**IN THE SUPREME COURT OF FLORIDA**

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| SETH PENALVER, | ) | |
| | ) | |
| Appellant, | ) | |
| | ) | |
| vs. | ) | CASE NO. SC00-1602 |
| | ) | |
| STATE OF FLORIDA, | ) | |
| | ) | |
| Appellee. | ) | |
| | ) | |
| _____ | ) | |

# INITIAL BRIEF OF APPELLANT


CAREY HAUGHWOUT
Public Defender

JEFFREY L. ANDERSON
Assistant Public Defender
15th Judicial Circuit of Florida
Florida Bar No. 374407
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(561) 355-7600

Attorney for Seth Penalver

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## PRELIMINARY STATEMENT

Appellant was the defendant and appellee the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida. In this brief the parties will be referred to as they appear before this Court.

References to the Record on Appeal will be denoted by a Roman numeral, the symbol "R", and the page number.

References to the Trial Transcript will be denoted by two numbers separated by "/". The first number is the transcript volume number and the second number is the page number of the trial transcript which is consecutively numbered throughout the volumes.

## STATEMENT OF THE CASE

Appellant, Seth Penalver, and Pablo Ibar, were charged by indictment with three counts of premeditated murder in the first degree, one count of robbery, one count of attempted robbery, and one count of burglary IR8-10. A jury trial was held and a mistrial due to a hung jury resulted IXR797. Another jury trial commenced on January 11, 1999. At the close of the State's case, Appellant moved for judgment of acquittal 91/12068. Appellant's motion was denied 91/12086. Appellant was found guilty of each offense as charged XR1825-30. Appellant moved for a new trial IXR1738-60. The motion was denied.

At the penalty phase Appellant proclaimed his innocence and waived presentation of mitigating evidence 110/14707,14710. Appellant's counsel moved for appointment of public counsel

IXR1728-32. The motion was denied IXR1832. The jury's recommendation was unanimous for death. On July 27, 2000, the trial court sentenced Appellant to death on the three counts of murder in the first degree and to life in prison for burglary and robbery, and to 15 years in prison for attempted robbery XR2000.

On July 28,2001, a timely notice of appeal was filed XIR2029-30. This appeal follows.

## STATEMENT OF THE FACTS

On June 27, 1994, the bodies of Casimir Sucharski (a/k/a Butch Casey), Sharon Anderson and Marie Rogers were discovered in the residence of Sucharski 42/5242. All three died from gunshot wounds 42/5343.

There was a dramatic change in Sucharski's character a week or two prior to his death 47/5948,5970. He became security conscious 47/5948. He was almost predicting his death 47/5970. The day before his death he was so upset he was ready to cry 49/5948.

Peter Bednarz worked as an assistant manager at Sucharski's club -- Casey's Nickelodeon 46/5916. Bednarz was also one of Sucharski's closet and most trusted friends 47/5986. Sucharski had run ins with his employees at times 46/5933. Sucharski was a very secretive person 47/5962. Even Bednarz did not know Sucharski's real name or where he lived for a year or two 47/5964. Sucharski kept money in his shoe 46/5931. Only a couple of other people including Kristal Fisher, would know where Sucharski lived and that he had money in his boots 47/6005.

Bednarz testified that he installed a surveillance camera in Sucharski's residence eight days before Sucharski's death 47/5976. The camera was installed due to Kristal Fisher 47/5977. Sucharski had recently kicked Fisher out of his house 47/5977. Sucharski was concerned because Fisher moved in with someone he suspected to be a drug dealer 47/5978. The drug dealer was 160-170 pounds and approximately 5'9" tall 47/5981. Police never asked Bednarz about the drug dealer in investigating Sucharski's murder 47/5985. Bednarz tried to find Fisher after Sucharski's murder, but she had disappeared 47/5985.

Kristal Fisher testified that she lived with Sucharski for almost two years 57/7494. Three weeks prior to the murder, Sucharski kicked Fisher out of his house 57/7505. Sucharski put a gun to her head that day 58/7693,7695. Sucharski literally threw her clothing out of the house 57/7507. Jewelry was left behind 57/7508. Fisher was distraught about Sucharski's death and decided to travel to Thailand, India, Germany and Laos 57/7509. She did not let the police know where to contact her 57/7535. Fisher knew she was a suspect and that no one knew how to find her 58/7658-59. Fisher also testified that the police could have found her if they had asked Terry Franks 58/7641.

The video surveillance camera that Bednarz had installed recorded the killing of Sucharski, Anderson and Rogers. The videotape was introduced into evidence as State's Exhibit Number 2. The videotape shows that two intruders entered the residence at 7:18 a.m. and left the residence at 7:40 a.m. 51/6643-44.

The videotape showed the following: A male and two females were in the residence. Two disguised intruders entered the residence. One of the intruders was dressed in white and had something covering his face and head and the other intruder wore a cap and sunglasses. Throughout the video the intruder dressed in intruder constantly moved about the residence and would return to where the victims and the other intruder were located. At one point, Sucharski's pockets were searched and his boots were removed. At another point, the intruder dressed in white cleared a shelf by swiping the objects with his hand. The intruder then appeared to throw an object at Sucharski. Toward the end of the intrusion, the intruder in white braced himself on a table with his hand. The intruder then began vigorously wiping the area of the table where his hand touched. The victims were then shot. The intruder in white then walked out of the camera's view. He returned and removed his disguise. The intruders left the residence at 7:40 a.m.

Firearm examiner, Carl Haemmerle, testified that the weapon in the video looked like a Tech-9 or K.G. product 46/5866.

The police went through the house for two days 44/5526. Certain areas of the house were ransacked while other areas were undisturbed 44/5525. The intruders left valuable looking jewelry behind, including some diamonds and gold 44/5525,5517. There were three safes in the house 44/5482. A black lockbox had a bullet strike on its surface 41/5132-33. It could not be determined whether the intruders got what they were after 44/5525;53/6978.

Inside the house live and spent .9 mm and .380 casings were found 44/5484. A shoe print impression in blood of one of the intruders was found 43/5397. There was also a patent foot impression in the carpeting 44/5494. A mask was found outside at the edge of the property 43/5414;44/5494. A blue T-shirt with trace evidence was found outside 43/5356;44/5500.

The police took a frame from the videotape and produced a flyer which was sent out to police agencies 48/6170. (State's Exhibit 128) 48/6172.

Approximately three weeks later, the police received a call from the Metro-Dade Police Department stating that they had someone in custody who looked like the person in the flyer 48/6189. Pablo Ibar, Alberto Rincon and Alex Hernandez had been arrested for a home invasion robbery 48/6190;52/6722.

Detective Paul Manzella talked to Pablo Ibar. Ibar said he was with a girl named Latisha and a friend named John Klimeczko on June 26, 1994. Ibar eventually went home and did not wake up until Monday, June 27 52/6732. Manzella took the shoes of Pablo Ibar, Alberto Rincon and Alex Hernandez because a bloody shoe imprint had been left at Sucharski's house 52/6766. There were others suspected of the Sucharski murder, but due to Ibar, the investigation of others was dropped prior to its conclusion 53/7000-01. Manzella testified that Appellant became a suspect after showing the flyers to Jean Klimeczko.

Gary Foy testified that he lived six houses from Sucharski 47/6023. Foy left his house on Sunday morning at 7:00 a.m., or at 7:15 a.m. 47/6025-27, but no later than 7:20 or 7:30 a.m.

47/6030-31. Foy drove past Sucharski's house and saw two men sitting in a Mercedes 600SL 47/6031. Foy knew it was Sucharski's car because it was a convertible Mercedes 47/6032. It was the only car in Sucharski's driveway 47/6033. The Mercedes backed out and traveled behind Foy for 5 or 10 minutes 47/6032,6035.

Foy testified that the passenger had short hair, a scruffy face and wore a white shirt 47/6043. Foy could not identify the driver 47/6062. Foy only knew that the driver had kind of long hair 47/6062. The driver's hair went midway between the top and bottom of his ears 47/6101. The driver's hair touched the back of his shoulders 47/6139. The driver's hair did not run down his back, but it did touch the low part of his shirt collar 47/6139. Foy testified that he picked photo #5 and #1 from a lineup 48/6156. Detective Craig Scarlett testified that Foy said #5 looked like the passenger in the car 48/6196. Photo #5 was a photo of Pablo Ibar 48/6192-94. Scarlett testified that Foy also made reference to #1 48/6196. Appellant's photo was in the lineup, but Foy did not identify him 55/9395.

Melissa Munroe testified that she was Appellant's girlfriend from 1988-1990 and he stayed with her in 1994 after her mom died 59/7822,26. Appellant had short hair 66/8764,8851. Appellant's hair did not go over his ears 66/8765. Appellant drove a maroon Cutlass 59/7827. Munroe had known Pablo Ibar all her life. She did not know that Appellant and Ibar were friends.

At trial, Munroe did not recognize the person in the flyer photo (Exhibit 6-X) from the videotape 63/8445.

In front of the grand jury, Munroe testified that one photo looked like Pablo Ibar and another photo looked like Appellant 63/8453,8457. Munroe testified that she was not identifying anyone and said that she signed the photos because she was asked to 63/8459-62. The person with the glasses and hat could have been anyone 63/8460,8462;66/8836-37. Munroe was asked to sign both photographs and she complied 63/8459.

Munroe testified that on August 4, 1994, she was shown photos by the police at 4:00 a.m. 63/8470,8475. Munroe told the police that she did not know who was in the photos 63/8465. The police wanted Munroe to say it was Appellant and Ibar in the photos and kept asking the same questions over and over 63/8486. Police asked Munroe which photo resembled Ibar and which one resembled Appellant 63/8493. Munroe told them there was no way she could say that the man in the hat was Appellant, but if she was forced to choose she would say one was Pablo Ibar and the other one (in the hat) would then be Appellant 63/8493,8494. Munroe initially told the police that she would not sign the photos, but finally acquiesced because the police said it was no big deal if she signed because it was not an identification 63/8496. Munroe felt pressured into signing the photo 63/8498. Police took a taped statement later that morning at 6:45 a.m. 63/8474. Police told Munroe because she was not making an identification to be short on the tape and not to elaborate 63/8499. Munroe testified that she did not feel the need to explain on tape that she was not identifying anyone because she

had already explained that to police 66/8813. The prosecutor read portions of the taped statement in questioning Munroe:

> Q And then the next question was: "Okay. And at that time do you recall being shown two photographs?"
> And your answer was: "Yes." Correct?
>
> A Uh-huh. Yes.
>
> Q And the next question was: "Okay. And for the record, would you indicate to us what names you placed to the individuals depicted in the photographs?"
> And your answer is: "That left photograph is Pablo Ibar and the right photograph is Seth."
>
> A Correct. As they laid the photos down in front of me, that were already signed, that we already went through them, that's why I said the left one is – I had already signed it. We had already went through all of that. And I said that.
>
> * * *
>
> Q Okay. Now, the photographs that we're referring to, that you sighed and dated, that you – in response to that question, those questions, when you responded the left photograph is Pablo Ibar and the right photograph is Seth, are the same photographs in 6-Y; correct?
>
> A Yes, but you're taking that out of context by saying it right there. I know it says it right there, but you have to understand how it is, what's happening.
> I already signed the pictures. We were already in the police department, going through all of that.
> Like I said, I didn't realize, I thought they were doing like a summary of what we had discussed.
> I didn't feel I had to go into all the details, when he asked me this question right here, okay, "and, for the record, would you indicate to us what names you placed on them."
>
> 63/8503-04.

Munroe's testimony at an August 31, 1994, hearing was read into evidence as follows:

> "Question: And did you that night on August 4th make an identification?"
>
> "Answer: So-to-speak I said that it resembles them. And they had me put my name on the back and I told them that I was not identifying the pictures. And they said because you said it looks like it, can you please put your name on the back."
>
> * * *
>
> "Question: And who did you tell the police that the photographs looked like?"
>
> "Answer: I told them it resembled Pablo Ibar."
>
> "Question: And who did you say the photograph on the right looked like?"
>
> "Answer: I said it resembled Seth."

64/8579-80.

Munroe's testimony from the 1997 trial was read into evidence as follows:

> "Right. You're asking me why I signed – or what was the reason my name is put there. That's the reason, because there was a resemblance and that's how the police said it to me.
>
> "If I would have said anything else, you would have tried to day I – that I wasn't giving you the right information. That's why the name's put on there. That's why they told me to put my name on there, because they had me say it resembled them when they narrowed it down. I don't know how."

64/8593.

Munroe testified that on a Sunday at 5:00 a.m. she saw Appellant at Casey's Nickelodeon 59/7858-61,7864. Appellant wore a nice dress shirt and pants 63/8405. Appellant's shirt was darker than the person's shirt in the video 63/8441. Munroe

saw Ibar at another part of the club 59/7863. Munroe did not see Appellant and Ibar together 66/8826. At approximately 2:00 a.m., Appellant was totally intoxicated 66/8824. Appellant asked Munroe if she wanted to go home with him 66/8825. Munroe did not remember on which weekend this occurred except that it was sometime before the murder 59/7874,7903.

Jean Klimeckzo testified that he was a friend of Pablo Ibar. Klimeckzo lived with Ibar at his Lee Street residence in 1994 67/8915. Alberto Rincon and Alex Hernandez also lived there 67/8912. Klimeckzo met Appellant through acquaintances 67/8910.

Klimeckzo testified that he did not remember seeing Appellant or Ibar on the weekend of the murders 67/8949. Klimeckzo has a general memory of questioning by police and being shown some pictures 67/8949-50. At trial, Klimeckzo did not recognize who was in the photos 71/9408. Klimeckzo's memory was not refreshed by reading the transcript of the August 31, 1994 hearing 67/8953.

The following from a transcript of the August 31, 1994, hearing came in evidence:

Klimeckzo, Pablo Ibar, Alberto Rincon, Appellant and a group of friends went to Casey's Nickelodeon on June 24, 1994 67/8989. They stayed out until 6:00 a.m. on Saturday morning 67/8990. Then they went to Ibar's house 67/8991. A bunch of people, including Appellant, were in and out of the residence that

Saturday 67/8992. Appellant and Ibar went out Saturday night 67/8992-93. They returned approximately 5:00 a.m. 67/8994. Ibar grabbed a Tech-9 and the left 67/8994. Klimeckzo saw Appellant's car and a big black shiny car 67/8998. Ibar and Appellant left 67/8999. They later returned in mid-afternoon 67/9000. They were in Appellant's car 67/9001. Klimeckzo was later questioned about two photos by police 67/9004. Klimeckzo said the photos were of Appellant and Ibar 67/9005.

Additional testimony from the August 31, 1994, hearing was read into evidence: Police came to Klimeckzo's house and showed him photos. A police office thought one of the photographs was of Alex. Klimeckzo apparently told the officer that the photograph was of Seth and not of Alex. Klimeckzo knew that Pablo Ibar and Alex Salazar had been involved in a home invasion robbery in Dade County 68/9096-9104.

Klimeckzo testified that he was probably under the influence of alcohol and a controlled substance when he came to court on August 31 71/9427.

Klimeckzo testified that he remembered police showing him some photographs, but could not remember which photographs he was shown 68/9113. The prosecutor read into evidence police statements showing that Klimeckzo identified Ibar and Appellant 69/9154-55. When Klimeckzo was asked about the photo of the individual with glasses he indicated that one could find a

hundred people who looked like that person 69/9158. In the police statement, Klimeckzo said that Appellant and Ibar pulled up at 7:00 a.m. in a big black car that looked like a detective's car 71/9396-97,9447.

Klimeckzo testified that he does not remember seeing a Tech-9 at the Lee Street location 69/9175. Klimeckzo remembers that the police showed him very different photos from Exhibit 151 70/9299. The police presented him pretty clear photos 70/9299. Klimeckzo was possibly angry with Appellant 70/9311. Klimeckzo admitted that he could have fabricated just because he was angry 71/9339.

Klimeckzo testified that his lack of memory was not to help Appellant. Appellant was never a friend 71/9397. The lack of memory was possibly due to the use of narcotics 71/9348. Klimeckzo told the prosecutor at the preliminary hearing that he was high the Saturday night in question and was doing a lot of drugs 71/9348. Klimeckzo was under the influence 71/9349,9363. Klimeckzo remembers that the photos the police showed him were clearer than any photos he has seen at trial, but admitted that previously he was so high that his perception had nothing to do with the reality of what he was shown 71/9362. Klimeckzo cannot make out who is in the photos now 71/9408.

Detective Manzella testified that Munroe and Klimeckzo identified Appellant and Ibar from the flyer 75/9950,9956.

Ian Milman testified that he lived with Pablo Ibar and Alex Salazar a/k/a Alex Hernandez at the Lee Street address 72/9471, 9477. Alberto Rincon, Jay Taylor and Jean Klimeckzo also spent nights there 72/9474. Milman was introduced to Butch Casey (a/k/a Casimer Sucharski) at Sucharski's club by Pablo Ibar 72/9493. Milman did not think that Ibar really knew Casey because he thought Casey was just being friendly to everybody 72/9498.

Milman testified that police showed him a couple of grainy, shady photographs, but he could not recognize anybody 72/9523-24. Milman signed the photos because he was told to 72/9531. Milman signed the photos for police to show that he had been shown the photos 72/9525. The police kept asking Milman if he recognized anybody in the photos and Milman kept saying that he could not 72/9530-31. Milman was shown the same photographs in court, but does not know who is in the photos 72/9528.

Milman testified that he never made an identification to the Grand Jury 72/9541. Milman could not determine who was in the hat and glasses 72/9544-45. Milman testified that he had seen a Tech-9 in Alex Hernandez' closet at the Lee Street house 72/9553. The Tech-9 was typically locked in Alex's room 73/9715-16.

Milman testified that he came back to the Lee Street house Sunday morning between 6:00 a.m. and 7:00 a.m. 73/9721.

Klimeckzo was tearing everything apart and was running around saying “I need a gun. I need a gun.” 72/9586;73/9714. Klimeckzo kept going into Ibar’s room 73/9686. Milman passed out and when he awoke Ibar and Jay said Klimeckzo had been kicked out 73/9686.

Robin Rice-Otero testified she has known Appellant since middle school 92/12226. When police discovered that Otero knew Appellant, they asked her if she recognized him in the videotape photo 92/12228-29. Otero was certain that the photos were not of Appellant 92/12228-29. The police asked her repeatedly if she was sure it was not Appellant and she said, “Yes” 92/12228-29.

Dr. Mehmet Iscan was declared an expert in the area of anthropology 95/12658. Iscan teaches facial reconstruction and image analysis 96/12699. Iscan previously investigated the 1987 case of whether a photo of a Nazi was John Damjanjuk and developed a methodology of comparing video images with other photos or person 96/12676. Iscan also wrote a book on human facial identification 96/12677. Iscan took photos and measurements of Appellant and compared them to the images and photos of the man with the hat and glasses in the videotape 96/12688-71;102/13654-55. Because the suspect wore glasses and a hat, only one-half of his face was ever exposed 96/12704. Neither

the eyes nor teeth were visible 97/12881. Also, the quality of the video was bad 97/12798.

Because of the quality of the video and photos, Dr. Iscan could not reach a positive conclusion of whether the person in the video was Appellant 96/12755,12762. However, discrepancies in the lower half of the face would lean toward a conclusion that Appellant was not the person on the videotape 96/12762. Appellant has a pointed chin while the person on the video has a rounder or square chin 96/12749. Appellant also has a more pronounced nose than the person on the video 96/12749. Appellant has more of a straight face than the man on the video 97/12778. There were a lot of anthrodometric and morphological discrepancies between the two men 96/12757. Due to the differences Appellant should not be considered the man in the video 96/12763. Iscan could not come to a positive conclusion, but it is more likely than not the person in the video is not Appellant 97/12784,12810.

State witness Dr. Walter Birkby was declared an expert in the field of forensic anthropology 99/13170-74. Dr. Birkby reviewed the videotapes and enhanced photos taken from the tape 99/13181-84. Birkby could not make a determination whether the image was Appellant 99/13181-82. The enhancement photos lacked so much detail that it was difficult to find certain facial features 99/13198. One cannot see the eyes, parts of the nose,

the shape of the lips, or the ears or wrinkles of the suspect 99/13286. The video had the same quality problems. Birkby testified that he could not make comparisons because "they are that bad" 99/13202. Birkby testified, "If you've got a poor unknown photo, I don't care what you do, you can massage it any way you want to, if it's poor it's going to be poor in the end" and he could not reach a conclusion 99/13206. Birkby recognizes Dr. Iscan as one of the best in the field 99/13249. However, Birkby cannot pick out the shapes of the eyes, nose or lips to make comparisons 99/13259.

Miramar police took Appellant's shoes from him at the Broward County Jail 89/11891-92. Fred Boyd, a latent print examiner, testified that he also performs footwear examinations 87/11609. A number of footwear impressions were found at the scene of the homicide – including an impression of a bloody shoe print 87/11624-33. There were minute, and individual, characteristics in the print 87/11676. Boyd received shoes from the Lee Street residence, the Miami Police Department, and Appellant to compare to the shoe prints left at the scene 87/11654,11664,11680. Boyd testified that one shoe matched the impression 87/11676. The sneaker had blood on it 86/10424. However, Boyd was not confident in saying for certain that there was a match 86/11711. Boyd eliminated Appellant's shoes as having made any impressions found at the scene 87/11681,11705.

According to measurements the impressions at the scene compared to a size 10 or 11 shoe 85/11189. Appellant's shoe is 7½ 87/11713.

Latent print examiner Herbert Jacoby testified that 94 latent prints of value were taken from the crime scene and compared to sets of known prints including Appellant's prints 7l8/10372-76. 61 prints were identified and 33 were unknown 78/10377. 57 of the prints belonged to Sucharski 78/10380. 2 prints belonged to Sharon Anderson 78/10392. A few prints belonged to Kristal Fisher 78/10380. None of the prints belonged to Appellant 78/10391. Jacoby testified that the unidentified prints could have belonged to the intruders 78/10394. Appellant's prints were found in Appellant's car 78/10385. The prints of Ibar, Hernandez or Rincon were not found in Appellant's car 78/10391.

Howard Seiden, an expert in the field of forensic hair identification, testified that he examined the blue shirt found outside Sucharski's residence 75/9919. There were 7 human hairs and 5 animal hairs taken from the shirt 75/9924. Some of the hairs were Caucasian and one was Negro 75/9927. None of the hairs was consistent with Pablo Ibar 75/9926.

Crime scene investigator Robert Haarer collected Appellant's clothes for blood and vacuumed Appellant's car 77/10292-83,10317. Haarer testified that if the person walked out with

blood into the vehicle there would be a good chance of serology transfer 77/10318.

Appellant's car tested negative for blood 78/10429. The prints of Ibar, Hernandez or Rincon were not found in Appellant's car 78/10391.

Marlene Vindel Martinez did housework for Pablo Ibar's mother in 1994. She testified that photographs 133 and 135 (State's Exhibits 6H) look like Pablo Ibar 50/6455. Martinez never told police that she was certain that the photos were of Ibar 50/6460.

Roxana Peguero, Marlene Martinez's daughter, testified that she was present when 5 or 6 police officers came to the residence of Maria Casas [Pablo Ibar's mother] 50/6468-70. Maria said, "Oh, my God, that's Pablo" 50/6468-69. Officer Scarlett showed a photo to Peguero and asked, "Does this look like Pablo?" 50/6471. He kept asking the question over and over so "we" said that person looks like Pablo 50/6471-72. Peguero was nervous and did not identify Pablo 50/6487. Peguero had not seen him in a long time so she did not know 50/6472. Peguero was asked to sign the photo 50/6476. Peguero testified that she could not identify the person in State's Exhibit 135 50/6479.

The prior trial testimony of Maria Casas was read into evidence 51/6577,6604. Pablo Ibar is her son 51/6578. Casas had seen Appellant only once or twice 51/6575. Police came to

her house to search Pablo's room 51/6582. Casas did not identify anyone that day 51/6585. Police showed her a photo, but she did not make an identification 51/6585. They said, isn't this Pablo and she replied, no, it's not 51/6601. Casas testified it was not Pablo 51/6601. Casas testified that she has never see State's Exhibit 35 (the blue T-shirt found at the scene) before 51/6593.

Jeannie Smith testified that she saw Pablo Ibar and Alex Hernandez in Casey's Nickelodeon on the Wednesday before them murders 75/9997-98. Ibar had a dispute with Sucharski over paying his bill 75/10000-11.

Dennis Meads works for Consolidated Electric Supply 50/6491. the blue T-shirt found at the scene was a T-shirt given away in promotions 50/6493. Thousands of these shirts were given out 50/6496. There is no way of telling who got a shirt 50/6499.

Detective Scarlett testified that he never asked Casas, Peguero or Martinez if the photo looked like Pablo 50/6501. Scarlett testified that the witnesses identified Ibar 50/6508-16.

Kimberly San testified that she moved in a house with Appellant around the first of June, 1994 83/10904-5. On June 27th, San and her relatives went to the residence to pick up moving boxes 83/10906-09. San drove and her brother Brian and Dave Phillips were right behind her 83/10918. They arrived at

8:01 or 8:02 84/11045. When San arrived she saw the garage door closing with a black car inside 83/10918. She went inside the house with Brian and Dave right behind 84/11142. There was a guy standing in the kitchen 83/10918. San had not seen the guy before and asked him who he was 83/10918-19. He said, “Pablo” 83/10918. San walked through the kitchen to the garage and saw Appellant 83/10918. San concluded the black car was a Mercedes due to its peace sign-type emblem 83/10919;84/11064. San asked Appellant where he got the car and he said it was a friend’s 83/10923. Appellant was at the house for 10 minutes and then left 83/10924. Appellant drove off in his Maroon Olds and Pablo drove off in the black car 83/10924. San saw pinkish bubbles coming from the washing machine 85/11049. A lot of them were on the floor 85/11058-59.

San testified that she came to realize in August of 1994 that Appellant was involved in the murder 84/11099-11100. San called the Broward County tips line but was told that they had enough information and they did not need her information 84/11102. Previously, San had denied that she had tried to contact anyone about this information 84/11104. In deposition, San had testified that she did not go to authorities in March of 1995 because she was afraid of Appellant 84/11115. In January through April of 1995, San wrote intimate letters to Appellant which included requests by San that she be placed on a contact

visit list so she could “come and see my sweetheart” 84/11115-37;85/11155-78. San traveled from Tennessee to Florida to visit Appellant in jail 84/11122. San posed as Appellant’s sister 84/11122,11127. San invited Appellant to come live with her 85/11153.

San testified that she went to authorities in 1997. San testified that it beat her up inside for three years to have the information about Appellant 85/11152. San’s fiancé is Bill Grace 85/11212. Grace was convicted in 1996 for aggravated battery on a pregnant female and possession of a gun by a convicted felon 85/11212. In February of 1997, San offered to give Grace’s attorney information against Appellant in return for keeping Grace out of prison 85/11217,11219.

San testified that she could not identify the face of the image in the video and photos because the face was too blurry 85/11256. However, she knows that person was Appellant based on the way he walks and the way he put the gun in his trousers 85/11256. San is unable to explain or describe what is distinctive about Appellant’ walk 85/11257-58. San does not know which hand the suspect used to put the gun into his trousers 85/11257. San testified that the other person looked like Pablo 85/11251. San testified, without identifying a time period, that she had once had a phone conversation with Appellant in which he stated

that he would have to kill someone to get some money 83/10915-16.

Brenda Kinnaman is Kim San's mother 86/11372. She testified that she helped Kim move 86/11396. Kinnaman arrived about the same time or right after Dave Phillips and Brian Kinnaman 85/11405. Kinnaman did not see a black Mercedes 86/11406. Kinnaman did not see bubbles flowing out of the washing machine 86/11498.

Dave Phillips testified that he helped San move in 1994. When he pulled up to the house he saw Appellant and another man pull away in a black Mercedes 79/10498-501. Phillips believes it was a Mercedes 79/10569. Phillips was questioned by police in 1997 79/10540-41. They had been sent to Phillips by Kim San 79/10541. Phillips testified that Kim San spoke to him about the Mercedes before police cam to talk to him 79/10598. Phillips called Kim San after talking to police to make sure that what he had told them was correct 79/10599. Phillips asked Kim San what he was supposed to say 79/10579. Phillips acknowledged asking Kim San if he had seen a black Mercedes:

> Answer: "I told her, I asked her if it was a Mercedes. And she said yes, there was a Mercedes. And I said there was a black Mercedes convertible; right? And she's – and she goes right. And she goes yeah, you're correct. And I said that's it." Right.
>
> A Correct.

79/10581. Phillips testified that he told the truth as to what he saw 79/10579. Phillips had an aggravated assault charge

pending against him at that time 79/10542. He was already on probation 79/10544. Phillips testified that he was unaware that helping police would help him 79/10548. Phillips received a withheld adjudication and probation 79/10543. It is possible that Phillips was upset with Appellant for having dated Kim San 79/10621.

Jasmine McMurtry testified that she gave birth to the Kinnaman grandchildren 92/12241. McMurtry knew Appellant through Kim San 92/12242. Prior to going to the State Attorney, Kim San had spoken of Appellant being not guilty 92/12244,12257. She said Appellant could not have done it because she was at home at 7:30 a.m. and he was with her 85/12250. At other times, San has indicated that she believed Appellant was involved in the murder 92/12260. McMurtry testified that the police flier was not of Appellant 92/12252. She could not say from the video that it was Appellant 92/12251.

Detective Robert Lillie of Margate testified that he has known Kim San from 15 to 20 years and saw that she came to court 95/12612-17. In June of 1997, San told Lillie that she had information about another homicide and an individual named Chris Lynch 95/12618-19. San was interested in some type of leniency for her boyfriend Bill Grace 95/12619-20. San gave the impression that no one had been arrested for the homicide 95/12670. When Lillie discovered that a suspect had been arrested he

discontinued talks 96/12620-24. San also implied that she was saving information from the prosecutor in order to get leniency for Grace 96/12621. Lillie testified that San has a reputation in the community as "not a truth-telling person. She's a liar" 96/12622.

Detective Mark Suchomel testified that because of the information regarding bloody clothing being washed and overflow from the washing machine, he tried to find blood in the laundry area of San's ex-residence 94/12453. The flooring in the laundry room had not been cleaned 94/12457-9. From San's deposition, Suchomel expected a good possibility of a positive reaction 94/12478. There were no positive results for blood 94/12466.

Stuart James, an expert in blood stains as a forensic scientist, testified that he performed a number of experiments trying to get pink bubbles from blood to overflow from a washing machine 93/12316-342. No matter what combinations of blood and detergent were used, and no matter what other variables were used, James could not get anything but white bubbles to overflow from the washing machine 93/12316-342,12388;103/13739.

Terry Laber, an assistant lab director for the Minnesota Crime Laboratory, testified that he was hired to determine whether pink bubbles could result from bloody clothes being washed 98/13037. Laber was able to get a pink discoloration to

the bubbles 98/13047. The more bubbles that were produced the less discoloration there was 98/13064,13097. In Laber's experiments, a person would not be alerted to the slight discoloration. Laber could not get the washed to overflow with bubbles in his experiments 98/13098.

Paul Kish, a research associate with the forensic science laboratory from Corning and recipient of an achievement award in blood stain interpretation testified as an expert 103/13741-48. Kish conducted experiments and reviewed the experiments or Laber and James. Laber was unable to replicate the conditions of having bubbles overflow 103/13762. After reviewing experiments, Kish concluded that washing bloody clothes would not impart color to bubbles overflowing the machine 103/13765-66.

Christopher Bass testified that he saw Appellant and Ibar in the Broward County Jail 73/9728-9. Bass knew who they were because he had seen a television report about their being arrested for murder the previous night 74/9794. Bass had been arrested for DUS 74/9730. Bass has been convicted of 13 felonies, 10 for dishonesty 74/9787. Bass appears to identify Ibar as Appellant in open court 73/9729. Bass testified that Ibar and Appellant were in a holding cell 74/9798. Bass heard Appellant say, "my lawyer says I got a shot because I didn't take my mask off, you did" 74/9798.

In deposition, Bass quoted Appellant differently and did not mention a mask 74/9880-81. Bass testified he has lied before 74/9824. Bass did not report the conversation until 40 days later when he contacted an FDLE agent that he had dealt with in the past 74/9802,9887. There were between 9 and 14 other inmates in the cell and it was possible that they heard the statement 74/9883. The FDLE agent would later speak against prison time for Bass 74/9814. Bass testified that the FDLE agent's actions were not related to this case 74/9814.

At 10:45 a.m. June 28, 1994, a two-door convertible 1991 Mercedes 300SL was found burning in Palm Beach County 42/5192; 82/10763. The car belonged to Casimir Sucharski 42/5195. There were tire tracks at the scene 82/10798. The wheelbase was 57 inches 82/10798. The measurement could be off by ¼ inch 82/10811.

George Sapora maintains the data bank archives for General Motors 90/12011. The front wheel to wheel measurements for a 1985 Oldsmobile Cutlass Supreme is 55.85 inches 90/12015-22. The wheelbase on each Chevrolet model car is within a 10$^{th}$ of an inch of 58.5 to 57.7 90/12042. 1.8 million cars for Chevrolet meet this measurement 90/12044.

Joseph Hanstein, an auto technician at Maroone Dodge in Pompano Beach, testified that track measurements for Chrysler cars are 57 inches 92/12266-75.

Michael Jordan is employed at Maroone Fort and testified that a number of Fords including Mustang, Capri, LTD and Marquis and other models have a wheelbase of 57 inches 93/12304.

Mary Ann Henry testified that she was the service advisor for Mercedes Benz in 1994 and knew Sucharski's automobile 98/12968. Sucharski's car did not have a stand up emblem 98/12975.

## SUMMARY OF THE ARGUMENT

1. Over Appellant's hearsay objection, Ian Milman testified that Alex Hernandez told him that he was going to North Carolina. The out-of-court statement was admitted to show Hernandez actually went to North Carolina -- i.e. as subsequent conduct -- § 90.803 (3). However, to be admissible there must be other evidence tending to show that Hernandez went to North Carolina. Because there was no such evidence in this case, it was error to admit the out-of-court statement. The error was not harmless.

2. Over Appellant's objection, the prosecutor was permitted to introduce evidence that there were conversations between the defense attorney and Melissa Munroe in order to speculate to the jury that Appellant's attorney had caused Munroe to change her testimony. Appellant objected that the conversations were irrelevant and the prosecutor should not be permitted to introduce the evidence and then intimate wrongdoing by the defense without evidentiary support of wrongdoing. It was error to admit the evidence. The error was not harmless.

3. The prosecutor introduced jail records showing contacts between Appellant and his attorney. Appellant objected that this evidence was irrelevant and that the prosecutor was going to utilize tis evidence to intimate to the jury that Appellant had tampered with a witness. There was no evidentiary support

of tampering. It was error to introduce the irrelevant jail records. The error was not harmless.

4. Over objection, Detective Manzella was permitted to testify that he did not believe what Pablo Ibar told him with regard to where he was at the time of the murders. It was error to allow the opinion testimony. The error was not harmless.

5. The trial court erred in overruling Appellant's objection and in permitting Detective Manzella to describe consistent facts that Klimeckzo and Milman had told him. The testimony was hearsay. Moreover, the purported use of the testimony -- to show why the police believed Klimeckzo -- was improper. It was reversible error to admit the hearsay evidence.

6. Over objection, evidence that Appellant resisted police when they took his shoes was introduced into evidence. Such evidence did not show that Appellant was guilty as the prosecutor claimed. Such evidence was irrelevant and prejudicial.

7. Over objection, a statement made by Appellant to Melissa Munroe was introduced into evidence allegedly to show consciousness of guilt. However, the statement was irrelevant and prejudicial. It was reversible error to admit the statement.

8. Over Appellant's objection, Dr. Birkby, an expert in forensic anthropology, was permitted to give an opinion on the

ability of a lay person to recognize someone in a poor quality photo. It was error to admit such an opinion. The error was not harmless.

9. The prosecutor made a number of improper comments during closing argument including telling the jury that defense counsel was putting blinders on them so that they would only see his version of the truth, that there had been another trial, that the defense was hiding evidence from the jury, that the defense had failed to exercise their subpoena power, that the jury owed it to the people of the community to return a guilty verdict.

10. Over Appellant's objection the prosecutor introduced out-of-court statements of Jean Klimeckzo as to what allegedly occurred on the weekend of the murders. The statements were hearsay and not excludable from hearsay pursuant to the former testimony or prior inconsistent statement exceptions to the hearsay rule. It was reversible error to admit these statements.

11. After being shown photo images taken from the videotape of the intruders, Melissa Munroe and Jean Klimeckzo gave alleged statements opining that the image was of Appellant. These alleged out-of-court statements were admitted under section 90.801(2)(c). However, these statements were lay opinions and not an identification after perceiving a person (§

90.801(2)(c)). Thus, the out-of-court statements constituted inadmissible hearsay.

12. The trial court erred in sustaining the state's objection and prohibiting Appellant from introducing to the jury a taped conversation between Casey Sucharski and Krystal Fisher.

13. The trial court erred in admitting hearsay statements made by Jean Klimeckzo into evidence. The statements made at an adversarial preliminary hearing were not admissible as identification or former testimony. The statements were very prejudicial and not cumulative.

14. Where the only the only evidence of Appellant's guilt was out-of-court statements, the evidence was insufficient for conviction.

15. It was reversible error to admit out-of-court statements of Kim San that she believed that Appellant was involved in the murders.

16. Maria Casas' prior trial testimony was unfavorable to the prosecutor yet the prosecutor introduced this testimony over defense objection. The former testimony was introduced as a subterfuge to admit <u>other</u> Casas' alleged out-of-court statements. Appellant was denied his rights to confrontation, due process, and a fair trial.

17. Appellant was denied his rights to confrontation, due process, and a fair trial where the prosecutor called witnesses

in order to admit their out-of-court statements which would otherwise be inadmissible.

18. The trial court erred in overruling Appellant's objection to the out-of-court statements as to why Kimberly San finally came forward with information three years after the murders. There was direct dispute as to why San finally came forward after three years. The out-of-court statement was hearsay. The hearsay evidence was not harmless.

19. The trial court erred in prohibiting the deposition of Herschel Kinnaman into evidence.

20. The death sentence violates Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000) and Ring v. Arizona, ___ U.S. _, 2002 Wl1357257 (June 24, 2002).

21. The death penalty in this case is unreliable.

22. The trial court erred in prohibiting consideration of residual doubt as a mitigating circumstance.

## ARGUMENT

## POINT I

**INTRODUCTION OF AN OUT-OF-COURT STATEMENT AS PROOF OF SUBSEQUENT CONDUCT UNDER § 90.803 (3)(A)(2), FLORIDA STATUTES, OVER APPELLANT'S OBJECTION DENIED APPELLANT HIS RIGHTS TO CONFRONTATION, DUE PROCESS AND A FAIR TRIAL UNDER THE FLORIDA AND UNITED STATES CONSTITUTIONS.**

### STANDARD OF REVIEW

Depending upon the nature of the issue involved, evidentiary rulings will be subject to either de novo review or to an abuse

of discretion review. If the ruling on evidence consists of a pure question of law, the ruling is subject to de novo review. See Steven Childress and Martha Davis, Federal Standards of Review, § 4.02 (1997) ("[w]hile many courts' rulings on evidence are discretionary, it is clear that many particular evidence determinations raise a question beyond that application and may be considered questions of law"). For example, statutory construction is purely a legal matter and therefore subject to de novo review. Engineering Contractors Association of South Florida v. Broward County, 789 So. 2d 445, 449-50 (Fla. 4th DCA 2001).

Evidentiary rulings that are not pure questions of law fall under an abuse of discretion review. However, rulings contrary to the evidence code constitute an abuse of discretion. Taylor v. State, 601 So. 2d 1304, 1305 (Fla. 4th DCA 1992) (discretion is "narrowly limited by the rules of evidence."); Nardone v. State, 798 So. 2d 870, 874 (Fla. 4th DCA 2001) (no discretion to make rulings contrary to evidence code).

The instant issue involves a pure legal question and therefore is subject to de novo review. However, even if an abuse of discretion standard is used -- the trial court would have abused its discretion in making a ruling contrary to the evidence code.

The defense in this case was that the prosecution failed to prove beyond a reasonable doubt that Appellant was one of the intruders -- especially with the grainy, blurry photos witnesses had been shown. A part of that reasonable doubt is that Alex Hernandez (a/k/a Alex Salazar) may have been one of the intruders.

Over Appellant's objection, Ian Milman testified that Alex Hernandez told him that he was going to North Carolina 73/9657. The trip to North Carolina was on the weekend of the murders 73/9657-58. The prosecutor argued that the out-of-court statement was admissible as substantive evidence to prove subsequent conduct that Hernandez was in North Carolina at the time of the murders 72/9576. It was reversible error to overrule Appellant's objection and allow the out-of-court statement into evidence.

Appellant objected that the statement should not be admitted as evidence that Hernandez was in North Carolina at the time of the murders. Appellant specifically argued some evidence of an independent act was needed in order for the out-of-court statement to be relevant and admissible 73/9632-34. The evidence of an independent act was required to provide sufficient probative value from the out-of-court statement to draw the inference that the act was done 73/9612. Appellant's counsel complained that he could not cross-examine Hernandez

about the statement 73/9636. Appellant pointed out that the statement was untrustworthy because a person who is performing a crime [as Appellant claims that Hernandez did] would have a motive to falsify a claim that he was going to be out of state and thus create an alibi for himself 70/9316;73/9636.

Rules and statutes are to be construed against the party claiming the exception to the rule or statute. Pal-Mar Water Management District v. Board of County Commissioners of Martin County, 384 So. 2d 232 (Fla. 4th DCA 1980).

Section 90.803(3) provides in pertinent part as follows:

> The provision of s. 90.802 to the contrary notwithstanding, the following are not inadmissible as evidence, even though the declarant is available as a witness:
>
> * * *
>
> (3) Then Existing Mental, Emotional, or Physical Condition.
>
> (a) A statement of the declarant's then existing state of mind, ... including a statement of intent, plan, ... when such evidence is offered to:
>
> * * *
>
> 2. Prove or explain acts of subsequent conduct of the declarant.
>
> (b) However, this subsection does not make admissible:
>
> * * *
>
> 2. A statement made under circumstances that indicate its lack of trustworthiness.

Section 90.803(3) is an adaptation of Mutual Life Insurance Co. v. Hillmon, 12 S.Ct. 909 (1892). In Hillman, one issue was whether a man named Walters went away. The Supreme Court held that letters saying that Walters was going away were not competent as proof that Walters actually went away, but when the letters were made at a time when "other evidence tended to show that he went away" the letters were admissible to show that it was more probable that he went away:

> The letters ... were competent not as narratives of facts communicated to the writer by others, nor yet as proof that he actually went away from Wichita, but as evidence that, shortly before the time when other evidence tended to show that he went away, he had the intention of going, and of going with Hillmon, which made it more probable both that he did go and that he went with Hillmon than if there had been no proof of such intention.

12 S.Ct. at 912-13 (emphasis added). This is consistent with Appellant's position that a mere statement of where a person is planning to go is not sufficiently probative by itself to prove that the person went there. This is especially true where the declarant has a possible motive to make a false statement of where he was going – thus creating an alibi.

In People v. D'Arton, 289 A.D.2d 711, 734 N.Y.S.2d 309 (S.Ct. App. N.Y. 2001), the court held independent evidence of reliability [circumstances which all but rule out a motive to falsify and evidence that the intended future acts were at least

likely to have taken place] is required to admit out-of-court statements to prove subsequent conduct:

> Nonetheless, even under the first and second classifications, there must be independent evidence of reliability, i.e., a showing of circumstances which all but rule out a motive to falsify and evidence that the intended future acts were at least likely to have actually taken place (People v. James, supra, at 634-35, 695 N.Y.S.2d 715, 717 N.E.2d 1052; see People v. Chambers, supra, at 92, 512, N.Y.S.2d 89). We agree with defendant that there is no independent evidence of reliability. There is no evidence that the debtors ever arrived, that Coppola received cash from the debtors or even that Coppola had loaned money to anyone. Accordingly, County Court erred in receiving evidence of the three telephone conversations between Gardner and Coppola.

289 A.D.2d at 714 (emphasis added); see also U.S. v. Badalamenti, 794 F.2d 821, 826 (2d Cir. 1986) (out-of-court statement was admissible to prove declarant's subsequent act because of independent evidence).

Also, the circumstances surrounding the statement are untrustworthy. Hernandez was a major suspect. As such, he would have had a very strong motive to have people believe he was out-of-state at the time of the murders. Nothing can make a statement more untrustworthy than a strong motive to falsify. Yet, there was absolutely no evidence aside from the out-of-court statement which indicated that Hernandez was in North Carolina. Further, the greatest engine of ascertaining the truth –- cross-examination -- was not available to test Hernandez on whether he actually was in North Carolina. The

jury could not view Hernandez' demeanor in determining the accuracy of the statement and the alleged subsequent conduct. It was error to allow the out-of-court statement to be placed in evidence over Appellant's objection.

The error cannot be deemed harmless. The defense was that the prosecutor failed to prove beyond a reasonable doubt that Appellant was one of the perpetrators. A contributing part of that reasonable doubt was evidence that Alex Hernandez was the individual with Pablo Ibar. Alex Hernandez lived with Ibar 72/9471,9477. Alex Hernandez was arrested with Ibar for another home invasion robbery 48/6190;52/6722. The other home invasion robbery was very similar 56/7366. Alex Hernandez owned and kept under lock a Tech-9 60/9179;73/9715-16. Even after viewing the video and flyers, due to facial features and eyewitness Foy's description – police thought that Alex Hernandez was the second suspect 48/6239;55/7277, 7286;68/9097. Alex Hernandez typically wore a hat 55/7287, as did the suspect in the video. In the photo lineup, Alex Hernandez looked the closest to the second suspect that was leaving the scene 49/6308. Hernandez, not Appellant, was with Ibar in the victim's club on the Wednesday before the murders when there was a dispute over a bill 75/9997-10000. The prosecutor emphasized the hearsay evidence, as to what Milman was told, to the jury to explain why Hernandez was eliminated as a suspect:

> They knew that Hernandez, who was initially a person that they thought was involved, given the bone structure, was in North Carolina, according to Milman, he told me that's where he was going, we had just come back from a trip. He told me that's where he's going. He left, went to his parent's house, came back Sunday. And Hernandez was out of town that weekend, even according to Milman. And the police know that. They don't need to keep barking down that alley -- or bowling down that alley when Milman is saying that.

108/14483.

The very existence of the above-mentioned evidence regarding Alex Hernandez could have aided reasonable doubt in the jury's mind as to Appellant's alleged guilt. However, informing the jury through hearsay that Hernandez had an alibi of being in North Carolina at the time of the murder negates any evidence pointing toward him. The error of admitting the hearsay alibi cannot be deemed harmless to Appellant's cause.

In addition, this was an extremely close case. **The first trial of this case resulted in a hung jury**. The prosecution relied on the out-of-court opinions of Melissa Munroe and Jean Klimeckzo. The prosecutor argued that his entire case rested upon the alleged recognition by these witnesses. Yet, these witnesses testified <u>at trial</u> that the video/photo was of such poor quality that they could not tell who was in the video/photo.[1] Other witnesses familiar with Appellant testified

[1] Also, Klimeckzo's ability to remember events around the time of the murders was very much in question. Klimeckzo testified that he had been taking drugs and was high on the weekend in question and that his perceptions may not have been

that Appellant was not the person in the video/photo 92/12228,12252. The expert witnesses could not identify Appellant in the video/photo. Even Detective Manzella conceded that the photos were blurry and fuzzy 76/10114. Foy, who saw 2 men leave in Sucharski's car, was shown Appellant's photo but did not make an identification 55/9395.

There is no physical evidence connecting Appellant to the crime. There was no DNA linking Appellant to the crime. None of Appellant's prints were found at the murder scene 78/10391. None of the items taken from the scene were even in Appellant's possession. The shoes taken from Appellant did not match the shoe that made a blood imprint at the crime scene 87/11681,11705. Appellant's shoe size 7½ (87/11713) was different from the size of the shoe that made the imprint 10-11 (85/11189). No blood, or any other evidence, was found in Appellant's car 78/10391. Ibar's prints were not found in Appellant's car 78/10391.

The wheelbase of Appellant's car (55.85 inches 90/12022) does not match the wheelbase found where Sucharski's car was abandoned (57 inches 82/10798).

Appellant was not connected with the one person who would have a motive to kill Sucharski -- Krystal Fisher.

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based on reality. Klimeckzo told police that he was with Milman and girls until 4 or 5 a.m. on the morning of the murders 76/10103. Milman dispute this statement.

The testimony of Kim San was effectively impeached. San had a motive to fabricate -- she was looking to give information in exchange for a deal for her fiancee -- Bill Grace.

Detective Robert Lillie testified that San has a reputation in the community as “not a truth-telling person. She’s a liar” 12622.

Jasmine McMurtry testified that prior to going to the grand jury, Kim San had spoken of Appellant being not guilty 12244,12257.

San failed to come forward with the alleged information until 3 years after the murders when she wanted to cut a deal for he boyfriend. San explained her delay was because she was afraid of Appellant. However, cross-examination showed that not only was she not afraid, but she made contact with Appellant and invited him to live with her. She also visited him and sent him love letters.

Dave Phillips allegedly corroborated part of San’s testimony about a black Mercedes being present. However, Phillips admitted that San spoke to him about the black Mercedes prior to talking with police and he had her tell him what he was supposed to say T10579. Phillips acknowledged asking San if he had seen a black Mercedes:

> Answer: “I told her, I asked her if it was a Mercedes. And she said yes, there was a Mercedes. And I said there was a black Mercedes convertible,

right? And she's -- and she goes right. And she goes yeah, you're correct. And I said that's it." Right.

A Correct.

10581.

The jury also knew that Phillips had motives to lie -- he was angry with Appellant for having dated Kim San 10621, and he had an aggravated assault charge pending against him 10542.

The bottom line is that San's credibility was very questionable. Thus, her testimony would not make an error harmless.

Also, even if the jury believed San to be credible, her testimony did not show that Appellant was guilty.[2]

Christopher Bass' testimony about an out-of-court statement about Appellant not taking off a mask would not be convincing to a jury. First, as the videotape demonstrates, the intruder in question did not wear a mask. Second, Bass was impeached regarding his credibility -- not only was he an admitted liar

[2] At best, San's testimony required a stacking on inferences to implicate Appellant in the crime. First, one would have to infer that the Mercedes that San allegedly saw belonged to Sucharski. A bare description of a vehicle being a black Mercedes simply is not sufficient to show that it was Sucharski's vehicle. After making the bare assumption that it was Sucharski's car, one must further infer that Appellant had something to do with the taking of Sucharski's car. Foy identified Ibar as being in Sucharski's car as it left Sucharski's residence. However, Foy did not identify Appellant as being in the car. In fact, Foy's description of the second person having hair length was contrary to Appellant's hair length. Appellant could have encountered Ibar afterward and their being together could have nothing to do with the murders. It is a blind inference that Appellant helped obtain the car. Thus, one inference was stacked upon another inference.

(9824), but he had 10 prior convictions for dishonesty 9787. Finally, despite Bass' claim that he heard Appellant make a statement, Bass wrongly identified Appellant as being Ibar 9729. It cannot be said beyond a reasonable doubt that the error was harmless. The error denied Appellant his rights to confrontation, due process and a fair trial. Fifth, Sixth, Fourteenth Amend., U.S. Const.; Art. I, §§ 2, 9, 16, and 22, Fla. Const. This cause must be reversed and remanded for a new trial.

## POINT II

**THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION AND ADMITTING IRRELEVANT EVIDENCE THAT MELISSA MUNROE HAD CONVERSATIONS WITH APPELLANT'S ATTORNEY.**

Melissa Munroe testified that she had conversations with Appellant's attorney (Roderman) about the case the weekend following Appellant's arrest 64/8631. Appellant objected to this evidence on the grounds that it was irrelevant and any probative value was outweighed by undue prejudice 64/8615. The trial court overruled the objection and allowed the evidence 64/8629. This was reversible error.

Rulings contrary to the evidence code constitute an abuse of discretion. Nardone v. State, 798 So. 2d 870, 874 (Fla. 4th DCA 2001). Prior to admission of the testimony, the prosecutor explained that he was going to elicit that Roderman (Appellant's attorney) knew prior to the Grand Jury and Adversary Preliminary hearings that the source of the images shown to Munroe was from

the crime scene and he was going to show that Roderman conversed with Munroe prior to those hearings 64/8617-18. The prosecutor explained that the information given to Roderman had not been made public 64/8617-20. Appellant complained that the prosecutor should not be permitted to intimate without proof that Appellant's attorney violated a trial court's gag order and revealed secret information to Munroe 64/8618-19,8622.

It is impermissible for the state to suggest without evidentiary support that the defendant's counsel has acted improperly – especially in some manner that may alter the witness's testimony:

> This court has repeatedly held that it is impermissible for the state to suggest, without evidentiary support, that the defense has "gotten to" and changed a witness's testimony or that a witness has not testified out of fear. See Johnson v. State, 747 So. 2d 436, 439 (Fla. 4th DCA 1999); Henry v. State, 651 So. 2d 1267, 1268-69 (Fla. 4th DCA 1995). In this case, there was no evidentiary support for the prosecutor's comment that Wilsure failed to testify out of fear or made her initial statement because someone threatened her. The state correctly concedes that the comments were improper.

Tindal v. State, 803 So. 2d 806, 810 (Fla. 4th DCA 2001); see also Henry v. State, 651 So. 2d 1267, 1269 (Fla. 4th DCA 1995) ("We strongly disapprove of the prosecutor's making comments which impugn the defense without any basis").

In Tindal, the Court noted that this improper intimation by the state is especially egregious because the prosecutor is an

agent of the state and tends to have unique knowledge that has not been presented to the jury:

> While appellant may have injected Wilsure into the proceedings, that does not justify the prosecutor's suggestion that Wilsure was intimidated or threatened. First, because the prosecutor is an agent of the state, such comments imply that the prosecutor has unique knowledge that has not been presented to the jury. See generally Martinez v. State, 761 So. 2d 1074, 1081 (Fla. 2000) (citing United States v. Young, 470 U.S. 1, 18-19, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985)). Second, the comment was "highly irregular, impermissible, and prejudicial" because it improperly implied that appellant engaged in witness tampering or suborning perjury, both criminal offenses. Henry, 651 So. 2d at 1268. Thus, the prosecutor's comments went beyond a fair reply.

Thus, it was improper for the prosecutor to introduce the evidence that Appellant's attorney had conversations with Munroe. The fact that they had conversations is completely irrelevant to the issues in the case. The issue is who is the person in the video and not the actions of the defense attorney. The focus of the attorney implies two wrongdoings: 1) that he violated a court order, and 2) he violated the order in order to tamper with the witness' testimony. The danger is that the attorney's wrongdoings can be attributed to the defendant.

The error of admitting the irrelevant evidence cannot be deemed harmless. Once the trial court admitted the irrelevant evidence, the prosecutor did exactly what he promised and what defense counsel worried would happen. The prosecutor intimated that Appellant and/or Appellant's attorney had essentially

tampered with a witness by conversations with Munroe after which she changed her testimony 86/11468-69. Where the instant case was a close case and the prosecutor used the irrelevant evidence, the admission of the irrelevant evidence cannot be deemed harmless. The error denied Appellant due process and a fair trial. Fifth, Sixth, Fourteenth Amend., U.S. Const.; Art. I, §§ 2, 9, 16 and 22, Fla. Const. This cause must be reversed and remanded for a new trial.

## POINT III

**THE TRIAL COURT ERRED IN ADMITTING IRRELEVANT JAIL RECORDS OVER APPELLANT'S OBJECTION.**

Over Appellant's objection 13636-37, the prosecutor introduced jail visitation records showing visits between Appellant and his attorney -- Tim Day 13647. This was reversible error.

The prosecutor was introducing the jail records to imply that attorney Day had relayed information to Appellant and to imply that the information was then forwarded to Melissa Munroe in order to change her opinion testimony regarding the intruder.

Appellant objected that there was no evidentiary proof to support the relevance, but only a series of speculative inferences about the actions of Appellant and his attorney:

> THE COURT: Anything further to discuss about the orders and the jail records?
>
> MR. RASTATTER: Only that to let it in, Judge, you would allow him then to argue the inference from that

> evidence, which would be for his argument, that because there was an order, the inference was that the order was adhered to, that Timothy Day received the affidavit.
>
> Then the further, second inference that you would have to draw, is after Timothy Day received it, he went and communicated it to Seth Penalver.
> And then you have to draw a third inference, that Seth Penalver indicated to Melissa Munroe. That's what he wants to ultimately argue.
>
> You're allowing in tenuous --
>
> THE COURT: What about the jail records?
>
> MR. RASTATTER: That's it. The jail records say that he went to see him.

The trial court allowed the jail records in evidence:

> THE COURT: Okay. I don't feel comfortable with the orders coming in, but I don't have any problem with the jail records coming in.
>
> You can argue anything you want out of that, but I just don't feel comfortable with the orders.
>
> MR. RASTATTER: Over objection. Mark it down. Let's go.

13636-37.

Rulings contrary to the evidence code constitute an abuse of discretion. Nardone v. State, 798 So. 2d 870, 874 (Fla. 4th DCA 2001). It was improper for the prosecutor to suggest, without proof, that Appellant and his attorney acted to tamper or influence the testimony of Melissa Munroe:

> This court has repeatedly held that it is impermissible for the state to suggest, without evidentiary support, that the defense has "gotten to" and changed a witness's testimony or that a witness has not testified out of fear. See Johnson v. State, 747 So.

> 2d 436, 439 (Fla. 4th DCA 1999); Henry v. State, 651 So. 2d 1267, 1268-69 (Fla. 4th DCA 1995). In this case, there was no evidentiary support for the prosecutor's comment that Wilsure failed to testify out of fear or made her initial statement because someone threatened her. The state correctly concedes that the comments were improper.

Tindal v. State, 803 So. 2d 806, 810 (Fla. 4th DCA 2001); see also Henry v. State, 651 So. 2d 1267, 1269 (Fla. 4th DCA 1995) ("We strongly disapprove of the prosecutor's making comments which impugn the defense without any basis").

Thus, it was improper to introduce the jail records. The fact that Appellant and his attorney met at the jail is completely irrelevant to the issues in this case. Innuendos that Appellant and his attorney were tampering with witnesses should not be part of the case -- unless there is actual proof.

The error of admitting the irrelevant evidence cannot be deemed harmless. Once the trial court admitted the irrelevant evidence, the prosecutor argued that Melissa Munroe changed her opinion and asked the jury to look at the jail records showing visits between Appellant and his attorney. The prosecutor noted that Appellant had conversations with Munroe and implied that Munroe's opinion had been tampered with 14468-69. Where the instant case was a close case and the prosecutor used the irrelevant evidence, this error cannot be deemed harmless. The error denied Appellant due process and a fair trial. Fifth, Sixth, Fourteenth Amend., U.S. Const.; Art. I, §§ 2, 9, 16 and

22, Fla. Const. This cause must be reversed and remanded for a new trial.

## POINT IV

**THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO DETECTIVE PAUL MANZELLA'S TESTIMONY THAT HE DID NOT BELIEVE WHAT IBAR WAS TELLING HIM ABOUT WHERE HE WAS AT THE TIME OF THE MURDERS.**

Detective Paul Manzella testified that Pablo Ibar conversed with him about being at Latisha's home and going to sleep at the time of the murders 52/6730-32. Ibar was relaying an alibi to Detective Manzella. Over objection, 52/6734, Detective Manzella testified that the conversation did not continue because:

> It had gotten to a point where I felt he was only telling me what he wanted me to hear.

52/6734. It was error to overrule Appellant's objection.

Detective Manzella's testimony that he thought Ibar was only saying what he wanted to be heard is a comment on Manzella's belief that Ibar was not telling the truth.

Rulings contrary to the evidence code constitute an abuse of discretion. Nardone v. State, 798 So. 2d 870, 874 (Fla. 4th DCA 2001).

It was error to admit opinion testimony that the witness believes someone is not telling the truth. See Acosta v. State, 798 So. 2d 809 (Fla. 4th DCA 2001) (reversible error for police

officer to explain his actions by testifying that "up until that point, everything Sarah Riley told me appeared to be the truth" -- as it was opinion testimony that officer did not believe what Riley had told him); Gore v. State, 706 So. 2d 1328, 1336 (Fla. 1998) (trial court erred in permitting officer to express opinion that Gore had lied to him with respect to a particular fact); Olsen v. State, 778 So. 2d 422 (Fla. 5th DCA 2001) (reversible error to allow officer to say he believed the victim's allegation of being robbed).

The error cannot be deemed harmless, especially where the witness was a police officer whose testimony could be afforded great weight by the jury. Acosta v. State, 798 So. 2d 809, 810 (Fla. 4th DCA 2001); Page v. State, 733 So. 2d 1079 (Fla. 4th DCA 1999). The error deprived Appellant due process and a fair trial. Fifth, Sixth, Fourteenth Amend., U.S. Const.; Art I, §§ 2, 9, 16 and 22, Fla. Const. This cause must be reversed and remanded for a new trial.

## POINT V

**THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION AND IN PERMITTING DETECTIVE MANZELLA TO DESCRIBE SPECIFIC CONSISTENT FACTS THAT KLIMECKZO AND MILMAN HAD TOLD HIM.**

Over Appellant's objection 76/10147-10174,10174-75, Detective Manzella testified to specific facts Klimeckzo and Milman had told him which were consistent with one another 76/10176-77. This was reversible error. The error denied

Appellant his rights to confrontation, due process and a fair trial. Fifth, Sixth, Fourteenth Amend., U.S. Const.; Art I, §§ 2, 9, 16 and 22, Fla. Const.

Specifically, Manzella testified to the following:

> Q Eventually there were other things that Mr. Milman had said that were consistent with what Mr. Klimeckzo had said, that you with were considering; am I correct?
>
> A Yes, sir.
>
> Q What were those things?
>
> MR. MOLDOF: Objection. Hearsay, Judge.
>
> THE COURT: Overruled.
>
> A First, that the people at the Lee Street address, the associates, all their names were the same. The fact that they all had interchanged clothing at that particular address on Lee Street in Hollywood, that he was aware of the fact that Pablo and Jean Klimeckzo had gotten into an argument earlier that morning, in regards to theft at the Lee Street address.
>
> They both indicated that there were guns at that residence, on being specifically a .9 millimeter and a Tec.9.
>
> That if someone would stay over, specifically either Ja or Jean Klimeckzo, they would sleep on the couch out in the living room.

76/10176-77. Out-of-court statements as to what Klimeckzo and Milman told Manzella were hearsay (the trial court even acknowledged that it was hearsay, “There’s no doubt it’s hearsay”) 76/10173. Rulings contrary to the evidence code constitute and abuse of discretion. Nardone v. State, 798 So. 2d 870, 874 (Fla. 4th DCA 2001).

The prosecutor argued that the out-of-court statements were admissible "to explain the officer's state of mind as to why he continued with the investigation, and accepted Mr. Klimeckzo's information" 76/10168. However, the officer's state of mind and conduct were not relevant to the case. The issue was identity. More importantly, assuming arguendo, the officer's state of mind and conduct were relevant the officer could be asked about his state of mind and conduct without brining in the details of out-of -court statements. See Baird v. State, 572 So. 2d 904, 906 (Fla. 1990) (if conduct of officer or sequence of events is relevant, officer can testify that he acted on "information received" rather than going into the details of the information). Thus, the out-of-court statements should not have been admitted into evidence.

Moreover, the admission of the out-of-court statements is even more problematic when, as the prosecutor states, they show consistencies and why the "officer accepted Mr. Klimeckzo's information." Thus, the officer was passing o the credibility of a witness and information in his testimony to the jury. This is improper. Acosta v. State, 798 So. 2d 809 (Fla. 4th DCA 2001) (new trial because "logical inference" from officer's testimony was that he believed what he had been told by a witness); Gore v. State, 706 So. 2d 1328, 1336 (Fla. 1997) (trial court erred in permitting officer to express opinion that Gore had lied to

him with respect to a particular fact); Page v. State, 733 So. 2d 1079 (Fla. 4th DCA 1999); Olsen v. State, 778 So. 2d 422 (Fla. 5th DCA 2001).

The error cannot be deemed harmless. The opinion of an officer as to consistencies of two important state witnesses serves to bolster their testimony and is particularly harmful due to the great weight afforded a police officer's testimony when viewed by the jury as a neutral witness. E.g., Acosta v. State, 798 So. 2d 809, 810 (Fla. 4th DCA 2001). This cause must be reversed and remanded for a new trial.

## POINT VI

**THE TRIAL COURT ERRED IN ADMITTING EVIDENCE THAT APPELLANT RESISTED THE TAKING OF HIS SHOES AS EVIDENCE OF CONSCIOUSNESS OF GUILT.**

Over Appellant's objections 87/11604/88/11730-42, the prosecutor introduced evidence that while Appellant was in jail the police sought to take his shoes as evidence and he resisted the taking of his shoes 89/11902. The prosecutor argued that Appellant's resisting of the taking of his shoes at jail was relevant evidence of consciousness of guilt. Appellant objected and argued that such evidence was not relevant and that any relevance was substantially outweighed by undue prejudice

88/11730,11740. It was reversible error to overrule Appellant's objection and to admit the evidence 88/11742. The error denied Appellant due process and a fair trial. Fifth, Sixth, Fourteenth Amend., U.S. Const.; Art. I, §§ 2, 9, 16, 22, Fla. Const.

**Resisting the taking of shoes at jail does not constitute consciousness of guilt.**

In this case the police were looking for a shoe that made a bloody imprint at the murder scene. It is undisputed that Appellant did not own, and did not possess at the jail, that shoe.[3] Thus, Appellant's shoes would tend to be exculpatory rather than inculpatory in nature.

If Appellant were guilty (with the accompanying consciousness of guilt) he would not resist giving up shoes which would not match the shoe prints at the scene. He would turn over the shoes in an effort to lead the police away from him -- after all if his shoes were not those of the intruder it is less likely that he would be perceived as the intruder. There is no nexus between guilt and resisting giving up exculpatory evidence.

The prosecutor's theory of the case demonstrates the lack of relevance of resisting giving up non-inculpatory shoes and consciousness of guilt. The prosecutor believed that Appellant and Pablo Ibar were the guilty parties. The prosecutor pre-

[3] At trial the state's expert opined that the shoe in question belonged to Albert Rincon 87/11675-76. The shoe in question was size 10 87/11683. Appellant's shoes in the jail were size 7½ 87/11713. The state's expert conclusively ruled out Appellant's hoe as being worn by the intruders 87/11681.

sented evidence that the shoes take from Appellant and Ibar at the jail were not the shoes worm by the in intruders. Yet, Appellant and Ibar acted totally the opposite in turning over the exculpatory evidence -- Appellant resisted and Ibar totally cooperated. If there were a consciousness of guilt involved -- their reactions should be the same. The point is, resisting or not resisting, the giving up of these shoes does not have the tendency of proving consciousness of guilt.

Appellant was told by his attorney that he did not have to give up his shoes without a court order 89/11908. A search warrant presented to Appellant did not mention Appellant or his shoes -- it only mentioned the search of a premises 89/11909. Only the affidavit to the warrant mentioned Appellant 89/11909-10. The police never read the affidavit to Appellant 89/11905. Thus, Appellant was not made aware of a valid court order for seizure of his shoes and he would legitimately feel that his rights were violated by the taking. This was not consciousness of guilt.

There is one explanation why one would resist giving up one's shoes in jail. One would be without shoes. Who wants to be without shoes -- especially in jail where overflowing toilets and other hazards are not unheard of. In the present case the evidence showed that no arrangements were made to replace the shoes that Appellant would be giving up 89/11910.

The nexus between resisting giving up non-incriminating shoes and consciousness of guilt does not exist. The nexus between resisting giving up the non-incriminating shoes and not wanting to be without shoes in jail does exist. It was reversible error to overrule Appellant's objection and to admit the evidence of Appellant's resisting in jail.

Assuming arguendo that there was a sufficient nexus to make the resistance to the taking of shoes relevant, any probative value was substantially outweighed by undue prejudice under § 90.403. Evidence of a person resisting police is very prejudicial. It becomes even more prejudicial when the jury is told that resisting of police occurred while Appellant was in jail. Finally, the error cannot be deemed harmless. As discussed in Point I, this was a close case and any type of error could sway the jury in its decision. Moreover, the prosecutor told jury that this evidence amounted to Appellant admitting to guilt 107/14313. This cause must be reversed and remanded for a new trial.

## POINT VII

**THE TRIAL COURT ERRED IN ADMITTING STATEMENTS FROM APPELLANT TO MELISSA MUNROE AS EVIDENCE OF CONSCIOUSNESS OF GUILT.**

Melissa Munroe testified to a conversation she had with Appellant regarding a news article that had been published about Appellant and the murders. Appellant said that he did not do it, but there was nothing he could do once his name was public 63/8412. Munroe did not know the exact words that Appellant used, but testified that he was upset and said, “Oh, I might as well be dead,” or “I want to kill myself,” or “how am I supposed to” – something to that effect 63/8413. Munroe continued to explain that Appellant truly did not threaten to kill himself, but was very upset about having his name in the newspaper:

> Q All right. Did he say in which manner he was going to kill himself or he wanted to kill himself?
>
> A No. It wasn’t like – it wasn’t like you’re saying I’m going to kill myself. It’s just something that he said in the moment. He was very upset. He was – how would you feel if you opened the newspaper and you saw your name connected to something, and all these people are calling.
>
> You know, he was just very upset. He doesn’t know what he was supposed to do, or how he was supposed to handle it. I don’t know how else to explain it.

63/T8414. Munroe did not believe that Appellant wanted to kill himself, but was just distraught because his name was associated with a murder and that he would never be able to get anywhere in life 63/T8414,8417,8431,8432.

Appellant objected to Munroe’s testimony on the grounds that it was not relevant and that any relevance that it did have was outweighed by its prejudice. Appellant’s objections were

overruled 59/7811. The introduction of this testimony denied Appellant due process and a fair trial. Fifth, Sixth, Fourteenth Amend., U.S. Const.; Art. I, §§ 2, 9, 16, 22, Fla. Const.

The prosecutor argued that Munroe's testimony showed that Appellant threatened suicide and was thus admissible as consciousness of guilt. In order for evidence to be relevant (probative) toward consciousness of guilt the evidence must show that it is more likely than not that the person is acting in a certain manner because of consciousness of guilt. Appellant's statements to Munroe were not relevant to the crime charged.

Appellant's statements were not threats to commit suicide. As Munroe explained, Appellant was upset that his name was in the paper, but that he was not actually threatening suicide. Appellant turned himself in -- hardly an act toward suicide.

Also, assuming arguendo, that Appellant was actually threatening suicide, a threat of suicide is not consciousness of guilt. Suicide is subject to innumerable interpretations. Snyder v. State, 762 A.2d 125, 135 (Md.App. 2000). As explained in State v. Coudette, 72 N.W. 913 (N.D. 1897), evidence of attempted suicide is not the same as flight toward discerning consciousness of guilt:

> One who flees does so, generally, for the purpose of avoiding the punishment that follows violated law. One who commits or attempts suicide seeks to avoid no punishment. ... Hence the very circumstance that raises the presumption of guilt from flight is absolutely wanting in suicide.

72 N.W. at 915 (emphasis added). It is more likely that one contemplates suicide to avoid public disgrace. 72 N.W. at 915-916.

Again, in this case Munroe testified that Appellant's statements were in the context of disgrace from being publically accused. These simply did not prove consciousness of guilt.

Finally, the error cannot be deemed harmless. As discussed in Point I, this was a close case and any type of error could sway the jury in its decision. Moreover, the prosecutor emphasized to the jury that the suicide threat was important and indicated guilt T14313. This cause must be reversed and remanded for a new trial.

## POINT VIII

**THE TRIAL COURT ERRED IN ALLOWING A STATE WITNESS TO GIVE OPINION TESTIMONY BEYOND HIS EXPERTISE.**

Over defense objection, Dr. Walter Birkby was permitted to testify that someone who is familiar with an unknown person in a photograph may be able to recognize the person in the photo-graph where a scientist is not able to 99/13210-11. The trial court overruled Appellant's objection 99/13235. This was error.

Rulings contrary to the evidence code constitute an abuse of discretion. Nardone v. State, 798 So. 2d 870, 874 (Fla. 4th DCA 2001). Dr. Birkby's expertise was in forensic anthropology and he used his expertise to try to make an identification of the individual in the video photos by comparison of measurements

of facial landmarks 99/13170-74. Because of the poor quality of the photo, Dr. Birkby could not reach a conclusion 99/13206. However, Dr. Birkby went afield from his expertise and testified that someone who is familiar with an unknown individual might recognize the person in a poor quality photograph while the scientist is unable to do so:

> A I think I see what you're asking. You're asking if the persons are of such poor quality, that somebody who was very familiar with the unknown individual, if they could look at and recognize it? And I think perhaps that's possible. I think our sensory input is a lot different when we're looking at an image.
>
> We're picking up on something that may not always be what the scientist is picking up with his rule. Yes, I think that's possible.

99/13210. Dr. Birkby was never qualified as an expert in the field of witness perception so as to give an opinion on the ability of a lay person to recognize someone in a poor quality photo. Dr. Birkby was never asked, or offered, any qualifications that would demonstrate an expertise in this area. It was error to permit this opinion testimony over defense objection. See Russ v. Iswarin, 429 So. 2d 1237, 1241 (Fla. 2d DCA 1983) (error to permit witness to give opinion in area in which he was not "properly qualified as an expert" and "did not purport to be an expert on the subject"); Phillips v. State, 440 So. 2d 432 (Fla. 1st DCA 1983) (not error to refuse expert testimony on the probabilities of misidentification); Lewis v. State, 572 So. 2d 908 (Fla. 1990), cert. denied, 111 S.Ct. 2914 (1991) (not error

to exclude psychiatric opinion regarding eyewitness identification process).

The error cannot be deemed harmless. As discussed in Point I, this was a close case. Despite the fact that Dr. Birkby could not discern the person in the photo, the prosecutor was able to bolster the alleged out-of-court opinion recognitions in his closing argument by use of Dr. Birkby's improper opinion testimony 14497.

The error deprived Appellant due process and a fair trial. Fifth, Sixth, Fourteenth Amend., U.S. Const.; Art. I, §§ 2, 9, 16, 22, Fla. Const. This cause must be reversed and remanded for a new trial.

## POINT IX

**APPELLANT WAS DENIED DUE PROCESS AND A FAIR TRIAL DUE TO PROSECUTORIAL MISCONDUCT.**

It is an abuse of discretion to permit improper closing argument. Gore v. State, 719 So. 2d 1197, 1200 (Fla. 1998) (while wide latitude given for closing argument that latitude does not extend to permit improper argument).

During closing arguments, the prosecutor made the following egregious arguments which denied Appellant due process and a fair trial. Fifth, Sixth, Fourteenth Amend., U.S. Const.; Art. I, §§ 2, 9, 16, 22, Fla. Const.

The prosecutor disparaged the defense by stating that it was searching for only its brand of truth and was putting blinders on the jury:

> MR. MORTON: Thank you, Judge, if the Court please, Mr. Defense attorney.
>
> The defense attorney had accused me, the police, and the witnesses of making mistakes and of trying to mislead you.
>
> Now, he knows that this is suppose to be a search for the truth. And this is not some sort of mud slinging contest, yet the defense attorney wants to put blinders on you so he can limit the search only to his own particular brand of truth.
>
> MR. MOLDOF: Objection. Motion.
>
> THE COURT: Overruled.
>
> MR. MORTON: It's his way of trying to slip those blinders on you.
>
> MR. MOLDOF: Same objection.
>
> MR. MORTON: The defense desecrates the Government.
>
> THE COURT: Overruled.

14431-32 (emphasis added. This was improper.

The prosecutor then told the jury that there had been another trial by improperly and inaccurately quoting a witness:

> Well, if you're not lying, then you have no reason to remember, but he goes on, "Yes, I should have, I did that. I testified about it in the last trial -- in the last proceeding and ---
>
> MR. MOLDOF: Judge, objection. Motion to make.

14463. It was improper and prejudicial to inform the jury of the prior trial. In fact, lay witnesses had been warned by the trial court not to discuss the prior trial:

> THE COURT: ... it would be very prejudicial to Mr. Penalver if the jury were to find out that there was a prior trial.

59/7832. However, unlike the lay witnesses, the prosecutor could not restrain himself from informing the jury of the prior trial.

The prosecutor then told the jury that there was evidence that the defense and its expert would not allow the jury to see:

> MR. MORTON: As a matter of fact, just the work, the significant work, 245, 246 and 247. I mean, there are numerous exhibits put in by the defense and <u>his own expert won't even allow these in for you to see</u>, to show you the particular --
>
> MR. MOLDOF: Objection. Motions.
>
> MR. MORTON: (continuing) -- to show you. Won't even say, "hey, look at this."

108/14464-65 (emphasis added). <u>Knight v. State</u>, 672 So. 2d 590 (Fla. 4th DCA 1996) (comment improper -- defense did not want witness to tell you about fingerprint results). The defense did not hide any evidence from the jury. Rather, the jury was allowed to see the evidence, but due to the delicacy of the evidence, it was agreed that instead of filing the exhibit the expert could keep it in his possession. It was extremely improper for the prosecutor to mislead the jury especially about

a fact he knew to be untrue. See Garcia v. State, 564 So. 2d 124 (Fla. 1990).

The prosecutor emphasized to the jury that the defense had the same subpoena power as the state and shifted the burden to the defense:

> MR. MORTON: And I can exercise the subpoena power in brining in lots of exhibits, witnesses, and things like that, so we both have equal rights to various things, so when one says well, the State could have done this, even though he has no burden to do so, none whatsoever, he chose to do so, bringing in things in this particular case, and then he's going to turn and complain and say the State didn't do it, but that's something to prove, then. Same subpoena power. Certainly can be exercised by the defense.
>
> MR. MOLDOF: Objection and motion, Judge.
>
> THE COURT: Continue please.

108/14498-99. This was improper. Crowley v. State, 558 So. 2d 529, 530 (Fla. 4th DCA 1990) (prosecutor's comment -- defense has same subpoena power as state -- is improper).

The prosecutor asked the jury as "good citizens to be "courageous" and they owed it to "the people of this community" to return a verdict of guilty:

> And now it's time, as good citizens, to be courageous and be just and you owe it to yourselves and the people of this community and I'm sure you will, and I'm simply asking you, based on the law, and based on the evidence and the reasonable inferences that can be drawn, you should return a verdict of guilty as charged, as to each count.

109/14584 (emphasis added).

Telling the jury that they "owe it" to "the people of this community" to return "a verdict of guilty as charged" was improper. See Grey v. State, 727 So. 2d 1063, 1065 (Fla. 4th DCA 1999) ("exhortations to the jury to 'do their job' may improperly exert pressure upon the jury to divert it from its responsibility to view this evidence independently and fairly"); Birren v. State, 750 So. 2d 168, 169 (Fla. 3d DCA 2000) (comments appealing to community improper).

After the defense waived all lesser included offenses, the prosecutor requested lesser offenses be instructed on 104/13815. Appellant objected on the ground that the prosecutor was merely requesting lessers in order to disingenuously tell the jury that it was not a case of lesser included offenses 104/13815-19. In closing argument the prosecutor did exactly that:

> MR. MORTON: This is not a case of lesser included offenses. It's guilty as charged to each and every count.

109/14584. By attacking the lessers, the prosecutor made it seem as if they must have been requested by the defense. As noted in Cochran v. State, 711 So. 2d 1159 (Fla. 4th DCA 1998), a prosecutor is obligated to use only legitimate and fair comments and "It is fair to say that the average jury, in a greater or lesser degree, has confidence in these obligations" and thus the prosecutor's assertions and insinuations "are apt to carry much weight against the accused when they should

properly carry none." This cause must be reversed and remanded for a new trial.

## POINT X

**THE TRIAL COURT ERRED IN ADMITTING HEARSAY STATEMENTS OF JEAN KLIMECKZO AS TO WHAT ALLEGEDLY OCCURRED ON THE WEEKEND OF THE KILLINGS.**

Over Appellant's hearsay objection 67/8930-32,8939-40,8957-61,8970-74, Jean Klimeckzo's out-of-court statement made August 31, 1994, which detailed that Appellant and Pablo Ibar came to the residence at 5:00 a.m. and Ibar grabbed a Tech-9 and they left in a big black shiny car and Appellant's car was introduced into evidence 67/8990-99. It was error to admit the hearsay evidence.

This issue involves questions of law and thus is subject to de novo review.

In the present case, the state introduced the out-of-court statements and sought to exclude them from the rule against hearsay as former testimony and prior inconsistent statements. Of course, rules and statutes are to be construed against the party claiming the exception to the rule or statute. Pal-Mar Water Management District v. Board of County Commissioners of Martin County, 384 So. 2d 232 (Fla. 4th DCA 1980).

The former testimony exception 90.803(22) is unconstitutional in criminal cases because it is "clear that line testimony may not be constitutionally supplemented with former

testimony absent a showing of unavailability." Abreu v. State, 804 So. 2d 442 (Fla. 4th DCA 2001). In the present case there was no unavailability.

Also, as explained in Point III, the adversarial preliminary hearing does not fall within the former testimony exception because there are different motives and interests at stake in developing testimony.

A prior inconsistent statement given under oath subject to the penalty of perjury may be admissible as non-hearsay. However, Klimeckzo's prior statement was not inconsistent with his trial testimony. At this trial, Klimeckzo indicated that he did not remember the events that occurred 6 years earlier 67/8949. The out-of-court statement did not dispute that Klimeckzo could no longer remember the event in question. Florida courts have not provided an analysis of this issue. However, the Oregon Supreme Court analyzed how other jurisdictions dealt with this issue and concluded that a statement about an event is not inconsistent with the failure to remember that event at trial:

> As a result, they do not allow impeachment by a previous statement about the events that the witness no longer remembers. See Anno., 99 A.L.R.3d 934 §§ 6(a) (previous statements as impeachment). We agree with the discussion. People v. Sam, 71 Cal.2d 194, 77 Cal.Rptr 804, 454 P.2d 700 (1969). In Sam, the state called Tubby to testify concerning a previous altercation with the defendant. Tubby, however, testified only that he had been too drunk at the time to remember anything....

> "Granted that the officer's experienced observation and the fact that a report was made and signed tended to impeach Tubby's assertion of drunkenness, it is not clear how the contents of that report impeached anything Tubby said on the stand. There is nothing necessarily inconsistent between the fact that Tubby gave a statement to the officer over two years earlier – or the substance of that statement – and his present claim of lack of recollection. Indeed, the circumstances can be quite consistent. 454 P.2d at 708, 77 Cal.Rptr. 804 (emphasis in original).
>
> The California court's analysis is consistent with the essential common law and statutory requirement for impeachment by prior inconsistent statement; the previous statement must be inconsistent. In this case, there were almost five, rather than two, years between the victim's four statements to Leedom and her inability to remember at trial; the fact that she made a statement in December 1992 has no logical capacity to impeach her lack of memory in August 1997.

State v. Staley, 995 P.2d 1217, 1222 (Ore. 2000) (emphasis added). It was error to admit the prior out-of-court statement which was not admissible under the prior inconsistent statement or former testimony provisions of the Florida Evidence Code.

The error of admitting Klimeckzo's statement was not harmless. As discussed in Point I, this was a very close case in which evidence that Ibar and Appellant were together and in possession of a weapon consistent with the murder weapon which might sway the jury. Certainly, the prosecutor tried to sway the jury with this evidence in the closing argument. The hearsay evidence cannot be deemed harmless. The error deprived Appellant's rights of confrontation, due process and a fair trial. Fifth, Sixth, Fourteenth Amend., U.S. Const.; Art. I, §§

2, 9, 16, 22, Fla. Const. This cause must be reversed and remanded for a new trial.

## POINT XI

**THE TRIAL COURT ERRED IN ADMITTING HEARSAY OPINIONS OF MELISSA MUNROE AND JEAN KLIMECKZO THAT APPELLANT WAS THE PERSON IN THE PHOTO TAKEN FROM THE VIDEOTAPE OF THE MURDER.**

In this case, there was a videotape of the murders and photos of the suspects were taken from the videotape. At trial, not a single witness testified that Appellant was the person in the photos. The witnesses testified that the photo was to unclear to tell who was in the photo. One witness testified that it was not Appellant in the photo. However, the prosecutor used out-of-court statements of Melissa Munroe and Jean Klimeckzo as proof that Appellant was the person in the photos. The out-of-court statements were hearsay. The present case involves questions of law and this is subject to de novo review.

**The opinion testimony of Munroe and Klimeckzo was opinion and not non-hearsay under Section 90.801(2)(c).**

Under Section 90.801(2)(c) a statement is not hearsay if the declarant testifies at trial and is subject to cross-examination and the statement is one of identification of a person after perceiving the person. The pertinent question is whether showing a person a photo and asking if she knows the person in the photo constitutes a non-eyewitness opinion or is an eyewit-

ness identification after perceiving the person. Caselaw has defined this as opinion testimony. See State v. Banton, 567 So. 2d 1067 (Fla. 2d DCA 1990) (testimony of lay witness as to identity of person in surveillance photos is opinion testimony under 90.701); Early v. State, 543 So. 2d 868, 869 (Fla. 5th DCA 1989) (same); Edwards v. State, 583 So. 2d 740 (Fla. 1st DCA 1991) (error to allow renditions of opinion concerning identity of person in videotape without proper predicate for introduction of opinion testimony); Robinson v. People, 927 P.2d 381 (Colo. 1996) (in-court opinion testimony identifying defendant in surveillance photo was admissible with proper predicate laid for opinion testimony); U.S. v. Bannon, 616 F.2d 413 (9th Cir. 1980) (lay witness opinion identifying defendant in bank surveillance photo was admissible under Rule 701); People v. Russell, 165 A.D.2d 327, 567 N.Y.S. 2d 548 (2d Dept. 1991), order aff'd, 79 N.Y.2d 1024, 584 N.Y.S.2d 428, 594 N.E.2d 922 (1992) (non-eyewitness testimony identifying defendant in surveillance photo was proper lay opinion where foundation had been laid).

In Commonwealth v. Anderson, 19 Mass.App.Ct. 968, 473 N.E.2d 1165 (Mass.App. 1985), testimony of a non-eyewitness that the defendant was the person in the robbery photo was declared to be opinion testimony and deemed inadmissible because it invaded the province of the jury. Of course, eyewitness identification after perceiving the person would never be considered invading

the province of the jury. In Anderson, the error of admitting the opinion testimony was harmless because there were eyewitnesses to the crime itself. Obviously, if the non-eyewitness testimony was identification rather than opinion testimony, the court in Anderson would not have made the distinction.

In People v. Gee, 286 A.D.2d 62, 66, 730 N.Y.S.2d 810, 813 (N.Y.App. 2001), the court considered whether viewing a surveillance or security photo constituted an improper identification and stated, "... we conclude that the viewing in question did not constitute an identification process ..."

If the non-eyewitness testimony was considered identification after perceiving the person rather than opinion testimony, any person would be allowed to give their opinion of who was in the photo even though the non-eyewitness was in no better position than the jurors to render such a judgment.[4] As noted by on jurist, such would result in trial by wager of law:

> We do not confront on this appeal the usual problems of eyewitness identification. Instead the issue is posed by surveillance photos of the robbery itself – photos that went to the jury for its determination as the finder of fact. Our question is thus whether someone else, a non-eyewitness, should have been permitted to opine on the very question that was at the heart of the jury determination: Was the person depicted in the photo Jackson?

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[4] Such testimony would not be admissible. E.g., Commonwealth v. Pleas, 741 S.2d 448 (Maine 1999); U.S. v. LaPierre, 998 F.2d 1460, 1465 (9th Cir. 1993) (error to admit testimony where non-eyewitness did not know defendant).

> What circumstances can justify that kind of lay opinion evidence? Reason teaches that there must also be sufficient other evidence to support the conclusion that the lay non-eyewitness is better able to identify the defendant than the jury. Were the rule otherwise there would be no logical basis to exclude a parade of people, having more or less acquaintance with the defendant, from coming to the stand and swearing that the photo did or did not resemble the defendant. That would restore a procedure akin tot he medieval concept of trial by wager of law, wholly at odds with our modern notions of trial.

United States v. Jackson, 688 F.2d 1121, 1127 (7th Cir. 1982) (Judge Skadur dissenting) (emphasis added).

An identification after perceiving a person under § 90.801 (2)(c) deals with an eyewitness rather than a non-eyewitness. The situation contemplated is where someone witnesses the crime and then shortly later is presented with a lineup and says, "that's the man." Stanford v. State, 576 So. 2d 737, 739-40 (Fla. 4th DCA 1991).

The justification for permitting out-of-court identifications under 90.801 to be admitted as substantive evidence is that an identification made "shortly after the crime is inherently more reliable than a later identification in court." State v. Ferber, 366 So. 2d 426, 428 (Fla. 1978). This justification is not present in a situation where someone is viewing a surveillance photo of the crime. A photo, or video, of the crime is frozen in time – far different than an eyewitness' memory in viewing the perpetrator during the crime – and the concern about a dissipating memory of the view of the perpetra-

tor is not present. Reliability does not decrease over time in this situation. In fact, in this case it was argued that reliability would increase over time due to the advance in technology which allegedly clarified the image from the video.[5]

Also, the out-of-court statements would not be admissible as prior inconsistent statements under § 90.801(2)(a). One of the requirements to admit an out-of-court statement as non-hearsay under 90.801(2)(a) is that the declarant court have been subject to perjury regarding the out-of-court statement. As shown above, the out-of-court opinions were lay opinion testimony. It is well-settled that opinion testimony, even if given under oath, is not subject to perjury. See Vargas v. State, 795 So. 2d 270 (Fla. 3d DCA 2001) (statement alleged to have been perjury must be fact and cannot be one of opinion or belief). Thus, the out-of-court statements could not be admitted under provision 90.801(2)(a) as inconsistent with Munroe's and Klimeckzo's lay opinion testimony.

Munroe and Klimeckzo's out-of-court statement was an opinion, their out-of-court statements would not be admissible under Sections 90.801(2)(a) or 90.801(2)(c). This cause must be reversed and remanded for a new trial.

**POINT XII**

[5] The images were enhanced over time. However, the enhancements still did not yield a truly identifiable image. The prosecutor even conceded to the jury that they would not make an identification from the photo or video.

**THE TRIAL COURT ERRED IN SUSTAINING THE STATE'S OBJECTION AND PROHIBITING APPELLANT FROM INTRODUCING TO THE JURY A TAPED CONVERSATION BETWEEN CASEY SUCHARSKI AND KRYSTAL FISHER.**

Krystal Fisher lived with Casey Sucharski for a period of two years 57/7494. Sucharski and Fisher had a conversation which was recorded on Sucharski's answering machine 53/7019. - Appellant sought to introduce the tape recorded conversation into evidence 53/7019-76. The prosecutor objected and moved to exclude the conversation under Florida Statute 934.06 53/7064. The trial court sustained the objection and excluded the evidence 57/7583-84; 53/7084.[6] Exclusion of the evidence denied Appellant due process and a fair trial. Fifth, Sixth, Fourteenth Amend., U.S. Const.; Art. I, §§ 2, 9, 16, 22, Fla. Const.

1. The taped conversation was not inadmissible under § 934.06 of the Florida Statutes. To be inadmissible under § 934.06, the recording must be intentionally made and without consent of one of the parties to the conversation. § 934.06.

There was no evidence produced to show that the recording of this conversation was intentionally made. The conversation was recorded when an answering machine answered an incoming call:

> (Thereupon, the tape was played in open court and the following proceedings were heard in open court via the tape:)

[6] The tape was played and proffered outside the jury's presence 57/7600.

"Sucharski: Yeah.

"Kristal: Hello.

"Sucharski: Hello, you have now reached the Butch Casey residence.

"Sucharski: (inaudible).

* * *

(Thereupon, phone was hung up, after which time phone picks up.)

"Sucharski: Hello.

"Kristal: I'd like to --

"Sucharski: Hello, you have now reached the Butch Casey residence. I'm not home presently.

"Sucharski: Hello.

"Kristal: Hello.

"Sucharski: Hello.

"Kristal: I'd like to get this sone as soon as possible, so --"

57/7600,7608. This is not an intentional recording.

In addition, the evidence showed that Fisher impliedly consented to the taped conversation. The conversation was picked up on an answering machine recording. The machine kept recording after the phone was picked up 55/7245. Fisher lived with Sucharski for two years 53/7015. Thus, Fisher would know that her conversation to Sucharski would be recorded and by taking part in the conversation Fisher impliedly gave her consent.

2. Even if the taped recording was inadmissible under § 934.06, it must give way to Appellant's due process rights.

The trial court even recognized Appellant's due process right to admit the tape recording 53/7027, and, in fact, admitted the tape recording to aid Appellant's theory of defense in the first trial 54/7084 [ending in a hung jury]. The trial court did not permit the recording in this trial to aid Appellant's theory of defense. The recording was important to Appellant's case as it showed that Krystal Fisher had a motive for the crime and the inflection in Fisher's voice on the tape also showed her passion and animosity toward Sucharski 54/7042. Due process especially required that Appellant be permitted to play the tape after Detective Manzella listened to the tape and told the jury that the tape was an argument over Fisher's boyfriend 52/6715;54/7044-45. The prosecution should not be permitted to mis-characterize the contents of the tape to dismantle the defense while the defense is prohibited from correcting the mischaracterized Due process required that Appellant be permitted to introduce the tape recording.

3. The state opened the door to the introduction of the tape recording by its direct examination of Detective Manzella regarding the contents of the tape recording 52/6716.

Also, under the rule of completeness, once the state had introduced portions of the tape recording the defense had to be

permitted to introduce other portions in order to shed light upon and eliminate mischaracterization created by the portions already heard by the jury. § 90.108, Fla. Stat. (1999).

4. Section 943.06 should not be construed to yield an absurd result. It is well-settled that statutes should not be construed to yield an absurd or ridiculous result.

It is absurd to prohibit the introduction of the tape recording where:

> A) The recording was played to a prior jury (T7084) and played in public in this case 57/7600. The only members of the public not permitted to hear the tape were the people most in need of information – the jury.
>
> B) A state witness on direct examination testified to listening to the tape and then described its contents [mischaracterizing it to the jury] 52/6716.
>
> C) None of the parties involved in the conversation were complaining about it being played in court.

5. The state did not have standing to object 54/7070. The person whose privacy interests were allegedly compromised was Krystal Fisher. Thus, only Fisher had standing to object to the playing of the tape. She did not object.

This cause must be remanded for a new trial.

## POINT XIII

**THE TRIAL COURT ERRED IN ADMITTING HEARSAY STATEMENTS FROM JEAN KLIMECKZO OVER APPELLANT'S OBJECTION.**

Over Appellant's objection 68/9018,9066, the prosecutor was allowed to introduce out-of-court statements made by Jean Klimeckzo in which he gave his opinion that Appellant was the person in the photo from the videotape 68/9098,9102. The out-of-court statement came from cross-examination by Appellant's previous attorney at an adversarial preliminary hearing and constitutes hearsay and deprived Appellant's rights of confrontation, due process and a fair trial. Fifth, Sixth, Fourteenth Amend., U.S. Const.; Art. I, §§ 2, 9, 16, 22, Fla. Const. This issue involves questions of law and is thus subject to de novo review.

The cross-examination at the preliminary hearing yielding Klimeckzo's opinion that Appellant was the person in the photo does not qualify as an identification under § 90.801(2)(c) because, as fully explained at Point XI, a non-eyewitness opinion of who is in a photo is lay opinion testimony and not identification testimony after perceiving the person. Thus, the testimony was not admissible under section 90.801(2)(c).

The prosecutor argued that Klimeckzo's out-of-court statement at the adversarial preliminary hearing would be admissible as substantive evidence only as former testimony (90.803(22)) and not any other way 67/8975.

Defense counsel specifically complained that an adversarial preliminary hearing was different from a final trial 67/8969.[7] The adversarial preliminary hearing does not fall within the former testimony exception because there are different motives and interests at stake in developing testimony. The adversarial preliminary hearing is to determine if the defendant may be held prior to trial versus a final trial where a potential penalty of death may result. See Nazworth v. State, 352 So. 2d 916, 918 (Fla. 1st DCA 1977) (bond hearing is far different from trial). The stakes and motive are radically different. One can explore the evidence and experiment at the preliminary hearing whereas at the final trial where utmost care must be taken. In the present case the defense attorney went into the preliminary hearing four days after taking on representation of Appellant. Going into the hearing the defense attorney was not even aware that the murders were on videotape. This can hardly equate to the years of preparation for the final trial. This difference in preparation demonstrates the differing motives and interests between the preliminary hearing and the final trial. United States v. Feldman, 761 F.2d 380, 385 (7th Cir. 1985) (factors in determining whether motives similar include 1) type of proceedings involved; 2) trial strategy; and 3) stakes involved).

[7] To be admissible as non-hearsay as former testimony, the party against whom the testimony is offered must have had an "opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." § 90.803(22).

These factors are different in adversarial preliminary hearings and trials. Also, the audience is different – a trial judge versus a jury. A trial attorney will cross-examine a witness differently in front of a judge. There is some safety where the judge is a factfinder versus laypersons -- a judge is less likely to consider evidence which she knows is inadmissible or irrelevant. A problem occurs when one relies on a learned judge to filter out such evidence only to find later that the evidence is before a jury without the filter.

Appellant also objected on the grounds of a due process violation. The different motives and interests of the two hearings can also have a due process impact when one uses the testimony during the cross-examination of Appellant's prior defense attorney. In addition to not wanting the cross-examination in evidence, Appellant did not want it to be identified with Appellant. Appellant was especially concerned that the jury would believe that Appellant's counsel at the prior hearing was in the same position as his present attorney,[8] but was unable to dispose or explain away Klimeckzo's testimony at the preliminary hearing through cross-examination T9061,67. In other words, Appellant's own attorney, because of being in a different

[8] The prior attorney had only been appointed to the case 4 days prior to the adversarial preliminary hearing and had no discovery as opposed to the situation where the present counsel had been on the case for years prior to the final trial.

position, ended up giving Klimeckzo's testimony the appearance that it withstood cross-examination.

In addition, former testimony exception 90.803(22) is unconstitutional in criminal cases because it is "clear that line testimony may not be constitutionally supplemented with former testimony absent a showing of unavailability." Abreu v. State, 804 So. 2d 442 (Fla. 4th DCA 2001). In the present case there was no unavailability.

For the reasons given above, it was error to admit the cross-examination of Klimeckzo. The error was prejudicial.

At first glance, it would seem that the admission of Klimeckzo's cross-examination opinion that Appellant was in the photo was cumulative to other evidence. However, the evidence was corroborative rather than cumulative.[9] The prosecutor in the court below explained how this evidence was very important and not merely cumulative:

> MR. MORTON: The contents of the statements made are very important to hear. Any time a witness makes a statement concerning identification, the circumstances surrounding it is important for the jury to understand, in order to determine what wait [sic] to give it.
>
> If we're just talk about statements that a person is making in a vacuum, then we wouldn't identify the circumstances of any – any statement he made concerning identification, including the statements to police, if it's a police setting.

[9] Also, the other out-of-court opinion evidence should not have been admitted.

> If it's in an Adversary Preliminary Hearing in a cross examination setting and the witness is still holding the same position against the lawyers that are representing Mr. Penalver at that time, in court, being sworn under testimony in front of a Judge, those are circumstances around which the jury can give weight to that to determine.

68/9062-63 (emphasis added). Thus, even if other opinion evidence that Appellant was the person in the photo were admissible, the error of admitting this evidence could not be deemed harmless. The prosecutor also explained from his perception the whole case depended on how the witnesses initial out-of-court "identifications" [opinions] were contrary to their in-court testimony and the jury would evaluate these contradictions:

> ... in an Adversarial Preliminary Hearing, where the witness is standing by his identification, when identification is the crucial issue in this case, under cross-examination, standing by the identification, not go get that in would be prejudicial to the State because that's the whole case.
>
> The whole case is whether or not this witness' initial identification is contrary to what he's doing in the courtroom today. Are they identifications that the jury should believe, and, therefore, should be allowed to be taken in as evidence and possibly based a conviction on it or should they simply base their decisions on what he is saying today in the courtroom about identification.

68/9049-50 (emphasis added).

Thus, the erroneous admission of the evidence cannot be deemed harmless. This cause must be remanded for a new trial.

## POINT XIV

**WHERE THE ONLY EVIDENCE OF APPELLANT'S GUILT WERE OUT-OF-COURT STATEMENTS, THE EVIDENCE WAS INSUFFICIENT FOR CONVICTION.**

In this case the only evidence showing that Appellant was involved in the crimes were out-of-court statements. Under the teachings of State v. Moore, 485 So. 2d 1279 (Fla. 1986), the out-of-court statements were insufficient for conviction.

Sufficiency of evidence is subject to de novo review. Out-of-court statements, even if admissible due to lack of objection, will be insufficient for conviction unless other evidence shows guilt. State v. Moore, 485 So. 2d 1279 (Fla. 1986); State v. Green, 667 So. 2d 756 (Fla. 1995) (reversal where there was not sufficient evidence corroborating the out-of-court statements -- risk of convicting the innocent was too great).

In the present case, the evidence going toward showing guilt was Melissa Munroe and Jean Klimeckzo's out-of-court opinion testimony regarding Appellant and the video/photo images. These witnesses testified at trial that the video/photo was of such poor quality that they did not know who was in the video/photo.

Other witnesses familiar with Appellant testified that Appellant was not the person in the video/photo 92/12228,12252.

The expert witnesses in forensic identification could not identify Appellant in the video/photo.

There is no physical evidence connecting Appellant to the crime. There was no DNA linking Appellant to the crime. None

of Appellant's prints were found at the murder scene 78/10391. There were 33 prints of unknown individuals at the scene 78/10372. The shoes taken from Appellant did not match the shoe that made a blood imprint at the murder scene 87/11681,11705. Appellant's shoe size 7½ (87/11713) was different from the size of shoe that made the imprint 10-11 (85/11189). No blood, or any other evidence, was found in Appellant's car 78/10391. Ibar's prints were not found in Appellant's car 78/10391.

The in-court testimony against Appellant was that of Kim San.[10] San's relevant testimony was that she saw Appellant and Ibar together on the morning after the murders. There were two cars -- Appellant's car and a black Mercedes.

This alleged evidence is not proof of Appellant's guilt. At best, there was a stacking of inferences to even begin to consider such a conclusion.

First, one must infer that the Mercedes San observed belonged to Casimir Sucharski. A mere bare description of a vehicle being a black Mercedes is not sufficient to conclude that it was Sucharski's vehicle.

After making the bare assumption that it was Sucharski's car, one must further infer that Appellant had something to do with the taking of Sucharski's car. Foy identified Ibar as

[10] For purposes of this Point, Appellant is not challenging San's credibility -- even though San was thoroughly impeached in the court below.

being in Sucharski's car as it left Sucharski's residence. However, Foy did not identify Appellant as being in the car.[11] Appellant could have encountered Ibar afterward and their being together could have nothing to do with the murders. It is a blind inference that Appellant helped obtain the car. Thus, one inference was stacked upon another inference. Appellant's convictions and sentences must be reversed.

## POINT XV

**THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S HEARSAY OBJECTION TO OUT-OF-COURT STATEMENTS BY KIMBERLY SAN THAT SHE HAD TOLD OTHERS THAT APPELLANT WAS INVOLVED IN THE MURDERS.**

Over defense counsel's objection 96/12261, Jasmine McMurtry was permitted to testify that Kimberly San had told others that she thought Appellant was involved in the homicides 96/12261. It was error to overrule ths objections and to admit this evidence.

San's out-of-court statement that she thought Appellant was involved in the homicides is patent hearsay. Moreover, San's belief that Appellant was involved in the homicides also improperly invaded the province of the jury. See Acosta v. State, 798 So. 2d 809 (Fla. 4th DCA 2001).

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[11] In fact, Foy's description of the second person having hair length was contrary to Appellant's hair length.

No exception to the hearsay rule was offered or applies. It was reversible error to admit the hearsay. The error deprived Appellant of his rights of confrontation, due process, and a fair trial. Fifth, Sixth, Fourteenth Amend., U.S. Const.; Art. I, §§ 2, 9, 16, 22, Fla. Const. This cause must be remanded for a new trial.

## POINT XVI

**APPELLANT WAS DENIED HIS RIGHTS TO CONFRONTATION, DUE PROCESS, AND A FAIR TRIAL BY THE PROSECUTION INTRODUCING THE FORMER TESTIMONY OF MARIA CASAS IN ORDER TO ADMIT HEARSAY OPINION TESTIMONY.**

Maria Casas' prior trial testimony was introduced into evidence by the prosecutor under the former testimony exception to the hearsay rule. The significance of the former testimony was that Casas testified that Pablo Ibar (her son) was not on the video or images taken from the video 51/6599,6601. Thus, Casas' former testimony was favorable to the defense. The prosecutor did not introduce the former testimony to advance its case. Rather, former testimony was introduced as a subterfuge to introduce testimony of police as to out-of-court statements of Casas in which she allegedly identified Ibar as one of the perpetrators after being shown photos from the video. This subterfuge denied Appellant his rights of confrontation, due process, and a fair trial.

The instant issue involves a trio of improprieties. First, it was improper to introduce former trial testimony as a

subterfuge merely to introduce Casas' alleged out-of-court statements. Cf. U.S. v. Morlang, 531 F.2d 183, 190 (4th Cir. 1975) (overwhelming authority is that evidentiary rules may not be used as a "mere subterfuge to get before the jury evidence otherwise not admissible"); Collins v. State, 698 So. 2d 1337, 1339 (Fla. 1st DCA 1997).

Second, a party may only introduce an out-of-court statement of identification under § 90.801(2)(c) where the declarant testifies at trial. E.g. Hayes v. State, 581 So. 2d 121, 124 (Fla. 1991). While her former testimony was read into evidence, Casas did not testify at this trial. The jury did not view her demeanor to assess her credibility when she testified that it was not her son in the photo or video. Her credibility was key. Yet the jury never saw her testify.

Third, Casas' out-of-court statement was not an identification after perceiving the person under § 90.801(2)(c). Rather, it was lay opinion. See Point XI. § 90.801(2)(c) could not be utilized to introduce Casas' out-of-court opinion testimony. See Point XI.

The actions of the prosecutor in using Casas' former testimony as a subterfuge to introduce out-of-court opinion testimony denied Appellant's rights to confrontation, due process, and a fair trial. Fifth, Sixth, Fourteenth Amend., U.S. Const.; Art.

I, §§ 2, 9, 16, 22, Fla. Const. This cause must be remanded for a new trial.

## POINT XVII

**APPELLANT WAS DENIED HIS RIGHTS TO CONFRONTATION, DUE PROCESS AND A FAIR TRIAL WHERE THE PROSECUTOR CALLED WITNESSES IN ORDER TO ADMIT THEIR OUT-OF-COURT STATEMENTS WHICH WOULD OTHERWISE BE INADMISSIBLE.**

The prosecution called Melissa Munroe, Jean Klimeckzo, Ian Milman and Maria Casas primarily to introduce out-of-court statements which would have otherwise been inadmissible. This procedure denied Appellant his rights to confrontation, due process and a fair trial.

The prosecutor called the above witnesses allegedly hoping they would give opinion testimony that Appellant and Pablo Ibar were the persons in the surveillance video/photo and/or would make other statements regarding the weekend of the murders that would incriminate Appellant and Ibar. The witnesses did not give the testimony that the prosecutor wanted.[12] This was not unexpected since the witnesses did not give the testimony that the prosecutor wanted during the first trial that resulted in a hung jury. The prosecutor also wanted Munroe and Klimeckzo to testify to activities of Appellant and Ibar on the weekend of the murders, but they did not produce the testimony that the prosecutor wanted.

[12] Munroe, Klimeckzo, Milman, Casas would not testify that it was Appellant or Ibar in the video/photo.

At times, the prosecutor was not even interested in the witness' in-court testimony. For example, as to the issue of whether Appellant was in the video/photo, the prosecutor never asked Klimeckzo at this trial who was in the photo,[13] the prosecutor only asked Klimeckzo about out-of-court statements that he made to police 9154-55.[14] The prosecutor was less concerned about the witnesses' in-court testimony than he was about extracting their out-of-court statements.

When the prosecutor asked about the prior statements he would first seek to refresh the witness' recollection [regardless of whether their memory needed to be refreshed] and they would give an answer the prosecutor was not pleased with -- typically that their memory was not refreshed or they would give an answer that the prosecutor did not like. The prosecutor would then read a prior statement to the jury. The prosecutor's procedure in this case is very similar to that in Morton v. State, 689 So. 2d 259 (Fla. 1997).

In Morton, this Court held that calling a witness for the primary purpose of introducing out-of-court statements that would otherwise be inadmissible was improper and that the out-

[13] Appellant's counsel asked Klimeckzo who was in the photo 71/9408.

[14] Also, Ian Milman was also questioned about his prior statements to police about the photos 9523-24, before he was even asked in-court who he thought was in the photos 9528.

of-court statements should have been excluded. 689 So. 2d at 264.

In the present case, the prosecutor called the witnesses not for the purpose of their in-court testimony, but primarily as a vehicle for the admission of their out-of-court statements which but for the presence of the witnesses would not be admissible.

Munroe, Klimeckzo, Milman, and Maria Casas alleged out-of-court statements that Appellant and Ibar were in the video/photo were admitted under § 90.801(2)(c) which requires the declarant be on the stand at trial and subject to cross-examination regarding the out-of-court statements. The same is true regarding prior inconsistent statements under § 90.801. The problem is where the prosecutor calls the witnesses not for the purpose of eliciting information from them on the stand, but calls them primarily as a subterfuge or vehicle to introduce what would otherwise be inadmissible evidence. Morton. This cause must be reversed for a new trial.

## POINT XVIII

**THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE OUT-OF-COURT STATEMENTS OF KIMBERLY SAN AS TO WHY SHE CAME FORWARD WITH INFORMATION AFTER THE MURDERS.**

Appellant presented evidence that Kimberly San only came forward with her allegations regarding the murders some 3 years after the fact in order to seek a deal for her fiancee – Bill Grace 85/11217/11219. San testified that she came forward with

information because she felt bad 85/11152. Over Appellant's hearsay objection, the prosecutor presented the testimony of Jasmine McMurtry that San said she came forward because she felt badly and that she did not mention Bill Grace 95/12638-39. The admission of this out-of-court statement was reversible error.

Rulings contrary to the evidence code constitute an abuse of discretion. Nardone v. State, 798 So. 2d 870, 874 (Fla. 4th DCA 2001). San's out-of-court statement that she came forward because she felt badly was offered to prove why she came forward at the time she did. In other words, it was for the truth of the matter asserted and constitutes hearsay. It was error to overrule Appellant's objection and to admit this evidence.

The error cannot be deemed harmless. The out-of-court statement was a prior consistent statement (made after a motive to fabricate came into existence) which improperly bolstered the trial testimony of Kim San. San's credibility was very important to the state's case. San had been impeached in a number of ways -- including he motive to fabricate. Bolstering her through a prior consistent statement helped the state and hurt Appellant. Where the case was close as this one, the error of improperly bolstering San's credibility was harmful.

## POINT XIX

**THE TRIAL COURT ERRED IN PROHIBITING THE DEPOSITION OF HERSCHEL KINNAMAN INTO EVIDENCE.**

Appellant moved to introduce into evidence a deposition of Herschel Kinnaman (Kim San's father) 98/12987. The state objected and the trial court prohibited Appellant from presenting this evidence 98/13016. This was reversible error.

Kinnaman testified in deposition that he viewed the videotape and that the intruder who looked into the camera was Appellant 98/13007. This testimony contradicted the state's theory that one familiar with a person could correctly opine who was in the video/photo. The prosecutor was present at the deposition and tried to undo his testimony even to the extent of telling Kinnaman in his cross-examination that Kinnaman was wrong 98/13012. However, Kinnaman stated, "You're wrong, I'm sure of my identification." 98/13013.

Knowing that Kinnaman was suffering from cancer, Appellant successfully moved to perpetuate Kinnaman's testimony. Unfortunately, Kinnaman died before the perpetuated deposition was done.

At trial, the prosecutor objected to Kinnaman's deposition on hearsay grounds. However, Kinnaman's testimony was <u>not</u> offered for the truth of the matter asserted -- that Appellant was one of the intruders. Rather, it was offered to show that Kinnaman was mistaken and that one familiar with a person can look at a video/photo and be wrong -- no matter how certain they are. Appellant's counsel argued that the deposition should be

admitted because of the Due Process Clause 98/13005-6,130013. The trial court indicated that it would be the fairest thing to do to admit the testimony 98/13006. State evidentiary rules and laws excluding certain evidence must at times give way to a defendant's due process rights to present evidence necessary to his defense. See Chambers v. Mississippi, 93 S.Ct. 1038 (1973) (application of state hearsay rule deprives the defendant of due process and a fair trial).

In this case, the prosecutor posited to the jury that someone familiar with a person could identify that person in a photo lineup or video while others not familiar with the person cannot. Kinnaman's testimony shows that someone familiar with the person can be mistaken.[15] Appellant needed this testimony.

It should also be considered that this evidence was not significantly procedurally different than much of the evidence the prosecutor used against Appellant. The hearsay rule recognizes the importance of statements under oath, subject to cross-examination and made where the jury can view the declarant's demeanor at the time of giving the statement. Kinnaman's testimony was under oath and subject to cross-examination. While the jury would not be able to view Kinnaman's demeanor, the same is true of the many out-of-court statements admitted as state's evidence (or even if the testi-

[15] Other witnesses who saw the video/photo indicated the image was of too poor a quality fo make an identification.

mony had been perpetuated since there is no requirement of taping the deposition). Due process requires that Appellant should have been permitted to introduce Kinnaman's testimony into evidence.

## POINT XX

**THE DEATH SENTENCE VIOLATES APPRENDI V. NEW JERSEY, 530 U.S. 466, 120 S.Ct. 2348 (2000) AND RING V. ARIZONA, ___ U.S. ___, 2002 WL1357257 (JUNE 24, 2002).**

This issue involves several related errors which combine to render the death sentence unconstitutional under the Fifth, Sixth, Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16, 17, and 22 of the Florida Constitution. Ring v. Arizona, ___ U.S. ___, ___ S.Ct. ___, 2002 WL1357257 (June 24, 2002); Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000); State v. Overfelt, 457 So. 2d 1385 (Fla. 1984). These errors include: (1) The jury made no finding of aggravating circumstances. (2) The jury made no finding that the aggravating circumstances are of sufficient weight to call for the death penalty. (3) The failure to instruct the jury that the finding that the aggravators outweigh the mitigators must be beyond a reasonable doubt. (4) In Florida, the jury's recommendation is by a simple majority vote.

(5) The indictment contains no notice of aggravating circumstances. (6) The trial judge relied on the CCP aggravating circumstance when the jury had not been instructed on it. Mr. Penalver acknowledges that this Honorable Court has rejected similar arguments in Mills v. Moore, 786 So. 2d 532 (Fla. 2001). However, the United States Supreme Court's decision in Ring mandates reconsideration of these issues.

Mr. Penalver filed a motion to Dismiss Indictment or to Declare That Death is Not a Possible Penalty 1R/202-204. This motion is based on the failure to allege the aggravating circumstances in the indictment. Mr. Penalver filed a Motion to Declare Fla. Stat. 921.141 unconstitutional 3R/508-34. In this motion he specifically raised the lack of jury finding of aggravating circumstances 3R/519-20. He filed a motion to declare Fla. Stat. 921.141 unconstitutional due to the jury recommendation being based on a bare majority 3R/590-2. He also filed a memorandum of law concerning the problems with Florida capital sentencing procedure 3R/621-8. In this memorandum he specifically pointed out the problems with the lack of jury findings as to aggravating circumstances 3R/621-8. These motions were denied 3R/777-8.

Defense counsel vigorously argued against the CCP aggravator 119/15896-15903. The jury ultimately was not instructed on CCP 119/15929,16002-3. Defense counsel again objected to this

aggravating circumstance in his sentencing memorandum 10R1921-23. The trial judge relied on this aggravating circumstance in imposing the death penalty despite earlier having held that the evidence was insufficient to instruct the jury on this circumstance R1992-95.

The issues involved in Apprendi and Ring constitute fundamental error which would require reversal even in the absence of an objection. Apprendi and Ring are grounded in the right to a jury trial. The right to a jury trial can only be waived by a personal waiver on the record by the defendant. State v. Upton, 658 So. 2d 86 (Fla. 1995). No such waiver took place in the current case.

Apprendi and Ring require a rethinking of the role of the jury in Florida. The Court in Apprendi described its prior holding in Jones v. United States, 526 U.S. 227 (1999).

> The question whether Apprendi had a constitutional right to have a jury find such bias on the basis of proof beyond a reasonable doubt is starkly presented.
>
> Our answer to that question was foreshadowed by our opinion in Jones v. United States, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), construing a federal statute. We there noted that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Id., at 243, n.6, 119 S.Ct. 1215. The Fourteenth Amendment commands the same answer in this case involving a state statute.

430 U.S. at 476.

In Ring, the United States Supreme Court overruled its prior opinion in Walton v. Arizona, 497 U.S. 639 (1990). The Court stated:

> For the reasons stated, we hold that Walton and Apprendi are irreconcilable; our Sixth Amendment jurisprudence cannot be home to both. Accordingly, we overrule Walton to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. See 497 U.S., at 647-649. Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' Apprendi, 530 U.S. at 497, n.19, the Sixth Amendment requires that they be found by a jury.
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> * * *
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> > 'The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and administered.... If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it.' Duncan v. Louisiana, 391 U.S. 145, 155-156 (1968).
>
> The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death. We hold that the Sixth Amendment applies to both. The judgment of the Arizona Supreme Court is therefore reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Ring, supra, at _____.

It is clear that in Florida, as in Arizona, the aggravating circumstances actually define those crimes which are eligible for the death penalty.

> With the issue of guilt or innocence disposed of, the jury can then view the question of penalty as a separate and distinct issue. The fact that the defendant has committed the crime no longer determines automatically that he must die in the absence of a mercy recommendation. They must consider from the facts presented to them -- facts in addition to those necessary to prove the commission of the crime – whether the crime was accompanied by aggravating circumstances sufficient to require death or whether there were mitigating circumstances which require a lesser penalty.

State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973).

It is clear that under Florida law the conviction of first degree murder alone does not make a person eligible for the death penalty. The jury must also find aggravating circumstances. This fact is also recognized by Fla. Stat. 921.141(7).

> **(7) Victim impact evidence**. – Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence.

It is only upon proving aggravating circumstances that the defendant becomes eligible for the death penalty. Thus, in Florida, as in Arizona, the jury must find aggravating circumstances. There was a clear violation of this rule.

An additional constitutional error is that the jury made no finding that the aggravators were sufficiently weighty to call for the death penalty. Florida law requires not only the presence of aggravators, but that they are sufficiently weighty to warrant the death penalty. State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973). There was no jury finding that the aggravating

circumstances are sufficiently weighty to call for the death penalty.

Apprendi was also violated in that the jury was not instructed that it had to find, beyond a reasonable doubt, that the aggravating circumstances must be sufficiently weighty to call for the death penalty or that it must find, beyond a reasonable doubt, that the aggravating circumstances outweigh the mitigating circumstances. As to the first aspect the jury was told:

> It is your duty to follow the law that will now be given to you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

16/1847. The jury was given no guidance as to by what standard it would have to find the aggravators sufficiently weighty to call for the death penalty.

The jury was also given no guidance as to by what standard it would determine whether aggravating circumstances outweigh mitigating circumstances.

> If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without the possibility of parole.
>
> Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.

16/1875-6. Not only does this instruction fail to tell the jury that it must find beyond a reasonable doubt that aggravating circumstances must outweigh mitigating circumstances, it affirmatively tells them that mitigating circumstances must outweigh aggravating circumstances. This violates Apprendi's requirement that any fact which increases the punishment, with the possible exception of recidivism, must be proven beyond a reasonable doubt.

An additional violation of Apprendi and Ring is the fact that Florida does not require a unanimous verdict for penalty. In Johnson v. Louisiana, 406 U.S. 356 (1972), the Court upheld a system whereby verdicts in serious felonies must be by at least nine votes out of twelve and verdicts in capital cases must be unanimous. In Apodaca v. Oregon, 406 U.S. 404 (1972), the Court upheld verdicts of 10-2 and 11-1 in non-capital felonies. In Burch v. Louisiana, 441 U.S. 130 (1979), the Court held that a six person jury must be unanimous. The Court took pains to note that Apodaca was a non-capital case. 441 U.S. at 136. The U.S. Supreme Court has not specifically reached the issue of whether a unanimous verdict is required in a capital case.

The Florida courts have held that unanimity is required in a capital case by the Florida Constitution. Williams v. State, 438 So. 2d 781, 784 (Fla. 1983); Jones v. State, 92 So. 2d 261

(Fla. 1957); Brown v. State, 661 So. 2d 309 (Fla. 1st DCA 1995); Flanning v. State, 597 So. 2d 864 (Fla. 3rd DCA 1992).

The indictment in this case is also defective pursuant to Apprendi. The indictment contains no mention of any aggravating factors or of any allegation that the aggravating factors are sufficiently weighty to call for the death penalty 1R1-3.

The reasoning of Apprendi and Ring is consistent with decisions of the Florida courts. In State v. Overfelt, 457 So. 2d 1385 (Fla. 1984), this Court stated:

> The district court held, and we agree, "that before a trial court may enhance a defendant's sentence or apply the mandatory minimum sentence for use of a firearm, the jury must make a finding that the defendant committed the crime while using a firearm either by finding him guilty of a crime which involves a firearm or by answering a specific question of a special verdict form so indicating." 434 So. 2d at 948. See also Hough v. State, 448 So. 2d 628 (Fla. 5th DCA 1984); Smith v. State, 445 So. 2d 1050 (Fla. 1st DCA 1984); Streeter v. State, 416 So. 2d 1203 (Fla. 3d DCA 1982); Bell v. State, 394 So. 2d 570 (Fla. 5th DCA 1981).

457 So. 2d at 1387. The rule of Overfelt is grounded in the Double Jeopardy and Due Process Clauses of the Florida Constitution. Brown v. State, 763 So. 2d 1190, 1193 (Fla. 4th DCA 2000). The District Courts of Appeal have consistently held that a three year mandatory minimum can not be imposed unless the use of a firearm is alleged in the indictment. Peck v. State, 425 So. 2d 664 (Fla. 2nd DCA 1983); Gibbs v. State, 623 So. 2d 551

(Fla. 4th DCA 1993); Bryant v. State, 744 So. 2d 1225 (Fla. 4th DCA 1999).

The trial court's handling of the CCP aggravator is also in violation of the rule of Apprendi and Ring. Ring specifically holds that the Sixth Amendment right to a jury trial requires a jury finding of aggravating circumstances. Here, the judge refused to instruct the jury on this aggravating circumstance. The only possible basis for this decision is a determination that the evidence is insufficient to support this aggravator. Thus, the trial court effectively acquitted him of this aggravator. Delap v. Dugger, 890 F.2d 285, 306-319 (11th Cir. 1989). It is clearly inconsistent with Apprendi and Ring for the trial judge to take this aggravator out of the jury's consideration and then to rely on it to impose the death penalty.

The denial of jury trial is clearly a structural error which can never be harmless. See Sullivan v. Louisiana, 508 U.S. 275, 278 (1993). The proper remedy for this error is the imposition of a life sentence. The Court in Ring stated that the aggravating factors operate as a functional equivalent of an element of a greater offense. Ring, supra, at _____. Thus, the Court recognized that conviction of first degree murder is not enough to subject a person to the death penalty. It is the presence of sufficiently weighty aggravating circumstances which turns the offense into a death eligible offense, i.e. capital murder.

Under Ring, it is only the finding of aggravating circumstances sufficiently weighty to call for the death penalty which turn the offense of first degree murder into a death eligible offense. Thus, first degree murder, without a jury verdict that there are aggravating circumstances sufficiently weighty to call for the death penalty, is a lesser included offense of capital murder. This is analogous to simple battery being a lesser included offense of aggravated burglary. Mr. Penalver was only charged with, and convicted of, first degree murder. His indictment did not allege the presence of aggravating circumstances sufficiently weighty to call for the death penalty and his jury did not find such circumstances. Mr. Penalver was convicted of ordinary first degree murder. He was not convicted of capital murder. Upon the jury's guilt phase verdict for first degree murder, without a finding of aggravating circumstances sufficiently weighty to call for the death penalty, life imprisonment is the only available penalty. Assuming arguendo, that this deficiency could be cured by a subsequent jury verdict, it did not occur in this case. At no point in the proceedings did the jury make a finding, beyond a reasonable doubt, of death eligibility. It is well-settled that the Double Jeopardy Clauses of the Florida and Federal Constitutions bar a subsequent prosecution after conviction of a lesser included offense based on the same conduct. United States v. Dixon, 509

U.S. 688 (1993); Chikitus v. Shands, 373 So. 2d 904 (Fla. 1979); State v. Witcher, 737 So. 2d 584 (Fla. 1st DCA 1999). Here, the indictment, prosecution and conviction of Mr. Penalver for ordinary first degree murder bar any subsequent prosecution seeking the death penalty. Thus, this case must be reversed for the imposition of a life sentence.

## POINT XXI

**THE DEATH PENALTY IN THIS CASE IS UNRELIABLE.**

This issue involves three separate errors in the sentencing proceeding. First, the trial court denied defense counsel's motion to appoint public counsel to investigate and present mitigation. This left the prosecution's case essentially unchallenged. Second, the trial court erred when it gave great weight to the jury's recommendation of death. Muhammad v. State, 782 So. 2d 343, 361-2 (Fla. 2001). Third, the trial court did not order a pre-sentence investigation. Muhammad, supra at 362-6. These are all issues of law involving de novo review by this Court. These errors individually and cumulatively create an unreliable death sentence, which is rendered in violation of the Eighth and Fourteenth Amendments to the United States Constitution; Article I, Sections 2, 9, 16, and 17 of the

Florida Constitution; and Florida Statute 921.141. Indeed, they combined to render a virtually automatic death sentence without a meaningful adversarial proceeding and without a proper basis for this Court to engage in proportionality review required by the Florida and United States Constitutions.

Trial counsel filed a motion to appoint public counsel to present mitigation IXR1728-32. The trial court denied this motion after hearing argument 11014703-17, IXR1762. Appellant concedes that this Court has previously rejected the requirement of appointing public counsel in cases in which a capital defendant waives the presentation of mitigating evidence. Hamblen v. State, 527 So. 2d 800 (Fla. 1988). However, the rule of Hamblen has been the subject of consistent criticism since it was announced. Hamblen, supra, dissenting opinions of Justices Ehrlich and Barkett at 805-9. Hauser v. State, 701 So. 2d 329 (Fla. 1997), concurring opinion of Justice Anstead, joined by Justices Kogan and Shaw at 332-3; Muhammad v. State, 782 So. 2d 343 (Fla. 2001), concurring opinion of Justice Pariente, joined by Justices Anstead and Shaw at 368-72. The Court's majority has implicitly recognized the problems with a case in which the defendant waives the presentation of mitigation. In Klokoc v. State, 589 So. 2d 219 (Fla. 1991) this Court recognized that a trial court had discretion to appoint public counsel. In Muhammad, supra this Court mandated the ordering of Pre-Sentence

Investigations in all capital cases in which the defendant waives mitigation and reaffirmed the trial court's discretion to appoint public counsel to present mitigation. The time has come for this Court to take the final step and mandate the appointment of public counsel in all cases in which the defendant waives mitigation.

The current process is arbitrary and irrational. It allows some defendants to essentially mandate the death penalty in their cases by waiving mitigation whereas in other cases the judge may appoint public counsel completing altering the state of the penalty phase evidence for the judge, jury, and this Court. Justice Anstead perhaps best summarized this problem in his concurring opinion in Hauser, supra.

> A process that permits death to be imposed by default obviously impairs the ability of the trial jury and judge to make a proper and reasoned decision as to whether the ultimate penalty of death is an appropriate penalty in a particular case. What this means, in fact, is that the irrationality of a defendant in defaulting will be allowed to infect , and render equally irrational and arbitrary, any decision predicated on the default. Further, this Court obviously cannot carry out its mandatory obligation to conduct a reasoned proportionality analysis of the penalty on appeal where there has been a default in the trial court.

701 So. 2d at 332.

Justice Pariente's concurring opinion further amplifies the problems with the current system.

> I am convinced that for the future we should have a uniform procedure to be followed in all cases where

> the defendant waives mitigation so that available mitigating evidence is placed in the record at the time of the original sentencing proceedings. We should not have cases: (1) where some trial judges consider proffered evidence as mitigation and others do not, see Hauser v. State, 701 So. 2d 329, 330 (Fla. 1997); (2) where some trial judges order PSIs in death penalty cases where mitigation has been waived and others do not, see Farr v. State, 656 So. 2d 448, 450 (Fla. 1995) ("Farr II"); and (3) where some judges appoint special counsel to present mitigation and others do not, see Klokoc v. State, 589 So. 2d 219, 220 (Fla. 1990).

782 So. 2d at 368-369. In these cases proper proportionality review is impossible. See Justice Ehrlich's dissenting opinion in Hamblen, 527 So. 2d at 806.

The present system is arbitrary and irrational and comes dangerously close to state-assisted suicide. This Court should complete the process begun in Klokoc and Muhammad and require the appointment of public counsel in all cases in which the defendant waives mitigation.

The failure to appoint public counsel in this case was compounded by the trial court's giving of great weight to the jury's recommendation of death. In Muhammad, supra this Court reversed for a resentencing due to the trial court's placing great weight on the jury's death recommendation in a case in which the defendant had waived mitigation and the trial court had failed to appoint public counsel. 782 So. 2d at 361-62.

The same error occurred in this case. The trial court gave great weight to the jury's recommendation after Mr. Penalver

refused to put on mitigation and the court refused to provide any alternative means for the presentation of mitigation. The trial court in this case stated that it gave "great weight" to the jury's recommendation XR1988. This is the identical phrase to that used in Muhammad. Additionally, in this case the trial court instructed the jury that its recommendation would be entitled to "great weight" and that "only under rare circumstances" that the court could impose a different sentence XR1874. This Court noted the significance of the same language in Muhammad. 782 So. 2d at 363.

The only possible distinction between this case and Muhammad is that in Muhammad the defendant requested to waive the advisory jury and this was not done in this case. This should not control this issue. Although counsel did not attempt to waive the jury's advisory verdict, counsel did have an entire section of his sentencing memo concerning the judge's responsibility to guard against "the inflamed emotions of jurors" XR1906-1914. Counsel specifically pointed out that the jury could have overreacted to several emotional aspects of the case. In the memo counsel pointed out how Mr. Penalver's failure to allow the presentation of mitigating evidence handicaps the judge in assessing the case and again repeated his call for public counsel XR1923-30. Thus, counsel clearly put the trial court on notice as to the dangers of reliance on the jury's

recommendation in this case. Despite this there is nothing in the judge's sentencing order indicating that he understood that he had the duty, or even the ability, to give the jury's death recommendation anything less than "great weight" if he found it legally required XR1987-2001. In Muhammad, this Court distinguished its prior decision in Sireci v. State, 587 So. 2d 450 (Fla. 1991). 782 So. 2d at 361-2. This Court noted that the trial judge in Sireci had specifically noted that if he felt that the jury was influenced by improper considerations he had "the ability and duty to lessen the reliance on upon the jury's verdict." 782 So. 2d at 362. In the present case, as in Muhammad, there was no such recognition. Here, as in Muhammad resentencing is required.

In the present case, as in Muhammad, there was no Pre-Sentence Investigation (PSI). This Court specifically held that this requirement should only apply to penalty phases held after the decision in Muhammad. However, where there is no PSI, a waiver of mitigation, and the trial court gives great weight to the jury recommendation, this requirement should apply to pipeline cases. See Smith v. State, 598 So. 2d 1063 (Fla. 1992) (principles of fairness and equal treatment).

There is no reason for the requirement of a PSI in capital cases in which the defendant waives mitigation and the trial court gives the jury's recommendation great weight not to apply

to all cases pending on direct appeal. Reversal for re-sentencing is required.

## POINT XXII

**THE TRIAL COURT ERRED IN PROHIBITING CONSIDERATION OF RESIDUAL DOUBT AS A MITIGATING CIRCUMSTANCE.**

Prohibiting the jury from considering residual doubt as a mitigating circumstance and refusal to consider it as a mitigating circumstance denied Mr. Penalver due process of law and subjected him to cruel and/or unusual punishment pursuant the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16, and 17 of the Florida Constitution. This issue is a pure issue of law which involves de novo review on appeal.

The trial court gave the jury a special instruction that residual doubt is not a mitigating circumstance over defense objection. 119/15,987-91. The trial court gave the jury the following instruction.

> The defense attorney made a comment that you should show mercy to the defendant just in case he is not the person on the video. You have returned a verdict of guilty. And the law requires that your recommendation decision not be based on arguments of lingering doubt.

119/16,005.

Defense counsel again argued residual doubt as a mitigating circumstance in his Sentencing Memorandum 10R1936-9. However, the trial court refused to consider this as a mitigating circumstance 10R1998. The “reasonable doubt” standard of the

guilt/innocence phase was applied and renders this mitigator meaningless 10R1998.

The United States Supreme Court has consistently held that the sentencer may "not be precluded from consideration as a mitigating factor, and aspect of a defendant's character or record and any of the circumstances of the offense." Lockett v. Ohio, 438 U.S. 586, 604 (1978). The Eleventh and Fifth Circuits have held that the rule of Lockett requires the consideration of residual doubt as a mitigating circumstance. Smith v. Wainwright, 741 F. 2d 1248 (11th Cir. 1984); Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981), modified on other grounds at 671 F.2d 882 (5th Cir. 1982). The error is particularly egregious where there was an explicit jury instruction not to consider a mitigating circumstance. Hitchcock v. Dugger, 481 U.S. 393 (1987). Residual doubt should have been the primary factor at the penalty phase. Indeed, the first trial of this case resulted in a hung jury. Thus this clearly is a case in which residual doubt plays a role. This error can not be held to be harmless beyond a reasonable doubt. Reversal for a new penalty phase is required.

## CONCLUSION

For the foregoing reasons, Mr. Penalver's convictions and sentences must be reversed.

Respectfully submitted,

CAREY HAUGHWOUT
Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(561) 355-7600

_____
JEFFREY L. ANDERSON
Assistant Public Defender
Florida Bar No. 374407

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to LESLIE T. CAMPBELL, Assistant Attorney General, 1515 North Flagler Drive, Ninth Floor, West Palm Beach, Florida 33401-3432, by courier this _____ day of July, 2002.

_____
Of Counsel

## CERTIFICATION OF COMPLIANCE

I HEREBY CERTIFY the instant brief has been prepared with 12-point Courier New type, a fond that is not spaced proportionally.

_____
Attorney for Seth Penalver