IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC00-2043

PABLO IBAR,

Appellant,

VS.

STATE OF FLORIDA,

Appellee.

****

*** ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA, (Criminal Division)

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AMENDED ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Pablo Ibar, the defendant below, will be referred to as "Ibar". Appellee, the State of Florida, will be referred to as the "State". References to the record on appeal will be by the symbol "R", the transcripts will be by the symbol "T", to any supplemental record or transcripts will be by the symbols "SR[vol.]" or "ST[vol.]", and to the Appellant's brief will be by the symbol "IB", followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

After leaving his club, Casey's Nickelodeon, with Sharon Anderson ("Sharon") and Marie Edwards ("Marie"), Casimir Sucharski/Butch Casey ("Casey") brought the ladies to his home. Casey had a camera and video taping equipment installed which recorded events in part of the living room and kitchen area. The victims were captured on tape sitting around the kitchen table when sometime after 7:00 a.m. on June 26, 1994 (Sunday), two men entered the home. One wore a cap and sunglasses and the other a shirt over his head. Subsequently, the man in the cap was identified as Seth Penalver[1] and the man in the light colored shirt, wearing a shirt over his head and carrying a rod-like object was identified as Pablo Ibar. After emerging from the

[1]In a separate trial, Penalver was convicted and sentenced to death. His appeal is pending under case number SC 00-1602.

master bedroom, Ibar was then armed with a handgun (T15 1991).

Penalver carried a Tec-9 gun and immediately confronted Casey taking him to the floor and holding him at gun point, periodically hitting him about the head and back during approximately twenty minutes. Marie was pushed to the floor near the kitchen table and Sharon tried to escape to a bedroom, but was followed by Ibar where she was tied with electrical cords. Casey's home was searched by Ibar; he looked through Sharon's purse (T15 1985-88) and rummaged through the home and entered the bedrooms and garage. During this time, Casey was searched, his boots removed, and as he struggled, Penalver hit him repeatedly with the Tec-9 gun and Ibar struck him. The assailants were seen putting things in their pockets (T15 1988, State's exhibit 1). Peter Bednarz, averred Casey would keep 10 to 20 thousand in cash, carried a gun and owned a man's Cartier watch (T17 2353-54; T18 2363). The watch was not found and Casey's holster was empty (T15 1985-88).

Toward the end of the attack, Sharon, with her limbs tied, was brought out of the bedroom and directed to the floor near the other victims. Shortly thereafter, Ibar and then Penalver fired their weapons, killing the victims. Before leaving, Ibar removed the shirt from his head and face was captured on camera (video tape).

The autopsy revealed Sharon was killed by two close range gun shot wounds to the back of her neck, shattering her cranium and destroying her right eye. (T14 1823-28). Casey had a fractured finger, broken teeth, and lacerations, bruises, and scratches to his hands, back, face, and ear. He also had a gun shot wound to his right back which perforated his aorta and lung, exiting through his chest and causing death within moments. There was also has a contact wound to his neck which he received while alive (T14 1828-35). Marie died from a gunshot wound to the back of her neck which exited the front of her neck (T14 1836). Each death was a homicide.

By agreement with the Miramar Police, the Broward Sheriff's Office (BSO) processed the crime scene. Fingerprint, shoe print, ballistic, serological, video tape, hair, and fiber evidence were collected and processed from the crime scene as well as locations where Ibar and Penalver resided. No fingerprints, blood or hair evidence were matched to Ibar (T33 4394-97; T35 4564-68, 4575-77; T48 6236-38; T52 6767-72). The ballistics showed that the guns used were .38 caliber and nine millimeter weapons. The video tape revealed that the nine millimeter was a Tec-9 handgun. The video tape also was analyzed and still photographs were developed of the suspects and later of an assailant's hands wearing gloves (T16 2217-18;

T38 5011). In turn, fliers were created, which included selected still photographs. The fliers were distributed to area law enforcement agencies, and on July 14, 1994, a tip was received from the Metro-Dade Homicide Unit regarding Ibar.

Detectives Black, Manzella ("Manzella"), and Scarlett ("Scarlett") responded to Metro-Dade and met Ibar. Appellant agreed to talk to the police after his Miranda v. Arizona, 384 U.S. 436 (1966) rights were explained. Ibar reported he lived on Oaktree Lane in Hollywood and admitted he was familiar with the Consolidated Electric Supply (T28 3818-22, 3854-55). He also disclosed that on June 26, 1994, he had been at Cameo's, a night club, until 4:00 a.m. with his girl friend, Latasha and male friend, Jean Klimeczko ("Klimeczko"). Later, they went to Casey's Nickelodeon where Ibar and Latasha fought in the parking lot, then left. Ibar went home with her and slept until Monday morning. (T28 - 3821-25). He could not recall Latasha's last name, address, or phone number, nor could he give Klimeczko's exact address. With the limited information provided and getting the sense Ibar did not want to communicate, Manzella ended the interview by showing Ibar a video still photograph of him (T28 3823-26, 3834-36). Polaroid pictures of Ibar were taken, he consented to a search of his Oaktree Lane room, and surrendered his sneakers (T28 3820, 3835-36, 3855, 3872).

Manzella obtained the sneakers worn by Mr. Rincon and Mr. Hernandez who were with Ibar in Miami (T28 3872).

While searching Ibar's room on July 14, 1994, Scarlett reported he showed the still video photograph to Marie Casas, Ibar's mother, Marele Vindel, Casas' friend and maid, and Roxana Peguero, Vindel's 14 year old daughter. According to Scarlett, each positively identified the picture as one of Ibar.

Gary Foy ("Foy"), Casey's neighbor, reported that he had seen two young men leaving in Casey's Mercedes Benz. Foy averred the men followed him for about two to three miles. During that time he would look at them through his rear and side-view mirrors. While he did not see the driver well because he would cover his face or look away, Foy did get a good look at the passenger. The passenger stared "hard" and glared at Foy.

On July 15, 1994, Foy viewed a photo line-up, selecting Ibar's photograph along with another individual's, but he desired to see both in live line-ups. However, Foy knew Ibar was the passenger he had seen leaving Casey's home in the Mercedes. In response to Foy's request, the Miramar police obtained a court order compelling Ibar to appear for a line-up. He was not in custody for the Broward homicides at the time, and although he requested his attorney, the police did not wait for counsel to arrive. When Ibar was presented in the line-up, Foy

selected him immediately. The line-up was memorialized in a photograph.

Klimeczko testified that in June and July 1994 he stayed with Ibar, Alex Hernandez, and Alberto Rincon on Lee Street for a few weeks before having an argument with Ibar and moving out (T30 4011-14, 4018, 4034). According to Klimeczko, on June 24, 1994, he went with Pablo, Penalver, and others to the Nickelodeon and stayed until 6:00 a.m. the following morning (T30 4065-80). Klimeczko identified Ibar and Penalver as being depicted in the photographs he was shown by the police (T30 4083-87, 4103-04; T31 4109-13 4136-39, 4144, 4189-91). Also, Klimeczko averred there was a Tec-9 gun in the Lee Street home (T31 4154, 4158-62). Describing the events at the Lee Street house between 5:00 a.m. and daybreak on June 26, 1994, Klimeczko testified Penalver and Ibar entered the home, Ibar took the Tec-9, left with Penalver driving, then returned near daybreak in a big, black shiny new car, stayed a few minutes, before leaving once again in two cars. Klimeczko did not see Penalver and Ibar until noon, maybe 1:00 p.m., but they no longer had the black car (T31 - 4180-85).

Ian Milman testified the photo resembled Ibar, but denied ever saying that it was Ibar or ever making an identification before the grand jury (T34 4439-55, 4492-4500, T35 4517-20). He

was confronted with the identification he made before the grand jury. Manzella testified that when he showed Milman the photo Milman responded "that's Pablo." (T39 5236).

Melissa Munroe ("Munroe"), Penalver's girl friend in 1994, testified that she knew Ibar (T35 4607, 4613). Munroe averred she had seen Penalver and Ibar at Casey's Nickelodeon the weekend before the murders (T59 7862-7864). Munroe had identified Penalver in the enhanced photo taken from the video the police showed her as they searched her home (T63 8473-8496). Munroe also testified that Penalver was upset when he found out he was wanted for questioning and said his life was over (T63 8413).

Ibar's Lee Street residence was searched where a pair of vinyl exam gloves, literature for a Tec-9 gun, a nine millimeter round, a box of .380 ammunition, and shoes were collected (T38 5018-19, 5022-26, 5031-32).

Kim Sans testified she saw Penalver and another man, who identified himself as "Pablo" on the last weekend in June 1994. Near 8:00 a.m. on June 26, 1994 she saw Penalver and Ibar with a black and tan Mercedes. Sans averred she came forward because of her conscience, as well as the fact that her fiancé was facing charges and she hoped she could obtain a "deal" (T43 5828-32; T44 5920-60; 5990-6007). Mr. Phillips reported seeing

Penalver with a black Mercedes Benz one morning in late June 1994 (T43 5836-83).

The State's footwear expert, Mr. Boyde, testified he compared footwear impressions with those found at Casey's house and determined one was consistent with the size 10 sneakers seized from Mr. Rincon (T47 6145-98). Mr. Boyde was contradicted by defense expert, Dale Nute (T48 6382-6416).

Ibar presented an alibi defense. His mother-in-law, Alvin Quinones, wife, Tonya, and in-laws, Heather Quinones and Elizabeth Claytor testified they either were told or witnessed Ibar sleeping in Tonya's bed near 7:30 a.m. on June 26, 1994. This alibi was repeated by Ibar in his testimony.

In the penalty phase the State presented victim impact testimony from family members of Sharon Anderson and Marie Edwards (T59 7310-29). The defense called Ibar's family and friends to discuss his character and lack of prior criminal history. The trial court found (1) prior violent felony, (2) felony murder, (3) avoid arrest, (4) heinous, atrocious or cruel, and (5) cold, calculated, and premeditated (this factor was not given to the jury). (R6 1096-1100). In mitigation, the trial court found: (1) no significant prior criminal history (medium weight), (2) age (minimum weight), (3) good/loving family relationship (medium weight), (4) good worker (minimal

weight), (5) rehabilitation/no danger to others in prison (very little weight), (6) good friend to brother and friend (minimal weight, (7) good courtroom behavior (minimal weight), (8) Defendant is religious (minimal weight), (9) family/friends care for Defendant (minimal weight), (10) good family (minimal weight), (11) remorse (minimum weight). The trial court rejected the mitigators of (1) defendant's participation was minor (2) good jail record, (3) lack of father growing up, (4) entered victim's home without intent to kill, (5) defendant did not flee after offense committed, (6) bad peer influence, (7) no time for cool consideration before killing, (8) under influence of alcohol at time of crimes, (9) Defendant is not violent person, (10) Defendant is intelligent (proven but not mitigating), (10) residual doubt (not mitigating factor), (11) extraneous emotional factors, (12) death penalty is not deterrent, (13) family's request for life sentence, (14) cost less for life sentence, (15) innocent people have been sentenced to death. (R6 1104-14).

SUMMARY OF THE ARGUMENT

Point I - The officers' testimony regarding prior out-of-court identifications of Ibar by six witnesses after viewing his photograph are admissible as statements of identification under section 90.801(2)(c).

Point II - The State did not call witnesses for the sole purpose of impeachment. Each witness provided testimony in furtherance of the State's case or in rebuttal to Ibar's alibi. Any impeachment of these witnesses was proper. Moreover, to the extent that the testimony involved identifications, any contradictory testimony or evidence was permissible as substantive evidence under section 90.801(2).

Point III - Maria Casas was deceased by the time of Ibar's 2000 trial; however, she had testified in 1997 trial and was subject to cross examination by Ibar's counsel. As such her prior testimony was admissible under section 90.804(2). Her prior cross-examined testimony satisfied the requirement of section 90.801(2)(c) to permit Detective Scarlett to report on Casas' prior out-of-court identifications of Ibar after viewing his photograph.

Point IV - The trial court properly allowed Ian Milman's testimony, under section 90.803(3)(a)2, that Alex Hernandez was going to North or South Carolina for the weekend. It also

properly admitted Kim Sans testimony regarding an identification Ibar made to her at her home the morning of the murders and properly admitted testimony from shoe print expert, Fred Boyd.

Point V - The trial court properly excluded an audiotape of a conversation between Kristal Fisher and the victim, Casey and properly excluded alleged reputation testimony from Detective Lillie.

Point VI - The trial court properly denied Ibar's motion to suppress his live line-up as it did not violate his Fifth or Sixth Amendment rights.

Point VII - The admission of evidence regarding: (1) tip coming from the Homicide Unit; (2) basis for the discontinuation of police questioning; and (3) Penalver's gang graffiti, criminal history, and contemplated suicide were not improper and did not deprive Ibar of a fair trial. The inferences Ibar draws from the evidence are stretched at best. Even if the evidence was improper, it was rendered harmless given video tape of the crimes and the identification of Ibar as the assailant.

Point VIII - Florida's death penalty statute is not implicated by Ring v Arizona as death is the statutory maximum in Florida. Also, the trial court's finding of aggravation in this case is supported by substantial, competent evidence.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY ADMITTED TESTIMONY FROM OFFICERS SCARLETT AND MANZELLA REGARDING IDENTIFICATIONS MADE BY SEVERAL WITNESSES IN THEIR PRESENCE (RESTATED).

Ibar claims the trial court erred by admitting, as substantive evidence, testimony from Officers Scarlett and Manzella regarding identifications made by State witnesses Peguero, Vindel, Casas, Klimeczko, Ian Milman, and Melissa Monroe, identifying Ibar as the person in the photos[2] that were admitted into evidence. Ibar argues that such evidence is improper opinion testimony under section 90.701, Florida Statutes (2003) and does not fall under the hearsay exception provided in section 90.801 (2)(c), Florida Statutes (2003). This Court will find that these claims are not preserved for appellate review, lack merit as the identifications were clearly admissible under section 90.801(2)(c), and even if improperly admitted, any error was harmless.

The admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion. Ray v. State, 755 So.2d 604, 610 (Fla. 2000); Zack v. State, 753

[2] The photographs were still shots from the videotape of the crime, that was also admitted and played for the jury.

So.2d 9, 25 (Fla. 2000); Cole v. State, 701 So.2d 845 (Fla. 1997); Jent v. State, 408 So. 2d 1024, 1039 (Fla. 1981). The State's first argument is that Ibar's claims are not properly before this court as they have not been preserved for appellate review.[3] At trial, Ibar failed to object to either Officer Scarlett's or Detective Manzella's testimony regarding these identifications. It is well established that for an issue to be preserved for appeal, it must be presented to the lower court and "the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved." Archer v. State, 613 So.2d 446 (Fla. 1993). See, Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982). Therefore, these claims are not properly before this court as they have not been preserved.

Turning to the merits, it is clear that the officers' testimony regarding the out-of-court identifications made by

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[3]Ibar implicitly acknowledges he did not preserve this issue by asserting the error in admitting these identifications was fundamental (IB 41). He also attempts to argue he preserved this issue by objecting to the cautionary instruction the judge gave the jury before prior sworn testimony from Melissa Munroe and Klimeczko was admitted as substantive evidence. Those objections could not preserve Ibar's complaint about the officers being able to testify to out-of-court identifications made by six witnesses prior to trial. Ibar admits he prevailed upon the judge to not give an instruction that the identifications were substantive evidence (IB 35, 36, n. 16, 38-39).

Roxanne Peguera, Marlene Vindel, Maria Casas, Jean Klimeczko, Ian Milman, and Melissa Monroe, prior to trial, after viewing a photograph of Ibar were properly admitted. In Florida, when a witness identifies an individual before trial, the out-of-court identifications, made after perceiving the person, are excluded from the definition of hearsay by section 90.801(2)(c) and therefore, are admissible as substantive evidence. See also State v. Freber, 366 So.2d 426, 427 (Fla. 1978) (holding that testimony concerning a prior, out-of-court identification, from a witness who observes the identification, is admissible as substantive evidence of identity, even if the identifying witness is unable to identify the defendant at trial); Charles W. Ehrhardt, Florida Evidence, section 801.9, at 662 (2000). Section 90.801(2)(c) applies even if the witness fails to make an in-court identification, or confirm the prior identification was made. Id; see Brown v. State, 413 So.2d 414, 415 (Fla. 5th DCA 1982)(holding it "makes no difference whether the witness admits or denies or fails to recall making the prior identification"); A.E.B. v. State, 818 So.2d 534, 535-36 (Fla. 2d DCA 2002)(same). Rather, all that is required by the rule is that the witness who made the identification testify at trial and be subject to cross-examination.

Section 90.801(2)(c) states:

> (2) A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross examination concerning the statement and the statement is;
>
> (a) Inconsistent with the declarant's testimony and was given under oath subject to the penalty of perjury at a trial, hearing or other proceeding or in a deposition.
>
> (b) Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of improper influence, motive, or recent fabrication; or
>
> (c) **One of identification of a person made after perceiving the person**.

Under section 90.801(2)(c), both the person making the identification and any witnesses who were present when the identification occurred, may testify as to the identification. See Freber, at 427-28; Miller v. State, 780 So.2d 277, 281 (Fla. 3d DCA 2001), J. Cope (concurring) (noting statements identifying defendant were admissible as substantive evidence under section 90.801(2)(c)); Lewis v. State, 777 So.2d 452 (Fla. 4th DCA 2001)(police officer's testimony concerning the victim's out-of-court identification of the defendant as his assailant was non-hearsay under section 90.801(20(c) and thus, admissible); Lopez v. State, 716 So.2d 301, 304 n.3 (Fla. 3d DCA 1998)(noting that the witness's sworn statement reiterating his identification of defendant in the photo line-up was independently admissible as a non-hearsay statement of

identification under section 90.801(2)(c).

Further, there is no requirement that the identification occur immediately after the event. See Henry v. State, 383 So.2d 320 (Fla. 5th DCA 1980)(holding father of 12 year-old sexual battery victim was allowed to testify to his daughter identified defendant, in his presence, two months after the attack when she happened to see him on the street); Ferreira v. State, 692 So.2d 264 (Fla. 5th DCA 1997) (holding photographic identification of defendant by victim about a week after crime was sufficiently close in time to be considered reliable). "[O]ne of the reasons for admitting section 90.801(2)(c) identification statements as non-hearsay is that the 'earlier, out-of-court identifications are believed to be more reliable than those made under the suggestive conditions prevailing at trial.'" Lewis, 777 So.2d at 454.

It is section 90.801(2)(c) that makes identifications from a photo line-up admissible as substantive evidence. See State v. Richards, 2003 WL 1916693 (Fla. 3d DCA April 23, 2003). The identifications in this case are akin to photo identifications and are therefore, admissible. Defense counsel even acknowledged that the state could bring in this testimony when he was arguing against Ibar's mother's prior testimony being admitted (T Vol. 25, 3392). Richards also supports the

admission of the police officers' testimony in this case. In Richards, the defendant was on trial for the first-degree murder of Floyd Williams. The State sought to introduce, under section 90.801(2)(c), a statement from the defendant's girlfriend that the defendant telephoned her after the shooting, and admitted to her that he shot the victim. While the Third District held that section 90.801(2)(c) could not be used to introduce the defendant's **admission** to committing the crime, it agreed that "'perceiving' a person under paragraph 90.801(2)(c) may occur through a voice identification [and] thus, identifying a person as a telephone caller by voice identification would qualify as a statement of 'identification of a person made after perceiving the person.'" And it also agreed that "making a visual identification of the defendant in a photo line-up is a statement of 'identification of a person made after perceiving the person.'"

Ibar's reliance upon two (2) cases from the Fourth District is misplaced. In Stanford v. State, 576 So.2d 737 (Fla. 4th DCA 1991), the issue was whether out-of-court identifications by the victim, **naming** his assailant (whom he knew), to his daughter, grandson and neighbor (a police officer), were admissible. Reasoning that it did not believe that section 90.801(2)(c) was intended to allow out-of-court statements by a witness **naming**

the person the witness believed committed the crime, the Fourth District held that any error in admitting the testimony was harmless, at worst.

> We believe that the typical situation contemplated by the code and the case law is one where the victim sees the assailant shortly after the criminal episode and says, "that's the man." Hence, the phrase "identification of a person made after perceiving him" refers to the witness seeing a person after the criminal episode and identifying that person as the offender. We do not believe this code provision was intended to allow other out-of-court statements by a witness to others naming the person that the witness believes committed the crime. To extend the rule that far would permit countless repetitions by a witness to others, regardless of time and place, of the witnesses' belief as to the guilty party, a result we do not believe intended by the drafters of the rule.

Id at 739-40 (citations omitted). The Fourth District noted that case law supported its interpretation, relying upon Henry v. State, 383 So.2d 320 (Fla. 5th DCA 1980), the case holding it was permissible for the father of 12 year-old sexual battery victim to testify that his daughter identified the defendant, in his presence, as her attacker, **two months** after the attack, when she happened to see him on the street. The point of Stanford seems to be not so much the timing of the identification, but, the type of identification, one after seeing the person, rather than repeating the name of someone the witness believes was her assailant. Simmons v. State, 782 So.2d 1000 (Fla. 4th DCA 2001)(victim's statement he was confident he could identify

assailant was not statement of identification but any error harmless).

Here, in contrast to Stanford and Simmons, we have witnesses who were shown a photograph and identified the person in the photograph as Ibar. As already noted, the situation in this case is most similar to identifications made after a photo line-up. This is not a case where the state was trying to introduce witnesses' naming Ibar as the assailant. Roxanne Peguera testified that she was shown a photograph on July 14, 1994 (State's Exhibit 139) and she does not remember what the officer said, but she remembers "saying that that looks like Pablo." (T22 3056). The officer may have asked her "do you know this person?" or "does this look like Pablo?", but she doesn't know (T22 3059). Subsequently, a recorded statement was taken from her and she was shown the picture again on September 1, 1994 (T22 3062-64). They asked her "do you recognize the person in that picture?" The first time she answered, "um, yes. He looks like Pablo. But I really haven't seen him in a long time so I really don't know" (T22 3069-70). Officer Scarlett testified that when he showed Roxanne the picture on July 14, 1994, he asked "do you know who this is?" and she looked at it and said it was Pablo (T25 3402).

Thus, Roxanne did not deny making the identification of Ibar

and the only difference between her testimony and Scarlett's is the strength or degree of the identification. Roxanne remembered saying "it looked like Pablo," while Officer Scarlett testified that she positively identified it "as Pablo." The same is true for her mother, Marlene Vindel's testimony. Ms. Vindel testified that she was shown a "very cloudy" photograph on July 14, 1994 and asked if she knew the person. (T23 3172). She responded that he looked like Pablo, but she wasn't really sure because it wasn't very clear (T23 3173). Officer Scarlett testified that he showed Marlene Vindel the photo and asked "do you know who this is?" She responded "Pablo." (T25 3401). Maria Casas was Ibar's mother and she had passed away by the time of trial. Her testimony from the first trial was read into the record and she denied making any identifications of Ibar (T24 3333-40). Scarlett testified that he showed Maria Casas the photograph on July 14, 1994 and asked "do you recognize this picture?" (T25 3399). She responded, "yes, it's Pablo." (T25 3399).

Ian Milman testified that the photo resembled Ibar, but denied ever saying that it was Ibar or ever making an identification before the grand jury (T34 4439-55, 4492-4500, T35 4517-20). Milman was impeached with the identification he made before the grand jury. Also, Manzella testified that when

he showed Milman the photo and asked "do you know who this is?" Milman responded "that's Pablo." (T39 5236). Klimeczko admitted he previously identified Pablo from a photo he was shown, but recalled the photo as very clear, not the fuzzy one shown in court. Klimeczko believed the picture he identified was a "file" picture, not the video still the police claimed he identified. Klimeczko was impeached with his testimony from the Adversary Preliminary Hearing wherein he identified Ibar. Further, Manzella testified he showed Klimeczko the photo twice and both times Klimeczko said "that's Pablo." (T39 5186-87). The last identification witness, Melissa Munroe, testified Pablo resembled the man in the photo but said she could not make an identification. She was also impeached with her August 25, 1994 Grand Jury testimony, wherein she testified the pictures looked like Penalver and Ibar (T39 5219-20).

Moreover, even if it was error to admit the police officers' testimony regarding the out-of-court identifications, any error was harmless. The focus of a harmless error analysis "is on the effect of the error on the trier-of fact." State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986). "The question is whether there is a reasonable possibility that the error affected the verdict." Id. Here, it is clear that the police officers' testimony regarding the out-of-court identifications was not the

only or even the most compelling evidence that Ibar committed the murders. It is most important to remember that the murders were captured on videotape and, therefore, unlike the vast majority of crimes, the jury actually had the opportunity to view the crime and determine for itself whether Ibar was one of the assailants. The jury viewed the crime scene video several times during the trial and could compare the person in it to Ibar who it saw daily during the six week trial. Further, eyewitness Gary Foy identified Ibar, in an out-of-court photo line-up, live line-up, and an in-court identification, as one of the men he saw leaving Casey's house on the morning of the murders in Casey's black Mercedes. Kim Sans and David Phillips also reported seeing Ibar in possession of a black Mercedes on the morning of the murder. Finally, the officers' testimony merely corroborated the testimony of Vindel, Perguero, Klimeczko, Milman and Monroe. Both Vindel and Perguera admitted in-court that they identified the person in the photo as Ibar, but varied from the officers in the strength of their identification. Further, Klimeczko, Milman and Munroe were each impeached with prior sworn testimony that they had previously identified the person in the photo as Ibar. Based on the strength of the compelling nature of the evidence identifying Ibar as one of the murderers, any error in admitting the police

officers' testimony was harmless.

POINT II

THE STATE DID NOT CALL WITNESSES FOR THE SOLE PURPOSE OF IMPEACHMENT (RESTATED)

Ibar asserts the testimony of Roxana Peguera ("Peguera"), Marlene Vindel ("Vindel"), Casas, Klimeczko, and Mimi Quinones should not have been admitted because each was called for the sole purpose of impeachment (IB 42-43). The State submits these witnesses were not called for the sole purpose of impeachment, but each supplied evidence supporting the State's case or rebutted Ibar's alibi. Where impeachment was offered, such was proper. The conviction should be affirmed.

Admissibility of evidence is within the trial court's sound discretion, and its ruling will not be reversed unless there is a clear abuse of discretion. Ray; Zack; Cole. (See Point I, 13) Substantial deference must be paid to the court's ruling. See Trease v. State, 768 So. 2d 1050, 1053, n. 2 (Fla. 2000).

At trial, Ibar did not object to the witnesses as being called for the sole purpose of impeachment. There was no contemporaneous objection to Peguera, Vindel, Mimi Quinones George McEvoy, or Detective Scarlett. With respect to the admission of Casas' testimony, Ibar objected based on the assertion that it was unclear from her prior testimony which

photograph she was being shown during the trial, thus, the defense could not impeach later testimony (T24 3252-67, 3289). Likewise, Ibar objected to the procedure the State used to impeach Klimeczko, but not the fact that the witness could be impeached (T30 - 4043-47, 4060-64, 4075, 4111-14, 4186-88). The objections raised do not equate to the specific argument presented here, i.e., that the sole purpose for the admission of testimony is to impeach the witness. As such, the claim that witnesses were called for the sole purpose of impeachment is not preserved for review. Steinhorst, 412 So. 2d at 338 (holding except for fundamental error, an issue will not be considered on appeal unless it was presented to lower court; to be cognizable, "it must be the specific contention asserted as legal ground for the objection, exception, or motion below"). However, should this Court reach the merits, the record reveals the testimony was admitted properly.

Prior to 1990, the party calling the witness was not permitted to impeach his witness' credibility. Jackson v. State, 451 So. 2d 458, 462-63 (Fla. 1984) (recognizing it is improper for party calling witness to impeach witness unless party shows witness is providing harmful testimony). However, in 1990, section 90.608(1), Florida Statute was amended and Federal Rule 607 of the Federal Rules of Evidence was adopted to

permit any party, including the party calling the witness, to impeach that witness. Ehrhardt, Florida Evidence, § 608.2 at 458 (West 2002). Contemporaneously, section 90.608(2) was repealed, thereby, removing the requirement that the witness had to be declared adverse before the calling party could offer impeaching evidence. The result of these legislative changes provided that the party calling a witness could impeach the witness' credibility irrespective of whether the calling party was surprised[4] or harmed by the testimony. Morton v. State, 689 So. 2d 259 (Fla. 1997), receded from on other grounds, Rodriguez v. State, 753 So. 2d 29 (Fla. 2000). Any permissible impeaching method may be employed.

In Morton, 689 So. 2d at 264, this Court stated:

> Generally, however, if a party knowingly calls a witness for the primary purpose of introducing a prior statement which otherwise would be inadmissible, impeachment should ordinarily be excluded. On the other hand, a party may always impeach its witness if the witness gives affirmatively harmful testimony. In a case where a witness gives both favorable and unfavorable testimony, the party calling the witness should usually be permitted to impeach the witness with a prior inconsistent statement.

Prior inconsistent statements may be used to establish, not

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[4] Ibar cites James v. State, 765 So. 2d 763 (Fla. 1st DCA 2000) for the proposition surprise is required (IB at 48). However, it is clear, based upon Morton v. State, 689 So. 2d 259 (Fla. 1997), and the 1990 statute change that surprise is not required.

that the prior statement is true and the in-court one false, but to ask the jury to place less weight on the in-court account. Prior statements are not admitted as substantive evidence and must directly contradict the in-court testimony. State v. Hoggins, 718 So. 2d 761, 771 (Fla. 1998) (opining "[t]o be inconsistent, a prior statement must either directly contradict or materially differ from the expected testimony at trial."); Brumbley v. State, 453 So. 2d 381 (Fla. 1984) (noting prior inconsistent statements are admitted as impeachment not substantive evidence). Pursuant to United States v. Williams, 737 F.2d 594, 608 (7th Cir. 1984):

> Inconsistency "may be found in evasive answers, ... silence, or changes in positions." ... In addition, a purported change in memory can produce "inconsistent" answers. ... **Particularly in a case of manifest reluctance to testify**, ... "if a witness has testified to [certain] facts before a grand jury and forgets ... them at trial, his grand jury testimony ... falls squarely within Rule 801(d)(1)(A)."

Williams, 737 F.2d at 608 (emphasis supplied) (citations omitted).

Witnesses, Peguera, Vindel, Klimeczko, and Casas, were not called with the intent of impeaching them with "otherwise inadmissible" evidence, but were called, in part, to testify about identifications they made of Ibar from photographic evidence. Under section 90.601(2)(c), others could be called to

offer substantive evidence regarding identification. Likewise, where there was conflict with prior testimony "given under oath subject to the penalty of perjury" at a prior hearing, proceeding or deposition, the witness could be confronted with this non-hearsay evidence under section 90.608(2)(a). To the extent Klimeczko was impeached under section 90.608, the trial court made the appropriate findings as to his reluctance to testify or feigned lack of memory as will be discussed below.

Ibar misplaces reliance upon Morton; James v. State, 765 So. 2d 763 (Fla. 1st DCA 2000) (addressing impeachment evidence under section 90.608); Calhoun v. State, 502 So. 2d 1364 (Fla. 2d 1987); United States v. Ince, 21 F.3d 576 (4th Cir. 1994) (discussing impeachment with prior inconsistent statement under Rule 607 Federal Rules of Evidence); United States v. Peterman, 841 F.2d 1474 (10th Cir. 1988); United States v. Webster, 734 F.2d 1191 (7th Cir. 1984); United States v. Morlang, 531 F.2d 183 (4th Cir. 1975); State v. Stanley, 995 P.2d 1217 (Ore. 2000) (finding officer's report of victim's account not admissible as substantive evidence because witness had not adopted report at time when her memory was fresh and report could not be used as impeachment as it did not contradict witness' testimony of memory loss); Pickett v. State, 707 A.2d 941 (Md. 1998) (analyzing admission of impeachment testimony regarding what

defendant told sister and what sister conveyed to officer and finding such improper where officer's impeaching testimony would not have been admissible otherwise). These cases deal with those instances where the witnesses are being impeached on **non-identification** issues with prior inconsistencies. That is not the case here. Instead, the State was relying upon sections 90.801(2)(a) and (c) for the admissibility of the identification testimony from Peguera, Vindel, Klimeczko, and Casas and would reincorporate its Point I analysis here. The State did not have to resort to section 90.608 for the admissibility of evidence contradicting the identification witnesses.

Both Peguera and Vindel testified at trial that they were shown a picture on July 14, 1994, while police officers were in Casas' home, and that they told the officer that it "looks like" Ibar (T22 - 3040, 3049-53, 3055-60; T23 - 3165-70, 3172-73, 3192-93). On August 23, 1994, a Miramar police officer, came to Vindel's home and took a tape recorded statement and she signed and dated the photograph the officer presented, reiterating that the photograph shown "looks like" Ibar. (T23 3175-80, 3184, 3198). Vindel admitted that she had responded to the officer's question regarding the July 14th identification as "Yeah, I know I say it's Pablo." (T23 3182). In court, Vindel reconfirmed the photographs she was shown looked like Ibar (T23 3198). On

September 1, 1994, the police took Peguera's recorded statement in which she expressed the photograph looked like Ibar, but because she had not seen him since July 4, 1994, she was not sure (T22 3064-71, 3087).

Relying upon Thompson v. State, 619 So. 2d 261 (Fla. 1993); Henry v. State, 649 So. 2d 1366 (Fla. 1994) and section 90.804(2)(a) Casas was found to be unavailable and the State was permitted to read her prior testimony into the record (T24 3250-52, 3268). The defense had no argument with respect to the trial court's ruling under section 90.804(2)(a) (T24 3268-3324). Casas' prior trial testimony revealed that while Ibar had moved out of her home before July 14, 1994, he kept some personal items in his old room (T24 3326-27). Casas confirmed that on July 14, 1994, Peguera and Vindel were at her home when the police arrived (T24 3330-32). Casas denied looking at photographs and making an identification, yet later she testified she had looked at pictures. She admitted Ibar had worn his hair the way the person depicted in the video wore his. While she denied having ever seen a T-shirt imprinted with Consolidated Electric Supply's[5] logo, but she may have done

[5] A Consolidated Electric Supply T-shirt was found at the scene and Ibar wore a shirt over his head during the homicides. (T13 - 1689; T14 - 1869-70; State's exhibit 1 video tape).

business with the company (T24 3333-34, 3340-49, 3354-59).

Scarlett testified Peguera, Vindel, and Casas identified the photographs shown them on July 14, 1994 as that of Ibar. Each recognized the person in the photograph: Casas replied "Yes, it's Pablo", Vindel answered "Pablo", and Peguera replied that it was Ibar. Scarlett denied having suggested the identity to the witnesses (T25 3399-3403).

Klimeczko's made prior identifications of Ibar from photos presented to him during the investigation and court proceedings (T30 4098-39, 4186-4195, 4251-60). These proceedings were under oath and Klimeczko was subject to perjury (T3 4075).

To the extent these witnesses did not provide testimony consistent with prior positive identification of Ibar, the State was permitted to present, as substantive evidence, prior sworn statements/testimony or Scarlett's testimony that positive identifications were given pursuant to sections 90.801(2)(a) and (c). In order to admit prior identification testimony under section 90.801(2)(c), it is only necessary the declarant testify at trial and be subject to cross-examination. See, United States v. Owens, 484 U.S. 554 (1988); State v. Freber, 366 So. 2d 426, 427 (Fla. 1978) (holding testimony concerning prior out-of-court identification from witness who observes identification is admissible, substantive evidence of identity even if identifying

witness is unable to identify defendant at trial); Brown, 413 So. 2d at 415; A.E.B., 818 So. 2d at 535-36. Where the State used Klimeczko's prior trial/deposition testimony to show his previous identifications of Ibar on the video tape, such was proper substantive evidence under section 90.801(2)(a).

Turning to Klimeczko's non-identification testimony, after he had testified for a short period of time and feigned memory loss, the prosecutor brought to the trial court's attention the witness' demeanor, reluctance to testify, "selective memory", and unwillingness "to say anything to hurt" Ibar. The court found:

> We got a witness that is definitely reluctant to testify. What the appellate court can't see is this guy's attitude. He's slumped down in his chair constantly yawning, his facial expressions and the sighs that he lets out after his answer. Those are what I observed. This is what he had to refresh his memory when he got out of jail, he couldn't remember that. Not remembering the last time he went to Casey's Nickelodeon. He doesn't even remember making a recorded statement, and this last thing about the position.

(T30 4043-44). In announcing his opinion that Klimeczko had a "selective memory", the trial court referenced section 90.614, Florida Statutes (T30 4046). Defense counsel agreed that now "[t]hey can impeach their own witness...." (T30 4047). As pointed out by the prosecutor, the "memory loss" was not due to alleged drug use, but to Klimeczko's claim that the passage of

time faded his memory (T30 4050). Based upon Williams, 737 F.2d at 608, the trial court allowed the examination (T30 4051).

The State admitted some of the exam was impeachment, but noted other was for identification. The court instructed:

> This witness will be confronted with statements allegedly made by him prior to these proceedings. Prior statements made by a witness concerning identification of a person after perceiving the person are admissible both to impeach the witness' credibility and as evidence of identification.
>
> All other prior statements made by a witness are admissible not to prove the truth of the statement but only to impeach the witness' credibility.
>
> Remember you are the exclusive finder of fact as to any evidence presented in this trial.

(T30 4052-53, 4060; T32 4218-19).

Overall, Klimeczko examination through direct questioning and confrontation with prior sworn testimony and statements on identification and non-identification matters was permissible under section 90.804(1)(c), Florida Statute. From the trial court's finding that Klimeczko was such a reluctant witness, one unwilling to remember pertinent facts (T30 4043-44, 4046, 4051), the use of the prior sworn testimony was appropriate under section 90.804(1)(c). Robertson v. State, 829 So. 2d 901, 906 (Fla. 2002) (recognizing "longstanding principle of appellate law" which permits the reviewing court to affirm a trial decision where the right result was reached, but for other

reasons).

To the extent Klimeczko testified inconsistently regarding non-identification matters, his prior testimony given under oath in an earlier proceeding or deposition was admitted properly as substantive evidence under section 90.801(2)(a). The State attempted to refresh Klimeczko's recollection of his July 28, 1994 police statement by permitting him to hear the tape re-played (T33 4066-67). Ibar complains this was improper. While the statement was read in open court, Morton, 689 So. 2d at 264 n. 5 (noting section 90.613 prohibits either witness or counsel from publishing to the jury a document used to refresh a witness' recollection as possible inadmissible evidence may be contained in that material), Klimeczko subsequently adopted the information as correct. Klimeczko reaffirmed that he, Ibar, and others were at Casey's Nickelodeon on June 24, 1994. (T30 4069-70). Hence, any error in the procedure utilized was harmless as the jury did not hear anything inadmissible. Nonetheless, the information was admitted properly as substantive evidence under section 90.801(2)(a) when Klimeczko affirmed he gave sworn testimony in the August 31, 1994 trial proceeding while subject to cross examination (T30 4075).

Klimeczko's prior sworn testimony related to his seeing a gun at Ibar's Lee Street residence, Ibar and Penalver returning

home early on June 26, 1994 acting paranoid, retrieving the Tec-9, leaving in Penalver's car, and returning home near daybreak in a "big, black", "new, shiny car." Ibar admitted to Klimeczko he possessed the car (T31 4166-90). Again, under section 90.801(2)(a), it was admissible, substantive evidence.

As Ibar's final challenge to Klimeczko's testimony revolves around the account that Ibar and others living in the Lee Street home exchanged clothing (IB 46). At trial, Klimeczko stated that he and others "probably" exchanged clothing, but he could not "particularly remember them." (T32 4226-27). The July 28, 1994 police statement was read in open court, and the witness did not deny making those statements (T32 4227-36, 4246). While Klimeczko was impeached on this issue, he was not called for the sole purpose of impeachment. The record reveals Klimeczko covered many areas of the case, from where Ibar lived, with whom he associated, Ibar's actions near the time of the murders, his possessions, and access to a Tec-9 gun which was consistent to the murder weapon. The jury was instructed[6] on the proper use of impeachment evidence (T30 4060; T32 4218-19). Clearly, the witness offered testimony in furtherance of the State's case,

[6]It is presumed jurors follow the instructions. Sutton v. State, 718 So.2d 215, 216 n. 1 (Fla. 1st DCA 1998)(finding law presumes jurors followed instructions in absence of contrary evidence). See, U.S. v. Olano, 507 U.S. 725, 740 (1993)(same).

thus, this area of impeachment was not improper. Morton, 689 So. 2d at 264 (noting it is improper to call witness for primary purpose of impeachment, but, where he gives both favorable and unfavorable testimony, party calling witness should usually be permitted to impeach witness with prior inconsistencies); United States v. Hogan, 763 F.2d 697, 702 (5th Cir.) (reasoning party may call witness known to be hostile and impeach his credibility), remanded on other grounds, 771 F.2d 82 (5th Cir. 1985).

Turning to the calling of Mimi Quinones, the record reveals that Ibar presented an alibi defense consisting of a claim that he was with his 15 year old girl friend on the morning of the homicides. To support this claim raised for the first time in his second trial, Ibar testified and called Alvin and Heather Quinones, Elizabeth Claytor, and Tonya Quinones Ibar.

According to Alvin, she and Mimi left for Ireland on June 24, 1994. While there, Mimi called home using a calling card because it was less expensive than calling collect (T49 - 6451-57). Remaining home were Alvin's daughter's Tonya and Heather. Elizabeth Claytor, their cousin, was left to supervise.

Near 7:30 a.m. on June 26, 1994, Heather and Elizabeth entered Tonya's room where they saw a man sleeping. Heather identified him as Ibar and Elizabeth testified that Tonya said

the he was Ibar. This information was communicated to Mimi while she was in Ireland and then to Alvin upon her return to Florida.

In the State's rebuttal, Mimi explained her relationship with Alvin, Heather, and Tonya Quinones as well as Elizabeth Claytor (T52 6775-76) She reported that she and Alvin were in Ireland on June 26, 1994 and had phoned home during their trip using the more economical calling card. According to her, the hotel vending machine where she purchased the card took pounds or dollars and gave cards in $10.00 or $20.00 denominations (T52 6776-78, 83).

George McEvoy ("McEvoy"), explained that in June 1994, his company was the sole provider of telephone calling card vending machines. At that time, the machines were in Houston station, Dublin (T52 6787-89). Since inception, no telephone calling card vending machines have been placed in hotels in Ireland (T52 6789-91). These machine carry calling cards in denomination of two pounds and three pounds 50 which equates to 10 to 20 units of talk time. The machines do not accept paper money or foreign currency (T52 6792-94). McEvoy testified that collect calls could be made from pay phones and it is not economical to use a calling card to make an international telephone call (T52 6793-94).

Ibar cites Stoll v. State, 762 So. 2d 870, 875 (Fla. 2000), for the proposition the State was not permitted to call a rebuttal witness to explain or contradict evidence the State had presented previously. The error in Stoll was that the prosecution introduce evidence in rebuttal to evidence it had introduced in its case-in-chief. Id. This Court recognized that the State could rebut evidence the defense has offered in its case. Id.

In the instant case, Ibar asserted an alibi defense and presented witnesses in support (T49-50 6433-6639). The State's presentation of Mimi and McEvoy were in an effort to undermine the alibi defense by showing the unreasonableness of telephoning home using a calling card, and calling into question the veracity of the alibi. Because the testimony of Mimi and McEvoy meshed together to challenge the alibi, such was permissible.

Ibar also cites to Morton. Under Morton, it is improper to call a witness for the sole purpose of impeaching her with what would be **otherwise inadmissible evidence**. Morton, 689 So. 2d at 264. Mimi was not impeached with what would be otherwise inadmissible evidence. McEvoy's testimony was admissible. Hence, Morton is not implicated and no error was committed.

However, should this Court find that none of the witnesses should have testified, such was harmless. First and foremost,

the jury viewed the crime scene video and could compare it to the Appellant during the six week trial. Moreover, Vindel, Perguero, and Klimeczko merely varied the strength of the identification, not that it was not Ibar. Each maintained that the photograph looked like Ibar. The strength of the witnesses' identification must be viewed in light of the fact the jury was viewing the same evidence and could draw its own, independent conclusion.

Although the State attempted to challenge the veracity of the alibi witnesses, the fact that Mimi and Alvin may not have telephoned home using a calling card does not undermine completely the claimed alibi. Alvin testified that Elizabeth and Tonya reported the incident upon her return home. Further, Elizabeth, Heather, Tonya and Ibar testified about the incident. As such, the pith of the alibi defense remained and it was the jury's role to evaluate the facts. Also, Melissa Munroe recognized Ibar as the person depicted in the video tape and Gary Foy identified Ibar as the passenger in Casey's Mercedes Benz just after the murders. Kim Sans and David Phillips also reported seeing Ibar in possession of a black Mercedes. The manner these witnesses were questioned was harmless beyond a reasonable doubt.

With respect to Mimi Quinones, any impeachment of her was

harmless error. The jury had to evaluate the family members' claim of an alibi years after the crimes against the witnesses. Along with this, Ibar admitted that a Tec-9 weapon was kept in his Lee Street home and he had access to it, but claimed it had been sold to a friend's brother, now deceased, a few weeks after April 1, 1994 (T50 6592-94) According to Ibar he could wear either a 10 or 10 and a half shoe (T50 6594). Ibar admitted to exchanging shirts with Mr. Salizar, who also lived in the Lee Street home (T50 6600-01). While Ibar did not know Casey, Ibar has been to the Nickelodeon and had seen Casey there (T50 6604). Moreover, when first questioned by Manzella, Ibar was unable to give the last name of his girl friend, Latasha (later Ibar called her Natasha), or her address (T28 3823-25). There was no mention of Tonya or the Quinones family in 1994 when questioned just two weeks after the homicides. Any error was harmless.

POINT III

THE PRIOR TRIAL TESTIMONY OF MARIA CASAS WAS ADMITTED PROPERLY AS THE WITNESS WAS UNAVAILABLE (restated)

Ibar asserts it was improper to permit Detective Craig Scarlett to testify that Maria Casas made a positive identification of her son under section 90.801(2)(c) where Casas did not testify **live** in the instant trial (IB 55). While this issue is not preserved as Ibar did not raise the same objection

below, it is also without merit because Casas was declared unavailable and her testimony for the 1997 trial was read to the jury. She was cross-examined in the prior trial on her identification of Ibar, As such, her prior testimony satisfied the confrontation clause of the Sixth Amendment, fulfilled the dictates laid out in section 90.804(2), Florida Statutes and permitted admission of the officer's testimony under section 90.801(2)(c). The conviction should be affirmed.

Admissibility of evidence is within the sound discretion of the trial court, and the ruling will not be reversed unless there has been a clear abuse of that discretion. Ray, 755 So. 2d at 610; Zack, 753 So. 2d at 25; Cole, 701 So. 2d at 854; Mendoza v. State, 700 So. 2d 670 (Fla. 1997). Under the abuse of discretion standard, unless no reasonable person would have ruled as court. Canakaris, 382 So. 2d at 1203; Trease, 768 So. 2d at 1053, n. 2.

During the State's opening statement, the prosecutor noted that he expected the evidence to establish that Casas, now deceased, had identified her son in a photograph shown her by the police (T12 1584-85). This drew an objection and request for mistrial on the grounds that the comment was a misstatement of the evidence, that there had not been prior notice to use Casas' prior testimony, and the State had not proffered how the

identification testimony for the officer could be admitted without the declarant testifying (T12 1585, 1287). The motion was denied because the jury had been instructed that what the attorneys argue is not evidence (T12 1587). Whether or not the evidence was admissible was to be addressed at the time it was to be offered (T12 1587).

Prior to Casas' former testimony being presented by the State, Ibar objected. Defense counsel had nothing on the issue of unavailability (T24 3252), but challenged the use of the former testimony on the ground "that Maria Casas was never presented the particular photo the [Detective] Scarlett says that he would controvert her about." (T12 3253). The pith of the objection was that the testimony surrounding the presentation of the photograph by the police was unclear, thereby, making it difficult to cross-examine Scarlett on the matter (T12 3254-67). The State countered that it had confronted Casas directly and then asked a broad question regarding the photographs to which Casas denied making any identification from the photos. The prosecutor also noted that Scarlett had been called in the first trial to report Casas' prior identification, and that present defense counsel had cross-examined Casas on this issue in the first trial (T12 3254-66). After noting that "[w]hen Scarlett testifies that might be

an issue", the trial Court permitted the admission of Casas' testimony finding it proper under section 90.804 (T12 3263, 3268).

Prior to Scarlett testifying, the issue was re-raised:

> THE COURT: The objection is Scarlett shouldn't be allowed to testify in contradiction to what was read yesterday into the testimony.
>
> MR. MORGAN: **No. Don't misconstrue it.**
>
> ...
>
> MR. MORGAN: ... but the point is, **that picture was never identified**. We don't know what picture it really was...
>
> ...
>
> THE COURT: But you asked about the word "picture" during cross. The witness said she was never shown a picture, correct?

(T25 3385-86). Even when section 90.801(2)(c) was discussed by the court, counsel returned to his theme that the alleged failure to identify the picture Casas was discussing in her testimony was the objectionable factor (T25 3290-92). Defense counsel objected to Scarlett's testimony because he could cross-examine him due to the fact that Casas "never identified a photograph." (T25 3396). The trial court permitted Scarlett to testify (T25 3296).

The issue before this Court is whether the reading of former testimony satisfies the requirement of section 90.801(2)(c) that

the declarant testify at the trial and be subject to cross-examination. Such issue was not presented to the trial court by a specific, contemporaneous objection. See Archer v. State, 613 So. 2d 446, 448 (Fla. 1993) (finding to preserve argument for appeal, it must be asserted as legal ground for objection below); Steinhorst, 412 So. 2d at 338 (same). The matter is not preserved.

However, should this Court reach the merits, it will find that Casas' former testimony was admissible under section 90.804 because she was unavailable and her former testimony was subject to cross-examination. The former testimony satisfied the requirement of section 90.801(2)(c) that the declarant testify at trial and be subject to cross-examination.

Marlene Vindel testified Casas passed away in 1998 (T23 3164). Pursuant to section 90.804(1)(d), Florida Statutes Casas was unavailable for Ibar's 2000 trial. Conner v. State, 748 So. 2d 950, 956 n. 5 (Fla. 1999) (reasoning "State unquestionably established the unavailability of the declarant, as Mr. Ford died prior to trial."). Section 90.804(2) provides in part that an unavailable witness' former testimony is admissible, non-hearsay where that testimony was given in another hearing and the party against whom it is being offered had an opportunity to cross-examine the witness. In Thompson v.

State, 619 So. 2d 261, 265 (Fla. 1993), this Court identified four criteria which must be established before former testimony may be presented. Casas' former testimony satisfies the dictates of Thompson and section 90.804(2)(a) in that she testified during Ibar's initial trial and was cross-examined by Ibar's counsel,[7] on the same identification issues here. She is deceased and her testimony was admissible. Happ v. Moore, 784 So. 2d 1091, 1100 (Fla. 2001); Henry v. State, 649 So. 2d 1366, 1368 (Fla. 1994) Thompson, 619 So. 2d at 265.

Once Casas' testimony was admitted, then Scarlett could testify with respect to the identification Casas made from the photographic evidence under section 90.801(2)(c). On direct examination by the State, Casas had testified that on July 14, 1994, she did not see the flier or the pictures on that flier and she did not identify a photograph shown her by the police (T18 - 2455-57; T24 3333-34). On cross-examination, Casas reiterated she had never seen the flier (T24 3348-49). Later, she admitted that the police showed her a photograph (T24 3349-54). Casas was cross-examined on what material she viewed in an attempt to determine the identify of the person depicted.

Under section 90.801(2)(c), Scarlett was permitted to

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[7]See Garcia v. State, 816 So. 2d 554, 564 (Fla. 2002) (recognizing cross-exam motive need be only similar).

testify as to Casas' prior identification of the photographic evidence. Owens, 484 U.S. at 554; Freber, 366 So. 2d at 427 (holding testimony concerning out-of-court identification from witness who observes identification is admissible, substantive evidence even if identifying witness is unable to identify defendant at trial); Brown, 413 So. 2d at 415; A.E.B., 818 So. 2d at 535-36. While these cases involve instances where a witness was present to give live testimony, they should not give this Court pause.

While generally hearsay is not admissible, State v. Freber, 366 So. 2d 426, 427-28 (Fla. 1978); Ehrhardt, Florida Evidence, §801.1 at 667-68 (West 2002), former testimony, given under oath, is admissible as an exception and is considered more reliable than other exceptions. Former testimony qualifies as a hearsay exception based on its indicia of reliability, foremost of which it that the witness was subject to cross-examination and "many of the defects in the declarant's credibility will be demonstrated to the trier-of-fact." Ehrhardt, Florida Evidence, § 804.2 at 862 (West 2002). Ibar's counsel had examined Casas regarding the central issue in the case, Ibar's identification. See Mancusi v. Stubbs, 408 U.S. 204, 213-216 (1972) (recognizing hearsay exception for admission of cross-examined prior testimony rests upon solid foundation

and comports with constitutional protections). As recognized by the Supreme Court:

> To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. The law, in its wisdom, declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused.

Mattox v. United States, 156 U.S. 237, 243 (1895). To deprive the public of the use of prior identification evidence, merely because the witness, now deceased, could not testify live, but only through prior trial transcript, would be sacrificing the rights of the public for an incidental benefit to the accused.[8]

Even if Casas' testimony should have been excluded, such was harmless error based upon the video tape and Gary Foy's testimony as explained in points I and II and reincorporated here as well as the fact that Vindel, Perguera, Klimeczko, Kim Sans, and Melissa Munroe identified Ibar from the crime scene still photographs. On this evidence, the conviction should be

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[8]Although Ibar claims that his counsel, after the hung jury in the first trial, credited Casas for this, (IB 52) such is irrelevant, and does not make the announcement correct or necessitate that the testimony be excluded from a future trial. Also, if her testimony, challenged in the same manner in both trials, was so critical to Ibar's hung jury, one would think he would have welcomed Casas' testimony in the second trial as well.

affirmed.

POINT IV

THE TRIAL COURT PROPERLY ALLOWED IAN MILMAN'S TESTIMONY REGARDING ALEX HERNANDEZ, KIM SANS' TESTIMONY THAT IBAR IDENTIFIED HIMSELF TO HER AND FRED BOYDE'S EXPERT TESTIMONY CONCERNING SHOE PRINTS (RESTATED).

A. THE WHEREABOUTS OF ALEX HERNANDEZ-Ibar argues that the trial court reversibly erred by allowing Ian Milman ("Milman") to testify that Alex Hernandez ("Hernandez") told him that he was going to North or South Carolina the weekend the murders occurred for his nephew's communion. Ibar claims that the evidence was not admissible under the hearsay exception provided in section 90.803(3)(a)2 because the statement was not trustworthy and there was no corroboration showing that Alex Hernandez actually went to North or South Carolina.

Primarily, any claim that the hearsay statement was untrustworthy was not properly preserved below. In this case, defense counsel never argued that the statement was untrustworthy, rather he only argued there has to be some evidence that Hernandez was actually in North or South Carolina in order to allow the statement into evidence (T34 4422-24). See Archer, 613 So. 2d at 446; Steinhorst, 412 So. 2d at 338.

Further, this claim lacks merit as Ian Milman's testimony

does provide the indicia of corroboration needed to make the testimony admissible. The admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion. Ray; Zack; Cole; Jent. (See Point I, 13).

A hearsay statement of intent or plan is only admissible under the section 90.803(3)(a)2 exception when offered to "[p]rove or explain acts of subsequent conduct of the declarant.". Muhammad v. State, 782 So.2d 343, 359 (Fla. 2001). The relevant portion of section 90.803 states:

> (3) Then-existing mental, emotional, or physical condition.
>
> (a) A statement of the declarant's then-existing state of mind, emotion, or physical sensation, including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health, when such evidence is offered to ...
>
> 2. Prove or explain acts of subsequent conduct of the declarant.

The state-of-mind exception to the hearsay rule permits the admission of extrajudicial statements to show the declarant's state of mind at the time the statement is made when it is an issue in the case. See United States v. Brown, 490 F.2d 758 (D.C.Cir.1974); Kennedy v. State, 385 So.2d 1020 (Fla. 5th DCA 1980); Van Zant v. State, 372 So.2d 502 (Fla. 1st DCA 1979). Also, the state-of-mind exception allows the introduction of the

declarant's statement of future intent to perform an act, if the occurrence or performance of that act is at issue. Morris v. State, 456 So.2d 471, 475 (Fla. 3d DCA 1984).

Here, Ibar has failed to show that the trial court abused its discretion by admitting Milman's testimony that Alex Hernandez told him that he planned to go to North or South Carolina the weekend that the murders occurred because there was other testimony corroborating the fact that Hernandez did, in fact, go to North or South Carolina that weekend. Ian Milman was one of Hernandez's roommates (T34 4430-31). Hernandez not only told him that he was planning on going to North or South Carolina for the weekend, but Milman dropped Hernandez off at his mother's house so that he could leave for the trip (T34 4476). Hernandez was not at the house where they lived together that weekend and came back Sunday afternoon, stating that he took a flight home (T34 4476). Thus, Milman's testimony corroborates Hernandez's intended action.

However, should this court find that the trial court improperly admitted the testimony, any error was harmless beyond a reasonable doubt. In this case, considering the compelling identity evidence of the videotape of the crime, combined with eyewitness Gary Foy's identification that he saw Ibar leaving the house where the victims were murdered and get into victim

Casey's black Mercedes, there is no reasonable possibility that the error affected the verdict. The State also relies upon and re-incorporates the harmless error analysis in Points I-III.

B. KIM SANS IDENTIFICATION OF IBAR WAS PROPER-Ibar next argues that the trial court erred by admitting testimony from Kim Sans that Penalver and another man showed up at her house the morning of the murders with a black Mercedes Benz and that when she asked the other man "who the hell are you?" he responded "I'm Pablo." (T44 5941). The trial court properly admitted the statement under section 90.803(1), the spontaneous statement exception to the hearsay rule. See McGauley v. State, 638 So.2d 973, 974 (Fla. 4th DCA 1994)(holding wife's response to officer's question "who jumped through the window" identifying defendant as person who jumped through the window was admissible under section 90.803(1), even though wife's statement was in response to question); McDonald v. State, 578 So.2d 371, 373 (Fla. 1st DCA 1991)(holding victim's statement to her friend, in a sexual battery case, immediately after the incident was admissible under section 90.803(1). The testimony was also admissible under section 90.804(2)(c), as a statement against interest.

The cases relied upon by Ibar are distinguishable. In Weinstein v. LPI-The Shoppes, Inc., 482 So.2d 520 (Fla. 3d DCA

1986), the Third District held that the statement of identification was inadmissible under section 90.801(2)(c). The case did not even discuss spontaneous statements under section 90.803(1). See also Zimmerman v. Greate Bay Hotel and Casino, Inc., 683 So.2d 1160 (Fla. 3d DCA 1996)(statement if identification to process server not admissible under section 90.801(2)(c). Moreover, even if it was error to admit this testimony, it was harmless beyond a reasonable doubt. As already noted, the jury had the compelling identity evidence of the videotape of the crime, combined with eyewitness Gary Foy's identification that he saw Ibar leaving the house where the victims were murdered and get into victim Casey's black Mercedes. There were also out-of-court identifications by friends and family of Ibar that it was he on the videotape. Even if Pablo's response to Kim's question was inadmissible, her testimony and Dave Phillips' remain that Ibar showed up at her house the morning of the murders in a black Mercedes. Based on the foregoing, there is no reasonable possibility that the error affected the verdict. The State also relies upon and re-incorporates the harmless error analysis in Points I-III.

C. EXPERT TESTIMONY ON FOOTWEAR IMPRESSION WAS PROPER-Ibar's last claim is that the admission of expert testimony from shoe print examiner, Fred Boyd, was error because the "science" of

shoe print examination and identification does not meet the Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) standard for admissibility.[9] Ibar asserts that "[t]he time has come" in Florida "for shoe print comparison testimony to be scrutinized under" the Ramirez/Frye test (IB 63). In support of his argument, Ibar cites only to federal courts which have subjected handwriting analysis, field sobriety tests, hair analysis, voice spectrography and bite mark comparison analysis to review under Daubert v. Merrel Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), a less restrictive standard than Frye, and found in those particular cases that the testimony presented did not meet Daubert for one reason or another. U.S. v. Hines, 55 F.Supp.2d 62 (D. Ma. 1999)(disallowing handwriting analysis under Daubert to prove it was defendant who wrote note); U.S. v. Horn, 185 F.Supp.2d 530 (D. Md. 2002)(disallowing field sobriety tests to prove blood alcohol level); Williamson v. Reynolds, 904 F.Supp. 1529 (10th Cir. 1997)(disallowing hair analysis comparison

[9]The State sought to introduce this testimony regarding Ibar's roommate, Rincon's, shoes because the sneakers were the same shoe size as Ibar and there was evidence that the roommates exchanged clothing and shoes (T10 1370-71). Trial court found there was no law of the case problem and that the testimony was relevant. Defense counsel requested and was given a continuance to depose Fred Boyd and obtain its own expert. The State noted that defense counsel already had Fred Boyd's report from the prior trial (T10 1372-73, 1379-80, 1384-85, 1521-38).

without standards for identification of human hair as not meeting Daubert); U.S. v. Bahena, 223 F.3d 797 (8th Cir. 2000)(exclusion of expert testimony regarding voice spectrography as not meeting Daubert within court's discretion); Howard v. State, 701 So.2d 274 (Miss. 1997)(disallowing bite mark comparison).

The State's first argument is that this issue is not properly preserved for appellate review because Ibar did not request a Frye hearing below. The trial court specifically asked counsel if they needed a Frye hearing, to which the State responded "[n]ot from me," and **defense counsel responded "I don't think so."** (T11 1521). It cannot seriously be argued that defense counsel "deferred" on a Frye hearing as Ibar suggests (IB 62). See Archer, 613 So. 2d at 446; Steinhorst, 412 So.2d at 338. Even after voir dire of Mr. Boyd, when defense counsel objected to him being qualified as an expert, he did not request a Frye hearing (T47 6155-56). Instead, he merely argued that Mr. Boyd was not a scientist and that "there is no basis on which we can judge any opinions that he might offer the jury. This jury has no objective basis to relate to whatever he would say he sees, whatever he resorted to in an evaluation to arrive at his opinion." (T47 6155-56). This was not an express claim that shoe print analysis did not satisfy Frye, sufficient to put

the trial court on notice. Hence, the issue presented by Ibar is not properly before this Court.

Moreover, assuming arguendo, that this Court reaches the merits, it will find no error as the trial court properly admitted Fred Boyd's expert testimony. The admissibility of expert testimony is subject to the abuse of discretion standard. See Cooper v. State, 336 So.2d 1133 (Fla. 1976). Here, Ibar has failed to cite a single case, state or federal, holding that shoe print analysis either requires a Frye determination or that it does not meet the Frye test. This Court recently examined and rejected a similar challenge, made to handwriting analysis, in Spann v. State, 2003 WL 1740646 (Fla. April 3, 2003), expressly holding that a Frye hearing is not required for handwriting analysis. This Court explained that "[c]ourts will only utilize the Frye test in cases of new and novel scientific evidence. 'By definition, the Frye standard only applies when an expert attempts to render an opinion that is based upon new or novel scientific techniques.'" (citations omitted). Noting that "[i]n the vast majority of cases, no Frye inquiry will be required because no innovative scientific theories will be at issue," this Court concluded that forensic handwriting identification is not a new or novel science, has been around since the turn of the century and had already established itself

as a tool commonly used in court by the time Frye was decided in 1923. "Once established, handwriting identification experts were unchallenged as valid and acceptable experts for the majority of the twentieth century." Id.

This Court noted that "[i]n 1993, the United States Supreme Court decided Daubert, which interprets a federal rule of evidence and is not binding on the states. Daubert requires the trial judge to evaluate scientific expert testimony to ensure that the 'reasoning or methodology underlying the testimony is scientifically valid" before admitting it.'" Id. citing Daubert at 592-03, 113 S.Ct. 2786. Noting that "[f]ollowing Daubert, some federal courts have reexamined the admissibility of handwriting expert testimony, but stated that Florida still considers the admissibility of new and novel scientific evidence under the test set forth in Frye. "Because expert forensic handwriting identification is not new or novel, Frye has no application."

Other states that have considered the issue likewise hold that shoe print analysis does not have to be subjected to a Frye test, because a Frye test is only warranted where the evidence is a new or novel scientific technique, not a mere physical comparison as it is in shoe print analysis. See Colwell v. Mentzer Inv., Inc., 973 P.2d 631, 636 (Colo. App. 1998)(Frye is

applied to novel scientific devices or processes involving the manipulation of physical evidence; if the proffered evidence does not depend on any scientific device or process or does not involve the manipulation of physical evidence and if an understanding of the expert's techniques is readily accessible to the jury and not dependent in highly technical or obscure scientific theories, then the admission of the evidence is governed by the state rule of evidence not Frye); People v. Fears, 962 P.2d 272 (Colo. App. 1997)(shoe print analysis not subject to Frye); People v. Perryman, 859 P.2d 263 (Colo. App. 1993)(same); People v. Abdul, 244 A.D.2d 237, 665 N.Y.S.2d 406 (N.Y. App. 1997)(Frye hearing not required for shoe print comparison because procedure involves mere physical comparison rather than a novel scientific technique).

Additionally, a federal court that has applied the Daubert standard, has found that shoe print analysis meets that test. See U.S. v. Allen, 207 F.Supp.2d 856 (N.D. Ind. 2002) and U.S. v. Allen, 208 F.Supp.2d 984 (N.D. Ind. 2002) (footwear impression evidence met Daubert standard). Based on the foregoing, Ibar's claim must be rejected. Moreover, any error in admitting the testimony was harmless beyond a reasonable doubt for the reasons expressed in Points I-III.

POINT V

THE TRIAL COURT PROPERLY EXCLUDED AN AUDIOTAPE OF A CONVERSATION BETWEEN CASEY SUCHARSKI AND KRISTAL FISHER AND ALLEGED "REPUTATION" TESTIMONY. (RESTATED).

A. THE AUDIOTAPE-Ibar claims that the trial court improperly excluded an audiotape recording of a conversation between Casimir Sucharski ("Casey") and Kristal Fisher that he attempted to introduce through witness Peter Bednarz, a friend/employee of Casey's (T18 2392-2406). This claim lacks merit for several reasons: (1) the tape recording was inadmissible as it was not properly authenticated; (2) the tape recording was inadmissible as substantive evidence during the State's case; (3) the tape recording was not admissible through Peter Bednarz, who was not a party or witness to the telephone conversation; and (4) the tape recording was inadmissible pursuant to section 934.06, Florida Statutes (2003). Moreover, even if admissible, any error in refusing to admit the tape recording was harmless.

The admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion. Ray; Zack; Cole; Jent. (See Point I, 13). Here, Ibar was improperly attempting to introduce an audiotape recording of a telephone conversation between Casey and Kristal Fisher through witness Peter Bendarz, a friend/employee of Casey's, who was

neither a party nor witness to the telephone conversation. Ibar failed to lay the necessary predicate for authenticating the tape through Bednarz and failed to call the only living witness who could have testified as to the tape's authenticity –- Kristal Fisher. The tape recording was also properly excluded because Ibar could not introduce substantive evidence during the State's case-in-chief.

Further, the tape was inadmissible pursuant to Chapter 934, Florida Statutes. Section 934.03, Florida Statutes (2003) provides that it is a crime to willfully intercept oral communications without the prior consent of all the parties to the conversation if those oral communications are uttered by a person exhibiting an expectation of privacy under circumstances reasonably justifying such an expectation. See Inciarrano v. State, 473 So.2d 1272 (Fla. 1985). Section 934.06, Florida Statutes (2003) specifically prohibits the contents of an intercepted communication from being used as evidence in any trial "if the disclosure of that information would be in violation of [chapter 934]."

An expectation of privacy is accorded to oral telephone conversations, see Katz v. United States, 389 U.S. 347 (1967)(privacy of a public telephone booth); Mozo v. State, 632 So.2d 623 (Fla. 4th DCA 1994), approved, 655 So.2d 1115 (Fla.

1995) (privacy of cordless telephone conversations). Ibar argues for the first time on appeal, that Ms. Fisher did not have an expectation of privacy in her telephone conversation (IB 67). This argument has not been preserved for appellate review because it was not raised below. Archer, 613 So. 2d at 446; Steinhorst, 412 So. 2d at 338. Because Ibar failed to raise this claim below, it is not properly before this court. Moreover, as the person offering the evidence, it was incumbent upon Ibar to prove that Kristal Fisher did not have an expectation of privacy once the state objected to the tape's admission on the basis of section 934.06. Ibar failed to call Kristal Fisher, the only witness who could have testified as to her expectation of privacy. Inciarrano, cited by Ibar, is inapplicable here since the audiotape was not a recording of a crime or Casey's murder, as it was in Inciarrano. There is no expectation of privacy if a crime is being committed.

Ibar also argues that the State had the burden of establishing that the taping was intentional since unintentional or accidental recordings have been held admissible (IB 66). See e.g. Otero v. Otero, 736 So.2d 771 (Fla. 3d DCA 1999)(accidental recording of conversation by 9 year-old child admissible). This argument, likewise, has not been preserved as it was not raised below. See Archer; Steinhorst. Further, the

federal cases relied upon by Ibar, for the proposition that the party claiming a violation of the statute has the burden of proving it, do not involve a factual scenario like the one presented here. In Ross, Wuliger, and Johnson-Howell, the State sought to use tape recordings of the defendants against them in criminal prosecutions and the federal courts noted that the defendants had the burden of establishing a violation of the federal statute in order to suppress the tape recording. Here, in contrast, the tape was not being used against either party to the conversation. Instead, the defense was attempting to use it to show motive on the part of a third party, Kristal Fisher, who was easily accessible to the defense and could have established the necessary predicate for admitting the tape. As the proponent of the evidence, the burden of establishing the inapplicability of section 934.06 in this case should lie with Ibar. See Darling v. State, 808 So.2d 145 (Fla. 2002) (noting that the proponent of the evidence has burden of meeting Frye test).

Ibar's next claim is that section 934.06 is inapplicable if the parties consent to the tape recording and Ms. Fisher's consent can be gleaned from the fact that she lived in the house for a year and presumably knew how the answering machine worked. Again, this argument was not raised below and therefore, is not

preserved for appellate review. This was not a situation where a message was left on an answering machine, as in Commonwealth v. Proetto, 771 A.2d 823 (Pa. Super. 2001).

Ibar's final claim is that the court abused its discretion by refusing to allow him to use the tape recording to impeach Officer Scarlett, whom he claims disclaimed or minimized any knowledge of animosity between Casey and Kristal Fisher. Again, this argument is unpreserved as it was not raised below. The portion of the record cited by Ibar does not reflect a request by defense counsel to play the tape recording or to use the tape as impeachment; instead, it shows that defense counsel wanted to ask Scarlett whether he had played a tape for Kristal Fisher and the judge sustained the State's objection to the question on the ground that it had been asked and answered previously (T Vol. 20, 2706-09).

Moreover, even if the issue was preserved, the tape recording was inadmissible because it was not authenticated and could not be authenticated through Officer Scarlett. Further, Morales v. State, 513 So.2d 695 (Fla. 3d DCA 1987), relied upon by Ibar, does not support his contention. The portion of Morales relied upon by Ibar is Judge Pearson's specially concurring opinion, wherein he states that a tape recording of two (2) co-defendants that was inadmissible pursuant to section

934.06, should nevertheless, have been admissible to impeach the testifying co-defendant when he denied making the statements on the tape. That is not the case here. Ibar was not offering the tape to impeach either declarant. As such, Morales is inapplicable. Finally, even if it was error to not admit the tape, any such error was harmless. There was plenty of testimony establishing the animosity between Casey and Kristal Fisher so tape recording would have been cumulative on that point. The State further relies upon the harmless error analysis set forth in Points I-IV.

B. THE REPUTATION TESTIMONY-Next, Ibar argues that the trial court reversibly erred by refusing to allow him to present impeaching testimony from Detective Robert Lillie, who was going to testify regarding Kim Sans' poor reputation in the community for truthfulness (T48 631-68). This Court will find that the trial court's decision was a proper exercise of its discretion since the proffer of Detective Lillie shows that he had no knowledge of Kim Sans' reputation in her community for truthfulness, but instead, was basing his opinion on a specific instance of conduct and family members' opinions that Sans was lying about that incident.

As previously noted, the admissibility of evidence is within the sound discretion of the court, and the ruling will not be

reversed unless there has been a clear abuse of that discretion. Ray; Zack; Cole; Jent. (See Point I, 13). Section 90.609, Florida Statutes (2003), allows a party to use character evidence to attack the credibility of a witness if the evidence relates to the witness's reputation for truthfulness. "However, a foundation must first be laid to establish that the person testifying as to the witness's reputation is aware of the witness's reputation for truthfulness in the community." Morrison v. State, 818 So.2d 432, 449 (Fla. 2002), citing Lott v. State, 695 So.2d 1239, 1242 (Fla.1997); Charles W. Ehrhardt, Florida Evidence § 405.1 1995 ed.). "Essentially, it must be established that the community from which the reputation testimony is drawn is sufficiently broad to provide the witness with adequate knowledge to give a reliable assessment." Morrison, 818 So.2d at 449, citing Larzelere v. State, 676 So.2d 394, 400 (Fla. 1996). "Reputation evidence must be sufficiently broad-based and should not be predicated on 'mere personal opinion, fleeting encounters, or rumor.' " Morrison, at 449, citing Lott, 695 So.2d at 1242 (quoting Rogers v. State, 511 So.2d 526, 530 (Fla.1987)). “Further, reputation evidence ‘must be based on discussions among a broad group of people so that it accurately reflects the person’s character, rather than the biased opinions or comments of...a narrow segment of the

community.'" Morrison, at 400 (citation omitted).

Here, the proffer of Detective Lillie ("Lillie") revealed that Kim Sans gave him a statement in this case, in June or July, 1997 (T48 6311-12). Lillie, solely from his job as a police officer, knew Kim Sans prior to her giving a statement. He had responded to various calls/complaints at her family's house in Margate, Florida (T48 6311-12, 6360). These calls were domestics or problems with neighbors, mostly involving her brothers (T48 6314-15). Lillie admitted that he had not heard anything about Kim Sans' reputation for truthfulness in her community before her 1997 statement (T48 6315). Thereafter, Kim Sans made accusations against Lillie, which he knew to be untruthful (T48 6316). The person who told him about the accusations was a secretary in the State Attorney's Office, someone who is not part of Kim Sans' "community." (T48 6316-17). He then spoke to Kim Sans' mother, brother(s) and friend, Jasmine McMurtry, about the accusations and they told him she was lying about him/the incident (T48 6318, 6328, 6363-67). Lillie admitted he hadn't spoken to anyone else in the community about Sans' reputation for truthfulness (T48 6317) and further admitted he does not have knowledge about what Sans' reputation for truthfulness is in the community from people who reside there (T48 6331-32). Everyone he has spoken to about Sans has

been about the incident regarding allegations she made against him (T48 6339-40). He's never had any social contact with Kim Sans, her family members, or any of her neighbors (T48 6360-61). Lillie admitted his testimony about Sans' reputation for truthfulness was based on the one instance of her allegations and he does not have broad-based knowledge of her reputation in the community for truth and veracity. His only concern was with the accusations she made against him (T48 6362, 6367).

Based on Lillie's proffer, it is clear that the trial court properly excluded his testimony as he admitted that his knowledge about Kim Sans reputation for truthfulness was not broad-based on the community's opinion, but rather, was based on a single situation wherein she had made accusations against him which he knew to be untrue. Lillie spoke to Kim Sans' mother, brother(s), and friend about the accusations and testified that they opined that she was lying about the incident. This testimony only established Lille's opinion that Sans was a liar and was not reflective about the community's opinion. Consequently, it could not be used as impeachment testimony. See Morrison, 818 So.2d 450-51 (holding that trial court properly excluded witness's testimony where required predicate had not been established because the witness's testimony was based on personal experiences with Sandra Brown rather than on

broad-based knowledge of the community's opinion of her reputation for truthfulness); Larzelere, 676 So.2d at 399 (holding sufficient predicate for reputation testimony had not been established by two witnesses who only knew individual through narrow segment of the community--his association with gay bars– and testimony would be based "largely on personal opinion and rumor"); Wisinski v. State, 508 So.2d 504 (Fla. 4th DCA 1987) (trial court did not abuse its discretion in refusing to admit reputation testimony given the small number of people, the limited cross-section, and the relatively short period of time on which the reputation testimony was based); Gamble v. State, 492 So.2d 1132 (Fla. 5th DCA 1986) (trial judge has wide discretion in admitting or excluding reputation testimony; one learns of another's general reputation in a community over a period of time and through miscellaneous contact with many people); Parker v. State, 458 So.2d 750, 754 (Fla. 1984)(criminal justice system is not the "community" referred to); State v. Johnson, 540 So.2d 842 (Fla. 4th DCA 1988)(error for trial court to fail to strike from witness list assistant state attorney who was going to testify to reputation based on knowledge gained as prosecutor).

Nelson v. State, 739 So.2d 1177 (Fla. 4th DCA 1999), relied upon by Ibar, is distinguishable because the only issue in that

case was whether the defendant was acting in self-defense when he shot the victim. While acknowledging that Larzelere requires reputation testimony to be sufficiently broad so as to be reliable, the Fourth District also noted it is well-established that "if there is the slightest evidence of an overt act by the victim which may be reasonably regarded as placing the defendant in imminent danger, all doubts as to the admission of self-defense evidence must be resolved in favor of the accused." Nelson, 739 So.2d at 1178, citing Smith v. State, 606 So.2d 641, 643 (Fla. 1st DCA 1992). There, the court concluded that the trial court should have allowed testimony from a witness, who had heard from four or five people in the neighborhood that the victim had been a drug dealer who used violence as a method of enforcement. Moreover, even if the trial court erred by excluding the testimony, any such error was harmless considering the significant impeachment of Kim Sans. See Lazerlere, 676 So,2d at 400 (holding exclusion of reputation testimony harmless where other means of impeachment regarding truthfulness are available). The State relies upon and re-incorporates its harmless error arguments under Points I-IV.

POINT VI

THE TRIAL COURT PROPERLY DENIED IBAR'S MOTION TO SUPPRESS THE LIVE LINE-UP AND A STATEMENT OF IDENTIFICATION MADE AT LINE-UP (RESTATED).

Ibar claims that the trial court improperly denied his motion to suppress[10] his live line-up and a statement of identification made by witness Gary Foy at that live line-up. Ibar claims that the live line-up was conducted in violation of his right to counsel and due process rights under the Fifth, Sixth, and Fourteenth Amendment to the U.S. Constitution and Article 1, sections 9 and 16 of the Florida Constitution.[11] This Court will find that the trial court properly denied Ibar's motion as Ibar was not "in custody" on the Miramar triple homicide at the time of the line-up and consequently, his right to counsel had not yet attached, nor does the Fifth Amendment apply to live line-ups.

The standard of review applicable to a trial court's ruling on a motion to suppress is that "a presumption of correctness" applies to a trial court's determination of historical facts, but a ***de novo*** standard of review applies to legal issues and

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[10] Ibar titled his pleading a "Motion in Limine" but it was clearly to suppress the live line-up and statement of identification made therein.

[11] Ibar does not present a separate argument as to why the statement of identification made at the line-up should be suppressed. The State notes that statements of identification are admissible as substantive evidence because excluded from the definition of hearsay and admissible as substantive evidence pursuant to section 90.801(2)(c), Florida Statutes (2003)

mixed questions of law and fact that ultimately determine constitutional issues. See Smithers v. State, 27 Fla.L.Weekly S477 (Fla. May 16, 2002), citing Connor v. State, 803 So.2d 598, 608 (Fla. 2001).

The trial court properly found that the live line-up conducted in this case, without Ibar's counsel, did not violate his Sixth Amendment right to counsel because Ibar was not "in custody" on the Miramar triple homicide at the time of the line-up. The line-up was conducted on July 21, 1994, less than four (4) weeks after the murders, at the Dade County jail where Ibar was being held after arrest on an unrelated Miami charge (SR 163). The Miramar police had compiled a flier, with the suspects' pictures from the videotape, and had circulated it to area police departments (SR 154). A detective from Miami-Dade recognized Ibar's picture on the flier and contacted the Miramar police, advising that he had a person in custody who looked similar to the flier (SR 154-55). Detective Manzella, of the Miramar Police Department, visited Ibar at the jail on July 14, 1994 and after advising him of his Miranda rights, obtained a signed waiver of Miranda rights from Ibar (R Vol. 28, 3818). Ibar spoke with Manzella for 30-40 minutes and Manzella thereafter took a Polaroid photograph of Ibar to use in a photographic line-up for eyewitness Gary Foy, who saw two young

men leaving in victim Casey's car on the morning of the murders (SR 155-56, 170).

Once witness Gary Foy identified Ibar as one of the men he saw leaving, the Miramar police obtained a search warrant, compelling Ibar to participate in a live line-up. It is important to note that Ibar had not been charged with these murders at this point. Detective Manzella told Ibar that he was a suspect in a triple homicide and that he had a warrant for him to participate in a line-up. Ibar stated that he wanted his attorney, who was representing him on the Miami crime, to be present at the line-up (SR 184). Although Detective Manzella spoke to Ibar's counsel by phone, the live line-up was conducted without his presence. Ibar claims that because he was in-custody on the Miami crime, had invoked his right to counsel on that crime, and requested his counsel's presence at the compelled live line-up, his constitutional rights were violated by his counsel's absence from the live line-up.

The Sixth Amendment right to counsel is offense-specific. The attachment and invocation of the right on one charge imposes no restrictions on police inquiry concerning other charges against a defendant. McNeil v. Wisconsin, 501 U.S. 171 (1991); Traylor v. State, 596 So.2d 957, 968 (Fla. 1992); Owen v. State, 596 So.2d 985 (Fla. 1992); San Martin v. State, 705 So. 2d 1337,

1345 (Fla. 1997). In Traylor, 596 So. 2d at 968, this Court held that Florida's counter-part to the Sixth Amendment, the Article I, Section 16 right to counsel, is also charge specific and "invocation of the right on one offense imposes no restrictions on police inquiry into other charges for which the right has not been invoked." This Court further noted that the section 16 right to counsel attaches as provided in rule 3.111, Florida Rules of Criminal Procedure, "at the earliest of the following points: when [the defendant] is formally charged with a crime via the filing of an indictment or information, or as soon as feasible after custodial restraint, or at first appearance."[12] Traylor, at 970. See also Chavez v. State, 832 So.2d 730, 758 (Fla. 2002) (same). But see U.S. v. Wade, 388 U.S. 218 (1967) (the federal Sixth Amendment right to counsel attaches at indictment).

Because there is no dispute that Ibar sought to invoke his right to counsel on the Miramar triple homicide, the crucial

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[12] Any attempt by Ibar to argue that the right to counsel attaches at any earlier stage than that listed in rule 3.111 (IB 74), is clearly misplaced. While this court noted in Traylor that the right to counsel applies at each crucial stage, at 968, it clearly went on to hold that those stages are defined in rule 3.111, id. at 970,972. State v. Burns, 661 So.2d 842 (Fla. 5th DCA 1995) is likewise inapplicable as the defendant had been arrested in that case and therefore, the Fifth District's analysis involved determining whether an attorney had been appointed "as soon as feasible" after custodial restraint.

issue in this case is whether Ibar's right to counsel on those crimes had attached at the time he tried to invoke it. See Kirby v. Illinois, 406 U.S. 682, 689-90 (1972) (no right to counsel for a pre-indictment line-up in the federal system). Logic dictates that Ibar could not invoke a right that had not yet attached. See also U.S. v. Briley, 2002 WL 31027966 (unreported decision) (N.D. Ill. 2002)(holding that counsel was not ineffective for failing to move to suppress a live line-up conducted without counsel after a defendant had been arrested and counsel had instructed the police that the defendant would not be making any statements because the right to counsel had not attached at the time of the line-up.

Applying the Traylor test, it is clear that Ibar's right to counsel had not attached by the time of the live line-up and therefore, his attempt to invoke his right was a nullity. Ibar had not been indicted or charged with the triple homicide by the time of the line-up, nor had he been to a first appearance.[13] Further, contrary to his assertions (IB 74), he was not "under custodial restraint" for those murders at the time of the line-up. The record shows that Ibar was not being held, detained or restrained in any manner for the triple murders. The fact that

[13] The record shows Ibar was not indicted until August 25, 1994 and not arrested until August 29, 1994 (R 2-7, 11).

he had been arrested and was being held on the Miami charges does not mean that he was "in custody" on the Miramar murders. See Gethers v. State, 838 So.2d 504, 507 (Fla. 2003)("when a defendant is serving time in jail on one charge and a separate jurisdiction issues a detainer for another charge, there is no formal, definitive mandate to hold the defendant in relation to the detainer . . . [o]nly if the prisoner is subject to release but is being held because a detainer has been lodged can it be said that the prisoner is in custody pursuant to the detainer").

The fact that Ibar was not "in custody" on the Miramar murders immediately distinguishes this case from State v. Stanley, 754 So.2d 869 (Fla. 1st DCA 2000), and Sobczak v. State, 462 So.2d 1172 (Fla. 4th DCA 1985), relied upon by Ibar. Ms. Stanley was clearly "in custody" as she had "turned herself in" and was being held when the police decided to question her, without her attorney present, in contravention of an express directive from her attorney that she not be questioned. Similarly, Mr. Sobczak had already been arrested and gone to his first appearance before the judge issued the order compelling him to appear in a live line-up. Conversely, here, as already noted, Ibar was not "in custody" on the Miramar murders, had not been charged or arrested and therefore, could not invoke his

right to counsel.

Further, to the extent that Ibar is claiming a violation of his Fifth Amendment right to counsel, the State notes that argument is also without merit. When Detective Manzella initially met with Ibar, he advised him of his Miranda rights and Ibar waived them, signing the requisite form (R Vol. 28, 3818). Further, no Fifth Amendment right is implicated by the compulsory live line-up. In U.S. v. Wade, 388 U.S. 218 (1967), the Supreme Court held "compelling the accused merely to exhibit his person for observation by a prosecution witness prior to trial involves no compulsion of the accused to give evidence having testimonial significance. It is compulsion of the accused to exhibit his physical characteristics, not compulsion to disclose any knowledge he might have." Thus, no Fifth Amendment privilege against self-incrimination is implicated by requiring Ibar to participate in a live line-up.

Moreover, Ibar's contention that his "due process" rights, in general, were violated, is without merit. State v. Smith, 547 So.2d 131 (Fla. 1989), relied upon by Ibar, is immediately distinguishable from this case. In Smith, the defendant was arrested and at his first appearance, he indicated that he would retain his own attorney. After the hearing, the defendant was asked to stand in a lineup but refused. Several days later,

without notice to Smith, the state obtained an ex parte court order compelling the defendant's appearance at a lineup later that day. Smith was not represented by counsel at the hearing or at the lineup. Prior to the lineup the defendant stated that he did not know who his attorney was. Stating that it could not "countenance an ex parte court hearing requesting a lineup against a criminal defendant already in custody," this Court held the lineup should have been suppressed on due process grounds. Id. at 134.

Smith is inapplicable here as the facts in this case do not reflect an attempt by the State to circumvent Ibar's rights. Unlike the defendant in Smith, Ibar was not "in custody" on the Miramar murders and his right to counsel had not attached at the time of the live lineup. Further, Ibar's attendance was secured through proper means, by a search warrant at which a defendant is never present. See also Haliburton v. State, 514 So.2d 1088 (Fla. 1987) (holding that police officers failure to inform defendant that attorney was in the station house and had asked to speak to him violated the due process provision of the Florida Constitution, so as to vitiate defendant's otherwise valid waiver of the right to an attorney).

Peoples v. State, 612 So.2d 555 (Fla. 1992), cited by Ibar is also inapplicable. In Peoples, the defendant refused to

answer questions after being read his rights.

> At booking, he was told of his right to counsel and, when asked if he would like to call a lawyer of his choice, responded affirmatively and called attorney Bruce Raticoff. The following day, he attended first appearance, was declared partially indigent, and was appointed the services of a public defender. On March 4, the court relieved the public defender of representation and recognized Raticoff as attorney of record. Peoples subsequently was released on bail, and Raticoff was replaced by appointed counsel.

Peoples, 612 So.2d 555, 556. Following defendant's release and after the defendant clearly retained counsel, the police tape recorded several phone conversations between the defendant and his co-defendant. Ultimately, this Court ruled that, by taping the conversations, law enforcement officials acted improperly by knowingly circumvented the defendant's right to counsel. Id, 612 So.2d at 557. This ruling simply does not apply to the instant case wherein no statements from Ibar were wrongfully obtained or used against Ibar.

Moreover, any error in admitting Ibar’s live line-up was harmless. Gary Foy identified Ibar in a photo line-up and in-court. There is no reasonable probability that any error affected the verdict. The State also relies upon and re-incorporates its harmless error analysis set out in Points I-V.

POINT VII

THE TRIAL COURT PROPERLY DENIED REQUESTS FOR MISTRIAL RESPECTING REFERENCE TO METRO-DADE TIP, BASIS POLICE STOPPED QUESTIONING IBAR, AND REFERENCE TO PENALVER'S GANG GRAFFITI, DOC CARD, AND CONTEMPLATED SUICIDE (restated)

Ibar asserts he was denied due process based upon the trial court's denials of mistrials following the admission of evidence regarding: (1) uncharged criminal conduct (homicide unit tip and Klimeczko's theft of drugs); (2) Manzella's explanation why he discontinued questioning Ibar; (3) Penalver's gang graffiti, criminal history, and contemplated suicide. Some of these issues were preserved and others were not, however, there was no constitutional infirmity generated from the evidentiary rulings.

A trial court's ruling on a motion for mistrial is subject to an abuse of discretion. Anderson v. State, 841 So. 2d 390, 403 (Fla. 2002) (recognizing ruling on mistrial rests with court's sound discretion); Smithers v. State, 826 So. 2d 916, 930 (Fla. 2002); Gore v. State, 784 So. 2d 418, 427 (Fla. 2001); Goodwin v. State, 751 So. 2d 537, 546 (Fla. 1999); Thomas v. State, 748 So. 2d 970, 980 (Fla. 1999); Hamilton v. State, 703 So. 2d 1038, 1041 (Fla. 1997); Cole, 701 So. 2d at 853.

The first sub-issue is unpreserved. Manzella identified the tip's origin without objection (T27 3738-39). Later, when the **prosecutor** asked for a sidebar to discuss confusion over the

timing of the Metro-Dade and Miramar Miranda waivers, defense counsel alleged a discovery violation (T27 3744-48, 3750-74, 3785-98). No violation was found (T27 3749-50, 3767-74). More than 30 minutes into the discussion, counsel admitted he had not objected to the "homicide unit" reference, but then started to complain about it (T27 3774-78, 3798). Based upon the **finding that defense counsel did not object** to the reference to the homicide unit, and that nothing was mentioned about Ibar's incarceration in Dade, the mistrial was denied (T27 3798-3803). Because no objection was lodged at the time, nor during that particular line of questioning, the matter is unpreserved. Norton v. State, 709 So.2d 87, 94 (Fla. 1997); Jackson v. State, 451 So.2d 458, 461 (Fla. 1984).

Even if this Court find the objection timely, the denial of a mistrial was proper. "A motion for mistrial should be granted only when it is necessary to ensure that the defendant receives a fair trial." Cole, 701 So.2d at 853. In Cole, this Court affirmed the denial of a mistrial as the witness' comment that she knew some history about the defendant "was not so prejudicial as to require reversal" and that the reference was "isolated and inadvertent and was not focused upon." Id. In Evans v. State, 800 So.2d 182, 189 (Fla. 2001), this Court reviewed a request for mistrial where a witness referred to the

defendant's Orlando Police Department records. Recognizing that the reference was not as obscure as the reference made in Cole, this Court agreed the isolated comment did not require a mistrial as it was made while trying to explain how fingerprints were compared. Evans, 800 So. 2d at 189.

The comment complained of in the instant case was merely that a tip came from a homicide unit. A review of the record reveals that there was no mention that Ibar was in police custody. Also, the jury had been informed that fliers asking for assistance in solving the Broward triple homicide were distributed to area police department, thus, if a tip arose from there it would not be prejudicial, in and of itself. This reference was not discussed with or highlighted to the jury. Surely, the isolated comment did not deprive Ibar of a fair trial. The judge exercised his discretion properly and the conviction should be affirmed.

Ibar next challenges Manzella's reference to notes he took of Klimeczko's interview (IB 79). Counsel was questioning Manzella about Klimeczko's claimed basis for leaving the Lee Street house and account that Ibar and Penalver were seen on the weekend of June 26, 1994 with a Tec-9 weapon and a big black car (T41 5571-80). Several times Manzella was directed by defense counsel to the incident report filed by Klimeczko (T41 5572-73,

5579-80), finally responding "Yeah. Based on the notes that were taken the night on the porch, it stated he took money and drugs. Ah, two, three days later, his home got shot up." (T41 5580).

The mistrial request was denied upon finding there was no reference that the "money and drugs" were taken from Ibar and that the jury would take the witness for whatever he was worth (T41 5582-83, 5589-90, 5595-96). The denial of the motion was correct as there was no reference to Ibar being the one who possessed the drugs Klimeczko was accused of taking. There was no reference to any criminal activity connected to Ibar. The passing reference was not so glaring as to render the trial unfair especially in light of the fact the State did not refer to this in closing. Anderson, 841 So.2d at 402-03; Evans, 800 So.2d at 189; Cole, 701 So.2d at 853.

In the instant case, there was no direct reference made to Ibar's custody or his possession of drugs. The jury was **not** informed Ibar was in police custody, only that an area law enforcement department offered a "tip". Likewise, when Manzella testified regarding Klimeczko's basis for recalling when he last saw Ibar and Penalver with a Tec-9 gun, the reference to an allegation Klimeczko took money and drugs did not directly or indirectly relate those drugs to Ibar. Hence, Ibar's reliance

on the following cases is misplaced; each is distinguishable. Czubak v. State, 570 So. 2d 925, 927-28 (Fla. 1990) (finding improper description of defendant as "escaped convict"); Holland v. State, 636 So. 2d 1289, 1293 (Fla. 1994) (concluding testimony regarding defendant's prior drug conviction in murder prosecution error); Drayton v. State, 763 So. 2d 522, 523 (Fla. 3d DCA 1999)(reversing conviction based on reference made to unrelated robberies); Adams v. State, 743 So. 2d 1216, 1217-18 (Fla. 4th DCA 1999) (presuming testimony defendant pled guilty to drug charge was improper in robbery case where drugs found were not linked to charged crime); Chambers v. State, 742 So.2d 839, 840 (Fla. 3d DCA 1999) (determining testimony "robbery clearing house" used to find defendant improper); Ford v. State, 702 So. 2d 279, 280-81 (Fla. 4th DCA 1997)(finding reference to matters outside record and inferring in closing defendant committed similar crimes improper); Williams v. State, 692 So. 2d 1014, 1015 (Fla. 4th DCA 1997) (reasoning it was error to argue defendant was released from jail and had gotten in trouble in Miami); Halsell v. State, 672 So. 2d 869, 870 (Fla. 3d DCA 1996) (finding error where prosecutor referenced prior conviction); Freeman v. State, 630 So. 2d 1225 (Fla. 4th DCA 1994) (finding testimony defendant gave witness gold bracelet he received as drug payment improper). In each of the above cases,

there was a direct reference to an uncharged crime. That is not the case here. The denial of a mistrial was proper.

Ibar's reliance upon Ruiz v. State, 743 So. 2d 1 (Fla. 1999); Martinez v. State, 761 So. 2d 1074 (Fla. 2000) and Brooks v. State, 787 So. 2d 765, 779 (Fla. 2001) in support of his characterization that the prosecutor's reference to the first lead as one of "some substance" inferred that "other evidence exists which the jury may not hear." (IB at 81). Initially, it is unpreserved, Steinhorst, 412 So. 2d at 338, but also, the inference that Ibar asks this Court to draw is unreasonable. When the question posed by the prosecutor is read in conjunction with the case as a whole, it is clear there was no error.

The prosecutor inquired what investigation Manzella had conducted before July 14, 1994. Manzella reported attempting to recover security tapes from Casey's Nickelodeon and develop a still photo from the crime tape. The prosecutor asked: "After you made those efforts when was, would you say, the first lead that you followed up on that you -- that was of some substance that led you to a particular suspect?" (T27 3736-38). By no stretch of reasoning could it be inferred that the jury was being deprived of evidence. The State was merely asked how Ibar became a suspect.

Even if this Court concludes that the prosecutor's question

was inartful it does not rise to the level of impropriety found in Ruiz where the State argued that only the guilty are prosecuted, Ruiz, 743 So. 2d at 4-7 or Martinez, 761 So. 2d at 1078-82, where the witness was permitted to give his opinion of the defendant's guilt. Martinez, 761 So. 2d at 1078-79. The import of the State's question here was what was the fist solid lead.[14]

Turning to the challenge to Manzella's testimony regarding why he ceased questioning, when read in context, the Court will find, Manzella was not commenting on Ibar's rights or veracity.

The initial exchange which drew a motion for mistrial is:

> Q: ... after you talked to [Ibar] about that, his background, his work associates, and whereabouts, what happened next.
>
> A: Getting a sense that Pablo really didn't want to communicate with me, prior to leaving I introduced a photograph that I had in my pocket from the stills taken from the video inside of the Sucharski home....

(T28 3826). The trial court found Manzella did not express "that [Ibar] did not want to talk to him anymore. Your client never called it off and said I'm not talking to you. There is a difference. Your client did not say to him, I'm not talking

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[14]Brooks v. State, 787 So. 2d 765 (Fla. 2001) is dissimilar; there were numerous erroneous evidentiary rulings which permitted improper information before the jury. Ibar has suffered no cumulative error. Zeigler v. State, 452 So. 2d 537, 539 (Fla. 1984), vacated other grounds, 524 So. 2d 419 (Fla. 1988).

to you anymore. He didn't say that." (T28 3831). Based upon this, the mistrial was denied (T28 3833). Ibar maintains that the above comment was improper because it conveyed to the jury Manzella stopped questioning because he did not believe Ibar. (IB 82). Yet, this information was not conveyed or inferred as is evident by the follow-up question.

> Q: ... Now ... Detective Manzella until this point in time when you are talking to Mr. Ibar, how would you describe your approach in communicating with him?
>
> A: When speaking with Mr. Ibar and he couldn't give me additional information in reference to his girlfriend where she might live, her last name and telephone number, Mr. Klimeczko lives somewhere in the area of Pembroke Road, not having a telephone number and being friends and associates with Mr. Ibar.
>
> Q: Because you were getting this limited information is that why you pulled out the photograph?
>
> A: Yes it is.

(T28 3833-34). These questions show Ibar had little information to offer, hence, the detective proceeded to display the photo from the video. This does not amount to a comment upon the right to remain silent nor an opinion of Ibar's veracity. Manzella merely related what led up to the showing of the crime scene photo.

Shortly thereafter, Manzella characterized his final moments with Ibar as "confrontational" when the crime scene photograph was displayed without seeking a response from Ibar (T28 3835-

36). Counsel renewed his objection and request for a mistrial on the basis that the testimony was a comment on silence[15] (T28 - 3837). The trial court believed it was not a comment on silence as Ibar had been given his rights, waived them, and never said he was stopping or did not want to talk. (T28 3840-41, 3851-52).

The test used to determine whether there has been an impermissible comment on the right to remain silent is the "fairly susceptible" test set forth in State v. Kinchen, 490 So. 2d 21, 22 (Fla.1985). See Rimmer v. State, 825 So. 2d 304, 322-23 (Fla. 2002); Jackson v. State, 522 So. 2d 802 (Fla. 1988); State v. DiGuilio, 491 So. 2d 1129, 1135-36 (Fla. 1986). While the State may not comment on a defendant's right to remain silent, State v. Hoggins, 718 So. 2d 761, 772 (Fla. 1998), where a defendant waives his Miranda rights and talks, the State may admit evidence of the defendant's silence in response to certain questions. See Valle v. State, 474 So. 2d 796, 801 (Fla. 1985), vacated on other grounds, 476 U.S. 1102 (1986).

The trial court found the statement did not advise the jury that Ibar had invoked his right to remain silent nor that Ibar unequivocally invoked his right. These findings are owed

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[15]Ibar attempts to stretch this exchange into one where Manzella was giving an opinion on guilt (IB 83). This issue is unpreserved. Steinhorst, 412 So. 2d at 338.

deference. Surely, where the officer is testifying he was the one who ended the conversation, there can be no finding that there was a comment on the right to remain silent. Manzella made the decision to stop the interview and confront Ibar with a picture from the video. There was no testimony elicited regarding whether Manzella waited for a response from Ibar or whether Ibar commented after viewing the photo. Following this testimony closely was Manzella's report that Ibar continued to cooperate and signed a consent to search form (T28 3835). This information is not "fairly susceptible" as a comment on Ibar's right to remain silent, first and foremost, because Ibar did not remain silent.

Here, we have the detective revealing the information received from Ibar, i.e., he does not know his girlfriends name or address. To suggest some "invidious" intent on the part of the State (IB 84) is asking this Court to draw too many inferences from Manzella's innocuous testimony. Because Ibar waived his right to remain silent, the State was permitted to introduce the content of the conversation and to put that encounter in context.

With respect to the showing of the photograph, Rimmer, 825 So. 2d at 322-23 is instructive. In Rimmer, the State inquired of the defendant's wife whether she had ever asked Rimmer about

the murders. She responded, no. This Court concluded that while the question bordered on a comment on silence (apparently Rimmer never waived his Miranda rights), the "question coupled with the answer was not fairly susceptible of being interpreted by the jury as a comment on the defendant's failure to testify." Id. at 323. In the case at bar, we have a detective relating that he showed a picture to Ibar. There were no follow-up questions seeking to know Ibar's response. The mere fact Ibar was confronted with a photo does not equate to a comment on silence. See LeCroy v. State, 533 So. 2d 750, 753 (Fla. 1988) (rejecting contention that police advisement that the defendant's "statement was being taken to refresh his memory in the event he was called on to testify at trial" was a comment on the right to remain silent). As is evident from the instant record, Ibar was not silent, but spoke to the police for 30 to 40 minutes and signed a consent to search form. There was no reference to his refusing to cooperate or talk to the police. The State did not point to this information in its closing argument. It was not highlighted or used as a basis for finding Ibar guilty.

These events are much different than those in Acosta v. State, 798 So. 2d 809, 809 (Fla. 4th DCA 2001) where an officer testified that "everything [the defendant] told me appeared

untruthful", and Olsen v. State, 778 So. 2d 422 (Fla. 5th DCA 2001), where a police officer was permitted to testify that she believed the victim's version of the criminal events. Those were direct comments on the veracity of the defendant, which are not evident here. Ibar cites Martinez, 761 So. 2d at 1078-79 (denouncing as improper comment testimony that office did not doubt defendant murdered victim); Page v. State, 733 So. 2d 1079 (Fla. 4th DCA 1999) (reversing based upon testimony that everything confidential informant did for police was "trustworthy and reliable"); and Sosa -Valdez v. State, 785 So. 2d 633, 634-35 (Fla. 3d DA 2001) (finding it improper to permit officer to testify that his training/experience led him to conclude victim was not involved in crime as suggested by defense). Again, there is no such direct comment upon Ibar's rights, his veracity, or ultimate guilt. Clearly, no improper evidence was placed before the jury; the conviction is sound.

Appellant asserts that Manzella inferred "Pablo did not deny the accusation" (IB 84). Manzella made no such inference nor could one be drawn[16] (T28 3835-36). Ibar's cites are not applicable to the instant fact scenario. Clark v. State, 780 So. 2d 184, (Fla. 3d DCA 2001) does not further Ibar's position.

[16]Given that the State did not ask how Ibar responded, a reasonable inference is there was an exculpatory response.

While the court apparently agreed the defendant's partial statement, "I'm not going to talk to you now", could have been excluded, these facts are different from Ibar's case. Neither Ibar, nor any other witness testified that Ibar refused to talk. Ibar has failed to indicate where argument was made that he made an adoptive admission (IB 84). In Brown v. State, 367 So. 2d 616, 623-24 (Fla. 1979), testimony about a confrontation between the co-defendant's in the presence of the police was admissible even though it related that the co-defendant accused Brown of involvement in the homicide, that Brown did not respond for 30 seconds, and then confessed after the co-defendant left the room. Id. at 623. The evidence was admissible, non-hearsay because it put in context the impetus for Brown to confess. Id. at 624. Manzella's testimony regarding his confrontation with Ibar puts in context the encounter and Ibar's continued willingness to cooperate by signing a consent to search his room. Dickey v. State, 785 So. 2d 617, 618-20 (Fla. 1st DCA 2001) is distinguishable. In that case, the jury was informed the defendant declined to talk because he was tired. There is not such evidence here; at no time in Manzella's testimony did Ibar invoke his right. There was no error and the mistrial was denied properly. The conviction should be affirmed.

As his final guilt phase challenge, Ibar points to the

testimony centering around his co-defendant, Penalver (IB 84-90). Ibar challenges the references made to “MAS 77", a “Franklin Soccer ball bearing gang graffiti fee (sic), Zulu” (T29 3959) and item “MAS 83", a “Department of Corrections Offender [“DOC”] ID card with [Penalver’s] name and date of birth” found in Melissa Munroe’s bedroom (T29 3960). No contemporaneous objection was raised to these items. It was not until the witness reached item “MAS 109" that defense counsel asked for a side bar (T29 3963), during which he asked that certain items found in the room associated with Christopher Munroe, Melissa’s brother, not be discussed. These included Christopher’s Department of Corrections card (T29 3964-65). Then defense counsel moved for a mistrial with respect to the soccer ball and DOC ID card for Penalver (T28 3964). Without waiting for a ruling, counsel reasserted an objection to a juror continuing to reside (T2 3965). After addressing the juror issue, the trial court denied the mistrial on the evidentiary issue (T28 - 3965-66). Because no contemporaneous objection was raised, the issue is not preserved. Steinhorst, 412 So. 2d at 338.

However, if this Court finds the objection timely, Ibar waived the matter when he failed to obtain a ruling on his objection, instead accepting a ruling on the mistrial alone.

The record is unclear whether the court found the comment objectionable or not. Armstrong v. State, 642 So. 2d 730, 740 (Fla. 1994)(finding claim procedurally barred where judge heard motion, but never ruled); Richardson v. State, 437 So. 2d 1091, 1094 (Fla. 1983)(same).

Should this Court reach the merits, it will find that the mistrial was denied properly. Ibar would have this Court find that the mere mention of the word "gang" is improper and demands a mistrial (IB85-86), but the cases he cites deal with instances where the defendant himself was linked to a gang and the prosecution highlighted the fact and used it in closing argument. Appellant attempts to draw too much from the single, un-linked reference here. There was no testimony that either Penalver, or more important, Ibar, was a gang member. The challenged evidence relates, at most, to Penalver, as the item was identified as property seized from his girl friend's home. The "gang" insignia was found on a soccer ball, but there was no evidence presented that the ball was Penalver's, that he put the graffiti on the ball, or that he was in a gang. Just as important, the possible "gang" connection was not utilized in the State's closing argument, nor did the State imply that Ibar was in a gang. Ibar's "guilt by association" argument must fail as the comment does not rise to the level found improper in

Fulton v. State, 335 So. 2d 280 284-85 (Fla. 1976) (referencing pending criminal charges improper) and Doherty v. Sate, 726 So. 2d 837, 838 (Fla. 4th DCA 1999) (discussing gang's racial animus improper where defendant, although gang member, was not shown to hold these beliefs).

Given this single innocuous "gang" reference, it cannot be said that the entire trial was vitiated. Anderson, 841 So. 2d at 403 (finding single comment did not deny fair trial); Spencer v. State, 645 So. 2d 377, 383 (Fla. 1994). Cf. United States v. Abel, 469 U.S. 45, 51-52 (1984) (recognizing gang membership of defendant and witness admissible to prove bias of witness).

Appellant's cited cases establish that presentation of gang membership may be reversible error where the irrelevant testimony is extensive and featured in the trial. Given the fact that the tenuous evidence of gang association was not linked to Ibar and was not argued by the State, the cases support the State's position that the mistrial was denied properly. See Reyes v. State, 783 So. 2d 1129, 1135 (Fla. 3d DCA 2001) (ordering new trial because there was extensive and irrelevant testimony about the evils of gang membership in general); Garcia v. Konckier, 771 So. 2d 550, 551 (Fla. 3d DCA 2001) (reversing civil case where defense in negligent security case repeatedly characterized the deceased as a gang member with

a prior criminal history); People v. Arrington, 843 P.2d 66, 65 (Colo. App. 1992) (recognizing that ascribing membership to defendant was irrelevant in murder case which was started by exchange of racial epithets); State v. Stone, 802 P.2d 668 (Ore. 1990) (concluding gang evidence that defendant or others may have committed drive-by shooting was irrelevant to prove defendant knew car was stolen). The instant case does not contain extensive or featured evidence of gang association.

Moreover, if the comment was improper, such was harmless. Evans v. State, 800 So. 2d 182, 191 (Fla. 2001) (recognizing that even though defendant's gang membership was irrelevant, such was harmless because state did not argue gang-membership in closing and there was strong evidence of guilt). The State reincorporates the harmless error argument presented in Points I-III and would note that a single reference to a gang insignia on a soccer ball found in Penalver's girl friend's home would have little impact in comparison to the video tape of the murder.

With respect to evidence a Penalver's DOC ID card was located in Melissa Munroe's bedroom does not vitiate Ibar's trial. Ibar characterizes this evidence as proof of a third-party's wrongdoing which is inadmissible generally against a defendant. (IB 86-87). The reference to the card was part of

the laundry list of items seized. The jury was not informed of the import of this card nor asked to infer Ibar had a criminal history. The State was merely identifying the evidence collected at part of its investigation. The DOC card was not utilized in any way to prove Ibar's character nor to establish guilt. Ibar asks this Court to make too many assumptions, leaps of logic in order to find error. Under Ibar's theory, the jury would have had to know the import of a DOC ID card, would have had to find that Penalver was a convicted felon, and that this fact alone proved Ibar knew Penalver was a felon, yet associated with him and they committed crimes together. After this, Ibar asks this to Court find that without the reference to the DOC card, the jury would have acquitted. Too many inferences need to be heaped upon this one passing reference before it can be said the trial was unfair. See, Anderson, 841 So. 2d at 403; Spencer, 645 So. 2d at 383.

Denmark v. State, 646 So. 2d 754 (Fla. 2d DCA 1994) and Nowitzke v. State, 572 So. 2d 1346, 1355-56 (Fla. 1990) are distinguishable. In Denmark, there was extensive testimony about three prior violent crimes committed by third-parties, but not linked to the defendants Denmark v. State, 646 So. 2d at 755-57. Similarly, in Nowitzke there was testimony that drug abusers in general steal from their families and commit crimes.

Nowitzke, 646 So. 2d 1355-56. These cases involve actual testimony about criminal behavior. Nothing remotely similar occurred here with the passing reference to a DOC ID card and no testimony relating the card's signifance or that it involved Ibar. The State did not use this evidence in closing. The conviction should be affirmed.

Evidence of a suicide attempt may be admissible as consciousness of guilt and to show the declarant's then existing mental or emotional condition to prove his state of mind. See Walker v. State, 483 So. 2d 791, 796 (Fla. 1st DCA 1999); Nelson v. Seaboard Coast Line R. Co., 398 So. 2d 980, 982 (Fla. 1st DCA 1981); section 90.803(3), Florida Statutes. While a co-defendant's out-of-court statements cannot be used to prove a defendant's subsequent actions, it is admissible to prove the declarant's state of mind. Brooks v. State, 787 So. 2d 765, 770-73 (Fla. 2001); Sandoval V. State, 689 So. 2d 1258, 1259 (Fla. 3d DCA 1997). See State v. Feaster, 156 N.J. 1, 68-69, 716 A.2d 395, 428-29 (1998) (finding admission of co-defendant's suicide appropriate - shows consciousness of guilt); Whitehead v. State, 777 So. 2d 781, 825-26 (Ala. 1999) (find no error in admitting defendant's threatened suicide when confronted by police).

Penalver was a party opponent and the State was proceeding under a principal theory of guilt. The evidence was admissible

under section 90.804(2)(c). See Machado v. State, 787 So. 2d 112, 113 (Fla. 4th DCA 2001) (recognizing "non-testifying accomplice's statement against penal interest is admissible as a hearsay exception if corroborating circumstances show the statement has 'particularized guarantees of trustworthiness'"), review denied, 814 So. 2d 440 (Fla. 2002) (quoting Lilly v. Virginia, 527 U.S. 116, 136-37 (1999). In Machado, the murder trials of Jesus Machado and co-defendant Olivera were severed. Machado, 787 So. 2d at 111. During Machado's trial, his cousin, whose father was killed during the commission of the homicide, testified for the State and reported that Olivera was a good friend who shortly after being questioned by the police bragged they could not catch him. Machado's cousin also testified that Olivera explained that he, Machado, Enrique Machado, Sr., and a fourth man, ambushed the victim and described how the crime took place. Id. at 113. Olivera did not testify in Machado's trial, yet his statements were admissible against Machado as substantive evidence.

Melissa Munroe, Penalver's girl friend, was permitted to testify that upon hearing he was wanted for questioning, Penalver became upset and claimed his life was over because his name was linked to the murders (T37 4760-61). While Munroe recognized Penalver was upset, she did not believe he was

intending suicide (T37 4761). Here the State was attempting to establish co-Penalver's reaction to being confronted with information that the police were seeking him for questioning. The prosecutor explained that he was proceeding under two theories, one was Penalver was a party opponent and principal and that it was relevant to Penalver's state of mind. The statement was not being offered for the truth of the matter (contemplation of suicide), but only to show guilty knowledge. The statement was not offered to inculpate Ibar (T37 4751-53). The trial court concluded that the statement was admissible under section 90.803(3) (T37 4755-58).

As a co-defendant, Penalver's actions were relevant to put the entire case in context. Penalver's reaction to his name being linked to the crime was relevant to his guilty knowledge about the crimes and was being used to establish his involvement as a principal in the homicides. See Brooks, 787 So. 2d at 773 (noting "section 90.803(3) allows the admission of a declarant's statements to prove only the declarant's state of mind or to explain or prove only the declarant's subsequent conduct"); Feaster, 156 N.J. at 68-69, 716 A.2d at 428-29 (finding admission of co-defendant's suicide appropriate as it shows consciousness of guilt). Moreover, the admissions were imbued with an indicia of reliability as they were made by Penalver to

his girlfriend in the solace of their room as they discussed a news article about the murders and the police seeking Penalver. Cf. Machado, 787 So. 2d at 111-13. The fact that State v. Mann, 625 A.2d 1102 (N.J. 1993) and Pettie v. State, 560 A.2d 577 (Md. 1989) look to the suicidal parties subsequent actions to determine the reliability of the announced intention and connection to the crime does not undermine confidence in the reliability of Munroe's account of Penalver's comments. The statements were made while they were alone and in direct response to discussion about the police seeking Penalver regarding homicides. The suicide comment was reliable and connected to this case. Likewise, the circumstances surrounding the suicide comment satisfy the concerns raised in Snyder v. State, 762 A.2d 125, 135 (Md. App. 2000). See, Vannier v. State, 714 So. 2d 470 (Fla. 4th DA 1998); Vermont v. Onorato, 762 A.2d 858 (Vt. 2000).

The State was not seeking the introduction of Penalver's comment as part of or in furtherance of the conspiracy as provided under section 90.803(18)(e). Instead, as an alternate argument, the State sought admission under section 90.803(18)(a). Penalver was a party opponent/principal in the case. Hence, his comment equates to an admission which is an exception to the hearsay rule.

Should this Court find otherwise, the State relies on, and reincorporates herein the harmless error analysis presented in Points I-III. Any admission of Penalver's state of mind is harmless beyond a reasonable doubt. DiGuilio, 491 So. 2d 1129.

POINT VIII

IBAR'S DEATH SENTENCE DOES NOT VIOLATE THE UNITED STATES AND FLORIDA CONSTITUTIONS BECAUSE APPRENDI V. NEW JERSEY, 530 U.S. 466(2000), AND RING V. ARIZONA, 120 S. CT. 2348 (2002), DO NOT APPLY TO FLORIDA'S CAPITAL SENTENCING SCHEME. (RESTATED).

Ibar argues that Florida's capital sentencing scheme is unconstitutional warranting vacation of his death sentence. Specifically, Ibar challenges the lack of "findings of fact" in the jury's recommendation, the lack of specific findings by the jury regarding aggravating factors, the lack of unanimity of the jury's penalty phase recommendation, the failure to allege the aggravating factors in the indictment, the statement to the jury that its role is merely advisory and the jury's resulting misunderstanding and the limitations placed on defense counsel's argument by not allowing her/him to ask for mercy/jury pardon or to argue lingering doubt/witnesses' personal opinions on the applicability of the death penalty.

A. The Ring Issue is not properly before this Court-Only two (2) of Ibar's challenges to the validity of Florida's capital

sentencing scheme are properly preserved for appellate review. It is well established that for an issue to be preserved for appeal, it must be presented to the lower court, and "the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved." Archer v. State, 613 So. 2d 446 (Fla. 1993), quoting Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985); Steinhorst, 412 So. 2d at 338. Here, Ibar never argued that his Sixth Amendment right to a jury trial was violated by the lack of "findings of fact" in the jury's recommendation, the lack of specific findings by the jury regarding aggravating factors, the failure to allege the aggravating factors in the indictment, and the limitations placed on defense counsel's argument by not allowing him to ask for mercy/jury pardon or to argue lingering doubt or the witnesses personal opinions on the applicability of the death penalty. While Ring was decided recently, the issue addressed is neither new nor novel. Instead, the Sixth Amendment claim, or a variation of it, has been known prior to Proffitt v. Florida, 428 U.S. 242, 252 (1976) (holding Constitution does not require jury sentencing). See Hildwin v. Florida, 490 U.S. 638 (1989)(noting case "presents us once again with the question whether the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of capital

punishment in Florida" and determining it does not); Spaziano v. Florida, 468 U.S. 447 (1984). The basis for the claim of constitutional error has been available since before Ibar was sentenced. Hence, the claims not raised have not been preserved and are barred from review. Also, the two claims that were preserved for review -- the lack of unanimity in the jury's recommendation and notifying the jury that its role is merely advisory - - must be rejected for the reasons set out below.[17]

B. The Ring decision does not apply to Florida-This Court has clearly rejected the argument that Ring implicitly overruled its earlier opinions upholding Florida's sentencing scheme. See e.g. Mills v. Moore, 786 So.2d 532, 537 (Fla. 2001). In Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002), this Court stated:

> Although Bottoson contends that he is entitled to relief under Ring, we decline to so hold. The United States Supreme Court in February 2002 stayed Bottoson's execution and placed the present case in abeyance while it decided Ring. That Court then in June 2002 issued its decision in Ring, summarily denied Bottoson's petition for certiorari, and lifted the stay without mentioning Ring in the Bottoson order. The Court did not direct the Florida Supreme

[17]In a "Motion to Declare Section 921.141, Florida Statutes, Unconstitutional for Lack of Adequate Appellate Review," Ibar argued the failure to require a unanimous jury recommendation violates the Sixth Amendment. He also filed a motion alleging the death penalty statute violates the Sixth Amendment by advising the jury its role is merely advisory (SR 94-96, 97-98).

Court to reconsider Bottoson in light of Ring.

See King v. Moore, 831 So. 2d 143 (Fla. 2002).

Ring does not apply because Florida's death sentencing statute is very different from the Arizona statute at issue in Ring. The statutory maximum sentence under Arizona law for first-degree felony murder was life imprisonment. See Ring v. Arizona, 122 S.Ct. at 2437. In contrast, this Court has previously recognized that the statutory maximum sentence for first-degree murder in Florida is death and has repeatedly denied relief requested under Ring. See Porter v. Crosby, 28 Fla.L.Weekly S33 (Fla. Jan. 9, 2003)("we have repeatedly held that the maximum penalty under the statute is death and have rejected the other Apprendi arguments [that aggravators had to be charged in the indictment, submitted to the jury and individually found by a unanimous jury"]); Anderson v. State, 28 Fla.L.Weekly S51 (Fla. Jan. 16, 2003); Cox v. State, 819 So.2d 705 (Fla. 2002); Conahan v. State, 28 Fla. L. Weekly S70a (Fla. January 16, 2003); Spencer v. State, 28 Fla. L. Weekly S35 (Fla. January 9, 2003); Fotopoulos v. State, 838 So. 2d 1122 (Fla. 2002); Doorbal v. State, 837 So.2d 940 (Fla. 2003); Bruno v. Moore, 838 So. 2d 485 (Fla. 2002); Bottoson v. State, 813 So. 2d 31, 36 (Fla. 2002), cert. denied, 122 S. Ct. 2670 (2002); Hertz v. State, 803 So. 2d 629, 648 (Fla. 2001), cert. denied, 122 S.

Ct. 2673 (2002); Looney v. State, 803 So. 2d 656, 675 (Fla. Shere v. Moore, 830 So.2d 56 (Fla. 2002); Mills v. State, 786 So.2d 532 (Fla. 2001), cert. denied, 532 U.S. 1015 (2001); Brown v. Moore, 800 So. 2d 223, 224-225 (Fla. 2001); Mann v. Moore, 794 So. 2d 595, 599 (Fla. 2001); Mills, 786 So. 2d at 536-38. Because death is the statutory maximum penalty for first-degree murder, Apprendi and Ring do not impact Florida's capital sentencing statute.

This Court further noted in Bottoson that "the United States Supreme Court repeatedly has reviewed and upheld Florida's capital sentencing statute over the past quarter of a century, and . . . has specifically directed lower courts to 'leav[e] to [the United States Supreme] Court the prerogative of overruling its own decisions." Bottoson, at 695 (quoting Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989))." The fact that the United States Supreme Court has declined to disturb its prior decisions upholding the constitutionality of Florida's capital sentencing process, and that only it may overrule its own decisions also shows that Ibar is not entitled to relief based on Ring.

Furthermore, Ibar's claims that the death penalty statute is unconstitutional for failing to require juror unanimity, the

charging of the aggravating factors in the indictment, "findings of fact" in the jury's recommendation, or specific findings of aggravating factors, are without merit. These issues are not addressed in Ring, and in the absence of any United States Supreme Court ruling to the contrary, there is no need to reconsider this Court's well established rejection of these claims. Sweet v. Moore, 27 Fla. L. Weekly S585 (Fla. June 13, 2002); Cox v. State, 27 Fla. L. Weekly S505, n.17 (Fla. May 23, 2002) (noting that prior decisions on these issues need not be revisited "unless and until" the United States Supreme Court recedes from Proffitt v. Florida, 428 U.S. 242 (1976)). Moreover, this Court has already rejected these arguments post-Ring. Porter v. Crosby, 28 Fla.L.Weekly S33 (Fla. Jan. 9, 2003)(rejecting argument that aggravators must be charged in indictment, submitted to jury, and individually found by unanimous verdict); Doorbal v. State, 837 So.2d at 940 (same).[18]

C. Prior violent felony and felony murder aggravators- Finally, in this case, two of Appellant's five aggravators were due to prior convictions: (1) that the defendant was previously

[18] Ibar's argument that it was improper to notify the jury of its "advisory" role and to prohibit counsel from pleading for mercy/jury pardon, arguing lingering doubt or witnesses' personal opinions about the death penalty, likewise, were not addressed in Ring and have already been rejected by this Court.

convicted of violent felonies (contemporaneous murders); and (2) that the murder was committed in the course of a felony (robbery/burglary) (R 1096). Ring does not alter the express exemption in Apprendi for the fact of a prior conviction ("other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.") Even if Ring were found to apply, the requirements of same have been met through the contemporaneous murders, armed burglary and armed robbery (R 1094) yielding the prior violent felony and felony murder aggravators.

D. Alleged insufficiency of aggravators (Ibar's 9A-D)-Ibar next attacks the trial court's findings of the CCP, avoid arrest and HAC aggravators. This Court will find that there is substantial, competent evidence supporting the trial court's findings of CCP, avoid arrest and HAC. See Hildwen v. State, 727 So.2d 193, 196 (Fla. 1998)(whether an aggravator exists is a factual finding reviewed under the competent, substantial evidence test); Gordon v. State, 704 So.2d 107 (Fla 1997); Alston v. State, 723 So.2d 148, 160 (Fla. 1998)(court is not to reweigh evidence, only to determine whether competent, substantial evidence supports the trial court's finding).

CCP-The judge's finding that the murders were cold,

calculated and premeditated is supported by substantial, competent evidence. As the trial court found, "acts do not get any colder or calmer than are witnessed by watching the videotape of [Ibar] murdering the victims ...." (R 1101). Hertz, 803 So.2d at 650 ("cold" element not found only if the crime is a "heated" murder of passion). The murders "were the product of cool and calm reflection and not acts prompted by emotional frenzy." (R 1101). "The videotape clearly shows all three victims were murdered execution-style." (R 1101). See Henderson v. State, 463 So.2d 196 (Fla. 1985)(finding CCP aggravator established under similar facts involving victims being bound and shot execution-style). The court further noted seven (7) minutes elapsed between the time Ibar shot the first victim, Casey, until the time all three victims were executed (R 1101). This showed a well-thought out plan, not emotional frenzy.

The court further found the murders were the product of a careful or prearranged plan. Even if you assume that their initial plan was robbery/burglary, that plan changed 14 ½ minutes after they were in the house when they shot Casey in the back while he was bound and lying face down on the floor. Brown v. State, 721 So.2d 274, 280 (Fla. 1998). Ibar had to reach into his midsection to retrieve the gun and after retrieving it,

stepped forward and shot. They then spent the next seven minutes carrying out a plan to execute all three victims. This shows heightened premeditation, they contemplated their actions. Gordon v. State, 704 So.2d at 107.

Avoid arrest-To establish this aggravator, the evidence must show that "the sole or dominant motive for the murder was the elimination of the witness." Preston v. State, 607 So.2d 404 (Fla. 1992). Here, as the trial court found, the evidence established the victim, Casey, knew Ibar as one of his bar patrons. Also, Penalver went in to the house armed with a Tech 9 and Ibar armed himself with Casey's .380 after entering. Each victim was made to lay face down on the floor, Anderson's ankles were tied and Casey's wrists were tethered. Each was held at gunpoint the entire time. When Casey resisted after 14 ½ minutes, he was shot in the back by Ibar. At that point any plan to commit just a robbery, was expanded to include killing witnesses. The plan is depicted on the videotape as Ibar shoots the victims at close range. Forty seconds later, Penalver shot each victim with the Tech 9 to make sure they were dead. The motives for the murder, after Casey resisted, were clearly to eliminate the witnesses to the robbery and to Casey's shooting. Rodriguez v. State, 753 So.2d 29 (Fla. 2000); Henry v. State, 613 So.2d 429 (Fla. 1993).

HAC-There is also substantial, competent evidence supporting the finding of HAC. This Court has repeatedly stated fear, emotional strain, mental anguish, or terror suffered by a victim before death are important in determining whether HAC applies. James v. State, 695 So.2d 1229, 1235 (Fla. 1997); Pooler v. State, 704 So.2d 1375 (Fla. 1997); Preston, 607 So.2d at 404. Also, the victim's knowledge of his impending death supports HAC. Douglas v. State, 575 So.2d 165 (Fla. 1991); Rivera v. State, 561 So.2d 536, 540 (Fla. 1990). In evaluating the victim's mental state, common-sense inferences from the circumstances are allowed to be drawn. Swafford v. State, 533 So.2d 270, 277 (Fla. 1988).

This heinous crime was captured on videotape and the entire ordeal lasted 22 minutes. From the moment the men entered the house, Casey was hit about his head with the Tec-9 gun and the beating continued throughout the ordeal. As the court found, Casey suffered blunt force injuries to his head, face, neck, teeth, and hands. He had a fracture of the right index finger and fractured teeth. Casey was shot 14 ½ minutes into the ordeal while the other two victims were laying face down on the floor. The three victims then lay for another seven minutes in terror, fearing that they too would be shot. It is apparent all three victims experienced extreme pain and fear while

anticipating their fate. Henderson v. State, 463 So.2d 196 (Fla. 1985); Alston, 723 So.2d at 148.

Proportionality-Proportionality review is to consider the totality of the circumstances in a case compared with other capital cases to ensure uniformity. Urbin v. State, 714 So. 2d 411, 416-17 (Fla. 1998); Terry v. State, 668 So. 2d 954 (Fla. 1996). It is not a comparison between the number of aggravators and mitigators, but is a "thoughtful, deliberate proportionality review to consider the totality of the circumstances in a case, and to compare it with other capital cases." Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990). The Court's function is not to reweigh the aggravators and mitigators, but to accept the jury's recommendation and the judge's weighing of the evidence. Bates v. State, 750 So. 2d 6 (Fla. 1999).

The State relies upon Rimmer v. State, 27 Fla. L. Weekly S633 (Fla. July 3, 2002) (triple homicide with under sentence of imprisonment, prior violent felony ("PVF") felony murder, avoid arrest, CCP - non-statutory mitigation and sever non-statutory mitigators); Bush v. State, 682 So.2d 85 (Fla. 1996) (execution style murder of clerk, three aggravators, PVF, felony murder, and CCP - no mitigation); Alston v. State, 723 So.2d 148, 153 (Fla. 1998) (car jacking and execution style murder four aggravators, felony murder, avoid arrest, HAC, CCP), in support

of its argument that Ibar’s death sentence is proportionate.

CONCLUSION

Based upon the foregoing, the State requests respectfully that this Court affirm Ibar's conviction and death sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Peter Raben, Esq. 1200 Brickle Avenue, Suite 1620, Miami, FL 33131 on June 2, 2003.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately on June 2, 2003.

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