

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

REPLY BRIEF OF APPELLANT

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1320 N.W. 14th Street
Miami, Florida 33125
(305) 545-1958

CHRISTINA A. SPAULDING
Assistant Public Defender
Florida Bar No. 995320

Counsel for Appellant

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INTRODUCTION

In this reply brief, citations to the record are as in the initial brief. Appellant's initial brief is cited as "Initial Br." and appellee's answer brief as "Answer Br." With respect to any issues not separately addressed in this reply, appellant relies on the arguments in his initial brief and does not waive any claims raised therein.

ARGUMENT

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 state answers that (1) the trial court properly applied the oath requirement of section 90.801(2) to exclude Ribera's videotaped statements; (2) Ribera's videotaped statements were not proper impeachment evidence because they did not materially contradict statements made in his 1998 trial testimony, even if they did establish that he lied in earlier proceedings in this case; and (3) any error was harmless because Ribera had given so many inconsistent statements in the past that the defense had ample impeachment material. Answer Br. at 9-17. The state does not attempt to defend on appeal the trial court's ruling that Ribera's videotaped statements were inadmissible because they preceded the administration of a polygraph examination.

A.

THE OATH REQUIREMENT OF SECTION 90.801(2)(a),
FLORIDA STATUTES, DOES NOT APPLY TO
STATEMENTS THAT ARE NOT OFFERED FOR THEIR
TRUTH

The state does not dispute that prior statements that are used for impeachment need not be under oath to be admissible. Answer Br. at 10. Rather, the state suggests that Ribera's videotaped statements were not sufficiently inconsistent with his 1998 trial testimony to be used as impeachment. Thus, the state reasons, the statements were offered, at least in part, as substantive evidence and were properly excluded under section 90.801(2)(a), Florida Statutes (1997), because they were not under oath.¹ Answer Br. at 11. This argument is wrong on two counts. First, for the reasons explained below, the statements were proper impeachment and should have been admitted as such. Second, and more fundamentally, the state overlooks that section 90.801(2)(a) applies only to statements offered for their truth. *See* CHARLES W. EHRHARDT, FLORIDA EVIDENCE § 801.7 (2001 ed.).

As Professor Ehrhardt explains, section 90.801(2)(a), which defines an exclusion from the hearsay rule, was intended to create an exception to “the traditional rule that prior statements of witnesses who testify during a trial are admissible to attack the credibility of a witness but inadmissible *as substantive evidence of the*

¹The defense, of course, maintained that the statement was under oath, as Judge Dean found – based on Ribera's testimony that he considered himself still to be subject to the oath administered to him earlier in the evening. (T. 2228; S.R. 1231-32)

truth of the facts contained in the prior statements.” *Id.* Section 90.801(2)(a) thus allows a prior inconsistent statement to be used “*as substantive evidence of the facts contained in the statement* if it was given under oath, subject to the penalty of perjury, at a trial, hearing, or other proceeding, or in a deposition.” *Id.*

The defense never sought to introduce Ribera’s statements “as substantive evidence of the truth of the facts contained in” them, but only to establish that Ribera *made* the statements, which were inconsistent with his trial testimony and with other statements he has given in this case. The oath requirement is therefore irrelevant to the admissibility of Ribera’s videotaped statements.

B.

RIBERA’S VIDEOTAPED STATEMENTS WERE RELEVANT IMPEACHMENT EVIDENCE THAT WOULD HAVE SHOWN HIM TO BE A FUNDAMENTALLY UNRELIABLE WITNESS

The state also argues that the videotaped statements were not proper impeachment because they were not sufficiently inconsistent with Ribera’s 1998 trial testimony – even if they were internally inconsistent and inconsistent with his 1988 trial testimony. Answer Br. at 10, 12-13. The state’s argument is both factually and legally incorrect.

Ribera’s 1998 Trial Testimony

First, the videotaped statements *were* materially inconsistent with Ribera’s 1998 trial testimony in numerous respects, including how Ribera described himself and his relationship with Pardo and Garcia and the detail (or lack thereof) in his description

of the Amador/Alfonso homicides.² Thus, while it is true that in his 1998 trial testimony Ribera omitted some of the most flamboyantly self-serving details from his 1988 testimony regarding his personal financial straits, his ailing wife, etc.,³ he still depicted himself as an unemployed, naive supplicant to Pardo and Garcia, who wanted to be included in a drug deal so that he could have the same money and lifestyle that they did. (T. 2171, 2174) Ribera denied that he ever actually participated in a drug deal; he denied knowing or speaking to Sergio Godoy, another drug dealer, except as a customer at the video store where he worked and as a friend of Garcia's; and he claimed he did not learn that Godoy was a drug dealer until after an incident in which Pardo and Garcia allegedly commandeered Ribera's car and used it in a drive-by shooting at Godoy's house . (T. 2174-75, 2209-10)

On the videotape, Ribera told a very different story, in which he was the well-heeled big shot who helped the financially-distressed Garcia and Pardo in the drug business. Ribera claimed that he was in the drug business with the video store owner, and that Godoy was an associate of theirs. (S.R. 583-84, 711) Ribera referred to having frequent telephone conversations with Godoy, including on the day after the

²The state misconstrues appellant's reference to the *Millot* transcripts. Answer Br. at 10, 13. Appellant never argued, at trial or on appeal, that the transcripts should have been admitted as impeachment evidence in the Amador/Alfonso trial. The transcripts were made part of the record below, and discussed on appeal, simply to illustrate how effectively the videotaped statements were used to impeach Ribera in the *Millot* case.

³See Answer Br. at 13-14.

drive-by shooting and on the very day Ribera was interviewed by police. (S.R. 442, 714-15) Ribera said Godoy asked him to help Garcia and Pardo because they were desperate for money; that Garcia personally appealed to him for help getting into the drug business and that Ribera tried to help him. (S.R. 572, 583-84, 669, 711).

Ribera's testimony that he had never spoken to or even met Pardo before the time he was invited into Pardo's home in March 1986 was also contradicted by claims he made on the videotape that suggested either a far more intimate acquaintance with Pardo and his family or a penchant for exaggeration. *See* Initial Br. at 30-31.⁴

The fact that in his videotaped statements and his 1998 testimony Ribera characterized himself and his relationship with Pardo and Garcia in such radically inconsistent terms is relevant to an accurate assessment of Ribera's credibility. The videotaped statements are damning impeachment evidence not simply because there are inconsistencies with Ribera's trial testimony, but because of the *kind* of inconsistencies. Whether Pardo and Garcia petitioned Ribera for help getting into the drug trade or vice versa defines the nature of the parties' relationship; it is not the kind of small, factual mistake a witness makes in good faith.

Indeed, there is no explanation for these inconsistencies that does not

⁴The state asserts that the exclusion of this impeachment evidence was harmless because Ribera could still have been impeached with his audiotaped May 5-6, 1986 interview in which he similarly claimed he had seen Pardo's seven-year-old daughter shoot an Uzi. Answer Br. at 15. However, Ribera previously asserted that the transcript of the audiotaped statement was inaccurate – a claim Detective MacArthur backed up in 1988. (1988 T. 1944-46, 1948-50, 2134, 2286-87, 2337, 2339) The videotaped statements were critical precisely because Ribera could not disavow them.

undermine Ribera's credibility: Either Ribera's grandiose claims on the videotape are false, in which case he is exposed as a compulsive liar who inflates his own importance and embellishes facts, making him a deeply unreliable witness. Or, he lied in his 1998 testimony, in which he minimized his own involvement in criminal activity, making him an equally untrustworthy witness. In either case, the jury would be left with grave doubts about the veracity of Ribera's testimony regarding his own role in the crimes charged.

Ribera's 1988 Trial Testimony

Ribera's already-dubious credibility would have been further undermined by contrasting his self-aggrandizing statements on the videotape with his 1988 trial testimony, in which he tearfully claimed that he was driven to associate with Garcia and Pardo because he was "drowning" in debt brought on by his wife's grave illness.⁵ (1988 T. 2189-90, 2195, 2211)

The state does not deny that Ribera's 1988 trial testimony is radically inconsistent with his videotaped statements. Rather, the state maintains that these inconsistencies have "no relevance" to the credibility of Ribera's 1998 trial testimony and were not admissible as impeachment "unless and until" Ribera repeated the same

⁵The state suggests that the exclusion of the videotaped statements was harmless because Ribera did not repeat these claims in 1998. Answer Br. at 13-14. Unless the videotaped statements were also admitted for contrast, however, defense counsel would have no reason to bring out Ribera's self-serving 1988 testimony, which would only have reinforced the misleading, though less exaggerated, self-portrait he presented in 1998.

self-serving claims he made in 1988. Answer Br. at 10, 13-14.

This takes too narrow a view of “impeachment.” That a witness altered his testimony in an earlier proceeding in the same case – in an apparent effort to appear more sympathetic to a jury – surely constitutes “relevant and important facts bearing on the trustworthiness of [the witness’] testimony.” *See Sanders v. State*, 707 So. 2d 664, 667 (Fla. 1998).⁶ For example, in *Raupp v. State*, 678 So. 2d 1358, 1360 (Fla. 5th DCA 1996), the court held that the defense should have been allowed to cross-examine the complaining witness in a sexual battery case about her failure to mention on direct examination that she had originally accused the defendant of performing oral sex on her and to bring out the fact that DNA tests had failed to corroborate that allegation. Even though the state had dropped the charge of oral contact, the fact that the witness tailored her testimony to omit the unsubstantiated allegation was relevant to the jury’s assessment of her credibility. *Id.*; *see also American Automobile Ass’n v. Tehrani*, 508 So. 2d 365, 369-70 (Fla. 1st DCA 1987) (plaintiffs’ tax returns, which

⁶It is reversible error to preclude the cross-examination of a key witness regarding prior false statements that are relevant to the witness’ credibility. *See Cliburn v. State*, 710 so. 2d 669, 670 (Fla. 2d DCA 1998) (complaining witness’ false charges in another case were relevant impeachment); *Tacy v. Kellner*, 697 So. 2d 932, 933 (Fla. 2d DCA 1997) (plaintiff’s repeated false and inconsistent statements regarding his drug use and medical treatment were relevant to impeach credibility in personal injury action); *Clark v. State*, 567 So. 2d 1070, 1071 (Fla. 3d DCA 1990) (defendant in contempt case should have been allowed to question complaining witness about allegedly false statements in affidavit to obtain restraining order); *Jaggers v. State*, 536 So. 2d 321, 328 (Fla. 2d DCA 1988) (witness’ prior false charges were relevant impeachment); *Williams v. State*, 386 So. 2d 25, 26-27 (Fla. 2d DCA 1980) (witness’ prior false statements to police were relevant impeachment).

showed they lied in claiming lost earnings, were relevant to impeach credibility even though claim was dropped).

In this case, the jury similarly should have been allowed to know how Ribera's testimony changed: from the grandiose "wannabe" who appeared on the videotapes in 1986, to his 1988 performance – when the videotapes were withheld from the defense – as a sympathetic figure who took up with Garcia and Pardo because he needed money to pay his wife's hospital bills, to his more muted performance in 1998, after the tapes had been inadvertently disclosed to the defense.

Ribera's Description of the Amador/Alfonso Murders

The state also contends that the trial court properly excluded the videotaped statements because they did not refer in any detail to the Amador/Alfonso homicides but were concerned primarily with two unrelated murders. Answer Br. at 12. The state dismisses in a footnote appellant's contention that Ribera could have been impeached with the *absence* of detail regarding the Amador/Alfonso killings, asserting that the police interview did not constitute "circumstances in which that fact would naturally be asserted." Answer Br. at 12 n.2.

The record, however, shows otherwise. While the Hialeah police who conducted the interrogation did focus on the Musa/Quintera murders, Ribera testified that he "always told the police the truth *and I told them everything*." (T. 2292) The purpose of the interview was for Ribera to establish his credibility, so that prosecutors could rely on his statements to obtain a search warrant for Pardo's house. (S.R. 472,

570-71) Ribera asserted from the outset that Pardo and Garcia had committed five killings or more. (S.R. 707, 1626) In his audiotaped statement and then in his videotaped statement, Ribera related not only what he knew about the Musa/Quintera murders, but also what he knew about the murders of Luis Robledo, “Frenchie” Millot, and Ramon “El Negro” Alvero. (S.R. 585-86, 694, 696, 704-05, 717, 726-27, 1650-51, 1657-58, 1674-79) It therefore would have been natural for him to tell police what he knew about the Amador/Alfonso shooting as well. Instead, Ribera referred only to “this guy named Mario,” whom Ribera believed to be the brother of Luis Robledo, and whom he erroneously believed to be the man who was with Robledo when he was killed. (S.R. 603) Significantly, Garcia was acquitted of killing Robledo and his companion. (R. 50)

The lack of information about “Mario” suggests that either Ribera did *not* know much about the Amador/Alfonso shooting⁷ – until information was supplied to him – or he was hiding what he did know. *See* Initial Br. at 31-34. The defense should have been allowed to question Ribera about the apparent lack of knowledge regarding the Amador/Alfonso shootings reflected in his initial statements to police. *See Davis v. State*, 756 So. 2d 205, 206-07 (Fla. 4th DCA 2000) (defense should have been allowed to impeach witness by showing she added material details to her trial testimony that were not included in her original statement to police); *Sanjurjo v. State*,

⁷This would have been consistent with Pardo’s assertion that he alone killed Amador and Alfonso. (S.R. 216)

736 So. 2d 1263, 1263-64 (Fla. 4th DCA 1999) (defense should have been allowed to impeach victim by showing that he added facts at trial that were omitted from his deposition).

The inference of coaching is supported by the fact that, during the videotaped interview, Ribera refers to having been shown crime scene photos and states that Detective MacArthur corrected him when he confused the killing of Luis Robledo with that of El Negro, and when he inaccurately described Robledo's home, (S.R. 694, 726). The police also corrected Ribera's belief that only one .22 was used in the shootings. (S.R. 693)

Recently, in *Rogers v. State*, 26 Fla. L. Weekly S75, S78 (Feb. 15, 2001), this Court found that an audiotape of prosecutors coaching the state's star witness – who was a co-perpetrator of the crime – to iron out factual inconsistencies between his testimony and that of other witnesses was *Brady* material that would have been powerful impeachment evidence. Ribera's videotaped statements suggest that he received similar assistance in reconciling his account to fit the prosecution's needs.⁸

⁸The inference of police and prosecutorial misconduct in this case is potentially stronger: (1) Ribera's videotaped statements were internally inconsistent, and he apparently performed badly on his initial polygraph test, causing the police to repeatedly question his veracity (S.R. 516, 567-71, 575-80, 616-19, 671, 674, 710); (2) police nevertheless promised Ribera the tape would be kept confidential and assured him he could keep taking the polygraph test until he passed (S.R. 526, 651-52); (3) there was at least one Assistant State Attorney at the Hialeah police station, waiting for the polygraph to be completed so that Ribera's statements could be used to support an application for a search warrant (S.R. 472); (4) the state nevertheless failed to disclose the existence of the videotaped statements prior to appellant's 1988 trial; (5) at appellant's 1988 trial, Ribera's testimony was materially inconsistent with

See also Kyles v. Whitley, 514 U.S. 419, 443 & n.14 (1995) (evidence improperly withheld by prosecution was “material” when it would have shown “adjustments to” the witness’ story over time, raising an implication of coaching). The lack of information in Ribera’s initial statements to police and the inference of coaching were, again, “relevant and important facts bearing on the trustworthiness of [Ribera’s] testimony” that should not have been withheld from the jury. *See Sanders*, 707 So. 2d at 667.

C.

THE ERRONEOUS EXCLUSION OF IMPEACHMENT
EVIDENCE THAT WOULD HAVE BEEN
DEVASTATING TO THE CREDIBILITY OF THE
STATE’S KEY WITNESS WHOSE TESTIMONY WAS
THE ONLY DIRECT EVIDENCE AGAINST
APPELLANT WAS NOT HARMLESS BEYOND A
REASONABLE DOUBT

In *Rogers*, this Court explained that “[w]henver the government’s case depends almost entirely on the testimony of one witness, without which there can be no conviction, that witness’s credibility is an important issue in the case.” 26 Fla. L. Weekly at S78. There is no dispute that Ribera’s testimony was essential to the state’s case or that Garcia could not have been convicted without it. Rather, the state claims that because Ribera was impeached with his many other inconsistent statements, the

his videotaped statements in ways that made him a far more sympathetic witness for the prosecution; and (6) the tapes were finally disclosed only when a secretary in the prosecutor’s office inadvertently provided a copy of the videotapes to defense counsel. (T. 554; R. 96-97)

videotaped statements would have been merely cumulative. Answer Br. at 15.

The videotaped statements, however, were more devastating to Ribera's credibility than any of Ribera's other statements. Ribera's videotaped, pre-polygraph statements are a crucial because they represent his initial, untutored (or relatively untutored), version of events and, unlike the audiotaped interview that concluded shortly beforehand, the accuracy of the videotapes is unassailable. Without the videotaped statements, it was impossible for the defense to demonstrate how dramatically Ribera's testimony and persona changed over time to meet the needs of the state's case; to contrast Ribera's tearful protestations of innocence at trial with his videotaped boasts about his own role in the drug trade; or to contrast Ribera's detailed account of the Amador/Alfonso homicide at trial with the vague and inaccurate information he apparently possessed when first interviewed by police.

Where, as here, the trial court improperly "limit[s] the scope of cross-examination in a manner which keeps from the jury relevant and important facts bearing on the trustworthiness" of the testimony of "the key prosecution witness," the error is rarely harmless.⁹ See *Stradtman v. State*, 334 So. 2d 100, 101 (Fla. 3d DCA

⁹The cases on which the state relies in claiming that the error is harmless are distinguishable. In *Sanders, supra*, the defendant *confessed* to killing the victim, his palm prints were found on the truck containing the victim's body, and another witness had heard the defendant agree to kill the victim several days earlier. 707 So. 2d at 665. In *Pomeranz v. State*, 703 So. 2d 465 (Fla. 1997), the jury was apprised of the most significant impeachment – that the witness was a co-defendant who made a deal with the state to avoid the death penalty, that he had an extensive criminal record, and he had a substantial drug habit. This court therefore concluded that the exclusion of a prior inconsistent statement regarding the details of another robbery the witness

1976), *approved* 346 So. 2d 67 (Fla. 1977); *see also Pugh v. State*, 637 So. 2d 313, 314 (Fla. 3d DCA 1994) (erroneous exclusion of prior inconsistent statement required reversal where witness was critical to state’s case); *Stewart v. State*, 622 So. 2d 51, 55 (Fla. 5th DCA 1993) (improper exclusion of impeachment evidence required reversal, even if arguably cumulative, where case turned on credibility of two witnesses); *Kimble v. State*, 537 So. 2d 1094, 1096 (Fla. 2d DCA 1989) (improper limitation on cross-examination directly related to credibility of a key prosecution witness required reversal); *Fleming v. State*, 457 So. 2d 499, 503 (Fla. 2d DCA 1984) (exclusion of witness’ taped statement which was arguably inconsistent with his trial testimony was reversible error in otherwise circumstantial case), *review denied*, 467 So. 2d 1000 (Fla. 1985); *Kelly v. State*, 425 So. 2d 81, 84 (Fla. 2d DCA) (improper limitation on cross examination of state’s “star witness” required reversal even when other witnesses testified to impeachment evidence), *review denied*, 434 So. 2d 889 (Fla. 1983).

In this case, the evidence of harm is uniquely compelling, since Mr. Garcia was ***acquitted*** of related murder charges that turned on Ribera’s testimony, both when he was allowed to use the videotaped statements for impeachment and when the state proceeded without Ribera’s testimony. *See* Initial Br. at 35-36. Under these circumstances, the trial court’s error cannot be found harmless beyond a reasonable

committed with Pomeranz was harmless. In this case, as discussed above, the excluded evidence was more important for purposes of impeachment than any of Ribera’s other inconsistent statements.

doubt.

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 state answers (1) that Mr. Garcia cannot complain about Detective Merritt's vouching for Ribera because defense counsel elicited the comments on cross-examination; (2) the comments did not constitute improper vouching because the detective did not say that "he personally believed in Ribera's veracity;" and (3) the defense did not specifically object to either Merritt's testimony or the prosecutor's closing argument on grounds of improper vouching. Answer Br. at 18-21.

First, the objectionable testimony was not "elicited" by the defense, it was volunteered by the lead detective during a combative cross examination:

Q: What efforts did you make to find out whether or not Carlo Ribera was in that apartment complex the day those people were killed?

A: 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. 2379-80) This Court has held specifically that information volunteered by a witness on cross-examination is ***not*** invited error. *Czubak v. State*, 570 So.2d 925, 928 (Fla.1990). Indeed, this Court has expressed particular concern about "an

experienced detective, selectively volunteering inappropriate matters to a jury.” *Keen v. State*, 775 So. 2d 263, 275 (Fla. 2000). Here, as in *Czubak*, the witness’ answer was not responsive to defense counsel’s question, as the trial judge recognized when he admonished the detective “just to answer [defense counsel’s] questions directly.” (T. 2381)

Contrary to the state’s contention, Detective Merritt’s comments did constitute improper vouching, which includes not only direct assertions of personal belief in the witness’ veracity¹⁰ but also the implication “that evidence not presented to the jury, but known to the investigating officer, supports the charges against the defendant.” *Martinez v. State*, 761 So. 2d 1074, 1080 (Fla. 2000). Defense counsel specifically objected that Merritt was advertent to a polygraph examination that had been administered to Ribera in Tampa. (T. 2380) Detective Merritt was instructed to “stay away from areas that really are dangerous and potentially could result in a mistrial.” (T. 2381)

Nevertheless, in closing argument, the prosecutor referred to this testimony, asserting, “Merritt said over and over and over again, ‘we checked him out.’” (T. 2621) Defense counsel objected immediately. (T. 2621) The objection was overruled, and the prosecutor continued in precisely the same vein. (T. 2621) Contrary to the state’s contention that this issue was not adequately preserved, the

¹⁰Merritt did testify that, based on the putative verification of Ribera’s story, “we did not believe that he was involved.” (T. 2380)

grounds for defense counsel's objection were apparent from the context in which it was made and from defense counsel's earlier objection to Detective Merritt's testimony, which put both the trial court and the state on notice that the defense objected to the implication that Ribera's veracity had been confirmed by methods to which the jury was not privy. *Cf. Jackson v. State*, 451 So. 2d 458, 461 (Fla. 1984) (defense counsel's relevance objection sufficient in context to preserve *Williams* rule issue).

This case is analogous to *Ruiz v. State*, 743 So. 2d 1, 4 (Fla. 1999), in which this Court reversed in part on the basis of improper vouching in the prosecutor's closing argument. There, the prosecutor argued:

[MS. COX:] What interest, ask yourselves what interest does [State witness] Charles Via, Michael Witty, the Hahns, Dianne Guty and Abraham Machado have in seeing that somebody other than the person responsible for this horrible crime be convicted? ***What interest do we as representatives of the citizens of this county have in convicting somebody other than the person--***

MR. DONERLY: Objection, Your Honor.

THE COURT: Yeah, sustained.

MR. DONERLY: Move for a mistrial.

THE COURT: Denied.

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

Ruiz, 743 So.2d at 5 (emphasis in original). There, as here, the grounds for the

objection, (and, in *Ruiz*, the motion for mistrial), were obvious from the nature of the prosecutor's arguments, which this Court agreed were patently improper. *Id.*

The state's further contention that the prosecutor's comments were a fair response to attacks on Ribera's credibility is untenable on this record. *Rogowski v. State*, 643 So. 2d 1144, 1145 (Fla. 3d DCA 1994), on which the state relies, held that it was appropriate for the prosecution to elicit from its witnesses that they had promised to testify truthfully as a condition of their plea agreements, to counter defense attacks on the witnesses' credibility. *See* Answer Br. at 20. In this case, far from correcting a misleading impression created by defense counsel, the prosecutor's closing misled jurors by implying that police and prosecutors were privy to information that confirmed Ribera's credibility, when the truth was actually to the contrary. *See* Initial Br. at 40-41. This was compounded by the prosecutor's fallacious assurance to the jury that the defense had been given free reign to challenge Ribera's credibility when, in fact, the state had successfully withheld from the jury the most damaging impeachment evidence. *See* Initial Br. at 35-36.

Finally, even if defense counsel's objection was not sufficient, this Court has held that it may "consider both preserved and unpreserved errors in determining whether the preserved error was harmless beyond a reasonable doubt." *See Martinez*, 761 So. 2d at 1082-83; *accord Ruiz*, 743 So. 2d at 7 (considering properly preserved comments with "additional acts of prosecutorial overreaching" in concluding that "resulting convictions and sentences [were] irreparably tainted."). Accordingly, this

Court may consider the cumulative effect of the trial court's improper restrictions on the cross-examination of Ribera and the state's improper vouching for his credibility, which combined to fundamentally undermine the truth-seeking function of the trial. *See* Initial Br. at 66-69.

III.

THE TRIAL COURT'S REFUSAL TO 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.

On appeal, as below, the state relies on *United States v. DiNapoli*, 8 F.3d 909, 912 (2d Cir. 1993)(en banc), to justify the exclusion of Pardo's former trial testimony, which exonerated Garcia, because the state had "no interest or need to convince the jury of [Garcia's] guilt in Pardo's trial." Answer Br. at 26. The state's answer both reads *DiNapoli* too broadly and ignores the record evidence that contradicts the state's disclaimer of a similar motive. *See* Initial Br. at 45-49.

The *DiNapoli* court explained that "the opponent [of the testimony] at the first trial normally has a motive to dispute the 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." 8 F.3d at 913 (emphasis added). In this case, although the prosecution *also* had an interest in discrediting Pardo's insanity defense, Answer Br. at 24, "disbelief of" Pardo's testimony exonerating Garcia was plainly "of some significance" to the state's case. Indeed,

Pardo quickly denied on cross-examination that he was insane and disavowed the insanity defense asserted on his behalf. (S.R. 205-06) The prosecutor thereafter questioned Pardo extensively about the facts of the different crimes, including about Garcia's involvement in the homicides. (S.R. 226-28, 240-41) When Pardo responded that he acted alone, the prosecutor reacted with frank disbelief and attacked Pardo's claims in closing argument, admonishing the jury that, despite Pardo's admission of guilt, "you have to decide what is true." (S.R. 226-27, 240-41; Pardo T. 3953 3957, 3958, 3982)

Thus, contrary to the state's contention, the *DiNapoli* standard for similar motive is satisfied in this case. The fact that the prosecution failed to question Pardo more extensively on the subject does not alter the outcome. The en banc court in *DiNapoli* clarified its own precedent in *United States v. Serna*, 799 F.2d 842 (2d Cir.1986), *cert. denied*, 481 U.S. 1013 (1987), to specifically reject any implication that "lack of particularized cross-examination . . . negates a similar motive." *DiNapoli*, 8 F.3d at 914 n.5. *Serna* similarly involved an effort by the defense to introduce a co-defendant's exculpatory prior testimony, provided at the co-defendant's trial. The en banc court emphasized that the prosecution, in fact, had a very strong motive to discredit the co-defendant's testimony at his own trial but chose not to pursue the relevant line of questioning because it was unlikely to be fruitful. *Id.* That did not, the court explained, negate the existence of a similar motive. *Id.*

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.

The state answers that the trial court did not abuse its discretion in admitting entries from Pardo's diary into evidence, over hearsay objection by the defense, because the diary entries consisted merely of "random words" that "cannot constitute a 'statement,' much less a hearsay statement offered to prove the truth of the matter asserted." Answer Br. at 36.

The definition of "statement" for purposes of the hearsay rule includes "[a]n oral or written assertion." § 90.801(1)(a)1, Fla. Stat. (1997). A "person makes an assertion when that person speaks, writes, acts or fails to act with the intent to convey an expression of fact or opinion." *State v. Carlson*, 808 P. 2d 1002, 1006 n.7 (Or. 1991), *quoted in* EHRHARDT, *supra* § 801.2 at 646 n.9. In this case, the state treated Pardo's diary entries as containing assertions of fact and relied upon the entries to prove the truth of those facts. Thus, the prosecutor argued specifically that the entries meant that Pardo had obtained \$23,000 from the drug rip-off and murder of Mario Amador and that he gave "\$10,000 to Roly" as his share of the profit. (T. 2591) In so doing, the state treated Pardo's diary entries as the equivalent of a business ledger. Such documents are inadmissible hearsay unless they fall within an exception to the

hearsay rule. *See, e.g., Rae v. State*, 638 So. 2d 597, 598 (Fla. 4th DCA 1994) (ledger sheets were inadmissible hearsay in action to establish restitution for embezzlement where proper foundation not laid).

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 state answers that (1) Alan Lopez was properly permitted to testify that Amador distrusted Garcia; (2) the objection to John Hegarty, Sr.'s testimony regarding his distrust of Garcia was not sufficient to preserve the issue for appellate review; and (3) the prosecutor's improper assertion of facts outside the record was harmless. Answer Br. at 38-42.

Lopez

The state fails to address the central point that Lopez' testimony regarding Amador's supposed fear and distrust of Garcia was improper because those statements were not self-inculpatory and therefore were not admissible under the statement against interest exception to the hearsay rule, even if made in the context of a broader self-inculpatory narrative (Amador's supposed drug transaction with Garcia). *See* Initial Br. at 60-61.

The state further contends that Lopez' testimony did not run afoul of *Stoll v. State*, 762 So. 2d 870 (Fla. 2000), because Lopez did not specifically testify that

Amador was afraid of Garcia. Answer Br. at 39. Lopez testified that Amador did not want to do a drug transaction alone with Garcia because he did not trust him. (T. 2031-32) Appellant submits that the logical implication of Lopez' testimony is that Amador was afraid of Garcia. Even if the testimony is construed as the state urges, however, as conveying merely distrust of Garcia rather than physical fear, it was still inadmissible hearsay that was irrelevant and highly prejudicial. *See* Initial Br. at 62-63.

Hegarty

The state next contends that defense counsel's general objection was insufficient to preserve the claim that John Hegarty, Sr., improperly testified that he distrusted Garcia and warned Amador to beware of him. Answer Br. at 40-41. Even if unpreserved, however, this error can be considered in assessing the harm of other, preserved errors. *See Martinez*, 761 So. 2d at 1082-83; *Ruiz*, 743 So. 2d at 7. Hegarty's testimony compounded the harmfulness of Lopez' testimony that Amador feared and distrusted Garcia, which was also exacerbated by the prosecutor's improper closing argument. *See* Initial Br. at 66.

Closing Argument

The state does not dispute that the prosecutor improperly referred to facts not in evidence when she purported to quote from an answering machine message warning Amador to be careful of "Rolly," but claims that the argument was harmless because Hegarty also testified that he warned Amador about Garcia. Answer Br. at

41-42. The prosecutor's argument was harmful, however, precisely because it bolstered Hegarty's credibility by asserting that a tape that was available to the police, but not to the jury, corroborated his testimony. *See, e.g., Martinez*, 761 So. 2d at 1080 (error to imply that defendant's guilt was established by incriminating information from surveillance that was available to police but not to jury).

Penalty Phase Issues

Counsel wishes to clarify that arguments presented with respect to the penalty phase of the case are not intended in any way as a concession of guilt, as Mr. Garcia has steadfastly maintained his innocence of these charges.

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.

The state answers that “[t]he same reasoning for excluding Pardo’s testimony in the guilt phase applies equally to the penalty phase in this case.” Answer Br. at 45. The state’s argument makes section 921.141(1), Florida Statutes, which provides that the exclusionary rules of evidence do not apply at the penalty phase, a virtual nullity and erroneously equates the “opportunity to rebut” required by the case law with an absolute right to full cross-examination.

In this case, the state had the opportunity to, and did, cross-examine Pardo at his trial, including on the subject of Garcia’s role in the homicides. If Pardo’s former

testimony in fact falls short of meeting the requirements for admissibility at the guilt phase, it does so narrowly.¹¹ Cross-examination is not, moreover, the only means of rebuttal. The state would have been free to present other evidence to rebut Pardo's claim that he acted alone. *Cf. Lawrence v. State*, 691 So. 2d 1068, 1073 (Fla. 1997) (defense counsel had fair opportunity to rebut former testimony of prosecution witness where witness had been cross-examined at original trial and counsel could have offered other rebuttal evidence at resentencing).

Finally, the state's contention that there is no error because Mr. Garcia waived mitigation is erroneous. Pardo's former testimony was the one piece of evidence that Mr. Garcia asked to have considered in mitigation. (T. 2714) That evidence is directly analogous to the mitigating evidence at issue in *Green v. Georgia*, 442 U.S. 95, 97 (1979), which held that technical application of the hearsay rule to exclude the co-defendant's admission that he alone shot the victim violated the defendant's rights to due process and a fair sentencing proceeding. This Court similarly has held that such evidence is not only relevant mitigation but that it is sufficient to sustain a life recommendation. *See* Initial Br. at 72-75.

¹¹*Hitchcock v. State*, 578 So.2d 685 (Fla.1990), *vacated on other grounds*, 505 U.S. 1215 (1992), on which the state relies, is distinguishable. In *Hitchcock*, the Court found that it was not error to exclude the witnesses' former testimony because the defense had not demonstrated the witnesses were unavailable. *Id.* at 690. In this case, there was no dispute that Pardo was unavailable. *Hitchcock* also contended that the state, unlike the defense, was not entitled to an opportunity to rebut penalty-phase hearsay evidence. *Id.* No such claim is made here.

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.

Relying on *LaMarca v. State*, 26 Fla. L. Weekly S149 (March 8, 2001), the state argues that the trial court did not err in failing to discuss *any* of the mitigating circumstances proposed by defense counsel pursuant to *Koon v. Dugger*, 619 So. 2d 246 (Fla. 1993). Answer Br. at 48-49. This case, however, is distinguishable from *LaMarca*. The trial court in *LaMarca*, “recognized that it had to give good faith consideration to any mitigation in the record,” despite the defendant’s waiver of mitigation. 26 Fla. L. Weekly at S149. The trial court specifically considered six nonstatutory mitigating circumstances that had some record support but refused to consider three additional mitigating circumstances proffered by standby counsel which apparently were not supported by the record. *Id.* at S149-50. This Court held that the trial court was not required to accept the three unsupported “potential mitigating circumstances as proven based on defense counsel’s proffer of evidence.” *Id.* at 151.

Unlike the judge in *LaMarca*, the trial judge in this case drew no distinction between mitigators that were merely proffered and those that were supported by evidence already in the record.¹² He simply recited that the defendant had waived

¹²In fact, there was record support for virtually all of the mitigating circumstances proposed by defense counsel, including (1) Garcia’s age; (2) his minor participation in the crime; (3) his substantial domination by Pardo; (4) the possibility

mitigation, listed the statutory mitigating circumstances, and announced that “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. 1437-38) Thus, there is absolutely no indication that the trial judge in this case recognized that he had a duty – as this Court reaffirmed in *LaMarca* – to “consider[] and weigh[]” mitigating evidence “contained ‘anywhere in the record’” notwithstanding the defendant’s waiver of mitigation. *LaMarca*, 26 Fla. L. Weekly at S151 (quoting *Farr v. State*, 621 So. 2d 1368, 1369 (Fla. 1993)); accord *Muhammad v. State*, 26 Fla. L. Weekly S37, S42 (Jan. 18, 2001).

Where, as here, “the trial court does not conduct . . . a deliberate inquiry and then document its findings and conclusions, this Court cannot be assured that it properly considered all mitigating evidence” and is “precluded from meaningfully reviewing the sentencing order.” *Walker v. State*, 707 So.2d 300, 319 (Fla. 1997). The appropriate remedy is to “vacate the sentence of death and remand for a proper evaluation and weighing of all nonstatutory mitigating evidence” *Id.*

The state’s insistence that any error was harmless because, in the state’s view, the aggravating circumstances necessarily outweigh the mitigating circumstances, Answer Br. at 49-51, is belied by the jury recommendations in this case. As discussed

of consecutive life sentences; (5) lack of intent to kill; and (6) good trial conduct. See Initial Br. at 77-78. The only proposed mitigating circumstance that could reasonably be considered only a proffer was the defendant’s positive family relationships, though even that could have been observed by the trial judge during the course of the trial.

in issue IX, *infra*, Garcia should have received the benefit of the 1988 jury's life recommendation for Amador's murder. The 1998 jury recommended death for Alfonso's murder by only a one-vote margin, despite Garcia's waiver of mitigation, suggesting that the jury had serious questions about the degree of Garcia's culpability and quite possibly about the credibility of Ribera's testimony which was the basis for the CCP aggravating circumstance. (T. 2744-45, 2760, S.R. 1-2, 1436-37) The trial court's complete failure to consider the proposed mitigating circumstances therefore cannot be presumed harmless.

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.

The state answers that because this Court did not review the trial court's 1988 override of the jury's life recommendation for the murder of Mario Amador, Garcia was never acquitted of the death penalty. Answer Br. at 53. The state further maintains that Garcia should have no remedy for this oversight. Rather, relying on a number of cases involving individual aggravating circumstances, the state asserts that "the slate [was] wiped clean" by this Court's 1990 reversal, leaving the state free to again seek the death penalty and forever stripping Garcia of the benefit of the jury's 1988 life recommendation. Answer Br. at 53-54.

The state's argument that Garcia lost the benefit of his life recommendation when this Court granted him a new trial is directly contrary to *Wright v. State*, 586 So.2d 1024, 1032 (Fla. 1991), in which this Court held that it "would be fundamentally unfair and inconsistent with the Florida Constitution" to "force death-sentenced prisoners to risk giving up the life recommendation by arguing for a new trial." Appellant submits that the state constitutional principles of due process and double jeopardy that underpin *Wright* require this Court, in the unique circumstances of this case, to belatedly review the propriety of the trial court's override under *Tedder v. State*, 322 So. 2d 910 (Fla. 1975), to determine whether "the defendant must be deemed acquitted of the death penalty for double jeopardy purposes." *Wright*, 586 So.2d at 1032.

This Court recently granted similar relief in a case involving a capital defendant's competency to proceed in postconviction proceedings. In *Ferguson v. State*, 26 Fla. L. Weekly S313 (May 10, 2001), the defendant asked this Court to apply retroactively its decision in *Carter v. State*, 706 So. 2d 873 (Fla. 1997), establishing a capital defendant's right to a competency determination in postconviction proceedings, and to review on the merits the trial court's 1989 determination that Ferguson was competent to proceed. *Ferguson*, 26 Fla. L. Weekly at S313. After finding that *Carter* should indeed be applied retroactively, this Court agreed that the appropriate remedy was to revisit the merits of the competency issue that Ferguson had raised on appeal from the denial of his first motion for post-conviction relief. In

the first appeal, this Court had summarily rejected Ferguson’s claim that he was entitled to a competency determination without reaching the merits of the trial court’s finding of competence. *Id.* at S315.

Citing “this Court’s solemn constitutional responsibility to review capital cases” and “the recognition that death is a uniquely irrevocable penalty, ***requiring a more intensive level of judicial scrutiny or process than would lesser penalties***,” this Court proceeded to review the issue it had overlooked in Ferguson’s earlier appeal. *Id.* (quoting *Tillman v. State*, 591 So. 2d 167, 169 (Fla. 1991) (emphasis in original)). That is precisely the remedy appellant seeks here, and it is particularly appropriate in light of “the importance attributed to the jury’s recommendation under our death penalty statute.” *See Craig v. State*, 685 So.2d 1224, 1230 (Fla. 1996) (because defendant was entitled to benefit of original life recommendation in resentencing, trial judge could not consider new aggravating factors).

For example, even when this Court has affirmed an override on direct appeal, the defendant does not lose the benefit of the life recommendation. Rather, when assessing the prejudice of ineffective assistance of counsel or other errors at the penalty phase, the Court asks whether mitigating evidence that could have been presented, but wasn’t, would have provided a reasonable basis for the life recommendation. *See, e.g., Torres-Arboleda v. Dugger*, 636 So.2d 1321, 1325-26 (Fla.1994); *Stevens v. State*, 552 So. 2d 1082, 1086-87 (Fla. 1989). If the defendant is ultimately granted a new sentencing hearing, this Court has explained that:

Because the defendant has already received the benefit of a life recommendation, it would be improper to summon another jury, which could recommend death. It also would be unfair--as well as pointless--to have the judge bound by our previous approval of the override, since new evidence has been presented. The trial judge, therefore, must weigh all the evidence, old and new, and determine if there was a reasonable basis to support the jury's recommendation.

Buford v. State, 570 So.2d 923, 924 (Fla. 1990). Thus, while the specific circumstances of this case present an issue of first impression, the relief appellant seeks is dictated by this Court's well-settled precedent regarding the legal significance of a jury's life recommendation in Florida's capital sentencing scheme.

With respect to the merits of this issue, the state has done nothing more in its answer than set forth the text of the trial court's 1988 sentencing order – the inadequacy of which is addressed at length in the initial brief, at 83-94.

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 state answers that appellant's challenge to the Florida sentencing statute pursuant to *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000), is not preserved because *Apprendi* was decided after the sentencing in this case was concluded and no similar constitutional challenges were asserted in the trial court. Answer Br. at 61. This

Court may, however, consider the issue as one of fundamental error. Facial challenges to the constitutionality of a statute – in this case, section 921.141, Florida Statutes – that raise “fundamental ‘liberty’ due process” issues may be raised as fundamental error for the first time on appeal. *See Johnson v. State*, 616 So. 2d 1, 3 (Fla. 1993); *see also Trushin v. State*, 425 So. 2d 1126,1129 (Fla. 1982).

Appellant acknowledges that this Court, in *Mills v. Moore*, 26 Fla. L. Weekly S242, S244 (April 12, 2001), held that *Apprendi* did not invalidate Florida’s capital sentencing scheme, including its override provision, because the Supreme Court did not overrule *Walton v. Arizona*, 497 U.S. 639 (1990), which upheld the constitutionality of judge sentencing in capital cases. Appellant respectfully submits that *Apprendi* does not foreclose the issue presented here, since the four dissenting justices in *Apprendi* indicated that the majority’s decision could **not** be reconciled with *Walton*, and Justice Thomas declined to take a position on the issue, which was not presented in *Apprendi*. *See Apprendi*, 120 S. Ct. at 2387-89 (O’Connor, J., dissenting, with Rehnquist, C.J., and Kennedy and Breyer, JJ.); *id.* at 2380 (Thomas, J., concurring). Appellant further submits that *Mills* relied erroneously on the denial of *certiorari* in *Weeks v. Delaware*, 121 S. Ct. 476 (2001), as precedential authority for the proposition that *Apprendi* does not apply to capital sentencing schemes. It is well-settled that the denial of *certiorari* “imports no expression of opinion upon the merits of a case” and therefore has no precedential value. *See House v. Mayo*, 324 U.S. 42, 47-48 (1945), *overruled on other grounds, Hohn v. United States*, 524 U.S.

236 (1998). This Court should therefore address the merits of whether Florida's capital sentencing scheme comports with the due process requirements set forth in *Apprendi*. See Initial Br. at 94-100.

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,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1320 N.W. 14th Street
Miami, Florida 33125
(305) 545-1958

BY: _____
CHRISTINA A. SPAULDING
Assistant Public Defender
Florida Bar No. 995320

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, Assistant Attorney General, 2002 N. Lois Avenue, Suite 700, Tampa, Florida 33607-2366, this __ day of May 2001.

CHRISTINA A. SPAULDING
Assistant Public Defender

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Florida Rule of Appellate Procedure 9.210(a)(2), that the type used in this brief is 14 point proportionately spaced Times New Roman.

CHRISTINA A. SPAULDING
Assistant Public Defender