mandatory sentences of 50 years; (5) lack of intent to kill; (6) good trial conduct; and (7) positive family relationships. (T. 2713-14) There was record evidence to support most of these mitigating circumstances.

As discussed above, Pardo's proffered testimony provided compelling evidence that Garcia was a minor participant in the offenses, that he acted under the substantial domination of Pardo, and that he did not intend to kill. Garcia was only 23 years old

at the time of the crime; he had looked up to Pardo since they first met when Garcia was 14 and Pardo was 20 years old; and he was particularly impressionable because, as Pardo put it, "he might have an IQ of two," and was "not wrapped too tight." (S.R. 180, 186, 227; 1988 T. 3553) This evidence should have been sufficient to at least warrant consideration of age as a mitigating circumstance, but it is not even mentioned by the trial judge. *Cf. Lukehart v. State*, 25 Fla. L. Weekly S489, S495 (Sept. 28, 2000) (trial judge gave some weight to defendant's age of 22); *Asay v. State*, 769 So. 2d 974, 977 n.2 (Fla. 2000) (trial judge gave some weight to defendant's age of 23); *Woods v. State,* 733 So. 2d 980, 984 (Fla. 1999) (trial court gave moderate weight to defendant's age of 24).

Similarly, this Court has held that the possibility of receiving consecutive minimum mandatory sentences totaling 50 years may be considered in mitigation. *Turner v. State,* 645 So. 2d 444, 448 (Fla. 1994); *Jones v. State,* 569 So. 2d 1234, 1239-40 (Fla. 1990). Finally, the defendant's conduct during the trial and his postive family relationships, while not apparent from the written record, should have been observable by the judge, but these are also not mentioned.

It is impossible to tell from this order whether the trial judge even understood that he *should* evaluate the mitigating circumstances proffered by defense counsel, let alone to divine what his reasoning may have been in rejecting them. Certainly, the trial court's conclusory assertion that the record is devoid of mitigating circumstances falls far short of the "thoughtful and comprehensive analysis" of mitigating evidence

that this Court has found essential to "satisfy *Campbell* and its progeny." *Walker*, 707 So.2d at 319. As this Court cautioned,

> If the trial court does not conduct such a deliberate inquiry and then document its findings and conclusions, this Court cannot be assured that it properly considered all mitigating evidence. In such a situation, we are precluded from meaningfully reviewing the sentencing order.

Id. This case, even more starkly than *Walker*, illustrates the necessity of this rule. *See also Jackson v. State,* 704 So. 2d 500, 506 (Fla. 1997) (finding inadequate sentencing order that concluded without explanation that testimony offered in support of mitigation was not credible); *Ferrell v. State,* 653 So. 2d 367, 371 (Fla. 1995) (finding inadequate sentencing order that consisted solely of conclusory statements). Accordingly, this Court must, at the very least, vacate the sentence of death and remand for a proper evaluation and weighing of all mitigating evidence.

IX.

> THIS COURT MUST REVIEW THE OVERRIDE OF THE PREVIOUS JURY'S REASONABLE LIFE RECOMMENDATION FOR THE AMADOR HOMICIDE TO DETERMINE WHETHER APPELLANT WAS ACQUITTED OF THE DEATH PENALTY AND THE STATE THEREFORE BARRED FROM SEEKING THE DEATH PENALTY A SECOND TIME, PURSUANT SECTION 921.41, FLORIDA STATUTES, *TEDDER V. STATE*, ARTICLE I, SECTIONS 9 AND 17 OF THE FLORIDA CONSTITUTION, AND AMENDMENTS VIII AND XIV TO THE U.S. CONSTITUTION.

Introduction

In his 1988 trial, Mr. Garcia was convicted of the first degree murders of Amador, Alfonso, Alvero and Ricard and related offenses. *Garcia v. State*, 568 So. 2d 896 (Fla. 1990). The jury recommended life for the Amador homicide and death

for the other three homicides. *Id.* The judge followed the jury's three death recommendations and overrode its life recommendation, ultimately imposing four consecutive death sentences, in addition to fifty-five years on the non-capital charges. *Id.* (R. 896-903, 904).

On appeal, Mr. Garcia challenged, *inter alia*, the trial court's refusal to sever the homicide counts and its override of the jury's life recommendation for the Amador homicide. This Court reversed the convictions, based on improper joinder of offenses, and remanded for a new trial, with instructions to sever the criminal episodes. Ruling that resolution of the severance issue "disposes of this case," *Id.*, at 901, this court failed to address any of Mr. Garcia's other appellate issues, including his challenge to the trial court's override of the jury's life recommendation for the Amador homicide.

Despite Mr. Garcia's unresolved challenge to the override of the jury's life recommendation, on remand for retrial of the Amador/Alfonso episode, the state again sought the death penalty for the Amador homicide. Following what would be the fourth trial on this count, the jury found Mr. Garcia guilty of first degree murder of Amador and recommended a death sentence, which the trial court imposed. This appeal involves the question whether the trial court erred in overriding the preceding jury's life recommendation for the Amador homicide.

A. STATE CONSTITUTIONAL PRINCIPLES OF DUE PROCESS AND DOUBLE JEOPARDY REQUIRE *TEDDER* ANALYSIS OF THE TRIAL COURT'S OVERRIDE OF THE PRECEDING JURY'S LIFE RECOMMENDATION.

As noted, once this Court reversed on the basis of the severance issue, it omitted to address the propriety of the override, an issue raised by Mr. Garcia in his appeal. Yet this Court has acknowledged that even where, as here, it has vacated a capital conviction, it must nevertheless address the propriety of an override, because a jury's reasonable recommendation in favor of life imprisonment binds the trial court in the event of retrial. *Wright v. State*, 586 So.2d 1024, 1031 (Fla. 1991). Relying on Article I, Sections 9 and 17 of the Florida Constitution, this Court held that a reasonable life recommendation operates as an acquittal of the death sentence, barring the state from again seeking death; otherwise, a defendant would be forced to make a "fundamentally unfair" "Hobson's choice" between arguing guilt phase or penalty phase issues on appeal. *Id.*, at 1032. *Accord Barrett v. State*, 649 So.2d 219, 223 (Fla. 1994) (even though guilt phase error required reversal of conviction, override of life recommendation "*necessitate[d] consideration of*" *Tedder* issue); and *Keen v. State*, 25 Fla. L. Weekly S671 (Fla. 2000).

B. THE TRIAL COURT IMPROPERLY OVERRODE THE JURY'S REASONABLE LIFE RECOMMENDATION.

Under *Tedder v. State*, 322 So.2d 910 (Fla. 1975), a jury's life recommendation is presumptively valid. Under *Wright*, *Barrett* and *Keen*, Mr. Garcia has a state constitutional right to this Court's review of the prior jury's presumptively valid life recommendation for the Amador homicide. Because, in reversing his conviction, this Court overlooked Mr. Garcia's challenge to the override of his life recommendation, an omission which the trial court could not rectify on remand, this Court must review

the override at this time.

The Legal Standard for Reviewing Override of Life Recommendation

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

Florida's capital sentencing scheme accordingly gives the jury the power "in the first instance, to determine the validity and weight of the evidence presented in aggravation and mitigation," and to render an opinion regarding the appropriate punishment. *Holsworth v. State*, 522 So.2d 348, 354 (Fla. 1988). Because the jury's voice reflects "the conscience of the community," *Dolinsky v. State*, 576 So.2d 271, 274 (Fla. 1991), the jury's life recommendation may not be overridden unless "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." *Tedder*, 322 So.2d 908 at 910. This Court has "consistently interpreted" *Tedder* to mean that an override may be improper "when there is a reasonable basis," comprised of "valid mitigating factors discernible from the record," upon which the jury could have based its life recommendation. *Boyett v. State*, 688 So.2d 308, 310 (Fla. 1996) (quoting *Ferry v. State*, 507 So.2d 1373, 1376 (Fla. 1987); *accord Pomeranz v. State*, 703 So.2d 465, 472 (Fla. 1997); *Barrett v.*

State, 649 So.2d 219, 223 (Fla. 1994); *Parker v. State*, 643 So.2d 1032, 1034 (Fla. 1994). Under *Tedder*, the role of the trial judge is solely to determine whether there is record evidence sufficient to form a basis upon which reasonable jurors may rely in recommending life. *Cheshire v. State*, 568 So.2d 908, 911 (Fla. 1990).

Noting that the jury functioned as the "conscience of the community," the state advised the trial judge to follow the preceding jury's recommendation. *See* State's Sentencing Memorandum (S.R. 356). This is because there was substantial record evidence of mitigating circumstances upon which the jury relied in recommending a life sentence for the Amador homicide.

(1) Evidence That Pardo, Not Garcia, May Have Killed Amador.

Where there is record evidence that the defendant's accomplice, and not the defendant, may have actually killed the victim, this Court has repeatedly found an override not to be warranted. *Marta-Rodriguez v. State*, 699 So.2d 1010, 1013 (Fla. 1997); *Barrett*, 649 So.2d at 223; *Parker*, 643 So.2d at 1035; *Christmas*, 632 So.2d at 1371; *Cooper v. State*, 581 So.2d 49, 51 (Fla. 1991); *Pentecost v. State*, 545 So.2d 861, 863 (Fla. 1989); *Hawkins v. State*, 436 So.2d 44, 47 (Fla. 1983).

In *Hawkins*, for example, although the evidence established that the two murders were committed with two different guns, and the defendant had stated, just prior to the murders, that he wanted to "blow away a couple of dudes," he testified at trial that it was his accomplice who shot both victims. *Hawkins*, 436 So.2d at 47. Given that the defendant had less gunshot residue on his hands than his accomplice

(rubber gloves at the scene could have explained this disparity), and that the jury found the defendant guilty of felony not premeditated murder, the jury's life recommendation was held to rest on the reasonable basis of its conceivable uncertainty about the identity of the actual shooter. *Id.*, at 47, 48. *See also Marta-Rodriguez*, 699 So.2d at 1013 (where trial court overrode life recommendation because, having presided over accomplice's trial, it possessed knowledge superior to jury's that defendant was triggerman, death sentence reversed: *jury's conceivable uncertainty* on this issue provided reasonable basis for *its* life recommendation). *Accord Parker*, 643 So.2d at 1034; *Barrett*, 649 So.2d at 223; and *Cooper*, 581 So.2d at 51 (conflicting evidence about the identity of actual killer comprises reasonable basis for life recommendation).

Even disregarding the significant questions raised by the instant appeal about Ribera's credibility, the evidence in the preceding trial was at best ambiguous as to whether Pardo or Garcia killed Mario Amador. The weapon that killed Amador was different from the one that killed Alfonso, (1988 T. 3455), a fact consistent with there having been two killers, but not inconsistent with there having been one. Neither weapon was tied to Garcia. According to Ribera, Garcia consistently referred to Amador as "Mario." But in describing the Amador/Alfonso homicides to Ribera, Garcia allegedly said it was "***the other guy*** [i.e., not Mario Amador who] started running upstairs, and ***I got him*** and ***brought him down*** and we handcuffed him and we put him face down" and killed him. (1988 T. 2217). Ribera's account of Mr.

Garcia's alleged admission suggests that Garcia shot Alfonso, not Amador. This construction of the evidence explains why, during first phase deliberations, the jury asked whether the rule of principals applies to unlawful possession of a firearm during an offense. (1988 T. 4124) This construction of the evidence also explains why the jury recommended life for Amador, and death for Alfonso (1988 T. 4121-27). Under the case law, the ambiguous evidence of the identity of the triggerman provides a reasonable basis for the jury's life recommendation for the Amador homicide.

(2) Evidence That Mr. Garcia Had A Lesser Role Than Pardo In Planning The Crime.

Where the defendant's accomplice may have been the mastermind, or played the primary role in planning or executing the crime charged, this Court has repeatedly found a reasonable basis for a jury's recommendation of life. *Dolinsky*, 576 So.2d at 274; *DuBoise v. State*, 520 So. 2d 260, 266 (Fla. 1988); *Wasko v. State*, 505 So.2d 1314, 1318 (Fla. 1987); *Barclay v. State*, 470 So.2d 691, 695 (Fla. 1985). There was abundant record evidence, arising from the entire course of conduct between Mr. Garcia and his accomplice Manny Pardo, that Pardo was the leader and Mr. Garcia the follower in committing the charged offenses, including the murder of Amador.

The record reflects that Mr. Garcia met Manny Pardo ten years prior to the events at trial, when Garcia was fourteen and Pardo was twenty years old. (1988 T. 3553). Pardo became a police officer, got married, and had children (1988 T. 3553, 3614); he acquired an "extremely well-furnished apartment," an arsenal of weapons, cars, etc. (1988 T. 2021, 2126). Garcia, on the other hand, had dropped out of school

in the ninth grade and was barely literate, lived in a trailer with his parents, had no car or even a driver's license, no bank account, no credit cards, no safe deposit box, no assets of any kind. He subsisted on a variety of menial jobs, such as washing cars, working at a paint and body shop, as a line cook, as a stable boy, and as a penny ante drug dealer. (1988 T. 2149, 2203-04, 2349-50, 2465, 3627, 3630, 3638, 3652, 3663, 3671, 3719). Mr. Garcia worshipped Manny Pardo, whom he referred to as "uncle" (1988 T. 2193, 3641): he considered him an exemplary father, a good friend and a successful man. (1988 T. 3614, 3666-69).

The police took a very different view of Manny Pardo, whom they characterized as a "sick and violent person". (1988 T. 1974, 2126). The police had to employ a SWAT team to execute a search warrant at Pardo's home. (1988 T. 1974). Inside the home were bazookas, submachine guns, a torpedo shooter, grenade launchers, mach 12s, and 45s, as well as a variety of military fatigues and police uniforms, false police identification documents, police radios and walkie-talkies. (1988 T. 2018, 2022, 2126, 2226, 2337). A lead-lined safe drilled into the floor of Pardo's home had been used to test artillery and was designed to store explosives. (1988 T. 2023, 2025). Also found in the home was Pardo's diary of the crimes charged, Robledo's credit cards, Pardo's address book with an entry for Robledo, and Amador's INS documents. (1988 T. 1975, 1982, 1988-89, 1992). In contrast to the search of Pardo's home, the search of Garcia's home was apparently conducted without a SWAT team, and yielded no evidence of Garcia's connection to these or any other crimes: no weapons

or other implements or fruits of crime, no uniforms, no documents. (1988 T. 3739).

According to Ribera, Pardo had taught his six-year-old daughter to shoot an Uzi (1988 T. 2127-28), and habitually fed Quaaludes and cocaine to the family dog, who responded to this regimen by biting Pardo and his children. (1988 T. 2318). Pardo's relationship with Garcia was not unlike his relationship with his gun-toting daughter or his dope-addled dog, a relationship in which Pardo controlled and corrupted a weak member of his inner circle.

It was Pardo who had all of the drug contacts, doctored police records, maintained the diary and stockpiled the weapons. (1988 T. 1992, 2126, 2153, 2205). Pardo ordered and paid for the handguns Garcia purchased with Amador's driver's license. (1988 T. 2097, 2099, 3524-26, 3728). Pardo gave Garcia Robledo's visa card and told him what to purchase with it. (1988 T. 2235). Pardo told Garcia to drive to Godoy's house, with lights out and low speed, then to clean the casings from the car, after Pardo had fired from the passenger window. (1988 T. 2241-44).

It was Pardo who decided to kill Robledo and Ledo; Garcia, who had accompanied Pardo to Robledo's home, was "scared shitless" when Pardo started shooting, and threw himself to the floor. (1988 T. 2226). It was Pardo who decided to kill Alvero, when the latter refused to cut Pardo in on future drug deals.[42] (1988 T.

[42] Garcia has since been acquitted of the Alvero/Ricard homicides and related charges. (R. 366-69)

2250, 2264). When Pardo got shot during the Alvero/Ricard episode, he summoned his "nephew" to help him flee to New York for medical attention. (1988 T. 3700-01). Garcia carried his bags on the plane and otherwise looked after him, then, at Pardo's direction, corroborated Pardo's false account of the shooting for the New York City police. (1988 T. 3017-18, 3642). Once Pardo had received medical attention, he returned to Miami, leaving Garcia in New York to fend for his own fare home. (1988 T. 3709).

The evidence suggests that Garcia may have originally intended only to rob Amador of his cocaine, but not to kill him. John Heggerty testified that he had cautioned Amador about selling drugs to Garcia, because ***"[h]e'll rip you off."*** (1988 T. 2387). Although, according to Ribera, Garcia bragged that Amador was *his* contact, and not Pardo's, (1988 T. 2117), the jury might have reasonably assumed that the initiative to kill Amador, like the initiative to kill the other victims, came from Pardo, and not Garcia.

In penalty phase closing, defense counsel argued evidence that Pardo was the "principal mover and planner" of these crimes; that Mr. Garcia's relative poverty and his conceded worship for his "uncle" reflected that he was the follower, and Pardo the leader. (1988 T. 4203-04, 4216-19, 4223). This evidence formed a reasonable basis for the jury's life recommendation.

(3) Evidence That Mr. Garcia Could Have Served Consecutive Life Sentences in Lieu of the Death Sentence for the Amador Murder.

Evidence that the defendant could serve two consecutive life sentences for two

first degree murder convictions, without parole eligibility for fifty years, is a mitigating circumstance upon which the jury may rely in recommending life instead of death. *Marta-Rodriguez*, 699 So.2d at 1013; *Turner v. State*, 645 So.2d 444, 448 (Fla. 1994).

During the penalty phase, defense counsel explained to the jury that, if it recommended life rather than death for the four first degree murder convictions, and the sentences were imposed consecutively, Mr. Garcia would not be eligible for parole for one hundred years. (1988 T. 4200). This accurate statement of the law and facts provided the jury with a reasonable basis for a life sentence for the Amador conviction.

(4) Credibility Problems In Chief Prosecution Witness Carlo Ribera

This Court has recognized that credibility problems in the state's chief witness forms a reasonable basis for a life recommendation. *Keen*, *supra*; *Pomeranz v. State*, 703 So.2d 465, 471 (Fla. 1997). Carlo Ribera, who provided the only direct evidence against Mr. Garcia, had significant credibility problems. Because his early audiotaped statement to the Hialeah Police Department contradicted his trial testimony in material areas, Ribera's direct examination and that of lead detective MacArthur read like an extended anticipatory rehabilitation of this severely challengeable chief prosecution witness. About Ribera's audiotaped statement, MacArthur explained that Ribera was "confused" and "disheveled." Ribera explained that he had been awake for eighteen hours before making the statement, that the officers who took the statement failed to

question him chronologically, that they kept turning the tape off and on, that part of the audiotape was missing, that the transcript of the audiotape is inaccurate, and that the transcript of his deposition is inaccurate. MacArthur maintained that he had never coached Ribera, that he had checked and checked and checked the veracity of Ribera's formal statement, that the police had never charged Ribera with perjury, etc. (1988 T. 1948-50, 1973, 2039, 2282, 2286, 2288, 2292, 2362). The defense at trial was that Ribera, not Garcia, was Pardo's likely accomplice, and that he fingered Garcia to deflect police attention from himself. In those prosecutions where Ribera did not testify, or where he was impeached with a videotaped statement that the state had suppressed during this trial, Mr. Garcia prevailed in this defense. (R 366-69; S.R. 1621). The obvious credibility problems of this chief prosecution witness form a reasonable basis for the jury's life recommendation. *Keen*; *Pomeranz*.

(5) The State's Acknowledgment of the Propriety of a Life Sentence

This Court has treated the state's advice to the trial judge not to override a life recommendation as an indication that the life recommendation is reasonable. *Turner,* 645 So.2d at 448, n. 4; *Pomeranz*, 703 So.2d at 473 (Anstead, J., concurring).

The state submitted a Sentencing Memorandum to the trial court which specifically advised it not to override the jury's life recommendation:

> "Because the jury's recommendation '. . .is entitled to great weight, reflecting as it does the conscience of the community, and should not be overruled unless no reasonable basis exists for the opinion,' See *Richardson v. State*, 437 So.2d 1091, 1095 (Fla. 1983), the State submits that this Court should follow the jury's recommendation."

(R. 356). Furthermore, Mr. Garcia testified, without objection, that the state had offered him a sentence of twenty-five years for a plea to the charged offenses. (1988 T. 3721-23, 3862). The state's pre-trial position that life was an appropriate penalty, and its post-penalty phase position against overriding the jury's life recommendation constitutes an admission that the jury's recommendation was reasonable, and that an override would violate *Tedder*.

The Trial Court's Order

Just as in *Pomeranz*, *supra*, the trial court in this case failed even to acknowledge the state's advice against overriding the jury's reasonable life recommendation. The trial court simply concluded that the aggravating circumstances outweighed the mitigating circumstances, and overrode the life recommendation on this basis. (S.R. 59-62) This conclusion betrays the judge's ignorance of the standard to be applied in considering a jury's life recommendation. The weighing process is to be conducted only after a death recommendation; the "singular focus of a *Tedder* inquiry is whether there is 'a reasonable basis in the record to support the jury's recommendation of life.'" *Keen v. State*, 25 Fla.L. Weekly S761 (Fla. 2000). A trial judge considering a life recommendation is not supposed to "[p]rove that the jury got it wrong," but is instead supposed to focus on finding support for the jury's recommendation. *Id.* The trial judge here erroneously failed even to consider, let alone to weigh, any of the above-cited nonstatutory mitigating circumstances which would have supported the jury's recommendation. (S.R. 62) *See Eddings v.*

Oklahoma, 455 U.S. 104, 110 (1982); *Campbell v. State*, 571 So.2d 415, 419-20 (Fla. 1990). The sentencing order contains several other significant errors.

First, the trial court's calculation of the aggravators was deficient, because it improperly doubled the aggravating factors of pecuniary gain and committed in the course of a robbery (S.R. 60), an error which the state conceded in its Answer Brief filed during appeal of the preceding trial, at p. 70. *Bonifay v. State*, 626 So.2d 1310 (Fla. 1993); *Oats v. State*, 446 So.2d 90 (Fla. 1984), *receded from on other grounds*, *Preston v. State*, 564 So. 2d 120 (Fla. 1990). Second, the trial court's order conjectured that the life recommendation must have been based on the non-mitigating circumstance that Amador was a drug trafficker: "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." (S.R. 61) This denigration of the jury's recommendation is both baseless and illogical, because the jury recommended death for the murder of Alvero, who was also a drug trafficker.

Third, the trial court failed to give the jury's recommendation the deference due its patent industry and reason. This was an alert, engaged and conscientious jury. The jurors asked numerous questions during first phase deliberations: they wanted to view the physical evidence, they wanted transcripts of several witnesses' testimony, they asked for the definition of second degree grand theft, and whether the rule of principals applies to unlawful possession of a firearm while engaged in the offense. (1988 T. 4014, 4121-27). The jurors sorted through complicated evidence of the

numerous offenses presented, both charged and uncharged, acquitting Mr. Garcia of the Robledo/Ledo murders, but finding him guilty of forgery, uttering and second degree grand theft in connection with his use of Robledo's credit cards, and guilty of the Amador/Alfonso and Alvero/Ricard episodes. (R. 845-865). After the penalty phase, the jurors requested the non-testimonial evidence presented in connection with the four murders at issue, "including any charts, ballistics, etc." (1988 T. 4257). "Also," the jurors asked, "could we possibly have use of the easel with a large pad of paper?" *Id*. The jurors later asked to see three other charts, including, in particular, the firearms charts. (1988 T. 4274). Finally, the jurors said, "[W]e really" – the latter word underlined twice – "need the ballistics charts." (1988 T. 4278-79). It may well be that the jurors were struggling with the evidentiary ambiguity regarding the identity of Amador's shooter. As the assistant state attorney noted, "[The jurors] were very discriminating about the evidence." (1988 T. 4277). The trial judge agreed, commending the jurors for "the great care that you have. . .exhibited" during the course of penalty phase deliberations. (1988 T. 4285).

Where, as here, "the jury was apparently quite capable of reasonably sorting out the facts and applying the law in the guilt phase, where it distinguished [one murder] from [the others] in handing down their guilty verdicts, all of which were supported by the record. . .[t]here is no reason to believe that the same jury was less capable of reasonably applying the aggravating and mitigating circumstances in the penalty phase of the trial." *Parker*, 643 So.2d at 1035. *See also Keen*, *supra,* at n. 10 ("As the

judge's own order indicates, the jury was able to reasonably sort out the facts and apply the law in convicting Keen of first-degree murder." There was, therefore, no reason to believe same jury less capable of reasonably applying penalty phase circumstances.) Given that this concededly reasonable and discerning jury was presented with substantial record evidence of mitigating circumstances which this Court has repeatedly found sufficient to support a life recommendation, the trial judge erred in overriding the jury's life recommendation for the Amador count.

X.

FLORIDA'S DEATH PENALTY STATUTE VIOLATES THE FLORIDA CONSTITUTION, ARTICLE I, SECTIONS 9 AND 17, AND THE U.S. CONSTITUTION, AMENDMENTS VIII AND XIV, BECAUSE IT DOES NOT REQUIRE NOTICE OF AGGRAVATING CIRCUMSTANCES, DOES NOT REQUIRE SPECIFIC JURY FINDINGS REGARDING THE SENTENCING FACTORS, PERMITS A NON-UNANIMOUS RECOMMENDATION OF DEATH, IMPROPERLY SHIFTS THE BURDEN OF PROOF AND PERSUASION TO THE DEFENSE, AND FAILS ADEQUATELY TO GUIDE THE JURY'S DISCRETION, THEREBY PRECLUDING ADEQUATE APPELLATE REVIEW.

The U.S. Supreme Court recently held that held that "it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Apprendi v. New Jersey*, ___ U.S. ___, 120 S. Ct. 2348, 2355 (quoting *Jones v. United States*, 526 U.S. 227, 252-53 (1999)). Grounding its decision both in the traditional role of the jury under the Sixth Amendment and principles of due process, the Court made clear that

> "[i]f a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others . . . it necessarily follows that the defendant should not — at the moment the state is put to proof of those circumstances — be deprived of protections that have, until that point unquestionably attached."

Id. at 2359. These essential protections include (1) notice of the government's intent to establish facts that will enhance the defendant's sentence, (2) determination by a jury that (3) such facts have been established by the government beyond a reasonable doubt. *Id.* at 2362-63; *Jones*, 526 U.S. at 231.

While the majorities in *Apprendi* and *Jones* attempted to distinguish capital sentencing schemes, the distinction is not logically tenable, as the dissenters in *Jones* noted:

> If it is constitutionally impermissible to allow a judge's finding to increase the maximum punishment for carjacking by 10 years, it is not clear why a judge's finding may increase the maximum punishment for murder from imprisonment to death.

Jones, 526 U.S. at 272 (Kennedy, J., dissenting; *see also Apprendi,* 120 S.Ct. at 2388 ("If the Court does not intend to overrule *Walton*,[43] one would be hard pressed to tell from the [majority] opinion.") (O'Connor, J., dissenting). As Justice Kennedy anticipated, the majority's ruling compels a reexamination of the Court's capital jurisprudence regarding the roles of judge and jury. *Jones*, 526 U.S. 272..

Florida's capital sentencing scheme, like the hate crimes statute at issue in *Apprendi*, exposes a defendant to enhanced punishment — death rather than life

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[43] *Walton v. Arizona,* 497 U.S. 639 (1990).

imprisonment — when a murder is committed "under certain circumstances but not others." *Id.* at 2359. Indeed, this Court has emphasized that "[t]he aggravating circumstances" in Florida law "actually define those crimes . . . to which the death penalty is applicable . . ." *State v. Dixon*, 283 So. 2d 1, 8 (Fla. 1973). While this Court properly recognized in *Dixon* that individual aggravating circumstances must be proved beyond a reasonable doubt, *id*, it has thus far failed to apply other due process requirements, as outlined in *Apprendi*, to the capital sentencing context. Thus, under Florida law (1) the state is not required to provide notice of the aggravating circumstances it intends to establish at the penalty phase; (2) the jury is not required to make any specific findings regarding the existence of aggravating circumstances, or even of a defendant's eligibility for the death penalty; (3) there is no requirement of jury unanimity for finding individual aggravating circumstances or for making a recommendation of death; and (4) the state is not required to prove the appropriateness of the death penalty beyond a reasonable doubt.

1) Notice. Under Florida law, in contravention of basic due process principles, the state is not required to provide notice of the aggravating circumstances it intends to prove at the penalty phase. *See, e.g., Vining v. State,* 637 So. 2d 921, 927 (Fla. 1994). In other contexts, however, this Court has properly recognized that punishment-related facts must be charged, presented to a jury, and proved beyond a reasonable doubt, in a separate punishment determination proceeding. *See State v. Harbaugh*, 754 So. 2d 691 (Fla. 2000) (felony DUI); *State v. Overfelt,* 457 So. 2d

1385 (Fla. 1984) (sentencing enhancement for use of a firearm).

2) Specific Jury Findings. Although the sentencing jury is instructed to determine whether individual aggravating circumstances have been established beyond a reasonable doubt, it is not required to make any specific findings regarding the existence of particular aggravators, only to make a recommendation as to the ultimate question of punishment. The jury is thus a "black box"that renders a life or death decision without disclosing its reasoning.

Apprendi logically compels the conclusion that a sentencing jury must make findings regarding the existence of individual aggravating circumstances. Two of the four aggravating circumstances at issue in this case (pecuniary gain and CCP), like the biased motive factor in *Apprendi*, involve "[t]he defendant's intent in committing a crime," a consideration that "is perhaps as close as one might hope to come to a core criminal offense 'element,'" requiring a jury's determination. *See Apprendi*, 120 S. Ct. at 2364.

Even if *Apprendi* did not compel jury findings regarding every aggravator, its logic would appear, at a minimum, to require a jury finding of death eligibility. Again, as the dissenters in *Jones* and *Apprendi* noted, the defendant could not be sentenced to death under the Arizona statute at issue in *Walton*, "unless the trial judge found at least one of the enumerated aggravating factors." *Jones,* 526 U.S. at 272 (dissenting opinion); *accord Apprendi,* 120 S.Ct. at 2388 (O'Connor, J., dissenting). Precisely the same is true in Florida. *See* § 921.141 (2)(b) (1997).

The *Jones* majority attempted to distinguish *Hildwin v. Florida,* 490 U.S. 638, 640 (1989), on the ground that a Florida jury *implicitly* finds the existence of the necessary aggravating circumstances when it recommends a sentence of death. 526 U.S. at 250-51. This, however, leaves no record of which aggravators the jury did or did not find. Moreover, if the jury recommends life — as it did for Amador's homicide after Garcia's 1988 trial — there is no jury finding implicit or otherwise regarding the existence of *any* aggravating circumstance. Consequently, in an override case, the defendant's sentence is increased from life to death based *solely* upon judicial findings of fact, in violation of the defendant's due process and jury trial rights.

Hildwin does not, moreover, address the Eighth Amendment concerns raised by the absence of any mechanism for determining which aggravating and mitigating circumstances the jury relied upon in sentencing. *See Combs v. State,* 525 So. 2d 853, 859 (1988) (Shaw, J., specially concurring) (lack of jury findings, combined with *Tedder* deference, raises serious arbitrariness problem); *cf. Parker v. Dugger,* 498 U.S. 308, 321 (1991) (emphasizing importance of adequate appellate review to individualized sentencing). The failure to require specific jury findings impermissibly undermines the reliability of the sentencing process and the adequacy of appellate review.

3) Jury Unanimity. The Supreme Court has never specifically addressed whether a unanimous verdict is required in a capital case. However, it has never

upheld a verdict of less than nine to three, even in a non-capital case. *See Johnson v. Louisiana*, 406 U.S. 356 (1972) (upholding 9:3 verdicts in serious felonies); *Apodaca v. Oregon*,406 U.S. 404 (1972) (upholding verdicts of 10:2 and 11:1 in non-capital felonies); *Burch v. Louisiana*, 441 U.S. 130 (1979) (six person jury must be unanimous). The Court took pains to note that *Apodaca* was a non-capital case. *See Burch*, 441 U.S. at 136.

Florida law requires unanimity at the guilt/innocence stage of a capital case. *See, e.g.*, *Williams v. State*, 438 So. 2d 781 (Fla. 1983); *Jones v. State*, 92 So. 2d 261 (Fla. 1956). But it does not require unanimity either to find individual aggravating circumstances or to render a recommendation of death, which is nonetheless entitled to great weight under *Tedder*. Given that aggravating circumstances are essential elements that must be instructed and proved beyond a reasonable doubt, a non-unanimous death verdict, and particularly one of seven to five[44] violates due process and the protection against cruel and/or unusual punishment guaranteed by the United States and Florida Constitutions.

4) Burden and Standard of Proof. *Apprendi* reaffirmed that the due process prohibition on burden-shifting enunciated in *Mullaney v. Wilbur*, 421 U.S. 684 (1975), and the reasonable doubt standard apply to the determination of sentence enhancements. 120 S.Ct. at 2362, 2359, 2364. Florida's capital sentencing statute

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[44]The jury in this case recommended death for the homicide of Roberto Alfonso by a margin of only seven to five. (T. 2760, S.R. 2) As discussed above, Garcia previously received a life recommendation for Amador's murder. (S.R. 355)

violates these constitutional requirements by placing the burden on the *defendant* to prove that "sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist." § 921.141(2)(b), (3)(b), Fla. Stat. (1993); *see also Dixon*, 283 So. 2d at 9. The plain meaning of this language requires imposition of a death sentence if the aggravating and mitigating evidence is in equipoise. This impermissibly relieves the state of its burden to prove, beyond a reasonable doubt, that death is the appropriate sentence.

The burden-shifting instruction also "vitiates the individualized sentencing determination required by the Eighth Amendment." *See Jackson v. Dugger,* 837 F.2d 1469, 1473 (11th Cir.), *cert. denied,* 486 U.S. 1026 (1988) (instruction that advised jury that "death is presumed to be the proper sentence unless [aggravating factors] are overridden by one or more . . . mitigating circumstances" violated Eighth Amendment).

CONCLUSION

For the foregoing reasons, this case must be reversed and remanded for a new trial, and the 1988 life recommendation must be given effect.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded by mail to Assistant Attorney General KIMBERLY NOLEN HOPKINS, Office of the Attorney General, 2002 North Lois Avenue, Suite 700, Westwood Center, Tampa, Florida 33607 on the 26th day of June, 2001.

_____
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