IN THE SUPREME COURT OF FLORIDA

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

REPLY BRIEF OF APPELLANT

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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 will rely on the Statement of the Case as set forth in his Initial Brief.

STATEMENT OF THE FACTS

Appellant will rely on the Statement of the Facts as set forth in his Initial Brief.

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.

Appellee claims that the instant issue was not preserved in the court below. However, this issue was argued extensively

below. Moreover, Appellant's counsel specifically argued that the statement was untrustworthy because a person who is performing a crime [as Appellant claims 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.

Appellee also claims that a pure discretion standard of review must be imposed and affirmance is mandated because the trial court reviewed arguments, rules, and cases. However, the issue in this case was a purely legal question. It involved analysis of caselaw -- something this Court is in as good a position as the trial court to an analyze. Appellee has not analyzed the caselaw. In fact, Appellee has not disputed that under Mutual Life Insurance Co. v. Hillman, 12 S.Ct. 909 (1892) and other cases in Appellant's brief and logic 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. Appellee has not disputed that such a statement alone would not be trustworthy. Instead, Appellee essentially posits that the resolution of the question of law is unimportant and that the trial court's ruling must be affirmed because the trial court had pure discretion in its ruling. Such analysis would result in opposite rulings on the identical question of law. As explained in the Initial Brief, a mere statement that a person

is going to go somewhere by itself is not sufficiently probative to show that the person went there and constitutes hearsay.

Appellee claims that the error was harmless. In performing its harmless error analysis Appellee lays out the evidence in a light most favorable to its case and essentially claims that the evidence was sufficient for conviction and thus the error was harmless.[1] However, the harmless error test is not an analysis of whether the evidence was sufficient or even whether it was overwhelming. Rather, the focus is on whether the error could have been considered by the jury without consideration of other evidence untainted by the error. State v. DiGuilio, 491 So. 2d 1129, 1137 (Fla. 1986). Furthermore, in performing a harmless error analysis the evidence is not viewed in a light most favorable to the beneficiary of the error – it is viewed in light most favorable to the victim of the error. See Barnes v. State, 743 So. 2d 1105, 1114 (Fla. 4th DCA 1999) (while reviewing sufficiency of the evidence for guilt determination the evidence is viewed most favorably toward the prevailing party, appellate court must look at "evidence in favor of losing party" to assess whether error was harmless).

In this case the improper admission of hearsay testimony that Alex Hernandez was going to be in North Carolina at the

[1] In its brief Appellee cites to the caselaw that says a harmless error test is not a sufficiency of the evidence analysis. However, Appellee's analysis ignores that caselaw and essentially analyzes the sufficiency of the evidence.

time of the murders was not harmless. As explained at page 33 of Appellant's Initial Brief, there was a viable defense theory that Hernandez was a perpetrator rather than Appellant. The complained-of testimony cannot be harmless in that it was used by the prosecutor to rebut the a defense theory 108/14483. At page 9 of Appellee's Answer Brief, Appellee acknowledges the importance of the complained-of testimony – "... the hearsay statement was properly admitted to refute that [defense] theory" (emphasis added).

Appellee points to Detective Manzella's testimony that he ruled out Hernandez as a suspect because his height was inconsistent with the perpetrator on the videos. Manzella's testimony was disingenuous. Police had viewed the video of the crime and had met with Hernandez.[2] Yet, they were pushing him as the second suspect 48/6239;55/7227.[3] The truth is that Hernandez was not ruled out as a suspect based on the video.[4] Nor should he be. That is why the prosecutor emphasized the hearsay statement about going to North Carolina 108/14483. That is why the error cannot be deemed harmless.

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[2] Who was in jail for a home invasion robbery that occurred a short time later.

[3] There was testimony that one could not discern heights on the video.

[4] Manzella's testimony also presupposes that Ibar was definitely one of the perpetrators which is not automatically true.

At pages 10-12 of its Answer Brief, Appellee refers to testimony of Gary Fox, Melissa Munroe, Jean Klimeczko, Ian Milman, Chris Bass, David Phillips and Kim San in making its harmless error analysis. Because Appellee refers back to this analysis in other points to claim that other errors were harmless, Appellant will briefly discuss some of Appellee's claims.

Appellant would first point out that this was an extremely close case. In fact, the first trial resulted in a hung jury. Appellee fails to mention that none of the physical evidence connected Appellant to the crime. In fact, the physical evidence is more exculpatory than inculpatory. Appellant's shoe size (7½ (87/11713)) is different from the shoe size (10-11 (85/11180)) that the intruder (who Appellant was alleged to have been) – as shown by the imprint left by the intruder's shoe at the crime scene. Appellant's car did not match the wheelbase found at the scene where the victim's vehicle was abandoned. There was no evidence left at the scene that was connected to Appellant and there was no evidence from Appellant's person or property that was connected to the crime scene. See page 35 of Appellant's Initial Brief. There were witnesses who opined that Appellant was not the person in the video 92-12228-9.

Appellee claims that Gary Fox's testimony was damaging to Appellant's defense. However, Fox never saw Appellant. In

fact, Fox's description of the person allegedly leaving with Ibar had a hair length inconsistent with Appellant and more consistent with Hernandez.

Appellee points out that Ian Milman had seen the alleged murder weapon, a Tech-9 gun, at the Lee Street house where Hernandez and Ibar resided. In fact, Milman went on to testify that the Tech-9 was typically locked at Alex Hernandez's room 73/9715-16. The fact that the suspected murder weapon was locked in Hernandez' room does not eliminate Hernandez as a suspect. Rather, it strengthens the probability that Hernandez was involved in the murders.

Contrary to Appellee's representation, Melissa Munroe did not testify that she had seen Appellant and Ibar together at the victim's club the weekend of the murders. Munroe testified that she had seen Appellant at the club on a Sunday, but did not know which weekend 59/7874,7903. Although Ibar was at the club, Appellant and Ibar were not together 66/8826. If this was the weekend of the murders it would only have been a few hours before the murders and Munroe's testimony would actually be exculpatory. Munroe testified that at 2:00 a.m. Appellant was totally intoxicated 66-8824 – whereas all indications are that the intruders were totally sober.

Appellee argues that Jean Klimeczko gave an out-of-court statement that he saw Appellant and Ibar together and also gave

an out-of-court opinion that Appellant was the person in a photo taken from a video of the crime scene. However, Klimeczko's trial testimony was that he did not remember seeing Appellant on the weekend of the murders and he did not recognize anyone in the photos 87/8949;79/9408. Klimeczko also testified that he was high on the night in question and he was doing a lot of drugs 71/9340 and may have made the out-of-court statements because he was angry with Appellant 71/9339. Thus, at best for the state were out-of-court statements inconsistent with in-court testimony and these inconsistent statements were made by a person who was high on drugs and who was motivated to fabricate against Appellant. Moreover, the out-of-court statements were impeached by state witness Ian Milman. Klimeczko's out-of-court statements indicated that he was with Milman the night before the murders and the early morning hours of the murders. Milman testified he was not with Klimeczko at these times. Milman testified when he came to the Lee Street residence (approximately 1 hour prior to the murders) Klimeczko was looking for a gun 72/9586;73/9714.

Appellee points to Chris Bass' testimony that he overheard Appellant say that he had shot "because he didn't take his mask off." However, Bass would have little, if any, credibility before a jury. Despite testifying that Appellant made the statement, Bass wrongly indicated Appellant as being Ibar 9729.

Also, Bass was impeached as an admitted liar 9834 and had 10 prior convictions for dishonesty 9787. Finally, the video showed that the intruder did not wear a mask, thus making Bass' testimony more problematic.

Appellee points to Dave Phillips allegedly seeing Appellant and a black Mercedes. However, as explained on page 36 of the Initial Brief, Phillips had been told what to say by Kim San. Also, Phillips had strong motives to lie – he was angry with Appellant and had a pending charge against him (from which the jury could find he was trying to curry favor with the state). See Initial Brief at 36.

Appellee also points to Kim San's testimony about Appellant and Ibar and the black Mercedes. San's credibility before the jury was a serious problem. She had a motive to fabricate where she was looking to give information in exchange for a deal for her fiancé and even Detective Lillie testified that she has the reputation in the community as a liar 12622. Also, a bare description of a black Mercedes does not mean what she saw was Sucharski's car. Even if it was Sucharski's car one must infer that Appellant had something to do with the taking of the vehicle – rather than mere evidence that Appellant had met up with Ibar after Ibar had taken the vehicle. Gary Fox saw Ibar in Sucharski's vehicle around the time of the offense, but was unable to identify Appellant as the other person. In fact, the

hair length of the second intruder was inconsistent with Appellant's hair length at the time. A likely view of San's testimony (if credible) is that Appellant became involved with the black Mercedes after the crime.

The bottom line is that the instant case was a close case and it cannot be said that the error was harmless due to the other evidence presented. This cause must be remanded for a new trial. Appellant relies on his Initial Brief for further argument on this point.

POINT II

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

Appellee does not dispute that the principle and caselaw discussed in Appellant's Initial Brief that actions of a defense attorney are irrelevant unless there is some evidentiary support to show that the attorney's actions were improper or in this case that there was evidence of witness tampering.

Nor does Appellee dispute that the prosecutor's intention in this case was to lay out that the defense attorney had information and that witness Munroe met with the attorney and then changed her testimony. The inference laid out by such evidence was tampering by defense counsel. Page 38 of Appellant's Initial Brief more fully explains the undisputed situation.

Instead, Appellee claims there is no error because the "state was not able to establish before the jury" that the defense attorney attempted to have Munroe change her testimony. However, it is the very lack of evidentiary support of wrongoing that makes the conversation between the defense attorney and witness prior to changing her testimony irrelevant. In fact, Appellee fails to offer a single reason why the conversation was relevant.

The prosecutor does not have to comment on the improperly admitted evidence which implied that the defense attorney tampered with witness Munroe for the error to be prejudicial. Jurors are presumed to follow the evidence that is introduced at trial. Through his examination of defense attorney Roderman the prosecutor let the jury know that Roderman had information and then Roderman spoke with Munroe and then Munroe changed her testimony. It does not take a rocket scientist on the jury for the jury to figure out the prosecutor's theory that Roderman had improperly given the information to Munroe. Thus, the error was not harmless. Additionally, the beneficiary of the error has not even attempted to carry its burden of proving that the error was harmless.

Appellant relies on his Initial Brief for further argument on this point.

POINT III

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

Appellee does not dispute that evidence of attorney-client contacts are normally irrelevant. More importantly, Appellee does not dispute that witness tampering should not be alleged unless there is evidentiary support for such a claim. Mere speculation is not sufficient.

Instead, Appellee claims that "the jail records were relevant to show that there was a possibility that Melissa Munroe became aware that a video of the crime existed and that she changed her testimony thereafter." Appellee's Brief at 16 (emphasis added). However, as argued in the Initial Brief, there was no evidentiary support that Munroe was tampered with – i.e. changed her testimony due to the defense telling her certain information. The possibility of this occurring is not evidentiary support. It is pure speculation.

Finally, Appellee has not disputed that the error was prejudicial as argued in the Initial Brief. Appellant relies on his Initial Brief for further argument on this point.

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.

Appellee claims that there was no prejudice, or mistrial required, because Manzella did not say that a key witness, or the defendant himself, was lying. However, having a police officer comment that he did not believe Ibar, who police believe had committed the crime with Appellant, regarding his where-abouts at the time of the crime, is extremely prejudicial. Appellee implies that there are other reasonable meanings to this, but fails to suggest what the other reasonable meanings could be. There simply is no other reasonable meaning. This cause must be remanded for a new trial. Appellant relies on his Initial Brief for further argument on this point.

POINT V

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

Appellee claims that the hearsay of specific facts that Klimeczko and Milman had told Manzella was admissible for three reasons:

1) The state wanted to establish consistencies between the two witnesses.

2) To explain the officer's conduct.

3) By attacking the police investigation the defense invited the state to introduce the hearsay evidence that bolstered the witnesses.

These reasons do not justify the admission of inadmissible hearsay statements.

It is true that the state wanted to establish that their witnesses were consistent – but this does not justify admission of hearsay. The consistencies should rest on the trial testimony and hot hearsay.

The last two reasons relate to Manzella's investigation. However, how Manzella conducted his investigation was not relevant to the case. The issue was identity. Thus, the statements were not admissible for this purpose.

More importantly, assuming arguendo that Manzella's investigation had been made relevant, he could still not testify to 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 still cannot testify to details of information received).

The prosecutor below did not allege that the defense did anything improper in criticizing the police investigation in this case. The challenges to the police investigation were totally within the rules of evidence. Thus, if the defense had placed Manzella's investigation in issue the prosecution could not go outside the rules of evidence to respond to the defense (made within the rules of evidence). See Baird v. State, 572 So. 2d 904, 906 (Fla. 1990). Appellant relies on his Initial Brief for further argument on this point.

POINT VI

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

Both parties agree that for resistance to be evidence of consciousness of guilt there must be a nexus between the resistance and the crime charged.

Appellee does not dispute that the shoes taken from Appellant were exculpatory rather than inculpatory (see page 47 of the Initial Brief). Nor has Appellee disputed the explanation on page 48 of the Initial Brief that there logically would be no reason to resist giving up exculpatory evidence if one were truly guilty.

Instead, Appellee claims that because the police had a warrant, and Appellant resisted, Appellant's resistance became admissible. However, 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.

Appellee alleges there was a nexus because Appellant believed the shoes were involved in the crime. However, this ignores a fact that the actual perpetrator would know – the shoes were not worn by the perpetrator. Again, resisting the turning over of exculpatory evidence is not evidence of consciousness of guilt. Indeed, an innocent party is mere logically prone to resist turning over such evidence than would the actual guilty party.

Appellee has not disputed Appellant's argument on page 49 of the Initial Brief that the most valid reason for resisting giving up shoes is that one would be without shoes in jail and no promise had been made to replace the shoes that were being taken. This is the true nexus – not consciousness of guilt.

Appellee has not disputed that even if there was some probative value of the resistance, such probative value was substantially outweighed by undue prejudice. This is especially true where the resistance occurred in jail and the prosecutor told the jury that this evidence amounted to Appellant admitting his guilt 107/14313. Appellant relies on his Initial Brief for further argument on this point.

POINT VII

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

Appellee does not address Appellant's explanation on page 50 of the Initial Brief that Appellant did not actually threaten suicide. Appellee merely alleges that Appellant threatened suicide. As explained on page 50, the record does not support this claim.

Appellee does claim that Appellant's statement was made because he was guilty. However, the witness to the statement (and the only person capable of putting the statement in context) testified the statement was the result of the publicity of being accused.

Appellee has not addressed the argument or cases that threat of suicide is not indicative of consciousness of guilt. Instead, Appellee cites to Walker v. State, 483 So. 2d 791 (Fla. 1st DCA 1986) that an attempted suicide equals consciousness of guilt. However, a possible threat of suicide is not equivalent to the actual attempt of suicide. Also, as explained in the Initial Brief, Appellant did not even threaten suicide. Also, based on the argument and cases cited at pages 51 and 52 of the Initial Brief as to the different interpretations that an attempted suicide may convey – Walker should not be followed.

Appellee does not address that even if the evidence had some probative value it was substantially outweighed by undue prejudice.

Finally, the error cannot be deemed harmless where the prosecutor emphasized to the jury that the suicide threat was important and indicated guilt 14313. Appellant relies on his Initial Brief for further argument on this point.

POINT VIII

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

Appellee claims that Dr. Birkby's expertise in human identification qualifies him as an expert in the field of witness perception. Appellee misconstrues the two areas of expertise. The two areas of expertise are not the same. One deals with taking measurements and making conclusions as to identifications. The other deals with how the human eye and mind work in perceiving things. Dr. Birkby did not even purport to have any expertise in the ability of witnesses to make identifications. His opinion was merely thrown out without first qualifying him in this area. Appellant relies on his Initial Brief for further argument on this point.

POINT IX

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

Appellee claims that the prosecutor's complained of arguments were proper. Such a claim is without merit.

Appellee claims that the prosecutor's disparagement of defense counsel by stating that he wanted to put blinders on

them to limit the search for the truth was “fair reply” to defense counsel arguing mistakes were made in police investigation and by the prosecutor. First, there is nothing wrong with pointing out poor police investigation mistakes made by the prosecutor. Appellee fails to show how it is improper for defense counsel to argue to the jury that mistakes were made. However, assuming arguendo that defense counsel’s argument was improper, the prosecutor’s remedy was to object and not to take the law in his own hands by making improper comments under the guise of fair reply. Finally, accusing the defense counsel of putting blinders on the jury and trying to hide the truth simply does not reply to accusations of poor investigation. The prosecutor’s disparagement of defense counsel was improper and prejudicial.

Appellee claims that the prosecutor’s telling the jury that there had been a first trial was not prejudicial. However, even the trial court acknowledged that the statement was extremely prejudicial.

Nor can it legitimately be said that it was made harmless by the trial court’s later instruction – the cat was already out of the bag at that time by the improper comment. But for the improper comment the trial court would never have told the jury of an earlier mistrial.

Appellee claims it was proper for the prosecutor to disparage the defense by saying the defense expert was not allowing the jury to see certain evidence. By telling the jury "he won't even allow these in for you to see," the prosecutor was not reviewing the expert's work as Appellee claims.

Appellee claims that it was proper for the state to make improper comments on Appellant's subpoena power as fair response to defense counsel's improper comments about the state's failure to call witnesses. If defense counsel was making improper comments it was the duty of the prosecutor to object to the comments rather than wait and retaliate with its own improper comments.

Finally, the rhetoric about owing it to yourselves and community to review the evidence and find Appellant guilty is not proper and should not be condoned. Appellant relies on his Initial Brief for further argument on this point.

POINT X

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

Appellee argues that Klimeczko's out-of-court statements were admissible as former testimony under either § 90.803(22) or § 90.804 of the evidence code.

Appellee asserts that Appellant has misrepresented the trial court's ruling by addressing § 90.803(22) and ignoring § 90.804.

§ 90.804 was not discussed because the trial court recognized, and agreed with defense counsel's argument, that § 90.804 requires that each out-of-court statement be scrutinized regarding the unavailability of the declarant 67/8941. Klimeczko was never asked about his statement that Appellant and Ibar came to the residence at 5:00 a.m. and that Ibar grabbed the Tech-9. Thus, Appellant believes that the trial court was not actually admitting this statement under § 90.804. However, Appellant can see Appellee's point that the trial court ruled Klimeczko's statements were admissible under § 90.804 and § 90.803(22). Thus, Appellant will respond to Appellee's claims regarding both statutes.

Section 90.803(22) has been declared unconstitutional by this Court. State v. Abreau, 28 Fla. L. Weekly S16 (Fla. Jan 9, 2003) and thus cannot justify the admission of the hearsay statements.

Appellee claims that the out-of-court statements of Klimeczko were admissible under § 90.804 because Klimeczko was unavailable due to loss of memory. Specifically, Appellee states that the trial court found Klimeczko suffered from a loss of memory and thus Klimeczko's statements were admissible under § 90.804:

> The trial court found that Klimeczko suffered from a loss of memory. Therefore, the former testimony was admis-sible pursuant to 90.804....

Appellee's Brief at 42. However, the trial court did not find that Klimeczko had a memory loss. In fact, the trial court very specifically found that Klimeczko had a memory of events, and even displayed it selectively, but refused to testify via a feigned memory loss:

> THE COURT: There is no doubt in my mind he's feigning lack of memory ...

67/8936.

> THE COURT: ... He remembers the general subject matter. Now, he says he slept in the front room. He's selectively choosing what to remember.

67/8942.

> THE COURT: ... And Mr. Klimeczko, by stating what he had stated, removed all doubt that I may have had before and how there's no doubt or any doubt that I may have had before and now there's not doubt in my mind that he's lying where he says he doesn't remember.

67/8955. The prosecutor then tried arguing that Klimeczko had memory loss but the trial court rejected such a notion:

> THE COURT: I just made a finding that he was lying when he said he has no memory of this, and there's not even doubt in my mind.

67/8955. Klimeczko made it clear that he had memory of some of the events while not of others 67/8970,8980. Defense counsel objected that Klimeczko was not unavailable for memory loss or feigning memory loss 67/8939,8971-73,8975.

Because of the trial court's unequivocal finding that Klimeczko did not suffer a memory loss he would not be unavail-

able pursuant to 90.804(1)(c). Thus, Appellee's claim that the out-of-court statements were admissible is without merit.

Also, defense counsel pointed out there is no specific provision in § 90.804 involving one being unavailable due to feigning memory loss 67/8975. Nor has Appellee claims there is such a provision. As Appellee notes in its brief at page 41, it is the burden of the party introducing the out-of-court statement to show the unavailability. E.g. Lawrence v. State, 691 So. 2d 1068 (Fla. 1997). Appellee has not met that burden.

It could conceivably be argued that a witness is unavailable due to feigning memory loss under § 90.804(1)(b) if he:

> (b) Persists in refusing to testify concerning the subject matter despite an order of the court to do so.

There is no caselaw stating so. Moreover, § 90.804(1)(b) does not apply in this case because (1) the trial court never issued an order directing Klimeczko to testify to the subject matter and (2) Klimeczko never persisted in refusing to testify after a trial court order. Thus, the requirements of § 90.804(1)(b) were not met. In fact, if the trial court had ordered Klimeczko to testify to the subject matter it was very possible that he would have done so.[5] Klimeczko testified that his memory was improving throughout the hearing and that he could remember some of the events 67/8939, 8970, 8980.

[5] All the discussions about Klimeczko feigning memory loss were done outside Klimeczko's presence.

Also, defense counsel correctly pointed out that Klimeczko was not unavailable under § 90.804 because Klimeczko was never questioned about every subject matter that was being introduced 67/8971.

In addition, under § 90.804(2)(a) former testimony is admissible only if there is a "similar motive to develop the testimony." As explained at pages 59, 70-71 of Appellant's Initial Brief, an adversarial preliminary hearing involves different motives and stakes in developing the testimony. Appellee has not disputed the reasoning at pages 59, 70-71. The statements at the adversarial preliminary hearing were not admissible under § 90.804(2)(a).

Appellant relies on his Initial Brief for further argument on this point.

POINT XI

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

Appellee claims that the present issue is not preserved. Appellee may be correct or incorrect. Defense counsel challenges the out-of-court statements at numerous times throughout the case. Certainly there was no "gotcha" manoeuver by defense counsel. On the other hand, defense counsel did not formally meet all the requirements of the contemporaneous objection rule.

However, this Court should still review the instant issue. The error, under the unique circumstances of this case, is fundamental error which goes to the very heart of the case.

Why the error is fundamental

The Florida Legislature recognizes that some errors that occur during a trial may not be preserved by objection but should still be reviewed on appeal as fundamental error. § 924.051, Florida Statutes.

The issue before the jury in this case was identity. Although there was plenty of physical evidence in this case, none of it connected Appellant to the crime. There was no eyewitness to the crime. There was exculpatory evidence. Another prime suspect was the owner of the murder weapon. Another suspect owned the shoes that made a print at the crime scene and these shoes were vastly different in size from those of Appellant.

The key to identity was a videotape of the crime. The video, and photos from the video, were of poor quality as even the police conceded. Enhancement of the photos did not help. In fact, the state's expert could not discern the difference between the "original" and an enhancement 46/5788,5795.

Two forensic anthropologists, experts in analyzing photos and videos, did not help the prosecution. One opined that Appellant was not the person in the video while the other

testified that the video and photos were of such poor quality that he could not render an opinion.

Lay witnesses, who were familiar with Appellant at the time of the crime, came in court and either opined that it was not Appellant in the video or they could not give an opinion due to the quality of the photos and video.[6]

With no physical evidence or live testimony proving identity, the prosecutor resorted to the out-of-court statements complained of in this point to prove identity. The out-of-court statements were the heart of the state's case.

Fundamental error is error which goes to the heart of the case. Barnes v. State, 589 So. 2d 988 (Fla. 1st DCA 1991); State v. Johnson, 616 So. 2d 1 (Fla. 1993).

In Barnes, an attachment to a search warrant was introduced into evidence. There was no objection to this evidence. The appellate court held that the error was fundamental error because the hearsay contained in the attachment went to the very heart of the case. More specifically, in Barnes, the evidence was sufficient to go to the jury as a swearing match between the defendant and his girlfriend as to what happened. The attach-

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[6] The one exception was Kim San who opined it was Appellant due to the way the man in the video put the gun in his trousers and walked. San did not indicate that she had ever seen Appellant put a gun in his trousers or that he had a distinctive walk. San could not recognize Appellant's face in the video. San's opinion was without foundation and would not be substantial, competent evidence which would result in a guilty verdict.

ment had hearsay which broke the swearing match and could sway the jury. Thus, the error in admitting the hearsay was deemed to be fundamental error.

In this case the error is much more fundamental. Unlike in Barnes, there was no witness to the crime. Here, the hearsay was the heart of the state's case as to identity. The sate would not have gained a conviction without the hearsay. The error was fundamental.

In addition, Appellant was denied due process where the state was calling witnesses who could not opine Appellant was in the video in order to introduce the hearsay statements. See Points XVI and XVII. Error of the magnitude to deny due process constitutes fundamental error. See Johnson, supra. This Court should review this issue.

Appellee does not dispute that the out-of-court statements are not admissible under § 90.801(2)(c) because they are opinions rather than identifications. In fact, Appellee disavows that § 90.801(2)(c) was the basis for admission of the evidence. Thus, Appellant relies on the Initial Brief for the undisputed argument that the statements constituted opinions.

Appellee does claim that the out-of-court statements were properly admitted as substantive evidence as prior inconsistent statements under § 90.801(2)(a). One of the requirements of § 90.801(2)(a) is that the declarant be subject to the penalty of

perjury when making the statement. As explained at page 65 of the Initial Brief, 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 opinion evidence (which is not subject to perjury) would not be admissible pursuant to § 90.801(2)(a). Appellant relies on his Initial Brief for further argument on this point.

POINT XII

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.

Appellee relies on § 934.03 to argue that the taped statement was inadmissible. However, § 934.03 does not deal with the question of admissibility. § 934.06 is the statute regarding admissibility. Appellee has not disputed Appellant's argument on reasoning on pages 66-67 of the Initial Brief that § 934.06 does not prohibit introduction of the tape in this case.

Nor does Appellee dispute that any restriction of § 934.06 would have to give way to Appellant's due process rights.

Nor does Appellee dispute that Appellant should have been permitted to introduce the tape to clear up mischaracterizations by the state witness. Nor is it disputed that the state lacked standing.

Appellee does claim that the error was harmless since Appellant had a transcript of the tape. However, the audio showed information to the jury that a transcript could not – the inflection in Fisher's voice showed her passion and animosity toward Sucharski 54/7042. In turn, this would be useful to argue Fisher had a motive and the animosity to kill Sucharski. Fisher was also associated with drug dealers and others who could have done the home invasion. It cannot be said that the error was harmless as cumulative. Appellant relies on his Initial Brief for further argument on this point.

POINT XIII

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

Appellee argues that Klimeczko's testimony on cross-examination at the adversarial preliminary hearing was cumulative and thus the error was harmless. However, as explained on pages 72-73 of the Initial Brief the error was not cumulative. Appellant relies on his Initial Brief for further argument on this point.

POINT XIV

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

Appellee claims that there was an abundance of evidence that Appellant was one of the intruders. Appellee refers to the

videotape and testimony of Gary Fox, Ian Milman, Chris Bass, Kim San and Brenda Kinnaman as the abundant evidence.

However, the videotape gives no clue as to the identity of the disguised intruders but for the out-of-court statements. In fact, the in-court witness testimony was that Appellant was not the person in the video 92/12228-29,12252.

Gary Fox's testimony was exculpatory toward Appellant's case as he saw the second alleged intruder in Sucharski's car with a hair length consistent with Alex Hernandez and inconsistent with that of Appellant.

Ian Milman does not opine that Appellant is the person on the video. Milman's testimony that the Tech-9 gun was kept locked in Alex Hernandez's room also does not hurt Appellant.

Appellee refers to Chris Bass' testimony that he overheard the person he thought to be Appellant make a statement. The problem with this evidence is that Bass wrongly indicated that Appellant was the person he thought was Pablo Ibar 9729. This evidence therefore did not implicate Appellant. Besides Bass was impeached as an admitted liar 9834 and had 10 prior convictions for dishonesty 9787.

Appellee refers to Kim San's opinion that Appellant was the person in the video. However, San's testimony was that she could <u>not</u> identify the face in the video and photos because the face was too blurry 85/11256. San's opinion was based on the

way the intruder walked and placed the gun in his trousers 85/11256. San was unable to explain or describe what is distinctive about Appellant's walk 85/11257-58. San does not know which hand the suspect used to put the gun in his trousers 85/11257. San's testimony was hardly substantial, competent evidence which could support a finding of guilt beyond a reasonable doubt.

Finally, Appellee refers to the testimony of Brenda Kinnaman. However, Kinnaman's testimony does not implicate Appellant in the murders. Kinnaman's testimony served only to cast doubt on the testimony of Kim San where she did not see a black Mercedes and did not see bubbles flowing out of the washing machine 86/11406,11498.

Even putting aside all the evidence exculpating Appellant, the evidence referred to by Appellee would not be sufficient for conviction.

Appellant relies on his Initial Brief for further argument on this point.

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.

Appellee claims that this evidence was relevant to rebut earlier evidence. However, this does not take away from the fact that Appellant's objection was well taken – an out-of-court

statement by San that she thought Appellant was involved in the murders was patent hearsay and also improperly invaded the province of the jury.

Appellee does not dispute that the testimony that San told others that Appellant was involved in the murders was totally improper, that defense counsel's objection was well-founded, and that such evidence was very prejudicial.

Appellee attempts to justify the improper testimony as "invited error." However, defense counsel had not invited the error. Defense counsel had impeached San's position that she believed Appellant was the person in the video by introducing evidence that she had also said that Appellant could not have been involved in the murders 96/12250,12244. This does not open the door for the state to bring in improper hearsay evidence which invaded the province of the jury – that San told others Appellant was involved in the murders. Assuming that the prosecutor felt that the defense should not have elicited evidence that San had talked of Appellant being not guilty because he was with her at the time of the murders, the prosecutor should not have taken the law in his own hands by retaliating with highly improper prejudicial evidence. The trial court should have sustained the defense objection. Finally, assuming arguendo that the invited error doctrine does apply to this issue to some degree, this simply goes too far in a close case

to bring in this type of evidence. Appellant relies on his Initial Brief for further argument on this point.

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.

Appellee has not addressed the merits of this issue discussed in the Initial Brief. Appellee points out that there was no objection. Because the procedure used in this case was a due process violation, the error was fundamental error. See Point XI of this Reply Brief.

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.

Appellee correctly argues that defense counsel did not make this specific argument. As pointed out in Point XI of this reply brief, this type of error would be fundamental error.

Appellee also claims that under Morton v. State, 689 So. 2d 359 (Fla. 1997) it would be permissible to call a witness as a mere facade for the sole purpose of introducing out-of-court statements as long as the statements are not used to impeach the witness. However, there is nothing in Morton which endorses manipulation of the criminal justice system in such a way. The witnesses must have some value and not merely be strawmen used

for other purposes. Appellant relies on his Initial Brief for further argument on this point.

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.

Appellee claims that the hearsay testimony was relevant to rebut earlier testimony of Detective Lillie. It is not relevancy that is in issue. It is hearsay. Appellee has not disputed that the statement was hearsay.

Appellee claims that the defense opened the door to the improper evidence by putting San's motives for coming forward. Appellant does not dispute that the state could bring in evidence relating to that issue. However, the state cannot go outside the rules of evidence in doing so. The prosecutor below did not object or complain that the defense was misleading the jury with the inadmissible evidence. The prosecutor never objected. Thus, the doctrine of invited error does not apply. See Fryer v. State, 693 So. 2d 1046 (Fla. 3d DCA 1997) (Sorondo, J., concurring specifically (doctrine of invited error does not contemplate sitting silently while opposition violates the rules in order to later make one's own prejudicial error – an objection is required to use the doctrine).

POINT XIX

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

Appellee has not addressed Appellant' argument on this point. Appellant will rely on his Initial Brief for argument on this point.

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).

Appellant relies on his Initial Brief for argument on this point.

POINT XXI

THE DEATH PENALTY IN THIS CASE IS UNRELIABLE.

Appellee claims that the public counsel issue was waived. However, defense counsel certainly did not waive this issue. Also, the very nature of the public counsel issue is something that the defendant cannot waive as it is a device to insure that the death penalty is imposed in accordance with the laws and constitutions despite waivers by the defendant. Appellant will rely on his Initial Brief for further argument on this point except to point out the irony in Appellee's position that "THE DEATH PENALTY IN THIS CASE IS RELIABLE (RESTATED)" without knowing what the mitigating circumstances were or how much weight they had. One-half of the death penalty equation was missing [mitigating circumstances]. This Court cannot even

perform a valid proportionality analysis due to the withholding of the mitigating circumstances. Undersigned counsel could not even raise proportionality. Public counsel was necessary to insure the death penalty was imposed in accordance with the laws of Florida.

POINT XXII

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

Appellant relies on his Initial Brief for argument on this point.

POINT XXIII

THE DEATH SENTENCE MIGHT BE OR MIGHT NOT BE PROPORTIONATE IN THIS CASE.

Because the mitigation that was discovered through investigation by the penalty phase attorney was never disclosed to the jury, trial court, or this Court for consideration in determining the applicability of the death penalty under Florida law, it cannot be determined whether the death sentence is proportionate in this case.

CONCLUSION

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

Respectfully submitted,

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_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to MELANIE ANN DALE, Assistant Attorney General, 1515 North Flagler Drive, Ninth Floor, West Palm Beach, Florida 33401-3432, by courier this _____ day of January 2003.

_____
Of Counsel

CERTIFICATION OF COMPLIANCE

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

_____
Attorney for Seth Penalver